

## The provision of belligerent materials in the Russia-Ukraine conflict: Beyond the law of neutrality?

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### 1. Introduction

One of the distinctive features of the Ukrainian-Russian armed conflict is the open provision of lethal war materials, and eventually intelligence,<sup>1</sup> to Ukraine. This support has been provided by around 30 States, including a large majority of the EU Member States, plus Albania, Australia, Canada, North Macedonia, Turkey, United Kingdom, and the USA,<sup>2</sup> as complemented by the EU which is providing similar support through Council Decision (CFSP) 2002/238<sup>3</sup> and its European Peace Facility (EPF).<sup>4</sup> Furthermore, some other countries have limited their support to non-lethal materials. Conversely, regarding Russia, multiple claims have been made regarding an effective military support provided by some States, even if such allegations have been denied by concerned States.

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<sup>1</sup> On intelligence and its legal implications see: A Wentker, 'At War? Party Status and the War in Ukraine' (2023) *Leiden J Intl L* (advanced version); M Milanovic, 'The United States and Allies Sharing Intelligence with Ukraine' *EJIL:Talk!* (9 May 2022) <[www.ejiltalk.org/the-united-states-and-allies-sharing-intelligence-with-ukraine](http://www.ejiltalk.org/the-united-states-and-allies-sharing-intelligence-with-ukraine)>.

<sup>2</sup> For some surveys see 'The United States and Allies Provide Military and Intelligence Support to Ukraine' (2022) 116 *AJIL* 646; Forum on the Arms Trade, 'Arms Transfers to Ukraine' (May 2023) <[www.forumarmstrade.org/ukrainearms.html](http://www.forumarmstrade.org/ukrainearms.html)>; 'List of military aid to Ukraine during the Russo-Ukrainian War' Wikipedia (February 2023) <[https://en.wikipedia.org/wiki/List\\_of\\_foreign\\_aid\\_to\\_Ukraine\\_during\\_the\\_Russo-Ukrainian\\_War](https://en.wikipedia.org/wiki/List_of_foreign_aid_to_Ukraine_during_the_Russo-Ukrainian_War)>.

<sup>3</sup> Council Decision (CFSP) 2022/338 on an Assistance Measure Under the European Peace Facility for the Supply to the Ukrainian Armed Forces of Military Equipment, and Platforms, Designed to Deliver Lethal Force [2022] *OJ L* 60.

<sup>4</sup> Council Decision (CFSP) 2021/509 establishing a European Peace Facility [2021] *OJ L* 102 art 1.1.

Such activities could raise a series of legal challenges and, indeed, since the early phases of the conflict scholars have scrutinized such activities in view of identifying potential legal reasonings and limits, as complemented by the emergence of positions expressed by States on such conducts. In particular this scenario has extensively been addressed by doctrine under the lens of the law of neutrality,<sup>5</sup> considering how legal principles pertaining to this body of law could play a role in the context of an international armed conflicts like the current one, even if other legal arguments were also addressed in order to identify potential legal reasonings behind such conducts. Such scholarly positions hardly found proper echo in positions expressed by concerned States which have been far from being consistent and clear on their legal reasonings, also raising the parallel issue of States' silence.<sup>6</sup>

Against this background the current contribution aims to explore legal challenges raised by military support provided to belligerent parties in the Ukrainian/Russian armed conflict, particularly in light of different positions expressed by States, regarding both the provision of lethal war material to Ukraine (section 2) and more limited forms of military assistance to this latter State or, conversely, the deny or absence of such support to belligerent parties (section 3), finally exploring legal challenges in relation to Russia (section 4). In the concluding section 5 some tentative remarks will be provided on the potential impact of the current scenario on future developments in this area of law.

## 2. *The provision of belligerent materials to Ukraine: Potential legal justifications*

As mentioned above a series of States have openly provided lethal war material in favour of Ukraine, through conducts apparently in contrast with conducts required to neutral States by the law of neutrality, not being possible to discriminate among belligerent parties, in particular providing military assistance to one of the warring parties.

<sup>5</sup> On this legal regime see J Upcher, *Neutrality in Contemporary International Law* (OUP 2020); C Antonopoulos, *Non-Participation in Armed Conflicts* (CUP 2022).

<sup>6</sup> On the role of silence see A Marie, *Le silence de l'État comme manifestation de sa volonté* (Pedone 2018).

However, as maintained by a group of scholars, it would be eventually possible to justify such activities referring to concepts as benevolent/qualified neutrality, a theory aimed at factoring *ius ad bellum* elements in this area, with the possibility for neutral States to discriminate between belligerent parties avoiding to apply a strict neutrality in case of aggression.<sup>7</sup> This solution, based on a decentralised assessment of *ius ad bellum* elements, would thus work independently from the undisputed scenario according to which a potential binding resolution of the UNSC adopted under Chapter VII of the Charter might request Member States to adopt measures implying their need to supersede the law of neutrality.<sup>8</sup>

As mentioned above, regardless of doubts expressed in the past by several scholars on the possibility to admit the emergence of a ‘benevolent/qualified’ exception in the law of neutrality,<sup>9</sup> particularly lacking clear state practice supporting this approach,<sup>10</sup> within analysis related to the current Russian/Ukrainian armed conflict a group of scholars have clearly endorsed this solution.<sup>11</sup> This position was linked to the flagrant violation of the UN Charter by Russia, as confirmed by UNGA Resolution ES-11/1,<sup>12</sup> and the impossibility for the UN SC to exercise its

<sup>7</sup> See for instance A Gioia, ‘Neutrality and Non-Belligerency’ in H Post (ed), *International Economic Law and Armed Conflict* (Brill 1994); N Ronzitti, *Diritto internazionale dei conflitti armati* (6th edn, Giappichelli 2017) 342.

<sup>8</sup> On this scenario see for instance Upcher (n 5) 126-161.

<sup>9</sup> For denials of this theory see for instance Antonopoulos (n 5) 146; M Bothe, ‘Neutrality, Concept and General Rules’ (October 2015) in A Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn) para 5; L Ferro, N Verlinden, ‘Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties’ (2019) 17 Chinese J Intl L 15; WH von Heinegg, ‘“Benevolent” Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality’ in MN Schmitt, J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff 2007).

<sup>10</sup> United States Department of Defence [2016] Law of War Manual 952-953.

<sup>11</sup> O Hathaway, S Shapiro, ‘Supplying Arms to Ukraine is not an Act of War’ Just Security (12 March 2022) <[www.justsecurity.org/80661/supplying-arms-to-ukraine-is-not-an-act-of-war](http://www.justsecurity.org/80661/supplying-arms-to-ukraine-is-not-an-act-of-war)>; H Nasu, ‘The Future Law of Neutrality’ Articles of War (July 19 2022) <<https://lieber.westpoint.edu/future-law-of-neutrality>>; MN Schmitt, ‘Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force’ *ibid* (7 March 2022) <<https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force>>; MN Schmitt, ‘Ukraine Symposium – Are We at War?’ *ibid* (May 9 2022) <<https://lieber.westpoint.edu/are-we-at-war>>; WH von Heinegg, ‘Neutrality in the War against Ukraine’ *ibid* (1 March 2022) <<https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine>>.

<sup>12</sup> UNGA Res ES-11/1 ‘Aggression against Ukraine’ (2 March 2022).



functions and identify the aggressor State due to the P-5 character of Russia, making clear how ‘any application of the traditional law of neutrality and the concomitant equal treatment of the aggressor and the victim of aggression would be tantamount to a declaration of legal and moral bankruptcy’.<sup>13</sup>

While this solution was clearly maintained by some scholars, it can only find some indirect references in States’ positions providing such support. Indeed, even if the provision of weapons has expressly been linked with the ongoing aggression carried out by Russia and the individual right of self-defence exercised by Ukraine, such States did not directly engage in an analysis of their actions under the law of neutrality as in no instances it is possible to identify a direct claim maintaining how such support was lawful, under the lens of the law of neutrality, based on the benevolent/qualified approach. Basically, States justified their conducts providing legal arguments in line with this potential exception, without however directly mentioning it or engaging with this body of law.

Such positions could be identified in statements made in UNSC debates. France maintained that it ‘is providing, and will continue to provide, the Ukrainian people with all the support they need to exercise their right to self-defence...That includes military support, both bilaterally and through the European Union’;<sup>14</sup> joint statements were expressed by the Baltic and Nordic States, according to whom ‘Under the Charter, Ukraine has an inherent right to self-defence. The Nordic and Baltic States are determined to enhance Ukraine’s military capabilities and to provide all necessary support’;<sup>15</sup> as confirmed by Norway which claimed that ‘Other States are entitled to respond positively to Ukraine’s call for

<sup>13</sup> S Talmon, ‘The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine’ Bonn Research Papers on Public International Law 20/2022, 21 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4077084](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4077084)>.

<sup>14</sup> UN Doc S/PV.9256 (8 February 2023) 13. See also UN Doc S/PV.9127 (8 September 2022) 18: ‘military assistance will continue for so long as the Russian armed aggression persists’.

<sup>15</sup> ‘Remarks by Latvia, also speaking on behalf of Denmark, Estonia, Finland, Iceland, Lithuania, Norway, Sweden at the UNSC’ UN Doc S/PV.9269 (24 February 2023) 29. See also Republic of Estonia, Ministry of Foreign Affairs, ‘Joint statement by Latvian, Estonian, Lithuanian Foreign Ministers in Support of Ukraine’ (24 February 24 2022) <<https://vm.ee/en/news/joint-statement-latvian-estonian-lithuanian-foreign-ministers-support-ukraine>>.



assistance in the exercise of its legitimate right to self-defence’;<sup>16</sup> the USA underlined how ‘the inherent right to individual and collective self-defence is reflected in Article 51 of the Charter...The security assistance, including weapons, that the United States and more than 50 other countries are providing, and will continue to provide, is for Ukraine’s self-defence...Ukraine is using those weapons to repel the invading Russian forces’;<sup>17</sup> while regarding the provision of weapons the UK affirmed ‘We will continue to support Ukraine in defending itself..., as Ukraine defends itself in accordance with Article 51 of the Charter of the United Nations’.<sup>18</sup>

Interestingly, some UNSC members, even if not engaged in this military support, endorsed such actions: Ghana reaffirmed ‘Ukraine’s inherent right to self-defence under customary international law’ and maintained how ‘(t)here is no prohibition on such action, neither do the rules of international law or the Charter prohibit the supply of conventional weapons to a State under armed attack by another’;<sup>19</sup> Ireland positively assessed the ‘military support provided by the European Union to help Ukraine exercise its inherent right of self-defence and defend its territorial integrity and sovereignty’.<sup>20</sup> Indeed, the same EU Council Decision 2022/338 supplying lethal war material to Ukraine emphasizes how ‘(t)he objective of the Assistance Measure is to contribute to strengthening the capabilities and resilience of the Ukrainian Armed Forces to defend the territorial integrity and sovereignty of Ukraine and protect the civilian population against the ongoing military aggression’.<sup>21</sup>

At domestic level, some positions held in national parliaments or in official statements have linked the provision of weapons to the ongoing aggression and the individual right to self-defence for Ukraine. These positions have been expressed by: Germany, where the State Secretary’s statement in Parliament maintained that ‘(t)he Federal Government and its partners are supporting Ukraine by supplying weapons in exercising its right of individual self-defence against Russia’s illegal war of

<sup>16</sup> UN Doc S/PV.9126 (n 14) 16-17.

<sup>17</sup> UN Doc S/PV.9126 (n 14) 12.

<sup>18</sup> UN Doc S/PV.3000 (31 March 2022) 7.

<sup>19</sup> UN Doc S/PV.9126 (n 14) 10.

<sup>20</sup> *ibid* 16.

<sup>21</sup> Council Decision (CFSP) 2022/338 (n 3) art 1.4.

aggression’;<sup>22</sup> Greece, according to which ‘(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’;<sup>23</sup> Italy, where the resolution adopted by the Parliament enjoined the Government ‘to transfer military equipment and assets...in order to enable Ukraine to exercise its right to legitimate defence and to protect its people’;<sup>24</sup> Luxembourg, whose declaration by the MFA maintains how ‘(l)e Luxembourg continuera d’apporter une aide substantielle à l’Ukraine afin de lui permettre d’exercer son droit de légitime défense, consacré par l’article 51 de la Charte des Nations unies’;<sup>25</sup> Romania, where the press release by the MoD maintained how ‘(t)he transfer of these materials towards the Ukrainian Government is part of the general efforts made by the NATO and EU state members to support Ukraine in defending its own territory, state independence and integrity against the Russian Federation’s aggression’,<sup>26</sup> with similar positions echoed in a joint declaration between the UK and Ukraine.<sup>27</sup> Similarly, US Public Law 117-118 ‘Ukraine Democracy Defense Lend-Lease Act of 2022’, whose title even recalls USA legislation providing support to the UK in the early stages of WWII, provided the USA President with the authority ‘to enter into

<sup>22</sup> Statement by State Secretary in the Federal Foreign Office, Susanne Baumann in Response to a Written Parliamentary Question, Bundestags-Drucksache 20/1918, 39 (18 May 2022) <<https://dserver.bundestag.de/btd/20/019/2001918.pdf>>.

<sup>23</sup> Greece Ministry of Defence, Reply 3503/18378 to the Greek MPs on the matter of sending defensive materiel to Ukraine (18 May 2022) in Greek <<https://tinyurl.com/2pepx722>>.

<sup>24</sup> Italian Houses of Parliament, Resolution 6-00208 n 1 (1 March 2022) <[www.senato.it/japp/bgt/showdoc/18/Resaula/0/1340251/index.html?part=doc\\_dc-allegatoa\\_aa](http://www.senato.it/japp/bgt/showdoc/18/Resaula/0/1340251/index.html?part=doc_dc-allegatoa_aa)>.

<sup>25</sup> Ministry of Foreign Affairs of Luxembourg, ‘Déclaration du gouvernement à l’occasion de la guerre d’agression contre l’Ukraine déclenchée par la Russie il y a un an’ (24 February 2023) <[https://maee.gouvernement.lu/fr/actualites.gouvernement%2Bfr%2Bactualites%2Btoutes\\_actualites%2Bcommuniqués%2B2023%2B02-fevrier%2B24-declaration-gouvernement-guerre-ukraine.html](https://maee.gouvernement.lu/fr/actualites.gouvernement%2Bfr%2Bactualites%2Btoutes_actualites%2Bcommuniqués%2B2023%2B02-fevrier%2B24-declaration-gouvernement-guerre-ukraine.html)>.

<sup>26</sup> Romanian Ministry of National Defence, Press Statement n 64, ‘The Ministry of National Defence Offers Support to the Ukrainian Armed Forces’ (27 February 2022) <[https://english.mapn.ro/cpresa/5580\\_the-ministry-of-national-defence-offers-support-to-the-ukrainian-armed-forces](https://english.mapn.ro/cpresa/5580_the-ministry-of-national-defence-offers-support-to-the-ukrainian-armed-forces)>.

<sup>27</sup> ‘Declaration between the government of the United Kingdom of Great Britain and Northern Ireland and the government of Ukraine’ (8 February 2023) <[www.gov.uk/government/publications/uk-ukraine-declaration-of-unity/declaration-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-ukraine](http://www.gov.uk/government/publications/uk-ukraine-declaration-of-unity/declaration-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-ukraine)>.

agreements with the Government of Ukraine to lend or lease defense articles to that Government to protect civilian populations in Ukraine from Russian military invasion'.<sup>28</sup>

States' practice thus provides some first element of interest on the provisions of belligerent materials to Ukraine. The most striking aspect is certainly provided by the lack of proper engagement with the law of neutrality. This approach could pragmatically be seen as a confirmation of the legal irrelevance of this body of law, a solution which is however at odds with continuous references to the law of neutrality in international and domestic practice, even by the same States currently providing belligerent support.<sup>29</sup> Probably, the uncertain legal character of the benevolent/qualified exception to legitimize military assistance, in front of past practice where this solution failed to crystalize, might have prevented involved States to firmly push for this legal solution, as complemented by the political-legal interest to avoid providing strong arguments for theories which could be used in the future by other States with biased approaches in front of less flagrant violations of *ius ad bellum* as in the current case.

The law of neutrality has however not been identified as the only legal regime potentially relevant for assessing the lawfulness of military support to Ukraine. Scholars also referred to further arguments to justify such measures, in particular circumstances precluding wrongfulness, through solutions which have however not significantly echoed in States' positions.

In particular, some scholars have claimed how the provision of weapons to Ukraine could be justified as a form of collective self-defence under Article 51 of the UN Charter,<sup>30</sup> or recognized how 'the difficulty of

<sup>28</sup> USA, Public Law [2022] 117-118, 117th Congress <[www.congress.gov/117/plaws/publ118/PLAW-117publ118.pdf](http://www.congress.gov/117/plaws/publ118/PLAW-117publ118.pdf)>.

<sup>29</sup> For extensive references to the law of neutrality in military manuals by Canada, Denmark, Germany, New Zealand, UK and USA see P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' (2023) 72 ICLQ 527, 533 footnote 38.

<sup>30</sup> K Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and thus Be Exposed to Countermeasures?' EJIL:Talk! (2 March 2022) <[www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/](http://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/)>; M Krajewski, 'Neither Neutral nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine', Völkerrechtsblog (9 March 2022) <<https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the->



qualifying the provision of military assistance to Ukraine under the category of self-defence arise, more than from some insurmountable legal hurdle, from the material constraint of preventing an escalation of the conflict with Russia'.<sup>31</sup> This approach is based on a *a maiore ad minus* argument, maintaining how Article 51 UN Charter, legitimizing collective self-defence against the State responsible of an armed attack, can implicitly justify a right to resort to less intrusive measures against it, as the provisions of weapons to the State victim of the aggression.

In our perspective, this solution seems problematic, and it would be hard to maintain how collective self-defence could be a sound legal basis for such activities, apart from clear political hurdles to invoke this concept in the current scenario. First, on a procedural level, we cannot record any formal communication sent by involved States to the UNSC under Article 51, second sentence, UN Charter. Even if compliance with this requirement is not strictly mandated to resort to self-defence, the current approach is striking in light of the numerous instances in which the same States providing military support to Ukraine recently informed the UNSC of actions qualified as a resort to individual or collective self-defence in other contexts.<sup>32</sup> Second, the *a maiore ad minus* argument does not seem consistent with the purpose of Article 51 UN Charter aimed at creating an express exemption to the prohibition to use force imposed by the same Charter under its Article 2(4), thus confirming doubts expressed by scholars who have maintained how 'It is nevertheless doubtful whether the right to get involved in an armed conflict by reference to the right of collective self-defense justifies the conclusion that, *de maiore ad minus*, non-participating States are also free to openly discriminate against a party to an international armed conflict',<sup>33</sup> also in front of lack of past practice supporting this approach.<sup>34</sup>

conflict>; T Hamilton, 'Defending Ukraine with EU Weapons: Arms Control Law in Times of Crisis', (2022) 1 European L Open 635, 641-643.

<sup>31</sup> M Arcari, 'The conflict in Ukraine and the Hurdles of Collective Action' (2022) 96 QIL-Questions Intl L 7, 22.

<sup>32</sup> N van der Steenhoven, 'Conduct and Subsequent Practice by States in the Application of the Requirement to Report under UN Charter Article 51' (2019) 6 J on the Use of Force and Intl L 242; A Green, 'The Article 51 Reporting Requirement for Self-Defense Actions' (2015) 55 Virginia J Intl L 563.

<sup>33</sup> Heinegg (n 9) 552-553. See also Bothe, 'Neutrality' (n 9) para 29.

<sup>34</sup> See also Upcher (n 5) 24.





Third, it must be noticed how in the current scenario, States providing military support to Ukraine have not apparently maintained to act in collective self-defence. The only exception could be identified in statements made at the UNSC by Albania, where, in relation to arms transfer to Ukraine, the point was made that ‘there is a clear provision agreed by everyone on how to help victims, and Article 51 of the Charter provides the legal basis for individual States to offer whatever assistance to a country exercising its inherent right to self-defence’,<sup>35</sup> while a less clear reference could be found in the position maintained by Poland according to which ‘(a)ssisting such a country is not only admissible, but legally substantiated and morally right...Poland is proud to be a part of the world’s collective self-defence against the trespasser trampling on the most fundamental principles of the United Nations Charter’.<sup>36</sup> Conversely, aside from not referring to this theory, other States expressly denied this scenario. This point was made clear by the German State Secretary on her statement on the supply of weapons to Ukraine according to which ‘This lawful assistance does not pass the threshold of an exercise of the right of collective self-defence’.<sup>37</sup>

An additional legal argument has furthermore been proposed to justify the provision of lethal war material to Ukraine. In particular, taking into account how the prohibition of aggression implies *erga omnes* obligations, as maintained by the ICJ in the Barcelona Traction Case,<sup>38</sup> some scholars have maintained how an argument could be made on the possibility for qualifying military assistance as countermeasures adopted by States other than the injured one as a legal response to the Russian aggression.<sup>39</sup> Therefore, an argument could be made how the reaction to the violation of the relevant *erga omnes* obligation might have an impact in this sphere too. Indeed, it could be maintained how reactions against violations of *ius ad bellum*, through the provision of military support to the victim States, even if interfering with duties required by the law of

<sup>35</sup> UN Doc S/PV.9256 (n 14) 11.

<sup>36</sup> UN Doc S/PV.3000 (n 18) 21.

<sup>37</sup> Statement by State Secretary (n 22).

<sup>38</sup> *Barcelona Traction (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, 32 para 34.

<sup>39</sup> E Benvenisti, A Cohen, ‘Bargaining about War in the Shadow of International Law’ Just Security (28 March 2022) <[www.justsecurity.org/80853/bargaining-about-war-in-the-shadow-of-international-law](http://www.justsecurity.org/80853/bargaining-about-war-in-the-shadow-of-international-law)>; R Pedrozo, ‘Is the Law of Neutrality Dead?’ Articles of War (31 May 2022) <<https://lieber.westpoint.edu/is-law-of-neutrality-dead>>.



neutrality would deny the aggressor State with the possibility to exercise its prerogatives provided by this body of law against States providing assistance, as such conducts could be identified as lawful countermeasures related to the previous wrongful act committed by the aggressor State.

This solution would imply, first, the fulfillment of conditions provided by the same ILC for countermeasures. Reference could be made to the possibility to qualify the military support as a reaction to stop the ongoing aggression, and the fulfillment of the proportionate and necessary requirement, while regarding the notification of the intention to adopt such measures this procedural requirement could be set aside in urgent circumstances. In this context, references have also been made to other provisions of the ILC ARSIWA potentially relevant, as for Article 41(1), maintaining a duty for States to cooperate to bring an end to serious breaches of peremptory norms through lawful means. On such basis, scholars have claimed that whether international law requests States to cooperate to end such conducts, including instances related to aggressions, then it could not demand a parallel respect for the laws on neutrality.<sup>40</sup> However, it seems hard to frame such forms of military assistance as an actual duty imposed by international law, at least based on the current content and understanding of ARSIWA,<sup>41</sup> and this element might also imply the variety of approaches adopted by States with only some of them reacting to this wrongful act.

Theoretically, references to secondary norms, as countermeasures, could be a sound solution in case doubts might be expressed on the existence of a benevolent/qualified neutrality exemption, but this solution has the main disadvantage of being dependent on the possibility to admit the lawful character of countermeasures for States other than the injured one in violation of *erga omnes* obligations, a solution far from being accepted. Furthermore, in this case too, concerned States failed to clearly qualify their military support as a countermeasure to violations of *erga omnes* obligations, making it more a scholarly construct than a solution solidly grounded on actual practice based on States' positions.

<sup>40</sup> A Clapham, 'On War' Articles of War (5 March 2023) <<https://lieber.westpoint.edu/on-war>>.

<sup>41</sup> Clancy (n 29) 540-43.

3. *Other positions expressed by States regarding the provision of military support to Ukraine*

Even if a relevant number of States have been involved in the provision of lethal war material to Ukraine to repeal the ongoing aggression, this approach has not been endorsed by other States which have conversely adopted a variety of positions.

The first block of States is composed by those which limited their military support to Ukraine short of the provision of lethal material, only providing non-lethal one, as for vests, helmets and other equipment. This approach has been adopted by some States, as exemplified by the New Zealand's Prime Minister who maintained how '(t)his is the first time New Zealand has provided direct funding to a third party organisation for non-lethal military assistance' in relation to the provision of body armour, helmets and vests.<sup>42</sup> A similar approach has been adopted by other States, such as Austria, which also authorized the transport of weapons and other military equipment through its territory, including airspace,<sup>43</sup> Ireland,<sup>44</sup> Israel,<sup>45</sup> Japan,<sup>46</sup> and South Korea,<sup>47</sup> which has however recently

<sup>42</sup> New Zealand Government, Press release 'NZ to Provide Non-Lethal Military Assistance to Ukraine' (21 March 2022) <[www.beehive.govt.nz/release/nz-provide-non-lethal-military-assistance-ukraine](http://www.beehive.govt.nz/release/nz-provide-non-lethal-military-assistance-ukraine)>.

<sup>43</sup> R Janik, 'Current Developments: Austrian Neutrality amid Russia's War on Ukraine' (2023) 26 *Austrian Rev Intl European L* (forthcoming) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4201552](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4201552)>. On Austria see also P Hilpold, 'Das Neutralitätsrecht Österreichs und der Schweiz im "weiten Feld" des internationalen Rechts Aktuelle Entwicklungen im Vergleich' (2022) 60 *Archiv des Völkerrecht* 268.

<sup>44</sup> M Killeen, 'Irish PM: Non-Lethal Aid to Ukraine Not Against Military Neutrality', *EURACTIV* (1 March 2022) <[www.euractiv.com/section/politics/short\\_news/irish-pm-non-lethal-aid-to-ukraine-not-against-military-neutrality](http://www.euractiv.com/section/politics/short_news/irish-pm-non-lethal-aid-to-ukraine-not-against-military-neutrality)>.

<sup>45</sup> A Ahronheim, 'Israel Won't Give Ukraine Weapons, Will Help Make Missile Warning System' *The Jerusalem Post* (19 October 2022) <[www.jpost.com/breaking-news/article-720028](http://www.jpost.com/breaking-news/article-720028)>.

<sup>46</sup> The Government of Japan, 'Japan Stands with Ukraine' (24 February 2023) <[https://japan.kantei.go.jp/ongoingtopics/pdf/jp\\_stands\\_with\\_ukraine\\_eng.pdf](https://japan.kantei.go.jp/ongoingtopics/pdf/jp_stands_with_ukraine_eng.pdf)>.

<sup>47</sup> 'South Korea still refuses to send arms to Ukraine' *The Economist* (2 February 2023) <[www.economist.com/asia/2023/02/02/south-korea-still-refuses-to-send-arms-to-ukraine](http://www.economist.com/asia/2023/02/02/south-korea-still-refuses-to-send-arms-to-ukraine)>.



authorised the export by Poland to Ukraine of howitzers which include parties manufactured in South Korea and originally bought by Poland.<sup>48</sup>

This latter approach could have a twofold possible interpretation. On the one hand, based on some past elements of practice,<sup>49</sup> it could consolidate solutions according to which even within a regime of strict neutrality it could be possible to provide non-lethal war material to belligerent parties. On the other hand, this practice might militate against the consolidation of the benevolent/qualified exception, as the law of neutrality might have been perceived as still limiting the potential forms of military support eventually to be provided to Ukraine. However, for several of such States too, the factual provision of such material was not accompanied by clear statements framing their conducts on scrupulous legal assessments and a proper engagement with the law of neutrality or other international law aspects. Still, at least in some States which have embraced a permanent neutrality policy, such as Austria and Ireland,<sup>50</sup> public and political debates also addressed this latter body of law with concerned governments keen to maintain the possibility to provide such support to Ukraine but avoiding to escalate their support to the provision of lethal war material.

Conversely, other States have clearly maintained how it was impossible to provide any measure of military support to belligerent parties based on a traditional strict approach related to the law of neutrality. The most prominent example is provided by Switzerland which, regardless of its support to unilateral economic sanctions against Russia,<sup>51</sup> has officially reaffirmed its adherence to a strict approach regarding military material. As maintained by the Swiss Federal Council in its highly-detailed report on this topic issued in October 2022, 'Le droit de la neutralité interdit la transmission directe de matériel de guerre issu de ses propres stocks militaires aux parties à un conflit. En conséquence, la Suisse ne peut fournir du matériel de guerre provenant des stocks de son armée ni à la Russie ni

<sup>48</sup> J Smith, J Lee, 'Seoul approved Poland's Export of Howitzers with S. Korean Parts to Ukraine' *Reuters* (4 March 2023) <[www.reuters.com/world/seoul-approved-polands-export-howitzers-with-skorean-parts-ukraine-official-says-2023-03-08](https://www.reuters.com/world/seoul-approved-polands-export-howitzers-with-skorean-parts-ukraine-official-says-2023-03-08/)>.

<sup>49</sup> Upcher (n 5) 83-84.

<sup>50</sup> See the debate at the Houses of the Oireachtas on 'Ireland's Military Neutrality: Motion' (23 November 2022) <[www.oireachtas.ie/en/debates/debate/seanad/2022-11-23/14](https://www.oireachtas.ie/en/debates/debate/seanad/2022-11-23/14)>.

<sup>51</sup> Swiss Federal Council, 'Switzerland adopts EU sanctions against Russia' (28 February 2022) <[www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87386.html](https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87386.html)>.

à l'Ukraine'.<sup>52</sup> Its traditional approach has been confirmed for non-lethal war material too. According to Switzerland, as such materials 'sont classés parmi les biens utilisables à des fins militaires...la Suisse a refusé les demandes de livraison de casques et de gilets pare-balles à destination de l'armée ukrainienne'.<sup>53</sup> Switzerland, contrary to the approach adopted by other neutral States, as Austria, has also denied the 'survol d'avions militaires d'autres États dans le but d'apporter un soutien militaire aux parties en conflit, notamment par la livraison de matériel de guerre'.<sup>54</sup>

This solution has had reverberating effects for other States, as exemplified by the denial of authorizations to re-export to Ukraine military material sold by Switzerland. For instance in November 2000 the Swiss Government prohibited Germany to re-export certain Swiss-made weapons to Ukraine, originally purchased by Germany,<sup>55</sup> and similar refusals made to Denmark. Nonetheless, Switzerland has admitted the exportation of components functional for the making of war material 'même si le matériel de guerre fabriqué à l'étranger pouvait parvenir ensuite en Ukraine. Le droit de la neutralité ne régleme[n]te pas ce cas de figure impliquant des chaînes de création de valeur internationales', providing such components would be less than 50% of the final product.<sup>56</sup>

It should nonetheless be recognised how the very large majority of States did not provide any military support in favor of belligerent parties, including Ukraine. However, it is hard to attribute specific legal value to such positions as there was a lack of engagement with the law of neutrality, as exemplified in debates at UNGA or UNSC where this body of law was not mentioned, and general concerns were only expressed by some States on risks for the proliferation of the circulation of weapons. Regarding these latter States, it is thus hard to assess whether this choice was based on a potential legal scrutiny of obligations imposed by the law of

<sup>52</sup> Swiss Federal Council, 'Rapport du Conseil fédéral en réponse au postulat 22.3385 de la Commission de politique extérieure du Conseil des États du 11 avril 2022' (26 October 2022) 21 <[www.news.admin.ch/news/message/attachments/73618.pdf](http://www.news.admin.ch/news/message/attachments/73618.pdf)> [hereinafter *Rapport*].

<sup>53</sup> *ibid* 22.

<sup>54</sup> *ibid*, 20.

<sup>55</sup> Swiss Ministry of Foreign Affairs, 'Rejet d'une demande de transmission de matériel de guerre suisse à l'Ukraine' (3 November 2022) <[www.wbf.admin.ch/wbf/fr/home/dokumentation/nsb-news\\_list.msg-id-91146.html](http://www.wbf.admin.ch/wbf/fr/home/dokumentation/nsb-news_list.msg-id-91146.html)>.

<sup>56</sup> *Rapport* (n 52) 21.

neutrality or political choices aimed at avoiding to take any side in the current armed conflict.

#### 4. *Russia and the provision of belligerent materials*

A final scenario to be discussed relates to the position of Russia in relation to the provision of belligerent material in the current armed conflict.

First, mention should be made to the position held by Russia regarding the provision of war material to Ukraine. Interestingly, even if political criticisms were expressed by this State, Russia did not frame its condemnations under the lens of the law of neutrality, a body of law which was never mentioned in its statements at UNSC or UNGA, focusing on risks of escalation of the conflict or threat to consider supplying States as directly involved in the hostilities.

Unfortunately, it is not possible to take advantage of the confidential diplomatic note sent by Russia to the USA on 14<sup>th</sup> April 2022 at the time of the adoption by the USA of a shift in the military quality of supplied material to Ukraine. Based on newspapers which had access to the document, whose existence was confirmed by the Russian Ministry of Foreign Affairs, in its diplomatic note titled ‘On Russia’s concerns in the context of massive supplies of weapons and military equipment to the Kiev regime’, Russia ‘accused the allies of violating “rigorous principles” governing the transfer of weapons to conflict zones’.<sup>57</sup> However, lacking access to the document it is impossible to verify whether Russia effectively invoked breaches of the law of neutrality.

In this case too, therefore, it is hard to speculate the reason behind the choice not engaging with other States based on an extensive use of legal arguments, particularly through an instrumental recourse to the law of neutrality in case Russia would have claimed in its favor an application of a strict regime by other States and denied the lawfulness of potential exemptions as the benevolent/qualified one, in line with the position

<sup>57</sup> K DeYoung, ‘Russia Warns U.S. to Stop Arming Ukraine’ *Washington Post* (14 April 2022) <[www.washingtonpost.com/national-security/2022/04/14/russia-warns-us-stop-arming-ukraine/](https://www.washingtonpost.com/national-security/2022/04/14/russia-warns-us-stop-arming-ukraine/)>.

maintained by few scholars who claimed how the support provided to Ukraine was in violation of this legal regime.<sup>58</sup>

It is indeed complex to assess whether this choice was based on the alleged irrelevance of this legal regime under current international law or could be linked to Russia's own distortive classification of the hostilities as a 'special military operation', a label which could have made more complex for Russia to invoke violations of a legal regime pertaining to international armed conflicts. Furthermore, as highlighted, '(a)n important geopolitical factor is that Russia...is not in a position to enforce its belligerent rights against neutral States',<sup>59</sup> particularly regarding measures as visiting and search of neutral vessels and similar activities, a scenario which might have eventually reduced the relevance for Russia to engage in diplomatic-legal debates on neutrality. Nonetheless, as maintained by scholars, even in case the 'benevolent/qualified' neutrality approach could be endorsed, theoretically, 'there is no reason to suspect, at least not under the current state of affairs, that qualified neutrality would proscribe methods of naval warfare that have existed for centuries'.<sup>60</sup>

The law of neutrality might nonetheless be helpful to address the position of States allegedly ready to provide military support to Russia, as China, Iran or North Korea. Assuming the law of neutrality is still a relevant body of law, it could act as a legal limit to such activities as such States could not invoke potential exemptions under this legal regime, as for the benevolent/qualified neutrality, being Russia the aggressor State. In this regard it might be interesting to note how such States have officially denied such allegations,<sup>61</sup> a position which might reinforce the interpretation according to which such potential support would not be

<sup>58</sup> See for instance K Zhao, F Xiao, 'Aggression and Determination: Two Basic Issues of International Law in the Russia-Ukraine Conflict' (2022) Beijing L Rev 13 <[www.scrip.org/journal/paperinformation.aspx?paperid=117479#return4](http://www.scrip.org/journal/paperinformation.aspx?paperid=117479#return4)>; KJ Heller, L Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' (2022) 13 J Intl Humanitarian L Studies 251, 263.

<sup>59</sup> Nasu (n 11).

<sup>60</sup> See the remarks by Major W Casey Biggerstaff reproduced in 'Are Methods of Naval Warfare at Risk Under "Qualified" Neutrality? Expert Q&A from Stockton Center's Russia-Ukraine Conference' Just Security (10 March 2023) <[www.justsecurity.org/85419/are-methods-of-naval-warfare-at-risk-under-qualified-neutrality-expert-qa-from-stockton-centers-russia-ukraine-conference](http://www.justsecurity.org/85419/are-methods-of-naval-warfare-at-risk-under-qualified-neutrality-expert-qa-from-stockton-centers-russia-ukraine-conference)>.

<sup>61</sup> See for instance N Kennedy et al, 'Iran Denies Supplying Russia with Weapons for Use in Ukraine' CNN (15 October 2022) <<https://edition.cnn.com/2022/10/15/europe/iran-denies-supplying-russia-weapons-ukraine-intl-hnk/index.html>>.



legally irrelevant with the impossibility to openly vindicate it by concerned States. However, in this case too, no references to the law of neutrality were made by such States and such denials could be more linked with the interest of concerned States to avoid sanctions and political backlashes rather than on legal assessments.

Furthermore, apart from the law of neutrality, other legal limits could be relevant for such States. For those States party to the Arms Trade Treaty, as China, it could be pinpointed how this convention provides a clear prohibition to transfer weapons to other States in case the State Party has knowledge that the arms would be used in the commission of war crimes, a scenario clearly present in the Russian/Ukrainian armed conflict in light of the constant pattern of violations perpetrated by Russia.<sup>62</sup> Additionally, other international law provisions could provide sound basis for maintaining how potential military support to Russia could imply wrongful acts for concerned States, as provided by common Article 1 to the 1949 Geneva Conventions or, under the regime of international responsibility, Articles 16 and 41(2) of the ILC Articles on State Responsibility.

#### 4. *Tentative conclusions on the provision of weapons to Ukraine*

Overall, this assessment of State's practice emphasis how the factual shift recorded in this international armed conflict, namely an open military assistance provided to the attacked party, was not supported by clear and extensive legal reasonings by concerned States, finally implying how legal arguments were largely put to one side.

This self-restraint attitude in properly engaging with legal arguments, particularly regarding the law of neutrality, could have different reasonings and consequences. The easiest interpretation would be to consider this body of law not anymore relevant. This solution however hardly reconciles with continuous references to this body of law in international and domestic practices, and furthermore might dismiss the enduring

<sup>62</sup> T Hamilton, 'China Would Violate the Arms Trade Treaty if It Sends Weapons to Russia for Use in Ukraine: Part I', *OpinioJuris* (6 March 2022) <<http://opiniojuris.org/2022/04/06/china-would-violate-the-arms-trade-treaty-if-it-sends-weapons-to-russia-for-use-in-ukraine-part-i>>.

potential helpful character of this body of law, as a legal limit to avoid military support for warring parties, particularly against the aggressor State.

As for States currently providing lethal military support to Ukraine it could be speculated how the uncertain character of some of the potential favorable legal solutions examined above might have been a restraint factor preventing them to firmly push for these legal approaches. Furthermore, a backlash risk could have been perceived by concerned States for potential misuses of such legal solutions in future armed conflicts, particularly the benevolent/qualified approach, once similar conducts could be adopted with biased approaches by other States even in circumstances where flagrant violations of *ius ad bellum* could not be at stake. Its inherent complexity is indeed being dependent on self-assessments made by States, lacking the authoritative involvement of the UNSC, with the potential emergence of cacophonous views on the legal qualification of parties in relation to breaches of *ius ad bellum* rules, as emphasized by claims made by Russia to lawfully exercise its prerogatives under Article 51 UN Charter.<sup>63</sup> This solution has furthermore being criticized as eventually exposing neutral States ‘to pressure by belligerents to adopt their views on whether their use of force is justified, which would result for economic and geopolitical reasons in double standards’.<sup>64</sup>

The abovementioned self-restraint approach in properly framing their practice as compatible with the law of neutrality, through an open vindication of such conducts as in line with the benevolent/qualified approach, consequently, implies challenges in considering abovementioned conducts and accompanying legal-political statements, clearly in line with its theoretical premises, as able to reinforce the emergence/consolidation of this exception in the law of neutrality. Similarly, the position adopted by some States, stopping short of providing lethal war material, could militate against the emergence/consolidation of this solution, even if the lack of an extensive engagement with legal arguments in relation to their political choices makes complex to assess the effective relevance of

<sup>63</sup> ‘Letter from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General’ UN Doc S/2022/154 (24 February 2022).

<sup>64</sup> See the remarks by Sassoli at a hearing before the Swiss Parliament held on 8th September 2022 reported in ‘Neutrality Law in a Comparative Perspective: Austria, Switzerland, Finland’ 8 <[www.thedefencehorizon.org/post/neutrality-law-comparison-austria-switzerland-finland](http://www.thedefencehorizon.org/post/neutrality-law-comparison-austria-switzerland-finland)>.

potential normative constraints imposed by the law of neutrality in framing their positions. Furthermore, the lack of engagement with legal arguments by by-stander States not involved in any support can similarly be hardly conclusive. As discussed, basically, only in one case, as for Switzerland, we can record an exhaustive engagement with the law of neutrality and a strict application of its legal paradigms, also grounded on political advantages aimed at non-modifying its standing in international relations.

Regardless of the uncertain legal-political positions emphasised by concerned States, and accompanying analysis by legal scholarship moving into different directions, it goes without saying how the current Ukrainian-Russian armed conflict, characterized by the Russian aggression and the incapacity of the UNSC to exercise its functions, might act as a game changer for the law of neutrality. While its rationale could still be grounded in the aim to avoid the spread of armed conflicts, keep economic business as usual with belligerents through a minimization of the disruption to trade caused by war, finally permitting to a neutral country 'to assert its sovereignty notwithstanding being torn between two rival blocs',<sup>65</sup> it seems more and more complex to maintain how this legal regime could still work in contemporary international law independently from assessments related to the resort to force by States.

Whether, regarding neutrality, a legitimate expectation could be present for *ius ad bellum* concerns to play a role in this area in light of an international legal order based on the rule of law, as to permit States to react and not passively act as bystanders in front of flagrant violations of basic principles of its legal infrastructure and provide a military assistance fundamental to avoid the weak (and victim) party being levelled by powerful States acting in breach of the international legal order, the uncharted seas entered with this conflict would imply how only further practice in other armed conflicts could potentially consolidate the prevalence of collective concerns. However, other elements might act as opposing forces, as the preference for traditional legal premises identified as able to contain further spread of international tensions and involvement in armed conflicts, regardless of the fate of individual States

<sup>65</sup> P Hilpold, 'How to Construe a Myth: Neutrality Within the United Nations System under Special Consideration of the Austrian Case' (2019) 18 Chinese J Intl L 247, 276.

exposed to violations of their sovereignty, and the need to avoid conducts arranged on individual self-assessments on the lawfulness of the resort to force by concerned States, without collective decisions through the UNSC.

In sum, the Russian-Ukrainian armed conflict is thus a further scenario of the continuing move of the pendulum in the international legal order between public and private interests: This conflict might thus represent a way to confirm, in this area too, the trend favoring ‘the effective enforcement of rules aiming to protect the common interests of the international community and on the role which third states may play in that regard’.<sup>66</sup> This approach, however, might finally imply how ‘the law of neutrality...appears destined to find still less room for application, if not to vanish entirely through obsolescence’:<sup>67</sup> a trend potentially started in the current conflict through States largely avoiding to engage with this legal regime.

<sup>66</sup> P Palchetti, ‘Consequences for Third States as a Result of an Unlawful Use of Force’ in M Weller (ed) *The Oxford Handbook on the Use of Force* (OUP 2015) 1229.

<sup>67</sup> *ibid* 1230.

