
THE THIN RED LINE: NEUTRALITY AND BELLIGERENCY IN
MODERN CONFLICTS

*Thibault Moulin**

ABSTRACT

Since the invasion of Ukraine, Western states have faced a dual red line, i.e., at what point neutrality loss and co-belligerency occur. In this Article, I argue that neutrality law is still relevant regarding arms transfers and troop training, which are prohibited, but is often ill-suited to regulate activities like intelligence sharing, which is not subject to a specific treaty or customary rule. As this Article argues, this is because “impartiality” cannot be described as an abstract and autonomous rule, but rather as an umbrella principle underpinning the law of neutrality. It means that helping a belligerent is not ipso facto prohibited. I also consider that private actors like arms brokers or telecommunication service providers are subject to insufficient constraint, and that qualified neutrality is not yet part of positive law, which is problematic in the event of an aggression. Indeed, if necessary, the aggrieved belligerent remains entitled to use proportionate use of force to end neutrality breach. Then, this Article finds that analogies with the rules governing non-international armed conflicts and responsibility are still required to help clarify belligerency law, even where an international armed conflict is at stake. Drawing on the Nicaragua and the Tadić cases, it seems that “arming and training” constitute use of force, and that “organizing, coordinating or planning” military actions result in conflict participation. Mere “financing, training and equipping or providing operational support” are not enough to become a conflict party, however.

* Dr. Thibault Moulin is a Tenured Associate Professor of Law at the Catholic University of Lyon (France) and a Research Associate at the HUJI Federmann Cyber Security Center (Israel). He also serves as a Captain in the Citizens’ Reserve of the French Air and Space Forces and is a member of the UR CONFLUENCE: Sciences et Humanités (EA1598). The views expressed are those of the author. Email: thibault.moulin@mail.huji.ac.il. ORCID: 0000-0002-9694-5580.

I.	INTRODUCTION.....	902
II.	THE NON-EXISTENCE OF QUALIFIED NEUTRALITY IN POSITIVE LAW	907
	A. The Theory of Qualified Neutrality	908
	B. Qualified Neutrality as <i>Lex Ferenda</i>	913
III.	THE “UMBRELLA PRINCIPLE” OF IMPARTIALITY AND THE “INTELLIGENCE-SHARING GAP”	920
	A. Treaty Law	921
	B. Customary Law	925
IV.	THE LIMITED CATEGORIES OF STATE ASSISTANCE RESTRICTED BY NEUTRALITY LAW.....	931
	A. Troop Training and Transit	932
	B. Arms Transfers	933
V.	THE LIMITED CATEGORIES OF PRIVATE ASSISTANCE RESTRICTED BY NEUTRALITY LAW.....	937
	A. ARMS TRADE	938
	B. Telecommunication Services.....	942
VI.	THE LIMITS ON CO-BELLIGERENCY.....	943
	A. <i>Jus Ad Bellum</i>	944
	B. <i>Jus In Bello</i>	946
VII.	CONCLUSION	955

I. INTRODUCTION

At a NATO summit in spring 2022, the Western strategy vis-à-vis the war between Russia and Ukraine was revealed by French President Emmanuel Macron: “to carry on supplying defensive and lethal weapons, but with a red line, which consists in not becoming co-belligerents.”¹ As a matter of fact, since the Russian invasion of Ukraine, NATO allies have faced a recurrent dilemma—i.e., assisting the latter and avoiding escalation with the former, which they fear would result in a third world war. Threats of nuclear strikes have indeed regularly been made by Moscow, especially by former Prime Minister Dmitry Medvedev, who currently sits as the deputy chairman of the Russian

¹ BFMTV, *Emmanuel Macron: “La ligne reste la même pour l’ensemble des alliés: fournir des armes défensives et létales (. . .) mais avec une ligne rouge de ne pas être cobelligérants”* [Emmanuel Macron: “The Line Remains the Same for All Allies: Provide Defensive and Lethal Weapons (. . .) but with a Red Line of Not Being Co-Belligerents”], DAILYMOTION, www.dailymotion.com/video/x89ca2d [<https://perma.cc/74YF-46SA>] (last visited Feb. 13, 2024).

security council. In March 2023, he stated that “[e]very day when they [the Westerners] provide Ukraine with foreign weapons brings the nuclear apocalypse closer.”² Even if there is some doubt about the seriousness of this nihilistic approach, Russia has since declared it was ready for a “direct conflict” with NATO.³ On the occasion of the very same declaration, and for security reasons, President Macron also stated that he would abstain from “going into the details.”⁴ No further indication was therefore given regarding the location of this red line which, if crossed, would set Westerners on the verge of war. Another gap in this discourse was the omission of neutrality law, which is supposed to regulate the relation between the so-called “belligerent” and “non-belligerent” powers. President Macron has since declared that it was necessary to have “strategic ambiguity” when dealing with Vladimir Putin.⁵ One is therefore left with a twofold mystery—i.e., at what point the “thin red line” of neutrality loss and co-belligerency is crossed.

First, the main challenge with neutrality law is that main treaty rules date back to 1907, as they appear in the Hague Conventions V and XIII, which respectively govern the interactions between neutral and belligerent states in land and naval warfare. As a matter of fact, this century-old legal framework suffers from several deficiencies and does not expressly address the new challenges of modern warfare. For

² Vladimir Isachenkov, *Russia's Security Chief Blasts West, Dangles Nuclear Threats*, AP NEWS (Mar. 23, 2023, 12:46 PM), <https://apnews.com/article/medvedev-nuclear-putin-arrest-warrant-germany-ukraine-6dcde92e06f41a7c5cb7386f7939df33> [<https://perma.cc/M9MY-P26B>]. A similar threat was made regarding a hypothetical arrest of Vladimir Putin following the warrant of the International Criminal Court. Théa Jacquet, *Guerre en Ukraine: l'arrestation de Poutine serait une déclaration de guerre, affirme Medvedev* [*War in Ukraine: Putin's Arrest Would Be a Declaration of War, Says Medvedev*], RTBF (Mar. 23, 2023, 3:45 AM), www.rtb.be/article/guerre-en-ukraine-larrestation-de-poutine-a-letranger-serait-une-declaration-de-guerre-affirme-medvedev-11171826 [<https://perma.cc/7NF8-5E68>].

³ Isabel van Brugen, *Russians Ready for 'Direct Conflict' with NATO, Putin Ally Claims*, NEWSWEEK, <https://www.newsweek.com/russia-medvedev-nato-putin-ally-ukraine-war-1830156> [<https://perma.cc/2788-D6X6>] (Sept. 27, 2023, 5:06 AM).

⁴ BMFTV, *supra* note 1. The original speech is in French and says: “c’est aussi pour cette raison que je n’entrerai dans aucun détail.”

⁵ *Macron Doesn't Rule Out Troops for Ukraine If Russia Breaks Front Lines*, LE MONDE, https://www.lemonde.fr/en/france/article/2024/05/02/macron-doesn-t-rule-out-troops-for-ukraine-if-russia-breaks-front-lines_6670198_7.html [<https://perma.cc/F7DR-6Z5H>] (May 2, 2024).

instance, the “supply” of “warships, ammunition, or war material of any kind whatever” is only forbidden by Article 6 of the Hague Convention XIII and therefore, in the sole context of naval warfare. Then, they are silent regarding intelligence sharing, funding and sanctions, whereas an excessively permissive approach towards private trade and services is favored.⁶ For this reason, and to distinguish between what is prohibited and what is authorized, it is arguably necessary to clarify the meaning of these ancient provisions through treaty interpretation, but also based on the assessment of customary international law.⁷ At the time of drafting, most rules codified in the Hague Conventions were described as customary,⁸ and the significance of customary law vis-à-vis neutrality was confirmed by the International Court of Justice (“ICJ”).⁹ The ICJ has confirmed that neutrality was applicable to all international armed conflicts, but was not able to specify its content.¹⁰

⁶ On these issues, see, for example, Julian Fernandez, *Ykpaisha 2022*, 7 UNIV. BOLOGNA L. REV. 1, 2 (2022); Alexander Wentker, *At War: When Do States Supporting Ukraine or Russia Become Parties to the Conflict and What Would that Mean?*, EJIL:TALK! (Mar. 14, 2022), www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/ [<https://perma.cc/JW7V-KUHW>].

⁷ On the relation between customary and treaty law in that context, see JAMES UPCHER, NEUTRALITY IN CONTEMPORARY INTERNATIONAL LAW 72-73 (2020).

⁸ *Id.* at 72.

⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 88 (July 8).

¹⁰ *Id.* at ¶ 89. This is an important aspect, as some thirty states are parties to the Hague Conventions, and that their provisions “do not apply except between Contracting powers and then only if all the belligerents are Parties to the Convention.” Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 20, Oct. 18, 1907, 36 Stat. 2310, U.S.T.S. 540 [hereinafter Hague Convention V]; Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War art. 28, Oct. 18, 1907, 36 Stat. 2415, 205 Consol. T.S. 395 [hereinafter Hague Convention XIII]. In their written observations, states did not seek to deny the fact that non-parties were also bound by neutrality law. See Letter Dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, Together with Written Comments of the United Kingdom ¶ 3.78 (June 16, 1995), <https://www.icj-cij.org/sites/default/files/case-related/95/8802.pdf>; Letter Dated 20 June 1995 from the Acting Legal Adviser to the Department of State, Together with Written Statement of the Government of the United States of America 31-32 (June 20, 1995), <https://www.icj-cij.org/sites/default/files/case-related/95/8700.pdf>; Note Verbale Dated 20 June 1995 from the Embassy of New Zealand, Together with Written Statement of the Government of New Zealand ¶ 81 (June 20, 1995), <https://www.icj-cij.org/sites/default/files/case-related/95/8710.pdf>; Written Comments of the

It is important to emphasize that, in the opinion of most experts, “impartiality” has now become a cardinal duty in the field, according to which neutrality is breached as soon as a state favors one belligerent.¹¹

Second, it is vital to underline from the outset that every breach of neutrality does not automatically result in co-belligerency.¹² In fact, solely participation in an armed conflict does so, meaning that a wide range of behaviors contradict neutrality, but do not turn one into a party to the conflict. The next challenge here, however, is the identification of the red line. In the context of Ukraine, the sole issue of arm transfer was subject to significant disagreement. For instance, Hungary refused to proceed with arms deliveries as it would allegedly equate such conduct with being “involved in [the] war,”¹³ whereas states like France have long argued that such conduct would occur only where “offensive weapons” were supplied.¹⁴ Russia, for its part,

Government of the Solomon Islands ¶ 20(b) (Sept. 20, 1995), <https://www.icj-cij.org/sites/default/files/case-related/95/8724.pdf>; Letter Dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, Together with Written Statement of the Government of the Marshall Islands ¶ 5 (June 22, 1995), <https://www.icj-cij.org/sites/default/files/case-related/95/8720.pdf>; Letter Dated 20 June 1995 from the Permanent Representative of Lesotho to the United Nations 2 (June 20, 1995), <https://www.icj-cij.org/sites/default/files/case-related/95/8706.pdf>; Note Verbale Dated 20 June 1995 from the Embassy of Sweden, Together with Written Statement of the Government of Sweden 5 (June 20, 1995), <https://www.icj-cij.org/sites/default/files/case-related/9/8692.pdf>; Note Verbale Dated 19 June 1995 from the Embassy of the Islamic Republic of Iran, Together with Written Statement of the Government of the Islamic Republic of Iran 5 (June 19, 1995), <https://www.icj-cij.org/sites/default/files/case-related/95/8678.pdf>.

11 Wolff Heintschel von Heinegg, *Neutrality in the War Against Ukraine*, LIEBER INST. WEST POINT (Mar. 1, 2022), <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/> [<https://perma.cc/ZKK3-ATJJ>]; Jeremy K. Davis, *Bilateral Defense-Related Treaties and the Dilemma Posed by the Law of Neutrality*, 11 HARV. NAT'L SEC. J. 455, 466-67 (2020); ALEXANDER SPRING, THE INTERNATIONAL LAW CONCEPT OF NEUTRALITY IN THE 21ST CENTURY 152-53 (2014).

12 Davis, *supra* note 11, at 497-98.

13 *Hungary Will Not Allow Lethal Weapons for Ukraine to Transit Its Territory*, REUTERS (Feb. 28, 2022, 9:04 AM), www.reuters.com/world/hungary-will-not-allow-lethal-weapons-ukraine-transit-its-territory-fm-2022-02-28/.

14 France Inter, *La livraison d'armes de plus en plus offensives à l'Ukraine mérite un débat public*, RADIOFRANCE (Jan. 10, 2023), <https://www.radiofrance.fr/franceinter/podcasts/le-monde-d-apres/le-monde-d-apres-de-jean-marc-four-du-mardi-10-janvier-2023-5316736> [<https://perma.cc/PY7Y-UJ2Z>]; Jean-Pierre Maulny, *Des armes offensives pour l'Ukraine?*, RADIOFRANCE (Apr. 14, 2022), <https://www.radiofrance.fr/franceculture/podcasts/les-enjeux->

seems to equate support of any kind with co-belligerency. Before the UN Security Council (“UNSC”), the Russian delegate argued that “the West is directly involved in the Ukrainian conflict, not only by providing weapons and intelligence, but also by sending mercenaries and military personnel, without whom Kyiv simply cannot operate some Western weapons.”¹⁵

Third, and beyond the breach of the UN Charter and peremptory norms, one of the most striking characteristics of the conflict in Ukraine is that the aggressor is a permanent member of the UN Security Council, who is abusing veto power. For this reason, collective security mechanisms are paralyzed.¹⁶ Even in this situation, however, neutrality and belligerency law are not abolished. It means that, even if states act in the framework of collective self-defense and cooperate through “lawful means” to end the violation of peremptory norms, they are not prevented from being considered as non-neutral or co-belligerent. Hence, states may qualify as parties to the conflict even if they are helping the victim of an aggression.¹⁷ In other words, the theory of “qualified neutrality”—according to which neutral states are free to help the victim of an aggression through non-neutral acts without qualifying as belligerents—is not yet part of *lex lata*.¹⁸

As highlighted above, an aura of mystery is maintained regarding the position of the red line which, if crossed, would result in neutrality loss, or turn a state into a conflict party. To borrow the words of Judge Yusuf, it is almost as if “[p]redictability, stability and certainty of the rule of law disappear.”¹⁹ This Article ventures into this issue and finds

internationaux/des-armes-offensives-pour-l-ukraine-5262435
[<https://perma.cc/MQ2H-N6WN>].

¹⁵ U.N. SCOR, 78th Sess., 9256th mtg. at 6, U.N. Doc. S/PV.9256 (Feb. 8, 2023).

¹⁶ See, e.g., Anne Peters, *The War in Ukraine and Legal Limitations on Russian Vetoes*, 10 J. USE FORCE & INT'L L. 162 (2023).

¹⁷ Valentina Azarova & Ido Blum, *Belligerency*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (2015), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e249>.

¹⁸ *Contra* Anne-Laure Chaumette, *Livraison d'armes à l'Ukraine: sommes-nous en guerre contre la Russie?* [*Arms Delivery to Ukraine: Are We at War with Russia?*], LE CLUB DES JURISTES (Feb. 16, 2023, 11:26 AM), <https://blog.leclubdesjuristes.com/livraison-darmes-a-lukraine-sommes-nous-en-guerre-contre-la-russie-par-anne-laure-chaumette/> [<https://perma.cc/5LMU-XNRB>].

¹⁹ Speech of H.E. Mr. Abdulqawi Ahmed Yusuf, President, Int'l Ct. of Just., Before the Security Council: Multilateralism and the International Court of Justice 1, ¶ 3 (Nov. 9, 2018), <https://www.icj-cij.org/sites/default/files/press-releases/0/000-20181109-PRE-01-00-EN.pdf>.

that several forms of assistance to a warring state neither result in neutrality loss nor in co-belligerency. It means that in most situations, the red line may not only be found, but it appears as surprisingly (and perhaps excessively) remote, suggesting that renewed effort is necessary to improve the legal framework.

To proceed, I first return to the “qualified neutrality” theory, and I explain that—even if desirable—it is not yet part of *lex lata*. It is particularly unsatisfactory, as a state may forfeit neutrality by helping the victim of an aggression, and that an aggrieved belligerent like Russia is entitled to end such breaches, if needed through the proportional use of force (Part II). Second, I explain that “impartiality” has not yet matured into an autonomous and abstract rule of international law, and may be better described as an umbrella principle, which underpins the law of neutrality. For this reason—and save a specific rule based on treaty or customary law—acting in a “partial” way cannot *ipso facto* qualify as a breach of neutrality law. I also focus on intelligence sharing, which appears as a main gap here (Part III). Third, I turn to the substance of neutrality law, and I explain that only limited categories of state assistance are restricted (Part IV). Fourth, I draw the same conclusions, but regarding assistance by private actors (Part V). Fifth, I focus on co-belligerency, and I find that analogical reasoning with the law governing non-international armed conflicts and responsibility may help in bringing clarity in the field. On this basis, I suggest that only the organization, coordination, or planning of military actions may turn a state into a conflict party under the lens of the *jus in bello*. I also explain that under the lens of *jus ad bellum*, material assistance or intelligence sharing do not result in an armed attack or act of aggression (Part VI). Some concluding thoughts end the Article (Part VII).

II. THE NON-EXISTENCE OF QUALIFIED NEUTRALITY IN POSITIVE LAW

According to the theory of “qualified neutrality,” states have the right to discriminate in favor of the victim of an aggression and to support the victim.²⁰ First, this Part recalls that neutrality cannot prevail where resolutions are passed by the UN Security Council, and this Part explains the implications of qualified neutrality, which would equally apply where the latter fails to act (Section A). Then, this Part

²⁰ Michael N. Schmitt, “Strict” Versus “Qualified” Neutrality, LIEBER INST.: WEST POINT (Mar. 22, 2023), <https://lieber.westpoint.edu/strict-versus-qualified-neutrality/> [https://perma.cc/9KAQ-LAZ9].

argues that qualified neutrality theory has not matured into *lex lata*, even if such change is desirable (Section B).

A. *The Theory of Qualified Neutrality*

Where collective security mechanisms are in action, UNSC resolutions shall take precedence over neutrality.²¹ As a matter of fact, by virtue of the UN Charter, states agree “to accept and carry out the decisions of the Security Council,”²² to give “every assistance in any action” taken in accordance with it,²³ and to “refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.”²⁴ In addition, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement,” the former “shall prevail.”²⁵ This textual approach is also confirmed by state practice, which “shall be taken into account, together with the context” in the framework of treaty interpretation.²⁶ Long before the invasion of Ukraine, they had agreed that neutrality may not be invoked to deviate from a binding resolution

²¹ This conception was acknowledged in the first years following the adoption of the UN Charter. See Titus Komarnicki, *The Place of Neutrality in the Modern System of International Law*, 80 RECUEIL DES COURS 472 (1952). It has since been confirmed by San Remo and HPCR manuals. See INT'L INST. HUMANITARIAN L., SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶¶ 7-8 (Louise Doswald-Beck ed., 1995); THE PROGRAM ON HUMANITARIAN POLICY & CONFLICT RESEARCH AT HARVARD UNIV., HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 52 (2013) (rule 165). One of the few examples of a direct contradiction with the UN Security Council was the *Kadi* case before the European Court of Justice. See Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council and Comm'n*, 2008 E.C.R. I-06351, ¶ 280 (Sept. 3, 2008); see also Martin Scheinin, *Is the ECJ Ruling in Kadi Incompatible with International Law?*, 28 Y.B. EURO. L. 637 (2009).

²² U.N. Charter art. 25.

²³ U.N. Charter art. 2, ¶ 5.

²⁴ *Id.*; see also Jeremy K. Davis, “You Mean They Can Bomb Us?” *Addressing the Impact of Neutrality Law on Defense Cooperation*, LAWFARE (Nov. 2, 2020, 8:01 AM), <https://www.lawfaremedia.org/article/you-mean-they-can-bomb-us-addressing-impact-neutrality-law-defense-cooperation> [https://perma.cc/KK4A-BPCZ].

²⁵ U.N. Charter art. 103.

²⁶ Vienna Convention on the Law of Treaties, art. 31(3), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

adopted by the UN Security Council under Chapter VII.²⁷ In fact, when the UN Security Council “decides” that territories must be made available,²⁸ that embargoes and sanctions must be enforced,²⁹ or that activities of private persons shall be monitored,³⁰ states must comply with it.³¹ However, the UN Security Council has traditionally not gone

²⁷ For Australia, Denmark, Germany, New Zealand, Switzerland, the United Kingdom, and the United States, see DEP’T OF DEFENCE (Cth), EXECUTIVE SERIES ADDP 06.4 - LAW OF ARMED CONFLICT ¶ 11.6 (2006) (Austl.) [hereinafter AUSTRALIAN DEP’T OF DEFENCE], www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/AUS-Manual-Law-of-Armed-Conflict.pdf [https://perma.cc/6D39-2DXF]; DANISH MINISTRY OF DEFENCE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 63 (2016) (Den.) [hereinafter DANISH MINISTRY OF DEFENCE], www.forsvaret.dk/globalassets/fko---forsvaret/dokumenter/publikationer/-military-manual-updated-2020-2.pdf [https://perma.cc/L4TP-HFLB]; BUNDESMINISTERIUM DER VERTEIDIGUNG, LAW OF ARMED CONFLICT – MANUAL ¶ 1204 (2013) (Ger.) [hereinafter BMVG], www.bmvg.de/resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf [https://perma.cc/9KN5-6WFZ]; DEFENCE FORCE, MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT ¶ 16.2.2 (2d ed. 2021) (N.Z.) [hereinafter NEW ZEALAND DEFENCE FORCE], www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/NZ-Manual-Law-of-Armed-Conflict.pdf [https://perma.cc/424N-2E28]; MINISTERIO DE DEFENSA [MINISTRY OF DEF.], DERECHO INTERNACIONAL HUMANITARIO (DIH) EN LAS FAS [INTERNATIONAL HUMANITARIAN LAW (IHL) IN THE FAS] ¶ 1414 (2022) (Spain) [hereinafter SPAIN MINISTRY OF DEF.], https://publicaciones.defensa.gob.es/media/downloadable/files/links/p/d/pdc_02.01_derecho_internacional_humanitario_fas.pdf [https://perma.cc/ZWA3-KXFR]; MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL ON THE LAW OF ARMED CONFLICT ¶ 1.42.2 (2004) (U.K.) [hereinafter U.K. MINISTRY OF DEFENCE], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf [https://perma.cc/W5VS-LFBP]; U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ¶ 15.2.3.2 (2023) [hereinafter U.S. DEP’T OF DEF.], <https://media.defense.gov/2023/jul/31/2003271432/-1/-1/0/dod-law-of-war-manual-june-2015-updated-july%202023.pdf> [https://perma.cc/EY7R-R8H7].

²⁸ DANISH MINISTRY OF DEFENCE, *supra* note 27.

²⁹ *Id.*

³⁰ U.S. DEP’T OF DEF., *supra* note 27.

³¹ See *Are UN Resolutions Binding?*, DAG HAMMARSKJÖLD LIBR. (Jan. 5, 2024), <https://ask.un.org/faq/15010> [https://perma.cc/S2KD-8V3N]. In Resolution 661, with respect to Iraq and Kuwait, the UN Security Council decided “that all states shall prevent” the “import” and “export” of commodities, as well as their “sale of supply” by nationals, decided “that all states shall not make available” funds, financial and economic resources, and directed prevention of nationals from doing so as

as far as ordering states to send their armies on the battlefield, merely authorizing and inviting them to take coercive measures instead.³² For instance, Resolution 83 “[r]ecommends that the members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.”³³ In Resolution 1973, it “authorizes” states “to take all necessary measures to enforce compliance with the ban on flights,”³⁴ and “[c]alls upon” them “to provide assistance, including any necessary overflight approvals.”³⁵

The invasion of Ukraine presented an original situation: the aggressor, who is a permanent member of the UN Security Council, is preventing the adoption of a binding resolution and therefore paralyzes collective security mechanisms.³⁶ Yet, practice has not created a viable way to circumvent a veto. Resolution 377 (V), which is also known as the “Acheson Plan,” was adopted in 1950 to deal with this

well. S.C. Res. 661, ¶¶ 3-4 (Aug. 6, 1990). In Resolution 713, it decided, “under Chapter VII of the Charter of the United Nations, that all states shall . . . immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia.” S.C. Res. 713, ¶ 6 (Dec. 25, 1991). In Resolution 1970, it decided “that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer” of military equipment to Libya, decided “that all Member States shall take the necessary measures to prevent the entry into or transit through their territories of individuals” who are listed by the Committee of Sanctions, and directed them to “freeze without delay all funds, other financial assets and economic resources” belonging to them. S.C. Res. 1970, ¶¶ 9, 15, 17 (Feb. 26, 2011). In Resolution 1973, it decided “to establish a ban on all flights in the airspace” of Libya and required “all states [to] deny permission to any aircraft” registered in Libya or operated by Libyans. S.C. Res. 1973, ¶¶ 6, 17 (Mar. 17, 2011). On this issue, see also Natalino Ronzitti, *NATO’s Intervention in Libya: A Genuine Action to Protect a Civilian Population in Mortal Danger or an Intervention Aimed at Regime Change?*, 21 ITALIAN Y.B. INT’L L. 1, 16 (2011).

³² See Eric Robert, *Le Statut des États Neutres dans le Golfe* [*The Status of Neutral States in the Gulf*], in *LA GUERRE DU GOLFE ET LE DROIT INTERNATIONAL* 43, 93-94 (1991).

³³ S.C. Res. 83 (June 27, 1950).

³⁴ See S.C. Res. 1973, *supra* note 31, ¶ 8.

³⁵ *Id.* ¶ 9.

³⁶ It is however not unprecedented that the prohibition to use force is breached by a permanent member of the UNSC, as seen with the invasion of Iraq. See, e.g., Sean Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004). It is also not unprecedented that a permanent member of the UNSC is participating in a conflict and uses veto power, as seen with the Soviet Union in the Korean War. See generally Mark O’Neill, *Soviet Involvement in the Korean War: A New View from the Soviet-Era Archives*, 14 OAH MAG. HIST. 20, 22-3 (2000).

type of blockage.³⁷ Accordingly, the UN General Assembly (“UNGA”) provided:

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.³⁸

Unfortunately, UNGA resolutions—including the Acheson Plan—are not binding.³⁹ For this reason, even if the use of coercive measures were recommended, states would be under no obligation to perform them.⁴⁰ In the 1960s, experts wondered if—in situations where the UN Security Council is unable to act—UN members may “deal equally with victim and aggressor” and “even supply the aggressor with the means of war.”⁴¹ If the second proposal has since been ruled out, owing to the birth of an obligation to cooperate through

³⁷ Even if reservations were expressed about the constitutionality of the resolution at the time of adoption, it seems to reflect the agreement of parties, with 52 votes in favor of the resolution, five against and two abstentions. See Jacques Leprette, *Le Conseil de sécurité et la Résolution 377 A (1950)* [*The Security Council and Resolution 377 AS (1950)*], 34 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 424, 428-30 (1988); Alain Pellet, *Inutile assemblée générale?* [*No Need for a General Meeting?*], 109 POUVOIRS 43, 51-52 (2004).

³⁸ G.A. Res. 377 (V), United for Peace, ¶ 1 (Nov. 17, 1950). The latter was quoted by UNGA Resolution ES-11/1: “Recalling General Assembly resolution 377 A (V) of 3 November 1950, entitled ‘Uniting for peace’, and taking into account that the lack of unanimity of the permanent members of the Security Council at its 8979th meeting has prevented it from exercising its primary responsibility for the maintenance of international peace and security.” G.A. Res. ES-11/1, Aggression against Ukraine, 1 (Mar. 18, 2022).

³⁹ Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SEC. L. 453, 463, 465-66 (2013).

⁴⁰ See REBECCA BARBER, THE POWERS OF THE UN GENERAL ASSEMBLY TO PREVENT AND RESPOND TO ATROCITY CRIMES: A GUIDANCE DOCUMENT 44-46 (2021).

⁴¹ Louis Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, 57 PROC. AM. SOC’Y. INT’L. L. 147, 161 (1963).

lawful means to end *jus cogens* breaches,⁴² the first one must be contemplated. Louis Henkin—who candidly confessed that he had “no basis for a certain answer” and hoped that “any guess” would remain “academic”—found it “fair to say that any claim to traditional neutrality will have and deserve little sympathy.”⁴³ Dietrich Schindler thought that the UN system was not commanding “abstention and impartiality,” but “rather an active intervention in favor of states who are unlawfully under attack,” as neutrality would amount to “a breach of international solidarity” in this situation.⁴⁴ The United States has long favored “qualified” or “benevolent” neutrality, while confessing that it was a “controversial” position at the same time.⁴⁵ In this situation, “certain duties of neutral States may be inapplicable under the doctrine of qualified neutrality.”⁴⁶ Accordingly:

The law of neutrality has traditionally required neutral states to observe a strict impartiality between parties to a conflict, regardless of which state was viewed as the aggressor in the armed conflict. However, after treaties outlawed war as a matter of national policy, it was argued that neutral states could discriminate in favor of states that were victims of wars of aggression.⁴⁷

⁴² *Report of the Commission to the General Assembly on Work of its Fifty-Third Session*, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part. 2), 29 (2001).

⁴³ Henkin, *supra* note 41, at 161.

⁴⁴ Dietrich Schindler, *Aspects contemporains de la neutralité* [*Contemporary Aspects of Neutrality*], 121 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INT'L DE LA HAYE 221, 237 (1967).

⁴⁵ See U.S. DEP'T OF DEF., *supra* note 27, ¶ 15.2.2. This position predates the UN Charter, as it was invoked over the course of World War II to justify assistance to those states who were fighting Nazi Germany. According to U.S. General Attorney Jackson, both the Briand-Kellogg Pact of 1928 – to which Axis powers were parties – and the Saavedra-Lamas Treaty of 1933 had created a new era: “these treaties destroyed the historical and juridical foundations of the doctrine of neutrality conceived as an attitude of absolute impartiality in relation to aggressive wars. It did not impose upon the signatories the duty of discriminating an aggressor, but it conferred upon them the right to act in that manner.” Robert H. Jackson, U.S. Att’y Gen., Address of Robert H Jackson at the First Conference of the Inter-American Bar Association 9-10 (Mar. 27, 1941), www.justice.gov/sites/default/files/ag/legacy/2011/09/16/03-27-1941.pdf [<https://perma.cc/2UU4-PQVG>].

⁴⁶ U.S. DEP'T OF DEF., *supra* note 27, ¶ 15.2.2.

⁴⁷ *Id.*

Hence, states allegedly had the *right* to discriminate in favor of victims *without breaching neutrality*, and without having the *obligation* to do so. However, it appears that the position remains *de lege ferenda*.

B. Qualified Neutrality as *Lex Ferenda*

Even if desirable to some extent, qualified neutrality cannot yet be considered part of *lex lata*. In fact, the United States is an isolated supporter of the theory, and this approach has generally been disavowed by the classical views of several states, both before and after the Russian invasion of Ukraine. According to Germany, the UN Charter “does not generally supersede the law of neutrality” and, “[w]ithin the framework of international law, every state may make a sovereign decision on whether or not it will participate in a conflict on the side of the victim (what is known as collective self-defence), provided that the victim accepts the assistance.”⁴⁸ In the opinion of Australia, “[s]hould the UN Security Council determine not to institute an enforcement action or is unable to do so, due to the use of the veto by one of its members, member nations remain free to assume neutral status.”⁴⁹ A considerable amount of literature has also been produced by Switzerland since February 2022. In the autumn of 2022, the Swiss Federal Council took due note that the UN Security Council had failed to pass a binding resolution, and therefore “came to the conclusion that neutrality applies in respect to both Russia and Ukraine, and that Switzerland must observe those rights and obligations that exist for neutral states by virtue of international law.”⁵⁰ In the spring of 2023, the Federal Council confirmed that UNGA resolutions “do not change anything regarding the implementation of neutrality law.”⁵¹ From the perspective of the Federal Council, “If Switzerland decided to [authorize re-exportation of Swiss-made weapons to Ukraine] in a unilateral way, equality of treatment would be breached and consequently, duties

⁴⁸ BMVG, *supra* note 27, ¶ 1204.

⁴⁹ AUSTRALIAN DEP’T OF DEFENCE, *supra* note 27, ¶ 11.6.

⁵⁰ CONSEIL FÉDÉRAL, CLARTÉ ET ORIENTATION DE LA POLITIQUE DE NEUTRALITÉ [CLARITY AND ORIENTATION OF THE NEUTRALITY POLICY] 19 (2022), <https://www.news.admin.ch/newsd/message/attachments/73618.pdf> [https://perma.cc/8WHS-4WPM].

⁵¹ *Modification de la loi sur le matériel de guerre [Amendment to the War Materials Act]*, LE PARLEMENT SUISSE (Jan. 24, 2023), www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20233005 [https://perma.cc/N93J-JC4Y].

arising out of neutrality law.”⁵² If the Europeans and North Americans insisted on the need to assist Ukraine in collective self-defense, neutrality is typically absent from their discourses.⁵³ As stated by Giulio Bartolini, “this practice might militate against the emergence of the ‘benevolent/qualified’ exception, as the law of neutrality might have been interpreted as limiting potential military support.”⁵⁴ Furthermore, if one reviews the “supplementary means of interpretation,”⁵⁵ preparatory works of the UN Charter do not favor qualified neutrality either.⁵⁶ An amendment proposal by the French delegation, according to which permanent neutrality had to be expressly abolished, was not retained in the final version of the Charter.⁵⁷ At the time, it was argued that a neutral state would be unable “to fulfil some of the most important obligations of the Charter, particularly that of assisting in repelling or punishing an aggressor.”⁵⁸ Chile also argued against equality of treatment towards belligerents following identification of the aggressor by the UN Security Council, and supported the abolition of neutrality.⁵⁹

In other words, and even if a growing number of experts have argued in favor of the existence of qualified neutrality since the invasion of Ukraine, it is not yet part of positive law.⁶⁰ In spite of the

⁵² *Id.*

⁵³ For Albania and Norway, see U.N. SCOR, 77th Sess., 9127th mtg. at 12-13 (Albania), 16-17 (Norway), U.N. Doc. S/PV.9127 (Sept. 8, 2022). For Japan, see U.N. SCOR, 78th Sess., 9256th mtg. at 8-9, U.N. Doc. S/PV.9256 (Feb. 8, 2023).

⁵⁴ Giulio Bartolini, *The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice*, EJIL:TALK! (Apr. 11, 2023), www.ejiltalk.org/the-law-of-neutrality-and-the-russian-ukrainian-conflict-looking-at-state-practice/ [https://perma.cc/S8JC-YJLL].

⁵⁵ VCLT, *supra* note 26, art. 32.

⁵⁶ For a discussion on these issues, see, for example, Luzius Wildhaber, *Switzerland, Neutrality and the United Nations*, 12 MALAYA L. REV. 140, 154-59 (1970).

⁵⁷ U.N. Conference on International Organization, Documents of the United Nations Conference on International Organization San Francisco, 1945, vol. VII, at 309 [hereinafter Documents of the 1945 U.N. Conference, vol. II]; *see also* U.N. Conference on International Organization, Documents of the United Nations Conference on International Organization San Francisco, 1945, vol. VI, at 459.

⁵⁸ Documents of the 1945 U.N. Conference, vol. II, *supra* note 57, at 309.

⁵⁹ U.N. Conference on International Organization, Documents of the United Nations Conference on International Organization San Francisco, 1945, vol. III, at 293.

⁶⁰ Oona Hathaway & Scott Shapiro, *Supplying Arms to Ukraine is Not an Act of War*, LAWFARE (Mar. 12, 2022, 2:00 PM), www.lawfareblog.com/supplying-arms-ukraine-not-act-war [https://perma.cc/TE7P-ALP4]; Hitoshi Nasu, *The Future Law of Neutrality*, LIEBER INST.: WEST POINT (July 19, 2022),

arguments in favor of a “New World Order” following the San Francisco Conference,⁶¹ international law thus remains a binary regime in that respect: either a state is neutral, or it is not.⁶² Lacking a resolution by the UN Security Council, helping the victim of an aggression means that neutrality may be forfeited.⁶³

It seems that the obligation to “cooperate through lawful means” to end violations of peremptory norms does not affect the law of neutrality either. First, the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (“DARS”) do not “prescribe what measures states should take in order to bring to an end serious breaches,” and merely highlight that “[s]uch cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation.”⁶⁴ It is, however, “made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach,” and that “[w]hat is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches.”⁶⁵ However, and out of logic, one may argue that the very fact that neutrality (i.e., a legal obligation) may be breached (i.e., subject to a violation) raises doubt as to whether non-compliance with it constitutes “lawful means.”⁶⁶ Furthermore, in situations where the behavior of a state renders it necessary to commit a *prima facie* breach of international law, express provisions are made by the DARS (i.e., with countermeasures).⁶⁷

<https://lieber.westpoint.edu/future-law-of-neutrality/> [perma.cc/2ASZ-D9UF]. *But see* Pearce Clancy, *Neutral Arms Transfers and the Russian Invasion of Ukraine*, 72 INT’L & COMPAR. L.Q. 527, 533 (2023).

⁶¹ Hathaway & Shapiro, *supra* note 60.

⁶² Davis, *supra* note 24.

⁶³ Wolff Heintschel von Heinegg, “Benevolent” *Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 543, 552 (Michael Schmitt & Jelena Pejic eds., 2007).

⁶⁴ Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 114 (2001).

⁶⁵ *Id.*

⁶⁶ From the perspective of countermeasures, see, e.g., Raul (Pete) Pedrozo, *Ukraine Symposium - Is the Law of Neutrality Dead?*, LIEBER INST.: WEST POINT (May 31, 2022), <https://lieber.westpoint.edu/is-law-of-neutrality-dead/> [https://perma.cc/4F5P-HVSP].

⁶⁷ *See* Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, *supra* note 64, at 128-39.

Second, preparatory works suggest that collective response through the United Nations was favored. For instance, the Netherlands “assume[d]” that the “emphasis” was “on cooperation, i.e. maximizing the collective response, for example, through the collective security system of the United Nations, and preventing states from going it alone.”⁶⁸

Third, recent state practice does not point towards a neutrality exception based in peremptory norms either. Governments who decided to transfer arms to Ukraine did not refer to the obligation to cooperate through lawful means,⁶⁹ though Colombia was among the few states to do so.⁷⁰ Yet, Switzerland only recommended the adoption of economic sanctions, which have long been regarded as compliant with neutrality.⁷¹

⁶⁸ Int'l Law Comm'n, State Responsibility - Comments and Observations Received from Governments, U.N. Doc. A/CN.4/515 and Add.1-3, at 72 (2001). It may be noted that the preparatory work of the ILC draft articles on peremptory norms is not especially enlightening either. It is worth noting, though, that according to Cyprus, “States are also obliged to make efforts individually to end any unlawful results deriving from a violation of peremptory norms. In addition, States are under an obligation to refrain from assisting and/or recognizing as lawful a situation occurring from a breach of peremptory norms. The customary character of the duties of cooperation, non-recognition and non-assistance entails that States must perform those duties regardless of the existence of a judicial or political decision (for example, a Security Council resolution) calling on them to do so.” Int'l Law Comm'n, Peremptory Norms of General International Law (*Jus Cogens*) - Comments and Observations Received from Governments, U.N. Doc. A/CN.4/748, at 85 (2022).

⁶⁹ See Clancy, *supra* note 60, at 542.

⁷⁰ See U.N. GAOR, 11th Emergency Special Sess., 3d plen. mtg. at 2, U.N. Doc. A/ES-11/PV.3 (Mar. 1, 2022).

⁷¹ See, e.g., *Questions-réponses au sujet de la neutralité de la Suisse*, DÉPARTEMENT FÉDÉRAL DES AFFAIRES ÉTRANGÈRES [DFAE] (Sept. 9, 2022), <https://www.eda.admin.ch/eda/fr/dfaef/dfaef/aktuell/newsuebersicht/2022/03/neutralitaet.html> [<https://perma.cc/8H3W-HH84>]; see also Markus H. . . fliger, *What Putin's Invasion Means for the Future of Switzerland*, SWISS INFO (Mar. 7, 2022, 9:00 AM), <https://www.swissinfo.ch/eng/what-putin-s-invasion-means-for-the-future-of-switzerland/47402202> [<https://perma.cc/3W5C-EYNQ>]; Fabian-Maximilian, Johannes-Teichmann & Chiara Wittmann, *How Compatible Is the Principle of Neutrality with the Implementation of Economic Sanctions? An Examination into Switzerland's Use of Sanctions*, 30 J. FIN. CRIME 512 (2023). This is obviously challenged by Russia. *Russia Says Switzerland Cannot Represent Its Interests in Ukraine*, SWISS INFO (Aug. 11, 2022, 11:38 AM), <https://www.swissinfo.ch/eng/politics/russia-says-switzerland-cannot-represent-its-interests-in-ukraine/47819330> [<https://perma.cc/BC8M-EGRC>].

Fourth, one action seems clearly prohibited: delivering weapons to Russia.⁷² Some states seemed tempted to do so, like Iran and South Africa. Iran had continuously denied helping Russia with arms transfers, even if a huge number of Iranian drones are currently used by Russia in Ukraine,⁷³ and that cargo traffic on the Caspian Sea—which provides a direct maritime route between both countries—has increasingly become busier.⁷⁴ As far as South Africa is concerned, Minister of Defense Thandi Modise once said that they may “exploit such commercial opportunities as may arise out” and “from time to time enter into commercial agreements with foreign entities and/or governments, including the Russian Federation.”⁷⁵ However, this is obviously in flagrant contradiction with the obligation “to refrain from any action which might exacerbate the situation,” which arises as soon as peremptory norms are breached.⁷⁶ Again, Colombia was the one underlining this duty to “comply with the negative obligation to refrain from recognizing a de facto situation imposed by force through a serious breach of international law” and “from assisting or enabling such a situation, along with all its implications.”⁷⁷

Even if positive law does not yet acknowledge the existence of qualified neutrality, arguments may be found to endorse the

⁷² On these issues, see, e.g., Michael N. Schmitt, *Military Aid to Russia and International Law*, LIEBER INST.: WEST POINT (Sept. 12, 2023), <https://lieber.westpoint.edu/military-aid-russia-international-law/> [<https://perma.cc/GPZ5-ZSXX>].

⁷³ Ellie Geranmayeh & Nicole Grajewski, *Alone Together: How the War in Ukraine Shapes the Russian-Iranian Relationship*, EUR. COUNCIL FOREIGN REL. (Sept. 6, 2023), <https://ecfr.eu/publication/alone-together-how-the-war-in-ukraine-shapes-the-russian-iranian-relationship/> [<https://perma.cc/DB3Z-YK45>].

⁷⁴ Lauren Kent & Salma Abdelaziz, *Iran Has a Direct Route to Send Russia Weapons - and Western Powers Can Do Little to Stop the Shipments*, CNN, <https://edition.cnn.com/2023/05/26/europe/iran-russia-shipments-caspian-sea-intl-cmd/index.html> [<https://perma.cc/CC74-4RT2>] (May 26, 2023, 12:34 AM).

⁷⁵ Ray Hartley & Greg Mills, *Defence Minister Thandi Modise's Dangerous Dance with Putin*, DAILY MAVERICK (Oct. 30, 2022), <https://www.dailymaverick.co.za/article/2022-10-30-defence-minister-thandi-modises-dangerous-dance-with-putin/> [<https://perma.cc/WLL3-KAZY>]; see *Vente d'armes à la Russie : le "jeu dangereux" de l'Afrique du Sud* [*Selling Arms to Russia: South Africa's "Dangerous Game"*], COURRIER INT'L (Nov. 2, 2022, 3:48 PM), www.courrierinternational.com/article/guerre-en-ukraine-vente-d-armes-a-la-russie-le-jeu-dangereux-de-l-afrique-du-sud [<https://perma.cc/H2UZ-UVRR>].

⁷⁶ S.C. Res. 541, ¶ 8 (Nov. 18, 1983).

⁷⁷ U.N. GAOR, 11th Emergency Special Sess., 3d plen. mtg., *supra* note 70, at 2.

transformation of this *de lege ferenda* rule into a *de lege lata* one.⁷⁸ The most obvious reason is that, where neutrality is breached, the aggrieved belligerent is entitled to employ non-neutral measures, including through intervention on the territory of the “neutral” state and the proportionate use of force.⁷⁹ However, and with the exception of Denmark (who leaves the issue unclear),⁸⁰ states openly agree that only “enemy forces” operating from the territory of a neutral state may be subject to an attack.⁸¹ Such measures may be deployed where belligerent states are threatened or attacked by enemy forces,⁸² or where “assistance in such an attack” is provided.⁸³ Some of them also mention that it is part of “self-defense.”⁸⁴ If deviation from neutral duties is not sufficiently serious, reparation may still be sought,⁸⁵ and countermeasures may be taken.⁸⁶ As a matter of fact, “[t]o respond to such

⁷⁸ JAMES KRASKA, DAVID LETTS, RAUL “PETE” PEDROZO, WOLFF HEINTSCHEL VON HEINEGG, ROB MCLAUGHLIN, JAMES FARRANT, YURIKA ISHII, GURPREET S. KHURANA & KOKI SATO, *NEWPORT MANUAL ON THE LAW OF NAVAL WARFARE 227* (2023) (published in volume 101 of *International Law Studies*).

⁷⁹ For state positions, see DANISH MINISTRY OF DEFENCE, *supra* note 27, at 62; U.S. DEP’T OF DEF., *supra* note 27, 15.4.2.

⁸⁰ DANISH MINISTRY OF DEFENCE, *supra* note 27, at 62.

⁸¹ AUSTRALIAN DEP’T OF DEFENCE, *supra* note 27, ¶ 11.8; U.S. DEP’T OF DEF., *supra* note 27, ¶ 15.4.2; U.K. MINISTRY OF DEFENCE, *supra* note 27, ¶ 1.43.a; OFF. OF THE JUDGE ADVOC. GEN., *LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS*, ¶ 1304(3) (2001) (Can.), www.fichl.org/fileadmin/_migrated/content_uploads/Canadian_LOAC_Manual_2001_English.pdf [<https://perma.cc/RA3N-2NGT>].

⁸² AUSTRALIAN DEP’T OF DEFENCE, *supra* note 27, ¶ 11.8; U.S. DEP’T OF DEF., *supra* note 27, ¶ 15.4.2.

⁸³ AUSTRALIAN DEP’T OF DEFENCE, *supra* note 27, ¶ 11.35. According to Jeremy Davis, “[e]xercise of the right is fundamentally conditioned on the neutral state’s unwillingness or inability to meet its prevention obligation,” that “the opposing belligerent’s use of neutral territory must seriously and immediately endanger the aggrieved belligerent’s security, not merely place it at a disadvantage,” and that “the belligerent must not have available to it *any* feasible and timely alternative to using force to protect itself from serious harm.” Davis, *supra* note 24.

⁸⁴ AUSTRALIAN DEP’T OF DEFENCE, *supra* note 27, ¶ 11.35; U.S. DEP’T OF DEF., *supra* note 27, ¶ 15.4.2; UK MINISTRY OF DEFENCE, *supra* note 27, ¶ 1.43.a.

⁸⁵ AUSTRALIAN DEP’T OF DEFENCE, *supra* note 27, ¶ 11.36; Davis, *supra* note 24.

⁸⁶ Kevin Jon Heller & Lena Trabucco, *The Legality of Weapons Transfers to Ukraine Under International Law*, 13 J. INT’L. HUMANITARIAN LEGAL STUD. 251, 256, 274 (2022). *But see* Markus Krajewski, *Neither Neutral Nor Party to the Conflict?: On the Legal Assessment of Arms Supplies to Ukraine*, VÖLKERRECHTSBLOG (Mar. 9, 2022), <https://voelkerrechtsblog.org/neutral-neutral-nor-party-to-the-conflict/> [<https://perma.cc/BA8B-SFXP>].

[less serious forms of] violations by a declaration of war or by armed attack directed against the neutral is contrary to international law.”⁸⁷ For instance, the use of Shannon airport by the U.S. army—i.e., to transport troops, weapons and for refueling—has generated lively debate at the Irish Parliament,⁸⁸ with neutrality being called a “mockery,” a “Faustian pact,” the “giant elephant in the room,” or that it was being “sold piece by piece.”⁸⁹ The Irish government’s justification was more-or-less credible, appealing to its non-accession to the Hague Conventions, the non-international nature of conflicts, supersession by the UN Charter, and specific arrangement with the United States.⁹⁰

⁸⁷ AUSTRALIAN DEP’T OF DEFENCE, *supra* note 27, ¶ 11.36.

⁸⁸ See generally 835 No. 1 Dáil Deb., Defence Forces Operation (Mar. 25, 2014) (Ir.); 862 No. 3 Dáil Deb., Thirty-Fourth Amendment of the Constitution (Peace and Neutrality Bill 2014: First Stage (Dec. 18, 2014) (Ir.); 950 No. 1 Dáil Deb., Military Aircraft Landings (May 10, 2017) (Ir.); 981(6) Dáil Deb., Thirty-Eighth Amendment of the Constitution (neutrality) Bill 2018: Second Stage [Private Members] (Apr. 9, 2019) (Ir.); 265 No. 12 Seanad Deb., An tOrd Gnó - Order of Business (May 22, 2019) (Ir.). For the specific context of the War in Iraq, where the victim of an aggression was not the one supported, see 945 No. 1 Dáil Deb., Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) Bill 2016 [Seanad]: Second Stage (Resumed) (Mar. 30, 2017) (Ir.); 958 No. 2 Dáil Deb. (July 13, 2017), Defence Forces Operations: Motion (Resumed) (Ir.); 978 No. 8 Dáil Deb., Ratification of EU and NATO Status of Forces Agreements: Motion (Feb. 5, 2019) (Ir.).

⁸⁹ 847 No. 2 Dáil Deb., (July 9, 2014) (Ir.); 885 No. 1 Dáil Deb., Business of Dáil (June 30, 2015) (Ir.); 930 No. 2 Dáil Deb., Credit Union Sector (Nov. 24, 2016) (Ir.). During a testimony at the Irish Parliament, Dr. Karen Devine “agree[d] that refueling planes and the transit of U.S. troops through Shannon on their way to a theatre of war does breach the international law of neutrality. It means we are not neutral. When the Government agreed to do that, it broke the law on neutrality.” *Joint Committee on Public Service Oversight and Petitions Debate*, HOUSE OF THE OIREACTHAS (July 15, 2015), https://www.oireachtas.ie/en/debates/debate/joint_committee_on_public_service_oversight_and_petitions/2015-07-15/2/ [<https://perma.cc/Z28K-LFCJ>].

⁹⁰ 930 No. 2 Dáil Éireann Deb., Thirty-Fifth Amendment of the Constitution (Neutrality) Bill 2016: Second Stage (Nov. 24, 2016) (Ir.); according to MP Pascal Donohe, “[s]uccessive Governments have made overflight and landing facilities available at Shannon Airport to the US for well over 50 years. These arrangements do not amount to any form of military alliance with the United States and are governed by strict conditions. These include stipulations that the aircraft must be unarmed, carry no arms, ammunition or explosives and do not engage in intelligence gathering, and that the flights in question do not form any part of military exercises or operations. I therefore see no incompatibility between the use of Shannon Airport and our traditional policy of military neutrality.” See 847 No. 2 Dáil Éireann Deb. (July 9, 2014) (Ir.).

Even if Austria—which authorized the transit of weapons on the way to Ukraine through its own national territory—was subject to less criticism, some argued that “this stands in clear contradiction to traditional law on neutrality as enshrined in Hague Convention V.”⁹¹ Decades earlier, in the context of the Sand War between Algeria and Morocco, France considered that authorizing Algerian military airplanes to land on the Colomb-Béchar base was “contrary to a spirit of strict neutrality,” and refused to do so.⁹²

The problem in the context of the Ukrainian War is that treating the aggressor (Russia) and the victim (Ukraine) equally may play into the hands of aggressors.⁹³ In this situation, measures short of belligerency but beyond neutrality—e.g., troop training or arms transfers—must be considered acceptable. Of course, this would require a change in the law.

III. THE “UMBRELLA PRINCIPLE” OF IMPARTIALITY AND THE “INTELLIGENCE-SHARING GAP”

Today, most experts agree that an abstract and autonomous rule of “impartiality” has emerged in neutrality law.⁹⁴ Accordingly, any

⁹¹ Ralph Janik, *Current Developments: Austrian Neutrality Amid Russia’s War on Ukraine*, 26 AUSTRIAN REV. INT’L & EUR. L. 147, 154 (2023).

⁹² Jean Charpentier, *Pratique française du droit international* [French Practice of International Law], 10 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [A.F.D.I.] 900, 929 (1964).

⁹³ See, e.g., Nicolas Monnet, *Guerre en Ukraine: la Suisse prête à abandonner sa neutralité historique pour livrer des armes à Kyiv* [War in Ukraine: Switzerland Ready to Abandon Its Historic Neutrality to Deliver Weapons to Kyiv], L’INDEPENDANT (Feb. 7, 2023, 9:44 AM), www.lindependant.fr/2023/02/07/guerre-en-ukraine-la-suisse-prete-a-abandonner-sa-neutralite-historique-pour-livrer-des-armes-a-kyiv-10980871.php [<https://perma.cc/96TP-VTN7>] (saying that Thierry Burkart, the president of the Liberals, is in favor of authorizing the re-exportation of Swiss weapons to Ukraine and believes that failing to do so would amount to supporting Russia).

⁹⁴ For monographs and articles published before the war in Ukraine, see LASSA FRANCIS LAWRENCE OPPENHEIM, INTERNATIONAL LAW: A TREATISE 675 (Hersch Lauterpacht ed., 1952); SPRING, *supra* note 11; Michael Bothe, *Neutrality, Concept and General Rules*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L. (2015), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e349>; Davis, *supra* note 11, at 466. For articles published after 2022, see Stefan Talmon, *The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine* 1-4 (U. of Bonn, Inst. of Pub. Int’l L., Paper No. 20/2022,

“partial” behavior like intelligence sharing would *ipso facto* go against the rule. However, following an analysis of treaty law (Section A) and customary law (Section B), I argue that there is no such rule, and that impartiality may better be described as an “umbrella principle” that underpins the law of neutrality but cannot *per se* result in an internationally wrongful act.

A. Treaty Law

A fundamental and early question which arises in the field of neutrality is whether there is an abstract obligation to act impartially. If that is the case, then a breach of neutrality occurs whenever a state favors one belligerent. If not, then several forms of assistance which are not otherwise prohibited by an express treaty or customary rule—like intelligence sharing—will escape the law of neutrality and constitute potential gaps.⁹⁵ Express appeal to impartiality is sometimes made in the Hague Conventions, but only in some specific situations. For instance—and this Article will discuss this obligation in further detail later—Article 9 of the Hague Convention V states: “Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents.”⁹⁶ A similar provision exists in the Hague

2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4077084 [<https://perma.cc/59XU-K96A>]; von Heinegg, *supra* note 11.

⁹⁵ Most authors consider that intelligence sharing is contrary to neutrality. See SEAN CORDEY & KEVIN KOHLER, *THE LAW OF NEUTRALITY IN CYBERSPACE* 56-57 (2021), <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/Cyber-Reports-2021-12-The-Law-of-Neutrality-in-Cyber-space.pdf> [<https://perma.cc/S472-VVNM>]; Marko Milanovic, *The International Law of Intelligence Sharing During Military Operations*, in *RESEARCH HANDBOOK ON INTELLIGENCE AND INTERNATIONAL LAW* (Russel Buchan & Inaki Navarrete eds.) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4438549 (May 9, 2023); Barry de Vries, *Assistance to Ukraine: Moving Away from the Neutrality Paradigm*, PRIF BLOG (Mar. 31, 2022), <https://blog.prif.org/2022/03/31/assistance-to-ukraine-moving-away-from-the-neutrality-paradigm/> [<https://perma.cc/EW8B-MNWN>]. *But see* Yann L. Schmuki, *The Law of Neutrality and the Sharing of Cyber-Enabled Data During International Armed Conflict*, in *2023 15TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT: MEETING REALITY* 25 (Tatiana Jančárková, D. Giovannelli, Podiňš, K. & I. Winther eds., 2023); Nasu, *supra* note 60.

⁹⁶ Hague Convention V, *supra* note 10, art. 9.

Convention XIII.⁹⁷ A textual interpretation of this provision, however, does not result in the identification of an abstract duty of impartiality. Restriction and prohibition—which are respectively defined as “a limitation on action”⁹⁸ and “[t]he action or act of forbidding”⁹⁹—do not adequately describe the situation where war material or intelligence is actively provided by a state to one belligerent. Furthermore, both the wording and the context of the provision make it obvious that Article 9 has limited tangible consequences. The matters referred to in Articles 7 and 8 respectively refer to the export and transport of arms and munitions of war,¹⁰⁰ and the use of telecommunications.¹⁰¹

Subsequent practice does not confirm an abstract duty of impartiality either.¹⁰² As far as the author is aware, the cooperation between Switzerland and South Africa in the 1990s is one of the few situations where the lawfulness of intelligence sharing was raised—i.e., an activity not expressly covered by Article 9. In 1993, a Swiss parliamentary commission wondered whether a “violation of the impartiality duty as laid down by Article 9 of the Hague Convention” occurred, as “South Africa [was] at war with Angola” and “could benefit from the information obtained thanks to Switzerland.”¹⁰³ However, isolated expression of this type is not enough to “establish[] the agreement of [the] parties” regarding the treaty interpretation.¹⁰⁴ Then, even if most states consider that an otherwise protected aircraft or vessel may be

⁹⁷ See Hague Convention XIII, *supra* note 10, art. 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 which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.”).

⁹⁸ *Restriction*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/> [<https://perma.cc/N5LE-AWLX>] (last visited Feb. 15, 2024).

⁹⁹ *Prohibition*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/> [<https://perma.cc/9Q7K-BDJR>] (last visited Feb. 15, 2024).

¹⁰⁰ Hague Convention V, *supra* note 10, art. 7.

¹⁰¹ *Id.* art. 8.

¹⁰² According to James Upcher, “[w]hile States have occasionally adhered to positions of impartial neutrality, such a course of conduct is not required by customary international law.” See UPCHER, *supra* note 7, at 77.

¹⁰³ DÉLÉGATION DES COMMISSIONS DE GESTION (DELEGATION OF MGMT. COMM’N), ECHANGES DE PILOTES AVEC L’AFRIQUE DU SUD [PILOT EXCHANGES WITH SOUTH AFRICA] 96-97 (1993), <https://www.parlament.ch/centers/documents/fr/bericht-gpdel-pilotenaustausch-1993-09-28-f.pdf> [<https://perma.cc/Y7LZ-MHMF>].

¹⁰⁴ VCLT, *supra* note 26, art. 31(3)(b).

subject to an attack “if incorporated into, or assisting, the enemy’s military intelligence system,” or that persons who take part in the hostilities by transmitting intelligence forfeit protection under international humanitarian law, nothing is openly said regarding the effects on a state’s neutrality.¹⁰⁵

Such an attempt is also bound to fail where attention is given to the terms “act of hostility” and “hostile operations,” which appear in Articles 2 and 8 of the Hague Convention XIII.¹⁰⁶ According to the former, “[a]ny act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.”¹⁰⁷ According to the latter, “A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that Government is at peace.”¹⁰⁸

Again, there is a specific context for these “acts of hostility” and “hostile operations,” and state practice does not result in the identification of a more autonomous rule.¹⁰⁹ In fact, national doctrines, which

¹⁰⁵ See DANISH MINISTRY OF DEFENCE, *supra* note 27, ¶¶ 3.3.2.1-3.3.2.2; BMVG, *supra* note 27, ¶¶ 1029, 1122; NEW ZEALAND DEFENCE FORCE, *supra* note 27, ¶¶ 10.6.19, 10.6.28, 12.9.23; U.K. MINISTRY OF DEFENCE, *supra* note 27, ¶¶ 12.37, 12.43.1, 13.47; U.S. DEP’T OF DEF., *supra* note 27, ¶¶ 13.5.2, 14.8.3.2; MINISTÈRE DES ARMÉES (MINISTRY OF ARMED FORCES), MANUEL DE DROIT DES OPÉRATIONS MILITAIRES [GUIDANCE ON THE LAW OF MILITARY OPERATIONS] 112, 240-42 (2022) (Fr.) [hereinafter FRENCH MINISTRY OF ARMED FORCES], <https://www.defense.gouv.fr/sites/default/files/ministere-armees/Manuel%20de%20droit%20des%20op%C3%A9rations%20militaires.pdf> [https://perma.cc/567E-Z496]; MINISTERIO DE DEFENSA (MINISTRY OF DEFENSE), MANUAL DE DERECHOS HUMANOS Y DERECHO INTERNACIONAL HUMANITARIO DE LAS FUERZAS ARMADAS DEL PERÚ [GUIDANCE ON HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW OF THE ARMED FORCES IN PERU] ¶¶ 107, 131, 143-44 (2010) (Peru) [hereinafter PERU MINISTRY OF DEF.], https://www.mindef.gob.pe/informacion/documentos/manual_ddhh_ffaa_2010.pdf [https://perma.cc/DKR9-7QPY].

¹⁰⁶ Hague Convention XIII, *supra* note 10, arts. 2, 8.

¹⁰⁷ *Id.* art. 2.

¹⁰⁸ *Id.* art. 8.

¹⁰⁹ There are few doctrinal definitions from the perspective of neutrality, in contrast with international humanitarian law. See, e.g., NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009).

are often guided by the San Remo Manual,¹¹⁰ reveal that (apart from capture and the exercise of the right of search, which are expressly forbidden),¹¹¹ acts of hostility prohibited by Article 2 consist of “ordering vessels to steer a specific course,”¹¹² “attack on or capture of persons or objects located in, on, or over neutral waters or territory,”¹¹³ the use of neutral waters as a base of operations by belligerent forces,¹¹⁴ and laying mines.¹¹⁵ Article 8, for its part, merely creates a due diligence obligation for the neutral state, who shall prevent the preparation of warring vessels.¹¹⁶

The Hague Air Rules, which never came into force and are not necessarily representative of customary law, beget similar results.¹¹⁷ According to Article 47, “[a] neutral State is bound to take such steps as the means at its disposal permit to prevent within its jurisdiction aerial observation of the movements, operations or defenses of one belligerent, with the intention of informing the other belligerent.”¹¹⁸ Even if it may sound paradoxical, nothing expressly indicates that the neutral state is prevented from sharing intelligence and therefore advantaging a belligerent.¹¹⁹ In the end, other argumentations “remain relatively constructed and notably rely on analogies and assumptions rather than black-letter or case law.”¹²⁰

¹¹⁰ See generally SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, *supra* note 21.

¹¹¹ See U.S. DEP'T OF DEF., *supra* note 27, ¶ 15.13.3; BMVG, *supra* note 27, ¶ 1216.

¹¹² BMVG, *supra* note 27, ¶ 1216.

¹¹³ U.K. MINISTRY OF DEFENCE, *supra* note 27, ¶ 13.9.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ J. Ashley Roach, *Neutrality in Naval Warfare*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (2017), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e348>.

¹¹⁷ MARCO ROSCINI, CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW 247 (2014); Natalino Ronzitti, *The Codification of Law of Air Warfare*, in THE LAW OF AIR WARFARE: CONTEMPORARY ISSUES 3, 7-8 (Natalino Ronzitti & Gabriella Venturini eds., 2006).

¹¹⁸ Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Drafted by a Commission of Jurists at the Hague, Dec. 1922 – Feb. 1923, art. 47 [hereinafter 1923 Hague Rules of Air Warfare].

¹¹⁹ Schmuki, *supra* note 95, at 33. *Contra see* Luca Ferro & Nele Verlinden, *Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties*, 17 CHINESE J. INT'L L. 15, 41 (2018).

¹²⁰ Schmuki, *supra* note 95, at 34.

Further provisions about non-neutral services focus exclusively on the duty of private persons, and not neutral states themselves. For instance, Article 17 of the Hague Convention V underlines that “[a] neutral cannot avail himself of his neutrality” if “he commits hostile acts against a belligerent” or if “he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.”¹²¹ However, contextual analysis reveals that it is only relevant for physical persons, as this language appears in the third chapter about “neutral persons.” Article 16 of the Hague Air Rules underlines that “[n]o aircraft other than a belligerent military aircraft shall engage in hostilities in any form,” even if “[t]he term ‘hostilities’ includes the transmission during flight of military intelligence for the immediate use of a belligerent.”¹²² Again, however, nothing is openly said regarding the neutral status of the state itself. The same is true of Article 6(1) of the Hague Rules of 1923 concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, which states that “[t]he wireless transmission, by an enemy or neutral vessel or aircraft while being on or above the high seas, of any military information intended for a belligerent’s immediate use, shall be considered a hostile act exposing the vessel or aircraft to be fired at.”¹²³ For these reasons, an abstract duty to act “impartially” may hardly be identified in treaty law, and it is no different in customary law.

B. Customary Law

The absence of a treaty rule about “impartiality” means that, should such obligation exist, it would be embedded in customary

¹²¹ Hague Convention V, *supra* note 10, art. 17; *see also id.* art. 17(b) (stating that “[i]n such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act”).

¹²² 1923 Hague Rules of Air Warfare, *supra* note 118, art. 16.

¹²³ *Id.* art. 6(1).

international law.¹²⁴ Both general and consistent practice,¹²⁵ as well as *opinio juris*,¹²⁶ are required for the existence of a customary rule.¹²⁷ Forms of state practice include “diplomatic acts and correspondence,” “legislative and administrative acts,” “decisions of national courts,” as well as various forms of conduct: “conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference,” “conduct in connection with treaties,” or “executive conduct, including operational conduct ‘on the ground.’”¹²⁸ Forms of *opinio juris* include “public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.”¹²⁹

On the one hand, “impartiality” is mentioned in several national war manuals. For instance, according to Australia, “a neutral has a duty to abstain from taking part in the conflict and to remain impartial by according rights of passage or providing goods and services to belligerents on a non-discriminatory basis.”¹³⁰ A similar appeal to “impartiality,” “equal treatment,” or “abstention” appears in the war

¹²⁴ An appeal to other sources like general principles of law is less obvious here. First, this characterization has historically been favored for processual principles. Second, they are usually inspired by state domestic law. Third, the method used by the ICJ to identify general principles is unclear and controversial. Fourth, references to general principles often manifest a reliance of the ICJ on customary international law. See THIBAUT MOULIN, *CYBER-ESPIONAGE IN INTERNATIONAL LAW: SILENCE SPEAKS* 46 (2023).

¹²⁵ See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10 (2016), at 77 [hereinafter Rep. on the Work of Its Sixty-Eighth Session] (providing that general means “it must be sufficiently widespread and representative”).

¹²⁶ *Opinio juris* means that the practice in question must be undertaken with a sense of legal right or obligation. See North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20).

¹²⁷ *Id.* ¶¶ 74-77; see also Rep. on the Work of Its Sixty-Eighth Session, *supra* note 125, at 76.

¹²⁸ Rep. on the Work of Its Sixty-Eighth Session, *supra* note 125, at 77.

¹²⁹ *Id.* It may be noted that “official publications” consist of “documents published in the name of a State, such as military manuals and official maps,” as well as “[p]ublished opinions of government legal advisers.” *Id.* at 100.

¹³⁰ AUSTRALIAN DEP'T OF DEFENCE, *supra* note 27, ¶ 11.4.

manuals of Canada,¹³¹ Germany,¹³² Peru,¹³³ and the United States.¹³⁴ In 2022, Swiss Federal Councillor Guy Parmelin stated that “the law of neutrality is clear: involved parties must be treated the same way.”¹³⁵ Switzerland also took the general position that “neutrality prohibits the granting of military advantages to a conflict party.”¹³⁶ As far as the author is aware, one of the few situations where the relation between intelligence activities and neutrality was contemplated was again in relation to the Shannon airport. Simon Coveney, the Irish Minister of Foreign Affairs, declared that “[f]acilitation of landing requests for foreign military aircraft does not alter or breach Ireland’s policy of military neutrality,” as “[s]uch requests must meet a number of conditions, including that the aircraft are unarmed, carry no arms, ammunition or explosives, and do not engage in intelligence gathering, nor can the flights form part of military exercises or operations.”¹³⁷

On the other hand, several arguments contravene the existence of an autonomous and abstract rule of impartiality. First, several war

¹³¹ OFF. OF THE JUDGE ADVOC. GEN., *supra* note 81, ¶ 1304(2).

¹³² BMVG, *supra* note 27, ¶ 1201.

¹³³ PERU MINISTRY OF DEF., *supra* note 105, ¶ 112.

¹³⁴ U.S. DEP’T OF DEF., *supra* note 27, ¶ 15.3.2; DEP’T OF THE NAVY, DEP’T OF HOMELAND SEC. & U.S. COAST GUARD, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 7.2 (2022), https://usnwc.libguides.com/ld.php?content_id=66281931 [<https://perma.cc/RER8-2L5T>]. It may be noted that “impartiality” or “abstention” may have different implications. According to the U.S. manual: Certain other duties may be viewed as a consequence of these principal duties, but different publicists have categorized these duties differently. For example, the duty of a neutral State to refrain from supporting one side in the conflict may be viewed as a function of its duty to abstain from participation in hostilities. On the other hand, the duty of a neutral State to refrain from supporting one side in the conflict may also be viewed as a result of its duty of impartiality. The duties of a neutral State may also be classified in terms of: (1) abstention (obligations to refrain from taking certain actions); (2) prevention (obligations to take certain actions); and (3) acquiescence (obligations to accept certain actions by belligerents).

U.S. DEP’T OF DEF., *supra* note 27, ¶ 15.3.2 (citations omitted).

¹³⁵ Guy Parmelin, *Réponse à la question de Büchel Roland Rino*, LE PARLEMENT SUISSE (July 6, 2022), www.parlament.ch/fr/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen [<https://perma.cc/MG2P-6ARJ>].

¹³⁶ CONFEDERATION SUISSE, LA NEUTRALITÉ DE LA SUISSE [THE NEUTRALITY OF SWITZERLAND] 7 (2022), https://www.eda.admin.ch/dam/eda/fr/documents/publications/Schweizerische-Aussenpolitik/neutralitaet-schweiz_FR.pdf.

¹³⁷ 981 No. 6 Dáil Deb. (Apr. 9, 2019) (Ir.).

manuals do not refer to such duty, including those of Argentina,¹³⁸ Denmark,¹³⁹ France,¹⁴⁰ New Zealand,¹⁴¹ and the United Kingdom.¹⁴² Second, an in-depth analysis of state practice reveals that, when impartiality was appealed to in the framework of existing conflicts, it was typically mentioned in conjunction with a behavior that was already expressly prohibited by the Hague Conventions and treaty law. Such approach is favored by the Spanish war manual, which first refers to the “equal or uniform” treatment by neutral states, which does not involve “advantage or disadvantage,” and then says that “the duty of impartiality” does “materialize, more specifically, in the question of freedom and restrictions imposed on neutral trade.”¹⁴³ Then, the so-called “abstention principle” prevents “acts of hostility” (the meaning of which was highlighted above).¹⁴⁴ And that is how during the Iran-Iraq War, the United Kingdom stated that, “[a]s part of our scrupulously maintained impartiality in this conflict we refuse to sell to either side defense equipment which will significantly enhance their capability to prolong or exacerbate the conflict.”¹⁴⁵ It later reaffirmed that it “has been strictly impartial in the conflict between Iran and Iraq and has refused to allow the supply of lethal defense equipment to either side.”¹⁴⁶ When it was revealed that Germany had obtained a copy of Saddam Hussein’s plan to defend the Iraqi capital in 2003, and that the plan was passed to the United States one month before the invasion, a huge scandal erupted.¹⁴⁷ Support from Germany continued

¹³⁸ MINISTERIO DE DEFENSA (MINISTRY OF DEF.), *MANUAL DE DERECHO INTERNACIONAL DE LOS CONFLICTOS ARMADOS* [MANUAL OF INTERNATIONAL LAW OF ARMED CONFLICT] (2010) (Arg.).

¹³⁹ See DANISH MINISTRY OF DEFENCE, *supra* note 27, at 581, ¶ 4.4.1 (mentioning “obligation on neutral States to remain impartial” is only mentioned once in the context of neutral waters).

¹⁴⁰ The term “impartiality” may only be found vis-à-vis blockades. See FRENCH MINISTRY OF ARMED FORCES, *supra* note 105, at 247.

¹⁴¹ Impartiality is not mentioned about states, but for humanitarian organizations. See NEW ZEALAND DEFENCE FORCE, *supra* note 27, ¶¶ 16.6.1, 16.6.6-7.

¹⁴² See U.K. MINISTRY OF DEFENCE, *supra* note 27, ¶ 1.42 (mentioning that “[t]raditionally, the law has incorporated the principle of non-participation in armed conflict and also impartiality in certain dealings with the belligerents” without taking position in favor of it).

¹⁴³ SPAIN MINISTRY OF DEF., *supra* note 27, ¶¶ 1415-16.

¹⁴⁴ *Id.* ¶¶ 1417-18.

¹⁴⁵ HL Deb (Feb. 9, 1987) (484) col. 421-22 (UK).

¹⁴⁶ HC Deb (Oct. 29, 1985) (84) col. 450 (UK).

¹⁴⁷ See generally DW Staff, *Report: Germans Allegedly Gave Iraq's Defense Plan to US*, DEUTSCHE WELLE (Feb. 27, 2006), <https://www.dw.com/en/report-germans->

after the United States invaded Iraq, as it was reported that “the BND gave ‘direct support’ in ‘selecting targets.’”¹⁴⁸ For instance, a German intelligence agent deployed in Baghdad allegedly succeeded in “confirm[ing] US suspicions that a caravan of cars carrying Iraqi officials, including Saddam Hussein, was driving through the area,” and “[t]he information he relayed on April 7, 2003, was reportedly used in an immediate bomb attack on a complex of buildings in which at least 12 people died.”¹⁴⁹

Though the administration of former Chancellor Gerhard Schröder was subject to mass critics for its aid, appeal to a breach of “neutrality” was found nowhere. In fact, it was the dissymmetry between the public opposition and the private support by the German government that was denounced, in a context where German people strongly opposed the war.¹⁵⁰ Then, the cautious approach of Westerners regarding intelligence sharing with Ukraine (which is discussed further below) is difficult to use as evidence of the existence of impartiality. Westerners refrained from claiming neutrality and did not seek to justify intelligence-sharing in terms of neutrality either, in contrast with belligerency.¹⁵¹ Furthermore, it was publicly acknowledged that “useful” and “timely” forms of “battlefield intelligence” were being provided by the United States and its partners “to help Ukrainians defend their country.”¹⁵²

allegedly-gave-iraqs-defense-plan-to-us/a-1917369 [https://perma.cc/TZ62-SVRX].

¹⁴⁸ DW Staff, *Report: German Secret Agents Helped in Iraq Invasion*, DEUTSCHE WELLE (Jan. 12, 2006), <https://www.dw.com/en/report-german-secret-agents-helped-in-iraq-invasion/a-1853687> [https://perma.cc/5AD7-VSRR].

¹⁴⁹ *Id.*

¹⁵⁰ Ewen MacAskill & Samuel Loewenberg, *Secret Papers Reveal German Spies Passed Intelligence on Iraq to US Before Invasion*, GUARDIAN (Feb. 28, 2006, 7:12 PM), <https://www.theguardian.com/world/2006/feb/28/iraq.germany> [https://perma.cc/U5TZ-DSTC].

¹⁵¹ For research about silence in international law, see JACQUES BENTZ, *LE SILENCE COMME MANIFESTATION DE VOLONTÉ EN DROIT INTERNATIONAL PUBLIC* 49 (1963); ALEXIS MARIE, *LE SILENCE DE L'ÉTAT COMME MANIFESTATION DE SA VOLONTÉ* 720 (2018); Elisabeth Schweiger, *Listen Closely: What Silence Can Tell Us About Legal Knowledge Production*, 6 LONDON REV. INT'L L. 391 (2019). See generally Sophia Kopela, *The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals*, 29 AUSTRALIAN Y.B. INT'L L. 87, 123-25 (2010); DUSTIN A. LEWIS, NAZ K. MODIRZADEH & GABRIELLA BLUM, *QUANTUM OF SILENCE: INACTION AND JUS AD BELLUM* (Dutin A. Lewis ed., 2019).

¹⁵² *Pentagon Press Secretary John F. Kirby Holds a Press Briefing*, U.S. DEP'T OF DEF. (May 5, 2022),

Even if some states refer to impartiality, practice must be sufficiently widespread, representative, and consistent, and be accompanied with *opinio juris* to reveal a sense of legal obligation. This is not the case today, but it does not mean that it will never be, and a new customary norm may emerge in the future.¹⁵³ Impartiality, then, may better be described as an “umbrella principle,” which underpins the law of neutrality but cannot alone be subject to a breach and result in an internationally wrongful act.¹⁵⁴ This situation is not unprecedented, as sovereignty became a similar sort of umbrella principle,¹⁵⁵ resulting in the birth of several more-specific rules, such as respect for territorial integrity, non-intervention, and non-aggression.¹⁵⁶

In the end, and regarding the specific question of intelligence sharing, it appears that “[t]here is no clear rule, either in customary international law or in an international treaty, that directly addresses the connection between data sharing and neutrality.”¹⁵⁷ And, as demonstrated above, there is no rule that indirectly addresses this issue either, confirming that “[u]ncertainty regarding the technologically advanced means of support for belligerents has the potential to create loopholes for neutral states to participate in hostilities without losing their neutral status and associated protection.”¹⁵⁸ The proposal made by Yann Schmuki may be worth considering for the purpose of filling the gap. He suggested distinguishing between sharing “actionable” and “non-actionable” data, with only the former amounting to a breach

<https://www.defense.gov/News/Transcripts/Transcript/Article/3022007/pentagon-press-secretary-john-f-kirby-holds-a-press-briefing/> [https://perma.cc/LE54-TVNX].

¹⁵³ See UPCHER, *supra* note 7, at 77.

¹⁵⁴ According to James Upcher, “[t]he concept of impartiality in the law of neutrality is, therefore, closer to a principle than a specific rule.” UPCHER, *supra* note 7, at 77.

¹⁵⁵ THIBAUT MOULIN, *LE CYBER-ESPIONNAGE EN DROIT INTERNATIONAL* 79 (2021); MOULIN, *supra* note 124, at 74.

¹⁵⁶ Phil Spector, *In Defense of Sovereignty, in the Wake of Tallinn 2.0*, 111 AJIL UNBOUND 219, 219 (2017); see also Gary P. Corn & Robert Taylor, *Sovereignty in the Age of Cyber*, 111 AJIL UNBOUND 207, 210 (2017); Roman Kwiecień, *Armed Intervention and Violation of State Sovereignty in International Law*, 13 POLISH Q. INT’L AFFS. 73 (2004); Dan Jerker B. Svantesson, “*Lagom Jurisdiction*” - *What Viking Drinking Etiquette Can Teach Us About Internet Jurisdiction and Google France*, 12 MASARYK U. J.L. & TECH. 29, 45 (2018).

¹⁵⁷ Schmuki, *supra* note 95, at 33; see also Nasu, *supra* note 60.

¹⁵⁸ Hitoshi Nasu, *The Laws of Neutrality in the Interconnected World: Mapping the Future Scenarios*, in *THE FUTURE LAW OF ARMED CONFLICT* 123, 129 (Matthew Waxman & Thomas Oakley eds., 2022).

of neutrality.¹⁵⁹ Actionable data would, in his opinion, consist of “data that allows an actor to prepare and execute concrete military action, be it in kinetic form or in cyberspace,” like “data on tactical military developments or locations.”¹⁶⁰

IV. THE LIMITED CATEGORIES OF STATE ASSISTANCE RESTRICTED BY NEUTRALITY LAW

There are numerous ways to assist a belligerent state, and only a couple of them were openly covered by the Hague Conventions of 1907. According to the Hague Convention V on land warfare, a neutral power shall not tolerate, on its own territory:¹⁶¹ transit of “troops or convoys of either munitions of war or supplies”¹⁶² or the erection and use by warring states of means of communication “for the purpose of communicating with belligerent forces” or which “has not been opened for the service of public messages,”¹⁶³ as well as for forming and recruiting combatants.¹⁶⁴ According to the Hague Convention XIII on naval warfare, a neutral power shall make sure that captures do not occur within its territorial waters;¹⁶⁵ limit the number of belligerent warships, as well as the duration and frequency of their stays;¹⁶⁶ and abstain from “supply[ing], in any manner, directly or indirectly . . . war-ships, ammunition, or war material of any kind whatever.”¹⁶⁷ In addition, a neutral power shall “employ the means at its disposal to prevent the fitting out or arming of any vessel” and their “departure” if they were “adapted entirely or partly within [a neutral] jurisdiction for use in war,” and if they are “intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace.”¹⁶⁸ It must also constantly monitor territorial waters to prevent such violations from occurring.¹⁶⁹ However, it appears that several new forms of assistance are not specifically covered by the Hague Conventions, or are only prohibited in one environment but not the

¹⁵⁹ Schmuki, *supra* note 95, at 29.

¹⁶⁰ *Id.*

¹⁶¹ Hague Convention V, *supra* note 10, art. 5.

¹⁶² *Id.* art. 2.

¹⁶³ *Id.* art. 3.

¹⁶⁴ *Id.* art. 4.

¹⁶⁵ Hague Convention XIII, *supra* note 10, art. 3.

¹⁶⁶ *Id.* arts. 12-16, 17.

¹⁶⁷ *Id.* art. 6.

¹⁶⁸ *Id.* art. 8.

¹⁶⁹ *Id.* art. 25.

other (e.g., land, sea, or airspace). In this Part, the issues surrounding troop training are briefly addressed (Section A), before analyzing the question of arms transfers in depth (Section B).

A. Troop Training and Transit

If some types of support to a belligerent in the framework of recent conflicts clearly contradict neutrality—such as the training of Ukrainian soldiers on British soil¹⁷⁰ or the transit of U.S. troops and weapons through Shannon airport¹⁷¹—the application of these conventions in a modern context is challenging. As highlighted above, it is common for the Hague Conventions to omit types of assistance, or to cover them in one environment but not the other, such as land, sea, or airspace. One basic example is the training of Ukrainian pilots, which France and the United Kingdom offered to undertake, but failed to offer justification in terms of neutrality.¹⁷² Article 4 of the Hague Convention V provides that “[c]orps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral power to assist the belligerents.”¹⁷³ However, these rules only regulate the “laws and customs of war on land,” not those of the air; no specific provision about pilot training was included in the Hague Air Rules of 1923.¹⁷⁴ Yet, legal reasoning tends to indicate that the training of belligerent pilots does not comply with neutrality. In fact, pilots do qualify as “combatants,” who are defined as “members of the armed forces to a party to a conflict” (other than medical personnel and

¹⁷⁰ Jonathan Bartholomew, *Supporting the Training of Ukrainian Forces on the UK Defence Training Estate*, GOV.UK (Feb. 20, 2023), <https://insidedio.blog.gov.uk/2023/02/20/supporting-the-training-of-ukrainian-forces-on-the-uk-defence-training-estate/> [<https://perma.cc/J9QW-FYVX>].

¹⁷¹ *Dubsky v. Ireland*, [2005] IEHC 442 (H. Ct.), ¶¶ 27-29 (Ir.); *Horgan v. Ireland*, Application for declaratory relief, [2003] IEHC 64 [2003] 2 IR 468, ¶ 125 (Ir.).

¹⁷² Isabelle Lasserre, *La France forme l'armée de l'air ukrainienne sur des Mirage*, LE FIGARO, www.lefigaro.fr/international/la-france-forme-des-pilotes-ukrainiens-sur-des-mirage-20230322 [<https://perma.cc/325Q-W5EK>] (Mar. 24, 2023, 4:42 PM); *UK and Netherlands Agree 'International Coalition' to Help Ukraine Procure F-16 Jets*, GUARDIAN (May 16, 2023, 3:53 PM), www.theguardian.com/world/2023/may/16/uk-and-netherlands-agree-international-coalition-to-help-ukraine-with-f-16-jets [<https://perma.cc/W2KB-LM8F>].

¹⁷³ Hague Convention V, *supra* note 10, art. 4.

¹⁷⁴ A potential explanation for such omission may well be that it was perceived as superfluous, but this is based on an extrapolation.

chaplains).¹⁷⁵ It may be argued that training partly occurs on the ground, or at least within one's national airspace, and that pilots are also entitled to the prisoner-of-war status.¹⁷⁶ In addition, during the Iran-Iraq War, the U.K. government did not distinguish between warfighters, and generally underlined that "[n]o Iranian personnel are currently receiving military training from the Ministry of Defense, and any future requests for such training would be considered in the context of our policy of neutrality."¹⁷⁷

B. Arms Transfers

An even more complex and pressing issue resides in arms transfers. In fact, arms transfers by neutral powers are only prohibited by the Hague Convention XIII, which regulates the "rights and duties of neutral powers in naval war."¹⁷⁸ Article 6 provides that "[t]he supply, in any manner, directly or indirectly, by a neutral Power to a belligerent power, of war-ships, ammunition, or war material of any kind whatever, is forbidden."¹⁷⁹ If Article 1 of the Hague Convention XIII indicates that waters and land are not subject to a hermetically-sealed border—as belligerents shall "abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality"—it is international customary law which confirms that arms transfer is contrary to neutrality.¹⁸⁰ Most experts agree that supplying weapons is not compatible with

¹⁷⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Vol. 1125-17512, June 8, 1977, art. 43(2). "The armed forces of a [p]arty to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates"—even if it is represented "by a government or an authority not recognized by an adverse [p]arty"—and who are "subject to an internal disciplinary system" which "shall enforce compliance with the rules of international law applicable in armed conflict." *Id.* art. 43(1).

¹⁷⁶ INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOL OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶¶ 1644-51 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman, eds., 1987).

¹⁷⁷ HL Deb (May 2, 1984) (451) col. 622WA (UK).

¹⁷⁸ As mentioned in the full name of the Convention: "Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War."

¹⁷⁹ Hague Convention XIII, *supra* note 10, art. 6.

¹⁸⁰ *Id.* art. 1.

neutrality.¹⁸¹ However, few explain on what ground provisions from the Hague Convention XIII were also relevant outside the context of naval warfare or engage in in-depth analysis of state practice and *opinio juris*.¹⁸² Yet, state discourse about the contradiction between arms transfer and neutrality has a long history, both before and after the invasion of Ukraine, and both in peacetime and wartime.

In 1957, Egyptians' assistance to rebels in Algeria, which remained an integral part of France until 1962, was strongly denounced by the French authorities, who claimed it was "a breach of international law."¹⁸³ Such assistance allegedly consisted in manufacturing, supplying, and transporting weapons.¹⁸⁴ It also consisted in training Algerian fighters on Egyptian soil, and administrative and financial help.¹⁸⁵ In 1963, the French government argued that, in the event of an armed conflict between two states like Algeria and Morocco, "a strictly neutral attitude" had to be observed.¹⁸⁶ Over the Six-Day War, French neutrality was guaranteed through an embargo on the delivery of military equipment.¹⁸⁷ The French policy vis-à-vis the exportation of weapons and ammunition was officially subject to a dual assessment, based on whether a state was participating in an armed conflict, and whether they would be used for the purpose of self-defense.¹⁸⁸

¹⁸¹ Yves Sandoz, *Rights, Powers, and Obligations of Neutral Powers Under the Conventions*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 89 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015); Bothe, *supra* note 94, ¶ 36; SPRING, *supra* note 11, at 199; Heller & Trabucco, *supra* note 86, at 259; Krajewski, *supra* note 86; Michael Schmitt, *Providing Arms and Material to Ukraine: Neutrality, Co-Belligerency, and the Use of Force*, LIEBER INST.: WEST POINT (Mar. 7, 2022), <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/> [https://perma.cc/DUP3-8G9R]; von Heinegg, *supra* note 11.

¹⁸² *Id.*

¹⁸³ Jean Charpentier, *Pratique française du droit international public*, 3 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 781, 800-01 (1957).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Jean Charpentier, *Pratique française du droit international*, 10 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 900, 928-29 (1964).

¹⁸⁷ Jean Charpentier, *Pratique française du droit international*, 13 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 867, 895 (1967). Sales resumed just after the ceasefire, in the name of an "equilibrium of forces." Jean Charpentier, *Pratique française du droit international*, 14 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 879, 901-02 (1968).

¹⁸⁸ Jean Charpentier, *Pratique française du droit international*, 16 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 941, 945 (1970). A decade later, though, France argued that selling weapons at the same time to Colombia and Nicaragua,

Germany, for its part, stated that compensation paid to Jewish refugees who escaped Nazi persecutions may never be described as a breach of neutrality, as the agreement would not result in weapons, ammunition, or other military equipment being sold to Israel.¹⁸⁹ For a similar reason—i.e., the fact that it was not supplying Israel with “goods essential to the war effort”—Germany denied any involvement in the Arab-Israeli conflict.¹⁹⁰ Germany also found it compatible with neutrality to perform contracts with warring states, as long as it did not involve the delivery of war material.¹⁹¹ In 1966, Sweden decided to impose an embargo on weapon sale to Australia, due to the latter’s involvement in the Vietnam War.¹⁹² In the 1970s, Japan announced that it would not sell weapons to countries “which are actually involved or are likely to be involved in an international conflict,” countries subject to UN embargoes, or “communist bloc countries.”¹⁹³ In 1977, the Austrian minister of defense resigned upon revelations about the sale of weapons to Syria, which was found contrary to neutrality.¹⁹⁴

However, the event that raised most issues about neutrality was the Iran-Iraq war, which took place in the 1980s.¹⁹⁵ The United Kingdom, invoking “impartiality,” officially “refuse[ed] to sell to either side defence equipment which [would] significantly enhance their capability to prolong or exacerbate the conflict.”¹⁹⁶ The Foreign Secretary had the opportunity to “repeat” that U.K. policy was “one of neutrality and a refusal to sell lethal arms to either side.”¹⁹⁷ It was also

who were experiencing significant tensions toward each other, was still neutral. See Jean Charpentier, *Pratique française du droit international*, 28 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 1017, 1024-25 (1982).

¹⁸⁹ *Völkerrechtliche Praxis der Bundesrepublik Deutschland in den Jahren 1949 bis 1955*, 23 Z.A.O.E.R.V. 175, 284 (1963).

¹⁹⁰ *Id.*

¹⁹¹ *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1956*, 18 Z.A.O.E.R.V. 691, 725 (1957-1958), https://www.zao-erv.de/18_1957_58/18_1957_4_b_691_763.pdf.

¹⁹² Australia gave weapons and sent a contingent to help South Vietnam. See Françoise Moussu, *Chronologie des faits internationaux d'ordre juridique – 1966*, 12 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONALE 925, 927, 936, 959 (1966).

¹⁹³ Shigeru Oda & Hisashi Owada, *Annual Review of Japanese Practice in International Law XV (1976-1977)*, 28 JAPANESE ANN. INT’L L. 59, 174 (1985).

¹⁹⁴ Laurent Klein, *Chronologie des faits internationaux d'ordre juridique*, 23 A.F.D.I. 1086, 1102 (1977).

¹⁹⁵ George P. Politakis, *Variations on a Myth: Neutrality and the Arms Trade*, 35 GERMAN Y.B. INT’L L. 435, 472-95 (1992); von Heinegg, *supra* note 63, at 548-50.

¹⁹⁶ HL Deb (9 Feb. 1987) (484) col. 422 (UK).

¹⁹⁷ HC Deb (8 Mar. 1984) (55) col. 998 (UK).

decided not to “approve orders for any defense equipment which . . . would significantly enhance the capability of either side to prolong or exacerbate the conflict” and “continue to scrutinise rigorously all applications for export licences for the supply of defense equipment to Iran and Iraq.”¹⁹⁸ When KLM agreed to carry out maintenance work “on Iranian civil aircraft with a military character,” the Dutch government announced that it “wish[ed] to maintain its attitude of absolute impartiality in the war between Iran and Iraq,” that “no maintenance work shall be carried out in the Netherlands on aircraft with a military character,” and that “such aircraft, considering their special equipment, will in future be subject to the criteria applicable under the license system for arms exports.”¹⁹⁹

In the 1990s, in the framework of the First Gulf War, “[t]here were reports that Jordan supplied materials (including munitions) to Iraq during Operations Desert Shield and Desert Storm.”²⁰⁰ Yet, according to the United States, “[f]urnishing supplies and munitions to a belligerent traditionally has been regarded as a violation of a neutral’s obligations.”²⁰¹ Switzerland postulated that “[a] neutral state has to permanently deploy those means, that are necessary not to go to war and to refrain from doing anything, which may result in having it being military involved in the conflict.”²⁰² In 1999, Switzerland decided to oppose a rise in the exportation of weapons to NATO members that were involved in the conflict in Kosovo.²⁰³ Switzerland had another opportunity to confirm its opinion following the Second Gulf War, stating that “[i]t is a further duty of neutral states not to provide warring states with war material” and “[t]his is why on 20 March [2003] the Federal Council forbade the Confederation to supply the conflicting parties with war material or to provide them with military services.”²⁰⁴ More recently, the U.K. government argued that “the

¹⁹⁸ HL Deb (29 Oct. 1985) (84) col. 450 (UK).

¹⁹⁹ R. C. R. Siekmann, *Netherlands State Practice for the Parliamentary Year 1983-1984*, NETHERLANDS Y.B. INT’L L. 319, 416-17 (1985).

²⁰⁰ SALLY CUMMINS & DAVID STEWARD, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1991-1999, at 2104 (2005).

²⁰¹ *Id.*

²⁰² Lucius Caflisch, *La pratique suisse en matière de droit international public 1990*, 1 SWISS REV. INT’L EUR. L. 513, 561 (1991) [author’s translation].

²⁰³ Lucius Caflisch, *La pratique suisse en matière de droit international public 1999*, 10 SWISS REV. INT’L & EUR. L. 627, 683 (2000).

²⁰⁴ Furthermore, in its decision of 20 March 2003, the Swiss Federal Council stated that no approval was granted for the export of military equipment and services by private companies in the following cases: “if the export of this equipment or the

involvement of Hizballah's military wing in Syria and its support for Assad's brutality violates Lebanon's policy of neutrality."²⁰⁵

It is interesting to note that following the invasion of Ukraine, Switzerland argued against the distinction between "defensive" and "offensive" military equipment. Ukraine had requested protective equipment such as bullet-proof vests and helmets.²⁰⁶ Yet, the Swiss Federal Council stated that "in light of neutrality," these requests must be refused if equipment is "classified among goods with a military application."²⁰⁷ Doubt may be raised, however, regarding the law of neutrality's prohibition of the delivery of such equipment. In fact, and as highlighted above, states had the opportunity to mention that what was prohibited under the principle of neutrality was the trade of "lethal" equipment. The latter were described in terms of goods which "enhance the capability of either side to prolong or exacerbate the conflict," such as services on military aircrafts. It therefore seems that a "narrow" interpretation of war material was favored by States (i.e., those which are "directly and exclusively serving the killing and destruction purposes" of war).²⁰⁸ This is exactly the line that was drawn by Austria in its support of Ukraine, as it consented to send "non-lethal" material, including protective equipment.²⁰⁹

V. THE LIMITED CATEGORIES OF PRIVATE ASSISTANCE RESTRICTED BY

provision of this service would contribute to military operations in Iraq" or "if the export of this equipment or this service exceeded the 'courant normal', i.e. if because of the Iraq war these exports resulted in an increase of the average volume of these goods to the country concerned." FED. DEP'T OF FOREIGN AFFS., NEUTRALITY UNDER SCRUTINY IN THE IRAQ CONFLICT 13-14 (2005), https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/neutralitaetspraxis-schweiz-irak-konflikt_EN.pdf.

²⁰⁵ HL Deb, Vol. 753 col. 279 (8 Apr. 2014) (UK); see Jacques Hartmann, Sang-eeta Shah & Colin Warbrick, *United Kingdom Materials on International Law 2014*, 85 BRITISH Y.B. INT'L L. 301, 683 (2015).

²⁰⁶ CONSEIL FÉDÉRAL, *supra* note 50, at 21-22.

²⁰⁷ *Id.*

²⁰⁸ Anke Biehler, *War Materials*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (2013), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e434>.

²⁰⁹ Alexander Purger, *Alte Helme, alte Westen und neue Millionen aus Österreich für die Ukraine*, SALZBURGER NACHRICHTEN (May 5, 2022, 12:14 AM), www.sn.at/politik/innenpolitik/alte-helme-alte-westen-und-neue-millionen-aus-oesterreich-fuer-die-ukraine-120859114 [<https://perma.cc/JR35-GP64>].

NEUTRALITY LAW

When it comes to assistance provided by private persons, the Hague Conventions have a permissive approach, as such persons are neither prevented from trading weapons (Section A), nor providing telecommunication services (Section B). However, if a neutral state decides to adopt restrictions, they must be impartially applied to both belligerents. In this Part, I analyze these aspects, and I find that further amendments must be made to cover such activities in a better fashion.

A. ARMS TRADE

Another issue in the field of war material and neutrality law pertains to the activities of private persons. Articles 7 of the Hague Conventions V and XIII tackle the activities of private persons in rather similar terms and favor a permissive approach. The former provides that “[a] neutral power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.”²¹⁰ The latter underlines that “[a] neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet.”²¹¹ However, Article 9 of the Hague Convention V states that “[e]very measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 [about telecommunications] must be impartially applied by it to both belligerents.”²¹²

In other words, and according to treaty law, trade in war material is prohibited for the state, but it is permitted for private actors.²¹³ If restrictions are decided, however, they must apply impartially to every belligerent.²¹⁴ This rule is an ancient one, as U.S. President Thomas

²¹⁰ Hague Convention V, *supra* note 10, art. 7.

²¹¹ Hague Convention XIII, *supra* note 10, art. 7.

²¹² Hague Convention V, *supra* note 10, art. 9.

²¹³ As underlined by Yoram Dinstein, “[t]he upshot is that the laws of neutrality make it possible for the neutral state to opt for one of two diametrically opposed policies in respect of the sale and export of war materials from its territory by private individuals to the belligerents. On the one hand, it is entitled to impose a total embargo on such sale and export. On the other, it may enable all interested parties to purchase in the open market in its territory any item whatsoever.” See Yoram Dinstein, *The Laws of Neutrality*, 14 ISR. Y.B. HUM. RTS. 80, 95 (1984).

²¹⁴ For an opinion by Robert Kolb, see Frédéric Koller, *Livraison d’armes et de munitions: que disent vraiment le droit suisse et la neutralité?*, LE TEMPS (Dec. 25,

Jefferson stated it in 1793.²¹⁵ It also survived the World Wars and, in 1915, Germany had appealed to a “true spirit of neutrality” to prevent U.S. companies from selling weapons to the United Kingdom: “if it is the will of the America people that there shall be a true neutrality, the United States will find means of preventing this one-sided supply of arms.”²¹⁶ Yet, the U.S. government had referred to the letter of the Hague Conventions, and rejected this claim.²¹⁷ According to several experts, this distinction between public and private actors is outdated. For instance, Alexander Spring considers that “[t]he category of private war material export merged into the category of governmental export,” and that a new customary law has emerged.²¹⁸ Accordingly, “in the cases of an international armed conflict not only the governmental export of war material to a belligerent is prohibited for the relatively neutral state, but also any private export of war material.”²¹⁹ Though desirable, this evolution better qualifies as *de lege ferenda*.

Under the UN Arms Trade Treaty (“ATT”), a significant number of states agreed to monitor arms export, and to create national control systems for doing so.²²⁰ Under the ATT, transfers, including by private actors, of “conventional arms,” “ammunition and munitions” as well as “parts and components” are subject to state approval.²²¹ However, this treaty provides little evidence that the law of neutrality was amended. The ATT’s prohibitions prevent a state from authorizing transfers where it “would violate” certain obligations, but none of them correspond to neutrality.²²² Swiss practice is particularly

2022), www.letemps.ch/suisse/livraison-darmes-munitions-disent-vraiment-droit-suisse-neutralite [<https://perma.cc/CHL4-4LGN>].

²¹⁵ Letter of Mr. Jefferson to Mr. Hammond (May 15, 1793) <https://history.state.gov/historicaldocuments/frus1872p2v2/d119> [<https://perma.cc/UY2H-42AD>].

²¹⁶ *Papers Relating to the Foreign Relations of the United States, 1915, Supplement, the World War (File No. 763.72111/1930 74)*, DEP’T OF STATE OFF. OF THE HISTORIAN, <https://history.state.gov/historicaldocuments/frus1915Supp/d205> [<https://perma.cc/JQJ9-UG23>] (last visited May 16, 2024).

²¹⁷ *Id.* at 57.

²¹⁸ SPRING, *supra* note 11, at 204.

²¹⁹ *Id.*

²²⁰ *Treaty Status, ARMS TRADE TREATY (ATT)*, <https://thearmstradetreaty.org/treaty-status.html?templateId=209883> [<https://perma.cc/R758-GF2A>] (last visited May 16, 2024).

²²¹ Arms Trade Treaty arts. 2-4, Apr. 2, 2013, 3013 U.N.T.S. 269.

²²² *Id.* arts. 6-7. They are the following: “under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United

enlightening in that respect. The Federal Council confirmed in 2022 that the law of neutrality prohibits “direct transmission of war material” by a state, whereas it authorizes “export of war material” by private companies.²²³ However, and owing to the “principle of equal treatment,” if the country “restrains such export to a party to a conflict,” then it “shall also apply to the other party.”²²⁴ An approval scheme for export of war material and military services was nevertheless incorporated in the Federal Law on War Material,²²⁵ which provides that exportation “shall not be authorized if the receiving country is involved in an international armed conflict.”²²⁶ This position was confirmed in 2023, when the question of re-exportation of Swiss equipment to Ukraine by Germany and Denmark was raised:

To date, the Federal Council has responded to requests from European states to re-export war material from Switzerland to Ukraine on the basis of the law of neutrality as set out in the 5th Hague Convention of 1907 and . . . the Federal Law on War Material The law of neutrality does not explicitly regulate the question of re-exportation. It provides only that war material may not be delivered to third states with the intention of re-exporting it to a belligerent party. If, by virtue of a declaration of non-re-exportation, a state is obliged to request authorization from Switzerland to re-export war

Nations, in particular arms embargoes,” “under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms,” or “if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such,” or “other war crimes as defined by international agreements to which it is a Party.” In addition, states shall make sure that such transfers would not “contribute to or undermine peace and security, be used to “commit or facilitate a serious violation” of international humanitarian law” or “international human rights law,” “an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting state is a Party” or “an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting state is a Party.”

²²³ CONSEIL FÉDÉRAL, *supra* note 50, at 21.

²²⁴ *Id.*

²²⁵ FED. DEP'T OF FOREIGN AFFS., *supra* note 204, at 13; *see also Réponses claires aux questions en suspens sur l'affaire NSA ainsi que sur les activités du SRC et la collaboration entre le SRC et d'autres services*, L'ASSEMBLÉE FÉDÉRALE — LE PARLEMENT SUISSE (June 15, 2018), <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20183260> [<https://perma.cc/C3EJ-9T98>].

²²⁶ CONSEIL FÉDÉRAL, *supra* note 50, at 21.

material originating in Switzerland, the equal treatment deriving from the law of neutrality applies and, ultimately, it is for Switzerland to decide whether such war material may be delivered to a belligerent party. In such a case, there is a link between re-export and neutrality. If the Federal Council were to approve the re-export of war material to Ukraine, it would also have to approve requests for deliveries of war material to Russia.²²⁷

If the Swiss legislation enables the suspension or revocation of re-exportation licenses under “exceptional circumstances,”²²⁸ such request was nevertheless denied for Ukraine.²²⁹

At a time when states exercise significant scrutiny over the sale of weapons by private companies, the rationale for maintaining a distinction between state and nonstate actors in neutrality law is indeed questionable. Through the authorization regime, states are the true final decision-makers when it comes to the sales of weapons, even where they are made by private companies. In fact, “[t]he traditional assumption that there is no governmental involvement in the pursuit of unimpeded economic gain by private actors from the supply of arms has become untenable.”²³⁰ For this reason, it would be reasonable to have neutrality cover both public and private transfers of weapons. It could be conceivable to excuse a breach where the company is the author of a fraud and escaped compliance with the domestic legal framework. But outside this type of situation, states must be responsible for enforcing the rules. This would, however, require a change in the law. The telecommunication services situation is similar.

²²⁷ *Modification de la loi sur le matériel de guerre*, L’ASSEMBLÉE FÉDÉRALE — LA PARLEMENT SUISSE (Jan. 24, 2023), www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20233005.

²²⁸ LOI FÉDÉRALE SUR LE MATÉRIEL DE GUERRE [LMFG], RS 514.51, Dec. 13, 1996, art. 19, § 2 (Switz.).

²²⁹ *Rejet d’une Demande de Transmission de Matériel de Guerre Suisse à l’Ukraine*, DEFR (Switz.) (Nov. 3, 2022), www.wbf.admin.ch/wbf/fr/home/dokumentation/nsb-news_list.msg-id-91146.html [<https://perma.cc/4LM9-289B>].

²³⁰ Nasu, *supra* note 158, at 128; see also JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES—AND WAR-LAW 364 (1954).

B. Telecommunication Services

The transfer of war material is not the only type of “help” to a belligerent that may result from private action; the availability of means of communication is also relevant in that context. The Hague Convention V adopts an equally permissive approach, stating that “[a] neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals,”²³¹ but “[e]very measure of restriction or prohibition taken by a neutral Power in regard” to such matters “must be impartially applied by it to both belligerents.”²³² It also openly provides that “[a] neutral Power must see to the same obligation being observed by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.”²³³ Furthermore, belligerents must not “[e]rect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea,”²³⁴ or to “[u]se any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.”²³⁵ For this reason, SpaceX’s decision to provide Ukraine with Starlink satellites is not *per se* a breach of neutrality by the United States, as the former is a private company. Yet, those satellites allegedly played a decisive role, as they secured communications between Ukrainian troops,²³⁶ at a moment when internet access had been successfully cut off by the Russians.²³⁷ Since then, a decision to restrict access for drone attacks has been made by Elon

²³¹ Hague Convention V, *supra* note 10, art. 8.

²³² *Id.* art. 9.

²³³ *Id.*

²³⁴ *Id.* art. 3.

²³⁵ *Id.*

²³⁶ Graeme Massie, *Elon Musk Helps Ukraine with SpaceX’s Starlink Satellites*, INDEPENDENT (Feb. 28, 2022, 1:16 PM), www.independent.co.uk/news/world/europe/elon-musk-helps-ukraine-satellites-b2024893.html [https://perma.cc/CG94-BBKW].

²³⁷ Alex Horton, *Russia Tests Secretive Weapon to Target SpaceX’s Starlink in Ukraine*, WASH. POST., www.washingtonpost.com/national-security/2023/04/18/discord-leaks-starlink-ukraine/ [https://perma.cc/6U6N-DTQU] (last updated Apr. 18, 2023, 11:00 AM).

Musk, but probably not out of consideration for legal principles of neutrality.²³⁸

In this field too, at a time when the contribution of private actors in the field of telecommunications can make a difference in a war, a change in the law is required. In fact, telecommunication suppliers, who mainly consist of private companies, still come within the jurisdiction of a neutral state, who could regulate them.²³⁹

VI. THE LIMITS ON CO-BELLIGERENCY

As mentioned above, breaches of neutrality may give rise to countermeasures or even to an intervention on the territory of a neutral state to end violations. However, to quote the war manual of Denmark, “If neutrality is not enforced at all, the neutral state will also run the risk that the parties to the conflict will deem the neutrality to have been abolished with the effect that the neutral state becomes a party to the conflict.”²⁴⁰ The challenging question, then, is to determine where is the red line between neutrality breach and co-belligerency. If the line is obviously crossed when an armed attack is directed by a neutral state against a belligerent,²⁴¹ past conflicts reveal that there are various other forms of assistance that also generate significant tensions without amounting to a direct aggression. As highlighted in the Introduction, Russia was prompt to denounce the fact that “the West is directly involved in the Ukrainian conflict, not only by providing weapons and intelligence, but also by sending mercenaries and military personnel,

²³⁸ Two reasons were given by observers about it: it may result from economic considerations, or by fear to be accused of war crimes. See Sophie Leroy, *Le drôle de jeu d’Elon Musk en Ukraine avec Starlink*, L’ECHO (Feb. 14, 2023, 12:52 AM), <https://www.lecho.be/dossiers/conflit-ukraine-russie/le-drole-de-jeu-d-elon-musk-en-ukraine-avec-starlink/10447221.html> [https://perma.cc/T4ZK-ZFW9]; Alex Marquardt, *Musk’s SpaceX Says It Can No Longer Pay for Critical Satellite Services in Ukraine, Asks Pentagon to Pick Up the Tab*, CNN (Oct. 14, 2022, 6:38 PM), <https://edition.cnn.com/2022/10/13/politics/elon-musk-spacex-starlink-ukraine/index.html> [https://perma.cc/73CF-X6QZ]; Andrew Stanton, *Russian State TV Host Rails Against ‘War Criminal’ Elon Musk*, NEWSWEEK (Jan. 30, 2023, 3:23 PM), www.newsweek.com/russian-state-tv-host-rails-against-war-criminal-elon-musk-1777648 [https://perma.cc/WE75-3NKD].

²³⁹ The right of diplomatic protection is traditionally afforded to corporate entities to the state where it is incorporated or where its office is registered. See *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, 42, ¶ 70 (Feb. 5).

²⁴⁰ DANISH MINISTRY OF DEFENCE., *supra* note 27, at 62.

²⁴¹ See *id.*; see also U.S. DEP’T OF DEF., *supra* note 27, ¶ 15.4.2.

without whom Kyiv simply cannot operate some Western weapons.”²⁴² The status of the legal framework is therefore assessed in the context of Ukraine, first under the lens of *jus ad bellum* (Section A) and then, under the lens of *jus in bello* (Section B).

A. *Jus Ad Bellum*

Under the lens of *jus ad bellum*, an armed attack or an act of aggression is not committed where mere material assistance or intelligence is supplied to a belligerent.²⁴³ For this reason, self-defense may not be invoked in this situation.²⁴⁴ This becomes clear in light of UN General Assembly Resolution 3314, which is a good indicator in this context.²⁴⁵ In fact, behaviors listed in the Resolution all involve a physical trespass, either via the movement of armed troops or the use of a physical weapon: “[t]he invasion or attack by the armed forces of a State of the territory of another State,” its “military occupation” or “annexation,” “[b]ombardment” or “the use of any weapons by a State against the territory of another State,” “blockade” of “ports and coasts,” “[a]n attack . . . on the land, sea or air forces, or marine and air fleets,” the breach of an agreement relating to the stationing of troops, to place one’s territory “at the disposal of another State” to be used “for perpetrating an act of aggression against a third State,” the “sending” of “armed bands, groups, irregulars or mercenaries.”²⁴⁶ However, it would explain why Belarus was subject to sanctions a couple of hours following the aggression of Ukraine.²⁴⁷ In fact, the

²⁴² U.N. SCOR, 78th Sess., 9256th mtg. at 6, UN Doc. S/PV.9256 (Feb. 8, 2023).

²⁴³ For a discussion on these issues, see, e.g., Raphaël van Steenberghe, *Military Assistance to Ukraine: Enquiring the Need for Any Legal Justification Under International Law*, 28 J. CONFLICT & SEC. L. 231, 233-36 (2023).

²⁴⁴ U.N. Charter, art. 51.

²⁴⁵ Even if General Assembly Resolution 3314 provides a list of “acts of aggression” (i.e., in the context of Article 39 of the UN Charter) rather than “armed attack,” “the difference between the two is so small that it is often overlooked” and they are often deemed to be identical. See Peter Randelzhofer & Georg Nolte, *Article 51*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 1407-08 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 2012); Jaroslav Žourek, *La Définition de l’agression et le droit international: développements récents de la question*, 92 RECUEIL DES COURS 755, 816-17 (1957); Georges Abi-Saab, *Cours général de droit international public*, 207 RECUEIL DES COURS 9, 362 (1987).

²⁴⁶ G.A. Res. 3314 (XXIX), Definition of Aggression, art. 3 (Dec. 14, 1974).

²⁴⁷ Chad De Guzman, *Why Russia’s Invasion of Ukraine Led to Sanctions on Belarus*, TIME (Feb. 25, 2022, 12:00 PM), <https://time.com/6151347/belarus-russia-ukraine/> [<https://perma.cc/YH9F-UNU9>].

U.S. Department of Treasury said that its sanctions were “due to Belarus’s support for, and facilitation of, the invasion.”²⁴⁸ What became public at the time was that Russian troops entered Ukraine from its northern border—that is, from Belarus.²⁴⁹

The next question, then, is what conduct results in the use of force. In the *Nicaragua* case, the ICJ acknowledged that “the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua.”²⁵⁰ In contrast, “this is not necessarily so in respect of all the assistance given by the U.S. Government,” like “the mere supply of funds to the *contras*” (which nevertheless “undoubtedly” amounted to “an act of intervention in the internal affairs of Nicaragua”).²⁵¹ Even though the case was about a non-international armed conflict and even though the effects of ICJ judgments are supposed to be *inter partes*, Michael Schmitt persuasively argues that “the logic of the court’s holding arguably applies equally to international armed conflicts.”²⁵² If some kind of assistance to a nonstate actor might qualify as use of force, there is no rationale for describing similar support to a state actor in a different way. Hence, the “arming and training” likely constitute use of force in both international and non-international armed conflicts. In the context of the Russian aggression against Ukraine, however, Western states do not contradict the rules of *jus ad bellum*,²⁵³ since they act in the framework of collective self-defense, which was their main justification before the United Nations.²⁵⁴ Even Ghana, which did not supply weapons to

²⁴⁸ Press Release, U.S. Dep’t of the Treasury, U.S. Treasury Targets Belarusian Support for Russian Invasion of Ukraine (Feb. 24, 2022), <https://home.treasury.gov/news/press-releases/jy0607> [<https://perma.cc/9YJC-7NSX>].

²⁴⁹ De Guzman, *supra* note 247; *see also* G.A. Res. ES-11/1, Aggression against Ukraine, ¶ 10 (Mar. 18, 2022).

²⁵⁰ Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 I.C.J. Rep. 14, ¶ 228 (June 27, 1986).

²⁵¹ *Id.*

²⁵² The whole quote is the following: “But the logic of the court’s holding arguably applies equally to IAC, for if arming and training a non-State group fighting a State is a use of force (as distinct from unlawful intervention, a separate legal question), why would it not also be a use of force to provide arms to another State engaging in hostilities against that State? After all, the harm to the State could be much more severe, thereby meriting equal protection by international law.” Schmitt, *supra* note 181.

²⁵³ Heller & Trabucco, *supra* note 86, at 254-55.

²⁵⁴ For Albania, the United States, France, and Mozambique, *see* U.N. SCOR, 78th Sess., 9256th mtg. at 12-14, U.N. Doc. S/PV.9256 (Feb. 8, 2023). For Ireland

Ukraine, agreed that “the rules of international law or the Charter” do not “prohibit the supply of conventional weapons to a State under armed attack by another.”²⁵⁵

B. *Jus In Bello*

Under the lens of *jus in bello*, it is necessary to determine whether states who help in hostilities become party to an ongoing international armed conflict, and at what point the red line is crossed.²⁵⁶ Such

and France, see U.N. SCOR, 9127th mtg. at 17-19, U.N. Doc. S/PV.9127, (Sept. 8, 2022). For Ukraine, Latvia, and Estonia, see U.N. SCOR, 78th Sess., 9269th mtg. at 4-5, 28, 34, UN Doc. S/PV.9269 (Feb. 24, 2023). For positions expressed outside the UN Security Council, see generally Schriftliche Fragen [Written Questions], Deutscher Bundestag: Drucksachen [BT] 20/1918, ¶ 56 (May 20, 2022), <https://dserver.bundestag.de/btd/20/019/2001918.pdf> [<https://perma.cc/38ZB-62SW>] (Ger.); Senato, Comunicazioni del Presidente del Consiglio dei Ministri sugli Sviluppi del Conflitto tra Russia e Ucraina, Risoluzione 6-00208 (Mar. 1, 2022), www.senato.it/japp/bgt/showdoc/18/Resaula/0/1340251/index.html?part=doc_dc-allegatoa_aa [<https://perma.cc/38RK-XPUY>] (It.); Ministère des Affaires étrangères et européennes, de la Défense, de la Copération et du Commerce extérieur, Déclaration du gouvernement à l'occasion de la guerre d'agression contre l'Ukraine déclenchée par la Russie il y a un an (Feb. 24, 2023), https://maee.gouvernement.lu/fr/actualites.gouvernement%2Bfr%2Bactualites%2Btoutes_actualites%2Bcommuniqués%2B2023%2B02-fevrier%2B24-declaration-gouvernement-guerre-ukraine.html [<https://perma.cc/R7XB-TEGR>] (Lux.); Press Release, Ministry of Nat'l Defence, The Ministry of National Defence offers support to the Ukrainian Armed Forces (Feb. 27, 2022), https://english.mapn.ro/cpresa/5580_the-ministry-of-national-defence-offers-support-to-the-ukrainian-armed-forces [<https://perma.cc/9EC8-86YH>] (Rom.); Prime Minister's Office, *Policy Paper: Declaration Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine*, GOV.UK (Feb. 8, 2023), www.gov.uk/government/publications/uk-ukraine-declaration-of-unity/declaration-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-ukraine [<https://perma.cc/F6TX-6VNQ>] (U.K.); see also Bartolini, *supra* note 54.

²⁵⁵ U.N. SCOR, 77th Sess., 9216th mtg., U.N. Doc. S/PV.9216, at 10 (Dec. 9, 2022).

²⁵⁶ Stefan Talmon underlines that Western states failed to notify the UN Security Council of arms transfers. Talmon, *supra* note 94, at 6. In his opinion, “[o]ne reason why States did not invoke the right to collective self-defence might be that it would have made them ‘co-belligerents’ of Ukraine in the latter’s armed conflict with Russia.” *Id.* He nevertheless considers that “[i]n view of the obvious Russian aggression against Ukraine, any application of the traditional law of neutrality and the concomitant equal treatment of the aggressor and the victim of aggression would be tantamount to a declaration of legal and moral bankruptcy.” *Id.* at 21.

conflicts are “those which oppose [states] and occur when one or more States have recourse to armed force against another State, regardless of the reasons for or the intensity of the confrontation.”²⁵⁷ The challenge is that, lacking clear guidelines on this aspect, one is left with analogies to determine when a state becomes a “party” to a conflict.

This challenge was particularly present in the *Tadić* case, in which the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) had to determine whether the support provided by the Federative Republic of Yugoslavia to the Serbs of Bosnia was sufficient to turn them into a conflict party.²⁵⁸ Qualifying organized armed

²⁵⁷ ICRC, *Convention (III) Relative to the Treatment of Prisoners of War*. Geneva, 12 August 1949 – Commentary of 2020, INT’L HUMANITARIAN L. DATABASES ¶ 251 (2020), <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-2/commentary/2020?activeTab=undefined> [<https://perma.cc/2QX6-KUD5>] (last visited Feb. 16, 2024). It refers in particular to the *Tadić* case, in which the ICTY found that “an armed conflict exists whenever there is a resort to armed force between States.” See ICTY: Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995). The ICC, for its part, considered that “an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State.” See Prosecutor v. Bemba Gombo, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 223 (June 15, 2009). According to Article 2 of the Geneva Conventions, they “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516. The definition of “armed conflict” by the International Law Commission is the following: “a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.” See *Report of the Commission to the General Assembly on the Work of Its Sixty-Third Session*, [2011] 2 Y.B. Int’l L. Comm’n 107, U.N. Doc. A/CN.4/SER.A/2011/Add.1.

²⁵⁸ Céline Tran, *La Responsabilité internationale de l’Etat pour le fait d’acteurs non étatiques : approche différenciée de deux juridictions internationales*, LES BLOGS PÉDAGOGIQUES (May 30, 2011), <https://blogs.parisnanterre.fr/content/la-responsabilite-internationale-de-l-etat-pour-le-fait-d-acteurs-non-etatiques-approche-d-0> [<https://perma.cc/BP72-BMYB>]; *Conflit armé non international, Conflit armé interne, Guerre civile, Insurrection, Rébellion*, MÉDECINS SANS FRONTIÈRES: DICTIONNAIRE PRATIQUE DU DROIT HUMANITAIRE, <https://dictionnaire-droit-humanitaire.org/content/article/2/conflit-arme-non-international-conflit-arme-interne-guerre-civile-insurrection-rebellion/> [<https://perma.cc/VJG6-PZMB>] (last visited Feb. 10, 2024).

groups as *de facto* organs of a third state, the ICTY found the following:

Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a state (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.²⁵⁹

Michael Schmitt suggests that “[i]f materiel assistance to a non-State group in a non-international armed conflict does not initiate [international armed conflict] between the supporting State and the State against which the arms and equipment will be employed,” then “there is no rationale for saying it would do so in an international armed conflict.”²⁶⁰ It is interesting to note that following the attack of Hamas on Israel, words from U.S. Deputy National Security Adviser Jon Finer were close to those used in the *Tadić* case, as he stated: “What we don’t have is direct information that shows Iranian involvement in ordering or planning of the attacks that took place over the last couple of days,” something they were “going to keep looking at closely.”²⁶¹ If this analogy proves to be correct, then arms transfers and intelligence sharing—which may be described in terms of “equipping” and “operational support”—would not amount to belligerency.

On the one hand, the validity of the analogy is confirmed by the withdrawal of Western military advisors from Ukraine, the maintenance of which would qualify as belligerency under this framework,

²⁵⁹ Prosecutor v. Tadić, Case No. IT-94-1, Appeal Judgement, ¶ 137 (July 15, 1999).

²⁶⁰ Schmitt, *supra* note 181; see also Julia Grignon, *Co-Belligerency or When Does a State Become a Party to an Armed Conflict*, IRSEM (2022), www.irsem.fr/media/sb-39-grignon-cobelligerency.pdf [<https://perma.cc/YZ9W-RYZZ>]; Heller & Trabucco, *supra* note 86, at 265.

²⁶¹ Nadeen Ebrahim, *Hamas and Iran are Longtime Allies. Did Tehran Help with Its Attack on Israel?*, CNN (Oct. 10, 2023, 4:33 AM), <https://edition.cnn.com/2023/10/09/middleeast/hamas-iran-israel-attack-analysis-intl/index.html> [<https://perma.cc/6DHz-H6QG>].

as it would probably go beyond “operational support.”²⁶² Of course, direct confrontation would convert a party into a belligerent, which was also confirmed by the U.S. decision to withdraw troops that were still stationed in Ukraine a couple of days before the invasion. In parallel, thousands of U.S. soldiers were redeployed on the Eastern border of NATO. Regarding the first decision, U.S. National Security Adviser Jake Sullivan gave the following justification: “We continue to see signs of Russian escalation, including new forces arriving at the Ukrainian border . . . [W]e are in the window when an invasion could begin at any time should Vladimir Putin decide to order it.”²⁶³ Regarding the second decision, he explained that these deployments of U.S. service members to Poland, Romania, and Germany were “not soldiers who are being sent to go fight Russia in Ukraine” and were “not going to war with Russia.”²⁶⁴ In fact, he said they were “non-escalatory” and “defensive” deployments, who were “meant to reinforce, reassure, and deter aggression against NATO territory,” as well as “defend NATO territory, consistent with our Article 5 obligation.”²⁶⁵ All of this was also confirmed by reactions following President Macron’s declaration in 2024, according to whom the option to send troops on the Ukrainian soil shall not be ruled out.²⁶⁶ This would indeed certainly result in belligerency.²⁶⁷

²⁶² Several authors argue that it is at least a breach of neutrality. See Dinstein, *supra* note 213, at 91; Heller & Trabucco, *supra* note 86, at 258.

²⁶³ Press Briefing by Press Secretary Jen Psaki and National Security Advisor Jake Sullivan, THE WHITE HOUSE (Feb. 11, 2022), www.whitehouse.gov/briefing-room/press-briefings/2022/02/11/press-briefing-by-press-secretary-jen-psaki-and-national-security-advisor-jake-sullivan-february-11-2022/ [<https://perma.cc/YES6-X9Y7>].

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Élysée, *Conférence de presse du Président Emmanuel Macron à l’issue de la Conférence de soutien à l’Ukraine*, YOUTUBE (Feb. 26, 2024), www.youtube.com/watch?v=9PFusZVj9hE&ab_channel=%C3%89lys%C3%A9e [<https://perma.cc/FNK4-ZVDF>]; Emmanuel Macron on How to Rescue Europe, THE ECONOMIST (May 2, 2024), www.economist.com/europe/2024/05/02/how-to-rescue-europe [<https://perma.cc/9QUA-P3AB>].

²⁶⁷ Andrew Osborn, *Putin Allies Tell Macron: Any French Troops You Send to Ukraine Will Suffer Fate of Napoleon’s Army*, REUTERS (Feb. 28, 2024, 10:23 AM), www.reuters.com/world/europe/putin-allies-tell-macron-any-french-troops-you-send-ukraine-will-suffer-fate-2024-02-28/; John Irish, Michel Rose & Andrew Gray, *Macron’s Ukraine Troop Talk Shakes Up NATO Allies*, REUTERS (Feb. 28, 2024, 2:53 AM), www.reuters.com/world/europe/macrons-ukraine-troop-talk-shakes-up-nato-allies-2024-02-27/; Guy Faulconbridge, *Kremlin Warns of Conflict*

It is also likely that a state becomes a belligerent where its territory is put at the disposal of a warring state.²⁶⁸ This arose again vis-à-vis Shannon airport. Irish Deputy Mick Wallace argued that “[t]he law is unequivocal,” and that they were neither “non-participants” nor “militarily neutral.”²⁶⁹ He carried on as follows: “We are belligerents and, as long as Shannon remains a forward military base for the US war machine, we will remain belligerents”²⁷⁰ Several deputies agreed with him.²⁷¹ Russia warned that if airfields for Ukraine’s military aviation were provided by the Westerners, with subsequent use against the Russian armed forces, such provision “may be regarded as the involvement of these states in an armed conflict.”²⁷² This was also the position adopted a couple of years earlier by the U.S. Office of Legal Counsel.²⁷³

On the other hand, recent practice vis-à-vis Ukraine revealed significant carefulness towards arms transfer and intelligence sharing. The United States emphasized that material delivered to Ukraine consisted in “defensive weapons intended to defend Ukraine against aggression” and were “not meant for offensive purposes against any country.”²⁷⁴ Ukrainian President Volodymyr Zelensky promised President Biden that jets purchased from the United States would not be

with *NATO If Alliance Troops Fight in Ukraine*, REUTERS (Feb. 27, 2024), www.reuters.com/world/europe/kremlin-warns-conflict-with-nato-if-alliance-troops-fight-ukraine-2024-02-27/.

²⁶⁸ Alexander Wentker, *At War? Party Status and the War in Ukraine*, 36 LEIDEN J. INT’L L. 643, 655 (2023).

²⁶⁹ 872 No. 4 Dáil Deb., Thirty-Fourth Amendment of the Constitution (Peace and Neutrality) Bill 2014: Second Stage [Private Members] (Mar. 27, 2015) (Ir.).

²⁷⁰ *Id.*

²⁷¹ *See id.*

²⁷² Elena Teslova, *Russia Warns of Providing Airfield for Ukraine’s Military Aviation*, AA, (Mar. 7, 2022) <https://www.aa.com.tr/en/russia-ukraine-crisis/russia-warns-of-providing-airfield-for-ukraine-s-military-aviation/2525844>

[<https://perma.cc/X8W9-ZFSQ>]; *see also* Mateusz Piątkowski, *The Saga of the Polish MiG-29: The Laws on Neutrality and the Law of Air Warfare*, OPINIO JURIS (Oct. 3, 2022), <http://opiniojuris.org/2022/10/03/the-saga-of-the-polish-mig-29-the-laws-on-neutrality-and-the-law-of-air-warfare/> [<https://perma.cc/Z3UG-Z8HQ>].

²⁷³ “Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention, 28 Op. O.L.C. 35, 44 (2004).

²⁷⁴ *Press Briefing by Press Secretary Jen Psaki and National Security Advisor Jake Sullivan*, *supra* note 263.

used on Russian territory.²⁷⁵ France also underlined that no delivery of “weapons which could reach the Russian soil or attack Russia” would occur.²⁷⁶ A situation of “political window-dressing” was nevertheless pointed out, as Caesar canons have a range of thirty-five kilometers—which is enough to strike Russia—and were still provided to Ukraine.²⁷⁷ In a similar fashion, Ukrainian Minister of Defense Oleksii Reznikov declared that his “country [was] prepared to offer guarantees . . . that their weapons won’t be used to strike inside Russian territory.”²⁷⁸ Of course, this may be justified by political reasons, and especially over-caution. Yet, subject to some conditions, this kind of practice may still have legal consequences, and states must be cautious if they do not want it to be considered in treaty interpretation or the assessment of customary law.²⁷⁹ Nevertheless, the United Kingdom eventually consented to deliver long-range missiles to Ukraine in May 2023.²⁸⁰ Russia reacted only by saying that it viewed this action “extremely negatively,” without further substantiated legal elements.²⁸¹ A problem with Russian past reactions, however, is that they

²⁷⁵ Brendan Cole, *Putin Is Running Out of Red Lines*, NEWSWEEK, (June 7, 2023, 2:07 PM) www.newsweek.com/putin-red-lines-fl16s-ukraine-russia-war-escalation-1802264 [<https://perma.cc/J7FU-4WGL>].

²⁷⁶ TF1 INFO, *Emmanuel Macron répond aux questions de Gilles Bouleau dans le 20H*, YOUTUBE (May 15, 2023), www.youtube.com/watch?v=YSFgdX5HSF0 [<https://perma.cc/TUH7-BH88>].

²⁷⁷ Pierre Haski, *La France va former des pilotes ukrainiens : un tabou de plus a sauté*, RADIO FRANCE (May 16, 2023), www.radiofrance.fr/franceinter/podcasts/geopolitique/geopolitique-du-mardi-16-mai-2023-9876038 [<https://perma.cc/DSL2-3WAB>].

²⁷⁸ Tara Copp, Matthew Lee & Lolita Baldor, *US to Send Ukraine Longer-Range Bombs in Latest Turnaround*, AP (Feb. 2, 2023, 4:43 PM), <https://apnews.com/article/russia-ukraine-politics-military-and-defense-0f550a262fb6178a7d91b8be6e2c601b> [<https://perma.cc/3S89-KBVZ>].

²⁷⁹ See, e.g., Marko Milanovic, *The United States and Allies Sharing Intelligence with Ukraine*, EJIL: TALK!, (May 9, 2022), www.ejiltalk.org/the-united-states-and-allies-sharing-intelligence-with-ukraine/ [<https://perma.cc/887J-5RTV>].

²⁸⁰ Dan Sabbagh & Luke Harding, *UK Sending Long-Range Storm Shadow Missiles to Ukraine, Says Defence Minister*, THE GUARDIAN (May 11, 2023, 2:19 PM), www.theguardian.com/politics/2023/may/11/uk-sending-long-range-storm-shadow-missiles-to-ukraine-says-defence-minister-ben-wallace [<https://perma.cc/EJ4H-VXF5>].

²⁸¹ Jill Lawless & Danica Kirka, *Britain Promises More Weapons for Ukraine as Zelensky Continues His Tour of Europe*, L.A. TIMES (May 15, 2023, 5:38 PM), www.latimes.com/world-nation/story/2023-05-15/uk-more-weapons-ukraine-zelensky-visit [<https://perma.cc/2ESJ-E3P2>].

frequently shift and cannot be relied upon for determining the location of the red line.²⁸² On the day Russia began its invasion of Ukraine, Vladimir Putin said that “anyone who tries to interfere with us” would face “immediate” response.²⁸³ In April, Sergey Lavrov, Russia’s Minister of Foreign Affairs, stated that “NATO is essentially going to war with Russia through a proxy and arming that proxy,” and added, “War means war.”²⁸⁴

Older practice does indicate, however, that delivery of war material does not result in belligerency. For instance, during World War II and before the attack on Pearl Harbor, the United States’ transfer of arms to the United Kingdom was not perceived as belligerent, even if it was described as a breach of neutrality in a quasi-unanimous way.²⁸⁵ A paradoxical point was even reached during the Iran-Iraq War, when states simultaneously sent massive arms transfers to both conflicting parties.²⁸⁶

Sharing intelligence with Ukraine has also been perceived as controversial and special precautions have been taken in this realm. At the start of the conflict, U.S. Representative Adam Smith stated: “We want to support the Ukrainians in every way we possibly can, without

²⁸² As observed by Maxim Samorukov, “Russia has devalued its red lines so many times by saying certain things would be unacceptable and then doing nothing when they happen.” The “problem is that we don’t know the actual red line. It’s in one person’s head [Vladimir Putin], and it can change from one day to the next.” See John Hudson & Dan Lamothe, *Biden Shows Growing Appetite to Cross Putin’s Red Lines*, WASH. POST (June 1, 2023, 5:00 AM), www.washingtonpost.com/national-security/2023/06/01/ukraine-f-16s-biden-russia-escalation/ [<https://perma.cc/E3DE-29VC>].

²⁸³ *Putin Describes the Attack on Ukraine as an Act of Self-Defense*, NPR (Feb. 24, 2022, 5:12 AM), <https://www.npr.org/2022/02/24/1082736117/putin-describes-the-attack-on-ukraine-as-an-act-of-self-defense> [<https://perma.cc/6PTP-PLWK>].

²⁸⁴ Jon Jackson, *NATO Has Already Crossed Vladimir Putin’s ‘Red Line’*, NEWSWEEK, www.newsweek.com/nato-has-already-crossed-vladimir-putins-red-line-1703136 [<https://perma.cc/HR78-JTTH>] (May 3, 2022, 5:04 PM).

²⁸⁵ In the famous *Destroyers-for-Bases* agreement, President Roosevelt consented to transfer warships to the United Kingdom, in exchange for a lease on certain naval bases. See SELIG ADLER, *THE UNCERTAIN GIANT: 1921-1941 - AMERICAN FOREIGN POLICY BETWEEN THE WARS* 237 (1965); Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 AM. J. INT’L L. 569, 569 (1940).

²⁸⁶ Claude Pernet, *Les origines de la crise: Table ronde sur l’Histoire juridique de la région*, in *LES ASPECTS JURIDIQUES DE LA CRISE ET DE LA GUERRE DU GOLFE* 27, 30 (1991); see also 26 *Countries Selling Arms to Both Sides in Gulf War*, L.A. TIMES (June 18, 1987, 12:00 AM), www.latimes.com/archives/la-xpm-1987-06-18-mn-8000-story.html [<https://perma.cc/Q9C2-Q3C5>].

going to war with Russia When it comes to intel-sharing and targeting, that’s a fine line.”²⁸⁷ He said that the United States would not provide “real-time targeting” intelligence to Ukraine, “because that steps over the line to making us participating in the war,” and added that “the Pentagon is really struggling and walking that very fine line.”²⁸⁸ This distinction between “real-time targeting” and other types of intelligence is, as far as the author is aware, a recent one. In any case, parties did not limit themselves within this theoretical framework. In fact, it was later revealed that the United States provided real-time targeting intelligence to Ukrainian officials, thus helping with the destruction of command posts, ammunition depots, and logistical facilities,²⁸⁹ as well as Russian cruiser *Moskva*,²⁹⁰ Russian troops, and even senior members of the Army.²⁹¹ Commentaries by spokesperson Adrienne Watson are a good example of the embarrassment in Washington D.C.: “The United States provides battlefield intelligence to help the Ukrainians defend their country . . . We do not provide intelligence with the intent to kill Russian generals.”²⁹² It was reported that France also refused to transmit digital maps to Ukraine, which were essential for combat aircrafts or drones to carry out low-altitude

²⁸⁷ Ken Dilanian, *Biden Administration Walks Fine Line on Intelligence-Sharing with Ukraine*, NBC (Mar. 4, 2022, 5:01 AM), www.nbcnews.com/news/investigations/biden-administration-walks-fine-line-intelligence-sharing-ukraine-rcna18542 [https://perma.cc/MVC8-3B89].

²⁸⁸ *Id.*

²⁸⁹ Julian E. Barnes & Helene Cooper, *Ukrainian Officials Drew on U.S. Intelligence to Plan Counteroffensive*, N.Y. TIMES (Sept. 10, 2022), www.nytimes.com/2022/09/10/us/politics/ukraine-military-intelligence.html [https://perma.cc/H9BA-XJYM].

²⁹⁰ Helene Cooper, Eric Schmitt & Julian E. Barnes, *U.S. Intelligence Helped Ukraine Strike Russian Flagship, Officials Say*, N.Y. TIMES (May 5, 2022), www.nytimes.com/2022/05/05/us/politics/moskva-russia-ship-ukraine-us.html.

²⁹¹ Julian E. Barnes, Helene Cooper & Eric Schmitt, *U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say*, N.Y. TIMES (May 4, 2022), www.nytimes.com/2022/05/04/us/politics/russia-generals-killed-ukraine.html [https://perma.cc/9MF6-3UDJ].

²⁹² AFP, *US Intelligence Helped Ukraine Target Russian Generals – Report*, TIMES OF ISRAEL (May 5, 2022, 7:43 AM), www.timesofisrael.com/us-intelligence-helped-ukraine-target-russian-generals-report/ [https://perma.cc/MG2E-R8A6]. Former CIA members also asked for more discretion, as they thought it could result in escalation. Julian Borger, *US Intelligence Told to Keep Quiet over Role in Ukraine Military Triumphs*, THE GUARDIAN (May 7, 2022, 1:10 AM), www.theguardian.com/us-news/2022/may/07/us-spies-ukraine-russia-military-intelligence [https://perma.cc/XC7Q-BZXD].

missions over the Belarusian territory.²⁹³ However, if the analogy drawn from *Tadić* is correct, such actions would not cross the red line of belligerency. Though supplying intelligence of this kind would likely result in (lethal and destructive) action, Ukraine is the final decision-maker.²⁹⁴ The farthest Ukraine's allies could have gone is to accompany intelligence with tactical or strategic recommendations. In the end, the correct vision seems to be that of U.S. Senator Ben Sasse, who stated, "Putin threatens that real-time actionable intelligence is tantamount to being engaged in the war in their soil. That's obviously not true."²⁹⁵

In the context of Iran's involvement in Hamas's recent attacks against Israel—and provided that it is more relevant under the lens of *jus in bello* than *jus ad bellum*—discussions focused on the degree of Hamas's dependence on Iran.²⁹⁶ If the legality of Iran's aid did not center on its financial, material, political support,²⁹⁷ or training,²⁹⁸ the main question was whether it "helped plan Hamas's Saturday surprise attack on Israel and gave the green light for the assault at a meeting in Beirut."²⁹⁹ Reporters noted that "U.S. and Israeli officials said they have no firm evidence so far that Iran authorized or directly coordinated the attack that killed more than 900 Israelis and wounded thousands."³⁰⁰ The red line seems to have been drawn at direct

²⁹³ Jacques Follorou & Cédric Pietralunga, *France Refuses to Provide Ukraine with Maps to Target Belarus*, LE MONDE, www.lemonde.fr/en/international/article/2023/04/21/france-refuses-to-provide-ukraine-with-maps-to-target-belarus_6023755_4.html [<https://perma.cc/XL9Z-P97L>] (Aug. 8, 2023, 4:44 PM).

²⁹⁴ *Contra* Raul (Pete) Pedrozo, *Russia-Ukraine Conflict: The War at Sea*, 100 INT'L L. STUD. 1, 56 (2023).

²⁹⁵ Dilanian, *supra* note 287.

²⁹⁶ Patrick Wintour, *How Iran Uses Proxy Forces Across the Region to Strike Israel and US*, THE GUARDIAN (Nov. 1, 2023, 1:00 AM), <https://www.theguardian.com/global/2023/nov/01/how-iran-uses-proxy-forces-across-the-region-to-strike-israel-and-us> [<https://perma.cc/5PAZ-KRL6>].

²⁹⁷ Ebrahim, *supra* note 261.

²⁹⁸ Farnaz Fassihi, *After Years of Vowing to Destroy Israel, Iran Faces a Dilemma*, N.Y. TIMES (Nov. 1, 2023), <https://www.nytimes.com/2023/11/01/world/middleeast/iran-israel-hamas.html>.

²⁹⁹ Summer Said, Benoit Faucon & Stephen Kalin, *Iran Helped Plot Attack on Israel Over Several Weeks* (Oct. 8, 2023, 7:32 PM), <https://www.wsj.com/world/middle-east/iran-israel-hamas-strike-planning-bbe07b25>.

³⁰⁰ Joby Warrick, Ellen Nakashima, Shane Harris & Souad Mekhennet, *Hamas Received Weapons and Training from Iran, Officials Say*, WASH. POST, <https://www.washingtonpost.com/national-security/2023/10/09/iran-support->

authorization and coordination, and training likely did not seem sufficient to breach neutrality since “[i]f you train people on how to use weapons, you expect them to eventually use them.”³⁰¹

VII. CONCLUSION

Hitoshi Nasu recently argued that “the traditional law of neutrality is built upon anachronistic premises and assumptions, which may not survive the future environment of warfare.”³⁰² In some ways, he seems to be correct. On the one side, the law of neutrality remains well-suited to prohibit state-sponsored arms transfer and troop training, which are contrary to this framework, either under customary or treaty rules. On the other side, the law of neutrality is unsatisfactory when it comes to intelligence sharing and the regulation of private activities. In contrast with most experts, who consider that an autonomous and abstract rule of impartiality has come into existence, this Article suggests that it may at best qualify as an umbrella principle, which underpins the law of neutrality, but no punishable wrongful act stems from its violation. This means that, outside an express treaty or customary rule, advantaging one belligerent over the other does not result in neutrality loss. As such, intelligence sharing is not *prima facie* contrary to the legal framework, which is questionable. Today, private companies like arms brokers and telecommunication service providers can influence a war in a significant way, but the near absence of constraint on their activities is indeed obsolete. This is true because states have established internal control mechanisms on weapons and could, to a certain extent, exert similar controls on telecommunications.

Neutrality law does not currently allow a neutral state to discriminate between the perpetrator and the victim of an aggression if the UN Security Council fails to pass a binding resolution. A consequence of this is that a belligerent state is theoretically free to take all measures against a state who acts at odds with neutrality, even if such measures involve intervention in the territory of the neutral State. Finally, when it comes to the rules about belligerency, it is still necessary to resort to analogies with the law governing non-international armed conflict and responsibility. The *Nicaragua* case indicates that “arming and training” constitute use of force, in contrast with the “mere supply of

hamas-training-weapons-israel/ [https://perma.cc/9DHP-2DEH] (Oct. 9, 2023, 11:21 PM).

³⁰¹ *Id.*

³⁰² Nasu, *supra* note 158, at 127.

funds,” which amounts to an intervention in the internal affairs. In light of the *Tadić* case, “organizing, coordinating or planning” the military actions of a military group constitute conflict participation, in contrast with “financing, training and equipping or providing operational support to that group.” Further concurring state practice would be required to confirm that such understanding—which would be sound and relevant—is indeed a proper framework.