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## Neutrality

In this relatively brief Section, no attempt is being made to reproduce all of the rules of the law of neutrality. Rather, the purpose of the Section is merely to draw attention to some of those rules that are considered to be of greatest relevance to military operations involving nuclear weapons.

Neutrality law applies only during an international armed conflict. The law of neutrality and therefore the Rules of this Section do not apply to non-international armed conflicts.<sup>1</sup> Key rules of the law of neutrality are to be found in Hague Conventions V and XIII of 1907 and in customary law. The word 'neutral' refers to a State that is not a belligerent party to the conflict.<sup>2</sup> Neutral territory is therefore the 'land territory of neutral States, as well as waters subject to their territorial sovereignty (internal waters, territorial sea and, where applicable, archipelagic waters) and the airspace above those areas'.<sup>3</sup>

No declaration is required to establish neutral status. Rather, it is the simple fact of not being a belligerent party to the international armed conflict that suffices.<sup>4</sup> The law of neutrality does not apply if the UN Security Council has either (i) identified one or more belligerent parties as responsible for an unlawful resort to armed force in breach of Article 2(4) of the UN Charter or (ii) if the UN Security Council has taken binding preventive or enforcement measures under Chapter VII of the UN Charter. In such circumstances, a State that is not a party to the conflict cannot invoke the law of neutrality as justification for an act that is incompatible with its obligations under the UN Charter.<sup>5</sup> So, if the UN Security Council has determined the existence of

<sup>1</sup> AMW Manual, Commentary accompanying Section X, para. 5.

<sup>2</sup> San Remo Manual, para. 13(d).

<sup>3</sup> Tallinn Manual 2.0, Commentary accompanying Part 20, para. 2. See also German Manual, paras. 1108, 1118; AMW Manual, Commentary accompanying Rule 166; San Remo Manual, para. 14.

<sup>4</sup> UK Manual, para. 12.11.

<sup>5</sup> AMW Manual, Commentary accompanying Rule 1(aa) and Rule 165.

a threat to the peace, a breach of the peace or an act of aggression under Article 39 of the UN Charter and has taken preventive or enforcement measures, the decisions of the Security Council are binding on member States and prevail over other treaty obligations.<sup>6</sup> Accordingly, States taking no part in the enforcement or preventive action are not permitted to hamper or impede action being taken in accordance with the binding UN Security Council decision and cannot rely on the impartial status of neutrals.<sup>7</sup>

Neutrality law governs the relationship between, on the one hand, States that are involved as parties to an international armed conflict and, on the other, States that are not party to the armed conflict. The primary purpose of the law of neutrality is to prevent an escalation of an international armed conflict. The parties to the conflict are obliged to respect the inviolability of neutral territory. To that end, the law of neutrality obliges the belligerent States to refrain from the exercise of any belligerent rights in neutral territory (which includes the territorial sea and, where applicable, archipelagic waters) and in neutral national airspace (which is the airspace above neutral territory and neutral sea areas). Neutral States are obliged to treat the belligerents impartially and to defend their neutral status. Strictly speaking, the law of neutrality, which protects the territorial sovereignty of neutral States, does not address the protection of neutral nationals or neutral aircraft and ships, whose status is to be determined under prize law (which can be ignored for present purposes).

## Neutral Territory

### Rule 65

*Hostilities between parties to an international armed conflict, including nuclear operations, must not be conducted within or from neutral territory.*

1 The basis for this Rule is Article 1 of Hague Convention V and Article 1 of Hague Convention XIII.<sup>8</sup> The Rule reflects customary law. Compliance with the Rule is vital if escalation of international armed conflicts is to be prevented.

2 The parties to an international armed conflict are not permitted to engage in hostilities in neutral airspace, on neutral territory, in neutral internal waters or in neutral territorial seas and archipelagic seas, if applicable. Similarly, they

<sup>6</sup> UN Charter, Article 103.

<sup>7</sup> AMW Manual, Commentary accompanying Rule 165, para. 2

<sup>8</sup> See also the 1923 Draft Hague Rules of Aerial Warfare, Articles 39, 40; AMW Manual, Rule 166; Tallinn Manual 2.0, Rule 151.

may not fire off weapons while in such locations, even if the intended target is located outside neutral territory. The definition of neutral territory, given in the chapeau to this Section, does not include the Exclusive Economic Zone (EEZ). Accordingly, it is not prohibited to conduct hostilities within a neutral State's EEZ or in the airspace above a neutral State's EEZ.<sup>9</sup> There is, however, an obligation on the parties to the armed conflict to pay due regard to the rights of coastal States (e.g. in respect of exploration and exploitation of the EEZ's economic resources and the protection of the marine environment). This has been interpreted as an obligation to 'balance the military advantages anticipated as against any negative impact on the rights of Neutrals'.<sup>10</sup>

## Prohibited Acts in Neutral Territory

### Rule 66

*In neutral territory the parties to an international armed conflict must not: commit hostile acts such as attacking or capturing persons or objects; establish bases of military operations; intercept, inspect, divert or capture vessels or aircraft; use neutral territory as a sanctuary; or undertake any activity that contributes to the war-fighting effort of either party to the conflict. Parties to such a conflict must not use neutral territory for the movement of troops, munitions of war or supplies or for the operation of military communication systems.*

1 This Rule is based on Articles 2 and 3 of Hague Convention V, Articles 2 and 5 of Hague Convention XIII and Articles 39, 40, 42 and 47 of the Draft Hague Rules of Aerial Warfare of 1923. It is a rule of customary law.<sup>11</sup>

2 This Rule spells out the implications of the inviolability of neutral territory. If a party to an international armed conflict attacks, destroys or captures an enemy aircraft in neutral airspace, or attacks, destroys or captures a nuclear-armed enemy vessel (e.g. a submarine) in neutral waters or at a neutral port, this would be a clear breach of the Rule. Equally, if a party to such a conflict were, for example, to use an airfield on neutral territory as a base for aircraft that are being used for nuclear operations, or were to use a neutral port as the base from which a nuclear-armed submarine undertakes its patrols, this kind of activity would clearly breach this Rule.

3 The Rule also applies to overflights by military aircraft. So, if a nuclear-armed military aircraft of a party to an international armed conflict were to

<sup>9</sup> San Remo Manual, paras. 34, 35.

<sup>10</sup> AMW Manual, Commentary accompanying Rule 166, para. 3.

<sup>11</sup> AMW Manual, Commentary accompanying Rule 167(a), para. 1.

overflow the territory of a neutral State – say, while on its way to the target of a planned attack, including a nuclear attack – the Rule will have been breached.<sup>12</sup> It follows from this that if a military aircraft belonging to a party to an international armed conflict enters neutral airspace (other than the airspace superjacent to straits used for international navigation or archipelagic sea lanes), the neutral must do everything in its power to prevent or terminate the violation of its neutrality.<sup>13</sup> If the intruding aircraft cannot be forced to land, it may be shot down. If the aircraft does land, the aircraft and its crew must be interned for the duration of the international armed conflict. Likewise, States that are party to an international armed conflict are prohibited from transporting equipment and supplies through neutral territory for use in connection with nuclear operations and from using apparatus on neutral territory for the purpose of communicating with nuclear forces, whether land-, sea- or air-based.

4 Belligerent warships may, however, continue to exercise the right of innocent passage in neutral territorial seas. That right does not, however, permit the launching, landing or taking-on-board of any aircraft or of any military device.<sup>14</sup> In addition, there is no violation of neutrality where a party to an international armed conflict uses a public, internationally and openly accessible network such as the Internet for military purposes, even if part of this infrastructure is situated within the territories of neutrals.<sup>15</sup>

5 It follows from the foregoing that parties to an international armed conflict must not attack persons or objects on neutral land, in neutral waters or in neutral airspace. They must not use those places as a base for undertaking military operations against targets, wherever those targets may be located. Moreover, they must not engage in the interception, inspection, diversion or capture of vessels or aircraft in neutral territory. Finally, they must not otherwise use military force or contribute to the war-fighting effort within neutral territory.<sup>16</sup>

<sup>12</sup> Note, however, that a belligerent military aircraft in distress may be allowed to enter neutral airspace and to land on neutral territory. The neutral State, for its part, must require the aircraft to land – if need be, backing up the requirement with the use of suitable force – and must intern the aircraft and its crew for the duration of the conflict; see AMW Manual, Rule 172(a) (i). Belligerent military aircraft may also be permitted to enter neutral territory in order to capitulate; see AMW Manual, Rule 172(a)(iii). The capitulating military aircraft and its crew must likewise be interned for the duration of the conflict. If the aircraft commits a hostile act, it may be attacked; see AMW Manual, Rule 172(b).

<sup>13</sup> Hague Convention XIII, Article 25; Draft Hague Rules of Aerial Warfare, Articles 42, 47; AMW Manual, Rule 170(c).

<sup>14</sup> UNCLOS, Article 19(2).

<sup>15</sup> Consider Hague Convention V, Article 8.

<sup>16</sup> AMW Manual, Rules 171(a), (b), (c), (d).

6 As to activities that contribute to the war-fighting effort, it should be noted that a neutral 'is not bound to prevent the export or transit on behalf of a belligerent of aircraft, parts of aircraft, or material, supplies or munitions for aircraft'.<sup>17</sup> A neutral is, however, 'bound to use the means at its disposal: (1) to prevent the departure from its jurisdiction of an aircraft in a condition to make a hostile attack against a belligerent Power . . .'.<sup>18</sup>

## Obligations of Neutrals

### Rule 67

*A neutral must not permit the acts referred to in Rule 66 to take place within its territory and must do everything it can to prevent or stop them.*

1 This Rule is based on Article 5 of Hague Convention V and Article 42 of the Draft Hague Rules of Aerial Warfare. It is a rule of customary international law.<sup>19</sup> Central to the Rule, and to the law of neutrality, is the idea that if a State wishes to benefit from the advantages of neutrality and the protections it offers, the State must not permit misuse of its territory by the belligerent parties.

2 A neutral is required to use the means that are available to it to monitor activity on its territory, including its territorial sea and in its airspace, in order to become aware if a belligerent party is breaching its neutrality. The action that a neutral will, in practice, be able to take in this regard will depend on the relevant technical facilities that are available to it.<sup>20</sup>

3 The neutral State must use the means available to it to prevent or stop breaches of its neutrality.<sup>21</sup> Depending on the circumstances, those means may include the use of force. Such a use of force cannot be regarded as a hostile act by the neutral.<sup>22</sup> The degree of force used by the neutral must be limited to that which is required to 'repel the incursion and maintain its neutrality'.<sup>23</sup> These provisions reflect customary law.

4 If a neutral uses force to defend its neutrality, this cannot be regarded as an armed attack for the purposes of Article 51 of the UN Charter, with the

<sup>17</sup> Draft Hague Rules of Aerial Warfare, Article 45.

<sup>18</sup> *Ibid.*, Article 46(1).

<sup>19</sup> Consider San Remo Manual, para. 22.

<sup>20</sup> AMW Manual, Rule 170(b) and the accompanying Commentary.

<sup>21</sup> Hague Convention XIII, Article 8; Draft Hague Rules of Aerial Warfare, Articles 42, 47.

<sup>22</sup> Hague Convention V, Article 10; Hague Convention XIII, Article 26; Draft Hague Rules of Aerial Warfare, Article 48.

<sup>23</sup> AMW Manual, Rule 169. If the neutral uses force that exceeds what is required to terminate the violation of its neutrality, the affected belligerent may take countermeasures; see AMW Manual, Commentary accompanying Rule 169, para. 2.

consequence that the affected belligerent has no right to use force in self-defence.

5 Consider a situation in which a nuclear armed submarine belonging to a belligerent party to an international armed conflict is loitering within the territorial sea of a neutral State. The neutral State becomes aware of its presence and demands that the submarine move into international waters. The commander of the submarine refuses to leave the neutral's territorial sea. The neutral State would, in the absence of alternative, less destructive possible measures, be entitled, indeed required, to use force against the submarine in order to bring an end to the breach of its neutrality.

6 If a neutral State is unwilling or unable to take the measures necessary to terminate a violation of its neutral status, the opposing belligerent 'may, in the absence of any feasible and timely alternative, use such force as is necessary to terminate the violation of neutrality'.<sup>24</sup> In all other instances, the unjustified use of force against a neutral State by a belligerent will be contrary to Article 2(4) of the UN Charter and may trigger an international armed conflict between the belligerent and the neutral State.

7 The issue remains unresolved as to whether the law of neutrality applies in its entirety to a State that has declared itself neutral and that is a member State of a system of collective self-defence, such as NATO. For instance, during the 2003 Iraq War, the German government officially declared its neutrality, but it continued to allow the use of Allied military bases in Germany. While some take the position that membership of a system of collective self-defence modifies the law of neutrality, the present authors take the view that the use of military bases in neutral territory is in violation of neutrality.

## Protection of Neutral Territory against Harmful Effects of Hostilities

### Rule 68

*In the conduct of military operations, including nuclear operations, the parties to an international armed conflict must take all feasible measures to avoid harmful effects on neutral territory.*

1 Neither Hague Convention V nor Hague Convention XIII contains any specific provision corresponding to this Rule. Rather, the Rule follows from the general obligation to refrain from activities violating the rights of other States. It must not be confused with the obligation of belligerent States to pay

<sup>24</sup> AMW Manual, Rule 168(b). See also San Remo Manual, para. 22.

due regard to the rights enjoyed by neutral States in their EEZ, on their continental shelf or in high sea areas.<sup>25</sup>

2 The purpose of the Rule is to protect the territorial integrity of neutral States against harmful effects of hostilities. Accordingly, this obligation also applies, for example, to the radiation effects of a nuclear explosion. It is important to stress that it is not absolute. The term 'feasible' implies measures that are practicable or practically possible, taking all attendant circumstances into account, including military and humanitarian considerations. Accordingly, what is feasible has to be determined in the light of the circumstances of the concrete situation.

<sup>25</sup> San Remo Manual, paras. 34, 35, 36.