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ARTICLE

The Principle of Separation and the Law of Neutrality

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Abstract

The recent rise of 'qualified neutrality' has proven highly controversial. Some have suggested that the separation between the *jus ad bellum* and the *jus in bello* under international law may prevent the reform of 'traditional neutrality' into qualified neutrality. This article will seek to resolve academic debate on this topic, arguing that the principle of separation is of limited relevance to perpetuation and reform within the law of neutrality. Although the principle of separation is *prima facie* incompatible with qualified neutrality, it does not have the required characteristics as a legal rule to inhibit reform of the law of neutrality and the recognition of qualified neutrality as a positive rule under international law.

Keywords: public international law; international humanitarian law; general principles of law; law of armed conflict; law of neutrality; *jus ad bellum*; *jus in bello*; principle of separation

1. Introduction

In February 2014, Russia launched a covert military operation, illegally occupying territory in the Ukrainian Donbas and Crimea, an act regarded as the inception of the Russo-Ukrainian War.[1] On 24 February 2022, Russia escalated the conflict by launching a full-scale military invasion.[2] Since the invasion, over 30 States have rallied to offer an ongoing supply of military provisions to Ukraine.[3]

However, from an international law perspective, the mass supply of arms to Ukraine is highly controversial. The international law of neutrality regulates the relationship between States party to an international armed conflict (belligerents) and States not party to the conflict (neutrals).[4] Under the traditional

[1] M Ray, 'Russia–Ukraine War', *Encyclopedia Britannica* (17 July 2023) <https://www.britannica.com/event/2022-Russian-invasion-of-Ukraine>.

[2] ibid.

[3] Kiel Institute for the World Economy, 'Ukraine Support Tracker' (5 December 2024) <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/>.

[4] SAG Talmon, 'The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine' (2022) Bonn Research Papers on Public International Law, Paper No 20/2022, 2.

understanding ('traditional neutrality'), the fundamental obligation incumbent upon neutrals is the duty of impartiality.[5] This duty prohibits neutrals from discriminating against belligerents, requiring like treatment irrespective of justice or politics.[6] In this sense, it is indisputable that States have violated the duty of impartiality by discriminating against Russia through the supply of arms to Ukraine. Violating the law of neutrality is an internationally wrongful act entailing State responsibility, making neutrals liable to non-forceful countermeasures by wronged belligerents.[7]

Given the seeming moral necessity of supporting Ukraine that has been felt by many throughout the West, scholars have begun to question the validity of traditional neutrality.[8] One suggestion is that traditional neutrality is now obsolete, having been superseded entirely by the 1945 Charter of the United Nations (UN Charter).[9] Another is that traditional neutrality has not been carried forward into the twenty-first century as it has been replaced by 'qualified neutrality', which is an alternative understanding of neutrality that does not impose a duty of impartiality, allowing neutrals to support just belligerents.[10]

An issue frequently acknowledged in such discussions, but yet to be considered in detail, is the impact of the principle of separation on reform in the law of neutrality.[11] In international law, the principle of separation dictates that the *jus in bello* (the law governing conduct in war) and the *jus ad bellum* (the law governing the justification for going to war) are formally distinct, with the *jus in bello* applying equally to all belligerents irrespective of *ad bellum* considerations. Expressed more simply, the principle of separation requires that compliance with the laws of war is assessed without regard to whether an actor was right or wrong to initiate hostilities.[12] Being traditionally understood as part of the *jus in bello*, any conception of neutrality that permits discrimination against unjust belligerents (i.e. qualified neutrality) inherently conflicts with the principle of separation by allowing *ad bellum* considerations (who is just or unjust) to influence *in bello* obligations (how war is conducted). Given this fundamental incompatibility, some authors argue

[5] 'Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War' (1939) 33 AJILSupp 233.

[6] Talmon (n 4) 3.

[7] International Law Commission (ILC), 'Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session' (2001) UN Doc A/56/10, arts 2, 22.

[8] See e.g. WH von Heinegg, 'Neutrality in the War against Ukraine' (*Articles of War*, 1 March 2022) <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>.

[9] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter). See e.g. C Fenwick, 'Is Neutrality Still a Term of Present Law?' (1969) 63 AJIL 100, 102.

[10] See e.g. O Hathaway and S Shapiro, 'Supplying Arms to Ukraine is Not an Act of War' (*Just Security*, 12 March 2022) <https://www.justsecurity.org/80661/supplying-arms-to-ukraine-is-not-an-act-of-war/>.

[11] For acknowledgement of the potential clash, see K Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and Thus be Exposed to Countermeasures?' (*EJIL: Talk!*, 2 March 2022) <https://www.ejiltalk.org/willa-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-tocountermeasures/>; M Krajewski, 'Neither Neutral nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine' (*Völkerrechtsblog*, 9 March 2022) <https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict/>.

[12] C Greenwood, 'The Relationship between *Ius ad Bellum* and *Ius in Bello*' (1983) 9 RevIntlStud 221, 221.

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that the principle of separation may necessitate the perpetuation of traditional neutrality and prevent the law of neutrality from reforming into qualified neutrality.[13]

The relevance of the principle of separation to perpetuation and reform within the law of neutrality is a vital issue, given its potential to determine the permissibility of the supply of arms and the ability of victim States to defend themselves. Being perceived as an eighteenth-century relic, the law of neutrality has received only limited scholarly attention over the past 80 years, but it was revived in large part by a series of blog posts following the Russian invasion.[14] Given this very recent resurgence, the status and content of the law of neutrality remain highly contentious.[15] Furthermore, almost nothing (beyond discursive assertions of incompatibility) has been written regarding the relationship between the law of neutrality and the principle of separation.[16]

This article will argue that the principle of separation has only limited relevance to perpetuation and reform within the law of neutrality. It does not necessitate the perpetuation of traditional neutrality or provide an indefeasible objection to qualified neutrality. The central argument of this article is that the separation is best understood merely as a description of how the law is applied in a few individual and fragmented legal regimes, rather than as a binding general legal principle with prescriptive force over anything designated as '*in bello*'. Expressed more simply, the principle of separation is nothing more than a useful description of how some particular legal treaties or regimes (e.g. the Geneva Conventions) expressly provide that the application of their provisions is to be without reference to the cause of the conflict.

Section 2 will outline the principle of separation and its emergence in international law. Historical analysis will demonstrate that the principle was of lesser normative importance in the international legal order than is commonly thought. Section 3 will outline the law of neutrality. It will be argued that whilst traditional neutrality remains binding, qualified neutrality may plausibly emerge from a current or future conflict as a rule of custom to replace it. Using Sections 2 and 3 as an analytical foundation, Section 4 will consider the relationship between the principle of separation and neutrality. It will be argued that the principle of separation is not a binding legal rule capable of subjugating the law of neutrality and providing a compelling objection to the emergence of qualified neutrality as positive law. It will be argued that the only potential impact of the principle of separation on

[13] C Antonopoulos, *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality* (CUP 2022) 147; M Bothe, 'Neutrality, Concept and General Rules' in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (2015) para 29; M Bothe, 'The Law of Neutrality' in D Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) 612.

[14] See e.g. H Nasu, 'The Future Law of Neutrality' (*Articles of War*, 19 July 2022) <https://lieber.westpoint.edu/future-law-of-neutrality/>; C Biggerstaff, 'Are Methods of Naval Warfare at Risk Under Qualified Neutrality? Expert Q&A from Stockton Center's Russia–Ukraine Conference' (*Just Security*, 10 March 2023) <https://www.justsecurity.org/85419/are-methods-of-naval-warfare-at-risk-under-qualified-neutrality-expert-qa-from-stockton-centers-russia-ukraine-conference/>.

[15] J Upcher, *Neutrality in Contemporary International Law* (OUP 2020) 37.

[16] For the only detailed treatments of the subject, see P Clancy, 'The Law of Neutrality: *Jus ad Bellum* or *Jus in Bello*?' (2022) 13 JIntlHumLegStud 353; A Orakhelashvili, 'Overlap and Convergence: The Interaction between *Jus ad Bellum* and *Jus in Bello*' (2007) 12 JC&SL 157.

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reform in the law of neutrality is if the view that it ought to govern neutrality is compelling enough to be codified. Section 5 will briefly address such normative arguments, demonstrating that the subjugation of the law of neutrality to the principle of separation (and the corresponding rejection of qualified neutrality) is normatively undesirable. Thus, the principle of separation is of limited relevance to perpetuation and reform within the law of neutrality.

2. The principle of separation

Before considering its relevance to perpetuation and reform within the law of neutrality, it is first necessary to outline the principle of separation. The principle of separation has garnered an almost hegemonic significance, with a strong academic consensus viewing the doctrine as an unquestionable and foundational principle of international law.[17] In recent years, however, critiques of the principle of separation have gained increasing traction. The most prevalent form of critique approaches the issue from a moral philosophy perspective, arguing that the principle of separation fails to track the ethics of war closely.[18] Another, underexplored, form of critique approaches the principle of separation from a doctrinal legal perspective, arguing that the principle is more limited in scope than is often acknowledged.[19] This section aims to provide a foundation for the subsequent analysis in Section 4 that focuses primarily on this second form of critique. In providing such a foundation, this section will demarcate the principle of separation and track its emergence within international law. In doing so, this section does not seek to challenge—and will grant for argument's sake—the common academic conception of the principle of separation regarding its content and legal status (see Section 4 instead for a critique of this common conception). This will allow not only for expository context regarding the potential doctrinal clash between the principle of separation and the law of neutrality, but also for elucidation of the fact that—irrespective of its status within contemporary positive law—the principle of separation is historically a far less normatively significant part of the international legal order than is commonly acknowledged.

2.1. Outlining the Principle of Separation

The principle of separation is premised upon a distinction between the *jus ad bellum* and the *jus in bello*. The *jus ad bellum* refers to the rules governing the legality of a State's recourse to the use of force.[20] The *ad bellum* finds its most extensive codification in the UN Charter.[21] In contrast, the *jus in bello* refers to the rules

[17] JHH Weiler and A Deshman, 'Far Be It from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between *Jus ad Bellum* and *Jus in Bello*' (2013) 24 EJIL 25, 58.

[18] See generally J McMahan, *Killing in War* (OUP 2009).

[19] See e.g. R Goodman, 'Controlling the Recourse to War by Modifying *Jus In Bello*' (2010) 12 YIntlHL 53; M Mandel, 'Aggressors' Rights: The Doctrine of "Equality between Belligerents" and the Legacy of Nuremberg' (2011) 24 LJIL 627.

[20] Greenwood (n 12) 221.

[21] See UN Charter (n 9) Chs I, VII.

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governing a State's conduct in an ongoing armed conflict.[22] The *in bello* finds its most extensive codification in the Geneva and Hague Conventions.[23]

The content of the principle of separation is best expressed through two theses. First is the 'symmetry thesis', which asserts that the content of *in bello* rights and obligations are the same for all belligerents.[24] Second, the 'independence thesis' asserts that *in bello* rights and obligations are 'independent of the *ad bellum* justice of the war'.[25] The separation is commonly regarded as a general and prescriptive legal principle. In this respect, all rights and obligations falling within the *in bello* category are automatically subject to the normative consequences of the symmetry and independence theses without the need for any further express provision to that effect. Regarding the legal status of the principle of separation, the widely held view is that it has become a binding rule of customary international law.[26] In support of this claim, proponents cite post-World War II jurisprudence, military manuals and the four Geneva Conventions.[27]

This common conception of the content and legal status of the principle of separation will later be called into question (see Section 4). Yet, even for those who subscribe to this common conception, the principle of separation seems counterintuitive insofar as it prescribes the 'equal application of the laws of war'.[28] As Rodin and Shue observe:

> It is difficult to understand why the just side in such a war should always be bound to observe *in bello* restrictions … if doing so might imperil victory … it is equally hard to understand why the unjust side should receive any *in bello* privileges … if this would aid their prosecution of evil purposes.[29]

In this regard, the principle of separation is primarily justified pragmatically concerning reciprocity in *in bello* compliance.[30] Whilst such pragmatic justifications may be weaker than commonly regarded (see Section 5), it is also the case that the original emergence of the principle of separation within international law had little to do with such pragmatism. Examining the emergence of the separation highlights that it is, historically, less of a normatively foundational part

[22] Greenwood (n 12) 221.

[23] The full list of Geneva Conventions and their Additional Protocols can be accessed at International Committee of the Red Cross (ICRC), 'The Geneva Conventions and their Commentaries' <https://www.icrc.org/en/law-and-policy/geneva-conventions-and-their-commentaries>. The extensive list of Hague Conventions can be accessed at ICRC, 'Hague Conventions' <https://casebook.icrc.org/a_to_z/glossary/hague-conventions>.

[24] D Rodin and H Shue, 'Introduction' in D Rodin and H Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (OUP 2008) 2.

[25] ibid 3.

[26] See e.g. RD Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War' (2009) 34 YaleJIntlL 48, 66; I Brownlie, *International Law and the Use of Force by States* (OUP 1963) 407; Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2004) 158.

[27] See e.g. V Koutroulis, 'And Yet it Exists: In Defence of the "Equality of Belligerents" Principle' (2013) 26 LJIL 449, 451–65; A Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure' (2008) 90 IRRC 931, 941.

[28] Rodin and Shue (n 24).

[29] ibid 5.

[30] Orakhelashvili (n 16) 171.

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of the international legal order than is commonly perceived, being grounded in dubious philosophies and ill-deserving of the grandeur often attributed to it.

2.2. The historical development of the principle of separation

Disguised in Latin overalls, the terms *jus ad bellum* and *jus in bello* spring up, seemingly for the first time, in the work of Josef Kunz and the Vienna School during the 1930s.[31] Indeed, it is not until after World War II that ideas of separation become expressly recognised in international law.[32] Yet, to conclude that the principle of separation is essentially a product of the mid-twentieth century is a flawed historiography (albeit one dominant in the literature) that grants the principle unwarranted solemnity by disguising its roots in problematic eighteenth-century philosophies.[33]

It would be incongruous to assert that, in or before the Middle Ages there existed a separation, or even a distinction, between a law concerning recourse to war and a law concerning conduct in war.[34] In the dominant Romanist and Scholastic traditions, the sole focus was the *bellum justum* doctrine, which concerned the just causes that generated a right to wage war.[35] In this respect, as Kolb observes:

> The predominance of *ad bellum* considerations in general over the *in bello* aspect made it impossible even to conceive of such terms, whose existence would have implied a more extensive, evenly balanced and fully articulated development of two mutually exclusive branches of the law.[36]

Kolb further argues that the establishment of the terms *ad bellum* and *in bello* and the conceptualisation of the separation was only able to 'come into existence when the two aspects of war assumed approximately equal importance and it became necessary to underline the distinction between them', which occurred in the era of the League of Nations.[37] Kolb is correct in two respects. First, the separation is not comprehensively and expressly theorised—except in nascent form by Vitoria,[38] Wolff[39] and Vattel[40]—until the twentieth century. Second, it was not until the twentieth century that the *ad bellum* and *in bello* assumed equal importance. Whereas the Romanists and Scholastics focused solely on the *ad bellum*, early-modern intellectuals focused primarily on the *in bello*.[41] From the seventeenth to the nineteenth centuries, grounded in the predominance of the nation-State, war was perceived as the sovereign right of States and a 'routine means of conducting everyday international business'.[42] Thus, the *ad bellum*

[31] R Kolb, 'Origin of the Twin Terms *Jus ad Bellum*/*Jus in Bello*' (1997) 37 IRRC 553, 561.
[32] ibid 553.
[33] For an example of this historiography, see ibid 558.
[34] ibid 553.
[35] ibid 554.
[36] ibid 555.
[37] ibid 558.
[38] F de Victoria, *De Indis et De Jure Belli Relectiones* (1557), cited in ibid 557.
[39] C Wolff, *Jus gentium methodo scientifica pertractatum* (1749), cited in Kolb ibid 557.
[40] E de Vattel, *Le droit des gens* (1758), cited in Kolb ibid 557.
[41] S Neff, *War and the Law of Nations: A General History* (CUP 2005) 167.
[42] ibid 161.

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'shrivelled into virtual nothingness', with ideas of justice of limited relevance to the legal and philosophical landscape of recourse to war.[43]

However, whilst convincing in his assertion that eighteenth- and nineteenth-century philosophies stunted terminological development, Kolb's view that the separation does not conceptually emerge until the twentieth century risks being overly simplistic. Unlike the Romanists and Scholastics, whose focus on the *bellum justum* prevented any conceptual awareness of an '*in bello*',[44] eighteenth- and nineteenth-century theorists were well aware of an '*ad bellum*' category.[45] Thus, it is not that the *ad bellum* was beyond conceptual imagination, but rather that it was acknowledged and then subsequently attributed limited significance.[46] This can be seen as bringing the principle of separation into *de facto* existence. Regarding the 'independence thesis', if considerations of justice in recourse to war are insignificant, how then could the *in bello* be anything other than independent of the *ad bellum*? Regarding the 'symmetry thesis', if belligerent rights stem from sovereignty rather than just causes, how then could the *in bello* rights of two sovereign States be anything other than symmetrical? Thus, rather than their subsequent equality in the twentieth century, it was the inequality between the *ad bellum* and *in bello* in the eighteenth and nineteenth centuries that necessitated the principle of separation and brought it into existence. Of course, its existence is purely *de facto*. Yet, this reflects the fact that, given the underlying philosophies of war, the separation was an entirely obvious triviality that warranted minimal theorising.

Here, however, the proposed *de facto* existence of the principle of separation may be objected to on the basis that it is overly simplistic to state that the *ad bellum* was of limited significance in the nineteenth century. Indeed, Verdebout documents that the *ad bellum* was a feature of nineteenth-century academic discourse and a factor considered by States in their recourse to war.[47] Yet, in the nineteenth century, the *ad bellum* was fundamentally tied to the concept of 'self-preservation', which Verdebout suggests operated as the exception to a more general prohibition on the use of force.[48] However, 'self-preservation' justifications for recourse to war were innumerable and wide-ranging,[49] including—to name only a few—concerns regarding monarchical accession,[50] responses to a variety of 'injuries' inflicted by other States,[51] the 'infringement of treaty obligations',[52] the crushing of revolts,[53]

[43] ibid 164.
[44] Kolb (n 31) 555.
[45] See generally A Verdebout, *Rewriting Histories of the Use of Force: The Narrative of 'Indifference'* (CUP 2021) parts I, II.
[46] Neff (n 41) 161.
[47] Verdebout (n 45).
[48] ibid 107, 204–5.
[49] M Helal, 'Symposium on Rewriting Histories of the Use of Force: Of Rules and Exceptions in *Jus ad Bellum*' (*Opinio Juris*, 14 February 2023) <https://opiniojuris.org/2023/02/14/symposium-on-rewriting-histories-of-the-use-of-force-of-rules-and-exceptions-in-jus-ad-bellum/>.
[50] Verdebout (n 45) 134.
[51] ibid 51, 136, 139–40, 156, 177.
[52] ibid 148–9.
[53] ibid 119–25.

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the protection of commerce rights[54] and even the need to maintain 'the balance of power' and an 'equilibrium between the members of the Family of Nations'.[55]

In this respect, as Helal notes, 'the doctrine of self-preservation operated as something of an all-encompassing Schmittian exception … [being] so expansive, capacious, and indeterminate that it ultimately displaced and eviscerated any putative rule of non-intervention'.[56] Helal convincingly concludes that 'pre-1914 international law was not indifferent to the question of the use of force, this is not because it placed meaningful restrictions of the right of states to use force, but because it explicitly, and rather unapologetically, permitted the use of force'.[57] This permissive, sovereignty-based approach to the use of force would have made the independence and symmetry theses self-evident in the manner previously explained, bringing the principle of separation into *de facto* existence.

However, following the tragedy of World War I, a revolution took place within international law which reinvigorated the *ad bellum*.[58] Recourse to war became legally restricted through the 1919 Covenant of the League of Nations (Covenant) and the 1928 Kellogg–Briand Pact renouncing war as an instrument of national policy.[59] The UN Charter in 1945 made this outlawry of war absolute, with Article 2(4) prohibiting 'the threat or use of force against the territorial integrity or political independence of any State'.[60] This prohibition is subject to only two exceptions: UN Security Council (UNSC) authorised measures (Article 42) and acts of self-defence (Article 51).[61] In this respect, all uses of force could be dichotomously classified as either lawful/just (i.e. in compliance with the UN Charter) or unlawful/unjust (i.e. in breach of the UN Charter).[62] Indeed, with aggression perceived as 'the supreme international crime' by the International Military Tribunal (IMT) at Nuremberg, *ad bellum* considerations once again became paramount.[63]

Despite the reinvigoration of the *ad bellum*, the *de facto* principle of separation of the preceding centuries remained mostly unquestioned and, instead, appeared expressly in law.[64] The intuitive response to the increased significance of the *ad bellum* was provided by Justice Robert Jackson, Chief Prosecutor at the IMT.

[54] ibid 156, 159, 177.

[55] T Ruys, 'Review of Agatha Verdebout. *Rewriting Histories of the Use of Force: The Narrative of "Indifference"*' (2023) 34 EJIL 728, 735 quoting L Oppenheim, *International Law: A Treatise* (1912) vol 1, para 136.

[56] Helal (n 49).

[57] ibid.

[58] Neff (n 41) 279.

[59] Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) preamble; Kellogg–Briand Pact (adopted 27 August 1928, entered into force 24 July 1929) 94 LNTS 57, art 1.

[60] UN Charter (n 9) art 2(4).

[61] ibid, arts 42, 51.

[62] Hersch Lauterpacht also made this argument in 1940 concerning the Covenant of the League of Nations: see L Oppenheim, *International Law: A Treatise* (H Lauterpacht ed, 6th edn, 1940) vol 2, 176–7.

[63] *Judgment of the International Military Tribunal 1946* (1947) 41 AJIL 172, 186.

[64] These apparent encapsulations of the principle of separation in positive law are detailed and analysed in Section 4.

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Justice Jackson rejected the notion of unjust belligerents possessing rights, and thus the principle of separation, as 'inherently criminal acts [killing and assaults] cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal'.[65] Justice Jackson was explicit in his contempt for the counter-position contained within the 'foul doctrines' of the eighteenth and nineteenth centuries, which were 'contrary to the teachings of early Christian and International Law scholars such as Grotius'.[66]

Justice Jackson's view was not wholly unsupported in post-World War II jurisprudence.[67] In *United States of America v Ohlendorf* (typically referred to as the *Einsatzgruppen* case), the tribunal ruled against belligerent equality, holding that the illegal nature of the Nazi invasion precluded defences of necessity and self-defence regarding the killing of civilians, as 'the assassin who is being repulsed by his intended victim may not slay him and then, in turn, plead self defense'.[68] A similar ruling was exhibited in the *Trial of Hans Albin Rauter*, which rejected the Nazi claim of a right to legitimate reprisals, as they were the aggressors.[69]

Despite this, most post-World War II jurisprudence ignored arguments pertaining to belligerent discrimination,[70] with a few judgments expressly rejecting them.[71] Of these express rejections, the *Trial of Wilhelm List and Others* (typically referred to as the *Hostages Trial*) at Nuremberg provided the most expounded reasoning and is often hailed as the foundation for the principle of separation as positive law.[72] The tribunal held that:

> International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory … Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject … It must not be overlooked that international law is prohibitive law. Where the nations have affirmatively acted, as in the case of the Hague Regulations, 1907, it prohibits conduct contradictory thereto. Its specific provisions control over general theories, however reasonable they may seem. We concur in the views expressed in the following text on the subject [*Oppenheim's International Law*, vol II Lauterpacht, p174]: 'Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and

[65] RH Jackson, 'The Nurnberg Case as Presented by Robert H Jackson, Chief of Counsel for the United States, Together with Other Documents' (1971) 82–4 cited in Mandel (n 19) 632.

[66] ibid.

[67] Mandel (n 19) 634–8.

[68] *United States of America v Ohlendorf* (Military Tribunal II, 1948) 494.

[69] *Trial of Hans Albin Rauter* (1949) 14 LRTWC 89, 134 (Netherlands Special Court of Cassation).

[70] *German High Command Trial* (1948) 12 LRTWC 1, 124 (United States Military Tribunal V); *Judgment of the International Military Tribunal for the Far East* (International Military Tribunal for the Far East, 4 November 1948) paras 452–453.

[71] *Trial of Wilhelm List and Others* (1949) 8 LRTWC 34, 59–60 (United States Military Tribunal V); *Trial of Josef Altstötter* (1948) 6 LRTWC 1, 51–2 (United States Military Tribunal III).

[72] See e.g. J Moussa, 'Can *Jus ad Bellum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law' (2009) 90 IRRC 963, 982; M Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar 2019) 460.

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> neutral States. This is so, even if the declaration of war is ipso facto a violation of International Law …'.[73]

In the updated 1952 version of the Lauterpacht text which the tribunal cites, Lauterpacht acknowledges that before the Covenant and the UN Charter, 'it was generally believed that whatever may be the cause of war, and whether or not the cause be a so-called just cause, the same rules of law applied between the belligerents'.[74] Whilst Lauterpacht goes on to justify the principle of separation on modern pragmatic grounds concerning 'the humanitarian character of a substantial part of the rules of war', such pragmatic reasoning is absent from the *Hostages Trial*, which appears to uphold the principle of separation (to the extent that it does—see Section 4) based on the Hague Conventions and the 'general belief' that international law requires it.[75] In this sense, the inclusion of the principle of separation in legal reasoning should not be unduly modernised, but should be seen as the mere continuation of the *de facto* principle of separation from the preceding centuries.

Neff argues that in the twentieth century 'international lawyers would begin to think in new ways about war … but even then, their minds would work along the lines that had been set down in the nineteenth century'.[76] The principle of separation is paradigmatic of this. As Weiler and Deshman observe, 'legal scholars at the time [the twentieth century] were accustomed to simply applying the same laws of war to both sides of a conflict', which constituted a deeply ingrained social practice.[77] In this sense, understanding that the principle of separation emerged in legal reasoning as a continuation of eighteenth- and nineteenth-century philosophies (which may now aptly be described as abhorrent) that legitimised war as the extension of politics, rather than a reflection of nuanced, modern and pragmatic justifications, undermines the almost mythical status of the principle. Whilst the extent to which the sources outlined above attest to the status of the separation as a binding legal principle will later be questioned, by stripping away any unjustified grandeur attributed to the principle, the above historical analysis allows the question of legal status and doctrinal clashes (i.e. with the law of neutrality) to be approached with a normative openness that is too often absent in the literature's 'religious' approach to the principle of separation.[78]

3. Perpetuation and reform in the law of neutrality

Given the uncertainty surrounding its status and content, it is first necessary to outline the law of neutrality before considering the impact of the principle of separation. Following a demarcation of the rights and duties entailed by traditional neutrality, this section will highlight the doctrine's grounding in normatively undesirable eighteenth-century philosophies. From this perspective, academic assertions of the unsuitability of traditional neutrality and the desirability of reform

[73] *Trial of Wilhelm List* (n 71) 59–60.
[74] L Oppenheim, *International Law: A Treatise* (H Lauterpacht ed, 7th edn, 1952) vol 2, 217–18.
[75] ibid.
[76] Neff (n 41) 166.
[77] Weiler and Deshman (n 17) 29.
[78] M Milanovic, 'A Non-Response to Weiler and Deshman' (2013) 24 EJIL 63, 64.

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are well founded. However, whether any such reform has taken place is far more contentious. As will be demonstrated, the preferable view is that traditional neutrality remains binding, neither having been superseded by the UN Charter nor replaced by qualified neutrality. Despite this, qualified neutrality may plausibly emerge from a current or future conflict as a rule of custom to replace traditional neutrality.

3.1. Traditional neutrality and its historical evolution

Traditional neutrality refers to a settled understanding of the law of neutrality which stretches back to the eighteenth century. In governing the relationship between neutrals and belligerents, traditional neutrality imposes a duty on belligerents to 'respect the sovereign rights of neutral Powers and to abstain … … from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality'.[79] Reciprocally, traditional neutrality imposes three fundamental duties on neutrals: first, abstention (neutral States cannot participate in the armed conflict); second, impartiality (neutral States cannot discriminate against belligerents); and, third, prevention (neutral States must prevent belligerents from violating their territory).[80] All States not party to the conflict are automatically considered neutrals and subject to the corresponding rights and duties.[81]

Traditional neutrality finds its fullest substantiation in the 1907 Hague Conventions (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land and (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, which codify the three fundamental duties of neutrals through a plethora of specific prohibitions.[82] In respect of the currently controversial prohibition on the supply of arms, Article 6 of the Hague Convention (XIII) provides that 'the supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden'.[83] Whilst Hague Convention (V) is silent on the supply of arms, such a prohibition is a necessary corollary of the duty of impartiality. This duty of impartiality is part of the customary law of neutrality that existed before 1907, of which the Hague Conventions (V) and (XIII) represent a partial codification.[84] It is for this reason that, despite ratifying neither Convention, States such as the United Kingdom (UK) and Italy are regarded as bound by traditional neutrality and the duty of impartiality.[85]

This 'traditional' customary law of neutrality arose out of eighteenth-century naval disputes and is a product of the same hegemonic philosophies of war that generated the

[79] 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.

[80] Talmon (n 4) 3.

[81] Oppenheim (n 74) 653.

[82] Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 October 1907, entered into force 26 January 1910); Convention XIII (n 79).

[83] Convention XIII, ibid, art 6.

[84] H Nasu, 'The Laws of Neutrality in the Interconnected World Mapping the Future Scenarios' in M Waxman and T Oakley (eds), *The Future Law of Armed Conflict* (OUP 2022) 125.

[85] Antonopoulos (n 13) 28; Upcher (n 15) 72.

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de facto principle of separation. In the eighteenth century, there existed two conflicting visions of neutrality.[86] The Grotian view (retrospectively termed 'qualified neutrality') held that neutrals are under a duty 'to do nothing whereby he who supports a wicked cause may be rendered more powerful, or whereby the movements of him who wages a just war may be hampered'.[87] On this view, neutrals are permitted to support just belligerents whilst retaining their protection as neutral States.[88] For Grotius, this duty and permissive approach to supporting just belligerents constitutes part of the natural law, arising out of man's natural desire for peace and the corresponding need to distinguish just and unjust belligerents.[89]

The competing view was provided by Cornelius van Bynkershoek. His vision of neutrality entailed impartiality, with neutrals under a duty not to 'sit in judgment between his friends who may be fighting each other, and to grant or deny anything to either belligerent'.[90] This reflected van Bynkershoek's underlying philosophy of war. He argued that 'considerations of the relative degree of justice' in recourse to war were irrelevant, as States have the right to pursue their self-interest through war.[91] On this basis, he posited that neutrals should be considered friends to both belligerents, entailing impartiality as it is 'not acting the part of a friend in ruining or in injuring in any manner the cause of his friend'.[92]

These competing visions came to a head in the Seven Years' War (1756–1763), a context pivotal to the establishment of traditional neutrality.[93] In adjudicating the commerce rights of neutrals, British Prize Courts adopted van Bynkershoek's vision of neutrality and rejected the Grotian view.[94] In doing so, 'traditional neutrality' and its duty of impartiality took hold as the dominant international framework.[95] By the nineteenth century, British domestic law had codified the duty of impartiality,[96] and the 1871 Treaty of Washington centred around the duty of impartiality in governing the Alabama Claims Arbitration.[97]

The reasons for traditional neutrality prevailing over qualified neutrality are easily apparent, with the former closely reflecting nineteenth-century views on the insignificance of the *ad bellum*.[98] Yet, given the subsequent twentieth-century revival of the *ad bellum*, van Bynkershoek's vision of neutrals as 'friends' to just

[86] T Helfman, 'Neutrality, the Law of Nations, and the Natural Law Tradition: A Study of the Seven Years' War' (2005) 30 YaleJIntlL 549, 563.

[87] H Grotius, *On the Law of War and Peace 1625* (S Neff ed, CUP 2013) 3.17.3.

[88] S Neff, 'The Law of Armed Conflict' in R Lesaffer and J Nijman (eds), *The Cambridge Companion to Hugo Grotius* (CUP 2021) 472.

[89] Grotius (n 87) 2.23.13.

[90] C van Bynkershoek, *Quaestionum Iuris Publici Libri Duo 1737* (JS Brown and T Frank eds, OUP 1930) 61.

[91] ibid.

[92] ibid 72.

[93] Helfman (n 86) 552.

[94] ibid 563.

[95] ibid 585.

[96] Foreign Enlistment Act 1819, section 7.

[97] For extensive analysis of neutrality in the Alabama Claims Arbitration, see T Bingham, 'The Alabama Claims Arbitration' (2005) 54 ICLQ 1; The Treaty of Washington (adopted 8 May 1871) art VI.

[98] Helfman (n 86) 586; Neff (n 41) 162.

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and unjust belligerents alike runs counter to the contemporary 'neo-just-war order'.[99] On this basis, many have questioned the continuing suitability of traditional neutrality and its status as positive law.[100]

3.2. Traditional neutrality as superseded by the UN Charter

One of the foremost arguments against the perpetuation of traditional neutrality is the view that it has been superseded entirely by the UN Charter.[101] Chapter VII of the UN Charter establishes a collective security mechanism, allowing the UNSC to authorise the taking of measures, including the use of force, where it determines that there is a 'threat to the peace, breach of the peace, or act of aggression'.[102] In such scenarios, Article 2(5) obligates all States to 'give the United Nations every assistance in any action it takes in accordance with the present Charter'.[103] Thus, where the UNSC mandates States to take discriminatory action against aggressive belligerents, a State's obligations under the UN Charter conflict irreconcilably with the State's duty of impartiality under traditional neutrality. In such instances, Article 103 of the Charter necessitates that Charter obligations prevail over 'any other international agreement'[104] and rule of custom.[105] In this sense, where UN collective security is operative, the law of neutrality is superseded.

However, the view that the UN Charter entirely supersedes the law of neutrality mistakenly assumes the comprehensiveness of UN collective security. As Lauterpacht observes, 'neutrality and collective security are complementary concepts; the more there is of the one, the less there is of the other'.[106] Thus, whereas comprehensive collective security would entirely subsume the law of neutrality, sporadic collective security leaves open a vacuum for neutrality. The collective security regime of the UN Charter forms an example of the latter.[107] Given its status as a permanent member of the UNSC, Russia possesses veto power over UNSC resolutions.[108] Indeed, continuing the collective security paralysis of the Cold War,[109] Russia has vetoed collective security resolutions regarding the Russo-Ukrainian War.[110] As there exists a frequent subset of cases where collective security is paralysed and there are

[99] Neff ibid 316.

[100] J Kunz, 'The Laws of War' (1959) 50 AJIL 313, 327; Q Wright and C Eagleton, 'Neutrality and Neutral Rights Following the Pact of Paris for the Renunciation of War' (1930) 24 ASILPROC 79, 79.

[101] H Bull, 'The Grotian Conception of International Society' in K Alderson and A Hurrell (eds), *Hedley Bull on International Society* (Macmillan 2000) 121.

[102] UN Charter (n 9) arts 39, 41, 42, 48.

[103] ibid, art 2(5).

[104] ibid, art 103.

[105] *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58, para 34.

[106] H Lauterpacht cited in H Morgenthau, 'The Problem of Neutrality' (1938) 7 UKanCityLRev 109, 124.

[107] L Henkin, 'Force, Intervention and Neutrality in Contemporary International Law' (1963) 57 ASILPROC 147, 148.

[108] UN Charter (n 9) arts 23, 27.

[109] See e.g. P Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 17 HarvIntlLJ 249, 252.

[110] UNSC Draft Res (25 February 2022) UN Doc S/2022/155.

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no overriding obligations under the Charter, the law of neutrality has not been entirely superseded but continues to bind States.[111]

It may be objected that even where the collective security regime of the UN Charter has not been engaged, States are not necessarily bound by the law of neutrality, as there exist further overriding rules of international law. However, such arguments are also unconvincing. The first argument suggests that the supply of arms to just belligerents constitutes an act of 'collective self-defence' under Article 51 of the UN Charter.[112] Yet, regarding the Russo-Ukrainian War, no State has reported the supply of arms as a measure of collective self-defence to the UNSC as required by Article 51.[113] This is unsurprising, as invoking collective self-defence would make the State party to the conflict as a co-belligerent.[114]

The second argument suggests that arms can be supplied to just belligerents as lawful countermeasures under the law of State responsibility in response to illegal acts of aggression.[115] However, under the law of State responsibility, only the injured party (e.g. Ukraine) is entitled to take countermeasures.[116] Whilst it may be objected that the prohibition on aggression is a peremptory norm and obligation *erga omnes*, Talmon argues that in such cases, non-injured neutral States are only permitted to invoke wrongdoing rather than to respond through countermeasures.[117] The law of countermeasures is, however, a matter of some uncertainty where legitimate doubt exists regarding what is permissible, especially concerning peremptory norms.[118]

In this regard, it must also be noted that Article 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that 'States shall cooperate to bring to an end through lawful means any serious breach [of a peremptory norm of general international law]'.[119] Here, it may be argued that Article 41 establishes a 'duty of cooperation', abrogating the law of neutrality potentially in both a minimal sense (by *permitting* partiality towards a victim of aggression) and in a maximal sense (by *mandating* partiality towards a victim of aggression).[120] However, there are several problems with this view. First, it is unclear whether the duty espoused in Article 41 exists as part of international law. The

[111] Upcher (n 15) 126.

[112] MN Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (*Articles of War*, 7 March 2023) <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>; Ambos (n 11); Krajewski (n 11).

[113] Talmon (n 4) 6.

[114] ibid.

[115] R Pedrozo, 'Ukraine Symposium – Is the Law of Neutrality Dead?' (*Articles of War*, 31 May 2022) <https://lieber.westpoint.edu/is-law-of-neutrality-dead/>; E Benvenisti and A Cohen, 'Bargaining about War in the Shadow of International Law' (*Just Security*, 28 March 2022) <https://www.justsecurity.org/80853/bargaining-about-war-in-the-shadow-of-international-law/>; P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' (2023) 72 ICLQ 527, 535–40.

[116] Talmon (n 4) 7.

[117] ibid.

[118] See e.g. R van Steenberghe, 'Military Assistance to Ukraine: Enquiring the Need for Any Legal Justification under International Law' (2023) 28 JC&SL 231, 241–2; CL Lim and R Martinez Mitchell, 'Neutral Rights and Collective Countermeasures for Erga Omnes Violations' (2023) 72 ICLQ 361, 362.

[119] ILC (n 7) art 41.

[120] For an argument of this nature, see A Haque, 'An Unlawful War' (2022) 116 AJILUnbound 155, 157–8.

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contemporaneous commentary to the articles provides that 'it may be open to question whether general international law at present prescribes a positive duty of cooperation', with Article 41 potentially reflecting 'the progressive development of international law'.[121] Clancy argues that the legal status of the duty of cooperation 'remains controversial' today, pointing to its apparent acceptance by a number of States, and its rejection by others—namely Israel, the United States (US), the UK and Japan.[122] Second, even if the duty does exist, its scope and content are highly uncertain. Doubt exists as to how Article 41 applies outside of situations of UN institutional determination, and the forms of cooperation permitted and required.[123] Third, it is not clear that a duty of cooperation would abrogate neutrality as opposed to merely dictating a reinterpretation of it, that is, requiring neutrality to become 'qualified' or 'optional'.[124] Finally, in the Russo-Ukrainian War, no State has justified its supply of arms as a countermeasure or under the law of State responsibility more broadly.[125] Bartolini critiques such legitimations for the supply of arms as 'more of a scholarly construct than a position grounded on the behaviour of States'.[126] Thus, it cannot be argued that the law of neutrality has been superseded; rather, it continues to bind States where the UN Charter's collective security regime has not been engaged.

3.3. The replacement of traditional neutrality by qualified neutrality as customary law

Despite the continuing applicability of neutrality, the content of the customary law of neutrality that remains applicable has been disputed. That the law of neutrality remains a rule of custom is rarely disputed.[127] It continues to be expounded in soft-law instruments,[128] military manuals[129] and jurisprudence, including in the International Court of Justice (ICJ) in *Corfu Channel*,[130] *Nicaragua*,[131] *Namibia*[132] and *Oil*

[121] ILC (n 7) art 41, commentary (3).

[122] Clancy (n 115) 541–2.

[123] ibid 542. Regarding doubt over the content of the duty to cooperate, see also J Crawford, *State Responsibility: The General Part* (CUP 2013) 85–90; P Gaeta, JE Viñuales and S Zappalá, *Cassese's International Law* (3rd edn, OUP 2020) 270.

[124] For discussion of this, see generally E Schmid, 'Optional but not Qualified: Neutrality, the UN Charter and Humanitarian Objectives' (2024) IRRC, doi:10.1017/S1816383124000183.

[125] Talmon (n 4) 8; N Zugliani, 'The Supply of Weapons to a Victim of Aggression: The Law of Neutrality in Light of the Conflict in Ukraine' (2024) 35 EJIL 389, 405.

[126] G Bartolini, 'The Ukrainian–Russian Armed Conflict and the Law of Neutrality: Continuity, Discontinuity, or Irrelevance?' (2024) 71 NILR 281, 293.

[127] Antonopoulos (n 13) 32; A Wentker, 'The Armed Attack Exception to Neutrality in International Peace and Security Law' (2024) 73 ICLQ 963, 968–9.

[128] See e.g. L Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 2010).

[129] Antonopoulos (n 13) 27.

[130] *Corfu Channel Case* (*UK v Albania*) (Merits) [1949] ICJ Rep 4, 22.

[131] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*) (Merits) [1986] ICJ Rep 14, 112.

[132] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 92 (Separate Opinion of Judge Ammoun).

Platforms.[133] Indeed, in the *Nuclear Weapons Advisory Opinion*, the ICJ held that 'the principle of neutrality, whatever its content … is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict'.[134] However, reflective of the uncertainty generated by the 'whatever its content' aspect of the ruling, some have suggested that traditional neutrality has been replaced by qualified neutrality (sometimes termed 'non-belligerency'[135]) under customary law.[136]

Whilst an issue of some uncertainty, the preferable view is that traditional neutrality has not been replaced by qualified neutrality.[137] As observed in the *North Sea Continental Shelf* case, the emergence of a customary rule requires sufficient State practice and *opinio juris* (the subjective belief that the 'practice is rendered obligatory by the existence of a rule of law requiring it').[138] Regarding qualified neutrality, arguably both requirements are lacking.

In terms of State practice, Italy adopted a policy of non-belligerency during World War I and did so again during the 2003 Iraq War.[139] Similarly, the US adopted a policy of non-belligerency in World War II, supplying the Allies with arms through the Lend-Lease Act 1941.[140] Additionally, a range of States supplied arms to both sides in the Iran–Iraq War.[141] Furthermore, in the 2003 Iraq War, the coalition received arms from neutrals such as Denmark, Italy, the Netherlands and Spain.[142] Yet, for all these examples, there exist counter-examples of neutrals imposing arms embargos, including in the 1948 Israeli–Arab War, the 1956 invasion of Suez, the 1965 India–Pakistan War, the 1967 war in the Middle East, the 1971 India–Pakistan War and the 1973 war in the Middle East.[143] Upcher thus aptly characterises State practice regarding the law of neutrality as indicative of 'a somewhat chaotic range of positions'.[144]

Whilst State practice regarding qualified neutrality is mixed, the requisite *opinio juris* is almost certainly lacking. In World War I, Italy did not legally justify its non-belligerency policy.[145] Furthermore, US justifications in World War II were varied. Whilst some US jurists, including Robert Jackson, justified the supply of arms through the Lend-Lease Act on the grounds of qualified neutrality,[146] as

[133] *Case Concerning Oil Platforms* (*Islamic Republic of Iran v USA*) (Merits) [2003] ICJ Rep 161, 183.

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

[135] Arguing that 'qualified neutrality' and 'non-belligerency' are synonymous, see Antonopoulos (n 13) 13.

[136] See e.g. Hathaway and Shapiro (n 10).

[137] Upcher (n 15) 37; K Heller and L Trabucco, 'The Legality of Weapons Transfers to Ukraine under International Law' (2022) 13 JIntlHumLegStud 251, 263.

[138] *North Sea Continental Shelf Case* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) (Judgment) [1969] ICJ Rep 1969, para 77.

[139] Antonopoulos (n 13) 13.

[140] ibid 14; Lend-Lease Act 1941, 55 Stat 31, 11 March 1941.

[141] Upcher (n 15) 82.

[142] ibid.

[143] ibid 81.

[144] ibid 83.

[145] Antonopoulos (n 13) 14.

[146] 'Address of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941' (1941) 35 AJIL 348 cited in Antonopoulos (n 13) 44; Q Wright, 'The Lend-Lease Bill and International Law' (1941) 35 AJIL 305, 308.

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Antonopoulos argues, the official justification seemed to be one of self-defence, with the formal title of the Lend-Lease Act reading: 'An Act to Promote the Defense of the United States'.[147] Indeed, except for the US military manual and Italian justifications in the 2003 Iraq War, post-war invocations of qualified neutrality are entirely absent.[148] Regarding the Iran–Iraq War, the States supplying arms denied they were doing so and acted clandestinely.[149] Indeed, in the 2003 Iraq War, the States supplying arms to the Coalition did not reference the law of neutrality but cited political justifications.[150] In this sense, there lacks the uniform *opinio juris* required to establish qualified neutrality as a rule of custom.[151]

Therefore, traditional neutrality remains binding, having not been superseded entirely by the UN Charter or replaced by qualified neutrality. In this regard, attention may be turned to the Russo-Ukrainian War, and whether the conflict evidences the customary emergence of qualified neutrality. Such a proposition is, however, highly doubtful. Regarding State practice, whilst there has been a mass supply of arms to Ukraine by numerous (predominately Western) States, many non-Western States—such as China, India and Brazil—have not provided material support to Ukraine.[152] The existence of accompanying *opinio juris* is even more dubious. As Bartolini observes, whilst many States have invoked Ukraine's right to self-defence against unlawful aggression as a justification for the supply of arms, it 'has not been accompanied by clear and extensive legal reasoning' with a 'lack of engagement with the law of neutrality'.[153] Yet, even if the requisite State practice and *opinio juris* were to emerge in a current or future conflict, it has been argued that the principle of separation forms a potential barrier to qualified neutrality and necessitates the perpetuation of traditional neutrality.

4. The relationship between the law of neutrality and the principle of separation

Given the increasing relevance of qualified neutrality, the relationship between the law of neutrality and the principle of separation has come to the fore, with some scholars noting a potential clash.[154] Other scholars, however, including Antonopoulos and Bothe, have expressly rejected the validity and emergence of qualified neutrality based on incompatibility with the principle of separation.[155] This article disagrees. There are two broad understandings of the relationship between the law of neutrality and the principle of separation, either considering neutrality to constitute part of the *in bello* or considering it to fall outside the *in*

[147] Lend-Lease Act (n 140); Antonopoulos (n 13) 44.
[148] Antonopoulos ibid 16, 145.
[149] Upcher (n 15) 82.
[150] ibid.
[151] Antonopoulos (n 13) 146; Bothe, 'The Law of Neutrality' (n 13) 603.
[152] Zugliani (n 125) 406.
[153] G Bartolini, 'The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice' (*EJIL: Talk!*, 11 April 2023) <https://www.ejiltalk.org/the-law-of-neutrality-and-the-russian-ukrainian-conflict-looking-at-state-practice/>.
[154] See e.g. Ambos (n 11); Krajewski (n 11).
[155] Antonopoulos (n 13) 147; Bothe, 'Neutrality, Concept and General Rules' (n 13) para 29; Bothe, 'The Law of Neutrality' (n 13) 612.

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bello. As will be demonstrated, regardless of how the relationship is conceived, the principle of separation does not form a compelling objection to the emergence of qualified neutrality as positive law. Indeed, the separation is best understood merely as a description of how the law is applied in a few individual legal regimes, rather than as a general legal principle with prescriptive force over anything designated as '*in bello*'.

4.1. The law of neutrality as part of the jus in bello

The first way to conceptualise the relationship between the law of neutrality and the principle of separation is to understand neutrality as part of the *in bello*. This is the classical understanding of the relationship. As Antonopoulos argues, the *jus in bello* 'includes the law of neutrality as it is inextricably linked to an armed conflict'.[156] This view was assumed in the *Oil Platforms* case, where the ICJ held that the actions of Iran and Iraq were 'in disregard of the rules of international jus in bello, in particular the laws of maritime neutrality'.[157]

On this basis, Bothe objects to the rights and duties of neutrals being contingent upon *ad bellum* considerations, as it 'would be contrary to a general principle of the law of war, namely the principle of equality of the parties regardless of the justification of the conflict'.[158] Elsewhere, Bothe argues that:

> Supporting the party to a conflict is a violation of the law of neutrality even if the supported party is a victim of aggression. This follows from a general principle of the law of war which also applies to the law of neutrality, namely the principle of equality of the parties regardless of the justification of the conflict.[159]

Similarly, Antonopoulos argues that qualified neutrality departs from 'the fundamental principle of keeping jus ad bellum and jus in bello absolutely distinct', and that:

> authoritative opinion supports the claim that the absolute separation of the application of the jus in bello from considerations of legality of resort to force under the jus ad bellum includes the law of neutrality.[160]

Where the law of neutrality is understood as part of the *in bello*, such arguments are correct in pointing out the incompatibility of qualified neutrality with the principle of separation. Indeed, allowing neutrals to discriminate against unjust belligerents is premised upon *ad bellum* considerations altering *in bello* rights and duties.

However, objections to the legal status of qualified neutrality based on the principle of separation are unconvincing. Immediately, it must be noted that such objections are implicitly premised on the principle of separation being absolute. However, some scholars have proposed that the principle of separation is subject to exceptions, including wars justified on the basis of humanitarian intervention,

[156] Antonopoulos ibid 146.
[157] *Oil Platforms* (n 133) para 44 (Separate Opinion of Judge Simma).
[158] Bothe, 'Neutrality, Concept and General Rules' (n 13) para 29.
[159] Bothe, 'The Law of Neutrality' (n 13) 612.
[160] Antonopoulos (n 13) 146, 147.

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UNSC-mandated operations and circumstances of extreme self-defence.[161] The existence of potential exceptions to the principle of separation introduces the question of whether the law of neutrality could be considered an additional one. This is the approach taken by Greenwood and Orakhelashvili, who, in identifying qualified neutrality as customary law (albeit perhaps prematurely), argue that the law of neutrality constitutes an exception to the principle of separation.[162]

The existence of exceptions is, however, disputed.[163] Yet, it is proposed that to focus on whether qualified neutrality could be an exception and engage in disputes of this nature would be to overlook the uncertain foundational assumptions revealed by considering the notion of 'exceptions'. First, focus on exceptions supposes that the principle of separation is a general rule that applies across all *in bello* doctrines (which must then be proven to be exceptions to that general rule), rather than a rule that applies only to a few individual doctrines where expressly provided for (with such doctrines then having to be proven to be subject to the rule). Second, and relatedly, for the term to have any conceptual significance, a focus on exceptions supposes that where there is custom attesting to an emerging doctrine incompatible with the principle of separation, the doctrine may still be subject to the principle of separation and is not necessarily a *de facto* 'exception'.

This second supposition would require the principle of separation to be a rule that imposes limits on States *qua* makers of international law, with the principle preventing the emergence of any conflicting norm. In placing limits on States *qua* makers of international law, the principle of separation would share a key feature of, and thus be akin to (in a restricted sense), *jus cogens* norms. As the International Law Commission (ILC) has explained, 'a rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*)'.[164] The ILC goes on to detail that 'even if constituent elements of customary international law are present', a customary rule conflicting with a *jus cogens* norm will not come into existence as *jus cogens* norms are 'hierarchically superior to other norms of international law and therefore override such norms in the case of conflict'.[165] Yet, the ability of even *jus cogens* norms to place limits on States *qua* makers of international law and the legal mechanisms by which such limits function are issues of controversy and uncertainty.[166] As will be shown, the veracity of both suppositions underpinning the discussions of 'exceptions' are highly doubtful.

Indeed, Antonopoulos and Bothe's objections to qualified neutrality are also implicitly premised on the above suppositions that the separation is a general principle that encompasses all *in bello* doctrines and imposes limits on States *qua*

[161] Goodman (n 19) 58, 64–76.

[162] Greenwood (n 12) 230; Orakhelashvili (n 16) 185–93.

[163] See e.g. T Gill, 'The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction between the *Jus ad Bellum* and the *Jus in Bello*' (1999) 12 LJIL 613, 623.

[164] ILC, 'Report of the International Law Commission on the Work of its 71st Session' (29 April–7 June and 8 July–9 August 2019) UN Doc A/47/10, Ch V, conclusion 14(1).

[165] ibid 182.

[166] U Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 EJIL 853, 854–5.

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makers of international law. However, two alternative views are available. First, it may be argued that the separation is not a general principle, but merely a description of a feature exhibited by certain independent rules and doctrines. Such a view is indicative of the fragmented nature of international law, whereby rules emerge as a result of specific instances of State consent rather than by reasoning from abstract general principles.[167] Thus, the principle of separation may describe how the rules in one particular treaty or regime are applied (where the content of the separation is expressly provided for), but not constitute a general principle that applies across all doctrines.

Regarding the alternative view, as Dinstein observes, the *jus in bello* contains two distinct parts: the 'conduct of belligerents *inter se*' and 'the relations between neutrals and belligerents'.[168] The first part, in which international humanitarian law (IHL) provides the archetypical obligations, can be termed the 'belligerent *in bello*'. The second part, in which the law of neutrality provides the archetypical obligations, can be termed the 'neutrality *in bello*'. Thus, even if the separation is a general principle, such a general principle may apply only to the 'belligerent *in bello*' rather than the 'neutrality *in bello*'. As will be demonstrated, both alternatives are preferable to the view of the separation as an all-encompassing general principle capable of enveloping the law of neutrality.

The four sources proclaimed as establishing the separation as a general principle 'anchored in conventional and customary law'[169] are the Geneva Conventions and their Additional Protocols, post-World War II jurisprudence (particularly the *Hostages Trial*), military manuals and the consensus of publicists.[170] Regarding the first and supposedly most evidentiary, the oft-cited preamble to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (AP-I) reaffirms:

> further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances *to all persons who are protected by those instruments*, without any adverse distinction based on the nature or origin of the armed conflict.[171]

Thus AP-I seemingly does not constitute evidence that the principle of separation is a general rule, but rather that the principle of separation merely describes how the rules of 'those instruments' (as fragmented and isolated rules) are to be applied.[172] Similarly, the 1987 commentary to AP-I states that the justness of the war 'should not affect the application *of the Protocol*'.[173] Here, the commentary in no way

[167] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (18 July 2006) UN Doc A/CN.4/L.702, 3–5.

[168] HH Almond Jr et al, 'Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part II)' (1988) 82 ASILPROC 594, 607.

[169] Koutroulis (n 27) 451.

[170] See e.g. Brownlie (n 26); Koutroulis ibid; Roberts (n 27).

[171] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 (AP-I) preamble, para 5 (emphasis added).

[172] Mandel (n 19) 643.

[173] Y Sandoz, C Swinarski and B Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) 37 (emphasis added).

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suggests that this clarification on the application of the Protocol is necessitated by, or reflective of, a broader general principle of keeping the *in bello* distinct from the *ad bellum*.

Elsewhere, however, the commentary notes that 'the fourth paragraph [of the AP-I preamble] states that *jus in bello* cannot affect *jus ad bellum*; this point [the fifth paragraph of AP-I preamble] confirms the reverse'.[174] It goes on to observe that 'this [fifth paragraph] is a reaffirmation that humanitarian law should apply in all circumstances to all persons (and objects) protected by it, without taking into account the nature or origin of the conflict'.[175] Two points are worth noting. First, the commentary appears to be conflating the *in bello* with IHL. It seemingly switches between the terms, giving no indication or evidence that the fifth paragraph establishes that the *in bello*—as something broader and not synonymous with IHL—is also (along with IHL) distinct from the *ad bellum*. Second, it is ambiguous whether the commentary posits that paragraph 5 is 'reaffirming' the separation as a general principle, or merely reaffirming Common Articles 1 and 2 of the Geneva Conventions that specify that the 'Convention[s]' apply 'in all circumstances'.[176] The former assertion is certainly dubious. Indeed, in its 'reaffirmation', the commentary makes no note of the separation as a rule of positive law existing outside of the Geneva Conventions, nor does it make any mention of terms such as 'principle'. Furthermore, the fifth paragraph of AP-I itself deploys the term 'reaffirming', which is used purely in the context of explaining how those specific instruments (the Geneva Conventions and Protocol) are to be applied. Thus, analysis of the Geneva Conventions attests only to the separation as a description of how the rules within those isolated and individual regimes are to be applied.

Yet, even if the AP-I preamble is somehow taken as evidence of the separation as a general principle, the text holds that the separation applies in the context of all 'protected persons' and the commentary specifies 'humanitarian law'. In this sense, even if a general principle is established, there is no evidence that such a principle extends beyond IHL and the 'belligerent *in bello*' (which concerns the protection of individuals) to the 'neutrality *in bello*' (which governs inter-State relationships).

Regarding the second source, as well as supposedly being the key jurisprudential evidence of the separation being a 'general principle', the *Hostages Trial* also constitutes the 'authoritative opinion' that Antonopoulos cites in his argument that the principle of separation expressly 'includes the law of neutrality'.[177] However, neither assertion is convincing. Whilst the *Hostages Trial* does state that the justness of the cause does not alter the rules applicable between the 'belligerents themselves' or 'between belligerents and neutral States', this must be understood within the broader theoretical framework set out by the judgment.[178] Recalling the key part of the dicta:

[174] ibid 28.

[175] ibid 29.

[176] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention) art 1.

[177] Antonopoulos (n 13) 147.

[178] *Trial of Wilhelm List* (n 71) 60.

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> Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject … It must not be overlooked that international law is prohibitive law. Where the nations have affirmatively acted, as in the case of the Hague Regulations, 1907, it prohibits conduct contradictory thereto. Its specific provisions control over general theories, however reasonable they may seem.[179]

The judgment reminds us that international law is a 'prohibitive law' that operates 'where the nations have affirmatively acted'.[180] In this sense, in 1947, as in 1907, the principle of separation would apply to the law of neutrality, as States had acted affirmatively to prohibit belligerent discrimination by acceding to traditional neutrality in customary law and the 1907 Hague Conventions. Given such affirmative action, the principle of separation applied to the law of neutrality, as 'specific provisions control over general theories' (i.e. the specific provisions of traditional neutrality entailing belligerent equality control over any general theory promoting belligerent discrimination). If, however, qualified neutrality emerges as a rule of custom (and belligerent discrimination is thus expressly provided for by States), the principle of separation cannot be appealed to in order to deny such reform, as doing so would be giving general theories (i.e. the principle of separation and belligerent equality) control over the specific provisions created through the affirmative action of States.

The *Hostages Trial* provides evidence against both assertions. First, if qualified neutrality emerges as a reflection of State consent, the law of neutrality would not be expressly encompassed within the separation. Second, it is not a 'general principle' capable of subjugating doctrines such as neutrality, as the permissibility of belligerent discrimination falls to be determined purely by the specific prohibitions within the individual and fragmented rules to which States consent. In this respect, the *Hostages Trial* does not constitute authority for the separation imposing limits on States *qua* makers of international law, which arguably also runs counter to the judgment's emphasis on the primacy of specific provisions manifesting from acts of State consent. Congruently, the rest of the (much less cited) post-World War II jurisprudence also fails to establish convincingly the separation as a general principle, with Orakhelashvili summarising his extensive analysis with the observation that the 'judicial practice is divided, some decisions are not so straightforward and may even uphold the principle of aggressor discrimination'.[181]

Proponents of the principle of separation as a general principle cite military manuals as a third source. Koutroulis cites the UK Military Manual as typical,[182] which states that:

> One of the most important characteristics of the law of armed conflict is its universal application. It applies with equal force to all parties engaged in an armed conflict, whether or not any party is considered to be 'an aggressor' or 'a victim of aggression'.[183]

[179] ibid 59–60.
[180] ibid.
[181] Orakhelashvili (n 16) 168; cf Koutroulis (n 27) 460–5.
[182] Koutroulis ibid 457.
[183] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) 34.

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Yet, even if military manuals constitute authority enough to establish the separation as a general principle, it is not clear that such a principle applies to the entire *in bello*. Indeed, the UK military manual, in its brief discussion of neutrality, refuses to rule out the possibility of qualified neutrality (and thus belligerent discrimination in the law of neutrality) as a valid rule of international law, remaining ambiguous as to its own position.[184] Unless the UK military manual is held to be contradictory, it appears that the 'law of armed conflict' which the cited passage claims must be applied equally can only be understood as referring to the 'belligerent *in bello*' rather than the 'neutrality *in bello*' as well.

Similarly, regarding the fourth source, as Weiler and Deshman observe, 'it was primarily the work of publicists which made the distinction fundamental'.[185] However, academic commentary regarding the principle of separation almost entirely (except for the cited examples) concerns the humanitarian goal of ensuring the equal application of IHL. Thus, even if the work of publicists is to be considered a valid source of law, such an argument would support the view that the separation was a 'general principle' only in relation to the 'belligerent *in bello*' and not the 'neutrality *in bello*'. Thus, none of the acclaimed sources of the separation supports the view that it is a general principle that applies to the entire *in bello*.

It is also difficult to see how any of the sources attest to the separation constituting a hierarchically superior norm imposing limits on States *qua* makers of international law. At what point did the separation become a norm of this nature: through its *de facto* existence in the positivistic nineteenth century, or following the *Hostages Trial*, or after the Geneva Conventions, or as a result of military manuals? None seems convincing. Indeed, the literature on the principle of separation has not engaged with any specificity on how the separation could constitute a norm of this nature. This is unsurprising, as norms of such a nature are rare, with the requirements for their formulation highly contested.[186]

In sum, even if the law of neutrality does constitute part of the *in bello*, the principle of separation does not form a compelling objection to the emergence of qualified neutrality. First, the separation is best understood as a mere description rather than a binding general principle. Second, even if the separation were to be understood as a general principle imposing limits on States *qua* makers of international law, the sources only support its application to the 'belligerent *in bello*' and not the 'neutrality *in bello*'.

4.2. The law of neutrality as distinct from the jus in bello

The alternative way to conceptualise the relationship between the law of neutrality and the principle of separation is to understand neutrality as distinct from the *in bello*. Instead, the law of neutrality may be understood as solely part of the *ad bellum*, or as distinct from either field. If this is the case, the doctrine does not fall under the purview of the principle of separation and there can be no conflict.

[184] ibid 19–20.

[185] Weiler and Deshman (n 17) 27.

[186] D Tladi, 'Ius cogens' in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (2024) para 19.

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Whilst the view of neutrality as part of the *in bello* is the classical understanding, as some scholars have observed, the fit is an uneasy one.[187] Sassòli argues that the law of neutrality straddles the divide, 'containing some *jus ad bellum* rules as well as some *jus in bello* rules'.[188] Regarding the *in bello* rules, some aspects of the law of neutrality are humanitarian in nature, such as the rules relating to belligerent combatants captured on neutral territory.[189] However, other rules appear more closely related to the *ad bellum*, such as the inviolability of neutral territory and the prohibition on moving troops through neutral territory.[190] Sassòli also argues that the law of neutrality also contains 'many rules that belong to neither *jus ad bellum* nor IHL but instead regulate rights and obligations of neutral States in fields other than humanitarian ones', such as trade, communications and the duty of impartiality.[191] This passage is interesting because it reminds us that some obligations under the law of neutrality are radically different from the humanitarian obligations typical of the *in bello*. However, Sassòli appears to conflate IHL with the *in bello*, ignoring Dinstein's analysis in which the *in bello* can be split into the 'belligerent *in bello*' and the 'neutrality *in bello*'.

Dinstein's view categorising the law of neutrality as its own distinct part of the *in bello* is preferable over the categorisation of neutrality as belonging to both the *in bello* and *ad bellum*. It acknowledges the fact that some rules of neutrality (e.g. trade, communications and impartiality) are fundamentally different from humanitarian obligations, whilst simultaneously reflecting the view of Antonopoulos and the ICJ that the law of neutrality only becomes relevant against the background of an ongoing conflict—a definitional characteristic of the *in bello*.

The debate concerning whether neutrality is part of the *in bello* or *ad bellum* raises some pertinent questions. When thinking about the principle of separation, the law of neutrality may need to be divided, with the principle of separation applying to some aspects and not others. Here, however, it should be noted that where the principle of separation applies to rules under the law of neutrality (e.g. the treatment of detained belligerents), the principle of separation applies because such rules are first and foremost rules of IHL, with equivalent rules under the 'belligerent *in bello*'. In this sense, the principle of separation applies to the law of neutrality incidentally (where rules of IHL and the 'belligerent *in bello*'—which expressly provide for the principle of separation—are replicated within the 'neutrality *in bello*') but not per se (by virtue of the principle of separation applying to the 'neutrality *in bello*' in and of itself).

It should also be noted that debate concerning whether the law of neutrality constitutes part of the *in bello* or *ad bellum* cannot help but seem reductive. The debate is a descriptive one, concerning whether the rules are a closer fit to the '*in bello*' or '*ad bellum*' definition. However, what makes such descriptive categorisations meaningful is that they have drastic normative consequences for

[187] Sassòli (n 72) 476; Clancy (n 16) 357.
[188] Sassòli ibid 476.
[189] ibid 475.
[190] ibid 479; Clancy (n 16) 357.
[191] Sassòli ibid 476, 479.

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how the rules are applied. Clancy seems to accept this, worrying (albeit mistakenly) that 'by situating the law of neutrality solely in the *jus in bello*, the law of neutrality would be subjected to the principle of belligerent equality'.[192] However, such an understanding fails to tackle the legitimacy of imposing vast normative consequences based on the mere assignment of a doctrine to a descriptive category.

Clancy argues that 'there is an absurdity in insisting that a body of law which largely developed during the 19th Century … would conform to the contours of this relatively recent doctrinal phenomenon [the principle of separation]'.[193] It is submitted that the real absurdity is not the requirement of describing neutrality as part of the '*in bello*' or '*ad bellum*', but the assumption that the vast normative consequences of the principle of separation result automatically from such a description. In this sense, and consistently with the analysis in Section 4.1, what matters is not whether a doctrine is perceived as descriptively more similar to the *in bello* or *ad bellum*, but whether there is specific provision in positive law that the separation applies to the doctrine in question. Regarding the law of neutrality, there is none.

Drawing together the above analysis, the principle of separation only constitutes a compelling objection to the emergence of qualified neutrality if the following propositions are accepted: first, that neutrality forms part of the *jus in bello* and that it is appropriate to draw vast normative conclusions from this mere description; second, that the separation governs the 'neutrality *in bello*' as well as the 'belligerent *in bello*'; and, third, that the separation constitutes a general principle that imposes limits on States *qua* makers of international law. As has been demonstrated, all three propositions are false. The principle of separation is, doctrinally, irrelevant to the status of qualified neutrality as positive law. The only impact the principle of separation may have on perpetuation and reform within the law of neutrality is if some normative argument (e.g. that the principle of separation ought to apply in the case of neutrality) proves persuasive and is codified.

5. The normativity of qualified neutrality and the principle of separation

Given that the principle of separation's impact on perpetuation and reform within the law of neutrality is contingent upon further normative argumentation, it is worth briefly considering this potential ancillary form of impact. By permitting belligerent discrimination and allowing neutrals to support just belligerents, qualified neutrality inherently conflicts with the principle of separation. Thus, by rejecting normative arguments that the principle of separation ought to apply to the law of neutrality, this section is synonymous with a normative argument in favour of qualified neutrality (and against traditional neutrality).[194] As will be demonstrated, there exist powerful moral reasons to reject the principle of separation. These moral reasons are compelling not only regarding neutrality but

[192] Clancy (n 16) 360.

[193] ibid 358.

[194] The normative argument here is simply that States not party to an armed conflict be permitted to discriminate between belligerents and supply arms to a victim State. To this extent, this section does not seek to argue the merits of qualified neutrality specifically in opposition to a similarly permissive 'third status' (e.g. 'optional neutrality'). Regarding optional neutrality, see e.g. Schmid (n 124).

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also IHL and the 'belligerent *in bello*'. However, the principle of separation is primarily justified on pragmatic grounds. Yet, whilst such pragmatic justifications may be compelling regarding IHL (a claim beyond the scope of this article), they are not sufficiently compelling regarding the law of neutrality to outweigh the moral considerations necessitating the rejection of the principle of separation.

5.1. Moral reasons for rejecting the principle of separation

There are compelling moral reasons to reject the principle of separation. The principle of separation entails that unjust, aggressive belligerents gain the rights and benefits usually and appropriately incumbent upon just belligerents. However, aggressive belligerents gaining rights through unjust acts of aggression is deeply problematic. As Talmon highlights, it contravenes the basic moral and legal principle *ex injuria jus non oritur*—that legal rights and benefits cannot arise from illegal acts.[195] The absurdity of this, in the context of allowing unjust belligerents the right to kill combatants, was pointed out by Justice Jackson:

> it was under the law of all civilized peoples a crime for one man with his bare knuckles to assault another. How did it come that multiplying this crime by a million, and adding firearms to bare knuckles, made a legally innocent act?[196]

As well as at the level of the combatant, at the level of the State the incomprehensibility of unjust belligerents gaining rights is equally apparent.[197] The notion of unjust belligerents possessing the right not to be discriminated against is morally permissible only if nineteenth-century positivist attitudes towards war are adopted, out of which the separation arose, with justice insignificant in recourse to war and inconsequential in comparison to the self-interest of States. Yet, in the twenty-first century, where the international community rightly views war as an evil that must be purged, and aggression is outlawed as an obligation *erga omnes*, granting aggressive belligerents protection from discrimination is morally unconscionable.[198]

The immorality of the principle of separation and traditional neutrality is particularly apparent in asymmetric warfare, in which one belligerent is vastly militarily superior to the other.[199] If, in asymmetric warfare, the duty of impartiality applies, the law operates to promote the military success of the more powerful belligerent by denying the weaker the ability to strengthen themselves through provisions from neutral States. Thus, where the more powerful nation is unjust, traditional neutrality works in practice to maximise the possibility of unjust belligerents triumphing. Whilst 'might makes right' may have been perceived as

[195] Talmon (n 4) 8.

[196] Jackson (n 65) 82–4.

[197] For a more extensive version of Jackson's critique, see McMahan (n 18) 14; cf M Walzer, *Just and Unjust Wars* (Basic Books 1977) 34, 41.

[198] Regarding the *erga omnes* nature of aggression, see H Krieger, 'Rights and Obligations of Third Parties in Armed Conflicts' in E Benvenisti and G Nolte (eds), *Community Interests across International Law* (OUP 2018) 449.

[199] S Lee, 'The Moral Problems of Asymmetric War' in L May (ed), *The Cambridge Handbook of the Just War* (CUP 2018) 114.

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morally justifiable in early modern times, for the international community and the vast majority of moral philosophers over the last century, it no longer is.[200] Because of this, proponents of the principle of separation and traditional neutrality rarely rely on the inherent morality of their position; rather, they rely on pragmatic justifications.[201]

5.2. Pragmatic reasons for upholding the principle of separation

The principle of separation is primarily justified for the pragmatic reason that allowing belligerent discrimination would lead to disastrous consequences in practice.[202] However, whilst such pragmatic justifications may be persuasive in relation to IHL, they are not persuasive regarding the law of neutrality. These justifications respond to four issues: epistemic problems; the risk of further violations of the *in bello*; victors' justice; and finally the risk of criminalising combatants.[203] Justifications of the latter three types relate only to the impact of the principle of separation at the level of the combatant, focusing on issues of compliance and individual liability.[204] This section will therefore focus solely on the first type of justification, which is relevant at the level of the State and constitutes the central argument in favour of traditional neutrality.[205]

The foremost pragmatic justification for the principle of separation is that there exist epistemic difficulties in determining the justness of a belligerent. First, there are concerns that determining belligerent justness is 'difficult and ambiguous, as evidenced by the fact that frequently, even highly trained lawyers and philosophers disagree about the justice of particular wars'.[206] Second, there are concerns that both belligerents will view the other as the unjust party, and see themselves as permitted to exercise the rights restricted to just belligerents.[207] Third, and as a consequence of the second point, 'the overall destructiveness of war would go up with no strategic advantage being reaped by the genuinely just side'.[208] Proponents of traditional neutrality hold this epistemic problem as particularly acute given that the law of neutrality is only relevant where UN collective security fails, meaning in situations where there is no authoritative institutional designation of belligerent justness.[209]

However, in respect of neutrality, such pragmatic concerns are significantly overstated—determining belligerent justness is not a philosophically gruelling task. Given the UN Charter's blanket prohibition on force, international law—for better or worse—proposes a relatively simplistic *ad bellum* framework for determining

[200] Talmon (n 4) 21.
[201] See e.g. Sassòli (n 72) 459; Moussa (n 72) 989.
[202] Rodin and Shue (n 24) 7.
[203] ibid 7–8; Orakhelashvili (n 16) 178–9.
[204] C Kutz, 'Fearful Symmetry' in Rodin and Shue (n 24) 83; Rodin and Shue (n 24) 8.
[205] T Bridgeman, 'The Law of Neutrality and the Conflict with Al Qaeda' (2010) 85 NYULRev 1186, 1214.
[206] Rodin and Shue (n 24) 7.
[207] Orakhelashvili (n 16) 171.
[208] Rodin and Shue (n 24) 7.
[209] Bothe, 'The Law of Neutrality' (n 13) 612; Heinegg (n 8).

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whether a belligerent is just (in compliance with Articles 42 and 51) or unjust (in contravention of Articles 42 or 51).[210] Given this clear framework, Orakhelashvili argues that the designation of belligerent justness is a straightforward task, irrespective of a lack of institutional determination.[211]

Orakhelashvili's view, however, whilst broadly persuasive, must be nuanced slightly given the controversy surrounding whether the *ad bellum* permits wars of preventative self-defence and humanitarian intervention.[212] These disputes have led to examples of uncertainty in the application of the *ad bellum* in practice, such as in Bangladesh,[213] Kosovo[214] and Iraq.[215] Doubts concerning these aspects of the *ad bellum* may increase the likelihood of conflicts of dubious validity, in which belligerents may wrongly but convincingly present themselves as 'just' and the valid recipients of weapons. Despite this, the *ad bellum* remains a generally restricted scheme that distinguishes itself from the complex moral questions that occupied the Scholastics and Romanists. Considering this, it would be wrong to overemphasise the subjectivity involved in determining belligerent justness.

However, it may be objected that qualified neutrality may result in the escalation of conflicts, as belligerents would inevitably frame themselves as just, leading a variety of States to supply weapons to either side of the conflict and become embroiled themselves.[216] Here, three types of cases must be distinguished: 'Type A'—cases where a neutral supports an unjust belligerent whilst knowing, or suspecting, the belligerent to be in violation of the *ad bellum*; 'Type B'—cases where a neutral supports a belligerent where the belligerent's *ad bellum* position is genuinely complex and uncertain; and 'Type C'—cases where a neutral supports a belligerent who is clearly acting in accordance with the *ad bellum*. That Type C cases exist is illustrated by the Russo-Ukrainian War, where Russia has clearly violated the *ad bellum*,[217] with a UN General Assembly (UNGA) resolution to this effect passing with 141 votes in favour, 5 against and 35 abstentions.[218] Once these types of cases are distinguished, the unconvincingness of the epistemic uncertainty objection is made plain.

First, in all three types of cases, qualified neutrality prevents, rather than causes, conflict escalation. Under Article 51 of the UN Charter, States can aid victims of

[210] For a critique of the *ad bellum* being overly simplistic, see J McMahan, 'Laws of War' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 496.

[211] Orakhelashvili (n 16) 172.

[212] See e.g. D Akande and T Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107 AJIL 563; A Cassese, '*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 EJIL 23.

[213] See generally T Franck and N Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67 AJIL 275.

[214] See generally Cassese (n 212).

[215] T Marauhn, 'How Many Deaths Can Article 2(4) UN Charter Die?' in L Brock and H Simon (eds), *The Justification of War and International Order: From Past to Present* (OUP 2021) 459.

[216] See e.g. Sassòli (n 72) 459; Bridgeman (n 205) 1214.

[217] Talmon (n 4) 19; Heinegg (n 8).

[218] UNGA Res ES-11/1 (18 March 2022) UN Doc A/RES/ES-11/1; UNGA, 'Agenda Item 5: Draft Res A/ES-11/L.1' (2 March 2022) UN Doc A/ES-11/PV.5, 14–15.

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aggression through acts of 'collective self-defence'.[219] However, in such instances, the State in question enters the conflict fully as a co-belligerent, thus becoming liable to attack by the opposing belligerent.[220] Yet under traditional neutrality, the same State, whilst permitted to join the conflict as a co-belligerent, is prevented from merely supplying equipment to the just belligerent. Thus, traditional neutrality, in conjunction with the UN Charter, creates an all-or-nothing standard for State involvement, which may actually cause conflict escalation by encouraging concerned States to intervene fully.[221] However, a neutral State supplying equipment does not embroil themself in the conflict. The liability of a neutral to be subject to the use of force falls squarely under the *ad bellum*.[222] Unless the action of a neutral itself constitutes the use of force and direct participation in the conflict such that it becomes a party to the conflict, belligerents are not entitled to use force in response.[223] In this sense, qualified neutrality does not risk the escalation of conflict but minimises it by allowing concerned States to take measures short of fully entering the conflict.

Turning to the nuances of each case, in terms of Type C cases, qualified neutrality desirably promotes and permits such cases. However, Type C cases will often entail Type A cases as a corollary (e.g. the Russo-Ukrainian War is a Type C case in relation to the UK, whereas it is a Type A case in relation to Belarus). However, whether undesirable and prohibited Type A cases, and the corresponding conflict escalation, are more probable under qualified neutrality than traditional neutrality is a question that spirals into issues of international legal compliance and the extent to which international law influences State conduct.[224] Yet, as Henkin reminds us, international law does not principally address itself to 'saints' or 'criminal elements' but, rather, 'at the mass in between—at those who, while generally law-abiding, might yet be tempted to some violations by immediate self-interest'.[225] Accordingly, qualified neutrality likely does not promote the increased regularity of Type A cases, as the States in question would likely supply weapons to unjust belligerents in accordance with their self-interests in any event, irrespective of the legality of so doing. The only likely difference is that Type A cases may become framed (illegitimately) in the language of qualified neutrality rather than done clandestinely or with political language. An analogy can be drawn here to Russia's aggression against Ukraine, which was framed in the language of genocide prevention.[226]

Finally, regarding Type B cases, and the 'generally law-abiding', Grotius himself acknowledged that there may be situations where determining belligerent justness is fraught with genuine epistemic difficulty.[227] In such cases, Grotius held that

[219] UN Charter (n 9) art 51.
[220] Krajewski (n 11).
[221] ibid.
[222] Schmitt (n 112).
[223] ibid.
[224] For scepticism of the impact of the law of neutrality on State conduct, see generally Morgenthau (n 106).
[225] L Henkin, *How Nations Behave* (2nd edn, Columbia University Press 1979) 94.
[226] See generally *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v Russian Federation*) (Order for Provisional Measures) [2022] ICJ Rep 211.
[227] Grotius (n 87) 3.17.3.

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neutrals should assume an attitude of impartiality.[228] However, this impartiality was a matter of prudence rather than legal obligation.[229] Concerns of prudence remain relevant in contemporary international law where, in supporting belligerents, neutrals act at their own risk of committing an internationally wrongful act if their determination of belligerent justness is incorrect.[230] Such considerations of risk and prudence, in conjunction with the determination of belligerent justness being a relatively simple task under the UN Charter, mean that qualified neutrality will likely not significantly promote Type B cases and conflict escalation.

Given the limited pragmatic concerns entailed by qualified neutrality (the potential rise of Type B cases), the pragmatic justifications for the principle of separation do not constitute countervailing considerations capable of outweighing the moral reasons entailing the rejection of the application of the principle of separation. Indeed, following the Russian invasion of Ukraine, the perception of qualified neutrality as normatively desirable has taken hold as the consensus view.[231] Thus, the principle of separation has limited relevance to perpetuation and reform within the law of neutrality, with qualified neutrality and belligerent discrimination both doctrinally possible and normatively desirable.

In light of this, it may be questioned why some scholars viewed the principle of separation as a relevant barrier to qualified neutrality in the first place. The prevalence of the principle of separation in debates on neutrality is likely a reflection of the 'separationist totalistic posture', which grips the literature more broadly.[232] Weiler and Deshman attribute this posture—to the extent to which the International Committee of the Red Cross (ICRC) promotes the principle of separation—to the ICRC's political nature, with its civilian protection operations centring around the organisation's guiding principle of absolute impartiality.[233] Belligerent discrimination would threaten the ICRC's operations, as it would require the ICRC to determine '*jus ad bellum* issues in order to draw *jus in bello* consequences'.[234] Alternatively, Milanovic attributes this posture to the experience and concerns of himself and others regarding belligerent discrimination leading to disastrous humanitarian consequences.[235] In both respects, however, such fears need not protrude into debates on neutrality. As a doctrine outside the purview of the principle of separation, qualified neutrality allows the international community to hold unjust belligerents to account without undermining humanitarianism. Not applying the principle of separation to the law of neutrality provides the international community the chance to 'have its cake and eat it too'.

[228] ibid.
[229] Neff (n 88) 473.
[230] Talmon (n 4) 19.
[231] See e.g. Hathaway and Shapiro (n 10); Ambos (n 11); Schmitt (n 112).
[232] Weiler and Deshman (n 17) 59.
[233] ibid 58.
[234] ibid.
[235] Milanovic (n 78) 65–6.

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6. Conclusion

The principle of separation is of only limited relevance to perpetuation and reform within the law of neutrality. Given the lack of positive law attesting to the contrary, the separation cannot be considered a general principle to which the law of neutrality must conform. First, the separation is best understood as a mere description rather than as binding general principle. Second, a more nuanced understanding of the *jus in bello* leads us to recognise the differences between the 'neutrality *in bello*' and the humanitarian-focused 'belligerent *in bello*', as well as question the legitimacy of deriving vast normative conclusions from mere descriptive categories. Thus, the separation cannot, doctrinally, mandate the perpetuation of traditional neutrality or curtail reform towards qualified neutrality. Similarly, the possibility of such an outcome arising from the principle of separation's normative persuasiveness is equally unconvincing, as there are strong moral reasons to reject the application of the principle of separation to the law of neutrality, which overshadow any countervailing pragmatic considerations. However, the principle of separation is of limited rather than no relevance, as it highlights the importance of encouraging States to approach doubtful cases of belligerent justness with prudence and vigilance to avoid undesirable escalations of conflicts. Nonetheless, the status of qualified neutrality as a rule of positive international law remains entirely dependent upon either its codification or its recognition as a rule of custom.

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