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Neutrality 2.0: Redefining the Law of Neutrality in a Changing World

A Critical Analysis on the Validity and Relevance of the Law of Neutrality

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Summary

The unprecedented military and economic support provided by non-participating States to Ukraine following the Russian aggression has reignited the debate surrounding the *law of neutrality*. The law of neutrality, first codified in the Hague Conventions of 1907, defines the legal relationship between States involved in an international armed conflict (IAC), known as *belligerents*, and States not taking part in such hostilities, commonly known as *neutrals*. The law of neutrality establishes a system of reciprocal rights and duties for belligerents and neutrals, particularly the duties of strict impartiality and non-participation of neutral States in the conflict. In essence, the aim of the law of neutrality is to limit the escalation of conflicts.

However, since its codification, the evolving landscape of international law, in particular the establishment of the collective security system through the UN and the adoption of the UN Charter, has led to widespread disagreement about the validity and relevance of the law of neutrality. This thesis therefore undertakes a critical examination of the law of neutrality in contemporary international law, examining the changing perspectives of scholars and States over the past century. Moreover, it conducts case studies on two contemporary IACs characterised by extensive third State support - the 2003 Iraq War and the ongoing Russo-Ukrainian War - in order to examine whether there has been an evolution in customary international law regarding the commitment to and acceptance of the law of neutrality.

While the majority of scholars consider the law of neutrality to be a valid and relevant body of international law, while recognizing certain modifications imposed by the UN Charter, this thesis identifies critical gaps and unresolved aspects in the doctrine. Specifically, there is a significant lack of consistent State practice and *opinio juris* regarding the law of neutrality, which is particularly evident when examining the case studies. This inconsistency raises questions about the current validity of the law of neutrality.

With regard to its current and future relevance, this thesis acknowledges potential ways in which the law of neutrality could play a crucial role in mitigating conflict escalation. However, it stresses the need to redefine the content and applicability of the law of neutrality. States appear to adopt intermediate positions of neutrality in line with their political objectives, leading to a lack of predictability in the current framework. There is a need to address these deficiencies to effectively restrain the escalation of conflicts in the changing landscape of international relations.

Sammanfattning

Det omfattande militära och ekonomiska stödet från icke-deltagande stater till Ukraina till följd av Rysslands aggression har väckt en omfattande debatt avseende *neutralitetsrätten*. Neutralitetsrätten, först kodifierad i Haagkonventionerna från 1907, definierar det rättsliga förhållandet mellan stater som är inblandade i en internationell väpnad konflikt, så kallade krigförande stater, och stater som inte deltar i en sådan konflikt, vilka benämns som neutrala stater. Genom neutralitetsrätten fastslås ett regelverk med ömsesidiga rättigheter och skyldigheter för både krigförande och neutrala stater, i synnerhet skyldigheterna för neutrala stater att iaktta strikt opartiskhet och inte delta i konflikten. I korthet är det övergripande syftet med neutralitetsrätten att begränsa upptrappning av konflikter och minska risken för att fler stater blir involverade.

Sedan 1907 har emellertid folkrättens utveckling, främst inrättandet av det kollektiva säkerhetssystemet genom FN och antagandet av FN-stadgan, lett till en utbredd oenighet om neutralitetsrättens giltighet och relevans. Denna uppsats granskar därför kritiskt neutralitetsrättens inkludering i modern folkrätt och undersöker hur perspektiven hos akademiker och stater har ändrats under det senaste århundradet. Därutöver utförs fallstudier av två nutida internationella väpnade konflikter som kännetecknas av omfattande stöd från icke-deltagande stater - Irakkriget 2003 och det pågående rysk-ukrainska kriget - i syfte att undersöka om det har skett en förändring av den internationella sedvanerätten vad gäller staters inställning till neutralitetsrätten.

Medan majoriteten av alla akademiker anser att neutralitetsrätten är en giltig och relevant del av modern folkrätt, även om vissa förändringar erkänns till följd av FN-stadgan, identifierar uppsatsen centrala outredda aspekter i doktrinen. I synnerhet finns det en betydande brist på enhetlig allmän praxis och *opinio juris* vad gäller neutralitetsrätten, vilket märks särskilt i förhållande till de två fallstudierna. Denna avsaknad väcker frågor om neutralitetsrättens nuvarande giltighet.

Med avseende på neutralitetsrättens nuvarande och framtida relevans uppmärksammar uppsatsen flera tänkbara sätt som neutralitetsrätten skulle kunna spela en avgörande roll för att förhindra att konflikter eskalerar. Behovet av att omdefiniera neutralitetsrättens innehåll och tillämplighet betonas emellertid. Utifrån fallstudierna och tidigare konflikter verkar stater anta olika alternativa neutrala positioner i linje med sina politiska mål, vilket leder till en brist på förutsägbarhet i det nuvarande regelverket. Slutligen betonas vikten av att adressera dessa aspekter för att effektivt begränsa upptrappningen av konflikter i ljuset av ett förändrat världsläge.

Preface

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Abbreviations

ARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
EU	European Union
Geneva Conventions	Geneva Conventions I-IV of 1949 and their Additional Protocols I-II
Hague Convention V	Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land
Hague Convention XIII	Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War
IAC	International Armed Conflict
ICJ	International Court of Justice
IHL	International Humanitarian Law
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
NIAC	Non-International Armed Conflict
UN	United Nations
UN Charter	Charter of the United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

1 Introduction

1.1 Background

When ‘neutrality’ or ‘neutral States’ are mentioned in the context of war, most people will probably think of neutrality as a foreign policy position or of permanently neutral States. Switzerland or Austria will likely come to mind, as they are renowned for their longstanding status as neutral States.[1] Perhaps one might also consider Sweden, known for its political position as ‘alliance-free’.[2] However, there is a whole body of international law that governs neutrality in times of war - *the law of neutrality* - which defines the *legal* relationship between States engaged in armed conflict and States not taking part in such hostilities.[3]

The question of neutrality often arises following a large-scale international armed conflict (IAC), particularly when non-participating States have provided military support to one of the warring parties or otherwise acted in a non-neutral manner. Following the 2003 Iraq War, during which a coalition led by the United States and the United Kingdom invaded Iraq with assistance from other States, there was a massive debate about whether the supporting States had violated neutrality.[4] Perhaps unsurprisingly, the unprecedented Western support to help Ukraine defend itself against the Russian aggression has once again reignited the debate on the law of neutrality.[5]

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[1] Michael Bothe, ‘The Law of Neutrality’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2014), 602-634, 608; Constantine Antonopoulos, *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality* (Cambridge University Press 2022) 1, 13; James Upcher, *Neutrality in Contemporary International Law* (OUP 2020) 4.

[2] Bothe (n 1) 608.

[3] ibid 602; Lassa Oppenheim, *International Law: A Treatise*, vol 2 (Longmans, Green and Company 1906) § 293; Michael N. Schmitt, ‘”Strict” Versus “Qualified” Neutrality’ (*Lieber Institute West Point Articles of War*, 22 March 2023) <https://lieber.westpoint.edu/strict-versus-qualified-neutrality/> accessed 10 December 2023; Rebecca Ingber, ‘Co-Belligerency’ [2017] 42 *The Yale Journal of International Law* 67, 90 f.

[4] Luca Ferro & Nele Verlinden, ‘Neutrality during Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties’ [2018] 17 *Chinese Journal of International Law* 16, 17; Bothe (n 1) 603; Upcher (n 1) 57.

[5] Kevin Jon Heller & Lena Trabucco, ‘The Legality of Weapons Transfers to Ukraine Under International Law’ [2022] 13(2) *Journal of International Humanitarian Legal Studies* 251, 252 f; Schmitt, ‘”Strict” Versus “Qualified” Neutrality’ (n 3), Hitoshi Nasu, ‘The Future of Law of Neutrality’ (*Lieber Institute West Point Articles of War*, 19 June 2023) <https://lieber.westpoint.edu/future-law-of-neutrality/> accessed 10 December 2023; Raul (Pete) Pedrozo, ‘Ukraine Symposium – Is the Law of Neutrality Dead?’(*Lieber Institute West Point Articles of War*, 31 March 2022) <https://lieber.westpoint.edu/is-law-of-neutrality-dead/> accessed 10 December 2023; Wolff Heintschel von Heinegg, ‘Neutrality in the War against Ukraine’ (*Lieber Institute West Point Articles of War*, 1 March 2022)

Through the law of neutrality, first codified in 1907, a system of reciprocal rights and duties were established between warring States, referred to as *belligerents*, and non-participating States, known as *neutrals*.[6] Neutral States have a duty not to participate in hostilities and to be impartial in their conduct toward belligerents. In return, belligerents are obliged to respect the territory of neutral States.[7] The provision of support by third States, witnessed both in the 2003 Iraq War and, on a larger scale, in the ongoing Russo-Ukrainian War, appears to be incompatible with the law of neutrality. However, the law of neutrality is far from straightforward, and many unresolved questions surround this body of international law.[8]

Firstly, a major issue for the law of neutrality concerns the establishment of the United Nations (UN) and the adoption of the UN Charter[9] in 1945.[10] The development of the prohibition on the use of force made it necessary to distinguish between the *aggressor* and the *victim of aggression*, thus challenging the classical principle of impartiality and non-discrimination.[11] The implementation of a centralized system of collective security, which positions the UN at the centre of decision-making and empowers it to decide that member States should support the organisation or withhold support from a particular State, also raises the question of whether neutrality is still necessary or even possible.[12] In the words of one scholar: 'Collective security and neutrality collide head-on'.[13]

The validity and relevance of the law of neutrality has been seriously questioned because of this development. The controversy has prompted some authors to proclaim the 'death' of neutrality as a legal status, or at least to argue that the law of neutrality has become irrelevant.[14] To quote one contemporary scholar: 'The applicability and content of the law of neutrality - indeed, its very existence - is radically uncertain, and has been for a considerable period of time'.[15]

Several conflicting perspectives on the law of neutrality have arisen without any consensus within the international community. Certain scholars adhere

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<https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/> accessed 10 December 2023.

[6] Yoram Dinstein, 'The Laws of Neutrality' in Yoram Dinstein (ed), *Israel Yearbook on Human Rights*, vol 14 (Brill | Nijhoff 1984) 80-110, 80 f; Antonopoulos (n 1) 3; Ingber, 'Co-Belligerency' (n 3) 90.

[7] Dinstein (n 6) 80 f.

[8] Antonopoulos (n 1) 4.

[9] Charter of the United Nations and the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

[10] Bothe (n 1) 605.

[11] ibid 604.

[12] Dinstein (n 6) 81.

[13] ibid (n 6) 81.

[14] Heller & Trabucco (n 5) 256.

[15] Upcher (n 1) 2.

to the traditional law of neutrality, asserting that neutrality is still a mandatory status applied to all States not participating in an IAC.[16] On the contrary, it is argued that the adoption of the UN Charter has made neutrality a purely optional status for States to adopt if they wish to claim the rights of a neutral State.[17] Furthermore, a mixture of these two positions has emerged through the endorsement of a doctrine known as 'qualified neutrality', which allows States to engage in non-neutral actions in support of the victim of an unlawful war of aggression.[18] This suggests a possible intermediate position between neutrality and belligerency, also known as 'non-belligerency'.[19]

It is unclear which rules apply and how the relationship between non-participating and belligerent States is governed. This confusion is causing uncertainty regarding the Western support for Ukraine, as well as third State assistance during previous conflicts. Currently, there appears to be a pick-and-choose approach to the law of neutrality. This inconsistency raises further questions about the future role and application of neutrality, and what rights and duties, if any, will be imposed on non-participating and belligerent States. Perhaps we are witnessing a paradigm shift in international neutrality law, moving towards the perspective of former President Roosevelt, who declared that 'even a neutral cannot be asked to close his mind and conscience'.[20]

1.2 Purpose and Research Questions

As illustrated by the background chapter, there is widespread disagreement regarding the concept of neutrality in contemporary international law. Since the adoption of the Hague Conventions on neutrality in 1907, significant challenges to the law of neutrality have emerged. These particularly include the establishment of the UN collective security system with the prohibition on the use of force and the right of collective self-defense.

[16] Oppenheim (n 3), § 293; Bothe (n 1) 604; Heller & Trabucco (n 5), 255.

[17] Dietrich Schindler, 'Transformations in the Law of Neutrality Since 1945' in Delissen, Astrid. J Delissen & Gerard. J Tanja (eds), *Humanitarian Law of Armed Conflict* (Brill | Nijhoff 1991) 373; Ove Bring, *Folkrätt för totalförsvaret: en handbok* (2nd ed, Norstedts Juridik 2000) 237; Rebecca Ingber, 'Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda' [2011] 47 *Texas International Law Journal* 75 , 86.

[18] Ferro & Verlinden (n 4) 32; Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5); Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[19] Natalino Ronzitti, 'Italy's Non-belligerency during the Iraqi War' in Ragazzi, Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Brill | Nijhoff 2005) 197–207, 198; Ferro & Verlinden (n 4) 32.

[20] 'FDR Announces US Neutrality' (*Voices & Visions*, 3 September 1939) <http://vandvreader.org/president-roosevelt-announces-u-s-neutrality-3-september-1939/#:~:text=%E2%80%9CI%20cannot%20ask%20that%20every,mind%20and%20close%20his%20conscience.%E2%80%9D> accessed 10 December 2023.

The purpose of this thesis is therefore to clarify the continued validity of the law of neutrality in light of these challenges, and to consider whether it is still relevant. Assessing validity involves determining whether the law of neutrality remains applicable under both treaty law and customary international law, or whether it has become obsolete. The focus is on the legal binding nature of the law of neutrality today, in terms of having a real normative effect, rather than its inclusion in a legal system or its proper adoption through the Hague Conventions.[21]

In examining relevance, the aim is to determine whether the law of neutrality is currently important in regulating relations between non-participating States and belligerents and in effectively containing conflicts, or whether, regardless of its current validity, it could have such importance in the future. Considering that the level of non-neutral support provided by third States to belligerents appears to vary considerably between different IACs, as demonstrated by the 2003 Iraq War and the Russo-Ukrainian War, the question of relevance also includes whether political, geopolitical, economic and, not least, historical considerations appear to influence the extent to which States adhere to the obligations of the law of neutrality.

To fulfil the purpose, this thesis addresses the following research question:

Is the law of neutrality valid and relevant?

1.3 Method and Material

In order to examine the continuing validity and relevance of the law of neutrality, it is firstly needed to explore the relevant sources of international law to examine the law of neutrality *lex lata*. In this regard, a doctrinal law study will be conducted to identify existing positive law and understand the law as it stands, rather than evaluating its morality or effectiveness.[22]

Article 38(1) of the Statute of the International Court of Justice (ICJ)[23] recognises three different sources of international law:[24]

a) *'international conventions*, whether general or particular, establishing rules expressly recognized by the contesting states;
b) *international custom*, as evidence of a general practice accepted as law;

[21] Joseph Raz, *The authority of law: Essays on law and morality* (OUP 1979) 146 ff; Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* (9th edn, Routledge 2022) 32.

[22] Orakhelashvili (n 21) 32 f; Jan Kleineman, 'Rättsdogmatisk metod' in Maria Nääv and Mauro Zamboni (eds), *Juridisk metodlära* (2nd edn, Studentlitteratur 2018) 33 ff.

[23] Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[24] Orakhelashvili (n 21) 32 f.

c) the *general principles* of law recognized by civilized nations' [emphasis added].

The primary sources of international law are thus international conventions or treaties, custom and general principles, which immediately create the rules of international law. Subject to these sources of international law, Article 38(1) of the Statute of the ICJ provides that the rulings of international courts, along with international legal doctrine, may be used as subsidiary means for providing evidence or describing the process of the creation of these rules.[25]

The Hague Conventions[26] on neutrality from 1907 are the primary legal instruments of interest. Given that the adoption of the UN Charter has posed major challenges to the law of neutrality, the articles of the UN Charter that may be considered contrary to the law of neutrality are also examined.

Around 30 States have ratified the Hague Conventions, including Russia, Ukraine, the United States and Germany. However, some of the States involved in the 2003 Iraq War or which have supported Ukraine, such as the United Kingdom, are not parties to the Conventions.[27] Their obligations are limited to the international customary law of neutrality, which must therefore be examined. International customary law, as described by the ICJ in the Nicaragua case,[28] consists of two elements: the objective element of 'general practice' and the subjective element of *opinio juris*, which means being 'accepted as law'.[29]

'General practice', or State practice, consists not only of positive acts and omissions, but also of views and positions expressed in response to such conduct, all of which together constitute a State's practice. These views may be derived from a variety of sources, including published materials, government statements, legislative acts and domestic judicial decisions.[30] Furthermore, the formation of customary law requires the State practice to be accompanied by a belief that it reflects a legal obligation, which may be inferred, for example, from actual behaviour, official statements or reactions by other States.[31]

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[25] Orakhelashvili (n 21) 32 f.

[26] Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (Hague Convention V); Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, entered into force 26 January 1910) (Hague Convention XIII) (Hague Conventions).

[27] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[28] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) ICJ [1986] ICJ Rep 1986 para 183-187.

[29] Orakhelashvili (n 21) 36.

[30] ibid 38.

[31] ibid 43 f.

It is widely accepted, although with certain reservations, that military manuals constitute State practice and, in particular, evidence of *opinio juris*. Accordingly, the thesis examines such manuals in order to shed light on the approach of States to the law of neutrality.[32] Moreover, the thesis will also examine resolutions of the UN Security Council and the General Assembly, with a particular focus on the influence such resolutions may have on the development of customary neutrality law. According to Chapter VII of the UN Charter, Security Council resolutions are binding on UN members. Conversely, resolutions from the General Assembly are generally considered non-binding. Nevertheless, both types of resolutions are of importance in shaping the content of customary international law by displaying State practice, and possibly also the existence of an *opinio juris*.[33]

To examine the development of international customary law regarding the law of neutrality and thus its continuing relevance, the thesis will also include two case studies of IACs that have occurred in the last 20 years or are still ongoing: the 2003 Iraq War and the Russo-Ukrainian War. The purpose of the case studies is to examine the extent to which States adhered to their neutral duties in the two conflicts, and whether and how States invoked the law of neutrality in relation to their decision to remain neutral or to provide non-neutral support to a party to an IAC. The aim is to examine whether States appear to act in accordance with the law of neutrality and whether they accept it as a binding and relevant body of international law. In addition, the purpose is to explore whether the approach to the law of neutrality appears to differ between the 2003 Iraq War and the Russo-Ukrainian War. This is valuable in understanding whether the law of neutrality is valid and relevant in preventing and mitigating the escalation of armed conflict.[34]

These two IACs were chosen for several reasons. Firstly, they were both initiated after the establishment of the UN, in contrast to the two World Wars. Since the development of a collective security system and the adoption of the UN Charter represent the main challenge facing the law of neutrality, examining how this has influenced State practice and views towards neutrality is desirable. Secondly, the two IACs differ in their portrayal within the global community. The Russo-Ukrainian War is viewed as a classic example of an 'unjust war'[35] with a clear aggressor and victim of aggression. In contrast, perceptions of the 2003 Iraq War are more ambiguous, at least in the eyes of the West, with the United States and the United Kingdom claiming to be fighting a 'just war' in destroying alleged

[32] Upcher (n 1) 29; Antonopoulos (n 1) 5.

[33] Orakhelashvili (n 21) 34, 46 ff; Heller & Trabucco (n 5) 263.

[34] Orakhelashvili (n 21) 6, 51.

[35] See Section 2.1 regarding the doctrine of 'just war'; Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

weapons of mass destruction in Iraq.[36] These case studies offer insight into how political, geopolitical, economic, and historical factors can impact the enforcement of the law of neutrality and a third State's commitment to maintaining traditional neutral duties.

After examining the law of neutrality *lex lata*, the thesis will examine the law of neutrality as it should be or is coming to be: the law of neutrality *lex ferenda*. The thesis takes a critical approach to positive international law, going beyond a mere description of what the law of neutrality is and considering how the law may appear unsatisfactory or should be changed.[37]

In particular, the *lex ferenda* argument in this thesis is based on the assumption that the normative goal of general international law is the promotion of 'world order' and the maintenance of peaceful coexistence between States.[38] In this context, peace is predominantly conveyed by the concept of *negative peace*, which implies the absence of war.[39] Originating from Hugo Grotius's distinction between 'the law of war' and 'the law of peace', negative peace emphasizes the prevention of armed conflict and violence. This can be contrasted to the more recent broader concept of *positive peace*, which advocates cooperation, social justice, human rights and the elimination of structural violence.[40] Hence, the purpose of this section is to explore whether the law of neutrality, either in its current or modified form, can serve a purpose in preventing and reducing the escalation and spread of armed conflict and preserving peace.

1.4 Previous Research

There has been rather limited in-depth exploration of the law of neutrality in academic research since the adoption of the Hague Conventions in 1907, especially in the last 20 years.[41] Interest in the law of neutrality has, however, emerged repeatedly in the aftermath of major global conflicts, such as the two World Wars and, more recently, the Iran-Iraq War of 1980 and the Iraq War of 2003.[42] Russia's war in Ukraine has since renewed the debate, resulting in a number of journal articles examining the law of neutrality, particularly in the context of the current conflict.[43] Although

[36] Peter Lee, *Blair's Just War: Iraq and the Illusion of Morality* (Palgrave Macmillan UK 2011) 14 ff.

[37] Kleineman (n 22) 41.

[38] Martti Koskenniemi, *From Apology to Utopia* (Cambridge University Press 2006) 1; Anders Henriksen, *International Law* (OUP 2021) 22.

[39] Cecilia Marcela Bailliet & Kjetil Mujezinovic Larsen (eds), *Promoting Peace Through International Law* (OUP 2015) 2.

[40] ibid 3.

[41] Upcher (n 1) 1.

[42] Antonopoulos (n 1) 4.

[43] See Heller & Trabucco (n 5); Heintschel von Heinegg 'Neutrality in the War against Ukraine' (n 5); Michael N. Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (*Lieber Institute West Point Articles of War*, 7 March 2022) <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>

there has been an increasing interest in the concept over the last two years, there is significant disagreement about the definition and importance of neutrality. A range of positions exist, from complete disregard to immense relevance, with a variety of perspectives in between.[44]

Besides the fact that the law of neutrality is a relatively unexplored area of international law, there are also apparent tendencies in the existing literature. Only a limited number of notable academics have examined and provided input on the law of neutrality, the majority of whom are males residing in Western countries, which may influence their perspective on the application of the law.[45] They may for example be historically biased and have an Eurocentric view of international law, mostly reflecting the interests and perspectives of powerful Western nations.[46] In particular, there is a large number of scholars from the United States and United Kingdom, where the approach to the law of neutrality is generally more controversial and far-reaching regarding the concept of 'qualified neutrality'.[47]

Additionally, there appears to be a considerable focus on historical retrospection and how the view upon warfare has changed throughout history, influencing the different approaches to neutrality over time. In this thesis, historical aspects will be examined in an attempt to understand how different views on neutrality can be explained from a historical perspective, but the ultimate focus will be on the current and future relevance of the law of neutrality.

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accessed 10 December 2023), Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3); Pedrozo (n 5); Kevin Ambos, 'Will a State supplying weapons to Ukraine become a party to the conflict and thus be exposed to countermeasures?' (*EJIL: Talk!*, 2 March 2022) <https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/> accessed 10 December 2023; Jeremy K. Davis, '"You Mean They Can Bomb Us?" Addressing the Impact of Neutrality Law on Defense Cooperation' (*Lawfare*, 2 November 2020) <https://www.lawfaremedia.org/article/you-mean-they-can-bomb-us-addressing-impact-neutrality-law-defense-cooperation> accessed 10 December 2023; Giulio Bartolini, 'The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice' (*EJIL:Talk!*, 11 April 2023) <https://www.ejiltalk.org/the-law-of-neutrality-and-the-russian-ukrainian-conflict-looking-at-state-practice/> accessed 10 December 2023.

[44] Antonopoulos (n 1) 4; Upcher (n 1) 1 f.

[45] See eg Upcher (n 1); Bothe (n 1); Antonopoulos (n 1); Oppenheim (n 3); Heller & Trabucco (n 5); Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5); Ferro & Verlinden (n 4); Bring (n 17). Prominent female authors who have contributed to the literature on neutrality include Ingber, 'Co-Belligerency' (n 3), while non-Western men include for example Dinstein (n 6).

[46] James Thuro Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' [2011] 3(1) *Trade, Law and Development* 26, 32-35, 42, Antony Anghie & B. S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict' [2004] 36 *Studies in Transnational Legal Policy* 185, 191.

[47] See eg Davis, '"You Mean They Can Bomb Us?"' (n 43); Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43); Pedrozo (n 5); Ambos (n 43).

Moreover, within both contemporary and older doctrinal literature, there appear to be a large number of different conceptual and terminological approaches to the law of neutrality, as well as modifications of the historically strict and binary law of neutrality. In addition, sometimes these different concepts seem to overlap, for example the concept of 'qualified neutrality' and the right of collective self-defense, and there appears to be conceptual confusion in the field, further complicating an already complex area of international law.

1.5 Delimitations

To align with the purpose of the thesis - examining the continuing validity and relevance of the law of neutrality - several delimitations have been made. Firstly, the term 'neutrality' can, as described in the opening paragraph, encompass various meanings. Neutrality can for example refer to both a foreign policy approach or a legal status.[48] The concept of neutrality as a political status differs from the legal term and will not be considered in this thesis.[49]

There is also the concept of 'permanent neutrality' or 'neutralization', which can be understood as a combination of a political and a legal status.[50] Permanent neutrality refers to a State that has committed, through bilateral agreements, to remain neutral at all times.[51] The establishment of permanent neutral status thus differs significantly from neutrality in the sense of the law of neutrality, which arise only upon the outbreak of concrete hostilities.[52] Moreover, a State that has announced permanent neutrality has a duty, even in times of peace, to refrain from any action or commitment that might endanger its neutrality in the event of armed conflict, such as entering into military alliances.[53]

Two significant examples of contemporary permanent neutral States include Switzerland, neutralized since the Congress of Vienna in 1815, and Austria, which declared its permanent neutrality in 1955.[54] The practice of these permanently neutral States can provide some insight into the general practice of States regarding the law of neutrality in IACs and will be briefly discussed in this context. Beyond that, no additional consideration will be given to permanently neutral States in this thesis.[55]

[48] Bothe (n 1) 608.
[49] ibid.
[50] ibid; Antonopoulos (n 1) 13.
[51] Bothe (n 1) 607; Bring (n 17) 115; Upcher (n 1) 3 f; Oppenheim (n 3) § 300.
[52] Bothe (n 1) 607; Bring (n 17) 115; Upcher (n 1) 3 f; Oppenheim (n 3) § 295.
[53] Bothe (n 1) 607; Upcher (n 1) 3 f; Oppenheim (n 3) § 295.
[54] Bothe (n 1) 607; Bring (n 17) 115; Upcher (n 1) 3 f.
[55] Upcher (n 1) 5.

The law of neutrality further only applies in situations of IACs.[56] There is, however, a similar doctrine that prohibits third State interference during NIACs: the 'principle of non-intervention'. These two doctrines regulating neutrality in situations of armed conflict can be said to share a 'common purpose and core'.[57] Neutrality in NIACs and the 'principle of non-intervention' will, due to the limited scope of the study, be excluded from the thesis. This suggests that certain armed conflicts, which may appear to be obvious instances of neutrality violations, do not fall within the scope of the law of neutrality because they are civil wars between the government and internal rebels.[58] This applies, for example, to the 2011 war in Libya between Gaddafi's government forces and the opposition. As the conflict was classified as a NIAC, the extensive bombing of civilian targets by NATO Allies in support of the opposition did not constitute a violation of neutrality.[59] Similarly, the law of neutrality does not apply to armed conflicts between a State and a non-State actor, such as between the United States and al-Qaeda.[60]

Furthermore, the law of neutrality encompasses rights and duties for both neutral and belligerent States, and thus implies that both neutrals and belligerents can violate neutrality.[61] For example, according to traditional neutrality law, a neutral State violates its neutrality if it discriminates against one belligerent in favour of the other. Similarly, the law of neutrality is violated when a belligerent's armed forces enter neutral territory.[62] Since the purpose of this thesis is to examine the validity and relevance of the law of neutrality, particularly with regard to third State assistance to IACs, the focus will be primarily on the duties of neutral States and the potential responsibilities for violations of such duties. The discussion will therefore not examine to the same extent the belligerents' violations of neutral rights.

There are also intersections between the law of neutrality and the *jus in bello*, international humanitarian law (IHL), in several respects.[63] IHL consists of a set of rules aimed at the protection of civilians and non-combatants during IACs, which are governed in particular by the four Geneva Conventions of 1949 and their Additional Protocols,[64] but also by

[56] Upcher (n 1) 1; Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5); Antonopoulos (n 1) 222, 241.

[57] Ferro & Verlinden (n 4) 16.

[58] Orakhelashvili (n 21) 511 ff; Ingber, 'Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda' (n 17) 80.

[59] Kubo Mačák & Noam Zamir, 'The Applicability of International Humanitarian Law to the Conflict in Libya' [2012] 14 *International Community Law Review* 403, 436.

[60] Ingber, 'Co-Belligerency' (n 3) 91; Ingber, 'Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda' (n 17) 80.

[61] Bothe (n 1) 602.

[62] ibid 602, 612.

[63] Antonopoulos (n 1) 20.

[64] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950)

the Hague Conventions.[65] IHL is considered part of a larger body of rules known as the *law of armed conflict*, to which the law of neutrality also belongs.[66] The two legal regimes are completely separate, but may overlap and interact in certain cases.[67] For example, one issue that concerns both the law of neutrality and IHL is the characterisation of 'co-belligerency'.[68] However, IHL will be studied only to a limited extent to comprehend its impact on the relevance of the law of neutrality and the differences in how, for example, 'co-belligerency' is understood in the respective legal frameworks.

Moreover, other IACs will receive attention to demonstrate previous application of international law and State practice. Nonetheless, this thesis will focus on the 2003 Iraq War and the Russo-Ukrainian War and the current state of affairs in regard to the law of neutrality.

1.6 Disposition

Following the introductory chapter, Chapter 2 offers an overview of the historical background to the law of neutrality. Its aim is to provide a better understanding of the historical context in which the law of neutrality emerged and the issues it sought to address. The historic background also aims to provide a brief introduction to the challenges to the law of neutrality posed by historical developments, in particular the two World Wars, which will be examined in detail in subsequent chapters. Finally, the chapter examines the sources of the law of neutrality and whether it is part of customary international law.

Chapter 3 examines the scope of the law of neutrality and aims to provide a summary of the provisions governing neutrality and their practical relevance. Firstly, the threshold for the application of the law of neutrality to an IAC is explored. This is followed by a description of the fundamental rights and duties of neutral States and what conduct would constitute a

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75 UNTS 31 (Geneva Convention I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II); Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV); Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II) (Geneva Conventions).

[65] Orakhelashvili (n 21) 505 f.

[66] ibid 505 f, 534 f.

[67] Heller & Trabucco (n 5) 253.

[68] ibid (n 5) 263; Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).

violation of these rights and duties. Next, a brief overview of responsibility for violations of neutrality, in particular with regard to the rules of State responsibility, is given. The chapter will conclude with an explanation of how neutral status terminates, and whether violations of neutrality can transform the neutral State into a party to the conflict, a so-called 'co-belligerent'.

Chapter 4 analyses the significant challenges posed to the law of neutrality in the last century, particularly in relation to the establishment of the UN collective security system and the UN Charter. The purpose is to examine how these challenges have influenced and modified the traditional law of neutrality described in the previous chapter, and how this may affect its validity and relevance in contemporary international law.

This is followed in Chapter 5 by an examination of the different perspectives on the validity and relevance of the law of neutrality, which these challenges have given rise to. The chapter will focus on examining the academic literature, past State practice in IACs, and the perspective presented in national military manuals. Four distinct approaches will be outlined, along with the consequences of aligning with each approach for the governance of the relationship between non-participating States and belligerents in the future. The ambition is to determine the degree of support for the different approaches and the implications for the law of neutrality.

After analysing the historical development of the law of neutrality and the current views on its validity and relevance from the perspective of scholars and States in preceding chapters, Chapter 6 provides a case study of two recent or ongoing IACs: The 2003 Iraq War and the Russo-Ukrainian War. The purpose is to examine how different States have engaged with the law of neutrality in reality, and whether there is any State practice or *opinio juris* that argues for a change in customary international law in any of the directions mentioned in Chapter 5.

Finally, Chapter 7 summarises the research and offers some observations on the validity and present or future relevance of the law of neutrality, particularly in the light of the State practice observed in the two case studies.

2 Introduction to the Law of Neutrality

2.1 Historical Background

A historical context of the law of neutrality is vital as the various approaches to neutrality outlined earlier are rooted in its history. The law of neutrality, although first codified at the Second Hague Peace Conference in 1907, is an ancient body of international law. The concept of *neutrals* emerged during antiquity and the Middle Ages with the primary purpose of regulating relations between belligerents and neutrals, in particular to prevent and limit the involvement of non-participating States in the internal and external affairs of belligerent States.[69] The concept of neutrality was developed as a result of belligerent States interventions in the maritime trade of non-participating States. These interventions aimed to regulate trade between non-participating States and the opposing belligerent, with the objective of limiting support for the enemy's war efforts.[70]

However, neutrality simply referred to the non-participation in an armed conflict and did not imply a legal status giving rise to rights and duties for either neutrals or belligerents. Neutrality was also subject to the belligerent's discretion, who could accept or decline a neutral status and subsequently decide whether to abide by the neutral rights associated with it.[71]

The sixteenth and seventeenth centuries marked the beginning of the development of *legal* rules on neutrality. It eventually led to the establishment of a legal system in which non-participating States were entitled to maintain neutrality during an IAC and had certain rights and duties as long as they remained uninvolved in the conflict.[72] This development coincided with the rise of modern international law, which provided a formal framework for neutrality.[73] The expansion of regional and worldwide commerce, especially maritime commerce, was significant in this process and further emphasised the importance of the concept of neutrality, which sought to protect trade from the adverse effects of war.[74]

Perhaps most importantly, during this period war was considered lawful and largely seen as a natural extension of State power.[75] States frequently resorted to war to resolve disputes, assert dominance or pursue their

[69] Elizabeth Chadwick, *Traditional Neutrality Revisited: Law, Theory and Case Studies* (Brill | Nijhoff 2002) 2; Oppenheim (n 3) § 289; Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 402 ff.

[70] Antonopoulos (n 1) 2; Oppenheim (n 3) § 286.

[71] Antonopoulos (n 1) 2 f; Oppenheim (n 3) § 285-286.

[72] Oppenheim (n 3) § 286 ff; Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[73] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[74] ibid.

[75] Antonopoulos (n 1) 17.

interests - and were justified in doing so. However, this has not always been the case throughout history. The legitimacy of war was embraced with the birth of modern international law, which emphasized the equality of States and the recognition of State sovereignty. Until the sixteenth century, the 'just war' doctrine, a moral and ethical framework in which belligerents should be distinguished on the basis of their wrongfulness, had been predominant.[76]

The doctrine of the 'just war' can be traced back to the fifth century and the emergence of Christianity in Europe. It aimed to establish criteria for determining the justifiability of war and the conduct of warfare; according to this doctrine, war must be fought with a 'just cause', a 'right intention', and as a 'last resort' in order to be considered lawful.[77] War was perceived as a conflict between good and evil, or the innocent and the noninnocent, and other States therefore had a moral obligation to support the righteous State and not to support the wrongdoer in any way.[78] According to the 'just war' doctrine, impartiality was deemed morally questionable, therefore leaving no room for the concept of neutrality.[79]

However, the idea that States had an absolute right to go to war, which began to develop in the sixteenth century, and the many wars that followed, contributed to the demand for rules governing the relationship between belligerents and non-participant States.[80] This provided a fertile environment for the development of rules on neutrality.[81] In the early eighteenth century, the Dutch jurist and legal theorist Cornelius van Bynkershoek for example insisted that a neutral 'must in every way guard against interfering in the war, and against showing favoritism toward or prejudice against either belligerent'.[82] He stated that 'the question of justice and injustice does not concern the neutral, and it is not his duty to sit in judgement between his friends who may be fighting each other, and to grant or deny anything to either belligerent through considerations of the relative degree of justice'.[83]

The classical and positivist view of neutrality was during this time one of complete impartiality by a neutral State toward parties involved in a conflict, except when a treaty of alliance modified this position.[84] This

[76] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3); Jefferson McMahan, *Killing in War* (OUP 2009) 6; Orakhelashvili (n 21) 481.

[77] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[78] ibid; McMahan (n 76) 8.

[79] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[80] Dinstein (n 6) 81.

[81] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[82] Cornelius van Bynkershoek, *Quaestionum Juris Publici Libri Duo [On Questions of Public Law, Two Books]* (Tenney Frank tr, first published 1737, Clarendon Press, 1930) 61.

[83] ibid.

[84] Oppenheim (n 3) § 289; Brownlie (n 69) 402 ff.

evolution led to the Paris Peace Conference of 1856, where the first significant steps were taken to codify the rules governing neutrality in armed conflict, particularly at sea. Through the Paris Declaration[85] an initial effort to regulate the relation between neutrals and belligerents was made, for example confirming that belligerents were not allowed to seize enemy goods on neutral vessels nor neutral goods on enemy vessels.[86] The law of neutrality then culminated at the turn of the twentieth century in the Second Hague Peace Conference of 1907, where the codification of most aspects of the law of neutrality was achieved through the Hague Conventions.[87]

However, as noted earlier, the aftermath of the first and second World Wars brought about a transformative change in the approach to war and conflict and presented significant challenges to the law of neutrality.[88] Firstly, the establishment of the League of Nations in 1920 constituted a shift towards the traditional 'just war' doctrine, through its collective security scheme which stated that '[a]ny war or threat of war […] is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations'.[89]

The challenges to the law of neutrality continued, with the 1928 Kellogg-Briand Pact[90] which outlawed war and marked a departure from the doctrine that war was a legitimate instrument of national State policy.[91] The Kellogg-Briand Pact was initially signed by 15 States, including the United States, Germany and the United Kingdom, and soon had a total of 62 signatories.[92] This development was interpreted by many as being contradictory to the entire body of law, since the law of neutrality in fact originated from the concept of the legality of war.[93]

In addition, some States argued that the pact allowed for discrimination against unlawful belligerents and that States were not bound by their obligations of strict impartiality and abstention.[94] It was even argued that the pact allowed States to use force against a State that was pursuing its national interests by going to war.[95] However, the pact did not formally address

[85] Declaration Respecting Maritime Law, Paris (entered into force 16 April 1856).

[86] Bothe (n 1) 604; Oppenheim (n 3) § 291.

[87] Antonopoulos (n 1) 11; Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[88] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[89] See ibid; Covenant of the League of Nations (adopted 28 April 1919, entered into force 10 January 1920), article 11.

[90] Kellog-Briand Pact (adopted 27 August 1928, entered into force 24 July 1929).

[91] See Kellogg-Briand Pact, article 1; Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3); Antonopoulos (n 1) 18.

[92] Orakhelashvili (n 21) 483.

[93] Dinstein (n 6) 81.

[94] Brownlie (n 69) 403; Pedrozo (n 5).

[95] See eg the preamble to the Kellogg-Briand Pact 1928, which provides that 'any signatory Power which shall hereafter seek to promote its national interests by resort to war

neutral rights and duties, and many States continued to apply traditional rules of neutrality.[96]

Furthermore, the very existence of the two World Wars and the massive destruction they caused demonstrated the inadequacy of the legal framework and the traditional concept of neutrality.[97] Moreover, during these conflicts, the concept of 'qualified neutrality' was first introduced. Multiple States provided non-neutral assistance to belligerents while maintaining their supposed neutrality by adopting a 'non-belligerent' status.[98]

The aforementioned factors emphasized the need for modifying the existing doctrine of neutrality. This progress, however, was not truly initiated until the establishment of the UN collective security system in 1945.[99] Before examining the challenges imposed by the UN on the law of neutrality and its consequences, which will be examined in later chapters, the sources and principles of the law of neutrality will be explored.

2.2 Sources of the Law of Neutrality

2.2.1 Treaty Law

The first step towards codifying the law of neutrality was taken, as mentioned above, through the Paris Declaration 1856 on Respecting Maritime Law, a multilateral treaty agreed to by the warring parties in the Crimean War.[100] However, the central principles of the law of neutrality were codified through two treaties during the Second Hague Peace Conference in 1907: The Hague Convention V concerning land warfare and the Hague Convention XIII concerning naval warfare. There are also additional treaties regulating the laws of armed conflict that comprise provisions on the rights and obligations of neutral States, most notably The Geneva Conventions.[101]

There has been no comprehensive attempt to codify the law of neutrality since the Hague Conventions of 1907.[102] In addition to these legally binding instruments, some provisions on neutrality have been formulated in contemporary restatements over the last 30 years, primarily regarding naval warfare. For instance, the law of neutrality is addressed in the 1998 Helsinki

should be denied the benefits furnished by this Treaty'; Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[96] Brownlie (n 69) 403; Upcher (n 1) 1.

[97] Egon Guttman, 'The Concept of Neutrality Since the Adoption and Ratification of the Hague Neutrality Convention of 1907' [1998] 14(1) *American University International Law Review* 55, 56.

[98] Antonopoulos (n 1) 15 f.

[99] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[100] Bothe (n 1) 604; Antonopoulos (n 1) 11.

[101] Bothe (n 1) 604 f.

[102] ibid 605; Antonopoulos (n 1) 11.

Principles on the Law of Maritime Neutrality and the 2009 Manual on International Law Applicable to Air and Missile Warfare.[103]

2.2.2 Customary International Law

Whether the law of neutrality and the content of the Hague Conventions exist in customary international law is subject to debate, as State practice has been inconsistent.[104] It is an important issue to examine as only 34 States are party to Hague Convention V and 30 to Hague Convention XIII.[105]

The common view is that the customary law of neutrality originated in the sixteenth century, gained widespread acceptance in the seventeenth and eighteenth centuries, and was confirmed by State practice in the nineteenth and early twentieth centuries.[106]

Moreover, the ICJ's reasoning in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* suggests that the law of neutrality is part of customary international law.[107] In the case, ICJ expresses that 'international law leaves no doubt that the principle of neutrality, whatever its content […] is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict'.[108] Through its judgment, ICJ acknowledged the continued validity and relevance of the law of neutrality. However, ICJ did not explicitly state whether the law of neutrality constituted customary international law or define the substance of the principle.[109]

In addition to ICJ's judgment, the inclusion of the law of neutrality in several national military manuals constitutes evidence of the general recognition of its existence in customary international law.[110] Furthermore, the law of neutrality has been referred to by national courts in several cases in the aftermath after the 2003 Iraq War, for instance the High Court of

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[103] Bothe (n 1) 605; Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5).

[104] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5).

[105] 'Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907.' (*International Humanitarian Law Databases*) <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-v-1907/state-parties> accessed 10 December 2023; 'Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907.' (*International Humanitarian Law Databases*) <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-xiii-1907/state-parties?activeTab=undefined > accessed 10 December 2023.

[106] Antonopoulos (n 1) 10.

[107] Heller & Trabucco (n 5) 255; Bothe (n 1) 605.

[108] *Legality of the Use or Threat of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 66 para 88-89.

[109] Jeremy K. Davis, 'Bilateral Defense-Related Treaties and the Dilemma Posed by the Law of Neutrality' [2020] 11 *Harvard National Security Journal* 455, 462 f.

[110] ibid; Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5).

Ireland in 2003 and the *Bundesverwaltungsgerich* (the German Federal Administrative Court) 2006.[111] This further reinforces the view that the law of neutrality is part of customary international law.[112]

Most experts therefore agree that the law of neutrality, while subject to some modifications, is part of customary international law. Both the Hague Conventions are thus widely acknowledged to reflect customary international law.[113]

[111] *Horgan v. An Taoiseach & Ors* [2003] IEHC 64 (High Court of Ireland) 504-505; BVerwG, 2 WD 12.04 21 June 2005 (Federal Administrative Court of Germany) 81-84 (authors' translation for this and all the following quotes from this judgment); Bothe (n 1) 605.

[112] Bothe (n 1) 605.

[113] Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43), Antonopoulos (n 1) 12.

3 Basic Principles of the Law of Neutrality

3.1 The Threshold for Application of Neutrality

Prior to examining the content of the law of neutrality, it is necessary to consider the question of its applicability to a conflict. The prevailing view appears to be that the law of neutrality is not just connected to armed conflict but *dependent* on the existence of armed conflict for its application.[114] In the words of one scholar, 'in a nutshell neutrality cannot exist without an armed conflict'.[115] There are, however, differing views on the threshold for applicability of neutrality in IACs. [116]

The *first* position argues that neutrality is restricted to declared war. According to this view, neutral States are bound by the obligations of the law of neutrality, such as the duty of impartiality, only in the case of a declared war, that is, a formal state of war.[117] This viewpoint originates from the early understanding of neutrality, when it was left to each State to decide whether to participate or to adopt a neutral status at the outbreak of an IAC. During this period, States usually made 'declarations of neutrality' to indicate their decision.[118] Moreover, under traditional international law, belligerents must notify neutral States of the outbreak of war in accordance with Hague Convention III relative to the Opening of Hostilities.[119]

However, this position has not received sufficient support from contemporary State practice and has been dismissed by the majority of the scholars.[120] It is suggested that, considering the decrease in formal declarations of war, the Hague Rules should be considered obsolete in this respect.[121] This view is also contradicted by the fact that IHL is accepted as soon as an armed conflict exists, whether or not it is labelled war.[122] The case *United States v. List*, regarding United States authorities war crimes in Germany during the Second World War, further speaks against this position. The military court stated that international neutrality law applies between

[114] Oppenheim (n 3) § 295; Upcher (n 1) 38.
[115] Antonopoulos (n 1) 2.
[116] Upcher (n 1) 38, 46 f
[117] Upcher (n 1) 47 f.
[118] Oppenheim (n 3) § 293-294; Bothe (n 1) 607.
[119] See Hague Convention (III) relative to the Opening of Hostilities (adopted 18 October 1907, entered into force 26 January 1910), article 2.
[120] Bothe (n 1) 607; Antonopoulos (n 1) 222, Upcher (n 1) 47 f; Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5).
[121] Bring (n 17) 239.
[122] Upcher (n 1) 38.

belligerents and neutral States 'to war from whatever cause it originates', and even if the war itself is illegal.[123]

The *second* position claims that neutrality is applicable to all situations of IACs, regardless of whether a State has declared neutrality or not.[124] The coherence between the law of neutrality and IHL favours this approach, since IHL applies to all armed conflicts. The law of neutrality and IHL would therefore apply simultaneously.[125] Some scholars further suggest that this view is supported by modern State practice and national military manuals.[126] Case law from ICJ also confirms this perspective, as it affirms that neutrality is applicable to *all* IACs.[127] In addition, it is in line with the purpose of the law of neutrality, which is to prevent the escalation and spread of armed conflict.[128]

However, the *third* position, which represents the majority, argues that because the threshold for establishing an IAC is relatively low, neutrality applies only to IACs of significant intensity, scale or duration.[129] An IAC emerges in relation to 'any difference arising between two States and leading to the intervention of members of the armed forces'.[130] Moreover, it is of 'no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces'.[131] An IAC thus takes place when a State intentionally uses armed force against another State.[132] The majority suggest invoking neutrality requires a higher threshold than identifying an IAC. In contrast to the criteria for establishing an IAC, the concept of neutrality arguably requires a 'generalised state of hostilities', that is, a certain duration and intensity of the conflict between two States.[133] Some scholars argue that this is supported by State practice and reflects reality, as it explains why several States adopted a status of neutrality during the 1980 Iran-Iraq War, an IAC of considerable scale and duration.[134]

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[123] *The United States of America v. Wilhelm List, et. al.,* Case No. 47, United States Military Tribunal, Nuremberg (19 February 1948*)* para 57.

[124] Upcher (n 1) 48.

[125] ibid 51.

[126] ibid (n 1) 54; Antonopoulos (n 1) 222.

[127] *Legality of the Use or Threat of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 66 para 89; Upcher (n 1) 51.

[128] Upcher (n 1) 54.

[129] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5); Bothe (n 1) 608.

[130] International Committee of the Red Cross, *Commentary on the First Geneva Convention* (Cambridge University Press 2016) paras 236–244.

[131] ibid.

[132] Heller & Trabucco (n 5) 257.

[133] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5); Heller & Trabucco (n 5) 257; Upcher (n 1) 48 ff.

[134] Upcher (n 1) 49.

3.2 The Traditional Rights and Duties of Neutral States

3.2.1 Introduction

The law of neutrality includes both rights and duties for neutral States, laid down in the Hague Conventions.[135] While a comprehensive overview of the content of the law of neutrality is beyond the scope of this thesis, a number of key principles and rules certainly lie at its core.[136] On the one hand, there is the right of neutral States to *remain outside* and *not be adversely affected* by the conflict. On the other hand, there are the three core duties of *non-participation*, *impartiality,* and *prevention*.[137]

3.2.2 The Right to Remain Outside Armed Conflicts

Primarily, Hague Convention V articulate that the neutral territory is inviolable.[138] This principle ensures the fundamental right of a neutral State to remain outside armed conflicts and not be adversely affected by them.[139] Belligerents must show due respect to neutral territories, which also include the territorial waters and the national air space of the neutral State, and refrain from any hostile action within or over them. It is strictly forbidden to utilize neutral territories for military operations, or military units for communication or collaboration with belligerent forces. The same applies to recruitment agencies established in neutral territory by the belligerent.[140] Parties to the conflict must therefore not use the neutral territory in any way related to the conflict, such as for the transport of war material.[141]

3.2.3 The Duty of Non-Participation

The duty of non-participation, sometimes referred to as the duty of abstention from hostilities, requires a State to refrain from supporting a party to a conflict and from participating in hostilities.[142] It is debated what actions by neutral States may violate the fundamental principle of non-participation.[143] Deploying a States' own armed forces to an IAC is clearly a violation of the duty of non-participation.[144] Additionally, sharing intelligence with a belligerent that is used to target the other party's military

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[135] Bring (n 17) 238.

[136] Upcher (n 1) 70.

[137] Bothe (n 1) 602; Upcher (n 1) 70 f, 89; Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[138] Upcher (n 1) 111; Article 1 of Hague Convention XIII states that 'belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality', and thus also establishes the inviolability of neutral territory.

[139] Bothe (n 1) 602, 612 f.

[140] Bring (n 17) 238.

[141] Ambos (n 43).

[142] Bothe (n 1) 602.

[143] Heller & Trabucco (n 5) 257 ff.

[144] Bothe (n 1) 615.

objectives, or providing military advisors, most likely violates the duty of non-participation.[145]

The provision of material assistance to the military of a belligerent also constitutes a violation of these duties, although the Hague Conventions are somewhat more ambiguous on this point.[146] Article 6 of the Hague Convention XIII explicitly prohibits the 'supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or *war material of any kind whatever*' [emphasis added]. A similar provision that applies to armed conflict on land is surprisingly not present in Hague Convention V. However, it is generally viewed that the prohibition applies as a matter of customary international law to all areas of warfare.[147]

The term 'war material' is not defined by the law of neutrality. Some scholars have interpreted the article in a strict way, arguing that the prohibition only covers the supply of weapons *stricto sensu*, which means 'material that is capable of being used for killing enemy soldiers or destroying enemy goods'.[148] In contrast, it has been argued more broadly that 'material which has, exclusively (or at least mainly), a military purpose is prohibited'. National military manuals seem to agree with the latter view.[149]

There are two categories of assistance that are disputed in relation to the duty of non-participation. One is whether the provision of financial support to belligerents is forbidden, and the other is whether there is an obligation to prevent or prohibit assistance from private companies or persons.[150]

Firstly, it is unclear whether offering significant financial support, for example the provision of oil or coal, to a belligerent could violate the law of neutrality.[151] The Hague Conventions do not address the issue of financial support given by the State, thus leaving this area to customary international law.[152] State practice is ambiguous. If any prohibition on financial support existed, it was substantially violated during the Second World War, when nearly every neutral State provided financial support to one of the belligerents. During the Winter War between Finland and the Soviet Union, for example, Sweden, known for its long-standing policy of neutrality, and the United States provided public loans to Finland.[153] On the contrary, State

[145] Bothe (n 1) 615; Ferro & Verlinden (n 4) 31.
[146] Bothe (n 1) 615 ff; Ferro & Verlinden (n 4) 31.
[147] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5).
[148] Bothe (n 1) 616.
[149] Ferro & Verlinden (n 4) 40.
[150] Heller & Trabucco (n 5) 259.
[151] Bothe (n 1) 614; Ferro & Verlinden (n 4)31; Upcher (n 1) 87 f.
[152] Upcher (n 1) 87 f.
[153] ibid 87 f.

practice during the Iran-Iraq War suggests that there may be a prohibition on economic aid. During the conflict, Iran expressed numerous objections to the significant financial support provided by Kuwait and other Arab States to Iraq.[154] Thus, some scholars argue that such substantial financial support would constitute a non-neutral support to a belligerent and a violation of the duty of non-participation.[155]

Secondly, it has been argued that neutrality obligations should extend to preventing private companies or persons from supplying a belligerent with military equipment.[156] Article 7 of Hague Convention V explicitly states that that '[a] neutral Power is *not called upon to prevent the export or transport*, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet' [emphasis added]. Traditional neutrality law does thereby not impose this prohibition on the private sector, but some scholars nevertheless argue that customary international law no longer upholds this distinction between the State and private enterprises.[157] They suggest that this separation no longer corresponds with the political landscape, as the State manages, promotes and controls arms production and trade in various ways.[158] Thus, it is claimed that allowing such supplies would constitute a non-neutral service and violate a State's duty of non-participation.[159] However, any obligation to actively prevent the private supply of war material would appear to be limited, for example due to the existence of a black market that is beyond government control, and the prohibition arguably cover no more than weapons *stricto sensu*.[160]

3.2.4 The Duty of Impartiality

The duty of impartiality entails, in particular, a prohibition of discrimination.[161] It thus basically means equal treatment.[162] Neutral States must refrain from taking sides in an IAC between belligerents and must treat all belligerents equally.[163] This right is derived from Article 9 of the Hague Convention V, which provides that '[e]very measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents'.[164] The principle of impartiality implies that a neutral State is prohibited from

[154] Bothe (n 1) 614; Upcher (n 1) 87 f.
[155] Bothe (n 1) 614; Ferro & Verlinden (n 4) 31; Upcher (n 1) 87 f.
[156] Bothe (n 1) 615.
[157] ibid 615; Oppenheim (n 3) § 296; Guttman (n 97) 55 f.
[158] Bothe (n 1) 615.
[159] ibid 616 f, Upcher (n 1) 79.
[160] Bothe (n 1) 616 f; Upcher (n 1) 83.
[161] Bothe (n 1) 602.
[162] Pål Wrange, 'Neutrality, impartiality and our responsibility to uphold international law' in Engdahl, Ola & Wrange, Pål (eds), *Law at War: The Law as it Was and the Law as it Should Be: Liber Amicorum Ove Bring* (Martinus Nijhoff Publishers 2008) 273-292, 277.
[163] Upcher (n 1) 73 f.
[164] ibid 74.

providing assistance to a belligerent that *could influence the outcome of the conflict*.[165] The law of neutrality therefore imposes a 'negative equality approach', prohibiting not only war-related support to one of the belligerents, but also the provision of similar support to all parties to an IAC.[166]

There are, however, two apparent exceptions to the duty of impartiality. Firstly, the law of neutrality does not prohibit States from *maintaining existing trade relations* with belligerents, provided they do so impartially.[167] Rather, a drastic change in trade relations in favour of one of the belligerents, such as the imposition of economic sanctions, may constitute a taking of sides which is incompatible with the duty of impartiality.[168] This right to continue commercial relations is not surprising as the growth of trade and the aim to safeguard it from the negative effects of war was one of the main reasons for the emergence and development of the law of neutrality.[169] Nonetheless, trade restrictions may arise between neutral and belligerent States due to other obligations, such as resolutions adopted by the Security Council.[170]

Secondly, *humanitarian aid* to victims of conflict, even when exclusively benefitting one side, does not violate neutrality.[171] Necessity is the only criterion for such aid, not equal benefit for the parties to the IAC.[172] However, any aid that aims to gain a military advantage for one party rather than alleviating the suffering of victims cannot be considered humanitarian. Nonetheless, inequalities in aid distribution, based on discrepancies in need and requirements, are not in violation of the principle of humanitarian impartiality.[173]

3.2.5 The Duty of Prevention

The broader duty of *prevention*, entails, in particular, a duty of defending neutrality.[174] The neutral State must, in accordance with Article 5 of the Hague Convention V, prevent any belligerent actions from occurring within its territory.[175] The original intention seemed to be for the duty of prevention to be absolute, however, under contemporary law it is suggested that the duty of prevention of the neutral State is to be judged according to whether

[165] Bothe (n 1) 614; Heller & Trabucco (n 5) 257; Davis, '"You Mean They Can Bomb Us?"' (n 43).

[166] Ferro & Verlinden (n 4) 40.

[167] Bothe (n 1) 603; Oppenheim (n 3) § 314.

[168] Bothe (n 1) 603; Upcher (n 1) 76.

[169] See Section 2.1.

[170] See Hague Convention V, article 9; Ferro & Verlinden (n 4) 32

[171] See Hague Convention V, article 14; Bothe (n 1) 614; Bring (n 17) 243; Ferro & Verlinden (n 4) 32; Upcher (n 1) 105 f.

[172] Bothe (n 1) 614 f.

[173] ibid.

[174] ibid 602; Oppenheim (n 3) § 294.

[175] Upcher (n 1) 112.

it has exercised ‘due diligence’. This approach derives from Hague Convention XII, which provides that the neutral State should use ‘the means at its disposal’[176] to prevent certain belligerent acts on its territory, a phrase that has been used in more recent conventions.[177] The duty of prevention is therefore rather ‘an obligation of conduct rather than one of result’.[178]

To accomplish this objective, neutral military forces are entitled to use force under Article 10 of the Hague Convention V, which should not be regarded as a hostile act. However, the State that holds neutral status is solely permitted to utilize force within its own territory, provided it is not legitimate self-defense against an armed attack.[179]

It should be noted that the general duty of prevention includes numerous specific duties relating to naval, land and aerial warfare. For instance, a neutral State is obliged to prevent the movement of troops across neutral territory and to detain belligerent soldiers, as well as to prevent belligerents from establishing a naval base in neutral ports or territorial waters. However, these duties will not be further explored in this thesis.[180]

3.3 Responsibility for Neutrality Violations

Although the Hague Conventions contain extensive provisions on the rights and duties of belligerents and neutrals, they are silent on the consequences of violating these provisions. Neutrality violations are thus governed by the relevant rules of international law on State responsibility.[181] State responsibility refers to the legal repercussions faced by a State when it contravenes international law regulations.[182] These principles are set out by the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),[183] which are generally seen to reflect pre-existing customary law in line with the General Assembly resolution ‘Responsibility of States for internationally wrongful acts’, Res. 56/83.[184]

According to Article 1 of ARSIWA, each internationally wrongful act committed by a State imposes international responsibility on that State. Article 2 of ARSIWA outlines internationally wrongful acts as actions or omissions that breach international obligations and are attributable to the State.[185] The law of neutrality is such an international obligation as referred

[176] See Hague Convention XII, article 8.
[177] Upcher (n 1) 90 f.
[178] ibid 90.
[179] Bothe (n 1) 613 f; Bring (n 17) 239; Upcher (n 1) 89-106.
[180] Upcher (n 1) 98-111.
[181] Antonopoulos (n 1) 235.
[182] Orakhelashvili (n 21) 296 f.
[183] ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001) Supplement No 10 (A/56/10) (ARSIWA).
[184] Orakhelashvili (n 21) 297; UNGA Res. 56/83 (28 January 2002) A/RES/56/83.
[185] Orakhelashvili (n 21) 301 f.

to in Article 2.[186] As per Article 12 of ARSIWA, an international obligation is violated when an act, regardless of its origin or nature, is not in conformity with what is required by that obligation.[187]

Violations of the law of neutrality may therefore constitute internationally wrongful acts and thus be subject to the remedies available under the rules of State responsibility.[188] In the case of violations of the law of neutrality, these remedies may include *countermeasures* or *reparations*.[189]

A violation of the law of neutrality would allow the *injured State* to undertake actions that otherwise would have been restricted, known as *countermeasures*. The injured State refers to a State that has had its legal rights or interests violated by the wrongful act of another State, as stated in Article 42 of ARSIWA.[190] In such cases, other States have no legitimate basis to intervene because their rights have not been affected or violated.[191] Regarding neutral States violations of the law of neutrality, the term injured State refers to the *adversely affected belligerent*.[192]

The right to resort to countermeasures is outlined in Article 22 of ARSIWA. According to this article, an injured State may only take countermeasures in order to induce the offending State to comply. The countermeasures must also meet the requirements of, for example, proportionality in Articles 49-53 of ARSIWA. The adversely affected belligerent is thus entitled to respond with proportional countermeasures against the offending State until it ceases to act non-neutrally.[193] For instance, if a neutral State fails to prevent a violation of its territorial integrity by a belligerent State, the opposing belligerent may resort to proportional countermeasures to restore neutrality. Traditional customary international law grants opposing belligerents the right to militarily enter neutral territory to address such violations, yet this

[186] William Gerald Downey Jr, 'Claims for Reparations and Damages Resulting From Violation of Neutral Rights' [1951] 16 *Law and Contemporary Problems*, 487, 488.

[187] Henriksen (n 38) 118; See *Case Concerning United States Diplomatic Staff in Tehran (United States of America v. Tehran)* (Questions of jurisdiction and/or admissibility) [1980] ICJ Rep 3 para 90.

[188] Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43); Ingber, 'Co-Belligerency' (n 3) 90.

[189] Orakhelashvili (n 21) 314 f; Heller & Trabucco (n 5) 260; Ingber, 'Co-Belligerency' (n 3) 90.

[190] Henriksen (n 38) 136.

[191] While the general rule is that only injured States can resort to countermeasures, article 54 of ARSIWA allows third States or non-injured States to respond to a serious violation of international law if the obligation in question is of an 'erga omnes' nature. Erga omnes obligations are those that all States have a legal interest in protecting, as defined by articles 42 and 48 of ARSIWA. These obligations include fundamental principles like the prohibition of aggression and genocide, most likely not violations of neutrality; Orakhelashvili (n 21) 314 f.

[192] Heller & Trabucco (n 5) 260.

[193] ibid.

view is said to have changed due to the UN Charter, which will be discussed in Chapter 4.[194]

In addition to countermeasures, the injured State may also have the right to receive reparation from the offending State.[195] According to ARSIWA, reparation for an internationally wrongful act consists of four essential components: restitution, compensation, satisfaction and guarantees of non-repetition.[196] Together, these elements address the material and moral aspects of the harm caused by the wrongful act.[197] Of these remedies, compensation, which entails payment in monetary or material terms for certain losses, is generally the most prominent.[198]

There are, however, few examples of reparations due to neutrality violations. One example of compensation resulting from violations of neutrality can be found in the American case *Panay*. Although the case deals with belligerent violations of the inviolability of neutral territory, it can serve as an example of how the rules of reparation can be applied in relation to the law of neutrality. In December 1937, Japanese naval aviators unlawfully attacked and sank the neutral ship U.S.S. Panay during military operations against Chinese forces, resulting in American casualties and property damage. The Japanese government promptly acknowledged responsibility, apologized, and agreed to pay reparations, including compensation for loss of life and destruction of property amounting to $2,214,007.36.[199]

3.4 The Termination of Neutrality

Similarly to the issue of responsibility for violations of the law of neutrality, the Hague Conventions are silent on the question of termination of neutrality.[200] The prevailing opinion is, however, that a State's neutrality terminates in one of three ways.[201]

The *first* is when the neutral terminates its own neutral status by entering the IAC as a belligerent, or 'co-belligerent'.[202] The *second* scenario occurs when a belligerent initiates an attack or hostile actions against a neutral party, resulting in an armed conflict between the belligerent and the neutral

[194] Upcher (n 1) 92 ff.
[195] Henriksen (n 38) 130 f.; Oppenheim (n 3) § 286.
[196] See ARSIWA articles 35-38; Henriksen (n 38) 130 f.
[197] Orakhelashvili (n 21) 315 ff.
[198] Henriksen (n 38) 131; Ingber, 'Co-Belligerency' (n 3) 91.
[199] Downey Jr (n 186) 488.
[200] Upcher (n 1) 64.
[201] ibid 54; Davis, '"You Mean They Can Bomb Us?"' (n 43); Oppenheim (n 3) § 312.
[202] Ingber, 'Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda' (n 17) 90; Oppenheim (n 3) § 312.

State. The *third* situation is when neutrality is terminated due to the cessation of hostilities.[203]

The initial scenario raises the question of when a neutral State's violation of its neutral duties or its assistance to a belligerent amounts to 'co-belligerency' or participation in hostilities.[204] Since a co-belligerent State is a party to the conflict, the rules of IHL apply to it in full.[205] This mean, *inter alia*, that the State's soldiers and military objects can be lawfully targeted 'anytime, anywhere, and with any amount of force'.[206]

Most scholars regard the question of when assistance to a State party to an IAC makes the assisting State itself a party to the conflict - or a 'co-belligerent' - as a threshold question determined solely by IHL and the Geneva Conventions.[207] This means that a State is a 'co-belligerent' only if the provision of assistance can be said to trigger an IAC in itself.[208] However, some scholars have occasionally argued that merely violating the law of neutrality makes a State a party to the ongoing IAC, or a 'co-belligerent', regardless of whether the conduct meets the threshold for participation under IHL.[209]

In 1984, it was for instance suggested that if a neutral State deviates from its neutral position, it surrenders the principles of neutrality and triggers the application of IHL.[210] The same view was expressed by the two scholars Jack Goldsmith and Curtis Bradley in an article published in 2005. They stated explicitly that '[o]ne way that a State can become a co-belligerent is through systematic or significant violations of its duties under the law of neutrality'.[211]

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[203] Upcher (n 1) 54-68; Davis, '"You Mean They Can Bomb Us?"' (n 43); Oppenheim (n 3) § 312.

[204] Upcher (n 1) 55.

[205] Heller & Trabucco (n 5) 263.

[206] Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I* (Martinus Nijhoff 2009) 87.

[207] See Additional Protocol I to the Geneva Conventions, article 51(3) and Additional Protocol II to the Geneva Conventions, article 13(3); Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43); Stephen P. Mulligan, 'International Neutrality Law and U.S. Military Assistance to Ukraine' *Congressional Research Service* (26 April 2022) <https://crsreports.congress.gov/product/pdf/LSB/LSB10735/3> accessed 10 December 2023, 3; Ambos (n 43).

[208] Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).

[209] Curtis A. Bradley & Jack L. Goldsmith, 'Congressional Authorization and the War on Terrorism' [2005] 118 *Harvard Law Review* 2047, 2112; Stefan A.G Talmon, 'The Provision of Arms to the Victim of Armed Aggression: the Case of Ukraine' [2022] 20 *Bonn Research Papers on Public International Law* 3.

[210] Dinstein (n 6) 80.

[211] Bradley & Goldsmith (n 209) 2112.

However, this approach has been strongly criticized. Some critics argue that the scholars' perspective is flawed and exaggerates the consequences of violating the law of neutrality.[212] Moreover, it is claimed that the only situation in which supporting measures can lead to becoming a party to the conflict is through direct participation in hostilities within the meaning of the Geneva Conventions.[213] The question of when the provision of arms or other assistance crosses the threshold of becoming a party to the conflict under IHL is beyond the scope of this thesis.[214] Two clear examples, however, would be inviting a belligerent to enter neutral territory or when a neutral State joins the conflict through armed intervention.[215]

Thus, no violation of the law of neutrality can, *in itself*, result in the supporting State becoming a party to the conflict.[216] In other words, 'co-belligerent' status is determined by the underlying actions, rather than by potential violations of the law of neutrality. For example, a supporting State could become a party to the conflict by participating in attacks on the side of one of the belligerents, but failing to detain belligerent soldiers would not.[217] This perspective is also supported by domestic military manuals. For example, according to the military manual of the United States, '[a]cts that are incompatible with the relationship between the neutral State and a belligerent State under the law of neutrality need not end the neutral State's neutrality and bring that State into the conflict as a belligerent'.[218] To conclude, a violation of neutral duties should not be confused with a loss of neutral status.[219]

The two remaining scenarios, termination of neutrality through hostilities against a neutral State and cessation of hostilities, have not been the subject of the same debate. Nevertheless, a few observations should be noted.

Firstly, it is important to distinguish between a legitimate defense against a belligerent's attempt to violate neutrality and 'hostilities' against the neutral State. As previously mentioned, the defense of neutrality is a duty of neutral States, and neutral military forces are entitled under the Hague Conventions

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[212] Ingber, 'Co-Belligerency' (n 3) 72 f; Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).

[213] Ambos (n 43).

[214] Heller & Trabucco (n 5) 263 f; Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).

[215] Upcher (n 1) 56.

[216] Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).

[217] ibid.

[218] Department of Defense, *Law of War Manual* (2015), § 15.4.1 <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190> accessed 10 December 2023.

[219] Hitoshi Nasu, 'The End of the United Nations? The Demise of Collective Security and Its Implications for International Law' [2021] 24(1) *Max Planck Yearbook of United Nations Law Online* 110, 133.

to use force to prevent belligerent acts on their territory. A State that seeks to repel a violation of neutrality will thereby maintain its neutral status until an armed conflict arises between itself and the belligerent or if the belligerent occupies the neutral territory.[220]

Regarding termination through cessation of hostilities, in the past, a formal peace agreement was necessary as the application of neutrality depended on a declared war. In contemporary times, however, State practice indicates that a peace treaty is no longer necessary. Instead, it appears necessary to establish a certain degree of permanence for the cessation of ongoing hostilities.[221]

[220] Upcher (n 1) 63 ff.
[221] ibid 65 ff.

4 The Law of Neutrality *vis-à-vis* the UN Charter

4.1 Introduction

Following the significant suffering and destruction of the Second World War, the collective security system of the UN was established to ensure peace and prevent similar wars from happening again. Consequently, the UN Charter was adopted, containing far more substantive rules than its predecessor, the League of Nations.[222] The creation of the UN collective security system and the implementation of the UN Charter, which prohibits the use of force and recognises the right of self-defense, have seriously challenged the validity of the law of neutrality as a legal regime in international law.[223] In this chapter, these challenges and their impact on the law of neutrality will be examined.

4.2 The Prohibition on the Use of Force

The law of neutrality developed in a historical context in which States had an unrestricted right to go to war and neutral States wanted to ensure that they were protected from its consequences.[224] However, war was outlawed first by the Kellogg-Briand Pact, and later by the prohibition on the threat or use of force in Article 2(4) of the UN Charter. Under the UN Charter, States may only use force in two situations: when authorized by the Security Council under Article 42, and in the exercise of their inherent right of individual or collective self-defense against an armed attack under Article 51. The very same rules exist in customary international law.[225]

The prohibition on resorting to war has posed significant challenges to the law of neutrality. Firstly, there have been claims that neutrality has lost its *raison d'être* since neutrality is inextricably linked to lawful war,[226] and that the prohibition on the use of force have replaced the law of neutrality.[227] For example, it is argued that the duty of impartiality is incompatible with the prohibition, as it outlaws an aggressor in situations of armed conflict.[228]

On a less far-reaching level, it has been suggested that the prohibition on the use of force has altered the law of neutrality to the extent that there is no longer an obligation of impartiality towards the belligerent party that has used unlawful force.[229] This view has led to some States and scholars

[222] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).
[223] ibid.
[224] Antonopoulos (n 1) 144.
[225] Orakhelashvili (n 21) 488, 550.
[226] Antonopoulos (n 1) 144.
[227] Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).
[228] Bothe (n 1) 574.
[229] Antonopoulos (n 1) 144.

endorsing the doctrine of ‘qualified neutrality’ or ‘non-belligerency’. However, the legal basis for this doctrine is unclear and a separate section is therefore devoted to this issue in Chapter 4.[230]

One thing that is clear is that the prohibition on the use of force has influenced the types of countermeasures allowed in response to violations of neutrality. Prior to the Charter era, lawful countermeasures could include military force against a State violating the law of neutrality, in the absence of a prohibition on the use of force.[231] This possibility was, however, limited by the international prohibition on the use of force.[232] In line with Article 2(4) of the UN Charter, the use of force in response to violations of neutrality is permissible only if the violation itself qualifies as an illegal armed attack.[233] In the same vein, Article 50(1)(a) of ARSIWA explicitly prohibits countermeasures that constitute force or the threat of force under Article 2(4) of the UN Charter.[234]

Lawful countermeasures are therefore today limited to non-forcible ones, such as imposing tariffs or restricting airspace access.[235] For example, during the 1973 conflict between Israel and its Arab neighbours, Arab States imposed an oil embargo on Western States, arguing that they had violated their obligation of neutrality by supporting Israel in the war.[236]

4.3 The UN Collective Security System

Chapter VII of the UN Charter, under the name *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, includes three important articles in regards of the law of neutrality.[237] According to Article 39 of the UN Charter, the Security Council[238] has the power to identify threats to global peace and decide on appropriate measures under Articles 41 and 42. Threats to global peace can encompass specific cases such as conflicts and broader issues like terrorism and weapon distribution. However, the Security Council commonly designates a threat to peace solely in situations involving the use of armed force.[239] Under Article

[230] Orakhelashvili (n 21) 534 f; Nasu ‘The End of the United Nations?’ (n 219) 131; Antonopoulos (n 1) 224.

[231] Bothe (n 1) 611; Heller & Trabucco (n 5) 260; Ferro & Verlinden (n 4) 34.

[232] Bothe (n 1) 611.

[233] ibid 581; Heller & Trabucco (n 5) 260; Ferro & Verlinden (n 4) 33 f.

[234] Orakhelashvili (n 21) 317 f; Henriksen (n 38) 125 ff.

[235] Heller & Trabucco (n 5) 260.

[236] Ferro & Verlinden (n 4) 33 f; Upcher (n 1) 102 f.

[237] Davis, ‘“You Mean They Can Bomb Us?”‘ (n 43).

[238] The UN Security Council represents one of the six principal organs of the UN and is responsible for maintaining international peace and security. Its composition comprises of fifteen members, five of which are permanent: China, France, Russia, the United Kingdom, and the United States.

[239] Orakhelashvili (n 21) 548 ff.

39, the Security Council has the power to officially identify one party to an IAC as the aggressor, posing a threat to global peace.[240]

Article 41 of the UN Charter grants the Security Council the authority to decide on and call upon member States to take non-forcible measures to restore international peace and security. According to the article, this may include 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'. When Article 41 measures are deemed to be insufficient, the Security Council may also authorize the use of force under Article 42.[241] It should be noted that the Security Council can only grant member States the *right* to use force through Article 42, which States can decide whether or not to use. The Security Council is therefore unable to force States to take military action.[242]

Where the Security Council makes a determination under Article 39 and proceeds to take measures under Articles 41, the members of the Security Council are bound to implement those decisions. This is due to Article 25 of the UN Charter, which requires member States to accept and carry out the decisions of the Security Council in accordance with the UN Charter.[243] This means that the Charter will have precedence over other international obligations, as reinforced by Article 103 of the UN Charter.[244] Article 103 also precludes wrongfulness under the law of State responsibility.[245] Security Council-imposed obligations may, therefore, eliminate the occurrence of an internationally wrongful act, thereby removing any possibility of countermeasures by the adversely affected belligerent.[246]

Moreover, Article 2(5) of the UN Charter, provides that '[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter and shall refrain from giving assistance

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[240] Davis, '"You Mean They Can Bomb Us?"' (n 43).

[241] Ambos (n 43).

[242] Orakhelashvili (n 21) 550; Authorization to use force under article 42 of the UN Charter is distinct from binding decisions of the Security Council that member States are obligated to comply with under article 25 and 103 of the UN Charter. When article 25 is triggered, States have no discretion in determining their actions. Resolutions authorizing the use of force use the phrase 'authorizes all means necessary', which differs from authorizing binding decisions expressed by the Security Council's use of the phrase 'decides'.

[243] Upcher (n 1) 133 ff.

[244] ibid 133; Henriksen (n 38) 35. It is uncertain whether article 103 of the UN Charter covers only *obligations* imposed by the Security Council under article 41, or also *authorizations* under article 42. See also Ferro & Verlinden (n 4) 34; It is also unclear whether Article 103 covers only strictly international agreements and treaties or whether it also extends to customary international law. This is of importance to the States that are not parties to the Hague Conventions, for example the United Kingdom, but are bound by the customary law of neutrality.

[245] Upcher (n 1) 134.

[246] Ferro & Verlinden (n 4) 34.

to any State against which the United Nations is taking preventive or enforcement action'. Article 2(5) thus imposes both a positive duty of assistance to the UN and a duty of non-assistance to the aggressor, which appear to prevent a member State of fully adhering to the duties of neutrality.[247] Both these duties may override certain duties a State would otherwise have under the law of neutrality, for example the duty not to discriminate one party and the duty of non-participation.[248] However, the word 'assistance' in Article 2(5) does not impose a duty on member States to provide military assistance, according to the general consensus. States are not obliged to provide more help than what is necessary based on Security Council decisions in accordance with Article 41.[249]

To conclude, if the Security Council uses its authority under Article 39 to officially declare one party to an IAC as the aggressor, member States are legally entitled to abandon their impartiality and support the non-aggressor State. This right extends to forcible measures authorized under Article 42 of the UN Charter.[250] However, in accordance with both Article 2(5), Article 25 and Article 103 of the UN Charter, member States are in fact obliged to abandon their impartiality if the Security Council calls upon member States under Article 41 to take non-forcible measures to restore international peace and security.[251] The rules under the law of neutrality are then superseded by the Security Council decisions.[252]

The Security Council may, for instance, demand that States limit arms sales by private entities in favour of one party to an IAC over another. It may also permit direct military assistance to one of the belligerents, both of which would normally violate traditional law of neutrality.[253] Exceptions to the duty of non-participation and impartiality must nevertheless be determined on a case-by-case basis by the Security Council.[254]

There is a widely accepted consensus that the rules under traditional law of neutrality may be modified when the Security Council has authoritatively declared a particular State to be the aggressor, or has taken preventive or enforcement measures.[255] This view is reinforced by the ICJ's reasoning in

[247] Upcher (n 1) 130-134.
[248] ibid 130-134.
[249] ibid 132.
[250] Bothe (n 1) 575; Upcher (n 1) 138.
[251] Davis, '"You Mean They Can Bomb Us?"' (n 43).
[252] Heller & Trabucco (n 5) 261; Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43); Bothe (n 1) 576; Ambos (n 43).
[253] Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).
[254] Bothe (n 1) 576.
[255] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5); Program on Humanitarian Policy and Conflict Research at Harvard University, 'Commentary to the HPCR Manual on International Law Applicable to Air and Missile Warfare: Elaborated by the Drafting Committee of the Group of Experts under the supervision of Professor Yoram

its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where the Court held that 'the principle of neutrality, whatever its content [...] is applicable (*subject to the relevant provisions of the United Nations Charter*) to all international armed conflict' [emphasis added].[256]

However, the recognition of an aggressor during an IAC has been infrequent in the history of the Security Council, in particular because of its political structure, with five permanent members who hold veto power in the decision-making.[257] In certain cases, the Security Council has responded to an armed attack against a member State by explicitly deeming the other party the aggressor and proceeding to authorize non-forcible or forcible enforcement action under Chapter VII of the UN Charter.[258] There are two prominent examples of the Security Council exercising this power: the Korean War in 1950 and the Kuwait War in 1990.[259]

During the Korean War in 1950 the Security Council recognized the North Korean aggression against South Korea and authorized UN members to use both military force and non-forcible measures to repel the attack and restore peace.[260] At the time, the Soviet Union was boycotting the UN, which meant that it could not veto the resolutions. The boycott originated in a dispute over the organization's refusal to recognize the People's Republic of China as the legitimate representative in the Security Council, since Taiwan held the seat at the time.[261]

In the 1990 Kuwait War, Iraq was identified as the aggressor after invading neighbouring Kuwait.[262] The Security Council proceeded to impose economic and other non-military sanctions on Iraq[263], and thereafter continued to authorize the use of 'all necessary means' to force Iraq out of Kuwait.[264]

If the Security Council does not designate an aggressor or oblige States to support in maintaining or restoring peace, the traditional rights and duties under the law of neutrality continue to apply.[265] Moreover, it is important to note that there are differences in terms of the consequences for neutrality

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Dinstein' in *HPCR Manual on International Law Applicable to Air and Missile Warfare* (Cambridge University Press 2013) 51; Davis, '"You Mean They Can Bomb Us?"' (n 43).

[256] *Legality of the Use or Threat of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 66 para 88-89; See Section 2.2.2.

[257] Orakhelashvili (n 21) 544.

[258] ibid 553.

[259] Antonopoulos (n 1) 63 f.

[260] UNSC Res 82 (25 June 1950) UN Doc S/1501; UNSC Res 83 (27 June 1950) UN Doc S/ 1511; UNSC Res 84 (7 July 1950), UN Doc S/1588.

[261] Orakhelashvili (n 21) 545.

[262] UNSC Res 660 (2 August 1990) UN Doc S/RES/660.

[263] UNSC Res 661 (6 August 1990) UN Doc S/RES/661(1990).

[264] UNSC Res 678 (29 November 1990) UN Doc S/RES/678(1990).

[265] Bothe (n 1) 605 ff.

between binding enforcement measures carried out by the Security Council and military operations authorized by the Security Council. The Security Council's authorization for military action permits States to use force that would otherwise violate neutrality, but it does not preclude the possibility of neutrality, since no State is obliged to make use of this authorization.[266] Essentially, the law of neutrality has not been completely set aside by the UN Charter, but can be temporarily suspended in particular cases by a binding decision of the Security Council.[267]

4.4 'Uniting for Peace' Resolutions

As outlined in the previous section, it is clear that binding decisions of the Security Council supersede the law of neutrality. However, there have been suggestions that the General Assembly may also be able to modify the law of neutrality through its ability to adopt enforcement recommendations in the context of an 'Uniting for Peace' resolution when the Security Council is unable to act, for example due to a veto by a permanent member.[268]

After ending its boycott of the Security Council in 1950, the Soviet Union used its veto to block any further resolutions against North Korea during the Korean War.[269] The original 'Uniting for Peace' resolution was therefore adopted by the General Assembly in 1950 to bypass the Soviet veto.[270] The resolution resolved 'that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security […], the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures'.[271] The aim of the procedure is thus to provide the UN with an alternative method of action should at least one permanent member use its veto to prevent the Security Council from carrying out its functions under the UN Charter.[272] Since 1950, the 'Uniting for Peace' procedure has been activated ten times, although never to recommend enforcement action.[273]

The legitimacy of the 'Uniting for Peace' resolution was implicitly confirmed by the ICJ in 2004, where it assessed and confirmed the

[266] Bothe (n 1) 606.
[267] ibid 607.
[268] Ambos (n 43); Antonopoulos (n 1) 65 f.
[269] Orakhelashvili (n 21) 566.
[270] Rebecca Barber, 'What can the UN General Assembly do about Russian Aggression in Ukraine?' (*EJIL: Talk!*, 26 February 2022) <https://www.ejiltalk.org/what-can-the-un-general-assembly-do-about-russian-aggression-in-ukraine/> accessed 10 December 2023; Orakhelashvili (n 21) 566.
[271] UNGA Res 337(V) (3 November 1950) UN Doc A/RES/337(V).
[272] Barber (n 270).
[273] Antonopoulos (n 1) 66.

fulfilment of the preconditions of the resolution.[274] Moreover, in 2010, the ICJ characterised the 'Uniting for Peace' resolution as a mechanism that empowers the General Assembly to recommend collective measures when the Security Council is unable to act due to lack of unanimity among its permanent members.[275]

It is worth noting that General Assembly resolutions are not legally binding on States, unlike decisions taken by the Security Council.[276] However, there has been debate as to whether enforcement measures recommended by the General Assembly within the 'Uniting for Peace' procedure fall within the context of Article 2(5). The crux of the issue is whether such action is 'in accordance with the present Charter'.[277] If this is the case, recommendations from the General Assembly would thereby legitimize the taking of appropriate action and impose a duty of assistance, thus overriding any neutrality objections and justifying non-neutral support to one of the belligerents.[278] Most scholars, nevertheless, either remain silent on this issue or seem to hold the opinion that due to the non-binding nature of General Assembly resolutions, they cannot have the authoritative impact to trigger the effect of Article 2(5) on neutrality.[279]

4.5 The Right of Self-Defense

When the Security Council has authorized the use of force under Article 42, the law of neutrality may be modified.[280] Whether the same remains true with respect to assisting a State in its inherent right of individual self-defense or the use of force in collective self-defense under Article 51 of the UN Charter is debatable. This question is also closely related to the rules on State responsibility in ARSIWA, which were briefly described above. Pursuant to the right of self-defense enshrined in the UN Charter, ARSIWA regulates lawful measures taken in self-defense.[281]

Article 21 of ARSIWA provides that 'the wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken *in conformity with the Charter of the United Nations*' [emphasis added].[282] The right to resort to self-defense, as defined by the rules of State responsibility, pertains to Article 51 of the UN Charter, which permits States to assist the

[274] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 30 ff.

[275] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] General List No 141 para 42.

[276] Orakhelashvili (n 21) 546.

[277] Antonopoulos (n 1) 65 f.

[278] ibid; Ambos (n 43).

[279] Antonopoulos (n 1) 65; Brownlie (n 69) 404.

[280] See Section 4.3.

[281] Ambos (n 43).

[282] Henriksen (n 38) 125.

victim of an armed attack in the exercise of their right of self-defense.[283] It is imperative to fulfil the requirements set forth in Article 51 of the UN Charter, such as the need for necessity and proportionality, to ensure lawful actions that do not entail State responsibility under ARSIWA.[284] Furthermore, the exercise of the right of self-defense is only permitted under Article 51 of the Charter until the Security Council takes action to preserve international peace and security. If the Security Council authorizes the use of force, the targeted State is prohibited from invoking self-defense.[285]

States may thus support the victim of aggression without violating their obligations of neutrality, since collective self-defense is accepted as a 'circumstance precluding wrongfulness' under international law.[286] It is therefore argued that acting in collective self-defense may justify violations of neutral duties.[287] However, it is necessary to remember that the right of collective self-defense in the UN Charter is a *right* of all States to assist a victim of an armed attack, not an obligation to do so.[288] It is in no way unlawful for a State to refrain from assisting a victim of aggression, by remaining impartial and neutral. Similar to Security Council authorizations under Article 42 of the UN Charter, this indicates that the right of self-defense may override the law of neutrality in certain cases, but it does not generally exclude the traditional duty of non-participation and impartiality.[289]

Closely connected to the right of self-defense in the UN Charter is the question of how military alliances, such as NATO, interact with the law of neutrality.[290] The inherent right of self-defense can be implemented individually or collectively, but also within the framework of formalized regional and collective security arrangements.[291] For instance, the well-known Article 5 of the North Atlantic Treaty[292] establishes the general principle of the right of collective self-defense, which entails mutual defense guarantees for all NATO members[293]; a similar provision is contained in

[283] Nasu 'The End of the United Nations?' (n 219) 133.

[284] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) 75. Orakhelashvili (n 21) 494 f; Ambos (n 43).

[285] Orakhelashvili (n 21) 550.

[286] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3); Nasu 'The End of the United Nations?' (n 219) 132 f.

[287] ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries' 74; Nasu 'The End of the United Nations?' (n 219) 132 f; Bothe (n 1) 607.

[288] Bothe (n 1) 606.

[289] ibid.

[290] A R Tomas & D C James (eds), *Annotated supplement to The commander's handbook on the Law of Naval Operations*, vol 73 (International Law Studies 1999*)* 368.

[291] ibid.

[292] The North Atlantic Treaty (adopted 4 April 1949, entered into force 24 August 1949).

[293] Article 5 of the North Atlantic Treaty provides that if a party is the victim of an armed attack, each and every other party to the alliance will consider this act of violence as an armed

Article 4 of the Collective Security Treaty[294], which applies to the six members[295] of the Collective Security Treaty Organization.[296]

It is worth noting from the outset that simply being a member of a regional or collective security alliance does not contradict the duties under the law of neutrality, as the requirement to remain neutral only arises after the outbreak of an IAC.[297] There is really only one difference between exercising the right of self-defense on an *ad hoc* basis or through a military alliance with regard to neutrality. A State may not have the right to choose between supporting a State or remaining neutral when it is part of a regional or collective security arrangement, as opposed to when a State seeks support from other States on an *ad hoc* basis.[298]

However, the mutual defense guarantees in the alliances only actualize when the requirements in Article 51 of the UN Charter are fulfilled. This is evident since both Article 5 of the North Atlantic Treaty and Article 4 of the Collective Security Treaty refer to Article 51. Therefore, when assisting a State through a regional or collective security arrangement, this would likewise fall under the exception in Article 21 of ARSIWA and justify the violation of neutrality.[299]

It is, however, unclear whether a neutral State, which discriminates against an aggressor in self-defense, remains neutral or if its neutral status is terminated.[300] Since a violation of neutral duties does not imply a loss of neutral status, as described above, it has been argued that States do not lose their neutral status by providing non-neutral support in the exercise of the right of collective self-defense.[301] Hence, a State with existing cooperative treaty obligations will still be considered neutral unless its level of support for a party to an IAC is significant enough to be considered a belligerent under IHL.[302] The possibility of maintaining a neutral status under such arrangements thus instead depends upon the extent to which the parties are

attack against all parties and will take the actions it deems necessary to assist the party attacked.

[294] Collective Security Treaty (adopted 15 May 1992, entered into force 20 April 1994).

[295] The six members are Russia, Armenia, Kazakhstan, Uzbekistan, Kyrgyzstan and Tajikistan.

[296] Article 4 of the Collective Security Treaty establishes that an aggression against one State party would be perceived as an aggression against all State parties and all other participating States will provide him with the necessary assistance, including military.

[297] Nasu 'The End of the United Nations?' (n 219) 133; Oppenheim (n 3) § 295.

[298] Tomas & James (n 290) 368.

[299] ibid.

[300] Upcher (n 1) 24.

[301] See Section 3.4; ibid.

[302] Nasu, 'The End of the United Nations?' (n 219) 133.

obligated to provide assistance in a regional action, or in the case of collective self-defense, to come to the aid of a victim of an armed attack.[303]

[303] Tomas & James (n 290) 368.

5 Views on the Validity and Relevance of Neutrality

5.1 Introduction

The law of neutrality is, as we have seen, a controversial area of international law that has faced several challenges since the two World Wars.[304] These challenges, almost all originating from the adoption of the UN Charter, have led to major disagreements regarding the continuing validity and relevance of the law of neutrality.

For the purpose of this analysis, the perspectives will be classified in four categories. The *first* viewpoint is that the law of neutrality has become obsolete. The *second* perspective holds that neutrality is an optional status that States that are not parties to an IAC may choose to adopt, and the *third* perspective instead argues that neutrality is a mandatory status that applies to all States that are not parties to an IAC. The *fourth* perspective acknowledges the continued existence of the law of neutrality but emphasizes significant modifications, through the endorsement of the doctrine of 'qualified neutrality'.

5.2 The Law of Neutrality has Become Obsolete

The perspective that the law of neutrality had become obsolete arose shortly after the adoption of the Hague Conventions in 1907.[305] For instance, it has been argued that the law of neutrality has lost its substantive content due to the significant violations of neutral rights and the expansion of belligerent rights during the two World Wars.[306] Furthermore, it is argued that the establishment of a collective security system to counter any threat to or breach of international peace and security has replaced the law of neutrality and made it impossible to fulfil neutral obligations.[307]

Advocates of this view contend that the duty of impartiality is incompatible with the UN Charter and the prohibition on the use of force, as it outlaws an aggressor in situations of armed conflict and provides that aggression should be met with a community response by the UN.[308] In the words of one scholar, '[t]he doctrine of collective security really literally amounts to an

[304] Ferro & Verlinden (n 4) 15; Heller & Trabucco (n 5) 256 f.
[305] Antonopoulos (n 1) 25.
[306] ibid.
[307] Heller & Trabucco (n 5) 256; Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43); Ingber, 'Co-Belligerency' (n 3) 90.
[308] Bothe (n 1) 605; Upcher (n 1) 126.

elimination of the right of neutrality; everybody has a duty to participate in the collective system'.[309]

If the law of neutrality is indeed outdated, the question is what replaces it. In a famous speech from 1941, US Attorney General Jackson argued that the establishment of collective security through the League of Nations and the Kellog-Briand Pact constituted this 'new international law'. If applied to contemporary international law, this would mean that relations between non-participating States and belligerents are governed solely by the UN Charter.[310]

Nonetheless, this perspective has been disregarded by the majority.[311] For example, it has been claimed that 'the general law of neutrality […] has not been revoked'[312] or 'excluded or abolished'[313] by the UN Charter.[314] To quote another scholar, 'there is broad consensus that neutrality law survives but must be adjusted in some circumstances to accommodate enforcement action under the UN Charter and collective self-defense'.[315]

Many scholars argue that the collective security system does not provide an adequate response to every unlawful use of force, especially as exemplified by the political stalemate of the Cold War. As expectations of the machinery of collective security began to diminish due to this development, it was believed that the UN Charter and the law of neutrality could exist alongside each other.[316] This reinforces the view that the UN Charter has not displaced the law of neutrality, even if it has modified the rules in some situations.[317]

Additionally, there is no evidence in the UN Charter's text or drafting history to suggest a desire to abolish the law of neutrality entirely.[318] France proposed including a provision in the UN Charter stating that neutrality was incompatible with UN membership. However, it was later revealed that the term 'neutrality' in the French proposal meant permanent neutrality and was primarily intended to exclude the admission of Switzerland.[319] In fact, Switzerland only joined the UN in 2002, partly because some opponents

[309] Hedley Bull, 'The Grotian Conception of International Society' in Richard Falk & Samuel S Kim (eds), *The War System, An Interdisciplinary Approach* (Routledge 1980) 121.

[310] Edwin Borchard, 'War, Neutrality and Non-Belligerency' [1941] 35(4) *The American Journal of International Law* 618, 618.

[311] Nasu, 'The End of the United Nations?' (n 219) 128.

[312] Bothe (n 1) 605.

[313] Antonopoulos (n 1) 60.

[314] ibid; Bothe (n 1) 605.

[315] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

[316] ibid; Upcher (n 1) 126; Heller & Trabucco (n 5) 256; Antonopoulos (n 1) 223.

[317] Upcher (n 1) 1 f.

[318] Heller & Trabucco (n 5) 256.

[319] Antonopoulos (n 1) 59.

believed that membership was incompatible with Switzerland's neutral status.[320]

Neutral States in situations of IAC are also mentioned in the Geneva Conventions of 1949, which followed the UN Charter.[321] For instance, the Geneva Conventions contain several rules in which the terms 'neutral Powers', 'neutral countries' or 'neutral States' are used. The 2017 commentary to the Geneva Conventions explicitly notes that '[b]y referring to these terms in 1949, the Conventions acknowledged […] the continued validity of the law of neutrality following the adoption in 1945 of the UN Charter and its system of collective security'.[322]

The argument of obsolescence is also challenged by the fact that a few States have ratified the Hague Conventions since the Second World War.[323] For instance, in 2015, Ukraine became a party to Hague Convention V.[324] Moreover, State practice indicates that the law of neutrality remains part of customary international law, as evidenced by government statements, military manuals, judgments of both domestic and international courts, and the recent adoption of non-binding texts.[325] The International Law Commission also recognises the law of neutrality as a valid and relevant regime of international law.[326]

States have also applied the principles of neutrality in IACs, for example, during the 1980 Iran-Iraq War and the 2003 Iraq War, the latter of which will be examined in more detail below.[327] It is further noteworthy that during both World Wars, the disregard for neutral rights by the belligerents was justified under the guise of legal argument, rather than outright neglect of the law of neutrality. The belligerents who violated neutral rights, particularly the inviolability of neutral territory, claimed that neutral States had first violated their duties by, for example, failing to defend their neutrality against the opposing belligerent. Consequently, the belligerents considered themselves injured States with the right to take proportionate countermeasures to restore neutrality.[328]

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[320] Henriksen (n 38) 60; UNGA 'With Admission Of Switzerland, United Nations Family Now Numbers 190 Member States' (10 September 2002) Press Release GA/10041.

[321] Heller & Trabucco (n 5) 256; For example, article 4 of the Geneva Convention (1) states that 'Neutral Powers shall apply by analogy the provisions of the present Convention'.

[322] Geneva Convention (II) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Commentary of 2017 para 956.

[323] Heller & Trabucco (n 5) 256.

[324] 'Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907.' (n 103).

[325] See Section 2.2.2; Antonopoulos (n 1) 222.

[326] See United Nations, *Yearbook of the International Law Commission 2011*, vol II, part 2 (United Nations 2018), article 17.

[327] Heller & Trabucco (n 5) 256.

[328] Antonopoulos (n 1) 4.

5.3 Neutrality as an Optional Status

The second viewpoint is that the law of neutrality retains its relevance, but only as an optional status. According to these scholars, States that are not party to an IAC are not obliged to maintain neutrality. Instead, neutrality is seen as a chosen, declared status.[329] The Hague Conventions do not provide a definition of a neutral State and consequently offer no guidance as to whether neutrality during armed conflict is optional or mandatory.[330]

Perhaps the most well-known articulation of the perspective that neutrality is optional was made by Dietrich Schindler in 1991, where he stated that 'States not wishing to take part in the armed conflict on the victim's side are no longer obliged to apply the law of neutrality. […] Neutrality has become purely optional'.[331] This argument for optionality appears to rest mainly on the prohibition on the use of force and the right to collective self-defense.[332]

Firstly, it is argued that non-participating States in armed conflicts are not automatically obliged to adhere to the law of neutrality, since they already enjoy the right to territorial inviolability under Article 2(4) of the UN Charter.[333] Thus, some scholars claim that contemporary law of neutrality does not provide further rights beyond those already available in peacetime, but instead imposes a number of duties on non-participating States. States appear to receive few, if any, benefits from being granted neutral status, which makes the concept of automatic neutrality upon the outbreak of conflict difficult to sustain.[334]

The argument that neutrality is purely optional is also based on the right of collective self-defense under Article 51 of the UN Charter. This right of collective self-defense is seen as giving States greater flexibility, removing the traditional distinction between neutrality and belligerency, and allowing States to adopt various intermediate positions between these two statuses.[335] This position also supports the doctrine of 'qualified neutrality', which advocates for an intermediate position of 'non-belligerency', as will be discussed below.[336]

Furthermore, it is claimed that customary international law supports the view that neutrality is merely an optional status.[337] This perspective appears to be founded on the observation that not every non-participating State fully

[329] Upcher (n 1) 21.
[330] See Hague Convention V and Hague Convention XIII.
[331] Schindler (n 17) 373.
[332] Upcher (n 1) 21 f.
[333] ibid.
[334] ibid; Schindler (n 17) 378 ff.
[335] Schindler (n 17) 373.
[336] Upcher (n 1) 21 f.
[337] Schindler (n 17) 373.

adheres to its neutral duties.[338] However, critiques have argued that non-compliance with a legal rule is not in itself evidence of the creation of a new rule. They hold that States may discriminate in favor of a belligerent, but that this does not necessarily negate their neutral status.[339]

In support of the view that neutrality is an optional status, a few additional scholars has stated that a State can 'choose to *adopt* "neutral" status' [emphasis added][340] or *declare* itself neutral when wishing to avoid involvement in an imminent or ongoing conflict.[341] It is argued that a declaration of neutrality was seen as unnecessary in 1907 when neutrality was automatically required for third States, but that this is unlikely to be the case today with the introduction of collective security systems.[342]

If it is assumed that neutrality is optional for States, this would mean, in the case of an IAC, that a State that does not wish to take part in hostilities is not bound by the law of neutrality. It is argued that it could instead provide non-belligerent assistance or declare neutrality to signal its neutral status.[343] If adopting a neutral status, the State would then receive the benefits laid down in the Hague Conventions, such as the right to maintain existing trade relations with the belligerents.[344]

5.4 Neutrality as a Mandatory Status

Several objections have been raised against the view that neutrality is purely optional.[345] The majority of present-day scholars advocate that neutrality is mandatory, both as treaty law and as customary international law, and thus applies to all States.[346] Their view is that when two or more States are involved in an IAC, all States that are not party to the IAC in question are obliged to take a neutral stance to the conflict. In other words, neutrality is the legal status that applies to a State that is not participating in an IAC.[347]

This view on the law of neutrality implicates that 'neutrality is not optional' and that a State not party to an IAC is not free to legally 'violate single duties of the law of neutrality as it will, or to declare them irrelevant, without having to fear a countermeasure taken by the adversely affected State'.[348] According to the traditional rules of neutrality, '[a] State is either a

[338] Schindler (n 17) 373; Upcher (n 1) 30 ff.
[339] Upcher (n 1) 31 ff.
[340] Ingber, 'Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda' (n 17) 86.
[341] Bring (n 17) 237.
[342] ibid 240.
[343] Upcher (n 1) 21 f.
[344] ibid; See Section 3.2.
[345] Upcher (n 1) 22-37.
[346] ibid 37.
[347] Oppenheim (n 3) § 293; Bothe (n 1) 602 f; Heller & Trabucco (n 5) 255.
[348] Bothe (n 1) 604; Heller & Trabucco (n 5) 256.

belligerent or neutral; there is no legal middle ground. Belligerent States are those engaged in an international armed conflict. [...] All other States are neutral; they need not declare neutrality to benefit from, and be bound by, neutrality rules'.[349]

Furthermore, it is argued that customary international law maintains that neutrality is mandatory for States not involved in an international armed conflict.[350] Most national military manuals also reject the idea that neutrality is voluntary and hold that neutrality becomes mandatory once a certain threshold of conflict is reached.[351] Military manuals could, as explained above, be an indication of both State practice and *opinio juris*.[352] Thus, it is argued that the law of neutrality is applicable to all non-participating States rather than being an optional position that States may choose to discard.[353]

5.5 'Qualified Neutrality'

As a result of the historical developments since the adoption of the Hague Conventions, and the extensive debate on the validity and applicability of neutrality law, modifications to the traditionally strict law of neutrality have emerged.[354] The most prominent modification is the doctrine of 'qualified neutrality'. It is sometimes referred to as 'benevolent neutrality', 'differentiated neutrality' or 'non-belligerency', although the different terms describe the same concept.[355]

According to the doctrine of 'qualified neutrality', States may engage in non-neutral actions in support of the *victim* of an unlawful war of aggression even in the absence of a Security Council decision. This therefore constitutes an exception to the requirement of complete neutrality in IACs where the Security Council has not designated an aggressor or obliged States to assist in the maintenance or restoration of peace.[356] 'Qualified neutrality' may for example apply when the aggressor is apparent, but the Security Council cannot take effective action due to, for example, a veto by a permanent member.[357]

By adopting a policy of 'qualified neutrality', States seek to uphold the protection afforded to neutrals, while respecting only the duty of non-participation in hostilities and abandoning the duty of impartiality.[358] This

[349] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).
[350] Upcher (n 1) 37; Heller & Trabucco (n 5) 256.
[351] Upcher (n 1) 29 f.
[352] See Section 1.3.
[353] Upcher (n 1) 37.
[354] Dinstein (n 6) 80.
[355] Oppenheim (n 3) § 304-305; Brownlie (n 69) 404; Ferro & Verlinden (n 4) 32; Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).
[356] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).
[357] ibid.
[358] Ferro & Verlinden (n 4) 32; Heller & Trabucco (n 5) 261.

places States in a grey-zone between being neutral and belligerent - a position usually referred to as 'non-belligerent'.[359]

The endorsement for 'qualified neutrality' generally stems from the adoption of the prohibition on the use of force in Article 2(4) of the UN Charter in 1945[360] and of any act of aggression, as enshrined in the General Assembly Resolution 3314 (XXIX) in 1974.[361] However, the term 'qualified neutrality', along with the aforementioned terms, does not appear in any of the treaties on neutrality.[362] Hence, its inclusion in the law of neutrality is only possible if it is supported by State practice and *opinio juris* to such an extent that it can be considered customary international law.[363]

Particularly the United States contend that neutral States may adopt a position of 'qualified neutrality', by distinguishing between an aggressor and a victim of aggression.[364] In this regard, the United States military manual states that '[a]fter treaties outlawed war as a matter of national policy, it was argued that neutral States could discriminate in favor of States that were victims of wars of aggression. Thus, before its entry into World War II, the United States adopted a position of "qualified neutrality" in which neutral States had the right to support belligerent States that had been the victim of flagrant and illegal wars of aggression'.[365] Likewise, the United Kingdom military manual states that 'qualified neutrality' and 'non-belligerence' describe a status which, while departing from certain traditional neutral duties, is still based on the avoidance of active participation in hostilities. Unlike the United States manual, it does not tie this practice to the prohibition on the use of force.[366]

Several States believe that they can deviate from neutrality in the absence of a Security Council decision and have endorsed the concept of 'qualified neutrality' during the last century, adopting a 'non-belligerent' position towards various IACs.[367] Before entering the Second World War, the United States supported the United Kingdom in a way that was incompatible with its duties under the law of neutrality and regarded itself a 'non-belligerent',

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[359] Ferro & Verlinden (n 4) 32; Ronzitti (n 19) 198.

[360] See Section 4.2.

[361] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5).

[362] Ronzitti (n 19) 198; Ferro & Verlinden (n 4) 33; However, it should be noted that the term 'non-belligerent' is present in article 4(b) of the Geneva Convention III and article 2(c) of the Additional Protocol I to the Geneva Conventions, which governs IHL.

[363] Antonopoulos (n 1) 146.

[364] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5).

[365] Department of Defense, *Law of War Manual* (n 218), § 15.2.2.

[366] Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (Joint Service Publication 383, 2004 Edition) §§ 1.42.1–1.42.2 <https://assets.publishing.service.gov.uk/media/5a7952bfe5274a2acd18bda5/JSP3832004Edition.pdf> accessed 10 December 2023.

[367] Schmitt, '"Strict" Versus "Qualified" Neutrality' (n 3).

as described in their manual.[368] Furthermore, in the Second World War, Italy declared itself as a 'non-belligerent' to avoid taking an active part in the hostilities, while providing military support on the side of the Allies in the end of the war.[369] Similarly, when the Winter War broke out between Finland and the Soviet Union, Sweden did not want to be a 'co-belligerent' with Finland or remain neutral, and thus declared itself a 'non-belligerent'.[370]

In addition to a few examples of State practice and military manuals supporting the doctrine of 'qualified neutrality', the principles of State responsibility may also be considered to favour the policy. In addition to the rules on State responsibility mentioned in the previous chapter, Article 41(2) of ARSIWA provides that States shall cooperate to end violations of peremptory norms of international law and shall refrain from encouraging or facilitating acts in violation of such norms. Peremptory norms, also known as *jus cogens* norms, include the principles of territorial integrity and the prohibition on the use of force in the UN Charter. For example, during an IAC, States are not only permitted, but may even be required, to take measures to restore the lawful State of affairs, rather than supporting or contributing to the violation.[371] This suggests that the rules of State responsibility leave no room for impartiality in the case of serious violations of international law by a State.[372]

However, there have been occasions when a third State has supported the aggressor State and likewise argued for the exception of 'qualified neutrality'. For instance, during the 1980 Iran-Iraq War, the United States once again adopted a policy of 'qualified neutrality'. They favoured Iraq and discriminated against Iran, despite the fact that Iraq had initiated the conflict in September 1980. This support was exemplified by actions such as the reflagging of eleven Kuwaiti tankers in the United States, meaning that these vessels were registered as American and thus received the protections and benefits associated with the American flag.[373]

Assistance that is not clearly on the side of a victim of aggression, or where it is unclear who the victim is, raises the question of whether 'qualified neutrality' applies to binding obligations under a military alliance, a position supported in particular by the United States.[374] They argue that qualified neutrality extends to situations where violating neutrality is necessary for

[368] Bothe (n 1) 603 f.

[369] ibid; Ferro & Verlinden (n 4) 32; Upcher (n 1) 55.

[370] Lars Ericson Wolke, 'Vinterkriget: Anfallet på Finland blev även Sveriges sak' [2009] 11 *Populär Historia*.

[371] Ambos (n 43).

[372] ibid.

[373] Antonopoulos (n 1) 145 f.

[374] Heller & Trabucco (n 5) 262; Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).

'regional and collective self-defense arrangements'.[375] Some scholars argue that, presumably, 'the same legal logic would apply in bilateral or *ad hoc* collective self-defense cases',[376] even if the extension has not been explicitly advocated for by the United States.[377] This would provide a legal justification for States that do not maintain strict neutrality because of their membership of an alliance such as NATO or due to bilateral defense agreements.[378]

Nevertheless, the concept of 'qualified neutrality' remains controversial.[379] For instance, it has repeatedly been argued that claims of derogation from the law of neutrality are, if anything, premature, and that there is no foundation for notions like 'qualified neutrality'.[380] Although some States have proclaimed 'qualified neutrality' or 'non-belligerency' over the years, it cannot be said to be a concept recognized by customary international law, as there is insufficient general practice to justify such a conclusion.[381] It is also argued that international law does not acknowledge 'qualified neutrality' as an 'intermediate status that a State may lawfully claim for itself'.[382]

Moreover, it has been argued that States cannot legitimately replace a decision of the Security Council with their own subjective judgment regarding which belligerents should be given assistance.[383] State practice has been found to demonstrate the difficulty of identifying a particular State as the aggressor in the absence of an authoritative decision by the Security Council, since both sides in an IAC tend to justify their military operations as an exercise of individual or collective self-defense.[384] In the words of one scholar, '[i]f neutral States were allowed to absolve themselves from their neutrality obligations by a unilateral determination of the aggressor, the law of neutrality could no longer fulfill its function of effectively preventing an escalation of an IAC'.[385] Without a Security Council resolution to override

[375] Department of Defense, *Law of War Manual* (n 218), § 15.2.4.
[376] Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).
[377] Heller & Trabucco (n 5) 262.
[378] ibid.
[379] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5); Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43); Heller & Trabucco (n 5) 261; Oppenheim (n 3) § 305.
[380] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5); Wolff Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts: the Myth of the Irrelevance of the Law of Neutrality' in Michael Schmitt, & Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Brill | Nijhoff 2007) 543–568, 544.
[381] Bothe (n 1) 572.
[382] Davis, '"You Mean They Can Bomb Us?"' (n 43).
[383] ibid.
[384] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5).
[385] ibid.

the law of neutrality, 'the law is binary: States are either belligerents or neutrals'.[386]

This view was widely supported by the majority of experts who participated in the drafting of the 2013 Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare. They concluded that an intermediate status of either 'qualified neutrality' or 'non-belligerency' could not be acknowledged unless the UN Security Council under Chapter VII of the UN Charter made an authoritative determination.[387]

However, multiple scholars contend that the concept has legal support, at least in some form. Some argue, for example, that the idea of 'qualified neutrality' is the most defensible interpretation of the law of neutrality, given State practice and the development of international law since the Hague Conventions came into force in 1907.[388]

Since the outbreak of the Russo-Ukrainian war in 2022, there has also been a slight shift in the debate. Some scholars contend that 'qualified neutrality' is applicable to this conflict, even though Russia has not been deemed the aggressor by the Security Council due to its veto of such a resolution. They argue for this position specifically on the grounds that 141 States have designated Russia as the aggressor through General Assembly Resolution ES-11/1[389], a 'Uniting for Peace' resolution.[390] These scholars further claim that the States that voted against the resolution or abstained, such as China, Cuba and Venezuela, can be disregarded as they are the 'usual suspects'.[391]

Even scholars who have continuously criticized the concept of 'qualified neutrality' have supported this argument, arguing that in such cases 'neutral States can no longer be bound by an obligation of strict impartiality and a prohibition to supply the victim of aggression with the means necessary to defend itself against an aggressor State that is obviously determined to ignore core principles and rules of international law'.[392]

Furthermore, it has been argued that 'qualified neutrality' should apply in such situations of clear military and economic imbalance between the aggressor and the victim of aggression.[393] This asymmetrical war between

[386] Davis, '"You Mean They Can Bomb Us?"' (n 43).

[387] Program on Humanitarian Policy and Conflict Research at Harvard University (n 255) 1-404, 51.

[388] Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).

[389] UNGA Res ES-11/1 (2 March 2022) UN Doc A/RES/ES-11/1.

[390] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5); Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).

[391] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5).

[392] ibid.

[393] Ambos (n 43).

Russia and Ukraine poses a significant challenge to the traditional distinction between *jus ad bellum* and *jus in bello*, and consequently to the equal treatment of combatants and civilians of the two belligerents that the traditional law of neutrality demands.[394] In such cases of extreme imbalance, some argue that moral-philosophical arguments deserve greater attention in order to address the causes of the armed conflict in question.[395]

However, the Russo-Ukrainian conflict has also sparked criticism, with some arguing that the validity of 'qualified neutrality' is questionable and may be interpreted as political manoeuvring by States seeking to justify their violations of neutrality law as necessary measures to counter Russian expansionism. They hold that the debate would likely not have arisen had Belarus, rather than Russia, invaded Ukraine.[396]

5.6 Conclusion

The disagreement regarding if the law of neutrality is obsolete or still holds relevance in an optional, mandatory, or modified form appear to be widespread. On the basis of the discussion in the previous chapter, some conclusions can although be drawn.

Firstly, the prevailing scholarly view is that the UN Charter has not revoked the general law of neutrality. Most scholars claim that the law of neutrality is not obsolete and that its validity has not been affected by the evolution of international law. Neither has it been compromised due to the large-scale violations of the rights of neutrals by the belligerents in the two World Wars.

As noted above, the Hague Conventions are silent on the definition of a neutral State and thus on whether neutrality is an optional or mandatory status. The view that neutrality is purely optional is based primarily on the claim that contemporary neutrality law does not provide any additional rights for non-participating States, but instead imposes a number of duties on them. While certain scholars advocate for the idea that neutrality is a status that one chooses or asserts voluntarily, the prevalent line of thought in international legal doctrine maintains that States are obliged to adopt a neutral status at the outbreak of hostilities. The view has explicit support from the majority of scholars and military manuals and is reinforced by the fact that the Hague Conventions include only two different statuses - neutral and belligerent.

The concept of 'qualified neutrality', which refers to the possible provision of non-neutral assistance in the absence of a Security Council decision,

[394] Ambos (n 43); McMahan (n 76) 4.
[395] Ambos (n 43); McMahan (n 76) 4; Guttman (n 97) 57 f.
[396] Pedrozo (n 5).

seems to be controversial. There are two scenarios in which ‘qualified neutrality’ is considered applicable. The first is when the aggressor is evident, but the Security Council is unable to act effectively because of a veto by a permanent member. Additionally, the United States and some others contend that ‘qualified neutrality’ is also applicable to regional and collective self-defense agreements, and possibly to bilateral and *ad hoc* agreements. The former option appears to have received considerable attention and is occasionally supported by military manuals, while the latter seems less common and more contested, as the next chapter will show.

It is noteworthy that following to the Russo-Ukrainian conflict, legal scholars have suggested that the once contentious notion of ‘qualified neutrality’ may find justification. This is attributed to Russia’s blatant disregard for fundamental principles of international law, which prompts consideration of ‘qualified neutrality’ as a strategic means of balancing power dynamics. Notably, this scholarly approach differs from previous global IACs, where the position of ‘non-belligerency’ adopted by States has typically been dismissed as a poorly disguised attempt to justify clear violations of neutrality.

Finally, one unresolved issue that this chapter raises is the relationship between the right of collective self-defense, as described in Section 4.5, and the concept of ‘qualified neutrality’. This may be merely a terminological issue, but it raises concerns. Acting in collective self-defense under Article 51 of the UN Charter is a circumstance that precludes wrongfulness under Article 21 of ARSIWA. Article 41(2) of ARSIWA, moreover, may even constitute an obligation to prevent violations of *jus cogens* norms, such as the use of force. It really does seem that these rules justify the same kind of non-neutral action as the concept of ‘qualified neutrality’, provided that one is actually the victim of aggression and not just an alleged victim.

6 Case Studies: The Current State of Affairs

6.1 Introduction

As the Hague Conventions have only been ratified by approximately 30 States, the validity of the law of neutrality for the wider international community depends on its incorporation into customary international law.[397] The previous chapters have dealt with the theoretical aspects of the law of neutrality, exploring different perspectives on its content and relevance in academic discourse. However, a practical examination is essential to assess whether States are actually engaging with the law of neutrality and demonstrating acceptance of these rules.

Both the 2003 Iraq War and the ongoing Russo-Ukrainian War are characterised by one notable feature: the active involvement of third States providing support to a belligerent party. This conduct, as described above, appears to be inconsistent with the neutral duties under the traditional law of neutrality. Therefore, these conflicts serve as two illustrative case studies of how various States have interacted with the concept of neutrality in the last two decades. They can provide insight into how States perceive the validity and relevance of the law of neutrality. Furthermore, these examples may indicate whether political, geopolitical, economic and historical considerations appear to influence the extent to which States provide non-neutral assistance to belligerents, and whether they attempt to justify this behaviour by invoking the law of neutrality.

6.2 The 2003 Iraq War

6.2.1 Introduction to the Conflict

The 2003 Iraq War was an IAC that began when a coalition led by the United States and the United Kingdom, initially including Australia and Poland, invaded Iraq on 20 March 2003 without Security Council

[397] Orakhelashvili (n 21) 6.

authorization.[398] The coalition is sometimes referred to as the 'coalition of the willing'.[399]

The 2003 Iraq War was primarily justified by the United States and the United Kingdom based on the belief that Iraq, led by Saddam Hussein, possessed weapons of mass destruction and had violated its disarmament obligations under several Security Council resolutions.[400] However, the UN had verified the destruction of Iraq's nuclear weapons program, and no substantial evidence of weapons of mass destruction was indeed found after the invasion.[401]

The active phase of the 2003 Iraq War formally came to an end on 1 May 2003.[402] The major combat operations, involving hundreds of thousands of troops, were followed by a long-term belligerent occupation, which was equivalent to an IAC and therefore subject to the rules of IHL.[403] While the occupation is outside the scope of this thesis, it follows that at least the active phase up to 1 May 2003 clearly reached the threshold for the applicability of the law of neutrality, meaning that all States not party to the IAC were obliged to adopt a neutral status and not to favour any of the belligerents.[404] However, the actual course of the conflict differed from this description.

6.2.2 Neutrality Violations During the Conflict

The 2003 Iraq War witnessed a range of responses from third States, with some explicitly supporting the so-called 'coalition of the willing' and others actively abstaining from involvement. However, no State provided any form of support to Iraq.[405]

The United States claimed that 45 States had joined the coalition, with the State Department releasing a list of 30 States that had provided support and claiming that 15 other States supported the coalition's efforts but chose to

[398] Ferro & Verlinden (n 4) 17; Marc Weller, 'The Iraq War—2003' in Ruys, Tom, Corten, Olivier, Hofer, Alexandra (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 639-661, 644; Michael. N Schmitt, 'Iraq (2003 Onwards)' in Wilmshurst, Elizabeth (ed), *International Law and the Classification of Conflicts* (OUP 2012) 360; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010) 365; Federal Department of Foreign Affairs, 'War against Ukraine – measures taken by the Confederation since 24 February 2022' (last updated 16 October 2023) <https://www.eda.admin.ch/eda/en/fdfa/fdfa/aktuell/dossiers/krieg-gegen-ukraine.html> accessed 10 December 2023, 10.

[399] Ferro & Verlinden (n 4) 17.

[400] Weller (n 398) 643; Corten (n 398) 233, 365 f.

[401] Weller (n 398) 643.

[402] Schmitt, 'Iraq (2003 Onwards' (n 398) 361.

[403] ibid 362, 365; Weller (n 398) 656.

[404] Schmitt, 'Iraq (2003 Onwards' (n 398) 360.

[405] Ferro & Verlinden (n 4) 17 f.

remain anonymous.[406] However, this representation did not accurately reflect the situation. Apart from the initial coalition States, a small number of troops and military support were provided to the coalition by Denmark and the United Arab Emirates. The coalition also received arms or munitions from a few other States, such as Spain and the Netherlands.[407] Moreover, several States, including some Arab States like Kuwait, Oman, and Qatar, were bases for coalition troops, personnel, and warplanes.[408] Most significantly, the coalition asked various States for overflight rights, meaning the right to fly over a foreign State without landing.[409] Among the States that granted the coalition such overflight rights to access Iraq were Egypt, Bulgaria, Lithuania and Italy.[410]

Supplying troops and arms is clearly in violation of the duty of non-participation under the traditional law of neutrality, as described in the previous chapters. Granting permission for overflight rights on the other hand violates the duty of prevention, in particular the obligation to prevent the movement of troops or convoys across neutral territory as stated in Article 5 of Hague Convention V. Similarly, allowing coalition bases on neutral territory conflicts with this duty.[411]

6.2.3 State Practice

State practice during the 2003 Iraq War shows few references to the law of neutrality, although certain acts and declarations may be linked to neutral duties.

The permanently neutral States Austria and Switzerland were two of the States that denied overflight of military aircraft over their territories.[412] In its refusal, Austria generally referred to its status as a 'neutral State', which could therefore be based on the Austrian policy position of neutrality as much as it could be based on neutrality law.[413] The Chancellor of the European Council stated that 'there is agreement that military action requires Security Council authorization, that neutral Austria will not participate in any military action and will not grant overflight rights'.[414]

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[406] Ewen MacAskill, 'US claims 45 nations in 'coalition of willing'' *The Guardian* (19 March 2003) <https://www.theguardian.com/world/2003/mar/19/iraq.usa> accessed 10 December 2023.

[407] Upcher (n 1) 82.

[408] Jesse Lorenz, 'The Coalition of the Willing' (Stanford University 2003) <https://web.stanford.edu/class/e297a/The%20Coalition%20of%20the%20Willing.htm> accessed 10 December 2023.

[409] Ferro & Verlinden (n 4) 17.

[410] Lorenz (n 408).

[411] Upcher (n 1) 103.

[412] Ronzitti (n 19) 198; Ferro & Verlinden (n 4) 17.

[413] Ferro & Verlinden (n 4) 17.

[414] See Parlament Österreich, 'Einigkeit in der Ablehnung des Irak-Kriegs' (Parlamentskorrespondenz Nr. 151, 26 March 2003)

The Swiss explicitly denied overflight over its territory on the basis of the law of neutrality. The President at the time declared that '[t]he coalition led by the US has decided to resort to force without the approval of the UNSC. We are therefore confronted with an armed conflict between States during which the law of neutrality applies'.[415] The Minister of Foreign Affairs at the time further explained that, '[i]f an armed conflict breaks out in Iraq without the approval of the UNSC, the law of neutrality is applicable. In that case, overflight for military purposes will not be authorized, while overflight for humanitarian purposes […] will be allowed'.[416]

However, numerous States supported the coalition in diverse ways, several of them being NATO members.[417] Italy, for instance allowed the United States to employ its military bases for the purposes of transit, refueling and maintenance, as well as granting authorization for American military aircraft to overfly its airspace.[418] Nevertheless, Italy set out explicit limitations, such as forgoing direct military involvement, providing weapons or military vehicles, and launching direct attacks against Iraqi targets from its military installations.[419] Italy issued a proclamation of 'non-belligerency' in an attempt to justify its support for one side in the conflict.[420]

Besides Italy's declaration of 'non-belligerency', several States granted overflight rights or other support to the coalition, referring to obligations under the North Atlantic Treaty and 'practices between allies'.[421] For example, France granted overflight rights, despite its earlier strong opposition to the Iraq invasion within the Security Council.[422]

<https://www.parlament.gv.at/aktuelles/pk/jahr_2003/pk0151> accessed 10 December 2023 (author's translation).

[415] Assemblée fédérale (Chambres réunies), *Déclaration du Conseil fédéral concernant la crise en Irak*, 03.200 (20 March 2003) <https://www.parlament.ch/fr/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=5833> accessed 10 December 2023 (author's translation).

[416] The Federal Assembly – The Swiss Parliament, 'Fragestunde' (Session de printemps 2003, Onzième séance, 03.5017, 17 March 2003) <https://www.parlament.ch/en/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=5544)> accessed 10 December 2023.

[417] Ferro & Verlinden (n 4) 17 f.

[418] See I Presidente della Repubblica, 'Il Presidente Ciampi ha presieduto il Consiglio Supremo di Difesa' (Comunicato, 19 March 2003) <https://presidenti.quirinale.it/Elementi/186403> accessed 10 December 2023 (author's translation).

[419] ibid.

[420] ibid; Ronzitti (n 19) 201.

[421] Ferro & Verlinden (n 4) 18.

[422] ibid.

Germany, another vocal opponent of the Iraq conflict[423], granted American and British military aircraft the right to fly over its territory, referring to the NATO alliance.[424] In addition, German military forces were permitted to conduct border surveillance between Turkey and Iraq from the air,[425] as well as the transport of weapons and military supplies through German territory to the war zone.[426] The former Chancellor of Germany expressed the position by stating that 'against the background of our alliance obligations, we will continue to allow the use of the bases [and] not to deny overflight rights'.[427] Their support was therefore justified based on the NATO Treaty and bilateral agreements with coalition States.[428]

Furthermore, Ireland, not a NATO member, extended its support to the coalition by allowing American aircraft to use Shannon airport for stopovers *en route* to Iraq. The Irish government argued that providing these facilities did not amount to participation in the conflict, insisting that they remained 'militarily neutral' and that its support did not make it a member of any military coalition.[429]

Kuwait and Saudi Arabia provided additional forms of support during the conflict. Saudi Arabia declared a policy of non-participation in the conflict, while still granting the United States access to its military facilities.[430] Kuwait allowed its territory to be used as a launching pad for coalition attacks against neighbouring Iraq, a decision that led to retaliatory missile attacks by Iraq.[431] In fact, Kuwait is the only assisting third State to have been the victim of armed retaliation by the aggrieved belligerent. No

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[423] Tuomas Forsberg, 'German Foreign Policy and the War on Iraq: Anti-Americanism, Pacifism or Emancipation?' [2005] 36(2) *Security Dialogue* 213, 213, 218.

[424] Ferro & Verlinden (n 4) 19.

[425] ibid 19.

[426] John Hooper, 'Necessity as the mother of cooperation' *The Guardian* (26 March 2003) <https://www.theguardian.com/world/2003/mar/26/germany.worlddispatch> accessed 10 December 2023.

[427] See Deutscher Bundestag, 'Stenografischer Bericht 34. Sitzung' (Plenarprotokoll 15/34, Berlin, 19 March 2003) 2728 <https://dserver.bundestag.de/btp/15/15034.pdf> accessed 10 December 2023 (author's translation).

[428] Ferro & Verlinden (n 4) 19.

[429] See Houses of the Oireachtas, 'Foreign Conflicts: Motion' (Dáil Éireann Debate, vol 563 no 3, 20 March 2003) <https://www.oireachtas.ie/en/debates/debate/dail/2003-03-20/4/?highlight%5B0%5D=article&highlight%5B1%5D=article&highlight%5B2%5D=article&highlight%5B3%5D=article&highlight%5B4%5D=articles&highlight%5B5%5D=43> accessed 10 December 2023.

[430] Ferro & Verlinden (n 4) 20; Craig. S Smith, 'Threats and Responses: A Command Post. Reluctant Saudi Arabia Prepares its Quiet Role in the U.S.-led War on Iraq' *The New York Times* (20 March 2003) <https://www.nytimes.com/2003/03/20/world/threats-responses-command-post-reluctant-saudi-arabia-prepares-its-quiet-role-us.html> accessed 10 December 2023.

[431] Ferro & Verlinden (n 4) 20; 'Missile hits Kuwait City mall' *CNN* (29 March 2003) <https://edition.cnn.com/2003/WORLD/meast/03/28/sprj.irq.kuwait.explosion/index.html> accessed 10 December 2023; 'Iraq launches Squd missiles' *The Guardian* (20 March 2003) <https://www.theguardian.com/world/2003/mar/20/iraq6> accessed 10 December 2023.

evidence has emerged of similar military actions taken by Iraq towards Saudi Arabia or any other States that supported the coalition.[432]

It is equally interesting to examine how the intervening States defended their invasion of Iraq. The coalition States asserted that they acted under authorization by the Security Council through the 16 Security Council Resolutions calling for the complete elimination of Iraq's weapons of mass destruction, which had been passed before the outbreak of the IAC. The prevailing opinion is that these resolutions did not provide authorization and therefore did not justify the invasion of Iraq. Nonetheless, if the coalition's rationale for intervention was valid, the support provided by the aforementioned States would not have violated the core duties of prevention and non-participation under the law of neutrality.[433]

Finally, the Security Council debates that ensued in the days after the outbreak of war are of note. Of the States participating, 37 opposed the military intervention whilst 23 supported it, and 21 chose to abstain from formal condemnation or approval. It must be acknowledged, however, that the 37 opposing States can legitimately claim to voice the sentiments of a greater number of States as some spoke on behalf of larger groups, such as the 116-member Non-Aligned Movement.[434] No references to the law of neutrality were ever made in the Security Council.

6.2.4 Domestic Case Law

At least two of the assisting States - Germany and Ireland - were later confronted with domestic judgments indicating violations of neutral duties. As outlined in Section 1.3, domestic judicial decisions also constitute a source of State practice and can shed light on the States' approach to the law of neutrality.

In a judgment delivered by the German Federal Administrative Court in 2005, the Court examined whether the actions taken by the German government during the 2003 Iraq War were consistent with the principles of neutrality. Initially, the Court held that the determination of when assistance by a non-belligerent to a belligerent is illegal under international law is derived, *inter alia*, from the international law of neutrality, which has its basis in customary international law and the Hague Convention V.[435] This was then followed by a thorough analysis of the relevant aspects of the law of neutrality. [436]

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[432] Ferro & Verlinden (n 4) 20.

[433] Bothe (n 1) 606; Corten (n 398) 233, 365 f.

[434] Corten (n 398) 369.

[435] BVerwG, 2 WD 12.04 21 June 2005 (Federal Administrative Court of Germany) para 4.1.4.1.2, 81 f.

[436] ibid, para 4.1.4.1.2, 83.

The Court reached a significant conclusion that Germany's status as a member of NATO did not exempt it from the basic obligations imposed by the law of international neutrality.[437] The Court explicitly stated that providing cross-border rights to American and British military aircraft, as well as facilitating the transfer of troops and military equipment, violated Germany's obligations as a neutral State.[438] The Court emphasized that the purpose of these actions was to facilitate or support the military actions of the United States and the United Kingdom, a position that raised 'serious concerns' under the law of neutrality and the principles set out in the Hague Convention V.[439] The Court did thus not agree with Germany's justification for neutrality violations in regards of practice between allies and the NATO membership.[440]

Furthermore, the Irish case of *Horgan v An Taoiseach et al*, which dealt with the law of neutrality, is worth noting. The case was brought before the Irish courts in 2003 and related to Ireland's support for the coalition in the Iraq War. Mr. Horgan, a peace activist, initiated the case to challenge the Irish government's decision to permit American military aircraft to land at Shannon Airport in Ireland.[441]

The case revolved around whether Ireland's actions, particularly its support for the United States military operations, were in violation of the State's declared policy of military neutrality and its obligations under the law of neutrality.[442] In response to the Irish government's argument that the plaintiff had not demonstrated that there was a generally recognized principle of international law that obligated States to apply the law of neutrality upon the outbreak of hostilities, they held that 'there does still exist in international law a legal concept of neutrality whereunder co-relative rights and duties arise for both belligerents and neutrals alike in times of war in circumstances where the use of force is not 'UN led'.[443] The Irish High Court thereby ruled against the Irish interpretation and emphasized the existence of customary law norms regarding neutrality.[444] Such norms prohibit a neutral State from facilitating the transit of large numbers of troops or munitions from a belligerent State through its territory on their way to a war zone with another belligerent State.[445]

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[437] BVerwG, 2 WD 12.04 21 June 2005 (Federal Administrative Court of Germany) para 4.1.4.1.3, 90 ff.

[438] ibid, para 4.1.4.1.4, 95 f.

[439] ibid, para 4.1.4.1.3, 94 f.

[440] Ferro & Verlinden (n 4) 18.

[441] *Horgan v. An Taoiseach & Ors* [2003] IEHC (High Court of Ireland), opening para.

[442] It should be noted that Ireland's declared policy of military neutrality does not fall under the scope of this thesis, see Section 1.5.

[443] Upcher (n 1) 36 f. *Horgan v. An Taoiseach & Ors* [2003] IEHC (High Court of Ireland) 468, 496, 504.

[444] Ferro & Verlinden (n 4) 19.

[445] *Horgan v. An Taoiseach & Ors* [2003] IEHC 64 (High Court of Ireland) 487- 493.

6.2.5 Conclusion

The 2003 Iraq War illustrates a contemporary IAC in which several third States provided support to one of the belligerents. Before examining the Russo-Ukrainian War, some important considerations need to be noted.

Firstly, it is generally accepted that the coalition led by the United States and the United Kingdom did not operate on the basis of a Security Council resolution. Had they done so, the non-neutral support of the third States might have been justified.

Secondly, it is worth noting that although most of the world's States remained impartial during the conflict, and the majority even seemed to oppose military intervention in the Security Council debates, those that did provide some form of support all did so in favour of the coalition. The coalition States in fact invaded Iraq without Security Council authorization, making them the aggressors. Although Iraq was the victim, it received no support, while the aggressors, despite initial reluctance, received considerable support from third States, such as Germany. This is similar to the 1980 Iran-Iraq War, where for example the United States supported the Iraqi government, which constituted the aggressor.

Consequently, the most accepted view of the concept of 'qualified neutrality', namely that it is justifiable to support the victim of aggression, does not apply in this case. The only circumstance in which non-neutral support for the coalition would be justified is if 'qualified neutrality' applied to regional or collective self-defense arrangements, such as the NATO Treaty.

The supporting States indeed argued that the NATO Treaty obligations or 'practice between allies' superseded neutrality. However, the legitimacy of 'qualified neutrality' to collective self-defense obligations was challenged in national courts following the war. The Irish and German courts both affirmed that even in military alliances such as NATO, member States must abide by the law of neutrality, making support for the coalition a violation of neutrality and potentially subject to countermeasures or reparations by Iraq. This implies that the concept of 'qualified neutrality' may not apply to regional or collective self-defense arrangements, and thus probably not to the even more controversial notion of bilateral or *ad hoc* collective self-defense cases.

Furthermore, it is remarkable that there are few explicit references to the law of neutrality in official statements. In fact, only Switzerland referred to the applicability of the law of neutrality and how neutral duties limit the possibility of granting overflight rights. Additionally, Italy adopted a position of 'non-belligerency', which can be regarded as an attempt to justify violations of neutrality through the concept of 'qualified neutrality',

thereby signalling an acknowledgement of the validity of the law of neutrality. However, it might also be viewed as a justification for engaging in non-neutral warlike acts while hoping to escape the consequences of 'co-belligerency'. Other than that, the supporting States solely referred to their policy positions of neutrality or non-participation, or their responsibilities as NATO members.

Finally, it is noteworthy that there have been only two instances of domestic case law ruling against unjustifiable non-neutral support for the aggressor of an illegitimate war. If the law of neutrality were indeed regarded as a valid body of law at the time, it is interesting that no other domestic courts have ruled on the legal basis for government intervention and support to the IAC.

6.3 The Russo-Ukrainian War

6.3.1 Introduction to the Conflict

The IAC between Ukraine and Russia was initiated with the annexation of the Crimean Peninsula in 2014. The conflict significantly escalated on 24 February 2022, when Russian armed forces launched an attack and invaded Ukraine. At least since 2022, the intensity and expected duration of the armed hostilities are of a magnitude that evidently reaches the threshold for the law of neutrality.[446]

As Russia holds a permanent membership of the Security Council, it is impossible to pass a resolution under Article 39 declaring their behaviour a threat to global peace and deeming them the aggressor. Russia has vetoed draft Security Council resolutions addressing its military actions in Ukraine on numerous occasions, both in 2014 and more recently in relation to the invasion that began in 2022.[447] The Security Council has thus not adopted any decisions under Chapter VII that would provide a legal basis for neutral States to deviate from their obligations under the law of neutrality.[448]

6.3.2 Neutrality Violations During the Conflict

Western States have shown an escalating level of support towards Ukraine.[449] This encompasses the imposition of considerable economic and financial sanctions on Russia, the provision of weapons and military

[446] Heller & Trabucco (n 5) 257; Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5).

[447] 'Russia vetoes Security Council resolution condemning attempted annexation of Ukraine regions' *UN News* (30 September 2022) <https://news.un.org/en/story/2022/09/1129102> accessed 10 December 2023.

[448] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5).

[449] Nasu, 'The Future of Law of Neutrality' (n 5); Claire Mills, 'Military assistance to Ukraine since the Russian invasion' (2023) House of Commons Library Research Briefing 9477 <https://researchbriefings.files.parliament.uk/documents/CBP-9477/CBP-9477.pdf> accessed 10 December 2023, 4; Heller & Trabucco (n 5) 252.

equipment to Ukraine, and the sharing of relevant battlefield intelligence with Ukraine by some States.[450] Since the Russian invasion last year, a total of 41 States have provided Ukraine with some form of military support.[451]

Concerning non-neutral assistance to Russia, the most notable is Belarus, who have hosted Russian forces to enable access to Ukraine.[452] Other States have also provided military assistance to Russia, although on a more limited scale. For example, Iran has supplied Russia with drones which have been notorious in attacks on Ukraine's energy infrastructure.[453] Media reports also indicate that North Korea has supplied Russia with indispensable ammunition for its artillery batteries.[454] Furthermore, according to reports, China is likely providing Russia with comparable assistance.[455]

There are also cases of private individuals and enterprises assisting the belligerents in various ways. As described previously, it is debatable if the neutral State has a duty to prohibit such assistance.[456] For instance, Elon Musk's company SpaceX has provided the Ukrainian military with Starlink

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[450] Nasu, 'The Future of Law of Neutrality' (n 5); Ken Dilanian et al., 'U.S. intel helped Ukraine protect air defenses, shoot down Russian plane carrying hundreds of troops' *NBC News* (26 April 2022) <https://www.nbcnews.com/politics/national-security/us-intel-helped-ukraine-%20protect-air-defenses-shoot-russian-plane-carry-rcna26015> accessed 10 December 2023; Julian Barnes, et al., 'U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say' *The New York Times* (4 May 2022) <https://www.nytimes.com/2022/05/04/us/politics/russia-generals-killed-ukraine.html> accessed 10 December 2023.

[451] 'Ukraine Support Tracker, A Database of Military, Financial and Humanitarian Aid to Ukraine' (*Kiel Institute for the World Economy*, last updated 7 December 2023) <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/> accessed 10 December 2023.

[452] Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (n 5), Schmitt, 'Providing Arms and Materiel to Ukraine' (n 43).

[453] Isobel Koshiw, 'Drone analysis in Ukraine suggests Iran has supplied Russia since war began' *The Guardian* (10 November 2022) <https://www.theguardian.com/world/2022/nov/10/iranian-made-drones-supplied-to-russia-after-february-invasion-says-ukraine> accessed 10 December 2023; Jeff Mason & Steve Holland, 'Russia received hundreds of Iranian drones to attack Ukraine, US says' *Reuters* (10 June 2023) <https://www.reuters.com/world/europe/russia-has-received-hundreds-iranian-drones-attack-ukraine-white-house-2023-06-09/> accessed 10 December 2023.

[454] Karen DeYoung, 'North Korea provided Russia with weapons, White House says' *The Washington Post* (13 October 2023) <https://www.washingtonpost.com/national-security/2023/10/13/north-korea-russia-weapons-ukraine/> accessed 10 December 2023; Hyung-Jin Kim, 'North Korea likely sent missiles, ammunition and shells to Russia, Seoul says' *ABC News* (2 November 2023) <https://abcnews.go.com/International/wireStory/north-korea-missiles-ammunition-shells-russia-seoul-104565541> accessed 10 December 2023.

[455] Kanishka Singh & Michael Martina, 'US intelligence report says China likely supplying tech for Russian military' *Reuters* (27 July 2023) <https://www.reuters.com/world/us-intelligence-report-says-china-likely-supplying-tech-russian-military-2023-07-27/> accessed 10 December 2023.

[456] See Section 3.2.

satellites, which have been used to guide drones and launch unmanned drone attacks on Russian tanks and positions.[457]

The implementation of unilateral sanctions against Russia, as well as arms exports and intelligence sharing in support of both belligerents, appear to violate the neutral duties of non-participation and impartiality described in Section 3.2.[458]

6.3.3 State Practice

From a recently produced overview of State practice concerning non-participating States in the Russo-Ukrainian War, it is noticeable that there are few references to the law of neutrality.[459]

Switzerland, one State not providing military assistance to Ukraine, referred to the law of neutrality in a report by the Swiss Federal Council. They explicitly stated that 'the law of neutrality prohibits the direct transfer of war material'.[460] Their position also implied that the law of neutrality prohibited the provision of non-lethal war material and the transit of military aircraft carrying military material to Ukraine.[461] However, Switzerland has adopted EU sanctions against Russia, freezing around CHF 7.5 billion Swiss francs in Russian assets, and has provided humanitarian aid to Ukraine. According to Switzerland, this does not constitute a violation of the law of neutrality, as they have not favoured a belligerent militarily.[462] While the latter is clearly not a violation of the law of neutrality, the former is more questionable: a drastic change in trade relations favouring one of the belligerents, such as the imposition of economic sanctions, may be inconsistent with the duty of impartiality.[463]

Switzerland remains the only State not to have militarily supported any of the belligerents who have referred to the law of neutrality. Other States that

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[457] Alexander Freund, 'Ukraine using Starlink for drone strikes' *DW* (27 March 2022) <https://www.dw.com/en/ukraine-is-using-elon-musks-starlink-for-drone-strikes/a-61270528> accessed 10 December 2023.

[458] Nasu, 'The Future of Law of Neutrality' (n 5).

[459] Bartolini (n 43).

[460] Le Conseil fédéral, *Clarté et orientation de la politique de neutralité, Rapport du Conseil fédéral en réponse au postulat 22.3385 de la Commission de politique extérieure du Conseil des États du 11 avril 2022* (26 October 2022) <https://www.newsd.admin.ch/newsd/message/attachments/73618.pdf> accessed 10 December 2023, 21 (author's translation).

[461] ibid 20, 22.

[462] 'Swiss president pledges more support for Ukraine in Kyiv visit' *Reuters* (25 November 2023) <https://www.reuters.com/world/europe/swiss-president-pledges-more-support-ukraine-kyiv-visit-2023-11-25/> accessed 10 December 2023; Federal Department of Foreign Affairs, 'War against Ukraine – measures taken by the Confederation since 24 February 2022' (last updated 16 October 2023) <https://www.eda.admin.ch/eda/en/fdfa/fdfa/aktuell/dossiers/krieg-gegen-ukraine.html> accessed 10 December 2023.

[463] See Section 3.2.

have not adopted measures in favour of one of the belligerents have remained silent on the question of the law of neutrality, making it difficult to establish a specific legal value for such an approach.[464]

It is worth noting that the only non-European States to have militarily supported Ukraine are the United States, Australia, Japan, and New Zealand.[465] Most States in the rest of the world have been hesitant to take sides, particularly the African continent. For instance, out of the 35 abstentions to Resolution ES-11/1, 17 were African States, along with several Asian States such as India, China and Vietnam.[466] In short, these States may be reluctant to cut ties with Russia due to historical as well as current trade connections and a fear that supporting an economic blockade could lead to higher costs, famine and internal instability in their own countries.[467] In addition, Russia is perceived as a non-colonialist power and is favourably received by African public opinion for dismantling colonialism and promoting self-determination in Africa. In addition, many Africans tend to see the Russo-Ukranian War as a dichotomy between Western expansion and Russian reaction, and feel that issues concerning Africa, such as the threat of terrorism, have not been treated with equal respect.[468]

This neutral approach to the war has raised concerns among Western States, who urge the African continent in particular to demonstrate solidarity with Europe.[469] French President Emmanuel Macron, for example, has urged African States not to remain neutral, accusing the entire continent of 'hypocrisy'.[470] In response, African leaders have announced that Africa 'does not want to be the breeding ground for a new Cold War'[471], with Ugandan President Yoweri Museveni further declaring that '[w]e don't

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[464] Bartolini (n 43).

[465] Mills (n 449) 63 ff.

[466] Sâ Benjamin Traoré, 'Making sense of Africa's massive abstentions during the adoption of the UNGA resolution on the Aggression Against Ukraine' (*AfricLaw*, 21 April 2022) <https://africlaw.com/2022/04/21/making-sense-of-africas-massive-abstentions-during-the-adoption-of-the-unga-resolution-on-the-aggression-against-ukraine/> accessed 10 December 2023; Colum Lynch, 'The West Is With Ukraine. The Rest, Not So Much' *Foreign Policy* (30 March 2022) <https://foreignpolicy.com/2022/03/30/west-ukraine-russia-tensions-africa-asia-middle-east/> accessed 10 December 2023; Niha Masih, 'U.N. resolution to end Ukraine war: How countries voted and who abstained' *The Washington Post* (24 February 2023) <https://www.washingtonpost.com/world/2023/02/24/un-ukraine-resolution-vote-countries/> accessed 10 December 2023.

[467] Traoré (n 462); Lynch (n 462); Masih (n 462).

[468] Traoré (n 462).

[469] ibid; Lynch (n 462); Masih (n 462).

[470] Adam Taylor, 'Africa is being pushed to take sides in the Ukraine war' *The Washington Post* (28 July 2022) <https://www.washingtonpost.com/world/2022/07/28/macron-africa-lavrov/> accessed 10 December 2023.

[471] Krista Larson 'Africa leader warns of pressure to choose sides in Ukraine' *AP News* (20 September 2022) <https://apnews.com/article/russia-ukraine-united-nations-general-assembly-macky-sall-f7b8ec5e6092dc439adc1230e4f64d1d> accessed 10 December 2023.

believe in being enemies of somebody's enemy'.[472] However, no references have been made to the law of neutrality from either the Western or African perspective.

As for the States which have provided military assistance to Ukraine, they have not explicitly referred to 'qualified neutrality' or a position of 'non-belligerency', in fact no explicit reference has been made to the law of neutrality.[473] Not even the United States, the most notable proponent of 'qualified neutrality', has argued for such an extension in this situation, which, according to their usual reasoning, would more than clearly apply in the conflict.[474] Resolution ES-11/1 itself does not address the issue of the law of neutrality or the provision of arms to Ukraine, but merely IHL and international human rights law.[475] The supply of weapons by several States has instead been explicitly linked to the ongoing aggression in Ukraine and its individual right to self-defense.[476]

Especially in debates in the Security Council, States supporting Ukraine have referred to Ukraine's right to self-defense under the UN Charter.[477] France declared, for example, that it 'is providing, and will continue to provide, the Ukrainian people with all the support they need to exercise their right to self-defence'.[478] The United States, the Nordic States and the Baltic States made comparable statements in the Security Council.[479] Italy's parliament adopted a resolution at national level expressing the same view with regard to their transfer of military equipment.[480]

Germany is particularly notable, because despite a long-standing foreign policy commitment not to export lethal weapons to conflict zones, it has provided an considerable amount of lethal weapons to Ukraine.[481] The State Secretary of Germany announced in Parliament that '[t]he Federal Government […] are supporting Ukraine in exercising its individual right of self-defence against Russia's war of aggression […] by supplying weapons

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[472] Chris Muronzi, 'Is Africa still 'neutral' a year into the Ukraine war?' *Al Jazeera* (26 February 2023) <https://www.aljazeera.com/features/2023/2/26/is-africa-still-neutral-a-year-into-the-ukraine-war> accessed 10 December 2023.

[473] Bartolini (n 43).

[474] Heller & Trabucco (n 5) 262.

[475] ibid 263; UNGA Res ES-11/1 (2 March 2022) UN Doc A/RES/ES-11/1.

[476] Bartolini (n 43).

[477] ibid.

[478] Security Council 78th year 9256th meeting (8 February 2023) UN Doc S/PV.9256, 13; See also Security Council 77th year 9127th meeting, (8 September 2022) UN Doc S/PV.9127, 18.

[479] Security Council 77th year 9127th meeting, (8 September 2022) UN Doc S/PV.9127, 16 f, Security Council 78th year 9256th meeting (8 February 2023) UN Doc S/PV.9256, 12; Security Council 78th year 9269th meeting (24 February 2023) UN Doc S/PV.9269, 29.

[480] Senato della Repubblica, 'Rizoluzione (6-00208) n.1' (1 March 2022) <https://www.senato.it/japp/bgt/showdoc/18/Resaula/0/1340251/index.html?part=doc_dc-allegatoa_aa> accessed 10 December 2023.

[481] Heller & Trabucco (n 5) 252 f; Mills (n 449) 43 f.

[…] which comply with international law'.[482] However, Germany was initially reluctant to support Ukraine with powerful lethal weapons, particularly to provide and grant re-export of German-made Leopard 2 tanks, which are seen as vital to Ukraine's war effort. This position did not sit well with the United States and European leaders, who put pressure on Germany, claiming that it was 'standing in the way' of a 'united coalition' of States militarily supporting Ukraine.[483]

There has, however, been a widespread discussion about the type of war material that can be sent to help Ukraine defend itself without being drawn into the conflict as a 'co-belligerent'. Early in the conflict, there was debate about whether the United States should support the transfer of MiG-29 fighter jets, used during the Cold War and familiar to Ukrainian pilots, through Poland. Additionally, there were considerations of sending Soviet-era fighter jets to Ukraine with NATO support. Both proposals were rejected by the United States. Furthermore, the United States and NATO members have rejected the idea of establishing a no-fly zone over Ukraine, as this would be seen as involvement in the conflict with Russia.[484] In this vein, Russian President Vladimir Putin has warned that States imposing a no-fly zone would be considered 'participants in the military conflict'.[485]

There is also group of States that have limited themselves to sending non-lethal assistance to Ukraine, such as body armour or helmets. These States include New Zealand, Australia, and Japan. This position, although not officially stated by the States, could be linked to their obligations under the law of neutrality.[486] For example, some scholars has argued that it may be possible to provide non-lethal war material to belligerents without violating neutral duties,[487] while others have argued that this type of assistance would instead fall under the 'qualified neutrality' exception.[488]

Ireland, which has consistently maintained a foreign policy position of military neutrality since the Second World War, initially refrained from providing lethal support to Ukraine. However, the Irish government emphasized that its military neutrality does not necessarily imply political or

[482] Deutscher Bundestag, 'Schriftliche Fragen mit den in der Woche vom 16. Mai 2022 eingegangenen Antworten der Bundesregierung' (Drucksache 20/1918, 20 May 2022) 39, question no 56 <https://dserver.bundestag.de/btd/20/019/2001918.pdf> accessed 10 December 2023 (author's translation).

[483] Luke McGee, 'Why Germany is struggling to stomach the idea of sending tanks to Ukraine' *CNN* (21 January 2023) <https://edition.cnn.com/2023/01/21/europe/germany-tanks-ukraine-intl/index.html> accessed 10 December 2023.

[484] Veronica Stracqualursi, 'Why the US rejected Poland's plan to send fighter jets to Ukraine' *CNN* (9 March 2022) <https://edition.cnn.com/2022/03/09/politics/ukraine-russia-poland-fighter-jets/index.html> accessed 10 December 2023.

[485] ibid.

[486] Bartolini (n 43).

[487] Upcher (n 1) 83 f.

[488] Bartolini (n 43).

moral neutrality,[489] and welcomed 'the military support provided by the European Union to help Ukraine exercise its inherent right of self-defence'.[490] Since August 2023, Irish troops have nonetheless been providing weapons training to the Ukrainian military, a departure from the position that Ireland is only providing non-lethal assistance.[491]

Lastly, it is of interest to examine how Russia has justified its aggression. Unlike the 'coalition of the willing', which claimed inaccurately that it had Security Council authorization to invade Iraq, Russia has argued that it exercised its right of self-defense. On the day it launched the aggression against Ukraine, Russia declared that the 'special military operation' was carried out in accordance with Article 51 of the UN Charter, which it has repeatedly asserted.[492]

6.3.4 Conclusion

The ongoing Russo-Ukrainian War shows a markedly different landscape from the 2003 Iraq War, with an unprecedented level of third State military support to a belligerent. This conflict highlights certain aspects concerning the validity and relevance of the law of neutrality.

Firstly, it should be noted that the Security Council's authoritative decisions, based on the UN Charter, may override the traditional law of neutrality in particular situations. Consequently, the enforcement measures carried out by the Security Council are regulated by rules distinct from the law of neutrality, which were explained in Chapter 4 and 5. The supremacy of the UN Charter has dual implications for the ongoing Russo-Ukrainian conflict. The right of self-defense ceases as soon as the Security Council takes action to uphold international peace. If Russia had acted under authorization from the Security Council, it would be considered impermissible to support the opposing belligerent. This would render neutrality violations in support of Ukraine unjustifiable. Alternatively, if the Security Council had designated Russia as the aggressor, this decision would supersede the law of neutrality and legitimize non-neutral actions in support of the victim, namely, Ukraine. The same principles would apply to the 2003 Iraq War, but since no States provided support for the victim of aggression, this is not relevant.

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[489] Rose Birchard, 'Ireland rethinks neutrality in wake of Ukraine war' *DW* (15 April 2023) <https://www.dw.com/en/ireland-rethinks-neutrality-in-wake-of-ukraine-war/a-65330418> accessed 10 December 2023.

[490] Security Council 77th year 9127th meeting, (8 September 2022) UN Doc S/PV.9127, 16.

[491] Mariamne Everett, 'War in Ukraine sees Ireland reckon with its policy of neutrality' *Al Jazeera* (1 September 2023) <https://www.aljazeera.com/features/2023/9/1/war-in-ukraine-sees-ireland-reckon-with-its-policy-of-neutrality> accessed 10 December 2023.

[492] Heller & Trabucco (n 5) 253.

Secondly, the question of ‘co-belligerency’ inevitably arises in the wake of the Russo-Ukrainian War, given the massive amount of heavy military support. It is widely recognized that neutrality violations alone do not automatically transform neutral States into ‘co-belligerents’, regardless of their magnitude. As described in Section 3.4, to qualify as a ‘co-belligerent’, a State must cross the threshold of IHL, such as inviting a belligerent into neutral territory or directly participating in the conflict. This position aligns with the aim of the law of neutrality to prevent the escalation and expansion of the conflict, since otherwise IHL would apply to all States that violate the law of neutrality in any way, and their soldiers and military objects would be lawful targets.

While it is beyond the scope of this thesis to identify which States may have become ‘co-belligerents’ in this conflict, it suggests that the approximately 40 States that have supplied Ukraine with lethal weapons are not ‘co-belligerents’. Belarus, on the other hand, by hosting Russian forces on its soil, is undoubtedly a ‘co-belligerent’ with Russia.

Furthermore, as previously mentioned, the recent acts of Russian aggression against Ukraine have prompted a re-evaluation of the concept of ‘qualified neutrality’, even among the most reluctant of scholars. Under ‘qualified neutrality’, only the victim State is entitled to support, and the aggressor State retains the duty to protect neutral territory. This implies that Western support for Ukraine is justified, while, for example, Iran’s provision of drones to Russia is not. However, the lack of explicit references to ‘qualified neutrality’ by the supporting States is remarkable. The same counts for the right of collective self-defense as a circumstance precluding wrongfulness for violations of neutrality. The right of collective self-defense is commonly regarded as an exception to the law of neutrality that could justify military support for a belligerent, making it notable that no State has made an explicit declaration to this effect with respect to Ukraine. Furthermore, the silence on the law of neutrality in Resolution ES-11/1 and by non-supporting States is striking.

Besides, Russia has not imposed any countermeasures on States violating its neutrality, nor has it made any reference to the law of neutrality. This is particularly significant given the adverse effects the State and its citizens have suffered as a result of the non-neutral actions of third States, not only in terms of military support for Ukraine. These considerations raise questions about the genuine acceptance of the law of neutrality by States and its potential importance. When examining State practice in the Russo-Ukranian War, it appears that the only factor possibly restricting certain forms of assistance is the fear of becoming a ‘co-belligerent’, rather than violating the law of neutrality.

Finally, the positions of Ireland and Germany are noteworthy in the context of their domestic case law in the aftermath of the 2003 Iraq War. Although the domestic courts have ruled against their previous liberal interpretation of neutrality, both States have offered Ukraine non-neutral support without attempting to substantiate these actions under the law of neutrality. However, when examining the actions of the two States during the conflict, it seems that the law of neutrality may have played a role in shaping their decisions. For instance, Germany exhibited hesitation in providing or authorizing the re-export of tanks crucial for Ukraine's war effort, and Ireland initially supplied Ukraine solely with non-lethal assistance. These actions could suggest acceptance of the law of neutrality, particularly Ireland's provision of solely non-lethal aid with some States, since such aid is unlikely to 'influence the outcome of the conflict'.

7 Final Reflections

7.1 Introductory Comments

The field of international law concerning neutrality is complex. The disagreement appears to be widespread and has not left any part of the law of neutrality undisputed. Consequently, questions arise as to the *validity* and *relevance* of the law of neutrality. To reiterate, the validity relates to whether the law of neutrality is a legally valid and applicable rule in contemporary international law. In this regard, attention must be paid to the treaties governing neutrality, to developments in customary international law, and indeed to scholarly debate. The relevance of the law of neutrality is distinct from the question of validity, and concerns whether the law of neutrality is currently or could in the future serve a purpose in promoting peace and mitigating the escalation of conflict by regulating in a desirable manner the relationship between non-participating States and belligerent States.

7.2 The Validity of the Law of Neutrality

The predominant academic perspective, as outlined in Chapter 5, is that the law of neutrality remains valid and has not been undermined by the evolution of international law, although its application is subject to modification by the UN Charter in certain situations. Furthermore, the prevailing view seems to be that neutrality is mandatory at the outbreak of an IAC, although it is debatable whether the law of neutrality should be limited to IACs of a certain duration and intensity or whether it should apply to all IACs. Although the majority of scholars favour the former perspective, the latter position aligns with IHL, evades the difficulty of determining criteria for a ‘generalised state of hostilities’, and is supported by ICJ case-law affirming the applicability of the law of neutrality to all IACs. This view is also in line with the purpose of the law of neutrality - to reduce conflict.

However, concerns remain regarding the validity of the law of neutrality, particularly in relation to the evolution of customary international law and the willingness of States to adhere to and acknowledge the law of neutrality. These issues have received varying degrees of attention from scholars.

First and foremost, recent State practice does not strongly suggest the continued applicability of the law of neutrality; on the contrary, it suggests the opposite. International law, unlike domestic law, evolves without the need for new legislation, relying on the behaviour of States and their acceptance of rules. This is pertinent to the law of neutrality, as only approximately 30 States have ratified the Hague Conventions of 1907, and no other legally binding treaties governing the relationships between neutral States and belligerents have been adopted since. This indicates that for the

wider international community, the validity of the treaty provisions, and hence the traditional law of neutrality, depends on their incorporation into customary international law.

Indeed, the Geneva Conventions include provisions referring to ‘neutral States’ or ‘neutral powers’ and a few restatements on neutrality have been formulated in the past 30 years. Some military manuals, such as for the United States and the United Kingdom, also contain sections on the law of neutrality. Furthermore, the ICJ has on one occasion, in 1996, recognised the validity and applicability of the law of neutrality to IACs. It should be noted, however, that the ICJ implied, but did not explicitly state, that the law of neutrality is part of customary international law. It appears evident that some form of State practice and expression of *opinio juris* is essential to provide evidence that the law of neutrality remains applicable. This does not imply a requirement for States to comply with their duties, as many norms in international law are frequently violated yet still considered valid, but rather some sort of engagement with the law.

The arguments validating the law of neutrality often take a reverse approach. Rather than identifying States’ behaviour and interaction to establish the law’s validity, scholars argue that certain behaviours could be consistent with the law of neutrality and serve as evidence of its existence. One could argue that third States’ frequent references to Ukraine’s right of self-defense are connected to the law of neutrality, as this could provide justification for non-neutral assistance. Moreover, providing exclusively non-lethal aid - like vests and helmets - to Ukraine by certain States may suggest a recognition of the law of neutrality. Nevertheless, this is pure speculation.

In both case studies, the absence of explicit references to the law of neutrality is particularly striking. In the case of the Russo-Ukrainian War, this is particularly notable as there are exceptions available to States which could justify their non-neutral support for Ukraine and preclude wrongfulness. The 2003 Iraq War is interesting from a different perspective. The third States’ support for the coalition was arguably an unjustifiable violation of the law of neutrality. It is noteworthy that most attempted to justify their actions solely by referencing the NATO Treaty, rather than using legal arguments based on the law of neutrality. This pattern of State practice differs from that observed during the Second World War, as described in Section 5.2, where the States that violated neutrality sought to justify their violation by invoking the concept of countermeasures, claiming that the other State had first violated its duties.

The potential issue arising from the lack of engagement with regard to the validity of the law of neutrality is better illustrated by the prohibition on the use of force. When comparing modern State practice on neutrality with the

prohibition on the use of force, an important difference emerges. While many States contravene the prohibition, they frequently provide justifications based on lawful exceptions, particularly the flexible interpretation of the right of self-defense. Violations of the law of neutrality, on the other hand, occur with limited recognition or engagement with the law, with the sole exception of permanently neutral States.

The decrease and current lack of State practice and *opinio juris* does not necessarily mean that the law of neutrality is invalid. For example, the domestic case law from Ireland and Germany in the aftermath of the 2003 Iraq War offer insight into the current role of the law of neutrality and support its validity. However, for its validity to be irrefutable, it would be beneficial if there were additional concrete examples of States addressing the law of neutrality or a legally binding recodification occurred. Relying solely on sporadic case law, contemporary restatements and limited references in military manuals is inadequate for survival in the face of evolving conflicts.

7.3 The Relevance of the Law of Neutrality

The present section turns away from the question of whether the law of neutrality is valid and applicable in contemporary international law and turns to the broader discussion of its current or potential relevance. At the outset, I would like to begin by recalling the words of Cornelius van Bynkershoek from the early eighteenth century, who emphasized that ‘it is not [the neutral State’s] duty to sit in judgement between his friends who may be fighting each other’. However, the contemporary geopolitical landscape is not only characterized by friendships, but also by strategic rivalries and enemies fighting endless wars against each other. Regulating the relationship between non-participating States and belligerents is undeniably crucial to preventing and mitigating armed conflicts. In this respect, the law of neutrality could potentially play a role in serving this purpose and levelling the global playing field, but a number of things need to be addressed.

Firstly, a notable difference from the conditions prevailing at the time of the codification of the law of neutrality in 1907 is the existence of a sophisticated, although imperfect, system of rules governing relations between non-participating and belligerent States during armed conflicts. The UN Charter, with its provisions guaranteeing the territorial inviolability of non-participating States, covers the rights of neutral States in particular. It is therefore necessary to consider whether the UN Charter alone, with its prohibition on the use of force and the right of self-defense, could serve this purpose of preserving peace and restraining armed conflict. This may render the law of neutrality irrelevant.

It is, however, evident that the collective security system is not fulfilling its responsibilities of upholding peace and preventing conflicts. This is especially evident in light of the ongoing Russo-Ukrainian War, where the Security Council remains deadlocked, and no clear solution is in sight. Furthermore, the duties for neutral, or non-participating, States are not addressed in the UN Charter. The UN Charter does not specify how non-participating States should act in times of armed conflict between two or more States, what kind of assistance they can provide without facing retaliation, and what measures should be taken to prevent their territory from being used for warfare. These more nuanced questions, such as those concerning trade, can significantly influence the escalation of conflict and the economic development of the parties involved. In the absence of the law of neutrality, the only relevant question would be at what point certain support makes the third State a 'co-belligerent' under IHL, which, as has been observed, is quite high.

This might well pave the way for the law of neutrality. If effectively implemented and provided that neutral States refrained from engaging in non-neutral support for belligerents, the law of neutrality would serve as a conflict-reducing mechanism. However, the observed tendency of States to influence conflict outcomes, rather than maintaining strict neutrality, presents a challenge.

This tendency is particularly evident among the permanent members of the Security Council. This brings us to the *second* important matter concerning the potential future relevance of the law of neutrality: the composition of the permanent members of the Security Council, namely China, the United States, France, the United Kingdom and Russia. If we acknowledge the law of neutrality, subject to modifications in the UN Charter, it implies a recognition that these five States have the power to determine when States may legitimately violate neutrality in an IAC. These States were granted permanent membership because of their significance in the post-Second World War era. However, in recent decades, at least three of these States have engaged in highly questionable behaviour. As indicated by the case studies, the United States, the United Kingdom and Russia have all initiated major conflicts that have resulted in massive civilian casualties and destruction. This certainly challenges the appropriateness of their continued power.

While this issue extends beyond the law of neutrality, the establishment of collective security through the UN Charter gives the Security Council the authority to regulate the relationship between non-participating States and belligerents, thereby influencing the outcome of global conflicts. The decisions of the Security Council, which are supposed to maintain or restore international peace and security, often seem to favour the economic and political interests of the permanent members. This structure appears to be att

odds with the fundamental purpose of the law of neutrality, which is to restrain conflict and prevent further States from being drawn into hostilities. For the law of neutrality to be truly relevant and to retain any legitimacy, this very structure and the ability of the Security Council to supersede the traditional law of neutrality may need to be reconsidered.

Further, it is hardly surprising that the questionable structure of the Security Council, which obstructs its effective action, has led to the emergence of the concept of 'qualified neutrality' as a challenger to traditional neutrality law in the post-UN era. If 'qualified neutrality' were to be recognized as an aspect of the law of neutrality, it could enhance the ability of the law of neutrality to fulfil its intended function and increase its relevance. However, despite a significant increase in scholarly acceptance of the concept the last two years, the legitimacy of this approach remains contested and raises a number of outstanding questions.

'Qualified neutrality' in the context of regional or collective self-defense agreements was rejected by domestic courts in the wake of the 2003 Iraq War. This indicates that there is no justification for violating neutrality on the basis of alleged obligations arising, for example, from NATO membership, except in genuine situations of collective self-defense when the requirements of Article 51 of the UN Charter are met. Thus, the concept of 'qualified neutrality' would presumably only entitle the victim State to receive support, whilst the aggressor State remains responsible for safeguarding neutral territory. This position seems justified. International law cannot reasonably defend the sovereignty of an aggressor State that disregards the sovereignty of other States, as this would be inherently unjust.

In the Russo-Ukrainian War context, scholars especially advocate for 'qualified neutrality' due to the inability of the Security Council to act in the face of Russia's veto and the condemnation of Russia as the aggressor by 141 States in the General Assembly Resolution ES-11/1. The possible application of 'qualified neutrality' would therefore seem to depend on the General Assembly recommending enforcement measures within the framework of the 'Uniting for Peace' procedure, first used during the Korean War in 1950.

This perspective could have two possible explanations. One suggestion is that a 'Uniting for Peace' resolution is now considered to fall within the scope of Article 2(5) and, as such, should be regarded as a decision 'in accordance with the present Charter' to be followed by all members. However, this has neither been established nor has it been explicitly stated by scholars or governments. Another reason could be that, in the eyes of the international community, the large number of States that voted in favour of the resolution is tantamount to an authoritative decision of the Security

Council, irrespective of its non-binding nature, thus clearly implicating Russia as the aggressor. Regardless of what one believes to be the reason for the high level of confidence in General Assembly resolution ES-11/1, the threshold for the number of States ratifying such a resolution and the significance of the voting composition raise unanswered questions. Would it, for instance, have mattered if Germany or Japan had voted against the General Assembly resolution instead of North Korea, Syria, and Eritrea? Or, if only 90 States had condemned Russia's aggression?

However, no criteria for when the concept of 'qualified neutrality' should apply has been established in either the scholarly literature or military manuals, except that it is generally accepted that there should be both a clear aggressor and a clear victim of aggression. A 'Uniting for Peace' resolution from the General Assembly may therefore not be necessary for the application of 'qualified neutrality', and the decision on the existence of a clear aggressor could also be left to each sovereign State. Consequently, each State would have to determine which State had a 'just' or 'unjust' cause for resorting to force, with the State acting justly entitled to non-neutral support and the unjust State to be isolated and sanctioned. This would mark a real return to the historical doctrine of 'just wars', when war was perceived as a conflict between 'good' and 'evil', and impartiality was therefore considered morally questionable.

In addition, determining which State deserves support involves subjective moral judgement, political discretion, and geopolitical factors. As demonstrated by the Russo-Ukrainian War, Western countries were swift to support Ukraine. Meanwhile, African States have been reluctant to take sides in the conflict, partly because of former European colonialism and longstanding trade ties with Russia. This impartiality has not been embraced by Western States, who have attempted to coerce African States into demonstrating solidarity with Europe and Ukraine. Similarly, Germany's initial reluctance to provide Leopard 2 tanks to Ukraine was not well-received, and other Western leaders exerted severe pressure on them. Political, geopolitical, economic, and historical factors evidently influence when it is honourable to be neutral and when it is not.

The 2003 Iraq War further demonstrated the impact of political factors on the interpretation of the law of neutrality and the course of the conflict. In this instance, the aggressors obtained full support, while the victim was left isolated. To summarize the third State support in both IACs, it is apparent that the decision to support a belligerent or not has not been solely based on who is the aggressor. While determining the aggressor in multi-State conflicts can be difficult, decisions appear to be influenced, at least in part, by which States the West may have perceived as innocent and vulnerable. Given that Iraq is not, it received no support.

In the face of these two case studies, it seems that the status of neutrality does not carry much weight today, apart from when it can be used as an excuse to avoid ‘co-belligerency’. On the contrary, maintaining a neutral position may be perceived as negative and immoral, especially if one remains impartial towards a belligerent that the West perceives as ‘evil’ and engaging in an ‘unjust’ war. If the aim is to preserve peace and limit armed conflict, this approach to war is counterproductive.

If the law of neutrality is to have a bearing on mitigating future conflicts and governing the relations between non-participant States and belligerents in a desirable manner, the possible exceptions to the requirement to remain neutral will need to be reviewed and settled. The current situation is unpredictable and unbalanced, with States seemingly picking and choosing to adopt intermediate positions of neutrality that suit the occasion and their political objectives. Similar to ensuring the validity of the law of neutrality, a comprehensive recodification of the law of neutrality is essential for its future relevance. The traditional law of neutrality requires adaptation and specificity in its rules in order to address unresolved issues and to truly serve its purpose.

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