

Principle of Neutrality and the Obligation to Prevent International Humanitarian Law Violations: A Case Study of US Military Assistance in Russia-Ukraine War

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Abstract

Although international law forbids states to use force against each other, every state has an obligation to stop the ongoing violation of international humanitarian law. Consequently, the relevance of the traditional law of neutrality is questionable and often considered obsolete in contemporary armed conflict. The United States of America introduced the doctrine of qualified neutrality. The doctrine allows other states to do something when there is a threat or ongoing violations of the peace and security of humankind. The United States has commonly justified its military assistance to one of the warring parties using the doctrine as in the current Russia-Ukraine War. The United States provides vast military assistance to Ukraine, consisting of weapons and specialized military training to stop Russian aggression. This study aims to assess the qualified neutrality doctrine from an international law perspective and whether the United States can still preserve its neutral status or become a co-belligerent of Ukraine. This study argues that qualified neutrality will not change the status of a neutral state into co-belligerent if it does not involve any use of force measures or, otherwise, these measures shall fall within the framework of the UN Charter and require authorization from the UN.

Keywords: collective self-defense, co-belligerency, qualified neutrality.

A. Introduction

Although the use of force is strictly prohibited under international law, war among states or even non-state actors still occurs.¹ During war, the complexity of the conflict might escalate in no time. A war started initially between two states might involve more than four states as warring parties. The conflict among states during the cold war era has opened awareness; and showed how alien intervention might prolong and escalate the level of conflict. It also demonstrated how the “super

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¹ James Upcher, *Neutrality in Contemporary International Law* (New York: Oxford University Press, 2020), 34.

powers” and other Western states interjected their interest in one conflict between least developed countries in many territories worldwide.²

Apart from any indescribable non-legal motives, in the development of an inter-state relationship, international law provides instruments for states as external parties or third parties to involve in other state’s wars.³ These instruments are crafted in the form of rights, and, at the same time, an obligation imposed by international law. States on the outer side of an ongoing conflict have at least two obligations and rights. First, they have the right and obligation to remain neutral or not to intervene in the conflict. On the other hand, some conditions oblige and simultaneously entitle them to act on behalf of other states to ensure respect for international humanitarian law and maintain world peace and security.⁴

The obligation not to intervene is widely known as the law of neutrality. It stands independently and equally as another branch of international law. The law of neutrality demands that states not intervene or interject their military or political interest in an ongoing armed conflict between other states. Historically, the law of neutrality was first introduced and regulated under The Hague Convention V and XIII from 1899 to 1907. Chapter I of The Hague Convention V describes the rights and duties of neutrals, although most of the provisions refer to the obligation of neutral powers to ensure territorial neutrality. The Hague Convention V did not provide any further reference to the violation of neutrality in the form of military support. However, Article 6 of The Hague Convention XIII explicitly asserts the prohibition of providing any support or any kind of war materials by neutral powers to the belligerent.⁵

The obligation to remain neutral in this general context is also known as traditional neutrality. Yet, due to the development of the law, states are also bound by the obligation to act. It is referred to as the obligation to ensure respect for international humanitarian law under common article I of the Geneva Conventions 1949. The ICJ in Nicaragua Case renders that the main objective is to require all states, parties to the Geneva Conventions to take action to prevent the occurring violation of IHL. The obligation leaves an enigma to the relevance and applicability of the law of neutrality in practical situations.⁶

The relevance of the law of neutrality is further being questioned in the ongoing Russia-Ukraine War. It has at least taken 80.000 casualties (death and

² Isabella Ginor and Gideon Remez, *The Soviet-Israeli War 1967-1973: The USSR’s Military Intervention in the Egyptian-Israeli Conflict* (New York: Oxford University Press, 2017), 306.

³ Stephen C. Neff, *War and the Law of Nations: A General History* (New York: Cambridge University Press, 2005), 36.

⁴ Knut Dormann and Jose Seralvo, “Common Article I to the Geneva Conventions and Obligation to Prevent Humanitarian Law Violations,” *International Review of the Red Cross* 96 (2014): 711, <https://doi:10.1017/S181638311400037X>.

⁵ Article 6 of The Hague Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War 1907.

⁶ Case Concerning Military and Paramilitary Activities and Against Nicaragua (Nicaragua v. United States of America Case), 1986, I.C.J., 104 (Judgment) (“Nicaragua Case”).

wounded) and is still counting as the conflict is still raging.⁷ The US supports Ukraine by providing billions of dollars in military assistance for Ukraine to defend its territory against Russian invasion. The assistance consists of military equipment and sophisticated armaments such as Hi-mars artillery, howitzers, anti-tank missile, UAV drone, etc.⁸ In enhancing Ukraine's soldier combat ability, and the US has also provided them with special training to operate heavy weapons in Poland and Germany.⁹ The US Government argues that such military assistance is necessary to support Ukraine against Russia's premeditated and unjust war.¹⁰ Normatively, military assistance is against the concept of traditional neutrality mentioned in the Hague Conventions. It is clear that the US is not neutral. However, the US came up with an excuse for applying a doctrine called 'Qualified Neutrality.' This doctrine allows the state to provide military assistance if it is consistent with the Charter of the United Nations ("the UN Charter").¹¹

Due to these emerging exceptions to the law of neutrality in practice, the first section of this article ought to describe the basic concept of the law of neutrality since it was first acknowledged by the international society, including the rights and duties carried by states in their neutral status. This article will also elaborate on the emergence of international organizations significantly impacts the application of the law of neutrality in practice. Further in the second section, as this article stands in a neutral perspective, it does not deny the existence of qualified neutrality as an existing concept; however, it assesses the suitability of the doctrine's application in practical situations. As a form of concretization, this article tries to match the suitability between qualified neutrality *stricto sensu* and the US military assistance to Ukraine in the Russian-Ukraine War. Having established the compatibility between the invocation of qualified neutrality and the US military assistance, the third section of this article aims to validate the lawfulness of such assistance through available alternatives under IHL and the UN framework. In closing, the fourth section of this article delineates the consequence of being considered as co-belligerent to be considered by the US in carrying out military assistance to Ukraine, especially when the military assisting activity does not meet

⁷ Jack Detsch, "Russia is Readying the Zinc Coffins Again," accessed on August 8, 2022, <https://dnyuz.com/2022/08/08/russia-is-readying-the-zinc-coffins-again>.

⁸ Al Jazeera Staff, "US Providing Additional \$150m in Military Aid to Ukraine," accessed on May 6, 2022, <https://www.aljazeera.com/news/2022/5/6/us-providing-additional-150m-in-military-aid-to-ukraine>.

⁹ Natasha Bertrand, "US Troops in Poland are Training Ukrainians on How to Use Weapons Sent by the West," accessed on May 25, 2022, <https://edition.cnn.com/2022/03/29/politics/us-troops-poland-ukraine/index.html>.

¹⁰ US Department of State, Bureau of Political and Military Affairs, "US Security Cooperation with Ukraine," accessed on November 6, 2022, <https://www.state.gov/u-s-security-cooperation-with%20Ukraine/#:~:text=The%20United%20States%2C%20our%20allies,and%20unjustified%20war%20against%20Ukraine>.

¹¹ Stephan P. Mulligan, "International Neutrality Law and US Military Assistance to Ukraine," accessed on April 26, 2022, <https://crsreports.congress.gov/product/pdf/LSB/LSB10735/3>.

the required conditions to be included as an action taken within the coverage of the permitted exceptions to the law of neutrality.

B. The Origins and Basic Concept of the Law of Neutrality Under International Law

1. Traditional View of Neutrality under the Paris Declaration 1856 and the Hague Conventions

As mentioned earlier, the law of neutrality is not a novel branch of international law. Neutrality is a consequent practice in armed conflict carried out for centuries. As time goes by and conflict becomes more sophisticated, furnished by political and economic interest, the need to codify neutrality law and practice increases, especially to codify the rights and duties of neutrals. Arms trade and the importance of preserving the neutral status of commercial ships urged the drafting of the codification of neutrality law. Several condemnations to captivation and search towards the neutral commercial ship by the belligerents is seemingly unfair for neutral states involved in commercial arms trade without military purpose.¹²

Due to the background, the Paris Declaration was made in 1856 for the sake of maritime interest and in the context of the Paris Treaty to end the Crimean War. The significance of the declaration is that it specifies the rights of neutrals, for instance, the acknowledgment of neutral flags and goods.¹³ Nevertheless, it shall be considered insufficient, as the declaration only addresses the rights of neutrals rather than their duties. It is the reason for the Hague Conventions' existence. The Hague Convention V has a superficial understanding of what neutrals are defined. Neutrals are simply those who are not belligerent. Therefore, they are entitled to inviolable territory, and territorial intervention by belligerents without exception to trade, distribution, or export on behalf of one of the belligerents; and remain impartial.¹⁴ Although in its development, the relevance of the law of neutrality in the minor context of armed or weapon trade has incrementally become questionable.¹⁵

Due to that simple definition of "neutrals" under Hague Conventions, there is a clear separation between violation and compliance of neutral duties. Article 17 of The Hague Convention V stipulates that state is no longer neutral if it acts in favor of one of the belligerents.¹⁶ Further, The Hague Convention XIII prohibits neutral power to provide supply indirectly or directly, in a form of war material or any

¹² Hessel Edward Yntema, "The Leonora: Retaliation and Rights of Neutrals", *Michigan Law Review* 17, no. 7 (1919): 564.

¹³ Maria Gavouneli, "Neutrality – A Survivor?", *The European Journal of International Law* 23, no. 1 (2012): 268, <http://dx.doi.org/10.1093/ejil/chr107>.

¹⁴ Chapter I (Article 1-10): Rights and Duties of Neutral, The Hague Convention V concerning the Rights and Duties of Neutral Powers and Persons in case of War on Land, 1907.

¹⁵ Knut Dormann, "Common Article I to the Geneva Conventions and Obligation to Prevent Humanitarian Law Violations," 732.

¹⁶ Article 17 of The Hague Convention V concerning the Rights and Duties of Neutral Powers and Persons in Case of War on Land 1907.

other kind to one of the belligerents.¹⁷ An absolute restriction to act in favor of belligerents or support them directly or indirectly (except for humanitarian assistance) falls within the notion of traditional neutrality. Traditional neutrality is often considered obsolete, especially in the post the UN Charter era.¹⁸ However, the concept provides clearly distinguishes between neutral and partial positions in an armed conflict, leaving no space for third parties to ‘smuggle’ their subjective interest in an undergoing conflict.¹⁹

2. United Nations and Reconceptualization Towards the Law of Neutrality

As a subject of international law, an international organization consists of members who are states or other entities governed by their own rules or constitution and acting for the collective purposes of their members.²⁰ States' multiple interests are refined into one representative interest. The Law of neutrality, by its nature, is closely related to the state's action, whether it is hostile or not. However, the natural conceptualization of the law of neutrality started shifting when many international organizations, particularly peace and security-driven organizations such as United Nations, were formed.

The UN is a clear example of how international organization plays a significant role in shifting the nature of the law of neutrality. The UN, by its character, is an international organization established to maintain international peace and security; and to take effective collective measures to prevent any threat to international peace and security. For this purpose, the UN was intentionally established to intervene and quell conflict that may threaten international peace and security.²¹ It demonstrates that international organization plays a significant role in settling ongoing conflict, especially between states. Under the regime of the UN Charter, member states are possibly persuaded or even ordered to intervene in an ongoing international armed conflict for peaceful reasons. Article 2(5) of the UN Charter stipulates that all member states shall provide the UN with every assistance in any action it takes in accordance with the UN Charter. Furthermore, under Chapter VII of the UN Charter, the UNSC may render a resolution that orders the UN member states to assist them, including providing military assistance.²² Therefore, the enforcement of the law of neutrality should be adjusted. Otherwise it will become obsolete.

Thus, this study argues that the law of neutrality is no longer as conservative as in its early days of creation. Now, at least 193 member states of the UN have agreed to hand over their own “guts and will” to the UN, including its persistence

¹⁷ Article 6 of The Hague Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War 1907.

¹⁸ James Upcher, *Neutrality in Contemporary International Law*, 179.

¹⁹ James Upcher, 302.

²⁰ Article 2 (a), Draft Article on the Responsibility of International Organizations (DARIO), 2011.

²¹ James Upcher, *Neutrality in Contemporary International Law*, 180.

²² Article 2 (5) Charter of the United Nations (“UN Charter”), 1945.

to remain neutral in the event of armed conflict. Because they are not only bound by duties and rights to remain neutral but also duties and rights as the UN member states. Apart from the UN Charter, another obligation is also imposed by Common Article 1 ("CA I") of the Geneva Convention. CA, I oblige the high contracting parties to respect and ensure respect for IHL in all circumstances. It means that third parties, the neutrals, have an obligation to ensure respect for the IHL for as long as they are parties to the Geneva Conventions.²³ This obligation might also exist as a relevant exception to the applicability of the law of neutrality.

However, apart from those emerging exceptions, this study is of the position that the law of neutrality is still relevant even after the existence of the UN and other international organizations. The UN's irrefutable existence shows the manifestation of neutrals' rights and duties through international organizations.²⁴ Further, suppose the law of neutrality is obsolete. In that case, any state may engage in an armed conflict with another state anywhere and anytime and intervene in any other armed conflict. Conclusively, instead of being considered obsolete, the law of neutrality only needs reconceptualization in its development.

3. Fundamental Rights and Duties of the Neutrals

As mentioned earlier, this study is in the position that the law of neutrality is still and will always be relevant. It provides the list of the fundamental rights and duties of neutral power. Neutral means stand still and, in the context of armed conflict, not intervening and not be intervened. However, in the development of armed conflict, a state may need to intervene to some extent and perhaps they must take an external intervention to a certain permitted extent. Consequently, law of neutrality should expand beyond the rules that limit rights and duties of states to participate in an armed conflict. The law should consider that international law provides certain conditions that may force a state to actively participate in other conflicts just to stop them from committing violations of the IHL. Thus, this Law shall provide minimum conditions a neutral state should meet so that belligerents will not doubt its status.²⁵

According to the Hague Convention, there are two general duties or obligations of states to maintain their neutral status.²⁶ The first is the duty to remain impartial; and the second is the duty of abstention. The earlier implies that states not participating in an armed conflict shall treat the belligerents equally. Neutral states are expected to not provide the belligerents with military advantage such as granting permission for overflight in its air space, or granting permission to land or

²³ Common Article I of Geneva Convention I-V (Geneva Conventions) 1949.

²⁴ James Upcher, *Neutrality in Contemporary International Law*, 180.

²⁵ Maria Gavouneli, "Neutrality – A Survivor?", 271.

²⁶ Stephen C. Neff, *War and the Law of Nations: A General History*, 76.

take off for fighter jets in a territory of a neutral state.²⁷ Back in the days before the regime of the Hague Conventions, even a neutral ship might lose its status as a neutral object if it carries a weapon from the territory of one state to one of the belligerents.²⁸ However, in its development, this duty has become narrower. The old wooden concept of impartiality, which includes trade, economic and social aspects, is no longer relevant. It is limited to military support that implies non-equal treatment by neutral states to the belligerents.²⁹

An example of neutral states' awareness and compliance with the duty of impartiality can be found during the Yom Kippur War. The NATO member states, and Spain terminated its permission for other states to use their waters as a transit area for one of the belligerents to refuel and unload military supplies.³⁰ As a fundamental duty under the law of neutrality, a violation of this duty may result in the impairment of neutral status. For instance, in 1988, Iran accused Saudi Arabia of violating its neutral duty as Saudi Arabia granted permission for Iraqi Jets to do an emergency landing at Abu Jobil Airport.³¹

As for the duty of abstention, it is an improvement of the duty of impartiality. However, the duty of abstention is more specific to the prohibition of a third state from providing any assistance or taking any action that may give one of the belligerents' certain military advantages, like providing any supply of war materials to one of the belligerents. Judge Ammoun, in his separate opinion in the Namibia Case, includes the supply of oil or any petroleum products, transportation, and industrial assistance as violations to the duty of abstention for as long as one of the belligerents achieved its military advantage.³² Apart from its rigidity, the duty provides a clearer distinction between action related to military advantage and private action for commercial purpose.³³ Indeed a state is prohibited from supplying or selling weapon to one of the belligerents in wartimes, however it does not apply to commercial activity of private sector.³⁴

²⁷ Article 42 of The Hague Rules of Air Warfare 1923; See Heinze Marcus Hanke, "The Hague Rules of Air Warfare: A Contribution to the Development of International Law Protecting Civilians from Air Attack," *International Review of the Red Cross*, no. 3 (1991): 155.

²⁸ Stephen C. Neff, *War and the Law of Nations: A General History*, 76.

²⁹ James Upcher, *Neutrality in Contemporary International Law*, 110.

³⁰ Matthew C. Maxman and Thomas W. Oakley, *The Future of Law of Armed Conflict* (New York: Oxford University Press, 2022), 128-129.

³¹ Luca Ferro and Nele Verlinden, "Neutrality During Armed Conflicts: A Coherent to Third States Support for Warring Parties," *Chinese Journal of International Law* 17, no. 1 (2018): 20, <https://doi.org/10.1093/chinesejil/jmy011>.

³² International Court of Justice, Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa), notwithstanding Security Council Resolution 276 separate opinion of Vice President Ammoun, I.C.J. Rep. (1971), para. 14.

³³ James Upcher, *Neutrality in Contemporary International Law*, 117; Lawrence Preuss on the concept of "differentiation": if commercial relationship is carried out by private entity with one of the belligerents is not prohibited except for trade in contraband (lethal contraband)."

³⁴ James Upcher.

States that maintain their neutral status are expected to comply with the two obligations, even though non-compliance does not necessarily entail a violation that may result in a co-belligerency.³⁵ In practice, it is again a subjective view from one of the belligerents whether a neutral state has changed its status to co-belligerent. Still, non-compliance to such duties usually led to a prejudiced assumption by one of the warring parties.

C. Qualified Neutrality and Conditions in Waiving Duties to Remain Neutral

The existence of new doctrines and the establishment of international organizations and military alliances after World War II have shifted the focus of international society to protect and maintain international peace and security. A couple of years before the establishment of the UN, the US, through the draft charter of the UN, initiated a new concept of neutrality to supersede the old concept. The American attorney general at that time, Robert H. Jackson, at the first conference of the Inter-American Bar Association in 1941. The concept is currently acknowledged as qualified neutrality.³⁶

Jackson viewed traditional neutrality as an obstacle to maintaining international peace and security. In his view, traditional neutrality forbids states to render acts of assistance or take action to assist invaded states in a situation of aggression. This view was also in line with the primary purpose of the UN's establishment to maintain international peace and security. Subsequently, the recent military assistance provided by the US to Ukraine is being questioned by many parties. It is reported that the US has been providing Ukraine with military assistance amounting to 9.1 billion USD in total. The US also provides Ukraine troops with specialized training to operate and increase their combat capability in war situation.³⁷

In its congressional press release, the US reveals that this military assistance is solely intended to help Ukraine defend itself and maintain international peace and security.³⁸ In response to several allegations that it has violated the law of neutrality, the US refers to the concept of qualified neutrality to justify their action. The US government defends itself by saying that they were acting on behalf of the victim, which is similar to the projection of the doctrine of qualified neutrality.³⁹

This study does not aim to oppose the doctrine of qualified neutrality. Instead, it analyzes the doctrine's consistency to the original purpose. Jackson's idea on

³⁵ Article 10 of The Hague Convention V (1907): *"The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act."*

³⁶ Robert H. Jackson, Paper Release at the First Conference of the Inter American Bar Association in Havana (Cuba, March 21, 1941), 6.

³⁷ Tom Nagorski, "The Ukraine War in Data: \$9 Billion in US Military Aid; More than \$50 Billion Overall," accessed on August 11, 2022, <https://www.grid.news/story/global/2022/08/11/the-ukraine-war-in-data-9-billion-in-us-military-aid-more-than-50-billion-overall/>.

³⁸ Jim Garamone, "US Trains Ukrainian Troops in Germany," accessed on April 29, 2022, defense.gov/News/News-Stories/Article/Article/3015610/us-troops-train-ukrainians-in-germany.

³⁹ Stephan P. Mulligan, "International Neutrality Law and US Military Assistance to Ukraine," 4.

qualified neutrality bases the doctrine on the purpose of maintaining international peace and security. Any action taken by states to protect collective peace and security shall be a justifiable basis to an act of intervention without impairing its neutral status. However, a neutral state is and will always be a “black and white” definition. There will not be a quasi-neutral position. On the other hand, a doctrine of qualified neutrality implies a quasi-neutral position. Hence, to use this doctrine as a basis to justify an action taken by a state, it should be accompanied by another legal basis under the framework of the UN.

Setting an aggressor-victim relationship was proposed after the UN Charter concluded. When Jackson first presented this doctrine in 1941, he believed any war must be deemed just. After the UN Charter was concluded, there is no just cause to war unless for self-defense. Thus, the interpretation and application of such doctrine must be compatible with the provision under the UN Charter.⁴⁰ The focus of international society in the situation of war is to reduce casualties of war and cease it as soon as possible and encourage both belligerents to proceed to a peaceful dispute settlement.

Accordingly, qualified neutrality is an available justification for a state to provide military assistance or other intervening action if it fulfills the required condition under the framework of the UN Charter. Article 1 of the UN Charter asserts that the purpose of the United Nations is to maintain international peace and security, and to take effective collective measures to prevent and remove threats to peace. Furthermore, in the last paragraph of the article, it is stated that the UN shall be a center for harmonizing nations' actions to attain these common ends. It is clear from that article that if an action is taken by or through the channel of the UN, it is a neutral action since it represents the guts and will of its member states to maintain international peace and security.

Conversely, if an action is taken otherwise, there will be a ‘subjective’ perception of being neutral or not neutral from other states. It is important to remember that an action taken through the channel of the UN does not necessarily mean that it must be done by the UN as an organization. The UN may issue an order or authorize its member to assist the particular situation; however, at the very first place, the order is made by the UN, not subjectively made and concluded by each member state. An example of such an order may be seen in the United Nation Security Council Resolution (“the UNSC”) resolution no. 678 in 1990 on the Iraq-Kuwait situation.⁴¹ This Resolution calls all member states to provide adequate assistance to cooperate with the Kuwait government and take all appropriate measures to put Iraq back in compliance with international law.

⁴⁰ Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflict* (Oxford: Hart Publishing, 2008), 11.

⁴¹ UN Security Council, Security Council Resolution 678 (1990) [Iraq-Kuwait], November 29, 1990, S/RES/678 (1990).

Qualified neutrality is a concept that leans on this understanding. The right to take action to maintain international peace and security without impairing a neutral status shall be made within the framework of the UN since maintaining international peace and security has a powerful political nuance.⁴² As an international organization, the UN plays a vital role in assessing the objectivity of one state that acts on behalf of this purpose. Member states must notify the UN before taking any action and obtaining approval. Without any order or approval of the UN to formalize an action as an objective and neutral action taken by states to maintain international peace and security, there will always be a possibility that an action taken is no longer organic. Therefore, by applying qualified neutrality and fulfilling the required conditions, an action taken by the state would not impair its neutral status and be considered legitimate.

D. Lawfulness of United States Military Assistance under the Framework of International Law

The previous paragraph has concluded that certain conditions exist for the doctrine of qualified neutrality to be considered a legitimate justification. Therefore, a state's neutral status would not be impaired. To be precise, this study discusses whether the US practice of providing military assistance to Ukraine during the Ukraine-Russia War under the qualified neutrality doctrine is lawful and justifiable under international law. The US argued that providing military assistance to Ukraine is not just exercising its right but also fulfilling its obligation as a third party to take action to maintain international peace and security.⁴³ However, besides the qualified neutrality doctrine, IHL, as an inalienable element in assessing the lawfulness of military action in an armed conflict, also imposes a roughly similar legal obligation to states. Thus, before assessing the compatibility between qualified neutrality doctrine and the US's action, it is noteworthy also to analyze how IHL provides available justification for US military assistance.

Under IHL, a similar legal obligation is contained in CA I of the Geneva Conventions. CA I imposes a positive obligation to its contracting parties to respect and to ensure respect for IHL in any circumstances.⁴⁴ This particular due diligence obligation demands any state within its capabilities to use any necessary means or take any necessary measure to prevent or lower the degree of IHL violation foreseeable to them.⁴⁵ The International Court of Justice also confirms this positive obligation in its advisory opinion on the construction of wall in the occupied Palestinian Territory, the court certifies that the obligation to take action under CA

⁴² D.W. Bowett, *Self-Defense in International Law* (Manchester: Manchester University Press, 1958), 178.

⁴³ Stephan P. Mulligan, "International Neutrality Law and US Military Assistance to Ukraine," 4.

⁴⁴ Common Article I of the Geneva Conventions (GCs) 1949.

⁴⁵ Knut Dormann, "Common Article I to the Geneva Conventions and Obligation to Prevent Humanitarian Law Violations," 730.

I, applies to all high contracting parties of the GC, including neutral powers to prevent a conflict become obstinate and barbaric.⁴⁶

Can the US military assistance be categorized as exercising due diligence obligation under the IHL? If the answer is yes, is such military assistance allowed under Common Article I of the GCs? Ukraine indeed requested supports from NATO, including the US and European Union (EU) for effectively defending their territory from Russian aggressive act.⁴⁷ According to Ukraine, Russia has committed flagrant violation of international law as well as IHL.⁴⁸ Russia's attack on Ukraine has undeniably caused thousands of casualties, destruction of non-military objects and severe war damage.⁴⁹ The fact that a violation of IHL is necessary to meet the conditions under common article I of the GC so that any action taken can be a humanitarian-related action or at least taken within the course of international humanitarian law.⁵⁰

Hence, if a neutral party is willing to step in and take action, it must be limited solely to prevent or stop the IHL violations. Thus, the study began its analysis by emphasizing that a state still maintains its neutral status while assisting one of the belligerents if it is a related humanitarian support. Common Article I do not specify measures that shall be taken by third parties to ensure respect, prevent and punish the occurring violation of the IHL. However, does it include military assistance, or would it be against the purpose to maintain respect and compliance with IHL? The Nicaragua case court prohibits third states from encouraging any state to go to war and violate the IHL.⁵¹ Accordingly, the obligation not to encourage shall also be an obligation not to prolong armed conflict.⁵² Unfortunately, Common Article I imply a stronger nuance of imposing a positive obligation to contracting parties. The word 'ensure' means that every state carries a positive obligation within its capability and available resource to take any necessary measure to suppress the possibility or

⁴⁶ Advisory Opinion on the Legal Consequences of Construction of a Wall in Palestinian Occupied Territory, Advisory Opinion, I.C.J. Rep. (2004), para. 158.

⁴⁷ Paul LeBlanc, "Ukraine Has Requested Military Aid. Here's how allies are providing assistance," accessed on March 18, 2022, <https://edition.cnn.com/2022/03/18/politics/ukraine-military-weapons-javelin-stinger-s300-switchblade-drones/index.html>.

⁴⁸ Peter Stano, "Declaration by the High Representative on Behalf of the EU on the Invasion of Ukraine by Armed Forces of the Russian Federation," accessed on February 22, 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/ukraine-declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-invasion-of-ukraine-by-armed-forces-of-the-russian-federation/>.

⁴⁹ Al-Jazeera News Agency, "Civilians Killed as Russia Intensifies Attacks Across Ukraine", accessed on July 16, 2022, <https://www.aljazeera.com/news/2022/7/16/civilians-killed-as-russia-intensifies-attacks-across-ukraine>; See also, Luke Harding, "Russia's war in Ukraine Causing 3.6 Billion USD of Building Damage a Week," accessed on May 3, 2022, <https://www.theguardian.com/world/2022/may/03/russias-war-in-ukraine-causing-36bn-of-building-damage-a-week>.

⁵⁰ Knut Dormann, "Common Article I to the Geneva Conventions and Obligation to Prevent Humanitarian Law Violations," 731.

⁵¹ Nicaragua Case, para. 104.

⁵² Knut Dormann, "Common Article I to the Geneva Conventions and Obligation to Prevent Humanitarian Law Violations," 731.

ongoing violation of the IHL.⁵³ According to the US, excessive civilian casualties as the effect of Russian attacks against maternity, hospital, school, and shopping is sufficient evidence to demonstrate Russian flagrant violations of IHL and constitutes a justifiable basis for the US to take action.⁵⁴

Furthermore, the obligation under Common Article I have an *erga omnes* character, which will entail state responsibility if failing to fulfill such obligation.⁵⁵ However, does this article also justify for a third state to provide military assistance only to one party of the conflict that it considers a victim of the aggressor? This is because under IHL, this action can be considered direct participation in hostilities since the aid substantially contributes to the enemy military power to win the war. This is also why in IHL practices, measures taken under Common Article I should not go beyond non-military approaches such as sanctions, trade embargo, retorsions, or any non-use of force measure available.⁵⁶

It can be observed from the variety of non-military responses by EU states or other states by imposing trade and economic embargos. Many assets of Russian billionaires are frozen within those states, and termination of trade and business deals with the states concerned.⁵⁷ Those approaches demonstrate the awareness of states' obligation to respect and ensure the respect of IHL and the importance of remaining neutral by not extending the geographic scope of the conflict and causing greater damage. States are aware of their rights and duties as neutral states by avoiding any actions that may categorize them as actively participating in hostilities.

Meanwhile, the US can also argue its legality of military assistance based on collective self-defense under Article 51 of the UN Charter. As a *Jus ad bellum*, Article 51 of the UN Charter provides available right and condition that justify third parties to use armed forces in the effort to maintain international peace and security, and to reduce or prevent oppression by the aggressing party.⁵⁸ Nevertheless, although collective self-defense is an available choice for the US, it does not guarantee its neutral status and the applicability of the qualified neutrality doctrine.

As stated earlier, qualified neutrality is only applicable in certain conditions. There are 'procedures' that must be carried out first before taking action based on

⁵³ Jean Pictet on Knut Dormann, "Common Article I to the Geneva Conventions and Obligation to Prevent Humanitarian Law Violations," 728 (Third states have an obligation to 'endeavor' bring it back to an attitude of respect for this Convention).

⁵⁴ Milena Sterio, "The Russian Invasion of Ukraine: Violation of International Law," accessed on October 7, 2022, <https://www.jurist.org/commentary/2022/07/milena-sterio-russia-war-crimes-ukraine/>.

⁵⁵ The Wall Advisory Opinion, para. 158.

⁵⁶ Article 89 of Additional Protocol I to the Geneva Conventions 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977; See Knut Dormann, "Common Article I to the Geneva Conventions and Obligation to Prevent Humanitarian Law Violations," 726.

⁵⁷ BBC, "What are the Sanctions on Russia and are They Hurting its Economy?," accessed on September 30, 2022, <https://www.bbc.com/news/world-europe-60125659>.

⁵⁸ D.W. Bowett, *Self Defense in International Law*, 78.

qualified neutrality, which is notifying the UN and obtaining its approval or authorization before states take further action. Conversely, in the Russia-Ukraine War, the military assistance provided by the US is based on their legal consideration and interpretation of the obligation to maintain international peace and security. The UN has not even received any notification from the US or released any authorization for the US to act on behalf of Ukraine.

Article 51 of the UN Charter asserts that member state has an inherent right of collective self-defense. However, it does not specify or even stipulate the impartiality of a state that invokes it. Hence, article 51 does not guarantee a state's neutrality. Because essentially, what makes qualified neutrality is applicable is the formalization by the UN. The absence of the UN authorization renders the US's military assistance partial and not neutral. However, it does not impair the US from its right to carry out collective self-defense. Therefore, based on this factual situation, the US cannot invoke collective self-defense on behalf of Ukraine while insisting on remaining neutral.

However, it might be too early for this article to come into conclusion that US is running out of options. Since Russia is one of the UNSC permanent members, it seems almost impossible to convince Russia to pass a resolution authorizing individual military deployment for third states on behalf of Ukraine to maintain its neutrality. Yet, this article contends otherwise.

The fact that Russia is the permanent member of the UNSC and equipped with veto right might not be the "end-of-the-road" for the US. In 1951, United Nations General Assembly ("the UNGA") adopted Resolution 377(V) or widely known as the "Uniting for Peace Resolution". The resolution asserts the failure of the UNSC to exercise its primary responsibility for the maintenance of international peace and security, hence the UNGA shall seize itself of the matter.⁵⁹ The resolution re-highlighted the capacity of the UNGA to consider the making of appropriate recommendation for the UN member states to carry out collective measure, including recommend and authorize the use of armed forces.⁶⁰

Furthermore, the ICJ in its advisory opinion on certain expenses of the United Nations, re-emphasized this resolution by interpreting the relation between the UNSC and the UNGA in maintaining international peace and security. The court came into conclusion that, the responsibility to maintain international peace and security of the UNSC is not exclusive, and the UNGA has a secondary responsibility within the same domain.⁶¹ This is in line with the backdrop of the Uniting for Peace Resolution that asserts the responsibility of all the UN Members to maintain international peace and security albeit with constitutional constraints and that is why, the UNGA shall have the power to render a collective recommendation.

⁵⁹ UNGA. Res. A/RES/377, 3rd of November 1950. *Uniting for Peace*, fifth session.

⁶⁰ Christian Tomuschat, "Uniting for Peace", United Nations Audiovisual Library of International Law, 2008.

⁶¹ Andrew J. Carswell, "Unblocking the UN Security Council: The Uniting for Peace Resolution," *Journal of Conflict & Security Law* 18, no. 3 (2013): 460.

According to Kelsen, a recommendation by the UNGA may also be considered an authorizing action.⁶² He states, "Insofar as member states take action within the scope of a recommendation of the UNGA, that action may be subsumed within the authority of the UN."⁶³

In this situation, the problem of applying qualified neutrality that requires UN authorization is barred by constitutional constraint. the UNSC is the only UN Organ in the capacity to produce a legally binding instrument. Nonetheless, it does not necessarily abolish the role and capacity of the UNGA. Where qualified neutrality relies intensely on the framework of maintaining international peace and security, authorization in the form of collective recommendation through the UNGA resolution might still be given. Although *de jure* authorization by the UNSC is implausible, the essence of invoking qualified neutrality is whether the UN members' collective interest backs up the action taken. If the US is capable of uniting other UN members to render a similar resolution through the channel of the UNGA, a recommendation on providing military support, according to Kelsen's understanding, might be viewed as an authorization of the UN principal organ and qualified neutrality is *de facto* applicable. This alternative for the US is worth reckoning, although it lacks constitutional justification due to the UN not so-called institutional failure.

Therefore, although qualified neutrality is still inapplicable in the present situation, and none of the resolutions has been rendered by either the UNSC or the UNGA related to this issue, the US might still have other available measures to justify its military assistance. By referring to the obligation imposed by the CA I as a supporting basis, the US might use it to convince the UNGA to pass a resolution authorizing its military assistance to Ukraine, although in the form of a collective recommendation. However, presently, the assistance provided is not yet neutral. In the event the US manages to persuade the UNGA to pass such resolution, qualified neutrality might be at least *de facto* applicable, and the assistance provided is also considerably neutral."

E. Re-Interpreting the Concept of Co-Belligerency in the Case of Third-Party Intervention in Armed Conflict

As stated above, the US military aid to Ukraine and several incentive trainings are not justified under the qualified neutrality doctrine. However, does it mean the US can be perceived as Ukraine's co-belligerent in the Russia-Ukraine war? Being not neutral does not necessarily entail co-belligerency to third parties. Thus, it is important to discuss further the co-belligerency concept.⁶⁴ First, we need to underline the distinction under the Fourth Geneva Convention between neutral,

⁶² Andrew J. Carswell, 461.

⁶³ Andrew J. Carswell, 464.

⁶⁴ Article 10 of The Hague Convention V, 1907.

belligerent, and co-belligerent. A neutral state stands separately from belligerent and co-belligerent. This implies that the convention does aware that neutral and not neutral do not have an undivided correlation with co-belligerency, although co-belligerency requires partiality.⁶⁵

The US denies its co-belligerent status in the Ukraine war based on two reasons. First, its participation is only to help Ukraine defend its territory and thus remain neutral. Second, co-belligerency is regulated under the US constitution and requires a war declaration by Congress.⁶⁶ Regarding the first reason, in a strict view of neutrality, the direct participation of a neutral or non-participant party into hostility amounts to a co-belligerency or allies.⁶⁷ However, in its development, indirect participation also amounts to losing its neutral status for as long as the neutral state provides material assistance to one of the belligerents without directly engaging in hostilities.⁶⁸

During Iraq-Iran War, Kuwait, as a neutral state, was alleged to have provided Iraq with the assistance that caused a significant military advantage. They opened their air space for the Iraqi Air Force, although they kept denying it.⁶⁹ As an implication, Kuwaiti Vessel, Jabal Ali, was struck by Iranian missiles in its voyage to Dubai. Indeed, Iran took a stand to see Kuwait as a co-belligerent in the war.⁷⁰ No rules provide the definition and threshold of co-belligerency since it heavily relies on the subjective perception of the warring parties. However, it is necessary to bear in mind that it is legitimate under IHL to attack any target/object that gives a definite military advantage, and the destruction is not excessive compared to the civilian casualties. Therefore, to be considered a co-belligerent, a state must have a direct participation in the hostilities such as by providing assistance that gives a significant contribution to the military of one of the warring parties to prove the belligerent nexus.⁷¹

In the situation between Russia and Ukraine, the US has been very active in providing financial, logistical, and military assistance to Ukraine, either individually or through the NATO. Any military action carried out by Ukraine as reprisal to

⁶⁵ Article 4 (2) of the First Geneva Convention 1949; See also, James Upcher, *Neutrality in Contemporary International Law*, 82.

⁶⁶ James Carden, "US a Co-belligerent in Ukraine War", Asia Times Expert Opinion, accessed on April 19, 2022, <https://asiatimes.com/2022/04/us-a-co-belligerent-in-ukraine-war-legal-expert-says/>; See Article I Section 8, Clause 11 of the United States Constitution.

⁶⁷ James Upcher, *Neutrality in Contemporary International Law*, 82.

⁶⁸ James Upcher, 84.

⁶⁹ S/18582, Letter from the *Chargé d'affaires* of the Permanent Mission of Kuwait to the United Nations addressed to the Secretary General: "Kuwait has always affirmed that it does not permit any party of forces in Iraq-Iran conflict to use its territory of airspace," January 12, 1987.

⁷⁰ US Chose not to consider Kuwait as co-belligerent, it can be seen by allowing Kuwaitis supertankers to fly US Flag. See Don Oberdofer and Molly Moore, "New Accord to Let Kuwaiti Tankers Fly US Flag," last modified on May 20, 1987, <https://www.washingtonpost.com/archive/politics/1987/05/20/new-accord-to-let-kuwaiti-tankers-fly-us-flag/ce926262-1232-4db1-9e23-c3e081c0927c/>.

⁷¹ Nils Mezler, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Geneva: International Committee of Red Cross, 2009), 47.

Russia's attack cannot be separated from US's military involvement. For instance, Ukraine's success in pushing back Russian troops in Kherson is inseparable from drones and UAVs provided by the US.⁷² Therefore, there is no doubt that direct participation in hostilities is fulfilled. The US assistance in weapons and special combat training is expected to advantage Ukraine's military capability to counter Russia's attack. Lastly, it is not fair to blatantly consider that this assistance is provided merely on US's initiative without considering President Zelensky's request to the US and other European states; all these military advantages are made by request and consent from Ukraine.⁷³

The second reason that is war declaration; considering the term aggression and invasion, especially after the conclusion of the UN Charter, a formal declaration of war is no longer needed. A similar argument was proposed by the US in the Vietnam War, that nothing in modern international law requires a state to declare war before participating or engaging in hostilities.⁷⁴ Therefore, participation in an armed conflict shall be seen more practically, whether there has been intervention or participation in an ongoing war.⁷⁵ The statement of the US in the US-Vietnam War contradicts its statement to defend its participation in the Russia-Ukraine War. Although Congress can declare war, it is merely a formal declaration and their subjective consideration that a war has occurred. In fact, by the time they engage in the war either directly or indirectly, even without a formal declaration, they have already been a party to it. Therefore, we shall move to the other side of the coin, which is quite decisive in determining US co-belligerent status.

Since the elements of co-belligerency are fulfilled in the US assistance to Ukraine in the Ukraine-Russia war, according to IHL, Russia may perceive the US as a legitimate war target. As a third party that maintains neutrality, the US should be more cautious in deciding its form of assistance. It should not only rely on its doctrine of qualified neutrality and the rules of international law but must also consider the IHL as *lex specialis* during the armed conflict.

F. Conclusion

The law of neutrality develops; and becomes more relevant in contemporary armed conflict. One of the developments is the doctrine of qualified neutrality. A concept was introduced in 1941 to expand the scope of neutrality based on international peace and security maintenance. Currently, the US refers to the same

⁷² Al-Jazeera, "War of Drones: Ukraine Troops Push Back Russians in Kherson," accessed on November 10, 2022, <https://www.aljazeera.com/news/2022/11/10/ukrainians-say-only-a-matter-of-time-before-they-re-take-kherson>.

⁷³ BBC, "What are the Sanctions on Russia and are They Hurting it's Economy?"

⁷⁴ James Carden, "US a co-belligerent in Ukraine War," 72.

⁷⁵ United States Defense Department Statements, "Effects of a Formal Declaration of War: US Defense Department Statement," *International Legal Materials* 5, no. 4 (1966): 792, <https://doi.org/10.1017/S0020782900049809>; See also Department of State, Office of the Legal Adviser, "The Legality of US Participation in the Defense of Viet-Nam," *Yale Law Journal* 75, no. 7 (1966): 572-573.

doctrine when they provide billions of dollars of military assistance to Ukraine in the Russia- Ukraine War.

Maintaining the peace and security of humankind, as the foundation of the qualified neutrality doctrine, is the purpose of the UN. Hence, any measure related to this doctrine's imposition shall be channeled through the UN as a neutral international organization. Article 51 of the UN Charter allows states, either individually or collectively, to conduct self-defense if there is an armed attack against a member of the UN. The US referred to this article, particularly to the collective self-defense, to justify its military assistance to Ukraine based on Ukraine's request. However, although the US is entitled to such a right, its neutrality is not guaranteed. Qualified neutrality postulated by the US to safeguard the status as a neutral power in collective self-defense action may only be invoked if the UN authorizes so. Subjective interpretation and the absence of UN authorization render US's military assistance lopsided.

This study concludes that the US is currently in a difficult position. The US has been persistent in providing military assistance to Ukraine. On the other hand, they are neglecting the obligation to wait for UN authorization. The situation indeed jeopardizes the US position.

First, the US impatience has rendered obligation under CA I superfluous. The obligation under CA I may appear as a sufficient supplementary basis to obtain permission from the UN before providing military assistance and imposing qualified neutrality to preserve its neutral status. In addition, Russia is a permanent member of the UNSC. It is also exacerbating the situation. Any effort to pass a resolution that allows a third state to provide military assistance on behalf of Ukraine individually is implausible.

However, it does not necessarily mean that the US is entirely running out of alternatives. the authorization is not only limited to the UNSC resolution. In addition to the constitutional constraint within the UN, the US may still have a chance to unite the collective interest of the UN member states through the UNGA by passing a similar resolution consisting of collective recommendations, including a recommendation for third states to provide military support for Ukraine to maintain international peace and security. The available alternative is worth reckoning if the US still insists on maintaining its neutrality based on qualified neutrality while providing military assistance to Ukraine.

Second, although this study provides available alternatives for the US, as the UN has issued no authorization in the first place, the US is considered to neglect the obligation to remain neutral. Due to this negligence, the US is risking itself by opening the possibility of being considered a co-belligerent and, thus, a legitimate military target. Although violation of its neutral status is not equivalent to co-belligerency, at this very moment, billions of dollars in military assistance have proved that the US participates in the ongoing hostilities. A 'co-belligerent' status levied upon the US by Russia as one of the belligerents is an absolute risk and a

worth reckoning legal consequence. The US is a member of the UN Security Council with ample experience in settling conflicts around the world. They should have acted more carefully and put forward a non-military approach in safeguarding action on behalf of invaded states. This approach could have retrieved them from the upcoming adverse military and legal consequences.

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