



ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

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THE EU AND ITS MEMBER STATES AT WAR IN UKRAINE? COLLECTIVE SELF-DEFENCE, NEUTRALITY AND PARTY STATUS IN THE RUSSO-UKRAINE WAR

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ABSTRACT: To assist Ukraine in defending itself against Russian aggression, the EU invoked the European Peace Facility to “finance the provision of [...] military equipment and platforms designed to deliver lethal force for defensive purposes”. It marks the first time that the EU is funding the provision of lethal equipment to a third state. In October 2022, the EU announced the creation of EUMAM Ukraine to train Ukrainian Armed Forces to use the weapons EU Member States have provided. Since February 2022, the EU's military aid and assistance has only increased. EU Member States are also providing military aid and assistance bilaterally, including training Ukrainian soldiers. In so doing, they are aligning their assistance with “like-minded” partners and NATO Member States, particularly the United States of America, the United Kingdom and Canada. This *Article* will assess the supply of military aid and equipment to Ukraine as well as the training of UAF through the lens of international law. One wonders whether the EU's military aid and assistance amounts to collective self-defence, even if none of the supporting actors have invoked art. 51 UN Charter. The argument could be made that the EU and its Member States are breaching neutrality law in supplying lethal aid to Ukraine, albeit it has been argued that neutrality law is no longer relevant in the post charter era. The question also arises whether these actors have become parties to the conflict, even if supporting states and the EU frequently assert that they are not co-belligerents.

KEYWORDS: European Union Peace Facility – military aid and assistance – neutrality law – collective self-defence – party status – Russian aggression against Ukraine.

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I. INTRODUCTION

When Russia launched a full-scale invasion against Ukraine on 24 February 2022, and consequently not only violated art. 2(4) UN Charter but also committed an act of aggression, the EU did not have an army that it could send to Ukraine to help it defend itself. Instead, alongside the United States of America (US), the United Kingdom (UK), Canada and other allies, it adopted “massive and unprecedented” economic sanctions¹ and announced that it would “finance the provision of equipment and supplies to the Ukrainian Armed Forces, including - for the first time - lethal equipment”.² The latter is being carried out through the European Peace Facility (EPF), an “off budget” mechanism that was adopted in March 2021. The war in Ukraine marks the first time that the EU finances the delivery of such weaponry to a third state involved in an international armed conflict. Since February 2022, the EU’s military aid and assistance has only increased, and so has the EPF’s budget. At the time of writing, the EU has committed €5.6 billion in military aid and €24.26 billion in financial aid.³ Moreover, in October 2022 the EU instituted the EU Military Assistance Mission to Ukraine (EUMAM UA), which is tasked to train Ukrainian Armed Forces so that they can continue their fight against Russian forces.⁴ Short of using force, the EU is using the means at its disposal in an unprecedented manner to assist Ukraine’s exercise of self-defence. As mentioned, the EU is not alone in assisting Ukraine in this manner, and many EU states are providing additional bilateral aid and assistance to Ukraine.

Concerns have been voiced that sanctions, sending weapons, training troops, etc., are only adding fuel to the fire and that the focus should be on reaching a negotiated settlement. Speaking at the UNGA Emergency Special Session in February 2023, the Ukrainian delegate asserted that: “the calls for ceasing the delivery of weapons and ammunition to Ukraine are badly misplaced. It is perfectly legitimate to help a nation that has been attacked and is justifiably defending itself. It is an act in defence of the Charter of the United Nations”.⁵ While it may be legitimate and morally justifiable to defend the UN Charter, what are the legal implications? Ukraine’s statement, and many declarations from the EU and its Member States, justify the military aid and assistance by invoking the language of collective

¹ European Council, *The EU sanctions against Russia explained* www.consilium.europa.eu. For a discussion on the EU’s massive and targeted sanctions see A Hofer, ‘The EU’s “Massive and Targeted” Sanctions in Response to Russian Aggression, a Contradiction in Terms’ (2023) CYELS (first view) 1.

² Council of the EU, Press Release, ‘EU Adopts new Set of Measures to Respond to Russia’s Military Aggression Against Ukraine’ (28 February 2022) www.consilium.europa.eu; Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment and platforms, designed to deliver lethal force.

³ Statista Research Department, ‘Total Bilateral Aid Commitments to Ukraine between January 24, 2022 and May 31, 2023, by Type and Country or Organization’ (18 July 2023) www.statista.com.

⁴ A Tidey, ‘EU Countries Agree to Train Ukrainian Soldiers as Part of New Mission’ (17 October 2022) Euronews www.euronews.com.

⁵ General Assembly, 11th Emergency Special Session, 17th Plenary Meeting (22 February 2023) UN Doc A/ES-11/PV.17, 5.

self-defence. But does this mean that, through the EPF and EUMAM UA, the EU is assisting Ukraine in collective self-defence under art. 51, and consequently that the EU is indirectly using force against Russia, even if it has no army of its own? If this would be the case, has the EU unwittingly acquired party status? Yet, supporting states appear very wary of being engaged in a conflict with Russia and do not want to be co-belligerents alongside Ukraine. Amongst this debate, neutrality appears to be lost in the background, however it is relevant for states that have refrained from assisting Ukraine, either by abstaining from sending military aid and equipment or by refusing to implement sanctions against Russia.

As reported in *New York Times*: “Germany and France, like the United States, want to calibrate the weapons Ukraine gets, to prevent escalation and direct attacks on Russia”.⁶ There are weapons that Ukraine has reportedly requested but that states are unlikely to provide, *inter alia* “out of fear that they could hit Russia”.⁷ While Ukraine has requested long-range missiles, the US initially did not want to transfer weapons to Ukraine that would enable them to attack Russia on its territory. Yet, an overview of the weapons provided to Ukraine demonstrates this policy has shifted as some of the material could ostensibly be used on Russian territory⁸ and Member States appear to be willing to send longer-range weapons.⁹ On 9 December, it was reported that the Pentagon gave Ukraine the green light to strike inside Russian territory,¹⁰ yet it appears the issue is still subject to debate.¹¹ If this were to happen, the concern is that Russia would “go beyond attempting to target [the weapons] on Ukrainian territory, try to hit the supply convoys themselves and perhaps the NATO countries on the Ukrainian periphery” that serve as transfer points for supplies from the US¹² or elsewhere.

Since the war began, states and international organisations have discussed the assistance they are willing to provide Ukraine while being careful to reiterate that they are not party to the conflict. For instance, NATO Secretary General Stoltenberg indicated that, in spite of Ukraine’s request, the Alliance would not implement a no-fly zone as this would bring them in direct conflict with Russia.¹³ This is the fine line that States have been walking: although they want to assist Ukraine, they want to avoid becoming, or being seen as, a party

⁶ S Erlanger and L Jakes, ‘U.S. and NATO Scramble to Arm Ukraine and Refill Their Own Arsenals’ (26 Nov 2022) *New York Times* www.nytimes.com.

⁷ *Ibid.*

⁸ Al Jazeera, ‘Which Weapons might the US Send to Ukraine?’ (13 March 2022) www.aljazeera.com.

⁹ O Moody, ‘With New Tanks and Jets Ukraine can Win the War’ (2 September 2022) *The Times* www.thetimes.co.uk.

¹⁰ M Evans and M Bennetts, ‘Pentagon gives Ukraine Green Light for Drone Strikes inside Russia’ (9 December 2022) *The Times* www.thetimes.co.uk.

¹¹ P McLeary and L Hudson, ‘The Air Force Wants to Send its Reaper Drones to Ukraine: The Pentagon’s not so Sure’ (12 September 2022) *Politico* www.politico.com.

¹² K DeYoung, ‘Russia Warns U.S. to Stop Arming Ukraine’ (15 April 2022) *The Washington Post* www.washingtonpost.com.

¹³ NATO, Press conference by NATO Secretary General Jens Stoltenberg previewing the extraordinary Summit of NATO Heads of State and Government (23 March 2022) www.nato.int.

in the conflict. Nonetheless, according to Russia, various states and the EU have already reached party status.

These different positions will be reviewed in the first section of this *Article*, which collects information on the support that has been provided by Ukraine and the justifications evoked. It does not only focus on the EU, but also on the individual positions of its Member States, as well as the positions adopted by the US, the UK and Canada. Including non-Member States provides a point of comparison, particularly as the US and the UK are two of Ukraine's biggest supporters. As we shall see, although the EU presents a common front, its Member States are divided and compromise is often necessary. This is achieved by allowing states to "opt out" or to constructively abstain from funding lethal military equipment or from training Ukrainian Armed Forces. There is an apparent tension between responding to an act of aggression while remaining below the threshold of using force and becoming a belligerent in the conflict. Whereas the EU, its Member States and NATO allies want to assist Ukraine in collective self-defence, they want to avoid a direct confrontation with Russia. Neutrality law is relevant to this discussion, but EU Member States have adopted differing positions on the matter. Permanently neutral states (Ireland, Malta and Austria) are doing their best to remain militarily neutral. On the other hand, some EU Member States appear to flout neutrality altogether, even going as far as shaming states who have adopted a neutral position in the conflict.

The first section of this *Article* will also consider Russia's reaction. If Russia does not react, either by physically responding or making a clear statement, this could provide insight on the relevance of neutrality law and on the question of which thresholds need to be met to consider force is being used or a state/international organisation has become party to the conflict. The first section will also assess the positions of states that have decided to not lend support to Ukraine: do they invoke legal arguments? Or are they acting out of political considerations?

This brings us to one of the limits of this study, which is to untangle the legal from the political.¹⁴ This may be an exercise in futility, as the law is deeply political, particularly when the stakes are so high. States' national preferences depend on their historical trajectory, their geographic proximity to Russia and their bilateral relations with Russia. Still, it is interesting to consider how, or to what extent, states justify their conduct in *legal* terms. Furthermore, if Russia does not react to the support provided to Ukraine this may be because it does not want a *direct* conflict with NATO and is therefore exercising political restraint.

Another one of this study's limits is the difficulty to quantify the extent of the military aid and equipment that has been provided to Ukraine. This is also because of the number of countries involved; after all, the EU alone encompasses 27 Member States that have diverse approaches. This *Article* relies on the dataset created by the Kiel Institute, which tracks the financial, military, and humanitarian donations that have been given. It also

¹⁴ See also M Piątkowski, 'The Saga of the Polish MiG-29: The Laws on Neutrality and the Law of Air Warfare' (3 October 2022) [Opinio Juris opiniojuris.org](https://www.opiniojuris.org).

draws from official information provided by states, reports, and news items. Moreover, events are moving fast, and the level of assistance provided shifts. For example, as this *Article* was reaching its conclusion in September 2023, the US gave Denmark and the Netherlands permission to provide Ukraine with F-16 jets once Ukrainian pilots have been trained to fly them. The author has done her best to provide a broad overview, but this does not exclude that there may be gaps.

The legal analysis is found in the section thereafter, which addresses three inter-related questions identified above: collective self-defence under *jus as bellum*, neutrality law, and party status under international humanitarian law. Under international law, these issues are treated differently; different conditions need to be met in each case. Self-defence is a matter of *jus ad bellum*, whereas party status falls under international humanitarian law. Neutrality law is generally treated as a distinct area of international law. However, these different issues are closely related in that the *facts* that establish the one can also be used to establish another.¹⁵ For instance, if states engage in indirect use of force to assist another state in collective self-defence by providing weapons and training the third state's armed forces, the supporting states are clearly not neutral. Breaches of neutrality do not lead to party status, however, as argued, systemic and substantial breaches of neutrality can lead to party status. Or the facts that establish that force has been used can lead to the determination that a state is party to a conflict.¹⁶ Thus, even though the questions addressed are distinct they are inter-related and there is need for a coherent overview of the military aid and assistance that has been provided.

II. AID AND ASSISTANCE PROVIDED TO UKRAINE SINCE FEBRUARY 2022

II.1. THE EUROPEAN UNION AND ITS MEMBER STATES

Under the EPF, which was adopted by the Council in March 2021,¹⁷ the EU has been financing the EU Member States' provision of lethal weapons to Ukraine for defensive purposes since February 2022.¹⁸ When the EU announced further measures under the EPF in February 2023, Josep Borrell, the High Representative of the Union for Foreign Affairs

¹⁵ MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' (2023) *International Law Studies* 186, 193, fn 29.

¹⁶ R van Steenberghe, 'Military Assistance to Ukraine: Enquiring the Need for Any Legal Justification under International Law' (2023) *Journal of Conflict and Security Law* 231, 235 quoting *Tadic*.

¹⁷ Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528.

¹⁸ Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment and platforms, designed to deliver lethal force; see also Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, which is on the delivery of non-lethal assistance.

and Security Policy, proclaimed: “Ukraine should get all the necessary military equipment and training it needs to defend its territory and its people from Russia’s war of aggression. [...] we will continue supporting Ukraine for as long as it takes and as long as it is needed”.¹⁹ By May 2023 (the latest Council decision at the time of writing), the EU had committed €5.6 billion in military equipment and assistance to Ukraine.²⁰ This includes the €2 billion that the EU pledged to reimburse Member States donating ammunition to Ukraine. When the EU first decided to provide ammunition, Borrell claimed this demonstrated the “EU’s united resolve and determination to continue supporting Ukraine’s legitimate right of self-defence against the brutal Russian aggressor”.²¹

The war in Ukraine marks the first time the EU contributes to providing such military equipment to a third state.²² Before, it provided non-lethal assistance to state armed forces in sub-Saharan Africa, the Western Balkans, and Eastern Europe.²³ The EPF is an off-budget mechanism (meaning its financing is outside of the general EU budget) and decisions on how the funding is allocated are under the control of individual EU Member States. Importantly, under art. 56(3) EPF, Member States “retain discretion over the arms transfer decision-making process”; meaning they “remain responsible for carrying out their own risk assessment”, which is independent from the assessment carried out by the European External Action Service.²⁴ As the EU funds the material it can attach its own conditions to the beneficiaries, in addition to those attached by the exporting state.²⁵ Furthermore, “the EU member state from which the transfer of the equipment originates retains its full prerogative to authorize (or deny) the export”.²⁶ Due to the Council’s prominent role in the EPF, it has been designed in such a way that Member States maintain “strict control”.²⁷

¹⁹ Council of the EU, Press release, ‘Ukraine: Council Agrees on Further Military Support under the European Peace Facility’ (2 February 2023) www.consilium.europa.eu.

²⁰ Council of the EU, Press release, ‘EU Joint Procurement of Ammunition and Missiles for Ukraine: Council Agrees €1 billion Support under the European Peace Facility’ (5 May 2023) www.consilium.europa.eu.

²¹ Council of the EU, Press release, ‘Ammunition for Ukraine: Council agrees €1 billion Support Under the European Peace Facility’ (13 April 2023) www.consilium.europa.eu.

²² Council of the EU, Press release, ‘EU Adopts New Set of Measures to Respond to Russia’s Military Aggression against Ukraine’ (28 February 2022) www.consilium.europa.eu.

²³ G Maletta and L Héau, ‘Funding Arms Transfers Through the European Peace Facility: Preventing Risks of Diversion and Misuse’ (June 2022) Sipri 4.

²⁴ *Ibid.* 7; art. 56(3) of Council Decision (CFSP) 2021/509 cit. reads: “Any assistance measures involving the export or transfer of items on the Common Military List of the Union shall respect the principles laid down in Common Position 2008/944/CFSP and shall be without prejudice to the procedure to be followed by Member States regarding such export or transfer in accordance with that Common Position, including in terms of assessment. Furthermore, such assistance measures shall not affect the discretion of Member States regarding policy on the transfer within the Union, and the export of, military equipment”.

²⁵ G Maletta and L Héau, ‘Funding Arms Transfers Through the European Peace Facility’ cit. 7.

²⁶ *Ibid.* 6.

²⁷ F Santopinto and J Maréchal, ‘EU Military Assistance under the New European Peace Facility’ (16 February 2021) Research Paper Konrad Adenauer Stiftung 13.

The EPF allows the EU to finance but not deliver military assistance to Ukraine, Member States bear responsibility for providing the military equipment. The High Representative's role is to ensure consistency and to coordinate actions financed by the EPF. It makes room for Member States to opt out or to choose how they want to participate. Although Denmark initially "opted out" of the EU's Common Security and Defence Policy, following a referendum on 1 June 2022 it reversed course and is now a participating member state.²⁸ While decisions must be unanimous, when deciding on transferring lethal military equipment EU Member States can constructively abstain and "allocate corresponding contributions to another EPF assistance measure instead".²⁹ This gives the EU room to adopt decisions while accommodating member States that are traditionally neutral or that may have other national constraints. For example, three permanently neutral states, Malta, Ireland and Austria, only contribute to the non-lethal assistance.³⁰ Cyprus is providing financial aid but will not send weapons, citing concerns that this would undermine its own security needs.³¹ Hungary also announced it will not provide weapons and will not allow them to be transferred over its territory; as a country that borders Ukraine, it is concerned that the conflict may escalate and spill over into its territory.³² In general, the EPF generally follows a procurement procedure, but in providing weapons to Ukraine the EU Member States supplied their own armed forces' stocks and then requested reimbursement from the EU.³³ Thus, the ministers of defence of the EU Member States are the implementing actors.³⁴

In addition, since 17 October 2022, the EU Military Assistance Mission in support of Ukraine (EUMAM Ukraine) trains the Ukrainian Armed Forces to use the lethal and non-lethal equipment provided by the Member States and funded by the EPF.³⁵ The current goal is to train 30 000 soldiers by the end of 2023³⁶ and to "help Ukraine defend its territorial integrity within its internationally recognised border and be able to deter and respond to possible future military offensives by Russia".³⁷ Before, EU Member States were

²⁸ S Gargiulo and Reuters, 'Russia's war on Ukraine Prompts Denmark to Vote to Join EU Shared Defense Policy' (1 June 2022) CNN edition.cnn.com.

²⁹ G Maletta and L Héau, 'Funding Arms Transfers Through the European Peace Facility' cit. 5; Council Decision (CFSP) 2021/509 cit. arts 5(2) and 5(3).

³⁰ G Maletta and L Héau, 'Funding Arms Transfers Through the European Peace Facility' cit. 5; these countries are not listed in Council Decision (CFSP) 2022/338 cit.; see also N Borg, 'Neutrality Clause Included in EU-Ukraine Security Pledge' (30 June 2023) Times of Malta timesofmalta.com.

³¹ N Theodoulou, 'Cyprus Rules Out Sending Weapons to Ukraine (Updated)' (5 April 2022) Cyprus Mail cyprus-mail.com.

³² Under art. 56(3) of the EPF, Council Decision (CFSP) 2021/509 cit. Member States retain discretion over the transfer of military equipment through their territory.

³³ G Maletta and L Héau, 'Funding Arms Transfers Through the European Peace Facility' cit. 6.

³⁴ They are identified as such under Council Decision (CFSP) 2022/338 cit. art. 4(4).

³⁵ Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine); see also Council of the EU, Press release, 'Ukraine: Council Agrees on Further Support under the European Peace Facility' (17 October 2022) www.consilium.europa.eu.

³⁶ Council of the EU, *Foreign Affairs Council, 24 April 2023* www.consilium.europa.eu.

³⁷ EU External Action, *EU MAM Ukraine (EUMAM UA)* (31 March 2023) www.eeas.europa.eu.

training UAF individually.³⁸ Announcing the effort, Borrell proclaimed: “Today we step up our support to Ukraine to defend itself from Russia’s illegal aggression. The EU Military Assistance Mission will train the Ukrainian Armed Forces so they can continue their courageous fight. EUMAM is not just a training mission, it is clear proof that the EU will stand by Ukraine for as long as is needed”.³⁹

This sentiment was reiterated six months later: “[t]his training mission is another proof of our unshaken and determined support to continue together with Ukraine”.⁴⁰ EUMAM Ukraine is the first time the EU provides operational missions on its own territory, as these generally take place abroad.⁴¹ The EU’s role is to finance, coordinate, and synchronise Member States’ efforts. Through the mission, EU Member States provide the UAF the training required to use the military equipment that they delivered. At present, 24 Member States are participating, either through training modules or by providing personnel.⁴² States that have not provided such aid provide de-mining training, such as Ireland.⁴³ Austria is contributing to the mission financially but is not providing any military personnel.⁴⁴ Hungary constructively abstained when the EU voted on training Ukrainian armed forces.⁴⁵

The EU has justified its support to Ukraine by invoking the language of self-defence. For example, the conclusions of the European Council meeting of 23-24 June 2022 explicitly refers to Ukraine’s right of self-defence: “[t]he European Union remains strongly committed to providing further military support to help Ukraine exercise its inherent right of self-defence against the Russian aggression and defend its territorial integrity and sovereignty”.⁴⁶

Under the EPF and EUMAM UA, the EU’s High Representation plays a coordinating and facilitating role, ensuring consistency between the Member States as they provide

³⁸ A Brzozowski, ‘EU Strikes Political Deal on Ukraine Military Training Mission’ (13 October 2022) Euractiv www.euractiv.com.

³⁹ Council of the EU, Press Release, ‘Ukraine: Council Agrees on Further Support under the European Peace Facility’ cit.

⁴⁰ Informal Foreign Affairs Council (Defence), ‘Press Remarks by High Representative Josep Borrell at the Press Conference’ (8 March 2023) www.eeas.europa.eu; see also Council of the EU, Press Release ‘Ukraine: Council Agrees on Further Military Support under the European Peace Facility’ (2 February 2023) www.consilium.europa.eu.

⁴¹ For a commentary under EU law see: A Melzer, ‘EU Military Mission Is Coming Home: On the New European Union Military Assistance Mission in Support of Ukraine’ (19 October 2022) [Verfassungsblog verfassungsblog.de](http://Verfassungsblog.verfassungsblog.de).

⁴² As stated on the official website of the EUMAM Ukraine, see www.eeas.europa.eu.

⁴³ Government of Ireland, Department of Defence, ‘Approval for Defence Forces’ Participation in the EU Military Assistance Mission in Support of Ukraine’ www.gov.ie; Irish Defence Forces, ‘Irish Defence Forces Training Assistance to EU Military Assistance Mission in Support of Ukraine (EUMAM UA) - Cyprus’ www.military.ie.

⁴⁴ Federal Ministry, Republic of Austria, European and International Affairs, ‘Eastern Europe’ www.bmeia.gv.at.

⁴⁵ About Hungary, ‘FM: Hungary says no to EU’s Ukraine army training mission’ (18 October 2022) abouthungary.hu.

⁴⁶ European Council Conclusions of 23 and 24 June 2022, para. 6 available at data.consilium.europa.eu.

support to Ukraine. Meanwhile, individual states manage the aid and assistance they provide to Ukraine bilaterally and retain control over how much they want to contribute to Ukraine's defensive actions.

It is beyond the scope of this *Article* to list the entirety of the aid and equipment that has been provided by EU Member States.⁴⁷ Nonetheless, it is useful to be aware of which countries have provided the most military and financial aid. According to data collected by the Kiel Institute,⁴⁸ Germany is the European country that has pledged the most military aid (€17.1 billion), donating more than the EU institutions (€5.6 billion). The countries that follow are Denmark (3.5), Poland (3), Netherlands (2.48), Sweden (1.47), Finland (1.22), Czech (1.06), Italy (0.66), Slovakia (0.67), Lithuania (0.71), France (0.53), Estonia (0.42).

While states contribute to the EU's mechanisms, they also provide their own bilateral aid. The states that have committed the most bilateral aid in terms of percentage of their GDP are Lithuania (1.4 per cent), Estonia (1.3 per cent), Latvia (1.1 per cent), Denmark (1.1 per cent), Poland (0.7 per cent), Slovakia (0.6 per cent), Netherlands (0.4 per cent), Finland (0.5 per cent) Czech Republic (0.6 per cent) and Bulgaria (0.3 per cent). Thus, though Germany has donated the most military aid this only represents a small percentage of its GDP. In terms of financial aid, the EU institutions are providing the most (€77.1 billion), and are then followed by Norway (3.55), Germany (1.3), Netherlands (0.99), Poland (0.92), France (0.8).⁴⁹ Romania and Poland also play a strategically important role in allowing weapons to be transferred through their territory,⁵⁰ with Poland "acting as a logistical hub for the transfer of military equipment from other allies into the western part of Ukraine not occupied by Russian forces".⁵¹

In January 2023, a group of EU countries – Estonia, Poland, Latvia, Lithuania, Czech Republic, the Netherlands and Slovakia – issued a joint statement with the UK, "the Tallinn Pledge", whereby they "reaffirm[ed] [their] continued determination and resolve to supporting Ukraine in their heroic resistance against the illegal and unprovoked Russian aggression" and "commit[ed] to collectively pursuing delivery of an unprecedented set of donations".⁵²

Although they present a united front through the EU, Member States disagree over what their level of participation should be. Hungary, for example, is an outlier. At the start, when the EU agreed to supply Ukraine with weapons, it stated that it would not allow its territory to be used to transfer weapons to Ukraine given that this would give

⁴⁷ A comprehensive overview is available here: C Mills, 'Military Assistance to Ukraine since the Russian Invasion' (14 August 2023) House of Commons Library, Research briefing commonslibrary.parliament.uk.

⁴⁸ Kiel Institute, *Ukraine Support Tracker* www.ifw-kiel.de.

⁴⁹ After the EU, the top financial contributors are the US (€24.3 billion), Japan (€5.6 billion), the UK (3.9) and Canada (3.6), which all provide more than the EU's top contributor, Germany.

⁵⁰ C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 55.

⁵¹ *Ibid.* referencing A Brzozowski, 'Poland "Key" in Western Weapons Supplies to Ukraine' (1 March 2022) Euractiv www.euractiv.com.

⁵² UK Ministry of Defence, 'Joint Statement – The Tallinn Pledge' (19 January 2023) www.gov.uk.

rise to a “direct security threat”,⁵³ ostensibly given its border with Ukraine the conflict could spill into its territory, and because “such deliveries might become targets of hostile military action”.⁵⁴ In October 2022, Péter Szijjártó, the Hungarian Minister of Foreign Affairs and Trade, explained: “[t]he question of whether shipments or troops linked to the mission may transit Hungarian territory will always be decided on an individual basis”,⁵⁵ thus indicating a shift. However, Hungary did not vote in favour of training Ukrainian soldiers but, as noted above, “abstained constructively” so as not to obstruct the procedure. Furthermore, speaking at the UNGA’s 11th Special Emergency Session, the representative of Hungary stated: “[b]ased on our experience, it has already become quite obvious that measures such as the delivery of weapons or sanctions do not save lives. On the contrary, they contribute to the prolongation and the risk of escalation of this war, and they bring about more suffering”.⁵⁶

Cyprus has also refrained from providing military aid, also acting out of security concerns. As mentioned, other EU Member States are permanently neutral, in which during an armed conflict they must abstain from supporting either of the parties in an armed conflict and must treat them equally. This is the case of Ireland, Malta, and Austria which, as we saw above, have refrained from providing lethal equipment through the EPF. On the other hand, Finland and Sweden reversed their neutral status and are participating in providing aid and assistance to Ukraine; they have even gone as far as joining NATO.⁵⁷ Germany overturned its long-standing policy of not providing lethal equipment when the war in Ukraine broke out.

The supporting states are adamant that the military assistance provided to Ukraine is essential to uphold international norms, particularly the UN Charter. Speaking on behalf of the Nordic countries (Denmark, Finland, Sweden, Norway, Iceland) the Danish representative stated: “[w]e will not be neutral when asked to stand on the side of the United Nations Charter and on the side of the victims of aggression. As the late Archbishop Desmond Tutu said, ‘If you are neutral in situations of injustice, you have chosen the side of the oppressor’”.⁵⁸

⁵³ About Hungary, ‘FM: Hungary Maintains Ukraine Arms Delivery Ban’ (8 April 2022) abouthungary.hu.

⁵⁴ A Brzozowski, ‘Poland “Key” in Western Weapons Supplies to Ukraine’ *cit.*

⁵⁵ About Hungary, ‘FM: Hungary Says No to EU’s Ukraine Army Training Mission’ (18 October 2022) abouthungary.hu.

⁵⁶ General Assembly, 11th Emergency Special Session Verbatim Record, 18th Plenary Meeting (23 February 2023) UN Doc A/ES-11/PV.18, 2. See also About Hungary, ‘State Secretary: Brussels has a simplistic view of Hungary’s position on war in Ukraine’ (27 April 2023) abouthungary.hu: “Hungary opposes steps that would escalate the war, he said, noting that the country does not support weapons deliveries to Ukraine”.

⁵⁷ Under neutrality law, a permanently neutral state may not join a military alliance; see M Bothe, ‘Neutrality’ (2015) MPEPIL paras 15-17.

⁵⁸ General Assembly, 11th Emergency Special Session Verbatim Record, UN Doc A/ES-11/PV.18, *cit.* 1.

The French presentation similarly proclaimed: “neutrality is not possible because neutrality would be tantamount to being an accomplice of the aggressor”.⁵⁹ Czechia: “I would like to appeal to all those who might be tempted today to take a neutral stance or to those who believe that it is not ‘their’ war: if we do not act now, we are accepting a new international order based on use of brutal force and on colonialism”.⁶⁰

Furthermore, states’ positions have shifted over time as the conflict drags on. They were initially unwilling to provide Ukraine with weapons that could be used to attack Russia on its territory, their main concern being that this would make them parties to the conflict or that Russia would perceive this as an escalation. For instance, although Poland is one of Ukraine’s staunchest supporters (it is considered the main supplier of heavy weaponry⁶¹), it has been reluctant to equip it with MiG-29 planes because doing so would mean they are party to the conflict.⁶² The Czech Republic and Poland were among the first NATO Member States to deliver tanks.⁶³ However, other countries were more hesitant. The provision of Leopard 2 tanks (which defend specifically against the Russian T-72 tanks that are deployed in Ukraine) was hotly debated, and then in January 2023, after much deliberation,⁶⁴ the German government approved of supplying them and allowed other countries to do likewise.⁶⁵ Following this announcement, the Netherlands,⁶⁶ Denmark, Poland,⁶⁷ Finland,⁶⁸ Norway,⁶⁹ Portugal, Spain and Sweden⁷⁰ also committed to sending Leopard 2 tanks.⁷¹

⁵⁹ *Ibid.* 4; see also statement by French President Macron: “I also know that some countries represented here have remained neutral with regard to this war. I want to say to tell them as clearly as possible today that those who wish to take up the cause of the non-aligned by refusing to express themselves clearly are mistaken and bear a historic responsibility” at General Assembly, 77th Session, 4th Plenary Meeting, Official Records, (20 September 2022) UN Doc A/77/PV.4*, 45-46.

⁶⁰ General Assembly, 11th Emergency Special Session Verbatim Record, UN Doc A/ES-11/PV.18 cit. 9.

⁶¹ C Mills, ‘Military Assistance to Ukraine Since the Russian Invasion’ cit. 53.

⁶² M Piątkowski, ‘The Saga of the Polish MiG-29’ cit.

⁶³ R Gramer, J Detsch, and A MacKinnon, ‘The West Finally Starts Rolling Out the Big Guns for Ukraine’ (15 April 2022) Foreign Policy foreignpolicy.com; CTV News, ‘“Better Late than Never”: Polish PM Applauds West for Sending Tanks to Ukraine’ (27 January 2023) www.ctvnews.ca.

⁶⁴ L Baldor and T Copp, ‘Defense Chiefs Fail to Resolve Dispute on Tanks for Ukraine’ (20 January 2023) AP News apnews.com.

⁶⁵ F Jordans, K Griesaber and S Kullab, ‘US, Germany to Send Advanced Tanks to Aid Ukraine War Effort’ (25 January 2023) AP News apnews.com.

⁶⁶ Netherlands Ministry of Defence, Press Release ‘Nederland koopt Leopard-2 tanks voor Oekraïne’ (20 April 2023) www.defensie.nl.

⁶⁷ CTV News, ‘“Better Late than Never” cit.; Reuters, ‘Poland has Delivered Tanks to Ukraine, Government Announces on War’s First Anniversary’ (24 February 2023) www.reuters.com.

⁶⁸ Finnish Ministry of Defence, Press Release, ‘Finland Donates Defence Materiel Assistance to Ukraine Including more of Mine-Clearing Leopard 2 Tanks’ (23 March 2023) www.defmin.fi.

⁶⁹ The Local, ‘Norway to Send Eight Leopard Tanks to Ukraine’ (14 February 2023) www.thelocal.no.

⁷⁰ Sweden, Ministry of Defence, Press Release, ‘Heavy Advanced Weapons to Ukraine in New Support Package’ (24 February 2023) www.government.se.

⁷¹ See further C Mills, ‘Military Assistance to Ukraine since the Russian Invasion’ cit.

Committing long-range missions was also a sensitive issue. In an interview on 3 December 2022 with TF1, Macron reiterated his support for Ukraine. France would continue to send weapons alongside other European countries and the US, but it would not deliver weapons that would allow Ukraine to attack Russia on its own territory.⁷² This changed in July 2023, when Macron announced France “[has] decided to deliver new long-range strike missiles to Ukraine”, SCALP missiles (also known as Storm Shadow) that have a range of 250 km.⁷³ In so doing, it joined the UK, which also committed to supplying Ukraine with Storm Shadow missiles in May 2023.⁷⁴

At the time of writing, Ukraine is scheduled to receive F-16 fighter jets, which have been on its “wish list” for a while. After receiving the greenlight from the US, Denmark and the Netherlands have announced they will transfer the fighter jets once the Ukrainians can fly them.⁷⁵ Alongside Luxembourg, Norway, Belgium, Portugal, Poland, Romania, Sweden they will train Ukrainian pilots to use F-16s.⁷⁶ These countries have joined forces with Canada and the United Kingdom to form a joint coalition to train the Ukrainian Air Force to use F-16s.⁷⁷

II.2. THE UNITED STATES OF AMERICA, THE UNITED KINGDOM AND CANADA

The EU and European countries are not alone in supporting Ukraine through weapons and training. As discussed in this section, two of the main contributors to Ukraine’s military efforts are the US and the UK, and Canada is also a significant contributor. The three countries are NATO Member States. Like the EU, NATO is an important organisation through which states express their commitment to assist Ukraine in its exercise in self-defence and coordinate their efforts.⁷⁸ Out of 27 EU Member States, only five are currently not part of NATO: Ireland, Austria, Cyprus, Malta, and Sweden. However, Sweden’s accession to NATO has been approved.⁷⁹ NATO members that are not part of the EU are Turkey, the UK, the US, Albania, Canada, Iceland, Norway, Montenegro, North Macedonia. This section will review the assistance provided by the US, the UK and Canada.

⁷² TF1, ‘Emmanuel Macron sur TF1: son interview en intégralité’ (3 December 2022) www.tf1info.fr.

⁷³ L Kayali and H van der Burchard, ‘France and Germany Pledge more Weapons for Ukraine’ (11 July 2023) Politico www.politico.eu; B Gabel, ‘“A Strong Gesture”: French Delivery of SCALP Missiles to Ukraine Marks Shift in Western Strategy’ (13 July 2023) France 24 www.france24.com.

⁷⁴ C Mills, ‘Military Assistance to Ukraine since the Russian Invasion’ cit. 20.

⁷⁵ J Lukiv, ‘Ukraine War: US Allows Transfer of Danish and Dutch F-16s War Planes to Kyiv’ (18 August 2023) BBC www.bbc.com.

⁷⁶ US Department of Defense, ‘Defense Contact Group Remains Steadfast on Ukraine Support’ (25 May 2023) www.defense.gov.

⁷⁷ Danish Ministry of Defence, ‘Statement on a Joint Coalition on F-16 Training of the Ukrainian Air Force’ (11 July 2023) www.fmn.dk.

⁷⁸ For an overview of NATO’s support to Ukraine, see the NATO, *Relations with Ukraine* www.nato.int.

⁷⁹ Although at the time of reviewing the article, Sweden has not yet joined the alliance as Hungary stills needs to ratify Sweden’s membership: L Bayer, ‘Why is Orbán Blocking Sweden’s Entry to Nato – and What Happens Next?’ (24 January 2024) The Guardian www.theguardian.com.

The US has been a key player in assisting Ukraine's military operations in self-defence against Russia, not only in terms of the equipment provided but also in coordinating assisting states' efforts. It was already providing military assistance to Ukraine prior to February 2022. In January that year, the US Department of Defense had delivered "Javelin missiles, other anti-armour systems, ammunition and non-lethal equipment", as well as Mi-17 helicopters.⁸⁰ Concerned that a Russian attack was imminent, the US Department of State cautioned that: "if Moscow does move forward with its aggression, we are prepared and our Ukrainian partners will be prepared with what they need to defend themselves. That is why we have provided the defensive security assistance that we have to Ukraine".⁸¹

Since then, US supplies have only increased. In July 2023, the Department of Defense published a three-page list of the aid and assistance that has been committed to Ukraine since 22 February 2023. It includes: Stinger anti-aircraft systems, Javelin and other anti-armour systems, High Mobility Artillery Rocket Systems (HIMARS) and ammunition, 155mm Howitzers, 122mm GRAD rockets, rocket launchers and ammunition, precision guided rockets, one Patriot air defence battery and munitions, National Advanced Surface-to-Air Missile Systems (NASAMS) and munitions, HAWK air defence systems and munitions, as well as RIM-7 and 20 Avengers for air defence, high speed anti-radiation missiles, various artillery rounds, mortar systems and unmanned aerial systems, tank ammunition, etc.⁸² General Mark Milley explained on 18 July 2023 that the

"latest security assistance package includes substantial provision of additional artillery munitions, to include HIMARS and air defense weapons, such as Patriot missiles. It also includes a broad range of artillery systems and munitions, anti-armor munitions, precision aerial munitions, demolitions, and various other supplies that are necessary to keep Ukraine in the fight.

In combination, this training and equipment enables Ukraine to have the capacity and the capability to defend itself. U.S. security assistance to Ukraine now totals over [...] \$40 billion...".⁸³

The US played a strategically important role in ensuring that Ukraine received Leopard 2 tanks. In an effort to convince Germany to transfer this equipment to Ukraine, President Biden announced that the US would send Abrams tanks in January 2023 in order to help

⁸⁰ C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 27.

⁸¹ US Department of State Press Briefing, 'Remarks by Ned Price, Department Spokesperson' (27 January 2022) www.state.gov.

⁸² US Department of Defense, 'Fact Sheet on U.S. Security Assistance to Ukraine' (25 July 2023) media.defense.gov.

⁸³ US Department of Defense, 'Secretary of Defense Lloyd J. Austin III and Joint Chiefs of Staff Chairman General Mark A. Milley Hold Press Conference Following Virtual Ukraine Defense Contact Group Meeting' (18 July 2023) www.defense.gov.

Ukrainians defend their territory and prepare for a counter-offensive.⁸⁴ On the other hand, whereas Ukraine has requested ATACMs, the Biden administration was reluctant to provide them as this would give Ukrainian forces the ability to strike within Russia – which assisting states do not want to facilitate as they fear this could lead to escalation. The concern appeared to be linked to their party status, as sending such weapons may put them at war with Russia.⁸⁵ However, the US government eventually changed its approach and supplied them to Ukraine.⁸⁶

The US also participates in training Ukrainian armed forces. In June 2023, General Milley claimed that the US has trained around 11 000 Ukrainian soldiers.⁸⁷ In July, the total number of soldiers trained by states supporting Ukraine was reportedly 63 000.⁸⁸ The US is training Ukrainian soldiers to use fighter jets and has announced that it will allow allies to transfer F-16s to Ukrainian forces once they are able to fly them.⁸⁹ It is also reported to have provided Ukraine with intelligence that has enabled it to carry out strategic strikes against Russian armed forces.⁹⁰

The US is by far the largest military donor (providing €42.1 billion), with Germany coming in second, and the UK third (€6.6 billion).⁹¹ In terms of financial support, the UK is also the third biggest donor (after the EU and the US). The British government had already begun supplying Ukraine with lethal equipment in January 2022, when there were concerns that Russia would launch an invasion. The then British Defence Secretary, Ben Wallace, specified that this aid would be used for defensive purposes only.⁹² Prior to the

⁸⁴ LC Baldor, T Copp, and A Madhani, 'Despite Concerns, US to send 31 Abrams Tanks to Ukraine' (25 January 2023) AP News apnews.com; it is anticipated that they will be delivered by fall 2023: US Department of Defense, 'Ukrainians to Get U.S. Tanks by Fall' (21 March 2023) www.defense.gov.

⁸⁵ T Wheeldon, 'Why the US Declined to Send Ukraine Long-Range Missiles, Tanks' (22 December 2022) France 24 www.france24.com.

⁸⁶ N Bertrand and O Liebermann, 'US Has Provided Ukraine Long-Range ATACMS Missiles, Sources Say' (18 October 2023) CNN edition.cnn.com.

⁸⁷ D Vergum, 'Nations Step Up With New Ukraine Military Assistance' (15 June 2023) US Department of Defense www.defense.gov.

⁸⁸ J Garamone, 'Ukraine Defense Contact Group Members Remain Unified in Support to Kyiv' (18 July 2023) US Department of Defense www.defense.gov.

⁸⁹ E Schmitt, J Ismay, and L McCarthy, 'Allies to Be Allowed to Send F-16s to Ukraine, U.S. Official Says' (17 August 2023) The New York Times www.nytimes.com.

⁹⁰ J E Barnes, H Cooper and E Schmit, 'U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say' (4 May 2022) The New York Times www.nytimes.com: "U.S. intelligence support to the Ukrainians has had a decisive effect on the battlefield, confirming targets identified by the Ukrainian military and pointing it to new targets"; K DeYoung, 'An Intellectual Battle Rages: Is the U.S. in a Proxy War with Russia?' (18 April 2023) The Washington Post www.washingtonpost.com.

⁹¹ Per the Kiel Institute, *Ukraine Support Tracker* cit.

⁹² "the UK is providing a new security assistance package to increase Ukraine's defensive capabilities [...] Ukraine has every right to defend its borders, and this new package of aid further enhances its ability to do so. Let me be clear, this support is for short-range and clearly defensive weapon capabilities. They are not strategic weapons and pose no threat to Russia. They are to use in self-defence" from UK

conflict, British forces were in Ukrainian territory to train UAF. These troops returned to the UK when the war broke out.

The UK continued to provide Ukraine with support following Russia's aggression, which included next generation light anti-tank weapons, anti-tank javelin missiles, a Starstreak air defence system, missiles, Challenger II main battle tanks,⁹³ Storm shadow missiles, Harpoon anti-ship missile systems, M270 multiple-launch rocket systems with ammunition, M-109 self-propelled artillery units, drones, AMRAAM rockets, etc.⁹⁴ It was the first country to provide Ukraine with long-range missiles.⁹⁵ In May 2023, it committed to giving Ukraine long-range attack drones, which have a capability to reach a target within 200 km, and Storm Shadow missiles, which have a range of 250 km.⁹⁶ The UK is also hosting a training programme, Operation Interflex, where various supporting countries are also participating.⁹⁷ It is reported that more than 11 000 Ukrainian soldiers were trained by the UK in 2022 and the British have committed to training 20 000 more in 2023.⁹⁸ The programme includes training Ukrainian fast jet pilots, although at the time of writing the UK is not providing F-16s. Speaking on the aid and assistance donated to Ukraine, then British PM Liz Truss stated in September 2022: "[n]ew weapons from the United Kingdom are arriving in Ukraine [...] We will not rest until Ukraine prevails".⁹⁹

Both the US and the UK play important coordinating roles, alongside Poland. As discussed below (section III.1), they have helped set up the Ukraine Defence Contact Group, the International Donor Coordination Centre, and the International Fund for Ukraine.¹⁰⁰

Canada is the tenth biggest donor of military equipment, total aid amounting to \$CAD 1.8 million (or €1.66 billion),¹⁰¹ and is also involved in training Ukrainian soldiers. CAF have been involved in training UAF since 2015, which is when Operation UNIFIER was first created.¹⁰² Members of the Canadian Armed Forces are currently training UAF in Poland, the

Parliament, Commons Chamber, 'Ukraine, Volume 707: Debated on Monday 17 January 2022', column62, hansard.parliament.uk quoted in C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 12.

⁹³ UK Government, Press Release, 'PM Accelerates Ukraine Support Ahead of Anniversary of Putin's War' (14 January 2023) www.gov.uk.

⁹⁴ C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 10-11 listing the equipment provided, see also *ibid.* 13 ff.

⁹⁵ *Ibid.* 11.

⁹⁶ *Ibid.* 20.

⁹⁷ *Ibid.* 11: these countries are the Netherlands, Canada, Sweden, Finland, Norway, Denmark, Lithuania, New Zealand and Australia.

⁹⁸ *Ibid.* 22.

⁹⁹ General Assembly, 77th General Debate Verbatim Record, 7th Plenary Meeting (21 September 2022) UN Doc A/77/PV.7, 48.

¹⁰⁰ C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 7-10.

¹⁰¹ This is according to Government of Canada, 'Canadian Donations and Military Support to Ukraine' www.canada.ca.

¹⁰² Government of Canada, *Operation UNIFIER* www.canada.ca.

UK and Latvia. In addition to training, they are involved “in various roles such as the provision and coordination of training, national command support, and the facilitation and delivery of military donations to Ukraine”.¹⁰³ Per the Canadian government’s website: “Canada’s military contributions, including training, equipment, and transport, have been integral in Ukraine’s counter offensive to-date, and [Canada] will continue to provide Ukraine with the support it needs to defend its sovereignty, freedom, and independence”.¹⁰⁴

The intention to remain committed to Ukraine’s efforts to defend itself against Russia’s invasion is frequently reiterated by supporting states. For instance, in a communiqué issued following a NATO summit in Vilnius on 11 July 2023 NATO Member States announced:

“We reaffirm our unwavering solidarity with the government and people of Ukraine in the heroic defence of their nation, their land, and our shared values. We fully support Ukraine’s inherent right to self-defence as enshrined in Article 51 of the UN Charter. We remain steadfast in our commitment to further step up political and practical support to Ukraine as it continues to defend its independence, sovereignty, and territorial integrity within its internationally recognised borders, and will continue our support for as long as it takes. We welcome efforts of all Allies and partners engaged in providing support to Ukraine”.¹⁰⁵

Also in July 2023, the G7 published a joint declaration of support for Ukraine, affirming they “will stand with Ukraine as it defends itself against Russian aggression, for as long as it takes”.¹⁰⁶ The states committed to: “[e]nsuring a sustainable force capable of defending Ukraine now and deterring Russian aggression in the future, through the continued provision of security assistance and modern military equipment [...]; training and training exercises for Ukrainian forces; intelligence sharing and cooperation; support for cyber defense, security, and resilience initiatives”.¹⁰⁷

Having reviewed the military aid and equipment provided by the EU, its Member States and some of their allies, the next section addresses how Russia has responded to these policies.

II.3. RUSSIA’S RESPONSE

In general, Russia appears to be tolerating the support states are providing to Ukraine, while warning these states that the military equipment they send to Ukraine will be seen as “legitimate military targets” and they run the risk of becoming parties to the conflict.

Russia reportedly sent a diplomatic note to the US and other countries supplying military aid and equipment in April 2022, warning them against providing such support which

¹⁰³ Government of Canada, ‘Canadian Donations and Military Support to Ukraine’ cit.

¹⁰⁴ *Ibid.*

¹⁰⁵ The statement is available online: NATO, ‘Vilnius Summit Communiqué’ (11 July 2023) www.nato.int.

¹⁰⁶ Government UK, ‘Joint Declaration of Support for Ukraine’ (12 July 2023) assets.publishing.service.gov.uk.

¹⁰⁷ *Ibid.*

Russia would view as a legitimate target.¹⁰⁸ While some of the supplies had apparently been targeted in Ukraine, some raised the question as to whether Russian forces would “try to hit the supply convoys themselves and perhaps the NATO countries on the Ukrainian periphery”.¹⁰⁹ Russia continuously warned that it would consider sending long-range missiles to Ukraine as a threat¹¹⁰ and that it would view states sending these weapons as party to the conflict,¹¹¹ which was one of the reasons supporting states were hesitant to send such aid to Ukraine. When it was announced these weapons would be sent in Spring 2023, Russia announced it views them as “legitimate military targets”.¹¹² In March 2022, the Defence Ministry spokesman Igor Konashenkov said that if any country provides airfields for Ukraine's military aviation with subsequent use against the Russian armed forces it “may be regarded as the involvement of these states in an armed conflict”.¹¹³

In May 2022, Vyacheslav Volodin, speaker of the Russian Duma, stated that “Washington is essentially coordinating and developing military operations, thereby directly participating in military actions against our country”.¹¹⁴ This position appears to be shared by the Russian government. In September 2022, Russian Foreign Minister Sergei Lavrov told *Newsweek*:

“Today, Western states funnel weapons and military hardware into the neo-Nazi regime in Kiev, and train Ukraine's armed forces. NATO and U.S. arms are used to fire at the Russian territory bordering Ukraine, killing civilians there. The Pentagon does not hide the fact of passing on to Kiev intelligence and target designations for strikes. We record the presence of American mercenaries and advisers ‘in the battlefield.’ The United States, in fact, is teetering on the brink of turning into a party to conflict”.¹¹⁵

¹⁰⁸ K DeYoung, ‘Russia Warns U.S. to Stop Arming Ukraine’ (15 April 2022) Washington Post www.washingtonpost.com.

¹⁰⁹ *Ibid.* quoting George Beeb, former director of Russia analysis at the CIA and advisor to Dick Cheney. See also Reuters, ‘Russia Targets Ukraine's Missiles as Western-Supplied Weapons Bite’ (18 July 2022) www.reuters.com.

¹¹⁰ Tass, ‘Fuss over Arms Deliveries to Kiev Aims to Stretch out Conflict in Ukraine, Putin Says’ (5 June 2022) tass.com.

¹¹¹ Al Jazeera, ‘Russia Warns US not to Provide Longer-Range Missiles to Ukraine’ (15 September 2022) www.aljazeera.com.

¹¹² Reuters, ‘Moscow has Made clear it Sees such Weapons Supplied by the West as Legitimate Targets’ (4 June 2023) www.reuters.com; T Baker, ‘Russia Threatens “Military Response” after UK Gives Long-Range Missiles to Ukraine’ (12 May 2023) Sky News news.sky.com.

¹¹³ E Teslova, ‘Russia Warns of Providing Airfield for Ukraine's Military Aviation’ (6 March 2022) AA www.aa.com.tr.

¹¹⁴ Reuters, ‘Senior Russian Lawmaker says U.S. Directly Involved in Ukraine Fighting’ (7 May 2023) www.reuters.com.

¹¹⁵ T O'Connor, ‘Exclusive: Russia's Sergey Lavrov Warns U.S. It Risks Becoming Combatant in Ukraine War’ (21 September 2022) *Newsweek* www.newsweek.com; see also, The Ministry of Foreign Affairs of the Russian Federation, ‘Foreign Minister Sergey Lavrov's remarks at a meeting of the UN Security Council on Ukraine, New York, September 22, 2022’ mid.ru: “[t]he position of the states that are pumping Ukraine with

Then, when the EU announced EUMAM Ukraine in October 2022, the Russian Ministry of Foreign Affairs said that the EU has become party to the conflict. Spokeswoman Maria Zakharova is reported to have said: “[a]lmost €107 million (\$104.6 million) are allocated for this venture. This step goes along with the supply of lethal weapons to the Kyiv regime, qualitatively increases the involvement of the European Union, making it, of course, a party to the conflict”.¹¹⁶

Commenting on the US’ supply of intelligence to Ukraine, Zakharova stated: “[t]he Americans openly admit that they are transferring satellite and other intelligence information to the command of the Armed Forces of Ukraine (VSU) virtually in real time, and that they are taking part in planning combat missions. Is this not complicity? This is a genuine hybrid war”.¹¹⁷

At a press conference, she commented that the states supplying Ukraine with aid and military equipment have lost their neutral status.¹¹⁸ She also expressed doubt over NATO’s stance that it is not party to the conflict.¹¹⁹

During an interview in February 2023, Dmitry Peskov, the spokesman for the Kremlin, reportedly claimed the US, UK and France “are now in the same organization that is de facto fighting with us, is in a state of direct armed confrontation with us, given their weapons in Ukraine”.¹²⁰ A month prior, he had said: “they have de facto become an indirect party to this conflict, pumping Ukraine with weapons, technologies, and intelligence”.¹²¹ Finally, President Vladimir Putin would have expressed a similar position, claiming that in sending “billions of dollars in weapons to Ukraine” countries are “really participating”.¹²²

weapons and combat equipment and training its armed forces [...] implies the direct involvement of Western countries in the Ukrainian conflict, which is turning them into its party”.

¹¹⁶ E Teslova, ‘EU Military Assistance to Ukraine Makes it Party to Conflict: Russia’ (20 October 2022) AA www.aa.com.tr; see also E Teslova, ‘Russia Says EU Military Assistance Mission to Ukraine Will Make Bloc Party to Conflict’ (6 October 2022) AA www.aa.com.tr; The Ministry of Foreign Affairs of the Russian Federation, ‘Briefing by Foreign Ministry Spokeswoman Maria Zakharova, Moscow, October 6, 2022’ mid.ru: “[i]f the proposed mission is established, the EU’s involvement will be upgraded to the status of a party to the conflict”.

¹¹⁷ The Ministry of Foreign Affairs of the Russian Federation, ‘Briefing by Foreign Ministry Spokeswoman Maria Zakharova, Moscow, October 6, 2022’ mid.ru.

¹¹⁸ *Ibid.*: “the states that declare their neutrality have in fact lost this status since they are actively supplying weapons or weapons procurement funding and providing political support to these extremist aspirations of the Kiev regime”.

¹¹⁹ *Ibid.*: “NATO leaders’ statements to the effect that all arms supplies to Ukraine are bilateral and are not carried out under NATO aegis are just a smokescreen that enables the alliance to insure itself against the need to intervene on behalf of a country that is a mere tool in their confrontation with Russia”.

¹²⁰ D Brennan, ‘NATO De Facto at “War” With Russia in Ukraine, Kremlin Says’ (28 February 2023) Newsweek www.newsweek.com.

¹²¹ E Teslova, ‘US, NATO “Indirect Party” to Ukraine Conflict with “Obvious” Involvement: Russia’ (10 January 2023) AA www.aa.com.tr; see also Reuters, ‘Russia is now Fighting NATO in Ukraine, Top Putin Ally Says’ (10 January 2023) www.reuters.com; Reuters, ‘NATO Countries a Party to Ukraine Conflict - Russia’s Patrushev’ (27 March 2023) www.reuters.com.

¹²² A Hernandez-Morales, ‘Putin Accuses NATO of Participating in Ukraine Conflict’ (26 February 2023) Politico www.politico.eu.

To summarise, the Russian position is that NATO and EU Member States are not only in violation of neutrality law, but that they are also parties participating in the armed conflict alongside Ukraine.

II.4. REACTIONS FROM OTHER STATES

In addition to the states listed above, Australia, New Zealand, Japan, and others are providing supporting. It is estimated that about fifty states are assisting Ukraine. This means that a large number of countries have abstained from donating military aid and equipment, and some have explicitly committed to neutrality. This is the case of Pakistan,¹²³ China, India,¹²⁴ Saudi Arabia, Brazil, Mexico. The African continent appears to be divided on Ukraine, with many states adopting a position of non-alignment. Part of this position comes from a lack of trust in Western policies, particularly following the aggression against Iraq in 2003 and the NATO-led intervention in Libya in 2011.¹²⁵ They also want to be able to mediate peace between Ukraine and Russia as they are concerned about the war's impact on their own countries.

Several African countries – Algeria, Burundi, Central African Republic, Congo, Eritrea, Eswatini, Ethiopia, Guinea, Lesotho, Mali, Mozambique, Namibia, South Africa, Uganda, Togo, Tanzania, Zimbabwe – abstained during the vote on UNGA Resolution ES-11/4 on the “[t]erritorial integrity of Ukraine: defending the principles of the Charter of the United Nations”, which was adopted following the referendums in the regions of Donetsk, Kherson, Luhansk and Zaporizhzhia in September 2022. That said, during the explanation of the vote they recalled their support for the UN Charter and its principles.¹²⁶

In general, votes on UNGA resolutions are not a very good indicator of countries' position on neutrality or their view of how the conflict should be addressed. It is entirely possible that states condemn Russia's aggression as well as how Western countries have responded to the war, finding that not enough is done to de-escalate the conflict and resolve it through peaceful means. For example, while Bolivia abstained it still “categorically rejected[ed] any act of aggression” but also criticised states that “speak about de-

¹²³ S Ali, 'Pakistan to Stay Neutral on Russia-Ukraine Conflict' (21 February 2023) The Nation www.nation.com.pk; R Grim and M Hussain, 'Secret Pakistan Cable Documents U.S. Pressure to Remove Imran Khan' (9 August 2023) The Intercept theintercept.com.

¹²⁴ P Shankar, 'What India's Position on Russia-Ukraine War Means for its EU Ties' (9 March 2022) Al Jazeera www.aljazeera.com.

¹²⁵ P-S Handy and F Djilo, 'Unpacking Africa's divided stance on the Ukraine war' (12 August 2022) issafrica.org; B Ndiaye, 'Senegal: the "Voice" of Africa in the Russian-Ukrainian Crisis, Three Questions to Babacar Ndiaye' (1 July 2022) Institut Moutaigne www.institutmoutaigne.org; AFP, 'War in Ukraine strains ties between Africa and West' (27 October 2022) France 24 www.france24.com.

¹²⁶ See explanations of the vote in: General Assembly, 11th Emergency Special Session, 14th Plenary Meeting (12 October 2022) UN Doc A/ES-11/PV.14; C Muronzi, 'Is Africa still "Neutral" a Year into the Ukraine War?' (26 February 2023) Al Jazeera www.aljazeera.com.

fending peace while they continue to supply weapons and promote measures that accelerate the violence”.¹²⁷ Other states equally condemned the aggression but abstained because they found the resolution did not sufficiently focus on mechanisms that would ensure the peaceful resolution of the conflict.¹²⁸ Even states that vote in favour did so because they supported the spirit of the Resolution, but believed more could be done to settle the war peacefully. For instance, Bangladesh voted in favour of the resolution, but highlighted: “[w]e believe that antagonism, like war, economic sanctions or countersanctions cannot bring good to any nation. Dialogue, discussion and mediation are the best ways to resolve crises and disputes”.¹²⁹ Brazil also voted in favour but felt that not enough was done to send a clear message “urging the parties to cease hostilities and engage in peace negotiations”.¹³⁰

The explanations of the vote on Resolution ES-11/6 on “Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine” during the debate at the Emergency Special Session on 22 and 23 February 2023 further illustrate that countries’ positions on the war in Ukraine are more nuanced than a simple “Yes”, “No”, or abstention. For example, Thailand voted in favour of the resolution but cautioned:

“More weapons escalate fighting. More fighting exacerbates human suffering. More sanctions intensify human pain and have never led to regime change. Condemnations bear no positive weight on altering behaviour or conduct. Thailand calls on all parties to step up diplomatic efforts to engage in dialogue to achieve a peaceful negotiated settlement as a way out of the Ukraine conflict. [...] Wars cannot be settled by the deployment of more lethal weapons, not unless total destruction and human casualties are the only objectives and the only option available. Wars can be settled only by engagement and dialogue and by pragmatism [...]”.¹³¹

¹²⁷ General Assembly, 11th Emergency Special Session, 14th Plenary Meeting, cit. 18; see also comments made by Bolivian President Arce Catacora during the General Assembly, 77th General Debate Verbatim Record, 5th Plenary Meeting (20 September 2022) UN Doc A/77/PV.5, 12-13.

¹²⁸ See, for example, General Assembly, 11th Emergency Special Session, 14th Plenary Meeting, cit.: China (4: “we stress the need for dialogue and engagement for a political settlement to the crisis in Ukraine”), Pakistan (14: “the highest priority at this moment is the immediate cessation of hostilities and the resumption of a peaceful dialogue through direct negotiations, mediation or other peaceful means to resolve the causes of the conflict and restore peace and security in Ukraine”), India (15: “With that firm resolve to strive for a peaceful solution through dialogue and diplomacy, India decided to abstain”), Thailand (16: “It is the ultimate duty and responsibility of this Organization to restore peace and normalcy of life to the Ukrainians, not through violent means but by diplomatic mechanisms that can only bring practical and lasting peace”).

¹²⁹ General Assembly, 11th Emergency Special Session, 14th Plenary Meeting, cit. 16.

¹³⁰ *Ibid.* 17. Similarly, see Saint Vincent and the Grenadines at *ibid.* 10-11.

¹³¹ General Assembly, 11th Emergency Special Session, 19th Plenary Meeting (23 February 2023) UN Doc A/ES-11/PV.19, 4.

Costa Rica regretted “the approach that has been taken to the conflict, which continues to be a military one. We also deplore the fact that investment in weapons continues to increase...”,¹³² yet it had nonetheless co-sponsored the Resolution and voted in favour. South Africa expressed similar reservations:

“Today we consider yet another draft resolution on the war in Ukraine, which comes amid an influx of arms to the region, perpetuating greater acts of violence and increased human suffering. Together with the threat of nuclear war, that makes peace seem less attainable. [...] are our ways and actions focused on the maintenance of peace or on creating further divisions that make the attainment of immediate peace less likely?”.¹³³

As did Egypt, which urged “all parties that are involved directly or indirectly in the crisis to avoid any escalation and refrain from taking any measures that would prolong the crisis or exacerbate it”¹³⁴ China comparably commented: “sending weapons will not bring about peace – adding fuel to the fire will only exacerbate tensions, and prolonging the conflict will only force ordinary people to pay an even greater price. We hereby appeal that diplomacy and negotiation not be abandoned”.¹³⁵

Malaysia¹³⁶ and South Sudan¹³⁷ called for resolving the dispute through peaceful means. Nepal also emphasised “dialogue and diplomacy are the tools for resolving disputes and differences” and called for “the immediate cessation of hostilities and the creation of conditions for dialogue and diplomacy”.¹³⁸ Indonesia¹³⁹ and Lesotho¹⁴⁰ expressed a similar position. Brazil also voted in favour of the resolution because it wanted to express its commitment to the principles of the UN Charter and its desire to a peaceful resolution of the conflict. It called on: “start[ing] peace talks rather than fuel[ing] the conflict. Brazil considers the call for the cessation of hostilities in paragraph 5 as an appeal to both sides to halt violence without preconditions”.¹⁴¹

¹³² General Assembly, 11th Emergency Special Session, 17th Plenary Meeting (22 February 2023) UN Doc A/ES-11/PV.17, 24.

¹³³ *Ibid.* 4.

¹³⁴ *Ibid.* 9.

¹³⁵ General Assembly, 11th Emergency Special Session, 18th Plenary Meeting cit. 18.

¹³⁶ General Assembly, 11th Emergency Special Session, 19th Plenary Meeting cit. 5.

¹³⁷ *Ibid.* 9.

¹³⁸ *Ibid.* 3. Nepal found that the draft resolution could have placed more emphasis on diplomacy and negotiation to resolve the dispute, but nonetheless voted in favour.

¹³⁹ *Ibid.* 9: “the resolution is missing the call for the two parties in conflict to pursue dialogue and diplomatic means and enter into direct peace negotiations”.

¹⁴⁰ *Ibid.* 10: “[t]he manner in which the resolution is framed creates further distance between the warring parties and does not indicate any immediate steps for diplomatic solution or endeavours that would hasten a peaceful settlement of the conflict”.

¹⁴¹ *Ibid.* 5.

Angola abstained because of paragraph 9 of the Resolution, which calls for holding those responsible for war crimes on Ukrainian territory.¹⁴² It explained: “[t]he Republic of Angola defends the notion of accountability for crimes committed by any of the parties. However, we do not think that this is the right time to include such a paragraph in the draft resolution [...] We would like to reiterate that the Republic of Angola is of the opinion that conflict resolution between Russia and Ukraine can be achieved only through dialogue”.¹⁴³

Nigeria expressed similar reservations but nonetheless voted in favour.¹⁴⁴

India and Pakistan both abstained, finding that the resolution did not do enough to promote a genuine peace between the parties.¹⁴⁵ Cuba abstained because it found the Resolution did not sufficiently call for diplomacy and negotiation, and it also did not to support a resolution that would be a potential “legal basis to justify the eventual creation of tribunals for national and international prosecutions”.¹⁴⁶ It also accused the US and NATO of adding fuel to the fire by “the increasing flow of arms, aggressive rhetoric and unilateral sanctions”.¹⁴⁷

II.5. CONCLUSION

A substantial amount of military aid, equipment and support has been provided by the EU, as well as by a number of its Member States bilaterally and by NATO Member States. This assistance has been justified as necessary to help Ukraine defend itself against Russian aggression. It is the first time that the EU is funding the provision of lethal military equipment and training armed forces involved in an international armed conflict on EU territory. This shift in the EU’s policy raises a number of questions under public international law, which are addressed in the following section.

III. *JUS AD BELLUM*, NEUTRALITY LAW, AND *JUS IN BELLO*: THE NEED FOR LEGAL COHERENCE

The support provided to Ukraine raises three distinct but inter-related questions under *jus ad bellum*, neutrality law, and international humanitarian law. The first is whether the countries are assisting Ukraine in collective self-defence, which implies that the military aid and assistance they are providing amounts to an indirect use of force against Russia (section III.1). Another question is whether these states are in breach of neutrality law, and consequently whether they could be subjected to Russian countermeasures (section III.2). Finally, the status of supporting states and whether they are parties, or co-belligerents, is equally relevant. This is the issue that seems to concern the supporting states the

¹⁴² *Ibid.* 4-5.

¹⁴³ *Ibid.* 5.

¹⁴⁴ *Ibid.* 2.

¹⁴⁵ *Ibid.* 10-11.

¹⁴⁶ *Ibid.* 8.

¹⁴⁷ *Ibid.* 8; see also the Democratic People’s Republic of Korea, *ibid.* 11.

most, which appear to limit the extent of their aid and assistance to avoid a direct confrontation with Russia (section III.3). Each of these questions will be addressed in turn below.

III.1. COLLECTIVE SELF-DEFENCE

It could be said that the states supporting Ukraine are acting in collective self-defence in accordance with art. 51 UN Charter.¹⁴⁸ While they have not officially communicated to the UNSC that they are doing so (as required under art. 51 UNC), the question still arises whether the military aid and assistance they are supplying amounts to a use of force against Russia. One wonders whether these states are engaging in force against Russia *indirectly* by supporting Ukraine's armed forces. An indirect use of force has been defined as: "aid or assistance to another state's use of force, or to an armed group's actions that would qualify as such a use if engaged in by states".¹⁴⁹

In its judgment in *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice (ICJ) found that:

"the United States has committed a *prima facie* violation of [the customary international law principle of the non-use of force] by its assistance to the *contras* in Nicaragua. By 'organizing or encouraging the organization of irregular forces or armed bands [...] for incursion into the territory of another State' and 'participating in acts of civil strife [...] in another State', in the terms of General Assembly resolution 2625 (XXV). [...] In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government[...]"¹⁵⁰

The judgment then reads: "the Court is unable to consider that in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State".¹⁵¹ In *Armed Activities in Congo*, the ICJ reiterated that a state that provides training and military support to an armed group engaged in an armed conflict with another state breaches the prohibition to use force. The relevant parts of the judgment read: "[...] the training and military support given by Uganda to the ALC, the military wing of the MLC, violates [...] the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda [...]".¹⁵²

¹⁴⁸ A de Hoogh, 'The Elephant in the Room: Invoking and Exercising the Right of Collective Self-Defence in Support of Ukraine against Russian Aggression' (7 March 2022) *Opinio Juris* opiniojuris.org.

¹⁴⁹ MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' (2023) *International Law Studies* 186, 197.

¹⁵⁰ ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [27 June 1986] para. 228.

¹⁵¹ *Ibid.* para. 230.

¹⁵² ICJ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [19 December 2005] paras 161-163.

In the cases cited, the bench was addressing the issue of a state (the USA/ Uganda) providing weapons and training to armed groups (the *Contras/ Armée de Libération du Congo*) involved in an internal armed conflict with another state (Nicaragua/ Democratic Republic of Congo). As the *Nicaragua* judgment clearly states, the sending of weapons does not per se constitute a use of force. It seems the Court found that a particular level of involvement needs to be met in order for military assistance to constitute a use of force, albeit indirectly. The question is whether this applies to an international conflict between two states, where third states provide support to one of the parties. Considering their contribution to Ukraine, can the supporting states be said to be indirectly using force against Russia?

For some, the analogy with the *Nicaragua* judgment does not hold. For instance, van Steenberghe argues that the ICJ's reasoning is restricted to providing support to an armed group without the territorial state's consent and is tied to the principle of non-intervention.¹⁵³ Although the ICJ's assessment was *linked* to the prohibition of intervention this does not exclude the fact that the prohibition to use of force was equally applicable.¹⁵⁴ The Court itself said that *both* prohibitions were at stake.¹⁵⁵ Others find that there is no reason why the ICJ's findings would not be applicable in an international armed conflict.¹⁵⁶ According to the present author, this approach is the more reasonable one. The difference between the conflicts in the *Nicaragua* and *Armed Activities* cases and the Russia-Ukrainian war is primarily the nature of the conflict. As Schmitt and Biggerstaff point out, the prohibition to use force is applicable between states and it is therefore compelling to argue that indirect uses of force can also apply between states.¹⁵⁷

Clancy is not convinced that the Court's reasoning clearly stipulates that "the supply of arms to a victim of aggression can be considered to constitute the use of force against the aggressor".¹⁵⁸ To the extent that the ICJ was not dealing with that precise issue, it is true that its findings were not clear on that point. Moreover, as noted above, both the *Nicaragua*

¹⁵³ R van Steenberghe, 'Military Assistance to Ukraine' cit. 233.

¹⁵⁴ For van Steenberghe, the ICJ's findings "were intrinsically linked to the violation of the principle of non-intervention in the internal affairs of that territorial state due to such support" and cannot be applied to the situation in Ukraine; see *ibid.* 233-234.

¹⁵⁵ *Case Concerning Armed Activities on the Territory of the Congo* cit. para. 164: "acts which breach the principle of non-intervention 'will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations'", quoting *Military and Paramilitary Activities in and against Nicaragua* cit. paras 109-110 and 209.

¹⁵⁶ MN Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (7 March 2022) Articles of War lieber.westpoint.edu; see also MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' cit. 197 ff.; KJ Heller and L Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' (2022) *Journal of International Humanitarian Studies* 251, 254-255.

¹⁵⁷ MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' cit. 203-204.

¹⁵⁸ P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' (2023) *ICLQ* 527, 535.

judgment and the *Armed Activities* judgment suggest that the military assistance needs to reach a certain threshold to breach the prohibition to use force. This appears to be confirmed by the UNGA Declaration on Friendly Relations (Resolution 2625). We could also add Resolution 3314 on the Definition of Aggression, wherein art. 3(g) reads: “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State *of such gravity* as to amount to the acts listed above, or *its substantial involvement therein*”¹⁵⁹ (emphasis added).

Contributing to the debate, Schmitt and Biggerstaff suggest that the most compelling criteria is “the nature of the relationship between the aid or assistance provided and the ultimate application of force by the supported State”.¹⁶⁰ In other words, it needs to be assessed to what extent the aid or assistance directly contributes to the use of force. They provide a non-exhaustive list of objective factors to identify when states’ indirect aid and assistance qualifies as a use of force: intent, timing, causal nexus, nature of the aid and assistance, geopolitical context, and impact.¹⁶¹ All these elements need to be assessed on a case-by-case basis, and each state’s contribution needs to be scrutinised separately. The degree of support states have provided varies and not all of them meet all six criteria.

In the present author’s view, there is clearly the intention to assist Ukraine as it defends itself against Russia. States are “purposely and consciously” supplying Ukraine with military aid and assistance to achieve this goal.¹⁶² Writing on the EU’s aid through the European Peace Facility, van Steenberghe points out that: “[t]he purpose of those arms deliveries is specific. The aim is not merely to strengthen the general military capacity of a state but to help a state to repel an armed attack”.¹⁶³ This general logic can be applied to all states providing Ukraine with military aid and assistance. Schmitt and Biggerstaff however find that it is not so clearcut, particularly as assisting states appear to want to limit the consequences of their support.¹⁶⁴ Yet, as has been mentioned, some states’ benchmarks have varied and, as the war progress, they have re-evaluated their limits *depending* on Ukraine’s needs. Germany eventually agreed to send Leopard 2 tanks, and France shifted its initial position and committed to sending SCALP missiles. States are now training Ukrainian soldiers to pilot F-16s, which they then intend on donating to the UAF. Despite their initial reluctance, the intention to assist Ukraine in self-defence appears to have motivated them to adjust their policies and to commit further military aid and assistance.

¹⁵⁹ General Assembly, Resolution, ‘Definition of Aggression’, 14 December 1974, UN Doc A/RES/3314(XXIX).

¹⁶⁰ MN Schmitt and WC Biggerstaff, ‘Aid and Assistance as a “Use of Force” Under the *Jus ad Bellum*’ cit. 205.

¹⁶¹ *Ibid.* 206 ff.

¹⁶² On “intent” see MN Schmitt and WC Biggerstaff, ‘Aid and Assistance as a “Use of Force” Under the *Jus ad Bellum*’ cit. 206: “the clearer the intent to meaningfully contribute to a supported State’s use of force, the greater the likelihood that States will consider aid or assistance a discrete use of indirect force”.

¹⁶³ R van Steenberghe, ‘Military Assistance to Ukraine’ cit. 232.

¹⁶⁴ MN Schmitt and WC Biggerstaff, ‘Aid and Assistance as a “Use of Force” Under the *Jus ad Bellum*’ cit. 207-208.

For the most part, the timing, which is determined by how “immediate the effects of aid or assistance are felt”,¹⁶⁵ is met. States providing aid and assistance are doing so in real time, considering Ukraine’s needs on the ground.¹⁶⁶ For example, the US Department of Defense press releases on support provided to Ukraine consistently read: “[t]he United States will continue to work with its Allies and partners to provide Ukraine with capabilities to meet its immediate battlefield needs and longer-term security assistance requirements”.¹⁶⁷ Announcing an increase in military aid to Ukraine, former British Defence Secretary Wallace referred to their decisions as “a calibrated response to Russia growing aggression”.¹⁶⁸ It is reported that Canadian Minister of Defence “remains in close contact with Ukrainian officials through the Ukraine Defense Contact Group” (UDCG).¹⁶⁹ In fact, the UDCG allows all participating states to be in communication with Ukraine and to coordinate their efforts based on its needs. The group has been described by *Politico* as: “an under-the-radar yet central force in equipping the Ukrainian military with everything from precision rockets to main battle tank. It’s also helped [Ukraine] create an ad hoc yet astonishingly modern military that would be capable of outgunning some long-standing NATO members”.¹⁷⁰

The first meeting of the UDCG reportedly took place on 22 April 2022 at the Ramstein Air Base in Germany, and since then regular meetings occur, either in person or virtually. The group contains around 50 countries, including all the NATO Member States. The meetings are generally chaired by US Defense Secretary Lloyd Austin, who steadily convinces hesitant countries to provide additional support.¹⁷¹ Alongside the US, the UK and Poland play important coordinating roles.¹⁷² The UK, for example, co-established the International Donor Coordination Centre, which supports the UDCG and “field[s] Ukraine’s requests for weaponry, coordinate[s] the response of allies and ensure[s] the delivery of equipment into Ukraine”,¹⁷³ – and the International Fund for Ukraine, which coordinates

¹⁶⁵ *Ibid.* 213.

¹⁶⁶ To quote General Mark Milley: “[o]ur close and ongoing relationship with Ukraine’s military leaders has informed our process to provide a tailored timely assistance based on Ukrainian needs. [...] The speed that we have delivered security assistance is without comparison” in US Mission to NATO, ‘Ukraine Defense Contact Group: Secretary of Defense Austin and Gen. Milley Press Avail’ (15 June 2022) nato.usmission.gov; see also C Mills, ‘Military Assistance to Ukraine since the Russian Invasion’ cit. 8: “[w]hile allies are in discussion with Ukrainian officials on potential weapon systems and future requirements, it has been made clear that process is led by the requirements and priorities of the Ukrainian government”.

¹⁶⁷ US Department of Defense, ‘Biden Administration Announces Additional Security Assistance for Ukraine’ (25 July 2023) www.defense.gov.

¹⁶⁸ Oral statement to Parliament, Defence Secretary oral statement on war in Ukraine (16 January 2023) www.gov.uk.

¹⁶⁹ Government of Canada, ‘Canadian Donations and Military Support to Ukraine’ cit.

¹⁷⁰ L Seligman and P McLeary, ‘The Little-Known Group that’s Saving Ukraine’ (1 May 2023) *Politico* www.politico.com.

¹⁷¹ *Ibid.*

¹⁷² C Mills, ‘Military Assistance to Ukraine since the Russian Invasion’ cit. 7.

¹⁷³ *Ibid.* 8.

the purchase and transport of military equipment to Ukraine.¹⁷⁴ Poland is considered the main donor of the International Donor Coordination Centre and as a logistical “hub”.¹⁷⁵ According to a report prepared for the British Parliament, it is the biggest provider of heavy weaponry.¹⁷⁶

Friction reportedly emerged within the UDCG as countries disagree over the weapons to send to Ukraine. While states were initially reluctant to send Abram and Leopard 2 tanks, they eventually shifted their position. To the participating countries, it has become clear that they “would need to overcome past misgivings about arming Ukraine and commit for the long haul” if Ukraine is to successfully defend itself against Russia.¹⁷⁷ This not only illustrates the intention to assist Ukraine in defending itself, but that this assistance is time sensitive and is considered necessary. According to General Milley in June 2022, the immediate assistance provided had an “exceptional impact on the battlefield”.¹⁷⁸ This remained apparent in the Spring 2023 counter-offensive, where the equipment provided was considered essential and was adjusted to Ukraine’s needs on the battleground.¹⁷⁹ But the equipment alone is insufficient, which is why UAF requiring training from the supporting countries.¹⁸⁰ Based on these facts, the “causal nexus”, or “directness”, between the support provided and the action taken in self-defence would also be met. “Impact” is the degree in “which the support in question meaningfully contributes to, and sometimes enables, the supported State’s use of force”.¹⁸¹ The argument could thus be made that states enabled Ukraine to carry out the Spring 2023 counteroffensive.

The geopolitical context, meaning the setting in which the assistance occurs and states’ motives, also supports the claim that states are engaged in indirect self-defence. There is beyond any doubt a conflictual and hostile relationship between Russia and the EU, NATO, and their Member States, particularly those supplying Ukraine with equipment. Both sides clearly see each other as a threat, this was the case even before 24 February 2022 as demonstrated by the military build-up during the end of 2021 and beginning 2022.¹⁸²

Where states differ significantly is on the nature of the aid and assistance. While some are providing lethal weapons and actively contribute to the training of UAF, other NATO and

¹⁷⁴ *Ibid.* 9.

¹⁷⁵ *Ibid.* 53.

¹⁷⁶ *Ibid.*

¹⁷⁷ L Seligman and P McLeary, ‘The Little-Known Group that’s Saving Ukraine’ cit.

¹⁷⁸ US Mission to NATO, ‘Ukraine Defense Contact Group’ cit.

¹⁷⁹ B Gabel, “A Strong Gesture” cit.

¹⁸⁰ M Schwritz and S Kozliuk, ‘Ukrainian Troops Repel Russian Attacks, and Hope Western Arms Turn the Tide’ (27 April 2023) New York Times www.nytimes.com.

¹⁸¹ MN Schmitt and WC Biggerstaff, ‘Aid and Assistance as a “Use of Force” Under the *Jus ad Bellum*’ cit. 220-221.

¹⁸² J Mersheimer, ‘The Darkness Ahead: Where the Ukraine War is Headed’ (23 June 2023) mearsheimer.substack.com according to whom “[w]e are now in a war where both sides – Ukraine and the West on one side and Russia on the other – see each other as an existential threat that must be defeated”.

EU Member States have limited their support to financing the EUMAM UA and the EPF, or have limited their assistance to humanitarian aid or defensive equipment only. This means that each state's impact on Ukraine's exercise of self-defence also differs. It is not because a state spends the most amount that the impact of that aid is the most significant; rather it depends on type of weapon that is sent. Poland ranks seventh in the Kiel Institute's database¹⁸³ and is Ukraine's biggest providers of heavy munition. Financially, France has contributed comparably less military aid, yet in July 2023 it pledged to send SCALP missiles, providing Ukraine with a missile that has a range of 250 km. On the other hand, ammunition is a necessary component to using force against Russian troops.

It should however be noted that sometimes states publicly promise to deliver equipment but are vague about when it will arrive.¹⁸⁴ For example, the US pledged Abram tanks early 2023 but these will only be delivered to Ukraine in fall 2023.¹⁸⁵ This arguably means that the different criteria will not be met. Again, each of the conditions proposed by Schmitt and Biggestaff can only be assessed on a case-by-case basis.

To the present author, those states whose aid and assistance could amount to an indirect use of force are the US, the UK, and Poland. These states are providing a substantial amount of weapons as well as training on how to use them. They also play an important role in coordinating and facilitating the assistance provided,¹⁸⁶ and the US is reported to have supplied intelligence for targeting. All this together means they would have the biggest role in assisting Ukraine's exercise of self-defence against Russia. Other notable European contributors to Ukraine's war efforts (in terms of weapons provided, training and logistics) are Denmark, Germany, the Netherlands, France, Czechia, and the Balkan States. According to a leaked Pentagon document, "a small contingent of less than a hundred special operations personnel from NATO members France, America, Britain and Latvia were already active in Ukraine".¹⁸⁷ France subsequently denied any troops were in Ukraine.¹⁸⁸ If there are troops on the ground, this has the potentiality of amounting to direct interaction between NATO Member States and Russia. Across the Atlantic, Canada plays a significant role as well.

However, none of the states involved have explicitly invoked art. 51 UNC and have not sent an official letter to the UNSC as required under that provision.¹⁸⁹ As argued below (section III.3), this may be because they want to avoid becoming (or being seen as)

¹⁸³ This is based on the data provided on 7/09/2023, when the Kiel Institute's database was last accessed.

¹⁸⁴ L Seligman and P McLeary, 'The Little-Known Group that's Saving Ukraine' cit. Canada, for example, lists its military aid as "delivered", Government of Canada, 'Canadian donations and military support to Ukraine' cit.

¹⁸⁵ LC Baldor, T Copp, and A Madhani, 'Despite Concerns, US to Send 31 Abrams Tanks to Ukraine' cit.

¹⁸⁶ According to Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 7: "[t]he UK, US and Poland have taken a leading role in coordinating international military assistance to Ukraine".

¹⁸⁷ P Oltermann, 'French Defence Ministry Denies Presence of French Soldiers in Ukraine' (9 April 2023) *The Guardian* www.theguardian.com.

¹⁸⁸ L Kayali, 'France Denies Military Presence in Ukraine' (9 April 2023) *Politico* www.politico.eu.

¹⁸⁹ R van Steenberghe, 'Military Assistance to Ukraine' cit. 235, this means that the states concerned do not believe they are acting in collective self-defence.

parties to the conflict.¹⁹⁰ Despite this, they consistently frame their assistance in the terms of self-defence (recall sections II.1 and II.2).

The EU, as an international organisation, is not in the same position as its Member States.¹⁹¹ This is due to the institutional design of the EPF and EUMAM UA. As discussed, when it comes to the transfer of lethal equipment the EU Member States, as the implementing actors, retain discretion. The EU plays a financial and coordinating role, but states decide for themselves what type of aid and assistance they wish to transfer to Ukraine and are responsible for its delivery. As such, the transfer of weapons and other aid, as well as the training of Ukrainian Armed Forces, are not attributable to the EU under neither art. 6 DARIO, as the conduct is not being carried out by an organ or agent of the EU,¹⁹² nor under art. 7 DARIO, as the organ of the implementing states (such as the ministries of defence) have not been placed at the EU's disposal.¹⁹³ For either provision to be applicable, the relevant test would be the "direction and control" the EU and the states have over the conduct in question.¹⁹⁴ It cannot be said that the EU is exercising such effective control over its Member States that they are the organisation's organs. Based on the ICJ's findings, the "mere" funding and coordination would not be sufficient to constitute an indirect use of force. Finally, not all military aid and assistance provided by EU Member States is funded under the EPF; as we saw, some states contribute additional bilateral aid.

Consequently, it does not seem to the present author that the EU is responsible for an indirect use of force against Russia. Its aid and assistance may, however, breach neutrality law, discussed in the following section.

III.2. DIFFERENT SHADES OF NEUTRALITY?

Neutrality is an old area of international law. The last codification was in 1907 at the Hague Peace Conference, which resulted in the adoption of two conventions: the Rights and Duties of Neutral Powers and Persons in Case of War on Land and the Convention concerning the Rights and Duties of Neutral Powers in Naval War.

¹⁹⁰ *Ibid.*

¹⁹¹ On this issue, see A Rasi, 'Providing Weapons to Ukraine: The First Exercise of Collective Self-Defence by the European Union?' (2024) European Papers (forthcoming).

¹⁹² Art. 6(1) of International Law Commission, *Draft Articles on the Responsibility of International Organizations* (DARIO) reads: "[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization".

¹⁹³ Art. 7 *ibid.* reads: "[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct".

¹⁹⁴ International Law Commission, *Draft Articles on the Responsibility of International Organizations, with Commentaries* (2011) Commentary to Article 7, 20, para. 4.

The purpose of the law of neutrality is to prevent a conflict from escalating or extending. Neutrality is the status enjoyed by states that are not party to the armed conflict and it entails both rights and duties.¹⁹⁵ In terms of rights, neutral states shall remain “non adversely affected” by the armed conflict.¹⁹⁶ Neutrality requires that the territory of non-participating states remains inviolable; it cannot be used by states involved in an inter-state conflict.¹⁹⁷ In terms of duties, neutral states shall respect the principles of impartiality and non-participation; the latter requires states “abstain from supporting a party to the conflict”¹⁹⁸ and from “any act that may have an impact on the outcome of the conflict”.¹⁹⁹ This can be in the form of transferring war materials, financial support, training troops, supplying intelligence or military advisors, etc.²⁰⁰ It requires, for instance, that a neutral state does not transfer weapons to a belligerent.²⁰¹ It may also not allow its territory to be used by one of the belligerents participating in the conflict, lest a belligerent state uses force against it “in self-defence”.²⁰² Humanitarian assistance, however, is permissible.

While states supporting Ukraine are constantly anxious about crossing a line and becoming party to the conflict (analysed further below in section III.3), for the most part neutrality has not been that much of a concern, save few exceptions. In Ireland, support provided to Ukraine has sparked debate about its consistency with Ireland’s historical tradition of neutrality,²⁰³ while Austria remains committed to neutrality.²⁰⁴ Like Switzerland, Austria has a status of permanent neutrality. Finland, on the other hand, reversed its policy of non-alignment and has accepted that in training Ukrainian troops that it is not a neutral party: “Finnish training for Ukrainian troops indicates that Finnish neutrality is unlikely to return”.²⁰⁵ It also joined NATO in April 2023, marking the end of its military neutrality.

States that have supplied Ukraine with weapons, training, intelligence, or any other form of military aid and assistance are in breach of neutrality law. According to Bothe: “[v]iolations of the law of neutrality occur even where support is given to the victim of aggression, and even when it does not amount to participation in the conflict”.²⁰⁶ The

¹⁹⁵ M Bothe, ‘Neutrality, Concept and General Rules’ in A Peters and R Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press) opil.oup.com para. 1.

¹⁹⁶ *Ibid.*

¹⁹⁷ A Clapham, *War* (Oxford University Press 2022) 62.

¹⁹⁸ M Bothe, ‘Neutrality, Concept and General Rules’ cit. paras 1 and 2.

¹⁹⁹ *Ibid.* para. 36.

²⁰⁰ *Ibid.*

²⁰¹ A Clapham, *War* cit. 72-74.

²⁰² *Ibid.* 64, quoting the UK Manual; see also M Bothe, ‘Neutrality, Concept and General Rules’ cit. para. 33.

²⁰³ See, for instance, S Harrison, ‘Ukraine: Ireland’s Military Neutrality Sparks Public Debate’ (9 March 2022) BBC www.bbc.com.

²⁰⁴ G Cafiero, ‘Austria Commits to Neutrality, even as Russia Destroys Ukraine’ (15 August 2022) Al Jazeera www.aljazeera.com, noting that Austria remains neutral but “has supported Ukraine with non-lethal weapons, such as donating humanitarian assistance and protective gear”.

²⁰⁵ B Cole, ‘Finland Offers to Train Ukraine Soldiers in Winter Warfare Against Russia’ (29 November 2022) Newsweek www.newsweek.com.

²⁰⁶ M Bothe, ‘Neutrality, Concept and General Rules’ cit. para. 5.

consequence is that they may be subjected to countermeasures adopted by the injured belligerent, in this case Russia. That said, it has been argued that in the era of the UN Charter, neutrality is no longer relevant and is instead an “optional” legal status; this doctrine is known as optional neutrality and has given rise to the position of non-belligerency. A somewhat related argument is that states can aid the victim of aggression without violating neutrality law, which is known as “qualified” or “benevolent” neutrality. As we will see, these different categories (optional neutrality, non-belligerency, and qualified/benevolent neutrality) are closely related.

It has also been suggested that if states supporting Ukraine are in breach of neutrality law, they can invoke a circumstance precluding wrongfulness, namely self-defence which was codified under art. 21 ARSIWA. This pre-supposes that those states are engaging in self-defence under art. 51 UN Charter. Each of these arguments will be reviewed in the proceeding paragraphs.

In general, “[t]he law of neutrality is binary. A State is either a belligerent or neutral; there is no legal middle ground”.²⁰⁷ However, the argument has been made that neutrality has lost its relevance since the adoption of the UN Charter and the prohibition to use force and is now “optional”. Upcher summarises this view as follows: “[i]f the unrestricted right to go to war was the foundation of neutrality, and if that right has now been abolished, it may signal vast changes in the creation of neutral status in contemporary international law”.²⁰⁸ The idea is that, subject to the UN Charter, neutrality is now an “optional legal status that States are free to take up or decline as they see fit”.²⁰⁹ States that choose not to be neutral have a position of “non-belligerency”, where a distinction is made between “neutral States” that follow the rules of neutrality *stricto sensu* and “non-belligerent parties”.²¹⁰

Non-belligerent parties that assist the victim of aggression are engaged in qualified/benevolent neutrality. According to this view, States may provide aid and assistance to the victim of an armed attack, or in this case an act of aggression, without breaching neutrality law.²¹¹ States would be allowed to treat the aggressor and victim state differently, thereby not respecting the principles of impartiality and non-participation. Hathaway and Shapiro explain this view as follows: “[t]he end of impartiality means that states

²⁰⁷ MN Schmitt, ‘“Strict” versus “Qualified” Neutrality’ (22 March 2023) Articles of War lieber.westpoint.edu.

²⁰⁸ J Upcher, *Neutrality in Contemporary International Law* (Oxford University Press 2020) 9; but see A Verdebout, *Rewriting Histories of the Use of Force* (Oxford University Press 2021), arguing that contrary to popular belief amongst international lawyers, international law was not indifferent to the use of force prior to 1945.

²⁰⁹ J Upcher, *Neutrality in Contemporary International Law* cit. 10.

²¹⁰ *Ibid.* see also: R van Steenberghe, ‘Military Assistance to Ukraine’ cit. 239-240; A Clapham, *War* cit. 54 ff.; see also N Ronzitti, ‘Italy’s Non-Belligerency during the Iraqi War’ in M Ragazzi, *International Responsibility Today: Essays in Memory of Oscar Schachter* (Brill 2005).

²¹¹ P Clancy, ‘Neutral Arms Transfers and the Russian Invasion of Ukraine’ cit. 527: “qualified neutrality would allow neutral States to discriminate in favour of the victim of aggression while retaining their neutral status and fully conforming with their duties as a neutral”; see R van Steenberghe, ‘Military Assistance to Ukraine’ cit. 240-241; M Piątkowski, ‘The Saga of the Polish MiG-29’ cit.

are permitted to supply weapons or other support to Ukraine. Doing so violates no legal duty of neutrality [...] if anything, providing assistance to Ukraine *supports* the international legal order by allowing Ukraine to defend itself against a war of aggression".²¹²

It is not universally agreed in the literature that these different legal categories are supported by state practice. Upcher rejects the notion that neutrality may be "optional" and that there are statuses such as "non-belligerent" or "non-participating" states. He writes, for instance: "[t]he prohibition of the threat or use of force in international law has had profound effects on the status of neutrality. It has not, however, led to the acceptance of an optional theory of neutrality or of a concept of non-belligerency in international law. [...] Customary international law continues to support the view that neutrality becomes obligatory for States that are not parties to an international armed conflict".²¹³

Other commentators have expressed similar views.²¹⁴ Some have also voiced scepticism about "qualified neutrality", as they find it is not supported in state practice. This is (or was) the case of Heintschel von Heinegg. Writing in 2007, he found that state practice and *opinio juris* did not support "benevolent neutrality".²¹⁵ To the contrary, state practice that lends support to the emergence of qualified neutrality was rather ambiguous. States would stand to gain economically, politically, and ideologically from more relaxed interpretations of neutrality²¹⁶ and therefore not be motivated by a legal right. In many instances, they were lucky that the aggrieved belligerent had decided not to retaliate, after all it was not obliged to accept this new status.²¹⁷ Quoting Briggs, he maintained that: "Nonbelligerency' is in reality only a euphemism designed to cover violations of international law in the field of neutral obligations".²¹⁸

Heintschel von Heinegg's position changed entirely with Russia's invasion of Ukraine in 2022, which he held was a "game changer".²¹⁹ For him, the fact that the UNSC was

²¹² O Hathaway and S Shapiro, 'Supplying Arms to Ukraine is not an Act of War' (12 March 2022) Just Security www.justsecurity.org; on the other hand, China's support to Russia aggression would violate international law because China would assist Russia in committing a grave breach of international law, see O Hathaway and R Goodman (17 March 2022) Just Security www.justsecurity.org; see also A Clapham, *War* cit. 66 ff.

²¹³ J Upcher, *Neutrality in Contemporary International Law* cit. 37.

²¹⁴ M Bothe, 'Neutrality, Concept and General Rules' cit. paras 9-10; see also R van Steenberghe, 'Military Assistance to Ukraine' cit. 239-240.

²¹⁵ W Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts: the Myth of the Irrelevance of the Law of Neutrality' in *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein* (Brill 2007); see also: L Ferro and N Verlinden, 'Neutrality during Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties' (2018) *Chinese Journal of International Law* 15; M Bothe, 'Neutrality, Concept and General Rules' cit.; P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' cit. 533-534: "[t]he inescapable conclusion is that qualified neutrality is not a part of contemporary international law", noting that this does not prevent the emergence of such a rule in the future.

²¹⁶ W Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts' cit. 554.

²¹⁷ *Ibid.* 554-5.

²¹⁸ *Ibid.* 555 quoting: H W Briggs, 'Neglected Aspects of the Destroyer Deal' (1940) 34 *AJIL* 569-587, 569.

²¹⁹ W Heintschel von Heinegg, 'Neutrality in the War Against Ukraine' (1 March 2022) *Articles of War* lieber.westpoint.edu.

blocked from adopting an authoritative decision (due to the Russian veto) and that the aggression was universally condemned as unlawful meant that states were allowed to supply Ukraine, the victim of an aggression, with military aid to defend itself without violating neutrality law. It is not clear why he suddenly accepted arguments that he had previously rejected, particularly as he had continuously emphasised that differentiating between belligerents could escalate the conflict, which is exactly what neutrality aspires to prevent. Similarly, while acknowledging that the doctrine is controversial, van Steenberghe finds that benevolent neutrality fits the practice of the states supporting Ukraine and that their behaviour could contribute to the emergency of a new norm.²²⁰

Of course, any change in international law must be supported by state practice and *opinio juris* and must have widespread acceptance; it should not only be supported by those states engaging in the new conduct. Clancy does not find that states assisting Ukraine have said “they sincerely believed themselves to be acting based on a permissive rule of customary international law” which would contribute to the new rule.²²¹ In his preliminary assessment, Bartolini nonetheless finds that some states’ positions lend support to qualified neutrality.²²² This would be the case of France, the Baltic and Nordic states, the USA, Germany, Greece, Luxembourg, and Romania, which have linked their support to Ukraine with collective self-defence. As of yet, they have not expressly referred to the doctrine of qualified/benevolent neutrality. Although not directly supporting Ukraine, Ghana has stated such aid and assistance is permissible under the UN Charter.

During the UNGA General Debate in September 2022, Belgian Prime Minister Alexander de Croo called upon states to consider: “[w]hat did you do to stop [to stop the war in Ukraine]? What did you do to protect the people of Ukraine? Did you look away, or did you act? In this conflict, there is no room for neutrality”.²²³ De Croo may be referring to the fact that states have a responsibility to react to a grave breach under international law (as per art. 41 ARSIWA), just as France, the Nordic countries and Czechia have done.²²⁴ Austria, on the other hand, has maintained its status as militarily neutral but not politically neutral.²²⁵ As Ralph Janik notes, this has resulted in a rather inconsistent approach as it tries to strike a balance between expressing solidarity with the EU’s position (for

²²⁰ R van Steenberghe, ‘Military Assistance to Ukraine’ cit. 241; see also, SP Mulligan, ‘International Neutrality Law and U.S. Military Assistance to Ukraine’ (26 April 2022) Congressional Research Service crs-reports.congress.gov.

²²¹ P Clancy, ‘Neutral Arms Transfers and the Russian Invasion of Ukraine’ cit. 534.

²²² G Bartolini, ‘The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice’ (11 April 2023) EJIL Talk! www.ejiltalk.org.

²²³ General Assembly, Belgium, H.E. Mr. Alexander de Croo, Prime Minister (23 September 2022) gadebate.un.org.

²²⁴ Recall *supra* footnotes 58 to 60, and accompanying text.

²²⁵ NJ Kurmayer, ‘Neutrality and Support for Ukraine: Austria’s Tightrope’ (3 February 2023) Euractiv www.euractiv.com.

example by adopting EU restrictive measures against Russia and allowing weapons to be transferred through its territory) while remaining permanently neutral.²²⁶

That said, as also noted above (section II.4), a large number of states have refrained from supporting either belligerent and have emphasised that the conflict needs to be resolved through peaceful means, even if a vast majority has condemned Russia for acting unlawfully. There needs to be a cessation of hostilities and negotiations between the warring parties without preconditions. Some states have implicitly condemned the sending of arms to Ukraine by stating that more should be done to de-escalate tensions and settle the conflict through peaceful means, while others have done so explicitly. The concern is that the conflict is escalating, with no room being made for a peaceful solution. Whereas neutrality may be politically unpopular in the states supporting Ukraine, this does not mean it is devoid of meaning or that it has become irrelevant to the rest of the world.

The result is that the states providing military aid and assistance as described at the beginning of this section are in breach of neutrality law. This equally applies to the EU, as providing financial support to one of the parties' war efforts constitutes a breach of neutrality law and the EU is the main financial contributor.²²⁷ This may place permanently neutral states that have abstained from funding or providing any military aid and assistance in a rather awkward position, as despite their best efforts they are part of an organisation that has violated neutrality law. That said, it is doubtful that these states would share responsibility to the extent that the funding they made available did not contribute to the breach, they are not listed as the implementing actors of the lethal equipment provided and their funding was not that significant.²²⁸ Matters are a bit more complicated for Austria, which has allowed weapons to be transferred from its territory to Ukraine. Under neutrality law, "armed forces of the parties to the conflict may not enter neutral territory. They may not in any way use this territory for their military operations, or for transit or similar purposes".²²⁹ Whether such a transit through Austrian territory breaches neutrality law therefore depends on whether the EU is a party to the conflict, discussed below.²³⁰

This means Russia could adopt countermeasures in retaliation. If such countermeasures would affect neutral European states this may result in an unfair outcome.²³¹ Self-defence could function as a circumstance precluding wrongfulness and preclude the

²²⁶ RRA Janik, 'Current Developments: Austrian Neutrality amid Russia's War on Ukraine' (2023) Austrian Review of International and European Law ssrn.com.

²²⁷ M Bothe, 'Neutrality, Concept and General Rules' cit. para. 36: "Massive financial support for a party to the conflict also constitutes non-neutral service" (emphasis added).

²²⁸ Note the word "massive" in *ibid*.

²²⁹ *Ibid*. para. 30.

²³⁰ RRA Janik, 'Current Developments' cit. 6.

²³¹ Note that countermeasures should not be directed against "third states" not responsible for the breach, per ILC, Articles on Responsibility of States for Internationally Wrongful Acts (2001) art. 49(1).

breaches of neutrality,²³² provided however that those states are actually engaging in collective self-defence.²³³ It should be noted that invoking a circumstance precluding wrongfulness would preclude the development of a new customary norm, such as qualified or benevolent neutrality.²³⁴ If, as argued above, the support is found to constitute a use of force, which would include indirect use of force as discussed previously (section III.1),²³⁵ then it falls under art. 51 UN Charter and not art. 21 ARSIWA. The latter only justifies subsidiary breaches that are not the prohibition to use force.²³⁶ If supporting states breach other international obligations when assisting Ukraine in collective self-defence then art. 21 ARSIWA is applicable. As Buchan writes, the latter: “is a secondary rule of international law and precludes State responsibility for ancillary or incidental violations of international law that occur as a result of defensive measures being taken under art. 51 UN Charter, such as breaches of the principles of territorial sovereignty and non-intervention, a treaty of amity, a trade treaty, etc’”.²³⁷

Self-defence can only be invoked as a circumstance precluding wrongfulness under the condition that action is being taken under art. 51 UN Charter. This raises the question of whether, under these circumstances, neutrality is even relevant. As van Steenberghe points out, if states are acting in self-defence then neutrality law is no longer applicable “as the assisting state would have become a (co-)belligerent due to its use of force”.²³⁸ The next section addresses this question of co-belligerency, or party status. As will be discussed, the question of party status is a vexed one and international law does not contain specific rules that determine when it is achieved.²³⁹

²³² This argument has been raised in some shorter commentaries: K Ambos, ‘Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and thus be Exposed to Countermeasures?’ (2 March 2022) EJIL Talk! www.ejiltalk.org; M Milanovic, ‘The United States and Allies Sharing Intelligence with Ukraine’ (9 May 2022) EJIL Talk! www.ejiltalk.org.

²³³ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001), Commentary to arts 21, 74, para. 2: “[s]elf-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision”; see further F Paddeu, ‘Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility’ (2015) BYIL 90, 94: “[s]elf-defence, in its incidental function as a secondary rule, serves to justify the potential infringement of [ancillary] obligations caused by the use of self-defensive force”.

²³⁴ P Clancy, ‘Neutral Arms Transfers and the Russian Invasion of Ukraine’ cit. 534: “[b]y invoking a circumstance precluding wrongfulness a State acknowledges that a primary rule has been breached and concedes that it was not acting pursuant to a good-faith belief as to the existence of a legal right or obligation”.

²³⁵ The implication is that states whose aid does not constitute self-defence would be in breach of neutrality law.

²³⁶ F Paddeu, ‘Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility’ cit. 92; P Clancy, ‘Neutral Arms Transfers and the Russian Invasion of Ukraine’ cit. 534-535.

²³⁷ R Buchan, ‘Non-Forcible Measures and the Law of Self-Defence’ (2022) ICLQ 1, 5.

²³⁸ R van Steenberghe, ‘Military Assistance to Ukraine’ cit. 238.

²³⁹ A Wentker, ‘At War? Party Status and the War in Ukraine’ (2023) LJIL 643, 647.

III.3. PARTY STATUS

While states, NATO and the EU do not seem to attach that much importance to neutrality, they are deeply concerned about not being considered a party to the conflict.²⁴⁰ When a state is a party, or a belligerent, then the rules of international humanitarian law apply to it. This means that combatants would enjoy prisoner of war status if captured and that its military personal and objects would be lawful targets.²⁴¹

German foreign minister Annalena Baerbock created quite a stir when she declared: “We are at war against Russia”. Germany and EU Member States quickly stepped in to clarify that they are not belligerents.²⁴² Yet, in March 2023 Josep Borrell similarly stated that “We are in war times”.²⁴³ In October 2022, there was a “near miss” between Russian and British forces, where a Russian fighter jet nearly shot down a British spy plane over the Black Sea.²⁴⁴ When a missile landed in Polish territory and killed two civilians on 15 November 2022, everyone held their breath amidst fears that the strike had originated from Russia, which could potentially drag NATO into the conflict. Ukraine immediately blamed Russia for the incident, while the US was quick to say that the strike had originated from Ukrainian forces and was most likely an accident, thus there was no need to invoke art. 5 of the North Atlantic Treaty. According to the *Wall Street Journal*, the incident displayed the tensions surrounding states’ involvement in Ukraine and the potential repercussions. The journal wrote: “[w]hile Kyiv hopes to increase the North Atlantic Treaty Organization’s role in combating Russia in Ukraine, Washington and its European allies are determined to avoid steps that could trigger direct conflict between the alliance and Russia”.²⁴⁵ Yet, as we saw above, Russia already considers that NATO, the EU and some individual countries are party to the conflict. There is a clear tension between states’ political objective to support Ukraine and this support’s potential legal implications.

Some of the EU’s decisions suggest it is aware of this issue. For instance, as noted above, EUMAM Ukraine marks the first time the EU is providing training to a third state on its own territory. One could speculate that the reason for this may be because it is also the first time the EU is providing training to a state that borders the EU’s territory and that is the victim of aggression, and hence during an ongoing international armed conflict. If the operation was taking place on Ukrainian territory, the risk of direct military

²⁴⁰ R van Steenberghe, ‘Military Assistance to Ukraine’ cit. 235.

²⁴¹ KJ Heller and L Trabucco, ‘The Legality of Weapons Transfers to Ukraine Under International Law’ cit. 263.

²⁴² See Deutsche Welle, ‘Germany Says It Is Not a Warring Party in Ukraine’ (27 January 2023) www.dw.com.

²⁴³ Informal Foreign Affairs Council (Defence), Press remarks by High Representative Josep Borrell at the press conference (8 March 2023) www.eeas.europa.eu.

²⁴⁴ B Armbruster, ‘Why Aren’t we Talking about Russia Almost Downing a UK Spy Plane?’ (18 April 2023) [ResponsibleStatecraft responsiblestatecraft.org](http://ResponsibleStatecraft.responsiblestatecraft.org).

²⁴⁵ Wall Street Journal, ‘Deadly Missile Strike in Poland Exposed Tension between NATO Allies in Ukraine’ (3 Dec 2022) www.wsj.com.

confrontation between EU Member States and Russia would be greater. However, under *jus ad bellum*, Russia cannot target forces on German and Polish territory as this would be an unlawful use of force against these states and, inevitably, escalate the conflict. Supporting states have required reassurance from Ukraine that it will not use the aid and assistance provided to attack Russia on its territory as this could bring them in direct confrontation with Russia. This suggests that they believe their support potentially makes them a party to the conflict but that they are cautiously avoiding a spill over or an escalation with Russia. Some media commentators suggest that the EU and NATO are a *de facto* party of the war, but not *de jure* because there have no boots on the ground.²⁴⁶ In other words, there is not a *direct* confrontation between the EU and NATO members states with Russian armed forces. Jens Stoltenberg, NATO's Secretary General, expressed a similar position in March 2022:

"[...] NATO is not part of the conflict. We provide support to Ukraine, but we are not part of the conflict. We help Ukraine with upholding their right for self defence which is enshrined in the UN Charter. But NATO will not send troops into Ukraine. We have to understand that it is extremely important to provide support to Ukraine and we are stepping up, but at the same time it is also extremely important to prevent that this conflict becomes a full-fledged war between NATO and Russia".²⁴⁷

However, the situation has evolved significantly since then and states' aid to Ukraine has intensified. Some are doing everything they can to support Ukraine short of sending troops.²⁴⁸ Under international law, when does a state or organisation become party to a conflict?

Somewhat counterintuitively, "[v]iolating neutrality does not necessarily bring an *end* to neutrality" and does not mean that a state has acquired belligerent status.²⁴⁹ This is confusing because neutrality law distinguishes between neutral states and parties. Would it not make sense that a breach of neutrality law means a state is a belligerent? The fact is that a threshold needs to be met to become party to a conflict. According to Bothe: "[o]nly where a hitherto neutral State participates to a *significant* extent in hostilities is there a change of status".²⁵⁰ There are debates on what this threshold is and how significant the participation needs to be. As discussed above, to the extent that the military aid and assistance provided to Ukraine is considered a use of force, albeit indirect,

²⁴⁶ See this discussion DW News, to the Point, 'As the war in Ukraine escalates, will NATO soon be party to the conflict?' www.youtube.com at about 20".

²⁴⁷ NATO, 'Press Conference, by NATO Secretary General Jens Stoltenberg Previewing the Extraordinary Summit of NATO Heads of State and Government' (23 March 2022) www.nato.int.

²⁴⁸ Although there have been reports that some states have sent small contingents on Ukrainian territory, see L Kayali, 'France Denies Military Presence in Ukraine' cit.

²⁴⁹ N Weizmann, 'Associated Forces and Co-Belligerency' (24 February 2015) Just Security www.justsecurity.org; A Wentker, 'At War?' cit. 648.

²⁵⁰ M Bothe, 'Neutrality, Concept and General Rules' cit. para. 26 emphasis added.

then the argument can be made that these states are party to the conflict. Nonetheless, the majority position finds a state becomes a party when it provides a *direct* contribution to one of the belligerents.

The ICTY's findings in the *Tadic* case carry important weight in this discussion, where the Appeals Chamber stated that an international armed conflict exists when there is "resort to armed force between states".²⁵¹ For many, such force needs to be direct and "requires acts of a particular nature or quality".²⁵² According to Hathaway and Shapiro: "[s]tates would become parties to the international armed conflict between Russia and Ukraine if, and only if, they resort to armed force against Russia".²⁵³ Equipping and financing is not enough, there need to be direct hostilities.²⁵⁴ If a third state allows a belligerent to use its territory this could be a form of direct participation, but it depends on how the territory is used. If a military operation is launched from a third state's territory (such as Belarus which allows Russia to attack Ukraine through its territory) then this state can be considered a belligerent. With regard to allowing arms to be transferred on a state's territory, or allowing military personal to be trained, it depends on whether these forms of participation are considered sufficient to meet party status.

Wentker proposes two criteria to assess whether states are party to an ongoing international armed conflict. State parties are those that *i)* provide an operational contribution to the hostilities that is directly connected to harm caused to an adversary and *ii)* that is co-ordinated with other co-belligerents.²⁵⁵ The contribution required in the first element demands "a relationship of 'directness' to harm to the adversary".²⁵⁶ The level of "directness" can be assessed by asking "whether the acts directly cause harm to the adversary in one step, or form an integral part of co-ordinated military operations that do so".²⁵⁷ The second element is necessary to argue that the co-parties are involved in the same conflict and are not involved in separate conflict against a common enemy;²⁵⁸ co-ordination "connects partners' acts such that they intertwine as contributions to one conflict".²⁵⁹ According to Wentker, if these elements are met "party status is an automatic legal consequence, independent of whether parties intend, know, or accept that consequence".²⁶⁰ This is consistent with IHL that an armed conflict is established on the basis of facts and not the subjective assessment the parties involved.

²⁵¹ ICTY, *Prosecutor v Dusko Tadic*, Appeals Chamber, Decision on the defence Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995), IT-94-1, para. 70.

²⁵² A Wentker, 'At War?' cit. 649.

²⁵³ O Hathaway and S Shapiro, 'Supplying Arms to Ukraine is not an Act of War' cit.

²⁵⁴ Also argued by R van Steenberghe, 'Military Assistance to Ukraine' cit. 236.

²⁵⁵ A Wentker, 'At War?' cit.

²⁵⁶ *Ibid.* 650.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.* 650-1.

²⁵⁹ *Ibid.* 651.

²⁶⁰ *Ibid.* 651.

Based on these two conditions, providing weapons and training would not make EU Member States and the US party to the conflict as these contributions do not directly harm the Russian adversary; “only the actual use of weapons causes harm to Russia”.²⁶¹ Heller and Trabucco agree that providing weapons is insufficient to reach belligerency status.²⁶² Conversely, providing intelligence in real time that assists Ukrainians in targeting is a direct contribution that is co-ordinated with one of the belligerents.²⁶³ It depends, however, on the quality of the information provided and to what extent it assists Ukraine in targeting Russian military objectives.²⁶⁴

Nevertheless, it is submitted that the above understanding of “directness” is somewhat narrow. As discussed above, albeit in the context of *jus ad bellum*, there are different degrees of “causal directness”. Although there may be a step between the aid and assistance provided and the fighting, this does not mean that there is no proximity. As another commentator notes: “the state that supplies weapons but whose personnel provide advice and assistance in the use of the weapons can also become a party to the conflict”.²⁶⁵ It has also been noted that: “any indirect military engagement that would consist of taking part in the planning and supervision of military operations of another State suffices to establish co-belligerency”.²⁶⁶ This seems to be the case for a number of countries, particularly those not only supplying military equipment and technology, but that are also providing training, logistical support, and who are in close communication with the UAF. The support provided has significantly enhanced Ukraine’s ability to fight against Russian forces.

Weizmann offers a different perspective: “the *systematic or substantial* supply of war materials, military troops, or financial support in association, cooperation, assistance or common cause with another belligerent would make it a co-belligerent”.²⁶⁷ In other words, a state becomes a party if there are “systematic or substantial violations of its duties of impartiality and non-participation”.²⁶⁸ As noted, the purpose of neutrality is to prevent a state “from being involved in an ongoing international armed conflict and to

²⁶¹ *Ibid.* 653.

²⁶² KJ Heller and L Trabucco, ‘The Legality of Weapons Transfers to Ukraine Under International Law’ cit. 265.

²⁶³ A Wentker, ‘At War?’ cit. 653-4.

²⁶⁴ A Wentker, ‘At War: When Do States Supporting Ukraine or Russia become Parties to the Conflict and What Would that Mean?’ (14 March 2022) EJIL: Talk! www.ejiltalk.org; M Milanovic, ‘The United States and Allies Sharing Intelligence with Ukraine’ (9 May 2022) EJIL Talk! www.ejiltalk.org.

²⁶⁵ M Krajewski, ‘Neither Neutral nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine’ (9 March 2023) [Völkerrechtsblog voelkerrechtsblog.org](http://voelkenrechtsblog.voelkerrechtsblog.org).

²⁶⁶ J Grignon, ‘“Cobelligerency”, Or When Does a State Become a Party to an Armed Conflict?’ (2022) IRSEM Strategic Brief 1, 2, quoted in KJ Heller and L Trabucco, ‘The Legality of Weapons Transfers to Ukraine Under International Law’ cit. 264.

²⁶⁷ N Weizmann, ‘Associated Forces and Co-Belligerency’ cit. emphasis added. This threshold was first provided by C Bradley and J Goldsmith, ‘Congressional Authorization and the War on Terrorism’ (2005) *HarvLRev* 2047, 2112.

²⁶⁸ *Ibid.*

prevent any extension of that conflict".²⁶⁹ If a state consistently violates neutrality, and does so to the extent that they are sustaining the fighting, it becomes more difficult to deny their involvement in an armed conflict. Wentker, like many others, finds that as neutrality law and party status under *jus in bello* are two distinct areas of international law they are best kept separate.²⁷⁰ Schmitt has expressed scepticism over the "systematic or substantial violations of neutrality" threshold and stated one should look at the underlying actions, writing that "violations of a neutral's obligations by providing military materiel does not *per se* trigger *co-belligerency* status".²⁷¹ However, he acknowledges: "at a certain point, support to a belligerent will make the supporting State a party to the conflict. [...] some situations are obvious, such as when a supporting State is involved in joint planning of, and provides assistance essential to, another State's combat operation that would trigger an IAC if conducted alone by the supporting State".²⁷²

Various states appear to be providing aid and assistance that amounts to "joint planning" and that is "essential" to Ukraine's military operations. Moreover, if force can be used indirectly, why would it not be possible for a state to become a party through indirect participation? Although these questions fall under two separate areas of international law, it is hardly logical that a state would be responsible for using force but not be a party to a conflict. Per *Nicaragua* and *Armed Activities*, providing military equipment and training can constitute indirect use of force when it reaches a certain threshold. To the extent that force is used in an international armed conflict, it is a logical consequence that the state becomes party to the conflict. This is a more holistic and consistent approach to *jus ad bellum* and *jus in bello*.

The fact that states were reluctant to provide Ukraine with weapons that can be used in Russian territory suggests that they are aware that such assistance edges them closer to party status. This is the case of ATACMs, which President Biden declined to send to Ukraine, stating: "[w]e're not looking to go to war with Russia".²⁷³ As we saw, despite similar misgivings,²⁷⁴ France announced in July 2023 that it will send SCALP/Storm Shadow missiles to Ukraine. From an IHL perspective, does it matter if the weapons and training enable Ukraine to fight Russian armed forces in the exercise of self-defence on Ukrainian territory or Russian territory? The distinction is clearly politically significant as states do not want to be perceived as being at war against Russia.

Despite these concerns, it seems to the present author that the support that has been provided to Ukraine is, when taken as a whole, systemic and substantial. Ukraine is clearly dependant on the aid and assistance provided by the West in military operations

²⁶⁹ R van Steenberghe, 'Military Assistance to Ukraine' cit. 238.

²⁷⁰ A Wentker, 'At War?' cit. 648.

²⁷¹ MN Schmitt, 'Providing Arms and Materiel to Ukraine' cit.

²⁷² *Ibid.*

²⁷³ T Wheeldon, 'Why the US Declined to Send Ukraine Long-Range Missiles, Tanks' cit.

²⁷⁴ TF1, 'Emmanuel Macron sur TF1' cit.

against Russia. Not only are Western states providing Ukraine with lethal weapons, they are also ensuring that UAF are trained to use them and in some cases providing them with intelligence that is used for targeting. In training Ukrainian Armed Forces, they are to become a “NATO-standard fighting force” that demonstrates that “the American way of warfare [...] is superior to [...] the Russian approach”.²⁷⁵ Some supporting states are also deeply implicated in how Ukraine is conducting its counteroffensive and using the donated military aid and equipment. For example, a *New York Times* article recounts how Ukrainian allies are concerned that Ukraine has become “casualty adverse” and their tactics may cause them to “race through precious ammunition supplies”.²⁷⁶ This could suggest that they give military advice to Ukraine on how to combat Russian forces.

Furthermore, to the extent that Ukraine would not be able to sustain the conflict without third party assistance, does it not logically hold that those states are party to the conflict? Western policymakers have continuously and consistently emphasised Ukraine’s military efforts are heavily dependent upon the support provided. Underscoring the importance of the West’s support, previous British Defence Secretary Ben Wallace claimed in January 2023:

“President Putin believed the West would get tired, bored and fragment. Ukraine is continuing to fight and, far from fragmenting, the West is accelerating its efforts. [...] [I]f we’re to continue helping Ukraine seize the upper hand in the next phase of this conflict, we must accelerate our collective efforts diplomatically, economically and militarily to keep the pressure on Putin. [...] Today’s package is an important increase in Ukraine’s capabilities. It means they can go from resisting to expelling Russian forces from Ukrainian soil. [...] We believe that in 2023, increased supplies, improved training, and strengthening diplomatic resolve will enable Ukraine to be successful against Russia [...]”.²⁷⁷

In June 2023, Josep Borrell reaffirmed Member States’ “commitment to support Ukraine, doubling down on equipment and training, so that everything is done in order to support the counteroffensive that Ukraine is doing”.²⁷⁸ Regarding the US, as reported by the *Washington Post* in April 2023, leaked documents demonstrated that: “the United States is involved in virtually every aspect of the war, with the exception of U.S. boots on the ground. [...] [T]he administration has given Ukraine more than \$40 billion in military and economic aid, along with real-time targeting assistance and sophisticated weapons systems on which it has trained Kyiv’s forces”.²⁷⁹

²⁷⁵ H Cooper and E Schmitt, ‘Ukraine’s Western-Trained Brigades Begin to Enter the Fight’ (23 June 2023) *New York Times* www.nytimes.com.

²⁷⁶ H Cooper, T Gibbons-Neff, E Schmitt and J E Barnes, ‘Troop Deaths and Injuries in Ukraine War Near 500,000, U.S. Officials Say’ (18 August 2023) *New York Times* www.nytimes.com.

²⁷⁷ Oral statement to Parliament, Defence Secretary oral statement on war in Ukraine cit.

²⁷⁸ EU External Action, ‘Foreign Affairs Council: Press Remarks by High Representative Josep Borrell at the Press Conference’ (26 June 2023) www.eeas.europa.eu.

²⁷⁹ K DeYoung, ‘An Intellectual Battle Rages’ cit.

In discussing the Spring 2023 counteroffensive, US General Milley asserted that the training and military equipment the US has provided “enables Ukraine to have the capacity and the capability to defend itself”.²⁸⁰ US Secretary of Defense Austin Lloyd opined that: “[t]he United States and our allies and partners have moved mountains to provide Ukraine with critical air defense systems, munitions and more”.²⁸¹ He assured “we’re going to do everything we can to make sure that Ukrainians can be a success’ and confirmed that the Contact Group ‘are determined to support Ukraine’s fight for freedom for as long as it takes”.²⁸²

The aid and assistance provided to Ukraine is systemic in the sense that it is a full-fledged policy. It is also substantial; some states supporting Ukraine have depleted their own stockpile and are investing significant sums to purchase more. The commitment to give Ukraine whatever it needs came across when the Biden administration made the controversial decision to send cluster munitions to Ukraine because “they are out of ammunition”.²⁸³ In essence: it is either cluster munitions or nothing. While this support has not (at the time of writing) allowed the Ukrainian Armed Forces to make significant advances in its counteroffensive against Russian military,²⁸⁴ the question is whether Ukraine would be in a position to launch a counteroffensive without the aid provided by its allies.

Summing up, the contribution provided may not be “direct” in the sense that supporting countries have not sent their own forces to combat Russia, but it is a co-ordinated effort that is proximate to the armed conflict and that has significantly enhanced Ukraine’s ability to fight back. The statements quoted above send a clear message: without the allies’ efforts, Ukraine would not be in a position to defend itself.

The assessment is more complex when it comes to the European Union’s party status. As discussed above (section II.1), EU Member States have adopted a differentiated approach; each country supplies Ukraine with the military aid and assistance it determines to be most appropriate, and some countries have refrained from providing lethal aid altogether or to allow weapons to transit their territory. Consequently, it does not seem to the present author that the EU can be considered a party to the conflict. On the other hand, individual states that have provided substantial and systemic aid and assistance may be parties to the conflict, this would be the case of the US, the UK, and Poland.

²⁸⁰ US Department of Defense, ‘Secretary of Defense Lloyd J. Austin III and Joint Chiefs of Staff Chairman General Mark A. Milley Hold Press Conference Following Virtual Ukraine Defense Contact Group Meeting’ cit.

²⁸¹ *Ibid.*

²⁸² *Ibid.*; see also US Department of Defense, ‘Deputy Pentagon Press Secretary Sabrina Singh Holds a Press Briefing’ (17 July 2023) www.defense.gov.

²⁸³ A Shoab, ‘Biden Said he Decided to Send Ukraine Controversial Cluster Bombs because Kyiv is “Running Out of Ammunition”’ (8 July 2023) *Business Insider* www.businessinsider.com.

²⁸⁴ *Wall Street Journal*, ‘Ukraine Adopts Slow Approach to Counteroffensive: “Our Problem Everywhere Is the Sky”’ (18 July 2023) www.wsj.com; D De Luce and P McCausland, ‘Is Ukraine’s Counteroffensive Failing? Kyiv and Its Supporters Worry about Losing Control of the Narrative’ (4 August 2023) *NBC News* www.nbcnews.com.

To the extent that these states would be engaged in an (indirect) use of force against Russia, it should follow that they are parties to the conflict. It could also be discussed whether other states have achieved this status, such as Germany, France, Denmark, the Netherlands, Canada, Czechia and Balkan countries, due to the nature of the aid and training they are providing, or have committed to provide.²⁸⁵

If states are party to the conflict, then this has consequences under *jus in bello*, they would become military targets and if their combatants are captured by Russia forces they would enjoy prisoner of war status. In essence, it would only have practical repercussions if these countries actually send forces to Ukrainian territory. Although Russia may consider that a supporting states' forces are a military target, under *jus ad bellum*, Russia cannot violate the territorial integrity of the states providing support and attack them directly. This would result in a further breach of art. 2(4) UN Charter against the supporting state, particularly if the latter is found to be assisting Ukraine in collective self-defence (even if such aid is indirect).

IV. CONCLUSION

Though none of the states supplying Ukraine with military aid and assistance has sent a letter invoking art. 51 UN Charter to the UNSC, they frequently frame their support as collective self-defence. While being neutral seems to be the least of their concerns, they are wary of being a party to the conflict. Indeed, states, the EU and NATO are careful to reiterate that they are not party to the conflict. The states that have rallied to support Ukraine and that raise neutrality appear to be caught between, on the one hand, not being neutral, or indifferent, to a grave breach of international law and thus taking action, and, on the other hand, avoiding becoming a *direct* party to the conflict. They do not want to be directly engaged with Russia on the battlefield and do not want to contribute to an act that would enable Ukraine to attack Russia on its territory (for example, by providing long-range missiles). However, as we have seen, these goalposts have progressively changed. As Ukraine's need for assistance increases, so does the support it receives from third states. States that are providing support appear to be walking the fine line between, one the hand, assisting a state in collective self-defence and, on the other hand, not being a party. This fine line becomes a tight rope when they are part of an organisation (such as the EU) that has adopted a different, even contradictory, policy and where Member States do not agree on a coherent approach.

As discussed throughout this *Article*, numerous states have provided substantial military aid and equipment to Ukraine. This not only breaches neutrality law but could also amount to an indirect use of force against Russia (that can be justified under collective self-defence) and result in these states being co-belligerents alongside Ukraine. Whether

²⁸⁵ For instance, the Netherlands and Denmark have committed to supplying Ukraine with F-16s, J Lukiv, 'Ukraine War' cit.

or not the thresholds of using indirect force and becoming party to the conflict are met can only be assessed on a case-by-case basis. The states that appear to have met these thresholds are the US, the UK, Poland. One could also wonder whether other states, such as Germany, France, Denmark, the Netherlands, Czechia, the Balkan countries, and Canada have also reached this threshold.

Because the military aid and assistance are provided bilaterally, with the EU mainly playing a supporting and coordinating role, this *Article* has not found that the EU is using force against Russia nor that it is party to the conflict, at least at the time of writing. However, the EU and the Member States providing military aid and equipment (except for those donating humanitarian and non-lethal assistance) and significant financial support are in breach of neutrality law.