

Excerpt from the Project proposal “Arms, Peace and Sustainability”

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the Proposal aims to enhance dialogue and exchanges between the research and the enterprise in a very topical and important area of international law: the trade on arms. To this end the Proposal endorses an inductive and case-by-case methodology with the aim of collecting a number of relevant “case studies” to test the existing legal framework on arms transfer and neutrality against the background of actual practice and elaborate tailor-made proposals. A fundamental component of the inductive methodology will revolve around the study of arms corporations and their activities and the exchange with relevant NGOs and practitioners. During the whole duration of the project, all research units will make efforts to establish contacts with NGOs, corporations and practitioners in the field of arms transfer [...] The “case studies” will be collected in a report providing for each case information concerning the applicable legal framework, challenges and proposals (“Report”); the content of the Report will be discussed in a public engagement event

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Objective 1: defining the content of neutrality today with specific reference to the issue of arms supply to belligerents, and its relevance in the light of current state practice.

The conflict in Ukraine is a case study of fundamental importance for assessing the continuing relevance of the legal concept of neutrality and for investigating some of the key questions that have remained unanswered in the scholarly debate on the issue. In the first place, this is in fact an inter-state conflict in which the treaty legal framework based on the Fifth and Thirteenth Hague Conventions is directly applicable in several bilateral relationships among the concerned states. Even disregarding the customary nature of the law of neutrality, it must be noted that the Russian Federation has been a party to the two covenant instruments since 1909, while Ukraine acceded to them in 2015. Secondly, the current conflict has brought about from the outset, and for obvious reasons given the involvement of a permanent member of the Security Council, a situation of unavailability of the UN Charter collective security system. Therefore, the traditional scholarly argument according to which the obligations arising from the law of neutrality should be considered superseded if the determination of the existence of an aggressor were to be made by the Security Council has no bearing in the present case. Thirdly, an initial analysis of the practice reveals that a large number of states have engaged in conduct that is visibly incompatible with the requirements arising from the law of neutrality. This was done through a series of conducts ranging from the sharing of intelligence information, to military training and, most of all, to the supply of weapons and economic support. The military aspects of neutrality were called into question in an unprecedented way also because some European states (Switzerland, Sweden, Finland, Moldova, Austria, Ireland) that had historically adopted a policy of permanent neutrality to varying degrees decided to revise their position or openly considered the possibility of doing so. In this context, the most widely discussed issue has been the supply of arms by third states to both belligerents. Indeed, the supply of arms by third parties was so extensive and apparently decisive for the fate of the conflict that it generated a wide debate, both within states and internationally, on the lawfulness of such conduct and its effects. Against this background, through the analysis of the practice generated by the conflict in Ukraine, the UniTrento RU will address the main theoretical questions that have emerged in the academic debate on the law of neutrality from the specific perspective of the supply of weapons to belligerents. Firstly, the question will be asked whether the supply of weapons constitutes a violation of the law of neutrality and whether the latter is still relevant or has been abrogated in whole or in part by contemporary *ius ad bellum*. Secondly, the question of the possible qualification of the supply of weapons in the sphere of the circumstances precluding wrongfulness as a form of self-defence or, alternatively, as a countermeasure taken in the

face of a grave breach of international law will be addressed. In this context, an attempt will also be made to understand whether the widely held doctrinal view that the supply of weapons to belligerents, per se, would not constitute conduct amounting to participation in the conflict is borne out in the light of practice.

Objective 2: defining the nature of the relationship between states and corporations in the field of the arms industry and its impact on states' responsibility under the law of neutrality.

Unlike other industries, defense has not undergone privatization and today state participation remains remarkably high across most of the top defense corporations worldwide. The state remains the predominant stakeholder, with majority voting rights and control over key strategic decisions, in a quarter of European top defense corporations. For example, the 30% of the share capital of the Italian corporation Leonardo S.p.A. is owned by the Italian Ministry of Economy, and the UK government retains a golden share of 1 £ that allows it to exercise veto power in British Aerospace (BAe System). The two corporations are ranked 13th and 6th respectively in the SIPRI Top 100 arms-producing and military services corporations in the world (2020) and play a major role in the international trade of arms. In general, the activities of state-owned corporations do not subject the state of ownership to international legal responsibility. This is because international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion (Barcelona Traction). However, according to art 8 of the ILC Articles on State Responsibility for Internationally Wrongful Acts "the conduct of a person or group of persons shall be considered as an act of a state under international law if the person or group of persons is in fact acting on instructions of, or under the direction and control of, that state in carrying out the conduct." Thus, if a state-owned corporation acts inconsistently with the international obligations of the state that owns and controls it, the state may be responsible provided that it has actually authorised the conduct in question as a result of its capacity to direct and control the actions of the corporation (Muchlinski). This panorama leads to question whether the distinction between public and private still has a *raison d'être* in the current context of the arms industry. From this perspective, the UniTrento RU will investigate the issue of the supply of arms by corporations, and it will seek to determine whether, in the view of states, the supply of arms by private individuals actually falls outside the scope of the duties of abstention and impartiality laid down in the law of neutrality. Or whether and in what terms acts and omissions of the state-owned or controlled corporation are attributable to the state giving rise to its international responsibility. From this perspective, the cognate question of whether states are bound by a customary duty of prevention with respect to the supply of weapons by corporations and private individuals will also be tackled.

Objective 3: assessing the impact of international and domestic law norms on arms trade on international investment law and arbitration.

The norms on the international transfer of arms traditionally refer to states. The Arms Trade Treaty (ATT), currently in force for 110 states, establishes - among the others - that the state party shall not authorize any transfer of conventional arms, if it has knowledge that the arms would be deployed in the commission of international crimes (art. 6); and that state parties shall authorize export/import of arms and make relevant assessments (art. 7, art. 8). The obligations are undertaken by states and are inextricably linked to the aim of securing international peace, sustainable development and human rights. Although international obligations concerning the international transfer of arms are undertaken by states, corporations play a significant role in determining the state's capacity to comply with such obligations. For example, if it is true that the export of arms is only possible following the express authorization of governments granting licenses to corporations in accordance with articles 6 and 7 of the ATT, after the authorization is granted continuing compliance with ATT depends on corporations' behavior. States have limited capacity to monitor corporations' activities, especially when these

activities occur through subsidiaries or within the context of cooperative ventures with other foreign corporations. Large corporations may take advantage of differences among domestic legal frameworks. Through their corporate structure or JV partnership, they may carry out exports from the country that features softened regulation. To avoid forum shopping, some states request their domestic corporations to include in investment contracts specific clauses, for example Germany requests corporations to inform the state as to its (foreign) partners' export intentions and seek legally binding arrangements on end-use. On the one hand, this type of legislation impacts on corporations' foreign direct investments (FDIs) and has the potential of giving rise to investor-state disputes. On the other hand, this legislation may stimulate the reform of international investment treaties in the sense of introducing provisions that engage the investors "not [to] undertake or cause to be undertaken, acts that breach ... human rights" or "not manage or operate the investments in a manner that circumvents ... obligations, to which the host State and/or home State are Parties" (ECOWAS, Supplementary Act on Investment of the Economic Community of West African States, 2009, art. 14(2)). These aspects relate to a long-standing debate in the field of international investment law, concerning the need that investment law standards are interpreted and applied consistently with other international obligations of the state, especially "international canons aimed at fostering respect for human rights" (EDF v. Argentina; Saur International SA v. Republic of Argentina). The UniTrento RU will contribute to this debate with a novel perspective. Through the application of the inductive approach, the UniTrento RU will attempt to collect relevant "case studies" involving corporations in the field of the arms industry, to assess whether and to what extent they are affected by international and domestic law norms on arms trade (and conflicting regimes) and test the existing international legal framework against the background of actual practice.

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The results envisaged by the Proposals are:

- Definition of the content and boundaries of the law of neutrality today.
- Screening and classifying the main corporations in the arms field (privately owned or state-owned), and analysis of the consequences deriving thereof in terms of states' responsibility under the law of neutrality.
- Comprehensive review of a number of "case studies", illustrating for each one the applicable legal frameworks - including international and domestic law norms on arms trade, international investment law - and their interplay.

The Researcher will liaise with arms corporations, NGOs and practitioners and collect relevant "case studies". The "case studies" will be collected in a report providing for each "case study" information concerning the applicable legal framework, challenges and proposals.

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