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Qualified neutral, or not?

The Law of Neutrality from Paris in 1856 to Ukraine in 2022

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Abstract

This thesis addresses the research question whether state practice observed so far in the war in Ukraine establishes a third legal position in addition to those of “neutral” or “belligerent”? The third position examined is termed “qualified neutral” or “non-belligerent”.

In order to accurately answer this question, the thesis examines the historical developments of the law of neutrality from the Declaration of Paris in 1856 to the ongoing war in Ukraine. Developments in state practice are brought into focus, particularly state practice that differs from neutral state practice allowed by traditional neutrality law. This examination establishes lex lata for the law of neutrality and the status of “qualified neutral” or non-belligerent” states until the war in Ukraine.

Finally, this thesis evaluates the state practice during the war in Ukraine in regards to establishing the position of “qualified neutral” or “non-belligerent” during an international armed conflict. The thesis concludes that under certain conditions, states can choose traditional neutrality or “qualified neutrality” in accordance with their own political interests and beliefs.

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1 General overview of the thesis

1.1 Introduction

In international law, neutrality may refer to three different understandings. First, neutrality might refer to permanent neutral states, such as Switzerland. Second, it might refer to terms and conditions for the long-term "neutralization" of a state. Third, it can refer to rights and duties of neutral states and their citizens during an international armed conflict. The war in Ukraine has major implications on all three types of neutrality. This thesis focuses on the last category.

The law of neutrality has developed over centuries. In the traditional approach to the law of neutrality, parties can either be classified as "belligerents" or "neutrals". The fundamental norms were developed during the 18th and 19th century, with the aim of protecting international trade during war, to localizing the state of war, and finally, limiting the scale of the war.[1]

Two world wars and the establishment of the United Nations fundamentally changed international law in general and the norms regulating war in particular. This has led to debate over whether the law of neutrality has any relevance or if it has altered into new customary international law which implements the fundamentals of the UN Charter and state practice during the last century.[2]

The war in Ukraine has rekindled debates on the law of neutrality. If the traditional law of neutrality were applied, all states that didn't treat the two belligerents impartial would lose their status of neutrality. By the traditional norm, they would become belligerents themselves. Many states argue that this is absurd, given the situation in Ukraine, where the aggressor is the same state which blocked the United Nations Security Council from action. To legitimize their actions, states then argue for a third legal position with basis in the UN Charter, the position of a "qualified neutral" or "non-belligerent" state. This is not a new argument, and the U.S. has claimed this position throughout the 20th century. It has been a controversial topic, however, which has not been established as customary international law prior to the war in Ukraine.[3]

1.2 Research question

This thesis addresses the research question whether state practice observed so far in the war in Ukraine establishes a third legal position in addition to those of "neutral" or "belligerent"? The third position examined is termed "qualified neutral" or "non-belligerent".

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[1] Cheatham, A (2022), A Look at Neutrality Now — and After the Ukraine War

[2] A few examples: Schnakenbourg, É. (2014). The end of neutrality? Neutral maritime law and the First World War (French); Pedrozo, R. (2022) Is the Law of Neutrality Dead?; Goetschel, L. (1999) Neutrality, a Really Dead Concept?

[3] Congressional Research service (2022), International Neutrality Law and U.S. Military Assistance to Ukraine, and Heintschel von Heinegg, W. (2022) Neutrality in the war against Ukraine

In order to accurately answer this question, the following sub-questions will be addressed:

- What is lex lata for the law of neutrality prior to the war in Ukraine?
- How would the state practice in the war in Ukraine be considered throughout the 20th century? In other words, has the law of neutrality evolved throughout the 20th century?
- Is the state practice in the war in Ukraine establishing new customary law, or constituting continued breaches of the law of neutrality?

1.3 Scope and limitations

The application of different areas of international law is complicated, and the rules may even seem to contradict each other. This is also the case for the law of neutrality in regard to other areas of international law.[4] This thesis will not consider the state practice in Ukraine in relation to humanitarian law or United Nations rule of law in general. It will only consider the state practice in Ukraine from the perspective of the law of neutrality.

Dependent upon the answer to the research question, numerous new sub-questions will arise. In the case of a new legal position of "qualified neutral" or "non-belligerent", it will be important to address what conditions needs to be present in the armed conflict for the new legal position to be a legal state option. And in the event of the state practice during the war in Ukraine is in fact breaches of neutrality law, the consequences of these breaches will need to be examined. It is outside the scope of this thesis to address the consequences or implications of the state practice in the war in Ukraine.

This thesis does not consider state practice during the war in Ukraine with an aim of establishing de lege ferenda for future conduct during an international armed conflict.

1.4 Methodology and structure

To evaluate state practice during the war in Ukraine, this thesis examines the historical developments of the law of neutrality. This is essential to fully understand the status of the law of neutrality in present day situations.

Chapter 2 presents the sources which make or influence international law in general. It also briefly presents the most relevant sources of international law influencing the law of neutrality.

[4] For instance, legal countermeasures adopted from the law of State responsibilities or the possibility for collective self-defense in Article 51 in the UN Charter are both situations where states can legally use force without becoming a belligerent.

Chapter 3 delves further into the most relevant sources, and presents them in chronological order. The law of neutrality was codified more than a century ago, and major international incidents have since influenced the legal context and understanding of the law. This chapter establishes what remains of the original law of neutrality, and which parts of it that have changed. To do this in a precise manner, the historical presentation has been given significant focus.

To discover any developments in the law of neutrality throughout the 20th century, the state practice in Ukraine will be evaluated briefly after each historical period.

Chapter 4 uses the results from chapter 3 as a basis to evaluate the state practice during the war in Ukraine. First, the evaluation is general. Then, the practice is evaluated more specifically in regards to establishing a third legal position during an international armed conflict.[5]

2 Sources of international law

2.1 Introduction

This chapter briefly presents the sources of international law. This will serve as a theoretical fundament for the following chapters where neutrality will be discussed more specifically. Moreover, this chapter comments on how the modern reality of the doctrine of sources differs from the classical starting point in finding relevant sources of international law. In addition, this chapter presents the most relevant sources of law under each subsection where appropriate. Finally, this chapter presents of the Vienna Convention on the Law of Treaties, and how that convention influences the international sources in the case of neutrality.

International law consists of a doctrine of sources that differs from those of domestic legal systems in several aspects. In domestic law, the discussion seldom revolves around whether a rule exists or not, but mostly focuses on the meaning of the rule and how the rule affects the applicable case. In international law, it is often harder to establish whether a rule exists at all and who it binds. Only when the international legal instrument has established the existence of a rule, arise questions related to the rule's content and how it applies to the facts.

The traditional theory of the doctrine of sources states that Article 38 of the Statue of the International Court of Justice (ICJ) is the starting point for finding sources relevant in international law.[6] However, the sources listed in Article 38 do not reflect the complete picture of relevant sources in international law, since the Article omits important sources and misrepresents the weight and nature of some of the listed sources.[7] The following chapters, discuss both the

[5] "Qualified neutral" or "non-belligerent"

[6] Roberts, Anthea and Sivakumaran, Sandesh (2018). In International law, p. 89-118

[7] Ibid, p. 89 Summary.

sources listed in Article 38 and what is considered a more precise representation of relevant sources today.

Article 38 refers to three sources in international law: treaties, customary international law, and general principles of law. In addition, Article 38 lists two subsidiary means for determining the rules of law: judicial decisions and teachings of the most qualified publicists.[8]

In the following, the relevant sources to answer this thesis's question will be presented briefly. It will be done in the same order as Article 38 mentions them.

2.2 Treaties

2.2.1 Introductory note

The first source of law listed in Article 38 (1) is "international conventions".[9] This phrase has the same meaning as «treaties».[10] This is the clearest way states can obligate themselves to follow certain rules in relation to other states. The flipside to treaties is that they only bind the states that have agreed to implement and ratify them, and do not bind a third state "without its consent".[11]

Treaties may however come to reflect customary international law if certain conditions are met.[12]

2.2.2 Declaration of Paris from 1856

The Declaration of Paris from 1856 was the first multilateral treaty signed during peacetime to regulate how neutral trade was to be conducted during war. The primary goal of the declaration was to abolish privateering, but it also gave neutral states the possibility to trade peacefully with the belligerents during wartime (as long as they did not transport contraband to any of the belligerents).

The Paris declaration opened up the opportunity for states not present at the peace conference to accede the declaration and sign it afterwards. Only states part of this treaty were bound by its limitations. States who had signed it did not need to heed the declaration if they were at war

[8] ICJ Article 38

[9] ICJ Article 38 (1)(a)

[10] According to the 1969 Vienna convention on the Law of Treaties (VCLT) a "" treaty" means an international agreement concluded between States in written form and governed by international law", Article 2 (1)(a)

[11] VCLT Article 34

[12] This is established in several judicial decisions. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) and *North Sea Continental Cases (Federal Republic Germany v Denmark and The Netherlands)* among others

with a state that was not part of the treaty. The Declaration of Paris, by this, became an important step towards globalization of international law, and influenced the law of neutrality in the following decades. Fifty-five states ended up agreeing to and signing the declaration.[13]

2.2.3 The Hague Conventions from 1899 and 1907

The peace conferences in The Hague in 1899 and 1907 represent the most concrete written treaties on the subject of neutrality. The peace conference of 1899 did not produce any treaties directly dealing with neutrality but founded customs relating to war on land and sea, and most noteworthy, established a definition of a belligerent state.[14]

The later peace conference in 1907 produced two treaties regarding neutrality.[15] They mainly codified what was considered existing international law developed during the 19th century. The main sources of influence were the "Armed Neutralities" of 1780 and 1800, how the United States viewed neutrality, the status of the permanent neutral states (Switzerland and Belgium) and the already mentioned Declaration of Paris of 1856.[16] Despite the fact that these conventions only codified existing international law, they were only ratified by 17 (land war convention) and 18 (naval war convention)[17] countries, and several dominant nations at the time did not ratify the conventions (Great Britain, Italy and some other states).

2.2.4 The Covenant of the League of Nations

The League of Nations was established after the First World War. The Covenant of the League of Nations does not mention neutrality specifically, but several of the Articles leave room for the law of neutrality to still play a part during war.

First, in an illegal war between members, neutrality is abolished altogether. Article 10 and 16 force member-states to support the offended state and do not allow member states to remain neutral in the conflict. This was a new way of governing international conflicts, and also changed the availability for neutrality in wars (at least for members of the League of Nations).

Secondly, Article 13 para 4 and Article 15 para 6 force neutrality on member states if one of the parties to a dispute complies with a "unanimous" report from the Council in the League of

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[13] The Paris Declaration include these principles: (1) privateering was abolished; (2) free ships made free goods; (3) neutral goods on enemy ships must not be appropriated; and (4) blockades must be effective, in the sense of preventing access to the enemy coast.

[14] Hague Convention (II) Convention with Respect to the Laws and Customs of War on Land, Section I –On Belligerents, Article 1-3

[15] Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, and Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval war

[16] Schindler & Toman, The Laws of Armed Conflicts, Introductory note p. 1399

[17] IHL Treaties, State Parties and Commentaries section, intro to the two relevant conventions

Nations.[18] This duty to remain neutral in a situation like this was also a new innovation in neutrality law.

Finally, in a war between non-members there is nothing in the Covenant hindering third party states to claim neutrality towards the conflict. Both members and non-member third parties to the conflict have an opportunity to claim neutrality towards the conflict.

2.2.5 The Charter of the United Nations (UN)

With the establishment of the United Nations and the ratification of the Charter of the United Nations after the Second World War, many of the earlier treaties became less influential. The Charter of the United Nations had universal jurisdiction early, and sought to "maintain international peace and security". [19] In addition, the UN charter outlaws the use of force (or threat to use force) against "the territorial integrity or political independence of any state".[20]

To govern the world peace, the United Nations Security Council (UNSC) was established.[21] The UNSC has the power to "decide what measures shall be taken […] to maintain or restore international peace and security".[22] In addition, all member states to the UN Charter must comply with decisions made by the UNSC[23]. The UNSC has 15 members, with five permanent members who have the right to block a vote.[24]

2.2.6 Geneva Conventions (GC) with its additional protocols (AP)

The Geneva Conventions only carry limited aspects of neutrality law. In essence, these conventions cover the obligation for "neutral or non-belligerent powers"[25] to treat the sick and wounded, prisoners of war, hospital ships and medical aircraft impartially. The codified aspects of neutrality law in the GC are mostly humanitarian in nature, and this supports the role the law of neutrality plays in both the laws of peace and the laws of war.[26]

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[18] Covenant of the League of Nations

[19] UN charter Article 1 (1)

[20] Ibid Article 2 (4)

[21] Ibid Article 7 and 24

[22] Ibid Article 39

[23] Ibid Article 25

[24] Ibid Article 23 and 27 (3). The five permanent members with veto-rights are: the United States of America, the United Kingdom, China, France and the Russian Federation.

[25] GC (III) Article 122, AP I Articles 2(c), 9(2)a, 19, 22(2)a, 31, 39(1) and 64

[26] Chadwick, Elizabeth, *Back to the future: Three civil wars and the law of neutrality, p. 13*

It is however noteworthy that the GC do mention different legal statuses other than the classical thoughts of just belligerents and neutrals in a war.[27]

2.3 Customary international law

2.3.1 Introductory note

The second source of law listed in the ICJ Statute Article 38 is "international custom, as evidence of a general practice accepted as law".[28] This source is also called customary international law or just customs, and I will use this terminology when I refer to this source of law.

Customary international law is developed over time.[29] It can sometimes start as an agreement between states to act in a certain way under certain conditions, but it might also develop outside this format. Over time, the agreed upon conduct develops into expected behavior, to which the states consider themselves legally bound.[30] The establishment of customary international law is complicated by the fact that it will bind states that did not object to the custom during its formation, and it will also bind states that comes into existence after the custom has been formed.

Customary international law is generally considered to consist of two elements: state practice and *opinio juris sive necessitatis* (normally abbreviated *opinio juris*). Both elements must be present for a custom to be established. State practice refers to consistent and general practice by states, and the *opinion juris* element means that the state practice must be considered and accepted as law.[31] Case law has established the same understanding of what is required to establish a new customary international law. The lead argument supporting this comes from the *North Sea Continental Shelf* case.[32]

2.3.2 State Practice

State practice refers to the practice of state organs since states are abstract entities. These organs include the judiciary, the legislature, the executive, the military and state officials (such as the Head of State).[33] When the state practice is evaluated, all practice must be included in the

[27] "Non-belligerent" and "neutrals and other states not party to the conflict" contained in GC (III) Article 122, AP I Articles 2(c), 9(2)a, 19, 22(2)a, 31, 39(1) and 64.

[28] ICJ Article 38 (1)(b)

[29] Some scholars have argued that in some instances customary international law may develop instantly (for new areas, like space exploration). This view is controversial, and delving further into this discussion is outside the scope of this thesis. (International Law, p. 94)

[30] International law, p. 92

[31] Ibid, p. 92

[32] North Sea Continental Shelf, judgement, ICJ Reports 1969, p. 3, para 77.

[33] International law, p. 93

evaluation.[34] If there are discrepancies between what different state organs represent regarding the state practice in question, the argument of it being an established custom might become discounted or weakened.

There are no firm rules on the consistency, generality, or duration of practice to create a new customary international law. In the *North Sea Continental shelf* case, the ICJ confirmed this and stated that it could not "be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasion and circumstance.".[35] It is also not necessary for all states to follow the practice, but it must be widespread and be followed by a diversity of states (both geographically, economical, and geopolitically diverse).[36] Both actions and reaction of states to the practice in question will be considered, and affirmations or protests to the practice will be important when deciding whether a Custom has been established.

2.3.3 Opinio juris sive necessitatis (Opinio juris)

With states being abstract entities, they cannot "believe" a custom to be law. It is therefore necessary to evaluate the actions and communication of states to be able to establish a "state belief". There is some dispute on how this belief can exist before a custom is established, but one approach is where a state asserts that the custom is the law (the state belief is irrelevant in this case), and if other states accepts this assertion, it becomes the law (over time if necessary).[37]

When considering opinio juris, it is important to separate customary international law from those state actions that are done for other reasons than a sense of duty (like moral, tradition, or courtesy). The best example is when states offer humanitarian assistance to other states in need; they do not do this because they feel legally bound to do so, but do it out a sense of morality or good intentions alone.

By this, state practice can become custom only if the states' statements of belief indicate a legal articulation of the practice. In other words, that the state conducting the practice or action believes it to be required or permitted under international law. For this thesis, the question is whether the state practice of supporting weapons to a victim of aggression is allowed under international law, if it contributes to establishing customary law or if it is just continued breaches of neutrality law.

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[34] International law lists these examples (p. 93): Diplomatic correspondence, public statements by State officials, executive actions and practice, official manuals that govern State actions (including Military manuals), legislation, case law, and statements and votes of States in international fora. The list only serves as examples and is thus not complete.

[35] North Sea Continental shelf case, Dissenting opinion of Judge Tanaka, p. 176

[36] International law, p. 93

[37] Ibid, p. 96

2.4 General principles of law

The third, and last, primary source of law listed in the ICJ Statute Article 38 is "the general principles of law recognized by civilized nations".[38] The motivation for the committee to include this general term as a source of law was the concern that the court would not have a treaty or customary international law to build their rulings on. The committee found it undesirable and inappropriate that an international court could not decide a matter where the law was considered clear (*non liquet*).

There are two main understandings among scholars of what this third source of law entails. One interpretation is that this source refers to a derivation of the domestic law systems. By comparing how a matter is regulated in domestic law, the International Court would be able to use that as a basis for their own ruling. The second alternative refers to principles directly relating to international law, and principles applicable in a more general way. Examples of such principles are the principle of *pacta sunt servanda*, the principle of *lex specialis* and the principle that a later law prevails over an earlier law.[39]

2.5 Subsidiary means for determining the rules of law

2.5.1 Introductory note

Article 38 in the ICJ Statute clearly distinguishes between the primary sources of law in its paragraphs a-c, and the "subsidiary means" listed in paragraph d.[40] It also specifically refers to Article 59 of the ICJ Statute, which states that "[t]he decision of the Court has no binding force except between the parties and in respect to that particular case". Consequently, ICJ decisions do not necessarily establish a precedent for future cases, and later judicial decisions reaffirm this. "The real question" for the Court is to look for reasons not to follow their earlier decisions when they have a new case.[41]

2.5.2 Judicial decisions

When evaluating judicial decisions, the ICJ includes decisions made by other international courts, in addition to their own judicial decisions. These courts can be regional courts, international tribunals, other international courts, and even domestic court decisions. The weight given

[38] ICJ statute Article 38(c)

[39] International law, p. 97-98

[40] ICJ Article 38(d) list these subsidiary means for determining the rule of law: "judicial decisions and the teachings of the most qualified publicists of the various nations"

[41] International law, p. 99 and *Land and Marine Boundary between Cameroon and Nigeria, judgement, ICJ Reports 1998, p. 21, para 28* where the ICJ states "The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases".

to any judicial decision varies from case to case, but the ICJ seems to use all relevant judicial decisions.[42]

It is important to note that when the ICJ evaluate domestic juridical decisions, the decisions can either represent a subsidiary means or be an expression of state practice establishing a customary law under Article 38(b). If the juridical decision is presented by either part as an expression of state practice, the Court will have to determine whether the practice is established as customary international law. On the other hand, if these decisions are presented as a subsidiary means the only question would be whether they represent the law. The weight of the argument will differ greatly if it is considered a customary international law versus just a subsidiary means to determine the law.

2.5.3 Teachings of the most qualified publicists of the various nations

The weight of the teachings of publicists has diminished greatly since the committee agreed upon the Statutes of the ICJ. In the early days, the teachings of "the most qualified" authors carried significant weight.[43] Today, it is only a limited number of publicized teachings that carry significant weight in Court decisions. These teachings still have some weight, but not nearly as much as in earlier times, when much of international law yet to be established. The number of publicists today has greatly increased, and states tend to use the teachings of those publicists that support their case. ICJ seldomly cites teachings in their rulings.[44]

2.6 Sources of international law not listed in Article 38 in the Statutes of the International Court of Justice

2.6.1 Introductory note

There are several important sources of international law missing from Article 38 in the ICJ Statutes. I will, in the following, present the sources missing from Article 38, since some of them will be important for determining the status of neutrality in the following chapters. The important international sources of law missing from Article 38 are unilateral decisions, resolutions of the United Nations Security Council (UNSC), Resolutions of the United Nations General Assembly (UNGA), and *jus cogens* norms.[45]

2.6.2 Unilateral decisions

Unilateral declarations can bind the states making the declaration. The crucial point when figuring out if a declaration is binding, is the intentions of the state. ICJ has confirmed this in the

[42] International law, p. 99
[43] Ibid, p. 99
[44] Ibid, p. 99
[45] Ibid, p. 100-103

Nuclear tests case, where it stated: "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations […] When it is the intention of the state making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking…".[46]

2.6.3 Resolutions of the United Nations Security Council (UNSC)

Under Article 25 of the UN charter all member states are obliged to "accept and carry out decisions" made by the UNSC. The wording of this rule indicates that it is only decisions that bind the member states. In other words, recommendation, findings or opinions of the UNSC does not enforce any member state.[47] After the Cold War, the UNSC has been able to use this power more frequently, since the division between the permanent members (with the power to veto draft resolutions) has lessened. During the war in Ukraine, the UNSC has again lost the ability to issue any binding resolution due to Russia's right to veto any resolution they disagree with.

2.6.4 Resolutions of the United Nations General Assembly (UNGA)

General Assembly resolutions are not a source of law that are binding on states. Article 10 of the UN Charter provides that the UNGA "may make recommendations to the Members of the United Nations or to the Security Council or to both on any" matter "within the scope of the present Charter". The fact that these resolutions are not binding, does not mean that they have little value as a source of international law.

ICJ has commented on this in the "Legality of the threat or use of Nuclear weapons" case. In this case, the ICJ noted that GA resolutions "may sometimes have normative value", even if they are not binding. "They can, in certain circumstances, provide evidence important for establishing the existence of a rule, or the emergence of an opinio juris".[48]

The weight a GA resolution carries varies and depends on a number of factors, including how many states voted for or against it (or abstained from voting), how clear the substance of the resolution is and whether it is affirmed in later resolutions.[49] It is however, important to note the ever-present political power struggle that happens between states in international fora like the GA. When Western states dominated the GA, they used these resolutions to achieve what they could not achieve through other means (like Security Council resolutions, because of the

[46] Nuclear test (Australia v France), judgement, ICJ reports 1974, p. 18 para 43

[47] International law, p. 100

[48] Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, p 32-33, para 70

[49] International law, p. 103

blocking vote). Following the decolonization, the developing states became the majority in the GA. Then, the same Western states reasserted that UNGA resolutions were not binding on states and tried to shift the political law-making power back to arenas where they had more direct power (like the Security Council).[50]

UNGA resolutions might carry extra weight in the case where the UNSC does not function as intended due to one of the permanent members using their blocking vote.

2.6.5 *Jus Cogens* norms

There is still some controversy as to which norms are considered *jus cogens*. The ICJ has identified "the prohibition of torture" and the "norm prohibiting genocide" as *jus cogens* norms, and the International Law Commission has identified the prohibition of aggression, slavery, racial discrimination, crimes against humanity, and the right to self-determination as *jus cogens* norms. All of these norms are important human rights norms, and are considered important to the international community as a whole.[51]

2.7 Soft law in the international doctrine of sources

Soft law is a convenient description of the variety of non-binding legal instruments used by states and international organizations. Hard law is always binding, and the expression soft law therefore describes sources that are not formally binding. Also, soft law has had its critics, and some scholars consider soft law redundant. Prosper Weil argues that there is only law and non-law.[52]

Later writings have given a less black-and-white picture of soft law in international law.[53] They claim that international law include inter-state declarations, United Nations General Assembly instruments and resolutions, guidelines or recommendations from international organizations, and so on. Soft law consists of a myriad of sources with varying weight when legal instruments determine if an international customary law has been established.[54]

This points towards soft law as a source in international law. It is obvious that soft law is not binding, but when establishing whether state practice has developed into a law, soft law often plays a role in determining what are considered norms for a particular area. This is especially true for UNGA resolutions where all states have had a saying in the process.

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[50] International law p. 102

[51] Ibid p. 102

[52] Ibid, p. 119 and Prosper Weils Article "Towards Relative Normativity in International Law"

[53] The UN has pioneered the use of soft law in international law making, Rosalyn Higging has argued the relevance of soft law in addition to several other scholars referred to in International law, p. 120

[54] Ibid. Pg. 121

Soft law relates to treaties, customs, and general principles of the law in a multifaceted way. It gives states a simpler alternative to treaties to establish norms, and even though they are not binding initially, they may represent what has become a customary law over time. Soft law is also widely used by states to legitimize their legal arguments in the ICJ and other international organs.[55]

2.8 Vienna Convention on the Law of Treaties (VCLT)

A convention governing the international treaties between states was one of the first ambitions of the International Law Commission of the United Nations (ILC), and efforts towards this ambition started as early as 1949. It took 20 years before the efforts bore fruits, and the Vienna Convention on the Law of Treaties was codified in 1969. It took another decade before the necessary 35 states had ratified the convention and it entered into force on January 27, 1980. By 2018, more than half of the UN members had ratified this convention.[56] This achievement is considered one of the greatest achievements of the ILC, even though it does not cover all aspects of treaty development, interpretation and termination. In addition, the issuing of treaties is constantly evolving, as most international law, exemplified by the fact that ILC has two on-going projects concerning the matter.[57]

The VCLT regulates written[58] treaties concluded between states.[59] This does not imply that the principles in VLCT do not apply to oral agreements or other customary law in general, just that that the VLCT does not govern them directly.[60]

For this thesis, it is the interpretation of treaties that has relevance. In several rulings, the ICJ has acknowledged that VCLT Article 31 is customary international law on the matter.[61]

According to Article 31(1) of the VCLT, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In addition, the "[i]nterpretation must be based above all upon the text of the treaty [,and a]s a supplementary measure recourse may be had to means of

[55] Ibid. p. 135

[56] Britannica, Vienna Convention on the Law of Treaties.

[57] International law, p. 170. The two ongoing projects are "subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "the provisional application of treaties".

[58] VLCT, Article 2 (1)(a)

[59] VLCT, Article 1

[60] International law, p. 143

[61] Ibid, p. 152. ICJ rulings: Territorial dispute (Libyan Arab Jamahiriya/Chad), Judgement, ICJ Reports 1994, para 41, Oil Platforms (Islamic Republic of Iran v United States of America), Judgement, ICJ Reports 1996, para 23, Kasikili/Sedudu Island (Botswana/Namibia), Judgement, ICJ Reports 1999, para 18

interpretation such as the preparatory work of the treaty" according to the ICJ.[62] In the same judgements, the ICJ confirms Article 31 to be an expression of customary international law, and use the principles when older treaties are interpreted.

Even though VCLT Article 31, only applies directly to treaties codified after the VCLT entered into force[63], the principles that represent customary law can be applied more generally on earlier treaties and other sources of international law.[64] I will therefore use these principles when considering the relevant sources in the following paragraphs, even when they are from a time well before the ratification of the VCLT.

2.9 Chapter summary

This chapter presents the sources of international law. There are subtle boundaries between these sources, and the process of deciding what is international law is a complicated matter where all of these sources must be regarded. Finishing off this chapter, the VCLT and its norms for the interpretation of treaties were presented to be used in the following chapter as a guideline as to how the relevant sources of law are to be interpreted.

The following chapter uses the theoretical background discussed in chapter 2 to establish the relevant sources for determining the status of neutrality today. In order to do so, an understanding of the historical development of the law of neutrality is essential. The reasons and needs for neutrality have changed with the evolution of the world in general, and chapter 3 presents this evolution.

3 Historical development of the law of neutrality

3.1 Introduction

The previous chapter presented the different sources in international law, with a focus on the sources that are particularly relevant to this thesis. It showed that international law differs from national law in several aspects, particularly when a legal instrument tries to establish what the actual law on any given area is. This chapter delves further into the relevant sources of international law that affect the question of neutrality and specifically how these sources relate to support provided by third-party states during an ongoing war. This chapter presents and discusses the relevant sources in a chronological order, and by this, presents current law in its historical context. Finishing off each historical period, the Western support to Ukraine will be analyzed and judged by the norms of that particular era.

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[62] Territorial dispute (Libyan Arab Jamahiriya/Chad), Judgement, ICJ Reports 1994, para 41

[63] VCLT Article 4

[64] International law, p. 143. The ICJ also does this in the already mentioned cases under bookmark 49

3.2 The Law of Neutrality before World War I

3.2.1 The armed neutralities and the Declaration of Paris (1856)

The law of neutrality in this period initially consisted of two principles. First, the neutral states and individuals had a right to conduct peaceful trade with the belligerents as long as the neutral states did not favor one over the other. Secondly, the belligerents were entitled to search and monitor this trade to prevent unlawful contraband to be delivered to the opposing state.[65]

The use of the belligerent right to search neutral trade escalated after the British Colonies in North America claimed their independency in 1776. Several European states wanted to trade with these new colonies, but the British hampered the trade. In response to this, Russia announced to the European states that Russia would not allow European wars to hinder peaceful Russian trade. Russia then listed five principles to ensure this, and entered into alliance with several other European states to protect the right of neutral trade.[66] Russia initiated these neutral alliances to secure its trade twice, in 1780 and 1800. They are called the armed neutralities, since Russia announced the intention to defend their rights as neutral merchants. After the second armed neutrality, Russia and Britain signed a convention to include the rights of neutral trade vessels, "free ships, free goods", and thereby limiting the rights of the belligerents to search neutral merchant ships.[67]

The peace conference after the Crimean war (1853-1856) led to the adaptation of the Declaration of Paris. Seven nations[68] assembled in Paris to negotiate the terms after the war, and further agreed to how they would conduct war in the future. The main point of the Declaration of Paris was that privateering was outlawed, and belligerent rights to interfere with neutral trade was limited further. Privateering was a small state's weapon against the greater sea powers, and it was in Great Britain's interest to limit the tactical use of privateers by the U.S. This partly explains why the British, in particular, gave up the rights of the belligerents to search merchant vessels more freely.[69]

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[65] Chadwick, ibid n. 26, p. 3

[66] Chadwick ibid at n. 26, p. 3-5. The five principles where: (1) neutral vessels may navigate freely; (2) enemy goods carried in neutral ships are protected, apart from illegal contraband (3) the definition of contraband contained in the tenth and eleventh Articles of her 1766 treaty of commerce with Britain would be applied to all the powers at war (4) a blockade must be effective; and (5) these principles would apply to the adjudication of prizes

[67] Chadwick ibid at n. 26, p. 5. In particular, that only public ships of war could do the search, and a single privateer could no longer stop an entire fleet of merchant ships for this purpose.

[68] Austria, France, Britain, Prussia, Russia, Sardinia and Turkey

[69] Van Hulle, I. (2015). Power, Law and the End of Privateering, written by J.M. Lemnitzer, Journal of the History of International Law / Revue d'histoire du droit international, 17(1), 139-142

Before the law of neutrality came into effect, it had to be established whether a belligerency existed. This was a *de facto* consideration if neutral trade and diplomatic relations were disturbed. A state's claim of neutrality thereby established the state of war between the belligerents. This normally happened when two different states were at war, but could also happen in domestic armed conflicts.[70]

The aftermath of the American Civil War led to a more restrictive approach to the recognition of belligerents. States were more hesitant to adopt the law of neutrality because of the many financial and legal consequences that followed after the Civil War ended. The focus turned more towards how war could be conducted more humanely, and how the state of war could be made more certain. Additionally, it was argued that the law of neutrality was also a part of the law of peace, and that it was not only a law during war.[71]

3.2.2 Hague Conventions from 1899 and 1907

The development during the latter part of the nineteenth century led to two peace conferences in Hague in 1899 and 1907. The conventions resulting from these conferences were not considered complete, but were an effort to codify what was considered to be established customary state practice.[72] For the question of neutrality, particular Hague Convention V (respecting the rights and duties of neutral powers and persons in war on land) and XIII (respecting the rights and duties of neutral powers in naval war) are of particular interest.

Where the Declaration of Paris sought to limit the belligerents' rights related to ships sailing under neutral flag, the Hague conventions went into more detail as to what neutral states could not do to stay neutral. This development seems natural as wars generate trade possibilities. Without regulation of this trade, a state could easily support one of the belligerents and thereby harm the other belligerent for their own purpose.

The Hague conventions do not exclude trade possibilities for neutral states as long as they act impartial to both belligerents.[73] The neutral power can export "arms, munitions of war [… and] anything which can be of use to an army or a fleet"[74], as long as the neutral power does not discriminate between the belligerents.

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[70] Chadwick ibid at n. 26, pg 5-7. The American revolution was one example where third party states claimed neutrality in the conflict to be able to trade freely with both northern and southern States of the U.S.. By doing this they also acknowledged the Confederate southern States as a belligerent, much to the dismay of President Lincoln and the northern states.

[71] Ibid, p. 8.

[72] Ibid, p.8

[73] Article 9 in both conventions deals directly with neutrality ((V) war on land and (XIII) naval war)). Article 9 provides that neutral Powers must be impartial to all belligerents.

[74] Haag Convention (V) War on land, Article 9

In addition, the neutral states are not allowed to let one of the belligerents "move troops or convoys of either munitions of war or supplies" across its territory.[75] A neutral state can neither erect "a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces"[76] on its territory. Finally, a neutral state cannot form "[c]orps of combatants" on its territory "to assist the belligerents".[77]

These conventions are the latest to regulate the law of neutrality directly, and they are therefore referred to when neutrality is discussed in present day debates.

3.2.3 The status of the Law of Neutrality going into World War I

In this historical time, war was considered a legal political tool. War was only the business of the states involved, and the states not part in the conflict wanted to be able to trade freely. The two main concerns at the time were firstly to limit the scope of the war and secondly to limit the impact of the war on trade between the belligerents and third-party states. To maintain neutrality, a state could not favor any of the belligerents in the war.

3.2.4 Evaluation of state practice in the war in Ukraine in pre-World War I context

By applying principles expressed in VCLT Article 31, and by the ICJ, on the Hague Conventions, it seems clear that Western support to Ukraine is in breach with both the text itself, and also the "ordinary meaning" of "the terms of the treaty in their context and in the light of its object and purpose".[78]

The Western states have given one of the belligerents, namely Ukraine, weapons, ammunitions and a wide variety of items "which can be of use to an army or a fleet".[79] Russia has not been offered the same opportunity or support. The support of Ukraine has also included training of military personnel,[80] secure communication platforms, intelligence support,[81] health and medical support and treatment and pretty much most of what a belligerent can want from allies.

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[75] Haag Convention (V) War on land, Article 5 and 2

[76] Ibid, Article 5 and 3

[77] Ibid, Article 5 and 4

[78] VCLT Article 31 and ICJ statements referred to in footnote 51

[79] The support is widespread among NATO member States and western States in general. As an example: Norway has contributed with anti-tank weapons, Air defense systems, long-range artillery, Hellfire missiles, bullet-proof vests, helmets, field rations, sleeping bags, protective masks and other material (The level of support is continually updated at regjeringen.no "Norsk støtte til Ukraina og nabolandene").

[80] regjeringen.no "Norsk støtte til Ukraina og nabolandene"

[81] Barnes, Julian E., and Helene Cooper. (2022) "Ukrainian Officials Drew on U.S. Intelligence to Plan Counter-offensive." The New York Times

This is clearly in violation of these treaties, and the supporting states would not be able to claim neutrality at the time these conventions where the only reference for neutrality in international law.

The issue then, is whether the law of neutrality has changed in the periods after the Hague peace conferences.

3.3 The Law of Neutrality from World War I to World War II

3.3.1 Introduction

During the time between the World War I and II, it is mainly the Covenant of the League of Nations and state practice that influence the law of neutrality. The period has ongoing juridical discussions on the relevance of the law of neutrality,[82] and whether it is still relevant in its historical form or if modern warfare and globalization have changed it or rendered it irrelevant. The U.S. continues its historical approach of isolated neutralism throughout this period, and it is therefore important to present the U.S. development in addition to the more general ambitions shown through the League of Nations.

3.3.2 World War I and the establishment of the League of Nations

World War I introduced new challenges to the law of neutrality. The industrialization of the war led to longer lists of prohibited contraband, the notion of an "effective blockade" was abandoned and automated contact mines made safe passage for neutral ships impossible. Neutral states were more or less forced to support this total war, and neutrality was to be viewed as "not morally justified".[83] Due to this, the traditional neutrality failed in many ways during World War I. Smaller states (like the Scandinavian states) were too weak to have their protests heard, and only the states who were in a position to bargain were able to maintain some semblance of neutrality.[84] Other states, like the U.S., were too powerful to remain neutral in the war since neutrality at this time in history was a policy "of passivity and abstention".[85]

Following World War I, a public demand to find a method to prevent the devastations of modern warfare evolved. The idea to prevent and outlaw aggressive warfare was not new, but the

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[82] This is illustrated by ongoing conferences referring to the topic. One example is: Kunz, J. L., & Hudson, M. O. (1935). THE COVENANT OF THE LEAGUE OF NATIONS AND NEUTRALITY. Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969), 29, 36–45

[83] See Nils Ørvik, *The Decline of Neutrality* (1953), Wolff Heintschel von Heinegg, *"Benevolent" Third States in International Armed Conflicts: The myth of the Irrelevance of the law of Neutrality* (2007), Chadwick ibid at n. 19, p. 9.

[84] Ørvik, The Decline of Neutrality, p. 50, cited in Hertog, J., & Kruizinga, S. (Eds.). (2012). Caught in the Middle: Neutrals, Neutrality and the First World War. Amsterdam University Press

[85] A. Wolfers, Discord and Collaboration (Baltimore: The John Hopkins University Press, 1962), 222, cited in Hertog, J., & Kruizinga, S. (Eds.).

common view was that the sovereign state was not limited by any natural or supreme law to wage war when they chose to do so. The devastation of World War I altered this view, and it only took the allied victors a few weeks to agree upon the Covenant of the League of Nations. The main idea was to prevent major wars by making aggressive war a crime against the whole human community. In effect, the League of Nations made "external aggression" towards member states a matter for all League members.[86] In addition, the League would treat "[a]ny war or threat of war" affecting "any of the Members of the League or not" as a "concern to the whole League". In such a case, the League would "take any action that may be deemed wise and effectual to safeguard the peace of nations".[87]

The League of Nations did not outlaw the use of force between members, but obligated other states to act on the victim state's behalf with a goal to prevent aggression altogether. If any member state resorted to war in disregard of the provisions pertained in Article 12, 13 or 15, it would "ipso facto be deemed to have committed an act of war against all other Members of the League". This in turn would obligate other states to the "severance of all trade or financial relations", including "all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State". In addition, the Council would recommend "what effective military, naval or air force the Members of the League shall severally contribute" to the victim state.[88] This effort was in many ways the first attempt at establishing an international collective security in a larger scale. The U.S., however, ended up not ratifying the Covenant, and by this the League of Nations in all practicality did not have the power to enforce this collective security.[89]

By this, the Covenant changed a state's options during war. It was, for League members, possible to have a situation where a third state was neither a belligerent in the conflict nor a neutral state towards the conflict, but the third state could legally support the victim state and sanctioned against the aggressor state. There were no rules concerning rights and duties of the aggressor state if an illegal war were to happen. But since the war was illegal under the Covenant in the first place, it was probably not much point in trying to regulate the actions of the aggressor state anyways.

3.3.3 The Spanish Civil War

The Spanish Civil War is a good example from this period as to how the European community addressed conflicts after World War I. A non-intervention agreement signed by most European

[86] Covenant of the League of Nations, Article 10

[87] Ibid, Article 11

[88] Ibid, Article 16

[89] Britannica, The Editors of Encyclopaedia. "League of Nations".

states, hindered the democratically elected government of Spain the help guarantied in the Covenant of the League of Nations.

The Civil War was not acknowledged as a war, the parts in the conflict were not recognized as belligerents and no state claimed neutrality towards the conflict. A major reason for this was to not "legitimize by implication what everyone agrees to be a covenant-breaking invasion", since large contingents of German and Italian soldiers fought on the Nationalist side.[90] The flip side to this however, was that the legal Republican government of Spain was not given belligerent rights and that non-participants to the conflict were not bound by the duties assigned to neutral states. The consequence for the Republican Spanish Government was that it did not have legislation through international law to search ships for contraband. This became a major hindrance as both Germany and Italy supported General Franco and the Nationalist rebel forces extensively during the civil war.[91]

The international community was more focused on the ideological struggle between fascism, communism and democracy which was growing all over Europe, than on opening their eyes towards a civil war not defined as a war and therefore not obliging anyone to follow the rules of war (or neutrality).

In Norway, the non-intervention agreement led to several laws set to hinder Norwegian nationals to participate in foreign wars, favor either side or make money by supporting war contraband. The law set to hinder Norwegian nationals to participate in foreign wars led to a Royal Decree that specifically forbid Norwegian nationals to join either side of the Spanish Civil War.[92] Also the law that was passed to hinder Norwegian ships to transport war materials to the civil war, led to a Royal Decree hindering such transportation.[93]

Commentaries from the period of the Spanish Civil War largely denied the relevance of the law of neutrality in the conflict, and further did not want to recognize both parties as belligerents throughout the civil war. This clearly shows that the states were much more reserved towards acknowledging the status of belligerency, or claiming neutrality than they were prior to World War I.[94]

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[90] Garner, J. W. (1938). Recognition of Belligerency. The American Journal of International Law, 32(1) p.106

[91] Britannica, "Spanish Civil War".

[92] Norsk Lovtidende. 1. Afdeling. 1937. p. 310-311. See also Ot. Prp. nr. 10. (1937)

[93] Ibid. p. 368-369. See also Ot. Prp. nr. 12. (1937)

[94] See: Bauer, F. G. (1936). Some Legal Aspects of the Spanish Civil War. The Military Engineer, p. 408–412; Garner (note 96) p. 106–113; Borchard, E. (1937). "Neutrality" and Civil Wars. The American Journal of International Law, 31(2) p. 304–306; Padelford, N. J. (1937). International Law and the Spanish Civil War. The American Journal of International Law, 31(2), 226–243

3.3.4 U.S. neutrality from 1920 to 1941

Following the U.S. decision to not ratify the Covenant of the League of Nations the U.S. emphasized its neutrality towards any future war. Internal U.S. public opinion consisted of two distinct bodies.

Firstly, there was a considerable body of people who believed that collective security and international cooperation was the best way to prevent any future war. They believed that the traditional neutrality of impartiality and nonparticipation was not consistent with this new world order. Some exponents of this theory claimed a U.S. neutrality in this world order to be "immoral".[95]

Secondly, and what the majority of U.S. citizens favored, was the thought of U.S. continuing its role as the "leading neutral nation of the world".[96] They argued for a return to the policy of isolation, and believed that the U.S. should not ever participate in a war again, particularly a war on European soil.[97]

By the 1930s, the isolationist movement had continued to grow, but the dream of a world without wars crumbled.[98] In addition, U.S. investigations showed that the U.S. was more or less manipulated into participation in World War I by international bankers and munition makers. All this combined shifted the public opinion strongly towards U.S. neutrality in what seemed to be a fast-approaching war. The isolationist movement argued that the U.S. should remain neutral in any war by avoiding financial dealings with countries at war.[99]

By the mid-1930s, the U.S. passed a series of Neutrality Acts designed to prevent American involvement in the increasing number of conflicts around the world. In addition, these Neutrality Acts stated the U.S. point of view on how it would act as a neutral state.

The first neutrality act prohibited the export of "arms, ammunition, and implements of war" from the U.S. to foreign nations at war. In addition, the act required arms manufacturers in the U.S. to apply for an export license. With the outbreak of the Spanish Civil War in 1936 and the rise of fascism in Europe, the U.S. further strengthened its foreign policy towards neutral isolationism. There was, however, a compromise to President Roosevelt in the neutrality act of

[95] Deak, F. (1940). The United States neutrality acts: theory and practice. p. 75

[96] Ibid. p. 73

[97] Ibid. p. 74

[98] Both the Japanese invasion of Manchuria, increased diplomatic tension, and a crazy armament race in Europe increased the likelihood of war

[99] Office of the Historian, U.S. department of State, The Neutrality Acts, 1930s

1937 where the U.S. allowed for a belligerent to acquire any items from the U.S. as long as it was paid for immediately and carried on non-U.S. ships. This, in Roosevelt opinion, strongly favored the UK and France since they were the only countries which both had the hard currency and the ships to effectively take advantage of this "cash-and-carry" program.[100]

Even the outbreak of World War II did not change the majority U.S. attitude towards being neutral.[101] President Roosevelt still wanted to assist the nations fighting Nazi-Germany, but had to do so without violation the legal prohibition against the granting of credit, and in a way that both satisfied his military leaders and didn't upset the public to much. Initially, he signed a "Destroyers for Bases" agreement where the U.S. gave the British more than 50 destroyers for a U.S. right to establish military bases on UK territory in the Caribbean and on Newfoundland.[102] To further be able to assist the states fighting Nazi-Germany, and also serve U.S. interest in the future, the U.S. and Britain signed a "Lend-Lease" program in December 1941. The British would get the supplies needed to fight, and payment would not have to happen immediately. Following this agreement, the U.S. signed similar programs with more than 30 countries.

3.3.5 Summary and status of the Law of Neutrality before World War II

As discussed above, there was a shift in attitude towards the morality of neutrality after World War I. The League of Nations wanted to differentiate between the aggressor and the victim state in war, and also wrote into its Covenant the principle of collective defense and both mandatory neutrality and forced partiality under certain situations. The U.S. decision to not join the League of Nations made the collective defense ambition impossible to enforce. Over time, the member states got much more self-determination in the question of neutrality than what the text in the Covenant opened up for.

This self-determination became evident during the Spanish Civil War, where most European states signed a non-intervention agreement instead of claiming neutrality towards the belligerents in the conflict.

The U.S. reestablished itself as a neutral state throughout this period, and passed several Neutrality Acts which stated its intentions and how it would conduct trade during war. The U.S.

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[100] Ibid. President Roosevelt was opposed to the U.S. neutrality, but relented his view due to strong congressional and public opinion towards neutrality. The "Cash-and-carry" program expired after 2 years, and was not initially renewed even though Germany occupied Czechoslovakia. With the further escalating war in Europe, Roosevelt persisted, and were able to expand the cash-and-carry program to include arms in November 1939.

[101] United States Holocaust Memorial Museum. "THE UNITED STATES: ISOLATION-INTERVENTION"

[102] Office of the Historian, The Neutrality Acts, 1930s. The agreement was that the U.S. would lease land from the British for this purpose. The argument Roosevelt could use to still concern from his military or the public was that these bases would be able to secure U.S. strategically in the future, and by this be essential to the security of the Western Hemisphere.

policy shifted towards more and more support to states the U.S. considered allies at the beginning of World War II. This shows that some state practice in this period shift toward a neutrality that isn't impartial, but in favor of the belligerent that is either the victim of aggression or the belligerent who a state sympathizes the most with.

The neutrality with a moral aspect is not any proof of the law of neutrality changing per se, but it is an important change in regard of the black-and-white view on belligerents and neutrals that existed before World War I. The period also shows the growing hesitance towards acknowledging the state of war, and the limitations of the law of war and neutrality in non-international conflicts. In addition, there was an attempt through the Pact of Paris in 1928 to outlaw wars of aggression.[103]

3.3.6 Evaluation of state practice in the war in Ukraine in pre-World War II context

With regard to how the Western support of Ukraine would be judged in this historical period of time, little has changed from the previous period.

The Law of Neutrality and what the law represent is still a norm states have to consider while planning its foreign policy. This is best shown by the U.S. careful approach to not jeopardize its own neutrality through the 1930s. It seems quite clear that the Western support of Ukraine in this period of time would be in conflict with any ambitions of being a neutral state. It is however important to note the shift taking place towards supporting the victims of aggression. And that this support did not automatically make the supporting state a belligerent in the conflict.

3.4 The Law of Neutrality after World War II

3.4.1 Introduction

World War II further changed how states viewed neutrality in the classical sense. Neutral states were occupied *en masse* and the U.S. favored one side in the war and initially still claimed neutrality, before they fully engaged in the war in 1941. These actions reinvigorated the discussions after the war to accept a change in the law of neutrality to include a third option for a state's position beside the classical belligerent/neutral choice. This debate also happened in the previous period, following the establishment of the League of Nations and the Pact of Paris, but lost some of its momentum until the effectuation of the U.S. neutrality act in 1939, which clearly favored one side in the war. The U.S. choice to support one side created precedence for the post-war period, and it can be argued that a status of non-belligerency has since grown into a

[103] The Pact of Paris (The Kellogg–Briand Pact) officially called the General Treaty for Renunciation of War as an Instrument of National Policy, was initially signed and ratified by most States. The Pact declared that war would not be a legal "instrument of national policy" for a State in relation to other States.

legal status for a state.[104] However, the question is whether the choice of supporting one side in the conflict is actually new state practice turning into customary international law, or just repeated breaches of the law of neutrality.

The next subsection shifts focus towards the establishment of the United Nations (UN) and how this change in world order influenced a state's options if an armed international conflict arose. Next, state practice during the Cold War period will be described, with extra focus on the war between Iraq and Iran. Finally, the subsection will consider the period after the Cold War with an example from the U.S.-led invasion of Iraq starting in 2003.[105] This historical period has seen a great variance in politics, both at a global level and in how the superpowers have altered their foreign policies. The issue then, is how this variance in state practice and foreign policies has influenced the law of neutrality.

3.4.2 The establishment of the United Nations and the UN Charter

3.4.2.1 UN Charter removes a sovereign state's option to use war as a political tool

Even prior to the official surrender of Germany, 50 nations gathered at the United Nations Conference on International Organization in San Francisco, California, in April 1945. During the following two months, they drafted and then signed the Charter of the United Nations. The goal was to establish an international organization to prevent future wars such as the one they had just been part of. This conference was the result of preparatory work done by the allies during World War II.[106]

For the first time in history, aggressive use of force was made illegal through the Charters Article 2 (4).[107] This was a major change in regards to a state's sovereignty, and clearly tells us the ambitions from this time to do everything in their power to ensure the world did not erupt

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[104] Heinegg, W. H. (2007). "Chapter 20. Benevolent Third States in International Armed Conflicts: the Myth of the Irrelevance of the Law of Neutrality". p. 544-546

[105] Operation Iraqi Freedom

[106] UN home page, "Preparatory Years: UN Charter History" and "History of the United Nations". First, The Declaration of St. James Palace (1941) which was a declaration made in London by representatives of Great Britain, Canada, Australia, New Zealand and the Union of South Africa and of the exiled governments of Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, Yugoslavia and of General de Gaulle of France. Secondly, The Atlantic Charter (1941) where the U.S. President Roosevelt and Prime Minister Churchill signed a charter where a future "establishment of a wider and permanent system of general security" was an ambition. And finally, The Declaration by United Nations (1942) where twenty-six States at war with the Axis Powers (twenty-one other States adhered to that Declaration at a later date) embodied in the Atlantic Charter.

[107] UN Charter Article 2(4) provides: 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.

into a large scale war again. There are, however, two exceptions where states are allowed to use force in accordance with the UN Charter.

First, Article 2 (4) permits force authorized by the UNSC because that would not be "inconsistent with the Purposes of the United Nations". Secondly, Article 51 allows use of force in "individual or collective self-defense if an armed attack occurs against a Member of the United Nations". Article 51 however, has a limitation in time. A state can only conduct legal self-defense "until the Security Council has taken measures necessary to maintain international peace and security".[108]

Article 51 is generally viewed upon as a direct exception to the general prohibition of the use of force in Article 2(4). However, it is important to note that Article 51 is part of Chapter VII in the UN Charter which relates to the UNSC. The first sentence of the initial draft of Article 51 showed this link clearly: "Should the Security Council not succeed in preventing aggression", a "member state possesses the inherent right to take necessary measures for self-defense".[109] The reason for not including the part relating to the UNSC in the final draft was to not "undermine in a dangerous fashion the strength of the international organization". [110] In other words, the conference delegates did not want to imply in the Charter a situation where a state was subject to aggression and that the UNSC did not function as intended. This implies that Article 51 is not a direct exception to Article 2(4), but rather that it is an exception to Article 39 and 42 in the UN Charter. Article 39 provides that the UNSC "shall determine the existence of any … act of aggression" and "decide what measures shall be taken", and Article 42 provides that the UNSC may take measures involving the use of armed force.[111] It also correlates with the purpose of establishing the UN, to create an international organization which had the mechanisms to prevent future wars and preserve peace. This distinction is important when looking at the collective self-defense measures taken during the war in Ukraine.

Hence, it seems clear that the UNSC does not have exclusive rights to consider whether the use of force by a state is in violation with the UN Charter. If the UNSC is unable to act under Chapter VII, a state can independently determine the legality of the use of force. A state would have to identify the aggressor, and demonstrate that the state it intends to support is a victim of

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[108] UN Charter Article 51 provides: Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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.

[109] Voiced British concern referred to in 500.CC/5–2145: Circular airgram The Acting Secretary of State to Diplomatic Representatives in the American Republics (1945)

[110] Ibid.

[111] Further clarification of this point of view can be found in both the preparatory work for the UN Charter and in two Articles by Adil Ahmad Haque, The United Nations Charter at 75: Between Force and Self-Defense – part one and two

illegal use of force. Finally, the state would have to justify its behavior by referring to Article 51. However, the supporting state would then discriminate between the belligerents in the conflict and obviously not claim neutrality. Several correlated questions then arise. Firstly, by supporting one of the belligerents only, does this make the supporting state a belligerent in the conflict as well? Secondly, does the UN Charter legalize discriminating support, and is the supporting state provided a new legal status, between the status of "neutral" and "belligerent"? And finally, is the support in reality "just" a breach in neutrality law, and as such giving the discriminated belligerent legal measures to hinder the support? The uncertainty towards this issue puts the belligerent being discriminated against in a legal void as to what options that state has. In the case of the supporting state being regarded as neither neutral or belligerent the situation would not be governed by any legal rule at all.[112]

Both the power given to the UNSC to take measures involving the use of armed force, and the allowance for collective self-defense through Article 51, indicate that a new legal status during war might have been established in addition to the black-and-white status of belligerent or neutral governed through the law of neutrality. This is by no means clear, and later state practice will have to dictate whether this is the case. The question of the establishment of a new legal status during war will be addressed towards the end of this chapter.

3.4.2.2 Subsection summary

The UN Charter in effect removed the choice for sovereign states to use war as a political tool. And it might also have created a third legal status for states between "belligerent" and "neutral". However, these changes are not enough to render the law of neutrality obsolete. First, the law of neutrality only comes into effect in the state of war (jus in bello), and the changes to when and how the use of force can legally be used (jus ad bellum) do not change the need for rules concerning state neutrality during war. Second, even if the UN Charter does create a new position between "belligerent" and "neutral" in the state of war, a state still has the option to claim neutrality towards the conflict and, by this, be governed through neutrality law.

3.4.3 Geneva Conventions (GC) with its additional protocols (AP)

The Geneva Conventions and its additional protocols contain rules to be followed during war (jus in bello). This is when the law of neutrality also functions, so it would seem natural for the GC to mention neutral rights and duties if they intended to alter the status of these rights and duties.

[112] Heinegg, (n. 104), p. 552-554

However, there is no such mentioning of change of the law of neutrality in the GC. Neutral states are mentioned in several of the Articles, strongly indicating that the status of neutrality is still a viable option for a state to choose during war.[113]

The combination of the UN Charter and the GC does indicate that the law of neutrality has a smaller area of application. And both conventions give states more options in their selection if a war should arise. It is, however, important to note that even if the GC make a distinction between neutral states and states not taking part in the hostilities, this does not necessarily mean that the status of "non-belligerency" has become a recognized concept under international law. It could just be the result of an uncertainty among the delegates concerning the new status of law of neutrality and the state practice during World War II.[114]

3.4.4 The Cold War and the war between Iran and Iraq

Following World War II, the political differences between the west and communist states increased. This practically made the UNSC powerless. With blocking votes on both political sides, there was no realistic way for the UNSC to function as intended. In turn, this led to states following their own interests in the international conflicts that arose during this period. State practice from this period strongly suggests the establishment of the status as a "non-belligerent state" in customary international law. In addition, the state practice also suggests less relevance for the law of neutrality since states claiming neutrality towards a conflict still distinguish between the belligerents and more often than not, favor one side over the other when conducting trade. This last point is well illustrated in the war between Iran and Iraq from 1980 to 1988.

During the Iran-Iraq war, the majority of states not directly participating in the conflict defined themselves as neutrals. France, Saudi Arabia and Kuwait officially adopted the status of "non-belligerency" and continued to support Iraq through the war. The states claiming to be neutral in the conflict, did not abide by the law of neutrality and clearly distinguished their trade and conduct with the belligerents.[115]

The U.S. declared its position as a neutral state and it emphasized that neither belligerents in the conflict would be supplied with war materials in any way. However, the U.S. had severe trade restrictions towards Iran under anti-terrorism legislation, and declared that it would support Iraq to ensure that Iraq could defend itself.[116] The Soviet Union also ended up supporting Iraq with weapons during this war. The Soviet Union "improved relations with Iraq, lifted an

[113] GC (III) Article 122, AP I Articles 2(c), 9(2)a, 19, 22(2)a, 31, 39(1) and 64.

[114] Heinegg, (n. 104), p. 554

[115] Ibid. p. 549

[116] Ibid. p. 549 The U.S. supported Iraq with both helicopters and intelligence provided by satellites and AWACS aircraft.

arms embargo, and become Baghdad's largest supplier of military equipment and a key source of economic aid".[117]

The political situation in the Gulf region was complicated, and the U.S. had an ongoing conflict with Iran due to American diplomats being held hostage in Teheran. It is still noteworthy that the states claiming neutrality in this conflict, including the U.S., ended up supporting the aggressor, Iraq. This illustrates that state practice during this particular war in large follows the state's foreign policy towards the belligerents, and that states are less inclined to follow either the law of neutrality or the legal form of collective support under Article 51 in the UN Charter unless it is in the state's own interest.

3.4.5 The end of the Cold War to the start of the war in Ukraine

The end of the Cold War also ended the constant deadlock in the UNSC. Russia replaced the USSR and seemed more willing to compromise with the west in the cases presented.[118] With the possibility for the UNSC to function as intended, the whole UN system would be better able to follow up on its purpose to "maintain international peace and security".[119]

The UN system was challenged over the next decades, with both conflicts in former Yugoslavia, the Iraqi invasion of Kuwait and the U.S.-led coalition attack on Iraq in 2003, Operation Iraqi Freedom (OIF). I will focus on OIF in 2003, and more specifically on one state not directly participating in the attack, Germany.

State practice since World War II has in general terms consisted of third-party states supporting one side in an international armed conflict. This state practice strongly suggest that the law of neutrality have been derogated during this time period, and that states now have the option of what the UN Charter suggest, to not follow the law of neutrality and be considered a "non-belligerents" state.

During the OIF, Germany supported the U.S.-led coalition in numerous ways, but emphasized that Germany was only "securing the alliance" since Germany did not actively take part in the war-fighting effort.[120] A ruling by the Federal Administrative Court in Germany following the

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[117] Amzacost, M.H. (1987) U.S. Soviet Relations: Testing Gorbachev's "New Thinking", 87 Dept. of State Bulletin 36 et seq., 39

[118] Chadwick, p. 14 Russia both wanted and needed better interaction with the western States, and compromised in UNSC matters for both political and economic support.

[119] UN Charter Article 1(1)

[120] German support consisted of both allowing U.S. troops on German bases, the use of Germany as a buildup location, German troops guarding U.S. military installations in Germany and several German deployments to the area of the conflict. (n. 121)

OIF considered Germanys actions during OIF in regard to both the UN Charter and the law of neutrality.[121]

The case was against a German soldier who was demoted for not following orders to develop software intended to be used in the U.S.-led attacks on Iraq. The relevant part of this juridical decision is the courts reference to neutrality law. The court argues that it was not decisive that German soldiers did not participate in active combat to determine if Germany had violated the ban on the use of force. And as a "neutral power", Germany was not allowed to grant the U.S. the right to operate from and over German soil. The court also noted that Germany could not use the argument of being part of NATO to legitimize the support of other NATO states.

This ruling is clearly in contrast to the aforementioned state practice since World War II. The ruling further indicates that the state practice of supporting one of the belligerents was not new customary international law being developed towards the establishment of "non-belligerency", but rather continued breaches of neutrality law.

3.4.6 New legal status of either "qualified neutrality" or "non-belligerency"

As discussed above, both the UN Charter, the GC and in particular state practice since World War II indicate a new legal status of "qualified neutrality" or "non-belligerency". There are however no judicial decisions or UNSC resolutions supporting this.

However, the judicial decision in Germany strongly suggests that neutrality law still applies to third-party states in international armed conflict. In addition, the UNSC did not differentiate between "strict" and "benevolent" neutrals during the Iran-Iraq war, but called "upon all other States to exercise the utmost restraint and to refrain from any act which may lead to further escalation and widening of the conflict".[122] Such a UNSC statement, does not carry much weight by itself, but gives support to the argument of the relevance of neutrality law in this particular case.

In addition, the question of how to define neutrality was raised when the "Commentary to the HPCR Manual on International Law Applicable to Air and Missile Warfare" was written. This work was concluded in 2013, and the majority of these international law experts "was not prepared to recognize an intermediate status of either "qualified neutrality" or "non-belligerency",

[121] Bodansky, D. and Baudisch, I. (2006) "Germany v. N.," American Journal of International Law, Cambridge University Press, 100(4), pp. 911–917, and the Case itself (German text) at refworld.org

[122] Resolution 598 (1987) adopted by the Security Council at its 2750th meeting, on 20 July 1987.

unless there was an authoritative determination by the UNSC under Chapter VII of the UN Charter".[123]

Most state practice in this period, is too varied and non-consistent to establish any new costumery international law. For state practice to develop into a costumery international law it has to be both "consistent and general" and contain the *opinion juris* element as described in chapter 2. With both juridical decisions, UNSC resolutions and expert commentary indicating that the law of neutrality still binds states, it shows that no new status in addition to that of neutral and belligerent, has been established. To sum up, there are only two legal statuses during an international armed conflict, that of "neutral" and "belligerent".

3.5 Chapter Summary

In a chronological order, this chapter presents and discusses the relevant sources that have affected or related to the law of neutrality up until the war in Ukraine. Despite several indications of the establishment of a new legal status, in addition to that of neutral and belligerent, the fundamentals of neutrality law seem unchanged. This does leave us, however, with two separate choices when deciding whether a state's conduct is legal under international law. Is it legal under neutrality law, or is it legal under the provisions in Article 51 of the UN Charter. Without the recognition of an intermediate status of either "qualified neutrality" or of "non-belligerency" this apparent contradiction in international law will persist.

State practice throughout the 20th century strongly suggests that state practice have moved towards a state supporting the belligerent it favors. However, the support seems mostly politically motivated, as both the form of support and the arguments for contributing it have varied throughout the period. It is likely that most of the state practice during this period has in fact been breaches of neutrality law, and not an indication of customary law being established.

The war in Ukraine has rekindled debates on both the law of neutrality, and of the state position of "qualified neutral" in an international armed conflict. The final chapter discusses how the war in Ukraine influence both of these topics.

4 The war in Ukraine and the law of neutrality

4.1 Introduction

The historical development of the international rules governing neutrality during warfare, as presented in chapter 3, forms the basis for understanding modern-day rules in this field. Chapter 4 applies these rules on the ongoing war in Ukraine.

[123] Commentary to the HPCR Manual on International Law Applicable to Air and Missile Warfare, p. 44

Chapter 4 discusses two key questions. The first question is if the support given to Ukraine is in breach with the law of neutrality. The second question is if the war in Ukraine has contributed towards acknowledging the position as a "qualified neutral" or "non-belligerent" state.

Initially, a brief summary of the support given to Ukraine from states and institutions is provided. Then, the arguments used to legitimize this support are examined. The support is then evaluated in light of neutrality law. Finally, this chapter examines if state practice during the war in Ukraine tips the scales in favor of acknowledging the position as a "qualified neutral" or "non-belligerent" state.

4.2 Assistance to Ukraine since the Russian invasion

4.2.1 Background and general considerations

Ukraine gained its independence in 1991. This marked the starting point for defense and security links between Ukraine, NATO members and other allies. These links of support intensified when Russia annexed Crimea in 2014, but consisted primarily of training and bilateral provision of non-lethal military equipment.[124]

Since Russia's attack against Ukraine began on February 24th, 2022, the support has increased substantially. The support now includes lethal weapons, battlefield intelligence and specific military training on western weapons and equipment. In addition, the UNGA has passed several resolutions condemning the Russian aggression in Ukraine. NATO has been clear in its political support of Ukraine, and fully supports the provision of military assistance by individual allies. In addition, NATO helps coordinating requests from the Ukrainian government.[125] Also, the EU has for the first time directly financed military assistance and lethal weaponry to a third country through its new European Peace Facility.[126]

4.2.2 UNGA resolutions

The UNGA has passed several resolutions to comment and express its opinion on the Russian invasion of Ukraine. The two most relevant resolutions for this thesis are emergency session resolution ES 11/1 and ES 11/4.[127]

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[124] UK parliament (2022), House of Commons library, Military assistance to Ukraine since the Russian invasion

[125] Ibid.

[126] United States Institute of Peace (2022), Ukraine: The EU's Unprecedented Provision of Lethal Aid is a Good First Step

[127] UNGA resolution 377 A (V) "Uniting for peace" (1950) gives the GA an opportunity to meet in an emergency session in the case where the UNSC "because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security". When in session discussing the matter, the UNGA is obligated to give a recommendation to "Members for collective measures … to maintain or restore international peace and security".

First, the UNGA called an emergency special session on March 2nd, 2022 during which resolution ES 11/1 was adopted. This resolution deplored the Russian attack on Ukraine sovereignty and its recognition of certain areas in Ukraine as independent areas. Furthermore, the resolution, demanded a full withdrawal of Russian forces and a reversal of its decision to recognize the Ukrainian areas as independent of Ukraine. In addition, the resolution deplored the involvement of Belarus in the unlawful use of force, and called upon Belarus to abide its international obligations. Finally, the resolution urged an immediate peaceful solution to the conflict.[128]

Secondly, the UNGA passed resolution ES 11/4 on October 12th, 2022. This resolution "[c]alls upon all States, international organizations and United Nations specialized agencies" to not recognize the four regions of Ukraine which Russia has claimed by their "illegal so-called referendums" in September 2022.[129]

Both resolutions came as a result of Russia blocking the UNSC from action. The UNGA then is obligated to give a recommendation to its members under the mandate of the "Uniting for peace" resolution.[130] It is noteworthy that neither resolution recommends member states to support Ukraine under Article 51 of the UN Charter, but only refers directly to Russia and Belarus to stop their aggression or support of the aggressor.

4.2.3 NATO alliance support

NATO, as an alliance, has been clear in its political support of Ukraine and fully supports the military assistance provided by individual allies. The NATO alliance deems a strong, independent Ukraine to be "vital for the stability of the Euro-Atlantic area". Furthermore, NATO is helping the coordination of requests from the Ukrainian government, and supports states in the delivery of humanitarian aid to Ukraine.[131]

At the NATO summit in Madrid in June 2022, a strengthening of the support to Ukraine in the following years was agreed in order to transition from Soviet-era material to modern NATO equipment. This further shows the commitment of the NATO alliance to create close bonds with Ukraine.

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[128] UNGA A/RES/ES 11/1, The resolution was passed with 141 States voting for, 5 States voted against (Russia, Belarus, Syria, Eritrea and North Korea) and 35 States abstained from voting (including China, India, Pakistan and South Africa).

[129] UNGA A/RES/ES 11/4, The resolution was passed with 143 States voting for, 5 States voted against (Russia, Belarus, Syria, Eritrea and North Korea) and 35 States abstained from voting (including China, India, Pakistan and South Africa).

[130] UNGA resolution 377 A (n. 127)

[131] NATO webpage (2022), Relations with Ukraine

Lastly, NATO gives individual member states security guarantees through Article 5 of the NATO treaty. This Article gives individual member states the confidence to support Ukraine with military equipment without fully jeopardizing their own security.

4.2.4 Support from individual states

The support to Ukraine from individual states has been massive since the Russian invasion in February 2022. The U.S. is the largest provider by far, but many other states have provided substantial support as well. The U.S., the U.K. and Poland have taken leading roles in coordinating the international military support to Ukraine.

The support from individual states includes non-lethal aid, lethal weapon systems, military training and intelligence. [132] The lethal weapon systems provided to Ukraine include long-range artillery, anti-tank weapons, tanks, drones, air defense systems and ammunition to support these systems.[133]

Military support to Ukraine comes mainly from NATO states. Several of the European neutral states have limited their support to include only non-lethal aid like helmets, protective vests and fuel. However, both Finland and Sweden have provided lethal weapon systems to Ukraine, despite their long-standing policy of military non-alignment. It should be noted that both countries have applied for NATO membership after the Russian invasion of Ukraine. Outside of NATO and Europe, also Australia and New Zealand have supported Ukraine militarily. Australia has provided lethal weapon systems while New Zealand has sent non-lethal aid and supported the UK-based training.[134]

To legitimize the support given to Ukraine, most states align their arguments with the NATO arguments. The states will "provide Ukraine with … support, helping to uphold its fundamental right to self-defence".[135]

To legitimize the U.S. support, the U.S. argues that it has adopted the doctrine of "qualified neutrality". Under this doctrine, the U.S. argues, states can take non-neutral acts when supporting the victim of an unlawful war of aggression. This is not a new position for the U.S. to adopt, but as discussed in chapter 3, it is not recognized as customary international law prior to the

[132] UK parliament (2022), House of Commons library, Military assistance to Ukraine since the Russian invasion
[133] BBC (2022), Ukraine weapons: What military equipment is the world giving?
[134] UK parliament (2022) (n. 132)
[135] NATO, NATO's response to Russia's invasion of Ukraine

war in Ukraine. However, the U.S. also considers the consequences of supporting Ukraine as limited even if their position as "qualified neutral" is not recognized.[136]

The foreign minister of Norway, Anniken Huitfeldt, uses the overall purpose of the UN system and Article 51 of the UN Charter as arguments to legitimize Norway's contribution to Ukraine. She also points to the fact that it is the aggressor in this war that makes the UNSC incapable of action, and argues further that a fallback to century-old treaties on neutrality would undermine the essence of the UN system. She deems the Norwegian support to Ukraine legal under international law, and clearly states that she does not consider Norway a belligerent in the war.[137]

The number of states supporting Ukraine with weapons, intelligence and military training has increased since the war started, and more states are now providing support by means of lethal weaponry. All this support of material, training and intelligence suggest that many states share the U.S. and Norway attitudes towards the war in Ukraine, and that they consider their support legal under international law.[138] This indicates that the two elements needed to establish new customary law, as discussed in chapter 2, are present. Both "consistent and widespread state practice" is observed and the relevant actors consider and accept the practice as law (opinio juris).[139]

4.2.5 The support to Ukraine and the law of neutrality

As chapter 2 describes, the law of neutrality is regulated in two treaties from the second Hague Peace Conference from 1907, namely Hague Conventions V and XIII. Chapter 3 confirms that the law of neutrality has survived more or less in the same form as these treaties present it, even though the issue has been controversial throughout the 20th century. Further, subsection 3.4.6 shows that international customary law still only consists of two legal statuses ("belligerent" and "neutral") during an international armed conflict (IAC). Consequently, states that are not parties in the armed hostilities in Ukraine, are bound by the law of neutrality.

The duty of a neutral state during an IAC is to be impartial towards the conflict. In addition, the neutral state is not allowed to "move troops or convoys of either munitions of war or supplies" or form "[c]orps of combatants" on its territory "to assist the belligerents".[140]

[136] Congressional Research Service (2022), International Neutrality Law and U.S. Military Assistance to Ukraine

[137] Huitfeldt, A. (2022) Norsk våpenstøtte til Ukraina og folkeretten. Available at regjeringen.no

[138] The Ukraine Support Tracker, available at the Kiel Institute for the world economy website

[139] See subsection 2.3

[140] Haag Convention (V) War on land Article 5 and 4

When regarding the support given during the war in Ukraine, it is clear that it is in breach with the principle of being impartial towards the belligerents. Ukraine has been supported in numerous ways, and Russia has been sanctioned against. This differentiated treatment of the two belligerents is a clear violation of neutrality law. Also, the use of neutral territory to prepare the military support to Ukraine is in clear violation with the duties of a neutral state.

However, it is important to note that even though a state has violated its duties as a neutral state, it does not automatically become a belligerent in the conflict. There is a threshold that needs to be reached for this to occur. It is beyond the scope of this thesis's analysis to determine whether a particular state has become a belligerent in the war in Ukraine. However, international law scholar Michael N. Schmitt concluded that "supporting States … have become parties to the conflict" in his Article "Are we at war?". His conclusion was based on the close relationship between the support given and the Ukrainian use of the provided support in tactical battle decisions and attacks.[141] Without delving further into this topic, his conclusion is that some states have become parties in the war in Ukraine if only analyzing the support in relation to traditional neutrality law.

Hence, the question is whether the support to Ukraine is forming new customary international law, or merely constituting continued breaches of existing neutrality law.

The following discussion considers whether the state practice of supporting Ukraine so far has tipped the scales in favor of acknowledging the position as a "qualified neutral" state as customary law.[142] This has been a controversial topic all through the 20th century as shown in chapter 3, but the war in Ukraine may represent a game-changer in this regard.

4.3 "Qualified neutrality" and the war in Ukraine[143]

The UNGA resolutions concerning the war in Ukraine show massive international condemnation of the Russian aggression in Ukraine. This implies support to Ukraine as the victim of this aggression. However, the resolutions do not recommend member states to provide military support to Ukraine. To assume that the same number of supporting states would be in favor of a resolution recommending such military support, would only be speculations. By this, these resolutions do not carry much weight when considering the military support provided to Ukraine, and if the position of "qualified neutral" is now established as a legal option.

[141] Michael N. Schmitt (2022) ARE WE AT WAR?

[142] Qualified neutral or non-belligerent State; I will only use "qualified neutral" in the following subsection when discussing the issue

[143] Reference subsection 2.3 which presents how customary international law is developed

As of October 3rd, 2022, 40 states have provided support to Ukraine. This includes states who have only given humanitarian support.[144] When considering the states who have provided military support, only Australia and New Zealand have provided support beside the European and NATO states. Even though the number of states providing military support is high, the lack of state diversity reduces the likelihood of customary international law being formed in the war in Ukraine.

However, when deciding whether a custom has been established both affirmations and protests to the practice are important. There seems to be few protests from other states to the state practice of supporting Ukraine. This may indicate that other states accept the state practice as legal under international law. Most of the supporting states are part of the world's strongest military alliance, and also represent extremely important consumer markets. These two factors, could influence non-supporting states to be more reluctant to deliver clear protests to the practice of supporting Ukraine militarily. Even considering this, the combination of a large number of states providing military support, and a low number of protests suggest that a new customary law may have been formed in Ukraine.

Also, the renowned scholar, Wolff Heintschel von Heinegg continuously opposed the concept of "qualified neutrality" before the war in Ukraine. He now believes there are "good reasons to take a more nuanced position".[145] The main arguments for his shift in opinion are the particulars aspects of the war in Ukraine. First, the aggressor state prevents the UNSC from functioning as intended. Second, the Russian attack on Ukraine is an apparent act of aggression without any justification in facts or international law. Finally, an overwhelming number of states condemns the Russian attacks as violations of international law.

Finally, a situation where the aggressor state is the same state that block the UNSC from action is a situation that needs to be addressed specifically. Article 51 of the UN Charter was intended as the solution, where states could, on their own accord, contribute to the collective self-defense of the victim state if the UNSC did not function as intended. To use Article 51 like it was intended would in fact support the establishment of the position of "qualified neutral" for a state to choose under the given circumstances. This also align with the supporting states arguments, which have received little protests from third-party states.

[144] Specifically, the EU member states, other members of the G7, as well as Australia, South Korea, Turkey, Norway, New Zealand, Switzerland, China, Taiwan and India. Reference from the Kiel Institute: Ukraine Support tracker

[145] Heinegg, W. (2022) Neutrality in the war against Ukraine

To sum up, the military support provided during the war in Ukraine and the reactions of third-party states to this support, suggest that a concept of "qualified neutrality" has been established under international law. However, it is important to note that even if the position as "qualified neutral" is recognized after the war in Ukraine, it would not automatically be established as a legal position for all other international armed conflicts. It would merely be an option for states to choose in international armed conflicts similar to the situation in the war in Ukraine. The main condition that needs to be present is that it is the aggressor in the war which blocks the UNSC from functioning as intended.

5 Concluding remarks

Whilst the future of a status as a "qualified neutral" state under given circumstances remain uncertain, this thesis discovers several factors pointing towards such a conclusion.

It does so by first evaluating the law of neutrality over the last two centuries, with specific focus on state practice during this period. During this time, state practice has shifted gradually away from the impartiality required to remain neutral after the traditional law of neutrality, towards support of the state who is the victim of aggression, or in some cases the state favored by the supporting state. The inconsistency in state practice regarding this matter, in addition to the topic being controversial in general, led to the position as "qualified neutral" not being recognized before the war in Ukraine.

This thesis then considers the specifics in the war in Ukraine, and evaluates several factors that influence whether customary international law has evolved regarding the status as a "qualified neutral" state during the ongoing war. After considering all of these factors, this thesis argues that a third legal position as "qualified neutral" has been established under the specific circumstances of the war in Ukraine.

The relationship between the law of neutrality and the position of "qualified neutrality" does not contradict each other. Neutral status is still a viable option for a state to choose in a situation such as the war in Ukraine. When the UNSC does not function as intended, this thesis concludes that states can choose traditional neutrality or "qualified neutrality" in accordance with their own political interests and beliefs.

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