

Law of Neutrality

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Russia-Ukraine: Full Spectrum Conflict and International Law

U.S. Naval War College, Newport, Rhode Island

13-15 December 2022



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Traditional Law of Neutrality

- All states not party to an IAC are considered **neutral states**
- Duty of neutral states
 - Observe strict **impartiality** between the belligerents
 - **Abstain** from providing war-related goods or other military assistance to the belligerents



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Post-Charter Neutrality

- States may violate the law of neutrality if the **UNSC** has
 - **identified** a specific State as an **aggressor** and
 - **decided** to take preventative or enforcement **action** against the aggressor under Chapter VII
- **Article 2(5)** requires member States to give the UN “every assistance in any action it takes in accordance with the...Charter” and to “refrain from giving assistance to any state against which the UN is taking preventive or enforcement action”
- **Article 25** requires member States to comply with the decisions of the UNSC, to include support for a UN action at the expense of their neutrality
- Absent a decision by the UNSC, the law of neutrality remains in full force and neutrals must observe strict impartiality between the parties to the conflict
- UNSC action not possible in the case of Russia-Ukraine Conflict given Russia’s status as a permanent member of the Council



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Military Aid

- Since Feb. 24, over **40** states have provided billions of dollars in lethal military aid, including weapons and ammunition, to Ukraine
- Clearly inconsistent with the traditional law of neutrality

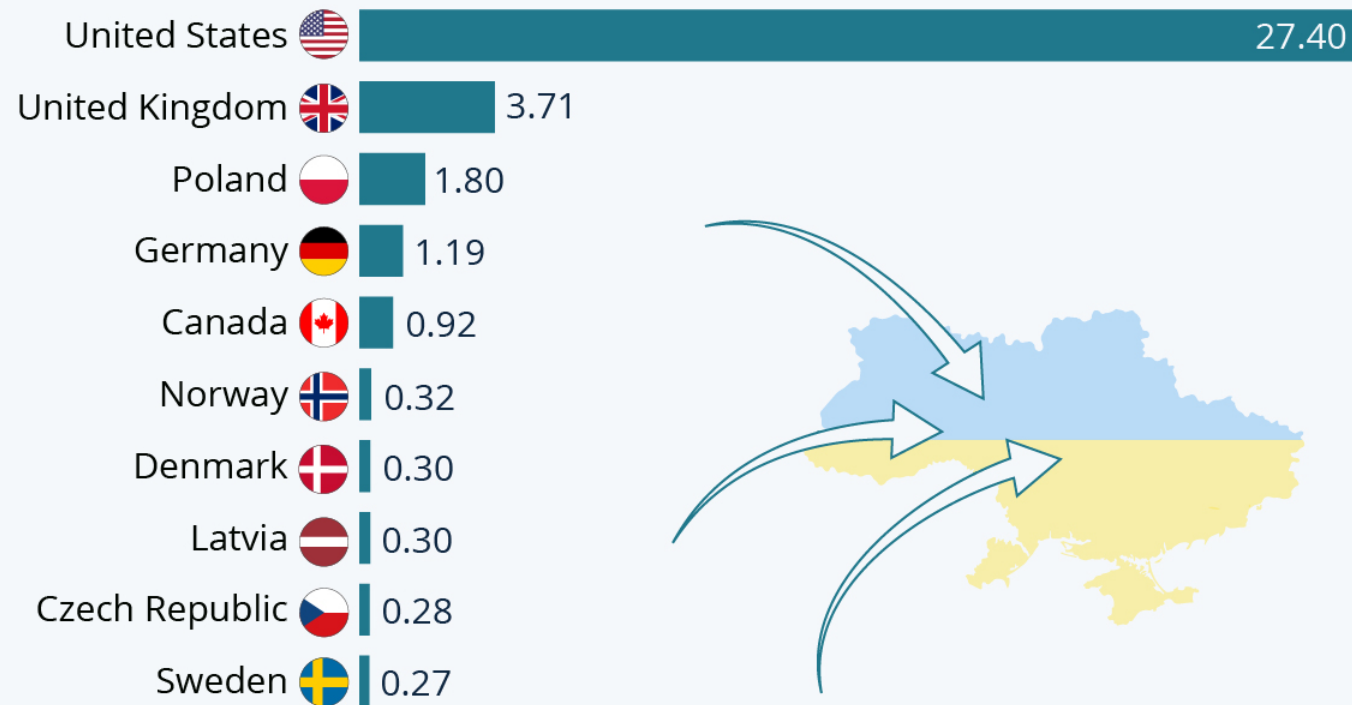


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Where Military Aid to Ukraine Comes From

Countries pledging most arms/weapons transfers to Ukraine, Jan 24 to Oct 3, 2022 (in billion U.S. dollars)



May include other military aid (protective equipment).

Currencies converted using September averages

Source: IfW Kiel



Qualified Neutrality

- After treaties outlawed war as a matter of national policy, the United States and other States took the position that neutral States could **discriminate** in favor of States that were **victims** of wars of aggression
- Neutral States supplying weapons and other war material to the victim of aggression are **not** acting **contrary** to the law of neutrality
- **Not** universally accepted position

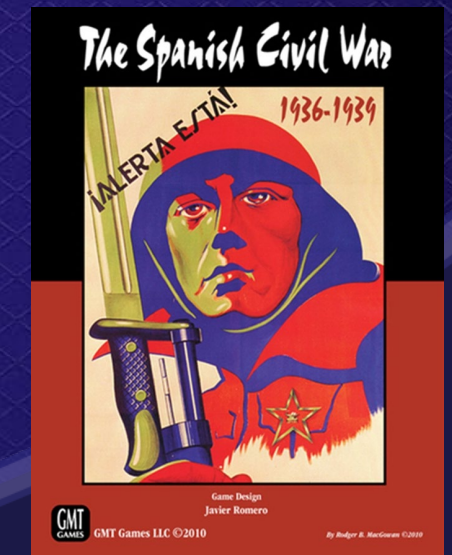


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Pre-Pearl Harbor

- U.S. leading advocate of qualified neutrality
- Neutrality Acts of
 - 1935 – **prohibited** (inter alia) export of “arms, ammunition, and implements of war” from the U.S. to foreign nations at war
 - 1937 – prohibited (inter alia) U.S. merchant ships from transporting arms to belligerents and allowed the President to **extend** the export **embargo** to any additional “articles or materials”
 - **Cash-and-Carry Exception** – President authorized to allow belligerent nations to acquire any items **except arms** (e.g., oil and other raw materials) from the U.S., so long as they immediately paid for such items and carried them on non-U.S. ships
 - 1939 – **lifted** the arms embargo and put all trade with belligerent nations under the terms of “**cash-and-carry**”



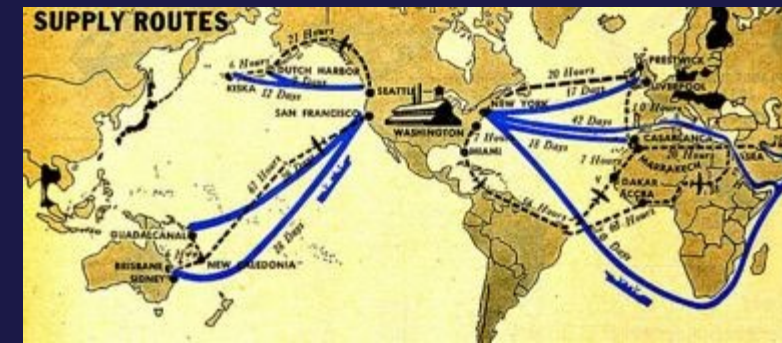
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Lend-Lease Program (1940)

- Allies provided aid under the Lend-Lease program
- U.S. would provide supplies but would **defer payment**
- U.S. **justification** for these actions
 - Out of a sense of moral responsibility
 - National security concerns
 - Buy time to prepare the U.S. armed forces for war



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Violating Neutral Status

- Neutral states that fail to comply with their duty of abstention and impartiality **may** lose their neutral status and become a **party** to the armed conflict
 - Conducting an **armed attack** against one of the belligerents
 - Providing **actionable intelligence** to one of the belligerents that allows that belligerent to successfully attack the other belligerent

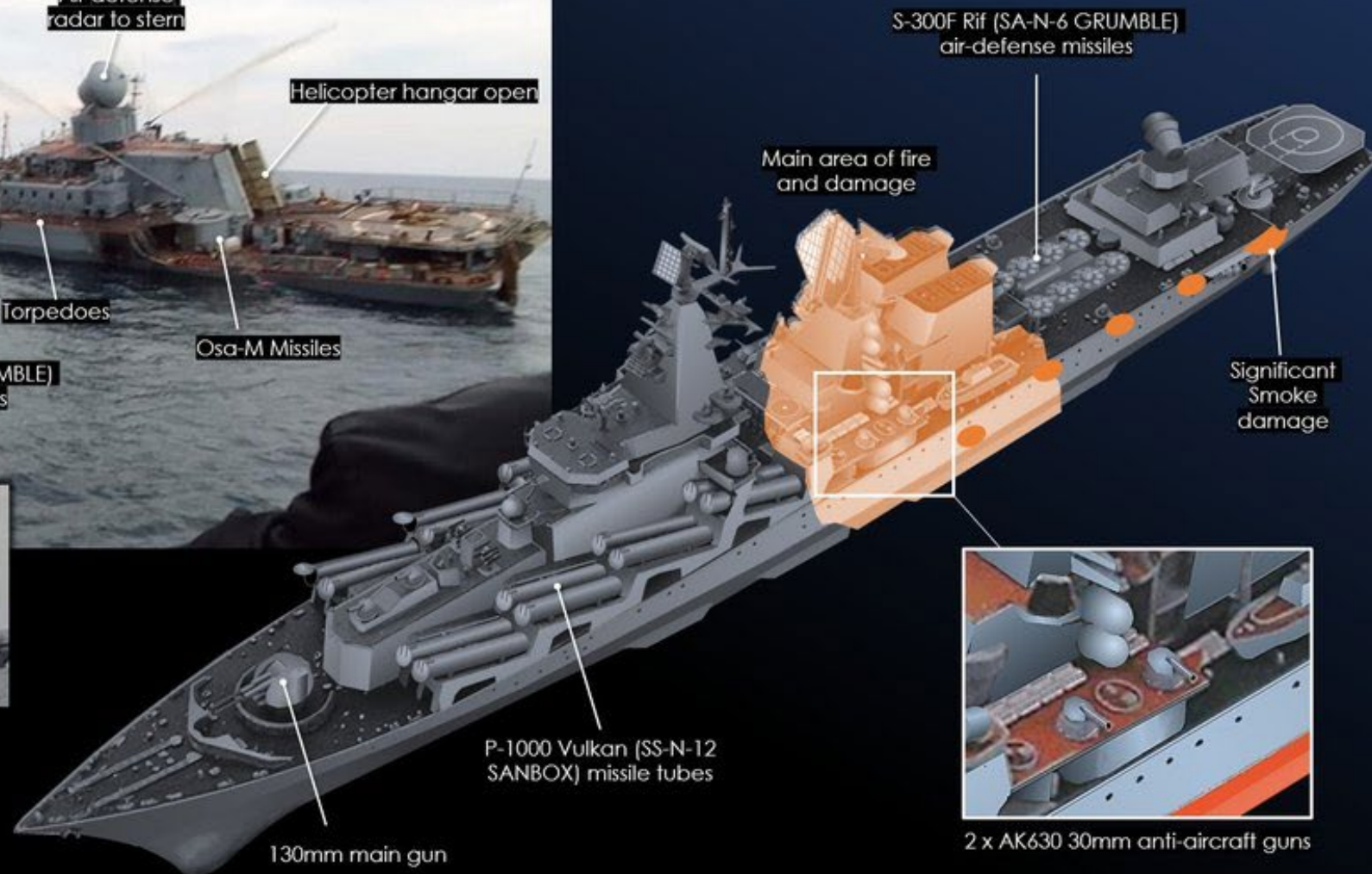
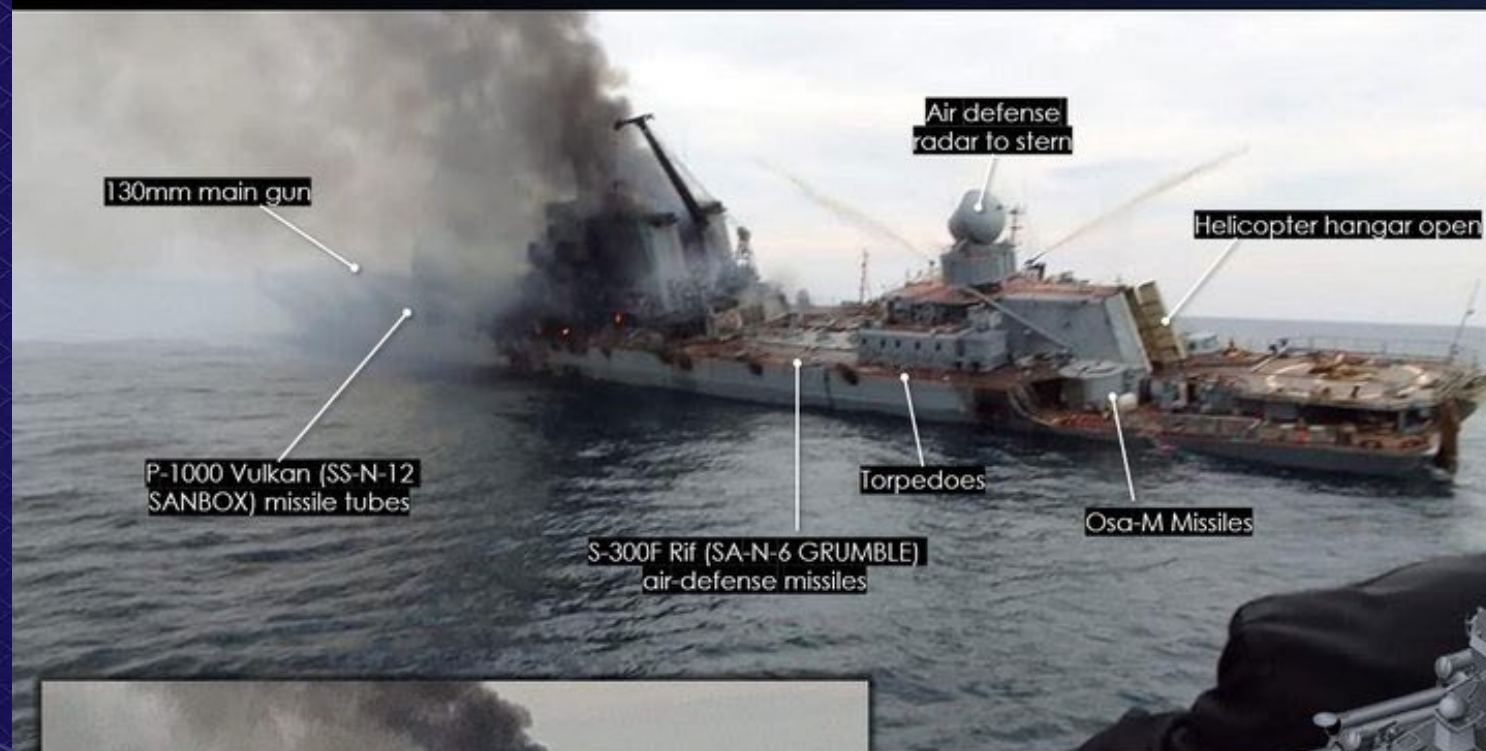


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Sinking of the Moskva (May 2022)

- Mixed signals from U.S. officials
 - **Press reports** indicate U.S. provided real-time intelligence to Ukrainian forces that was used to locate, attack, and sink the Moskva with two ground-based Neptune anti-ship missiles
 - **Some U.S. officials** indicated
 - Ukrainian **already** had targeting **data** on the Moskva and the U.S. simply **confirmed** that data
 - **Attack** was executed **without** the **prior knowledge** of U.S. officials
 - **Others U.S. officials** stated U.S. intelligence was more than just a report on the Moskva's location 65 nautical miles south of Odesa and was **vital** to sinking the Russian cruiser
- The attack killed 40 Russian sailors and wounded an additional 100
- If the U.S. directly assisted in the attack by providing real-time, actionable intelligence that was used by Ukrainian forces to attack the Russian warship, has the U.S. crossed the threshold of a mere violation of neutrality and become a party to the armed conflict? **YES**



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Violating Neutral Status

- **Not every violation of neutrality automatically brings a neutral into the armed conflict as a co-belligerent**
 - Providing weapons and other war-related material does not, in-and-of-itself, mean that a State engaged in such conduct becomes a party to the armed conflict
 - But at what point does providing weapons and other war-related materials cross the line?



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U.S. Military Aid to Ukraine (\$27.4 B) (Major Weapon Systems as of August 2022)

- High Mobility Artillery Rocket Systems (HIMARS) and ammunition;
- 1,500 Tube-Launched, Optically-Tracked, Wire-Guided (TOW) missiles;
- 155mm Howitzers;
- 105mm Howitzers;
- 120mm mortar systems;
- National Advanced Surface-to-Air Missile Systems (NASAMS);
- Phoenix Ghost Tactical Unmanned Aerial Systems;
- Switchblade Tactical Unmanned Aerial Systems;
- Puma unmanned aerial systems;
- Mi-17 helicopters;
- Harpoon coastal defense systems;
- Scan Eagle Unmanned Aerial Systems;
- VAMPIRE Counter-unmanned aerial systems;
- Stinger anti-aircraft systems;
- Javelin anti-armor systems;
- High Speed, Anti- Radiation Missiles; and
- over 27,000 other anti-armor systems.



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Belligerent Right of Self-Help

- If a neutral State engages in conduct that breaches its neutral status, the aggrieved belligerent may (but is not required to) undertake such **proportionate self-help enforcement actions** as it deems necessary, including the **use of force**, to ensure compliance by the neutral State with its obligations of abstention and impartiality under the law of neutrality
- **Russia's position** – the provision of weapons and other war-related material to Ukraine violated the law of neutrality
 - Moscow warned U.S. and NATO to stop arming Ukraine
 - Weapons shipments are “adding fuel” to the conflict and could have “unpredictable consequences”
 - Increased weapons support is “dragging out the conflict” and risks “possible direct confrontation between Russian and the West
 - MOD warned Russia could target NATO transports carrying weapons to Ukraine



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Questionable Validity of Qualified Neutrality

- We can all agree that Russia's invasion of Ukraine is deplorable and a violation of Article 2(4) of the UN Charter
- But Russia's aggression does not justify turning a blind eye to the rule of law or the storied law of neutrality
- Validity of qualified neutrality is **questionable** as a matter of law, undermines the rules-based order, and may be seen as **political expediency** to allow States to justify their violations of the law of neutrality on moral and ethical grounds to contain Russian expansionism
 - **If Belarus had invaded Ukraine, we wouldn't be having this discussion**
- The law of neutrality serves important goals, to include preventing escalation of the conflict



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Possible Alternative Law of State Responsibility

- Prohibition of aggression is a **peremptory norm** of general international law (*jus cogens*) (ILC A/CN.4/L.967, Conclusion 23)
 - **Defined** as a “norm accepted and recognized by the international community of States as a whole as a norm from which **no derogation is permitted**” (Conclusion 3)
 - Peremptory norms “give rise to obligations **owed** to the **international community** as a whole ..., in relation to which all States have a legal interest” (Conclusion 17)
 - Any State has a right to “invoke the responsibility of another State for a breach” of a peremptory norm in accordance with the rules of State responsibility for **internationally wrongful acts** (Conclusion 17.2)



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INTERNATIONAL LAW COMMISSION

State Responsibility

- States incur **responsibility** for their **internationally wrongful acts** (ASR Art. 1)
- An internationally wrongful act occurs when an act or omission is **attributable** to a State under international law and constitutes a breach of an **international obligation** of that State (ASR Art. 2)
- A State **breaches** its international obligations when an act of that State does **not conform** to what is required by those **obligations** (ASR Art. 12).



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State Responsibility

- All States are required to **settle** their international **disputes** by **peaceful means** so that international peace and security and justice are not endangered (UN Charter, Art. 2(3))
- All States shall “**refrain** in their international relations from the **threat** or **use of force** against the territorial integrity or political independence of any state” (UN Charter, Art. 2(4))
- These obligations are owed to the international community as a whole, not just individual States (**peremptory norm**)
- By engaging in a war of aggression against Ukraine, Russia has **endangered** international peace and security, an **internationally wrongful act** for which it bears State responsibility (ASR, Art. 28)



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Countermeasures

- **Any State** may take lawful countermeasures against Russia for its internationally wrongful act of aggression (which has endangered international peace and security) to **induce** Russia to **comply** with its international legal obligations under the UN Charter (ASR, Art. 49)
- Countermeasures **may not** involve the **use of force** and must be **commensurate** with the **injury suffered**, the **gravity** of the international **wrongful act**, and the **rights** of the injured State being **violated** (ASR, Art. 50-51)
- The imposition of sanctions and the provision of war-related materials, albeit violations of the law of neutrality, would be **appropriate countermeasures** to **convince** Russia to **cease** its aggression and **withdraw** its forces from Ukraine



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Conclusion

- By applying the law of State responsibility, neutral States can legally violate their neutrality by imposing sanctions and providing weapons and other war-related materials to Ukraine as lawful countermeasures without undoing the traditional law of neutrality and without increasing the risk of widening the conflict



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