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Abstract

This article examines the position and implications of the neutrality of a state during armed conflict. It discusses the changes in dynamics following the membership of the UN and security alliances. Essentially, the legal regime of neutrality redefines the relationship between belligerents and the party that abstains from the armed conflict. However, there are slightly different approaches to neutrality in relation to the UN Charter on one hand, and International Humanitarian Law on the other hand. This paper investigates both perspectives. However, it is important to note that while neutrality in the UN Charter and similar security arrangements continues to draw debate because of its modification by rules on resort to force, neutrality is firmly established in the laws of war; and imposes obligations on belligerents as well as the neutral State. The paper asserts that as conceived by the laws of armed conflict, the neutral status is indispensable to the protection of the neutral state from the effects of hostilities; and to sustain the provision of humanitarian services.

Keywords: Neutrality, belligerents, UN Charter, International Humanitarian Law, NATO, naval warfare, aerial warfare.

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Introduction

The theoretical or practical character of neutrality during war has continued to polarize views. Some authors challenge its relevance in modern times, positing that all States are bound to participate in the collective security architecture of the United Nations.¹ Other scholars regard neutrality and collective security as complementary regimes of law.² Kai Ambos has said that in an age of collective military alliances, absolute neutrality can only exist if a state, such as Switzerland, does not belong to such an alliance and also does not take part in collective peacekeeping operations.³ The dynamism of international relations; including neutral states joining defence pacts, the ongoing armed conflict between Russia and Ukraine, invite a reassessment of preexisting legal norms on neutrality. The recent Russian aggression against Ukraine has made some European States like Finland and Sweden to reconsider their long espoused neutrality.⁴

The focus of neutrality is the relationship between belligerents and third States which take no part in the armed conflict. There may be permanent neutrality on one hand, or mere or temporary neutrality on the other hand. According to Neuhold, a permanently neutral State is bound by a treaty or compelling unilateral declaration not to participate in any future armed conflict, and must observe the norms of neutrality in the event of war.⁵ By a constitutional enactment, Austria declared for permanent neutrality in 1955. Switzerland is another example of a permanently neutral State.⁶ In temporary neutrality, the State has a discretion whether or not, to participate in a specific

¹ Pål Wrange, *Impartial or Uninvolved? The Anatomy of 20th Century Doctrine on the Law of Neutrality*. *Impartial Or Uninvolved?: The Anatomy of 20th Century Doctrine on the Law of Neutrality* (Faculty of Law, Stockholm University Research Paper No. 56, 2007) < <https://ssrn.com/abstract=3119006> or <http://dx.doi.org/10.2139/ssrn.3119006> > accessed 15 May 2022.

² *ibid.*

³ Kai Ambos, 'Will a State Supplying Weapons to Ukraine become a Party to the Conflict and thus be Exposed to Countermeasures?' (2022) *EJIL: Talk. Blog of the European Journal of International Law* < <https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-andthus-be-exposed-to-countermeasures/> > accessed 2 June 2022.

⁴ 'Neutral Countries in Europe Recede as Finns, Swedes Edge Toward NATO' *Business Standard* (New Delhi, 15 May 2022) < https://www.business-standard.com/article/international/neutral-countries-in-europe-recede-as-finns-swedes-edge-toward-nato-122051500373_1.html > accessed 9 May 2022.

⁵ Hanspeter Neuhold, 'Permanent Neutrality and Non-alignment: Similarities and Differences' (1979) 35 (3) *India Quarterly* 285.

⁶ John Dreyer and Neal G. Jesse (2014) 'Swiss Neutrality Examined: Model, Exception or Both?' Vol. 15. No. 3. *Journal of Military and Strategic Studies*; 60-83.

conflict.⁷ It is the view of Heribert Franz Koeck that temporary or mere neutrality is a momentary status and, by that fact, contributes to international instability rather than to stability because such a State could renounce its status to support any of the belligerents anytime.⁸ A country may neutralize in consequence of a constitutional enactment or treaty-making. Non-alignment; a concept paralleling, and often contrasted with neutrality, reflects a moral or non-binding, political and dynamic position of expressing no support for either of the super powers of the cold war era. In this sense, scholars may talk about cold war neutrality.⁹

However, despite the polemics on neutrality in international law and relations, it remains a recognized status in International Humanitarian Law (IHL), stitching itself firmly into the fabric of humanitarian services and peacekeeping operations. Neutrality in the laws of armed conflict is governed by customary law norms and treaties especially the Paris Declaration of 1856;¹⁰ the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land 1907; Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War 1907, the four Geneva Conventions of 1949 and Additional Protocol I of 1977. In IHL, the concept of neutrality evokes rights and obligations upon the State assuming the position. It is worthy to note that since 1945, the practice of making a formal declaration of neutrality has significantly waned. In essence, except for the sake of publicity, a formal declaration is no longer necessary for a State to assume a position of neutrality.¹¹ By its behaviour or inaction, a State can be categorized as neutral or belligerent.¹² In addition, a formal recognition of the neutrality of a State, by other States, is no longer a requirement.

Neutrality in IHL closely mirrors its context in public international law, reflecting the position of abstention from war, impartiality and equality of treatment to belligerents.¹³ As a result, the

⁷ D. Turns, 'Cyber War and the Law of Neutrality' in Nicholas Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar Publishing 2021); 380-400

⁸ Heribert Franz Koeck, 'A Permanently Neutral State in the Security Council' (1973) 6 (137) *Cornell International Law Journal*; 140.

⁹ T. Fischer, J. Aunesluoma, and A. Makko, 'Neutrality and Nonalignment in World Politics during the Cold War' (2016) 18 (4) *Journal of Cold War Studies*; 6.

¹⁰ Declaration Respecting Maritime Law. Paris, 16 April 1856.

¹¹ 'The Law of Armed Conflict: Neutrality,' International Committee of the Red Cross. Geneva, Switzerland, p.5. Available at https://www.icrc.org/en/doc/assets/files/other/law8_final.pdf accessed on 2 August 2022.

¹² Andrew Cheatham (2022) 'A Look at Neutrality Now - and After the Ukraine War' 28 April 2022. Available at <https://www.usip.org/publications/2022/04/look-neutrality-now-and-after-ukraine-war> accessed on 2 August 2022.

¹³ P Wrange, Neutrality, impartiality and our responsibility to uphold international law (Ola Engdahl & Pål Wrange 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

territory of a neutral power is inviolable.¹⁴ Neutrality is defined as ‘the attitude of impartiality adopted by third States towards belligerents and recognized by belligerents, such attitude creating rights and duties between the impartial States and the belligerents.’¹⁵ Neutrality evolved as a serious legal norm around the 19th century to regulate the conduct of states during warfare.¹⁶ The neutral State is not a party to the conflict; and offers no military support to any one of the belligerents. The objective is for the abstaining State to remain uninvolved in the conflict. Thus, neutrality governs the relationship between belligerents and non-participating States in international armed conflicts.¹⁷ In the context of humanitarian law, several provisions of the Geneva Conventions of 1949 and the Additional Protocols relate to neutrality and humanitarian assistance.¹⁸ Or to put it in another way, an inquiry into neutrality requires a careful analysis of the *ius ad bellum* (modern law of resort to force) and the *ius in bello* (law of armed conflict). The UN System and other parallel regimes embody the *ius ad bellum*.

Part I of this article is introduction. It presents the background of the paper, analyzes the concept of neutrality and its legislative basis in international law. In part 2, the article addresses the intersection between neutrality on one hand, and the UN Charter as well as military mutual defence pacts on the other hand. It argues that absolute neutrality is no longer realistic in modern times. In part 3, the paper takes a look at the rights and duties of belligerents towards neutrals, and *vice versa*; the legitimate use of the territory of neutral states in IHL, and the operations of neutrality in naval and aerial warfare. Part 4 concludes the paper.

¹⁴ Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, October 18, 1907, Article 1.

¹⁵ L. Oppenheim, 2 International Law: A Treatise 653 (Hersch Lauterpacht ed., 7th ed. 1952).

¹⁶ K Wani, Neutrality in International Law from the Sixteenth Century to 1945 (1st edn, Routledge 2017).

¹⁷ Nathalie Weizmann, ‘The End Of Armed Conflict, The End Of Participation In Armed Conflict, And The End Of Hostilities: Implications for Detention Operations under The 2001 Aumf’ (2016) (47) (1) *Columbia Human Rights Law Review*; 226.

¹⁸ See, Articles 27 and 37 Geneva Convention For the Amelioration of the Condition of The Wounded and Sick in Armed Forces in the Field of 12 August 1949 (GCI); Articles 21 and 25 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (GCII); Articles 110 and 122, Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (GCIII); and Article 24 of the Geneva Convention Relative to the Protection of Civilian Persons In Time of War of 12 August 1949 (GC IV). For Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, see Articles 9, 19, 22 (2) (a), 31, 39 (1), and 64.

The Impact of the UN Charter and Military Defence Alliances on Neutrality

The Charter of the United Nations 1945, as well as military defence pacts like the North Atlantic Treaty Organization (NATO) have tremendously influenced and challenged the law and practice of neutrality within the context of Public International Law. Some confusion persists because the preparatory documents for the Charter of the United Nations show that permanent neutrality was regarded as being incompatible with membership of the UN.¹⁹ There appears to be change in the stance of the UN, as Wengler has pointed out broad assurances by the UN that membership of defence alliances are not generally incompatible with the Charter; or that a State's permanent neutrality is not incompatible with its membership of the UN.²⁰ Nevertheless, Wengler has also noted that such membership would impair the ability of a State to participate in a UN action against its allies.

The UN Charter was adopted in the aftermath of World War II and the collapse of the League of Nations Covenant. Embodying the post-war sentiment of saving mankind from the scourge of war, members of the UN are obligated to resort to pacific means of resolving international disputes;²¹ and to respond to a UN Security Council call for collective defence.²² Thus, all members have an obligation to place at the disposal of the UN Security Council, armed forces, assistance, and facilities, including the right of passage, necessary for restoring and maintaining universal peace and security.²³

The commingling of neutrality and self-defence, presents yet another interesting extension of the operation of the status. An exercise of the right of self-defence in Article 51 of the UN Charter is excluded from the prohibitory scope of Article 2 (4). Article 2 (4) of the UN Charter outlaws the use of force in violation of the territorial integrity of another State. A State does not lose its neutrality by the mere fact of exercising its right of self-defence.²⁴

¹⁹ See Doc. 944, I/1/34(1), 6 U.N.C.I.O. Docs. 459-60 (1945) cited in Heribert Franz Koeck (n7) 137. Following prolonged discussions on neutrality, the committee which addressed the purposes of the UN Charter explained 'that the status of permanent neutrality is incompatible with the principles declared in the Charter.'

²⁰ Wilhelm Wenger, 'The Meaning of Neutrality in Peace Time' (1964) 10 *McGill Law Journal*; 369, 369-379.

²¹ Charter of the United Nations, 1945, Articles 2 (3), and 33-38.

²² *ibid*, Article 1 (5) and (6).

²³ *ibid*, Article 43.

²⁴ See for example, Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land 1907, Article 10.

Similar to the UN Charter, subscribing to military alliances by States have also impacted on their claim of neutrality. Therefore, absolute neutrality is no longer feasible as States bind together to establish defence cooperation. The constitutive instrument of the European Union contains a mutual defence clause. Article 42 (7) of the Treaty of Lisbon 2007 provides for aid and assistance by other Members States towards a Member state of the European Union, which is a victim of armed aggression on its territory. It states further that this provision is consistent with Article 51 of the UN Charter, commitments under the North Atlantic Treaty Organization; without prejudice to the security and defence policy of certain Member States. The North Atlantic Treaty (Washington Treaty) of 4 April 1949, establishing the North Atlantic Treaty Organization operates in an identical manner.²⁵ Nevertheless, Article 42 (7) of the Treaty of Lisbon contrives a way out of the confusion by preserving the security and defence policy of certain State parties, by which they can opt out of a collective defence operation.

The Russia - Ukraine armed conflict, which threatens international peace and stability, has again, brought to the fore, the operation of neutrality. After years of frosty diplomatic relations, armed skirmishes and the annexation of Crimea by Russia, Russia launched a full scale invasion of Ukraine in February 2022. One of the reasons advanced by Russia for the invasion is America's plan to bring Ukraine into NATO, and make Ukraine 'a Western bulwark on Russia's border.'²⁶ Therefore, it became necessary for Russia to 'ensure Ukraine's neutral status.'²⁷ If Ukraine joins NATO; under Article 5 of the North Atlantic Treaty, any attack against it would be regarded as an attack against all NATO countries, which would entitle them individually or collectively, to use armed force to repel the attack.²⁸

²⁵ Article 5 Washington Treaty: The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

²⁶ John Mearsheimer, 'The Causes and Consequences of the Ukraine War,' *Russia Matters*. 23 June 2022. Available at <https://www.russiamatters.org/analysis/causes-and-consequences-ukraine-war> accessed on 3 August 2022.

²⁷ Paul Kirby, 'Why Has Russia Invaded Ukraine and What Does Putin Want?' BBC News. 9 May 2022. Available at <https://www.bbc.com/news/world-europe-56720589> accessed on 3 August 2022.

²⁸ North Atlantic Treaty, Washington D.C. 4 April 1949, Article 5: The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures

Russian aggression was greeted by a flurry of financial sanctions, counter measures by other States; the supply of war materials to Ukraine, and confiscation of Russian property across Europe and America.²⁹ In other words, some countries had either tried to impair Russia's ability to prosecute or pay for the war through the imposition of embargoes, or directly strengthened Ukraine's military power to defend itself or counter-attack Russia. In the discourse on neutrality, States which have supported Ukraine's war efforts are no longer neutral, although they may not be regarded as belligerents as they do not directly participate in the conflict. Nevertheless, their ability to broker peace between the belligerents is greatly compromised.

1. International humanitarian law and neutrality

In International Humanitarian Law (IHL), the question of neutrality arises only when there is an armed conflict between two or more States. Other States may participate in the conflict or merely watch from afar. States which join in the conflict become belligerents while those who do not join and are willing to assume the responsibilities of neutrality become neutrals. A State which fails to adhere to these duties, will lose its neutrality status and be demoted to the position of a non-belligerent State. Chris Wigwe has pointed out that neutral States may assist belligerents to foster relations which mitigate the suffering of individuals affected by the conflict, and also broker peace.³⁰ Neutrality is available only in an international armed conflict. The application of a status of neutrality to an internal armed conflict depends upon the State recognizing the rebel forces as belligerents, in which case, third party States may assume a neutral position in relation to the belligerents. In the absence of a recognition of belligerency, a State would normally refrain from interfering in the internal affairs of another.

taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

²⁹ A BBC news article titled 'What Are the Sanctions Against Russia and Are They Hurting its Economy?' dated 22 June 2022, reads as follows: 'the UK has excluded key Russian banks from the UK financial system, frozen the assets of all Russian banks, barred Russian firms from borrowing money, and placed limits on deposits Russians can make at UK banks. The US is banning all Russian oil and gas imports... The US, EU, UK and other countries have sanctioned more than 1,000 Russian individuals and businesses. These include wealthy business leaders, the so-called oligarchs, considered close to Kremlin, including the former Chelsea FC owner, Roman Abramovich.' Available at <https://www.bbc.com/news/world-europe-60125659> accessed on 3 August 2022. In another news publication captioned 'Arms for Ukraine: Who has sent What?' France 24 reported that the US had agreed to Kyiv's request for HIMARS multiple-rocket launchers. Turkey had supplied Bayraktar TB2 combat drones to Ukraine. The UK government had offered aid to Ukraine including 120 armoured vehicles, over 5,800 anti-tank missiles, five air defence systems, over 1,000 rockets and 4.5 tonnes of explosives; the French government had delivered more than 100 million euros of military equipment to Ukraine, and Norway had dispatched 100 French-made Mistral anti-aircraft missiles to Ukraine as well as 4,000 M72 anti-tank weapons. Available at <https://www.france24.com/en/live-news/20220601-arms-for-ukraine-who-has-sent-what> accessed on 3 August 2022.

³⁰ Chris C Wigwe, *International Humanitarian Law* (Readwise Publishers 2010); 293.

1.1 Duties of belligerents towards neutral states

As previously said, neutrality produces a relationship between the neutral State and parties to an ongoing armed conflict. This relationship imposes several duties on the belligerents, which enforce their rights against neutrals and ensure that the essence of neutrality is preserved. The International Committee of the Red Cross (ICRC) has posited that belligerents must establish a neutrality policy ensuring respect for neutral space, in particular that armed forces involved in the conflict do not enter neutral space and that neutral States are not affected by the collateral effects of hostilities.³¹ Belligerents are prohibited from moving troops or convoys of munitions of war or supplies across the territory of a neutral Power.³² The use of the territory of a neutral power for war communication with hostile forces is prohibited too. Consequently, a belligerent may not install on neutral territory, a wireless telegraphy station for communicating with belligerent forces on land or sea; or use a similar installation established by them prior to the outbreak of hostilities, on a neutral territory purely for military use, and which has not yet been commissioned for public communication.³³ Furthermore, except where absolutely necessary, a belligerent may not seize railway material coming from the territory of a neutral power, whether they are publicly or privately owned, and such goods must be dispatched to their country of origin as soon as possible.³⁴

The rights and obligations of neutral states

The basic rules regulating the rights and duties of neutral States have been made to ensure that they stay outside the conflict and are not adversely affected by it. Another objective is to prevent the use of the territory of a neutral State to confer military advantage on any of the belligerents. Thus, belligerent combatants found on neutral territory must be disarmed and interned until the end of hostilities, in order to prevent them from further participation in hostilities.³⁵ When these measures are taken, then neutral territory, whether land or waters, can be held to be inviolable. On the contrary, the Aggressor-State may launch counter-measures against a State with compromised

³¹ The International Committee of the Red Cross, 'The Law of Armed Conflict: Neutrality' (2002); 4. Available at https://www.icrc.org/en/doc/assets/files/other/law8_final.pdf. Accessed on 16 June 2022.

³² Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907, Article 2.

³³ Ibid, Article 3.

³⁴ Ibid, Article 19.

³⁵ Ibid, Article 11.

neutrality. A neutral State may be drawn into the war and be tagged a co-belligerent if it severely violates its neutrality.³⁶

The inviolability of the territory of neutral powers in Article 1 of Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, presupposes that neutral territory is spared the collateral effects of hostilities. Liability in damages follow a breach of the neutrality of one State by the other. A State is not in breach of its neutrality by carrying out an act of self-defence against a perceived attack against its territory.³⁷ The use of force by a neutral State in defence of a violation of its neutrality must conform to the limits imposed by international law, including necessity and proportionality.³⁸

Article 5 of Hague Convention V states that ‘a neutral power must not allow any of the acts referred to in Articles 2 – 4 to occur in its territory. The acts in question have already been mentioned in the preceding segment of this paper. Article 4 of Hague V forbids the formation of a corps of combatants or recruiting agencies on the territory of a neutral Power to assist the belligerents. Writing some decades ago, Ian Brownlie observed that ‘the use of pseudo-volunteers as an instrument of government policy and for purposes of aggression gives increasing significance both to the shortcoming of, and to the recent modifications in the law’.³⁹

Following the Russian invasion of Ukraine in 2022, Ukraine established an International Legion of Territorial Defence with volunteers drawn from many countries including Georgia, Great Britain, Latvia, the United States of America, Japan, etc.⁴⁰ Any active participation by a State in the recruitment of such volunteers would be inconsistent with the law of neutrality. Although such a State may not be regarded as a co-belligerent or party to the conflict, it is not a neutral State. However, a State would not be in breach of neutrality by the mere fact of a volunteer passing through its territory to offer services to a belligerent. This situation is governed by Article 6 Hague Convention V which provides that “the responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents”. If

³⁶ Curtis A. Bradley and Jack L. Goldsmith (2005), ‘Congressional Authorization and the War on Terrorism’(2005)118 Harvard Law Review; 2047, 2112

³⁷ Alexander Porter Moss (1898), ‘Rights and Duties of Belligerents and Neutral from The American Point of View’ *The American Law Register*’ (1898); 662

³⁸ San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Article 3.

³⁹ Ian Brownlie, ‘Volunteers and the Law of Neutrality’ (1956) 5 (4) *The International and Comparative Law Quarterly*; 570

⁴⁰ Ken Watkin, ‘Foreign Fighters, Mercenaries and the Ukraine Conflict’ (2022) PKI Global Justice Journal, 23 March. < <https://globaljustice.queenslaw.ca/news/foreign-fighters-mercenaries-and-the-ukraine-conflict> >Accessed on 17 June 2022.

nationals of a neutral State enlist in the armed forces of a belligerent, they are taken to have personally assumed the risk of doing so.

The prohibition of the recruitment of combatants in the territory of a neutral State does not only fulfil its obligations on neutrality but also prevents the recruitment of mercenaries to assist one of the belligerents. Some States, for example Nigeria, actively prevented the enlistment on their territories, of their nationals to fight on the side of Ukraine or Russia.⁴¹ Such nationals of non-belligerents enlisted to fight in an armed conflict would be regarded as mercenaries.⁴² In the African region, the O.A.U Convention for the Elimination of Mercenarism in Africa imposes an obligation on contracting parties to take all necessary measures to eradicate all mercenary activities in Africa.⁴³ The UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries prescribes a similar duty to prevent and punish mercenarism in the territory of State parties.⁴⁴ It bears mentioning that corps of combatants who are nationals of the recruiting belligerents are not mercenaries, even if the activity is carried out in the territory of a neutral State. The obligations pertaining to neutrality apply to acts of the State or its organs, and not the private acts of its citizens.

The responsibility of a State to refrain from furnishing the belligerents with certain goods and services deserves attention.⁴⁵ The supply of war materials may amount to aiding acts of aggression as defined by Article 8*bis* of the Statute of the International Criminal Court.⁴⁶ Markus Krajewski has expressed the view that the supply of weapons and other kinds of military assistance intended to bolster up the military capability of any of the belligerents will prolong the conflict, and lead the aggressor to respond with more acts of violence.⁴⁷ It is for this reason that Hague Convention XIII states that the supply, in any manner, directly or indirectly, by a neutral Power to

⁴¹ Jesupemi Are, 'FG: We'll Not Tolerate Recruitment of Nigerians into Ukrainian Army' *The Cable* (Nigeria, 7 March 2022). < <https://www.thecable.ng/fg-well-not-tolerate-recruitment-of-nigerians-into-ukrainian-army> > Accessed on 17 June 2022.

⁴² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, Article 47.

⁴³ O.A.U Convention for the Elimination of Mercenarism in Africa, Gabon, 1977, Article 6.

⁴⁴ See Articles 1, 5, 6 and 12, UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989.

⁴⁵ Robert W Tucker, *The Law of War and Neutrality at Sea* Vol. 50 (The Lawbook Exchange Ltd 2006) 206.

⁴⁶ Rome Statute of the International Criminal Court, 17 July 1998.

⁴⁷ Markus Krajewski, 'Neither Neutral nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine' (2022) *Volkerrechtblog: International Law and International Legal Thought*. doi: 10.17176/20220310-000928-0. < <https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict/> > Accessed on 17 June 2022.

a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.⁴⁸

Regarding the supply of war materials by neutral a State, Dieter Fleck has opined that; State practice has modified the former rule of both customary and treaty law that a neutral state is not bound to prohibit export and transit of war material by private persons for the benefit of one of the parties to the conflict. To the extent that arms export is subject to control by the state, the permission of such export is to be considered as a non-neutral service.⁴⁹

The permissible use of neutral land

Significant increases in the volume of humanitarian assistance in recent armed conflicts underscore the role neutral States may play as a base for the conduct of humanitarian operations. In consequence, a neutral State may authorize the use of its land territory for the coordination of humanitarian efforts, even when only one of the belligerents' benefits from the assistance rendered. Article 14 of Hague Convention V provides that: "A neutral Power may authorize the passage over its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor war material. In such a case, the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose. The sick or wounded brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral Power so as to ensure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

In the Geneva Conventions, the wounded and sick may be repatriated to, and accommodated in neutral countries.⁵⁰ Likewise, prisoners of war may be interned in a neutral country.⁵¹ James D. Morrow has identified a key problem besetting IHL. He points out the decentralized nature of treaty implementation. Thus, the belligerents alone may counter conduct which breach IHL treaties. 'Although member states at war are entitled to prosecute and punish those from the other

⁴⁸ Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 1907, Article 6.

⁴⁹ Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (4th edn OUP 2021). See also Article 7 of Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907.

⁵⁰ Article 110, Geneva Convention Relative to the Treatment of Prisoners of War of 12 August, 1949.

⁵¹ *Ibid*, Article 111.

side who violate the treaties, they rarely do so, owing in part to concern with retaliation against their own soldiers held captive.⁵² There have been reports of abuses of Russian prisoners of war (POWs) in the custody of Ukrainian authorities. The Non-Governmental Organization; Human Rights Watch, has reported the beating and shooting of the legs of Russian POWs.⁵³ Ukrainian POWs held in Russia have also alleged the infliction of physical, sexual and mental abuse on them by their captors, during their period of captivity.⁵⁴ It would appear that the internment of POWs in a neutral territory would secure for them better treatment than they would obtain in captivity by a belligerent. International law requires a neutral State to grant asylum to combatants who fell into the hands of the adversary, and escaped to its territory. The State may not restrain them; and if it allows them to remain in its territory, may assign them a place of residence.⁵⁵ The neutral State is expected to be impartial in its treatment of the personnel of belligerents, found in its territory.

Neutrality in naval warfare

The legal rules on neutrality apply to armed conflict on waters as much as they apply to land territory. Article 1 of the San Remo Manual applies the rules of IHL to naval warfare. Over the ages, the sea has been an important theater of armed conflict, although it has lost a lot of significance as a centre of warfare in the post-World War years.⁵⁶ Nevertheless, naval warfare influences the results of hostilities conducted in the field. The law of neutrality implies that the maritime environment of a neutral State should not be used for the conduct of hostilities. This position is affirmed by Article 17 of the San Remo Manual which provides that: ‘belligerent forces may not use neutral waters as a sanctuary.’ The rights of neutral States became an issue in the 18th

⁵² James D. Morrow (2001) ‘The institutional features of the prisoners of war treaties’. Vol. 55. No. 4. *International Organization*; 982.

⁵³ Ukraine: Apparent POW Abuse Would Be War Crime: Video Appears to Show Fighters Shooting Russian POWs. 31 March 2022. Available at <https://www.hrw.org/news/2022/03/31/ukraine-apparent-pow-abuse-would-be-war-crime> accessed on 3 August 2022

⁵⁴ Stewart Bell, ‘Ukrainian prisoner of war accuses Russia of torture,’ Global News, 22 June 2022. Available at <https://globalnews.ca/news/8932906/ukrainian-prisoner-of-war-russia-torture/> accessed on 3 August 2022.

⁵⁵ Article 13, Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907.

⁵⁶ Michael Boethe, Neutrality in Naval Warfare: What is Left of Traditional International Law? (*Legal Restraints on the Use of Military Force*, Thilo Marauhn and Barry de Vries (eds), Brill/Nijhoff, 2021); 574.

century on account of the widespread practice of capturing neutral ships by privateers armed with Letters of Marque from belligerent authorities.⁵⁷

Bruce A. Harrow has reduced the essential legal principles on neutrality in naval armed conflict to five points, reproduced *ad verbatim* below:

- a. Although belligerents are obliged to refrain from acts of hostility in a neutral's waters and are forbidden to use those waters as a sanctuary or a base of naval operations, the neutral may, on an evenhanded basis, allow 'mere passage' of belligerent warships through its ordinary territorial sea.
- b. Although the general practice has been to prohibit belligerent submarines in the ordinary territorial sea, a neutral may, on a nondiscriminatory basis, allow them surface passage or even submerged passage.
- c. The law of armed conflict generally prohibits the entry of armed belligerent military aircraft into neutral airspace, including the airspace over a neutral's ordinary territorial sea.
- d. Belligerents are authorized to act in self-defense when attacked while in neutral waters, or when attacked from neutral waters or airspace; and
- e. When a neutral is unable or unwilling to prevent abuse of its neutrality by a belligerent, that belligerent's adversaries may take action against the offending vessel or aircraft.⁵⁸

Out of The Hague Conventions adopted in 1907, Convention XIII addresses the rights and duties of neutral powers in armed conflict. International law imposes a duty on belligerents 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.⁵⁹ This provision is strengthened by Article 2 which states that 'any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.'

There are certain other restrictions on what belligerents are permitted to do on the maritime territory of a neutral State. For example, they are prohibited from using neutral ports and waters

⁵⁷ 'Martin Hübner's Law of Neutrality and Prize (1759) A Champion of Neutrality in the Age of Privateering'. Available at <https://www.duo.uio.no/bitstream/handle/10852/36267/182041.pdf?sequence=4> accessed on 2 August 2022.

⁵⁸ Bruce A. Harrow (1984), 'The Law of Neutrality at Sea for the 80's and Beyond' (1984) 3 (42). *UCLA Pacific Basin Law Journal*; 43.

⁵⁹ Article 1, Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 1907.

as a base of naval operations against their adversaries, especially the installation of a wireless telegraphy station or an apparatus for the purpose of communicating with belligerent land or sea forces.⁶⁰ Acts of hostilities are prohibited in the waters within the jurisdiction of a neutral a State. Chris Wigwe has noted that ‘the exercise of the law of prize such as stop, visit and search; orders to follow a specific course, capture of merchant ships’ are forbidden on neutral waters.⁶¹

A few other points need to be made here about the law of prize. Firstly, if a ship in the territorial water of a neutral State has been captured by a belligerent, as long as the ship or prize is still within the territorial jurisdiction of the neutral State, it may adopt any means at its disposal to release the prize with its officers and crew, and to intern the prize crew.⁶² The second point refers to situations where the captured ship has left the waters within the territory of the neutral State. In such a case, on the request of the neutral State, the government which captured the prize must release it, along with its officers and crew. Thirdly, a neutral State has an obligation to ensure that combatants who have fallen into its hands are denied any further opportunities to rejoin hostilities. Thus, if the wounded, sick or shipwrecked are taken aboard the ship of a neutral State, it must ensure that these persons take no further part in hostilities.⁶³

The right of innocent transit

The right of innocent passage through the internal waters of a neutral State constitutes an exception to the general rule prohibiting the presence of belligerent warships in waters within the jurisdiction of a neutral State. In Article 10 of Hague Convention XIII, the neutrality of a neutral State is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents. In some respects, The Hague Conventions of 1907 appear to have been modified by the United Nations Convention on the Law of Sea, 1982. This influence is especially felt in the right of innocent passage transit through waters within national jurisdiction: the territorial sea and archipelagic waters.⁶⁴ To prevent the abuse of the right of transit passage, UNCLOS obligates

⁶⁰ Ibid, Article 5.

⁶¹ Wigwe (n 30); 306.

⁶² Article 3, Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 1907.

⁶³ Article 15, Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II), Geneva 12 August 1949.

⁶⁴ See Articles 38 and 52 of the United Nations Convention on the Law of the Sea, 1982. Compare with Article 23 of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994. which states that: ‘belligerent warships and auxiliary vessels and military and auxiliary aircraft may exercise the rights of

ships and aircrafts exercising the right to proceed through the strait expeditiously; and refrain from any threat or use of force against States bordering the strait, contrary to international law.⁶⁵

Innocent passage may not exceed twenty-four hours; as Article 12 of Hague Convention XIII stipulates that: In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war-ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty four hours, except in the cases covered by the present Convention.⁶⁶ Several other provisions of Hague Convention XIII limit how much time a belligerent warship may stay in the waters of a neutral country. For example, a belligerent warship whose departure is delayed by damage, stress, or weather, must leave as soon the cause of delay ends. Limited assistance may be rendered to belligerent warships to make them seaworthy only.⁶⁷ In addition, neutral ports or waters may not be used for restocking war materials or completing the crew of warships.⁶⁸ All measures, conditions, and restrictions imposed by the neutral State should be applied impartiality towards all belligerents.⁶⁹

Neutral merchant shipping

It is desirable to insulate maritime commerce from the harmful effects of war, so that trade can go on without interruption. David Letts has stated that the protection of maritime commerce is based upon the belief that despite the belligerents being involved in an armed conflict at sea, it is imperative for maritime trade and commerce to continue among neutral States and between neutral States and belligerent parties with as little interruption as possible.⁷⁰ About this aspect of the law, Chris Wigwe has noted that the constituents of the customary international law on the control and protection of neutral merchant shipping, by belligerents is unsettled.⁷¹

Neutral merchant ships are not military objectives, but in certain conditions, they may lawfully be attacked by the belligerents. Article 67 of the San Remo Manual lists a number of grounds which

passage through, under or over neutral international straits and of archipelagic sea lanes passage provided by general international law’.

⁶⁵ Article 39, United Nations Convention on the Law of the Sea, 1982.

⁶⁶ On the 24-hour rule, see also Articles 13, 14, 15 and 16, Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 1907.

⁶⁷ Article 17, Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 1907.

⁶⁸ *Ibid*, Article 18.

⁶⁹ *Ibid*, Article 9.

⁷⁰ David Letts, ‘Ukraine Symposium - Maritime Neutrality in The Russia-Ukraine Conflict’ (2022) Lieber Institute, West Point. < <https://lieber.westpoint.edu/maritime-neutrality-russia-ukraine-conflict/> > Accessed on 18 June 2022.

⁷¹ Wigwe (n30); 310.

justify attacks against neutral merchant ships. Thus, they may not be attacked unless they: (a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture; (b) engage in belligerent acts on behalf of the enemy; (c) act as auxiliaries to the enemy's armed forces; (d) are incorporated into or assist the enemy's intelligence system; (e) sail under convoy of enemy warships or military aircraft; or (f) otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.

The London Declaration Concerning the Laws of Naval Warfare 1909, despite not being ratified by any signatory, contains a significant number of provisions on neutral merchant shipping. The International Committee of the Red Cross (ICRC) maintains the view that most of the rules in the London Declaration of 1909 embody State practice and the decisions of municipal courts on prize. Belligerents seek to control neutral shipping on the high seas in order to prevent the use of their cargo for the war efforts of other belligerents. The control may be effected by the right of warships of belligerents to stop, visit and search neutral merchant vessels as provided by Article 118 of the San Remo Manual: in exercising their legal rights in an international armed conflict at sea, belligerent warships and military aircraft have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.⁷² However, there are several exceptions to the right to stop and search neutral merchant ships under Article 120 of the San Remo Manual.⁷³ Regarding the convoying of merchant ships, Cameron Williams has posited that although ship owners resist convoying initially for obvious economic reasons: convoying delays sailings, increases risk of collisions at sea, and increases port

⁷² San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994.

⁷³ Article 120, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994: A neutral merchant vessel is exempt from the exercise of the right of visit and search if it meets the following conditions: (a) it is bound for a neutral port; (b) it is under the convoy of an accompanying neutral warship of the same nationality or a neutral warship of a State with which the flag State of the merchant vessel has concluded an agreement providing for such convoy; (c) the flag State of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; and (d) the commander of the neutral warship provides, if requested by the commander of an intercepting belligerent warship or military aircraft, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.

congestion, thus causing delays loading and discharging cargo, conveying has always proved to be the only workable solution.⁷⁴

The cargo onboard a neutral merchant vessel is subject to capture if it is contraband.⁷⁵ Contraband are goods that ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict.⁷⁶ The London Declaration Concerning the Laws of Naval Warfare provides a list of articles treated as absolute contraband and conditional contraband of war.⁷⁷

Rights and duties of neutral states, and belligerents in aerial warfare

Belligerent military operations are prohibited in the airspace of a neutral country.⁷⁸ The military aircraft of belligerents are therefore, prohibited from entering the airspace of a neutral country. They may be compelled to land and both aircraft and crew interned by the neutral State until the end of hostilities.⁷⁹ The Hague Rules of aerial warfare vests some responsibilities upon a neutral State including: to refrain from supplying in any manner, directly or indirectly, aircraft, parts of aircraft, or material, supplies or munitions required for aircraft, to a belligerent Power;⁸⁰ and to prevent from leaving neutral territory, any aircraft in a condition to launch a hostile attack against

⁷⁴ E. Cameron Williams (1986), 'The Four 'Iron Laws' of Naval Protection of Merchant Shipping' (1986) 39 (3) *Naval War College Review*; 35.

⁷⁵ Article 147, San Remo Manual.

⁷⁶ Article 148, San Remo Manual.

⁷⁷ The London Declaration Concerning the Laws of Naval Warfare, 1909, Article 22: The following articles may, without notice be treated as contraband of war, under the name of absolute contraband: (1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts. (2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts. (3) Powder and explosives specially prepared for use in war. (4) Gun-mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts. (5) Clothing and equipment of a distinctively military character. (6) All kinds of harness of a distinctively military character. (7) Saddle, draught, and pack animals suitable for use in war. (8) Articles of camp equipment, and their distinctive component parts. (9) Armour plates. (10) Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war. (11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea. Under Article 24, articles susceptible to use in war and peacetime, which may without notice be regarded as conditional contraband, include: foodstuffs, forage and grain, suitable for feeding animals; clothing, fabrics for clothing, and boots and shoes, suitable for use in war; gold and silver in coin or bullion; paper money; vehicles of all kinds available for use in war, and their component parts; vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts; railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones; powder and explosives not specially prepared for use in war; field glasses, telescopes, chronometers, and all kinds of nautical instruments.

⁷⁸ Article 39, The Hague Rules of Air Warfare, The Hague, December, 1923.

⁷⁹ Article 18, San Remo Manual. See also Article 42, The Hague Rules of Air Warfare, The Hague, December, 1923.

⁸⁰ Article 44, Hague Rules of Aerial Warfare 1923.

a belligerent; or prevent from departing neutral territory, any aircraft whose crew includes any member of the combatant forces of a belligerent Power.⁸¹ Under Article 47 of the Hague Rules, a neutral State is bound to take such steps as the means at its disposal permit to prevent within its jurisdiction aerial observation of the movements, operations or defences of one belligerent, with the intention of informing the other belligerent.

The private aircraft of neutral States are liable to visit, search and capture by the military aircraft of belligerents.⁸² Medical aircraft are required to be distinctively marked with the emblem of the Red Cross and other distinguishing markings to enable them to enjoy the protections in the Geneva Conventions.⁸³

Conclusion

From the preceding discussion, it has been demonstrated that the rules governing neutrality were developed in the 20th century, culminating in the codification of The Hague Conventions of 1907. The law and practice of neutrality has been substantially modified by the UN Charter as well as mutual defence pacts. The prohibitions against force; and conditions for resort to force either individually or collectively, have modified the neutrality of States in modern times. Nevertheless, the Geneva Conventions of 1949 have preserved and made several allusions to neutral powers, their responsibilities, and interrelations with belligerents. Neutrality is preserved not only to insulate the neutral State against the collateral effects of hostilities, but to serve as a geographical base for the provision of humanitarian services during armed conflict. Despite the decline in its significance in the present age, the use of the maritime environment for the conduct of hostilities cannot be cursorily dismissed.

⁸¹ Ibid, Article 46.

⁸² Ibid, Article 49.

⁸³ Ibid, Article 17.