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Cover Page Footnote

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BEBAS-AKTIF: ON THE LAW OF NEUTRALITY APPLICABLE TO INDONESIA

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Abstract

*Tensions have heightened in the Indo-Pacific, with the People's Republic of China engaging in aggressive behaviors in the South China Sea, confronting India in border disputes, and poising itself for a forcible unification of Taiwan in the midst of a great power competition with the United States. While the situation remains precarious, it is imperative for Indonesia to consider how it might position itself if a large-scale armed conflict erupted in the region. Indonesia could plausibly maintain a neutral status without taking part in hostilities, pursuant to its long-standing "free-active" foreign policy. In such a case, the law of neutrality will regulate Indonesia's relationship with belligerent parties according to corresponding rights and obligations derived from neutral status. However, this body of law is in a state of constant flux, with pragmatic considerations often prevailing over normative consistency. This article explores how Indonesia might implement the law of neutrality to maintain peaceful relations with belligerent parties, with a focus on three specific issues pertaining to its national interest: (1) closure of its archipelagic waters; (2) arms export control; and (3) the protection of its cyber infrastructure. This article concludes by finding that Indonesia is well positioned to make a pragmatic choice based on the geopolitical and socioeconomic conditions prevailing at the time but must pre-empt various legal risks by building its practice and expressing its *opinio juris* to shape the development of customary international law in this field.*

Keywords: Archipelagic waters, Arms export control, Cyber operations, Law of neutrality, Non-aligned movement.

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I. INTRODUCTION

Tensions have heightened in the Indo-Pacific, challenging Indonesia's long-standing policy towards non-alignment in great power politics.¹ The People's Republic of China (PRC) has increasingly demonstrated aggressive behaviors in the South China Sea, deploying both government ships and fishing vessels organized into a maritime militia to assert its national interest.² The PRC has

¹ Arie Afriansyah and Aristyo Rizka Darmawan, "Sailing between Reefs: Balancing Indonesia's Maritime Security Cooperation in the Indo-Pacific," *Chinese (Taiwan) Yearbook of International Law and Affairs* 40 (2022): 166.

² Shuxian Luo and Jonathan G. Panter, "China's Maritime Militia and Fishing Fleets: A Primer for Operational Staffs and Tactical Leaders," *Military Review* (Jan.-Feb. 2021): 7; Gregory B.

also confronted India along the 2,100-mile long-contested border between the two countries – known as the Line of Actual Control – with fighting in the Galwan Valley resulting in casualties on both sides.³ Further, the PRC poises itself for achieving forcible unification of Taiwan in the midst of a great power competition with the United States.⁴

While these situations remain precarious, it is imperative for Indonesia to consider how it might position itself if a large-scale armed conflict has erupted in the region. Indonesia could plausibly maintain a neutral status without taking part in hostilities, pursuant to its long-standing “free-active” foreign policy. In such a case, the law of neutrality will regulate Indonesia’s relationship with belligerent parties, with corresponding rights and obligations derived from neutral status. However, this body of law is in a state of constant flux, with pragmatic considerations often prevailing over normative consistency. This article explores how Indonesia might implement the law of neutrality to maintain peaceful relations with belligerent parties by examining how Indonesia’s free-active foreign policy dovetails with the traditional law of neutrality as codified in the 1907 Hague Conventions V and XIII.⁵

To that end, this article first reviews Indonesia’s non-aligned foreign policy that has been maintained by successive governments and deciphers the traditional law of neutrality, drawing on existing literature and state practice. These two bodies of study will then be fused into an integrated analysis of the three specific issues that are likely to confront Indonesia as a neutral state in the event of an armed conflict unfolding in the Indo-Pacific region: (1) closure of its archipelagic waters; (2) arms export control; and (3) the protection of

Poling, et al., “Pulling Back the Curtain on China’s Maritime Militia,” Center for Strategic & International Studies, 18 November 2021, <https://www.csis.org/analysis/pulling-back-curtain-chinas-maritime-militia>.

³ International Crisis Group, “Thin Ice in the Himalayas: Handling the India-China Border Dispute,” Asia Report No. 334, 14 November 2023, <https://www.crisisgroup.org/sites/default/files/2023-11/334-thin-ice-himalayas.pdf>; Jan-Tino Brethouwer, et al., “Rising Tension in the Himalayas: A Geospatial Analysis of Chinese Border Incursions into India,” *PLoS One* 17 no. 11 (2022): e0274999, doi:10.1371/journal.pone.0274999.

⁴ Kyle Amonson and Dane Egli, “The Ambitious Dragon: Beijing’s Calculus for Invading Taiwan by 2030,” *Journal of Indo-Pacific Affairs* 6, no. 3 (2023): 38; Michael J. West and Aurelio Insisa, “Reunifying Taiwan with China through Cross-Strait Lawfare,” *The China Quarterly* 257 (2024): 186, doi:10.1017/S0305741023000735.

⁵ Convention (No. V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, adopted 18 October 1907, 205 Consol. T.S. 299, 36 Stat. 2310, T.S. No. 540 (entered into force 26 January 1910) (hereinafter Hague Convention V); Convention (No. XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, adopted 18 October 1907, 205 Consol. T.S. 395, 36 Stat. 2415, T.S. No. 545 (entered into force 26 January 1910) (hereinafter Hague Convention XIII).

its cyber infrastructure. This article concludes by finding that Indonesia is well positioned to make a pragmatic choice based on the geopolitical and socioeconomic conditions prevailing at the time but must pre-empt various legal risks by building its practice and expressing its opinio juris to shape the development of customary international law in this field.

II. INDONESIA'S NON-ALIGNED POSTURE

Indonesia achieved its independence on 17 August 1945 by ending its struggle against occupation by colonial countries. One of the first steps taken by the nation's leaders at that time was to establish the nation's ideology, Pancasila. They hoped that the Pancasila ideology would help achieve "Indonesia as an independent, sovereign, just and prosperous country".⁶ They envisaged that peace and stability would be essential to facilitate post-war reconstruction efforts through international cooperation. They placed their faith in international organizations, such as the United Nations (UN), as an institutional foundation for establishing friendly relations among nations and fostering international solidarity.⁷

Despite these premises, the Cold War emerged between the American-led western block and the Soviet-led eastern bloc, which impeded international cooperation. Indonesia chose not to join either side for various reasons. As the then Vice President Hatta stated, Indonesia intended to establish Pancasila without relying on other nations.⁸ Indonesia did not see the need to join either side because there was no external threat posed to it. Most significantly, Indonesia's desire for peaceful relationship and friendship among nations, independent of any alliance, was deep-rooted in its national sovereignty and vision for world peace. As the preamble of the 1945 Constitution provides,⁹ Indonesia shall preserve the nation and aspire to end imperialism and colonialism in the formulation of its foreign policy.¹⁰ Indonesia has also pursued the good neighbor policy with other nations.¹¹

⁶ Mohammad Hatta, "Indonesia's Foreign Policy," *Foreign Affairs* 31, no. 3 (1953): 441.

⁷ *Ibid.*, 444.

⁸ *Ibid.*, 441-442.

⁹ Siti Mutiah Setiawati and Ali Roziqin, "New Trends of Indonesia's Foreign Policy under President Joko Widodo in the First Period," *Technium Social Sciences Journal* 54 (2024): 249, 251, doi:10.47577/tssj.v54i1.10554.

¹⁰ *Ibid.*

¹¹ *Ibid.*

Based on these ideals, President Soekarno introduced a “bebas-aktif” (free-active) foreign policy. According to Indonesian foreign policy, “free” means independence in making decisions without foreign interference.¹² The adjective “active” signals Indonesia’s resolve to actively build international relations by participating in international forums, such as the UN and the Association of Southeast Asian Nations (ASEAN).¹³ Central to Indonesia’s foreign policy has thus been the balancing of national and international interests based on mutual respect for sovereignty and the principle of non-interference.¹⁴ As a foreign policy, however, it does not define Indonesia’s neutral status in the event of an international armed conflict affecting the country’s national interests. Nor does it articulate how Indonesia might assert neutral rights or implement neutral obligations under the law of neutrality.

Indonesia has adopted a non-aligned foreign policy by not taking sides between the two ideological blocs formed during the Cold War.¹⁵ However, this policy must be distinguished from permanent neutrality, such as the one that Switzerland has traditionally adopted as the central pillar of its foreign policy. As will be discussed below, a state may stay neutral when other states engage in an armed conflict, with certain rights and obligations attached to it under the law of neutrality. Permanent neutrality is the undertaking of such a position in advance of any future armed conflict by disavowing the state’s participation in any military alliances or the presence of foreign military forces within its own territory.¹⁶ Indonesia’s foreign policy, by contrast, is not premised on its anticipated position in case of an armed conflict but rather prioritizes the maintenance of peaceful relations.¹⁷ Non-alignment is a manifestation of Indonesia’s “free-active” foreign policy without prejudice to its war-time neutral status. Indonesia’s non-aligned position in accordance with its “free-active” foreign policy has remained intact to date, based on the ideals set forth by Vice President Hatta.¹⁸

¹² Susilawati, Rizal Yusuf and Arief Rachman, “Politik Luar Negeri Indonesia yang Bebas Aktif Dasar Mewujudkan Perdamaian Dunia,” *Indonesian Journal of Interdisciplinary Research in Science and Technology* 2, no. 3 (2024): 309, 311, doi:10.55927/marcopolo.v2i3.8528.

¹³ *Ibid.*, 314.

¹⁴ Hatta, “Indonesia’s Foreign Policy,” 442.

¹⁵ Rizal Sukma, “Indonesia’s Bebas-Aktif Foreign Policy and the ‘Security Agreement’ with Australia,” *Australian Journal of International Affairs* 51, no. 2 (1997): 231, 233, doi:10.1080/10357719708445212.

¹⁶ See Constitutional Law on Neutrality 1955 (Austria), art. 1(ii); Declaration on the Neutrality of Laos, signed 23 July 1962, 456 UNTS 301 (entered into force 23 July 1962), arts. 2(e) and 2(g).

¹⁷ Rizal Sukma, “The Evolution of Indonesia’s Foreign Policy: An Indonesian View,” *Asian Survey* 35, no. 3 (1995): 304, 312, doi:10.2307/2645547.

¹⁸ Ahmad Rizky Mardhatillah Umar, “The Rise of the Asian Middle Powers: Indonesia’s

Despite changes of government over time, Indonesia has consistently maintained a non-aligned posture in its international relations.¹⁹ The ways in which Indonesia has implemented this policy from the time when the Cold War unfolded to today's multipolar world illuminate the prospect for Indonesia's neutrality in the event of an international armed conflict in the Indo-Pacific region.

When Indonesia emerged as an independent nation, President Soekarno emphasized anti-colonialism, imperialism, and nationalism in his foreign policy.²⁰ In the early 1950s, this emphasis on nationalism signified Indonesia's anti-western stance and became the impetus for establishing relations with communist nations such as the Soviet Union and the PRC.²¹ Soekarno's anti-colonialism grew stronger over time, with confrontational policy towards Irian Jaya and Malaysia.²² However, Indonesia gained little from such a combative approach. The clash in Malaysia contradicted Indonesia's free-active foreign policy and raised suspicions that Indonesia was leaning towards one of the ideological blocs.²³ It was against this background that Soekarno hosted and co-founded the Asia-Africa Conference in Bandung in 1955, with a view to strengthening and disseminating Indonesia's non-aligned policy.²⁴

The government policy shifted in favor of the western bloc under President Soeharto.²⁵ His approach restored the balance between the geopolitical climate surrounding Indonesia and the idea of free-active foreign policy by tracking independence and neutrality to its roots. The Indonesian economy needed urgent attention and a national development program. This economic focus made the country's mindset resemble western block economies.²⁶ Additionally, Soeharto prioritized amicable relations with neighboring countries to promote regional stability and cooperation in Southeast Asia.²⁷ The government settled the dispute with Malaysia through diplomacy and mediation.

Conceptions of International Order," *International Affairs* 99, no. 4 (2023): 1459, 1463, doi:10.1093/ia/iiaad167.

¹⁹ Setiawati and Roziqin, "New Trends of Indonesia's Foreign Policy," 251.

²⁰ Michael R. J. Vatikiotis, "Indonesia's Foreign Policy in the 1990s," *Contemporary Southeast Asia* 14, no. 4 (1993): 352, 353.

²¹ *Ibid.*

²² Anthony L. Smith, "Indonesia's Foreign Policy under Abdurrahman Wahid: Radical or Status Quo State?" *Contemporary Southeast Asia* 22, no. 3 (2000): 498, 501.

²³ Vatikiotis, "Indonesia's Foreign Policy," 353.

²⁴ *Ibid.*, 357. For details, see Seng Tan and Amitav Acharya, eds., *Bandung Revisited: The Legacy of the 1955 Asian-African Conference for International Order* (Singapore: National University of Singapore Press, 2008).

²⁵ Smith, "Indonesia's Foreign Policy," 501.

²⁶ Sukma, "The Evolution of Indonesia's Foreign Policy: An Indonesian View," 312.

²⁷ Vatikiotis, "Indonesia's Foreign Policy," 353.

In the 1990s, Indonesia began playing an active role as a mediator by helping resolve neighboring conflicts. For example, the Indonesian and Vietnamese Ministers of Foreign Affairs hosted a “cocktail party” with four Cambodian factions to resolve the Cambodian conflict.²⁸ Indonesia has attempted to mediate the South China Sea conflict involving Brunei, Malaysia, the Philippines, Taiwan, Vietnam, and the PRC.²⁹ Indonesia’s mediation also helped the Moro National Liberation Front negotiate with the Philippine government.³⁰

President Megawati weathered a difficult time due to the rise of international terrorism and the new mantra of counterterrorism cooperation. The events of 11 September 2001 in the United States, the Bali bombing on 12 October 2002, and the bombing that followed on 5 August 2003 at the “JW Marriott” hotel in Jakarta had a significant impact on Indonesia’s foreign policy. These events created an environment where great powers—most notably the United States and Britain—increasingly resorted to unilateral measures in their anti-terrorism initiatives.³¹ Indonesia was not explicit about a neutral status in these conflicts but, instead, pursued multilateral diplomacy to protect its independence and sovereignty. President Megawati’s visit to Moscow for arms trade, while it was placed under US arms embargoes due to the military’s failure to stem violence in East Timor, illuminated Indonesia’s resolve to protect its national interests as a matter of priority over political allegiances.³²

Indonesia’s foreign relations turned into a whole-of-government enterprise under the 2004–2014 presidency of Soesilo Bambang Yudhoyono. This is evident in the “total diplomacy” strategy designed to engage “all instruments in a manner that involves of all stakeholders and utilizes all elements of influence (multitrack diplomacy).”³³ By proclaiming “democracy as a national

²⁸ Dewi Fortuna Anwar, “Indonesia’s Foreign Policy After the Cold War,” *Southeast Asian Affairs* (1994): 146, 149.

²⁹ *Ibid.*, 150.

³⁰ *Ibid.*

³¹ See John Dumbrell, “Working with Allies: The United States, the United Kingdom, and the War on Terror,” *Politics and Policy* 34, no. 2 (2006): 452, doi:10.1111/j.1747-1346.2006.00021.x; Hakan Cem Çetin, “War on Terrorism: What Went Wrong in Afghanistan?” *Journal of Human Sciences* 10, no. 2 (2013): 532.

³² Agus Nilmada Azmi, “Kebijakan Luar Negeri Indonesia (Kepemimpinan Habibie, Abdurrahman Wahid, Megawati dan Soesilo Bambang Yudhoyono),” *Emerald: Journal of Economics and Social Sciences* 2, no. 1 (2023): 1, 9; “Indonesian President to Visit Moscow for Arms Talks,” ABC News, 14 April 2003, <https://www.abc.net.au/news/2003-04-15/indonesian-president-to-visit-moscow-for-arms-talks/1836576>.

³³ Philips J. Vermonte, “Foreign Policy Begins at Home: The Domestic Sources of Indonesia’s Foreign Policy under SBY’s Presidency (2004-2014),” *Indonesian Quarterly* 42, no. 3-4

identity” at the core of its foreign policy, Indonesia is also considered to have indirectly promoted democratic values across the region.³⁴ One noteworthy example is Indonesia’s role in facilitating the adoption of the ASEAN Charter in 2007, which turned the regional grouping into a rule-based forum that upholds “the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms”.³⁵ However, none of these new initiatives changed the traditional non-aligned posture. Indeed, President Bambang Yudhoyono stated in his inauguration speech for his second term as president:

*“Indonesia will continue to practice a free and active politics, fighting for justice and world peace. Indonesia will maintain a friendly and moderate spirit and nationalism. Indonesia is facing a strategic environment where no country perceives Indonesia as an enemy and there is no country that Indonesia considers an enemy. Thus, Indonesia can exercise its foreign policy freely in all direction, having a million friends and zero enemies. Lastly, Indonesia will cooperate with anyone with the same intentions and goals to build a peaceful, just, democratic and prosperous world”.*³⁶

President Joko Widodo’s foreign policy concentrated on economic diplomacy, security and peace, and the protection of Indonesian nationals and legal entities overseas. The Indonesian Ministry of Foreign Affairs’ strategic plan similarly emphasizes ASEAN cooperation, but it does so in a more inward sense, emphasizing ASEAN’s relevance to domestic policy, particularly in the infrastructural and economic sectors. Under Joko Widodo’s Nawa Cita program, foreign policy has increasingly focused on economic diplomacy with three broad objectives: increasing foreign investment, opening up domestic markets to foreign countries, and developing tourism to draw in foreign tourists.

(2014): 201, 209.

³⁴ See Sevira Marsanti Utari and Baiq Wardhani, “National Identity and Foreign Policy: Indonesia Million Friends Zero Enemy under Yudhoyono Regime,” *Proceedings of Airlangga Conference on International Relations (ACIR 2018) - Politics, Economy, and Security in Changing Indo-Pacific Region* (2018): 581. doi:10.5220/0010280600002309.

³⁵ Charter of the Association of Southeast Asian Nations, adopted 20 November 2007, 2624 UNTS 223 (entered into force 15 December 2008), preamble.

³⁶ SBY Inaugural Speech on 20 October 2009 as quoted by Vermonte, “Foreign Policy Begins,” 209-210.

President Widodo has also envisaged as his second foreign policy goal establishing Indonesia as a “global maritime fulcrum” with a view to turning Indonesia into a global maritime hub.³⁷ However, the pursuit of this policy has stalled due to bureaucratic infighting surrounding maritime security and the prioritization of domestic politics.³⁸ As a result, Indonesia missed an opportunity to develop a strategy to effectively deal with the South China Sea dispute and the PRC’s encroachment in Indonesian waters.³⁹ The absence of a maritime security strategy has left Indonesia uncertain about how it might protect its archipelagic waters in the event of an armed conflict in the region.

III. THE LAW OF NEUTRALITY

During an international armed conflict, the law of neutrality governs the legal relationship between the belligerent parties and Indonesia as a neutral state. This body of law applies in parallel to any other rules of international law governing their peacetime relationship, including any rights and obligations arising from bilateral treaties concluded between them, multilateral treaties to which they are both party, and customary international law binding on them. As such, it has no application to non-international armed conflict between a state and a non-state actor or among non-state armed groups. However, the law of neutrality can operate even in cases where one of the belligerent parties is not recognized as a sovereign state (for example, Taiwan) if a recognition of belligerency is granted.⁴⁰

The traditional law of neutrality emerged through state practice during the seventeenth to nineteenth centuries.⁴¹ In 1907, this development culminated in the adoption of Hague Conventions V and XIII, which codified the law

³⁷ Muhammad Budiana, “Analysis of Indonesia’s Foreign Policy during President Jokowi,” *Jurnal Mantik* 6, no. 3 (2022): 3564, 3569.

³⁸ Evan Laksana, “Indonesia as ‘Global Maritime Fulcrum’: A Post-Mortem Analysis,” Asia Maritime Transparency Initiative, 8 November 2019, <https://amti.csis.org/indonesia-as-global-maritime-fulcrum-a-post-mortem-analysis/>.

³⁹ Scott Bentley, “The Maritime Fulcrum of the Indo-Pacific: Indonesia and Malaysia Respond to China’s Creeping Expansion in the South China Sea,” CMSI Red Books, Study No. 17 (2023), <https://digital-commons.usnwc.edu/cmsi-red-books/17/>.

⁴⁰ For details, see Hitoshi Nasu, “The Strategic Use of International Law in the Crisis of Taiwan Strait,” *Chinese (Taiwan) Yearbook of International Law and Affairs* 41 (2024): 19, 39-41.

⁴¹ For the historical development, see Kentaro Wani, *Neutrality in International Law: From the Sixteenth Century to 1945* (Abingdon: Routledge, 2017); Elizabeth Chadwick, *Traditional Neutrality Revisited: Law, Theory and Case Studies* (The Hague: Kluwer Law International, 2002); Stephen C. Neff, *The Rights and Duties of Neutrals: A General Theory* (Manchester: Manchester University Press, 2000); Philip C. Jessup, *Neutrality: Its History, Economics and Law* (New York: Columbia University Press, 1936).

of neutrality in the case of land warfare and naval warfare respectively.⁴² These instruments set out neutral states' rights and obligations that would have allowed them to stay out of the conflict, together with corresponding rights and obligations on the part of belligerent parties in their interaction with neutral states. These rules were codified more than a century ago when maritime transport gained significance to the world's economies as the means of international commerce. It is thus debatable to what extent these rules remain relevant to belligerent-neutral relations in the modern and future conflict where unneutral support for a belligerent party can take different forms, such as intelligence sharing and cyber activities.⁴³ Pragmatic considerations often prevail when a neutral state adjusts its foreign policy and trade relationship with the belligerent parties to an armed conflict.

As a general principle, the sovereign territory of a neutral state, including its territorial sea and airspace, is inviolable. In other words, belligerents are prohibited from conducting military operations within neutral territory, such as moving troops, transporting munitions or supplies, and installing or using military communication stations or other apparatus except for pre-existing ones that have been open for public use.⁴⁴ In return, a neutral state owes four obligations towards belligerent parties to ensure inviolability of its territory.⁴⁵

First, a neutral state must abstain from the supply of arms and war materials to assist a belligerent party.⁴⁶ This means that other forms of support, such as financial assistance or the provision of goods and services that are unrelated to the conduct of hostilities fall outside of neutral obligations.⁴⁷ Ambiguities nonetheless abound in the text of the rule built on the past practice. Even during the 1907 Hague Conference, views were divided as to whether the revictualling of belligerent auxiliary vessels constituted forbidden supply.⁴⁸

⁴² Convention (No. V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, adopted 18 October 1907, 205 Consol. T.S. 299, 36 Stat. 2310, T.S. No. 540 (entered into force 26 January 1910) (hereinafter Hague Convention V); Convention (No. XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, adopted 18 October 1907, 205 Consol. T.S. 395, 36 Stat. 2415, T.S. No. 545 (entered into force 26 January 1910) (hereinafter Hague Convention XIII).

⁴³ See Hitoshi Nasu, "The Laws of Neutrality in the Interconnected World: Mapping the Future Scenarios," in *The Future Law of Armed Conflict*, Matthew C. Waxman and Thomas W. Oakley, eds. (Oxford: Oxford University Press, 2022): 123, doi:10.1093/oso/9780197626054.003.0008.

⁴⁴ Hague Convention V, arts. 1-3; Hague Convention XIII, arts. 1-5.

⁴⁵ For details, see Robert W. Tucker, *Law of War and Neutrality at Sea* (Washington, DC: United States Government Printing Office, 1955), 202-58.

⁴⁶ Hague Convention V, arts. 2, 5; Hague Convention XIII, art. 6.

⁴⁷ Hitoshi Nasu, "The Future Law of Neutrality," *Articles of War*, 19 July 2022, <https://lieber.westpoint.edu/future-law-of-neutrality/>.

⁴⁸ A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences*

More recently, Japan and Switzerland appear to have adopted the position that the supply of protective gear and demining equipment is not prohibited under the law of neutrality.⁴⁹ A more radical view justifies the supply of arms and munitions on the basis of “qualified neutrality” in favor of victims of aggression.⁵⁰

Second, a neutral state has a duty to use the means at its disposal to prevent its nationals from rendering assistance within neutral territory, for example, forming corps of combatants on its territory and arming vessels within its jurisdiction.⁵¹ Some countries have also agreed to criminalize the recruitment, use, financing, or training of mercenaries for participation in an armed conflict.⁵² However, in the absence of such agreement, a neutral state is not obliged to prevent its nationals from voluntarily offering their service to a belligerent’s armed forces, as long as the state is not involved in recruitment on its own territory.⁵³ Likewise, there is no obligation to prohibit private individuals and companies from exporting arms and military equipment or rendering assistance in favor of one or the other of the belligerent parties. The traditional law of neutrality preserved the freedom of private commerce.

Concerning the Laws and Usages of War: Texts of Conventions with Commentaries (Cambridge: Cambridge University Press, 1909), 464.

⁴⁹ “Japan Supplies Ukraine with Gear to Remove Russia-Planted Landmines,” NHK, 4 April 2024, https://www3.nhk.or.jp/nhkworld/en/news/20240405_01/; Hugo Miller, “Swill to Allow Some Demining Equipment to Be Sent to Ukraine,” Bloomberg, 25 January 2023, <https://www.bloomberg.com/news/articles/2023-01-25/swiss-to-allow-some-demining-equipment-to-be-sent-to-ukraine>.

⁵⁰ See Natalino Ronzitti, “Neutrality, Non-Belligerency, and Permanent Neutrality according to Recent Practice and Doctrinal Views,” *Journal of Conflict & Security Law* 29 (2024): 55, doi:10.1093/jcsl/krae001; Pearce Clancy, “Neutral Arms Transfers and the Russian Invasion of Ukraine,” *International and Comparative Law Quarterly* 72 (2023): 527, 529-34 and literature cited at fn. 8, doi:10.1017/S0020589323000064. Cf. Wolff Heintschel von Heinegg, “‘Benevolent’ Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality,” in *International Law and Armed Conflict: Exploring the Faultlines*, Michael N. Schmitt and Jelena Pejic, eds. (The Hague: Nijhoff, 2007) 543, 553-56, doi:10.1163/ej.9789004154285.i-590.104.

⁵¹ Hague Convention V, art. 4; Hague Convention XIII, art. 8.

⁵² International Convention against the Recruitment, Use, Financing and Training Mercenaries, adopted 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001). Note that mercenaries are defined restrictively as foreign nationals specially recruited to fight in an armed conflict abroad essentially by the desire for private gain.

⁵³ Hague Convention V, art. 6; Nicholas Tsagourias, “Ukraine Symposium – Cyber Neutrality, Cyber Recruitment, and Cyber Assistance to Ukraine,” *Articles of War*, 19 April 2022, <https://lieber.westpoint.edu/cyber-neutrality-cyber-recruitment-cyber-assistance-ukraine/>.

Third, a neutral state may impose restrictions or prohibitions on certain activities by or with belligerent parties, but such measures must be adopted in an impartial and non-discriminatory manner towards all the belligerents.⁵⁴ The neutral's duty of impartiality means that restrictive measures must be applied to all the belligerents and must not be directed against only one party to a conflict. It does not require the neutral state to adopt an impartial attitude or policy towards the belligerents, nor does it mean that restrictive measures must have equal effect upon them or must be intended as such. However, it is debatable if and to what extent this duty has survived under modern international law. As a state that adopts neutrality at the core of its foreign policy, Switzerland has taken the view that the law of neutrality "does not require equal treatment and leaves the neutral state to conduct its international economic relations as it sees fit."⁵⁵ Alternatively, non-performance of this duty by adopting non-forcible measures of restriction, such as economic sanctions, could be justified as a countermeasure directed at the belligerent state responsible for a breach of international law when it is intended to induce compliance with an obligation *erga omnes*, such as the prohibition on the use of force in international relations.⁵⁶ This justification must be distinguished from the issue of third-party countermeasures by non-injured states, where the debate remains unsettled.⁵⁷

⁵⁴ Hague Convention V, art. 9; Hague Convention XIII, art. 9.

⁵⁵ Federal Council of Switzerland, *White Paper on Neutrality: Annex to the Report on Swiss Foreign Policy for the Nineties of 29 November 1993* (1993), 21.

⁵⁶ *Articles on Responsibility of States for Internationally Wrongful Acts*, GA Res. 56/83, 12 December 2001, art. 42. According to the International Law Commission, only injured states are entitled to invoke the responsibility of the offending state, and a state qualifies as such when it is "specially affected" by the violation of a collective obligation. Which states are "specially affected" must be assessed on a case-by-case basis, "having regard to the object and purpose of the primary obligation breached and the facts of each case." International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, UN Doc. A/56/10 (2001), 119. However, the International Court of Justice has not adopted this distinction and, instead, has relied on a broader construct of "legal interest" in compliance with an obligation *erga omnes*: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), Preliminary Objections, ICJ Reports 2022, 477, at 541-43 (Declaration of Judge ad hoc Kress).

⁵⁷ See e.g., Clancy, "Neutral Arms Transfers," 535-40; Michael N. Schmitt and Sean Watts, "Collective Cyber Countermeasures?" *Harvard National Security Journal* 12 (2021): 373; Amanda Bills, "The Relationship between Third-Party Countermeasures and the Security Council's Chapter VII Powers: Enforcing Obligations *Erga Omnes* in International Law," *Nordic Journal of International Law* 89 (2020): 117, 120-128, doi:10.1163/15718107-bja10003; Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge: Cambridge University Press, 2017).

Fourth, a neutral state is obliged to acquiesce in the exercise of the belligerent rights to suppress violations of neutral obligations and other unneutral service. Traditionally, this duty of acquiescence meant that the disadvantaged party had the right to respond to unlawful belligerent activities by proportionate means, including the use of force within neutral territory, after it had afforded the neutral state a reasonable opportunity to remedy the situation.⁵⁸ The neutral state also had no right to challenge the confiscation of a neutral merchant ship, along with any goods designated as contraband, if it was lawfully captured as prize.⁵⁹ Since 1945, however, this practice has become sparse due to the prohibition on the use of force in international relations as enshrined in Article 2(4) of the UN Charter.⁶⁰ Some critics thus question whether this obligation remains valid, arguing that a belligerent can only resort to the use of force when the violation of neutral obligations or other unneutral service constitutes an armed attack.⁶¹ It remains to be seen whether belligerent parties would disclaim such belligerent rights against neutral states and their subjects, while they may well abstain from doing so for political and strategic reasons.

The law of neutrality is a pragmatic body of law. The extent to which a neutral state may adhere to these obligations may depend on a variety of geopolitical and socioeconomic factors, such as strategic alignment, geographical proximity, and existing trade relations. The belligerent parties' reaction could also dictate the neutral state's assessment of the boundaries between lawful support and the violation of neutrality. A belligerent can challenge the legality of a neutral state's action or inaction as a breach of neutral obligations, but that does not necessarily lead to a loss of neutral status. The former raises the issue of state responsibility, whereas the latter is essentially a question of conflict classification governed by the law of armed

⁵⁸ Office of the General Counsel, U.S. Department of Defense, *Law of War Manual* (rev. ed., July 2023) §15.4.2; Michael N. Schmitt, "Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law," *Columbia Journal of Transnational Law* 52 (2013): 77, 81-82; Myres S. McDougal and Florentino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (New Haven, New Haven Press, 1994), 406-407; Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley and Los Angeles: University of California Press, 1959), 538; Erik Castrén, *The Present Law of War and Neutrality* (Helsinki: Annales Academiae Scientiarum Fennicae, 1954), 462-463, 487.

⁵⁹ See James Kraska et al., "Newport Manual on the Law of Naval Warfare," *International Law Studies* 101 (2023): 1, 159-177; Louise Doswald-Beck, ed., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge: Cambridge University Press, 1995), 187-221.

⁶⁰ Charter of the United Nations, opened for signature 26 June 1945, 1 UNTS XVI, 59 Stat. 1031, T.S. No. 993 (entered into force 24 October 1945), art. 2(4).

⁶¹ See Andrew Clapham, "Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law," *International Law Studies* 97 (2021): 1200, 1250-1255.

conflict.⁶² A neutral state becomes a belligerent party to the conflict when its support forms an integral part of coordinated military operations conducted by a belligerent.⁶³ This determination involves a factual assessment of various factors, such as the domestic policy of the state, the materiality of a breach, and the nature of assistance relative to the act of hostilities.⁶⁴ Here again, pragmatic considerations prevail over the legal technicality of conflict classification.

IV. IMPLEMENTING THE LAW OF NEUTRALITY IN INDONESIA

Indonesia is not a party to Hague Convention V or XIII – the two primary treaties constituting the traditional law of neutrality. As such, neutral rights and obligations applicable to Indonesia during an armed conflict in the region depends on the status of each rule under customary international law. However, there has been little authoritative determination made regarding the modern law of neutrality under customary international law.⁶⁵ This uncertainty provides Indonesia with ample opportunities to pragmatically approach and shape customary international law in this field through its practice and expression of *opinio juris*.

For Indonesia, there are three areas that raise particular concerns due to its geographical features and “free-active” foreign policy – first, Indonesia’s rights and obligations in the archipelagic waters which did not exist when the traditional law of neutrality was formed; second, the government’s control over arms export and its compatibility with the law of neutrality; and third, Indonesia’s obligations to manage and prevent hostile cyber activities directed towards belligerent parties. This section addresses these questions to demonstrate the ways in which Indonesia can apply pragmatic considerations

⁶² International Committee of the Red Cross, *Updated Commentary on the Third Geneva Convention of 1949* (Cambridge: Cambridge University Press, 2020), para. 1083 fn. 253.

⁶³ See Alexander Wentker, “At War? Party Status and the War in Ukraine,” *Leiden Journal of International Law* 36 (2023): 643; Michael N. Schmitt, “Ukraine Symposium – Are We at War?” *Articles of War*, 9 May 2022, <https://lieber.westpoint.edu/are-we-at-war/>.

⁶⁴ See Hitoshi Nasu, “The End of the United Nations? The Demise of Collective Security and Its Implications for International Law,” *Max Planck Yearbook of United Nations Law* 24 (2020): 110, 133-134, doi:10.1163/18757413_02401005.

⁶⁵ Cf. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, at 261 para. 89 (acknowledging the principle of neutrality without touching on its content); *Dubsky v. The Government of Ireland* [2005] IEHC 442, para. 90 (High Court of Ireland dismissing the applicant’s claim that the provisions of the 1907 Hague Convention V are sufficiently well established as a principle of international law). For a recent scholarly work on the modern law of neutrality, see especially James Upcher, *Neutrality in Contemporary International Law* (Oxford: Oxford University Press, 2020).

to protect its national interests as a neutral state and the potential risks associated with them.

A. THE CLOSURE OF INDONESIA'S ARCHIPELAGIC WATERS

Indonesia's legal status over its archipelagic waters has evolved significantly since Prime Minister Djuanda Kartawidjaja issued a landmark declaration in 1957, asserting Indonesia's sovereignty over the waters between its islands and redefining its maritime boundaries by treating the archipelago as a unified whole rather than a series of individual islands.⁶⁶ This marked the first step towards an international recognition of archipelagic waters, which culminated in the codification of the rights and obligations of an archipelagic state under the 1982 UN Convention on the Law of the Sea.⁶⁷ This legal regime represents a diplomatic compromise balancing the interests of an archipelagic state like Indonesia and international maritime interests in the freedom of navigation.⁶⁸

Under UNCLOS, Indonesia has secured the right to exercise sovereignty over its archipelagic waters, which include the waters enclosed by the archipelagic baselines, the seabed, the subsoil, and the air space above.⁶⁹ This legal regime grants archipelagic waters a special status, allowing for an exercise of sovereignty akin to that over territorial waters but for specific rights reserved for international navigation.⁷⁰ During an armed conflict in the region, archipelagic waters would therefore be regarded as part of sovereign territory from which belligerent parties may not conduct hostilities.⁷¹ However, despite the "closure" of waters between island formation, foreign-flagged vessels may exercise the right of innocent passage to navigate through the

⁶⁶ Damos Dumoli Agusman and Citra Yuda Nur Fatihah, "Celebrating the 25th Anniversary of UNCLOS Legal Perspective: The Natuna Case," *Indonesian Journal of International Law* 17, no. 4 (2020): 539, 542-543, doi:10.17304/ijil.vol17.4.799.

⁶⁷ United Nations Convention on the Law of the Sea, adopted 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994), arts. 46-54 [hereinafter UNCLOS]. For historical background, see Till Markus, "Article 46: Use of Terms," in *United Nations Convention on the Law of the Sea: A Commentary*, Alexander Proelss, ed. (Munich: H.C. Beck, 2017) 334, 338-47; Satya N. Nandan and Shabtai Rosenne, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Martinus Nijhoff, 1993) vol. II, 399-406.

⁶⁸ Satya N. Nandan, "An Introduction to the Regime of Passage Through Straits Used for International Navigation and Through Archipelagic Waters," in *Freedom of the Sea, Passage Rights and the 1982 Law of the Sea Convention*, Myron H. Nordquist, Tommy T.B. Koh, and John Norton Moore, eds. (Leiden: Martinus Nijhoff, 2009), 57.

⁶⁹ UNCLOS, art. 49(1).

⁷⁰ Donald R. Rothwell and Tim Stephens, *The International Law of the Sea*, 3rd ed. (Oxford: Hart, 2023), 297; Hiran W. Jayewardene, *The Regime of Islands in International Law* (Dordrecht: Martinus Nijhoff, 1990), 156-172.

⁷¹ Dieter Fleck, "The Law of Neutrality," in *The Handbook of International Humanitarian Law*, Dieter Fleck, ed., 4th ed. (Oxford: Oxford University Press, 2021) 602, 619-620.

area.⁷² Indonesia's status as a neutral state during an armed conflict is unlikely to compromise it because this navigational right is akin to the belligerent right of mere passage through a neutral state's territorial waters without prejudice to the latter's neutral status.⁷³ The right of innocent passage must be exercised in a way "not prejudicial to the peace, good order, or security of the coastal state."⁷⁴ In the same way, the mere passage of belligerent forces must be limited for navigational purposes and cannot permit them to use archipelagic waters as a base of naval operations against their adversaries or to evade capture by enemy forces.⁷⁵

The belligerent right of mere passage was agreed without prejudice to a neutral state's right to prohibit or otherwise impose restrictions on the navigation of belligerent vessels within neutral waters as long as it is done in an impartial manner.⁷⁶ This century-old neutral right is consistent with the archipelagic state's right to suspend the innocent passage of foreign-flagged vessels in specific areas of its archipelagic waters as well as territorial sea under UNCLOS, provided that such suspension is essential for protecting its security, including military exercises.⁷⁷ As Barnes and Massarella note, archipelagic states are more likely to perceive the activities of foreign-flagged ships within archipelagic waters as a threat to their security.⁷⁸ It is therefore clear that Indonesia can exercise the right to close its archipelagic waters or specific shipping routes thereof against innocent passage in an impartial and non-discriminatory manner if there is a reasonable ground to suspect that the conduct of belligerent parties poses a genuine threat to Indonesia's security as a neutral state.

However, Indonesia will not be able to deny the right of archipelagic sea

⁷² UNCLOS, art. 52. See also Maria Maya Lestari, "Study of the Right of Foreign Ship against State Sovereignty (Case Study Indonesia)," *Indonesian Journal of International Law* 14, no. 4 (2017): 497, 498, doi:10.17304/ijil.vol14.4.704.

⁷³ Hague Convention XIII, art. 10.

⁷⁴ UNCLOS, art. 19.

⁷⁵ For detailed analysis, see James Farrant, "Modern Maritime Neutrality Law," *International Law Studies* 90 (2014): 198, 209-14.

⁷⁶ Hague Convention XIII, art. 9.

⁷⁷ UNCLOS, arts. 25(3), 52(2). The latter provision does not explicitly refer to military exercises but is not excluded as a reason for suspension: see Nandan and Rosenne, eds., *Commentary*, 461; Law No. 6 of 1996 on Indonesian National Waters (Indonesia), art. 12(1).

⁷⁸ Richard A. Barnes and Carmino Massarella, "Article 52: Right of Innocent Passage," in *United Nations Convention on the Law of the Sea: A Commentary*, Alexander Proelss ed. (Munich: C.H. Beck, 2017) 389, 392.

lanes passage through the sea lanes and air routes there above that Indonesia has designated as suitable for the continuous and expeditious passage or otherwise normally used for international navigation.⁷⁹ Just as transit passage through international straits is designed to ensure uninterrupted navigation,⁸⁰ archipelagic sea lane passage is intended to facilitate international maritime traffic.⁸¹ As such, a mere passage through archipelagic sea lanes is unlikely to compromise Indonesia's neutrality, provided such passage remains consistent with the requirements of being continuous and expeditious and without prejudicial activities.⁸² On the other hand, Indonesia may assert a violation of its neutrality if passage involves conduct of hostilities such as shooting at enemy ships, laying mines, or other acts inconsistent with archipelagic sea lanes passage.⁸³ The same observation would equally apply to the exercise of transit passage through the Malacca Strait, which Indonesia shares with Malaysia and has no dispute over its international character.

As an archipelagic state, Indonesia is authorized to designate sea lanes and air routes suitable for continuous and expeditious passage of foreign ships and aircraft. To date, Indonesia has designated three south-north passage routes,⁸⁴ but has not done so for east-west routes.⁸⁵ If relevant sea lanes are not designated, this passage right may be asserted through routes normally used for international navigation.⁸⁶ This leaves uncertainty and potential disagreement regarding which east-west passages qualify as the routes normally used for international navigation.⁸⁷ Indonesia should therefore ensure clear designation of sea lanes to avoid ambiguity and potential conflict. In the absence of designated specific sea lanes, belligerent parties may utilize various routes to conduct activities such as launching or recovering aircraft, military exercises,

⁷⁹ UNCLOS, art. 53.

⁸⁰ UNCLOS, art. 44.

⁸¹ Rpthwell and Stephens, *The International Law of the Sea*, 298; J. Ashley Roach, *Excessive Maritime Claims*, 4th ed. (Leiden: Brill, 2021), 422-425; Kresno Buntoro, "Legal and Technical Issues on Designating Archipelagic Sea Lanes Passage: Indonesia Experience," *Indonesian Journal of International Law* 8, no. 2 (2011): 219, 226-227, doi:10.17304/ijil.vol8.2.2.

⁸² Fleck, "The Law of Neutrality," 622.

⁸³ UNCLOS, art. 54.

⁸⁴ Government Regulation No. 37/2002. See also *Routeing Measures and Mandatory Ship Reporting Systems: Datum Reference Status and Provision of Modern Nautical Charts Covering Indonesian Archipelagic Sea Lanes, Submitted by Indonesia*, IMO Doc. NCSR 6/INF.19, 13 November 2018.

⁸⁵ Dikdik Mohamad Sodik, "The Indonesian Legal Framework on Baselines, Archipelagic Passage, and Innocent Passage," *Ocean Development & International Law* 43 (2012): 330, 333-335, doi:10.1080/00908320.2012.726830.

⁸⁶ UNCLOS, art. 53.

⁸⁷ Rothwell and Stephens, *The International Law of the Sea*, 300-301; Sodik, "The Indonesian Legal Framework," 335.

and underwater navigation, which could lead to disputes if Indonesia believes these routes do not qualify as archipelagic sea lanes. To manage this risk, Indonesia should proactively designate sea lanes and ensure that they are widely communicated and internationally recognized.

B. ARMS EXPORT CONTROL

Indonesia's ability to continue trading with both belligerent parties to an armed conflict in the region is another thorny issue that will test its readiness to apply and abide by the law of neutrality. Currently, Indonesia trades arms and military equipment with multiple countries: Japan, the United States, Vietnam, the Philippines, Singapore, and Malaysia are the primary destinations of arms exports.⁸⁸ Its defense procurement has in recent years shifted away from the traditional partners such as Russia by diversifying suppliers, with a view to developing indigenous capabilities.⁸⁹ Overall, the largest trading partner for Indonesia is the PRC, followed by the United States, Japan, India, and Southeast Asian countries.

As stated above, the traditional law of neutrality enjoins states from supplying arms and military equipment to assist a belligerent party. This obligation does not extend to private commerce. There is no obligation to prohibit private individuals and companies from exporting arms and military equipment or rendering assistance in favor of one or the other of the belligerent parties. However, Indonesia exercises strict control over arms export under comprehensive national laws. Law No. 16 of 2012 on Defense Industry provides the legal framework for giving the state a primary role in the procurement, use, export, import, and regulation of defense and security equipment, stipulating that the defense industry must operate under the government's guidance.⁹⁰ The Indonesian government implements this legislation through Government Regulation No. 141 of 2015 on the Management of Defense Industry and Minister of Defense Regulation No. 6 of 2017 on the Determination of the Defense Industry, Production Licensing,

⁸⁸ Adi Ahdiat, "Indonesia Jualan Senjata, Ini Negara Pembelinya [Indonesia Sells Weapons, These are the Trading Countries]," Katadata Media Network, 5 April 2024, <https://databoks.katadata.co.id/datapublish/2024/04/05/indonesia-jualan-senjata-ini-negara-pembelinya>.

⁸⁹ See Gavril Torrijos, "Arms and Influence in Southeast Asia: The Link between Arms Procurement and Strategic Relations," Center for Strategic & International Studies, 22 September 2022, <https://www.csis.org/blogs/new-perspectives-asia/arms-and-influence-southeast-asia-link-between-arms-procurement-and>; Ristian Atriandi Supriyanto, "Indonesia's Opportunistic Approach to Arms Procurement," East Asia Forum, 1 July 2021, <https://eastasiaforum.org/2021/07/01/indonesias-opportunistic-approach-to-arms-procurement/>.

⁹⁰ "Defense and Security Equipment" is defined broadly to cover all equipment that support national defense and security and public order: Law No. 16/2012, art. 1(2).

Export, and Import of Defense and Security Equipment. These instruments provide detailed regulations regarding defense equipment's import and export process, including licensing procedures. This governmental control over arms export does not bode well with the freedom of private commerce and has the potential to trigger Indonesia's obligation of abstention under the law of neutrality.

National rules on arms exports in Indonesia have several requirements and conditions. The government plays a significant role in licensing and supervision through the Committee for Defense Industry Policy (KKIP) and the Ministry of Defense. KKIP is formed by the president and is authorized to plan, coordinate policies and standards, and formulate mechanisms for buying and selling in the defense industry.⁹¹ Government Regulation No. 141 of 2015 mandates the KKIP to provide recommendations on export permits, having regard to the type of product, the quantity of the product, the destination country, and Indonesia's foreign policy.⁹²

Any individual or entity wishing to export or transfer defense and security equipment must apply for a permit from the Minister of Defense in accordance with Defense Regulation 6/2017.⁹³ In applying for this permit, exporters must specify the type and quantity of defense products for export and their destination countries.⁹⁴ Before granting a permit, the Minister must take into account several factors, including the fulfillment of domestic defense and security equipment needs, production capacity, human resource capabilities, guarantees from the destination country such as end-user certificates, and recommendations from the KKIP.⁹⁵ The House of Representatives also has the authority to prohibit or grant exemptions for the export of certain defense and security equipment under the government's foreign policy.⁹⁶

Exporting defense and security equipment without a permit is a violation. It can be subject to criminal penalties in the form of imprisonment and/or fines, as provided for in Chapter VII of Law No. 16 of 2012.⁹⁷ In the case of sales or exports, violations can result in a maximum imprisonment of 12 years and/or a maximum fine of two hundred billion rupiahs.⁹⁸ If done for the

⁹¹ Law No.16/2012, arts. 10, 21.

⁹² Government Regulation No. 141/2015, art. 24(4).

⁹³ Law No. 16/2012, art. 55; Government Regulation No. 141/2015, art. 24; Minister of Defense Regulation No. 6/2017, arts. 44-55.

⁹⁴ Government Regulation No. 141/2015, art. 24(2).

⁹⁵ Government Regulation No. 141/2015, art. 24(3).

⁹⁶ Law No. 16/2012, art. 56.

⁹⁷ Law No. 16/2012, art. 68.

⁹⁸ Law No. 16/2012, art. 73.

defense needs of another country without a permit, the penalty is a maximum imprisonment of five years and/or a maximum fine of one hundred billion rupiahs.⁹⁹ If committed during wartime, the penalty is more severe with a maximum imprisonment of 15 years and/or a maximum fine of five hundred billion rupiah.¹⁰⁰ When the exporter is granted a permit but does not fulfill its obligations, administrative sanctions are imposed, which range from written warnings to revocation of permits and blacklisting.¹⁰¹

In pursuance of its “free-active” foreign policy, Indonesia may continue trading defense and security equipment where a permit has been granted in accordance with aforementioned regulations. Given that Indonesia is not a party to the 1907 Hague Convention V or XIII, it is arguable that Indonesia has no obligation to abstain from the supply of arms and military equipment to assist one or the other belligerent party. Moreover, Indonesia is not a party to the Arms Trade Treaty,¹⁰² meaning that Indonesia is not required to prohibit arms trade with countries that are committing violations of international humanitarian or human rights law. This position is consistent with Indonesia’s freedom of commerce without limitations imposed under political conditions, as stipulated in Article 43(5) of Law No. 16 of 2012.¹⁰³ While this strategy has been considered effective for Indonesia,¹⁰⁴ there is a risk that Indonesia may be accused of violating its neutral obligations under customary international law by aiding a belligerent party with the supply of arms and military equipment. Even if such an obligation is found not to exist under customary international law, Indonesia may still be considered in breach of impartiality if trade restrictions are deemed discriminatory in favor of one belligerent party over the other.

C. THE PROTECTION OF INDONESIA’S CYBER

⁹⁹ Law No. 16/2012, art. 74.

¹⁰⁰ Law No. 16/2012, arts. 73-74.

¹⁰¹ Minister of Defense Regulation No. 6/2017, arts. 56-57.

¹⁰² Arms Trade Treaty, adopted 2 April 2013, 3013 UNTS 269 (entered into force 24 December 2014).

¹⁰³ Pusat P2K Multilateral and Universitas Budi Luhur, *Kajian Strategis Posisi Indonesia Pasca Pemberlakuan Arms Trade Treaty* (Jakarta: Universitas Budi Luhur, 2017), 74.

¹⁰⁴ Rodon Pedrason, “Indonesian Defense Diplomacy Strategy in Post the ATT Enforcement,” *Sang Pencerah: Jurnal Ilmiah Universitas Muhammadiyah Buton* 8, no. 2 (May 31, 2022): 592, 598, doi:10.35326/pencerah.v8i2.2255.

INFRASTRUCTURE

Indonesia has been particularly vulnerable to the exploitation of cyberspace for malicious cyber activities,¹⁰⁵ with over 370 million cyber-attacks recorded for 2022 and approximately 2,200 anomalous cyber-attacks every minute in 2023.¹⁰⁶ This vulnerability creates opportunities for belligerent parties to engage in hostile cyber activities from within, through, or against Indonesia's cyber infrastructure. The Indonesian government is well aware of this risk, recognizing cyberspace as the fifth domain of battlefield where internet-based platforms are used to advance strategic interests and to support national defense capabilities.¹⁰⁷ But the question is whether Indonesia is ready to take appropriate action in the implementation of neutral obligations to the extent that these obligations are applicable to cyber infrastructure within neutral territory.

The primary legislation for the regulation of cyberspace in Indonesia is the Electronic Information and Transactions Law (Law No. 11 of 2008), which has been amended in 2016 (Law No. 19 of 2016) and in 2024 (Law No. 1 of 2024). It criminalizes various computer-based activities, such as an unauthorized access to computer system, an unauthorized interception or wiretapping of electronic communications, and the distribution of illegal content.¹⁰⁸ Government Regulation No. 71 of 2019, on the other hand, strengthens obligations on Electronic System Providers (ESP) both in public and private sectors, requiring them to safeguard electronic systems and protect personal data.¹⁰⁹ These legislative measures are directed towards the content of electronic information and transactions, leaving unattended other important aspects of cybersecurity such as network infrastructure.¹¹⁰ Presidential Regulations No. 82 of 2022 and No. 47 of 2023 have been issued to fill this gap by designating Vital Information Infrastructure Providers to establish Cyber Incident Response Teams for managing cyber incidents and crises. The National Cyber and Crypto Agency (Badan Siber dan Sandi Negara – “BSSN”)

¹⁰⁵ Thomas Paterson, “Indonesian Cyberspace Expansion: A Double-Edged Sword,” *Journal of Cyber Policy* 4 (2019): 216, 219-220, doi:10.1080/23738871.2019.1627476.

¹⁰⁶ Randy Mulyanto, “Indonesia’s 2024 Cybersecurity Challenge: Rising Threats and Human Risks,” *The Jakarta Post*, 12 February 2024, <https://www.thejakartapost.com/culture/2024/02/12/indonesias-2024-cybersecurity-challenge-rising-threats-and-human-risks.html>.

¹⁰⁷ Defense Ministry of the Republic of Indonesia, *Defense White Paper*, 3rd ed. (2015), 9, 15-16, 110.

¹⁰⁸ Law No. 11/2008 as amended, art. 31.

¹⁰⁹ Government Regulation No. 71/2019, arts. 14-15.

¹¹⁰ Noor Halimah Anjani, “Cybersecurity Protection in Indonesia,” Center for Indonesian Policy Studies, Policy Brief No. 9, March 2021, <https://www.econstor.eu/bitstream/10419/249442/1/CIPS-PB09.pdf>.

has been designated as the primary coordinator in cyber crisis management.

Ministry of Defense Regulation No. 82 of 2014 provides guidelines for cyber defense. It defines cybersecurity as comprising all efforts to secure the information and the supporting infrastructure at the national level from cyber-attacks.¹¹¹ Cyber-attacks are defined broadly to encompass all forms of action, words, and thoughts that threatens national security, national sovereignty, and territorial integrity, including critical infrastructure such as financial institutions and transportation systems.¹¹² However, the Regulation merely serves as guidelines for the development of military cyber defense capabilities and does not necessarily operate as legal authorization for specific action that can be taken against cyber-attacks originating from foreign jurisdictions.

Indonesia's neutral obligations are not engaged against cyber-attacks directed against Indonesia and its infrastructure but apply rather to those conducted by a belligerent party from within or through Indonesia's cyber infrastructure. The law enforcement approach pursuant to Law No. 11/2008 has its limit against a belligerent's use of cyber infrastructure within neutral territory as a base for launching hostile cyber operations. Even if it were to involve criminal offences within Indonesia's jurisdiction, the belligerent's law enforcement authorities might not readily engage in mutual legal assistance when the belligerent party itself was organizing or otherwise supporting hostile cyber operations. National defense action may not be warranted when hostile cyber activities are not directed against Indonesia's cyber infrastructure but are merely routed through it.

Indonesia is not necessarily held responsible for failing to prevent a belligerent's use of cyber infrastructure within its territory as a base for launching hostile cyber operations. Indonesia's obligation to prevent a belligerent's use of neutral territory is not an absolute one. It is one of due diligence requiring a neutral state to use the means at its disposal to prevent a violation of neutral territory.¹¹³ In other words, Indonesia must take all reasonably available measures when it comes to know that its territory is

¹¹¹ Ministry of Defense Regulation No. 82/2014, chapter 1.5.

¹¹² *Ibid.*, chapter 2.2.b.

¹¹³ The Alabama Arbitration, reported in John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party* (Washington, DC: Government Printing Office, 1898) vol. I, 495, 572-73. See also Alice Ollino, *Due Diligence Obligations in International Law* (Cambridge: Cambridge University Press, 2022); Giulio Bartolini, "The Historical Roots of the Due Diligence Standard," in *Due Diligence in the International Legal Order*, Heike Krieger, Anne Peters, and Leonhard Kruezer, eds. (Oxford: Oxford University Press, 2020), 23-41, doi:10.1093/oso/9780198869900.003.0002; Hanqin Xue, *Transboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003), 162-163.

being used to conduct hostile activities directed against another state. Tallinn Manual 2.0 explains that what measures are reasonably available is contextual and “depends, inter alia, on the technical wherewithal of the State concerned, the intellectual and financial resources at its disposal, the State’s institutional capacity to take measures, and the extent of its control over cyber infrastructure located on its territory”.¹¹⁴ This means that lax regulation or a lack of legislative basis for action does not relieve a neutral state from fulfilling its obligation to exercise due diligence. At the same time, however, legislative deficiency alone is insufficient to establish a breach of neutral obligations regarding the failure to prevent a belligerent’s use of Indonesia’s cyber infrastructure for hostile purposes.

Moreover, Indonesia’s neutral obligations do not extend to the belligerent use of pre-existing communication stations or apparatus, such as radio-telegraphic stations and telephone cables, if these are open for public use and not being used for purely military purposes.¹¹⁵ This exception reflects the compromise reached between the interests of belligerents and the rights of neutrals.¹¹⁶ A majority of experts involved in the drafting of Tallinn Manual 2.0 considered that this exception would equally apply to cyber communication systems.¹¹⁷ Lemnitzer questions whether this exception remains valid under the modern law of neutrality by referring to stringent broadcasting regulations that have been adopted in state practice.¹¹⁸ It must be remembered, however, that neutral states are entitled to impose restrictions as long as impartiality is maintained.¹¹⁹ The question is therefore whether neutral states have applied such measures based on the belief that they are legally required to do so under the law of neutrality. In the absence of clear evidence that suggests otherwise, it is reasonable to assume that neutral states are under no obligation to prevent belligerents from using the means of communication open to the public.

As emphasized above, pragmatic considerations must guide Indonesia’s legal assessment. Consider, for example, whether Indonesia has the technological means to detect and block a belligerent’s access to computer networks within its territory. In the absence of such ability, any discussion

¹¹⁴ Michael N. Schmitt, ed., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge: Cambridge University Press, 2017) 47, r. 7 para. 16 [hereinafter Tallinn Manual 2.0].

¹¹⁵ Hague Convention V, arts. 3(b), 8.

¹¹⁶ Higgins, *Hague Peace Conferences*, 290.

¹¹⁷ Tallinn Manual 2.0, r. 151 para. 4.

¹¹⁸ Jan Martin Lemnitzer, “Back to the Roots: The Laws of Neutrality and the Future of Due Diligence in Cyberspace,” *European Journal of International Law* 33, no. 3 (2022): 789, 803-804.

¹¹⁹ Higgins, *Hague Peace Conferences*, 292.

around neutral obligations to prevent a belligerent's use of computer networks serves little purpose. Even assuming that Indonesia does, practical difficulties remain when a belligerent party does not have a technological means to monitor and detect the adversary's access to computer networks within neutral territory.¹²⁰ In other words, the applicability of neutral obligations in cyberspace is premised upon the neutral state's ability to exercise a high degree of technological autonomy and control over cyber activities that take place within neutral territory. Legal risks would accordingly increase if Indonesia were to help build a new communication facility, such as a cloud server, specifically designated for a belligerent's use as a means of launching cyber-attacks against the adversary.

V. CONCLUSION

Indonesia's non-aligned posture has been shaped and maintained through a "free-active" foreign policy. Ever since its emergence as an independent state, Indonesia has upheld this policy to guide successive governments in managing international relations despite dynamic shifts in power balance. However, the policy's compatibility with the law of neutrality has not been tested. Given that Indonesia is not a party to Hague Convention V or XIII, it is well positioned to take a pragmatic approach by building its practice and expressing its *opinio juris* to shape the development of customary international law in this field.

First, as an archipelagic state, Indonesia should remind belligerent parties that hostilities must not be conducted within its archipelagic waters, with readiness to exercise its right to close off archipelagic waters or specific parts thereof against them if there is a reasonable ground to suspect that their conduct poses a genuine threat to Indonesia's security as a neutral state. An exercise of navigational rights by belligerent forces alone is unlikely to compromise Indonesia's neutrality. However, disputes may arise regarding which sea lanes qualify as the routes normally used for international navigation. It is therefore imperative to proactively designate archipelagic sea lanes and seek international recognition to avoid ambiguity and potential conflict.

Second, Indonesia's strict control over arms export under Law No. 16 of 2012 raises a potential problem with the neutral obligation to abstain from supplying arms and military equipment in support of a belligerent party under the traditional law of neutrality. Indonesia will have to contest the validity of

¹²⁰ For further discussion, see Nasu, "The Laws of Neutrality in the Interconnected World," 134-135.

this rule under modern customary international law in order to continue trading defense and security equipment in pursuance of its “free-active” foreign policy. There is also a risk that Indonesia could be accused of discriminatory practice if its trade restrictions are deemed to favor one belligerent party over the other.

Third, Indonesia’s neutral obligations may be engaged when a belligerent’s cyber operations originate from or route through cyber infrastructure within Indonesia. Regulatory gaps between the current law enforcement scheme and national defense measures may leave Indonesia ill-equipped to prevent a belligerent’s use of cyber infrastructure within its territory as a base for launching hostile cyber operations. However, Indonesia’s obligation is only engaged when it has the technological means to exercise due diligence against a belligerent’s access to computer networks within its territory. Moreover, Indonesia should be prepared to assert that it has no obligation to prevent belligerents from accessing or using cyber infrastructure that remains open to the public.

The law of neutrality in modern international law is in a state of flux. Indonesia’s free-active foreign policy bodes well for the pragmatic choice it will have to make in maintaining its neutral status during an armed conflict in the Indo-Pacific region. Ultimately, its policy decisions will be based on a variety of geopolitical and socioeconomic factors prevailing at the time. However, Indonesia needs to be mindful of the legal risks discussed above in asserting its rights as a neutral state and when it determines the extent of its obligations under the law of neutrality.

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