

OPTIONAL AND ILL-DEFINED? RECONSIDERING STRICT AND QUALIFIED NEUTRALITY IN LIGHT OF STATE RESPONSES TO RUSSIA'S INVASION OF UKRAINE

I INTRODUCTION

Russia's ongoing invasion of Ukraine is an international crisis of the highest order. Many States have rallied in support of Ukraine, dedicating billions in aid to buoy its efforts at self-defence while imposing extensive sanctions on Russia.¹ At least 30 States, to date, have also provided Ukraine military aid such as arms, armaments and military vehicles.² These actions, and their uncertain legal basis, have triggered an avalanche of scholarship about the law of neutrality³ —

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¹ See, eg: White House, 'Fact Sheet: One Year of Supporting Ukraine' (Press Release, 21 February 2023) <<https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/21/fact-sheet-one-year-of-supporting-ukraine/>>; Comment, 'The United States and Allies Provide Military and Intelligence Support to Ukraine' (2022) 116(3) *American Journal of International Law* 646; 'EU Sanctions against Russia Following the Invasion of Ukraine', *European Commission* (Web Page) <https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en>; 'Russia's Invasion of Ukraine', *Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/crisis-hub/invasion-ukraine-russia>>.

² Christoph Trebesch et al, 'The Ukraine Support Tracker: Which Countries Help Ukraine and How?' (Working Paper No 2218, Kiel Institute for the World Economy, July 2023) <<https://www.ifw-kiel.de/publications/ukraine-support-tracker-data-20758/>>; Claire Mills, 'Military Assistance to Ukraine since the Russian Invasion' (Research Briefing No 9477, Parliamentary Library, United Kingdom House of Commons, 14 August 2023) 8.

³ See, eg: Kai Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and Thus Be Exposed to Countermeasures?', *European Journal of International Law: Talk!* (Blog Post, 2 March 2022) <<https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/>>; Pearce Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' (2023) 72(2) *International and Comparative Law Quarterly* 527; Wolff Heintschel von Heinegg, 'Neutrality in the War against Ukraine', *Articles of War* (Blog Post, 1 March 2022) <<https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>>; CL Lim and Ryan Martínez Mitchell, 'Neutral Rights and Collective Countermeasures for *Erga Omnes* Violations' (2023) 72(2) *International and Comparative Law Quarterly* 361; Stephen P Mulligan, 'International Neutrality

an area which has remained somewhat controversial since at least World War I.⁴ In brief, to observe strict neutrality,⁵ a State must abide by all requirements established by customary international law and codified in the two Hague conventions on neutrality: the *Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land* ('Hague V')⁶ and the *Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War* ('Hague XIII').⁷ Strict neutrality requires that a neutral State not involve itself in the conflict in any way and treat all belligerents with complete impartiality. But at times, a neutral State may determine that certain aspects of an armed conflict permit the requirements of strict neutrality to be qualified: for example, that one State party to an armed conflict has clearly violated international law by committing an act of aggression against another. In this situation, it may assume a position of qualified neutrality, where it deviates from some of the requirements of strict neutrality while still purporting to maintain neutral status.

Although this comment will briefly address the basis and content of both strict and qualified neutrality, that will not be its focus. Based on extensive recent State practice and the conclusions of many international law commentators,⁸ this comment will assume that: (1) qualified neutrality is a valid position under international law (in appropriate circumstances); and (2) provision of arms and funding is not sufficient to make a State a party to the armed conflict, or co-belligerent. The comment will also assume that the law of neutrality remains relevant to modern armed conflict and is not, as has sometimes been claimed, obsolete.⁹ However, it will query what scope of application strict neutrality now has, given the current developments in the

Law and US Military Assistance to Ukraine' (Legal Sidebar No LSB10735, Congressional Research Service, United States Congress, 26 April 2022); Raul (Pete) Pedrozo, 'Ukraine Symposium: Is the Law of Neutrality Dead?', *Articles of War* (Blog Post, 31 May 2022) <<https://lieber.westpoint.edu/is-law-of-neutrality-dead/>>; Michael N Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force', *Articles of War* (Blog Post, 7 March 2022) <<https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>> ('Providing Arms and Materiel to Ukraine'); Michael N Schmitt, "'Strict" versus "Qualified" Neutrality', *Articles of War* (Blog Post, 22 March 2023) <<https://lieber.westpoint.edu/strict-versus-qualified-neutrality/>> ('Strict versus Qualified Neutrality').

⁴ Detlev F Vagts, 'The Traditional Legal Concept of Neutrality in a Changing Environment' (1998) 14(1) *American University International Law Review* 83, 88–95.

⁵ Also called 'traditional' or 'Hague' neutrality.

⁶ *Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, opened for signature 18 October 1907, 205 CTS 299 (entered into force 26 January 1910) ('Hague V').

⁷ *Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War*, opened for signature 18 October 1907, 205 CTS 395 (entered into force 26 January 1910) ('Hague XIII').

⁸ See above n 3.

⁹ See below n 17 and accompanying text.

area: when must a State adhere to all the requirements of strict neutrality in order to claim neutral status?

It concludes that such situations may now be limited. Based primarily on State practice emerging out of the Russia–Ukraine conflict, this comment concludes that numerous valid justifications could be raised by a State that does not wish to adhere to strict neutrality. Further, it appears that decisions reached by States within the United Nations (‘UN’) may now determine, in even more contexts, the applicable role and obligations of third-party States when armed conflict occurs. This may be directly, because of a determination by the Security Council,¹⁰ or indirectly, where States respond to the General Assembly formally assigning blame to one belligerent.

II STRICT NEUTRALITY

The two main conventions governing the law of neutrality are *Hague V* and *Hague XIII*, both from 1907. Despite the naming dichotomy, these conventions do not strictly set out the rules applying to land and sea respectively and have generally been taken as together representing the law¹¹ — at least, the law as at 1907, before two world wars upset the proverbial apple cart.

Under the provisions set out therein, a neutral State must treat all belligerents impartially.¹² In particular, ‘[t]he supply, in any manner ... by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden’.¹³ Even the provision of significant financial support to one side of the conflict may potentially be considered non-neutral.¹⁴ The legal problem with the actions of many ‘neutral’ States towards the Ukraine conflict is immediately apparent.

The need for the law of neutrality has been explained in two main ways. Non-belligerent States remaining strictly neutral prevents maritime and other commerce from grinding to a halt when some States are at war:¹⁵ those that are not directly

¹⁰ Such determinations are binding on States under the *Charter of the United Nations* arts 2(5), 25 (‘UN Charter’). See generally Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004).

¹¹ Heintschel von Heinegg (n 3).

¹² *Hague V* (n 6) art 9; *Hague XIII* (n 7) Preamble para 5, art 9.

¹³ *Hague XIII* (n 7) art 6.

¹⁴ Lim and Mitchell (n 3) 366; Unit for Relations with Armed and Security Forces, International Committee of the Red Cross, *The Law of Armed Conflict: Neutrality* (Lesson No 8, June 2002) 6 <https://www.icrc.org/en/doc/assets/files/other/law8_final.pdf>. Although not explicitly set out in *Hague V* (n 6) and *Hague XIII* (n 7), this is based on the requirement that neutral States be impartial to the belligerent parties.

¹⁵ See, eg, Constantine Antonopoulos, *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality* (Cambridge University Press, 2022) 1–2.

involved in the hostilities can continue to trade non-military goods as usual, with only minor interruptions for inspection by belligerents. More crucially, impartiality by neutral States — and the obligation on belligerents to respect this status — prevents them being dragged into and thus expanding the conflict.¹⁶

For decades, States and academics alike have debated whether strict neutrality is obsolete.¹⁷ The International Court of Justice ('ICJ') found that the law of neutrality continues to apply to all armed conflict, but kept a foot in each camp when it added 'whatever its content'.¹⁸ *Hague V* and *Hague XIII* do not have a huge number of parties (34 and 30, respectively),¹⁹ but these include many significant military States (such as China, France, Russia and the United States ('US'))²⁰ and the conventions were ultimately codifications of existing customary international law developed over the course of the 19th century.²¹ State manuals pertaining to the law of armed conflict ('LOAC') are similarly equivocal: although some express doubt as to the extent of the law of neutrality's relevance in the context of the modern UN security regime,²² they often set out in great detail the granular requirements of strict

¹⁶ See, eg: Pedrozo (n 3); Clancy (n 3) 527.

¹⁷ See, eg: *Report of the International Law Commission: Sixty-Second Session (3 May–4 June and 5 July–6 August 2010)*, UN Doc A/65/10 (2010) 311 [281]; Antonopoulos (n 15) 4–5.

¹⁸ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 261 [89] ('*Nuclear Weapons Advisory Opinion*').

¹⁹ Australia and the United Kingdom, for example, are not party to either.

²⁰ 'Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land: The Hague, 18 October 1907', *International Humanitarian Law Databases* (Web Page) <<https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-v-1907/state-parties?activeTab=undefined>>; 'Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War: The Hague, 18 October 1907', *International Humanitarian Law Databases* (Web Page) <<https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-xiii-1907?activeTab=default>>.

²¹ See, eg, Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Martinus Nijhoff, 4th ed, 2004) 1399.

²² See, eg: Australian Defence Force, *ADDP 06.4: Law of Armed Conflict* (Defence Publishing Service, 2006) 11-2–11-3 [11.7] ('*Australian LOAC Manual*'); Jes Rynkeby Knudsen (ed), *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (Danish Ministry of Defence and Defence Command Denmark, 2016) 62–3 ('*Danish LOAC Manual*'); New Zealand Defence Force, *DM 69 (2 ed) Manual of Armed Forces Law: Law of Armed Conflict* (2nd ed, 2019) vol 4, 16-4 [16.2.2]–[16.2.4] ('*NZ LOAC Manual*'); Joint Doctrine and Concepts Centre, *JSP 383: The Joint Service Manual of the Law of Armed Conflict* (2004) 19–20 [1.42.1]–[1.42.2] ('*UK LOAC Manual*'); Office of General Counsel, Department of Defense, *Law of War Manual* (rev ed, 2023) 965–7 [15.2.2]–[15.2.3.1] ('*US LOAC Manual*').

neutrality derived from the broad principles set out in *Hague V* and *Hague XIII*.²³ Overall, strict neutrality remains broadly on the books.²⁴

III EXCEPTIONS FROM OBSERVING STRICT NEUTRALITY

Though strict neutrality may not be obsolete, it has become increasingly complicated to identify a scenario in which its full requirements must be observed in order for a State to claim neutral status. Current State practice suggests that a growing range of situations, all to some extent dependent on the response of the UN to the outbreak of armed conflict, may allow strict neutrality to be qualified.

A Security Council Decision

Under the *Charter of the United Nations* ('*UN Charter*'), the Security Council can simply require UN member States to assist it with peace enforcement action and can therefore override a State's decision to remain neutral.²⁵ Assuming member States comply with the requirements of the *UN Charter*, this renders any status they assume under the law of neutrality in regard to an armed conflict irrelevant. To be clear: this should, in theory, make the law of neutrality entirely irrelevant. When an armed conflict arises somewhere in the world, the Security Council can dictate how this should be managed, and States must then present a collective front with none allowed to take matters into their own hands or opt out of the decision.

Unfortunately, as is now painfully well understood, when one of the five permanent members has a stake in an armed conflict it often becomes practically impossible for the Security Council to take effective action. Even if the Security Council does act, it does not necessarily achieve decisive results. In such situations it might appear that States seeking to remain neutral must adhere to strict neutrality — however,

²³ See generally: *Australian LOAC Manual* (n 22) ch 11; *Danish LOAC Manual* (n 22) chs 13–14; Bundesministerium der Verteidigung, *Law of Armed Conflict Manual* (2013) ch 12; Wolff Heintschel v Heinegg and Hans-Joachim Unbehau, *Commander's Handbook: Legal Bases for the Operations of Naval Forces*, tr Bundessprachenamt (German Navy, 2002) pt II; *NZ LOAC Manual* (n 22) ch 16; Norwegian Defence University College, *Manual of the Law of Armed Conflict* (Norwegian Chief of Defence, 1st rev ed, 2018) 23 [1.44]–[1.45], chs 10–11; *UK LOAC Manual* (n 22) 20 [1.43], chs 12–13; Navy Warfare Development Command, *NWP 1-14M, MCTP 11-10B, COMDTPUB P5800.7A: The Commander's Handbook on the Law of Naval Operations* (Navy Warfare Library, 2022) ch 7; *US LOAC Manual* (n 22) ch XV.

²⁴ See, eg: Schmitt, 'Providing Arms and Materiel to Ukraine' (n 3); Pedrozo (n 3).

²⁵ *UN Charter* (n 10) arts 2(5), 25. See generally: de Wet (n 10); 'Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression', *United Nations Security Council* (Web Page) <<https://www.un.org/securitycouncil/content/repertoire/actions>>.

this has long been questioned,²⁶ and clearly has not been observed in relation to Ukraine.

B Uniting for Peace *Resolution*

Where the Security Council does not act — whether due to veto by or failure to agree among permanent members — applying strict neutrality would effectively prevent States from assisting a victim of aggression, unless they are willing to join the war as a belligerent on the side of the victim State (in the exercise of collective self-defence). The *Uniting for Peace* procedure can give the General Assembly a voice in this situation,²⁷ allowing it to give non-binding recommendations to member States for the restoration of peace.

The *Uniting for Peace* resolution states:

if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.²⁸

The first emergency special session of the General Assembly was held in 1956, in response to the Suez Crisis.²⁹ There have since been 10 more, including that convened in response to the invasion of Ukraine.³⁰

The General Assembly passed a *Uniting for Peace* resolution shortly after the invasion of Ukraine, with overwhelming support of 141 votes in favour to 5 against (with 35 abstentions, including China and India).³¹ It should be noted that the

²⁶ See, eg, Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, 1995) 87–8 [13.11]–[13.12].

²⁷ *Uniting for Peace*, GA Res 377(V), UN Doc A/RES/377(V) (3 November 1950) (*'Uniting for Peace Resolution'*). See also Michael P Scharf, 'Power Shift: The Return of the Uniting for Peace Resolution' (2023) 55(1) *Case Western Reserve Journal of International Law* 1, 7.

²⁸ *Uniting for Peace Resolution* (n 27) 10 [1].

²⁹ GA Res 997 (ES-I), UN Doc A/RES/997(ES-I) (2 November 1956) ('GA Res 997 (ES-I)').

³⁰ 'UN General Assembly Resolutions Tables', *Dag Hammarskjöld Library* (Web Page) <<https://research.un.org/en/docs/ga/quick/emergency>>.

³¹ *Aggression against Ukraine*, GA Res ES-11/1, UN Doc A/RES/ES-11/1 (18 March 2022, adopted 2 March 2022) (*'Aggression against Ukraine Resolution'*).

resolution did not approve sanctions against Russia or military aid to Ukraine.³² The closest it came was a statement that it welcomed efforts by member States (and others) to ‘support the de-escalation of the current situation’.³³ However, the resolution ‘[d]eplore[d] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the [UN Charter]’.³⁴ It demanded that Russia ‘cease its use of force’³⁵ and ‘immediately, completely and unconditionally withdraw’ from Ukraine.³⁶

Interestingly, the most recent example is far from the first time that the General Assembly has attributed blame to one belligerent during an emergency special session. In the very first resolution of the first special session, the General Assembly noted that ‘the armed forces of Israel ha[d] penetrated deeply into Egyptian territory in violation of the General Armistice Agreement between Egypt and Israel’.³⁷ Another session held in 1956 responded to the short-lived occupation of Budapest by Soviet Union forces (ostensibly to suppress widespread political demonstrations); the General Assembly ‘condemn[ed] the use of Soviet military forces to suppress the efforts of the Hungarian people to reassert their rights’.³⁸ In January 1980, the General Assembly ‘[s]trongly deplore[d] the recent armed intervention in Afghanistan’,³⁹ while later that same year it ‘[c]all[ed] upon Israel to withdraw completely and unconditionally from all the Palestinian and other Arab territories occupied since June 1967’.⁴⁰

But despite such previous apportionment of blame, States have not previously used a *Uniting for Peace* resolution to justify departures from the strict law of neutrality. State responses to Ukraine now suggest that the finding of an act of aggression on the part of one belligerent is enough for States to adopt a position of qualified neutrality. Even beyond simply refusing to abide by strict neutrality themselves,

³² Those following it have also been silent on the matter. See, eg: *Territorial Integrity of Ukraine: Defending the Principles of the Charter of the United Nations*, GA Res ES-11/4, UN Doc A/RES/ES-11/4 (13 October 2022, adopted 12 October 2022); *Furtherance of Remedy and Reparation for Aggression against Ukraine*, GA Res ES-11/5, UN Doc A/RES/ES-11/5 (15 November 2022, adopted 14 November 2022); *Principles of the Charter of the United Nations Underlying a Comprehensive, Just and Lasting Peace in Ukraine*, GA Res ES-11/6, UN Doc A/RES/ES-11/6 (2 March 2023, adopted 23 February 2023).

³³ *Aggression against Ukraine Resolution* (n 31) 4 [15].

³⁴ *Ibid* 3 [2].

³⁵ *Ibid* 3 [3].

³⁶ *Ibid* 3 [4].

³⁷ GA Res 997 (ES-I) (n 29) Preamble para 1.

³⁸ GA Res 1004 (ES-II), UN Doc A/RES/1004/ES-II (4 November 1956) Preamble para 4.

³⁹ *Situation in Afghanistan and its Implications for International Peace and Security*, GA Res ES-6/2, UN Doc A/RES/ES-6/2 (14 January 1980) 2 [2].

⁴⁰ *Question of Palestine*, GA Res ES-7/2, UN Doc A/RES/ES-7/2 (29 July 1980) 3 [7].

States have in fact exerted pressure on others to follow suit.⁴¹ The rationale for such pressure seems to be: if extensive State practice does now demonstrate a customary international law basis for States to lawfully support a victim of aggression without giving up their neutrality, why would they still refuse to do so? The degree of neutrality adopted by a State then appears motivated predominantly by political and economic self-interest, rather than any legal compulsion, which has been seen as distasteful by States supporting Ukraine (in light of its dire situation).⁴² In these sentiments are faint echoes of the scornful attitude towards permanently neutral States after World War II.⁴³

Two aspects remain obviously unclear in regard to when such a resolution could serve as justification for adopting qualified neutrality. The first is whether the practice established in the current war could be generalised to other armed conflicts (especially where the aggressor is not a P5 member,⁴⁴ but the Security Council's action is blocked due to P5 political interests). The second is the level of concurrence required for States to use a *Uniting for Peace* resolution as a basis for adopting qualified neutrality. As stated above, in the case of Russia's invasion of Ukraine, the General Assembly vote was 141 to 5, overwhelmingly confirming Russia had committed an act of unlawful aggression. Could qualified neutrality apply on this basis in a case where the vote was, say, 100 to 46? 80 to 66? There is as yet no basis for assigning any threshold. Regardless, it must be acknowledged that there is now precedent allowing a finding of aggression by the General Assembly potentially to excuse States from adherence to strict neutrality.

⁴¹ See, eg: Clea Caulcutt, 'Macron Slams Nations Staying Neutral on Ukraine as "Complicit" with Russia', *Politico* (online, 20 September 2022) <<https://www.politico.eu/article/macron-accuses-neutral-nations-complicity-russia-new-imperialism-ukraine-war-un-general-assembly/>>; Andrea Shalal, 'US Aims to Rally Allies to Up Pressure on Russia, Shore Up Ukraine Support', *Reuters* (online, 11 April 2023) <<https://www.reuters.com/world/europe/us-aims-rally-allies-up-pressure-russia-shore-up-ukraine-support-2023-04-10/>>; Constanze Stelzenmüller, 'Ukraine Crisis Could Transform the Future of Neutrality', *Financial Times* (online, 23 November 2022) <<https://www.ft.com/content/2ddad5db-3500-44b9-a93e-d5ca40c7409e>>; Melissa Conley Tyler, 'Why Outrage Over the War in Ukraine Isn't Universal', *The Strategist* (online, 7 March 2023) <<https://www.aspistrategist.org.au/why-outrage-over-the-war-in-ukraine-isnt-universal/>>; Abdullah Bozkurt, 'Russia Turned to Turkey on Land Transportation to Avoid Western Sanctions', *Nordic Monitor* (online, 19 December 2022) <<https://nordicmonitor.com/2022/12/russia-turned-to-turkey-on-land-transportation-to-avoid-western-sanctions/>>.

⁴² See, eg, Afsah Qazi, Muhammad Shoaib and Muhammad Faisal, 'Russia-Ukraine War and the Indo-Pacific: A Perspective from Pakistan' (2023) *Journal of Asian and African Studies* 1745-2538:1-18, 11.

⁴³ See, eg, Leos Müller, *Neutrality in World History* (Routledge, 2019) 11.

⁴⁴ A P5 member is a permanent member of the UN Security Council. The P5 members are China, France, Russia, the United Kingdom and the US.

C *Self-Defence and the Responsibility of States for Internationally Wrongful Acts*

Another rationale put forward for adopting a position of qualified neutrality is the justification of assisting, via non-violent means, a State which is acting in legitimate self-defence. Article 51 of the *UN Charter* confirms the inherent right of States to act in ‘individual or collective self-defence’ in response to an armed attack, until the Security Council takes necessary measures. Neutral States may view the provision of arms to a belligerent State, in apparent violation of the obligations of neutrality, as justified where: (1) that State is responding in legitimate self-defence; and (2) the Security Council has failed to act, or has taken actions which have not yet restored international peace and security. The argument is that this support is a form of ‘countermeasure’ justified by the aggressor State’s violation of international law, which permits a neutral State to support the victim State without joining in collective self-defence and thus becoming a co-belligerent.⁴⁵

Acts of aggression by one State against another are a violation of *jus cogens*, the peremptory norms of international law from which States may not derogate.⁴⁶ Article 41 of the *Responsibility of States for Internationally Wrongful Acts* (*RSIWA*) provides that States ‘shall cooperate to bring to an end through lawful means any serious breach’ of a peremptory norm.⁴⁷ Some commentators have argued this could go beyond a mere right to qualify neutrality and become arguably a duty for States to act in support of Ukraine via collective countermeasures.⁴⁸

But is the provision of military aid to Ukraine, contrary to a claimed neutral status, a lawful means to respond to Russia’s violation of a peremptory norm? It certainly does not appear to be a permitted countermeasure under *RSIWA*, which provides that ‘[c]ountermeasures are limited to the non-performance for the time being of international obligations’.⁴⁹ Countermeasures also specifically cannot extend to the use of force,⁵⁰ which the ICJ has determined includes the provision of arms and training.⁵¹ This said, the ICJ’s determination related to the provision of such military assistance to encourage incursions by non-government actors on the territory of a State,⁵² and not in the context of arming a State to defend its own territory. It therefore may be that the provision of arms to Ukraine in the circumstances could not be considered a use of force.

⁴⁵ Schmitt, ‘Strict versus Qualified Neutrality’ (n 3); Clancy (n 3) 539–40.

⁴⁶ *Report of the International Law Commission: Seventy-First Session (29 April–7 June and 8 July–9 August 2019)*, UN Doc A/74/10 207.

⁴⁷ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) art 41 (*‘RSIWA’*).

⁴⁸ See, eg: Clancy (n 3) 540–1; Lim and Mitchell (n 3) 386.

⁴⁹ *RSIWA* (n 47) art 49(2).

⁵⁰ *Ibid* art 50(1)(a).

⁵¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 119 [228].

⁵² *Ibid*.

Even assuming that the provision of military aid to Ukraine could be construed as a use of force (which is perhaps doubtful), *RSIWA* also specifies that '[t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the *Charter of the United Nations*'.⁵³ Although a somewhat strained interpretation, it could be argued that technically excessive countermeasures are permissible where States are assisting one of their number which is acting in valid self-defence, in response to a serious breach of a peremptory norm. Some commentators have outlined the logical paradox if a State fully joining the conflict as a co-belligerent supporting Ukraine in collective self-defence would be acting lawfully, but a State supplying military aid while otherwise remaining neutral is acting unlawfully.⁵⁴

Therefore, a neutral State providing aid to another State acting in lawful self-defence (but not joining the conflict as a co-belligerent) seems yet another situation potentially excusing derivation from strict neutrality.

D Possible Application

To recap, the full demands of strict neutrality appear to have been displaced in favour of the lesser requirements of qualified neutrality where:

1. the Security Council has acted under chs VI or VII of the *UN Charter*;
2. the Security Council has failed to act, but:
 - a. the General Assembly has identified, with a very high level of concurrence, an aggressor under a *Uniting for Peace* resolution; and/or
 - b. one State is clearly acting in self-defence (such as where an actual invasion of its territory has occurred).

On this basis, in what situations would States now agree they are bound to observe strict neutrality to the letter? The main circumstance is probably where the Security Council cannot achieve unanimity (likely where a P5 member is involved or otherwise invested in the hostilities), and it is unclear which side is the aggressor — if a *Uniting for Peace* resolution reflected more division among voting States, for example. In such circumstances, States would likely seek to maintain impartiality and could be expected to adhere more rigidly to the requirements of strict neutrality.

Regardless of the positions taken by States in their LOAC manuals, the application of strict neutrality now appears to be optional in a range of armed conflicts that might be anticipated in future. State practice suggests that there is no rigid binary between belligerent and neutral, and that the potential for third-party State involvement in armed conflict may be more nuanced than the requirements of strict neutrality imply.

⁵³ *RSIWA* (n 47) art 21.

⁵⁴ Markus Krajewski, 'Neither Neutral nor Party to the Conflict?: On the Legal Assessment of Arms Supplies to Ukraine', *Völkerrechtsblog* (Blog Post, 9 March 2022) <<https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict/>>; Schmitt, 'Providing Arms and Materiel to Ukraine' (n 3).

IV QUALIFIED NEUTRALITY

The concept of ‘qualified neutrality’, or ‘non-belligerency’ is not new: it dates at least back to World War II, when the US used its Lend-Lease Program to support the allied States despite its officially neutral status.⁵⁵ Waging war as a means of international relations had been made unlawful by the 1928 Kellogg–Briand Pact,⁵⁶ and in these circumstances the US’ position was that ‘[a] system of international law which can impose no penalty on a lawbreaker and also forbids other states to aid the victim would be self-defeating and would not help even a little to realize mankind’s hope for enduring peace.’⁵⁷ After the establishment of the UN, qualified neutrality has been justified by the tenets of the *UN Charter* — effectively that, since waging war is now a clear violation of international law, neutral States ‘can take non-neutral acts when supporting the victim of an unlawful war of aggression’.⁵⁸ The US has supported this doctrine ever since, despite accepting that it was controversial.⁵⁹

Arguably, qualified neutrality is simply an ‘abandonment of neutrality as it had crystallized in international law’.⁶⁰ Until the invasion of Ukraine, the ‘general paucity in State practice’ made it difficult to establish any right for neutral States to discriminate between belligerents in this way.⁶¹ But on the other hand, it has long been apparent that strict neutrality may be difficult to apply in practice. Historically, even when States make a good faith effort to observe its requirements, the desperation of 20th century war has soon prevailed: this is reflected in the continuous expansion of ‘contraband’ in World War I,⁶² as well as the aggressive treatment of ‘neutral’ ships and other clear breaches of strict neutrality during World War II.⁶³

⁵⁵ ‘Lend-Lease Act (1941)’, *National Archives* (Web Page, 28 June 2022) <<https://www.archives.gov/milestone-documents/lend-lease-act>>; ‘The Lend-Lease Act’, *Library of Congress* (Web Page) <<https://www.loc.gov/item/today-in-history/october-23/>>.

⁵⁶ *General Treaty for Renunciation of War as an Instrument of National Policy*, opened for signature 27 August 1928, 94 LNTS 57 (entered into force 24 July 1929). See also Lim and Mitchell (n 3) 367–8.

⁵⁷ Robert H Jackson, ‘Address of Robert H Jackson: Attorney General of the United States’ (Speech, First Conference of the Inter-American Bar Association, 27 March 1941) 15 <<https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/03-27-1941.pdf>>.

⁵⁸ Mulligan (n 3) 1.

⁵⁹ See, eg, *US LOAC Manual* (n 22) 965–6 [15.2.2].

⁶⁰ Antonopoulos (n 15) 15.

⁶¹ *Ibid* 146.

⁶² Stephen C Neff, ‘Disrupting a Delicate Balance: The Allied Blockade Policy and the Law of Maritime Neutrality During the Great War’ (2018) 29(2) *European Journal of International Law* 459, 462; Roger Howell, ‘Contraband Lists in the Present War’ (1917) 4(5) *Virginia Law Review* 371, 377–9.

⁶³ Sally V Mallison and W Thomas Mallison, ‘The Naval Practices of Belligerents in World War II: Legal Criteria and Developments’ (1993) 65(1) *International Law Studies* 87, 90; Schmitt, ‘Strict versus Qualified Neutrality’ (n 3).

While the ICJ has supported that the law of neutrality exists, in some manner,⁶⁴ it has also acknowledged the extremes to which a State may be driven when its very survival is threatened.⁶⁵ The law of neutrality must accommodate the reality that when war is no longer a permissible approach to international relations, it becomes the province of the desperate and the deluded. This acceptance seems reflected in the large number of neutral States adopting a position of qualified neutrality to aid Ukraine in the current war, with their right to do so now acknowledged even by some of the staunchest critics of qualified neutrality.⁶⁶

This rapid emergence of norms has been one of necessity: without the actions of States supporting Ukraine, it appeared very likely that Russia's egregious violation of international law would succeed, thereby setting a dangerous precedent. Much as States once argued they were compelled to wage just wars to suppress acts of evil by other States,⁶⁷ 'States continuing to rely on and believe in international law can no longer stand by and allow an aggressor government to pursue its apparently illegal aims'.⁶⁸ At least 30 'neutral' States, to date, have provided military aid to Ukraine.⁶⁹ This wave of positive State practice may be sufficient to establish qualified neutrality as a rule of customary international law, applicable where the General Assembly has identified an aggressor.

Of course, there is no unanimity among States; even among the 141 that voted in favour of the *Uniting for Peace* resolution, only a fraction have adopted a position of qualified neutrality and provided military aid to Ukraine. Qualified neutrality is largely a western stance. Africa, Central America and the majority of Asia have remained strictly neutral.⁷⁰ Brazil, despite being a fellow member of the BRICS alignment of States⁷¹ with Russia, voted in favour of the special resolution; however, its president Luiz Inácio Lula da Silva has criticised western States for 'encouraging war'⁷² (although this has fallen short of suggesting they are acting unlawfully).

⁶⁴ *Nuclear Weapons Advisory Opinion* (n 18) 261 [89].

⁶⁵ *Ibid* 263 [97].

⁶⁶ Heintschel von Heinegg (n 3).

⁶⁷ See generally David D Corey and J Daryl Charles, *The Just War Tradition: An Introduction* (ISI Books, 2012).

⁶⁸ Heintschel von Heinegg (n 3).

⁶⁹ Trebesch et al (n 2). See also Mills (n 2) 8.

⁷⁰ Trebesch et al (n 2). See also: Maria Siow, 'Asia's Russia-West Balancing Act on Show with Push for Peace in Ukraine from Indonesia's Prabowo', *South China Morning Post* (online, 10 June 2023) <<https://www.scmp.com/week-asia/politics/article/3223563/asia-russia-west-balancing-act-show-push-peace-ukraine-indonesias-prabowo>>; Mohammed Haddad, 'Where Does Your Country Stand on the Russia-Ukraine War?', *Al Jazeera* (online, 16 February 2023) <<https://www.aljazeera.com/news/2023/2/16/mapping-where-every-country-stands-on-the-russia-ukraine-war>>.

⁷¹ The BRICS alliance includes, inter alia, Brazil, Russia, India, China and South Africa.

⁷² Duarte Mendonca, 'US Should Stop "Encouraging" Ukraine War, Brazilian President Says', *CNN* (online, 15 April 2023) <<https://edition.cnn.com/2023/04/15/world/brazil-president-ukraine-war-intl/index.html>>; Gabriel Araujo and Eduardo

Neither China nor India — two of the notable abstentions in the October 2022 *Uniting for Peace* resolution — have publicly taken a stand for or against qualified neutrality. China's official position on the 'Ukraine Crisis' is very general: it suggests that '[h]umanitarian operations should follow the principles of neutrality and impartiality' and that States should 'avoid fanning the flames and aggravating tensions', but there are no concrete assertions made about the actions of any State or States.⁷³ India's Prime Minister, Narendra Modi, has simply reiterated that India has 'urged both sides to resolve issues through dialogue and diplomacy',⁷⁴ while some commentators have speculated that India's complex political and geographic position makes it difficult for it to speak out against either Russia or the US.⁷⁵ India's remarks at the General Assembly vote (from which it abstained) emphasised the need to de-escalate the conflict, but otherwise seemed focussed on concerns for the impact of the war on the 'global South'.⁷⁶ But despite the lack of absolute consensus, there now appears to be sufficient State practice to support the validity of the doctrine of qualified neutrality. After all, it should be borne in mind that despite *Hague V* and *Hague XIII* having been ratified by only 34 and 30 States parties respectively, they have been held out as representative of the law of neutrality for over a century.

After World War II, the effect of the US position on the law of neutrality remained unsettled. Japan attacked Pearl Harbor on 7 December 1941, bringing the US into the war as a belligerent. It is unclear if Russia would ever go so far as to launch an actual attack against any of the States supporting Ukraine, although it certainly

Simoes, 'Brazil's Lula Calls for "Peace Group" to Broker Ukraine-Russia Deal', *Reuters* (online, 17 April 2023) <<https://www.reuters.com/world/brazils-lula-calls-peace-group-broker-ukraine-russia-deal-2023-04-16/>>.

⁷³ Ministry of Foreign Affairs of the People's Republic of China, 'China's Position on the Political Settlement of the Ukraine Crisis' (Media Release, 24 February 2023) <https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/202302/t20230224_11030713.html>.

⁷⁴ 'PM Modi Bats for Permanent UN Security Council Seat, Rights of Global South', *India Today* (online, 13 July 2023) <<https://www.indiatoday.in/india/story/modi-france-visit-pushes-permanent-un-security-council-seat-rights-global-south-2405983-2023-07-13>>.

⁷⁵ See, eg: Emily Tamkin, 'India is Stuck in a New World Disorder', *Foreign Policy* (online, 1 June 2023) <<https://foreignpolicy.com/2023/06/01/india-g7-un-ukraine-russia-war-global-south/>>; Teresa Mettela, 'What's Behind India's Strategic Neutrality on Russia's Invasion of Ukraine', *ABC News* (online, 30 March 2023) <<https://abcnews.go.com/Politics/india-remaining-neutral-russias-invasion-ukraine/story?id=97891228>>.

⁷⁶ United Nations, 'With 143 Votes in Favour, 5 Against, General Assembly Adopts Resolution Condemning Russian Federation's Annexation of Four Eastern Ukraine Regions' (Press Release GA/12458, 12 October 2022) <<https://press.un.org/en/2022/ga12458.doc.htm>>.

does not accept the legal rationale given for ‘neutral’ States’ actions.⁷⁷ However, the likelihood is that faced with a significant number of States supporting Ukraine from a position of qualified neutrality, and an already uncertain position in the conflict, Russia would be geopolitically ill-advised to encourage any other States to assume belligerent status. This will likely leave the right of neutrals to assert qualified neutrality substantively unchallenged.

V CONCLUSION

The law of neutrality appears to have entered a phase of accelerated revision. Russia’s campaign against Ukraine has both changed many minds about the validity of qualified neutrality, and potentially further narrowed the requisite application of strict neutrality in the era of State decision-making within the constructs of the UN. This seems to reflect modern attitudes to war in the wake of the 20th century: leaving a victim State forced into armed conflict and fighting for its survival unaided due to legal technicalities is simply not acceptable. However, questions still remain as to the legal justification for qualified neutrality, especially in the absence of formal State explanations for its rationale. Further definition is also needed for what is now required of neutral States, in what contexts, and how this may interact with the more granular requirements of the law of neutrality. Neutrality remains an important doctrine, for the same reasons it always was: it is capable of protecting non-belligerent States and preventing armed conflicts from becoming uncontrollably and unpredictably enlarged. The time is right for States to put forward *opinio juris* as to when qualified neutrality will apply, and when strict neutrality must still be observed, to clarify what has now become a fairly unpredictable and flexibly interpreted area of law.

⁷⁷ See, eg, Russian ambassador Vassily Nebenzia’s comments that ‘[i]t’s not Ukraine that is fighting Russia, but rather it is a collective West ... All decorum is set aside, and the goal is to inflict strategic defeat on my country’: ‘Ukraine: General Assembly Resumes Emergency Special Session, Taking up New Text to End War’, *UN News* (online, 22 February 2023) <<https://news.un.org/en/story/2023/02/1133797>> (emphasis omitted).