

The Return of Neutrality¹

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Abstract

Neutrality is caught in an inherent contradiction: On the one hand, it has been largely irrelevant as a matter of law for almost a century. The general prohibition of war and force protects all peaceful (!) states alike, neutral or not. On the other hand, neutrality has never disappeared as a *political* concept. There have always been good reasons for states to refrain from taking sides in international crises: avoiding the wrath of an aggressor, maintaining access to foreign markets and cheap raw materials, or extracting political benefits of various kinds. In light of the growing global instability of our times, neutrality appears to be making a comeback.

To describe this legal decline and political revival, the present chapter first describes the parallel development of the broad right to wage war and the laws of neutrality from the eighteenth to the early twentieth century. It then explains how the latter became obsolete after the two World Wars, were revived during the Cold War, fell into abeyance again in the early 1990s, and are reemerging in the post-liberal world order. The conclusion is therefore straightforward: the more interstate war returns, the more neutrality gains in political, rather than legal, significance.

I. Introduction

Neutrality is a big and small word. Big because it can be used to convey the impression of a sober, objective and rational foreign policy, of being above the muddy ground of world politics. Small because neutrality usually means doing little or *nothing* at all, *i.e.* not taking a stand or sides, or, at the very least, not supporting any belligerent militarily.

1 Thanks go to Andrew Scott Mansfield for helping me with the translation of this article. Any remaining errors or confusing formulations are my responsibility.

This passivity can therefore be both amoral and moral.² Once international law outlawed war, especially when it is clear which state is the aggressor, there is little to no justification to treat both sides as equals. At that point, neutrality is no longer, as it could be for most of its existence, a value-free security strategy.³ Staying neutral is now only justified when both sides may be partly, or perhaps equally, wrong or right, or where the situation of who is “in the right” is not (yet) sufficiently clear. Better to help no one than – intentionally or not – helping the wrong one.

From a legal perspective, neutrality and its underlying justifications have become irrelevant. While it has never been formally abolished, choosing this status does not offer any additional protection. The prohibition of force knows no difference between neutral and non-neutral states; it distinguishes between aggressors and their victims. When states act neutrally, they thus do so for political reasons. Legally speaking, a neutral state is no better off than a state that assists another in exercising its right to (collective) self-defence. While it is better protected, and perhaps “more moral,” than the aggressor state and those supporting it, that distinction does not amount to much.

This chapter explains why and how neutrality has nevertheless survived to the present day and is even enjoying a kind of a renaissance. This is particularly, though not exclusively, true in permanently neutral states such as Austria and Switzerland, where neutrality is often regarded as a hallmark of national identity, a precondition for peace, and, indeed, a source of moral superiority.⁴ Given the current global political turmoil,⁵ this is somewhat understandable. For that reason, it seems entirely possible that the *political* significance of neutrality will continue to grow.

Before we reach that point, however, there is still some ground to cover. We first need to trace the history of the law of neutrality from its heyday

2 On the ethical and moral aspects of neutrality, see Franz Cede and Ralph Janik, ‘Die ethische Dimension der österreichischen Neutralität. Spannungspunkte und Widersprüche’, in: Martin Senn and Jodok Troy, *Österreichs Neutralität: Recht, Politik und Gesellschaft – Eine Debatte* (transcript 2025), 153–168.

3 For a critical discussion of the self-proclaimed morality of permanently neutral states, first and foremost Austria, see Karl Zemanek, ‘Immerwährende Neutralität in der österreichischen Staatenpraxis’, in: Waldemar Hummer, *Staatsvertrag und immerwährende Neutralität Österreichs* (Verlag Österreich 2007), 197–212.

4 Zemanek (n 3), 197–198.

5 See, among countless others, Richard N. Haass, *A World in Disarray. American Foreign Policy and the Crisis of the Old Order* (Penguin Press 2017); Carlo Masala, *Weltunordnung: Die globalen Krisen und die Illusionen des Westens* (C.H. Beck 2025).

during Eric Hobsbawm's "long nineteenth century" to its demise after the two World Wars. But do not worry, the following pages are not a staccato enumeration of historical events but rather describe how the significance of the law of neutrality stands or falls with the level of respect for the prohibition of force (the *ius contra bellum*). The more states claim a broad right to wage war, the more important neutrality might become.

II. The origins of (modern) neutrality

Neutrality is as old as war itself. Whenever two or more politically organised communities fight each other – to use the broadest and most historically constant definition of war⁶ – some will deliberately keep their distance: be it out of fear, due to strategic considerations, to receive political concessions or economic benefits such as cheap energy and raw materials from Russia, as one could observe after its full-scale invasion of Ukraine. We thus find early examples of neutrality as a political instrument in ancient Greece⁷ and in the Old Testament.⁸ Even the Roman Empire's "either with us, or against us" logic occasionally allowed others to refrain from joining wars of conquest.⁹ Only the Middle Ages, with their feudal system of loyalties and the idea of a unified Christian realm, left no room for neutrality.¹⁰

Obviously, such historical excursions often lack detail and may be superficial. For example, the question of whether and to what extent the Greek city-states and the rules governing relations between them can be compared with the modern concept of sovereignty and the corresponding understanding of international law. The lesson, however, is clear: wars do

6 Hedley Bull, 'Recapturing the Just War for Political Theory', *World Politics* 31/4 (1979), 588–599 (595–596).

7 Robert A. Bauslaugh, *The Concept of Neutrality in Classical Greece* (University of California Press 1991).

8 Alfred P. Rubin, 'The Concept of Neutrality in International Law', *Denver Journal of International Law & Policy* 16/2 (1988), 353–375.

9 Peter Lyon, 'Neutrality and the Emergence of the Concept of Neutralism', *The Review of Politics* 22/2 (1960), 255–268 (258–259).

10 Lyon (n 9). Simon Hornblower, who mentions the 'limited neutrality' allowed in *foedus Cassianum* in his entry on neutrality in *The Oxford Classical Dictionary*, available at <<https://doi.org/10.1093/acrefore/9780199381135.013.4395>>. Cf Josef Kunz, *Kriegsrecht und Neutralitätsrecht* (Springer-Verlag 1935), 204, who emphasizes that there was no neutrality between Greeks and non-Greeks in antiquity or between Christians and infidels during the Middle Ages.

not necessarily draw others in. There will always be some political actors who choose to remain neutral.

The beginnings: de Vattel

For present purposes, this brief history of neutrality can begin much later than antiquity, namely with Emer de Vattel, perhaps the most important founder of its modern understanding.¹¹ His moral relativism, formed and applied during the age of cabinet wars, can be transposed almost seamlessly into the present-day “dog-eat-dog” understanding of international relations.¹² Although de Vattel did not entirely abandon just war thinking, he accepted the view that both sides could have a *iusta causa* to wage war, not only subjectively, but even objectively.¹³ At the same time, he considered this distinction insignificant only as between the warring parties themselves, not in their relations with neutral parties.¹⁴ If a “prince makes an unjust war, every one [sic] has a right to succour the oppressed party. If he makes a just war, the neutral nations may interfere as mediators for an accommodation,—they may induce the weaker state to propose reasonable terms and offer a fair satisfaction,—and may save her from falling under the yoke of a conqueror”.¹⁵ As we shall see, this argument remains relevant to the law of neutrality today, albeit in different forms and against different backgrounds.

11 See Koen Stapelbroek, ‘Vattel and the Seven Years’ War’ in: Peter Schröder, *Concepts and Contexts of Vattel’s Political and Legal Thought* (Cambridge University Press 2021), 101–120.

12 Philip Allott, ‘The Emerging Universal Legal System’, *International Law FORUM du droit international* 3 (2001), 12–17.

13 Yet, de Vattel was not the first, Alberico Gentili did so already during the late 16th century, see Joachim von Elbe, ‘The Evolution of the Concept of the Just War in International Law’, *The American Journal of International Law* 33/4 (1939), 665–688 (675–677).

14 See Albert Geouffre de La Pradelle’s Introduction to Emer de Vattel, *Le droit des gens ou principes de la loi naturelle. Volume One* (Carnegie Institution of Washington, 1916), xxi.

15 Emer de Vattel, *The Law of Nations or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns* (6th American Edition by Joseph Chitty, T. & W. Johnson, Law Book Sellers 1844), § 49, available at <https://tile.loc.gov/storage-services/service/l1/llmlp/DeVattel_LawOfNations/DeVattel_LawOfNation.s.pdf> last accessed 31 December 2025.

Furthermore, de Vattel was probably the first to argue that neutrality should be achieved not only through equal treatment of the belligerents, but also through abstention: “Neutral nations are those who, in time of war, do not take any part in the contest, but remain common friends to both parties, without favoring the arms of the one to the prejudice of the other.”¹⁶ This is especially true where, as is so often the case, complete substantive equality of treatment is impossible.

In this respect, de Vattel’s answer to one of the fundamental questions of neutrality has survived until this very day: Neutral nations must stay out of wars, but they “are under no obligation to renounce their commerce for the sake of avoiding to supply [the respective belligerent’s] enemy with the means of carrying on the war”.¹⁷ In other words: Neutrality is preserved if trade continues as it did before the war began and if all belligerents are being treated equally.

De Vattel set the tone for debates on neutrality over the following century. More generally, his writings also foreshadowed both the triumph of legal positivism and the definitive end of the Christian natural law concept of just war. From the late eighteenth century onwards, the dichotomy between *iusta* and *iniusta causa* gave way to the dual function of sovereignty: a right to be left alone *by* other countries and a right to act *against* other countries. This meant, on the one hand, a robust prohibition of intervention and, on the other, understanding war as a means of enforcing state interests.

The classic law of neutrality: von Martens

By way of illustration, three standard works on international law from the period between the French Revolution and the last years before the outbreak of the First World War will be discussed below: Georg Friedrich von Martens’ *Introduction to Positive European International Law Based on Treaties and Customary Law* from 1796 (first published – interestingly – in 1789 as *Precis du droit des gens moderne de l’Europe*), the first edition of Henry Wheaton’s *Elements of International Law* (1836), and that of Lassa Oppenheim’s famous *International Law. A Treatise* from 1905.

16 De Vattel (n 15), § 103.

17 De Vattel (n 15), § III.

Von Martens' *magnum opus* is remarkable because it stood at the beginning of the positivist turn in international law.¹⁸ As a textbook for diplomats, it focuses on the actual practice of European states as expressed in treaties and other legally relevant acts. In short, von Martens tried to approach international law scientifically, by systematising, classifying and subdividing it and by defining its subjects and analysing its instruments. This left no room for teleologically-determined wishful thinking. Von Martens essentially viewed the law as what it is and how it is applied, not what one might wish it to be, whether for reasons of morality, religion, or politics. Secondly, von Martens built on Vattel's work, to which he repeatedly referred.¹⁹ He regarded war as justified, and objectively just for both sides, where it was undertaken as a measure of last resort in response to a past, ongoing, or reasonably foreseeable violation of a "perfect" (*vollkommen*) duty, and where no agreement existed to resolve the dispute by other means.²⁰ Examples include respect for treaties, access to impartial courts for foreign nationals, the right to one's own and legitimately acquired territory, protection for soldiers who are unable or unwilling to fight, and, most importantly for present purposes, respect for neutral states.

Von Martens' understanding of war results from his equation of people with their state. Sovereignty is a kind of collective property right over the respective state territory: "As soon as a people occupies a district (von Martens uses the German word "*District*" in the original version), it thereby acquires ownership of everything located within that borough (*Bezirk*), to the extent that it can make use of it to the exclusion of all other peoples and dispose of it in any way it sees fit, provided that this does not violate the full rights of a third party."²¹ The state has "supreme authority" (*Oberherrschaft*) and the "sole discretion" (*alleiniges Ermessen*) to determine its

18 See Martti Koskeniemi, 'Into Positivism: Georg Friedrich von Martens (1756–1821) and Modern International Law', *Constellations* 15/2 (2008), 189–207. On a side note, the arguably first positivist with a systematic approach to international law was Richard Zouch, see Anthony H. O'Brien-Thomond, 'Positivism and Monism in International Law', *Franciscan Studies* 8/4 (1948), 321–350 (321–325).

19 When outlining the rules of warfare or distinguishing between offensive and defensive wars for example.

20 Georg Friedrich von Martens, *Einleitung in das positive Europäische Völkerrecht auf Verträge und Herkommen gegründet* (published by Johann Christian Dieterich, 1796), 79 [original spelling retained], available at <https://www.deutschestextarchiv.de/boek/show/martens_voelkerrecht_1796> last accessed 31 December 2025, 325.

21 Von Martens (n 20), 79 (these and all subsequent translations are by the present author).

constitution, i.e. “excluding any foreign participation” (*mit Ausschluss aller fremden Theilnahme*).²² It follows that, as long as its fundamental rights are not infringed upon, “no nation has the right to demand “accountability from another state for its actions, other than to compel it to undertake or refrain from such actions”.²³ This also includes the right of a people to freely determine their religion and, complementarily, the prohibition of imposing one's own religion on others.²⁴

In the event of a violation of their rights and claims, states have the right to first announce and then resort to armed self-help: “Once the demand has been duly brought to light, the rule is that an amicable reminder, whether direct or indirect through a third party, must precede any actual violence; but in the case of a justified demand, a nation is as little obliged to accept an arbitrator as it is to accept a settlement at all. Therefore, if the path of kindness does not work, or if it is foreseeable that it will not succeed, there is no other way left for free peoples, since they recognise no higher judge above themselves, than that of self-help.”²⁵

Simply put, in von Martens own words, war is “one of the most essential sovereign rights”.²⁶ In line with the philosophical mainstream of his and the preceding era, he relies on a combination of contract theory and, relatedly, on the assumption that interstate relations exist in a state of nature: “Since every nation is entitled to follow its best insights in this matter, but none is the judge of the other, every people retains the right to repel force with force, but wars between free peoples must in every doubtful case be judged as externally just on both sides, insofar as the treatment of the enemy and the conclusion of war treaties and peace treaties are concerned.”²⁷

Thirdly, von Martens provided one of the first summations of the law of neutrality. Provided that third states do not belong to any alliance or coalition, he held that the right of one to wage war goes hand in hand with the other's right to neutrality.²⁸ Here, in keeping with his aforementioned penchant for structuring and categorisation, von Martens distinguishes between *complete*, *incomplete* and *contractual* neutrality. The first corresponds with the dichotomy between general abstention and equal treatment

22 Von Martens (n 20), 80.

23 Von Martens (n 20), 137.

24 Von Martens (n 20), 133.

25 Von Martens (n 20), 291–292.

26 Von Martens (n 20), 297.

27 Von Martens (n 20), 297.

28 Von Martens (n 20), 340.

that we find in de Vattel's writings and that is still common today. Complete neutrality is the only one guaranteeing the neutral party that it will be "treated amicably by the warring parties, spared all acts of violence and not deprived of its rights".²⁹ If these obligations are violated in isolated cases but not in their entirety, neutrality is considered imperfect: the relevant right is therefore "not yet extinguished in its entirety", but "restricted (*neutralité limitée*)".³⁰ Contractual neutrality, in turn, corresponds to today's understanding of perpetual neutrality: states *may* commit themselves, both in times of war and in times of peace, not to interfere during present and potential future wars.

On this basis, von Martens subdivides the rights and obligations of neutral actors into rules on support, neutral territory, neutral goods in war zones, and trade, although he refers to peoples rather than to states.

To begin with, von Martens indicates that neutral states are not permitted to send troops, ships or armaments, provide financial support or allow their nationals (referred to as "subjects") to participate in hostilities. This differs from the later-codified law of neutrality, which expressly does not impose any obligation on neutral parties to prevent their nationals or other people living on their territory from joining a belligerent.³¹

Von Martens set forth a second outdated rule: Neutral states could decide – as long as they treated all parties to a conflict equally – to allow belligerents to move troops through their territory. This contradicts the now long-standing obligation upon neutral states to refrain both from tolerating and also to actively prevent such actions on their territory. Belligerents, in turn, may not move their armed forces or war material through neutral territory.³²

If neutral states comply with these obligations, then, neither their land or sea territory nor their "subjects" and goods may be exposed to "violent acts".³³ The only exceptions are situations in which, although von Martens does not elaborate on them, a belligerent's "true right of necessity" at least "excuses" it from marching through or fleeing to the territory of the neutral state without its consent.³⁴

29 Von Martens (n 20), 342.

30 Von Martens (n 20), 342 (emphasis in the original).

31 Article 6 of Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.

32 Articles 2 and 5 of Hague Convention V.

33 Von Martens (n 20), 345.

34 Von Martens (n 20), 346.

Last but not least, he does not presume that there are any restrictions on private trade, not even regarding “dual-use” (to use today’s terminology) or genuinely military goods. The sole condition is, again, equal treatment. Belligerents themselves may, of course, confiscate contraband, take it for themselves so long as they pay compensation, or at least prevent it from falling into enemy hands.

War as a sovereign prerogative: Wheaton

The next major figure in the history of international law whose views on neutrality merit discussion is Henry Wheaton. His *Elements of International Law*,³⁵ which remained a standard work for over half a century after his death, aimed to provide lawyers with a “simple, clear and convincing description”³⁶ of the topic. Some even regard him as the (William) “Blackstone” of international law.³⁷

In comparison to von Martens, Wheaton’s treatise is far less systematic and structured. Following the Anglo-American tradition, he refers much more to contemporary – primarily US and British – practice in a loose structure that does not claim to be exhaustive. States, not philosophers, make law. For Wheaton, custom now became the supreme source of law.³⁸ Sovereignty trumped justice and natural law. Natural law, as *divine law*, was separate from the actual *law of nations* and its focus is not on people but on the state itself. Wheaton takes both for granted, each needs no further legitimization. “The only foundation [...] of international law, so far as it differs from the law of nature, is the general consent of mankind to consider each separate civil society as a distinct moral being.”³⁹

The same applies to the rights of states discussed in the second part of his *Elements of International Law*, above all self-preservation and independence. Due to the state of nature prevailing between states, each state may defend itself and make appropriate preparations to protect its territory and

35 Henry Wheaton, *Elements of International Law* (Carey, Lea & Blanchard 1836), 36.

36 Mortimer N. S. Sellers, ‘The Elements of International Law’, *International Legal Theory* 6/1 (2000), 12–15 (12).

37 Sellers (n 36).

38 William S. Dodge, ‘Withdrawing from Customary International Law: Some Lessons from History’, *Yale Law Journal Online* (2010), <<http://yalelawjournal.org/forum/withdrawing-from-customary-international-law-some-lessons-from-history>> last accessed 3 January 2025.

39 Wheaton (n 35), 39.

population at any time. Interference in foreign affairs is only allowed if a state's independence, freedom and security are directly affected.⁴⁰ The maxim, as we all know, or should know from interpersonal relationships, that the freedom of one person ends where that of another begins was also applied in classical international law in the 19th and 20th centuries.

In this context, one state's right to be left alone may yield to another's interest in waging war to enforce rights. In Wheaton's work we again find the well-known fundamental problem of international law, the lack of a universally recognised judge above the states and an effective and centralised enforcement mechanism: "Every state has therefore a right to resort to force as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society [...] Every state is also entitled to judge for itself the nature and extent of the injuries which will justify such a means of redress."⁴¹

We are therefore once again at the intersection of older natural law and early modern sovereignty. Natural law still required a just cause for war that could be understood objectively, even if asserted subjectively. Sovereignty, by contrast, "recognises no superior" and allowed rulers to judge their own causes, including alleged violations of peace by others: "Sovereignty is only fulfilled" by exercising jurisdiction, both internally and externally, and the ability "to enforce respect for its own peace mandate and the implementation of the law with military force from its equals, who, like it, recognise no superior above themselves",⁴² as von der Heydte once put it. Wheaton is a perfect example of this then-prevailing thinking: "The right of making war, as well as of authorizing reprisals, or other acts of vindictive retaliation, belongs in every civilized nation to the supreme power of state."⁴³ As a consequence, he was one of the first, if not the first, who expressly announced the death of just war theory: "The voluntary or positive law of nations makes no distinction [concerning the *ius in bello* or related rights and obligations] between a just and an unjust war. A war in form, or duly commenced, is to be considered, as to its effect, as just

40 Wheaton (n 35), 131.

41 Wheaton (n 35), 209.

42 Friedrich August Freiherr von der Heydte, *Die Geburtsstunde des souveränen Staates. Ein Beitrag zur Geschichte des Völkerrechts, der allgemeinen Staatslehre und des politischen Denkens* (Verlag Josef Habel 1952), 294.

43 Wheaton (n 35), 212.

on both sides. Whatever is permitted, by the laws of war, to one of the belligerent parties, is equally permitted to the other.”⁴⁴

Let us now turn to Wheaton’s thoughts about neutrality, to which he devotes the entire third chapter of part four to deal with alliances and “qualified neutrality”, the protection of neutral property, or the right to pursue, detain and search neutral ships for contraband (*ie* war-related material).

Wheaton cites impartiality as the primary duty of a neutral state (using de Vattel’s terminology). It is “the common friend of both parties, and consequently is not at liberty to favour one party to the detriment of the other”.⁴⁵ The only exceptions are cases of individual contractual obligations, *i.e.* qualified neutrality. Fulfilling these obligations does not make a state a party to the war and therefore does not lead to the loss of all rights arising from neutrality.

Wheaton identifies three central elements of neutrality. The first is the protection of neutral territory, including against the passage of belligerent troops or fleets. Here, unsurprisingly, he treats equal treatment as a basic prerequisite. The second is abstention. Drawing on de Vattel, Wheaton treats abstention as a general duty, which means that even qualitatively and quantitatively equal support for both belligerents would be incompatible with neutrality, quite apart from its practical difficulty. The third concerns the limits of neutral trade and the law of prize, including the imposition and breach of blockades. Here, too, Wheaton engages with de Vattel and Cornelis van Bynkershoek, while also drawing extensively on British and American practice from the late eighteenth and nineteenth centuries, though without much systematisation.

Neutrality and legal positivism: Oppenheim

Later nineteenth- and early twentieth-century authors continued to regard international law as resting on the “common consent” of sovereign states to its fundamental rules. In its most extreme form, this view implied that states could withdraw at any time, turning international law into something closer to a set of moral principles than a body of legal rules.⁴⁶ This is particularly evident in the sovereign decision on war and peace. As the perhaps

44 Wheaton (n 35), 213.

45 Wheaton (n 35), 281.

46 Dodge (n 38). See also Gustav Adolf Walz, *Wesen des Völkerrechts und Kritik der Völkerrechtsleugner* (W. Kohlhammer 1930).

best-known representative of this school of thought,⁴⁷ Lassa Oppenheim poignantly assumed that war “cannot always be avoided” due to the structure of the international community.⁴⁸ It is therefore neither illegal nor “inconsistent with, but a condition regulated by international law”.⁴⁹ War usually ends diplomatic relations but not the application of international law as such. Rather, it entails a number of legal consequences, most importantly, for our purposes, the application of the *ius in bello* and the laws of neutrality. Hence, it does not contradict but, on the contrary, *confirms* the status of international law as law in the proper sense of the term. Interestingly enough, Oppenheim also stated that he would welcome a *ius contra bellum*, but ultimately considers it unrealistic, prompting him to make a less legal than political statement by describing Kant’s idea (without mentioning him by name) of an “eternal peace” as “an impossibility in the conditions and circumstances under which mankind live and perhaps will live for ever, although eternal peace is certainly an ideal of civilisation”.⁵⁰

Hence, we once again find the interplay between self-preservation and independence as self-evident “fundamental rights”⁵¹ of states in Oppenheim’s work: states justify their interventions with their sovereignty, and conversely, sovereignty means that not every intervention is permitted. States violate the sovereignty of others if needed to maintain their own sovereignty,⁵² as a “legal remedy” to respond to previous violations of their rights, or for mere “political reasons only”.⁵³ As there exists, as already mentioned, no judge with mandatory jurisdiction and no higher authority that can or even has to apply coercive measures, war inevitably remains available as a justified and legitimate measure of last resort. Assessing the cause of war is largely beyond the grasp of the law. Wars can be fought for all sorts of reasons, both legal and political.⁵⁴

47 Devika Hovell, ‘The Elements of International Legal Positivism’, *Current Legal Problems* 75/1 (2022), 71–109.

48 Lassa Oppenheim, *International Law. Vol. II. War and Neutrality* (Longman, Green & Co. 1905), 56.

49 Oppenheim (n 48), 56.

50 Oppenheim (n 48), 56.

51 Lassa Oppenheim, *International Law. Vol. I Peace* (Longmans, Green and Co. 1905), 158.

52 Oppenheim (n 51), 178.

53 Oppenheim (n 48), 56.

54 Oppenheim (n 48), 56–57.

Unsurprisingly, Oppenheim also devotes considerable space to the law of neutrality. The word itself appears in the title of the second book (Volume II), where an entire section (Chapter III) is devoted to it, and some 400 times in the text. He explains the development of the law of neutrality by the fact that all states may benefit from its observance:⁵⁵ the belligerents remain on good terms with the neutrals, and the neutrals avoid being drawn into a war.⁵⁶ The understanding of sovereignty at that time went hand in hand with the acceptance of wars and the corresponding right to remain neutral (while belligerents had no right to request other countries to remain neutral). Unless a state became directly or indirectly involved in a conflict or declared otherwise, it was presumed to be neutral and thus had a right to be left alone. A separate declaration might be helpful in removing any doubts, but is not mandated by international law.⁵⁷

At this point, a brief addendum on the historical context of Oppenheim's treatise is necessary. In the first edition from 1905, he was still hopeful that the law of neutrality would be codified at the Second Hague Conference in 1907.⁵⁸ Indeed, the two Hague Conventions turned out to be the culmination of a development that dates back to the late eighteenth century. When they were concluded, they did not introduce anything fundamentally new. This may explain why Oppenheim does not mention them in the second edition, published in 1912, despite his detailed account of the conference.

III. From the League of Nations to the Kellogg-Briand Pact

The long heyday of the law of neutrality came to an abrupt end with the horrors of the First World War. A few months after the beginning of the invasion, German Chancellor Theobald von Bethmann Hollweg described Belgium's neutrality as a "mask," and argued that Germany had been "coerced" to march through Belgium "for the sake of self-preservation" due to "military necessity" caused by France's war plans.⁵⁹ This official position was supported by authoritative voices from German academia, which con-

55 Oppenheim (n 48), 314.

56 Oppenheim (n 48), 314.

57 Oppenheim (n 48), 317.

58 Oppenheim (n 48), 314.

59 Quoted in Karl Strupp, *Die Neutralisation und die Neutralität Belgiens* (Verlag Friedrich Andreas Perthes A.-G. Gotha 1917), 180.

tinued to view Germany's actions as lawful even after the war had been lost.⁶⁰ Since that time Germany's invasion of Belgium and Luxembourg are routinely invoked to show that neutrality offers no protection if powerful states have overriding interests.

More generally, the attitudes towards war had been turned upside down since then. It was no longer seen as a natural and inevitable element of the anarchic character of the international system but rather as a fundamental evil that needed to be prevented. The “wherever there are states, there is war” cynicism had had its day and the pacifist movement experienced an “*I told you so*” moment that it would probably have preferred to avoid. For example, in July 1917, before the war's unexpected end, Walther Schücking wrote a powerful indictment of “the system in Europe” that had made “such a tragedy possible. [...] today we have learned where 'realpolitik' and the cult of power in Europe have led us. If we want to save our continent from renewed destruction by the return of such catastrophes, there is no other way than to seek refuge in the very idea of law”.⁶¹ Accordingly, it was necessary to “further develop the norms of peace law on the prevention of war in such a way that the recurrence of such a catastrophic war is prevented as far as possible”.⁶² This included, above all, overcoming the state of nature by creating a “union of states” in Kant's sense: “organized pacifism”, as Schücking called it.⁶³

He and other pacifists articulated these ideas even before Woodrow Wilson's famous Fourteen Points speech of January 1918. The idea of a permanent and ultimately political organisation became mainstream, with universal ambitions, insofar as universality was possible in a world still shaped by colonialism and by a civilisation paradigm that divided peoples and states into different classes. Even Oppenheim, horrified by the war, viewed “the right to peace” as “the centre of gravity of international law,” and “watched the growth of the League of Nations movement” with “cautious sympathy” late in his life.⁶⁴

60 For a general – and critical (!) – discussion of this argument, see Josef L. Kunz, *Das Problem von der Verletzung der belgischen Neutralität* (Manzsche Verlags- und Universitätsbuchhandlung 1920).

61 Walther Schücking, *Die völkerrechtliche Lehre des Weltkrieges* (Veit & Comp. 1918), v-vi (as noted at the end of this foreword, the printing of the book was delayed).

62 Schücking (n 61), 9.

63 Schücking (n 61), 11–12.

64 See Ronald F. Roxburgh's preface to his revised third edition of Oppenheim's *International Law* (Longmans, Green and Co. 1920), vii.

That also had consequences for neutrality. It is, after all, a product of anarchy, a state the League of Nations tried to overcome with a system of collective security aimed at eliminating or at least making war less frequent.⁶⁵ States that jointly take action against those who break the peace would move closer to an organized community.⁶⁶

Nevertheless, the League of Nations Covenant, although it contained an obligation to respect the independence and territorial integrity of all its parties, did not prohibit war altogether. Instead, it was made conditional on bringing the underlying dispute before an arbitration tribunal or the Council of the League of Nations.

The right to neutrality thus lost much of its significance without becoming completely obsolete. It continued to apply in wars fought between countries that remained outside of the League of Nations or in what has been described as “permitted individual wars”,⁶⁷ i.e. those in which the aforementioned procedural rules were observed, the two parties to the dispute did not recognise the Council's report as binding, one party did not fulfil its obligations under the report, or the report was not produced within the deadline (within six months) or was not unanimous.⁶⁸ In addition, there was the special case of Switzerland, which, under the banner of “differential neutrality”, was on the one hand exempt from military measures adopted by the league and on the other hand agreed to “cooperate” in economic sanctions against aggressors.⁶⁹ A few years later, however, it officially returned to a broad understanding of neutrality that included refraining from participating in economic sanctions on the eve of the Second World War after the sanctions regime and, more generally, the collective security system failed in the Abyssinia crisis.⁷⁰

The actual, albeit theoretical, end of the right to neutrality therefore arrived a few years after the conclusion of the League of Nations Covenant,

65 Lassa Oppenheim, *The League of Nations and its Problems* (Longmans, Green and Co. 1919), 11.

66 Nicolas Politis, *Neutrality and Peace* (Carnegie Endowment for International Peace 1935), 3.

67 Walther Schücking and Hans Wehberg, *Die Satzung des Völkerbundes* (second edition, Verlag von Franz Vahlen 2025), 635.

68 Schücking and Wehberg (n 67), 513.

69 Schücking and Wehberg (n 67), 634; see also Freiherr von Freytagh-Loringhoven, *Die Satzung des Völkerbundes* (Verlag von Georg Stilke 1926), 38.

70 See Francis Paul Walters, *A History of the League of Nations* (Oxford University Press 1960), 781.

with the Kellogg-Briand Pact of 1928. As it finally prohibited war altogether, neutrality offered no additional protection and thus was no longer a prerequisite for being left in peace. Outlawing war made neutrality redundant.⁷¹

Needless to say, matters were not quite so simple at the time. In academic writing and later also in practice, there was a lively debate about the actual scope of the Pact, *i.e.* whether it also prohibited low-threshold means of warfare such as armed reprisals or wars that were not subjectively recognised as such by neither of the belligerents.⁷² To name one prominent example, Philip C. Jessup, further developing the ideas of de Vattel, Wheaton and Oppenheim, still emphasized that the distinction between aggressor and defender was not always clear-cut and that neither the international community nor individual states would necessarily wish to take a clear position.⁷³ Furthermore, he argued that a number of countries, namely Germany, Austria, Czechoslovakia, Italy, Yugoslavia and Lithuania, had committed themselves to neutrality in certain circumstances.⁷⁴ Furthermore, the United States in particular was yet to abandon its neutral tradition.⁷⁵

Last but not least, one should keep in mind that the Pact was an unsatisfactory compromise and that the security guarantees France had originally hoped to receive from the United States never materialised. The first and final moment of glory of the declaration to “condemn recourse to war for the solution of international controversies” and to “renounce it, as an instrument of national policy in their relations with one another” came *after* the end of the Second World War, when it served as the basis for the notion of crimes against peace in the Nuremberg and Tokyo trials. The Pact could not alter the course of the 1920s and 1930s: the lasting influence of revanchist voices in Germany, the arguments of self-declared “realists” who saw peace as “war in disguise,”⁷⁶ the rise of fascism, or the challenges posed by the then-young Soviet Union. As the world had to learn once again in 1939, a piece of paper – and that is all international treaties are at the end of the day – cannot prevent wars.

71 Politis (n 66), 80.

72 See, for example, Axel Møller, ‘The Briand-Kellogg Pact’, *Nordisk Tidsskrift for International Ret* 3 (1932), 94–107.

73 Philip C. Jessup, ‘The Birth, Death and Reincarnation of Neutrality’, *The American Journal of International Law* 26/4 (1932), 789–793 (793).

74 Jessup (n 73), 792.

75 See, in addition to Jessup, also Lester H. Woolsey, ‘Problems of American Neutrality’, *American Society of International Law Proceedings* 43 (1940), 21–31.

76 Alexander Hold-Ferneck, *Lehrbuch des Völkerrechts. Erster Teil* (Felix Meiner Verlag in Leipzig 1930), 11.

IV. The definitive end of the right to neutrality: the Charter of the United Nations

Despite all the prophecies of doom, the interwar peace project, though sometimes disparaged as “utopian” and naïve,⁷⁷ was taken up again and further developed during and after 1945: the League of Nations gave way to the United Nations, its Council of the League to the Security Council, and the prohibition of war to a more far-reaching prohibition of force. The charge of naivety could no longer be made easily. After the failure to draw lessons from global politics after 1918, and in light of the invention and actual use of the atomic bomb, avoiding a Third World War had become a matter of global survival. The utopians had become realists.

As a consequence, neutrality was once again rendered obsolete.⁷⁸ Ironically, from an Austrian perspective, Hans Kelsen (the famous architect of its Constitution) was one of the earliest prominent scholars to point out that the prohibition of force precluded the equal treatment of belligerents. As he emphasized, international law now knew only three types of wars: they are either a serious violation of international law, legitimate self-defence or a permissible means of coercion within the framework of the collective security system.⁷⁹ There is nothing in-between. The age of anarchy was finally over, or so it seemed. Strict neutrality was incompatible with membership in the United Nations and its collective security system.⁸⁰

Matters developed differently in the real world. Although neutrality acquired a bad reputation or often proved ineffective during and immediately after the Second World War, non-aligned Sweden joined the United Nations as early as 1946, followed by neutral Austria, Ireland and Finland in December 1955.

The reason lay, among other things, in Soviet pragmatism after Stalin's death and the Korea War. At that point, neutrality, or more precisely *de facto* (i.e. not treaty-based) “neutralisation”, was “rediscovered”⁸¹ to create buffers to NATO and as a means of indirectly weakening the West. In

77 See E. H. Carr, *The Twenty Years' Crisis, 1919 – 1939* (Harper Perennial 1964).

78 For general information on this topic, see Jamal el-Zein, *Das Ende des Neutralitätsrechts* (Nomos 2024).

79 Hans Kelsen, *The Law of Nations. A Critical Analysis of Its Fundamental Problems* (Stevens & Sons Limited 1951); Hans Kelsen, *Principles of International Law* (Rinehart & Company Inc 1952), 89.

80 Kelsen (n 79, 1951), 108.

81 Heinz Fiedler, *Der sowjetische Neutralitätsbegriff in Theorie und Praxis. Ein Beitrag zum Problem des Disengagement* (Verlag für Politik und Wirtschaft 1959), 221 *et seq.*

the short term, securing existing spheres of influence was a more realistic alternative to hopeless expansionism. In the longer run, a *modus vivendi* for coexistence with non-communist states had to be found. If the Soviets could not tie them (too closely) to themselves, neutrality would at least keep or even pull them away from the United States.

Austria's neutral status is a case in point. Starting in 1952, the United States and, to a lesser degree, the United Kingdom and France had worked on the reconstruction of the Austrian Armed Forces in their zones of occupation.⁸² Occupied by the four Allied Powers since 1945, Austria's political elite and population felt closer to the West than the Soviet Union for various reasons. While United States' aid packages, products and pop culture proved remarkably popular, Red Army soldiers had committed countless war crimes and were particularly oppressive in their occupation zone, and countless Austrian prisoners of war remained in Soviet hands years after the end of the war. Unsurprisingly, the Communist Party enjoyed only limited support. However, due to Austria's geographic location, the (Austro-)German property located there, and the fact that Soviet troops had taken great pains to reach Vienna as early as possible during the final phase of the Second World War, NATO membership was never an option. The other alternatives were endless occupation, a division similar to that of Germany, or, as it was ultimately agreed, neutrality. Initially, there had even been talk of security guarantees for Austria, though these were never given.⁸³

At the UN level, Austria relied on the "Kunz-Verdroß doctrine", named after Josef L. Kunz, professor at the University of Toledo after his emigration in 1932, and Alfred Verdroß, professor at the University of Vienna and also a member of the International Law Commission from 1957 to 1966. It assumed that the veto powers would take due account of Austria's well-known perpetual neutrality. With the exception of China, they were also parties to the Austrian State treaty – and could therefore be expected to refrain from demanding any military or otherwise non-neutral action.⁸⁴ For some 35 years, however, this position was never really tested in practice

82 Johann Christoph Allmayer-Beck, 'Landesverteidigung und Bundesheer' [Parts I–III], 4–6 *Österreichische Militärische Zeitschrift* (1972); Manfred Rauchensteiner, 'Die B-Gendarmerie - mehr als eine Episode', 4 *Truppendienst* (2002), 4–9.

83 See Helfried Pfeifer, 'Der österreichische Staatsvertrag', *Archiv des Völkerrechts* 5/3 (1955), 296–307 (301–302).

84 See, among others, Alfred Verdross, 'Austria, Neutrality and the United Nations' *India Quarterly* 16/1 (1960), 24–30.

because the Security Council did not adopt any military coercive measures until the Iraq War of 1990-91. In the only two cases of Cold War sanctions, Austria's insistence that each case had to be examined individually and that the adoption of sanctions would have no general consequences for neutrality met with little or no interest.

Politically, Austria successfully managed to strike a balance between East and West. To take a particularly prominent example, it benefitted, similar to Sweden and Ireland, but in marked contrast to Finland,⁸⁵ from the Marshall Plan. In 1961, the United States then made some 1.2 billion Schillings (the then-currency of Austria;) available to Austria, subject to certain limits enshrined in a bilateral agreement. This sum of roughly 87,207,401.00€, albeit without taking inflation into account, exists to this day and is mostly used for development co-operation, research, and technological development, mostly benefitting small and medium-sized enterprises.⁸⁶

A few years later, in September 1968 and thus immediately after the brutal suppression of the Prague Spring by Warsaw Pact troops, Austria also became the first Western European country to receive Soviet natural gas. It thus served as a kind of laboratory to test the reliance of similar exports to Germany, which started two years later. The logic behind this offer was as simple as it was tempting: Austria had the best of both worlds, so why not other Western countries as well? Why not be good friends with both blocs instead of being best friends with only one?⁸⁷ All it took was to keep at least some distance from the United States!

At the end of the day, Austrian neutrality often boiled down to avoiding angering Moscow. The Soviet Union usually insisted or would have insisted on an expansive interpretation of permanent neutrality whenever Austria contemplated moving politically, economically or, God forbid, militarily closer to NATO countries. It meant "not only staying out of 'hot' wars, but also out of 'cold' wars",⁸⁸ as D. B. Lewin, an influential academic voice

85 Mikko Majander, 'The limits of sovereignty. Finland and the Question of the Marshall Plan in 2047', *Scandinavian Journal of History* 19/4 (1994), 309–326.

86 *Der Standard*, Nachkriegshilfe für Österreich: 600 Millionen aus ERP-Fonds im Jahr 2017, 15 June 2018, available at <<https://www.derstandard.at/story/2000081638840/nachkriegshilfe-fuer-oesterreich-600-millionen-aus-erp-fonds>>, last accessed 5 January 2026.

87 See Fiedler (n 81), 224.

88 D. B. Lewin, *Grundprobleme des modernen Völkerrechts* (Fundamental Problems of Modern International Law), in: Grigory Tunkin, D. B. Lewin, Eberhard Menzel, *Drei sowjetische Beiträge zur Völkerrechtslehre* (Three Soviet Contributions to International

from the University of Moscow⁸⁹ put it in the late 1960s. Because of the dysfunction of the Security Council, permanent neutrality was “by no means outdated; rather, it has taken on new significance as a means of consolidating peace and security”.⁹⁰ During the Cold War, Austria’s foreign policy was therefore mostly determined by political considerations camouflaged in pseudo-legal debates on “pre-emptive obligations” (*Vorwirkungen*).⁹¹ When in doubt, restraint steadfastly remained the order of the day.

Meanwhile, the core of the *law* of neutrality with its focus on the military dimension remained unchanged and was applied repeatedly. Although the number of interstate wars had declined sharply since 1945, it had not fallen to zero. In addition, there were numerous conflicts with varying degrees of external involvement, some low-level, others quite intense. Thomas M. Franck famously wondered who had “killed” the prohibition of force as early as 1970.⁹² In the chaotic world of civil and decolonisation wars, the aftermath of the Prague Spring, nuclear threats and conflicts between Israel and its Arab neighbours, North and South Korea, and India and Pakistan, there were understandable reasons for the motivation to remain on the sidelines.

al Law) (Hansischer Gildenverlag, Joachim Heitmann & Co. 1969), 1–275 (226f.), cited in Ludmilla Lobova, ‘Die Außenpolitik und Neutralität Österreichs aus der Sicht der UdSSR’ in: Arnold Suppan, Gerald Stourzh and Wolfgang Mueller, *Der österreichische Staatsvertrag. Internationale Strategie, rechtliche Relevanz, nationale Identität* (Verlag der Österreichischen Akademie der Wissenschaften 2005), 891–922 (895) [own translation].

89 Kazimierz Grzybowski, review of ‘Three Soviet Contributions to International Law. Vol. 59. Foundations of Modern International Law; The Ideological Struggle and International Law; Fundamental Problems of Modern International Law. by G. I. Tunkin, D. B. Lewin, Eberhard Menzel’, *The American Journal of International Law* 65/2 (1971), 430–431.

90 Lewin (n 88), 227–228 [own translation].

91 For a critical view on this academic “dogmatism” concerning the interpretation of Austria’s neutrality, see Karl Zemanek, ‘Österreichs Neutralität und die GASP’, *Österreichisches Jahrbuch für Politik* 11 (1994), 1–17 (10).

92 Thomas M. Franck, ‘Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States’, *The American Journal of International Law* 64/5 (1970), 809–837.

V. The end of the Cold War: Swan songs for neutrality

The political downfall of neutrality came only later, with the end of the Cold War, when the soon-to-be formerly socialist states and the Western states undertook, as they stated in the 1990 Charter of Paris for a New Europe, “to build, consolidate and strengthen democracy as the only system of government of our nations”, followed by a declaration that sounds almost like science fiction today: “Now that a new era is dawning in Europe, we are determined to expand and strengthen friendly relations and co-operation among the States of Europe, the United States of America and Canada, and to promote friendship among our peoples.”⁹³

In this atmosphere, passive coexistence increasingly gave way to active cooperation, while strategic analyses and foreign policy increasingly focused on domestic, terrorist and non-military threats. The Security Council now intervened more frequently in civil wars – which had long been considered “internal affairs” –, from East Africa to the Yugoslav Wars, and even began to address the individual accountability of political leaders. Neutrality plays no role in intra-state warfare or when fighting terrorists.

In parallel, the negotiations and entry into force of disarmament treaties like the Ottawa Convention, the Chemical Weapons Convention, or the Firearms Protocol meant that arms exports were no longer predominantly, if at all, addressed through the law of neutrality. Interestingly, neutral states themselves had long moved beyond the narrow question of whether an interstate war existed. The 1972 version of the Swiss War Material Act, adopted in response to the Biafra War, during which weapons were supplied to Nigeria despite massive human rights violations, already went beyond the law of neutrality. It prohibited deliveries to areas where an “armed conflict”, whether between states or within a state, “prevails, threatens to break out or otherwise dangerous tensions exist”.⁹⁴ Austria followed suit in 1982 by amending the War Material Act of 1977. As the members of parliament behind this change openly stated, their intention was to prevent arms exports to military dictatorships such as that of Augusto Pinochet's

93 <<https://www.osce.org/sites/default/files/f/documents/0/6/39516.pdf>> last accessed 5 January 2025.

94 Quoted in Stefan Oeter, *Neutralität und Waffenhandel* (Springer 1992), 207.

in Chile or that of the Argentine junta under Jorge Rafael Videla.⁹⁵ To this day, arms deliveries in Austria are still viewed primarily through the lens of human rights, and only occasionally through the lens of neutrality law.⁹⁶

One final development from the 1990s that is significant for present purposes is the debate on the state responsibility articles: the International Law Commission once again clarified that states that knowingly aid or assist in a breach of international law can also be held responsible (Article 16). At least in some cases, the permitted passage of an aggressor's warships for example, there is a contradiction with the duty of equal treatment under neutrality law. Another, but ultimately (still?) hypothetical restriction on neutrality is the envisaged obligation to cooperate to end serious violations of peremptory international law (*ius cogens*), including the prohibition of force, and not to recognise the resulting situations (such as annexations).⁹⁷

In this atmosphere, Austria joined the European Union and later participated in the further development of its Common Foreign and Security Policy (CFSP), including the Common Security and Defence Policy (CSDP) and, ultimately, the mutual defence clause in the Lisbon Treaty. Since then, its dual status as a permanently neutral EU Member State has meant that it may, but is not obliged to, participate in military measures within the framework of the European Union. Where the limits lie, or indeed whether there are any limits at all, would only be determined in case of an actual armed attack.

Switzerland, meanwhile, did not go this far. Even so, the Swiss Foreign Ministry openly acknowledged, as early as 1992 that neutrality “had lost importance as a result of the changed foreign policy environment [...] compared to other foreign policy instruments”, which also required a “re-orientation of foreign policy with regard to neutrality”.⁹⁸ A few months later, then-Minister of Defence Kaspar Villiger called for closer ties with NATO and the Western European Union, which still existed at the time:

95 See motion 177/A XV. GP submitted by Heinz Fischer, Karl Blecha and other SPÖ members of parliament on 12 May 1982, available at <https://www.parlament.gv.at/DOCUMENT/XV/A/177/IMFNAME_285039.PDF>, last accessed on 9 July 2025.

96 Heinz Gärtner and Ralph Janik, ‘Between Neutrality and Norm Compliance: Austria’s Arms Export Laws in a Multilateral Order’, working paper, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6059015> last accessed 11 January 2025.

97 Article 41 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts. See also el-Zein (n 78), Chapter VI.

98 Aussprachepapier des EDA an den Bundesrat vom 1. April 1992, available at <<https://dodis.ch/59120>> last accessed on 9 July 2025.

“This is the only way we can avoid becoming isolated in terms of security policy.”⁹⁹

Ten years later, Switzerland joined the United Nations, a step that had failed in 1986 because of a negative referendum. In hindsight, as in Austria, the decades-long debate on this issue was thus ultimately primarily about *neutrality policy* rather than neutrality law. By the 1990s, it was generally accepted that sanctions, especially those imposed by the Security Council, did not trigger any obligations under the law of neutrality. There had also been no doubt that Switzerland could not be obliged to send peacekeeping troops.¹⁰⁰ What remained was the controversial question of overflights or the transit of armed forces acting on the basis of a Security Council mandate: It allowed only non-military transport for the “Coalition of the Willing” in the 1991 Iraq War and for NATO during its operations in the war in Bosnia and Herzegovina. Today, however, and similar to neutral Austria or Ireland, Switzerland takes the view that coercive military measures authorized by the Security Council do not constitute a war within the meaning of neutrality law and therefore allow them to render even military support.¹⁰¹ In any event, participation in peace-enforcement operations is not mandatory. While the Security Council could oblige members of the United Nations to contribute soldiers, especially since its powers, as the Charter of the United Nations in general, take precedence over other obligations under international law, including neutrality, the composition and the general lack of agreement among the P-5 renders such a scenario plainly unrealistic.

99 Sicherheitspolitische Annäherung der Schweiz an die NATO und die WEU, 18 December 1992, available at <<https://dodis.ch/61267>> last accessed on 9 July 2025.

100 On both issues, see Detlev Chr. Dicke, ‘Völkerrechtliche Probleme eines eventuellen Beitritts der Schweiz zu den Vereinten Nationen’, Archiv des Völkerrechts 22 (1984), 405–417.

101 See, for example, <https://www.eda.admin.ch/dam/eda/de/documents/aussenpolitik/internationale-organisationen/uno/2017-und-aelter/20140814-UNO-Politik-der-Schweiz_DE.pdf> last accessed on 9 July 2025. For Ireland’s position see <<https://www.gov.ie/en/department-of-foreign-affairs/publications/international-security-policy-background-information/#irelands-policy-of-military-neutrality>> last accessed 9 July 2025: “Like other European neutral states, Ireland has not seen UN membership, EU membership or membership of NATO’s Partnership for Peace programme as prejudicing Ireland’s policy of military neutrality.”

VI. 9/11 and Iraq 2003: war, terror and neutrality

Despite the euphoria of the Post-Cold War period, neutrality was neither completely abandoned during the phase of the “liberal world order” nor rendered completely irrelevant. According to the Stockholm International Peace Research Institute (SIPRI), four *major* inter-state conflicts broke out in the hopeful period between 1990 and 2004:¹⁰² Iraq-Kuwait (including the US-led response) from 1990 to 1991, India-Pakistan from 1990 to 1992 and again 1996 to 2003, Ethiopia-Eritrea from 1998 to 2000, and the 2003 invasion of Iraq. In addition, and despite their characterization as a “humanitarian intervention” to stop and prevent human rights violations in Kosovo, the NATO air strikes against Serbia in 1999 also constituted a war in the sense of the laws of neutrality. Meanwhile, numerous internal conflicts were “internationalised” by external interventions, such as the conflicts over Transnistria in 1990-1992, South Ossetia from 1991 to 1992, Abkhazia from 1992 to 1993, Nagorno-Karabakh in 1992, as well as the civil wars in Sierra Leone from 1991 to 2001, Burundi from 1993 to 2005, the Democratic Republic of Congo from 1996 to 1997, and the Yugoslav Wars from 1991/92 and 1995.¹⁰³

This relatively (!) peaceful phase came to an end with the 9/11 attacks and the massive US response, above all the 2003 Iraq War. While the former were followed by a wave of solidarity, the situation was quite different when the possibility of an attack on Iraq was intensively discussed from 2002 onwards. Although George W. Bush stated that other countries could only side with the United States or with the terrorists when announcing the *War on Terror*,¹⁰⁴ he could no longer count on unconditional support, even within NATO. France and Germany, in particular, opposed the war, called for more time for the UN weapons inspectors and refused to participate (directly) in the attack. France also announced that it would use its veto

102 It should be noted that this is not a classification under international law; rather, SIPRI refers to whether the armed forces and territories of several states are involved, see <<https://www.sipri.org/sites/default/files/YB05%20121%2002a.pdf>> last accessed on 9 July 2025.

103 Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout', *The American Journal of International Law* 92/2 (1998), 236–242.

104 Speech from 30 April 2002, available at <<https://www.ssa.gov/history/gwbushstmts2.html>> last accessed on 9 July 2025.

in the Security Council if necessary.¹⁰⁵ Subsequent US attempts to invoke “pre-emptive” self-defence or a “resurgence” of the older authorisation of armed force against Iraq dating from the 1990/91 Gulf War were generally rejected.

These different starting points also had an impact on how neutrality was handled. In the case of “Operation Enduring Freedom” against Al-Qaeda and the Taliban as the de facto rulers in Afghanistan, Austria, in contrast to Switzerland, approved military overflights – despite the lack of authorisation by the UN Security Council, which merely reaffirmed the United States’ right to self-defence. A few weeks after 9/11, then-Federal Chancellor Wolfgang Schüssel once again said that he would not rule out NATO membership.¹⁰⁶ In December, the Parliament’s Defence Committee even passed a resolution with the votes of the ÖVP and the FPÖ (the two governing parties at that time) that mentioned the “security and defence policy benefits of Austria’s NATO membership [...] in light of security policy developments” and that it would “keep the option of [NATO] accession in mind”.¹⁰⁷

As a typical – formally speaking – inter-state war, the 2003 US attack on Iraq was different. Despite its sympathies for the Bush administration’s position, the Austrian government basically had no choice but to close its borders and hope for the best. Ultimately, it performed a veritable balancing act by sharply criticising Saddam Hussein while still explicitly openly declaring *ad hoc*-neutrality. This was a political decision that would not have been necessary since a permanently neutral state can be expected to act in conformity with this status in every war anyhow. Switzerland also emphasised its intention to apply the laws of neutrality on the first day of the attack. Furthermore, both states had already prohibited military overflights and troop movements through their territory because they were part of the preparations for the war.

In this regard, one must keep in mind that any military support for the United States and its co-belligerents would have been contrary to international law, regardless of neutrality. The Iraq War was a clear case

105 <<https://www.nytimes.com/2003/03/06/international/europe/france-and-russia-ready-to-use-veto-against-iraq-war.html>> last accessed 9 July 2025.

106 <https://www.ots.at/presseaussendung/OTS_20011103_OTS0009/profil-schuessel-nato-beitritt-nicht-ausschliessen> last accessed 9 July 2025.

107 <https://www.parlament.gv.at/aktuelles/pk/jahr_2001/pk0871> last accessed 9 July 2025.

of aggression. As briefly explained above, international law prohibits both direct attacks and support for violations of the prohibition of the use of force. No state, whether neutral or not, may make its territory available to an aggressor (not even for mere troop movements), supply weapons, provide strategically relevant information, or provide substantial financial support. Mere “*non-belligerence*” is not sufficient; the passive support for the Iraq War by countries such as Germany, Italy or Canada – be it by permitting overflights, participating in the surveillance of Iraqi airspace, or transporting troops¹⁰⁸ – was therefore illegal.¹⁰⁹

VII. Neutrality after 24 February 2022: legal end and (political) comeback?

Around 19 years after the Iraq War, neutrality returned to the spotlight once again when Russia launched its full-scale invasion of Ukraine. This time, the European neutrals went further than ever, although they still adhered to their core obligations under the law of neutrality. In addition, then still non-aligned Sweden and Finland even sent weapons and ultimately joined NATO. Intense debates about “whose” war the war in Ukraine was and at what point a state would become a “warring party” and, related to this, where support should end also took place in the United States or Germany. Neutrality law also played a significant role here. The decision to remain outside of conflict or set certain limits to military support is often independent of membership in military alliances.

In the end, Ireland, Austria, Malta and Switzerland (only) provided various forms of “*non-lethal aid*”. Ireland went remarkably far in its support, sending “Meal, Ready-to-Eat” and protective clothing from its armed forces’ stocks right at the start of the war to support Ukraine’s troops.¹¹⁰ Later, it went as far delivering radar systems¹¹¹ and training Ukrainian soldiers

108 <<https://www.dw.com/de/irak-krieg-nach-der-1%C3%BCge-folgte-der-v%C3%B6llige-errechtsbruch/a-64942299>> last accessed 9 July 2025.

109 See Georg Nolte and Helmut Philipp Aust, ‘Equivocal Helpers—Complicit States, Mixed Messages and International Law’, *International and Comparative Law Quarterly* 58/1 (2009), 1–30.

110 <<https://www.breakingnews.ie/ireland/body-armour-and-10-tonnes-of-food-sent-by-ireland-to-ukrainian-army-1273802.html#:~:text=Ireland%20has%20sent%200%20ready,forces%20battling%20the%20Russian%20invasion>> last accessed 9 July 2025.

111 <<https://www.irishtimes.com/ireland/2025/02/24/ireland-to-donate-air-defence-systems-to-ukraine-as-war-enters-fourth-year/>> last accessed 9 July 2025.

in clearing mines and unexploded ordnance as part of the *EU Military Assistance Mission in support of Ukraine* (EUMAM Ukraine).¹¹²

Austria was somewhat more cautious and ruled out any support for Ukraine's armed forces. Instead, it merely sought to "help the Ukrainian civilian population to better protect itself" by supplying helmets and protective vests,¹¹³ as Defence Minister Klaudia Tanner (ÖVP) announced on 28 February 2022. Following a debate initiated by Federal President Alexander van der Bellen in May 2023, she stated that "[w]e will not risk the involvement of Austrian soldiers, even indirectly, in acts of war".¹¹⁴ In a response to a parliamentary question in November of the same year, she also argued that "the [legal] conditions for deployment [...] in the context of humanitarian aid during an ongoing conflict were not met."¹¹⁵ This finding was correct. The relevant law, the Federal Constitutional Law on Cooperation and Solidarity in the Deployment of Units and Individuals Abroad (KSE-BVG), does not permit deployments of the Austrian Armed Forces to war zones, whether outside or inside the EU. It would have only been possible to train Ukrainian soldiers inside Austria. As one may expect, this idea remained an academic pipe dream. Any direct contact between Austrian and Ukrainian soldiers was the government's red line. In the end, it merely financed, via the International Trust Fund and similar to Switzerland, demining equipment and support for an aid programme run by the Organisation for Security and Cooperation in Europe (OSCE).¹¹⁶

Nevertheless, a small but remarkable revolution, especially in light of Austria's long-standing practice of "exaggerating"¹¹⁷ its neutrality obligations beyond what was actually required by law, did take place: While the government never actually thought about sending or allowing the export of weapons, it did allow their transit. To this end, the Foreign Ministry specif-

112 <<https://www.military.ie/en/news-and-events/news/rish-defence-forces-training-as-sistance-to-eu-military-assistance-mission-in-support-of-ukraine-eumam-ua-cyprus.html>> last accessed 9 July 2025.

113 <<https://www.derstandard.at/story/2000133716003/oesterreich-schickt-helme-schutzwesten-und-treibstoff>> last accessed 9 July 2025.

114 <<https://orf.at/stories/3316150/>> last accessed 9 July 2025.

115 <https://www.parlament.gv.at/dokument/XXVII/AB/15658/imfname_1594196.pdf> last accessed 9 July 2025.

116 <<https://www.bmeia.gv.at/ministerium/presse/aktuelles/alle/2023/05/oesterreich-finanziert-entminungsgeraet-fuer-die-ukraine-im-wert-von-2-millionen-euro>> last accessed 9 July 2025.

117 Peter Hilpold, *Solidarität und Neutralität im Vertrag von Lissabon* (Facultas 2010), 28 *et seq.*

ically requested a provision in the relevant Council Decision (338/2022), according to which “[m]ember States shall permit the transit of military equipment, including accompanying personnel, through their territories, including their airspace”.¹¹⁸ In contrast to the parallel Council Decision on providing lethal aid (339/2022), the government did not abstain “constructively” (meaning it does not prevent the adoption of a decision) but voted in favour. Such a Council Decision supersedes the Neutrality Act: In conjunction with Article 23j of the Federal Constitutional Law, which allows participation in measures within the framework of the CFSP whenever there is a legal basis under EU law, there was a clear constitutional basis. Ultimately, Austria’s neutrality proved quite flexible: Traditional neutrality as codified in the two Hague Conventions ultimately focuses on direct military support from or to a belligerent. It says nothing about equipment transported by a non-belligerent, meaning a state that is neither neutral nor a direct participant in a war, to a belligerent.¹¹⁹

Malta, the third permanently neutral EU Member State, took a middle path. Its small size probably played a role here. Although Prime Minister Robert Abela repeatedly stated that Ukraine could not “win this war”, Malta nevertheless participated in the aforementioned training mission by sending a liaison officer between the United Kingdom and the EU.¹²⁰ In this context, the Maltese armed forces emphasised that none of their soldiers were involved in training their Ukrainian colleagues and that ensuring communication did not constitute a violation of neutrality.¹²¹

Unsurprisingly, Switzerland was much more cautious than the neutral EU Member States. Even two and a half years after the start of the war, the Federal Council (*Bundesrat*) still continued to refuse the export of protective vests to Ukraine because they can be used for both military and civilian purposes and because it found that equal treatment of the warring parties takes precedence over the protection of the Ukrainian

118 Helmut Tichy, Konrad Bühler and Pia Niederdorfer, ‘Recent Austrian Practice in the Field of International Law. Report for 2022’, *Zeitschrift für öffentliches Recht* 78 (2023), 113–163 (162).

119 See Ralph Janik, ‘Austrian Neutrality amid Russia’s War on Ukraine’, *Austrian Review of International and European Law* 26 (2023), 147–155.

120 <https://www.maltatoday.com.mt/news/national/134217/malta_is_part_of_eu_mission_to_train_and_supply_ukraine_against_russia> last accessed 9 July 2025.

121 <https://www.maltatoday.com.mt/news/national/134217/malta_is_part_of_eu_mission_to_train_and_supply_ukraine_against_russia> last accessed 9 July 2025.

civilian population.¹²² At the same time, Switzerland has taken the initiative in humanitarian mine clearance in civilian areas since the first year of the war by providing substantial funding and entering into partnerships with non-governmental organisations active in demining and the Swiss company Global Clearance Solutions.¹²³

Looking back, it is striking that, in addition to the permanently neutral states, debates in Germany and even the United States also drew on the vocabulary of neutrality. For example, the German federal government under Chancellor Olaf Scholz has supplied Ukraine with weapons while stopping short of directly supporting military operations since the beginning of the war. In his first statement after taking office, his successor Friedrich Merz also emphasised that Germany would continue to support Ukraine but would not become a party to the war.¹²⁴

In general, Germany repeatedly acted with hesitation and only gave way under sustained pressure from external or domestic sources and after the Biden-led United States took the lead, most prominently when it came to the delivery of Leopard 2 battle tanks. While criticism of such excessive restraint repeatedly came from within the ranks of the conservative CDU/CSU, the pro-Russia (populist) opposition, namely the Bündnis Sahra Wagenknecht and the far-right Alternative für Deutschland (AfD), exploited both the memory of the Second World War and all too understandable concerns that becoming a “warring party” would make Germany a legitimate target.

From a purely legal point of view, it was and remains clear that arms deliveries as such constitute a violation of neutrality without reaching the threshold of belligerency. The German government made a clear statement on this in response to a question from the CDU/CSU in April 2023: “Supporting Ukraine with equipment and arms deliveries in exercising its right to self-defence, as enshrined in the United Nations Charter, does not make Germany a party to the conflict.”¹²⁵

122 <<https://www.swissinfo.ch/ger/st%C3%A4nderat-will-schutzwesten-export-in-ukraine-nicht-erm%C3%B6glichen/87602731>> last accessed 9 July 2025.

123 <<https://www.eda.admin.ch/eda/de/home/das-eda/aktuell/dossiers/krieg-gegen-ukraine.html>> last accessed 9 July 2025.

124 <<https://www.tagesschau.de/inland/bundestag-merz-erste-regierungserklaerung-100.html>> last accessed 9 July 2025.

125 <<https://www.bundestag.de/presse/hib/kurzmeldungen-943542>> last accessed 9 July 2025.

While this simple finding was and remains correct, determining whether and when Germany becomes a party to Russia's war against Ukraine is *legally* irrelevant. It only arises in relation to the legality of attacks inside Ukraine, not attacks on or in Germany. While German soldiers may be attacked or weapons be destroyed there under the *ius in bello*, Germany remains protected under the *ius ad bellum* / *ius contra bellum*. The prohibition of force applies to all states, be it the victim of an attack or those who come to its aid, whether directly or indirectly, whether through arms deliveries or the deployment of their own armed forces, whether as non-neutral states or as belligerents.

On a side note, the German debate regarding support for Ukraine was not only conducted in the language of international law but also German constitutional law. As the Research Services of the German Bundestag ("wissenschaftliche Dienste") emphasised in connection with the highly controversial but, as yet, unrealized delivery of TAURUS cruise missiles, "even a – theoretically assumed – decision by the German government to use the TAURUS cruise missile to combat war-related military targets and infrastructure in Russia (for example the Crimean Bridge) would be covered by the collective right of self-defence and thus permissible under international law [...] Conversely, this means that even active military support by Germany in favour of Ukraine, which would make Germany a party to the conflict (deployment of ground combat troops, participation in air defence in Ukraine, etc.), would not constitute an act of aggression within the meaning of Article 26(1) [of Germany's constitution, the "Basic Law" (*Grundgesetz*)]."¹²⁶

Similarly, no other state that supplies Ukraine with weapons took the view that this, or, more generally, violating neutrality would turn it into a belligerent. Very few governments even found it necessary to justify their support in more detail under international law at all.¹²⁷ The reason might be the simple fact that there is no doubt as to the legitimacy of coming to the aid of the victim whenever the aggressor is clearly identifiable. While there was, for obvious reasons, no UN Security Council resolution condemning Russia's aggression, the UN General Assembly passed several

126 <<https://www.bundestag.de/resource/blob/1002070/WD-2-025-24-pdf.pdf>> last accessed 9 July 2025.

127 See Niccolò Zugliani, 'The Supply of Weapons to a Victim of Aggression: The Law of Neutrality in Light of the Conflict in Ukraine', *European Journal of International Law* 36/2 (2024), 389–410.

resolutions with solid majorities of 140 or more states and only five to six negative votes, among them Russia itself.¹²⁸ Furthermore, the International Court of Justice ordered the withdrawal of Russian troops early on in the proceedings brought by Ukraine against Russia because of Putin's and his regime's absurd allegation of genocide,¹²⁹ which it would probably not have done had there been even the slightest legitimate legal basis for doing so.

That leaves the United States, which had long been Ukraine's largest and most important supporter. However, it is also significant because of its long tradition of neutrality, which, as the election of Donald Trump has shown, continues to have an impact. A position paper prepared by Stephen P. Mulligan for the United States Congress on 26 April 2022 stated that arms deliveries were covered by the old concept of "qualified neutrality". This concept was prominently articulated by former Attorney General and later Supreme Court Justice Robert Jackson during the Second World War, who argued that neutrality only prohibited support for an aggressor, not for states under attack. The paper also stated that even if such deliveries violated neutrality, Russia would not be entitled to attack the US because – and here it concurs with the above findings – a violation of neutrality does not *ipso facto* make a state a co-belligerent or a party to the war on the side of Ukraine.¹³⁰

Another internal US debate relating to neutrality concerned the question how to deal with citizens who fought or wished to fight on the side of Ukraine. According to the Neutrality Act, they should in principle be prevented from waging "private wars" against states with which the United States maintains peaceful relations. It therefore assumes that all US citizens should remain neutral in foreign wars.¹³¹

During Joe Biden's term in office, however, there appear to have been no serious criminal or other consequences, although some fighters were at least questioned when leaving the United States so that they could be kept

128 UN General Assembly Resolution ES-11/1, 2 March 2022, A/RES/ES-11/1 and the subsequent resolutions on Russia's war against Ukraine.

129 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, ICJ Reports 2022, 211 (231).

130 <<https://www.congress.gov/crs-product/LSB10735>> last accessed 9 July 2025.

131 <<https://www.justsecurity.org/80612/american-fighters-ukraine-and-the-neutrality-act-the-law-and-the-urgent-need-for-clarity/>> last accessed 9 July 2025.

under surveillance upon their return.¹³² At the time of writing, no specific information could be found on how the second Trump administration is dealing with these fighters. It should be noted, however, that Trump has said that it was a “shame” that “they died in a foreign country”.¹³³

Needless to say, Russia disagrees with the European and (former?) US views on neutrality. Russian officials have repeatedly stated that they regard states that supply military equipment, first battle tanks, later in the context of the TAURUS debate, and also NATO itself to be “warring parties”.¹³⁴ Even Austria and Switzerland, together with numerous other European states, are characterized as “unfriendly” countries.¹³⁵

VIII. Conclusion

Legally speaking, neutrality has been dead for some eighty, probably even one hundred years. Genuinely peaceful states have long been benefitting from the prohibition of war and the use of force, even if they provide military assistance to a country under attack in the exercise of the (collective) right of self-defence. Put bluntly, Germany could supply the Ukrainian armed forces with TAURUS missiles tomorrow and send the Bundeswehr to attack Moscow the next day and still not become a legitimate target. Every state merely *may*, but is not required to stay neutral. Only permanently neutral states can be expected, because of their unilateral declarations, constitutional provisions, or long-standing foreign policy, to stay out of future wars. From a purely legal point of view, however, even they could justify a departure from their neutrality as a collective countermeasure in favour of the victim. Aggressors have no legal or other basis for complaints. They cannot massively violate one of the most fundamental rules of international law and then demand that neutral parties remain passive or impartial. The prohibition of the use of force clearly takes precedence over neutrality.

132 <<https://www.politico.com/news/2022/05/24/american-fighters-ukraine-white-supremacists-00034860>> last accessed 9 July 2025.

133 <<https://www.thedailybeast.com/donald-trump-79-sends-stunning-message-to-families-of-fallen-us-fighters/>> last accessed 11 January 2025.

134 <<https://www.tagesspiegel.de/internationales/kreml-erneuert-vorwurf-russland-sieht-nato-de-facto-als-kriegspartei-14330996.html>> last accessed 25 September 2025.

135 <https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Laenderinformationen/Laenderinfo_Russische_Foederation.pdf> last accessed on 25 September 2025; <<https://www.interfax.ru/russia/906573>> last accessed on 9 July 2025.

Nevertheless, no state has a right to demand support in repelling an attack that violates international law. The obligation to cooperate in bringing systematic violations of peremptory norms of international law like the prohibition of force to an end, as formulated by the International Law Commission in its articles on state responsibility, has proven toothless. With regard to Ukraine, a vast majority of states have repeatedly condemned Russia's war but have taken no further measures such as imposing sanctions or supplying arms. And none of them has deemed it necessary to justify its inaction by referring to legal arguments. Many countries simply do not consider themselves affected, cite their difficult social and economic situation, or simply want to take advantage of the opportunity to benefit from war. India's willingness to buy Russian raw materials or the role of Central Asian countries in the circumvention of sanctions are both a case in point.

Although there is no right to assistance in self-defence, there is at least a general obligation not to participate in attacks, either by providing one's own territory, sending armed forces, supplying weapons, sharing (intelligence and other) information or providing military training. Again, however, neutrality plays no role here; this obligation stems from the broad scope of the prohibition of the use of force under international law.

Politically, neutrality can be a double-edged sword. In the Iraq War, for example, Austria and Switzerland could rely on their status without being perceived as hostile to US' interest. Virtually no state, whether because of the extreme military asymmetry between Iraq and the US or the all too understandable lack of sympathy for Saddam Hussein's cruel dictatorship, considered to support his regime.

In Russia's large-scale attack on Ukraine, however, the pendulum swung in the opposite direction. Unless one is dumb enough to believe in Russian propaganda, Zelenskyy is no dictator but the democratically-elected president of a country that sought closer ties to the West rather than Russia which simply did not have much to offer. Here, neutrality meant and continues to mean abandoning a victim of aggression that had done nothing wrong.

Both politically and legally, clear-cut situations like this one explain neutrality's sometimes poor reputation, which goes back much further in history: while doubts about its protective function arose during the First World War with the German invasion of Belgium and Luxembourg, countries such as Sweden and Switzerland understandably stood accused of

having accommodated and even facilitated the actions of Nazi Germany to keep their countries safe.

As the discussions on Russia's attack on Ukraine show, the 19th-century logic of "when two quarrel, the third rejoices" (or at least stays out of the dispute) remains popular. Even though it has been clear who started the war in violation of international law and who defended themselves in most interstate conflicts since the founding of the United Nations, the old assumption that a war may involve two sides that are equally right or equally wrong seems to be alive and well.

What does this mean for the further development of neutrality? Prophetic statements run the risk of ageing badly, but it would be intellectually cowardly to end this article with a mere analysis of the past and current state of neutrality. I would therefore like to conclude with a short forward-looking statement: neutrality is here to stay and will even become more popular, be it due to opportunism, fear, or the simple inability to do more. But legally speaking, it is gone. In 1935, after the first major crisis of the League of Nations, Japan's invasion of Manchuria, and the National Socialist rise to power, Nicolas Politis wrote emphatically that neutrality had no place in an orderly system of states. A few years later, that very system collapsed, only to be rebuilt, albeit with a few improvements. Since then, Hans Kelsen's fundamental insight, born of the Second World War, has prevailed: collective security and the idea of *peace through law* are incompatible with neutral passivity. Anyone who takes *ius contra bellum* seriously can only stand on the side of the victim. Legally and morally, nothing has changed in this respect.

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