

Neutralizing Neutrality: Aid to Victim States in Armed Conflict

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Abstract

Russia's 2022 invasion of Ukraine produced a flood of scholarship asking how third states could legally justify providing weapons, funds, and intelligence to Ukraine. That assistance appeared to violate obligations under the venerable international law of neutrality. Many scholars argued that these neutrality "violations" could be justified under the law of state responsibility as either acts of collective self-defense or as countermeasures. Some also invoked the idea of "qualified neutrality," a controversial principle that exempts states supporting victims of unlawful aggression from otherwise applicable neutrality limitations. This was a critical debate. The law of neutrality has been dormant for decades, especially in the immediate post-Cold War era, when the U.N. Security Council dominated the landscape of international responses to armed conflict. This scholarship sought to reconcile neutrality principles with contemporary law on state responsibility and the use of force and provide clarity in an era when collective measures by the Security Council are all but impossible to achieve.

This article responds to these well-intentioned scholarly accounts and argues that the justifications given for assisting Ukraine are misguided and, ultimately, unnecessary. Neutrality law has never involved binding obligations on third states, even in its nineteenth-century heyday. Neutrality was instead a status; a set of rights and obligations that states could choose to accept if they stayed within its limits. States could also choose to discard those limits and risk becoming parties to the conflict. Understanding neutrality as a status rather than an obligation means there is no need to justify "unlawful" transgressions of neutrality limits under the law of state responsibility. But even if third party assistance to a victim state like Ukraine were unlawful, the justifications of self-defense and countermeasures fail on their own terms. And while invoking "qualified neutrality" may appear more promising, that principle simply begs the question of how

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law on the use of force would conceive of third party assistance, the grounds of debate that would exist had neutrality law never entered the picture. Qualified neutrality, in other words, does not resolve the lawfulness of third party assistance but instead assumes the issue has been resolved under an entirely different body of international law. The entire effort to avoid neutrality barriers to assisting Ukraine and other victims of aggression turns out to have been a tempest in a teapot.

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I. INTRODUCTION

Russia's full-scale 2022 invasion of Ukraine prompted an outpouring of international law scholarship, but much of it did not address the invasion itself. Instead, many scholars examined the role of third states supporting the two sides.¹ There are several possible explanations for this analytical imbalance. The obvious illegality of Russia's actions meant that the issues involved were not the complex or novel kind that usually attract scholarly attention.² Many of the third states supporting Ukraine and Russia did not provide a well-developed, or indeed, any legal justification for their actions, leaving much room for speculation. A more pedestrian explanation is that the states providing the greatest assistance to

¹ Much of the literature on third states will be cited throughout this article. Leading commentary includes Markus Krajewski, *Neither Neutral nor Party to the Conflict*, VÖLKERRECHTSBLOG, (Mar.9, 2022) <https://perma.cc/K7CL-63FG>; Christian Schaller, *When Aid or Assistance in the Use of Force Turns into an Indirect Use of Force*, 10 J. USE FORCE & INT'L L. 173 (2023); Alexander Wentker, *At War: When Do States Supporting Ukraine or Russia Become Parties to the Conflict and What Would that Mean?*, EJIL: TALK!, <https://perma.cc/WDD6-HGNH> (Mar. 14, 2022); James A. Green, *The Provision of Weapons and Logistical Support to Ukraine and the jus ad bellum*, 10 J. USE FORCE & INT'L L. 3 (2023); Masahiko Asada, *The War in Ukraine under International Law: Its Use of Force and Armed Conflict Aspects*, 26 INT'L CMTY. L. REV. 5, 24–38 (2024); Meika Atkins et al., *The Shadow Side of Aid: When Assistance Veers into Indirect Force*, 2 J. INT'L L. & HUM. RTS. 49 (2023); Giulio Bartolini, *The Ukrainian-Russian Armed Conflict and the Law of Neutrality: Continuity, Discontinuity, or Irrelevance?*, 71 NETH. INT'L L. REV. 281 (2024); Pearce Clancy, *The Law of Neutrality: Jus ad bellum or Jus in bello?*, 13 J. INT'L HUMAN. LEGAL STUD. 353 (2022) [hereinafter Clancy, *Law of Neutrality*]; Pearce Clancy, *Neutral Arms Transfers and the Russian Invasion of Ukraine*, 72 INT'L & COMPAR. L. Q. 527 (2023) [hereinafter Clancy, *Neutral Arms Transfers*]; Oona A. Hathaway & Scott Shapiro, *Supplying Arms is Not an Act of War*, JUST SEC., <https://perma.cc/HBM2-2J6L> (Mar. 12, 2022); Kevin Jon Heller & Lena Trabucco, *The Legality of Weapons Transfers to Ukraine Under International Law*, 13 J. INT'L HUMAN. LEGAL STUD. 251 (2022); Rebecca Ingber, *The Abuse of Neutrality*, 65 VA. J. INT'L L. 437 (2025); CL Lim & Ryan Martinez Mitchell, *Neutral Rights and Collective Countermeasures For Erga Omnes Violations*, 72 INT'L & COMPAR. L. Q. 361 (2023); Hitoshi Nasu, *The Laws of Neutrality in the Interconnected World: Mapping the Future Scenarios*, in THE FUTURE LAW OF ARMED CONFLICT 165 (Matthew C. Waxman & Thomas W. Oakley eds., 2022); Natalino Ronzitti, *Neutrality, Non-belligerency, and Permanent Neutrality According to Recent Practice and Doctrinal Views*, 29 J. CONFLICT & SEC. L. 55 (2024); Stefan Talmon, *The Provision of Arms to the Victim of Armed Aggression: the Case of Ukraine*, BONN RSCH. PAPERS ON PUB. INT'L L., PAPER NO. 20/2022, 2022; Niccolo Zugliani, *The Supply of Weapons to a Victim of Aggression: The Law of Neutrality in Light of Conflict in Ukraine*, 35 EUR. J. INT'L L. 389 (2024); Marja Lehto, *The Right of Self-defence and Third State Provision of Arms: Reflections on the Current Debate*, 94 NORDIC J. INT'L L. 45 (2025); Michael N. Schmitt & W. Casey Biggerstaff, *Aid and Assistance as a "Use of Force" Under the Jus ad bellum*, 100 INT'L L. STUD. 186 (2023); Marko Milanovic, *The Complicity of Iran in Russia's Aggression and War Crimes in Ukraine*, LIEBER INST., (Oct. 19, 2022), <https://perma.cc/GVT4-3M38>; Niklas Reetz, *Belarus is Complicit in Russia's War of Aggression*, EJIL TALK!, (Mar. 1, 2022), <https://perma.cc/G39S-66NE>.

² A different strand of scholarship addressed how that obvious illegality, and the lack of a uniform international response, might weaken law on the use of force and the international legal system more generally. See Ingrid W. Brunk & Monica Hakimi, *The Prohibition of Annexations and the Foundations of Modern International Law*, 118 AM. J. INT'L L. 417 (2024); Ingrid W. Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 AM. J. INT'L L. 687 (2022).

Ukraine are home to many prominent international law scholars, and it was natural for them to assess the lawfulness of their own governments' actions.

But the best explanation is almost certainly that the law concerning third party support to states who, like Ukraine, claim to be victims of aggression, is a doctrinal mess. The law of neutrality, which appears at the center of most scholarly efforts to make sense of third party assistance, emerged in the eighteenth and nineteenth centuries, and is in many respects incompatible with contemporary law on the use of interstate force (the *jus ad bellum*).³ Neutrality has also been largely absent from diplomatic and legal discussions in contemporary armed conflicts, leaving scholars with only a handful of episodes on which to base conclusions about state practice.⁴

Neutrality law in its heyday was said to limit the spread of conflict by granting third states a formal means of signaling that they posed no threat to the warring parties.⁵ States could thus remain outsiders to any and all conflicts, even those initiated for conquest. But the 1945 U.N. Charter outlawed aggressive force and created an elaborate (if largely underutilized) set of mechanisms to unite international opposition to aggressors. Did neutrality law survive this radical upgrading of collective efforts to limit armed conflict in the Charter era, or has it faded into irrelevance? One view is that neutrality subsists as a residual option when the Security Council fails to take measures in response to acts of aggression.

³ As Andrew Clapham writes:

The state of neutrality law has been described by one scholar as not only *chaotic*, but also in *crisis*, with the legal writing leaving only a picture of *confusion*. Much of the confusion is due to the fact that no multilateral treaties have specifically addressed Neutral Status as such since 1907. This is compounded by the near absence of authoritative decisions of international judicial bodies, and the careful ambiguity with which states treat the question of Neutral Status.

Andrew Clapham, *Declarations of War and Neutrality*, in WAR 41, 54 (2021) (emphasis in original).

⁴ Paolo Palchetti, *Consequences for Third States as a Result of an Unlawful Use of Force*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, 1224, 1230 (Marc Weller, ed., 2015); Patrick M. Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT'L L. J. 249, 276 (1976) ("in perhaps the preponderance of cases, states have not relied upon the law of neutrality even where apparently applicable; rather, they have avoided taking any legal stance at all.") It is also telling that a neutrality discussion does not appear in many well-regarded treatises on law on the use of force. See CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (4th ed. 2018); CHRISTIAN HENDERSON, THE USE OF FORCE AND INTERNATIONAL LAW (2d ed. 2024); TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER (2010); OLIVIER CORTEN, THE LAW AGAINST WAR (2d ed. 2021).

⁵ This conflict-limitation function is repeated throughout the literature. See, e.g., International Committee of the Red Cross, Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 4, ¶ 908, <https://perma.cc/5GAA-NZU6> (2016) ("the law of neutrality, at least in part, has the same object and purpose as international humanitarian law of mitigating and containing the adverse effects of an international armed conflict."); Heike Krieger, *Rights and Obligations of Third Parties in Armed Conflicts* 7 BERLIN POTSDAM RSCH. GRP., KFG WORKING PAPER SERIES NO. 5, 2016.

Third party assistance also implicates the law of state responsibility, which assumed its contemporary form only in the early twenty-first century.⁶ Are violations of neutrality obligations to be evaluated by the “secondary” rules of state responsibility, including the circumstances that may preclude the wrongfulness of those violations? Or should they be seen as fully autonomous—a “self-contained regime”—in which the singular significant consequence of a neutrality law violation is that the assisting state may be considered a “party to the conflict,” a remedy prescribed by traditional neutrality law? In contemporary international law, the idea of a “party to the conflict” appears prominently in the *jus in bello* (international humanitarian law), but has no particular meaning in the *jus ad bellum*. A self-contained neutrality regime would thus appear simply to beg the question of what being a “party to the conflict” means for contemporary law on the use of force.

To top it all off, international armed conflicts between two or more states (IACs), the setting in which third party support implicates the legal regimes discussed here, have been in decline for decades, resulting in a shrinking pool of relevant state practice.⁷ The potential conflict or coexistence between these three distinct bodies of law—nineteenth-century neutrality law, twentieth-century law on the use of force and early twenty-first century state responsibility law—has provided ample fodder for scholarly analysis.

The literature evaluating these and other issues of third party involvement is far from uniform, but there is a recurring “standard account” of how the analysis should proceed.⁸ It goes as follows. Certain forms of assistance to one state in an armed conflict violate the obligation of neutral states not to favor one belligerent state over another, even if the neutral state believes it is assisting a victim of an armed attack.⁹ That violation of neutrality law, however, can be justified in two ways, both of which draw on “circumstances precluding wrongfulness” in state responsibility law. The first is as an act of collective self-defense, as provided in

⁶ The law of state responsibility has deep historical roots and evolved substantially over time, but there is a good case that its current form dates only to the 2001 International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts.

⁷ Since 1991 only 8% of conflicts in the world have been IACs. See Gregory H. Fox & Timothy Jones, *Peace Agreements and the Persuasive Authority of International Law*, 34 MINN. J. INT’L L. 1, 4 (2025) (discussing data).

⁸ The necessarily broad summary of this argument scheme presented here is not intended to suggest there are not important differences among scholarly accounts, including well-founded objections, to the reasoning described.

⁹ Neutrals were traditionally prohibited from providing belligerents with war materiel. Convention Concerning the Rights and Duties of Neutral Powers in Naval Wars art. 6, Oct. 18, 1907, 36 Stat. 2415 [hereinafter Hague XIII] (“[t]he supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.”)

Article 51 of the U.N. Charter and Article 21 of the International Law Commission (ILC)'s Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).¹⁰ If the assisted state has in fact been unlawfully attacked, it has a clear right to self-defense. Third states would also have a clear right to assist that state as a matter of "collective self-defense." The second is countermeasures, as provided in Article 22 of ARSIWA.¹¹ Countermeasures are acts that would otherwise be unlawful, but which are limited in nature and scope and intended only to induce legal compliance on the part of the targeted state. Abrogating neutrality would otherwise be unlawful, the argument goes, but in this case is designed to induce an aggressor state to cease its use of force against the victim state as long as the assistance itself does not rise to the level of a use of force.¹² If either of these justifications is accepted, it is argued, the third states providing assistance will not have acted wrongfully when they abrogated their neutrality obligations. They can thereby avoid becoming parties to the conflict, the most consequential result of violating neutrality obligations.

This article responds to the standard account. Each of the steps just described has a host of problems, some of which involve misreadings of the doctrines involved, some of which involve devolution into logical cul-de-sacs, and some of which result from conflations of related but distinct legal principles. Given the lack of obvious fit between the bodies of law relevant to third party assistance, these problems are understandable, especially given the impulse to justify assistance to Ukraine and to prioritize the prohibition on aggressive force over neutrality law, which has only an uncertain status in the twenty-first century. But the distinctiveness and coherence of each separate legal regime is important as well. Contemporary international law has worked hard to separate the *jus ad bellum* from the *jus in bello* and both from the "secondary" rules of state responsibility. Neutrality does not fit comfortably, or indeed at all, in any of them, and attempting to slot neutrality into the tests required by those doctrines only leads to conclusions that do not satisfy the doctrines themselves.

The standard account is also handicapped by the fact that the states assisting Ukraine have largely avoided giving legal justifications for their aid. Scholars are thus left to speculate about the legal rationale for one of the most consequential episodes of assistance by third parties to one side in an IAC since 1945.¹³ Finally, even if the justifications for neutrality violations are accepted, it is unclear how

¹⁰ U.N. Charter art. 51; Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session: Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 (2001) [hereinafter ARSIWA].

¹¹ *Id.* art. 22.

¹² *Id.* art. 50(1)(a) (Countermeasures cannot affect "the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations").

¹³ As of April 2026, 41 states had provided military, financial and humanitarian assistance to Ukraine. Ukraine Support Tracker, <https://perma.cc/VE9K-LWM3> (last visited Apr. 22, 2026).

those states' legal positions differ from those that would exist if the justifications were to fail. In both cases, their conduct will be determined by the modern *jus ad bellum*, regardless of the outcome of a neutrality law analysis.

Another strand of the standard account relies on the idea of “qualified neutrality,” an American-led effort to adapt neutrality law to the new *jus ad bellum* as it emerged in the early twentieth-century. Qualified neutrality holds that assisting a victim state that is defending itself against the unlawful use of force does not abrogate a third state's neutrality obligations to the aggressor state. Proponents acknowledge that qualified neutrality has not been accepted by most states, and even the U.S. does not explicitly support its application in difficult cases where the U.N. Security Council has failed to act. I will argue that even if qualified neutrality were seen as well-established, it adds little to how contemporary international law would approach third party neutrality “breaches.” If the assistance does not rise to the level of armed force, then qualified neutrality is unnecessary, since its entire purpose is to align neutrality law with the new *jus ad bellum*, and assistance short of force does not implicate the *jus ad bellum*. If the assistance *does* constitute a use of force, then the *jus ad bellum* analysis that follows will turn on factors that do not include whether neutrality was breached.

Because this article joins a robust debate already in progress, several disclaimers are required concerning issues that it will not address at length. This account will not provide a full history of neutrality law, and in particular, it will not address the fraught question of whether neutrality survived the advent of the U.N. Charter and today retains some or all of its force. Despite the many incompatibilities with contemporary norms, principles of neutrality can still be found in widely ratified treaties, the military manuals of major powers, and decisions of international tribunals.¹⁴ On the other hand, it is difficult to find cases

¹⁴ Hague Conventions V and XIII of 1907 are still in force and have 43 and 40 parties respectively. Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague V] (parties listed at <https://perma.cc/FK6H-GVSU>); Hague XIII, *supra* note 9 (parties listed at <https://perma.cc/45PG-WHE2>). In the newly revised United States Department of Law of War Manual of 2023, the two 1907 Hague Conventions and several other instruments bearing on neutrality from the pre-Charter era “have been almost entirely incorporated, and thus have been recognised as still applicable.” WILLIAM H. BOOTHBY & WOLFF HEINTSCHEL VON HEINEGG, *THE LAW OF WAR* 372 (2018). See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. REP. 226, 261 (July 8) (“the principle of neutrality, whatever its content, [] is of a fundamental character similar to that of the humanitarian principles”); Christopher Greenwood, *The Concept of War in International Law*, 36 INT’L & COMPAR. L. Q. 283, 299 (1987); Alexander Wentker, *The Armed Attack Exception to Neutrality in International Peace and Security Law*, 73 INT’L COMPAR. L. Q. 963, 968 (2024). In ruling on whether U.S. aircraft could overfly German territory during the 2003 Iraq war, the German Federal Administrative Court (Bundesverwaltungsgericht) raised “serious concerns” about German adherence to neutrality law in permitting the overflights. See Luca Ferro & Nele Verlinden, *Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties*, 17 CHINESE J. INT’L L. 15, 18 (2018) (citing

after 1945 of states complying with neutrality obligations or belligerents asserting that neutrals had breached their obligations.¹⁵ I will therefore assume that neutrality remains extant, though what precisely that means is highly disputed. The article also will not address aspects of neutrality unrelated to the question of third party assistance to a state acting in self-defense, such as a belligerent's use of a third state's territory or its right to board neutral shipping to search for contraband. Finally, I will not consider the rather straightforward case of a third state sending its own combat troops to assist a victim state. That is uncontroversially an act of collective self-defense, assuming the assisted state has in fact been the victim of an armed attack and has asked for troops to be sent.¹⁶ I will instead assume the assistance involves weapons, funds, foodstuffs, medical supplies, and the like.

This article focuses instead on two key analytical steps in the standard account. The first is whether breaching neutrality obligations through assistance is an internationally wrongful act. That is, are neutral third states required to remain neutral? The second is whether assistance short of providing combat troops—usually in the form of weapons, funds or intelligence—may qualify as acts of collective self-defense. In my view, these are the two major vulnerabilities of the standard account. A third argument—whether assistance may qualify as countermeasures—is asserted much more tentatively by scholars. As we will see, the remarkably well-informed debate surrounding proposals to confiscate frozen Russian assets in the aftermath of the Ukraine war suggests their tentativeness is well-founded.

The discussion will proceed as follows. Section II will begin by asking how third party assistance to a belligerent party was conceived under traditional neutrality law. It will then set out three challenges to the standard account of how that assistance can be reconciled with neutrality obligations. The first is that the standard account misconceives neutrality law as imposing binding obligations on third states, which if transgressed constitute internationally wrongful acts. I argue that neutrality was instead a voluntary status that states could choose to adopt in order to make clear they were not supporting one side or the other in a war. If chosen, neutrality provided rights and obligations for those third states. But third

Bundesverwaltungsgericht, Urteil vom 21.06.2005 - 2 WD 12.04. [ECLI:DE:BVerwG:2005:210605U2WD 12.04.0]

¹⁵ Wolff Heintschel von Heinegg, *Benevolent Third States in International Armed Conflicts: the Myth of the Irrelevance of the Law of Neutrality*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 543, 548 (Michael Schmitt & Jelena Pejic eds., 2007) (“In post-World War II international armed conflicts States not parties have rarely complied with the comparatively strict rules of the law of neutrality laid down in 1907 Hague Conventions V and XIII. Instead, they have more or less openly supported one of the belligerent parties, either economically or militarily.”).

¹⁶ See HENDERSON, *supra* note 4, at 336–343. A potential gray area would be troops sent not to engage in combat but to train or advise troops of the victim state.

states were not required to remain neutral and could lawfully choose to assist one of the belligerents and risk becoming a co-belligerent. If abandoning neutrality was not wrongful, then doing so need not be excused. The standard account's reliance on circumstances precluding wrongfulness in state responsibility law to justify neutrality "violations" is thus misconceived.

The second and third challenges arise if we nonetheless accept, as the standard account argues, that third party assistance is an internationally wrongful act. Both challenges arise from efforts to justify that "wrongful" act. The second challenge concerns the justification of self-defense. This section argues that the right of self-defense simply does not apply to non-forceful actions such as supplying weapons and funds. Recharacterizing those forms of assistance as "indirect force" does not change their character or the inapplicability of a self-defense claim.

The third challenge concerns the justification of countermeasures, another circumstance precluding wrongfulness. Countermeasures are traditionally invoked only by states injured by another state's wrongful act. But third states assisting a state victimized by aggression are not injured by that aggression. Only the victim state can claim injury. So the countermeasures justification must rely on the controversial idea of "third party" or "collective" countermeasures. These find only minimal support in international practice, a conclusion reinforced by the recent controversy over whether state supporters of Ukraine could lawfully seize frozen Russian assets.

Part III examines third state assistance under a more modern conception of neutrality law that seeks consistency with contemporary law on the use of force. "Qualified neutrality" holds that a neutral state may assist a state victimized by unlawful aggression and not forfeit its neutral status. Qualified neutrality is not widely accepted, and many critics view it as introducing a dangerous subjectivity into decisions on the use of force. But while this section argues that the risks of subjectivity are highly overstated, qualified neutrality ultimately does not change the legal status of third parties under the contemporary *jus ad bellum*.

Part IV argues that the many misunderstandings and logical gaps in the standard account render it unhelpful in understanding the legal consequence of third-party assistance to victim states. Its multifaceted effort to justify "violations" of neutrality law are unnecessary. And even if accepted, they fail on their own terms. The legal dilemmas that prompted the standard account turn out to be a tempest in a teapot. The acts of third states can instead be uncontroversially assessed by the contemporary *jus ad bellum*.

Part V concludes by discussing the future of neutrality law in light of its contemporary marginalization.

II. THIRD PARTY ASSISTANCE UNDER TRADITIONAL NEUTRALITY LAW

A. Overview of Traditional Neutrality Law

When states went to war in the pre-Charter era, those not participating directly as belligerents were by default considered neutral.¹⁷ A series of legal obligations immediately arose for both neutrals and belligerents. Belligerent states were obligated not to use neutral territory to move troops or stage attacks, as well as to respect the inviolability of neutral shipping.¹⁸ For their part, neutral states had obligations of abstention, prevention, and impartiality in order to maintain their status.¹⁹ “The duty of abstention obliges a neutral State to ‘abstain from participating in the armed conflict’, which also denotes abstention ‘from furnishing belligerents with war-related goods or services’, including putting at their disposal ‘troops, war materials, territory, military intelligence and credits for war purposes’.”²⁰ The duty of prevention required a neutral to take active measures to prevent its officials and territory from being used to support one of the belligerents.²¹ And the duty of impartiality required treating the belligerents equally in commercial and other relations.²²

These obligations were not intended to cut neutrals off entirely from belligerents or diminish their capacity to operate in the global marketplace. Third

¹⁷ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 26 (6th ed. 2017). The identity of neutral states was easily determined when one or more of the belligerents declared war. In the absence of a declaration, neutrality status became a factual question. Traditional international law did not require a declaration of neutrality, which some states nonetheless issued in order to make their status clear. 2 L. OPPENHEIM, *INTERNATIONAL LAW: WAR AND NEUTRALITY* 400-1 (Ronald F. Roxburgh ed., 3d ed. 1921). The Third Hague Convention of 1907 sought to avoid misunderstandings by requiring that “[t]he existence of a state of war must be notified to the neutral Powers without delay.” Convention Relative to the Opening of Hostilities, art. 2, Oct. 10, 1907, 36 Stat. 2259 [hereinafter Hague III]. See Oppenheim, *supra* note 17, at 413 (“it is apparent that an immediate notification of war by belligerents is of great importance, as excluding all doubt and controversy regarding knowledge of the outbreak of war.”).

¹⁸ These obligations are codified in Articles 1-4 of Hague V, *supra* note 14. See Nasu, *supra* note 1, at 167; Dinstein, *supra* note 17, at 28-29.

¹⁹ Agata Kleczkowska, *The Limits of Collective Self-defence: The Case of Ukraine* 14 CONF., INT’L L. & THE REGUL. OF RESORT TO FORCE: EXHAUSTION, DESTRUCTION, REBIRTH?, 2023. See also JAMES UPCHER, *NEUTRALITY IN CONTEMPORARY INTERNATIONAL LAW* 9 (2020).

²⁰ Kleczkowska *supra* note 19, at 12; Hague XIII, *supra* note 9, art. 6; Hague V, *supra* note 14, arts. 2-4. Neutrals were also precluded from lending money to or guaranteeing loans for belligerents. CHARLES G. FENWICK, *INTERNATIONAL LAW* 554-55 (1924).

²¹ Nasu, *supra* note 1, at 169.

²² THEODORE D. WOOLSEY, *INTERNATIONAL LAW* 280 (5th ed. 1886) (“powers not parties to the war must treat both belligerents alike as friends. Hence no privilege can be granted or withheld from one and not equally from the other”); Oppenheim, *supra* note 17, at 455.

states could remain neutral if they provided roughly equivalent (but non-lethal) assistance to each side and kept private commercial relations on an equal footing.²³ The rules were instead designed to allow neutrals to engage in trade that did not threaten to widen the conflict by giving the warring states reasons to believe they were threatened.²⁴ Neutrality law thus sought to strike a balance between maintaining commerce as usual and recognizing that belligerents would inevitably defend themselves against neutrals perceived as favoring the other side.

While many commentators describe these limiting principles as serving a conflict-restraining function, neutrality's goals were quite modest.²⁵ Neutrality offered third states a safe haven from war in which they could continue to enjoy benefits of the rapidly expanding maritime commerce in the eighteenth and nineteenth centuries. But it did not seek to enlist neutrals to end wars by, for example, restricting or foreclosing their trade with either or both belligerents. Nor did it compel them to seek common cause with other neutral states to help end a war. Not surprisingly then, as Quincy Wright noted in 1928, “[i]t seems probable that neutrality has never been a constructive force for peace at all but merely a consequence of the recurrence of war in an anarchic but trading world.”²⁶

In this respect, neutrality law was wholly consistent with international law prior to the Second World War in accepting armed conflict as a fact of interstate relations to be managed but not condemned. At neutrality law's high point—which we can uncontroversially identify as the turn of the 20th century when its central principles were codified in three of the 1907 Hague Conventions—aggressive war in service of the national interest was not unlawful.²⁷ A state could lawfully remain at peace with its fellow states or start a war, and after it started a war, it could lawfully fight on to total victory or it could negotiate a peace treaty.²⁸ Absent a meaningful *jus ad bellum*, moving from peace to war and back again was

²³ Hague XIII, *supra* note 14, at ¶ 9; Peter Hostettler & Olivia Danai, *Neutrality in Land Warfare*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L., <https://perma.cc/5B55-4UWX> (Feb. 2015).

²⁴ CONSTANTINE ANTONOPOULOS, NONPARTICIPATION IN ARMED CONFLICT 90 (2022); Hathaway & Shapiro, *supra* note 1.

²⁵ Krieger, *supra* note 5, at 13–14 (neutrality law “draws a distinction between neutral states and belligerents, promotes abstention, furthers impartiality, and thus aims to stop the conflict from escalating and spreading.”).

²⁶ Nasu, *supra* note 1, at 184 n. 31 (quoting Quincy Wright, *The Future of Neutrality*, 242 INT'L CONCILIATION 353, 367 (1928)).

²⁷ STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 161 (2005) (in the 19th Century, war “was frankly recognised by international lawyers as an accepted and routine means of conducting everyday international business.”).

²⁸ For a discussion, see Gregory H. Fox, *Old and New Peace Agreements*, 52 SETON HALL L. REV. 797, 805–08 (2022).

neither required nor prohibited. Neutral states equally shared this capacity to pursue their national interests by initiating a war or choosing peace.

Instead, states were encouraged (in the view of some, required) to declare their wars so other states were on notice that specialized rules applicable only in times of armed conflict had become operative.²⁹ These rules displaced those normally applicable in peacetime. As Marko Milanovic and Vidan Hadzi-Vidanovic put it, “[l]ike war and peace, the law of war and the law of peace excluded each other.”³⁰ Neutrality was the most elaborate of these laws of war, but there were also regimes on the suspension of treaty relations, the treatment of enemy aliens and property, and other matters.³¹ The end of a conflict, signaled by a peace treaty, served the parallel, bookending function of terminating the laws of war and returning both belligerents and neutrals to peacetime law.³²

A belligerent faced with a neutral state acting inconsistently with its obligations had three options. It could ignore the transgression, perhaps hoping it was an isolated action or deciding that the costs of a direct confrontation with the neutral would outweigh its potential benefits. Or it could engage in a one-time reprisal, which could involve armed force or not. Or, most consequentially, it could treat the neutral as a co-belligerent with the other conflict party and engage it in a full-on war.³³

Some argue that resort to war was only available for severe neutrality law violations.³⁴ The examples given for this view—most prominently Kuwait’s support for Iraq in the Iran-Iraq war that Iran argued constituted a breach of its neutrality obligations—focus on the lack of clear declarations by other states that

²⁹ The Third Hague Convention of 1907 required a declaration of war or its equivalent before hostilities commenced, but, as Manuel Bruner notes, the “elements of the 1907 Hague Convention III were, at the time of their drafting, not reflective of existing customary international law.” Manuel Bruner, *Declaration of War*, MAX PLANCK ENCYCLOPEDIA PUB. INT’L L. ¶ 13, (Feb. 2018), <https://perma.cc/BL4J-HN2V>.

³⁰ Marko Milanovic & Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW 256, 258 (Nigel D. White & Christian Henderson, eds., 2013).

³¹ Fox, *Old and New Peace Agreements*, *supra* note 28, at 812–15.

³² See OPPENHEIM, *supra* note 17, at 361.

³³ Talmon, *supra* note 1, at 2. Much can be lost in translation when discussing states as “parties” to armed conflicts or as co-belligerents. As will be discussed below, the question of whether a state is a “party” to a conflict is today primarily a matter of international humanitarian law (IHL). But in traditional neutrality discussions, a state’s move from neutral to party or co-belligerent was question of whether an aggrieved belligerent could use force against that state, a question not addressed by IHL. As will be discussed below, this article is not concerned with party status for IHL purposes.

³⁴ See ALEXANDER WENTKER, PARTY STATUS TO ARMED CONFLICT IN INTERNATIONAL LAW 157, n. 43 (2024) (collecting citations); Michael Bothe, *Neutrality*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 571, 581 (Dieter Fleck, ed., 4th ed. 2024) (“[o]nly where a hitherto neutral state participates to a significant extent in hostilities is there a change of status”).

the assistance rendered the neutrals parties to the conflict.³⁵ In the Kuwait case, for example, James Upcher recounts that “other States provided mixed responses to the question whether Kuwait could be considered to be a ‘co-belligerent’ or a participant in the conflict.”³⁶ But such muted reactions could just as easily be understood as those states choosing not to classify Kuwait as a co-belligerent. To conclude otherwise would require a legal automaticity that was simply not contemplated by traditional neutrality law. As Oppenheim wrote in 1905:

Even if the worst comes to the worst and the violation of neutrality is so great that the offended party considers war the only adequate measure in answer to it, it is not the violation which brings neutrality to an end, but the determination of the offended party. For there is no violation of neutrality so great as to oblige the offended party to make war in answer to it, such party having always the choice whether it will keep up the condition of neutrality or not.³⁷

This focus on the belligerent’s choice of responses to neutrality transgressions is consistent with permissive pre-Charter law on the use of force.³⁸ A rule *prohibiting* resort to full-on war to all but the most severe neutrality violations would have made little sense in that legal environment. The United States did not automatically become a party to the conflict between Nazi Germany and the U.K., for example, by virtue of its supply of substantial funds, weapons and matériel to the latter in 1940-41.³⁹ If it had, there would have been no reason for Germany to declare war on the U.S., as it did, in December 1941. It was the choice of the aggrieved belligerent, in other words, not some legal tripwire, that could put an end to neutrality and render the former neutral a party to the conflict.⁴⁰

B. Is Neutrality Law a Barrier to Assisting a Victim State?

If traditional neutrality law just described has survived intact, it would need to co-exist in contemporary international law with a host of newer regimes that diverge from many of its core assumptions: the *jus ad bellum*, international humanitarian law (IHL), and state responsibility law. Much recent scholarship has

³⁵ UPCHER, *supra* note 19, at 61–2; Wentker, *supra* note 34, at 158–9.

³⁶ UPCHER, *supra* note 19, at 60.

³⁷ LASA OPPENHEIM, INTERNATIONAL LAW 388 (1905).

³⁸ As will be discussed below, it was this body of law—governing the use of force (such as it was)—that governed the move to co-belligerency in response to violations of neutrality law. Neutrality law did not limit that move to “severe” violations because neutrality law simply did not control that question in the first place. See text accompanying notes 69–74, *infra*.

³⁹ DINSTEIN, *supra* note 17, at 189.

⁴⁰ OPPENHEIM, *supra* note 37 (“it is not the violation which brings neutrality to an end, but the determination of the offended party”); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 584 (1959).

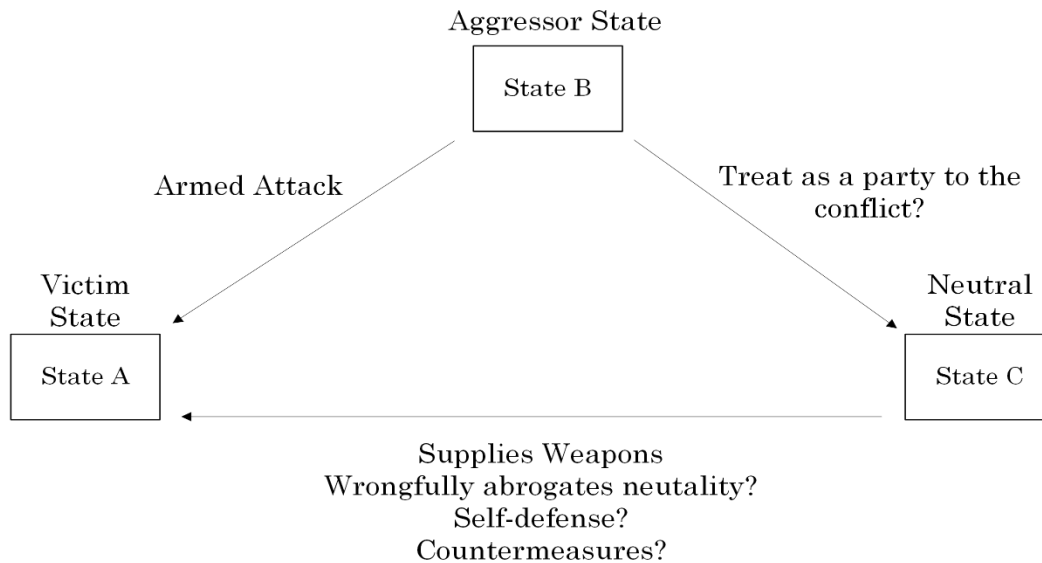
sought ways to reconcile these regimes with the logic of neutrality. This section will review those efforts to seek an accommodation, which encounter a host of problems. Section III considers a different perspective that assumes traditional neutrality law has been modified to accommodate the Charter-based *jus ad bellum*.

Let us assume State C, a third party, supplies weapons to State A, which C believes to be the victim of an armed attack by State B. This scenario is depicted in *Figure 1*. State C would thereby breach its most fundamental neutrality obligation to remain outside the conflict and treat the belligerent parties impartially. Hague Convention XIII of 1907 provided in Article 6 that “the supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.”⁴¹ Neutrality would also be breached if State C supplied State A but not State B with economic assistance. Or if it continued trade with A but not B. All such actions would entitle State B, at its discretion, to treat State C as a party to the conflict or to engage in reprisals short of a full war.⁴² In either case, State C’s neutral status will have been forfeited. Having lost the benefits of State C’s neutrality, State B would no longer be required to respect its neutral rights.

⁴¹ Hague XIII, *supra* note 9, art. 6.

⁴² The pre-Charter option of reprisals is to be distinguished from countermeasures under state responsibility law. Reprisals were “used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.” Countermeasures today cover “that part of the subject of reprisals not associated with armed conflict.” ARSIWA, *supra* note 10, at 128.

Figure 1



Re-running this scenario in contemporary international law gives rise to two questions. First, what are we to make of State C’s evident transgression of neutrality limitations? What consequences should there be for this alleged violation? Second, doesn’t contemporary international law supply a good reason for C’s actions, namely that it was trying to assist the victim of an armed attack? Surely contemporary international law would not condemn such assistance and instead provide a justification that resonated with the contemporary condemnation of armed aggression.

1. Is Breaching Neutrality Obligations “Wrongful”?

To answer these two related questions, a number of scholars have turned to state responsibility law.⁴³ Could not those acts be nonetheless justified as acts of

⁴³ Because the two 1907 Hague Conventions addressing neutrality do not prescribe the consequences of violations, it is argued, the “regulation of this contingency has been left to the relevant rules of international law on State responsibility with respect to reparation for an internationally wrongful act.” Antonopoulos, *supra* note 24, at 163. ; Giulio Bartolini, *The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice*, EJIL: TALK!, <https://perma.cc/W4G6-BEH9> (Apr. 11, 2023); Clancy, *Neutral Arms Transfers*, *supra* note 1, at 534; Kritika Ramya, *The Interplay Between Neutrality, Qualified Neutrality and Co-Belligerency in the Context of U.S. Intervention in the Russia-*

self-defense or countermeasures, both “circumstances precluding wrongfulness”?⁴⁴ If they can, then neutrality law would not constrain western aid to Ukraine, or aid from State C to State A in our scenario.

But invoking either of these arguments of justification, which will be addressed in substance below, begs the more fundamental question of whether acting contrary to neutrality obligations is a “wrongful” act? Only internationally wrongful acts require justification via circumstances precluding wrongfulness.⁴⁵ An act is wrongful, according to the International Law Commission (ILC), when it is “contrary to international law.”⁴⁶ In the traditional view, neutral state obligations of abstention, prevention, and impartiality were not mandatory; states were not prohibited from abrogating those limits and transitioning into co-belligerency.⁴⁷ Answering this question is not made easier by the frequent use of mandatory-sounding terminology—many writers discuss the “rights” and “obligations” of neutrals and belligerents—that implies a positive legal imperative for the two sets of parties to maintain their roles.⁴⁸ Abrogation instead involved a pragmatic choice of whether to retain or reject a particular legal condition or status. Making the transition from one status to another was neither wrongful nor required, but simply had the effect of subjecting the state to an entirely different set of rights and obligations. The choice was thus not “contrary to international

Ukraine War, 23 INT’L & COMPAR. L. REV. 72, 89 (2023) (state responsibility law applicable to neutrality “violations” in slightly different context than discussed here).

⁴⁴ ARSIWA, *supra* note 10, art. 21 (self-defense); *id.*, art. 22 (countermeasures).

⁴⁵ ARSIWA, *supra* note 10, at 71 (circumstances precluding wrongfulness provide “a shield against an otherwise well-founded claim for the breach of an international obligation.”).

⁴⁶ *Id.* at 32 (“for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law.”).

⁴⁷ Michael Bothe, *The Law of Neutrality*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 485, 489 (Dieter Fleck ed., 1999) (“[t]raditional international law left to each state the sovereign decision of whether, at the outbreak of a conflict between other states, it would participate or remain neutral. . . . The distinction between participation and neutrality is a political, not military, decision.”)

⁴⁸ Elihu Lauterpacht wrote, for example, that “Nonparticipants become neutrals. As such they are bound by the obligations of impartiality incumbent upon neutrals.” Elihu Lauterpacht, *The Legal Irrelevance of the State of War*, 62 AM. SOC’Y INT’L L. PROC. 58, 59 (1968). There may be a difference between actions by belligerents that violate the rights of neutral states and acts by neutrals that abrogate their neutral status. The former could involve a state determined to maintain its neutrality, and so in response to a belligerent’s violation of its neutral rights, it proceeds not to join the conflict as a belligerent but instead seeks compensation for its losses. A belligerent held liable in this manner would have acted “wrongfully” in depriving a neutral of its choice to remain neutral. But a neutral state that favors one side in a conflict has chosen to opt out that category. The status of the adverse belligerent in that will have not changed; it is still a belligerent. That state certainly faces a new opposing belligerent, but its own status as a belligerent has not been altered, let alone “wrongfully” altered.

law” but wholly consistent with nineteenth-century neutrality law’s agnostic view of state participation in armed conflict.

One can view the relationship between the belligerent and neutral parties as quasi-contractual, in that neutrality and belligerency were reciprocal legal conditions of mutual benefit, mutually agreed upon.⁴⁹ The neutral state could continue most of its foreign commerce in exchange for not favoring one party to the detriment of the other. The belligerent could be confident that third states would not assist its adversaries in exchange for not seeking to gain military advantage by attacking the third states or using their territory for military purposes. But once these benefits ceased to be reciprocally beneficial, either neutral or belligerent could make the perfectly lawful decision to exit the bargain. As with a contract in private law, that decision to end the relationship would have consequences for both parties, which international law spelled out in detail. As Oppenheim described in 1920,

The rule that belligerents must not interfere with the legitimate commerce of neutrals is based on a compromise—just as is the rule that belligerents must not violate neutral territory; and it presupposes that both belligerents will carry it out, and that neutrals will prevent both of them from violating it. If, on the contrary, neutrals acquiesce in the violation of this rule by one belligerent to the vital disadvantage of the other belligerent, the latter cannot be expected to suffer this without redress, and must be excused if, in retaliating upon the enemy, he also violates the rule.⁵⁰

Scholars in the era of neutrality’s ascendance acknowledged that maintaining neutrality was a matter of choice, not obligation.⁵¹ Westlake wrote in his 1895

⁴⁹ As the U.S. Department of Defense explains:

The rights and duties of belligerents and neutrals under the law of neutrality may be understood as correlative or reciprocal. The duties of neutrals often correspond to rights of belligerents, and rights of neutrals often correspond to the duties of belligerents. For example, the duty of a neutral to abstain from hostilities is also a right of a belligerent not to have its adversary aided in hostilities by the neutral State. The right of a neutral State to have its territory be inviolable is also a duty of belligerent States to avoid conducting hostilities in neutral territory.

GEN. COUNS. OF THE DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 972–73 (2023) [hereinafter *Law of War Manual*].

⁵⁰ OPPENHEIM, *supra* note 17, at 427.

⁵¹ This view persisted into the twentieth-century. In 1939, Georg Cohn described neutrality as a “precarious” condition, meaning that “the neutral state could at any time itself abandon its neutrality, or, by a single act of one of the belligerents, become spontaneously involved in the war, whereupon the whole system of neutrality, together with the rights and duties connected with it went into abeyance.” GEORG COHN, NEO NEUTRALITY 9 (Arthus S. Keller & Einar Jensen, trans., 1939). *See also*, ERIK CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 423 (1954) (there is “no duty for a State to remain neutral when there are no special agreements, and it may at any time open hostilities without making itself guilty of a breach of neutrality or of any other delict under international law.”).

treatise, “In considering the duties which are incumbent on neutrals it is important to bear in mind that they exist only so long as the neutrality is maintained. There is no general duty of maintaining the condition of neutrality.”⁵² Charles Fenwick explained in 1924 that for neutrals, while “it is their option to take sides with one or other of the belligerents if they find it to their essential interest to do so, it is also their right to declare that the war is one in which they have no legal concern.”⁵³ Oppenheim similarly stated that “[w]hether or not a third State will adopt an attitude of impartiality at the outbreak of war is not a matter for International Law but for International Politics. Therefore, unless a previous treaty stipulates it expressly, no duty exists for a State, according to International Law, to remain neutral when war breaks out.”⁵⁴ Neutrality, in other words, was a legal category that states could freely choose to enter or exit according to its defined parameters. As Hersch Lauterpacht wrote in the seventh edition of Oppenheim’s treatise, “[a] violation of neutrality is nothing more than a breach of a duty *deriving from the condition* of neutrality.”⁵⁵

The three 1907 Hague Conventions codifying neutrality law also do not oblige state parties to maintain their neutrality.⁵⁶ The status of some states as neutral and some as belligerent is taken by the Conventions as a given, with no criteria to determine which is which before setting out rights and obligations.⁵⁷ The criteria for whether or not states can *maintain* status in each category is described in detail, but none of the Conventions requires states to be in one or the other in the first instance. Indeed, the entirety of the Third Hague Convention Relative to the Opening of Hostilities, which requires declarations of war and their immediate transmission to neutral states, appears premised on parties themselves choosing their status.⁵⁸ The Convention simply refers to “neutral Powers” and “a belligerent Power” with no definitions, preconditions or elaboration.⁵⁹

An analogy may be helpful. One might think of a neutral state choosing to become a co-belligerent as similar to what might happen if, under Article 4 of the Third Geneva Convention, members of a militia group belonging to a party to the

⁵² JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 161 (1894).

⁵³ CHARLES G. FENWICK, INTERNATIONAL LAW 519 (1924).

⁵⁴ OPPENHEIM, *supra* note 17, at 400, 417 (describing a “class of cases in which war breaks out between one of the belligerents and a hitherto neutral State simply because it does not suit the belligerent any longer to recognise its impartial attitude, or because it does not suit the neutral to remain neutral any longer.”).

⁵⁵ 2 L. OPPENHEIM, INTERNATIONAL LAW 752 (H. Lauterpacht, ed., 7th ed. 1952) (emphasis added).

⁵⁶ Hague III, *supra* note 17; Hague V, *supra* note 14; Hague XIII, *supra* note 9.

⁵⁷ Article 1, for example, provides “[t]he territory of neutral Powers is inviolable.”

⁵⁸ Hague III, *supra* note 17.

⁵⁹ *Id.* art. 3(2) (belligerents) and preamble, arts 2 & 3(2) (neutrals).

conflict decided not to carry their weapons openly.⁶⁰ Before that choice, the militia members would be entitled to prisoner of war status. After the decision, they would not. But the Convention does not *require* militia members to carry their arms openly and their decision not to do so is not wrongful. The members would simply be balancing a perceived benefit (the subterfuge of appearing to be civilians) against a potential risk (if captured, harsher treatment with no POW protections). That calculus occurs without the addition of a sanction for assuming the risk, in other words, without the choice being unlawful. Or to take another category of detainees: spies carrying out espionage are not entitled to POW status notwithstanding that “[e]spionage during times of armed conflict is not . . . in itself unlawful under international law.”⁶¹ A person can choose to be a spy or not unconstrained by international legal obligation. While international law does not dictate the choice itself, it does prescribe the consequences of that choice.

In addition to neutrality transgressions not being wrongful acts that state responsibility law might mitigate, there is another problem of “fit” between neutrality and state responsibility law: the latter would seem to compel third states to give up the former in a case of clear aggression. Article 41 of the Articles on State Responsibility provides that states “shall cooperate to bring to an end through lawful means” serious breaches of peremptory norms of international law.⁶² An unprovoked invasion of another state is clearly such a breach.⁶³ Third states cannot both take refuge in the agnosticism of traditional neutrality law and be subject to a “positive duty to cooperate in order to bring to an end serious

⁶⁰ Article 4 of the Third Geneva Convention sets out the criteria for treating detainees as prisoners of war, a condition that entitles them to a broad set of protections. One qualifying group is “[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict.” Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, <https://perma.cc/PK6T-Z9PD>). In order to be included in this group, members must fulfill the following conditions:

- a) that of being commanded by a person responsible for his subordinates;
- b) that of having a fixed distinctive sign recognizable at a distance;
- c) that of carrying arms openly;
- d) that of conducting their operations in accordance with the laws and customs of war.

⁶¹ INT’L COMM. RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, art. 4, ¶ 988, (2020) <https://perma.cc/4CZA-SMK9>.

⁶² ARSIWA, *supra* note 10, art. 41. The obligation is to cooperate in response to serious breaches of peremptory norms as described in Article 40.

⁶³ The ILC itself states that the status of the prohibition on aggression as a peremptory norm is “clearly accepted and recognized.” ARSIWA Commentary, *supra* note 45, art. 26, ¶ 5.

breaches”.⁶⁴ If one understands neutrality as obligatory then this conflict becomes a question of a hierarchy of norms that could be resolved in a variety of ways.⁶⁵ But if neutrality “obligations” do not require states to maintain neutrality, then the conflict disappears.

There are two final problems in trying to reconcile a mandatory conception of neutrality with contemporary rules on state responsibility.⁶⁶ First, as the 1920 edition of Oppenheim’s influential treatise recounts, neutrality law did not itself prescribe the most consequential remedy for its own breach:

Even in an extreme case, in which the violation of neutrality is so great that the offended party considers war the only adequate measure in answer to it, it is not the violation which brings neutrality to an end, but the determination of the offended party. For there is no violation of neutrality so great as to oblige the offended party to declare war in answer to it, such party always having the choice whether he will keep up the condition of neutrality or not.⁶⁷

Belligerents offended by a neutral state’s failure to adhere to its obligations, in other words, had to invoke an entirely separate legal regime—that governing the use of force—in order to respond by declaring war. This view of the relation between a substantive legal obligation and permissible responses to its breach simply does not translate to contemporary international law.⁶⁸ Today, unless a primary rule itself sets out the consequences of its breach (which neutrality law does not), the consequences are defined by secondary rules of state responsibility.⁶⁹ State responsibility law contains a number of important

⁶⁴ *Id.* at 114. *See also* Legal Consequences Arising from the Policies and Practice of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. 1, ¶ 279 (July 19), <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf> (“in view of the character and importance of the rights and obligations involved, all States are under an obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory. They are also under an obligation not to render aid or assistance in maintaining the situation created by Israel’s illegal presence in the Occupied Palestinian Territory.”).

⁶⁵ *See generally*, Luca Pasquet, *De-Fragmentation Techniques*, in MAX PLANCK ENCYCLOPEDIAS OF INT’L L., (July 2018) <https://perma.cc/43DC-XT83>.

⁶⁶ As previously discussed, the *jus ad bellum* only assumed its contemporary form after 1945. It is harder to fix a particular date for the emergence of state responsibility law, but the profound disagreements within the International Law Commission that caused its work to drag on from 1957 to 2001 suggests the law may not have crystallized until the international community began to accept the 2001 Draft Articles. In other words, the early 21st century at a minimum. *See generally*, James Crawford, *State Responsibility*, in MAX PLANCK ENCYCLOPEDIA OF INT’L L., (Sep. 2006) <https://perma.cc/6YDN-TM5M>.

⁶⁷ OPPENHEIM, *supra* note 17, at 494–95.

⁶⁸ This move from the law of neutrality to law on the use of force also means that neutrality law cannot be conceived today as a self-contained regime that eschews reliance on other international legal doctrines.

⁶⁹ ARSIWA Commentary, *supra* note 10, ¶ 2, at 86–87.

limitations on injured states' possible responses, the most important for present purposes being the prohibition on using unlawful armed force as a countermeasure.⁷⁰ That limitation would preclude an automatic option to declare war—the assumption of traditional neutrality law—unless war were otherwise permitted by the *jus ad bellum*. This incompatibility of neutrality law with modern state responsibility principles is avoided if neutrality is viewed as optional, obviating the need for resort to secondary rules to define permissible responses.⁷¹

Second, viewing neutrality as a primary legal rule whose violation might be precluded through secondary rules of state responsibility is inconsistent with secondary rules having no effect on the ongoing validity of the primary obligation. A circumstance precluding the wrongfulness of a primary rule violation negates only the wrongfulness of the particular act in question. As the International Law Commission noted, circumstances precluding wrongfulness “do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists.”⁷² The Commission thus distinguished between “the effect of circumstances precluding wrongfulness and the termination of the obligation itself.”⁷³

As a result, if a third state successfully invokes, say, countermeasures as a circumstance precluding the wrongfulness of abrogating its neutrality, the neutrality obligation must remain unaffected. But exactly the opposite would happen. The obligation might not persist beyond a third state assisting one of the belligerents. Persistence would require the third state to revert to its previously neutral status. But at the discretion of the aggrieved belligerent, the third state could instead become a party to the conflict. At that point, it could not recover or resurrect its neutrality for the period it was assisting the belligerent. Once again, this problem is easily resolved if neutrality is understood as a choice not an obligation. The defect of a circumstance precluding wrongfulness causing the primary rule obligation to terminate would disappear because neutrality would not be conceived as an obligation in the first place.

Recent state practice demonstrating (or even refuting) the non-binding nature of neutrality is quite difficult to find, likely because of the rarity of IACs since 1945, as well as *jus ad bellum* frameworks and phraseology dominating diplomatic

⁷⁰ ARSIWA, *supra* note 10, art. 50(1)(a) (countermeasures shall not affect “the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations”).

⁷¹ There remains the possibility that state responsibility rules on whether a breach has occurred (contained in Part I of the ILC Articles) might still be employed even if the rules on the consequences of breach (contained in Part II) are not available. I am grateful to Federica Paddeau for relating this point.

⁷² ARSIWA Commentary, *supra* note 10, at 71.

⁷³ *Id.*

exchanges surrounding the few interstate conflicts.⁷⁴ One exception is the Iran-Iraq War of the 1980s. In that conflict, Iran regularly criticized Kuwait for acting contrary to neutrality obligations by permitting Iraq to use its airspace, ports and other facilities as well as providing it with financial support.⁷⁵ In a series of angry letters to the Security Council, Iran did not describe Kuwait as acting “illegally” or assert that it was required to remain neutral (a position Kuwait argued it had maintained). Instead, it argued that Kuwait needed to “prove its neutrality”⁷⁶ and that “until the official announcement by Kuwait of its guaranteed withdrawal of financial, political and logistical support of Iraq and hence a position of complete neutrality, Kuwait will be regarded as a partner of Iraq in the war.”⁷⁷ That is, in Iran’s view, Kuwait had become a party to the conflict. But Iran did not describe that as an unlawful move.

In addition, when the U.S. came to Kuwait’s assistance and reflagged eleven Kuwaiti ships as its own, Under-Secretary of Political Affairs Michael Armacost explained that while “[s]ome charge that by supporting Kuwait, the United States assists a so-called ally of Iraq and ceases to be a neutral in the war,” the U.S. did not “consider Kuwait a belligerent—nor does Iran, formally.”⁷⁸ Each of these statements describes Kuwait as capable of moving in and out of neutrality status depending on its actions, and not as having crossed a threshold of illegality. For Iran and the U.S., the consequence of abrogating neutrality was the status of a belligerent, though they obviously differed diametrically on whether that category change had occurred.

⁷⁴ In a slightly different context, Switzerland regards its own permanent neutrality as optional rather than an obligation of international law. *White Paper on Neutrality: Annex to the Report on Swiss Foreign Policy for the Nineties* 6 (Nov. 29, 1993), <https://perma.cc/W3MX-6MXQ> (“[u]nder international law, Switzerland is at liberty to give up its neutrality unilaterally. Historically, permanent neutrality is a status under international law freely chosen by the Confederation. Switzerland has reiterated its desire to be neutral on countless occasions, but has never given or recognized a commitment under international law to remain permanently neutral.” (emphasis in original)).

⁷⁵ See, e.g., Permanent Rep. of Iran to the U.N., Letter dated Aug. 14, 1987 from the Permanent Rep. Of the Islamic Republic of Iran to the U.N. addressed to the Secretary-General, U.N. Doc. S/19041 (Aug. 14, 1987); Permanent Rep. of Iran to the U.N., Letter dated May 25, 1984 from the Permanent Rep. of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. S/16585 (May 25, 1984); Charge d’affaires a.i., Letter dated January 7, 1988 from the Charge d’affaires of the Islamic Republic of Iran to the U.N. addressed to the Secretary-General, U.N. Doc. S/19409 (Jan. 07, 1988). For an overview of the Iran-Iraq War, see Andrea de Guttry, *The Iran-Iraq War—1980-88*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH* 315, 316 (Tom Ruys & Olivier Corten eds., 2018).

⁷⁶ Charge d’affaires a.i., Letter dated January 7, *supra* note 75.

⁷⁷ Permanent Rep. of Iran to the U.N., Letter dated Aug. 14, *supra* note 75.

⁷⁸ *The U.S. Plan to Protect Kuwaiti Ships in the Gulf by Putting Them Under U.S. Flags*, 26 I.L.M. 1422, 1430 (1987).

2. Preclusion of “Wrongful” Neutrality Law Violations

Notwithstanding the difficulty of viewing the abrogation of neutrality as wrongful, let us assume that move *can* be understood as an internationally wrongful act, and that a third state might invoke self-defense (ARSIWA, art. 21) or countermeasures (ARSIWA, art. 22) as circumstances precluding its wrongfulness.⁷⁹ Both justifications encounter problems on their own terms.

a) Self-Defense as a Circumstance Precluding Wrongfulness

The fundamental problem with the self-defense claim is that measures short of force, such as weapons transfers or economic assistance, do not constitute acts of collective self-defense. This is by far the majority view.⁸⁰ Judge Higgins directly rejected the claim in her separate opinion in the Palestine Wall case and states have generally not relied on self-defense in explaining their non-forcible assistance to victims of aggression.⁸¹ This has been strikingly true for the states aiding Ukraine since 2022, none of which has justified its assistance on collective self-defense grounds.⁸²

Some scholars argue that if military force can be used in self-defense, then less destructive or consequential forms of assistance (weapons, intelligence or economic support) must necessarily be permitted.⁸³ But this “greater includes the lesser” argument involves a category error. If a lesser example of legally regulated action is to be subsumed within a rule governing a greater form of the same action,

⁷⁹ Clancy, *Neutral Arms Transfers*, *supra* note 1, at 534–40.

⁸⁰ See the sources cited in Russell Buchan, *Non-Forcible Measures and the Law of Self-Defence*, 72 INT’L & COMPAR. L. Q. 1, 4–6 (2023). Buchan himself argues that non-forcible measures *can* constitute collective self-defense.

⁸¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, I.C.J. 136, 215–16 ¶ 35 (July 9) (separate opinion Higgins, J.); Frederic Paddeu, *Self-defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility*, 85 BRITISH Y.B. INT’L L. 90, 110–11 (2016) (giving examples); Schaller, *supra* note 1, at 181 (“there is no documented case of a state invoking collective self-defence to justify the provision of arms and military equipment to a belligerent”); von Heinegg, *supra* note 15, at 553 (“third States assisting one belligerent against another never referred to the right of collective self-defense. Instead, they either advanced contractual obligations, claimed that their assistance did not cover military (‘lethal’) items, or simply acted clandestinely.”).

⁸² Clancy, *Neutral Arms Transfers*, *supra* note 1, at 534. Most significantly, none of Ukraine’s supporters notified the Security Council that they were undertaking a collective self-defense action, as required by Article 51 of the U.N. Charter. *Id.*

⁸³ Lehto, *supra* note 1, at 53–4 (“it would be odd if States were prohibited from providing weapons and other war materiel to support legal acts of self-defence when, at the same time, they are entitled to exercise the right of collective self-defence by sending troops and participating in hostilities in support of the victim of aggression”); Asada, *supra* note 1, at 29; Artem Ripenko, *Should Third States Follow Ukraine’s Lead and Confiscate Russian State Assets?*, VÖLKERRECHTSBLOG, (June 19, 2023) <https://perma.cc/EZ5L-ADHX>.

then both must be examples of acts in the same legal category. The logic compelling the latter will necessarily control (“include”) the former. But self-defense is not an all-purpose response to any international wrong but an integral part of the norm prohibiting aggressive force, defining the point at which unlawful aggression ends and permissible defensive force begins.⁸⁴ As the ILC stated, “a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4.”⁸⁵ By contrast, and by definition, non-forceful measures tell us nothing about the permissible extent of a state’s right to use lawful force. Such measures are not lesser uses of force that partake of justifications controlling that category but not uses of force at all. As Federica Paddeu explains,

The right of self-defence is an exception to the prohibition of force, so that if the prohibition is limited to military force (direct or indirect as it may be) then the exception must be about the use of military force as well: the whole point of an exception is to exclude the application of the (general) rule from conduct which would otherwise fall within the domain of that (general) rule. Consequently, if the right of self-defence (the primary rule) is limited to permitting uses of force, then Article 21 must of necessity concern uses of force. As a result, non-forcible unlawful measures against aggressors cannot be justified by reference to Article 21, as they would be excluded from its intended scope.⁸⁶

This view is bolstered by the *lack* of support among states for viewing the mere provision of weapons to an aggressor as a use of force prohibited by Article 2(4), which takes the same self-contained view of the use of force norm but from the perspective of the aggressor rather than the victim state.⁸⁷ That Article 2(4) is not implicated by mere weapons transfers would also seem clear from the 2013 U.N. Arms Trade Treaty,⁸⁸ which prohibits the transfer of a long list of conventional arms in only three circumstances: (i) if doing so would violate obligations under a Chapter VII Security Council resolution; (ii) if doing so would violate obligations under other treaties; and (iii) if the weapons involved would be

⁸⁴ Ian Scobbie, *Smoke, Mirrors and Killer Whales: the International Court’s Opinion on the Israeli Barrier Wall*, 5 GER. L. J. 1107, 1128 (2004) (“the right of self-defence was juridically meaningless when States could have recourse to force at will. Only with the advent of restraints on the use of force did self-defence become relevant as a legal justification for resort to force”).

⁸⁵ ARSIWA Commentary, *supra* note 45, art. 21, ¶ 1.

⁸⁶ Paddeu, *supra* note 81, at 110.

⁸⁷ Schaller, *supra* note 1, at 187 (“states are generally not willing to treat the provision of weapons by one state to another state using force against a third state as a sub-category of the use of force under Article 2(4) of the UN Charter.”)

⁸⁸ Arms Trade Treaty, *opened for signature* June 3, 2013, S. TREATY DOC. NO. 114-14; 3013 U.N.T.S. 269, <https://perma.cc/AA6V-R5XJ> (entered into force Dec. 24, 2014).

used in international crimes.⁸⁹ Setting out this limited set of prohibitions would make no sense if they and *all other* arms transfers meeting the Article 2(4) threshold were already prohibited by the *jus ad bellum*. Prohibiting only some transfers suggests that others are not prohibited (*expressio unius est exclusio alteris*). The treaty's preambular language supports this view by recognizing "the legitimate political, security, economic and commercial interests of States in the international trade in conventional arms."⁹⁰

Some scholars argue nevertheless that non-forceful aid can, at a certain level, amount to an "indirect" use of force, and thereby become the functional equivalent of providing combat troops in collective self-defense.⁹¹ The I.C.J. invoked the idea of indirect force when it held in the *Nicaragua* case that American "arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua," though it also held that "the mere supply of funds" did not amount to a use of force.⁹² The Court returned to indirect force in the *Congo/Uganda* case, holding that Uganda's support for and training of a rebel group in Congo violated "the principle[] of the non-use of force."⁹³ The General

⁸⁹ Article 6 ("Prohibitions") provides in full:

1.A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.

2.A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.

3.A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

⁹⁰ *Id.*

⁹¹ Schmitt & Biggerstaff, *supra* note 1; Schaller, *supra* note 1; Nabangsu Chakma, *Examining Ukraine's Right of Collective Self-Defense: Can It Be Invoked or Is It Already in Exercise?*, 28 UCLA J. INT'L L. FOR. AFF. 69 (2025).

⁹² Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment. 1986 I.C.J. 14 ¶ 228 (June 27) [hereinafter *Nicaragua Case*]. Many have noted this is a distinction without a difference. As James Green observes, "drawing such a distinction between giving weapons to a group and giving them the money to buy weapons feels like splitting hairs, and there is no clear basis for it in practice." Green, *supra* note 1, at 10.

⁹³ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 163 (Dec. 19).

Assembly's Friendly Relations Declaration and Definition of Aggression similarly assimilated support for armed groups into the prohibition on aggressive force.⁹⁴

Indirect force is not an argument of complicity, since that concept in state responsibility law involves one state assisting another state's unlawful acts.⁹⁵ Nor does it involve a principal-agent claim, since most forms of state support for an armed group will not meet the extraordinarily high bar for attributing the group's specific acts to the supportive state.⁹⁶ It is instead a claim that the support itself amounts to unlawful force regardless of the relation under state responsibility law between the state and non-state group.

In order to apply the idea of indirect force to acts of self-defense, two additional steps are necessary. Both have problems. First, the actions would need to be transposed from *unlawful* force in violation of U.N. Charter article 2(4) to *lawful* collective self-defense. This would tear the idea of indirect force from its intellectual roots. The doctrine began as a means of filling gaps between the prohibition on direct military action and the many ways states can inflict equivalent harm indirectly.⁹⁷ The Friendly Relations Declaration, which provided primary support for the I.C.J.'s *Nicaragua* holding, includes assistance to proxy forces in a long list of prohibited uses of offensive force.⁹⁸ In the *Congo/Uganda*

⁹⁴ The Friendly Relations Declaration provided that "[e]very State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State." G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]. The General Assembly's Definition of Aggression similarly qualified as an act of aggression "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein." G.A. Res. 3314 (XXIX), Definition of Aggression, art. 3(g) (Dec. 14, 1974).

⁹⁵ Article 16 of ARSIWA provides, "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State. ARSIWA, *supra* note 10, art. 16.

⁹⁶ Article 8 of ARSIWA codifies the I.C.J.'s test in the *Nicaragua* case and other sources, providing that a group's conduct will be attributable to a state "if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." ARSIWA, *supra* note 10, art. 8. See Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 EUR. J. INT'L L. 563, 574 (2017) ("there are only limited circumstances in which private conduct may be attributable to a state, namely if a private actor has acted under a state's instructions, direction or control.").

⁹⁷ Chosen Udorji poses the challenge of adopting an indirect force doctrine as "whether a state can be constrained, and to what extent, under international law, from using such force *against* another state". Chosen Udorji, *Reconceptualizing the Meaning of Indirect Force and the Scope of its Regulation under International Law*, 30 J. CONFL. & SEC. L. 47, 50 (2025) (emphasis added).

⁹⁸ Friendly Relations Declaration, *supra* note 94, part 1; *Nicaragua* case ¶ 228.

case, the Court focused on the “magnitude and duration” of the force used by the MLC rebel group, which Uganda supported, in concluding that Uganda had committed “a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.”⁹⁹ The destructive nature of Uganda’s actions was thus the critical metric for invoking indirect force. In the case of self-defense, by contrast, the destructiveness of force does not function to include an act in that category and fills no doctrinal gaps. Granted, a disproportionately destructive act would be excluded from legitimate self-defense, but proportionality has long been a requirement of self-defense, and such an exclusion fills no preexisting doctrinal gaps.

Another justification for the idea of unlawful indirect *aggressive* force is to equalize application of the *jus ad bellum* between wealthy powerful states (which can subcontract unlawful uses of force to non-state surrogates or dependable state allies) and smaller under-resourced states (which cannot).¹⁰⁰ Yet another is the need to account for cyber operations, which can inflict destruction equal to that of kinetic attacks, but which would remain in a legal grey zone if they were not brought at least partially into the *jus ad bellum*.¹⁰¹ Neither of these justifications for a doctrine of indirect *aggressive* force remotely applies to lawful *defensive* force.

Second, indirect force must be extended from support for non-state groups to support for states. U.S. support for the Nicaraguan *contras* would be an example of the first category and European support for Ukraine an example of the second. To accomplish this transition, the relevant actor with legal agency would move from a state that *supplies* weapons to a non-state group to a state that *receives* weapons from another state. That is because in the first case, the non-state group cannot itself violate the *jus ad bellum*; the supplying state is accused of a *jus ad bellum* violation through a proxy, regardless of what happens after the weapons are delivered. Hence the U.S. was held to violate the *jus ad bellum* in the Nicaragua case, while the *contras* did not violate any international rule. By contrast, in the second case, the supplying state can only justify sending weapons as an act of collective self-defense if the state *receiving* weapons itself has a valid self-defense claim.¹⁰² That is because the supplying state’s claim of legality is entirely derivative of that of the supplied state. If the supplied state has not been subjected to an armed attack—the trigger for an individual self-defense claim under Article 51 of the U.N. Charter—then the supplying state cannot invoke collective self-defense.

⁹⁹ Dem. Rep. Congo. v. Uganda, ¶ 163.

¹⁰⁰ *Id.*

¹⁰¹ Schmitt & Biggerstaff, *supra* note 1, at 195.

¹⁰² Nicaragua Case ¶ 195 (“[i]n the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this.”).

In other words, the problem is that in the second case of collective self-defense—the one invoked by an indirect force principle—the actor whose deeds must be scrutinized does not have full agency. The third-party supplying state's claim to collective self-defense cannot be resolved without first evaluating the self-defense claim of the *supplied* state. An offensive indirect force theory may not, therefore, transfer cleanly to a defensive claim.¹⁰³

Even putting this difficult transition from direct to indirect force aside, the self-defense claim would still encounter the category error (previously discussed) of whether non-forceful measures qualify as acts of self-defense. The fundamental obstacle—that self-defense is an exception to the prohibition on the use of force and so cannot, by definition, be comprised of acts not involving force—is not resolved by simply recharacterizing non-forceful measures as “indirect force.” Changing the act's label does not change the category problem. Given these many hurdles, it is not surprising that “there is no documented case of a state invoking collective self-defense to justify the provision of arms and military equipment to a belligerent.”¹⁰⁴

b) Countermeasures as a Circumstance Precluding Wrongfulness

The second possible circumstance precluding the wrongfulness of neutrality law violations is countermeasures.

(1) Third Party Countermeasures

Justifying neutrality law “violations” as countermeasures encounters the unique problem that the measures would not be invoked by the injured state (the attacked state, State A in our prior hypothetical), but by third states acting on behalf of the attacked state.¹⁰⁵ Those third states, according to this view, could remain neutral if countermeasures precluded the wrongfulness of their actions.

¹⁰³ If such a case were to reach the International Court of Justice, there may also be a problem of a missing necessary party. Case of the Monetary Gold Removed from Rome in 1943, (It. v. Fr./U.K./U.S.), Preliminary Question, 1954 I.C.J. 19, 32 (June 15); Marco Longobardo, *The Monetary Gold Principle and States' Obligations Triggered by a Serious Risks of Atrocities Being Committed by Another State: The Cases of the Duty to Prevent Genocide and the Duty to Ensure Respect for IHL*, 27 INT'L COMM. L. REV. 282, 284 (2025). A *Monetary Gold* problem would not arise in an offensive indirect force case, since the third party would be a rebel group that could not become a party to an I.C.J. case under any circumstances.

¹⁰⁴ Schaller, *supra* note 1, at 181.

¹⁰⁵ There is the additional problem, not explored at length here, that if the provision of weapons were characterized as “indirect force” in violation of Article 2(4), the action could not qualify as a countermeasure of any kind, since no countermeasures can violate “the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.” ARSIWA, *supra* note 10, art. 50(a). If one responded that the indirect force would constitute lawful collective self-defense, as explored in the previous section, then the validity of a countermeasures justification would turn entirely on the validity of the self-defense claim.

Article 48 of the ILC's Articles on State Responsibility does allow states other than those injured to invoke the responsibility of a wrongdoer in a limited set of circumstances.¹⁰⁶ These can either be treaty-based obligations (*erga omnes partes*) or those arising under customary law (*erga omnes*).¹⁰⁷ Third party claims under treaties in particular have proliferated in recent years, especially in cases brought before the I.C.J.¹⁰⁸

These limited opportunities for non-injured third states to invoke the *responsibility* of a wrongdoing state, however, are legally distinct from third states employing *countermeasures* against such a state. The two different types of response to unlawful acts are sometimes conflated in the literature.¹⁰⁹ But in drafting the Articles on State Responsibility, the International Law Commission was “careful to distinguish third States invoking responsibility from them taking

¹⁰⁶ Article 48 provides in full:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

¹⁰⁷ Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 803 (2002); Pok Yin S. Chow, *On Obligations Erga Omnes Partes*, 52 GEO. J. INT'L L. 469, 487 (2001).

¹⁰⁸ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gam. v. Myan.), Preliminary Objections, 2022 I.C.J. 477 (July 22); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422 (July 20); Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Can./Neth. v. Syrian), Provisional Measures, 2023 I.C.J. 587 (Nov. 16); Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J. Reports 3 (Jan. 26).

¹⁰⁹ See Oona A. Hathaway, Maggie M. Mills & Thomas M. Poston, *War Reparations: The Case for Countermeasures*, 76 STAN. L. REV. 971, 1030–33 (2024) (citing the success of I.C.J. litigation by third parties as support for the permissibility of collective countermeasures); Int'l Inst. for Strategic Stud., *On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine*, ¶¶ 43, 50, 52 (May 20, 2024); New Lines Inst. for Strategy & Pol'y, *Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine* 16 (June 2023) [hereinafter NLISAP Report].

countermeasures.”¹¹⁰ The former involves lawful (and usually pre-existing) avenues for dispute resolution, such as negotiation or filing a claim in an international court.¹¹¹ In the *Gambia/Myanmar* case, for example, the I.C.J. held that because all state parties to the Genocide Convention have a “common interest in compliance with the relevant obligations under the Genocide Convention,” it follows that “any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations . . . through the institution of proceedings before the Court.”¹¹² By contrast, countermeasures involve actions that are otherwise unlawful but may nonetheless be justified (subject to important substantive and procedural requirements) as a means of inducing compliance. In the *Gabčíkovo-Nagymaros* case, the I.C.J. began its discussion of Slovakia’s countermeasures claim by noting that Slovakia was thereby seeking to justify “an internationally wrongful act.”¹¹³ Merely invoking state responsibility, in other words, involves no unlawful acts, whereas countermeasures, by definition, involve acts that would otherwise be unlawful. In this respect countermeasures pose a unique danger, since they are acts of self-help that usually lack supervision by multilateral institutions. This led the ILC to build in numerous procedural and substantive limitations.¹¹⁴ To qualify as countermeasures, the acts must be necessary and proportionate, intended to induce compliance, temporary and reversible, and not in violation of fundamental

¹¹⁰ Nigel D. White & Ademola Abass, *Countermeasures and Sanctions*, in INTERNATIONAL LAW 537–43 (Malcolm Evans ed., 5th ed. 2018). As the ILC explained in its commentary, Article 48 gives a specifically defined group of non-injured states “a legal interest in compliance.” ARSIWA, *supra* note 10, art. 54, cmt. 1. It continued that this is distinct from “the question [] to what extent these States may legitimately assert a right to react against unremedied breaches.” *Id.* It is instructive that ARSIWA Article 48, allowing states other than an injured state to invoke responsibility, is located in Chapter 1 of Part III of the Articles, dealing with “Invocation of the Responsibility of a State,” whereas countermeasures are addressed in Chapter 2 of Part III. The I.C.J. has also treated the two concepts as distinct. Tom Ruys, *Immunity, Inviolability, and Countermeasures — A Closer Look at Non-UN Targeted Sanctions* in CAMBRIDGE HANDBOOK ON IMMUNITIES AND INTERNATIONAL LAW 670, 703 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019) (“if the I.C.J. has confirmed that all States can invoke the international responsibility of another State in respect of a breach of an *erga omnes* norm before an international court or tribunal, its case-law contains no positive indications that non-injured States can similarly proceed to taking countermeasures.”).

¹¹¹ See ARSIWA, *supra* note 10, art. 42, ¶ 2 (“Invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal.”).

¹¹² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gam. v. Myan.), Preliminary Objections, 2022 I.C.J. at ¶ 108.

¹¹³ Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 82 (Sept. 25).

¹¹⁴ ARSIWA Commentary, *supra* note 45, chap. II, ¶ 6 (detailing the ways the Articles fulfill “the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse.”).

principles such as the protection of human rights and the prohibition on aggressive force.¹¹⁵

When one separates third states invoking responsibility from those engaging in countermeasures, it becomes clear that relevant state practice is substantially diminished. For its part, when the ILC finalized the draft articles in 2001, it found international law to be inconclusive on whether non-injured states can engage in “collective countermeasures” in the general interest.¹¹⁶ Not wishing to foreclose future developments, it inserted a savings clause in Article 54: “This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.”¹¹⁷ In David Bederman’s words, the ILC chose “to defer debate to another day and to allow customary international lawmaking processes to elaborate any conditions on the use of collective countermeasures.”¹¹⁸

(2) *Recent Practice: The Frozen Russian Assets Controversy*

Where do collective countermeasures stand today? As Tom Ruys has written, the arguments on both sides remain compelling. On the one hand, such measures “would increase the cost of non-compliance with international law (especially where there is no directly injured State, or where the State injured by the breach is not in a position to engage in countermeasures vis-à-vis a (more powerful) offending State).”¹¹⁹ On the other, “to leave the enforcement of collective/community interests at the mercy of individual States or organizations, acting based on their own understanding of international legality, is a recipe for chaos and subjectivism, and possibly for escalation of disputes. This is all the more so since the proportionality of third-party countermeasures may be particularly

¹¹⁵ ARSIWA, *supra* note 10, arts. 49–51. These limitations provide additional grounds for objecting to a countermeasure’s rationale for third party support. For example, Alexander Wentker argues that “[m]ilitary assistance to a State fending off an armed attack, by definition, cannot be reversed.” Wentker, *supra* note 14, at 976. Whether one agrees with this view depends on whether the “assistance” involved is each piece of equipment or intelligence (non-reversible) or the overall flow of equipment and intelligence (reversible).

¹¹⁶ ARSIWA, *supra* note 10, art. 54, cmt. 6 (“the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest.”).

¹¹⁷ ARSIWA, *supra* note 10, art. 54. *See also*, art. 22, cmt. 6 (“Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State.”).

¹¹⁸ David J. Bederman, *Counterintuitive Countermeasures*, 96 AM. J. INT’L L. 817, 828 (2002).

¹¹⁹ Ruys, *supra* note 110 at 703.

difficult to verify.”¹²⁰ In a thoughtful and deeply researched 2024 article, Federica Paddeu and Miles Jackson assessed developments since the ILC’s decision in 2001 not to take a position. They found few cases where third states explicitly described actions on behalf of injured states as third party countermeasures, even when they might have qualified.¹²¹ They also found states divided when opining on the issue as a pure question of law, apart from specific cases. Evidence of *opinio juris* was thus particularly lacking.¹²² Paddeu and Jackson conclude that even if practice since 2001 is assessed in a flexible manner, “the best that can be said is that the law remains uncertain.”¹²³

The debate over whether to seize frozen Russian assets during the Ukraine war, which played out among governments, civil society organizations and scholars from 2022 to 2026, held the potential to clarify international opinion on third-party countermeasures. As assets of the Russian central bank, the funds were protected from seizure by principles of sovereign immunity.¹²⁴ But the states in which the assets were located had not been injured by Russia’s invasion of Ukraine, and thus characterizing the seizures as third party countermeasures would be the only basis for precluding the wrongfulness of a sovereign immunity violation.¹²⁵

¹²⁰ *Id.*

¹²¹ Miles Jackson & Federica Paddeu, *The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?*, 118 AM. J. INT’L L. 231 (2024).

¹²² *Id.* at 273.

¹²³ *Id.* at 246. See also Hathaway et al., *supra* note 109, at 1036 (“[w]e acknowledge that collective countermeasures are still largely untested”); Alexandra Hofer, *Third-Party Countermeasures: Making Custom Out of Ambiguous Practice?*, 74 INT’L & COMP. L. Q. 287, 316 (2025) (“[a]lthough unilateral sanctions have flourished and doctrine has suggested that third-party countermeasures are permitted under customary international law, this article has argued that practice is too ambiguous and *opinio juris* too absent to reach this conclusion with confidence.”).

¹²⁴ Philippa Webb, *Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine*, EUR. PARLIAMENTARY RSCH SERV. 7 (Feb. 2024). The 2004 U.N. Convention on Jurisdictional Immunities of States and Their Property provides that “property of the central bank or other monetary authority of the State” shall be immune from post-judgment attachment or execution. G.A. Res. 59/38, annex, Convention on Jurisdictional Immunities of States and Their Property, art. 21(c) (Dec. 2, 2004). While the U.N. Convention is not yet in force, its provision on the immunity of central bank assets reflects customary international law. Ingrid W. Brunk, *Central Bank Immunity, Sanctions, and Sovereign Wealth Funds*, 91 GEO. WASH. L. REV. 1616 (2023).

¹²⁵ Hathaway et al., *supra* note 109, at 1013; Menno T. Kamminga, *Confiscating Russia’s Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?*, 70 NETH. INT’L L. REV. 1 (2023); Harold Hongju Koh, *Past Time to Liquidate Russian Assets*, EJIL: TALK!, <https://perma.cc/KG56-ZYM6> (Mar. 5, 2024); Angelina Maleska, *From Rubles to Hryvnia: The Freezing and Seizing of Russian Assets to Rebuild Ukraine*, 99 TUL. L. REV. 191 (2024); Anton Moiseienko, *Frozen Russian State Assets*, VERFASSUNGSBLOG, <https://perma.cc/NQ39-R7J7> (Apr. 4, 2025). Alternatively, some scholars argued that because both seizure orders would originate from legislative or executive organs, sovereign immunity would not apply because the principle only limits judicial impositions on state-

Ukraine's allies froze Russian assets almost immediately after the February 2022 invasion,¹²⁶ seeking both to punish Russia and generate additional funds to underwrite their economic and military support.¹²⁷ The assets were located in the U.S., Europe and other countries supportive of Ukraine,¹²⁸ and consisted largely of foreign currency reserves of the Central Bank of Russia. In the end, the G7 decided against seizure. Instead, Ukraine's supporters used the assets to structure two separate loans to Ukraine. The first, in June 2024, loaned Ukraine \$50 billion using interest from certain frozen assets as collateral.¹²⁹ The vast majority of these were held by Euroclear, a Brussels-based central securities depository engaged in cross-currency transactions.¹³⁰ These assets had generated yearly profits of \$3-4 billion since their freezing.¹³¹ The loans, created under the G-7's "Extraordinary Revenue Acceleration (ERA) Loans for Ukraine," were secured and would be repaid by the interest generated by the Euroclear accounts, without recourse to Ukraine.¹³² If and when war reparations for Ukraine were assessed against Russia,

owned property. Anna Madei, *Confiscation and Other Ways of Using the Frozen Russian Assets as a Lawful Response to Russian Military Aggression: a Legal Analysis* 18–19 (2023) (Master's thesis, Vilnius University) (on file with the Vilnius University Library); Ruys, *supra* note 110; Daniel Franchini, *When Finance Becomes a Weapon: The Challenge of Central Bank Sanctions under International Law*, 24 J. INT'L TRADE & POL'Y 37 et seq (2024); Philip Zelikow, *A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine*, LAWFARE, <https://perma.cc/5FCQ-EHK7> (May 12, 2022). This is a minority view; for a summary of the majority view, see Evan J. Criddle, *Turning Sanctions into Reparations: Lessons for Russia/Ukraine*, HARV. INT'L L.J. ONLINE, <https://perma.cc/HG3E-NBFH> (Jan. 30, 2023).

¹²⁶ Kamminga, *supra* note 125, at 1-2.

¹²⁷ "The recovery and reconstruction cost to Ukraine of Russia's war of aggression was estimated at US\$486 billion at the end of 2023 in a joint damage and needs assessment conducted by the World Bank, the United Nations, Ukraine and the European Union." Ian Clark, James Hardy & Prema Govind-Hitti, *ERA Loans for Ukraine Initiatives*, WHITE & CASE (Jan. 10, 2025), <https://perma.cc/MMC8-WBC8>.

¹²⁸ Alexander Conner & David Wessel, *What Is the Status of Russia's Frozen Sovereign Assets?*, BROOKINGS (June 24, 2025), <https://perma.cc/AA7Y-Y7DM> ("In 2022, most of the frozen assets were debt securities denominated in euros or U.S. dollars. Euroclear, a Belgian central securities depository, on behalf of the Central Bank of Russia. Euroclear manages about 90% of frozen reserves in the EU, while France holds much of the remainder. The U.S. holds around \$5 billion."). See also, Paul Stephan, *Giving Russian Assets to Ukraine—Freezing Is Not Seizing*, LAWFARE (Apr. 26, 2022, 10:48 AM), <https://perma.cc/MC5X-WWE6>; Gary Clyde Hufbauer & Jeffrey J. Schott, *The United States Should Seize Russian Assets for Ukraine's Reconstruction*, PETERSON INST. INT'L ECON. (Apr. 21, 2022, 10:30 AM), <https://perma.cc/RAR2-RS3A>.

¹²⁹ Alan Rappeport and Jenny Gross, *G7 Finalizes \$50 Billion Ukraine Loan Backed by Russian Assets*, N.Y. TIMES (Oct. 23, 2024), <https://perma.cc/H9HH-AG2U>; Scott R. Anderson, *Understanding the G7's New Plan for Funding Ukraine*, LAWFARE (June 21, 2024, 1:00 P.M.), <https://perma.cc/W5FF-7TGN>.

¹³⁰ Conner & Wessel, *supra* note 128 ("Euroclear manages about 90% of frozen reserves in the EU, while France holds much of the remainder. The U.S. holds around \$5 billion.").

¹³¹ Anderson, *supra* note 129.

¹³² Clark et al., *supra* note 127.

these could also be paid from the income generated by the frozen assets.¹³³ The second loan, concluded in January 2026, provided 90 billion Euros to Ukraine for 2026-27 and was financed by EU borrowing in capital markets.¹³⁴ While many EU states had backed an earlier proposal that would have swapped the frozen assets for bonds, this option failed in the face of determined Belgian opposition.¹³⁵

Did the reluctance to seize the Russian assets reflect uncertainty by the states involved about the lawfulness of third-party countermeasures? Isolating that legal objection as a single motive is not easy. First, the countries were divided on whether even to pursue seizure. In the U.S., President Biden acquired legal authority to effect seizure under the REPO Act, which he signed in April 2024, but never invoked.¹³⁶ Canada also adopted a seizure statute that it never used.¹³⁷ The U.K. Foreign Minister announced support for seizure, as did frontline states Poland, Lithuania and Estonia.¹³⁸ France, Belgium, Germany, Italy, Spain and Luxembourg opposed seizure, as did legal officials of the European

¹³³ *Id.*

¹³⁴ European Comm'n, *Implementing Enhanced Cooperation on the Establishment of the Ukraine Support Loan for 2026 and 2027*, 2026/0008 (COD) (Jan. 14, 2026), <https://perma.cc/QQ58-L9SK>; European Comm'n, *Commission presents a financial support package for Ukraine for 2026–2027* (Jan. 13, 2026), <https://perma.cc/X9CE-S6S2>.

¹³⁵ Associated Press, *EU Leaders Agree on \$105bn Ukraine Loan, but Without Relying on Frozen Russian Assets*, OPB (Dec. 19, 2025), <https://perma.cc/38ZW-5UMB>; Ruth Green, *Russia's Invasion of Ukraine: EU's €90bn Deal Signals Growing Strength of 'Coalition of the Willing'*, INT'L BAR ASS'N (Jan. 15, 2026), <https://perma.cc/4P8U-9H6T>. The initial proposal for a "reparations loan" was based on the Russian assets in Euroclear having matured into cash. Euroclear would use that cash to purchase EU bonds at zero interest rate and the bonds would replace the cash in Euroclear's accounts. The EU would then distribute the cash in tranches to Ukraine. See Trent Buatte, *Russian Assets Redux: Examining New Proposals for Reparations Loans*, LAWFARE (Oct. 16, 2025), <https://perma.cc/ZZ4Z-2NBN>.

¹³⁶ Rebuilding Economic Prosperity and Opportunity for Ukrainians Act, Pub. L. No. 118-50, 138 Stat. 895 (2024). Conner & Wessel, *supra* note 128. The Biden Administration stated that its support for seizure was contingent on support from Europe. Anderson, *supra* note 129.

¹³⁷ Kamminga, *supra* note 125, at 11; Mihajlo Vucic, *Illegal Aspects of the Proposed Seizure of Russian Central Bank Assets*, in GLOBAL SECURITY AND INTERNATIONAL RELATIONS AFTER THE ESCALATION OF THE UKRAINIAN CRISIS 221, 226 (Dusan Prorokovic, Paolo Sellari, Rich Mifsud eds., 2024), <https://perma.cc/44NP-RGSX>.

¹³⁸ Conner & Wessel, *supra* note 128; Minister of Finance G. Skaistė: "Russia's Frozen Assets Should be Used for the Reconstruction of Ukraine", MINISTRY OF FIN. OF THE REPUBLIC OF LITH. (May 24, 2022), <https://perma.cc/X3PK-BGS7>.

Commission¹³⁹ and the European Central Bank.¹⁴⁰ Outside the West, “official support for asset confiscation is scarce.”¹⁴¹

Second, the opposing states were quite vague about the precise “legal obstacles” they raised as objections.¹⁴² None specifically mentioned collective counter measures.¹⁴³ At the same time, the complex loans arrangements were designed specifically to *avoid* seizures and so also the need to argue for the legitimacy of countermeasures. One can certainly rule out a general reluctance to take aggressive economic measures against Russia as a motive, since during the same period the U.S. and EU instituted a broad array of other economic sanctions.¹⁴⁴

Two factors appear to militate against reading the Russian sanctions episode as state practice supportive of collective countermeasures. First, countermeasures of any kind must be limited to the duration of the wrongful act targeted and, as a result, reversible when that act ends.¹⁴⁵ The seizure of assets, which would then be spent resupplying Ukraine or helping rebuild its economy, could not be

¹³⁹ Brunk, *supra* note 124, at 1655.

¹⁴⁰ *Id.*; Ashley Deeks, Mitu Gulati & Paul Stephan, *The Syndicated Loan for Ukraine: A Model for Future Crisis Collaboration*, 20 CAP. MKTS. L. J. (forthcoming 2025) (manuscript at 8), <https://perma.cc/VX3L-ZCM6>.

¹⁴¹ *A Frozen Conflict: The Dilemmas of Seizing Russia's Money for Ukraine*, INT'L CRISIS GRP. (June 17, 2025), <https://perma.cc/KQR4-LS67> (“Japan, the second-largest holder of Russian assets after Europe, has stressed that these assets must be treated according to international law. China, Indonesia and Saudi Arabia have also let the EU know that they oppose confiscation, while at a 2024 Swiss peace summit, Kenyan President William Ruto condemned ‘the unilateral appropriation of Russian assets’ as ‘unlawful, unacceptable and a violation of the UN Charter’”).

¹⁴² Conner & Wessel, *supra* note 128 (“Neither the nations of the REPO Task Force nor the EU internally have agreed on seizing the frozen reserves outright, largely citing legal barriers and the fear of eroding international norms”); Brunk, *supra* note 124, at 1658 (western states’ desire to compensate Ukraine was “in tension with the desire to keep in place customary international law governing immunity so that other countries will continue to invest in dollars (and in other leading Western currencies) with confidence that those assets will not be confiscated”); Anderson, *supra* note 129 (ERA loan arrangement “avoids many of the international legal challenges that seizing Russia’s frozen assets would present, at least in the eyes of many European policymakers.”); Vucic, *supra* note 137, at 225 (EU officials’ “bottom line is to ensure that any EU legal framework for seizure can withstand a legal challenge by the Russian state.”)

¹⁴³ Hofer, *supra* note 123, at 304 (2025) (“the language of collective countermeasures has been absent in G7 pronouncements and more generally, but it is clear that a number of legal, policy and financial issues are at stake that are leading States to be very cautious.”).

¹⁴⁴ KRISTIN ARCHICK, CONG. RSCH. SERV., IN11897, RUSSIA’S WAR AGAINST UKRAINE: EUROPEAN UNION RESPONSES AND U.S.–EU RELATIONS 2 (Jan. 15, 2025), <https://perma.cc/PR6U-6HZA>.

¹⁴⁵ See Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, 56-57 ¶ 87 (Sept. 25); ARSIWA, art. 49(1), <https://perma.cc/83DF-HMSN>.

reversed.¹⁴⁶ There were responses to this objection but they did not get the better of the argument.¹⁴⁷ Given the forcefulness of the argument, non-reversibility could well have been the dominant legal motive. Second, many observers warned that a U.S.-led seizure could jeopardize the dollar's status as the international reserve currency of choice, as foreign investors might lose trust in U.S.-based assets or dollar-denominated accounts elsewhere.¹⁴⁸ As with non-reversibility, one would need to isolate opposition to third party countermeasures from this non-legal motive in order to make the state practice relevant.

In light of both the lack of prior state practice supporting collective countermeasures and the complete novelty of applying the concept to asset seizures and breaches of sovereignty immunity,¹⁴⁹ practice and *opinio juris* in this episode would need to be particularly clear and uniform in order to advance the claim. Neither reached that threshold. The debate over Russian assets thus supplies little new evidence of state support for third-party countermeasures. Paddeu and Jackson's conclusion that the law is uncertain at best appears to remain valid.

¹⁴⁶ Hathaway et al, *supra* note 109, at 1007-1011; Paul Stephan, *Seizing Russian Assets*, 17 CAP. MKT. L. J. 276, 285 (2022), <https://perma.cc/87C7-4HCD>.

¹⁴⁷ One theory that reversibility would not bar asset seizures was that because Russia owed an obligation to compensate Ukraine for the damage it (Russia) had caused, asset seizure would only become irreversible if the seized amount exceeded Russia's liability to Ukraine. That is, the freezing states would not engage in an international wrong if the seizure were viewed as one part of a set-off. See Webb, *supra* note 124, at 27 ("[t]he requirements of inducement, temporariness and reversibility would all be satisfied if the RCB assets (the full amount of assets, not just the interest) are allocated to Ukraine as a loan conditional on Russia's fulfilment of its obligation to make full reparation.") (emphasis in original); Hugo Dixon & Lee Buchheit, *The Ukraine Reparation Loan Solution*, AM. ENTER. INST. (Feb. 2025), at 2 <https://perma.cc/C7TG-BTE7> (set-off arrangement "is different from the principle of countermeasures, which has been used to justify alternative mechanisms for mobilizing the Russian assets."). The problem with this view is that the wrongful act of violating Russia's sovereign immunity by confiscating its assets is separate from the wrongful act for which Russia owes compensation, namely its invasion and partial destruction of Ukraine. That there may be a net zero set-off does not diminish the unlawful nature of the asset seizure and the need for *that* unlawful act to be reversible. Despite these problems, with the war dragging on in spring 2025, two former Biden Administration officials urged the G7 to revisit its decision and seize the assets. They cite countermeasures as legal justification. Wally Adeyemo & David Shimer, *Make Moscow Pay: The Case for Seizing Russian Assets to Fund Ukraine's Defense*, FOR. AFFS. (May 21, 2025), <https://perma.cc/8VUZ-3P2N>.

¹⁴⁸ Hathaway et al., *supra* note 109, at 1005.

¹⁴⁹ NLISAP Report, *supra* note 109, at 7 ("no state has ever expressly qualified its practice on state immunity as countermeasures"); Brunk, *supra* note 124, at 1652 ("[s]tate practice in favor of countermeasures to obtain reparations appears to be effectively nonexistent, even for those who are generous in how they characterize state practice supporting countermeasures."); *id.* at 1647 (there is "apparently no practice of states explicitly denying central bank immunity, or any other state immunity, as a countermeasure").

3. Conclusions for Traditional Neutrality Law

There is a strong case to be made that (i) international law in the pre-Charter era did not oblige neutral states to maintain their status, (ii) a binding conception of neutrality fits uncomfortably or not at all with the contemporary *jus ad bellum* and state responsibility law, and (iii) even if neutrality is seen as binding, the two most frequently-invoked circumstances precluding wrongfulness—self-defense and countermeasures—have fatal defects of their own, suggesting there is little point in pursuing the bindingness claim. One might read the absence of self-defense or countermeasures justifications by states involved in the Russian asset freeze as evidence that cognizance of these defects is widely shared, though the absence of any comprehensive legal justification from Ukraine’s supporters makes this a particularly difficult episode of state practice from which to draw legal conclusions.

III. ASSISTANCE UNDER QUALIFIED NEUTRALITY

So far, we have examined the lawfulness of assistance to victim states on the assumption that traditional neutrality law remained essentially intact. This section examines the question from the alternative assumption that a new version of neutrality has emerged to account for the modern *jus ad bellum*. This Article will refer to the principle as “qualified neutrality,” the term used by the U.S., its strongest proponent, though other terms are also used.¹⁵⁰

Qualified neutrality is an effort to reconcile traditional neutrality’s agnosticism on the use of force with the post-1945 prohibition on acts of aggression. Agnostic neutrality came under challenge in the early twentieth-century, as the 1919 League of Nations Covenant and the 1928 Kellogg-Briand Pact began to distinguish between lawful and unlawful uses of force.¹⁵¹ The U.S. interpreted these developments aggressively, describing Kellogg-Briand as fundamentally changing neutrality law, a position it later adopted in practice when it argued that its assistance to the U.K. under the 1941 Lend-Lease Act was not inconsistent with neutrality properly conceived.¹⁵² As Attorney-General Robert Jackson famously explained, “No longer can it be argued that the civilized world must behave with

¹⁵⁰ For the contemporary U.S. position, see Law of War Manual, *supra* note 49, sec. 15.2.2 (“The United States has taken the position that certain duties of neutral States may be inapplicable under the doctrine of qualified neutrality.”). Others refer variously to “differentiated neutrality,” “benevolent neutrality” and “non-belligerency.” See Ferro & Verlinden, *supra* note 14, at 32. For a concise discussion of how the terms have been used to describe different permutations of traditional neutrality law, see Wentker, *supra* note 14, at 965, n.7.

¹⁵¹ See DINSTEIN, *supra* note 17, at 84–86 (League Covenant); 87–89 (Kellogg-Briand); KENTARO WANI, NEUTRALITY IN INTERNATIONAL LAW: FROM THE SIXTEENTH CENTURY TO 1945 142–50 (2017).

¹⁵² Antonopoulos, *supra* note 24, at 43–45; Clancy, *Neutral Arms Transfers*, *supra* note 1, at 531–33.

rigid impartiality toward both an aggressor in violation of the treaty and the victims of unprovoked attack. We need not now be indifferent as between the worse and the better cause, nor deal with the just and the unjust alike.”¹⁵³ Jackson concluded that “the state which has gone to war in violation of its obligations acquires no right to equality of treatment from other states, unless treaty obligations require different handling of affairs. It derives no rights from its illegality.”¹⁵⁴

The UN Charter’s collective security regime created an even more pointed challenge. The Charter sought to alter the power dynamics of bilateral conflicts, challenging the symmetry between belligerents assumed by neutrality law. The international community would now isolate aggressor states by denying them allies and, if the Security Council so directed, oblige the rest of the international community to align itself with the victim state.¹⁵⁵ This conception of a collective imperative to stop aggressive war could be accomplished because (i) Charter Article 2(4) and its legal progeny distinguished in somewhat granular detail between lawful and unlawful uses of force,¹⁵⁶ (ii) the Security Council was empowered to determine illegality in specific cases,¹⁵⁷ and (iii) all U.N. member states were obligated to carry out Council dictates not to recognize or support an aggression, as well as to carry out any remedial steps the Council might

¹⁵³ Address Of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941, 35 AM. J. INT’L L. 348, 358 (1941), <https://perma.cc/PKY2-HAYP>.

¹⁵⁴ *Id.* at 354.

¹⁵⁵ In fairness, neutrality was also conceived as serving a kind of collective interest, since it addressed relations between belligerents and potentially all other states. So conceived, “a state of war was *not* simply a matter between the contending parties inter se. It inevitably and automatically affected the entire world.” NEFF, *supra* note 27, at 191 (emphasis in original).

¹⁵⁶ Article 2(4) provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This article was later fleshed out in General Assembly Resolutions (see the Friendly Relations Declaration, *supra* note 96, and the Definition of Aggression, GA. Res. 3314 (XXIX) (Dec. 14, 1974)), decisions of the International Court of Justice (Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27); Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, 2003 I.C.J. 161 (Nov. 6); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19)), and the statute of the International Criminal Court (Rome Statute of the International Criminal Court art. 8bis, *opened for signature* July 17 1998, 2187 U.N.T.S. 28 (entered into force July 1, 2002)).

¹⁵⁷ U.N. Charter, arts. 39–42.

prescribe.¹⁵⁸ There appeared little room in this scheme for third states to remain neutral or, even less, to join aggressor states as co-belligerents.

Despite this seeming logical imperative, many scholars point out that few states have fully endorsed qualified neutrality, including its main exponent the U.S.¹⁵⁹ State support for Ukraine after the 2022 Russian invasion has been invoked both in support of qualified neutrality (because it went only to a victim of aggression)¹⁶⁰ and against it (because no state explicitly relied on the principle to justify its actions).¹⁶¹

The case for qualified neutrality is strongest when the Security Council has not only designated an aggressor and a victim state but compelled other states to take sides.¹⁶² It may do so either by requiring member states to assist the victim

¹⁵⁸ U.N. Charter, art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”) and art. 48 (“The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.”). Even member states who might dissent from a particular finding of aggression are estopped from deviating from Council decisions because, as Charter Article 24(1) provides, the Council “acts on their behalf.” See *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 38 (May 31, 2004) (Special Court for Sierra Leone cites Article 24(1) agency principle to conclude that the agreement between Sierra Leone and the Security Council establishing the Court was “an agreement between *all* members of the United Nations and Sierra Leone.” (emphasis in original)).

¹⁵⁹ See Antonopolous, *supra* note 24, at 145–46; Clancy, *Neutral Arms Transfers*, *supra* note 1, at 533 n.38; Bartolini, *supra* note 1, at 288. The DOD Law of War Manual describes the U.S. position prior to its entry into World War II— that “neutral States had the right to support belligerent States that had been the victim of flagrant and illegal wars of aggression”—as “controversial.” Law of War Manual, *supra* note 49, § 15.2.3. The Manual does not address the most difficult question, discussed below, of whether non-treaty-based acts of collective self-defense fall within qualified neutrality. The Manual does state that “obligations” under regional or collective self-defense arrangements “*may* prevail over the State’s right under the customary law of neutrality to be impartial among the belligerents and to abstain from the armed conflict.” *Id.* §15.2.4 (emphasis added).

¹⁶⁰ Bartolini, *supra* note 1, at 289 n.41; Wolff Heintschel von Heinegg, *Neutrality in the War Against Ukraine*, LIEBER INST. (Mar. 1, 2022), <https://perma.cc/D87C-LBWQ>; Wentker, *supra* note 14, at 978, n.82 (collecting citations).

¹⁶¹ Clancy, *Neutral Arms Transfers*, *supra* note 1, at 534 (“qualified neutrality has not been invoked by any State to date as a justification for the supply of arms to Ukraine. The inescapable conclusion is that qualified neutrality is not a part of contemporary international law”); Paul Berman, *Party Status to Armed Conflict*, EJIL: TALK! (Apr. 3, 2025), <https://perma.cc/5WZN-C78U> (“[i]t is particularly notable how few States have referenced neutrality in relation to support for Ukraine.”).

¹⁶² Immediately after Iraq’s invasion of Kuwait on August 2, 1990, for example, the Council determined that “there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait,” and imposed a trade embargo on Iraq that it required all member states to observe. S.C. Res. 660 (Aug. 2, 1990); S.C. Res. 661 (Aug. 6, 1990).

The analysis becomes more complicated where the Council condemns the use of force by *both sides* and does not designate one state as the aggressor. See, e.g., S.C. Res. 1177, ¶ 1 (June 26, 1998) (responding to the Eritrea-Ethiopia conflict, Council “Condemns the use of force and demands

(something it has never done) or prohibiting them from assisting the aggressor (something it has done frequently).¹⁶³ While both these scenarios descriptively resemble qualified neutrality as an exception to neutrality obligations—in that third states may assist the victim without risk of becoming parties to the conflict—their right to do so derives not from neutrality law (or more accurately, an exception to neutrality obligations) but from the Council's Chapter VII authority to compel action. Chapter VII resolutions take normative precedence over neutrality "obligations," whether based in treaty or customary law.¹⁶⁴ The Council has also condemned force as illegal without also requiring subsequent action. One circumstance is when it "calls on" third states to assist a victim—the so-called "coalition of the willing" approach most famously associated with Resolution 678 on the 1990-91 Iraq-Kuwait war.¹⁶⁵ Another is its simple condemnation of force as unlawful and nothing more.¹⁶⁶

Despite this range of possible responses to aggression, Council condemnation is all that is needed to activate qualified neutrality as described by its proponents. Each of the actions just listed definitively identifies the aggressor and victim states. Individual member states must accept those conclusions notwithstanding any contrary views they might hold about the equities of a conflict. Additional steps such as embargoes, sanctions or assembling coalitions of the willing are *remedial responses* to the initial determination of illegality, but that determination itself resolves the lawful/unlawful force distinction at the heart of qualified neutrality. Once those roles are established, legally appropriate consequences for third states

that both parties immediately cease hostilities and refrain from further use of force"); S.C. Res. 1298, ¶ 2 (May 17, 2000) (invoking Chapter VII and demanding that "both parties immediately cease all military action and refrain from the further use of force"). In such cases, the Council could be describing an admittedly rare situation where both states engage in unlawful force. Or it could have refrained from designating an aggressor in the hope that a less judgmental approach would facilitate a quicker end to hostilities. As Robert Jackson's rather categorical phraseology implies (a state that has "gone to war in violation of its obligations"), his conception of qualified neutrality would not apply to such cases.

¹⁶³ The Council has regularly imposed arms embargoes on states and non-state actors for their use of military force. See Stockholm International Peace Research Institute, *Arms Embargoes*, <https://perma.cc/ADV6-CN44> (last visited May 19, 2026) (listing Council-imposed embargoes).

¹⁶⁴ A Council decision would supersede neutrality obligations in the Hague Conventions pursuant to Charter Article 103, which gives Charter obligations superiority over competing treaty obligations. Charter obligations are also understood to supersede rights or obligations under customary international law.

¹⁶⁵ S.C. Res. 678 (Nov. 29, 1990). For a discussion of other cases, see Neils Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'*, 11 EUR. J. INT'L L. 541 (2000) (discussing other examples).

¹⁶⁶ See, e.g., S.C. Res. 1177 (June 26, 1998) (responding to Eritrea-Ethiopia conflict, Council "[c]ondemns the use of force and demands that both parties immediately cease hostilities and refrain from further use of force").

may follow. For assistance to the victim state, international law simply does not prohibit lethal or non-lethal assistance to a state acting in lawful self-defense.¹⁶⁷ That aid would not, by definition, involve complicity in the state's wrongful use of force.¹⁶⁸ Whether or not the non-lethal aid qualifies as collective self-defense is irrelevant here. That difficult issue (discussed earlier) derived from the prior question of whether or not self-defense could function as a circumstance precluding the wrongfulness of neutrality law violations. But because qualified neutrality would pose no barrier to aiding a victim state, the aid would not be a wrongful act in need of a self-defense justification.¹⁶⁹

As for assisting the aggressor, state responsibility law requires third states not to "aid[] or assist another State in the commission of an internationally wrongful act."¹⁷⁰ That obligation is repeated for states assisting acts that violate peremptory norms.¹⁷¹ A state that continued agnostic neutrality and aided a state designated by the Council as an aggressor would be acting inconsistently with both these obligations of restraint, though the specific nature of the aid and how it facilitated the unlawful act would be critical questions.¹⁷²

These are the easy cases. Not only is qualified neutrality clearly explained by the authoritative nature of Council determinations and the duty of third states not to assist unlawful acts, but Council action is an effective rejoinder to the primary criticism of qualified neutrality at the time of Robert Jackson's speech: its subjectivity. As Edwin Borchard wrote in sarcastic response to Jackson,

¹⁶⁷ See text accompanying *supra* note 87 (non-lethal aid); U.N. Charter, art. 51 (permitting lethal aid in collective self-defense).

¹⁶⁸ See Alexandra Boivin, *Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons*, 87 INT'L REV. RED CROSS 467 (2005), <https://perma.cc/64TA-LA4U>.

¹⁶⁹ Clancy argues that if a state does invoke a circumstance precluding wrongfulness, including self-defense, this means it is abandoning reliance on a qualified neutrality rule. Clancy, *Neutral Arms Transfers*, *supra* note 1, at 534. There is some force to this claim, though to the extent the state's action qualifies as a use of force it would still require an affirmative justification that goes beyond avoiding abrogation of neutrality obligations.

¹⁷⁰ ARSIWA, *supra* note 10, art. 16. Charter Article 2(5) contains an inverse obligation—all member states "shall give the United Nations every assistance in any action it takes in accordance with the present Charter." It is unclear whether the Security Council condemning a use of force without more would qualify as "an action" of the U.N.. See Heller & Trabucco, *supra* note 1, at 261 (arguing for such a view).

¹⁷¹ ARSIWA, *supra* note 10, art. 41(2) ("No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.").

¹⁷² The ILC noted in its commentary to Article 16, "State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State." ARSIWA, *supra* note 10, at 37, ¶ 7.

the extent of the new discrimination would necessarily be determined for itself by each state. Its exercise seems to be based on the theory that a unilaterally assumed self-righteousness gives to acts of war a peaceful and benevolent connotation. All that is necessary is to deny that the country is a belligerent, and then apparently war becomes peace.¹⁷³

But what if the Security Council cannot act because of a veto, as in the case of Russia-Ukraine, or if it simply chooses not to act? How can third states convincingly distinguish between aggressor and victim states when conflict breaks out? Borchard's subjectivity critique, made before the U.N.'s founding, would appear to have continued application. As von Heinegg writes, "State practice has shown that without such an authoritative identification, it is often impossible to consider a given State an aggressor because all too often both sides of an IAC justified their military operations as an exercise of their individual or collective right of self-defense."¹⁷⁴ In some cases, other multilateral bodies may have singled out aggressor and victim states, such as the General Assembly's 2022 condemnation of Russia's Ukraine invasion, the Eritrea-Ethiopia Claims Commission finding that Eritrea was the aggressor in its 1998 war with Ethiopia, or the I.C.J.'s 1986 determination that the U.S. used unlawful force against Nicaragua.¹⁷⁵ But absent such collective determinations, to allow states to determine their own susceptibility to neutrality law would, the argument goes, derail the law's goal of limiting the spread of conflict by obliterating the traditionally clear and binary distinction between neutrals and belligerents. The belligerent aggrieved by a qualified neutral's assistance to its conflict opponent would be under no obligation to accept the neutral's view that it (the aggrieved belligerent) is an aggressor and has thus forfeited the protections of neutrality law.¹⁷⁶ A self-judging and inherently indeterminate third category would be added to neutrality law, one that states could easily invoke if they were seeking legal cover for their predatory uses of force.

One could end the discussion here by pointing out that few states have actually expressed support for qualified neutrality in these circumstances (i.e. absent a Security Council determination of wrongfulness).¹⁷⁷ But because the theory

¹⁷³ Edwin Borchard, *War, Neutrality and Non-Belligerency*, 35 AM. J. INT'L L. 618, 619 (1941), <https://perma.cc/HP42-E5T3>.

¹⁷⁴ von Heinegg, *supra* note 160, at 3.

¹⁷⁵ GA Res. ES-11/1 (March 18, 2022); Eritrea-Ethiopia Claims Commission, Partial Award: *Jus ad bellum*—Ethiopia's Claims 1–8, XXVI REP. INT'L ARB. AW. 457, 467 ¶16 (2009); Nicaragua Case, *supra* note 94, at 292.

¹⁷⁶ von Heinegg, *supra* note 15, at 555–56.

¹⁷⁷ Thibault Moulin, *The Thin Red Line: Neutrality and Belligerency in Modern Conflicts*, 7 CARDOZO INT'L & COMP. L. REV. 901, 913 (2024) ("the United States is an isolated supporter of the theory, and this approach has generally been disavowed by the classical views of several states, both before and after the Russian invasion of Ukraine."); Ferro & Verlinden, *supra* note 14, at 33 ("besides the official

purports to offer an alignment with the contemporary *jus ad bellum* that traditional neutrality does not, it is worth exploring two additional points. The first is that the subjectivity critique considerably overstates the danger posed by qualified neutrality. The second is that even taking account of the first point, qualified neutrality makes substantially less of a contribution to understanding the legal status of third parties than its proponents suggest.

For the first point, let us assume the most straightforward version of qualified neutrality: if a use of force violates the *jus ad bellum* then support for the “victim state” is not constrained by neutrality obligations. And as we have done earlier, let us further distinguish between third party assistance that qualifies as collective self-defense and assistance that does not. If the assistance is an act of collective self-defense, then Article 51 of the Charter already allows third states (after being invited) to invoke that right unilaterally. Unilateral action is the critical attribute of self-defense that distinguishes it from its institutionally-based companion exception to Article 2(4), which is collective security under Security Council guidance. As Dinstein observes, “[t]he essence of self-defense is self-help.”¹⁷⁸ While Article 51 requires that self-defense actions be “immediately” reported to the Security Council, and provides further that the right terminates when “the Security Council has taken measures necessary to maintain international peace and security,” it leaves the initial characterization of the triggering act—an “armed attack”—entirely to the attacked state.¹⁷⁹ Qualified neutrality in this scenario would add nothing to the discretion already given to third states acting in collective self-defense.¹⁸⁰ Its marginal subjectivity, in other words, would be minimal if not zero.

Alternatively, if third-state assistance does *not* qualify as collective self-defense—as we have argued would not be the case for weapons transfers or financial assistance—then qualified neutrality simply does not apply. No subjectivity concerns can arise. The doctrine is designed to give priority to the *jus ad bellum* by permitting assistance by neutrals in circumstances where that assistance would be prohibited by traditional neutrality law. But in this alternative scenario, these forms of assistance are simply not regulated by the *jus ad bellum* and so it has no preemptive effect on neutrality obligations. There would still remain the question of whether the assisting state would become a “party to the conflict”

Italian position of non-belligerency during the Iraq conflict in 2003, no other State in recent history has tried to justify violations of neutrality law by reference to such an intermediate status.”).

¹⁷⁸ DINSTEIN, *supra* note 17, at 202.

¹⁷⁹ The law of state responsibility, in which self-defense is a circumstance precluding wrongfulness, does not alter the essentially unilateral nature of self-defense actions. Article 21 of the ASR refers to acts of self-defense taken “in conformity with the Charter of the United Nations.”

¹⁸⁰ The attacked state would also need to request assistance from a third state and the force used would need to be necessary and proportionate, but these factors are tangential to the neutrality question. See DINSTEIN, *supra* note 17, at 249–53; 318–20.

by virtue of providing assistance to only one side. But that is separate from the effect of qualified neutrality on assistance not considered an act of collective self-defense. That effect is nil.

The second point follows from the first: qualified neutrality adds nothing to contemporary international law's understanding of third state actions. Let us examine the same two scenarios. If third state assistance qualified as an act of collective self-defense, then qualified neutrality drops out of the picture. It purports to exempt acts consistent with the *jus ad bellum* from neutrality limitations. Acts of collective self-defense are quintessentially consistent with those obligations; they are at the heart of the *jus ad bellum*. The third state's rights, therefore, will be wholly a matter of collective self-defense doctrine. If the assistance is not an act of collective self-defense, then qualified neutrality does not apply, since it only purports to make room for actions that are consistent with the *jus ad bellum*.

Alexander Wentker has proposed a different approach that stems from the same imperative of reconciling traditional neutrality with the modern *jus ad bellum*.¹⁸¹ Wentker finds numerous faults with a separate "qualified" status in neutrality law that would allow third states to provide assistance to victims of an armed attack. For one, a separate qualified neutrality category would unnecessarily allow states to opt out of neutrality law in its entirety, dispensing with other obligations that have retained their usefulness.¹⁸² Instead, Wentker argues for an exception to neutrality obligations themselves that permits assistance to an attacked state. "Neutrality duties of non-assistance and prevention, if applied to a victim of an armed attack, would thus conflict with the effective exercise of the right to self-defence. To avoid that conflict, systemic considerations require reading these neutrality duties in light of the *jus ad bellum* and understanding their scope as containing a carve-out for this scenario."¹⁸³

Wentker's approach accomplishes at the level of primary rules what arguments for self-defense and countermeasures seek to achieve via secondary rules of state responsibility. Like the latter approach, his claim requires accepting Buchan's position that assistance to an attacked state short of armed force may qualify as collective self-defense.¹⁸⁴ And like all efforts to justify or excuse neutrality

¹⁸¹ Wentker, *supra* note 14. Wentker also rejects using countermeasures as a circumstance precluding the wrongfulness of neutrality violations. *Id.* at 975–76.

¹⁸² *Id.* at 990 ("Beyond what is required to give effect to the purpose of the *jus ad bellum*, there is no reason not to give effect to the wider, conflict-constraining function of the law of neutrality, which would be undermined if neutrality were an entirely optional status.").

¹⁸³ *Id.* at 980.

¹⁸⁴ Buchan, *supra* note 80. This article has argued against this position. *See* text accompanying notes 80–90, *supra*.

transgressions, it requires designating them as internationally wrongful acts. This Article has argued against both positions. But those disagreements aside, Wentker argues that a carve-out is methodologically preferable because viewing the *jus ad bellum* as hierarchically superior to neutrality law limitations is more consistent with preferences widely visible throughout the international legal system than constructing an entirely new status in neutrality law.¹⁸⁵ Given neutrality law's effective absence from most IACs since 1945, this is a compelling claim.

Wentker's approach shares with qualified neutrality a vulnerability to third states acting in bad faith, claiming to support a belligerent victimized by an armed attack but actually pursuing their own interests in the conflict's outcome. But as this Article has noted, both proceed from an assumption that the Charter's collective mechanisms for identifying unlawful force are unavailable. As a result, neither would add to the unilateralism inherent in the right to self-defense itself.

IV. BREACH OR NO BREACH: DOES IT MAKE A DIFFERENCE?

While it has been useful to question each constituent step in the standard position, one also needs to ask whether it is all worthwhile. If neutrality law has fallen into desuetude and is not a factor in contemporary international law (as some argue), the legality of third-party assistance will be determined solely by the *jus ad bellum*. But if neutrality is still extant, the question is whether the standard position ultimately offers third states an analytical path that is different from the modern *jus ad bellum*. In this section, this Article will argue that it does not. A *jus ad bellum* analysis is still necessary and will proceed along the same steps whether one accepts the standard position or not. It turns out the analytical contortions purportedly made necessary by third party "breaches" of neutrality law have been a tempest in a teapot.

The premise of the standard position is that third states can avoid becoming "parties" to conflicts when they aid victim states. Under traditional neutrality law this was one possible response for an opposing belligerent party, the others being not reacting at all or engaging in one-time reprisals.¹⁸⁶ The states supporting Ukraine appeared to fear the risk of party status when they avoided claiming they were acting in collective self-defense.¹⁸⁷ The fear of party status was also reportedly

¹⁸⁵ *Id.* at 984 ("By accepting the *jus cogens* rules prohibiting aggression and permitting self-defence, States have consented to the systemic effects of these rules. States have thus accepted that norm conflicts will be avoided or resolved in a way that gives effect to these rules.").

¹⁸⁶ See discussion accompanying note 33, *supra*.

¹⁸⁷ As Wentker recounts, "several NATO member states officially attach their political red lines to the threshold at which they would be parties to the conflict under international law. These references make the legal notion of party status a crucial security policy benchmark." Wentker, *supra* note 1, at

one reason behind Western states' reluctance to seize Russian state bank assets.¹⁸⁸ To the extent these were serious legal arguments, the standard position purported to provide an off-ramp to avoid this much-feared outcome.¹⁸⁹

The standard position fails to accomplish this goal regardless of which of three possible outcomes emerges from its analysis. The first possibility is that it succeeds on its own terms, because third state support is deemed either collective self-defense or a collective countermeasure. Both preclude the wrongfulness of a neutrality law violation, meaning that neutrality poses no legal barrier to providing support. But the standard position will have done so not because the third state fails to become a party to the conflict but because the contemporary *jus ad bellum* would approve its actions. Self-defense as a circumstance precluding wrongfulness obviously derives entirely from it being an exception to Article 2(4)'s prohibition on aggressive force. A valid countermeasure, by definition, cannot involve the unlawful use of force.¹⁹⁰ Neither would involve a *jus ad bellum* violation. Again, the critical point is that neutrality's "party to the conflict" dictate plays no role in resolving the third state's legal status.

The second possible outcome is that claims supporting both circumstances precluding wrongfulness (self-defense and countermeasures) fail for the various reasons detailed above.¹⁹¹ As a result, the purported "breach" of neutrality obligations is not excused and the supporting third state could be deemed a party to the conflict under traditional neutrality law. Does this party designation allow the opposing belligerent state to use force against the supporting third state, as some states assisting Ukraine have feared?

The answer is no. The aid and the response it elicits today constitute some, but not all of, the data points contributing to a legal characterization of the third state's actions. Justifications for the use force are now the exclusive province of

645. See also Deeks et al., *supra* note 140, at 2 (Ukraine's supporters "regard the defeat of Ukraine as unacceptable, but do not want to become co-belligerents in its war with Russia.").

¹⁸⁸ Hathaway et al., *supra* note 111, at 1006–07 ("the states considering the seizure of Russia's assets, including the United States, understandably wish to refrain from suggesting that they have entered, in their own capacity, into a state of belligerency with Russia. An explicit invocation of self-defense or collective self-defense to justify antagonistic seizures would be in tension with this delicately delineated abstention"); Deeks et al., *supra* note 140, at 6 ("the seizure of an adversary's assets normally occurs in the context of an armed conflict, and none of the Western states saw themselves (and did not want to be seen) as stepping over the line into co-belligerency.").

¹⁸⁹ Alternatively, one could just not take the "party" argument seriously as a legal point. Marko Milanovic may well be correct that the states assisting Ukraine were simply trying to muddy their political reluctance to escalate the Ukraine conflict with imprecise but legal-sounding rhetoric. Marko Milanovic, *On Parties and Co-Parties: A Comment on Alex Wentker's Book*, EJIL TALK! (Apr. 1, 2025), <https://perma.cc/2D2U-R5UY>.

¹⁹⁰ ARSIWA, *supra* note 10, art. 50(1)(a).

¹⁹¹ See the discussion accompanying notes 79–118, *supra*.

the *jus ad bellum*, and so the belligerent's right to respond with force turns on which *jus ad bellum* category applies: has the third state engaged in an armed attack, entitling the belligerent to respond in self-defense, or in collective self-defense, which would not entitle the belligerent to respond (there is no self-defense to self-defense)?¹⁹² These categories generate their own questions. An armed attack must reach a certain gravity threshold.¹⁹³ Self-defense turns on who attacked first.¹⁹⁴ A third possibility is that the acts simply do not implicate the *jus ad bellum* because, as this Article argued above, providing weapons, funds or intelligence does not involve armed force.¹⁹⁵ These are empirical questions. The aid along with other factors—including the purpose, intensity, duration, effect and targets of the third party's actions—will be considered in their totality.

The antiquated “party to the conflict” dictate adds nothing to this analysis. In the 19th Century, an aggrieved belligerent could trigger party status by a unilateral declaration, since formal rather than empirical factors predominated and support for an opposing belligerent was only one of the virtually unlimited justifications available for starting a war. Moreover, the nineteenth-century approach assumed that abrogation of neutrality could move a state seamlessly into party status with no further triggering acts. The equivalent cannot happen today.¹⁹⁶ The aggrieved belligerent's right to use force self-defense under the Charter scheme is based on an objective test of whether it has been subjected to unlawful force that passes a minimum level of gravity.¹⁹⁷ In Wentker's words, “in contrast to the subjective conception of the state of war, the existence of an armed conflict (international or non-international) does not depend on the parties considering themselves to be engaged in a conflict.”¹⁹⁸ It is true that whether a state becomes a party is a critical threshold question for the application of international humanitarian law (IHL),

¹⁹² The basic assumption of this article has been that the assisted state has been unlawfully attacked and is properly exercising self-defense.

¹⁹³ CHRISTIAN HENDERSON, THE USE OF FORCE AND INTERNATIONAL LAW 276 (2d ed. 2014), <https://perma.cc/C8JT-VHLS>.

¹⁹⁴ *Id.* at 262.

¹⁹⁵ The quantum of facts used to determine whether “armed force” has been used will vary widely. Christian Henderson has broadly grouped the factors in “*effects* created by an action or, alternatively, the *means* used to create them.” *Id.* at 94. There are other approaches.

¹⁹⁶ Of course, classic neutrality could be abrogated by a use of force that would also qualify as an armed attack under the contemporary *jus ad bellum*, but this Article is explicitly not concerned with such a scenario.

¹⁹⁷ TOM RUYS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER 175 (2010), <https://perma.cc/J2TQ-ADH7> (“[t]he essence of an ‘armed attack’ remains of course the objective element.”).

¹⁹⁸ ALEXANDER WENTKER, PARTY STATUS TO ARMED CONFLICT IN INTERNATIONAL LAW 190 (2024), <https://perma.cc/G34B-WDZB>.

but that is also an objective, empirical question¹⁹⁹ and cannot be triggered by the mere abrogation of neutrality.²⁰⁰ To be sure, as Wentker points out, “under the *jus in bello*, becoming a party would mean that members of the state’s armed forces would be targetable as combatants.”²⁰¹ But “the *jus in bello* legality of such targeting would not remedy the potential illegality under the *jus ad bellum*.”²⁰²

The third possible outcome is that “breaching” neutrality obligations is simply not wrongful, as this Article has argued. The result is that third party support needs no justification to preclude its wrongfulness and the support can (as above) be evaluated as a data point in a *jus ad bellum* analysis. It does not follow from a lack neutrality violations that the assistance is *permitted* under the modern *jus ad bellum*. This Article has also argued against aid being considered unlawful “indirect force,” but others may disagree. If it is force of any kind, the aid would qualify as collective self-defense, again assuming the assisted state is lawfully defending itself.

In short, whether the standard position succeeds or fails, and for whatever it fails, the modern *jus ad bellum* will reach conclusions based on all the acts of all the parties, with subjective declarations of status (neutral, belligerent) playing no role in the fact-based inquiry. Any outcome of the standard position returns us to this same inquiry. Whether it succeeds or fails makes no difference.

V. CONCLUSIONS

The legal issues confronting third states supporting Ukraine after 2022 were understandably novel and unsettling. Neutrality law had not been a front burner question for international law since the first world war, and arguably earlier. Interstate armed conflicts, in which neutrality questions can arise, had been in

¹⁹⁹ States become parties for IHL purposes, according to Article 2(1) common to all four Geneva Conventions, if they participate in declared wars “or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, art. 2(1). In commentary, the ICRC notes that “Article 2(1) underlines the pre-eminence of the factual existence of armed conflict over the formal status of war. Therefore, the determination of the existence of an armed conflict within the meaning of Article 2(1) must be based solely on the prevailing facts demonstrating the *de facto* existence of hostilities between the belligerent.” *Id.*, Commentary of 2016, ICRC ¶ 211, <https://perma.cc/2NF2-BTYW>.

²⁰⁰ Many authors have pointed out the distinct nature of neutrality and the *jus in bello*. See Christopher Greenwood, *Historical Development and Legal Basis*, in *The Handbook of International Humanitarian Law* 1, 11 (Dieter Fleck, ed.) (2d ed. 2008), <https://perma.cc/LJ2Z-V2VG> (“international humanitarian law thus includes most of what used to be known as the laws of war, although strictly speaking some parts of those laws, such as the law of neutrality, are not included since their primary purpose is not humanitarian”); Dinstein, *supra* note 17, at 27 (“The laws of neutrality are operative only as long as the neutral State retains its neutral status. Once that State becomes immersed in the hostilities, the laws of neutrality cease being applicable, and the *jus in bello* takes their place.”).

²⁰¹ Wentker, *supra* note 1, at 646.

²⁰² *Id.*

decline for decades. And when such conflicts arose, the U.N. Security Council had regularly identified an aggressor and victim state, largely mooted the possibility that third states might nevertheless remain neutral as between the two.

States may have thus resorted to the law of state responsibility to justify “breaches” of neutrality obligations simply out of an abundance of caution. But this Article has argued that the effort is misguided. First, it is premised on transgression of neutrality obligations being internationally “wrongful,” a position not held by international law in neutrality’s heyday and at odds with the general absence of limitations on state uses of force. Second, even if neutrality transgressions are wrongful, neither the justifications of self-defense nor countermeasures succeed on their own terms. The normatively tenuous conception of “qualified neutrality,” premised on the priority of the modern *jus ad bellum*, simply begs the question of whether that body of law would itself support the particular third-party assistance in question. Qualified neutrality adds nothing of substance to that analysis.

Pointing out the hollowness at the core of these arguments should not be mistaken for legal certainty. Neutrality law exists in an international legal environment in which the infrastructure of mutual interest in peace and multilateralism seems on the verge of collapse. The neutrality problem has a complex but relatively clear solution if the *jus ad bellum* of the U.N. Charter continues to govern our assumptions about the use of force. But if it does not, the unilateralism and balance of power politics that gave rise to neutrality in the first instance may appear to be an attractive legal frame. Neutrality in that case may well stage a comeback.