2
Declarations of War and Neutrality

2.1 Declarations of War

The institution of a Declaration of War has ancient roots. From across the world and throughout time one can find reports of one side sending another a challenge to fight. These challenges can take various forms. A study by Davie lists examples from all five continents. We could just highlight the following: a boomerang with a shell attached (the shell to be broken and the boomerang sent back if the other side declines the challenge and accepts defeat); bamboo shoots with symbols explaining the grievances; a broken spear; or a bundle of arrows wrapped in rattlesnake skin. Davie's examples illustrate a sense that one should not only give the other side the chance to prepare, but that the details of the missive might explain the nature of the grievance, and give the other side a chance to avoid war. They also indicated the timing and scale of the war. Davie finds accounts that suggest that, for example, in Mexico it was believed to be 'cowardly and unworthy of valiant men to surprise the enemy'.[1] Such declarations of war help us to understand some of the early logic of the declaration.

In *The Laws of War in the Late Middle Ages*, Keen cautions against treating the early 'law of arms as if it were a modern international law'.[2] This older customary military law amounted to rules of honour rather than anything rational or humanitarian. The signs used nevertheless had legal significance. First, they could be an indication of the rules that would be observed in battle. So there were distinctions between *guerre mortelle*, which was war to the death, *bellum hostile* or open war between Christian sovereigns, where men might take the spoils and prisoners for ransom, and *guerre couverte*, covered or feudal war, where 'men could wound and kill without blame, but could not burn or take spoil'.[3] To signify a war to the death one would fly a red flag or

[1] Davie, *The Evolution of War: A Study of its Rôle in Early Societies* (1929) Appendix L at 293–96.
[2] Keen, *The Laws of War in the Late Middle Ages* (1965) at 108.
[3] Ibid at 104.

War. Andrew Clapham, Oxford University Press. © Andrew Clapham 2021.
DOI: 10.1093/law/9780198810469.003.0002

banner; for open or public war the Prince's banner would be unfurled and a State of War occurred as a matter of law. The State of truce was signified by a white flag, and the Heralds carried white wands as a sign of their immunity.[4]

The significance of such a State of War was that men would not be punished for killing, burning and theft – for these acts would no longer be crimes but rather justified as 'done under the right of war'.[5] For the crime of arson, Saint Raymond of Pennaforte wrote that 'an incendiary is one who, out of hate or ill-will or for the sake of revenge sets fire to a town, or to a village or to a house or vines or anything of that kind. But if he does this at the command of one who has the power to declare war, then he is not to be judged an incendiary.'[6] As Keen explains: 'It was the same with other crimes, such as spoliation of a man's goods. In time of peace this was robbery, but in time of war it might be the basis of a legal title to possession, because in war it is not unjust or unreasonable to despoil the goods of the enemy.'[7]

From the 14th century to the 19th century one finds that Declarations are crafted to reinforce and explain why the War is justified, and as von Elbe explains, even within the Declaration, states were 'wont to express the hope that justice of their cause will procure Divine assistance'.[8] Separate from the text of a Declaration of War were 'war manifestos'. These have recently been subjected to renewed scholarly attention. More than 350 manifestos for war spanning five centuries (1492–1945) have been collected and analysed by a project at Yale University and are now freely available.[9] In contrast to a Declaration of War, a manifesto would enter into pages of detail concerning the background reasons for war and why it was now necessary to resort to war. According to the Yale study:

4 Ibid at 105–09.

5 Ibid at 65.

6 Quoted by Keen, ibid at 64–65. *Summa de Poenitentia* (1224–26) Lib II, 5§5.

7 Keen, *The Laws of War* (n 2) at 65. See also Joseph-Mathias Gérard de Rayneval: '[A] war without a prior declaration is truly pillage and robbery: it is a war of pirates and filibusters.' Allain, *The Last Waltz of the Law of Nations: A Translation of the 1803 Edition of The Institutions of Natural Law and the Law of Nations by Joseph-Mathias Gérard de Rayneval* (2019) Book III, Ch III, § 1, 'On Declarations of War' at 149. A *filibustier* was the name given to a French pirate or freebooter in the Americas.

8 von Elbe, 'The Evolution of the Concept of Just War in International Law', 33 *AJIL* (1939) 665–88, at 685 fn 157, where he gives multiple examples, including the Duke of Milan's so declaring in taking up arms against the Duke of Savoy, 'confident in the Divine mercy which always favours the just cause' (1427).

9 See Hathaway et al, 'War Manifestos', 85 *Chicago Law Review* (2018) 1139–1225, and their War Manifestos Database containing all known war manifestos issued by sovereigns between 1492 and 1945, available at http://documents.law.yale.edu/manifestos.

The sovereign issuing the manifesto generally explains that he has attempted to negotiate with the other side or remedy the situation through diplomatic means. Because those efforts have not yielded the desired results, the sovereign concludes, he has no choice but to go to war.[10]

Some of the earliest attempts to define the rules on Declarations of War go into excruciating detail as to the various categories of war and the limits on who could make such Declarations and against whom.[11] But by the end of the 19th century, it seems clear that there were no real obligations to issue a declaration before hostilities, nor even at any stage. As Neff explains:

> In an era in which war was seen frankly as a matter of policy rather than of law or morals, and in which nationalistic sentiments were playing an increasing role, it is not surprising that the dryly polite style of declarations of previous centuries went out of fashion. In its place came elements of bombast, emotion and patriotic self-righteousness.[12]

Wars have existed even in the absence of formal Declarations, and even when Declarations have been issued, they may refer to wars that have already started. Although reference is sometimes made to Grotius (writing in the 16th century), stating that a Declaration was required to produce the legal effects that flowed from the institution of War, there are multiple examples of Wars from the 16th century to the middle of the 20th century where no Declaration was ever made.[13] Castrén mentions that between '1700 and 1870 declarations of war prior to hostilities occurred in one case out of ten, and such declarations were very rare after war had been commenced'.[14] Where

[10] Hathaway et al, 'War Manifestos' (n 9) at 1151.

[11] da Legnano, in his *Treatise on War*, set out a variety of types of wars and then 'what law allows the Church to declare war against infidels, and to invade their territories' and 'who are the emperors against whom war may be declared', 'whether universal war may be declared by others than a prince'. *Tractatus de Bello, de Represaliis et de Duello (1360)*, ed Holland, tr Brierly (1917) at 231–34. For an overview of how other writers treated the need for Declarations, see Ballis, *The Legal Position of War: Changes in its Practice and Theory from Plato to Vattel* (1937).

[12] Neff, *War and the Law of Nations: General History* (2005) at 185, where he offers a wonderful example in the form of the Emperor of Austria's announcement of War with Prussia in 1866.

[13] Westlake, *International Law: Part II War* (1907) 18–26; see also Eagleton, 'The Form and Function of the Declaration of War', 32 *AJIL* (1938) 19–35 and for later examples see Castrén, *The Present Law of War and Neutrality* (1954) at 97.

[14] Castrén, *The Present Law of War and Neutrality* (n 13) at 96; see the study by Maurice, *Hostilities without a Declaration of War: An Historical Abstract of the Cases in Which Hostilities Have Occurred Between Civilized Powers Prior to Declaration or Warning* (1883) at 4, which found that from 1700 to 1870, from the 107 instances analysed, 'less than ten' involved a Declaration

an ultimatum was issued, and the conditions were not met, War would start from the time when the demanded conditions were not met; in this way the ultimatum would become seen as a formal Declaration of War.

2.1.1 The Obligation to Declare War as a Matter of International Law

The move to generate an international obligation to declare War before the start of hostilities can be traced to the undeclared outbreak of the War between Russia and Japan in 1904, and the subsequent work of the Institut de droit international and its 1906 Resolution on the topic. The members of this private organization for the study and development of international law (which had been awarded the Nobel Peace prize two years earlier) suggested that states should issue either a declaration '*pure et simple*', or an ultimatum, which would be duly notified to the adversary, and that hostilities should not start before sufficient time had elapsed to show that the other side was aware.[15] The subsequent Hague Convention III of 1907 referenced the need for neutral powers to be aware of the beginning of war, and added that the Declaration must give reasons for the War. The treaty is still in force for the 36 states parties, and most recently, in 2015, Ukraine notified that it considered itself a party as a successor state to the Soviet Union.

Article 1 of the Hague Convention III states: 'The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.' Failure to duly declare War with reasons, and to notify neutral states, would be a violation of the treaty, but could not be used to avoid the law of war.

The Tokyo International Military Tribunal was careful to include in its definition of crimes against peace 'the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances'. Moreover, entering into

of War before hostilities. This study was requested by a Trade Committee looking into the issue of 'the Channel Tunnel' (!) and responded to a concern to know whether 'war would be declared against us, as we might say out of a clear sky, without any previous strain or notice that a quarrel was impending' (ibid at v).

[15] Available at http://www.idi-iil.org/app/uploads/2017/06/1906_gand_02_fr.pdf.

an armed conflict without fulfilling the requirements for a Declaration of War was, at one point, considered relevant to individual criminal charges in Tokyo. The indictment[16] against the Japanese defendants states that there was no 'declaration of War against China', for the force used against Nangking in 1932 and 1937, and the absence of a declaration of War for the attack on the USSR in 1938, the attack on Mongolia in 1939, and the 1941 surprise attacks on the British Commonwealth at Singapore, Hong Kong and Shanghai, and the attack on the Philippines. The indictment also considered that the document delivered to the United States after the attack on Pearl Harbour did not amount to a Declaration of War.

The Tokyo Tribunal listed the violation by Japan of Article 1 of the Hague Convention III ('Hague III'), concerning the need for a Declaration of War, as relevant not only for the prosecution of crimes against peace, ie a war in violation of international treaties, but also for simple charges of murder. The idea was that these killings 'resulted from the unlawful waging of war'.[17] The Judgment later explained:

> In all cases the killing is alleged as arising from the unlawful waging of war, unlawful in respect that there had been no declaration of war prior to the killings (counts 39 to 43, 51 and 52) or unlawful because the wars in the course of which the killings occurred were commenced in violation of certain specified Treaty Articles (counts 45 to 50).[18]

In the end, the Judges did not look at the idea of murder as a result of a violation of the obligation to issue a Declaration of War under Hague III or any other treaty, as they concentrated on the waging of aggressive wars as such.[19] The Judges found they could convict for conspiracy to wage wars of aggression, or actual waging of wars of aggression, and saw no need to look at wars otherwise in violation of international law or treaties.[20] The Majority explained: the waging of wars of aggression 'is the major crime, since it involves untold killings, suffering and misery. No good purpose would be served by

[16] The Indictment is reproduced in Boister and Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter Indictment and Judgments* (2008); for the references, see ibid at 32, 35, 36, 42, 45.
[17] Ibid at 86, para 48,452 of the Majority Judgment.
[18] Ibid.
[19] Ibid at paras 48,452–48,453, and esp paras 49,576–48,581.
[20] Ibid at para 49,772.

convicting any defendant of that major crime and also of murder [by that name].'[21]

In sum, states do enter into hostilities with other states without a Declaration of War, and for states parties to Hague III this could constitute a violation of that treaty. Fighting an undeclared War, or indeed any form of armed conflict, does not relieve the parties or any individuals of their obligations under the law of war.

2.1.2 Authority to Declare War under National Law

Different states will have different rules for determining which body or officeholder can declare War. As we shall see, under the US Constitution, only Congress can declare War. In France (and many other states), it is up to Parliament to authorize a Declaration of War, even if the decision is actually taken by the Executive.[22] Germany, Italy and Japan have constitutional prohibitions on war as an instrument of aggression. The Japanese Constitution is particularly emphatic:

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.[23]

[21] Ibid at para 49,576. See Ch 7 in this book for a discussion by certain contemporary just war theorists that individual soldiers should indeed be held accountable for murder in an aggressive war.

[22] Berramdane, 'La Constitution de 1958 et l'autorisation de déclaration de guerre', *Revue de droit public et de la science politique en France et à l'étranger* (1995) 1221–43.

[23] Japanese Constitution Art 9. For detail on the new legislation in force since 2016, which sets out what measures are permitted for self-defence or to support states engaged in operations for peace and security, see Ministry of Defense (Japan) *Defense of Japan 2017* Ch 3 available at <https://warp.da.ndl.go.jp/info:ndljp/pid/11591426/www.mod.go.jp/e/publ/w_paper/2017.html>. The right of belligerency clause is read as meaning not the right to self-defence but rather the 'various rights that a belligerent nation has under international law, including the authority to inflict casualties and damage upon the enemy's military force and to occupy enemy territory.' Japan draws a distinction here so 'Occupation of enemy territory, however, would exceed the minimum necessary level of self-defense and is not permissible.' *Defense of Japan 2016* at 166 available at <https://warp.da.ndl.go.jp/info:ndljp/pid/11591426/www.mod.go.jp/e/publ/w_paper/2016.html>.

But pointing to all such arrangements is now rather misleading. The Executive may justify its use of force not as war, but as part of a collective security operation, a UN authorized peace operation, or urgent intervention taken in self-defence or even to rescue individuals in imminent danger. To many people such military operations will look like war.

Such decisions to fight in something not labelled 'war' may still be subject to democratic control. France has introduced the need for parliamentary authorization where its armed forces intervene abroad and the intervention lasts more than four months, and Germany requires parliamentary approval for the deployment of armed forces, with the Constitutional Court playing an important role in determining what constitutes a deployment.[24] Japan and Italy have new legislation regulating participation in international operations.[25]

Interestingly, the Italian law allows for the authorization of 'exceptional humanitarian interventions' by participation in operations of international organizations, where Italy is a member of the organization. The same law nevertheless requires conformity with international law and the Constitution, which states that 'Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes.'[26] Curiously, the default internal military justice law to be applied is the military penal code for peace, but the military penal code for war can be applied for a particular mission under a special procedure involving Parliament.[27] The Italian Constitution nevertheless retains a number of provisions that relate to a 'state of war' or 'time of war', and Article 78 provides that 'Parliament has the authority to declare a state of war and vest the necessary powers into the Government.'[28]

[24] Peters, 'Military Operations Abroad Under the German Basic Law', in Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 791–809; Forteu, 'Using Military Force and Engaging in Collective Security: The Case of France', ibid at 811–27.

[25] Mori, 'Decisions in Japan to Use Military Force or Participate in Multilateral Peacekeeping Operations', in Bradley (n 24) at 829–42.

[26] Art 11 of the Italian Constitution (1948), Archives and Publications Office of the Senate Service for Official Reports and Communication; see the new law, Legge 21 July 2016, n 145, Disposizioni concernenti la partecipazione dell'Italia alle missioni internazionali (GU n 178 del 1 August 2016); for comment, see Ronzitti, 'Missioni all'estero, arriva la legge', 10 January 2017, *Affari Internationali*, available at https://www.affarinternazionali.it/2017/01/missioni-allestero-arriva-la-legge/.

[27] Legge 21 July 2016 (n 26), n 145, Arts 2(2) and 19(2).

[28] For further analysis, see Ronzitti, *Diritto internationale dei conflitti armati*, 6th edn (2017) Ch 4 and 155–60.

2.1.3 The Future of Declarations of War

The World Wars of the 20th century included multiple Declarations of War. There were therefore 52 situations of a State of War (formally understood) between different states in the First World War, and 164 situations of a State of War in the Second World War,[29] the last Declaration of War being the Soviet Union's made on Japan on 8 August 1945 (two days after the dropping of the nuclear bomb on Hiroshima).[30] But today, although recently there may be claims that this or that action by the United States represents an 'Act of War' for Iran[31] or a 'Declaration of War' for North Korea,[32] such statements are not considered as actually creating a State of War in the formal legal sense.

Even if the language of war is all around, states do not resort to their constitutional arrangements for going to war. The Executive in many cases, as we shall see, usually considers its use of force abroad to be authorized or required by the United Nations, or to be at the request of another state fighting insurgents or terrorists, or action justified by self-defence. Because the idea of a State of War seems incongruous with the collective security arrangements put in place by the United Nations (which limit any use of force to self-defence or Security Council-authorized operations), the paradox is that, today, even massive uses of force (such as the 1991 'Gulf War') are not strictly speaking Declared Wars. Of course, as we shall see, the laws of war most definitely apply, and violations could be war crimes, and in inter-state conflicts there could be prisoners of war, but for 70 years there have probably been no unequivocal Declarations of War leading to a recognized State of War as such. Whilst being at War may no longer be admitted as a strict matter of law, the same levels of violence can ironically be unleashed in many cases without

[29] Berramdane, 'La Constitution de 1958 et l'autorisation de déclaration de guerre', *Revue de droit public et de la science politique en France et à l'étranger* (1995) 1221–43; ibid at 1233 fn 22, for the references that contain the lists of these 216 separate Wars in the two World Wars; see *Revue générale de droit international public*) (1918) 84–92 for lists of the Declarations for the First World War, and *Recueil de textes à l'usage des conférences de la paix* (1946) 243–47, which contains matrices showing which states were in a State of War with which other states, along with the relevant Declarations of War for the Second World War.

[30] For the text, see at https://avalon.law.yale.edu/wwii/s4.asp.

[31] For example, see the quotes, tweets, etc in Cole, 'Trump's Order to Kill Iran's General is "Act of War" Says Tehran's UN Envoy: "There Will Be Harsh Revenge" (4 January 2020) available at https://www.newsweek.com/trump-iran-general-act-war-tehran-united-nations-revenge-1480392.

[32] Fish, 'The Long History of North Korea's Declarations of War', *The Atlantic* (25 September 2017). See also the 'Full War Declaration Statement from DPRK' published by North Korea, available at http://live.reuters.com/Event/North_Korea/70001409.

the constitutional controls that have to be exercised before a Declaration of War can be issued.

The question can arise as to how a declaration of war made by an unauthorized body would be seen. Eagleton's study gives some examples of declarations that were unauthorized but nevertheless treated as valid. He suggests 'if the President of the United States should, without Congressional authority, declare war against another state, there is little doubt that that state would consider itself at war with the United States'.[33] He also suggests that proclamations by commanders or admirals may equally establish a State of War. Because war can exist without a declaration, one could see declarations as redundant, but he nevertheless goes on to suggest some uses for the Declaration of War:

> Internally, it could furnish authority for legislative or executive acts which depend upon the existence of war; it could furnish a guide for domestic court action – if its authority and implications were clearly stated; it could state the reasons for the entry into war, both to arouse popular support at home and to win favor abroad. More important, it could give notice to neutral states of the coming into force of a different legal status, with its consequent variation of rights and duties; and it could fix the exact time at which this new legal status should go into effect, for the benefit of individuals and of foreign states.[34]

More recently, Charles Dunlap, a retired Major General from the US Air Force, has highlighted how the US Supreme Court has drawn a distinction in the past between a 'general war' and a 'limited war', also described as the difference between a 'perfect war' and an 'imperfect war'. Focusing on the 1952 decision of the US Supreme Court to strike down President Truman's seizure of steel mills in the interests of national security against the background of the hostilities in Korea, he refers to Chief Justice Rehnquist's book, in which Rehnquist writes 'I think that if the steel seizure had taken place during the Second World War, the government probably would have won under the constitutional grant of war powers to the president'.[35] Dunlap concludes that

[33] Eagleton, 'The Form and Function of the Declaration of War', 32 *AJIL* (1938) 19–35 at 38.

[34] Ibid at 34.

[35] Dunlap, 'Why Declarations of War Matter', *Harvard National Security Journal* (30 August 2016) available at http://harvardnsj.org/2016/08/why-declarations-of-war-matter/ quoting Rehnquist, *The Supreme Court* (2002) at 191. Rehnquist continues, 'but I also have the distinct feeling that if the American objectives and strategy in Korea had been less uncertain, the

'where there is a declaration of war, we may find that the Court is more deferential to presidential actions, even if not explicitly backed by law or clear Article II [of the US Constitution] authority'.[36] From a practical point of view he goes on to make the point that a declaration of war can generate support for a conflict and

> energize the citizenry towards winning it. That kind of overt national commitment could strengthen military morale . . . having troops in the field uncertain about the legality of their actions is plainly inimical to the kind of morale and discipline that facilitates military success.

We can now see that the Declaration of War is relevant at various levels. First, the failure to issue a warning in the form of a Declaration of War or an ultimatum can constitute a violation of Hague Convention III (1907). Such a violation will not now, however, be relevant for the prosecution of individuals for crimes against peace (if it ever was); the contemporary crime of aggression is defined without reference to this treaty.[37] Second, a Declaration of War could legalize certain measures where the treaty provisions or national rules specify that powers only flow from a valid Declaration of War.[38] Third, the judicial branch may arguably offer more deference where there is a clear situation of Declared War and there is a need to exercise exceptional executive war powers. Fourth, a Declaration can explain the reasons and objectives of a War and motivate support for it; at the same time, those acting to oppose the War can be tainted with treason, disloyalty or lack of patriotism (discussed in section 5.6). Lastly, we should explain that should any state, that had not been attacked, make a Declaration of War against another state, this would be most likely seen as a threat of the use of force and therefore be in violation of the UN Charter.[39] Moreover, a state would not be entitled to

government would probably have fared better in the Supreme Court even without being able to resort to the president's war power': *The Supreme Court* (2002) at 191.

[36] Dunlap 'Why Declarations of War Matter'.
[37] See Ch 4 below.
[38] See Ch 1 above for examples from treaties, and Ch 5 below for examples in national law; Ch 6 starts with some examples of arbitrators determining that certain statements did not constitute Declarations of War.
[39] Wehberg, 'L'interdiction du recours à la force: le principe et les problèmes qui se posent', 78 *RCADI* 1 (1951) 1–121 at 73.

react with the use of force to such a Declaration, as self-defence has to be in response to an armed attack and not a simple threat.[40]

2.2 The End of War: Peace Treaties, Armistices, Cease-Fires, Truces and Agreements with Non-State Actors

It is often assumed that a State of War leads to the termination of treaties, or at least their suspension, until a formal Peace Agreement is signed. While it may indeed be the case that, in the past, states did seek to avoid labelling their disputes as Wars in order to preserve their legal and diplomatic relations, and that treaties (then mostly bilateral) would be abrogated, there is a presumption today that multilateral treaty provisions continue even in time of war or armed conflict.[41] There would be an expectation that states would follow the procedures for the termination of treaties should they wish to alter their legal obligations. Although some of the treaty provisions may be inapplicable in certain contexts, or not intended to apply in time of conflict,[42] state practice suggests that even bilateral 'Friendship Treaties' may continue, and that certain rights of foreign nationals from the enemy state may even be preserved.[43] It is also clear that treaties concerning diplomatic and consular relations continue, and the treaties specifically require that even where diplomatic or consular relations are severed, the host state has to respect and protect the diplomatic or consular premises of the other state 'even in case of armed conflict'.[44]

A peace agreement thus is important to understanding when the war is over, and what obligations may flow, but such a treaty does not simply automatically restore terminated or suspended obligations from the time of peace.

[40] Ibid at 81, and more recently confirmed by Dinstein, *War, Aggression and Self-Defence*, 6th edn (2017) at 223: 'The crux of the issue is that anticipatory use of force today, in response to sheer threats rather than an armed attack, would not be in compliance with the text of Article 51 of the UN Charter.'

[41] For the details, see the work of the International Law Commission and its Draft Articles on the Effects of Armed Conflicts on Treaties (2011). The Draft Articles make no distinction between an armed conflict and a War: *Ybk ILC* (2011), Vol II, Part Two, 108–30.

[42] For examples us suspension during the Second World War of some multilateral treaties (unconnected to the law of armed conflict) under the supervision of the League of Nations see Brandon and Leriche, 'Suspension of Rights and Obligations Under Multilateral Conventions Between Opposing Belligerents on Account of War', 46 *AJIL* (1952) 532–37.

[43] *Ybk ILC* (2011),Vol II, Part Two, 108–30, at 123–26.

[44] Vienna Convention on Diplomatic Relations 1961 Art 45; and Vienna Convention on Consular Relations 1963 Art 27.

The peace agreement, like a Declaration of War, can set out when exactly the war is considered to be over. This could be back-dated, or apply on signature or set some date in the future. Such dates could be important for any national rules that are dependent on the existence of a formal State of War. This has meant that the end of the War may need to be defined quite precisely. For the First World War,

> declarations of war were general and it was officially made known when peace was re-established. In many of the more than fifty declarations of war the day, hour, and minute when war would begin was made known. For France the official period of the war was from '6.45 pm on August 3, 1914,' to '4.15 pm on January 10, 1920.'[45]

Today, as the institution of War fades and the focus shifts to the legal category of armed conflict, the significant date is more likely to turn on the end of the conflict, perhaps through an armistice, a cessation of hostilities, cease-fire or truce. Treaties and scholars have separated out these terms over the years, but they are not used today with any consistency. Readers would be advised to consider the context and intentions of the actors, rather than rely on the title that any agreement is given. Dinstein has tracked the evolving nature of terms such as 'peace treaty', 'armistice' and 'truce', and concludes that the 'passage of time has brought about alterations in international legal terms of art.'[46] He considers that the Panmunjom Armistice Agreement (ending the Korean conflict) would fit the 'modern meaning of an armistice agreement as an end to war.'[47] Just as armistices are the new peace treaties, in turn Dinstein suggests that the rules covering armistices in the Hague Regulations 'must be deemed applicable to present-day cease-fires (as opposed to modern armistices).'[48]

One can still find references by states in formal settings to 'acts of war' or being in 'a state of war',[49] but the rules on the beginning and end of the

[45] Wilson, 'Use of Force and Declaration of War', 32 *AJIL* (1938) 100–1, at 100.

[46] 'The Initiation, Suspension, and Termination of War', 75 *International Law Studies* (2000) 131–59 at 153.

[47] Ibid at 143

[48] Ibid at 147; but Dinstein has emphasized the continuing 'state of war' between Israel and Iraq (since 1948), and describes 'a number of rounds of hostilities' between Israel and Egypt and Syria as belonging to one war since 1967: *War, Aggression and Self-Defence* (n 40), esp 41, 51–52, 61, 64 and 227. See further the conclusion to the present book for a rejection of such an approach.

[49] In the 21st century there are hardly any official references that could be seen as evidence of the continuing international legal relevance of War. Such references as exist do not seem to be designed to trigger any particular legal effect. See UN Doc A/60/937-S/2006/515 for a letter

application of the laws of armed conflict mostly operate independently from the question of War, and we will tackle these thresholds in Chapter 6. For now, the possible remaining significance of a State of War or a State of Peace may be the implications for the rights and duties arising from the laws related to Neutral Status, and the historical legacy associated with Belligerent Rights connected to naval warfare involving search and seizure of neutral shipping on the high seas.

2.3 War and Neutrality

Just as with the notion of war, where we separated formal Wars involving a State of War from wars more generally, if we are interested in the legal rights and duties that flow from neutrality we may have to distinguish on the one hand between casual references to being 'neutral' and, on the other hand, the international law that flows when a state relies on rights and obligations that flow from its Neutral Status as a matter of international law. I will use a capital 'N' here to try to distinguish those states that have assumed Neutral Status under international law from those neutral states that are merely not participating on either side of an inter-state armed conflict. Such a non-participating state is now also known as a 'non-belligerent state'.

Commitments to neutrality made by humanitarian agencies raise a completely different set of duties. Organizations such as the International Committee of the Red Cross (ICRC) define themselves as 'neutral',[50] but the contours of what this means here, or for other humanitarian organizations abiding by a principle of neutrality, are more operational and ethical than legal, and the meaning of 'neutral' here is not uniform across all organizations. For example, some humanitarian organizations would consider that

from the Israeli Permanent Representative to the UN, stating that Hezbollah rockets constituted a 'clear declaration of war' and that 'Responsibility for this belligerent act of war lies with the Government of Lebanon', but no particular belligerent rights beyond the right of self-defence under the UN Charter were claimed. See also Israel's references to being engaged in a conflict 'short of war' in its submission to the Sharm el-Sheikh Fact-Finding Committee, 28 December 2000, at paras 18, 286, 323. It is not clear what was intended by the expression 'short of war' in this context.

[50] Statutes of the ICRC (2017), Preamble, Art 4(1)(a)(d) and (2); and see the Statutes of the International Red Cross and Red Crescent Movement (2006), which commit the movement to seven principles, including neutrality: 'In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.'

neutrality should not preclude 'undertaking advocacy on issues related to accountability and justice'.[51]

But to keep to the main focus of this book, let us try to separate out the rights and obligations that apply where states elect to rely on a recognized Neutral Status[52] from the rules that apply to all states that have chosen not to join another state in an inter-state armed conflict. In other words, I think we should consider two sets of obligations: one applying to states that have assumed Neutral Status, and another set of rules that applies to all non-participating states in all international armed conflicts.[53]

2.3.1 The Obligations and Rights of Neutral and Belligerent States

The state of neutrality law has been described by one scholar as not only *chaotic*, but also in *crisis*, with the legal writing leaving only a picture of *confusion*.[54] Much of the confusion is due to the fact that no multilateral treaties have specifically addressed Neutral Status as such since 1907.[55] This is compounded by the near absence of authoritative decisions of international judicial bodies,[56] and the careful ambiguity with which states treat the question of Neutral Status. States with powerful navies might have once seemed keen to limit the rights of neutral shipping when they were engaged as Belligerent

[51] Schenkenberg van Mierop, 'Coming Clean on Neutrality and Independence: the Need to Assess the Application of Humanitarian Principles', 97 *IRRC* (2016) 295–318 at 298, explaining the process leading to the Common Humanitarian Standard.

[52] On the the relevance of Declarations of Neutrality and recognition of Neutral Status in the 19th century, see Upcher, *Neutrality in Contemporary International Law* (2020) Ch 1 esp at 12ff.

[53] Not everyone would agree with such a dichotomy; see, eg, the approach taken by Upcher ibid, and Verlinden, 'The Law of Neutrality', in Wouters, De Man and Verlinden (eds), *Armed Conflicts and the Law* (2016) 75–106. Both would apply the obligations of Neutral Status to all international armed conflicts.

[54] Gioia, 'Neutrality and Non-Belligerency', in Post (ed), *International Economic Law and Armed Conflict* (1994) 51–110.

[55] See, for regional treaties, the Convention on Maritime Neutrality (1928) for the Americas, and the Stockholm Declaration Regarding Similar Rules of Neutrality (1938) for the five Nordic countries. For the history and scope of neutrality law as well as early treaties whereby states committed to remain neutral, see Verzijl, *International Law in Historical Perspective: Part IX-B The Law of Neutrality* (1979).

[56] For a rare example, see *The SS 'Wimbledon', United Kingdom and ors v Germany*, PCIJ, Judgment 17 August 1923, which held that the Versailles Peace Treaty obligations on Germany meant the Kiel Canal was an international waterway for ships from states at peace with Germany. Art 380 of the Treaty reads 'The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.' But see the Dissenting Opinions by Anzilotti, Huber and Schücking.

States at War, yet those same states, having abandoned recourse to War, or the prospect of naval warfare, may now see the need to protect their own neutral shipping in times of armed conflict. At the same time, some states that might have championed the rights of neutral trade may later find themselves dominant naval powers.[57]

As an illustration, the United States adopted complex rules on neutrality starting in 1794, some of them applying beyond what was commonly understood by neutrality at the time.[58] Presidential proclamations on the subject were not questioned in the courts, as they were considered 'political questions'. The United States essentially wanted to keep out of European Wars and did not want to give European powers an excuse to go to War with them. Much later, in the First World War, the German naval attacks on US merchant ships were explained by Germany in terms of US deviation from the duties derived from Neutral Status through its assistance to the United Kingdom.[59] Neutrality came to be seen by some in the United States as a liability rather than merely a way for ensuring peace. By the time of the Neutrality Act of 1939, it was explicitly stated that proclamations of Neutrality could only be triggered by the President or Congress, where they found that there existed a State of War between foreign states and that it was 'necessary to promote the security or preserve the peace of the United States or to protect the lives of the citizens of the United States'.[60] As Quincy Wright illustrated in 1940, the

[57] For the ways in which the attitudes of the different naval powers changed over time, see Neff, *The Rights and Duties of Neutrals* (2000). Of course the vast majority of states that exist today were not included in the formation of the rules that applied between the major powers in the centuries leading to the eventual creation of the United Nations. The 1909 London Naval Conference was only open to the following powers: Austria-Hungary, France, Germany, Italy, Japan, Netherlands, Russia, Spain, UK and USA. The resulting Declaration was never ratified.

[58] Interestingly, with regard to the *Caroline* incident (to be discussed in section 4.1.1), America was taking steps at that time to bolster her role as a state with Neutral Status in other people's Wars, and under international law that also meant that Belligerents from those Wars had to respect its rights that flowed from its Neutral Status. Strictly speaking, the fight in 1837 between the Canadian insurgents and Great Britain could not be considered a War in the technical sense but rather as something closer to a civil war. However, from the US perspective at that time, Neutrality obligations should apply to civil wars, and their own Neutrality Acts were adjusted in 1818 so that the provisions indeed applied to civil wars as well. Wani, *Neutrality in International Law: From the sixteenth century to 1945* (2017) at 58–59. Indeed, two of the ringleaders organizing the use of the *Caroline* for the insurgency were convicted for violating these Neutrality Acts in the years following the incident. Forcese, *Destroying the Caroline: The Frontier Raid that Reshaped the Right to War* (2018) at 251 and 253.

[59] On the failure by the United States to respect strict laws of neutrality in the first year of the War, see Coogan, *The End of Neutrality: The United States, Britain, and Maritime Rights 1888–1915* (1981).

[60] Explained and discussed by Wright, 'The Power to Declare Neutrality under American Law', 34 *AJIL* (1940) 302–10; in the inter-war years there was a stream of opinion that suggested

United States and others were willing in the inter-war years simply to pick out those conflicts where they would declare Neutrality; and in other instances they would consider a state's action as aggression, or a violation of treaties, and go on to choose to aid the victim state.[61]

After the Second World War, the creation of the United Nations suggested that there would now be collective security measures, and states could no longer choose to remain neutral in the face of an aggression in violation of the UN Charter. The scholarly debate in the middle of the 20th century, over what was left of the law on neutrality, ebbed and flowed depending on the context, and statements from state representatives were either too casual, or too cautious to be conclusive. Scholars in the 1950s and 1960s usually assumed that the United Nations would do one of two things: either identify who the aggressor was (thus making it illegal to take sides), or oblige states to support the United Nations' policing action to restore the peace (thus overriding any neutrality obligations). These scholars would then often adhere to the idea that in the absence of such UN action, remaining neutrality rights and obligations depend on a State of Declared War.

But of course during the Cold War the United Nations was unable either to condemn aggression, or to authorize the use of force to restore the peace. Castrén (in his 1954 book-length study on neutrality) saw that it may be difficult to determine whether there is an actual War or 'merely some other kind of armed activity'; his solution was that the parties to the conflict should 'make their attitude known and notify it to outside States in order for them to take appropriate measures'.[62] By 1979 Schindler was concluding that 'State practice since 1945 shows that, in a state of war, third parties generally do not act in a different way than in that of an armed conflict without war.'[63] He then went beyond the simple elimination of the distinction between War and armed conflict and suggested that 'This may lead to the conclusion that a duty of non-participants to apply the law of neutrality is no longer recognized, even when a state of war exists.'[64] For a permanently Neutral State such

that insisting on neutrality rights 'leads to ultimatums which inevitably lead to war'. Warren, 'Troubles of a Neutral', 12 *Foreign Affairs* (1934) 377–94 at 390.

[61] Wright, 'The Present Status of Neutrality', 34 *AJIL* (1940) 391–415, esp at 403–07.

[62] Castrén, *The Present Law of War and Neutrality* (n 13) at 423; and see Skubiszewski, 'Use of Force by States. Collective Security. Law of War and Neutrality', in Sørensen (ed), *Manual of Public International Law* (1968) 739–854 at 809, 'whenever the parties do not regard their armed conflict as war ... the law of neutrality does not apply at all'.

[63] Schindler, 'State of War, Belligerency, Armed Conflict', in Cassese (ed), *The New Humanitarian Law of Armed Conflict* (1979) 3–20 at 15.

[64] Ibid at 15.

as Switzerland, he admitted that such a state 'stands aside from all inter-State conflicts and not merely' some particular War.[65]

Brownlie, having researched in detail the reasons why states and the League of Nations sought to avoid categorizing a conflict as leading to a State of War, took a variegated approach. He admitted there needed to be different definitions of war for different contexts. So, for the humanitarian aspects of the laws of war there should be the 'widest possible application', while 'the law of neutrality with its far reaching effects on international relations should only be brought into operation when the hostilities have a degree of permanence and a scope which necessitate regulation of the belligerents and third states'.[66] Significantly, he also suggested that the now universal prohibition on the use of force allows a third state to avoid any obligations related to Neutral Status by arguing that it is responding to the illegal use of force with a countermeasure. Failure to observe such obligations can therefore be presented as a sanction, reprisal or countermeasure against the aggressor state, and this precludes the wrongfulness of the behaviour of the non-belligerent state. This was indeed part of the US argumentation to explain why its support for Britain before the United States entered the Second World War did not breach the law on neutrality.[67]

After the Iran–Iraq conflict in the 1980s, there was a new flurry of scholarly writing and more confusion based on the ambiguous behaviour of states.[68] By now, for many authors, it was clearer that, even faced with a major armed conflict, the Security Council, stymied by the Cold War, might be unable to come to clear decisions as to who the aggressor was, or what all member states must do. Schindler explains that, in such circumstances, 'A duty to remain neutral in case of uncertainty as to who is the aggressor does not exist.'[69] His conclusion was 'A third State may assist the victim of armed attack without regard to the existence of a state of war.'[70]

Similarly, scholars such as Gioia argued that state behaviour during the Iran–Iraq conflict suggested that 'States not wishing to enter into an armed

[65] Ibid at 449.

[66] Brownlie, *International Law and the Use of Force by States* (1963) at 400–01.

[67] Ibid at 79, 106–07 and 403, where he also points out that if a third state is entitled to join in collective self-defence against an aggressor, that state ought also to be able to refrain from fulfilling all its duties under the law of neutrality.

[68] Dekker and Post (eds), *The Gulf War of 1980–1988* (1992); Post (ed), *International Economic Law and Armed Conflict* (1994) 5–34.

[69] Schindler, 'Commentary to the 1907 Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War', in Ronzitti (ed), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (1988) 193–222 at 212.

[70] Ibid at 213.

conflict are no longer under a legal duty to abide by the traditional laws of neutrality.'[71] And he went on to outline the legal relevance of states' having a choice to remain neutral, or take an intermediate position of 'qualified neutrality' or 'non-belligerence'.[72] Such an approach is not shared by all,[73] but it reflects in many ways the practice of states such as the United Kingdom and Italy, who have been more transparent than most in addressing their understanding of the law.[74]

Under this approach, only those states that declare themselves to have Neutral Status in a particular prolonged conflict (and this would include states with a status of Permanent Neutrality such as Switzerland) will take on the duties of Neutral Status 'in its strict sense'.[75] These are the duties of abstention, prevention and impartiality (dealt with below).

The 2007 *US Commander's Handbook on the Law of Naval Operations*, valid until 2017, stated that 'a neutral nation is defined as a nation that, consistent with international law, either has proclaimed its neutrality or has

[71] Gioia, 'Neutrality and Non-Belligerency', in Post (ed), *International Economic Law and Armed Conflict* (1994) 51–110 at 68; and see further examples of states favouring one side in the Iran–Iraq war in Gioia and Ronzitti, 'The Law of Neutrality: Third States' Commercial Rights and Duties', in Dekker and Post (eds), *The Gulf War of 1980–1988* (1992) 221–42 at 228–31.

[72] Gioia (n 71) at 86.

[73] See especially Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality', in Schmitt and Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines (Essays in Honour of Yoram Dinstein)* (2007) 543–68 at 555–56; and Heintschel von Heinegg, 'International Economic Relations and Armed Conflict', in de Guttry, Post and Venturini (eds), *The 1998–2000 War between Eritrea and Ethiopia* (2009) 371–87. Kleffner simply concludes that the law of neutrality applies to an international armed conflict even in the absence of a State of War: 'Scope of Application of International Humanitarian Law', in Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict*, 3rd edn (2013) 43–78 at 49.

[74] Ronzitti, 'Italy's Non-Belligerency During the Iraqi War', in Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 197–207; Humphrey, 'Belligerent Interdiction of Neutral Shipping in International Armed Conflict', 2 *Journal of Conflict and Security Law* (1997) 23–44; Gray, 'The British Position in Regard to the Gulf Conflict', 37 *ICLQ* (1988) 420–28; Gray, 'The British Position in Regard to the Gulf Conflict (Iran–Iraq): Part 2', 40 *ICLQ* (1991) 464–73.

[75] Schindler, 'Commentary' (n 69) at 213. See also Shearer, *Starke's International Law*, 11th edn (1994) at 481: 'Assuming the hostilities are on a sufficiently extensive scale, the decision may be made ... to make a declaration of neutrality, irrespective of the intentions of the contestants. A third state, adopting this course, would be subject to the risk of the exercise of belligerent rights by either contestant, whose right to do so could not then be challenged. A non-war status could none the less still apply in the relations of the contestants inter se.' See also McNair and Watts, *The Legal Effects of War*, 4th edn (1966) at 10, and the definition offered by McNair, 'The Legal Meaning of War, and the Relation of War to Reprisals', 11 *Transactions of the Grotius Society* (1925) 29–51. Compare Wright, 'When Does War Exist?', 26 *AJIL* (1932) 362–68 at 365–67.

otherwise assumed neutral status with respect to an ongoing conflict'.[76] More recently, the US *Manual on the Law of War* (2016) explains:

> Although the practice of issuing formal proclamations of neutrality has declined, States have continued to make public statements of neutrality to indicate their national policy and legal status in relation to an armed conflict. States may also communicate their neutral status through diplomatic channels or use other means they deem appropriate.[77]

The *Manual* stops short of demanding that all non-participating states owe international obligations of neutrality, because it accepts its own idea, practised by the United States in the Second World War, of 'qualified neutrality', whereby 'neutral States had the right to support belligerent States that had been the victim of flagrant and illegal wars of aggression'.[78]

It is contested whether and when the rights and duties that flow from Neutral Status apply outside such a formal proclamation of declaration. The German *Manual* suggests one should posit a threshold for triggering the obligations of Neutral Status by reference to the intensity or duration of the armed conflict.[79] In practice, for low-level conflicts the issue of neutral duties

[76] Version of 2007 at para 7.1. The 2017 version of para 7.1 has dropped this definition and simply states: 'The law of neutrality prescribes the legal relationship between belligerent States and neutral States. Belligerent States are those engaged in an international armed conflict, whether or not a formal declaration of war has been made, while neutral States are those that are not taking part in the armed conflict. A third term, "nonbelligerent" State, is also sometimes used to describe a State not participating in an armed conflict. ... The duties of neutral states to refrain from certain types of support to belligerent States are only triggered in international armed conflicts of a certain duration and intensity.'

[77] At para 15.2.1.4 (footnote with examples of declarations of neutrality omitted).

[78] At para 5.2.2 for the idea that the United States considered that it could adopt 'qualified neutrality' at the start of the Second World War as it was responding to aggression outlawed by treaties such as the 1928 Kellogg-Briand Pact of Paris. Today some experts consider that such 'qualified neutrality', ie the right to assist one side to the conflict, can only be claimed where the Security Council has determined in a binding decision who the aggressor is – see Boothby and Heintschel von Heinegg, *The Law of War: A Detailed Assessment of the US Department of Defense Law of War Manual* (2018) at 376; however, one might have to admit that in some cases the Security Council may not come to such a conclusion and yet a state would feel obliged to react to an obvious aggression by arming the victim state. If obligations of Neutral Status apply as a matter of international law then the easiest justification for the otherwise wrongful action would be for the assisting state to consider its breach of its obligations as a reprisal or countermeasure directed at the aggressor state.

[79] See the German *Law of Armed Conflict Manual*, Joint Service Regulation (ZDv) 15/2, May 2013, at para 209: 'In a state of war or any other international armed conflict, the law of neutrality may be applied to the relations between Parties to the conflict and States not participating in the conflict.' And at para 1202 (original emphasis): 'The neutrality of a State in an international armed conflict *begins* with the outbreak of an international armed conflict between other States which is of such *duration or intensity* that it requires the application of the law of neutrality.' See

under law may not arise. As Mancini concludes, having studied the evidence of the last few decades, 'so far the rules of neutrality have been applied only where there were extensive hostilities involving a large number of troops'.[80]

Upcher concluded his study by arguing that the obligations related to Neutral Status apply to all third states in all international armed conflicts (notwithstanding that they may sometimes act contrary to the obligations that flow from that Status).[81] But he nuances this by stating that the rights and duties change according to the scope of the conflict, so in the context of naval warfare the justifications for belligerents to interfere with neutral shipping will be greater as the conflict 'expands in intensity and reach', and at the same time the duties of neutrality become 'more onerous' as 'an international armed conflict expands'.[82]

For those taking this variegated approach, the full range of obligations applies only in *exceptional circumstances*. As Heintschel von Heinegg concludes:

> The position of some authors who apply the law of neutrality *in toto* to every international armed conflict is unsustainable in light of State practice. While it is true that the law of neutrality serves the interests of both belligerents and neutrals, this does not necessarily mean that the law of neutrality is applicable *in toto* in every international armed conflict. State practice supports the view that the law of neutrality applies automatically and comprehensively in exceptional cases only, regardless of whether the armed conflict in question amounts to a state of war or not. According to modern State practice, the applicability of the law of neutrality depends on functional considerations that will, in most cases, result in differential or partial applicability of that body of law.[83]

the US *Department of Defense Law of War Manual* (2016) at para 15.2.1.2: 'The duties of neutral States to refrain from certain types of support to belligerent States do not apply to all armed conflicts to which *jus in bello* rules apply; rather, such duties are only triggered in armed conflicts of a certain duration and intensity.'

80 Mancini, 'The Effects of a State of War or Armed Conflict', in Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2015) 988–1013 at 1004.

81 Upcher, *Neutrality* (n 52) at 30.

82 Ibid at 51.

83 Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts' (n 73) at 561 (footnote omitted).

We seem, then, to have here an argument for a sort of sliding scale, where different rules on neutrality apply according to the extent of the conflict, while at the same time the old division between Wars and other forms of armed conflict is no longer as relevant as it once was.

I suggest that one way out of this confusion is to break down the rights and obligations associated with neutrality into four separate packages.

Let me try to sketch the outlines of the four packages before we embark on the excavation of the actual obligations:

- The expressions 'neutral states' or 'neutrals' are often used to describe states that are not parties to an armed conflict between other states.[84] We could call them 'non-participating states'. All such states have rights not to have their territory used by belligerent states as part of the conflict. Rather than seeing these rights as stemming from the law of war, it may be better simply to see them as flowing from states' sovereignty over their own territory.
- All non-participating states have certain obligations with regard to humanitarian protections for the victims of war under international humanitarian law, codified in the 1949 Geneva Conventions and their Protocols. The references in those treaties to 'neutral Powers' includes any state not participating in an international armed conflict.
- In some international conflicts, where the Security Council has not called for cooperation against a particular state, states may declare that that they will assume a Neutral Status in a strict sense and abide by the obligations in the Hague Conventions V and XIII of 1907. States with Permanent Neutrality, such as Switzerland, will automatically assume these obligations of Neutral Status from the outbreak of such hostilities between two states.
- There is a continuing sense in some quarters that a belligerent state should be able to assert against neutral ships and aircraft the sort of Belligerent Rights to engage in economic warfare at sea that states once assumed in time of a State of War. It is not at all clear what sort of conflict today would trigger the right to engage in such economic warfare, for

[84] See Commentary to the Draft Articles on the Effects of Armed Conflicts on Treaties, 2011, UN Doc A/66/10, Art 17, para 1, 'Article 17 is another "without prejudice" clause, which seeks to preserve the rights and duties of States arising from the laws of neutrality. It was felt that the reference to "neutrals" was, as a matter of drafting, imprecise, as it was not clear whether it referred to formal neutrality or mere non-belligerency.'

example seizing and confiscating neutral ships for carrying contraband, engaging in unneutral service or breach of blockade.

2.3.2 The Rights and Duties of All Third States to Have their Territory Protected from the International Armed Conflict

States engaged in an inter-state armed conflict are prohibited from using the territory (including the territorial waters) of all non-participating third states for the armed conflict. This means such a non-participating state is protected by law from the conflict. To be clear, this applies to all states irrespective of any declaration of war or neutrality. The International Court of Justice, when considering the legality of the use of nuclear weapons, confirmed that 'the principle of neutrality' applies 'whatever its content' and '(subject to the relevant provisions of the United Nations Charter) to all international armed conflict, whatever type of weapons might be used'.[85] The Court here was really only addressing this first rule, which would prohibit fighting or damage by belligerents on the territory of a third (non-participating) state.[86]

But this first package of rights and obligations remains important and applies in all international armed conflicts.[87] It protects all non-participating states and those that live there, and it can be seen as preventing the spread or escalation of the conflict. The non-participating state will have obligations to address harmful acts emanating from its territory.[88] The right of the non-participating (neutral) state is described in the US *Law of War Manual*:

[85] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996) at para 89; but then the Court went on to conclude (at para 95) that it did not have the elements to conclude that the use of nuclear weapons would necessarily violate the principles and rules applicable in armed conflict 'in any circumstance'.

[86] See the detailed explanation in Dominicé, 'La question du droit de la neutralité', in Boisson de Chazournes and Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons* (1999) 199–208 esp at 202–04, where he suggests that because the extension of damage onto the territory of the third state is itself a wrongful act, whether or not there is a conflict is in fact irrelevant. The rule is also reflected in Hague V (1907) Art 1 and Hague XIII (1907) Arts 1 and 25; see also Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995) paras 15 and 22; Harvard Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare* (2013) Section X.

[87] Boothby and Heintschel von Heinegg, *The Law of War* (n 78) at 375; and see *Department of Defense Law of War Manual* (2016) at para 15.2.1.2.

[88] See Heintschel von Heinegg, 'The Current State of the Law of Naval Warfare: A Fresh Look at the San Remo Manual', 82 *International Law Studies* (2006) 269–96 at 283; see also *Harvard Manual on Air Warfare* (n 86) Rule 168(a); the *Tallinn Manual 2.0 on Cyber Operations* (2017) Rule 153 provides 'If a neutral State fails to terminate the exercise of belligerent rights on its

> The territory of neutral States is inviolable. The inviolability of neutral territory prohibits any unauthorized entry into the territory of a neutral State, its territorial waters, or the airspace over such areas by armed forces or instrumentalities of war.[89]

The *Manual* then goes on, however, to claim a right of a participating state to use force on the territory of the non-participating state in case of breaches by the non-participating state of its obligations :

> Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the forces of one belligerent entering or passing through its territory (including its lands, waters, and airspace), the other belligerent State may be justified in attacking the enemy forces on the neutral State's territory.[90]

There is a problematic conflation here between, on the one hand, a failure of a state to address the use of its territory by one of the belligerents, and, on the other hand, an implied authorization under international law to use force on the territory of the non-participating state. Today, I would suggest, it is not enough to point to a breach of neutrality in this way: all use of force is governed by the UN Charter,[91] as the latest UK *Manual* makes clear:

territory, the aggrieved party to the conflict may take such steps, including by cyber operations, as are necessary to counter that conduct.'

89 US *Law of War Manual* (n 87) para 15.3.1.1. See also Art 1 of the Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907) (Hague V); Art 1 of the Convention Concerning the Rights and Duties of Neutral Powers in Naval War (1907) (Hague XIII); see also *Harvard Manual on Air Warfare* (n 86) Rules 166 and 167.

90 Para 14.4.2.

91 'As the use of force against the territory of another State is now regulated by the UN Charter, the cited rule of the law of neutrality is no longer applicable. The legality of armed countermeasures is to be judged on the basis of Article 51 of the Charter, the Charter taking precedence over the old law of neutrality.' Schindler, 'Transformations in the Law of Neutrality Since 1945', in Delissen and Tanja (eds), *Humanitarian Law* of Armed *Conflict – Challenges Ahead: Essays in Honour of Fritz Kalshoven* (1991) 367–86 at 382; see also Ingber, 'Co-Belligerency', 42 *Yale Journal of International Law* (2016) 67–120 and her assertion (at 89) that 'any right to use force in response to a violation of neutrality falling below an armed attack does not survive the UN Charter's regulation of the use of force'. See further the discussion and similar conclusion by Upcher, *Neutrality* (n 52) at 89–98. For the disagreements on this issue during the drafting of the *San Remo Manual* see Doswald-Beck (n 85) at 101–02. The *San Remo Manual* suggests (at para 22) 'If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.'

> Neutral states must refrain from allowing their territory to be used by belligerent states for the purposes of military operations. If a neutral state is unable or unwilling to prevent the use of its territory for the purposes of such military operations, a belligerent state may become entitled to use force in self-defence against enemy forces operating from the territory of that neutral state. Whether or not they are so entitled will depend on the ordinary rules of the *jus ad bellum*.[92]

Attention has recently turned to how such rights and duties for non-participating states would apply with regard to cyberwarfare or in outer space. According to the *Tallinn Manual*, a '"Neutral State" denotes a State that is not a party to the international armed conflict in question.'[93] The *Manual* states that belligerents may not direct operations by cyber means against cyber infrastructure, or use neutral territory for cyber operations.[94] Furthermore, 'A neutral state may not knowingly allow the exercise of belligerent rights by the parties to the conflict from cyber infrastructure located in its territory or under its exclusive control.'[95] And as with the traditional rules, the *Manual* suggests that breaches can be met with appropriate countermeasures: 'If a neutral State fails to terminate the exercise of belligerent rights on its territory, the aggrieved party to the conflict may take such steps, including by cyber operations, as are necessary to counter that conduct.'[96]

The key point in concluding this section is that a non-participating state in an international armed conflict is protected from any other state's using its territory for the conflict. If the non-participating state fails to bring an end to such uses then another state can take steps to bring it back into compliance, but any use of force on the territory of the non-participating state

[92] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) para 143(a). See also para 13.9E as amended in 2004 for violations of the regime of neutral waters. Compare the UK's 1958 *Manual of Military Law* at para 655: 'Should, however, one belligerent violate neutral territory by marching troops across it and the neutral state be unable or unwilling to resist the violation, the other belligerent may be justified in attacking the enemy there or in demanding compensation from the offending state.' The differences among experts are captured and described as 'doctrinal' in Doswald-Beck (ed) *San Remo Manual* (n 85) at 101-02.

[93] *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017) at 553.

[94] Ibid Rules 150 and 151.

[95] Ibid Rule 152.

[96] Ibid Rule 153. For outer space, it has been suggested by Heintschel von Heinegg that the core rules apply in all situations of armed conflict, and so 'the launching of belligerent military space objects from neutral territory constitutes a violation of neutrality'. But in his view, 'If the neutral State is unwilling or unable to terminate the violation of its neutrality and if the violation is serious, the aggrieved belligerent is entitled to use proportionate force to terminate the violation'. Heintschel von Heinegg, 'Neutrality and Outer Space', 93 *ILS* (2017) 526–47 at 538.

should today, I would say, be justified under the law on the use of force, and not by simple reference to some breach of neutral duties.[97]

2.3.3 The Humanitarian Protection Provisions for the Protection of Victims of War in Neutral States

The Geneva Conventions of 1949 (GC) and Additional Protocol I of 1977 (AP I) contain a number of protections for the victims of international armed conflicts. They contain duties for 'neutral Powers', and refer in addition to 'neutral or non-belligerent powers' as well as to 'neutral and other States not Parties to the conflict'.[98] We are here in the protective humanitarian branch of the laws of war, and there seems no reason to question the low threshold that would normally apply for the applicability for these treaties to an inter-state armed conflict. There is no need here to tangle up the humanitarian duties of neutral states with the onerous traditional duties associated with a State of War (discussed in the next package).

For an example of these protective humanitarian provisions consider Article 4 of the First Geneva Convention 1949, which demands that neutral states apply the provisions regarding the wounded and sick to individuals received in their own territory. Here the idea is to ensure protection for such persons in third neutral states beyond the territory of the states in conflict. The idea that such neutral states would only be bound if there were a formal Declaration of Neutrality or a conflict amounting to a War makes no sense.

The ICRC Commentary to the Additional Protocols confirms that the term 'neutral' in the Geneva Conventions can be interpreted as covering non-participation in conflicts in general.[99] It is also clear that all non-participating

97 In his historical account, Verziij was unable to find historical examples of 'counter-action' by belligerents in response to neutral states violating their obligations towards belligerents. He details, however, the explicit references in the 1907 Hague Conventions that state that the use of force by a neutral state to suppress acts against its territory by a belligerent cannot be regarded as hostile acts. *International Law in Historical Perspective: Part IX-B The Law* of Neutrality (1979) at 38. See Arts 10 and 26 of Conventions V and XIII respectively. Art 24 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War (1939) foresaw reprisals by belligerent states against neutral states, but added 'a State is not to be charged with failure to perform its duties as a neutral State because it has not succeeded in inducing a belligerent to respect its rights as a neutral State': 33 *AJIL* (supplement) (1939) 175–203.

98 See eg GC 1 Art 4; GC III Arts 4B(2); and AP I Art 2(c).

99 Sandoz, Swinarski and Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) at para 136; see further ICRC *Commentary GC I* (2016) Art 4 esp at paras 908–919; Sandoz, 'Rights, Powers, and Obligations of Neutral Powers under the Conventions', in Clapham, Gaeta, and Sassòli (eds), *The 1949*

states would continue to have these international humanitarian law obligations in relation to the wounded, even if the Security Council had called for all states to take measures against a belligerent state.[100]

2.3.4 Rules Related to Neutral Status in a Strict Sense: Abstention, Prevention and Impartiality

A third package of obligations relates to what might be termed Neutral Status in a strict sense (use of capitals deliberate). In contrast to the first two packages, whereby all non-participant states take on rights and obligations in every international armed conflict, these duties may only apply under certain conditions that flow from the older ideas of War. The duties that flow from Neutral Status are traditionally said to be abstention, prevention and impartiality. They have been summarized by Schindler as follows:[101]

> Abstention means that the neutral State may not provide military assistance to belligerents. In particular it may not put at their disposal troops, war materials, territory, military intelligence and credits for war purposes (*cf*, Articles 5–8 of the Hague Convention V and Article 6, Hague Convention XIII).
>
> Under the duty of prevention, the neutral State is obliged to prevent belligerents from using its territory for war purposes. Neutrals may not tolerate on their territory acts of belligerents which are prohibited by the law of neutrality (*cf*, Articles 5 and 10 of the Hague Convention V, Articles 8 and 25, Hague Convention XIII) [eg the movement of belligerents, munitions or supplies through the territory, the erection of radio equipment for communication with belligerent forces, formation or recruitment of combatants].
>
> Finally, the duty of impartiality obliges the neutral State to apply equally to all belligerents the rules set up by itself with regard to its relations with

Geneva Conventions: A Commentary (2015) 85–108, at 92-3; for a discussion of the scope of the obligations see Sassòli, *International Humanitarian Law* (2019) Ch 9.5.

[100] ICRC *Commentary GC I* (2016) para 918.

[101] Schindler, 'Transformations in the Law of Neutrality Since 1945', in Delissen and Tanja (eds), *Humanitarian Law of Armed Conflict – Challenges Ahead: Essays in Honour of Fritz Kalshoven* (1991) 367–86 at 379–80. For a very thoughtful detailed study, see Upcher, *Neutrality* (n 52).

belligerents *eg* rules restricting the private export of war materials (*cf*, Article 9 of both Hague Conventions V and XIII).

The question for us now is when might these obligations still apply?

The law on Neutral Status now has to be adjusted to take into account the obligations undertaken by UN member states. Where the UN Security Council decides that a member state has to cooperate with a UN authorized use of force in an international armed conflict, or in the imposition of sanctions on certain goods, those obligations as a UN member state override any obligations that flow from that member state's Neutral Status.[102] Whether or not the Security Council can make such demands on a non-member state was of some interest before Switzerland joined the United Nations,[103] but it is now of limited interest. In fact the clearest modern practice on the issue of the obligations of a state with Neutral Status has emerged since Switzerland joined the United Nations.

The application of these rules related to Neutral Status, reflected in treaty law and sometimes considered customary,[104] emerges when one considers the way Switzerland carries out its obligations, which are not related to any particular conflict but stem from its status of Permanent Neutrality.[105] First,

[102] See esp Arts 25 and 103 of the UN Charter.

[103] See Thürer, 'UN Enforcement Measures and Neutrality: The Case of Switzerland' 30 *Archives du droit international* (1992) 63–85.

[104] See, eg, Hague V (1907) and Hague XIII (1907). The Irish cases mentioned in Ch 1 of this book considered whether Ireland (a non-party to these treaties) was bound by customary international law on neutrality. The results are contradictory. In *Horgan v An Taoiseach et al* ILDC 486 (IE 2003), the Judge found that there was a war and that customary international law on neutrality applied to Ireland as the operation was not 'UN led' (at paras 120–122 and 125): 'Despite the great historic value attached by Ireland to the concept of neutrality, that status is nowhere reflected in Bunreacht na hÉireann, or elsewhere in any domestic legislation. It is effectively a matter of government policy only, albeit a policy to which, traditionally at least, considerable importance was attached. Ireland is thus in a different position than certain other States, who have incorporated a permanent status of neutrality in their domestic laws. Without exhaustively requoting from the charters, conventions and writings relied upon by the plaintiff in this case, I am satisfied that there does still exist in international law a legal concept of neutrality whereunder co-relative rights and duties arise for both belligerents and neutrals alike in times of war in circumstances where the use of force is not "UN led". ... The court is prepared to hold therefore that there is an identifiable rule of customary law in relation to the status of neutrality whereunder a neutral state may not permit the movement of large numbers of troops or munitions of one belligerent State through its territory en route to a theatre of war with another.' In *Dubsky v Government of Ireland et al* ILDC 485 (IE 2005), the Judge concluded (at para 90) 'I do not accept that the applicant has established that the provisions of the Hague Convention as contended for, are sufficiently well established as a principle of international law as are necessarily included in Article 29 of the Constitution.'

[105] Seger, 'The Law of Neutrality' in Clapham and Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 248–70; Permanent Neutrality is explained ibid at 259–50; see also Bothe, 'Neutrality, Concept and General Rules', *MPEPIL* (2015) at para

one should understand that, from the perspective of a UN member state, once the Security Council has authorized the use of force and UN member states are bound by decisions of the Council in terms of what they must do to co-operate, then no duties related to Neutral Status apply. The non-participating state is simply obliged as a UN member state to do whatever the Security Council demands. As explained by the Swiss Federal Government in 2005, in its review of its policy with regard to the 2003 Iraq conflict, 'neutrality law is not applicable to military measures decided on by the UN Security Council in accordance with Chapter VII of the UN Charter'.[106]

But where an international armed conflict arises without any Security Council authorization and demands on the member states, the international law on Neutrality may apply to a state that has assumed Neutral Status. The detail has been helpfully explained by Seger, from the perspective of the Legal Advisor of the Ministry of Foreign Affairs of Switzerland. For example, in the context of the 2003 Iraq conflict, Switzerland officially declared the application of the Law on Neutrality and undertook its own obligations, from the 'beginning of the aerial attacks on Iraq on 20 March 2003'.[107] Similarly, Switzerland had denied overflight to belligerent states in the 1991 conflict with Iraq (when Switzerland was not yet a member of the United Nations),[108] and again in 1999 when it rejected requests by NATO for military overflights and transit of military goods through its territory in the context of the Kosovo conflict. In the words of a Swiss brochure prepared by the Federal Government, 'As NATO's military operation took place without a UN mandate, the law of neutrality had to be observed.'[109]

15: 'Permanent neutrality 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.'

[106] Summary of Switzerland's neutrality policy during the Iraq conflict in response to the Reimann Postulate (03.3066) and to the Motion by the SVP Parliamentary Group (03.3050) of 2 December 2005 at para 3.1.1. So when the Security Council did later authorize the use of force, the report continues (at para 6) 'Security Council Resolution 1546 means that neutrality cannot legally be applied.'

[107] Seger, 'The Law of Neutrality' (n 105) at 254.

[108] See White Paper on Neutrality: Annex to the Report on Swiss Foreign Policy for the Nineties of 29 November 1993 at 18: 'As a matter of principle, Switzerland has never participated in military measures. When allied military Gulf War operations . . . began on January 17, 1991, the Federal Council decided not to allow countries involved in the military measures decreed by the UN to fly over Swiss territory with combat aircraft or airlifters carrying troops and ammunition. Already then, however, the Federal Council announced that it would re-examine Swiss practice in this area.'

[109] *Swiss Neutrality*, 4th edn (no date) at 8, available at https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/Swiss%20neutrality.pdf.

The ending of the obligations that flow from the self-imposed Neutral Status is, according to Seger, something that can be determined by the state that has assumed this Status:

> Unless a formal armistice or peace agreement is signed between the warring parties, the determination of the appropriate moment to cease applying the law of neutrality is left to the appreciation of the neutral power. In the case of the Iraq war Switzerland considered this moment to have come on 16 April 2003 when the Iraq army was seen as defeated, and lifted the measures taken in application of the Hague Conventions of 1907. The issue of military occupation is left unanswered by the Hague Conventions. One may find arguments for and against the continued applicability of the law of neutrality: the fact that occupation is a direct consequence of the armed conflict and is still a military act speaks in favour. On the other hand, occupation is also the consequence of military defeat of the occupied power. Since the hostilities between the former belligerents have come to an end (at least provisionally), the law of neutrality which is intended for active war is no longer applicable.[110]

What about states that are not in the unambiguous situation of Switzerland with its Permanent Neutrality? Three possibilities are often suggested as triggering the obligations related to Neutral Status: there is a Declaration of War, and so non-participating states are on notice that they have duties under the law of Neutrality; there are Declarations of Neutrality, and such Declarations trigger Neutral Status with the attendant rights and obligations; or the scope of the conflict is so extensive that the rules relating to Neutral Status apply just as they would have done in the past in time of War. The doctrine produces no clear answer.

The late LC Green continued to make the following suggestion in the 2008 version of his book:

> So that third states may know when the duties of neutrality are expected of them, belligerents should notify non-parties to the conflict that a state of war exists, although if it is clear that this is a matter of public notoriety and they do in fact know of the state of affairs they cannot defend what would otherwise be unneutral conduct on the lack of notification. Regardless of

[110] Seger, 'The Law of Neutrality' (n 105) at 254.

> notification, the rights and duties of neutrality come into effect with the outbreak of hostilities and it is usual, if no declaration of war has been announced or notifications thereof made for third states to issues declarations proclaiming their neutrality. Nevertheless, if the belligerents deny that a state of war exists, as did the United Kingdom at the time of the Suez conflict in 1956, they cannot complain if third states refuse to observe the rules of neutrality.[111]

Ultimately he has left the door open for non-participating neutral states to avoid the obligations that flow from Neutral Status in situations where the other states deny they are in a State of War. Should we insist today on more? Should the obligations of Neutral Status now apply to all states, irrespective of how the parties categorize their conflict? At one level it would seem a wise thing to expand the duties on non-participating states in this way. Duties of abstention in participation in the conflict could prevent the expansion or even the duration of the conflict, and this looks at first sight like a good thing. But the history of this topic suggests that things are not so simple.

Violations of the rights and duties of Neutral Status have themselves been historically used to justify the use of force and new Wars in their own right. Insisting on strict obligations connected to Neutral Status for every significant conflict could create more tension rather than less violence. It is said that it was the manner of the British denial of the right of the United States to trade with France that was one of the causes of the 1812 War.[112] Similarly, violations of the neutrality rights of the United States by Germany in the First World War were also a factor leading the United States to enter that War.[113] Such examples may seem irrelevant today, but the idea that the armed conflict can be taken to neutral states that are unwilling or unable to fulfil their neutral duties has some traction. It looks as though insisting on neutral duties could be another way to expand rather than reduce the use of force abroad.

In any event, as we saw above, a state that might have obligations that flow from some continuing idea of Neutral Status can apparently argue that it is

[111] LC Green, *The Contemporary Law of Armed Conflict*, 3rd edn (2008) at 298.

[112] For the detail of the background and further references to the official reasons in the Declaration of War, see Kert, *Prize and Prejudice: Privateering and Naval Prize in Atlantic Canada in the War of 1812* (1997).

[113] Neff, *The Rights and Duties of Neutrals* (n 57) at 162 suggests that the United States entered the First World War 'for the defence of its claimed neutral rights'; he also considers that concerns about neutral rights led to the US Declaration of War on the United Kingdom in 1812: Neff, 'A Tale of Two Strategies: Permanent Security and Collective Security', in Reginbogin and P Lottaz (eds), *Permanent Neutrality: A Model for Peace, Security, and Justice* (2020) 15–38 at 18.

breaching those obligations by way of reprisal in order to help a state that is the victim of an aggression by another state. We saw this with regard to the way the US *Manual* currently describes the idea of 'non-belligerency' by reference to its assistance to Great Britain in the early part of the Second World War.

Stepping back, we could ask, from a moral perspective, should we be encouraging aloofness or rather solidarity with the victims of aggression? An obligation of abstention for all states that were not participating in the War made sense when War was a duel to resolve a dispute or reclaim a debt and no international law prevented states from going to War in this way. But now that the recourse to force is forbidden, why should states be forbidden from acting in ways that punish the wrongdoing aggressive state and assist the innocent victim state?

Recent state action suggests that governments want to keep their options open. Italy chose to describe its position as one of non-belligerency with regard to the 2003 conflict with Iraq. Italy prohibited aircraft from taking off to bomb Iraq, but allowed troops not immediately engaged in combat activity to take off from Italian soil.[114] Ronzitti further explains how the strict obligations might have operated had Italy had Neutral Status rather than been simply 'non-belligerent'. A number of treaties between Italy and the United States regulate US military facilities in Italy: 'It would have been impossible to follow a strict policy of neutrality since it would have implied freezing NATO assets and interning American soldiers!'[115]

But the issues here, I would suggest, are more political than technical. As Ronzitti concludes, 'Non-belligerency could be an appropriate policy in those legal orders in which constitutional constraints limit the possibility of going to war.' As was seen in section 2.1.2, the Italian Constitution says that Italy rejects 'war as an instrument of aggression', but Ronzitti suggests that political or logistical support is not covered. Other NATO states, such as France, Germany and Turkey, all allowed overflight over their territory for this 2003 conflict with Iraq.[116] Some might see all this support as constituting violations of the obligations of Neutral Status.[117] The problem is that if such

[114] Ronzitti, 'Italy's Non-Belligerency During the Iraqi War', in Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 197–207.

[115] Ibid at 200. Note Hague V (1907) Art 11, 'A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.'

[116] Ronzitti, 'Italy's Non-Belligerency' (n 114) at 202.

[117] See Verlinden, 'The Law of Neutrality' (n 53) at 104.

obligations exist, states have ignored them.[118] There is little convincing evidence that states consider that the old law relating to Neutral Status applies to such a situation beyond the obligations of Permanent Neutrality adopted by Switzerland and others. It seems to me that the better view is that today Neutral Status is something that a state elects to have.[119] In sum, it seems fair to draw the partial conclusion that the duties attached to Neutral Status in a strict sense apply where states have formally declared themselves to have this Status.

As already noted, the content of the obligations that flow from Neutral Status are abstention, prevention and impartiality. Let us look into these obligations in a bit more detail.

The question of supplying arms is complicated. According to the abstention rule, Neutral Status means the state cannot supply either side with arms, etc,[120] and further rules cover the conversion of merchant ships to warships.[121] However, the Hague Conventions (1907) expressly state that 'A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.'[122] This has been understood to mean that there is no obligation to ban *private* arms sales, even though the obligation remains to ensure that any restrictions are applied impartially. Switzerland expresses this as an obligation to 'ensure equal treatment for belligerent states in respect of the exportation of war material.'[123]

[118] 'In post-World War II international armed conflicts States not parties have rarely complied with the comparatively strict rules of the law of neutrality laid down in the 1907 Hague Conventions V and XIII. Instead, they have more or less openly supported one of the belligerent parties, either economically or militarily.' Heintschel von Heinegg, ' "Benevolent" Third States' (n 73) at 548.

[119] See in this direction Roberts and Guelff (eds), *Documents on the Laws of War*, 3rd edn (2001) at 86 (with regard to Hague V) and at 127–28 (with regard to Hague XIII): 'UN member states are free to be neutral or non-belligerent if, in an armed conflict, the UN does not call upon all members to take action involving the use of force under Chapter VII of the Charter.' Of course if two states went to War and insisted on other states abiding by the Neutrality obligations in the Hague Conventions V and XIII, those obligations could perhaps be seen as valid as a matter of treaty law, but this rather suggests that states retain the right to go to War and benefit from the Belligerent Rights associated with being at War. We will be questioning in Chapter 8 whether such Belligerent Rights should continue to exist.

[120] See Hague XIII (1907) Art 6.

[121] See Hague VII Convention Relative to the Conversion of Merchant Ships into War-ships (1907).

[122] See Hague V (1907) Art 7; Hague XIII (1907) Art 7.

[123] 'Neutrality', Directorate of International Law, Federal Department of Foreign Affairs, Switzerland, available at https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/neutrality.html.

Today, however, arms exports are usually strictly regulated and export licences would be required from the state. The state's involvement in private arms supplies to a state involved in an international armed conflict is going to be such that the old laissez-faire idea of non-interference with the private sector's exports of arms makes little sense. Bothe is clear that, in his opinion, a new rule has emerged, which would consider a state's authorization of arms transfers from the private sector to violate the obligations of a state that has assumed Neutral Status:

> 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 accords with the 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.[124]

Furthermore, in any event, all states will have obligations not to aid or assist violations of international law by the receiving state.[125] States parties to the Arms Trade Treaty (2013) will have additional obligations where the arms or ammunition would or could be used for certain violations of international law, including war crimes.[126]

Special rules apply in treaty law forbidding recruitment to assist the belligerents,[127] duties to intern the troops of belligerent armies on the territory of states with Neutral Status,[128] and obligations related to the fitting out or arming of ships in the jurisdiction of these states. A state with Neutral Status has an obligation to do what it can 'to prevent the fitting out or arming of

[124] Bothe, 'The Law of Neutrality', in Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict*, 3rd edn (2013) 549–80 at 562; see also Neff, *The Rights and Duties of Neutrals* (n 57) 201–02.

[125] See Art 16 of the ILC's Articles on State Responsibility (2001); and Jackson, *Complicity in International Law* (2015).

[126] For the details, see Casey-Maslen, Clapham, Giacca and Parker, *The Arms Trade Treaty: A Commentary* (2016).

[127] Hague Convention V (1907) Art 4.

[128] Hague Convention V (1907) Art 11.

any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace'.[129] A second connected rule for Neutral Status demands that such states prevent adapted ships leaving 'for use in war'.[130]

Lastly in this context, we can mention Seger's examination of what it means to ensure impartiality or equal treatment:

> [T]he principle of equal treatment only applies to acts of the neutral state which are of military relevance to the belligerents. It does not require the neutral to treat them impartially or equally in other areas, such as politics, human rights, or the media. For instance, a neutral state may criticize one party for resorting to armed force or for not respecting the laws of armed conflict without violating its neutrality.[131]

Switzerland has the status of 'Permanent Neutrality'. As Seger explains:

> [A] permanent neutral state fully respects its obligations if it practises a military neutrality and a 'political' neutrality is not required. As an example, a neutral power is entirely free to recognize other states, to establish diplomatic relations or not, and to take positions on violations of human rights or international humanitarian law.[132]

Beyond the legal obligations it has assumed, Switzerland has distinguished a separate neutrality policy. 'The policy of neutrality is not governed by law. It is a combination of all the measures a neutral state takes of its own accord to ensure the clarity and credibility of its permanent neutrality.'[133] There may be some international legal obligations that apply to a state with Permanent Neutrality even in peacetime. For example, such a state could not join a military alliance that demanded military assistance in the event that another member is attacked.

[129] Hague Convention XIII (1907) Art 8.
[130] Hague Convention XIII Art 8.
[131] Seger, 'The Law of Neutrality' (n 105) at 257; see also, on human rights law and neutrality, Schindler, 'Neutrality and Morality: Developments in Switzerland and in the International Community', 14 *American University International Law Review* (1998) 155–70.
[132] Segar (n 105) at 269.
[133] 'Neutrality', Directorate of International Law, Federal Department of Foreign Affairs, Switzerland, available at https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/neutrality.html.

2.3.5 The Question of the Rights of a Belligerent State over Ships and Aircraft from Neutral States

We shall see in Chapter 8 that there are real questions to be answered when it comes to deciding if the traditional Belligerent Rights of a State at War should continue to be applied in a world where recourse to War has been abolished by law. There are also a number of new practical challenges that suggest that searching for, diverting, seizing, or even attacking or destroying ships flying neutral flags are no longer feasible courses of action in the modern world.[134]

The law of economic naval warfare, whether or not it has survived the outlawing of war and the arrival of the UN Charter, was developed and distorted in the two World Wars, with the result that hundreds of neutral merchant ships were destroyed and thousands of crew members and passengers lost their lives, as each side sought to demolish the economic life of their enemy. As Humphrey explains, this traditional law 'was developed for and clearly applicable to war, and war on a scale requiring the economic destruction of the opposition where the very survival of the state was at stake'.[135]

I will be suggesting that we may be making a fundamental error if we blithely transfer these Belligerents Rights for states at War to today's armed conflicts.

For the moment it is enough to highlight that when these rules for warfare at sea were last codified by experts in the *San Remo Manual* in 1994, the commentary concluded that, while it is clear that the 'protective rules of

[134] See Haines, 'War at sea: Nineteenth-century laws for twenty-first century wars?', 98(2) *IRRC* (2016) 419–47. The far-reaching belligerent rights that seem to remain on the books, such as blockade and capture of enemy goods, and even the destruction of enemy merchant shipping, have been similarly questioned by Haines in an earlier piece as not only 'out of fashion' and politically problematic, but also in some cases unacceptable and absurd. 'The idea that it would today be generally acceptable for belligerent warships to trawl the oceans in search of belligerent merchant shipping and, when finding it, to destroy it, for the simple reason that it was not convenient to escort back to their own ports as prize, is close to absurd.' S Haines, 'The United Kingdom's Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared', 36 *Israel Yearbook of Human Rights* (2006) 89–118 at 113–14. Greenwood has also questioned the extent to which the international community would tolerate the degree of interference that goes with visit and search, condemnation of contraband in prize, and the use of force against neutral shipping. For detail, see Greenwood, 'Self-Defence and the Conduct of International Armed Conflict', in Dinstein and Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 273–88 esp at 283, although he leaves open the possibility that the traditional law developed in the two World Wars could apply in the same way 'in a conflict on the massive scale of the two World Wars'. He also suggests (ibid at 286) that 'a decision by States to regard a conflict as war would be factual rather than legal. It would normally reflect the fact that the conflict was on a considerable scale and this in turn would have a bearing on the degree of force that could be regarded as reasonably necessary and proportionate in self-defence.'

[135] Humphrey, 'Belligerent Interdiction' (n 74) at 28.

humanitarian law' apply from the moment armed force is used by the parties to the conflict, it is 'less clear if all the traditional rules relating to the duties of neutral states automatically come into operation at the same time'.[136]

The *Manual* continues, however, to say that once the belligerent rights associated with economic warfare are imposed on neutral shipping and aircraft, then one applies the rules in the *Manual* applicable to the relationship between belligerents and neutral ships and aircraft. The question left unanswered is: when exactly does this point come?[137] The post-Second World War examples of states interfering with neutral shipping mostly seem to skirt an application of traditional Belligerent Rights in time of War, and rely instead on notions of self-defence, defensive quarantine, or interdiction.[138]

We will examine in detail the rights claimed by belligerents against neutral shipping in Chapter 8. For present purposes we can mention the following: the right to capture neutral ships carrying contraband (goods destined for military use by the enemy); the right to capture neutral ships for breach of blockade; and the right to attack neutral ships for resisting such capture or failing to stop.[139]

Traditionally these economic warfare rights to capture neutral ships and goods on the high seas were applied as of right by belligerent states in a State of War. Now that force has to be justified by the Security Council, or as a proportionate and necessary act of self-defence, I will suggest that any remaining belligerent rights to acquire neutral property at sea or use force against neutral shipping are constrained by the UN Charter and the parallel customary international law.

The UK *Manual of the Law of Armed Conflict* states that the UN Charter rule that force can only be used by a belligerent state where necessary and proportionate to the 'achievement of the goal for which force may be used' applies to the detailed conduct of maritime warfare. And according to this

[136] Doswald-Beck (ed), *San Remo Manual* (n 85) at 74.

[137] In the past Prize Courts in the Belligerent States would be granted jurisdiction over ships and goods seized from neutral states and their jurisdiction would be associated with the State of War. One might ask whether today non-participating states would accept the jurisdiction of a Prize Court answerable only to the belligerent capturing state (see section 8.5 for more detail on prize Courts). The proposals for an International Prize Court or compulsory jurisdiction for the Permanent Court of Arbitration have not borne fruit: see the Institut de droit international's *Règlement international des prises maritimes* (1897) paras 100–109; Hague Convention (XII) relative to the Creation of an International Prize Court (1907); the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, 33 *AJIL* (supplement) (1939) 175–203, Art 113.

[138] Neff, *The Rights and Duties of Neutrals* (n 57) 210–17.

[139] *San Remo Manual* (n 85) at paras 67, 68, 146, 153.

Manual, in 'a conflict of limited scope' the belligerent states are 'constrained' to a greater extent than the traditional rules in the action they may lawfully take 'against the shipping or aircraft of states not involved in the conflict'.[140] The phrases 'conflict of limited scope' and 'states not involved in the conflict' suggest that we are speaking of something less than Declared War and something other than Neutral Status. The *Manual*, however, does not elaborate further, nor on how such constraints would operate, adding only 'In cases where those constraints apply, further guidance will be given by the Ministry of Defence.'

Humphrey, writing in 1997 when he was the UK's Chief Naval Judge Advocate, explains the consequences of demanding that belligerents apply not only the traditional law regarding interference with neutral shipping, but also the restraints of proportionality and necessity inherent in the law of self-defence:

> [I]t follows that the legality and extent of measures of economic interdiction are dependent on the intensity of the struggle in which they are sought to be implemented: in a large scale conflict or one in which the very survival of the state is in jeopardy the full range and extent of economic measures permitted by the traditional law would be justified; in a small conflict or one of less desperate intensity such full measures would be less justified or not justifiable at all.[141]

Although this approach, which builds the limits of self-defence into the tactical calculation of how much force can be used against neutral shipping, has been roundly rejected by some experts,[142] others (and a majority of those involved in the *San Remo Manual*[143]) are of the opinion that the

[140] See the UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) (as amended) at 348–49, paras 13.3 (for force used by a belligerent against shipping or aircraft of 'states not involved in the conflict') and 13.9E (for force used in neutral waters), and generally on neutrality paras 1.42–1.43; Greenwood, 'Scope of Application of Humanitarian Law', in Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict*, 2nd edn (2007) 45–78 at 54. See further Greenwood, 'Comments', in Dekker and Post (eds), *The Gulf War of 1980–1988* (1992) 212–16 at 216 and 'Comments' by Bring in Dekker and Post at 243–4; and see the US *Manual on the Law of War* at para 15.2.3.1 and the reference in fn 40; compare Doswald-Beck (ed), *San Remo Manual* (n 85) at 101–02 discussion on para 22;

[141] Humphrey, 'Belligerent Interdiction' (n 74) at 38.

[142] Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts' (n 73) esp 561–65.

[143] See Doswald-Beck, 'The San Remo Manual on International Law Applicable to Armed Conflict at Sea', 89 *AJIL* (1995) 192–208 at 197.

logical consequence of the prohibition on the use of force in inter-state relations means that 'Unless the belligerent has the right to self-defence in the first place, it cannot validly act against the neutrals through the exercise of its claimed belligerent rights.'[144] This makes sense in the abstract, but the problem remains that, today, it is rare that a state considers that it is the aggressor, or that its actions are not somehow authorized under the UN Charter. Rather than seeking to limit Belligerent Rights over enemy and neutral property to those exercising self-defence, perhaps we ought to admit that these detailed rights and obligations for Belligerent and Neutral States were developed for periods when there could be little doubt that states were at War and that the regime would continue until the agreement of an armistice or a peace treaty. In other words, rather than adjusting such Wartime Belligerent Rights for the modern world, perhaps we should admit that they should no longer exist.

The starting point for the codification of the law of seizing private property for War at sea was that the right of visit existed from the time when the Declaration of War had been notified to states, and continued up until the time of a peace treaty, armistice or truce.[145] One could make the case that these Belligerent Rights over neutral shipping and aviation only apply in a formal State of War (and this is why I have insisted in capitalizing Belligerent Rights, they are directly derived from the old idea of a State of War and arguably have no other legitimacy). The expert and military manuals, however, have chosen to leave open the possibility of exercising such belligerent rights in armed conflicts of a certain duration that look a bit like wars. Those who continue to believe in belligerent rights in this context have avoided too much detail on the threshold question by explaining that these claimed rights in practice only occur from the moment that a belligerent state resorts to 'recognized methods and means by, for example interfering with neutral shipping and aviation.'[146]

[144] Orakhelashvili, 'Overlap and Convergence: The Interaction Between *Jus ad Bellum* and *Jus in Bello*', 12 *Journal of Conflict and Security Law* 2 (2007) 157–96 at 192; for the details of some of these claimed Belligerent Rights, see Ch 8.

[145] See the Institut de droit international's 'Traitement de la propriété privée dans la guerre maritime (1877) Zurich Session, para V : 'Le droit de visite peut être exercé depuis le moment où la déclaration de guerre a été notifiée jusqu'à la conclusion de la paix. Il est suspendu pendant une trêve ou un armistice.' The London Declaration concerning the Laws of Naval War (1909), which did not enter into force, was to apply under Article 66 in any war in which all the belligerents would be parties to the Declaration.

[146] Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts' (n 73) at 561.

As I will be arguing in Chapter 8 that no such belligerent rights should continue to exist over enemy or neutral ships and goods, there is no need for me here to add to the doctrine and try to develop a threshold for their application. There is no need to adapt the old ideas of economic warfare that allowed that a state at War can capture neutral ships and aircraft accused of unneutral service. One might recall the origin of some of these rules of unneutral service. The Rule of the War of 1756 is explained by Neff as stemming from the idea that colonial trading should be reserved for subjects of the colonial state. So when France opened its colonial trade in the West Indies to the Dutch, the British considered that neutral Dutch ships carrying French goods could be interfered with and the French goods seized as good prize. The justification for the Rule of 1756, according to Neff, was that the British considered that such seizures were justified, as neutrals were 'not allowed to enter a trade during wartime which was closed to them in peacetime'.[147] Belligerent Rights were in this case rights assumed by naval powers over the nationals from neutral states in order to retain their economic dominance.

Such seizures of neutral property could of course also be further justified as tackling neutral behaviour that is assisting the enemy. But today, why should a belligerent state engaged in an armed conflict have any rights over neutrals seeking to sail the high seas and engage in trade? The fact that naval powers enforced related rights for hundreds of years does not make it just. The idea of War (Declared or not) should no longer be used to capture neutral ships, planes and property, not least because it is a small step from a right to capture to a claimed right to destroy or attack neutral ships and aircraft.[148]

[147] Neff, *The Rights and Duties of Neutrals* (n 57) at 66.

[148] See further Ch 8; for the rights to attack, see *San Remo Manual* (n 85) paras 67 and 68, for the destruction of neutral vessels see ibid para 151.