



Degree Program in **Politics: Philosophy and Economics**

Course of **International Law**

SI VIS PACEM PARA BELLUM?
Article 11 of the Italian Constitution and
Military Aid to Ukraine

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Introduction

In the aftermath of World War Two, Italy developed its new Constitution which marked the shift from a monarchic form of government to the birth of the Republic. Enshrined within its fundamental principles that define the identity of the Republic, is Article 11. The latter was envisioned as a crucial cornerstone in Italian history. On one hand, looking at the past, it was essential, following the destruction caused by the two world wars, to distance humanity from the harrowing consequences of warfare and strive to construct a peaceful and just global order. On the other hand, to secure a brighter future, Italy sought to rehabilitate its image and reestablish itself as a significant player in the international arena. This was the genesis of the pacifist and internationalist principles found in the subject of the present analysis, Article 11 of the Italian Constitution.

Walking through the years preceding the ratification and entry into force of the Italian Constitution of 1948 will help understand the deeply rooted anti-fascist sentiment that the members of the Constituent Assembly shared. This does not suggest the absence of discussions; instead, those discussions prompted the drafters to set aside their divergent political perspectives and collaborate on a more significant endeavor, namely, providing the newly born Republic with a Constitution that reinstated Italy's greatness in the hands of its citizens. Italy's willingness to depart from its past as a perpetrator of war and terror was not unique to its experience. Germany and Japan—as members of the Axis alongside Italy—adopted similar provisions in their respective constitutional charters, which will be analyzed in comparison to the Italian legal framework later in this thesis. Despite the inherent differences between the three constitutions to be analyzed, what all of them share is the quest for peace and distinct detachment from those values that had, for decades, plunged a great number of people across the globe into the agony of war.

With the evolution of the notion of war and the correlated technological advancements that added new layers to the traditional conception of warfare, new debates surfaced. Some argue for absolute pacifism, supported by an overly restrictive reading of Article 11 that would permit wars exclusively for the defense of national territory. Other legal scholars emphasize the necessity of interpreting Article 11 to include principles of customary international law, which Italy integrates into its legal framework, as well as decisions made by the international organizations that Italy has long sought to join. This dialectic (re)gained traction after the Russian invasion of Ukraine in 2022, to which Italy,

as well as other countries, responded with the sending, in various manners and reiterated under two different governments, of military aid to the unjustly invaded Ukraine. As it will be discussed, it is incongruent and almost outrageous that some, so-called “pacifists”, see this as a violation of Italian constitutional values. The compatibility of Italy’s military aid to Ukraine will be explained on the basis of the international legal framework, coupled with the domestic one, favoring a line of interpretation that allows for the principle of collective and individual self-defense without having to actively be involved in a conflict. The modest goal of this thesis is to explore Article 11 of the Italian Constitution and provide a comprehensive understanding of this, indeed *fundamental*, fundamental principle. In doing so, it is wise to keep in mind three research questions that will serve as the base of the three chapters of this thesis. Firstly, how has Article 11 been interpreted in Italian and international law? Secondly, is Italy’s military aid compatible with its pacifist disposition and the derived obligations under international law? And lastly, how does Article 11 compare to similar clauses in the German and Japanese constitutions?

The present thesis is structured as follows: Chapter one, on the origins, meaning and legal interpretation of Article 11 of the Italian Constitution will focus, in §1.1, on the historical context, giving an overview of Italy’s post-war situation and the anti-fascist foundation of the Constitution. Moreover, §1.2 will present a breakdown of Article 11 to better understand each part, followed by a contextualization of the article within both the domestic and international legal frameworks. The modern legal debates around the content and different interpretations of the article will be discussed in §1.3, together with Italy’s participation in *peace-keeping* and military missions. Chapter two presents the case of military aid to Ukraine, introducing in §2.1 the context of the invasion, the subsequent response of Italy and the different types of military aid. Consequently, §2.2 will assess the debate around the compatibility of military aid with Article 11 by discussing both arguments against and for it. The last chapter will include a comparative study of the pacifist provisions of the German and Japanese constitutions, in light of Italy’s Article 11. Firstly, §3.1 will focus on the German Basic Law and specifically Article 26, highlighting its core principles and the role of the parliament in approving military missions. Secondly, in §3.2, Article 9 of the Japanese Constitution and its reinterpretations will be analyzed, together with recent geopolitical pressures and attempts to amend the overly pacifist clause. Lastly, §3.3. will highlight similarities and differences among the three legal

frameworks in the context of peace and disarmament, in light of new global security threats. Finally, the conclusion will contain some important reflections on the demanding task to balance pacifism and international obligations.

1. Article 11 of the Italian Constitution—Origins, Meaning and Legal Interpretation

After a thorough introduction into the topic of this thesis, it is essential to start with a solid groundwork on Article 11, which will help the understanding of the discussions about recent debates and its similarities and differences with other constitutional works, to be tackled in later chapters. Firstly, in section 1.1 the historical context of Article 11 will be presented, together with its drafting process, focusing on Italy's post-war situation and departure from fascist values, as well as internal debates within the Constituent Assembly regarding the wording of the article itself. Moreover, the analysis of the legal framework adopted in those years and a juridical study of Article 11 will find their way into section 1.2, alongside its relationship with other constitutional provisions and the influence of international law, specifically the UN Charter. Section 1.3 will conclude this first chapter by disentangling modern legal debates over the evolving interpretation of Article 11 and its relevance to the current military and *peace-keeping* operations in which Italy is participating.

1.1 Historical Context and Drafting Process

To make sense of Article 11 of the Italian Constitution, an overview of the main events leading up to its creation is paramount. Following the decision to side with Nazi Germany, Italy, under Mussolini's leadership, waged a war that ultimately resulted in the suffering and misery of the Italian people itself. The fundamental years to take into consideration for a real understanding of the Italian Constitution's genesis are 1943 through 1945. After being defeated in the African continent and in Russia, bombings from the allies hit the main cities in Italy.¹ Finally, on July 10, 1943, the Anglo-Americans set foot in Sicily, paving the way to "liberation". Only 15 days later, at a reunion of the Great Council of Fascism, it was decided to get Mussolini arrested. This marked the end of fascism, but not the end of the war. The period that goes from the 25th of July until the 8th of September is known as the "forty-five days" of Badoglio's government. It was a time of tremendous tensions, in which Badoglio—appointed by the King—somehow managed to keep together a country destined to be divided, through effective communication between the

¹ Losano, M. G. (2020). Il rifiuto della guerra nella Costituzione italiana del 1948. In *Le tre costituzioni pacifiste* (Vol. 14, p. 194). Max Planck Institute for Legal History and Legal Theory; JSTOR. <https://www.jstor.org/stable/j.ctv18gfz5b.6>

Germans and the monarchy. However, Badoglio's radio announcement of the armistice with the allies on September 8, generated the rage of the Germans, who, in the span of four days, freed Mussolini and brought him to the northern Italian city of Salò, where he created the Italian Social Republic (RSI). After a difficult start to his government, Badoglio, not knowing the exact date in which the allies would have reached Rome, possibly made the worst decision he could have imagined: together with King Vittorio Emanuele III and the heads of the military, they crossed the Apennine and arrived in Pescara, from where they embarked on a ship towards Brindisi. Preoccupied by their own safety rather than the one of the whole nation, they left without giving any order to the military and organs of the State, resulting in thousands of people being victims of German reprisals. This shameful retreat by the heads of State represents a turning point in the history of the war, leading to Italy being split in two halves. In the north, the Italian Social Republic supported by the nazis, and in the south, the Kingdom of Italy backed by the allies. Despite a minority of Italians who accepted the German rule in the north, hundreds of thousands were imprisoned and sent to Germany, while others gathered and formed partisan groups, joining the resistance. In the south, instead, these two years were made less dramatic by the tightness between the monarchy and the Anglo-Americans. Italians abroad suffered the most during this time, for instance in Greece and in the Balkans, where the infamous massacres of Cephallonia and Kos took the lives of over 10,000 Italian nationals.²

These tragedies effectively explain how, for the vast majority of Italians, the repudiation of war was a deeply rooted aspiration and a necessary milestone.

The strong partisan movement led to the liberation of many Italian cities in the spring of 1945, culminating with that of Milan on April 25 and the subsequent collapse of the RSI four days later. Italy had resolved one big issue that it had to grapple with for the best part of two decades, but was left with another important task: rebuilding a devastated nation. On June 2, 1946, Italy conducted its first political elections with universal suffrage, granting all men and women over the age of 21 the right to vote. The referendum had the Italian people choose between a republican form of government or the continuation of a monarchic system, and vote the creation of a Constituent Assembly. With a difference of two-million votes, "Repubblica" won over "Monarchia". The Assembly, elected on the

² *Ivi*, p.196

basis of a proportional system, comprised 556 deputies tasked with the drafting of the Constitution, as well as voting the motion of confidence to the new government, approving the national budget and ratifying international treaties.³ The Assembly elected among its members the Constitutional Commission, also known as the “Commission of the Seventy-five”, tasked with formulating the Constitution’s broader framework. The Commission was further divided into three sub-commissions,⁴ and a Drafting Committee, also called the “Committee of the Eighteen”, who would transform the decisions of the sub-commissions into an official, final text. The final product by the Constitutional Commission was approved and published in the Official Gazette on December 27, 1947, eventually entering into force the first of January 1948.⁵ The strong antifascist sentiment that led to the creation of the Italian Constitution, and specifically Article 11, is highlighted by the report accompanying the draft Constitution, presented by the Commission’s president Meuccio Ruini.⁶ *«The Constitution, after affirming the concept of national sovereignty, intends to frame Italy’s position in the international field: it arranges its legal system in such a way as to automatically adapt to the generally recognized norms of international law. Firmly renouncing the disastrous fascist interlude, Italy renounces war as a tool of conquest and an offense to the freedom of other peoples. As an independent and free state, Italy does not allow, in principle, any further limitations to its sovereignty, but declares itself ready, under conditions of reciprocity and equality, to those necessary to organize solidarity and peace among peoples. Against any threat of resurgent nationalism, our Constitution reconnects with what represents not only the purest traditions but also the historical and concrete interest of Italy: the respect for international values».*

The debate within the Constitutional Commission regarding Article 11 took into consideration two preexisting norms to help navigate the intricate notion of “war rejection”. The first was the Briand-Kellogg pact of 1928 which stated that, *«The High Contracting Parties solemnly declare in the names of their respective peoples that they*

³ Ivi, p.200

⁴ The Rights and Obligations of the Citizens; the Constitutional Organization of the State; and the Economic and Social Relationships

⁵ Einaudi, M. (1948). The Constitution of the Italian Republic. *The American Political Science Review*, 42(4), 661–676. <https://doi.org/10.2307/1950923>

⁶ Carlassare, L. (2013). *L’art. 11 Cost. nella visione dei Costituenti*. pp. 2-3. https://www.costituzionalismo.it/wp-content/uploads/Costituzionalismo_437.pdf

condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another». The second source of inspiration was Article 6 of the 1931 Spanish Constitution, declaring that «*Spain renounces war as an instrument of national policy*».⁷ While it may look as though both of these texts convey the same decision, the phrasing of each article is not insignificant. The Commission meticulously examined whether the verbs “condemn” or “renounce” could be accommodated within the framework of the Italian Constitution. Eventually, they decided that the verb “repudiate” (*ripudia* in Italian) was the best at expressing Italy’s desire to denounce any propaganda or doctrine that preached war, clearly departing from the Fascist rhetoric that consistently glorified violence. The reasoning behind this choice is evident in the words of, again, Meuccio Ruini: «*The Commission has considered that, while ‘condemns’ has more of an ethical than a political-legal value, and ‘renounces’ presupposes, in a certain way, the renunciation of a good, of a right, the right to war (which we precisely want to contest), the word ‘repudiate’ has an intermediate meaning, an energetic accent and thus implies both condemnation and renunciation of war*». The verb “repudiate” had been present in Italian literature for centuries, though it had never been used in a legal context. In fact, the original meaning of the word stood for the rejection of a person with whom one has a social or emotional bond, no longer wanting to recognize that bond as legally or sentimentally valid, for instance rejecting your own spouse,⁸ or, moreover, no longer recognizing something as one’s own that had been recognized as such until that point.

The long history behind the drafting of Article 11 needs to be read in light of the atmosphere within the Constituent Assembly at that time. All deputies, despite their different political perspectives and background, were inspired by a shared system of values that gathered all under the same legal roof. The intent of introducing and giving relevance to the fundamental pacifist principle communed all deputies in the attempt to formulate it in the most robust and resolute fashion.⁹ Among the multiple discussions as to the content of the article, was the coupling of the concept of war with that of any “act

⁷ Text of New Spanish Constitution. (1932). *Current History* (19161940), 36(3), 374–384. JSTOR. <https://doi.org/10.2307/45334062>

⁸ *Ripudiare - Significato ed etimologia - Vocabolario - Treccani*. (2023). Treccani. <https://www.treccani.it/vocabolario/ripudiare/>

⁹ Carlassare, L. (2013). *L’art. 11 Cost. nella visione dei Costituenti*. p.2. https://www.costituzionalismo.it/wp-content/uploads/Costituzionalismo_437.pdf

of violence”. For some people, war had a broader meaning, inclusive of the notion of violence. The proposition by deputy Crispo, during the afternoon session of March 24, 1947, incorporated the concept of violence, *«nor will [Italy] use violence against the freedom of any people»*, because *«unfortunately our recent history proves that there can be attacks on the freedom of peoples even without reaching a formal declaration of war, and in which the forces of other States are involved»*. The common antifascist conviction of all political parties represented in the Constituent Assembly explains why the pacifist and internationalist principles contained in Article 11 found almost unanimous support, with only two votes against. Deputy Guido Russo Perez, belonging to the political party “L’Uomo Qualunque”,¹⁰ claimed it was ridiculous to define as pacifist a disarmed country and it was impossible, according to him, to distinguish between a just and an unjust war. For Francesco Saverio Nitti,¹¹ instead, it was nonsense that such a norm would be adopted by a defeated and destroyed country, which had not yet regained its full sovereignty, thus being unable to declare or conduct a war. Finally, Article 11 as it exists today, was ratified on December 22, 1947, introducing within the fundamental—and unmodifiable—principles of the Italian Constitution, a pacifist disposition which also reflected Italy’s sincere aspiration to reintegrate into the international community following the devastations of World War Two, for which it was very much liable.

1.2 Legal Framework and Juridical Analysis

Building upon the informative historical context and summary of the events preceding the ratification of Article 11 of the Italian Constitution presented in the previous section, the next priority will be the analysis of all the clauses within the article to comprehensively grasp its various dimensions.

«Italy shall repudiate war as an instrument of aggression against the freedom of other peoples and as a means of settling international disputes; it shall consent, on conditions of equality with other States, to sovereignty limitations required for a world order that ensures peace and justice among Nations. Italy shall promote and encourage international organizations furthering such ends».

¹⁰ Which would be defined today as a populist party, whose motto was: “The people is like a donkey: useful, patient and beaten.”

¹¹ Representative of the “National Democratic Union”, a center-right coalition.

Prior to delving into the study of each component of this article, it is essential to emphasize its cohesive nature, as envisioned by the drafters of the Constitution. The idea that the different clauses of this article could be read separately and independently of each other was merely an attempt to limit the power of the provision. However, as it has been proven by many scholars and international lawyers, such as Antonio Cassese, it is impossible to deny the unitary character of this disposition.¹² The cohesive essence of this provision is given by its shape, which is not divided into multiple paragraphs, but only presents one in which three sentences are placed in a logical order, intrinsically connected with one another.¹³ The first sentence is an important and new principle in Italian history, i.e. the rejection of war as an instrument of aggression and as a means of settling international disputes. Departing from nationalism and imperialism, the Italian Constitution henceforth considers solidarity and justice among Nations as an unconditional requirement to achieve peace. Thus, it is only logical—after repudiating war—to agree to the limitations of sovereignty, reciprocally and equally with other states, which are necessary to ensure peace and justice among Nations. In different terms, the repudiation of war necessitates the removal of all obstacles from establishing peace, and it was clear to all members of the Constituent Assembly that the major barrier was, in fact, states' *absolute* sovereignty. In general, limitations of sovereignty, the relinquishment of nationalism and solidarity with other people were all essential preconditions for peace, thus rendering the concept of repudiation of war less abstract. After a much-needed preamble regarding the holistic structure of Article 11, it is now logical to analyze each clause composing the article itself, before contextualizing it with other constitutional provisions that enhance its interpretation.

«Italy shall repudiate war as an instrument of aggression against the freedom of other peoples and as a means of settling international disputes;».

This is the pacifist principle incorporated within the article. A multitude of signals can be discerned from the initial sentence in only a few words, skillfully put together by the drafters of the Constitution. At first appearance, this pacifist stance may appear to

¹² Cassese, A. (1985). Modern Constitutions and International Law (Volume 192, pp. 368-373). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. https://doi.org/10.1163/1875-8096_pplrdc_A9789024733736_03

¹³ Lupo, N. (2020, November 23). *L'influenza dell'Alleanza atlantica nell'interpretazione della Costituzione economica: ovvero, sulla centralità dei principi dell'art. 11 Cost.*, in *Rivista Trimestrale di Diritto dell'Economia*, 2020, n. 3, pp. 453-455. https://www.researchgate.net/publication/346108895_L

preclude Italy from ever engaging in warfare, functioning as a complete prohibition of military activities. This, indeed, would have been the case if the drafters decided to insert a full stop after the word “war”. However, it was necessary to define which wars are to be repudiated, which comes with the implication that some of them are not to be repudiated at all, thus accepting the idea that Italy might partake in some armed conflicts. The article indicates that Italy should abstain from engaging in conflicts that infringe upon the freedom of other peoples, namely “offensive wars”, as well as those intended to “settle international disputes”. In simpler terms, this first proposition contains a clear choice not to resort to offensive war in order to limit the freedom of other peoples and not to deviate from international law as the primary means to resolve any disputes with other States.¹⁴ On the wording of the article, it must be noted that the subject of the entire provision is one and one only: Italy. In fact, there is no reference to “the Republic”, “the Nation” and certainly not “the Government”; rather, the provision refers to one entity that surpasses and integrates all the elements that form the specificity and regulates its relationship with the rest of humanity. The drafters aimed to portray the Nation as it is recognized internationally, emphasizing its esteemed and illustrious name, Italy, in this significant piece for the country’s future within the international community at large.

Moreover, the choice of the verb “*repudiate*” over other options such as “*condemn*” or “*renounce*”, the background of which was already discussed in §1.1, articulates, to the utmost extent, both the denunciation of a specific action and the renunciation thereof, as repudiating someone or something clearly indicates an intention to irrevocably distance oneself, accompanied by a complete negation that implies an almost ontological alienation.¹⁵

Lastly, it is important to explain that the article contains the term “war” as potentially the most significant aspect of this pacifist ideal; nonetheless, the entirety of Italian constitutional law does not provide a definition for it. Thus, the definition of war was delegated to the international organizations that Italy aspired to be part of. This decision

¹⁴ Bruno, P. (2022). *L’art. 11 della Costituzione - Associazione Nazionale Magistrati | LA MAGISTRATURA*. Associazione Nazionale Magistrati | LA MAGISTRATURA.
https://lamagistratura.it/commentario/lart-11-della-constitutione/#_ftn9

¹⁵ Ceola, P. (2017). *Sempre giovane L’articolo 11 della Costituzione italiana di fronte ai nuovi scenari di guerra e di crisi internazionali*. pp. 13-15.
<https://www.societaitalianastoriamilitare.org/Pubblicazioni%20dei%20soci/Paolo%20Ceola%20Sempre%20Giovane..pdf>

implied that the constant evolution of the concept of war influences the interpretation of this specific constitutional provision, meaning that a change in the definition of war under *international* law, simultaneously alters the very same definition under *national* law. However, Italy does not repudiate war in general, but only two specific types of it: *as an instrument of aggression to the freedom of other peoples and as a means of settling international disputes*. The first one is called “war of aggression”, where a State starts a conflict against another State, invading its territory, attacking its people and denying its sovereignty.¹⁶ The second one is meant to extend the constitutional prohibition to encompass any war initiative that violates the freedom and self-determination of a nation and its people.

The second proposition of Article 11 continues:

«it shall consent, on conditions of equality with other States, to sovereignty limitations required for a world order that ensures peace and justice among Nations.»

From a first reading of this clause, it appears clear that Italy is willing to give up some of its sovereignty,¹⁷ under two conditions: first, it must be *on conditions of equality with other States*, second, such limitations must be necessary to consent the participation in a *world order that ensures peace and justice among Nations*. One could be surprised with the wording of this second part of the article—especially after the assertive “repudiate” just a few lines prior. The stark contrast between the unequivocal and almost categorical rejection of war and the less confident agreement to restrict sovereignty under specific conditions prompts the reader to question the application of this provision. This choice was evidently made by the Constituent Assembly to delineate a kind of sovereignty that is nationalist yet not absolute, and is, in any event, qualified by the requirement of reciprocity, from which originated the wording of this part of the article. This second proposition cannot be read without the one that follows:

«Italy shall promote and encourage international organizations furthering such ends.»

¹⁶ Marazzita, G. (2022). “*Guerra vietata, legittima e necessaria.*” Federalismi.it. p.58.
<https://federalismi.it/AppOpenFilePDF.cfm?artid=47673&dpath=document&dfile=10082022112600.pdf&content=%27%27Guerra%2Bvietata%2C%2Blegittima%2Be%2Bnecessaria%27%27%2B%2D%2Bsta%20%2B%2D%2Bdottrina%2B%2D%2B>

¹⁷ Which, according to Article 1 of the Italian Constitution «belongs to the people, who exercise it in the manner and within the limits provided for by the Constitution.»

This third and last sentence of Article 11 goes hand in hand with the preceding two, completing the picture. It derives from a necessary precondition, i.e. the limitation of sovereignty, finally establishing Italy's support to the development and establishment of international organizations, whose goal must be that of ensuring peace and justice among Nations. In a way, this article is a journey that starts with the formal departure from Italy's past as a country that was responsible for, and defeated in World War Two, to the path of active pacifism, aspiring not only to participate in international organizations, but also contribute to the development and establishment of a world order where peace and justice among Nations are assured.

This analysis sheds light on a widely discussed distinction between aggressive war and defensive war. The former was fiercely condemned and explicitly forbidden; the latter was regrettably essential and object of a specific constitutional provision.¹⁸ Although there was unanimous consensus on the imperative to transcend all manifestations of nationalism—considered the primary catalyst for the outbreak of World War Two—to establish pacifist and amicable international relations, this pacifist ideology did not culminate in the complete disarmament of Italy or a total ban of war, because «*si vis pacem para bellum*».¹⁹ Peace was the ultimate goal, yet absolute pacifism was not the instrument to attain it.

The analysis of article 11 of the Italian Constitution conducted thus far is crucial for situating this provision within the broader constitutional framework. Article 11 cannot, in fact, be interpreted in isolation from other constitutional provisions. In this context, our examination shall start with Article 10, strategically positioned immediately prior to Article 11. The first paragraph of Article 10 states:

«The Italian legal system conforms to the generally acknowledged provisions of international law.»

Through this clause, the members of the Constituent Assembly aimed to integrate the international legal system into the domestic framework. Consequently, where the *generally acknowledged provisions of international law* do not conflict with the fundamental principles of the Italian Constitution, they shall be integrated into the domestic legal framework. The relevance of this disposition is undeniable, because when

¹⁸ Art.52 of the Italian Constitution, which will be discussed later.

¹⁹ A Latin phrase for: if you want peace, prepare for war. Definition retrieved by <https://www.treccani.it/vocabolario/si-vis-pacem-para-bellum/>

reading Article 11, one must first be aware of the fact that it was agreed upon, by the Constituent Assembly, that international law should be part of the Italian legal system. One implication deriving from this article is that the principle of neutrality, governed by customary international law, is therefore incorporated within the Italian legal system, as well as the modifications that occurred over time. This idea will be crucial in our examination of the compatibility of Italian military assistance to Ukraine in the aftermath of the Russian invasion. However, for now, it is sufficient to recognize that Italy demonstrated a distinct commitment to adhere to international law, together with all the repercussions that such a decision may entail.

Another crucial provision that is generally interpreted alongside the pacifist fundamental principle is Article 52, which states:

«The defense of the Fatherland is the sacred duty of every citizen.

Military service shall be compulsory within the limits and the manners set forth by the law. The fulfillment thereof shall not prejudice a citizen's employment, nor the exercise of their political rights.

The organization of the armed forces shall be based on the democratic spirit of the Republic.»

The first two paragraphs of Article 52, presented above, unequivocally indicate that the prospect of war was not entirely eliminated by Article 11. That is, among the accepted wars were, in fact, defensive ones. The first clause establishes a constitutional obligation for every citizen to protect the homeland, if required, even to the point of ultimate sacrifice. The term *sacred*, in this context, establishes a hierarchical relationship between the obligation and the one responsible for fulfilling it, the citizen. This very relationship of priority allows for the possibility to prevail, in case of a defensive war, over the constitutional rights of the citizen. Each citizen is required to undertake any necessary initiative aimed at the defense of the Republic's independence, its constitutional sovereignty and the freedom of its people.²⁰ Defensive wars appear thus as a constitutional necessity, denying the possibility for an—idealistic—absolute pacifism. The second clause complements the first one, establishing the necessity of mandatory

²⁰ Marazzita, G. (2022). “‘Guerra vietata, legittima e necessaria.’” *Federalismi.it*. pp.78-79.
<https://federalismi.it/AppIOpenFilePDF.cfm?artid=47673&dpath=document&dfile=10082022112600.pdf&content=%27%27Guerra%2Bvietata%2C%2Blegittima%2Be%2Bnecessaria%27%27%2B%2D%2Bsta%20%2B%2D%2Bdottrina%2B%2D%2B>

military service to be conducted according to the parameters established by law. The rationale behind this choice was not only to prepare for the worst scenario, that of engaging in a war, but also to institutionalize the military service as an instrument of education and integration of the citizens of the newly born Republic.²¹ The mandatory military service was later limited in 1972 by the law on contentious objectors²² and finally suspended, by another law, in 2004.²³ In reaction to an aggression perpetrated by another State, Italy is both authorized and obliged to engage in a war aimed at defending itself. However, Italy's defense should be confined to safeguarding its territory, people, and sovereignty, and if the invasion is decisively quelled, military operations must likewise cease. Otherwise, Italy would violate the prohibition of war imposed by Article 11 by reversing the *animus bellandi*. Ultimately, the most important takeaway from Article 52 is that defensive wars are envisaged by the Italian Constitution and seen as a necessary measure in response to national aggression.

The notion that not all wars should be condemned is substantiated, if it was not already evident, by Article 78, which asserts:

«The Chambers shall deliberate upon the state of war and confer the necessary powers on the Government.»

This provision establishes the mechanism to be followed in response to a war emergency,²⁴ centering in the hands of the Parliament both the power to decide on the state of war and to confer decision-making capacity on the Executive. This system prevents the Government from self-activating its emergency powers in absence of a legitimizing condition granted by the Parliament. This article explicitly asserts that Italy may legitimately engage in warfare under specific conditions, which are not delineated under the same clause. In this regard, articles 11 and 52, which have already been examined, elucidate the conditions in question. The subsequent section of the Italian Constitution, governing the authority of the President of the Republic, includes Article 87, which is complementary to Article 78. The paragraph relevant to our analysis is number 9, which states: *«The President shall be the commander of the Armed forces, shall*

²¹ *Ibidem*.

²² Law of December 15, 1972, no.772, the so-called “Legge Marcora”. Available at: <https://www.gazzettaufficiale.it/eli/id/1972/12/18/072U0772/sg>

²³ Law of August 23, 2004, no.226. Available at: <https://www.gazzettaufficiale.it/eli/id/2004/08/31/004G0257/sg>

²⁴ This, then, encompasses solely war emergencies and excludes other types.

preside over the Supreme Defense Council set forth by law, and shall make declarations of war decided by the Chambers.» While some regard this as a mere formality, others emphasize the significance of this procedural limit which, coupled with that of Article 78, complements the substantial limits to the possibility of Italy's engagement in war, as outlined by Article 11. To conclude, articles 78 and 87 establish the involvement of all three organs, i.e. the Parliament, the Executive and the Head of the State, when declaring a state of war, ensuring that no single branch may abuse authority or extend its own powers beyond those prescribed by law.

The picture of the broad constitutional framework within which Article 11 has been inserted is now clear; nevertheless, a few other articles are worth mentioning, as they are to some extent related to the subject of our analysis. Firstly, Article 27, paragraph 4, originally envisaged the death penalty according to the military penal code during a state of war.²⁵ Similarly, Article 60, paragraph 2,²⁶ does not allow for the possibility of extending the Chambers' terms, except by law and only in the event of a war. Article 103, paragraph 3,²⁷ instead, specifies that during wartime, military tribunals shall possess the authority prescribed by law, whilst during peacetime, their jurisdiction is limited to military offenses perpetrated by members of the Armed Forces. Article 111, paragraph 7,²⁸ waives the authority of the Court of Cassation to appeal sentences by military tribunals during times of war. Lastly, Article 117, paragraph 1, completes the picture by incorporating, within the domestic legal system, the international legal treaties which constitute a limit to the power exercised by the executive and legislative powers.²⁹

²⁵ Art. 27, para.4: *«The death penalty is not permitted, except in cases provided for by the military penal code under the state of war.»* Original text, amended by Constitutional Law of October 2, 2007, No.1 in Official Gazette No.236, of October 10, 2007, provided, by Art.1, para.1, for the amendment of Art.27, para.4. Which now states: *«The death penalty shall not be permitted.»*

https://www.senato.it/sites/default/files/media-documents/Costituzione_INGLESE.pdf

²⁶ Art. 60, para.2: *«The term of each Chamber cannot be extended, except by law and only in the event of war.»* https://www.senato.it/sites/default/files/media-documents/Costituzione_INGLESE.pdf

²⁷ Art. 103, para.3: *«In time of war, military tribunals shall have the jurisdiction set forth by law. In times of peace they shall have jurisdiction only for military offences committed by members of the Armed forces.»* https://www.senato.it/sites/default/files/media-documents/Costituzione_INGLESE.pdf

²⁸ Art. 111, para.7: *«Appeals to the Court of Cassation shall always be allowed in cases of violations of the law against sentences and measures concerning personal freedom pronounced by permanent judges and special courts. This provision may only be waived in cases of sentences by military tribunals in time of war.»* https://www.senato.it/sites/default/files/media-documents/Costituzione_INGLESE.pdf

²⁹ Art. 117, para.1: *«Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and the constraints deriving from EU legislation and international obligations.»* https://www.senato.it/sites/default/files/media-documents/Costituzione_INGLESE.pdf

Having meticulously analyzed the domestic constitutional framework, crucial for a comprehensive understanding of Article 11, attention may now turn to the equally crucial relationship with international law.

The evident internationalist character of Article 11 cannot be neglected. It is apparent that, even if one wants to read Article 11 separately from other constitutional provisions that further corroborate Italy's international aspiration, the provision was envisaged as an instrument to allow Italy's—immediate—participation to the United Nations. Additionally, interpreting Article 11 in light of international law, as it was envisioned by the drafters of the Constitution—otherwise Article 10 could not be explained—, allows to clarify what is meant with the term “defensive war”.³⁰

The pacifist provision enshrined within the fundamental principles of the Italian Constitution is based on the world order that the international community was interested in establishing after the two devastating world conflicts. Effectively, the United Nations Charter imposed, for the first time, an absolute and generalized prohibition of the use of force, which now corresponds to an established, general norm of international law, known as *jus cogens*. The Charter's Preamble clearly states «*We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,[...]»*, consequently indicating, in Article 1, paragraph 1, among the main objectives of the organization itself, that of maintaining international peace and security. To support this, Article 2, paragraph 3, positively prescribes the obligation of peacefully settling all international controversies,³¹ while paragraph 4 of the same article negatively prohibits the threat or use of force.³² Therefore, just by looking at this framework presented so far, it is clear that the world order that was to be created was founded on the common objective of maintaining international peace and security, and the main way to do it was prohibiting the threat or use of force. While this aligns perfectly with the Italian pacifist and internationalist principles, the UN Charter allows for one exception, present in Article 51: «*Nothing in the present Charter*

³⁰ Rossi, P. (2022). *La compatibilità con il diritto internazionale e la Costituzione italiana dell'invio di aiuti militari all'Ucraina*. p.209.

³¹ Art. 2, para. 3 «*All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*» <https://legal.un.org/repertory/art2.shtml>

³² Art. 2, para. 4 «*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*» <https://legal.un.org/repertory/art2.shtml>

shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. [...]». This provision contains the inherent and thus natural, implicit and almost genetic right of individual and self-defense, should an armed attack against a member of the United Nations take place. It was envisioned however, by the drafters of the Charter, as a limited and conditional right, since it could be exercised only *until the Security Council has taken measures necessary to maintain international peace and security*. This *inherent right* ceases to exist once the Security Council, which must be promptly informed of the actions taken in the name of legitimate defense, takes matters upon its own hands by adopting all measures it deems necessary to maintain or restore international peace and security. The States' "renunciation" of *jus ad bellum* as a means of self-defense has been compensated in the Charter's architecture through the establishment of a collective security system fundamentally founded on some important cornerstones. Firstly, the monopoly of the use of force by the Security Council, which, according to Article 24 bears «*primary responsibility for the maintenance of international peace and security*», is not an exclusive power but prevails on that of other bodies of the UN (e.g., the General Assembly) when the Security Council is carrying out its functions contained in Chapter VII. This "responsibility" of the Security Council is exercised either through the pacifist, conciliative functions set out in Chapter VI ("Pacific Settlement of Disputes), or, more frequently, through the powers conferred upon by Chapter VII ("Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression").³³ In practice, however, there has been a growing inclination to expand the General Assembly's scope of action, reflecting a narrow interpretation of the notion of "exercise of functions" by the Security Council. This is directly associated with the renowned UN Resolution titled "Uniting for Peace" (UN Doc. 377 V. (1950)), which affirms the presence of a surrogate power within the Assembly concerning the preservation of international peace and security when the Council's actions are obstructed by the veto of one or more permanent members. Notwithstanding the subsequent exclusion of the possibility that such surrogate power may encompass binding decisions for States or coercive measures, it is through

³³ Ligustro, A. (2024). *Principio pacifista e uso della forza nel diritto internazionale contemporaneo*. Dpceonline.it. pp.26-27. <https://www.dpceonline.it/index.php/dpceonline/article/view/2118/2357>

this practice that the Assembly was able to reiterate its position on the ongoing Ukrainian conflict, which will be assessed in the next chapter.

1.3 Modern Legal Debates

Having presented a thorough analysis of Article 11, together with its position within the domestic constitutional framework and the broader architecture of international law, this section will introduce some of the recent legal debates around this topic, facilitating a smooth transition to the second chapter of this thesis.

The core idea that all legal debates surrounding this topic share is the fact that modern conflicts challenge the rigidity of Article 11, rendering Italy's constitutional pacifism increasingly impractical. While some advocate for a re-interpretation of the article, given the evolving nature of the concept of war itself and the mutable essence of international law, others demand a strict interpretation of the pacifist provision embedded within Italy's fundamental principles, as envisioned by the drafters of the Constitution. Among the most frequent questions that critics posed over time is, where does the "defense of the Fatherland" stop? What differentiates a *peace-keeping* mission from a fully-fledged war, when the former implies military equipment being used and human lives being taken? Moreover, is it constitutionally acceptable that Italian soldiers die abroad during the aforementioned missions? All these controversies gained traction in the early years of the 21st century, following Italy's involvement in international operations such as the first Gulf war, missions in Serbia in 1999, Afghanistan in 2001, and Iraq in 2003. Naturally, the debate surfaced once again following Italy's decision to send military aid to Ukraine in 2022. The answer is not easy, as Italy has been trying to balance, through Article 11, the necessary repudiation of war and its active participation on the international stage.

One concept that needs to be explained is that of neutrality, since it is highly relevant to our analysis and has been debated as to whether the repudiation of war in Article 11 results in an obligation of neutrality. Before linking it to Article 11, one must understand the notion "state of neutrality". The latter brings about a set of rights and duties to the State that has declared itself to be 'neutral'. In fact, a neutral State is obliged not to involve its armed forces in the conflict, not to provide military assistance to the parties at war, and to adopt equal treatment towards the belligerents.³⁴ Legal scholars have differentiated

³⁴ de Vergottini, G. (2024, March 13). *Ripudio della guerra e neutralità alla luce dell'articolo 11 Cost.* Federalismi.it. pp.3-5.

between the notion of *permanent neutrality*, for instance through constitutional choices or international obligations,³⁵ and *contingent / occasional neutrality*, thus depending each time on the discretion of States before any international conflict. The state of neutrality is regulated by customary international law, which imposes a position of impartiality towards armed conflicts between states.³⁶ The controversy lies here in the eventuality of a war, criminalized by the international community, generating a conflict between the state of neutrality and the right to collective self-defense when responding to an illegitimate aggression. Applying this discussion to the case of Italy, it appears clear that neither Article 11, nor any other constitutional provision, contains an obligation of neutrality. Thus, it is discretion of the organs of the State to decide how to act in response to an armed conflict, with respect to the Constitution and international treaties. Rather than talking about the state of neutrality in general, it is advised to understand the *degree* of such neutrality. That is, many States decide to abandon the state of neutrality and intervene in an international conflict, positioning themselves in the area of “non-belligerency”, or “qualified neutrality”. This means that for a State to be considered as a party of the conflict, it is not sufficient for it to leave the state of neutrality by, for example, sending military equipment to one of the belligerents, but there needs to be an act of war, i.e. a direct involvement of armed forces. Thus, the state of non-belligerency lies between the two opposing statuses of neutrality and belligerency.³⁷ In summary, Article 11 does not include an obligation of neutrality, but simply a principle of international law which can be decided *omnis tempus*.

After having clarified that the sending of military aid to one of the belligerents does not automatically result in the State being considered actively involved in the conflict, around which there is still great confusion, another debate revolves around Article 11’s interpretation and understanding of the concept of war. Among those who want to attribute to Article 11 a rigid pacifist stance, there is the idea that the only wars not to be repudiated are those aimed at defending the national territory. This argument is backed

<https://www.federalismi.it/AppOpenFilePDF.cfm?artid=50293&dpath=document&dfile=12032024212104.pdf&content=Ripudio%2Bdella%2Bguerra%2Be%2Bneutralit>

³⁵ This is the case, for instance, of Switzerland, Austria, Malta and Republic of Ireland.

³⁶ de Vergottini, G. (2024, March 13). *Ripudio della guerra e neutralità alla luce dell’articolo 11 Cost.* Federalismi.it. pp.3-5.

<https://www.federalismi.it/AppOpenFilePDF.cfm?artid=50293&dpath=document&dfile=12032024212104.pdf&content=Ripudio%2Bdella%2Bguerra%2Be%2Bneutralit>

³⁷ *Ibidem*.

by the argument that the provision is “clear enough” and thus does not require further interpretation in light of international law to understand the meaning of ‘defensive war’.³⁸ Nevertheless, others contest the clarity of Article 11 and especially the notion of “international dispute”, which does not have a single literal meaning and has been defined differently by the international law doctrine and jurisprudence.³⁹ Additionally, the assertion that the notion of war *as a means of settling international disputes* includes all wars beyond national boundaries is inaccurate. The second part of Article 11 clearly reflects an effort to join the United Nations and to create a global order built on international peace and justice, which is the primary goal of the UN Charter, while still permitting individual and collective self-defense as articulated in Article 51. Also, if the drafters of the Constitution wanted to attribute an absolutist nature to the repudiation of war, they would have added a clause that imposed permanent neutrality,⁴⁰ which, however, is still nowhere to be found.

The concept of war remains highly debated among different schools of thought. While some see a clear dichotomy between prohibited wars, as prescribed by Article 11, and constitutionally necessary wars of Article 52, namely those defending the national territory; others envisage a more nuanced framework. Between the “constitutionally prohibited” and the “constitutionally required”, the Constitution delineates areas designated for political discretion, which can be categorized as “constitutionally possible”, where it is plausible to accommodate potential multilateral defense agreements ratified by Italy and the subsequent measures involving the use of force.⁴¹ This debate mirrors the prior one: some insist on a strict interpretation of Article 11, thereby precluding an interpretation that encompasses international law, which others claim is constitutionally warranted and required by the second part of the same article and the preceding Article 10.

³⁸ Caterina, E., Giannelli, M., & Siciliano, D. (2022, April 26). *Il ripudio della guerra preso sul serio. Quattro tesi sull'incostituzionalità dell'invio di armi all'Ucraina*. SIDIBlog. <http://www.sidiblog.org/2022/04/26/il-ripudio-della-guerra-preso-sul-serio-quattro-tesi-sullincostituzionalita-dellinvio-di-armi-allucraina/>

³⁹ Rossi, P. (2022). *La compatibilità con il diritto internazionale e la Costituzione italiana dell'invio di aiuti militari all'Ucraina*. p.211.

⁴⁰ *Ibidem*.

⁴¹ Equizi, C. (2024). *Questioni e dinamiche costituzionali sui conflitti armati*. Dpceonline.it. pp.123-124. <https://www.dpceonline.it/index.php/dpceonline/article/view/2159/2362>

The last aspect to address is the inquiry regarding what types of humanitarian operations may be deemed legitimate in accordance with the repudiation of war outlined in Article 11. By advocating for international institutions that pursue peace and justice among nations, Italy endorses humanitarian missions, particularly those facilitated and governed by organizations to which it belongs. *Peace-keeping* operations, as classically understood, do not include active use of armed force but are designed to maintain peace primarily through monitoring and support actions, typically under a UN mandate. Peace enforcement, in contrast, is conducted under explicit UN Security Council authorization (Chapter VII of the UN Charter) and can involve the use of force to restore or maintain peace.⁴² Although peace enforcement operations may pursue humanitarian objectives, they are distinct from humanitarian interventions because they require the UN's endorsement.⁴³ Humanitarian interventions may occur even without a UN Security Council mandate—often justified by an urgent need to prevent large-scale human rights violations. An example frequently cited is NATO's 1999 intervention in Serbia, which was legally controversial due to the absence of a direct UN Security Council resolution but was publicly framed as necessary on humanitarian grounds. In this context, Italy's constitutional organs have generally been open to participating in operations that pursue genuine humanitarian goals, although there is an ongoing debate regarding whether interventions lacking full UN authorization can be reconciled with Article 11's repudiation of war. The Italian Constitutional Court has accordingly distinguished "traditional" international war from these new categories of military engagements, underlining that the constitutional legitimacy of using force must be carefully weighed against both international obligations and national constitutional guarantees.⁴⁴ All in all, modern international conflicts have changed the way we think about war. The latter does not have limits in time and space, there is no single stage in which a war takes place, there is usually no official declaration of war, nor a peace treaty marking its end. It therefore culminates in a scenario that is hybrid just as hybrid are the wars that are being fought.

⁴² Gray, C. (2018). *International Law and the Use of Force*. Google Books. 26-31.
<https://books.google.fr/books?hl=it&lr=&id=wSJLDwAAQBAJ&oi=fnd&pg=PP1&dq=Gray>

⁴³ Simma, B. (1999). NATO, the UN and the use of force: legal aspects. *European Journal of International Law*, 10(1), 1–22. <https://doi.org/10.1093/ejil/10.1.1>

⁴⁴ de Vergottini, G. (2024). *La persistenza della guerra e il diritto costituzionale*. Dpceonline.it. pp.3-5.
<https://www.dpceonline.it/index.php/dpceonline/article/view/2117/2355>

This chapter started with a look into the historical background that led to the adoption of the Italian Constitution of 1948, paying particular attention to the discussions within the Constituent Assembly on the drafting of Article 11, which, not incidentally, they decided to insert among the fundamental principles. Henceforth, the focus shifted to a more thorough analysis of the article and its components. Examining each proposition of the article while also underlining its cohesive nature was important in establishing the ultimate goal of Article 11, that is, constitutionalizing pacifism and conforming to international law and its respective system of collective security. To understand Article 11, however, one must also take into account other constitutional provisions that corroborate its importance and shed light on other significant concepts relative to *peace* and *war*. Articles 10, 52 and 78 were attentively studied, as well as other related provisions. At this point, attention turned to international law. In particular, some dispositions contained in the United Nations Charter, such as Article 2(4) and Article 51, clarified the notions of threat or use of force, as well as “defensive war”. The last section introduced some of the most prominent legal debates around the topic. For instance, some argue for a strict interpretation of Article 11 that emphasizes its rigidity, while others highlight the importance of reading it in light of international law. Also, the concept of neutrality was developed, together with its intricate relation with the status of belligerency. Ultimately, controversies around humanitarian missions and the notion of *peace-keeping* were presented, topics which are still debated in both constitutional and international legal doctrines.

This chapter was instrumental in setting the stage for the discussions that chapter two will bring about. In assessing the case of military aid to Ukraine, in fact, the analysis presented thus far will facilitate the understanding of the legal conversations regarding the compatibility, for example, of the various types of military support provided to Ukraine by Italy, both from a constitutional and international standpoint.

2. Contemporary Legal Challenges—The Case of Military Aid to Ukraine

The discussions of chapter one will now serve the purpose of assessing, from a juridical point of view, the compatibility of Italy's military aid to Ukraine with constitutional and international legal constraints. Firstly, there will be a brief overview of the main events of the Ukrainian conflict, followed by the legal measures taken by Italy—in the form of decree-laws—and the different types of aid. Section 2.2 will answer the question of whether Italy's military aid to Ukraine is compatible with its legal constraints, flowing both from domestic and international law. The legal evaluation of such compatibility will include all perspectives of the debate, divided into five different thematic sub-sections.

2.1 Context and Legal Measures

The ongoing conflict in Ukraine is rooted in a complex interplay of historical ties, political transitions, and competing geopolitical interests. Following Ukraine's declaration of independence from the Soviet Union in 1991, tensions with Russia surfaced around issues of sovereignty, cultural identity, and strategic alliances. These tensions finally culminated in late 2013 and early 2014, when widespread protests—collectively known as the Euromaidan demonstrations—erupted in Kyiv in response to then-President Viktor Yanukovich's decision to abandon a planned association agreement with the European Union.⁴⁵ The consequent political turmoil resulted in Yanukovich's removal and, thereafter, Russia's contested annexation of Crimea in March 2014. By mid-2014, pro-Russian separatist movements had emerged in the eastern Ukrainian regions of Donetsk and Luhansk, sparking an armed conflict that would persist in varying intensities for years.⁴⁶ Despite international diplomatic efforts to de-escalate hostilities, such as the Minsk agreements,⁴⁷ fragile ceasefires repeatedly broke down. In February 2022, Russia's decision to launch a full-scale military invasion of Ukraine dramatically escalated hostilities, drawing global condemnation and prompting widespread international

⁴⁵ Onuch, O. (2015). EuroMaidan Protests in Ukraine: Social Media Versus Social Networks. *Problems of Post-Communism*, 62(4), 217–235. <https://doi.org/10.1080/10758216.2015.1037676>

⁴⁶ Andor, L., & Optenhögel, U. (2023). *EUROPE AND THE WAR IN UKRAINE FROM RUSSIAN AGGRESSION TO A NEW EASTERN POLICY*. pp.7-9. <https://feps-europe.eu/wp-content/uploads/2023/06/Europe-and-the-war-in-Ukraine.pdf>

⁴⁷ Often referred to as 'Minsk I' and 'Minsk II'. Dumoulin, M. (2024, February 19). *Ukraine, Russia, and the Minsk agreements: A post-mortem*. ECFR. <https://ecfr.eu/article/ukraine-russia-and-the-minsk-agreements-a-post-mortem/>

sanctions. These developments have had profound implications not only for Ukraine's territorial integrity and political stability, but also for regional security and international law.

As mentioned, following the Russian attack, a multitude of States promptly decided to support Ukraine from an economic, humanitarian and military standpoint, as well as adopt a set of economic sanctions to punish the aggressor. The Italian government, led by Mario Draghi, adopted on February 25, 2022, the Decree-Law no. 14 which allowed the *transfer of non-lethal protective military equipment and materials, free of charge*, to Ukraine until the end of 2022. In the subsequent Decree-Law of three days later,⁴⁸ the phrase «*non-lethal*» disappeared.⁴⁹ On March first, 2022, the Chambers approved two identical resolutions, referred to as “twin resolutions”, according to which the Government aims «*to ensure support for the Ukrainian people, with humanitarian and financial assistance actions and - keeping Parliament informed and in coordination with other European countries and allies - with the transfer of military equipment and instruments for the defense of Ukraine*».⁵⁰ The conversion law no. 28 of 2022 on the military support measures in favor of Ukraine is the translation into a law, published in the Official Gazette, of the Decree-Laws adopted since the beginning of the conflict. Article 1 reinforces Italy's military contribution to NATO, allowing «*until September 30, 2022, the participation of military personnel in NATO initiatives for the deployment of high-readiness forces, called the Very High Readiness Joint Task Force (VJTF)*» and «*for the year 2022, the continuation of military personnel participation in the enhancement of the following NATO devices: a) device for the surveillance of the Alliance's airspace; b) device for naval surveillance in the southern area of the Alliance; c) presence in Latvia (Enhanced Forward Presence); d) Air Policing for the surveillance of the Alliance's airspace*».⁵¹ According to Article 2, «*For the year 2022, an expenditure of 12,000,000 euros is authorized for the free shipment of non-lethal military protection equipment and materials to the governmental authorities of Ukraine*». Article 2-bis, paragraph 2,

⁴⁸ Decree Law no.16, 28 February 2022.

⁴⁹ Latino, A. (2024). *L'invio di armi all'Ucraina fra Costituzione e diritto internazionale*. Dpceonline.it. pp. 693-695 <https://www.dpceonline.it/index.php/dpceonline/article/view/2156/2396>

⁵⁰ Marazzita, G. (2022). “*Guerra vietata, legittima e necessaria*.” Federalismi.it. pp. 52-55 <https://federalismi.it/AppOpenFilePDF.cfm?artid=47673&dpath=document&dfile=10082022112600.pdf&content=%27%27Guerra%2Bvietata%2C%2Blegittima%2Be%2Bnecessaria%27%27%2B%2D%2Bsta%20%2B%2D%2Bdottrina%2B%2D%2B>

⁵¹ *Ibidem*.

importantly clarifies the executive regulation over Italy's military support to Ukraine, stating that «*With one or more decrees from the Minister of Defense, in agreement with the Minister of Foreign Affairs and International Cooperation and the Minister of Economy and Finance, the list of military vehicles, materials, and equipment subject to the transfer referred to in paragraph 1, as well as the methods for its implementation, including for accounting purposes, are defined*».⁵² The list of military equipment to be sent to Ukraine, contained in the decrees adopted by the Ministry of Defense, are part of a classified document, which was not published in the Official Gazette. Nevertheless, according to the main media outlets, these 'packages' should include portable weapons as well as bulletproof vests and daily food rations.⁵³ Over time, in light of the "protracted severe international crisis in Ukraine",⁵⁴ Italy has reiterated its position, assisting Ukraine with the shipment of military aid packages. Decree-Law No. 200 of 2024 authorized, until 31 December 2025, subject to the instructions of the Chambers, the transfer of military assets and equipment to the Government authorities of Ukraine, under the terms and conditions provided by Article 2-bis of the decree-law of February 25, 2022, No. 14, presented above.

It looks apparent that, ever since the beginning of the war, Italy, alongside many other countries, has maintained a tough stance against the aggressor, highlighting particular solidarity with Ukraine. This is confirmed by the multitude of military aid solutions offered to the Republic of Ukraine,⁵⁵ diplomatic efforts to reach a cease-fire and economic sanctions imposed on the Russian Federation. Said commitment to defend the victim of the conflict, nevertheless, sparked debate in both the constitutional and international legal

⁵² *Gazzetta Ufficiale*. (2022). *Gazzettaufficiale.it*. Art.2 bis, para.2.

<https://www.gazzettaufficiale.it/eli/id/2022/04/13/22A02359/sg>

⁵³ Marazzita, G. (2022). "«Guerra vietata, legittima e necessaria.»" *Federalismi.it*. pp. 52-55

<https://federalismi.it/AppOpenFilePDF.cfm?artid=47673&dpath=document&dfile=10082022112600.pdf&content=%27%27Guerra%2Bvietata%2C%2Blegittima%2Be%2Bnecessaria%27%27%2B%2D%2Bsta%2B%2D%2Bdottrina%2B%2D%2B> For a more detailed list of weapons and military equipment, see Rossi, P. (2022, March 8). *La compatibilità con la Costituzione italiana e il diritto internazionale dell'invio di armi all'Ucraina*. SIDIBlog. p.187. <http://www.sidiblog.org/2022/03/08/la-compatibilita-con-la-costituzione-italiana-e-il-diritto-internazionale-dellinvio-di-armi-allucraina/>

⁵⁴ Camera dei deputati. (2024, July 15). *Cessione di materiali d'armamento alle autorità governative dell'Ucraina - Difesa e Sicurezza internazionale*. Documentazione Parlamentare. https://temi.camera.it/leg19/temi/19_cessioni-di-materiali-d-armamento-alle-autorit-governative-dell-ucraina.html

⁵⁵ As of today, Italy has sent ten 'packages' of military equipment to Ukraine, spanning over two different governments (Draghi and Meloni), underlining Italy's unwavering support to the people of an unjustly invaded territory.

doctrines. Before assessing this compatibility in detail, it is important to clarify a common—but legally imprecise—distinction that has featured in public and political discourse: the idea of categorizing military support as “defensive” or “offensive.” While frequently invoked in policy statements, this dichotomy holds limited significance under international law. What matters is not the intrinsic nature of the weapon, but the context and proportionality of its use. The principle of proportionality, firmly established in *jus ad bellum* doctrine, governs the legality of self-defense responses under Article 51 of the UN Charter. It does not require that defensive acts be geographically confined to the territory of the state under attack, nor does it prohibit particular categories of weapons. Thus, if Ukraine employs foreign-supplied weapons in a manner that remains within the limits of necessity and proportionality, their use is legally justified—regardless of the weapons’ range or technological capacity. Conversely, should Ukraine engage in disproportionate military action, even the use of the most basic weaponry would fall outside the limits of lawful self-defense. The legality of military assistance provided by states such as Italy therefore depends not on the classification of the equipment per se, but on whether its use supports a response that aligns with the principles of international law.

2.2 Compatibility with Italy’s Internal and International Obligations

The present section explores a fundamental question in Italian constitutional and international law: is the shipment of lethal weapons to one of the parties at war compatible with the Italian Constitution, hence, its international obligations? Is it possible to reconcile Italy’s military assistance to Ukraine with the pacifist and internationalist principles established in Article 11?

The controversy stems from Italy’s decision to assist one warring faction by supplying military assets while not being directly attacked. At first glance, this seems to fall neatly within the category of ‘international dispute’, which is one of the two types of war prohibited by Article 11. So, how can Italy justify its intervention in this conflict?

The debate surrounding Article 11’s interpretation has consistently existed within both the constitutional and international legal frameworks. Proponents of an unequivocal pacifist interpretation of the article, highlighting Italy’s repudiation of war as a definitive characteristic permitting involvement in war only in the event of direct aggression, fail to

consider the escalating security concerns presented by emerging modalities of international armed conflict. In contrast, the “internationalist” perspective emphasizes Italy’s fervent aspiration to participate in international organizations dedicated to preserving peace and justice among nations and to adopt generally recognized principles of international law; however, this approach may occasionally diminish the significance of the fundamental principle as envisioned by the ‘Constituent Fathers’. The challenge lies in striking a balance between the two. The sections below explore some of the most important themes around which legal scholars and politicians alike still discuss and present opposing views. They include *jus ad bellum* discussions, the law of neutrality, democratic oversight procedures, as well as constitutional interpretations of Article 11 and understanding State’s responsibility.

2.2.1 Jus ad Bellum and the Right to Self-Defense

A central point in the debate over Italy’s military aid to Ukraine lies in the interpretation of *jus ad bellum* and the right to self-defense under international law. A minority of critics have argued that the type of assistance offered to Ukraine has been in violation of *jus ad bellum*, by not being limited to strictly defensive purposes. That is, some argue that the support to Ukraine provided by Western countries, therefore also Italy, was aimed at weakening the military capacities of the aggressor, thus acting beyond the strict meaning of (collective) self-defense. By extending the range of action of self-defense initiatives, there is the risk of entering the field of “preventive action”, incompatible with customary international law.⁵⁶ Additionally, acting in the guise of preventive protection for other states paradoxically mirrors the very “preventive” measures unsustainably cited by Putin as justification for his “special military operation”.⁵⁷ That said, there is no doubt whatsoever that the full-scale invasion of Ukraine perpetrated by Russia represents a clear violation of the prohibition of threat or use of force against the territorial integrity or political independence of Ukraine.⁵⁸ Affirming otherwise would completely deprive the

⁵⁶ Danish Institute for International Studies. (2005). *Preventive Use of Force not authorised by the Security Council*. In NEW THREATS AND THE USE OF FORCE (pp. 121–140). Danish Institute for International Studies. <http://www.jstor.org/stable/resrep30726.10>

⁵⁷ De Sena, P., former president of Società italiana di Diritto internazionale e dell’Unione europea (2021–2024), in an interview on April 28, 2022, GUERRA IN UCRAINA/ “Gli Usa non vogliono più la pace, tocca alla Cina”, available at: <https://www.ilsussidiario.net/news/guerra-in-ucraina-gli-usa-non-vogliono-piu-la-pace-tocca-alla-cina/2331807/>

⁵⁸ As outlined by Article 2(4) UN Charter and confirmed by the UN General Assembly on March 11, 2022, available at: <https://docs.un.org/en/A/ES-11/L.1> This resolution, titled “Aggression against

discussion of any meaning, as the actions carried out by Russia cannot be justified under international law. That is, to be sure, Russia's "special military operation" falls within the notion of 'war of aggression', defined by the intention of the invading army to achieve the *debellatio* of the invaded country.⁵⁹ It logically follows that Ukraine, by defending itself, is acting well within its inherent right of self-defense, as long as the Security Council has not taken measures necessary to maintain international peace and justice, which is not the case due to the Russian veto. The concern, however, is whether military aid by third states may be legitimate under international law. Critics emphasize that Article 51 of the UN Charter, while acknowledging the inherent right to self-defense, does not mandate its invocation, but merely permits it.⁶⁰ They argue that the Charter does not impose any obligation on States to assist others, and that by not providing military aid to Ukraine, Italy would not be in breach of any international obligation. Similarly, they note that Article 5 of the North Atlantic Treaty (NATO) outlines mutual defense obligations among member states,⁶¹ but since Ukraine is not a NATO member, this provision is inapplicable to the present case. This argument substantiates the previous one: Italy is not legally bound by any treaty to provide military aid to Ukraine. On the other hand, third states' support to Ukraine, via the supply of weapons, cannot be considered as illegitimate under international law, in light of the norm of international law which allows for

Ukraine" came to light within the framework of a special emergency session convened based on the Resolution Uniting for Peace (UN Doc. 377 V. (1950)). As has already been explained, in the first paragraph of the operative part of the Uniting for Peace Resolution, which allowed the United States to intervene in the Korean War under the auspices of the UN, the Assembly «Resolves that 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, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security».

⁵⁹ Zicchittu, P., (2023, May 31). *Article 11 of the Italian Constitution and the war in Ukraine: The constant dialogue between Constitutional and International Law - QIL QDI*. QIL QDI. p.38
<https://www.qil-qdi.org/article-11-of-the-italian-constitution-and-the-war-in-ukraine-the-constant-dialogue-between-constitutional-and-international-law/>

⁶⁰ Chapter VII, Article 51 UN Charter. <https://legal.un.org/repertory/art51.shtml>

⁶¹ «The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area». Retrieved at: https://www.nato.int/cps/bu/natohq/topics_110496.htm

individual and collective self-defense.⁶² The pre-requisites for applying Article 51 of the UN Charter containing the right of self-defense are all met in the case of Ukraine, since the latter, as seen above, is defending itself from an unjust—and unjustifiable—aggression by its neighbor, Russia. For one, Ukraine’s persistent appeals for assistance are a crucial measure enabling third states to maintain that they are engaging in collective self-defense.⁶³ The right to self-defense—both individual, *uti singulus*, and collective, *uti universi*—appears to permit a direct use of force against the aggressor, provided it conforms to the principle of proportionality and remains within the boundaries of defensive purpose.⁶⁴ Therefore, if it is true that self-defense, almost by its very nature, involves the use of armed force, thereby representing, in fact, a derogation from the prohibition of the use of force in international relations, and if Italy’s supply of arms constitutes only a *minoris generis* use of force, then it should not be justified on the basis of collective self-defense, but at most as a sort of ‘external support’ to Ukraine’s individual self-defense, that can be justified not only in light of the United Nations Charter, but rather by focusing on the nature of the violated obligation.⁶⁵ In essence, given the right of self-defense permits the direct use of force to safeguard the attacked State, military assistance of lesser intensity is, *a fortiori*, permissible.⁶⁶ To support this thesis, no State has so far justified its military assistance to Ukraine by invoking the principle of collective self-defense. On the contrary, many of them claimed to be aiding the Ukrainian people with all the support they need to exercise their individual right to self-defense.⁶⁷ Logically, then, since third states are not using force against the aggressor, they do not need to justify their actions with the right of collective self-defense, and, most

⁶² Spagnolo, A. (2022). The Armed Attack Against Ukraine and the Italian Reaction From a *Ius ad Bellum* Perspective. *The Italian Review of International and Comparative Law*, 1(14), pp.443-456. <https://doi.org/10.1163/27725650-02020012>

⁶³ Steenhoven, N. van der. (2019). *Conduct and subsequent practice by states in the application of the requirement to report under UN Charter Article 51*. *Journal on the Use of Force and International Law*, 6(2), 242–272. <https://doi.org/10.1080/20531702.2019.1690333>

⁶⁴ Latino, A. (2024). *L’invio di armi all’Ucraina fra Costituzione e diritto internazionale*. Dpceonline.it. p. 703 <https://www.dpceonline.it/index.php/dpceonline/article/view/2156/2396>

⁶⁵ *Ibidem*.

⁶⁶ Hamilton, T. (2022, March 30). *Articulating Arms Control Law in the EU’s Lethal Military Assistance to Ukraine*. Just Security. <https://www.justsecurity.org/80862/articulating-arms-control-law-in-the-eus-lethal-military-assistance-to-ukraine/>

⁶⁷ Rossi, P. (2022). *La compatibilità con il diritto internazionale e la Costituzione italiana dell’invio di aiuti militari all’Ucraina*. p.189. The author continues, claiming that «it is easily understandable that the Western reluctance to mention collective self-defense reflects a desire not to exacerbate tensions and to reaffirm the intention not to directly participate in hostilities».

importantly, such type of support—a *minoris generis* use of force, or “indirect”—would not require justifications as to the *jus ad bellum*.⁶⁸ This, however, has always been object of debate among scholars. By appealing to the ICJ ruling on the case of Nicaragua, critics emphasized that the mere sending of weapons regardless of their mode of use, could constitute a potential threat or use of force. However, supporters of military aid argue that this analogy is flawed. The ICJ case concerned US support for non-state actors (the contras), not an internationally recognized sovereign state such as Ukraine. Furthermore, the ICJ justified its decision by referencing the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970),⁶⁹ which in the first principle of the XXV Resolution, paragraph 8, states, «*Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State*». Thus, the context of the aid is crucial. In summary, critics warn of the legal risks tied to supplying military aid under the banner of self-defense, especially when such aid may blur the line between defensive assistance and unlawful use of force.⁷⁰ They highlight the non-binding nature of the self-defense clause and raise the issue of neutrality. Conversely, supporters underscore the legitimacy of aiding a sovereign state acting within its inherent right to self-defense, emphasizing that the aid provided does not constitute direct force and is justified both under Article 51 and broader principles of international law. The legality of Italy’s actions, therefore, hinges on whether its support remains within the limits of necessity and proportionality—cornerstones of the *jus ad bellum* framework.

2.2.2 Interpretation of Article 11

A second axis of the debate concerns the constitutional interpretation of Article 11 in relation to Italy’s military aid to Ukraine. Critics argue that several provisions of the Italian Constitution, including Articles 11 and 52, clearly prohibit any involvement in armed conflict unless it is for the defense of national territory. According to this view, Article 11 reflects a definitive pacifist principle that permits engagement in military

⁶⁸ *Ibidem*.

⁶⁹ Available at: <https://digitallibrary.un.org/record/202170?v=pdf>

⁷⁰ Clancy, P. (2023). NEUTRAL ARMS TRANSFERS AND THE RUSSIAN INVASION OF UKRAINE. *International & Comparative Law Quarterly*, 72(2), 527–543. <https://doi.org/10.1017/S0020589323000064>

operations only in the event of direct aggression against Italy. The placement of Article 11 among the fundamental principles of the Constitution underscores its importance as a normative constraint on the exercise of public powers, particularly in the domain of foreign and defense policy. Critics further assert that Article 11 does not allow all limitations of sovereignty but only those necessary for a world order that ensures peace and justice among Nations.⁷¹ Therefore, Italy's participation in international organizations that adopt measures favoring war—even under the pretext of peacekeeping—would be unconstitutional if such measures contradict the values enshrined in the Constitution. The key claim is that international obligations must be interpreted through the lens of Article 11, not the other way around. This implies that resolutions or policies from international organizations that conflict with the domestic commitment to peace should not be recognized or enforced. The argument concludes that Article 11 should not be seen as a “blank check” to international law, but rather as a limitation of the Republic's sovereignty—and at the same time a positive commitment—, conditioned on the actual pursuit, by the relevant international organizations, of peace and justice among Nations.⁷² In support of this position, critics invoke a systemic reading of Article 11 alongside Article 52, which asserts that the defense of the homeland is a sacred duty. While the Constitution does not impose a complete prohibition on war, it remains silent on the possibility of defending foreign territories.⁷³ This omission is interpreted to mean that support for military operations beyond Italian territory falls outside the scope of constitutional legitimacy. According to this logic, any form of military aid not explicitly tied to national self-defense would breach the constitutional order. Moreover, critics emphasize the binding force of the Constitutional Court's jurisprudence, particularly a 1984 decision stating that a Treaty, *«when it imposes limitations on sovereignty, cannot be enforced in the country unless it corresponds to the conditions and purposes dictated by Article 11 of*

⁷¹ Allegretti, U. (1991). Guerra del Golfo e Costituzione. *Il Foro Italiano*, 114, 392-393. JSTOR. <https://doi.org/10.2307/23269231>

⁷² Caterina, E., Giannelli, M., & Siciliano, D. (2022, April 26). *Il ripudio della guerra preso sul serio. Quattro tesi sull'incostituzionalità dell'invio di armi all'Ucraina*. SIDIBlog. <http://www.sidiblog.org/2022/04/26/il-ripudio-della-guerra-preso-sul-serio-quattro-tesi-sullincostituzionalita-dellinvio-di-armi-allucraina/>

⁷³ Pistorio, G., (2022). *La cessione di armamenti alle Forze armate ucraine, tra interpretazioni costituzionalmente e internazionalmente conformi e (ir)regolarità costituzionali*. Associazione Italiana dei Costituzionalisti. p.2. https://www.associazionedeicostituzionalisti.it/images/laLettera/LaLetteraAIC_04_2022_Contributo_introuduativo.pdf

the Constitution».⁷⁴ They argue that Italy's military aid should be evaluated according to its alignment with the principle of peace, rather than presumed to be valid simply because international law allows it. In contrast, supporters of military aid present a different reading of the constitutional text. They argue that while Article 11 indeed renounces war as an instrument of aggression or settlement of disputes, it also allows Italy to accept limitations on sovereignty in favor of an international legal order committed to peace and justice. From this perspective, the second part of Article 11 is not a constraint but a normative gateway for Italy's participation in international solidarity efforts, provided these efforts are consistent with the defense of peace. Supporters claim that a literal reading of Article 11, divorced from the rest of the constitutional text, is misleading. They argue that Articles 10 and 11 establish an internationalist orientation, which integrates general international law and international treaties into the domestic legal order. Therefore, constitutional interpretation must be systemic and include these provisions. Excluding them leads to an incomplete and potentially distorted view of Italy's obligations and powers. Furthermore, defenders assert that interpreting Article 11 in light of other constitutional norms does not neutralize its pacifist character but rather contextualizes it within the broader constitutional framework.⁷⁵ They emphasize that the Constitution does not impose an absolute prohibition on military engagement, especially when such engagement is non-aggressive and in support of an internationally recognized right to self-defense. Article 78, which regulates the declaration of a state of war, is cited to illustrate that the Constitution allows for defensive military action under certain conditions. Supporters also argue that military aid to Ukraine does not constitute participation in an offensive war or in the settlement of an international dispute by force. Instead, it is a response to a request for help from a sovereign state exercising its right to self-defense. Thus, it should not be equated with the kinds of wars renounced by Article 11. Finally, they highlight that both general international law and treaty obligations recognized in the constitutional hierarchy above ordinary legislation must be taken into account. The Italian Constitution assigns legal significance to these sources, and their relevance cannot be ignored when evaluating the constitutionality of military aid. In

⁷⁴ Sentence no. 300 of 1984, retrieved at:

https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:1984:300

⁷⁵ Rossi, P. (2022). *La compatibilità con il diritto internazionale e la Costituzione italiana dell'invio di aiuti militari all'Ucraina*. p.212.

conclusion, the constitutional debate is characterized by two competing interpretations: one that sees Article 11 as an absolute pacifist clause and another that views it as a conditional commitment to peace, permitting participation in international efforts to counter aggression. Critics warn of constitutional overreach and the dilution of parliamentary sovereignty, while supporters argue that the Constitution, properly understood, supports Italy's engagement in lawful international solidarity. The resolution of this tension hinges on whether one adopts a literal and isolated reading of Article 11 or a systemic and integrated approach that balances national values with international responsibilities.

2.2.3 Neutrality and the Use of Force

Another important point of contention involves the alleged violation of the law of neutrality and its interaction with the international legal order. Critics have consistently claimed that such military aid is in violation of the status of neutrality, as established by the classical international law of war. The question is whether Italy's assistance to Ukraine constitutes an *ad bellum* use of force—although *minoris generis*—and if as such, it impacts the neutrality status of our country.⁷⁶ The concept of neutrality has long been debated within the international legal doctrine and in order to grasp its meaning, one must turn to the Hague Conventions of 1907, V and XIII, which are dedicated to neutrality and regulate the relationships, during an international armed conflict, between belligerent and non-belligerent States. In particular, Article 6 of Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War, clearly states that: «*The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden*».⁷⁷ In fact, neutrality implies the obligation to conform to four fundamental duties: abstention, prevention, impartiality, and acquiescence.⁷⁸ These four commitments, according to the international law of war, were considered a necessary condition for third states wishing to maintain a neutral stance regarding an armed conflict. Thus, in the present case, it seems that there

⁷⁶ Rossi, P. & Iovane, M. (2023). *Gli obblighi internazionali di neutralità dagli Alabama Claims alla guerra in Ucraina*, in Porchia, O., Vellano, E. (eds.), *Il diritto internazionale per la pace e nella guerra. Sviluppi recenti e prospettive future – Liber amicorum in onore di Edoardo Greppi* (Naples: ESI 2023) pp. 23-36., Available at: <https://www.collane.unito.it/oa/items/show/149#?c=0&m=0&s=0&cv=0>

⁷⁷ Retrieved at: <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-xiii-1907/article-6?activeTab=>

⁷⁸ Latino, A. (2024). *L'invio di armi all'Ucraina fra Costituzione e diritto internazionale*. Dpceonline.it. pp.706-710. <https://www.dpceonline.it/index.php/dpceonline/article/view/2156/2396>

is a conflict between the peremptory prohibition under article 6 of Convention XIII, and the actions carried out by a multitude of states, sending weapons, military vehicles and ammunitions to Ukraine. Despite the evolution of international law and the ratification of the UN Charter, that does not allow room for neutrality in situations in which the Security Council has taken «measures necessary to the maintenance of international peace and justice», the case at hand presents instead a situation of “paralysis”, given by the veto of the permanent members of the Security Council, among which there happens to be the aggressor itself. Therefore, in such cases, the traditional regime of neutrality should continue to apply without substantial modifications. In fact, critics contend that the principle of neutrality is unaffected by the norms regarding self-defense, and that any discrimination against the aggressor State is impermissible. In different terms, a breach of neutrality obligations in favor of the attacked state would never be warranted, even under the right to collective self-defense.⁷⁹ «The law of neutrality can effectively fulfil its function of restraining conflicts only if the question of which party is the aggressor and which the victim remains irrelevant for the evaluation of certain acts in the light of the law of neutrality».⁸⁰ This is further corroborated by the fact that the “inherent right” of self-defense, as delineated in Article 51 of the UN Charter, does not impose an obligation on the States to exercise said right. Furthermore, the idea that the supply of weaponry should be considered as an indirect use of force against the other party at war is mainly based on a sentence by the International Court of Justice (ICJ) in the case of *Nicaragua v. United States*.⁸¹ The ICJ decided that the supply of weapons and military trainings provided by the United States to the *contras*,⁸² despite not being a fully-fledged armed conflict, was unlawful under international law as it constituted a violation of the prohibition of threat or use of force against Nicaragua. Moreover, the ICJ, by not explicitly stating that the modality of the use of such weapons was crucial in evaluating its legality, suggested that the mere sending of weapons regardless of their mode of use,

⁷⁹ Bothe, M. (2013), 'The Law of Neutrality', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd Edition (2013; online edn, Oxford Academic), <https://academic.oup.com/book/57495/chapter-abstract/473436741?redirectedFrom=fulltext>

⁸⁰ *Ibidem*.

⁸¹ Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*). <https://www.icj-cij.org/case/70>

⁸² Right-wing militias who waged anti-communist guerilla warfare (1979–1990) against the Marxist governments of the Sandinista National Liberation Front and the Junta of National Reconstruction, which came to power after the Nicaraguan Revolution in 1979.

could constitute a potential threat or use of force. Ultimately, although discussions on indirect applications of force, as illustrated by the example above, have focused on State support for non-State entities, there is no basis for distinguishing these scenarios from those in which aid or assistance is provided to a State. To be sure, restricting the prohibition of indirect force to situations involving non-State groups would be at odds with the object and original purpose of the rule prohibiting the use of force between States.⁸³ In contrast, defenders of Italy's military assistance assert that the law of neutrality has evolved considerably since the adoption of the Hague Conventions. They argue that the entry into force of the UN Charter and subsequent developments in customary international law have significantly limited the applicability of classical neutrality, especially in the face of aggression.⁸⁴ According to this view, the use of force is no longer just in the new world order, and states can provide weapons and other types of support to an unjustly attacked State so that it can defend itself. This needs to be read in light of the norms of *jus ad bellum*, contained in Article 51 of the UN Charter. Rather obviously, the principle of neutrality has no relevance whenever the Security Council has intervened on the matter.⁸⁵ That is, should the Security Council decide what actions shall be taken by states in order to ensure the maintenance of international peace and security, the law of neutrality could not illegitimize those states' actions. The position becomes ambiguous when the Security Council fails to deliberate due to the veto of one of the permanent members, which is exactly the case here. While critics argue that, in such situations, the law of neutrality should continue to apply, because, accordingly, the latter is effective only as long as the question of who is considered the aggressor and who the victim remains irrelevant for the assessment of actions in light of such law;⁸⁶ extensive doctrine has claimed that the aggressor State should not take advantage of parts of the law of the war, such as the law of neutrality. That is, the difference between *jus ad bellum*—containing the right to self-defense—and *jus in bello*—containing the law of neutrality—

⁸³ Schmitt, M., & Biggerstaff, W. C. (2023). *Aid and Assistance as a "Use of Force" Under the Jus Ad Bellum*. Published by the Stockton Center for International Law (pp. 197–204). <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=3042&context=ils>

⁸⁴ Schindler, D. (1991). Transformations in the Law of Neutrality Since 1945. *Humanitarian Law of Armed Conflict Challenges Ahead*, 367–386. https://doi.org/10.1163/9789004636071_028

⁸⁵ Rossi, P. (2022). *La compatibilità con il diritto internazionale e la Costituzione italiana dell'invio di aiuti militari all'Ucraina*. p.198.

⁸⁶ Bothe, M. (2013), 'The Law of Neutrality', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd Edition (2013; online edn, Oxford Academic), <https://academic.oup.com/book/57495/chapter-abstract/473436741?redirectedFrom=fulltext>

is undisputed. However, it can be argued that the law of neutrality constitutes a *sui generis* area of *jus in bello*, as it is not based on humanitarian conditions, but rather on the protection of the interests of belligerent, as well as non-belligerent states.⁸⁷ Therefore, invoking the law of neutrality as a safeguard that prohibits the intervention by third states in assistance to an unjustly attacked State, is not legitimate and would go against the established principle of *ex iniuria jus non oritur*.⁸⁸ In summary, this section has outlined two competing views on neutrality. On one hand, critics emphasize the enduring relevance of the Hague Conventions and argue that neutrality remains binding absent explicit Security Council authorization. They stress that international legal norms governing neutrality cannot discriminate between aggressor and victim. On the other hand, supporters maintain that neutrality must be interpreted in light of modern international law, particularly when facing egregious violations such as acts of aggression. They argue that assisting Ukraine does not violate neutrality but rather affirms the fundamental principles of international law aimed at maintaining peace and justice.

2.2.4 Democratic Oversight and the Principle of Legality

Another convincing argument put forward by critics is the lack of democratic oversight during the decisions taken by the Italian Government as to the type of military aid to provide. The first problem regards the content and the form of parliamentary delegations to the Government.⁸⁹ While the centrality of the Parliament in procedures involving war events is indisputable, it seems inappropriate to resort to *extra ordinem* measures without a proper consideration of the requirements of extraordinary necessity and urgency underlying the relation between decree-laws, parliamentary resolutions, and ministerial decrees.⁹⁰ Moreover, other yet pressing doubts are raised by the authorization regime of the “twin resolutions”. The acts of the two Chambers, in fact, limited themselves to categorizing military instruments as forms of assistance to the Ukrainian authorities,

⁸⁷ Rossi, P. (2022). *La compatibilità con il diritto internazionale e la Costituzione italiana dell’invio di aiuti militari all’Ucraina*. p.200.

⁸⁸ *Ibidem*.

⁸⁹ For a detailed analysis on the lack of “transparency” and democratic oversight, see Mazzola, A. (2024). *Il ripudio alla guerra sospeso tra crisi della democrazia interna e mutamento delle regole internazionali*. Dpceonline.it. pp.197-212.

<https://www.dpceonline.it/index.php/dpceonline/article/view/2126/2366>

⁹⁰ Chiappetta, A. (2024). *Il costituzionalismo moderno alla prova di un nuovo conflitto: l’impermeabilità delle regole come baluardo del principio pacifista*. Dpceonline.it. pp.112-117.

<https://www.dpceonline.it/index.php/dpceonline/article/view/2122/2361>

without clarifying the type of equipment involved or the methods of transfer. In essence, the resolutions have taken on the appearance of “blank checks”, ultimately binding the Government without any conditions; the Executive has effectively received, through these two parliamentary resolutions, the power it had attributed onto itself under the first decree-law, reserving an unbounded and unregulated field of action.⁹¹ Therefore, some argue that we have witnessed, from the outset, a distortion of the balance between constitutional bodies in matters of foreign and defense policy—a distortion that highlights the weakness and marginalization of the Parliament in relation to the Government.⁹² Additionally, these legislative interventions unequivocally legitimize armed assistance to a country at war, introducing a precedent with potentially disruptive effects that would pave the way for Italy’s active participation in other war scenarios and could represent the basis for future military aid, of any kind, to third countries.⁹³ The significance of setting such a precedent through decree-laws and ministerial decrees, that is, not ordinary pieces of legislation, is given by the impossibility of a constitutional system based on the repudiation of war, as is the Italian one, to pass laws that allow the supply of weaponry to a belligerent. Put differently, decree-laws were used in a way to circumvent Italy’s fundamental pacifist principle, which would have otherwise not allowed the adoption of laws for such military aid. To sum up, Italy’s military support to Ukraine was authorized through acts that are procedurally correct, yet constitutionally fragile. The use of decree-laws and classified interministerial decrees has resulted in a shift away from parliamentary centrality, raising concerns over a normalization of military decisions taken outside democratic scrutiny.⁹⁴ The source of concern is here the loss of sovereignty, which belongs to the people, in favor of the rapidity of action by which the Government may enact potentially disastrous policy-decisions; and which is further exacerbated by Italy’s unyielding submission to the dictates of international organizations, even if these were to lead to the origin of a global armed conflict. In contrast, supporters argue that this concern does not necessarily translate into a constitutional breach. That is, the use of decree-laws

⁹¹ *Ibidem*.

⁹² Equizi, C. (2024). *Questioni e dinamiche costituzionali sui conflitti armati*. Dpceonline.it. p.128.

<https://www.dpceonline.it/index.php/dpceonline/article/view/2159/2362>

⁹³ Chiappetta, A. (2024). *Il costituzionalismo moderno alla prova di un nuovo conflitto: l'impermeabilità delle regole come baluardo del principio pacifista*. Dpceonline.it. pp.112-117.

<https://www.dpceonline.it/index.php/dpceonline/article/view/2122/2361>

⁹⁴ Piluso, P. (2025). “*Ripudio della guerra e legittima difesa collettiva*”. Consulta Online. pp.235-237.

<https://giurcost.org/contents/media/posts/25726/piluso2.pdf>

is permitted by the Italian constitutional framework under Article 77 in cases of extraordinary necessity and urgency, conditions that were arguably met given the sudden escalation of the Ukrainian conflict and the need for timely international coordination.⁹⁵ Moreover, the legislative framework guarantees a posterior form of democratic legitimacy, by demanding decree-laws be converted into law by the Parliament within 60 days, which ensures that executive action is subject to legislative scrutiny, even if it occurs after the fact. Additionally, while the “twin resolutions” may have lacked specificity, their adoption reveals an institutional willingness to exercise oversight, rather than a surrender of parliamentary prerogatives.⁹⁶ Finally, the use of such instruments, even if procedurally exceptional, remains constitutionally legitimate when interpreted in light of the interplay between national and international obligations—particularly in a scenario where Italy is acting in support of a collective legal and moral order, not unilaterally engaging in hostilities. Therefore, although greater transparency and deliberative depth would have been preferable, the process followed does not, in itself, violate the constitutional balance of powers, nor does it diminish the legality of Italy’s support to Ukraine.

2.2.5 Responsibility Under International Law and ARSIWA

Finally, another argument put forth by critics involves the non-mandatory nature of the actions taken in the name of self-defense, outlined in Article 51 of the UN Charter. The latter, in fact, establishes the inherent right of states to use force in cases of collective or individual self-defense, which, however, does not amount to an obligation, therefore implying that, by not supplying military aid, one would not violate international law. This argument, again, is poor. The absence of an obligation for states to respond to violations of the prohibition of the use of force in the UN Charter does not indicate that the Charter or other sources of international law may permit such actions. Precisely, the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA hereinafter) of 2001, provide substantial arguments for the legitimacy of a violation of the law of neutrality to help an attacked State. Importantly, being the prohibition of the use of force a norm of *ius*

⁹⁵ Marazzini, M. (2023). *I poteri normativi del Governo nell'emergenza bellica in Ucraina. Alcuni spunti critici a partire dall'invio di aiuti militari e sulla loro segretezza*. CONSULTA ONLINE. pp.168-172. <https://giurcost.org/contents/giurcost/studi/marazzini2.pdf>

⁹⁶ Pensabene, P. (2023). *Brevi note sulla classificazione dei mezzi, materiali ed equipaggiamenti militari ceduti all'Ucraina: il ruolo del Copasir*. Associazione Italiana dei Costituzionalisti. pp.85-89. https://www.osservatorioaic.it/images/rivista/pdf/2023_6_09_Pensabene.pdf

cogens, carrying effects *erga omnes*,⁹⁷ a violation of such norm can be denounced by the entirety of the international community, moving the discussion to the international responsibility for wrongful acts, regulated, in fact, by ARSIWA. ARSIWA's Chapter V, titled "Circumstances Precluding Wrongfulness", contains Article 21, stating that «*The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations*». The article would eliminate any uncertainty if the supply of weapons was considered as use of force, be it direct or indirect. However, as extensively discussed, the mere assistance to an attacked country does not amount to a use of force, thereby potentially casting doubts on the relevance of this clause in the current circumstances. Nevertheless, it follows that since the provision allows for the direct use of force, it will, *a fortiori*, allow actions below such threshold. Furthermore, and for the sake of completeness, the combined content of ARSIWA's Article 40, relative to cases of *a serious breach by a State of an obligation arising under a peremptory norm of general international law*, and Article 41, according to which *States shall cooperate to bring to an end through lawful means any serious breach*, yield two significant legal implications for third states, with respect to Article 51 of the UN Charter.⁹⁸ On the one hand, it marks a shift from the requirement of consent or an explicit request by the injured State to the recognition of a universal entitlement—*uti universi*—for all members of the international community to unilaterally adopt countermeasures. On the other, it signals an evolution from a mere prerogative to act into a normative imperative, that is, a duty incumbent upon all, once again *uti universi*, to respond.⁹⁹ The entanglement of legal principles and geopolitical realities renders this discussion more complex, obscuring clear lines of analysis. Nonetheless, even where doubts arise about a State's unilateral capacity to adopt countermeasures against violations of *erga omnes* obligations, it is crucial to recognize that such measures are lawful when they embody collective actions that express the will of the international community as a whole. In summary, this section has explored how ARSIWA, alongside

⁹⁷ For an in-depth understanding of obligations '*erga omnes*', see: Rossi, P. & Iovane, M. (2020, March 01) *International Fundamental Values and Obligations Erga Omnes*. The Protection of General Interests in Contemporary International Law, Oxford University Press, 2021, pp. 46-67., Available at SSRN: <https://ssrn.com/abstract=4887115> or <http://dx.doi.org/10.2139/ssrn.4887115>

⁹⁸ Latino, A. (2024). *L'invio di armi all'Ucraina fra Costituzione e diritto internazionale*. Dpceonline.it. pp. 703-704 <https://www.dpceonline.it/index.php/dpceonline/article/view/2156/2396>

⁹⁹ *Ibidem*.

the *ius cogens* nature of the prohibition of the use of force, creates a legal framework where states may not only be permitted, but even expected, to respond to grave violations such as aggression. This adds an important layer of legal justification to Italy's actions, moving beyond permissive interpretations into the realm of international responsibility and moral obligation.

Chapter two shed light on a highly relevant topic, the assessment of the legitimacy of Italy's military aid to Ukraine, tackling it from a comprehensive legal perspective. The next chapter will present a comparative analysis of the pacifist dispositions in the constitutional works of the Federal Republic of Germany and Japan, emphasizing commonalities and differences with the Italian fundamental pacifist principle enshrined in Article 11.

3. Comparative Study—Pacifist Constitutional Dispositions in Germany and Japan in Light of Italy’s Article 11

The concluding chapter of this thesis will deepen the analysis of Article 11 of the Italian Constitution by placing it in dialogue with its German and Japanese counterparts—three pacifist clauses born from the ashes of war, yet shaped by unique historical, cultural and political trajectories. Since World War Two had originated from the belligerent policies of the three states bound by the Tripartite Pact, the winning powers sought to ensure that each of their post-war constitutions contained a provision explicitly repudiating war as a means of resolving international disputes. While the three systems undoubtedly share some commonalities, their divergences reveal how each nation has negotiated the tension between principled pacifism and increasing global security threats. Chapter three is structured as follows: section one will be dedicated to Article 26 of the German Basic Law—*Grundgesetz*—, by looking at the historical context and the adoption of the constitution, examining the core principles contained in the provision, and ultimately assessing parliamentary role in military missions. Article 9 of the 1947 Japanese constitution will be studied in section two, together with the evolution of the “Self-Defense Forces”, proposed reinterpretations of the article and attempts to amend the ultra-pacifist clause. The concluding section will focus on the comparative analysis of the three systems, highlighting their shared goal of preserving peace and preventing future aggressions; while also delineating the significant disparities between them.

3.1 The German Grundgesetz (Article 26)

Immediately after World War Two, Germany was divided between the four winning powers in different “zones of occupation”. The three western areas were occupied by United States, France and Great Britain, transforming it into the Federal Republic of Germany (*Bundesrepublik Deutschland*), while the east was occupied by the Soviet Union, becoming the German Democratic Republic (*Deutsche Demokratische Republik*), led by the Socialist Unity Party of Germany (SED)¹⁰⁰. Soon after the Allies occupied the German territory, the military governors of the three Western zones of occupation asked

¹⁰⁰ The “*Sozialistische Einheitspartei Deutschlands*” (SED) was established in the DDR and east Berlin, merging the traditional social democratic party (SPD, *Sozialdemokratische Partei*), and the communist party (KPD, *Kommunistische Partei Deutschlands*).

local representatives to draft a constitution.¹⁰¹ Different proposals arose: a federalist one inspired by Bavaria and the Christian-Social parties, and a unitary one, put forward by the *Länder* and the social democratic party. Due to the division of Germany and the tensions between different political parties and the occupying forces, an agreement on a constitutional work was not found for a long time. The matter of a German constitution resurfaced at the London Six-Power Conference in 1948, where the three Western occupying forces and the Benelux¹⁰² countries met to discuss possible trizonal solutions to the existing economic and political standstill in the western zones.¹⁰³ After long negotiations and internal discussions,¹⁰⁴ the final agreement—the “*Londoner Beschlüsse*”—envisioned a federal structure of the future German State, with its own constitution. The Germans contested the overly restrictive nature of the agreement, therefore the Allies presented, in July of the same year, the “*Frankfurter Dokumente*”, which regulated the occupation regime and encouraged the Germans to vote for a constituent assembly, tasked with drafting a constitution based on federalism and respect for fundamental rights. The content of the Documents of Frankfurt was only partially accepted by the Germans, which refused the strict occupation regime proposed and the creation of a West-German State, because they feared the official division of Germany. Finally, some compromise was achieved, with the decision of leaving the ratification of the new constitution to the *Länder*’s parliaments, instead of a referendum.¹⁰⁵ The task of drafting the constitution was entrusted to 95 representatives of the western *Länder*, members of the “*Parlamentarischer Rat*”, with the duty of approving, for the western part of Germany, a “Basic Law” or “*Grundgesetz*”. The choice of the term “Basic Law” was a deliberate linguistic and political strategy, intended to underscore the provisional nature

¹⁰¹ Losano, M. G. (2020). Il rifiuto della guerra nella Legge Fondamentale tedesca del 1949. In *Le tre costituzioni pacifiste: Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania* (Vol. 14, pp. 219–234). Max Planck Institute for Legal History and Legal Theory. <http://www.jstor.org/stable/j.ctv18gfz5b.7>

¹⁰² A political and economic alliance between Belgium, the Netherlands and Luxembourg.

¹⁰³ Patton, D. F. (1996). The Allied Occupation and German Unification Compared: A Forgotten Lesson of the 1940s. *German Politics & Society*, 14(4 (41)), 1–3. <http://www.jstor.org/stable/23736425>

¹⁰⁴ France, for instance, still viewed Germany as the main security concern, thus demanding a restrictive Occupation Statute for West Germany that severely limited the new State’s sovereignty and an International Authority of the Ruhr (IAR), that ensured international control of West German coal, iron and steel.

¹⁰⁵ Losano, M. G. (2020). Il rifiuto della guerra nella Legge Fondamentale tedesca del 1949. In *Le tre costituzioni pacifiste: Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania*. p.222.

of the document and to preserve the hope of eventual German reunification,¹⁰⁶ also evident in the preamble and in article 146 of the original text.¹⁰⁷ Eventually, in early 1949, the Basic Law received the necessary approvals from the *Parlamentarischer Rat*, the Allied military governors, and the parliaments of the *Länder*. The complex and contested journey of this “non-constitution” culminated on May 23, 1949, with its entry into force—marking the formal establishment of the Federal Republic of Germany.

The German Basic Law, after an extensive bill of rights, also contains, under section II “The Federation and the *Länder*”, a pacifist article. Article 26, “Securing International Peace”, was inserted in a constitutional framework aimed at preserving peace globally. Particularly, the two preceding articles, 24 and 25, establish the international relations that the Federation had to carry out. Article 24 of the *Grundgesetz* (GG hereinafter) states: «(1) *The Federation may, by a law, transfer sovereign powers to international organizations. (1a) Insofar as the Länder are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighboring regions. (2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world. (3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration.*» The phrasing of the first and second paragraphs bears a striking resemblance to the second and third clauses of Article 11 of the Italian Constitution¹⁰⁸—a parallel that is hardly coincidental, given the comparable post-war contexts in which both texts emerged. Moreover, Article 25 GG, on the primacy of international law, «*The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.*», quite remarkably mirrors the first paragraph of Article 10 of the Italian Constitution. The

¹⁰⁶ *Ibidem*.

¹⁰⁷ The original Preamble states: «[...] the German people, [...], has, by virtue of its constituent power, enacted this Basic Law of the Federal Republic of Germany to give a new order to political life for a transitional period.» Even more clearly, Article 146: «This Basic Law shall become invalid on the day when a constitution adopted in a free decision by the German people comes into force.»

¹⁰⁸ Article 11 of the Italian Constitution: «[...] *it shall consent, on conditions of equality with other States, to sovereignty limitations required for a world order that ensures peace and justice among Nations. Italy shall promote and encourage international organizations furthering such ends.*»

two articles presented serve the purpose of committing to international law and organizations aimed at *securing a lasting peace in Europe and among the nations of the world*, setting the stage for the paramount pacifist principle enshrined in Article 26 GG: «(1) *Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be criminalized.* (2) *Weapons designed for warfare may be manufactured, transported or marketed only with the permission of the Federal Government. Details shall be regulated by a federal law.*»

Article 26 GG—object of the preset analysis—is composed of two paragraphs, the first of which adopts an explicitly pacifist tone, expressed through the condemnation of *acts undertaken with the intent to disturb the peaceful relations between nations* aimed at aggressive war. The peculiarity of this article—and what distinguishes it from the pacifist principles contained in the Italian and Japanese constitutional frameworks—is the direct reference to criminal law.¹⁰⁹ That is, the commitment to repudiating wars of aggression was so profound that the framers chose to embed within this pacifist declaration a penal law clause, effectively transforming the denunciation of aggressive war from a purely normative stance into a matter of criminal accountability. The sanction referred to in Article 26 GG was originally contained in article 80 of the German penal code (*Strafgesetzbuch*, StGB), later abrogated in 2017. Article 80 StGB stated: «*Whoever prepares a war of aggression (Article 26, paragraph 1 of the Basic Law), thereby exposing the Federal Republic of Germany to the danger of a war, shall be punished with life imprisonment or with a term of imprisonment of not less than ten years*». Currently, however, the sanction is to be found in the new §80a StGB, titled “Inciting the crime of aggression” (*Aufstacheln zum Verbrechen der Aggression*) which envisions the imprisonment for a term of three months to five years for whoever incites the crime of aggression. This provision directly references article 13 of the Code of Crimes against International Law (*Völkerstrafgesetzbuch*), which, in turn, refers to the UN Charter.¹¹⁰

¹⁰⁹ Bagnato, S., & Piccolo, C. (2024). *Costituzioni pacifiste e tutela umanitaria: i procedimenti deliberativi delle missioni in Italia, Germania e Giappone attraverso il prisma degli organi costituzionali*. Dpceonline.it. p.88

<https://www.dpceonline.it/index.php/dpceonline/article/view/2121/2360>

¹¹⁰ (1) *Whoever conducts a war of aggression or commits any other act of aggression that, by its nature, severity, and scope, constitutes an obvious violation of the Charter of the United Nations shall be punished with life imprisonment.*

The introduction of §80a StGB has ignited plenty of discussion, since many perceive it as conflicting with Article 26 GG and the abrogated §80 StGB, due to its lenient interpretation of the concept of armed conflict, which legitimizes interventions beyond the parameters of Article 26 GG. Some argue that this interpretative approach is justified by Germany's political and democratic stability,¹¹¹ further suggesting that the escalating current global crises necessitate a more engaged international community. Others interpret this new norm as a clarification, rather than a replacement or repeal of the previous §80 StGB.¹¹² Moreover, the 1990 Two-Plus-Four-Agreement (*Zwei-plus-Vier-Vertrag*)¹¹³ that provided the unification of Germany, explicitly references Article 26 GG: *"The Governments of the Federal Republic of Germany and the German Democratic Republic reaffirm their declarations that only peace will emanate from German soil. According to the constitution of the united Germany, acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for aggressive war, are unconstitutional and a punishable offence. The Governments of the Federal Republic of Germany and the German Democratic Republic declare that the united Germany will never employ any of its weapons except in accordance with its constitution and the Charter of the United Nations"*.¹¹⁴ The present article references both the pacifist principle within the German Basic Law and international law, namely articles 42 and 53 of the UN Charter, which were essential to justify military activities beyond national borders under United Nations oversight.¹¹⁵ Finally, with the unification of Germany, the *Grundgesetz* started to apply also to the former German Democratic

(2) *Whoever plans, prepares, or initiates an aggressive war or any other act of aggression as defined in paragraph 1 shall be punished with life imprisonment or with imprisonment for not less than ten years. The act according to sentence 1 is only punishable if (i) the war of aggression has been waged or the other act of aggression has been committed, or (ii) the danger of a war of aggression or another act of aggression for the Federal Republic of Germany has been brought about by them.*

(3) *An act of aggression is the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or otherwise inconsistent with the Charter of the United Nations.*

Original text available at: <https://dejure.org/gesetze/VStGB/13.html>

¹¹¹ In the words of the Federal President Frank-Walter Steinmeier in an interview for welt.de:

<https://www.welt.de/politik/deutschland/article165595858/Steinmeier-fordert-staerkeres-Engagement-der-Bundeswehr.html>

¹¹² Losano, M. G. (2020). Il rifiuto della guerra nella Legge Fondamentale tedesca del 1949. In *Le tre costituzioni pacifiste: Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania*. p.225.

¹¹³ Officially, "Treaty on the Final Settlement with Respect to Germany" (German: *Vertrag über die abschließende Regelung in Bezug auf Deutschland*).

¹¹⁴ Article 2 of the Agreement, available in English at: <https://usa.usembassy.de/etexts/2plusfour8994e.htm>

¹¹⁵ Losano, M. G. (2020). Il rifiuto della guerra nella Legge Fondamentale tedesca del 1949. In *Le tre costituzioni pacifiste: Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania*. p.226.

Republic, with Article 26 covering the entire national territory,¹¹⁶ and the reference to the UN Charter was essential to clarify the rather vague meaning of use of armed forces. The second paragraph of Article 26 GG addresses the nation's armaments industry, historically a formidable force and a key contributor to the outbreak of World War Two. This paragraph does not impose any prohibition, that is, it does not outright ban military production, but it obliges the Parliament to regulate military production with an ordinary law.¹¹⁷ The intent of the framers of the *Grundgesetz* was, in this case, to give concreteness to the pacifist principle expressed in the first paragraph. Nonetheless, the discussions within the *Parlamentarischer Rat* underscore the legal and political challenges involved in striking a balance between the continued relevance of Germany's defense industry with the imperative to prohibit the manufacture and export of armaments intended for warfare. The original draft employed the term 'weapons and ammunition' (*Waffen und Munition*), but this was ultimately rejected for being overly broad, as it encompassed items used for hunting and sporting purposes. Alternative formulations, such as 'military equipment of all kinds' (*Kriegsgerät jeder Art*), were dismissed due to their potential to include raw materials used in arms production. Similarly, the phrase 'weapons usable in war' (*im Kriege verwendbare Waffen*) was set aside for its ambiguity, as it could also extend to equipment intended for domestic policing. The final and currently operative wording, 'weapons intended for military activities' (*zur Kriegsführung bestimmte Waffen*), was adopted as the most precise and legally sustainable formulation.¹¹⁸ Consequently, two laws regarding the production of weapons were adopted to further clarify the matter. The first is the "War Weapons Control Act" (*Kriegswaffenkontrollgesetz, KrWaffKontrG*), which came into force on June 1, 1961, and has been updated several times since.¹¹⁹ Its connection with the pacifist article of the Basic Law is explicit from the title: "Implementing Law of Art. 26, para. 2 of the Basic Law".¹²⁰ This law focuses on the procedures for authorizing the production and export of war weapons. The second is the broader "Foreign Trade and Payments Act" (*Außenwirtschaftsgesetz – AWG*)¹²¹, which does not pertain solely to military material but generally regulates the import and export

¹¹⁶ *Ibidem*.

¹¹⁷ *Ibidem*.

¹¹⁸ *Ivi*, p.227.

¹¹⁹ *Ivi*, p.228.

¹²⁰ Available at: <https://www.gesetze-im-internet.de/krwaffkontrg/>

¹²¹ Available at: https://www.gesetze-im-internet.de/englisch_awg/index.html

of all goods and services, thereby indirectly encompassing items of military nature. At the time of the constitution's drafting, many of the framers doubted that Germany would resume the production of military equipment, given the Allies' disapproving stance. Ultimately, however, the idea of prohibiting the trade in military goods was abandoned in favor of a system of control. This approach was intended to prevent threats to peace even beyond Germany's borders, while simultaneously avoiding undue restrictions on economic freedom within the country.¹²² These two laws, together with Article 26 GG, completed the picture of Germany's pacifist principle and its operationalization, up until 1968 with the introduction of two new articles within the *Grundgesetz*, namely Articles 87a ("Armed Forces") and 87b ("Federal Defense Administration").¹²³ Article 87a GG was a fundamental addition for a number of reasons. First of all, it constitutionalizes the legitimacy of defensive wars, defined as actions taken *in order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a Land*. Moreover, the second paragraph imposes a constitutional reservation of law, by stating that «*Apart from defense, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law*». In general, the combined content of Article 87a GG—stating that the Federation (*Bund*) prepares its Armed Forces for defense and necessitates approval from the Parliament—and Article 24 GG, paragraph 2—allowing the possibility for the Federation to be part of a *system of mutual collective security* for the *maintenance of peace*, thereby accepting *limitations on its own sovereignty*—did not provide unequivocal guidance on whether military interventions under the auspices of the United Nations or NATO were permissible, nor whether such interventions required prior authorization by the Bundestag.¹²⁴ These questions were definitively addressed on July 12, 1994, when the Federal Constitutional Court, in its landmark Out-of-Area decision (BVerfGE 90, 286),¹²⁵ was called upon to assess whether the federal government, by unilaterally deploying troops to missions in Bosnia and Somalia, had violated the Bundestag's prerogatives over the use of armed forces, thereby giving rise to a

¹²² Losano, M. G. (2020). Il rifiuto della guerra nella Legge Fondamentale tedesca del 1949. In *Le tre costituzioni pacifiste: Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania*. p.228.

¹²³ Both available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0457

¹²⁴ Bagnato, S., & Piccolo, C. (2024). *Costituzioni pacifiste e tutela umanitaria: i procedimenti deliberativi delle missioni in Italia, Germania e Giappone attraverso il prisma degli organi costituzionali*. Dpceonline.it. p.89.

¹²⁵ Judgment of 12 July 1994-2BvE 3/92, 2 BvE 5/93, 2 BvE 7/93, 2 BvE 8/93. Available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/1994/bvg94-029.html>

constitutional conflict of competences. The judgment explicitly affirms that Article 24 GG, paragraph 2 legitimizes the deployment of armed forces beyond German territory. This provision not only authorizes participation in a system of mutual collective security but also permits the execution of all tasks typically associated with such a system—including the deployment of armed forces—provided that such actions are carried out in accordance with the rules governing that system.¹²⁶ The importance of this ruling by the *Bundesverfassungsgericht* lies in its interpretation of Article 24 GG, paragraph 2, which permits the deployment of armed forces for purposes beyond national defense, without necessitating a constitutional amendment. This stands in contrast to a restrictive reading of Article 87a(2) GG, which would otherwise suggest that such deployments require a formal revision of the Basic Law.¹²⁷ Importantly, the Federal Constitutional Court decided that, in situations of urgency, the federal government may initially decide to deploy the armed forces unilaterally; however, such action must subsequently be submitted to the Bundestag for ratification. This interpretation gave rise to the principle of the “parliamentary reserve” (*Konstitutiver Parlamentsvorbehalt*)—a constitutional practice not originally codified in ordinary legislation.¹²⁸ As overseas missions became increasingly frequent, this practice was eventually formalized through legislation in 2005, namely the “Parliament Participation Act” (*Parlamentsbeteiligungsgesetz*), which, at Article 1, paragraph 2, states: «*The deployment of German armed forces outside the scope of the Basic Law requires the approval of the Bundestag*».¹²⁹ Although the new law provided clear regulation of overseas military deployments, it did not resolve the ongoing debate concerning the compatibility of such missions with the pacifist orientation of the German *Grundgesetz*, particularly as articulated in Article 26. This discussion has re-emerged with renewed intensity in the context of the Russian-Ukrainian conflict. In conclusion, this brief analysis of Article 26 GG and related constitutional provisions shed light on a variety of relevant topics, concluding that while the article reflects a strong constitutional commitment to pacifism, the evolving legal and political landscape—

¹²⁶ Bagnato, S., & Piccolo, C. (2024). *Costituzioni pacifiste e tutela umanitaria: i procedimenti deliberativi delle missioni in Italia, Germania e Giappone attraverso il prisma degli organi costituzionali*. Dpceonline.it. p.89.

¹²⁷ *Ivi*, p.90.

¹²⁸ Losano, M. G. (2020). Il rifiuto della guerra nella Legge Fondamentale tedesca del 1949. In *Le tre costituzioni pacifiste: Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania*. p.231.

¹²⁹ Available at: <https://www.gesetze-im-internet.de/parlbgb/BJNR077500005.html>

particularly in light of international military engagements—has tested the boundaries of this principle. The following section will examine how a similar pacifist commitment was enshrined in the Japanese Constitution, offering a contrasting yet equally complex approach to post-war constitutional pacifism.

3.2 The Japanese Constitution (Article 9)

Following centuries of self-imposed isolation, the beginning of the Meiji era in 1868 marked Japan's transformation from a feudal society into a modern, industrialized nation-state and emerging global power, actively drawing upon Western influences.¹³⁰ The 1889 Meiji Constitution institutionalized a *sui generis* form of monarchy, characterized by the concentration of sovereign powers in the Emperor, who was not only the head of state but also regarded as a divine figure who could dissolve the Parliament at any time, thereby reinforcing the theocratic and autocratic nature of imperial rule. During the decades that followed the promulgation of the Meiji Constitution, Japan rapidly expanded its military and imperial ambitions, engaging in a series of conflicts—including the First Sino-Japanese War (1894–1895), the Russo-Japanese War (1904–1905), and World War I—that solidified its status as a regional hegemon. By the 1930s the militarization of the state had intensified, culminating in aggressive expansion across East Asia and the Pacific, ultimately drawing Japan into World War Two as a central Axis power. In 1945, following Japan's extensive role in the aggression and atrocities committed before and during World War Two, the nation suffered a decisive military defeat and entered a period of occupation under the United States, which would profoundly reshape its political and legal order. The “Potsdam Declaration” of July 1945, ratified by the United States' President Truman, United Kingdom's prime minister Winston Churchill and China's President Chiang Kai-shek, outlined the terms for the unconditional surrender of the Empire of Japan, imposing a process of democratization and, consequently, the adoption of a democratic constitution.¹³¹ The Potsdam Declaration was followed by the bombings of Hiroshima and Nagasaki on August 6 and 9, 1945, which some attribute to the mistranslation into English of the word *mokusatsu*, that was interpreted as a rejection of the terms within the

¹³⁰ Losano, M., Albini, P., & Sclopis, F. (2014). *Il rifiuto della guerra nelle costituzioni postbelliche di Giappone, Italia e Germania*(pp. 77–79). <http://www.associazione25aprile.it/2018/wp-content/uploads/2019/05/573.-Tre-costituzioni-pacifiste-completo.pdf>

¹³¹ *Ibidem*.

declaration. Japan subsequently accepted the conditions of surrender outlined in the Potsdam Declaration; however, the latter notably left the status and prerogatives of the Emperor largely unaddressed. On August 15, 1945, Emperor Hirohito delivered a recorded radio address to the nation, announcing Japan's surrender to the Allied Powers. The speech, however, employed highly formal and archaic language—known as *gyokuon-hōsō*¹³²—which rendered its meaning obscure to much of the population. It was only through newspaper explanations published the following day that the public fully grasped the significance of the announcement.¹³³ The American occupation of Japan began shortly thereafter on August 28, lasting from 1945 to 1952. To administer the post-war reconstruction and oversee political reform, the United States established a dedicated administrative body, placing General Douglas MacArthur as the Supreme Commander for the Allied Powers (SCAP), tasked with implementing the directives issued by this agency. Mac Arthur's often grandiose and high-sounding rhetoric on his mission and assignment in Japan suggested from the very beginning of Japan's occupation that he considered the democratization of Japan a somehow 'divine' or 'sacred' mission he was charged with.¹³⁴ His rhetoric was followed by concrete action, through a set of directives aimed to pave the way to establish a Western type of democracy in the country. Firstly, through the "Human Rights Directive",¹³⁵ which was followed by the "Five Fundamental Reforms Directives".¹³⁶ The latter did not include a constitutional reform, but it was mentioned in the Preamble: «*The achievement of the Potsdam Declaration will unquestionably involve a liberalization of the constitution*». The reason why MacArthur did not explicitly mention constitutional revision in the aforementioned "Five Fundamental Reforms Directive" is probably that, as of October 11, 1945, he neither had the mandate nor the orders from Washington to initiate, guide and supervise a constitutional revision process in Japan. In fact, MacArthur *never* received the orders and

¹³² Fisher, M. (2012, August 15). *The Emperor's Speech: 67 Years Ago, Hirohito Transformed Japan Forever*. The Atlantic. <https://www.theatlantic.com/international/archive/2012/08/the-emperors-speech-67-years-ago-hirohito-transformed-japan-forever/261166/>

¹³³ Losano, M. G. (2020). Il rifiuto della guerra nella Legge Fondamentale tedesca del 1949. In *Le tre costituzioni pacifiste: Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania*. pp.171-172.

¹³⁴ Berkofsky, A. (2010). JAPAN'S POST-WAR CONSTITUTION. ORIGINS, PROTAGONISTS AND CONTROVERSIES. *Il Politico*, 75(2 (224)), 5–25. <http://www.jstor.org/stable/24006503>

¹³⁵ Actually titled "Removal of Restrictions on Political, Civil, and Religious Liberties".

¹³⁶ Which included: 1. "Enfranchisement of Women"; 2. "Encouragement of Labor Unions"; 3. "Introduction of Liberal Principles into Japan's Education"; 4. "Reform of the Judicial System"; 5. "Democratization of Economic Institutions".

authorization from Washington to assign the task of constitutional revision to himself and the so-called “Government Section” (GS).¹³⁷ In order to comply with the directive, MacArthur assigned the constitutional reform task to Prince Konoe Fumimaro, then vice Prime Minister in Japan’s cabinet led by Prime Minister Higashikuni. Konoe discussed constitutional revision with the Emperor, moved his activities under the aegis of the imperial household and assembled a small group of Japanese constitutional experts to start working on a constitutional draft a few days after the meeting with Mac Arthur.¹³⁸ However, Konoe Fumimaro was a representative of the pre-war political elite, having served twice as Prime Minister between 1936 and 1941. During his tenure, Japan solidified its role within the Axis alliance through the Tripartite Pact and escalated its aggression in East Asia, including the declaration of a so-called “war of annihilation” against China. In essence, the initial responsibility for drafting democratic constitutional reforms had been entrusted to an individual later implicated in the very militarist policies those reforms sought to repudiate.¹³⁹ On December 6, 1945, Konoe’s name first appeared on an official list of Japanese A-class criminals of war and a few days later Konoe committed suicide. In response to MacArthur’s directive to draft a revised Japanese constitution incorporating a ‘war-renouncing clause’, Prime Minister Shidehara established a cabinet-level body in February 1946—the ‘Constitutional Problem Investigation Committee’—chaired by Minister of State Jojo Matsumoto. However, existing records and official documentation showcase that neither Foreign Minister Yoshida Shigeru, Prime Minister Shidehara, nor Matsumoto himself regarded comprehensive constitutional revision as necessary. Instead, they advocated for limited amendments to the existing Meiji Constitution. Matsumoto, in particular, justified his position by arguing that the Potsdam Declaration imposed no explicit obligation on Japan to undertake full-scale constitutional reform.¹⁴⁰ Thus, according to a restrictive interpretation of the declaration, imposing onto Japan how to revise or amend the

¹³⁷ Berkofsky, A. (2010). JAPAN’S POST-WAR CONSTITUTION. ORIGINS, PROTAGONISTS AND CONTROVERSIES. *Il Politico*, 75(2 (224)), p.11. <http://www.jstor.org/stable/24006503> “The “Government Section” (GS) was the command center at GHQ in charge of implementing US policies in Japan. The GS was established on October 2, 1945, and it played a major role in the restructuring of the post-war Japanese governmental system through the purge of public officials, the revision of Japan’s Meiji Constitution, the reorganization of the country’s civil service, the reform of Japan’s election processes and the reorganization of the relations and interaction between Japan’s central and local governments.”

¹³⁸ *Ivi*, p.12.

¹³⁹ *Ivi*, p.13.

¹⁴⁰ *Ibidem*.

constitution would violate the terms agreed upon in the declaration itself. On February 1st, 1946, the “Matsumoto Draft” started to spread. The latter, however, was considered too conservative to be accepted by the US, and, most importantly, it did not contain a ‘war-renouncing’ clause. After rejecting the draft, alluding to the fact that the Japanese government was not capable of developing a revised constitution, MacArthur took the matter upon his own hands. Without consulting Washington or Tokyo, MacArthur assigned the SCAP’s Government Section with the drafting of a constitution, under the aegis of Major-General Courtney Whitney and Colonel Charles Kades.¹⁴¹ The latter published the guide document for the constitutional revision prepared by MacArthur to direct the Government Section, which contained the three basic principles.¹⁴² Within days, the constitutional draft was ready and presented to the Japanese cabinet, which was shocked by the *de facto* disarmament of the country, through the ‘war-renouncing’ clause, and the shift of the figure of the Emperor into a “symbol of the State”.¹⁴³ Despite the harsh conditions contained in the draft, and thanks to the allegedly “high pressure” put by MacArthur onto the Japanese government,¹⁴⁴ the constitution was finally adopted, after being discussed in both chambers of the Parliament, in August 1946, officially entering into force on May 3, 1947.

This much needed historical overview of the events and debates leading up to the ratification of the 1947 Japanese Constitution is instrumental for understanding the significance of the object of the present analysis—Article 9. «*Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war*

¹⁴¹ Losano, M. G. (2020). Il rifiuto della guerra nella Legge Fondamentale tedesca del 1949. In *Le tre costituzioni pacifiste: Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania*. p.178.

¹⁴² Kades, C. L. (1989). The American Role in Revising Japan’s Imperial Constitution. *Political Science Quarterly*, 104(2), 223–224. <https://doi.org/10.2307/2151582> (i) *The Emperor is at the head of the State*. His succession is dynastic. His duties and powers will be exercised in accordance with the Constitution and responsible to the basic will of the people as proved therein. (ii) *War as a sovereign right of the nation is abolished*. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection. *No Japanese Army, Navy, or Air Force will ever be authorized and nor rights of belligerency will ever be conferred upon any Japanese forces*. (iii) *The feudal system will cease*. No rights of peerage except those of the Imperial family will extend beyond the lives of those now existent. No patent of nobility will come from this time forth embody within itself any National or Civic power of Government. Pattern budget after British system. (Emphasis added).

¹⁴³ Losano, M. G. (2020). Il rifiuto della guerra nella Legge Fondamentale tedesca del 1949. In *Le tre costituzioni pacifiste: Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania*. p.179.

¹⁴⁴ Tatsuo Sato, official of the ‘Cabinet Legislation Bureau’, claimed that Whitney told the Japanese cabinet at the time that the safety of the Japanese Emperor could not be guaranteed if the cabinet did not approve the US draft and present it to the Japanese parliament. Whitney, for his part, does not recall having said any of this.

as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

*In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.»*¹⁴⁵ At first glance, the Japanese pacifist principle contained in Article 9 appears to be the most explicit in its renunciation of the use of force when compared to Article 11 of the Italian Constitution and Article 26 of the German Basic Law previously examined. In fact, the Japanese Constitution does not include similar dispositions to Articles 52 and 78 of the Italian Constitution that allow for defensive wars and *peace-keeping* operations.¹⁴⁶ That is, to be sure, it is not uncommon in contemporary constitutions to find a general declaration rejecting war as a means of resolving disputes, particularly in light of the development of customary international law. Likewise, it is also frequent—again in accordance with customary international law—to limit the use of force to specific circumstances, thereby renouncing offensive war. It is a different matter altogether, however, to codify the renunciation of the use of force in a prescriptive and binding provision that admits no exceptions.¹⁴⁷ On the wording of the article itself, the first paragraph, taken alone, would not, in theory, constitute a stricter condemnation of war when compared to similar Italian and German dispositions. However, the second paragraph effectively operationalizes such prohibition in two ways: firstly, it prohibits the Japanese people from maintaining any military forces, either on national territory or abroad, as well as any form of military arsenal in general; secondly, it expressly states that the right of belligerency will not be recognized for the Japanese state. Ultimately, this second paragraph constitutes the core of the provision, and it is particularly this latter clause that merits closer examination.¹⁴⁸ To be sure, by not recognizing the right of belligerency, the State denies itself a right that, under different circumstances, would naturally pertain to its very existence and sovereignty. This goes beyond a mere self-

¹⁴⁵ Chapter II “Renunciation of War”, Article 9. Available at:

https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html

¹⁴⁶ Bagnato, S., & Piccolo, C. (2024). *Costituzioni pacifiste e tutela umanitaria: i procedimenti deliberativi delle missioni in Italia, Germania e Giappone attraverso il prisma degli organi costituzionali*. Dpceonline.it. p.90.

¹⁴⁷ Ramaoli, F. L. (2016). Addio alle armi. L'articolo 9 della Costituzione giapponese. *Rivista Della Cooperazione Giuridica Internazionale*, 18(53), p.107.

https://www.academia.edu/30543398/Addio_alle_armi_Larticolo_9_della_Costituzione_giapponese

¹⁴⁸ *Ivi*, p.111.

limitation or a voluntary non-exercise of a right; rather, it constitutes a case in which the State—acting simultaneously as both the limiting and the limited subject, as both the active and passive subject of the law—refuses to acknowledge for itself what ultimately represents a fundamental attribute of its existence as a *sovereign* entity.¹⁴⁹ The very clear and precise phrasing of Article 9, while leaving little room for alternative interpretation, immediately raised doubts among the Japanese people and legal scholars. Some, for instance, interpreted Article 9 in a way that allowed for defensive wars, in theory, at least, not conflicting with the notion of war *as means of settling international disputes*. No common ground was found on this matter, given the rather strict tone of the provision. Simultaneously, discussions arose with regards to the possibility of reforming the Japanese armed forces. While the clause concerning the non-recognition of the right of belligerency may arguably lend itself to various interpretative theories, the part prohibiting the possession of an armed force leaves little room for ambiguity.¹⁵⁰ Consequently, with the Allied occupation and the entry into force of the new Constitution, Japan, pursuant to Article 9, no longer possessed an army, a Ministry of War or Defense, nor a military industry, which had been dismantled by the Allied forces. However, the outbreak of the Korean War in 1950 led to the redeployment of a substantial contingent of American occupation troops from Japan to Korea, and the internal tensions caused by left-wing parties provided the pretext for the establishment, in 1950, of a police force—the “National Police Reserve”—which would go on to form the initial nucleus of Japan’s future military.¹⁵¹ The outbreak of the Korean War represented a pivotal juncture in Japan’s post-war trajectory, particularly with respect to the evolving discourse on pacifism and rearmament. As the American occupation neared its conclusion, the redeployment of a significant portion of American military forces from Japanese territory to the Korean Peninsula effectively undermined the security guarantees that had underpinned Japan’s constitutional commitment to ‘absolute pacifism’, that is, to be sure, the military protection the US had promised to Japan in exchange for its complete disarmament, could not be sustained anymore. In response to the emerging regional security vacuum, it was the United States itself that actively promoted the creation of the

¹⁴⁹ Ivi, p.113-114.

¹⁵⁰ Ivi, p.116.

¹⁵¹ Losano, M. G. (2020). Il rifiuto della guerra nella Legge Fondamentale tedesca del 1949. In *Le tre costituzioni pacifiste: Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania*. p.180.

National Police Reserve¹⁵²—an institutional development that marked the first step toward the gradual reconstitution of Japan’s military capabilities. The National Police Reserve, officially within the category of police force, actually had all the requisites to be considered a military force. Its establishment represented a legal maneuver that, at least on a formal level, adhered to the rigid constraints of Article 9. The latter, while unequivocally prohibiting the maintenance of land, sea, and air forces, as well as any other war potential, it does not—nor can it be said to do so, even under an extensively construed interpretation—expressly preclude the creation of internal security bodies tasked with maintaining public order.

The necessity of reinterpreting Article 9 became increasingly apparent in the following years, marked by escalating geopolitical tensions stemming from the Cold War, the aforementioned Korean War, and the rise of Mao Zedong’s China—all of which posed a direct challenge to the strategic alignment between the United States and Japan, especially in light of Japan’s rooted pacifism. The entire framework of national defense provided by these police forces was formally institutionalized through the enactment of a series of laws passed by the Diet, which, on July 1, 1954, established the new Defense Agency and reorganized the National Police Reserve into the Self-Defense Forces—a denomination they continue to hold to this day.¹⁵³ The extensive debate surrounding the mere existence of the Self-Defense Forces, as well as its funding, is still a source of disagreement in the country. Yet, in a historical irony, few could have predicted that Japan’s post-war economic miracle—soon to elevate the nation to the ranks of the world’s most prominent powers—would trace its origins precisely to the constraints of the controversial Article 9. Conceived as a mechanism to prevent rearmament, the clause ultimately evolved into a strategic asset: a constitutional limitation that, while curtailing Japan’s military autonomy, simultaneously secured its protection under the US security umbrella and enabled the redirection of national resources toward economic development and industrial expansion.¹⁵⁴ Over the decades, due to the increased international tensions and Japan’s

¹⁵² MacArthur himself encouraged the Japanese elites, particularly prime minister Yoshida, to bypass the prohibition of Article 9. However, pacifism was already deeply entrenched in Japanese culture by then, understandably so for a population that had lived the scourge of an atrocious war, thereby rendering a reinterpretation of Article 9, after such little time since its entry into force, unfeasible as well as unpopular.

¹⁵³ Ramaioli, F. L. (2016). Addio alle armi. L'articolo 9 della Costituzione giapponese. *Rivista Della Cooperazione Giuridica Internazionale*, 18(53), p.121-122.

¹⁵⁴ *Ivi*, p.122.

involvement in actions of collective self-defense, the Liberal Democratic Party—still governing to this day—advocated for greater legal formalization of the paramilitary forces and proposed potential amendments to Article 9, in accordance with the constitutional revision procedure. However, the deeply rooted pacifism of the population, coupled with strong opposition from other political forces, consistently prevented any such governmental rearmament initiative from materializing. The first law to shed light on the issue, namely regulating Japan’s involvement in humanitarian missions, was the 1992 Act on Cooperation with United Nations Peacekeeping operations and Other operations - PKO Act,¹⁵⁵ formally establishing the principle that the Self-Defense Forces could be deployed to participate in international *peace-keeping* missions.¹⁵⁶ In recent years, the renewed geopolitical tensions peculiar to the Japanese region, such as the missile threats by North Korea and China’s growing influence in the area, with the self-proclaimed ownership of the Senkaku islands, the debate around Article 9 is more relevant than ever. The revision of the latter has substantially been endorsed by the political faction *Nippon Kaigi*,¹⁵⁷ comprising several members of the current government and former Prime Minister Shinzo Abe, in an attempt to reaffirm the right of the State to possess fully-fledged armed forces. On July 1, 2014, former Prime Minister Abe announced a new official interpretation of Article 9, according to which Japan would be permitted to employ its Self-Defense Forces in the context of collective self-defense, as recognized under international law, marking a shift from mere internal security towards a more active international involvement of what constitutes, as of today, one of the world’s most powerful militaries.¹⁵⁸ This was followed, in 2015, by the official reform of the aforementioned PKO Act, further granting freedom of action in military matters. Ultimately, this analysis of Article 9 of the Japanese Constitution shed light on a variety of different topics, some of which are still very much debated today. Envisioned as an absolute renunciation of war, it was transformed—through reinterpretation and strategic ambiguity—into a constitutional constraint that paradoxically enabled both security and

¹⁵⁵ Available in its reformed version at: https://www.mofa.go.jp/fp/ipc/page22e_000683.html

¹⁵⁶ Bagnato, S., & Piccolo, C. (2024). *Costituzioni pacifiste e tutela umanitaria: i procedimenti deliberativi delle missioni in Italia, Germania e Giappone attraverso il prisma degli organi costituzionali*. Dpceonline.it. p.91.

¹⁵⁷ One of Japan’s most influential NGOs and lobbying group, created in 1997.

¹⁵⁸ Sachie Mizohata. (2016). *Nippon Kaigi: Empire, Contradiction, and Japan’s Future*. *Japan Focus*, 14(6). p.3. <https://doi.org/10.1017/s1557466016013012>

prosperity. Today, Article 9—formally untouched, yet functionally redefined—exemplifies the unresolved tension between normative pacifism and geopolitical necessity, a common feature in the legal conversations of the German, Italian, and Japanese frameworks.

3.3 Comparative Analysis

Having extensively examined the pacifist principles of the three constitutional works of Italy, Germany and Japan, it is now wise to conduct a comparative analysis, which focuses, rather than on the commonalities—primarily stemming from their historical roles as aggressors and, subsequently, as defeated nations—, on the key differences among them. To be sure, the analysis of the three constitutional frameworks thus far has already shed light on the goals—not solely pertinent to these three countries—that the former Axis members shared in the aftermath of World War Two. The devastation brought about by both world conflicts exemplified the urgent need to drop arms and work towards a world order based on peace and justice. Exactly within this context, the Japanese Constitution of 1947, the Italian Constitution of 1948, and, ultimately, the German Basic Law of 1949, all found their genesis. The focus was, in particular, on the so-called ‘pacifist principles’, which all three countries presented, in varying degrees of intensity and strictness, in their foundational charters. A lot more remains to be said, however, about the profound divergences in how the pacifist principle has been operationalized and applied over time within the three legal systems, by both the executive and legislative powers.

Italy, for instance, with Law No. 145 of 2016,¹⁵⁹ consents to the use of its armed forces for military operations and humanitarian missions, as regulated by the United Nations or other international organizations to which it takes part, to the extent to which they conform with Article 11 of the Constitution and with the generally recognized principles of international law. Importantly, article 2, paragraph one of the same law, states: «*Italy's participation in international missions is decided by the Council of Ministers, after informing the President of the Republic*»,¹⁶⁰ designating the Council of Minister as the main actor during the deliberative process of said international missions. In this context, article 2, paragraph 4, regulates the financial resources to meet the planned missions,

¹⁵⁹ Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2016;145>

¹⁶⁰ *Ibidem*.

identified through a Decree by the President of the Council of Ministers.¹⁶¹ The same article mandates the technical reports be sent to both chambers of Parliament, which has to express itself within twenty days. The reports must indicate, for each mission, the geographical area of intervention, the objectives, the legal basis of reference, the composition of the units to be sent, including the maximum number of personnel involved, as well as the planned duration and the financial requirements for the current year. One fundamental aspect is that the opinions expressed by the chambers are not binding, allowing the government to distance itself from them, when duly justified, and, also admitting the hypothesis that the government may act anyway, even without the approval of the Commissions of Parliament, if these, once again involved, do not express themselves within the new ten-day period.¹⁶² This law showcases the prominent role exercised by the Italian government in decision-making for international interventions, when compared to the position of other constitutional organs. In comparison, recalling the German legislation adopted in 2005, titled “Parliament Participation Act”,¹⁶³ any deployment of armed forces beyond the scope of application within the Basic Law requires the Bundestag’s approval. The executive is given more power under the “simplified consent procedure” of paragraph four of the same article, according to which the federal government must provide a reasoned explanation of why the upcoming deployment is of low intensity and scope, followed by the sending of such request by the President of the Bundestag to the different parliamentary groups and members; approval is considered granted if, within seven days after the distribution of the printed matter, no faction or five percent of the members of the Bundestag requests the Bundestag’s involvement.¹⁶⁴ An operation is considered to be of low intensity and scope if the number of deployed soldiers is small, the operation is clearly of minor importance due to other accompanying circumstances, and it does not involve participation in a war.¹⁶⁵ Although framed differently from the Italian case, the German executive also appears to possess a certain degree of operational discretion in the context of international interventions and

¹⁶¹ Bagnato, S., & Piccolo, C. (2024). *Costituzioni pacifiste e tutela umanitaria: i procedimenti deliberativi delle missioni in Italia, Germania e Giappone attraverso il prisma degli organi costituzionali*. Dpceonline.it. p.92.

¹⁶² *Ibidem*.

¹⁶³ See p.49.

¹⁶⁴ Article 4, paragraph 1, available at: <https://www.gesetze-im-internet.de/parlbgb/BJNR077500005.html>

¹⁶⁵ *Ibidem*, paragraph 2.

missions. Ultimately, the Japanese PKO Act, regulating Japan's contributions to UN *peace-keeping* operations, frames, in Article 4,¹⁶⁶ the International Peace Cooperation Headquarters as the main decision-making actor. The Headquarters are responsible for the preparation of drafts of Implementations Plans for International Peace Cooperation assignments. Article 5 indicates the Prime Minister as the Chief of the International Peace Cooperation Headquarters, and the members of the latter shall be appointed by the Prime Minister from among the Ministers of State. In this case, the centrality of the executive is even more apparent: the *ad hoc* body constituted to regulate on Japan's international humanitarian engagements is composed exclusively of government members, reflecting a highly centralized and executive-driven model of decision-making.¹⁶⁷

The other side of the coin compels us to ask questions about the much-debated role of parliaments. As it was shown in earlier chapters, the matter of democratic oversight is fundamental, especially in the context of a country's engagement in international operations. Article 2 of the Italian law regarding participation to international missions, for instance, mandates that the Chambers must "promptly" (*tempestivamente*) discuss the resolutions by the Council of Ministers, yet it does not establish a specific deadline for the Chambers to respond, only indicating that this should take place before the conclusion of the current year. The document presented by the minister of Defense and the minister of Internal Affairs describes the missions it intends to initiate, as well as those it wishes to extend, which must be assessed (and potentially approved) altogether by the Parliament. Article 2, paragraph two of the German "Parliament Participation Act" states that: «*Preparatory measures and planning are not deployments within the meaning of this law. They do not require the approval of the Bundestag. The same applies to humanitarian aid services and assistance provided by the armed forces, where weapons are carried solely for the purpose of self-defense, provided that it is not expected that the soldiers will be involved in armed operations*», meaning that beyond these activities, all others require the Bundestag's approval.¹⁶⁸ It is useful to recall the previously mentioned decision by the Federal Constitutional Court of 1994, which declared that in cases of urgency, the

¹⁶⁶ Available at: https://www.cao.go.jp/pko/pko_e/data/law/pdf/law_01.pdf

¹⁶⁷ Bagnato, S., & Piccolo, C. (2024). *Costituzioni pacifiste e tutela umanitaria: i procedimenti deliberativi delle missioni in Italia, Germania e Giappone attraverso il prisma degli organi costituzionali*. Dpceonline.it. p.92.

¹⁶⁸ *Ivi*, p.93.

Federal Government is permitted to authorize the deployment of armed forces on its own initiative, provided that the decision is subsequently brought before the Bundestag for ratification. Along the same lines, Article 5 states: *«Assignments in the event of danger in default, which do not tolerate a postponement, do not require the prior approval of the Bundestag. The same applies to operations to rescue people from special danger situations, as long as the lives of the people to be rescued would be endangered by the public referral of the Bundestag»* and *«The Bundestag shall be informed in an appropriate manner before the start and during the deployment»*.¹⁶⁹ Logically, *if the Bundestag rejects the application, the assignment must be terminated*. Finally, looking over at the land of the Rising Sun, the Parliament's role is regulated by Article 6, paragraph 7, which establishes two distinct procedures for deploying the Self-Defense Forces in the context of international *peace-keeping* or similar missions. As a general rule, the Prime Minister must secure the prior approval of the Diet, submitting an Implementation Plan before any deployment takes place. However, under exceptional circumstances—specifically, when the Diet is not in session or the House of Representatives has been dissolved—deployment may proceed, provided that approval is sought without delay at the first subsequent session. This dual mechanism balances the need for parliamentary oversight with operational flexibility in urgent or unforeseen situations.

To conclude, while the three legal systems examined display a common tendency to vest their executive branches with significant decision-making authority in matters of international military engagement, this power does not amount to unchecked discretion. To be sure, democratic oversight, through parliamentary approval mechanisms, over international missions is a consistent feature of all the three jurisdictions of the present study. Nevertheless, what seems to constitute an even more substantive constraint on executive action are the legal and procedural frameworks established by the international organizations to which these states belong.

¹⁶⁹ Article 5, paragraphs 1 and 2: <https://www.gesetze-im-internet.de/parlbgb/BJNR077500005.html>

Conclusion

The aim of this thesis was to examine the balance between constitutional pacifism and contemporary international security threats through the lens of Article 11 of the Italian Constitution. Each of the three chapters addressed distinct but interrelated themes. Chapter One explored the historical context of the 1948 Constitution, offered a legal analysis of Article 11 and its links to international law and related constitutional provisions, and surveyed key modern debates on pacifism and peacekeeping. It was shown that Article 11 emerged from a deeply rooted anti-fascist sentiment and sought to reposition Italy as a peaceful actor in the post-war world. The term “repudiate” was carefully chosen to convey both condemnation and renunciation of war, marking a clear break from militaristic ideologies. The article’s unitary structure—three interconnected sentences—outlines the rejection of wars of aggression, the conditional limitation of sovereignty in pursuit of global peace, and Italy’s support for international organizations aligned with those goals. Article 11 was also analyzed alongside Articles 10, 52, 78, and 117, which reinforce the Constitution’s openness to international law and its allowance for defensive war under democratic oversight. The final section addressed evolving legal debates, including the interpretation of “defensive war,” peacekeeping, and neutrality. Legal scholars remain divided between a literalist view of Article 11 and a more flexible approach that incorporates international obligations and real-world geopolitical dynamics.

Chapter Two, “Contemporary Legal Challenges—The Case of Military Aid to Ukraine” examined the legal compatibility of Italy’s military aid to Ukraine with both constitutional and international law. Following a brief overview of the conflict’s escalation, the chapter analyzed key legislative measures, including Decree Law No. 14 of 2022 and its conversion into Law No. 28 of 2022, which specified that the modalities and limits of the transfer of military materials are to be defined by one or more decrees of the President of the Council of Ministers, upon the proposal of the Minister of Defense. The chapter’s core was the compatibility of military assistance with Italy’s internal and international obligations. Critics argue that only direct defense of Italy is constitutionally permissible, warning against an overly expansive interpretation that could undermine Italy’s pacifist principles. They also invoke the Hague Conventions of 1907 to assert that supplying arms violates the principle of neutrality, and express concern over the lack of democratic

oversight due to the use of decree-laws. On the other hand, many legal scholars defend the government's actions, arguing they align with both Italian constitutional values and international law. They emphasize Article 51 of the UN Charter, which upholds the inherent right to individual and collective self-defense when a member State is under attack. On neutrality, scholars correctly emphasize that Article 11 of the Italian Constitution does not provide an obligation thereof, and that while the Hague Conventions of 1907 clearly outline such principle, the traditional law of neutrality is argued to be less relevant in the context of an illegitimate aggression, invoking the principle of *ex iniuria ius non oritur*. Furthermore, the concerns about a lack of democratic oversight during the actions taken by the Italian government, unjustly underestimate the relevance of Article 77 of the Constitution which allows the use of decree-laws in cases of extraordinary necessity and urgency, arguably met by the sudden escalation of the conflict. ARSIWA's Article 21 precludes the wrongfulness of an act constituting a lawful measure of self-defense under the UN Charter, reinforcing the argument that since the right to self-defense permits the direct use of force by the attacked state, military assistance of lesser intensity is also permissible *a fortiori*. Ultimately, the violation of the *ius cogens* norm prohibiting the use of force by the aggressor allows the international community to respond, even with unilateral countermeasures.

Chapter Three offered a comparative analysis of constitutional pacifism in Germany and Japan, viewed alongside Italy's Article 11. The first section examined Germany's *Grundgesetz*, particularly Article 26, which prohibits wars of aggression and allows for participation in collective security systems—closely paralleling the second and third clauses of Article 11. Article 25 GG further mirrors Italy's Article 10 by incorporating general international law into domestic law. Complementary statutes, such as §80a StGB and the War Weapons Control Act, reinforce Germany's legal commitment to peace. The second section explored Japan's postwar Constitution, focusing on Article 9—arguably the most absolute expression of pacifism among the three. Paragraph one renounces war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes. Paragraph two prohibits the maintenance of land, sea, and air forces, as well as other war potential, and denies the right of belligerency of the state. However, the creation of the National Police Reserve (which later became the Self-Defense Forces - SDF) in response to the Korean War, at the urging of the US, marked a

significant reinterpretation of Article 9. Over time, the SDF's scope has expanded, culminating in a 2014 reinterpretation by Prime Minister Abe permitting their use in collective self-defense. Ongoing regional tensions have further fueled debate over potential constitutional amendment. The concluding section compared the pacifist principles of Italy, Germany, and Japan, focusing on the differences in their operationalization. While all three nations share a post-WWII commitment to peace, their legal frameworks differ. Italy, through Law No. 145 of 2016, designates the Council of Ministers as the main actor in initiating international missions, with Parliament receiving technical reports and expressing itself within twenty days. Germany's 2005 "Parliament Participation Act" generally requires Bundestag's approval for the deployment of armed forces abroad, with a "simplified consent procedure" for low-intensity missions. Japan, under the PKO Act, establishes the International Peace Cooperation Headquarters, led by the Prime Minister, as the main decision-making body for international humanitarian engagements. While prior approval from the Diet is generally required for deploying the SDF in peacekeeping operations, exceptions exist for urgent situations. Despite the varying degrees of executive power, democratic oversight through parliamentary approval mechanisms is a consistent feature in all three jurisdictions. Ultimately, the legal and procedural frameworks of international organizations to which these states belong impose the most substantive constraints on executive action.

In conclusion, after having led the analysis through an objective and nonpartisan lens, I shall now shift to some personal reflections. As some of the subjects that were touched upon demonstrate, the relevance of this inquiry cannot be overstated. Our discussion about Article 11 of the Italian Constitution—where constitutional pacifism meets the harsh terrain of global conflict—raises questions that go far beyond legal interpretation. At stake are not only abstract norms, but the very values we choose to uphold: peace, sovereignty, collective responsibility, and the role of law in face of violence. That is, it was shown how the question of pacifism is not a mere legal dilemma, but rather a mirror of our collective ideals and historical memory.

Moreover, this thesis emphasized the complexity of answering such questions, trying to build an awareness of the legal ambiguity and political nuances that characterize the contemporary debate, that is, how constitutional ideas are challenged by real-world crises

and the so-called *Realpolitik*.¹⁷⁰ To be sure, the ambiguities that arise are not flaws in the system, but expressions of the system's ongoing dialogue with reality. I have become increasingly convinced that Article 11 must be interpreted in light of international law—not as a compromise, but as a constitutional mandate. Put differently, only by aligning Article 11 with international law can we remain faithful to the principles our Constitution was built upon. Reading Article 11 in isolation from its internationalist context is not only selective—it diminishes its full constitutional meaning. Similarly, while morally principled, a rigid interpretation of Article 11 can unintentionally reduce pacifism to a dangerous form of passivity. This was shown through the case of the Russian-Ukrainian conflict, which saw many countries, including Italy, expressing their support to the Republic of Ukraine via military and humanitarian aid. To deny assistance to a victim of aggression in the name of abstract pacifism is not an act of constitutional fidelity, but a misreading of the values that animate our *lex fundamentalis*. Thus, by disregarding the historical and contextual evolution of Article 11, we risk reducing it to a mere symbol of respect rather than a living source of legal meaning. Finally, the Constitution, just as the society it governs, must *live* and adapt, avoiding the risk of becoming a *dead*, obsolete document.

Ultimately, I end this thesis with the words of Plato: «*Si vis pacem, para bellum*». This paradox effectively captures the ugly truth that characterizes the contemporary world: if you want peace, prepare for war. In this context, for Article 11 to remain meaningful, it must be interpreted in a way that departs from the passive rejection of conflict and embraces an effective commitment to peace—even when the latter requires force.

¹⁷⁰ A political approach that bases its considerations on realist and pragmatic assumptions, rather than strictly following ideological, moral or ethical premises. «*In political affairs the problem of morals does not enter*» Emery, H. C. (1915). What is Realpolitik? *The International Journal of Ethics*, 25(4), 448–468. <https://doi.org/10.1086/intejethi.25.4.2376875>

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