

MANDATORY NEUTRALITY LAW IN CONTEMPORARY PERSPECTIVE

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The law of neutrality is increasingly seen as optional or qualified, on grounds that the collective security system enshrined in the U.N. Charter no longer permits “mandatory” neutrality, or state practice indicates its desuetude. I argue both positions have misunderstood the binding nature of neutrality law which has continued to govern contemporary armed conflicts. The law is more appropriately understood as a mandatory rule of international law which regulates the conduct of third states in armed conflicts of others, including by requiring all third states to be *prima facie* neutral. In so arguing, this article strengthens the mandatory neutrality position and more precisely addresses the persisting discomfort towards neutrality law. The second half of the article demonstrates how neutrality law prohibits forms of assistance that materially risk escalating contemporary armed conflicts. The law regulates a wide range of third state involvement that falls short of direct participation in hostilities including, in some cases, the sharing of cyber defense intelligence by private actors. Neutrality law is, therefore, particularly useful in constraining proxy conduct by third (and in many cases powerful) states, thereby potentially mitigating the humanitarian consequences of contemporary international armed conflicts. Neutrality law complements the collective security system under the U.N. Charter and offers the potential for a less interventionist world.

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I. INTRODUCTION

Much like public international law generally, neutrality law is teetering on the edge of dismissal with writers questioning whether it is

“Dead,”¹ “obsolete”² or “abused.”³ This trend has come with a narrative that neutrality is optional⁴ or, as a more contested position,⁵

1. Raul (Pete) Pedrozo, *Is the Law of Neutrality Dead?*, LIEBER INST. WEST POINT (May 31, 2022), <https://lieber.westpoint.edu/is-law-of-neutrality-dead/>.

2. CONSTANTINE ANTONOPOULOS, *NON-PARTICIPATION IN ARMED CONFLICT: CONTINUITY AND MODERN CHALLENGES TO THE LAW OF NEUTRALITY* 8 (Cambridge Univ. Press 2022).

3. Rebecca Ingber, *The Abuse of Neutrality*, 65 VA. J. INT’L L. 437, 441 (2025).

4. See Dietrich Schindler, *Transformations in the Law of Neutrality since 1945*, in ASTRID J. DELISSEN & GERARD J. TANJA, *HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD* 371-3 (Martinus Nijhoff, 1991); see also, e.g., Andrea Gioia, *Neutrality and Non-Belligerency*, in *INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT* 59 (Harry H. G. Post ed., Martinus Nijhoff, Dordrecht, 1994); LASSA OPPENHEIM and HERSH LAUTERPACHT, *INTERNATIONAL LAW: A TREATISE* 221 (Longmans, Green, London, 7th ed. 1952) (noting it is now ““open to neutral States as a matter of legal right to give effect to their moral obligation to discriminate against the aggressor and to deny him, in their discretion, the right to exact from neutrals a full measure of impartiality””); Evelyne Schmid, *Optional but Not Qualified: Neutrality, the UN Charter and Humanitarian Objectives*, 927 INT’L REV. RED CROSS (Mar. 2025), https://international-review.icrc.org/articles/optional-but-not-qualified-neutrality-the-un-charter-and-humanitarian-objectives-927#footnote95_75rxdyh.

5. See, e.g., Pearce Clancy, *Neutral Arms Transfers and the Russian Invasion of Ukraine*, 72 INT’L & COMP. L.Q. 527, 533 (2023) (stating ““while the U.S. military manual still endorses qualified neutrality in a brief paragraph, it is an outlier in this regard. Indeed, qualified neutrality has not been used as justification for any subsequent U.S. breach of the law of neutrality since World War II. Subsequent developments in international law and practice have similarly been silent on the question of qualified neutrality.””); Pedrozo, *supra* note 1 (arguing that ““the validity of qualified neutrality is questionable

qualified,⁶ on grounds that the collective security system under the U.N. Charter no longer permits “mandatory” neutrality⁷ or state practice indicates its desuetude.⁸

In general terms, neutrality refers to the “status of a State not participating in an armed conflict between two or more other States.”⁹ This status carries with it rights and obligations under the law of neutrality. Neutrality law essentially regulates the conduct of non-participating and participating states during armed conflicts. For example, a neutral state may not supply “war-ships, ammunition, or war material” to a belligerent state.¹⁰ A belligerent state is “forbidden to use neutral ports and waters as a base of naval operations against their adversaries.”¹¹ The *Hague Convention (V) respecting the Rights and*

and may be seen as political expediency to allow States to justify their violations of the law of neutrality on moral and ethical grounds as necessary to contain Russian expansionism”).

6. 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/> (“... there is a strong view held by several States, including the United States, according to which neutral States are allowed to adopt a position of “qualified” or “benevolent” neutrality, by distinguishing between an aggressor and the victim of aggression ... there are good reasons to take a more nuanced position vis-à-vis “qualified neutrality.” The present situation in Ukraine is a game changer ...”); Michael N. Schmitt, *Providing Arms and Materiel 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/> (Schmitt finds “convincing” the qualified neutrality analysis by Heintschel von Heinegg); Michael N. Schmitt, “Strict” versus “Qualified” Neutrality, LIEBER INST. WEST POINT (Mar. 22, 2023), <https://lieber.westpoint.edu/strict-versus-qualified-neutrality/>.

7. See Schindler, *supra* note 4, at 371-3.

8. Heintschel von Heinegg, *supra* note 6. Cf. Clancy, *supra* note 5.

9. Antonopoulos, *supra* note 2, at 8.

10. Hague Convention (XIII) of 1907 concerning the Rights and Duties of Neutral Powers in Naval War, art 6, Oct. 18, 1907, 36 Stat. 2415; 205 Consol. T.S. 395. While Convention XIII specifies the duties of neutral states in naval warfare, those provisions apply to land and other types of warfare. Their applicability is reflected in Article 1 of the Convention which provides “[b]elligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in *neutral territory or neutral waters*, from any act which would ... constitute a violation of neutrality.” The preparatory works of Hague Convention XIII envisioned its application and development in warfare scenarios not contemplated in 1907: Pearce Higgins, *The Hague Peace Conferences*, Texts of Conventions with Commentaries, at 482-3; JAMES UPCHER, *NEUTRALITY IN CONTEMPORARY INTERNATIONAL LAW* 70 (Oxford University Press 2020).

11. Hague Convention (XIII) of 1907 concerning the Rights and Duties of Neutral Powers in Naval War, art 5.

*Duties of Neutral Powers and Persons in Case of War on Land*¹² and the *Hague Convention (XIII) of 1907 concerning the Rights and Duties of Neutral Powers in Naval War*¹³ have codified aspects of neutrality law which reflect customary international law at the time.¹⁴

I use the words “participating state” or “participant” in preference to “belligerent state” wherever possible to denote a state the party to an armed conflict. I recognize “belligerency”, bring the condition of being in fact engaged in war, was more commonly used prior to 1945 and continues to be infrequently used, sometimes interchangeably, with participant in an international armed conflict.¹⁵ Nevertheless, the latter formulation is legally more precise and better aligned with the contemporary framework of international humanitarian law.¹⁶

Neutrality law has become a “study in contradictions”¹⁷ and “one of confusion”¹⁸ especially since the use of force against other states is prohibited under article 2(4) the U.N. Charter. Article 2(4) being a key turning point because states “can no longer choose freely between neutrality and belligerency.”¹⁹ States must ordinarily refrain from entering an international armed conflict. The prohibition does not, however, offer clarity on whether and how states may provide assistance to a participating state that falls short of participation in the armed conflict. This, I say, is a question for the law of neutrality.

Two principal debates have emerged. The first is whether the law of neutrality still exists today and, if so, in what form. Some writers consider the status of neutrality has become optional, wherein states can choose whether to assist a participating state particularly in response to what could be considered an illegal use of force by the

12. Hague Convention (V) of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 205 Consol. T.S. 299 (“Hague Convention V”).

13. Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, *supra* note 9.

14. See, e.g., Antonopoulos, *supra* note 2, at 28-38; see also Eric Jensen, *Sovereignty and Neutrality in Cyber Conflict*, 35 FORDHAM INT’L L. J. 816, 819–20 (2012).

15. See, e.g., Sasha Radin, *The Current Relevance of the Recognition of Belligerency*, in *International Law Between Conflict and Peacetime*, in Search of the Human Face 115, 116–19 (Marcel Brus, Marielle Matthee & Brigit Toebe eds., TMC Asser Press 2013); Sandesh Sivakumaran, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT*, at 8-9.

16. See also, generally, Robert McLaughlin, *RECOGNITION OF BELLIGERENCY AND THE LAW OF ARMED CONFLICT* (2020).

17. Ingber, *supra* note 3, at 437.

18. Gioia, *supra* note 4, at 56.

19. Schindler, *supra* note 4, at 371.

other participating state.²⁰ Others, including myself, argue third states are required to be *prima facie* neutral whenever there is an international armed conflict even if they think one of the participants is using force illegally.²¹

The second debate is the extent to which neutrality law regulates the conduct of third states. The contours of this debate include questions about the kind of conduct neutrality law prohibits, as well as the extent to which the law, while only binding to states, regulates the conduct of private actors.²² Beyond weapons transfers,²³ assistance provided by third states may include military intelligence,²⁴ military

20. See, e.g., Schindler, *supra* note 4, at 371–73; Schmid, *supra* note 4.

21. See, e.g., Michael Bothe, *The Law of Neutrality* in Dieter Fleck et al (ed.), *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* (4th ed) 602 at 605-12 and FN 45; Upcher, *supra* note 9, at 23-30; Antonopoulos, *supra* note 2, at 17-21; 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, 544 (Michael N. Schmitt & Jelena Pejic eds., 2007) (“‘The present contribution aims to show that allegations of derogation of the law of neutrality are, to say the least, premature and that there is no basis for concepts such as “‘benevolent neutrality’” or “‘non-belligerency’”’. This is not to say that post-World War II State practice has been without effect on this body of law, only that the modification has not resulted in a legal vacuum permitting States to act at will”).

This article does not engage with the separate debate concerning the applicability of the law of neutrality to non-international armed conflicts. My view is, for reasons such as those adopted by Constantine Antonopoulos (*supra* note 2, at 175-200) and Kevin Jon Heller (*The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It’s a Good Thing, Too: A Response to Chang* 47 *TEX. INT’L L. J.* 115 (2011)), it does not.

22. See, e.g., HITOSHI NASU, *The Laws of Neutrality in the Interconnected World*, *THE FUTURE LAW OF ARMED CONFLICT* 247 (Matthew C. Waxman & Thomas W. Oakley eds., 2015); Jeffrey Biller & Michael Schmitt, *Classification of Cyber Capabilities and Operations as Weapons, Means, or Methods of Warfare*, 95 *INT’L L. STUD.* 179 (2019); Peter Hostettler & Olivia Danai, *Neutrality in Land Warfare*, in *Max Planck Encyclopedia of Public International Law* ¶ 24 (Rüdiger Wolfrum ed., Oxford Univ. Press, online ed. 2015) (“‘Another difficult issue may arise from the role which private military and security firms have started to play in recent armed conflicts ... What should be the policy of a neutral State which hosts the headquarters, or even a branch of such an enterprise, if the latter participates directly in hostilities?’”).

23. See, e.g., Christian Schaller, *When Aid or Assistance in the Use of Force Turns into an Indirect Use of Force*, 10 *J. USE FORCE & INT’L L.* 173 (2023).

24. See, e.g., Joshua Shaner, *CIA Helped Rebuild Ukraine’s Intelligence Network Ahead of Russia Invasion*, *ABC NEWS* (Feb. 9, 2024), <https://abcnews.go.com/International/cia-helped-rebuild-ukraine-intelligence-russia-invasion/story?id=116909361>.

training,²⁵ logistical support for the transfer of military equipment,²⁶ diplomatic²⁷ and financial support,²⁸ as well as humanitarian relief.²⁹ Such assistance is sometimes provided through private actors with the consent or acquiescence of the third state.³⁰

The conflict in Ukraine has served as a recent example for writers to question the utility of neutrality law,³¹ because assisting Ukraine is considered “the right thing to do.”³² Writers question whether the supply of weapons to Ukraine, as many states have done,³³ would violate the law³⁴ and, more broadly, whether the war “could confirm the trend favoring the protection of ‘the common interests of the international community and . . . the role which third states may play in that regard’, which could however imply how the law of neutrality might ‘vanish entirely through obsolescence.’”³⁵

25. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14, ¶ 228 (June 27); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 161 (Dec. 19).

26. See, e.g., Marta Pawelczyk, *Contemporary Challenges in Military Logistics Support*, 20 SEC. & DEF. Q. 85 (2018).

27. See, e.g., *Abbas Slams US's Diplomatic Support for Israel's War on Gaza in UN Speech*, AL JAZEERA (Sept. 26, 2024), <https://www.aljazeera.com/news/2024/9/26/abbas-slams-uss-diplomatic-support-for-israels-war-on-gaza-in-un-speech>.

28. See also Tom Ruys, *Of Arms, Funding and “Non-lethal Assistance” — Issues Surrounding Third-State Intervention in the Syrian Civil War*, 13 CHINESE J. INT'L L. 13 (2014).

29. See, e.g., David Fisher, *Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis*, 89 INT'L REV. RED CROSS 345 (2007).

30. See, e.g., Hostettler & Danai, *supra* note 22, ¶ 24.

31. See, e.g., Natalino Ronzitti, *Neutrality, Non-Belligerency, and Permanent Neutrality According to Recent Practice and Doctrinal Views*, 29 J. CONFLICT & SEC. L. 55 (Spring 2024); Niccolò Zugliani, *The Supply of Weapons to a Victim of Aggression: The Law of Neutrality in Light of the Conflict in Ukraine*, 35 EUR. J. INT'L L. 389 (2024); Giulio Bartolini, *The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice*, EJIL: TALK! (Apr. 11, 2023), <https://www.ejiltalk.org/the-law-of-neutrality-and-the-russian-ukrainian-conflict-looking-at-state-practice/>.

32. DOD Official Restates Why Supporting Ukraine Is in US Interest, U.S. DEP'T OF DEF. (Aug. 3, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3671938/dod-official-restates-why-supporting-ukraine-is-in-us-interest/> (Jun. 6, 2026).

33. See, e.g., Kiel Institute for the World Economy, *Ukraine Support Tracker*, <https://www.kielinstitut.de/topics/war-against-ukraine/ukraine-support-tracker/>.

34. See, e.g., Zugliani, *supra* note 31.

35. Bartolini, *supra* note 31.

Far less clear is what the right thing to do is in other armed conflicts. With respect to the ongoing genocide in Palestine,³⁶ many states have continuously provided, amongst other things, armed equipment and intelligence to Israel.³⁷ Other conflicts in Iraq,³⁸ Syria,³⁹ Yemen,⁴⁰ and Nagorno-Karabakh⁴¹ have similarly been fueled by external assistance provided by third states.

This article shows neutrality law is neither contradictory nor confusing. It retains significant value in regulating the conduct of non-participants in contemporary international armed conflicts, as it leaves little room for unilateral judgements of what ought to be done with respect to armed conflicts of others. This position rests on two interpretations of neutrality law that have not been adequately clarified thus contributing to the perception that the law is no longer of legal or practical value.

First, neutrality law remains a mandatory rule of international law. Duties under the law apply to third states once there is an international armed conflict, unless and until duties under the U.N. Charter take precedence, or there are circumstances precluding the wrongfulness of breaching neutral duties. This position is consistent with the historical application of neutrality law and the text and context of the Hague Conventions, and not inconsistent with state practice. States may not, as a result, extend military aid to parties in an international armed conflict without a careful legal assessment of the propriety of such action, much less act on unilateral judgments of sympathy or perceived merit of one participant over the other. These doctrinal arguments

36. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 26 January 2024, General List No. 192, ¶ 54.

37. See, e.g., Jonathan Masters & Will Merrow, *U.S. Aid to Israel in Four Charts*, Council on Foreign Relations (Oct. 7, 2025), <https://www.cfr.org/articles/us-aid-israel-four-charts>.

38. See, e.g., *Why Did the U.S. and Allies Invade Iraq, 20 Years Ago?* BBC News (Mar. 19, 2003), <https://www.bbc.com/news/world-64980565>.

39. See, e.g., Anne Barnard and Karam Shoumali, *U.S. Weaponry Is Turning Syria Into Proxy War With Russia*, N.Y. Times (Oct. 15, 2015), <https://www.nytimes.com/2015/10/13/world/middleeast/syria-russia-airstrikes.html?r=0>.

40. See, e.g., Amnesty International, *Yemen: Multibillion-Dollar Arms Sales by USA and U.K. Reveal Shameful Contradiction with Aid Efforts* (Mar. 23, 2017), <https://www.amnesty.org/en/latest/news/2017/03/yemen-multibillion-dollar-arms-sales-by-usa-and-uk-reveal-shameful-contradiction-with-aid-efforts/>.

41. See, e.g., Natalia Tellidou, *The Strategic Use of Plausible Deniability in Proxy Wars Azerbaijan's Proxy War (1988–1994)*, Small Wars J. (Feb. 20, 2025), <https://smallwarsjournal.com/2025/02/20/the-strategic-use-of-plausible-deniability-in-proxy-wars/>.

strengthen the mandatory neutrality position⁴² and address the persisting discomfort towards neutrality law.

Secondly, neutrality law governs the provision of a broad range of military assistance, including assistance which might otherwise be considered low level (such as providing cyber defense support). Where it is unclear whether the nature of the support or the items being provided constitute military assistance, neutrality law looks at the potential or actual impact of the assistance on the conflict. This does not mean neutrality law prohibits third states from doing anything at all. Military assistance aside, states are not prohibited from providing humanitarian assistance or simply having a political view about the conflict.

These two interpretations of neutrality law explain its continuing relevance and utility to regulate contemporary armed conflicts. As well as coexisting with the collective security system under the U.N. Charter, neutrality law strengthens the system, whether it is the one originally intended by the U.N. Charter or an otherwise less interventionist rendition of that.⁴³ Neutrality law does this by legally constraining proxy conduct by third states which almost always escalate the scale of conflicts.⁴⁴

The rest of this article is structured as follows. Part II examines the different ways in which third states and private actors engage in modern conflicts and highlights the gaps in accountability under other frameworks of international law. Part III explains the argument that neutrality law remains a mandatory rule of international law, and rebuts arguments that neutrality law is irrelevant, illogical or dangerous. Part IV interprets the key neutrality rules as codified in the Hague Conventions and discusses the types of assistance and conduct of third states which neutrality law governs.

II. THIRD STATE CONDUCT IN CONTEMPORARY ARMED

42. See *supra* note 21.

43. See, generally, B. S. Chimni, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* (2nd ed., Cambridge Univ. Press 2017) at 533–4 (critiquing the role of hegemonic power structures in shaping international legal norms governing the use of force); Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005).

44. See generally Chris Loveman, *Assessing the Phenomenon of Proxy Intervention*, CONFLICT, SECURITY & DEV. 29 (2002); Geraint Hughes, *My Enemy's Enemy: Proxy Warfare in International Politics* (Liverpool Univ. Press 2012); ANDREW MUMFORD, *PROXY WARFARE* (Wiley 2013).

CONFLICTS

A. Assistance from Third States

Conflicts of today are developed not only by formal participants to the conflict. Third states frequently shape the course of modern international conflicts through various forms of assistance.⁴⁵ Their contributions can range from direct support such as supplying weapons⁴⁶ to intangible support such as providing intelligence and financial support.⁴⁷ With the approval of their home states, private actors also offer specialized support that assists the military operations, cybersecurity and intelligence gathering of belligerent states.⁴⁸

Third state assistance can shape the course of conflicts to varying degrees.⁴⁹ The level and nature of its impact depend on such factors as the form and timing of the assistance, the scale of the conflict, the participating state receiving support and the strategic objectives behind the aid. In some cases, third state assistance can escalate the conflict by enabling the participating state to sustain or intensify its operations. For example, it may directly strengthen the state's military capacity thus increasing the scale of attacks; it may prolong hostilities by reducing the motivation of the state to negotiate or seek a ceasefire; it may exacerbate the suffering of civilians by emboldening belligerents to continue violating international humanitarian law with impunity; and it may hinder international efforts to mediate or broker peace agreements which makes diplomatic interventions more difficult.⁵⁰

At the same time, third states serve as crucial supporters of victim states, those who are, in a general sense, subjected to acts of aggression

45. See, generally, David Petraeus & Andrew Roberts, *CONFLICT: THE EVOLUTION OF WARFARE FROM 1945 TO UKRAINE* (William Collins 2023).

46. See, generally, World Peace Foundation, *Who Arms War?* (3 March 2022) <https://worldpeacefoundation.org/blog/who-arms-war/>.

47. See, e.g., *supra* notes 24–29.

48. See, e.g., Boycott, Divestment, Sanctions (BDS) Movement, *Guide to BDS Boycott & Pressure Corporate Priority Targeting* (6 December 2024) <https://bdsmovement.net/Guide-to-BDS-Boycott>; John F. Plumb, Assistant Secretary of Defense for Space Policy, *Remarks at Center for a New American Security 2023 DOD Cyber Strategy Event* (Sept. 12, 2023), <https://www.defense.gov/News/Speeches/Speech/Article/3525636/remarks-by-assistant-secretary-of-defense-for-space-policy-john-plumb-at-center/>.

49. See, generally, discussions in Ruys, *supra* note 28; Schaller, *supra* note 23.

50. See, e.g., Tariq Dana, *Merchants of Death: Israel's Permanent War Economy*, Security in Context Policy Paper 24-02 (2024), <https://www.securityincontext.org/posts/merchants-of-death-israels-permanent-war-economy>.

or unlawful use of force.⁵¹ Third states may extend their support through military assistance,⁵² humanitarian aid,⁵³ economic sanctions against the opponent⁵⁴ or advocacy in international institutions.⁵⁵ This is not to say ascertaining the victim state is always straightforward, nor is it to say assistance to victim states necessarily deescalates the conflict.⁵⁶

Some examples of recent international armed conflicts highlight the extensive role of third states and private actors in supporting participants:

Since Saudi Arabia's military intervention in Yemen's civil war in March 2015,⁵⁷ the United States and United Kingdom have together transferred more than U.S.\$5 billion worth of arms to Saudi Arabia.⁵⁸ Their military assistance extends to

51. I am using the phrase ““victim state”” in a general sense here, not limited to explicit determinations under Article 39 of the UN Charter.

52. See, e.g., Claire Mills, *Military Assistance to Ukraine (February 2022 to January 2025)*, House of Commons Library Research Briefing CBP-9477 (2025), <https://commonslibrary.parliament.uk/research-briefings/cbp-9477/>.

53. See, e.g., European Commission, *New €148 million EU humanitarian aid package for Ukraine* (Jan. 13, 2025), https://civil-protection-humanitarian-aid.ec.europa.eu/news-stories/news/new-eu148-million-eu-humanitarian-aid-package-ukraine-2025-01-13_en

54. See, e.g., Maziar Motamedi, *Which Countries Have Sanctioned Israeli Settlers – and Does It Mean Much?* Al Jazeera (Jul. 29, 2024), <https://www.bbc.com/news/world-europe-60125659>; BBC, *What Are the Sanctions on Russia and Have They Affected Its Economy?* (Feb. 24, 2024), <https://www.bbc.com/news/world-europe-60125659>.

55. See, e.g., G.A. Res. ES-11/6 (Fed. 23, 2023) (calling for ““a comprehensive, just and lasting peace in Ukraine”” based on the principles of the Charter of the United Nations); United Nations Meetings Coverage, *General Assembly Adopts Three Resolutions to Advance Middle East Peace, Two-State Solution* (Dec. 3, 2024), <https://press.un.org/en/2024/ga12661.doc.htm> (summarizing General Assembly voting and subsequent commentary regarding the Israeli-Palestinian conflict).

56. See, e.g., Tadek Markiewicz & Keren Sharvit, *When Victimhood Goes to War? Israel and Victim Claims*, 42 POL. PSYCHOL. 111, 114 (2021) (discussing victim narratives as social claims); Daniel Hurst, *Israel Ambassador Claims His Country Is the Victim as Penny Wong Warns of ‘Desperate Need’ in Gaza*, THE GUARDIAN (Oct. 25, 2023) (summarizing an Israeli ambassador's use of a victim narrative); Christopher Michaelsen, *Are the West's Sanctions Against Russia Actually Working?*, UNSW Sydney (Sept. 20, 2022) <https://www.humanrights.unsw.edu.au/research/commentary/are-the-wests-sanctions-against-russia-working>.

57. See, e.g., Dan Roberts & Kareem Shaheen, *Saudi Arabia Launches Yemen Air Strikes as Alliance Builds Against Houthi Rebels*, THE GUARDIAN (Mar. 26, 2015) (describing international support for Saudi airstrikes in Yemen).

58. See, e.g., *Yemen: Multibillion-Dollar Arms Sales by USA and U.K. Reveal Shameful Contradiction with Aid Efforts*, AMNESTY INTERNATIONAL (Mar. 23, 2017), <https://www.amnesty.org/en/latest/news/2017/03/yemen-multibillion-dollar-arms-sales-by-usa-and-uk-reveal-shameful-contradiction-with-aid-efforts/>.

providing advice and training for Saudi-led airstrikes in Yemen,⁵⁹ as well as intelligence and logistical support such as aerial refueling.⁶⁰ France has also supplied weapons and military equipment exports to Saudi Arabia and given training to Saudi Air Force pilots.⁶¹ Multiple companies in the United Kingdom and the United States have exported military equipment to Saudi Arabia.⁶² In the United States, it is common knowledge that these weapons contractors are “working hand-in-glove with the State Department,”⁶³ with Boeing, for example, commenting that the company follows “guidance from the United States government.”⁶⁴ Numerous sources and commentators have documented ongoing violations of international human rights and humanitarian law by the Saudi-led coalition in Yemen.⁶⁵

As of March 2024, the west have pledged over \$380 billion in military assistance to Ukraine for its defense against

59. Emma Graham-Harrison, *British And U.S. Military “In Command Room” “For Saudi Strikes On Yemen*, THE GUARDIAN (Jan. 15, 2016).

60. Akbar Shahid Ahmed, *Obama Could End the Slaughter in Yemen Within Hours*, HUFFPOST, https://www.huffpost.com/entry/barack-obama-could-end-the-killing-in-yemen-in-hours_n_57f7d5dee4b0b6a43031ba4e (Oct. 9, 2016); Timothy Robbins, Hijab Shah & Melissa Dalton, *U.S. Support for Saudi Military Operations in Yemen*, Ctr. for Strategic & Int’l Stud. (Mar. 23, 2018) <https://www.csis.org/analysis/us-support-saudi-military-operations-yemen>.

61. EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS (ECCHR), *French Arms Sales to Saudi Arabia and the United Arab Emirates* (Sept. 23, 2021), <https://www.ecchr.eu/en/press-release/transparency-in-french-arms-sales/>.

62. See, e.g., Alex Kane, *Here’s Exactly Who’s Profiting from the War on Yemen*, IN THESE TIMES (May 20, 2019) (describing which American defense manufacturers’ weapons have been used in the Saudi operation in Yemen); CAMPAIGN AGAINST ARMS TRADE, *Companies Supplying the War in Yemen* (Oct. 7, 2020), <https://caat.org.uk/homepage/stop-arming-saudi-arabia/companies-supplying-the-war-in-yemen/> (describing the use of weapons produced in the United Kingdom in Yemen).

63. Kane, *supra* note 62.

64. *Id.*

65. See, e.g., HUMAN RIGHTS WATCH, *World Report 2024: Yemen*, <https://www.hrw.org/world-report/2024/country-chapters/yemen> (last visited ____)(describing human rights and humanitarian law violations in the conflict in Yemen); INTERNATIONAL COMMITTEE OF THE RED CROSS, *Yemen: Humanitarian Impact of the Conflict*, <https://casebook.icrc.org/case-study/yemen-humanitarian-impact-conflict> (last visited ____)(human rights and humanitarian law violations in the conflict in Yemen).

Russia,⁶⁶ with the United States being by far the biggest provider.⁶⁷ This assistance ranges from heavy weapons and ammunition to light infantry and logistical support.⁶⁸ Russia has repeatedly condemned Western military aid as proof of a “proxy war” but, despite threats of retaliation, has largely avoided direct escalation.⁶⁹ States have also provided a range of humanitarian assistance to Ukraine.⁷⁰ Private actors have similarly been instrumental in Ukraine’s defense, with the conflict becoming “a huge profit center for the big companies: Lockheed Martin and Raytheon and Boeing.”⁷¹ Beyond arms exports, the United States has permitted a limited number of defense contractors to operate in Ukraine to maintain and repair U.S.-supplied weaponry.⁷² Russia, on the other hand, has received military aid from other

66. Ivana Kottasová, *Ukraine Aid: Where the Money Is Coming From, in 4 Charts*, CNN (Oct. 5, 2023), <https://edition.cnn.com/2023/10/05/world/ukraine-money-military-aid-intl-dg/index.html>.

67. *Id.*

68. KIEL INSTITUTE FOR THE WORLD ECONOMY, *Ukraine Support Tracker* <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/> (Feb. 11, 2026); U.S. *Security Cooperation with Ukraine*, U.S. Dep’t of State (Jan. 9, 2025) <https://www.state.gov/bureau-of-political-military-affairs/releases/2025/01/u-s-security-cooperation-with-ukraine>.

69. See, e.g., Liviu Horovitz & Anna Clara Arndt, *One Year of Nuclear Rhetoric and Escalation Management in Russia’s War Against Ukraine: An Updated Chronology* at 55 (SWP Working Paper No. 1) (Feb. 2023), https://www.swp-berlin.org/publications/products/arbeitspapiere/Arndt_and_Horovitz_-_Nuclear_Chronologie_21022023.pdf.

70. ““““Humanitarian Bulletin, RELIEFWEB, <https://response.reliefweb.int/ukraine/humanitarian-bulletin> (last visited Feb. 22, 2025) (““““In the 11 months of 2024, 8 million people across Ukraine received at least one form of humanitarian assistance from some 645 organizations””).

71. Huang Lanlan, *GT Investigates: How Much Have U.S. ‘Big Five’ Weapon Manufacturers Gained from Arms Sales to Ukraine?*, GLOBAL TIMES (Aug. 3, 2023), <https://www.globaltimes.cn/page/202308/1295637.shtml>; See also Mike Stone, *Ukraine War Orders Starting to Boost Revenues for Big U.S. Defense Contractors*, REUTERS, (Oct. 27, 2023), <https://www.reuters.com/business/aerospace-defense/ukraine-war-orders-starting-boost-revenues-big-us-defense-contractors-2023-10-27/> (describing increases in revenue for other defense contractors).

72. *Pentagon Allows U.S. Military Contractors to Fix Weapons in Ukraine*, ALJAZEERA (Nov. 9, 2024), <https://www.aljazeera.com/news/2024/11/9/pentagon-allows-us-military-contractors-to-fix-weapons-in-ukraine>.

countries including North Korea and China.⁷³ Many states have also imposed a range of sanctions against Russia.⁷⁴

The United States remains by far the largest supplier of arms to Israel,⁷⁵ followed by other states including Germany, Italy, the United Kingdom, Australia, France and Spain.⁷⁶ U.S.-imported weapons “have played a major role in Israel’s military actions.”⁷⁷ Apart from traditional arms support, the United States is also providing “anything the Israelis really need” in cyberspace.⁷⁸ Reports have identified numerous instances that U.S.-manufactured munitions were used throughout the war, including in strikes that killed Palestinian civilians.⁷⁹ Once again, private actors, primarily those based in the west, have played a significant role in the war’s devastation. Weapons supplied by private defense contractors to the Israeli government have been used “extensively” throughout the conflict.⁸⁰ Private actors have

73. Olen Velhan, *Russia’s War Relies on Aid from One Particular Country – Intelligence Statement*, RBC-Ukraine (Feb. 12, 2024), <https://newsukraine.rbc.ua/news/russia-s-war-relies-on-aid-from-one-particular-1770850644.html>.

74. Veronika Melkozerova, *U.S. Can Ramp Up Sanctions on Putin, Trump’s Ukraine-Russia Envoy Says*, POLITICO (Feb. 7, 2025), <https://www.politico.eu/article/donald-trump-can-ramp-up-sanctions-against-vladimir-putin-war-envoy-says/>.

75. Caolán Magee, *Not Just the US: India to Brazil, 51 Nations Armed Israel Amid Gaza War*, Al Jazeera (May 23, 2026), <https://www.aljazeera.com/news/longform/2026/5/23/not-just-the-us-india-to-brazil-51-nations-armed-israel-amid-gaza-war>; Robert Tait, *Which Countries Supply Israel with Arms and Why Is Biden Reluctant to Stop?*, The Guardian (Apr. 9, 2024), <https://www.theguardian.com/world/2024/apr/09/us-israel-weapons>

76. *Id.*

77. Antoinette Radford, *Where Does Israel Get Its Weapons?*, CNN (Oct. 16, 2024), <https://edition.cnn.com/2024/10/16/middleeast/where-israel-get-its-weapons>

78. *Washington Provides Cyber Support to Israel*, FDD (Oct. 11, 2023), <https://www.fdd.org/analysis/2023/10/11/washington-provides-cyber-support-to-israel/> (last visited Feb. 22, 2025).

79. *See Where Israel Gets Its Weapons*, CNN (Oct. 16, 2024), <https://edition.cnn.com/2024/10/16/middleeast/where-israel-get-its-weapons/index.html> (last visited Feb. 22, 2025) (claiming CNN analysis has identified multiple instances that US-manufactured munitions were used throughout the war, including in strikes that killed civilians).

80. *See Jessica Corbett, Meet the Companies Profiting From Israel’s War on Gaza*, COMMON DREAMS (Dec. 20, 2023), <https://www.commondreams.org/news/weapons-used-by-israel> (last visited Feb. 22, 2025) (noting that Boeing makes F-15 fighter jets and Apache AH-64 attack helicopters used by the Israeli forces, as well as “multiple types of unguided small diameter bombs (SDBs) and Joint Direct Attack Munition (JDAM) kits” that have been used “extensively” during the war).

also cooperated extensively with their governments. For instance, the Cybersecurity and Infrastructure Security Agency within the U.S. Department of Homeland Security has not only provided support and assistance but is also actively “working with industry and international partners to proactively identify potential cyber threats to Israel.”⁸¹ Several states have, at various points during the war, imposed sanctions and restrictive measures against Israel in response to its intensified military actions as well as against non-state actors such as Hamas which operates in Gaza.⁸²

The above examples illustrate the many ways in which third states support participating states. Weapons supply might be the most familiar and may include the supply of weapons, ammunition and other equipment like vehicles and aircraft. It may also entail training belligerent forces, sharing intelligence and even deploying troops. All this may be done through private military contractors.⁸³ Third states may also simply provide financial assistance, including direct funding and loans, for military use by the participating state.⁸⁴

Cyber assistance has also become popular. That includes not only strengthening cyber defense for the participating state but conducting cyberattacks on enemy infrastructure as well as conducting surveillance of the enemy and sharing such intelligence with the participating state.⁸⁵ An example is where the participating state engages private

81. FDD, *supra* note 78.

82. See, e.g., Alexandra Brzozowski, *EU Agrees on Sanctions on Hamas, Violent West Bank Settlers*, EURACTIV (Mar. 19, 2024), <https://www.euractiv.com/section/global-europe/news/eu-agrees-on-sanctions-on-hamas-violent-israeli-settlers/> (last visited Feb. 22, 2025) (reporting that EU foreign ministers agreed in principle to impose sanctions against Israeli settlers for attacking Palestinians in the West Bank and to add further sanctions on members of Hamas); Larissa van den Herik, *Targeted Sanctions on West Bank Settlers*, LIEBER INSTITUTE (May 1, 2024), <https://lieber.westpoint.edu/targeted-sanctions-west-bank-settlers/> (last visited Feb. 22, 2025) (noting that several states, including the U.S., U.K., and EU, imposed sanctions against Hamas and/or Hamas leaders before and after October 7, 2023, and only more recently against extremist Israeli settlers in the West Bank).

83. See, e.g., International Committee of the Red Cross, *Lesson 5 – Weapons* (n.d.), https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/law5_final.pdf (last visited Feb. 22, 2025).

84. See, e.g., *Funding, UKRAINE OVERSIGHT*, <https://www.ukrainecoversight.gov/Funding/> (last visited Feb. 22, 2025) (detailing the funding and loans provided by the U.S. to the Ukraine response).

85. See, e.g., Gordon Corera, *Inside a U.S. Military Cyber Team’s Defence of Ukraine*, BBC (Oct. 29, 2022), <https://www.bbc.com/news/uk-63328398> (describing the U.S. military’s provision of cyber defense to Ukraine against Russian cyber-attacks,

actors from third states to support their cyber defense capabilities. With the U.S. government's endorsement,⁸⁶ Microsoft has been tipping off the Ukrainian government about potential cyber threats from Russia⁸⁷ and, with the U.S. courts' authorization,⁸⁸ Microsoft has helped to take down Russia-backed botnets.⁸⁹ Amazon have also worked closely with Ukraine to transfer essential government data into their cloud computing system.⁹⁰ Ukraine's vice prime minister applauded that Amazon's "leadership made a decision that saved the Ukrainian government and economy."⁹¹

including its "'Hunt Forward'" missions which scour the computer networks of partner countries for signs of penetration).

86. See Plumb, *supra* note 48 (explaining that the U.S. government endorsed Microsoft's "'sharing [of] information about threats to [Ukraine's] networks'", acknowledging it was "'remarkable'" and "'had a direct impact on the course of the war in Ukraine'"); Cal Biesecker, *CISA's Joint Defense Collaborative Focused on Ukraine War, Easterly Says*, DEFENSE DAILY (Mar. 22, 2022), <https://www.defensedaily.com/cisas-joint-defense-collaborative-focused-on-ukraine-war-easterly-says/homeland-security/>.

87. See Brad Smith, *Digital Technology and the War in Ukraine*, MICROSOFT (Feb. 28, 2022), <https://blogs.microsoft.com/on-the-issues/2022/02/28/ukraine-russia-digital-war-cyberattacks/> (noting that Microsoft has provided threat intelligence and defensive suggestions to Ukrainian officials regarding attacks on a range of targets, including Ukrainian military institutions and manufacturers and several other Ukrainian government agencies); Tom Burt, *Ongoing Russian Cyberattacks Targeting Ukraine*, MICROSOFT (June 14, 2023), <https://blogs.microsoft.com/on-the-issues/2023/06/14/russian-cyberattacks-ukraine-cadet-blizzard/> (reporting that Microsoft threat intelligence teams have been tracking a wave of cyberattacks from Cadet Blizzard, an actor associated with Russia's foreign military agency, and that Microsoft has shared information with the security ecosystem and customers to raise visibility and protections against Cadet Blizzard attacks).

88. See *Justice Department Announces Court-Authorized Disruption of Botnet Controlled by the Russian Federation's Main Intelligence Directorate (GRU)*, U.S. DEP'T OF JUST. (Apr. 6, 2022), <https://www.justice.gov/archives/opa/pr/justice-department-announces-court-authorized-disruption-botnet-controlled-russian-federation> (announcing a court-authorized operation to disrupt a two-tiered global botnet of thousands of infected network hardware devices under the control of a threat actor known to security researchers as Sandworm, which the U.S. government has previously attributed to the Main Intelligence Directorate of the General Staff of the Armed Forces of the Russian Federation (the GRU)).

89. *Id.*

90. See, e.g., Kaido Einama, *The Cloud Saved a Nation: How Ukraine Backed Up an Entire Country During the War*, Baltic Sentinel (Oct. 26, 2025), <https://balticsentinel.eu/8350030/the-cloud-saved-a-nation-how-ukraine-backed-up-an-entire-country-during-the-war>.

91. Russ Mitchell, *How Amazon Put Ukraine's 'Government in a Box'— and Saved its Economy from Russia*, SEATTLE TIMES (Dec. 26, 2022), <https://www.seattletimes.com/business/how-amazon-put-ukraines-government-in-a-box-and-saved-its-economy-from-russia/>.

Cyber defense assistance, while seemingly benign, can tip the scales in favor of one party militarily. Supplying a state with cyber threat intelligence, for example, could tell them how to launch a counter cyberattack which could mean blowing up essential services like electricity and emergency medical response capabilities.⁹² Providing states with proactive cyber threat hunting services and I.T. training services could substantially strengthen their cyberwar capabilities.⁹³ Cloud computing services, as another example, often goes beyond data storage and is often bundled with access to corporations' data and new computing resources that could assist with military targeting and surveillance activities.⁹⁴

Other non-combative assistance, such as providing humanitarian aid to and imposing sanctions on the enemy, can also indirectly contribute to war effort by reinforcing stability in the receiving state and undermining such in the adversary.⁹⁵

The precise impact of these forms of assistance on the trajectory of the conflict is, in the same way, unpredictable and context dependent. Even low level or benevolent assistance could prolong

92. See, e.g., Andy Greenberg, *Sandworm Hackers Caused Another Blackout in Ukraine – During a Missile Strike*, WIRED (Nov. 9, 2023), <https://www.wired.com/story/sandworm-ukraine-third-blackout-cyberattack/> (detailing a Russian cyberattack that cut Ukrainian civilians' electricity at the same time missile strikes hit); David Hollingworth, *ASIO Boss Warns of Active Cyber Threat to Aussie Critical Infrastructure*, Cyber Daily (June 26, 2026) <https://www.cyberdaily.au/security/13813-asio-boss-warns-of-active-cyber-threat-to-aussie-critical-infrastructure>.

93. See Ramanpreet Kaur, Dušan Gabrijelčić & Tomaž Klobučar, *Artificial Intelligence for Cybersecurity: Literature Review and Future Research Directions*, 97 INFO. FUSION 101804 (2023) (providing a systematic literature review and a detailed analysis of AI use cases for cybersecurity provisioning, including automated threat hunting and adaptive security awareness and training).

94. See, e.g., Marc Anthony Rangel, *Military Breaking Boundaries: Implementing Third-Party Cloud Computing Practices for Data Storage* (2021) (Ph.D. dissertation, Walden University); Cordula Droegge, *Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians*, 94 INT'L REV. RED CROSS 533, 566–67 (2012) (noting that information technology corporations could be seen as 'war-supporting military objectives' since they produce hardware and software that are used for military machinery).

95. See Ruth Abril Stoffels, *Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps*, 86 INT'L REV. RED CROSS 515, 539–40 (2004) (arguing that every effort must be made to ensure that humanitarian assistance does not directly or indirectly favor one of the parties to the conflict, and that the principle of humanity is violated when the purpose of the humanitarian aid is to support, directly or indirectly, one of the parties to conflict).

hostilities by reducing incentives for negotiation.⁹⁶ Cyber assistance may enhance a state's defensive capabilities but also risks provoking wider cyber conflicts that spill beyond the immediate warzone.⁹⁷ Economic sanctions may weaken the target state but can also trigger retaliatory measures and harm civilian populations.⁹⁸

As to the extent of the third state involvement, at one end of the spectrum, third states may be deeply embedded in a conflict and provide military aid directly through defense contracts and executive authorizations. At the other end, their involvement may simply be refusing to restrict arms sales to belligerents, or as can be seen in the case of Microsoft's cyber defense support,⁹⁹ endorsing the conduct of private actors providing such support. Their involvement can, furthermore, be multifaceted. States that begin with humanitarian aid may later escalate to military assistance as conflicts evolve, while others may reduce their support due to geopolitical pressures. These varied forms of assistance underscore the growing complexity of third state involvement in warfare.

B. *Perceived Impunity*

Mainstream frameworks of *jus ad bellum* and *jus in bello* oftentimes struggle to comprehensively regulate assistance provided by third states in armed conflicts. This is of course not to say those frameworks are rendered otiose. They hold significant value in regulating the conduct of states in conflicts in other ways or, with respect to a particular conduct of the state, where they are implicated at the same time that

96. Benevolent in the sense that the particular form of assistance does not appear to overtly contribute to conventional military operations. Cf. 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, 556 (Michael N. Schmitt & Jelena Pejic eds., 2007) (arguing that there is no basis for concepts such as "benevolent neutrality" or "non-belligerency," as an aggrieved belligerent will have good reason to claim that a "benevolent" neutral did not comply with the duties of a neutral and will be entitled to resort to counter-measures, and that since there is no duty of acquiescence by the aggrieved belligerent, the difference between "benevolent" and "strict" neutrals is counter-productive).

97. See Jason Healey & Robert Jervis, *The Escalation Inversion and Other Oddities of Situational Cyber Stability*, 3 TEX. NAT'L SEC. REV. 30 (2020).

98. LISA HULTMAN & DURSUN PEKSEN, *Successful or Counterproductive Coercion? The Effect of International Sanctions on Conflict Intensity*, 61 J. CONFLICT RESOL. 1315 (2017).

99. See below Part IV.

neutrality law is, offering an additional framework of accountability (more is more).

Third state assistance does not always rise to the level of a use of force that would necessitate the question whether the third state has breached article 2(4) of the U.N. Charter, including whether the exception of self-defense or collective self-defense under article 51 would apply.¹⁰⁰ International humanitarian law primarily governs the conduct of existing participants to armed conflicts and does not generally regulate the conduct of third states.¹⁰¹ Many forms of third state assistance identified above, including logistical support, facilitating intelligence sharing, supporting private delivery of cyber capabilities and financial aid often fail to meet the threshold required to be classified as a party to an armed conflict.¹⁰²

Human rights law does not always adequately outline the responsibilities of third states in armed conflicts,¹⁰³ particularly when the conduct of the third state does not constitute a clear human rights violation within its own jurisdiction or that within the effective control of the participating state.

The Arms Trade Treaty,¹⁰⁴ on the other hand, focuses primarily on regulating arms transfers and does not comprehensively address other less obviously lethal or direct forms of wartime assistance described above. Due diligence obligations under the Arms Trade Treaty might require third states to assess the potential risk that exported weapons could be used to commit violations of international law.¹⁰⁵ However, its language leaves significant discretion to states in

100.Schaller, *supra* note 23.

101.Nils Melzer, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (May 2009), <https://www.refworld.org/policy/legalguidance/icrc/2009/en/68382>.

102.*See, e.g.,* Damien van der Toorn, *Direct Participation in Hostilities: A Legal and Practical Road Test of the International Committee of the Red Cross's Guidance through Afghanistan* (2010) 17 AUSTRALIAN INTERNATIONAL LAW JOURNAL 7; Kevin Jon Heller & Lena Trabucco, *The Legality of Weapons Transfers to Ukraine Under International Law*, JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES (2022).

103.*See, e.g.,* Sangeetha Yogendran, *The Responsibility of States Indirectly Involved in an Armed Conflict to Provide Medical Care* (August 2020), https://watson.brown.edu/chrhs/files/chrhs/imce/research/Responsibility%20of%20States%20Indirectly%20Involved%20in%20an%20Armed%20Conflict%20to%20Provide%20Medical%20Care_Yogendran.pdf.

104. Arms Trade Treaty, Apr. 2, 2013, 3013 U.N.T.S. 269 (“ATT”).

105. *Id.* Arts 6 & 7. For example, Article 7(1)(b)(i) of the ATT obliges states to assess the potential for arms to be used to commit or facilitate ““a serious violation of international humanitarian law.””

determining whether an arms transfer poses an unacceptable risk.¹⁰⁶ It also does not apply to non-lethal forms of assistance.¹⁰⁷

The articles on state responsibility adopted by the International Law Commission,¹⁰⁸ which govern the secondary responsibility of states,¹⁰⁹ offer another potential but ultimately inadequate avenue for accountability. To establish legal responsibility on the basis of aiding or assisting under article 16 or complicity under article 17, a causal link must ordinarily be demonstrated between the third state's actions and a specific violation of international law.¹¹⁰ The mainstream view is there must be evidence the third state not only contributed to the act but did so with knowledge of its illegality and intent to facilitate it.¹¹¹ This sets a high bar for accountability. Forms of assistance are not always clearly linked to the facilitation of international crimes.

The challenge becomes greater when third state involvement is indirect, non-lethal or concealed through private actors.¹¹² Proving

106. Implications of States' Views on an Arms Trade Treaty, UNIDIR, <https://unidir.org/files/publication/pdfs/implications-of-states-views-on-an-arms-trade-treaty-en-240.pdf> (last visited Feb. 22, 2025) at 23; The Arms Trade Treaty: A Commentary — Art. 7 Export and Export Assessment, OSAIL, https://thearmstradetreaty.org/hyper-images/file/OSAIL_The_Arms_Trade_Treaty_A_Commentary_Art7_Export_and_Export_Assessment/OSAIL_The_Arms_Trade_Treaty_A_Commentary_Art7_Export_and_Export_Assessment.pdf (last visited Feb. 22, 2025).

107. ATT, Article 2(1).

108. *Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 43 (2001) (“*ARSIWA*”).

109. See, e.g., Katja Creutz, *The Tenacity of the Articles on State Responsibility as a General and Residual Framework: An Appraisal*, EJIL: TALK! (Aug. 5, 2021), <https://www.ejiltalk.org/the-tenacity-of-the-articles-on-state-responsibility-as-a-general-and-residual-framework-an-appraisal/>; Maurizio Arcari, *The Future of the Articles on State Responsibility: A Matter of Form or of Substance?*, QIL QDI (June 30, 2022), <https://www.qil-qdi.org/the-future-of-the-articles-on-state-responsibility-a-matter-of-form-or-of-substance/>; James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874 (2002).

110. Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*, European Journal of International Law, Volume 26, Issue 2, May 2015, Pages 471–492.

111. Harriet Moynihan, *Aiding and Assisting: The Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility*, 67 INT'L & COMP. L.Q. 455 (2018); Cf. e.g., Kate Nahapetian, *Confronting State Complicity in International Law*, 7 UCLA J. INT'L L. & FOREIGN AFF. 99 (2002).

112. Jessica Howard, *Invoking State Responsibility for Aiding the Commission of International Crimes—Australia, the United States and the Question of East Timor*, 2 MELB. J. INT'L L. 1 (2001); Moynihan, *supra* note 111; Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L.

complicity is equally complex as it requires establishing both awareness of the wrongful act and intent to contribute to it.¹¹³ The content of these rules of responsibility remains in dispute,¹¹⁴ and, in any event, the rules generally prescribe thresholds that third state assistance rarely meets in practice.¹¹⁵

III. MANDATORY NEUTRALITY LAW

Neutrality law is “one of the oldest and most fundamental principles of international law.”¹¹⁶ Essential parts of neutrality law were codified in the early twentieth century in Hague Convention V and Hague Convention XIII. They remain the only adopted treaties on this topic and reflect state practice at the time.¹¹⁷

More vigorous attempts at elucidating neutrality law in the context of air and naval warfare are seen in a few unadopted instruments including the Hague Rules on Air Warfare, the HPCR Manual on International Law Applicable to Air and Missile Warfare and the San Remo Manual on International Law Applicable to Armed Conflicts at Sea.

Much debate about the nature of neutrality law has centered on its continuing relevance in the contemporary system of international

511 (2005); Nicolette Boehland, *The People's Perspectives: Civilian Involvement in Armed Conflict*, Center for Civilians in Conflict (2015), https://civiliansinconflict.org/wp-content/uploads/2015/05/Peoples_Perspectives_WebFinal.pdf.

113. Miles Jackson, *COMPLICITY IN INTERNATIONAL LAW* (Oxford Univ. Press 2015); Giovanni Distefano, *State Responsibility for Internationally Wrongful Acts*, in *FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW* 637 (Brill 2019).

114. *See, generally*, Fernando Lusa Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 63 INT'L & COMP. L.Q. 535 (2014).

115. *See also* Gregory P. Noone & Sindija Beta, *What Responsibility Do States That Supply Weapons or Other Assistance to Russia Have Under International Law?*, *Lawyering Justice Blog* (Oct. 8, 2024), <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2024/10/8/what-responsibility-do-states-that-supply-i-weapons-or-ii-other-assistance-to-russia-have-under-international-law>.

116. Noam Neuman, “‘Neutrality and Cyberspace: Bridging the Gap between Theory and Reality’” 97 INTERNATIONAL LAW STUDIES 765 at 767 (2021).

117. Antonopoulos, *supra* note 2, at 28 (“... the majority of writers maintain that the Hague Conventions constitute, for the most part, a codification and reflection of customary law with respect to neutrality”). *See also, e.g.*, G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 2 vols. (London: Stevens, 1968), vol. II, 550 (“... the two Conventions are declaratory of international customary law”); P. Seger, ‘The Law of Neutrality’ in A. Clapham and P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2015) 248–249.

law (one that is marked, at least in principle, by a U.N. Charter based commitment to maintaining international law through institutionalized cooperation). There are three competing interpretations of neutrality law:

Neutrality law is mandatory;¹¹⁸

Neutrality law is optional but not qualified;¹¹⁹ and

Neutrality law is qualified.¹²⁰

Mandatory neutrality means neutrality law applies to all states who are not participants in an armed conflict. They are all required to be neutral. Assistance to “victim of aggression” would not be an exception.¹²¹

For proponents of optional neutrality, helping the victim is an exception wherein “[s]tates not wishing to take part in the armed conflict on the victim’s side are no longer obliged to apply the law of neutrality Neutrality has become purely optional.”¹²² The rationale for optionality has rested mainly on the prohibition on the use of force and the right to collective self-defense, as well as state practice.¹²³ This camp of writers would also accept an intermediate status exists between neutrality and belligerency. That status is usually termed non-belligerency and it “becomes an option for a State which does not seek to directly participate in the conflict and yet wants to militarily sustain one party.”¹²⁴

Writers who maintain neutrality law is qualified would argue “neutrality rules need not be applied impartially when there is clear-cut aggression, as is the case of Russia’s unjustified armed attack on Ukraine.”¹²⁵ Simply put, neutrality law still applies to those states who

118. Sympathizers of this view include Antonopoulos, *supra* note 3; Upcher, *supra* note 10; Bothe, *supra* note 19; Pedrozo, *supra* note 1, Emily Crawford & Alison Pert, *INTERNATIONAL HUMANITARIAN LAW* (3RD ed, 2024) p. 47 (““The law of neutrality provides that, upon commencement of an armed conflict, all States not already party to the conflict must decide whether to join the hostilities, or not to become involved – that is, be neutral””).

119. Sympathizers of this view include Schindler, *supra* note 4; Schmid, *supra* note 4; Ingber, *supra* note 3; Gioia, *supra* note 4.

120. Sympathizers of this view include Schmitt, *supra* note 7; von Heinegg, *supra* note 6.

121. Bothe, *supra* note 19, at ¶ 5.

122. Schindler, *supra* note 4, at 373.

123. See, e.g., Schindler, *supra* note 4, at 371-4; Gioia, *supra* note 4, at 58-68; Schmid, *supra* note 5.

124. Robert Kolb & Benjamin Meret, *Clarifying Neutrality: The Rise of Different Statuses?*, Lieber Institute West Point (Mar. 19, 2025), <https://lieber.westpoint.edu/clarifying-neutrality-rise-different-statuses/>.

125. Schmitt, ““Strict”” versus ““Qualified” “Neutrality””, *supra* note 6.

wish to help the victim, but it does not fully apply or does so with the same usual force. “Qualified neutrality” may, for example, apply when the aggressor is apparent (from whatever perspective), but the U.N. Security Council cannot take effective action due to, for example, veto by a permanent member.¹²⁶

Qualified neutrality has been criticized in the scholarship for being “unconvincing from a legal point of view,” since “[w]e do not need qualified neutrality to allow for an unfavorable treatment of the aggressor State.”¹²⁷ Insofar as state practice is concerned, writers have also note, even in the case of Ukraine, “only a fraction” of (mostly western) states have adopted a position of qualified neutrality, whereas “Africa, Central America and the majority of Asia have remained strictly neutral.”¹²⁸

Neutrality law as it was originally understood is mandatory, in that it automatically applies to all states where there is a war, whether formally declared or objectively found.¹²⁹ This position is largely uncontested,¹³⁰ with Antonopoulos summarizing thus:

126. *Id.*

127. Schmid, *supra* note 4 at 1058.

128. Joanna Jarose, *Optional and Ill-Defined? Reconsidering Strict and Qualified Neutrality in Light of State Responses to Russia’s Invasion of Ukraine*, 44 ADEL. L. REV. 639, 649 (2023).

129. “‘War’” remains an undefined concept in international law. I use it here occasionally as a word of art to describe the circumstances to which the law of neutrality applied prior to 1945. As discussed below, as regards neutrality law’s application after 1945, it may be used interchangeably with the term “‘armed conflict’”. See, e.g., J. K. Kleffner, ‘Scope of Application of International Humanitarian Law’ in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th ed. (Oxford: Oxford University Press, 2021), p. 57 (Prior to the shift from formal preconditions for the applicability of international humanitarian law to a fact-based approach, the law of neutrality was only triggered between neutral powers and belligerent states in case of a formal declaration of war made by the belligerent states. Some support persists in academic writings for the view that the law of neutrality applies only if there is a formal state of war. There is also evidence that a number of states take the same view.)

130. See, e.g., *Id.* (“‘During an international armed conflict, the law of neutrality shall be applied to the relations between the belligerent parties and states not participating in the conflict’”); Oppenheim and Lauterpacht, *supra* note 4 pp. 666–667; JHW Verzijl, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE*, vol IX, p. 503 (“‘In an international war in which a State was unwilling to participate it had the right and the duty to observe the rules of the law of neutrality and was in no way obliged to assist the victim of an aggression. The law of neutrality had, just a few years previously (1907), been defined in a well drafted codification which permitted certain actions and forbade others’”); Roderick Ogley, *THE THEORY AND PRACTICE OF NEUTRALITY IN THE TWENTIETH CENTURY*, p. 13; Luca Ferro & Nele Verlinden, *Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties*, 17 CHINESE

Even though there is considerable State practice of issuing proclamations of neutrality, at least until World War II, it is generally accepted that such a step is not a *conditio sine qua non* required by law. This appears to be the case because neutrality as the status of non-participation in an armed conflict is a matter of fact. Once a State is non-participant, its juridical position vis á vis the belligerents, is governed by the law of neutrality; this is the rationale underlying Hague Conventions V and XIII (1907) and the Geneva Conventions I and II (1949).¹³¹

Schmid, herself a sympathizer of optional neutrality, also acknowledge that “[a]t the time of the Budapest Articles, neutrality was definitely not considered as optional (and was often connotated with impartiality), which sat uneasily with the intention to condemn and sanction a State attacking another one.”¹³²

For the following additional reasons, the doctrinally stronger view is the Hague Conventions did codify the mandatory nature of neutrality law. This is despite the Hague Conventions simply regulate the “rights and duties of neutral powers,”¹³³ rather than the *choice* to be neutral, and do not contain an explicit provision requiring states to adopt neutral status. The Hague Conventions, as treaty instruments reflecting customary international law, must, as a matter of legal interpretation under the Vienna Convention on the Law of Treaties, be understood first with reference to its original understanding, and secondly with reference to whatever subsequent practice or other developments that might have revised this original understanding.

First, the Hague Conventions appear to assume that states not engaged in hostilities occupy the status of neutrals as a matter of law. Article 16 of Hague Convention V, for example, provides that “[t]he nationals of a State which is not taking part in the war are considered as neutrals.” The commentary to the Conventions, published at the same time they were entered into force, has also assumed there are only two statuses with respect to an armed conflict. It states, for example, “[t]he object which the Committee kept in view was to effect a reasonable compromise between the interests of belligerents and the rights of neutrals . . .”¹³⁴ That the Conventions contemplate the

J. INT’L L. 15, 39 (2018); Christopher Greenwood, ‘The Concept of War in Modern International Law’ (1987) 36 International and Comparative Law Quarterly, 283, 299.

131. Antonopoulos, *supra* note 2, at 21.

132. Schmid, *supra* note 4.

133. Hague Convention V, *supra* note 12, Preamble.

134. Higgins, *supra* note 10, at 290.

possibility that states may depart from neutrality rules¹³⁵ simply acknowledges the choice a neutral state has to abandon its neutral status by engaging in hostilities thereby becoming a belligerent state. The relevant provisions do not, without more, imply that neutrality itself is discretionary.¹³⁶

Secondly, drafted in circumstances where war had *not* yet been outlawed and the concept of a victim state and an aggressor did not exist, there was no conceptual or legal space for an intermediate position in which a state could partially align itself with one belligerent while claiming to remain non-belligerent. Such a position presupposes an assessment of the legality of the war and a differentiated treatment of the parties for which international law, at least at the time the Hague Conventions were drafted, provided minimal guidance.

Thirdly, from the adoption of the Declaration of Paris in 1856¹³⁷ (which provided international maritime law rules including those with respect to the protection of neutral goods) to the Hague Conventions, states and scholars have recognized the role of neutrality in preventing conflict escalation and limiting the geographical spread of war.¹³⁸ The Hague Conferences and its preparatory materials recognized the aim of neutrality laws as to prevent neutral states from contributing to the intensification of international conflicts.¹³⁹ The rights and duties set out in the Hague Conventions (for example those requiring neutral states to prevent the use of their territory for military operations, to refrain from supplying war material, and to apply impartial treatment to belligerents) can only sensibly operate to carry out this intention if neutrality is understood as mandatory.¹⁴⁰

The question, then, is whether neutrality law has become optional or otherwise qualified by virtue of the U.N. Charter or the collective security system created therefrom. Comments made by international organizations and international courts have been unclear about the extent to which neutrality law might have been transformed. The International Court of Justice noted in its *Nuclear Weapons Advisory Opinion* that “[t]he principle of neutrality, whatever its content, which

135. *E.g.*, Hague Convention XIII, *supra* note 13, Preamble (making neutrality’s voluntary nature explicit by stating that States created these rules to ““regulate the results of the attitude of neutrality when adopted by them””).

136. *Cf.* Ingber, *supra* note 3, at 444-5 (“[Hague Convention V] does not address the choice of neutrality and instead speaks primarily of the obligations of neutral and belligerent powers toward one another”).

137. Declaration of Paris, Apr. 16, 1856, 115 Consol. T.S. 1.

138. *See, e.g.*, Neuman, *supra* note 116, at 768.

139. Higgins, *supra* note 10, at 460.

140. *Cf.* Ingber, *supra* note 3.

is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict.”¹⁴¹ The words “whatever its content” and “subject to the relevant provisions of the United Nations Charter” leave open that neutrality law may have been modified, as proponents of optional and qualified neutrality argue, to the extent compatible with the framework of collective security and evolving state practice.¹⁴² The International Law Commission (“ILC”), in its draft articles on the effects of armed conflicts on treaties, observed the articles are drafted “without prejudice to the rights and duties of States arising from the law of neutrality.”¹⁴³

Proponents of optional neutrality have, as discussed, placed weight on the U.N. Charter and state practice. As regards the U.N. Charter, “[a]rticle 2(4) of the Charter abolished the right of States to resort to war . . . has the consequence that States, in case of an armed conflict between other States, can no longer choose freely between neutrality and belligerency. Their choice is limited by the Charter.”¹⁴⁴ Secondly, “[b]ased on the right of collective self-defense, third States may assist the victim of an armed attack by any conceivable means”, although “[t]hey have . . . no duty to do so but may remain neutral. On the other hand, they are prohibited from assisting the aggressor State.”¹⁴⁵ As a result, optional neutrality “offers greater doctrinal clarity” as “[i]t recognizes that most States may lawfully supply arms to a victim State, while allowing a smaller group of States to commit to genuine neutrality.”¹⁴⁶

As regards state practice, writers proposing optional neutrality argue “[n]o State, since 1945, has ever considered itself bound by the law of neutrality in the case of a state of war recognized by parties to a conflict. Examples of this are provided in the case of the Arab-Israeli conflict, in the Indo-Pakistani War, possibly also, in the Iran-Iraq War (in which a state of war never was officially affirmed) and in the enforcement action against Iraq in 1991 in which some of the

141. *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 261 ¶ 89.

142. See, e.g., Jarose, *supra* note 128.

143. Draft Articles on the Effects of Armed Conflict on Treaties, with Commentaries, art. 17, reprinted in 2 Y.B INT’L L. COMM’N 119 (2011), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf

144. Schindler, *supra* note 4 at 371.

145. Schindler, *supra* note 4 at 373.

146. Schmid, *supra* note 4.

participating States spoke of being at war with Iraq although they did not issue formal declarations of war.”¹⁴⁷

Proponents of qualified neutrality have placed weight on similar matters. Writers note the prohibition on the use of force should allow what are ordinarily neutral states to discriminate against the aggressor state to assist the victim state.¹⁴⁸ It has also been suggested the widespread military and other support provided by third states recently to Ukraine appears inconsistent with the traditional law of neutrality and suggests its erosion in practice due to this “rapid emergence of norms.”¹⁴⁹

As a matter of doctrinal interpretation, neither the U.N. Charter¹⁵⁰ nor state practice¹⁵¹ could have superseded the mandatory nature of neutrality law as codified in the Hague Conventions.

First, the U.N. Charter does not cover the field of what third states can do. It only provides that states must not use force against the territory of others and does not otherwise provide, in circumstances where there has already been an international armed conflict, what third states can or cannot do (other than not using force, except, if available, pursuant to article 51 of the U.N. Charter). There exists a broad spectrum of passivity third states can adopt during an armed conflict without necessarily participating in the conflict.¹⁵² The effect of article 2(4) is that a non-participant state must necessarily be inactive upon the outbreak of a war, but it does not prescribe the level of inactiveness required. The answer to what can be done lies in neutrality law.

Secondly, the U.N. Charter is not inconsistent with remaining neutral in response to an armed conflict. Article 2(4) of the U.N. Charter does not impose on states any duty or responsibility to support the victim state (whoever they are). The duty to assist only arises when, for example, the Security Council has decided under chapter VII that member states should use force against other states. In that case, it may be that, by virtue of article 103 of the U.N. Charter, duties under neutrality law would be temporarily superseded.

The right to collective self-defense under article 51 of the U.N. charter does not provide any such duty either. It is also unlikely it, being

147. Schindler, *supra* note 4, at 375 (footnotes omitted).

148. Schmitt, ““Strict”” versus ““Qualified” “Neutrality””, *supra* note 6.

149. Jarose, *supra* note 128, at 649.

150. Noting article 31(3)(a) of the VCLT ““any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”” may be used to interpret a treaty.

151. Noting article 31(3)(b) of the VCLT.

152. *See* Part II.

an exception to the general prohibition of the use of force,¹⁵³ applies to the military assistance with which neutrality law is concerned, as such assistance ordinarily falls short of a direct use of force.¹⁵⁴ Where collective self-defense is relied upon, the third state would ordinarily be at conflict with the other participant and become a participant in the armed conflict.¹⁵⁵ Remaining inactive during an international armed conflict of others is compatible with the U.N. Charter as a matter of doctrinal coherence. The *jus ad bellum* has not “modified the traditional conditions for the operation of the law of neutrality.”¹⁵⁶

Thirdly, most writers agree state practice is at most inconclusive, which largely supports the continuing application of strict neutrality during conflicts. Many states have incorporated neutrality principles into their legislation and military manuals.¹⁵⁷ States have, at various times post 1945, actively supported the application of neutrality law. That included India, Iran and Jordan during the Gulf War, and other major powers during the Iran-Iraq war.¹⁵⁸ It remains sensible to conclude that “[n]eutrality as simply non-participation in an armed conflict is a concept that may suggest wider positions of policy adopted by States.”¹⁵⁹

Even if it may be said assertions of neutrality law have substantially decreased in recent decades, the burden of demonstrating mandatory neutrality has evolved rests on those who challenge it, who must point to sufficient evidence of state practice and *opinio juris*. In that regard, state practice with respect to the recognition of a third status of non-belligerency or optional neutrality generally is “not confirmed by enough state practice to be part of customary law.”¹⁶⁰ Antonopoulos notes similarly “[i]t appears that non-belligerency as an intermediate status between neutrality and belligerency is not admitted in the post–World War II practice of States.”¹⁶¹ This is despite “[i]n State practice there was some support for the view that the law of neutrality could not be relied upon at all in light of the prohibition on

153. See, e.g., *Democratic Republic of the Congo v Uganda*, [2005] ICJ Rep 169, ¶ 148.

154. See, e.g., Clancy, *supra* note 5, at 535. Cf., e.g., Schmitt, ‘Providing Arms and Materiel to Ukraine’, *supra* note 6; KJ HELLER & LUCA TRABUCCO, *The Legality of Weapons Transfers to Ukraine under International Law*, 13 J. INT’L HUM. LEGAL STUD. 251, 254–55 (2022).

155. See, e.g., Andrew Clapham, WAR, at 242–7 (2021).

156. Cf. Gioia, *supra* note 4 at 65.

157. Nasu, *supra* note 22, at 125.

158. Antonopoulos, *supra* note 2, at 71.

159. *Id.* at 12.

160. Schmid, *supra* note 4.

161. Antonopoulos, *supra* note 2, at 16.

force.”¹⁶² State practice with respect to qualified neutrality is even more sparse, as discussed above.

As regards what has been described as widespread state practice with respect to assistance to Ukraine, suffice it to say the legal justification given by those states has been unclear. “Although those states did not articulate any clear legal argument on the matter, they repeated, as already emphasized, that their support was only aimed at helping Ukraine exercise its right of self-defense against the illegal armed attack committed by Russia.”¹⁶³ It was right even for some proponents of optional neutrality to conclude that “[s]tate practice is inconsistent – we find examples in which neutrality is presented as the only alternative choice to belligerency as well as examples of States proclaiming non-belligerency without claiming that they are neutral . . . and many States do not make public statements about neutrality, so important gaps of knowledge ensue.”¹⁶⁴

It may be states believe they are able to circumvent neutrality law by exercising collective countermeasures under the Articles on State Responsibility, or believe that they were exercising collective self-defense under the U.N. Charter.¹⁶⁵ It is enough to say the justification is unclear, meaning there is insufficient state practice and *opinio juris* to indicate a rejection of neutrality law as a legal framework.¹⁶⁶ Occasional violations of neutrality law, on the other hand, merely reflect breaches of such international law rather than an abandonment of mandatory neutrality.¹⁶⁷

Fourthly, that it is no longer a choice for states to declare war or the perceived anachronism of the language of “war” does not frustrate its application. The term has long operated as a word of art in international law and was frequently employed by states prior to 1945 to describe situations of armed hostilities. Hague Convention V, for example, refers to “the rights and duties of neutral Powers *in case of* war on land,”¹⁶⁸ yet does not expressly condition the applicability of those rules on the formal declaration or recognition of a state of war. Whether a conflict is determined unilaterally or assessed by reference to objective circumstances does not appear to affect the operation of

162. Upcher, *supra* note 10, at 15-16.

163. Raphaël van Steenberghe, *Military Assistance to Ukraine: Enquiring the Need for Any Legal Justification under International Law*, 28 J. CONFLICT & SEC. L. 231, 240 (2023).

164. Schmid, *supra* note 4.

165. *See also* Clancy, *supra* note 6, at 534-40.

166. *See generally* *North Sea Continental Shelf* (Fed. Rep. Ger./Den.; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 76 (Feb. 20).

167. *See also* von Heinegg, *supra* note 6.

168. Hague Convention V, *supra* note 11, Preamble (emphasis added).

the Hague Conventions because their words do not condition their applicability on formal declarations of war. It simply reflects the realities of the time where war was to be formally declared. The operation of the Hague Convention rules governing the relationship between belligerents and neutrals, on the other hand, does not (as also discussed above) lose its purpose simply because formal declarations of war are now largely obsolete or because war itself is legally constrained.

As Common Article 2 of the Geneva Conventions makes clear, the law applies not only to declared wars, but to “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.*” The concept of war, therefore, has sought to encompass *undeclared* armed conflicts in contemporary times. In this context, where flexibility in the terminology of “war” is habitual, there is no reason why “war” and “armed conflicts” could not be used interchangeably (for the purposes of interpreting the Hague Conventions), especially where contemporary international humanitarian law has largely replaced the legal terminology of “war” with that of “international armed conflict.” This interpretation should be permitted in light of article 31(1) and 31(3)(c) of the *Vienna Convention on the Law of Treaties*. Antonopoulos has, moreover, noted the “agreement in the literature on the application of the law of neutrality in the event of ‘armed conflict’ rather than a ‘state of war.’” Contrary to what a proponent of optional neutrality has argued, it is not necessary at all “to determine whether or not a given conflict amounted to ‘war’ in the traditional sense: in case of a conflict falling ‘short of war,’ third States would not be obliged to abide by the laws of neutrality.”¹⁶⁹

Fifthly, perhaps the primary way in which neutrality law has “*evolved in important ways*”¹⁷⁰ is with respect to the consequence of violating neutral duties. Before the U.N. Charter (and thus the prohibition on the use of force) entered into force, violation of neutral duties might mean that the belligerent could attack the neutral state.¹⁷¹ When neutral duties are violated today, article 2(4) of the U.N. Charter would prohibit such a consequence. The use of countermeasures under article 49 of the Articles on State Responsibility does not “affect . . . the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.” Therefore, violation of neutrality

169. Gioia, *supra* note 4, at 65.

170. EVELYNE SCHMID, *Optional but Not Qualified: Neutrality, the UN Charter and Humanitarian Objectives*, 106 INT’L REV. RED CROSS 1044 (2024).

171. JAMES BROWN SCOTT, *The Right of Neutrals to Protest Against Violations of International Law*, 10 AM. J. INT’L L. 341, 343 (1916).

obligations could be followed by contemporary consequences for breaches of international law. For example, a belligerent may engage in diplomatic protest or bring a claim before international courts if they so wish. That no states have thus far *openly* engaged in countermeasures in response to violations of neutrality does not suggest that neutrality law has ceased to exist as a rule of international law.

Another way in which neutrality law may have evolved concerns the stringency and manner in which neutral duties apply. As will be further discussed in Part IV below, the law of neutrality has had to contend with (and is capable of doing so) the emergence of increasingly complex commercial relationships and modes of economic interaction between states and private actors.

A third way in which neutrality law may be said to have evolved is in recognizing it operates subject to the framework of the UN Charter and may, in certain circumstances, yield to it. For example, where military assistance provided by a neutral state to a party to an armed conflict amounts to a use of force (noting, however, that the precise threshold for what constitutes a use of force remains a matter of academic debate), the assisting state would ordinarily assume the status of a participant in the armed conflict. In such circumstances, the law of neutrality would cease to apply, and the relevant provisions of the UN Charter governing the use of force would instead regulate the conduct in question.

Sixthly, with respect to violations of neutrality law and assistance to victim states generally, it may be states are able to assist such victim states if they could establish circumstances precluding wrongfulness. For example, where a participating state has committed a breach of *jus cogens*, a neutral state may rely on collective countermeasures to assist the other participant.¹⁷² While the law with respect to collective countermeasures “remains in a state of development . . . its current trajectory points in the direction of such measures being lawful in the context of breaches of obligations *erga omnes*.”¹⁷³ Ultimately, the circumstances under which neutral states may legitimately provide assistance to a belligerent state where it would otherwise be a violation of neutral duties would depend on a legal analysis of the exception. For present purposes, it is enough to say that states are likely able to, in a proportionate manner, assist a victim state against which *jus cogens* violations have been committed.

172. Articles on State Responsibility, *supra* note 109, art. 48(1). The Articles ““are considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility.”” JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 43 (2013).

173. Clancy, *supra* note 5, 540.

Moving, then, from a doctrinal analysis to a normative one. One concern about mandatory neutrality is the perceived incoherence between remaining neutral in a war in circumstances where war has been outlawed and where “[t]he world has moved away from ignoring evil to confronting evil.”¹⁷⁴

Using the conflict between Russia and Ukraine as an example, Hathaway and Shapiro have noted:

... when the states joined together to outlaw war in 1928 and reaffirm that commitment in the U.N. Charter in 1945, they created a New World Order in which might is no longer right and in which states can provide weapons and other support to a state unjustly attacked so that it can defend itself.

The end of impartiality means that states are permitted to supply weapons or other support to Ukraine. Doing so violates no legal duty of neutrality. States would become parties to the international armed conflict between Russia and Ukraine if, and only if, they resort to armed force against Russia. Indeed, if anything, providing assistance to Ukraine supports the international legal order by allowing Ukraine to defend itself against a war of aggression.¹⁷⁵

Another concern is the continued invocation of neutrality law creates legal confusion as it competes with the clearer legal framework established by the U.N. Charter. Rebecca Ingber argues “that confusion is itself dangerous and has been abused . . . the problems with permitting any remaining ambiguity over the status of neutrality law as a legal framework regulating state action are threefold: unjustified restraint, unjustified force, and the muddying of the legal landscape regulating war.”¹⁷⁶

A further contention is neutrality law is obsolete because “all states are already inviolable”.¹⁷⁷ This argument stems from the idea neutrality law was originally designed to protect the territory and rights of states who decided to stay out of a conflict, including to prevent armed hostilities from spilling over into non-belligerent states. With the prohibition on the use of force and the principle of non-intervention, the inviolability of all states is now, in theory, built into

174. Egon Guttman, *The Concept of Neutrality Since the Adoption and Ratification of the Hague Neutrality Convention of 1907*, 14 AM. U. INT'L L. REV. 55, 58-9 (1998).

175. Oona Hathaway & Scott Shapiro, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017), at xiv.

176. Ingber, *supra* note 3, at 457.

177. *Id.* at 452.

the system regardless of whether a state formally declares itself neutral in a particular conflict.

I disagree with each of the normative complaints.

First, abandoning neutrality law would encourage more serious abuse of conflicts which would be antithetical to the (objective) spirit of the U.N. Charter. Outside a small number of relatively clear cases, for instance assistance to Ukraine following Russia's invasion in 2022, the classification of a state as a victim of an armed attack is often indeterminate and, more troublingly, prone to mischaracterization.¹⁷⁸ This is especially so where the Security Council remains unable to act or is otherwise unclear as to what it demands of states.¹⁷⁹ Absent clear rules of international law in determining the circumstances under which a state can contribute to an existing armed conflict, states would be left to unilaterally assess the deservedness of each party to an armed conflict to be assisted. It would thus be difficult for proponents of optional or qualified neutrality to confidently suggest, simply based on one state's consciousness, despite allowing neutral states to assist victim states, "[w]ith respect to the attitude towards the aggressor State, any assistance to him is prohibited."¹⁸⁰

The repeated invocation and brazen abuse of the notion of a "just war" illustrates the paradigm has never truly existed in practice. Neutrality, while often presenting itself with a veneer of impartiality or "unjustness," would in reality be the most effective mechanism to counteract the arbitrary exercise of proxy conduct. Nonneutral conduct has dominated (and frequently exacerbated the humanitarian consequences of) contemporary armed conflicts, as is reflected in some examples below:

third state facilitation of NATO operations during the 1999 Kosovo intervention;

assistance rendered by some third states to the United States following its invasion of Afghanistan in the name of "just war,"¹⁸¹ which was critical to enabling the continuation of the military campaign;

178. See, e.g., *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14 at [238].

179. See, e.g., Press Release, Secretary-General, United Nations, *Security Council Paralyzed by Divisions, Global Governance Failing to Manage Climate, New Technology Threats, Secretary-General Tells Doha Forum, Urging Deep Reforms* (Dec. 10, 2023), <https://press.un.org/en/2023/sgsm22078.doc.htm>.

180. Schindler, *supra* note 4, at 374.

181. LEONI CONNAH, *US Intervention in Afghanistan: Justifying the Unjustifiable?*, 41 S. ASIA RSCH. 70 (2021).

support provided by certain European and other regional states to the U.S. led coalition in Iraq in 2003;

assistance rendered by some third states to the United States and Russia as part of their intervention in the Syrian Civil War;

assistance rendered by some third states to the United States following its military operation in Yemen as well as the Saudi Arabia-led coalition fighting in Yemen,¹⁸² which has crippled the civilian populations of the country;¹⁸³

assistance rendered by some third states to Armenia and Azerbaijan respectively in the Nagorno-Karabakh conflict;¹⁸⁴

assistance rendered by third states to Israel¹⁸⁵ in the name of “fighting a war of survival,”¹⁸⁶ which was critical to enabling Israel to sustain long-term military operations in Gaza and Lebanon.

By imposing binding obligations of abstention and impartiality on non-participating states, neutrality law (ideally) limits the extent to which powerful states can universalize their security preferences through assistances framed as collective action. Since deviation of neutrality would require a proper legal justification and adherence to proportionality requirements,¹⁸⁷ it also preserves a space for legal restraint in an otherwise politicized security environment by providing smaller and middle powers with a legal basis for resisting pressure to align.

182. AMNESTY INT’L, *Yemen: USA, UK and France Risk Complicity in Collective Punishment of Civilians* (Nov. 17, 2017), <https://www.amnesty.org/en/latest/press-release/2017/11/yemen-usa-uk-and-france-risk-complicity-in-collective-punishment-of-civilians/>.

183. KELLEY BEAUCAR VLAHOS, *Does the US Military Even Know Why It’s Bombing Yemen? Sources Tell Military.com There Had Been No Attacks Against the Navy Since Before Trump’s Inauguration*, RESPONSIBLE STATECRAFT (Mar. 21, 2025), <https://responsiblestatecraft.org/us-airstrikes-yemen/>.

184. ALEX LITTLE, *Ending U.S. Military Assistance to Azerbaijan Immediately: Washington Was Giving Baku Transfer Waivers for Years to Fight Terrorism After 9/11. That’s No Longer Necessary, Especially Now*, RESPONSIBLE STATECRAFT (Oct. 30, 2023), <https://responsiblestatecraft.org/armenia-azerbaijan/>.

185. *See supra* notes 75-81.

186. STEVE WENICK, *Vice President Vance’s Misguided Utterances*, THE TIMES OF ISRAEL (JUN. 19, 2026), <https://blogs.timesofisrael.com/vice-president-vances-misguided-utterances/>.

187. *See above* discussion with respect to collective countermeasures.

It appears, expectedly or not, often “the collective will of the U.N. member states has failed to respond adequately and sufficiently in terms of both time and substance;”¹⁸⁸ or at least, to do so in a manner that is sufficiently humanitarian and respectful of local communities. That “the corpus of neutrality regulations was premised upon a decentralized international community”¹⁸⁹ functions to counteract interventionist tendencies that have been largely enabled by the so-called collective security system.

States may still militarily assist whichever “victim” in a conflict as they so please but must understand that they could only do so where they are satisfied that the “victim” has suffered from a violation of *jus cogens*, and that the assistance is proportionate to attempting to end such suffering.

Secondly, the ambiguity which currently surrounds the nature and application of neutrality law should be viewed less as a flaw in the legal framework and more as a space for careful clarification and refinement. That neutrality may at times have been invoked by some states as a pretext to refuse assistance to a victim state in armed conflict, or conversely (wrongly) to justify attacks on a purportedly neutral state, in no way undermines its legal or normative significance in constraining intervention. States do not generally have a legal obligation to assist victim states in an armed conflict, save as to specific obligations such as those under the Genocide Convention and pursuant to Security Council resolutions. The choice of states to participate in, or abstain from, armed conflicts is frequently shaped by political motives, in which international law itself exerts no direct control. Insofar as neutrality law does not doctrinally contradict or undermine the Charter’s collective security framework, there is no reason to reject the doctrine.

Thirdly, true it is modern international law already guarantees the territorial integrity and sovereignty of all states, neutrality law retains practical relevance. It continues to regulate the conduct of belligerents toward neutral states, and vice versa, including the scope of permissible assistance a state may provide to a party to a conflict (in circumstances where such assistance has not crossed the threshold of the use of force or otherwise constituted participation in the conflict). Neutrality law provides a mechanism for participating states against which neutrality violations are committed to seek reparations. Far from being obsolete,

188. Maria Gavouneli, *Neutrality – A Survivor?* 23 Eur. J. of Int’l L. 267, 273 (2012).

189. *Id.*

these rules of neutrality still anchor state behavior and preserve the coherence of the international legal order in armed conflicts.

The potential for less interventionism reflects the inspiration behind the Hague Conferences which, although “foundered on the rock of inter-imperialist competition”, sought to “prevent war and encourage the peaceful settlement of disputes, along with the more realistic attempts to humanize war through developing the laws of war.”¹⁹⁰ This part has shown, not only the “rumors of extinction have been exaggerated,”¹⁹¹ the benefits of neutrality law have been largely swept aside.

IV. WHAT CONSTITUTES A SUPPLY OF WAR MATERIAL?

The purpose of this part is to demonstrate neutrality law as set out in the Hague Conventions usefully governs a broad spectrum of third state military assistance regularly used in contemporary armed conflicts.

The Conventions set out three core duties of neutrality, along with corresponding exceptions. These general provisions form the backbone of neutrality law.¹⁹²

The primary duties are as follows. *First*, third states are strictly prohibited from supplying warships, ammunition, or any war materials directly or indirectly to belligerents. This is outlined in Article 6 of Hague Convention XIII:

The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war material of any kind whatever, is forbidden.

Secondly, third states are required to ensure their territories are not used for military activities such as troop movement, establishment of military communications or recruitment and formation of combatant corps. Article 5 of Hague Convention V provides:

A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory.

It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.¹⁹³

190. Chimni, *supra* note 43, at 494.

191. Gavouneli, *supra* note 188, at 273.

192. *See, generally*, Crawford & Pert, *supra* note 118, at 47-48

193. *Note articles 2-4 as follows:*

Thirdly, Article 9 of Convention V requires any measures restricting export, military use of communications or other related activities be applied impartially to all belligerents. This obligation extends to ensuring that private companies or individuals within their jurisdiction also adhere to these impartiality standards:

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.

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.¹⁹⁴

The exceptions to these obligations are as follows. *First*, under common Article 7 of Convention V and Convention XIII, neutral states are not obligated to prevent the export or transportation of arms, munitions, or other war-utilizable materials, irrespective of the belligerent destination:

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.

Secondly, Article 6 of Hague Convention V clarifies the neutrality of a state is not compromised by individuals who independently cross the border to offer their services to a belligerent:

Article 2: Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

Article 3: Belligerents are likewise forbidden to:

(a) Erect 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;

(b) Use 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.

Art. 4. Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.

194. Note articles 7-8 as follows:

Article 7: 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.

Article 8: 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.

The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

Lastly, Article 8 of Hague Convention V provides that neutral powers are not required to restrict or prohibit the military use of privately owned communication equipment by belligerents.

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.

For the purposes of this part, I will focus on article 6 of Hague Convention V because it most comprehensively constrains the proxy conduct with which this article is concerned and provides a lens through to examine how the Hague Conventions adapt to the practical challenges in enforcing these rules in contemporary armed conflicts.

Article 6, and the corresponding exceptions, raise two important interpretative questions, the first being the level of involvement required for a violation of neutrality as well as how the exception for private activities apply, the second being the scope of war items under these provisions.

A. Level of Involvement

Article 6 of Convention XIII prohibits third states from supplying warships, ammunition or war materials to belligerent powers, whether “directly or indirectly.” While a direct supply, such as a government formally transferring arms to the participating state, clearly constitutes a violation, the scope of “indirect” supply is less straightforward. The extent to which neutrality law restricts third state assistance thus depends on how expansively “indirect” support is interpreted.

This ambiguity does not normally arise when a state explicitly provides support to the participant or enforces restrictions on them, such as through economic sanctions or arms embargoes (in which case Article 9 of Convention V would ordinarily apply). It becomes relevant in cases where the state’s involvement is more passive or indirect. Does neutrality law prohibit a state from permitting its domestic companies to sell arms to a belligerent, even if the state itself plays no active role in facilitating the transaction?

Two interrelated questions arise. One is whether the neutral state needs to be the actor originating the supply of war items such that if the actor supplying the war items to the participating state is a private actor of the third state, the third state would not be caught under neutrality law. The other is the interaction between this duty of

abstention under Article 6 and the permissibility of private trade under common Article 7 of Convention V and Convention XIII. While Article 7 explicitly states that a neutral power is not required to prohibit private exports of arms or military supplies, that does not necessarily mean a state may actively permit or encourage such trade without consequence. The primary issue is when the state's failure to regulate or restrict private arms transfers amounts to tacit support for the participating state thereby compromising its neutrality.

The text and objectives of the Hague Conventions, as well as state practice, suggest the neutral state need not be the actor who originates the supply. Nonetheless, some degree of state involvement, whether through active facilitation or mere approval, is necessary to constitute a violation.

First, the language “supply, *in any manner*, directly or indirectly” in Article 6 allows for an expansive interpretation. The ordinary meaning of “supply” is “to *make available* to someone.”¹⁹⁵ The concept of “making available” is broad enough to encompass both active and passive facilitation of the provision of goods or services whether through direct transfer, authorization or tacit approval.¹⁹⁶

The phrase “in any manner” further confirms that the method or mechanism through which the supply occurs is not limited to a specific form or action. Third state involvement can take various forms without necessarily engaging in the physical transfer of assistance itself.

The dictionary meaning of “indirectly” is “by indirect action, means, connection, agency, or instrumentality” or “through some intervening person or thing; mediately.”¹⁹⁷ This suggests third states can be implicated in the supply even if it does not act as the immediate provider who originates the supply but instead facilitates, condones or enables the transfer through intermediaries including private entities operating within its jurisdiction.

Secondly, neutrality is less a formulaic set of rules than an attitude of impartiality. Neutrality is, as Lassa Oppenheim noted, “the *attitude of impartiality* adopted by third States towards belligerents and recognized by belligerents . . . creating rights and duties between the impartial

195. *Supply*, Oxford English Dictionary, https://www.oed.com/dictionary/supply_v1?tab=meaning_and_use#19718178 (Last visited Feb. 22, 2025).

196. *Available*, Oxford English Dictionary, https://www.oed.com/dictionary/available_adj?tab=meaning_and_use (Last visited Feb. 22, 2025). *Make*, Oxford English Dictionary, https://www.oed.com/dictionary/make_v1?tl=true (last visited Feb. 22, 2025).

197. *Indirectly*, Oxford English Dictionary, http://oed.com/dictionary/indirectly_adv (Last visited Feb. 22, 2025).

States and the belligerents.”¹⁹⁸ He then made it clear neutrality is not just a set of prohibitions, but an obligation to actively uphold impartiality in both action and restraint.¹⁹⁹

Michael Bothe echoed this point by clarifying that neutrality does not require treating belligerents identically, but rather prohibits unjustified discrimination:

The duty of impartiality does not mean that the state is bound to treat the belligerents in exactly the same way. It entails a prohibition of discrimination, i.e. it forbids only differential treatment of the belligerents which in view of the specific problem of the armed conflict is not justified.²⁰⁰

Thirdly, recent state practice reinforces this conclusion. Funding by third states that contributes to a joint arms supply by multiple states has been said to violate neutrality. Following Russia’s invasion of Ukraine, the European Union activated the European Peace Facility instrument to finance lethal military assistance to Ukraine. States including Austria, Ireland, and Malta abstained from voting on the resolution to provide such financial contributions, citing neutrality reasons.²⁰¹ That was despite these countries not being “politically neutral” in the war as they oppose to Russia’s aggression against Ukraine.²⁰² While the war material might not have come from the third state, financial assistance that contributed to its supply to belligerents has been considered a breach of neutrality.

Limiting Article 6 to cases where the neutral state is the originator of the supply would undermine the provision’s purpose. States should not be allowed to circumvent their neutrality obligations by channeling military support through intermediaries – a practice that, as discussed in Part II, has become increasingly prevalent. Such an approach would be inconsistent with both the textual intent of the Hague Conventions

198. Oppenheim and Lauterpacht, *supra* note 4, at § 293 (emphasis added).

199. *Id.* at 362-3 (emphasis added, citations omitted).

200. Bothe, *supra* note 21, at 602.

201. Council of the European Union, *Draft Minutes of the Foreign Affairs Council Meeting*, 17 October 2022, 13777/22 ADD 1, at 3, <https://data.consilium.europa.eu/doc/document/ST-13777-2022-ADD-1/en/pdf>.

202. See, e.g., Molly Killeen, *Irish PM: Non-Lethal Aid to Ukraine Not Against Military Neutrality*, EURACTIV (Mar. 1, 2022), https://www.euractiv.com/section/politics/short_news/irish-pm-non-lethal-aid-to-ukraine-not-against-military-neutrality/ (noting that Ireland declared that it is not politically neutral ““in the sense that [it] uphold[s] democratic values and democratic principles”” and that it decided to provide non-lethal supplies instead of weaponry for Ukraine in line with its policy of military neutrality).

and the practical realities of modern warfare, where indirect forms of support can be just as consequential as direct arms transfers.

As regards the extent to which a neutral state is obliged to prevent or restrict private entities within its jurisdiction from supplying war materials to participating states, article 7 is key. It provides 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.” It applies generally in the negative, in that it does not impose a positive duty on neutral states to restrict private trade but clarifies neutrality does not require a prohibition on private exports of military goods.

Article 7 was inserted to preserve international trade and commercial relationships²⁰³ in recognition that neutrality should not obstruct lawful commerce, allowing belligerents to procure military materials from neutral vendors through open-market transactions.²⁰⁴ The issue, related to the first question, is determining where the line between neutrality and indirect involvement should be drawn, particularly when state and private sector actions become increasingly entangled in modern conflicts.

The phrase “anything which could be of use to an army or fleet” is broader in scope than “war materials” in Article 6. That encompasses a wider range of supplies beyond traditional weaponry.²⁰⁵ A literal reading of Article 7 in isolation would suggest it applies to the conduct of private actors thus exempting the neutral state from any obligation to prevent them from supplying military goods and services to belligerents.

Article 7, however, does not override Article 6. What Article 7 exempts is the action of neutral states from restricting private commercial exports. The exemption applies solely to the state’s non-interference with private commercial exports but not to any active role in military support. If a third state actively aids a belligerent in a way

203. See, e.g., Higgins, *Conventions Commentaries*, *supra* note 9, at 464 (noting that under Article 7, the export of arms from neutral states by private persons is not internationally unlawful); Jacqueline Van De Velde, *From Telegraphs to Terabytes: The Implications of the Law of Neutrality for Data Protection by “Third” States and the Corporations Within Them*, in *THE RIGHTS TO PRIVACY AND DATA PROTECTION IN TIMES OF ARMED CONFLICT* 67, 72 (Russell Buchan & Asaf Lubin eds., 2022) (explaining that under Article 7, neutrals are not obligated to prevent transit of supply that could be of use to an army or fleet).

204. Upcher, *supra* note 10, at 78.

205. Pearce Clancy, *Ireland, Ukraine, and the International Law of Neutrality*, IRISH CENTRE FOR HUM. RTS. BLOG (Mar. 4, 2022), <https://ichrgalway.org/2022/03/04/ireland-ukraine-and-the-international-law-of-neutrality%E2%82%AC%91BC/>.

that would violate Article 6, it would not fall under the protection of Article 7. Article 7 applies only within a narrow scope of situations where neutral states permit private individuals and entities to engage in commercial transactions independently of state obligations, provided that the state itself does not actively facilitate, endorse, or participate in such activities. The exemption protects a neutral state's inaction in allowing private actors to trade with belligerents but does not extend to situations where the state plays an active role in the supply or transfer of military resources. Thus, as Robert Kolb and Richard Hyde have said:

This is true in, for example, commercial dealings with the belligerents. This does not mean that neutral states are obliged to cut off all commerce with the belligerents, and neither are they required to equalize all commercial dealings once the armed conflict begins when the commercial exchanges with both belligerents were not equal before the war. However, they must not discriminate by granting commercial rights to one side that they do not concede to the other. Usual state practice is to continue commerce with the belligerents on the same basis as existed prior to the commencement of hostilities. Such a stance clearly implies that some pre-existing differences can be maintained. However, war material may not be delivered, as this would potentially favor one party in the conflict over another. Changes to the pre-existing trade relationships to the detriment of one belligerent, or, in some cases, extreme imbalances in the pre-existing trading relationship being maintained without giving the other belligerent any chance to take part in trade on an equal basis, are prohibited.²⁰⁶

Ultimately, while the threshold for what constitutes war material is relatively low, and it varies depending on the type of item, a key distinction must still be made between exports that directly bolster a belligerent's military capabilities and regulated commercial activities that remain impartial and permissible. On the one hand, government regulation of exports does not necessarily indicate partiality. Regulatory measures such as export licensing, non-military use restrictions or compliance with international sanctions are often enacted to fulfill (or

206. Robert Kolb & Richard Hyde, *AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS* 279 (2008).

purportedly fulfill) international or domestic obligations rather than to engage in the conflict.²⁰⁷

Conversely, even indirect facilitation of war materials through state regulated channels could blur the line between neutrality and partiality. If a neutral government knowingly allows the sale of military items to a participating state, even under regulatory oversight, it may create the perception (or reality) of partiality. Similarly, if a state has been supplying ammunition to another state during peacetime, but the recipient later becomes engaged in armed conflict, the timing at which the neutrality assessment is made becomes crucial.

A state may argue its prior arms exports were conducted in good faith under peacetime trade agreements, yet once a recipient state enters into armed conflict, continued supply or even the failure to halt existing contracts, could be interpreted as a breach of neutrality. The principle of neutrality demands not only impartiality in intent but also in effect, meaning that even pre-existing commercial relationships may require reevaluation when geopolitical circumstances change.

As such, the exact nature of this obligation is flexible and depends significantly on the specific circumstances. The critical question to ask is whether the state's participation would have a military impact on the conflict, an assessment of which will also entail the consideration of the type of war items being supplied.

B. *Types and Lethality of Items*

Article 6 of Convention XIII explicitly prohibits the supply of “war-ships, ammunition, or war material of any kind whatever” yet it offers no further clarification on what constitutes those items, especially in relation to “war material”, a term that leaves more room for interpretation as compared to “war-ships” and “ammunition”.²⁰⁸ This ambiguity becomes particularly significant in modern warfare where technology and cyber capabilities have expanded the range of potential military strategies.

This ambiguity raises two questions. First, what types of war items are covered? Secondly, how “lethal” must the item be?

A debate has arisen as to whether malware or other forms of malicious code could be classified as “weapons” or “munitions of war”

207. See, e.g., Wolfgang Friedmann, *The Growth of State Control over the Individual, and Its Effect upon the Rules of International State Responsibility*, 19 BRIT. Y.B. INT'L.L. 118, 135–36 (1938) (observing that more neutral States prohibited the sale of arms to belligerents, e.g., 52 States stopped trading arms and certain other goods with Italy to comply with the sanctions against it by the League of Nations in 1935).

208. See, e.g., Clancy, *supra* note 5.

under neutrality law.²⁰⁹ Some writers advocate for a broad interpretation of “munitions,” arguing the term should encompass contemporary means of warfare, including cyber tools used in military operations.²¹⁰ Others reject this view, arguing that malware does not meet the traditional definition of a weapon or munition.²¹¹ Some scholars have also suggested the law of neutrality is increasingly impractical to apply in today’s interconnected world.²¹²

Another debate has been whether neutrality obligations would apply to data and intelligence sharing.²¹³ Cordey and Kohler have argued that “sharing military intelligence about a belligerent to another belligerent violates neutrality,”²¹⁴ drawing a historical analogy between Article 47 of the 1923 Hague Rules of Aerial Warfare and cyberspace-based intelligence gathering by neutral states. Their reasoning is, just as neutral states were obligated to prevent aerial reconnaissance operations that benefited a belligerent, they should also be required to prevent belligerents from exploiting their digital infrastructure for intelligence purposes.²¹⁵ Neuman suggests that the mere provision of intelligence regarding a belligerent’s cyber operations could, by analogy, be equated with the supply of “war material of any kind whatever.”²¹⁶

My view is the assessment should emphasize not necessarily on the character of the war item, but the effect of that war item could have

209. See, e.g., 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); TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Cambridge Univ. Press 2017) (noting that foreseeable spillover effects in neutral territory may violate neutrality law, but that “each case must be assessed on its own merits,” “that states would be unlikely to regard *de minimis* effects as precluding an otherwise legitimate attack, and that neutrality law requires balancing belligerents’ interest in effectively conducting military operations against neutral states’ interest in remaining generally unaffected by the conflict).

210. See, e.g., TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Cambridge Univ. Press 2017) 557 ¶ 6.

211. Jeffrey T. Biller & Michael N. Schmitt, *Classification of Cyber Capabilities and Operations as Weapons, Means, or Methods of Warfare*, 95 INT’L L. STUD. 179, 194–95 (2019).

212. See, generally, Nasu, *supra* note 20.

213. Yann L. Schmuki, *The Law of Neutrality and the Sharing of Cyber-Enabled Data During International Armed Conflict*, 2023 15th International Conference on Cyber Conflict: Meeting Reality (CyCon), at <https://icccexplore.iccc.org/document/10181885>.

214. Sean Cordey & Kevin Kohler, *The Law of Neutrality in Cyberspace*, CSS Cyberdefense Report (Dec. 2021), <https://css.ethz.ch/en/center/CSS-news/2021/12/the-law-of-neutrality-in-cyberspace.html>.

215. See also Schmuki, *supra* note 213.

216. Neuman, *supra* note 116 at 79.

on the course of the war. On this approach, questions as to whether malicious code or intelligence qualify would generally be answered in the affirmative, albeit for that reason.

First, the words “warships, ammunition, or war material *of any kind*” denote a broad scope. In contemporary conflicts, the range of materials that could be used to assist belligerents in conducting war (whether it is war on the ground or in cyberspace) is not limited to tangible items.²¹⁷ Malware, for example, could be deployed not only to infiltrate the adversary’s government computer systems but also to manipulate commands sent to critical infrastructure systems and lead to physical catastrophes.²¹⁸ Software exploits or vulnerabilities sold on the black market could allow belligerents to penetrate adversary networks, disrupt communication systems, or steal sensitive data.²¹⁹ Advanced spyware or monitoring tools could be used to track troop movements, intercept communications, or gather intelligence on enemy strategies.²²⁰ AI powered tools can be employed for targeting systems in drones, optimizing logistics for supply chains, or analyzing battlefield data in real time. Biological materials, such as synthetic biology tools or genetic editing technologies, could be repurposed for developing bioweapons.²²¹

Ferro and Verlinden observe in broad strokes “the ‘duty of neutrality,’ applicable to all armed conflicts, certainly proscribes assistance to the belligerent parties that has a direct and effective impact on their war-waging ability (including the supply of both lethal and non-lethal military material, i.e., any type of armament and ammunition, but also armored vehicles, body armor and military intelligence for example), whereas it also clearly allows for humanitarian assistance.”²²² These observations support the emphasis of whether an item, regardless of whether it is traditionally associated

217. *Id.* at 767.

218. Threat Intelligence, *Critical Infrastructure Protection: Securing the Foundation of Modern Society* (Nov. 14, 2024), <https://www.threatintelligence.com/blog/critical-infrastructure-protection>.

219. See, e.g., Kristel M. de Nobrega et al., *The Whole of Cyber Defense: Syncing Practice and Theory*, 33(4) J. STRATEGIC INFO. SYS. (2024).

220. Aahana M. Joshi, *Spy Satellites: The Future of National Security Space Technology*, News Interpretation (June 4, 2024), <https://newsinterpretation.com/spy-satellites-2/>.

221. Stewart Patrick & Josie Barton, *Mitigating Risks from Gene Editing and Synthetic Biology: Global Governance Priorities*, Carnegie Endowment for International Peace (Oct. 16, 2024), <https://carnegieendowment.org/research/2024/10/mitigating-risks-from-gene-editing-and-synthetic-biology-global-governance-priorities>.

222. Luca Ferro & Nele Verlinden, *Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties*, 17 CHINESE JOURNAL OF INTERNATIONAL LAW 15, 41 (2018), <http://dx.doi.org/10.1093/chinesejil/jmy011>.

with warfare, has a direct and material impact on the conduct of hostilities.

Examples in state practice further illustrate how intelligence transmission could be or has been treated as a violation of neutrality. During World War I, in the case of *Oberstenaffäre*, the Swiss Military Court found that the regular transfer of the daily intelligence briefings from two Swiss-German colonels to the Central Powers breached neutrality, as the intelligence entailed “a certain, even if only formal and external, advantage for the concerned belligerent powers.”²²³ The United States’s *Naval Operations Manual*, for example, provides that “[a]ny transmission to an opposing belligerent of information concerning military operations or military forces is inconsistent with the neutral duties of abstention and impartiality.”²²⁴

On the specific issue of cyber intelligence, Biller and Schmitt suggest despite its “great military value,” malware or “any form of cyber communication, even those that may involve the transmission of code that will contribute to an attack on enemy forces”, could not be war materials or weapons.²²⁵ They claimed malware is best analogized to communication only, because “[a]n attacker may not have full control over the path taken by the malware packets to the intended target” (in other words, lack of control and harm is indirect) and “the neutral State is unlikely to effectively identify those packets passing through its cyber infrastructure, at least in the current state of the technology” (in other words, an enforceability issue).²²⁶

I would disagree. The manipulability of a war material might affect its perceived effectiveness or the level of associated risks, but that would not negate the fact those materials could be used in warfare and greatly affect the conduct of war. The manipulability of traditional war items, like grenade launchers, can similarly be fluid and context dependent. Factors like terrain, logistics and the skill level of operators can impact the effectiveness of conventional weapons on the battlefield.

223. SEBASTIAN STEINER, *Oberstenaff.re*, in INT’L ENCYC. FIRST WORLD WAR (May 23, 2016), <https://encyclopedia.1914-1918-online.net>; JÜRIG SCHOCH, DIE OBERSTENAFF. ...RE: EINE INNENPOLITISCHE KRISE 1915/1916 94 (Lang 1972); Yann L. Schmuke, *The Law of Neutrality and the Sharing of Cyber-Enabled Data During International Armed Conflict*, in 2023 15 INT’L CONF. ON CYBER CONFLICT 25, 35 (2023).

224. See U.S. *Commander’s Handbook on the Law of Naval Operations*, https://usnwc.libguides.com/ld.php?content_id=66281931.

225. Jeffrey T. Biller & Michael N. Schmitt, *Classification of Cyber Capabilities and Operations as Weapons, Means, or Methods of Warfare*, 95 INT’L L. STUD. 179, 194 (2019).

226. *Id.*, at 194-5.

The ease of capturing war material should also be irrelevant. Neutrality law concerns the obligations of non-parties to refrain from participating in the war. Although it would be preferable for this obligation to be easily enforceable, that has nothing to do with interpreting the primary obligation of neutral states regarding the types of materials they could supply to belligerents.

On forms of support that is remotely military, some writers have also suggested that open expression of “support for one of the warring belligerents . . . amounted to a violation of the duty of impartiality.”²²⁷ However, merely endorsing or voicing political support for private actions is not sufficient, as state practice demonstrates that expressing political opinions is not forbidden under neutrality law. The situation changes, though, if such expressions of support are accompanied by more tangible forms of assistance. That “something more” need not be a high threshold, given the broad scope of the provisions and the key issue at hand, namely, whether an action might be perceived as partial or could potentially affect the conduct of the war.

Similarly, the lethality of an item under neutrality law depends not on its classification as offensive or defensive, but rather on its effects on the course of the war. Though that effect must remain somewhat military in nature. While the wording of Article 6 does not impose an explicit restriction on the type of military support that may be covered, it is accepted that for an item to be considered prohibited “war material,” it must be capable of producing a tangible impact on the military conduct of the conflict, for example, it provides meaningful support to a belligerent in a way that strengthens its war efforts.

Secondly, apart from the objectives of neutrality law as described above, the historical application of the Hague Conventions supports this effects-based approach. During the 1939–1940 Winter War, for example, France classified as absolute contraband not only traditional arms and ammunition but also “all means of communication, tools, implements, instruments, equipment, geographic maps, pictures, papers and other articles, machinery or documents necessary or appropriate for the conduct of enemy operations.”²²⁸ The United Kingdom adopted a similar list, demonstrating that states have

227. Alonso E. Illueca, *International Coalitions and Non-Militarily Contributing Member States: A Perspective from Panama's Practice and the Law of Neutrality*, 49 U. MIAMI INTER-AM. L. REV. 1, 34 (2018)

228. Contraband Lists of the 1939–40 War, France, Schedule 1, in *International Law Situations*, 17, 17–20 (U.S. Naval War College ed., 1940), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2376&context=ils>.

historically interpreted war materials to include non-lethal but strategically significant items.²²⁹

Modern military manuals and legislation have also drawn attention to the war-aiding criterion for determining what constitutes “war material” without drawing a distinction between offensive and defensive capabilities or tangible and intangible items. As Switzerland’s *War Material Act*, for instance, provides that war materials include “equipment that has been specifically conceived or modified for use in combat or for the conduct of combat and which is not as a general rule used for civilian purposes.” Similarly, Australia’s export control framework assesses whether a good possesses “intrinsic military utility” based on its proposed or actual use.²³⁰ The U.S. Naval Operations Manual takes an even broader approach, stating that “[a]ny transmission to an opposing belligerent of information concerning military operations or military forces is inconsistent with the neutral duties of abstention and impartiality.”²³¹

The legal challenges faced by Germany and Ireland following their involvement in the Iraq War also illustrate how neutrality law can extend beyond direct arms transfers to include logistical and operational support. In a 2005 judgment, the German Federal Administrative Court classified Germany as a neutral state with respect to the Iraq War and articulated its legal obligations under Convention V. The Court emphasized that neutrality law is designed to prevent neutral territory from being used to support combat operations and to avoid escalation involving the neutral state. Applying this reasoning, the Court found that Germany had failed to take sufficient measures to prevent its territory from being used for military support in Iraq.²³² Specifically, Germany’s authorization of U.S. and U.K. military fly-over

229. Contraband Lists of the 1939–40 War, Great Britain, Schedule 1, in *International Law Situations*, 17, 17–20 (U.S. Naval War College ed., 1940), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2376&context=ils>.

230. Australian Government Department of Foreign Affairs and Trade, *Factsheet: Arms or Related Matériel*, <https://www.dfat.gov.au/international-relations/security/sanctions/what-we-can-do-help/factsheet-arms-or-related-materiel> (last visited 22 February 2025) (““To assess whether a good is arms or related matériel, [the] ASO considers: first, the nature of the good; second, the *proposed or actual end use of the good*; and, third, in cases of doubt, the *end user of the good*”).

231. See U.S. *Commander’s Handbook on the Law of Naval Operations*, https://usnwc.libguides.com/ld.php?content_id=66281931.

232. BVerwG, Judgment of 21 June 2005 - 2 WD 12.04, at 83-5 https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Germany/Pfaff_Judgement_21-6-2005.pdf. See also Nikolaus Schultz, Was the War on Iraq Illegal? – The German Federal Administrative Court’s Judgement of 21st June 2005, 7 GERMAN L.J. 25 (2006).

rights, troop movements, and the transport of weapons and military supplies raised serious concerns under Article 5 of Convention V and Article 2(4) of the U.N. Charter. In determining whether Germany had breached its neutrality, the Court did not focus on whether the support was administrative, logistical or indirect but rather on whether it had a practical impact on the military operations.²³³

An example in point to illustrate the effect of this interpretation, as noted in Part II,²³⁴ is Microsoft's intervention in Ukraine's cyber defense, where the company tipped off the Ukrainian government about the wiper malware attack with the endorsement of the U.S. government. With the U.S. government's coordination and support, Microsoft is actively and continuously participating in the operational aspect of the conflict, by providing real-time intelligence information that can influence the cyber strategies and actions of Ukraine.

Intelligence about potential Russian cyberattacks obtained through Microsoft holds significant military value, that is much more than raw data or communication. To produce this intelligence, Microsoft has employed analytical methods and expert techniques to identify patterns and understand anomalies.²³⁵ This intelligence has allowed Ukraine to comprehend the potential impact and imminence of the threat on their systems, and to devise defense strategies to safeguard critical networks. Without this intelligence, Ukraine could have suffered from serious disruption of cyber defense systems and data breaches.

Although the U.S. government did not directly transmit the intelligence, its endorsement and facilitation of the transfer raise serious neutrality concerns under Article 6 as its actions, albeit through private entities or intelligence partnerships, could amount to military support for a belligerent. Cyber war materials could have a war-aiding feature regardless of whether it is offensive or defensive, actionable or non-actionable in nature. Information that might seem non-actionable at one point could become actionable and offensive according to its use and evolving strategies of belligerent states. Pieces of seemingly non-actionable intelligence can also be aggregated to form a comprehensive actionable intelligence report. For example, intelligence about the location of Russia's mobile headquarters provided by the United States (which is not considered offensive or actionable), in

233. BVerwG, *supra* note 228, at 83-5.

234. *See supra* notes 71-72.

235. MICROSOFT, *Defending Ukraine: Early Lessons from the Cyber War* (June 22, 2022), <https://blogs.microsoft.com/on-the-issues/2022/06/22/defending-ukraine-early-lessons-from-the-cyber-war/>.

combination with Ukraine's own geographic intelligence, has assisted Ukraine in conducting artillery strikes against the Russian military.²³⁶

A majority of the Tallinn Manual experts has, moreover, suggested individual components of a cyber weapon (e.g. packets of data) should be treated as a complete cyber weapon for the purposes of neutrality law.²³⁷ The United States's conduct in endorsing Microsoft's efforts in assisting Ukraine likely violates neutrality law.

This conclusion, however, should not be understood to suggest providing cyber defensive intelligence is necessarily impermissible under neutrality law. Rather, the legality of such assistance turns on its nature, scope and effect on the conduct of hostilities, and must be assessed on a case-by-case basis. It is this flexibility that underscores the continuing relevance and utility of neutrality law in regulating state conduct during contemporary armed conflicts. It is also likely, in any event, that any breach of neutrality law to assist Ukraine in that case could be justified on the basis of lawful collective countermeasures.²³⁸

V. CONCLUSION

Often viewed as a relic of the past, neutrality law remains a crucial yet increasingly overlooked and, at times, allegedly eroding framework of international law. When the idealized vision of collective security begins to fracture, the temptation to rely on the supposed conscience of states must be resisted. This article shows how neutrality law can regulate third state conduct in international armed conflicts by virtue of its continuing binding nature. The broad and adaptable principles of the Hague Conventions further provide a robust foundation for regulating a wide range of third state involvement in contemporary armed conflicts.

Neutrality law must not therefore be dismissed as irrelevant, obsolete or dangerous. Rather, it provides a beneficial rule of law to restrain (western) interventionist tendencies in contemporary armed conflicts and, more broadly, opens up space for a more legally rigorous debate about the propriety of foreign military aid. Rather than falling back on a rhetoric of "helping the victim," which often bears little relation to improving civilian conditions or otherwise ending the conflict, neutrality law compels states to grapple with the structural

236. See JULIAN E. BARNES, HELENE COOPER & ERIC SCHMITT, *U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/us/politics/russia-generals-ukraine-intelligence.html>.

237. *Tallinn Manual*, 2.0, *supra* note 209, at 557.

238. See discussion in above Part III.

implications of intervention and to carefully weigh its legal and political consequences.

The arguments developed in this article would contribute to current efforts of international lawyers in (re)conceptualizing the collective security system, including in opposing the ideological narrative that cast foreign encroachment as a permanently superior remedy to conflicts. It is in periods of political uncertainty and fragmented adherence to legal norms that the international order benefits from more, rather than fewer, rules of international law.