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TITLE

Neutrality towards an 'aggressor': A case study of the Russia-Ukraine conflict

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List of Abbreviations

AJIL	American Journal of International Law
API	Additional Protocol I
APII	Additional Protocol II
ASIL	Annual Meeting of International Law
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
AUILR	American University International Law Review
BYIL	British Yearbook of International Law
CUP	Cambridge University Press
EJIL	European Journal of International Law
EU	European Union
GCs	Geneva Conventions
GYIL	German Yearbook of International Law
HCs	Hague Conventions
IAC	International Armed Conflict
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Studies
IRRC	International Review of the Red Cross
IHL	International Humanitarian Law
NATO	North Atlantic Treaty Organization
NIAC	Non-International Armed Conflict
NIRL	Netherlands International Law Review
NYULR	New York University Law Review
OUP	Oxford University Press
UK	United Kingdom
UN	United Nations
US	United States of America

Statement of Original Authorship

The work contained in this thesis has not been previously submitted to meet requirements for an award at this or any other higher education institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made.

Signature: _____

Date: _____

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1.- Introduction

Russia's invasion of Ukraine instigated an unprecedented response from western States, NATO and the European Union (EU), who rushed to aid the "victim of aggression" [1]. Biden's administration, as the leading provider of assistance to Ukraine, has pledged more than $10 billion in security assistance to provide Ukraine the equipment it needs to defend itself[2]. The military aid Ukraine has received from multiple ends includes advanced lethal arms, missiles, ammunition and training of Ukrainian soldiers[3].

This flood of military support by non-participating States has revamped the debate on the relevance and continuing validity of the law of neutrality. The law of neutrality regulates the relationship between the parties to an armed conflict and non-participating States. It entails correlated rights and duties of both categories of States, and it aims to demarcate hostilities, decrease their impact on third States and prevent their escalation. It emerged out of practical necessity and was solidified during the 19th century. However, the two World Wars and the United Nations (UN) Charter's collective security system and prohibition on the use force has led many authors to declare the 'death' of neutrality as a legal status or at the very least its irrelevancy. These developments have also put a strain on several aspects of the traditional law of neutrality.

In this piece we will only focus on the legal status of neutrality and not on issues of neutralization, permanent neutrality and neutrality under the four Geneva Conventions (GCs) and their additional Protocols (AP I and AP II). In particular, we will examine neutrality's continuing validity and content under contemporary international law and evaluate third State support towards Ukraine under the law of neutrality.

The methodology employed for this study is thus a combination of 'black letter' research and a case study. More precisely, we will refer to international treaties, mainly the Hague Conventions V and XIII, customary international law, military manuals, international and national court decisions, and we will examine if and how the law of neutrality applies in the case of the Russia- Ukraine armed conflict.

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[1] For instance it is the first time that the EU has authorized the supply of lethal weapons to a third country. See Council Decision (cfsp) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force (2022) . In addition Germany and Sweden have also reversed their previous defence policies which ruled out providing offensive weapons.

[2] Congressional Research Plan, 'U.S. Security Assistance to Ukraine' (29 August 2022) https://crsreports.congress.gov/product/pdf/IF/IF12040, accessed 11 September 2022.

[3]Claire Mills and John Curtis, 'Military assistance to Ukraine since the Russian Invasion' (House of Commons Library, 15 August 2022) https://researchbriefings.files.parliament.uk/documents/CBP-9477/CBP-9477.pdf, accessed 11 September 2022.

This study consists of an introduction, six main chapters (Chapters 2-7) and conclusions (Chapter 8). Chapter 2 deals with the history of the law of neutrality, in order to provide an idea on how this legal framework developed over time and which practical exigencies led to its codification. Chapter 3 outlines the content of traditional neutrality law, namely the duty of abstention, the duty of prevention alongside the right to territorial inviolability, the duty of impartiality and the duty of acquiescence. The relevancy and the binding nature of these duties was challenged by the establishment of the collective security system of the UN Charter and the prohibition of the use of force, following the two World Wars. These issues are examined in Chapter 4, where it is submitted that in case of an international armed conflict of a certain intensity and duration the law of neutrality continues to apply and should the Security Council fail to indicate an aggressor and take action under Chapter VII of the Charter, States not participating in the conflict are bound by their neutral duties.

Although it is concluded that the law of neutrality still applies, its contemporary content is not easily identifiable. Chapter 5 focuses on the present status of the neutral duty to not supply arms to a belligerent and of belligerent rights. It is suggested that the former has evolved to impose on neutral States an obligation to prohibit private arm sales to belligerents to the extent that they control this industry, and that the latter continue to exist, but their exercise is now evaluated under both the *ius in bello* and *ius ad bellum*.

Having outlined the content of neutrality in its current state, we then proceed to examine the consequences of breaches of the law of neutrality. Specifically in Chapter 6 it is submitted that violations of neutrality are internationally wrongful acts, and the general rules of State responsibility are applicable. It is also suggested that neutral States cannot forcibly protect their territory's inviolability and that the 'unable and unwilling doctrine' is not *lex lata*. With regards to the question of when a neutral State becomes a party to the conflict, the criteria of direct participation in hostilities, causal link to harm and co-ordination with the belligerent are put forward.

Chapter 7 then focuses on the Russia-Ukraine conflict and how the law of neutrality applies in this context. It is argued that the law of neutrality applies in this conflict and that non-participating States have breached their duties of abstention and impartiality. It is also put forward that qualified neutrality is not part of customary international law and thus neutral States have violated their aforementioned duties; however the wrongfulness of these violations is precluded under Article 21 of the Articles on State Responsibility. Chapter 7 also deals with the question of whether non-participating States have become parties to the conflict due to their military assistance to Ukraine but is concluded that the answer is most likely no. Finally, Chapter 8 presents the conclusions reached based on the analysis in Chapters 2–7.

2.- History of the law of neutrality

Neutrality has been referred to as a concept 'inherently flexible'[4], as it evolves to meet the needs of war. Although the concept of neutrality dates back to antiquity, it was not until the 19th century that a coherent system of interconnected rights and duties of belligerents and neutral States was developed.

Neutrality as a notion was first vaguely referenced in the eleventh century in the maritime context. It was then better expressed in Consolato del Mare during the thirteenth century, where it was originally conceived as providing belligerents with the right to seize enemy property carried on neutral ships[5]. In the centuries to come and up until the seventeenth century, European wars were fought for a 'just cause' and therefore one of the adversaries appeared to retain the moral high ground. It was thus considered unfathomable or immoral that some states would not join the just side[6] and any attempts to remain neutral were limited to a temporary abstention from hostilities[7].

However, the discovery of the New World brought into question the status quo and detached the concept of war from theological influences[8]. As 'crusades' were abandoned, conflicts were seen as balance of power issues[9]. During the seventeenth and eighteenth centuries the practice of States hinted that neutrality was perceived as an optional policy and had yet to acquire a customary legal status. Due to the existence of multiple, interwoven alliances States were concluding treaties of qualified, or 'imperfect' neutrality, which allowed them to provide some form of aid to their allies[10].

Progressively, as wars were more and more disassociated from moral and religious justification, positivism re-emerged[11].During the nineteenth century a clear divide between war and peace was established in international law and neutrality was elevated to a legal status[12]. The turn of the century saw the neutral duties of abstention and prevention being generally recognized as rules.

Having outlined the timeframe and political background of the evolution of the law of neutrality, it is now necessary to pinpoint the scholarly work and State practice that

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[4] Elizabeth Chadwick, *Traditional Neutrality Revisited: Law, Theory and Case Studies* (Brill | Nijhoff 2002),2.
[5] Constantine Antonopoulos, *Non-participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality* (CUP 2022) 3.
[6] Detlev F. Vagts 'The Traditional Legal Concept of Neutrality in a Changing Environment' (1998) 14 *American University International Law Review* 83, 85.
[7] Elizabeth Chadwick, 'THE "IMPOSSIBILITY" OF MARITIME NEUTRALITY DURING WORLD WAR 1' (2007) 54 *NILR* 337, 340.
[8] Ibid.
[9] Vagts (n 6) 86.
[10] L. Oppenheim, *International Law: A Treatise. Disputes War and Neutrality*, H. Lauterpacht (ed.), vol II (7th edn David McKay, 1952) 625.
[11] Alfred P. Rubin, 'The Concept of Neutrality in International Law' (1988) 16 *Denver Journal of International Law & Policy* 353, 360.
[12] James Upcher, *Neutrality in Contemporary International Law* (OUP 2020) 235.

significantly contributed to the crystallization of the law of neutrality and led to its codification.

2a.- Theoretical background

In 1625, Hugo Grotius in his 'De Juri Belli ac Pacis' called neutrals 'medeii', meaning those that were between war and peace[13]. Influenced by the concept of 'just wars", Grotius proposed that if a just belligerent could be identified then non-belligerent States ought not to inhibit that belligerent with their action and not to provide any aid to the unjust belligerent[14]. However, in case of doubt as to who the just belligerent was, Grotius advised them: '…to behave themselves alike to both Parties; as in suffering them to pass through their Country, in supplying them with Provisions, and not relieving the Besieged'[15].

Other writers also significantly helped in laying the foundations of neutrality as a legal status with defined content. For instance, Cornelius van Bynkershoek emphasized on the duties of a neutral to abstain and be impartial and distinguished neutrality from the 'just cause" of the war[16]. Emer de Vattel identified impartiality as the pinnacle of neutral duties. More specifically, he suggested that impartiality urges States to 'give no assistance where there is no obligation to give it' and to refuse 'voluntarily to furnish troops, arms, ammunition, or anything of direct use in war'[17]. Outside that context, Vattel argued, neutral States could continue trading with belligerents, subject to the belligerents' right to seize the goods based on necessity[18].

2b.- State practice leading to codification

Although the legal significance of these theoretical constructs cannot be overstated, what mainly informed the conduct of States and led to the development of the law of neutrality were pragmatic exigencies[19]. During the seventeenth and eighteenth centuries there were consecutive, and at times overlapping, wars being fought by an intricate web of alliances. Thus, most States either participated in an ongoing war or at the very least were allies with a belligerent State[20]. Against this background the duty of impartiality - which Vattel placed at the center of his theory- was not initially established as part of neutrality and was not strictly adhered to by neutrals[21].

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[13] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (Knud Haakonssen (tr)) Liberty Fund 2005) book III, ch XVII.
[14] Ibid,1525.
[15] Ibid.
[16] Cornelius Van Bynkershoek, *Quaestionum Juris Publici Libri Duo* (T Frank tr)) Clarendon Press 1930) 61.
[17] Emmer de Vattel, *Les droits des gens, ou principles de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (B Kapossy and R Whatmore (tr)) Liberty Fund 2008), book III para.104.
[18] Ibid para. 111.
[19] Maria Gavouneli, 'Neutrality - a Survivor?' (2012) 23 *EJIL* 267, 268.
[20] Philip C. Jessup, 'The Birth, Death and Reincarnation of Neutrality' (1932) 26 *The American Journal of International Law* 789,790.
[21] Nils Norvik, *The Decline of Neutrality 1914-1941* (Johan Grundt Tanum Forlag 1953),12.

On the contrary, it was common ground that, under specific circumstances, a non-participating State could provide aid to one of the belligerents and still remain neutral. More specifically neutral States could allow levies of troops by a belligerent in its territory and provide troops, money or supplies on the basis of a treaty that predated the commencement of hostilities[22]. Thus, during the 17th and 18th century a neutral State was perceived as a 'friend' and 'ally' that had opted out of direct participation in the war.

At the same time, commerce and specifically maritime commerce was becoming more and more central to the economies of European Powers. Two opposite sets of interests emerged during wartime: on the one hand belligerent States wanted to ensure that their enemy would not receive any material support by neutral States and on the other neutral States wished to continue trade without interference from the belligerents[23].

More specifically three main issues arose with regards to maritime neutrality. The first one revolved around whether ships flying a neutral flag could carry goods that were the property of a belligerent, an idea that was dismissed by belligerents. The second issue appertained to the rights of neutral ships to sail to and from any port or coast, including ports or coasts of states at war. Belligerents deemed this right to be a form of help to their enemies and thus an unneutral service. The third question concerned contraband of war and their confiscation by belligerents[24].

Gradually, belligerent and neutral States reached a compromise through a push and pull interaction and several of the milestones that helped in the 'figuration' of the law of neutrality will be highlighted in the following paragraphs.

In 1780 Empress Catherine II of Russia issued a Declaration of Armed Neutrality[25], which was prompted by the broad practice of the Royal Navy of Great Britain to intercept vessels and seize all goods destined for European States, with which Britain was at war at the time, even if the nationality of the vessel was of a neutral State. In particular the Empress reacted to neutral Russian merchant vessels and goods destined for France and Spain being captured by the Royal Navy and the Declaration contained the following principles:

1)That neutral vessels may navigate freely from port to port and along the coasts of nations at war;

2) That the effects belonging to subjects of the said powers at war shall be free on board neutral vessels, with the exception of contraband merchandise;

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[22] Jessup (n 20) 790.
[23] Robert W. Tucker, *The Law of War and Neutrality at Sea* (United States Government Printing Office 1957) 182.
[24] Leos Muller, *Neutrality in World History* (Routledge Taylor & Francis Group 2019) 9.
[25] James Brown Scott, *The Armed Neutralities of 1780 and 1800: A Collection of Official Documents Preceded by the Views of Representative Publicists* (OUP 1918) 273.

3) That to determine what constitutes a blockaded port, this designation shall only apply to a port where the attacking power has stationed vessels sufficiently near and in such a way as to render access thereto clearly dangerous.[26]

A League of Armed Neutrality was formed and by 1800 Denmark, Sweden, Prussia, and Russia had also joined forces to resist British aforementioned tactics[27].

It is commonly accepted, that the traditional law of neutrality, consisting of correlative rights and duties, was developed during the nineteenth century. However, an important milestone that paved the way for neutrality rules to regulate conduct outside the maritime context was the US position during the French Revolutionary war[28]. In 1793 US president George Washington issued a declaration which read: 'Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands of the one part and France on the other, the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers'.[29] The value of this Declaration lies in the fact that a great Power not only assumed the status of neutrality, but also referred to it as a duty thus recognizing and embracing the legal nature of neutrality.

In addition in a letter rejecting France's demand that French vessels use US bases to conduct operations against Britain, Thomas Jefferson the US Secretary of State reasserted the neutral duty of impartiality and stated that the US was bound to prohibit armament of vessels of either party to the war and enlistment of men within their ports and territories[30]. Therefore, it was affirmed that rules of neutrality are not exclusive to maritime warfare, but are also applicable to land.

What followed in the nineteenth century solidified the development towards a binding body of law, even if at the turn of the century its content was not yet settled. After the end of the French Revolutionary and Napoleonic Wars in 1815, neutrality became a status in many international conflicts, and it served as a key principle in international relations.

In 1854 France and Britain, who were allies in the Crimean War against Russia, issued a proclamation- as a necessary compromise of their opposing views in order to coexist- essentially espousing the concept of "free ships, free goods", meaning that with the exception of contraband of war enemy goods would not be seized on neutral vessels nor neutral goods on enemy vessels[31]. These rules were later reaffirmed in the 1856 Paris

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[26] Kostas Hatzikonstantinou, *Approaches of International Humanitarian Law* (2nd ed., I. Sideris 2009) 66 .(trans. from Greek).
[27] Maartje Maria Abbenhuis, 'A Most Useful Tool for Diplomacy and Statecraft: Neutrality and Europe in the "Long" Nineteenth Century, 1815–1914' (2013) 35 *IHR* 1, 4.
[28] Ibid.
[29] Proclamation 4— *Neutrality of the United States in the War Involving Austria, Prussia, Sardinia, Great Britain, and the United Netherlands Against France* (The Presidency Project, 22 April 1793).
[30] Paul Leicester Ford, *The Works of Thomas Jefferson*, federal edn, vol 7 (G.P. Putnam's Sons, 1905) 804.
[31]Philip Drew, *The Law of Maritime Blockade: Past, Present and Future* (OUP 2017) 15.

Declaration, which officially abolished privateering and included the principle that blockades are legally binding only if effective[32].

The Paris Declaration was ratified or acceded to by fifty-five states (and adhered to by even more[33]) and it signified a defining step towards the codification of laws of war , as it was the first time that States agreed to create a multilateral treaty regulating warfare[34]. This significant milestone therefore validates Thomas Holland's observation that around that time the issue of neutrality was: «the most important of all those dealt with by the Law of Nations".[35]

Another attempt to clarify the rights and responsibilities of belligerent and neutrals was made in the bilateral Treaty of Washington of 1871[36] during the American Civil War. Britain, the first to proclaim neutrality, was accused of alleged negligence in permitting the building of Confederate ships. After the war ended, the two powers both had claims against each other and brought their differences before an Arbitration Tribunal in Geneva pursuant to the Treaty of Washington. The case is famous for dealing with the notion of 'due diligence' in relation to the observation of neutral duties of abstention and impartiality. The Arbitrators construed due diligence as imposing on neutral States a high level of responsibility which required them to prevent belligerent acts that would violate their neutrality[37].

Even though this high standard of due diligence has been since seemingly abandoned[38], the Treaty of Washington is a milestone in the history of the law of neutrality, because the two –arguably- greatest powers of the time convened to imprint the generally accepted rules of neutrality in a legally binding document [39].

3.- Traditional law of neutrality

The process of development of the law of neutrality has been described as "a working compromise between demands"[40]. The demands at hand were those of the belligerents to pursue their war objective to subdue their enemy and of the neutrals to remain outside the theatre of hostilities and to continue their peaceful relations with the belligerents and

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32 See ICRC, 'Declaration Respecting Maritime Law' (16 April 1856), https://ihl-databases.icrc.org/ihl/INTRO/105, accessed 11 September 2022.
33 Ibid.
34 Drew (n 31) 16.
35 Thomas Holland, *Letters to 'the Times' upon War and Neutrality* (3rd edn, Longmans Green and Co 1921) 399.
36 United Kingdom and the United States of America, *Treaty for an Amicable Settlement of all Causes of Differences Between the United States and Great Britain* (8 May 1871) 17St, 863, USTS 133.
37 Chadwick (n 10) 348.
38 Cf., the 1907 Hague Convention XIII Art. 8, which substitutes the words 'to use due diligence' with 'to employ the means at its disposal'.
39 Drew (n 31) 16-17.
40 Westlake, *International Law*, part 2: *War* (2nd edn, 1913) 195, as mentioned in Stephen Neff, 'Disrupting a Delicate Balance: The Allied Blockade Policy and the Law of Maritime Neutrality during the Great War' (2018) 29 *EJIL* 459,461.

the rest of non-participants in the conflict with as little interference as possible[41]. The result of the ensuing negotiations and compromises was a corpus of corresponding rights and duties between belligerent and neutral States. The need to safeguard this legal framework led States to the adoption of international treaties[42]. The culmination of these efforts occurred in the Second Hague Conference of 1907.

Out of the thirteen conventions that were adopted during that Conference, five dealt with the issue of neutrality. More specifically the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land[43] concerns the rights and duties of neutral Powers in case of war on land, and the rest deal with maritime neutrality, the most important being the Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War[44]. For the most part the rules contained in these treaties were a codification of customary law[45]. This is important, because not all States supporting Ukraine are parties to Hague Conventions.

Under the traditional law of neutrality, neutrality was solidified as a mandatory legal status that was triggered by the existence of a war[46] and applied in times of war[47] or recognized belligerency[48]. However, upon the adoption of the Hague Conventions determining whether a war existed was somewhat elusive, because the existence of war was not an issue of factual assessment, but a result of expressed intent of the belligerents.

To combat this uncertainty States concluded Hague Convention III Relative to the Opening of Hostilities with the aim to specify when a war exists and therefore at which point in time the law of neutrality was applicable. Article 1 of the Convention conditioned the commencement of hostilities upon a declaration of war and Article 2 referenced the need for neutral powers to be notified or otherwise aware of the beginning of war.

The treaty has been criticized for being ambiguous and was for the most part not adhered to by State practice, as States refrained from declaring war even in instances of large-scale hostilities, thus circumventing the law of neutrality[49]. It is therefore implausible that in 1907 the treaty represented customary law.[50] Nonetheless, the

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41 Antonopoulos (n 5) 75.
42 Hatzikonstantinou (n 26) 67.
43 Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (28 October 1907) 36 Stat. 2310, 1 Bevans 654.
44 Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War (18 October 1907) 36 Stat. 2415, 1 Bevans 723.
45 Gavouneli (n 19) 3.
46 Tucker (n 23) 365, T. Komarnicki, 'The Problem of Neutrality under the United Nations Charter' (1952) 38 *Transactions of the Grotius Society* 77.
47 On the concept of war see Andrew Clatham, *War* (OUP 2021).
48 See generally Robin McLaughlin, *Recognition of Belligerency and the Law of Armed Conflict* (The Lieber Studies Vol 3, OUP 2020).
49 Upcher (n 12) 14.
50 Yoram Dinstein, *War, Aggression and Self-Defence* (4th edn, CUP 2005) 32.

Convention is still in force for the 36 states parties, and in 2015, Ukraine notified that it considered itself a party as a successor State to the Soviet Union.

Hague Convention III was supposed to complement Conventions V and XIII, which set out in writing the rights and duties of belligerent and neutral States in land and naval warfare. Based on these Conventions neutral States have three basic duties: abstention from taking part in the hostilities, prevention of certain belligerent actions on its territory and impartiality towards both belligerents[51], who have the right to demand adherence to these duties and to ensure compliance with them. In juxtaposition, neutrals enjoy two fundamental rights that belligerents ought to observe: the inviolability of their territory and the freedom to continue peaceful relations, mostly commerce, with both the belligerents and the non-participating States without interference.

Although an extensive examination of the content of all the rights and duties included in Hague Conventions V and XIII goes beyond the purposes of the present piece, we will proceed to outline the basic core of the traditional law of neutrality starting with the basic duties of neutrals and "branching out" into the concomitant rights and obligations.

Duties and Rights in the Law of Neutrality

As mentioned above the three main duties of neutral States are abstention, prevention and impartiality. Clapham refers to these core duties as "Neutral status in the strict sense"[52].

3a.- Duty of abstention

Abstention means that the neutral State may not take part in the hostilities by providing the belligerents with military assistance. More specifically, according to Article 6 of Hague Convention XIII, neutral States may not supply directly or indirectly warships, ammunition or war material to either or both belligerents[53]. There is no equivalent provision in the Hague Convention V, but there is little doubt that the prohibition also applies to land and air warfare as a matter of customary international law[54].

Under traditional law this obligation is limited to transactions between States. On the contrary supply of military material by private actors to belligerents is not prohibited under the Hague Conventions[55]. Therefore, under the traditional law, which reflects a laissez-faire economy, a State had no obligation to prevent its citizens from supplying materials that contributed to the war effort of the belligerent. However, it did have the capacity to impose restrictions on the right of private persons to trade with the

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51 Impartiality is generally considered as a fundamental duty of neutral States. However, Upcher disputes this position and suggests that impartiality is not a concrete rule, but rather a principle that dictates how a neutral State should discharge of its obligations, see (n 12) 73-77, See also Tucker (n 23) 365.

52 Clapham (n 47) 66.

5353 Hague XIII (n 44) Article 6.

54 Yves Sandoz, 'Rights, Powers, and Obligations of Neutral Powers under the Conventions' in Andrew Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 91.

55 HCs V (n 43) and XIII (n 44) Article 7.

belligerents, provided that these restrictions would be impartially applied[56]. Contemporary examples of such legislation include the Arms Trade Treaty (ATT 2012)[57] and the EU Council Common Position (2008)[58].

In addition, it has been suggested that the duty of abstention also covers other forms of aid, including substantial economic aid[59]. Although this issue was not dealt with in the Hague Conventions, a customary rule had emerged during the nineteenth century that prohibited neutral States from providing such assistance to either belligerent[60]. In particular Schindler integrated under the umbrella of the duty of abstention a prohibition of placing "at the disposal of the belligerents troops, war materials, territory, military intelligence and credits for war purposes" (cf Article 5-8 Hague Convention V and Article 6 Hague Convention XIII)[61].

In particular with regards to troops, the combined effect of Articles 4, 5 and 6 of Hague Convention V is that under the law of neutrality only the dispatch of organized groups by a neutral State constitutes a violation. On the contrary it is not required of neutral States to prevent their nationals from volunteering in the armed forces of a party to the conflict, so long as these volunteers depart individually in their own initiative or in disorganized groups[62].

3b.- Duty of prevention and territorial inviolability

The neutral State is also under a duty to prevent the belligerents from using its territory in their war efforts, while it simultaneously enjoys a fundamental right to prohibit a belligerent from conducting military operations on neutral territory, which is considered inviolable[63]. The specific actions described in the following provisions encumber both the belligerent and the neutrals. Belligerents have a duty to refrain from such actions, while neutral States have a duty to prevent them from occurring in their territory.

In the case of land warfare, the neutral State must not allow belligerents to move troops or convoys of munitions of war or supplies across its territory. It must also not allow the erection of communication devices by the belligerents or the formation of corps of combatants or the opening of recruiting agencies in its territory[64].

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[56] Marjorie M. Whiteman, *Digest of International Law*, Vol. 11 (Department of State Publication 1968) 417.
[57] Text in https://www.un.org/disarmament/convarms/arms-trade-treaty-2/. The treaty entered into force in 2014; it has 104 contracting parties among which major arms exporters such as the UK, France, Germany and Brazil.
[58] EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.
[59] Michael Bothe, 'The Law of Neutrality', in Dieter Fleck, *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) 614.
[60] Upcher (n 12) 87.
[61] As mentioned in Clapham (n 47) 66.
[62] Antonopoulos (n 5) 88.
[63] HC V (n 43) Article 1.
[64] HC V (n 43) Articles 2-5.

The duties of prevention at sea are set out in Hague Convention XIII. The first set of duties relates to the prevention of misuse of a neutral State's waters, ports and roadsteads by belligerent warships[65]. To that end, the neutral State is obligated to ensure that a belligerent does not commit acts of hostility in its territorial waters[66], does not replenish arms or ammunition in its ports, roadsteads or territorial waters[67], does not conduct repairs beyond those absolutely necessary to make its vessels seaworthy[68] and refuels its vessels only to the amount necessary to reach the nearest port in its country[69]. Furthermore Article 5 of the Convention enshrines the duty to prevent the establishment of a base of operations of a belligerent in neutral ports and waters[70].

Hague Convention XIII also establishes the twenty-four hour rule. This rule provides that on certain occasions warships of the parties to the conflict are not permitted to remain in the ports, roadsteads, or territorial waters of the neutral State for more than twenty-four hours[71], with the exception of cases of damage or bad weather, where the stay of a warship can be extended[72]. Should the belligerent warship not depart within that time limit, the neutral State has the right to take such measures as it considers necessary to render the ship incapable of taking the sea during the war[73].

The rule's rationale is to prevent a belligerent from seeking refuge from the ships of the other party to the conflict in neutral waters. Though the text of the Hague Convention, refers only to the 'stay' of belligerent warships, the prominent view is that based on the object and purpose of the treaty any passage is also covered[74]. The famous Altmark incident concerned exactly this rule. More specifically during the World War II a German auxiliary warship spent two days passing through the territorial waters of Norway, in order to escape the British Royal Navy. Norway suggested that Hague Convention XIII imposes no time-limit on mere passage, but the argument was rejected[75].

It should be noted that the aforementioned articles indicate that it is incumbent upon the belligerent to not use neutral ports, roadsteads and territorial waters for a prohibited

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65 HC XIII (n 44) Article 9: "A neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships or of their prizes. Nevertheless, a neutral Power may forbid a belligerent vessel that has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads".
66 Ibid Article 2.
67 Ibid Article 18.
68 Ibid Article 17.
69 Ibid Article 19.
70 Ibid Article 5.
71 Ibid Articles 12,13,16.
72 Ibid Article 14.
73 Ibid Article 24.
74 Bothe (n 59) 622.
75 See Humphrey Waldock, 'The Release of the Altmark's prisoners'(1947) 24 *BYIL* 216; Edwin Borchard, 'Was Norway Delinquent in the Case of the Altmark?' (1940) 34 *AJIL* 289.

use. However, the corresponding duty of the neutral state to prevent such use is derived from Article 25 of the Convention and customary law[76].

A neutral State must also prevent the fitting out or arming of any vessel within its jurisdiction, when it has reason to believe that the vessel is intended to be used in hostile operations against the adversary and the departure of any vessel that has been adapted entirely or partly within its jurisdiction for use in hostilities.[77] It could be said that this duty to prevent vessels from being supplied to belligerent forces is the maritime equivalent of the general prohibition of assisting belligerents in their military effort[78].

It should be specified, that the distinction between assistance by the State and by private persons or entities made in the field of land warfare, does not apply in the context of naval warfare. Thus, the duty to prevent fitting out and arming of vessels in neutral jurisdiction extends to both belligerent private vessels as well as warships[79].

3c.- Duty of impartiality

The duty of impartiality[80] provides that a neutral state is required to fulfill its obligations and enforce its rights in a manner equal toward all belligerents[81]. Thus, if for instance a neutral State has exercised its right to regulate arms trade between individuals and parties to the conflict, then it must ensure that these rules restricting the private export of war materials are applied equally to both belligerents.

However, equal treatment is not due in all circumstances and at all times, but specifically in acts of military relevance. As Seger stated: '[T]he principle of equal treatment only applies to acts of the neutral state which are of military relevance to the belligerents. It does not require the neutral to treat them impartially or equally in other areas, such as politics, human rights, or the media. For instance, a neutral state may criticize one party for resorting to armed force or for not respecting the laws of armed conflict without violating its neutrality.'[82].

3d.- Duty of acquiescence

Some scholars have suggested that a neutral State also bears a duty of tolerance or acquiescence towards belligerent rights or measures[83]. Under the traditional law of neutrality, belligerents can undertake certain measures to interfere with and control neutral shipping in order to prevent war materials from reaching their adversary. This

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[76] Upcher (n 12) 99.
[77] HC XIII (n 44) Article 8.
[78] Bothe (n 59) 621.
[79] Upher (n 12) 99.
[80] HCs V (n 43) and XIII (n 44) Article 9.
[81] Tucker (n 23) 365.
[82] Paul Seger, 'The Law of Neutrality' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014)257.
[83] George Politakis, *Modern Aspects of the Law of Naval Warfare and Maritime Neutrality* (Kegan Paul International Ltd 1998) 369; Drew (n 31) 22.

right is correlative with the right of neutral merchants to engage in trade with belligerents. Therefore, although neutral merchants are not prohibited to engage in trade with the parties to the conflict, they do so with the risk of their cargo and vessels being seized.

In particular the measures that belligerents can undertake against neutral shipping include: the exercise of the rights of visit and search of neutral merchant vessels on the high seas and the EEZ of other States, the right to designate goods and items as contraband of war, the right to set up and enforce a naval blockade, the seizure or the destruction of neutral merchant vessels and the ability to establish 'maritime exclusion zones' for the conduct of hostilities. Although these rights were initially developed in the maritime context, it is accepted that they are also applicable in air warfare[84]. Neutral States are under an obligation to submit to the exercise of these belligerent rights, provided their exercise is in conformity with the applicable law and does not violate the territory of the neutral State[85].

4.- Challenges to the traditional law of neutrality

Sir Arnold McNair remarked in 1932: "I cannot tell you what the law of neutrality is today, I can tell you where to find what was the law of neutrality in 1914, but I cannot conscientiously tell you what it is today".[86] The development of the law of neutrality reached a climax in the partial codification of the laws of war in 1907. However, in the decades to come its relevancy and content would be severely challenged, to the point that several scholars argued that the law of neutrality had become obsolete[87].

The two World Wars of the twentieth century placed a serious strain on the compromise of the interests of belligerents and neutrals, which was the crux of the law of neutrality. Their very nature as 'total wars' alongside the massive destruction they caused due to the employment of new technological means of war, such as submarines and aircraft, demonstrated the inadequacies and lacunae of the existing legal framework[88]. In addition- and especially in the context of World War II- morality considerations reemerged[89]. World War II was perceived as a crusade against the powers of the Axis and

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[84] Upcher (n 12) 162.
[85] Ibid.
[86] Quoted in Upcher (n 12) 2 n7.
[87] Nicolas Politis, *Neutrality and Peace* (Carnegie Endowment for International Peace, 1935); C. G. Fenwick, 'Is Neutrality Still a Term of Present Law?' (1969) 63 *AJIL*, 101–102.
[88] Egon Guttman, 'The Concept of Neutrality Since the Adoption and Ratification of the Hague Neutrality Convention of 1907' (1998) 14 *AUILR* 55,58; Hatsue Shinohara, 'International Law and World War I' (2014) 38 *Diplomatic History* 880, 883.
[89] See Krister Wahlbäck, 'Neutrality and Morality: The Swedish Experience' (1998) 14 *AUILR* 103; Dietrich Schindler, 'Neutrality and Morality: Developments in Switzerland and in the International Community' (1998) 14 *AUILR* 155; Henry I. Sobel, 'Neutrality, Morality and the Holocaust' (1998) 14 *AUILR* 205.

neutrality was considered as 'indifference, callousness, or a studied calculation of costs and benefits'[90].

Beyond considerations of morality and the magnitude of these wars, another factor that contributed to the skepticism towards the law of neutrality was the flagrant violations of its rules by the parties to the conflict[91]. Examples of these violations are the practice of 'distance blockade', meaning the institution of total exclusion zones and the all-inclusive contraband lists that abolished the distinction between absolute and conditional contraband[92].

Nonetheless the States that deviated from the established rules of the law of neutrality proceeded to excuse their actions by presenting them either as acts of reprisal in order to counter prior violations of the laws of war by the enemy[93] or as acts undertaken in a state of necessity. In either case this need for a justification constituted in principle an admission of the continuing validity of the law of neutrality[94].

4a.- Collective security and law of neutrality

I.- In the aftermath of the WWI, States created the League of Nations in an attempt to enforce peace through international law[95]. To that end, the Covenant of the League of Nations introduced a system based on sovereign equality. After World War II and the adoption of the United Nations Charter a modified, more centralized system of collective security, that places a UN institution at the center of decision-making and action, was established[96]. The foundations of neutrality are in sharp contrast with the idea behind this system. In juxtaposition to neutrality which aims to prevent the expansion of conflict through an individual duty of abstention, in the U.N. system peace is guaranteed by the Security Council through collective action[97].

More specifically, under the United Nations framework, in the event of a threat or breach of the peace or an act of aggression, the Security Council is empowered to identify the aggressor and to take enforcement action on behalf of all member States, in order to maintain or restore international peace and security[98]. This action may include non-military sanctions under Article 41 or military sanctions under Article 42 and member States, when called upon by the Security Council to do so, are obligated to

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[90] Vagts (n 6) 84.
[91] George Ginsburgs, 'The Soviet Union, the Neutrals and International Law in World War II' (1962) 11 *ICLQ* 171.
[92] See Oppenheim (n 10) 802-804; Politis (n 87) 40.
[93] For instance, the establishment of maritime exclusion zones in which all vessels, both enemy and neutral, were liable to attack without warning by the powerful belligerents in World Wars I and II was justified as acts of reprisal. See also Neff (n 40) 469-470.
[94] Antonopoulos (n 5) 121.
[95] See Hans Kelsen, *Peace through Law* (The University of North Carolina Press 1944).
[96] For a comparison between the two systems see N. D. White, 'From Covenant to Charter: A Legacy Squandered?' (2020) 22 *International Community Law Review*, 310.
[97] Georgios C. Petrochilos, 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality' (1998) 31 *Vanderbilt Journal of Transnational Law* 575, 580.
[98] UN Charter Articles 39, 41 and 42.

provide assistance to the United Nations' action for the implementation of the Security Council's decision and to refrain from assisting any nation against whom such action is directed[99]. Additionally, Article 103 of the UN Charter establishes the supremacy of obligations under the Charter in case of a conflict with other international obligations of a State[100].

It follows that the system of collective security in its initial conception and ideal application leaves no room for abstention and impartiality, which are fundamental notions of the law of neutrality. However due to the Cold War split among the permanent members of the Security Council, that organ never assumed the collective security role initially envisioned for it. As of today, the Security Council has neither made a determination of an act of aggression under Article 39 of Chapter VII of the Charter; nor identified a State as the aggressor.

As Seger pointed out: 'The system of collective security, if it worked effectively, simply would leave no room for neutrality'[101]. This sentence and in particular the phrase '…if it worked effectively…' entails the crux of the issue. The aforementioned obligations of the member States, which are incompatible with the status of neutrality, come into existence only if the Security Council has discharged its responsibility to activate Chapter VII of the Charter.

To what extent the Security Council has actually done so, is a matter that must be ascertained in each particular case. If the Security Council does not identify an aggressor or oblige States to support the United Nations' action to maintain or restore peace, the law of neutrality still applies[102]. In other words the traditional duties of abstention and impartiality have not been excluded by the Charter *in toto* but may in particular cases be suspended by a binding decision of the Security Council.

4b.- Uniting for Peace Resolution

It has also been suggested that action by the General Assembly under the emergency procedure of the 'Uniting for Peace Resolution' has the same effect on neutrality as enforcement action by the Security Council under Chapter VII of the Charter, namely the exclusion of strict impartiality[103]. The validity of the Uniting for Peace Resolution in

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[99] Ibid Articles 2(5), 25, 43 and 49.

[100] It is accepted that under Article 103, obligations under the Charter prevail over customary obligations as well. See Michael Wood, 'The UN Security Council and International Law: The Legal Framework of the Security Council' (Hersch Lauterpacht Memorial Lectures, University of Cambridge 2006) https://www.lcil.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.lcil.law.cam.ac.uk/Image/Publications/2006_hersch_lecture_1.pdf . See also Security Council Resolution 670 which emphasized that the obligations of the Charter prevailed over obligations stemming from the law of neutrality.

[101] Seger (n 82) 262.

[102] Oppenheim (n 10) 647-652; Joseph Kunz, 'The Laws of War' (1956) 50 *AJIL* 313, 326-327; Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) 404 ;Politakis (n 83) 386–389; Upcher (n 12) 160-161; Antonopoulos (n 5) 64.

[103] Antonopoulos (n 5) 66.

terms of the Charter has been challenged. Some critics argued that based on Articles 5, 24, 39, 50, 53, 99, and 106 of the Charter the Security Council maintains the primary responsibility for the maintenance of international peace, while supporters of its validity suggested that the General Assembly retains a residuary competence in the same regard based on the wide terms of Article 10 and Article 11, paragraph 4.

However, the gist of the issue does not lie in the 'constitutionality' of this procedure, but on the lack of binding force of the General Assembly's Resolutions[104]. State practice has indicated that when States are called upon to undertake enforcement action, but are not required to do so, the law of neutrality is considered as applicable[105]. For instance, when the Security Council authorized Member States to use force in response to Iraq's aggression against Kuwait[106], Iran and Jordan declared their neutrality and their ability to do so was acknowledged by other States[107]. Thus, even if the action pursuant to the Uniting for Peace Resolution procedure is action under Chapter VII of the Charter, its effects should be equated to those of SC Resolutions that are of a rather permissive nature and do not displace the law of neutrality.

4c.- Neutrality and the prohibition on the use of force

Under traditional international law, neutrality was a legal status conditional upon the existence of war. States had the unrestricted right to go to war, which was considered a permissible policy, and neutral States wished to ensure that they would be protected from its consequences. However, after World War I the concept of a war of aggression was gradually outlawed. In particular this process was initiated by Article 12 of the League Covenant that regulated resort to war, advanced by the abolishment of war as an instrument of national policy in the 1928 Pact of Paris and completed with the prohibition of the threat or use of force in Article 2 (4) of the UN Charter[108]. Under the Charter, States are allowed to use force only pursuant to a Security Council authorization under Article 42, or in the exercise of their inherent right of individual or collective self-defense against an armed attack under Article 51.

The UN Charter's scheme regulating the use of force shook the foundations of neutrality and triggered two important debates. Firstly, it was questioned whether the law of neutrality, a status previously dependent upon the existence of war, could exist outside the scope of a declared war. Secondly, the question whether the legal status of neutrality was optional or mandatory became more prominent. Both issues will be examined in the subsequent paragraphs.

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[104] Brownlie (n 102) 404.
[105] Upcher (n 12) 151.
[106] The authorization was only given to States 'co-operating with government of Kuwait'.
[107] United States: Department of Defense Report to Congress on the Conduct Of the Persian Gulf War – Appendix on the Role of the Law of War (1992) 31 *ILM* 612,637.
[108] This prohibition is also customary international law. See *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (Merits) (1986) ICJ Rep 4, 188.

I.- Application of the law of neutrality

The status of war in contemporary international law is at best dubious and unclear and has generated a considerable amount of debate[109]. According to the classical state of war doctrine, a state of war exists if at least one of the parties to a conflict admits or declares it to exist. However in the years following World War II, Article 2(4) of the Charter reaffirmed the prohibition of war, already part of customary law,[110] and the 1949 Geneva Conventions detached the application of international humanitarian law (or laws of war) from the higher threshold of the existence of a declared war and expanded it to all cases of armed conflict[111].

Following these developments international law has evolved and it is now uncontestable that the legal concept prompting the application of IHL has become the armed conflict, regardless of whether that armed conflict is also characterized as war. Thus, the application of IHL has been detached from the will of the belligerents and is now dependent on the factual situation of the existence of armed hostilities. However, the issue of whether the law of neutrality has evolved alongside the rest of *ius in bello* is controversial. In general, four arguments have been advanced; war has been abolished and so has neutrality; the law of neutrality continues to apply only in case of war; it applies in all cases of international armed conflict; neutrality is invoked in conflicts of a certain scale and intensity.

i.-Neutrality no longer applies

Following the establishment of the UN, it was asserted that because 'going to war' is incompatible with Article 2 (4) UN Charter, war no longer constitutes an institution of international law[112]. According to this submission, no legal consequences, including the application of the law of neutrality, arise out of deciding that a particular conflict constitutes a 'war'. However, this account seems oblivious to reality. Although not without controversy, both the concepts of war and neutrality have survived to this day, at least in some shape or form.

In particular for the law of neutrality[113] - besides the obvious fact that Hague Conventions V and XIII are still in force and binding upon their State parties- its continued validity is evidenced in State practice and international and national case law. The law of neutrality has been referenced by States in the contexts of multiple armed conflicts, such as the Arab-Israeli conflict, the 1965 Indian-Pakistani conflict, the Gulf

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[109] See generally Dinstein (n 50) and Clapham (n 47).
[110] See Brownlie (n 102) 109-112.
[111] Common Article 2 of the Geneva Conventions I-IV.
[112] See Elihu Lauterpacht, 'The Legal Irrelevance of the "State of War"' (1968) 62 *Proceedings of the American Society of International Law at Its Annual Meeting* 58.
[113] For the state of war see Christopher Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *ILCQ* 283.

war, the conflict in Falklands and the Iraq invasion in 2003[114]. Moreover, the law of neutrality is referenced in the military manuals of a number of States[115].

In addition, both the ICJ and national courts that dealt with cases of alleged violation of the law of neutrality have confirmed its continued application[116]. The International Law Commission, in its 2011 Draft Articles on the effects of armed conflicts on treaties, also refers to the law of neutrality as a valid and relevant part of international law[117].

ii.-Neutrality in war

A significant number of legal scholars support the view that war as a legal notion has survived, and that neutrality remains conditional upon its existence[118]. It is commonly suggested that for armed hostilities to be described as war, war has to be declared or at least the hostilities have to be accompanied by a subjective element, namely the intent to conduct a war (*animus belligerendi*)[119]. However, should the threshold of the application of the law of neutrality be left to the discretion of the parties to the conflict, then its application could be easily evaded[120]. Therefore, subjective criteria ought to be excluded.

But even with regards to the objective elements of war, prominent authors have recognized the challenge of determining when the threshold of a war in a material sense has been crossed[121]. In addition, Schindler pointed out that: 'State practice since 1945 shows that, in a state of war, third parties generally do not act in a different way than in that of an armed conflict without war'[122]. Therefore, a distinction between war and armed conflict for the purposes of the law of neutrality appears to be difficult and in any case irrelevant[123].

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114 See Petrochilos (n 97).

115 See indicatively UK Ministry of Defence, The Manual of the Law of Armed Conflict(OUP 2004) 1.42; Germany Joint Service, Law of Armed Conflict Manual (Bundesministerium der Verteidigung 2013), para. 1201, US Department of Defense, Law of War Manual, June 2015 (updated December 2016), Chapter XV.

116 *Legality of the Use or Threat of Nuclear Weapons*, (Advisory Opinion) ICJ Reports 1996, 66 (paras 88 et seq.); *Hogan v An Taoiseach et al.*, High Court of Ireland, Judgment of 28 April 2003 468, 2I.R., 504 et seq.; Bundesverwaltungsgericht (German Federal Administrative Court), Judgment of 21 June 2005, 59 Neue Juristische Wochenschrift (2006) 77, 96.

117 Art. 17, Yearbook of the International Law Commission 2011, Vol. II, Part Two.

118 Hans Kelsen, *Principles of International Law* (2nd edn Rinehart & Inc. Company 1952) 155; Kunz (n 102) 326; Oppenheim (n10) 655; Arnold Duncan McNair and Arthur Watts, *The Legal Effects of War* (4th edn CUP 1967) 9; Erik Castrén, *The Present law of War and Neutrality* (Academia Scientiarum Fennica 1954) 34-35.

119 Bothe (n 59) 609.

120 During the Faklands conflict UK denied it was at 'war' with Argentina, however that did not affect the application of the law of neutrality. See Petrochilos (n 97) 599.

121 See Castrén (n118) 423, where he maintains that in situations of armed force it may be difficult to determine whether the situation is a war or 'merely some other kind of armed activity'. See also Dinstein (n 50) 230, where he admits that 'it is not always easy to whether resort to force in a particular situation amounts to war or is merely short of war'.

122 David Schindler, 'State of War, Belligerency, Armed Conflict' in Antonio Cassese (ed) *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica1979) 15.

123 Petrochilos (n 97) 613.

iii.- Neutrality in extended IACs

To that end the position adopted by contemporary scholars is that the law of neutrality applies in cases of international armed conflict[124]. The question that follows this statement is whether it applies to all situations of international armed conflicts or if there are qualifications. The answer to this question has not been definitive. It has been suggested, that for the law of neutrality to come into play the situation of armed conflict has to be one of a certain intensity, scale or duration.

This approach appears consistent with State practice, and it explains why States are more eager to comply with their duties of neutrality in large scale or high intensity armed conflicts. The rationale behind this suggestion is that the lower threshold of an international armed conflict should apply for rules of humanitarian character, in order to ensure the widest protection possible, but not for the rules that impose duties on neutral States[125]. Furthermore, this interpretation could explain the reference in Additional Protocol I of the Geneva Conventions to both neutrals and States 'not party to the conflict'. In particular the latter term could refer to low-intensity, non-protracted armed conflicts[126].

On the other hand, one might say that this approach does not stray far from the second submission. In particular the most prominent suggestion of a threshold at which the law of neutrality would apply has been that of a state of 'generalized hostilities' which corresponds to a situation of "war in a material sense"[127] and is thus problematic in the same ways.

Another criterion that has been proposed to determine when the law of neutrality applies, is the exercise of belligerent rights by the parties to the conflict. It is true that most contemporary instances where the traditional law of neutrality was invoked related to naval warfare[128]. It is also accurate that the exercise of belligerent rights leads to intense interactions between parties to the conflict and non-participating States. However, the argument that a party to the conflict can impose duties of neutrality on non-participating States simply by unilaterally intensifying the situation and exercising control over neutral shipping seems to contradict the current status of international law, especially taking into account the current law on the use of force[129]. In addition, this approach ignores the instances where States relied upon the law of neutrality in situations of armed conflict that are predominantly related to land and air.

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[124] Marco Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 475; Bothe (n 59) 608; Antonopoulos (n 5) 222; Upcher (n 12) 50-53.
[125] Brownlie (n 102).
[126] Bothe (n 54) 609.
[127] Petrochilos (n 97) 605.
[128] Gavouneli (n 19) 272.
[129] Greenwood (n 113) 300.

For example, in the case of the 2003 Iraq invasion, Switzerland denied overflight of the Coalition's military aircraft over its territory on the basis of the law of neutrality[130]. Furthermore, although several States provided some form of assistance to the Coalition, they felt the need to justify this conduct and deny any violation of duties of neutrality, indicating that they considered themselves bound by the law of neutrality in the context of this international armed conflict[131].

In conclusion, while the approach that the law of neutrality applies in situations of armed conflict of an "extended" character is evident in State practice, such practice has not been consistent enough for a general rule to emerge and hence: 'One can only say that there must be a conflict of a certain duration and intensity'[132].

iv.- Neutrality in all IACs

The last submission locates the application of neutrality in all international armed conflicts, irrespective of intensity, duration or scope. This approach provides clarity and consistency, as situations of international armed conflict are easier to identify.

The arguments in favor of applying the law of neutrality in all international armed conflicts are mostly based on humanitarian considerations. For instance, the ICRC submits that the law of neutrality and international humanitarian law share, to some extent, the same object and purpose of limiting the adverse effects of an international armed conflict and hence both bodies of law apply to situations of international armed conflict. While this argument appears to make sense at first glance, it relies on the least common denominator of the two bodies of law and is thus not a strong argument.

Although humanitarian considerations led to the inclusion of duties on neutrals in the Geneva Conventions, the traditional law of neutrality is the product of a different time. It was developed not for humanitarian purposes, but in order to limit the armed conflict between the belligerents and prevent its escalation and in order to balance antithetical economic interests[133]. Therefore, the law of neutrality should not be applied in all conflicts, but in those that are of a particular scope and intensity and thus pose a real risk of escalation or significantly affect the interests of non-participating States.

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130 The then Swiss President Couchepin declared on 20 March 2003 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 [...]'. See Switzerland, 03.2003 *Déclaration du Conseil fédéral concernant la crise en Irak*, BO 2003 N 531.

131 For instance, Ireland allowed US aircraft to use the Shannon airport for stop-overs on their way to Iraq, but insisted that: "the provision of facilities does not make Ireland a member of a military coalition nor does anybody regard us as such. [Ireland] remains militarily neutral" See Ireland, Foreign Conflicts: Motion (2003) 563 Dail Eireann Debate.

132 Bothe (n 59) 609.

133 See Christopher Greenwood, 'Historical Development and Legal Basis', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn, OUP 2008) 11: 'International humanitarian law thus includes most of what used to be known as the laws of war, although strictly speaking some parts of those laws, such as the law of neutrality, are not included since their primary purpose is not humanitarian.'.

Another argument is that the law of neutrality should also apply in low-intensity conflicts, because it is the only juridical basis for claims of reparation for injury suffered by a violation of the rights of the neutral States and their nationals[134]. It is clear that this is not a *lex lata* but rather a 'last resort' argument, which are generally not accepted in international law[135].

It has also been suggested that this position was adopted by the ICJ in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, where it was stated that : '… *as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used*'.[136]

However, it is the opinion of the author that this dictum is too vague to constitute evidence that the Court submits that the law of neutrality, as a system of rights and duties, is applicable in all international armed conflicts. It is not clear what is meant by the term 'principle of neutrality' and whether it encompasses the duties and rights of belligerent and neutral States or simply neutrality stripped to its bare minimum content. An argument could be made for the latter approach, based on the distinction between the "principle of neutrality" and 'humanitarian principles and rules'[137]. It can be said that the fact that there is no mention of rules in relation to neutrality indicates that the Court is not referring to the legal framework of the law of neutrality.

This difference in language prompted Upcher to construe an intermediate position, according to which the law of neutrality is applicable in all international armed conflicts, but the rights and duties escalate according to the scope of the conflict[138]. However, Upcher does not contribute instances of State practice and of the necessary *opinio iuris* in support of this suggestion. Rather it appears that he propounds this view in order to balance the 'uncomfortable' realization that, if it is accepted law of neutrality applies *in toto* in all international armed conflicts, then there is a very low rate of compliance.

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134 Antonopoulos (n 5) 222.
135 See for instance *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits) (2012) ICJ Rep 99, 98-104.
136 See (n 116*)* [89].
137 Upher (n 12) 53.
138 Ibid 53, See also Wolff Heintschel von Heinegg 'Benevolent Third States in International Armed Conflicts: the Myth of the Irrelevance of the Law of Neutrality' in Michael Schmitt and Jelena Pejic (eds) *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff Publishers 2007) 561 : 'According to modern State practice, the applicability of the law of neutrality depends on functional considerations that will, in most cases, result in differential or partial applicability of that body of law.'; ICRC's Commentary, where it is suggested that this compartmentalization occurs only in practice and not in law and it is due to the fact that : 'many of the rights only to specific types of events, which do not necessarily arise in every type of international armed conflict'.

Following this analysis, it is the position of the author that the law of neutrality as a legal framework consisting of interconnected duties and rights applies in situations of 'extended' international armed conflicts, where the mutual taxing compromises of belligerent and neutral States is necessary and reasonable. To accept the position that the law of neutrality applies in all situations of international armed conflict, would be analogous to the trend of 'over-classification' and it would bear the same dangers[139].

II.- Qualified neutrality

The developments of the law on the use of force have led several authors and States to suggest, that the law of neutrality has evolved to provide States with the right to discriminate against the belligerent who unlawfully resorted to force, even absent Security Council action under Chapter VII, and that neutrality has become purely optional[140].

There are indeed a number of cases where States have adopted a stance of non-belligerency or qualified neutrality, meaning an intermediate position between belligerency and neutrality[141]. The US, before entering the Second World War, provided assistance to Great Britain in a way incompatible with the law of neutrality[142]. In addition, during the Gulf War, the US progressively adopted a policy of 'qualified neutrality' in favour of Iraq and discriminated against Iran by agreeing to the reflagging of eleven tankers of Kuwait in the US. Another recent example of such practice is the declaration of non-belligerency by Italy during the invasion of Iraq in 2003 and the "unneutral" assistance that other States offered to the US and Great Britain, all the while retaining their status as non-participants to the conflict[143].

Furthermore, the concept of 'qualified neutrality' is mentioned in the US manual as an option for neutral States based on of the prohibition of the use of force and refers to the policy adopted by the US towards the UK during the first stages of World War II[144]. However it is recognized in the manual that this policy was controversial[145].

In spite of this practice, it is the view of the author that no customary status of qualified neutrality has emerged. State practice in this regard has been sparse and inconclusive and

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[139] For the concept of over-classification see indicatively Gloria Gaggioli and Pavle Killbarda 'Counterterrorism and the risk of over-classification of situations of violence' (International Review of the Red Cross, February 2022) https://international-review.icrc.org/articles/counterterrorism-and-risk-of-over-classification-916, accessed 11 September 2022.

[140] Clapham (n 47) 72 where he states: 'In sum, it seems fair to draw the partial conclusion that the duties attached to Neutral Status in a strict sense apply where states have formally declared themselves to have this Status.'.

[141] See generally Andrea Gioia, 'Neutrality and Non-Belligerency', in Harry Post (ed.), *International Economic Law and Armed Conflict* (Martinus Nijhoff Publishers 1994).

[142] Politakis (n 83) 458 et seq.

[143] See Luca Ferro and Nele Verlinden, 'Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties' (2018) 17 *Chinese Journal of International Law* 15,17-20.

[144] United States Department of Defense Law of War Manual 2015 (updated December 2016), 952–953, 15.2.2.

[145] Ibid.

no unequivocal *opinio iuris* can be deduced. As Borchard observed: 'Non-belligerency is a name used as a modern excuse for violating the laws of neutrality and as a hope that warlike acts can be committed while escaping the consequences of belligerency.'[146] For instance, the US was partial towards Iraq, even though it was Iraq who initiated the conflict in September 1980. Germany provided overflight rights for American and British military aircraft during the 2003 Iraq invasion, although it strongly opposed it[147].

Furthermore, the idea that States can unilaterally discriminate against the alleged "aggressor" runs counter to two fundamental concepts of the law of armed conflict. First, it is opposed to the principle of equality of belligerents, according to which international humanitarian law applies equally to both belligerents irrespective of the legality of the resort to force that initiated the conflict[148]. This principle emanates from the separation between *ius ad bellum* and *ius in bello* and ensures that all parties to the conflict will have the same obligations and all protected persons will be equally protected[149]. In *United States v. List* the Tribunal stated that the rules of neutrality apply between belligerents and neutral States irrespective of the cause of war and even if the war itself is illegal[150].

Second, the suggestion that there is an intermediary status between belligerent and neutral[151] contradicts the oppositional binary classification system that permeates the law of armed conflict[152]. Perhaps the most prominent example of binary classification is the distinction between combatants and civilians, since the term 'civilian' is defined in opposition of the term 'combatant'[153].

What is maybe the most important point in this regard, is the significance of a strict observance of neutrality laws for international relations and the victims of armed conflict. It is by virtue of this body of law that neutral states are clearly distinguished from belligerents and are able to maintain friendly relations with them and even take on the role of a mediator. It is therefore an issue of utmost importance that this distinction remains intact.

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146 Edwin Borchard, 'War, Neutrality and Non-Belligerency' (1941) 35 *AJIL* 618, 624.
147 SC Verbatim Record, UN Doc. S/PV.4701 (5 February 2003), 36-37/39.
148 Dieter Fleck, '*Scope of Application of International Humanitarian Law*' in (n 59) 57.
149 AP I stipulates that the principles of international humanitarian law 'must be applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties'. Protocol Additional to the Geneva Conventions of 12 August 1949 (AP I), 16 International Legal Materials 1391. See also Marco Sassoli, (n 24) 2; Fleck (n 59) 57.
150 See Surya P. Subedi 'Neutrality in a Changing World: European Neutral States and the European Community' (1993) 42 *ICLQ* 238,255.
151 Sassoli (n 149) 477.
152 Upcher (n 12) 25.
153 AP I (n 149) Article 50.

It has also been suggested that no absolute neutrality can exist in an era of 'regional and collective self-defence arrangements', such as the North Atlantic Treaty[154]. However, this suggestion is highly controversial and has been rejected by national courts. The Federal Administrative Court of Germany rejected Germany' argument that during the invasion of Iraq it provided overflight rights to UK and US, because it was a NATO member by stating that the law of neutrality applied and that Germany: 'was not freed from these obligations under international law by being [...] a member of NATO'[155].

To conclude, neutrality is not optional, in the sense that each state is free to unilaterally circumvent the duties of neutrality[156]. On the contrary, it is mandatory and the States that adopt a stance of qualified neutrality, either formally or informally, are in fact violating their duties under the law of neutrality.

5.- Present status of particular rights and duties

Beyond the advancements that threatened the very existence of the law of neutrality, there have also been developments that challenged the content of this body of law. The traditional law of neutrality was a product of its time and thus reflected notions that today appear outdated. More specifically, the separation of State and private armament industry and the status of belligerent rights exist in a state of serious uncertainty.

5a.- The duty of a neutral State not to supply arms to a belligerent

As Politakis eloquently observed: 'Neutrality presupposes war. War presupposes arms. And arms presuppose humans, sometimes alleged neutrals, disposed to furnish them in abundance.'[157]. Under the traditional law of neutrality while States were prohibited from furnishing war material to either belligerent, 'humans', meaning citizens of those States were not. This distinction was rooted in the laissez-faire principle that dominated the nineteenth century and dictated a sharp functional and economic divide between the State and individuals.

Over the past century, the demarcation of States from private armaments industries has been significantly blurred. Contemporary international arms production and trade is predominantly regulated and controlled by States[158]. In this context scholars have suggested that there exists an emerging rule of customary law, according to which neutral

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[154] See Department of Defence, *Law of War Manual* (31 May 2016) § 15.2.4;. See also Kai 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 11 September 2022.

[155] As mentioned in Ferro (n 143) 19.

[156] Ibid 25; Bothe (n 59) 603; Upcher (n 12) Chapter 1.

[157] George P. Politakis, 'Variations on a Myth: Neutrality and the Arms Trade' (1992) 35 *GYIL* 435.

[158] Bothe (n 59) 615.

States, to the extent that they control arms trade, are under a duty to prevent their citizens from furnishing military assistance to belligerents[159].

This view was clearly espoused by the German military manual which states that: 'State practice has modified the former conventional rule that a neutral state is not bound to prohibit export and transit of war materiel by private persons for the benefit of one of the parties to the conflict (Art. 7 HC V). To the extent to which arms export is subject to control by the state, the permission of such export is to be considered as unneutral Service.'[160]. It also finds some support in State practice, since there are instances where neutral States have imposed arms embargoes on belligerents.

In the 1930s, the United States enacted legislation prohibiting the export of arms to belligerents[161]. Later on, at the outbreak of the Arab-Israeli conflicts the United States, Great Britain, and France concluded a Tripartite Agreement to embargo all arms exports to the Middle East[162]. Other States also imposed embargoes during the open hostilities[163]. Although this practice was fairly inconsistent and it was not always clear whether it was a matter of policy or legal duty, States for the most part appeared willing to prohibit arm supply during open hostilities, thus indicating the existence of a neutral duty.[164] In addition during the Iran- Iraq war, non-participating States that did permit arms export to belligerents, either did so covertly or on the basis of some justification, such as the existence of contracts predating the conflict[165].

Therefore, there is some evidence that under the contemporary law of neutrality, States should prohibit private arm sales to belligerents to the extent that they control this industry. However, it is not clear what kind of material is covered by this prohibition and whether the duty of the State to prohibit arm exports is absolute or is limited to the 'means at its disposal'. Due to the lack of density of State practice and clear *opinio iuris*, neither questions can be determinatively answered at this point. Nonetheless, with regards to the second question, it has been suggested that States, in preventing war material export to belligerents, should deploy the means reasonably available to them[166].

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159 Ibid, Drew (n 31) 10; Politakis (n 83) 34 who suggests a de lege ferenda, moral argument; Patrick M. Norton, 'Between the Ideology and the Reality*: The Shadow of the Law of Neutrality*' (1976) 17 Harvard International Law Journal 249, 298; Walter L. Williams Jr 'Neutrality in Modern Armed Conflicts: A Survey of the Developing Law' (1980) 90 *Military Law Review* 9, 33.

160 Federal Ministry of Defence of the Federal Republic of Germany, 'Humanitarian Law in Armed Conflict- Manual' German (1992) VR II, 1112.

161 See The Neutrality Act of 1939, Ch. 2, § 7, 54 Stat. 8, 22 U.S.C. 447 (1970); The Neutrality Act of May 1, 1937, § 1, 50 Stat. 121 (1937), and the Act of Jan. 8, 1937, 50 Stat. 3 (1937), prohibiting the export of arms to Spain during the Spanish Civil War.

162 See Tripartite Declaration Regarding Security in the Near East: Three Power Statement Released May 25, 195o, and Statement by President Truman Released May 25, 1950, 22 *DEP'T STATE BULL.* 886 (1950).

163 For instance, West Germany and Canada. SIPRI Arms Trade 515.

164 Norton (n 159) 299.

165 Upcher (n 12) 82.

166 Williams Jr (n 159) 33., Upcher (n 12) 87.

This view corresponds with the fact that most of the neutral States' other obligations are of due diligence[167].

5b.- Belligerent rights and the use of force

Belligerent rights were first enshrined in the Paris Declaration of 1856 and later reaffirmed in 'soft law' documents, namely the Declaration of London concerning the Laws of Naval War (1909), the San Remo Manual on International Law applicable to Armed Conflict at Sea (1995) and the ILA Helsinki Principles on Maritime Neutrality (1998). These rights were established by belligerents in an era where the resort to force was permissible and allowed belligerents to interfere with neutral shipping. However, this context was altered by the UN Charter's legal framework on the use of force and the status of belligerent rights was left in a state of uncertainty.

It is generally accepted that belligerent rights have survived these developments and continue to exist[168]. State practice since 1945 is indicative of their continuing validity. During the Korean War (1950–1953), the UN established a blockade of North Korea and as part of the Indo-Pakistan war, India blockaded East Pakistan's coast, captured merchant ships and attacked and sunk the vessels that ignored its orders[169]. India invoked self-defence under Article 51 as the legal basis for its action.

In the context of the 1982 Falklands conflict both the UK and Argentina established maritime exclusion zones of up to 200nm. On 28 April 1982 the UK declared a total exclusion zone in which: 'any ship and any aircraft, whether military or civil, which is found within this zone without due authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by the British forces'[170]. It was repeatedly stressed that the UK was exercising its inherent right to self- defence following Argentina's 1982 invasion and continuing occupation of the Falkland Islands [171]. Third states' reactions to the establishment of the exclusion zone were heavily influenced by the alliances of the Cold War era. Thus, the UK measure was qualified as a violation of international law by Argentina and its Latin American allies, but received full

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[167] See Bothe (n 59) 616 where it is recognized that : '…besides arms exports controlled by the state, there is a black market which evades state controls'.
[168] Paul Seger (n 82) 147; Antonopoulos (n 5) 101 et seq.
[169] Wolff Heintschel von Heinegg, '*Warships*', (Max Planck Encyclopedia of Public International Law 2015), 13.
[170] Letter, dated 28 April 1982, addressed to the President of the UN Security Council available at United Nations Digital Library https://digitallibrary.un.org/record/35171?ln=en, accessed 11 September 2022. On the legality of this practice see Kieran Tickler, 'Understanding the Use of Zones and the Concept of Proportionality: Enduring Lessons from the Falklands War' (EJIL:Talk!, 13 December 2017) https://www.ejiltalk.org/understanding-the-use-of-zones-and-the-concept-of-proportionality-enduring-lessons-from-the-falklands-war/ , accessed 11 September 2022.
[171] Christopher Michaelsen, 'Maritime Exclusion Zones in Times of Armed Conflict at Sea: Legal Controversies Still Unresolved' (2003) 8 *Journal of Conflict & Security Law* 363, 373.

support by the UK's NATO allies[172]. It is worth mentioning that only the USSR officially condemned the British total exclusion zone[173].

The most extensive practice with regards to belligerent rights occurred in the Iran-Iraq conflict, during which both parties established exclusion zones and conducted visit and search operations[174]. Iran's zone ran along the Iranian coast along the length of the Persian Gulf and Iraq's zone extended around an Iranian oil facility on Kharg Island and served Iraq's aim to cut off Iran's oil export[175]. Iraqi officials invoked three distinct legal bases to justify this measure. Firstly, they argued that the right to institute an exclusion zone was part of customary international law. They also qualified these measures as reprisal against Iran's prior illegal interference with the freedom of navigation through international straits and in the territorial waters of Iraq[176]. Lastly Iraq's 'right of legitimate self-defence' was invoked[177].

As the conflict escalated the visit and search operations by both parties to the conflict equally intensified. The international reaction to this practice, although mixed, tilted towards acquiescence[178]. Most States acknowledged the belligerent right of visit and search[179], while some expressed their opposition. Most notably France condemned the Iranian measures and threatened with military response. When in October 1985 the French merchant ship Ville d'Angers was intercepted by an Iranian warship, boarding was prevented by a French frigate. The UK held a unique position as it linked the right of visit and search not to the law of neutrality, but solely to the freedom of navigation and the right of self-defence[180].

During the international armed conflict between the States of NATO and the FRY, NATO forces contemplated imposing a blockade of the port of Bar with the main objective of limiting petroleum imports to the FRY so as "to have a decisive impact on

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[172] Etienne Henry, 'The Falklands/Malvinas War – 1982' in Forthcoming in T. Ruys and O. Corten (eds.), *The Use of Force in International Law: a Case-based approach* (OUP 2017), ANU College of Law Research Paper No. 18-16, 369-370 https://ssrn.com/abstract=3000666, accessed 11 September 2022.

[173] See Wolff Heintschel von Heinegg, 'The Law of Armed Conflict at Sea' in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edn. OUP 2013) 47, where the author argues that the lack of protests was due to the remote location and short duration of the exclusion zone.

[174] For an extensive overview of this practice see Francis V. Russo Jr., 'Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law' (1988) 19 *Ocean Development & International Law* 381.

[175] Horace B. Robertson Jr. 'Interdiction of Iraqi Maritime Commerce in the 1990–1991 Persian Gulf Conflict' (1991) 22 *Ocean Development & International Law* 289.

[176] D.R. Humphrey, 'Belligerent Interdiction of Neutral Shipping in International Armed Conflict' (1997) 2 *Journal of Armed Conflict Law* 23, 32.

[177] See UN doc. S/16590 (27 May 1984).

[178] Humphrey (n 176) 32.

[179] Russo (n 174) 385.

[180] See Christine Gray, 'The British Position in Regard to the Gulf Conflict', (1988) 37 *ICLQ* 420.

military operations in Yugoslavia"[181]. However, NATO States were evidently reluctant to physically enforce this measure, even though an IAC existed and thus the law of neutrality was applicable[182].

In addition, the 2006 Lebanon War included what the UN Human Rights Council characterized as 'a comprehensive blockade of Lebanese ports and harbours'[183] by Israel[184]. The blockade was established on 13th July 2006 following a letter of the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, where it was stated that Israel reserved its inherent right of self-defence under Article 51 of the UN Charter[185].

Finally, a more recent example of relevant practice is the Mavi Marmara incident[186]. Israel has imposed a naval blockade on Gaza since 2007 and in May 2010 Israeli Navy forcibly boarded a 'Gaza flotilla', flying flags of various non-participating States, which was located well beyond Israel's territorial waters. This action was heavily criticized by third States[187] and multiple reports of the incident were conducted, each reaching a different conclusion and thus indicating the unclear status of belligerent rights. More specifically an annex of the so-called Palmer report concluded that using force against a foreign flagged ship is legal if 'used in self-defence, in line with Articles 2(4) and 51 of the U.N. Charter'[188]. Furthermore, the report of the Human Rights Council stated that "a right to visit, inspect and control the destinations of neutral vessels on the high seas' exists only 'upon reasonable suspicion that a vessel is engaged in activities which support the enemy"[189], while an official Turkish report condemned Israeli action as 'unlawful use of force'[190].

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[181] Press Conference given by NATO Spokesman, Jamie Shea and SHAPE Spokesman, Major General Walter Jertz https://www.nato.int/kosovo/press/p990516b.htm, accessed 11 September 2022.

[182] Christopher Greenwood, 'The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign' (2002) 78 *ILS* 35, 55-56.

[183] Human Rights Council, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S2/1 (2006), 62.

[184] On the legality of the Israeli operation in Lebanon see Michael Schmitt, 'Change Direction 2006: Israeli Operations in Lebanon and the International Law of Self-Defense' (2008) 29 *Michigan Journal of International* Law 127.

[185] Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council (12 July 2006) UN Doc. A/60/937–S/2006/515.

[186] See Douglas Guilfoyle, 'The Mavi Marmara Incident and Blockade in Armed Conflict' (2011) 81 *BYIL* 171.

[187] Ibid, 212.

[188] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (2011) 39.

[189] UN Human Rights Council, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance (27 September 2010), 14.

[190] Turkish National Commission of Inquiry, Report on the Israeli Attack on The Humanitarian Aid Convoy to Gaza on 31 May 2010 (2011), 86.

This incident and the subsequent international reaction should not be viewed separately from the general context of the Israel-Palestine conflict. Israel itself has been reluctant to define the type of armed conflict it has been engaged in but has accepted that the law of international armed conflict applies[191]. Additionally, it remains unclear whether Israel has a right to self-defence against Gaza or Palestine[192] and it is debated whether Israel's blockade of Gaza is legal under international humanitarian law.

The practice reviewed suggests that although belligerent rights continue to exist in the context of an international armed conflict and to serve the objective of diminishing the adversary's war fighting or war sustaining effort[193], their exercise has been "infused" with *ius ad bellum* considerations. This is evident by the reluctance of States to rely solely on the law of neutrality for the exercise of belligerent rights and the recurring invocation of the right of self-defence as a legal justification.

More specifically there is evidence that a rule has developed, according to which belligerents' rights including use of force must also be consistent with the UN Charter[194]. The legality of actions undertaken by belligerents is thus evaluated both under the international humanitarian law and the law of neutrality[195] and under the *ius ad bellum*[196].

6.- Consequences of violations

Hague Conventions V and XIII (1907) regulate the rights and duties of belligerents and neutrals but are mostly silent on the consequences of the violation of these provisions. The question thus remains: What measures can a neutral State take in case of a violation of its neutrality by the belligerents and what rights does a belligerent have if a neutral State does not conform with its neutral duties?

6a.- Violations by a party to the conflict

In the absence of *lex specialis*, the general rules of international law on State responsibility are applicable. In particular with regards to what a neutral State is entitled to do in the

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191 *Public Committee Against Torture in Israel v. Israel* (2007) 46 ILM 375, 25.

192 Dapo Akande, 'Is Israel's Use of Force in Gaza Covered by the Jus Ad Bellum?', (*EJIL:Talk*! 22 August 2014) https://www.ejiltalk.org/is-israels-use-of-force-in-gaza-covered-by-the-jus-ad-bellum/ , accessed 11 September 2022.

193In its current armed conflict with Ukraine, Russia has established maritime exclusion zones in the Black Sea and Sea of Azov 'due to counter-terrorists operations' and merchant ships have for the most part complied with Russian demands and avoided these areas. See Paul Pedrozo, 'Ukraine Symposium: Maritime Exclusion Zones in Armed Conflicts' (Lieber Institute West Point, 12 April 2022) https://lieber.westpoint.edu/maritime-exclusion-zones-armed-conflicts/, accessed 11 September 2022.

194 Michaelsen (n 171) 379-380.

195 According to paragraph 67 of the San Remo Manual '[m]erchant vessels flying the flag of neutral States' can be targeted when they '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', or where ships 'otherwise make an effective contribution to the enemy's military action'.

196 Thilo Marauhn and Barry de Vries (eds.), *Legal Restraints on the Use of Military Force* (Brill | Nijhoff 2020) 578, where they refer to this as the "double scrutiny principle".

event of a violation of its neutrality by a party to the conflict, it is stated that a neutral State can demand the cessation of the violation, ask for reparation and adopt countermeasures[197].

For instance, in December 1937, Japanese naval aviators, in the course of military operations against the Chinese forces, bombed and sank the neutral U. S. S. Panay. This act resulted in the death of U.S. citizens and the destruction of US property. The US Government protested the violation of its neutral rights and demanded reparations for the damages it suffered. Japan immediately acknowledged its responsibility for the bombing, offered an official apology, agreed to pay damages and several months later actually paid to the United States damages in the amount of $2,214,007.36 as compensation for the injuries thereby inflicted[198].

Another example is that of the USS Stark incident. On May 17, 1987, a United States Navy frigate, the Stark, located in international waters outside of all exclusion zones in the Gulf was struck with missiles by an Iraqi warplane.[199] The attack resulted in the death of 37 crew members and the wounding of a significant number of others. The US Government protested over the attack and the Iraqi Government apologized for the "inadvertent" action, assumed full responsibility for targeting a neutral vessel in high seas and agreed to pay damages[200].

In addition to ARSIWA, Article 10 of Hague Convention V contains the only reference to use of force by a neutral State against a belligerent. There, it is mentioned that a neutral resisting, even by force, belligerent action that violates its neutrality is not engaging in a hostile act that would transform a neutral into a belligerent. Thus for instance, a neutral State complying with its obligation to take military countermeasures, where a belligerent attempts to use parts of the neutral territory as a base for hostilities, will not lose the advantages of its neutral status[201]. However, in forcibly defending its neutrality, the neutral State is bound by the law on the use of force, meaning that the prior violation must constitute an armed attack and the neutral's reaction must be proportionate and necessary[202].

6b.-The 'unwilling or unable' doctrine

A neutral State may elect not to exercise its right to self-defence in case of a belligerent committed to using its territory for war-related purposes, either because it is afraid of the

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197 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (November 2001) Supplement No. 10 UN Doc A/56/10), Articles 30, 31, 34-41 and 49-54.

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

199 John Cushman, '*Iraqi Missile Hits U.S. Navy Frigate in Persian Gulf*' (New York Times, 18 May 1987) https://www.nytimes.com/1987/05/18/world/iraqi-missile-hits-us-navy-frigate-in-persian-gulf.html, accessed 11 September 2022.

200 Sally V. Mallison and W. Thomas Mallison, 'Naval Targeting: Lawful Objects of Attack' (1991) 64 *ILS* 241, 270.

201 Bothe (n 59) 611.

202 Ibid (n 59) 614, Antonopoulos (n 5) 167.

possibly detrimental consequences or because it does not possess the military capacity to resist. Aggrieved belligerent States attempted to justify the use of force against the neutral State that allegedly violated its duty of due diligence not to allow its territory to be used as a base of operations by the other belligerent, by developing the "unwilling or unable" doctrine[203]. This position is enshrined in the US Law of War Manual where it is stated that: 'Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the forces of one belligerent entering or passing through its territory (including its lands, waters, and airspace), the other belligerent State may be justified in attacking the enemy forces on the neutral State's territory.'[204].

However, this approach is problematic under contemporary international law. More specifically it arbitrarily draws an implied authorization to use force on the territory of the non-participating State from that State's failure to repel a belligerent's use of its territory[205]. As Clapham suggests, although the aggrieved belligerent can take measures to induce compliance[206], any use of force on the territory of the neutral State should be: "justified under the law on the use of force, and not by simple reference to some breach of neutral duties"[207].Otherwise, this action would constitute an act of armed reprisal to redress a previous violation by the neutral State[208]. However, in the Charter era armed reprisals are considered unlawful[209]. Consequently, a reaction by the aggrieved belligerent, which would involve the use of force, is lawful only if the violation of the law of neutrality amounts to an armed attack and the right to self-defence is applicable.

6c.- Transition from neutral to belligerent

These restrictions on the resort to force against neutrals by belligerents exist due to the fact that the relationship between belligerents and neutrals under contemporary international law is one of peace and therefore the laws of peacetime, including the prohibition of the use of force, continue to apply[210]. The strict dichotomy between neutral and belligerent retains continuing vitality and a State can either be a belligerent or a neutral. Considerations of proportionality and necessity under the *ius ad bellum* are only discarded between belligerents[211]. Should a State become a party to the conflict the IHL

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203 See generally Ashley Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483.

204 Law of War Manual (n 154) 14.4.2.

205 Clapham (n 47) 63.

206 See also Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (2017), 153 where it is established that: 'If a neutral State fails to terminate the exercise of belligerent rights on its territory, the aggrieved party to the conflict may take such steps, including by cyber operations, as are necessary to counter that conduct'.

207 Clapham (n 47) 65.

208 Dereck Bowett, *Self-Defence in International Law* (The Lawbook Exchange Ltd. 2009) 168.

209 Bothe (n 59) 611, Ferro (n 143) 20, Michaelsen (n 171) 18.

210 Upcher (n 12) 164.

211 See Michael Bothe, 'Terrorism and the legality of pre-emptive force' (2003) 14 *EJIL* 227, 234, where it is stated that: 'The individual military action undertaken within the framework of the conflict can only be judged in the light of the jus in bello, but not by the yardstick of the *ius ad bellum* independently from the question which party violated the *ius ad bellum* by starting the conflict', Dinstein (n 50) 282–3. But see also Christopher Greenwood, 'The relationship between

applies in full, which means inter alia that its soldiers and military objects can be lawfully targeted anytime, anywhere, and with any amount of force[212]. However, there is no consensus as to the exact moment a neutral becomes a belligerent.

According to scholars co-belligerency[213] is a distinct legal issue from compliance with the law of neutrality[214]. Lauterpacht required an 'act of war' rather than a violation of neutrality for a neutral to become a belligerent[215]. According to Dinstein a State ceases to be neutral and becomes a party to the conflict once it is 'immersed in hostilities'[216]. A similar argument was suggested by Oppenheim. Oppenheim distinguished between hostilities and 'mere violations' of neutrality.'[217] Engaging in hostilities alongside a belligerent immediately brings neutral status to an end, and the neutral State is thereafter considered to be a party to the conflict[218]. Conversely violations of the law of neutrality short of participating in hostilities, such as allowing passage of troops through neutral territory, furnishing troops to a belligerent, or providing intelligence, do not terminate neutral status[219]. This position aligns with the aim of the law of neutrality to prevent the escalation and expansion of the conflict.

However, Oppenheim does put an asterisk in the case of systematic or flagrant violations of neutrality[220]. This suggestion finds some support in State practice. During the Iran-Iraq war, Iran insisted that Kuwait was simply pretending to be neutral and had by all practical accounts joined Iraq in its war effort. Iran had received information that Kuwait was financing the Iraqi war effort and had availed its territory and airspace to Iraqi aircraft, thus facilitating multiple airstrikes against Iranian facilities. For instance, it was informed that in September 1986 all Iraqi air strikes on merchant ships and coastal

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ius ad bellum and ius in bello' (1983) 9 *Review of International Studies* 221; Eliav Lieblich, '*On the Continuous and Concurrent Application of ad Bellum and in Bello Proportionality*' *Necessity and Proportionality in International Peace and Security Law* 41 (Claus Kress & Robert Lawless eds., 2021), who argue that *ius ad bellum* continues to apply during an armed conflict.

[212] Ian Henderson, *The Contemporary Law of Targeting* (Martinus Nijhoff 2009) 87.

[213] Co-belligerency' refers to a situation in which states involved in an IAC fight alongside each other against a common enemy. See Rebecca Ingber, 'Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda' (2011) 47 *Texas International Law Journal* 75, 90.

[214] Nathalie Weizmann, 'Associated Forces and Co-belligerency' (Just Security, 14 February 2015) https://www.justsecurity.org/20344/isil-aumf-forces-co-belligerency/ , accessed 11 September 2022; Michael Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-belligerency and the use of force' (Lieber Institute West Point, 7 March 2022) https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/, accessed 11 September 2022.

[215] Hersch Lauterpacht in Eihu Lauterpacht (ed.) *International Law Vol. V Disputes, War and Neutrality* (CUP 2004) 804.

[216] Dinstein (n 50) 26.

[217] See Oppenheim (n 10) 613.

[218] Ibid.

[219] Kevin Jon Heller, 'The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang' (2011) 47 *Texas International Law Journal* 115, 136.

[220] Oppenheim (n 10) 357–60 (describing conditions ending neutral status); Curtis A. Bradley and Jack L. Goldsmith, 'Congressional Authorization and the War on Terrorism' (2015) 118 *Harvard Law Review* 2047, 2112 ; Tess Bridgeman, 'The Law of Neutrality and the Conflict with Al Qaeda' (2010) 85 *NYULR* 1186, 1200.

installations in the Gulf were accommodated by transit-flight thorough the airspace of Kuwait[221].

In light of this practice Iran formally announced that it considered Kuwait as a co-belligerent of Iraq. In a letter to the UN in August 1987 Iran stated: 'The Government of the Islamic Republic of Iran has specifically called upon the State of Kuwait to maintain neutrality in the war. Regrettably, not only has Kuwait not observed the rules of neutrality by financially supporting Iraq but the officials of Kuwait have publicly acknowledged that their ports and other logistical facilities, including Kuwaiti airspace, are at the disposal of Iraq to fuel its war machine and to support its military forces and to conduct aggressive operations against the Islamic Republic of Iran.'[222].

Following this declaration, Iran unleashed systematic attacks against Kuwait. In the same month Kuwait reported that a Kuwaiti merchant vessel, the Jabal Ali, was struck by missiles[223] and two months later a Kuwaiti oil-tanker named the Sea Isle City was hit by an Iranian missile in Kuwait's territorial waters[224]. In the year that followed multiple attacks against Kuwaiti installations and facilities were launched[225]. Nonetheless, the position of Iran was rejected by several States. In particular the US, while admitting Kuwait's 'bias' towards Iraq, did not consider Kuwait to be a belligerent[226]. The Netherlands also did not accept Kuwait's alleged status of a co-belligerent, because there was no direct connection between Kuwait's action and the harm caused to Iran's forces[227].

The same standard of direct participation in combat was employed by the US during the Iraq invasion the US in the determination of its co-belligerents.[228] It should also be noted that, its massive support for the Allies notwithstanding, the US was not considered a party to WWII until it entered the fight against Germany and Japan directly.

Therefore, it appears that whether a neutral State has become a party to the conflict is not dictated based on the law of neutrality, but by its actions in the context of the armed conflict that constitute direct participation in the military operations of a belligerent[229] and are causally linked to the harm caused to the adversary[230]. However, the level of

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221 See UN Doc S/18557 (5 January 1987).
222 See UN DOC S/19041 (14 August 1987).
223 See UN DOC S/19093 (1 September 1987).
224 See UN DOC S/19215 (16 October 1987).
225 Politakis (n 83) 379.
226 US plan to protect Kuwaiti ships in the Gulf by putting them under Us flags (1987) 26 *ILM* 1429,1430.
227 Upcher (n 12) 61.
228 The United States Department of Justice, '"Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention' (2004) 28 Op OLC 35, 45.
229 Christopher Greenwood, 'Scope of Application of Humanitarian *Law*' in Dieter Fleck (ed.) *The Handbook of International Humanitarian Law.* (2nd edn. OUP 2008) 58.
230 Upcher (n 12) 63 ('To constitute "participation" or "co-belligerency" it seems that direct military support must be given, or there must be some sort of direct, causal link between the neutral's action and an act of belligerency'.)

participation required is not clear. Michael Schmitt suggested that one should look to the definition of an IAC[231], while other authors equated the requisite threshold to that of direct participation in hostilities under Art. 51(3) AP I and Art. 13(3) AP II[232].

On the contrary, isolated incidents of use of force in self-defence do not appear to suffice for a neutral to become a belligerent. This conclusion can be drawn by the response to US's practice during the Iran-Iraq conflict. During that time the US, on several occasions, resorted to the use of force against Iran, but did so under the pretense of self-defence and was never considered to have joined the war[233]. More specifically US forces destroyed the Iranian Rashadat platform, that had served as a base for helicopter and small boat attacks on neutral merchant shipping, four days after an attack on a U.S.-flag tanker in Kuwaiti territorial waters by an Iranian Silkworm missile. In addition, in response to Iran's practice of laying uncontrolled mines, US forces attacked and captured an Iranian naval ship caught in the act of laying mines in gulf sealanes[234]. In spite of these acts of hostility US' neutral status was unaffected.

It is also safe to suggest that a level of co-ordination between the co-belligerents is needed for a neutral to transform to a party to the conflict. During its operations in Cambodia in the Vietnam war, the US claimed that they entered Cambodian territory to conduct operations against North Vietnamese forces without coordinating with the Government of Cambodia because such coordination would have compromised Cambodia's neutrality and would have made Cambodia a co-belligerent[235].

6d.- Violations of neutral duties

Violations of neutral duties by non-participating States constitute internationally wrongful acts. In this case the aggrieved belligerent has several options. First, for pragmatic policy reasons the belligerent could choose not to respond to the violation[236]. A second course of action would be to respond by informally or formally protesting the neutral state's breach of its neutral duties and to request the cessation of violation. A third available option would be the adoption of retorsions against the breaching neutral state, meaning lawful but unfriendly measures such as severing or diminishing diplomatic relations, imposing tariffs on goods imported from the neutral state, or suspending

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231 Schmitt (n 214).

232 Ambos (n 154); Alexander Wentker 'At War: When Do States Supporting Ukraine or Russia become Parties to the Conflict and What Would that Mean?' (EJIL:Talk!, 14 March 2022) https://www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/ , accessed 11 September 2022..

233 L.F.E. Goldie and David L. Peace, 'Major Maritime Events in the Persian Gulf War' (1988) 82 *ASIL* 146, 151-2.

234 Ibid.

235 (n 228) 44. According to the US if it had responded to an invitation by the Cambodian Government to use force in its territory, Cambodia would have become a co-belligerent to the US. See 'Military Operations in Cambodia' (1970) 64 *AJIL* 932,935.

236 Oppenheim (n 10) 578 where it is mentioned: 'It is entirely within the discretion of a belligerent whether he will acquiesce in a violation of neutrality committed by a neutral in favour of the other belligerent.'.

voluntary economic aid[237]. The last lawful response would be for the aggrieved belligerent to engage in countermeasures. Countermeasures are otherwise internationally wrongful acts undertaken by one state against another state, in response to that other state's internationally wrongful act in order to induce its 'return' to legality[238].

7.- The Russia –Ukraine armed conflict

Having established the state of the law of neutrality in contemporary international law, we will now examine if it is applicable in the case of the Russia-Ukraine conflict, if there have been any violations of neutral obligations, if these violations are justified under international law and if any neutral States have become parties to the conflict.

7a.- Does the law of neutrality apply?

Ukraine and the Russian Federation have been in an international conflict since the annexation of the Crimean Peninsula in 2014 and the Russian military support of the separatists in Luhansk and Donetsk. The conflict escalated significantly on 24 February 2022, when Russian armed forces attacked and invaded Ukraine. It is generally accepted that since the 24th of February the armed hostilities are intense and protracted enough to prompt the application of the law of neutrality and thus non-participating States ought to comply with their neutral duties[239].

7b.- Violations of the law of neutrality

Since Russia's invasion this year, nearly 40 States have provided Ukraine with billions of dollars in lethal military aid, including weapons and ammunition[240]. This evidently violates the neutral duty of abstention and in response Russia warned the United States to stop arming Ukraine[241].

Under the duty of abstention States are obliged to not provide troops to either party to the conflict, but are not required to prevent their nationals from joining the fight. Therefore, since there is no indication that any Western State intends to commit its own armed forces to the conflict in Ukraine, no neutral obligation is being violated by

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237 ARSIWA, cmt to part III, chp. II, ¶ 3.
238 ARSIWA, cmt to Part III, Ch. II, ¶ 1.
239 Wolff Heintschel von Heinneg, 'Neutrality in the War against Ukraine' (Lieber Institute West Point, 1 March 2022) https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/ , accessed 11 September 2022; Heller (n 219).
240 See Kiel Institute for the World Economy, Ukraine Support Tracker, https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/, accessed 11 September 2022.
241 Raul Pedrozo, 'Ukraine Symposium- Is the law of neutrality dead?' (Lieber Institute West Point, 31 May 2022) https://lieber.westpoint.edu/is-law-of-neutrality-dead/ accessed 11 September 2022.

individuals voluntarily joining Ukrainian armed forces[242], or the individuals who offered their services to the IT army online[243].

However, as was mentioned earlier, under customary international law, a State's permission to a private company to supply war material to either belligerents constitutes a non-neutral service. Thus, it could be suggested that the US violated their duty of abstention by allowing Elon Musk's SpaceX to provide Ukraine with Starlink satellites, used to coordinate unmanned drone attacks on Russian tanks and positions[244]. There could be a counter argument that these satellites are not covered by the prohibition of supplying war-ships, ammunition, or war material. But there is sufficient ground to claim that the prohibition extends to 'equipment that has been specifically conceived or modified for use in combat or for the conduct of combat and which is not as a general rule used for civilian purposes'[245].

In addition, several Western States, mainly the US, are sharing with Ukraine intelligence useful on a tactical level[246]. The question remains whether intelligence sharing is a war-related service prohibited under the duty of abstention[247]. However, it can be argued that since it is accepted that non-violent actions linked to military operations are subsumed by the overarching term of hostilities[248], then sharing actionable intelligence e.g. on the location of military targets is a war-related service and thus unneutral[249]. At the very least sharing such intelligence violates the duty of impartiality[250].

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[242]Rob Mudge, 'Joining the war: Foreign nationals flock to Ukraine' (DW 11 March 2022) https://www.dw.com/en/joining-the-war-foreign-nationals-flock-to-ukraine/a-61084878, accessed 11 September 2022.

[243] Nicholas Tsagourias, 'Ukraine Symposium – Cyber neutrality, cyber recruitment and cyber assistance to Ukraine' (Lieber Institute West Point, 19 April 2022) https://lieber.westpoint.edu/cyber-neutrality-cyber-recruitment-cyber-assistance-ukraine/ , accessed 11 September 2022.

[244] Alexander Freund, 'Ukraine is using Elon Musk's Starlink for drone' (2022) *DW* https://www.dw.com/en/ukraine-is-using-elon-musks-starlink-for-drone-strikes/a-61270528, accessed 11 September 2022 .

[245] Switzerland, Federal Act on War Materiel (1996) § 5(b).

[246] Warren Strobel, 'U.S. Walks Fine Line Sharing Intelligence With Ukraine in War With Russia' (Wall Street Journal, 7 May 2022) https://www.wsj.com/articles/u-s-walks-fine-line-sharing-intelligence-with-ukraine-in-war-with-russia-11651921201 accessed 11 September 2022.

[247] Hitoshi Nasu, 'The Future Law of Neutrality' (Lieber Institute West Point, 19 July 2022) https://lieber.westpoint.edu/future-law-of-neutrality/ accessed 11 September 2022.

[248] Yoram Dinstein, *Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn. CUP 2001) 3.

[249] There were reports that the US has provided Ukraine with 'near real-time intelligence' that enabled it to shoot down a Russian transport plane carrying hundreds of soldiers shortly after the invasion began and that has been critical to locating and killing a number of Russian generals. See Julian Barnes et al, *'U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say'* (New York Times, 4 May 2022).

[250] Kevin John Heller and Lena Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' (2022) *Journal of International Humanitarian Legal Studies* 1, 8. Milanovic accepts that should neutrality apply in this conflict then: 'sharing actionable/battlefield intelligence could be inconsistent with a third state's obligation to remain neutral between the belligerents of the Russia/Ukraine IAC'. See Marko Milanovic, 'The United States and Allies Sharing Intelligence

Furthermore, it has been reported that the US has conducted "a series of operations across the full spectrum; offensive, defensive, [and] information operations"[251] and that US Cyber Command's 'cybermission teams' based in Eastern Europe are supporting Ukraine's operations by disrupting Russian cyber operations and communication channels[252]. These actions would also be in breach of neutrality law.

On the other side of the conflict, Russia has launched missile strikes and air raids against Ukraine from Belarus' territory with the government's consent[253]. Beyond questions of complicity and co-belligerency, it is clear that Belarus is violating its duty of prevention, by allowing its territory to be used for war-related purposes by a belligerent.

7c.- Qualified neutrality

Many scholars have suggested that non-participating States supporting Ukraine are not violating neutrality law, because Ukraine is the victim of Russia's aggression and thus these States are non-belligerents[254]. Nonetheless, the Security Council has not determined an aggressor and taken action under Chapter VII. In addition, Ukraine is not a member of NATO. Under these circumstances the law of neutrality applies, and non-participating States ought to comply with their neutral duties, otherwise neutrality would be reduced to a mere policy option[255]. However, some authors have suggested that despite qualified neutrality's questionable status up until now, this armed conflict has created a 'perfect storm' that justifies the adoption of this stance by non-participating States[256].

More specifically, in the context of this conflict the Security Council action is precluded, due to Russia's status as a permanent member of the Council and its right to veto any decision that would order enforcement action against its operation in Ukraine. Nonetheless, on March 1, 2022, the General Assembly adopted a Resolution[257] condemning the Russian actions and demanding immediate and unconditional withdrawal. Of the 193 UN members, 141 States voted for the adoption of the Resolution, 35 abstained and only 5 (Belarus, North Korea, Eritrea, Russia, and Syria) voted against it. It has been suggested that the General Assembly Resolution in this case legitimizes measures in support of the victim of aggression and 'overcomes' possible

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with Ukraine' (EJIL:Talk!, 9 May 2022) https://www.ejiltalk.org/the-united-states-and-allies-sharing-intelligence-with-ukraine/ accessed 11 September 2022.

[251] Michael Schmitt, 'Ukraine Symposium- U.S. offensive cyber operations in support of Ukraine' (Lieber Institute West Point,6 June 2022) https://lieber.westpoint.edu/us-offensive-cyber-operations-support-ukraine/ accessed 11 September 2022 .

[252]David Sanger et al., 'Arming Ukraine: 17,000 Anti-Tank Weapons in 6 Days and a Clandestine Cybercorps' (New York Times, 6 March 2022) https://www.nytimes.com/2022/03/06/us/politics/us-ukraine-weapons.html accessed 11 September 2022.

[253] Wentker (n 232).

[254] Schmitt (n 214); Nasu (n 247); Milanovic (n 250).

[255] Even Schmitt points out that if it is not crystal clear who the aggressor is qualified neutrality should be precluded: 'Otherwise, qualified neutrality would be an exception that would often swallow the rule'. See (n 214).

[256] Von Heinegg (n 239); Nasu (n 247).

[257] UN General Assembly Resolution ES-11/1 (2 March 2022) A/RES/ES-11/2.

neutrality objections[258]. However, Res. es-11/1 makes no mention of the law of neutrality and does not authorize non-participating States to adopt the measures that they have[259].

Another consideration that presumably contributes to the particularity of this conflict is the extreme asymmetry of powers between the two belligerents[260]. An argument has been put forward that in case of a great disparity of military capabilities between belligerents a departure from the principle of equality of belligerents is warranted. Nonetheless most combats are unequal and the principle of equality of belligerents remains at the foundation of international humanitarian law[261].

In conclusion, no new rule of the law of neutrality has developed in the form of non-belligerency and issues of *ius ad bellum* should be viewed completely separately from the application of *ius in bello*[262]. Therefore, western States materially supporting Ukraine are in fact violating the law of neutrality.

7d.- Collective self-defence as a circumstance precluding wrongfulness

Nonetheless these violations can be justified pursuant to the inherent right to collective self-defence[263]. This right is triggered by the same criteria as the individual right to self-defence, namely in case of an armed attack and is restricted by the necessity and proportionality requirements[264]. Collective self-defence has two additional criteria: the declaration by the victim of the armed attack that it is a victim and the request for assistance[265]. Although these criteria have been the object of severe criticism and doubt, it appears that the requirement of a request by the State under armed attack has settled in theory and in practice[266].

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258 Ambos (n 154), Terry Gill, 'The Jus ad Bellum and Russia's "Special Military Operation" in Ukraine' (2022) 25 *Journal of International Peacekeeping* 121, 127.
259 Heller and Trabucco (n 250) 13.
260 Ambos (n 154).
261 Dinstein (n 50) 6; See generally Adam Roberts, 'The equal application of the laws of war: a principle under pressure' (2008) 90 *IRRC*931.
262 Rob Mclaughlin, 'Keeping the Ukraine-Russia jus ad bellum and jus in bello issues separate' (Lieber Institute West Point, 7 March 2022), https://lieber.westpoint.edu/keeping-ukraine-russia-jus-ad-bellum-jus-in-bello-issues-separate/ accessed 11 September 2022.
263 Nasu (n 247); Milanovic (n 250); Andre de Hoogh, 'The Elephant in the Room: Invoking and Exercising the Right of Collective Self-Defence in Support of Ukraine against Russian Aggression' (Opinio Juris, 7 March 2022) http://opiniojuris.org/2022/03/07/the-elephant-in-the-room-invoking-and-exercising-the-right-of-collective-self-defence-in-support-of-ukraine-against-russian-aggression/; Barry de Vries, 'Assistance to Ukraine: Moving away from the neutrality paradigm' (Prif, 31 March 2022) https://blog.prif.org/2022/03/31/assistance-to-ukraine-moving-away-from-the-neutrality-paradigm/ all accessed 11 September 2022.
264 See for the criteria Article 51 UN Charter: Nicaragua (n 108) 176; *Legality of the Threat or Use of Nuclear Weapons* (n 116) 41; Oil Platforms (Islamic Republic of Iran v United States of America) (judgment) (2003) ICJ Rep 161, 186–7, 196–7.
265 *Nicaragua* (n 108) 195, 199.
266 Laura Visser, 'Intervention by invitation and collective self-defence: two sides of the same coin?' (2020) 7 *Journal on the Use of Force and International Law* 292, 302; James A. Green 'The "additional" criteria for collective self-defence: request but not declaration' (2017) 4 *Journal on the Use of Force and International Law* 4, 5.

In the case at hand, all requirements of the right to collective self-defence are met. Ukraine undoubtedly has the individual right to self-defence, since Russia's invasion of Ukraine reached the threshold of an armed attack[267]. In addition, Ukraine has extended a request for assistance to all Western States, at times requesting even more than what these States are willing to provide[268]. As was stated in the *Nicaragua* judgement one form of collective self-defence is providing material support[269].

Therefore neutral States materially supporting Ukraine are adopting permissible measures pursuant to their right of collective-defence, but are simultaneously breaching their obligations under neutrality law. This legal conflict is resolved by Article 21 of ARSIWA, which precludes the wrongfulness of breaches of other international obligations of States, when they are fulfilling their right of self-defence[270]. Therefore, the States providing Ukraine with war-related materials and sharing intelligence are not committing internationally wrongful acts and Russia cannot take countermeasures against them[271].

7e.- Co-belligerency

Having examined all issues arising out of the law of neutrality, we will now focus on whether any neutral States have acquired belligerent status during the Russia-Ukraine conflict.

There is consensus that States supplying Ukraine arms and war related material have not become parties to the conflict, because this form of support does not reach the threshold of an armed attack[272] or direct participation in hostilities[273]. This threshold would however be reached in case neutral States respond to Ukraine's request for the establishment of a no-fly zone over Ukraine and use force against Russian military aircraft to enforce it[274] .

With regards to the cyber support and actionable intelligence that the US has provided the situation is not clear, due to lack of sufficient information to determine the nature and the extent of these actions. The argument could be made that if these actions are integrated in concrete attacks by Ukraine and there is a level of co-ordination between

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[267] De Hoogh (n 263).

[268] President Zelensky of Ukraine has repeatedly and emphatically urged Western States to impose a no-fly zone over Ukraine. See https://www.reuters.com/world/europe/ukraines-zelenskiy-says-it-is-time-consider-no-fly-zone-russian-aircraft-2022-02-28/ accessed 11 September 2022.

[269] Nicaragua (n 108) [229].

[270] Nasu (n 247).

[271] But see Heller and Trabucco (n 250) 24, where it is suggested that Russia can take lawful countermeasures. Notably, although in examining a possible violation of the *ius ad bellum* by third States providing arms to Ukraine, the authors conclude they do not commit an internationally wrongful act, because they are exercising their right to collective self-defence, they inexplicably do not consider the same scenario for the violations of the law of neutrality.

[272] *Nicaragua* (n 108) 126–27, ¶ 247, where the Court refused to equate supplying arms with support to an armed attack.

[273] Wentker (n 232).

[274] Ibid.

US and Ukranian forces, then the US could be considered a party to the conflict[275]. The US itself, not willing to be viewed as a party to the conflict has drawn the line between simply supplying intelligence – which is what it claims it has done- and being involved in targeting decisions.[276]

Lastly, although Belarus has not directly participated in hostilities between Russia and Ukraine, it has consented to its territory being used as a launching point for Russian attacks against Ukraine. The use of a neutral's territory as a launching point was the qualifying factor employed by the US in the 2003 Iraq conflict to deem Kuwait and Qatar as its 'co-belligerents' against Iraq[277]. Thus, there is ground to suggest that Belarus is a party to the Russia-Ukraine conflict. In addition, there is evidence in State practice that in case there was prior co-ordination between Russia and Belarus, then Belarus could be viewed as party to the conflict. This is the reason why the US invaded Cambodia and conducted operations on its territory without previously communicating with the Cambodian government.

8.- Conclusions

Neutrality, as a body of law containing rights and duties imposed on belligerents and neutrals during an armed conflict, was mainly developed during the 19th century after the concept of 'just' and 'unjust' war was abandoned. It was the outcome of mutual concessions and it aimed at protecting neutrals from the consequences of war and preventing the escalation and expansion of hostilities.

Following the two 'total wars' and the creation of the UN system every aspect of neutrality, from its scope to its very relevancy, was challenged, with some authors treating it as a relic of the past. However, State practice, international and domestic court decisions and scholarship prove that neutrality adapted to these challenges and survived. Outlawing a situation does not make it disappear. Armed hostilities still occur between States and their relationships with non-participating States need to be regulated in a way that corresponds to reality.

When hostilities reach a certain intensity or scope, they affect the interests of neutral States and the risk of them being drawn into the conflict increases. The collective security system under the Security Council proved ineffective and its replacement in the form of the Uniting for Peace Resolution procedure lacks binding effect. This is evident in the Russia-Ukraine conflict, where action by the Security Council was precluded due to Russia's veto and the Uniting for Peace Resolution did not authorize any action.

Therefore, when an international armed conflict is of a certain intensity and duration the law of neutrality continues to apply. However, no general rule of when that threshold is reached has emerged from the relevant State practice. In the case of the Russia-Ukraine

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[275] Heller and Trabucco (n 250) 14.
[276] Milanovic (n 250).
[277] Wentker (n 232).

conflict it is accepted that the law of neutrality applied since the 24th of February 2022 when Russia invaded Ukraine. These States had been in an international armed conflict since 2014, but the intensity of the hostilities on February 24th and their foreseeable duration triggered the application of neutrality law.

Some scholars have suggested that pursuant to the prohibition on the use of force under Article 2 para. 4 of the Charter the law of neutrality has evolved to allow neutral States to discriminate against the aggressor without violating their neutral duties. Nonetheless, State practice in this regard is extremely limited and there is no evident *opinio iuris* that States wish to deviate from the principle of equality of belligerents, which is fundamental to international humanitarian law. Therefore, no customary rule of qualified neutrality has emerged and once an extended international armed conflict occurs, non-participating States are bound by the law of neutrality.

In the Russia-Ukraine conflict a number of scholars have argued that States providing material support to Ukraine are not breaching their neutral duties, because they are entitled to aid the victim of Russia's aggression. Most of these commentators, in order to justify the application of the non-belligerency concept, highlight a perfect storm of circumstances in this armed conflict that clearly indicate Russia as the aggressor, even without an authoritative determination by the Security Council. Thus, even if their position is right, this practice's contribution to a formation of a customary rule of non-belligerency is limited.

Furthermore, the Russia-Ukraine conflict has confirmed the position that violations of the law of neutrality, even if systematic and significant, do not transform neutral States into belligerents. Approximately 40 States have continuously supplied Ukraine with lethal weapons, thus violating their duty of abstention and significantly contributing to Ukraine's war effort, but Russia in spite of its empty threats, has shown no real indications of considering any of these States as a party to the conflict.

Although these breaches of neutrality law are justified under the States' right to self-defence and Article 21 of ARSIWA, one could easily suggest that in the aftermath of this conflict neutrality's continuing validity might be left in a challenging State due to the extreme amount of deviations. This conflict seems to have resurrected considerations of an 'unjust'

war, where neutrality is considered as unacceptable apathy. However, neutrality faced similar challenges during WWII and endured. Neutrality will cease to concern us only when the reality of armed conflict ceases to exist.

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