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NEUTRAL RIGHTS AND COLLECTIVE COUNTERMEASURES FOR *ERGA OMNES* VIOLATIONS

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Abstract The Western response to the Russian invasion of Ukraine has featured remarkable solidarity over diplomatic and sanctioning initiatives. This unity of action, however, has largely not extended to developing or non-Western States. Many such States have, instead, expressed their non-alignment in respect of Western 'economic warfare', albeit not infrequently while also condemning Russia's military actions. This article proposes an approach to reconciling the positions of States in different economic, geopolitical and regional/cultural alignments. First, it suggests that current norms on State responsibility do not rule out using collective countermeasures against States accused of *erga omnes* norm violations, including via sanctions not authorised by the United Nations but rather imposed by coalitions. At the same time, however, it is argued that individual third-party States retain extensive rights to decide whether or not to participate in such initiatives. This autonomous agency can be derived, in part, through the continued applicability of traditional neutrality principles that require all sides to a conflict to respect the status of neutral States. As collective countermeasure initiatives come to be used more frequently in response to global conflicts, the 'forgotten' rules of neutrality provide a useful guide for balancing inter-State legal relations.

Keywords: *erga omnes*, *jus cogens*, neutrality, countermeasures, State responsibility.

I. INTRODUCTION

Outside of the situations of self-defence or a duly authorised action undertaken by the United Nations (UN) Security Council to maintain international peace and security, the use of force by States violates international law. Aggression has come to be seen as a paradigmatic international crime, and also as a violation of *jus cogens*, the peremptory norms of international society.[1]

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[1] See H Kelsen, 'Collective Security and Collective Self-Defense under the Charter of the United Nations' (1948) 42(4) AJIL 783; M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59(4) Law&ContempProbs 63.

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Violations of this legal prohibition on aggression may be responded to by the UN Security Council itself acting as the designated UN organ that may employ 'effective collective measures' against threats to international peace and security.[2] However, the Security Council is not always up to this task, particularly when the alleged act of aggression has been committed by one of its permanent veto-holding members.

The degree to which that function of the Security Council may instead be exercised by other actors, such as individual States, 'coalitions of the willing', or regional organisations, has long been subject to debate.[3] However, as has been evident in the international response to the Russian invasion of Ukrainian territory that began on 24 February 2022, there is a growing body of State practice whereby groups of States have taken it upon themselves to exercise 'effective collective measures' against norm-violators in lieu of Security Council action.[4] Such collective sanctioning practices have also been used to target other alleged acts by States that, like aggression, constitute violations of *erga omnes* obligations.[5] This increasing use of economic sanctions and other forms of countermeasures by States seeking to pressure a norm-violating peer implicates a range of issues involving the rights and obligations of those carrying out sanctions, those at whom these measures are aimed, and also the role played by third States.

This article focuses on the rights and duties of third States in situations where alleged *erga omnes* norm violations are met by regimes of collective countermeasures. Although this problem appears to constitute a gap in existing legal doctrine (especially given the novelty and relatively contested status of collective countermeasures themselves), it is argued that there is in fact a substantial body of doctrine and precedent which offers relevant guidance. On the one hand, with respect to violations of norms constituting *jus cogens*, very recent developments suggest the existence of a general 'duty to cooperate' to bring about an end to such violations.[6] However, the exact status, scope and content of this duty remain debatable, and its vagueness complicates any effort to define in greater detail the resulting concrete obligations upon States.

[2] UN, Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 1 (UN Charter).

[3] See, eg, E Benvenisti, '"Coalitions of the Willing" and the Evolution of Informal International Law' in C Calliess, G Nolte and P-T Stoll (eds), *"Coalitions of the Willing": Avantgarde or Threat?* (Carl Heymanns Verlag 2007) 1.

[4] Such practices of circumventing Security Council action were, however, already first introduced almost immediately after the establishment of the UN system due to the emergence of Cold War enmities. See, eg, Q Wright, 'The Prevention of Aggression' (1956) 50 AJIL 514; JL Kunz, 'Legality of the Security Council Resolutions of June 25 and 27, 1950' (1951) 45 AJIL 137.

[5] Cf L Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127, 1131.

[6] ILC, 'Report of the International Law Commission on the Work of its Seventy-Third Session' (18 April–3 June and 4 July–5 August 2022) UN Doc A/77/10, Chapter IV, 70–3 (Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) with Commentaries).

Does 'cooperation', for example, mean that third States may be forced to participate in any and all sanctions efforts taken by coalitions of the willing, regardless of the costs imposed on participants as a result, or the degree of remoteness of these measures from the censured act? Or, at the opposite extreme, does 'cooperation' merely entail a duty not to obstruct good-faith sanctioning efforts by States actively, such as by facilitating any *jus cogens* violating acts? The lack of clarity on such questions may prove to have significant practical consequences, as third States may justly worry about, for example, the risk of secondary sanctions resulting merely from choosing to maintain some normal commercial ties with an alleged *jus cogens* norm-violator.

Thus, in order to define the scope of third States' rights and duties with respect to collective countermeasure regimes which implicate *jus cogens* or other *erga omnes* norm violations, this article suggests the continued relevance of the traditional international law of neutrality. Specifically, the law of neutrality contains principles which may help to define the limits of collective countermeasure regimes in terms of the duties they impose on non-participating States, serving as a counterpoint to potentially overbroad interpretations of the novel 'duty to cooperate'.

Notably, while neutrality law was historically applied primarily in situations of outright military conflict, it was also used with respect to various forms of blockade (whether 'pacific' or during wartime), and has also been considered applicable in the context of unilateral and multilateral economic sanctions. While each of the above forms of countermeasures for wrongful action by States was in 1945 identified as a prerogative of the Security Council as authorised enforcer of international legal sanctions in general, the last method, economic sanctions, has, along with some other forms of countermeasures, remained in use, albeit not uncontroversially, by States outside of Security Council-approved contexts.

Beginning with the premise that the law of neutrality remains customarily valid with respect to *jus in bello*, this article argues that neutrality principles —specifically, what is here identified as the core 'right to maintain a neutral status'—also characterise the role of third States with respect to collective sanctions regimes imposed without Security Council authorisation, but with alleged justification on the basis of *erga omnes* norm violations by their targets. Relatedly, and coming from another direction, norms concerning the proportionality of countermeasures also support a recognition of neutral third-party status, mitigating against the potentially excessive application of otherwise valid collective sanction regimes. Both 'vestigial' neutrality law and proportionality norms ought to apply to collective countermeasures undertaken in accordance with the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), and the latter should be interpreted to require respect for the neutral rights and autonomy of non-participating States.

The sections that follow first explain the legal status of neutrality in its traditional contexts from the law of armed conflict to other forms of sanction recognised under international law, both during its pre-1945 heyday as well as in its continued (if reduced) applicability to subsequent conflicts. It then assesses the relevant features of current collective countermeasure practices and doctrine that necessitate a better understanding of the rights and duties of third States. Finally, it seeks to show that neutrality doctrine may offer an effective, well-established, and widely endorsed set of principles for the treatment of third States in collective sanctioning regimes.

II. THE TRADITIONAL NEUTRALITY PARADIGM IN THE LAW OF WAR

A. The Sources and Justifications of Neutrality Law

Though it has usually been regarded as a topic of reduced importance since the establishment of the UN Charter system, the idea of neutrality was once fundamental to international law. In the view of some of its leading scholarly advocates of the early twentieth century, the doctrine of neutrality in wartime and the various norms that it comprised had 'narrowed the area of conflict', 'kept a large part of the world at peace', and 'been conducive to the making of sensible treaties of peace', as well as '[doing] much to ameliorate the duration and the barbarity of war'.[7]

Though that positive assessment would be contested by some critics of neutrality doctrine, especially during the interwar period of the 1920s–30s, fewer perhaps would deny the ongoing legal significance of neutrality until the major changes introduced by the UN Charter.[8] As an aspect of customary international law, the notion of neutrality 'began to be detected in the fifteenth century and gradually became more pervasive until it was practically ubiquitous in the late eighteenth and nineteenth centuries'.[9] As Grotius had summarised the early understandings of neutrality:

> it is the duty of those who profess neutrality in a war to do nothing towards increasing the strength of a party maintaining an unjust cause, nor to impede the measures of a power engaged in a just and righteous cause. But in doubtful cases, they ought to shew themselves impartial to both sides.[10]

The notion of 'impartiality', as Grotius explained, drawing on ancient examples, implied a duty not to confer benefits on one side to a conflict that were not also available to the other side (the exception, however, being the legitimacy of supporting a 'just and righteous' war). Neutrals themselves,

[7] EM Borchard, 'Neutrality' (1938) 48(1) YaleLJ 37, 53.
[8] See, eg, Q Wright, 'The Present Status of Neutrality' (1940) 34(3) AJIL 391.
[9] ibid 394.
[10] H Grotius, *The Rights of War and Peace* (AC Campbell trans, M. Walter Dunne 1901 [1625]).

meanwhile, had rights against violation of their territory or the security of their nationals by belligerents.

By the time of Emmerich de Vattel's *Droit des Gens*, these general principles were capable of explanation in the form of more specific rules. In respect of the duties of neutrals, de Vattel continued to emphasise the principle of impartiality as the core of the relevant doctrine. This required, first, that neutral States give no military assistance to either of the two warring sides (including 'furnish[ing] troops, arms, ammunition or any thing of direct use in war'). Secondly, impartiality also required that '[i]n whatever does not relate to war, a neutral and impartial nation must not refuse to one of the parties … what she grants to the other'.[11] With regard to the latter norm, as de Vattel had emphasised, commercial relations between neutral States and belligerents should not be compromised, nor could one side take exception to commerce of a neutral with their enemy. That held true even for preferential trade with one warring side, provided these were a continuance of 'customary trade', rather than being calculated to disadvantage its opponent.[12]

As regarded the rights of neutrals, these included rights against interruption to such customary commercial and diplomatic relations with both warring sides, as well as the inviolability of the neutral State's territory, goods and citizens to interference by either side of the conflict. In general, the aim of maintaining the overall stability and increase of commercial relations among States even in times of (localised) conflict grew to become one of the defining aspects of neutrality doctrine by the mid-nineteenth century.[13] Indeed, even those who professed relative reticence about the capacity of neutrality rules to help 'maintain peace' or to 'ameliorate the duration and the barbarity of war' tended to accept that, if nothing else, the increasing attention to such rules within the Western community of States[14] would indeed help to ensure the continued 'growth of civilisation and commerce' despite occasional inter-State enmities.[15]

The most significant embodiments of neutrality norms in jurisprudence, codes, as well as positive treaty instruments were motivated by each of these justifications, particularly the latter. The watershed *Alabama* arbitration of

[11] E de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (T & JW Johnson & Co 1863) [1758] 438.

[12] ibid 441. [13] See WE Hall, *International Law* (7th edn, Clarendon Press 1917) 632.

[14] Like most rules of public international law, the norms associated with neutrality were not respected by Western States with respect to non-European powers on a basis of strict equality before the mid-twentieth century. Indeed, one of the most frequently articulated complaints by non-Western international lawyers regarding the existing international legal order in the late nineteenth and early twentieth centuries concerned their States' inability to enjoy the rights of neutrals to have their territory and citizens respected as inviolable during foreign conflicts. See, eg, G Zhou, 'Juwai Zhongli Tiaogui Pingyi [Commentary on the Neutrality Regulations]' (1915) 1(8) Jiayin 1; see also RM Mitchell, *Recentering the World: China and the Transformation of International Law* (CUP 2022) 128–9.

[15] HS Maine, *International Law: A Series of Lectures Delivered Before the University of Cambridge, 1887* (John Murray 1888) 33.

1872 turned on a more specific articulation of duties of due diligence by neutral powers, in that case Britain vis-à-vis the American Civil War, to prevent the use of the neutral's territory to the advantage of either side to a conflict.[16] Though the notion of 'due diligence' itself remained comparatively vague, efforts to define the scope of neutral duties and corresponding rights better led to significant and animated efforts by the Institut de Droit International and other major international law associations.[17]

The principle of impartiality, and the acceptability of maintaining the status quo of normal commercial ties with belligerents, remained core features of the developing neutrality doctrine. As Travers Twiss had phrased the rule, 'the maintenance of an order of things which existed prior to the war, against which no complaint was raised in time of peace … cannot expose a Neutral Nation to any imputation of bad faith towards either of two Belligerent parties'.[18] The increasing doctrinal insistence on the rights of neutral States to conduct trade without excessive restrictions by belligerents led to further efforts to explain the rules of neutrality. These were prominent aspects of the 1899 and (especially) 1907 Hague Conferences, at the latter of which specific conventions were signed codifying, for the first time in detail, 'the Rights and Duties of Neutral Powers and Persons in case of War on Land' (Convention V) as well as 'the Rights and Duties of Neutral Powers in Naval War' (Convention XIII). These conventions remain, today, the most widely endorsed global legal instruments articulating neutral rights and duties during wartime. Along with the Havana Convention on Maritime Neutrality adopted at the Sixth International Conference of American States in 1928, Hague Conventions V and XIII form the most recent expression of the general views on neutrality amongst States.

Many of these rules of neutrality law that were clarified by the instruments just mentioned turned on relatively detailed points regarding the conduct of naval warfare, particularly the taking of prizes—a highly important topic in the wars of the late nineteenth and early twentieth centuries. However, some of the rules developed had much wider applicability. These included newly specified rules regarding the conduct of commerce by neutral States, with an increasingly clear demarcation between normal commercial ties and the provision of military assistance. Significantly, however, the provision of general loans or 'open credits' to one warring side was increasingly also regarded as a violation of the duty of impartiality, given the ease with which such assistance could be turned to direct military applications.[19]

[16] Treaty for an Amicable Settlement of All Causes of Differences between the United States and Great Britain (adopted 8 May 1871, entered into force 17 June 1871) art 6.

[17] J Brown Scott (ed), *Resolutions of the Institute of International Law* (Carnegie Endowment of International Peace 1916) 12–13.

[18] T Twiss, *The Law of Nations Considered as Independent Political Communities: On the Rights and Duties of Nations in Time of War* (2nd edn, Clarendon Press 1875) 473.

[19] Havana Convention on Maritime Neutrality (adopted 20 February 1928, entered into force 21 January 1931) 135 LNTS 187, art 16 contains such a provision, but also notes an exception for loans or credit marked off for specific non-military purposes: 'The neutral state is forbidden: (a) To deliver

Another key feature of the developing neutrality doctrine as reflected in the Hague Conventions as well as subsequent scholarly commentary was an increased emphasis on the rights of neutrals to maintain their neutral status, free from compulsion by either party to a conflict. Article 1 of Hague Convention XIII begins by articulating the principle that the obligation upon belligerents to respect the sovereign rights of neutral States and the right of the neutral State to inviolability of its territory are inherent in the very existence of States.[20] The topic of whether or not States outside of a situation of hostilities had a 'right of neutrality'—ie a general right not to be targeted by hostile or interventionist measures by the parties to a conflict—had been debated by international law scholars with differing views. However, by the end of World War I, it was increasingly agreed that neutrality was, rather than merely a set of general obligations for conduct by belligerents and third States during wartime, also itself a status which such States had a positive right to maintain in an unmolested condition.[21] The next sections will describe the survival of this 'right to maintain a neutral status' through World War II and into the post-1945 UN Charter era.

B. The Transition to Collective Security and Continued Applicability of Neutrality Norms

During the inter-war period, the prevailing positive assessment of neutrality doctrine was increasingly contested by advocates of legal arrangements geared toward collective security.[22] The latter ideal led to major developments in the sources of law such as the League of Nations Covenant and the Kellogg–Briand Pact, in the former of which States agreed to collective sanctioning of member States carrying out aggression against other members and by the latter of which States renounced the use of war 'as an instrument of national policy'.[23] Under both instruments, as would later be

to the belligerent, directly or indirectly, or for any reason whatever, ships of war, munitions or any other war material; (b) To grant it loans, or to open credits for it during the duration of war. Credits that a neutral State may give to facilitate the sale or exportation of its food products and raw materials are not included in this prohibition.'

[20] Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, entered into force 26 January 1910) art 1: 'Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.'

[21] L Oppenheim and RF Roxburgh (eds), *International Law: A Treatise* (Longmans, Green and Company 1921) 407: 'the Law of Nations in its present development objects to a would-be neutral State being forced into war, and a belligerent who refuses to recognise it as neutral violates International Law'.

[22] See, eg, HJ Morgenthau, 'The Problem of Neutrality' (1938) 7 UKanCityLRev 109.

[23] The League's collective sanction policy in response to acts of aggression by members against other members was contained in the Covenant of the League of Nations (28 April 1919) art 16, which required 'the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of

the case under the UN Charter, wars of aggression were to be regarded as violations of a mutual obligation held by each of the signatory States, rather than only localised conflicts between two (or more) active belligerent parties.

The innovations of the Kellogg–Briand Pact, UN Charter, and Nuremberg and Tokyo Tribunals in denoting the illegality of wars of aggression in turn served to found a new *jus ad bellum* order, one within which some uses of force were to be condemned universally. As the US Secretary of State, Henry Stimson, had argued in 1932, 'hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers'.[24] While this strong expression of a doctrinal shift remained debatable, it was generally accepted that the emerging norms of collective security that were developing were placed in stark tension with neutrality. Hersch Lauterpacht expressed the view that 'broadly speaking neutrality and collective security are mutually exclusive: the more there is of one the less there is of the other'.[25] Hans Morgenthau wrote that norms of collective security were 'legally … based on the distinction between lawful and unlawful warfare and the obligation to cooperate actively with those waging lawful war'.[26] This conflicted starkly with strict ideas of neutrality which required the 'fundamental obligations' of 'abstention from interference with the warring activities of other States and impartiality toward those States in their position as belligerents'.[27]

Despite a clear recognition of these tensions, the general view of international law scholars before the adoption of the UN Charter was that neutrality law remained in effect. Lauterpacht, for example, qualified his position by noting that 'the Covenant [had] only very little affected the foundation of the orthodox conception of neutrality.'[28] Collective security could not fully displace the application of rules of neutrality unless there was also a binding legal definition of aggressive war and an organ or body empowered to determine when such wars had occurred.[29]

Sceptics of collective security aims tended to discount the possibility of reaching satisfactory conclusions on either or both of these necessary elements for the displacement of neutrality. Yale Law School's Edwin Borchard, for example, was among those who regarded the effort to proscribe wars of aggression as a 'revival of ancient and unworkable theoretical distinctions between a just and an unjust war', which would easily be manipulated by States portraying their own uses of force as just while proscribing and punishing those of geopolitical rivals.[30] Borchard and others feared that some of the traditional benefits of the 'hard-won institution'[31] of neutrality, such as limiting the spill-over effects of armed conflicts, their harm

all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State'.

[24] See Wright (n 8).

[25] M Bourquin (ed), *Collective Security: A Record of the Seventh and Eighth International Studies Conference, Paris 1934—London 1935* (League of Nations International Studies Conference 1936) 429.

[26] Morgenthau (n 22).

[27] ibid.

[28] Bourquin (n 25) 430–1.

[29] ibid.

[30] Borchard (n 7) 38.

[31] ibid 39.

to global stability and trade, and their tendency towards escalation, were at risk under new doctrines.[32]

Ultimately, however, collective security was enshrined as a major feature of the UN Charter when adopted in 1945. Article 2 of the Charter prohibits all uses of force other than in self-defence or pursuant to determinations of the Security Council within the proper scope of its authority.[33] Chapter VII, meanwhile, empowers the Security Council to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression', and to undertake the role of the collective sanctioning organ of the Charter signatory States.[34] The legal status of neutrality is not mentioned in the Charter, nor does it in any way indicate that the existing customary law of neutral rights and duties during wartime has been supervened.[35] However, the duty of States to comply with actions taken by the Security Council in pursuit of its mandate implies a clear limit on the applicability of neutrality norms.[36]

Generally, States only have a duty to cooperate with sanctions regimes if these are implemented by the Security Council pursuant to its mandate. However, the argument has been raised that the General Assembly could also make 'authoritative' pronouncements, not just upon whether there is a breach, even a serious breach, of an obligation *erga omnes*, but also in respect of the fulfilment of the conditions for the application of lawful third-party collective countermeasures.[37] At least with respect to *jus cogens* norm violations, such an authoritative status for the General Assembly with respect to collective countermeasures would be supported by the notion of a duty to cooperate to bring an end to such violations, which is referred to in the International Law Commission's (ILC's) commentary to ARSIWA as a possible 'progressive development of international law' and more recently in its Draft Conclusions on Peremptory Norms of International Law (Draft Conclusions), where it is described as being 'now recognized under international law'.[38]

At the same time, the novelty of this 'duty to cooperate' as well as the still relatively unsettled legal status of collective sanction/countermeasure regimes implemented outside of the context of the Security Council each suggest that even in the case of General Assembly authorisation, it has hardly been determined that States may not decide *not* to participate in such sanctions. This is all the more true of unilateral sanctions efforts coordinated outside of

[32] See Morgenthau (n 22). [33] UN Charter (n 2) art 2. [34] ibid, arts 39–51.
[35] See J Upcher, *Neutrality in Contemporary International Law* (OUP 2020) 19.
[36] UN Charter (n 2) arts 48–49.
[37] See, eg, RJ Barber, 'Cooperating through the General Assembly to End Serious Breaches of Peremptory Norms' (2022) 71(1) ICLQ 1, 30: 'Most of the Assembly's sanctions recommendations have been made without the Security Council having imposed mandatory sanctions. Thus, the Assembly's recommendations have been for States to act autonomously—insofar as that term is used to mean without Council authorisation—in imposing the recommended measures.'; M Ramsden, 'Uniting for Peace: The Emergency Special Session on Ukraine' (2022) HarvIntlLJ, Online Scholarship, Perspectives <https://harvardilj.org/2022/04/uniting-for-peace-the-emergency-special-session-on-ukraine/>. [38] ILC (n 6) 71. See also Barber, ibid 2.

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the scope of a resolution by any UN central organ, ie, neither the Security Council nor the General Assembly.

Meanwhile, as the next section shows, outside cases of Security Council action, neutrality norms remain in regular use among States. The military manuals and foreign policy statements of many of them continue to refer to neutrality and its corresponding rights and obligations. Since 1945, various States have also, explicitly, declared neutrality with respect to particular armed conflicts, while others have behaved in a manner consistent with earlier expressions of *opinio juris* regarding the validity of neutrality norms. The parties to Hague Conventions V and XIII have not denounced these treaties, nor have States declared the intent no longer to be bound by customary norms regarding wartime neutrality. As the next section shows, certain core features of neutrality doctrine both remain widely endorsed and provide a useful guide for defining rights and duties of third States with respect to collective countermeasures applied in response to alleged *erga omnes* norm violations. This ongoing validity of neutrality norms suggests that States maintain a general 'right to neutral status' with respect to unfriendly inter-State behaviour, including countermeasures, except where authorised by a UN central organ. Put bluntly, removal of vestigial neutrality rights would require at least the General Assembly to authorise the collective measures in question.

C. The Key Principles of Modern Neutrality Doctrine and the 'Right to Neutral Status'

States have exhibited differing positions as to whether current neutrality norms comprise those contained in instruments such as Hague Convention XIII and further defined via relevant judicial and arbitral decisions, or are instead limited to a reduced set of 'basic principles'.[39] National military manuals, for example, in some cases indicate a broad reception of the rules contained in the Hague Conventions and other relevant sources of neutrality precedent, while in other cases they endorse the 'principles' that neutral States have rights against interference with their territory or nationals by belligerents and duties of impartiality towards the latter.[40] In either case, State practice on neutrality has relied upon the core assumption that there is, in principle, an inherent right of States to maintain neutrality vis-à-vis the conflicts of their peers.

Even approaches oriented toward a set of core 'principles' of neutrality have at times indicated the potentially wide scope of such principles' applicability. Along these lines, the International Court of Justice (ICJ) found in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* that 'international law leaves no doubt that the principle of neutrality, whatever its

[39] See Upcher (n 35) 178.
[40] ibid; see UK Manual of the Law of Armed Conflict, section 1.43.

content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used'.[41] The Court found that neutrality principles limited acceptable methods of warfare to those that did not cause damage to third States, though it could not rule definitively on the specific issue of whether nuclear weapons would invariably cause such 'transborder damage' as would naturally be impossible to limit 'within the territories of the contending States'.[42] Belligerent parties had to continue to respect duties of non-interference with the territorial jurisdiction of third States.

A number of European States, such as Austria, Republic of Ireland, Switzerland, Sweden and Finland, long maintained official policies of neutrality, though a few have since been changed or qualified their positions.[43] Nonetheless, States' insistence over decades on their right to pursue such policies suggests a general right of States to maintain neutral status. The idea of a 'right to neutrality' was also expressly included in the Final Act of the Helsinki Conference of 1975, and reaffirmed, inter alia, in the 1990 Charter of Paris for a New Europe and 1999 Charter for European Security.[44] Meanwhile, throughout the Cold War, many non-Western States adopted policies of neutrality, ranging from foreign policy postures to, in some cases, explicit constitutional principles.[45]

The public expressions of neutrality taken by States in recent decades have tended to focus on these core principles, rather than to have endorsed a specific set of codified provisions explicitly and consistently. Both executive and judicial organs of a number of States, for example, expressly asserted the existence of a state of neutrality for their States with respect to the US invasion of Iraq beginning in 2003. In this connection, Germany's Federal Administrative Court ruled in 2005 that Germany had violated both norms of neutrality and Article 16 of ARSIWA (regarding aid or assistance in the

[41] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 89.

[42] ibid 261–2.

[43] See, eg, NG Jesse, 'Choosing to Go it Alone: Irish Neutrality in Theoretical and Comparative Perspective' (2006) 27(1) IntlPolSciRev 7.

[44] Conference on Security and Co-Operation in Europe, Final Act (Helsinki 1975) art I; Charter of Paris for a New Europe (Paris 1990); Charter for European Security (Istanbul 1999).

[45] See, eg, T Elbegdorj, 'Mongolia as a Neutral State' (*World Economic Forum*, 28 January 2016) <https://www.weforum.org/agenda/2016/01/mongolia-as-a-neutral-state/>; G Bhattarai, *Nepal Between China and India: Difficulty of Being Neutral* (Palgrave Macmillan 2022) 1–30; A Tripathi, BM Mandara and AM Suresh, 'Turkmenistan's Positive Neutrality and Its Bilateral Relations: Special Focus on India' (2020) 5(1) LibStud 131; P Lyon, 'Neutrality and the Emergence of the Concept of Neutralism' (1960) 22(2) RevPol 255; Constitution of Cambodia 1993 (rev. 2008) art 53 ('The Kingdom of Cambodia adopts policy of permanent neutrality and non-alignment.'); HG Espiell, 'Costa Rica's Permanent Neutrality and the Inter-American System' (1987) 11 DalhousieLJ 663; N Ronzitti, 'Malta's Permanent Neutrality' (1980) 5(1) ItalYbkIntlL 171; N Ahmad, G Lilienthal and F Mustafa. 'The Policy of Neutrality and International Law with Critical Overview of Malaysian Context' (2019) 15(1) JIntlL&IslamL 29.

commission of an internationally wrongful act), by facilitating US and UK prosecution of the war in Iraq.[46]

Similar jurisprudence has been found in the domestic courts of other jurisdictions, which have also determined the continued applicability of neutrality as a feature of international law.[47] Outside of the judicial sphere, a number of States have made explicit statements of neutrality with respect to conflicts including the Iran–Iraq War of 1980–1988, the NATO intervention in the Balkans (Kosovo Campaign) of 1999, and the US military operations in Afghanistan beginning in 2002 and Iraq beginning in 2003.[48] Generally speaking, such declarations of neutrality have not entailed clear statements of intent to apply the rules of the Hague Conventions, but have endorsed a position of impartiality and expectation of attendant rights.

Scholars of various States have also indicated divergent views as to the content and scope of applicability of neutrality norms. While a minority of the advocates for aspirations of collective security have argued that under the UN Charter system neutrality law has been almost entirely superseded and thus, for example, 'provid[ing] weapons and other support to a state unjustly attacked … violates no legal duty of neutrality',[49] a more widespread view holds that neutrality in much of its pre-1945 contours remains a feature of the international law of armed conflict.[50] This view was, for example, the basis for the International Law Association's project from 1988 to 1998 to draft and

[46] *Attorney of the Federal Armed Forces v Anonymous (a Major of the Armed Forces*), Final Appeal, BVerwG 2 WD 12.04, ILDC 483 (DE 2005), 21st June 2005, Germany. The Federal Administrative Court also found, notably, that neutrality was an objective legal status that was automatically created for third States 'upon the outbreak of international armed conflict'. Ibid.

[47] The High Court of Ireland, for example, held that 'there does still exist in international law a legal concept of neutrality whereunder co-relative rights and duties arise for both belligerents and neutrals alike in times of war in circumstances where the use of force is not "UN led"' and that neutral States 'may not permit the movement of large numbers of troops or munitions of one belligerent State through its territory en route to a theatre of war with another'. *Horgan v Ireland and ors*, Application for Declaratory Relief., 2003 No 3739P, [2003] IEHC 64, (2003) 2 IR 468, ILDC 486 (IE 2003), 28th April 2003, Ireland; High Court.

[48] See Upcher (n 35).

[49] See O Hathaway and S Shapiro, 'Supplying Arms to Ukraine is Not an Act of War' (*Lawfare*, 12 March 2022) <https://www.lawfareblog.com/supplying-arms-ukraine-not-act-war>. Here, Hathaway and Shapiro argue correctly that *jus ad bellum* rules regarding the duties of neutrals have changed dramatically since the pre-UN Charter era. Because rules governing the use of force now preclude it except in cases of self-defence or UN Security Council action under Article 51 of the Charter, 'the United States and others [could not] become parties to the conflict by supplying arms to Ukraine', and instead 'States would become parties to the international armed conflict between Russia and Ukraine if, and only if, they resort to armed force against Russia.' However, they ignore the important continued relevance of neutrality law for both *jus in bello* and, as this article argues, for the purposes of determining the application of general principles of State responsibility in some situations. In this sense, they go too far by conflating '[any] legal duty of neutrality' with the extreme case of violations of neutrality that were historically invoked as justifications for military reprisals.

[50] See, eg, E Crawford, 'The Temporal and Geographic Reach of International Humanitarian Law' in B Saul and D Akande (eds), *The Oxford Guide to International Humanitarian Law* (OUP 2020) 69 ('For those states that refrain from involvement in hostilities, the law of neutrality will apply.'); F Xiao, *Zhongli Fa* (*The Law of Neutrality*) (Zhongguo Zhengfa Daxue Chubanshe 1999) 249, 251 ('the body of neutrality principles of which the Hague Conventions

adopt the Helsinki Principles on the Law of Maritime Neutrality.[51] These principles, notably, limit the rights of States to maintain a neutral status only with respect to obligations derived from actions taken by the UN Security Council under its Charter powers.

This is also shown in the continuing relevance of international norms governing the practices of blockade, which by definition involve application to third States. Both the UN Charter and UN General Assembly Resolution 3314 on the definition of aggression include blockade as an example of use of force that is restricted by Charter norms. States have, however, continued to make use of blockades during armed conflicts. The practice has been limited by rules of proportionality under the law of armed conflict—ie that a blockade not justified as a proportional response to a prior wrongful act by its target would be an illicit act of aggression.[52]

Blockades implicate the rights and duties of third-party States seeking (generally) commercial, diplomatic or otherwise non-military access to the excluded zone. They thus give rise to problems of enforcement against non-belligerent third States, as to which States themselves have formulated various doctrines. One question concerns whether a lawful blockade may only be enforced in the actual space of exclusion, or whether vessels on the open sea or in neutral ports *bound* for the restricted port may also be detained. The most recent legal instrument to deal explicitly with this problem, the 1909 London Declaration Concerning the Laws of Naval War, ruled out the latter doctrine as contravening neutral rights and freedom of navigation.[53]

While remotely applied (eg financial institution-targeting) sanctions not directly affecting the physical movement of goods or vessels are not legally equivalent to traditional blockades, they implicate related concerns over effects upon third parties and internationalised spaces. Even in cases of search and seizure of vessels transporting suspected contraband within a blockaded zone, for example, non-military goods only potentially convertible to military usage—such as currency, precious metals or foodstuffs—may only be treated as conditional contraband based upon a specific declaration by the enforcing party.[54] A sanctions regime implying total exclusion of commercial relations for non-military goods by a target State with all partners would thereby render void these traditional limits applied even in cases of formal blockade.

In respect of the general duties of neutrals, meanwhile, the *United States Commander's Handbook on the Law of Naval Operations* provides a

are the core remain in effect … in an international society of equals, neutrality is an inalienable sovereign right of states').

[51] D Schindler and J Toman, 'Helsinki Principles on the Law of Maritime Neutrality' in D Schindler and J Toman (eds), *The Laws of Armed Conflicts* (Brill Nijhoff 2004).

[52] UN Charter (n 2) art 42; UNGA Res 3314 (14 December 1974) UN Doc A/RES/3314.

[53] London Declaration Concerning the Laws of Naval War (adopted 26 February 1909) arts 13–19. For recent State practice on this issue, see Upcher (n 35) 411–30.

[54] London Declaration Concerning the Laws of Naval War, ibid, arts 22, 26.

relatively clear set of principles intended to distil applicable norms of customary international law. These include: 'Absention … from furnishing belligerents with certain goods or services'; 'Prevention … [of] the commission of certain acts by anyone within [the neutral State's] jurisdiction'; and '*Impartiality* … to fulfil their duties and to exercise their rights in an equal … manner toward all belligerents, without regard to its differing effect on individual belligerents.'[55] With regard to commerce, the provision of military assistance, or goods and services constituting direct material aids to a war effort, would thus violate the duty of abstention, while the termination of commercial relations with one party to a conflict, but not the other, could potentially violate duties of impartiality.

Meanwhile, pressure upon third States to violate such duties, either from States parties to the ongoing armed conflict or third States seeking to support one of the warring sides, would itself potentially constitute a violation of the legitimate rights of neutral States to maintain that stance. Particularly to the degree that the Hague Conventions remain in effect or have been adopted into customary international law, the rule that a right to maintain neutral status is 'inherent in the very existence of States' implies a strong norm against coercion to abandon that status.[56] As the next section argues, the principles of proportionality of countermeasures and prohibition of coercion contained in ARSIWA, as well as its framework for defining collective countermeasures in general, support the existence of such a right. In that sense, modern norms of State responsibility are consistent with the still-valid core principles of neutrality law.

III. COLLECTIVE COUNTERMEASURES AND THE PROBLEM OF THIRD STATES

A. Unilateral Coercive Measures and Third Parties

Coming now to sanctions as a form of unilateral coercive measures, these may be—and typically are—justified as countermeasures under the international law of State responsibility. 'Unilateral' sanctions, ie those not authorised by the UN Security Council under UN Charter Article 41, may comprise various forms of economic, diplomatic, or other action harmful to the interests of the affected State. Where such action responds to internationally wrongful acts by the target State, it may as a general matter be seen as justified despite contravening general principles regarding the maintenance of friendly relations, non-interference in domestic affairs, or infringements of sovereignty or States' *domaine reservé*.[57] Under Part Three, Chapter II of

[55] *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (1997), 7.2, fn 12.

[56] Hague Convention XIII (n 19) art 1.

[57] *Opinio juris* and State practice related to sanctions vary significantly among States. Some States maintain the view that only the UN Security Council is authorised to impose economic sanctions as a means of carrying out its mandate relative to international peace and security,

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ARSIWA, countermeasures are permissible provided they do not violate core norms including those regarding the use of force, fundamental human rights, humanitarian limits on reprisals, other peremptory norms, or the inviolability of diplomatic personnel, premises and effects.[58] If they satisfy these criteria, countermeasures limited to 'non-performance for the time being of international obligations' may be undertaken in order to induce compliance by the targeted State with the rules governing the international responsibility of States.[59]

These rules in turn include those imposing a duty on the State to perform the obligation breached, to cease and not to repeat the breach of the obligation, and to provide reparation.[60] It is required that countermeasures taken to achieve these ends are proportionate,[61] and that the responsible State is first called upon to fulfil its international obligations, failing which it must be notified of the decision by the injured State to adopt countermeasures.[62] While violation of a *jus cogens* norm or other source of *erga omnes* obligations may well provide the rationale for such a regime of countermeasures, there are strong reasons to assume that the resulting countermeasure regime does not attain a universally binding character, despite its origins. These reasons have to do with an area of conceptual overlap between ARSIWA's limits on countermeasures and the traditional customary right of States to maintain a neutral status.

The notion of neutrality which has thus far been outlined in its traditional context of the law of war might, it could be suggested, also be approached by peering through the lens of international State responsibility more generally. A clear-cut rule in respect of any third-party effects applies to unilateral coercive measures taken by a directly injured State against the perpetrator of the breach of a primary obligation. Directing countermeasures at third parties is, implicitly, disallowed under Article 49(1) of ARSIWA as that provision states that countermeasures can only be directed against the responsible State. Whether (any) adverse effects are also disallowed under Article 49(1) may be a more difficult question, although that argument has been made.[63]

Practice which can be seen at the moment, in the context of a modern multi-layered (or 'hybrid')[64] conflict fought by an alliance of Western and other States

while others consider the UN General Assembly, regional organisations, or even individual States themselves to be empowered similarly to use sanctions proactively to enforce norm violations. See DW Bowett, 'Economic Coercion and Reprisals by States' (1972) 13 VaJIntlL 1, 6–7. Unilateral use of sanctions by States thus has a contested status, but some commentators have suggested that they are most clearly valid in relation to peremptory norms. See, eg, A Pellet, 'Memorandum from Mr Alain Pellet: Unilateral Sanctions and International Law' (2015) 76 AnnIDI 723, 724.

[58] ILC Ybk 2001/II/(2); ARSIWA, art 50. [59] ARSIWA, ibid, art 49(1), (2).

[60] ibid, Part II. [61] ibid, art 51. [62] ibid, art 52.

[63] A Hofer, 'The Proportionality of Unilateral "Targeted" Sanctions: Whose Interests Should Count?' (2020) 89 ActScandJurisGent 399, 410–11.

[64] On the notion of 'hybrid' wars, where various interlocking forms of hostile inter-State behaviour are used in tandem and which involve a continuum between military and other forms of coercive action, see FG Hoffman, *Conflict in the 21st Century: The Rise of Hybrid Wars* (Potomac Institute for Policy Studies 2007).

against Russia, constitutes the development of third-party collective countermeasures outside of UN authorisation. This raises the question whether a third State should at least enjoy, in the context of such a conflict, rights analogous to those enjoyed by a neutral State in an armed conflict; namely the right to stand apart from and not to become involved in such a conflict. This, roughly speaking, appears to be the position adopted by even some major States, such as India and China, in the current Russia–Ukraine conflict. However, it appears to be accepted by at least some of the States presently adopting countermeasures against Russia that such third-party collective countermeasures,[65] taken by 'non-injured' States,[66] albeit to induce compliance with an obligation *erga omnes*, will entail an acceptable level of collateral adverse effects on the rights of other third-party States. As has been noted, this view is consistent with aspirational language in ARSIWA and (much more so) with ILC conclusions regarding *jus cogens* violations.[67]

Meanwhile, however, potential failure by third States to adhere to such collective measures has led to warnings by sanctioning States to their peers of the consequences of such non-adherence. In the absence of clearly settled legal doctrine, such pressure may amount to coercion,[68] for example in respect of non-performance of obligations during the conduct of normal trade relations. While this non-performance might indeed be excusable under the principles of ARSIWA in cases of breach of *erga omnes* norms by the targeted State, the latter would nonetheless probably interpret it as an unfriendly act and take its own countermeasures as a result. At the same time, it is significant that ARSIWA has *not* adopted a position expressly allowing for the use of third-party collective countermeasures outside the

[65] Rather than collective countermeasures per se, which may involve a collection of directly injured States. See J Crawford, *State Responsibility: The General Part* (CUP 2013) 703.

[66] For the latest development on the troublesome distinction in Articles 41 and 48 of ARSIWA between 'injured' and 'non-injured' States in the face of a breach of an *erga omnes* obligation, see Judge ad hoc Kress's Declaration in respect of the judgment on preliminary objections in *Gambia v. Myanmar*. He quotes B Stern: 'Il nous paraît à tout le moins curieux que certains Etats puissent invoquer la responsabilité d'un Etat s'ils ne sont pas lésés. Si un Etat est bénéficiaire d'une obligation qui a été violée, je ne vois pas comment on pourrait considérer qu'il n'est pas un Etat lésé.' (Author translation: 'It seems to us at the very least curious that certain States can invoke the responsibility of a State if they are not injured. If a State is the beneficiary of an obligation which has been breached, I do not see how it could be considered that it is not an injured State.'); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Preliminary Objections*, ICJ, 22 July 2022, Declaration of Judge ad hoc Kress, para 9, citing B Stern, 'Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C.D.I. sur la responsabilité des Etats' (2001) 47 AFDI 24. The ICJ, as Judge Kress points out, has never applied the ILC's distinction above, between an 'injured State' and a 'State other than an injured State' which would be entitled to invoke the responsibility of another State resulting from that State's violation of an obligation *erga omnes*. See *Gambia v. Myanmar*, *Preliminary Objections*, Declaration of Judge ad hoc Kress, para 11, and also the ICJ's judgment in that case, paras 106–107, citing its judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) [2012] ICJ Rep 422, 449, para 68.

[67] See UN Charter (n 2) arts 48–49.

[68] See also ARSIWA (n 58) art 18 (coercion of another State).

UN. Indeed, the reason it does not is because the proposal by James Crawford as special rapporteur to include the lawful use of collective countermeasures outside the framework of the powers of the UN Security Council was rejected by the Sixth Committee (Legal) of the General Assembly. Neither the text nor its *travaux*, then, are immediately conducive to a maximalist reading that would indicate a total overthrow of the traditional principles of State autonomy and non-interference, or of the concomitant right to maintain a neutral status in times of conflict.

B. Third-Party Collective Countermeasures

If the international law of unilateral countermeasures forbids countermeasures that are directed at States other than the State responsible for the injury, then by extension any measure adopted collectively by 'non-victim' (ie third-party) States must likewise not affect the rights of other third parties adversely. This view is also supported by the historical background to ARSIWA's framework for countermeasures, which tends to support the prudent limitation of their effects.

Indeed, the very possibility of third-party collective countermeasures was long excluded. Roberto Ago, during the earlier years of the ILC's work on what ultimately became ARSIWA, objected to the idea of collective countermeasures taken by third-party or 'non-injured' States, absent at least institutional sanction such as that provided for under Chapter Six of the UN Charter.[69] In the end, ARSIWA was to have what now is Article 54, as a compromise following considerable controversy.[70] The history of that provision is by now well documented. It was William Riphagen and Gaetano Arangio-Ruiz who, successively, steered the ILC toward an attempt to establish provisions for third-party collective countermeasures in the Draft Articles,[71] but in the end Arangio-Ruiz's proposals were abandoned and Crawford's proposals became mired in controversy which led to a compromise. As Crawford described it:[72]

> More particularly, Article 54 (countermeasures by states other than injured states) was reduced between 2000 and 2001 from a substantive article to a saving clause in response to the general views of governments.

In 1995 Arangio-Ruiz's proposals, in his Seventh Report,[73] had been rejected by the ILC and the Sixth Committee. These proposals (Draft Articles 17 and 19)

[69] Discussed in M Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 76.

[70] ibid. Article 54 of ARSIWA (n 58) states, that: '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.'

[71] ibid 78–86.

[72] J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, 875.

[73] G Arangio-Ruiz, Seventh Report, ILC Ybk 1995/II(1).

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would have required a new convention instituting a dual institutional safeguard of requiring, first, a political assessment of the Security Council or the General Assembly, and if either were to assess the situation to be of sufficiently grave concern to the international community, the concerned State would, secondly, bring contentious proceedings before the ICJ in the hope of obtaining a declaration that an international crime had in fact occurred, which would only then justify third-party countermeasures.[74]

There were two dimensions to this proposal. First, there was Roberto Ago's Draft Article 19 which had sought to establish the new category of 'international crimes', which Arangio-Ruiz also sought to preserve. That effort was subsequently abandoned, however, and Draft Article 19 ultimately was replaced with the notion of a 'serious breach' of 'a peremptory norm of general international law' under what now are Articles 40 and 41 in Chapter III of Part Two of ARSIWA on the content of international responsibility. Not all breaches of peremptory norms are envisaged under those provisions, merely 'serious' breaches. Thus, ARSIWA as adopted in 2001 today only provides, in Article 48 which is also contained in Chapter III of Part Two, for third-party invocation of the perpetrator State's responsibility in the face of a breach of a primary obligation *erga omnes*, together with the right to claim cessation, non-repetition and the performance of the obligation of reparation.[75] Meanwhile, Arangio-Ruiz inserted a compulsory institutional and adjudicatory element in between the notion of international crimes and, secondly, countermeasures, although it must be emphasised that he objected to third-party collective countermeasures taken outside the institutional framework of the UN.

The 'link' with compulsory adjudication was 'severed', as Robert Kolb puts it, by Crawford in his subsequent shepherding of the provision.[76] Following Arangio-Ruiz's resignation as rapporteur, Crawford's Third Report of 2000 five years later went on to consider State practice supporting third-party countermeasures, albeit that such support came largely from Western States only, was both limited and inconsistent, and that *opinio juris* on the topic was unclear.[77]

According to Crawford, there were two exceptional situations in relation to which third-party collective countermeasures taken outside the UN might yet be envisaged. The first is when injured States act collectively or where third parties adopt countermeasures on behalf of the injured State at the injured State's

[74] See Dawidowicz (n 69) 82–3.

[75] ARSIWA (n 58) art 48. It is said it 'only' allows for these, but as Bruno Simma has pointed out, that nonetheless was a leap forward for the protection of human rights. See ARSIWA, Commentary (n 58) art 48, section 7. See B Simma, 'The ILC's Work on State Responsibility: Personal Reflections' (*EJIL:Talk!*, 2 August 2021) <https://www.ejiltalk.org/the-ilcs-work-on-state-responsibility-personal-reflections/>.

[76] R Kolb, *The International Law of State Responsibility* (Edward Elgar 2017) 29.

[77] See Crawford (n 65) 703.

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request. The existing jurisprudence did not preclude it,[78] and as Crawford argued '[t]here seems no reason in principle why a state injured by a breach of a multilateral obligation should be left alone to seek redress for the breach'.[79] The second is where there is a violation of an obligation *erga omnes* where there is no directly injured State rather than, for example, a directly injured national of that State in the case of a violation of an international human right or of international humanitarian law.[80] Assuming that the Ukraine–Russia conflict can be said to fit into either (or both) of those two exceptional situations, third-party collective countermeasures may thus be justified. Indeed, the possibility but relatively unsettled character of both justifications supports the recent Western practice of presenting countermeasures taken vis-à-vis Russia as having been taken at Ukraine's explicit and public request, as well as being in response to breaches of humanitarian law and acts of aggression.

Although Crawford's resultant Draft Articles 50A and 50B—which eventually became Article 54—were not without controversy in the ILC's debate in 2000, there was at least a 'significant level' of support within that body.[81] He urged the ILC not to be overly cautious, not to pre-empt the issue, but rather to leave it to the Sixth Committee to raise any objections it might have.[82] This was how he put it, referring first to the two exceptional situations, namely, third-party collective countermeasures at the request of the injured State, and where there is no direct injury to a State as such but a violation of human rights or humanitarian law:[83]

> When international law did not permit the establishment of collective procedures, it tried to establish individual ones. The same applied, at a certain level, to countermeasures. Two cases could be envisaged in that context. First, when the State victim itself had the right to take countermeasures as the result of a breach of an obligation to the international community as a whole, or indeed of any multilateral obligation, other States parties to the obligation should be able to assist that State, at its request, in taking countermeasures, within the limits that they could have taken countermeasures themselves. Such a procedure was directly analogous to that of collective self-defence. The other, more difficult, case concerned collective countermeasures taken in response to breaches when there was no State victim. Practice was limited in that regard, but it existed nonetheless.

[78] In the *Nicaragua* case the ICJ had not considered this type of situation; see Crawford (n 65) 704; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. USA)* (Merits, Judgment) [1986] ICJ Rep 14; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 44.

[79] Crawford (n 65) 704.

[80] See further, for these two exceptional situations, Dawidowicz (n 69) 94; J Crawford, 'Third Report on State Responsibility, by Mr. James Crawford, Special Rapporteur' (2000) UN Doc A/CN.4/507 and Add. 1–4, 105–6, paras 400, 403.

[81] Dawidowicz, ibid 96, 97–100.

[82] Also discussed in ibid 107.

[83] Summary Records of the First Part of the Fifty-Second Session, ILC Ybk 2000/I, 303, para 7.

Though the limited amount of relevant practice and almost complete lack of 'any *opinio juris*' posed a problem for any clear doctrinal statement, that situation did not preclude the Drafting Committee from endorsing the existence of a right to take collective countermeasures.[84] The Drafting Committee thus adopted Crawford's Articles 50A and 50B in a modified form, in the earlier 2000 version of Draft Article 54:

> 1. Any State entitled under [now ARSIWA, Article 48(1)], to invoke the responsibility of a State may take countermeasures at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this chapter.
> 2. In the cases referred to in [now ARSIWA, Article 40], any State may take countermeasures, in accordance with the present chapter in the interest of the beneficiaries of the obligation breached.
> 3. Where more than one State takes countermeasures, the States concerned shall cooperate in order to ensure that the conditions laid down by this chapter for the taking of countermeasures are fulfilled.

However, the provision was to prove too controversial in the General Assembly's Sixth Committee (Legal), also eliciting the United Kingdom's objection.[85] Notwithstanding Alain Pellet's later characterisation of the whole affair as a 'soap opera' in which only a minority in the Sixth Committee had been against Crawford's proposal 'but certainly a majority of the most influential ones',[86] there were, practically speaking, only two options left.[87] These were either to remove Draft Article 54 of 2000 altogether, which would have amounted implicitly to acceptance of the position that there was no practice at all in support of third-party countermeasures, which would have not been entirely inaccurate, or to adopt Article 54 as it now stands, ie in the 2001 version, merely as a 'saving clause', thereby preserving the issue for another day.[88]

As Crawford was to recall, the ILC had been 'caught between a rock and a hard place'.[89] Article 54 of ARSIWA now reformulated, with 'an ambiguity worthy of the oracle at Delphi',[90] reads:

> 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.

[84] ibid. [85] Dawidowicz (n 69) 100–7. [86] Pellet (n 57) 732.
[87] Dawidowicz (n 69) 108.
[88] That day could come soon, in the form of the current work of the ILC on *jus cogens*; see ILC (n 6) 64, Draft Conclusion 17. See further, D Tladi, 'The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*): Making Wine from Water or More Water Than Wine' (2020) 89 ActScandJurisGent 244.
[89] Crawford (n 65) 705. [90] ibid, quoting Judge Sicilianos.

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Reading this article in context, then, it hardly seems a firm foundation for the establishment of a novel authority for a group of unilaterally sanctioning States to demand participation in their enterprise by any and all third parties. Indeed, it only barely establishes the legal possibility for States to choose to participate in the first place. Meanwhile, other aspects of ARSIWA defining collective countermeasures and their scope similarly mitigate against overbroad readings.

IV. PROPORTIONALITY AND THE RELEVANCE OF NEUTRALITY RIGHTS

A. Proportionality as a Constraint on Countermeasures

Despite their troubled history as a matter of ILC codification, third-party collective countermeasures taken outside the UN may well be legitimate, of course. Nonetheless, even where this is the case, as potentially in the circumstances of sanctions coordinated against violators of *jus cogens* norms, there remain important doctrinal concerns. Chief among these are issues related to proportionality of countermeasures. Even for States that clearly embrace the legality of unilateral coercive measures like those currently being taken vis-à-vis Russia over its alleged acts of aggression, proportionality remains a valid concern.

It is safe to assert that most Western nations consider unilateral coercive measures per se to be potentially justified. As for collective countermeasures which respond to the breach of an *erga omnes* obligation in the limited ways outlined in Crawford's Third Report, an acute practical and systemic issue which arises, apart from the relationship between third-party collective countermeasures and the UN collective security system, has been the effect of such measures on other third-party States.

Specifically, to what extent is an 'other third State' obligated to adhere to the conditions imposed by a collective coercive measure which is applied by third parties in response to the breach of an obligation *erga omnes*, and whether it is not or even if it is—a proposition which must be rejected—what limits might be said to impose a constraint on the scope and effect of those measures as a matter of general international law? To be clear, if proportionality under Article 51 of ARSIWA applies as a constraint (as it must),[91] but the principle of proportionality is violated by a given countermeasures regime, then those countermeasures ought to be considered themselves to be a violation of international law. The issue occurs at the inter-State level in respect not only of inter-State obligations, ie in respect of injury to a third-State, but also in respect of the legal consequences of injury to third-party alien nationals. Thus, compelling another third State to adhere to third-party collective countermeasures initiated by a group of States, even if to enforce an *erga omnes* norm, may injure not only that other third State but also its nationals. A

[91] Crawford himself, despite his advocacy of third-party collective countermeasures, was in no doubt about this point. Indeed, he stated that if collective countermeasures were accepted, proportionality would then be a 'key concern'; Crawford (n 65) 704.

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clear example of the latter situation occurs in the context of the performance of ordinary commercial contractual obligations toward (and by) Russian parties.

While the matter of secondary or extraterritorial sanctions is often also framed as an issue involving the principle of non-intervention, that broad view would assume the illegality of such sanctions at the outset. However, if it is assumed that unilateral coercive measures which are designed to induce compliance with an obligation *erga omnes* are justified, the question of any potential illegality would be better framed as one which involves a potential breach of the requirement of proportionality. The legality of secondary sanctions per se need not be decided.

While concerns may remain about the unregulated nature and questionable legality of unilateral coercive measures generally, for the purposes of this argument their legality is accepted, particularly in the face of a breach of an obligation *erga omnes*. This apparently is also the position of a relatively wide grouping of countries including not only the United States and its NATO allies, but also Australia, Japan, South Korea, and even Singapore, among others. However, assuming for the sake of argument the legitimacy of a collective countermeasure regime in the current circumstances, under ARSIWA's principles a proportionality test would still serve as a constraint upon the third-party effects of secondary or extra-territorial sanctions. The relevant provision, Article 51 of ARSIWA, is phrased in quite broad and general terms:

> Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

The question of the proportionality of the current collective countermeasures regime targeting Russia should thus, in light of ARSIWA, be analysed by reference to commensurability with injuries suffered as well as gravity of the wrongful acts responded to and rights infringed. These proportionality concerns can be helpful in distinguishing the approaches of various States to the application of countermeasures in the present situation.

One major difference among States regards views on the legitimacy and application of 'secondary sanctions', meaning those applied to third-party States and nationals, as well as what are sometimes called 'extraterritorial' sanctions which have their effect outside the targeting State. In a useful discussion of these policies, Alexandra Hofer examines the prohibition of Iranian oil in the absence of previous exceptions to purchasers in third countries such as in China and Turkey, as well as the use of what she calls 'U.S. dollar sanctions' in order to prevent access to financial services which (at least then) had prompted criticism from Russia, China and the European Union (EU).[92] Each of these techniques has also been implemented in the current regime.

[92] Hofer (n 63) 408–9.

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Present restriction of access to US dollar payments as a form of unilateral coercive measure is not limited to Russia but is also used in relation to Iran, North Korea, Syria and Venezuela, while their extraterritorial and third-party effects have been felt for example by Russian and Chinese firms which have committed violations, allegedly, in respect of Iranian and North Korean sanctions.[93] However, it is the employment of sanctions in connection with Russia's invasion of Ukraine, at least in popular international opinion, which now presents a key example of evolving State practice, stirred by condemnation of Russia's actions. Yet the underlying controversy over financial sanctions remains. As one former US Congressman put it recently:[94] '[E]very time we use it, even our allies and our friends start to wonder, why is it that you can do this?' The reach and scope of US-style secondary sanctions, arguably, begins to look disproportionate in comparison with sanctioning or countermeasure practice among States in general.

In the case of the current sanctions against Russia the applied sanctions involve, in addition to trade and travel restrictions, sanctions on transactions with Russian banks, their subsidiaries, and also Russian individuals, thus cutting them off from US financial markets, so-called 'prohibitions of dollar transactions',[95] as well as blocking such property in the possession of US persons. The last includes the US freezing of the Russian Central Bank's reserves abroad totalling US$630 billion and debarring Russia from servicing its debt with US$600 million held in US banks by prohibiting US bank participation in not only the primary but also secondary market for both rouble and non-rouble denominated bonds.[96] The above restrictions constituted elements of just the first tranche of sanctions against Russia co-ordinated with the EU, the United Kingdom, Canada, Japan and Australia, with subsequent tranches further extending the impact of the nearly unprecedentedly robust regime.

Moreover, Russian banks have been removed from the Belgian-owned SWIFT international financial messaging system. The United Kingdom for its

[93] K Yeung, 'How the US Uses the Dollar Payments System to Impose Sanctions on a Global Scale' (*South China Morning Post*, 25 August 2020) <https://www.scmp.com/economy/china-economy/article/3098691/how-us-uses-dollar-payments-system-impose-sanctions-global>.

[94] J Letzing, 'This is Why the US Dollar is a Potent Sanctions Weapon… For Now' (*World Economic Forum*, 1 June 2022), quoting former US Congressman, Eric Cantor <https://www.weforum.org/agenda/2022/06/this-is-why-the-us-dollar-is-a-potent-sanctions-weapon-for-now>.

[95] In the loose sense used by Hofer (n 63) 408–9. To be precise, Directive 1A under Executive Order 14024, Office of Foreign Assets Control (OFAC), 22 February 2022, does not limit itself to US dollar transactions contrary to popular press accounts; see, eg, N Carvajal et al, 'US Cutting Off Russia's Central Bank from US Dollar Transactions' (*CNN*, 28 February 2022) <https://edition.cnn.com/2022/02/28/politics/sanctions-russia-putin-rainy-day-fund/index.html>. Rather, it refers to 'ruble and non-ruble' transactions with Russia's Central Bank. There may be similar public misperception about the risk of relying upon the US dollar as a global reserve currency at least in this regard. Rather, the sanction lies in isolation from US financial institutions and markets.

[96] See Directive 1A under Executive Order 14024, OFAC, 22 February 2022, which also applies sanctions to the Nordstream 2 gas pipeline. See further, Executive Order 14024, 15 April 2021, Federal Register, Vol 86, No 73, 19 April 2021, 20249.

part, acting through the Office of Financial Sanctions Implementation (OFSI) of HM Treasury, has frozen Russian bank assets and excluded certain Russian banks from having access to the UK financial system, as well as placing limits on Russian deposits in UK banks.[97]

More recently in May 2022, the United Kingdom as well as the United States and EU in a coordinated effort have precluded access to consultancy, accountancy and public relations services.[98] In its sixth package of sanctions, the EU has prohibited oil imports from Russia by land, extended sanctions to Belarus as well as to Russian broadcasting, imposed sanctions on more Russian banks and exports, including on the exportation of chemicals that can be used for chemical weapons manufacturing. The EU has also added the United Kingdom and the Republic of Korea to its Annex of partner countries which have adopted substantially equivalent sanctions to those of the EU.[99]

Sectoral sanctions (eg affecting only the financial sector) should be distinguished from more highly targeted sanctions only in respect of a particular individual or company, and which do not have any extraterritorial dimension. For example, in the case of its recent, and unprecedented, Russia-related sanctions, Singapore's sanctions extend not only to the exportation of military goods but also to a whole range of 'dual-use' goods.[100] In addition to sanctions on individual entities, namely the prohibition of any transactions with and of the provision of financial services to the VTB Bank Public Joint Stock Company, The Corporation Bank for Development and Foreign Economic Affairs Vnesheconombank, Promsvyazbank Public Joint Stock Company, and Bank Rossiya, as well as to the Government of Russia and Russia's Central Bank or any entity owned, controlled or directed by them which facilitates fund raising, Singapore's sanctions extend more broadly to the prohibition of financial services to the transport, telecommunications, energy and extractive industries in the regions of Donetsk and Luhansk. However, all these have no secondary, 'extraterritorial' effect, as they apply only to financial services institutions in Singapore.[101]

[97] These UK sanctions are enforced principally through The Russia (Sanctions) (EU Exit) Regulations 2019, S.I. 2019 No 855. The parent statute is the Sanctions and Anti-Money Laundering Act 2018. For press coverage, see 'What are the Sanctions on Russia and are they Hurting its Economy?' (*BBC*, 30 September 2022) <https://www.bbc.co.uk/news/world-europe-60125659>.

[98] For a summary, see 'U.S., EU, and UK Impose Further Sanctions and Export Controls in Response to Russia's Invasion of Ukraine' (*Covington*, 13 May 2022) <https://www.cov.com/en/news-and-insights/insights/2022/05/us-eu-and-uk-impose-further-sanctions-and-export-controls-in-response-to-russias-invasion-of-ukraine>.

[99] European Commission, 'Press Release: Russia's War on Ukraine: EU Adopts Sixth Package of Sanctions Against Russia' (3 June 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2802>.

[100] Namely, those in the 'Electronics', 'Computers' and 'Telecommunications and Information Security' categories of the Dual-Use Goods List in Singapore's Strategic Goods (Control) Order 2021, made under the Strategic Goods (Control) Act (Chapter 300).

[101] See Singapore's Export Control Measures on Russia Factsheet in Ministry of Foreign Affairs, Singapore, 'Sanctions and Restrictions Against Russia in Response to its Invasion of Ukraine' (5

Singapore's sanctions are, clearly, considerably more narrowly tailored in comparison with the sectoral sanctions imposed by the United States or the United Kingdom where these extend to US and UK nationals (including companies) abroad as well, and in the case of US sanctions against '[a]ll entities owned 50 percent or more, directly or indirectly … even if not identified by OFAC [Office of Foreign Assets Control]'.[102]

In practice, as the present context of the Russia–Ukraine conflict shows, the aim of collective countermeasures implemented by the United States and some of its closest NATO allies is to exert maximum pressure in order to induce Russia's compliance with international law, including but not limited to Article 2(4) of the UN Charter.[103] However, that aim, rather than taking into account the gravity of the internationally wrongful act, takes instead the rule in Article 49 of ARSIWA as the practical benchmark,[104] ie the need to induce Russia's compliance.[105] Certainly, it is possible to assert that Western sanctions are not disproportionate in the face of the extremely serious nature of unlawful Russian acts of aggression. This would seem to avoid any concerns that collective sanctions have instead a punitive aspect and are thereby unlawful. However, the proportionality rule should in these circumstances apply also to the actual scope and effect of collective countermeasures in terms of their reach to and effects on other third parties,[106] notwithstanding that the sanctions are taken only against Russia specifically.

Article 49 itself, importantly, commands that countermeasures can only be taken against the State responsible for the internationally wrongful act, rather than third States. Secondary sanctions, too, must be closely tied to action against the targeted violator of a *jus cogens* norm in order to meet ARSIWA's demands regarding countermeasures. Notably, the notion of primary and secondary sanctions itself is porous:[107] insofar as sanctions have

March 2022) <https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2022/03/20220305-sanctions>.

[102] See U.S. Department of the Treasury, 'Press Release: U.S. Treasury Designates Facilitators of Russian Sanctions Evasion' (20 April 2022) <https://home.treasury.gov/news/press-releases/jy0731>.

[103] For example, as Russian forces are said to have, in addition, committed breaches of international humanitarian law. See D Child et al, 'Russia-Ukraine Latest: Russia "Overwhelmingly" Striking Civilians' (*Al Jazeera*, 17 June 2022) <https://www.aljazeera.com/news/2022/6/17/russia-ukraine-live-news-gross-violations-in-mariuopol-un-says-liveblog>.

[104] For the drafting origins of the tension between Articles 49 and 51 of ARSIWA, see E Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12(5) EJIL 889, 892–4.

[105] Hence the 'unprecedented sanctions' against Russia which are 'devastating their economy and their ability to move forward' according to US President Biden; see J Guyer, 'The Biden Experts Waging War Without Weapons' (*Vox*, 9 May 2022) <https://www.vox.com/23041830/technocrats-waging-bidens-war-sanctions-russia>.

[106] One argument is that collective countermeasures which are sought to be justified by the needs of the international community should also account for their effect on other members of that community; see Hofer (n 63) 420, who frames this issue as one involving the needs of the multilateral order.

[107] See further Hofer (n 63) 418–20.

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been directed at Russian entities in third States, for example, they are extraterritorial and secondary in nature. Yet where third countries might face punitive consequences if they or their nationals were not to abide by the terms of these collective measures, the impact of secondary sanctions begins to appear disproportionate. Especially in the context of a complex, multi-layered, 'hybrid' conflict among groups of States, this raises the question of whether there is, in the international law of responsibility, a right-based status equivalent to that of a neutral nation under the laws of war. The next section argues that there is indeed such a status, which coexists with and is mutually limited by the countervailing duty to cooperate to bring to an end a breach of *jus cogens* norms.

B. Proportionality as the Basis for Neutral Status vis-à-vis Collective Countermeasures

Whatever may be the position of other *erga omnes* obligations, in cases where the breach of such an obligation involves also a breach of a *jus cogens* norm, the ILC in its current work on *jus cogens* has supported a duty to cooperate to bring to an end (through lawful means) any serious breach of an obligation under a peremptory norm of general international law. In this, the ILC has cited both the *Chagos* and the *Wall* advisory opinions in support of its view,[108] where the ICJ has applied Article 41 of ARSIWA to breaches of such *erga omnes* obligations.[109] ARSIWA's Article 41 rule, however, is not limited only to a duty to cooperate. Notably in Article 41(2) there is contained also a duty not to render aid or assistance in maintaining the unlawful situation, ie one involving a serious breach of a *jus cogens* norm.

This jurisprudence already suggests a perfect analogy with the *duties* of a neutral under the laws of war. Thus, it would appear that rendering military assistance to Russia would indeed constitute a violation of the international law of State responsibility. However, the maintenance of normal commercial relations may be another matter, so long as it does not directly render aid or assistance in maintaining the unlawful situation caused by a breach of a *jus cogens* norm. Meanwhile, precluding the normal commercial relations of a third State where collective countermeasures have been imposed in the form of secondary sanctions apparently misinterprets a 'duty not to assist' as a 'duty to proactively prevent', as well as raising proportionality concerns as has been noted above. As a matter of legal interpretation, negative obligations not to carry out a certain activity should not be conflated with positive obligations to carry out the opposite activity, or (even less so) to

[108] ILC (n 6) 65, Conclusion 17, Commentary, section 2.

[109] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 92, para 180; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 159.

prevent others from doing so actively.[110] A legal regime that recognises neutrals' duties, in other words, must also recognise their rights.

While some may have argued that (any) adverse effects on third parties from countermeasures are simply prohibited, under all circumstances, that would be a misreading of ARSIWA.[111] Some State practice, such as that of the United States, would assume that a degree of adverse effects is permissible in pursuit of a sufficiently compelling community objective. Many States and commentators have agreed that *jus cogens* norms represent, collectively, among the most important set of such community objectives.[112] Yet even with respect to the enforcement of such norms, there has been little agreement that this important aim completely obviates any concern for countervailing rights of States vis-à-vis non-interference and territorial integrity. Indeed, it is relevant to note that, historically, the concept of *jus cogens* was itself often directly connected with the legal principles surrounding State autonomy, as well as State obligations.[113]

In the case of the application of the proportionality principle, there is support for this view. Crawford after stating that '[t]here seems to be no reason in principle why a state injured by a breach of a multilateral obligation should be left alone to seek redress for the breach' adds:[114]

> Of course, any countermeasures taken collectively must abide by the rules governing resort to individual countermeasures; proportionality will be a key concern.

Likewise, Chinkin has written that:[115]

> The collective security arrangements of the United Nations do not absolve States from individual or regional responsibilities for the maintenance of international peace and security. However, legitimate unilateral third-party involvement in conflict is to be limited and, even where permissible, should be restricted by requirements of proportionality, economy, and reasonableness.

The question becomes then whether secondary sanctions, in other words those having an adverse effect on third States, would always be disproportionate. The answer, at least insofar as the commentaries to ARSIWA are concerned, is no. ARSIWA appears to envisage instances in which collateral adverse effects on third States will simply have to be expected, although that clearly is not the end

[110] Cf PZ Eleutheriadēs, *Legal Rights* (OUP 2008) 87: 'It is possible that some prescription may have a complex, mixed content requiring, for example, both doing and forbearing. But this would be a compound of two distinct simple norms that could be analyzed further into the above components.'

[111] Hofer (n 63) 410–11.

[112] See, eg, E de Wet, '*Jus Cogens* and Obligations *Erga Omnes*' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013).

[113] See, eg, A von Verdross 'Forbidden Treaties in International Law: Comments on Professor Garner's Report on "The Law of Treaties"' (1937) 31(4) AJIL 571.

[114] Crawford (n 65) 704.

[115] C Chinkin, *Third Parties in International Law* (OUP 1993) 295.

of the matter. One might imagine situations in which third-party collective countermeasures are directed essentially, or only, at the wrongdoer but where nonetheless there are spillover effects on other third States. The Commentary to Article 49 of ARSIWA, after stating that the word 'only' in paragraph 1 applies equally to the target of the countermeasures,[116] and that wrongfulness of the countermeasure is not precluded in respect of a third State,[117] goes on to state that:[118]

> This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties.

When then might third-party collective countermeasures be considered disproportionate? It is suggested that they could be thought disproportionate where such effects would, in the analogous context of the laws of war, violate neutral rights much like those implicated in the case of a blockade. Thus, if a neutral cannot supply the enemy, and only items of military value can be treated as contraband, then by analogy only incidental adverse effects on third States that are caused by collective measures which are intended to deny military assistance to the wrongdoer may be permitted under the international law of peace. Ordinary commercial contracts relating to trade in non-military or civilian items, or financial transactions that are unrelated to financing the military efforts of the wrongdoer, should remain unaffected. This approach to defining neutral status vis-à-vis countermeasures would also present continuity with the long history of custom related to treatment of third parties with respect to the practices of non-wartime 'pacific blockades'.[119]

To the extent that the 'economic weapon' of blockade[120] has close parallels with the 'economic weapon' of modern, primarily remote sanctions-based collective countermeasure regimes,[121] recognising the continuity of core neutral rights across both contexts would promote the integrity and cohesion of inter-State legal obligations. While thus deterring legal fragmentation, such a doctrine would also promote the search for diplomatic solutions to international disputes.

[116] And not merely to limiting the countermeasure to inducing that State to comply with its international obligations.
[117] ARSIWA, Commentary (n 58) art 49, section 4.
[118] ibid, section 5.
[119] See R McLaughlin, 'United Nations Mandated Naval Interdiction Operations in the Territorial Sea?' (2002) 51(2) ICLQ 249, 252, describing pacific blockades as possible under Chapter VI of the UN Charter, and comprising an economic sanctions regime associated with naval observation or reporting, to be distinguished from 'use of force' blockades authorisable under Chapter VII, and advocating 'approaching interdiction as an umbrella concept encompassing two fundamentally different forms'.
[120] A Bertram, 'The Economic Weapon as a Form of Peaceful Pressure' (1931) 17 TransGrotiusSoc 139.
[121] N Mulder, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (Yale University Press 2022).

V. CONCLUSION

In general, third-party collective countermeasures remain, in the words of Pellet (who had voted in favour of Crawford's Articles 50A and 50B [2000]), 'a terra *incognita*'.[122] ARSIWA's Article 54 preserves both arguments for and against such countermeasures.[123] Although clearly accepted *de facto* by a large number of States, an even greater number have exhibited the view that such countermeasure regimes are discretionary and that States may not be legally compelled to join them—even where they respond to *jus cogens* norm violations. Currently, the Western sanctions regime against Russia for its aggression in Ukraine has vividly brought this issue to the foreground of international relations and international law.

While recent ILC determinations regarding *jus cogens* and the 'duty to prevent' are an important consideration in legally analysing these developments, ARSIWA clearly embodies a more firmly established and widely embraced point of departure. It is significant, then, that while there is 'a degree of solid State practice' in favour of third-party collective countermeasures, the 'basis and conditions of their adoption' have not yet been 'clarified' in ARSIWA.[124] At the present moment, one of the key tasks for scholars of international law should be to clarify the nature and boundaries of third-party collective countermeasures, and to articulate their role in inter-State legal relationships better. This would promote the achievement of legal certainty for States employing such measures as well as those deciding whether or not to join their efforts.

Proportionality under ARSIWA offers a highly valuable general guide toward these ends. In particular, proportionality should be properly understood as applying to both the *means* and *aims* of countermeasure regimes.[125] For example, where the aim of a countermeasure initiative is to sanction a State bank which funds, or could fund, a wrongful military campaign, such sanctions ought not to extend to causing adverse effects upon ordinary commercial transactions in third States that are unconnected to any possible military support. The parallel with traditional blockade and contraband rules is, in such a case, quite apparent as a concrete analogy.

At the same time, however, a stated concrete aim of specific countermeasures—ie, a subordinate aim in the service of the more general aim of inducing compliance by the target State—must also exhibit proportionality. For example, a set of countermeasures intended to isolate a specific bank completely, and any of its subsidiaries anywhere, including subsidiaries in the territory of a third State, and in terms of their ability to perform any international transaction arguably would be disproportionate. Especially to the extent that the attempt to achieve such an aim was associated with the use or threat of secondary sanctions, or other forms

[122] Pellet (n 57) 726.
[123] ARSIWA, Commentary (n 58) art 54, sections 6, 7.
[124] Kolb (n 76) 184.
[125] Cannizzarro (n 104) 897–9.

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of pressure vis-à-vis a third-party State so affected, it would not be a proportionate action. Any legally defensible practice of 'outcasting' international norm-violators, in other words, should not be simply conflated with suspending *all* normal relations of a target State's citizens or organisations with transnational partners.[126] Here, the principle of a 'right to maintain neutral status', which is implicit in the ongoing customary law of neutrality as practised by States since 1945 and in the other sources of law cited above in Section II, is clearly implicated.

At the same time, under Article 41 of ARSIWA concerning the content of international responsibility, it is also clear that even 'neutral' third States are not wholly free of obligations. In particular, they still have the duty not to render aid or assistance in the commission of wrongful international acts,[127] such as military assistance in a case of unlawful use of force. There is also the duty to cooperate with other third States to bring the breach of the most serious obligations, such as *jus cogens* norms, to an end.[128] However, this article has argued that the 'duty to cooperate' does not clearly endow States adopting third-party collective countermeasures with the ability to reject any right to 'neutrality' (as it is here called) for third-party States.[129] The scope of 'cooperation' remains to be more carefully defined and elucidated by State practice, and to this extent it would be at minimum highly premature to presume a maximalist reading. Meanwhile, a lack of clarity regarding the scope of third States' legal duties may have the perverse effect instead of dissuading them from meeting their important, limited obligations.

Although aims of collective security as well as prevention and punishment of *erga omnes* norm violations are among the most cherished shared ideals of many UN Member States, extra-Charter approaches to pursue these aims at times conflict with the Charter's purposes. In particular, the 'principle of equal rights and self-determination of peoples' has historically been associated with customary rights including those associated with the status of neutrality. To the extent that sanctions regimes and other forms of collective countermeasures impose automatic costs on all non-participating third States,

[126] Compare O Hathaway and SJ Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121(2) YaleLJ 252, 296–9, outlining various forms of 'outcasting' used to sanction norm-violators, and arguing in general for the centrality of the practice to the modern enforcement of international law, but describing few limits to its scope or potential effects, and declining to consider its relationship with neutrality principles.

[127] ARSIWA (n 58) art 41(2). See NHB Jørgensen, 'The Obligation of Non-assistance to the Responsible State' in J Crawford et al (eds.), *The Law of International Responsibility* (OUP 2010) 687.

[128] ARSIWA, ibid, art 41(1). See also NHB Jørgensen, 'The Obligation of Cooperation' in J Crawford et al (eds), ibid 695.

[129] The idea that neutrality has a role to play in the context of serious breaches of *erga omnes* obligations, including addition of the application of third-party collective countermeasures, is not new. The tension between neutrality and solidarity is also not new. See the reference in passing to this tension in Jørgensen, ibid 700.

they run the risk of turning into forms of intervention in contravention of such States' rights as neutrals and as equal legal subjects.

Traditional advocates of neutrality doctrine defended it as a 'hard-won institution' that reflected the principles of States' equality and autonomy, as well as the view that 'international solidarity requires that the liberty of commerce should be always respected, avoiding as far as Possible unnecessary burdens for … neutrals'.[130] Related aspirations for autonomous economic development with minimal externally imposed burdens have continued to be cherished by many members of the international community, particularly those States with backgrounds of colonisation or other forms of extensive intervention by foreign powers.[131] As the frameworks governing collective countermeasures continue to develop, it is important that they reflect not only aspirations for solidarity and moral unity of purpose in the face of international conflicts, but also continuity with *modus vivendi* norms of the international community. Taking principles of neutrality and proportionality seriously as limits on the scope of coercive behaviour by coalitions of States operating outside the ambit of Security Council authorisation—albeit potentially in genuine pursuit of community interests—aids in this regard. Ultimately, a proportionate approach to applying norms of State responsibility promotes a more robust legal order, and more sustainable progress towards the shared aims of the UN Charter.

[130] Havana Convention on Maritime Neutrality (adopted 20 February 1928, entered into force 12 January 1931) Preamble.

[131] UN General Assembly, 'Resolution 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' (24 October 1970) UN Doc A/RES/2625(XXV): 'International disputes shall be settled on the basis of the Sovereign equality of States and in accordance with the Principle of free choice of means.'; 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.'