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Optional but not qualified: Neutrality, the UN Charter and humanitarian objectives

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Abstract

Neutral States must abstain from supporting a party to a conflict with military equipment and assistance. This core aspect of the law of neutrality has not changed with the adoption of the UN Charter in 1945, or with the brutal Russian aggression against Ukraine. That said, by reviewing the changes to neutrality law over time, this article finds plausible reasons to believe that neutrality has – for better or worse – become optional for the vast majority of States, which can today opt to be non-belligerent States – i.e., States that are neither neutral nor parties to the armed conflict. All States have to cooperate to bring to an end serious violations of international law, including humanitarian law, and this duty of

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cooperation has abolished "sitting-still neutrality", but it does not render neutrality law moot. This reading of "optional but not qualified" neutrality maintains the core neutrality idea of abstaining in military matters. In this article, I argue that views of "obsolete" or "qualified" neutrality are not new at all but depart from well-accepted rules of legal interpretation and raise concerns about double standards. Viewing neutrality as optional but unqualifiable offers greater conceptual clarity, is more honest than alternative views, and comes with advantages for humanitarian action.

Keywords: State neutrality, United Nations Charter, use of force, collective security, non-belligerency, arms transfers, duty to cooperate.

Introduction

The neutrality of States is currently perceived very differently by different actors. Some accuse neutral States of serving the interests of the aggressor by refusing to provide military assistance and thereby undermining efforts to restore international peace and security.[1] Others view neutrality positively and link the idea of military abstention to de-escalation and humanitarian objectives.[2] The debate revolves around arguments about what has changed, or has not changed, since the adoption of the Briand–Kellogg Pact and the entry into force of the United Nations (UN) Charter, with the known challenges of implementing collective security. This article revisits the debate, versions of which are now almost 100 years old, on whether the international law of neutrality of States is still relevant, and particularly how it interacts with modern international law. We will see that the law of neutrality has evolved in important ways, and that States today have a duty of cooperation to bring serious violations of international law to an end. If neutrality is interpreted in light of this duty of cooperation – and despite its moral dilemmas – military neutrality still has the potential to increase space for humanitarian action and support preparations for more peace in an imperfect world.

These debates on the continued relevance and content of neutrality are important because the way we interpret the relationship between neutrality, the UN Charter and the duty of States to cooperate towards peace and humanitarian objectives reflects key disagreements about how modern international law should achieve peace and whether there is room for a principled position of military

1 Kolb summarizes (already in 2018) that there is a view that "[n]eutrality is not anymore seen as having a pacificatory effect, but as an anti-social practice making it easier for the aggressor State to pursue its objectives". Robert Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum*, Edward Elgar, Cheltenham, 2018, p. 308.

2 For an overview of the various justifications that are historically invoked, see e.g. Constantine Antonopoulos, *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality*, Cambridge University Press, Cambridge, 2022, p. 220; James Upcher, *Neutrality in Contemporary International Law*, Oxford University Press, Oxford, 2020, pp. 213 ff.; Andrea Gioia, "Neutrality and Non-Belligerency", in Harry H. G. Post (ed.), *International Economic Law and Armed Conflict*, Martinus Nijhoff, Dordrecht, 1994, p. 56.

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abstention no matter why a conflict emerged – an idea which arguably shares some commonalities with the adherence to moral justifications of a body of law, international humanitarian law (IHL), that does not distinguish between belligerents and their combatants on either side of a war.

We must first clarify what kind of neutrality this article focuses on. Paul Seger summarizes that there is a difference between the term "neutrality" in everyday language and in international law: "In common language, [neutrality] means not taking sides, being impartial or even indifferent to one party's side or cause."[3] The law of neutrality is narrower: it only applies to States (and not, for example, to the neutrality of humanitarian actors such as the International Committee of the Red Cross (ICRC)),[4] it only applies in situations of international armed conflict (IAC), and it concerns a limited set of obligations,[5] with the prohibition of *military*[6] assistance to the belligerents at its core, including not making the neutral State's territory available to parties to the conflict and not supplying war material to those parties.[7]

The main source of the international law on neutrality is customary international law. Customary international law in this field developed considerably after the adoption of the 1907 Hague Conventions,[8] two of which – Hague Conventions V and XIII – deal with neutrality.[9]

For almost a century, a key question was the number of options that States have when an IAC breaks out. It is undisputed that States can be neutral or parties to the armed conflict, but can States also provide military material or other assistance to a belligerent without being party to the conflict and without breaking neutrality law? The entry by Michael Bothe on neutrality in the *Max Planck Encyclopaedia of Public International Law* summarizes the view according to which States have two

3 Paul Seger, "The Law of Neutrality", in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford 2014, p. 248; Denise Plattner, "La neutralité du CICR et la neutralité de l'assistance humanitaire", *International Review of the Red Cross*, Vol. 78, No. 818, 1996, p. 174.

4 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, 2nd ed., Edward Elgar, Cheltenham, 2024, p. 517.

5 The rights attached to neutrality and the inviolability of territory are available to all States.

6 Over time, economic sanctions became considered as a tool outside the scope of neutrality. On the history of this development, see Nicolas Multer, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War*, Yale University Press, New Haven, CT, 2022.

7 Michael Bothe, "Neutrality, Concept and General Rules", in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2015. The obligation not to supply or transfer arms to a party to an international armed conflict is contained in Article 6 of Hague Convention XIII, considered to be part of customary law. Maria Gavouneli, "Neutrality – A Survivor?", *European Journal of International Law*, Vol. 23, No. 1, 2012, p. 269.

8 See e.g. M. Bothe, above note 7, paras 7 or 40; Adrian Schaub, *Neutralität und Kollektive Sicherheit*, Helbing, Frankfurt, 1995, p. 16. The Hague Conventions are still applicable law, but, for instance, it is no longer necessary that States declare wars to trigger the applicability of neutrality law, and the separation between public and private actors is outdated.

9 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 205 CTS 299, 18 October 1907; Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 205 CTS 395, 18 October 1907, both available in the ICRC IHL Treaty Database at: https://ihl-databases.icrc.org/ihl (all internet references were accessed in April 2024).

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options: "participate or remain neutral".[10] The idea behind this binary choice is to limit the attractiveness to third States of getting involved in the armed conflict so that neutrality will thereby help to limit the geographic spread of the IAC.[11] Does international law today allow for a position of non-belligerency, i.e. a State supporting the victim State but below the level of becoming a party to the armed conflict? Or, if neutrality is still, *prima facie*, *required* of all States (unless they accept becoming parties to the conflict), can neutrality sometimes be "qualified" and/or can circumstances precluding wrongfulness (such as collective self-defence or countermeasures) provide justifications for what would arguably otherwise be considered wrongful assistance to a belligerent in breach of neutrality?

Before we delve into the various arguments advanced in this debate, three methodological considerations must be taken into account.

First, some changes to neutrality law affect States differently depending on the type of neutrality involved. We must distinguish permanently neutral States from States that choose "ordinary" (or relative) neutrality by deciding to take a neutral position in a given IAC.[12] Permanent neutrality is not mentioned in the 1907 Hague Conventions but was recognized in the Conference of Vienna and Paris of 1815, when Switzerland joined the League of Nations in 1920,[13] and when the UN General Assembly recognized the "permanent neutrality" of Turkmenistan in 1995.[14] For permanently neutral States, "the duty to remain neutral is set in advance and concerns all future armed conflicts", unless the State is itself attacked or, if legally permitted, renounces its position as a neutral State.[15] The importance of distinguishing permanently neutral States from all other States is shared among authors who otherwise disagree on key points. Andrew Clapham and James Upcher, for instance, disagree on whether "ordinary" States can freely choose between neutrality and non-belligerency at the outbreak of an inter-State armed conflict,[16] but they both insist on the difference between those States that commit (in peacetime) to permanent neutrality and all others.[17] Authors sometimes write about the durability of the status of neutrality for "ordinary" States but not permanently neutral ones without necessarily making this explicit. Whenever we discuss changes to the international law on neutrality, we must consider whether these changes also

10 M. Bothe, above note 7, para. 12.
11 See the references above in note 2.
12 M. Bothe, above note 7, paras 12 ff.; J. Upcher, above note 2, pp. 3–4; R. Kolb, above note 1, pp. 305, 307; María Caffi, "Regímes jurídicos de neutralidad", *Revista Chilena de Derecho*, Vol. 13, No. 1, 1986, p. 157.
13 P. Seger, above note 3, p. 259.
14 UNGA Res. 50/80, 12 December 1995.
15 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart, London, 2008, p. 278. If a State is permanently neutral because of a unilateral declaration (such as Switzerland when it joined the UN in 2002 and declared that, as a member of the UN, it will remain neutral; see Declaration of Acceptance of the Obligations Contained in the Charter of the United Nations, 2195 UNTS 291, 20 June 2002), it could untie itself from neutrality with a subsequent unilateral act, but good faith would require a notification. For other permanently neutral States, the situation is more complex if their permanent neutrality is an obligation by virtue of an international treaty.
16 Andrew Clapham, *War*, Oxford University Press, Oxford, 2021, p. 54 fn. 53.
17 J. Upcher, above note 2, p. 5; A. Clapham, above note 16, p. 54 fn. 53.

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affect the legal obligations of permanently neutral States (such as Austria, Costa Rica, Moldova, Turkmenistan or Switzerland);[18] otherwise, we may end up with overly broad conclusions. Most importantly, if readers accept the availability of the option of non-belligerency for most States, this option cannot be transferred to States that are already committed to neutrality.

Second, it is important to note at the outset that the debate on the continued relevance of neutrality did not start with the violation of the UN Charter by Russia in 2014, nor in 2022. Rather, ideas about the irrelevance of neutrality or concepts such as "qualified" (or benevolent) neutrality have been around since the establishment of the League of Nations,[19] with various ideas circulating about how modern international law would minimize neutrality law.[20] A common thread of the debate is the notion that States are allowed to provide military assistance to the victim State of an armed attack, such as Ukraine, without breaching neutrality law. The argument broadly goes like this: given that modern international law bans the use of force between States, all States are allowed to differentiate between the aggressor and the victim, and there would be no obligation of military abstention (for some, not even when the State in question is a permanently neutral State). Given the long history of this debate, we must consult sources that span a longer period than the last few years.

The third methodological consideration is an important note on terminology. A difficulty that arises is that terms such as "benevolent" or "qualified" neutrality are used differently by different people and are interwoven with various understandings of the legal existence of a status of non-belligerency. Some refer to qualified neutrality as shorthand for indications that neutrality law is less relevant, or no longer relevant, today.[21] Here, I reserve the term "qualified neutrality" for positions that take as a starting point the still widespread view that neutrality is *compulsory* for all States – i.e., that States are at least, *prima facie*, *required* to remain neutral (unless they accept the consequences of becoming a party to the conflict). Qualified neutrality denotes the idea that this (normally compulsory) neutrality could, however, be qualified in some situations to allow (neutral) States to act in ways that are *prima facie* incompatible with the duties of neutrals, e.g. by delivering arms. As Clancy summarizes, qualified neutrality denotes "an interpretation of the law of neutrality which holds that *neutral* States are not obligated to exercise the neutral duty of impartiality towards an aggressor State, and may provide assistance, including arms, to a victim of aggression".[22] In other words, qualified neutrality proclaims that States can have it both ways: they can be neutral but militarily assist a party to an inter-State conflict. With this use

18 A. Clapham, above note 16, p. 53.
19 R. Kolb, above note 1, p. 308.
20 For example, writing in 1956, Potter asserted that "neutrality … was abolished for all signatory States within the limits of the Charter". Pitman B. Potter, "Neutrality, 1955", *American Journal of International Law*, Vol. 50, No. 1, 1956, p. 102.
21 See e.g. C. Antonopoulos, above note 2, pp. 13 ff., associating "qualified" neutrality with "obsolete", "optional" or "partial" neutrality.
22 Pearce Clancy, "The Law of Neutrality: *Jus ad Bellum* or *Jus in Bello*?", *Journal of International Humanitarian Legal Studies*, Vol. 13, No. 2, p. 355 (emphasis added).

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of the term, non-belligerency, optional neutrality and qualified neutrality are conceptually distinct. This clarification is an important aspect of this paper and is one that is not always made in the literature.[23]

In 2007, von Heinegg wrote that neither optional nor qualified neutrality exist.[24] In this view, a State thus has (or had) a duty to remain neutral and to refrain from assisting belligerents, and States assisting belligerent States "were simply lucky that their violations of the law of neutrality went unpunished".[25] Von Heinegg argued in 2007 that while "it is more difficult to accommodate the dichotomy of belligerency and neutrality", State practice and *opinio juris* do not support the idea that third States have a choice; rather, acts of armed assistance to belligerents should "be characterized as what they are: violations of the law of neutrality".[26] In this regard, von Heinegg cited Herbert Whittaker Briggs, who wrote in 1940 that non-belligerency "was in reality only a euphemism designed to cover violations of international law in the field of neutral obligations".[27] Writing on Ukraine in 2022, von Heinegg concluded differently and wrote that

> neutral States can no longer be bound by … a prohibition to supply the victim of aggression with the means necessary to defend itself …. States continuing to rely on and believe in international law can no longer stand by and allow an aggressor government to pursue its apparently illegal aims.[28]

We will review these arguments and conclude that non-belligerency probably exists today, but that this change occurred much before 2022, and that qualified neutrality must be rejected for legal and policy reasons. The key conclusion of this article is that States which are not permanently neutral may choose to deliver arms to a victim State, but that they cannot have it both ways – if States claim to be neutral, they must go the whole hog and abstain militarily, while taking their duty of cooperation seriously by employing non-military means.

The article proceeds as follows. We will first see that neutrality law still exists (i.e., neutrality has not fallen into desuetude, nor is it obsolete, nor has it been overridden by the UN Charter). In the second section, I analyze what it means to say that neutrality is still part of contemporary law. Is neutrality still at least *prima facie* compulsory for all States that do not wish to become parties to an inter-State conflict, or only for permanently neutral States? I will conclude that, for better or worse, there are plausible reasons to accept that neutrality is

23 See e.g. Natalino Ronzitti, "International Responsibility Today: Essays in Memory of Oscar Schachter", in Maurizio Ragazzi (ed.), *Italy's Non-Belligerency during the Iraqi War*, Brill, Leiden, 2005, p. 199.

24 Wolff Heintschel von Heinegg, "Benevolent Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality", in Michael N. Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein*, Brill, Leiden, 2007, p. 544.

25 *Ibid.*, pp. 553–554.

26 *Ibid.*, p. 555.

27 Herbert W. Briggs, "Neglected Aspects of the Destroyer Deal", *American Journal of International Law*, Vol. 34, No. 4, 1940, p. 569 fn. 562, cited in W. Heintschel von Heinegg, above note 24, p. 555.

28 Wolff Heintschel von Heinegg, "Neutrality in the War against Ukraine", *Articles of War*, 1 March 2022, available at: https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/.

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optional for the vast majority of States. If one accepts that neutrality is now optional for most States (except for permanently neutral ones), most States may lawfully supply the victim State with war material and will only become a party to the conflict if they meet the IHL threshold for a State to be party to the conflict. I then go on to review arguments in favour of qualified neutrality, and I reject them firmly. A neutral State cannot qualify neutrality, no matter the gravity or clarity of the violation of the UN Charter, nor by virtue of circumstances precluding wrongfulness.

Towards the end of the article, I reflect on the legal findings for peace and space for humanitarian action. I conclude that military abstention is, and should remain, at the core of neutrality law. Those States that want to be neutral cannot supply war material while claiming to be neutral. That said, "sitting-still neutrality" and impartiality are no longer options available to any State given the duty of cooperation to bring to an end serious violations of international law.[29] The historically problematic interests in neutrality as a sinister tool for maintaining economic relationships[30] are not the ones that contemporary neutrality may pursue. However, if neutral States take their cooperation duty seriously in ways that do not involve military support, I will argue that there is a continuous place for neutral States and that maintaining the law's relevance in relation to neutrality is probably prudent.

Neutrality is neither in desuetude, nor obsolete, nor overridden by the UN Charter

This section reviews the arguments put forward that neutrality is today no longer existent or relevant at all. I start with the most far-reaching arguments, namely that neutrality is (a) simply obsolete or in desuetude or (b) has been overridden as a whole by the primacy of the UN Charter.

No desuetude or obsolescence of neutrality law

Peter Hilpold argued in a recent legal opinion to the Swiss parliament that the 1907 Hague Conventions were obsolete because they were old (and because more States were parties to the UN Charter than to the Hague Conventions).[31] The age of treaties or the number of State parties, however, are not decisive to determine a treaty's applicability. There is a nuance between desuetude and obsolescence:

29 UNGA Res. 56/83, "Responsibility of States for Internationally Wrongful Acts", 12 December 2001, Arts 40, 41.

30 See C. Antonopoulos, above note 2, p. 220, rightfully drawing our attention to the shared economic motives of belligerents and neutrals to continue trading, "but for different reasons", and how neutrality allowed for "very lucrative business that laid neutrals open to the accusations of amorality and profiteering".

31 Discussed in Othmar von Matt, "Exklusives Gutachten zur Neutralität: Die Schweiz darf doch Waffen wiederausführen – jetzt gerät der Bundesrat unter Druck", *Aargauer Zeitung*, 6 May 2023, available at: https://tinyurl.com/5avxn63r.

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desuetude denotes the termination by tacit agreement of the parties to the treaty (including by the emergence of contrary rule of customary international law),[32] while an obsolescent treaty is a treaty that has become inapplicable because it is legally impossible to respect the treaty given "major changes in the international legal system or in the law governing the parties to the treaty".[33] Desuetude is discussed very controversially in scholarship,[34] and the number of ratifying States is certainly irrelevant once the treaty has entered into force.[35] Even if desuetude were to be considered, Ukraine confirmed its commitment to the Hague Conventions in 2015, which shows that, despite their age, those treaties have not fallen into oblivion.[36] When the US administration argued that the Geneva Conventions were "old law" and irrelevant in times of the threat of terrorism,[37] international lawyers strongly rejected the dangerous argument that the age of treaties renders them inapplicable.[38]

The argument regarding obsolescence, on the other hand, is based on the idea that the interpretation of neutrality law in light of the UN Charter would erode neutrality, but this is not the case. The rules of treaty interpretation found in the Vienna Convention on the Law of Treaties (VCLT) suggest that we interpret treaty norms in light of "any relevant rules of international law applicable in the relations between the parties",[39] thus notably in light of the UN Charter. Since the 1950s, various authors have affirmed that the UN Charter coexists alongside international legal rules on neutrality.[40] Reactions of other

32 Jan Wouters and Sten Verhoeven, "Desuetudo", in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2008, paras 1–2.

33 Marcelo G. Kohen, "Desuetude and Obsolescence of Treaties", in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, p. 358.

34 Some reject desuetude generally as a cause of extinction of treaties. Marcelo Kohen, for instance, argues that the negotiators of the Vienna Convention on the Law of Treaties deliberately did not allow desuetude: *ibid.*, pp. 355, 359. Michael Glennon, on the other hand, claims that "excessive violation of a rule … causes the rule to be replaced by another rule that permits unrestricted freedom of action". Michael J. Glennon, "How International Rules Die", *Georgetown Law Journal*, Vol. 93, No. 3, 2005, p. 940. The latter position is arguably more attractive to great powers than to small or less powerful States that are more dependent on legal certainty (and whose State practice of adherence to a rule might be given less public attention than other States' violations of the same rule).

35 And this is even so in cases in which the number of parties falls below the number necessary for the treaty's entry into force: see Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980) (VCLT), Art. 55.

36 Government of the Netherlands, "*Note Verbale* by Ukraine", Treaty Database, Convention Relative to the Rights and Duties of Neutral Powers and Persons in Case of War on Land: Reservations, Declarations and Objections: Ukraine, 29 May 2015, available at: https://treatydatabase.overheid.nl/en/Treaty/Details/003320_b#Ukraine. In this *note verbale*, Ukraine reaffirmed its intention to take over the treaty from the Soviet Union (an identical declaration exists for the 13th Hague Convention).

37 Alberto R. Gonzales, "Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban", memorandum to President George W. Bush, 2002, available at: https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020125.pdf, stating that the "new kind of war" rendered parts of the Geneva Conventions "obsolete" and "quaint".

38 See e.g. Steven Ratner, "Think Again: Geneva Conventions", *Foreign Policy*, 8 October 2009, available at: https://foreignpolicy.com/2009/10/08/think-again-geneva-conventions.

39 VCLT, above note 35, Art. 31(33)(c).

40 See, for instance, Charles Chaumont, "La neutralité de l'Autriche et les Nations-Unies", *Annuaire Français de Droit International*, Vol. 1, 1955, notably pp. 153 ff. More recently and with further references, see e.g. R. Kolb and R. Hyde, above note 15, p. 278.

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States to neutral States joining the UN or members declaring neutrality confirm that neutrality coexists with the UN Charter.[41] This view was shared by the UN General Assembly in 1995, when it expressed the view that "the adoption by Turkmenistan of the status of permanent neutrality does not affect the fulfilment of its obligations under the Charter and will contribute to the achievement of the purposes of the United Nations".[42] Similar conclusions were reached on the American continent when Costa Rica proclaimed its status as permanently neutral and unarmed. Costa Rica conceptualizes its neutrality as a tool for promoting, defending and guaranteeing peace,[43] and is a member of both the UN and the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), which foresees a system of regional collective security and requires States Parties "to assist [the aggressed State] in meeting the attack" ("ayudar a hacer frente al ataque"). The Rio Treaty explicitly affirms that "no State shall be required to use armed force without its consent", notwithstanding the obligation to assist a victim State in responding to an armed attack.[44] We can conclude that all States, including neutral ones and those outside the inter-American system, may and most probably must help the victim State in one way or another, but they are not required to deliver arms. More recently, the Costa Rican Constitutional Court stated in 2022 that cooperating with other States in sanctions and in international criminal accountability was a way for Costa Rica to meet its duty of cooperation while being neutral.[45] We can thus conclude that modern international law has not rendered adherence to neutrality law impossible and that neutrality has therefore not become obsolete.

The next group of arguments does not refer to the extinction of obligations but is based on the priority of some rules over others – i.e., the idea of the higher-ranking law overriding neutrality as a whole.

The UN Charter did not override neutrality law

Scholars have presented various arguments as to why the law of neutrality would be superseded by the UN Charter. Arguments based on the idea of normative superiority of the UN Charter require the presence of a normative conflict between the Charter and the obligations of neutral States, but no such conflict exists. Hence, Article 103 of the Charter does not override neutrality.

41 For example, Costa Rica was a UN member before becoming neutral. See Francisco Alfaro Pareja, "La política de defensa del Estado de Costa Rica: Neutralidad y desmilitarización frente a los retos actuales", *Politeia*, Vol. 34, 2011, p. 95: "de hecho y de derecho, se admite que un Estado neutral pueda ser miembro de las Naciones Unidas".

42 UNGA Res. 50/80, 12 December 1995.

43 Ley de Proclamación de la Paz como Derecho Humano y de Costa Rica como País Neutral, No. 9288, 21 November 2014, Art. 2.

44 Inter-American Treaty of Reciprocal Assistance, 2 September 1947 (entered into force 3 December 1948), OAS Treaty Series B29, Arts 3(1), 20. In scholarly literature, see notably M. Caffi, above note 12, pp. 173–174; Héctor Gros Espiell, "La neutralidad permanente de Costa Rica y el sistema interamericano", *Revista Española de Derecho Internacional*, Vol. 39, No. 1, 1987, pp. 17 ff.

45 Sala Constitucional, Costa Rica, No. 2022021576, 16 September 2022.

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Upcher points out that all UN member States have (a) the duty to assist the UN on the basis of Article 2(5) of the UN Charter, (b) the duty of non-assistance to an aggressor (based on Article 2(4) and the prohibition on complicity) and (c) the duty to implement Security Council measures by "[joining] in affording mutual assistance in carrying out the measures decided upon by the Security Council" (Article 49 of the Charter).[46] None of these duties imposes an *obligation* to provide military assistance to the victim State.[47] In cases in which the Security Council is not blocked because of the veto power (a problem that has been known since 1945),[48] States are obliged to participate in sanctions under Article 41, which will prevail over any potential obligations under neutrality law,[49] and no State may obstruct these measures.[50] When the Security Council adopts resolutions for *military* measures, it *authorizes* military force, but it does not *oblige* States to use force or to provide arms.[51] Hence, even when the Security Council manages to adopt Chapter VII resolutions with enforcement measures involving force, this does not eradicate neutrality. As Kolb summarizes, neutrality is compatible with the UN Charter because the UN Charter does not *impose* on member States a duty to participate in armed enforcement action: it *authorizes* these actions and leaves the choice to participate to the States.[52]

Readers may wonder if a systematic or teleological interpretation of the UN Charter leads to a different result. I do not think it does. As mentioned, we would need to find an *obligation* to militarize before we could argue that neutrality law has been superseded by the UN Charter – which is, to say the least, a stretch. The objective of the UN Charter, stated in Article 1(1), of the "removal of threats to the peace, and … the suppression of acts of aggression or other breaches of the peace", is at the very least not incompatible with a stance of military abstention to limit the spread of an armed conflict and to ensure that neutral States are not pressured by more powerful States to take part in wars, which is the very raison d'être of neutrality. Neutral States ensure that they do not become military threats, which is certainly in line with the peace objective of the UN Charter. As we will see in the next section, readers who view neutrality with suspicion can plausibly argue that most States (except those that commit to neutrality) are *permitted* to provide military (and other) support of the victim State; however,

46 J. Upcher, above note 2, pp. 129 ff.
47 Note also that the duty under Article 2(5) of the Charter is a duty to assist the UN, not the victim State directly. *Ibid.*, p. 132; Terry Gill and Kinga Tibori-Szabó, *The Use of Force and the International Legal System*, Cambridge University Press, Cambridge, 2023, p. 343.
48 Philip C. Jessup, *A Modern Law of Nations: An Introduction*, Macmillan, London, 1948, p. 103.
49 J. Upcher, above note 2, p. 161; Raphaël van Steenberghe, "Military Assistance to Ukraine: Enquiring the Need for Any Legal Justification under International Law", *Journal of Conflict and Security Law*, Vol. 28, No. 2, 2023, p. 239. P. Seger, above note 3, p. 262, emphasizes that Switzerland, Austria and Ireland are unanimous in stating that the law of neutrality does not apply to compulsory measures taken by the Security Council. For further references, see also M. Sassòli, above note 4, p. 516.
50 R. van Steenberghe, above note 49, p. 239; Daniel Thürer, "UN Enforcement Measures and Neutrality: The Case of Switzerland", *Archiv des Völkerrechts*, Vol. 30, No. 1, 1992, p. 82.
51 J. Upcher, above note 2, p. 160.
52 R. Kolb and R. Hyde, above note 15, p. 278.

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the Charter does not *compel* States to provide military assistance and thus does not override neutrality law.

States cannot have it both ways: Optional neutrality and non-belligerency exist, but qualified neutrality does not

If neutrality still exists, the question arises as to what neutrality entails for States when they decide whether or not they will provide military support to a victim State. In this section I will explain why I believe there are plausible reasons to consider that neutrality is today optional for the vast majority of States and that the relevant legal determination as to whether a State is party to the armed conflict is to be made exclusively in accordance with IHL, not neutrality law.

As mentioned in the introduction, some take for granted that States can, for instance, arm Ukraine without violating neutrality law and without becoming a party to the armed conflict because neutrality would simply be an option, not a duty.[53] These States would then be non-belligerents – i.e., neither neutral nor parties to the armed conflict. The option of non-belligerency is thus a consequence of neutrality having become optional. But is this really the case?

To address this issue, let us review the question of what could indicate that neutrality might remain the only option other than participation in the armed conflict. A large body of literature suggests that non-belligerency is controversial.[54] There is a widespread view that customary law offered (or offers) only two choices to States when an IAC breaks out: stay neutral or join a belligerent party.[55] It is challenging to evaluate the legal situation because State practice over a vast time span is difficult to assess, the law of neutrality emerged prior to decolonialization, and many States do not make public statements about neutrality, so important gaps of knowledge ensue. There are almost no relevant court judgments, and the scholarship seems dominated by a relatively limited number of scholars.

According to Bothe, "[v]iolations of the law of neutrality occur even where support is given to the victim of aggression, and even when it does not amount to participation in the conflict".[56] The same view is expressed in the 1999 edition of the US *Commander's Handbook on the Law of Naval Operations*: "Customary international law contemplates that all nations have the option to *refrain* from participation in an armed conflict by declaring or otherwise assuming neutral status."[57]

53 Paul Seger takes optional neutrality for granted: "The main difference between occasional and permanent neutrality is that, in the first case, a State can *choose*, each time a military conflict occurs, to be neutral or not." P. Seger, above note 3, pp. 266–267 (emphasis added).
54 See also the introduction to this article.
55 The 1907 Hague Conventions contain no such rule, at least not explicitly.
56 M. Bothe, above note 7, para. 5.
57 A. R. Thomas and James C. Duncan (eds), "Annotated Supplement to the Commander's Handbook on the Law of Naval Operations", *International Law Studies*, Vol. 73, 1999, para. 7.2 (emphasis added).

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This sentence also appears in the 2024 edition.[58] In 1992, Torrelli (even though he ended up accepting optional neutrality) cited Georges Scelle, who said that ideas related to either non-belligerency or qualified neutrality, such as the position of Italy in 1939 or the position of the United States before entering World War II, were nothing more than attempts to disguise intentions to intervene in an armed conflict while pretending to remain neutral and without facing the consequences.[59] There are few court decisions on the question: in 2005, a German tribunal adhered to the traditional view[60] and presumed that Germany had violated the 1907 Hague Conventions by allowing the United States to use German territory (and airspace) for military conduct by the United States, which was intervening in Iraq in contravention of the UN Charter;[61] and in 2003, an Irish tribunal also rejected the view that neutrality was optional.[62]

The fact that Article 19 of Additional Protocol I and Articles 4(B)(2) and 122 of Geneva Convention III speak of "neutral and other States not Parties to the conflict" or "neutral or non-belligerent Powers" does not lead to a clear conclusion either way. The 2017 ICRC Commentary to Article 5 of Geneva Convention II, on neutral powers, refers to a statement by Yves Sandoz in 2015 that "[w]e can confirm that when an IAC breaks out, States are *either* belligerent *or* neutral".[63] The Commentary, however, also makes clear that Article 5 aims to "bind all States which are not Parties to an international armed conflict in the sense of common Article 2", no matter their determination under neutrality law.[64] These indications from IHL serve to emphasize that all non-participating States are bound by these provisions, but the (inconsistent) wording of the provisions does not resolve the debate on optional neutrality. Security Council resolutions are also inconclusive – a number of them speak of States that are not parties to the conflict, often without distinguishing whether or not these States are all neutrals.[65] Based on this short review, it is evident that there are widespread views that international law presumes that neutrality remains an

58 James Kraska, Raul Pedrozo and Michael N. Schmitt, "Annotated Supplement to the Commander's Handbook on the Law of Naval Operations", *International Law Studies*, Vol. 102, 2024, para. 7.2.

59 Maurice Torrelli, "La neutralité en question", *Revue Générale de Droit International Public*, Vol. 96, No. 1, 1992, pp. 13–14.

60 German Federal Administrative Court, Judgment of the 2nd Military Service Senate, BVerwG 2 WD 12.04, 21 June 2005, para. 211.

61 *Ibid.*, paras 346 ff.

62 Irish High Court, *Horgan v. An Taoiseach et al.*, 2 IR 468, 28 April 2003, p. 504.

63 Yves Sandoz, "Rights, Powers and Obligations of Neutral Powers under the Conventions", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford 2015, p. 93 (emphasis added). The notion that a neutral State is any State which is not party to the conflict also appears in both the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 1994, Art. 13(d), and the *HPCR Manual on International Law Applicable to Air and Missile Warfare*, 2009, Rule 1(aa).

64 ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017, para. 961 fn. 919.

65 N. Ronzitti, above note 23, p. 198.

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obligation for all States which do not want to take part in an IAC, beyond permanently neutral ones.[66]

On the other hand, there are those who argue that State practice has evolved or is evolving, and that international law today allows for non-belligerency. Some conceive this to be the case because neutrality has become optional for all but a few States, and others view non-belligerency as a result of a qualification to *prima facie* still compulsory neutrality (this is the qualified neutrality position). Despite the uncertainties, I find it plausible to consider that neutrality is today optional for the vast majority of States. These States may opt for non-belligerency and militarily support the victim State, but this option is not available to neutral States, and where neutrality is chosen, it cannot be qualified.

As mentioned previously, the idea of a third status is not new, and State practice is inconsistent – we find examples in which neutrality is presented as the only alternative choice to belligerency as well as examples of States proclaiming non-belligerency without claiming that they are neutral.[67] We may, however, conclude that the binary opposition between neutrality and belligerency is at the very least no longer unchallenged.[68] According to Upcher, optional neutrality (to which he did not subscribe) presumes that there is no longer a legal reason to adhere "to the view that non-participating States may have the duties of neutrality foisted upon them".[69] In this view, international law gives ordinary States the right to militarily discriminate against the aggressor State because neutrality is optional (rather than qualified); while Dietrich Schindler and Andrea Gioia are the two most influential authors holding this view,[70] it is shared by others,[71] including the present author.

If neutrality still exists, but has become optional, is it possible for States to have it both ways – to be neutral but deliver arms, at least under some circumstances? I will now move on to review – and dismiss – two groups of arguments that make this claim.

The two groups of arguments that States can have it both ways are, first, the invocation of circumstances precluding wrongfulness, and second, the position of

66 In recent literature, see Kevin Jon Heller and Lena Trabucco, "The Legality of Weapons Transfers to Ukraine Under International Law", *Journal of International Humanitarian Legal Studies*, Vol. 13, 2022, p. 251; Pearce Clancy, "Neutral Arms Transfers and the Russian Invasion of Ukraine", *International and Comparative Law Quarterly*, Vol. 72, No. 2, 2023; Hitoshi Nasu, "The Laws of Neutrality in the Interconnected World: Mapping the Future Scenarios", in Matthew Waxman and Thomas Oakley (eds), *The Future Law of Armed Conflict*, Oxford University Press, Oxford, 2022, p. 137.

67 Such as the example of Italy in the Iraq war of 2003, reviewed by N. Ronzitti, above note 23, pp. 198–200.

68 One may speculate that this arguable result shares some parallels with the acceptation over time by international law of "intervention by invitation", something that further research would need to evaluate.

69 J. Upcher, above note 2, p. 10.

70 Dietrich Schindler, "Transformations in the Law of Neutrality since 1945", in Astrid J. Delissen and Gerard J. Tanja, *Humanitarian Law of Armed Conflict: Challenges Ahead*, Martinus Nijhoff, Dordrecht, 1991, notably p. 373; A. Gioia, above note 2, p. 64. Upcher explains in detail how the thesis of optional neutrality emerged and why he rejects it: *ibid.*, pp. 21 ff.

71 See e.g. A. Clapham, above note 16, p. 53. See also Titus Komarnicki, "The Problem of Neutrality under the United Nations Charter", *Transactions of the Grotius Society*, Vol. 38, 1952, already distinguishing non-belligerency from qualified neutrality; Adil A. Haque, "An Unlawful War", *AJIL Unbound*, Vol. 116, 2022; and most recently, T. Gill and K. Tibori-Szabó, above note 47, pp. 334, 341, 343.

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qualified neutrality *stricto sensu*. These two views uphold the continuity, at least *prima facie*, of the binary opposition between neutrality and belligerency, but then go on to find that States can adopt conduct which is normally considered incompatible with neutrality law and still be considered neutral. In addition to the serious risk of double standards, the problem with these two views is that we face difficulties in describing what exactly remains of neutrality if neutral States can, *à géométrie variable*, either invoke circumstances precluding wrongfulness or argue that the interpretation of neutrality has changed to the point that the qualification of neutrality erodes its substance. We will first turn to circumstances precluding wrongfulness.

Circumstances precluding wrongfulness: Not needed, not available

Writers have discussed two circumstances precluding wrongfulness that might arguably permit a State to militarily assist a victim of an armed attack: collective self-defence and countermeasures. Both arguments have problems, and are unnecessary if one accepts the view of optional neutrality. For reasons of space, I defer to Pearce Clancy as well as Alexander Wentker and Claus Kreß, who have recently and comprehensively reviewed the arguments.[72] Clancy finds the argument based on collective countermeasures stronger than arguments based on collective self-defence, but he admits that it is unclear whether countermeasures can be exercised collectively at all.[73] If, for the sake of the argument, circumstances precluding wrongfulness were needed because one takes the view that neutrality remains an obligation for all States, accepting that type of argument would suffer the same problems as qualified neutrality reviewed below. In any event, circumstances precluding wrongfulness could at best apply to all "ordinary" States and not to States that have made a prior commitment to neutrality. Permanently neutral States have renounced the invocation of circumstances precluding wrongfulness because they have made a commitment in peacetime for exactly the scenario in which circumstances precluding wrongfulness will be available, and good faith requires them to adhere to this commitment. Neutrality aims at reducing pressures to take part in wars, and the price to pay is a loss in flexibility in military matters – a key consideration that also applies to qualified neutrality.

Qualified neutrality: Illogical, dangerous and ahistorical

The second view within the category of those arguing that States can have it both ways assumes that international law prima facie still requires third parties to be

72 P. Clancy, above note 66, p. 543; Alexander Wentker and Claus Kreß, "L'assistance d'États tiers dans la guerre d'Ukraine au regard du droit international", *Annuaire Français de Droit International*, Vol. 68, 2022, pp. 183 ff.

73 P. Clancy, above note 66, p. 537. Others place more emphasis on collective self-defence, despite the fact that States have not invoked it e.g. in relation to Ukraine. Markus Krajewski, "Neither Neutral nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine", *Voelkerrechtsblog*, 9 March 2022, available at: https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict/.

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neutral, but that this obligation of neutrality can be qualified to allow the military support of a State that is a victim of (either "flagrant" or otherwise "clearly identified"[74]) aggression. Michael N. Schmitt, the US Congressional Research Service[75] and, more uncertainly, the Research Services of the German Bundestag[76] adhere to this view. Schmitt argues that the United States could remain neutral while providing military support to a victim State such as Ukraine, including in the absence of a resolution by the Security Council authorizing force.[77]

The three most significant problems with qualified neutrality are, first, that it is unconvincing from a legal point of view; second, that it seems like a bad (or even dishonest) idea for peace and humanitarian action; and third, that it is based on ahistorical assumptions. A fourth problem, as already mentioned, is that qualified neutrality is considered "as not confirmed by enough State practice to be part of customary law",[78] but this last critique can admittedly also be raised against optional neutrality, which nevertheless seems more convincing than alternative views. Bartolini usefully provides an overview of State practice in relation to the provision of war material to Ukraine since 2022 and cautions that "positions are far from conclusive": while some States' positions "appear to echo [qualified neutrality, … it] is difficult to identify proper statements aimed at expressly engaging the law of neutrality and invoking the 'benevolent/qualified' neutrality exception".[79] It is also notable that some State positions in relation to Ukraine mainly seem concerned with the argument that the State providing military support to Ukraine is not a party to the armed conflict, rather than with qualified neutrality as such.[80] In any event, the inconclusiveness of current State practice means that it does not confirm either optional or qualified neutrality.

74 Alexander Spring, *The International Law Concept of Neutrality in the 21st Century: An Analysis of Contemporary Neutrality with a Focus on Switzerland*, Dike, Zürich, 2014, p. 144.

75 US Congressional Research Service, *International Neutrality Law and U.S. Military Assistance to Ukraine*, LSB10735, 2022, pp. 2–3.

76 Research Services of the German Bundestag, *Militärische Unterstützung der Ukraine: Wann wird ein Staat zur Konfliktpartei?*, WD 2-3000-023/23, 2023, pp. 13–14. However, in an earlier document, the Research Service did not (or at least not explicitly) adhere to qualified neutrality but oscillated between optional neutrality/non-belligerency and other justifications. See Research Services of the German Bundestag, *Rechtsfragen der militärischen Unterstützung der Ukraine durch NATO-Staaten zwischen Neutralität und Konfliktteilnahme*, WD 2-3000-019/22, 2022, pp. 5–6, stating that today, non-belligerency exists, neutrality would have been "overridden", and States are no longer required to remain neutral when the Security Council or the General Assembly qualifies a situation as a violation of the prohibition on the use of force.

77 Michael N. Schmitt, "Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force", *Articles of War*, 7 March 2022, available at: https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force.

78 See R. van Steenberghe, above note 49, p. 240, who assimilates qualified neutrality to optional neutrality.

79 Giulio Bartolini, "The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice", *EJIL: Talk!*, 11 April 2023, available at: www.ejiltalk.org/the-law-of-neutrality-and-the-russian-ukrainian-conflict-looking-at-state-practice. See also P. Clancy, above note 66, p. 528, who diagnoses an "absence of explicit explanations from States engaged in the supply of arms and war material to Ukraine".

80 See e.g. Research Services of the German Bundestag, *Militärische Unterstützung der Ukraine*, above note 76, pp. 13–14, arguing that Germany's arms supplies are legal and that the legal test to decide if a State is a party to the armed conflict is separate from the question of whether a State breaches neutrality. If we assume that the main concern was or is to avoid being considered a party to the armed conflict,

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Let us turn to the first problem of the lack of a convincing legal justification for qualified neutrality. Given the UN Charter's prohibition on the use of force, *any* inter-State conflict is the result of a violation of the Charter. As neutrality law only applies in these exceptional (or indeed abormal) situations, there can be no case in which neutrality law would apply without triggering the proponents' argument of a circumstance precluding wrongfulness or a qualification. Proponents of qualified neutrality present the idea as special and only available in exceptional circumstances,[81] but international law since 1945 characterizes *all* situations in which neutrality law becomes relevant as exceptional.

It is true that the International Law Association's 1934 Budapest Articles of Interpretation on the Briand–Kellogg Pact stated that, "in the event of a violation of the Pact, the other contracting parties may refuse to fulfil the obligations of neutrality towards the aggressor, and that these States would thereby not commit a breach of any rule of international law".[82] Though not without contestation,[83] the underlying idea was that all contracting parties had an interest in sanctioning the aggressor.[84] At the time of the Budapest Articles, neutrality was definitely not considered as optional (and was often connotated with impartiality), which sat uneasily with the intention to condemn and sanction a State attacking another one. This unequal treatment of the aggressor and the victim State is today squarely part of the UN Charter and the law of State responsibility, and States militarily supporting an aggressor State are themselves violating the law. We do not need qualified neutrality to allow for an unfavourable treatment of the aggressor State.

It is fair to say that the view of optional neutrality also comes with problems. First of all, as for all the alternative views, State practice is inconclusive and *opinio juris* scarce and ambiguous. As mentioned above, all positions suffer from uncertainties in relation to the question of whether or under what circumstances neutrality remains compulsory for ordinary States not wishing to become parties to the inter-State conflict. Upcher convincingly diagnoses that those arguing in favour of optional neutrality point to State practice and *opinio juris* in relation to conduct *prima facie* deviating from neutral duties, rather than the status of neutrality as such, and that this "elides the distinction between the status of neutrality and the duties of neutrality"; he goes on to state that "[w]hile it may be the case that States depart in a number of instances from full compliance with the duties of neutrality, this is not sufficient evidence that the status of neutrality is inapplicable *prima facie* to a particular armed conflict".[85] At the same time, Schindler presents an equally strong argument that the

optional neutrality might be equally attractive, and the document uses the terms "non-belligerency" and "qualified neutrality" interchangeably.

81 See W. Heintschel von Heinegg, above note 28, describing the situation in Ukraine as a "game changer".

82 International Law Association, "Briand–Kellogg Pact of Paris: Budapest Articles of Interpretation", *Transactions of the Grotius Society*, Vol. 20, 1934.

83 P. Clancy, above note 66, p. 530.

84 For more, see Stefan Talmon, "Waffenlieferungen an die Ukraine als Ausdruck eines wertebasierten Völkerrechts", *Voelkerrechtsblog*, 9 March 2022, available at: https://verfassungsblog.de/waffenlieferungen-an-die-ukraine-als-ausdruck-eines-wertebasierten-volkerrechts/.

85 J. Upcher, above note 2, pp. 31, 213.

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UN Charter has introduced at least some changes to the law of neutrality and erodes the traditional duty of neutrality for third States. According to Schindler, the reason is that Article 51 (arguably) permits military contributions to a victim State short of the use of force which would not necessarily make that State a belligerent.[86] Olivier Corten adds that the reason that neutrality became optional is to be found in Article 2(4) of the Charter, which replaced a previous duty of neutrality with non-participation.[87] Although he rejects it, Upcher finds this position at least "consistent".[88]

If, on the other hand, the views on circumstances precluding wrongfulness and qualified neutrality are accepted, we end up upholding a fiction, or an empty shell, of neutrality because qualified neutrality or qualifications or circumstances precluding wrongfulness become available whenever neutrality applies. Some will object here and argue that certain violations of the prohibition of the use of force are clearer than others: whether the violation is considered "flagrant" or not often lies in the eye of the beholder – being influenced by the political preferences of powerful actors – and not necessarily (or at least not exclusively) in convincing legal distinctions.[89] I will return below to the problem that allowing that some violations of the prohibition of the use of force are able to qualify neutrality and others are not (while all violations of the prohibition of the use of force are considered infringements of *jus cogens*) is opening the door to double standards. It is true that qualifying neutrality is of course less adventurous when the UN Security Council or General Assembly assess the facts in a resolution as compared to situations in which States conclude on their own that a breach of the Charter was "flagrant" or otherwise obvious.[90] Yet the devil is in the details – not all uses of force face equal condemnation, and not all resolutions are interpreted in the same way by different States. If military abstention is the core idea of neutrality, and the use of force against another State is *always* illegal, it seems a very murky undertaking to draw a convincing line between those cases that would require military abstention and those that would require neutrality but would simultaneously allow military assistance.

We now turn to the second significant problem for qualified neutrality, relating to its ramifications for peace and humanitarian action. Despite the uncertainties involved, the position of optional neutrality seems more honest and more advantageous for humanitarian objectives than the alternative views. I say this with some trepidation, however, as accepting optional neutrality is accepting a profound shift in the way international law traditionally conceives of neutrality. If one agrees that neutrality aims to limit the geographic spread of armed conflicts and serves de-escalation, arguing that neutrality is now optional for the vast majority of States seems risky and raises old questions of how, or when,

86 D. Schindler, above note 70, p. 373, reviewed by J. Upcher, above note 2, pp. 21–22.
87 Olivier Corten, *Le droit contre la guerre: L'Interdiction du recours a la force en droit international*, Pedone, Paris, 2008, pp. 256–257. See also J. Upcher, above note 2, p. 23.
88 J. Upcher, above note 2, pp. 22, 37, 213.
89 Anastasiya Kotova and Ntina Tzouvala, "In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law", *American Journal of International Law*, Vol. 116, No. 4, 2022, p. 710.
90 A. Wentker and C. Kreß, above note 72, p. 185.

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military means contribute to a more peaceful world. All positions outlined here imply that States, except neutral ones, can lawfully deliver arms to a victim State. Two positions reviewed in this article (qualified neutrality and circumstances precluding wrongfulness) would allow this result while upholding an empty shell of neutrality. The position of optional neutrality, on the other hand, preserves neutrality for those States that choose it and does not provide a disguise for States engaged in arms transfers.[91] The example of the United States in 1939 is telling. When General Jackson argued in 1941 that the Lend Lease Program for assistance to the Allies was consistent with the concept of neutrality because neutrality was now qualified, the United States "did not indicate an acceptance of non-belligerency" for other States articulating a similar position to do exactly the same when Argentina tried to argue that it remained neutral but would join the Allies as a "non-belligerent".[92] As history shows, States – and their arms industries – will often find reasons to export war material to a State if it suits the interests of their military-industrial complex, and it is no secret that the armament sector is linked to political lobbying and that there are often close ties between industries and State actors.[93] By qualifying neutrality or invoking circumstances precluding wrongfulness, the rules of neutrality law will be meaningless in some cases but invoked *à discretion* for scenarios in which a State is not sympathetic to the interests of the victim State – a situation not conducive to UN peace objectives.

The position of optional but not qualifiable neutrality preserves the concept of neutrality. Some argue that the doctrine of qualified neutrality is less radical than the idea of optional neutrality. According to van Steenberghe, qualified neutrality would "[allow] States to deviate from their obligation of impartiality only when they intend to support a State that is clearly victim of an armed attack, like in the Ukrainian case", and would also be "less radical than non-belligerency since it does not create a third status and does not purport to make neutrality optional".[94] For Schmitt, accepting optional neutrality would amount to "throw[ing] the baby out with the bathwater", while qualified neutrality would better "[shield] non-belligerents from the effects of an armed conflict".[95] However, the prohibition on supporting an aggressor is, in any event, clearly established. There is no room for any support to a State waging war in contravention of the UN Charter, and the unequal treatment of the aggressor is always required when neutrality comes into play. Hence, the argument that qualified neutrality would only benefit victim States and only in certain special situations does not make it less radical than optional neutrality. On the contrary, qualified neutrality subordinates the core idea of neutrality – military abstention – to considerations about the "flagrancy" or "clarity" of a breach of the Charter, which is risky as qualified neutrality

91 J. Upcher, above note 2, p. 33.
92 *Ibid.*, p. 33 (with further references).
93 The so-called "military-industrial complex" is "a universe of shared interests that puts pressure on policies to continue raising military budgets". Jordi Calvo Rufanges, "The Arms Industry Lobby in Europe", *American Behavioral Scientist*, Vol. 60, No. 3, 2016, pp. 308–309.
94 R. van Steenberghe, above note 49, p. 240.
95 M. N. Schmitt, above note 77.

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allows States to "disguise" their military support under a myth of neutrality and thereby leads to an erosion of the neutrality of those States that commit to it.

Qualified neutrality is a potentially hazardous doctrine for humanitarian purposes. Proponents of qualified neutrality argue that they are siding with the "just cause" – i.e., the self-defence of the victim State. As mentioned above, I do not find the doctrine of qualified neutrality convincing for legal reasons. Here, I argue from a policy perspective and offer reflections on how qualified neutrality gives away neutrality's potential advantages for humanitarian objectives, such as when neutral States are perceived as predictable and credible interlocutors who can facilitate negotiations for humanitarian access, initiatives to strengthen compliance with IHL or other key aspects of the protection of civilian populations in armed conflicts. Neutral States take the stance that no matter what, they will not engage militarily in international hostilities. While the exploitation of neutrality for economic reasons is reprehensible, neutrality as deference to diplomatic, humanitarian and other peaceful means is not immoral. If all States would adhere to it, inter-State war would be a thing of the past.

Of course, the problem is that some States go to war. Some will object that neutrality is naive, and that qualifications should therefore be allowed. Difficult moral questions arise when prevention has failed and no good options are left, but optional neutrality at least offers conceptual clarity on the doctrinal explanation for arms supplies to victim States, prevents arms-delivering States from simultaneously claiming neutrality and puts the onus on these States to explain their potentially diverging positions from one conflict to another. With optional but not qualified neutrality, neutral States, on the other hand, are better positioned to maximize the potential benefits of neutrality. A principled stance that neutral States do not militarily support States in inter-State conflict achieves greater consistency and can, ideally and at least sometimes, equip neutral States with a degree of flexibility in engaging with belligerents that States delivering arms to a belligerent party may not have. Moreover, it is not unreasonable to consider the possibility that nationals of a neutral State continue to have some advantages in negotiating humanitarian access, although a State's (and, for historic reasons, particularly Switzerland's) neutrality and the neutrality of humanitarian assistance are distinct.[96]

The third argument against qualified neutrality is that qualified neutrality hinges upon inaccurate assumptions about the history of the prohibition of the use of force. Qualified neutrality assumes that the use of force between States was a discretionary option available to States at the time of the drafting of the 1907 Hague Conventions – i.e., that States could lawfully resort to force[97] – and that this situation only changed in 1928 with the Briand–Kellogg Pact and in 1945

96 On these links, see Brigitte Troyon and Daniel Palmieri, "The ICRC Delegate: An Exceptional Humanitarian Player?", *International Review of the Red Cross*, Vol. 89, No. 865, 2007, pp. 103 ff., 110.

97 Nicolas Politis, *Neutrality and Peace*, Carnegie Endowment for International Peace, Washington, DC, 1935, p. xiii. More recently, see e.g. Nele Verlinden, "The Law of Neutrality", in Jan Wouters, Philip De Man and Nele Verlinden (eds), *Armed Conflicts and the Law*, Intersentia, Cambridge, 2016, p. 274; A. Gioia, above note 2, p. 53.

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with the UN Charter. However, we may need to rethink that assumption: as Agatha Verdebout shows in her in-depth study of practice in the nineteenth and early twentieth centuries, it is not accurate that war was merely a matter of power and not of law (albeit that law was not as explicit as today's treaty law).[98] According to Verdebout, international lawyers created a narrative to make themselves and us believe that the prohibition of the use of force emerged only after World War I – a narrative which allows us to believe that the failure to prevent the Great War had to do with the inadequacies of international law and that we "simply" need to fix these to avoid further wars.

This narrative of indifference impacts debates on neutrality law. Proponents of qualified neutrality invoke a quote by Hersch Lauterpacht in which he said that "the historic foundation of neutrality as an attitude of absolute impartiality has disappeared with the renunciation and the abolition of war",[99] or Justice Jackson, who said in 1941 that belligerents were "no longer equal in the eyes of the law".[100] Lauterpacht referred to the idea that neutrality as "absolute impartiality" has vanished; indeed, neutrality as passive impartiality has disappeared, but it has done so because of the gradual emergence and consolidation of the duty to cooperate, and not because the legal core of neutrality in the military domain would no longer have its place in international law. Adil Haque summarizes that the duty of cooperation today means that States have an "obligation of partiality toward the victim of aggression. [States] may elect not to provide military assistance, but only if they cooperate with other States to bring the aggression to an end through other lawful means".[101] With Verdebout's results in mind, we must acknowledge that our predecessors who lived at the end of the long nineteenth century already thought that "the unbridled use of armed force was not socially or legally acceptable", and relevant scholars were not simply naturalist exceptions.[102] In this line of argument, we cannot conclude that the rules on neutrality were drafted at a time when international law was silent on the use of force. It is, therefore, ahistorical to defend qualified neutrality.

Conclusion

This article has identified the continuality of two major anomalies: the fact that there are still IACs, and the fact that neutrality exists and coexists with the UN Charter,

98 Agatha Verdebout, *Rewriting Histories of the Use of Force: The Narrative of "Indifference"*, Cambridge University Press, Cambridge, 2021.

99 Lassa Oppenheim and Hersh Lauterpacht, *International Law*, 7th ed., Vol. 2, Longmans, Green, London, 1952, p. 221. Cited e.g. in Michael N. Schmitt and Casey Biggerstaff, "Aid and Assistance as a 'Use of Force' under the *Jus ad Bellum*", *International Law Studies*, Vol. 100, 2023, p. 204 fn. 278.

100 Robert Jackson, "Address of Robert Jackson, Attorney General of the United States, at the First Conference of the Inter-American Bar Association", 1941.

101 A. A. Haque, above note 71, p. 158. A corollary of this finding is that States are sometimes required to evaluate in a decentralized manner whether there is a serious violation of international law in order to be able to cooperate to bring it to an end.

102 A. Verdebout, above note 98, pp. 105, 205.

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despite the prohibition on the use of inter-State force. If the prohibition on the use of force was respected, neutrality (and IHL in IACs) would not need to exist.[103]

Debates on neutrality are far from new. I draw readers' attention to the continuity of the controversies over the last approximately 100 years since States and scholars started to wonder how the 1907 Hague Conventions and the customary law on neutrality interact with modern international law. Over time, probably the major change that has taken place is that neutrality is no longer a duty for all States not participating in an international conflict, but has become optional for the vast majority of States, while the duty of cooperation has developed and consolidated. This duty of cooperation means that political neutrality as complete impartiality or "sitting-still neutrality" is indefensible, but it does not mean that there is no room left for neutrality law.

For those States that have committed to permanent neutrality and all other States that claim to be neutral, neutrality is a choice that coexists with the UN Charter. In this article I have argued that defending qualified neutrality is not only legally unconvincing but also increases the possibilities for double standards, is a risk for humanitarian action and diplomacy, and adds to militarization and confusion. After all, the doctrine of qualified neutrality is used to justify arms transfers that can often be justified in more plausible and more honest ways, but without the disguise of neutrality.

If neutrality has become optional, it can still be useful. The idea at its legal core – abstention in military matters – deserves to be preserved as a principled option available to States. If neutral States take their duties to cooperate seriously, they can avoid playing the role of "useful idiots" and can use their resources to alleviate suffering and to bring to an end serious violations of international law. *Si vis pacem, para pacem*: if you want peace, prepare for peace.

103 P. Seger, above note 3, p. 262.

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