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NEUTRAL ARMS TRANSFERS AND THE RUSSIAN INVASION OF UKRAINE

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Abstract Since the beginning of the Russian invasion of Ukraine in February 2022, numerous Western States have supplied Ukraine with arms, munitions and war material, in ostensible breach of their obligations as neutral, non-participating States. States have failed to provide any legal explanation for such transfers, leaving the task to scholars and commentators to provide legal argumentation as to the compatibility of arms transfers to victims of aggression with neutral duties. This article analyses and seeks to evaluate these arguments in favour of 'qualified neutrality' and assess which of the proposed grounds, if any, are the most compelling.

Keywords: law of neutrality, Russian invasion of Ukraine, arms transfers, qualified neutrality, State responsibility, countermeasures.

I. INTRODUCTION

On 24 February 2022, Russia launched a large-scale invasion of Ukraine. This invasion, declared by the United Nations (UN) General Assembly (UNGA) to constitute an act of aggression,[1] has unearthed an old and contentious debate on the relationship of neutrality with the prohibition of aggression. For some, the law of neutrality must be 'qualified' in the face of aggression. Such a 'qualified neutrality' would allow neutral States to discriminate in favour of the victim of aggression while retaining their neutral status and fully conforming with their duties as a neutral.

The law of neutrality is an old body of international law which seeks to regulate the relationship between States engaged in international armed conflicts (belligerents) and those at peace (neutrals), with a view to localising the conflict and preventing its spread. This is done by ascribing certain rights and duties to both belligerents and neutrals, including the neutral duty to

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[1] UNGA Res 377(V) (3 November 1950) UN Doc A/RES/377(V).

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refrain from providing belligerents with 'war-ships, ammunition, or war material of any kind whatever'.[2] Nonetheless, from the outset of the Russian invasion, Western States have provided nearly US$8 billion in arms and munitions to the Ukrainian armed forces, as reported by the BBC in June 2022.[3] As of May 2022, the European Union (EU) had earmarked €1.84 billion for 'the supply to the Ukrainian Armed Forces of military equipment and platforms, designed to deliver lethal force'.[4] This is the first time that the EU has taken such steps and has been referred to as a 'watershed' moment in EU policy.[5] Germany, which has historically refused to provide arms to regions enmeshed in armed conflicts, has made a similar shift in policy.[6] Similarly, the Republic of Ireland, which defines itself as 'militarily neutral', and Austria, a permanently neutral State, have eschewed the provision of lethal military equipment in favour of solely supplying non-lethal equipment.[7]

In the absence of explicit explanations from States engaged in the supply of arms and war material to Ukraine, it has fallen to legal scholars and commentators to explain how such measures may conform with the law of neutrality. A number of possible arguments have been provided to allow the law of neutrality to be 'qualified' in favour of Ukraine, as the victim of Russian aggression. First, and most commonly, it has been argued that there is a primary rule of international law which stipulates that neutral States may discriminate in favour of victims of aggression, meaning that supplying States are not in breach of any international obligation.[8] This position, rooted

[2] Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague (adopted 18 October 1907, entered into force 26 January 1910) Art 6.

[3] J Beale, 'Inside the Room where Ukraine Orders Arms for the West' (*BBC*, 15 June 2022) <https://www.bbc.com/news/world-europe-61816337>.

[4] Council Decision (CFSP) 2022/809 of 23 May 2022 amending 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 L145/40.

[5] 'War in Ukraine: A Watershed Moment for European Defense Policy and Transatlantic Security?' (*Politico*, 9 June 2022) <https://www.politico.eu/event/war-in-ukraine/>.

[6] DM Herszenhorn, L Bayer and H von der Burchard, 'Germany to Send Ukraine Weapons in Historic Shift on Military Aid' (*Politico*, 26 February 2022) <https://www.politico.eu/article/ukraine-war-russia-germany-still-blocking-arms-supplies/>.

[7] C Gallagher, 'Some €55 Million in Military Aid Given by Ireland to Ukraine' (*Irish Times*, 24 September 2022) <https://www.irishtimes.com/politics/2022/09/24/ireland-has-given-55m-in-military-aid-to-ukraine/>; G Cafiero, 'Austria Commits to Neutrality, Even as Russia Destroys Ukraine' (*Al Jazeera*, 15 August 2022) <https://www.aljazeera.com/news/2022/8/15/austrian-neutrality-in-light-of-the-ukraine-war>.

[8] See, inter alia, W Heinstchel von Heinegg, 'Neutrality in the War Against Ukraine' (*Articles of War*, 1 March 2022) <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>; MN 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/>; OA Hathaway and S Shapiro, 'Supplying Arms to Ukraine is Not an Act of War' (*Just Security*, 12 March 2022) <https://www.justsecurity.org/80661/supplying-arms-to-ukraine-is-not-an-act-of-war/>; MN Schmitt, 'A No-Fly Zone over Ukraine and International Law' (*Articles of War*, 18 March 2022) <https://lieber.westpoint.edu/no-fly-zone-ukraine-international-law/>; B Finucane, 'Ukraine and War Powers: A Legal Explainer' (*Just Security*, 3 March 2022) <https://www.justsecurity.org/80438/ukraine-and-war-powers-a-legal-explainer/>;

in the outlawry of war and the prohibition of aggression, will be referred to as 'qualified neutrality per se' and will be explored in Section II. Failing the existence of such a rule, a second set of arguments revolve around the application of the circumstances precluding wrongfulness set out in the law of State responsibility. According to this line of reasoning, the supply of arms to Ukraine is justified as a matter of law as it is included as part of the collective self-defence of Ukraine against Russian aggression,[9] or because such transfers may otherwise be described as lawful countermeasures in response to Russia's manifest violation of international law.[10] Such arguments will be discussed in Section III. Finally, it has been suggested that arms transfers to Ukraine are not only permitted, but may in fact be obligatory as part of the duty to cooperate to bring breaches of obligations *erga omnes* to an end.[11] This claim—'qualified neutrality as duty'—will be considered in Section IV.

II. QUALIFIED NEUTRALITY PER SE

The claim that the law of neutrality has shifted to allow neutral States to discriminate in favour of victims of aggression can be traced back to the aftermath of World War I and is closely tied to efforts to outlaw the waging of aggressive wars through the 1928 Pact of Paris.[12] The Pact attempted this through two operative Articles:

> Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

TD Gill, 'A Ukraine No-Fly Zone: Further Thoughts on Law and Policy' (*Articles of War*, 23 March 2022) <https://lieber.westpoint.edu/a-ukraine-no-fly-zone-further-thoughts-on-law-and-policy/>; E Benvenisti and A Cohen, 'Bargaining About War in the Shadow of International Law' (*Just Security*, 28 March 2022) <https://www.justsecurity.org/80853/bargaining-about-war-in-the-shadow-of-international-law/>; AA Haque, 'An Unlawful War' (2022) 116 AJIL Unbound 155; SAG Talmon, 'The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine' (2022) Bonn Research Papers on Public International Law, Paper No 20/2022.

[9] K Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and thus be Exposed to Countermeasures?' (*EJIL:Talk!*, 2 March 2022) <https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/>; Schmitt, 'Providing Arms and Materiel to Ukraine', ibid; A Clapham, 'On War' (*Articles of War*, 5 March 2022) <https://lieber.westpoint.edu/on-war/>; M Krajewski, 'Neither Neutral nor Party to the Conflict?: On the Legal Assessment of Arms Supplies to Ukraine' (*Völkerrechtsblog*, 9 March 2022) <https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict/>; cf Talmon ibid, 5–6.

[10] P Pedrozo, 'Ukraine Symposium – Is the Law of Neutrality Dead?' (*Articles of War*, 31 May 2022) <https://lieber.westpoint.edu/is-law-of-neutrality-dead/>; Clapham, ibid; Benvenisti and Cohen (n 8).

[11] Talmon (n 8) 21; Haque (n 8) 158; Benvenisti and Cohen (n 8); Ambos (n 9).

[12] General Treaty for the Renunciation of War as an Instrument of National Policy (adopted 27 August 1928, entered into force 24 July 1929) (Pact of Paris).

> Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.[13]

These Articles are made conditional in the preamble: '… any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty'.[14] Accordingly, States waging war in breach of the Pact lost their right not to have war waged against them. The obligation to refrain from aggressive war is owed to all other States, meaning that if the Pact is breached, all parties are considered to be injured and may respond.[15] The argument, made repeatedly in US publications by writers such as Quincy Wright[16] and Clyde Eagleton,[17] was that due to the prohibition of war, aggressive belligerents could no longer accrue legal rights through their unlawful actions, including those belonging to the law of neutrality, giving neutral States a right to discriminate against the aggressor.[18]

Nonetheless, the Pact failed to eliminate war successfully, and, by extension, neutrality. Cognisant of this, the International Law Association adopted the Budapest Articles of Interpretation at its thirty-eighth conference in Budapest in 1934. Article 4 asserted that the law of neutrality had been abrogated during aggressive wars. The tone of the proceedings was one of frustration that the Pact had failed.[19] It is often noted that the Budapest Articles were adopted unanimously by the delegates in their final vote.[20] However, it is important to recall that the debates on the text of Article 4 were far from conclusive and the suggestion that the Pact allowed for discrimination between belligerents was not universally accepted.[21]

[13] ibid, Arts 1–2.

[14] ibid, Preamble.

[15] Q Wright, 'Neutrality and Neutral Rights Following the Pact of Paris for the Renunciation of War' (1930) 24 ASILPROC 79, 80.

[16] ibid; Q Wright, 'The Meaning of the Pact of Paris' (1933) 27(1) AJIL 39; Q Wright, 'The Present Status of Neutrality' (1940) 34(3) AJIL 391; Q Wright, 'The Outlawry of War and the Law of War' (1953) 47(3) AJIL 365.

[17] C Eagleton, 'Neutrality and the Capper Resolution' (1928) 6 NYULRev 346; C Eagleton, 'Neutrality and Neutral Rights Following the Pact of Paris for the Renunciation of War' (1930) 24 ASILPROC 87; C Eagleton, 'The Duty of Impartiality on the Part of a Neutral' (1940) 34(1) AJIL 99.

[18] For an excellent narration of the contemporary legal debate in the United States, see SC Neff, 'A Threefold Struggle over Neutrality: The American Experience in the 1930s' in P Lottaz and HR Reginbogin (eds), *Notions of Neutralities* (Lexington 2019).

[19] See, for example, the comments of WA Bewes in 'Effect of the Briand-Kellogg Pact of Paris on International Law' (1934) 38 International Law Association Reports of Conferences 1 (Budapest Articles) 15: 'The Briand–Kellogg Pact, which was originally signed in 1928, had not immediately, and has not now, anything like the effect which it deserved and was expected to have.'

[20] Talmon (n 8) 13.

[21] See the comments of FH Aldrich in the Budapest Articles (n 19), 59: 'It seems to me that this motion is based upon what I regard as a fallacy that has come into International Law during the last twelve or fifteen years, and that is that there can be a war where one belligerent has certain rights that another belligerent does not have.'

Although the organisers of the Budapest conference claimed that the Articles represented 'a growing conviction among lawyers throughout the world that nineteenth century ideas cannot longer be allowed to dominate our legal thinking',[22] doctrinal opposition was commonplace. Hersch Lauterpacht was particularly critical of the Articles, arguing that they drew 'conclusions from the Pact of Paris on matters to which no express reference is to be found in the terms of the Treaty'.[23] Specifically on Article 4, he wrote:

> … it is objectionable if the intention was to suggest that it is within the province or, indeed, the power of jurists to effect a change which governments failed or declined to make. Neutrality … may have lost its moral foundation; it may have ceased to be politically and economically feasible or tolerable; it may, as the result of legal development, have become a juridical anachronism. But this does not mean that it has ceased to be part of the law or that it can be removed from the law by the process of interpretation.[24]

For Lauterpacht, there was no evidence, outside of the assertions of the delegates at Budapest, that the breach of any rule of international law by a belligerent allowed a neutral to 'alter the accepted rules of neutrality against the law-breaker'.[25] Edwin Borchard was similarly dismissive:

> So far as known, not a single nation has ever adopted these private resolutions or Articles of Interpretation and they have not the slightest weight except as the personal recommendations of a small private body.[26]

Indeed, State practice and *opinio juris* in support of the Budapest Articles are difficult to find. When given an opportunity to endorse the Articles in a 1935 House of Lords debate, Viscount Sankey, then-Lord Chancellor, declined:

> [The International Law Association's] members were expressing, quite rightly from their point of view, their own views: they did not necessarily represent the opinion of lawyers in all their own countries, still less the opinions of their Governments … it does not follow that all the Governments concerned would be ready to accept all the articles of interpretation which were adopted by the Conference.[27]

Then-former US Secretary of State Henry Stimson was more supportive of the Articles, citing them in a 1935 speech to the American Society of International Law, although he did not go so far as to endorse them personally.[28]

[22] MO Hudson, 'The Budapest Resolutions of 1934 on the Briand–Kellogg Pact of Paris' (1935) 29(1) AJIL 92.

[23] H Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation' (1934) 20 TransGrotiusSoc 178, 179.

[24] ibid 191.

[25] ibid; note also at ibid 192: describing the assertions in Article 4 as 'a matter of the future and not of existing law'; cf T Komarnicki, 'The Problem of Neutrality under the United Nations Charter' (1952) 38 TransGrotiusSoc 77.

[26] E Borchard, 'War, Neutrality and Non-Belligerency' (1941) 35 AJIL 618, 623.

[27] House of Lords Debates, vol 95, 20 February 1935, col 1043.

[28] HL Stimson, 'Neutrality and War Prevention' (1935) 29 ASILPROC 121, 127.

The essential thrust of the Articles was, however, supported in the unratified 1939 Draft Convention on the Rights and Duties of States in Case of Aggression produced by US scholars as part of the Harvard Research in International Law programme.[29] While its preface does stress that opinion amongst the Advisory Committee was split, the proposed text explicitly states that States supporting victims of aggression and those remaining aloof from the conflict need not extend the benefits of neutrality to the aggressor. At the same time, such States would retain the rights inherent to neutral status.[30]

The most famous argument for qualified neutrality was made in March 1941 in an address by then-US Attorney-General Robert Jackson to the Inter-American Bar Association in Havana.[31] Jackson's task at Havana was to justify the dramatic shift in US foreign policy following the 'destroyers-for-bases' agreement with the United Kingdom and the enactment of the Lend-Lease Act in March 1941. Under the terms of the former agreement, the United States supplied the British with 50 decommissioned destroyer vessels in exchange for 99-year leases of various British military bases in the Caribbean. The Lend-Lease Act, meanwhile, gave the President the domestic authority to discriminate between belligerents and supply the Allies with war material.[32] After President Roosevelt's officials had failed to provide a convincing argument that these measures were in conformity with the law of neutrality, Jackson enlisted the help and expertise of Lauterpacht.[33] While sceptical of the Budapest Articles, Lauterpacht was 'strongly affected by an interest in not interpreting the lend-lease and United States' economic assistance to the allies as a violation of neutrality'.[34] Based on a memo prepared by Lauterpacht, Jackson argued in Havana that the Pact of Paris had fundamentally altered the fabric of international law, a reality which, he argued, the majority of contemporary scholars did not yet appreciate.[35]

Jackson's speech was as controversial as the Budapest Articles; however, later that year, in December 1941, the United States entered World War II as a belligerent following the Japanese attack on Pearl Harbour, rendering the issue effectively moot. The notion of qualified neutrality was largely forgotten and, with the war over, all sense of urgency and importance was lost. Writing in the seventh edition of *Oppenheim's International Law*, Lauterpacht argued that:

[29] 'Draft Convention on Rights and Duties of States in Case of Aggression' (1939) 33 AJIL Supp 827 (Harvard Draft).
[30] ibid, Arts 10, 12.
[31] 'Address of Robert H Jackson, Attorney-General of the United States' (1941) 19(4) CanBarRev 229 (Jackson Speech).
[32] For a sympathetic international law analysis of these powers, see Q Wright, 'The Lend-Lease Bill and International Law' (1941) 35(2) AJIL 305.
[33] K Sellars, *'Crimes against Peace' and International Law* (CUP 2013) 41–2.
[34] M Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law' (1997) 8(2) EJIL 215, 237.
[35] Jackson Speech (n 31), 232. Note that Jackson also suggested an alternate justification in the form of self-defence: Jackson Speech (n 31), 239ff.

> … there is no doubt that by destroying the basis of the traditional doctrine of neutrality as an attitude of absolute impartiality, namely the unrestricted right of sovereign States to go to war, the [Pact of Paris] has provided that starting-point for important changes in the law of neutrality. It is preferable that these changes should be effected by common action of States themselves, and not by jurists engaged in drawing logical conclusions from the [Pact].[36]

To date, this common action does not appear to have come about. While the US military manual still endorses qualified neutrality in a brief paragraph,[37] it is an outlier in this regard.[38] Indeed, qualified neutrality has not been used as justification for any subsequent US breach of the law of neutrality since World War II. Subsequent developments in international law and practice have similarly been silent on the question of qualified neutrality. Some have pointed to the language of 'neutral or non-belligerent Powers'[39] and 'neutral or other State not Party to the conflict'[40] found in Geneva Convention III and Additional Protocol I, respectively, as evidence of a status of non-belligerency wherein States may break free of the duties of the law of neutrality.[41] Italy, for example, professed to take such a stance during the 2003 invasion of Iraq and allowed the United States and United Kingdom to pass through its territory.[42] Subsequent commentary, however, has been generally unsympathetic to the claims of an intermediate status between neutral and belligerent, with Wolff

[36] H Lauterpacht (ed), *International Law: A Treatise. Vol. II, Disputes, War and Neutrality* (7th edn, Longmans, Green and Co 1952) 643, para 292a.

[37] US Department of Defense, *Law of War Manual* (June 2015, updated December 2016) 952–3, para 15.2.2.

[38] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2014) 19, para 1.42.1, acknowledging only that some States have professed to qualified neutrality in the past; Australian Defence Forces, *Law of Armed Conflict* (2006) Chapter 11, making no mention of qualified neutrality, save in the context of Chapter VII action at para 11.7; Office of the Judge Advocate General of Canada, *Law of Armed Conflict at the Operational and Tactical Levels* (2001) Chapter 13, in particular 13-1, paras 1302(4), 1304(2), reiterating the traditional reading of the law of neutrality set out in the Hague Conventions; Danish Ministry of Defence, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (2016) discussing neutrality throughout but without mention of qualified neutrality; Federal Ministry of Defence of Germany, *Law of Armed Conflict Manual* (2013) Chapter 12, in particular 175, para 1201, and 176–7, para 1207 reiterating the traditional view of neutrality set out in the Hague Conventions; New Zealand Defence Force, *Manual of Armed Forces Law: Volume 4, Law of Armed Conflict* (2nd ed, 2019) 16–10, para 16.4.3, noting that New Zealand, when a neutral State, may not 'supply weapons, ammunition or war material of any kind to any party to the conflict', cf with an acknowledgement at 16-4, para 16.2.4 that 'States sometimes choose not to actively participate in a conflict, but nevertheless materially support one of the parties.'

[39] Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Art 4(b)(2).

[40] Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Art 2(c).

[41] This argument is interrogated in more depth in N Verlinden, 'The Law of Neutrality' in J Wouters, P De Man and N Verlinden (eds), *Armed Conflicts and the Law* (Intersentia 2016) 103–4.

[42] ibid 104.

Heintschel von Heinegg in particular suggesting that such States 'were simply lucky that their violations of the law went unpunished'.[43]

It cannot come as a surprise, then, that qualified neutrality has not been invoked by any State to date as a justification for the supply of arms to Ukraine. The inescapable conclusion is that qualified neutrality is not a part of contemporary international law. This does not, however, preclude the emergence of such a rule in the future—if supplying States were to say that they sincerely believed themselves to be acting based on a permissive rule of customary international law, this may very well contribute to the creation of such a rule. At the time of writing, however, no such claims have been made. Thus, States which provide arms and war material to the Ukrainian armed forces are doing so in prima facie breach of their neutral obligations.

III. QUALIFIED NEUTRALITY AND CIRCUMSTANCES PRECLUDING WRONGFULNESS

All State responsibility assessments must consider, first, whether a primary rule has been breached and secondly, whether the State in question may invoke any circumstances which may preclude the wrongfulness of that act. As noted above, two candidates have been identified as potentially justifying neutral arms transfers to Ukraine in the circumstances precluding wrongfulness listed by the International Law Commission (ILC) in the 2001 Draft Articles for the Responsibility of States for Internationally Wrongful Acts: self-defence and countermeasures.[44]

Crucially, if neutral States opt to justify the supply of arms to Ukraine by pleading self-defence or countermeasures, a new primary rule of qualified neutrality in customary international law cannot emerge. By invoking a circumstance precluding wrongfulness a State acknowledges that a primary rule has been breached and concedes that it was not acting pursuant to a good-faith belief as to the existence of a legal right or obligation, as is required to crystallise an emerging customary rule.

A. Self-Defence

Article 21 of the Draft Articles recognises self-defence as a circumstance precluding wrongfulness when 'taken in conformity with the Charter of the United Nations'.[45] Self-defence within the meaning of Article 21 serves to cover any breaches of the rights of the aggressor State that may be incidental

[43] W Heinstchel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Armed Conflict' in M Schmitt and J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein* (Martinus Nijhoff 2007) 554; M Bothe, 'The Law of Neutrality' in D Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 550.

[44] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) (ARSIWA).

[45] ibid, Art 21.

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to the exercise of the victim State's self-defence pursuant to Article 51 of the UN Charter.[46] The question thus becomes whether neutral States supplying arms to Ukraine are using force in collective self-defence of Ukraine. If they are, wrongfulness may be precluded. Ukraine has requested that States join it in collective self-defence; however, third States have refrained from directly participating in the hostilities, or claiming that they are acting in collective self-defence. No State has notified the UN Security Council of an intention to act pursuant to Article 51.[47]

There has been some suggestion that the supply of arms to Ukraine could constitute the use of force. Michael Schmitt, Kevin Jon Heller and Lena Trabucco suggest that an analogy may be drawn between the provision of arms to Ukraine and the arming and training of the *contras* in Nicaragua by the United States in the 1980s.[48] As set out by the International Court of Justice (ICJ) in *Nicaragua*, 'the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua'. Importantly, however, the Court went on to stress that 'the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua … does not in itself amount to a use of force'.[49] Thus, the Court was unable to conclude that 'the provision of arms to the opposition in another State constitutes an armed attack on that State'.[50] It is therefore not at all clear that the supply of arms to a victim of aggression can be considered to constitute the use of force against the aggressor.

In light of the above, a careful approach is warranted. It is submitted that the mere supplying of arms to Ukraine does not constitute the use of force in collective self-defence, even if for the express purpose of repelling Russian aggression. Accordingly, collective self-defence cannot be used as a justification for neutral arms transfers to Ukraine.

B. Countermeasures

Countermeasures are premised on the notion that one State may act in proportionate prima facie breach of its legal obligations in response to a comparable breach by another State to bring the latter into compliance with international law. They are thus a highly controversial, if widely accepted, aspect of the modern international legal system and one which has served as 'one of the lightning rods of criticism and controversy for the [ILC's]

[46] F Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility' (2015) 85(1) BYIL 90, 94, 107.

[47] Talmon (n 8) 6.

[48] Schmitt, 'Providing Arms and Materiel to Ukraine' (n 8); KJ Heller and L Trabucco, 'The Legality of Weapons Transfers to Ukraine under International Law' (2022) 13(2) JIntlHumLegStud 251, 254–5.

[49] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 119, para 228 (*Nicaragua*).

[50] ibid 119, para 230.

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articles'.[51] The ILC sought to walk a fine line between restating existing customary international law and progressive development.[52] For this reason the Draft Articles are at times unclear.

The Draft Articles proscribe a number of procedural conditions. Countermeasures must be taken only for the purposes of inducing the wrongdoer into complying with its international obligations,[53] must be reversible or non-permanent[54] and must be proportionate to the initial wrongful act.[55] Countermeasures should be preceded by a notification of an intention to take countermeasures and attempts to negotiate.[56] Nonetheless, injured States may take 'urgent countermeasures' where necessary to 'preserve [their] rights'.[57] Finally, countermeasures are not permitted in circumstances where the wrongful act at issue is being adjudicated by a competent court or tribunal with the power to issue binding decisions,[58] although this will not serve as an absolute bar to countermeasures if the wrongdoer fails to engage with such processes in good faith.[59]

The Draft Articles require notice to be given except when urgency is 'necessary to preserve [the injured State's] rights'.[60] Here the law remains unclear and, as noted by Bederman, the distinction between typical and urgent countermeasures 'will likely be troublesome' well into the future.[61]

In the case of the EU, rhetorical condemnation and acts of retorsion began on 23 February 2022 in response to the recognition of the Donetsk and Luhansk republics, and continued following the beginning of the invasion.[62] On 27 February, European Council President Charles Michel announced an intention to provide the Ukrainian military with 'Guns, ammunition, rockets and fuel'.[63] Arms transfers were formally agreed the next day.[64] Taken as a unit, EU Member States thus appear to have acted in conformity with the procedural requirements for countermeasures. The picture is, however, somewhat muddled owing to the lack of coordination in messaging. For example, according to NATO Secretary-General Jens Stoltenberg on 25 February 2022, NATO members had already committed to the supply of

[51] DJ Bederman, 'Counterintuiting Countermeasures' (2002) 96(4) AJIL 817, 817.

[52] *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009, para 381. [53] ARSIWA (n 44) Art 49(1). [54] ibid, Art 49(2).

[55] ibid, Art 51. [56] ibid, Art 52(1). [57] ibid, Art 52(2). [58] ibid, Art 52(3)(b).

[59] ibid, Art 52(4). [60] ibid 136, Commentary (6). [61] Bederman (n 51) 825.

[62] 'Joint Statement by the Members of the European Council' (*European Council*, 24 February 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/joint-statement-by-the-members-of-the-european-council-24-02-2022/>.

[63] 'Address to the Ukrainian People by European Council President Charles Michel' (*European Council*, 27 February 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/02/27/address-to-the-ukrainian-people-by-european-council-president-charles-michel/>.

[64] 'EU Adopts New Set of Measures to Respond to Russia's Military Aggression against Ukraine' (*Council of the European Union*, 28 February 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/02/28/eu-adopts-new-set-of-measures-to-respond-to-russia-s-military-aggression-against-ukraine/>.

arms in response to the Russian invasion by that point.[65] Nonetheless, it does not appear that any such transfers were actually made until after 28 February 2022.

Meanwhile, US arms transfers have been ongoing since 2014, when Crimea was seized and annexed by Russia.[66] The appropriate timeline to consider for the United States is therefore the aftermath of the 2014 invasion of Crimea. Immediately following the invasion of Crimea, the United States provided Ukraine with non-lethal equipment and only agreed to provide lethal equipment three years later, in 2017.[67] Thus, the case for US compliance with the requirement for notice would doubtlessly be easily made if the United States chose to do so.

The biggest question, however, is whether international law allows for collective countermeasures, or countermeasures in the collective interest.[68] Sympathetically termed by Martti Koskenniemi as 'solidarity measures',[69] their anchor in the text of the Draft Articles is found in Articles 48 and 54. Article 48 sets out that:

> Any State other than an injured State is entitled to invoke the responsibility of another State … if … the obligation breached is owed to the international community as a whole.

As illuminated by the official commentaries,[70] obligations 'owed to the international community as a whole' is a direct reference to obligations *erga omnes*, first enumerated by the ICJ in *Barcelona Traction*. In its judgment, the Court ruled that there are certain State obligations which can be distinguished from typical bilateral and multilateral obligations in that they are owed to all States.[71] Every State therefore has an interest in obligations *erga omnes* being upheld. The concept is notoriously unclear; however, the Court did helpfully identify a number of candidates for such a status, including the prohibition of aggression, genocide, slavery and racial discrimination.[72] In *East Timor*, the Court further included the right of self-determination.[73]

[65] 'NATO Allies to Provide More Weapons to Ukraine, Stoltenberg Says' (*Reuters*, 25 February 2022) <https://www.reuters.com/world/europe/nato-allies-provide-more-weapons-ukraine-stoltenberg-says-2022-02-25/>.

[66] 'U.S. Security Cooperation with Ukraine' (*U.S. Department of State*, 1 July 2022) <https://www.state.gov/u-s-security-cooperation-with-ukraine/>.

[67] M Kosinski and R Browne, 'US Will Provide Anti-Tank Weapons to Ukraine, State Dept. Official Says' (*CNN*, 23 December 2017) <https://edition.cnn.com/2017/12/22/politics/us-ukraine-anti-tank-weapons-russia/index.html>.

[68] Both terms are used interchangeably in the literature—while the term 'collective countermeasures' will be used here, note the case for the phrase 'countermeasures of general interest' in D Alland, 'Countermeasures of General Interest' (2002) 13(5) EJIL 1221, 1222.

[69] M Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' (2001) 72(1) BYIL 337.

[70] ARSIWA (n 44) 127, Commentary (9).

[71] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* [1970] ICJ Rep 3, para 33.

[72] ibid, para 34.

[73] *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, para 29.

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While Article 48 allows for only very narrow entitlements,[74] it must be read in conjunction with Article 54, which enigmatically provides that:

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

The commentaries refer to Article 54 as a 'saving clause' and refrain from taking an explicit position on collective countermeasures, leaving the issue for the further development of international law.[75] Even though the commentaries provide a survey of State practice in support of collective countermeasures, they conclude that such practice is inconclusive and selective.[76]

This is the result of a compromise during the drafting process. In his third report as Special Rapporteur, James Crawford supported the recognition of the validity of collective countermeasures.[77] However, he proposed that the injured State must have requested and consented to the actions of third States and that those States must remain within the scope of that consent.[78] Crawford further stressed that a prohibition on collective countermeasures would be inappropriate where the initial wrongful act is 'gross, well attested, systematic and continuing'. In such circumstances, he argued that international law ought to provide interested States with 'some means of securing compliance which does not involve the use of force'.[79] He thus proposed an analogy between collective countermeasures and collective self-defence, whereby an injured State may request third States to join it in taking countermeasures against the wrongdoer.[80] Crawford's proposals do not appear in the final text. The open-ended language which was settled on, however, does not preclude Crawford's analysis from holding and he continued to support his position well after 2001.[81]

The ICJ in *Nicaragua* rejected the suggestion that the United States could take unsolicited collective countermeasures. It held that:

> The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.[82]

[74] ARSIWA (n 44) Art 48(2); note also that the list given is said to be 'exhaustive', ARSIWA (n 44) 127, Commentary (11). [75] ARSIWA (n 44) 139, Commentary (6). [76] ibid.
[77] ILC, 'Third Report on State Responsibility, by Mr. James Crawford, Special Rapporteur' (2000) UN Doc A/CN.4/507/Add.4, paras 401–402. [78] ibid, paras 402, 412.
[79] ibid, para 405. [80] ibid, para 400.
[81] J Crawford, *State Responsibility: The General Part* (CUP 2013) 703–4; cf Alland (n 68) 1232–3, arguing that the use of the term 'lawful measures' in Article 54 allows for acts of collective retorsion only. [82] *Nicaragua* (n 49) 127, para 249.

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While this appears to be a wholesale disavowal of collective countermeasures, commentators have subsequently argued that the scope of this passage may be narrower than it may appear. Schmitt and Sean Watts suggest that the Court's *dictum* should not be separated from the specific facts of the case at hand—the United States had not been requested to intervene in any way by the injured States and had sought to intervene by using force, which is prohibited as unlawful reprisal.[83] Similarly, drawing on his earlier analogy with the law of collective self-defence, Crawford suggests that the outcome reached by the Court may well have been different had the injured States requested assistance from the United States.[84] This reading similarly appears to be in line with subsequent State practice, which, in the view of a multitude of authors, supports the existence of a right to take collective countermeasures in circumstances in which obligations *erga omnes* have been breached.[85]

Collective countermeasures have emerged as an issue of considerable importance in the cyberwarfare context. The use of force in self-defence is not permitted where cyberattacks fall short of qualifying as an armed attack. In such circumstances, countermeasures have been relied upon as an alternative means for injured States to respond in kind. This has begged the question as to whether injured States must act alone in this regard, or whether they may be assisted by third States. A body of literature has materialised arguing for collective countermeasures to be recognised in this context.[86] In terms of *opinio juris*, the lawfulness of collective countermeasures has been recognised by Estonia in 2019,[87] New Zealand in 2020,[88] and the position was tepidly supported by the United Kingdom in 2022.[89] On the other hand,

[83] MN Schmitt and S Watts, 'Collective Cyber Countermeasures?' (2021) 12 HarvNatlSecJ 373, 391; reflecting its contentious nature, Schmitt himself has developed his thinking considerably on this issue, cf MN Schmitt, 'Below the Threshold Cyber Operations: The Countermeasures Response Option and International Law' (2014) 54(3) VaJIntlL 698, 728–9, 730–1.

[84] Crawford (n 81) 704.

[85] See, inter alia, CJ Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP 2005) 249–51; M Dawidowicz, 'Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council' (2007) 77(1) BYIL 333, 417–18; F Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (CUP 2018) 266.

[86] See S Haataja, 'Cyber Operations and Collective Countermeasures under International Law' (2020) 25(1) JC&SL 33; Schmitt and Watts (n 83); G Corn and E Jensen, 'The Use of Force and Cyber Countermeasures' (2018) 32(2) TempleIntlCompLJ 127; J Kosseff, 'Collective Countermeasures in Cyberspace' (2020) 10(1) NotreDameJIntl&CompL 18.

[87] Text available at 'President of the Republic at the opening of CyCon 2019' (29 May 2019) <https://ceipfiles.s3.amazonaws.com/pdf/CyberNorms/LawStatements/Remarks+by+the+President+of+the+Republic+of+Estonia+at+the+Opening+of+CyCon+2019.pdf>.

[88] New Zealand, 'The Application of International Law to State Activity in Cyberspace' (2020) paras 21–22 <https://dpmc.govt.nz/sites/default/files/2020-12/The%20Application%20of%20International%20Law%20to%20State%20Activity%20in%20Cyberspace.pdf>.

[89] UK Attorney General, 'International Law in Future Frontiers' (19 May 2022) <https://www.gov.uk/government/speeches/international-law-in-future-frontiers>.

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their lawfulness has been rejected by France in 2019.[90] Canada has adopted the cautious line taken by the ILC, that it 'does not, to date, see sufficient State practice or *opinio juris* to conclude that [collective countermeasures] are permitted under international law'.[91] While these positions were outlined in statements and speeches discussing collective countermeasures during cyberwarfare, the reasoning deployed by these States is rooted in international law more generally, and thus should be read beyond the confines of this context.

The law remains in a state of development. However, its current trajectory points in the direction of such measures being lawful in the context of breaches of obligations *erga omnes*. Contrary to the situation regarding qualified neutrality, where an express rule of international law prohibits the arming of one belligerent over another, there is no clear prohibition of collective countermeasures. Rather, the wealth of State practice, as well as scholarly analysis, supports the lawfulness of collective countermeasures at best and at worst is simply inconclusive.

It would therefore appear that collective countermeasures provide the most compelling justification for the supply of arms by neutral States to the Ukrainian armed forces. Although this conclusion is not without controversy,[92] there does not appear to be any insurmountable doctrinal reason why this might not be so, nor does State practice preclude reliance on collective countermeasures. If neutral States opt to rely on this justification, the effect would surely be to consolidate permissive *opinio juris* further.

IV. QUALIFIED NEUTRALITY AS DUTY

Having concluded that sending arms to Ukraine is lawful as collective countermeasures, it is necessary to consider whether States are duty-bound to do so. The crucial provision here is once again found in the Draft Articles, specifically Article 41(1):

> States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

Article 40 clarifies that this duty is triggered by 'a serious breach by a State of an obligation arising under a peremptory norm of general international law'.[93] The Draft Articles do not specify what form such cooperation should take, except

[90] See M Schmitt, 'France's Major Statement on International Law and Cyber: An Assessment' (*Just Security*, 16 September 2019) <https://www.justsecurity.org/66194/frances-major-statement-on-international-law-and-cyber-an-assessment/>.

[91] Government of Canada, 'International Law Applicable in Cyberspace' (2022) para 37 <https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/peace_security-paix_securite/cyberspace_law-cyberespace_droit.aspx?lang=eng#a9>.

[92] See, for example, Talmon (n 8) 6–8.

[93] ARSIWA (n 44) Art 40(1).

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that it must be through lawful means.[94] In addition, as noted by the commentaries, this duty of cooperation may not have been part of general international law at the time of the Draft Articles' finalisation and 'may reflect the progressive development of international law'.[95] This begs two related questions: first, does such a duty exist; and secondly, if so, does this duty necessitate the supply of arms? This is of particular importance due to the apparent incompatibility between neutrality and a duty to cooperate.[96]

The duty to cooperate in response to serious breaches of *jus cogens* norms has been indirectly alluded to by the ICJ in the context of the Wall in the occupied Palestinian territory[97] and ongoing British colonial control of the Chagos archipelago,[98] although in those circumstances the duty was linked to measures taken through and in cooperation with the UN. As part of the ILC's current study into *jus cogens* norms, States have been given the opportunity to comment on draft conclusion 19(1), which closely mimics Article 41(1). Only Israel, the United States, the United Kingdom and Japan objected to this provision.[99] This largely reflects the earlier experience in the development of the analogous provision in the Draft Articles on the responsibility of international organisations.[100] Support or tacit acceptance of the conclusions was much more common.[101] Recently, Colombia has underlined the duty's relevance to the Russian invasion of Ukraine.[102]

The matter, however, remains controversial with proponents on both sides. A third view suggests that while the duty may not have existed in 2001, during the adoption of the Draft Articles, their reliance in various courts and their

[94] ibid 114, Commentary (3).

[95] ibid.

[96] A Gattini, 'A Return Ticket to "Communitarisme", Please' (2002) 13(5) EJIL 1181, 1188; P Palchetti, 'Consequences for Third States as a Result of an Unlawful Use of Force' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015); C Chinkin, 'Third Party Response to Armed Conflict and Acts of Aggression: Neutrality' in C Chinkin, *Third Parties in International Law* (Clarendon Press 1993); NHB Jørgensen, 'The Obligation of Non-Assistance to the Responsible State' in J Crawford et al (eds), *The Law of International Responsibility* (OUP 2010) 700.

[97] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 159–160.

[98] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 180.

[99] ILC, 'Fifth Report on Peremptory Norms of General International Law (*jus cogens*) by Dire Tladi, Special Rapporteur' (24 January 2022) UN Doc A/CN.4/747, paras 176–178.

[100] ILC, 'Eighth Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur' (14 March 2011) UN Doc A/CN.4/640, para 85.

[101] A number of Western States retained a cautious position, requesting further evidence of State practice and *opinio juris*; see comments from: Australia in 'Comments and Observations of the Australian Government: International Law Commission Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*)', paras 9–10 <https://legal.un.org/ilc/sessions/73/pdfs/english/jc_australia.pdf>; Italy in 'Observations of Italy to the ILC Conclusions on Peremptory Norms of General International Law (*Jus cogens*)', paras 28–29 <https://legal.un.org/ilc/sessions/73/pdfs/english/jc_italy.pdf>; the Netherlands in 'Comments and Observations on the ILC Draft Conclusions on Peremptory Norms of International Law (*jus cogens*)', para 11 <https://legal.un.org/ilc/sessions/73/pdfs/english/jc_netherlands.pdf>.

[102] UNGA, 'Eleventh Emergency Special Session' (1 March 2022) UN Doc A/ES-11/PV.3, 2.

invocation in State practice has over time introduced the duty into general international law.[103] Either way, it is noteworthy that the duty to cooperate has been largely absent from Western State discourse on the Russian invasion of Ukraine despite the active engagement of many Western States, probably owing to the duty's implications for Israeli breaches of international law.[104]

Accepting the duty to cooperate as *lex lata*, it nonetheless remains 'open to a broad interpretation'.[105] Considering the content of Article 41(1), it must be noted that the focus here was clearly, although not exclusively, on cooperation within the UN.[106] Pragmatically, this makes sense—collective measures within the UN machinery have the benefit of structure, which is imperative for meaningful cooperation. The Security Council has the authority to impose mandatory sanctions and while the UNGA does not have the same power, its virtually universal membership allows it to play an important role in coordinating joint action. Cooperation necessarily becomes more difficult outside this framework and while entities such as the EU have robust tools for inter-State cooperation, their membership is limited and do not have the same powers as the Security Council. In a similar vein, the duty to ensure respect for international humanitarian law[107] and the duty to prevent the commission of genocide[108] do not specify the steps which must be taken by third States. The effect is that, outside of the specific context of the UN, the duty to cooperate and other related duties are extremely blunt instruments—exactly how States must cooperate, or what this may entail, remains unspecified.

It stands to reason that while there may be a duty on all States to cooperate to bring the Russian invasion of Ukraine to an end, this cannot be said to translate into a specific duty to supply Ukraine with arms. The paralysis of the Security Council and the failure of the UNGA to prescribe a method for States to cooperate leaves it open to each State to decide how they intend to contribute. Neutral States remain free to opt for measures that fit within the

[103] ILC, 'Third Report on Peremptory Norms of General International Law (*jus cogens*) by Dire Tladi, Special Rapporteur' (12 February 2019) UN Doc A/CN.4/714, paras 90–94; RM Essawy, 'The Responsibility Not to Veto Revisited under the Theory of 'Consequential *Jus Cogens*' (2020) 12(3) GlobResponsibProt 299, 317–29.

[104] Y Zhang, 'Summoning Solidarity Through Sanctions: Time For More Business and Less Rhetoric' (*Völkerrechtsblog*, 8 June 2022) <https://voelkerrechtsblog.org/summoning-solidarity-through-sanctions/>.

[105] Jørgensen (n 96) 697.

[106] ARSIWA (n 44) 114, Commentary (2): 'Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.'

[107] See International Committee of the Red Cross, *Commentary on the First Geneva Convention* (CUP 2016) para 172.

[108] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, 220–1, paras 428–430; see also M Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18(4) EJIL 669, 684–8.

law of neutrality, such as political condemnation. Even though arms supplies may be lawful as collective countermeasures, it cannot be concluded that there is any specific obligation to provide the Ukraine with arms.

V. CONCLUSION

This article has sought to consider whether contemporary international law allows for neutral States to assist one belligerent over another lawfully. No specific rule in favour of qualified neutrality appears to exist as part of customary international law. However, arms transfers by neutral States may be justified as collective countermeasures in response to Russia's breach of *jus cogens* norms. This conclusion may have been different had supplying States articulated their legal rationale for arms supplies, and may have contributed to the clear emergence of a customary rule of qualified neutrality. If the above analysis holds, the implication of neutral arms transfers being best justified as collective countermeasures is also important—because recognition of a prima facie breach of a legal obligation is a prerequisite to the application of the circumstances precluding wrongfulness, this necessarily precludes the current emergence of a new customary rule should States adopt this legal rationale. It cannot be said, however, that neutral States are obligated to provide arms to Ukraine. Ongoing State silence as to the legal basis for the provision of arms to Ukraine does nonetheless leave this question in a state of some uncertainty.