




## SENDING WEAPONS TO UKRAINE UNDER THE PROHIBITION OF THE USE OF FORCE AND THE LAW OF NEUTRALITY

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Article Info	ABSTRACT
<b>Article type:</b> Research Article	The claim of Russia's humanitarian intervention in Ukraine serves as a legal justification for the use of force. However, there is no evidence supporting allegations of genocide in the Donetsk or Luhansk regions. While the majority of states oppose Russia's invasion, this does not justify overlooking the rule of law, particularly the law of neutrality. In Ukraine's struggle against Russian aggression, the United States and its allies have provided weapons and military training to Ukrainian forces. This unprecedented support violates the prohibition of the use of force and the law of neutrality. According to the Thirteenth Hague Convention of 1907, neutral countries cannot supply "war material of any kind" to belligerent powers. Consequently, Russia holds the right to take countermeasures against governments violating neutrality. Furthermore, under Article 52 of the First Protocol to the Geneva Convention of 1949, Russia may target weapons in Ukraine's possession. However, if Russia targets these weapons before they are actively used by Ukraine, such an attack could violate jus ad bellum, as the transfer of weapons alone cannot be classified as an armed attack against Russia.
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## Introduction

In 2022, following the military attack on Ukraine, Russian President Vladimir Putin signed the annexation documents for four partially occupied provinces: Luhansk, Donetsk, Kherson, and Zaporizhia. This act, which disregards the prohibition against the use of force, undermines the foundation of international law and the principles established by the United Nations Charter. UN Secretary-General António Guterres, during an emergency meeting of the UN Security Council, urged: “President Putin, stop your troops from attacking Ukraine; give peace a chance.”<sup>1</sup> From February 24, 2022, the date of Russia’s armed aggression against Ukraine, until May 1, 2022, the Office of the UN High Commissioner for Human Rights (OHCHR) recorded 6,469 civilian casualties, including 3,153 killed and 3,316 injured.<sup>2</sup>

In response, Western countries have taken unprecedented measures to support Ukraine’s defense against Russian aggression. The United States, the European Union, and its member states have provided substantial military, financial, and humanitarian aid. In February 2022, President Joe Biden authorized the release of additional weapons from US stocks to Ukraine, including anti-armour weapons, small arms, body armor, and munitions. For the first time in its history, the European Union also financed the purchase and delivery of arms to Ukraine. Other countries, such as the United Kingdom, Canada, France, the Netherlands, Germany, Sweden, Norway, and Denmark, have similarly contributed military aid.<sup>3</sup>

While the West opposes the Russian invasion, its involvement in Ukraine has escalated tensions. The EU’s efforts to forge closer ties with Ukraine, particularly through the Association Agreement, were perceived by Russia as an encroachment on its sphere of influence, leading to increased unrest and the subsequent annexation of Crimea. Western support for pro-European movements in Ukraine, without fully grasping the region’s historical and geopolitical

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1 UN Security Council, ‘Security Council Holds Late Night Emergency Meeting on Ukraine’ (24 February 2022) <https://news.un.org/en/story/2022/02/1112592>.

2 Office of the High Commissioner for Human Rights, ‘Ukraine: Civilian Casualty Update’ (2 May 2022) <https://www.ohchr.org/en/documents/country-reports/ukraine-civilian-casualty-update-2-may-2022>.

3 Al Jazeera, ‘Which Countries Are Sending Military Aid to Ukraine?’ (28 February 2022) <https://www.aljazeera.com/news/2022/2/28/which-countries-are-sending-military-aid-to-ukraine>.



complexities, has further intensified tensions. Additionally, NATO's expansion towards Russia's borders is viewed by some as a provocative action exacerbating the situation.

It is crucial to recognize that the conflicts in Ukraine involve a multitude of factors, and while the West's role is significant, it should not be seen as the sole cause of the tensions. Historical, cultural, geopolitical, and internal dynamics within Ukraine also play vital roles. To achieve lasting peace and stability, all parties must engage in open dialogue, address historical grievances, and pursue equitable solutions. A comprehensive approach that considers the perspectives of all stakeholders will be essential in resolving these longstanding conflicts.

Despite the West's significant military support for Ukraine, there has been a lack of clear legal justification for sending weapons. In the absence of explicit explanations from involved states, legal scholars and commentators have sought to clarify how these actions may align with the law of neutrality. Their justifications can be categorized into four groups:

1. **Qualified Neutrality:** The first group argues that supplying weapons to Ukraine is consistent with the principle of qualified neutrality, asserting that neutral states may favor victims of aggression without breaching international obligations.<sup>1</sup>
2. **Collective Self-Defense:** The second group contends that the supply of arms is justified as a form of collective self-defense for Ukraine against Russian aggression.<sup>2</sup>
3. **Lawful Countermeasures:** The third group posits that the supply of arms constitutes lawful countermeasures in response to Russia's clear violations of international law.<sup>3</sup>
4. **Obligatory Cooperation:** The fourth group believes that sending weapons is not only permitted under Article 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) but may also be obligatory to cooperate in addressing serious breaches of peremptory norms of international law, specifically Russia's aggression against Ukraine.<sup>4</sup>

1 See Heinegg, *Neutrality in the War Against Ukraine* (2022) <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>; Michel N Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (Articles of War, 7 March 2022) <https://lieber.westpoint.edu/ukraine-neutrality-cobelligerency-use-of-force/>; Oona A Hathaway and Scott 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/>; Michel N 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/>; Brian 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/>; Terry D 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/>; Eyal Benvenisti and Amichai 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/>; Adil Ahmad Haque, 'An Unlawful War' (2022) 116 American Journal of International Law Unbound 155; Stefan A G 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.

2 Kai Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and thus be Exposed to Countermeasures?' (EJIL:Talk!, 2 March 2022); Schmitt, 'Providing Arms and Materiel to Ukraine', *ibid*; Andrew Clapham, 'On War' (Articles of War, 5 March 2022) <<https://lieber.westpoint.edu/on-war>>; Markus 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/>.

3 Raul (Pete) Pedrozo, 'Ukraine Symposium – Is the Law of Neutrality Dead?' (Articles of War, 31 May 2022) <<https://lieber.westpoint.edu/is-law-of-neutrality-dead/>>; Andrew Clapham, *ibid*; Eyal Benvenisti and Amichai Cohen, 'Bargaining About War in the Shadow of International Law' (Just Security, 28 March 2022).

4 Stefan A. G. 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.; Adil Ahmad Haque, 'An Unlawful War' (2022) 116 American Journal of International Law Unbound 158; Eyal Benvenisti and Amichai Cohen, 'Bargaining About War in the Shadow of International Law' (Just Security, 28 March 2022); Kai Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and thus be Exposed to Countermeasures?' (EJIL:Talk!, 2 March 2022) <<https://www.ejiltalk.org/willa-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/>>

While acknowledging the legal arguments that Western countries may use to justify sending weapons to Ukraine, the first group's perspective will be explored in Part 3 of this article. Regarding the second group's argument for collective self-defense, Article 51 of the UN Charter affirms Ukraine's inherent right to self-defense. Additionally, countries supporting Ukraine against Russian aggression can invoke their right to self-defense if Ukraine requests assistance. However, Article 51 mandates that member states report any measures taken under the right of self-defense to the Security Council. To date, no state providing arms to Ukraine has reported these deliveries to the Security Council.

Regarding the third group's claim of countermeasures, Article 49 of the ARSIWA stipulates that only the injured state can enact such measures. An injury may be defined as a violation specifically affecting a state or, if part of a broader group, impacting the international community. In this context, Ukraine is the injured party; thus, it is not the responsibility of the West or other arms-sending states to claim countermeasures. Consequently, while other states may demand that Russia cease its illegal aggression and provide compensation for damages, only Ukraine can invoke responsibility for Russia's actions.

The fourth group's claim raises controversial questions regarding whether cooperation under Article 41 of the ARSIWA includes sending weapons and whether these states can still benefit from neutral status. There is concern that such cooperation might escalate the conflict, which could explain why no state has invoked Article 41 to date. Although ARSIWA does not explicitly clarify this, if we consider Russia's invasion of Ukraine a serious breach of a peremptory norm of international law, it may grant other countries the right to cooperate in lawful means to end the aggression. However, sending weapons could violate the neutrality laws established by the Fifth and Thirteenth Hague Conventions of 1907. Nonetheless, this violation may not constitute an offense under international law, and Russia cannot legally classify the states sending weapons to Ukraine as co-belligerents.

## 1. Russia's Humanitarian Intervention in Ukraine

Humanitarian intervention refers to military intervention in a state that either violates human rights or is unable to prevent such violations. To prevent misuse of this concept, any humanitarian intervention must occur within the framework of Article 42 of the UN Charter and require Security Council (UNSC) authorization. Thus, it cannot be viewed as an exception to the prohibition on the use of force, and its legitimacy hinges on UNSC approval. The Russian government did not secure this approval for its attack on Ukraine; the UNSC even passed a resolution demanding an immediate cessation of hostilities, which Russia vetoed.<sup>1</sup>

In the past forty years, several governments have attempted to justify unilateral military actions under the guise of humanitarian intervention. However, the international community has consistently rejected these actions as legitimate.<sup>2</sup> Humanitarian intervention aims to prevent or stop gross human rights violations in states that are either unable or unwilling to protect their citizens or are actively persecuting them. The 1990s are often referred to as the

1 United Nations, 'Russia blocks Security Council action on Ukraine' (26 February 2022) <https://news.un.org/en/story/2022/02/1112802>.

2 Alex de Waal and Rakiya Omaar, 'Can Military Intervention be "Humanitarian"?' (Middle East Research and Information Project, n.d.) <http://www.merip.org/mer/mer187/can-military-intervention-be-humanitarian>.



“decade of humanitarian intervention,” during which the UN authorized several interventions on humanitarian grounds.<sup>1</sup>

The collapse of the Soviet Union in 1991, prompted by various factors including economic difficulties stemming from communist policies, led to the emergence of 15 independent states. This period was marked by a series of conflicts in Central Asia, Eastern Europe, and particularly the Caucasus region. Following this collapse, independent countries faced not only economic challenges but also worsening conditions. Russia, the largest successor state, struggled with numerous issues until Vladimir Putin’s rise to power in 2000, which marked a significant shift in governance. Putin has described the USSR’s collapse as the “greatest geopolitical catastrophe of the century”<sup>2</sup> and has initiated policies that suggest a desire to restore a federal state akin to the former Soviet Union.

Vladimir Putin’s speech on February 24 included claims that millions of people in the Ukrainian territories of Donetsk and Luhansk were suffering genocide at the hands of Ukraine, thus justifying Russia’s intervention. He stated: “Meanwhile, the so-called civilized world, which our Western colleagues proclaim as the only representatives, prefers not to see this, as if this horror and genocide, faced by nearly 4 million people, do not exist. But they do exist, and only because these people did not agree with the West-supported coup in Ukraine in 2014 and opposed the aggressive nationalism and neo-Nazism that have become national policy. They are fighting for their fundamental right to live on their own land, to speak their own language, and to preserve their culture and traditions. How long can this tragedy continue? How much longer can one tolerate this?”<sup>3</sup>

These words can be interpreted as a form of humanitarian intervention,<sup>4</sup> as Putin asserts the use of force to protect non-nationals from widespread and systematic human rights violations occurring in another country. In its Application to the International Court of Justice (ICJ), Ukraine “respectfully requests the Court to: Adjudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine.”<sup>5</sup>

The ICJ stated, “The Court can only take a decision on the Applicant’s claims if the case proceeds to the merits. At the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party’s unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide.”<sup>6</sup> Here, the Court implicitly questions Russia’s genocide allegations, even while refraining from directly addressing them. By highlighting the lack of evidence, the Court suggests that such evidence does not exist.

1 Kaldor, *Human Security: Reflections on Globalization and Intervention* (2007) 16.

2 NBC News, ‘Putin: Soviet collapse a “genuine tragedy”’ (25 April 2005) <https://www.nbcnews.com/id/wbna7632057>.

3 President of the Russian Federation, ‘Address by the President of the Russian Federation’ (n.d.) <http://en.kremlin.ru/events/president/transcripts/67828>.

4 Marko Milanovic, ‘What is Russia’s Legal Justification for Using Force Against Ukraine?’ *EJIL:Talk!* (24 February 2022) <[www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/](http://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/)>.

5 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Order of 16 March 2022, Request for the Indication of Provisional Measures, ICJ Rep (16 March 2022) <[www.icj-cij.org/public/files/case-related/182/182-20220316-ORD01-00-EN.pdf](http://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD01-00-EN.pdf)>, para 2.

6 Ibid, para 59

## 2. Sending Weapons to Ukraine under the Prohibition of the Use of Force

The inviolability of the territorial sovereignty of states is a fundamental principle in international law. The principle of respect for the territorial integrity of states is a cornerstone of the international system, as is the norm prohibiting interference in the internal affairs of other states. Article 2(4) of the UN Charter preserves the territorial integrity and political independence of states by forbidding any use of force or threat thereof against either. The Charter's general prohibition against resorting to force encompasses all coercive actions in international relations, including war, threats of war, armed countermeasures, and naval blockades. However, two exceptions allow for the use of force in international relations:

1. **The Right of Self-Defense:** Article 51 of the Charter states that in the event of an armed attack against a UN member, the right of self-defense remains intact until the Security Council takes necessary measures to maintain international peace and security. This right applies to individuals or groups.
2. **Actions of the UNSC:** Based on the delegated authority in Articles 24 and 25 and Chapter VII of the UN Charter, the UNSC can take measures to maintain and restore international peace and security.

The prohibition of the use of force is emphasized in a decision by the ICJ, where the Court referred to it as a “cornerstone of the UN Charter.”<sup>1</sup> To determine whether sending weapons violates this prohibition, we can refer to the Nicaragua case, where the ICJ stated that the “arming and training” of the Contras by the United States “can certainly be said to involve the threat or use of force against Nicaragua.”<sup>2</sup> While this case involved a non-international armed conflict, ICJ judgments serve as persuasive authority for states not party to the case (ICJ Statute, Art. 59). Thus, the Court's reasoning may apply equally to International Armed Conflicts (IAC). If arming and training a non-State group opposing a State constitutes a use of force, it stands to reason that providing arms to another State engaged in hostilities against that State would also be a use of force. The potential harm to the State could be more severe, warranting equal protection under international law.<sup>3</sup>

On the other hand, Ukraine has the right to self-defense against Russian aggression. Therefore, providing weapons to Ukraine cannot be considered an internationally wrongful act. Article 21 of the ARSIWA recognizes self-defense as a circumstance precluding wrongfulness. Article 21 states: “The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations.”

## 3. Sending Weapons to Ukraine under the Law of Neutrality

Generally, states that are not parties to an IAC are considered neutral states. The law of neutrality is a longstanding body of international law that seeks to regulate the relationship between states engaged in international armed conflicts (belligerents) and those at peace (neutrals), with the aim

<sup>1</sup> ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 December 2005, I.C.J. Reports 2005, para 148.

<sup>2</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v U.S.)* (Merits Judgment) [1986], para 228.

<sup>3</sup> Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force* (2022) <https://www.articlesofwar.org>.



of localizing the conflict and preventing its spread. This is achieved by assigning certain rights and duties to both belligerents and neutrals, including the neutral duty to refrain from providing belligerents with “warships, ammunition, or war material of any kind whatsoever.”<sup>1</sup>

The United States and its allies have not claimed neutrality in this context; rather, their involvement in Ukraine has exacerbated tensions. They have provided various forms of military assistance to Ukraine, including weapons, equipment, and training for the Ukrainian armed forces. The U.S. has supplied a range of defensive weapons, such as antitank missiles, armored vehicles, and small arms. Additionally, NATO countries have provided non-lethal aid, including medical supplies, communications equipment, and intelligence sharing. The U.S. and its allies have also conducted joint military exercises with Ukraine to enhance its capabilities and readiness. Furthermore, they have imposed economic sanctions on Russia, targeting key sectors of the Russian economy—energy, finance, and defense—with the goal of pressuring Russia to end its aggression and respect Ukraine’s sovereignty.

However, while the U.S. and its allies have provided military assistance to Ukraine, they have not directly engaged in combat operations against Russia. This raises the question: do these actions violate the law of neutrality?

The laws of neutrality are mentioned across several domains of legal jurisprudence. The most literal interpretation is captured in the Max Planck Encyclopedias of International Law, which defines neutral “as a state not a party to an armed conflict.” The law of neutrality only applies in situations of IAC.

The roots of the law of neutrality can be traced back to the practices of 17th and 18th century governments, which established a system of reciprocal rights and obligations for neutral and belligerent states. Neutral countries are obligated not to participate in hostilities and to maintain a neutral stance toward belligerents. Conversely, belligerents are required to respect the territory of neutral countries, and neutrals are permitted to trade with all parties to the conflict, provided they do so impartially. Over time, some principles of neutrality have been accepted as part of customary international law—a body of rules derived from state practice that conveys a sense of legal obligation.<sup>2</sup>

In essence, when an armed conflict occurs or is declared between two or more states, third countries must make a political decision to either participate in that conflict or remain neutral. If a third country chooses to participate, it is considered hostile towards one or more of the conflicting states and is subject to the rights and duties of a conflict party. In contrast, if states opt to stay out of the conflict, they enjoy neutral status. The most significant right of a neutral government is that no restrictions should be placed upon it due to the conflict, except for those restrictions that stem from prescribed rights.

The law of neutrality is regulated by two treaties adopted at the Second Hague Peace Conference on October 18, 1907, to which both Russia and Ukraine are parties. The treaties are:

- Convention (V) Respecting the Rights and Duties of Neutral Powers in Case of War on Land.

<sup>1</sup> 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.

<sup>2</sup> Mulligan, *International Neutrality Law and U.S. Military Assistance to Ukraine* (2022) 2.



- Convention (XIII) on the Rights and Duties of Neutral Powers in Naval War.

In addition to these legally binding instruments, the law of neutrality is addressed in Articles 39 to 48 of the 1923 Hague Rules of Air Warfare, the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, and the 2009 Manual on International Law Applicable to Air and Missile Warfare.

The law of neutrality, as established in the ICJ's 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,<sup>1</sup> is a key component of customary international law. This issue is significant because some countries supporting Ukraine, such as the United Kingdom, are not parties to the relevant conventions.

Article 9 of the Fifth Hague Convention of 1907 stipulates: "Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7<sup>2</sup> and 8<sup>3</sup> must be impartially applied by it to both belligerents." Additionally, the Thirteenth Hague Convention of 1907 prohibits neutral countries from providing "war material of any kind whatever" to belligerents. Humanitarian aid is exempt from this ban, and neutral governments are not required to prevent private companies from selling ammunition or war material.

Neutral countries are obligated to prevent hostile acts on their territory. Providing material aid to the Ukrainian military contravenes the duty of neutrality. Article 6 of the Thirteenth Hague Convention states: "The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden."

It suffices for a government to refrain from supplying items with exclusively or primarily military purposes. This view is supported by government practices; for instance, Switzerland defines an instrument of war to include not only "weapons, weapon systems, munitions, and military explosives" but also "equipment specifically conceived or modified for use in combat."<sup>4</sup>

Article 6 of the Fifth Hague Convention clarifies: "The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents." Thus, the duty of neutrality does not prohibit all forms of assistance to a belligerent. States are not obligated to prevent their nationals from fighting alongside one of the belligerents, which has occurred in the Ukraine conflict.

A more complex issue arises regarding whether a government should prevent private companies from supplying weapons or military equipment to a belligerent. For example, Elon Musk's SpaceX has provided Starlink satellites to Ukrainians, enabling coordination of drone attacks on Russian positions.

Some scholars argue that, under customary international law, the distinction between states and private enterprises regarding the prohibition of arms supply does not apply.<sup>5</sup> If this view is

1 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [88].

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 7.

3 *Ibid* art 8: A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.

4 Switzerland, Federal Act on War Materiel of 13 December 1996 § 5(b).

5 Bothe, *The Law of Neutrality* in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2008) 585-586.



accurate, then a government allowing the export of military items would violate its neutrality; this includes cases like Starlink.

The Fifth and Thirteenth Hague Conventions do not specify remedies for violations of neutrality, but there is consensus on certain principles. A breach of neutrality does not itself constitute an “act of war” justifying another state’s use of force in response. The UN Charter permits force only in two scenarios: with Security Council approval or in self-defense under Article 51.

An action may violate the duty of impartiality and justify the use of force only if it independently satisfies an exception in the UN Charter. For example, if a state breaches neutrality by launching an armed attack during an ongoing war, Article 51 might permit the attacked state to use force in self-defense. However, less severe infractions, such as failing to seize a hostile vessel, do not authorize force in response.<sup>1</sup>

Therefore, if a neutral state engages in conduct breaching its neutral status, the aggrieved belligerent may (but is not required to) undertake proportionate self-help actions, including countermeasures, to ensure compliance with neutrality obligations. Consequently, Russia may take proportionate countermeasures against any government violating neutrality principles, provided that these violators cease their support. For instance, in 1973, OPEC justified an oil embargo on Western countries by arguing that their support for Israel during a conflict violated neutrality obligations.

These arms transfers and sanctions, which are clearly inconsistent with the traditional law of neutrality, have been justified by several scholars and governments under the concept of qualified neutrality. The United States has adopted the “Doctrine of Qualified Neutrality,” also referred to as benevolent neutrality or non-belligerency.<sup>2</sup> Under this doctrine, states can engage in non-neutral acts when supporting the victim of an unlawful war of aggression. Qualified neutrality clearly applies when the UNSC, under its Chapter VII authority, has expressly deemed one party to the conflict an aggressor.

For example, in June 1950, the Security Council determined that North Korea’s armed attack on the Republic of Korea constituted a breach of the peace<sup>3</sup> and recommended that UN member states furnish necessary assistance to repel the attack and restore international peace and security.<sup>4</sup> Similarly, when Iraq invaded Kuwait in August 1990, the Security Council condemned the invasion and imposed sanctions on Iraq to induce its withdrawal.<sup>5</sup> Importantly, the Council clarified that its decisions did not prohibit assistance to the legitimate government of Kuwait. In these instances, there was no room for impartiality toward the conflicting parties, and thus the law of neutrality was not applicable.

1 Mulligan, *International Neutrality Law and U.S. Military Assistance to Ukraine* (2022) 3.

2 United States Department of Defense, *US Law of War Manual* (2016) § 15.2.2: Qualified Neutrality. The United States has taken the position that certain duties of neutral States may be inapplicable under the doctrine of qualified neutrality. The law of neutrality has traditionally required neutral States to observe a strict impartiality between parties to a conflict, regardless of which State was viewed as the aggressor in the armed conflict. However, after treaties outlawed war as a matter of national policy, it was argued that neutral States could discriminate in favor of States that were victims of wars of aggression. Thus, before its entry into World War II, the United States adopted a position of “qualified neutrality” in which neutral States had the right to support belligerent States that had been the victim of flagrant and illegal wars of aggression. This position was controversial.

3 UN Security Council, *Resolution 82* (25 June 1950) UN Doc S/1501.

4 UN Security Council, *Resolution 83* (27 June 1950) UN Doc S/1511.

5 UN Security Council, *Resolution 661* (6 August 1990) UN Doc S/RES/661 (1990), paras 2-4.



In fact, Article 2(5) of the United Nations Charter abrogates neutrality rules in such circumstances, stipulating: “All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.” However, in the case of Ukraine, the Security Council did not designate Russia as the aggressor, effectively precluding any action against it. As a permanent member of the Council, Russia can and will veto any resolution that seeks to impose preventive or enforcement actions regarding its unlawful invasion of Ukraine.

If one of the five permanent members of the Security Council commits an act of aggression or wishes to block action, perhaps due to sympathy with the aggressor, it can use its veto power to prevent the Council from designating the aggressor or taking measures to restore international peace and security. As early as 1948, Philip C. Jessup identified a “gap” in the United Nations’ collective security system, noting that if the veto is exercised and UN action is blocked, fighting may continue indefinitely. This raises the question of what the legal position of third states and their nationals should be in such scenarios.<sup>1</sup>

The permissibility of Western governments providing arms to Ukraine under neutrality law hinges on whether the concept of qualified neutrality can be extended to situations like Ukraine’s, where it may be viewed as an overt aggressor. Many scholars reject the expansion of qualified neutrality. Von Heing argues that allowing neutral states to determine the aggressor unilaterally would undermine the law of neutrality’s ability to prevent escalation of an IAC.<sup>2</sup>

Nonetheless, the law on qualified neutrality may evolve due to the situation in Ukraine. Von Heing himself contends that qualified neutrality should apply to arms supplies to Ukraine because “the aggressor state itself prevented the enforcement mechanism under Chapter VII of the UN Charter from functioning,” despite a potential majority in the Security Council. With or without an authoritative classification by the UN, Russia’s military operations against Ukraine are evident acts of aggression, lacking any legitimate justification under international law. The overwhelming number of states condemning these actions as violations of international law cannot be ignored. Therefore, the many states supplying military equipment to Ukraine—whether defensive or offensive—are not acting contrary to the law of neutrality, nor are they committing internationally wrongful acts or aiding and assisting such acts.<sup>3</sup>

The United States Congressional Research Service has justified U.S. intervention in Ukraine using the concept of Qualified Neutrality. Specifically, in the report titled “International Neutrality Law and U.S. Military Assistance to Ukraine,”<sup>4</sup> published in April 2022, it states that “binary systems of neutrals and belligerents are no longer available as modern international law allows for countries to take an active role in assisting the victims of unlawful wars.” It further posits that “states can take non-neutral acts when supporting the victim of an unlawful war of aggression.”<sup>5</sup> Therefore, military aid to Ukraine is considered lawful as long as Ukraine adheres

1 Jessup, *A Modern Law of Nations* (1948) 203.

2 Heinegg, op.cit, (2022).

3 Ibid.

4 *International Neutrality Law and U.S. Military Assistance to Ukraine* (2022) <https://crsreports.congress.gov/product/pdf/LSB/LSB10735/3> accessed 8 January 2024.

5 Ibid, 1.



to the legal framework governing the conduct of hostilities under the Geneva Convention. However, it is important to note that the Congressional Research Service has not explicitly defined the meaning of Qualified Neutrality.

The validity of Qualified Neutrality is questionable for several reasons:

- Although General Assembly resolutions can influence customary international law, the “Union for Peace” resolution is silent on both neutrality law and arms supply to Ukraine.
- The application of Qualified Neutrality may be seen as political expediency, allowing states to justify violations of neutrality on moral grounds to contain Russian expansionism.
- To date, no government has explicitly argued that Qualified Neutrality applies to Ukraine or a similar situation.

#### 4. Sending Weapons to Ukraine and Co-belligerency

According to the Max Planck Encyclopedias of International Law, belligerency is the condition of being engaged in war, applicable to both international and non-international armed conflicts. The Geneva Conventions outline specific obligations for each belligerent but do not detail how a state or group becomes a belligerent.<sup>1</sup> Certain actions can clearly qualify a state as a co-belligerent, particularly direct participation in hostilities on the side of another state, defined as engaging in actions that directly harm the adversary.<sup>2</sup> This direct-participation standard influenced the U.S. designation of some states as co-belligerents during the Iraq conflict in 2003.<sup>3</sup>

To date, no Western country has directly participated in the war against Russia. While it is possible for a country to be considered hostile by providing information that aids Ukraine in targeting Russian assets, this has not occurred. Providing weapons and war-related materials to Ukraine does not automatically classify these states as parties to the armed conflict with Russia. In short, simply transferring weapons does not make these countries co-belligerents; more active involvement, such as direct participation in hostilities or providing critical targeting information, is required.

#### 5. Military Targets of Weapons in Ukraine’s Possession

Article 52, Paragraph 2 of the First Protocol of the Geneva Convention of 1949 states: “Attacks shall be limited strictly to military objectives.” Military objectives are defined as objects that make an effective contribution to military action, and whose destruction offers a definite military advantage. While the First Protocol acknowledges that civilian casualties may be inevitable during armed conflict, it imposes a duty on parties to distinguish between combatants and civilians, targeting only military objectives.

<sup>1</sup> Mulligan, Op. Cit. (2022) 4.

<sup>2</sup> Alexander Wentker, ‘At War: When Do States Supporting Ukraine or Russia Become Parties to the Conflict and What Would That Mean?’ *EJIL: Talk!* (14 March 2022) <[www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/](https://www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/)>.

<sup>3</sup> ‘Protected Person’ Status in Occupied Iraq Under the Fourth Geneva Convention’

Once weapons enter Ukrainian territory, they may be considered military targets by Russia, as per Article 52. However, the question arises: are these weapons considered military targets before entering Ukraine? If the country sending weapons is a co-belligerent, then yes, they could be considered military targets. If the country is not a co-belligerent, the situation is less clear. The term “purpose” in Article 52 suggests that if the Russian government has reasonable grounds to believe that these weapons are destined for Ukraine, it may treat them as military targets.

In this scenario, if Russia attacks the weapons being sent to Ukraine, it might be lawful under international humanitarian law. However, such an attack would violate *jus ad bellum*, as the transfer of weapons cannot be classified as an armed attack against Russia.

## Conclusion

From the perspective of international law, Russia’s aggression against Ukraine constitutes a clear violation of the prohibition on the use of force and is regarded as an international crime. The ongoing war in Ukraine, occurring 77 years after World War II, underscores the potential for another extensive conflict in Europe. In the case of *Ukraine v. Russian Federation* (2022), the International Court of Justice noted that there is insufficient evidence to substantiate Russia’s claim of genocide occurring in Ukraine.

Under contemporary international law, the use of force to fulfill the obligation to prevent and punish genocide is impermissible. Therefore, while Russia’s assertion of humanitarian intervention is questionable, it is evident that most states oppose the Russian invasion of Ukraine. However, this opposition does not justify overlooking the rule of law, particularly the law of neutrality.

The provision of military aid to Ukraine by Western states raises serious concerns regarding compliance with the prohibition of the use of force and the principles of neutrality. The law of neutrality, as established in the ICJ’s 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, is also a part of customary international law. This is significant because some countries supporting Ukraine, such as the United Kingdom, are not parties to the relevant conventions. A failure to adhere to the principle of neutrality may prolong the conflict.

Russia retains the right to undertake proportionate countermeasures against states that violate neutrality principles until these states cease their support for Ukraine. Historical precedents, such as OPEC’s oil embargo on Western nations in 1973, illustrate how violations of neutrality can lead to retaliatory actions.

While UN General Assembly resolutions can influence customary international law, the “Union for Peace” resolution remains silent on both the law of neutrality and arms supplies to Ukraine. After World War II, the international community sought to redefine neutrality to avert a third world war, delegating intervention authority to the UN Security Council in situations threatening international peace and security. However, the evolving global order has rendered the structure of the UNSC somewhat outdated, particularly in light of the U.S. intervention in the Russia-Ukraine conflict without the Council’s approval.

These developments highlight the urgent need to redefine neutrality in a modern context



and update norms regarding co-belligerency. Despite extensive support for Ukraine, NATO allies remain cautious about being drawn into the conflict as co-belligerents. No Western nation has yet directly engaged in hostilities against Russia. However, providing intelligence to assist Ukraine in targeting Russian forces could lead to a state being perceived as hostile.

Historically, the U.S. was not recognized as a party to World War II until its direct involvement against Germany and Japan. The countries supplying arms to Ukraine clearly intend for these weapons to be used against Russian forces, thus providing a military advantage to Ukraine. Consequently, according to Article 52 of the First Protocol of the Geneva Convention (1949), Russia may view these weapons as military targets. If Russia targets these weapons before they enter Ukraine's possession, such an attack may violate *jus ad bellum*, as the transfer of weapons does not constitute an armed attack on Russia.



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