

Consequences of the support given by Western States to Ukraine in the Conflict against Russia

Teodoro Lüscher

Student number: 4815971

Supervised by: Dr Alessandra Spadaro

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I. Introduction

1. The Prohibition of the Use of Force and the Role of the United Nations

In the post-World War II era, aggression and the use of force have been prohibited by the Charter of the United Nations (UN Charter)¹ via a collective security system led by the UN Security Council. The prohibition is enshrined in Article 2 (4) of the UN Charter in its conventional form and it has been considered by the International Court of Justice (ICJ) as a customary rule and cornerstone of the UN Charter.² This prohibition under the Charter refers to the use of armed or military forces between States.³ The most common justification for the use of force would be self-defence present in Article 51 UN Charter. Self-defence is lawful only when a grave incident of armed forces occurs⁴ and if the act of self-defence respects necessity and proportionality.⁵ Through the UN Charter the multilateral system of collective self-defence was created under Chapter VII to centralize the use of force and assure an enforcement mechanism.⁶

The Security Council has a central role in cases of threat to the peace, breach of the peace, or act of aggression⁷ and the primary responsibility for the maintenance of peace according to Article 24 UN Charter. Aggression is defined by the UN General Assembly Resolution 3314.⁸ The Security Council determines the existence of aggression and makes legally binding resolutions with measures on the matter through Chapter VII UN Charter. To adopt a resolution on the existence of aggression, a decision has to be adopted by at least nine of the fifteen Members of the Security Council and without a negative vote of one of the five Permanent Members.⁹ The Security Council does not have, however, the exclusive authority

¹ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 2 (4).

² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, para 73; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986*, p. 14, paras 187-190; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C.J. Reports 2004*, p. 136, para 87; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, para 148.

³ Oliver Dörr, 'Use of Force, Prohibition Of' in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedias of International Law [MPIL]* paras 11-14, 25 <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e427?print=pdf>>.

⁴ *Military and Paramilitary Activities in and against Nicaragua, Merits*, paras 195, 211.

⁵ *Military and Paramilitary Activities in and against Nicaragua, Merits*, paras 194, 237; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 41.

⁶ Dörr (n 3) para 8; Christine Gray, 'The UN and the Use of Force', *International Law and the Use of Force* (4th edn, 2018) 262 <<https://opil-ouplaw-com.proxy.library.uu.nl/display/10.1093/law/9780198808411.001.0001/law-9780198808411-chapter-6?prd=OPIL>> accessed 23 June 2023; Nico Schrijver, 'The Ban on the Use of Force in the UN Charter' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2015) 469 <<https://opil-ouplaw-com.proxy.library.uu.nl/display/10.1093/law/9780199673049.001.0001/law-9780199673049-chapter-22?prd=OPIL>> accessed 23 June 2023.

⁷ UN Charter, Article 39.

⁸ UN General Assembly, *Definition of Aggression*, 14 December 1974, A/RES/3314.

⁹ *Ibid* Article 27 (3).

to produce resolutions on matters of security and peace,¹⁰ also the General Assembly can express itself on the matter through a non-binding resolution according to Article 14 UN Charter. What is even more relevant is that the General Assembly following the Uniting for Peace Resolution¹¹ can adopt a resolution when the Security Council is blocked by a veto and recommend measures. In this situation, the Security Council will adopt a resolution that activates the General Assembly. Procedural matters like this one are not subject to the veto of a Permanent Member according to Article 27 (2) UN Charter and thus Permanent Member cannot efficiently oppose this procedure.

Russia and Ukraine were already engaged in an armed conflict since 2014 with the occupation of Crimea and the support of rebel forces in Donbas by Russia.¹² In February 2022 Russian troops were seen on the border with Ukraine and in Belarus in what was the biggest deployment since the Cold War.¹³ Eventually on the 24th of February Putin announced the beginning of a special military operation consisting in practice of a full-scale land, sea, and air invasion of Ukraine.¹⁴

In the United Nations context, Russia used its veto power as a Permanent Member on the draft resolution condemning the aggression against Ukraine.¹⁵ The General Assembly subsequently adopted, with a large majority, a resolution denouncing Russian aggression and use of force.¹⁶ This demonstrates a condemnation of Russia's actions and shows vast support for Ukraine. In addition to diplomatic and political support, States began to export weapon supplies and other support to Ukraine in the last 18 months. This support is at the centre of the thesis as it has consequences for States regarding the law of neutrality and party status in the conflict with Russia. This leads to the research question:

To what extent does the support of Western States to Ukraine breach the law of neutrality and make those States parties to the armed conflict between Russia and Ukraine?

2. Methodology and Scope of the Thesis

To answer the research question the methodology used is of evaluative and descriptive nature. The goal is to first analyse how the law of neutrality applies

¹⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C.J. Reports 2004, p. 136, para 26.*

¹¹ UN General Assembly, *Uniting for peace*, 3 November 1950, A/RES/377.

¹² Global Rights Compliance, 'International Law and Defining Russia's Involvement in Crimea and Donbass' (13 February 2022), pp. 336-342.

¹³ Center for Preventive Action, 'War in Ukraine' *Global Conflict Tracker* <<https://cfcr.org/global-conflict-tracker/conflict/conflict-ukraine>> accessed 23 June 2023.

¹⁴ *Ibid.*

¹⁵ UN General Assembly, *Aggression against Ukraine*, 2 March 2022, A/RES/ES-11/1.

¹⁶ *Ibid.*

in the absence of a Security Council resolution and determine if an intermediate or new status emerged in this context according to customary international law. To tackle this, a legal desk research method is used to analyse what the legal frameworks are, and which norms apply and represent the reality of applicable law. The focus is on the support provided and its implications for the law of neutrality and the possibility to become parties to the conflict for States providing this support to Ukraine. I will mostly confront primary legal sources, authoritative interpretations and State practice that formed relevant *opinio juris* on the matter.

For what concerns the law of neutrality, the principal instruments are the Hague Convention V and XIII,¹⁷ and how States applied them or acted as non-parties in armed conflicts. Regarding the possibility of becoming parties to the international armed conflict (IAC), the Geneva Conventions¹⁸ and the Commentary of the International Committee of the Red Cross (ICRC),¹⁹ in addition to other interpretative publications, have been the main sources. Those legal bases have been then confronted with the facts in Ukraine and the specific support provided.

An analysis of the possible justifications for potential violations of the prohibition of the use of force and breaches of neutrality, specifically Article 51 UN Charter²⁰ and Article 21 ARSIWA,²¹ will not be present in this thesis. In fact, the thesis aims at identifying violations of the law of neutrality and the party Status according to International Humanitarian Law (IHL), rather than the existence of circumstances precluding wrongfulness. Another limit of the scope of the thesis concerns the fog of war; indeed, this is an ongoing conflict characterised by a heavy information war from both sides.

The study case of Ukraine is particularly relevant because States do not hide their material support, which includes the transfer of heavy weapons and the sharing of military intelligence, on the contrary, they promote it. This is very different from how neutral States acted, for example, during the Iran-Iraq War. The relevance of this case study is underlined as well by the clear act of aggression which questions the law of neutrality and in particular the duties of neutral States faced with an evident aggressor and a victim. The literature thus far mostly defended the possibility to discriminate against Russia indeed because the aggression is evident and the inability of the Security Council to act is caused by Russia. It is argued, however, that a traditional approach to the application of the

¹⁷ International Conferences (The Hague), *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907; International Conferences (The Hague), *Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War*, 18 October 1907.

¹⁸ ICRC, Geneva Conventions, 12 August 1949.

¹⁹ ICRC Database, Treaties, States Parties and Commentaries, Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Commentary of 01.01.2020.

²⁰ United Nations, Charter of the United Nations, Article 51.

²¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA), November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 21.

law of neutrality should prevail. The fact that we are facing evident aggression should not be an excuse to disregard the law of neutrality and the fact that there are high chances that, following some types of support, certain Western States are today parties to the IAC against Russia. The current conflict should be used in the future as a starting point to modify and improve the collective security system to deal with these situations and to update the law of neutrality.

Chapter II analyses in detail the factual issues in the IAC in Ukraine underlining the legal aspects and the main challenges related to the support provided, in addition to briefly explaining the separation between the law of neutrality, *jus ad bellum* and IHL. It is fundamental to keep in mind this separation as the support provided has different consequences under the different bodies of law.

Chapter III provides the law of neutrality's legal framework analysing the traditional approach and the debated status of qualified neutrality according to post-World War II practice. Here I will tackle the sub-questions "do neutral States have a duty to apply traditional neutrality in the absence of a Security Council resolution identifying an aggressor?" and "did an intermediate status of 'qualified neutral' emerge in State practice?". Furthermore, the consequences of violations of the law of neutrality will be discussed as the concrete implications for the conflict in Ukraine. This chapter thus answers the first part of the research question on the violations of the law of neutrality.

Chapter IV will answer the second part of the research question related to the co-belligerency status of certain supporting States. After an overview of the different possible approaches to consider a State as participating in an ongoing armed conflict the focus shift to the importance of how this support is integrated into the hostilities and the directness of support on the impact on both belligerents respectively. This chapter ends with an evaluation of the support provided on the field in the last year of the conflict.

II. Legal and factual issues in the war in Ukraine

1. The current situation in Ukraine

Since 2014 Ukraine and Russia are engaged in an IAC, after Russia's use of force in Crimea,²² which escalated in February 2022 with large-scale Russian

²² RULAC, 'International armed conflict in Ukraine' (Geneva Academy of International Humanitarian Law and Human Rights); Council on Foreign Relations, 'Conflict in Ukraine' (*Global Conflict Tracker*); Human Rights Watch, 'World Report 2015' (2015), p. 571; The Office of the Prosecutor of the ICC, 'Report on Preliminary Examination Activities (2016)' (14 November 2016), para. 158; Geneva Academy, 'Armed Conflicts In Ukraine: Updates On Our RULAC Online Portal' (23 July 2020); Human Rights Watch, 'Questions and Answers: Russia,

aggression.²³ In the following months Ukraine managed to reconquer parts of its territory, discovering also evidence of war crimes,²⁴ achieving the liberation of half of the Russian-occupied territory by the end of the year.²⁵ Currently an important counteroffensive is underway to push Russian forces outside Ukraine. This is possible thanks to the support provided by the Western States.²⁶ These States decided to supply Ukraine with military material²⁷ avoiding, however, entering the conflict.²⁸ The material provided includes defensive air systems such as the Patriot missile system,²⁹ large amounts of infantry equipment such as anti-armour systems, body armour, Stinger missiles, and also ammunition, grenades and artillery pieces in addition to the vast provision of drones.³⁰ In a second moment, States decided and committed to the provision of more heavy weapons such as tanks and howitzers on top of the HIMARS system which allow Ukraine to move on to the offensive targeting with precision far away objectives.³¹ Another important support consists in the sharing of military intelligence used by Ukraine in the hostilities. The States exporting are the European Union as an organization, and then individually, the United States, Australia, Belgium, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, United Kingdom.³² There has been a shift in the support provided, in fact at first the weapons provided were defensive to strengthen Ukraine's ability to stop the invasion, in a second moment States began

Ukraine, and International Humanitarian and Human Rights Law' (21 March 21), pp. 352-353 cited in Global Rights Compliance (n 11) p. 13.

²³ Ibid; Visual Journalism Team, 'Ukraine Conflict: Simple Visual Guide to the Russian Invasion' *BBC News* (24 February 2022) <<https://www.bbc.com/news/world-europe-60506298>> accessed 16 February 2023.

²⁴ Michael Ray, 'Russia-Ukraine War | Casualties, Map, Causes, & Significance | Britannica', *Encyclopedia Britannica* (2023) <<https://www.britannica.com/event/2022-Russian-invasion-of-Ukraine>> accessed 26 June 2023.

²⁵ Center for Preventive Action (n 13).

²⁶ Ray (n 15).

²⁷ Claire Mills, 'Military assistance to Ukraine since the Russian invasion', UK Parliament (25 January 2023).

²⁸ See e.g. for Germany: Stefan Talmon, 'Waffenlieferungen an die Ukraine als Ausdruck eines wertebasierten Völkerrechts' (*Verfassungsblog*, März 2022) <<https://verfassungsblog.de/waffenlieferungen-an-die-ukraine-als-ausdruck-eines-wertebasierten-volkerrechts/>> accessed 31 January 2023.

²⁹ David Brown, Jake Horton and Tural Ahmedzade, 'Ukraine Weapons: What Tanks and Other Equipment Are the World Giving?' *BBC News* (1 July 2022) <<https://www.bbc.com/news/world-europe-62002218>> accessed 22 June 2023.

³⁰ Joseph Gedeon, 'The Weapons and Military Aid the World Is Giving Ukraine' [2022] *POLITICO* <<https://www.politico.com/news/2022/03/22/ukraine-weapons-military-aid-00019104>> accessed 22 June 2023; 'Pledged/Delivered Weapons to Ukraine' (Forum on the Arms Trade) <<https://www.forumarmstrade.org/ukraine-countries.html>> accessed 22 June 2023.

³¹ Kiel Institution for World Economy, 'Government Support to Ukraine: By Country Group, € Billion' 70 <https://app.23degrees.io/view/5V9AdDpw1pmLxo1e-bar-stacked-horizontal-figure-1_csv> accessed 24 May 2023; Brown, Horton and Ahmedzade (n 29).

³² 'Pledged/Delivered Weapons to Ukraine' (n 30).

to provide more offensive weapons and material to allow Ukraine to launch offensive attacks and push Russian forces outside Ukraine.³³

This IAC causes States and scholars to discuss the law of neutrality and its obligations, duties, and most importantly relevance in the post-World War II era.³⁴ In particular, the consequences of violation of the law of neutrality and the possibility to become party to the conflict worry States that are supplying Ukraine,³⁵ even though it is doubtful this latter would act against those States.³⁶ Regardless, a violation of neutrality does not automatically imply the outbreak of an IAC,³⁷ the existence of a conflict is determined on a factual basis stemming from the hostile use of armed forces between States.³⁸

It is clear that Russia acted in violation of the prohibition of the use of force under Article 2 (4) UN Charter and committed an act of aggression as defined in Article 3 of Resolution 3314 invading Ukraine with its armed forces.³⁹ Despite the fact that the Security Council was not able to issue a resolution on the matter, the General Assembly based on its Resolution Uniting for Peace defined Russia's actions as aggression and a violation of the prohibition on the use of force.⁴⁰ This resolution has been adopted by a majority of 141 States out of a total of 193 Member States. The States that voted against are notably Russia and its closest

³³ Jonathan Masters and Will Merrow, 'How Much Aid Has the U.S. Sent Ukraine? Here Are Six Charts.' [2023] *Council on Foreign Relations* <<https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts>> accessed 22 June 2023.

³⁴ Markus Krajewski, 'Neither Neutral nor Party to the Conflict?: On the Legal Assessment of Arms Supplies to Ukraine' [2022] *Völkerrechtsblog* <<https://voelkerrechtsblog.org/de/neutral-nor-party-to-the-conflict/>> accessed 31 January 2023. ; Raul (Pete) Pedrozo, 'Ukraine Symposium - Is the Law of Neutrality Dead?' (*Articles of War*, 31 May 2022) <<https://lieber.westpoint.edu/is-law-of-neutrality-dead/>> accessed 31 January 2023. Michael N Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (*Articles of War*, 7 March 2022) <<https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>> accessed 31 January 2023.; Hitoshi Nasu, 'The Future Law of Neutrality' (*Articles of War*, 19 July 2022) <<https://lieber.westpoint.edu/future-law-of-neutrality/>> accessed 30 January 2023.

³⁵ Kai Ambos, 'Wird Deutschland durch Waffenlieferungen an die Ukraine zur Konfliktpartei?' [2022] *Verfassungsblog* <<https://verfassungsblog.de/wird-deutschland-durch-waffenlieferungen-an-die-ukraine-zur-konfliktpartei/>> accessed 8 February 2023.; Kai Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and Thus Be Exposed to Countermeasures?' (*EJIL: Talk!*, 2 March 2022) <<https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/>> accessed 31 January 2023. ; Jack Detsch and Robbie Gramer, 'Biden Administration Debates Legality of Arming Ukrainian Resistance' (*Foreign Policy*, 24 February 2022) <<https://foreignpolicy.com/2022/02/24/biden-legal-ukraine-russia-resistance/>> accessed 8 February 2023.

³⁶ Scott Anderson stating, 'How far is Russia willing to push the argument that the United States or Europe are making themselves part of the conflict in arming the Ukrainians?' in Detsch and Gramer (n 35).

³⁷ Kevin Jon Heller and Lena Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' (2022) 13 *Journal of International Humanitarian Legal Studies* 251, 264 <https://brill.com/view/journals/ihls/13/2/article-p251_004.xml> accessed 4 May 2023.

³⁸ ICRC, Common Article 2 to the Geneva Conventions, 12 August 1949; ICRC Database, Treaties, States Parties and Commentaries, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Commentary of 01.01.2016, Article 2, para. 209.

³⁹ UN General Assembly, *Definition of Aggression*, Article 3 (a).

⁴⁰ UN General Assembly, *Aggression against Ukraine*.

allies: Belarus, Eritrea, Syria, and North Korea.⁴¹ Although the General Assembly resolution does not have a strict legal value, the large number of States that have voted in favour of the resolution and their unwillingness to accept Russia's justifications for the use of force in the face of the facts⁴² leads to the conclusion that Russia has committed a new act of aggression against Ukraine in February 2022.⁴³

2. The separation between the law of neutrality, IHL and *jus ad bellum*

In the context of this thesis, it is vital to distinguish between the law of neutrality, *jus ad bellum*, and IHL in considering which actions are lawful under these bodies of law.

The law of neutrality is a body of law that provides for the obligations and rights of third-party States in a conflict. As explained in more detail in the next chapter, neutrality has customary status and is still relevant today. States at the same time are bound by the prohibition of the use of force which in turn has customary and *jus cogens* value⁴⁴ and is enshrined in Article 2 (4) of the UN Charter.

These are two distinct obligations and a violation of one does not entail a violation of the other one. For example, imposing discriminatory economic sanctions on a belligerent consists of a violation of the law of neutrality, however, it is not considered to amount to the use of force in violation of Article 2(4) UN Charter.⁴⁵ If neutral States forcibly supported the victim of aggression officially designed by the Security Council, the acts of the former would be contrary to the law of neutrality but not a breach of the prohibition on the use of force because the neutral State has the right to claim collective self-defence under Article 51 of the UN Charter under certain circumstances.⁴⁶ These circumstances have been described as customary international law by the ICJ, and are the presence of an armed attack against a State, the State has to declare itself as a victim of such attack and issue a request for intervention.⁴⁷ Collective self-defence cannot justify

⁴¹ United Nations General Assembly, 'Aggression against Ukraine :: Resolution /: Adopted by the General Assembly' <<https://digitallibrary.un.org/record/3959039>> accessed 6 June 2023.

⁴² Michael N Schmitt, 'Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense' (*Lieber Institute West Point*, 28 February 2022) <<https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>> accessed 13 February 2023.

⁴³ UN General Assembly (n 10); Talmon (n 28) ; André de Hoogh, 'The Elephant in the Room: Invoking and Exercising the Right of Collective Self-Defence in Support of Ukraine against Russian Aggression' (*Opinio Juris*, 7 March 2022) <<http://opiniojuris.org/2022/03/07/the-elephant-in-the-room-invoking-and-exercising-the-right-of-collective-self-defence-in-support-of-ukraine-against-russian-aggression/>> accessed 10 February 2023.

⁴⁴ *Military and Paramilitary Activities in and against Nicaragua Merits, Judgment*, paras. 187-190.

⁴⁵ Dörr (n 3) para 12.

⁴⁶ Michael Bothe, 'Neutrality, Concept and General Rules' in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedias of International Law* (2015) para 29.

⁴⁷ *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment*, paras. 195, 196, 199.

a breach of neutrality as it refers to the use of force exclusively.⁴⁸ Another example would be a neutral State airlifting troops of the victim of aggression to the theatre of war. Also in this case, the action is a violation of neutrality, however, the act would justify the assistance under *jus ad bellum* via collective self-defence if the circumstances previously listed exist.⁴⁹ The distinction between the victim and the aggressor remains insignificant for the law of neutrality to fulfil its purpose to limit the spread of hostilities and evaluate acts of neutral States.⁵⁰

The law of neutrality is also separated from the termination of the neutral status that leads to becoming a belligerent.⁵¹ In fact, a State's status as a co-belligerent is connected to its participation in the armed conflict, rather than being solely defined by the law of neutrality.⁵² Linking the status of a State as a party to the armed conflict with violations of neutrality is not wrong per se, violations of neutrality can lead a State to become party to a conflict, but what is important is the neutral States act and not the fact this act is a violation of neutrality.

A distinction is due between *jus ad bellum* and IHL as well. IHL determines the beginning of an armed conflict⁵³ and applies to all belligerents without discrimination. Indeed, it does not matter if the use of force is lawful or not under *jus ad bello*: IHL will apply to both parties.⁵⁴ This is true even if the two parties have military or other inequality or if one does not respect IHL.⁵⁵ The principle of equal application of IHL has, for example, no effect on Russia's obligation to respect the prohibition of the use of force.⁵⁶ At the same time, when parties to the conflict, States can lawfully use force against military objectives belonging to the opposite party.⁵⁷

It is important to underline that the same support can have different repercussions and consequences under the different legal regimes. This means that those consequences are intertwined but not necessarily connected. In the next chapters, I will discuss firstly the consequences of this support under the law of neutrality and in the third chapter under IHL, concerning party status.

⁴⁸ In this case, a violation of neutrality would be arguably justified by Article 21 ARSIWA.

⁴⁹ Luca Ferro and Nele Verlinden, 'Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties' (2018) 17 Chinese Journal of International Law 15, para 36 <<https://doi.org/10.1093/chinesejil/jmy011>> accessed 15 February 2023.

⁵⁰ Bothe (n 46) para 29.

⁵¹ Lassa Francis Lawrence Oppenheim and Hersch . Lauterpacht, *International Law: A Treatise. Vol. II, Disputes, War and Neutrality* (7th ed. edited by H. Lauterpacht, Longmans, Green and Co 1952) 672, 752.

⁵² Heller and Trabucco (n 37) 264.

⁵³ ICRC (n 21), paras. 209-210.

⁵⁴ ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, Preamble para. 5, Article 39 (3) (c); ICRC (n 21), para. 42; ICRC Database, Commentary of 01.01.2016, Convention (I), para. 186.

⁵⁵ ICRC Database, Treaties, Commentary of 01.01.2016, Convention (I), para. 187-188.

⁵⁶ Michael N Schmitt, 'Ukraine Symposium - Are We at War?' (*Lieber Institute West Point*, 9 May 2022) <<https://lieber.westpoint.edu/are-we-at-war/>> accessed 4 May 2023.

⁵⁷ ICRC, *Additional Protocol I*, 8 June 1977, Article 52 (2).

III. Law of neutrality

1. Introduction

The law of neutrality is an old set of rules very relevant in a world where war was a lawful instrument to conduct one State's policies and agenda through military force.⁵⁸ Neutrality describes the status adopted by States who do not take part in an armed conflict and differentiates them from belligerents.⁵⁹ This body of law aims to avoid States becoming involved in the conflict and it can be summarized in three principles: abstention, impartiality, and prevention.⁶⁰

Neutral States must abstain from supplying war material to belligerents⁶¹ and from supporting a party to the conflict. Even if some authors provide for a very strict definition of "war material",⁶² this includes weapons, ammunition⁶³ and material which has a mainly military purpose.⁶⁴ Abstention implies as well a prohibition to support through loans a belligerent.⁶⁵ The transfer of financial aid, or services that could influence the conflict, such as intelligence sharing, is also considered as supporting a belligerent.⁶⁶

Under the law of neutrality, the principle of impartiality entails the prohibition to favour one belligerent, especially in trade.⁶⁷ The duty of impartiality means that neutral States must apply restrictive measures uniformly to both belligerents.⁶⁸ A neutral State cannot export weapons to both belligerents to bypass the impartiality requirement. Impartiality can also be described by the concept of *courant normal* according to which neutral States may maintain their commercial relations with

⁵⁸ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge University Press 2011) paras 207–211 <<https://www.cambridge.org/core/books/war-aggression-and-selfdefence/C800C83087F8FF1E10C8646E4055DB69>> accessed 5 May 2023; James Upcher, 'Neutrality, Non-Belligerency, and the Prohibition of the Use of Force', *Neutrality in Contemporary International Law* (2020) 9–10.

⁵⁹ Yves Sandoz, 'Part I Cross-Cutting Issues and Common Provisions, A Cross-Cutting Issues, Ch.5 Rights, Powers, and Obligations of Neutral Powers under the Conventions' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* 93 <<https://opil.ouplaw.com/display/10.1093/law/9780199675449.001.0001/law-9780199675449-chapter-5>> accessed 13 May 2023; H Ed Lauterpacht, *Disputes, War And Neutrality*, p 653 <<http://archive.org/details/in.ernet.dli.2015.459056>> accessed 31 January 2023.

⁶⁰ Ferro and Verlinden (n 49) paras 32–33.

⁶¹ Yoram Dinstein, 'The Laws of Neutrality' (1984) 14 *Isr YB Hum Rts* 80, p. 95.

⁶² Bothe (n 46) para 42.

⁶³ Interpretation of the International Conferences (The Hague), *Hague Convention (XIII)*, 18 October 1907, Article 6; Luca Ferro and Nele Verlinden (n 16), paras. 58-59.

⁶⁴ Erik Johannes Sakari Castrén, *The Present Law of War and Neutrality* (Academia Scientiarum Fennica 1954) 474.

⁶⁵ John Westlake, *International Law* (Cambridge, University pr 1907) 217 <<http://archive.org/details/internationallaw00westrich>> accessed 7 June 2023.

⁶⁶ Castrén (n 64) 474.

⁶⁷ Hague Convention (V), Article 9.

⁶⁸ James Upcher, 'The Duties and Rights of Neutrals', *Neutrality in Contemporary International Law* (2020) 74.

belligerents as they were doing in times of peace.⁶⁹ The only lawful discrimination is in the provision of humanitarian aid, according to Article 14 of the Hague Convention V, which provides that neutral States are authorized to allow the passage of sick and wounded of one of the parties.⁷⁰

Finally, the duty of prevention⁷¹ entails the defence of neutrality in that the neutral State has to prevent a party to the conflict from using the territory for belligerent acts and resources of the neutral State.⁷² There are two requirements in customary international law: the neutral State has knowledge of the violation of neutrality and it has to employ all means at its disposal to prevent belligerent actions.⁷³ Knowledge is defined by the fact that the State has actual or constructive notice.⁷⁴ This is in line with the concept of knowledge adopted by the ICJ in the *Corfu Channel* case where it was stated that States have the obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States”.⁷⁵ In acting, a neutral State shall use all the means at its disposal and thus its capacities must be evaluated and, subsequently, their use must be evaluated as well.⁷⁶

Security Council Resolutions may restrict trade between neutral and belligerent States for example imposing an embargo.⁷⁷ In the case of Security Council imposed measures which will entail discrimination against one belligerent, States have to act in accordance with those measures even if those are contrary to the law of neutrality.⁷⁸ In fact, according to Articles 48 and 103 UN Charter duties from the Charter prevail over other obligations. Nevertheless, even with authorization by the Security Council, it is important to distinguish between “enforcement measures *stricto sensu* undertaken by the United Nations under the direction of the UN Security Council”⁷⁹ which would limit the possibility to adopt strict impartiality and “military operations undertaken by one or more States and authorized by the UN Security Council (...)”.⁸⁰

⁶⁹ Ibid 76.

⁷⁰ Hague Convention (V), Article 14.

⁷¹ See inter alia, Hague Convention (XIII), Article 8; Hague Convention (V), Article 5.

⁷² Bothe (n 46) para 2; Upcher, ‘The Duties and Rights of Neutrals’ (n 68) 89.

⁷³ Upcher, ‘The Duties and Rights of Neutrals’ (n 68) 90.

⁷⁴ Tal Becker, John Cairns Jr and Olivia Robinson, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Bloomsbury Publishing Plc 2006) 134
<<http://ebookcentral.proquest.com/lib/uunl/detail.action?docID=1772528>> accessed 5 June 2023.

⁷⁵ *Corfu Channel case, Judgment of April 9th*, 1949: *I.C.J. Reports* 1949, p. 4, p. 22

⁷⁶ Upcher, ‘The Duties and Rights of Neutrals’ (n 68) 91.

⁷⁷ Ferro and Verlinden (n 49) para 43.

⁷⁸ Marco Sassòli, ‘IHL and Other Branches of International Law’, *International Humanitarian Law: rules, controversies, and solutions to problems arising in warfare* (Edward Elgar Publishing 2019) s 9.133
<<https://www.elgaronline.com/display/9781786438546/ch09.xhtml>> accessed 23 May 2023.

⁷⁹ Michael Bothe, ‘Neutrality, Concept and General Rules’ in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedias of International Law* (2015) para. 10.

⁸⁰ Ibid, example of Iraq in 2003: on one hand the authorization to use force in collective self-defence against Iraq which does not consist in a duty to act and on the other hand non-forcible measures imposed on all State Members.

A fundamental change in the philosophy of neutrality emerged in the context of World War II as a consequence of the crystallization of the prohibition of the use of force in the UN Charter, already outlawed by the Kellogg-Briand Pact in 1928.⁸¹ Indeed, some authors believe that the traditional law of neutrality is less relevant and a new status of qualified neutral has been developed.⁸² Qualified neutrality allows States to stay neutral and at the same time discriminate in favour of States victims of aggression.⁸³

The Security Council has the authority to determine the existence of aggression and uncertainty emerges when it is blocked by a veto.⁸⁴ It is clear that allowing every State to determine the aggressor risks transforming this classification into a political instrument as both sides will justify their action as self-defence.⁸⁵ Qualified neutrality furthermore implies that the aggrieved belligerent has to accept being discriminated against without a Security Council pronouncement on the aggression, and thus without an authoritative and proper legal basis.⁸⁶

With the conflict in Ukraine, however, the debate about the evolution of neutrality and the existence of this intermediate status has been brought back. The discussion focuses on one hand on the relevance of a traditional approach according to which rules continue to apply notwithstanding the prohibition of the use of force. On the other hand, the focus is on qualified neutrality which allows neutral States to discriminate against Russia. After a deeper analysis of the legal framework of the law of neutrality, it is necessary to study both the traditional approach and qualified neutrality in this context.

⁸¹ Scott J. Shapiro and Oona A. Hathaway, *The Internationalists: How a Radical Plan To Outlaw War Remade The World*, 12 September 2017 cited in Scott J. Shapiro and Oona A. Hathaway, 'Supplying Arms to Ukraine Is Not an Act of War' (*Just Security*, 12 March 2022) <<https://www.justsecurity.org/80661/supplying-arms-to-ukraine-is-not-an-act-of-war/>> accessed 31 January 2023.

⁸² Philip C Jessup, 'Should International Law Recognize an Intermediate Status between Peace and War?' (1954) 48 *American Journal of International Law* 98, 103 <<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/should-international-law-recognize-an-intermediate-status-between-peace-and-war/CBE0B82BC64AE1C08174159FB756E28E>> accessed 15 May 2023.

⁸³ Department of Defense US, 'Department of Defense Law of War Manual' para 15.2.2 <<https://dod.defense.gov/Portals/1/Documents/pubs/DoDLawofWarManual-June2015UpdatedDec2016.pdf?ver=2016-12-13-172036-190>>.

⁸⁴ Wolff Heintschel Von Heinegg, 'Chapter 20. Benevolent Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality', *International Law and Armed Conflict: Exploring the Faultlines* (Brill | Nijhoff 2007) 557 <https://web-p-ebscobhost-com.proxy.library.uu.nl/ehost/ebookviewer/ebook/bmxlYmtfXzI1MjgwOV9fQU41?sid=8313b873-1842-4a11-85d6-ae2ea0a261a6@redis&vid=0&format=EB&lpid=lp_543&rid=0> accessed 30 January 2023.

⁸⁵ Wolff Heintschel von Heinegg, 'Neutrality in the War against Ukraine' (*Articles of War*, 1 March 2022) <<https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>> accessed 30 January 2023.

⁸⁶ *Ibid* 556.

2. Legal framework

a) Scope of application of the law of neutrality

The law of neutrality applies in the context of an IAC,⁸⁷ however, the relation between belligerent and neutral States requires a conflict of a certain duration and intensity to change and shift to one framed in the law of neutrality. This means that the law of neutrality becomes effective when it becomes meaningful to apply the legal limitations according to its object and purpose and not at every armed incident and skirmish.⁸⁸ A general threshold is hard to define but it is argued that a conflict between two States has reached a general state of hostilities when the hostilities continue for a certain prolonged period with a certain intensity of fighting.⁸⁹ Until the moment the threshold has been reached neutral States have not the obligation to enforce their duties, for example, to intern troops of one belligerent.⁹⁰ Furthermore, States do not need a declaration of neutrality to make the law of neutrality applicable.⁹¹ The relevance of the law of neutrality in the conduct of hostilities is determined by multiple factors.⁹² As hostilities escalate and spread, the rights and obligations of neutral States, as well as those of the belligerents, become more extensive as necessary.⁹³

b) Support prohibited by the law of neutrality

Neutral States' acts that enhance the military effort of a party to the conflict or influence this latter are violations of the law of neutrality.⁹⁴ The export of war material, military-purpose logistical support, and military advisors are covered by this prohibition.⁹⁵ The Hague Conventions V and XIII explicitly discharge States from preventing private persons to trade these goods,⁹⁶ however, the distinction between public and private trade is currently considered artificial⁹⁷ as most

⁸⁷ Constantine Antonopoulos, *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality* (Cambridge University Press 2022) 21–22 <<https://www.cambridge.org/core/books/nonparticipation-in-armed-conflict/CB9B143E277756AD5118D37FACD615CB>> accessed 10 May 2023.

⁸⁸ Bothe (n 46) paras 19–22.

⁸⁹ Georgios Petrochilos, 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality' (1998) 31 *Vanderbilt Journal of Transnational Law* 575, 605–606 <<https://scholarship.law.vanderbilt.edu/vjtl/vol31/iss2/6>>; Michael Bothe, 'The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th Edition, 2021) 609.

⁹⁰ Sassòli (n 78) s 9.134.

⁹¹ Bothe (n 46) para 21.

⁹² This concept will be analysed more in detail at the end of the section on traditional approach.

⁹³ Hitoshi Nasu, 'The End of the United Nations?: The Demise of Collective Security and Its Implications for International Law', *Max Planck Yearbook of United Nations Law Online*, vol 24 (Brill Nijhoff 2021) 130 <https://brill.com/view/journals/mpyo/24/1/article-p110_5.xml> accessed 14 February 2023.

⁹⁴ Castrén (n 64) 474; Heinegg (n 84) 565.

⁹⁵ Hague (XIII), Article 6

⁹⁶ Hague (XIII), Article 7; Hague (V), Article 7.

⁹⁷ Bothe (n 46) paras 39–40.

authors and States advocate for a duty of prevention regarding the export by private actors as well.⁹⁸ This follows also private industries' obligation to obtain a license to transfer weapons.

It is more difficult to find agreement on the provision of financial support.⁹⁹ It would seem logical that providing financial support is a non-neutral service¹⁰⁰ as support would have an impact on the conflict and it is far from being impartial. On this note, it is argued that economic sanctions are violating the law of neutrality as well. Economic sanctions from the United States against Nicaragua were deemed as not violating the principle of non-intervention by the ICJ.¹⁰¹ However, regarding the law of neutrality reference is made to Article 9 of Hague Convention V which prohibits discrimination between belligerents, thus economic sanctions should be applied to both parties.¹⁰²

Sharing military intelligence with one belligerent is also considered a violation of the law of neutrality, specifically of duties of abstention and impartiality.¹⁰³ This was confirmed by German Supreme Court concerning AWACS flights in Iraq in 2003 where it was underlined that compliance with the law of neutrality depended on "whether the data obtained during these operations were of importance for the war operations in Iraq and whether US and UK forces had *de facto* access to them".¹⁰⁴ The focus is thus on the provision of intelligence and data that could be used in military operations and have a central role in the deployment of those operations. The same German Court ruled on the deployment of German troops in defence of US Army barracks, considering that this action as well constituted a violation of the law of neutrality if it had facilitated the movement of US troops into the war zone.¹⁰⁵

It can be stated that the element of support to the military operations in all forms that provide integrated or at least important support to one belligerent is considered a violation of the law of neutrality. This is crucial in an always more technological society where it will be easier for States to escape being caught violating neutrality as the transmission of intelligence or other data does not

⁹⁸ Ferro and Verlinden (n 49) n 99.

⁹⁹ James Upcher, 'The Application and Termination of Neutrality', *Neutrality in Contemporary International Law* (2020) 57; Ferro and Verlinden (n 49) para 59.

¹⁰⁰ Bothe (n 46) para 36; Upcher, 'The Duties and Rights of Neutrals' (n 68) 88.

¹⁰¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. *Merits*, para. 245.

¹⁰² Ferro and Verlinden (n 49) para 65.

¹⁰³ Bothe (n 46) para 51; Department of Defense US (n 83) para 13.8.2.

¹⁰⁴ BVerwG, Urteil vom 21.06.2005 - 2 WD 12.04 - [ECLI:DE:BVerwG:2005:210605U2WD12.04.0], para.4.1.4.1.4 translation in Ferro and Verlinden (n 49) para 10.

¹⁰⁵ *Ibid.*

imply physical transport and thus also visit and search rights of belligerent lose relevance.¹⁰⁶

c) Consequences of violations of the law of neutrality

Countermeasures in response to a violation of international law are lawful according to the Draft Articles on States' Responsibility which has customary value.¹⁰⁷ These measures are a consequence of a breach of an international obligation, meaning that a State's act is not in conformity with the specific obligation it has.¹⁰⁸ The conditions of countermeasures are listed in Article 52 and proportionality is required by Article 51.¹⁰⁹ The objective of countermeasure is to force a State to comply with its obligation and cease its violation.¹¹⁰ Violations of the law of neutrality result as well in a right for the aggrieved belligerent to recur to countermeasures and self-help until the neutral State ceases its non-neutral act.¹¹¹ Countermeasures cannot, however, consist of forcible measures as they would entail the use of force in violation of Article 2 (4) UN Charter.¹¹² It follows that armed countermeasures are lawful only in response to violations of neutrality that consist as well of an armed attack in the sense of Article 51 UN Charter.¹¹³

When discrimination against one belligerent is imposed by the Security Council, it does not consist in a violation of the law of neutrality. An example is Resolution 82 (1950) when the Security Council called upon Members States to help with the implementation of the Resolution and to avoid assisting North Korean authorities¹¹⁴ or Resolution 661 (1990) when it imposed an embargo on Iraq and on occupied Kuwait.¹¹⁵ These sanctions imposed by the Security Council thus, cannot be responded to by the designed aggressor with countermeasures. There are some doubts if simple authorizations by the Security Council, without imposed measures, have the same effect or if the aggrieved aggressor could resort to countermeasures.¹¹⁶ It is argued here that the identification of an aggressor,

¹⁰⁶ Hitoshi Nasu, 'The Laws of Neutrality in the Interconnected World: Mapping the Future Scenarios' in Matthew C Waxman and Thomas W Oakley (eds), *The Future Law of Armed Conflict* (Oxford University Press 2022) 6 <<https://doi.org/10.1093/oso/9780197626054.003.0008>> accessed 10 May 2023.

¹⁰⁷ International Law Commission (ILC), ARSIWA, Article 22.

¹⁰⁸ Ibid, Article 12

¹⁰⁹ Ibid, Articles 51-52.

¹¹⁰ Ibid, Article 49 (1)

¹¹¹ Bothe (n 46) para 28; Pedrozo (n 34); Heller and Trabucco (n 37) 260.

¹¹² ILC, ARSIWA, Article 50 (1) (a), see also general rule on the prohibition of the use of force.

¹¹³ Bothe (n 46) para 28; Nasu, 'The End of the United Nations?' (n 93) 132; Ferro and Verlinden (n 49) para 42; Heinegg (n 84) 555; Ambos, 'Wird Deutschland durch Waffenlieferungen an die Ukraine zur Konfliktpartei?' (n 35).

¹¹⁴ United Nations Security Council, Resolution 82 (1950) / [adopted by the Security Council at its 473rd meeting], of 25 June 1950, S/RES/82(1950).

¹¹⁵ United Nations Security Council, Resolution 661 (1990) / adopted by the Security Council at its 2933rd meeting, on 6 August 1990, S/RES/661(1990).

¹¹⁶ Ferro and Verlinden (n 49) para 43, fn 119.

even without imposed measures, is sufficient to render lawful the discrimination, precluding thus the right to countermeasures.¹¹⁷ In the same way a Security Council identification of an aggressor modifies the law of neutrality for neutral States, the same classification prevents the aggressor to exercise its powers and right as a belligerent.¹¹⁸

Neutral States that decide to favour one party to the conflict and discriminate against another must expect countermeasures. The fact that the belligerent does not or is not able to adopt such countermeasures does not mean they are not lawful.¹¹⁹

3. Traditional approach

The traditional approach finds its basis in the Hague Conventions V and XIII, which are considered customary international law.¹²⁰ This approach underlines that the law of neutrality has been modified by the prohibition on the use of force, but it remains applicable in the absence of a Security Council resolution. The relevance of the traditional law of neutrality after the UN Charter was confirmed as well by the ICJ in its *Advisory Opinion on the Legality of the Use and Threat of Nuclear Weapons*,¹²¹ by the Permanent Court of Justice,¹²² and national courts.¹²³

Furthermore, the International Law Commission (ILC) treated the law of neutrality as a valid body of law in its 2011 Draft Articles on the Effect of Armed Conflicts on Treaties.¹²⁴ These Articles were then commended by the UN General Assembly with the invitation to governments to refer to them when appropriate.¹²⁵ General Assembly resolutions can express *opinio juris* on the existence and on the institution of neutrality.¹²⁶ Article 17 of the Draft Articles states that the law

¹¹⁷ Talmon (n 28).

¹¹⁸ James Upcher, 'The Exercise of Belligerent Rights Against Neutrals', *Neutrality in Contemporary International Law* (2020) 165 <<https://opil.ouplaw.com/display/10.1093/law/9780198739760.001.0001/law-9780198739760-chapter-6>> accessed 24 May 2023.

¹¹⁹ Heinegg (n 84) 554.

¹²⁰ Nasu, 'The Laws of Neutrality in the Interconnected World' (n 106) 3.

¹²¹ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 260-261.

¹²² The SS 'Wimbledon', United Kingdom and ors v Germany, Judgment, (1923) PCIJ Series A no 1, ICGJ 235 (PCIJ 1923), 17th August 1923, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ].

¹²³ Antonopoulos (n 87) 34–35; Bothe (n 46) para 9.

¹²⁴ Bothe (n 46) para 9.

¹²⁵ UN General Assembly, *Effects of armed conflicts on treaties*, 7 December 2017, A/RES/72/121.

¹²⁶ Paul Seger, 'Part III Legal Regimes, Ch.10 The Law of Neutrality' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 252 <<https://opil.ouplaw.com/display/10.1093/law/9780199559695.001.0001/law-9780199559695-chapter-10?prd=OPIL>> accessed 23 May 2023.

of neutrality prevails on other treaty obligations and rights that may be modified or terminated at the outbreak of conflicts.¹²⁷

The law of neutrality is indeed part of customary international law as the inclusion of detailed provisions on the rights and duties of neutrals States in military manuals shows.¹²⁸ Even though some authors claim that the law of neutrality fell in desuetude,¹²⁹ States have continued to access the Hague Conventions after World War II.¹³⁰ Thus, at least parties to these treaties are bound to the law of neutrality. To overcome the *si omnes proviso* in applying, reference is made to the customary value of the content of these rules. This view is inter alia, expressly stated in Germany's military manual.¹³¹

Irrespective of the substantive application of the law of neutrality, this body of law must be considered part of international customary law and consequently binding States.¹³² It is however undeniable that the prohibition of the use of force has modified some aspects of the law of neutrality.

a) Law of neutrality and the Prohibition of The Use of Force

The prohibition of the use of force had a strong impact on neutrality by limiting the obligations and the rights of neutral States. This is evident from the fact that if there was a right to recur to force, its prohibition implies changes in the law of neutrality and its application.¹³³ Some authors even argue that if the collective security mechanism was to be applied in perfect accordance with the letter of the Charter, neutrality would be useless and irrelevant.¹³⁴ However, academics

¹²⁷ International Law Commission, *Draft Articles on the Effects of Armed Conflicts on Treaties*, sixty-third session (2011), Article 17.

¹²⁸ Canada: Law of Armed Conflict at the Operational and Tactical Levels, 2001, Chapter 7 (conduct of hostilities in the air), sections 5.719 (neutral merchant vessels), Chapter 8 (conduct of hostilities at sea), section 2 (maritime operations in neutral waters), section 5.823 (maritime operations on the high seas and seabed beyond national jurisdiction; regard for rights of neutrals), section 8.835 (attacks on neutral merchant vessels), section 9.839–9.840, 9.843 (laying of sea mines), section 10 (Blockade), section 11.854 (war zones), section 15 (capture of neutral merchant vessels and goods), Chapter 13 (rights and duties of neutral powers). Germany: Joint Service Regulation (ZDv) 15/2 Law of Armed Conflict Manual, Chapter 11. New Zealand: Manual of Armed Forces Law, Vol. 4 Law of Armed Conflict, 2017, Chapter 16. Danish Ministry of Defence. Defence Command Denmark. Military Manual on International Law Relevant to Danish Armed Forces in International Operations, 2016, at 62–63. Norway: Manual of the Law of Armed Conflict, 2013, at 23 paras. 1.44–1.45. France: Manuel de Droit des Conflits Armés, Ministère de la Défense, 2012, 66. Argentina: Manual de Derecho Internacional de los Conflictos Armados, 2010, 42, 3.02. cited in Antonopoulos (n 87) 31.

¹²⁹ James Farrant, 'Modern Maritime Neutrality Law' (2014) 90 International Law Studies 222 <<https://digital-commons.usnwc.edu/ils/vol90/iss1/13>>.

¹³⁰ Heller and Trabucco (n 37) 6.

¹³¹ Germany: Joint Service Regulation (ZDv) 15/2 Law of Armed Conflict Manual, Chapter 1, p. 126.

¹³² Antonopoulos (n 87) 27–28; 32.

¹³³ Upcher, 'Neutrality, Non-Belligerency, and the Prohibition of the Use of Force' (n 58) 9.

¹³⁴ Seger (n 128) 262; Nasu, 'The End of the United Nations?' (n 93) 128.

tend to agree that while the Security Council has the potential to drastically limit, or even eliminate, a state's ability to act as a neutral with respect to a particular armed conflict, history suggests that political realities still leave room for neutrality.¹³⁵

The UN Charter, and the Kellogg-Briand Pact earlier, provide for a right of collective self-defence and thus a right to assist the victim of aggression, but not a duty to do so.¹³⁶ From this premise Attorney General Robert Jackson *inter alia* promoted the legal view that the Pact nullified the strict and absolute duty of impartiality in the context of aggression and allowed for States to discriminate against the aggressor in the interests of the whole community.¹³⁷

It is clear that in the case of a Security Council resolution identifying the aggressor, UN Members are not allowed to apply neutrality contrary to the measures of the resolution.¹³⁸ It is explained as well by the Institut de Droit International in Article 4 of the 1975 Wiesbaden Resolution of the Institut de Droit International:

Lorsque les Forces des Nations Unies sont engagées dans des hostilités, les Etats membres de l'Organisation ne peuvent ni se prévaloir des règles générales du droit de la neutralité pour se soustraire aux obligations qui leur sont imposées en vertu d'une décision du Conseil de la sécurité agissant conformément à la Charte (...).¹³⁹

An example of the modifications for neutral States in the context of a Security Council resolution based on Chapter VII can be found during the armed conflict in Iraq in 1990¹⁴⁰ when Jordan and Iran proclaimed neutrality.¹⁴¹ Here, their neutral obligations and rights were modified by the Security Council to avoid inconsistency with the obligations following the resolution.¹⁴² Thus their rights

¹³⁵ Zachary P Augustine, 'Cyber Neutrality: A Textual Analysis of Traditional Jus in Bello Neutrality Rules through a Purpose Based Lens' (2014) 71 Air Force Law Review 69, 78 <<https://go.gale.com/ps/i.do?p=AONE&sw=w&issn=00948381&v=2.1&it=r&id=GALE%7CA385654618&sid=googleScholar&linkaccess=abs>> accessed 10 May 2023.

¹³⁶ Bothe (n 46) para 10.

¹³⁷ Robert H Jackson, 'Address of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941' (1941) 35 The American Journal of International Law 348 <<https://www.jstor.org/stable/2192277>> accessed 16 May 2023.

¹³⁸ Antonopoulos (n 87) 60–62.; UN Charter, Articles 25, 48, 103.

¹³⁹ Institut de Droit international, 'Les conditions d'application des règles, autres que les règles humanitaires, relatives aux conflits armés aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagés' (197AD) art 4 <https://www.idi-iil.org/app/uploads/2017/06/1975_wies_02_fr.pdf>.

¹⁴⁰ UN Security Council, *Security Council resolution 678 (1990) [Iraq-Kuwait]*, 29 November 1990, S/RES/678 (1990).

¹⁴¹ US Department of Defense, 'United States: Department of Defense Report to Congress on the Conduct of the Persian Gulf War - Appendix on the Role of the Law of War' (1992) 31 International Legal Materials 612, 637 <<https://www.jstor.org/stable/20693692>> accessed 14 February 2023.

¹⁴² *Ibid* 638.

were lawful to the extent they did not have an adverse impact on the coalition or improved the operational capability of Iraq.¹⁴³ Indeed, in requesting all States to provide support to the enforcement of the resolution¹⁴⁴ some duties of Iran were modified, for example for what concerned the internment of coalition pilots who landed on their territory. Iran had the duty to intern the aircraft personnel under Article 11 of the Hague Convention V, however, this duty was modified as the internment would have had an adverse impact on the coalition and thus would have been contrary to Iran's obligations under the UN Charter.¹⁴⁵ Furthermore, as mentioned, Security Council Resolution 661¹⁴⁶ imposed an embargo contrary to the duty of impartiality.

The UN Charter modified the scope of the application of neutrality as well. It is in fact doubtful it applies *in toto*.¹⁴⁷ Indeed, State practice shows that States apply the totality of the law of neutrality only in exceptional cases.¹⁴⁸ For example, belligerents do not always recur to their right of visit and search if the conflict is not considered at high intensity.¹⁴⁹ Furthermore, the application of rules of neutrality will depend on functional considerations which will result in different applications of neutrality.¹⁵⁰ The factors considered can be of political and contextual nature, including previous relations between the belligerent and the neutral; the duration of the conflict; the power position between actors; the intensity of the hostilities.¹⁵¹

The essential part that will always apply is the one who protects the object and purpose of this body of law.¹⁵² One of the main purposes is to prevent the conflict from escalating on a temporal, spatial, and intensity scale.¹⁵³ The essential part includes the abstention from weapons trade and other measures that will influence the outcome of the conflict¹⁵⁴ and the duty of prevention regarding the use of its territory by belligerents.¹⁵⁵ If the remaining rules will apply it will depend on the

¹⁴³ Antonopoulos (n 87) 71.

¹⁴⁴ UN Security Council, *Security Council resolution 678 (1990)*, 29 November 1990, para. 3.

¹⁴⁵ US Department of Defense (n 142) 639–640.

¹⁴⁶ UN Security Council, *Security Council resolution 661 (1990) [Iraq-Kuwait]*, 6 August 1990, S/RES/661 (1990)

¹⁴⁷ Andrew Clapham, *War*, p 60 <<https://opil.ouplaw.com/display/10.1093/law/9780198810469.001.0001/law-9780198810469-chapter-2>> accessed 10 February 2023.

¹⁴⁸ Heinegg (n 84) 560.

¹⁴⁹ Christopher Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *The International and Comparative Law Quarterly* 283, 297–298 <<https://www.jstor.org/stable/759997>> accessed 7 June 2023.

¹⁵⁰ Heinegg (n 84) 561.

¹⁵¹ Walter L Williams, 'Neutrality in Modern Armed Conflicts: A Survey of the Developing Law' (1980) 90 *Faculty Publications* 13–14.

¹⁵² Heinegg (n 84) 565.

¹⁵³ UN Security Council, Resolution S/RES/540 of October 31, 1983, para. 6.

¹⁵⁴ Ferro and Verlinden (n 49) 31.

¹⁵⁵ Heinegg (n 84) 565.

circumstances of the conflict, and specifically on the belligerents' intent to enforce and apply those rules.¹⁵⁶

The UN Charter did not render neutrality invalid or obsolete and the law of neutrality remains valid in the context of Security Council resolutions.¹⁵⁷ In the absence of a Security Council resolution, it is argued that neutrality continues to be applied to allow the continuation of relations between neutrals and belligerents. This remains true regardless of one's perspective on the validity of the specific rules encompassed within the law of neutrality.¹⁵⁸

In conclusion, it can be affirmed that the relations between neutrals and belligerents are governed by the essential part of the law of neutrality in the absence of a Security Council resolution that identifies an aggressor.¹⁵⁹ In fact, in this situation, States have most likely pushed to assert neutral rights and fulfil neutral obligations to protect their interests from the actions of belligerents.¹⁶⁰ An example of this behaviour was seen in the Iraq invasion of 2003 when Switzerland and Austria stuck to their obligations under the law of neutrality denying the coalition the permission to overfly their territory, whereas other neutral States offered services with consequences on their neutrality obligations.¹⁶¹

It is suggested by some authors that neutral States have also a right to adopt qualified neutrality in favour of the victim of aggression.¹⁶²

4. Qualified neutrality

The concept of qualified neutrality emerged as a consequence of the prohibition of the use of force. Qualified neutrality is mainly thought to replace neutrality when force was used unlawfully and not as an intermediary status between traditional neutrality and belligerency.¹⁶³ However, other scholars believe it to be an intermediate status of States who abandon impartiality and non-assistance duties and respect only the obligation of non-participation in the conflict.¹⁶⁴

On the base of the principle *ex injuria jus non oritur*, one of the main reasons in support of qualified neutrality was avoiding that States that breached peace were

¹⁵⁶ Ibid 567.

¹⁵⁷ Augustine (n 136) 78; Antonopoulos (n 87) 26.

¹⁵⁸ Nasu, 'The Laws of Neutrality in the Interconnected World' (n 106) 15.

¹⁵⁹ Heinegg (n 84) 556.

¹⁶⁰ Nasu, 'The End of the United Nations?' (n 93) 129.

¹⁶¹ Ferro and Verlinden (n 49) paras 6–13.

¹⁶² Antonopoulos (n 87) 64.

¹⁶³ Edwin Borchard, 'War, Neutrality and Non-Belligerency' (1941) 35 *The American Journal of International Law* 618, 618, 624 <<https://www.jstor.org/stable/2192562>> accessed 4 May 2023.

¹⁶⁴ Jessup, Fauchille and de la Pradelle referred to in Heinegg (n 84) 544–545; Antonopoulos (n 87) 43.

able to impose belligerent rights on neutral States.¹⁶⁵ Following this reasoning, neutral States have the right to discriminate against the aggressor.¹⁶⁶ On the same note, it is argued by the supporters of this status that neutral States cannot be forced to apply impartiality and prevented from supplying the victim State with the necessary means to defend itself from an aggressor who does not respect the fundamental principles of international law.¹⁶⁷

The logic follows the shifting of international law to advance the international community's interests in the balancing of neutral and belligerent obligations. Those interests are defended only if the victim is supported and assisted in response to the aggression. Applying strict impartiality would arguably undermine this objective. A system that prohibits the use of force and sanctions aggression as a crime under international law virtually demands support for the victim.¹⁶⁸ Thus, for some authors, when States came together to collectively prohibit war in 1928 and reaffirmed this commitment in the United Nations Charter, they established a new order where the principle of 'might is right' was replaced. In this new order, States have the freedom to provide weapons and other forms of support to a State that has been unjustly attacked, enabling it to defend itself.¹⁶⁹ Thus, discriminative actions against one belligerent do not constitute a violation of the law of neutrality.¹⁷⁰

In justifying this position by the United States before entering World War II, Attorney General Jackson defined as "unrealistic and cynical" the idea that the aggressor and the victim had to be treated equally under international law.¹⁷¹ According to Jackson, this interpretation is necessary to uphold the values of international law.¹⁷²

A source cited in favour of qualified neutrality is the San Remo Manual, which in Rule 7 provides for the right to aid the victim of aggression when the Security Council identified an aggressor in compliance with Chapter VII, even if no

¹⁶⁵ International Law Association (ILA), Budapest Articles of Interpretation (As resolved at the closing session on September 10, 1934), ILA, Report of the Thirty-Eighth Conference held at Budapest, September 6th to 10th, 1934 (London: Eastern Press, 1935) 17-18; Stefan AG Talmon, 'The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine' (6 April 2022) 8, 21 <<https://papers.ssrn.com/abstract=4077084>> accessed 15 May 2023.

¹⁶⁶ Pearce Clancy, 'NEUTRAL ARMS TRANSFERS AND THE RUSSIAN INVASION OF UKRAINE' (2023) 72 *International & Comparative Law Quarterly* 527, 4 <<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/neutral-arms-transfers-and-the-russian-invasion-of-ukraine/5231C2F510CBDCB67B2093C62C8415B5>> accessed 15 May 2023.

¹⁶⁷ Heinegg (n 85).

¹⁶⁸ Talmon (n 166) 21; Pedrozo (n 34).

¹⁶⁹ Shapiro and Hathaway (n 81). A. Cavaglieri, *Belligeranza, Neutralità e Posizioni Giuridiche Intermedie*, *Rivista di Diritto Internazionale* 13 (Ser. II Vol. 8, 1919), at 58-91, 328-362, 345; A.S. de Bustamante y Sirven, *Droit International Public*, Tome 4, at 513 et seq. (Paris 1937); T. Komarnicki, *RdC* 80 (1952 I), 395 ff., at 431 f.

¹⁷⁰ Antonopoulos (n 87) 63; Nasu, 'The Future Law of Neutrality' (n 34).

¹⁷¹ Jackson (n 138) 350.

¹⁷² *Ibid* 358.

enforcement measures have been provided.¹⁷³ An identification of the aggressor by the Security Council is thus notably necessary. The San Remo Manual is not legally binding but was prepared by naval warfare experts to offer a contemporary look at the applicable international law. The right to assist the victim of aggression is mentioned as well in the dissenting Opinion of President Ammoun in the *South West Africa case* where he refers to the Kellogg-Briand Pact, presenting the examples of the Destroyer Deal between the United States and the United Kingdom, and to the Aid Britain Act.¹⁷⁴

Reference in support of qualified neutrality is made as well to the 1934 Budapest Articles of Interpretation.¹⁷⁵ These non-binding Articles have been drafted by the International Law Association with the objective of providing an interpretation of the Kellogg-Briand Pact. Article 4 affirms that the law of neutrality was nullified in the context of wars of aggression.¹⁷⁶ Indeed, it was argued that the Budapest Articles cleared the way for States to support financially and through war material the aggressed State, adopting a non-belligerency position opposing the aggressor, but without taking an active part in the hostilities.¹⁷⁷

It is important, however, to take into account the fact that debates around Article 4 were not conclusive and suggestions that the Kellogg-Briand Pact allowed States to discriminate between belligerents were not accepted.¹⁷⁸ Sir Hersch Lauterpacht was critical of the Articles and considered that even if neutrality may have lost its foundation, it certainly did not cease to be part of the law.¹⁷⁹ Borchard criticised the Articles as well affirming that they had no legal weight as they consisted of personal recommendations.¹⁸⁰ Finally, the lack of legal value was repeated by the then-Lord Chancellor Viscount Sankey in 1935 when he underlined that the International Legal Association was expressing its view and not one of their respective governments, or the majority of lawyers from those countries.¹⁸¹

In the presence of an identification of an aggressor by the Security Council, the position of qualified neutral does not appear revolutionary or contrary to practice.

¹⁷³ ‘San Remo Manual on International Law Applicable to Armed Conflicts at Sea’ (1994) art 7 <<https://ihl-databases.icrc.org/en/ihl-treaties/san-remo-manual-1994>> accessed 16 May 2023.

¹⁷⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) (Separate Opinion of Vice-President Ammoun)* [1971] ICJ Rep 67, at 92, 81.

¹⁷⁵ International Law Association, ‘The Budapest Resolutions of 1934 on the Briand-Kellogg Pact of Paris’, *International Law Association 38th Conference* (American Society of International Law 1935) <https://www.roberthjackson.org/wp-content/uploads/2015/01/International_Order.pdf> accessed 17 May 2023.

¹⁷⁶ Ibid 4; Clancy (n 167) 4.

¹⁷⁷ Talmon (n 28).

¹⁷⁸ Clancy (n 167) 4.

¹⁷⁹ Hersch Sir Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation* (1935) 178–179, 191.

¹⁸⁰ Borchard (n 164) 623.

¹⁸¹ ‘Briand-Kellogg Pact - Hansard - UK Parliament’ col 1043 <<https://hansard.parliament.uk/lords/1935-02-20/debates/55b8f0a2-14cc-4a5e-8b9f-51a4596b1bf0/Briand-KelloggPact>> accessed 17 May 2023.

However, those who support qualified neutrality believe as well that in the absence of such classification, it would be lawful for States to discriminate against the aggressor.¹⁸² Schmitt refers to the US Military Manual which states that regional and collective arrangements may modify neutral States' obligations forcing them to intervene before the Security Council's determination of the situation.¹⁸³ He believes that this refers to *ad hoc* collective defence under Article 51 UN Charter as well and thus would allow neutral States to adopt discriminatory measures against the aggressor.¹⁸⁴ If it is true that States may recur to collective self-defence while waiting for Security Council resolution on the matter, this concerns the use of force and not the violations of the law of neutrality and it does not justify said violations.¹⁸⁵ The State intervening would be a belligerent and thus not a neutral party. Moreover, it is underlined elsewhere that the right to support a Party implies that if the Security Council states afterwards that there was no act of aggression, the aggrieved belligerent may claim the States' responsibility for acts contrary to international law.¹⁸⁶

States are entitled to support, within the limits of collective self-defence, the belligerent they consider the victim.¹⁸⁷ However, it is doubtful that the right to use armed force under the principle of collective self-defence, which would make States parties to the conflict, justifies *de majore ad minus* the notion that non-participating States are also entitled to openly discriminate against one of the parties. A qualified neutral position would resemble that of a State that is formally part of the conflict but has chosen not to actively engage in the hostilities.¹⁸⁸

a) Conclusion on qualified neutrality beyond Security Council's authorization

After this analysis, it seems logical to affirm that a position of qualified neutral in the absence of a Security Council resolution identifying an aggressor has not found its place in international law. As Sir Lauterpacht affirmed, there is no evidence that a breach of international law by a State would give authorization to neutrals to violate in turn rules of neutrality.¹⁸⁹ In connection with the failure or inaction by belligerents to enforce their rights and adopt reprisals, it is argued that these behaviours do not imply that the core of the law of neutrality is obsolete and irrelevant.¹⁹⁰ When belligerents have the means and the intent to implement

¹⁸² Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (n 34).

¹⁸³ Department of Defense US (n 83) para 15.2.4.

¹⁸⁴ Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (n 34).

¹⁸⁵ Bothe (n 46) para 29.

¹⁸⁶ Talmon (n 28).

¹⁸⁷ Ibid.

¹⁸⁸ Heinegg (n 84) 552.

¹⁸⁹ Hersch Lauterpacht, 'Neutrality and Collective Security' in Sir Elihu Lauterpacht (ed), *International Law*, vol 5 (2004) 619; Clancy (n 167) 5.

¹⁹⁰ Heinegg (n 84) 567.

traditional rules of neutrality they will and neutral States will return to strict neutrality.¹⁹¹ Furthermore, besides Italy when it allowed the use of its military bases by the coalition against Iraq in 2003, no State in recent history tried to justify violations of neutrality by referring to qualified neutrality.¹⁹² Indeed, States advanced contractual obligations and claimed their assistance did not cover lethal items or acted clandestinely without trying to justify their conduct.¹⁹³ Moreover, no international treaty or even soft law instrument refers to such status and military manuals defending qualified neutrality, such as the United States one,¹⁹⁴ support qualified neutrality in the context of a defined victim of aggression.¹⁹⁵ As mentioned earlier, if States were allowed to lawfully abandon their neutral obligations following a unilateral determination of the aggressor, the law of neutrality would lose its objective of preventing and limiting the hostilities.¹⁹⁶

In the case of Ukraine to date, no State claimed qualified neutrality.¹⁹⁷ Even if they did, to form and change a customary international norm State practice and *opinio juris* are required.¹⁹⁸ The State practice must be “widespread and representative”¹⁹⁹ and *opinio juris* must prove that States believe that there exist a legal obligation on a subjective level.²⁰⁰ This can be found also in Article 38 of the ICJ Statute where custom is defined as “evidence of a general practice accepted as law”.²⁰¹ The reluctance and attempts to conceal assistance shows that States did not base their conduct on relevant *opinio juris* about a shift of the law of neutrality towards qualified neutrality status.²⁰²

In conclusion, there is no sufficient State practice to support the idea that qualified neutrality has been recognized in international law as an alternative to the traditional approach to neutrality.²⁰³ It follows that absent a Security Council resolution, neutral States are in violation of the law of neutrality even when they support the victim of aggression. It is, however, possible that practice will change in the future and States’ acts here analysed will be considered a starting point to change customary rules concerning the law of neutrality. A long period of time is

¹⁹¹ Ibid 554.

¹⁹² Ferro and Verlinden (n 49) para 40.

¹⁹³ Heinegg (n 84) 553. Citing the Iran-Contra Affair in Toivo Miljan, Alan T Leonhard and Nicholas Mercurio, ‘Neutrality: Changing Concepts and Practices’ (1989) 45 International Journal 187, 4.

¹⁹⁴ Department of Defense US (n 83) para 15.2.2.

¹⁹⁵ Ferro and Verlinden (n 49) para 40.

¹⁹⁶ Heinegg (n 85).

¹⁹⁷ Clancy (n 167) 534.

¹⁹⁸ Tullio Treves, ‘Customary International Law’ in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedias of International Law* para 8.

¹⁹⁹ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3, para. 73.*

²⁰⁰ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3, para. 77; Military and Paramilitary Activities in and against Nicaragua, Merits, para. 207; Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 246, para. 111.*

²⁰¹ United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article 38 para. 1 (b).

²⁰² Heinegg (n 84) 553.

²⁰³ Bothe (n 46) para 5; Heinegg (n 84) 555; Ferro and Verlinden (n 49) 40.

not necessary if the practice is uniform and extensive,²⁰⁴ however, for the moment no such practice can be found and consequently a change in customary law is to be excluded.

5. Application of legal findings to the IAC in Ukraine

In the context of the IAC in Ukraine, many Western States committed to supporting Ukraine against Russia. The exact numbers are not clear, but a study estimated that, in the first year of the renewed conflict, States have donated at least 156.6 billion euros.²⁰⁵ It is estimated that 63.4 billion euros are of military aid considering only the 10 biggest contributors in-between those States.²⁰⁶ This support is undoubtedly contrary to the traditional approach to the law of neutrality as it has a vast influence on the conflict and consists in favouring one belligerent over the other. Furthermore, there are reports confirming the sharing of intelligence with Ukraine. This also constitutes a violation of the law of neutrality considering that such intelligence is allegedly precise and direct enough to allow specific military operations.²⁰⁷

This support would be lawful under the approach of qualified neutrality as the States involved consider Russia to be the aggressor and that they are helping Ukraine in its right to self-defence under the UN Charter. They did not invoke qualified neutrality but followed its logic. The accusations against Russia were stated in discussions during Security Council debates where the United States also referred to “invading Russian forces”.²⁰⁸ These statements were repeated also on a national level for example by Greece's Minister of Defence stating

(t)he provision of military equipment to Ukraine seeks to immediately reinforce, on the ground, the Ukrainian Armed Forces in defense of their sovereign rights, in accordance with the United Nations Charter, following the Russian invasion.²⁰⁹

²⁰⁴ *North Sea Continental Shelf, Judgment*, para. 74.

²⁰⁵ Kiel Institution for World Economy (n 31).

²⁰⁶ Christoph Trebesch and others, ‘THE UKRAINE SUPPORT TRACKER: WHICH COUNTRIES HELP UKRAINE AND HOW?’ 35–41. Remarkably, 36.9 billion dollars in military aid provided by the US, see: ‘U.S. Security Cooperation with Ukraine’ (*United States Department of State*, 9 May 2023) <<https://www.state.gov/u-s-security-cooperation-with-ukraine/>> accessed 31 May 2023.

²⁰⁷ Intelligence will be analysed in Chapter IV.

²⁰⁸ UN Security Council, 9256th Meeting (2023), S/PV.9256, (USA and FRANCE) 12-13; UN Security Council, 9127th Meeting (2022) S/PV.9127 (FRANCE), 18; (BALTIC STATES); UN Security Council, 9127th Meeting (2022) (NORWAY), 16-17; UN Security Council, 9216th Meeting (2022), S/PV.9216 (GHANA), 10; UN Security Council, 9127th Meeting (2022), S/PV.9127, (IRELAND), 16; ‘Joint Statement by Latvian, Estonian, Lithuanian Foreign Ministers in Support of Ukraine | Välisministeerium’ <<https://vm.ee/en/news/joint-statement-latvian-estonian-lithuanian-foreign-ministers-support-ukraine>> accessed 24 May 2023.

²⁰⁹ Hellenic Republic, Ministry of National Defense, Reply 3503/18378, quoted in Giulio Bartolini, ‘The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice’ (*EJIL: Talk!*, 11 April 2023)

Furthermore, Germany and Romania explicitly called the Russian invasion an aggression and reiterated their support in defence of Ukraine's right to self-defence.²¹⁰

A strong argument of the States supporting Ukraine in front of the absence of a Security Council resolution is the fact that Russia itself blocked the adoption of the Resolution and the Chapter VII mechanism of collective defence using its veto. This is also the reason behind many authors, such as Heintschel von Heinegg, supporting the position of qualified neutrals regarding Ukraine when in the past they advocated against it.²¹¹ This demonstrates once again some of the weaknesses in the UN Charter system, especially with consideration to the functioning of the Security Council. However, it does not give a green light to States to violate the law of neutrality and its core principles.

In the context of this IAC as well, qualified neutrality remains without a solid basis in the absence of a Security Council resolution. The support given to Ukraine, being vastly military, combined with economic facilitations and sanctions on Russia, violates the law of neutrality opening the door for non-forcible countermeasures from Russia. However, Russia is not able to adopt countermeasures because it simply does not have the means.²¹² Furthermore, the refusal to consider the invasion an IAC, but rather a 'special military operation', might be another reason precluding Russia from adopting some sort of countermeasure in accordance with its belligerent rights.²¹³

6. Conclusions

In the absence of an authoritative determination by the Security Council, the relations between neutral States and belligerents are governed by the law of neutrality. Indeed, there is no right of neutral States to depart from traditional neutrality without suffering the consequences through countermeasures by the injured belligerent.²¹⁴ When the Security Council reaches a decision and classifies one party as the aggressor neutral States have the duty to implement the measures adopted by the Security Council under Chapter VII. As mentioned, in the past,

<<https://www.ejiltalk.org/the-law-of-neutrality-and-the-russian-ukrainian-conflict-looking-at-state-practice/>> accessed 24 May 2023.

²¹⁰ 'The Ministry of National Defence offers support to the Ukrainian Armed Forces' (*Romanian Ministry of National Defence*, 27 February 2022) <https://english.mapn.ro/cpresa/5580_the-ministry-of-national-defence-offers-support-to-the-ukrainian-armed-forces> accessed 24 May 2023; Staatssekretär, 'Deutscher Bundestag: Schriftliche Fragen, 20. Wahlperiode' 39 <<https://dserver.bundestag.de/btd/20/019/2001918.pdf>>.

²¹¹ Bartolini (n 210).

²¹² Nasu, 'The Future Law of Neutrality' (n 34).

²¹³ Ibid.

²¹⁴ Robert W Tucker, *The Law of War and Neutrality at Sea* (The Lawbook Exchange, Ltd 2022) 199.

States have tried to present different justifications for violations of the law of neutrality, whereas others simply denied such behaviour.²¹⁵ However a status of qualified neutral has not crystallized in customary international law in the absence of a Security Council authorization and thus the military support given to a belligerent violates the law of neutrality.

The law of neutrality in its traditional approach has to be relied upon to regulate the relations between neutral and belligerent States, especially in a situation like the IAC in Ukraine where the collective security mechanism is paralysed.²¹⁶ The collective security system did not completely replace the law of neutrality but modified substantially its application as we have seen with the examples of Iran's and Kuwait's neutrality following Security Council measures.²¹⁷ Without State practice and subsequently *opinio juris* development there cannot be an adjustment of the traditional law of neutrality in customary international law.²¹⁸ Thus, even if it seems unfair to consider exporting States helping Ukraine as violating the law of neutrality in the context of the IAC it is not possible to argue that a position of qualified neutrality allowing to discriminate against one belligerent exists. The support provided constitutes a violation of the law of neutrality and may have other consequences for States for what concerns their status as parties to an IAC.

IV. Co-belligerency

1. Legal framework

Western States have notably been worried that the support given to Ukraine would lead them to become party to the conflict.²¹⁹

²¹⁵ Ferro and Verlinden (n 49) paras 67–68.

²¹⁶ Nasu, 'The End of the United Nations?' (n 93) 130; Nasu, 'The Laws of Neutrality in the Interconnected World' (n 106) 2.

²¹⁷ Antonopoulos (n 87) 58.

²¹⁸ Nasu, 'The Laws of Neutrality in the Interconnected World' (n 106) 13.

²¹⁹ Press Briefing by Press Secretary Jen Psaki, 3 March 2022, available at www.whitehouse.gov/briefing-room/press-briefings/2022/03/03/press-briefing-by-press-secretary-jen-psaki-march-3rd-2022/; M. Sermo, 'La cobelligérance, acte de guerre ou légitime défense collective ?', *Le Monde*, 26 May 2022, available at https://www.lemonde.fr/idees/article/2022/05/26/la-cobelligerance-acte-de-guerre-ou-legitime-defense-collective_6127767_3232.html (quoting France's President Emmanuel Macron and the then Minister of the Armed Forces Florence Parly); Address to the Nation by Federal Chancellor Scholz, 8 May 2022, available at www.bundesregierung.de/resource/blob/992814/2037608/883b3ea4c4c65852c8a8da991559c7e4/2022-05-08-bk-ansprache-8-mai-pdf-data.pdf?download=1; 'Poland Ready to Place All its MIG-29 Jets at the Disposal of U.S.', Reuters, 8 March 2022, available at www.reuters.com/world/europe/poland-ready-place-all-its-mig-29-jets-disposal-us-2022-03-08/ (quoting Poland's Prime Minister Mateusz Morawiecki); 'West "Working Hard" to Avoid War', Sky News, 28 June 2022, available at www.youtube.com/watch?v=gRGT5urKrmM (interview with the then UK Prime Minister Boris Johnson); see also 'Press Point with NATO Secretary General Jens Stoltenberg', 30 September 2022, available at www.nato.int/cps/en/natohq/opinions_207788.htm cited in Alexander Wentker, 'At War? Party Status and the War in Ukraine' [2023] *Leiden Journal of International Law* 1, n 6 <<https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/at-war-party-status-and-the-war-in-ukraine/EC59482A140EE6FBDD86292ED18C2FA6>> accessed 4 May 2023.

It is important to remember that, IHL and the law of neutrality being two different bodies of law, the fact that a neutral State violates the law of neutrality does not imply automatically that the State will also become a party to the conflict as such acts do not necessarily amount to a use of force or consist in an armed attack giving rise to a right to self-defence.²²⁰ The existence of traditional enforcement measures under the law of neutrality, allowing parties to take action against a neutral State for violations, implies that States maintain their neutral status even after committing breaches of neutrality.²²¹ A State's neutral status can be compromised, even if it does not violate its neutral obligations if it provides essential support that is directly connected to the conduct of hostilities by one of the belligerents.²²² The evaluation of the change of status depends on an examination of facts and there may be a change of status because of a significant and extensive participation in the hostilities.²²³

The existence of an IAC is determined on a factual basis according to Common Article 2 of the Geneva Conventions and its accompanying ICRC Commentary.²²⁴ Although Common Article 2 does not define the requirements for an IAC to arise, the ICRC Commentary relies on the *Tadić* case of the International Criminal Tribunal for the former Yugoslavia (ICTY), where it was stated that an IAC exists when there is a “resort to armed force between two or more States” and “any difference arising between states and leading to the intervention of armed forces regardless of how long the conflict lasts or how much slaughter takes place”.²²⁵

For a Third State to become a party to an ongoing IAC, the State must participate in a direct way through an act of war. However, it does not exist an agreed test to know when a State becomes a party to a conflict or evaluate the ‘directness’ of participation in the conflict.²²⁶ It is not necessary that a State perpetrates an act grave enough to meet all the requirements to cause the outbreak of a new conflict.²²⁷ As the ICRC stated in its 2015 Challenges Report “[t]he decisive element would be the contribution made by such forces to the collective conduct of hostilities”.²²⁸ Hostilities are defined, according to the ICRC’s study, as “means

²²⁰ Sassòli (n 78) s 9.132; Sandoz (n 59) 94; Schmitt, ‘Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force’ (n 34).

²²¹ Wentker (n 219) 6.

²²² Nasu, ‘The End of the United Nations?’ (n 93) n 118; Nasu, ‘The Future Law of Neutrality’ (n 34).

²²³ Bothe (n 46) paras 26–28.

²²⁴ ICRC (n 21)

²²⁵ ICTY, *Prosecutor v. Dusko Tadić* (Decision On The Defence Motion On Jurisdiction) IT-94-1 (10 August 1995), para. 70; ICRC Database, Commentary of 01.01.2016, Convention (I), Article 2, para. 218.

²²⁶ Alexander Wentker, ‘At War: When Do States Supporting Ukraine or Russia Become Parties to the Conflict and What Would That Mean?’ (*EJIL: Talk!*, 14 March 2022) 7–8 <<https://www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/>> accessed 4 May 2023.

²²⁷ Wentker (n 219) 7; Wentker (n 226).

²²⁸ International Committee of the Red Cross, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts | International Committee of the Red Cross’ (ICRC 2015) 32IC/15/11 22–23

or methods of injuring the enemy”,²²⁹ that is, “acts which by their nature or purpose are intended to cause actual harm to the personnel and equipment of the armed forces”.²³⁰ To be considered a co-belligerent the support provided must have “a direct impact on the opposing party’s ability to carry out military operations”.²³¹ The directness might be considered under different views.

a) Direct participation in the hostilities from ICRC’s Guidance

One view that emerged transposes the concept of direct participation found in the ICRC’s Guidance concerning civilians’ direct participation in hostilities (DPH).²³² This view is based on the idea that, as in direct participation of civilians, certain States are contributing to the military effort of a belligerent and if some conditions are met, they will become a legitimate target as party to the conflict. According to this view,²³³ the support is considered a direct participation in the hostilities in the meaning of Articles 51 (3) Additional Protocol I²³⁴ and 13 Additional Protocol II.²³⁵ In the Commentary of the Additional Protocol I, direct participation means that the action by its purpose or nature is likely to cause harm to the enemy’s military.²³⁶ The harm to the enemy is brought in one causal step between the neutral State’s action or military support and an act of belligerency.²³⁷ Support is provided with the objective of helping a belligerent and causing harm to the enemy.²³⁸ A State’s action consisting in an integral part of an operation that leads

<<https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>> accessed 27 May 2023.

²²⁹ International Committee of the Red Cross, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (2015) Publication 43 <<https://www.icrc.org/en/publication/0990-interpretive-guidance-notion-direct-participation-hostilities-under-international>> accessed 27 May 2023.

²³⁰ Yves Sandoz and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) para 1942 <https://hdl.loc.gov/loc.law/llmlp.Commentary_GC_Protocols> accessed 27 May 2023. As cited in Wentker (n 219) 7.

²³¹ International Committee of the Red Cross (n 228) 22–23.

²³² International Committee of the Red Cross (n 229).

²³³ Kai Ambos, ‘Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and Thus Be Exposed to Countermeasures?’ (*EJIL: Talk!*, 2 March 2022) <<https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/>> accessed 4 May 2023; Ambos, ‘Wird Deutschland durch Waffenlieferungen an die Ukraine zur Konfliktpartei?’ (n 35).

²³⁴ ICRC, *Additional Protocol I*, 8 June 1977.

²³⁵ ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609.

²³⁶ Sandoz and Zimmermann (n 230) para 1944; *Prosecutor v Pavle Strugar (Appeal Judgment)* [2008] International Criminal Tribunal for the former Yugoslavia (ICTY) IT-01-42-A [178].

²³⁷ International Committee of the Red Cross (n 229) 53; James Upcher, ‘The Application and Termination of Neutrality’, *Neutrality in Contemporary International Law* (2020) 63 <<https://opil.ouplaw.com/display/10.1093/law/9780198739760.001.0001/law-9780198739760-chapter-3>> accessed 25 May 2023; US Department of Justice Office of Legal Counsel, ‘“Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention’ 45 <https://www.justice.gov/d9/olc/opinions/2004/03/31/op-olc-v028-p0035_0.pdf>.

²³⁸ International Committee of the Red Cross (n 229) 43.

to such harm and respecting the other two conditions can also be considered as directly participating.²³⁹

b) Support integrated into the hostilities

Another view, which is also ICRC's opinion, takes up the concept of integrated acts: a State participates in the conflict when the support provided to a belligerent is integrated into the military operations of that belligerent.²⁴⁰ This means, that the support takes place in the context of and it is linked with the military operations of a belligerent. It is also considered direct support when the adverse impact on the enemy only materializes in combination with other acts by the supported belligerent.²⁴¹ On this point, Wentker finds that a State will become a co-belligerent the moment its contribution, direct as required, is also sufficiently coordinated with the supported party.²⁴² Coordination means that each participating State has a say in deciding how the military operation is conducted.²⁴³

Ferraro gives some examples of types of support that are sufficiently direct and integrated to constitute an act of war, and which include:

transportation of the troops of one of the belligerents on the front line, the provision of intelligence used immediately in the conduct of hostilities and the involvement of members of the third power in planning and coordinating military operations conducted by the supported party.²⁴⁴

The ICRC provided four criteria upon which classification as a party to the conflict can be based in the context of Third State intervention in a NIAC.²⁴⁵ These are (1) a pre-existing NIAC; (2) the support is related to the conduct of hostilities in the context of that conflict, thus integrated; (3) the support benefits a party (meaning that there is a nexus to the conflict); (4) an official decision by

²³⁹ Wentker (n 226).

²⁴⁰ Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict' (2015) 97 *International Review of the Red Cross* 1227, 1231 <https://www.cambridge.org/core/product/identifier/S1816383116000448/type/journal_article> accessed 27 May 2023; Nasu, 'The End of the United Nations?' (n 93) 133.

²⁴¹ Tristan Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 *International Review of the Red Cross* 561, 585 <https://www.cambridge.org/core/product/identifier/S181638311400023X/type/journal_article> accessed 27 May 2023.

²⁴² Wentker (n 219) 10.

²⁴³ *Ibid* 9.

²⁴⁴ Tristan Ferraro (n 241) 1231.

²⁴⁵ *International Committee of the Red Cross* (n 228) 23.

the State or organization concerned to support the party has been taken.²⁴⁶ The ICRC suggested that the same criteria could apply in the context of a Third State intervening in support of one party in an ongoing IAC.²⁴⁷

According to Grignon, “any indirect military engagement that would consist of taking part in the planning and supervision of military operations of another State” suffices to establish co-belligerency.²⁴⁸ Thus, integrated support that entails planning joint operations and essential assistance to a military operation that would trigger an IAC if performed solely by the belligerent is considered participation.²⁴⁹

c) Provision of operational and logistical assistance

Another view adds to integrated support, the provision of operational, logistical, or intelligence assistance to an active belligerent that directly contributes to their overall military efforts in the conflict.²⁵⁰ Greenwood, however, disagrees pointing out that financial, political and intelligence support will not amount to participation because such support is not enough directly related to the hostilities.²⁵¹ It is thus unclear if a State would become party to the conflict as a consequence of the amount of military support.²⁵² Few scholars are of the opinion that substantial and continuous support through war material and financial support to a belligerent makes the supplying State co-belligerent.²⁵³ This was supported inter alia by Judge John Bassett Moore, who promoted the idea that the provision of arms and ammunitions to an active belligerent is considered a direct contribution to their military resources, thereby constituting participation in the conflict.²⁵⁴ However, the majority of scholars believe that simply supplying weapons without further engagement would not have a sufficiently direct

²⁴⁶ Schmitt, ‘Ukraine Symposium - Are We at War?’ (n 56).

²⁴⁷ Cordula Droege and David Tuck, ‘Fighting Together and International Humanitarian Law: Setting the Legal Framework (1/2)’ (*Humanitarian Law & Policy Blog*, 12 October 2017) <<https://blogs.icrc.org/law-and-policy/2017/10/12/fighting-together-international-humanitarian-law-setting-legal-framework-1-2/>> accessed 27 May 2023.

²⁴⁸ Julia Grignon, ‘« Co-Belligerency » or When Does a State Become a Party to an Armed Conflict?’ (2022) Strategic Brief 39 Institut de Recherche Stratégique de l’Ecole Militaire.

²⁴⁹ Schmitt, ‘Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force’ (n 34).

²⁵⁰ Peter S Konchak, ‘U.S. and Allied Involvement in the Russo-Ukrainian War: The Belligerent Status of NATO States and Its Implications’ (*Opinio Juris*, 20 July 2022) <<https://opiniojuris.org/2022/07/20/u-s-and-allied-involvement-in-the-russo-ukrainian-war-the-belligerent-status-of-nato-states-and-its-implications/>> accessed 4 May 2023.

²⁵¹ Christopher Greenwood, ‘Scope of Application of Humanitarian Law’ in Dieter Fleck and Michael Bothe (eds), *The Handbook of International Humanitarian Law* (Oxford University Press 2008) s 214.

²⁵² Daphne Karahalios, ‘International Law, Order, and Justice’ (*Lieber Institute West Point*, 24 April 2023) <<https://lieber.westpoint.edu/international-law-order-justice/>> accessed 4 May 2023.

²⁵³ Nathalie Weizmann, ‘Associated Forces and Co-Belligerency’ (*Just Security*, 24 February 2015) <<https://www.justsecurity.org/20344/isil-aumf-forces-co-belligerency/>> accessed 25 May 2023.

²⁵⁴ John Bassett Moore, ‘The New Isolation’ (1933) 27 *The American Journal of International Law* 607, 625 <<https://www.jstor.org/stable/2190111>> accessed 27 May 2023.

connection to the IAC.²⁵⁵ State practice as well points out that solely providing logistical support cannot automatically make the State a co-belligerent.²⁵⁶ Furthermore, the Appeal Chamber of the ICTY in the *Tadić* case judged that merely “equipping and financing” a non-State group does not “internationalize” a NIAC.²⁵⁷ If the material support to an armed group does not provoke the outbreak of an IAC between the supporting State and the one engaged in a conflict with an armed group, the support for a belligerent in an existing IAC would arguably have the same result.

d) Indirect support

Others argue that States can be considered as directly participating in the hostilities if they conduct a series of non-violent acts. This is the case when States carry out actions that enable the conduct of more efficient attacks for example via logistical support and intelligence collecting and sharing.²⁵⁸

The ICJ in the *Nicaragua*²⁵⁹ and the *Armed Activities*²⁶⁰ cases supported the idea of the indirect use of force. Both judgements discuss State’s support in the context of a NIAC, however, it seems logical that the same support can be considered as a violation of the use of force in the context of an IAC.²⁶¹ This violation of the prohibition of the use of force would also imply becoming a party to the conflict under IHL. Not all acts of support are to be considered threats or use of force and clear criteria have been absent in State practice.

Considering this indirect assistance given to a belligerent Schmitt and Biggerstaff analyse some specific factors in the relationship between the support and the force eventually employed.²⁶² The two authors base their reasoning on the approach taken by the International Group of Experts, who are the authors of the two versions of the Tallinn Manual,²⁶³ and on the position taken by some NATO

²⁵⁵ Heller and Trabucco (n 37) 15.

²⁵⁶ Upcher, ‘The Application and Termination of Neutrality’ (n 99) 62.

²⁵⁷ ICTY, *Prosecutor v. Dusko Tadić* (Appeals Chamber) IT-94-1 (15 July 1999), para. 131.

²⁵⁸ Konchak (n 251).

²⁵⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits para. 228.

²⁶⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, paras. 161-163.

²⁶¹ Michael N Schmitt and William Biggerstaff, ‘Aid and Assistance as a “Use of Force” Under the Jus Ad Bellum’ (2023) 100 SSRN Electronic Journal 203–204 <<https://www.ssrn.com/abstract=4372086>> accessed 22 May 2023.

²⁶² Michael N Schmitt Biggerstaff William Casey, ‘Are States Aiding and Assisting Ukraine and Russia Using Force?’ (*Lieber Institute West Point*, 7 April 2023) <<https://lieber.westpoint.edu/are-states-aid-assisting-ukraine-russia-using-force/>> accessed 4 May 2023.

²⁶³ International Group of Experts, *Tallinn Manual 1.0 International Group of Experts and Other Participants 2* (2nd edn, Cambridge University Press 2017) <<https://www.cambridge.org/core/books/tallinn-manual-20-on-the-international-law-applicable-to-cyber-operations/tallinn-manual-10-international-group-of-experts-and-other-participants2/879AA96834717C02142DFC1250DD7C30>> accessed 29 May 2023; International Group of

Members.²⁶⁴ The factors proposed are the intent to enhance the supported State's use of force and capabilities; the immediacy of the support's impact on the use of force; the directness of the connection between the support given and the use of force by the supported State; the nature of the support itself; the geopolitical context; and the impact that the support eventually has on the State's use of force.²⁶⁵ It is reminded that intent here is mentioned as a criterion in the classification of a State as belligerent by other States and not on pure legal terms, as the existence of an IAC is not related to the intent of belligerents or their consideration of its existence.

e) View adopted

What is central in the analysis of a State's party status it's the directness of support provided and how it relates to the hostilities. I believe the more important aspects are the integration and coordination of acts with one party to the conflict and the strict causality between said support and its employment on the field. Direct participation, especially causality, as considered in DPH and the criteria regarding integration presented by the ICRC in its study on Third State intervention are the two principal aspects to consider. Indirect support as described by Schmitt and Biggerstaff, as also logistical and operational support, must be evaluated in this optic as also suggested by the authors in the criteria presented. The amount of support is relevant, in my opinion, after it has been established how the support is integrated into the military operations of a party and how 'close' it is to the actual harm inflicted on the enemy.

2. Evaluation of the situation with respect to Western States supporting Ukraine

As outlined in Chapter II, Ukraine has received weapons in large amounts and of different types from Western States. To this day, no State has directly participated in hostilities against Russia in a sufficient manner to create a new IAC.²⁶⁶ The military aid amounts to 63.4 billion considering the top 10 exporting States.²⁶⁷ This support may be considered as a use of force against Russia²⁶⁸ as did the ICJ considering the "arming and training" provided by the United States in the

Experts, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, Cambridge University Press 2017) <<https://www.cambridge.org/core/books/tallinn-manual-20-on-the-international-law-applicable-to-cyber-operations/E4FFD83EA790D7C4C3C28FC9CA2FB6C9>> accessed 28 May 2023.

²⁶⁴ NORTH ATLANTIC TREATY ORGANIZATION (NATO), 'AJP-3.20, Allied Joint Doctrine for Cyberspace Operations (Edition A)' para 3.7.

²⁶⁵ Schmitt and Biggerstaff (n 262) 205.

²⁶⁶ Heller and Trubucco (n 37) 14.

²⁶⁷ See fn 206.

²⁶⁸ Heller and Trubucco (n 37) 2.

Nicaragua case.²⁶⁹ Even if the ICJ was referring to a NIAC, there is no legal reason to make a distinction from an IAC when considering the use of force following this type of support.²⁷⁰ However, it is not clear under which conditions military support given by Western States crosses the use of force prohibition threshold.²⁷¹ What counts for what concerns party status, is the directness of the support given to Ukraine and its effect on Russia. The support has been massive and has had an impact on the capability of the Ukrainian Armed Forces to fight Russia in the current conflict. The supply of weapons is thus significant in terms of quantity and integral to Ukraine's war effort.

At the same time, the supply of weapons is generally not considered direct enough to provide a direct connection to the hostilities since it is the actual use by Ukraine of those weapons and systems of weapons that causes harm to Russia's military.²⁷² According to this reasoning, Western States did not become parties to the IAC because of the exports of weapons to Ukraine. However, other authors point out the evident impact that Western weapons had on the conflict and affirm that States who have exported those weapons have entered the conflict as belligerents based on their significant operational, and logistical assistance.²⁷³

It is argued here that the Western supply of weapons does not cause those States to become belligerents in this IAC. This is because it does not have a one-step causal link, as defined in the context of DPH, to harm caused to the Russian forces. In particular, the provision of weapons allows for attacks against Russia but it is Ukraine that eventually uses them in practice. It is no doubt essential to the war effort, but not integrated in the hostilities perpetrated by Ukraine against Russia in such a manner to cause the exporting States to become parties to the IAC.

In the context of this thesis, it is vital to understand if the provision of military intelligence to a belligerent by a neutral State would consist of participation in the IAC.²⁷⁴ The same reasoning must apply, it must be evaluated if the intelligence is direct enough to cause harm to the enemy with a direct causal link with the action taken by the supported State. The sharing of intelligence that is essential to the performance of an operation will be considered participation.²⁷⁵

²⁶⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, para. 228.

²⁷⁰ Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (n 34).

²⁷¹ Biggerstaff (n 263).

²⁷² Wentker (n 219) 11.

²⁷³ Konchak (n 251).

²⁷⁴ Karahalios (n 253).

²⁷⁵ Francis Boyle, 'International Crisis and Neutrality: United States Foreign Policy Toward the Iran- Iraq War' (1992) 43 Mercer Law Review 538 <https://digitalcommons.law.mercer.edu/jour_mlr/vol43/iss2/1?utm_source=digitalcommons.law.mercer.edu%2Fjour_mlr%2Fvol43%2Fiss2%2F1&utm_medium=PDF&utm_campaign=PDFCoverPages>; Konchak (n 251).

Military intelligence is one of the most debated types of support, especially because it is allegedly been used to strike Russian objectives and played an integral role in Ukrainian forces operations.²⁷⁶ There are reports and declarations by US officials indicating that the United States provided intelligence that allowed Ukraine to kill Russian generals and notably sink the Russian flagship Moskva.²⁷⁷ Furthermore, the United States provided intelligence that prevented Russian airstrikes from being efficient and establishing air superiority, and intelligence that led to the shutdown of an aircraft airlifting hundreds of troops in the first phases of the conflict which prevented Russia to reach a strategic airfield close to Kyiv.²⁷⁸

The United States officially denies that the intelligence provided is concrete and precise enough to allow targeting Russian troops or that the United States intended or decided to target the Moskva or the generals.²⁷⁹ As Wentker suggests, this justification may indicate that the United States believe as well that such acts would push them closer to co-belligerency.²⁸⁰ In fact, localization and confirmation of intelligence and coordinates are part of the targeting process and thus integral to the military operations against Russia and would meet the threshold of participation in the IAC as the contribution is direct and causal to a lethal and operation.²⁸¹

²⁷⁶ Wentker (n 226).

²⁷⁷ BBC News, 'Moskva Sinking: US Gave Intelligence That Helped Ukraine Sink Russian Cruiser - Reports' *BBC News* (6 May 2022) <<https://www.bbc.com/news/world-us-canada-61343044>> accessed 30 May 2023; Dan Sabbagh, Dan Sabbagh Defence and security editor, 'US Shared Location of Cruiser Moskva with Ukraine Prior to Sinking' *The Guardian* (6 May 2022) <<https://www.theguardian.com/world/2022/may/05/us-intelligence-russia-moskva-ukraine>> accessed 30 May 2023; Julian E Barnes, Helene Cooper and Eric Schmitt, 'U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say' *The New York Times* (4 May 2022) <<https://www.nytimes.com/2022/05/04/us/politics/russia-generals-killed-ukraine.html>> accessed 30 May 2023; Peter Beaumont and Julian Borger, 'US Intelligence Helping Ukraine Kill Russian Generals, Report Says' *The Guardian* (5 May 2022) <<https://www.theguardian.com/world/2022/may/05/us-intelligence-helping-ukraine-kill-russian-generals-report>> accessed 30 May 2023.

²⁷⁸ Heller and Trabucco (n 37) 8; Paul Mcleary, 'Ukraine Has Shot down 55 Russian Warplanes, U.S. General Says' [2022] *POLITICO* <<https://www.politico.com/news/2022/09/19/ukraine-has-shot-down-55-russian-warplanes-00057569>> accessed 30 May 2023; Isabelle Khurshudyan and others, 'Ukraine's Rocket Campaign Reliant on U.S. Precision Targeting, Officials Say' *Washington Post* (22 May 2023) <<https://www.washingtonpost.com/world/2023/02/09/ukraine-himars-rocket-artillery-russia/>> accessed 30 May 2023; Alexander Vindman and Dominic Cruz Bustillos, 'America Must Do More to Help Ukraine Fight Russia' [2022] *Foreign Affairs* <<https://www.foreignaffairs.com/articles/ukraine/2022-03-05/america-must-do-more-help-ukraine-fight-russia>> accessed 30 May 2023.

²⁷⁹ Ken Dilanian, Courtney Kube and Carol E Lee, 'U.S. Intel Helped Ukraine Sink Russian Flagship Moskva, Officials Say' *NBC News* (5 May 2022) <<https://www.nbcnews.com/politics/national-security/us-intel-helped-ukraine-sink-russian-flagship-moskva-officials-say-rcna27559>> accessed 31 May 2023; Ken Dilanian, 'Biden Administration Walks Fine Line on Intelligence-Sharing with Ukraine' *NBC News* (4 March 2022) <<https://www.nbcnews.com/news/investigations/biden-administration-walks-fine-line-intelligence-sharing-ukraine-rcna18542>> accessed 31 May 2023.

²⁸⁰ Wentker (n 219) 12.

²⁸¹ Schmitt, 'Ukraine Symposium - Are We at War?' (n 56); Michael N Schmitt, 'Ukraine Symposium - U.S. Offensive Cyber Operations in Support of Ukraine' (*Lieber Institute West Point*, 6 June 2022) <<https://lieber.westpoint.edu/us-offensive-cyber-operations-support-ukraine/>> accessed 4 May 2023; Wentker (n 219) 12.

It is not confirmed that the United States did share such actionable intelligence with Ukraine, however, the behaviour of US officials in changing versions on what was the content of intel raises doubts. Furthermore, a US official denied that the United States have a role in selecting and engaging targets, however when he explained the sharing process it was clear that Ukraine does not strike without confirmation from the United States.²⁸² In the same article a Ukrainian official states that the United States is “controlling every shot anyway” when talking about the request for long-range weapons.²⁸³ If this reflects reality, it would mean that the United States' role is central and integrated into Ukrainian military operations and imply their status as a co-belligerent in the IAC with Russia.²⁸⁴ To cast more doubts on the United States' role, Milanovic observes that the same report was mentioning the provision of offensive and defensive military intelligence in different stages of the conflict.²⁸⁵

It is fundamental to underline that intelligence not being actionable or able to facilitate specific Ukrainian military operations does not make the United States a party to the conflict.²⁸⁶

3. Conclusions

In this chapter, the support of Western States to Ukraine has been discussed to analyse the consequences on their party status in the IAC. The main findings point out that these States have vastly influenced the conflict through the provision of weapons and military intelligence. The one-step causality and the integration in the hostilities are the criteria crucial to evaluate the co-belligerent status. The weapon supply is integrated into the hostilities, however, fails to present a one-step causality. It follows that the material support provided is not close enough to change the party status of supporting States. Conversely, the provision of actionable military intelligence, mainly from the United States, has met the threshold as it is alleged that Ukraine does not strike without confirmation by the United States, making their contribution essential and indispensable, as well as integrated into Ukraine's military operations. It is almost certain that as a matter of law, the United States are party to the IAC in Ukraine.

²⁸² Khurshudyan and others (n 279).

²⁸³ Ibid.

²⁸⁴ Heller and Trabucco (n 37) 14.

²⁸⁵ Marko Milanovic, 'The United States and Allies Sharing Intelligence with Ukraine' (*EJIL: Talk!*, 9 May 2022) <<https://www.ejiltalk.org/the-united-states-and-allies-sharing-intelligence-with-ukraine/>> accessed 31 May 2023.

²⁸⁶ Schmitt, 'Ukraine Symposium - Are We at War?' (n 56).

V. Conclusion

In the thesis, I have analysed the very topical issue of the legality of the support provided to Ukraine by Western States. This support as mentioned in the first chapter affects three bodies of law: the law of neutrality, IHL, and *jus ad bellum*. In considering if these States have become parties to the conflict and breached the law of neutrality, I have analysed the first two bodies of law, leaving *jus ad bellum* outside of the scope of the thesis, but without ignoring its relevance. The extent of support provided, and its legal consequences have been the common thread of this analysis, and, in my opinion, it is important in view of how States and the public speak about it daily.

The law of neutrality has been affected by the prohibition of the use of force, but it continues to apply with some modifications and limits when the Security Council intervenes and adopts binding measures. It seems that especially in the absence of such measures the law of neutrality has an important role in regulating the relation between belligerent and neutral States. A status of qualified neutrality failed to crystallize in customary international law and only through State practice and *opinio juris* this can change in the future. States supporting Ukraine have been reluctant to explicitly take such a position and have limited themselves to affirming that they are supporting a victim of aggression in its right of self-defence.

The support provided to Ukraine does violate the law of neutrality as it is contrary to the duties of abstention, participation, and impartiality. In fact, Western States openly attack Russia's actions and worked together to rend Ukraine stronger with the common goal to allow it to defend itself. Those States consider their support as lawful because it is in support of a victim of aggression, despite the fact the Security Council did not adopt a resolution condemning Russia's action. Thus, the supply of weapons is a violation of neutrality. If the allegations on the integral role of intelligence in Ukraine's military operations were to be confirmed, the United States in particular would have violated the law of neutrality under this aspect as well. States who violated the law of neutrality could be subject to countermeasures.

On the other hand, States' fear of becoming a party to the conflict due exclusively to the massive support provided in violation of neutrality may be unfounded. In fact, what is important is how the support is integrated into the hostilities and its place in the causality chain. Here it is the sharing of intelligence that allegedly allowed the killing of Russian generals and the sinking of the Moskva that potentially made the United States a party to the conflict. Indeed, United States' military intelligence is deemed to have been integral to the military operations

and used immediately by the Armed Forces of Ukraine. The same cannot be stated about the weapons exported, as the causality is not linked to a specific operation.

To answer the research question, the support of Western States to Ukraine caused breaches of the law of neutrality by its content, as weapons and intelligence are vital to the hostilities, and the amount that massively influences the conflict. Additionally, the provision of military actionable intelligence has most likely transformed the United States into a party to the conflict.

The findings of this thesis confirm the relevance of the law of neutrality and the importance of the stricter traditional approach in the specific contest of the absence of Security Council resolutions. These situations may be more frequent in the future and thus interpreting the current context as a warning bell could spur States to change customary norms of the law of neutrality to be able to help victims of aggression by relying on a solid legal basis. On the other hand, findings on party status, elaborate on the importance of analysing the different types of support provided and their placement in the context of the hostilities to classify a State as a co-belligerent.

VI. Bibliography

Primary sources

Treaties

International Conferences (The Hague), *Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War*, 18 October 1907

International Conferences (The Hague), *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907,

International Committee of the Red Cross (ICRC), Common Article 2 to the Geneva Conventions, 12 August 1949.

International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609.

Judgments

The SS 'Wimbledon', United Kingdom and ors v Germany, Judgment, (1923) PCIJ Series A no 1, ICGJ 235 (PCIJ 1923), 17th August 1923, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ].

Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 4.

North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C.J. Reports 2004, p. 136.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 67, at 92.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392

Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 246

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.

International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadić (Decision On The Defense Motion On Jurisdiction) IT-94-1 (10 August 1995)*.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226

International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadić (Appeals Chamber) IT-94-1 (15 July 1999)*

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168.

International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Pavle Strugar (Appeal Judgment) [2008] IT-01-42-A, 2008*.

BVerwG, Urteil vom 21.06.2005 - 2 WD 12.04 - [ECLI: DE: BVerwG: 2005: 210605U2WD12.04.0], para.4.1.4.1.4.

UN Documents

United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

United Nations, *Statute of the International Court of Justice*, 18 April 1946

United Nations General Assembly, *Uniting for peace*, 3 November 1950, A/RES/377

United Nations General Assembly, *Definition of Aggression*, 14 December 1974, A/RES/3314.

United Nations Security Council, *Security Council resolution 540 (1983)*, 31 October 1983 S/RES/540.

United Nations Security Council, *Security Council resolution 678 (1990)*, 29 November 1990, S/RES/678

United Nations Security Council, *Security Council resolution 661 (1990)*, 6 August 1990, S/RES/661 (1990).

International Law Commission, *Draft Articles on the Effects of Armed Conflicts on Treaties*, sixty-third session (2011).

United Nations General Assembly, *Effects of armed conflicts on treaties*, 7 December 2017, A/RES/72/121.

United Nations General Assembly, *Aggression against Ukraine: Resolution /: Adopted by the General Assembly*, 18 March 2022, A/RES/ES-11/1.

United Nations Security Council, 9127th Meeting (2022) S/PV.9127.

United Nations Security Council, 9216th Meeting (2022), S/PV.9216.

United Nations Security Council, 9127th Meeting (2022), S/PV.9127.

United Nations Security Council, 9256th Meeting (2023), S/PV.9256.

Official documents

‘Briand-Kellogg Pact - Hansard - UK Parliament’ <<https://hansard.parliament.uk/lords/1935-02-20/debates/55b8f0a2-14cc-4a5e-8b9f-51a4596b1bf0/Briand-KelloggPact>> accessed 17 May 2023

Claire Mills, ‘Military assistance to Ukraine since the Russian invasion’, UK Parliament (25 January 2023).

US Department of Defense, ‘United States: Department of Defense Report to Congress on the Conduct of the Persian Gulf War - Appendix on the Role of the Law of War’ (1992) 31 International Legal Materials 612 <<https://www.jstor.org/stable/20693692>> accessed 14 February 2023

‘San Remo Manual on International Law Applicable to Armed Conflicts at Sea’ (1994) <<https://ihl-databases.icrc.org/en/ihl-treaties/san-remo-manual-1994>> accessed 16 May 2023

US Department of Justice Office of Legal Counsel, ‘“Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention’ <https://www.justice.gov/d9/olc/opinions/2004/03/31/op-olc-v028-p0035_0.pdf>

Department of Defense US, ‘Department of Defense Law of War Manual’ <https://dod.defense.gov/Portals/1/Documents/pubs/DoDLawofWarManual-June2015UpdatedDec2016.pdf?ver=2016-12-13-172036-190>

NORTH ATLANTIC TREATY ORGANIZATION (NATO), ‘AJP-3.20, Allied Joint Doctrine for Cyberspace Operations (Edition A)’

Staatssekretär, ‘Deutscher Bundestag: Schriftliche Fragen, 20. Wahlperiode’ <https://dserver.bundestag.de/btd/20/019/2001918.pdf>

Grignon J, « Co-Belligerency » or When Does a State Become a Party to an Armed Conflict? (2022) Strategic Brief 39 Institut de Recherche Stratégique de l’Ecole Militaire

‘Joint Statement by Latvian, Estonian, Lithuanian Foreign Ministers in Support of Ukraine | Välisministeerium’ <<https://vm.ee/en/news/joint-statement-latvian-estonian-lithuanian-foreign-ministers-support-ukraine>> accessed 24 May 2023

‘The Ministry of National Defence offers support to the Ukrainian Armed Forces’ (*Romanian Ministry of National Defence*) <https://english.mapn.ro/cpresa/5580_the-ministry-of-national-defence-offers-support-to-the-ukrainian-armed-forces> accessed 24 May 2023

‘U.S. Security Cooperation with Ukraine’ (*United States Department of State*) <<https://www.state.gov/u-s-security-cooperation-with-ukraine/>> accessed 31 May 2023

Secondary sources

Books

Antonopoulos C, *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality* (Cambridge University Press 2022) <<https://www.cambridge.org/core/books/nonparticipation-in-armed-conflict/CB9B143E277756AD5118D37FACD615CB>> accessed 10 May 2023

Becker T, Cairns J Jr and Robinson O, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Bloomsbury Publishing Plc 2006) <<http://ebookcentral.proquest.com/lib/uunl/detail.action?docID=1772528>> accessed 5 June 2023

Bothe M, 'Neutrality, Concept and General Rules' in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedias of International Law* (2015)

—, 'The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th Edition, 2021)

Castrén EJS, *The Present Law of War and Neutrality* (Academia Scientiarum Fennica 1954)

Clapham A, '2 Declarations of War and Neutrality', *War* <<https://opil.ouplaw.com/display/10.1093/law/9780198810469.001.0001/law-9780198810469-chapter-2>> accessed 10 February 2023

De Bustamente A.S y Sirven, *Droit International Public*, Tome 4, (Paris 1937).

Dinstein Y, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2004)

Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge University Press 2011) <<https://www.cambridge.org/core/books/war-aggression-and-selfdefence/C800C83087F8FF1E10C8646E4055DB69>> accessed 5 May 2023

Dörr O, 'Use of Force, Prohibition Of', *Max Planck Encyclopedias of International Law* <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e427?prd=MPIL>> accessed 12 May 2023

Christine Gray, 'The UN and the Use of Force', *International Law and the Use of Force* (4th edn, 2018) 262 <<https://opil-ouplaw-com.proxy.library.uu.nl/display/10.1093/law/9780198808411.001.0001/law-9780198808411-chapter-6?prd=OPIL>> accessed 23 June 2023

Greenwood C, 'Scope of Application of Humanitarian Law' in Dieter Fleck and Michael Bothe (eds), *The Handbook of International Humanitarian Law* (Oxford University Press 2008)

ICRC Database, Treaties, States Parties and Commentaries, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Commentary of 01.01.2016.

Lauterpacht H, 'Neutrality and Collective Security' in Sir Elihu Lauterpacht (ed), *International Law*, vol 5 (2004)

Lauterpacht H, *Disputes, War And Neutrality* <<http://archive.org/details/in.ernet.dli.2015.459056>> accessed 31 January 2023

Lauterpacht H, *The Pact of Paris and the Budapest Articles of Interpretation* (1935)

Nasu H, 'The Laws of Neutrality in the Interconnected World: Mapping the Future Scenarios' in Matthew C Waxman and Thomas W Oakley (eds), *The Future Law of Armed Conflict* (Oxford University Press 2022) <<https://doi.org/10.1093/oso/9780197626054.003.0008>> accessed 10 May 2023

Oppenheim LFL and Lauterpacht H., *International Law: A Treatise. Vol. II, Disputes, War and Neutrality* (7th ed. edited by H. Lauterpacht, Longmans, Green and Co 1952)

Sandoz Y, 'Part I Cross-Cutting Issues and Common Provisions, A Cross-Cutting Issues, Ch.5 Rights, Powers, and Obligations of Neutral Powers under the Conventions' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* <<https://opil.ouplaw.com/display/10.1093/law/9780199675449.001.0001/law-9780199675449-chapter-5>> accessed 13 May 2023

Sandoz Y and Zimmermann B (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) <https://hdl.loc.gov/loc.law/llmlp.Commentary_GC_Protocols> accessed 27 May 2023

Sassòli M, 'IHL and Other Branches of International Law', *International Humanitarian Law: rules, controversies, and solutions to problems arising in warfare* (Edward Elgar Publishing 2019) <<https://www.elgaronline.com/display/9781786438546/ch09.xhtml>> accessed 23 May 2023

Schrijver N, 'The Ban on the Use of Force in the UN Charter' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2015) 469 <<https://opil-ouplaw-com.proxy.library.uu.nl/display/10.1093/law/9780199673049.001.0001/law-9780199673049-chapter-22?prd=OPIL>> accessed 23 June 2023.

Segeer P, 'Part III Legal Regimes, Ch.10 The Law of Neutrality' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) <<https://opil.ouplaw.com/display/10.1093/law/9780199559695.001.0001/law-9780199559695-chapter-10?prd=OPIL>> accessed 23 May 2023

Tucker RW, *The Law of War and Neutrality at Sea* (The Lawbook Exchange, Ltd 2022)

Tullio Treves, 'Customary International Law' in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedias of International Law*

Upcher J, 'The Application and Termination of Neutrality', *Neutrality in Contemporary International Law* (2020)

—, 'The Duties and Rights of Neutrals', *Neutrality in Contemporary International Law* (2020)

—, 'Neutrality, Non-Belligerency, and the Prohibition of the Use of Force', *Neutrality in Contemporary International Law* (2020)

—, ‘The Application and Termination of Neutrality’, *Neutrality in Contemporary International Law* (2020)
<<https://opil.ouplaw.com/display/10.1093/law/9780198739760.001.0001/law-9780198739760-chapter-3>> accessed 25 May 2023

—, ‘The Exercise of Belligerent Rights Against Neutrals’, *Neutrality in Contemporary International Law* (2020)
<<https://opil.ouplaw.com/display/10.1093/law/9780198739760.001.0001/law-9780198739760-chapter-6>> accessed 24 May 2023

Westlake J, *International Law* (Cambridge, University pr 1907)
<<http://archive.org/details/internationallaw00westrich>> accessed 7 June 2023

Journal Articles

Augustine ZP, ‘Cyber Neutrality: A Textual Analysis of Traditional Jus in Bello Neutrality Rules through a Purpose Based Lens’ (2014) 71 *Air Force Law Review* 69
<<https://go.gale.com/ps/i.do?p=AONE&sw=w&issn=00948381&v=2.1&it=r&id=GALE%7CA385654618&sid=googleScholar&linkaccess=abs>> accessed 10 May 2023

Borchard E, ‘War, Neutrality and Non-Belligerency’ (1941) 35 *The American Journal of International Law* 618 <<https://www.jstor.org/stable/2192562>> accessed 4 May 2023

Boyle F, ‘International Crisis and Neutrality: United States Foreign Policy Toward the Iran-Iraq War’ (1992) 43 *Mercer Law Review*
https://digitalcommons.law.mercer.edu/jour_mlr/vol43/iss2/1?utm_source=digitalcommons.law.mercer.edu%2Fjour_mlr%2Fvol43%2Fiss2%2F1&utm_medium=PDF&utm_campaign=PDFCoverPages

Cavaglieri A, *Belligeranza, Neutralità e Posizioni Giuridiche Intermedie*, *Rivista di Diritto Internazionale* 13 (Ser. II Vol. 8, 1919).

Clancy P, ‘NEUTRAL ARMS TRANSFERS AND THE RUSSIAN INVASION OF UKRAINE’ (2023) 72 *International & Comparative Law Quarterly* 527
<<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/neutral-arms-transfers-and-the-russian-invasion-of-ukraine/5231C2F510CBDCB67B2093C62C8415B5>> accessed 15 May 2023

Farrant J, ‘Modern Maritime Neutrality Law’ (2014) 90 *International Law Studies*
<<https://digital-commons.usnwc.edu/ils/vol90/iss1/13>>

Ferro L and Verlinden N, ‘Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties’ (2018) 17 *Chinese Journal of International Law* 15
<<https://doi.org/10.1093/chinesejil/jmy011>> accessed 15 February 2023

Greenwood C, ‘The Concept of War in Modern International Law’ (1987) 36 *The International and Comparative Law Quarterly* 283 <<https://www.jstor.org/stable/759997>> accessed 7 June 2023

Heinegg WHV, 'Chapter 20. Benevolent Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality', *International Law and Armed Conflict: Exploring the Faultlines* (Brill | Nijhoff 2007) <https://web-p-ebSCOhost-com.proxy.library.uu.nl/ehost/ebookviewer/ebook/bmxlYmtfXzI1MjgwOV9fQU41?sid=8313b873-1842-4a11-85d6-ae2ea0a261a6@redis&vid=0&format=EB&lpid=lp_543&rid=0> accessed 30 January 2023

Heller KJ and Trabuco L, 'The Legality of Weapons Transfers to Ukraine Under International Law' (2022) 13 *Journal of International Humanitarian Legal Studies* 251 <https://brill.com/view/journals/iHLS/13/2/article-p251_004.xml> accessed 4 May 2023

Jackson RH, 'Address of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941' (1941) 35 *The American Journal of International Law* 348 <<https://www.jstor.org/stable/2192277>> accessed 16 May 2023

Jessup PC, 'Should International Law Recognize an Intermediate Status between Peace and War?' (1954) 48 *American Journal of International Law* 98 <<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/should-international-law-recognize-an-intermediate-status-between-peace-and-war/CBE0B82BC64AE1C08174159FB756E28E>> accessed 15 May 2023

Komarnicki T, *RdC* 80 (1952 I), 395.

Miljan T, Leonhard AT and Mercurio N, 'Neutrality: Changing Concepts and Practices' (1989) 45 *International Journal* 187

Moore JB, 'The New Isolation' (1933) 27 *The American Journal of International Law* 607 <<https://www.jstor.org/stable/2190111>> accessed 27 May 2023

Nasu H, 'The End of the United Nations?: The Demise of Collective Security and Its Implications for International Law', *Max Planck Yearbook of United Nations Law Online*, vol 24 (Brill Nijhoff 2021) <https://brill.com/view/journals/mpyo/24/1/article-p110_5.xml> accessed 14 February 2023

Petrochilos G, 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality' (1998) 31 *Vanderbilt Journal of Transnational Law* 575 <<https://scholarship.law.vanderbilt.edu/vjtl/vol31/iss2/6>>

Schmitt MN and Biggerstaff W, 'Aid and Assistance as a "Use of Force" Under the Jus Ad Bellum' (2023) 100 *SSRN Electronic Journal* <<https://www.ssrn.com/abstract=4372086>> accessed 22 May 2023

Talmon SAG, 'The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine' (6 April 2022) <<https://papers.ssrn.com/abstract=4077084>> accessed 15 May 2023

Tristan Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 *International Review of the Red Cross* <https://www.cambridge.org/core/product/identifier/S181638311400023X/type/journal_article> accessed 27 May 2023.

Wentker A, 'At War? Party Status and the War in Ukraine' [2023] *Leiden Journal of International Law* 1 <<https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/at-war-party-status-and-the-war-in-ukraine/EC59482A140EE6FBDD86292ED18C2FA6>> accessed 4 May 2023

Williams WL, 'Neutrality in Modern Armed Conflicts: A Survey of the Developing Law' (1980) 90 *Faculty Publications*

Blog posts

Ambos K, 'Wird Deutschland durch Waffenlieferungen an die Ukraine zur Konfliktpartei?' [2022] *Verfassungsblog* <<https://verfassungsblog.de/wird-deutschland-durch-waffenlieferungen-an-die-ukraine-zur-konfliktpartei/>> accessed 8 February 2023

——, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and Thus Be Exposed to Countermeasures?' (*EJIL: Talk!*, 2 March 2022) <<https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/>> accessed 31 January 2023

Bartolini G, 'The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice' (*EJIL: Talk!*, 11 April 2023) <<https://www.ejiltalk.org/the-law-of-neutrality-and-the-russian-ukrainian-conflict-looking-at-state-practice/>> accessed 24 May 2023

Biggerstaff MNS William Casey, 'Are States Aiding and Assisting Ukraine and Russia Using Force?' (*Lieber Institute West Point*, 7 April 2023) <<https://lieber.westpoint.edu/are-states-aid-assisting-ukraine-russia-using-force/>> accessed 4 May 2023

Droege C and Tuck D, 'Fighting Together and International Humanitarian Law: Setting the Legal Framework (1/2)' (*Humanitarian Law & Policy Blog*, 12 October 2017) <<https://blogs.icrc.org/law-and-policy/2017/10/12/fighting-together-international-humanitarian-law-setting-legal-framework-1-2/>> accessed 27 May 2023

Heinegg WH von, 'Neutrality in the War against Ukraine' (*Articles of War*, 1 March 2022) <<https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>> accessed 30 January 2023

Hoogh A de, 'The Elephant in the Room: Invoking and Exercising the Right of Collective Self-Defence in Support of Ukraine against Russian Aggression' (*Opinio Juris*, 7 March 2022) <<http://opiniojuris.org/2022/03/07/the-elephant-in-the-room-invoking-and-exercising-the-right-of-collective-self-defence-in-support-of-ukraine-against-russian-aggression/>> accessed 10 February 2023

Karahalios D, 'International Law, Order, and Justice' (*Lieber Institute West Point*, 24 April 2023) <<https://lieber.westpoint.edu/international-law-order-justice/>> accessed 4 May 2023

Konchak PS, 'U.S. and Allied Involvement in the Russo-Ukrainian War: The Belligerent Status of NATO States and Its Implications' (*Opinio Juris*, 20 July 2022) <<https://opiniojuris.org/2022/07/20/u-s-and-allied-involvement-in-the-russo-ukrainian-war-the-belligerent-status-of-nato-states-and-its-implications/>> accessed 4 May 2023

Krajewski M, 'Neither Neutral nor Party to the Conflict?: On the Legal Assessment of Arms Supplies to Ukraine' [2022] *Völkerrechtsblog* <<https://voelkerrechtsblog.org/de/neutral-nor-party-to-the-conflict/>> accessed 31 January 2023

Milanovic M, 'The United States and Allies Sharing Intelligence with Ukraine' (*EJIL: Talk!*, 9 May 2022) <<https://www.ejiltalk.org/the-united-states-and-allies-sharing-intelligence-with-ukraine/>> accessed 31 May 2023

Nasu H, 'The Future Law of Neutrality' (*Articles of War*, 19 July 2022) <<https://lieber.westpoint.edu/future-law-of-neutrality/>> accessed 30 January 2023

Pedrozo R (Pete), 'Ukraine Symposium - Is the Law of Neutrality Dead?' (*Articles of War*, 31 May 2022) <<https://lieber.westpoint.edu/is-law-of-neutrality-dead/>> accessed 31 January 2023

Schmitt MN, 'Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense' (*Lieber Institute West Point*, 28 February 2022) <<https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>> accessed 13 February 2023

—, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (*Articles of War*, 7 March 2022) <<https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>> accessed 31 January 2023

—, 'Ukraine Symposium - Are We at War?' (*Lieber Institute West Point*, 9 May 2022) <<https://lieber.westpoint.edu/are-we-at-war/>> accessed 4 May 2023

—, 'Ukraine Symposium - U.S. Offensive Cyber Operations in Support of Ukraine' (*Lieber Institute West Point*, 6 June 2022) <<https://lieber.westpoint.edu/us-offensive-cyber-operations-support-ukraine/>> accessed 4 May 2023

Shapiro SJ and Hathaway OA, 'Supplying Arms to Ukraine Is Not an Act of War' (*Just Security*, 12 March 2022) <<https://www.justsecurity.org/80661/supplying-arms-to-ukraine-is-not-an-act-of-war/>> accessed 31 January 2023

Talmon S, 'Waffenlieferungen an die Ukraine als Ausdruck eines wertebasierten Völkerrechts' (*Verfassungsblog*, März 2022) <<https://verfassungsblog.de/waffenlieferungen-an-die-ukraine-als-ausdruck-eines-wertebasierten-volkerrechts/>> accessed 31 January 2023

Weizmann N, 'Associated Forces and Co-Belligerency' (*Just Security*, 24 February 2015) <<https://www.justsecurity.org/20344/isil-aumf-forces-co-belligerency/>> accessed 25 May 2023

Wentker A, 'At War: When Do States Supporting Ukraine or Russia Become Parties to the Conflict and What Would That Mean?' (*EJIL: Talk!*, 14 March 2022) <<https://www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/>> accessed 4 May 2023

Newspaper Articles

Barnes J E, Cooper H and Schmitt E, 'U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say' *The New York Times* (4 May 2022)

<<https://www.nytimes.com/2022/05/04/us/politics/russia-generals-killed-ukraine.html>>
accessed 30 May 2023

BBC News, 'Moskva Sinking: US Gave Intelligence That Helped Ukraine Sink Russian Cruiser - Reports' *BBC News* (6 May 2022) <<https://www.bbc.com/news/world-us-canada-61343044>> accessed 30 May 2023

Beaumont P and Borger J, 'US Intelligence Helping Ukraine Kill Russian Generals, Report Says' *The Guardian* (5 May 2022) <<https://www.theguardian.com/world/2022/may/05/us-intelligence-helping-ukraine-kill-russian-generals-report>> accessed 30 May 2023

Brown D, Horton J and Ahmedzade T, 'Ukraine Weapons: What Tanks and Other Equipment Are the World Giving?' *BBC News* (1 July 2022) <<https://www.bbc.com/news/world-europe-62002218>> accessed 22 June 2023.

Detsch J and Gramer R, 'Biden Administration Debates Legality of Arming Ukrainian Resistance' (*Foreign Policy*, 24 February 2022) <<https://foreignpolicy.com/2022/02/24/biden-legal-ukraine-russia-resistance/>> accessed 8 February 2023.

Dilanian K, Kube C and Lee C E, 'U.S. Intel Helped Ukraine Sink Russian Flagship Moskva, Officials Say' *NBC News* (5 May 2022) <<https://www.nbcnews.com/politics/national-security/us-intel-helped-ukraine-sink-russian-flagship-moskva-officials-say-rcna27559>>
accessed 31 May 2023.

Dilanian K, 'Biden Administration Walks Fine Line on Intelligence-Sharing with Ukraine' *NBC News* (4 March 2022) <<https://www.nbcnews.com/news/investigations/biden-administration-walks-fine-line-intelligence-sharing-ukraine-rcna18542>> accessed 31 May 2023.

Gedeon J, 'The Weapons and Military Aid the World Is Giving Ukraine' [2022] *POLITICO* <<https://www.politico.com/news/2022/03/22/ukraine-weapons-military-aid-00019104>>
accessed 22 June 2023; 'Pledged/Delivered Weapons to Ukraine' (Forum on the Arms Trade) <<https://www.forumarmstrade.org/ukraine-countries.html>> accessed 22 June 2023.

Khurshudyan I and others, 'Ukraine's Rocket Campaign Reliant on U.S. Precision Targeting, Officials Say' *Washington Post* (22 May 2023) <<https://www.washingtonpost.com/world/2023/02/09/ukraine-himars-rocket-artillery-russia/>>
accessed 30 May 2023.

Masters J and Merrow W, 'How Much Aid Has the U.S. Sent Ukraine? Here Are Six Charts.' [2023] *Council on Foreign Relations* <<https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts>> accessed 22 June 2023.

Mcleary P, 'Ukraine Has Shot down 55 Russian Warplanes, U.S. General Says' [2022] *POLITICO* <<https://www.politico.com/news/2022/09/19/ukraine-has-shot-down-55-russian-warplanes-00057569>> accessed 30 May 2023

Sabbagh D, 'US Shared Location of Cruiser Moskva with Ukraine Prior to Sinking' *The Guardian* (6 May 2022) <<https://www.theguardian.com/world/2022/may/05/us-intelligence-russia-moskva-ukraine>> accessed 30 May 2023

Vindman A and Cruz Bustillos D, 'America Must Do More to Help Ukraine Fight Russia' [2022] *Foreign Affairs* <<https://www.foreignaffairs.com/articles/ukraine/2022-03-05/america-must-do-more-help-ukraine-fight-russia>> accessed 30 May 2023

Visual Journalism Team, 'Ukraine Conflict: Simple Visual Guide to the Russian Invasion' *BBC News* (24 February 2022) <<https://www.bbc.com/news/world-europe-60506298>> accessed 16 February 2023.

Reports

Center for Preventive Action, 'War in Ukraine' *Global Conflict Tracker* <<https://cfr.org/global-conflict-tracker/conflict/conflict-ukraine>> accessed 23 June 2023.

Christoph Trebesch and others, 'THE UKRAINE SUPPORT TRACKER: WHICH COUNTRIES HELP UKRAINE AND HOW?'

Global Rights Compliance, 'International Law and Defining Russia's Involvement in Crimea and Donbass' (13 February 2022).

International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts | International Committee of the Red Cross' (ICRC 2015) 32IC/15/11 <<https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>> accessed 27 May 2023.

International Committee of the Red Cross, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2015) Publication 43 <<https://www.icrc.org/en/publication/0990-interpretive-guidance-notion-direct-participation-hostilities-under-international>> accessed 27 May 2023.

Institut de Droit international, 'Les conditions d'application des règles, autres que les règles humanitaires, relatives aux conflits armés aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagés' (197AD) <https://www.idi-il.org/app/uploads/2017/06/1975_wies_02_fr.pdf>.

International Group of Experts, *Tallinn Manual 1.0 International Group of Experts and Other Participants 2* (2nd edn, Cambridge University Press 2017) <<https://www.cambridge.org/core/books/tallinn-manual-20-on-the-international-law-applicable-to-cyber-operations/tallinn-manual-10-international-group-of-experts-and-other-participants2/879AA96834717C02142DFC1250DD7C30>> accessed 29 May 2023

International Group of Experts, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, Cambridge University Press 2017) <<https://www.cambridge.org/core/books/tallinn-manual-20-on-the-international-law-applicable-to-cyber-operations/E4FFD83EA790D7C4C3C28FC9CA2FB6C9>> accessed 28 May 2023.

International Law Association, Budapest Articles of Interpretation (As resolved at the closing session on September 10, 1934), ILA, Report of the Thirty-Eighth Conference held at Budapest, September 6th to 10th, 1934 (London: Eastern Press, 1935)

International Law Association, 'The Budapest Resolutions of 1934 on the Briand-Kellogg Pact of Paris', *International Law Association 38th Conference* (American Society of International Law 1935) <https://www.roberthjackson.org/wp-content/uploads/2015/01/International_Order.pdf> accessed 17 May 2023.

Kiel Institution for World Economy, 'Government Support to Ukraine: By Country Group, € Billion' 70 <https://app.23degrees.io/view/5V9AdDpw1pmLx01e-bar-stacked-horizontal-figure-1_csv> accessed 24 May 2023

Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict' (2015) 97 *International Review of the Red Cross* <https://www.cambridge.org/core/product/identifier/S1816383116000448/type/journal_article> accessed 27 May 2023

Others

Michael Ray, 'Russia-Ukraine War | Casualties, Map, Causes, & Significance | Britannica', *Encyclopedia Britannica* (2023) <<https://www.britannica.com/event/2022-Russian-invasion-of-Ukraine>> accessed 26 June 2023.

'Pledged/Delivered Weapons to Ukraine' (Forum on the Arms Trade) <<https://www.forumarmstrade.org/ukraine-countries.html>> accessed 22 June 2023.