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For Whom the Bugle Calls

Past and Present of Third-Party Enforcement in International Law

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Till Freja

In Memoriam

Det känns som vi är gjorda sand
Vi bygger högt och rasar ibland
Så hittar vi oss själva nånstans
Där vi kan börja om, starkare imorr'n[1]

[1] Molly Sanden, 'Sand' (song lyrics).

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Abstract

This thesis examines the phenomena of third-party enforcement in public international law, in a historical as well as in a contemporary perspective. To that end, it traces the role of such enforcement measures from the past into the present. It also studies the potential discrepancies between current unilateral sanctions and the recent changes experienced by international law at large. Two legal methods are used in the thesis: historic critical and analytical.

Modern international law from the 17th century and onwards was shaped around the idea of the sovereign state. In a world where war was a legitimate tool of foreign policy, third states had no objective way of judging the merits of a conflict. A law of neutrality developed, imposing obligations of strict impartiality on non-belligerents. Neutrality was strengthened by the principle of non-intervention. In the 20th century, neutrality lost importance, while state sovereignty remained standing firm. Meanwhile, the importance of international community and individual rights received widespread recognition.

Third-party enforcement received limited acceptance only in the mid-war period. It was then recognized that third states had an interest in upholding treaty obligations which sought to prevent war. The League of Nations used modest economic sanctions against Italy, whereas the American oil embargo against Japan likely contributed to the attack on Pearl Harbor. Under the UN, the use of force became prohibited, strengthening the popularity of economic sanctions, often to enforce more 'moralistic' values like human rights.

Today, the driving force behind sanctions is often of such a moralistic nature. Similar to the Medieval Just-War doctrine, it is now possible to on more objective grounds establish the occurrence of an act of aggression or a violation of human rights. International law recognizes the legal interest of the international community in upholding certain norms, but the question of third-party enforcement remains highly controversial. Viewed in the light of the extensive state practice within the area, there are indicators that a permissive rule in customary international law is developing or has developed. If so, this is however yet to be authoritatively established.

Occasionally, states have gathered around a common value or interest, pledging to enforce it as a collective. In the Middle Ages, the uniting force was Christianity, and under the League of Nations, peace and security. Even the UN Security Council has the mission of enforcing international peace and security; exactly what this entails has been the cause of much disagreement among the P-5. The US and other Western states tend to demand enforcement of what would in previous centuries have been considered questions of purely national importance, much to the chagrin of the Soviet Union/Russia and China.

Third-party enforcement can thus be considered inherently foreign to international law – a legal system based on sovereignty and bilateralism. However, the recent expansion in the material scope of international law suggests that it might be the only way of upholding the legality in a system which has grown to encompass obligations it was never intended for. As for now, these measures remain legally dubious.

Abbreviations

ACIL	Amsterdam Centre for International Law
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CEPR	Centre for Economic and Policy Research
CUP	Cambridge University Press
ECHR	European Convention on Human Rights
EU	European Union
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Court of Justice
JHIL	Journal of the History of International Law
LNTS	League of Nations Treaty Series
LNOJ	League of Nations Official Journal
LON	League of Nations
LONC	Covenant of the League of Nations
ILA	International Law Association
ILC	International Law Commission
MPEPIL	Max Plank Encyclopedia of Public International Law
NATO	North Atlantic Treaty Organization
NE	Nationalencyklopedin
NPR	National Public Radio
OSCOLA	Oxford University Standard for the Citation of Legal Authorities
OED	Oxford English Dictionary
OJ	Official Journal of the European Communities
OPIL	Oxford Public International Law
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice (World Court)
SvJT	Svensk Juristtidning
UN	United Nations
UNCH	Charter of the United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

UNSCOR	United Nations Security Council Official Records
UNTS	United Nations Treaty Series
UNYILC	United Nations Yearbook of the International Law Commission
USSR	Union of the Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties

1. Introduction

> *No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were; any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.*[2]

1.1 Background

On 24 February 2022, I woke up in a world different from the one I fell asleep in. Or at least it felt that way to me, a 'child of democracy' who had never known war.[3] The Russian attack against Ukraine struck at the very heart of the international legal order. The UN General Assembly deemed that Russia's action amounts to an aggression against Ukraine, thereby violating the prohibition on the use of force in art 2(4) of the UN Charter, and Ukraine's sovereign rights.[4] Meanwhile in the UN Security Council, a draft resolution was put forth which 'deplore[d] in the strongest terms the Russian Federation's aggression against Ukraine'.[5] To the surprise of no one, Russia used its veto power to block the resolution.[6] In the absence of Security Council action, extensive unilateral sanctions against Russia have been adopted by among others the European Union, the United States, Switzerland, Japan, and Singapore.[7] At the time of writing in mid-May, the armed hostilities in Ukraine are still ongoing.

The situation inevitably makes one question whether international law is law at all. In what legal system can an actor commit the worst of crimes without anyone putting a stop to it? Can it really be up to the individual members to enforce the law? Yes. Kelsen, exploring what law

[2] John Donne, 'Meditation XVII' in Henry Alford (ed) *The Works of John Donne,* (London: John W Parker, 1839) 574-575.
[3] Cf Ursula van der Leyen U, 'Speech by the President' (Munich Security Conference, 19 Feb 2022).
[4] UNGA Res ES-11/1 of 2 March 2020, UN Doc A/Res/ES-11/1. See also UNGA Res 2625 (XXV) of 24 Oct 1970, UN Doc A/RES/2625(XXV) (Friendly Relations Declaration); UNGA Res 3314 (XXIV) of 14 Dec 1974, 2319 plenary meeting (Definition of Aggression);
[5] UNSC draft Res of 25 Feb 2022, UN Doc S/Res/2022/155, at 2.
[6] See UNSC written records, 8979d meeting (25 Feb 2022), UN Doc S/PV.8979.
[7] Minami Funakoshi and Hugh Lawson and Kannaki Deka, 'Tracking Sanctions against Russia', *Reuters Graphic* (online 9 March 2022).

truly is, holds that this was often the case in what he terms 'primitive societies' under 'primitive law'.[8] In these municipal legal systems, there were no centralized organs to enforce the law. They were decentralized in the sense that the principle of self-help prevailed. It was up to the injured party, i.e. the individual and their family, to avenge their right by enacting sanctions vis à vis the perpetrator. This did not necessarily mean that a state of lawlessness reigned; even in primitive legal orders, sanctions were conditioned on a prior delict having been committed. If not, the sanction was illegal, and thereby a delict itself. In other words, the force monopoly did belong to the community, only that the responsibility of exercising it laid with the individual subjects rather than with a judicial system.[9]

Compared to modern municipal law, international law can appear strange indeed; it rather resembles the legal order of primitive societies. International law, namely through treaties and customs, provides rules stipulating or prohibiting states from certain actions. However, it is a decentralized system in that it, too, lacks centralized organs of enforcement. If there exist rules providing for sanctions, it would be up to the states themselves to enact them, and thereby also to enforce international law.[10]

A decentralized legal system comes with many flaws. Kelsen writes, 'if the individual, or group of individuals, authorized by law to carry out the sanction is not more powerful than the delinquent and his group, the sanction cannot be successfully executed.'[11]Applied to international law, it is the smaller states – unable to enforce their rights against a more powerful aggressor – whose independence and existence hang in the balance. Even more defenseless are individuals, or groups, whose protection under international law is violated by their own states.

Who, then, can help you if you cannot help yourself? In a world where might risks becoming right, a state standing alone is not strong. But will a third state come to its aid? Is a third state even allowed to come to its aid? In the 17th century, English poet and minister John Donne admonished, 'never send to know for whom the bell tolls; it tolls for thee'.[12] The title of this thesis – *For Whom the Bugle Calls* – draws on those words. When hearing the proverbial

[8] Hans Kelsen, *Principles of International Law,* Robert W Tucker (ed), (2d edn, Holt, Rinehart and Winston 1966) 7-15.
[9] Ibid.
[10] Cf ibid, 17–20. See also International Law Commission, 'Report of the Commission to the General Assembly on the work of its fifty-third session' 2001 UNYILC II [2], (ILC Report on 53d session) at 128.
[11] Kelsen, *Principles of International Law* (1966) 15.
[12] Donne, 'Meditation XVII' (1839).

bugle calling out across the battlefield, do states – like islands – ask for whom it is calling? Or need they not ask, convinced that the bugle is in fact calling for all of them; for an international community where a violation of the rules will diminish everyone?

On 24 February 2022, the bugle called for Ukraine. Ukrainian forces are now fighting Russia on the ground, but their country is also receiving extensive support from around the world. Third states are both weakening the Russian economy and supply routes,[13] as well as providing war materiel to Ukraine.[14] Thus, many third states can be said to clearly express where their sympathies lie, without actively becoming a party to the dispute.

Sanctions – that word appears to have been everywhere during the past year, which is not surprising considering their extensive usage. Today, the US has sanction regimes in place which target around 25 states; [15] the same number for the EU is around 30.[16] Said sanctions not only pertain to 'classical' cases of international conflicts, but also to e.g. human rights issues. In other words, sanctions are reasonably common as a foreign policy tool.[17] In the EU Sanction Guidelines, the restrictive measures are not presented as particularly problematic. The document affirms that they must at all times comply with international law but fails to address in any depth on what ground.[18] Likewise, my own experience is that sanctions are not presented as controversial by Western media or in the public discourse, likely because of their frequency. Rather, their usage is conveying the message of a government 'doing something' to stand up for certain values or to alleviate human strife.[19] For a person with some knowledge of international law, however, this can appear strange, as it is by no means intuitive how third-party sanctions fit into the larger framework that constitutes said legal order.

[13] See eg Counil Reg (EU) No 883/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, OJL 229 31.7.2014, 1, [as amended 14 Apr 2022]; and Funakoshi et al (2022).
[14] See e.g. 'Fact Sheet on US Security Assistance to Ukraine', *the White House*, (online 16 Mar 2022); 'Military aid and arms for Ukraine', *France 24* (online 22 Apr 2022).
[15] 'Sanctions Programmes and Country Information', *US Department of the Treasury* (online).
[16] EU, 'EU Sanctions Map' (online, updated 21 Apr 2022).
[17] See eg Council, 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU common foreign and security policy' (4 May 2018) Doc 5664/18 (Sanctions Guidelines).
[18] Cf Council, 'Sanctions Guidelines (2018) at II.B.
[19] Cf David Cortright; George A Lopez; David Gerber-Stellingwerf, 'The Sanctions Era: Themes and Trends in UN Security Council Sanctions since 1990' in Vaughn Lowe et al, *The United Nations Security Council and War – The Evolution of Thoughts and Practice since 1945,* (OUP 2008); David Lopez and David Cortright, 'Economic Sanctions in Contemporary Global Relations', in *Economic Sanctions – Panacea or Peacebuilding in a Post-Cold War World?* (Taylor & Francis, 1995) 5-7.

States and other political entities have waged war since time immemorial. It was not until 1928 that war ceased to be a legitimate tool of foreign policy.[20] The right to self-defense has been more or less undisputed, in ancient times as well as today.[21] The question of what a third party faced with a violation of international law could do, and can do still, is however not as easily answered. From a historical perspective, the world's response to the 2022 crisis in Eastern Europe is both unusual and controversial. Indeed, had Russia attacked Ukraine one hundred or three hundred years ago, events would certainly have played out differently. Even from a contemporary perspective it can appear strange, although for largely different reasons. Why has nobody stopped Russia yet? How can the United Nations allow this to happen? Why unilateral sanctions *en masse* if they are largely ineffective as well as legally dubious?

'History will judge you'– variations of that saying have echoed from the Hague Peace Palace to the UN Headquarters in New York.[22] And yes, sometimes we have to turn back the clock, though preferably not to pass judgement retrospectively. Rather, we should try to see events and trends in the context in which they occurred, in order to understand both them and our present better. What role has third-party enforcement played historically? On what legal basis? Why and at what point did unilateral sanctions enter center-stage? Are there any viable alternatives? It is questions like these that the present thesis will attempt to answer, by way of tracing the historical roots of third-party enforcement up until the usage and permissibility of said measures in international law today. In short – where are we now, and how did we get here?

1.2 Purpose Statement and Research Questions

Being a decentralized legal system, the responsibility of enforcing international law has always fallen on the members of the international community themselves – the states. However, such a system runs the risk of creating an enforcement gap whenever the injured party, their strength being inferior to that of the responsible state, is *de facto* unable to assert their rights against aforementioned state.

[20] See the General Treaty for the Renunciation of War (1928) 22[4] AJIL 171-173 (Pact of Paris). Nb the Pact only bound signatories.
[21] See Charter of the United Nations and Statute of the International Court of Justice, 1 UNTS XVI (adopted in San Francisco 26 June 1945); Francisco de Vitoria, 'On the Law of War', in Antony Pagden & Jeremy Lawrence, Political *Writings* (CUP 1991) at 1.
[22] See eg (1936) 151 LNOJ, Spec Supp [i], 18th plenary meeting (30 June 1936) 25 [Hailee Selassie]; UNSC written rec, 8228th meeting (10 Apr 2018) UN Doc S/PV.8228 at 9 [Haley].

In this thesis, I aim to trace the history of third-party enforcement in international law up until its place in the international legal order of today. A third party, or third state, will here be taken to mean any state other than those primarily involved in a dispute of international law, especially those not having suffered any direct injury. The dispute in question can be international, as between two or more states, or concern an internal issue pertaining to an international obligation. A third state then enforces a policy-objective related either to the perceived rights of one of the parties, or to international law at large. This can be done by aiding the favored party in their struggle, for example by providing them with weapons and other relevant supplies. Another option for a third state is to obstruct the efforts of, or put pressure upon, the disfavored side. For example, sanctions can be imposed to undermine the economic and/or political power of the target state in order to prevent it from pursuing a certain foreign or national policy. Policy-objectives of the sender state, meanwhile, can for example be related to international peace and security or human rights compliance.

The purpose is to outline the origin and permissibility of third-party enforcement in international law in light of their historical context. Furthermore, the thesis will provide the reader with an understanding of why third-party enforcement has evolved to the form seen today. Finally, it seeks to offer a clearer picture of the role and legitimacy of sanctions in contemporary international law.

In this process, the following research questions will be examined:

1. What role has third-party enforcement historically played in international law, leading up to its usage today?
    i. In what way has the level of acceptance of war as a tool of foreign policy reflected the constraints and expectations imposed on third states as to their involvement in the dispute?
    ii. How has the general tendency of third-party enforcement shifted between unilateral and collective action? What factors can explain these shifts?
    iii. When and why did economic sanctions come to be more widely used?
2. Do discrepancies exist between the legal position of third-party enforcement in today's international law and the recent developments in international law at large? If so, in what way(s)?

i. How has the shift from an international law of coexistence to one of cooperation and international community affected the issue of enforcement?
ii. Is the principle of non-intervention still relevant as an impairment to third-party enforcement? In what way?
iii. On what grounds could be argued the existence, or non-existence, of a permissive rule of third-party enforcement in customary international law?

In view of the wide scope of the two primary research questions, they are each supplemented by secondary questions. The latter type concretizes what has been deemed the major issues within the primary questions, and such aims to guide the reader by making the following chapters more accessible as to their relation to the purpose statement.

1.3 Scope and Delimitations

Third-party enforcement is a vast and intricate topic, especially so when not limited to current law. Due to limited time and resources, certain delimitations had to be made. Below will be presented the major considerations as to what was included and what was left out.

While the research questions focus on evolution and parallels of third-party enforcement in the greater scheme of history, there was no good way of transferring this to the thesis outline. In order to present the extensive range of source material in a structured and comprehensive way, what I have termed a 'chronological-thematic' outline was instead chosen. The three main chapters are thematic in that they each cover a distinct issue of third-party enforcement. Also, they are presented chronologically, according to the time periods for which their respective themes carry the most relevance. However, the chapter-associated time periods do overlap. This is partly due to the gradual nature of historical change, but also to give the reader a better understanding of from where a phenomenon arose. It also creates a more logical transition into the following chapter. Within the chapters, a chronological outline is used. As for the research questions, they will instead be used to structure the analysis.

Chapter 2, entitled '(Not) Choosing a Side', spans the longest period of time, but also goes the furthest back. It outlines the possibilities for third states to interfere in an international dispute during the formative and classical period of international law, i.e. prior to the new world order

born in the 20th century. Emphasis will be laid on the law of neutrality, since this for a long time imposed strict limitations on the actions of non-belligerents. It is however important to see neutrality also in the context of what preceded it – namely Just-War doctrine. Entering more modern times, the chapter will finally explore how the old ideas of previous centuries fared in relation to contemporary international law. In this chapter, it will be a question of unilateral enforcement, as the third state will be acting outside of the framework of an international organization.

Chapter 3, 'One for All, All for One", deals with collective enforcement. Examining centrally organized collective security, very much a product of the two world wars, military alliances are not considered. Pt 3.1 examines the efforts of the League of Nations while pt. 3.2 explores the era of the United Nations, focusing on the varying level of cooperation within the Security Council.

Something also excluded from chapter 2 is collective self-defense. The UN Charter concedes such a right, accessory to the right of the victim state.[23] Admittedly, collective self-defense through regional organizations can take highly organized forms, but the assumption here tends to be that the third states shall take *active part* in the conflict.[24] Furthermore, any collective self-defense would be secondary to the UN Charter.[25]

Another delimitation is the focus on UN *sanctions.* Operations involving the deployment of military personnel, e.g. peacekeeping operations, are therefore not covered. This is motivated both by the great differences between this and other examples covered by the thesis, but also by the sheer scope of the topic of UN foreign missions.

As pointed out, the time periods of chapters 2 and 3 overlap and therefore, certain examples will also reappear. One such incident is the international conflict in Manchuria during the early 1930s. Chapter 3 will focus on the collective efforts of the League to enforce its Covenant and thereby the rights of China to the territory. Meanwhile, chapter 2 will examine the conflict in the context of the Pact of Paris, as well as its impact on the law of neutrality and third-party unilateral action.

[23] Art 51.
[24] Cf North Atlantic Treaty (4 Apr 1949) (Washington Treaty) art 5.
[25] See UN Charter arts 52–54; Washington Treaty Preamble and art 1.

Lastly, chapter 4 – 'New World, Old World' – deals with contemporary issues of third-party enforcement. It picks up where chapter 3 left off – with the stagnation of the Security Council in the early 21st century and the following wave of unilateral action. Emphasis is on the great changes regarding the material scope of international law, namely through human rights, and how this corresponds to the modern principle of non-intervention. Finally, pt. 4.2 briefly considers the legal grounds for unilateral sanctions and the controversies surrounding the issues.

As seen, the time span of this thesis is long indeed – stretching from Antiquity up until today. This kind of *longue durée*, as seen in contrast to focus on individual epochs, was necessary to fulfill the purpose of tracing the historic development of third-party enforcement in a satisfactory way. 1648 (Peace of Westphalia) is arguably a natural starting point for an historic study of international law,[26] but I chose to go still further back. With this I wanted to highlight especially the moralistic Just-War doctrine as a clear contrast to neutrality and positivism, but also its similarities with contemporary international law. Antiquity is then used to provide the context in which the Medieval structures developed.

Largely absent from this thesis is the time of the two World Wars and the actions that have taken place therein. Rather, the consequences of the war for international law and for third states are examined. Nonetheless, the actions of the US up until 1942 are covered. The state was at this time still neutral, at least officially. What is then being examined is not the war as such, but rather some considerations surrounding it.

A major delimitation of a general nature is the type of enforcement measures explored by the thesis. I hold third-party enforcement to mean measures which are *prima facie* illegal, i.e. would be illegal in other circumstances. There are of course other ways to put pressure on a state. Retorsion is the general term used for unfriendly but legally permissible measures.[27] Examples include diplomatic means or refusing trade when there is no prior obligation to do so. While retorsion in of itself is unproblematic, separating it from illegal measures – sanctions – can be very much so. Furthermore, the distinction between retorsion and

[26] Cf pt 2.2.
[27] 'ILC Report on 53d session' (2001) 128.

sanctions has mainly been an issue in the 20th century and onwards.[28] Under the law of neutrality, prior obligations could even act the opposite way – precluding a breach of neutrality.[29] With this said, I have decided not to thread the line between sanctions and retorsion, and I do not look at what prior obligations the third state might have breached by a specific measure. The enforcement measures as such are therefore assumed to be *prima facie* illegal and in need of some justification.

1.4 Methodology

The use of legal research methodology is decisive for any juridical work of substance. As a thesis concerned with both past and present issues, a combination of two methods are used: a critical method of legal history and an analytical legal method. The two furthermore entwine wherever historical perspectives are used as an analytical tool to understand issues seen today.

Methodological questions regarding legal history are especially complex, as the area seeks to combine two different disciplines. How a writer should approach his material is therefore not evident. In an article by Orford, the author heavily criticizes the traditional, contextual approach to legal history. She holds that a contextualized reading focuses only on the time period in which a given text was written. Instead, Orford argues, the legal historian ought to embrace anachronisms.[30] She continues:

> International law is inherently genealogical, depending as it does upon the transmission of concepts, languages and norms across time and space. The past, far from being gone, is constantly being retrieved as a source or rationalisation of present obligation.[31]

At the same time, there are inherent dangers with diminishing the historical context. The most obvious danger is misinterpretation; legal concepts change over time, and so does the reality that surrounds them.[32] Furthermore, using a positivistic mindset to separate the past from the

[28] 'ILC Report on 53d session' (2001) 128.
[29] See pt 2.2.2.
[30] Anne Orford, 'On international legal method' [2013] London Rev Int'l Law 167–175.
[31] Ibid,175.
[32] See Maria Astrup Hjort, 'Rettshistorisk metode og tolkning av historiske tekster' in JØ Sunde (ed) *Fordom og forventning : ei handbok i rettshistorisk metode* (Akademisk publisering 2019) 17, 20–23.

present risks 'suppressing or undermining efforts to find patterns in history that might account for today's experiences […].'[33]

Koskenniemi expands on Orford's model and instead advocates a critical legal history method. He writes that:

> *critical* legal history ought not rest content with [the merits of placing historical subjects in their local contexts]; it should not dispose of using materials drawn from other chronological moments, including studies of the *longue durée* and structural determination to assess the meaning and significance of the past.[34]

Also advocating a critical legal history is Benton. According to him, the most innovative scholarly works within the field have been achieved not by following strictly in the methodological footsteps of historians, nor traditional jurists. Rather, it is important to understand both the legal culture and politics of the time, as well as to make analytical approaches regarding how these findings fit into a larger framework.[35]

On this background, the present thesis adopts a critical method of legal history. My source of inspiration and subsequent starting point of the work has, as expressed in the Background, been current issues of international law, namely the use of sanctions. Part of the aim, then, has been to trace the historic development of a legal concept – third-party enforcement. For this reason, it was impossible to stop at a contextual study of history. Rather, the thesis is a study of the *longue durée*, studying the transmission of the given concept through time. This includes also the search for parallels between different time periods, e.g. the Medieval Just-War doctrine and contemporary moralization of international law. This work also inquires into the correlation between different ideas as seen over time, such as the legitimate use of war as a foreign policy tool and the permissibility of third-party enforcement measures. At the same time, I have gone to great lengths to understand the context of historic events and personages, an abridged version of which is then presented to the reader.

[33] Marti Koskenniemi, 'Vitoria and Us: Thoughts on Critical Histories of International Law', (2014) 22 Rechtsgeschichte 124.
[34] Ibid 123.
[35] Lauren Benton 'Beyond Anachronisms: Histories of International Law and Global Legal Policies' (2019) 21 JHIL 8, 30–34.

When approaching present time, the issues facing a work on legal history are no longer as pressing. Firstly, at this point appears source material which is more familiar for a jurist schooled first and foremost in contemporary law. Furthermore, historic context is no longer a major issue. Given that questions such as the outlines of latter 20th century history, or the principal differences between the UN General Assembly and Security Council ought to be familiar to any presumptive reader, lengthy explanations thereof would be superfluous.

For these reasons, an analytical legal method was used in addition to, and occasionally in combination with, the historical legal method. The analytical legal method is a development of the dogmatic legal method in that it, too, seeks to establish 'current law'. However, the former goes further in that it to a greater extent enables the writer to study the systematized legal sources in the light of accompanying argumentation. The analytical method is thus not bound to what the law is – *lex lata* – but can explore also what it ought to be – *lex ferenda*.

Chapter 4 sees the most extensive usage of analytical legal method as the thesis is there trying to account for current law on issues such as countermeasures and obligations *erga omnes*. The thesis then goes on to analyze these findings on the background of arguments advanced e.g. within the framework of the ILC, as well as against the historical context already established. In this last capacity, the thesis seeks to learn the *why* of current law and practice. Here, it thus combines the legal analytical method with the critical method on legal history.

Finally, a note on the terminology used has to be made. Terminology is especially challenging when writing a historical work because meanings, as mentioned by Orford, tend to shift over time. Especially challenging has been the usage of terms to denote various forms of disagreements over international law issues. As defined in the purpose statement, *dispute* will here be used as an umbrella term. *(Armed) conflict* will be held to mean any dispute involving the use of force.[36] The term *war,* on the other hand, is used sparingly, as it had a very particular meaning prior to 1945. Two states could prior to this point therefore have been involved in a conflict involving *measures short of war* (reprisals) without being at war.

1.5 Material and Previous Research

[36] Cf Pact of Paris, art II which refers to settlements of 'all disputes or conflicts of whatever nature'.

During the writing process, a wide range of source materials has been used. Being a decentralized legal system, international law consists of multiple legal sources, but art 38(1) of the ICJ Statute[37] is considered a general starting point. The Statute differentiates between two types of legal sources. Primary sources – conventions, custom, and general principles – create new law and obligations, whereas secondary sources – judicial decisions and doctrine – can be used to interpret the primary sources. Not all international agreements, however, have the status of treaties/conventions. For example, the Helsinki Final Act[38] does not attempt to create new law, but only lays down general commitments on the part of its signatories. It can instead be considered a 'soft law instrument', which can help in the formation and interpretation of notably customary international law.[39]

Chapter 3 in particular focuses on enforcement within the League of Nations and the United Nations. An international organization often has an internal legal framework, with legal sources specific for that organization. Both the League and the UN were founded through treaties – a primary legal source – which bestowed different competences upon their different bodies.[40] Whereas the internal organization of the League largely falls outside of the scope of this work, a number of different UN sources feature prominently. Resolutions from the Security Council can create binding obligations for the member states by virtue of the UN Charter.[41] The many draft resolutions discussed in pt. 3.2.2 are of course not binding, as they were never adopted in the first place. Neither are resolutions from the General Assembly binding,[42] but they can be an important soft law instrument. The Friendly Relations Declaration is for example of major importance to the interpretation of the use of force and principle of non-intervention as they exist in the Charter and in customary international law.[43] Finally, the International Law Commission's articles on state responsibility – ARSIWA – are not a legal source in and of themselves but are considered an authoritative codification of international customary law.[44]

[37] Charter of the United Nations and Statute of the International Court of Justice, 1 UNTS XVI (adopted in San Francisco 26 June 1945).
[38] See pt 4.1.2.
[39] See Henriksen, *International Law* (2d edn, OUP 2019) 36-38.
[40] Covenant of the League of Nations; Charter of the United Nations.
[41] Arts 24(1) and 25; ch VII generally.
[42] UN Charter, art 14.
[43] See notably pts 3.1.1 and 4.1.2.
[44] See pt 4.2.1.

The outline of legal sources sketched out above is primarily intended for contemporary international law and cannot be directly translated into a historical context. Treaties were primarily bilateral, and therefore ill-suited for a work focused on the legal position of third-parties.[45] State practice on many issues were not codified before the 20th century. For example, the law of neutrality, of major importance for chapter 2, was not set down in writing until the Hauge Convention (V) of 1907.[46] Instead, the works of prominent jurists were much more important then than the modest role granted to doctrine by the ICJ Statute today.[47] For example, the birth of modern international law is often attributed to the Peace of Westphalia in 1648. This is at most a truth with modification. Whereas peace treaties certainly created new obligations, they hardly invented them. Instead, they could be viewed as an affirmation of legal ideas which had already developed through other means.[48] Meanwhile, writers such as Vitoria (1483-1546), Grotius (1583-1645), and Vattel (1714-1767) played an important role in influencing the development of international law.[49]

In this work, primary historical texts, i.e. those describing the time period of their contemporaries, are used as far as resources and time constraints permitted. I have therefore studied the works of authors whose legacies, often with the benefit of hindsight, are widely recognized. Examples include Grotius, Vattel, Oppenheim, and Lauterpacht. These are of course but a few; works by authors like Suarez, Gentili and Pufendorf are not used. The choice of primary texts was largely based on one practical reason – what books were available to me in a language I could understand. Furthermore, I chose authors whose works I *prima facie* deemed to be of the most relevance to the topic of this thesis.

Considering the impossibility of an extensive study of primary historical texts, I instead fill out many gaps with more accessible secondary texts in the form of academic studies of legal history. *The Oxford Handbook of the History of International Law* has been of great use, and so have the works of Edinburgh professor Stephen Neff on the topics of war and neutrality. Another major name within the field is professor Martii Koskenniemi of Helsinki University. Koskenniemi's unconventional approach to e.g. time periods[50] made his books difficult to use

[45] Cf pt 4.1.1.
[46] See pt 2.2.1.
[47] Henriksen, *International Law* (2019) 32.
[48] Anthony A Carty, 'Doctrine versus state practice' in B Fassbender and A Peters (eds) *The Oxford Handbook of the History of International Law* (2012 OUP) at 973f.
[49] Cf ibid; Carty; Henriksen, *International Law* (2919) 32.
[50] Cf Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870*-1960 (CUP 2001) 3-10.

as source material for my particular purposes. While his works have been a great source of inspiration, it is primarily his writing on methodology which is used in direct connection with the text.

Returning to the primary texts, they were, whenever possible, studied in their original language. Vattel's *Le Droit Des Gens* and Bonet's *L'arbre des batailles* were therefore read in the original French. To accurately convey the idea of the writer, quotes are given in the same language as read, with my own, subpar, translations in footnotes for the convenience of the reader. Meanwhile, Grotius and Cicero both wrote in Latin, which I unfortunately cannot understand enough of to study the original texts.

Even a number of non-legal resources are used, notably encyclopedic entries. Their purpose is to provide the reader with any necessary historic background information regarding e.g. time periods and events. The Britannica Group, behind the here used Encyclopedia Britannica, is a well-established actor with a 250-year history of fact-checked articles. Their trustworthiness is further strengthened by the number of universities and other institutions, Lund University among them, utilizing their services.[51] Furthermore, the Swedish Nationalencyklopedin (NE) has been used. NE, too, has to be considered a reliable source of information, as they, among other things, are staffed by expert writers and enjoy the trust of large parts of the Swedish public sector, while still being an independent corporation.[52]

Turning to previous research, this thesis touches upon many different yet distinct subdisciplines in international law. The sheer scope of material available, especially considering the number of online databases at my disposal, could easily appear intimidating. In other words, a lot of previous research exists on topics of relevance to this thesis, but none of the material I have studied in the course of my extensive reading manages to combine *all* the elements of relevance to me. Koskenniemi, as already mentioned, has made important contributions to legal history. The works of Neff bear a structure similar to mine, tracing a legal phenomenon (war, neutrality) chronologically from Antiquity to the present. Furthermore, Dawidowicz should receive much of the credit for the idea of *third-party* countermeasures. In the foreword to *Third-Party Countermeasures in International Law*, the

[51] Read more at https://britannicalearn.com/britannica-academic/.
[52] Read more at 'Redaktionen', NE https://www-ne-se.ludwig.lub.lu.se/info/redaktionen/; 'Våra tjänster för skolor', NE https://www-ne-se.ludwig.lub.lu.se/info/skolor/

work of Dawidowicz is commended by James Crawford[53] who, although not named in this thesis, in his capacity of Special Rapporteur played an important role in the ILC's codification of state responsibility.[54]

Finally, a comment shall be made regarding the mode of citation. This thesis follows the OSCOLA model of formatting footnotes and bibliography. One exception has however been made: weblinks are as a rule not provided in the footnotes. Instead, the term 'online' is used to refer the reader to the 'Online Resources' part of the bibliography. The decision is based on the desire to provide a more readable text, without overly long footnotes stealing the attention of the reader away from the material at hand. Exceptions have however been made for material of relevance exclusively to the introductory chapter; these are not included in the bibliography.

1.6 Outline

This section will briefly present the continued structure of this thesis. To start off, chapter 2 *(Not) Choosing a Side* lays down what possibilities a third state has had of enforcing international law from a historical perspective. Following a chronological outline, pt. 2.1 deals with the time periods of Antiquity and Middle Ages, whereas pt. 2.2 is concerned with the Positivist era of the 17th through 19th century, and pt. 2.3 traces the changing realities of the inter-war period. Finally, pt. 4 considers how these tendencies fare in relation to modern international law.

The overarching theme in chapter 3 – *One for All, All for One* – is collective enforcement within the two major international organizations of the 20th century. Pt 3.1 studies collective security within the League of Nations while pt. 3.2 is concerned with the same under the United Nations.

Chapter 4 – *New World, Old World* – is the final principal chapter. The main issue here is third-party enforcement in contemporary international law. Unlike chapter 2, the starting point is here the present. Pt. 4.1 considers the general tendencies of modern international law

[53] At ix-x.
[54] See 'Special Rapporteurs of the International Law Commission (1949-2016)', *International Law Commission* https://legal.un.org/ilc/guide/annex3.shtml (accessed 16 May 2022).

relevant for third party enforcement – what has changed and what remains the same? Finally, pt. 4.2 applies these observations in a brief discussion of whether there is any justification in international law for the economic sanctions so common today.

In chapter 5, the reflections on the material presented throughout the thesis are summed up and analyzed further. The work then finishes with some concluding remarks.

2. (Not) Choosing a Side – Historical Position of Third States

I then, with error yet encompass'd, cried:
"O master! What is this I hear? What race
Are these, who seem so overcome with woe?"
He thus to me: "This miserable fate
Suffer the wretched souls of those, who liv'd
Without or praise or blame, with that ill band
Of angels mix'd, who nor rebellious prov'd
Nor yet were true to God, but for themselves
Were only. From his bounds Heaven drove them forth,
Not to impair his lustre, nor the depth
Of Hell receives them, lest th' accursed tribe
Should glory thence with exultation vain.[55]

For most of recorded history, war has existed as a means of solving international disputes. Even states not directly involved in the dispute are likely to have a preference as to its outcome. The reasons can be many: internal political considerations, the nature of its relationship to one or both of the warring states, or the belief that the actions of one are unjustified or morally reprehensible. However, having a preference is one thing, acting on it is another. There is always a risk of the disfavored state viewing the third state as an enemy, and the latter unwillingly being drawn into an armed conflict, albeit its claim to 'neutrality'. The legal position of third-party states in this situation has differed throughout history, allowing for different or no degrees of interference.

This chapter will examine what, if any, possibilities third states have had of discriminating against one side while remaining a non-participant to a conflict. As such, research question

[55] Dante Alighieri, *Dante's Divine Comedy: Hell, Purgatory, Paradise* (first published 1472 Arcturus 2012) Inf, canto III.

(1) is of the most relevance, especially no (i) regarding permissibility of third-party enforcement and war, and (iii) regarding economic sanctions.

2.1 'He that is not with me is against me'[56]

It is not possible to talk of classical and medieval Europe in terms of sovereign states, nor of a coherent law of nations. Up until the 5th century AD, Rome was the dominant power, extending its influence over large parts of Europe.[57] After the fall of the Western Roman Empire, Western Europe fragmented into smaller political entities whose rulers had various degrees of sovereign power.[58] The uniting factor was instead Christianity, with the Church exercising considerable influence also in the worldly domain.[59] This would continue throughout the Middle Ages.[60] During these centuries predating the Early Modern Era, legal distinctions and rules concerning disputes between political entities began to develop. Of special importance for this thesis is the development of Just-War doctrine and its associated value judgements.

2.1.1 Antiquity

In the beginning there was war, or rather, there was no peace. Many communities in the Classical world lived in a state of endemic conflict and constant hostility with their neighbors. Plato describes how the Greeks were 'united together by ties of blood and friendship, and alien and strange to the barbarians.' The barbarians, therefore, could be considered 'by nature enemies.'[61] Similarly, Cicero implies how earlier Romans considered all foreigners[62] as enemies, denoting both as *hostis.*[63] In the last days of the Roman Republic, there was however a clear distinction between being at war and being at peace. Cicero writes that '[wars] are to

[56] Matthew 12 :30, *Holy Bible* (NIV, Biblica 1973).
[57] Encyclopædia Britannica, 'Roman Empire' *Britannica Academic* (accessed 10 Apr 2022).
[58] See Vitoria 'On the Law of War' (1991) at 7.1.2.
[59] See Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870* (CUP 2021) 19ff.
[60] Lawrence Cunningham et al, 'Roman Catholicism' *Encyclopedia Britannica* (online 11 Nov 2020) at 'History of Roman Catholicism'.
[61] Plato, *The Republic of Plato,* (B Jowett tr, 2d ed, Oxford: Clarendon Press 1881) book V at 162.
[62] Note that the distinction between the 'Roman' and the 'foreign' was difficult to make, even for the Romans themselves. With the gradual territorial expansion, peoples previously considered 'barbarians' became Roman subjects, as did previous 'enemies' However, it was not before 212 AD that full citizenship was extended to all free men within the empire. See Mary Beard, *SPQR: A History of Ancient Rome* (Profile Books 2016), in particular 197-207, 520-522, 527-529.
[63] Marcus Tullius Cicero, *De Officii* (AP Peabody tr, written c 44 BC, Little, Brown 1887) at 1.11.

be waged in order to render it possible to live in peace without injury'.[64] This was reflected also linguistically, with *perduellis* denoting a public enemy and adversary in arms, while the more neutral word *peregrinus* described a foreigner.[65]

Regardless of the emergence of different legal categories of foreigners, there does not appear to have been any denoting third-parties to a dispute. Neither classical Greek nor Latin had any term for neutrality. The word *neutralis* in Latin is instead described by Wheaton as being nothing but a 'barbarianism', invented by later generations of jurists to describe a reality postdating Rome.[66] Thus, at the time of Cicero, there was no concept of neutrality, neither in theory nor in practice.

The situation outlined above did not entail a requirement for a party to actively pick a side and join it on the battlefield. However, requested aid could not be denied to an ally. If one of the belligerents turned to a heretofore uninvolved state and requested e.g. supplies or safe passage, said state could either provide it to their now ally, or refuse and thereby declare the belligerent their enemy.[67] In other words, a non-belligerent did not have to consider in what ways it could discriminate[68] between the two sides while remaining on the outside, as such a thing was not possible. If prompted, it *had to* choose a side and discriminate accordingly, lest it wanted to be an enemy of not one but both sides.

2.1.2 Middle Ages

Although the Middle Ages later were considered a step back from the civilizations of ancient Greece and Rome,[69] the ideas surrounding warfare were much developed. Already the Stoics of classical Greece had elaborated the idea of *ius naturalae* – a universal law of nature which bound everyone at all times – but coupled with Church moralist teachings, its influence grew

[64] Cicero, *De office* (1887) at 1.11.
[65] Ibid at 1.12 with translators note.
[66] Henry Wheaton, *Elements of International Law* (3d edn, Philadelphia: Lea and Blanchard 1846) at IV.III.1.
[67] Lassa Oppenheim, *International Law – A Treatise*, Vol II Disputes, War and Neutrality, Hersch Lauterpacht (ed) (7th edn, Longmans 1952) at III.I.285.
[68] The term 'discriminate' here refers to all measures taken by a third party by way of which the two sides receive different treatment, advantages, or disadvantages.
[69] The historical label 'Middle Ages', was introduced to express 'the notion of a thousand-year period of darkness and ignorance' situated between Antiquity and the Renaissance. See Britannica, 'Middle Ages' *Encyclopedia Britannica* (online 6 May 2021).

exponentially.[70] Neff writes that 'it would be under the general auspices of Christianity that pacifist thought (if not practice) would reach its highest pitch prior to the twentieth century.'[71]

Of major impact to armed hostilities was the medieval Just-War doctrine. It had a dual heritage, containing elements both of natural and canon law.[72] The doctrine stipulated in what situations it was justifiable to stop different kinds of 'evildoing' by way of force.[73] An important aspect was the existence of an *iusta causa*. The cause had to be *objectively* just; strict liability applied to the parties in the sense that good faith in one's own *iusta causa* was not enough. It follows that only one side could wage a just war.[74]

Vitoria (c. 1483–1546) held that the following enterprises could in of themselves never qualify as a just war: differences in religions, expansion of empire; or 'the personal glory or convenience of a prince'.[75] Rather, Vitoria argued, 'the sole and only just cause for waging war is when harm has been inflicted.'[76] War could thus not be waged to further one's own ends; the *iusta causa* had to be altruistic in nature. A just war could on the other hand be waged with the purpose of protecting Christendom from 'attackers or oppressors.'[77] The most poignant example of the Christian perception of Just War were the crusades. In his 14th century *L'Arbre des batailles,* Bonet (c. 1340- c.1410) writes that on the orders of the Pope, a war could be waged against the Saracens to secure the Holy Land. It was also justified to aid persecuted Christians living in lands over which the Church lacked jurisdiction.[78] Bonet and Vitoria both therefore agreed that some sort of wrongdoing by the so called 'infidels' was required for an *iusta causa* to arise.

In the Just-War doctrine there was no room for neutrality. One reason was the entwinement of law, moral and religion; given that only one side was fighting for an *iusta causa,* a war effectively became a battle between good and evil. Not actively siding with the forces of good could in itself be perceived as akin to a sin.[79] This world view is strikingly depicted in

[70] SC Neff, *War and the Law of Nations: A General History* (CUP 2005) 32ff.
[71] Ibid, 34.
[72] Ibid, 54.
[73] SC Neff, *Justice among nations: a history of international law* (Harvard University Press 2014) 67.
[74] Ibid, 67-70. However, writing in the late Middle Ages, Vitoria (1991) argued that 'provable ignorance either of fact or law' could preclude wrongfulness. See at 7.2.4.32.
[75] 'On the Law of War' (1991) at 7.1.3.10-12.
[76] Ibid, at 7.1.3.13
[77] Neff, *Justice among nations* (2014) 68.
[78] Honoré de Bonet, *L'arbre des batailles* (Bruxelles, Leipzig, 1883, first published c 1386) at IV. II
[79] See Neff, *War and the Law of Nations* (2005) 59.

contemporary literature. The *Divina Commedia* of the early 14th century recounts the journey of Dante and his guide Virgil through the land of the dead. At the gates of Hell, they witness the suffering of the Indifferent, who 'lived withouten infamy or praise […] but were for self'[80], denied entry both to heaven and the abyss as they had not sided with God against the forces of evil.

Even practical reasons prevented neutrality from developing for most of the Middle Ages. Natural law persisted regardless of war; the Just-War doctrine was viewed rather as an extreme form of law enforcement belonging to the *ius gentium.* The rights and duties of non-belligerents thus remained unchanged.[81] Given that the law put no requirements on third states, such states could favor or disfavor the belligerents freely, unless having promised otherwise through a treaty of neutrality. As such treaties grew more common during the late Middle Ages, the idea of neutrality as an institution successively developed to mirror the practice. [82]

2.2 Every State for Itself

In the Early Modern Age, international law as we know it today began to take shape. The Peace of Westphalia in 1648 is often accredited with being at the origin, but the development has to be seen as a part of greater societal changes.[83] The gradual abandonment of natural law for the more scientific, positivist approach can for example be seen as one step in the larger Scientific Revolution. Between the 15th and 17th centuries, a new view of nature as distinct from philosophy and theology developed, replacing the ancient Greek world view.[84] Also important is the Reformation and the subsequent decrease of Church influence.[85] International law – or rather the law of nations– as it evolved in the following centuries was entwined with the idea of the sovereign state. This legal order was also one of stark contrasts, with different rules applying in times of peace and in times of war. Regarding third states, substantial rules on a scale thus unknown developed regarding their rights and duties in the face of an international conflict– a law of neutrality.

[80] Alighieri (1472, 2012) at Inf III, lines 37-38.
[81] Neff, *War and the law of nations* (2005) 59.
[82] Oppenheim and Lauterpacht (ed) *International Law* (1952) at I.III. I.286.
[83] See Carty 'Doctrine versus state practice (2012) at 973f. Also, cf pt 1.4.
[84] See Stephen G Brush and Margaret J Osler and Spencer J Brooks, 'Scientific Revolution' *Encyclopedia Britannica* (26 Nov. 2019).
[85] Britannica, 'Reformation', *Encyclopedia Britannica* (15 May. 2020).

This section will thus examine the period spanning from the early 17th century up until the First World War. Said period will here also be referred to as the Positivist Era, after the dominant legal philosophy of the time.[86]

2.2.1 Duties of Neutral States

The first comprehensive treatise of international law is often said to have been written by the Dutch lawyer Hugo Grotius (1583-1645). His *De iure belli ac pacis libri tres* was finished in 1625. The law of neutrality was at this time in its infancy, and only touched briefly upon by him. According to Grotius, it was the duty of those at peace not to support belligerents fighting for a 'wicked cause';[87] if it was unclear whose cause was just, however, a neutral party should remain impartial.[88] Meanwhile, Grotius also advanced the argument that third-parties to a war were in no position to judge its merits. He expressed it as follows:

> [K]ings and peoples who undertake war wish that their reasons for so doing should be believed to be just, and that, on the other hand, those who bear arms against them are doing wrong. How since each party wished this to be believed, and it was not safe for those who desired to preserve peace to intervene, peoples at peace were unable to do better than to accept the outcome as right.[89]

De iure belli ac pacis might be considered something of a watershed moment in international law, but it is clear that Grotius had not fully taken the leap. Natural law exercised an obvious influence where he ties the role of third states to Just-War; there existed 'wicked causes', even if they could not always be identified.[90] Meanwhile, Grotius' statement that it was in the general interest that third parties just accept the outcome rather than pass judgement and act accordingly would prove to be an argument of the future.

By the mid 18th century, neutrality as a legal category had gained a considerably more thorough meaning. In his 1758 *Le Droit Des Gens*, German Emer de Vattel (1714–1767) defines neutral states as : 'ceux qui n'y prennent aucune part, demeurant Amis communs des

[86] See pt 2.2.2.
[87] Hugo Grotius, *De jure belli ac pacis libri tres*, (Francis W Kelsey tr, Amsterdam: 1646, Clarendon Press 1925) at III.XVII.III
[88] Ibid at III.XVII.III
[89] Ibid at III.IX.IV.2.
[90] Cf II.XX.XLI

deux partis, & ne favorisant point les armes de l'un, au préjudice de l'autre.'[91] As to the duties of such neutral states, Vattel writes :

> Tant qu'un Peuple neutre veut jouir sûrement de cet état, il doit montrer en toutes choses une exacte impartialité entre ceux qui se font la guerre. Car s'il favorise l'un, au préjudice de 1'autre, il ne pourra se plaindre, quand celui-ci le traitera comme adhérent & associé de son Ennemi.[92]

In other words, a state wishing to stay outside of a conflict has to treat all parties within it equally.

The obligation to exercise impartiality extended beyond matter related directly to war. Vattel continues by saying that a neutral state also, […] ne refusera point à l'un des partis, à raison de la querelle présente, ce qu'elle accorde à l'autre'.[93] It would therefore be a violation of neutrality to upon the outbreak of war cease trade with one of the belligerents, while maintaining commercial relations with the other.[94] In this situation, it would be irrelevant whether the intent of the third state was to help one side, or merely to put pressure on the other, as the actions would *de facto* be benefitting one side over the other.[95]

Although development in state practice continued throughout the 19th century, it would take until 1907 before the law of neutrality was codified. It was the Hague Convention (V) which finally laid down rules applicable to neutral, third states during a conflict.[96] Such neutral states were under a duty not to let their respective territory be used to move troops and ammunition, nor for recruitment purposes.[97] A neutral could choose whether it wanted to trade with the belligerent states and allow usage of its communication lines, but it was not allowed to discriminate between the parties in these regards.[98]

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[91] Emer de Vattel E, *Le Droit Des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (London : 1758, Washington, DC 1916) at III.VII.103. My trans: 'those who do not take any part in the times of war and remains the common friend of both parties, and not favor the arms of one side to the disadvantage of the other. one side at the cause of the other.'
[92] Ibid at III.VII.104. My trans: 'If a neutral people want to assure itself of being able to enjoy this status, he must in all affairs exercise a strict impartiality between those who are at war. Because, if he favors one at the disadvantage of the other, he will have no right to complain when the disfavored side treats him as an adherent and associate of his enemy.'
[93] Ibid at III.VII.104. My trans: 'in all ways which do not regard war […] because of the present quarrel, not to refuse to one of the parties what is granted to the other.'
[94] Ibid, at III.VII.111.
[95] Ibid) at III.VII.106; and Oona A Hathaway and Scott J Shapiro *The Internationalists – And Their Plan to Outlaw War* (Penguin 2017) 90f.
[96] Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted at the Hague 18 Oct 1907)
[97] Arts 2, 4, 5.
[98] Arts 7-9.

To conclude, if a state attempted to enforce the rights of one belligerent, it had – in the words of Vattel – no right to complain if it was treated as an enemy by the other side. If a third state wanted to remain neutral, it had no choice but to stand on the outside, watching while the belligerents settled their differences. Unable or unwilling to do so, it would have to renounce its neutrality and thereby expose itself to an armed attack.

2.2.2 Positivist Non-intervention

As seen above, in 1625 Grotius stood with one foot in the past and one in the present. The law of neutrality, then in its formative phase, developed in the context of positivism emerging as the dominant legal ideology. Positivism stood in stark contrast to natural law; it adopted a voluntarist-approach, where law emanated from the will of the sovereign state, strictly separate from any value judgements.[99] This should be considered to be in line with the larger framework of the Scientific Revolution.[100] Furthermore, as every state had a unique history and culture, there could be no universal values holding true for every state.[101]

A major implication of the positivist approach was that no state could claim a right to intervene in the internal affairs of another. Instead 'each state must necessarily be the sole judge of what political, economic, social, and legal system to adopt'.[102] As states enjoyed sovereign equality under international law, none had the right to dictate the actions of others.[103] This did not preclude intervention as an act of necessity, in response to a perceived threat brought about by the internal policies of a foreign state. However, according to Funck-Brétando and Sorel, such intervention would mean that:

> [l'état] se soustrait aux obligations qui constituent le droit des gens en temps de paix et il y substitute le régime de la force et de la nécessité, c'est-à-dire le régimen du droit des gens en temps de guerre.[104]

[99] Frauke Lachenmann, 'Legal positivism' (2011 MPEPIL) at A-B.
[100] See pt 2.2 with references.
[101] Neff, *Justice among nations* (2014) 244.
[102] Ibid.
[103] Wheaton, *Elements of International Law* (1846) at II. I. 1-4 ; Théophile Funck-Bréntano and Albert Sorel, *Précis de droits des gens* (1877 E Plon et c[ie] : Paris) ch XI.
[104] Ibid at XI.I. My trans 'The state strays from the obligations which constitute international law in time of peace and replaces them with the regime of force and necessity, ie the regime of international law in time of war'.

Neither did the principle of non-intervention, according to the majority, allow for enforcement on moral grounds. Regardless of how appallingly a state might treat the population living within its territory, international law during this period simply did not allow a third-party to interfere.[105] Ignoring these rules would have entailed a violation of the sovereign rights of the other state and be tantamount to a declaration of war.

In other words, third-party enforcement was impaired both by the practical considerations of neutrality, i.e. fear of retaliation, as well as the associated more theoretical considerations of non-intervention. Every state was indeed, in the words of Donne, an island.

2.2.2 Qualified and Perfect Neutrality

Neutrality did not necessarily preclude every possibility for a third state to assist a belligerent. Opinions on the topic, however, varied throughout the period.

In the mid 18th century, Vattel made an important concession to his rule of strict impartiality. If a state already *before* the outbreak of war, through a treaty, had made general promises to one of the potential belligerents, it could provide the assistance laid out therein without violating its neutrality.[106] Vattel thus saw neutrality as *one* uniform concept, within the bounds of which there was room for an exception. This conceptual view would change during the late 18th century. A distinction was hereafter made between two separate forms of neutrality: qualified on the one hand and perfect on the other.[107]

Qualified neutrality was largely in line with the ideas of Vattel – a limited assistance could be given if it was in agreement with a previous engagement of a general nature. Perfect neutrality, meanwhile, allowed for no such thing. A perfectly neutral state could '[…] neither actively nor passively, neither directly nor indirectly, favour either belligerent.'[108]

As the 19th century wore on, the view of different kinds of neutrality became more controversial. While writers such as Wheaton retained the belief,[109] others were more skeptical. Oppenheim writes how many positivists claimed that perfect neutrality was the only

[105] Neff, *Justice among nations* (2014) 244-45.
[106] Vattel, *Le Droit Des Gens* (1758) at III.VII.104-5.
[107] Oppenheim and Lauterpacht (ed) *International Law* (1952) at III.I.V.305
[108] Ibid at III.I.V.305.
[109] Wheaton, *Elements of International Law* (1846) at IV.III.1-7.

form, and any third state which aided a belligerent, regardless of the nature of said assistance and the reasons behind it, was violating its neutrality.[110]

Neutrality as it developed could be considered a way of international law to adapt to the needs of the time. In a world where natural law was dead, there was no 'objective justice'. In a world where positivism reigned supreme, there was no room for a neutral state either to render assistance or to pass moral judgement. In a world where war was legal regardless of its reason, neutrality instead, as later expressed by Stimson, helped to 'narrow and confine its destructive effects'.[111] In the spirit of Grotius, Hathaway and Shapiro write:

> Strict impartiality was the only option in a world in which war was legal and no party could definitely judge who was right. For if everyone were permitted to choose sides based on their own particular interpretation, chaos would ensue.[112]

Whereas the restrictions imposed on third states wishing to remain neutral grew throughout the 19th century, things were soon about to change. As a young Serb in Sarajevo prepared to shoot an archduke,[113] neutrality would not come out unscathed from the inferno about to be unleashed.

2.3 A World Without War

The end of large-scale international disputes are often seen as historic turning points.[114] Arguably, the end of the First World War and its aftermath rivaled most others as far as international law is concerned.[115] Between 1914–1919, Europe had experienced destruction on a thus far unprecedented scale.[116] Approximate numbers indicate around 40 million civil and military casualties, out of which roughly half were fatal.[117] The perceived necessity of curbing the horrors of modern warfare now became all the more acute. To this end, the war

[110] Oppenheim and Lauterpacht (ed) *International Law* (1952) at III.I.V.305.
[111] Henry L Stimson, 'Address to Senate Foreign Relations Committee' (Washington, DC, 11 March 1941). Quoted in 'Lend-Lease Act (1949)', *National Archives* Stimson (1932) i-ii.
[112] *The Internationalists* (2017) 169-67. See also Grotius, *De jure belli* (1646) at III.IX.IV.2.
[113] See Fid Backhouse et al, 'Franz Ferdinand, archduke of Austria-Este', *Encyclopedia Britannica* (online 14 Dec 202).
[114] See Sally Marks, The Illusion of Peace: International Relations in Europe, 1918-1933 (2nd ed, Palgrave 2003) 1-2.
[115] See Hathaway and Shapiro, *The Internationalists* (2017), in particular Introduction and pt III.
[116] John G Royde-Smith and Dennis E Showalter, 'World War I' *Encyclopedia Britannica* (online 1 Mar 2022).
[117] Nadège Mougel, 'World War I casualties' *Repères and Centre européen Robert Schuman* (online 2011).

streamlined a change in the rules of the game, a process already initiated through e.g. the Hague Peace Conferences of 1899 and 1907.[118]

Here, the inter-war development regarding third-party *unilateral* enforcement will be explored, notably regarding neutrality following the Pact of Paris, also seen in the light of US assistance to the Allies prior to 1942.

2.3.1 Pact of Paris

In August 1928, 15 states signed the General Treaty for the Renunciation of War (Pact of Paris *or* Kellogg-Briand Pact).[119] The Pact imposed a general prohibition of war upon its signatories. The two substantive articles were as brief as their purpose was ambitious:

> Art I
> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
>
> Art II
> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Neutrality was not mentioned in the wording of the Pact of Paris, yet the treaty would have important implications for what a third state could do. The law of neutrality had, as seen in previous sections, developed as a corollary to the basic assumption that war was a legitimate institution of international law, capable of creating new rights between the belligerents. By outlawing war, the Pact turned the board of international law enforcement upside down.[120]

The promises enshrined in the Pact were mutual in nature in that an individual signatory's renouncement of war was dependent on that of the others. If one state broke the Pact, the others would no longer be bound by their promises to him. Compliance was therefore in the

[118] See Final Act of the International Peace Conference (adopted at the Hague, 9 July 1899) and Final Act of the Second Peace Conference (adopted at the Hague, 18 Oct 1907). Texts of the Final Acts and therein attached convents available through the ICRC's treaty database https://ihl-databases.icrc.org/ihl.
[119] Published in (1928) 22[4] AJIL 171-173.
[120] Oppenheim and Lauterpacht (ed) *International Law* (1952) at III.VII.II.292a-b.

interest of all parties.[121] In the words of Henry Stimson, Kellogg's successor as American Secretary of State, the international community would 'no longer draw a circle about [the warring states] and treat them with the punctilios of the duelist's code' but instead 'denounce them as lawbreakers.'[122]

Within a few years, this new approach along with Stimson's resolve would be tested in practice.

2.3.2 Sanctions by Virtue of Interpretation?

In 1931, Japan invaded the region of Manchuria in north-eastern China and proceeded by proclaiming the independent state of 'Manchukuo'.[123] In response to this flagrant violation of the Pact of Paris, incumbent Secretary of State Stimson launched a doctrine which would come to bear his name, regarding how remaining signatories should enforce the treaty.

Stimson argued that the determining factor behind the Pact was the revolution in human thought which deemed that war could no longer be allowed. The Pact was also a legal recognition of the individual interest of every state to prevent war. What would then help realize the Pact was 'the sanction of public opinion'.[124] It followed that all states would be able to express their moral judgement against an aggressor. Concerning Manchuria, the United States would 'not recognize any situation, treaty, or agreement which might be brought about by means contrary to the covenant and obligations of the Pact of Paris.'[125]

Stimson's view received endorsement also by the international legal community. In 1934, the International Law Association (ILA) passed its Budapest Articles of Interpretation of the Pact of Paris.[126] Other than considering the Pact to be binding, the Budapest Articles held it to include an obligation for all signatories 'not to recognize as acquired *de jure* any territorial or other advantages acquired *de facto* by means of a violation of the Pact.'[127]

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[121] See Pact of Paris at preamble.
[122] Henry L Stimson 'The Pact of Paris: Three Years of Development' (address before the Council on Foreign Relations, New York 8 Aug 1932) (Pact of Paris address) published in (1932) Foreign Affairs) 11 spec sup, at iv.
[123] (1933) 112 League of Nations OJ, Spec Supp 24, Annex V.
[124] Stimson, 'Pact of Paris address' (1932) iii-viii.
[125] Ibid at vii.
[126] 'The Effect of the Briand-Kellogg Pact of Paris on International Law' (1934) 38 Int'l L Ass'n Rep Conf (ILA Report). Budapest Articles at 1.
[127] Budapest Articles (1-2), (5).

The Budapest Articles went beyond the primarily moral sanctions of the Stimson Doctrine. According to the Articles, the Pact of Paris also bestowed on third state signatories the possibility of enacting enforcement measures. Art (4) reads as follows:

> In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or of any rule of International Law, do all or any of the following things:
>
> > (a) Refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, blockade, etc.;
> > (b) Decline to observe towards the State violating the Pact the duties prescribed by International, Law, apart from the Pact, for a neutral in relation to a belligerent;
> > (c) Supply the State attacked with financial or material assistance, including munitions of war;
> > (d) Assist with armed forces the State attacked.

On the basis of a breach of the Pact, the other signatories would, according to the Articles, be allowed to carry out extensive discrimination in favor of the victim-state. Such a third state could both impair the effort of the aggressor by imposing economic sanctions and render assistance directly to the victim. Assistance could go beyond supplies only indirectly contributing to the war effort; even the supply of war material and armed assistance would be allowed.

The ILA's interpretation of the Pact regarding third-party enforcement can only be considered revolutionary. It constituted a clear departure from the strict rules of the Positivist Era. Meanwhile, it could be deemed counterproductive to the main objective of the Pact of Paris – to prevent war. A pact for the renunciation of war could then come to be enforced by third states through the same means it sought to prevent in the first place – through war.

What was then to become of the law of neutrality? Third-party enforcement appeared to be gaining gradual acceptance – a theory clearly foreign to neutrality as it had existed previously. Given their incompatibility, neutrality as a legal institution would become somewhat confused. During the Budapest Conference, the term 'non-belligerent' had been the preferred term for a third state. The Swedish participant Åke Hammarskjöld had for example argued that such non-belligerency was not the same thing as pre-war neutrality, and that this new

category needed to be legally regulated.[128] However, the Budapest Articles could also be interpreted as indicating a return to some kind of qualified neutrality, regarding especially the formulations 'without thereby committing a breach […] of any rule of international law' read together with 'decline to observe the duties of a neutral'.[129]

A slightly different explanation model was later offered in Oppenheim's treatise. Given that upholding the Pact was in the interest of all signatories, it followed that also a breach would entail a violation of the rights of all signatories. On this basis, non-belligerents could have been entitled to respond by way of reprisals and thus *de facto* discriminate against the aggressor. Seen to the gravity of the offense, economic sanctions ought to have complied with the requirement of proportionality concerning reprisals.[130]

Overall, the interpretation of the Pact of Paris as proposed by both Stimson and the ILA – representative of a new, multilateral form of legal obligations – resembles the types of obligations which would in time come to be called *erga omnes partes*.[131]

As storm clouds gathered which would finally culminate in yet another war, it still remained to be seen whether such a brave new world would have any practical bearings.

2.3.3 Threading the Edge of Neutrality

As tensions grew in Europe during the 1930s, the United States retreated to their own shores. They were determined not to be dragged into another war, and never joined the League of Nations. To this end, Congress passed a series of legislation to ensure American neutrality.[132] The Neutrality Act of 1937 prohibited the export of war material to all states involved in war, as well as a prohibition on selling financial instruments to such states. It was up to the President to invoke the act upon finding that a state of war existed.[133] As these rules would apply to not one but to both sides, the US hoped to avoid a situation where their impartiality would be questioned.[134]

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[128] ILA Report (1934) 30-33.
[129] Oppenheim and Lauterpacht (ed) *International Law* (1952) at III.II.
[130] Ibid at III.VII.II.292a-b. See also the Naulilaa Arbitration (Portugal v Germany, 31 July 1928), Reports of International Arbitrational Awards, Vol II 1011, for the requirements of lawful reprisals in times of peace during the interwar-period.
[131] See pt 4.1.1.
[132] 'The Neutrality Acts, 1930s', *Office of the Historian*, US Department of State (online).
[133] 'Joint resolution to amend the joint resolution, approved August 31, 1935' (1 May 1937, [US] at secs 1(a), 3(a).
[134] Cordell Hull, *Memoires of Cordell Hull*, vol I (1948 Macmillan) 516.

However, when war in 1939 once again broke out in Europe, the US found itself in a predicament. It was clear that the sympathies of the Roosevelt administration lay with the United Kingdom (Britain) and France, but because of the Neutrality Act the US could not offer them any substantive assistance.[135] Also clear, in the words of Secretary of State Hull, was that 'a major conflict anywhere in the world would stir up waves that would sweep our shores'.[136] In other words, the bugle was calling also for the United States.

Roosevelt tirelessly lobbied to stir public and political opinion away from isolationism. The insistence paid off. In his 1941 State of the Union, Roosevelt gave a pledge to the democratic states 'to give you the strength to regain and maintain a free world'.[137] Two months later the promise materialized by Congress passing the Lend-Lease Act, allowing the US to supply Britain with war materiel.[138] Stimson, now Secretary of War, stated that 'we are buying […] not lending. We are buying our own security while we prepare.'[139] The US also opted to impose economic sanctions on Germany's ally Japan, notably an embargo on the export of oil.[140] By steering his country down a course clearly violating traditional laws of neutrality, Roosevelt held firm:

> we will not be intimidated by the threats of dictators that they will regard as a breach of international law or as an act of war our aid to the democracies which dare to resist their aggression. Such aid is not an act of war, even if a dictator should unilaterally proclaim it so to be.[141]

The United States was at this point enforcing international law as a third party to a war. It had adopted economic sanctions against the perceived aggressors and lawbreakers, while the support to their favored side was related directly to the war effort. By all indications, their actions were in accordance with international law as it had developed during the mid-war period. Later, Hull firmly maintained: 'we wanted peace. We wanted nothing to interrupt the flow of our aid to Britain, Russia, and other Allies resisting Hitlerism'.[142] Japan, however, did

[135] Ibid, 666.
[136] Ibid.
[137] Franklin D Roosevelt, 'Annual Message to Congress on the State of the Union (Washington, DC 6 Jan 1941).
[138] A Bill to Promote the Defense of the United States and for Other Purposes (10 Jan 1941) [US].
[139] 'Address to Senate Foreign Relations Committee' at 'Lend-Lease Act (1949)' *National Archives*. (online).
[140] Cordell Hull, *Memoires of Cordell Hull,* vol II (Hodder & Stoughton, 1948) 1069.
[141] Roosevelt, '1941 State of the Union Address to Congress'.
[142] Hull, *Memoires* vol II, 1084.

not respect this new form of neutrality. On 7 December 1941, Japanese air and naval forces attacked the American naval base of Pearl Harbor. The next day, Congress declared war.[143]

Despite this appearing a setback to third-party enforcement as it had developed in the mid-war period, this was far from the end. Japan might still have adhered to the old rules of international law, but this would not be possible for much longer.

2.4 Morality and Neutrality for a new Era

The radical changes to the international world order which had been initiated during the mid-war period continued with renewed vigor following the Second World War. In some ways, however, these new developments bore resemblances echoing the past. This section will cover the period from 1945 and approaching present day. Here, two major aspects will be the revival of Just-War doctrine, and the continued conundrum of legal neutrality in a new reality.

2.4.1 A Rediscovery of Just War

The two World Wars saw the gradual decline of the positivist laissez-faire approach to war;[144] instead something resembling a new Just-War doctrine developed. Especially the Second World War took on 'an aura of moral crusade',[145] as the Allies tried to liberate Europe from the clutches of the Nazis. Still today this narrative remains staunch: the actions of Nazi Germany were, objectively, atrocious.[146]

In 1974, the member states of the UN General Assembly did what neither the League of Nations nor the drafters of the Pact of Paris had done: they codified the definition of aggression.[147] Art 1 of the resolution contained a general definition: 'aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence

[143] Franklin D Roosevelt '" Day of Infamy" - Joint Address to Congress Leading to a Declaration of War Against Japan' (New York, 8 Dec 1941).
[144] Clive Parry remarks that international law never 'wholly licensed war, though its exponents may well have been guilty of an undue tolerance of it and of conceding too great a legality to its consequences'. 'The Function of Law in the International Community', in M Sørensen (ed) *Manual of Public International Law* (Macmillan 1968) 5.
[145] SC Neff, *The rights and duties of neutrals – A general history* (Manchester University Press 2000).
(2000) 192.
[146] Cf eg ibid,192ff; and 'Förintelsen', *Forum för levande historia* (Swedish government agency Living History Forum).
[147] UNGA res 3314 (XXIX) of 14 Dec 1974, adopted at 2319 plenary meeting (Definition of Aggression).

of another State.'[148] A non-exhaustive list of actions which would qualify was then provided. Importantly, the definition also did away with the old distinction between war and non-war, as a declaration of the intention of war was not required.[149] Art 4 then established that 'no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression'.

Furthermore, certain provisions pertaining to third states can be found in the Definition. Art 5(3), in line with the Stimson Doctrine, expresses not only a right but also a duty for third states not to recognize any acquisition or advantage resulting from aggression as legal. The Preamble also expresses the belief that defining aggression would 'facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim'.[150]

The changing legal consciousness of the 20th century offered a way for the international community to on more or less objective grounds denounce one party as lawbreaker. Meanwhile, the other party could receive the status of victim. This was made even clearer through codification. As the aggressor was committing a serious international crime, his war could never be just. Once clear which side was in the right and which was in the wrong, one of the main positivist arguments for neutrality was obsolete. In the words of Neff:

> In these modern just wars, as in the medieval ones, neutrality can hardly be tolerated. As between aggressor and victim, between policeman and criminal, there is no moral (or legal) space for traditional neutrality to flourish.[151]

Just like Dante had condemned the indecisive, history has, according to Neff, portrayed the actions of states like Sweden who chose to remain neutral in the face of Nazi crimes, 'in a less than flattering light'.[152]

2.4.2 Neutrality Reconsidered

Today in the 21st century, the law of neutrality is, despite everything, not dead. The Hague Convention of 1907 is still in force and no authoritative codification of an amended meaning

[148] Ibid at Annex I.
[149] Ibid arts 2-3.
[150] Ibid at par 9.
[151] Neff, *The rights and duties of neutrals* (2000) 193.
[152] Ibid 192-3.

has been made since. In the view of changing realities, however, traditionally neutral states have taken actions which, arguably, are not compatible with these older rules. Just like during the Budapest Conference, the word 'neutrality' is often avoided and alternative terms like 'solidarity' or 'non-belligerency' are often chosen.[153]

Sweden is one example of dubious neutrality. In 2021, its foreign minister declared that Sweden collaborates with a number of organizations, including the defense alliance NATO. She continued:

> Sverige kommer inte att förhålla sig passivt om en katastrof eller ett angrepp skulle drabba ett annat EU-land eller ett nordiskt land. Vi förväntar oss att dessa länder agerar på samma sätt om Sverige drabbas. Vi ska därför kunna ge och ta emot stöd, såväl civilt som militärt […] Sveriges säkerhetspolitiska linje ligger fast. Vår militära alliansfrihet tjänar oss väl […].[154]

Writing in 1997, Lindholm takes a traditional view on neutrality, and argues that international law does not provide for the policy adopted by Sweden. While solidarity within the UN framework was an exception, geographic distance was not. Nor could Sweden escape the duties of neutrality by virtue of not issuing a declaration thereof.[155]

Meanwhile, the traditionally self-proclaimed neutral Switzerland has in 2022 chosen to, along with the EU, impose sanctions on Russia. Despite this, the Swiss ambassador to the US, in an interview with American channel NPR, firmly states that his country has remained neutral as it is not supplying any war materiel. An invited professor in political sciences comments that 'neutrality, to Switzerland, has always been a bit malleable'. According to him, that their state is neutral is taken as fact, without people questioning what it really means.[156]

In sum, the meaning of legal neutrality for third states in contemporary international law can be considered unclear. All the same, it appears to have lost most of its practical relevance to

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[153] Paul Seger, 'The Law of Neutrality' in *the Oxford Handbook of International Law in Armed Conflict,* Andrew Clapham and Paola Gaeta (eds) (2014, OUP) at 14ff.
[154] Ann Linde, 'Utrikesdeklaration 2021', (Annual Swedish parlamentary debate on foreign policy, Stockholm, 24 Feb 2021). My translation: Sweden will not remain passive if a catastrophe or attack would befall another EU member or Nordic state. We expect that these states will act in the same way if Sweden is the victim. We will therefore be able to give and receive support, both of a civil and military nature […] Sweden's foreign- and security policy remains unchanged. Our military freedom of alliance is serving us well […]"
[155] Lindholm Rolf H 'Missuppfattningar om neutraliteten' (1997) SvJT 576.
[156] 'Switzerland joins sanctions against Russia, but claims it remains neutral' *NPR* (19 Mar 2022, transcript of radio program).

third-party enforcement. Previously, the main practical hurdle to rendering assistance had been the risk of exposing oneself to an armed attack over having violated the laws of neutrality. With the Pact of Paris as well as the UN Charter (the latter of which will be examined in detail below) the target-state no longer had any legal right to respond by force. According to the Definition of Aggression, also this second act would now be illegal, regardless of whatever discrimination had proceeded it.[157] The statement in the Preamble to the Definition also implicitly endorses 'assistance' to the victim. Although unclear what form such assistance would take, it certainly would not entail strict impartiality. Of course, any assistance rendered, be it legal or not, risks exposing the third state to retaliation, as shown by the Japanese attack on Pearl Harbor.

Parallel to the unilateral development of the 20th century outlined in this chapter, another form of third-party enforcement had appeared. Following the two World Wars, two subsequent international organizations developed systems of collective security: The League of Nations in 1919 and the United Nations in 1945. Here, it would not be a question of one state offering limited assistance to another. Rather, a community of states would be responding to an attack against one of its own. Or, that was the intention anyway.

[157] Cf UNGA (1974) arts 1, 2, 4.

3. One for All, All for One – Collective Enforcement

All animals are equal, but some animals are more equal than others.[158]

When Henry Stimson in 1932 declared that it was in the individual interest of all states to prevent war, it was becoming increasingly clear that an individual state could not alone enforce such peace.[159] Looking back on the first half of the 20th century, Parry remarks that, 'a major state, armed and embattled, may almost alone hold off the entire avenging world for years'[160] as well as, 'today, we are told on good grounds, no state can defend itself.'[161] With such realizations in mind, international law slowly left some of its bilateral roots behind and moved towards collective security and enforcement.[162]

While military alliances were not a new phenomenon, organized forms of collective security were mainly a product of the 20th century. Lowe et al offers the following definition of collective security:

> a system, regional or global, in which each state in the system accepts that the security of one is the concern of all, and agrees to join in a collective response to threats to, and breaches of the peace.[163]

One could of course argue that collective security is not third-party enforcement at all; by virtue of the collective system, the acting states have a legal interest in the conflict.[164] In any case, collective enforcement is a clear departure from the traditional bilateral enforcement model, as outlined in chapter 2. Returning to Kelsen's decentralized legal system, the responsibility of carrying out sanctions would under a system of collective security no longer rest exclusively on the injured party, but on a group of individual subjects.[165] Provided that

[158] George Orwell, *Animal Farm* (Signet Classics 1996) 136.
[159] Cf 'Pact of Paris address' (1932) iii ff.
[160] Parry 'The Function of Law in the International Community' (1968) 4-5.
[161] Ibid, 6-7.
[162] Ibid, 7-8.
[163] Vaughan Lowe et al, *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (OUP 2010) 13.
[164] Cf the explanation model of Lauterpacht and Oppenheim, presented in pt 2.3.3.
[165] See pt 1.1.

states indeed live up to promises given to the community – One for All, All for One in the spirit of Dumas' *Three Musketeers* – the inherent enforcement gap of decentralized legal systems stands a chance of being bridged. A weak state need not be alone in the world. Thus, for the purpose of this thesis, collective enforcement will be considered as a form of third-party enforcement.

Drawing on this background, the present chapter will examine collective enforcement measures within the framework of the two major international organizations of the 20th century: the League of Nations and its successor the United Nations. Following a presentation of their respective Covenant and Charter, the chapter will explore how the usage of these instruments manifested itself in practice. Pt 3.1 treats the involvement of the League in the China-Japan conflict over Manchuria, as well as the Italian invasion of Abyssinia. Pt 3.2, meanwhile, focuses on the UN Security Council in the context of Cold War rivalries and beyond. As such, chapter 3 bears the most relevance for research question (1. ii) regarding the shift between unilateral and collective action, and (1. iii) regarding economic sanctions.

3.1 Age of the League of Nations

As established in pt. 2.2, the First World War would prove to be a turning point in the history of international law. Beyond the unilateral development, a major breakthrough was made even for collective security. The 1919 Peace Treaty of Versailles[166] between the Allies[167] and the vanquished Germany created one of the world's first, if not the first, international organization – the League of Nations.[168] This section will explore collective enforcement within the League during the mid-war period (1919-1939).

3.1.1 Covenant Enforcement Mechanisms

The founding document of the League of Nations was its Covenant. Therein was expressed the primary purpose of the new organization: to 'promote international cooperation and to achieve international peace and security.'[169] Unlike the Pact of Paris which was still nine

[166] Treaty of Peace between the Allied and Associated Powers and Germany (adopted at Versailles 28 June 1919) in JAS Greenville, *The Major International Treaties 1914-1973 – A History and Guide with Texts* (Methuen 1974).
[167] Most importantly UK, France, and US.
[168] Caroline Fink, 'The Search for Peace in the Interwar Period' in R Chickering et alia (eds) *The Cambridge History of War* (CUP 2012) 288-289.
[169] LONC, preamble.

years in the making, the Covenant did not prohibit war as such. Instead, it held some wars to be illegal. The pivotal point was not moral in nature but procedural; war was not allowed lest the parties had first abided by the requirements stipulated in the Covenant. These included a cooling-off period and participation in either arbitration or in referral of the dispute to the League's Council.[170] Once the process was completed, the Covenant did not forbid its members from going to war.

To live up to its purposes, the Covenant went beyond mere commitments; it also provided enforcement mechanisms to ensure the peace. Art 16(1) stated:

> Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

Beyond art 16, the League's founding document also contained a formulation of commitment to collective security, similar to the one offered by Lowe.[171] Through its art 10, the member states made a general commitment to 'respect and preserve as against external aggression the territorial integrity and political independence of all Members of the League'. An illegal war against one would, if the Covenant was to be taken at its words, be an attack on all.

The enforcement mechanism of art 16 relied heavily on economic and financial means, something the League referred to as the economic weapon.[172] Economic sanctions, if employing today's terminology, had been rare prior to this period in time. Occasionally, they had been used by one belligerent against another in order to impair the enemy's capacity to wage war.[173] Like seen in chapter 2, this can be explained by the stringent laws of neutrality. Being an organization, which aimed to establish and enforce a new, more peaceful era of international relations, the League, quite naturally, sought to do so primarily by peaceful

[170] LONC, arts 12, 13, 15.
[171] See pt 2.2.
[172] 'Resolutions and Recommendations Adopted on the Reports of the Third Committee' (1921) 6 LNOJ, Spec Supp 23 (2) (Resolution on the Economic Weapon).
[173] Gary Hufbauer et al, *Economic sanctions reconsidered* (3d ed, Peterson Institute for International Economics 2007) 39ff, Appendix 1A, Table 1A.3.

means. All the while, enforcement by force remained on the table. Although the Covenant imposed no direct obligation of this kind upon its members, art 16(2) opened up for the possibility of military means. This tendency was further confirmed by a 1921 resolution which made it possible to, in special circumstances, establish a blockade of the seaboard of the offending State.[174]

Furthermore, the League's economic weapon was designed to be both collective and compulsory. For these reasons, it had the potential of being more powerful than any unilateral sanctions under the Pact of Paris. Any sanctions under the latter instrument would have to be justified on a basis of interpretation and would therefore remain optional. The Budapest Articles of Interpretation, it should be recalled, were formulated in terms of ways in which states *might* enforce the Pact. Neither was there any organization with the task of coordinating any such efforts. Meanwhile, the economic weapon held the promise of the combined economic might of the League's members targeting the same state in an organized manner.

3.1.2 Measures Against Japan Over Manchuria

The member states had given the League of Nations a powerful arsenal to enforce its Covenant, primarily by the economic weapon, but if need be also with force. The question remained, however, whether it would prove capable of and willing to wield it. Answers would come sooner rather than later, as several member states during the 1930s fell victim to just the sort of aggression that the Covenant sought to prohibit.

The first major conflict before the League was the Japanese invasion of Chinese Manchuria,[175] both states being members of the League at the time.[176] It was now that the system of collective security created by the Covenant would face its first great trial. A failure would 'be a great blow to [the League's] prestige'.[177] In February 1933, 17 months after the first appeal by China, the League Assembly unanimously found Japan to be the perpetrator , guilty of forcible seizure and subsequently occupation of Chinese territory.[178]

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[174] LON, 'Resolution on the Economic Weapon' (1921) at 18.
[175] Cf pt 2.3.2.
[176] For a complete list of members and time of membership, see Britannica, 'League of Nations' *Encyclopedia Britannica* (online 3 Mar 2020) at 'Members of the League of Nations'.
[177] Lord Lytton addressing Chatham House concerning the Twelfth assembly of the League. Quoted in J-A Pemberton, *The Story of International Relations: Part One – Cold-Blooded Idealists* (Palgrave 2020) 475.
[178] (1933) 112 LON OJ Spec Supp 14, 14-23; Annex V at 77ff. Nb Japan voted against, but the vote was not considered as Japan was a party to the dispute.

Japan had thereby not only violated the Pact of Paris, as seen in pt 2.3.2, but also the Covenant. As per the Stimson Doctrine, the League's member states were not to recognize the regime of 'Manchukuo'.[179] Suggested measures of non-recognition included: denial of access to international treaties, avoidance of trading in 'Manchukuo' currency, and considering passports issued there as invalid. All postal services to the region would furthermore be suspended.[180]

Sanctions against 'Manchukuo' were consequently negative rather than positive in nature. The non-recognition measures effectively consisted of pretending that the territory, by virtue of being under Japanese rule, did not exist. As it turned out, the outside world was more inconvenienced by this policy than Japan was. In the end it was China who balked; it managed to establish limited contact with 'Manchukuo' while still refusing to recognize Japanese control.[181]

Why then did the League of Nations not actively impose economic sanctions against Japan? A number of different contributing factors are possible. One is a lingering perception that enforcement by intervention, either military or economic, still constituted an act of war, which the member states were unwilling to commit themselves to.[182] Another possible factor was the attitude of the United States – a non-member but a major economic power.[183] Writing about British foreign policy during the period, Bassett contends that a majority of coercive means suggested before the League were made conditional on American participation. 'At no time, throughout the dispute', he writes, 'was there any clear demand for the application of economic sanctions by the League alone.'[184] Underpinning it all, however, seems to have been a general political unwillingness to take coercive action which could risk bringing Britain into a new war, only this time across the world.[185]

[179] (1933) 112 LON OJ Spec Supp 14 Annex V, sec III.
[180](1933) 113 LON OJ, Spec Supp 5, at V.
[181] Hataway and Shapiro, *The Internationalists* (2017) 172-73. Cf 'Measures Resulting from the Non-Recognition of Manchukuo' (1935) 16 LON OJ 10
[182] This was the view of President Hoover, who however deemed that the Stimson Doctrine did not risk war. See N Mulder, *The economic weapon: The rise of sanctions as a tool of modern warfare* (Yale University Press 2022) 183, 187
[183] See Nicholas Mulder, *The economic weapon* (2022) 183, 187.
[184] Reginald Bassett, *Democracy and Foreign Policy – A Case History: The Sino-Japanese Dispute, 1931-1933* (Taylor & Francis 2011) xx f. Also, cf Pemberton quoting Bassett in *The Story of International Relations* (2020) 555-56.
[185] Bassett, *Democracy and Foreign Policy* (2011) xix f.

It is worth emphasizing how the idea of collective security was still reasonably new at the time of the Manchurian crisis. If Japan had already broken the rules once by attacking Manchuria, what was to say it would not break them again by retaliating against the League's economic weapon? In the end, practical and national concerns prevailed over the lofty ambitions of the drafters of the Covenant. Rome was not built in a day, and neither was international law.

3.1.3 Measures Against Italy Over Ethiopia

Manchuria had not been off the table long before the League of Nations faced another large-scale crisis, this time concerning the member-states Italy and Ethiopia (Abyssinia). Tensions between the two states culminated on 3 October 1935 when Italian forces crossed the border of its colony Eritrea and entered Ethiopian territory. This time, the League was quicker to respond; already on 7 October its Council adopted a report declaring Italy the aggressor. [186] Italy's offense was that it had 'resorted to war in disregard of its covenants under Article 12 of the Covenant of the League of Nations.'[187] Again, the League's grievance with Italy was *not* the use of force as such, but that such force had been used without respecting the required procedural rules.

Within a month, the specially appointed Coordination Committee presented draft declarations for economic sanctions against Italy on different subject areas. The proposals prohibited the following: (I) export of arms and ammunition to both states; (II) loans, credits, and the like to the Italian government and other public bodies; (III) importation of Italian goods. Furthermore, (IV) placed an export embargo on articles such as transport animals and certain metals.[188] The member states would be obliged to implement the sanctions, as per art 16 of the Covenant.[189]

In the end, the League's efforts to stop Italy's imperialistic visions came to naught. After seven months of 'ruthless' warfare, the Ethiopian capital of Addis Ababa fell in May 1936.[190] When the League Assembly convened in Geneva that summer, the Italian occupation was

[186] 'Seventh Meeting (Public)' (1935) 16 LON OJ 1217. Quote at B (III). See also the Report of the Committee of Thirteen in Annex 1571 (VI).
[187] Ibid at B (III) and Annex 1571.
[188] 'Dispute Between Ethiopia and Italy – Co-ordination of Measures under Article 16 of the Covenant', (1935) 145 LON OJ, Spec Supp 1, 14-27.
[189] Cf LON, 'Seventh Meeting (Public)' (1935) at (III).
[190] 'Abessinienkrisen' *Nationalencyklopedin* (online, accessed 14 May 2022).

regarded as a *fait accompli*, with an overwhelming majority voting in favor of discontinuing the sanction regime.[191] The British delegate, Anthony Eden, stated that:

> the facts should be squarely faced […] The course of military events and the local situation in Ethiopia have brought us to a point at which the sanctions at present in force are incapable of reversing the order of events in that country. That fact is, unhappily, fundamental.[192]

The Australian delegate argued a similar point. As the sanctions in place had not prevented Italy from occupying Ethiopia, maintaining them would certainly not drive Italy out. Intensified sanctions, on the other hand, risked triggering an armed response from Italy. The facts, then, were that 'unless the nations are prepared to meet force with force […] there remains […] no alternative but to admit failure […]'.[193]

Condemning the ostensible course of the League was Abyssinian emperor Haile Selassie. He was in Geneva, 'to claim that justice that is due to my people, and the assistance promised to it eight months ago by fifty-two nations'.[194] Ethiopia, and many European states with it, were small and weak; they were unable to alone fend off an aggressive neighbor. Rather, his state had put its trust in the promise of protection given by the League and its Covenant.[195] In words that echoed of betrayal, Selassie questioned:

> What has become of the promises made to me? […] On many occasions I asked for financial assistance for the purchase of arms. That assistance was constantly denied me. What, then, in practice, is the meaning of Article 16 of the Covenant and of collective security?[196]

In retrospect, what went wrong? One proposed explanation concerns not what the economic sanctions did, but rather what they *did not* do. Importantly, no restrictions on oil and coal exports to Italy were ever implemented. Economic historian Ristuccia argues that such an embargo could have had important indirect effects on road transport and industrial production.[197] In turn, this 'negligence' on the part of the League could likely be explained by

[191] (1936) 151 LON OJ, Spec Supp 65–9.
[192] Ibid, 34.
[193] Ibid, 39 [S.M. Bruce].
[194] Ibid, 22.
[195] Ibid, 22–5.
[196]Ibid, 24–5.
[197] Cristiano A Ristuccia, 'The 1935 Sanctions against Italy: Would coal and oil have made a difference?' (2000) 4 Eur Rev Econ Hist 85.

fear of Italian armed retaliation, or a general cautiousness of wielding the economic weapon, still in its infancy. Such fears would not have been unwarranted, recalling the role that the American embargo on precisely oil likely played in Japan's decision to attack Pearl Harbor in 1941.[198]

Opinions similar to Ristuccia's were proposed already in 1937 by Bonn. He writes:

> economic war cannot be waged efficiently without going to the limit of economic pressure […] The Italian attitude was simple and clear. "We shall stand all sanctions which do not seriously hamper us; if they do more than inconvenience us, we shall fight." The League had the choice either of accepting this challenge and imposing such sanctions as would make war hopeless for Italy; or acknowledging that the independence of Abyssinia was not worth a world war.[199]

The League made their choice – there would not be another war in Europe. With the benefit of hindsight, they were very wrong indeed. The wheels were set in motion. In 1939, Germany under Hitler invaded Poland, and Europe was soon aflame for the second time in twenty years.[200]

3.2 Age of the United Nations

In 1935, the League of Nations deemed that an African state halfway around the world was not worth going to war for, regardless of promises of collective security. In the end, however, war could not be avoided. The atrocities of this Second World War, just like those experienced during the first, led to a general conviction that a new international order was needed. Law and reason would there replace power and violence.[201]

This section will examine the system of collective security and enforcement which developed within the framework of the United Nations. As such, the events during World War II are not

[198] Cf. Pt 2.3.3. See also Hathaway and Shapiro, *The Internationalists* (2017) 179-182.
[199] MJ Bonn MJ, 'How Sanctions Failed' (Jan 1937) 2 Foreign Affairs 359.
[200] See John G. Royde-Smith and Thomas A. Hughes, 'World War II', *Encyclopedia Britannica* (online, 28 Feb 2022) 2. See also Neville Chamberlain, 'Statement in the House of Commons concerning the guarantee to Poland" (31 March 1939) in Greenville (1974) 189.
[201] Devin O Pendas Devin O, 'Toward World Law? Human Rights and the Failure of the Legalist Paradigm of War' in Stefan-Ludwig Hoffmann (ed), *Human Rights in the Twentieth Century* (CUP 2010) 215ff.

covered.[202] Focus will instead be on the Security Council as the institution primarily responsible for upholding international peace and security. Following an analysis of relevant provisions of the UN Charter, I will examine how the Security Council has used the mandate bestowed on it in practice. It is here possible to talk about three separate periods: The Cold War Era (c. 1946– c. 1990), the Age of Sanctions (c. 1990– c. 2005), and finally the era of our present, where collective enforcement appears to once again have stalled.

3.2.1 The New World Order and its Guardian

Already during the war, the Allies had been planning for an organization which would replace the League.[203] 24 October 1945 saw the birth of the United Nations. One of its main purposes was the maintenance of peace and guarantee of respect for international law. This would be achieved through collective security. Art 1(1) of the UN Charter expresses the mentioned purpose as follows:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Although the intentions of the UN at first glance appear to coincide with those of its predecessor, the UN Charter would drastically change the playing field of international law in a way neither the League nor the Pact of Paris had even attempted. Its historic art 2(4) states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Art 2(4) did not, like the Pact of Paris, prohibit war. It did not have to do so, as it instead prohibited the use of force. As made clear by chapter 2, the dividing line between war and peace had previously been of uttermost importance. Previously, armed reprisals, as measures

[202] For events during the war, see pt 2.3.3 regarding American aid to the Allies prior to 1942; and pt 2.4.1 including a brief discussion of the neutrality of Sweden and Switzerland.
[203] See 'Report of the Crimea Conference' between the US, USSR and Britain (Yalta, 11 Feb 1945) at IV, in Greenville (1974) 226-230.

short of war, had been an accepted form of enforcement.[204] By virtue of being compulsive yet pacific means, much indicates that they were permissible even under the Pact of Paris.[205] Under the UN this would be no more; the Friendly Relations Declaration explicitly forbids states from committing acts of reprisals involving the use of force.[206] In addition, the Charter contained a general obligation for all members to solve their international disputes by peaceful means only.[207] In clear contrast to the League Covenant, however, this obligation was absolute. Even after peaceful attempts had failed, the prohibition on the use of force prevailed.[208] Consequently, the imperative dividing line would henceforth be between the use of force and/or armed conflict on the one hand, and peaceful settlement on the other.[209] Also, the previously so significant terms 'war' and 'peace' could since be considered to have been sent off to the same land of legal uncertainty as 'neutrality'.

The main burden of enforcing the new world order of the Charter fell upon the UN Security Council. Art 24(1) of the Charter expresses this in terms of it having the 'primary responsibility for the maintenance of international peace and security'. When carrying out its mission, the actions of the Security Council must comply with the purposes and principles of the UN. The true extent of the power conferred by the member states is expressed through arts 25 and 103. The Security Council is capable of making legally binding decisions for the member states, which take precedence over any other, conflicting obligations under international law.

Specific measures under the Security Council's mandate when enforcing the Charter are found in chapter VII. To be allowed to use them, the Security Council must first 'determine the existence of any threat to the peace, breach of the peace or act of aggression' according to art 39. In the absence of clarification by the Charter, the Security Council is given a large degree of discretion to determine whether a specific situation falls within this scope.[210]

Chapter VII continues by following the dividing line laid out in art 2(4) between force and non-force. Art 41 deals with measures commonly referred to as *sanctions*; the examples given

[204] Cf. Naulilaa Arbitration (Portugal v Germany, 1928).
[205] Oppenheim and Lauterpacht (ed) *International Law* (1952) at I.III.52fk.
[206] UNGA Res 2625 (XXV) of 24 Oct 1970, UN Doc A/25/2625, princ 1, par 6. See also pt 4.1.2.
[207] UNCH, art 2(3).
[208] UNGA, Friendly Relations Declaration (1970) princ 2.
[209] Note that art 2(4) did not preclude the right of self-defense. See also art 51.
[210] See Lowe et al, *The United Nations Security Council and War* (2008) 14.

include interruption of either economic relations or communication means. First when non-violent means are deemed to have failed may the Security Council, according to art 42, 'take such action by air, sea, or land forces as may be necessary […]'. It can therefore be concluded that war and reprisals as means of enforcement, previously available to each and every state under international law when enforcing their own rights, have instead become a weapon only legally possessed by the Security Council to the end of enforcing collective security. In practice, it falls upon the member states to implement any collective action decided by the Security Council.[211]

A final, yet important point is worth making here. The Security Council is *not* a 'world police' with the mission of enforcing international law as such. Rather, it is enforcing the UN Charter and the principles enshrined therein, namely international peace and security. The Charter lacks the equivalent of art 10 in the League's Covenant; the member states have *not* committed to viewing an attack against one as an attack on all.[212] Instead, what they have committed to is following the decisions of the Security Council when it, at its discretion,[213] deems that there exists a threat to international peace and security.

3.2.2 A Stake in a Cold War Game

This section will trace the activity – or rather inactivity – of the Security Council during the first decades of its existence, namely the Cold War Era and the extensive usage of veto power.

For all the extensive power the Security Council may hold in theory, in practice its usage can prove difficult. Whereas the voting system of this UN body is based on decisions by qualified majority,[214] art 27(3) includes an additional condition of major importance. For a resolution concerning substantial issues to be adopted, all of the five permanent members of the Security Council (P-5) have to find it acceptable – either voting in favor or abstaining from voting altogether. At least one actively cast negative vote, however, and a draft resolution will not pass. The P-5 states are: China, France, Russia (formerly the Soviet Union), the United Kingdom, and the United States.[215] The veto system thus constitutes a safeguard that Security Council power not be used against any of the P-5 nor against their interests.[216] In their

[211] UNCH art 48(1).
[212] Cf Washington Treaty (1949) art 5.
[213] Cf Lowe et al, *The United Nations Security Council and War* (2008) 14.
[214] UNCH art 27.
[215] UNCH art 23
[216] Lowe et al, *The United Nations Security Council and War* (2008) 13-14.

capacity as winners of the Second World War, the states conditioned their respective participation in the UN scheme upon such a guarantee.[217]

After signing the Charter, it did not take long before the cooperation between the one-time Allies, now P-5, started to unravel. The second half of the 20th century was dominated by the Cold War, primarily seen in terms of the hostilities between the US and the Soviet Union, and the two fundamentally different world order they represented.[218] Although direct hostilities were avoided, the two states engaged in several foreign proxy-wars. [219] However, the Cold War was more than a mere dispute between two superpowers; it was also 'a framework for organizing international relations', which in many ways created a bipolar world.[220]

Given the nature of international relations during the Cold War, many of the issues before the Security Council risked concerning the national interests of at least one state. There is a considerable difference in the number of vetoes cast annually during this period (1946–1990) compared to later years.[221] The first two decades were dominated by Soviet vetoes; by the time the US cast its first veto in 1970, the Soviet Union had already blocked 108 draft resolutions or parts thereof. From that point onwards, American usage becomes considerably more frequent, while Soviet usage declined.[222] As for agenda items, the situations calling for the highest number of Soviet vetoes included the Spanish question of the late 1940s, and the dispute between Pakistan and India.[223] Meanwhile, the US mainly wielded theirs to protect the interests of Israel.[224]

One case aptly illuminating the intricate web of interests and bipolarity of the time concerns the Teheran hostage situation. The events took place in the context of the Iranian revolution and the fall of the *Shah,* whom the US was considering hosting in his exile. On 4 November 1979, the American embassy in Teheran was overrun and occupied by protestors. The

[217] 'The Veto', *Security Council Report*, Research Report (2015) 3, 2f. Available online.
[218] D Sargent, 'The Cold War"' in JR McNeill and K Pomeranz (eds) *The Cambridge World History* vol 7 (CUP 2015) 325ff; Paul Krüger, 'From the Paris Peace Treaties to the End of the Second World War' in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 697.
[219] Michael Wood, 'United Nations Security Council' (MPEPIL 2007).
[220] Sargent, 'The Cold War' (2015) 329f
[221] UNGA, 'Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council' GAOR 58th Session Supp No 47 UN Doc A/58/47 (2004), at Annex III; 'The Permanent Members and the Use of the Veto: An Abridged History' *Security Council Report* (2013).
[222] 'In hindsight – the Veto', *Security Council Report* (online, 2013).
[223] Nb a considerable number of cast vetoes also concerned the blocking of membership applications.
[224] 'The Veto', *Security Council Report* (2015) 2-3.

diplomatic and other staff were then held hostage.[225] In May 1980, the ICJ would find the Iranian government responsible for much of the situation.[226] Already in January 1980 the US had put a draft resolution before the Security Council, where it called for economic sanctions against Iran.[227] However, the resolution was never adopted as the Soviet Union used their veto power.[228]

Further testimony of the tensions is provided in the transcripts of the Security Council debate which preceded the vote. The Soviet Union, while admitting that Iran was in the wrong, argued that it was here a question of a bilateral dispute. UN action under chapter VII would therefore be contrary to the Charter.[229] The delegate went on to heavily criticize the actions of the US:

> Today [the American] policy of intervention in internal affairs and the trampling under foot of the rights of peoples is being manifested with regard to Iran; tomorrow it will be other sovereign States. All those who cherish the interests of peace and détente, all those who are loyal to the letter and spirit of the Charter of the United Nations, must recognize the danger of that policy and take vigorous action to oppose its gaining ground in international relations.[230]

The American delegate dismissed the statement as 'pages of Alice in Wonderland'[231] and proceeded by condemning Soviet actions in turn:

> The Soviet Union's vote […] is a cynical and irresponsible exercise of its veto power. The motive behind it is transparent. The Soviet Union hopes that by blocking sanctions it can divert attention from its subjugation of Afghanistan and curry favour with the Government and people of Iran, who are among those directly affected by the Soviet invasion of Afghanistan. But I would suggest that the Soviet hope is in vain. The nations of the world, viewing this veto in tandem with the invasion of Afghanistan, cannot fail to note that Soviet tributes to the supremacy of international law are purely rhetorical and that Soviet policy conforms to international norms only on a selective and self-serving basis. [232]

[225] United States Diplomatic and Consular Staff in Tehran, Judgment, (1980) ICJ Reports 3, 17ff.
[226] Diplomatic and Consular Staff in Tehran case (1980) 95.
[227] UNSC, 'United States of America: draft resolution (10 Jan 1980) UN Doc S/13735.
[228] UNSC '2191st meeting: 11 and 13 January 1980' UN Doc S/PV/2191.
[229] Ibid at 44-56 [Troyanovsky, USSR]
[230] Ibid at 55.
[231] Ibid at158-59 [McHenry, US].
[232] Ibid.

It was in other words very difficult for the P-5 to cooperate during the Cold War period, and consequently also for the Security Council to carry out its mission of upholding international peace and security. It could then be argued that its members put national interests and foreign policy goals before collective security. At the same time, it has to be recognized that the Security Council is not a legal, but a political organ. It will never be impartial, as the agencies of its members correspond with those of their respective governments. Neither is it democratic; all states may be equal under international law, but in the Security Council some states are more equal than others. Or, as the delegate from Niger expressed it in the Teheran hostages-debate: 'we, the small countries, have the unpleasant feeling that the United Nations is daily becoming a stake in a game.'[233]

3.2.3 Age of Sanctions

This section will span the period following directly upon the Cold War (c. 1990-2005) which saw a high level of Security Council involvement. Here, the period is nicknamed the Age of Sanctions.

Around 1991, the East Block disintegrated. Out of the former Soviet republics, it was now the Russian Federation that overtook the permanent seat at the Security Council.[234] In the following decades, the veto would only be used sporadically. The US continued to block resolutions concerning the Middle East and Palestine, while Russia only used their veto three times between 1984 and 2004.[235]

With this hindrance to its ability to operate neutralized, the Security Council woke up as if from a long slumber, initiating the Age of Sanctions. The next 16 years saw frequent use of art 41 of the Charter and the associated possibility of enforcement by way of exercising economic pressure. In all, 18 entities[236] were targeted by UN sanctions between 1990 and 2006. For comparison, during the first 45 years of UN existence, sanctions were imposed only twice: against Rhodesia (1966) and South Africa (1977).[237]

[233] Ibid at 102 [Oumarou, Niger].
[234] See eg Zehuda Z Blum 'Russia Takes Over the Soviet Union's Seat at the United Nations' (1992) 3 EJIL 354.
[235] UNGA, 'Report on matters related to the Security Council' (2004) Annex III.
[236] This includes also non-state actors such as Al-Qaida and the Taliban.
[237] Cortright et al, 'The Sanctions Era' (2008) Appendix 4: 'UN-authorized sanctions 1945–2006'. See also UNSC Res 221 of 9 April 1966, UN Doc S/221(1966); and UNSC Res 417 of 31 Oct 1977, UN Doc S/Res/417(1977).

Writing in the early days of the Age of Sanctions, Pastor describes the general mentality surrounding the change as follows:

> [The] vetoes had a larger effect of inhibiting the global imagination as to what could be done to alleviate world suffering and foster peace […] The rapidity of change and the scope of these new collective efforts have turned on its head the long-standing question of whether the United Nations could do *anything* useful [to] whether the United Nations can do *everything*.[238]

The nature of the situations deemed a threat to international peace and security varied greatly. First state targeted was Iraq, in what at least initially can be termed a 'classic' case of aggression. The Security Council condemned the Iraqi invasion of Kuwait and proceeded by implementing a comprehensive sanction regime.[239] However, the sanctions would come to be conditioned also on Iraqi compliance with disarming obligations. The US even expressed an unwillingness to remove them as long as president Saddam Hussein remained in power. In retrospect, the Iraq-case has been described as 'the longest, most comprehensive, and most controversial in the history of the world body',[240] not in the least for its large humanitarian cost.[241]

Another major theme during the Age of Sanctions was countering international terrorism. Libya was its first target – the state accused of involvement in the attacks on two civil aircrafts. Sanctions included a flight and an arms embargo.[242] Entering the new millennium, focus laid on the groups of al-Qaeda and the Taliban who were labelled as terrorists. Already in 1999, sanctions were imposed against Afghanistan's Taliban government over harboring and training terrorists, among them Osama bin Laden.[243] Following the attacks of 9/11, measures proceeded to target the terrorist groups directly, as well as specified individuals and entities deemed to be associated with them, by *inter alia* travel bans and asset freezes.[244]

Furthermore, action under chapter VII was in several cases motivated by protecting democracy and human rights. An example of sanctions along this vein is the embargo on arms

[238] Robert Pastor, 'Forward to the beginning: widening the scope for global collective action' (1993) 43 Int'l J 641f.
[239] See UNSC Res 660 of 2 Aug 1990 UN Doc S/Res/660(1990); and UNSC Res 661 of 6 Aug 1990 UN Doc S/Res 661 (1990).
[240] Cortright et al, 'The Sanctions Era' (2008) 207ff.
[241] Ibid.
[242] UNSC Res 731 of 21 Jan 1992 UN Doc S/Res/731(1992); UNSC Res 748 of 31 March 1992 UN Doc S/Res/731(1992)
[243] UNSC Res 1267 of 15 Oct 1999 UN Doc S/Res/1267 (1999).
[244] UNSC Res 1390 of 16 Jan 2002 UN Doc S/Res/1390 (2002).

and military equipment imposed on Somalia in 1992, with one of the objectives being to deliver humanitarian assistance during the ongoing internal conflict.[245] Similarly, during what has later been called the Rwandan Genocide of 1994,[246] an embargo on all war materiel was decided upon.[247] Another case was the UN enforcement actions in Haiti following its coup d'état of 1991. With the stated objective of restoring democracy and legality, a comprehensive sanction regime was imposed on Haiti in the following years.[248]

Seen in the context of the history of third-party enforcement, several of these cases appear remarkable. Collective action was now called for in situations which would previously have been perceived as unilateral, or even national in nature. It is furthermore clear that the P-5 are not always in agreement as to what situations constitute a threat to *international* peace and security. [249] As the Security Council is effectively setting its own competence, does there not exist any objective indicators? The question might be answered by reading art 39 in conjunction with art 2(7). The latter emphasizes that the UN shall refrain from intervening 'in matters which are essentially within the domestic jurisdiction of any state'. This, then, could be interpreted as calling for some restraint when considering action under chapter VII. However, seeing as art 2(7) gives precedence to chapter VII, such an argument would be rather hollow. [250] In practice, then, the limits to Security Council power ought to depend more on the veto than any legal interpretation of the Charter.

With this in mind, is the dividing line between situations of national and international character a purely political question? The Age of Sanctions did after all coincide with the United States becoming the only remaining superpower, enabling it to steer the Security Council towards collective security of a 'moralistic' nature, emphasizing multilateralism, democracy and human rights. Meanwhile, this development could be seen as representative of international law at large.[251] Cortright et al write that public opinion from many directions

[245] UNSC Res 733 of 23 Jan 1992 UN Doc S/Res/773 (1992); UNGA, 'Emergency Assistance to Somalia: report of the Secretary General' (19 Sept 1991) UN Doc A/46/457.
[246] 'Folkmordet 1994', *Nationalencyklopedin* (online, accessed 20 Apr 2022).
[247] UNSC Res 918 of 17 May 1994 UN Doc S/Res/918 (1994). See also UNSC Res 872 of 5 Oct 1993 UN Doc S/Res/872 (1993) which established a UN peace keeping operation in Rwanda.
[248] UNSC Res 841 of 16 June 1993 UN Doc S/Res/841 (1993); UNSC Res 917 of 6 May 1994 UN Doc S/Res/917 (1994). See also 'U.S. and OAS Condemn Coup D'Etat in Haiti, Seek Return of President Aristide' (1991) 2 Foreign Policy Bulletin 61.
[249] See pt 3.2.2.
[250] Cf Swindells Felicia, 'UN Sanctions in Haiti: A Contradiction Under Articles 41 and 55 of the UN Charter' (1996) 20 [5] Fordham Int'l J.
[251] This development is explored in depth in ch 4.

was calling on the Security Council 'to do something' to alleviate human suffering.[252] In 1993, Pastor wrote that there were few issues which could now be considered fully national.[253] Does this imply that the meaning in customary international law of 'international peace and security' aligned with the actions of the Security Council during the Age of Sanctions? But then, international law of whom? *The United Nations Security Council and War* is a product of Oxford University whereas Pastor is an American professor. The US, as a western state, has to be assumed to advance western interests. The Security Council was no longer a stake in a Cold War game, but maybe it was a stake in *a* game all the same?

3.2.4 A Farewell to Collective Arms?

As it turned out, the United Nations could not do everything. From 2007 and onwards, the use of the veto has once again become more frequent.[254] Much like during the beginning of the Cold War era, it is Russia who makes the most use of theirs, having manage to block 26[255] resolutions up until February of 2022.[256] Russia does, however, not always stand alone; China has joined it by using their veto in 13 of the cases. The US, meanwhile, has been more cautious, only blocking four draft resolutions. Geographic locations of the states concerned by the draft resolutions are widespread in the case of Russia and China, while three of four draft resolutions blocked by the US pertained to the Palestinian question. The two remaining members of the P-5, France and Britain, remain unproblematic from a veto-perspective, not having used theirs since 1989.[257]

Many of the vetoed draft resolutions have had clearly stated humanitarian objectives or concerned other human rights-issues. In 2007, Russia and China jointly voted against a draft resolution on Myanmar, and in 2008 another on Zimbabwe. In both cases, grievances consisted of repressive internal policies, widespread violence, and arbitrary arrests. Myanmar was furthermore accused of targeting minorities. No sanctions were called for against Myanmar, but an arms embargo was proposed against Zimbabwe.[258] Similar arguments as

[252] Cf Cortright et al, 'The Sanctions Era' (2008) 206-7.
[253] Pastor, 'Forward to the beginning' (1993) 642ff.
[254] Security Council -Veto List' (1946–2022) *Dag Hammarskjöld Library*.
[255] Number does not include draft resolutions which received less than the required number of 9 votes, regardless of a P-5 state voting against its adoption.
[256] Security Council -Veto List' (1946–2022) *Dag Hammarskjöld Library*.
[257] Ibid.
[258] UNSC, 'United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution' (12 Jan 2007) Un Doc S/2007/14 on Myanmar; UNSC, 'United States of America et al: draft resolution' (11 July 2008) UN Doc S/2008/447 on Zimbabwe.

during the Cold War era were made to explain the negative votes. The issues at stake were the internal affairs of sovereign states; as the disputes were not a threat to international peace and security, the Security Council would be overstepping its mandate.[259] China argued that yes, Myanmar was experiencing problems, but so were many other states. Unless Myanmar was to be arbitrarily targeted, all member states would have to be subject to consideration, which was 'neither logical nor reasonable'.[260]

Making the chasm within the Security Council even more obvious was its response to the conflict in Syria. Between 2011 and 2020, Russia vetoed no less than 17 draft resolutions regarding said state, often along with China.[261] Quoting Lenin, the British delegate ironized: 'quantity has a quality all on its own'.[262]

Generally, the debates on Syria can be characterized by various degrees of distrust, accusations, and even hostility. The US, UK, and France, among others, constantly emphasized that the Security Council must shoulder its responsibility. Of special concern was the protection of civilians. In relation to a draft resolution calling for a ceasefire in Idlib,[263] Germany rhetorically questioned 'how can we explain to [the people of Idlib] and the world that, even on a purely humanitarian draft resolution, no consensus could be reached?'.[264] Following alleged uses of chemical weapon by the Syrian government, France stated that lack of a decisive response would:

> mark a serious and reprehensible setback to the international order that we have all patiently helped to develop. The consequences would be terrible, and we would all pay the price.[265]

The actions of Russia and China were categorically condemned by these same states. The UK stated that 'it has become very clear that Russia will do what it takes to protect Syria, whatever the compelling evidence of the crimes committed.'[266]

[259] UNSC, '5619th meeting: 12 Jan 2007' UN Doc S/PV/5619; UNSC, '5933rd meeting: 11 July 2008' UN Doc S/PV.5933.
[260] UNSC, S/PV/5619 at 2 [Wang, China].
[261] 'Security Council -Veto List' (1946–2022) *Dag Hammarskjöld Library*.
[262] UNSC, '8228th meeting: 10 Apr 2018' UN Doc S/PV.8228, at 6.
[263] UNSC, 'Belgium, Germany and Kuwait: draft resolution' (19 Sept 2019) UN Doc S/2019/756.
[264] UNSC, '8623d meeting: 19 Sept 2019' UN Doc S/PV.8623, at 4.
[265] UNSC, UN Doc S/PV.8228 at 2.
[266] Ibid at 5.

Meanwhile, Russia and China were highly critical of the Western approach. In their view, the alleged objectives of these states were but subterfuges. Instead, 'these Pharisees have been pushing their own geopolitical intentions, which have nothing in common with the legitimate interests of the Syrian people.'[267] Russia furthermore accused the West of using the UN to 'further their plans of imposing their own designs on sovereign States […]'.[268] They were therefore acting to aid 'international terrorists' opposing the lawful regime. Russia, on the other hand, was acting to uphold respect for the Charter and international law. It did so both by using its veto, and by participating in the efforts of the Syrian government to 'combat international terrorism'.[269]

Thus, visions of comprehensive collective enforcement under the Security Council, as envisaged by the drafters of the Charter, appear to have been paralyzed once again. Seeing that in 2022, Russia *itself* is a party to a matter before the UN, much indicates that the present slumber of the Security Council, if not eternal, will be a long one. As the Age of Sanctions ended, the pendulum would swing back towards unilateral enforcement – now also with a new vigor which echoed of the past.

[267] UNSC, '6810th meeting: 19 July 2012' UN Doc S/PV.6810 at 8 [Churkin, Russia].
[268] Ibid.
[269] UNSC, UN Doc S/PV.8228, at 4.

4. New World, Old World – Enforcing the Present

O wonder!

How many goodly creatures are there here!

How beauteous mankind is! O brave new world

That has such people in't![270]

What has been will be again,

What has been done will be done again;

There is nothing new under the sun[271]

As outlined in the previous chapter, collective security within the Security Council is currently, once more, often blocked by diverging political agendas. Despite this Age of Sanctions having passed, another has begun. Between 2004 and 2014, the number of sanctions regimes in place worldwide almost doubled.[272] However, when third states act unilaterally, the question of the legality of sanctions under international law risks becoming contentious. The actions take place outside of the UN framework, within an area of international law which, as we have seen, largely lacks historical precedence. The law of neutrality and positivism might have lost much of their influence, but many of the assumptions they were based on remain – assumptions which do not always correspond with reality.

This chapter will explore third-party enforcement in the context of modern international law. Its focus will therefore be on research question (2) regarding discrepancies between third-party enforcement and the realities of international law today. Spanning the 20th century and onwards, the time period of chapter 4 overlaps with that of pt. 2.4. A fundamental difference, however, lays in how the chapter at hand uses mainly an analytical legal method to explore

[270] William Shakespeare, *The Tempest* in *William Shakespeare: Complete Plays* (Fall River Press 2012) at V.I.181-84.
[271] Ecclesiastes 1:9, *Holy Bible* (NIV).
[272] Gabril Felbermayr et al, 'The Global Sanctions Data Base', *Vox EU* CEPR (online 4 Aug 2020).

current law, which is analyzed by looking back on the past. In contrast, pt. 2.4 had legal history as its starting point while looking forward.

Given this background, pt 4.1 will examine how the contemporary legal context surrounding third-party enforcement differs from that of previous centuries. Focus will here be on the development of multilateralism and human rights law, as seen in contrast to continued bilateralism and codified non-intervention. Pt 4.2 will then explore some possible justifications for unilateral third-party enforcement, through ARSIWA and beyond.

4.1 All the Changes We Can and Cannot See

The 20th century was a period of fundamental change for international law, with new subject areas and new types of obligations developing. Meanwhile, some changes which one would think corollary, are conspicuous by their absence. Below, pt. 4.1.1 focuses on research question (2.i) regarding how the changing nature of international law is affecting enforcement. Finally, pt. 4.1.2 considers the principle of non-intervention in a modern context according to question (2.ii).

4.1.1 New Norms and Obligations

During the 20th century, inter-state relations would take on entirely new dimensions. Henriksen refers to this development as 'the international law of cooperation'.[273] Rather than merely coexisting, states started working together towards common goals, on matters which had previously been of a domestic nature. Another word for such cooperation is *multilateralism*, expressing the belief that certain issues are better addressed by states together, unlike under the more individualistic unilateralism. Multilateralism can express itself in various forms, such as through international organizations or multilateral treaties.[274] In addition to concerns of peace and security, the UN Charter mentions the following goal:

> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all […][275]

[273] See Henriksen, *International Law* (2019) 11-12.
[274] André Nollkaemper, 'Unilateralism/Multilateralism' (MPEIL 2011) at A.
[275] UNCH art 1(3)

Nollkaemper describes how the influence of multilateralism grew even further in the wake of the Cold War. He cites the number of multilateral treaties registered with the UN as 371 between 1969-1989, whereas the corresponding number for the years 1989-2009 is 1286.[276] In other words, during the past decades the number of obligations between states have increased drastically, and their interests have become more intertwined. Collective enforcement as defined here might have taken a step back, but community of another kind appears to have developed.

Furthermore, the multilateral obligations of the 20th and 21st also concerned an important new area– human rights. The idea of all men possessing certain inalienable rights was not new, having been born already during the enlightenment. However, the world wars had made it obvious that such rights were not guaranteed in practice.[277] In the words of Lauterpacht, 'the rights of man were given a foundation no more solid or secure than the law of the sovereign State.'[278] The only way these rights could possibly be assured were through international law.[279] Human rights did come to be assured in the way prompted by Lauterpacht already in 1945. Among the host of multilateral treaties that developed, many under the UN framework, can be mentioned: The Genocide Convention (1948);[280] the two general human rights Conventions, ICCPR on civil and political rights,[281] and ICESCR on economic, social and cultural rights (1966),[282] and finally, the Torture Convention (1984)[283]. Progress was made also on the regional level, notably in Europe through the European Convention on Human Rights (1953).[284]

Human rights are highly peculiar when seen in the historical context of international law. Whereas individuals had previously, as expressed by Lauterpacht, been only '[to] an

[276] Nollkaemper, 'Unilateralism/Multilateralism' (2011) at B.
[277] Hersch Lauterpacht, *An International Bill of the Rights of Man* (OPIL 2013) I.I generally.
[278] Ibid, 5.
[279] Ibid at I.I generally.
[280] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 1948) 78 UNTS 227 (Genocide Convention).
[281] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[282] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) 993 UNTS 3.
[283] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in UNGA res 39/46 of 10 Dec 1984 (Torture Convention).
[284] Convention for the Protection of Human Rights and Fundamental Freedoms, CTS 005 (Council of Europe 2005). See also European Court of Human Rights, 'Official Texts' (online) for a brief history of the Convention. The Convention has since its adoption been modified on numerous occasions.

imperfect degree the object of the law of nations',[285] there were now international rules where states pledged to protect their rights. Meanwhile, individuals were not made subjects of international law– international human rights are not owed directly to them.[286]

Human rights could instead be understood as seen in the context of obligations *erga omnes (partes).* Already in 1932 Stimson had used the argument that by virtue of the Pact of Paris, all signatories had a legal interest in preventing war, and thereby also in taking certain enforcement measures.[287] Given that compliance is in the interest of and owed to all treaty-parties (*omnes partes*), it can be argued that a state violating human rights has breached an obligation owed also to what are essentially third states, despite them not having suffered any direct injury.

In its 1970 *Barcelona Traction*-case, the ICJ took the idea one step further by acknowledging even the existence of obligations *erga omnes*.[288] The Court gave the following definition:

> [those obligations] of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, al1 States can be held to have a legal interest in their protection; they are obligations erga omnes.[289]

The Court continued by giving examples of obligations of an *erga omnes* character. It mentioned prohibition of acts of aggression, genocide, and basic human rights.[290]

Obligations *erga omnes (partes)* should furthermore be considered in the context of norms *ius cogens.* Art 53 of the Vienna Convention on the Law of Treaties defines such a peremptory norm as:

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[285] Lauterpacht An International Bill of the Rights of Man (2013) 6
[286] Cf. Henriksen, *International Law* (2019) 78-9, writing how *collective* groups of individuals can in certain cases have rights under international law, eg the right of self-determination.
[287] See pt 2.3.2.
[288] Expressions of obligations *erga omnes* can be found also before the ICJ's 1970 judgement. See Elena Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the non-injured state and the idea of international community* (Routledge 2010) 34, with references.
[289] Barcelona Traction, Light and Power Company, Limited, Judgement, ICJ Reports 1970 p. 3, at 33.
[290] Ibid at 34.

> [one] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[291]

Thus, norms *ius cogens* must *always* be respected by *all* States.[292] Other than a treaty being void if it conflicts with an already existing peremptory norm, it will also become void *retroactively* if a new *ius cogens* norm appears.[293] A state can in other words be bound under international law without agreeing – a clear departure from consent-based positivism.[294]

Finally, it should be noted that although both norms *ius cogens* and obligations *erga omnes* express the idea of community interests at the expense of unlimited state sovereignty, they are not necessarily identical. Norms of *ius cogens* character create obligations *erga omnes*, but not all obligations *erga omnes* are of *ius cogens* character.[295]

Given these points, international law is no longer what it once was. Gone is the oftentimes black-and-white, purely bilateral world of the law of nations. Instead, international law of the 21st century is become increasingly more complex; its material scope is expanding, creating new beneficiaries of rights, and multilateral webs of obligations. However, with legal innovations comes new legal challenges. Obligations *erga omnes (partes)* have created a strange situation for third-party enforcement, where states are often considered to have a legal interest in a dispute without having any associated individual right. If the injured party is a group of individuals, the traditional form of enforcement through self-help cannot be applied. In that case, any enforcement has to be done by a third party, as individuals as such are not subjects of international law. The added seriousness of norms *ius cogens,* where states can be bound without at their leisure having ratified a convention, complicates matters further. The need of enforcing these norms in particular, made out to be of such fundamental importance, can be considered especially acute. Because, if not enforced – in the words of the Ethiopian emperor Haile Selassie – what then, is their practical meaning?[296]

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[291] 1155 UNTS 331 (adopted 23 May 1969).
[292] See e.g. VCLT (1969) arts 53, 64; UNGA Res 56/83 of 28 Jan 2002 UN Doc A/res/56/83, Annex, 'Responsibility of States for internationally wrongful acts' (ARSIWA) art 2; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, at 83:MN Shaw MN, *International Law* (9th edn CUP 2021) 106-7. VCLT (1969) arts 53, 64; ARSIWA art 26; *Legality of the threat or use of nuclear weapons*, at 83. See also Shaw (2021) 106f.
[293] VCLT (1969) arts 53, 64.
[294] See *Case of the SS Lotus* (France v Turkey) (Judgement) PCIJ Rep Series A No 10 (7 Sept 1927); Proukaki, *The Problem of Enforcement in International Law* (2010) 21-25.
[295] See Proukaki, *The Problem of Enforcement in International Law* (2010) 22-25, 33-34.
[296] See pt 3.1.3.

4.1.2 Old Structures

The Westphalian Law of Nations, as it developed in the 17th century and onwards was, as established above, one of bilateral relations between sovereign states. The assumptions which followed, though slightly modified, endure also in the 21st century. Pt 2.2.2 introduced the positivist non-intervention. It remains a fundamental principle of international law even today, albeit in a slightly different form.

Although the material scope of non-intervention has decreased, the modified principle can be considered to stand on firmer foundations. Today, the corresponding customary principle of sovereign rights of all states is safeguarded both in the form of treaty and codification. The most authoritative formulation can be found in art 2(1) of the UN Charter, stating that 'the Organization is based on the principle of sovereign equality of all its members'. Despite not imposing any direct obligation, the article still conveys the clear message that no state is above another in the eyes of international law. Quite naturally then, no state is entitled to dictate the actions of its equals without prior consent.

Non-intervention has repeatedly been the subject of attention before the General Assembly. In its 1960 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States,[297] the General Assembly stated that 'direct intervention, subversion and all forms of indirect intervention' constituted a violation of both the spirit and the letter of the Charter. Five years later followed what has been deemed 'one of the most important interpretations of the Charter'[298] – the Friendly Relations Declaration.[299] Therein was enshrined that 'the territorial integrity and political independence of the State are inviolable'[300] and that 'each State has the right freely to choose and develop its political, social, economic and cultural systems'.[301]

[297] UNGA Res 2131 (XX) of 21 Dec 1965 UN Doc A/Res/20/2131.
[298] UNGA, 'Economic measures as a means of political and economic coercion against developing countries – Report of the Secretary-General' (14 Oct 1997) UN Doc A/52/459 (SG's Report on Economic Coercion) at 74.
[299] UNGA, Friendly Relations Declaration (1970).
[300] Ibid at Principle of sovereign equality of States (d)
[301] Ibid at (e)

Influence of the non-intervention principle furthermore reaches beyond the UN framework. One example is the Helsinki Final Act by the Organization for Security and Co-operation in Europe (OSCE).[302] The participating states here commit to:

> refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.[303]

One example of the non-intervention principle in ICJ case law is *Military and Paramilitary Activities in and against Nicaragua* from 1986.[304] Although primarily concerned with the illegal use of force, issues pertaining to intervention following alleged violations of international law are also covered. The case, simplified, concerned responsibility for the United States over its involvement in a Nicaraguan dispute. The group of the *Sandinistas* had recently taken power in the country, but were challenged by the *Contras*, an opposition group the US had in various ways supported.

One of the possible justifications of American actions covered by the ICJ related to the authoritarian tendencies of the *Sandinista* government. This pertained to a pledge made in 1979 through the Association of American States, where Nicaragua had vowed to *inter alia* respect democracy and human rights. In 1985, US Congress adopted a resolution according to which Nicaragua had taken 'significant steps towards establishing a totalitarian Communist dictatorship' and had 'committed atrocities against its citizens'.[305] Furthermore, the Congressional report stated that the US 'has a special responsibility regarding the implementation of the commitments made by that Government in 1979'.[306] Although unclear if the resolution was intended as a legal justification for the intervention, the ICJ stated that a clear link could be discerned between it and the American support to the *Contras*.[307] *If* Nicaragua had then, indeed, made a legally binding pledge of this nature, said pledge had not been made directly to the US, but to the Organization of American States. On this basis, there were no apparent grounds allowing for US unilateral enforcement, the ICJ held.[308]

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[302] Conference on Security and Co-Operation in Europe Final Act (adopted in Helsinki, 1 Aug. 1975) 1st CSCE Summit of Heads of State or Government (Helsinki Declaration). Nb the Helsinki Accords does not have treaty status.
[303] Helsinki Declaration at 1(a)(VI) par 1.
[304] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986, p. 14.
[305] Ibid at 169, quoting Findings of US Congress (29 July 1985).
[306] Ibid at 170.
[307] Nicaragua case (1986) at 171.
[308] Ibid at 258-262.

Furthermore, in relation to the, from the American perspective, undesirable Communist ideology, the ICJ firmly stated:

> However the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.[309]

The Nicaragua case reaffirms the prominent position the sovereign state holds, even in contemporary international law. A state's decision not to subscribe to democratic values falls under its sovereign rights, precluding an intervention. Regardless of a state having made legally binding promises to uphold democratic institutions, a third party has no apparent right to enforce this obligation on behalf of an organization in which they are both members. [310] However, it is important to recall that the case concerned the use of force. Given art 2(4) of the UN Charter, not even the injured party, i.e. the Organization, would have been allowed to employ enforcement measures of such kind.[311]

To summarize, international law has come a long way in the past decades. We can see changes such as cooperation between states reaching new levels, and the increased emphasis put on protecting individuals and community interests. Meanwhile, there are some changes we cannot see. International law is still very much a law of nations, and the positivist principle of non-intervention remains and has been codified. It is in many ways a new world, but in others it is still the old world. The next section will explore how the increasing number of unilateral sanctions fits into the framework of contemporary international law as sketched here.

4.2 In Search of Legal Justifications

A state wishing to enforce international law in the 21st century is faced with the conundrum of how to do so without itself violating international law. Legal practice of the past century indicates a reconceptualization of the purpose of international law as such. Nollkaemper

[309] Ibid at 263.
[310] Ibid at 262.
[311] Cf ibid at 262.

refers to this process as 'moralization', stating that a number of international actors 'contribute to a paradigm shift from State sovereignty as the cornerstone of the legal order, to a paradigm based on rights of the individual, on the one hand, and the values and interest of international community, on the other.'[312] Said moralization is mirrored in the development outlined in pt. 4.1.1; states increasingly adopt a multilateral approach to issues traditionally of national interest, and how norms *ius cogens* now have the capacity of binding states without their prior consent. Faced with a serious violation of international law today, some would argue that there is a *moral duty* to act. It is a just war come again, fought with sanctions rather than firearms. Meanwhile, the principle of non-intervention, as expressed in e.g. the Friendly Relations Declaration, makes no explicit exceptions for when a third-party has an *iusta causa* – when enforcement, arguably, is 'the right thing to do'. The question then becomes what legal grounds, if any, unilateral third-party sanctions have in contemporary international law.

This final section of the thesis will give a brief overview of the discussion and controversies surrounding the subject. Focus will be on arguments and conclusions advanced within the ILC framework, as well as the more recent review of state practice by Dawidowicz in his work *Third-Party Countermeasures in International Law.* Therefore, focus will be on research question (2.iii).

4.2.1 A Modern *Iusta Causa*

Although a third state enforcing international law no longer faces an immediate threat of retaliation over breached neutrality, it does have to contend with more stringent rules governing inter-state relations, under the UN system and beyond. Furthermore, the international law of cooperation with its increased material scope of treaty regulation is likely to have curtailed the types of economic measures which beyond doubt can be classified as retorsion.[313] Put differently, there are few ways in which a third state can actively express its dissatisfaction against a state violating international law without risking being accused of the same offense itself. Given the 'moralization' of international law, such accusations risk undermining the cause of a state seeking the moral high ground by acting as a harbinger of justice.

[312] André Nollkaemper, 'The problem of many hands in international law', SHARES Research Paper 72 (2015) ACIL 2015-15, 6.
[313] 'ILC Report on 53d session' at 128.

Reacting to reported cases of economic coercion, the General Assembly in 1995 requested a report from the Secretary General concerning the issue.[314] The report was presented by an *ad hoc* expert group in 1997. Economic is there defined as 'negative economic activities (eg, economic sanctions) imposed, unilaterally or collectively, by the sender State(s) on the target State(s) for primarily political (ie, non-economic) purposes.'[315] A wide range of policy objectives are possible, including social and humanitarian issues.[316]

It was conceded by the *ad hoc* group that not all forms of economic coercion were unacceptable. Some exceptions may be allowed to 'ensure compliance with internationally agreed norms, standards or obligations.'[317] Given the risk of arbitrariness and abuse, any policy-objective should:

> be based on internationally recognized, accepted or agreed norms, standards and instruments. In the area of peace and security, this applies to deterring, limiting or ending conflict, as well as countering international terrorism. In the economic, social and related fields, examples include protection of human rights, safeguarding established environmental, labour and health-related standards, as well as combating illicit drug-trafficking and promoting democracy and good governance.[318]

However, the Report identifies as a major problem the fact that the stated policy-objective are not always in line with the actual motives and intent of the sender state. For example, a state will generally not overtly express dislike for the economic or political system of the sender state, and instead rely on 'rationales that have international, community-based resonance'.[319] This echoes the critique advanced by e.g. Russia and China during the Security Council debates, as well as American reluctance to lift the sanctions against Iraq.[320]

In light of the difficulties in separating a true *iusta causa* from coercive intent, the Report provides a 'legitimacy indicator' to serve as an analytical tool indicating when coercive economic measures may be allowed. Aside from the situations involving the Security Council, the following examples pertaining to third-party enforcement are put forth:

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[314] UNGA Res 50/96 of 2 Feb 1996 UN Doc A/Res/50/96.
[315] UNGA, 'SG's Report on Economic Coercion' (1997) at 58.
[316] Ibid at 59.
[317] Ibid at 75.
[318] Ibid at 66.
[319] Ibid) at 62.
[320] See pt 3.2

(d) Cases where economic sanctions are recommended by the General Assembly in resolutions adopted either by consensus or by large majorities over a period of time, in response to clear violations of international norms;

(f) Cases where economic measures are adopted on a unilateral basis by one or more States in response to a clear violation of universally accepted norms, standards or obligations, provided the sender State(s) are not seeking advantages for themselves, but rather pursuing an international community interest.[321]

To summarize, third-party enforcement must be seen in the context of contemporary international law and its stringent rules. The moralization is not a hindrance per se, as at least the Secretary General's report indicate that a prima facie violation of international law might be allowed if it is, so to speak, the 'lesser of two evils.' Any legal justification of third-party enforcement would furthermore have to be based on an accepted legal policy-objective – the existence of a modern *iusta causa.* Whether a cause is indeed just cannot be based on the subjective assessment of the sender-state; it needs to be objectively recognized as such by the international community.

4.2.2 'States other than an Injured State'

In an age where international law was becoming more complex, the International Law Commission (ILC), set out on a large-scale codification project. The codification of state responsibility was requested by the General Assembly already in 1953,[322] but it would take until 2001 before the ILC completed its work on ARSIWA. The General Assembly subsequently adopted the draft articles by a resolution.[323]

In large parts, ARSIWA as a codification is built on the bilateral enforcement model. The general assumption is that the wrongful act consists of state A breaching an obligation owed to state B, upon which state A in its position as an injured state is entitled to enact countermeasures to enforce what has been denied to it.[324] The enforcement action as such –

[321] UNGA, 'SG's Report on Economic Coercion' (1997) at 76.
[322] UNGA Res 799 of 7 Dec 1953 UN Doc A/Res/799(VIII).
[323] UNGA Res 56/83, Annex. of 28 Jan 2002UN Doc A/res/56/83, Annex, 'Responsibility of States for internationally wrongful acts'
[324] See in particular arts 2, 28-31, 35-37, 49-51.

countermeasures – is also defined on the basis that the injured state will be enforcing its own rights. Countermeasures are thus defined as follows:

> measures, that would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State [if] they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.[325]

In one important aspect, ARSIWA does however go beyond bilateralism. Art 48 is entitled *Invocation of responsibility by a state other than an injured state* and enables a third state by virtue of an obligation *erga omnes (partes)* to demand cessation or performance by the responsible state. Its legal interest in compliance is therefore recognized.[326]

It is paramount not to confuse the right of a third, non-injured state to invocate responsibility with a right to enact enforcement measures. While an injured state could base the latter right directly on customary international law as expressed by ARSIWA, the question is more complex for a third state. During the work on the draft articles, a formulation which would have endorsed third-party countermeasures was put forth. Any state entitled to invoke responsibility for obligations *erga omnes (partes)* would, according to draft article 54 [2000], be allowed to enforce it, on the request and behalf of the injured state. If it was instead question of an *ius cogens* norm, any state would be allowed to act 'in the interest of the beneficiaries of the obligation breached'.[327]

The subject of draft article 54 would however turn out to be contentious. Proponents, such as Pellet, argued before the ILC that states needed a reasonable way to respond to serious violations of international law, especially if the injured party could not enforce their own rights.[328] Simma stated that 'leaving it up to the […] United Nations, to react to breaches of obligations erga omnes bordered on cynicism.'[329] In contrast were the opinions of Brownlie, who expressed heavy disapproval with draft art 54:

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[325] 'ILC Report on 53d session (2001)' 128.
[326] 'ILC Report on 53d session' (2001) 126-27.
[327] 70 Draft art 54 [2000], 'Report of the Commission to the General Assembly on the work of its fifty-second session' 2000 UNYILC II [2].
[328] ILC, 'Summary records of the meetings of the fifty-third session 3 April–1 June and 2 July–10 August 2001' (2001) I UNYILC 41, at 49 [Pellet].
[329] ILC 'Summary records of the meetings of the fifty-second session 1 May–9 June and 10 July–18 August 2000' (2000) I UNYILC 305, at 31 [Simma].

> It provided a superficial legitimacy for the bullying of small States on the claim that human rights must be respected. Although article 54 referred only to non-forcible countermeasures, it would install a "do-it-yourself" sanctions system that would threaten the security system based on Chapter VII of the Charter of the United Nations. It added to circumstances precluding wrongfulness a new category that sooner or later might extend to the use of force. […] it was neither *lex lata* nor *lex ferenda*. Perhaps a new category would need to be invented for it: *lex horrenda*.[330]

Similar controversies arose when the draft article was put before the Sixth Committee, which will not be covered further in this work.[331]

In the end, art 54, named *Measures taken by a State other than an injured State*, was formulated as follows:

> This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Put differently, ARSIWA does not recognize the right of a third state to take countermeasures, but neither does it forbid the state from doing so. The commentary points out that although there are cases of countermeasures being employed for the public interest, state practice is sparse and involve only a limited number of actors. Thus, 'at present, there appears to be no clearly recognized entitlement of States […] to take countermeasures in the collective interest.'[332] Given the uncertainty, the ILC chose not to pass a verdict, but rather 'le[ft] the resolution of the matter to the further development of international law.'[333] Not everyone was however content with this resolution of the matter.

4.2.3 Silently Crossing the Rubicon of State Practice?

In 2001, the ILC left the question open as to the status of third-party countermeasures in international law. In the 20 years that have passed since, the political stalemate of the Security

[330] Ibid, 35 at (2) [Brownlie].
[331] For a summary of the debates before the Sixth Committee, see Martin Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 100ff, with references.
[332] 'ILC Report on 53d session' (2001) 139 at (6).
[333] Ibid at (7).

Council has resurfaced. Meanwhile, a unilateral Second Age of Sanctions can be considered to be ongoing. This inevitably brings to mind the question of whether international law has indeed developed to the extent that a permissive rule in customary international law can be considered to exist.

What is then required to establish such a rule? Customary international law is listed in the ICJ Statute as a primary legal source, which the ICJ shall apply, 'as evidence of a general practice accepted as law'.[334] That is to say, two different elements must be fulfilled for there to exist a rule of customary international law. The first element is objective and made up of state practice. States must *de facto* have followed a certain line of behavior before it can become legally binding. According to Henriksen, state practice of the kind must be consistent, widespread, and repeated over a period of time. The second element is the existence of a subjective *opinio juris*. It is not enough that states act in a certain way; the reason for their actions must be a belief that they are under a legal obligation to do so.[335] Yet, the International Law Association has deemed that provided the existence of sufficient state practice, *opinio juris* can be assumed, lest there are reasons to believe in a non-legal motive on the part of the sender state.[336]

In his *Third-Party Countermeasures in International Law,* Dawidowicz presents a thorough analysis of state practice on the topic. 21 cases are examined, spanning from the 1960s up until 2014.[337] The time period thereby overlaps with that examined by the ILC. Dawidowicz approaches each case in a similar methodical order. After establishing the existence of an initial wrongful act, he looks at the corresponding coercive act as such. The critical question is whether the measure was *prima facie* illegal in that the third state by its actions violated an international obligation.[338] As pointed out in pt. 1.3, these initial questions have largely fallen outside of the scope of this thesis.

If the enforcement measure is indeed *prima facie* illegal, the next step pertains to if and how it can be justified. Here, Dawidowicz works his way through and dismisses different options. In a majority of cases, all justifications but for a permissive rule in customary international law

[334] Art 38(1)(b).
[335] Henriksen, *International Law* (2019) 24ff.
[336] International Law Association, 'Final report of the committee – Statement of principles applicable to the formation of general customary international law' (London Conference 2000) pt III, pars 16-17.
[337] Dawidowicz, *Third-Party Countermeasures in International Law* (2017) at pt 4.1.
[338] Ibid, ch 4 generally.

are exhausted. Meanwhile, the states gave no indications of knowingly violating international law.[339] The last part is important, as the presumption advanced by the ILAs regarding *opinio juris* could potentially be applied – the states are assumed to have been under the impression that their actions were in accordance with international law since nothing indicate the contrary.[340]

Summarizing his findings, Dawidowicz dismisses the conclusions of the ILC. No – state practice is neither 'limited' nor 'embryotic', considering the high number of cases and sender states being located all across the world.[341] The category of third-party countermeasures is also needed to legally explain the perceived entitlement of third states. Dawidowicz concludes that 'the Rubicon [which divides custom from law] has been crossed silently, and without fanfare'.[342]

To conclude, the legal status of third-party enforcement is at present unclear. There are indications of a rule of customary international law developing, or having already developed, but this has not yet been acknowledged by the ILC or any other authoritative institution. In any case, any such third-party countermeasures would require a sufficient *iusta causa*. Furthermore, as long as the rules surrounding such *iusta causa* remain undefined, the risk of abuse will always have to be contended with.

[339] See ibid.
[340] ILA (London Conference 2000) pt III, pars 16-17.
[341] Dawidowicz, *Third-Party Countermeasures in International Law* (2017) 240ff.
[342] Ibid, 250ff.

5. Conclusions

In light of current events, this thesis has set out to trace the history of third-party enforcement in international law up until its place in the contemporary international legal order. The purpose of the thesis has been to outline the origin and permissibility of such measures, as seen in their historical context. Furthermore, the thesis has wanted to provide the reader with an understanding of why third-party enforcement has evolved to the form seen today. Finally, it has sought t to offer a clearer picture of the role and legitimacy of sanctions in contemporary international law.

During the writing process, a combination of critical method of legal history and an analytical legal method have been used. Rather than just presenting the material to the reader, it has been critically assessed throughout the thesis in order to find connections and parallels between the past and present.

With this purpose, two primary research questions were formulated (1 and 2). Each of the two then had three associated secondary questions (I–III). These questions have all strived to explore the *longue durée* of legal history, and how this corresponded to the situation today. However, in order to present the material in a structured and comprehensive way, a chronological-thematic outline has been used for the main text. In contrast, the present analysis will be presented in accordance with the research questions, hoping that the reader this way will find the answers already presented even clearer.

Question (1) has pertained mainly to the historical aspects of the thesis and reads as follows: *What role has third-party enforcement historically played in international law, leading up to its usage today?*

Secondary question (1.I) has then sought to establish *in what way the acceptability of war as a foreign policy tool reflected the constraints and expectations imposed on third states as to their involvement in the dispute.*

In the roughly 2000 years of history covered in this study, it is a remarkably small part where war has *not* existed as a legitimate tool of foreign policy. The first legal limitations of a

general nature on the subject emerged in the Middle Ages through the Just-War doctrine which had the dual heritage of natural and canon law. With the idea of the *iusta causa*, there existed – at least in theory – an objective way to judge which one of the two sides was waging a legal war. Supposedly, it would be possible also for outsiders to make this assessment. Adding religious teachings, third parties were not only encouraged to enforce the *iusta causa*, they were even morally obliged to do so. In practice, however, there were no rules preventing discriminations between the belligerents.[343]

In the Era of Positivism, the value-judgements and morality of natural law were replaced with the supreme will of the sovereign state. Despite writers like Grotius laying down rules on war, there existed no objective way of determining who was in the right during a dispute or conflict. If all third states could pick and choose which side to support based on subjective preference, chaos would likely have ensued. To rein in the destructiveness, stringent rules on third-party involvement were developed – the law of neutrality.

In the 20th century, the Pact of Paris and the Covenant of the League of Nations reintroduced objective indicators to distinguish between legal and illegal wars. With a general prohibition on the use of force under the UN and a codified definition of aggression, the choosing of sides did not have to be haphazard.[344] Today it is comparatively easy to determine when an aggression, formerly illegal war, has occurred. Sanctions of public opinion, i.e. the Stimson doctrine, is obligatory according to the Definition of Aggression. Assistance to the victim is explicitly endorsed in the same resolution. With the law of neutrality largely irrelevant, assistance in the form of supplies other than war materiel should thereby be considered more or less legally unproblematic.

In summary, the right, or even duty, of third states to interfere in international dispute has never been arbitrary. Legitimacy, and even more so permissibility, of third-party enforcement is dependent on the possibility of outsiders to, at least theoretically, judge the merits of the conflict. International law cannot accept that they enforce their subjective preferences; they have to enforce some kind of interest recognized or protected by the international community.

[343] See pt. 2.1.
[344] See pts. 2.4.1; 3.2.1.

Question (1.II) has explored *the shifts between unilateral- and collective action in third-party enforcement* as well as *their underlaying factors.*

Collective enforcement as here defined was born through the League of Nations. An attack on one was to be seen as an attack on all, with automatic economic sanctions as a consequence. Or at least that was the intention. All the same, even Medieval Just-War doctrine displays clear theoretically collective tendencies. In the absence of states in the modern sense, it was Christianity that united Europe. Good stood against evil, believers against the infidels. Coming together to defend sacred or eternal values was then, arguably, a duty. In contrast, the Positivist Era was clearly unilateral in nature.

Common values were also the basis for enforcement during the 20th century. Rather than religious teachings, peace and security were the goals emphasized in the inter-war period, prompted by the increased destructiveness of war. Mostly nothing came of the promises of collective security. However, the League's collective enforcement was not a failure per se; one cannot fail in what one does not see through. The cases of Manchuria and Abyssinia show that the member states of the League were unwilling to unleash the full arsenal of its economic weapon and exposing themselves to a full-scale war.

Under the United Nations, collective enforcement was also centered around international peace and security. The bipolar world and political considerations during the Cold War often prevented the Security Council from acting. It was only when the United States became the only remaining superpower of the P-5 that it could lead the Security Council through the Age of Sanctions. During this period, policy-objectives of enforcement included also human rights and democratic values. Russia and China would in time halter this development.

Enforcement on the basis of democracy and human rights did however not stop here. Rather, enforcement became unilateral. Economic sanctions are today an important part of EU and US foreign policies, taking place outside of an organized framework where the target state is a member. A general sense of (Western) community still persist, as these states can gather around the same value judgements, and often coordinate their sanction regimes.

In short, collective enforcement comes about in periods when states can gather around common values or interests. Together, they can then protect what they have in common

against actors perceived as posing a threat against the same. Notwithstanding, a scheme of collective enforcement risks failing if the belief of the members in the protected interest is not strong enough. Failure is also a possibility where there is disagreement as to what the community is really enforcing. Lastly, collective enforcement is doomed whenever a state, faced with a proverbial battle where it is not in the direct line of fire, asks for whom the bugle calls – convinced it is not calling for him.

Question (1.III) has inquired into *when and why third-party economic sanctions came to be more widely used.*

Economic sanctions are a reasonably recent phenomenon. During the 18th and 19th century, the mentality of positivism and the practicalities of neutrality effectively precluded their usage. Generally, a third-party was expected to observe complete impartiality between the belligerents. Breaches of neutrality meant exposing oneself to an armed attack, regardless of never having fired a single shot.

It was only in the inter-war period that economic sanctions received a tentative acceptance. During the Budapest Conference, the ILA interpreted the Pact of Paris as including a right for signatories to implement unilateral sanctions in response to a breach. Collective enforcement under the League furthermore relied heavily upon the economic weapon. However, the mentality of economic sanctions as an act of war would linger; the League was unwilling to risk war with Italy in 1935, whereas Japan responded to the far-reaching US sanctions with an armed attack in 1941.

Economic sanctions therefore received a wider usage only in the latter part of the 20th century. To reflect this, the period of increased Security Council activity around c. 1990-2005 has here been referred to as the Age of Sanctions. However, since 2005 – despite renewed Security Council polarization – the number of sanction regimes has increased even further, many of which are unilateral.

I believe this recent development is largely due to two factors. Firstly, through the prohibition on the use of force in art 2(4), economic measures suddenly became the most powerful enforcement tool available to individual states, unless they were prepared to flagrantly violate the UN Charter. Whereas the Security Council could use force, given their mandate and

principles, it is nonetheless likely they felt compelled to exercise restraint in this respect. Secondly, the moralization of international law has led to an internationalization of issues formerly within the sphere of state sovereignty. In the Age of Sanctions, a general belief was born that values like human rights could and should be enforced. A less idealistic interpretation is that said belief largely comes from civil society putting pressure on political institutions. Economic sanctions are then reasonably low-cost; they convey a message of a state 'doing something' while also avoiding a deeper level of involvement.

Finally, it has to be recognized that whereas all states are equal, some appear to be more equal than others as far as sanctions are concerned. Sanctions are widely used by Western states, namely the US and the EU, whereas target states are often non-western. The US has often used their veto to protect its ally, Israel. Sharp criticism along the lines of the West merely trying to impose their values on the rest of the world has been voiced. Being a thesis of law and not of political science, only a brief remark will here be made. It is not a coincidence that Europe has been the geographical center of this thesis – Europe is where international law was born and shaped into what it is today.

Moving on, research question no. (2) has highlighted more recent issues, but as seen in their historical context: *Do discrepancies exist between the role attributed to third-party enforcement by modern international law, and the legal and factual reality of international law at large?* In this process, secondary question (2.I) has focused on *how the shift from an international law of coexistence to one of cooperation have affected enforcement related issues*.

During the 20th century, the nature of international law changed drastically. This development is aptly described as a paradigm shift from a law of cooperation emphasizing state sovereignty, to one emphasizing the importance of the international community through multilateralism and individual human rights. However, even if the material scope of international law widened, the foundations it was built on did not. Seen not in the least through ARSIWA as a codification, there still exists a strong assumption of bilateral enforcement. This is out of tune with a legal reality built largely on multilateral concerns.

This discrepancy becomes especially problematic in the field of human rights law, where individuals are the beneficiaries. Here, there exists no injured state competent to enforce its

rights according to the bilateral model. Neither is it plausible that a group of more or less disorganized individuals would be more powerful than the state whose jurisdiction they are under. They will thereby lack a *de facto* possibility of helping themselves. Even if they did have such power, the status of the individual as a subject of international law is both weak and highly controversial.

In other words, international law has rapidly developed in a direction incompatible with its roots as a decentralized legal system where the assumed model of enforcement is self-help. In order to realize this changed nature – especially regarding human rights – when states refuse to comply with their respective obligations, third-party enforcement in some shape or form will be necessary.

Question (2.II) has concerned *the relevance of modern non-intervention as an impairment to third-party enforcement*.

Initially, it yet again must be emphasized that the historical roots of international law are made up of the sovereign state, and it was with the sovereign state at center-stage that it developed. Despite the paradigm shift experienced since 1945, this foundation has not changed. The tree has not been uprooted; rather, the attempts to reform international law have consisted of adding new, often artificial branches, and to remove those in clear contradiction to the current legal consciousness.

The principle of non-intervention, and the corresponding sovereign rights of states, have thus been curtailed, but certainly not abolished. Rather, today their meaning enjoys a solid foundation in written documents such as the Friendly Relations Declaration. All use of armed force, and even economic force, is forbidden.

Despite this, the use of unilateral sanctions is today widespread, often motivated by the sender state's desire to change the internal policies of the target-state. Two main explanations are possible – either there exists an exception whenever the policy-objective of the sender state represents a sufficient *iusta causa*; alternatively, sender states are disregarding or misinterpreting the rules.

Anyhow, non-intervention remains important – not as a practical impairment, but as a strategical one. States who, for various reasons, are opposed to third-party enforcement can always base their arguments on non-intervention. By claiming that e.g. a sanction regime constitutes economic coercion and/or is a violation of the target-state's sovereign rights, it is possible to delegitimize the unilateral measures. This thesis has provided examples such as the way in which Russia and China motivated their vetoes faced with the Syrian conflict, and in the ILC debate regarding third-party countermeasures.

Finally, question (2.III) has dealt with the controversial issue of *whether there exists a permissive rule of third-party enforcement in international law.* The thesis has never aspired to provide an answer, but rather to *highlight the arguments surrounding such an existence in customary international law.*

Pt 4.2.1 has established that any such rule would need to be based on a legitimate policy-objective – a modern *iusta causa*. In order to distinguish such justified cases from unacceptable economic coercion, a certain 'legitimacy indicator' was provided in the Secretary General's report. Unilateral measures would, according to the report, require a clear violation of universally accepted rules of international law. ILC labored with such an exception when codifying customary international law on state responsibility, but in the end opted for a 'saving clause', motivating it by limited support in state practice.

Picking up where the ILC left off in 2001, Dawidowicz inquired into whether a rule of third-party countermeasures – as he referred to them – had not yet developed in customary international law by 2017. Reaching the opposite conclusion from the ILC, Dawidowicz found that state practice on the subject was both frequent and widespread. Neither did the sender-states appear to knowingly disregard international law, potentially meaning that *opinio juris* would not have to be fully established but could instead be assumed. According to Dawidowicz, much then indicated that there was indeed a permissive rule of third-party countermeasures in customary international law.

Just as the unwritten rules in international law of yesteryear were vague, so is modern customary international law. Dawidowicz might very well be right; sanctions have after all become much more common today than they were at the time of ILC adopting the draft articles of ARSIWA. Regardless, one can question what difference it would really make. As

long as the existence is not confirmed by an authoritative power, e.g. the ICJ or the General Assembly, both sides can claim plausible deniability. Sender states can justify economic sanctions on humanitarian or otherwise moral grounds, whereas target states and other informal stakeholders can point to non-intervention and *lex horrenda*. After all, if no tangible proof of Julius Caesar's crossing of the Rubicon could be found – did it really happen?

To round off this work, I would like to offer some slightly more personal concluding remarks.

During the months of my thesis writing, the conflict – war – in Ukraine has dragged on. Ukraine has received support through war materiel. The Russian economy is struggling under the sanctions. Nonetheless, the war continues.

Here, the threads of the past and present intertwine. Russia is exercising what would once have been a legitimate form of foreign policy. Just like Medieval just war, the European and even international community has united in enforcing what they consider to be an *iusta causa.* Only, rather than religious dogma, the modern *iusta causa* expresses moral judgements, enshrined in various international conventions and other documents. Not clearly siding with Ukraine – remaining indifferent – risks being interpreted as silently approving Russia's aggression. The sanctions may or may not be legal under international law, but just like Japan in 1941, it is doubtful whether Russia is playing by the same rules. Sweden and Switzerland have for a long time been clinging to their neutrality – whatever that means in this day and age – but Sweden now appears to be on the verge of renouncing any such title, as joining NATO would certainly mean picking a side. But then, the West has already picked sides. Faced with Russia's imperialistic visions, Europe never sent to know for whom the bugle called, because it was calling for them all.

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