Neutrality, Concept and General Rules
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Subject(s):

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A. General Concept

1. Introduction

1 ‘Neutrality’ means the particular status, defined by international law, of a State not party to an armed conflict (→ Armed Conflict, International). This status entails specific rights and duties in the relationship between the neutral and the belligerent States (→ Belligerency). On one hand, there is the right of the neutral State to remain apart from, and not to be adversely affected by, the conflict. On the other hand, there is the duty of non-participation and impartiality.

2 The right not to be adversely affected means that the relationship between the neutral and belligerent States is governed by the law of peace, which is modified only in certain respects by the law of neutrality. In particular, the neutral State must tolerate certain controls in the area of maritime commerce. The duty of non-participation and impartiality are a necessary corollary to the right not to be adversely affected. The duty of non-participation means, above all, that the State must abstain from supporting a party to the conflict. This duty not to support also means that the neutral State is under a duty not to allow one party to the conflict to use the resources of the neutral State against the will of the opponent. Therefore, the defence of neutrality is part of the duty of non-participation.

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

4 As impartiality does not entail a duty of exactly equal treatment, a neutral State is under no duty to eliminate differences in the commercial relations between itself and each of the parties to the conflict at the time of the outbreak of the armed conflict. The neutral State is entitled to continue existing commercial relations (the principle of the so-called courant normal). A change in commercial relationships favouring one of the belligerents would, however, constitute taking sides in a manner incompatible with the status of neutrality. In more general terms, impartiality means that the neutral State must apply the specific measures it takes on the basis of the rights and duties deriving from its neutral status in a substantially equal way as between the parties to the conflict (Art. 9 Convention regarding the Rights and Duties of Neutral Powers and Persons in Case of War on Land [‘1907 Hague Convention V’]; Art. 9 Convention concerning the Rights and Duties of Neutral Powers in Naval War [‘1907 Hague Convention XIII’]; → Hague Peace Conferences [1899 and 1907]). This regime of rights and duties of the neutral State is an important international legal tool for restraining conflicts. By establishing a clear distinction between neutral States and States parties to the conflict, international law prevents more States from being drawn into the conflict. Neutral States may help parties to a conflict to maintain or establish relations that may mitigate the suffering of victims (eg by conducting relief operations or exchanging information) and that may finally smooth the path to peace (eg by arranging a → cease-fire). It is incompatible with this conflict-restraining function of neutrality that States should try to evade the duties flowing from their neutral status by styling themselves non-belligerents. This, however, has often happened in the past.

5 The United States considered itself as a non-belligerent before entering World War II, but not as neutral because it supported the United Kingdom in a way that was incompatible with the duty of non-participation under the law of neutrality. More recently, during the 2003 US-British intervention in Iraq, Italy issued a proclamation of non-belligerency (→ Iraq, Invasion of [2003]). Other European States also gave assistance to the intervening States, which was incompatible with the law of neutrality without becoming parties to the conflict (eg Germany), but they did not make a similar declaration—leaving a legal explanation of their behaviour open. Although there are, thus, a number of cases of declared or undeclared non-belligerency, there is no sufficiently uniform general practice that would justify the conclusion that non-belligerency has become a notion...
recognized by customary international law. The cases of non-belligerency either arose in the absence of a conflict of sufficient scope to require the application of the law of neutrality (or in a conflict which was not considered as such) or were simply violations of the law of neutrality. If a ‘non-belligerent’ State violates the law of neutrality it must bear the consequences, for instance → reprisals. A claim of non-belligerent status may not be used as a justification for a breach of the laws of neutrality. The consequences of such violations are discussed below. Violations of the law of neutrality occur even where support is given to the victim of → aggression, and even when it does not amount to participation in the conflict. It may, thus, be answered by countermeasures. Neutrality is not optional, in the sense that each State is free to violate single duties of the law of neutrality as it will, or to declare them irrelevant, without having to fear a countermeasure taken by the adversely affected State.

6 The situation is different if and to the extent that the law of neutrality is modified by the UN Charter or by a binding decision of the UN Security Council (‘UNSC’). In this case, it is meaningful and correct that newer treaties use the term ‘neutral or other State not a Party to the conflict’ (Art. 2 (c) → Geneva Conventions Additional Protocol I [1977]). Such a formulation clarifies that a proposal is to be applied to any State not participating in the conflict, without the need to enter into any controversy over the status of neutrality, and also where there is a conflict not sufficiently great in scope to trigger the application of the law of neutrality.

2. Historic Development

7 The essential aspects of neutrality have been developed through → State practice in modern times. As a legal status of non-participation, its basic scope was fixed by the end of the 18th century. The development continued during the 19th century in two ways. On one hand, greater protection of neutral commerce from belligerent acts was achieved. On the other hand, a legal status of permanent neutrality as an essential element of the maintenance of peace and the → balance of power in Europe was established (by the recognition of the neutrality of Switzerland, Belgium, and Luxembourg). During World Wars I and II, and also in a number of later conflicts, the law of neutrality retained its significance. The development of the State practice gave rise to customary law, which up to this day is an essential source of the law of neutrality. Following a modification of State practice, this customary law too underwent changes and introduced distinctions. This change, however, has produced only modifications of single specific rules of the law of neutrality, not a general abolition of this whole body of law.

8 Essential parts of the law of neutrality were codified during the 19th and the early 20th centuries. Important steps in this development were the Paris Declaration Respecting Maritime Law (→ Paris, Declaration of [1856]) and the Hague Conventions of 1907, namely 1907 Hague Convention V and 1907 Hague Convention XIII. Other treaties relating to the laws of war contain specific provisions concerning the rights and duties of neutral States, in particular the → Geneva Conventions I–IV (1949) and Additional Protocol I. There has, however, been no comprehensive codification of the law of neutrality since the Hague Conventions of 1907. These rules of 1907 have in part been rendered obsolete by later practice. The need for a new codification is urgent. An important part of the law of neutrality, namely → neutrality in naval warfare, has recently been formulated in private restatements, namely in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, adopted in 1994 by a group of experts convened by the International Institute of Humanitarian Law, in a set of rules on maritime neutrality formulated by a committee of the → International Law Association (ILA), and in the Manual on International Law Applicable to Air and Missile Warfare adopted in 2009 by a group of experts convened by the Harvard Program on Humanitarian Policy and Conflict Research.

3. Neutrality under the Charter of the United Nations

9 There has been a certain amount of controversy concerning the question of whether the UN...
Charter, by establishing a general international legal prohibition of the use of force (→ Use of Force, Prohibition of) and establishing a system of → collective security, still leaves a place for the law of neutrality. The traditional law of neutrality with its duty of impartiality, ie the prohibition of discrimination between the parties to the conflict, may appear at first glance to be incompatible with this development, which outlaws the aggressor. However, this is generally not the case. Also under the UN Charter, neutrality during international armed conflicts is permissible and possible. States expressly rely on the law of neutrality. The → International Court of Justice (ICJ) (see Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion] [1996] 260–61; → Nuclear Weapons Advisory Opinions) as well as national courts (Horgan v An Taoiseach et al High Court of Ireland [28 April 2003]; Unverbindlichkeit eines Befehls wegen einer Gewissensentscheidung–Irak-Krieg Bundesverwaltungsgericht [German Federal Administrative Court] [21 June 2005]) have recently upheld the continued validity of the law of neutrality. The law of neutrality played an important role in the dispute about the legality of the Israeli ‘→ blockade’ of the Gaza Strip and the ensuing Mavi Marmara incident in 2010. The ILC, in its 2011 Draft Articles on the Effect of Armed Conflicts on Treaties, also treats the law of neutrality as a valid and relevant body of law. The impartiality of the neutral State retains its important functions at least as long as there is no possibility of a binding decision concerning the question of who in a given conflict is the aggressor and who is the victim. Although the UN Charter provides for a binding decision by the UNSC on the question of whether there has been an → armed attack and which State is the aggressor, decisions of this kind have long been politically impossible in view of the polarization between the superpowers. After the end of the East-West conflict, the UNSC is in a better position to take decisions, but it still has often refrained from legally characterizing situations as breach of the peace or act of aggression and from designating a State as being an aggressor. Thus, it cannot be taken for granted that the UNSC will always exercise its powers in this respect.

10 The UN Charter provides for a right of collective → self-defence, ie a right of all States to assist a victim of aggression, but not a duty to do so. Thus, it is by no means unlawful if a State abstains from supporting a victim of aggression, ie remains impartial and neutral. The situation is different only if and to the extent that the UNSC uses its powers under Chapter VII UN Charter so as to oblige States to conduct enforcement measures (Arts 41–43, 48 UN Charter). This means that the traditional duty of non-participation and impartiality has not in a general way been excluded by the UN Charter, but only that it may in particular cases be suspended by a binding decision of the UNSC. When taking such a decision, the UNSC may also differentiate the duties of support imposed upon particular States. In this respect, one has to distinguish between enforcement measures → stricto sensu undertaken by the UN under the direction of the UNSC and military operations undertaken by one or more States and authorized by the UNSC. The military operation to liberate Kuwait was not an enforcement action undertaken by the UN (→ Iraq-Kuwait War [1990–91]). This operation is considered by many as simply constituting collective self-defence authorized by the UNSC. A distinction must be made, however, between the authorization to conduct military operations against Iraq; an authorization given only to the States ‘cooperating with the government of Kuwait’, which clearly implies the legal admissibility of non-participation; and non-military enforcement measures against Iraq, in particular the interruption of commercial relations and of monetary transactions imposed as a duty on all members of the UN. In this case, States were clearly under a duty to deviate from the principle of courant normal. There was, thus, a modification of the rules of neutrality. The authorization given by the UNSC to take military action against Iraq also modified the duty of non-participation, but it did not exclude the possibility of neutrality as no State was obliged to make use of that authorization. But in the light of this authorization, it could not be considered unlawful to grant to the States taking military action assistance which otherwise would be a violation of neutrality. In the case of the US-British intervention in Iraq in 2003, the intervening States also claimed that they acted under an authorization by the UNSC, which, however, is subject to controversy. If that claim was correct, the assistance given to the intervening States by a number of other States, including Germany, could be justified. If not, the law of neutrality had to be applied and this assistance was unlawful under
that standard.

11 The duty of non-participation as well as that of impartiality may, thus, be modified or even excluded by decisions of the UNSC. But it must be ascertained in each particular instance how far this has been the case.

4. State Decisions on Neutrality

12 Traditional international law left to each State the sovereign decision of whether, at the outbreak of a conflict between other States, it would participate or remain neutral. Thus neutrality, as a matter of principle, was a question to be decided ad hoc by each State when a conflict broke out. Therefore, there was a practice of pronouncing ‘declarations of neutrality’ at the outbreak of a conflict.

13 This is still true but only in a limited sense. At the outbreak of a conflict between two third States, a State is still free to participate or to remain neutral. Modern international law, however, limits the freedom of decision as to the side on which a State may become involved. Support granted to an aggressor is illegal; participation on the side of the victim of aggression, being collective self-defence, is permissible.

14 The decision to participate or to remain neutral is a political, not a military, decision. Where the law of neutrality requires decisions to be taken by military command, the government concerned must give political guidance and clarify the position it takes in relation to a particular conflict.

5. Permanent Neutrality

15 Permanent neutrality is a status under which a State undertakes in peacetime a legal obligation to remain neutral in case of an armed conflict between two other States. This status requires the neutral State in peacetime not to accept any military obligations and to abstain from acts that would render the fulfilment of its obligations of neutrality impossible should the armed conflict occur. A distinction must be made between such a legal obligation to remain neutral and a neutrality policy.

16 The legal → neutralization of certain States was one of the political tools used to maintain a balance of power in Europe under the European concert during the last century. The States that still possess a legally-based status of permanent neutrality are Switzerland and Austria. The permanent neutrality of Switzerland is based on mutual unilateral declarations made by Switzerland and by the most important European powers in connection with the → Vienna Congress (1815). The international legal basis of the permanent neutrality of Austria is also a → unilateral act, namely the Austrian notification of the Federal Constitution Act of 26 October 1955.

17 A permanently neutral State may not, in time of peace, accept any obligation that would render it impossible to fulfil, in times of armed conflict, its duties of neutrality. Therefore, a permanently neutral State may not become a member of a military alliance. In relation to Austria, there was a lively discussion as to whether the economic obligations involved in Austrian membership of the → European (Economic) Community would be incompatible with its status of permanent neutrality. Whether this was true in the context of the division of Europe into two blocs is a question that no longer needs an answer. The political changes in Europe after the end of the East-West confrontation have rendered the question of the significance of economic ties for the status of permanent neutrality irrelevant.

18 Permanent neutrality means a renunciation of the right of collective self-defence, ie the right to grant assistance, but not a renunciation of the right to accept help from others if the permanently neutral State is itself attacked. In most other cases where States declared themselves as permanently neutral, the declarations were not of a legal, but of a political nature. Under current international practice, the term ‘non-alignment’ is preferred to designate a policy that may formerly
have been called permanent neutrality.

6. Scope of Application, Beginning and End of Neutrality

19 The status of neutrality as defined by international law becomes effective with the outbreak of an armed conflict between two other States. Thus, the question arises of what constitutes an armed conflict within the meaning of the law of neutrality; in other words, what is the threshold of application of the law of neutrality? The law of neutrality leads to considerable modifications in the relationships between the neutral and the belligerent States, for instance as to the admissibility of exports, the sojourn of → warships of the parties to the conflict in neutral waters, and the control of neutral trade. These fundamental changes are not triggered by every armed incident, but require an armed conflict of a certain duration and intensity. Thus, the threshold of application of the law of neutrality is higher than that for the rules of the law of war relating to the conduct of hostilities and the treatment of → prisoners of war (‘POWs’), which are applicable also in conflicts of less intensity.

20 There is a traditional thesis, still defended in literature and by State organs, to the effect that the application of the law of neutrality requires the existence of ‘a war in the legal sense’. Whether and to what extent this thesis is a correct statement of the current state of customary law depends on the definition of ‘war in the legal sense’ under current international law. The threshold must be determined according to the object and purpose of the law of neutrality. This means that the law of neutrality must be applied in any conflict that has reached a scope rendering its legal limitation by the application of the law of neutrality meaningful and necessary. It is, however, difficult to establish this threshold in a general way. At least, there must be a conflict of a certain duration and intensity.

21 The determination of whether a particular conflict has reached the threshold of application of the law of neutrality is a matter of complex legal construction both for the parties to the conflict and for third States. In the interest of legal clarity, it is, therefore, desirable that States expressly clarify their position in this respect. This legal construction is a matter to be decided by governments, not by military command. Therefore, declarations and notifications of a State’s construction of the status of the conflict are relevant, but by no means constitutive for the characterization of the conflict. The law of neutrality is applicable without a specific declaration on the part of the State not party to the conflict being necessary. The difficulties described, however, have frequently led to situations in which different States evaluated the legal status of the same conflict in a different way, a fact that has led to considerable legal insecurity.

22 States not parties to a conflict that has not reached the threshold of application of the law of neutrality are not neutral in the legal sense, i.e., they are not bound by the particular duties of the law of neutrality. In those fields where the rules of international humanitarian law have a lower threshold of application than the law of neutrality, the use of the term ‘other State not a Party to the conflict’ is the logical consequence of this situation.

23 The application of the law of neutrality requires the existence of an international conflict. There is no neutrality in relation to non-international conflicts. On the other hand, third States are subject to certain legal restrictions in relation to internal armed conflicts. According to a traditional rule of international law, support given to insurgents constitutes unlawful interference in the internal affairs of another State. If it reaches a certain intensity, this support is considered equivalent to an unlawful armed attack. Support given to an established government, in whatever form, was in former times generally considered as legal, each State being free to request the assistance of other States for the purpose of maintaining its internal order. This, however, is now considered controversial, particularly because there have been a number of cases where the → legitimacy of the government requesting the assistance was subject to doubt, e.g., Afghanistan (the Afghan ‘government’ requesting Soviet help in 1979), → Vietnam (question of the → recognition of the South Vietnamese government cooperating with the US from the mid-1950s). There is controversy as to whether the assistance given to parties to a civil war (for instance in the armed conflict in
Syria in 2015), even in the form of an ‘→ intervention by invitation’, is generally inadmissible. A prohibition of interference of this kind must not be confused with the duty of non-participation under the law of neutrality. Foreign intervention, whether lawful or not, can change the status of an internal conflict and render it an international one. In this case, the law of neutrality is indeed applicable.

24 The status of neutrality (except, of course, those rules of permanent neutrality that apply in times of peace) ends with the armed conflict. This obvious rule raises a number of practical problems similar to those concerning the beginning of neutral status. Under today’s conditions, the end of a conflict cannot always be clearly determined. The actual cessation of hostilities does not always lead to a modification in the relations between the parties to the conflict which would render the law of neutrality inapplicable. On the contrary, the resumption of arms exports, for instance, during an → armistice, might even prompt the resurgence of the armed conflict and thus render futile a positive effect of the law of neutrality. On the other hand, an armistice may lead to the pacification of the situation, which, after several years, can no longer be distinguished from normal peacetime relations. For this question, too, there are no sufficiently clear criteria of general validity. Within the meaning of the law of neutrality, a conflict must be considered as terminated where, after the cessation of active hostilities, there is a certain degree of normalization of the relations between the parties to a conflict. There are specific rules for certain norms of the law of neutrality (eg Art. 111 Geneva Convention relative to the Treatment of Prisoners of War [‘Geneva Convention III’]).

25 In the course of the conflict, a neutral State may become a party to the conflict. Whether and under what circumstances this occurs is not always easy to determine. Different cases must be distinguished.

26 The first possibility is that either a party to the conflict or the neutral State by unequivocal acts or declarations change the existing status, eg Germany and Italy during World War II by their declaration of war against the US (which was neutral, but not behaving according to the law of neutrality) or Germany by its invasion of Norway. The question of whether this triggering of an armed conflict is or is not a violation of international law is irrelevant for the other question of whether the neutral status is ended. As long as States do not legally characterize their acts by declarations, the mere fact that hostilities occur between a neutral State and a party to the conflict must be evaluated in a differentiated way. Thus, the massive support given by the US to the States at war with Germany did not render the US a party to the conflict until the declaration of war mentioned earlier. Only where a hitherto neutral State participates to a significant extent in hostilities is there a change of status.

27 This becomes obvious if the duty of the neutral State to defend its neutrality, if necessary by the use of arms, is also considered. Where a party to a conflict tries to occupy parts of the neutral territory for use as a base for hostilities, the neutral State is bound to take military countermeasures. If it complies with this obligation, it cannot be considered as losing all the advantages of neutral status. It remains neutral despite the hostilities it wages with one of the parties of conflict.

28 The question of whether a change of a neutral status is effected by drawing the hitherto neutral State into the conflict must be distinguished from the different question of whether or not this change of status is brought about lawfully. In this respect, the change of status effected by a party to the conflict and by the neutral State itself must be distinguished. In addition, two levels of legal evaluation must be differentiated, namely the evaluation under the law of neutrality and the evaluation under the law relating to the international prohibition of the use of force (ius contra bellum). Where a hitherto neutral State violates the law of neutrality by supporting a party to the conflict, or in any other way, the affected party to the conflict is entitled to take reprisals, which are then subject to the general rules concerning reprisals, in particular the principle of
proportionality. According to traditional international law, reprisals could have involved the use of military force against the State violating the law. In this respect, the UN Charter requires a differentiated view. Armed reprisals are generally unlawful. As a consequence, a reaction against violations of neutrality that would involve the use of force against another State is permissible only where the violation of the law triggering that reaction itself constitutes an illegal armed attack. If this rule is applied in the context of an existing armed conflict, the question arises of whether the violation of neutrality is to the advantage of the aggressor or the victim. Support of the aggressor is illegal not only under the law of neutrality, but also under the law prohibiting the use of force. Illegal support for an aggressor, however, is not necessarily equivalent to an armed attack. Therefore, the victim of aggression reacting to a non-neutral service in favour of the aggressor is still subject to the prohibition of the use of force. For example, during the Iran-Iraq War (1980–88), the unneutral services rendered to Iraq by the US, Saudi Arabia, and Kuwait did not entitle Iran to adopt measures against those States involving the use of military force. In this case, it is, therefore, not necessarily legal to attack a State violating the law of neutrality and to make it, by that attack, a party to the conflict.

29 If a neutral State renders its support to the victim of aggression, this is contrary to the law of neutrality, but not a breach of the prohibition of the use of force. The neutral State could claim the right of collective self-defence and, thus, become a party to the conflict without violating the international prohibition of the use of force. The question then arises of whether the right of collective self-defence serves as a justification also for the purposes of the law of neutrality, thus excluding the lawfulness of a countermeasure otherwise lawful under the law of neutrality. Such a conclusion would be contrary to a general principle of the law of war, namely the principle of equality of the parties regardless of the justification of the conflict. Like international humanitarian law, the law of neutrality can effectively fulfil its function of restraining conflicts only if the question of which party is the aggressor and which the victim remains irrelevant for the evaluation of certain acts in the light of the law of neutrality. Therefore, reprisals taken against the State supporting the victim of aggression are admissible under the law of neutrality. Whether or not this support is legal under the rules relating to the prohibition of the use of force is reserved to a different level of analysis, for example where the question of the duty of the aggressor to pay damages is raised after the conflict.

B. The Rights and Duties of Neutral States

1. General Rights and Duties of a Neutral State

30 The territory of a neutral State is inviolable. It is prohibited to commit any act of hostility whatsoever on such territory (Art. 1 1907 Hague Convention V). This rule formulates the fundamental right of the neutral State to remain outside the armed conflict and not to be adversely affected by it. Above all, this means that the armed forces of the parties to the conflict may not enter neutral territory. They may not in any way use this territory for their military operations, or for transit or similar purposes. It must again be stressed that this rule applies regardless of whether a party to the conflict is the aggressor or the victim of aggression. The right of self-defence does not legitimize the use of any means contrary to the laws of war; nor does it legitimize military measures against States that have not themselves committed aggression, even if the use of their territory was useful or necessary for the exercise of the right of self-defence to be militarily effective. The right of self-defence does not constitute a comprehensive right of self-help against innocent third States. The inviolability of neutral territory applies not only to neutral land but also to neutral waters (see paras 54–88 below) and airspace (see paras 89–101 below). As far as sea areas are concerned, this right is subject to a right of innocent passage. As far as the right of flight over sea areas is concerned, a distinction must be made between the territorial sea generally (no right of overflight) and international straits (→ Straits, International) and shipping lanes through archipelagic waters, for both of which there is a right of overflight.
31 The inviolability of neutral territory also means that the neutral States must not be affected by collateral effects of hostilities. The parties to the conflict have no right to cause damage to neutral territory through hostilities themselves. Therefore, there is no rule of admissible collateral damage to the detriment of the neutral State. If the effects of attacks directed against targets on the territory of a party to the conflict are felt on neutral territory, they are unlawful. Recognizing this rule, Allied governments paid → compensation for damage occurring during World War II in Switzerland caused by attacks on targets in Germany, which had an impact in Switzerland. Also in this respect, the principle that the relations between the neutral States and the parties to the conflict are generally governed by the law of peacetime applies. An exception to this rule applies only where, as for example in maritime warfare, customary law recognizes a certain impact of hostilities on a neutral interest, in particular on neutral navigation, as being lawful (see paras 54–88 below). As to → land warfare, there is no similar rule of customary law that would lower the normal standard of peacetime protection against transboundary impact. The fact that the use of weapons yielding high explosive power, in particular nuclear weapons, would thus be rendered illegal under the law of neutrality may render respect for this rule difficult in the case of an armed conflict (→ Nuclear Weapons and Warfare). However, this fact has so far clearly not resulted in a change of practice and legal opinion which would have modified the traditional rule of the inviolability of the neutral territory.

32 The neutral State is bound to repel any violation of its neutrality, by force, if necessary (Art. 5 1907 Hague Convention V; Arts 2, 9, 24 1907 Hague Convention XIII). This obligation, however, is limited by the international legal prohibition of the use of force. The use of military force to defend neutrality is permissible only if it is legitimate self-defence against an armed attack.

33 The duty of the neutral State to prevent its territory from being used by one of the parties to the conflict as a base for military operations is the corollary of the neutral's right not to be adversely affected by the conflict. Therefore, it must prevent any attempt by a party to the conflict to use its territory for military operations, through invasion or in transit, by all means at its disposal. This duty, however, is limited to the defence feasible for the neutral State under the circumstances. A neutral State is certainly not obliged to destroy itself.

34 In connection with the duty to defend neutrality, it has been debated whether and to what extent neutrality obliges the neutral State to undertake military efforts. The Austrian and Swiss concept is that of armed neutrality, based on the idea that neutral States are indeed obliged to undertake military efforts in order to repel a violation of neutrality by the use of armed force. The neutrality policy of Costa Rica, on the other hand, is based on unarmed neutrality. This is certainly unobjectionable as long as no party to the conflict attempts to use the territory of the unarmed neutral State. In the absence of any effort by the neutral State to react to a violation of its territory, however, that State risks no longer being considered neutral by the party to the conflict adversely affected.

35 If the neutral State defends its neutrality, it must respect the limits which international law imposes on military violence. There is no specific need for international legal justification of military measures which the State takes on its own territory, for instance if it drives troops out of its own territory. If military measures are employed outside the neutral State's own territory, they are admissible only to the extent that the violation constitutes an armed attack within the meaning of Art. 51 UN Charter and if the countermeasure taken constitutes a necessary and proportional reaction to that attack. Art. 51 UN Charter, thus, always marks the limits of counterforce the neutral State may legally use. In other words: the UN Charter grants a right to use counterforce; the law of neutrality may, under certain circumstances, impose an obligation to exercise this right.

36 A neutral State may not assist a party to the conflict. It is especially prohibited to supply warships, ammunition, or other → war materials (Art. 6 1907 Hague Convention XIII). This rule is a central element of the principle of non-participation. The neutral State must abstain from any act
that may have an impact on the outcome of the conflict. The second sentence names only a few examples of such forbidden assistance. Massive financial support for a party to the conflict also constitutes non-neutral service. This was the case with a number of Arab States during the conflict between Iran and Iraq who gave substantial financial support to the war effort of Iraq. The supply of arms by Western States to Iraq, too, was objectionable under the law of neutrality. The prohibition is absolute and applies, also, where assistance is given to both parties. It is also unlawful for a neutral State to compensate an uneven relation of strength between the parties to the conflict by supplying arms or similar support. It may be questionable what is considered to be forbidden participation in a particular case; if the neutral State takes part by engaging its own military forces, this is a clear example. Another example might be the supply of military advisors to the armed forces of a party to the conflict.

37 The supply of any war material is forbidden. This rule, however, is among those that lend themselves to be modified where the UNSC adopts measures for the maintenance of peace.

38 \(\rightarrow\) Humanitarian assistance for victims of the conflict does not constitute a violation of neutrality even where it is for the benefit of only one party to the conflict (Art. 14 1907 Hague Convention V). The only criterion for such assistance is need, and not equal benefit for the parties to the conflict. This idea was clearly formulated for the first time in Art. 70 Additional Protocol I, which states that humanitarian assistance may not be considered as an interference in the conflict. Humanitarian assistance, however, is subject to its own requirements of neutrality. Any assistance whose purpose is not to mitigate the need of victims but to provide a military advantage to one party is not humanitarian. On the other hand, inequalities of assistance based on a difference in need and requirements do not violate the principle of humanitarian impartiality.

39 The traditional law of neutrality distinguished between unlawful assistance by the neutral State and assistance by private persons or private enterprises belonging to a neutral State. The latter was not attributed to the neutral State and there was no obligation on this State to prevent it. This rule has resulted in the private arms industry of neutral States supplying armaments in a relatively unimpeded way to a party to the conflict, and, frequently, to both sides. State practice has modified the former convention rule that a neutral State is not bound to prohibit export and transit of war material by private persons for the benefit of one of the parties to the conflict (Art. 7 1907 Hague Convention V). To the extent that arms export is subject to control by the State, the permission of such export is to be considered as a non-neutral service.

40 The separation of the State and the private armaments industry is nowadays artificial and does not correspond with political reality. Arms production and arms trade are in many ways managed, promoted, and controlled by the State. Therefore, it would simply be unrealistic if one did not attribute to the State the exports of that State’s ‘official’ arms industry. Modern State practice is in accordance with this rule of non-separation. Where States took the view that the law of neutrality applied, they did not permit arms exports by private enterprise, nor did they rely on the artificial separation between State and private enterprise. According to the current state of customary law, the correct view is that a State’s permission to supply war material constitutes a non-neutral service.

41 This raises two additional questions: first, what kind of effort must a State make to prevent the export of war material; and secondly, what kind of material constitutes war material within the meaning of the rule. As to the first question, one has to assume that besides arms exports controlled by the State, there is a black market, which evades State controls; the more stringent the controls, the greater the incentive to undertake transfers to circumvent them. Discussions about the supply of equipment for the production of chemical weapons in Libya and Iraq are an example. As to this question, there is no sufficient practice to produce an \textit{opinio iuris}. In the field of chemical weapons, the convention on their prohibition (Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction [1993]) entails
specific duties of export control. There is also a general prohibition of exports of relevant materials in the earlier Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972). In the area of nuclear weapons, the 1968 Treaty on the Non-Proliferation of Nuclear Weapons has a similar function for the non-nuclear weapon States. Generally speaking, non-proliferation regimes require export controls, which have the effect of buttressing exports restraints based on the law of neutrality. As to conventional weapons, the export prohibitions and restraints contained in the 2013 Arms Trade Treaty are not as sweeping, but may also coincide with, and strengthen, neutrality based prohibitions.

42 As to the definition of war materials that may not be supplied to the parties to the conflict, the problem must be distinguished from that of the definition of → contraband. There is apparently no State practice to the effect that the prohibition of supply covers more than weapons stricto sensu, ie material that is capable of being used for killing enemy soldiers or destroying enemy goods. Non-proliferation regimes usually cover related materials (technology, construction plans, etc).

43 Another open question is whether a permission given to an importing enterprise to grant sublicences or the non-prevention of re-exports are equivalent to the permission of exports. Arms exports may have the effect of instigating a conflict.

44 While the troops of a neutral State may not take part in any war operations (see para. 36 above), it cannot, and is not required to, prevent its nationals from entering the service of a party to the conflict on their own initiative and responsibility. This distinction between private and governmental assistance may, however, be misused. If the State tolerates the establishment of so-called volunteer corps, a not uncommon practice, this amounts to a non-neutral service. The same applies where the neutral State tolerates publicity for the establishment of troops by the parties to the conflict. All acts and omissions of the neutral State that further the military effort of a party to the conflict are prohibited (Arts 4, 6 1907 Hague Convention V).

45 Further duties of prevention result from the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989) (→ Mercenaries). The parties to this convention are bound to punish the recruitment of mercenaries. It must be taken into account, however, that the members of regular armed forces of a party to the conflict are not mercenaries within the meaning of the Mercenaries Convention. Recruitment for activities within the regular armed forces of another State thus does not constitute an activity that must be punished according to the Mercenaries Convention.

46 Additional duties of prevention may apply when the UNSC imposes an obligation to abstain from any assistance to an aggressor. This may imply an obligation to prevent private assistance, which does not exist under the general law of neutrality nor under the Mercenaries Convention.

2. War on Land

47 Troop or supply movements must not be carried out on neutral territory (Art. 2 1907 Hague Convention V). This is a consequence of the prohibition of non-neutral services and also of the prohibition against using neutral territory for the military purposes of a party to the conflict. Prohibited transport across neutral territory includes cases where a party to the conflict is granted landing rights for supply flights; a case that has considerable practical importance, and was a major issue during the US-British intervention in Iraq in 2003.

48 During World War II, the prohibition of transit was in some cases not respected by neutral States under the pressure of circumstances. Neutral States have granted transit rights to belligerents in different ways. In most cases, this was the first step towards a neutral State being drawn into the conflict. On the other hand, States refusing transit rights were attacked.
The exact definition of forbidden supply movement presents difficulties. Transport of weapons belongs to this category. On the other hand, the movement of medical supplies or of raw materials for the war industry would be considered as permitted.

In view of the great importance of telecommunications for modern high-technology warfare, the rules of the law of neutrality relating to neutral telecommunication installations are of particular significance. The relevant rules of 1907 Hague Convention V do not address modern problems of telecommunication with the necessary clarity, but they contain principles that remain valid and applicable today. Another element of the delimitation between permissible and impermissible use of neutral telecommunication installations is the idea of courant normal, which is of general importance for neutral commercial relations. The outbreak of an armed conflict does not result in an obligation for the neutral State to prevent the use of its telecommunication installations by a party to the conflict that used them or had access to them before. Existing non-military telecommunication infrastructure, in particular that owned by a public telecommunications enterprise or administration of the neutral State, may be used by the parties to the conflict. In this sense, the Global Positioning System (‘GPS’) is a generally available means of communication. The same holds true for data communication infrastructure, in particular hardware components of the internet, eg servers situated on neutral territory or under the jurisdiction or control of a neutral State. A neutral State is not obliged to bar the use of such components of the internet by parties to a conflict even if that use is of a military nature.

Thus, the parties may rent fixed lines for voice and data communication of a military nature and may be granted access from such lines to satellite communications (→ Satellite Broadcasting). On the other hand, it is a non-neutral service for a neutral State to place at the disposal of a party to the conflict telecommunication installations not available to it under normal conditions (for instance its own military telecommunication infrastructure) or if it creates, or acquiesces in the creation of, new telecommunication infrastructure for the particular purposes of a party to the conflict. It is also a violation of neutrality if a State provides to a party to the conflict satellite imagery containing valuable military information concerning the other party.

The treatment of military personnel and war material of the parties to the conflict found on neutral territory is unclear in many respects. If whole units of the armed forces of a party to the conflict arrive on neutral territory, it would be a violation of the duty of non-participation if the neutral State permitted them to take part again in hostilities. Therefore, those troops must be interned (Art. 11 1907 Hague Convention V). War material, too, has to be withheld until the end of the conflict (eg the military aircraft brought into Iran during the Gulf War, if the law of neutrality was applicable in that case).

A logical consequence of this rule would be that the neutral State has to prevent escaped prisoners arriving on its territory from taking further part in the hostilities. Art. 13 1907 Hague Convention V expressly states that such escaped prisoners must remain free. Certain authors conclude from this that they must be permitted to go back to their home country. However, this is by no means clear. The provisions of Geneva Convention III provide for → repatriation of POWs on neutral territory only in certain cases and do not regulate the question comprehensively (see Arts 110, 111). This question should, whenever possible, be regulated by a specific agreement between the States concerned.

3. Naval Warfare

(a) General

The → internal waters, → archipelagic waters, and → territorial sea of neutral States must be respected (Art. 1 1907 Hague Convention XIII). It is prohibited to commit any act of war in such waters (Art. 2 1907 Hague Convention XIII). The parties to the conflict are forbidden to use neutral
→ ports or territorial waters as a base for naval operations (Art. 5 1907 Hague Convention XIII). Acts of war are prohibited in neutral waters to the same extent as on neutral territory (Art. 2 1907 Hague Convention XIII). The forbidden acts of war include the exercise of the → prize law such as stop, visit, and search orders to follow a specific course, and capture of → merchant ships (Art. 2 1907 Hague Convention XIII).

55 These rules constitute the maritime aspect of the general principle that the territory of a neutral State is inviolable and may not be used for the purpose of conducting hostilities. This rule, however, is somewhat modified for neutral territorial sea, as compared to the rule in land warfare, in that there is a right of innocent passage. The jurisdictional waters to be respected consist of the territorial sea and the internal waters belonging to the sea, ie sea areas on the landward side of the baseline from which the territorial sea is measured (see Art. 8 UN Convention on the Law of the Sea). The status of waters superjacent to the → continental shelf is not affected by the exclusive rights over the resources of the shelf (Art. 78 UN Convention on the Law of the Sea ['UNCLOS']). They may thus belong to the → high seas or to the → exclusive economic zone ('EEZ'). As to the EEZ, third States enjoy all the freedoms of the high seas (Art. 58 UNCLOS) except the rights specifically reserved to the coastal State by Part V UNCLOS. Art. 88 UNCLOS, which reserves the use of the high seas and the EEZ for → peaceful purposes, is generally interpreted as prohibiting only those belligerent activities that violate the UN Charter, especially the prohibition of the use of force. The parties to the conflict must, however, in conducting hostilities, have due regard to the rights and duties of the neutral coastal State in whose EEZ hostilities are taking place. On the high seas, the belligerents must also conduct hostilities with due regard to the relevant rights of neutral States.

56 The acts of war prohibited in neutral waters are not defined with any precision. Mere passage is not a forbidden act of war. Acts of war include shooting at enemy ships, take-off by military aircraft from aircraft carriers, laying mines, and also transmission of intelligence. The exercise of the right of prize is also a prohibited act of war.

57 When a ship has been captured by a party to the conflict in the waters of a neutral State, the latter must, as long as the prize is still within its waters, use all means at its disposal to obtain the release of the prize and its crew. The prize crew must be interned (Art. 3 (1) 1907 Hague Convention XIII). This rule reflects the duty to defend neutrality. If the right of prize is exercised in neutral waters, contrary to the laws of neutrality, the neutral State must make an effort to undo this violation by freeing the prize captured in its waters. This liberation of the prize is not inconsistent with the prohibition of the use of force, since it constitutes an exercise of sovereign rights in the State’s own jurisdictional area where the justification of self-defence is not required.

58 If a ship of a neutral State takes → wounded, sick and shipwrecked persons on board, it must, to the extent required by international law, ensure that these persons take no further part in hostilities (Art. 15 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ['Geneva Convention II']). As a matter of principle, → combatants who fall into the power of a neutral State must be prevented from taking further part in hostilities.

59 In land warfare, the transit of wounded and sick persons through neutral territory is permitted (Art. 14 (1) 1907 Hague Convention V). If one were to equate the situation of taking such persons aboard during their transit, it would be lawful to permit them to return to their own party. As a matter of principle, however, one would compare the situation rather with that of reception on neutral territory; then, the general rule applies that any further participation of military personnel in hostilities must be prevented (Art. 14 (2) 1907 Hague Convention V). Only those seriously sick or heavily wounded whose complete recovery is unlikely may be repatriated. The rules for disabled POWs (Art. 110 Geneva Convention III) may be applied by analogy.

60 As regards the laying of sea mines, neutral States are subject to the same safety regulations as
the parties to the conflict (Art. 4 (1) Hague Convention on the Laying of Automatic Submarine Contact Mines [‘1907 Hague Convention VIII’]). The neutral State that is bound to defend its neutrality may, as a matter of principle, do so by using the same means of warfare that the parties to the conflict can use. Defensive laying of sea mines therefore constitutes a lawful protective measure. However, the neutral State must then take the same precautionary measures in the interest of third parties that the parties to the conflict are required to take. They must notify the location of minefields to the government of maritime States without delay (Art. 4 (2) 1907 Hague Convention VIII).

(b) Innocent Passage through Territorial Sea and Archipelagic Waters; Transit Passage

61 Passage through the territorial sea and archipelagic waters of a neutral State by warships belonging to and prizes taken by a party to the conflict does not constitute a violation of neutrality (Art. 10 1907 Hague Convention XIII). While → transit passage through international straits and archipelagic shipping lane passage include the right of overflight (Arts 38, 53 UN Convention on the Law of the Sea) and the right of submarine navigation, there are no such rights of innocent passage outside those waterways. The right of innocent passage is subject to the following provisions.

62 This principle of innocent passage constitutes an exception to the general rule of land warfare that a neutral State may not acquiesce in the presence of armed forces of a party to the conflict in areas subject to its jurisdiction. On the other hand, it confirms the rule that the relation between the neutral State and the parties to the conflict is as a matter of principle subject to the law of peacetime relations, which also provides for such rights of passage. This principle entails greater rights of innocent passage than those expressly provided for in the 1907 Hague Convention XIII. The parties to the conflict also enjoy rights of transit passage through international straits and archipelagic shipping lanes passage granted to their warships in times of peace (see Arts 38, 53 UN Convention on the Law of the Sea).

63 The right of transit or innocent passage is subject to a number of specific limitations designed to prevent the exercise of those rights from developing into the use of neutral jurisdictional areas for the purpose of conducting war contrary to the law of neutrality. Warships of the parties to the conflict are, as a matter of principle, not permitted to remain in neutral ports, → roadsteads, or territorial sea for more than twenty-four hours. The neutral State may prolong this period, but may also altogether prohibit such vessels from remaining in its waters (Art. 12 1907 Hague Convention XIII). Warships of the parties to the conflict may not extend their stay beyond the permissible time except on account of damage or bad weather. They must depart as soon as the cause of the delay has ceased to exist (Art. 14 1907 Hague Convention XIII).

64 The ‘twenty-four hour rule’ is the most important exception to the rule that the rights of passage or transit existing in peacetime apply equally in times of armed conflict. The rationale is to prevent a party to the conflict from using neutral waters as a refuge from enemy ships. According to the text of the 1907 Hague Convention XIII, the twenty-four hour rule applies to the ‘stay’. Taking into account the object and purpose of this provision, however, any passage is also covered. This became controversial during World War II in the ‘Altmark’ incident (→ Altmark, The), where a German auxiliary warship spent two days passing through the coastal waters of Norway, which, at the time, was still neutral, in order to avoid being captured by the British fleet. At that time, Norway claimed that the twenty-four hour rule did not apply to mere passage. That view has not prevailed.

65 The twenty-four hour rule does not apply where the passage through neutral waters is not possible within twenty-four hours. This will be the case particularly for passage through archipelagic → sea lanes or neutral international straits. In that case, the rule is modified to the effect that the time required for the shortest possible passage is permitted.
A neutral State must apply impartially to all parties to the conflict any conditions, restrictions, or prohibitions which it imposes on admission into its ports, roadsteads, or waters of warships or prizes belonging to the parties to the conflict (Art. 9 1907 Hague Convention XIII). A neutral State may forbid a warship that has failed to comply with its directions or has violated its neutrality to enter its ports or roadsteads (Art. 9 1907 Hague Convention XIII). This rule clarifies the neutral duty of impartiality.

(c) Control by the Parties to the Conflict

Warships of a party to the conflict are entitled to stop, visit, and search merchant ships flying the flag of a neutral State on the high seas (Flag of Ships) and control the contents and destination of their cargo (Ships, Visit and Search). The control of neutral commercial shipping by the parties to the conflict was traditionally a very important question until the recent past. The State of international customary law is controversial in many details concerning the extent of this control. The London Declaration concerning the Laws of Naval War (‘London Declaration’), which codified these rights of control, was never ratified, but is considered at least largely to constitute an expression of customary law.

Such rights of control have been exercised traditionally and in recent conflicts without objection, although certain specific measures and the status of some conflicts were controversial. The control by the parties to the conflict of neutral shipping constitutes an essential exception to the principle that the neutral State may not be adversely affected by the existence of an armed conflict. These rights of control, however, are limited, although during World War II a tendency to expand those rights was evident.

The purpose of such control is to impede the provision of goods important for the war effort to the other party to the conflict. A key position is taken by the right of visit and search, ie the right of warships of a party to the conflict to stop neutral commercial ships and to search them in order to find out whether they have goods aboard that could assist the war effort of another party to the conflict.

Warships of a party to the conflict may use only such force as is necessary against neutral merchant ships to exercise such control. In particular, neutral merchant ships which, although subject to control by a party to the conflict, resist inspection may be damaged or destroyed if it is not possible to prevent them from continuing their voyage by other means. The captain of the neutral ship shall previously be warned in an appropriate manner. Rescue of shipwrecked persons must be ensured.

This use of force, however, is limited by a strict principle of necessity (Necessity, State of). Only such force is permissible that is indispensable to enforce the right of control, in particular to prevent a merchant ship from evading such control. The destruction of the neutral merchant ship is permissible only in exceptional circumstances, because a warship will generally have other means at its disposal to enforce its right of control. To simplify such inspection, a party to the conflict may, subject to the approval of the neutral State concerned, issue an inspection document (‘navicert’) to the neutral vessel in the port of loading. A navicert issued by one party to the conflict is not binding on the other party. The fact that the ship carries a navicert of another party to the conflict does not justify any more far-reaching measures of control.

The ‘navicert system’ has often been used in practice. The navicert makes it possible for the neutral ship to prove, in the case of control by a warship of a party to the conflict, by a document issued at the port of loading by that party to the conflict (usually by its diplomatic representative), that it is not carrying contraband. A navicert is only accepted by the party that issued it.

The right of control shall not apply to merchant ships flying neutral flags and escorted by a neutral warship. In this case, however, a warship of a party to the conflict may request the
commander of the neutral warship to specify the type and destination of the cargo.

74 This right of → convoy was long controversial. The effect of the rule is that warships of the parties to the conflict may control neutral merchant ships but not neutral warships. The question then arises of whether the fact that certain neutral merchant ships are placed under the protection of neutral warships limits the right of control of the belligerents. In the Gulf conflict between Iran and Iraq, convoys of merchant ships flying neutral flags were indeed placed under the protection of warships of neutral States. In that case, the neutral States did not accept the rights of control of the parties to the conflict, essentially of Iran, which they otherwise tolerated. This practice seems to be a last step in the development, which has led to the recognition of the right of neutral convoy. In a lawful convoy, control is exercised by requiring the commander of the neutral warship to provide information concerning the type and destination of the cargo to the warship of the party to the conflict.

75 Whether a neutral State may place only neutral ships flying its own flag under the protection of its warships, or whether it may grant such protection to the ships of other neutral States, is less clear. The latter is probably the case. This practice may not, however, be used in order to disguise non-neutral service. Thus, it is problematic if a neutral State allows ships of another State, which has rendered non-neutral service to a party to the conflict, to fly its own flag and places reflagged merchant ships under the protection of its own warships.

76 If the cargo contains goods essential for war that are destined for the port of an adversary, such goods may be captured by the warship of the party to the conflict (‘absolute contraband’). The parties to the conflict may notify the neutral States with lists of the goods which they deem to be essential for war. Any goods destined for the administration or the armed forces of the opposing party to the conflict will likewise be deemed contraband (‘conditional contraband’). Absolute contraband comprises all essential war goods. Parties to the conflict have some discretion as to the determination of what is to be considered as essential for war. That distinction must always take into account the specific circumstances of the conflict. If the parties to the conflict set out their construction of goods essential for war in lists notified to the adversary, legal clarity is achieved. On the other hand, such lists have tended to be unacceptably broad. Absolute contraband is goods that must by their very nature be considered as essential for war, and must be distinguished from conditional contraband, which comprises those goods destined for the administration and armed forces of the adversary, whether or not they otherwise serve essential purposes of war. Thus, equipment that would otherwise not be considered as war essential belongs to this category. Art. 24 London Declaration refers also to food and clothing as conditional contraband, to the extent that such items are shipped for the purpose of humanitarian relief actions (Arts 23, 59 Geneva Convention relative to the Protection of Civilian Persons in Time of War [‘Geneva Convention IV’]; Art. 70 Additional Protocol I; → Civilian Population in Armed Conflict), they may, of course, not be considered as contraband. Contraband may be captured by the controlling warship.

77 As well as the cargo, the ship carrying such contraband is also subject to capture. Whether and to what extent this applies where only part of the cargo constitutes contraband is somewhat controversial.

78 Capture is a provisional measure only. The legality of the capture must be reviewed in a judicial procedure as soon as possible. The principle ‘toute prise doit être jugée’ applies. Only if the prize court finds that the ship was indeed carrying contraband is a final determination concerning the ship and cargo permissible. Cargo may be confiscated only after a prize court judgment. The same is true of the ship carrying that cargo and only if the contraband constituted more than half of the cargo, whether by value, weight, volume, or freight (Arts 39, 40 London Declaration). Bringing the prize to the port of a territory occupied by a party to the conflict is also permissible. The prize court may be established anywhere on the territory of the party to the conflict, in a territory occupied by it, or on the territory of an ally of that party.
If suspicion that a ship is carrying contraband, which led to control measures, proves unfounded, and if the neutral ship has not contributed to that suspicion, the party to the conflict is obliged to compensate for any damage caused by the delay. If the capture is not upheld by the prize court, and the cargo not confiscated, the control measure was unjustified. Delay of the shipping may have caused considerable financial damage. Such expense must be paid by the party that exercised the control.

A special and practically important form of restraint on (not only) neutral shipping is the blockade.

(d) Protection of Neutral Merchant Shipping

Warships of neutral States may escort merchant ships flying the flag of the same or another neutral State. Freedom of neutral shipping, limited only by the rights of control just described, is by no means unchallenged. Experiences in the conflict between Iran and Iraq proved this. From a political point of view, impeding neutral shipping, especially oil tankers, has obvious benefits because the adversary will benefit from this shipping, although, according to the rules just described, those ships were not subject to capture and confiscation. Fuel constitutes contraband only if it is destined for a party to the conflict, not if it comes from a party to the conflict that uses revenue from sales of fuel to finance its war effort. Nevertheless, in such a situation, the temptation for the disadvantaged party to the conflict to impede navigation is great. In this or similar situations, the question arises of how neutral shipping can be protected.

The formation of convoys has proved an efficient means of protection. The advantage of convoys in relation to the rights of control concerning cargo and destination has already been described. The formation of convoys also means that those convoys, in a manner of speaking, represent the State, so that attacks against them constitute attacks against a neutral State which trigger its right of self-defence.

It is understood that convoys operate within the applicable law of the sea and, in particular, must respect the rules concerning innocent passage and transit passage. The fact that the formation of a convoy also demonstrates military power does not mean that it constitutes a violation of the prohibition of the use of force. This was confirmed by the judgment of the ICJ in the Corfu Channel Case.

The formation of convoys may constitute a non-neutral service if merchant ships of a party to the conflict are placed under the protection of a neutral warship. It is doubtful whether it is possible to place merchant ships of a neutral State under the protection of a neutral warship if the flag State of the merchant ship renders non-neutral services to a party to the conflict. This was the case with the passage of Kuwaiti tankers through the Gulf. Kuwait was certainly guilty of non-neutral services in favour of Iraq. This would have justified the taking of reprisals by Iran against Kuwaiti navigation. The US placed Kuwaiti tankers under their protection, but only after reflagging the tankers with the American flag. Whether such reflagging could shield ships that would otherwise be a permissible object of reprisals is open to doubt.

On international shipping routes and on the high seas, warships of neutral States may sweep mines to the extent necessary to protect and maintain neutral shipping. Such minesweeping operations do not constitute a non-neutral service for the benefit of the adversary of the minelaying party.

Sweeping mines on the high seas and in sea areas subject to transit rights is a means for neutral States to protect themselves, which attained considerable practical significance during the conflict between Iran and Iraq. For the purpose of legal evaluation, minesweeping in the jurisdictional waters of a party to the conflict and similar activities on the high seas must be distinguished. On the high seas, the first aspect to be considered is the law of the sea.
hostilities is a lawful use of the high seas, although this is not explicitly stated in the UN Convention on the Law of the Sea. Minesweeping, therefore, constitutes a kind of self-help against a lawful activity. On the other hand, the high seas should be free for shipping, and this right has a great weight. The conduct of hostilities also limits the freedom of navigation of other States. Minesweeping, therefore, involves balancing two freedoms, similar to the conflicting interests involved in the conduct of hostilities on the high seas. Minesweeping undertaken to protect a State's freedom of shipping does not constitute an unacceptable limitation of the freedom of the parties to the conflict to conduct hostilities at sea.

87 From the point of view of the law of neutrality, minesweeping by neutral States constitutes an activity that benefits the adversary of the party that laid the mines. However, from the point of view of social significance, it is not the support for one of the parties that is the essential point, but the protection of the neutral State. Therefore, a minesweeping operation intended only to protect neutral shipping does not constitute a non-neutral service.

88 Unilateral minesweeping operations in the waters of a party to the conflict constitute a violation of the prohibition of the use of force. As a rule, they are illegal. However, there is no violation where a party to a conflict has laid mines in shipping lanes through which transit rights exist and which the minesweeping State is bound to keep open. This was confirmed by State practice during the conflict between Iran and Iraq.

4. Aerial Warfare

89 The inviolability of neutral territory implies the inviolability of neutral airspace (Art. 40 Hague Rules of Aerial Warfare [done December 1922–February 1923, not yet entered into force] [1923] 17 AJIL Supp 245–60). This rule is of particular importance because, in the era of modern air warfare and missile technology, violations of airspace are easily committed.

90 The territorial jurisdiction of a neutral State extends to the limits of the atmosphere. Outer space above neutral territory is not subject to the neutral State’s jurisdiction. Overflights by satellites and missiles moving in outer space therefore do not constitute a violation of neutrality (→ Missile Warfare).

91 Crossing a specific territory or stationing a satellite on a fixed point over the territory of a State does not constitute a violation of the territorial sovereignty of the respective States. Missiles only constitute typical space vehicles where they are at least partially brought into orbit around the Earth where the centrifugal force and the attraction of the Earth balance each other.

92 Parties to a conflict are forbidden to send military aircraft, rockets, or other missiles into neutral airspace (Art. 40 Hague Rules of Aerial Warfare). As a consequence of the inviolability of neutral airspace, the parties to the conflict are not allowed to penetrate by aircraft or other flight objects the airspace of neutral States. For aircraft attacking targets over large distances this may involve significant detours. The prohibition of military overflight also extends to neutral territorial waters. However, overflight is permissible over international straits and archipelagic sea lanes.

93 Overflight by civilian aircraft does not constitute a violation of neutrality. The neutral State must, however, exercise all necessary controls in order to prevent civilian overflight from being used for military purposes. Under air traffic rules, this is rendered possible by the so-called ‘war clause’ of the Convention on International Civil Aviation ([signed 7 December 1944, entered into force 4 April 1947] 15 UNTS 295 (‘Chicago Convention’)).

94 A neutral State is bound to prevent violations of its airspace. Aircraft entering such space must be forced to leave or to put down. The crews of military aircraft of a party to the conflict who have been brought down must be interned (Art. 42 Hague Rules of Aerial Warfare).
The dangers for neutral airspace resulting from modern war technology lead to the question: what must a neutral State do in order to prevent such violations of its airspace? It is undisputed that it must endeavour to prevent such violations. It is difficult, however, to determine the effort required for this purpose. There is an obligation of observation and of using force if necessary. The neutral State must exercise surveillance to the extent of the means at its disposal. This includes at least a simple radar observation. A neutral State must take economically feasible measures in order to create an aerial defence capacity. On the other hand, it may not be required that each State possess the latest missile technology in order to protect its neutrality.

The defence must be feasible for the neutral State. In this respect, defence against missiles possessing nuclear warheads, which may after interception fall on neutral territory and cause damage therein, cannot be required. Interception of aircraft by the air force of a neutral State is undoubtedly among the measures which the neutral State is required to take. Aircraft entering its airspace must be forced to turn back or land. The obligation to intern their crews derives from the general principle described above.

A neutral State may allow medical aircraft of a party to a conflict to overfly its territory or to land therein. This does not constitute non-neutral service; on the contrary, it is a form of humanitarian assistance, subject to rules similar to those concerning land warfare. The neutral State is not bound to tolerate flights which are not authorized or which violate conditions lawfully imposed. It may attack a medical aircraft flying illegally if there is no other means to prevent it from continuing the flight, or subject it to scrutiny. Given the risk of abuse of medical flights, it may even be concluded that the neutral State has a duty not to tolerate unauthorized medical flights over its territory, and to take appropriate countermeasures.

The right of neutral aircraft to overfly the territory of the parties to the conflict is regulated by the general rules of international law on the protection of national airspace and the rules of international air traffic.

Under general international law applicable in times of peace, there is no general right for foreign aircraft, whether private or State-owned, to overfly the territory of another State or to land therein. For private non-scheduled air services, the Chicago Convention provides certain rights of overflight and landing. However, these rights do not apply in armed conflicts. According to the ‘war clause’ of the Chicago Convention (Art. 89), the provisions of the convention do not affect the freedom of action of the contracting parties in a war, be they belligerent or neutral. Traffic rights for scheduled air services are, as a rule, derived from bilateral agreements. Whether and to what extent these rights are affected by the fact that one of the contracting parties is a party to a conflict with a third State is a question to be regulated by the relevant agreement. Generally speaking, the legal situation is that a State that is party to a conflict is relatively free to grant or not to grant rights of overflight to aircraft flying neutral flags, subject, in particular, to the provisions of bilateral air transport agreements.

Special rules apply to airspace above specific types of jurisdictional waters. As stated above, the right of innocent passage over territorial sea does not comprise overflight. As far as overflight is concerned, territorial sea is treated in the same way as the land areas around it. An exception to this rule applies to international straits and archipelagic waters. In this case, the right of transit or passage (Arts 38, 53 UN Convention on the Law of the Sea) includes a right of overflight. It is submitted that these rules are now customary law.

The increase in air traffic raised the question (originally rather theoretical) of the control of neutral air commerce. The analogy to neutral shipping offered itself. When the Hague Rules of Aerial Warfare were elaborated, the rules concerning the control of neutral shipping were imported comprehensively. There is, however, relatively little State practice in this matter. As it can only be applied by analogy, not every detail of the rules concerning the control of neutral shipping applies. The special character of air traffic must be taken into account. As far as air traffic over the high
seas is concerned, account must be taken of the fact that aircraft constitute a considerable threat to warships of the parties to the conflict. Thus, those ships will be inclined to react to a perceived threat where the identity of an aircraft is not beyond doubt. The shooting down of an Iranian civilian airplane by a US warship during the conflict between Iran and Iraq shows the kind of tragic errors that may result. The principle must be maintained that both belligerent and neutral warships, as in the case just mentioned, must endeavour to ascertain the nationality and category of an aircraft before it is attacked. This is only possible where neutral aircraft and civilian aircraft of the parties to the conflict do everything feasible to facilitate their identification. An aircraft that is not identifiable and does not carry any exterior emblem of nationality must be considered as an enemy military aircraft and may, therefore, be attacked.

5. Military Uses of Outer Space

102 Where military activities conducted in outer space relate to an armed conflict, the general rules of the law of neutrality must be observed. Military uses of outer space are not per se unlawful. Only the Moon and other celestial bodies (→ Moon and Celestial Bodies) are demilitarized. Yet, for instance, attacks conducted from outer space must respect the inviolability of neutral territory. The prohibition of overflight over neutral territory, however, does not apply to movements of spacecraft over neutral territory that take place in outer space, i.e. above the neutral airspace (→ Spacecraft, Satellites and Space Objects).

103 Space activities of neutral states must respect the duties of impartiality and abstention. Applying the rule contained in Art. 8 Hague Convention V, a neutral State is not obliged to bar a party to the conflict from the use of its communication satellites or similar installations. But, according to the rule of impartiality, such access may not be limited to one of the parties.

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