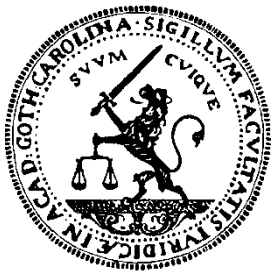

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Third States Sharing Military Intelligence with Ukraine

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Contents

Summary

This essay analyzes the legality of the sharing of military intelligence by third States with Ukraine. The analysis is made primarily with the law of neutrality and the Charter of the United Nations in focus but also draws on the work of legal scholars for specific insights into international law.

Details on military intelligence are rarely publicly disclosed which entails complexities with conducting case studies. This analysis is therefore of a general nature, although only considering the international armed conflict between Russia and Ukraine.

The essay concludes that the intelligence sharing is illegal under the traditional law of neutrality, i.e. as it is formulated in the Hague Conventions of 1907, because it violates the principle of impartiality. However, it may be legal provided that a distinctive form of the law of neutrality, called qualified neutrality, is considered to be valid. On the contrary, it concludes that the sharing of intelligence is legal under the UN Charter since it would be considered a measure of collective self-defence according to Art. 51 of the UN Charter.

Sammanfattning

Denna uppsats granskar om det är förenligt med folkrätten att stater delar militära underrättelser med Ukraina. Analysen görs med utgångspunkt i neutralitetsrätten och Förenta nationernas Stadga. Hänvisningar till folkrättslig doktrin förekommer också.

Denna undersökning är genomförd med en generell utgångspunkt i den internationellt väpnade konflikten mellan Ryssland och Ukraina. Att det inte gjorts en detaljerad fallstudie beror på att information om militära underrättelser sällan offentliggörs.

Slutsatsen är att tillhandahållandet av militära underrättelser utgör ett brott mot neutralitetsrätten, som den är formulerad i Haagkonventionerna från 1907, eftersom det bryter mot skyldigheten om opartiskhet i förhållande till krigförande stater. Däremot kan tillhandahållandet rättfärdigas förutsatt att den i doktrinen förekommande varianten kvalificerad neutralitet anses gälla. Att stater delar underrättelser med Ukraina bryter inte mot våldsförbudet i FN-stadgan eftersom åtgärden bör anses falla inom ramen för vad som ska betraktas som kollektivt självförsvar enligt Art. 51.

Abbreviations

DoD	United States Department of Defense
IAC	International armed conflict
ICJ	International Court of Justice
IHL	International Humanitarian Law
UNGA	United Nations General Assembly

1 Introduction

1.1 Background

With the purpose of assisting Ukraine in its war against Russia, Western States have taken wide-ranging measures consisting primarily of military, financial and humanitarian commitments.[1] These measures are closely monitored and the military commitments must be reported to the Security Council in order to comply with the provisions on self-defence of the UN Charter.[2] However, several reports indicate that various States assist Ukraine in its war-fighting and war-sustaining efforts by sharing military intelligence.[3]

Military intelligence is a term with a rather uncertain definition due to its many different forms. This essay will primarily see to the forms of human intelligence (HUMINT), open-source intelligence (OSINT) and cyber intelligence (CYBINT). These terms refer to different disciplines of intelligence gathering. While acknowledging that there are more disciplines, the selection has been made on the basis of that these are the ones considered most viable for targeted attacks.[4] They are thus the ones most relevant in the aspect of the Russo-Ukrainian IAC and the sharing of military intelligence with Ukraine.

Needless to say, the relationship between military intelligence and international law is a complex one due to the frequent linkage between intelligence and confidentiality. For instance, States conducting cyber operations that violate the prohibition on the use of force may be able to disguise their actions, implying difficulties for the attribution of responsibility.[5] However, intelligence gathering was addressed in the US *Military Manual* where the DoD concluded that cyber operations may in

[1] Antezza, Bushnell, Frank A., Frank P., Franz, Kharitonov, Rebinskaya, & Trebesch, sheet: Aggregates by group.
[2] Ibid, Sheet: Country Summary; Art. 51 of the UN Charter.
[3] Milanovic, EJIL.
[4] Sood and Enbody, p. 13.
[5] DoD Manual, p. 1018 (para. 16.3.3.4).

certain circumstances constitute such uses of force adverted to in Art. 2(4) of the UN Charter.[6] The *Manual* exemplifies by stating that, inter alia, cyber operations that cripple military logistics systems and thus affect the ability to conduct and sustain military operations, might be considered a use of force.[7]

1.2 Purpose and research question

This essay aims to demonstrate the lawfulness of the sharing of military intelligence to a belligerent State. In particular, under which conditions a State can provide Ukraine with intelligence in the ongoing IAC between Ukraine and Russia without violating international law. A conclusion on this matter ought to be necessary when evaluating how the response from the Western world complies with international law. To fulfill this purpose, the research question is: *Can the sharing of military intelligence be justified through international law?* Any potential provision of intelligence to Russia will be disregarded in this essay, which is explained in the following section.

1.3 Delimitations

Acknowledging the fact that Russia executed an armed attack on Ukraine and thereby violated Art. 2(4) of the UN Charter, this essay will not investigate any further violations of international law committed by Russia. Instead, the focus will entirely be on the measures taken by third States in support of Ukraine. This delimitation has been made on the basis that while it remains evident that Russia has violated international law through the straightforward breach of the prohibition on the use of force, the relation between international law and measures taken by third States is rather complex. This is a consequence of the fact that Art. 51 of the UN Charter provides a right to both individual and collective self-defence for States that are victims of an armed attack.

Furthermore, it should be noted that the assistance provided by third States to Ukraine since 24 February 2022 has been of various kinds, inter alia, arms

[6] Ibid, p. 1015 (para. 16.3.1).
[7] Ibid.

deliveries, financial support and humanitarian aid.[8] This essay will however merely investigate the legal consequences of the sharing of military intelligence. While acknowledging that arms deliveries and the sharing of intelligence are interlinked inasmuch as that both would be categorized as military commitments, the latter is particularly of interest because of the purported influence modern military intelligence has had on the conflict.[9] Also, the legality of arms deliveries has been examined before, for instance, by the ICJ in the *Nicaragua Case*.[10]

A relevant aspect, is the potential legal consequences of intelligence sharing for the States sharing the intelligence. For instance, if state responsibility could be invoked or if Russia could impose countermeasures. However, what is in the scope of this essay is limited to the examination of the legality of the intelligence sharing itself.

1.4 Method and materials

The framework of international law contains some noteworthy differences from domestic law. The vertical functioning of domestic legal systems is based on a hierarchy where most commonly a constitution or similar constitute the supreme regulation. However, the framework of international law is by Henriksen described as a horizontal system in the sense that there is no definite hierarchy of legal norms.[11] Although, some norms are considered superior to others, e.g. those of jus cogens character and erga omnes obligations.[12] The different structure of the legal system requires a different approach when researching international law.[13] Regarding this essay, the distinction between legal norms is crucial since the matter that is being examined, i.e. the lawfulness of sharing military intelligence with States involved in a conflict, regards the law of armed conflict, which is a field

[8] Antezza, Bushnell, Frank A., Frank P., Franz, Kharitonov, Rebinskaya, & Trebesch, sheet: Aggregates by group.
[9] E.g. The US provision of intelligence that allegedly helped Ukraine sink the missile cruiser Moskva.
[10] Nicaragua Case, para 228.
[11] Henriksen, p. 32.
[12] Henriksen p. 33 f.
[13] Hall, p. 182.

regulated through several different frameworks. Thus, the possibility of contradiction between those, cannot be dismissed.

Whichever area of law being examined, Kleineman states that the research method must be chosen with the research question in mind.[14] The question of this essay aims to determine the legality of the sharing of military intelligence with a belligerent State who is also the victim of an armed attack. To fulfill this purpose, a descriptive investigation of the international legal framework must be made. Additionally, the circumstance which is being investigated, i.e. the sharing of intelligence, must be seen in the perspective of that descriptive investigation.

An appropriate theory to adopt when making descriptive investigations of the law is the *pure theory of law* since, according to Kelsen, a preclusion of all elements foreign to the cognition of positive law must be made.[15] The theory is positivistic and seeks to achieve objectivity within legal research by disregarding value judgements, and by that, create *pure* legal conclusions.[16] However, it is difficult to distinguish conflicts from the influence of e.g. political, ideological and economic interests, which may be considered to constitute such value judgements. A positivistic method is thus not appropriate for this essay. On the contrary, a method appropriate for the research question would arguably be the method of international relations and international law (IR/IL) which is purposefully interdisciplinary and thus applies theories on the behavior of international actors as well as theories on international law.[17] However, the aspect of international relations is, although its relevance, not within the scope of this essay.

The positivistic or IR/IL approach to research in international law are two among many others.[18] The doctrinal legal method, is used to determine the positive law by analyzing, interpreting, and evaluating the written and

[14] Kleineman, p. 31.
[15] Kelsen, HLR, vol. 55, p. 44.
[16] Kammerhofer, p. 104.
[17] Ratner and Slaughter, p. 294.
[18] Ibid, p. 293.

unwritten rules, doctrines, case law and principles.[19] Hall explains the methodology of international law, not by denoting certain theories or methods, but by contending that the sources that are used, constitute the essence of it. In doing so, he refers to Art. 38(1) of the ICJ Statute, which refers to the sources that the Court shall apply in its practice.[20] Among treaties, customs and case law, the article refers to the works of legal scholars as sources of international law and as those works are considered important for this essay, the doctrinal legal method, will be used.

The method will be used to analyze these sources of law. The point of departure will be made in the material of written rules of international law found in the Hague Conventions and the UN Charter. Furthermore, the work of legal scholars will be used to interpret those sources. Especially regarding the Hague Conventions since the applicability of those and the law of neutrality in particular, have been questioned by various scholars (see section 2.3). Wulff Heintschel von Heinegg has during the last decades made great contributions to the area of law that will be researched in this essay. Furthermore, some of the articles that will be used, investigate the closely linked matter of *arms deliveries* to Ukraine, to which certain analogies have been made.

1.5 Structure

To be able to answer the research question this essay will initially review the legal framework of international law relevant for an IAC. As the intention with this essay is to bring about the conditions under which the sharing of military intelligence is in compliance with international law, it will merely investigate the parts of the framework which all States are bound by, i.e. norms of jus cogens, customary international law and the Charter of the UN. The focus that is put on the law of neutrality, which is a principle that derives from the Hague Convention, is thus explained by the fact that the law of

[19] Vranken, section 3.
[20] Hall, p. 183.

neutrality is part of customary international law according to the ICJ's 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.[21]

[21] ICJ, Legality of the Threat or Use of Nuclear Weapons, para. 88.

2 The Law of Armed Conflict

2.1 Sources of International Law

The legal framework of international law is in many ways different from the framework of domestic law. Due to this, it is necessary to define what constitutes international law and determine where from it gains its legitimacy. When identifying what constitutes the international legal framework a common starting point is the Art. 38(1) of the Statute of the ICJ.[22] According to the article, the Court shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The Statute of the ICJ regulates the practice of the Court but Art. 38(1) is considered to be generally relevant regarding the sources of international law.[23] Judicial decisions and teachings are not considered sources in the same sense as treaties, customary law and general principles. As the article states, they are rather considered means for the determination of rules of law. This implies that the Court will not judge on the basis of a teaching. However, it might use it for guidance when determining the applicable treaty, custom or principle.[24] The list in the article is not an exhaustive enumeration of sources, although, it is the most comprehensive one. For instance, it is being noted by

[22] Rose, p. 16; Henriksen, p. 21.
[23] Henriksen, p. 22
[24] Linderfalk, p. 33.

Rose that unilateral declarations and decisions of international organizations are considered sources of international law, yet they are not mentioned in the article.[25]

2.2 From War to Armed Conflict

Since Saint Augustine[26], attempts to define just causes for going to war have been made by various philosophers.[27] The continuous seeking for a justification potentially has its foundation in a common perception of war as an undesirable state. Despite, war has throughout history been considered a legitimate method of conflict resolution and a vital instrument of foreign policies.[28] For this reason, not only justifications for initiating war but also rules for conducting them have been fundamental for the coexistence of States. The former, i.e. jus ad bellum, regulates under which conditions a State lawfully can initiate a war.[29] The latter, i.e. jus in bello (equivalent to IHL), regulates the conduct of the war itself and seeks to minimize suffering.[30]

2.2.1 Jus ad bellum

The philosophy of jus ad bellum originates from the traditional theory of just war which recognizes some criteria as just causes for waging war, e.g. just cause, right authority and reasonable prospect of success.[31] In the aspect of modern international law[32], the view that there are just causes for waging war has altered significantly. Through the 1919 Covenant of the League of Nations and the 1928 Treaty of Paris (Briand-Kellogg Pact) war was outlawed and no longer considered a legitimate method of conflict resolution.[33] Being gravely disrespected during World War II, the principle of the treaties (i.e. the prohibition of the use of force) regained its legitimacy through the

[25] Rose, p. 17.
[26] Saint Augustine of Hippo 354-430 CE.
[27] E.g. St. Thomas Aquinas and Hugo Grotius, who are considered advocates of just war.
[28] Chinkin and Kaldor, p. 133.
[29] Henriksen, p. 251.
[30] Ibid, p. 273 f.
[31] Chinkin and Kaldor, p. 132.
[32] Refers to the time post the adoption of the Charter of the United Nations (1945–).
[33] Clapham, p. 101 f.; Chinkin and Kaldor, p. 133.

adoption of the Charter of the United Nations in 1945. Article 2(4) of the UN Charter confirms the obligation of the contracting parties to refrain from resorting to the threat or use of force. However, the use of force can be lawful under two circumstances according to the Charter. Either when authorized by the Security Council or as an act of self-defence if an armed attack occurs. These exceptions constitute an expression of the jus ad bellum since they determine causes for when the use of force is legal. Although, the purpose of the modern and the traditional view of just causes differ. The modern view emphasizes the right to self-defence while the traditional view focus on the justness of the cause itself.[34] The essence of this paradigm shift is however, that modern regulation seeks to prevent war rather than justifying it. For this reason, the modern jus ad bellum, is sometimes referred to as *jus contra bellum*, i.e. the law against war.[35]

2.2.2 Armed Conflict

Before the adoption of the UN Charter, it was customary for States to declare war when initiating a conflict. Primarily, it was therefore the subjective perception of the aggressor that concluded whether a war existed or not.[36] The common Article 2(1) of the Geneva Conventions states that the "Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". The conventions are of universal application and would apply to any armed conflict.[37] Covering all conflicts between States, regardless of whether a declaration of war has been made, the article determines when the IHL becomes applicable. However, the article does not determine when such an armed conflict, as is referred to in the article, exists.[38] According to Clapham, the threshold for when an armed conflict exists is low.[39] Nevertheless, he emphasizes the significance of intent on the part of the aggressor while disregarding situations whereas the

[34] Chinkin and Kaldor, p. 134
[35] Delerue, p. 273; Sassòli, p. 242, Kritsiotis, p. 46.
[36] Linderfalk, p. 205.
[37] Clapham, p. 242.
[38] Akande, p. 11; Clapham, p. 242.
[39] Clapham, p. 242.

prohibition of force may have been breached but merely because of a mistake, as armed conflicts.[40] Akande refers to the ICTY definition of armed conflict in the *Tadić jurisdiction* where the Appeals Chamber concluded that an armed conflict exists "whenever there is a resort to armed force between States".[41] In accordance with the ICTY definition, the Russo-Ukrainian conflict post 24 February 2022 should be designated as an IAC considering it involves two States using armed force, implicating that these are considered belligerents.

2.3 The Law of Neutrality

Treaties concerning neutrality in war have been entered into by State parties since the 16th century.[42] The principle, was however, codified in the Hague Conventions of 1899 and 1907. Following the industrial revolution during 18th and 19th centuries a considerable increase of the use of maritime trade routes was seen around the world which prompted the need of regulations on the interactions between States.[43]

Some researchers of international law argue that the law of neutrality have fallen into desuetude due to its anachronistic motives originating from the beginning of the 20th century.[44] Other researchers suggest that the law is still applicable, although confirming that the status of the law has been altered since the adoption of it.[45] For instance, there are more recent legal provisions than the Hague Conventions wherein the principle have been incorporated, such as the Geneva Conventions from 1949 and the first Additional Protocol from 1977.[46] For this reason, the desuetude argument is invalid according to Heller and Trabucco, who furthermore raises the rather recent invocation of the law of neutrality during the 2003 Invasion of Iraq as an argument for its continued applicability.[47] There has however, been split opinions on the

[40] Ibid, p. 243.
[41] Akande, p. 13; Tadić Jurisdiction, para. 70.
[42] E.g. The Treaty of Saint-Jean-de-Losne (1522).
[43] Nasu, p. 127.
[44] Nasu, p. 127; Krajewski, 09.03.2022.
[45] Heller and Trabucco, p. 5 f.
[46] Geneva Convention II, Art. 5; Additional Protocol I, Arts. 2(c) and 19; Ferro and Verlinden, p. 30.
[47] Heller and Trabucco, p. 6.

applicability of the law ever since the adoption of the UN Charter and the matter is far from settled.[48]

2.3.1 Violating the Law of Neutrality

The law of neutrality entails rights and obligations for both neutral and belligerent States. These reflect customary international law and derive from three principles found in the Hague Conventions V and XIII.[49] Impartiality (a), implies that measures of restriction or prohibition taken by neutral States must be impartially applied to both belligerents.[50] The principle of abstention (b) prohibits neutral States from supplying, whether directly or indirectly, a belligerent State with war material of any kind or assisting it with the recruitment of combatants.[51] The principle of prevention (c) prohibits neutral States from allowing its territory to be used for activities that according to the Convention would constitute a violation of the neutrality.[52]

Since the beginning of the IAC between Russia and Ukraine, numerous third States have assisted Ukraine's war-fighting and war-sustaining efforts by both economic and military measures through unilateral as well as bilateral and multilateral arrangements.[53] This circumstance forces a return to the question of the relevance of the law of neutrality. Due to the support given by third States to Ukraine, it is indisputable that the States in question have not acted in accordance with the principles of impartiality, abstention and prevention.

This abandoning of the principles is a development of State practice that has evolved since the adoption of the UN Charter in 1945 and is according to Heintschel von Heinegg a result of the inability of the traditional law of neutrality to meet modern requirements.[54] Simultaneously, the usage of terms

[48] Heintschel von Heinegg, (2007), p. 547 f. & 556.
[49] Boothby and Heintschel von Heinegg (2018), p. 377, Nasu, p. 126.
[50] Hague Convention V, Art. 9; Hague Convention XIII, Art. 9.
[51] Hague Convention V, Art. 4; Hague Convention XIII, Art. 6.
[52] Hague Convention V, Art. 5; Hague Convention XIII, Arts. 8 & 25.
[53] Antezza, Bushnell, Frank A., Frank P., Franz, Kharitonov, Rebinskaya, & Trebesch, Sheet: Country Summary.
[54] Heintschel von Heinegg (2007), p. 548.

such as “qualified neutrality”, “benevolent neutrality” or “non-belligerency” have become more frequent among scholars and domestic military manual authors to explain the behavior of States during armed conflicts.[55] In the US Military Manual,[56] the UN Charter is described as to have partly modified the rules of the law of neutrality.[57] This view, i.e. the relationship between the two independent legal frameworks, is shared by Heintschel von Heinegg who adds that the development reflects that of customary international law.[58]

2.3.2 Qualified Neutrality

In lieu of complying with the duties of neutrality, a State that adopts the intermediate position of qualified neutrality is on the side of one of the belligerents, without becoming a belligerent itself.[59] The other two concepts mentioned in the previous section, namely benevolent neutrality and non-belligerency, were vigorously repudiated by Heintschel von Heinegg who described them as “poor excuses for a violation of the duties of abstention and impartiality”.[60]

The concept of qualified neutrality is a rather clear departure from the traditional law of neutrality.[61] It represents an adaptation to the UN Charter’s prohibition on the use of force since the duties of the approach depend on whether one of the belligerents have been authoritatively identified as an aggressor, i.e. a violator of the jus ad bellum, by the Security Council or not.[62] If so – and this is where the *intermediacy* becomes apparent – States are not bound by the principle of impartiality, allowing them to support aggrieved States.[63] While there is disagreement as to whether this intermediate position

[55] Clapham, p. 58; Ferro and Verlinden, p. 32; Heintschel von Heinegg (2007), p. 547 f; DoD Manual, p. 952 (para. 15.2.2).
[56] DoD Manual.
[57] Ibid, p. 953 (para. 15.2.3).
[58] Heintschel von Heinegg (2018), p. 376.
[59] Heintschel von Heinegg (2007), p. 548.
[60] Heintschel von Heinegg (2018), p. 376.
[61] Referring to the textualistic interpretation of the Hague Conventions V and XIII.
[62] Boothby and Heintschel von Heinegg (2018), p. 374.
[63] Clapham, p. 59; Heintschel von Heinegg (2018), p. 376.

exists at all,[64] its definition arguably describes the positions taken by Western States in the Russo-Ukrainian IAC rather accurately.

However, as referred to above, an authoritative identification of the aggressor made by the Security Council, in accordance with Chapter VII of the UN Charter, is required before States obtain the right to entitle themselves as being in a state of qualified neutrality. Regarding the Russo-Ukrainian IAC, the Security Council has been stymied in its attempt to deem Russia the aggressor of the conflict due to Russia's veto against the resolution proposing it.[65] Clapham recognizes this *processual* issue and states that:

> [H]owever, one might have to admit that in some cases the Security Council may not come to such a conclusion and yet a state would feel obliged to react to an obvious aggression by arming the victim state. If obligations of Neutral Status apply as a matter of international law then the easiest justification for the otherwise wrongful action would be for the assisting state to consider its breach of its obligations as a reprisal or countermeasure directed at the aggressor state.[66]

Such an approach, i.e. where States make unilateral decisions about who is the aggressor in a conflict while disregarding the decision of the Security Council, could however imperil the legitimacy of international law.[67] It can therefore be said that it is in the interest of all States to not intervene in a conflict in which an aggressor has not been determined. However, there is a conflict of interests between on the one hand, preserving the functioning of the Security Council as the highest authority in case of armed conflicts. On the other hand, the complex situation where the obvious aggressor of an IAC is a permanent member of the Security Council. Clapham is not the first author to highlight this issue. As early as in 1948, Jessup acknowledged the deficiencies that the right to veto resolutions in the Security Council entails.[68]

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[64] Ferro and Verlinden, p. 33.
[65] Security Council Report, 02.25.2022; Heller and Trabucco, p. 12 f.
[66] Clapham, p. 59 (n. 78).
[67] Heintschel von Heinegg, Lieber Institute (2022).
[68] Jessup, p. 203.

In a conflict between State A and B, where A is a permanent member of the Security Council, a determination of the aggressor will entirely depend on the intentions of State A. If it chooses to, it can block the Security Council from deciding on the matter.[69] The possibility to invoke qualified neutrality is prevented thereof, leaving the matter unsolved regarding the ongoing IAC between Russia and Ukraine. Jessup referred to the problem as the "gap in the Charter"[70], and stated (in 1948) that he considered it unlikely that the gap would be filled soon.[71] A prediction which now, decades later, can be considered rather accurate bearing in mind that the *gap* has not yet been filled and that the issue is still highly relevant.

Some international lawyers advocate an approach to enable an adoption of the principle of qualified neutrality although the incapability of the Security Council. For instance, Heintschel von Heinegg stated that the circumstances regarding the Russo-Ukrainian IAC entail three reasons to take a nuanced position on the requirements for qualified neutrality. Firstly, the aggressor State, i.e. Russia, is the one stymieing the Security Council from applying its enforcement mechanism under Chapter VII of the UN Charter. Secondly, the UNGA resolution ES-11/1 was adopted on 2 March 2022 during an *emergency special session* with 141 States voting to condemn Russia as an aggressor in the IAC. Thirdly, the Russian military operations in Ukraine are apparent acts of aggression.[72] This approach is in fact a departure from what was earlier considered necessary for qualified neutrality. However, it does fill the *gap* in the UN Charter and it does so with the approval of a vast majority of the voting States of the General Assembly. Implying that it does not imperil the legitimacy of international law.

In summary, it is now rather apparent that whether the law of neutrality applies, is an unresolved issue of international law. Parts of it, the duty of impartiality for instance, have been ignored in State practice during the Russo-Ukrainian IAC. Hence, the law is explained to have fallen into

[69] Ibid, p. 202.
[70] Ibid, p. 203.
[71] Ibid, p. 204.
[72] Heintschel von Heinegg, Lieber Institute (2022).

desuetude by some international lawyers. States do however continue to endorse the law of neutrality, albeit in new shapes and principles where 'qualified neutrality' seems to be the strongest contender.[73] The modern approach does not derive from treaty or customary law but from recurring State practice which represents how States in fact operate internationally.

2.4 The Inherent Right of Self-Defence Under the UN Charter

As already mentioned, Art. 51 of the UN Charter provides States with an inherent right to use force as an act of self-defence if an armed attack occurs. Under the article, self-defence can be invoked by the aggrieved State individually, or by any other Member State of the UN as a measure of collective self-defence. To determine whether third States can support Ukraine without violating the provisions of the UN Charter the following must be examined: (a) what actions constitute the use of force? And, (b) what is required before a third State lawfully can use force as an act of collective self-defence? The first question aims to determine whether a violation of the prohibition on the use of force occurred in connection with the escalation of the IAC on 24 February 2022. A conclusion on this matter will tell if countermeasures may be taken. The second question aims to determine the possibilities for third States to use force in collective self-defence.

2.4.1 What Actions Constitute the Use of Force?

Investigating what actions violate the prohibition of the use of force is crucial before determining anything about the rights and obligations of third States relative to the conflict and its belligerents. Has the prohibition on the use of force been violated, countermeasures such as self-defence are justified by the UN Charter. The core of this issue is whether the measures taken by third States in support of Ukraine, constitute such countermeasures. Hence, the use of force against Ukraine must be investigated.

[73] E.g. the dismissal of the other concepts; Heintschel von Heinegg (2018), p. 376.

In the *Nicaragua Case*, the Court confirmed the validity of the principle of the prohibition of the use of force as customary international law.[74] Additionally, the Court concluded that the principle of non-use of force was not to be considered "only a principle of customary international law but also a fundamental or cardinal principle of such law"[75], i.e. a peremptory norm of international law (jus cogens).[76] There is thus no reason to examine the applicability of the law, which was necessary regarding the law of neutrality.

The relationship between the use of force and an armed conflict can be described as was outlined in section 2.2.2 with reference to the *Tadić jurisdiction*, namely, the conflict between Russia and Ukraine is an IAC because of the resort to armed force. However, it should be noted that in the *Nicaragua Case*, the Court found it necessary to further define the implication of the term *use of force* and therefore distinguished the gravest forms of use of force from lesser grave forms.[77] The necessity is explained by the possible countermeasures that should be considered proportionate to take in response to the force that one State is being exposed to.[78] The different forms of the use of force are termed *intervention*, being the lesser grave form, and *armed attack*, i.e. the most grave form of the use of force.[79] This distinction was confirmed through the ICJ judgement on the *Oil Platform Case* in 2003.[80] Regardless the degree of gravity, countermeasures may be taken by the victim State. However, the Court established that an intervention does not entitle a right to collective self-defence, while an armed attack does.[81] An act taken by one State against another State, can thus be assessed as a use of force without necessarily implying a right for the aggrieved State to use force itself in self-defence.[82] If such an intervention takes place, the appropriate response would be to conduct non-forcible countermeasures, excluding the use of force.[83]

[74] Nicaragua Case, para. 190.
[75] Ibid, para 188.
[76] Kritsiotis, p. 48.
[77] Nicaragua Case, para 191.
[78] Kritsiotis, p. 52.
[79] Ibid, p. 50 (n. 125).
[80] Oil Platform Case, para. 51.
[81] Nicaragua Case, para. 249.
[82] Kritsiotis, p. 52.
[83] Chinkin and Kaldor, p. 139.

Consequently, the designated degree of gravity of the force that has been used determines what countermeasures may be taken by the victim State.

2.4.2 Self-Defence

Art. 51 of the UN Charter states that any measures taken as an act of self-defence shall be reported to the Security Council. Apart from this, the right to decide to use force as a measure of self-defence is a right which every State are rightsholders of.[84] Art. 51 therefore waives the otherwise sovereign right of the Security Council to decide on the use of force, as set out in Arts. 39–41 of the UN Charter.

An issue with this effect of the law was recognized by Chinkin and Kaldor who stated that the threshold for the use of force potentially is not high enough. The two criticize the exclusive focus on an *armed attack* as means of using of force in self-defence, noting that this reflects the law on violence used in *inter-personal relations* "to which violence in self-defence is a justifiable response".[85] According to Chinkin and Kaldor the linkage between the international use of force between States and the use of violence between humans expresses a sexed meaning of Art. 51 of the UN Charter that affirms the role of "Western canons of masculinity to define danger, violence and aggression".[86] Such an assessment of the degree of the force used that was outlined in the previous section is however decisive in the matter, which is being confirmed by the authors who refer to both the *Oil Platform Case* and the *Nicaragua Case* but also the Russian annexation of Crimea in 2014 and the since then ongoing conflict in the eastern part of Ukraine.[87]

In the *Nicaragua Case*, the Court concluded that the United States violated the prohibition of the use of force when it supplied the *contras* (various rebel groups in opposition to the Nicaraguan government) with arms.[88] The same conclusion would most likely be made regarding the provision of arms to

[84] UN Charter, Art. 51.
[85] Chinkin and Kaldor, p. 136.
[86] Ibid.
[87] Ibid, p. 137–139.
[88] Nicaragua Case, para. 228.

Ukraine made by third States.[89] The important difference between the two cases is however that in the latter, the right to use force is granted due to the right of self-defence.

In summary, the escalation of the conflict on 24 February 2022 constituted an armed attack, i.e. the most grave form of the use of force, implying the right of Ukraine to use force in self-defence. The right of collective self-defence arises in connection with the right to individual self-defence provided that the force that is being used is of such a degree of gravity that is outlined in the *Nicaragua* and *Oil Platform Case*. Both rights are limited to be considered in accordance with the Charter only if the intended use of force is reported to the Security Council.[90] It is now clear that third States are entitled to use force in collective self-defence. Whether the sharing of military intelligence would count as use of force or not therefore lacks relevance.

[89] Heller and Trabucco, p. 4.
[90] UN Charter, Art. 51.

3 Discussion and Conclusion

The analysis will be divided into sections that separately describes the compliance of sharing military intelligence with the respective regulation. This division is made because of the distinctiveness of the legal framework of international law which is described in section 1.4. The division is thus necessary to enable a conclusion that answers the research question in a manner which corresponds with the structure of the framework. This entails two independent evaluations of the respective regulations in relation to the research question.

3.1 The Law of Neutrality

The law of neutrality is indisputably a contentious principle of law. It seems as if there are mainly two different positions regarding its applicability. The first position does not view the law as completely unaltered since its adoption in 1907, nonetheless it contends that it is applicable in relation to modern conflicts and that the principles which derive from the Hague Conventions rule. The other position, hereinafter referred to as *qualified neutrality*, sees the law of neutrality in the light of the development of international law since the adoption of the UN Charter by taking a somewhat interdisciplinary stance between the law of neutrality and the UN Charter. The interdisciplinary position between the regulations provides a possibility for States to take an intermediate position in conflicts, i.e. being somewhere in between a neutral and a belligerent State.

Additionally, a third position on the applicability of the law could arguably be said to exist. This position completely contends that the law of neutrality does not apply due to that it has fallen into desuetude. However, the Hague Conventions have not been derogated and the law of neutrality is considered to constitute customary international law, this gives reason to dismiss the third position.

3.1.1 The First Position

Taking this position renders the conclusion that the sharing of military intelligence by third States to Ukraine is illegal because the sharing would violate the duty of impartiality. Such a straightforward conclusion as this is possible due to the strict character of the duties enumerated in the Hague Conventions V and XIII. In order to comply with them, States must remain neutral in all aspects of the conflict and treat the belligerents equally. Thus, only a complete abstention from supporting Ukraine would be in accordance with the law of neutrality.

3.1.2 Qualified Neutrality

Would the principle of qualified neutrality be considered the ruling version of the law of neutrality, the conclusion would be that the sharing of military intelligence *can* be lawful. The uncertainty lies in the assessed requirement of a determination of the aggressor. If such a determination has been made by the Security Council, third States may adopt an intermediate position entitling them to support the aggrieved State. Some international lawyers have advocated a nuanced position on the requirement due to the *gap* in the Charter which stymies the Security Council from applying its enforcement mechanisms. As this is the case in the Russo-Ukrainian IAC, i.e. an aggressor has not been determined by the Security Council, the nuanced position proposes that a determination of the aggressor made by the General Assembly equally ought to justify an adoption of the position of qualified neutrality.

In my opinion, the nuanced position is a reasonable and pragmatic potential solution to the gap of the Charter which undeniably has been a long-standing issue of international law. As was outlined in section 2.3.2, there is a risk linked with unilateral decisions on who constitutes the aggressor. The resolution that condemned Russia the aggressor was however backed by 141 States and opposed only by the *usual suspects*, a rather expected circumstance that should not be considered relevant. In light of this, my opinion is that it should be considered possible for a third State to adopt an intermediate

position in the conflict, making it possible for it to supply Ukraine with military intelligence without violating international law.

3.2 The UN Charter

As stated in section 1.1, the use of CYBINT can under certain circumstances be considered to constitute such a use of force that is being referred to in Art. 2(4) of the UN Charter. Such a circumstance exists if the consequence of the use results in, inter alia, the crippling of military logistics systems that affect the possibility to conduct military operations. Thus, the sharing of intelligence that can come to cause similar results ought to be equally considered to constitute such a use of force. The relationship can be compared to that of the provision of arms, which was examined in the *Nicaragua Case*.

However, the right to collective self-defence entails an irrelevancy regarding the question of whether the sharing of intelligence constitutes a use of force or not due to that the right to self-defence implies a right to use force. It can thus be said that the sharing of intelligence is legal according to the UN Charter. There are however specific requirements that must be met before the right to self-defence exists. These are examined in section 2.4.2 and, in short, imply, that an armed attack must have occurred, also, the measures taken in self-defence must be reported to the Security Council. Due to the generally confidential nature of military intelligence, it is however rather unlikely that details, or information about the suppliance at all, are being reported to the Security Council. Furthermore, and as stated in the delimitations, it would be relevant to continue the investigation of what the intelligence sharing implies regarding state responsibility, the use of countermeasures and if the use of force in self-defence implies that third States become belligerents.

3.3 Conclusion

The sharing of military intelligence can be justified through the principle of qualified neutrality as well as the UN Charter, but not through the traditional law of neutrality. In my opinion, the justification implicates a strengthening of the jus ad/contra bellum since it reaffirms the fundamental objectives with

both the law of neutrality and the UN Charter, which is to secure world peace. Of course, the intervention of other States may seem contradictory to the peacekeeping purpose since it entails a risk for further escalation of the conflict. However, it cannot be neglected that a textbook example of an armed attack has occurred and the fact that the international community can practice the right of collective self-defence in response to it proves the robustness of the UN Charter.

Nevertheless, the risk of escalation truly is imminent. The potential consequence of an escalation probably explains why the measures taken by third States *purposefully* have been limited to supporting Ukraine by supplying it with resources to defend itself rather than actually intervening with armed forces.

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