

This is the Author's Accepted Manuscript (AAM) of *Relic of the Past or Immortal Phoenix? The Legal Relevance of Neutrality in the Russo-Ukrainian War* / Bartolini, Giulio; Pertile, Marco. - In: *ITALIAN YEARBOOK OF INTERNATIONAL LAW*. - ISSN 0391-5107. - 32:1(2023), pp. 201-230.

<https://dx.doi.org/10.1163/22116133-03201011>

## **Relic of the Past or Immortal Phoenix? The Legal Relevance of Neutrality in the Russo-Ukrainian War\***

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### Abstract

The article examines the role of neutrality in the Russo-Ukrainian war by analyzing the legal justifications offered by States with reference to the provision of weapons and economic assistance to the belligerents. The findings reveal that the law of neutrality has played a limited role as neutrality-based legal arguments were rarely utilized, even when they were available, either by countries supporting Ukraine or by those maintaining some impartiality towards the belligerents. The decision of a significant group of states to provide military and economic assistance to Ukraine was based on *ius ad bellum* arguments and rarely took into consideration the law of neutrality. Perhaps surprisingly, even the parties to the conflict seldom employed legal arguments related to neutrality. Permanent neutrals or countries traditionally adopting a policy of neutrality, on their turn, tend to limit the obligations of neutrality to their military dimension while remaining open to providing economic and humanitarian support. This diminishing relevance of neutrality law, amidst the ongoing crisis of the United Nations' collective security system, may lead to a legal order where third-party involvement in conflicts becomes more common. The authors maintain that the obsolescence of the law of neutrality is not yet complete, as occasional references to its rules still emerge, and many states have chosen not to take sides in the present conflict. Neutrality, however, as reflected in state declarations, appears to be interpreted more as a political choice rather than a legal obligation.

Keywords: Neutrality, Ukraine, Weapons, Economic Assistance, *Ius ad bellum*

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\* Giulio Bartolini is the author of section 2; Marco Pertile authored section 3. Sections 1 and 4 have been jointly written. Whenever possible, the Internet pages cited in this article have been saved on the Internet Archive's Wayback Machine (<https://web.archive.org>). Most of the internet addresses have been shortened with the url shortener rb.gy.

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## 1. Introduction

The current conflict in Ukraine is a case of fundamental importance for assessing the continuing relevance of the historical-legal concept of neutrality. Indeed, even if neutrality could appear as a relic of the past, having been codified particularly in the 1907 V Hague Convention on land warfare and the 1907 XIII Hague Convention relating to maritime warfare, this body of law has continued to attract attention, as exemplified by the Ukrainian accession to the abovementioned treaties in 2015. Its enduring relevance was furthermore confirmed by the International Court of Justice, on the assumption that the “principle” of neutrality is “an established part of customary international law”,<sup>1</sup> national judgments and other elements of State practice,<sup>2</sup> chiefly military manuals,<sup>3</sup> which still refer to this set of rules, as complemented by recent scholarly analysis reviewing such practice and academic debates,<sup>4</sup> including private codifications.<sup>5</sup>

Against this background, there are several elements that make neutrality a challenging topic.

Firstly, neutrality has attracted the interest of scholars since the birth of international law,<sup>6</sup> depending closely on the cultural, technological, ideological, institutional, and social changes that ran with war in inter-state relations. There is therefore a very rich debate on the subject that must be grasped in its historical context. Concepts developed at the time of the Napoleonic wars, in other words, are not necessarily adequate to legally qualify the behavior of States in the age of digitalization.

A further element of complexity lies in the asymmetrical nature of the legal framework. Neutrality is governed by a long-standing but fragmentary treaty codification that has been supplemented over time by a partially divergent customary law.<sup>7</sup> Written law, however, notoriously offers a precise anchorage to the scholarly debate and, although dated and poorly in step with the needs of the times, remains a point of reference,<sup>8</sup> especially when it is not clear

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<sup>1</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, paras. 88-89.

<sup>2</sup> See the references to neutrality in the position paper of the Italian Government on ‘International Law and cyberspace’, 2021, p. 19, <<https://rb.gy/rppm4>>.

<sup>3</sup> For examples regarding military manuals by Canada, Denmark, Germany, New Zealand, UK, USA, see CLANCY, “Neutral Arms Transfers and the Russian Invasion of Ukraine”, ICLQ, 2023, p. 7, footnote 38 (advanced version).

<sup>4</sup> See: UPCHER, *Neutrality in Contemporary International Law*, Oxford, 2020; ANTONOPOLOUS, *Non-Participation in Armed Conflicts*, Cambridge, 2022.

<sup>5</sup> See references to the law of neutrality in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, the *HPCR Manual on International Law Applicable to Air and Missile Warfare* and the *Tallinn Manual on the International Law Applicable to Cyber Warfare*.

<sup>6</sup> LAUTERPACHT (ed.), *International Law – A Treatise*, by L. Oppenheim, Vol II, Disputes, War and Neutrality, 7<sup>th</sup> ed., London, New York, Toronto, 1952, pp. 625-652.

<sup>7</sup> ZEMANEK, “Neutrality in Land Warfare”, in BERNHARDT (ed), *Encyclopedia of Public International Law*, Vol. 4 (N-Z), Amsterdam, New York, Oxford, 1982, p. 16. Examples are the debate on the extension of the duty of abstention also to private trade in arms in customary law or the conception of the duty of impartiality as a general customary rule of equidistance of third parties vis-à-vis belligerents. See, *infra*, section 3.

<sup>8</sup> KORMANICKI, “The Place of Neutrality in the Modern System of International Law”, RCADI, Vol. 80, 1952, p. 403.

whether State positions are dictated by political options or, to the contrary, by a belief in the compulsory nature of a specific behavior.<sup>9</sup>

Moreover, within the broad doctrinal debate that has developed over the years, two main questions have emerged that pertain to the very nature of neutrality and are crucial to assessing its relevance.

The first question regards the relationship between neutrality and the *ius ad bellum*, especially with reference to the functioning of a collective security system. In this respect, the law of neutrality has long shown problems of compatibility with centralized systems of use of force management, so much so that its death has been (prematurely) celebrated after the entry into force of both the Statute of the League of Nations<sup>10</sup> and the UN Charter.<sup>11</sup> The traditional argument is that the obligations arising from the law of neutrality should be superseded if the determination of an aggression were to be made by the Security Council. Uncertainty remains, however, as to the admissibility of derogation from the law of neutrality based on a decentralized assessment of a violation of the *ius ad bellum* by third States.<sup>12</sup>

The second question, which is strictly interrelated with the first one, regards the legal nature of the rules on neutrality and the existence of intermediate positions of third parties in addition to belligerence and neutrality. This thesis goes back to Cavaglieri, who questioned the dichotomy between belligerence and neutral status, and has more recently been interpreted to mean that neutrality would have become an optional framework, available to States, but incapable of automatically triggering legal obligations.<sup>13</sup>

Within this context, the current conflict has brought about from the outset, given the involvement of a permanent member of the Security Council, the unavailability of the UN collective security system. Although the so-called “special military operation” conducted by the Russian Federation was considered an act of aggression by a large part of the international community, as shown by the adoption of UNGA Resolution ES-11/1,<sup>14</sup> the assessment of the legality of the situation is left to the decentralized assessment of individual States. In addition, even disregarding the debate on the customary nature of the law of neutrality, this is a case in which the treaty law of neutrality is to a large extent directly applicable. The Russian Federation has been a party to the two Hague conventions since 1909, while Ukraine, as has been said, acceded

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<sup>9</sup> MIELE, *L'estraneità ai conflitti armati secondo il diritto internazionale*, Vol. II, Padova, 1970, pp. 276-282.

<sup>10</sup> POLITIS, *La neutralité et la paix*, Paris, 1935, p. 9.

<sup>11</sup> KUNZ, “The Laws of War”, *AJIL*, 1956, p. 326; FENWICK, *International Law*, 4<sup>th</sup> ed., New York, 1965, p. 727.

<sup>12</sup> BOTHE, “The Law of Neutrality”, in FLECK (ed.), *The Handbook of International Humanitarian Law*, 4<sup>th</sup> ed., Oxford, 2021, pp. 606-607; BINDSCHEDLER, “Neutrality, Concept and General Rules”, in BERNHARDT (ed), *cit. supra* note 9, p. 13.

<sup>13</sup> CAVAGLIERI, “Belligeranza, neutralità e posizioni giuridiche intermedie”, *RDI*, 1919, p. 58 ff; SCHINDLER ‘Transformations in the Law of Neutrality Since 1945’ in DELISSEN and TANJA (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead*, Dordrecht, 1991, p. 367 ff, p. 373; UPCHER, *cit. supra* note 4, pp. 80-137.

<sup>14</sup> UNGA, A/RES/ES-11/1, 02.03.2022.

to them since 2015. Similarly, an important number of the States assisting the warring parties have ratified the two conventions.

That notwithstanding an initial analysis of the practice shows that many States have engaged in conducts potentially incompatible with the law of neutrality ranging from intelligence sharing to military training, to the supply of weapons, and economic support. These forms of support were however mainly provided to Ukraine by Western States, while a large part of the international community dissociated itself from their stance.

This article will thus attempt to shed light on both the military and the economic dimensions of neutrality bearing in mind the two main questions outlined above and taking stock of the practice emerging from the Russo-Ukrainian conflict. In particular, section 2 will focus on the most discussed issue under the law of neutrality, namely the provision of weapons and other military support to the belligerents, whereas section 3 will discuss the legal qualification of unilateral economic measures against the Russian Federation and in support of Ukraine as well as the obstruction of naval trade in the Black Sea. Finally, section 4 will assess the impact of the examined practice on the law of neutrality.

## **2. The provision of military material in the Russo-Ukrainian armed conflict.**

One of the distinctive features of the current armed conflict is the massive provision of weapons and military material by third States. Even if a complete picture is far from being clear, around 30 States have provided lethal war materials to Ukraine. Such States include a large majority of EU Member States, plus Albania, Australia, Canada, North Macedonia, Turkey, the United Kingdom, and the USA.<sup>15</sup> Furthermore, the EU is providing military support to Ukraine through the European Peace Facility (EPF),<sup>16</sup> which in February 2022, through Council Decision (CFSP) 2022/238 started to be used for providing assistance to Ukraine, including military supplies and lethal war material.<sup>17</sup> Similarly, some States have also been engaged in supporting Ukraine through intelligence, even if their involvement and its characteristics are far from being clear.<sup>18</sup>

Some other countries, such as South Korea or New Zealand, have only provided non-lethal materials. A few other States, like Switzerland, have engaged in a thorough examination of permissible measures under the law of neutrality. In contrast, most States have not provided any

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<sup>15</sup> See e.g.: MILLS, Military assistance to Ukraine since the Russian invasion, House of Commons Library, Research Briefing 30 March 2023; “The United States and Allies Provide Military and Intelligence Support to Ukraine”, 116 AJIL, 2022, p. 646 ff.

<sup>16</sup> Council Decision (CFSP) 2021/509 establishing a European Peace Facility, 22.03.2021, Article 1 (1).

<sup>17</sup> Council Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, 28.03.2022.

<sup>18</sup> WENTEKER, “At war? Party status and the war in Ukraine”, LJIL, 2023 (advanced version); MILANOVIC, “The United States and Allies Sharing Intelligence with Ukraine”, EJIL:Talk!, 9.05.2022.

war material to support Ukraine. Finally, other States have allegedly provided war material to Russia, such as Iran and North Korea, even if no official declaration supporting such activities is available.

Since the early stages of the conflict, this practice has sparked a substantial debate among scholars regarding its legal bases, as complemented by positions expressed by some States that could provide insight into their legal reasoning. Even if such positions are far from conclusive, also raising the parallel issue of States' silence,<sup>19</sup> this analysis aims to fill the gap in current research, largely still grounded only on academic perspectives, to provide a legal perspective on the provision (or non-provision) of military material based on elements of States' practice.

Currently, some mainlines of reasoning can be identified based on the positions held by States, which partly overlap with the solutions proposed by scholars. On the one hand, some positions directly address the law of neutrality, as for references to i) the concept of "benevolent/qualified" neutrality, ii) the recourse to potential exemptions provided by this legal regime for support limited to military non-lethal material, or conversely iii) arguments on the impossibility to facilitate any military support based on the law of neutrality. On the other hand, the analysis will be extended to further potential justifications outside the law of neutrality, particularly recurring to circumstances precluding wrongfulness in the law of State responsibility as for i) references to collective self-defence or ii) countermeasures adopted as a reaction to violations of *erga omnes* obligations.

## **2.1 The provision of military material under the lens of the law of neutrality**

Regarding the analysis centered around the law of neutrality, opposite views could be identified. A first option would be to maintain that States supporting Ukraine could resort to exemptions already provided by this legal regime, referring to concepts as benevolent or qualified neutrality, a theory aimed at factoring *ius ad bellum* elements in this area. Regardless of potential differences between the two terms, both emphasise how neutral States could discriminate between parties to the conflict, not being obliged to maintain a strict neutrality towards States victims of unlawful resort to the use of armed force.<sup>20</sup> Based on such premises, each State would be entitled to apply a 'benevolent/qualified' neutrality in favor of victims of aggression, including through the provision of military assistance. This solution, based on a decentralized assessment of *ius ad bellum* elements, would thus work independently from the undisputed scenario according to which a binding resolution of the Security Council under Chapter VII of the Charter might request

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<sup>19</sup> On the role of silence, see MARIE, *Le silence de l'État comme manifestation de sa volonté*, Paris, 2018.

<sup>20</sup> See for instance, GIOIA, "Neutrality and Non-Belligerency", in POST (ed.), *International Economic Law and Armed Conflict*, Dordrecht, 1994, p. 51 ff.; RONZITTI, *Diritto internazionale dei conflitti armati*, 7<sup>th</sup> ed, Torino, 2021, p. 359.

Member States to adopt measures derogating from the law of neutrality.<sup>21</sup> This latter scenario is however unavailable in the present case due to the veto power potentially exercised by Russia.

This ‘benevolent/qualified’ exception has explicitly been advanced in the past by a few States<sup>22</sup> but has not gone without criticisms. In particular, based on the lack of a substantial practice, this theory was largely dismissed<sup>23</sup> maintaining that “allegations of derogation of the law of neutrality are, to say the least, premature and that there is no basis for concepts such as ‘benevolent neutrality’ or ‘non-belligerency’”,<sup>24</sup> as “qualified neutrality is not a part of contemporary international law”.<sup>25</sup> Apart from the lack of practice, one of the main concerns was related to challenges in clearly identifying, without a formal involvement of the Security Council, the violator of the *ius ad bellum* as belligerent parties have obviously different views on their legal justifications. This latter scenario could also be present in the current conflict, as exemplified by claims made by Russia before the Security Council on its alleged exercise of prerogatives provided by Article 51 UN Charter.<sup>26</sup>

Conversely in the case of Ukraine, a substantial number of scholars have endorsed the ‘benevolent/qualified’ neutrality approach,<sup>27</sup> largely based on the flagrant violation of the UN Charter by Russia, as confirmed by General Assembly Resolution ES-11/1,<sup>28</sup> and the impossibility for the Security Council to exercise its functions due to veto exercised by one of the warring parties. Based on such premises, it has been maintained that: “any application of the traditional law of neutrality and the concomitant equal treatment of the aggressor and the victim of aggression would be tantamount to a declaration of legal and moral bankruptcy”.<sup>29</sup>

Interestingly, some States’ positions appear to echo this solution, without however taking a clear stance in this regard. It is thus hard to identify statements aimed at expressly invoking the ‘benevolent/qualified’ neutrality exception. However, the provision of weapons has expressly been

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<sup>21</sup> On this scenario see for instance UPCHER, *cit. supra* note 4, pp. 126-161.

<sup>22</sup> USA, Department of Defence, Law of War Manual, 2016, pp. 952-953.

<sup>23</sup> For denials of this theory, see for instance: ANTONOPOLOUS, *cit. supra* note 4, p. 146; BOTHE, “Neutrality, Concept and General Rules”, MPEPIL, 2015, para. 5; FERRO, VERLINDEN, “Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties”, Chinese JIL, 2018, p. 15 ff.

<sup>24</sup> HEINTSCHEL VON HEINEGG, “‘Benevolent’ Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality”, in SCHMITT, PEJIC (eds.), *International Law and Armed Conflict: Exploring the Faultlines*, Boston, 2007, p. 543 ff, p. 544.

<sup>25</sup> CLANCY, “Neutral Arms Transfers and the Russian Invasion of Ukraine”, ICLQ, 2023, p. 8 (advanced version).

<sup>26</sup> Letter from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, S/2022/154, 24.02.2022.

<sup>27</sup> HATHAWAY, SHAPIRO, “Supplying Arms to Ukraine is not an Act of War”, Just Security, 12 March 2022; NASU, “The Future Law of Neutrality”, Lieber Institute, 19.07.2022; SCHMITT, “Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force”, 07.03.2022; SCHMITT, “Ukraine Symposium- Are We at War?”, Lieber Institute, 09.05.2022; HEINTSCHEL VON HEINEGG, “Neutrality in the War against Ukraine”, Articles of War, 01.03.2022.

<sup>28</sup> UNGA, A/RES/ES-11/1, 02.03.2022.

<sup>29</sup> TALMON, “The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine”, Bonn Research Papers on Public International Law, Paper No. 20/2022, p. 21.

linked with the ongoing aggression carried out by Russia and the individual right of self-defence exercised by Ukraine.

Such positions could be identified in several statements made in Security Council debates. France maintained that it “is providing, and will continue to provide, the Ukrainian people with all the support they need to exercise their right to self-defence...That includes military support, both bilaterally and through the European Union”;<sup>30</sup> joint statements were expressed by the Baltic and Nordic States, according to whom “Under the Charter, Ukraine has an inherent right to self-defence. The Nordic and Baltic States are determined to enhance Ukraine’s military capabilities and to provide all necessary support”;<sup>31</sup> as confirmed by Norway which claimed that “Other States are entitled to respond positively to Ukraine’s call for assistance in the exercise of its legitimate right to self-defence”;<sup>32</sup> the USA underlined how “the inherent right to individual and collective self-defence is reflected in Article 51 of the Charter...The security assistance, including weapons... is for Ukraine’s self-defence...Ukraine is using those weapons to repel the invading Russian forces”;<sup>33</sup> while regarding the provision of weapons, the UK affirmed “We will continue to support Ukraine in defending itself..., as Ukraine defends itself in accordance with Article 51 of the Charter of the United Nations”.<sup>34</sup>

Interestingly, some Security Council members, even if not directly providing lethal war material, endorsed such actions: Ghana reaffirmed “Ukraine’s inherent right to self-defence under customary international law” and affirmed that “(t)here is no prohibition on such action, neither do the rules of international law or the Charter prohibit the supply of conventional weapons to a State under armed attack by another”;<sup>35</sup> Ireland positively assessed the “military support provided by the European Union to help Ukraine exercise its inherent right of self-defence and defend its territorial integrity and sovereignty”.<sup>36</sup> Indeed, the same EU Council Decision 2022/338 supplying lethal war material to Ukraine emphasizes how “(t)he objective of the Assistance Measure is to contribute to strengthening the capabilities and resilience of the Ukrainian Armed Forces to defend the territorial integrity and sovereignty of Ukraine and protect the civilian population against the ongoing military aggression”.<sup>37</sup>

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<sup>30</sup> UNSC, S/PV.9256, 8/2/2023, p. 13. See also UNSC, S/PV.9127, 08.09.2022, p. 18: “military assistance will continue for so long as the Russian armed aggression persists”.

<sup>31</sup> Remarks by Latvia, also speaking on behalf of Denmark, Estonia, Finland, Iceland, Lithuania, Norway, Sweden at UNSC, S/PV.9269, 24.02.2023, p. 29. See also “Joint statement by Latvian, Estonian, Lithuanian foreign ministers in support of Ukraine”, Republic of Estonia, Ministry of Foreign Affairs, 24.02.2022, <<https://rb.gy/ovsme>>.

<sup>32</sup> UNSC, S/PV.9126, 08.09.2022, pp. 16-17.

<sup>33</sup> UNSC, S/PV.9256, 08.02.2023, p. 12.

<sup>34</sup> UNSC, S/PV.3000, 31/3/2022, p. 7.

<sup>35</sup> UNSC, S/PV.9127, 18, 8/9/2022, p. 10.

<sup>36</sup> UNSC, S/PV.9127, 08.09.2022, p. 16

<sup>37</sup> Council Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, 28.02.2022, art. 1(4).

At the domestic level, some positions held in parliaments or in official statements have linked the provision of weapons to the ongoing aggression and the individual right to self-defence for Ukraine. These positions have been expressed by: Germany, where the State Secretary's statement in Parliament maintained that "(t)he Federal Government and its partners are supporting Ukraine by supplying weapons in exercising its right of individual self-defence against Russia's illegal war of aggression"<sup>38</sup>; Greece, according to which "(t)he provision of military equipment to Ukraine seeks to immediately reinforce, on the ground, the Ukrainian Armed Forces in defense of their sovereign rights, in accordance with the United Nations Charter, following the Russian invasion";<sup>39</sup> Italy, where the resolution adopted by the Parliament enjoined the Government "to transfer military equipment and assets...in order to enable Ukraine to exercise its right to legitimate defence and to protect its people";<sup>40</sup> Luxembourg, whose declaration by the MFA maintains how "(l)e Luxembourg continuera d'apporter une aide substantielle à l'Ukraine afin de lui permettre d'exercer son droit de légitime défense, consacré par l'article 51 de la Charte des Nations unies";<sup>41</sup> Romania, where the press release by the MoD maintained that "(t)he transfer of these materials towards the Ukrainian Government is part of the general efforts made by the NATO and EU state members to support Ukraine in defending its own territory, state independence and integrity against the Russian Federation's aggression",<sup>42</sup> with similar positions echoed in a joint declaration between the UK and Ukraine.<sup>43</sup> Similarly, US Public Law 117-118 "Ukraine Democracy Defense Lend-Lease Act of 2022", whose title even recalls US legislation providing support to the UK in the early stages of WWII, provided the USA President with the authority "to enter into agreements with the Government of Ukraine to lend or lease defense articles to that Government to protect civilian populations in Ukraine from Russian military invasion".<sup>44</sup>

The law of neutrality could also be considered as the proper framework for assessing the activities carried out by a separate group of States which, conversely, limited themselves to provide non-lethal material, as vests and helmets. This approach has been exemplified by the New Zealand's Prime Minister who maintained how "(t)his is the first time New Zealand has provided direct funding to a third party organisation for non-lethal military assistance" in relation to the provision of body armour, helmets and vests.<sup>45</sup> A similar approach has been adopted by other

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<sup>38</sup> Statement by State Secretary in the Federal Foreign Office, 18.05.2022, *Bundestags-Drucksache* 20/1918, 39, available at <<https://dserver.bundestag.de/btd/20/019/2001918.pdf>>.

<sup>39</sup> Greek MoD, Reply 3503/18378 to Greek MPs on the matter of sending defensive materiel to Ukraine (in Greek), 18.05.2022, <<https://rb.gy/wh050>>.

<sup>40</sup> Italy, Resolution approved in both Houses of Parliament on 1 March 2022, <<https://rb.gy/kvn16>>. See also, PERTILE, "The Reaction to the Russian Federation's Invasion of Ukraine and the Debate on the Provision of Weapons to the State Victim of Aggression", this volume.

<sup>41</sup> Ministry of Foreign Affairs, Déclaration du gouvernement, 24.02.2023, <<https://rb.gy/gpn9>>.

<sup>42</sup> Romanian Ministry of National Defence, Press Statement no. 64, 27.02.2022, <<https://rb.gy/hsxa6>>.

<sup>43</sup> Declaration between the government of the United Kingdom of Great Britain and Northern Ireland and the government of Ukraine, 08.02.2023, <<https://rb.gy/rv1rp>>.

<sup>44</sup> USA, Public Law 117-118, 117<sup>th</sup> Congress, 09.05.2022, <<https://rb.gy/snrdrv>>.

<sup>45</sup> New Zealand Government, Press release, 21.03.2022, <<https://rb.gy/zmrnp>>.

States, such as Ireland,<sup>46</sup> Israel<sup>47</sup> and Japan.<sup>48</sup> Reference could equally be made to Austria, which also authorized the transport of weapons and other military equipment through its territory, including airspace,<sup>49</sup> and to South Korea,<sup>50</sup> which has however recently authorised the export by Poland to Ukraine of howitzers which include parties manufactured in South Korea.<sup>51</sup>

This latter approach could be interpreted in two ways. On the one hand, based on some past elements of practice,<sup>52</sup> it could consolidate solutions according to which even within a regime of ‘strict’ neutrality it could be possible to provide non-lethal war material to belligerent parties. On the other hand, this practice might militate against the emergence of the ‘benevolent/qualified’ exception, as the law of neutrality might have been interpreted as precluding military support. However, it is hard to identify clear statements framing such positions within a proper engagement with the law of neutrality, even if this latter body of law was more commonly present in political and public debates of permanent neutral states, such as Austria, or those traditionally endorsing a neutral policy, such as Ireland.<sup>53</sup>

At the same time the law of neutrality has certainly played a role for States which have clearly maintained that it was impossible to depart from a ‘strict’ approach. The most (...and apparently only) prominent example is provided by Switzerland which has officially reaffirmed its adherence to a ‘strict’ approach regarding military material. As maintained by the Swiss Federal Council in its highly detailed report on this topic issued in October 2022, “Le droit de la neutralité interdit la transmission directe de matériel de guerre issu de ses propres stocks militaires aux parties à un conflit. En conséquence, la Suisse ne peut fournir du matériel de guerre provenant des stocks de son armée ni à la Russie ni à l’Ukraine”.<sup>54</sup>

This solution has had reverberating effects for other States, as exemplified by the denial of authorizations to re-export to Ukraine military material sold by Switzerland, as exemplified by the 2022 November decision by the Swiss Government to prohibit Germany to re-export certain Swiss-made weapons to Ukraine, originally purchased by Germany,<sup>55</sup> and similar refusals made

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<sup>46</sup> “Irish PM: Non-Lethal Aid to Ukraine Not Against Military Neutrality”, EURACTIV, 01.03.2022.

<sup>47</sup> “Israel won’t give Ukraine weapons, will help make missile warning system”, The Jerusalem Post, 19.10.2022.

<sup>48</sup> “Japan Stands with Ukraine”, The Government of Japan, 24.02.2023, <[https://japan.kantei.go.jp/ongoingtopics/pdf/jp\\_stands\\_with\\_ukraine\\_eng.pdf](https://japan.kantei.go.jp/ongoingtopics/pdf/jp_stands_with_ukraine_eng.pdf)>.

<sup>49</sup> JANIK, “Current Developments: Austrian Neutrality amid Russia’s War on Ukraine”, Austrian Review of International and European Law, 2023 (forthcoming). On Austria see also HILPOLD, “Das Neutralitätsrecht Österreichs und der Schweiz im ‘weiten Feld’ des internationalen Rechts Aktuelle Entwicklungen im Vergleich”, AVR, 2022, p. 268 ff.

<sup>50</sup> “South Korea still refuses to send arms to Ukraine”, The Economist, 02.02.2023.

<sup>51</sup> “Seoul approved Poland's export of howitzers with S.Korean parts to Ukraine”, Reuters, 04.03.2023.

<sup>52</sup> UPCHER, *cit. supra* note 4, pp. 83-84.

<sup>53</sup> See the debate at the Houses of the Oireachtas on “Ireland’s Military Neutrality: Motion”, 23.11.2022, <<https://rb.gy/2hyw8>>.

<sup>54</sup> Rapport du Conseil fédéral en réponse au postulat 22.3385 de la Commission de politique extérieure du Conseil des États du 11 avril 2022, 26.10.2022, p. 21.

<sup>55</sup> Swiss Ministry of Foreign Affairs, Rejet d’une demande de transmission de matériel de guerre suisse à l’Ukraine, 03.11.2022.

to Denmark. Nonetheless, Switzerland has authorized the exportation of components functional for the making of war material “même si le matériel de guerre fabriqué à l'étranger pouvait parvenir ensuite en Ukraine”. In this respect it is held that “Le droit de la neutralité ne réglemente pas ce cas de figure impliquant des chaînes de création de valeur internationales”, providing such components would be less than 50% of the final product.<sup>56</sup> A strict approach has however been confirmed for non-lethal war material. According to Switzerland, such materials “sont classés parmi les biens utilisables à des fins militaires”.<sup>57</sup> Switzerland has also denied the “survol d'avions militaires d'autres États dans le but d'apporter un soutien militaire aux parties en conflit, notamment par la livraison de matériel de guerre”.<sup>58</sup> As will be seen in section 3, however, Switzerland does not take the view that neutrality also implies a duty of economic impartiality towards the belligerents and adopted sanctions against the Russian Federation.

It should nonetheless be recognized that most States did not adopt any measures in favor of belligerents, including Ukraine. However, it is hard to attribute specific legal value to such conducts as there was a lack of engagement with the law of neutrality, as exemplified in debates within the General Assembly or the Security Council where this body of law was rarely mentioned, and general concerns were only expressed on risks for the proliferation of the circulation of weapons.

Criticisms on such activities were obviously expressed by Russia. However, in this case too, Russia did not frame its condemnations under the law of neutrality, a body of rules which was never mentioned in its statements before the Security Council or the General Assembly. Unfortunately, it is similarly not possible to take advantage of the confidential diplomatic note sent by Russia to the USA on 14 April 2022 when the US itself upgraded the quality of military material supplied to Ukraine. Based on newspapers which had access to the document, whose existence was confirmed by the Russian Ministry of Foreign Affairs, in its diplomatic note titled “On Russia's concerns in the context of massive supplies of weapons and military equipment to the Kiev regime”, Russia “accused the allies of violating ‘rigorous principles’ governing the transfer of weapons to conflict zones”.<sup>59</sup> In this case, therefore, it is hard to speculate whether Russia effectively invoked breaches of the law of neutrality and the choice not to claim potential violations of this body of law was linked to its irrelevance or to domestic constraints related to the self-qualification of its armed attack against Ukraine as a “special military operation”. This label could have indeed made more complex for Russia to invoke violations of a legal regime pertaining to

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<sup>56</sup> Rapport, *cit. supra* note 54, p. 21.

<sup>57</sup> *Ibid.*, p. 22.

<sup>58</sup> *Ibid.*, p. 20.

<sup>59</sup> “Russia Warns U.S. to Stop Arming Ukraine”, Washington Post, 14.04.2022.

international armed conflicts. In any case, some scholars have qualified the provision of weapons as a violation of the law of neutrality.<sup>60</sup>

Similarly, it might be interesting to note that some States which have been claimed to provide military support to Russia, such as Iran, North Korea and eventually China, have officially denied such allegations.<sup>61</sup> These positions could indirectly reinforce the idea that this support could not be officially endorsed being in violation of the law of neutrality or other relevant obligations such as the Arms Trade Treaty.<sup>62</sup> However, in this case too, no references to the law of neutrality were identified and such denials could be easily linked with the interest to avoid sanctions and political backlash.

## 2.2 Using secondary norms to address military support to Ukraine

The law of neutrality has not been considered as the only legal regime potentially relevant for assessing the lawfulness of measures of military support. Scholars have also referred to arguments based on circumstances precluding wrongfulness, which are not however significantly echoed in the States' positions.

In particular, some scholars have claimed that the provision of weapons to Ukraine could be justified as a form of collective self-defence under Article 51 of the UN Charter,<sup>63</sup> or recognized that “the difficulty of qualifying the provision of military assistance to Ukraine under the category of self-defence arise, more than from some insurmountable legal hurdle, from the material constraint of preventing an escalation of the conflict with Russia”.<sup>64</sup> This approach is based on the *a maiore ad minus* argument, maintaining that Article 51, legitimizing collective self-defence against the State responsible of an armed attack, can implicitly justify a right to resort to less intrusive measures, such as the provision of weapons to the State victim of the aggression.

In our perspective, this conceptualization seems problematic. First, on a procedural level, we cannot record any formal communication by the involved States under Article 51(2) to the Security Council. Even if compliance with this requirement is not mandatory for resorting to self-defence, the current approach is striking in light of the numerous instances in which the same States providing military lethal (or non-lethal) material to Ukraine recently informed the Council

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<sup>60</sup> See for instance XIAO, “Aggression and Determination: Two Basic Issues of International Law in the Russia-Ukraine Conflict”, *Beijing Law Review*, 2022; HELLER, TRABUCCO, “The Legality of Weapons Transfers to Ukraine Under International Law”, *Journal of International Humanitarian Legal Studies*, 2022, pp. 251, 263.

<sup>61</sup> See for instance, “Iran denies supplying Russia with weapons for use in Ukraine”, CNN, 15.10.2022.

<sup>62</sup> HAMILTON, “China Would Violate the Arms Trade Treaty if It Sends Weapons to Russia for Use in Ukraine: Part I”, *OpinioJuris*, 06.03.2022.

<sup>63</sup> AMBOS, “Will a state supplying weapons to Ukraine become a party to the conflict and thus be exposed to countermeasures?”, *EJIL:Talk!*, 02.03.2022; KRAJEWSKI, “Neither Neutral nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine”, *Völkerrechtsblog*, 09.03.2022; HAMILTON, “Defending Ukraine with EU weapons: arms control law in times of crisis”, *European Law Open*, 2022, pp. 635, 641-643.

<sup>64</sup> ARCARI, “The conflict in Ukraine and the hurdles of collective action”, *QIL, Zoom-out* 96, 2022, pp. 7, 22.

of actions qualified as a resort to individual or collective self-defence in other contexts.<sup>65</sup> Second, the *a maiore ad minus* argument does not seem consistent with the purpose of Article 51 aimed at creating an exemption to the prohibition to use force imposed by the Charter itself under Article 2(4). In this respect scholars have maintained that “It is nevertheless doubtful whether the right to get involved in an armed conflict by reference to the right of collective self-defence justifies the conclusion that, *de maiore ad minus*, non-participating States are also free to openly discriminate against a party to an international armed conflict”.<sup>66</sup> Doubts naturally increase when considering the lack of past practice supporting this approach.<sup>67</sup>

Third, it must be noticed how in the current scenario, States providing military support to Ukraine have not claimed to be acting in collective self-defence. The only exception could be identified in the statements made before the Security Council by Albania, where, in relation to arms transfer to Ukraine, the point was made that “there is a clear provision agreed by everyone on how to help victims, and Article 51 of the Charter provides the legal basis for individual States to offer whatever assistance to a country exercising its inherent right to self-defence”,<sup>68</sup> while a less clear reference could be found in the position maintained by Poland according to which “(a)ssisting such a country is not only admissible, but legally substantiated and morally right...Poland is proud to be a part of the world’s collective self-defence against the trespasser trampling on the most fundamental principles of the United Nations Charter”.<sup>69</sup> Conversely, other States avoided any reference to this option or expressly denied its applicability. This point was made clear by the German State Secretary on her statement on the supply of weapons to Ukraine according to which “This lawful assistance does not pass the threshold of an exercise of the right of collective self-defence”.<sup>70</sup>

Finally, the qualification of such activities as lawful countermeasures should be explored. In particular, taking into account that the prohibition of aggression implies *erga omnes* obligations, as maintained by the ICJ in the Barcelona Traction Case,<sup>71</sup> an argument could be made that States other than the injured one could disregard obligations pertaining to the law of neutrality as a legal response to the Russian aggression. Even if the provision of military assistance interfered with the duties imposed by the law of neutrality, the unlawful aggression would deny the aggressor state the possibility of exercising its prerogatives under this body of law. The conduct of third states could thus be identified as a legitimate countermeasure in reaction to the unlawful act committed

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<sup>65</sup> VAN DER STEENHOVEN, “Conduct and subsequent practice by states in the application of the requirement to report under UN Charter Article 51”, *Journal on the Use of Force and International Law*, 2019, p. 242; GREEN, “The Article 51 Reporting Requirement for Self-Defense Actions”, *Va. J. Int’l L.*, 2015, p. 563.

<sup>66</sup> HEINTSCHEL VON HEINEGG, *cit. supra* note 23, pp. 552-553. See also BOTHE, *cit. supra* note 23, para. 29.

<sup>67</sup> See also UPCHER, *cit. supra* note 4, p. 24.

<sup>68</sup> UNSC, S/PV.9256, 08.02.2023, p. 11.

<sup>69</sup> UNSC, S/PV.3000, 01.04.2023, p. 21.

<sup>70</sup> Statement by State Secretary in the Federal Foreign Office, Susanne Baumann in response to a written parliamentary question, 18.05.2022, *Bundestags-Drucksache* 20/1918, p. 39, <<https://dserver.bundestag.de/btd/20/019/2001918.pdf>>.

<sup>71</sup> Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970, para 34.

by the aggressor state. Even if doubts are notoriously present regarding third States' countermeasures, this option cannot not be ruled out. Some of the basic conditions provided by the ILC for countermeasures could be fulfilled in the current scenario, considering how military assistance is aimed at stopping the ongoing aggression, and could be qualified as being proportionate and necessary, while the procedural requirement of notification could be ignored in urgent circumstances. Furthermore, countermeasures might also explain the approaches adopted by States, ranging from the provision of lethal or non-lethal war material to abstention from such acts, taking into account how such reactions are not mandated for the *omnes* by international law. The fact remains, however, that no clear statements could be identified in States' practice supporting the adoption of this legal argument.

Finally, it has also been emphasized that other provisions of the ILC Articles might reinforce this approach based on the duty of States to cooperate to bring to an end serious breaches of peremptory norms through lawful means, as stated by Article 41(1). On such basis, it has been maintained that if international law requests States to cooperate to end aggressions, then it could not simultaneously demand respect for the laws on neutrality.<sup>72</sup> However, it seems hard to frame such forms of military assistance as an actual duty, at least based on the current content of the ILC Articles.<sup>73</sup>

Reference to countermeasures, as endorsed by some scholars,<sup>74</sup> seems a sounder solution than the qualification of the described measures as collective self-defence. It might also better respond to doubts related to the current existence of a 'benevolent/qualified' neutrality exemption, being this latter solution a legal approach which, before the Russo-Ukrainian armed conflicts, failed to crystallize and, in the current context, has not openly been vindicated by the concerned States.

Recourse to secondary norms, rather than claiming uncertain modifications of the primary norms on neutrality, could thus have some theoretical advantages. However, the main disadvantage of this theory is its being dependent on admitting recourse to countermeasures for States other than the injured one, a solution far from being accepted. Even for this hypothesis, however, we must note the absence of explicit references in State practice, making it more a scholarly construct than a position grounded on the behavior of States.

### **3. The economic dimension of neutrality**

Although the military aspects of neutrality are generally considered preeminent, the existence of an economic dimension in the law of neutrality should not be neglected. As Jessup explained as early as 1935 – defining neutrality as a euphemism for economic warfare – there are

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<sup>72</sup> CLAPHAM, "On War", *Articles of War*, 05.03.2023.

<sup>73</sup> CLANCY, *cit. supra* note 24, pp. 14-17.

<sup>74</sup> BENVENISTI, COHEN, "Bargaining about War in the Shadow of International Law", *Just Security*, 28.03.2022; PEDROZO, *Is the Law of Neutrality Dead?*, *Articles of War*, 31.05.2022.

at least four types of economic interests underlying the law of neutrality.<sup>75</sup> First, the interest of neutrals in continuing their trade and economic activities as much as possible unchanged from peacetime. Second, the interest of neutrals themselves in profiting from the conflict by entering new trade relations favored by the state of war.<sup>76</sup> Third, the natural claim of each belligerent to benefit from striking trade relations between the enemy and the neutrals to prevail in the conflict. Finally, the interest of belligerents in taking advantage of the conflict to weaken and take over the trade relations of neutrals.

To understand how these interests are handled today, however, it is necessary to premise that the rules governing the economic aspects of neutrality are difficult to clearly identify. The legal framework presents considerable asymmetries as it is based on the one hand, on the two Hague Conventions, which mirrored the interests of the 19th-century economic liberalism, and, on the other hand, on more restrictive customary norms that emerged during the two world wars when competition between economic-industrial apparatuses became a determining aspect in the conduct of hostilities.<sup>77</sup>

Given these problems of ascertainment and this asymmetry between treaty rules and customary law, it is not uncommon to find opposing statements on the legal framework. Schindler, for instance, starting with a description of the Conventions, goes so far as to state that “there is no economic neutrality”<sup>78</sup>. In contrast, other authors believe that treaty law imposes on neutral states a general duty of equidistance in their economic relations with belligerents<sup>79</sup>.

In the face of the uncertainties emerging from the legal framework, a methodological premise must be clarified. As Miele masterfully explained, the Hague Conventions are only a partial codification of the customary rules that emerged during the nineteenth century<sup>80</sup>. The conventions, in other words, do not create a self-sufficient system since they were drafted on the assumption of the parallel existence of customary norms. Convention silence therefore cannot be resolved through arguments based on the internal logic of the system or on the object and purpose of the treaties but must be filled through the analysis of contemporary practice.

For these reasons, the conflict in Ukraine is a privileged vantage point for understanding not only the relevance of the military aspects of neutrality, but also the existence of its economic dimension under customary law. At least three issues of interest can be identified: direct support by some states to Ukraine not only through the supply of arms, but also through the provision of

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<sup>75</sup> JESSUP, *Neutrality, its history, economics and law*, New York, 1936, pp. 20-57.

<sup>76</sup> On this see also, NEFF, *The Rights and Duties of States of Neutrals. A General History*, Manchester, 2000, p. 2.

<sup>77</sup> SCHINDLER, “Aspects contemporains de la neutralité”, RCADI, Vol. 121, 1967, p. 235.

<sup>78</sup> *Ibid.*; see also, BINDSCHEDLER, *cit. supra* note 12, p. 13.

<sup>79</sup> DE NOVA, “La neutralità nel sistema della Società delle Nazioni e del Patto Kellogg (Continuazione)”, *Annali di scienze politiche*, Vol. 8, 1935, pp. 87-100; BOTHE, *cit. supra* note 12, pp. 602-604; LAUTERPACHT (ed.), *cit. supra* note 6, pp. 738-745.

<sup>80</sup> MIELE, *cit. supra* note 9, pp. 271-276.

economic aid; unilateral sanctions against the Russian Federation and some of its citizens; and, in an initial phase, a shoot on sight policy with respect to naval trade in the Black Sea by the Russian Federation, a situation that later led to the adoption of an informal agreement to guarantee trade in grain and fertilizers from three Ukrainian ports.

### 3.1 The provision of economic assistance in the Russo-Ukrainian armed conflict

It has gone rather unnoticed in the public debate that several states have provided economic aid to Ukraine in the form of loans, grants, or bank guarantees.<sup>81</sup> In addition to bilateral aid from states, international financial institutions have also provided economic support to Ukraine ranging from granting low-interest credit lines, providing guarantees, or even setting up multi-donor funds to channel aid from states.<sup>82</sup>

This practice shows that there are very different forms of financial assistance. Some aid programs provide loans aimed at purchasing armaments from the defense industry of the lending country or supporting the armed forces.<sup>83</sup> Others, on the contrary, provide economic aid for the purchase of goods or for humanitarian projects.<sup>84</sup> In the former case, economic support is so closely linked to military goods that it can be equated with the provision of arms. Conversely, economic aid aimed at the purchase of essential goods can be equated with humanitarian assistance, which is compatible with the obligations of the neutral.<sup>85</sup>

Economic aid with a general purpose – thus not framed either as the supply of war material or humanitarian assistance – is not explicitly prohibited by the Hague Conventions. Article 7 of the Fifth Convention merely provides that neutrals are not obliged to prohibit the export of a range of goods related to military activities (“arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet”). More explicit is Article 6 of the Thirteenth Convention, which simply clarifies that neutrals have no obligation to prohibit their nationals from providing war material to belligerents and, with respect to naval warfare, prohibits support of a military nature in interstate relations as well. Despite the silence of treaty law, in the scholarly debate there is a

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<sup>81</sup> The Kiel Institute for the Study of War monitored measures taken by a sample of 40 States, which includes EU States, G7 States as well as 9 other States. In the period from 24.01.2022 to 24.02.2023, financial assistance was provided to Ukraine by 21 States (Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Latvia, Lithuania, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States). The provision of humanitarian assistance was attributed to 28 States including Taiwan. The provision of war material was undertaken by the same number of States (28, although not always the same). See TREBESCH *et al.*, The Ukraine Support Tracker: Which Countries Help Ukraine and How?, Kiel Working Paper, Kiel Institute for the World Economy, No. 2218, February 2023. For an overview on the US financial assistance to Ukraine, see U.S. Direct Financial Support for Ukraine, Congressional Research Service, 25.01.2023, <<https://rb.gy/j5sbz>>.

<sup>82</sup> World Bank, Press Release, 14 March 2022, <<https://rb.gy/1pqmp>>.

<sup>83</sup> “Sweden sends Ukraine SEK 500 mln to support Ukrainian Armed Forces – Shmyhal”, Interfax, 4.3.2022.

<sup>84</sup> “Austria allocates another €42M in humanitarian aid to Ukraine”, Ukrinform, 04.05.2022; Finland, Government, Press Release, 17.02.2022, <<https://rb.gy/qhgg2>>.

<sup>85</sup> Article 70 of the First Additional Protocol to the Geneva Conventions makes it clear that humanitarian assistance cannot be regarded by the parties as interference in the conflict.

tendency to widen the prohibition of support to belligerents, both with respect to the distinction between private parties and States in arms trade<sup>86</sup> as well as with respect to the forms of economic support which would be prohibited as non-neutral behavior. This latter argument postulates that both the provision of non-refundable aid and the granting of loans by neutral states would be prohibited as incompatible either with the duty of abstention or with the duty of impartiality.<sup>87</sup>

With a view to understanding whether there is indeed a customary norm prohibiting economic support to belligerents by neutrals, it is therefore necessary to analyze how the granting of aid to Ukraine was motivated by third States. Such analysis reveals first of all the existence of many cases in which economic measures in favor of Ukraine were linked to Russia's commission of a violation of the *ius ad bellum*, variously described as an act of aggression or violations of sovereignty, territorial integrity and rules on the use of force.<sup>88</sup> In some cases, reference to Ukraine's right to self-defense is also present. However, in the examined statements it is not always clear how the violation of the rules on the use of force would justify the provision of economic aid since considerations of Russia's violation of the *ius ad bellum* appear most often simply juxtaposed with the description of the economic measures taken. In other words, reference to the violation of the rules on the use of force seems to constitute the description of the context in which the decision to provide economic support is made rather than the invocation of an actual legal basis.

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<sup>86</sup> In the arms export sector, in fact, it is rather difficult to recognize a clear distinction between the role of the state and that of private corporations. See, BOTHE, *cit. supra* note 12, pp. 615-616.

<sup>87</sup> Vattel's distinction between interest-bearing and interest-free loans, with the former lawful as an expression of a genuine business relationship and the latter prohibited as a form of undue support, has not found acceptance in the scholarly debate. See LAUTERPACHT (ed.), *cit. supra* note 6, p. 743. One should however point out that in treaty law the principle of impartiality is conceived of as a subsidiary rule clarifying the implementation of explicit obligations. It has thus been considered by some as an ancillary principle without an autonomous scope. UPCHER, *cit. supra* note 4, pp. 182-188; See also BINDSCHEDLER, *cit. supra* note 12, p. 12.

<sup>88</sup> "Di Maio, Da Italia 110 milioni di euro al governo di Kiev", Ansa, 27.02.2022; Prime Minister's Office of Japan, Press Release, 20.02.2023, <<https://rb.gy/13vmv>>; Government of the Netherlands, Press Release, 22.08.2022, <<https://rb.gy/564lz>>; Canada, Press Release, 14.02.2022, <<https://rb.gy/mwb0a>>; Norway, Government, Press Release, 21.11.2022, <<https://rb.gy/nx2i8>>; Portugal, Government, Press Release, 21.05.2022, <<https://rb.gy/cr5ho>>; "Korea to offer \$130 million in additional aid to Ukraine: ministry", Korea Times, 24.02.2023; Spain, Press Release, 07.07.2022, <<https://rb.gy/ahry4>>; Switzerland, DFAE, Press Release, 22.02.2023, <<https://rb.gy/2afjv>>; "Foreign Minister Wu unveils US\$8M donation, vows to stand with Ukraine during video call to Kyiv Mayor Klitschko", Taiwan Today, 25.04.2022; United Kingdom, Foreign, Commonwealth and Development Office, Policy Paper, 22.04.2022, <<https://rb.gy/r65t1>>; United States, Department of Defense, Press Release, 17.06.2022, <<https://rb.gy/mx75e>>; United States, Aid Agency, Press Release, 22.11.2022, <<https://rb.gy/lavdn>>; Latvia, Ministry of Foreign Affairs, Press Release, 01.03.2022, <<https://rb.gy/2ezek>>; European Union, Decision (EU) 2022/1628 of the European Parliament and the Council of 20.09.2022, <https://rb.gy/lyvfv>; European Union Investment Bank, Press Release, 10.03.2022, <<https://rb.gy/hjk2b>>; G7 Finance Ministers and Central Bank Governors' Petersburg Communiqué, 20.05.2022, <<https://rb.gy/ikhyj>>. Similar concepts are expressed collectively by states in the context of international conferences on the future of Ukraine. See the Lugano Declaration of 05.07.2022, a non-binding document in which 41 states make a commitment to support the reconstruction and encourage any financial commitment to this end, referring in advance to military aggression and respect for Ukrainian territorial integrity, <<https://rb.gy/w0aw2>>. See also the Paris Declaration of 13 December 2022, in which 47 states express solidarity with Ukraine and launch a fund-raising campaign for humanitarian assistance: Ministère de l'Europe et des Affaires étrangères, France, Press Release, 22.12.2022, <<https://rb.gy/8z6li>>.

Moreover, several States describe in overall terms the adoption of a package of measures ranging from the provision of war materials or weapons to the provision of humanitarian assistance, including precisely economic support measures, and always resorting to arguments related to *ius ad bellum* and the territorial integrity of Ukraine.<sup>89</sup> Reference to Russia's commission of an act of aggression and, at times, Ukraine's right to self-defense is thus used as a legal argument that can justify a wide spectrum of support measures. In some cases, economic measures are simply announced without reference to a legal basis, presumably because the country's position has already been clarified elsewhere or because the adoption of such measures is seen as legally unproblematic. These cases range from financial support<sup>90</sup> to humanitarian assistance<sup>91</sup>. Regarding humanitarian assistance, it is necessary to point out that there are also statements linking it to the breach of the *ius ad bellum*<sup>92</sup> or to violations of humanitarian law<sup>93</sup>.

What is most important for our purposes, however, is that arguments invoking the law of neutrality are rarely present and, in case, are framed in general terms. Almost none of the States that have provided economic assistance to Ukraine have addressed violations of neutrality.

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<sup>89</sup> Germany, Federal Foreign Office, Article, 21.03.2023, <<https://rb.gy/y1b5w>>; United Kingdom, PM Statement, 01.02.2023, <<https://rb.gy/i1jh2>>; United Kingdom, HM Treasury, 19.05.2022, <<https://rb.gy/uywd3>>; Norway, Government, Press Release, 16.02.2023, <<https://rb.gy/hj3r3>>; Belgium, Prime Minister, Press Release, 28.01.2023, <<https://rb.gy/frftq>>; Greece, Ministry of National Defence, Press Release, 14.02.2023, <<https://rb.gy/nxxmw>>; The Netherlands, Government, Press Release, 22.08.2022, <<https://rb.gy/u74x2>>; European Union, European Council Conclusions of 31.05.2022, EUCO 21/22 CO EUR 19 CONCL; Nordic and Baltic Countries (Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway, and Sweden), Joint Statement of Nordic Baltic Foreign Ministers, 02.03.2022, <<https://rb.gy/yrm0w>>; Norway, Government, Press Release, 16.02.2023, <<https://rb.gy/cc78o>>.

<sup>90</sup> Government of Canada, Press Release, 13.04.2023, <<https://rb.gy/vfndt>>; Ministry of Foreign Affairs of Finland, Press Release, 17.02.2022, <<https://rb.gy/zfyuh>>; Poland, Polish Development Bank, Press Release, 03.03.2022, <<https://rb.gy/7737u>>; Republic of Korea, Ministry of Foreign Affairs, Press Release, 09.06.2022, <<https://rb.gy/pwak0>>; Spain, Government, Press Release, 21.12.2022, <<https://rb.gy/czvlv>>; Spain, Ministry for Ecological Transition and Demographic Challenge, Press Release, 02.12.2022, <<https://rb.gy/x4wrđ>>; France, Ministère de l'Économie, Press Release, 29.11.2022, <<https://rb.gy/yj3yz>>; United Kingdom, Department of Business, Energy and Industrial Strategy, Press Release, 11 July 2022, <<https://rb.gy/ldjmq>>; United States, Congress, Public Law No. 117-128, 21.05.2022, <<https://rb.gy/v8ijs>>; Republic of Korea, Press Release, 09.07.2022, <<https://rb.gy/ezyzq>>; World Bank, Press Release, 14.03.2022, <<https://rb.gy/2svjn>>; IMF, Press Release, 31.03.2023, <<https://rb.gy/uun3b>>.

<sup>91</sup> Finland, Ministry for Foreign Affairs, Press Release, 02.11.2022, <<https://rb.gy/p5cmq>>; Germany, Federal Foreign Office, Statement by Foreign Minister, 10.01.2023, <<https://rb.gy/5vvqu>>; Slovenia, Ministry of Foreign Affairs, Press Release, 26.02.2022, <<https://rb.gy/07vrc>>; Ireland, Department of Health, Press Release, 11.03.2022, <<https://rb.gy/31b3e>>; Japan, Ministry of Foreign Affairs, Press Conference, 25.03.2022, <<https://rb.gy/raojv>>; Sweden, Prime Minister Office, Article, 16.11.2022, <<https://rb.gy/549u2>>.

<sup>92</sup> Germany, Federal Ministry for Economic Affairs and Climate Action, Press Release, 24.03.2022, <<https://rb.gy/g2y0y>>; Ireland, Department of Foreign Affairs, Statement by Foreign Minister, 13.12.2022, <<https://rb.gy/xztlo>>; New Zealand, Ministry of Foreign Affairs, Press Release, 14.12.2022, <<https://rb.gy/k6ess>>; Romania, Government, Press Release, 01.03.2022, <<https://rb.gy/dyfd4>>; Switzerland, Département Fédérale des Affaires étrangères, Press Release, 13.04.2023, <<https://rb.gy/wrq0s>>; Switzerland, Assemblée Fédérale, Motion, 22-3073, 03.03.2023, <<https://rb.gy/uvssm>>.

<sup>93</sup> France, Ministère de l'Europe et des Affaires étrangères, Press Release, 13.12.2022, <<https://rb.gy/qojzo>>; France, Ministère de l'Europe et des Affaires étrangères, Press Release, 17.03.2022, <<https://rb.gy/s0uff>>; Japan, Government, Press Release, 24.02.2023, <<https://rb.gy/1kjkv>>; Korea, Government, Press Release, 28.02.2022, <<https://rb.gy/lntu4>>.

Similarly, third States have not claimed violations of neutrality as a result of economic aid. Within debates before UN organs, neutrality has emerged in statements by the Arab States,<sup>94</sup> Iran<sup>95</sup> and Indonesia<sup>96</sup> that merely affirm their equidistance from the parties to the conflict. Some elements of greater precision emerge from the practice of the permanent neutrals or countries with a traditional neutral policy such as Switzerland,<sup>97</sup> Austria,<sup>98</sup> Malta,<sup>99</sup> Ireland,<sup>100</sup> Japan,<sup>101</sup> Moldova,<sup>102</sup> and Brazil.<sup>103</sup> These countries, after condemning the Russian invasion of Ukraine as incompatible with the rules on the use of force or the UN Charter, tend to draw a distinction between the provision of arms, which they consider incompatible with neutrality, and the provision of economic, humanitarian, or “nonlethal” assistance, which instead seems to be acceptable<sup>104</sup>. Noteworthy is the position of the Nordic countries according to which the violation of the rules on the use of force and the Charter does not permit a “choice” of neutrality.<sup>105</sup> Along the same lines, France describes the violation of the Charter as preclusive to a policy of neutrality, which is qualified as a form of complicity in aggression.<sup>106</sup>

### 3.2. The adoption of sanctions against the Russian Federation and other countries

Restrictive economic measures against the Russian Federation and other countries such as Iran and Belarus were adopted by the United States, the European Union, and countries such as Australia, Albania, Iceland, Japan, South Korea, Moldova, Montenegro, New Zealand, North

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<sup>94</sup> Letter dated 27 February 2023 from the Permanent Representative of Algeria to the United Nations, A/77/782, S/2023/153, 28.02.2023, p. 7.

<sup>95</sup> Letter dated 1 February 2023 from the Permanent Representative of the Islamic Republic of Iran to the United Nations, S/2023/78, 01.02.2023; “Iran Reiterates Neutrality in Ukraine War”, Tansim News Agency, 4.11.2022, <<https://rb.gy/bv4nv>>: Iran denies the Ukrainian accusation of having provided Russia with weapons and define its position as one of “active neutrality”.

<sup>96</sup> “Indonesia stance neutral on Russia-Ukraine conflict: KSP”, Antara, 22.04.2022.

<sup>97</sup> Switzerland, ONU Conseil de sécurité: Débat sur le maintien de la paix et de la sécurité en Ukraine – Déclaration, 24.02.2023, <<https://rb.gy/ixlky>>.

<sup>98</sup> “Austria says EU will find agreement on Russia sanctions in the next days”, Reuters, 16.05.2022, <<https://rb.gy/etx3h>>. See also: UNGA, A/ES-11/PV.17, 22.02.2023, Austria.

<sup>99</sup> “Malta has given Ukraine €1.7 million in emergency assistance since March”, Times of Malta, 14.12.2022.

<sup>100</sup> “Ireland to ‘constructively abstain’ from EU arms package for Ukraine”, RTE, 27.02.2022.

<sup>101</sup> “The China Factor: Explaining Japan’s Stance on Russia’s Invasion of Ukraine” Carnegie Politika, 28.03.2023.

<sup>102</sup> Moldova, State Secretary in Defense Policy, Statement, 11.08.2022, <<https://rb.gy/zdwz9>>.

<sup>103</sup> “Lula condena invasão russa e nega envio de munições para Ucrânia”, Poder360, 30.01.2023.

<sup>104</sup> Interestingly, the participation of Ireland, Malta and Austria in the European Defence Fund was limited to a specific stream of the fund for the provision of body armour, medical supplies and rations for the Ukrainian armed forces. See “Some €55 million in military aid given by Ireland to Ukraine”, Irish Times, 24.09.2022. See also: “Irish PM: Non-lethal aid to Ukraine not against military neutrality”, Euractiv, 01.03.2022; Houses of the Oireachtas, Dáil Éireann Debate, Tuesday – 31.01.2023, Questions 102, <<https://rb.gy/b0tfw>>; “Maltese neutrality not up for discussion, says Ian Borg”, Malta Today, 28.02.2023.

<sup>105</sup> UNGA, A/ES-11/PV.18, 23.02.2023, see the statement of Denmark also on behalf of Finland, Iceland, Norway and Sweden: “It is about standing up for international law. It is about standing up for the United Nations Charter and for peace. We will not be neutral when asked to stand on the side of the United Nations Charter and on the side of the victims of aggression”.

<sup>106</sup> UNGA, A/ES-11/PV.18, 23.02.2023, France.

Macedonia and Norway.<sup>107</sup> Other countries, such as China, India, Iran, the United Arab Emirates, Israel and Saudi Arabia have not adopted sanctions sometimes criticizing their adoption.<sup>108</sup> Turkey, a NATO State has not adopted sanctions, nor has Serbia, a candidate State for accession to the European Union.<sup>109</sup>

Over time, different types of sanctions have been adopted, including targeted measures toward the Russian leadership; sanctions toward the banking sector; the introduction of limits on the export to Russia of certain technological products; the imposition of restrictions on Russian-flagged ships and air traffic; the imposition of additional tariffs on the import of Russian products; and a ban on the import of certain Russian products. This is a very broad range of measures with no legal cover from the Security Council, which makes it interesting in terms of its relationship to the law of neutrality. In fact, while there is some consensus that sanctions adopted on the authorization of the Security Council may derogate from the law of neutrality, there is no established position regarding unilateral sanctions.<sup>110</sup>

It should also be pointed out that, based on the letter of the treaty law described above, there is no general duty of impartiality in economic relations,<sup>111</sup> but several authors interpret impartiality as an autonomous norm imposing a form of equidistance of neutrals from the belligerent parties.<sup>112</sup> From this perspective, the view is taken that if neutrals adopt restrictions to private parties' trade with belligerents, they should do so by ensuring equal treatment.<sup>113</sup>

On the whole, the justifications given by States that have adopted sanctions are in line with what has been argued above for military and economic assistance. Arguments refer to the Russian

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<sup>107</sup> For a comprehensive overview, see MILLS, "Sanctions against Russia", Commons Library Research Briefing, No. 9481, 22.03.2023.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> BOTHE, *cit. supra* note 12, pp. 605-607; MIELE, *cit. supra* note 9, pp. 496-52, (note 98). The compatibility of economic sanctions with the law of neutrality has been a long-standing topic both at the time of the League of Nations and within the United Nations. See, ROSS, *Neutrality and International Sanctions, Sweden, Switzerland, and Collective Security*, New York, 1989; SCHINDLER, *cit. supra* note 77, pp. 256-260; JESSUP, *cit. supra* note 75, pp. 86-123.

<sup>111</sup> UPCHER, *cit. supra* note 4, pp. 202-206.

<sup>112</sup> BOTHE, *cit. supra* note 12, pp. 602-603; KORMANICKI, *cit. supra* note 8, pp. 409-411; DE NOVA, *cit. supra* note 79, pp. 87-96; LAUTERPACHT (ed.), *cit. supra* note 6, p. 675; FERRO, VERLINDEN, *cit. supra* note 23, p. 31; ANTONOPOLOUS, *cit. supra* note 8, pp. 94-95.

<sup>113</sup> According to some authors existing commercial relations may continue under the concept of *courant normale* (normal amount). See BOTHE, *cit. supra* note 12, pp. 602-603. It is doubtful, however, whether the concept, which was elaborated in the practice of Switzerland at the time of the League of Nations sanctions against Italy, is mirrored by a rule of customary law. See, UPCHER, *cit. supra* note 4, p. 187; ROSS, *cit. supra* note 110, pp. 104-105; SEIDL-HOHENVELDERN, "La neutralité autrichienne et les relations de l'Autriche avec les Communautés européennes", AFDI, 1963, p. 828.

Federation's violation of the *ius ad bellum*,<sup>114</sup> including with reference to the UN Charter,<sup>115</sup> the need to preserve the territorial integrity of Ukraine and the need not to recognize border alterations resulting from the illegal annexations of occupied territories.<sup>116</sup> In the case of individual sanctions, the violation of the *ius in bello*, the commission of war crimes and the violation of human rights may also be used as subsidiary arguments.<sup>117</sup> Importantly, sanctions have not only targeted the Russian Federation, but also third countries and individuals accused of supporting it through the supply of weapons<sup>118</sup> or through assistance in circumventing the sanctions themselves.<sup>119</sup> Again, the debates reveal that States adopting sanctions tend not to address their incompatibility with the law of neutrality.

As already seen in the previous subsection, neutrality comes more prominently to the fore in the internal debate of the permanent neutrals or of countries with a traditional neutral policy where proposals for an outright abandonment of neutrality also emerged.<sup>120</sup> Two trends stand out. First, even in relation to economic sanctions, States tend to make a distinction between the military dimension of neutrality – which is considered the preeminent aspect and includes the supply of weapons – and economic assistance or restraint, as well as political solidarity, which would not be

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<sup>114</sup> United States, Department of State, Press Statement, 02.08.2022, <<https://rb.gy/02tdb>>; United States, Department of State, Fact Sheet, 11.03.2022, <<https://rb.gy/dvng7>>; Canada, Special Economic Measures (Russia) Regulations, SOR/2014-58, 17 March 2014, <https://laws.justice.gc.ca/PDF/SOR-2014-58.pdf>; Canada, Regulations Amending the Special Economic Measures (Russia) Regulations: SOR/2023-46, 10.03.2023, <<https://rb.gy/fif7v>>; Japan, Government, Press Statement, 24.02.2023, <<https://rb.gy/57c7z>>; Singapore, Ministry of Foreign Affairs, Press Statement, 05.03.2022, <<https://rb.gy/5x5ff>>; New Zealand, Russia Sanctions Bill, Explanatory note, 09.03.2022, <https://rb.gy/y3z34>; Norway, Ministry of Foreign Affairs, Press Release, 04.04.2023, <<https://rb.gy/682jx>>; European Union, Council of the EU, Press Release, 16.12.2022, <https://rb.gy/g9ihu>; European Union, Council of the EU, Press Release, 21.07.2022, <<https://rb.gy/gmdd8>>; United Kingdom, The Russia (Sanctions) (EU Exit) (Amendment) (No. 15) Regulations 2022, 26.10.2022, Explanatory Memorandum, <<https://rb.gy/ehz1x>>.

<sup>115</sup> Australia, Prime Minister and Minister for Foreign Affairs, Joint Media Statement, 24.02.2022, <<https://rb.gy/9t4za>>.

<sup>116</sup> United States, Department of State, Press Statement, 30.09.2022, <<https://rb.gy/0mgkk>>; Australia, Foreign Affairs Minister, Statement, 19.03.2014, <<https://rb.gy/izhfv>>; European Union, Council of the EU, Press Release, 13.03.2023, <<https://rb.gy/xubuq>>; European Union, COUNCIL DECISION (CFSP) 2023/388 of 20 February 2023, Official Journal of the European Union, L 53/37; United Kingdom, The Russia (Sanctions) (EU Exit) (Amendment) Regulations 2023, 18.04.2023, Explanatory Memorandum, <<https://rb.gy/6a87z>>.

<sup>117</sup> United States, Department of State, Press Statement, 08.05.2022, <<https://rb.gy/k54m2>>.

<sup>118</sup> United States, Department of the Treasury, Press Release, 15.11.2022, <<https://rb.gy/a0g95>>.

<sup>119</sup> G7 Leaders' Statement, 24.02.2023, <<https://rb.gy/qom7z>>; United States, Department of State, Press Statement, 12.04.2023, <<https://rb.gy/hjres>>.

<sup>120</sup> Sweden and Finland applied to join NATO on 18 May 2022. Finland became a NATO member on 4 April 2023. At the moment of writing, the ratification of Sweden's accession is still pending in two Member States' parliaments. A debate on the opportunity to join NATO has come to the surface in Ireland, Austria, and Malta. See "Malta, Austria and Ireland united in NATO 2023", The Times of Malta, 09.10.2022.

legally precluded. This approach emerges in the statements of the Swiss,<sup>121</sup> Irish,<sup>122</sup> Maltese,<sup>123</sup> and Austrian<sup>124</sup> governments that have joined the economic sanctions adopted by the European Union. In the case of Moldova, however, the country's neutrality was seen by the government as incompatible with economic sanctions.<sup>125</sup> Second, reference to domestic law as the legal basis for neutrality is clearly prevalent among these countries. With the partial exception of Switzerland and to a lesser extent Moldova and Ireland, the States' internal debates have referred primarily to domestic norms and policies of neutrality.<sup>126</sup>

Interestingly also the practice of third States that do not adopt sanctions shows that neutrality played a marginal role. Statements do not refer to a potential violation of neutrality by States adopting sanctions proposing instead an assessment of impact. It is argued that sanctions may have a negative impact on the prospects for conflict resolution,<sup>127</sup> on the humanitarian situation,<sup>128</sup> or on world trade,<sup>129</sup> while also introducing the issue of their indiscriminate effect on third countries,<sup>130</sup> including with reference to the problems of developing countries.<sup>131</sup> The only

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<sup>121</sup> Confédération Suisse, Département Fédéral des affaires étrangères, Questions-réponses au sujet de la neutralité de la Suisse, September 9, 2022, <<https://rb.gy/hbiur>>. See also, UNSC, S/PV.9256, 08.02.2023, where the Swiss delegate affirmed: "Switzerland's neutrality cannot be called into question. There can be no neutrality when international law or the Charter of the United Nations is being violated".

<sup>122</sup> Houses of the Oireachtas, Dáil Éireann Debate, Tuesday – 18.10.2022, Answers to questions 382, 383, <<https://rb.gy/x80db>>.

<sup>123</sup> "Neutrality should not stop Malta from condemning Russia's actions - Foreign Affairs Minister", The Malta Independent, 15 January 2023.

<sup>124</sup> "Austria's Neutrality in the Wake of the Ukrainian Conflict", The New Jurist - International Law Magazine, 09.04.2022. According to Alexander Schallenberg, Minister of Foreign Affairs: "Austria is militarily a neutral country. However, we are never politically neutral when it comes to respecting international law. We are by no means neutral in the face of violence and we will never remain silent when a state's sovereignty, territorial integrity, and independence are attacked. We will always take a firm stand against this at all levels. Compliance with international law, in particular the provisions of international humanitarian law, is our red line".

<sup>125</sup> "Moldova stays neutral, won't join sanctions against Russia – FM", Interfax, 28.02.2022.

<sup>126</sup> The Minister of Foreign Affairs of Ireland was asked in a parliamentary question whether the country intends to ratify the Fifth Hague Convention answering in the negative (Dáil Éireann Debate, 18.10.2022, <https://rb.gy/dgmqc>). In the case of Moldova, the issue of compliance with international law emerged during a debate centred on constitutional law, which provides for the country's neutral status (See Statement, *cit. supra* note 102). Switzerland's government has had recourse to the traditional argument of differential neutrality according to which international law merely precludes the supply of arms without affecting the provision of economic assistance or the adoption of sanctions. "Swiss president opposes arms exports to Ukraine", Euractiv, 08.03.2023; Confédération Suisse, *cit. supra* note 121. The theory of differential neutrality was put forward already when the country joined the League of Nations. Cf. DE NOVA, *cit. supra* note 79, pp. 87-96.

<sup>127</sup> UNSC, S/PV.8980, 27.02.2022, Brazil; UNGA, A/ES-11/PV.5, 02.03.2022, Brazil; UNSC, S/PV.9143, 30.09.2022, China; UNSC, S/PV.9161, 21.10.2022, China; UNSC, S/PV.9080, 28.06.2022, China; S/PV.9115, 24.08.2022, China. See also, GURMENDI, "Brazil and the War in Ukraine: Between Apology and Utopia", *OpinioJuris*, 28.02.2023.

<sup>128</sup> UNSC, A/ES-11/PV.5, 02.03.2022, Egypt.

<sup>129</sup> UNSC, S/PV.8998, 17.03.2022, China.

<sup>130</sup> UNSC, S/PV.8988, 07.03.2022, China; UNSC, S/PV. 9011, 05.05.2022, China; UNSC, S/PV.9014, 11.04.2022; UNGA, China; A/ES-11/PV.5, 02.03.2022, Laos, Belarus, China.

<sup>131</sup> UNSC, S/PV.9127, 08.09.2022, Kenya; UNGA, A/ES-11/PV.9, 24.03.2022, China; UNGA, A/ES-11/PV.10, 07.04.2022, China; UNSC, S/PV.9135, 22.10.2022, China; UNSC, S/PV.8983, 28.02.2022, Brazil; UNGA, A/ES-11/PV.9, 24.03.2022, Brazil.

third country that openly qualified sanctions as incompatible with neutrality is, to the writers' knowledge, Mexico.<sup>132</sup> Indeed, President Lopez-Obrador justified non-participation in sanctions by a desire to “remain neutral” and qualified neutrality as an option in line with the constitution. Neutrality thus seems to be conceived as a voluntary regime, but there is no doubt that this country considers the adoption of sanctions as a non-neutral act.

One specific position concerns India, which not only refused the adoption of sanctions, but also considerably expanded its economic relations with Russia going so far as to discuss a new free trade treaty.<sup>133</sup> Such behavior could in turn constitute a violation of economic impartiality, in this case, hardly justifiable by arguments related to the need to support an attacked country. Interestingly, however, the stance of Western States toward India has revolved around political pressure<sup>134</sup> or generic calls not to get “on the wrong side”<sup>135</sup> of international law without any questions being raised about the law of neutrality or any decision to adopt secondary sanctions toward India.<sup>136</sup>

Finally, one needs to examine the position of the two belligerents.

Regarding Ukraine, only a few generic calls on third States to abandon neutrality in the face of overt aggression are reported.<sup>137</sup> However, it is unclear whether the Ukrainian statements allude to neutrality as a policy or as a legal obligation waived by the violation of the *ius ad bellum*. The statements are generic, and perhaps this very aspect may lead to the view that neutrality is conceived by Ukraine as a political choice. The Ukrainian reaction to the intensification of trade relations between India and the Russian Federation, for example, is political, without any invocation of a duty of impartiality and with the Foreign Minister merely stating that goods imported from India would be “stained with Ukrainian blood”.<sup>138</sup> In the Ukrainian statements before the United Nations organs, there is, however, a clear reference to the fact that a choice of neutrality must be qualified as an alternative to the UN Charter and international law.<sup>139</sup>

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<sup>132</sup> “Mexico to Remain Neutral with Russia: López Obrador to Reaffirm Stance to Biden in Washington Visit”, *El American*, 07.08.2022.

<sup>133</sup> “India, Russia to Strengthen Trade Ties”, *VOA News*, 23.04.2023.

<sup>134</sup> “US calls India’s stand on Russian sanctions ‘deeply disappointing’”, *Business Standard*, 18.05.2023; “India to Face Significant Cost If Aligned With Russia, U.S. Says”, *Bloomberg*, 06.04.2022.

<sup>135</sup> “Germany woos India as an ally against Russia”, *DW*, 24.02.2023.

<sup>136</sup> “U.S. will not sanction India for buying Russian oil, say senior American officials”, *The Hindu*, 09.02.2023. The adoption of secondary sanctions against India and China was proposed by a member of the Ukrainian parliament, but such a request was never supported by the Ukrainian government, see: “Ukraine lawmaker calls on US to target China, India energy purchases”, *France24*, 01.02.2023.

<sup>137</sup> UNSC, S/PV.9135, 22.09.2022, pp. 25-26. See also, UNGA, A/ES-11/PV.17, 22.02.2023, p. 5, where the Ministry of Foreign Affairs, Kuleba, stated “Instead of hiding behind the mask of neutrality, let us choose the side of the Charter of the United Nations and international law. Never in recent history has the line between good and evil been so clear [...]”.

<sup>138</sup> “India is buying Ukrainian blood by purchasing Russian crude oil: Ukraine Foreign Minister Dmytro Kuleba”, *The Hindu*, 17.08.2022.

<sup>139</sup> See *supra* note 136.

It is rather surprising that even the Russian Federation, which has repeatedly qualified the adoption of sanctions as illegal in debates before the General Assembly<sup>140</sup> and the Security Council<sup>141</sup>, has not specified the reasons for such declarations of illegality. Even in the case of the Russian Federation, in fact, one cannot find a coherent reflection on the violation of the law of neutrality by the countries adopting the sanctions. The Vice-President of the Russian Security Council, Medvedev, has once qualified unilateral sanctions as an act of aggression, a ‘hybrid war’, which would activate the right of the States subjected to them to a reaction in the exercise of self-defense<sup>142</sup>. It follows logically that the adoption of sanctions would entail a loss of neutrality, but the point is not developed by the statement. More explicitly, the Russian government has once stated that the adoption of sanctions like those envisaged by the European Union would result in Switzerland’s loss of neutrality and inability to act as a Protecting Power in the conflict in Ukraine.<sup>143</sup>

Other statements support a conception of neutrality as a political doctrine devoid of mandatory content. In a telephone conversation with the Finnish President, for example, Vladimir Putin merely pointed out that any abandonment of Finland’s traditional policies of military neutrality would have negative effects on the level of relations between the two countries, without reconnecting such choice with a violation of law.<sup>144</sup> Similarly, the Russian Ambassador to Mexico, in congratulating the Latin-American country for not adopting sanctions, made no reference to an obligation to remain neutral, merely praising its independence of judgment.<sup>145</sup> Along the same lines, the Russian Embassy in Austria, commenting on the ongoing debate in the country about a possible revision of neutrality, merely expressed its regret and doubts about the quality of Austrian neutrality “which has been noticeably declining and eroding in recent times”.<sup>146</sup> The statement concluded with a generic political threat: “We will take this into account in the future”.<sup>147</sup> Even these statements, therefore, qualify the adoption of a neutral position as a discretionary choice rather than the fulfillment of a legal obligation.

### **3.3. Interference with trade in naval warfare in the Black Sea**

At an early stage of the conflict, the Russian Federation attacked some commercial vessels, which were struck in port or during navigation, resulting in some cases in sinking and loss of life. The initial attitude of Russian authorities seems to amount to a total war against private commerce,

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<sup>140</sup> UNGA, A/76/PV.74, 23.05.2022, p. 4.

<sup>141</sup> UNSC, S/PV.9036, 12.05.2022, p. 24.

<sup>142</sup> “Sanctions can be qualified as act of aggression against Russia – Medvedev”, Tass, 08.04.2022.

<sup>143</sup> “Russia says Switzerland cannot represent its interests in Ukraine”, Reuters, 11.08.2022; “‘Switzerland’s neutrality remains only in words’, Russian diplomat says”, Reuters, 20.04.2022. See also, UNSC, S/PV.9256, 08.02.2023, p. 6.

<sup>144</sup> Russia, President of Russia, Press Release, 14.05.2022, <<https://rb.gy/73vvyg>>: “rejecting the traditional policy of military neutrality would be wrong since there are no threats to Finland’s security. Such a change in the country’s foreign policy course could have a negative effect on Russia-Finland relations”.

<sup>145</sup> “Russia welcomes Mexico’s refusal to join sanctions – ambassador”, Tass, 06.03.2022.

<sup>146</sup> Austria’s Neutrality, *cit. supra* note 124.

<sup>147</sup> *Ibid.*

a shoot on sight policy very much aligned with the trends of World War II.<sup>148</sup> Flag States that suffered these attacks include Bangladesh,<sup>149</sup> Panama,<sup>150</sup> the Dominican Republic,<sup>151</sup> the Marshall Islands,<sup>152</sup> and Moldova.<sup>153</sup> On the Ukrainian side, attacks on Russian commercial vessels and resupply ships are recorded, but no attack on third country vessels.<sup>154</sup> The parties also accused each other of laying mines (possibly, drifting automatic contact mines with indiscriminate effects) in the Black Sea waters.<sup>155</sup>

At the beginning of the conflict, the Russian Federation had established two exclusion zones in the Sea of Azov<sup>156</sup> and the Black Sea,<sup>157</sup> which in fact blocked commercial traffic from Ukrainian ports leading to a global-scale increase in grain prices. At a later stage, such proclamation, which is of dubious legality,<sup>158</sup> was partially mitigated through an informal understanding between the belligerents brokered by the United Nations and Turkey, the Black Sea Grain Initiative (BSGI).<sup>159</sup> Such agreement provides for a joint monitoring system and aims to facilitate safe shipping for grain and related food and fertilizer products, from the Ukrainian ports of Odesa, Chernomorsk and Yuzhny.

The initiative is more broadly situated in the context of the difficult relationship between the right of belligerents to impose an effective naval blockade and the right of neutrals to continue their trade activities during the conflict.<sup>160</sup>

In summary, it can be said that neutrality law, on the one hand, gives broad freedom to private parties to trade with each other and with belligerents, but on the other hand, contemplates equally broad powers of control by belligerents with respect to maritime trade.<sup>161</sup> As for the position of belligerents, they will first of all have to respect trade between neutrals, which does not alter the balance between the parties to the conflict. Trade between neutrals and belligerents, moreover, is not per se prohibited, but is subject to three categories of limitations: the belligerents' right to visit

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<sup>148</sup> ANTONOPOLOUS, *cit. supra* note 4, p. 91.

<sup>149</sup> "One killed as two cargo ships hit by explosions off Ukraine", AlJazeera, 03.03.2022.

<sup>150</sup> "Panama says three ships hit by Russian missiles in Black Sea since start of Ukraine invasion", Reuters, 17.03.2022.

<sup>151</sup> "Foreign ship sinks in Mariupol after missile attacks, says flag registry", Reuters, 05.04.2022.

<sup>152</sup> "Two cargo ships hit by blasts around Ukraine, one seafarer killed", Reuters, 03.03.2022.

<sup>153</sup> *Ibid.*

<sup>154</sup> KRASKA, "The Attack on the Vasily Bekh and Targeting Logistic Ships", *Articles of War*, 11.07.2022.

<sup>155</sup> PEDROSO, "Russia-Ukraine Conflict: The War at Sea", *International Law Studies*, 2023, pp. 32-39.

<sup>156</sup> "Russian Navy's operations restrict shipping in Sea of Azov amid conflict with Ukraine", *Naval Today*, 24.02.2022.

<sup>157</sup> "Ukraine says Russia has closed off northwestern part of Black Sea to navigation", Reuters, 26.02.2022.

<sup>158</sup> PEDROSO, "Maritime Exclusion Zones in Armed Conflicts", *Articles of War*, 12.04.2022.

<sup>159</sup> Initiative on the Safe Transportation of Grain and Foodstuffs from Ukrainian Ports. For a description, see Report of the Secretary-General, 02.11.2022, A/77/576, pp. 6-7. In parallel, a memorandum of understanding between Russia and the United Nations on the facilitation of Russian food and fertilizer exports was signed.

<sup>160</sup> The Hague Conventions gave stringent protection to naval trade. The legal framework then underwent a divergent development in customary law, especially during World War I and World War II, which led to doubts about the continuing validity of treaty law. See: ANTONOPOLOUS, *cit. supra* note 4, p. 91.

<sup>161</sup> DINSTEIN, *Neutrality in Sea Warfare*, in BERNHARDT (ed), *cit. supra* note 9, pp. 24-26; RONZITTI, *cit. supra* note 19, pp. 361-362.

and seize contraband goods; the right to impose a naval blockade; and the right to suppress forms of unneutral service. Belligerents may exercise a right of visit and inspection over commercial vessels flying the flag of neutrals to check the nature and destination of the cargo. The cargo of ships and the ships themselves may be seized if it is determined that they were carrying war contraband.<sup>162</sup> However, there is a broad consensus that the use of force against neutral commercial ships without warning and without connection to the right of visit and control is prohibited. The use of force is permitted only as a last resort measure if ships resist the inspection and it is not admissible to prevent their navigation otherwise.<sup>163</sup>

From a legal perspective, however, it is important to point out that the establishment of exclusion zones by the Russian Federation is not equivalent to a naval blockade. Indeed, the latter requires compliance with precise requirements of prior notification, effectiveness, and impartiality, which do not appear to have been fulfilled in the case at hand.<sup>164</sup>

What indications, then, can we draw from the practice regarding naval trade in the Black Sea?

Firstly, it is necessary to premise that the attacks against commercial ships do not appear to have been openly claimed by the Russian Federation.<sup>165</sup> On the merits, we gathered only an ambiguous and perhaps poorly worded statement according to which Ukraine's export of grain would constitute a form of support to the Ukrainian authorities comparable to the supply of arms. The statement seems to imply that not only weapons but also the export of cereals could be qualified as a military target.<sup>166</sup> This is, if the interpretation of the statement is correct, an extreme position which claims a right of interdiction of any commercial relations of the enemy with third parties.

In the face of these indiscriminate attacks on commercial ships, it was not possible to collect statements criticizing such Russian attitude in light of the law of neutrality either from the flag countries or from third States. After the sinking of the ship *Azburg*, the authorities of the Dominican Republic emphasized the seriousness of the humanitarian situation and concerns for the safety of the ship's crew, calling on Russia to withdraw from Ukrainian territory and fulfill its

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<sup>162</sup> The concept of contraband has been variously defined in practice, and there has been a tendency to broaden its boundaries, but it is still centered on weapons and material that can be used in conflict. The concept, however, does not include export goods. RONZITTI, *cit. supra* note X, 2021, pp. 362-363; ANTONOPOLOUS, *cit. supra* note 4, pp. 106-114; KUSSBACH, "Neutral Trading", in BERNHARDT (ed), *cit. supra* note 9, p. 8.

<sup>163</sup> BOTHE, *cit. supra* note 12, p. 625.

<sup>164</sup> FINK, "The War at Sea: Is there a Naval Blockade in the Sea of Azov?", *Articles of War*, 24.03.2022.

<sup>165</sup> Report of the thirty-second Meeting of States Parties, UNCLOS, SPLOS/32/15, 05.06.2022, p. 16.

<sup>166</sup> UNSC, S/PV.9080, 28.06.2022, p.14: "(...) Kyiv's sole objective is to garner support in the form of money and weapons from members of the Council. At the same time, as we warned the Council from the very beginning, everyone should understand that such supplies were and remain military targets for us - as do the mercenaries from the same States. And the facilities where such weapons and mercenaries are stockpiled and stationed also become legitimate military targets (...)."

obligations under applicable treaties.<sup>167</sup> In relation to the attacks suffered by three of its ships, Panama merely made it known that they were aware of the situation, explaining that the damage suffered was only material.<sup>168</sup> The Estonian authorities have accused Russia of adopting human shield tactics with the Estonian freighter *Helt* then incurring contact with a mine.<sup>169</sup> It appears that the Bengali authorities focused their attention on obtaining compensation for the sinking of the state-owned ship *Banglar Samriddhi* without raising any issues at the inter-state level.<sup>170</sup> No statements could be collected from the Marshall Islands and Moldova for the attacks suffered by their vessels.

There was, in other words, no claim by the flag States of a right to trade with the belligerents based on the law of neutrality. On one occasion Ukraine described an attack against a commercial ship not only as a breach of international humanitarian law, but also as a violation of its “neutral status”.<sup>171</sup> In addition, the IMO Council held an extraordinary session where “it deplored the attacks of the Russian Federation aimed at commercial vessels, their seizures, including Search-and-Rescue vessels, threatening the safety and welfare of seafarers and the marine environment; [and] demanded that the Russian Federation cease its unlawful activities to ensure the safety and welfare of seafarers and the security of international shipping and the marine environment in all affected areas, and respect its obligations under relevant international treaties and conventions [...]”.<sup>172</sup>

The role of neutrality in the conclusion of the BSGI is also unclear. The negotiations that led to its conclusion are confidential, and it is not known whether the parties referred to the right of neutrals to trade with belligerents. The debates held at the United Nations express a general approval for the agreement, but do not reveal any connection between the law of neutrality and its conclusion.<sup>173</sup> Third States have asserted the need to reach an agreement with reference to humanitarian reasons and global food security, without mentioning their own neutral status as a justification. In this context, the BSGI should probably be seen as an autonomous instrument by which the parties guarantee the safety of certain transports with no implication of a right to trade with belligerents under the law of neutrality. As evidence of this, it should be noted that transports

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<sup>167</sup> IMO, Communication from the Government of the Commonwealth of Dominica, Circular Letter No.4550, 11.04.2022.

<sup>168</sup> “Panamá reporta que barcos con su bandera fueron impactados por misiles rusos”, Telemundo, 17.03.2022.

<sup>169</sup> “Estonian-owned cargo ship sinks off Odesa after Russian action”, ERR News, 03.03.2022.

<sup>170</sup> “BSC Seeks \$22.4m Insurance Claim for *Banglar Samriddhi* Ship Hit by a Missile in Ukraine”, Seabay Logistics, 25.03.2022.

<sup>171</sup> IMO, Communication from the Government of Ukraine, Circular Letter No. 4522, 02.03.2022.

<sup>172</sup> IMO Council extraordinary session (C/ES.35), 10-11.03.2022, <<https://rb.gy/qd5ck>>. See also, Statement of the IMO Secretary General Kitack Lim of 26.02.2022, <<https://rb.gy/bkomq>>, and Maritime Safety Committee Resolution MSC.495(105), 28.04.2022, <<https://rb.gy/d39yz>>.

<sup>173</sup> See, for instance, UNGA Resolution 77/186, 14.12.2022; UNSC, S/PV.9254, 06.02.2023, with statements by China, France, Ecuador, Japan, United Kingdom connecting the initiative to the need to protect food security and avoid a global food crisis. Along the same lines, see, UNSC, S/PV.9286, 17.03.2023, with statements by Denmark, China, Ecuador, France, Gabon, Ghana, Japan, United Arab Emirates, United Kingdom, United States.

carried out so far under the agreement are directed not only towards countries that have adopted a neutral stance, but also to countries that have not been impartial.<sup>174</sup> Although the law of neutrality is not directly invoked in the BSGI, the latter could be interpreted as an element of practice confirming that trade in food products with belligerents is not a violation of neutrality obligations.

#### 4. Final remarks

The analysis of State practice carried out in this article shows that the law of neutrality has played a marginal role in the justification or criticism of measures adopted in support of Ukraine in the Russo-Ukrainian war. Legal arguments based on neutrality were scarcely used, even when they were available, both by countries that supported Ukraine and by countries upholding some form of impartiality. Not even the belligerents themselves used legal arguments related to the law of neutrality, except episodically. Overall, the factual shift recorded in this conflict, namely the decision by a significant group of States to openly provide military and economic assistance to the attacked party, has been supported by superficial legal reasonings centered on the violation of the *ius ad bellum*.

Summarizing the analysis, we believe that two main trends emerge.

Firstly, a group of more than thirty States decided, essentially ignoring the law of neutrality, to provide extensive support to the State that they considered to be the victim of aggression. The question of what legal argument could justify the choice of supporting one of the belligerents was not clearly addressed, even if ample emphasis was placed on the violation of the *ius ad bellum* and the right to self-defence of the attacked State. In some statements, moreover, a conviction emerges that ‘choosing’ a status of neutrality in the face of an aggression as blatant and serious as the one currently underway would be unacceptable. It can thus be argued – even if this point is rarely made by States – that a clear violation of the *ius ad bellum* justifies the decision to ignore the law of neutrality. Some references to neutrality can be found, conversely, in the practice of permanent neutral countries or countries that have traditionally adopted a policy of neutrality, but also in this case both the States that chose to supply arms to Ukraine and the ones that limited their aid to economic or humanitarian assistance gave little consideration to the relevant international rules. The main legal parameters shaping their policies are embodied in domestic law.

Secondly, in the face of this position of the ‘interventionist’ States, both the States that did not take sides, and the belligerents, have only episodically referred to neutrality and, above all, even more rarely have done so in terms evoking a right or an obligation. In other words, even the statements of those who took a neutral stance and could have criticized the intervening States do not use the law of neutrality in a technical sense. It is striking, for instance, that in the context of

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<sup>174</sup> Spain and Italy, for example, are the second and fourth destination markets for cereal exports. The ships carrying out the transports, by contrast, generally fly the flags of states that have taken an impartial stance vis-à-vis the belligerents (Liberia, Panama, Egypt, Marshall Islands, Barbados, Turkey, Belize, Sierra Leone), with some limited exceptions (Norway, Greece, India). Information available at: <<https://www.un.org/en/black-sea-grain-initiative>>.

naval trade or economic sanctions, not even the States that could have invoked a right to continue their trade activities referred to the law of neutrality.

This self-restraint attitude by the concerned States could be based on different rationales and could have different consequences.

On the one hand, it could be interpreted as evidence of the irrelevance of the law of neutrality, a pragmatic solution which is however scarcely compatible with continuous references to this body of law in international and domestic practice, even by the very States which are currently supporting one of the belligerents. On the other hand, the uncertain legal character of the most promising arguments to legitimize assistance, namely the “benevolent/qualified” exception and the invocation of individual countermeasures to disregard the obligations of neutrality, may have prevented States from convincingly adopting them.

A further explanation could be linked to the political-legal interest to avoid arguments which could be used in the future by other States to provide military support to belligerents even in front of less manifest violations of the *ius ad bellum*. Such attitude, however, did not favor any clear analysis and reduced the contribution of the present practice in shaping international law.

Similarly, the Russian attitude undermining the importance of the law of neutrality might be connected to the need of avoiding a confrontation in legal terms. As has been seen, Russia has only rarely framed its criticisms towards the States supporting Ukraine within the law of neutrality. This approach might eventually be connected to its own distortive classification of the hostilities as a “special military operation”, a position which made it difficult to claim violations of a body of law pertaining to international armed conflicts. Moreover, as highlighted, “(a)n important geopolitical factor is that Russia...is not in a position to enforce its belligerent rights against neutral States”, particularly regarding measures as capture of neutral vessels and similar activities,<sup>175</sup> thus reducing the relevance of engaging in diplomatic-legal debates on neutrality. Ukraine for its part referred to neutrality in a predominantly political sense, although the Ukrainian argument that compliance with the UN Charter is not compatible with the assumption of a neutrality status should be noted.<sup>176</sup>

The broad invocation of the *ius ad bellum* demonstrates, moreover, that even when the collective security system is blocked and the law of neutrality retains, formally, its applicability, several States believe that a decentralized assessment on the use of force is admissible and that discriminating against the aggressor is lawful, a position already invoked since the time of the League of Nations.<sup>177</sup> It is not surprising that in the face of an overt aggression with no prospects of Security Council action, States consider the violation of the *ius ad bellum* as preeminent over neutrality. Some scholars have thus warned that “the situation in Ukraine is exceptional and unlikely to repeat itself in other parts of the world”<sup>178</sup>, based on the flagrant violation of the UN

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<sup>175</sup> NASU, “The Future Law on Neutrality”, Articles of War, 19 July 2022.

<sup>176</sup> See *supra* note 136.

<sup>177</sup> WHITTON, “La neutralité et la Société des Nations”, RCADI, Vol. 17, 1927, pp. 494-508; LAUTERPACHT (ed), *cit. supra* note 6, pp. 650-652, 666; FENWICK, *International Law*, 4<sup>th</sup> ed., New York, 1965, p. 727; DE HOOGH, Comments, in POST (ed.), *cit. supra* note 20, pp. 43-46.

<sup>178</sup> HEINTSCHEL VON HEINEGG, “Neutrality in the War against Ukraine”, Articles of War, 1 March 2022.

Charter, the impasse of the Security Council and the overall majority of the General Assembly condemning the aggression. As already experienced with the reverse effect of the remedial secession theory, now part of Russian lawfare, however, limiting the scope of a revised interpretation of the law of neutrality with some legal caveats might be futile.

This undoubtedly leads us towards a legal system where the involvement of third parties in conflicts may take place more easily. The inherent risk is the emergence of cacophonous views on the legal qualification of breaches of the *ius ad bellum*, as emphasized by the abovementioned claims by Russia to a lawful exercise of its prerogatives under Article 51,<sup>179</sup> exposing neutral States “to pressure by belligerents to adopt their views on whether their use of force is justified, which would result for economic and geopolitical reasons in double standards”.<sup>180</sup> The rationale of the law of neutrality has indeed been linked with the need to avoid the spreading of armed conflicts, keeping economic business as usual, minimizing the economic disruption of war, finally permitting to a neutral country “to assert its sovereignty notwithstanding being torn between two rival blocs”.<sup>181</sup>

In conclusion, the Russo-Ukrainian conflict shows that a significant group States is unwilling to condone a blatant violation of the rules on the use of force confirming, in this area too, the trend favoring the enforcement of the common interests of the international community through the action of third States.<sup>182</sup> This development might finally imply that “the law of neutrality... appears destined to find still less room for application, if not to vanish entirely through obsolescence”.<sup>183</sup> As has been shown, the pattern of obsolescence can be more pronounced for the rules on economic neutrality, which do not have a clear legal basis in treaty law. It does not yet seem possible, however, to postulate in general terms the completion of a process of obsolescence, both because reference to neutrality occasionally emerges and because the States that have openly supported one side in the conflict are a relatively limited group. There is in fact an evident rift within the international community as many have decided not to take sides in the present conflict. The ‘abstentionist’ States, however, have only occasionally invoked the rules of neutrality to qualify their behavior and, most importantly, have refrained from using such rules to criticize the conducts of the ‘interventionist’ ones. The thesis that in case of flagrant violations of the *ius ad bellum* the assumption of a neutrality status is becoming an option for third States, rather than an obligation, seems thus to be supported by some important elements of the current practice.<sup>184</sup>

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<sup>179</sup> See *supra* note 26.

<sup>180</sup> See the remarks by Sassoli at a hearing before the Swiss Parliament on 8<sup>th</sup> September 2022 reported in “Neutrality Law in a Comparative Perspective: Austria, Switzerland, Finland”, p. 8, <<https://rb.gy/bwyyie>>.

<sup>181</sup> See, generally, HILPOLD, “How to Construe a Myth: Neutrality Within the United Nations System under Special Consideration of the Austrian Case”, Chinese JIL, 2019, pp. 247, 276.

<sup>182</sup> PALCHETTI, “Consequences for Third States as a Result of an Unlawful Use of Force”, in WELLER (ed.), *The Oxford Handbook on the Use of Force*, Oxford, 2015, p. 1229.

<sup>183</sup> *Ibid.*, p. 1230.

<sup>184</sup> GIOIA, *cit. supra* note 20, pp. 61-68.