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Legal Sidebar

International Neutrality Law and U.S. Military Assistance to Ukraine

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The United States, the European Union (EU), and others have supplied many forms of security assistance to Ukraine in the weeks since Russia's invasion. Recent U.S. assistance to Ukraine, discussed in an earlier In Focus, ranges from ammunition to anti-aircraft weapons to communications systems. At the same time, the United States has stopped short of sending some military equipment requested by Ukrainian President Volodymyr Zelensky, such as combat aircraft. Deciding which arms to provide raises a variety of legal, political, and practical considerations, including the potential for escalation with Russia, the Ukrainian military's capacity to operate the equipment, and the risk that Russia could reverse engineer captured equipment. While international law is just one facet of this calculus, media outlets report that the Biden Administration discussed questions about the legality of U.S. security assistance, and observers have analyzed whether supplying arms could violate the international law of neutrality.

International neutrality law governs the legal relationship between countries that are not taking part in an international armed conflict (*neutral states*) and those that are engaged in such a conflict (*belligerents*). The international community developed the principles of the international law of neutrality in an era before the Charter of the United Nations (U.N.) prohibited using force as a tool to resolve international conflict. Scholars have described the law of neutrality as an "old body of law" with a "slightly musty quality" that does not always translate to modern warfare.

Russia and Ukraine are engaged in an international armed conflict and, thus, are belligerents. Under traditional conceptions of neutrality, sending "war material of any kind" to Ukraine or any other belligerent would violate a duty of neutrality; however, some countries, including the United States, have adopted the doctrine of *qualified neutrality*. Under this doctrine, states can take non-neutral acts when supporting the victim of an unlawful war of aggression. For the reasons discussed in an earlier Sidebar, Ukraine has firm grounds to contend that it is such a victim and is acting in self-defense. Under these circumstances, arms assistance to Ukraine would generally be lawful under the qualified neutrality doctrine, provided that Ukraine complies with other legal frameworks governing the conduct of hostilities.

Even if qualified neutrality did not apply in this instance and U.S. security assistance breached a duty of neutrality, international law would limit the breach's legal consequences. For example, security assistance to Ukraine would not permit Russia to use force against the United States in response to a neutrality

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violation unless Russia could satisfy an exception to the U.N. Charter's prohibition on use of force. Nor would a violation of neutrality, on its own accord, make the United States a *co-belligerent* or party to the conflict fighting alongside Ukraine. Questions of co-belligerency implicate other legal paradigms and are not resolved by neutrality law alone.

This Legal Sidebar discusses international neutrality law and its relationship with U.S. security assistance to Ukraine. (Another CRS In Focus discusses the domestic laws concerning neutrality, including restrictions on U.S. nationals serving in a foreign military.)

Sources and Requirements of the Law of Neutrality

The law of neutrality has its roots in 17th and 18th century state practice in which countries developed a system of reciprocal rights and obligations for neutral states and belligerents. Neutral states have a duty not to participate in hostilities and to be impartial in their conduct toward belligerents. In return, belligerents are obligated to respect neutral states' territory, and neutrals are permitted to trade with all sides of the conflict if they do so in an impartial way. Countries eventually came to accept certain principles of neutrality as part of customary international law—a body of law that is derived from state practice followed out of a sense of legal obligation.

Many facets of neutrality law were defined in two treaties adopted at a 1907 peace conference:

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

Under Hague V and XIII, neutral states cannot provide "ammunition, or war material of any kind whatever" to belligerents. The treaties exempt humanitarian assistance from this prohibition, and they do not require neutral states to prevent private companies from selling munitions and war material. Neutral states also have an obligation to prevent belligerents from committing certain hostile acts on neutral states' territory, and Hague V and XIII require neutrals to intern and detain belligerent forces found in their territory. As part of their corresponding set of duties, belligerents must treat neutral states' territory as inviolable. Belligerents may not move troops, munitions, or supplies, across neutral territory, and they may not set up communication apparatuses or recruit combatants, among other things, on neutral territory. Although Hague V and Hague XIII each have fewer than 35 state parties, the United States, Ukraine, and Russia have ratified both treaties.

Some observers view Hague V and XIII as reflecting customary international law, which is binding on all countries absent an objection. Others disagree with this view. In 2016, the U.S. Department of Defense observed that "it may be incorrect to assume" that Hague V and XIII reflect customary international law when "current events are quite different" from the time the treaties were drafted. Some commentators have gone so far as to question whether states so frequently ignore neutrality obligations that the treaties have fallen into a state of obsolescence and are no longer binding. The International Court of Justice has not directly addressed the customary status of these treaties, but it did state in an advisory opinion that "the principle of neutrality, whatever its content, … is of a fundamental character" that applies in all international armed conflicts.

20th-Century Changes: Qualified Neutrality and the U.N. Charter

Some aspects of the law of neutrality have been overtaken by 20th-century developments. Under the U.N. Charter, for example, the U.N. Security Council can decide upon measures necessary to respond to threats and acts of aggression. U.N. member states must "accept and carry out" the Security Council's decisions

and give the U.N. "every assistance" in its actions. Some Security Council decisions can require member states to support military operations, impose trade restrictions, and take other actions that could ordinarily violate neutral states' obligations. In those cases, the U.N. Charter prevails over neutrality law.

The doctrine of qualified neutrality (also called benevolent neutrality and non-belligerency) also arose in the 20th century. International law historically contemplated that states could vindicate their rights by resorting to war in a wide array of circumstances. After World War I, the international system began to transform following efforts to limit or prohibit war as a method for resolving interstate conflict. This paradigm shift culminated in Article 2 of the U.N. Charter, which prohibits use of force in most cases and requires member states to settle disputes by peaceful means. As part of this evolution in international relations, states and scholars began to contend that a binary system of neutrals and belligerents is no longer viable, and that modern international law allows for an intermediate position in which countries can actively assist victims of unlawful wars. Not all states have openly adopted the doctrine of qualified neutrality, however, and some legal observers argue against its acceptance.

Consequences for Neutrality Violations

Hague V and Hague XIII are largely silent on the remedies available for neutrality violations, but states and scholars generally agree on certain principles. A violation of the law of neutrality does not, on its own accord, amount to an "act of war" that creates a legal justification for another state to use force in response. The U.N. Charter permits states to use force in only three circumstances: approval from the Security Council, consent of the affected state, or self-defense meeting the standards of Article 51. States in the modern era, including Russia, use the U.N. Charter's terminology, not neutrality law, to describe the legal rationale for their use of force.

A single act could violate both a duty of neutrality and justify the use of force—but only if the act independently satisfied one of the U.N. Charter's exceptions. For example, if a state breached its neutrality obligations by launching an armed attack against a country engaged in an ongoing war, Article 51 could permit the attacked state to use force in self-defense. If a state breached a neutrality duty in a lesser manner—for example, by failing to detain a belligerent's ship—the U.N. Charter would not permit use of force in response.

Breaching a neutrality obligation also does not necessarily terminate a state's neutral status. Rather, the state harmed by the breach can choose to continue the neutral relationship, especially if the breach is "slight and unimportant." If a belligerent did choose to end the neutral relationship, the belligerent might also contend that it can take necessary and proportionate countermeasures short of military force.

Co-Belligerency: Becoming a Party to an Existing Conflict

When considering the legal impact of providing military assistance to a state engaged in ongoing armed conflict, the law of neutrality intersects with other legal frameworks. In particular, the question of when assistance to a country in a conflict makes the assisting state a party to that conflict—or co-belligerent—implicates other legal paradigms. The four Geneva Conventions of 1949 and international law governing state responsibility are relevant to the issue of when military assistance crosses a threshold to co-belligerency.

The Geneva Conventions provide rules governing the conduct of hostilities in international armed conflicts (i.e., conflicts between states, such as Russia's invasion of Ukraine) and non-international armed conflicts (e.g., conflicts between a state and an organized armed group, such as a separatist group). The United States is a party to the four Geneva Conventions of 1949 and one of the Convention's three additional protocols. The Conventions place certain obligations on each "[p]arty to the conflict," but they do not provide great detail on what actions make a state or group a "party" in this context. Some

commentators, such as the International Committee of the Red Cross, have sought to articulate more thorough standards for determining when a state's assistance is sufficiently connected to a belligerent's combat operations that the assisting state becomes a party to the conflict. However, no treaty provision or accepted rule of international law defines the threshold in detail.

The Draft Articles of State Responsibility for Internationally Wrongful Acts provide some rules for evaluating when conduct can be attributed to a state that supports another group. Some provisions of the Draft Articles reflect customary international law, but there is still significant debate on their customary status. Under Article 16, a supporting state can be responsible for violating international law if it "aids or assists" another state with knowledge of the circumstances of the violation, among other requirements. Article 8 allows actions to be imputed to a supporting state when the supporting state exercises control of the persons carrying out the conduct in question—an issue addressed in international tribunals.

The paradigm of state responsibility is premised on the notion that there has been some internationally wrongful conduct, and its rules address whether those acts can be attributed to a state. In the context of U.S. military assistance to Ukraine, however, the underlying wrongful conduct could be absent given Ukraine's legal right to use force in self-defense under Article 51 of the U.N. Charter. As such, U.S. military assistance to Ukraine may not neatly fall into the rubric of state responsibility.

Considerations for Congress

Congress may wish to consider neutrality law as it addresses proposals to authorize additional security assistance to Ukraine, but the law's antiquated nature and uncertain integration in the U.N. Charter era make its application less than straightforward. Whether U.S. arms assistance comply with neutrality law depends in large part on the status of the qualified neutrality doctrine.

The United States used the qualified neutrality doctrine in the World War II era, and thus applying it in response to Russia's invasion would not depart from that past legal interpretation. Prior to the United States' entry into World War II, then-Attorney General (and later-Supreme Court Justice and chief U.S. prosecutor at the Nuremburg Tribunals) Robert Jackson articulated the doctrine when defending the legality of the U.S. program to lend and lease war supplies to the United Kingdom. According to Jackson, the United States may provide "all the aid we choose" to a government defending an unlawful invasion, because 20th-century developments "destroyed the historical and juridical foundations of the doctrine of neutrality conceived as an attitude of absolute impartiality in relation to aggressive wars." The Ukraine Democracy Defense Lend-Lease Act of 2022 (S. 3522), which passed in the Senate on April 6, 2022, adopts the lend-lease model that prompted Jackson's defense of qualified neutrality. The bill would authorize the President to lend or lease defense articles to Ukraine and other countries impacted by the Russian invasion.

Some observers have recommended recalibrating U.S. security assistance to provide more "offensive" weapons to Ukraine. Neutrality law generally does not use the terminology of "offensive" and "defensive" military equipment. Hague V and XIII use a broader blanket prohibition on all "war material of any kind." Accordingly, U.S. officials' reference to the defensive nature of its assistance may reflect more practical considerations, such as the potential for escalation, than constraints in neutrality law.

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