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Weapons supplies in the light of the Law of Neutrality

Generally, international law prohibits states to involve in on-going armed conflicts. The non-intervention principle prohibits states to involve in a non-international armed conflict whereas the law of neutrality prohibits states to involve in an international armed conflict. The latter is of particular interested when discussing the war in Ukraine, being an international armed conflict.

The norms of the law of neutrality are of customary nature. They were first codified in 1907; some of them were further developed through state practice over the years. With the adoption of the UN Charter and the establishment of the common security system, some scholars have questioned the continued validity of the law of neutrality by stating that it is obsolete. However, since the common security system has proven to be ineffective many times, state practice kept the law of neutrality "alive".

The aim of the law of neutrality is to prevent the escalation of a conflict. It has, therefore, a conflict restraining function. It poses rights and corresponding duties on belligerents and on neutral states. Neutrals have the right that their territorial integrity is respected and the right to continue their peaceful relations with states (mainly economic relations). In turn, they are subjected to the duty of impartiality (treating all belligerents the same way), the duty of non-participation or abstention (they are not allowed to involve in the conflict in any way that could influence the outcome of the conflict), the duty of prevention (prevent belligerents of violating its neutrality) and the duty of internment (to intern military forces of any belligerent that are on neutral territory for the time of the conflict). The duties of the neutrals are the rights of the belligerents and vice versa.

Although it follows from the duty of non-participation that delivering weapons to one party to the conflict is prohibited, there is a norm that specifically prohibits the supply of weapons to a belligerent. Article 6 of the Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, which nowadays applies to all international armed conflicts, states: "The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden."

Accordingly, the weapons supplies to Ukraine are a clear violation of the law of neutrality. The training of Ukrainian soldiers as well, as it violates the duty of internment and the duty of abstention. Even the economic sanctions could be classified as violations of the law of neutrality as it could be argued that they violated the duty of impartiality, but this is not the focus of this presentation, especially since economic sanctions are problematic for other reasons as well.

Are there any exceptions from the norms of the law of neutrality? The only exception where there is consensus among legal scholars is the case of an UN Security Council resolution. Accordingly, if the Security Council acts according to chapter VII of the UN Charter and adopts binding measures in a resolution, it modifies the rights and duties under the law of neutrality in that certain case to the extent given in the resolution. Russia is a permanent member of the Security Council and can (and it did) veto such a resolution.

Since the outbreak of the war, legal scholars tried to justify the delivery of weapons to Ukraine based on different reasons. Because of the limited time, I will only focus on two justifications. The first one is the so-called status of "non-belligerency". Proponents of this status argue that it is established in customary law since World War II. Essentially, it would allow states to liberate themselves from their neutral duties in favour of a victim of aggression while enjoying the

protection of the law of neutrality. It is true that a few states claimed to be non-belligerents during World War II, however, it was not enough to constitute general state practice and there was no accompanying *opinio juris*. Both are necessary to establish customary law – and this is not the case with the non-belligerency status.[1] Also, if such a legal status would exist, it would be mentioned/explained in relevant documents of international humanitarian law, soft law instruments would refer to it too and lastly, there would be reference to it in state practice. None of this is the case.

The second justification I would like to mention is collective self-defence. It is argued that, if under the framework of collective self-defence, the use of force is permitted, then measures which are below the threshold of the use of force are permitted as well, such as the supply of weapons. However, there are some problems tied to this situation. While the state acting in collective self-defence would believe that its acts are legal and that it is no longer bound by its neutral duties, the aggrieved belligerent would not have to share this belief and could insist on its neutral rights. The law of neutrality and the right of collective self-defence would be in a competing position, since neither of them has the ability to modify the other. Also, if neutral duties of a non-belligerent are changed, to what extend are the duties of the aggrieved belligerent changed? To put in the words of one legal scholar: "The situation would thus not be governed by any legal rule at all."[2]

What are possible consequences of violations of neutral duties? The aggrieved belligerent can respond with countermeasures – with unarmed reprisals. Not every violation of neutral duties leads to the loss of neutrality, but grave and serious breaches, such as the military aid granted by western states. Nevertheless, the loss of a neutral status does represent the loss of the protection granted by the prohibition of the use of force. Also, the loss of neutrality does not mean that the state becomes a party to the conflict, although there is no legal status that describes this position. It is a grey zone at the moment, described by one commentator as "juridical 'ante room' of passage from neutrality to belligerency."[3]

Lastly, this conflict did modify the law of neutrality. The law of neutrality remains unchanged, because the practice of the aiding states only is not enough to change existing or constitute new customary law.

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[1] Michael Bothe, The Law of Neutrality in Dieter Fleck (ed), *The handbook of international humanitarian law*, Oxford scholarly authorities on international law, 4th edition Oxford University Press, Oxford, 2021, p. 603. See also: Wolff Heintschel von Heinegg, The Current State of The Law of Naval Warfare: A Fresh Look at the San Remo Manual in Anthony M Helm (ed), *International Law Studies: The Law of War in the 21st Century: Weaponary and the Use of Force,* Vol. 82, 2006, p. 283 Kōnstantinos Antōnopoulos, *Non-participation in armed conflict: Continuity and modern challenges to the law of neutrality,* Cambridge University Press, 2022, p. 146; Wolff Heintschel von Heinegg, Neutrality and Outer Space, International Law Studies, Vol. 93, 2017, p. 533; James Upcher, *Neutrality in contemporary international law.* Oxford Monographs in International Law, First edition Oxford University Press, 2020, p. 32; Georgios C Petrochilos, The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality, Vanderbilt Journal of Transnational Law Vanderbilt Journal of Transnational Law, Vol. 31, 1998, p. 598–99; Paul Seger, The Law of Neutrality in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014, p. 266; See also HPCR, *Commentary to the HPCR Manual on International Law Applicable to Air and Missile Warfare: Elaborated by the Drafting Committee of the Group of Experts under the supervision of Professor Yoram Dinstein.* (2013), p. 44.

[2] Wolff Heintschel von Heinegg, "Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality in Michael N Schmitt and Jelena Pejic (eds), *International law and Armed Conflict: Exploring the Faultlines.* Essays in Honour of Yoram Dinstein,International humanitarian law series, Martinus Nijhoff, 2007, p. 553.

[3] Antōnopoulos (note 1), p. 147.

References

Kōnstantinos Antōnopoulos, *Non-participation in armed conflict: Continuity and modern challenges to the law of neutrality,* Cambridge University Press, Cambridge, United Kingdom, New York, NY, USA, 2022

Michael Bothe, The Law of Neutrality in Dieter Fleck (ed), *The handbook of international humanitarian law*, Oxford scholarly authorities on international law, 4th edition Oxford University Press, Oxford, 2021

Wolff Heintschel von Heinegg, The Current State of The Law of Naval Warfare: A Fresh Look at the San Remo Manual in Anthony M Helm (ed), *International Law Studies: The Law of War in the 21st Century: Weaponary and the Use of Force,* Vol. 82, 2006

Wolff Heintschel von Heinegg, "Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality in Michael N Schmitt and Jelena Pejic (eds), *International law and Armed Conflict: Exploring the Faultlines.* Essays in Honour of Yoram Dinstein,International humanitarian law series, Martinus Nijhoff, 2007

Wolff Heintschel von Heinegg, Neutrality and Outer Space, International Law Studies, Vol. 93, 2017. 526–547

HPCR, *Commentary to the HPCR Manual on International Law Applicable to Air and Missile Warfare: Elaborated by the Drafting Committee of the Group of Experts under the supervision of Professor Yoram Dinstein.* (2013)

Georgios C Petrochilos, The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality, Vanderbilt Journal of Transnational Law Vanderbilt Journal of Transnational Law, Vol. 31, 1998. 575-615

Paul Seger, The Law of Neutrality in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014

James Upcher, *Neutrality in contemporary international law.* Oxford Monographs in International Law, First edition Oxford University Press, Oxford, 2020