University of Reading

# Neutrality and Inter-State Intelligence Sharing During International Armed Conflict

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# Neutrality and Inter-State Intelligence Sharing During International Armed Conflict

## Abstract

Technological advances are accelerating the ability of States and other actors to collect and disseminate information. Intelligence relevant to armed conflicts can be gathered far from hostilities and then instantly passed to the front line. The importance of information and connectivity on the near-future battlefield means that States must invest in close inter-State intelligence relationships and standing infrastructure.

This thesis examines how the law of neutrality will apply to intelligence sharing and associated infrastructure during international armed conflict. In particular, it examines how both traditional ('strict') and more recent ('qualified') approaches to neutrality may apply when non-party States seek to share intelligence with belligerents, and assesses which of these States may lawfully rely on.

First, the history of neutrality law's development and the basics of its application are considered as important context. Next, the application of strict neutrality to intelligence sharing is analysed, demonstrating the restrictions this approach imposes even if the recipient belligerent is a victim of aggression. The duty on States to limit intelligence sharing by non-State actors within their jurisdiction is also considered. The thesis then turns to (publicly known) recent State practice, noting that this has rarely adhered to strict neutrality's requirements. Finally, it considers qualified neutrality and other international law justifications for sharing with belligerents. It argues that strict neutrality is a relic of the nineteenth century out of step with modern international law, and that States may in some circumstances lawfully qualify their neutrality to aid victims of aggression. There may also be other justifications or excuses for doing so, such as self-defence and conduct of collective countermeasures.

# Declaration of Original Authorship and Caveat

I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

The views expressed in this thesis are my own, and do not necessarily represent those of the British Army, UK Ministry of Defence, or UK Government.

Charles Coventry
19 September 2024

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Any errors are of course my own.

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# INTRODUCTION

## The incentive to share

One of the oldest military constants is that intelligence can secure victory, if delivered to the right hands at the right time.[1] In the twenty-first century, humanity's ability to generate, analyse and disseminate information (and thus intelligence) has grown exponentially.

This has not been lost on States, which know that ever-improving capabilities can offer their militaries an 'information advantage' over adversaries. The use of information and intelligence thus features prominently in State analysis of future conflict.

The UK's 2019 Integrated Review, for example, sets the scene: "Novel technologies and applications are being developed and adopted faster than ever before. … New analytical techniques are producing greater insight from increasing volumes of data, enabling innovation."[2] The related 2021 Integrated Operating Concept thus prescribes: "Continuously hunting for and exploiting information to fuel information advantage – the competitive edge that underpins integration. At the heart of this is data … ."[3]

States have a long history of sharing intelligence, from passing single pieces of information to long-standing, complex arrangements such as the Five Eyes partnership.[4] The 2022 US National Security Strategy summarises the value of these: "Our intelligence relationships with our allies are a strategic asset that will increasingly factor in to our competition with our rivals, especially in technological competition."[5]

Technology will enable and incentivise States to share ever-greater quantities of information and intelligence during international armed conflicts (IACs). While the current IAC in Ukraine is not necessarily a harbinger of future conflicts – General David Petraeus described it as "not the future of warfare. In large measure it is what we would have seen had the Cold War turned hot in the

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[1] "Now the reason the enlightened prince and the wise general conquer the enemy whenever they move and their achievements surpass those of ordinary men is foreknowledge." Sun Tzu, The Art of War (Oxford University Press 1963) 144

[2] UK Government, *Global Britain in a competitive age: The Integrated Review of Security, Defence, Development and Foreign policy* (March 2021), 30. See also 39 ('Implications for Defence'): *'*The future calls for a far greater understanding of the potential operating environment. Understanding goes beyond gaining intelligence – and the military will have a role in developing that understanding, through both traditional means such as human intelligence, as well as lawfully exploiting new technologies such as Big Data analytics.*"*

[3] UK Ministry of Defence, *Integrated Operating Concept* (August 2021), 11. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014659/Integrated_Operating_Concept_2025.pdf. See also p17: "As we develop what will be the Future Operating Concept for this force, trend analysis suggests that it will involve an intense competition between hiding and finding, thus it will: … - be integrated into ever more sophisticated networks of systems through a combat cloud that makes best use of the mass of data; … - employ non-line-of-sight fires to exploit the advantages we gain from information advantage…".

[4] Providing for intelligence sharing between the US, UK, Canada, Australia and New Zealand.

[5] US Government, *National Security Strategy* (October 2022), 17. Available at: https://www.whitehouse.gov/wp-content/uploads/2022/11/8-November-Combined-PDF-for-Upload.pdf

mid-1980s… (albeit with some modernization)"[6] – it has shown the existential importance of intelligence sharing to a State victim of an armed attack. It has also highlighted modern 'information advantage' technologies.

State assistance to Ukraine,[7] particularly since Russia's full-scale invasion in 2022, has famously included war materiel[8] and the use of third State territory for the transport of materiel (e.g. Poland)[9] and training of forces (e.g. the UK).[10] It has also included intelligence sharing, described by the US Central Intelligence Agency's (CIA) Director as "the … essential cement in the coalition [to support Ukraine]."[11] Technology-enabled intelligence collection and sharing have undoubtedly altered the conflict's course. Four observations on modern inter-State intelligence sharing can be drawn from what is in the public domain.

First, States with the right technology are increasingly able to generate crucial intelligence at enormous geographic distance from a conflict, far from the territory of belligerents. Strategic collection tools include electronic intelligence (ELINT) aircraft, flying in international airspace far from hostilities but able to locate military forces with deadly accuracy,[12] and undisclosed US capabilities that revealed detailed Russian plans for a 'false flag' attack (and *causus belli*).[13] Even individuals and small collectives can obtain intelligence at distance, however. Volunteer analysts[14]

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[6] Peter Bergen, 'Gen. David Petraeus: How the war in Ukraine will end' (*CNN*, 14 February 2023) <https://www.cnn.com/2023/02/14/opinions/petraeus-how-ukraine-war-ends-bergen-ctpr/index.html> accessed 19 February 2023

[7] Russia has also received support, including drones and missiles supplied from Iran and North Korea, and the use of third State territory in Belarus for basing and launching attacks. See for example: Elsa Maishman & Sam Hancock 'Ukraine war: US says Iran now Russia's 'top military backer'', (*BBC News*, 10 December 2022) <https://www.bbc.com/news/world-europe-63921007> accessed 20th February 2023; John Paul Rathbone, Christian Davies, Roman Olearchyk and Christopher Miller, 'Missiles from Iran and North Korea boost Russia's onslaught on Ukraine' (Financial Times, 14 January 2024) <https://www.ft.com/content/1d1eb1dd-4fa0-4693-9512-23a219de5d77> accessed 12 March 2024; Amanda Coakley, 'Lukashenko Is Letting Putin Use Belarus to Attack Ukraine' (*Foreign Policy*, 24 February 2022) <https://foreignpolicy.com/2022/02/24/russia-ukraine-war-belarus-chernobyl-lukashenko/> accessed 10 July 2023

[8] For example, see Jake Horton & Tural Ahmedzade, 'Ukraine weapons: What tanks and other equipment are countries giving? (bbc.com)' (*BBC News*, 28 December 2023) < https://www.bbc.com/news/world-europe-62002218> accessed 12 March 2024

[9] Steve Hendrix, 'Military equipment for Ukraine secretly transferred at Polish border' (*The Washington Post*, 18 March 2022) <https://www.washingtonpost.com/world/2022/03/18/ukraine-military-aid-shipments/> accessed 24 May 2023

[10] Jonathan Holmes and Lee Madan, 'King Charles watches Ukrainian troops training in Wiltshire' (*BBC News*, 20 February 2023) < https://www.bbc.com/news/uk-england-wiltshire-64709125> accessed 24 May 2023

[11] Sophie Tanno *et al*, February 18, '2023 Russia-Ukraine news' (*CNN World*, 18 February 2023) <https://edition.cnn.com/europe/live-news/russia-ukraine-war-news-2-18-23-intl/h_9e476912605da360dac6521f6a126d05> accessed 19 February 2023

[12] Parth Satam 'Circumstantial Evidence Points To US RQ-4B Global Hawk Drone For Ukrainian Strike On Sevastopol – Russian Media' (*The EurAsian Times*, 30 October 2022) <https://eurasiantimes.com/us-rq-4b-global-hawk-drone-coordinated-ukrainian-strike-on-russia/> accessed 19 Feb 23; George Allison 'British jet monitors Russian forces in occupied Ukraine' (*UK Defence Journal*, 13 September 2022) <https://ukdefencejournal.org.uk/british-jet-monitors-russian-forces-in-occupied-ukraine/> accessed 19 Feb 23

[13] Julian Berger and Luke Harding, 'US claims Russia planning 'false-flag' operation to justify Ukraine invasion' (*The Guardian*, 14 January 2022) <https://www.theguardian.com/world/2022/jan/14/us-russia-false-flag-ukraine-attack-claim> accessed 20 Feb 23

[14] Bellingcat (an "independent investigative collective of researchers, investigators and citizen journalists"; see https://www.bellingcat.com/tag/ukraine/ was a pioneer in this field, but many other such collectives exist, with varying degrees of impact. For discussion of the role of OSINT in the Ukraine conflict, see Magdalene Karalis, 'Open-source intelligence in Ukraine: Asset or liability?' (*Chatham House*, 16 December 2022) <https://www.chathamhouse.org/2022/12/open-source-intelligence-ukraine-asset-or-liability> accessed 20 February 2023.

around the world have produced high-impact intelligence from – for example – social media content,[15] Google maps traffic data,[16] and leaked employment and telephone records.[17] These means are equally available to States with limited intelligence capabilities.

Second, States can quickly share huge quantities of information with their allies. Near-instant data transfers, over secure connections, allow passing of intelligence from remote States to belligerent front lines well within the 'shelf life' of its relevance. For example, a State not party to an IAC can detect a mobile, high value military target (such as an air defence system) and send its location to a belligerent ally before it can move. The speed with which target locations can be shared and attacked 'kinetically'[18] has affected both sides in Ukraine, with units needing to "Disperse, Dig Deep or Move Fast"[19] in order to survive.

Milanovic has noted that, after a slow start, the US appeared to significantly increase intelligence sharing with Ukraine.[20] Timely US intelligence both allowed key Ukrainian units to avoid Russian missile strikes before they occurred,[21] and (despite US officials sometimes downplaying the direct link)[22] enabled Ukrainian precision strikes on their Russian counterparts, such as military headquarters and air defence systems.[23] Media reports describe a 'portal,' to which US officials uploaded intelligence for Ukrainian counterparts to access in near-real time. Ukraine received details of Russian military locations and plans "as quickly as within 30 minutes to an hour of the US receiving it".[24] By February 2023, Ukrainian officials apparently 'almost never' launched HIMARS[25] rocket strikes without detailed co-ordinates provided by US military personnel situated

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[15] Bellingcat, How to Investigate TikTok Like a Pro - Part II: Using TikTok for Ukraine Research (2 November 2022) <https://www.bellingcat.com/resources/how-tos/2022/11/02/how-to-investigate-tiktok-using-tiktok-ukraine-research/> accessed 19 February 2023

[16] Shashank Jonki, 'How has open-source intelligence influenced the war in Ukraine?' (Podcast, *The Economist*, 30 August 2022) <https://www.economist.com/ukraine-osint-pod> accessed 22 February 2023

[17] Bellingcat, 'The Remote Control Killers Behind Russia's Cruise Missile Strikes on Ukraine' (24 October 2022) <https://www.bellingcat.com/news/uk-and-europe/2022/10/24/the-remote-control-killers-behind-russias-cruise-missile-strikes-on-ukraine/> accessed 19 February 2023

[18] Military jargon for a physical attack on a target using weaponry.

[19] Mykhaylo Zabrodskyi, Jack Watling, Oleksandr V Danylyuk and Nick Reynolds, 'Preliminary Lessons in Conventional Warfighting from Russia's Invasion of Ukraine: February–July 2022' (*Royal United Services Institute*, 30 November 2022) Royal United Services Institute < https://www.rusi.org/explore-our-research/publications/special-resources/preliminary-lessons-conventional-warfighting-russias-invasion-ukraine-february-july-2022>, 62

[20] Marko Milanovic, 'The United States and Allies Sharing Intelligence with Ukraine' (EJIL:Talk, 9 May 2022) https://www.ejiltalk.org/the-united-states-and-allies-sharing-intelligence-with-ukraine/ accessed 18 August 2024. The 'slow start' by the US was apparently grounded in fears of becoming a party to the conflict.

[21] Ken Dilanian et al, 'U.S. intel helped Ukraine protect air defenses, shoot down Russian plane carrying hundreds of troops' (*NBC News*, 26 April 2022) <https://www.nbcnews.com/politics/national-security/us-intel-helped-ukraine-protect-air-defenses-shoot-russian-plane-carry-rcna26015> accessed 5 March 2023.

[22] Martin Matishak, 'NSA chief trumpets intelligence sharing with Ukraine, American public' (*The Record*, 10 March 2022) <https://therecord.media/nsa-chief-trumpets-intelligence-sharing-with-ukraine-american-public/> accessed 18 August 2024

[23] Julian Barnes et al, 'U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say' (*New York Times*, 4 May 2022) <https://www.nytimes.com/2022/05/04/us/politics/russia-generals-killed-ukraine.html> accessed 19 February 2023

[24] Natasha Bertrand and Katie Bo Lillis, 'US officials say Biden administration is sharing intelligence with Ukraine at a 'frenetic' pace after Republicans criticize efforts' (*CNN Politics*, 4 March 2022) <https://edition.cnn.com/2022/03/04/politics/us-ukraine-intelligence/index.html> accessed 19 February 2023

[25] The (US-provided) High Mobility Artillery Rocket System – a precision, long range strike weapon.

elsewhere in Europe.[26] Meanwhile, the UK's Ministry of Defence tweeted daily,[27] sharing its analysis of Russian dispositions and future actions (perhaps with an eye on information warfare as much as directly enabling the defenders).[28] Russia has received assistance from States including China,[29] and may also benefit from covert inter-State sharing.

Intelligence produced by States and non-state actors far removed from the Ukraine IAC in every sense has thus ranged from the strategic (details of Russian intent) to the tactical (the disposition of individual units). It has been sourced from a range of capabilities, from the exquisite and sophisticated to the straightforward. In many cases it has reached Ukraine shortly after production.

Third, the potential permutations of future intelligence capabilities are near infinite, given the possibilities modern technology offers for collection, analysis and dissemination. No State can ever have a complete package of these. In particular, exquisite capabilities are likely to become increasingly complex and costly. The UK's Future Operating Environment 2035 programme notes that "…high-end prime platforms…look set to become considerably more expensive – making procurement of sufficient numbers unviable."[30] Even the wealthiest States cannot expect to enjoy a full range of capability. They also cannot expect global access for intelligence capabilities (while countries have obtained intelligence relating to the Ukraine IAC at reach, many have relied on their broad geographic presence to do so). To obtain an 'information advantage,' therefore, allied States will have to pool their intelligence collection resources and share what they obtain.[31]

Fourth, securing a near-instant flow of intelligence between allies could be a matter of military – or national – survival on a future battlefield. Ukraine's accurate strikes on key Russian targets contributed to its success against the odds. Concealing military units is increasingly difficult, and the time gap from detection to attack is frighteningly short. Sensors (from long range ELINT[32] and MASINT[33] detection systems to tactical reconnaissance drones) can quickly bring long range artillery systems and other offensive capabilities (such as loitering munitions) to bear. The effectiveness of these near-instantaneous 'sensor to shooter' links was amply proven well before

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[26] https://www.washingtonpost.com/world/2023/02/09/ukraine-himars-rocket-artillery-russia/ (accessed 19 February 2023).

[27] See the UK Ministry of Defence's X/Twitter account: @DefenceHQ

[28] Karla Adam, 'How U.K. intelligence came to tweet the lowdown on the war in Ukraine' (*The Washington Post*, 20 April 2022) <https://www.washingtonpost.com/world/2022/04/22/how-uk-intelligence-came-tweet-lowdown-war-ukraine/> accessed 26 February 2023

[29] Natasha Betrand, 'US warns allies at Munich conference that China may increase support for Russia' (CNN World, 18 February 2023) <https://edition.cnn.com/europe/live-news/russia-ukraine-war-news-2-18-23-intl/h_9e476912605da360dac6521f6a126d05> accessed 26 February 2023

[30] UK Ministry of Defence, Strategic Trends Programme Future Operating Environment 2035 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1076877/FOE.pdf) (1st edn, 'benchmarked' 30 November 2014, published 14 December 2015) 5. This describes the 'Strategic Context', which applies to intelligence capability as much as to other systems. It recommends a lessened reliance on high-end platforms as a result.

[31] "Risk will require to be mitigated in those areas where we choose not to invest, or to invest less, by leveraging investment and influence with our allies and partners. A coordinated (burden sharing) approach with allies may also allow broader harnessing of new technologies and capabilities." Ibid 37.

[32] Electronic Intelligence – which tends to relate to 'non-communications signals'.

[33] Measurement and Signature Intelligence – sophisticated intelligence gathering that uses a variety of methods – many of which remain classified to some extent - to detect the presence or actions of a force.

2022 in conflicts such as Nagorno-Karabakh.[34] A belligerent able to act on accurate intelligence will have a significant edge.

The UK Integrated Operating Concept (2021) predicts that technological advances will lead to a yet more dystopian picture: "…into the next decade, … proven technologies such as pervasive availability of data via enhanced cloud connectivity, machine learning and artificial intelligence, and quantum computing will allow not just a new generation of weapons systems but an entirely new way of warfare. A mix of crewed, uncrewed and autonomous systems look set to make a step change in lethality and utility. The pervasive nature of data – private, commercial, governmental and military combined – gathered from constellations of sensors and crunched at speed by artificial intelligence, will make it extremely hard to hide today's military signature anywhere on the globe. … In short, we face an inflection point between the Industrial Age and the Information Age…."[35] When "every intelligence and strike capability [is] integrated and connected by advanced command, control, communications and computer systems,"[36] allied States will have to ensure that intelligence flows seamlessly between them across shared capabilities.

Thus, should a State be unlawfully attacked, other States will have intelligence that could help the belligerent victim State to defend itself, and which may be crucial to its survival. They are likely to be able (physically, at least) to share this quickly with the victim State. They may also share joint intelligence collection and sharing capabilities with the victim.

## Infrastructure and automation

States will have to use existing and new infrastructure to realise the above. A significant part of this will be (to a greater or lesser extent) jointly built, owned and operated. The infrastructure in Ukraine used for receiving US intelligence was not created overnight – much was constructed with US input over several years before 2022.[37] Modern data transmission infrastructure includes satellites, undersea cables, and networks routed through servers in different countries. It is rarely confined neatly within State boundaries, and serves multiple users, including State governments and militaries, but also private companies and individuals.

Sharing between States will also be increasingly automated. States already generate and obtain more information than they could subject to human review. Even relatively low-cost collection (e.g. obtaining internet and mobile phone usage data, or 'scraping' web pages and social media accounts)[38] can generate millions of lines of data. States that hold large datasets will be aware of their outline content and proportions, but not all the information therein. Reviewing this to enable action requires automated tools, sometimes driven by artificial intelligence (AI). Passing intelligence between States at a speed matching that of the future battlefield described above will

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[34] Craig A. Reed Jr. and James P. Rife, 'New Wrinkles to Drone Warfare' (January 2022) Proceedings, US Naval Warfare Institute Vol. 148/1/1,427 <https://www.usni.org/magazines/proceedings/2022/january/new-wrinkles-drone-warfare> accessed 12 March 2024

[35] UK Ministry of Defence, Integrated Operating Concept (n3) 7.

[36] Peter Bergen, 'Gen. David Petraeus: How the war in Ukraine will end' (n5).

[37] Adam Entous and Michael Schwirtz, 'The Spy War: How the C.I.A. Secretly Helps Ukraine Fight Putin' (*New York Times*, 28 February 2024) <https://www.nytimes.com/2024/02/25/world/europe/cia-ukraine-intelligence-russia-war.html> accessed 24 August 2024

[38] See for example Joe Tidy, 'How your personal data is being scraped from social media' (*BBC News*, 16 July 2021) <https://www.bbc.co.uk/news/business-57841239> accessed 12 March 2024

also require such tools. Given it is often impossible for humans to understand or explain the networks that AI tools form to reach their decisions, these will not be easily susceptible to review.[39]

Inter-State sharing (including automated tools) may also be used to 'fuse' multiple sources from across different States, generating intelligence that is more likely to be accurate.[40] Intelligence fusion is part of military doctrine, as well as being core business for 'big data analytics' companies[41] and even some non-State actors.[42] In a basic example, the Ukrainian military combined US intelligence on mobile headquarters locations (above) with Ukrainian interceptions of Russian communications to identify the location of senior Russian officers.[43] Fusion also reduces the chance of AI tools being fooled by an adversary.[44]

For example, an automated tool designed to identify concentrations of civilians within an area of operations might function at its best when provided with extensive data (covering the entire conflict area, and possibly areas outside it, to allow for comparisons) from multiple sources (civil records, cellular and internet use, number-plate recognition, civilian CCTV networks, ELINT, and MASINT, for example). This may be in the possession of several States.

## Effect of neutrality law

International law will govern the current and near-future intelligence sharing envisioned above. States must not knowingly aid unlawful acts by their allies, or they risk liability for these under State responsibility rules[45] and (on one view) Common Article 1 of the Geneva Conventions.[46] States not party to a particular ongoing IAC will have to consider whether intelligence sharing will

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[39] Paul Maxwell, 'Artificial Intelligence is the Future of Warfare (just not in the way you think)' (*West Point Modern Warfare Institute*, 20 April 2020) <https://mwi.westpoint.edu/artificial-intelligence-future-warfare-just-not-way-think/> accessed 12 March 2024

[40] UK Ministry of Defence, Strategic Trends Programme Future Operating Environment 2035 (n 30), 'Characteristics of the Future Operating Environment' 19. This also notes: "Big Data analytics. The opportunities provided by the growing volume of data will increase, as will the risk of information overload. Big Data analytics (the ability to collect and analyse a vast amount of information quickly) will become increasingly important and sophisticated over the next 20 years. Organisations, including non-state actors, will seek to gain information advantage. Like many state actors using Big Data analytics, they will be able to uncover patterns and correlations to create probabilistic forecasts."

[41] Mini Migdal, 'How Big Data Empowers Organizations To Work Smarter, Not Harder' (*Forbes Technology Council*, 23 August 2021), <https://www.forbes.com/sites/forbestechcouncil/2021/08/23/how-big-data-empowers-organizations-to-work-smarter-not-harder/> accessed 23 July 2024

[42] See, for example, Bellingcat's Resources page: <https://www.bellingcat.com/category/resources/> accessed 23 July 2023.

[43] Julian Barnes et al, 'U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say' (n 23)

[44] Paul Maxwell, 'Artificial Intelligence is the Future of Warfare (just not in the way you think)' (20 April 2020) West Point Modern Warfare Institute <https://mwi.westpoint.edu/artificial-intelligence-future-warfare-just-not-way-think/> accessed 12 March 2024.

[45] See for example Article 16 of the Articles on State Responsibility (Responsibility of States for Internationally Wrongful Acts, International Law Commission, 12 December 2001, henceforth 'ASRs').

[46] Common Article 1 of all four 1949 Geneva Conventions: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." This arguably requires States to deny aid to allies that breach the Conventions. This was the view taken recently by an appeal court in the Netherlands – see Brian L. Cox, 'The Netherlands Appeals Court Order on F-35 Parts Delivery to Israel' (*Articles of War*, 27 February 2024) <https://lieber.westpoint.edu/netherlands-appeals-court-order-f-35-parts-delivery-israel/> accessed 23 July 2024, discussing the judgment of the Netherlands Court of Appeal in *Oxfam Novib Foundation et al. v State of the Netherlands (Ministry of Foreign Affairs)* (Case Number 200.336.130/01), <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:191> accessed 27 February 2024

cause them to become belligerents in that conflict. Even if not, such States will have to consider whether they are bound by any duties under the law of neutrality. This thesis will address the latter concern.

Neutrality law is "the law regulating the coexistence of war and peace."[47] It developed piecemeal over centuries to imperfectly address the clash between the desire of belligerents to prevail in conflict by any means necessary, and that of 'neutrals' (i.e. States not party to a given IAC) to carry on their 'business as usual'.[48]

For most of its history, neutrality law predominantly governed the interaction between naval warfare and maritime trade, given belligerent and neutral State interests most often came into conflict at sea. It protected neutral trade from belligerent action, for example by prohibiting belligerents from conducting operations in neutral territory and waters, and limiting the circumstances in which they could interfere with neutral merchant shipping and cargoes. In turn, it also limited or prohibited neutral State assistance to belligerents. Neutrals were not allowed to supply either side with war materiel, and had to prevent belligerent operations within their territory, by force if necessary. The overlapping but distinct requirements of abstention (from any involvement in the IAC), and impartiality (equal treatment of all belligerent States) often governed neutral State duties.

These origins remain at the core of modern approaches to neutrality. The Tallinn Manual, for example, notes that its key purposes are to: "(1) protect neutral States and their citizens against the conflict's harmful effects; (2) safeguard neutral rights, such as engaging in commerce on the high seas; and (3) protect parties to the conflict against action or inaction on the part of neutral States that benefits their enemy".[49]

Neutrality law has been in a state of flux since its emergence, however. Powerful States have tried to define it to suit their status as belligerents or neutrals in different conflicts over time. As legal 'vital ground', its requirements have remained constantly in dispute. Furthermore, at its core is the assumption that belligerents should be allowed to fight without interference. This has appeared increasingly outdated with the emergence of controls on inter-State force, and a United Nations (UN) system supposed to identify aggressor and victim States.

There is near-universal acceptance that the UN Security Council (UNSC) acting under Chapter VII of the UN Charter (UNC) can override any neutrality duties. Beyond this, there is little consensus or consistent State practice on how neutrality law operates today. Of particular importance is whether contemporary international law States to 'opt out' of neutral duties under any circumstances – for example, to aid a State victim of aggression. As Boothby and von Heinegg put it, neutrality law is "probably the one branch of the law of international armed conflict whose continuing applicability in the twenty-first century is unsettled, or at least highly controversial."[50]

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[47] Stephen C. Neff, *The Rights and Duties of Neutrals: A General History* (Manchester University Press 2000) 1
[48] Neff, ibid 1
[49] Michael Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, Cambridge University Press, 2017) 553 – 554 (Chapter 20, chapeau at para 2)
[50] WH Boothby and WH von Heinegg, *The Law of War: A detailed Assessment of the US Department of Defense Law of War Manual* (Cambridge University Press, 2018) 371

Returning to Ukraine, the UNSC has not addressed the ongoing IAC under Chapter VII UNC, as Russia is a 'veto'-holding permanent member. Despite this, UN General Assembly (UNGA) resolutions have identified Russia as the principal aggressor.[51] Many States have done likewise.

As described above, 'neutral' (i.e. non-party) States have overtly (and probably discreetly) shared intelligence with Ukraine (a belligerent), to aid its defence, including its military operations against Russia. Neutrality's twin principles of abstention and impartiality have obvious relevance to the lawfulness of this, given that such sharing is not impartial, and can hardly be called abstemious. Legal advisors to such a State will have identified that this sharing has the potential to breach the State's neutral duties, but will have had difficulty determining any consensus on current neutrality law, or how this affects intelligence sharing. Does modern neutrality law (if it exists at all) permit non-party States to share intelligence with a belligerent they adjudge, without a UNSC resolution, to be a victim? Are there any other justifications or excuses for sharing with a belligerent? These questions are considered below.

## Structure

This thesis examines the impact of neutrality law on intelligence sharing by a non-party State with a belligerent during an IAC. It considers neutrality law's history and basic requirements, before examining the application of the 'strict' (more traditional) law of neutrality to the act of inter-State intelligence sharing, means used for inter-State sharing, and sharing by non-State actors based in neutral jurisdictions. It reviews recent State practice, and then weighs arguments for and against 'qualified' neutrality (i.e. which allows States to depart from abstention and impartiality in certain circumstances), along with other potential justifications for sharing. It concludes that recent State practice and *opinio juris* culminating in the collective response to the 2022 invasion of Ukraine, along with the wider effect of the modern prohibition on the use of force, allows States to lawfully share intelligence with belligerent victims of aggression. In other words, States not party to an IAC may reasonably conclude that international law now permits them to share intelligence with belligerents that are acting in individual or collective self-defence, provided this is otherwise lawful. There are also other, narrower justifications that may permit intelligence sharing with belligerents.

## Definitions

'Intelligence sharing' (or simply 'sharing') refers to the sharing of all information of use to a State, whether refined intelligence 'products' or less refined material. In particular, 'intelligence' is used beyond (but including) its usual military doctrinal definition of a product formed from analysis and marshalling of information, generally for a specific purpose.[52] All inter-State sharing of

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[51] See for example, UNGA Res ES-11/2 'Humanitarian consequences of the aggression against Ukraine' (24 March 2022) <https://documents.un.org/doc/undoc/gen/n22/301/67/pdf/n2230167.pdf> accessed 18 August 2024; UN News, 'General Assembly resolution demands end to Russian offensive in Ukraine', (*UN News*, 2 March 2022) <https://news.un.org/en/story/2022/03/1113152> accessed 18 August 2024

[52] "The product resulting from the collection, processing, integration, evaluation, analysis, and interpretation of available information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations." US Department of Defense, *Joint Publication 1-02 Department of Defense Dictionary of Military and Associated Terms*, (US DOD, electronically published, May 2022) accessed 23 July 2023; "The product resulting

coherent facts, data and knowledge is considered, from single pieces of information to complete datasets, and including continuous flows of electronic information.[53]

Furthermore, unless otherwise stated, 'sharing' is used as shorthand for the particular sharing considered below; i.e. the passing of intelligence, during an IAC, by any organ of a State not party to the conflict, to any organ of a State that is a belligerent in the conflict. The former State will be referred to as the 'non-party' or 'assisting' State, the latter as the 'belligerent' or 'assisted' State.

## Permanent and constitutional neutrality

This thesis considers the neutrality law that may apply during an IAC to modify the rights and duties of belligerent and non-party States (rather than the neutrality of non-State organisations such as the International Committee of the Red Cross). It does not consider *permanent* neutrality, an international status voluntarily adopted by a State in peacetime independently of whether an IAC is in existence. A permanently neutral State is required not to accept military obligations, and to avoid other acts that would make wartime neutrality impossible.[54] Equally, the overlapping concept of *constitutional* neutrality – under which a State incorporates a permanently neutral approach into its domestic constitution or equivalently binding legislation[55] – will not be addressed.

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from the directed collection and processing of information regarding the environment and the capabilities and intentions of actors, in order to identify threats and offer opportunities for exploitation by decision-makers." NATO Term (The Official NATO Terminology Database, approved 18 July 2022) <https://nso.nato.int/natoterm/Web.mvc> accessed 18 August 2024

[53] According to NATO Term (ibid, approved 14 Dec 15), 'information' is: "Unprocessed data of every description which may be used in the production of intelligence." The US DOD Dictionary (ibid) does not define 'information' itself, but defines 'information management' as "The function of managing an organization's information resources for the handling of data and information acquired by one or many different systems, individuals, and organizations in a way that optimizes access by all who have a share in that data or a right to that information."

[54] This status was, for example, adopted by Switzerland and Belgium following the 1856 Paris Peace Conference. Michael Bothe, 'Neutrality, Concept and General Rules' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, Oxford University Press, article last updated October 2015) 349 <http://opil.ouplaw.com/home/EPIL> accessed 18 August 2024

[55] Currently claimed by Austria, Costa Rica, Finland, Ireland, Liechtenstein, Malta, Sweden, Switzerland, Turkmenistan and the Vatican.

# CHAPTER 1 – NEUTRALITY'S HISTORY AND EFFECT OF THE UN CHARTER

Understanding neutrality law's impact on modern and near-future intelligence sharing requires a review of its origins and current position in modern international law. As noted above, neutrality developed piecemeal to address relationships between belligerent and non-party States (which became known as neutrals) during conflict, and has remained in flux. Much of its historic development occurred during the age of sail, when codifications of international law were rare. Although treaties at the end of the nineteenth century and the beginning of the twentieth partially captured the state of the law at that stage (see below), no meaningful codification has occurred since.

Divining the current requirements of neutrality law is therefore difficult. Understanding its application to intelligence sharing is more so, as this was of oblique concern for much of neutrality's development and much of the technology that enables meaningful inter-State intelligence collection and sharing during conflict is relatively new. There is little in codified neutrality law that addresses intelligence sharing. Furthermore, relevant State practice is often a guarded secret.[56]

Modern approaches to neutrality are often divided into two approaches. First, there is the 'strict' – or 'traditional' – approach. This remains close to the traditional, customary neutrality rules and principles, and their partial codifications in the late nineteenth and early twentieth century. It thus requires impartiality and abstention from all non-party – i.e. neutral – States.[57] Second, there the 'qualified' approach. Proponents of this maintain that neutrality law has developed, so that it allows non-party States to behave partially towards (and to involve themselves in aiding) States that are victims of aggression.[58] They usually justify this by reference to twentieth century developments in international law (particularly the advent of controls on the use of force), State practice and international armed conflict. Versions of this view are sometimes referred to as 'benevolent' neutrality, or 'non-belligerency,' hence the use of 'non-party State' in this thesis rather than 'non-belligerent State.'

The understanding of the 'strict' approach as being 'traditional' belies the fact that no single 'traditional' approach has ever existed. Neutrality's links to both the economic advantages of

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[56] For example: Francis Deák and Phillip Jessup (eds) *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries* (vols 1–2, Carnegie Endowment for International Peace, Washington, 1939) 1608, which indexes only three articles, from Hague Conventions V and XII, and the Havana Convention (both considered below) as references to the transmission of intelligence in pre-1939 treaties. For historic literature on the history of neutrality see for example: Marjorie Whiteman (ed), *Digest of International Law* (US Government Printing Office, Washington DC, 1963) 139-475; Lassa Oppenheim, *International Law* vol 2 (7th edn, H Lauterpacht ed, 1952) 624 et seq; Erik Castrén, *The Present Law of War and Neutrality* (Annales Academiae Scientiarum Fennicae, Helsinki, 1954); Julius Stone, *Legal Controls Of International Conflict* Book III (Rinehart, New York, 1954).

[57] For example, see: James Upcher, *Neutrality in Contemporary International Law* (Oxford Monographs in International Law, Oxford University Press, 2020); Michael Bothe, 'Neutrality, Concept and General Rules' (n54), Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law*, 4th Edition (Oxford University Press, 2021), and more examples below.

[58] For example: Michael Schmitt and Casey Biggerstaff, '"Strict" versus "Qualified" Neutrality' (*Articles of War*, 22 March 2023) < https://lieber.westpoint.edu/strict-versus-qualified-neutrality/> accessed 18 August 2024; Wolff Heintschel von Heinegg, 'Neutrality in the War Against Ukraine' (*Articles of War*, 1 March 2022) <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/> accessed 18 August 2024.

maritime trade and the spoils of military victory have made it particularly controversial throughout its history, and approaches to it have varied. As noted above, great powers have attempted to adapt neutrality law to suit their ends depending on their current status as belligerents or neutrals, meaning neutrality has "been moulded far more by the struggles of the real world [i.e. State practice] than by the expositions of commentators", with the latter playing the role of "intellectual scavengers" in trying to assemble myriad doctrines and practices into a coherent whole.[59]

In his history of neutrality Neff identifies three different theories of neutral rights and duties of neutrals that have prevailed at different times. First, the 'conflict of rights' theory saw neutrality as governing the clash between a belligerent State's right (prior to the prohibition of the use of force) to prosecute a conflict, and a neutral's right to conduct its usual diplomatic and economic relations. The former often took priority, as belligerents could demonstrate the necessity (in the legal sense) of warfighting.[60] The second theory, dominant in the nineteenth century, saw neutrality as a 'code of conduct,' striking a "fair balance the opposing interests of belligerents and neutrals" and creating a "fixed and stable" gap-free frontier between these.[61] Texts considering nineteenth century neutrality rules took this approach, maintaining that the rights and duties of belligerents and neutrals "may be understood as correlative or reciprocal" and thus neutral States had to fulfil their neutral duties to validly assert their reciprocal rights.[62]

Third is the 'community interest school.' This prioritises the interests of the broader international community over those of individual States, and focuses on "combating evil and promoting the well-being of the human community at large." It was one of the earliest theories of neutrality, and reappeared in the twentieth century, embodied in the League of Nations and UN systems.[63] This can be used to justify both strict neutrality (because abstention and impartiality arguably limit conflicts) and qualified neutrality (which allows assistance to victims of aggression).

## Historical development

Early versions of neutrality can be identified in ancient times - some towns maintained friendly relations with both Athens and Sparta during the Peloponnesian War.[64] Early European approaches required partial treatment of belligerent states, however, based on the relative merits of their competing causes. The 'just war' doctrine of Saint Augustine in the early fifth century and Aquinas' *Summa Theologica* in the thirteenth century, inherited from an earlier Roman concept,[65]

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[59] Stephen C. Neff, *The Rights and Duties of Neutrals: A General History* (n47) – henceforth 'Neff, *The Rights and Duties of Neutrals*') 2
[60] Ibid 45-47
[61] Ibid 48-50
[62] US Department of Defense, *Law of War Manual* (June 2015 edition, updated December 2016) (henceforth '*DoD Law of War Manual*') <https://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015-Updated-Dec-2016.pdf> § 3.6.3.2.
[63] Neff, *The Rights and Duties of Neutrals* 51-52
[64] Peter Hostettler and Olivia Danai, 'Neutrality in Land Warfare' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, Oxford University Press, article last updated November 2015) 347 at para 6
[65] See for discussion of these Joachim von Elbe, 'The Evolution of the Concept of the Just War in International Law' (1939) 33 AJIL 4 665–88, available at <https://doi.org/10.2307/2192879> accessed 23 July 2024

identified a positive moral obligation to assist a belligerent acting righteously (i.e. in accordance with just war theory),[66] and not to assist a wrongdoer. [67]

The 'just war' approach declined, however, as 'modern' international law developed. From the end of the Middle Ages onwards, jurists, scholars and theologians began to take the view that a conflict might be reasonably *viewed* as just – or, depending on which of the multiple available justifications for war one recognised – actually *be* just on both sides.[68] In the early sixteenth century, Francisco de Vitoria noted that non-party States might experience "provable ignorance" as to which side was in the right.[69] Grotius took the view that a war could – at least by humans in an imperfect world – be 'just' to some degree on both sides.[70] Even at this stage, however, in '*On the Law of War and Peace*' (1625) he apparently hedged between strict and qualified neutrality depending on the relevant neutral's knowledge: "it is the duty of those who keep out of a war to do nothing whereby he who supports a wicked cause may be rendered more powerful, or whereby the movements of him who wages a just war may be hampered, … In a doubtful matter… those at peace should show themselves impartial to either side in permitting transit, in furnishing supplies to troops, and in not assisting those under siege."[71]

The theory that opposing causes could both be just eventually "brought the just war doctrine…to a cul de sac".[72] With the growing number of *causus belli*, belligerents could almost always justify their actions; attempts to distinguish 'just' actions were thus "discredited and abandoned" by the nineteenth century.[73] Meanwhile the right to go to war became seen as "the paramount attribute of sovereignty".[74] With belligerent States on even footings (or simply given the benefit of the doubt), belligerents seemed justified in requiring other States not to interfere in 'their' conflict. In the just war era, belligerent rights had been limited to the right of 'just' belligerents to subdue 'unjust' counterparts. The "equal rights of war, independently of the underlying justice of [the belligerents'] respective causes" reached by the end of the sixteenth century, meant all belligerents enjoyed rights within war.[75] Thus, by the early eighteenth century, commentators such as van Bynkershoek maintained that it was not for a neutral to deny or grant belligerents anything based on the respective justice of their causes.[76]

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[66] For example: Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, Cambridge University Press, 2017) 67-69 (henceforth 'Dinstein, *War, Aggression and Self-Defence*')

[67] On the just war theory and earlier international law writers taking the view that "non-belligerents should do nothing to hamper the cause of the just side or to help the cause of the unjust side" see Quincy Wright, *The Outlawry of War and the Law of* War-182 (1953) 47 Am J Int'l L 365, 366; D. Bowett, *Self-Defense in International Law* (Praeger, New York, 1958) 156

[68] Dinstein, *War, Aggression and Self-Defence* 69 – 71

[69] Francisco de Vitoria, '7 On the Law of War', in Anthony Pagden and Jeremy Lawrance (eds), *Political Writings*, (Cambridge University Press, 1991) 313.

[70] Hugo Grotius, 'Whether it is ever lawful to wage war' et seq in Stephen Neff (ed), *Hugo Grotius on the Law of War and Peace: Student Edition* (Cambridge University Press, 2012) 34 et seq

[71] Hugo Grotius, 'On those who are of neither side in war' ibid 411-412; Grotius' approach is also analysed in James Upcher, *Neutrality in Contemporary International Law* (Oxford Monographs in International Law, Oxford University Press, 2020), Annex, Part 2.

[72] Dinstein, *War, Aggression and Self-Defence* 70 – 71

[73] Ibid

[74] Dinstein, *War, Aggression and Self-Defence* 80. Given much of the international legal system was grounded on the sovereignty of States, Dinstein notes that it was at least incongruous to grant every sovereign State the right to destroy the sovereignty of others.

[75] Neff, *The Rights and Duties of Neutrals* 18.

[76] Van Bynkershoek, 'Quaestionum juris publici libri duo, quorum primus est De rebus bellicis, secundus De rebus varii argumenti' ('Questions of Public Law; two books, of which the First is On War, the Second On Miscellaneous Subjects' 1737) translated in Scott (ed), *Classics of International Law* (Oxford University Press, 1930), quoted ibid

On the neutral side, the "duty of abstention became more burdensome as neutrality became more morally respectable".[77] Furthermore, growing international trade made neutral States eager to ensure profits were not interrupted by third-party conflicts. Given that war "was seen increasingly in terms of the clash of national interests rather than of moral positions, the ethical stigma…of unsavoury profiteering associated with neutrality, tended to lift. The age of Aquinas had given way to the age of Clausewitz."[78]

From this time to the beginning of the twentieth century, it was perhaps "beyond doubt, at least in theory, that third States [not party to an IAC] could only choose between neutrality and belligerency."[79] Neutral States certainly did become subject to ever-more onerous duties over the sixteenth to the nineteenth centuries. With limited humanitarian exceptions, they were increasingly prohibited from any participation or use of State resources or territory to support a belligerent. In return, belligerents were required to respect neutral territory and trade. These form the core of what is labelled the 'strict' approach today.[80]

In an age when formal declarations of war were common, this approach offered the (at least theoretical) advantage that belligerent States knew exactly what to expect from all their peers. Neutrality could be seen as an enlightened stance, preventing the spread of conflict and integral to the nineteenth century peace movement – although in reality it was still being shaped by the dominant international powers.[81]

The above did not occur as the result of orderly evolution; neutral rights and duties varied over this period. Many rules codified in the 1907 Hague Conventions had only crystallised following the culmination of the French Revolutionary Wars in 1815, and legal theory struggled to keep pace throughout (for example, as to when and to what extent belligerents could interfere with neutral-flagged merchant ships and their cargoes).[82] In 1895, Lawrence wrote that neutrality contained "rules that have been observed for ages, and rules that have been developed in our own time." While some had gained adherence over long usage, others were "shifting and uncertain", with neutrality principles both "still warmly supported and fiercely decried."[83] Kleen, his contemporary, noted that neutrality was the "most anarchic" area of international law at the end of the nineteenth century.[84]

## Codification

Limited elements of neutrality law – predictably relating to aspects of naval warfare such as capture of cargoes and blockade – were codified in the Paris Declaration of 1856. The Declaration's text demonstrates its British and French drafters' focus on maritime trade[85] – unless intelligence can

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[77] Neff, *The Rights and Duties of Neutrals* 99
[78] ibid 87
[79] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality' in Michael Schmitt and Jelena Pejic (eds) *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, Leiden, 2007) 543, 544
[80] See for example Bothe (n 53), para 2
[81] Neff, *The Rights and Duties of Neutrals* 99 and 103
[82] Ibid chapters 3 – 5
[83] Thomas J Lawrence, *The Principles of International Law* (2nd edn, Macmillan, London, 1895) 473, quoted ibid
[84] Richard Kleen, *Lois et usages de la neutralité* (Chevalier-Marescq, Paris, 1898) vii-viii, quoted ibid
[85]The Declaration, made following the Paris Peace Conference of 1856, recorded that privateering remained abolished, that neutral flags 'covered' the goods of an enemy belligerent except for the 'contraband of war' (the 'free ships-free goods' principle, which meant that belligerent State goods on a neutral State merchant ship were immune

be deemed to be a ship's cargo or contraband (both considered below), the Declaration does not affect intelligence sharing. It did however include compromises on some neutrality issues that had previously caused significant differences between nations. Most such compromises favoured the continuation of neutral trade during conflict.[86] Over 40 States eventually became parties to the Declaration, including all major maritime powers other than the US.[87] The various powers continued to identify creative interpretations of neutrality law (including the Declaration) suited to their changing interests, however.[88]

The Hague Conventions of 1907 therefore attempted (among other things) to improve on the Declaration by clarifying neutrality duties.[89] Even at the conference, however, the lead lawyer noted that it was "of little use to develop… general considerations [of neutrality law]" because "neutrality is not viewed in the same light by everybody". He suggested instead concentrating on "propositions dealing with particular cases which… are presented in concrete and precise shape".[90]

Of the resulting agreements, Hague Convention V (HCV) relates to neutrality in land warfare,[91] and Hague Convention XIII (HCXIII) relates to neutrality in naval warfare.[92] Although not comprehensive, these are far broader than the Declaration. These are also of direct relevance to intelligence sharing. For example, they require both belligerents and neutrals to ensure that neutral territory is not used for any belligerent purpose,[93] and require neutrals to limit provision of telecommunications services to belligerents.[94] They also require belligerents to protect the sovereign rights of neutrals,[95] and prohibit belligerent violations of neutral territory and waters.[96] Some of these requirements represented progressive developments of international law at the time of drafting, apparently intended to prevent belligerents from drawing would-be neutrals into

from capture unless they were contraband), that neutral goods (with the exception of contraband) were not liable to capture on enemy-flagged merchant ships, and that naval blockades had to be effective (i.e. maintained by a force sufficient to prevent access to the enemy coast in order for the rules of blockade to apply). The definition of contraband is dealt with in more detail below.

[86] Neff, *The Rights and Duties of Neutrals* 98

[87] The US did not join as it which objected to the abolition of privateering, and the Declaration's failure to ban <u>all</u> capture of property at sea.

[88] Ibid, Ch. 6

[89] See for example ibid, Ch 7

[90] Louis Renault, quoted in Carnegie Endowment for International Peace, *The Proceedings of the Hague Peace Conferences* (vol 1, Oxford University Press, New York, 1920) 278

[91] Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.

[92] Hague Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War.

[93] By way of specific example, there are close restrictions on the activity of belligerent warships in neutral waters and ports , and neutrals must intern troops from belligerent armies that arrive on their territories. See HC XIII, Arts 9 – 25 and HC V, Art 11. The latter Article also states: "[The interning neutral power] may keep them in camps and even confine them in fortresses or in places set apart for this purpose. It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission." The neutral must supply interned belligerents with food, clothing, and humanitarian relief: HC V, Art 12. Neutral States must also prevent within their jurisdictions the fitting out and arming of vessels that they believe are intended to be used in hostile operations against a State they are at peace with – HC XIII, Art 8.

[94] HC V, Art 3

[95] HC XIII, Art 1

[96] HC V, Art 1; HC XIII, Arts 1, 2 and 5

conflicts.[97] Many States remain parties to the two Conventions today, including the US, Ukraine and Russia, albeit not the UK.[98]

Other attempts to codify parts of neutrality law included the 1909 London Declaration concerning the Laws of Naval War, which never came into effect, but reflected the views of ten major maritime powers to such an extent that it was incorporated into France, Germany and Britain's naval prize instructions.[99] There were also attempts following the First World War to codify rules (including on neutrality) for newer aspects of conflict. The Hague Rules for the Control of Wireless Telegraphy in Time of War and the Hague Rules on Air Warfare were both drafted from 1922-23, and limited neutral intelligence sharing. Although never adopted, they were an authoritative attempt at codification, and represent a view of the contemporary customary law.

There has been no significant international agreement on general neutrality law since the 1907 Conventions. The latter therefore remain the most successful attempt to codify neutrality law, and the focus of texts considering neutrality. The Conventions must be seen in their context, however. They were a compromise, reached between great powers of the time, on a body of law unsettled since the days of Grotius. In 1907, before the destruction of the World Wars, States remained interested in preserving their historic twin rights to trade and warfare. The latter right was largely unrestricted, other than the very limited controls on resort to war in the 1899 Hague Conventions (amounting to provisions on dispute settlement,[100] and some preconditions on when States could use force to recover debts).[101] The contemporary customary law that fell to be codified was grounded in strict neutrality, and was generally considered an enlightened stance.

Given the above, it was inevitable that the 1907 Conventions would adopt the approach to neutrality now labelled as 'strict' neutrality. Furthermore, the Conventions do not represent an apex of neutrality's coherent development. Instead, they captured a compromise interpretation of neutrality, at a point in its constant flux just prior to momentous historical events. This is important context when considering their application to intelligence sharing.

## 1907 – 1945

Over the 117 years since the Hague Conventions, the requirement that belligerents be given space to fight, whatever the justice of their respective causes, has become increasingly discordant with developments in wider international law. The First World War was a "thoroughgoing catastrophe"

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[97] The Report of the Third Commission noted that: "The starting-point of the regulations ought to be the sovereignty of the neutral State, which cannot be affected by the mere fact that a war exists in which it does not intend to participate. Its sovereignty should be respected by the belligerents, who cannot implicate it in the war or molest it with acts of hostility." It went on to observe that the obligation to respect another State's sovereignty did arise due to the existence of a conflict: "The principle which it is proper to affirm at the outset is the obligation upon belligerents to respect the sovereign rights of neutral States. This obligation is not a consequence of the war any more than the right of the State to inviolability of its territory is a consequence of its neutrality. The obligation and the right are inherent in the very existence of States." Carnegie Endowment for International Peace, *The Proceedings of the Hague Peace Conferences* (n 88, vol 1) 278, 290.

[98] See ICRC Treaty Database entries <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-v-1907/state-parties> and <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-xiii-1907/state-parties> accessed 22 August 2024

[99] Neff, *The Rights and Duties of Neutrals* 142

[100] Article 2 of both Hague Convention I of 1899, and its 1907 counterpart (both titled 'for the Pacific Settlement of Disputes'), required parties to 'as far as circumstances allow' seek the good offices or mediation services of friendly States, before making 'an appeal to arms'.

[101] Hague Convention II of 1907 Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Art 1

for contemporary advocates of neutral rights that exposed the weaknesses of pre-War codifications such as the Hague Conventions.[102] Nineteenth century neutrality rules intended to contain conflict failed spectacularly to do so, and proved unworkable during the destructive warfare that resulted.[103] Belligerents abandoned many rules in the 1909 London Declaration, for example on contraband and blockade, when they proved incompatible with 'total warfare' aimed at hostile economies. Equally little regard was paid to neutral rules relevant to intelligence sharing (see review of state practice below).

The post-War period thus saw neutrality reconsidered. Proposed remedies for its failure included drafting more realistic neutrality rules, abandoning attempts to codify it as futile (given it represented "an expression of power relations as they stood from time to time"), and focusing on conflict prevention rather than on neutral 'business as usual'.[104] The latter was reflected in increasing regulation of the use of force. The inter-war period saw significant (at least theoretical) progress towards outlawing aggressive force, via the Covenant of the League of Nations (1920) and the Kellogg-Briand Pact (or the Pact of Paris, 1928).

Members of the League of Nations accepted obligations not to resort to war.[105] Article 11 of the Covenant provided, "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. …" Article 16 provided that all other Members of the League would be automatically deemed subject to an 'act of war' by a Member that went to war in breach of its obligations. Those Members were required (among other things) at once to prohibit all intercourse "between their nationals and the nationals of the covenant-breaking State" and to prevent "all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State…." This apparently required Members not to allow nationals of any State to conduct any form of dealings or communication with the offending belligerent Member.

The League's Covenant was not a universal prohibition on using force. Members still had several lawful routes to belligerency. Crucially, the Covenant did not fully govern relations between Members and non-Members.[106] It is clear, however, that in 1920 States were already forming rules that could lead to partial treatment of and communications with – including partial intelligence sharing with – different belligerents. While this only applied to belligerents that had effectively consented to this treatment by joining the League in the first place, Members were required to ensure that these belligerents were also treated partially by non-Member States, likely in breach of traditional neutrality rights.

The Covenant contained no direct reference to neutrality. Léon Bourgeois, however, one of its principal authors, took the view during drafting that its sanctions system amounted to "complete abandonment of neutrality".[107] UK Foreign Minister Sir Austen Chamberlain[108] noted in 1925 that

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[102] Neff, *The Rights and Duties of Neutrals* 164-165
[103] Ibid, Ch 8
[104] Ibid, 164-165
[105] Preamble to the Covenant of the League of Nations 1919
[106] Dinstein, *War, Aggression and Self-Defence* 85-86
[107] David Miller, *The Drafting of the Covenant* (New York, GP Putnam's Sons, 1928) 238, 630
[108] Chamberlain was also instrumental in negotiating the Locarno Pact, a series of agreements designed to further guarantee peace in Western Europe. Apart from guaranteeing the post-Treaty of Versailles borders of France, Germany and Belgium, this provided for mutual defence (by otherwise neutral countries, including Britain) if one of these three countries violated the Locarno agreements. See the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy 1925 ('The Locarno Pact'), available in English at <https://avalon.law.yale.edu/20th_century/locarno_001.asp>.

Article 16's requirements were incompatible with neutral trade rights traditionally asserted by nations like the US.[109] Had the strict requirements of Article 16 been followed once the Covenant was ratified, corresponding State practice might have emerged. Following the League's failure to address Italy's invasion of Ethiopia, and the Anschluss,[110] however, several States effectively renounced the Article 16 regime.[111] The failure of the League and threat from Germany also led to countries such as Belgium reasserting their traditional permanent neutrality.[112]

Turning to the Kellogg-Briand Pact, parties condemned "recourse to war for the solution of international controversies" and "…renounce[d] it, as an instrument of national policy in their relations with one another."[113] They agreed to pacifically settle all disputes between them.[114] The Pact's guarantees were denied to States that "promoted [their] national interests by recourse to war"[115] – thus parties could go to war against Pact-breakers. The Pact only applied to 'war' and between parties, however (and was flawed in other respects).[116]

The Pact was <u>not</u> generally intended to abolish neutrality.[117] There was no obligation to act against a Pact-breaker, or to support a victim, thus parties could be neutral in any subsequent IAC. Nevertheless, contemporary commentators noted that the Pact allowed parties to set aside neutral duties if they chose, to act partially against a Pact-breaking state.[118] Some commentators thus questioned the continued force or existence of neutrality rules. A UK memorandum of 1931 asserted that there had been a "fundamental change" due to the League and the Pact, resulting in a situation "in which the rights and duties of belligerents and neutrals will [not] depend upon the old rules of war and neutrality, but … the position of the members of the League will be determined by the Covenant and the Pact."[119] In 1932, US Secretary of State Henry Stimson said of the Pact: "Hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers…. We no longer draw a circle around them and treat them with the punctilios

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[109] Address of Sir Austen Chamberlain, League of Nations Council, *Monthly Summary* (vol 5, 12 March 1925) 86-7
[110] Germany's annexation of Austria into the German Reich on 12 March 1938.
[111] Morgenthau notes that a joint declaration by Belgium, Denmark, Finland, Norway, Sweden, the Netherlands, Spain, and Switzerland on 1 July 1936 amounted to a veiled cancellation of their obligations under Article 16 of the Covenant. The declaration stated that "as long as the Covenant in its entirety is applied only in an incomplete and inconsistent manner, we are obliged to take this fact into account in applying [Article 16]". See Hans J Morgenthau, 'International Affairs: The Resurrection of Neutrality in Europe' (1939) 33(3) Am Pol Sci Rev 473-486, 473.
[112] Neff, *The Rights and Duties of Neutrals* 170 – 171
[113] Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy 1928, Art 1
[114] Ibid, Art 2
[115] Ibid, Preamble
[116] See for example Dinstein, *War, Aggression and Self-Defence* 87-89
[117] 'Budapest Articles of Interpretation of the Briand-Kellogg Pacts of Paris' in International Law Association, *Thirty Eighth Conference,* (1932) at 66-8.
[118] For example, Professor Quincy Wright stated at the 1930 American Society of International Law meeting: "It is believed… that under the Pact, … partiality is permissible. The Pact breaker would have no claim against any other signatory of the Pact for failure to observe the impartiality traditionally required by the law of neutrality. Similarly the traditional duty of neutrals to abstain from all direct aid to belligerents would not apply with reference to the victims of aggression." He went on to note that "In the new situation it would appear that if the terms war and neutrality are retained at all as terms of international law, their significance will be greatly changed. What has heretofore been called an act of war becomes under the Pact either a criminal breach of the Peace, an act of self-defense or an act of international police." (1930) 24 Proc ASIL 79, 84 and 86, available at <https://www.jstor.org/journal/procasilannumee>. At the same event, Professor Clyde Eagleton stated: "Neutrality [referring to strict neutrality], as a concept of international law, is comparatively recent. … to the founders of international law the doctrine would have been repugnant. Such men as Vitoria and Grotius taught a duty to support the just cause; and today we are returning to their ideas." (Ibid, 87.) Eagleton went on to claim that, following the inception of the League, neutrality was "an ancient and now useless theory" (1935) 29 Proc ASIL 132.
[119] UK Foreign Office, 'Memorandum on the Signature by his Majesty's Government in the United Kingdom of the Optional Clause of the Statute' (1931) 25 AJILS 82, 89–90

of the duelist's code. … By that act we have made obsolete many legal precedents…".[120] There was considerable academic support for the suggestion that strict neutrality was outdated.[121] Treaties, cases and States continued to refer to neutrality, however.[122]

The Second World War represented the spectacular failure of the League and Pact. Equally, strict neutrality rules both failed to prevent the conflict and were often abandoned during the War itself. Examples of the latter are discussed below the most famous being US 'non-belligerency' and clear partiality to the Allied cause. President Roosevelt justified this on the basis "…even a neutral cannot be asked to close his mind and close his conscience".[123] The US conducted extensive intelligence sharing with the UK before its entry to the War. It also provided destroyers and other materiel to Britain via Lend-Lease schemes, occupied Iceland, and escorted shipping supplying the Allies.[124] US Attorney General Robert Jackson described this as "a discriminating attitude towards warring States [which is] really a return to earlier and more healthy precepts" – i.e. a 'just war' distinction between belligerents.[125]

## The UN Charter

The 1945 UN Charter contained the clearest prohibition on the use of force between States at Article 2(4),[126] and introduced a binding system designed to preserve international peace. Article 2(4) also outlawed the *threat* of force, a legal development that underlined the UNC's stance against aggression set out in its Preamble and the UN's Purposes.[127] The UNC was not a direct return to 'just war' precepts, however, not least because the exceptions to its prohibition of force are extremely limited.[128]

Article 2(4) provides a (albeit sometimes ambiguous)[129] yardstick against which to judge State action. A State that threatens or uses force in breach of it acts unlawfully by definition. Thus, States

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[120] Henry L Stimson, 'The Pact of Paris: Three Years of Development', 11(1) Foreign Affairs, Special Supplement (October 1932) i - ix

[121] See for example: 'Budapest Articles of Interpretation of the Briand-Kellogg Pacts of Paris', International Law Association (n117) 66 et seq (which advocated disregard of neutrality law allowing discrimination against States which breached the Pact); Phillip C. Jessup et al, *Neutrality: Its History, Economics and Law* (vol IV, New York, 1936) 121 et seq; Fischer Williams, 'Sanctions under the Covenant' (1936) 17 BYBIL 130 – 149, 145 et seq.

[122] For summaries of the pre-WW2 position, see also: Phillip C. Jessup et al, *Neutrality: Its History, Economics and Law* (vol 4, ibid); The Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War, in (1939) 33 Am J Intl L, Special Supplement 167.

[123] Aidan Campbell, 'How Franklin Roosevelt learned of the start of the Second World War' (*The Franklin Delano Roosevelt Foundation, Adams House, Harvard College*, 2 September 2019) <https://fdrfoundation.org/how-franklin-roosevelt-learned-of-the-start-of-the-second-world-war/> accessed 16 August 2023

[124] For example: Dinstein, *War Aggression and Self-Defence*, 81-82; Neff *The Rights and Duties of Neutrals* 189.

[125] Jackson, 'Address' (1941) 35 Am J Intl L 348, particularly 349 – 350

[126] UN Charter, Art 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[127] UN Charter, Art 1: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;…"

[128] Dinstein, *War, Aggression and Self-Defence* 95 – 98

[129] This thesis is unable fully to address either the extensive discussion surrounding the exact effect of the prohibition at Art 2(4), or the exceptions to the prohibition. The Charter contains exceptions to the prohibition for UN Security Council-approved or -mandated action (Chapter VII) and for self-defence (Art 51). Arguments have been made for further exceptions beyond the Charter (e.g. for force used to conduct humanitarian interventions and to assist indigenous forces in wars of national liberation).

ought in theory to be able to identify lawful and unlawful belligerents in a given conflict, and act accordingly. During drafting, this led France to suggest it should explicitly state neutrality was incompatible with UN membership.[130]

Article 2(5) UNC requires UN Members to "give the United Nations every assistance in any action it takes in accordance with the present Charter, and … refrain from giving assistance to any State against which [the UN] is taking preventive or enforcement action". This clearly requires partiality.

Furthermore, Members agree at Article 25 to "accept and carry out" the UNSC's decisions. This includes decisions under the UNC's Chapter VII, which grants the UNSC power to "make recommendations, or decide what measures shall be taken…to maintain or restore international peace and security," including where unlawful force has been used or threatened.[131] In acting under Chapter VII, the UNSC may decide either to *compel* States to participate in enforcement action, or simply to *authorise* action by willing States. The former occurred when the UNSC compelled States to interrupt commercial relations with Iraq following its 1990 invasion of Kuwait,[132] the latter when the UNSC later authorised the US-led Coalition to use 'all necessary means' (i.e. force – but clearly also encompassing intelligence sharing) to enforce its prior decisions relating to the same situation.[133] Under Article 49, UN Members agree to offer each other "mutual assistance" in carrying out UNSC direction.[134]

The 'supremacy clause' at Article 103 UNC means that the above provisions will override any conflicting neutrality duties, including under other treaties like the 1907 Hague Conventions and customary law.[135] The UNC's introduction thus led to further suggestions that neutrality was obsolete.[136] The full extent to which neutrality duties have been altered by the UNC and subsequent international law is unclear. It seems indisputable that neutrality law has at least been adapted in three aspects relevant to intelligence sharing, however.

First, a binding UNSC decision under Chapter VII that *requires* State action (or inaction) will prevail over any conflicting neutrality duties or rights. For example, assume the UNSC requires State A to offer all feasible assistance to State B following an unlawful attack on B by State C. In these circumstances, A will not be acting unlawfully by providing B with intelligence on C's forces, even if this would otherwise breach its neutral duties to C. Equally, A cannot rely on neutrality duties

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[130] United Nations, *Documents of the United Nations Conference on International Organization* (vol 6, New York, UN Information Organization, New York, 1945) 712-22 and ibid (vol 7) 383.

[131] UN Charter, Art 39

[132] UNSC Resolution 660 of 2 August 1990 (UNSC S/RES/660(1990) <https://documents.un.org/doc/resolution/gen/nr0/575/10/pdf/nr057510.pdf> accessed 27 July 2024; also subsequent resolutions 662, 664, 665, 666, 667, 669, 670, 674, and 677.

[133] UNSC Resolution 678 of 29 November 1990, UNSC S/RES/678(1990) at <https://documents.un.org/doc/resolution/gen/nr0/575/28/pdf/nr057528.pdf> accessed 27 July 2024

[134] UN Charter, Article 49: "The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council."

[135] UN Charter, Art 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[136] As shown above, this occurred during drafting, but this was also the suggestion of commentary that followed the introduction of the Charter. See for example: Krzysztof Skubiszewski, 'Use of Force by States: Collective Security, Law of War and Neutrality' in Max Sorensen (ed) *Manual of Public International Law* (New York, St Martin's Press, 1968) 840 et seq; Phillip C. Jessup, 'Should International Law Recognize an Intermediate Status between Peace and War?' (1954) 48 AJIL 98; Andrea Gioia, 'Neutrality and Non-belligerency' in Harry Post (ed), *International Economic Law and Armed Conflict* (Dordrecht, 1992) 51-110; Ove Bring 'Comments' in Ige Dekker and Harry Post (eds), *The Gulf War 1980 – 1988* (Dordrecht, 1992) 243 – 246, particularly at 244; Gennady Melkov, 'Neutrality in War' (1978) Soviet Yearbook of International Law 237.

to avoid compliance, even if it does not wish to help B.[137] Furthermore, a UNSC decision *authorising* (rather than *requiring*) State action will still allow States that choose to act to breach any neutrality duties that conflict with the authorised acts.

Second, moving one step outwards, other States may assist their peers to act as required or authorised by the UNSC without breaching their neutrality or losing their neutral status.[138] Thus, during UNSC-authorised military action against North Korea (1950-53) and Iraq (1990-91), States not directly carrying out this authorised action still adopted 'non-belligerent' stances in favour of belligerent States that were doing so. During the 1991 Gulf War, several countries allowed US warplanes to refuel on their territory, for example, an act that would otherwise have contravened The Hague Conventions.[139] Such assistance could equally have included intelligence sharing. The US position was that the enabling UNSC resolution meant that "regardless of assertions of neutrality, all nations were obligated to avoid hindrance of Coalition operations undertaken pursuant to, or in conjunction with, UNSC decisions, and to provide whatever assistance possible."[140]

Third, States may not rely on neutrality to hinder UNSC-authorised action,[141] or to directly or indirectly support a State subject to such action (including a State identified as an aggressor under Article 39).[142] For example, a State cannot rely on its usual neutral duty to intern belligerent personnel on its territory to detain a UNSC-authorised belligerent's troops - hence the US stated during the 1991 Gulf War that it expected Iran and Jordan (which both claimed neutrality) to return downed Coalition aircrew from their soil.[143] Similarly, in these circumstances a neutral State should not likely intern a UNSC-authorised belligerent's personnel staffing an existing intelligence facility on the neutral's territory.

These modifications seem inevitable, given the supremacy of the Charter and the UNSC's Chapter VII powers. Modern publications also take this view. For example, the Tallinn Manual finds a State "may not rely upon the law of neutrality to justify conduct… that would be incompatible with [UNSC Chapter VII] preventive or enforcement measures…".[144] The San Remo Manual notes that if the UNSC has identified an aggressor, then neutral States must not help the offending State other than with humanitarian needs, cannot plead neutrality to justify non-compliance with UNSC-mandated economic measures, and may assist the aggressor's State victims.[145]

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[137] For example, Schmitt, *Tallinn Manual 2.0* (n 48, henceforth '*Tallinn Manual 2.0*') 562 (Rule 154, especially para 2); Helsinki Principles on the Law of Maritime Neutrality (adopted by the International Law Association at its 68th Conference, Taipei, 30 May 1998, henceforth 'The Helsinki Principles') para 1.2; Program on Humanitarian Policy and Conflict Research at Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare* (Cambridge University Press, 2013) (henceforth '*Harvard Manual on Air and Missile Warfare*') Rule 165; Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, 1995) (henceforth '*San Remo Manual on Naval Warfare*') para 7; Michael Bothe, 'Neutrality, Concept and General Rules' (n 53) para 10

[138] For example, James Upcher, *Neutrality in Contemporary International Law* (n57), p19; Michael Bothe, 'Neutrality, Concept and General Rules', ibid, para 10.

[139] Neff, *The Rights and Duties of Neutrals* 191-3

[140] US Department of Defense, *Final Report On The Persian Gulf War* (US Department of Defense, 1992) 626, also cited as (1992) 31 ILM 612

[141] *Tallinn Manual 2.0*, 562, especially Rule 154 para 2; Commentary to *Harvard Manual on Air and Missile Warfare*, Rule 165, para 2 – which notes that "This has been demonstrated by State practice."

[142] Some commentators maintain that a neutral stance may still be permissible in similar circumstances – see for example Daniel O'Connell, *The International Law of the Sea Volume II* (1st Edn, Oxford University Press, 1988) Ch 30.

[143] US Department of Defense, *Final Report On The Persian Gulf War* (n140) 628, quoted in *DoD Law of War Manual* §15.2.3.2.

[144] *Tallinn Manual 2.0,* 562. Rule 154 specifically refers to UN Charter Arts 25 and 103, noting that the latter overrides treaty obligations such as those arising from HCV and HCXIII.

[145] *San Remo Manual on Naval Warfare*, Section III, paras 7 and 8

Thus, neutral States *must* share intelligence with belligerents (notwithstanding any neutrality duties to the contrary) if explicitly or implicitly *required* to do so by UNSC direction under Chapter VII. They must also do so where to do otherwise would amount to assisting a State against which the UN is taking action, or a hindrance to that action. Otherwise, they *may* choose to share intelligence with lawful belligerents as part of action *authorised* under Chapter VII they choose to participate in, or as assistance that they choose to offer other States taking part in UNSC-authorised or UNSC-mandated action. The wording of the relevant UNSC resolution(s) is likely to govern the limits of the above. States are likely to interpret these differently, especially as to what must be disclosed to avoid 'hindering' a UNSC-authorised operation that the State is otherwise unwilling to contribute to, particularly if the relevant intelligence is sensitive.

Thus any application of neutrality law to intelligence sharing must account for the UNC. Whether the UNC and subsequent international law have further modified neutrality is considered below.

## Current position

Frictions between permanent UNSC Members have meant that the UNSC has not acted to address the majority of post-Second World War IACs. Where it has taken action, it has usually not identified an aggressor (albeit this can be implicit in its resolutions), and has not required all States to participate in enforcement action.[146] The prohibition on the use of force is well-established and reiterated in numerous treaties, however. It is probably customary law.[147] It is a cornerstone of modern international law.

Where does this leave the law of neutrality, and its application to contemporary intelligence sharing? First, neutrality is almost certainly not in desuetude or irrelevant. Treaties referring to 'neutral states'[148] include the Geneva Conventions and their Additional Protocol I of 1977.[149] The International Court of Justice (ICJ) implied in the 1949 *Corfu Channel* case that neutrality law remained extant,[150] referred to neutral status via the Hague Conventions in the 1971 *Namibia* case,[151] and explicitly referenced neutrality in its 1996 *Nuclear Weapons* advisory opinion.[152] The UNSC's failure to address many modern IACs and resolutions authorising (not mandating) force have left ample room for states to adopt neutrality since 1945.

Von Heinegg notes: "the fact that the law of neutrality has been included in numerous national military manuals provides sufficient evidence of the general recognition of the continuing validity

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[146] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality' (n79) 557

[147] Dinstein, *War, Aggression and Self-Defence* 98 – 108. The ICJ did find in the *Nicaragua* case that the customary prohibition on the use of force exists separately to, and does not exactly match, the UN Charter prohibition, although the two are not markedly divergent – see *Case concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. United States)* [1986] ICJ Rep 14, [92] – [97]

[148] For example,

[149] For example, the 1949 Geneva Conventions at Common Articles 8/8/8/9 envisage neutral countries acting as Protecting Powers. The 1977 Additional Protocol 1 includes specific provisions on rights and duties of neutral States: see AP I art 2(c); art 9(2)(d); art 19; art 22(2)(a); art 30(3); art 31; art 37(1)(d); art 39(1); art 64(1) and (3) – as well as an apparently separate category of 'other states not party to the conflict'. The effect of these provisions is discussed further below. See also for example the International Convention for the Prevention of Pollution of the Sea by Oil 1954, 327 UNTS 3, Art XIX, para I.

[150] *Corfu Channel Case (United Kingdom v. Albania)* [1949] ICJ Rep 4 [22]

[151] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, Opinion of Judge Ammoun at 67, 93

[152] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226 [88 - 89]

of [its essentials]."[153] The New Zealand Defence Force (NZDF) Manual, for example, notes that "the law governing neutrality … has been significantly affected by the [UN] Charter …", but finds that neutrality will strictly apply to conflicts where the UNSC has not authorised or prohibited force.[154] The US Department of Defense (DoD) Law of War Manual states that UNSC decisions "may, in certain circumstances, qualify rights and obligations under the law of neutrality"[155] and that "[a] State's obligations under *jus ad bellum*, including its obligations under the Charter, may alter significantly its rights and duties under the law of neutrality," but does not suggest neutrality law is extinct.[156] International law handbooks[157] and the general weight of commentary also suggest neutrality has survived.[158]

Assuming it persists, how does neutrality law operate today? Views on this are divergent. Neutrality is "caught between an international legal order which purports to outlaw war and hence make neutrality obsolete, and an international political environment characterized by frequent armed conflicts in which there is a need to regulate the relations of belligerent and non-belligerent states" and thus has led "a sort of 'juridical half-life'" according to Norton.[159] Roach notes in the context of naval neutrality: "There are differing views on many of the rules… . There has not been a recent multilateral conference to codify and progressively develop [neutrality] law … and there is not likely to be one …."[160]

As noted above, modern approaches to neutrality law theories can be generally split between 'strict' and 'qualified' approaches reflecting both sides of the dilemma Norton articulates. The strict approach maintains that, absent a UNSC resolution, neutrality law continues to require impartiality and abstention by neutral (i.e. all non-party) States during an IAC.[161] The prohibition on using force "has not … led to the acceptance of an optional theory of neutrality."[162] While requiring equal treatment of belligerents appears at odds with modern international law,[163] impartiality (it is argued) "retains its important functions at least as long as there is no possibility of a binding [UNSC] decision concerning the question of who in a given conflict is the aggressor and who is the victim."[164] Neutral duties are a workable code of conduct that avoid States taking unilateral,

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[153] Wolff Heintschel von Heinegg, 'Neutrality in the War Against Ukraine' (*Articles of War*, 1 March 2022) <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/> accessed 22 August 2024. Military manuals are examined in more detail below.

[154] New Zealand Defence Force, *Manual of Armed Forces Law DM 69 (*2nd Edn, Vol 4, Law of Armed Conflict, New Zealand Defence Force 2019) para 16.2.2. The NZDF Manual also recognises that some States may not actively participate in a conflict, but still choose to materially support one of the parties – see below.

[155] DoD Law of War Manual, §15.2.3.2

[156] DoD Law of War Manual, §15.2.

[157] Such as the 1994 *San Remo Manual on Naval Warfare*, the 1998 *Helsinki Principles on Maritime Neutrality*, the 2009 *Harvard Manual on Air and Missile Warfare*, the 2017 *Tallinn Manual 2.0*, the 2023 Newport Manual on the Law of Naval Warfare (James Kraska and Raul Pedrozo (eds) *Newport Manual on the Law of Naval Warfare* (Stockton Center for International Law, 2023)), and the 2020 Oslo Manual (Yoram Dinstein and Arne Willy Dahl, *Oslo Manual on Select Topics of the Law of Armed Conflict* (Springer Open, 2020)).

[158] See the views of contemporary commentators quoted throughout this thesis.

[159] Patrick M. Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' [1976] 17 Harv Int'l L J 249, 249 (footnote omitted)

[160] James Ashley Roach 'Neutrality in Naval Warfare' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, Oxford University Press, article last updated March 2017) 348, para 26

[161] For example: Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (n57) 604, para 18.03; James Upcher, *Neutrality in Contemporary International Law* (n57) 19.

[162] Upcher, ibid 37

[163] For example, ibid 19

[164] Michael Bothe, 'Neutrality, Concept and General Rules' (n 53) para 9. See also para 7, where Bothe asserts that: "During World Wars I and II, and also in a number of later conflicts, the law of neutrality retained its significance. The development of the State practice gave rise to customary law, which up to this day is an essential source of the

self-interested approaches to belligerents. Meanwhile the qualified approach maintains that neutrality law stands modified by developments in international law and State practice since the 1907 Hague Conventions. This allows States to behave partially towards lawful belligerents in certain circumstances. These arguments will be considered in greater detail below.

## Commencement, duration and extent of neutral duties

Assuming neutrality law exists in some form, States considering existing and new intelligence sharing activity will have to identify when neutral duties apply to them. State A, which has a long-standing intelligence sharing arrangement with State B, may need to know exactly when its neutrality duties will commence, if B is on the brink of war with State C, so that A knows when to modify its relationship with B. This thesis cannot address the duration of neutral duties in detail, but addresses the question briefly here.

The start point is that, without an IAC, there are no belligerent States, and thus no belligerent or neutral duties.[165] If no relevant IAC exists, inter-State intelligence sharing unaffected by neutrality.

The most popular position is that neutrality duties arise on the outbreak of an IAC. The 1907 Hague Conventions stated that neutral duties apply in the case of 'war on land' and 'naval war' respectively.[166] The ICJ stated in *Nuclear Weapons* that neutrality law applies to "all international armed conflicts", no matter the weapons used, and did not qualify this based on duration or intensity.[167] Many commentators and manuals agree that neutrality law duties commence with an IAC, without further action[168] or any declaration of neutrality.[169] Any State not party to the relevant IAC is thus automatically a neutral. The San Remo Manual defines a neutral simply as "any State not party to the conflict".[170] The Canadian Law of War Manual states that "the neutrality of a non-participating State commences with the outbreak of an [IAC]" and a State "does not need to declare its [neutral] status formally. [Formal declaration] will only have the effect of making such status better known."[171]

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law of neutrality. Following a modification of State practice, this customary law too underwent changes and introduced distinctions. This change, however, has produced only modifications of single specific rules of the law of neutrality, not a general abolition of this whole body of law."

165 Although note the historic (apparent) exceptions to this (on the limited occasions when States have declared their neutrality vis-à-vis both government and insurgent sides in non-international armed conflicts) addressed below.

166 Made clear in the respective Preambles, not to mention the full titles of both Conventions: Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land; Hague Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War.

167 *Nuclear Weapons Opinion* (n152) at [88 - 89]: "*89.* The Court finds that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used."

168 See for example: *Harvard Manual on Air and Missile Warfare*, chapeau to Section X, para 1; *San Remo Manual on Naval Warfare,* Section V, para 13(d); Dinstein, *War, Aggression and Self-Defence*, 26-27, relying on Erik Castrén, *The Present Law of War and Neutrality* (n56) 422-3; Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict', 560.

169 See Geneva Conventions of 1949, Common Art 2. The ICRC's Commentary to this notes (International Committee of the Red Cross, *Commentary on the First Geneva Convention* (Cambridge University Press, 2016), footnote 20 to para 205): "The law of neutrality applies when a declaration of war has been issued and the related state of war recognized and also applies when an international armed conflict within the meaning of Article 2(1) of the Geneva Conventions has come into existence."

170 *San Remo Manual on Naval Warfare*, Section V, para 13(d)

171 Canadian National Defense, *Joint Doctrine Manual Law of Armed Conflict at the Operational and Tactical Levels* (2001) para 1303

The exact circumstances in which an IAC begins remain controversial, of course. It is settled that this is not contingent on a declaration of war, or other belligerent recognition; the International Criminal Tribunal for the Former Yugoslavia (ICTY) reflected a common test in finding that an IAC exists "whenever there is resort to armed force between States."[172] This threshold ensures that nearly all violence between States is governed by international humanitarian law (IHL), but also represents a very low bar for triggering potentially onerous neutrality duties.[173]

This has led some States and commentators to suggest that neutral duties do not automatically arise in all IACs, but only those amounting to a 'state of war' or that meet a particular threshold.[174] Bothe suggests that neutrality's requirement to make "fundamental changes" in State relationships[175] is only triggered by "an armed conflict of a certain duration and intensity" (not "every armed incident"), and the "threshold of application of the law of neutrality is probably higher than that for [IHL]".[176] A conflict must have "reached a scope which renders its legal limitation by the application of the law of neutrality meaningful and necessary" for neutrality to apply (he explicitly avoids establishing the exact threshold).[177] Petrochilos argues that a 'generalized state of hostilities' (again requiring a certain duration and intensity) is needed.[178]

The issue with this, of course, is how to determine that the relevant threshold is met.[179] Von Heinegg (having examined different approaches) concludes these are all unworkable and "the law of neutrality has, in principle, applied in every [IAC] irrespective of whether neutral States wished to be bound by it or not."[180] Alternative suggestions that neutrality duties depend on belligerents subjectively accepting a State of war between them ('*animus belligerendi*') have been criticised for granting belligerents full control over the application of neutrality rules.[181]

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172 *Prosecutor v Tadic (Decision on Jurisdiction)* (ICTY Appeals Chamber 1995) [1996] 35 ILM 35, 54

173 Wolff Heintschel von Heinegg, 'Neutrality in the War Against Ukraine' (*Articles of War*, 1 March 2022) <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/> accessed 22 August 2024. This notes that the threshold for armed conflict is "any resort to a use of force by one State against another State".

174 Christopher Greenwood, 'The Concept of War in Modern International Law' [1987] 36 ICLQ 283, 305; Wolff Heintschel von Heinegg, ibid 558. See also for example Robert W. Tucker, *The Law Of War And Neutrality At Sea* (vol 50, U.S. Naval War College International Law Studies, 1955) 199-200, which draws a distinction between 'any international armed conflict' on the one hand and 'the existence of a state of war' on the other, with rules on neutrality depending strictly on the latter for their existence.

175 "…considerable modifications in the relationships between the neutral and the belligerent states, for instance as to the admissibility of exports, the sojourn of warships of the parties to the conflict in neutral waters, and the control of neutral trade." Bothe, ibid 608, para 18.06.1.

176 Ibid

177 Ibid, para 18.06.2. Interestingly, this seems to have been a departure from Bothe's previous view that there was a straightforward substitution of 'international armed conflict' for 'war' in the application of what had been previously called the 'law of war', that this applied equally to neutrality, and that the full law of neutrality thus applied to all IACs: see Michael Bothe 'Neutrality at Sea' in Ige Dekker and Harry Post (eds), *The Gulf War 1980 – 1988* (Dordrecht, 1992) 207.

178 Georgios C Petrochilos, 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality' [1998] 31 Vanderbilt Transnational Law Journal 575, 605

179 Competing approaches have been suggested. These can either examine belligerent-driven considerations (the presence of formal declarations, the imposition of neutrality law measures, and/or the intensity and duration of the conflict), or the actions of non-party States. Both approaches can be criticised for effectively giving one side of the neutrality relationship (or the other) control over the application of neutrality law. See the review of commentary and conclusions in Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' at 558-560.

180 Ibid 560

181 Christopher Greenwood, 'Neutrality at Sea: Comments', in Ige Dekker and Harry Post (eds), *The Gulf War 1980 – 1988* (Dordrecht, 1992), 212; James Upcher, *Neutrality in Contemporary International Law* (n57) 13, 39; Erik Castrén, *The Present Law of War and Neutrality* (n56) 421; Dietrich Schindler, 'Transformations in the Law of Neutrality since 1945',

A different approach posits that neutrality law applies in every IAC, but the intensity and extent of neutral duties imposed on each State will vary depending on the context. Upcher suggests these will be dictated by the relationship of each neutral with the belligerents, and its ability to affect the relevant conflict[182] – for example, the proximity (geographical, or otherwise) of the neutral State to the IAC.[183] The DoD Law of War Manual suggests that "the duties of neutral States to refrain from certain types of support to belligerent States do not apply to all armed conflicts to which *jus in bello* rules apply; rather, such duties are only triggered in armed conflicts of a certain duration and intensity"[184] – albeit belligerents retain "fundamental duties to respect the sovereignty of neutral states in all international armed conflicts".[185]

Von Heinegg notes that belligerents and non-party States have "in practice shown that they are only prepared to comply with the law of neutrality *in toto* in exceptional cases," even where there is unanimous agreement that a state of war exists. Exceptional cases apart, "the applicability of the law of neutrality depends on functional considerations that will, in most cases, result in a differential or partial applicability of [that law]".[186] Prize law, for example, only becomes applicable when belligerents employ tactics such as interference with neutral shipping.[187] Only those parts of the law of neutrality "strictly necessary for safeguarding its object and purpose" – the '*essentialia neutralitiatis*' are automatically applicable, including those prohibiting any non-party assistance to a belligerent that "could lead to a temporal, spatial or other widening of the conflict".[188]

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in Astrid Delissen and Gerard Tanja (eds) *Humanitarian Law of Armed Conflict—Challenges Ahead: Essays in Honour of Frits Kalshoven* (Nijhoff, 1991); Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (n57) 609, para 18.06.2-4

[182] James Upcher, *Neutrality in Contemporary International Law* (n57) 69 – the argument for varying intensity is discussed in more detail below.

[183] Upcher notes that "*in the contemporary international order, it seems unreasonable, as well as contrary to State practice, that the outbreak of international armed conflict in one region of the world could have the effect of foisting neutral status upon every State that is not involved in the conflict. Such a position smacks of unreality.*" "*…the closer* [geographically] *the State is to the theatre of hostilities, the more stringent will be the obligations of neutrality*": see James Upcher, *Neutrality in Contemporary International Law* (n 57), 51-2.

[184] DoD Law of War Manual, § 15.2.1.2.

[185] DoD Law of War Manual, §15.2.1.3. In doing so the Manual relies on the ICJ's *Nuclear Weapons* opinion despite the apparently different wording of this.

[186] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 560

[187] Ibid 561

[188] Ibid 565 and 567

States may formally proclaim neutrality,[189] or otherwise communicate their chosen status as neutrals,[190] although neutral status remains an objective matter based on the relevant IAC and the actions of the purportedly neutral state. A state can be neutral in one IAC, even if it is a belligerent in a parallel conflict involving some of the same belligerents: the USSR was at war with Germany but neutral in the war with Japan from mid-1941 until close to the end of the Second World War.[191]

A State determining when neutrality duties will affect its intelligence sharing with an ally will thus need to determine whether the latter is party to an IAC. If so, neutrality duties may apply to any existing and future intelligence sharing with the ally. Considering the tests above, the longer and more intense the IAC, and the more the intelligence shared relates to the conflict or has the potential to affect or widen it, the more likely it is that neutrality duties will apply. Given the observations above on the ability of States to influence IACs by intelligence collection and sharing at reach, the geographic location of the sharing State is unlikely to be a primary consideration.

Given the confusion, the sharing State cannot be certain of which test governs for the commencement of neutral duties. That said, treating itself as subject to all neutral duties as soon as any two other States 'resort to armed hostilities,' may lead it to a never-ending cycle of adjusting complex intelligence sharing relationships, denying access to its territory, interning belligerent personnel and so on, following every international resort to force. The better and more workable approach is for the State is likely to be application of a basic 'duration and intensity' test to dismiss low-level incidents, and then consideration of whether there is sufficient nexus between the intelligence sharing and the relevant IAC to engage the '*essentialia neutralitiatis*'.

There are limited historic examples of neutral duties arising (or being said to arise) in non-international armed conflicts (NIACs). States have recognised, or purporting to recognise, the

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[189] Formal proclamations include those by President Roosevelt at the commencement of the Second World War (Franklin D. Roosevelt, 'Proclamation of September 5, 1939: Proclaiming the Neutrality of the United States in the War Between Germany and France; Poland; and The United Kingdom, India, Australia and New Zealand' (1939) 54 STAT 2629; President Woodrow Wilson at the commencement of the First World War (Woodrow Wilson, 'Proclamation of August 18, 1914' (1914) 38 STAT 2015) and George Washington, Proclamation of Neutrality, April 22, 1793', reprinted in John Fitzpatrick (ed) *The Writings of George Washington from the Original Manuscript Sources 1745-1799* (Washington DC, US Government Printing Office, 1939) 430-31. More recently, Iran and Jordan proclaimed their neutrality during the Persian Gulf crisis (US Department of Defense, *Final Report On The Persian Gulf War* (n140) 626. See DoD Law of War Manual §15.2.1.4, footnotes 33 and 35. The George Washington proclamation also contains direction to US citizens: "…I have therefore thought fit by these presents … to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene [US neutrality]. And I do hereby also make known, that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding or abetting hostilities against any of the said powers, or by carrying to any of them, those articles which are deemed contraband by the modern usage of nations, will not receive the protection of the United States against such punishment or forfeiture; and further that I have given instructions to those officers to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the Courts of the United States, violate the law of nations, with respect to the powers at war, or any of them." The decision to make this proclamation is referenced in 'Cabinet Battle #2' in the musical 'Hamilton' by Lin-Manuel Miranda: "Washington: Hamilton is right … / We're too fragile to start another fight / You [Jefferson] would let your ideals blind you to reality / Hamilton? (Sir) Draft the statement of neutrality."

[190] The DoD Law of War Manual, §15.2.1, footnote 35 offers examples of these. These include Ronald Reagan's statement that "The United States is neutral in the Iran-Iraq war." This followed Jimmy Carter on the same conflict: "Let me repeat that we have not been and we will not become involved in the conflict between Iran and Iraq." The Government of Laos, stated on 9 July 1962 that it was "resolved to follow the path of peace and neutrality in conformity with the interests and aspirations of the Laotian people, as well as the principles of the Joint Communiqué of Zurich dated June 22, 1961, and of the Geneva Agreements of 1954 [i.e. agreements in relation to the Vietnam War], in order to build a peaceful, neutral, independent, democratic, unified and prosperous Laos" and thus declared it would not enter any military alliance or allow military use of its territory.

[191] Dinstein, *War, Aggression and Self-Defence* 27

belligerent status of rebel factions in civil wars, and have subsequently applied neutrality law to their relations with both rebels and government. The US declared neutrality in the 1820s conflicts between Spain and 'her colonies', deeming both sides 'belligerent nation(s)'. It recognised both sides in the war between Texas and the remainder of Mexico in 1852.[192]

Historically, this approach required certain conditions to be satisfied (rebels occupying and administering a large part of State territory, acting under responsible command and respecting the laws of war, and circumstances rendering it necessary for outside States to define their approach to the conflict).[193] There has been little reference to it since the UNC: from 1945 to 1976 there was "not a single instance" of a third State recognising a rebel force as a belligerent, despite at least twenty-seven major civil conflicts occurring.[194] If it survives, the approach will not trump UNC obligations, or the customary international rule against intervention in other States' affairs that recognising rebels may constitute.[195] It can likely be considered "defunct or at least moribund."[196]

Despite this, situations remain in which neutrality may remain relevant during NIACs. First, parallel IACs and NIACs may exist. Say State A is fighting both an IAC against State B, and a NIAC against rebels within its own territory. State C, neutral in the IAC, will have to consider whether sharing intelligence with A to aid its conduct of the NIAC will breach C's neutral duties to B, perhaps because the intelligence will also assist A to fight B.[197]

Second, a NIAC in State D may evolve ('internationalise')[198] into an IAC if State E joins on the rebel side.[199] State F, sharing intelligence with State D's government to aid its conduct of the NIAC, may not be a belligerent in the emerging IAC. F will suddenly find itself subject to neutrality duties, and must reconsider its continued sharing with D. Although E's interference in D's NIAC would likely be unlawful, F would still find itself having to choose between ending its intelligence sharing with D (to avoid breaching its newly acquired neutral duties) or becoming a party to the IAC.

Third, NIAC rebels in State G may win statehood for an area (State H) that was previously part of G.[200] Any continued conflict may constitute an IAC between G and H. State I, sharing intelligence to support G's government, may face the same choice as State F above.

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192 DoD Law of War Manual, §3.3.3.1; Robert McLaughlin, 'Some Challenging Issues and Case Studies in Recognition of Belligerency' in *Recognition of Belligerency and the Law of Armed Conflict* (The Lieber Studies Series, online edn, Oxford Academic 2020), Ch 5

193 Ibid; Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947) 175-76

194 Patrick M. Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' [1976] 17 Harv Int'l L J 249, 272

195 *Nicaragua case* (n147) [246]: "*Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition*." Art 7 of the Annex to the UN General Assembly's "Definition of Aggression" excludes support given to peoples struggling for self-determination from the definition of aggression: UNGAR 3314 (1974).

196 Patrick M Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' 309

197 This was the situation in Ukraine prior to 2022. Any States wishing to assist Ukraine by sharing intelligence on separatist armed groups would also have had to consider whether this breached any neutrality duties in relation to the apparent IAC with Russia (evidenced by the occupation of Crimea). The impact of neutrality on 'dual effect' intelligence is considered below.

198 For example: *Prosecutor v Dusko Tadić* (ICTY Appeals Chamber Decision) ICTY-94-1-AR72 (2 October 1995)

199 The involvement in a NIAC of an third party State on the side of the non-State group is likely to be prohibited by other rules of international law, including the prohibition on the use of force, but the third party's entry (lawful or not) will be a matter of fact, giving rise to an IAC and thus to neutral duties.

200 For example, the establishment (still disputed) of the Republic of Kosovo, or of the People's Republic of China.

These examples further demonstrate the unwieldiness of applying neutrality duties to intelligence sharing during any IAC, no matter its duration and intensity. They also underline how neutrality may intervene to block assistance to a State that is acting lawfully, to the benefit of an aggressor.

## End of neutrality duties

A State subject to neutral duties that restrict its ability to share intelligence will also wish to know when these will terminate. The tests discussed above will be relevant – if neutrality duties rely on the existence of an IAC of a certain duration or intensity, or a state of war, then they will presumably cease to apply if the required level is no longer met.

Another reason not to tie the existence of neutrality duties to the simple existence of an IAC is that the point at which the IAC itself ends may be unclear. Hostilities may be halted but not formally concluded, with 'temporary' ceasefires or stalemates rather than a conclusive peace settlement. IHL also continues to apply during belligerent occupation of State territory, even without armed resistance; there is little to say whether neutral duties would continue in this context.[201] Thus (again) it is better to link neutrality duties to the existence of active hostilities in by at least a basic intensity test.[202]

A neutral State will shed its neutrality immediately should it become a belligerent in the relevant IAC.[203] This may occur either if it is attacked by a belligerent State, or if it decides to engage in the existing hostilities. It may of course do the latter lawfully, if authorised by the UNSC under Chapter VII of the Charter, or acting in lawful collective self-defence of a State,[204] provided its actions otherwise accord with international law.[205] Given neutrality existed when using force was a largely unrestricted prerogative of sovereign States, the neutral duty of abstention will not bar a State from joining a conflict. This was certainly not the intent of the 1907 Hague Conventions, which were not seen as outlawing German aggression against Belgium during the First World War.[206] A neutral

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[201] See the 1949 Geneva Conventions I to IV, Common Article 2, read with Art 42 of the Regulations Respecting the Laws and Customs of War on Land of 1907 ('Hague Regulations').
[202] Upcher 'cautiously' suggests: "First, the obligations associated with neutrality are generally regarded as extinguished by the end of active hostilities [as opposed to when a formal conclusion or peace treaty is reached], particularly when accompanied by a stable cease-fire. Secondly, it appears that it is for the neutral State to make the assessment of when the obligations of neutrality may be relaxed." James Upcher, *Neutrality in Contemporary International Law* (n56) 65 – 68
[203] Dinstein, *War, Aggression and Self-Defence* 27
[204] Under UN Charter, Art 51 and customary international law. Use of force in collective self-defence of a State acting in self-defence must of course be necessary, proportionate, and at the request of the victim State – see the *Nicaragua case* and *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) (Merits Judgment)* [2003] ICJ Rep 161.
[205] Including UN Charter Art 2(4), Chapter VII and Art 51, and the prohibition on supporting States that are subject to Security Council enforcement action at UN Charter Art 2(5).
[206] *Editorial Comment to the Hague Conventions and the Neutrality of Belgium and Luxemburg*, [1915] 9 AJIL 959 ("[Articles of Hague V] do not, however, guarantee neutrality, nor do they prevent a state from declaring war against a state wishing to remain neutral, which thus becomes a belligerent and loses the benefit of the convention. If the Hague conventions were violated by Germany in this matter it would appear to be a violation of the spirit, not of the letter, and indeed it is difficult to maintain that there was a violation even of the spirit, because international law in its present development apparently allows nations to go to war whenever they please, and the Hague conventions do not modify or abridge this provision of the law of nations."); John Delatre Falconbridge, 'The Right of a Belligerent to Make War Upon a Neutral' [1918] 4 Transactions of the Grotius Society 204, 209-11 ("The fifth [Hague] convention [of 1907] does not relate to the question of the right to convert the relation of belligerent and neutral into that of belligerent and belligerent, but simply defines the rights and obligations incidental to the former relation. ... The fundamental proposition which has been left untouched by The Hague Conventions is that by the existing

State joining an existing IAC on the side of an aggressor or a State subject to UNSC enforcement action, will be acting unlawfully in breaching the UNC provisions quoted above. It is arguable that this act would also breach the joining State's neutral duties,[207] but the State will nevertheless thereafter shed its neutral duties. It would be able to share intelligence unencumbered by neutrality – but such sharing would still be in an illegal cause and thus unlawful.

While crossing the threshold of belligerency[208] automatically ends a State's neutrality, it is important to note that a breach of neutrality does not automatically render a State a belligerent. The thresholds for breach of neutrality and belligerency are not the same; the first marks the start of an internationally wrongful act under the law of State responsibility, while the second a change in a State's status in relation to an IAC.[209] Neutrality considerations "do not provide adequate distinctions regarding party status" and "[r]ather than relying on [neutrality], the legal framework for identifying parties must be drawn from the system of the international legal regulation of armed conflict."[210] This is a distinction that goes back to Grotius.[211]

Thus a particular act <u>might</u> meet both the threshold for breach of neutrality <u>and</u> that for belligerency (for example, a neutral State providing direct combat support to an existing belligerent),[212] but equally it might not (a neutral allowing a belligerent to transit some supplies through its territory on a few occasions, or tolerating a limited belligerent violation of its airspace). A State that breaches its neutrality duties without reaching the belligerency threshold violates international law. It could be subject to countermeasures (and potentially uses of force) from an aggrieved belligerent attempting to end an ongoing breach, but it does not become a party to the relevant IAC.

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rules of international law one State may declare war against another State without any justifiable casus belli, and it commits no breach of law in so doing if it complies with the requirements relating to the declaration of war. Its action may be immoral, but it is not illegal unless there is a treaty forbidding such action (as there was in the case of Belgium).").

[207] The DoD Law of War Manual seems to take the view that this would breach both neutral duties and the prohibition on the use of force: "For example, a neutral State's acts of participation in a war of aggression against another member of the United Nations would likely violate not only its duties under the law of neutrality, but also the Charter's prohibition on the unlawful use of force" (§15.2.3.1). This appears to be because, on the Manual's qualified neutrality approach, a State's neutral duties differ with regard to victim and aggressor.

[208] The exact point at which a State becomes a belligerent – particularly in relation to an existing IAC – is itself a matter of debate. In the *Tadic* case the ICJ found that an IAC exists "whenever there is resort to armed force between States": *Prosecutor v Tadic* (Decision on Jurisdiction) (ICTY Appeals Chamber, 1995) [1996] 35 ILM 35, 54.

[209] DoD Law of War Manual, §15.4: "Violations of neutrality by belligerent or neutral States should be distinguished from the end of a State's neutral status. Rather, whether violations of neutrality result in the end of the neutral status of a State may depend on the national policies of that State and the belligerent States. Acts that are incompatible with the relationship between the neutral State and a belligerent State under the law of neutrality need not end the neutral State's neutrality and bring that State into the conflict as a belligerent." See also Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (n57), 610; James Upcher, *Neutrality in Contemporary International Law* (n56) 63: "… it must be concluded that State practice does not yet support the view that action contrary to the neutral duties of abstention and prevention amounts to 'participation' in an armed conflict that would cause a neutral State to lose its neutrality. To constitute 'participation' or 'co-belligerency' it seems that direct military support must be given, or there must be some sort of direct, causal link between the neutral's action and an act of belligerency. There would therefore appear to be a significant 'gap' in present international law between the violation of neutral duties and the loss of neutral status."

[210] Alexander Wentker, 'At war? Party status and the war in Ukraine' in [2023] 36(3) Leiden J Intl L 643

[211] Hugo Grotius in Stephen Neff (ed), *Hugo Grotius on the Law of War and Peace: Student Edition* (Cambridge University Press, 2012) 602-3.

[212] For discussion of this threshold, see for example Michael Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the use of Force' (Articles of War, 7 March 2022) <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>, accessed 22 August 2024.

# CHAPTER 2 – APPLICATION OF STRICT NEUTRALITY TO ACT OF INTELLIGENCE SHARING

The next two chapters consider the strict application of neutrality duties – particularly those codified in the 1907 Hague Conventions – to the act of sharing intelligence (i.e. the fact that intelligence is passed between States, by what ever means), and then specific means of sharing. This serves to identify how the strict approach may apply to modern intelligence sharing activity, including the limits it will place on this, and to allow for later comparison with the qualified approach.

The early twentieth century codifications of neutrality law must be approached with some caution. This is for the reasons discussed above, and because they may "be limited in their application as a matter of treaty law [because many of them] were concluded before the Second World War, and have not been universally ratified by States."[213] The relevant Hague Conventions contain an 'all participation clause', so only have binding force if all parties to the relevant IAC are also parties to the applicable Convention.[214] They nevertheless assist to divine neutrality law's application to intelligence sharing, because they are a guide to the customary law of the time, remain (theoretically) binding on many States, and often underpin manuals and other commentary on neutrality law.

## Specific rules – early codifications

Hague Conventions V and XIII of 1907 ('HCV' and 'HCXIII') did not address the act of intelligence sharing of itself,[215] instead covering activity such as the supply of war materiel and use of neutral territory. Other codification attempts following the First World War did not directly deal with the act either, but did include some case-specific rules that indicate how the drafting States viewed intelligence sharing, discussed below. Unsurprisingly, these indicate that intelligence sharing with belligerents was considered incompatible with neutrality. More notably, they also suggest that sharing intelligence in a belligerent's interests was considered not just a breach of neutrality, but a hostile act.

Article 45 of the 1909 London Declaration concerning the Laws of Naval War, which reflected the views of ten major maritime powers,[216] stated that a neutral vessel on a voyage "especially undertaken … with a view to the transmission of intelligence in the interest of the enemy" could on capture be condemned under prize law and liable to treatment as if carrying contraband (discussed below).[217] Under Article 46, a neutral vessel was liable to receive the same treatment as an enemy merchant vessel (i.e. worse than carrying if it had been carrying contraband) if "exclusively engaged … in the transmission of intelligence in the interest of the enemy."

[213] *DoD Law of War Manual*, §15.1.4
[214] See Art 20 HC V and Art 28 HC XIII.
[215] As examined below, they do contain provisions relevant to the means that may be used for intelligence sharing.
[216] To the extent that it was incorporated into the naval prize instructions of France, Germany and Britain: Neff, *The Rights and Duties of Neutrals* 142.
[217] This was subject to certain exceptions where the ship's master was unaware of the relevant conflict. The meaning of 'contraband', the effects of carrying this, and the question of whether intelligence might be considered 'contraband' are discussed below, but it is evident from the above that the London Declaration does not seem to have treated intelligence as contraband.

These provisions represented proposed *lex specialis* for naval warfare. Nevertheless, they indicate that intelligence sharing with a belligerent was seen as so far outside legitimate neutral behaviour that they allowed neutral ships to be treated as hostile. Likewise, the 1923 Hague Rules on Air Warfare – also never adopted[218] – provided at Article 61 that: "No aircraft other than a belligerent military aircraft shall engage in hostilities in any form. The term "hostilities" includes the transmission during flight of military intelligence for the immediate use of a belligerent. …"

Article 6.1 of the 1923 Hague Rules for the Control of Radio in Time of War[219] – also unadopted – contained a similar provision: "The wireless transmission, by [a] … neutral vessel or aircraft while being on or above the high seas, of any military information intended for a belligerent's immediate use, shall be considered a hostile act exposing the vessel or aircraft to be fired at". Under Article 6.2, the transmission by a neutral vessel or aircraft, on or above the high seas, of information "concerning the military forces or operations" [sic],[220] and destined for a belligerent, rendered the offending craft liable to capture during the following year.[221] These Rules also allowed belligerent commanders, on finding neutral vessels or aircraft on the high seas in the vicinity of their force, to order those craft not to use their wireless apparatus while near the force, and permitted the capture of, or attacks on, a ship or aircraft ignoring these orders.[222]

Article 12 of the 1928 Pan-American Neutrality Convention[223] stated that a neutral vessel "shall be seized and in general subjected to the same treatment as [an] enemy merchantmen: ... d) When actually and exclusively destined ... for the transmission of information on behalf of the enemy."

The phrase 'belligerent's immediate use' and references to individual craft in the above provisions show they primarily concern tactical support to belligerents rather than strategic-level sharing. Nevertheless, they demonstrate the at least un-neutral, and often hostile, character ascribed to neutral intelligence sharing with an enemy belligerent.

## Specific rules – modern manuals and commentary

Modern State manuals, along with commentary and expert manuals, still rely on the provisions above, often building on them. For example, the DoD Manual finds that a belligerent warship may exercise control over the communications of any neutral merchant vessel or civilian aircraft present in the immediate vicinity of naval operations, on pain of capture or attack.[224] Citing the Rules for the Control of Radio, it broadens this to conclude: "Any transmission to an opposing belligerent State of information concerning military operations or military forces is inconsistent with the

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[218] Drafted in 1922-23, and useful as an authoritative early attempt to codify rules governing aircraft in war. The ICRC's Treaty Database (<https://ihl-databases.icrc.org/en/ihl-treaties/hague-rules-1923>) notes that these draft rules for air warfare, along with those concerning use of radio, are: "of importance 'as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war' [relying on Lassa Oppenheim, *International Law* (vol 2, 7th edn, Herscht Lauterpacht ed, Longmans, 1952) 519]. To a great extent, they correspond to the customary rules and general principles underlying treaties on the law of war on land and at sea."
[219] Drafted at the same time as the Rules on Air Warfare, and useful for the same reasons: ibid.
[220] The Rules do not specify whose military force this must be.
[221] 1923 Hague Rules for the Control of Radio in Time of War, Art 6.3
[222] Ibid, Art 7
[223] The Convention is available at: <https://ihl-databases.icrc.org/en/ihl-treaties/havana-conv-1928> (accessed 22 Apr 24). For analysis of the Convention, see James W. Garner 'The Pan American Convention on Maritime Neutrality' [1932] 26(3) AJIL 574, available at: <https://doi.org/10.2307/2190208> accessed 22 April 2024.
[224] *DoD Law of War Manual*, §13.8.2 – the relevant vessel must be in a position where its presence might otherwise endanger or jeopardise those operations. Legitimate distress communications are excepted, but only to the extent that these do not prejudice the success of the operation.

neutral State's duties of abstention and impartiality, and renders the neutral State's vessel or aircraft making such a communication liable to capture or destruction."[225] This is mirrored in the US Commander's Handbook on the Law of Naval Operations.[226] The Manual makes more general provision for treating neutral vessels and aircraft taking part in hostilities as hostile, the tipping point for which is grounded in direct support to enemy belligerent military operations.[227] Even if they have not acquired enemy character, the Manual states that neutral vessels and aircraft may be captured if communicating information in the interest of the enemy.[228]

Turning to expert views, the Harvard Manual on Air and Missile Warfare, for example, handrails provisions of Rules on Air Warfare and Control of Radio. It finds that a neutral civilian aircraft can become a military objective if it provides targeting information to enemy forces, is incorporated into an enemy's intelligence gathering system, or otherwise makes an effective contribution to military action.[229] While being 'incorporated into an intelligence gathering system' and passing targeting information may be a higher test than most sharing between States, these again demonstrate that any contribution to a belligerent's intelligence gathering is unlikely to be seen as neutral behaviour.

The San Remo Manual concludes that neutral-flagged merchant vessels and civil aircraft lose their immunity to attack if "incorporated into or assist[ing] the enemy's intelligence system",[230] this being an act of 'unneutral service' (the drafters decided not to distinguish in the wording between 'neutrals' and 'non-belligerents').[231] The Manual further underlines the hostile nature[232] it attributes to intelligence transmission by expressly forbidding medical ships from using their cryptographic equipment "in any circumstances to transmit intelligence data,"[233] and medical aircraft from

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[225] *DoD Law of War Manual* §13.8.2 and 14.8.3.2, referring to: Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare, *General Report, Part I: Rules for the Control of Radio in Time of War* [the same Rules as quoted above] (art. 6, 19 Feb 1923) reprinted in [1938] 32 AJIL Supplement: Official Documents 2, 7-8.

[226] US Navy, *The Commander's Handbook on the Law of Naval Operations* (March 2022 Edition, Department of the Navy / Department of Homeland Security) §7.8. The 1999 Annotated Supplement to the Handbook (AR Thomas and James C Duncan (eds) *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* cites (*inter alia*) in support of this: Robert W. Tucker, *The Law Of War And Neutrality At Sea* (vol 50, U.S. Naval War College International Law Studies, 1955) 300 and the 1923 Hague Radio Rules, Art 6.

[227] DoD Law of War Manual §15.14.2.1: "Neutral merchant vessels and civil aircraft acquire enemy character, and may be treated by a belligerent as enemy warships and military aircraft, when engaged in either of the following acts: • taking a direct part in the hostilities on the side of the enemy; or • acting in any capacity as a naval or military auxiliary to the enemy's armed forces," in reliance on earlier naval warfare publications and Tucker, ibid 321 ("It is not the mere fact of assisting a belligerent that permits this severe treatment [being treated as assimilated into the enemy armed forces]. Nor is it simply the consideration that the belligerent exercises a close control and direction over the neutral merchant vessel. The decisive consideration is rather that the services rendered are in direct support of the belligerent's military operations. It is this support, leading as it does to the identification of the neutral merchant vessel (or aircraft) with the belligerent's naval or military forces, that permits a treatment similar to that meted out to these forces.")

[228] DoD Law of War Manual, §15.15.1, relying on the 1909 London Declaration, Art 45, and the (similar but narrower) 1928 Pan-American Neutrality Convention, Art 12, both quoted above.

[229] *Harvard Manual on Air and Missile Warfare*, Rule 174 (b), (d) and (f)

[230] *San Remo Manual on Law of Naval Warfare*, Arts 67(d) and 70(d). Other triggers for loss of immunity include a vessel or aircraft refusing to stop when suspected of carrying contraband, blockade-running, and engaging in belligerent acts.

[231] The drafters were not in fact convinced that there was in fact a distinction to be drawn between 'neutrals' and 'non-belligerents': 'Basic rules and target discrimination' in Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, 1995) 158, para 67.11t.

[232] Enemy merchant vessels may also become military objectives if (among other things, including engaging in belligerent acts such as mine laying) they are "incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions": *San Remo Manual on International Law applicable to Armed Conflicts at Sea*, ibid, Art 60(c). Art 63(c) applies the same to aircraft.

[233] They are permitted to use such equipment to fulfil their humanitarian mission.

"carry[ing] any equipment intended for the … transmission of intelligence data."[234] The Newport Manual on the Law of Naval Warfare notes that neutral merchant vessels incorporated into the 'enemy's intelligence or military data-gathering systems' are engaging in belligerent acts and liable to be attacked.[235]

Again, while the findings above mostly relate to intelligence transmission by individual craft, they support the conclusion above: the limited codified rules addressing neutral intelligence sharing with belligerents suggest this is considered at least un-neutral, and often hostile.

## Principles of impartiality and abstention

Traditionally, neutral States have been required – with very limited, mostly humanitarian exceptions – to treat belligerent States alike, and to abstain from supporting any belligerent's war effort. It is self-evident that a neutral State sharing intelligence likely to affect an IAC with a favoured belligerent(s) is likely to contravene these principles.

Hostettler and Danai describe impartiality and abstention as the two 'fundamental principles' of neutrality. The latter requires that neutrals abstain from supporting or harming belligerent States "be it by offering direct support in military operations or hindering them outside neutral territory, or by offering services and rights to belligerent States not authorized under the law of neutrality." The former is the "obligation of the neutral State to treat all belligerents in the same way".[236] Dinstein describes 'the basic principles' of (what he labels) 'non-participation' and 'non-discrimination' as the 'two pillars of neutrality.'[237]

Neff traces the principles back centuries, noting that even mediaeval Europe had a law of neutral duties, with "basic agreement that two principles constituted the cornerstones of this law: abstention from participation in hostilities; and impartiality as between the belligerents". Following the demise of 'just war' ideas, these were eventually seen as applying equally to all conflicts, and "were laid down by about the turn of the seventeenth century [remaining] at the core of [neutral duties] from then onwards".[238]

These principles guided the formation of nineteenth century UK neutrality law.[239] The US Supreme Court found in 1897 that: "Neutrality, strictly speaking, consists in abstinence from any participation in a public, private, or civil war, and in impartiality of conduct towards both

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[234] Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* paras 171 and 178. The latter reflects Additional Protocol 1 to the Geneva Conventions, Art 28.

[235] James Kraska and Raul Pedrozo (eds) *Newport Manual on the Law of Naval Warfare* (Stockton Center for International Law, 2023), §8.6.3 and 8.6.5. A similar provision applies to neutral civilian aircraft (§8.6.6). Integration into enemy intelligence systems causes hospital ships (§10.4.1.6.2) and medical aircraft (§10.5.4) to lose their protections. This rule is further reflected in *Helsinki Principles* Rule 5.1.2(4)(c), Rule 5.1.2(5) of which prohibits attack on neutral ships carrying only civilian passengers, "unless they are incorporated into or assist the enemy's intelligence system". Warships collecting scientific data with potential military applications are not exempt from attack: DoD Law of War Manual §15.7.3.

[236] Peter Hostettler and Olivia Danai, 'Neutrality in Land Warfare' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, Oxford University Press, article last updated November 2015) 347, paras 7 – 10. To these principles they add the inviolability of neutral territory and the obligation on neutral States to suppress violations of their neutrality as 'General Rules'.

[237] Dinstein, *War, Aggression and Self-Defence* 27 – 28

[238] Neff, *The Rights and Duties of Neutrals* 13-14

[239] See for example William E. Hall, *The Rights and Duties of Neutrals* (London, 1874) 47

parties…".[240] In the same case the Court analysed both political statements[241] and other court decisions on neutrality,[242] from which common themes of abstention and impartiality emerged. In 1902, US Attorney General Philander C. Knox, noted: "One of the rules of international law which seems to be now fully agreed upon is that a neutral nation shall not give aid to one of the belligerents in the carrying on of the war."[243]

HCV and HCXIII did not impose specific requirements of impartiality and abstention, but rules founded on these principles are evident throughout them. The Conventions severely restrict neutral participation in IACs,[244] and place a positive duty on neutrals to monitor their territory and detect and prevent violations of neutrality therein.[245] They do not require complete abstention by private enterprises within neutral States: Article 7 of HCV states that a neutral 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 of anything of military use]." Article 8 adds that a neutral 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."[246] They do, however, require impartiality in neutral State control of private ventures: Article 9 requires that "every measure of restriction or prohibition" on these "must be impartially applied by it to both belligerents."

In 1912, Lauterpacht noted: "Since neutrality is an attitude of impartiality, it excludes such assistance and succor to one of the belligerents as is detrimental to the other, and, further, such injuries to the one as benefit the other." He added that this required active measures by neutrals.[247] Commentary continues to identify the two principles underlying modern strict neutrality.[248]

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[240] *The Three Friends*, 166 U.S. 1 (1897) at 52. The case concerned the operation of what was commonly called the 'Neutrality Act', intended to secure US performance of international law neutral duties. This imposed criminal penalties on acts likely to constitute breaches of neutrality – for example, fitting out or arming vessels for nations with whom the US was at peace. For interest, the Court noted that the first neutrality provisions in US law had been enacted in 1794, in what "has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of international law" (53). This legislation was recommended to Congress by Washington in his annual address on 3 December 1793, drawn by Hamilton, and passed the Senate by the casting vote of Vice President Adams. It was "deemed advisable to pass the act in view of controversy over that position [US neutrality in 1793], and, moreover, in order to provide a comprehensive code in prevention of acts by individuals within our jurisdiction inconsistent with our own authority, as well as hostile to friendly powers."

[241] Ibid 74. Note also this was in relation to neutrality in a NIAC between Spain and her American colonies: "That the parties then in contest were recognized as belligerents, and a neutrality was sought to be preserved, is clearly shown by the first annual message of President Monroe, in 1817. He says: 'Through every stage of the conflict, the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships, or munitions of war. They have regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having, as to neutral powers, equal rights. Our ports have been opened to both, and any article…that either was permitted to take has been equally free to the other.'"

[242] Ibid 77. "In the case of United States v. Trumbull … Judge Ross carefully reviews the different authorities, examines the question, and clearly indicates how he would have decided the question had it been necessary for the purposes of deciding the case before. He says: "… [The relevant section of the Revised Statutes] is found in the chapter headed 'Neutrality,' and … was originally enacted in furtherance of the obligations of the nation as a neutral. The very idea of neutrality imports that the neutral will treat each contending party alike, and it will accord no right or privilege to one that it withholds from the other, and will withhold none from one that it accords to the other.""

[243] Philander C. Knox, *Neutrality—Military Supplies—Horses, Apr. 4, 1902* (1903) 24 Opinions of the Attorney General 15, 18

[244] For example, HCV, Art 5.

[245] For example, HCXIII, Art 25

[246] Examined below.

[247] Lassa Oppenheim, *International Law* (vol 2, 7th edn, Herscht Lauterpacht ed, Longmans, 1952) 362 §394 <https://www.gutenberg.org/files/41047/41047-h/41047-h.htm> accessed 23 August 2024

[248] For example, James Upcher, *Neutrality in Contemporary International Law* and Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict'.

The principles are distinguishable in their effects. Abstention or 'non-participation' requires that neutrals take no part in the IAC, although as above this does not extend to private enterprises and private citizens (or at least did not in 1907 – see below). Impartiality allows neutral-belligerent interaction, but requires equal treatment of belligerents in this. There has always been uncertainty as to which acts engage the abstention principle (and thus cannot be done) and which engage impartiality (and can be done if they treat belligerents alike). There is a further debate as to whether impartiality is required simply in neutral actions, or whether these must have similar impact on the belligerents.[249]

While many specific rules of neutrality are founded in the two principles, it is unclear whether they are rules of neutrality in themselves. Most commentary views them as guiding principles for the divination of neutral (and belligerent) duties rather than rules. Upcher, for example, argues that impartiality is a principle under which specific rules of neutrality are applied, rather than a rule.[250] Others identify recognised exceptions to the principles – for example, States may favour belligerents with whom they are in ongoing commercial relationships, under the principle of '*courant normal*'.[251] Given that the differences between abstention and impartiality create areas of natural conflict in their operation (should a state refrain from acting altogether, or may it act provided it is impartial?), the view of them as principles only appears correct.

Do the two principles, or strict neutrality duties based on them, prohibit or restrict the act of neutral to belligerent intelligence sharing? While there are limited sources (of law or commentary) on this point, the weight of these and the wider law suggests that – under strict neutrality at least - customary rules grounded in the principles will prohibit most neutral to belligerent sharing.

Castrén took the view that intelligence sharing would breach neutrality, albeit observing that "[it] would seem that it suffices for a State to refrain from delivering to belligerents material which has, exclusively or at least mainly, a military purpose".[252] Bothe concluded that "Giving [satellite] imagery to one party and denying it to the other certainly is a violation of the duties of abstention and impartiality."[253] Ferro and Verlinden took the view that: "the 'duty of neutrality' … *certainly* proscribes assistance to the belligerent parties that has a direct and effective impact on their war-waging ability (including the supply of … military intelligence for example)…".[254]

Pedrozo has suggested recently that: "… a neutral State that provides actionable intelligence to a belligerent that allows that belligerent to successfully attack the opposing belligerent would become a party to the conflict". While the latter is not a direct observation on neutrality, if sharing transmutes a neutral into a belligerent, it is almost certain to also breach strict neutral duties.[255] Most commentary since the 2022 invasion has assumed that assistance provided to Ukraine –

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249 Neff, *The Rights and Duties of Neutrals* 13-14

250 "The concept of impartiality in the law of neutrality is, therefore, closer to a principle than a specific rule. A principle is an underlying precept or assumption that conditions the application of a specific rule…" James Upcher, *Neutrality in Contemporary International Law*, 77.

251 Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (n57) 603

252 Erik Castrén, *The Present Law of War and Neutrality* (n56), 474

253 Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (n 57), para 18.56.5

254 Luca Ferro and Nele Verlinden, 'Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties' [2018] 17(1) Chinese J Intl L 15, para 61, <https://doi.org/10.1093/chinesejil/jmy011>. Emphasis original. They added that neutrality also "also *clearly* allows for humanitarian assistance".

255 Raul Pedrozo, 'Ukraine Symposium – is the Law of Neutrality Dead?' (*Articles of War*, 31 May 2022) <https://lieber.westpoint.edu/is-law-of-neutrality-dead/> accessed 22 May 2022

including intelligence sharing – has been incompatible with strict neutrality, concentrating instead on whether assisting States may qualify their neutrality (see below). Some commentators are more circumspect. Nasu, for example, states that "whether the prohibition of intelligence sharing has been established as a neutral obligation under customary international law is far from certain," and notes (when considering the more specific rules discussed above), that "while the belligerent right to prevent neutral vessels from transmitting information for the adversary is well established, the corresponding neutral obligation is not."[256]

Looking to neutrality rules more broadly, the concept of 'unneutral service' further reveals neutrality's approach to intelligence sharing. This concept arose in the eighteenth century, to determine the point at which assisting a belligerent caused neutral merchant vessels to lose their protections.[257] Vessels conducting unneutral service not only forfeited their neutral protections, but could sometimes be considered hostile (many of the more specific rules discussed above appear grounded in the concept). The concept persists; a modern review found that: "… unneutral service which results in liability to capture… is unashamedly a catch-all category of means by which neutral vessels might support one belligerent's cause over the other's, yet is conduct falling short of the high threshold for rendering themselves a lawful target for attack. Examples might be Internet hacking activity or complicity in some form of cyber operation."[258] This suggests that partial or unabstemious acts will represent unneutral service.

Activities constituting unneutral service have included intelligence sharing since (at least) the nineteenth century, when carriage of conflict-related belligerent despatches by neutral vessels was viewed as unneutral service akin to transporting belligerent troops.[259] This was certainly the view of British admiralty court judge Sir William Scott, who tried a large number of neutrality cases arising from the French Revolutionary Wars. Scott found in the 1808 *Atalanta* case that carriage of military despatches for a belligerent represented unneutral service "of the most noxious and hostile nature".[260] Articles 45 – 47 of the 1909 London Declaration, addressing voyages taken to transmit intelligence to the enemy, are discussed above. More broadly, Oppenheim's International Law noted in 1912 that: "The transmission of any political intelligence of value to the enemy… must be considered unneutral service…."[261] Von Heinegg notes that following the London Declaration there was general agreement that that 'carriage of despatches' (and operating directly

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[256] Hitoshi Nasu, 'The Future Law of Neutrality' (*Articles of War*, 19 July 2022) <https://lieber.westpoint.edu/future-law-of-neutrality/> accessed 23 August 2024
[257] This was distinct from the act of carrying contraband, considered below.
[258] James Farrant, 'Modern Maritime Neutrality Law' [2014] 90 Intl L Stud 198, 305. Farrant's review divides unneutral service into two categories, the second as addressed in the quoted section, and the first being "… unneutral service which results in liability to attack [in which are] are offending neutral vessels that become legitimate military targets … ."
[259] James Upcher, *Neutrality in Contemporary International Law*, Annex, Part 4.b.v.
[260] As opposed to diplomatic dispatches from belligerent ambassadors to neutral States, which remained immune. Scott added that carriage of intelligence had consequences "infinitely beyond the effect of contraband that can be conveyed." He thus applied harsher penalties to carrying intelligence than for carriage of contraband, including condemnation of the relevant ships: see *The Atalanta (Klein)* [1808] 6 Rob 440, 455; [1808] 165 ER 991, 997. The doctrine of contraband is considered below.
[261] Lassa Oppenheim, *International Law* (vol 2, 7th edn, Herscht Lauterpacht ed, Longmans, 1952) 523 - 524 <https://www.gutenberg.org/files/41047/41047-h/41047-h.htm> accessed 23 August 2024. This applies "whether or not the intelligence is in relation to the war" and excepts cases where "intelligence is transmitted from the enemy to neutral Governments, and vice versa, and, further, from the enemy Government to its diplomatic agents and consuls abroad in neutral States".

under the control of a belligerent government) by a neutral merchant vessel (or aircraft)[262] could be viewed as unneutral service.[263]

Some care is required when considering unneutral service, as this often addresses the actions of private individuals or individual neutral craft, rather than those of a neutral State. The concept arguably allows belligerents to penalise carriage of intelligence, rather than forbidding the act of sharing itself, and (as Nasu notes) does not necessarily imply a corresponding neutral duty. Nevertheless, the fact that passing intelligence to a belligerent is widely seen as unneutral service is a strong indication that intelligence sharing can breach a State's neutral duties.

The general – and most convincing – view is that a neutral State that shares conflict-related intelligence with an IAC belligerent will usually be in breach of strict neutral duties. Even if not prohibited by any specific treaty rules, sharing of this nature is incompatible with the strict neutrality principles of impartiality and distinction, and likely a breach of customary neutrality law. This will include a neutral granting a belligerent access to large intelligence databases containing information of use in the conflict, or to systems of intelligence-gathering sensors.[264]

## Intelligence unaffected by neutrality law and 'dual use' intelligence

Strict neutrality will not bar all neutral-belligerent intelligence sharing during IACs. Intelligence sharing on matters unrelated to the IAC can continue unaffected. States may continue to exchange intelligence to assist each other in addressing terrorism and law enforcement matters,[265] healthcare (e.g. pandemic prevention), and on other topics. That said, the range of intelligence sharing likely to be caught by strict neutrality is likely to be wider than military intelligence, or that which directly enables an attack alone. It will include intelligence that allows the frustration of the other side's operations (such as the US intelligence that exposed Russia's 'false flag' plans, discussed above), that enables a belligerent's operations across any of the domains of warfare, including space and cyber, or that enables activity other than physical force (e.g. information operations). Such intelligence is capable of making a meaningful contribution to a belligerent's war effort. While the question of whether shared intelligence is of tactical, operational or strategic importance may be relevant to the separate test for belligerency,[266] intelligence at all of these levels has the potential to contribute to a belligerent's war effort, and thus to breach neutrality.

Neutrality law allows neutrals to treat belligerents differently for humanitarian reasons. Article 14 of HCV allows neutrals to authorise the passage over their territory of sick and wounded belligerent personnel, on condition (enforced by the neutral) that they are not accompanied by

[262] See *Harvard Manual on Air and Missile Warfare*, Rule 174(c) and (d), which includes carrying intelligence for the enemy.
[263] Wolff Heintschel von Heinegg, 'Visit, Search, Diversion, and Capture in Naval Warfare: Part I, the Traditional Law' [1991] 29 Can YB Intl L 283, 321 - 322
[264] Given its emphasis on sharing, this thesis does not consider whether a breach of neutrality law in the act of obtaining, or means used to obtain, information or intelligence will also affect the lawfulness of it (or products based on it) being subsequently shared with a belligerent. For example, intelligence might be obtained by a neutral unlawfully co-operating with a belligerent to use shared networks of sensors.
[265] Although see discussion in Chapter 1 on the exceptional occasions on which neutrality law has been invoked during NIACs.
[266] See Chapter 1, above. See discussion of this issue in relation to Ukraine in, for example: Michael Schmitt, 'Ukraine Symposium – Are We at War?' (*Articles of War*, 9 May 2022) <https://lieber.westpoint.edu/are-we-at-war/> accessed 30 May 24; and Raul Pedrozo, 'Ukraine Symposium – is the Law of Neutrality Dead?' (*Articles of War*, 31 May 2022) <https://lieber.westpoint.edu/is-law-of-neutrality-dead/> accessed 23 August 2024

other personnel or war materiel.[267] The neutral must guard them to ensure they play no further part in operations. Neutrals may also allow belligerent medical ships[268] and aircraft to transit their territory subject to prior agreement[269] (and let aircraft land to assist the sick and wounded).[270] Belligerent aircraft in distress may land in neutral territory, although their crews must be interned.[271] This, and the general emphasis on humanitarian concerns in modern international law, mean that even strict neutrality can be interpreted as allowing neutrals to share intelligence with a belligerent for humanitarian purposes, even if this favours one side of an IAC.

Intelligence often has more than one use. As discussed above, intelligence that assists a State in prosecuting a NIAC may help it in a parallel IAC. Ostensibly mundane information, such as weather reports, may be vital to one side's military operations (weather forecasts from US satellites were crucial to UK operations in the South Atlantic during the Falklands War, for example), and thus 'dual use.'[272] Equally, even humanitarian intelligence may be 'dual use'. Details of large-scale refugee movements have clear humanitarian uses but may also allow a force to choose obstacle-free routes, concentrate information operations, and conduct attacks more easily.

There are few sources to address the question of whether sharing 'dual use' intelligence with a belligerent will breach a neutral State's duties. Given the breadth of strict neutral duties and the principle of impartiality (and perhaps analogously applying approaches to contraband – see below), the correction position is likely that sharing 'dual use' intelligence is prohibited by strict neutrality, notwithstanding its alternative use, unless its contribution to the belligerent's war effort would be very limited. For the reasons above, intelligence with a genuine humanitarian use is likely to be an exception to this.

Can intelligence be 'impartially' shared with both sides, or publicly released, to avoid breaching neutrality? Some such sharing may be genuinely impartial. For example, some weather reports, or information relating to a terrorist group attacking civilians in areas controlled by both sides of the IAC might qualify as impartially if released to all belligerents. In many cases, however, sharing with all belligerents will not be a truly impartial act. Had a neutral State told all sides of the planned location of the D-Day invasion in May 1944, this would only have benefitted the Axis powers. Recently, the US's declassification and publication of intelligence relating to planned Russian 'false flag' attacks, before the 2022 full-scale invasion of Ukraine (but after the commencement of the Ukraine-Russia IAC), was undoubtedly partial.

Thus, once neutral duties arise, strict neutrality is thus likely to bar neutral-belligerent sharing during an IAC of all intelligence likely to assist one side over another – even if it has multiple uses. There will be an exception to this for intelligence shared for genuine humanitarian purposes.

[267] The article refers to 'trains bringing' the sick and wounded, but it is likely that this can be read to include any form of transport. Given the context, 'personnel' evidently means personnel other than the wounded or sick, and (presumably) appropriate medical and logistic personnel required for the movement.

[268] See for example the Second Geneva Convention of 1949, Arts 32 and 40, and the 1928 Havana Convention on Maritime Neutrality, Art 25.

[269] *Harvard Manual on Air and Missile Warfare*, Rules 84 and 85.

[270] First Geneva Convention, Art 37; Second Geneva Convention, Art 40

[271] *Harvard Manual on Air and Missile Warfare*, Rule 172(a)(i).

[272] Time Magazine 'Just How Much Did the US help?' (*Time Magazine Special Section*, 28 Jun 1982) available at <https://time.com/archive/6882618/just-how-much-did-the-u-s-help/> accessed 23 August 2024

# CHAPTER 3 - APPLICATION OF STRICT NEUTRALITY TO MEANS OF INTELLIGENCE SHARING

In addition to the act of sharing, strict neutrality law may also regulate some means by which States share intelligence. Again, the relevant State-led codifications, primarily HCV and HCXIII, date to the early twentieth century. These reflect both the customary law and the communications systems of their time. As above, the effect of traditional, strict neutral duties is considered below, for later comparison with the qualified position.

## Use of belligerent (or joint belligerent-neutral) facilities situated on neutral territory

Intelligence sharing does not occur in an intangible cloud. Shared data must travel through physical space, even if this is between computer servers via cables, airspace or space. Sharing relies on infrastructure situated in one or more States, which must be operated and maintained. Neutrality's longstanding rules restricting belligerent use of neutral territory are thus relevant.

Under strict neutrality, the territory of neutral States is inviolable.[273] Hostilities must not be conducted within neutral territory,[274] which also cannot be used as a 'base of operations' against belligerent forces.[275] Belligerents may not transport troops, munitions or war supplies over neutral territory, and neutrals must prevent this.[276] Neutrals must take proactive steps to ensure their territory remains unviolated, including by using force if necessary.[277] Neutrals 'receiving' belligerent troops onto their territory must disarm and "intern [them], as far as possible, at a distance from the theatre of war."[278]

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[273] HC V, Art 1; HC XIII, Art 1. See also, for example, *Helsinki Principles*, Rule 1.4. This includes the airspace above neutral territory – see for example *Harvard Manual on Air and Missile Warfare*, Rules 166, 167(a) and 170(a).

[274] *Harvard Manual on Air and Missile Warfare*, Rule 166

[275] *DoD Law of War Manual*, §15.5, quoting Consultative Meeting of Foreign Ministers of the American Republics, *Final Act of the Meeting: V General Declaration of Neutrality of the American Republics*, 3 October 1939, 1 Dept St Bull 326, 327 (The American Republics resolve: "[t]o declare that with regard to their status as neutrals, there exist certain standards recognized by the American Republics applicable in these circumstances and that in accordance with them they: (a) Shall prevent their respective terrestrial, maritime and aerial territories from being utilized as bases of belligerent operations."); and the 1955 *Commander's Handbook on Naval Operations* 10-2, para 442 ("Belligerents are forbidden to use neutral territory, territorial sea, or air space as a base for hostile operations."). See also *Harvard Manual on Air and Missile Warfare*, Rule 171(b).

[276] HC V, Arts 2 and 5

[277] HC V, Art 5, as interpreted and combined with customary law in, for example, *Harvard Manual on Air and Missile Warfare*, Rules 168(a) and 170; Canadian National Defense, *Joint Doctrine Manual Law of Armed Conflict at the Operational and Tactical Levels* (2001) para 1304(3): ("A neutral state is permitted to resist any attempted violation of its borders by force and such resistance does not make the neutral a party to the conflict. If enemy forces enter neutral such [sic] territory and the neutral state is unwilling or unable to intern or expel them, the opposing party is entitled to attack them there, or to demand compensation from the neutral for this breach of neutrality.") As noted in the above excerpt, a neutral correctly employing force for this purpose does not become a belligerent – see HC V, Art 10 and HC XIII, Art 26; *Harvard Manual on Air and Missile Warfare*, Rule 169.

[278] HC V, Art 11; see also *DoD Law of War Manual* §15.16.1.2; *Harvard Manual of Air and Missile Warfare*, Rule 170(c).

The above includes the maritime and air domains. On the outbreak of hostilities, neutrals must give belligerent warships notice to leave their ports and waters,[279] and must enforce[280] prohibitions on belligerent naval bases in their ports or waters[281] and belligerent violations of their airspace (including by interning belligerent aircrew landing in their territory).[282] Limited exceptions to these rules exist for humanitarian reasons (see above), and to allow some forms of passage through neutral waters and limited access to neutral ports for belligerent warships.[283] Beyond these, strict neutrality makes no allowance for belligerent presence in neutral territory.

Neutrals unlawfully tolerating belligerent forces or activity within their territory breach their strict neutral duties. They are thus liable to countermeasures or legal action by an aggrieved belligerent. There is debate as to whether such a belligerent can use force to address the neutral's breach or not, given the prohibition on the use of force, but there are strong arguments[284] that an aggrieved belligerent can attack enemy facilities sited in neutral territory in violation of neutrality, notwithstanding the prohibition.[285]

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[279] HC XIII, Art 13: ("If a Power which has been informed of the outbreak of hostilities learns that a belligerent war-ship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations."). *DoD Law of War Manual* §15.7.3.1.

[280] For example: Treaty between the United States and Great Britain, 8 May 1871, [1871] 17 Stat 863, 865 (Art 6: "A neutral Government is bound… – Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.")

[281] HC XIII, Art 5. The 1928 Havana Convention on Maritime Neutrality included this rule (Art 4), and extended it to auxiliaries, merchant ships converted to warships, and armed merchantmen (Art 12).

[282] *Harvard Manual of Air and Missile Warfare*, Rules 168, 170; *DoD Law of War Manual* §15.10.3, relying on Robert W. Tucker, *The Law Of War And Neutrality At Sea* (vol 50, U.S. Naval War College International Law Studies, 1955) 251 ("The practices of states during World Wars I and II may be regarded as having firmly established both the right as well as the duty of the neutral state to forbid the entrance of belligerent military aircraft into its air space") and the Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare, *General Report, Part II: Rules of Aerial Warfare*, 19 February 1923, reprinted in [1938] 32 AJIL Supplement: Official Documents 12, 36 (Art 42: "A neutral government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction. A neutral government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any.").

[283] These allow for: (1) belligerent 'transit passage' and 'archipelagic sea lane passage' through, over, and under straits used for international navigation within neutral waters; (2) belligerent 'mere passage' (through neutral territorial waters with the relevant neutral's permission); and (3) some access to neutral ports for belligerent warships; all without the neutral state breaching its neutrality.
On transit passage, see for example, *Helsinki Principles*, Rule 5.2.9; *Harvard Manual on Air and Missile Warfare*, Rule 170(a); James Ashley Roach 'Neutrality in Naval Warfare' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, Oxford University Press, article last updated March 2017) 348, para 10. The relevant neutrals should not impede this right of transit. Transiting belligerent vessels and aircraft must proceed without delay and refrain from hostile or other acts not incidental to their transit, albeit they may take defensive measures for their security, including electronic surveillance (and thus, presumably other forms of intelligence-gathering): *DoD Law of War Manual*, §15.8.1.
On mere passage, the neutral State must be impartial in granting or withholding permission to belligerents: HC XIII, Arts 9 – 10; *Tallinn Manual 2.0*, 233, chapeau to Chapter 8; 245 – 246, Rule 49.
On access to neutral ports: HC XIII, Arts 11 – 25 contains detailed rules. See also *Helsinki Principles*, Rule 2.2 (the 'Twenty-four hours rule').

[284] For example Jeremy K Davis '"You Mean They Can Bomb Us?" Addressing the Impact of Neutrality Law on Defense Cooperation' (*Lawfare*, 2 November 2020) <https://www.lawfaremedia.org/article/you-mean-they-can-bomb-us-addressing-impact-neutrality-law-defense-cooperation> accessed 16 July 2024

[285] For more on self-help by aggrieved belligerents see: Emmerich de Vattel, *Le droit des gens, ou, principes le la loi naturelle, appliqués à la conduite aux affaires des nations et des souverains* trans Charles Fenwick (vol III, first published 1916, reprinted New York 1964) 277; Erik Castrén, *The Present Law of War and Neutrality* (n56), 442; Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (Danish Ministry of Defence, 2016, English Version 2019), 62.

State military manuals endorse the above.[286] The 2006 Australian Manual notes that "all acts of hostility" are prohibited in neutral territory, and that: "A neutral state has a duty to prevent the use of its territory as a sanctuary or a base of operations by the belligerent forces of any side." An aggrieved belligerent "may resort to acts of hostility in [the territory of a non-compliant neutral] against enemy forces … making unlawful use of that territory" and may also lawfully "act in self-defence when attacked or threatened … while in neutral territory or when attacked or threatened from neutral territory."[287] The Canadian[288] and German[289] manuals reach similar conclusions. The 2004 UK LOAC Manual appears to justify belligerent uses of force against enemy "military operations" in the territory of a complicit neutral as self defence, dependent on "the ordinary rules of the *jus ad bellum*."[290]

States have invoked their belligerent right to forcibly counteract violations of neutrality, with varying degrees of justification. Examples include President Nixon's explanation of US and South Vietnamese operations in Cambodia in 1970,[291] the 1941 British intervention in Syria (after Vichy French authorities allowed German aircraft to use its airfields),[292] and a 1904 Japanese action to cut out a Russian cruiser from a Chinese harbour "when it became apparent that China was unable or unwilling to disarm the vessel".[293]

The Tallinn Manual extends this approach to the cyber domain. An aggrieved belligerent may take "such steps as are necessary," including via cyber operations, to counter unlawful belligerent use of neutral territory, if the neutral fails to act. The Tallinn Manual only permits such action if it is the only way an aggrieved belligerent can counter 'serious' violations negatively affecting the belligerent.[294] It finds that, if feasible, a warning to the neutral is likely to be necessary.[295] Assuming

[286] In addition to the below, see *DoD Law of War Manual*, §15.4.2: "Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the forces of one belligerent entering or passing through its territory (including its lands, waters, and airspace), the other belligerent State may be justified in attacking the enemy forces on the neutral State's territory. … For example, consistent with the *jus ad bellum* requirements for self-defense, belligerent forces may act in self-defense when attacked or threatened with attack from enemy forces unlawfully present in neutral territory, including by taking appropriate action to counter the use of neutral territory as a base of enemy operations when the neutral State is unwilling or unable to prevent such violations."

[287] Australia, *Executive Series ADDP 06.4 Law of Armed Conflict* (Australian Defence Force, 2006) para 11.8. The latter wording suggests two potential justifications for use of force by the aggrieved belligerent: (1) exercise of 'self-help' to reverse violations of neutrality; and (2) self-defence (both against threats arising from unlawful belligerent activity in neutral territory, and threats encountered when exercising self-help necessary to defeat a violation of neutrality).

[288] Canadian National Defense, *Joint Doctrine Manual Law of Armed Conflict at the Operational and Tactical Levels* (2001) para 1304(3)

[289] Germany, *German Commander's Handbook: Legal Bases for the Operations of Naval Forces* (German Navy, 2002) para 232 ("There is one exception to [the inviolability of neutral territory] which applies to measures of self-defence, that is the event that one of the parties to the conflict is attacked or endangered to be attacked in these areas. … a neutral state is obliged to prevent the parties to the conflict from misusing these areas as sanctuary or base of operations. If it is unwilling or unable to do so, the other party to the conflict is entitled to take all measures necessary to terminate the misuse of neutral territory or neutral waters.")

[290] United Kingdom, *JSP 383 The Joint Service Manual of the Law of Armed Conflict* (UK Defence Concepts and Doctrine Centre, 2004, para 1.43a

[291] Albeit it was not made completely clear whether the justification for this was redressing the alleged violation of neutrality, self-defence, or both. Richard Nixon, *Address to the Nation on the Situation in Southeast Asia, Apr. 30, 1970*, [1970] Public Papers of the Presidents 405, 406 – 408.

[292] James Spaight, *Air Power and War Rights* (Longmans, 1923) 434

[293] Ibid

[294] *Tallinn Manual 2.0*, 560 – 561, Rule 153; also *Helsinki Principles*, Rule 2.1.

[295] Commentary to *Harvard Manual on Air and Missile Warfare*, Rule 168(b), para 1.

the aggrieved belligerent proceeds lawfully, the Manual's view is that force used by the belligerent will not trigger the offending neutral's right to self-defence under Article 51 UNC.[296]

Belligerent personnel and infrastructure based in neutral territory for intelligence sharing purposes will fall within the rules above. Say that State B agrees that State A may operate an intelligence facility within B's territory. This is staffed and maintained by A's armed forces, and used (among other functions) for exchanging intelligence with B. A uses secure data cables running from the facility in B, across B's territory and possibly other States, to A's territory. A then becomes a belligerent in an IAC against State C, while B remains neutral. Strict neutrality law will require that B expel or intern A's personnel, and (unless it is unconnected with the conflict) stop A using the facility. B must also consider whether A can be permitted to continue to access the cables it controls (see below). Should B not do so, C may be entitled to employ countermeasures against B, or even use physical or cyber attacks against the facility and cables.

Such a facility may also be affected by more specific rules from the early twentieth century codifications. These govern belligerent use of neutral territory and infrastructure for communications (and thus intelligence sharing). Although framed in language of the codifications' vintage, they are easily applied to modern networks.

Under Article 3 of HCV, belligerents are forbidden to erect "wireless telegraphy station[s] or other apparatus for the purpose of communicating with belligerent forces on land or sea" on neutral territory. They are also forbidden to use existing installations of this nature "for purely military purposes" if these have "not been opened for the service of public messages". Neutrals must prevent such acts on their territory.[297] Under Article 5 of HC XIII, belligerents are prohibited from "erect[ing] wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea" in neutral ports or waters.[298] These rules were closely followed in (for example) the 1928 Pan-American Maritime Neutrality Convention, which remains in force.[299]

Similarly, Article 3 of the (non-binding) Rules for the Control of Wireless Telegraphy in Time of War (1922-23, discussed above) stated that belligerent installation or operation of "wireless stations" within neutral territory represented a violation of neutrality by both the belligerent and the relevant neutral. Article 4 added that a neutral was: "not bound to restrict or to forbid the use of the wireless stations situated within its jurisdiction", except as necessary to prevent the transmission of information, intended for a belligerent, concerning military forces or military operations (i.e. military intelligence). It also required neutrals to prevent belligerent mobile wireless stations from using their apparatus within neutral jurisdictions, and to apply any restrictions they imposed on these to all belligerents uniformly.

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[296] Commentary to *Harvard Manual on Air and Missile Warfare*, Rule 168(b), para 2.
[297] HC V, Art 5
[298] HC XIII, Art 5. This is reflected in the 1928 Havana Convention on Maritime Neutrality Art 4(b).
[299] Art 4: "a belligerent state is forbidden: ... b) To install in neutral waters radio-telegraph stations or any other apparatus which may serve as a means of communication with its military forces, or to make use of installations of this kind it may have established before the war and which may not have been opened to the public." The 1928 Pan-American Convention on Maritime Neutrality Convention 135 L.N.T.S. 187 available at <http://hrlibrary.umn.edu/instree/1928b.htm> was a product of the 1928 Pan-American Conference, signed between the US and many Central and Southern American States, and ratified by a handful. It entered into force 21 January 1931 and remains so. Art 24 states that the "use by the belligerents of the means of communication of neutral States or which cross or touch their territory is subject to the measures dictated by the local authority."

Expert manuals find these rules can be extended to modern communications infrastructure. The Tallinn Manual does so, also concluding that Article 3 HCV reflects customary law. It requires neutrals to prevent belligerents from using pre-existing belligerent cyber infrastructure in neutral territory for military purposes, and prevents belligerents from establishing new infrastructure for these purposes.[300] The Harvard Manual on Air and Missile Warfare prohibits both "operation of [belligerent] military communications systems,"[301] and "[a]ny other [belligerent] activity … contributing to the war-fighting effort, including transmission of data" in neutral territory."[302] Its Commentary adds that transmission of data for "targeting or other military purposes…must be considered a violation of neutral territory…even if it is not performed for attack, targeting or other purposes."[303]

Assuming the above requirements reflect strict neutrality rules, these will have a significant effect on the example intelligence facility discussed above. State B must close State A's facility (on B's territory), prevent A from establishing any new communications infrastructure (for intelligence sharing or other military purposes) within its territory, and prevent A from using its network infrastructure for military purposes. Furthermore, B may not use its own network infrastructure to transmit military intelligence to A.[304] This will apply even if B is at vast distance from A and C and the area of hostilities. Even a longstanding intelligence facility will be caught by the requirements. It is highly unlikely that such facilities could be 'opened for the service of public messages' on any good faith interpretation of Article 3 HCV (this exception appears to have been dropped by modern expert manuals).

Moving to a real example, say the US (taking State A's role in the above example), becomes involved in an IAC against China (C), and the UK (B) remains neutral. The UK is geographically distant from the likely conflict area. The scale of such a conflict and the networks that will support its execution, however, make it likely that intelligence passed to the US by the UK, and passed through US facilities and infrastructure within the UK, will contribute to US warfighting. Should the UK apply strict neutrality rules to its territory, this would require it to act against long-established US facilities.

Closing bases, halting activity and interning military personnel is a significant step in any inter-State relationship. Applying strict neutrality requirements to modern intelligence sharing relationships and infrastructure could thus be difficult or even politically impossible. As discussed below, this has rarely if ever occurred in practice. US intelligence facilities in the UK were not closed during the Vietnam war, nor were those in Japan shut during the 1991 Gulf War or 2003 Iraq War. As far as can be made out, no steps were taken to halt military use of US-controlled network infrastructure sited in these States.

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[300] *Tallinn Manual 2.0*, 558, Rule 152, esp para 2

[301] *Harvard Manual on Air and Missile Warfare*, Rule 167(a). The exception for public networks, part of whose infrastructure is within the jurisdiction of a neutral (see below), is at Rule 167(b).

[302] *Harvard Manual on Air and Missile Warfare*, Rule 171(d).

[303] Commentary to *Harvard Manual on Air and Missile Warfare*, Rule 171(d), para 2

[304] This is also highly likely to be prohibited by the provisions discussed below in any event.

## Use of neutral or third-party State communication networks and facilities

What if intelligence is passed from a neutral State to a belligerent other than via belligerent-controlled facilities or infrastructure in neutral territory? This could be via network infrastructure controlled by the sharing neutral, another neutral, or by a private entity such as a telecommunications company. While this would be caught by any neutrality law bar on the act of intelligence sharing, would the use of non-belligerent means for this purpose itself be unlawful?

The general prohibition on belligerent use of neutral territory and specific rules on communications facilities above will prevent infrastructure within the territory of a neutral State from being used for most belligerent purposes, no matter who controls it. The Tallinn Manual notes that such infrastructure is protected by the neutral State's territorial sovereignty,[305] and is thus neutral in character, whether publicly or privately owned, and irrespective of the owner's nationality.[306] It adds that the 'exercise of belligerent rights'[307] (including the routing of military communications) through neutral territory by cyber means is thus prohibited.[308] Neutral States with actual or constructive knowledge of belligerent rights being exercised via cyber infrastructure under their control must prevent this.[309] [310] Turning to a State manual, the US DoD Law of War Manual finds the fact that "a neutral State, if it so desires, may transmit messages by means of its communications facilities does not imply that the neutral State may use such facilities or permit their use to lend assistance to the belligerents on one side only."[311]

Article 8 of HCV provides an exception to the above. Neutral States are "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 [the neutral State] or to companies or private individuals,"[312] on the condition that any restrictions they do apply are imposed impartially. Neutrals must also ensure that any restrictions non-State parties impose on these are also impartial.[313] The Harvard[314] and Tallinn Manuals[315] take the view that the Article 8 exception represents customary law and can be applied to modern communications networks. It should be noted that this exception focuses on

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305 *Tallinn Manual 2.0*, 510, Rule 129, esp para 3, which also notes this protection can be lost – see Rules 76 and 151.
306 *Tallinn Manual 2.0*, Ch 20, esp chapeau at para 5
307 Synonymous with 'hostile act'.
308 *Tallinn Manual 2.0*, 556, Rule 151, esp para 3
309 *Tallinn Manual 2.0*, 559 – 560, Rule 152, esp paras 4 – 8. The *Manual* notes that this requirement is not prejudiced by the general principle that States must "exercise due diligence in not allowing [their] territory, or territory or cyber infrastructure under [their] governmental control, to be used for cyber operations that affect the rights of, and produce serious adverse consequences for, other States" – see 42 – 43, Rule 6, esp para 46.
310 The 1923 Hague Rules for Control of Radio (never adopted but often considered customary law – see above) even prohibited neutral wireless stations from keeping written copies of messages received from belligerent wireless stations that had not been intended for the neutral station. Violation of this entitled a belligerent to confiscate the relevant texts. This appears to have been an attempt to further avoid use of neutral infrastructure for the passage of belligerent intelligence and other communications. 1923 Hague Rules for the Control of Radio in Time of War, Art 8.
311 *DoD Law of War Manual*, §15.5.3.1
312 HC V, Art 8
313 HC V, Art 9. Arts 8 – 9 are reflected in the *DoD Law of War Manual* at §15.5.3.1. Furthermore, Art 24 of the 1928 Havana Convention on Maritime Neutrality rather blandly provided: "The use by the belligerents of the means of communication of neutral states or which cross or touch their territory is subject to the measures dictated by the local authority."
314 *Harvard Manual on Air and Missile Warfare*, Rule 167(b), and Commentary to the same Rule.
315 The majority of the *Tallinn Manual 2.0*'s formulating experts concluded that the Art 8 exception applied to 'cyber communications systems' – see *Tallinn Manual 2.0*, 556 – 557, Rule 151 esp para 4.

belligerent use of neutral networks, and does not allow neutrals to use their own networks partially, for example to share intelligence with a belligerent.

The Tallinn Manual restricts the exception to traffic via "public, internationally and openly accessible networks, such the Internet"[316], and finds it does not apply to belligerent use of neutral government cyber infrastructure, even if located outside the neutral's territory.[317] Bothe, for example, takes a similar (but not identical) approach, finding that existing non-military telecommunications infrastructure, including data infrastructure, can be used by the parties to the conflict.[318] Thus, a neutral is not required to restrict or prohibit belligerent use for intelligence sharing of at least publicly available cyber infrastructure on its territory or under its control. If it does so, however, any restrictions "must be impartially applied to all belligerents".[319]

The exception appears suited to the practicalities of modern network infrastructure. As the Tallinn Manual observes, the "global distribution of cyber assets and activities, as well as global dependency on cyber infrastructure" means belligerent cyber activity can easily reach neutral infrastructure. An email sent from belligerent territory may automatically route through neutral infrastructure, without neutral or belligerent control over this. The Manual thus urges "careful consideration" before deciding any State has violated neutrality in this fashion.[320]

Thus, the use by a belligerent of publicly available cyber networks in neutral States (assuming these are equally available to other belligerents) for passing or receipt of intelligence will not of itself breach the belligerent's strict neutrality duties. In contrast, any use by a neutral State of networks under its control or on its territory to pass intelligence to an ally belligerent – and any restrictions partial to a belligerent that a neutral imposes on its public networks[321] – are likely to breach strict neutrality rules. Even if a neutral could invoke the Article 8 HCV exception (perhaps by using public networks in other neutral States to transmit the relevant intelligence), it would likely still breach Article 3 HCV.

The same is likely to apply to intelligence sharing via infrastructure located in outer space,[322] which is not sovereign territory of any State.[323] Assuming the 'nationality' of a particular space object can

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[316] Ibid, 558, Rule 152, esp para 3
[317] Ibid, esp paras 3 and 4. Also ibid, 556, Rule 151, para 3.
[318] Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (n57), 618, para 18.16.1
[319] *Tallinn Manual 2.0*, 557, Rule 151 esp para 7
[320] Ibid, 553 – 554, Ch 20, initial observations at paras 3 – 4. The *Manual* takes a different position if what is being transmitted amounts to a 'cyber weapon' in itself: see 557, Rule 151 esp paras 5 – 6, relying on HC V, Art 2, which prohibits belligerent movement of troops, munitions and supplies across neutral territory. The *Manual* notes at Rule 151, para 7 that a minority of experts took the view that HC V, Art 8 provided an express exception to HC V, Art 2, and that the latter was only intended to prevent the physical transport of weapons. The position taken by the minority of *Tallinn Manual 2.0* experts is also the position taken by the *DoD Law of War Manual* (§16.4.1) and the *Harvard Air and Missile Warfare Manual* (commentary to Rule 167(b)).
[321] Such networks are unlikely to be openly available for public use, usually being restricted in access, particularly if used for intelligence sharing.
[322] Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (n 57), para 18.56
[323] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies 1967, Art 2

be determined,[324] a neutral power need not prevent belligerents from using publicly accessible satellite communications under its control to transmit intelligence, but must impartially apply any restrictions it does impose. The consequences of breaching neutrality rules may also extend to outer space: if "communication or observation satellites belonging to neutral States are used, or allowed by the neutral State to [violate] abstention and impartiality [which could include using these to share intelligence], this amounts to an unneutral service and the satellites may be destroyed as a countermeasure…."[325] Such use may also transmute the satellite into a military objective that an opposing belligerent can attack.[326]

Reviving the example above, strict neutrality would thus prevent neutral State B from using its government or publicly available network infrastructure (or those in another State) to share intelligence with belligerent State A. B may passively allow A to pass intelligence via publicly available networks on B's territory, but only if it also allows A's enemy, belligerent State C, to do so too. Furthermore, B cannot lawfully provide A with access to B's government or closed networks for intelligence sharing. If B wishes to prevent C's use of publicly available networks under its control (perhaps as part of sanctions in response to C's aggression), then B must apply identical controls to A's use of these networks. Moving to a real-world scenario, the provisions above would likely have required the US to ensure that the commercial company SpaceX allowed Russia the same access to its Starlink satellite network infrastructure as was (with US State support) provided to Ukraine following the 2022 invasion.[327]

## Can intelligence constitute war materiel or military supplies?

Intelligence shared by non-networked means (e.g. by physically passing information on a hard drive or even in paper form) may not be caught by the strict neutrality rules on communications facilities and networks discussed above. This does not necessarily render such sharing compatible with strict neutral duties, however. The conclusions above on the effect of strict neutrality act of sharing continue to apply. Furthermore, whether intelligence is sent by networked or non-networked means, this might also be viewed as a State transfer of supplies or war materiel, usually prohibited by strict neutrality.

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[324] This is a complex area and subject to debate too lengthy to discuss here. The current international legal regime for outer space does allow the nationality of an object to be determined with some degree of clarity (e.g. Outer Space Treaty 1967, ibid, Art 6 makes States internationally responsible for authorisation and oversight of private activities in space), but objects placed in outer space via multinational activity may be harder to classify.

[325] Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law*, para 18.56.5

[326] The application of this to the use of SpaceX Starlink communication satellites in Ukraine is discussed in Timothy Goines, Jeffrey Biller, Jeremy Grunert, 'The Russia-Ukraine War and the Space Domain', (*Articles of War*, 14 March 2022) <https://lieber.westpoint.edu/russia-ukraine-war-space-domain/> accessed 23 August 2024

[327] Tara Brown, 'Can Starlink Satellites Be Lawfully Targeted?' (*Articles of War*, 5 August 2022) <https://lieber.westpoint.edu/can-starlink-satellites-be-lawfully-targeted/> accessed 15 May 2024. From shortly after the February 2022 invasion, SpaceX provided Ukraine with terminals to access its Starlink satellite data network, thus allowing Ukrainian forces to continue communicating (and sharing and receiving intelligence) in environments with limited communications. Later, the US Department of Defense began funding this arrangement, including the provision of Starlink terminals to Ukrainian units – see for example: Tony Capaccio, 'Elon Musk's SpaceX wins Pentagon deal for Starlink in Ukraine' (*LA Times*, 1 June 2023) <https://www.latimes.com/business/story/2023-06-01/elon-musks-spacex-wins-pentagon-deal-for-starlink-in-ukraine> accessed 23 August 2024.

Traditional neutral rules require that neutral States (or at least their governments and State organs) refrain from providing war-related goods to the belligerents.[328] In particular, they must not "assist the war effort of one of the belligerents against its adversary through military supplies furnished on an inter-governmental basis"[329] or supply "war-ships, ammunition, or war material of any kind whatever".[330] [331] The position in relation to private actors within the neutral State is different (see below). HCV prohibits a belligerent from moving "munitions of war or supplies" across the territory of a neutral power – and requires the neutral to stop this occurring.[332] As noted above, humanitarian assistance is excepted.[333] These rules are generally considered to be customary law. Thus, if intelligence constitutes 'war materiel' or 'military supplies', a neutral may be prohibited by strict neutrality from supplying it to a belligerent, or allowing it to be moved across its territory.

Intelligence may take at least three forms when shared. It may be sent as an electronic transmission over a network. Alternatively, it could be stored as electronic data on an object, and the object physically transported (perhaps to avoid compromise during transmission over a network). Finally, it may itself form a physical object (a document, map, photo etc).

On the first and second forms identified above, there is ongoing debate as to whether data constitutes an 'object' in international law.[334] The majority of experts preparing the Tallinn Manual, for example, agreed that "tangible components of cyber infrastructure constitute objects," but found that data did not qualify.[335] State practice on the issue is limited and divided.[336] Assuming the Tallinn Manual is correct, it seems unlikely that intelligence in the form of data will constitute 'materiel' or 'supplies'. This would stretch the natural meaning of those terms.

Given the analogy with 'munitions of war' in Article 2 HCV, a majority of Tallinn Manual experts took the view that transporting a 'cyber weapon' across neutral territory would breach strict neutrality rules, whether this weapon was transported physically or as data across publicly available cyber infrastructure.[337] This conclusion was limited to weapons, however. It has been criticised on the basis that information packets on a network "merely propagate energy," and thus "cannot be

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[328] Dinstein, *War, Aggression and Self-Defence*, 29. This is distinct from their duties with regard to the activities of private actors, discussed below.

[329] Yoram Dinstein, 'The Laws of Neutrality' (1984) 14 Isr YB Hum Rts 80

[330] HC XIII, Art 6, also reflected in the 1928 Havana Convention on Maritime Neutrality, Art 16. Notably, HC V contains no mirrored provision; but, given the overarching duty of impartiality, context of the Conventions, and State practice, this will not mean that a neutral State is allowed to supply a belligerent with military equipment for land warfare.

[331] Also prohibited by the Conventions are the raising and recruiting of troops on neutral territory (HCV, Arts 4 – 5), although a neutral need not prevent persons from "crossing the frontier separately to offer their services to one of the belligerents" (Art 6).

[332] HC V, Arts 2 and 5

[333] For example, HC V, Art 14.

[334] This is often IHL-focussed, for example on whether civilian data can be a protected object in armed conflict under Additional Protocol 1 to the Geneva Conventions (AP1).

[335] Within the meaning of Additional Protocol to the 1949 Geneva Conventions 1, at least. A minority suggested the opposite, noting the importance of data, and the impact of an attack on it: *Tallinn Manual 2.0*, 437.

[336] See for example discussion in Tim McCormack, 'International Humanitarian Law and the Targeting of Data', (2018) 94 Intl L Stud 222, and Ori Pomson, "Objects'? The Legal Status of Computer Data under International Humanitarian Law' (2023) 28(2) J Conflict & Sec L 349.

[337] *Tallinn Manual 2.0*, 557, Rule 151. As noted above (n320), the minority of experts considered that the prohibition only applied to physical weaponry, not to data, and the *DoD Law of War Manual* and *Harvard Manual on Air and Missile Warfare* agree with the latter position.

analogised to physically violating neutral territory" – given belligerent radio waves passing through neutral airspace apparently do not.[338]

Determining whether intelligence in any three of the above forms constitutes 'war materiel' or 'military supplies' can also be assisted by contraband definitions. Neutrality rules allow belligerents to interdict the supply of war materiel to their opponents, including – in certain circumstances – by searching neutral merchant ships and seizing 'contraband' goods likely to aid an opposing belligerent's war effort. Given one of neutrality's original purposes was to allow continued trade, carriage of contraband is not prohibited by neutrality law.[339] Instead, transporting a cargo of contraband leaves that cargo, and possibly the neutral vessel containing it, liable to lawful capture by belligerents outside neutral territory.[340] This is a risk the merchant vessel's owner chooses to run by carrying such cargo.

The determination of which goods belligerents may seize focuses on two factors: first, whether the relevant cargo in fact constitutes goods that will aid a belligerent; and second (less importantly here), whether they are destined (either immediately or ultimately) for a belligerent-controlled location.[341] Thus, while the law of contraband applies to privately traded goods, its development has included significant attempts to define what constitutes 'goods likely to assist a belligerent.'

Like much of neutrality law, the definition of contraband goods has remained controversial, varying over time. A modern approach, in the San Remo Manual, describes these simply as "goods which…may be susceptible for use in armed conflict." [342] It sets out goods that should not be considered contraband (including medical supplies and humanitarian relief),[343] noting that belligerent contraband lists[344] may vary "according to the particular circumstances of the armed conflict".[345] Contraband is usually divided into two categories: "Absolute contraband is goods which must by their very nature be considered as essential for war, and … conditional contraband … comprises those goods destined for the administration and armed forces of the adversary,

[338] James Kraska, 'The Law of Maritime Neutrality and Submarine Cables' (*EJIL: Talk!*, 29 July 2020) <https://www.ejiltalk.org/the-law-of-maritime-neutrality-and-submarine-cables> accessed 25 January 2024. This post also notes that, once unleashed, cyber weapons are almost impossible to control or to keep off neutral networks.
[339] Subject to any duty that can be fixed on neutral States to exercise control over private entities (discussed below).
[340] *DoD Law of War Manual* §15.12, relying on *Commander's Handbook for Naval Operations* (2007 Edition), para 7.4.1.2 ("Contraband goods are liable to capture at any place beyond neutral territory, if their destination is the territory belonging to or occupied by the enemy.")
[341] See for example *DoD Law of War Manual*, §15.12.2. 'Requirement of Enemy Destination': "Contraband goods are liable to capture at any place beyond neutral territory if their destination is the territory belonging to, or occupied by, the enemy." The law of contraband has varied as to whether this relates only to the immediate destination of the goods, or also to any ultimate destination.
[342] *San Remo Manual on the Law of Naval Warfare*, Art 148. Also *DoD Law of War Manual* §15.12.1 on 'Classes of Goods That May Be Considered Contraband': "Contraband consists of goods that are destined for an enemy of a belligerent and that may be susceptible to use in armed conflict." A footnote to this elaborates that this may be understood to include "war- sustaining commerce, i.e., commerce that indirectly but effectively supports and sustains the belligerent State's war fighting capability (e.g., imports of raw materials used for the production of armaments and exports of products whose proceeds are used by the belligerent State to purchase arms and armaments)."
[343] *San Remo Manual on the Law of Naval Warfare*, Art 150
[344] i.e. a list of items, published by a belligerent State, that the State declares it will consider to be contraband
[345] *San Remo Manual on the Law of Naval Warfare*, Art 149

whether or not they otherwise serve essential purposes of war."[346] If it constitutes goods, military intelligence related to the conflict will fall into the former category, although other forms of intelligence could be conditional contraband depending on their potential uses (e.g. maps with both military and civilian purposes, weather reports).

The law of contraband has occasionally touched on whether intelligence constitutes contraband. Drawing on some of the sources above, von Heinegg found that it was a well-established right of belligerents to prevent neutrals from "transmitting information to the adversary", and that for a long time such acts of assistance to a belligerent by neutral vessels were not governed by separate rules, but were dealt with "under the heading of contraband or '*contraband par analogie*'", with "state practice regarding such 'unneutral assistance/service' and [its] consequences … for neutral vessels and their cargo [being] far from uniform". He identifies several examples of State practice from 1854 to 1904 in which "transmission of information was equated to carriage of contraband".[347]

Early treaty lists of contraband – including those considered to be model lists – did not list intelligence as contraband *per se*.[348] Furthermore, by the 19th century intelligence transmission was often viewed as an act of unneutral service (see Chapter 2) rather than as carriage of physical contraband. The London Declaration thus framed transmission of intelligence as unneutral service, and did not include intelligence products in its lists of absolute and conditional contraband.[349] In 1912 Oppenheim considered whether "enemy despatches embodying intelligence" carried on a neutral vessel could be seized by a belligerent. He found that detaining the vessel might be justified by the necessity[350] of preventing intelligence from reaching the enemy, but did not rely on contraband law.[351]

Lengthy British lists of contraband were published in late 1915 during the First World War blockade of Germany. Seen as a high-water mark of expansive contraband definitions, these lists did define: "Maps and plans [of a scale of 4 miles to the inch or larger, or reproductions of these] of any place within the territory of any belligerent" as absolute contraband. These were the only

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346 Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law*, para 18.42. See also for example *Commander's Handbook for Naval Operations* (2007 Edition) 7.4.1: "Contraband consists of goods destined for the enemy of a belligerent and that may be susceptible to use in armed conflict. Traditionally, contraband has been divided into two categories: absolute and conditional. Absolute contraband consisted of goods the character of which made it obvious that they were destined for use in armed conflict, such as munitions, weapons, uniforms, and the like. Conditional contraband consisted of goods equally susceptible to either peaceful or warlike purposes, such as foodstuffs, construction materials, and fuel."

347 Wolff Heintschel von Heinegg, 'Visit, Search, Diversion, and Capture in Naval Warfare: Part I, the Traditional Law' (1991) 29 Can YB Intl L 283, 319 – 320 <https://heinonline.org/HOL/P?h=hein.journals/cybil29&i=295>. The examples given are of the British position at the beginning of the Crimean War (1854), the British, French and Spanish declarations of neutrality at the start of the US Civil War (1861), and of Italian, French, Spanish, US, Russian and Japanese instructions and ordinances between 1866 and 1904.

348 See for example the treaty of Commerce between Great Britain and Russia of 1 July 1766 43 CTS 365, Art 12 (described as the 'standard contraband list' – Neff, *The Rights and Duties of Neutrals,* 33); and that between the US and Colombia of 3 October 1824 (the 'Anderson-Gual Treaty'), 74 CTS 455, Art 14 (a 'model agreement' on contraband that led to a standard form of contraband lists – ibid, 95).

349 1909 London Declaration, Arts 23, 25 and 33. This did allow parties to add articles to these lists via declarations – see Arts 23 and 25.

350 In the State responsibility sense, for the acting belligerent's self-preservation.

351 He added that once the physical despatches were seized the vessel should be released, as this would remove the necessity of detaining her: Lassa Oppenheim, *Oppenheim's International Law* (vol 2 'War and Neutrality', 2nd edn, 1912) 531 – 532, §413 <https://www.gutenberg.org/files/41047/41047-h/41047-h.htm> accessed 25 August 24

intelligence-related items listed, however.[352] Intelligence products do not seem to have made significant appearances on more recent contraband lists.

While the ongoing debate as to whether data is an object cannot be resolved here, there is little modern State practice or commentary to support the proposition that intelligence amounts to contraband during its transfer. The best approach is that intelligence itself does not constitute contraband, or war materiel or supplies (and is not caught by strict neutral rules on these), except when it takes a tangible, physical form falling within the natural meaning of the terms (e.g. a map). Strict neutrality will treat the sharing of intelligence in any form as unneutral service, which (for individual craft) may attract consequences akin to those for carrying contraband, but by analogy rather than because intelligence is contraband.

[352] AC Bell, *A History of the Blockade of Germany and the Countries Associated with her in the Great War, Austria-Hungary, Bulgaria and Turkey, 1914-1918* (London, HMSO, 1937) 721 - 44 (esp item 42, Schedule I of 14 Oct 1915 Proclamation at 730, and following Proclamations).

# CHAPTER 4 – DUTY ON NEUTRAL STATES TO RESTRICT INTELLIGENCE SHARING BY NON-STATE ACTORS

Contemporary conflicts often feature non-State actors collecting, refining and disseminating intelligence from within the jurisdiction of a neutral State. As noted above, the Ukraine conflict has seen numerous examples of companies and collectives sharing intelligence or simply making it publicly available.[353] This may be for ideological reasons, or profit.

Must neutrals prevent non-State actors within their territory from supplying intelligence to belligerents? Neutral States must exercise due diligence to prevent unlawful activity affecting the rights of other states from occurring on their territory.[354] Neutrality, however, has historically distinguished between the acts of neutral States and those of private entities within them. It permitted the latter to supply war materiel to belligerents, albeit at the risk of other belligerents confiscating their cargoes as contraband.

There has been little comment on how the above distinction extends to intelligence sharing. Thus, while (as shown above) neutrality law has usually treated intelligence sharing as distinct from supplying war materiel (and its transfer as unneutral service, rather than carriage of contraband), the rules on materiel transfer are of assistance.

Article 7 of HCV clarified that a neutral State was "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".[355] This broad definition could easily encompass intelligence sharing. The Conventions also required States to ensure any restrictions on sales and exports they chose to apply were impartial.[356] This rule was continued after the First World War into treaties such as the 1928 Havana Convention.[357]

In the twentieth century, many States imposed controls on private sales from their jurisdictions of arms and other specified materiel. These now include the US International Traffic in Arms Regulations (ITARs) (restricting sale of weapons, along with certain equipment and technologies with military applications), the UK's Export Control Act 2002, and Germany's Gesetz über die

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[353] By way of further example, several commercial satellite imagery companies began sharing imagery with the Ukrainian military shortly after the February 2022 invasion: see Christian Davenport, 'Commercial satellites test the rules of war in Russia-Ukraine conflict' (*The Washington Post*, 10 March 2022) <https://www.washingtonpost.com/technology/2022/03/10/commercial-satellites-ukraine-russia-intelligence/> accessed 21 May 2023; AFP, 'How commercial satellites are shaping the Ukraine conflict' (*France 24*, 4 March 2022) <https://www.france24.com/en/live-news/20220304-how-commercial-satellites-are-shaping-the-ukraine-conflict> accessed 21 May 2023.

[354] *Tallinn Manual 2.0*, Rule 6

[355] HC XIII, Art 7 has a near identical provision: "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".

[356] As is required by, for example, HC V Art 9, discussed above: "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."

[357] See for example the 1923 Hague Rules on Air Warfare, Art 45, and the 1928 Havana Convention on Maritime Neutrality, Art 22.

Kontrolle von Kriegswaffen.[358] Multilateral international arrangements also exist.[359] Some commentators assert this State practice has altered customary law so that neutrals must restrict private exports to belligerents to the extent their domestic law permits. Any State approval of the export of war materiel to a belligerent breaches neutrality. Some also assert that neutrality law now requires neutrals to actively prevent private actors from supplying arms to a belligerent.[360] Judge Ammoun supported this position in the ICJ's 1971 *Namibia* Advisory Opinion, noting "[neutral] governments must show due diligence in preventing any individual or collective act contrary to neutrality," including by controlling passage of contraband to belligerents by "every kind of [governmental] means, legislative, administrative and judicial…".[361]

There is little to suggest that the above represents customary law, however. The Canadian Manual (hand-railing The Hague Conventions and concurring with the DoD Law of War Manual)[362] finds: "A neutral is under no obligation to prevent the supply of munitions or any other military materiel by resident individuals or companies, nor is it required to prevent the passage of such goods across its territory."[363]

Turning to expert manuals, the Tallinn Manual's rule prohibiting the exercise of belligerent rights in neutral territory by cyber means[364] does not extend to private individuals, entities or groups.[365] The Harvard Manual notes in its Commentary that, while there has been scepticism of the continuance of the State-private distinction, "[the formulating experts had] not been able to confirm on the basis of State practice that a modification of the traditional rule relating to the distinction between public and private exports has occurred. State practice … gives no evidence that States consider themselves obliged by the law of neutrality to exercise [control of arms exports]."[366] Dinstein agrees, noting a neutral State may: "…opt for one of two diametrically opposed policies in respect of the sale and export of war materials from its territory by private individuals to the belligerents. On the one hand, it is entitled to impose a total embargo on such sale and export. On the other, it may enable all interested parties to purchase in the open market in its territory any item whatsoever."[367] Other commentators agree that freedom of commercial

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358 Ausführungsgesetz zu Art. 26 Abs. 2 Grundgesetz (Gesetz über die Kontrolle von Kriegswaffen); (trans: Act implementing Art. 26 para. 2 of the Basic Laws [War Weapons Control Act]).

359 Such as the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies – not a treaty but designed to "contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations"): <https://www.wassenaar.org/app/uploads/2021/12/Public-Docs-Vol-I-Founding-Documents.pdf> accessed 23 Jan 24.

360 For example, Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law*, p615

361 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* [1971] ICJ Rep 16, 95

362 *DoD Law of War Manual*, §15.3.2.1, and §15.12: "Although neutral States must not provide war-related goods and services to belligerents, neutral persons are not prohibited from such activity by the law of neutrality. … The law of neutrality's rules on neutral commerce and the carriage of contraband have sought to balance the right of neutral persons to conduct commerce free from unreasonable interference against the right of belligerent States to interdict the passage of war materials to the enemy."

363 Canadian National Defense, *Joint Doctrine Manual Law of Armed Conflict at the Operational and Tactical Levels* (2001) para 1306.1

364 *Tallinn Manual 2.0, Rule 151*, esp paras 2 and 3

365 Ibid

366 *Harvard Manual on Air and Missile Warfare*, Rule 173 and Commentary to Rule 173, para 3

367 Dinstein, *War, Aggression and Self-Defence*, 95

trade remains preserved under the law of neutrality,[368] but there remains no firm authority on this issue.[369]

Thus, there appears to be no contemporary strict neutrality duty (on neutral States) to prevent non-State actors from providing war materiel to belligerents – provided that any restrictions they do choose to impose are impartial. Some specific strict neutrality rules do nevertheless require neutrals to suppress particular private acts in their territory, such as the fitting out of warships,[370] and the departure from its territory of privately sourced armed ships and aircraft.[371]

Given the above, neutral States are probably not obliged by strict neutrality to prevent private intelligence sharing from their territory, even if they impose domestic legal controls on information (e.g. some States restrict passage of information detailing how to make weapons or prepare acts of violence, or official secrets). The (limited) commentary takes this approach. Oppenheim concluded in 1912: "It is obvious that his duty of impartiality must prevent a neutral from allowing belligerents to establish intelligence bureaux on his territory. On the other hand, a neutral is not obliged to prevent his subjects from giving information to belligerents, be it by letter, telegram, telephone, or wireless telegraphy."[372] Similarly, Dinstein found in 1984: "Generally speaking, the neutral State need not take steps in order to prevent transmission of intelligence data about one belligerent to its enemy."[373] Any such duty would likely be incompatible with The Hague Conventions rules on communications networks discussed above in any event.

The position might be change, however, if the quantity and nature of intelligence shared reached a level whereby a belligerent base of operations could be said to exist on neutral soil. Activity that transforms a neutral State into a base of operations for a belligerent is prohibited under strict neutrality.[374] HCV, reflecting customary law, also prohibited the formation of 'corps of combatants' on neutral soil.[375] (A neutral State was not responsible, however, for volunteers crossing its frontiers to offer their services to belligerents,[376] even in significant numbers,[377]

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[368] For example, see James Ashley Roach 'Neutrality in Naval Warfare' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, Oxford University Press, article last updated March 2017) 348, para 20; Hitoshi Nasu, 'The Future Law of Neutrality' (*Articles of War*, 19 July 2022) <https://lieber.westpoint.edu/future-law-of-neutrality/> accessed 23 August 2024.

[369] Neff, *The Rights and Duties of Neutrals,* 201 – 202

[370] James Ashley Roach 'Neutrality in Naval Warfare' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, Oxford University Press, article last updated March 2017) 348, para 20. Roach relies on the *Alabama Arbitration* case (*Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871*, Alabama Claims Award 1872, <https://legal.un.org/riaa/cases/vol_XXIX/125-134.pdf> accessed 30 Jan 24). The *Alabama* case involved the private purchase (and partial fitting out) in the UK of warships for the Confederacy, during the US Civil War. This was found to be in breach of the UK's neutral duties, because of the UK government's perceived failure to prevent what occurred.

[371] See HC XIII, Art 8, and *Harvard Manual on Air and Missile Warfare*, Rule 173(a) with Commentary. Britain was alleged to have breached a predecessor requirement in the *Alabama* arbitration (see ibid).

[372] Lassa Oppenheim, *Oppenheim's International Law* (vol 2 'War and Neutrality', 2nd edn, 1912) 436 – 437, §356 <https://www.gutenberg.org/files/41047/41047-h/41047-h.htm> accessed 25 August 24

[373] Dinstein, *War, Aggression and Self-Defence*, 98

[374] See above, and for example HC XIII, Art 5; US Navy, *The Commander's Handbook on the Law of Naval Operations* (March 2022 Edition, Department of the Navy / Department of Homeland Security) §7.3.

[375] HC V, Arts 4 and 5. The opening of belligerent recruitment offices is also prohibited.

[376] HC V, Art 6

[377] Dinstein, *War, Aggression and Self-Defence* 29; Ian Brownlie, 'Volunteers and the Law of War and Neutrality' (1956) 5 ICLQ 570 at 571 – 572 and 578.

provided these were not disguised mercenaries or regulars;[378] despite criticism, this rule has persisted).[379]

The Harvard Manual, for example, explicitly extends the above prohibition to "Use of neutral territory or airspace as a base of operations — for attack, targeting, or intelligence purposes…."[380] Thus the soundest approach is that a neutral State is not required to prevent non-State actors conducting intelligence sharing from its territory, unless their activity renders the State a belligerent 'base of operations.' What forms of sharing would reach the latter threshold? That which would amount to involvement in hostilities if conducted by a State, is likely to do so, otherwise this is likely to depend on its scale, frequency and the nature of the intelligence passed. Regular support to targeting, the activities of large private companies offering military intelligence services,[381] or even particularly effective open source intelligence (OSINT) organisations may all reach this level.

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[378] The 1989 Convention Against Recruitment, Use, Financing and Training of Mercenaries requires State parties to punish the recruitment of mercenaries.

[379] Ian Brownlie, 'Volunteers and the Law of War and Neutrality' (1956) 5 ICLQ 570 at 574 - 578. Brownlie describes these rules as "in all aspects … clumsy, uncertain and ineffective…" and "unsatisfactory and obsolescent", given the controls that States could apply, the numerous occasions when disguised 'volunteers' have been used to pursue policy, and that volunteers should perhaps only be permitted to join a victim State and its allies, or States undertaking UN-authorised action.

[380] *Harvard Manual on Air and Missile Warfare*, Rule 171(b) (emphasis added)

[381] Peter Hostettler and Olivia Danai, 'Neutrality in Land Warfare' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, Oxford University Press, article last updated November 2015) 347, para 24

# CHAPTER 5 – RECENT STATE PRACTICE AND *OPINIO JURIS*

Having identified the extensive restrictions that strict neutrality imposes on inter-State intelligence sharing, the next step is to consider whether these have in fact been observed in recent State practice. This has particular importance given the vintage of the only State codifications of neutrality law (and the other caveats that attach to these, discussed above). State practice in intelligence sharing can also be compared to references to neutrality in treaties, and State expressions of *opinio juris* on the same subject (including that drawn from the State military manuals referenced throughout this thesis), to identify whether these match or diverge.

## Broader State practice

Broader State practice provides helpful context to intelligence sharing State practice, and will be considered first. As might be expected, most analysis of neutral State practice has focussed on neutral provision of war materiel and supplies to belligerents, and violation of State territory.[382] The latter is of course relevant to means used for intelligence sharing.

The overall impression is that recent neutral State practice has been at best inconsistent.[383] Neutrality law – or at least strict neutrality – has been violated to a greater or lesser degree in most recent conflicts, and has not been invoked at all in some. It is therefore difficult to identify general State practices (let alone customary law arising from these).[384] A pessimist might conclude, however, that the only consistent practices are that States invoke neutrality to justify self-interested actions, and respect it only when compelled to do so.

Norton reviewed neutrality in conflicts between 1945 and 1976. He found that during the Korean War the general inviolability of neutral State territory was partially respected, as "United Nations forces refrained throughout the conflict from pursuing belligerent aircraft over Chinese and Soviet territory for fear that those states were neutrals." This may have been to avoid escalation, however. Other States were eager to invoke neutrality to avoid involvement. Some Arab States and Indonesia – seemingly against their UNC duties, given the UNSC mandate – cited neutral impartiality to justify refusing transit of UN forces and supplies through their territory.[385]

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[382] Which is unlikely to include intelligence sharing, for the reasons at Chapter 3 above. For more on State practice since WW2 relating to other aspects of neutrality, see: Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality'; Francis A. Boyle, 'International Crisis and Neutrality: United States Foreign Policy toward the Iran-Iraq War', (1992) 43 Mercer L Rev 523; Boleslaw Boczek, 'Law of warfare at sea and neutrality: Lessons from the Gulf War' (1989) 20(3) Ocean Dev & Intl L, 239; Francis Russo, 'Neutrality at Sea in Transition: State Practice in the Gulf War as emerging international customary law' (1988) 19(5) Ocean Dev & Intl L 381; H.S. Levie, 'The Falklands Crisis and the Laws of War' in Alberto Coll and Anthony Arend (eds) *The Falklands War* (Winchester MA, Allen and Unwin, 1985) 74 et seq; Maxwell Jenkins, 'Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals' (1985) 8 BC Intl & Comp LR 517 at 525 et seq; Yoram Dinstein, 'The Laws of Neutrality', (1984) 14 Isr YB Hum Rts 80; Patrick M. Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' [1976] 17 Harv Intl L J 249.

[383] See all ibid

[384] Customary international law may be said to exist where there is a general practice of States, accepted by them as law.

[385] Patrick M. Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 17 Harv Intl L J 249, 266-7

Norton identified widespread violations of neutrality in other wars, such as the Vietnam War, in which all sides operated in breach of neutral duties.[386] In the Arab-Israeli wars, the belligerent Arab States leveraged their control of oil supplies and the Suez Canal (Egypt), to successfully insist that other nations observe neutrality and not supply Israel. They themselves nevertheless received supplies from the Soviet Union via Eastern Europe.[387] (Similarly, von Heinegg notes that the US decided to restrict supplies to Israel during the Yom Kippur War only following action by the Arab States to enforce neutrality. He concludes that 'non-belligerents' tend to revert to strict neutrality when this is actively enforced.)[388]

After considering why neutrality had only been applied in certain conflicts, and then often patchily, Norton concluded: "The only apparent answer is the cynical one: … neutrality has been applied when a state has been able by the exercise of some sanction to compel its application,"[389] making "the law seem arbitrary and its use manipulative."[390] von Heinegg acknowledges that in post-Second World War conflicts: "states not parties [to IACs] have rarely complied with the comparatively strict rules of the law of neutrality … . Instead, they have more or less openly supported one of the belligerent parties, either economically or militarily."[391]

Neff describes the Cold War as "a golden age of 'non-belligerency", as "the various small conflicts that burst out over the globe were commonly seen as skirmishes in the great Manichean struggle between the superpowers, with the United States and the Soviet Union shamelessly supplying aid of all kinds to their respective favoured sides, sometimes on a huge scale".[392] He references the Soviet supply of North Korea and North Vietnam during their respective wars, along with the Chinese 'volunteers' sent to the former. Equally, the US supported India in its 1962 conflict with China, Afghans against Russia from 1979–1989, and both sides of the 1973 Middle East war.[393]

Amongst the many neutrality violations of the Cold War, there were limited examples of at least lip service being paid to neutrality. States did sometimes halt arms supplies to belligerents on the outbreak of conflict, but for a range of reasons. The US and UK halted supplies during the 1965 India-Pakistan conflict. France and the UK did likewise during the 1967 Middle East war,[394] and the UK stopped issuing licences for export of 'lethal' weapons on the commencement of the Iran-Iraq conflict of 1980–88.[395] States have occasionally published contraband lists and set up prize courts, such as Egypt during the Arab-Israeli conflicts of the 1940s, and Pakistan in 1965.[396]

As examined below, conflicts since the Cold War have also seen multiple violations of strict neutrality, including provision of war materiel to belligerents by neutral states, and extensive belligerent use of neutral territory. This has reached something of a peak in the assistance provided by non-party States to both sides of the Ukraine IAC.

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[386] Ibid, 270
[387] Ibid
[388] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 553-554
[389] Patrick M. Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 17 Harv Intl L J 249, 307
[390] Ibid, 307
[391] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 548.
[392] Neff, *The Rights and Duties of Neutrals* 195
[393] Ibid
[394] Ibid
[395] HC, vol 84, col W-450 (6th ser) [1984]
[396] Neff, *The Rights and Duties of Neutrals* 195

## Military manuals

Most military legal manuals rely heavily on HCV and HCXIII when identifying neutrality law, and thus lay out a strict approach that the issuing States have rarely followed to the letter. Some acknowledge the arguments for other versions of neutrality, however.

A succinct version of strict neutrality appears in the Canadian LOAC Manual. This links enjoyment of neutral rights to neutrals not "interfer[ing] with the legitimate activities of a belligerent or benefit[ting] one belligerent at the expense of the other."[397] Relying on HCV and HCXIII, it concludes simply: "A neutral State may not support any of the parties to the conflict."[398]

The New Zealand Defence Force Manual defines neutral States in terms of abstention and impartiality,[399] but does allow for other forms of neutrality, adding that States: "sometimes choose not to actively participate in a conflict, but nevertheless materially support one of the parties." It offers as examples of this US actions before Pearl Harbor (see below), and the Netherlands' support to the US coalition during the 2003 Iraq conflict. It is "a question of fact as to whether such support reaches the point where other parties to the conflict consider that State to no longer be neutral." The Manual does not define this point, or specify what such a State becomes.[400]

The DoD Manual sets out traditional neutral duties,[401] before acknowledging that States, including the US, have sometimes (controversially) chosen to qualify their neutrality. It notes that (on the strict view): "A neutral State … has a duty to refrain from placing its various governmental agencies at the disposal of a belligerent in such a way as to aid it directly or indirectly in the prosecution of the war."[402] It notes this duty of abstention covers "a vast field of governmental activities," likely including intelligence agencies and their products.[403]

The UK LOAC Manual likewise sets out the basic principles of impartiality and non-intervention.[404] It observes that the UNC may require departures from these, and that contrary State practice exists. It concludes, however, that "certain fundamental principles of neutrality law

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[397] Canadian National Defense, *Joint Doctrine Manual Law of Armed Conflict at the Operational and Tactical Levels* (2001) para 1302.4

[398] Ibid para 1304.2

[399] New Zealand Defence Force, *Manual of Armed Forces Law DM 69 (*2nd Edn, Vol 4, Law of Armed Conflict, New Zealand Defence Force 2019) para 16.2.1: "A neutral State is a State that is not a party to a conflict and takes no part in materially or militarily supporting the operations of any party to it."

[400] Ibid, §16.2.4

[401] *DoD Law of War Manual*, §15.3.2. This notes beforehand that the principal duties of neutral States are to abstain from participation in the conflict, and to be impartial in their conduct towards the contending parties, and that more specific duties flowing from these core principles have been categorised in different ways by different publicists. For example, the duty to refrain from supporting one side of the conflict or the other can be seen as a function of the duty to abstain from hostilities, or as a result of the duty of impartiality. Robert W. Tucker, *The Law Of War And Neutrality At Sea* (vol 50, U.S. Naval War College International Law Studies, 1955) 203 offers a different approach: "The duties of a neutral state may also be classified—and frequently are so classified—as duties of abstention, prevention and acquiesence [sic] (or toleration). Duties of abstention refer to acts the neutral state itself must refrain from performing; duties of prevention refer to acts the commission of which within its jurisdiction the neutral is obligated to prevent; and, finally, duties of acquiescence have reference to neutral obligations to permit belligerent measures of repression against neutral subjects found rendering certain acts of assistance to an enemy."

[402] DoD Law of War Manual, §15.3.2.1

[403] Robert W. Tucker, *The Law Of War And Neutrality At Sea* (vol 50, U.S. Naval War College International Law Studies, 1955) 208

[404] UK Ministry of Defence, *JSP 383 The Joint Service Manual of the Law of Armed Conflict* (UK Defence Concepts and Doctrine Centre, 2004), para 1.42. This does not immediately address what these 'certain dealings' are.

remain applicable" including the inviolability of neutral territory – a position apparently at odds with the UK's overt training of Ukrainian troops on its soil.[405]

A few manuals explicitly allow for qualified neutrality. Italy's Instructions on Naval Warfare, for example, recognise that a policy of qualified neutrality or non-belligerency may be adopted, instead of a policy of strict neutrality.[406]

Thus, the position taken by military manuals reflects the wider uncertainty about neutrality law. Those manuals that go beyond the early twentieth century codifications often acknowledge that States qualify their neutrality in practice, but add that this is of unsettled legality.

## Treaty law

Treaty law since 1907 (other than the UNC, discussed above) adds little on how neutrality operates, or how it applies to intelligence sharing. A limited number of widely ratified treaties refer to neutrality, but add little on its operation.

The 1949 Geneva Conventions are a good example of this. Article 4 of the First Geneva Convention (1949) provides that "Neutral Powers shall apply by analogy the provisions of the present Convention…" to defined 'protected persons.'[407] Common Article 8 of all four[408] Conventions provides for the appointment of Protecting Powers, which may select delegates from their own nationals or "the nationals of other neutral Powers." What constitutes a 'neutral power' remains undefined. The ICRC Commentary to Article 4 suggests that, under customary law, a 'neutral Power' is any State not party to an IAC.[409] Thus, the Commentary finds that Article 4[410] justifies neutral assistance given to the wounded, sick and shipwrecked that might otherwise breach neutrality (apparently without recognising the exception for humanitarian assistance contained within neutrality law).[411]

In defining all non-party States as neutrals, the ICRC Commentary relies mostly on texts considered elsewhere in this thesis that espouse strict neutrality.[412] There is an obvious humanitarian benefit in this approach, as it binds non-parties to protect the wounded, sick and

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[405] Ibid, para 1.43
[406] Stato Maggiore della Marina, *SMM-Gen 009, Istruzioni di diritto dei conflitti armati per i comandi navali* (November 2022), Art 169
[407] Article 5 of the Second Geneva Convention is identical, except it also refers to applying the Convention by analogy to the shipwrecked.
[408] This is in fact Article 9 in the Fourth Geneva Convention.
[409] ICRC, *Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949* (ICRC, 2016) paras 916 - 917 <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-4/commentary/2016> accessed 1 June 2024
[410] And Article 5 of the Second Geneva Convention.
[411] Ibid, para 929
[412] The relevant footnote is: "This definition corresponds to the ones reflected in recent restatements of international law drafted by independent groups of experts. See San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994), Rule 13(d); Manual on International Law Applicable to Air and Missile Warfare (2009), Rule 1(aa); and Helsinki Principles on the Law of Maritime Neutrality, adopted by the International Law Association at its 68th Conference, Taipei, 30 May 1998, Article 1.1. Similarly, see Australia, Manual of the Law of Armed Conflict, 2006, para. 11.3; Canada, LOAC Manual, 2001, paras 1302–1303; and United States, Naval Handbook, 2007, para. 7.1. Article 19 of Additional Protocol I similarly speaks of '[n]eutral and other States not Parties to the conflict' without affecting the meaning of the term 'neutral Power' in the Geneva Conventions; see fn. 13. See also Bothe, 2011, p. 1: 'Neutrality means the particular status, defined by international law, of a State not a party to an armed conflict.' The Russian Federation's Regulations on the Application of IHL, 2001, refers to 'neutral States' without defining the term."

shipwrecked. The Commentary explicitly avoids discussing the legality of approaches other than strict neutrality, asserting the Convention articles will apply even if "a State chooses to adopt a stance of so-called 'non-belligerency', regardless of whether doing so is lawful as a matter of international law."[413] It also notes that the Conventions' drafters "deliberately refrained from addressing questions regarding the substantive rules of the law of neutrality."[414]

As the Commentary acknowledges, the Third Convention takes a different approach, referring to 'neutral or non-belligerent Powers' at Articles 4(B)(2) and 122.[415] Similarly, parts of the 1977 Additional Protocol I to the Conventions distinguish between 'neutral States', and an (apparently wider) category of 'other States not Parties to the conflict,' when addressing how belligerents may interact with non-party States.[416] Article 31, for example, lists rules applicable to belligerent medical aircraft. These refer throughout to both 'neutral states' and 'states not party [to the IAC]', classing their territory as inviolable,[417] and permitting the internment of belligerent personnel landing in States of either category.[418]

Von Heinegg has argued that this differentiation does not amount to recognition of non-belligerency, given the provisions "may well be the result of the uncertainty that delegates felt with respect to the status of the law of neutrality".[419] The ICRC, relying on his findings and others, takes the same approach.[420] Clearly, however, the Third Convention and Additional Protocol I make allowance for States that were neither parties nor traditional neutrals.

There is little more in treaty law to help in determining the operation of neutrality. This is perhaps unsurprising, given the inconsistency of State views and practice.

## State practice on neutral-belligerent intelligence sharing

Turning to intelligence sharing itself, the below examines State practice from the Second World War onwards. This is because the first widely adopted treaties outlawing force – i.e. the strongest justifications for rejecting strict neutrality since Just War theory – emerged in the inter-War period. As discussed above, however, strict neutrality was not a constant even prior to this point, and had already been undermined by State practice.

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[413] Ibid, para 917 – 918
[414] Ibid, para 910
[415] Emphasis added.
[416] Additional Protocol I to the Geneva Conventions of 1949, Arts 2(c); 9(2)(d); 19; 22(2)(a); 30(3); 31; 37(1)(d); 39(1); 64(1) and (3)
[417] See for example Art 31(1): "Except by prior agreement, medical aircraft shall not fly over or land in the territory of a neutral or other State not a Party to the conflict. However, with such an agreement, they shall be respected throughout their flight and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water, as appropriate."
[418] Article 31(3): "If a medical aircraft, … lands or alights on water in the territory of a neutral or other State not Party to the conflict…the aircraft shall be subject to inspection for the purposes of determining whether it is in fact a medical aircraft. … If the inspection discloses that the aircraft is in fact a medical aircraft, the aircraft with its occupants, other than those who must be detained in accordance with the rules of international law applicable in armed conflict, shall be allowed to resume its flight, and reasonable facilities shall be given for the continuation of the flight. If the inspection discloses that the aircraft is not a medical aircraft, it shall be seized and the occupants treated in accordance with paragraph 4 [i.e. 'detained by that State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take part in the hostilities']."
[419] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 554
[420] ICRC, *Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949* (ICRC, 2016) para 916 esp fn 13 <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-4/commentary/2016> accessed 1 June 2024

For example, the US declared itself an 'armed neutral' at the commencement of the First World War. Before it joined the conflict, it was accused of significant partiality by Germany, especially given British dominance of the Atlantic meant most US goods, fuel and munitions were sold to the Allies, while German and Central Powers ships were interned in US harbours.[421] As a result, Germany carried out sabotage and intelligence operations inside the US, some of which were defeated due to neutral-belligerent intelligence sharing between the US and Britain.[422] The US's entry into the War was in large part due to intelligence sharing in the shape of the Zimmerman telegram.[423]

The US's actions prior to entering the Second World War have been closely analysed, given US assistance to the Allied (and particularly the British) cause before the Pearl Harbor attack. This included a strong sharing relationship between the US and UK, with regular intelligence exchanges, particularly of intercepted signals and decryption techniques. The US provided Britain with 'Purple' machines and know-how for decrypting Japanese communications.[424] In turn, the UK let a tiny contingent of US officers into the secret that German Enigma communications could be decrypted, and passed the US Enigma-acquired 'Ultra' intelligence.[425]

At the same time, the US and the Allies exchanged intelligence regarding German naval movements in the Atlantic, both to enforce the declaration by fifteen American countries of a 'neutrality zone', and to enable British naval operations.[426] By the latter half of 1941, the escort of individual Atlantic convoys was handed over by US to British ships mid-crossing. US escorts

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[421] Some such ships were used by German government agents to produce bombs, later placed by dock workers of German or Irish backgrounds on ships bound for allied ports. This destroyed many cargoes bound for the Allies before the perpetrators were apprehended by US law enforcement. See US Office of the Director of National Intelligence, 'WWI The Undeclared War: In the Cross-Hairs: Allied Shipping' (*intel.gov*) <https://www.intelligence.gov/evolution-of-espionage/world-war-1/undeclared-war/allied-shipping> accessed 17 August 2023.

[422] For example, in 1915 German military intelligence officer Captain Franz von Rintelen gave deposed Mexican leader General Huerta $800,000, in return for promises that Huerta would attack the US if he regained power and the US joined the Allied side. Britain's Secret Intelligence Service (which had intercepted intelligence linking sabotage in the US to the German secret service) shared this information with the US. Further intelligence sharing lead to Huerta being arrested by US law enforcement at the US-Mexico border, still in possession of this money. Howard Blum, *Dark Invasion: 1915: Germany's Secret War and the Hunt for the First Terrorist Cell in America* (New York, Harper, 2014), 108. Von Rintelen was eventually arrested by the Royal Navy in British waters, when returning to Germany under an alias. He was later extradited to, and imprisoned in, the US for his activities there: US Office of the Director of National Intelligence, 'WWI The Undeclared War, The Dark Invader' (*intel.gov*) <https://www.intelligence.gov/evolution-of-espionage/world-war-1/undeclared-war/dark-invader> accessed 17 August 2023.

[423] The telegram had been intended for Germany's ambassador to Mexico and proposed that Mexico attack the US, if the US joined the War on the Allied side. In return, Mexico would regain its lost territories of Arizona, Texas, and New Mexico. The telegram was decrypted by British signals intelligence on 17 January 1917, and shared with US officials on 24 February. It had been sent via the same US diplomatic cables that President Wilson had allowed to the Germans to access as a courtesy, after their own were severed by the Royal Navy. Wilson apparently cried "Good Lord! Good Lord!" in outrage when made aware of the telegram. US Office of the Director of National Intelligence 'WWI America Declares War, The Zimmerman Telegram' (*intel.gov*) <https://www.intelligence.gov/evolution-of-espionage/world-war-1/america-declares-war/zimmermann-telegram> accessed 16 August 2023.

[424] Robert Benson, 'The Origin of U.S.-British Communications Intelligence Cooperation (1940-41)' (*US Department of Defense website*, 30 Jun 21, original publication unknown) <https://media.defense.gov/2021/Jun/30/2002752843/-1/-1/0/ORIGIN%20US%20BRITISH.PDF> accessed 16 August 2023

[425] 'Ultra' material, codenamed 'Ostrich' in the US: ibid.

[426] William Langer and S. Everett Gleason, *The Challenge to Isolation: The World Crisis of 1937-1940 and American Foreign Policy* (New York: Harper and Row, 1952) 283

shared intelligence of German naval threats with their British counterparts – sometimes leading to co-operative attacks on U-boats.[427]

Ultra material and intelligence exchanges also assisted in operations to counter resumed German activity against the US homeland. From June 1940 the FBI's Special Intelligence Service, under orders from President Roosevelt, used Ultra material to neutralise German spy rings and radio stations in Mexico. Britain's Secret Intelligence Service was handed US information on German spy rings and intelligence activities in North and South America, so it could pinpoint these, passing its findings back to the US.[428] By the time of Pearl Harbor, the US was regularly passing intelligence to various UK agencies as part of an ever-deepening intelligence relationship.

This sharing was secret, but part of the US's wider policy of open partiality towards States it identified as lawful belligerents. The US Neutrality Act of 1939[429] permitted provision of US goods to the Allies on a 'cash and carry' basis; an arrangement denied to the Axis.[430] This was followed by the 'Destroyer Deal' in September 1940, and the Lend Lease Act of March 1941, by which the US arguably "gave up any pretense of impartiality"[431] and permitted the President to impose a discriminatory arms embargo and offer loans in favour of the Allies.[432]

In an act unusual in recent State practice, the US publicly justified its decision to depart from strict neutrality. Attorney General Robert Jackson argued that discriminating between the belligerents was lawful: the nineteenth century neutrality of the Hague Conventions had "been superseded" by the League of Nations Covenant and Kellogg-Briand Pact, which had "swept away the … basis for contending that all wars are alike…". This "discriminating attitude towards warring states [was] really a return to earlier and more healthy precepts" (the distinction between just and unjust wars),[433] given "…[a] state which has gone to war in violation of its obligations acquires no right to equality of treatment from other states… . It derives no rights from its illegality."[434]

This was immediately controversial. Borchard, for example, argued in 1940 that non-belligerency existed only as a US excuse to violate neutrality. He argued Jackson "feels obliged first to explode as obsolete the international law conceptions of war and neutrality of the past two centuries, culminating in The Hague Conventions, and to maintain that a new international law has now been revealed in the Covenant of the League of Nations, the Kellogg Pact [and other treaties]….

[427] Wilfred Deac, 'America's Undeclared Naval War' (1961) 87 US Naval Inst Proc 70
[428] The FBI records Ultra intelligence "helped us, for example, in Argentina, where a network of secret Nazi radio stations had sprung up after being shut down in Brazil in 1942. With the help of Ostrich messages decoded both by the British and by cryptanalysts in the FBI Laboratory, the Bureau learned of the strong political influence and extensive intelligence activities of German agent Johannes Becker, mapped out the operation of his ring, disrupted its work throughout the war, and later shut it down completely in the summer of 1945." FBI, 'A Byte Out of History: A Most Helpful Ostrich: Using Ultra Intelligence in World War II' (FBI Website, 6 October 2011) <https://www.fbi.gov/news/stories/byte-out-of-history-using-ultra-intelligence-in-world-war-ii> accessed 16 August 23.
[429] 1939 Neutrality Act ([1939] 54 Stat 4); Phillip Jessup, 'The 'Neutrality Act of 1939" (1940) 34 AJIL 95; Quincy Wright, 'Rights and Duties under International Law' (1940) 34 AJIL 238
[430] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 545
[431] Ibid, 545 – 546
[432] 1939 Neutrality Act
[433] Robert Jackson, 'Address' [1941] 35 AJIL 348, esp 349 – 350; Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 546.
[434] Jackson, ibid 354.

... The 'new international law' is thus found in the vague and illusory monuments to the myth called 'collective security,' which crumbled under the impact of the first European crisis. "[435]

The US approach, including to intelligence sharing, is arguably the "classical example of deviation from the traditional concept of impartial neutrality".[436] Jackson's points are central to today's arguments for qualified neutrality, as are Borchard's for the counter-argument. Tucker noted in 1955 that the "emergence of so-called 'nonbelligerency,' a term used to indicate the position of States that refrained from active participation in hostilities while at the same time abandoning the duties heretofore imposed upon non-participants" was "…one of the marked developments of the second World War…."[437] The contemporary DoD Manual cites the above, and notes that, given the outlawing of war, the US has "taken the position that certain duties of neutral States may be inapplicable under the doctrine of qualified neutrality," [438]albeit this remains controversial.[439]

For its part, the UK was content to receive intelligence from the neutral US. This was in character, given the UK regularly ignored strict belligerent duties to neutrals to prevent support from reaching Axis States.[440] Winston Churchill (as First Lord of the Admiralty) relied on Axis breaches of international law to flatly reject strict neutrality (and legal compliance) in a December 1939 memorandum recommending occupation of parts of neutral Norway to prevent its iron ore reaching Germany: "The letter of the law must not in supreme emergency obstruct those who are charged with its protection and enforcement … Humanity, rather than legality, must be our guide."[441]

On the Axis side, General Franco's Spain (a natural ally of Nazi Germany) initially declared neutrality, but then converted to 'non-belligerency' following Italy's declaration of war.[442] Spanish intelligence agencies regularly shared with their German counterparts, including to aid operations undermining British control of Gibraltar and its Straits, and monitoring shipping in the region. This enabled several successful sabotage attacks on Gibraltar.[443] Among the significant tribute it offered the Nazi war effort, Vichy France shared intelligence with Germany, albeit while countering German intelligence efforts against itself.[444]

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[435] Edwin Borchard 'The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases', (1940) 34 AJIL 690; Edwin Borchard, 'War, Neutrality and Non-Belligerency', (1941) 35 AJIL 618, 621 ("…It should be no surprise to the Attorney General that many international lawyers do not share his views on international law or how international law is created, or follow his unique construction of [the collective security agreements]."); and Herbert Briggs, 'Neglected Aspects of the Destroyer Deal' (1940) 34 AJIL 569. For an example of more favourable analysis of the US approach, see Quincy Wright, 'The Transfer of the Destroyers to Great Britain' (1940) 34 AJIL 680.
[436] Dinstein, *War Aggression and Self-Defence* 81-82
[437] Robert W. Tucker, *The Law Of War And Neutrality At Sea* (vol 50, U.S. Naval War College International Law Studies, 1955) 192. He adds that the term "has served to indicate varying degrees of departure from the duties traditionally consequent upon a status of non-participation in war" (198).
[438] *DoD Law of War Manual*, §15.2.2
[439] *DoD Law of War Manual*, §15.1.2.3
[440] For example, in July 1940, the Royal Navy attacked and sank the (declared neutral) Vichy French fleet in Algeria, after it resisted an ultimatum to join the Allies or surrender to supervised demobilisation: Neff, *The Rights and Duties of Neutrals*, 186. Britain, France and Sweden were neutral in relation to the Russo-Finnish war, but provided Finland with military supplies to resist Russian invasion, transferred by consent through Norwegian and Swedish territory in 1939-40: Wolff Heintschel Von Heinegg, "Benevolent' Third States in International Armed Conflicts' 547.
[441] Quoted in Nils Orvik, *The Decline of Neutrality 1914 – 1941* (2nd edn, London, Frank Cass, 1971) 245-6. Churchill noted on another occasion that it would not be acceptable for the Allies to become "entangled in the tatters of legal conventions": Ibid 244.
[442] This occurred in June 1940 – see Antonio Marquina, "The Spanish Neutrality during the Second World War" (1998) 14 Am U Intl L Rev, 171
[443] MI5 – The Security Service, 'The Battle For Gibraltar' (*MI5 - The Security Service,* undated) <https://www.mi5.gov.uk/history/world-war-ii/the-battle-for-gibraltar> accessed 2 July 2024
[444] Simon Kitson, *The Hunt for Nazi Spies: Fighting Espionage in Vichy France* (University of Chicago Press, 2007)

Given the technological advances discussed above, the years since the Second World War have seen an increase in inter-State intelligence sharing, including standing inter-State arrangements and the infrastructure associated with these. Much of this remains more or less secret, so determining recent State practice is difficult. Nevertheless, it is possible to identify numerous examples of neutral-belligerent intelligence sharing, and belligerent use of neutral territory for intelligence sharing – both apparently in breach of strict neutrality.

Neutral-belligerent sharing was evident in (for example) the 1980-88 Iran-Iraq war. Kuwait assisted Iraq to repel Iran's invasion by sharing information and intelligence (as well as providing military supplies and logistic support).[445] The declared neutral[446] US did the same, covertly sharing 'highly classified intelligence' on Iranian force dispositions obtained by AWACS[447] aircraft and satellites (as well as supplying arms).[448] US intelligence allegedly "helped Iraq avert defeat and eventually grow … into the regional power that invaded Kuwait in August 1990."[449] Meanwhile, the UN Security Council made no differentiation between neutrals and States that adopted 'non-belligerency', calling on all non-parties to avoid 'escalatory' acts.[450]

During the 1982 UK-Argentina Falklands conflict, the US publicly gave military assistance to the UK, including by sharing intelligence. Both Houses of Congress declared that "the United States cannot stay neutral," albeit the US did not join the conflict.[451] (Then) Senator Joe Biden sponsored one such resolution, naming Argentina as the 'clear' aggressor, and adding "Argentinians must be disabused of the notion … that the United States is truly neutral in this matter."[452] In addition to providing fuel, military coverage of the UK's NATO duties, and munitions, the US continued the UK's standing access to the US Defense Satellite Communications System – and thus to global encrypted messaging and satellite weather information crucial to operations in the South Atlantic.[453] The US allegedly even repositioned a reconnaissance satellite to assist,[454] but rejected a UK request for AWACS aircraft manned by US crews.[455]

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445 Francis A. Boyle, 'International Crisis and Neutrality: United States Foreign Policy toward the Iran-Iraq War' (1992) 43 Mercer L Rev 523 (1992), 553

446 Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 548. Kuwait, France and Saudi Arabia, each "more or less officially, adopted a position of 'non-belligerency'", with France being a leading supplier of arms to Iraq.

447 Airborne early Warning And Control Systems

448 Boyle, ibid 537-538 and 553; Boleslaw Boczek, 'Law of warfare at sea and neutrality: Lessons from the Gulf War' (1989) 20(3) Ocean Dev & Intl L, 239, 255 – 256; Seymour Hersh, 'U.S. Secretly Gave Aid to Iraq Early in Its War Against Iran', *New York Times* (New York, 26 January 1992) 1; J. McGuish and A. Terry, 'How US Sky Spies Help Iraq's War', *Sunday Times* (London, 7 March 1985) 21.

449 Seymour Hersh, 'U.S. Secretly Gave Aid to Iraq Early in Its War Against Iran', *New York Times* (New York, 26 January 1992) 1

450 Ibid 553; UN Docs S/RES/540 of 31 Oct 1983, S/RES/582 of 8 Oct 1986, S/RES/598 of 20 July 1987.

451 von Heinegg, ibid 550; H.S. Levie, 'The Falklands Crisis and the Laws of War' in Alberto Coll and Anthony Arend (eds) *The Falklands War* (Winchester MA, Allen and Unwin, 1985), 64 - 77 at 74 et seq

452 CBC, 'Joe Biden on the Falklands conflict, 1982' (*YouTube* video, 14 Apr 2020, original 1982) <https://www.youtube.com/watch?v=3C9hxsRO7pI> accessed 25 August 2024

453 Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 550-1; Time Magazine, 'Just How Much Did the US help?' *Time Magazine Special Section* (New York, 28 Jun 1982). See also for example George Walker, 'Information Warfare and Neutrality' [2000] 33(5) Vanderbilt J of Tranl L 1079 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1742&context=vjtl> accessed 25 August 2024; Robert Fo, 'CIA files reveal how US helped Britain retake the Falklands', *London Evening Standard* (London, 4 April 2012) <https://www.standard.co.uk/news/world/cia-files-reveal-how-us-helped-britain-retake-the-falklands-7618420.html> accessed 25 August 2024.

454 Michael Getler, 'U.S. Aid to Britain In Falklands War Is Detailed' *The Washington Post* (Washington DC, 6 March 1984) <https://www.washingtonpost.com/archive/politics/1984/03/07/us-aid-to-britain-in-falklands-war-is-detailed/6e50e92e-3f4b-4768-97fb-57b5593994e6/> 4 March 2024

455 Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 551

Following the 9/11 terrorist attacks against the US, NATO determined that an armed attack had occurred against a member State, and engaged Article 5 of the North Atlantic Treaty. On 26 October 2001, it agreed to measures to support the US, including "Enhance[d] intelligence-sharing and cooperation, both bilaterally and in appropriate NATO bodies, relating to the threats posed by terrorism and the actions to be taken against it".[456] Although no relevant IAC then existed,[457] these measures (also including US port and airfield access in NATO countries) had clear potential to conflict with the duties of any NATO member remaining neutral in a subsequent IAC involving the US.

During the 2003 Iraq War, Germany was neutral but provided intelligence to the US Coalition (in common with other States it also allowed US forces continued access to their bases in Germany, including intelligence facilities – see below).[458] A German Court considering (*inter alia*) the deployment of German AWACS aircraft "for … surveillance of Turkish airspace [bordering Iraq]", found that the compatibility of this with Germany's neutrality depended on whether the data gathered by the AWACS was of significance to belligerent combat operations, and whether this was shared with the (belligerent) US and UK.[459]

Standing sharing agreements have been honoured during IACs. The 'Five Eyes' intelligence sharing arrangement and its predecessor agreements date back to the Second World War.[460] While the full details of the modern arrangement are secret,[461] the original 1955 UK-US Agreement imposed positive obligations on both States to share intelligence with each other.[462] The alliance has grown to five members, and the sharing it requires has apparently persisted while these States have been parties to IACs (e.g. the US, New Zealand and Australia in Vietnam, the US and UK – and arguably Canada – in Iraq in 2003).

On belligerent use of neutral territory, while a belligerent in the Vietnam War the US regularly utilised bases in neutral countries that North Vietnam could not attack (including Thailand, Japan and West Germany, all of which included intelligence facilities). China demanded that the UK prevent the US from using its facilities in Hong Kong, but Britain (and Japan) denied that neutrality law applied at all.[463] The US nevertheless justified its operations in Cambodia and Laos as countering alleged violations of those States' neutrality.[464]

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[456] NATO, 'Collective defence and Article 5" (*NATO website*, 4 July 2023) <https://www.nato.int/cps/en/natohq/topics_110496.htm#:~:text=NATO%20invoked%20Article%205%20for,of%20the%20Russia%2DUkraine%20crisis> accessed 29 May 2024

[457] Furthermore, the subsequent invasion of Afghanistan was conducted under a Security Council Resolution.

[458] Peter Hostettler and Olivia Danai, 'Neutrality in Land Warfare' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, Oxford University Press, article last updated November 2015) 347, para 3

[459] Federal Administrative Trial, Judgment BVerwG 2 WD 12.04 of 22 June 2005, cited in Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 543 – 544. See more on this case below.

[460] See US National Security Agency, 'UKUSA Agreement Release' (NSA website) <https://www.nsa.gov/Helpful-Links/NSA-FOIA/Declassification-Transparency-Initiatives/Historical-Releases/UKUSA/> accessed 28 June 2024

[461] See for example: Scarlet Kim et al, 'Newly Disclosed Documents on the Five Eyes Alliance and What They Tell Us about Intelligence-Sharing Agreements' (*Lawfare*, 23 April 2018) <https://www.lawfareblog.com/newly-disclosed-documents-five-eyes-alliance-and-what-they-tell-us-about-intelligence-sharing-agreements> accessed 28 June 2024

[462] 1955 U.K.- U.S. Communications Intelligence Agreement ('UKUSA Agreement') <https://media.defense.gov/2021/Jul/15/2002763729/-1/-1/0/NEW_UKUSA_AGREE_10MAY55.PDF> accessed 28 June 2024, and ibid.

[463] Ibid

[464] Patrick M. Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 17 Harv Intl L J 249, 270

In the 1973 Yom Kippur war, some European States "denied the US use of its military bases for the purpose of assisting Israel by air, as well as use of their national airspace."[465] They did not expel US intelligence personnel from bases on their territory, however, or restrict their passing intelligence to Israel.

Following the 2003 Iraq War, the German Federal Administrative Tribunal previously mentioned also found that Germany's consent to US operational use of its territory violated Germany's neutrality.[466] The Court concluded that the Hague Conventions prohibited these acts, notwithstanding Germany's NATO membership and standing 'status of forces' agreements.[467] (Germany had not been alone in this; other European countries had provided varying degrees of support to the Coalition that would normally be barred by strict neutrality.)[468] The Court's decision has been criticised,[469] however, for applying The Hague Conventions strictly and without proper inquiry into whether these remained good law.

## Ukraine post-2022

Inter-State intelligence sharing since Russia's full-scale invasion of Ukraine is described in the Introduction. The US has overtly supported belligerent Ukraine (including by publicising intelligence).[470] So have the UK[471] and Germany,[472] both of which have formalised their co-operation with Ukraine (explicitly including intelligence sharing) in publicised bilateral security agreements.[473] NATO has publicly recognised that its constituent members are sharing intelligence with Ukraine and with each other, to guard against Russian hybrid threats related to the war.[474] On

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465 Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 554. This appears to have been because of pressure exerted by Arab States, reinforced by their control of oil supplies.
466 The Tribunal also found that provision of German troops to guard US installations in Germany, and naval escorts for US transports violated neutrality. It further concluded that the German government had assisted in an illegal attack on Iraq. Federal Administrative Trial, Judgment BVerwG 2 WD 12.04 of 22 June 2005, cited ibid 543 – 544.
467 Nikolaus Schultz, 'Case Note – Was the war on Iraq Illegal? – The Judgment of the German Federal Administrative Court of 21st June 2005' (2006) 7 German LJ 1 <https://web.archive.org/web/20070927042539/http:/www.germanlawjournal.com/article.php?id=684#_ftnref41> accessed 1 March 24, esp part C
468 Switzerland, for example, continued arms exports to the US and simultaneously banned exports to Iraq, but denied overflights of belligerent aircraft due to the lack of Security Council backing for either side: Peter Hostettler and Olivia Danai, 'Neutrality in Land Warfare' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, Oxford University Press, article last updated November 2015) 347, para 19.
469 Ibid
470 See discussion above, and Ken Klippenstein and Sarah Sirota, 'U.S. Quietly Assists Ukraine with Intelligence, Avoiding Direct Confrontation with Russia' (*The Intercept*, 18 March 2022) <https://theintercept.com/2022/03/17/us-intelligence-ukraine-russia/> accessed 25 August 2024.
471 UK Prime Minister's Office, 'PM in Kyiv: UK support will not falter' (*gov.uk*, 12 January 2024) <https://www.gov.uk/government/news/pm-in-kyiv-uk-support-will-not-falter> accessed 25 August 2024
472 Germany, 'Agreement on security cooperation and long-term support between the Federal Republic of Germany and Ukraine' (*Die Bundesregierung*, 16 February 2024) <https://www.bundesregierung.de/resource/blob/998352/2261062/d84fa168bdd3747913c4e8618bd196af/2024-02-16-ukraine-sicherheitsvereinbarung-eng-data.pdf?download=1> accessed 25 August 2024; see also accompanying article 'Visit by Ukrainian President Zelensky
"We will not let up in our support for Ukraine"' (*Die Bundesregierung*, 16 February 2024) <https://www.bundesregierung.de/breg-en/news/chancellor-zelensky-security-agreement-2260300> accessed 25 August 2024
473 Ibid
474 NATO, 'NATO's response to Russia's invasion of Ukraine' (*NATO website*, 2 July 2024) <https://www.nato.int/cps/en/natohq/topics_192648.htm> accessed 25 August 2024

the other side, Russia is alleged to have received intelligence support (among other things) from China.[475]

No country has fully set out its reasons for these apparent breaches of strict neutrality. A US Congressional Research Service Legal Sidebar notes, however, that countries including the US have previously adopted qualified neutrality, allowing "non-neutral acts when supporting the victim of an unlawful war of aggression".[476] It adds that even if the US cannot lawfully qualify its neutrality, any breach will have limited legal consequences, given the prohibition on the use of force and that violating neutrality does not automatically render an assisting State a belligerent.[477]

Most States assisting Ukraine have instead justified their support through broader references to the collective right to self-defence of Ukraine (perhaps wrongly – see below).[478] A few, like Switzerland, have relied on strict neutrality to justify their decisions not to support Ukraine – showing some States continue to follow strict neutrality.[479] Russia does not seem to have made explicit reference to neutrality in its protests and threats to States assisting Ukraine, but in an April 2022 diplomatic note it did accuse countries providing equipment of violating "rigorous principles" governing the transfer of weapons to conflict zones.[480]

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[475] Such as satellite imagery: see Alberto Nardelli and Jennifer Jacobs, 'China Providing Geospatial Intelligence to Russia, US Warns' (*Bloomberg*, 6 April 2024) <https://www.bloomberg.com/news/articles/2024-04-06/china-is-providing-geospatial-intelligence-to-russia-us-warns> accessed 25 August 2024
[476] Congressional Research Service, 'International Neutrality Law and US Military Assistance to Ukraine' (*CRS Reports*, 26 April 2022) <https://crsreports.congress.gov/product/pdf/LSB/LSB10735> accessed 15 July 2024
[477] Ibid
[478] See justifications offered by France, Germany, Greece, Italy, Luxembourg, Romania, the UK, and the Nordic and Baltic States and other UN Members, analysed in Giulio Bartolini, 'The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice' (*Lawfare Blog*, 11 April 2023) <https://www.ejiltalk.org/the-law-of-neutrality-and-the-russian-ukrainian-conflict-looking-at-state-practice/> accessed 16 July 2024.
[479] See for example Swiss Government report on neutrality: Swiss Federal Council, *Clarté et orientation de la politique de neutralité*, 26 October 2022, 23, para 5.3, available at: <https://www.newsd.admin.ch/newsd/message/attachments/73618.pdf> accessed 16 July 2024: "(l)e droit de la neutralité interdit la transmission directe de matériel de guerre…En conséquence, la Suisse ne peut fournir du matériel de guerre provenant des stocks de son armée ni à la Russie ni à l'Ukraine'.
[480] Karen DeYoung, 'Russia warns U.S. to stop arming Ukraine' (*The Washington Post*, 14 April 2022) <https://www.washingtonpost.com/national-security/2022/04/14/russia-warns-us-stop-arming-ukraine/> accessed 10 August 2024

# CHAPTER 6 – QUALIFIED NEUTRALITY

This thesis has so far considered the history of neutrality, impact of strict neutrality on both acts of and means for intelligence sharing, and recent State practice. The final two chapters seek to answer the question raised at its opening, crucial for a modern State wishing to assist a victim of aggression: can a State not party to an IAC lawfully share conflict-related intelligence with a belligerent under any circumstances?

The preceding chapters have outlined: (1) the constant flux in which neutrality has developed; (2) the lack of any recent authoritative codification of neutrality law; (3) the antiquated nature of State codifications, and the difficulties in applying these to contemporary intelligence sharing; (4) recent State practice suggesting strict neutrality is rarely adhered to in inter-State intelligence sharing; and (5) the general consensus that neutrality law nevertheless persists in some form.

As the DoD Manual puts it: "Some [neutrality law rules] were formulated long ago. Moreover, treaties concerning the law of neutrality might, by their terms, apply only to a limited set of international armed conflicts, and the rules prescribed in those treaties might not reflect customary international law. In addition, it may be important to consider the implications of more recent treaties [particularly the UNC]."[481] It is appropriate to question whether the strict rules identified above must be applied to intelligence sharing in all circumstances.

If neutral States are able to lawfully qualify their neutrality, then this may allow them to share intelligence with belligerents. This chapter therefore examines whether a State may adopt a qualified neutral stance.[482] The next examines what other potential international law justifications exist for sharing.

## The argument against qualified neutrality

There are compelling arguments that international law has not developed to allow for qualified neutrality, and thus (without a UNSC resolution to prescribe otherwise) non-party States must remain strictly neutral, including in sharing intelligence. Strict neutrality, it is argued, remains the best guard against escalation and spread of conflict. State practice in conflict with strict neutrality can be viewed as straightforward unlawful behaviour rather than a sign that the law has developed.

In 2007 von Heinegg reviewed post-WW2 State practice, concluding that it: "does not allow the conclusion that 'non-belligerency' has become a part of customary international law." He found most States aiding belligerents advanced other legal reasons for doing so, or simply acted clandestinely, suggesting qualified neutrality was unsupported by *opinio juris*. Highlighting the lack of references to 'non-belligerency' in publications such as the Helsinki Principles and San Remo Manual,[483] he concluded that acts contrary to strict neutrality "should … be characterized as what they are: violations of the law of neutrality."[484] In practice, states return to strict neutrality when

[481] *DoD Law of War Manual*, §15.1

[482] As noted above, this thesis uses the term 'qualified neutrality' to cover any status adopted by a State that is more favourable to a party to an IAC than strict neutrality would allow. Thus the term is intended to include any approach that might be labelled 'non-belligerency' or 'benevolent neutrality.'

[483] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict', 553

[484] Ibid 556

these rules are actively enforced.[485] This is a long-standing challenge. In 1941, Briggs attacked the US's basis for its aid to Allied belligerents: "International law recognises no such thing as the so-called 'status' of non-belligerency. 'Non-belligerency' is in reality only a euphemism designed to cover [breaches of neutrality law]."[486]

Bothe explains qualified neutrality as either a violation of neutrality law, or a feature of conflicts that (in his view) are too limited in scope to engage neutrality.[487] Similarly, Hostettler and Danai acknowledge examples of non-party States assisting belligerents, but deny this has altered the "concept of neutrality", and suggest that an approach like that adopted by the US pre-Pearl Harbor "nowadays … is considered to be a more or less grave breach of some or all of the rules of the law of neutrality". They add that partial breaches of neutrality are often accepted by disadvantaged belligerents to avoid expansion of the conflict, or because no effective response is available.[488] After an extensive study of neutrality's history and State practice, Upcher concluded that, while neutrality was "languishing in a state of disrepair," qualified neutrality was difficult to sustain and not reflected in customary law.[489]

The lack of codification and confused State practice since 1907 make defaulting to the tangible wording of the Hague Conventions a straightforward approach. Many States remain party to the Conventions.[490] The Group of Experts preparing the 2009 Harvard Manual on Air and Missile Warfare noted that "[IACs following] the end of WWII cast doubts on the continued applicability of the traditional law of neutrality," but offered evidence of core neutrality rules and principles.[491] The Manual set out rules drawn from the Hague Conventions and wider strict neutrality. The 1994 San Remo Manual considered the same issue with a similar result, finding: "All rules on neutrals [in the Manual] apply to all States not party to the conflict, even to those who may consider themselves authorized to depart from certain rules of neutrality".[492]

Proponents argue that, given the UNSC has never functioned as intended and appears increasingly paralysed, the best route to limiting conflicts is for all States to be compelled to follow strict neutrality.[493] This requires belligerents to keep conflicts outside neutral territory and non-party

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[485] For example, when the Arab States invoked neutrality against US supplies to Israel in the Yom Kippur War: ibid 553-554

[486] Herbert Briggs, 'Neglected Aspects of the Destroyer Deal' (1940) 34 AJIL 569-587 (1940) at 569.

[487] Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law,* 603

[488] Peter Hostettler and Olivia Danai, 'Neutrality in Land Warfare' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, Oxford University Press, article last updated November 2015) 347 at paras 3 and 4. Later in the same article they do suggest that, in the case of armed conflicts that become international, "…the law of neutrality is an option for States who do not wish to become involved, or which would like to concentrate on humanitarian tasks in order to support the quest for a peaceful settlement of the dispute" [para 22], and that "In a situation where a significant number of States are bound by military alliances, the role of the remaining neutral States in the international system has become more rather than less important" [para 28], although this may be a reference to permanent neutrality – the passages are not entirely clear.

[489] James Upcher, *Neutrality in Contemporary International Law* (Oxford Monographs in International Law, Oxford University Press, 2020), Conclusion. For further argument against qualified neutrality see for example: Constantine Antonopoulos, *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality* (Cambridge University Press, 2022).

[490] Marcus Krajewski, 'Neither Neutral Nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine' (*Voelkerrechtsblog*, 9 March 2022) <https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict> accessed 15 July 2024

[491] *Harvard Manual on Air and Missile Warfare*, chapeau to Section X, para 2

[492] *San Remo Manual on Naval Warfare* 57–60, esp para 13.3

[493] For example: Carl Salans, Deputy Legal Adviser, Department of State, comment to R.R. Baxter, 'The Legal Consequences of the Unlawful Use of Force under the Charter', (1968) 62 Proc ASIL 68, 76 ("When armed conflict occurs, the purpose of international law ought to be to limit the scope of the conflict. This is also a purpose of the

States to be neutral in fact as well as name (including in not offering belligerents conflict-related intelligence), meaning neutral-belligerent friction is less likely.[494] Clear boundaries prevent escalation and shorten conflicts.[495] In contrast, it is argued, qualified neutrality allows States to ignore these constraints, risking opacity and escalation. In Bothe's view: "It is incompatible with this conflict-restraining function of neutrality that States should try to evade the duties flowing from their neutral status by styling themselves non-belligerents."[496] Qualified neutrality introduces a 'grey area,' that makes it "all too easy to avoid duties of neutrality by just declaring a different status."[497]

Furthermore, non-party States "in many cases stand to profit economically, politically or ideologically" from relaxed neutrality rules.[498] Potential State reasons to support belligerents are legion; many are self-interested and ignoble. Permitting States to qualify their own neutrality, it is argued, effectively allows them to support the belligerent of their choice, not least as all parties in any given IAC will claim they are acting in self-defence. Without UNSC direction, proponents argue that uniform adherence to strict neutrality is the only effective constraint on non-party States. Just as the law on conducting hostilities treats belligerents equally, so must neutrality.

Even proponents of qualified neutrality "recognise that [its operation] presents considerable difficulties for adhering states."[499] Say a non-party State (State A) decides to qualify its neutrality to support an IAC belligerent (State B) by providing it with military intelligence. B's adversary (State C) will view A as complicit with B.[500] Given C will likely paint B as the aggressor, C will argue that A is supporting B's unlawful use of force, and that self-help measures (including the use of force, if allowed by neutrality) against A are justified to halt the flow of intelligence. A and B may apply the same logic to a neutral supporting C with intelligence, and thus the conflict may widen.

Even if C is in fact the aggressor in the example above, A is not observing the neutrality duties that guaranteed its inviolability and thus "cannot expect to receive all the protection that flows from [these]."[501] How exactly belligerents might be permitted to respond to qualified neutrals is unclear, but it is argued that wider neutrality law will still apply to the belligerent-'qualified neutral' relationship, and thus permit belligerent action against the latter.[502] Alternatively, the relationship between such a State and an (alleged aggressor) belligerent may be governed by no legal rules at

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Charter. The law of neutrality serves that purpose. Small States, like Cambodia, would find themselves quickly engulfed in conflict if they had to act on a determination that one side or the other in hostilities was acting unlawfully. And nuclear States run another kind of risk if they have to take sides in every conflict.")

[494] Yoram Dinstein, 'The Laws of Neutrality' (1984) 14 Isr YB Hum Rts 80

[495] See for example *Harvard Manual on Air and Missile Warfare*, chapeau to Section X, para 3: "On the one hand, [neutrality rules] are to protect Neutrals and their nationals against the harmful effects of the ongoing hostilities. On the other hand, they aim at the protection of interests of any Belligerent Party against interference by Neutrals and their nationals to the benefit of the enemy. Thus, these rules and principles aim to prevent an escalation of an ongoing international armed conflict." See also Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law,* 603: "This regime of rights and duties of the neutral state is an important international legal tool for restraining conflicts. By establishing a clear distinction between neutral states and states parties to the conflict, international law prevents more states from being drawn into the conflict."

[496] Michael Bothe, 'Neutrality, Concept and General Rules' (n 53), para 3

[497] Michael Bothe 'Neutrality at Sea' in Ige Dekker and Harry Post (eds), *The Gulf War 1980 – 1988* (Dordrecht, 1992) 205-211 at 207

[498] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 554

[499] Ibid 555; Andrea Gioia, 'Neutrality and Non-belligerency' in Harry Post (ed), *International Economic Law and Armed Conflict* (Dordrecht, 1992) 51-110, 100

[500] Gioia, ibid

[501] Bring, 'Comments' in Ige Dekker and Harry Post (eds), *The Gulf War 1980 – 1988* (Dordrecht, 1992) 243, 245

[502] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict', 556

all.[503] Whether neutrality law sits within the *jus ad bellum* or *jus in bello* is debatable – an issue that cannot be resolved here.[504]

Strict neutrality proponents conclude that, instead of muddying the waters by partial behaviour, a State wishing to assist a victim of aggression should join the relevant IAC. This will clarify the State's position (as a belligerent), and thus its relationships with all other States. In the example above, if B is a genuine victim of aggression, then Article 51 UNC[505] and customary international law[506] will permit A to join the IAC in collective self-defence of B, assuming B requests this. A may become a belligerent by taking part in hostilities[507] or declaring its status. Having shed its neutral status, A will be able to share military intelligence with B.[508]

Thus, Pedrozo argues that even widespread opposition to the invasion of Ukraine "does not justify turning a blind eye to the rule of law in general or the storied law of neutrality in particular." The "validity of qualified neutrality is questionable 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."[509] Others agree that support for Ukraine breaches neutrality, arguing for example that providing intelligence to Ukraine for military targeting must be an unlawful act.[510]

## The argument for qualified neutrality – especially in relation to intelligence sharing

Counter-arguments to the above generally contend that international law has developed so that States may lawfully qualify their neutrality. This thesis will aver that States may do so, at least to share intelligence.

Strict neutrality is a relic of pre-twentieth century international law, at odds (if not completely incompatible) with modern international law, particularly the UNC. It requires a State that wishes to assist a victim of aggression to either join the relevant IAC – thus escalating and spreading it – or otherwise to leave the victim State unaided. By forcing States to choose between abstention and

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[503] Ibid 552
[504] See for example: Pearce Clancy, 'The Law of Neutrality: Jus ad Bellum or Jus in Bello?' (2022) J Int'l Humanitarian Legal Stud 13(2), 353 <https://doi.org/10.1163/18781527-bja10055> accessed 29 August 2024; Natalino Ronzitti, 'Neutrality, non-belligerency, and permanent neutrality according to recent practice and doctrinal views' (2024) 29(1) J Conflict & Sec L 55 <https://doi.org/10.1093/jcsl/krae001> accessed 29 August 2024
[505] The full wording of Article 51 is: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."
[506] *Nicaragua* and *Oil Platforms* cases (n 144)
[507] See, for example, Common Article 2 to the 1949 Geneva Conventions.
[508] Both because it will no longer be bound by its neutral duty to act impartially, and because Article 21 of the Articles on State Responsibility provides that acting in lawful self-defence, in conformity with the UN Charter, is a circumstance that precludes the wrongfulness of a State's actions.
[509] Raul Pedrozo, 'Ukraine Symposium – is the Law of Neutrality Dead?' (*Articles of War*, 31 May 2022) <https://lieber.westpoint.edu/is-law-of-neutrality-dead/> accessed 22 May 2022
[510] Kevin Heller and Lena Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' (2022) J Int'l Humanitarian Legal Stud 13(2), 251-274, available at <https://doi.org/10.1163/18781527-bja10053> accessed 15 July 2024. Heller and Trabucco do acknowledge that neutrality law may change "precisely as a result of the situation in Ukraine."

impartiality on one hand, and joining a conflict on the other, strict neutrality blocks assistance to victim States, and permits the triumph of aggression.

It will be clear from the conclusions above that strict neutrality makes little allowance for non-party States to share conflict-related intelligence with belligerents. Other forms of assistance will also be barred. There is little that non-parties can do to help victim States, by intelligence sharing or otherwise.

States can of course join the relevant IAC in order to act partially towards belligerents, but this does not solve the issue. The consequences of belligerency are potentially enormous, for the State, the relevant region, and possibly (depending on the IAC) the global community. In a conflict between nuclear-armed States, these could be literally existential. Belligerency may be politically, militarily or otherwise impossible for a State. Adding a belligerent also – by definition – escalates the relevant conflict. There is a strong argument that States should not have to take this step to lawfully aid a victim of aggression.

If the would-be assisting State cannot join the conflict, and qualified neutrality is not permitted, then (without an unlikely UNSC resolution) it cannot properly help the victim. Even a significant international consensus identifying the aggressor State offers no legal basis. (A March 2022 UN General Assembly resolution passed by 141 votes to 5[511] deplored "the aggression by [Russia] against Ukraine in violation of Article 2(4) of the Charter" and demanded that Russia cease using force immediately.[512] It was ignored, and similar resolutions have followed since, but these all lack the force of UNSC resolutions.)[513]

If the non-party State nevertheless shares intelligence with the victim, then it exposes itself to claims, countermeasures or even force from the aggressor. Strict neutrality would frame these as a lawful assertion of the aggressor's belligerent rights, because: "Supporting the party to a conflict is a violation of the law of neutrality even if the supported party is a victim of aggression."[514] Even if the 'wronged' aggressor does not go this far, it can accuse the assisting State of breaking international law, thus undermining its credibility and introducing confusion as to the legality of a conflict. Russia has advanced multiple false legal justifications for its invasion of Ukraine.[515]

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[511] 35 abstentions

[512] UN General Assembly Resolution ES-11/1 (2 March 2022) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/293/36/PDF/N2229336.pdf?OpenElement> accessed 22 May 2023

[513] See for example: UN General Assembly Resolutions ES-11/4 (12 October 2022 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/630/66/PDF/N2263066.pdf?OpenElement> and ES-11/6 on 23 February 2023 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N23/063/07/PDF/N2306307.pdf?OpenElement> both accessed 22 May 2023

[514] Michael Bothe '18 The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* 611 - 612

[515] See for example the Canadian Government's collation of Russia's disinformation surrounding and attempting to justify the Ukraine conflict (including on international law grounds): Government of Canada, 'Countering disinformation with facts - Russian invasion of Ukraine' (*Canadian Government*, updated to 26 Aug 2024) <https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crises/ukraine-fact-fait.aspx?lang=eng> accessed 29 August 2024. This records quasi-legal justifications offered by Russia for the conflict including alleged Polish designs on Ukrainian territory, protection of those in Eastern Ukraine, and NATO's alleged breach of guarantees that it would not expand eastwards after the Cold War.

For the current Russia-Ukraine conflict, say a non-party State has intelligence on Russian units in Ukraine, likely to significantly assist Ukraine's lawful self-defence. Under strict neutrality, to share this intelligence the State must choose either to become a belligerent against Russia, or to act unlawfully by breaching its neutral duties (and leaving itself open to countermeasures). The safest course will be not to share the database, leaving a victim of aggression without vital intelligence.

A strong argument for the crystallisation of qualified neutrality as a lawful approach is that, when faced with the above situation, many States have rejected strict neutrality's binary choice. The sharing of large amounts of operational intelligence by the US and ally States discussed above was a clear rejection of this. While it is arguable that some of this may also have rendered assisting States *de facto* belligerents (thus not bound by neutrality),[516] the sharing States have not made any public suggestion that they consider themselves so. They have instead justified the intelligence and other support on Russia's plainly illegal aggression and concurrent blocking of any UNSC action to address the conflict. The nature of that war and associated State action has led some commentators to alter their positions in favour of qualified neutrality. Von Heinegg, for example, previously sceptical of 'benevolent' neutrality,[517] has described the situation as a 'game changer.'[518]

The assistance offered to Ukraine has been an important factor in – at least for now – preventing Russia from achieving its invasion goals. This highlights another difficulty with strict neutrality. It is said to limit the extent and duration of conflicts. Yet, in blocking aid to victims, it enables aggressor States. The latter are left unchecked to pursue their war aims and conduct unlawful behaviour often consistent with aggression, such as the law of armed conflict breaches[519] and human rights abuses committed by Russia in Ukraine.[520] Strict neutrality may indeed shorten or contain conflict – but by guaranteeing the triumph and dominance of an undemocratic aggressor, establishing permanent circumstances that become a standing, immovable breach of international law. Enabling aggression arguably encourages further breaches of the UNC, by the offending State and others (consider Russia's further actions after the limited response to its actions in Chechnya, Georgia, Crimea and the Donbas, and the interest of other autocratic States in the international response to these).[521]

Strict neutrality may thus hasten the defeat of victim States, block aid that could prevent permanent illegal occupation or annexation, and encourage repeated aggression. This does not meet its 'containment of conflict' aim. Other strict neutrality duties also risk friction and conflict. Consider for example the reaction of a belligerent State fighting in self-defence if its intelligence facilities,

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[516] See, for example, Michael Schmitt, 'Ukraine Symposium – Are We at War?' (*Articles of War*, 9 May 2022) <https://lieber.westpoint.edu/are-we-at-war/> accessed 30 May 24. Whether intelligence sharing that breaches neutrality also crosses the line into belligerency is not considered in this thesis.
[517] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict'
[518] Wolff Heintschel von Heinegg, 'Neutrality in the War Against Ukraine' (*Articles of War*, 1 March 2022) <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/> accessed 18 August 2024
[519] For example, the allegations outlined in recent International Criminal Court arrest warrants issued for President Putin, Maria Alekseyevna Lvova-Belova, and two senior Russian military officers: International Criminal Court, 'Situation in Ukraine: Investigation' (ICC-01/22) <https://www.icc-cpi.int/situations/ukraine> accessed 30 May 2024
[520] See for example US State Department, '2023 Country Reports on Human Rights Practices: Ukraine—Russia-occupied Areas' (*US State Department*, 2023) <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/ukraine/russia-occupied-areas/> accessed 30 May 24.
[521] See for example a famous (originally pre-war) Chatham House report on how to deter Russia: Keir Giles 'What deters Russia - Enduring principles for responding to Moscow' (*Chatham House,* 23 September 2021, updated 2 March 2023) <https://www.chathamhouse.org/2021/09/what-deters-russia> accessed 13 June 2024

lawfully established by treaty in a neutral State, were suddenly shut down by the neutral and its military personnel interned.

These criticisms are not new. Returning to AG Jackson's justifications for US actions in 1941, he noted: "weighty names and even heavier texts are found to contend that our only legal alternatives are to enter the war ourselves or to treat all belligerents with impartiality."[522] Faced with German and Japanese aggression, the US rejected these choices. Jackson argued that forcing States to choose between "the absolute category of neutrality" and belligerency: "will not square with the test of actual state practice," and that there was "a third category in which certain acts of partiality are legal even under the law of neutrality."[523]

Strict neutrality suited an era when war was a lawful act of State, but the outcomes of its application in modern conflicts with an identifiable victim are contrary to the UNC regime.[524] Requiring impartiality in the face of aggression does not achieve "the suppression of acts of aggression or other breaches of the peace."[525] The UNC does not explicitly bind States to inaction, and makes no reference to neutrality. As Dinstein puts it: "The trouble is that the idea of neutrality presupposes equality between the two belligerents (the aggressor and the victim of aggression), and is actually derived from the concept of the legality of war. Since a war of aggression nowadays … is branded as a crime against peace, the question arises whether neutrality is still necessary or, for that matter, possible."[526]

It is therefore unsurprising that throughout the twentieth century commentators have advanced a middle status between neutrality and belligerency.[527] Lauterpacht argued that the existence of the UNC meant it was "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", and that the Charter meant this right "assume[d] the clear complexion of a legal duty".[528] He noted neutrals might treat belligerents impartially for their own safety, but "they need not do so wherever they feel in the position actively to assert the principle" given "the historic foundation of neutrality as an attitude of absolute impartiality has disappeared with the renunciation and the abolition of war as an instrument of national policy."[529] There has been ample assertion that assisting Ukraine "violates no legal duty of neutrality".[530] The UNGA resolutions clearly naming Russia as the aggressor are arguably sufficient in themselves to justify this.[531]

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522 Robert Jackson, 'Address' [1941] 35 AJIL 348. Emphasis added.
523 Ibid 351
524 UN Charter, Art 1
525 Ibid, Art 1(1)
526 Yoram Dinstein, 'The Laws of Neutrality' (1984) 14 Isr YB Hum Rts 80, 81
527 See for example: Krzysztof Skubiszewski, 'Use of Force by States: Collective Security, Law of War and Neutrality' in Max Sorensen (ed) *Manual of Public International Law* (New York, St Martin's Press, 1968) 840 et seq; Dietrich Schindler, 'Transformations in the Law of Neutrality since 1945', in Astrid Delissen and Gerard Tanja (eds) *Humanitarian Law of Armed Conflict—Challenges Ahead: Essays in Honour of Frits Kalshoven* (Nijhoff, 1991); Andrea Gioia, 'Neutrality and Non-belligerency' in Harry Post (ed), *International Economic Law and Armed Conflict* (Dordrecht, 1992) 100; Bring, 'Comments' in Ige Dekker and Harry Post (eds), *The Gulf War 1980 – 1988* (Dordrecht, 1992) 243, 244; Gennady Melkov, 'Neutrality in War' (1978) Soviet Yearbook of International Law 237.
528 Lassa Oppenheim, *International Law* (vol 2, 7th edn, Herscht Lauterpacht ed, Longmans, 1952) 221, §61
529 Ibid
530 Oona Hathaway and Scott Shapiro, 'Supplying Arms to Ukraine is Not an Act of War' (*Lawfare Blog*, 12 March 2022) <https://www.lawfaremedia.org/article/supplying-arms-ukraine-not-act-war> accessed 29 August 2024
531 Stefan Talmon, 'The Provision of Arms to the Victim of Armed Aggression: the Case of Ukraine' (*Bonn Research Papers on Public International Law*, Paper No. 20/2022, 6 April 2022) <https://ssrn.com/abstract=4077084> accessed 15 July 2024

It might be argued that few IACs are as clear examples of unlawful aggression as the Ukraine-Russia conflict – and that strict neutrality is therefore needed to prevent States deciding on the legality of more opaque IACs. The issue with this argument is that States make exactly this judgment when choosing to act in collective self-defence.

Article 51 UNC preserves the right of States to individual and collective self-defence against armed attack, "until the Security Council has taken measures necessary to maintain international peace and security." These measures must be reported to the UNSC.[532] Until the UNSC acts (there is no requirement that action be forthcoming), Article 51 allows States to judge for themselves the lawfulness of belligerent actions, when deciding whether to join an IAC in collective self-defence of a belligerent. The UNSC's "responsibility for international peace and security does not exclude member States' right to independently evaluate the legality of a use of force [where it is unable to act]", because the UNSC's responsibility is primary, not exclusive.[533] States must make this decision reasonably, without blind reliance on a belligerent's word.[534] Should an assisting State use force in mistaken reliance on collective self-defence this may be an internationally wrongful act, even if the mistake was honest and reasonable.[535]

Given States exercise this judgement in choosing to become belligerents, it is dissonant to maintain they cannot do so – subject to the same requirement of diligence, and at their own risk – in deciding to qualify their neutrality in favour of a belligerent in order to share intelligence. As Quincy Wright noted in 1940, leaving determination of breaches of international law to States is perhaps "a condition of anarchy", but the "jural situation becomes … equally confused if non-participating states unilaterally decide that none of the participants in hostilities have broken obligations, and so proclaim neutrality."[536]

Insisting on strict neutrality in the face of aggression also threatens the wider legitimacy of international law. Jackson argued that: "the work-a-day world will not accept an unrealistic and cynical assumption that aggression, by a state that had renounced war by treaty, rests on the same basis as defense against an unprovoked attack in violation of treaty."[537] Norton observes that States

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[532] In full, UN Charter, Art 51 provides that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

[533] Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 552.

[534] *Nicaragua* case (n147), paras 193 – 226

[535] Argued for example in Marko Milanovic January 15, 2020, Mistakes of Fact When Using Lethal Force in International Law: Part II, Marko Milanovic (*EJIL: Talk!*, 15 January 2020) <https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-ii/> accessed 1 June 2024

[536] Quincy Wright, 'The Present Status of Neutrality' (1940) 34 AJIL 391, 402

[537] Robert Jackson, 'Address' [1941] 35 AJIL 348, 350. He added at 356, noting the difficulty of determining an aggressor (he was of course speaking before the formation of the UN) that: "In flagrant cases of aggression where the facts speak so unambiguously that world opinion takes what may be the equivalent of judicial notice, we may not stymie international law and allow these great treaties to become dead letters. Intelligent public opinion of the world which is not afraid to be vocal and the action of the American states has made a determination that the Axis Powers are the aggressors in the wars today which is an appropriate basis in the present state of international organization for our policy [of assisting the UK war effort]."

maintaining their neutrality may serve "to some extent [to] legitimize the legal status of the [relevant] conflict and impede its potential resolution by the appropriate international bodies".[538]

Given: (1) the strong, persisting arguments for the incompatibility of strict neutrality and the UNC; (2) the considerable State practice of qualified neutrality since the Second World War, and especially since the invasion of Ukraine; (3) the increasing State and expert support for the lawfulness of qualified neutrality; and (4) the impracticality and unrealistic outcomes of applying strict neutrality rules to modern international relations generally and intelligence sharing in particular, there is a strong argument that States may lawfully qualify their neutrality to share intelligence or otherwise support a victim of aggression. Qualified neutrality will not, of course, allow a State to assist an aggressor (as, for example, Belarus has done in relation to Russia's invasion), as this would conflict with its overriding UNC obligations described above.

Under strict neutrality, an 'aggrieved' belligerent – disadvantaged by a supposed neutral's support to one of its adversaries – may take self-help measures (sometimes including force) to respond to the relevant violation of neutrality. If qualified neutrality is lawful, how may such a belligerent react to a qualified neutral's acts to assist its enemies, including by sharing intelligence?

[538] Patrick M. Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 17 Harv Int'l L J 249, 252

# CHAPTER 7 - OTHER POTENTIAL MODIFICATIONS TO NEUTRAL DUTIES

This chapter examines what justifications – other than a UNSC resolution or standalone qualified neutrality – exist to enable a non-party State to share intelligence with an IAC belligerent. While the chapter is framed as examining grounds for sharing separate to the standalone concept of qualified neutrality, much of the below can also be deployed as further arguments for the latter's existence. Thus in some respects this chapter extends its predecessor's arguments.

## Collective self-defence of victim State

As discussed above, the UNC and customary law allow States to act in collective self-defence of a State under armed attack, at least "until the Security Council has taken measures necessary to maintain international peace and security."[539] In doing so, assisting States adjudge which of the belligerents is acting lawfully. All actions in national self-defence must be necessary and proportionate.[540]

Article 21 of the International Law Commission's Articles on State Responsibility (ASRs) provides that: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the [UNC]." This excuses otherwise unlawful acts (including a use of force, one of the gravest violations of international law) carried out in legitimate collective self-defence of another State. These therefore do not engage the assisting State's international responsibility. Thus, States arguably "may help the victim of aggression without violating their neutrality obligations because self-defense is … a treaty-based and customary law 'circumstance precluding wrongfulness'… ."[541]

Self-defence is thus both a justification (given the explicit permission in the UNC) and an excuse (because it precludes wrongfulness) for otherwise unlawful acts. Can a State invoke self-defence as a justification and/or an excuse for intelligence sharing with a victim State that breaches neutrality law?

As discussed above, the answer is straightforward if the assisting State becomes a belligerent in collective self-defence, as it will shed its neutrality duties. If, however, the State does not become a belligerent, may it still rely on self-defence when accused of breaching its neutrality? The answer to this depends on the unsettled question of whether a State may invoke collective self defence to justify or excuse acts that fall short of involvement in hostilities.

A restrictive view holds that self-defence only exists as an exception to the prohibitions on the threat and use of force.[542] A State may therefore only invoke self-defence when threatening or

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[539] UN Charter, Art 51

[540] *Nicaragua* case (n147) para 176; *Nuclear Weapons* Advisory Opinion (n152), para 41; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment (Merits) [2003] ICJ Rep 161, para 76.

[541] Michael Schmitt and Casey Biggerstaff, '"Strict" versus "Qualified" Neutrality' (*Articles of War*, 22 March 2023) < https://lieber.westpoint.edu/strict-versus-qualified-neutrality/> accessed 18 August 2024

[542] Both in the UN Charter and customary international law.

actually using force.[543] Any lesser act – such as intelligence sharing falling short of belligerency – fails to engage the prohibitions, and cannot be excused or justified by their exceptions.[544]

The counter-argument is that restricting actions categorisable as 'self-defence' to threats or use of force imposes limits beyond the natural meaning of the term,[545] and ignores State practice. Buchan identifies that (non-belligerent) State practice is to respond to aggression against other States with measures that breach international law but are not threats or uses of force – such as launching cyber operations against aggressors.[546] The review of State practice suggests these responses also include intelligence sharing.

The restrictive view of self-defence also faces the same issue as strict neutrality, in that it requires States that want to assist a victim of aggression to choose between inaction and belligerency (or threats of belligerency). If they must threaten or use force in order to justify or excuse actions as self-defence, then States must immediately escalate the relevant conflict to assist a victim State, without attempting less provocative approaches. This leaves States able to rely on collective self-defence to fight an aggressor, but not to share vital intelligence with its victim.

Buchan argues self-defence is better conceptualised as a general right, rather than an exception to a prohibition. Doing this "enhances the effectiveness of [self-defence] by broadening the response options available to victim States [enabling] them to confront armed attacks with a range of non-forcible and forcible measures." It also helps "prevent the unnecessary escalation of crises by allowing victim States to respond to armed attacks with non-forcible measures."[547] States may also struggle to justify non-forcible measures taken against aggressors under other international law provisions (discussed below).[548]

Buchan finds further justifications for the permissive approach. Article 51 UNC contains no explicit requirement that self-defence involve force; and non-forcible activity justified as self-defence can remain subject to the same requirements as forcible activity (including that it be in response to an actual or imminent armed attack, and necessary and proportionate.[549] [550] Even if

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[543] See for example: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep 136, Separate Opinion of Judge Higgins, para 35; James Crawford, 'International Law Commission, Second Report on State Responsibility by Mr James Crawford', (1990) UN Doc A/CN.4/498 and Add 1-4 (1999), para 298; International Law Commission, 'Eighth Report on State Responsibility by Mr Roberto Ago, Special Rapporteur – The Internationally Wrongful Act of the State, Source of International Responsibility (Part 1)' (1980) UN Doc A/CN.4/318/Add.5-7 para 87; International Law Commission, 'Articles on State Responsibility for Internationally Wrongful Acts with Commentaries' (2001) Commentary to art 21, para 1, and others as cited in Russell Buchan, 'Non-Forcible Measures and the Law of Self-Defence' (2023) 71 ICLQ 1, Part I.

[544] For argument against collective self-defence justifying assistance short of belligerency in the context of neutrality, see also James Upcher, *Neutrality in Contemporary International Law* 24 and Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflict' 552-553.

[545] Definitions include: "Defence of one's person, position, or interests; esp. [but not only] defence of one's person through the use of physical force against an assailant" and "Any system of techniques for defending oneself against an assailant." The Oxford English Dictionary does note that the international law definition involves "Use of force by a state to defend itself in response to or anticipation of an armed attack; this as a principle or right." Oxford English Dictionary, '*self-defence | self-defense (n.)*' (*Oxford English Dictionary*, July 2023) <https://doi.org/10.1093/OED/4772695023> accessed 18 Jun 24.

[546] Russell Buchan, 'Non-Forcible Measures and the Law of Self-Defence' (2023) 71 ICLQ 1, Part I and Part III, Section D

[547] Ibid, Part I

[548] Ibid, Section IV. For the rules pertaining to countermeasures as summarised by the ILC, see International Law Commission, 'Articles on State Responsibility', Part III, Chapter 2.

[549] As expressed in the *Nicaragua* case, para 176; *Nuclear Weapons*, Advisory Opinion, para 41; *Oil Platforms* case (merits judgment), para 76.

[550] Russell Buchan, 'Non-Forcible Measures and the Law of Self-Defence' (n546), Part V

Article 51 is restricted to breaches of Article 2(4), Article 21 ASRs is wider, given it excuses any act that is "a lawful measure of self-defence taken in conformity with the [UNC]". The restrictive argument also arguably curtails States' inherent sovereign rights – if, following an armed attack, the victim State cannot justify using threats or force (perhaps because these would not be necessary or proportionate) this will curtail any lawful response.

In relation to intelligence sharing, as discussed above States are in a position to gather intelligence relating to distant conflicts. They may have no ability to use force in these conflicts (and thus be unable to make credible threats to do so either), but still have intelligence vital to the victim. It seems unreasonable to bar them from sharing this due to their inability to use force. Furthermore, given Article 21 ASRs excuses even force, it is reasonable that it should also excuse breaches of neutrality via intelligence sharing.

The better position therefore seems to be that States may justify activity short of hostilities, including intelligence sharing, as collective self-defence. This has been advanced by commentators[551] and States to justify non-belligerent aid to Ukraine's war effort.[552] If this is correct, intelligence sharing (even if in breach of neutrality) will be lawful if the requirements for lawful collective self-defence are met (armed attack, necessity and proportionality of response, etc.). Self-defence may therefore offer a narrower justification for sharing than qualified neutrality (the requirements for which are less clear).

Sharing justified as collective self-defence may have to be reported to the UNSC.[553] It seems unlikely that this will compel a State to reveal the exact intelligence shared, just as it cannot be sensibly interpreted to require a State to expose the dispositions of forces fighting in collective self-defence. Should a State not report intelligence sharing – perhaps to keep its existence a secret – then it may breach Article 51 UNC, but even so its self-defence actions themselves are unlikely to be unlawful.[554]

A State may also be under a treaty-based *duty* to aid an attacked ally. Many States are bound by standing self-defence treaties[555] that include obligations to assist allies – and which may not require that assisting States become belligerents to do so. Collective self-defence treaties often envisage mutual aid short of belligerency, including intelligence sharing. The most prominent example is Article 5 of the NATO Treaty, which states that: "an armed attack against one or more of [the

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[551] See for example: Stefan Talmon, 'The Provision of Arms to the Victim of Armed Aggression: the Case of Ukraine' (*Bonn Research Papers on Public International Law*, Paper No. 20/2022, 6 April 2022) <https://ssrn.com/abstract=4077084> accessed 15 July 2024; Marcus Krajewski, 'Neither Neutral Nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine' (*Voelkerrechtsblog*, 9 March 2022) <https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict> accessed 15 July 2024, Kai Ambos, 'Will a state supplying weapons to Ukraine become a party to the conflict and thus be exposed to countermeasures?' (*EJIL: Talk!*, 2 March 2022) <https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/> accessed 16 July 2024.

[552] Again, see justifications offered by France, Germany, Greece, Italy, Luxembourg, Romania, the UK, and the Nordic and Baltic States and other UN Members, as analysed in Giulio Bartolini, 'The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice' (*Lawfare Blog*, 11 April 2023) <https://www.ejiltalk.org/the-law-of-neutrality-and-the-russian-ukrainian-conflict-looking-at-state-practice/> accessed 16 July 2024.

[553] UN Charter, Art 51. An argument could be mounted to say that this requirement only applies to uses of force.

[554] See for example: Jean Combacau, 'The Exception of Self-defence in UN Practice', in Tarcisio Gazzini (ed), *The Use of Force in International Law* (Routledge, 2012); and Dinstein, *War, Aggression and Self-Defence*, 258 - 260. On the covert action point see: Natalino Ronzitti, 'Neutrality, non-belligerency, and permanent neutrality according to recent practice and doctrinal views' (2024) 29(1) J Conflict & Sec L 55 <https://doi.org/10.1093/jcsl/krae001> accessed 29 August 2024, 343–359.

[555] See for example in relation to the US: US Department of State, 'Treaties in Force' at <https://www.state.gov/treaties-in-force/> accessed 29 August 2024

State parties] in Europe or North America shall be considered an attack against them all and … if such an armed attack occurs, each of [the parties], in exercise of the right of individual or collective self-defence …, will assist the [attacked party] by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."[556] This envisages action short of force, perhaps because certain NATO States may be politically or militarily unable to fight.

Can such obligations justify intelligence sharing in breach of neutrality? The DoD Manual takes the view that mutual assistance treaties "may prevail over the State's right under the customary law of neutrality to [impartiality and abstention]."[557]Arguably, such treaties will prevail (or should be prioritised) over neutrality duties. Davis analyses the duties created by several such treaties ratified by the US, finds these may conflict with neutrality, and argues for the prioritisation of the former by applying an analogous framework to Article 30 of the VCLT.[558] The argument against this is that States cannot use voluntarily assumed treaty obligations to avoid customary neutral duties owed to other states.

Collective self-defence treaties cannot justify helping an aggressor. A treaty premised on aiding an ally with aggression, or without regard to the legality of State actions, would be unlawful and void due to its conflict with the UNC and *jus cogens*.[559] It would not in fact be a 'self-defence' treaty at all, thus a State relying a lawful treaty to aid an aggressor will be wrongly invoking the treaty (even if honestly mistaken). The same applies to mutual assistance treaties such as intelligence sharing agreements – these cannot justify providing intelligence to an aggressor.

Self-defence and mutual assistance agreements therefore transform a State's *right* to aid a belligerent into an *obligation* to do so (usually on request), provided the relevant State is a lawful belligerent. The fact many States are parties to such agreements demonstrates that shouldering such obligations is considered lawful – and that States expect to identify the aggressor in any IACs.

Returning to the NATO treaty, its historic application by member States suggests Article 5 covers non-forcible measures including intelligence sharing. As discussed above, measures agreed to support the US following 9/11 included enhanced inter-State intelligence sharing and co-

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[556] The North Atlantic Treaty, 4 April 1949 <https://www.nato.int/cps/en/natohq/official_texts_17120.htm>; emphasis added.

[557] *DoD Law of War Manual*, §15.2.4. The use of 'right… to be impartial' rather than 'duty' suggests this sentence is premised on the *Manual*'s wider stance that States may (at least in some circumstances) adopt a position of qualified neutrality.

[558] Article 30 VCLT deals with successive treaties. Jeremy K. Davis, 'Bilateral Defense-Related Treaties and the Dilemma Posed by the Law of Neutrality' (2020) 11 Harv Nat'l Sec LJ 455, 466 <https://harvardnsj.org/wp-content/uploads/2020/06/DAVIS_FINAL.pdf> accessed 29 August 2024. The 1969 Vienna Convention on the Law of Treaties, Art 30 addresses how to resolve conflicts between treaties; Davis applies this by analogy to conflicts between customary law and treaties.

[559] See, for example, Vienna Convention on the Law of Treaties 1969 (VCLT), Art 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. ...". Under UN Charter, Art 103 and the rules of interpretation in the VCLT, States must give precedence to the Charter where there is a conflict with another treaty (VCLT, Art 30(1)), and would also have to interpret any ambiguous treaty obligations in the light of their Charter obligations (taking the requirements of Article 31 together with the other provisions cited here). A State that entered into a treaty for an aggressive war (or perhaps a Molotov-Ribbentrop-style secret clause to a wider treaty, with the same effect) would be understandably reluctant to register this with the UN as required by UN Charter, Art 102, and thus under the same Article the State would be unable to invoke the agreement before the UN in any event.

operation, along with other support falling short of force.[560] This suggests NATO States considered intelligence sharing justified as collective self-defence of the US.

International agreements may oblige a State to share intelligence, or to allow another State to maintain intelligence facilities within its territory. As with self-defence agreements, these will not override the prohibition on assisting an aggressor. States have historically honoured these even when State parties to them were belligerents (see discussion above on the Five Eyes arrangement).

Thus there is a compelling argument that States may rely on their treaty obligations to share intelligence with lawful belligerents. Furthermore, "[if] a State may act in accordance with qualified neutrality in cases of a *standing* arrangement based on collective self-defense …, and without Security Council imprimatur, then as a matter of law, it is equally entitled to do so on an ad hoc basis."[561]

## Individual self-defence of sharing State

A State may also be able to justify sharing intelligence with a lawful belligerent (in a manner that would breach strict neutrality) for its <u>own</u> self-defence. The US justified its support to the Allies before December 1941 as self-defence of the US itself, with lend-lease legislation entitled 'An Act to Promote the Defense of the United States'.[562] Say, for example, that the US had discovered before it became a belligerent in the Second World War that a Japanese attack on Pearl Harbor was imminent, and had passed this intelligence onto a belligerent ally able to attack the Japanese fleet and disrupt its progress. Self-defence would have justified any breach of neutrality.

Given the pre-requisites for self-defence, this only applies when an armed attack on the sharing State is anticipated with the necessary imminence, or an actual armed attack that somehow does not render the sharing State a belligerent is underway. This justification would also be subject to the debate (above) on actions short of force in self-defence.

## Countermeasures

Customary law permits States to employ countermeasures. These are acts that would usually breach the State's international obligations, but are lawful if carried out to bring an end to another State's internationally wrongful acts by inducing the latter's compliance with international law. Under Article 22 of the ASRs, the wrongfulness of a State's actions will be precluded if these constitute a lawful countermeasure.[563] Given an illegal threat or use of force is an internationally wrongful act, a non-party State might justify intelligence sharing with a victim belligerent as a

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[560] North Atlantic Treaty Organization, 'Collective Defence and Article 5' (*NATO*, 4 July 2023) <https://www.nato.int/cps/en/natohq/topics_110496.htm#:~:text=NATO%20invoked%20Article%205%20for,of%20the%20Russia%2DUkraine%20crisis> accessed 28 June 2024

[561] Michael Schmitt and Casey Biggerstaff, '"Strict" versus "Qualified" Neutrality' (*Articles of War*, 22 March 2023) < https://lieber.westpoint.edu/strict-versus-qualified-neutrality/> accessed 18 August 2024 – emphasis original

[562] See Neff, *The Rights and Duties of Neutrals*, 160, Ch 9

[563] Articles on State Responsibility, Art 22 reads: "Countermeasures in respect of an internationally wrongful act: The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three." Countermeasures must comply with the conditions within that chapter of the ASRs. For example, they cannot breach the state's obligations under the prohibition on the use of force or under other peremptory norms of international law (ASRs, Art 50), and must be proportionate (ASRs, Art 51).

countermeasure taken on the victim's behalf, or on behalf of the international community as a whole.

Whether this will succeed depends on the legality of countermeasures carried out by a State that has not been directly subjected to an internationally wrongful act – i.e. 'third party' or 'collective' countermeasures. The International Law Commission explicitly avoided addressing these in its commentary to the ASRs, stating it did "not purport to regulate the taking of countermeasures by States other than the injured State."[564] The debate surrounding these can only be summarised briefly here.[565]

The restrictive approach is that countermeasures may only be taken by the State subjected to the relevant wrongful act. Unlike with the right to self-defence,[566] State cannot take countermeasures on behalf of an injured State.[567] The broader view is that a State may take countermeasures on another's behalf in some circumstances. For example, a technologically disadvantaged State that suffers a cyber attack, may have little choice but to rely on help from another State with the capability to respond to it.[568]

Furthermore, some internationally wrongful acts breach obligations that give rise to rights of concern to all States ('*erga omnes*' – as defined by the ICJ in the *Barcelona Traction* case[569]). Any State may respond to such breaches.[570] The ICJ gave rights derived "from the outlawing of acts of aggression" as an example of these obligations.[571] Dinstein agrees, noting "the obligation to refrain from the use of inter-State force may indubitably be pigeonholed as both *jus cogens* … and *erga omnes*".[572] This has pedigree; in 1930, Wright argued that the Kellogg-Briand Pact and Covenant of the League of Nations meant wars of aggression were "no longer moral offenses against the victim alone, but legal offenses against every state party to these multilateral treaties".[573]

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564 United Nations International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (*UN*, 9 August 2001), Commentary to Chapter II, para 8, see https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, accessed 28 June 2024

565 For an overview, see for example: Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press, 2017); 'Oxford Process on International Law Protections in Cyberspace: A Compendium' (*Oxford Institute for Ethics, Law and Armed Conflict*, October 2022) <https://www.elac.ox.ac.uk/wp-content/uploads/2022/10/Oxford-Process-Compendium-Digital.pdf> accessed 28 June 2024, Part 7.

566 Collective self-defence is expressly permitted by Art 51 UNC, confirmed in the *Nicaragua* case (n147), para 194.

567 See for example France's position in France, Ministry of the Armies, 'International Law Applied to Operations in Cyberspace' (2019) <https://www.defense.gouv.fr/content/download/567648/9770527/file/international+law+applied+to+operations+in+cyberspace.pdf [https://perma.cc/WJQ3-XBWT]>, analysed in Michael Schmitt, 'France's Major Statement on International Law and Cyber: An Assessment' (*Just Security*, 16 September 2019), <https://www.justsecurity.org/66194/frances-major-statement-on-international-law-and-cyber-an-assessment/> accessed 29 August 2024.

568 Michael Schmitt and Sean Watts, 'Collective Cyber Countermeasures' (2021) 12 Harv Nat Sec J 373, <https://harvardnsj.org/2021/06/28/collective-cyber-countermeasures/> accessed 28 June 2024

569 *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 32

570 For example: Monica Hakimi 'Constructing an International Community' (2017) 111 Am J Intl L 317 <https://ssrn.com/abstract=3016642> accessed 29 August 2024; Oona A. Hathaway, Maggie Mills, and Thomas Poston, 'War Reparations: The Case for Countermeasures' (2023) 76 Stanford Law Review 971 <https://ssrn.com/abstract=4548945> accessed 28 June 2024

571 See *Barcelona Traction* case, para 34. This definition is also referred to in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Advisory Opinion) [2004] ICJ Rep 136, para 155.

572 Yoram Dinstein, *War, Aggression and Self-Defence* 123 – 124

573 Quincy Wright, (1930) 24 Proc ASIL 79, 81 <https://www.jstor.org/journal/procasilannumee> accessed 29 August 2024

Article 48 ASRs provides that an uninjured State may invoke the responsibility of another State if the latter breaches an obligation either "owed to a group of States including that State, and … established for the protection of a collective interest of the group" or "owed to the international community as a whole." Article 54 states that the ASRs' chapter on countermeasures does not prejudice the right of uninjured States, "to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation."[574] In the *South West Africa* case the ICJ suggested that "States may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice."[575]

Thus, unlawful aggression arguably allows all States to employ countermeasures against the offending State, even if they have not been attacked – either on behalf of victim States, or because the prohibition on uses of force is owed *ergo omnes*. For example, in addition to self-defence, the US alleged that its pre-December 1941 aid to the Allies amounted to proportionate reprisals[576] for Germany's violations of the Kellogg-Briand Pact.[577] Countermeasures have been presented as a justification for third-party State assistance to Ukraine since 2022.[578]

Assuming such countermeasures are permissible, an assisting State may still struggle to present intelligence sharing with a victim State as a countermeasure excusing any breach of neutrality. Buchan identifies several reasons why countermeasures are an unsuitable excuse for non-forcible assistance to a lawful belligerent, given they are "responses to illegality" rather than to "grave violence."[579] First, countermeasures aim to induce compliance with international law, rather than directly assist a victim. They must therefore be crafted as far as possible to permit resumption of the legal obligation in question.[580] Intelligence to be shared with a victim belligerent as a 'countermeasure' would have to be analysed to determine whether the effects of sharing it were reversible (unlikely in the case of intelligence designed to assist military operations) and whether irreversible effects were nevertheless justified by the above aim.

Second, countermeasures must also be proportionate to the injury to the wronged State,[581] requiring detailed balancing of the likely effect of sharing against any ongoing damage to the assisted belligerent. Third, an offending State must usually be given notification of countermeasures before these commence.[582] While this requirement can be waived where urgent

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[574] Provided they are entitled under ASRs, Art 48, para 1 to invoke the responsibility of a State acting wrongfully.
[575] *South West Africa Case, (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6, para 44
[576] An older word for actions now seen as countermeasures.
[577] See Neff, *The Rights and Duties of Neutrals* 190
[578] See for example: Raul Pedrozo, 'Ukraine Symposium – is the Law of Neutrality Dead?' (*Articles of War*, 31 May 2022) <https://lieber.westpoint.edu/is-law-of-neutrality-dead/> accessed 22 May 2022; Oona Hathaway, Maggie Mills and Thomas Poston, 'Emergence of Collective Countermeasures' (*Articles of War*, 1 November 2023) <https://lieber.westpoint.edu/emergence-collective-countermeasures/> accessed 28 June 2024; Eyal Benvenisti and Amichai Cohen, 'Bargaining About War in the Shadow of International Law' (*Just Security*, 28 March 2022), <https://www.justsecurity.org/80853/bargaining-about-war-in-the-shadow-of-international-law/> accessed 16 July 2024.
[579] See Russell Buchan, 'Non-Forcible Measures and the Law of Self-Defence' (n543). Buchan sets out the reasons below – albeit he suggests that countermeasures amount to 'law enforcement mechanisms' – a view rejected by commentators such as Schmitt and Watts (Michael Schmitt and Sean Watts, 'Collective Cyber Countermeasures' (n570)), who maintain that countermeasures are 'self-help mechanisms' rather than a means of law enforcement.
[580] ASRs, Art 49(3)
[581] ASRs, Art 51; *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment [1997] ICJ Rep 7, para 85
[582] ASRs, Art 52(1)(b); *Tallinn Manual 2.0*, Rule 21, paras 10-11

countermeasures are necessary to defend a State's rights,[583] or doing so would render the measure meaningless,[584] this is a further constraint on sharing.

Whether intelligence sharing with a victim State can be excused as a countermeasure depends on the wider debate on when countermeasures are permissible, and by which States. Even if 'third party' or 'collective' countermeasures are lawful, intelligence sharing presented as such may not easily meet the requirements for lawful countermeasures.

## Necessity

Necessity is also a circumstance precluding wrongfulness, reflected in the ASRs and ICJ jurisprudence.[585] The circumstances in which States may rely on necessity to justify their actions are deliberately narrow, to prevent States relying on it to excuse self-interested acts. Article 25 ASRs provides that a State act is only necessary if it "is the only way for the State to safeguard an essential interest against a grave and imminent peril…" and "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."[586] Necessity does not operate where "the international obligation in question excludes the possibility of invoking necessity" or "the [invoking] State has contributed to the situation of necessity."[587]

In the *Gabčíkovo-Nagymaros Project* case the ICJ examined an earlier version of the necessity provision in the (then-draft) ASRs. It found that customary law only allowed States to rely on necessity "on an exceptional basis," quoting with approval the ILC's view that "necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met."[588]

Just as it may be difficult for a sharing State to justify passing intelligence to a victim as individual self-defence, so the former may struggle to prove that intelligence sharing is the only way it can safeguard one of its own 'essential interests' against 'grave and imminent peril.' It might be possible to argue that the aggressor (albeit by attacking the victim State) has caused appropriately grave peril, perhaps because of the destabilising regional effects of the resulting IAC, but this remains a high bar.

There is nothing definitive in treaty or customary law on whether neutrality duties are international obligations that exclude the invocation of necessity. It thus appears necessity could excuse a breach of neutral duty, but given all the above this seems a difficult excuse for intelligence sharing in breach of neutrality.

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[583] ASRs, Art 52(2)
[584] *Tallinn Manual 2.0*, Rule 21, para 12
[585] See for example: *Case Concerning Nuclear Tests (Australia v. France)*, Judgment, [1974] ICJ Rep. 253; *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment [1997] ICJ Rep 7.
[586] ASRs, Art 25(1)
[587] ASRs, Art 25(2)
[588] *Gabčíkovo-Nagymaros* Case, paras 49 – 51

## Other potential justifications

Neutral duties, particularly where these block assistance to a victim of aggression, could conflict with a State's positive international obligations. The friction with mutual assistance treaties is considered above. Other positive obligations include the Article 41 ASRs requirement that States: "cooperate to bring to an end through lawful means any serious breach within the meaning of article 40 [i.e. a serious breach by a State of an obligation arising under a peremptory norm] …."[589] As the ILC's commentary makes clear, this applies to States not affected by the relevant breach.[590]

The prohibition on the use of force is generally considered a peremptory norm, although this assertion is subject to some debate.[591] Assuming an aggressor State is committing a 'serious breach' envisaged by Article 41, it may be argued that intelligence sharing to aid a victim State constitutes co-operation to end the breach, or is required to avoid complicity in the continuance of the unlawful situation.[592] The use of the phrase 'through lawful means' in Article 41 and the commentary suggests that the rule does not excuse unlawful acts, however, even if these would end the serious breach. The commentary adds that the Article calls for "a joint and coordinated effort by all States to counteract the effects of [breaches of peremptory norms]", but also that it "may be open to question whether general international law at present prescribes a positive duty of cooperation…."[593] Given this, Article 41 ASRs may not override neutrality.

Some international duties relating to peremptory norms are more specific. Parties to the 1951 Genocide Convention confirm that: "genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."[594] The ICJ has found that this imposes a positive duty on a State to prevent genocide, if it can "influence effectively" albeit without specifying what a State should do.[595] Say a State not party to an IAC has intelligence relating to the location and activity of a belligerent military unit committing genocide (similar to the Second World War's German *Einsatzgruppen*). Its positive duty to prevent genocide will arguably require it to share this information with the opposing belligerent, so the latter can halt the unit's activities.

Similarly, common Article 1 of the 1949 Geneva Conventions requires parties to "… undertake to respect and to ensure respect for the present Convention in all circumstances". The effect of

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[589] For analysis of the obligation to co-operate, see Nina Jorgensen, 'The Obligation of Cooperation' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of State Responsibility* (Oxford University Press, 2010) 700

[590] United Nations International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (*UN*, 9 August 2001), commentary on Article 41, para 3

[591] For example, James Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 Mich J Intl L 215 <http://students.law.umich.edu/mjil/article-pdfs/v32n2-green.pdf> accessed 29 August 2024

[592] For analysis of this argument see Paolo Palchetti, 'Consequences for Third States as a Result of an Unlawful Use of Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford Academic, 2015), 1224 - 1228, Ch 57.

[593] Yearbook of the International Law Commission 2001, vol II (2), pt 114, para 3

[594] Convention on the Prevention and Punishment of the Crime of Genocide 1951, Art 1 <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf> accessed 29 August 2024

[595] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment [2007] ICJ Rep 43; analysed in Pål Wrange, 'Chapter 19: Neutrality, Impartiality and Our Responsibility to Uphold International Law', in Ola Engdahl and Pål Wrange (eds), *Law at War – The Law as it was and the Law as it Should Be* (Koninklijke Brill BV, 2008) 285; Andrea Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 EJIL 695, 697-706.

this phrase is subject to lively debate,[596] but it could also be invoked in support of intelligence sharing in the *Einsatzgruppen* example above, or to justify wider sharing to assist a victim belligerent counter an opponent showing widespread disregard of the Conventions.[597] The Genocide Convention and common Article 1 might even permit limited neutral sharing with an aggressor, for example if an offending unit belonged to the victim State.

Perhaps more tenuously, Article 56 of the UNC notes that "[all UN] Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of [respect for human rights]", and thus could arguably be invoked in similar circumstances. The widespread ratification of these treaties by States indicates the importance placed in State practice on the upholding of human rights and international humanitarian law, and the prevention of genocide. This suggests these may trump neutrality where intelligence sharing will prevent or halt significant illegality.

Neutral duties also appear to conflict with State duties to enable the workings of international courts and the enforcement of their decisions. Under Article 94(1) UNC, all UN members undertake "to comply with the decision of the International Court of Justice in any case to which [they are] a party". Article 41(1) of the ICJ Statute allows the Court to indicate provisional measures that ought to be taken to preserve the parties' rights. In 2022, in a case brought by Ukraine, the ICJ directed provisional measures that included: "The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine."[598] This was ignored by Russia. States arguably ought to be able to offer practical assistance such as intelligence to Ukraine in the absence of UNSC enforcement of the ruling.

A State might also provide a victim belligerent with intelligence to use as evidence in a case against the aggressor belligerent in an international court. This might be required to show that the latter State was indeed the aggressor, or to prove breaches of the law of armed conflict – for example aerial imagery demonstrating the aggressor's troop movements over time, or signals intercepts revealing unlawful orders. Ukraine has brought cases against Russia in multiple fora, arising from Russia's illegal aggression in Ukraine since 2014.[599] The correct approach must be that non-party States are able to provide evidence that will assist international courts, even if this could be used in the ongoing IAC.

Such intelligence might also be crucial for the enforcement of international criminal law. As above, even States far from the battlefield may have intelligence likely to prevent a criminal act, assist in the investigation of an offence or arrest of a suspect, or constitute persuasive evidence at a criminal trial. The US release of intelligence on a Russian 'false flag' biological attack in Ukraine (discussed

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[596] For a recent reviews, see for example: Michael Schmitt and Sean Watts, 'Common Article 1 and the Duty to "Ensure Respect"' (2020) 96 Intl L Stud 674; Michael Schmitt, Sean Watts, 'Common Article 1 of the 1949 Geneva Conventions' (*Articles of War*, 12 April 2024 <https://lieber.westpoint.edu/common-article-1-1949-geneva-conventions> accessed 7 July 2024

[597] This argument is developed in Pål Wrange, 'Chapter 19: Neutrality, Impartiality and Our Responsibility to Uphold International Law', in Ola Engdahl and Pål Wrange (eds), *Law at War – The Law as it was and the Law as it Should Be* (Koninklijke Brill BV, 2008) 285

[598] *Provisional Measures in Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* International Court of Justice General List No. 182 <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf> accessed 29 August 2024

[599] Jill Goldenziel, 'An Alternative to Zombieing: Lawfare between Russia and Ukraine and the Future of International Law' (2023) 108 Cornell Law Review 1

above)[600] seems to have prevented the attack from occurring. US aerial imagery was used at the ICTY to assist the prosecution of individuals for the Srebrenica massacre.[601] Evidence relating to the shootdown of flight MH17 over Ukraine – some of which was ultimately used in the Dutch prosecution of key perpetrators *in absentia* – came from several nations.[602] Belligerents may prosecute combatants for war crimes while the relevant IAC is ongoing, as Ukraine has done, thus such intelligence may be shared mid-conflict.[603]

The Preamble to the UNC notes that one of the purposes of the UN is: "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". The Preamble to the Rome Statute for the International Criminal Court affirms that "…effective prosecution [of the most serious crimes] must be ensured by taking measures at the national level and by enhancing international cooperation" and recalls " …that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". It recognises that "such grave crimes [the 'unimaginable atrocities' of the twentieth century] threaten the peace, security and well-being of the world."

It would be perverse if a State were to be barred by neutrality from passing on information likely to prevent or prove a serious criminal offence, particularly war crimes, crimes against humanity and genocide. It could also be argued that intelligence should be shared to prevent the ongoing crime of aggression that an ongoing IAC such as that in Ukraine represents.[604]

There is little to determine whether a State's responsibilities to international courts and justice will prevail over neutrality duties. This is perhaps unsurprising, given neutrality (at least strict neutrality) pre-dates most modern international justice mechanisms. However, the correct position seems to be that States' treaty obligations to assist such courts and wider positive obligations such as those discussed above, along with the importance placed by modern international law on the prevention and punishment of international criminal offences, suggests that neutrality should not be a bar to sharing for these purposes.

Finally, and most tentatively, it could be argued that a non-party State may share intelligence with a belligerent (or by means that ensure it will reach such a belligerent, including by putting it in the public domain) in breach of neutral duties, simply to establish the truth of a matter of international importance. This might include, for example, information that establishes the legality of an IAC, to assist other States in determining an aggressor (especially if the UNSC has not acted, and thus States must determine

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[600] Barbara Plett-Usher, 'Russia-Ukraine: US warns of 'false-flag' operation', (*BBC News*, 14 January 2022) <https://www.bbc.com/news/world-europe-59998988> accessed 30 December 2023

[601] See Legacy website of the International Criminal Tribunal for the former Yugoslavia: <https://www.icty.org/en/content/investigations-0> accessed 1 July 2024.

[602] Details of the evidence relied on and videos of court hearings are available at Netherlands Public Prosecution Service, 'MH17 Plane Crash – Prosecution and Trial' (*NPPS*, 2022) <https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial> accessed 30 Dec 23. By way of example, the NPPS relied on telephone intercepts provided by the SBU (Ukraine's internal security service).

[603] See for example, Sarah Rainsford, 'Russian soldier pleads guilty in first war crimes trial of Ukraine conflict' (*BBC News*, 18 May 2022) <https://www.bbc.co.uk/news/world-europe-61496428> accessed 30 December 2023

[604] See for example Rome Statute of the International Criminal Court, Art 8 *bis* 'Crime of aggression', especially Art 8 *bis* (1), which states that: "'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

legality for themselves). US intelligence shared to pre-emptively debunk false Russian legal pretexts for the 2022 invasion are an example of this.[605]

[605] See for example Steve Holland and Trevor Hunnicutt, 'U.S. intelligence: Russia may stage video to create pretext for Ukraine war' (*Reuters*, 3 February 2022) <https://www.reuters.com/world/europe/us-intelligence-alleges-russia-has-plan-fabricate-pretext-attack-ukraine-reports-2022-02-03/> accessed 30 December 2023.

# CONCLUSION

Near-future inter-State intelligence sharing will not be restricted to passing individual elements of intelligence, but instead will feature constant passage of information over hugely complicated and sophisticated network infrastructure that cannot be easily closed down or removed.

A State that is not party to an IAC must consider neutrality law before sharing intelligence with a belligerent State, or maintaining existing intelligence relationships with it. This is likely to be a complicated process, given the current scope of neutrality law is opaque and disputed. As a 2022 US Congressional Research Service report on Ukraine (under)states, neutrality law's "antiquated nature and uncertain integration in the UNC era make its application less than straightforward".[606]

On a strict interpretation grounded in early twentieth century customary law, neutrality makes little allowance for non-party States to share intelligence with even lawful belligerents. It also severely restricts the activity (and use of infrastructure) that forms the core of modern intelligence sharing relationships. Strict neutrality will be still less compatible with the highly complex arrangements required for future sharing.

Strict neutrality also seems increasingly dissonant with wider international law. While neutrality law continues to apply, its strict requirements are a relic of the nineteenth century 'duellists' code' approach to international armed conflict. Its requirement of impartiality towards belligerents, no matter the justice of their respective causes, conflicts with the modern *jus ad bellum*. Justifications for strict neutrality seem increasingly outdated, even allowing for the dysfunction of the UNSC. Instead of containing conflict, strict neutrality forces States to choose either aggression-enabling inaction, or escalatory participation in an IAC.

This dissonance is particularly evident when considering modern intelligence sharing. States are often able to provide intelligence of significant value to State victims of aggression, even when at distance from the IAC and unable to use force against the aggressor. Strict neutral duties deny victims this assistance.

State practice demonstrates that, throughout the twentieth and early twenty-first centuries, non-party States have often shared intelligence with belligerents, and have maintained standing intelligence-sharing relationships and shared infrastructure with belligerents. While much of this was undoubtedly for self-interested reasons, some has been explicitly justified as assistance to a lawful, victim belligerent against an aggressor, such as US assistance to Britain in the Second World War and during the Falklands War. The assistance granted to Ukraine since Russia's full-scale invasion in 2022 has arguably constituted a final seismic shift towards the lawfulness of States adopting qualified neutrality.

Given the above, the correct approach is that States may choose to qualify their neutrality to share (or continue sharing) intelligence with lawful belligerents. Furthermore, intelligence sharing is also permissible if it represents collective self-defence of a victim State falling short of belligerency. In rarer circumstances, and provided the relevant conditions are met, sharing might also be justifiable as self-defence of the sharing State, or as a countermeasure or a necessary act.

[606] Congressional Research Service, 'International Neutrality Law and US Military Assistance to Ukraine' (*CRS Reports*, 26 April 2022) <https://crsreports.congress.gov/product/pdf/LSB/LSB10735> accessed 15 July 2024

Finally, there are disparate other obligations on States designed to prevent serious international wrongs that may trump neutrality duties and so justify intelligence sharing – such as the duties to end breaches of peremptory norms, prevent and punish genocide, uphold respect for the Geneva Conventions, prevent other international crimes, and to assist and uphold the workings and judgments of international courts charged with protecting these.

Intelligence sharing contrary to strict neutrality duties is not without risk. Strict neutrality is often justified on the basis that it prevents States involving themselves in IACs for self-interested reasons. States will always claim that they (or their allies) are the lawful belligerents in any particular armed conflict. Requiring a strictly neutral approach to intelligence sharing runs contrary to modern international law, however, and enables the triumph of powerful aggressors over smaller States.

Despite persisting, the law of neutrality has had decreasing practical influence on inter-State intelligence sharing since 1907. International agreements and customary law have produced a legal landscape very different to that which shaped neutrality law, and increasing numbers of potential exceptions to neutral duties. Strict neutrality has often been ignored in State practice, especially in relation to Ukraine. Lawful qualified neutrality better matches both the changed landscape and the reality of State practice.

Finally, the conflict in Ukraine has demonstrated that shared intelligence can be a vital lifeline to States that fall victim to totalitarian aggression. Intelligence sharing with other law-abiding States put in the same position will be equally crucial for them, and for the wider credibility of the rules-based international order. As Robert Jackson put it, today's "work-a-day world" is unlikely to accept a system that demands an unprovoked aggressor receive the same treatment as its victim and be permitted to continue its aggression.

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