Introduction

The subject of this book is non-participation in armed conflict and, in particular, the relevance, role and content of the law of neutrality in contemporary international law. The present book is confined to the law of neutrality that applies to the relations between belligerents and non-participating States in the event of an armed conflict. It does not deal with the status of permanent neutrality of a State as a result of a treaty arrangement (for instance, Switzerland) or the adoption of a policy of neutrality in its international relations (for instance, Austria).¹

This branch of international law emerged in order to regulate the relations between belligerents and non-participating States in an armed conflict. It is quite ironic that the law of neutrality emerged and developed at the initiative of the belligerents; in particular it was the result of their acts of interference with non-participants’ maritime trade that aimed at controlling the flow of commerce between non-participating States and the opposing belligerent in order to curtail the sustenance of its war effort.

This has resulted in extracting a substantial part of the relations between neutral and belligerent States from exclusively a ‘state of peace’ to an intersection with the armed conflict in progress. In other words, an armed conflict between two or more States does not constitute an insulated, parallel universe, totally unrelated to the peaceful intercourse of non-participating States, either among themselves or between them and the belligerents. Thus, relations between belligerents and non-participating States are ‘peaceful’ only in the sense that they are not directly engaged in active armed conflict. Beyond this an armed conflict between others impacts on the commercial relations of non-participants with either or both belligerents; the more geographically extensive

the conflict, the more widespread is the interference of the belligerents, and the more globalized the economic relations, the more non-participating States are to be affected by the conflict. Moreover, while it is true that an armed conflict does not affect every State in the world, the interconnectedness in cyberspace has the potential of impact of an armed conflict upon an extremely large number of States. Therefore, to argue that the relations between belligerents and non-participants are ‘peaceful’ is not quite accurate. Indeed, the law of neutrality would have been redundant if international law applicable in the peaceful relations between States had been deemed sufficient to regulate these relations. However, the degree of interference by the belligerents and the growth of international maritime trade have rendered this contingency unlikely, for it appears that the belligerents themselves would not view the law normally applicable in peaceful relations as the standard legal framework to regulate relations between them and non-parties to the conflict. This reality has given rise to the law of neutrality as a branch of international law that is not just connected to armed conflict but dependent on it for its existence. In a nutshell neutrality cannot exist without an armed conflict.

The law of neutrality is the product of a long norm-creating process that started at the beginning of the Renaissance and culminated at the turn of the twentieth century in the Second Hague Peace Conference of 1907. It was in that setting where the codification of the largest part of the law of neutrality was realized – in the Hague Convention V respecting the Rights and Duties of Neutral Powers in case of War on Land and the Hague Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War. In antiquity and the Middle Ages, neutrality was simply the fact of non-participation in an armed conflict and did not signify a status in law giving rise to rights and obligations. Indeed, it appeared that neutrality was in direct relation and proportion to the power of either the belligerents or the neutral State. This meant that a non-participant could have its neutrality respected not as a matter of right but only if it was powerful enough to assert it against the belligerents. The reverse situation meant that neutrality was contingent upon
the discretion of a powerful belligerent rather than a legal obligation to respect a right to remain neutral and have specific neutral rights respected by the belligerents. This is bluntly stated in the classical History of the Peloponnesian War by Thucydides in the celebrated Melian dialogue where Athens (the powerful belligerent) treated the claim of Melos (the weak non-participant) to remain neutral as of right in these terms: ‘you know as well as we do the right, as the world goes, is only in question between equal power, while the strong do what they can and the weak suffer what they must’.

Even though this attitude has continued to be present in international relations, it has since been opposed by a body of legal rules by virtue of which in the event of an armed conflict (with or without a formal state of war) third non-participating States have a right to remain neutral; and for as long as they do not participate in the conflict, they enjoy certain rights and incur certain obligations. Thus, it has been argued that the status of neutrality in law depended on recognition of a constitutive nature by the belligerents. I take the view that neutrality has been an objective legal status that is established as a result of the event of an armed conflict. This contingency gives rise to rights and obligations the precise content of which has been the object of a process of evolution that started with the Consolato del Mare in the fourteenth century and culminated in the Hague Conventions V and XIII of 1907 in the twentieth century.

The initial object of regulation was the treatment of neutral goods on enemy ships and, especially, the treatment enemy goods on neutral ships. According to the Consolato and the practice of maritime powers, such as Britain and the Netherlands, enemy goods on neutral ships were subject to condemnation as good prize, but not the ship itself. This position gradually changed, mainly as a result of treaty practice in the formation of a rule of customary law by the middle of the nineteenth century – codified in the Declaration of Paris 1856 – by virtue of which a neutral flag protected enemy goods from capture unless they constituted contraband of war (the principle of free ships, free goods). Moreover, the fundamental and stringent neutral duties of abstention and impartiality were not as absolute at the earlier stages of the evolution of the law of neutrality. Therefore, recruitment of combatants in and transport of troops and supplies through neutral territory were not prohibited. See Upcher, Neutrality, pp. 222–223, 238–240.

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6 Thucydides, Histories, Book 5, chapter 89 (in Greek).
7 R. W. Tucker, The Law of War and Neutrality at Sea, International Law Series (Newport, RI: US Naval War College, 1955), vol. XLIX, p. 165; Upcher, Neutrality, pp. 12–13, 266–277 but cf. ibid., p. 20. The merit of this thesis lies in acknowledging that neutral status was, to a large measure, precarious in the face of the readiness of the belligerents to disregard the rights of neutrals if this served their war aims.
8 The initial object of regulation was the treatment of neutral goods on enemy ships and, especially, the treatment enemy goods on neutral ships. According to the Consolato and the practice of maritime powers, such as Britain and the Netherlands, enemy goods on neutral ships were subject to condemnation as good prize, but not the ship itself. This position gradually changed, mainly as a result of treaty practice in the formation of a rule of customary law by the middle of the nineteenth century – codified in the Declaration of Paris 1856 – by virtue of which a neutral flag protected enemy goods from capture unless they constituted contraband of war (the principle of free ships, free goods). Moreover, the fundamental and stringent neutral duties of abstention and impartiality were not as absolute at the earlier stages of the evolution of the law of neutrality. Therefore, recruitment of combatants in and transport of troops and supplies through neutral territory were not prohibited. See Upcher, Neutrality, pp. 222–223, 238–240.
called a ‘juridical guerrilla war’, namely, the effort on the part of neutrals to safeguard the rights of continuing peacetime (mainly) economic intercourse with both the belligerents and the other non-participating States. This effort would take place in the face of a persistent trend on the part of the belligerents to expand their rights to the detriment of the rights of neutrals. Whenever this happened, as with the Rule of 1756, the concept of continuous voyage and the sweeping disregard for neutral rights by all belligerents during World Wars I and II, it was on the basis of legal argument rather than an outright assertion of power. Thus, belligerents would invoke the concept of reprisals (or countermeasures) in order to justify what constituted violations of neutral rights during the two world conflicts.\footnote{S. Neff, \textit{The Rights and Duties of Neutrals: A General History} (Manchester: Juris Publishing, Manchester University Press, 2000), p. 1.}

There has been a great deal of scepticism with respect to the relevance of the law of neutrality following World War I and, especially, World War II. Eminent authority has stressed the indeterminacy of the content of the law of neutrality. For instance, Sir Arnold McNair remarked in 1932, ‘I cannot tell you what the law of neutrality is to-day, I can tell you where to find what was the law of neutrality in 1914, but I cannot conscientiously tell you what it is to-day’;\footnote{See Section 1.2.4.} moreover, Kunz argued that neutrality after the end of World War II constituted ’one of the most uncertain parts of international law’.\footnote{Quoted in Upcher, \textit{Neutrality}, p. 2 n.7.} Equally, it is argued that the introduction of collective security mechanisms by the Covenant of the League of Nations and the UN Charter and the prohibition of the use of force in the Pact of Paris (1928) and Article 2 (4) UN Charter have either rendered the law of neutrality totally redundant or have restricted its relevance, namely, by introducing the option to cast off the obligation of impartiality in favour of the victim of aggression. In spite of this general contestation of the law of neutrality in the literature, the practice of States points at the opposite direction.

Even though the assertion of belligerent or neutral rights has been rare in the case of international armed conflicts after World War II, it has not been totally non-existent – for instance in the India–Pakistan conflict (1971) and the Iran–Iraq conflict (1980–1988). In fact, neutral rights have been claimed even in conflicts that occurred as a result of military enforcement action authorized by the UN Security Council – namely, the Korean crisis (1950–1952) and the Iraq–Kuwait crisis (1990–1991). Moreover, there is also a paucity of litigation\footnote{J. Kunz, ‘The Laws of War’ (1936) 50 \textit{American Journal of International Law}, 313, 326–327; Upcher, \textit{Neutrality}, pp. 1–2, n 5, 6.}
Introduction

concerning neutral or belligerent rights and duties. But it is the special part allocated to the law of neutrality in the military manuals of States that is of great significance. With one exception,\(^\text{13}\) all military manuals that I have used as sources give prominent place to the law of neutrality and rely on the Hague Conventions V and XIII as well as on other unratiﬁed draft treaties or non-binding (soft law) documents as the codiﬁcation or evidence of customary law. The validity of these manuals as evidence of State practice and opinio juris has been disputed by asserting the signiﬁcance of what States actually do on the battleﬁeld.\(^\text{14}\) However, there exists a body of authoritative opinion according to which national military manuals that are offiﬁcial publications of the govern-ment of a State constitute instances of State practice and, especially, evidence of opinio juris attesting to the existence of customary law.\(^\text{15}\)

The law of neutrality appears to constitute a micrograph of the entire international law with respect to all the jurisprudential issues that surround this area of the law: its emergence as a practical necessity; its existence without ﬁrm doctrinal or theoretical foundations; the role of power in shaping the law; and the signiﬁcance of breach to the continuing validity of legal rules. The existence of the law of neutrality has been doubted as a result of an evolutionary process towards the entrenchment of the rule of law and a higher degree of integration in the international community, but it has not been rejected altogether as a normative framework that is unnecessary or insigniﬁcant.

The book consists of an Introduction, six main chapters (Chapters 1–6) and Conclusions (Chapter 7). Chapter 1 deals with the concept of neutrality as a term of art and the sources of the law of neutrality. Moreover, it contrasts neutrality as a legal consequence of non-participation in armed conﬂict with the concepts of ’permanent neutrality’, ’armed neutrality’ and ’non-belligerency’; ﬁnally, it discusses the doubts that have been expressed with respect to

\(^{13}\) The UK military manual downplays the relevance of neutrality in the aftermath of World War II mainly as a result of the introduction of the UN Charter. The Manual of the Law of Armed Conﬂict. UK Ministry of Defence (Oxford: Oxford University Press, 2004), paras. 1.42–1.43.


the continuing validity of the law of neutrality and concludes that the law of neutrality remains both in force and relevant in the event of armed conflict and may be invoked as of right by non-participating States. Chapter 2 discusses the challenge posed by the UN collective security system to the law of neutrality. The conclusion is that neutrality has not been abolished as a result of the collective security mechanism of the UN Charter but that it has been substantially influenced by it. In particular, I argue that it does not exclude the adoption of neutrality in the event of military enforcement action as long as it does not subvert collective action against an aggressor; thus, while there are similarities between this stance and 'non-belligerency', it is not beyond doubt that this contingency is the only one admissible in law in the context of collective security. Chapter 3 deals with the rights and obligations under the law of neutrality. In particular it deals with the rights and duties of neutrals as well as the concomitant rights and duties of belligerents. The object of the discussion in this chapter is to investigate the relevance of the law provided in the Hague Conventions V and XIII with customary law, particularly as it is evidenced in the military manuals of a number of States. Chapter 4 discusses the challenges to the law of neutrality as a result of the prohibition of the use of force in Article 2 (4) of the UN Charter, and the right of self-defence. I argue that the relation between neutrality and the use of force is better to be kept within the jus in bello rather than the jus ad bellum, for neutrality is inseparable from the armed conflict in progress between the belligerents. As a result, the right of self-defence cannot be the indispensable legal basis for the use of force between belligerents and neutrals; on the contrary, it appears from State practice with respect to countering the action of non-State armed organizations that neutrality has been used in order to expand the right of lawful use of force in self-defence. Chapter 5 deals with the relevance of the law of neutrality to non-international armed conflicts. In it I argue that the law of neutrality is inapplicable to a non-international armed conflict, both as a matter of principle and by operation of the rule that in the event of a civil war assistance is permissible to the government but not to the rebels. In Chapter 6 I discuss the application of the law of neutrality to conflicts in cyberspace. In this regard there exists a proposed legal framework in the Tallinn Manual 2.0, which is not corroborated by sufficient State practice; however, the few military manuals that include regulations on this matter constitute evidence of an emergent opinio juris. Finally, Chapter 7 consists of the conclusions reached on the basis of the discussion in Chapters 1–6.

Even though the law of neutrality is discussed very summarily or even not at all in contemporary textbooks on the law of armed conflict, it has remained valid as the normative framework to regulate relations between the parties to
an armed conflict and non-participating States. It furnishes the legal basis to the latter to protect their territorial sovereignty, the freedom to conduct trade relations as uninhibited as possible and remain free of the attribution of responsibility or becoming the target of belligerent countermeasures in relation to the use of cyberspace infrastructure situated in their territory. The globalization of economic relations and the universality of cyberspace warrant more attention to and a revisiting of the law of neutrality in the event of armed conflict; the aim of this book is to contribute in this direction.
Is the Law of Neutrality Obsolete?

1.1 Introduction

1.1.1 The Concept of Neutrality

Defining neutrality appears a straightforward task. For all intents and purposes, it is a question of fact, namely, of the status of a State not participating in an armed conflict between two or more other States. This is reflected in works of authority. Lassa Oppenheim was succinct when he said, ‘Such States as do not take part in a war between other States are neutrals.’ Similarly, Stylianos Séfériades wrote that neutrality is the condition of non-participation of a State in a war between two other States. But, as in the case of other factual situations, the need to regulate neutrality has become a matter of importance to States, for the reality of ongoing violence between the belligerents in the course of an armed conflict and the fact of non-participation of other States have not and do not constitute a set of two parallel universes, foreign and unrelated to each other. Rather, it is the opposite. Armed conflict (between the belligerents) and a condition of peace between non-participating States and the belligerents, as well as among non-participants, do not just coexist but


Trade and the economy appear to be the point where belligerent and neutral interests cross. On the one hand, belligerents aim at incapacitating the economy of their opponents by disrupting or denying them trade with third States; moreover, it is in their interest that the ultimate aim of defeating their opponent is not subverted by the provision of matériel that would enhance the opponent’s capacity to conduct its war effort. On the other hand, neutrals assert a right to continue normal peacetime commerce among themselves and with the belligerents – the latter case being a highly profitable business.

The need to regulate relations between belligerents and neutrals gave rise to the law of neutrality, the body of international law consisting of rights and corresponding obligations for each group of actors. Neutrals bear two fundamental obligations: abstention and impartiality, namely and respectively, the obligation not to participate in the armed conflict on the side of either belligerent and to treat both belligerents with equality without favouring one at the expense of the other. Belligerents bear the obligation not to violate neutral territory by conducting military operations therein; they may use neutral territory for the transport of troops or supplies and interfere with neutral activities only to the extent required by reasonableness – in the event of transgressions of the neutral duties of abstention and impartiality or of the belligerent rights of blockade and seizure of contraband of war. However, the extent and delimitation of each group’s rights and obligations have given rise to controversy, and the rules that have eventually crystallized are presented as a complex and fluctuating legal regime that defies stability, predictability and security of the law.

That controversy may surround a body of rules of international law is not unknown or unforeseen and certainly not particular to the law of neutrality; it concerns the interpretation and application of these rules. Moreover, Tucker, in *War and Neutrality at Sea*, p. 165, has expressed the following view on the matter: ‘If anything, it seems reasonably clear that the present status of neutrality is, and will probably remain for some time to come, a matter over which considerable controversy and divergence of opinion can be expected.’

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5 N. Politis, *Neutrality and Peace* (Washington, DC: Carnegie Endowment for International Peace, 1935), p. 15. J. H. W. Verzijl, *International Law in Historical Perspective*, 11 vols. (Leiden: Brill Nijhoff, 1979), vol. X, pp. 28–29. As Sir Arnold McNair stated with regard to the content of the law of neutrality, ‘I cannot tell you what the law of neutrality is to-day, I can tell you where to find what was the law of neutrality in 1914, but I cannot conscientiously tell you what it is to-day’; quoted in Upcher, *Neutrality*, p. 2. Moreover, Tucker, in *War and Neutrality at Sea*, p. 165, has expressed the following view on the matter: ‘If anything, it seems reasonably clear that the present status of neutrality is, and will probably remain for some time to come, a matter over which considerable controversy and divergence of opinion can be expected.’
rules. However, it is of no consequence to the existence or the validity of the rules, which is a matter to be evaluated on the basis of the norm-creating mechanisms of international law (namely, its sources).

1.1.2 Sources

The sources of the law of neutrality are basically customary international law and treaties.6 Moreover, there have been rules stated in draft treaty texts that have not been ratified7 or in texts proposing rules that were drafted by academic or scientific associations,8 which have been subsequently adopted by States.

The customary international law of neutrality, namely, the general practice that is accepted as law (opinio juris)9 was formed as a result of State practice that started in the fourteenth century (the Consolato del Mare), became general practice in the seventeenth to eighteenth centuries and crystallized in the nineteenth and early twentieth centuries.10 This practice consisted of physical acts of the belligerents (for instance, the visit and search of neutral ships on the high seas, the sinking of neutral vessels, the confiscation of neutral cargoes as contraband and the institution of blockade), diplomatic statements by both belligerents and neutrals as to respective rights and obligations, physical acts of neutrals in order to preserve their neutrality and the jurisprudence of national prize courts established by the belligerents.

Treaties as a source of the law of neutrality appeared in the course of the seventeenth and eighteenth centuries as a result of the conclusion of a web of

6 Article 38 (1), Statute of the International Court of Justice. Judicial decisions of both national and international courts also constitute valuable subsidiary sources of the law of neutrality. Furthermore, the writings of publicists also constitute a subsidiary source of the law; but they often reflect the subjective views of their authors on neutrality and must be approached with some caution.
10 For an analytical account of the evolution of this practice, see Neff, Rights and Duties of Neutrals. Also see Upcher, Neutrality, Annex: The Historical Development of Neutrality, pp. 217–262.