

Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties

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Abstract

The law of neutrality and the principle of non-intervention both promulgate neutrality norms pertaining to third-state assistance for belligerent parties embroiled in an international or non-international armed conflict. This article compares and contrasts these two legal frameworks and assesses whether they work in perfect harmony or, on the contrary, establish different standards of behaviour depending on the type of armed conflict. Additionally, by approaching both regulatory frameworks simultaneously, conceptual uncertainties hindering their effective application in practice can be clarified. It is submitted that by adopting such a holistic approach, fresh insights are offered on the “duty of neutrality”, *sensu lato*, during armed conflicts under international law.

I. Introduction

1. While the neutral character of international law in general is subject to debate,¹ there are two international legal doctrines that can hardly be accused of challenging it. First, the body of law that specifies the rights and duties of neutral and belligerent

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1 See, e.g., the theme of the 2017 Research Forum of the European Society of International Law, entitled: The Neutrality of International Law: Myth or Reality?

States during international armed conflicts (IACs)—aptly dubbed the “law of neutrality”—and, second, the principle of non-intervention that, *inter alia*, prohibits third-state intervention during non-international armed conflicts (NIACs).

2. It is submitted that both doctrines share a common purpose and core. First, both aim to maintain peace, friendly relations and a balance of power between States.² Second, that aim is achieved by a set of norms limiting the interference by third States in the internal and external affairs of other States. More specifically, a neutral stance is imposed on third States during an IAC by neutrality law, while foreign, pro-rebel interventions during a NIAC are prohibited by the non-intervention principle. Together, they thus form a “legal firewall” against outside interference during armed conflicts.

3. This article compares and contrasts both legal frameworks to assess whether the neutrality norms they promulgate work in perfect harmony or, on the contrary, establish different standards of behaviour for third-state action depending on the type of armed conflict. Additionally, by approaching both regulatory frameworks simultaneously, theoretical uncertainties hindering their effective application in practice can be clarified. It is submitted that by adopting such a holistic approach, fresh insights are offered on the “duty of neutrality”, *sensu lato*, during armed conflicts under international law.

4. To that effect, the article is structured as follows: First, it lays out the current state of affairs by conducting four case studies on armed conflicts that have occurred in the past fifteen years or are still ongoing (Section II). Second, it (succinctly) revisits the applicable legal frameworks and highlights some of their conceptual difficulties through the legal evaluation of the aforementioned cases (Section III). Third, it compares and contrasts how international law mandates a neutral stance for third States during IACs and NIACs based upon the previous two sections. As a result, it provides a revamped account of these classical legal doctrines (Section IV). Finally, the paper ends with some tentative observations, while pinpointing the areas in need of additional research (Section V).

II. Neutrality during armed conflicts: a reality check

5. This section provides an overview of four modern examples of armed conflicts featuring the interference by non-belligerent parties. The first two examples deal with

2 See, generally: Michael Bothe, Neutrality, Concept and General Rules, Max Planck Encyclopedia of Public International Law (2011), para.4; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV) (1970).

such interference by “neutral Powers” in support of one of the belligerents of an IAC, while the final two discuss third-state intervention during NIACs.

II.A. The 2003 invasion of Iraq

6. During the invasion of Iraq in 2003, a US-led “coalition of the willing” (without UNSC authorization) requested various States for assistance, including rights of overflight.³ Some States—including Austria and Switzerland—denied such overflight of military aircraft over their territories. While Austria generally referred to its status as a “neutral State”,⁴ the Swiss justification was more precise. The then Swiss President Couchevin declared on 20 March 2003 that,

[t]he coalition led by the US has decided to resort to force without the approval of the UNSC. We are therefore confronted with an armed conflict between states during which the law of neutrality applies [. . .].⁵

Micheline Calmy, then head of the Federal Department of Foreign Affairs, further explained that,

[i]f an armed conflict breaks out in Iraq without the approval of the UNSC, the law of neutrality is applicable. In that case, overflight for military purposes will not be authorized, while overflight for humanitarian purposes, including the transport of wounded, will be allowed.⁶

7. Conversely, a myriad of other States assisted the coalition in various ways. NATO member Italy, for example, allowed the use of US military bases on Italian soil for “transit, refueling and maintenance exigencies” and authorized flight over its air

3 It is not the purpose of this article to provide an exhaustive overview of all types of support provided by third States to the members of the coalition against Iraq. For an overview of the support provided by European States, see: Hartwig Hummel, *A Survey of Involvement of 15 European States in the Iraq War 2003* (revised version), Paks Working Paper 7 (2007), (http://paks.uni-duesseldorf.de/Dokumente/paks_working_paper_7_rev.pdf).

4 See “Einigkeit in der Ablehnung des Irak-Kriegs”, *Parlamentskorrespondenz* Nr. 151 vom 26.03.2003, (www.parlament.gv.at/PAKT/PR/JAHR_2003/PK0151/). The Austrian refusal could therefore be based on the Austrian policy position of neutrality as much as it could be based on neutrality law.

5 Switzerland, 03.200 Déclaration du Conseil fédéral concernant la crise en Irak, BO 2003 N 531 (authors’ translation). The President specified that “transit over land and overflight for military purposes linked to the conflict or outside the courant normal”, as well as “the export of war material destined to the ongoing operations” would be prohibited. *Ibid.* (authors’ translation).

6 Switzerland, Nationalrat, Frühjahrsession 2003, 11th session, 17 March 2003, 03.5017 (www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=5544), (authors’ translation).

space.⁷ However, Italy explicitly prohibited the “participation in military actions by the Italian armed forces”, the “supply and provision of armaments or military vehicles of any kind” and the “use of military structures [on Italian territory] as a basis for direct attacks on Iraqi targets”.⁸ As a justification for its support to one side of the conflict, the Italian Supreme Defence Council attempted to creatively apply neutrality law by invoking a so-called status of non-belligerency.⁹

8. In addition, numerous other States offered some type of support for the military operation, justified by a general reference to “practice between allies” and/or obligations under the NATO treaty.¹⁰ For instance, France granted overflight rights, even though it had strongly opposed the Iraq invasion before the Security Council.¹¹ The then French Foreign Affairs Minister, Dominique de Villepin, explained to the *Assemblée Nationale* that “[France] wants the war to be as short and least lethal possible [and] the countries of the region to abstain from any involvement in the conflict.”¹² However, he admitted that “some practices between allies exist, which [France] needs to respect.”¹³

9. Similarly, although Germany strongly opposed the war,¹⁴ it nevertheless provided overflight rights for American and British military aircraft and authorized its own military to monitor the Turkish-Iraqi border with AWACS aircraft. The German government justified this support by reference to the NATO treaty and bilateral agreements with the US.¹⁵ However, the *Bundesverwaltungsgericht* (Federal Administrative Court) did not agree with that justification.¹⁶ After referring to

7 See “Comunicato del Presidente Ciampi” on 19 March 2003 (<http://presidenti.quirinale.it/Ciampi/dinamico/ContinuaCiampi.aspx?tipo=comunicato&key=21748>), (authors’ translation).

8 Ibid.

9 Ibid. In Section III.A. we argue why we do not think the argument of “non-belligerency” suffices as a justification for neutrality law violations.

10 1949 North Atlantic Treaty, 34 UNTS 243.

11 SC Verbatim Record, UN Doc. S/PV.4704 (14 February 2003), 11-13/32.

12 France, *Assemblée nationale*, *Débats parlementaires*, *Journal officiel de la République française* du mercredi 26 Mars 2003, *Compte Rendu integral*, 2e séance du mardi 25 mars 2003, question by M. Jean-Pierre Brard and answer by M. Dominique de Villepin (authors’ translation).

13 Ibid.

14 SC Verbatim Record, UN Doc. S/PV.4701 (5 February 2003), 36-37/39.

15 Germany, *Deutscher Bundestag*, *Stenografischer Bericht*, *Plenarprotokoll* 15/34, 15. Wahlperiode – 34. Sitzung. Berlin, Mittwoch, 19 March 2003, 2728.

16 *Bundesverwaltungsgericht*, *Urteil vom 21.06.2005 – 2 WD 12.04.* [ECLI:DE:BVerwG:2005:210605U2WD12.04.0], (authors’ translation for this and all the following quotes from this judgment).

various provisions of neutrality law,¹⁷ the Court ruled that Germany “was not freed from these obligations under international law by being [...] a member of NATO”.¹⁸ The Court specified that the obligations certainly included a prohibition on granting “cross-border rights for US and UK military aircraft” and the “admission of troops, the transport of weapons and military supplies from German soil to the war zone”.¹⁹ Since the “purpose of these measures was to facilitate or even to promote the military action of the USA and the UK”, the Court held that the supportive measures raised “serious concerns” in light of Hague Convention V.²⁰

10. For two other types of support, namely the deployment of AWACS flights over Turkey and the role of German soldiers in protecting US barracks on German territory, the Court’s analysis was more measured. With regard to the former, the compliance with neutrality law “[depended] on whether the data obtained during these operations were of importance for the war operations in Iraq and whether the US and UK forces had *de facto* access to them”, whereas for the latter it depended on whether these tasks were taken over from US soldiers “in order to enable or facilitate the withdrawal of the respective troops into the war zone”.²¹ If that were the case, these supportive acts would also not be compatible with the prohibition under neutrality law of supporting a belligerent party.²²

11. In addition, Ireland offered similar support by allowing US aircraft to use the Shannon airport for stop-overs on their way to Iraq. During the parliamentary debate, the government contended it did “not regard the provision of landing and overflight facilities to foreign aircraft as participating in a war”.²³ More specifically, it argued that “the provision of facilities does not make Ireland a member of a military coalition nor does anybody regard us as such. [Ireland] remains militarily neutral.”²⁴ However, and again similar to the German example, the Irish High Court later ruled that,

there is an identifiable rule of customary law in relation to the status of neutrality where under a neutral state may not permit the movement of large numbers

17 Ibid., para.4.1.4.1.2 which cites Hague Convention V, arts. 1, 2, 3, 5 and 11 and Hague Convention XIII, arts. 2, 9 and 24. For a discussion of neutral duties, see below Section III.A.

18 Ibid., para.4.1.4.1.3.

19 Ibid., para.4.1.4.1.4.

20 In addition, the support caused the same “serious concerns” in light of the prohibition on the use of force. Ibid.

21 Ibid.

22 Ibid.

23 See Ireland, Foreign Conflicts: Motion, 563 Dáil Éireann Debate (20 March 2003).

24 Ibid.

of troops or munitions of one belligerent State through its territory *en route* to a theatre of war with another.²⁵

12. Finally, Kuwait allowed its territory to be used as a basis for coalition attacks against neighbouring Iraq to which the latter responded by launching missiles against the former.²⁶ Saudi Arabia declared that it “[would] not participate in any way” in the war against Iraq, but nevertheless allowed the US to make use of its Prince Sultan Air Base.²⁷ No evidence was found of similar retaliating military action by Iraq against Saudi Arabia or any of the European States offering support to the coalition.

13. In sum, the 2003 invasion of Iraq features multiple examples of third-state support to one side of the IAC as well as some refusals thereof. States that provided assistance in violation of neutrality law justified their actions by reference to “practices between (NATO) allies” (France, Germany, Ireland) or by arguing that an intermediate status of non-belligerency exists (Italy). Some other States refused to provide any type of assistance, thereby explicitly referring to their neutral obligations or their (politically) neutral position. Nevertheless, at least two of the assisting States were later confronted with domestic judgments indicating (*ex post facto*) violations of neutral duties (Germany and Ireland). On one occasion, the assisting third State (Kuwait) was even the victim of armed reprisals by the aggrieved belligerent. In addition, there were clear examples of neutrality law violations that have remained without judicial or military consequences. Importantly, however, none of the assisting States overtly set aside neutrality law or denied its application.

II.B. The 2008 Russo-Georgian War

14. During the IAC between Russia and Georgia in 2008—again without UNSC authorization²⁸—far fewer outspoken violations of neutrality law occurred. The short

25 Ireland, High Court of Ireland, *Horgan v An Taoiseach & Ors* [2003] IEHC 64 (IEHC (2003)), 28 April 2003, para.125. The Court nevertheless decided that it could not pronounce on an issue it considered to fall within the discretion of Irish governmental policy. *Ibid.*, para.173.

26 Iraq Launches Scud missiles, *The Guardian*, 20 March 2003 (www.theguardian.com/world/2003/mar/20/iraq6); Missile Hits Kuwait City Mall, CNN, 29 March 2003 (<http://edition.cnn.com/2003/WORLD/meast/03/28/sprj.irq.war.main/>). No Iraqi statements referring to the law of neutrality were found.

27 Even though this base had a crucial role during the Iraq invasion, it is unclear whether or not Saudi Arabia allowed the US to launch attacks against Iraq from it. See Craig S. Smith, Threats and Responses: A Command Post. Reluctant Saudi Arabia Prepares its Quiet Role in the U.S.-led War on Iraq, *The New York Times*, 20 March 2003 (www.nytimes.com/2003/03/20/world/threats-responses-command-post-reluctant-saudi-arabia-prepares-its-quiet-role-us.html).

28 War with Russia over South Ossetia, *Keesing's World News Archive* (Keesing's) (2008), 48740.

but intense hostilities between Russia and Georgia started on 7 August and ended with an EU-brokered ceasefire on 16 August.²⁹ Even though the actions by Russia were condemned by numerous countries, including Russia's fellow members of the G8,³⁰ and even though those countries asserted their "strong and continued support for Georgia's sovereignty within its internationally recognized borders",³¹ none of them openly provided military support to Georgia (or Russia, for that matter) during the conflict.³²

15. However, assistance by the US qualified as the lone exception in this context. On 8 August 2008, the US delivered "disaster packages" which included "basic medical supplies, tents, blankets, bedding, hygiene items, clothing, beds and cots", whereas on 10 August \$250,000 were provided for the "procurement and distribution of emergency relief supplies".³³ Moreover, and more conspicuously, the US airlifted the Georgian troops who were operating in Iraq back to Georgia.³⁴ As this happened on 10 and 11 August, while the conflict was still ongoing, it could be regarded as a violation of neutral duties by the US. Nonetheless, the law of neutrality was neither invoked by third States as a justification for the general abstention in providing support to the "victim of aggression" (Georgia), nor used by Russia to condemn the (possible) illegality of the limited US action.³⁵

29 Georgia and Russia Declare Ceasefire, *The Guardian*, 16 August 2008, (www.theguardian.com/world/2008/aug/16/georgia.russia2).

30 See Joint Statement on Georgia by Foreign Ministers of Canada, France, Germany, Italy, Japan, the United States and the United Kingdom, Released on 27 August 2008 (<https://2001-2009.state.gov/r/pa/prs/ps/2008/aug/108941.htm>).

31 *Ibid.*

32 While this could partially be explained because of the short period the conflict lasted, the reluctance by third—and certainly European—States to actively support Georgia can also be explained by the EU's dependency on energy pipelines crossing Russian territory. See, for instance: US, Office of the Vice President, Background Briefing by Senior Administration Official on the Vice President's Trip to Azerbaijan, Georgia, Ukraine and Italy, 28 August 2008 (<https://georgewbush-whitehouse.archives.gov/news/releases/2008/08/20080828-9.html>).

33 US, The White House, Setting the Record Straight: President Bush Has Taken Action to Ensure Peace, Security and Humanitarian Aid in Georgia, Office of the Press Secretary, 13 August 2008 (<https://georgewbush-whitehouse.archives.gov/news/releases/2008/08/20080813-2.html>). A few months after the conflict, Russian Prime Minister Putin also accused Ukraine for having delivered weaponry to Georgia and even for having assisted with the operation of those weapons. See Putin accuses Ukraine of having assisted Georgia during war, *NY Times*, 2 October 2008 (www.nytimes.com/2008/10/02/world/europe/02iht-ukraine.5.16655766.html).

34 US, Setting the Record Straight, above n.33.

35 However, during the UNSC meeting of 8 August, one day after the conflict erupted, Georgia accused Russia of not abiding by its "obligation to remain neutral" vis-à-vis the relationship between Georgia and South Ossetia. See SC Verbatim

16. In conclusion, the Russo-Georgian war did not witness as many examples of third-state assistance in violation of the law of neutrality as was the case for the Iraq invasion. While most States abstained from assisting either side of the conflict, the US did provide aid but stressed it was of a purely humanitarian nature. The US also airlifted Georgian soldiers home from Iraq, without pronouncing on the legality of that action under neutrality law, whereas Russia did not invoke any violation of neutrality law, nor did it adopt any type of retaliatory action.

II.C. The Syrian Civil War

17. The Syrian Civil War provides abundant examples of third-state assistance to both sides of the non-international armed conflict pitting the ruling regime led by President Bashar al-Assad against multiple armed opposition groups.³⁶ A variety of “terrorist” (as opposed to “rebel” or “opposition”) groups are moreover involved,³⁷ adding a dimension to the conflict with significant legal relevance. However, the case-study is narrowed by looking in particular at the aid provided by the US and (members of the) EU to the Syrian armed opposition.³⁸ This particular focus is justified because the principle of non-intervention arguably does not apply in the context of third-state assistance upon request by the internationally legitimate government, without thereby arguing that such assistance is necessarily lawful under international law. Consequently, third-state support to the Syrian armed forces will not further be discussed here.³⁹

Record, UN Doc. S/PV.5951 (8 August 2008), 4/9. As Georgia does not consider South Ossetia to be an independent State, this statement can hardly be interpreted as a reference to neutrality law (which only applies when armed conflicts between States occur).

36 The International Committee of the Red Cross (ICRC) concluded in July 2012 that a non-international armed conflict was occurring in Syria. See: Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort amid Increased Fighting, ICRC, 17 July 2012 (www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm).

37 This is a highly controversial distinction. The approach of this article relies upon the lists maintained by the US and the EU. See: US, State Department, Foreign Terrorist Organizations (www.state.gov/j/ct/rls/other/des/123085.htm) and Council of the EU, EU Terrorist List, (www.consilium.europa.eu/en/policies/fight-against-terrorism/terrorist-list/).

38 See below Section III.B.

39 But see: Melanie De Groof, Groupe de Recherche et d’Information sur la Paix et la Sécurité (GRIP), Arms Transfers to the Syrian Arab Republic: Practice and Legality (15 November 2013) (www.grip.org/fr/node/1132), 35-8.

18. During the course of the Syrian civil war, the US has come out as one of the staunchest supporters of the anti-Government armed forces.⁴⁰ It has openly boasted about spending more than \$6.5 billion on *humanitarian* assistance since the start of the conflict,⁴¹ as well as providing “vetted” members of the armed opposition forces with so-called *non-lethal* assistance.⁴² The latter type encompassed “transition assistance” to create the conditions for an eventual political transition (including civil administration training programs and critical equipment) and “direct non-lethal assistance” to help defend against attacks by the regime and violent extremist groups (including food baskets, medical supplies, communications equipment, vehicles and other basic supplies).⁴³ In addition, there were regular reports of US *lethal* aid to select opposition groups.⁴⁴ However, at least some action to that effect was taken under “covert action authorities”,⁴⁵ which intended to obfuscate the role of the US government.⁴⁶ It appears that US officials have indeed avoided openly admitting to providing such support to date, though there are some (notable) exceptions.⁴⁷

19. Moreover, the National Defense Authorization Act 2015 (NDAA) authorized the US State and Defense Departments to provide “assistance [. . .] and sustainment, to appropriately vetted elements of the Syrian opposition”, for the purpose of, *inter alia*, “securing territory controlled by the Syrian opposition” and “[p]romoting the

40 See, generally: Tom Ruys, *Of Arms, Funding, and “Non-lethal Assistance” – Issues Surrounding Third-State Intervention in the Syrian Civil War*, 13 *Chinese JIL* (2014), 13, and Christian Henderson, *The Provision of Arms and “Non-Lethal” Assistance to Governmental and Opposition Forces*, 36 *University of New South Wales LJ* (2013), 642, 659-64.

41 US, State Department, *U.S. Humanitarian Assistance in Response to the Syrian Crisis* (5 April 2017), (www.state.gov/j/prm/releases/factsheets/2017/269469.htm). This support did not only benefit members of the armed opposition, but was rather aimed at providing “lifesaving support to the people of Syria wherever they are”.

42 US, Congress, *Consolidated Appropriations Act, 2016* (18 December 2015), P.L. 114-113 (www.congress.gov/bill/114th-congress/house-bill/2029/text), Sec. 7041 (h) Syria.

43 US, State Department, *Syrian Crisis: U.S. Efforts and Assistance* (7 August 2015), (<https://2009-2017.state.gov/r/pa/prs/ps/2015/08/245807.htm>).

44 Carla E. Humud, Christopher M. Blanchard and Mary Beth D. Nikitin, *Congressional Research Service, Armed Conflict in Syria: Overview and U.S. Response* (26 April 2017), (<https://fas.org/sgp/crs/mideast/RL33487.pdf>), n.110.

45 *Ibid.*, at 30. See also: Karen DeYoung, *Congressional Panels Approve Arms Aid to Syrian Opposition*, *The Washington Post*, 22 July 2013 (www.washingtonpost.com/world/national-security/congressional-panels-approve-arms-aid-to-syrian-opposition/2013/07/22/393035ce-f31a-11e2-8505-bf6f231e77b4_story.html?utm_term=.48f298872656).

46 US, Department of Defense, *DOD Dictionary of Military and Associated Terms* (February 2017), (www.hsdl.org/?abstract&did=799027).

47 See Humud, Blanchard and Nikitin, above n.44, 30-31.

conditions for a negotiated settlement to end the conflict in Syria”.⁴⁸ The joint explanatory statement adds that “sustainment [. . .] includes the provision of [. . .] arms, munitions, and equipment”.⁴⁹ This legislation, part of the so-called Syrian Train and Equip Program, thus—at least in theory—allows the provision of lethal aid, including for the benefit of the Syrian armed opposition groups *in their armed resistance to the Assad regime*. However, it seems that—in practice—the program was (and remains) fundamentally geared towards the fight against the Islamic State.⁵⁰ Indeed, although the NDAA 2017 extended the authorization for the Syria training programme through 31 December 2018, it also transferred the funds for the former Syria and Iraq “Train and Equip Funds” to a new “Counter-ISIL Fund”.⁵¹

20. Turning to European practice, more than €9.4 billion has been spent by the EU on humanitarian aid.⁵² Conversely, the Council of the EU implemented an arms embargo on Syria on 9 May 2011.⁵³ However, an exception was made for “non-lethal military equipment” and “equipment which might be used for internal repression” if “intended solely for humanitarian or protective use”.⁵⁴ The embargo was eased significantly in February 2013,⁵⁵ and finally lifted for the benefit of the Syrian National Coalition for Opposition and Revolutionary Forces in May of the same year.⁵⁶ However, the EU Foreign Affairs Council (again) noted that member States had committed themselves to exclusively consider arms deliveries for the purpose of protecting civilians and abide by the EU Council Common Position 2008/944 on exports of

48 US, Congress, Carl Levin and Howard P. “Buck” McKeon, National Defense Authorization Act for Fiscal Year 2015 (19 December 2014) P.L. 113-291, (www.congress.gov/bill/113th-congress/house-bill/3979), Section 1209(a).

49 See Legislative Text and Joint Explanatory Statement, Accompanying the Enrolled Version of H.R.3979, above n.48, 870.

50 Christopher M. Blanchard and Carla E. Humud, Congressional Research Service, The Islamic State and U.S. Policy (2 February 2017), (<https://fas.org/sgp/crs/mid-east/R43612.pdf>), 11-12.

51 See: US Congress, National Defense Authorization Act for Fiscal Year 2017 (23 December 2016) P.L. 114-328, (www.congress.gov/bill/114th-congress/senate-bill/2943), Sec. 1212 and 4302 Line 10.

52 European Civil Protection and Humanitarian Aid Operations, Syrian Crisis (May 2017), (http://ec.europa.eu/echo/files/aid/countries/factsheets/syria_en.pdf).

53 EU Council Decision 2011/273/CFSP (9 May 2011), OJ 2011 L 121/11 and Council Regulation 442/2011 (9 May 2011), OJ 2011 L 121/1.

54 EU Council Decision, above n.53, art. 2(1)(b).

55 EU Council Decision 2013/109/CFSP (28 February 2013), OJ 2013 L 58/8.

56 EU, Foreign Affairs – Council, Council Declaration on Syria (27 May 2013), (www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137315.pdf) (emphasis added). See also: Council Decision 2013/255/CFSP (31 May 2013), OJ 2013 L 147/14.

military technology and equipment.⁵⁷ That Council Common Position does not explicitly prohibit transferring arms to non-state armed groups embroiled in civil war, but does prescribe that an export license *shall* be denied if it would be inconsistent with member States' international obligations or would prolong armed conflicts in the country of final destination.⁵⁸ However, lifting an arms embargo does not (necessarily) imply that arms transfers are lawful. For example, the Dutch Government maintained that, although there was no international obligation to impose an arms embargo on Syria, the non-intervention principle still applied and included a prohibition on "supporting the armed opposition through the provision of military material and training".⁵⁹

21. In any event, no EU member State seems to have overtly admitted sending war material to the Syrian armed opposition.⁶⁰ While the UK confessed to having provided more than £67 million to the Syrian opposition, most of those funds have (officially) been allocated to rather innocuous support.⁶¹ Even sending life-saving equipment to the moderate armed opposition—including communications, medical and logistics equipment, as well as equipment to protect against chemical weapons attacks—does not immediately raise any red flags. In a similar sense, then French President François Hollande hinted at having provided arms to the Syrian rebels, but maintained that the support was in accordance with European commitments.⁶²

57 Moreover, the declaration stipulated that "Member States will not proceed at this stage with the delivery of the equipment mentioned above". *Ibid.*

58 Council Common Position 2008/944/CFSP (8 December 2008), OJ 2008 L 335/99, art. 2(1) and (3). See also the User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment (29 April 2009), (<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>).

59 The Netherlands, Ministry of Foreign Affairs, Kamerbrief over de Volkenrechtelijke Aspecten van het Sanctieregime tegen Syrië (4 April 2013), (www.rijksoverheid.nl/documenten/brieven/2013/06/04/brief-volkenrechtelijke-aspecten-van-het-sanctieregime-tegen-syrie), 2 (authors' translation).

60 De Groof, above n.39, 41. According to data by the Stockholm International Peace Research Institute, no State officially sent "major conventional weapons" to the Syrian rebels. Its Arms Transfers Database only shows "missile" deliveries in 2012, 2013 and 2014 by unknown suppliers. See: (www.sipri.org/databases/armstransfers).

61 United Kingdom, Foreign & Commonwealth Office, Factsheet: The UK's Non-humanitarian Aid Response to the Syrian Crisis (last updated on 1 December 2015) (www.gov.uk/government/statistics/factsheet-the-uks-non-humanitarian-aid-response-to-the-syria-crisis-2).

62 Christophe Ayad, David Revault d'Allonnes and Thomas Wieder, Hollande au « Monde »: « Les Rebelles Syriens Méritent Tout Notre Soutien », *Le Monde*, 20 August 2014 (www.lemonde.fr/politique/article/2014/08/20/hollande-au-monde-je-veux-acceler-les-reformes_4473704_823448.html).

The French Foreign Affairs Ministry website furthermore merely mentions that France supports moderate groups in Syria fighting the so-called Islamic State.⁶³ Additionally, a team of investigative reporters laid bare a €1.2 billion weapons pipeline from Central and Eastern European States to States considered to be key backers of the Syrian opposition in July 2016.⁶⁴ However, the exporting States seemed to rely on assurances provided by the beneficiaries that the arms would not be resold or exported.⁶⁵

22. Finally, in support of their decision *not* to export weapons to Syria, several European States expressed the view that the supply of arms to the Syrian opposition would (likely) be in breach of the customary principle of non-intervention and thus illegal under international law.⁶⁶

23. Looking at this practice, two elements stand out. First, the US and EU member States did not seem to have any qualms about admitting their support for organized armed groups in Syria, as long as it pertained to *humanitarian* aid.⁶⁷ Second, although the necessary authorization was adopted in the US and the EU arms embargo on Syria was eventually (partially) lifted, no State openly admitted to providing (lethal or non-lethal) *military* aid to the Syrian armed opposition directed towards its fight against the Assad regime. If assistance for military purposes was in fact (grudgingly) acknowledged, the “anti-terrorist” features thereof were highlighted where possible.⁶⁸

24. Furthermore, the Syrian government reacted furiously to the involvement of third States, evidenced by its numerous letters to the UNSC on the topic.⁶⁹ This

63 France, Ministry of Foreign Affairs, *La France et la Syrie* (last updated in February 2017), (www.diplomatie.gouv.fr/fr/dossiers-pays/syrie/la-france-et-la-syrie/).

64 See the *Balkan Arms Trade—Making a Killing Project* by the Balkan Investigative Reporting Network (BIRN) and Organized Crime and Corruption Reporting Project (OCCRP) (www.balkaninsight.com/en/page/balkan-arms-trade) and (www.occrp.org/en/makingakilling/).

65 Ivan Angelovski, Miranda Patrucic and Lawrence Marzouk, *Revealed: The £1bn of Weapons Flowing from Europe to Middle East*, *The Guardian*, 27 July 2016 (www.theguardian.com/world/2016/jul/27/weapons-flowing-eastern-europe-middle-east-revealed-arms-trade-syria).

66 See Julian Borger, *The Austrian Position on Arms Embargo in Syria—Official Document*, *The Guardian*, 15 May 2013 (www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf); The Netherlands, *Kamerbrief Sanctieregime Syrië*, above n.59.

67 Ruys, above n.40, paras.56-62.

68 See, e.g., above nn.50-51 and 63.

69 See, for an overview of Syrian letters in the first half of 2015 alone: Tom Ruys, Nele Verlinden and Luca Ferro, “Digest of State Practice 1 January–30 June 2015”, 2 *Journal on the Use of Force and International Law* (2015), n.216.

point of view was echoed by Russian and Iranian officials, as the Assad regime's main patrons, though admittedly couched in more general terms.⁷⁰

II.D. The War in Donbas (Eastern Ukraine)

25. Following the fall of the Ukrainian government in February⁷¹ and the secession of Crimea in March 2014 (later absorbed by the Russian Federation),⁷² increasingly heavy armed clashes erupted in the eastern Ukrainian regions Donetsk and Luhansk (together referred to as the “Donbas”) between Ukrainian governmental forces and pro-Russian separatists.⁷³ By 23 July 2014, the International Committee of the Red Cross labelled the situation in eastern Ukraine a NIAC⁷⁴—with no clear end in sight.⁷⁵

26. From the outset of the conflict, allegations of Russian involvement were ubiquitous. Already on 13 April 2014, the US State Department presented the (circumstantial) evidence of Russian pro-separatist support, leading to their assessment that Russia attempted to “undermine Ukrainian sovereignty [. . .] in contravention of [its] obligations under international law.”⁷⁶ Four months later, then NATO Secretary-General Anders Rasmussen condemned the use of Russian forces in Ukraine as well as “Russian artillery support” and “transfers of large quantities of advanced weapons, including tanks, armoured personnel carriers, and artillery to separatist groups in Eastern Ukraine.”⁷⁷ In November 2014, the EU High Representative for Foreign

70 See, e.g., SC Verbatim Record, UN Doc. S/PV.7621 (15 February 2016), 28 (Russian Federation); Iran Ministry of Foreign Affairs, Zarif: No Pre-condition for Iran Presence in Intl Forums Acceptable (29 October 2015), (<http://en.mfa.ir/index.aspx?keyid=&siteid=3&pageid=2027&newsview=364666>).

71 Election of President—Unrest in Eastern Ukraine, 60 *Keesing's* (2014), 53378.

72 Annexation of Crimea, 60 *Keesing's* (2014), 53241; Loss of Crimea to Russia, 60 *Keesing's* (2014), 53242.

73 Separatist Unrest in Eastern Ukraine, 60 *Keesing's* (2014), 53301.

74 Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law, ICRC, 23 July 2014 (www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm).

75 See, the biannual Digests of State Practice in the *Journal on the Use of Force and International Law* (e.g., above n.69) for a regular update of the conflict.

76 US, State Department, Evidence of Russian Support for Destabilization of Ukraine (13 April 2014), (<https://2009-2017.state.gov/r/pa/prs/ps/2014/04/224762.htm>). For States sharing that assessment, see: SC Verbatim Record, UN Doc. S/PV.7154 (13 April 2014); SC Verbatim Record, UN Doc. S/PV.7157 (16 April 2014); SC Verbatim Record, UN Doc. S/PV.7165 (29 April 2014); SC Verbatim Record, UN Doc. S/PV.7167 (2 May 2014); SC Verbatim Record, UN Doc. S/PV.7205 (24 June 2014).

77 NATO, NATO Secretary General Condemns Entry of Russian Convoy into Ukraine (22 August 2014), (www.nato.int/cps/en/natohq/news_112112.htm).

Affairs, Federica Mogherini, further called on Russia to prevent “movement of military, weapons or fighters from its territory into Ukraine” and withdraw “any troops, weapons and equipment under its control”.⁷⁸

27. More generally, the International Crisis Group reported that “while publicly sticking to the line that Moscow’s [...] influence [...] is minimal, [Donetsk separatist] leaders privately admit their total dependence”.⁷⁹ Still according to the report, the “armed groups’ dependence on Russia for weapons, equipment, clothing and military support has acted as a strong deterrent against challenging the Moscow line”.⁸⁰ Presumably, it was allegations of this kind that led the Prosecutor of the International Criminal Court (ICC) to examine whether Russia exercised “overall control over armed groups in eastern Ukraine”.⁸¹

28. The Russian reaction to such allegations was either evasive or in full denial.⁸² In August 2014, its Ministry of Foreign Affairs denounced the “hysteria in some capitals after Russia sent humanitarian aid to the suffering population”,⁸³ leading to “false claims of Russian aggression and incursions by our troops and armoured vehicles”.⁸⁴ Furthermore, in September 2015, Russian President Vladimir Putin broadly stated: “I believe that providing aid to illegitimate organizations is not in line with international law and the charter of the United Nations. We support only legitimate

78 European Union External Action, Statement by High Representative/Vice-President Federica Mogherini on the Latest Developments in Ukraine (9 November 2014), (https://eeas.europa.eu/headquarters/headquarters-homepage/6824/state-statement-high-representativevice-president-federica-mogherini-latest-developments-ukraine_en).

79 International Crisis Group, *Russia and the Separatists in Eastern Ukraine* (5 February 2016), 7, (www.crisisgroup.org/europe-central-asia/eastern-europe/ukraine/russia-and-separatists-eastern-ukraine).

80 *Ibid.*, 6.

81 ICC, The Office of the Prosecutor, *Report on Preliminary Examination Activities 2016* (14 November 2016), para.170 (www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf). With this quote, we do not intend to open the debate on the possible internationalization of the conflict. It merely illustrates the widespread allegations of Russian military support to the Ukrainian rebels.

82 See the interventions by the Russian representative during UNSC debates, above n.76. See also above n.75.

83 Russia, Ministry of Foreign Affairs, *Comment by the Russian Ministry of Foreign Affairs regarding Claims Addressed to Us regarding the “Legal Framework” of Sending Humanitarian Aid to Lugansk* (23 August 2014), (www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/673357).

84 Russia, Ministry of Foreign Affairs, *Statement by the Russian Ministry of Foreign Affairs on the Events in Ukraine* (29 August 2014), (www.mid.ru/en/web/guest/maps/ua/-/asset_publisher/ktn0ZLTvbbs3/content/id/672727).

government organizations.”⁸⁵ On 16 November 2016, two days after the damaging ICC report,⁸⁶ President Putin signed a decree dedicated to the intention not to become a party to the Court.⁸⁷ Maria Zakharova, the Foreign Ministry Spokesperson, explained that the report’s depiction of the situation in southeast Ukraine was “biased” and lambasted its sources.⁸⁸ Finally, after an international investigation concluded that the MH17 flight was downed by a missile launcher brought into Ukraine from Russia,⁸⁹ Zakharova again called the allegations “groundless and unsubstantiated”, while pointing at the investigation’s “poor quality”.⁹⁰

29. On two separate occasions, however, President Putin came close to admitting Russian involvement. First, on 17 December 2015, he stated during his annual press conference that: “We’ve never said there are no *people there who deal with certain matters, including in the military area*, but this does not mean that regular Russian troops are present there.”⁹¹ Second, on 12 October 2016, he admitted Russia “had—to reiterate, had—to *defend the Russian-speaking population in Donbass*”.⁹² Regardless of these statements, no direct admissions of involvement have surfaced to date.

30. In sum, and similar to the Syrian case study, Russian officials were upfront about their intentions to support the population in eastern Ukraine by providing *humanitarian* assistance. However, they have not (publicly) accepted responsibility for additional Russian interference. This included downplaying Russian-made equipment being used by the separatist forces, as well as the relationship between Russian citizens active in the conflict and their ties to the Russian State.

85 Charlie Rose, Transcript of President Vladimir Putin, Pt. 1 (28 September 2015), (<https://charlierose.com/videos/22696>). The quote is a reply to a question on the situation in Syria. However, the situation in southeast Ukraine was also discussed.

86 See above n.81.

87 Russia, Ministry of Foreign Affairs, Statement by the Russian Foreign Ministry (16 November 2016), (www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566).

88 Russia, Ministry of Foreign Affairs, Briefing by Foreign Ministry Spokesperson Maria Zakharova, Moscow (17 November 2016), (www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2529854).

89 Sterling and Deutsch, Malaysian Flight MH17 Downed by Russian-made Missile: Prosecutors, Reuters, 28 September 2016 (www.reuters.com/article/us-ukraine-crisis-mh-idUSKCN11Y0WN).

90 Russia, Ministry of Foreign Affairs, Briefing by Foreign Ministry Spokesperson Maria Zakharova Moscow (29 September 2016), (www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2479008#10).

91 Russia, Kremlin, Vladimir Putin’s Annual News Conference (17 December 2015), (<http://en.kremlin.ru/events/president/news/50971>) (emphasis added).

92 Russia, Kremlin, Russia Calling! Investment Forum (12 October 2016), (<http://en.kremlin.ru/events/president/news/53077>) (emphasis added).

III. Revisiting the applicable legal frameworks

31. Following an overview of recent and ongoing armed conflicts, and the interference therein by non-belligerent parties, the following section is dedicated to the evaluation of such practice on the basis of the applicable legal frameworks, i.e., the law of neutrality (for IACs) and the principle of non-intervention (for NIACs). Concomitantly, some of their conceptual difficulties are highlighted and clarified.

III.A. The law of neutrality

32. The law of neutrality is an old body of law which aims at preventing third States from becoming involved in a war. It applies solely in situations of international armed conflict. The main instruments of neutrality law date back to 1907 and are still in force today: Hague Convention V on Neutral Powers in Case of War on Land and Hague Convention XIII on Neutral Powers in Naval War.⁹³ More recent legal provisions have been included in the 1949 Geneva Conventions⁹⁴ and the 1977 First Additional Protocol,⁹⁵ as well as in non-binding instruments.⁹⁶

33. The basic rules of neutrality law all derive from the principles of impartiality, abstention and prevention, and include rights and duties for both neutral and belligerent States. Neutral States are prohibited from participating in the hostilities and providing assistance to the belligerent parties, while being bound by a duty of impartiality. More specifically, a neutral State may not allow the use of its territory by one of the belligerents, including allowing overflights or stopovers for military planes or the installation or use of “wireless telegraph stations”.⁹⁷

93 1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land and 1907 Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, both available in the ICRC IHL Treaty Database (<https://ihl-databases.icrc.org/ihl>) that further includes the Geneva Conventions and Additional Protocols).

94 E.g., GC II, art. 5 and GC IV, art. 4.

95 E.g., AP II, arts. 2 and 19.

96 International Law Association, Helsinki Principles on the Law of Maritime Neutrality, Final Report of the Committee on Maritime Neutrality, Report of the 68th Conference (1998), 496; Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995), (San Remo Manual).

97 See Hague Rules on Air Warfare, December 1922 – February 1923 (available at http://lawofwar.org/hague_rules_of_air_warfare.htm), art. 40; HPCR Manual on International Law Applicable to Air and Missile Warfare, published by Cambridge University Press, New York, 2013 (AMW Manual), rules 166 and 167(a) and San Remo Manual, para.14. For a modern application of this rule in relation to cyber, see Tallinn Manual 2.0, Rule 151 and its commentary: Michael N. Schmitt and NATO Cooperative Cyber Defence Centre of Excellence (eds.), Tallinn Manual

34. As such, and looking at the State practice discussed above,⁹⁸ granting overflight rights indeed forms a violation of the law of neutrality. The only exception would be allowing overflight for humanitarian purposes, as the example of Switzerland during the Iraq war correctly indicates. While the Irish government was perhaps right in saying that allowing US planes to land at Shannon airport does not equal an Irish “participation in the war”, such supportive actions nevertheless violated the law of neutrality.

35. The corollary of these neutral duties is the neutral State’s right to have its territory respected by the belligerents, meaning that combatants may not enter that territory (Article 1 HC V) and that belligerents may not recruit troops on the territory of a neutral State (Article 4 HC V). If a combatant enters the territory of a neutral State, that State has the duty to capture and intern him (Articles 11 and 12 HC V). Thus, if a third State allows a military base to be used by a belligerent on the neutral territory, as Italy did during the 2003 Iraq war, it violates the law of neutrality.

36. Furthermore, neutrality law clearly prohibits the provision of *war material* by neutral States to belligerents (Art. 6 HC XIII).⁹⁹ Even though it does not contain specific norms related to the provision of *other types of support*, the prohibition of assistance is considered to include also financial aid, such as gifts and loans,¹⁰⁰ or the provision of services that could influence the outcome of the conflict, such as intelligence sharing.¹⁰¹ As helping troops to return from a different battlefield to fight in a newly erupted IAC arguably influences the outcome of that IAC, the US assistance in airlifting Georgian troops from Iraq to Georgia in 2008 constituted a violation of neutrality law. Nevertheless, this observation does not exclude the fact that under the rules of *jus ad bellum*, as enshrined in the UN Charter, States are entitled to assist a victim of aggression in collective self-defence.

2.0 on the International Law Applicable to Cyber Operations (2017), 556. Note that the rule is different in case of passage through territorial waters, see HC XIII, art. 10.

98 Above n.16.

99 However, neutrality law does not impose a duty on neutral States to prevent supplies by individuals (HC V, art. 7 and HC XIII, art. 7). This rule is nowadays considered to be outdated, as most scholars accept a prevention duty on the side of the neutral State. See authors quoted in Yves Sandoz, “Rights, Powers and Obligations of Neutral Powers under the Conventions” in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (2015), 90.

100 Hersch Lauterpacht, *2 Oppenheim’s International Law: A Treatise* (1955), 2, para.352.

101 Eric Castrén, *The Present Law of War and Neutrality*, 85 *Annales Academiae Scientiarum Fennicae* (1954), 474. Castrén further notes 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”.

37. An important and undisputed exception to the foregoing is the provision of humanitarian aid, which falls outside the scope of the prohibition of assistance (Art. 14 HC V). It is, perhaps, no coincidence that the US stressed it was only providing humanitarian aid to Georgia during the IAC with Russia. The law of neutrality also does not prohibit States from maintaining trade relations with belligerents, as long as it does so in an impartial way (Art. 9 HC V). Restrictions on trade between neutral and belligerent States may however flow from other obligations, such as UNSC Resolutions.

38. The combination of both neutral rights and duties forms a source of uncertainty and discontent with regard to neutrality law. Indeed, States have occasionally expressed the desire to enjoy neutral rights without having to comply with the full range of neutral duties. Hence, such a stance would bring States in a grey zone between being neutral and being belligerent, which has been labelled by scholars as “qualified neutrality”,¹⁰² “differentiated neutrality”, “benevolent neutrality” or “non-belligerency”.¹⁰³

39. The notion of non-belligerency was introduced by Italy in 1939, when it initially decided not to take part in the Second World War but nevertheless supported Germany.¹⁰⁴ The US also claimed to be a non-belligerent during the Second World War before entering the war.¹⁰⁵ Non-belligerent States willingly abandon their duty of impartiality and non-assistance, respecting only the duty of non-participation in the hostilities.¹⁰⁶ In doing so, they hope to keep the protection offered to neutrals,¹⁰⁷ while still choosing a side in the conflict and influencing its outcome. Together with some States, some scholars have defended non-belligerency as a legal intermediate status.¹⁰⁸

102 Lauterpacht, above n.100, 648.

103 Maurice Torrelli, *La Neutralité en Question*, 96 *Revue Générale de Droit International Public* (1989), 5, 13–4. On the nuances between the various notions, see Brian F. Havel, *An International Law Institution in Crisis: Rethinking Permanent Neutrality*, 61 *Ohio State LJ* (2000), 167, 179.

104 Torrelli, above n.103, 14.

105 Michael Bothe, “The Law of Neutrality”, in Dieter Fleck (ed.), *The handbook of international humanitarian law* (2013), 550.

106 Torrelli, above n.103, 14.

107 Natalino Ronzitti, “Italy’s Non-Belligerency during the Iraqi War”, in Maurizio Ragazzi (eds.), *International responsibility today: essays in memory of Oscar Schachter* (2005), 199; Andrea Gioia, *Neutrality and Non-Belligerency*, in Harry H.G. Post (ed.), *International economic law and armed conflict* (1994), 79.

108 Gioia, above n.107, 76–80. See also Jessup, Fauchille and de la Pradelle referred to by Wolff Heintschel von Heinegg, “Benevolent” Third States in *International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality*, in Michael N. Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines: Essays in honour of Yoram Dinstein* (2007), 544–5. This

40. Nevertheless, there are convincing arguments to deny the existence of such an intermediate status. First, apart from two rare references in provisions of international humanitarian law (IHL),¹⁰⁹ no IHL treaty or (more recent) soft-law instrument refers to “non-belligerency”. Second, besides the official Italian position of non-belligerency during the Iraq conflict in 2003,¹¹⁰ no other State in recent history has tried to justify violations of neutrality law by reference to such an intermediate status. Lastly, non-belligerency is only rarely referred to in domestic Military Manuals.¹¹¹ In its recent LOAC Manual, the US defends the “qualified belligerent” theory, but only in case it is used in support of a victim of aggression, while nevertheless also admitting it is “controversial”.¹¹² In sum, a status of non-belligerency has not widely been recognized in legal doctrine,¹¹³ and finds only very limited support in State practice. As one author aptly summed it up: “whenever an IAC breaks out, States are either belligerent or neutral”.¹¹⁴

41. As a result, States adopting a non-belligerent stance still have to take into account possible¹¹⁵ countermeasures by an aggrieved belligerent, who finds that the State has violated its duties under neutrality law.¹¹⁶ For example, during the conflict between Israel and its Arab neighbours in 1973, Arab States imposed an oil embargo against Western States, because the latter were aiding Israel in its war effort. The Arab States justified this embargo by arguing that the targeted Western States

position was also strongly defended by US Attorney General Jackson in 1941, see *ibid.*, 546.

109 See GC III, art. 4(B)(2) and AP I, art. 2(c).

110 See above n.9.

111 See, for instance, Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, paras.1031 and 1036.

112 US Department of Defence *Law of War Manual*, June 2015 (updated December 2016), para.15.2.2.

113 Heintschel von Heinegg, above n.108, at 553–4.

114 Sandoz, above n.99, 93. The only possible correct use of the notion of non-belligerency would therefore refer to a neutral State which can temporarily set aside its obligations because of obligations imposed by a UNSC resolution.

115 In contrast to neutral States, who have a duty to defend their neutrality in case belligerents commit neutrality law violations, the opposite scenario (a violation by a neutral State) does not create a duty for the aggrieved belligerents to respond.

116 Heintschel von Heinegg, above n.108, at 555–6, citing Bring. See also Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and it's a Good Thing, Too: A Response to Chang*, 47 *Texas ILJ* (2011), 138; Walter L. Williams Jr., *Neutrality in Modern Armed Conflicts: A Survey of the Developing Law*, 90 *Military LR* (1980), 40.

(in particular the US and the Netherlands)¹¹⁷ violated their neutral duty of impartiality.¹¹⁸

42. Both in doctrine and practice, uncertainty nevertheless exists with regard to possible (forcible) countermeasures that can be taken against violations of neutrality law. In the Charter era, *forcible* countermeasures may only be taken by way of measure of self-defence in reaction to an armed attack in accordance with Article 51 UN Charter. If the violation of neutrality law by the neutral State does not amount to an armed attack, the aggrieved belligerent cannot react with force. This would lead to the conclusion that the armed reprisals adopted by Iraq against Kuwait in 2003, in retaliation for the latter's support to the US-led coalition, could at least not be justified by reference to violations of the law of neutrality.

43. However, UNSC-imposed obligations, such as an arms embargo, can temporarily suspend neutral obligations, hence removing the existence of a wrongful act in the first place and thereby excluding any type of countermeasure by the aggrieved belligerent. Controversy remains as to whether UNSC *authorizations* lead to the same effect. For instance, if the Iraq invasion in 2003 would have been authorized by the UNSC, then granting overflight to the US would arguably not have been considered problematic.¹¹⁹

117 Under Operation "Nickel Grass", the US airlifted tons of military material to Israel (see Walter J. Boryne, "Nickel Grass", 81 Air Force Magazine (1998) (online archived version: <https://web.archive.org/web/20120331195111/http://www.air-force-magazine.com/MagazineArchive/Pages/1998/December%201998/1298nickel.aspx>)). The Dutch Minister of Defence secretly allowed the US airplanes to stopover on Dutch territory on their way to Israel. See Duco Hellema, Cees Wiebes and Gerardus T. Witte, *The Netherlands and the Oil Crisis* (2004), 33-4.

118 Stephen C. Neff, *The Rights and Duties of Neutrals: A General History* (2000), 199.

119 The crux of the question is how one interprets UN Charter Article 103, which says that "[i]n the event of a conflict between the obligations [...] under the present Charter and [...] obligations under any other international agreement, [...] obligations under the present Charter shall prevail". A textual and strict interpretation would mean that only UNSC-imposed *obligations* can prevail over neutral duties. A broader interpretation would also include UNSC *authorizations*, thus removing the wrongful character of assistance offered by neutral States to belligerents and thereby excluding the possibility of countermeasures. The former position is defended by, *inter alia*, Jean Combacau, *Le pouvoir de sanction de l'ONU: étude théorique de la coercition non militaire* (1974), 284; Rudolf Bernhardt, "Article 103", in Bruno Simma et al. (eds.), *The Charter of the United Nations: a Commentary* (2002), 1296; Richard H. Lauwaars, "The Interrelationship between United Nations Law and the Law of Other International Organizations", 82 Michigan LR (1984), 1604, 1607. Case-law of both the ECtHR and the ECJ seem to point in that direction as well: see ECJ, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, Case No. C-124/95, [1995] ECR I-00081 (ECLI:EU:C:1997:8),

44. To summarize, providing the type of support as discussed under Section II (except for the humanitarian assistance) would clearly violate neutral duties. While some States explicitly recognized this—and therefore refused to provide such assistance—others have tried to deny it by wrongfully invoking an intermediate status of non-belligerency or by claiming that multi- or bilateral agreements between allies would prevail over neutrality rules—something which has been contested by national courts.

45. Nevertheless, there are some examples of support in violation of neutrality law which have remained without consequences, leaving us with inconsistent practice as regards the application of neutrality law. However, at no point was this *prima facie* unlawful behaviour accompanied by the necessary *opinio juris* to be able to argue a change in customary international law. As such, the traditional understanding of the law of neutrality (inasmuch as it has not been altered by the UN Charter) remains standing.

III.B. The principle of non-intervention

46. Complementary to neutrality law, though not applicable to international armed conflicts, is the principle of non-intervention that has classically been described as follows:

[I]ntervention is forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or consequences on that other state. [. . .] Since every state has the right, as an attribute of its sovereignty and insofar as it is not qualified by treaty obligations, to decide for itself such matters as its political, economic, social and cultural systems, and its foreign policy, interference in those matters can infringe its sovereignty.¹²⁰

47. In contrast to the law of neutrality, however, the principle of non-intervention is not enshrined in a specially devoted treaty. Nevertheless, in 1970, the General

para.60; and ECtHR, *Al Jeddah v. UK*, Application No. 27021/08, Judgment, 7 July 2011, para.102. Nevertheless, a broader interpretation can be found in more recent soft law instruments on neutrality (see Tallinn Manual, rule 85 and AMW Manual, art. 165), and seems to be widely defended (at least implicitly) in doctrine (*inter alia* by Bothe, above n.105, 553; Daniel Thürer, Comment: UN Enforcement Measures and Neutrality. The Case of Switzerland, 30 *Archiv Des Völkerrechts* (1992), 63, 81; Paul Seger, “The Law of Neutrality”, Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014), 262). Milanovic notes, however, that such interpretation is based “on policy grounds and without much textual support in the Charter”. See Marko Milanovic, *Norm conflict in international law: whether human rights?*, 20 *Duke JCIL* (2009), 69, 78.

120 Robert Jennings and Arthur Watts (eds.), 1 *Oppenheim’s International Law* (2008), para.129 (footnotes omitted).

Assembly adopted the Friendly Relations Declaration, wherein the same principle was considered to prescribe that,

[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.¹²¹

48. Finally, the ICJ dubbed the principle “part and parcel of customary international law”¹²² and clarified that

the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.¹²³

Two conditions thus need to be met for a violation of the non-intervention principle: State action must constitute *coercive* interference in another State’s *domaine réservé*.

49. Consequently, it is, first, submitted that the principle of non-intervention *in se* does not frustrate a government-in-distress from soliciting (military) support from an allied government in quelling a NIAC. The norm embodies the “*right of every sovereign State to conduct its affairs without outside interference*” and qualifies as the “*corollary of the principle of sovereign equality of States*”.¹²⁴ As the right is borne by the State, represented by its internationally recognized government, it logically cannot qualify as a legal impediment to foreign assistance if so requested by that government.¹²⁵ It is indeed difficult to see how such assistance could be described as

121 Friendly Relations Declaration, above n.2, 123. See also: AP II, art. 3(2).

122 Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, ICJ Reports 1986, 14, at para.202.

123 Ibid., at para.205.

124 Ibid., at para.202 (emphasis added). See also the principle of sovereign equality of States in the Friendly Relations Declaration, above n.2, 124.

125 Hafner noted in this context that “intervention and military assistance with prior consent are diametrically opposed concepts so that the one cannot be a legal limitation to the other”: Gerhard Hafner, Present Problems of the Use of Force in International Law; Sub-group: Intervention by Invitation, Institut de Droit International Tenth Commission, Naples Session (2009), 409. But, see also: Louise Doswald-Beck, The Legal Validity of Military Intervention by Invitation of the Government, 56 BYIL 189 (1985), 250; Théodore Christakis and Karine

coercive towards the requesting State, or intended to subordinate the exercise of that State's sovereign rights.¹²⁶ The better view seems to be that the right to self-determination is the appropriate legal norm for this purpose as it ensures the right of all peoples (as opposed to a State) to determine, without external interference, their political status and to pursue their economic, social and cultural development. However, given the focus of this article, that line of thought will not be further developed here.

50. Secondly, the principle clearly does forbid States to “organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities *directed towards the violent overthrow of the regime of another State*”.¹²⁷ The ICJ similarly determined that “if one State, with a view to the coercion of another State, supports and assists armed bands in that State *whose purpose is to overthrow the government of that State*, that amounts to an intervention by the one State in the internal affairs of the other”.¹²⁸ More specifically, the Court stipulated that “assistance to rebels in the form of the provision of weapons or logistical or other support [...] may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States”.¹²⁹

51. Mention should also be made of the Wiesbaden Resolution on “The Principle of Non-Intervention in Civil Wars”, adopted in 1975 by the Institut de Droit International (*Institut*).¹³⁰ Although the resolution can probably not be considered as the codification of customary international law in its entirety,¹³¹ it was clear that all members of the *Institut* agreed on the existence of a general prohibition for States to support insurgents abroad.¹³² Moreover, and perhaps most importantly, this is still

Bannelier, *Volenti Non Fit Injuria?* Les Effets du Consentement à l'Intervention Militaire, 50 AFDI (2004), 102, 113-20.

126 Maziar Jamnejad and Michael Wood, *The Principle of Non-intervention*, 22 Leiden JIL (2009), 345, 378.

127 Friendly Relations Declaration, above n.2, 123 (emphasis added).

128 ICJ Nicaragua case, above n.122, para.241 (emphasis added).

129 *Ibid.*, para.195. See also: *Ibid.*, para.228: “while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua [...] the Court considers that the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua, [...] does not in itself amount to a use of force”.

130 Resolution on the Principle of Non-Intervention in Civil Wars, Institut de Droit International Eight Commission, Wiesbaden Session (1975) (www.idi-iil.org/app/uploads/2017/06/1975_wies_03_en.pdf).

131 Dietrich Schindler, *Le Principe de Non-intervention dans les Guerres Civiles*, 56 AIDI (1975), 119, 127 and 411-74.

132 *Ibid.*, 127.

supported by the *opinio juris* of States.¹³³ An explicit example thereof can be found in the 2016 US Law of War Manual.¹³⁴

52. It is, therefore, somewhat surprising that the previous section describing modern State practice seems to capture a more pragmatic trend in international relations whereby third-state support to rebel groups, fighting the government-in-power, is not considered unlawful as long as it serves humanitarian or non-military purposes only. As such, it diverges from the *Nicaragua* *acquis* which prohibits even humanitarian assistance which is not “given without discrimination to all in need”.¹³⁵ Generally, however, the trend seems to correspond to the Wiesbaden Resolution, which prohibits pro-rebel forcible (e.g., through armed forces or the supply of war material) and dictatorial interference (e.g., through financial, economic or technical support which is likely to influence or have a substantial impact on the outcome of the armed conflict).¹³⁶

53. However, with regard to military support, it is equally clear that the sponsoring States showed an absolute unwillingness to accept responsibility for their actions,¹³⁷ except when it was aimed at fighting a group that is internationally branded as a terrorist organization.¹³⁸ This also matches with the classical understanding of the non-intervention principle, given that it solely proscribes support aimed at the violent overthrow of the internationally recognized government. As a consequence, the practice can have no bearing on the traditional interpretation of the non-intervention principle, as *prima facie* violations without accompanying *opinio juris* leave intact the prohibition on assisting rebel armed forces through military means.¹³⁹

133 Christine Gray, *International Law and the Use of Force* (2008), 68. See also: Malcolm N. Shaw, *International Law* (2008), 1152.

134 US Law of War Manual, above n.112, para.17.18.1.

135 ICJ *Nicaragua* case, above n.122, para.243. If correct, this aspect of the non-intervention principle is contrary to the rule under neutrality law, which clearly allows for humanitarian aid to parties to an international armed conflict (see for instance HC V, art. 14).

136 See Wiesbaden Resolution, above n.130, arts. 2-4.

137 See, above Sections II.C. and II.D.

138 See, above n.37. See also: SC Res 2249 (2015), 1.

139 See, from a methodological perspective: Olivier Corten, *The Law Against War* (2012), 30. Whether or not an exception exists under the same principle regarding similar support for anti-terrorist purposes is a matter currently under dispute, but outside the scope of this article. See Christakis and Bannelier, above n.125, 126; Raphael Van Steenberghe, *The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer*, EJIL: Talk! (2015), 12 February 2015 (www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/). Even so, a State defending its conduct by appealing to possible exceptions or

54. In sum, the combination of (1) the refusal by US officials to specify the types of lethal support and their broad reliance upon “covert action authority”, (2) the evasive reaction or outright denial of any Russian involvement in supporting the rebels in southeastern Ukraine, (3) the absence of overt State practice by European States, (4) the general emphasis placed on the fight against the terrorist organization “Islamic State”, and (5) the negative *opinio juris* expressed by a myriad of States therefore persuasively argues against the non-intervention principle having fallen into *desuetude* in this context.

IV. Towards a harmonized “duty of neutrality” during IACs and NIACs?

55. The foregoing sections suggest a remarkable complementarity between both modern practice by third States in their support to belligerent parties in IACs and rebel armed forces in NIACs (or refusal thereof) as well as the relevant legal frameworks. This inevitably begs the question whether taking a holistic approach might provide innovative insights and, perhaps, support some of the trends described and arguments made above.

IV.A. Optional or mandatory?

56. As outlined in section III, some authors still claim that neutrality law is merely optional. It is submitted, however, that neutrality law is automatically triggered when an IAC erupts, leaving no room for a general intermediate legal category of non-belligerency. This is in line with the principle of non-intervention, of which the legal consequences apply regardless of States deciding to “opt in”. A preliminary, but crucial, determination is thus that States have no (lawful) way of shirking international legal obligations related to neutrality—regardless of the type of armed conflict.

IV.B. Non-participation in hostilities

57. With regard to the duty of non-participation in hostilities, the law of neutrality unequivocally prohibits third States from sending their armed forces (including military advisers) to intervene militarily in an IAC, if they want to preserve their neutral status (and enjoy the correlating rights involved). This approach is equally uncontested in NIACs, since the non-intervention principle stipulates that armed intervention against the personality of the State is a violation of international law. It is

justifications “contained within the rule itself” actually reinforces rather than weakens that rule. ICJ Nicaragua case, above n.122, para.186. See also: Michael Wood, International Law Commission, Second Report on Identification of International Law, UN Doc. A/CN.4/672, 22 May 2014, para.78.

submitted that a conceptually sound approach to the term “intervention” in the latter case solely covers military intervention on the side of rebel forces, as military assistance upon request of the government would not constitute a breach of State sovereignty.¹⁴⁰ Again, neutrality law and the principle of non-intervention therefore outlaw similar behaviour.

IV.C. War(-related) material

58. During an IAC, a neutral State is not allowed to provide military assistance to the belligerent parties. Indeed, neutrality law prescribes a negative equality approach, outlawing not only war-related assistance to one of the parties, but even the provision of similar assistance to all warring parties in an IAC.¹⁴¹ Doctrine confirms the prohibition of assistance that “could influence the outcome of the [IAC]”.¹⁴² Looking at the provision of equipment more specifically, Article 6 HC XIII clearly states that “the supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or *war material of any kind whatever, is forbidden*”.¹⁴³

59. The notion of “war material” is, unfortunately, not further defined by neutrality law. Bothe interprets it in a very strict way, by arguing that solely the supply of weapons *stricto sensu* is banned, i.e. “material that is capable of being used for killing enemy soldiers or destroying enemy goods”.¹⁴⁴ This might be a bit of a stretch. Classical doctrine, for example, argues more broadly that “material which has, exclusively (or at least mainly), a military purpose is prohibited”, a statement which is similarly confirmed by domestic military manuals.¹⁴⁵ Nevertheless, both the law and the practice of neutral States as discussed under Section 1 only confirms a clear exception

140 But, see the reference to self-determination in Section III.B.

141 This can be derived *inter alia* from HC V, art. 6 and HC XIII, art. 9.

142 In a similar vein, Heintschel von Heinegg writes that neutral States “are prohibited from assisting one party in a manner that could lead to a temporal, spatial or other widening of the conflict.” See Heintschel von Heinegg, above n.108, 565.

143 Emphasis added.

144 Bothe, above n.2, para.42.

145 Castrén, above n.101. See also: Lauterpacht, above n.100. See also, for instance, the German Military Manual, which states in para.1207 that “a neutral state *may not support any of the parties to the conflict*. Prohibited is *for instance*: the supply of war ships, munitions and other war material [. . .] allowing military transit through the neutral state’s land, water or airspace [. . .] even though exceptions exist for the transit of wounded and sick [and] allowing the establishment of military bases or supply and telecommunication facilities” (authors’ translation, emphasis added), see Germany, ZDv15/2, Humanitärlich Völkerrecht in bewaffneten Konflikten, Handbuch, 2013, DSK AV230100262, 166. Similarly, see the US Law of War Manual, above n.112, para.15.3.2.1.

for humanitarian assistance, while leaving in the middle whether the supply of material or providing assistance that is linked to the conflict but does not have a main or direct military purpose¹⁴⁶ would be lawful or not.

60. If such support would be allowed by neutrality law, this would correspond to the recent trend in State practice during NIACs, which supports the proposition that providing assistance to rebel fighters, which is non-lethal *and* does not have a direct link to the armed conflict, does not violate a State's duty not to intervene in other States' domestic affairs. This trend confirms the Wiesbaden acquis, in that it suggests a ban on third-state assistance which either serves a (direct) military purpose or could likely influence (or have a substantial impact on) the outcome of the armed conflict.¹⁴⁷

61. In other words, the "duty of neutrality", applicable to all armed conflicts, *certainly* proscribes assistance to the belligerent parties that has a direct and effective impact on their war-waging ability (including the supply of both lethal and non-lethal military material, i.e., any type of armament and ammunition, but also armoured vehicles, body armour and military intelligence for example), whereas it also *clearly* allows for humanitarian assistance.

62. Somewhat less clear is whether the same harmony between neutrality law and the principle of non-intervention exists when it comes to assistance which is neither military nor lethal, but nevertheless does not qualify as purely humanitarian aid.¹⁴⁸ However, since recent practice in NIACs seems to suggest such (pro-rebel) assistance is allowed under the principle of non-intervention and the law of neutrality (as interpreted by States and legal scholars alike) is inconclusive, arguably both legal frameworks should share the same threshold of legality: unless the provided support could likely influence the outcome of the armed conflict, there is no prohibition against providing it to a party engaged in either an international or non-international armed conflict.

IV.D. Economic coercion

63. Article 9 HC V (embodying the duty of impartiality as part of neutrality law) prescribes that "[e]very measure of restriction or prohibition taken by a neutral Power [...] must be impartially applied by it to both belligerents". This is thought to imply that "[a] change in commercial relationships favouring one of the belligerents would [...] constitute taking sides in a manner incompatible with the status of

146 For examples of this type of support, see above nn.43, 54 and 61.

147 Wiesbaden Resolution, above n.130, art. 2(2)(c) and (d) and art. 3(b).

148 This includes certain types of equipment, training programs, and assistance that exclusively serves protective purposes. See, for example, above nn.43, 54 and 61.

neutrality”.¹⁴⁹ From the duty of impartiality, it logically follows that applying the same measure to all belligerent parties is nonetheless prohibited if its impact is differentiated and thereby has a likely effect on the outcome of the armed conflict: similar cases must not be treated differently, but different cases must not be treated similarly.

64. Conversely, in the context of the *Nicaragua* case, the ICJ determined (in one sentence) that the serious economic measures taken by the US administration to the detriment of the Nicaraguan government—which was argued by the latter to be an “indirect’ form of intervention”¹⁵⁰—could not be regarded as a violation of the principle of non-intervention.¹⁵¹ However, the type of measures adopted in that case arguably qualify as “the most common, and potentially most severe, economic actions that can be employed against a state”.¹⁵² Indeed, both the element of coercion inherent in the non-intervention principle and a comparison to the law of neutrality in similar circumstances, argue against the approach taken by the ICJ.

65. It is thus submitted that a third State should be prohibited from adopting economic coercive measures intended to significantly weaken a sitting government embroiled in a NIAC, or against only one of the belligerents in an IAC.

IV.E. Overview

66. Neutrality law and the principle of non-intervention thus (1) apply automatically during IACs and NIACs (though the principle of non-intervention obviously applies outside of armed conflict as well); (2) proscribe intervention through the use of their military forces in support of any of the belligerent parties in an IAC and the rebel forces in case of a NIAC; (3) prohibit the provision of assistance that has an effective impact on the war-waging capabilities of belligerents, and, finally; (4) do not allow the adoption of economic coercive measures to significantly weaken (one of) the government(s) embroiled in armed conflict.

V. Conclusion

67. A conceptually sound view on the law of neutrality and the principle of non-intervention leads to the conclusion that third States are prohibited from supporting any belligerent during an IAC (unless the third States choose to become belligerents themselves) or any non-state actor embroiled in a NIAC with the internationally recognized government. Taken together, international law has thus to a certain extent taken away individual States’ right to influence the outcome of armed conflict and,

149 Bothe, above n.144, para.4.

150 ICJ *Nicaragua* case, above n.122, para.244.

151 *Ibid.*, para.245.

152 Jamnejad and Wood, above n.126, 370.

instead, squarely placed the obligation to ensure international peace and security with the international community of States, represented by the United Nations. It is the UNSC that bears the greatest responsibility in this respect, as it is provided with near-limitless powers under Chapter VII of the UN Charter to curb armed violence.

68. However, theory only gets us so far. The events of the past decades and the ubiquity of armed conflicts today have shown, first, that States do wish to influence the outcome of conflicts and, second, that the UNSC more often than not refuses to take decisive action when faced with a conflict situation. As a result, States have sought for creative (but not always accepted) interpretations of international law that would justify their behaviour, by claiming for instance that they could be “non-belligerent”—rather than neutral—in international conflicts, or that providing protective equipment or support which would greatly save civilian lives would not fall within the scope of the non-intervention principle. While a gap between doctrine and practice is thus apparent, the way forward is much less so.

69. In this regard, we want to stress two points. First, neutrality law and the non-intervention principle seem to work in a complementary fashion and, though some differences undoubtedly remain, share a common core and purpose. It is a good example of the coherence, rather than fragmentation of international law. Second, there is no evidence that State practice and *opinio juris*, properly understood and analysed, have come so far as to change these fundamental doctrines.

70. Additional attention and research should nonetheless be devoted to an even more comprehensive comparison between neutrality law and the principle of non-intervention, since certain elements have not been touched upon (in any depth), e.g., assessing the possible due diligence obligation for third-states to impede the recruitment of rebel forces on their territory as well as the potential duty for such States to capture and intern rebel forces if found on their territory. In addition, it would be useful to monitor any future State practice which could further delineate the distinction between lawful humanitarian support and unlawful military support, and the grey zone in between.