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ABSTRACT

This chapter discusses the key debates surrounding neutrality that international legal thought has had to grapple with. It shows how international legal thought has made sense of an institution that has been shaped by States' pragmatic mindset in developing and invoking it. The chapter analyses how scholarship has positioned and continuously re-positioned neutrality within a dramatically changing international order in which neutrality has proved stubbornly resilient. In doing so, the chapter demonstrates that, however marginal neutrality's relevance to current international law may appear at first sight, theoretical reflection on neutrality helps in better grasping the current international legal regulation of war as a whole, and even structural developments in general international law beyond war.

KEY WORDS:

Law of neutrality, international legal theory, jus ad bellum, jus in bello, Hohfeld's fundamental legal concepts, resilience, status, rights, duties, pragmatism, conceptual inspiration, complicity, due diligence, unwilling or unable

Neutrality in International Legal Thought

Alexander Wentker[*]

1. INTRODUCTION

In his seminal history of the law of neutrality, Stephen Neff soberly finds as 'perhaps the single greatest lesson' of his survey 'that the evolution of the law of neutrality has been determined far more by events on the ground than by the theories of scholars'.[1] The law of neutrality developed through the scattered practices of States, roughly from the late Middle Ages onwards.[2] Writers only subsequently rationalised these practices into a more or less coherent legal framework.[3] Throughout the development of neutrality, this theorising of the messy practical reality of neutrality's existence and persistence has proved to be a continuous, and arguably still ongoing, process. Indeed, developments in international practice have regularly presented the law of neutrality with conceptual conundrums requiring theoretical reflection. Scholarly interest in neutrality faded after the Second World War but has recently seen a significant upsurge, which could already be observed preceding Russia's full-scale invasion of Ukraine in early 2022 and has since been intensified.[4]

This chapter discusses the key debates surrounding neutrality that international legal thought has had to grapple with. It shows how international legal thought has made sense of an institution that has been shaped by States' pragmatic mindset in developing and invoking it. The chapter analyses how scholarship has positioned and continuously re-positioned neutrality within a dramatically changing international order in which neutrality has proved stubbornly resilient. In doing so, the chapter demonstrates that, however marginal neutrality's relevance to current international law may appear at first sight, theoretical reflection on neutrality helps in better grasping the current international legal regulation of war as a whole, and even structural developments in general international law beyond war.

The chapter proceeds in the following way. Section 2 briefly sets out neutrality's rationale of regulating the co-existence and interaction of war and peace. Section 3 examines the nature of neutrality by dissecting its components and showing how neutrality

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[1] S Neff, *The Rights and Duties of Neutrals: A General History* (ManchesterUP 2000) 218.

[2] P Jessup and F Deák, *Neutrality: Its History, Economics and Law - Vol I: The Origins* (Columbia University Press 1935), 10-19; J Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (2nd edn, Maitland 1959) 364; K Wani, *Neutrality in International Law: From the sixteenth century to 1945* (Routledge 2017) 17-140.

[3] S Neff, *War and the Law of Nations: A General History* (CUP 2005) 152.

[4] See, eg, J Upcher, *Neutrality in Contemporary International Law* (OUP 2020); C Antonopoulos, *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality* (CUP 2022); J El-Zein, 'Das Ende des Neutralitätsrechts' (PhD Thesis, University of Cologne 2023); P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' (2023) 72 ICLQ 527; S Talmon, 'The Provision of Arms to the Victim of Armed Aggression: the Case of Ukraine' (Bonn Research Papers on Public International Law, 6 April 2022) <https://ssrn.com/abstract=4077084>.

has been conceived of as a mandatory or optional status. Section 4 then turns to the inherently problematic relationship between neutrality and the prohibition of the use force and discusses how the co-existence of these two regimes has been or could be conceptualised in international legal thought. Section 5 rounds off the analysis by canvassing how neutrality has inspired international legal thought more widely, how its structures have informed significant developments of the international legal order, and how they may—and may not—be used in international legal thought to resolve pressing issues of the current international legal order. Section 6 concludes.

2. NEUTRALITY'S RATIONALE

The conceptual position and rationale of the law of neutrality can best be explained in light of the separation between peace and war as separate spheres of international law, a separation that was adopted to an extent by early modern writers [5] and that was most rigorously followed in 19th and early 20th century international legal thought.[6] When two or more States went to war against each other, their legal relationship moved from the sphere of peace to that of war, while the relationships between other States remained within the sphere of peace.[7] The law of peace, in principle, also regulated the relationship between a belligerent State and third States. Yet, at this point, the practical reality of warfare did not conform to the analytical separation of war and peace. For war did affect the relationship between belligerents and third States, and their respective interests, and it did so in a way that required specific regulation.

This regulation was very much driven by the respective interests of belligerent and third States. On the one hand, belligerents had an interest in keeping third States out of their duel, at least on the side of their opponent. Naturally, third States likewise had an interest in having their territory and property spared from the destruction of war, while continuing trade with the belligerents. On the other hand, belligerents also had interests in conducting economic warfare against their opponents' trade relations by taking measures that also affected third States (such as blockades). Still more, third States could have strategic or economic interests in influencing the outcome of the duel by supporting a specific side. The law of neutrality regulates these shared and competing interests of belligerents and neutrals, and has thus, as Castrén put it, 'evolved in State practice as a compromise between conflicting interests.'[8]

These rationales can nonetheless also be theorised in a morally more ambitious way. Indeed, however self-interested the reasons behind developing neutrality rules, their aim was to constrain wars by preventing their extension to further States. This aim has

5 See, eg, H Grotius, *De Jure Belli ac Pacis Libri Tres*, vol II (F Kelsey tr, Clarendon 1925) 33.

6 See, eg, A Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (8th edn, F Geffcken, HW Müller 1888) 6.

7 JB Moore, *A Digest of International Law, Vol VII* (Government Printing Office 1906) 153-154.

8 E Castrén, *The Present Law of War and Neutrality* (Suomalainen Tiedeakatemia 1954) 427 (emphasis omitted).

been considered an early expression of community interests[9] embodied in international law, if a modest one.[10]

Conceptually, in sum, the law of neutrality regulates 'the coexistence of war and peace'[11] and their interaction. Its conceptual purpose was to fit the state of war, the circle drawn around the duellists, into the surrounding sphere of peace through a distinct status of rights and obligations applicable to the relationship of third States to belligerents.[12] This position in between the laws of war and peace has exposed the law of neutrality to enduring tensions, both theoretically and practically, as the following sections will explain.

3. THE NATURE OF NEUTRALITY

Within the traditional scheme of the international legal regulation of war, war was conceived of as a formal state of affairs, rather than as a set of facts on the ground as international and non-international armed conflicts are today understood. In line with this logic of war as a legal status,[13] war was (and, indeed, remains so to an extent) regulated by reference to the 'status' of belligerents. Belligerent 'status' meant the set of rights and duties that States acquired as they became belligerents; these rights and duties were distinct from States' rights and obligations in times of peace.[14] Neutrality, then, as the antipode of belligerency, was equally conceived of as a status composed of rights and duties of neutrals vis-à-vis belligerents, and entailing certain corresponding rights and duties of belligerents vis-à-vis neutrals.[15]

a. Neutrality's components

The nature of neutrality has thus, in the first place, been defined by rights and duties which constituted neutral status. Indeed, historically, neutral status developed incrementally out of a loose collection of rights and duties in the relationship between belligerent and third States.[16] The components of neutrality law can usefully be theorised from the perspective of Hohfeld's fundamental legal conceptions.[17] This is because Hohfeld's focus on capturing the essence of legal relationships in their actual application[18]

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9 On this concept, see generally, B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 RCADI 224; G Abi-Saab, 'Whither the International Community' (1998) 9 EJIL 248; S Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 EJIL 387; E Benvenisti and G Nolte, 'Introduction' in E Benvenisti and G Nolte (eds), *Community Interests across International Law* (OUP 2018) 4.

10 H Krieger, 'Rights and Obligations of Third Parties in Armed Conflicts' in E Benvenisti and G Nolte (eds), *Community Interests across International Law* (OUP 2018) 456-457; for scepticism as to neutrality's contribution to such a community interest, see already Q Wright, 'The Future of Neutrality' (1928) 12 IC 353, 367, and, more recently, A Clapham, *War* (OUP 2021) 70.

11 Neff (n 1) 1.

12 Castrén (n 8) 425-426.

13 For criticism of the concept of war as a status, see H Kelsen, *Principles of International Law* (Rinehart & Company 1952) 26 (suggesting that war should instead be conceived of as 'specific action').

14 A McNair and A Watts, *The Legal Effects of War* (4th edn, CUP 1966) 2.

15 L Oppenheim, *International Law: A Treatise* (Longmans 1906) vol II 333; Castrén (n 8) 422.

16 See above nn 2-3.

17 W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-14) 23 YaleLJ 16.

18 S Singh and J d'Asprémont, 'Introduction: The life of international law and its concepts' in S Singh and J d'Asprémont (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 6.

may prove helpful to better grasp the practice-driven belligerent-neutral relationship at the heart of neutrality law since his analytical grid was designed precisely to conceptualise legal relations by distilling their implicit, unarticulated character.[19] Applying this scheme to the law of neutrality reveals the complex legal interwovenness of belligerent and neutral States that developed over time.

Historically, the first component of neutrality law was that of belligerent rights against neutrals, such as rights to search for and confiscate contraband on neutral ships and establish and enforce blockades of areas controlled by the enemy even against neutral ships.[20] 18th and 19th century legal thought conceived of these rights as aspects of more general sovereign rights.[21] To Vattel, these sovereign rights were justified and limited by the general natural law principle of necessity (i.e., doing what is necessary to defeat the enemy).[22] In Hohfeld's scheme, belligerent rights against neutrals were actual 'rights' (and not mere 'privileges'), since neutral States bore a corresponding duty to acquiesce in the exercise of the belligerent right.[23] In that sense, they were different from the so-called belligerent 'rights' in the relationship between belligerents, such as the 'right to requisition enemy property'.[24] In Hohfeld's scheme, these would instead be characterised as privileges:[25] the belligerent invoking such a 'right' would not bear an obligation to abstain from such conduct; but nor would the enemy belligerent bear an obligation to tolerate that exercise of privilege. The enemy would merely have no right[26] that the other abstain from exercising the privilege.[27]

Beyond these initial belligerent rights vis-à-vis neutrals, neutrality law has developed to contain further characteristic correlative rights and duties of neutrals and belligerents. Chiefly, neutral States had to remain impartial in the conflict (as long as they retained neutral status), a principle that translated into duties not to assist the belligerents[28] and prevent them from using neutral territory for their war effort.[29] These duties, in turn, corresponded to rights of the belligerents that the neutrals abstain from such assistance and prevent such conduct. In return, neutrals' right to have their territory protected corresponded to duties of the belligerents to refrain from any violations of neutral territory. Similarly, neutral States' right to resort to necessary, including forcible, self-help to prevent or terminate any breaches of neutral territory[30] corresponded to duties of the belligerents to acquiesce in the exercise of neutral self-help (as a corollary of belligerents' duties not to

19 P Schlag, 'How to Do Things with Hohfeld' (2005) 78 Law and Contemporary Problems 185, 204.

20 Jessup and Deák (n 2) xiv; 50 et seq.

21 Unlike belligerent rights in the relationship between belligerents, rights vis-à-vis neutrals could not be derived from the notion of an agreement, by which the opposing parties fixed the terms of their 'duel', since third States would have had no part in that duel, see S Neff, 'The Prerogatives of Violence — In Search of the Conceptual Foundations of Belligerents' Rights' (1995) 38 GYIL 41, 42, 69.

22 E de Vattel, *Le Droit des Gens, ou, Principes le la Loi Naturelle, appliqués à la Conduite aux Affaires des Nations et des Souverains*, vol III (C Fenwick tr, Carnegie Institution 1916) 271, 280.

23 See Hohfeld (n 17) 32; for a concept of 'right' as corresponding to a duty borne by another person, see also H Kelsen, *Pure Theory of Law* (M Knight tr, University of California Press 1967) 126-129.

24 Art 34 GC I ('right of requisition recognized for belligerents by the laws and customs of war').

25 Hohfeld (n 17) 32.

26 In Hohfeld's terminology, the correlative to a privilege is thus a 'no-right' (ibid (n 17) 33).

27 See similarly C Greenwood, 'The Relationship between *Ius ad Bellum* and *Ius in Bello*' (1983) 9 Review of International Studies 221, 227-228; H Meyrowitz, *Le Principe de l'Égalité des Belligérants devant le Droit de la Guerre* (Pedone 1970) 112.

28 Art 6 Hague Convention XIII.

29 Arts 2-5 Hague Convention V; Art 5 Hague Convention XIII.

30 Art 10 Hague Convention V; see also Art 26 Hague Convention XIII, Art 48 Hague Air Rules.

infringe neutral territory in the first place. That right of neutrals was also an emanation of the duty of prevention. The duty of prevention, in turn, corresponded to a right of the aggrieved belligerent that the neutral take action against the infringing belligerent. Indeed, the aggrieved belligerent was considered to have a subsidiary right to take necessary measures self-help, including the use of force, against the enemy belligerent infringing neutral territory should the neutral State not prevent or terminate that infringement.[31] Just like neutral self-help, this belligerent self-help was a 'right' in the Hohfeldian sense, because it corresponded to a duty of the neutral State to tolerate the exercise of self-help, as a corollary of neutral States' duty of prevention.

To illustrate how this complex web of correlative rights and duties provides for a framework to enforce neutrality law, consider the hypothetical example of belligerent A launching attacks against belligerent B from the territory of neutral State N. Belligerent A here violates its duty not to infringe N's territory, corresponding to N's right that A abstains from such conduct. N not only has a right to take measures of self-help against A to terminate the infringement, but also a duty to prevent or at least terminate such infringements. Should N not prevent or terminate the infringement, N must tolerate B exercising its right to self-help to terminate the infringement by exceptionally using force against A on N's territory.

The nature of neutrality's elements can also, however, be looked at from a different perspective. In recent years, there have been theoretical debates as to whether today's laws of war are primarily, or even exclusively, a restrictive regime or whether and to what extent they contain permissions.[32] Neutrality, as understood in traditional international legal thought, contained both restrictive elements (belligerents' duty to respect the integrity of neutral territory and neutrals' duties of abstention and prevention) and permissive ones (belligerent rights vis-à-vis neutrals and neutrals' 'right' to forcible self-help), and both were closely intertwined. Perhaps unsurprisingly, it is the permissive elements that are particularly contested in current international legal thought in so far as they may conflict with the current *jus ad bellum*'s monopoly on the regulation of the recourse to force.[33] The permissive elements also seem out of step with the *jus in bello*'s wider normative shift towards a mainly prohibitive body of law.[34]

b. An optional or mandatory status?

Moving beyond the granular level of neutrality's components, the legal nature of neutrality itself as a status has been surrounded by unresolved debates in international legal thought. Do third States have (merely) a right—or at least a privilege—to be neutral, that is, can they freely choose to adopt the status of a neutral towards a conflict? Or do they have a duty to adopt such a status?

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31 de Vattel (n 22) 277; Castrén (n 15) 442; R Tucker, *The Law of War and Neutrality at Sea* (Government Printing Office 1957) 262; M Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959) 538.

32 See, eg, A Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?* (EE 2020).

33 See below 3.

34 On this shift A Haque, *Law and Morality at War* (OUP 2017) 30-35; see also E Lieblich, 'The Facilitative Function of *Jus in Bello*' (2019) 30 EJIL 321 (discerning a facilitative role of this body of law in legitimating violence, beyond and despite its jurisprudentially restrictive nature). On the question of whether the law of neutrality forms part of the *jus ad bellum* or the *jus in bello*, see below 4.d.

The notion of neutrality as a right has traditionally been controversial. Indeed, Oppenheim noted that '[j]ust as third States have no duty to remain neutral in a war, so they have no right to demand to remain neutral.'[35] On this account, neutrality was an 'attitude' of impartiality, a factual stance, which, however, required 'that the belligerents recognise this attitude by acquiescing in it and by not treating such third State as a party to the war.'[36] While recognition would thus usually be granted by an implicit attitude on part of the belligerents, it was, on this account, constitutive of neutral status.[37] Neutrality thus depended formally on the will of the belligerents, which were under no obligation to grant such recognition. Other writers plainly maintained a right of third States to be neutral flowing from their sovereignty.[38] By recognising neutral States' rights, the 1907 Hague Conventions seemingly hinted at a conception of neutrality as a right that is not placed at the will of the belligerents.[39] Yet any such right remained notoriously weak in principle as in practice, in the absence of a prohibition of States to use force that would prevent belligerents, as a matter of law, from violently drawing third States into the conflict.

Both of the above approaches agreed, however, that third States were under no *duty* to be neutral. The absence of that duty appeared as the logical corollary of the right (or rather privilege) of each State to make war, which implied a right (or at least a privilege) to pick a side or not in a war, as a matter of political choice.[40] In practice, the possibility of an implicit choice by the neutral through its attitude (and the corresponding implicit recognition by the belligerents) resulted in neutrality as a status brought into existence automatically with the outbreak of a war. Neutrality was, therefore, a default status for third States should they not actively opt or be forced to join the war as a belligerent on either side. At any rate, the choice of status for third States was, for a long time, believed to be a binary one—between neutrality and belligerency—for there was no third option.

Here too, events and practice widened imagination in international legal thought on neutrality. The 1928 Kellogg-Briand-Pact outlawed war 'as an instrument of national policy'[41] and squarely made war legally a concern to the international community and neutrality a morally less palatable option. In the aftermath, and particularly during the Second World War, States began referring to the position of third States vis-à-vis a war of aggression as 'non-belligerent'. This practice seemed to suggest that this was a different status than neutrality as previously understood and allowed for assisting the victim of an aggression, supposedly without violating neutrality law or joining the war—though 'non-belligerency' was also used more widely to justify support on either side of a war.[42] That

35 Oppenheim (n 15) 322 (footnote omitted).

36 ibid 322-323.

37 See also J Lorimer, *The Institutes of the Law of Nations* (William Blackwood and Sons 1884) vol II 130.

38 L-B Hautefeuille, *Des Droits et des Devoirs des Nations Neutres en Temps de Guerre Maritime* (3rd edn, Guillaumin et Cie 1868) vol I 161; H Wheaton, *Elements of International Law* (8th edn, reprint Clarendon 1936 (1866)) 485; H Halleck, *International Law or, Rules Regulating the Intercourse Between States in Peace and War* (Bancroft 1861) 514.

39 See notably Art 1 HC XIII; see also Upcher (n 4) 259.

40 de Vattel (n 22) 268; Oppenheim (n 6) 317.

41 General Treaty for Renunciation of War as an Instrument of National Policy (signed 12 August 1928, entered into force 24 July 1929) 94 LNTS 59, Art 1.

42 'Address of Robert H Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941' (1941) 35 AJIL 348, 351; D Schindler, 'Aspects Contemporains de la Neutralité' (1967) 121 RCADI 221, 263-264; for a thorough account of this practice, see Talmon (n 4) 14-17; for criticism of non-belligerency as constituting a separate legal status see, eg, E Borchard, 'War, Neutrality and Non-Belligerency' (1941) 35 AJIL 618; J Kunz, 'Neutrality and the European War 1939-1940' (1941) 39 MichLRev 719, 750.

position pragmatically fitted some States' interests in further pushing the restrictive boundaries of neutrality law and institutionalising a grey space at the margins between joining a war remaining fully aloof.

These developments in State practice in turn sparked subsequent theorisation. On the one hand, non-belligerency could be conceived of as a third, intermediate status in between neutrality and belligerency.[43] Such an approach would plainly render neutrality an optional status for third States, with non-belligerency becoming an alternative to neutrality for those not choosing to join the war as belligerents (which they were now only free to do on the side of the victim State).[44] Alternatively, non-belligerency could also be conceived of as a novel status for third States, replacing that of neutrality in cases of a war of aggression.[45] This reading would seem to suggest that neutrality was no longer a legal option in a context of aggression and non-belligerency thus not an optional, but an automatic status for third States (unless they joined the war as belligerents). It can be noted at this point already, however, that even if conflicts between neutrality law and the *jus ad bellum* are now to be resolved in favour of the latter, this primacy would not necessarily take the form of a separate status at all, distinct from neutral or belligerent status. In other words, neutrality can still theoretically be conceived of as an automatic status for third States. In addition, as will be seen below, there is no general duty *not* to remain neutral vis-à-vis the aggressor.[46]

The exact impact of the prohibition of the use of force and the emergence of the current peace and security architecture on the law of neutrality will be considered in greater detail in the following section.

4. NEUTRALITY AND THE PROHIBITION OF THE USE OF FORCE

If neutrality's original rationale was to operationalise the co-existence of war and peace as separate legal spheres, the breakdown of that separation was bound to threaten the institution of neutrality existentially. That the divide between peacetime and wartime law has been broken—though not completely—is today well accepted.[47] Treaty relations between warring States are no longer considered to be automatically ruptured[48] and central bodies of 'peacetime' law, such as human rights law, have strong and well accepted claims to their continued applicability in times of war (or, today, armed conflict).[49] Most importantly, the *jus ad bellum* binds States outside and—paradoxical as it may

43 A Gioia, 'Neutrality and Non-Belligerency' in H Post (ed), *International Economic Law and Armed Conflict* (Nijhoff 1994) 65 et seq.

44 In favour of such an optional approach see G Schwarzenberger, 'Jus Pacis Ac Belli?: Prolegomena to a Sociology of International Law' (1943) 37 AJIL 460, 470; Greenwood (n 27) 230; Clapham (n 10) 72.

45 S Talmon, 'The Provision of Arms to the Victim of Armed Aggression: the Case of Ukraine ' (Bonn Research Papers on Public International Law, 6 April 2022) <https://ssrn.com/abstract=4077084> 14.

46 See below 4.c.

47 See generally M Mancini, 'The Effects of a State of War or Armed Conflict' in M Weller (ed), *The Oxford Handbook on the Use of Force in International Law* (OUP 2015) 998 et seq.

48 ILC, Draft Articles on the Effects of Armed Conflicts on Treaties, Art 3.

49 *Legality of the Threat or Use of Nuclear Weapons* (AO) [1996] ICJ Rep 226 [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (AO) [2004] ICJ Rep 136 [106]; *Armed Activities (DRC v. Uganda)* (Merits) [2005] ICJ Rep 168 [216].

seem—during armed conflict.[50] That is to say, States are not freed from the constrains of the prohibition of the use of force when they become parties to an (inter-State) armed conflict becoming parties to an armed conflict.[51] With the traditional unfettered right—or privilege—of States to go to war to settle disputes no longer available, a structural premise of neutrality seemingly broke away, as Lauterpacht incisively noted.[52] Indeed, the structures of neutrality law were conceived at a time when States were free to transition between the spheres of war and peace at will. The regulatory environment has radically changed with the institutions of peace and security law centred around the prohibition of the use of force as the central pillar of today's international order.[53]

The prohibition of the use of force and its institutionalisation has also brought about a profound normative change in international law and international relations. Outlawing, preventing, and repressing aggressive war is not only a more ambitious community interest than merely constraining war.[54] The underlying normative evolution also significantly reduces the moral scope for neutrality as a tenable position in war. Indeed, with (aggressive) war now squarely a concern to the international community as whole, what room is left for members of the international community to take the position of a bystander in the face of aggression?[55] Especially to early inter-war post-World War II enthusiasts and idealists, the moral connotations of neutrality seemed to embody a bygone international order that had failed to protect humanity from the catastrophe of total war.[56]

a. Take-overs and tensions

Consequentially, at first sight, the new international legal order seems to have no need and leave no space for the old law of neutrality. General international law and particularly the *jus ad bellum* have taken over certain functions of neutrality law.[57] The protection of neutral States is now covered by the UN Charter, which protects States' territorial integrity in a much less precarious way than neutrality law, since the protection under the Charter

50 G Cohen, 'Mixing oil and water? The interaction between *jus ad bellum* and *jus in bello* during armed conflicts' (2022) 9 JUFIL 352, 366-371; R Sloane, 'The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War' (2009) 34 YJIL 47, 68.

51 KL Yip, 'Separation between *jus ad bellum* and *jus in bello* as insulation of results, not scopes, of application' (2020) 58 MLLWR 31, 40; Greenwood (n 27) 222; through see V Heiskanen and N Leroux, 'Applicable Law: *Jus ad Bellum*, *Jus in Bello*, and the Legacy of the UN Compensation Commission' in T Feighbery, C Gibson, and T Rajah (eds), *War Reparations and the UN Compensation Commission* (OUP 2015) 53-55 (suggesting that, during armed conflicts, the *jus in bello* alone determines whether force is used lawfully).

52 H Lauterpacht, 'The Limits of the Operation of the Law of War' (1953) 30 BYIL 206, 237.

53 For the implications of the historical development of the prohibition of the use of force on the law of neutrality see, eg, O Hathaway and S Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2017) 168-171.

54 Neff (n 11) 194.

55 H Bull, 'The Grotian Conception of International Society (Presentation at the British Committee on the Theory of International Politics, 15 April 1962)' in K Alderson and A Hurrell (eds), *Hedley Bull on International Society* (Macmillan 2000) 121 ('The doctrine of collective security really literally amounts to an elimination of the right of neutrality; everybody has a duty to participate in the collective system.')

56 N Politis, *Neutrality and Peace* (F Macken tr, Carnegie Endowment for International Peace 1935) 80-82 (fiercely criticising the backward-mindedness of international legal scholarship in failing to recognise that neutrality was 'doomed to condemnation'); ILA (ed), *Report of the Forty-First Conference 1946* (ILA 1948) 42; C Fenwick, '"The Old Order Changeth, Yielding Place to New"' (1953) 47 AJIL 84, 85-86.

57 For an argument that neutrality law has lost its practical relevance see El-Zein (n 4) 180-181.

does not depend on a status that the belligerent States could terminate at any time by turning the neutral into a belligerent.

Other core features of neutrality have been regarded as rendered anachronistic and even obsolete by the development of the *jus ad bellum*. Particular tensions arise regarding two main elements of neutrality law. First, most prominently debated in international legal thought are neutrality duties to abstain from assisting the parties and to prevent them from using neutral territory in certain ways. Support to the aggressor is now prohibited by the prohibition of aggression itself, in addition to the general complicity rule reflected in Article 16 ARSIWA.[58] More controversially, regarding support to the victim of aggression, the normative impetus underlying the prohibition of force and aggression, as well as the concept of collective self-defence, would seem to command that such support cannot be illegal.[59] Going further, the *jus cogens* nature of the prohibition of aggression[60] even raises questions as to what extent third States can still lawfully remain neutral.[61]

Secondly, somewhat less prominently debated has been the fate of traditional belligerent rights vis-à-vis neutrals. These rights embody a conception of war and belligerency as a status permissive of force. Yet, deriving such permissions from the status of being at war seems plainly incompatible with the restrictive *jus ad bellum* regime (to the extent that the exercise of the belligerent rights amounts to a use of force), with its narrowly confined permissive exceptions.[62]

b. Neutrality's resilience

Faced with such deep-seated tensions, the conceptually cleanest solution would seem to have been to abandon neutrality, a solution that had some support in the early days of post-World War II enthusiasm and idealism,[63] or at least 'radically overhaul' its rules.[64] Yet, the fate of neutrality has been determined once again less by principle than by pragmatism. Neutrality has thus proved remarkably resilient.[65] There are three key

58 UNGA Res 3314 (XXIX) (14 December 1974) (Definition of Aggression) Art 3 f) (considering as aggression the act of allowing territory placed at the disposal of another to be used for perpetrating aggression); see M Jackson, *Complicity in International Law* (OUP 2015) 144-146 (making the case that there is a wider rule of complicity in aggression, extending beyond the provision of territory); for a comprehensive analysis of inter-State assistance under the prohibition of the use of force, see B Nußberger, *Interstate Assistance to the Use of Force* (Nomos 2023).

59 C Kreß, *The Ukraine War and the Prohibition of the Use of Force in International Law* (TOAEP Occasional Paper Series No. 13 2022) 17-19; for the view that neutrality duties continue to prohibit such assistance, see K Heller and L Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' (2022) 13 JIHLS 251, 254.

60 ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)' (2022) UN Doc A/77/10, 85, 89 (Draft Conclusion 23; Annex (a)) (for the prohibition of aggression).

61 See below 4.c., text accompanied by n 74.

62 See already Henry Stimson, 'The Pact of Paris: Three Years of Development' Address before the Council on Foreign Relations, 8 August 1932 (Government Printing Office, Publication No. 357) 5 ('War between nations (...) is no longer to be the source and subject of rights.'); see also, following the Second World War R Baxter, 'So-Called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs' (1951) 28 BYIL 323, 323-324; E Lauterpacht, 'The Legal Irrelevance of the "State of War"' (1968) 62 ASILProc 58, 63; and more recently Clapham (n 10) 520.

63 n 56.

64 A Clapham, 'Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law' (2021) 97 ILS 1200, 1253.

65 On the notion of resilience of neutrality see already Neff (n 1) 196; T Bridgeman, 'The Law of Neutrality and the Conflict with Al Qaeda' (2010) 85 NYULR 1186, 1211;

structural factors that have facilitated this resilience, leaving aside the general uncertainty in international legal thought as to establishing the 'death' of a rule of international law.[66]

The first factor pertains to the structure of neutrality itself. While neutrality was initially wedded with war as a—perfectly legal—institution, that connection has proved to be more circumstantial than necessary, and clearly not indissoluble. Indeed, neutrality does not logically presuppose war to be legal for its structures to work. The rationale of keeping third States detached from the conflict need not necessarily be to protect the belligerents 'right' to wage war to settle their contest unhindered. The rationale of preventing the extension of wars, modest as it may be, is readily transposable to contemporary armed conflicts[67]—and the same would be true of the crucial role that neutral States may play in facilitating peace.[68] In so far as the scope of application of neutrality law is concerned, which was traditionally connected to war as a concept, exchanging 'war' for 'international armed conflict' may appear as mere technicality here.[69]

The second facilitating factor of neutrality's persistence are the structural imperfections of international law's current peace and security system.[70] As will be seen below in more detail, States have been much more half-hearted in centralising the decision-making on recourse to force than radical idealists may have hoped for. As pragmatism and self-interest trumped higher moral principles, this has almost naturally left space for such a pragmatic creature as the law of neutrality. Indeed, neutrality's premise of a decentralised positioning of each State regarding a given war still holds good more often than not.[71]

The third, and arguably decisive, factor is that States have held on to neutrality. They may not have done so exactly at the forefront of day-to-day international practice, but firmly enough to keep neutrality rules pragmatically at hand, so that these rules can be used when needed. States have thus neither been willing to abandon neutrality duties nor belligerent rights.[72] Beyond States' pragmatic attitude, this practice may also reflect a

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66 M Glennon, 'How International Rules Die' (2005) 93 GeoLJ 939; R Kolb, 'La Désuétude en Droit International Public' (2007) 111 RGDIP 577; J Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2011) 85-86.

67 M Bothe, 'The Law of Neutrality' in D Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) 603; Krieger (n 10) 467 (suggesting that '[a] way forward for promoting community interests through third-party obligations might thus lie in refocusing on de-escalation through the more traditional means of containing war: Duties of neutrality, abstention, and nonintervention for third states.')

68 A Graf and D Lanz, 'Conclusions: Switzerland as a paradigmatic case of small-state peace policy?' (2013) 19 Swiss Political Science Review 410; W Pfeifenberg, 'The Role Of Neutrality In International Politics' in C Boasson and M Nurock (eds), *The Changing International Community* (De Gruyter 1973).

69 See *Nuclear Weapons* (n 49) [89] (noting laconically that 'the principle of neutrality … is applicable … to all international armed conflict ….'); for the complexities of establishing neutrality law's threshold of application within the current *jus in bello*, see G Petrochilos, 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality' (1998) 31 VanJTL 575; Bothe (n 67) 608-610.

70 H Kelsen, 'Théorie du Droit International' (1953) 84 RCADI 1, 59-60.

71 C Chinkin, *Third Parties in International Law* (Clarendon Press 1993) 302.

72 P Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 17 HILJ 249, 254; see also, eg, *Nuclear Weapons* [51], [74], [88]-[90], [93]; France, 'Ministère des Armées: Droit International Appliqué aux Opérations dans le Cyberespace' 10 September 2019 <https://www.defense.gouv.fr/content/download/565895/9750877/file/Droit+internat+appliqué+aux+opérations+Cyberespace.pdf> 17; Netherlands, 'Letter of the Minister of Foreign Affairs to Parliament' 5 July 2019 (Kamerstuk 33 694 Nr. 47) <https://zoek.officielebekendmakingen.nl/kst-33694-47.html>; Italy, 'Italian Position Paper on "International Law and Cyberspace" November

wider, more subtle intellectual stickiness of status-type conceptions of war underlying neutrality which may be 'so deeply ingrained in legal thought, as well as in state practice and the popular imagination, that [they] tenaciously continued to survive in various contexts.'[73]

c. Conceptualising the co-existence

As claims to the irrelevance of neutrality law have given way to an increasing realisation that neutrality is there to stay, international legal thought has thus been left with conceptually harmonising the co-existence of neutrality with the current peace and security law. This role is much in line with the traditional role of legal thinking on neutrality over the past centuries of systematising and theorising unprincipled practice. To conceptualise this co-existence, the task has essentially been one of, first, identifying conflicts between specific rules from the two regimes, and, secondly, devising rules to resolve those conflicts.

Regarding the identification of conflicts, we can circle back to the main areas of tension identified above, that is, neutral States' obligations and belligerent rights. For neutrality obligations, conflicts arise where the *jus ad bellum* imposes a *duty* on third States to take action in support of a party to the conflict that neutrality law prohibits.[74] While theoretically possible in case of an obligation imposed by the Security Council under Article 25 UN Charter, this rarely happens in practice. Other duties to take positive actions against aggression—such as the duty to assist UN action under Article 2(5) UN Charter or the customary international law duty reflected in Article 41(1) ARSIWA to cooperate to terminate serious breaches of *jus cogens* norms—seem too general to command specifically action that would conflict with neutrality obligations.[75] More frequently, the Security Council or the right to individual or collective self-defence may *permit* States to take certain action (without imposing an obligation to do so). Conflict with the law of neutrality here only arises where a State wants to make use of that authorisation in a way that would prima facie be inconsistent with neutrality law.

In these cases, the conflict rule, flowing either directly from Article 103 UN Charter or from a wider notion of the primacy of the *jus ad bellum* in today's legal order, is that the States' obligations and permissions under that body of law prevail over the law of neutrality.[76] Precisely how that primacy is to be construed under the law of neutrality—as an exception to the scope of neutrality obligations for assistance to victims of aggression,

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2021 <https://www.esteri.it/mae/resource/doc/2021/11/italian_position_paper_on_international_law_and_cyberspace.pdf> 14; Costa Rica, 'Costa Rica's Position on the Application of International Law in Cyberspace' 21 July 2023 <https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/Costa_Rica_-_Position_Paper_-_International_Law_in_Cyberspace.pdf> 17-18; UNGA, 'Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States' UN Doc A/76/136 (13 July 2021) 78 (Romania); Switzerland, 'Switzerland's position paper on the application of international law in cyberspace' (May 2021) <https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20210527-Schweiz-Annex-UN-GGE-Cybersecurity-2019-2021_EN.pdf> 4-5.

73 Neff (n 3) 347.

74 Lauterpacht (n 52) 237 ('[T]he right of a neutral to discriminate against and to penalize an aggressor has been transformed into a duty. That duty may assume the complexion of the supreme obligation to abandon the neutral status itself.')

75 Clancy (n 4) 541-543.

76 Upcher (n 4) 155-156.

as a justification flowing from self-defence or collective countermeasures, or as a separate status of 'non-belligerency' or 'qualified neutrality'—remains a matter of conceptual and doctrinal controversy.[77] In all other cases, however, there is nothing in the *jus ad bellum* that prevents the co-existence, and thus crucially co-application, of the law of neutrality. The same reasoning can be applied to belligerent rights. Their exercise beyond the threshold of force under the *jus ad bellum* must therefore be justified under that body of law.[78] In that sense, as Bothe put it, 'the *jus contra bellum* constitutes a kind of overlay network of norms under which the old law still exists, but may, to a certain extent, take on a different shape.'[79]

d. Categorizing neutrality: *Jus ad bellum* or *jus in bello*?

The place of the law of neutrality within the current architecture of the regulation of war nonetheless remains an uneasy one. This becomes evident in the debates in international legal thought on whether to classify the law neutrality, in the dichotomous classification established in today's scholarship on the laws of war, as pertaining to the *jus ad bellum* or to the *jus in bello*. The law of neutrality dates back to an era where the decision of *whether* a State had recourse to force was not considered to be one on which international law placed many restrictions—although it may be an undue simplification to claim that even 19th century international legal thought and practice were entirely indifferent to the use of force.[80] At the same time, international law had already more clearly begun placing such restrictions regarding *how* force was to be used in conducting wars. It may therefore seem intuitive to categorise neutrality law as *jus in bello*. That intuition is backed by neutrality law's scope of application which is established in a *jus in bello* fashion.[81] It was conceived as a regime applicable to war and may today be applied to international armed conflict.[82]

The content of key rules of neutrality, however, regards belligerent or neutral States' decision to use force (belligerent rights or neutral self-help) or to contribute to the war effort of a belligerent and thus to its use of force (neutral duties of non-assistance and prevention).[83] That this in and of itself creates tensions with the current *jus ad bellum* rules given the divergence of the content of that body of law and neutrality law has already been noted. These tensions are further augmented by the structural mismatch between the law of neutrality and the prohibition of the use of force. The former is based on a status-based logic, depending on who has the status of a belligerent and who has not, more akin to the *jus in bello* (which applies to armed conflict as a state of affairs, even if today a state of affairs determined by a factual situation on the ground). By contrast, from the perspective of the *jus ad bellum*, there is no such thing as war or armed conflict. The prohibition of

77 See recently, eg, Clancy (n 4); G Bartolini, 'The provision of belligerent materials in the Russia-Ukraine conflict: Beyond the law of neutrality?' (2023) 99 QIL 3;

78 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2004) [13.3]; Upcher (n 4) 173-175.

79 M Bothe, 'Comments' in H Post (ed), *International Economic Law and Armed Conflict* (Nijhoff 1994) 36.

80 A Verdebout, *Rewriting Histories of the Use of Force* (CUP 2021) 107-112, 204-212.

81 Antonopoulos (n 4) 234; see also N Verlinden, 'The Law of Neutrality' in J Wouters, P de Man, and N Verlinden (eds), *Armed Conflicts and the Law* (Intersentia 2016) 99 (suggesting that the law of neutrality forms part of the 'jus in bello sensu lato').

82 See above n 69.

83 See similarly P Clancy, 'The Law of Neutrality: *Jus ad Bellum* or *Jus in Bello*?' (2022) 13 JIHLS 353 357-359 (arguing 'that the modern jus ad bellum and jus in bello have both 'inherited' components of the law of neutrality'); M Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (EE 2019) 479.

the use of force applies to individual acts, which it prohibits or exceptionally permits, to the extent that these qualify as a use of force.

Some of these tensions might be conceptually less troubling if neutrality law were considered part of the *jus in bello*. Doing so would mean, for example, that exercising belligerent rights would only matter for whether the respective operation is lawful as a matter of the *jus in bello*. Under the *jus in bello*, it would be perfectly consistent to apply belligerent rights equally to both sides, regardless of who is the aggressor.[84] The notion of belligerent equality underlying belligerent rights under the law of neutrality is in synch with the *jus in bello*, while unconceivable if these rights were *jus ad bellum* rights. The separate question of the legality of the acts undertaken in the exercise of belligerent rights under the *jus ad bellum* would, of course, remain unaffected (since, as has been noted above, the *jus ad bellum* continues to apply in armed conflict). At any rate, reflecting on the difficulty of categorising neutrality helps grasping the structural tensions surrounding neutrality law within the current regulation of war.

5. NEUTRALITY AS A SOURCE OF INSPIRATION FOR INTERNATIONAL LEGAL THOUGHT AND LAWMAKING

It has been noted above that the law of neutrality co-exists with more recent layers of international law. Beneath these layers, the neutrality layer will often remain hidden. But at times, notably where the more recent layers do not fully cover the ground, the old neutrality law surfaces. Neutrality, however, also impacts present international law in subtler and indirect ways, namely through its continued reflection in other, more recent rules, structures, and concepts. This influence as a source of inspiration may not be evident from the surface, but instead requires geological drilling into the sediments of international legal thought.[85] This section will discuss several prominent illustrations of this particular use of neutrality in international legal thought and law-making.

As has been explained at the outset of this chapter, neutrality has been a milestone in the development of international law and legal thought in that it fleshed out a specific legal regime for third States, understood in that context as States not parties to a war. In that sense, neutrality can be seen as having anticipated further developments of the legal position of third States in a much wider sense, understood as States not parties to a particular international legal relationship.[86] One such development has been the establishment of complicity rules in international law, which prohibit third States from aiding and assisting other States in conducting an internationally wrongful act. Of course, complicity rules structurally differ from non-assistance duties under neutrality law in that they only prohibit assistance to illegal acts. The duty is thus tied to an assessment of the legality of the conduct of another State, not to that State's status as a belligerent. Accordingly, complicity takes non-assistance duties to what has been described as a higher degree of 'moral sophistication'[87] and have been seen as a reflection of some kind

84 See, generally, A Roberts, 'The Equal Application of the Law of War: A Principle Under Pressure' (2009) 90 IRRC 931; V Koutroulis, 'And Yet It Exists: In Defence of the "Equality of Belligerents" Principle' (2013) 26 LJIL 449.

85 J Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 547, 548-549.

86 Chinkin (n 71) 7.

87 V Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 JILD 1, 12.

of wider international rule of law.[88] Perhaps this distinct moral emancipation explains why neutrality has not figured prominently in the ILC's work on complicity. Yet, conceptually, it is worth keeping in mind that neutrality may well have opened legal imagination beyond bilateralist conceptions of the international legal order that rules for inter-State complicity could then build on upon.[89]

While negative non-assistance duties of States have thus significantly developed further, and have proved easier to establish in recent decades, the development of positive obligations in many fields has proved more difficult. The duties of neutral States to prevent certain conduct by belligerents on their territory have been a fore-runner in the development of due diligence obligations in international law. What is more, neutrality even by today's standards appears as a remarkably detailed regime that could still serve as a useful guide in other domains. Accordingly, in the ongoing controversies on the existence and content of due diligence duties in the cyber realm,[90] Lemnitzer has suggested that the law of neutrality provides helpful contours for what due diligence might require of States in that respect.[91] He points out that neutrality law is interesting not only for its detailed corpus of relatively specific rules, but also because these rules were 'law created for the grey zone at the fringes of, or just below, armed conflict' which may therefore help 'to develop a flexible, but reliable, due diligence standard for cyberspace that will help states manage expectations of responsible behaviour and thereby defuse future potential conflicts before they arise.'[92]

In a seemingly similar way, the 'unwilling or unable' doctrine draws on the prevention limb of neutrality.[93] According to this doctrine, foreign States may use force against armed non-State actors which attack them from the territory of another State if that State is unwilling or unable to prevent or terminate the acts of those non-State actors.[94] This test draws on the traditional right of belligerent States to take necessary—including forcible—measures of self-help to terminate a breach of neutral territory by the enemy belligerent that the neutral has been unwilling or unable to prevent or terminate.[95] That right has historically been extended to cover forcible measures against non-State actors acting on neutral territory.[96] The idea behind the 'unwilling or unable' doctrine in today's *jus ad bellum* discourse is thus to transpose a traditional belligerent right to carve out a broad exception to the prohibition of the use of force. This transposition is problematic as

88 H Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 50 et seq.

89 See also ibid 15.

90 See generally A Coco and T de Souza Dias, ''Cyber Due Diligence': A Patchwork of Protective Obligations in International Law' (2021) 32 EJIL 771; E Jensen, 'Due Diligence in Cyber Activities' in H Krieger, A Peters, and L Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020).

91 J Lemnitzer, 'Back to the Roots: The Laws of Neutrality and the Future of Due Diligence in Cyberspace' (2022) 33 EJIL 789.

92 ibid, 790.

93 On the doctrine's origins in the law of neutrality see generally A Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 VaJIL 483, 497-501.

94 The doctrine was notably invoked by the US to justify its anti-ISIL campaign in Syria, see 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General' UN Doc S/2014/695. For scholarly surveys concluding that the doctrine does not reflect international law see O Corten, 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?' (2016) 29 LJIL 777; P Starski, 'Right to Self-Defence, Attribution and the Non-State Actor–Birth of the'Unable and Unwilling'Standard?' (2015) 75 ZaöRV 455.

95 See nn 30, 31.

96 Deeks (n 93) 501-503.

the legal and normative context in which this belligerent right was originally conceived has radically changed, as the previous section of this chapter has outlined. The transplant is therefore anachronistic. Indeed, as proposed above, if belligerent rights persist in the present day and age (and States' persistent references to them suggest they do), such rights can only lawfully be exercised within the confines of the established exceptions to the *jus ad bellum rules* and cannot be used to extend these exceptions.[97] The 'unwilling or unable' doctrine would thus sit uneasy with the primacy of the *jus ad bellum* that has been put forward above as the preferred rule of conflict between that body of law with neutrality law.

Neutrality duties have also been invoked in international legal thought to establish the point at which States or armed groups providing assistance to a party to an international or non-international armed conflict become parties to that conflict themselves, i.e. 'co-belligerents' in traditional terminology. On one account, the line to 'co-belligerency' would be crossed when the assistance would have violated the traditional neutral duty not to provide assistance to belligerents, had the assistance been provided by a neutral State—at least if such violations prove 'significant' and 'systematic'.[98] Leaving aside doubts as to whether using the law of neutrality beyond its original inter-State context in settings involving armed groups is appropriate, attaching the legal effect of 'co-belligerency' to the violation of neutrality duties is a problematic understanding of the structure and purpose of neutrality law.[99] It would be conceptually awkward for a legal regime to terminate a status (i.e. that of neutral) through the violation of duties which flow from that same status. Finding that a State's act violated a neutrality duty presupposes that the State is still neutral when concluding the act, which would no longer be the case had that same act simultaneously made it a 'co-belligerent'. But even if the connection is considered theoretically possible, it is at any rate inconsistent with the structure of neutrality law. That structure provides for distinct remedies (notably self-help) against neutrals violating their duties.[100] The rationale of these remedies is to enforce compliance with neutrality duties, which logically presupposes that neutral States remain neutral (and thus bound by their duties) despite violating these duties. Against this background, it is hardly surprising that traditional international legal thought at the heyday of neutrality did not read neutrality along the lines of this recent 'co-belligerency' approach.[101] Ultimately, it should be recalled that neutrality's purpose is to constrain conflicts. Understanding violations of neutrality law as extending the conflict—by turning neutral States into parties—would sit ill with that very purpose.[102]

In addition to neutrality duties, the traditional 'rights' or protections of neutral States have similarly been drawn upon to inform other concepts of international law. Specifically, Lim and Martínez Mitchell have argued that the 'right to maintain a neutral status' should shape the limits for collective countermeasures.[103] As seen above, that 'right'—or privilege—protected third States' interests to continue their trade relations unaffected by

97 See similarly Antonopoulos (n 4) 167.

98 C Bradley and J Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 HLR 2047, 2112; Bridgeman (n 65) 1200.

99 For a more detailed argument on this point see A Wentker, 'At war? Party status and the war in Ukraine' (2023) 36 LJIL 643, 648.

100 See above n 31.

101 Oppenheim (n 15) 388.

102 See above n 10.

103 CL Lim and R Martínez Mitchell, 'Neutral Rights and Collective Countermeasures for *Erga Omnes* Violations' (2023) 72 ICLQ 361, 363.

belligerent interference.[104] Transposed to the context of so-called secondary sanctions practices, that notion would suggest that the effects of such sanctions on third State's trade interests would have to be given due weight as part of the proportionality assessment for collective countermeasures to be lawful.[105] Conceptually, the usage of neutrality concepts to advance an unsettled debate in general international law is similar to Lemnitzer's argument on cyber due diligence. Normatively, however, Lim and Martínez Mitchell aim to counterbalance perceived 'aspirations for solidarity and moral unity of purpose in the face of international conflicts' with a sense of 'continuity with *modus vivendi* norms of the international community'.[106] Their argument thus crucially highlights that in an increasingly polarised international order, there remains conceptual appetite in international legal thought for the basic posture of third States under neutrality law, namely that of detachment from conflict.[107]

In sum, rules, concepts, and structures stemming from neutrality still inform debates in current international legal thought in manifold ways. The instrumental and pragmatic ways in which neutrality law is used to resolve pressing legal issues beyond the original ambit of neutrality may sometimes be more, sometimes less convincing in light of the rationales and structures of neutrality and the context in which its rules were conceived. At any rate, however, these usages of neutrality are perfectly in line with the pragmatism that has shaped the course of neutrality throughout its existence, as they are with pragmatic 'working with what we have'-mentalities in international legal thought more widely, beyond neutrality.

6. CONCLUSION

Throughout its history, neutrality has proved a remarkably resilient institution. As States pragmatically hold on to it, neutrality is there to stay, notwithstanding the ever-increasing conceptual tensions of fitting it into the present international legal order. The role of international legal thought will thus continue to be one of conceptualising the awkward co-existence and interaction of this old body of law with more recent regulatory layers in the laws of war. This task is still far from accomplished. The recent trend in scholarship of rediscovering the law of neutrality is a thus welcome development, which could further not only our understanding of neutrality's operation in today's regulation of war but also its conceptual legacy in international law more widely and uncover its potential for further conceptual inspiration.

104 See above 2., 3.b.
105 Lim and Martínez Mitchell (n 103) 386-389.
106 ibid 391.
107 See above 2.

Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)

"Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute's mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice…. The depicted sculpture…[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts … [represent] the individual states …. [The division] of the figure … into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable…. The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds." [transl. by S. Less]

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