THE PROVISION OF ARMS TO THE VICTIM OF ARMED AGGRESSION: THE CASE OF UKRAINE

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SUMMARY: I. *Introduction*. II. *Providing Arms and Material to Ukraine*. III. *Provision of Arms and the Traditional Law of Neutrality*. IV. *Neutrality and the United Nations Charter*. V. *Provision of Arms and Collective Self-Defence*. VI. *Provision of Arms as a Countermeasure*. VII. *Inapplicability of the Law of Neutrality in Case of Aggression*. VIII. *Conclusion*. IX. *Bibliography*.

I. INTRODUCTION

On 24 February 2022, the Russian Federation launched a full-scale invasion of Ukraine which amounted to a naked act of aggression.[1] For my long-time friend and colleague Manuel Becerra Ramírez, like for any true friend of Russia, this must have been a bleak day. For many years, Manuel has had a strong connection with Russia. He conducted his doctoral studies there in the early 1980s under the supervision of the world-renowned professor Grigory I. Tunkin, and in 1985 he received his degree of doctor of philosophy in International Law from the prestigious Lomonosov State University in Moscow after defending his thesis on *Mexico and the New International Economic Order: Legal Aspects* (in Russian). In 1989, Manuel translated professor Tunkin's famous book on *Law and Force in the International System* from russian into spanish. Both legal questions concerning Russia and the former Soviet Union and questions on the legal and political aspects of the use of force have been recurring themes in Manuel's academic work ever since. It is thus fitting to devote this short piece in his honour to a legal question resulting from Russia's illegal invasion of Ukraine.

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[1] See, *e.g.*, Green, James *et al.*, "Russia's Attack on Ukraine and the *jus ad bellum*", *Journal on the Use of Force and International Law*, vol. 9, 2022. (Forthcoming)

II. Providing Arms and Material to Ukraine

On the third day of Russia's illegal war of aggression against Ukraine, the German Federal Government broke with a long-standing tenet of german security policy and announced that it would deliver 1,000 anti-tank weapons and 500 surface-to-air missiles, as well as 14 armoured vehicles and urgently needed fuel to Ukraine in order to support the country in its defence against the advancing russian troops.[2] On the same day, it was also reported that the federal government had granted export permits to the Netherlands and Estonia to send 400 german-made rocket-propelled grenade launchers and nine german howitzers to Ukraine, respectively. A few days later, the federal government decided to send another 2,700 anti-aircraft missiles to Ukraine.[3] Several other western States also provided Ukraine with significant military assistance in its ongoing armed conflict with Russia.[4]

III. Provision of Arms and the Traditional Law of Neutrality

The provision of arms to Ukraine has been considered a violation of the law of neutrality yet did not make Germany and the other States assisting Ukraine parties to the armed conflict.[5] The law of neutrality regulates the relationship between States that are parties to an international armed conflict (belligerents) and States that are not (neutrals). The core of today's customary international law of neutrality was laid down in two of the 1907 Hague Conventions on the laws of war.[6] The legal position of the neutral is characterized by the

[2] McGuinness, Damien, "Germany to Send Weapons Directly to Ukraine", *BBC News*, February 26, 2022, available at: *https://www.bbc.com/news/world-europe-60541752*.

[3] "Germany to Ship Anti-Aircraft Missiles to Ukraine", *Deutsche Welle*, March 3rd, 2022, available at: *https://p.dw.com/p/47vfZ*.

[4] See Duthois, Thomas, "Ukraine War: Which Countries are Sending Weapons and Aid to Forces Fighting the Russian Invasion?", *Euronews*, March 4, 2022, available at: *https://www.euronews.com/next/2022/03/04/ukraine-war-these-countries-are-sending-weapons-and-aid-to-forces-fighting-the-russian-inv*.

[5] See, *e.g.*, Von Hartwig, Matthias, "Waffenlieferungen and die Ukraine: Führt Deutschland jetzt Krieg?", *Frankfurter Allgemeine Zeitung Einspruch*, March 1st., 2022, available at: *https://www.faz.net/einspruch/waffenlieferungen-an-die-ukraine-fuehrt-deutschland-jetzt-krieg-17843930.html*; Krajewski, Markus, "Neither Neutral nor Party to the Conflict?: On the Legal Assessment of Arms Supp lies to Ukraine", *Völkerrechtsblog*, March 9, 2022, *doi: 10.17176/20220310-000928-0*.

[6] Convention (V) Regarding the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907; Convention (XIII) Respecting the Rights and Du-

duties of abstention, impartiality, and prevention; that is, the neutral State must abstain from participating in the armed conflict, it must not discriminate between the belligerents, and it must prevent violations of its neutrality and its national territory by the belligerents. In particular, the law of neutrality prohibits neutrals from providing weapons, ammunition and other war material to the belligerents or supporting them in any other way, for example by providing militarily intelligence.[7] Violations of these duties can be punished by a belligerent with countermeasures or armed reprisals and, ultimately, with treatment of the assisting State as a warring party.

IV. Neutrality and the United Nations Charter

With the founding of the United Nations (UN) in 1945, the hour of neutrality seemed to have come. Hans Kelsen pertinently observed that "the obligation of impartiality imposed by general international law upon neutral States is superseded by the Charter".[8] Under the system of collective security established by the UN Charter, the use of force was generally prohibited, and the Security Council was given primary responsibility for the maintenance of international peace and security. In case force was used in violation of the prohibition, the Security Council was to determine the aggressor and make recommendations or decide what measures should be taken to restore international peace and security.[9] All members of the organization were to assist the United Nations in any action the Security Council decided to take against the aggressor.[10]

In June 1950, for example, the Security Council determined that "the armed attack on the Republic of Korea by forces from North Korea" constituted "a breach of the peace",[11] and recommended that "the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace

ties of Neutral Powers in Naval Warfare, 18 October 1907, reproduced in (1908) 2 *American Journal of International Law* 117 and 202, respectively.

[7] See, *e.g.*, Bothe, Michael, "Neutrality, Concept and General Rules", in Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press, 2012, vol. VII, pp. 617-634; at 624 MN 36.

[8] Kelsen, Hans, *Principles of International Law*, New York, Rinehart & Company, 1952, pp. 87 and 88.

[9] See Charter of the United Nations, UN Charter, 1945, Documents of the United Nations Conference on International Organization, vol. XV (1945) 335, Articles 2(4), 24, 39. On the UN Charter and the law of neutrality, see James Upcher, *Neutrality in Contemporary International Law* (Oxford: Oxford University Press, 2020) 129-135.

[10] UN Charter, Article 2(5).

[11] UN Security Council resolution 82 (1950), June 25, 1950, UN Doc. S/1501.

and security in the area".[12] When the military forces of Iraq invaded Kuwait in August 1990, the Security Council condemned the Iraqi invasion as "a breach of international peace and security".[13] Subsequently, the Security Council imposed sanctions on Iraq in order to induce it to withdraw its forces from Kuwait.[14] However, the Council expressly made it clear that its decisions did not prohibit assistance to the legitimate government of Kuwait.[15] In these cases, there was thus no room for impartiality towards the conflicting parties —the law of neutrality was not applicable.

Such clear determinations of the aggressor, however, remained the exception in the practice of the Security Council. The design of the UN Charter was flawed from the outset. As early as 1948, Philip C. Jessup identified, a "gap" in the United Nations' collective security system.[16] If one of the five permanent members of the Security Council committed an act of aggression or desired to block action, perhaps because of sympathy with the aggressor, that Council member could, by exercising its veto power, prevent the Council from designating the aggressor and taking any action to restore international peace and security. He wrote:

> ...[i]f the veto is exercised and action by the United Nations is thus blocked, completely or for a period of time, fighting between the parties may continue over a period of any duration permitted by the conditions of the contest and the contestants. During such a period, what is to be the legal position of third states and their nationals?".[17]

In such circumstances, many international lawyers assumed that the traditional law of neutrality would continue to apply.[18]

The flaw in the design of the UN Charter became evident again in the case of the russian invasion of Ukraine. On February 25, 2022, Russia vetoed a draft resolution which had been supported by 82 States.[19] In that resolution the Security Council would have "deplore[d] in the strongest terms

[12] UN Security Council resolution 83 (1950), June 27, 1950, UN Doc. S/1511.

[13] UN Security Council resolution 660 (1990), August 2nd, 1990, UN Doc. S/RES/660 (1990), preambular para. 2.

[14] UN Security Council resolution 661 (1990), August 6, 1990, UN Doc. S/RES/661 (1990), paras. 2-4.

[15] *Ibidem*, para. 9.

[16] Jessup, Philip C., *A Modern Law of Nations*, New York, Macmillan, 1948, p. 203.

[17] *Idem*.

[18] See, *e.g.*, Bothe (n. 7) 619 MN 9.

[19] See UN Security Council, 77th year, 8979th meeting, 25 February 2022, UN Doc. S/PV.8979, p. 6.

the Russian Federation's aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter" and would have "decide[d] that the Russian Federation shall immediately cease its use of force against Ukraine" and "shall immediately, completely, and unconditionally withdraw all of its military forces from the territory of Ukraine".[20] In the absence of any action by the Security Council, some commentators assumed that the law of neutrality was applicable and that it was being violated by the provision of arms to Ukraine.[21] This, however, is not the case as will be shown in the following sections.

V. Provision of Arms and Collective Self-Defence

Some authors have tried to justify the provision of arms to Ukraine as an exercise of the inherent right to collective self-defence under Article 51 of the UN Charter in response to russia's armed attack on the country.[22] It has been argued that, if States may take part in an armed conflict using their own armed forces to defend the victim of aggression, they must also be allowed to provide the victim with arms and munitions in order to enable it to defend itself. German government officials also seem to have alluded to collective self-defence when justifying the arms deliveries to Ukraine. In an interview broadcast on March 18, 2022, the Minister of State at the Federal Foreign Office stated: "[t]he arms deliveries are clearly legitimate in this situation. We have a war of aggression contrary to international law, and it is Ukraine's right to defend itself and our right to help it defend itself. And that is covered by the UN Charter".[23]

While this may be true in principle, the problem in the present case is that neither Germany nor any other State which provided arms to Ukraine formally invoked the right to collective self-defence. In particular, no State reported these arms deliveries to the Security Council. Article 51 of the UN

[20] UN Security Council, Albania *et al.*: draft resolution, UN Doc. S/2022/155, 25 February 2022, paras. 2-4.

[21] See, *e.g.*, Hartwig, Matthias von, *op. cit.*; Krajewski, Markus, *op. cit.*

[22] See, *e.g.*, Ambos, Kai, "Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and thus be Exposed to Countermeasures?", *EJIL: Talk!*, March 2nd, 2022, *https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/*; Schmitt, Michael N., "Providing Arms and Material to Ukraine: Neutrality, Co-Belligerency, and the Use of Force", Articles of War, March 7, 2022, available at: *https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/*.

[23] Eschenhagen, Philipp *et al.*, "Ukrainekrieg mit Katja Keul", *Völkerrechtsblog*, March 18, 2022, DOI: *10.17176/20220318-120945-0*.

Charter, however, requires Member States to report immediately to the Security Council any measures taken in the exercise of the right of self-defence. In contrast, following the armed terrorist attack on the United States on September 11, 2001,[24] and the armed attacks by the terrorist organization Islamic State on Iraq, France and other States, the German Federal Government had immediately informed the Security Council of the measures taken within the framework of collective self-defence.[25] One reason why States did not invoke the right to collective self-defence might be that it would have made them "co-belligerents" of Ukraine in the latter's armed conflict with Russia. For both legal and (internal) political reasons, the States supporting Ukraine wanted to avoid being seen as parties to the conflict.

VI. Provision of Arms as a Countermeasure

The provision of arms to Ukraine has also been justified as a "countermeasure" within the context of the law of State responsibility.[26] An injured State may counter an internationally wrongful act by not performing for the time being its own international obligations toward the responsible State —here the obligation of impartiality under the law of neutrality— in order to induce the latter to comply with its obligations under international law.[27] Back in the 1950s, several authors had argued, for example, that by resorting to war in violation of the General Treaty for the Renunciation of War (the "Kellogg-Briand Pact" or "Pact of Paris"),[28] a State violated the rights of all other Contracting Parties. The latter were thereby entitled to take measures of "reprisal" against the aggressor that could involve a departure from the duty of impartiality otherwise imposed on non-participants of an armed conflict by the traditional law of neutrality.[29] States which provided arms to the victim of aggression

[24] See UN Security Council, Letter dated on 29 November 2001 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/1127, November 29, 2001.

[25] See UN Security Council, Letter dated on December 10, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, S/2015/946, 10 December 2015.

[26] See, *e.g.*, Ambos (22).

[27] See Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility), adopted by the International Law Commission on August 3, 2001, ILC Yearbook 2001, vol. II/2, 26, Article 49.

[28] General Treaty for the Renunciation of War as an Instrument of National Policy, done at Paris 27 August 1928, 94 LNTS 59.

[29] See, *e.g.*, Kelsen, Hans, *Principles*…, *cit.*, p. 87; Kelsen, Hans, "Collective Security under International Law", *International Law Studies*, vol. 49, 1954.

could thus violate their duty of impartiality without losing their status as neutrals. At the time, the term "reprisals" was used for otherwise illegal acts that are exceptionally permitted as reaction of one State against a violation of its right by another State.[30] Since the late 1970s, the term reprisal has been replaced by the term countermeasure in order to describe non-forcible illegal acts in response to an internationally wrongful act.[31] While the terminology may have changed, the legal reasoning is the same and could also be applied to the prohibition of the use of force under the UN Charter. It may be argued that the obligation not to use force under the UN Charter, like the obligation to renounce war as an instrument of national policy, establishes an obligation erga omnes partes; that is, an obligation that is owed to all members of the United Nations.

While Russia's aggression against Ukraine undoubtedly constitutes a violation of the UN Charter, under the current law of State responsibility only the injured State is entitled to take countermeasures.[32] The injured State is defined as the State to whom the obligation breached is owed individually or, if the obligation is owned to a group of States including that State or the international community as a whole, the breach of the obligation specifically affects that State or is of such a character as radically to change the position of all other States to which the obligation is owed with respect to the further performance of that obligation.[33] In the present case, the injured State is Ukraine and not Germany or the other States delivering weapons. In case of obligations erga omnes partes or erga omnes, States other than the injured State are only entitled to invoke the responsibility of the wrongdoing State; that is, they may claim from the responsible State the cessation of the internationally wrongful act and the performance of the obligation of reparation.[34] Thus, while other States may call on Russia to end its illegal invasion and to make full reparation to Ukraine for the damage cause by the act of aggression, they may not provide arms as a countermeasure.

So-called third-party countermeasures are highly controversial in international law. The saving clause in Article 54 of the Articles on State Responsibility allows third States entitled to invoke the responsibility of the wrongdoing State only "to take lawful measures against that State to ensure the

[30] See Kelsen, Hans, *Principles…*, *cit.*, p. 23.

[31] See Air Service Agreement of 27 March 1946 between the United States of America and France, Decision of 9 December 1978, XXVIII RIAA 417 at 443-444. See further Shaw, Malcolm, *International Law*, 9th ed., Cambridge, Cambridge University Press, 2021, p. 691.

[32] Articles on State Responsibility, Article 49(1).

[33] *Ibidem*, Article 42.

[34] *Ibidem*, Article 48(1) and (2).

cessation of the breach". The provision of arms, however, would have to be considered unlawful according to the traditional law of neutrality. Even if one were to assume that in the present case any State would be entitled to take countermeasures, it must still be observed that neither Germany nor any other State has justified its arms deliveries to Ukraine as a countermeasure.

VII. Inapplicability of the Law of Neutrality in Case of Aggression

The provision of arms to Ukraine is nevertheless lawful because the law of neutrality does not apply at all in clear cases of aggression. The traditional law of neutrality developed in the 19th century; that is, at a time when States had an unrestricted right to wage war. At that time, it was irrelevant to international law whether wars were waged for a good, for a bad, or for no reason at all. All warring parties, regardless of whether they were the attacker or the attacked, were to be treated equally —the duties of abstention, impartiality and prevention extended equally to both parties.

This changed with the outlawing of war in international law in the first half of the 20th century, because aggressive war had become illegal under international law, the aggressor could no longer derive any rights and, in particular, no right to non-discrimination, from the state of war —*ex injuria jus non oritur*.

1. *Provision of Arms to the Victim of Aggression under the Covenant of the League of Nations*

The Covenant of the League of Nations did not outlaw war outright but made resort to war subject to certain rules and conditions. A member State which went to war in violation of the obligations under the Covenant was considered an aggressor.[35] Article 16 of the Covenant provided that an aggressor was *ipso facto* deemed to have committed an act of war against all other members of the League which undertook immediately to subject it to certain sanctions outlined in that provision.[36] There was, however, no mention of the provision of arms to the victim of aggression. In 1921, the League Assembly, however, agreed that the League members had full liberty to de-

[35] Jessup, Philip C., *Neutrality, Its History, Economics and Law*, New York, Columbia University Press, 1936, vol. IV "Today and Tomorrow", p. 86.

[36] Covenant of the League of Nations, *American Journal of International Law Supplement* 128, Article 16(1), 1919.

termine each for itself whether an act of aggression had been committed.[37] The Council and the Assembly of the League had no authority to render a binding decision but could merely give an opinion in regard to the soundness of which each member had to decide for itself. In September 1938, members further weakened the Covenant by agreeing that the sanctions in Article 16 were not automatic but that each member could decide for itself, in the light of its own position, on the nature of the sanctions which it would apply under Article 16 against the aggressor.[38] Despite these shortcomings, there is ample practice that the League and its members considered themselves entitled to discriminate against the aggressor and, if considered appropriate, provide arms to the victim of aggression.

For example, during the Chaco War between Bolivia and Paraguay (September 1932 to June 1935), the League of Nations initially proposed to its members in May 1934 an arms embargo against both belligerents. On 24 November 1934, the Assembly of the League of Nations unanimously adopted recommendations to end the dispute between the parties. Bolivia accepted the peace proposal while Paraguay did not. Thus, the continued use of force by Paraguay became illegal under the League's Convent.[39] This led the Advisory Committee appointed by the Assembly to assist members to concert their action and attitude towards the conflict to inform "those members of the League who have taken steps to prohibit the supply of arms to Bolivia and Paraguay that, in its opinion, this prohibition should not continue to be enforced against Bolivia".[40] As a consequence, the United Kingdom, for example, raised the arms embargo against Bolivia but continued it against Paraguay alone until the end of the war in June 1935.[41] There were, however, no reports of States actually delivering arms to Bolivia in the five months of the war continuing. While the League of Nations did not call on, or even order its members to supply weapons to Bolivia, it made it clear that it was in accordance with Covenant, and international law more generally, to

[37] Jessup, Phillip C., *Neutrality*…, *cit.*, pp. 101 and 102.

[38] See, *e.g.*, Streit, Clarence K., "League Separated from Versailles", *New York Times*, October 1st, 1938, p. 5.

[39] See Covenant of the League of Nations, Article 15(6).

[40] "Report dated January 16th, 1935, by the Advisory Committee on the Situation Created by the Replies of Bolivia and Paraguay Concerning the Recommendation Adopted by the Assembly on November 24, 1934", *League of Nations Official Journal*, Special Supplement No. 133 (1935) 49.

[41] Atwater, Elton, "British Control Over the Export of War Materials", *American Journal of international Law*, vol. 33, 1939, pp. 292-317; at p. 305. On the British lifting of the arms embargo on Bolivia, see also: Hansard, House of commons, Debates, vol. 301, col. 5, May 13, 1935.

discriminate against the belligerent which was considered the "aggressor".[42] In response to being branded as an aggressor and the lifting of the arms embargo against Bolivia, Paraguay withdrew from the League of Nations on February 23, 1935.[43]

On October 2nd, 1935, italian forces invaded Abyssinia (Ethiopia). Five days later, the Council of the League of Nations declared Italy to be the aggressor but did not adopt any specific recommendations for sanctions under Article 16 of the Covenant.[44] On October 11, 1935, a Coordination Committee established by the League Assembly adopted several proposals with a view to facilitating the execution by members of the League of their obligations under Article 16 of the Covenant. The Committee recommended, inter alia, that members immediately impose a comprehensive arms embargo on Italy and that those members which had been enforcing measures to prohibit or restrict the exportation, re-exportation, or transit of arms, munitions, and implements of war to Ethiopia would annul these measures immediately.[45] Of the 52 League members which gave detailed replies concerning the measures they intended to take, only two —Luxembourg and Switzerland— expressed an intention to be neutral and to place an embargo equally on arms to Italy and Ethiopia.[46] Others, including the United Kingdom, lifted existing embargos upon exports of arms to Ethiopia.[47] There was strong support for the provision of arms to Ethiopia in the United Kingdom. During a debate in the House of Lords, the Archbishop of Canterbury stated that "to forbid any arms entering [Ethiopia], would really be not neutrality, but taking sides, and allowing Italy, without any possible resistance, to work its will upon the Abyssinian people".[48] During the (second) Italo-Ethiopian war from October 1935 to February 1937, the british government issued several licences for the export of munitions to Ethiopia.[49] *The New York*

[42] Atwater (n. 41) 305 and n. 58. On the question of Paraguay being considered the aggressor, see also Quincy Wright, "The Concept of Aggression in International Law" (1935) 28 American Journal of International Law 373-395, pp. 373, 378, 390.

[43] "Paraguay Resigns as League Member", *New York Times*, February 24, 1935, 15.

[44] See *League of Nations Official Journal* 1935, 1225. See also "Aggression", *The Times*, October 8, 1935, p. 14.

[45] Proposal No. I, *League of Nations Official Journal*, Special Supplement No. 145 (1935), p. 14.

[46] "Sanctions To-Day", *The Times*, November 18, 1935, p. 14.

[47] "Ways and Means", *The Times*, October 15, 1935, p. 15.

[48] Hansard, House of Lords, vol. 99, col. 101, December 5, 1935.

[49] "Sell Arms to Ethiopia: Three British Concerns Have Received Licenses in 3 Months", *New York Times*, December 5, 1935, p. 10. See also Hansard, House of Lords, vol. 99, cols. 120-121, December 5, 1935 (Under-Secretary of State for Foreign Affairs, Earl Stanhope).

Times reported already in October 1935 that 30,000 rifles and 600 tons of ammunition had arrived in Ethiopia.[50]

The second time, members of the *League of Nations* actually provided arms to a victim of aggression was during the Soviet-Finnish Winter War from November 1939 to March 1940. On November 30, 1939, the Union of Soviet Socialist Republics (USSR) attacked Finland. On December 14, 1939, the Assembly of the League of Nations determined that by the "aggression" which the USSR had committed against Finland, it had "failed to observe not only its special political agreements with Finland but also Article 12 of the Covenant of the League of Nations and the Pact of Paris". The Assembly condemned the aggression and urgently appealed to "every member of the League to provide Finland with such material and humanitarian assistance as may be in its power".[51] On the same day, the League Council expelled the USSR from the *League of Nations*,[52] and british prime minister told the House of Commons:

> His Majesty's Government, for their part, have always held the view that no member State ought to remain indifferent to a clear case of aggression of the sort with which we are now faced. At the outset of the attack on Finland, and before the question had been raised at Geneva, they decided to permit the release and immediate delivery to Finland by the manufacturers concerned of a number of fighter aircraft of which the Finnish Government stood in urgent need; and they intend similarly to release other material which will be of assistance to the Finnish Government. Generous help for Finland has been forthcoming from several other countries, including the United States. It is known that several European countries have recently supplied war material to Finland.[53]

By the time war ended with the conclusion of the Moscow Peace Treaty on March 13, 1940, the United Kingdom had provided a large number of the weapons and munitions to Finland, including 110 aeroplanes, 114 guns of all kinds, 185,000 shells, 50,000 hand-grenades and 100 machine guns.[54]

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[50] See "30,000 Rifles Arrive: Ethiopia Gets First Arms Since League Rescinded Embargo", *New York times*, October 16, 1935, p. 12; "Ethiopia Getting Arms", *New York Times*, October 13, 1935, p. 32.

[51] *League of Nations Official Journal* 1939, p. 540.

[52] *Ibidem*, p. 506.

[53] Hansard, House of Commons, vol. 355, cols. 1337-1338: 14 December 1939 (The Prime Minister; Mr. Chamberlain).

[54] Hansard, House of Commons, vol. 358, cols. 1836-1837, March 19, 1940 (the prime minister; Chamberlain). On british military aid to Finland, see also ibid., vol. 357, col. 444, February 8, 1940.

Sweden also provided weapons and ammunition to Finland. The Swedish Government carefully avoided the use of the term "neutrality" and, in fact, decided to support Finland by all means, except armed intervention in the war.[55] After the League Assembly had designated the USSR the aggressor in the war, Sweden followed a policy, which in the words of the Swedish Foreign Minister, "might be characterized according to modern terminology as non-belligerent".[56]

During the Soviet-Finnish War, the "Soviet Government repeatedly noted with bitterness the world-wide assistance in armaments and war supplies furnished to Finland".[57] This was, of course, contradicting the USSR's own earlier position that a position of neutrality meant "conniving at aggression". Only in March 1939, soviet leader Joseph Stalin had stated in his report to the Communist Party that "[w]e stands for the support of nations which are the victims of aggression and are fighting for the independence of their country".[58] This pronouncement was later translated in soviet international law doctrine to mean that "there cannot be a similar relationship with the aggressor and the victim of aggression. This means that a state waging a just war must receive assistance and aid".[59]

2. *The Kellogg-Briand Pact and the New Legal Status of Non-Belligerency*

The right to discriminate against the aggressor and to provide arms to the victim of aggression can also be traced back to the Kellogg-Briand Pact in which the High Contracting Parties solemnly declared that "they condemn recourse to war for the solution of international controversies, and

[55] Ruche, Francis La, *La neutralité de la Suède: dix années d'une politique: 1939-1949*, Paris, Nouvelles Éditions latines, 1953, p. 66. See also Wallas, Ingo F., *Die Völkerrechtliche Zulässigkeit der Ausfuhr kriegswichtiger Güter aus neutralen Staaten*, Doctoral Thesis, Hamburg, 1970, pp. 98 and 99.

[56] Ruche, Francis La, *op. cit.*, p. 66. See also: Hicks, Agnes H., "Sweden", in Toynbee, Arnold and Toynbee, Veronica M. (eds.), *The War and the Neutrals*, Oxford, Oxford University Press, 1956, pp. 171-197; at 175.

[57] Ginsburgs, George, "The Soviet Union as a Neutral, 1939-1941", *Soviet Studies*, vol. 10, 1958, pp. 12-35; at 19-20.

[58] Stalin, Joseph V., "Report on the Work of the Central Committee to the Eighteenth Congress of the C.P.S.U.(B.)", March 10, 1939, available at: *https://www.marxists.org/reference/archive/stalin/works/1939/03/10.htm*.

[59] Akademiya Nauk SSSR, Institut Prava, Mezhdunarodnoe pravo [Academy of Sciences of the USSR, Institute of Law, International Law] (Moscow, 1951), p. 557; as quoted in Ginsburgs, George, *op. cit.*, p. 17.

renounce it as an instrument of national policy in their relations with one another".[60] The Pact, like the League Covenant, was a multilateral law-making treaty whereby each of the High Contracting Parties entered into legally binding obligations towards all of the other High contracting Parties —so-called obligations *erga omnes* partes—. A breach of such obligations directly affects the legal interests of all the other contracting parties. The Pact, which is still positive international law, binds 66 States, including Germany and the Russian Federation.[61] The Pact has not been overtaken by the UN Charter, which is shown, inter alia, by the fact that since 1945 several States have issued declarations on its continued application.[62]

In 1934, at its thirty-eighth conference in Budapest, the international Law Association adopted the "Budapest Articles of Interpretation" of the Kellogg-Briand Pact which provided in the relevant part:

> In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or of any rule of International Law, do all or any of the following things:
>
> ...
>
> (b) Decline to observe towards the State violating the Pact the duties prescribed by International, Law, apart from the Pact, for a neutral in relation to a belligerent.
>
> (c) Supply the State attacked with financial or material assistance, including munitions of war.[63]

The underlying idea was that, with the outlawing of war, war could no longer be the source and subject of rights. In particular, the aggressor could no longer claim, as against other States, the rights and duties of neutrality.[64]

Although the Budapest Articles of Interpretation were unanimously accepted by the conference,[65] they were not uncontroversial among international lawyers. They received, however, support from the former british ambassador to the United States who had assisted in the negotiation of the

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[60] General Treaty for Renunciation of War as an Instrument of National Policy, Article I.

[61] For an up-to-date list of parties, available at: *https://www.state.gov/wp-content/uploads/2020/02/249-Kellogg-Briand-Treaty.pdf*.

[62] *Idem*.

[63] International Law Association (ILA), Budapest Articles of Interpretation (As resolved at the closing session on September 10, 1934), ILA, Report of the Thirty-Eighth Conference held at Budapest, September 6 to 10, 1934 (London, Eastern Press, 1935), pp. 66-68.

[64] *Ibidem*, pp. 17 and 18.

[65] *Ibidem*, p. 237.

Kellogg-Briand Pact,[66] and the former U.S. Secretary of State Henry L. Stimson. The latter referred to the Articles in a speech to the American Society for International Law in April 1935 when he argued that in case of aggression the rules of neutrality would no longer apply among the signatories of the Kellogg-Briand Pact and that the United States would be under no obligation to follow them.[67]

In case of a use of force in breach of the Kellogg-Briand Pact, neutrality was replaced by the new status of "non-belligerency". Contrary to a widespread view in the literature,[68] non-belligerency was not regarded as an intermediary position between neutrality and belligerency but rather a novel status replacing neutrality in situations of an illegal use of force. The terms "non-belligerency" and "non-belligerents" were chosen deliberately to distinguish the new status clearly from that of neutrality. During the deliberations at Budapest, the swedish international lawyer and later judge of the Permanent Court of International Justice, Åke Hammarskjöld, stated:

> You will have noticed that, except when the texts compelled me to use the word "neutrality". I have been careful to use another word: the status of non-belligerency… I have chosen the other expression merely because I wanted to underline that the status of non-belligerency under the Kellogg Pact is not necessarily identical with the status of neutrality in pre-war international law.[69]

The term "non-belligerency" was originally used to describe the legal status of States discriminating against the aggressor without actively taking part in the hostilities in defence of the State attacked. It is in this sense that the term was also used in a Memorandum of the German Branch of the International Law Association on "Non-Belligerency and Neutrality" submitted to the fortieth conference of the Association in Amsterdam in 1938.

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[66] Hansard, House of Lords, Debates, vol. 95, cols. 1018-1019, 20 February 1935.

[67] Stimson, Henry L., "Neutrality and War Prevention", *American Society of International Law Proceedings*, vol. 29, 1935, pp. 121-129; at 127.

[68] See, *e.g.*, Von Heinegg, Wolff Heintschel, "*Benevolent* Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality", in Schmitt, Michael N. and Pejic, Jelena (eds.), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein*, Leiden, Martinus Nijhoff, 2007, pp. 543-568; at 552.

[69] ILA, Report of the Thirty-Eighth Conference held at Budapest, September 6 to 10, 1934 (London: ILA, 1935) 31. On the distinction between neutrality and non-belligerency, see also ILA, Report of the Fortieth Conference held at Amsterdam, August 29 to September 2, 1938 (London: ILA, 1939) 108 ("the members who took part in the discussion [at Budapest] studiously avoided the very word neutrality and substituted the word "non-belligerency"; in other words, there is neutrality as it stands, and there is non-belligerency which may more or less depart from the traditional neutrality"). See further, *ibid.*, 118.

Non-belligerency was defined as attitude towards belligerents under the Covenant of the League of Nations (Article 16) which "does *not* imply the same duties to all belligerents. Accordingly, this attitude is not strictly «impartial».[70] Neutrality, on the other hand, implied "strict impartiality… towards *all* belligerents, no matter whether towards aggressors or non-aggressors".[71]

The term non-belligerency has, however, also been used in other connotations. When on September 1st, 1939 Germany attacked Poland, Italy, which had entered an alliance with Germany in May 1939, expressly denied that it was neutral and claimed for itself the status of "non-belligerency".[72] In this situation, the term described Italy's position of being supportive of Germany while not taking "any initiative in military operations".[73] Throughout the Second World War, several other States also assumed the status of non-belligerency, connoting various shades of partiality towards one of the conflicting parties (either the attacker or the attacked), but stopping short of actual participating in the war. This led some commentators to reject non-belligerency as "a purely political creation" without any legal significance.[74]

While it is true that there has been no uniformity in the use of the term "non-belligerency", this does not preclude the existence of such a legal status, distinct from that of neutrality, which allows for discrimination against the aggressor.[75] The Third Geneva Convention Relative to the Treatment of Prisoners of War, for example, expressly distinguishes between neutral and "non-belligerent Powers".[76]

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[70] Memorandum of the German Branch on Non-Belligerency and Neutrality, ILA, Report of the Fortieth Conference held at Amsterdam, August 29 to September 2nd, 1938 (London, ILA, 1939), p. 300.

[71] *Idem*.

[72] Hackworth, Green Haywood, *Digest of International Law*, Washington D. C., USGPO, 1943, vol. VII, p. 349.

[73] *Idem*.

[74] Kunz, Josef L., "Neutrality and the European War 1939-1940", *Michigan Law Review*, vol. 39, 1941, pp. 719-754; at 750.

[75] During a debate on the international situation in the House of Commons, the Leader of the Liberal Party later British War Secretary Sir Archibald Sinclair stated: "Japan has been convicted by the League of Nations of the international crime of aggression, and of contravention of the Nine-Power Treaty and of the Pact of Paris... Therefore, neutrality, as distinct from non-belligerency, is legally as well as morally impossible for us in the struggle between China and Japan" (Hansard, House of Commons, Debates, vol. 350, col. 2000, July 31, 1939).

[76] See Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, Articles 4B. (2) and 122. It was held that the adjective "non-belligerent" was preferable to "neutral", experience gained during the war having shown the importance of the former term (International Committee of the Red Cross, Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, April 14-26, 1947, p. 112). See also Protocol Additional to the Geneva

3. *Provision of Arms to the Victims of Aggression During the Second World War*

During the Second World War, the United Kingdom in particular advocated for the new status of non-belligerency. In May 1940, when German troops rapidly advanced on the western front, british prime minister Winston Churchill appealed to U.S. president Franklin D. Roosevelt for assistance against the german aggressor, including the loan of forty or fifty destroyers and several hundred of the latest types of aircraft. He wrote: "[a]ll I ask now is that you should proclaim non-belligerency, which would mean that you would help us with everything short of actually engaging armed forces".[77] On September 5, 1940, Churchill announced the transfer of U.S. destroyers to the United Kingdom in the House of Commons, saying: "[o]nly very ignorant persons would suggest that the transfer of American destroyers to the British flag constitutes the slightest violation of international law or affects in the smallest degree the non-belligerency of the United States".[78]

In December 1940, Churchill once again pleaded for assistance, asking for the U.S. Navy to convoy goods to the United Kingdom, which he referred to as "a decisive act of constructive non-belligerency by the United States".[79]

In early 1941, the concept of non-belligerency formed the legal basis of the Lend-Lease Act, which allowed the U.S. Government to provide war materials such as weapons, ammunition, vehicles, fuel, food, and aircraft to the States fighting the Axis powers (Germany, Italy, Japan) without directly participating in the war. During the hearing on the Land-Lease Bill before the House of Representative's Committee on Foreign Affairs on January 16, 1941, Secretary of War, Henry L. Stimson called the Budapest Articles of Interpretation of the Kellogg-Briand Pact "the most authoritative statement of international law" on the question of the effect of an attack in violation of the Pact upon the right and redresses of the other Contracting Parties.[80] Se-

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Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125, UNTS 4, Articles 9(2)(a), 19 and 31, which distinguish between "neutral and other States not Parties to the conflict".

[77] Churchill, Winston S., *The Second World War*, vol. II, "Their Finest Hour", London, Chartwell Edition, Educational Book Company, 1954, p. 20.

[78] Hansard, House of Commons, Debates, vol.365, col. 39, September 5, 1940. The agreement to transfer 50 U.S. Navy destroyers to the United Kingdom om exchange for the right to lease certain naval and air bases was concluded on September 2nd, 1940.

[79] Churchill, Winston S., *op. cit.*, p. 430.

[80] Lend-Lease Bill, Hearings Before the Committee on Foreign Relations, House of Representatives, Seventy-seventh Congress, First Session, on H.R. 1776, A Bill Further to Promote the Defense of the United States, and for Other Purposes (1941) 103.

cretary Stimson considered the Budapest Articles of such importance that he read them into the records of the committee.[81] According to the Articles, the United States was no longer bound by the rules of neutrality and thus was allowed to provide the United Kingdom with material assistance, including munitions of war. Having been expressly asked whether the Kellogg-Briand Pat sanctioned such behaviour, he replied emphatically that such aid was not an infringement of international law; that is right.[82]

A few months later, the U.S. Attorney General and later Chief Prosecutor at the Nuremberg War Crimes Tribunal, Robert H. Jackson, justified the arms deliveries to the United Kingdom. In a speech to the Inter-American Bar Association in Havana on March 27, 1941, he stated: "[i]t is the declared policy of the Government of the United States to extend to England all aid «short of war». At the same time it is the declared determination of the government to avoid entry into the war as a belligerent".[83] Jackson argued that, against the background of Covenant of the League of Nations with its sanctions against aggressors and the outlawry of war in the Kellogg-Briand Pact and the Argentine Anti-War Treaty (the Saavedra-Lamas Pact), international law had evolved and that one could no longer accept the "unrealistic and cynical assumption" that the aggressor and the attacked were to be treated equally. The distinction between the belligerents represented a return to the doctrine of international law in the 17th and 18th centuries which distinguished between just and unjust wars. From that distinction there was logically derived the legal duty to discriminate against a State engaged in an unjust war; that is, a war undertaken without a cause recognized by international law. The outlawry of war by treaty in the 20th century meant that all Contracting Parties had an interest in the maintenance of peace. An act of aggression thus constituted a violation of international law which entitled, but did not oblige, the other Contracting Parties to assist the attacked State. Jackson declared:

> No longer can it be argued that the civilized world must behave with rigid impartiality toward both an aggressor in violation of the treaty and the victims of unprovoked attack. We need not now be indifferent as between the worse

[81] *Ibidem*, pp. 104 and 105.

[82] *Ibidem*, p. 118. Wright, Quincy, "The Transfer of Destroyers to Great Britain (1940)", *American Journal of International Law*, vol. 34, pp. 680-689; at 685-689, made an analogous argument after the 1940 destroyer-bases deal, citing Budapest Articles and the Harvard Draft Convention on Aggression.

[83] "Address of Mr. Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941" (1941) 35 *American Journal of International Law* 348-359 at 349.

> and the better cause, nor deal with the just and the unjust alike… A system of international law which can impose no penalty on a lawbreaker and also forbids other states to aid the victim would be self-defeating and would not help even a little to realize mankind's hope for enduring peace.[84]

Jackson, however, also recognized the Achilles' heel of the new concept of non-belligerency. There was no binding legal procedure to determine which belligerent was the aggressor.[85] This determination was left to each State itself —with all the concomitant dangers and potential for abuse—. But this was not to be a problem in cases of flagrant aggression where the facts spoke so unambiguously that world public opinion took what may be the equivalent of judicial notice. In the light of the flagrancy of the aggressions by the Axis Powers, the United States and other States were entitled to assert a right of discriminatory action, including the provision of material, weapons and ships to the victims of aggression.[86]

4. *Provision of Arms to the Victims of Aggression under the United Nations Charter*

Since 1945, the right of States to provide arms to the victims of aggression may be based not only on the Kellogg-Briand Pact but also on the UN Charter and general international law. Article 2(4) of the UN Charter, and the corresponding provision in customary international law,[87] does not only prohibit resort to war but to any threat or use of force.

The right to provide assistance to the victim of aggression is independent of the Security Council's power under Chapter VII of the UN Charter to obligate States to assist the State under attack; nor does it depend on the designation of the aggressor by the Security Council. Under the Charter, the Council has been endowed with the "primary responsibility", but not the exclusive responsibility, for the maintenance of international peace and security. In the horizontal and decentralized legal system of international law, it is the responsibility of each State itself to determine violations of the law and to draw the conclusions therefrom. Thus, the UN General Assembly reminded Member States that failure of the Security Council to

[84] *Ibidem*, p. 358.

[85] *Ibidem*, p. 355.

[86] *Ibidem*, pp. 353 and 354.

[87] ICJ, Military and Paramilitary Activities in und against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, ICJ Reports 1986, pp. 14 at 100, para. 190.

discharge its responsibilities did not relieve member States of their obligations under the Charter.[88] The individual responsibility of each member is called for not least because there is no guarantee that the Security Council will respond promptly, or respond at all, to an act of aggression. Hans Kelsen observed that between "the moment the illegal attack starts and the moment the centralized machinery of collective security is put into action, there is, even in case of its perfectly prompt functioning, a space of time, an interval, which may be disastrous to the victim".[89] In such a case, the victim of aggression must not be left without assistance. This is also shown by the fact that the Charter acknowledges an inherent right of collective self-defence "until the Security Council has taken the measures necessary to maintain international peace and security".[90]

However, if States provide arms to a belligerent before the Security Council has identified the aggressor, they act at their own risk. If it turns out later that there was no act of aggression, they may themselves have committed an internationally wrongful act that will entail their international responsibility.[91] In many cases, it may not be clear-cut who the aggressor is. For example, during the first Gulf War between Iran and Iraq (1980-1988) both sides invoked the right to self-defence. States may also choose to refrain from branding the aggressor for political, economic or other reasons. In such cases, States remain at liberty to adopt a position of neutrality. Hugo Grotius advised that where it was doubtful whose cause was just, third States should treat both belligerents equally in supplying them with provisions.[92] This may explain why since the Second World War there have been very few cases where States openly provided weapons to a victim of aggression. States, however, continue to consider themselves at liberty to discriminate against the aggressor as is shown, for example, by Italian Law No. 185 of July 9, 1990 which prohibited the export and transit of war materials

[88] UN General Assembly resolution 377 (V), 3 November 1950, UN Doc. A/RES/377(V), preambular para. 7. In this connection it is also of interest to note that in 1921 the Assembly of the League of Nations determined that it was "the duty of each Member of the League to decide for itself whether a breach of the Covenant has been committed" (Resolutions on The Economic Weapon, October 4, 1921, para. 4, *League of Nations Journal*, Special Supplement No. 6 (1921) 25).

[89] Kelsen, Hans, "Collective Security and Collective Self-Defense Under the Charter of the United Nations", *American Journal of International Law*, 1948, vol. 42, pp. 783-796; at 785.

[90] UN Charter, Article 51.

[91] See Bowett, Dereck V., *Self-Defence in International Law*, Manchester, Manchester University Press, 1958, p. 181.

[92] Grotius, Hugo, *Of the Rights of War and Peace in Three Volumes*, 1625, (Indianapolis, Liberty Fund, 2005), Book III, Chapter XVII, Section III.1.

"towards Countries in a state of armed conflict, in violation of the principles of Article 51 of the United Nations Charter".[93]

In the case of the russian attack on Ukraine there is no doubt about who the aggressor is. Russia managed to prevent the Security Council from determining the existence of an act of aggression by exercising its veto.[94] However, the General Assembly created a special residual procedure for exactly such a case back in 1950 in its resolution on "Uniting for Peace".[95] If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours at the request of the Security Council.[96] Unlike the question of the existence of an act of aggression, the referral of the situation to the General Assembly is a purely procedural matter to which the veto right of the permanent members does not apply.[97]

After Russia had vetoed the Security Council draft resolution on russian aggression against Ukraine, the Council decided on February 27, 2022, by eleven votes to one (Russia) and three abstentions to call an emergency special session of the General Assembly to examine the question.[98] This was only the 11th time in the history of the United Nations that the Assembly was called to meet in emergency special session. On March 1st, 2022, the General Assembly adopted a resolution on "Aggression against Ukraine", deploring "in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter" and demanding "that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders".[99] Of the 193 member States of the Uni-

[93] See Gioia, Andrea, "Neutrality and Non-Belligerency", in Post, Harry (ed.), *International Economic Law and Armed Conflict*, Dordrecht, Martinus Nijhoff, 1994, pp. 51-110; at 82.

[94] See text above at n. 19.

[95] UN General Assembly resolution 377(V), 3 November 1950, UN Doc. A/RES/377(V).

[96] *Ibidem*, A, para. 1.

[97] See UN Charter, Article 27(2).

[98] UN Security Council resolution 2623 (2022), UN Doc. S/RES/2623 (2022), 27 February 2022.

[99] UN General Assembly, Eleventh Emergency Special Session, Resolution ES-11/1, 2 March 2022, UN Doc. A/RES/ES-11/1, March 18, 2022, paras. 2 and 4.

ted Nations, 141 voted in favour of the resolution, 35 abstained and only five (Russia, Belarus, North Korea, Eritrea and Syria) voted against. While the General Assembly, unlike the Security Council, cannot determine the aggressor with legally binding force, its resolutions are widely viewed as an expression of world opinion. Dereck Bowett pointed out that when a two-thirds majority of world opinion can be secured, the characterization of a belligerent as aggressor by individual States and any discrimination against that belligerent are beyond suspicion.[100] With 141 votes in favour of the resolution that preponderance of world opinion has been more than met.

VIII. Conclusion

Over time, international law has developed from a mere order of coordination of inter-State relations to a legal order based on certain values. One of the core values of the international legal order today is peace. A State breaching the peace can no longer derive any rights from a state of armed conflict created by such a breach. The clear identification of the aggressor precludes the application of the law of neutrality with its duty of impartiality to both belligerents. In the majority of cases, this duty would only benefit the aggressor anyway.

The abandonment of the law of neutrality is without detriment to third States. The relations between the belligerents and non-belligerent States continue to be governed by the law of peace. This allows States to provide arms and other war material to other States as part of their general freedom of action.[101] In the absence of a breach of an international obligation, arms deliveries to the State attacked cannot form the basis for countermeasures and, even less so, for forcible reprisals by the aggressor against the State delivering arms. Any forcible reprisal would in any case be illegal as a violation of the prohibition of the use of force. Forcible measures are generally only permissible in response to an armed attack. The provision of arms as such, however, does not constitute such an attack.

In view of the obvious russian aggression against Ukraine, 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. As direct military intervention in the russian-ukrainian armed conflict on the side of Ukraine does not seem

[100] Bowett (n. 91) 181.

[101] *Cf.* PCIJ, The S.S. Lotus (*France v. Turkey*), Judgement, PCIJ Reports, Series A, No. 10, 18 (1927).

prudent for the moment, given the possibility of the war escalating and spreading beyond Ukraine, the provision of arms to the Ukrainian government is the least Germany and other States can do to help Ukraine defend itself and to defend the international legal order.[102] International law does not condemn the States to stand idly by and watch the aggression from the sidelines. On the contrary, a value-based international legal order that prohibits the use of force in inter-State relations and prescribes aggression as an international crime virtually demands assistance to the victim of aggression.

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