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Military Assistance to Ukraine: Enquiring the Need for Any Legal Justification under International Law

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Abstract

Since the invasion of Ukraine by Russia on 24 February 2022, Western states have provided significant military support to the Ukrainian armed forces, through the supply of arms or intelligence. This article enquires whether those states need any legal justification to make such support lawful under international law and, more particularly, under the law on the use of force, the law of neutrality and the regulation of arms transfers. It concludes that such justification might be required in certain circumstances and that the supporting states' narrative, namely helping Ukraine to exercise its right of self-defence in response to a blatant armed attack, might act as a valid justification, except with respect to certain regulations on arms transfer.

1. Introduction

Shortly after Russia invaded Ukraine on 24 February 2022, many Western states decided to provide military assistance to Ukraine, either in the form of military intelligence or, more often, through arms supply. Such supply, particularly from the European states, is of an unprecedented nature and scale. Massive transfers of military equipment, in particular defensive and offensive weapons, like transport helicopters, drones, tanks, rocket launchers and heavy artillery,[1] have been executed.

The European Union (EU) directly financed and coordinated the arms supply undertaken by EU member states. On 28 February 2022, four days after the Russian invasion, the EU Council took a decision on military assistance to Ukraine under the framework of the Common Foreign and Security Policy (CFSP), which covered the supply of 'military equipment, and platforms,

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[1] See 'Ukraine weapons: What military equipment is the world giving?' (*BBC News*, 10 September 2022) <www.bbc.com/news/world-europe-62002218> accessed 21 April 2023.

designed to deliver lethal force'.[2] The budget for military equipment that could be financed by this measure amounted to EUR 450 000 000.[3] This budget was subsequently increased several times to reach EUR 3 120 000 000 in February 2023.[4] This European assistance is part of the European Peace Facility (EPF) established in 2021, which allows for the financing of operations with military implications outside the regular EU budget.[5] Although it has been used in the past, notably also in relation to Ukraine,[6] this is the first time that the EPF has been mobilised to finance military assistance of a lethal nature.

The 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. As mentioned in various decisions of the EU Council, the objective is indeed to support the Ukrainian army 'to defend the territorial integrity and sovereignty of Ukraine and protect the civilian population against the ongoing military aggression'.[7] Russia criticised such military assistance several times,[8] arguing that in some cases it breached international law.[9] However, most scholars argue that such assistance is lawful as it can be justified under international law, in particular on the basis of collective self-defence as enshrined in Article 51 of the UN Charter.[10] This article intends to enquire whether this assistance requires any legal justification, such as the law of self-defence, in

2 Council Decision (CFSP) 2022/338, (28 February 2022).

3 ibid, art 2, s 1.

4 Council Decision (CFSP) 2023/230, (2 February 2023).

5 Council Decision (CFSP) 2021/509, (22 March 2021). See also art 41, s 2 of the Treaty on European Union, which provides that the 'expenditure arising from operations having military or defence implications' may not 'be charged to the Union budget'.

6 Council Decision (CFSP) 2021/2135, (2 December 2021). Ukraine benefited from assistance measures of non-lethal nature to 'strengthen the capacities [of its army] with respect to its: (a) military medical units . . .; (b) engineering units . . .; (c) mobility and logistics units; and (d) cyber defence units'.

7 See eg Council Decision (CFSP) 2022/338 (n 2) art 1, s 2.

8 For statements before the UN Security Council, see eg UN Doc S/PV.9195, (16 November 2022), at 16; UN Doc S/PV.9135, (22 September 2022), at 17–18; UN Doc S/PV.9126, (7 September 2022), at 17; UN Doc S/PV.9104, (29 July 2022), at 16.

9 For statements before the UN Security Council, see eg UN Doc S/PV.9127, (8 September 2022), at 6–7.

10 See eg M Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (*Articles of War*, 7 March 2022) <https://www.lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/> accessed 21 April 2023; 'U.S. Offensive Cyber Operations in Support of Ukraine' (*Articles of War*, 6 June 2022) <https://lieber.westpoint.edu/us-offensive-cyber-operations-support-ukraine/> accessed 21 April 2023; T Hamilton, 'Articulating Arms Control Law in the EU's Lethal Military Assistance to Ukraine' (*Just Security*, 30 March 2022) <www.justsecurity.org/80862/articulating-arms-control-law-in-the-eus-lethal-military-assistance-to-ukraine/> accessed 21 April 2023; 'Defending Ukraine with EU weapons: arms control law in times of crisis' *European Law Open* (2022), at 641–42; M Zwanenburg, 'The Russian Invasion of Ukraine: International Legal Implications' (*Asser Institute,* 28 March 2022) <www.asser.nl/about-the-asser-institute/news/report-the-russian-invasion-of-ukraine-international-legal-implications/> accessed 21 April 2023; O Corten, 'L'emploi de la force de la Russie contre l'Ukraine:

order to be lawful under international law. In particular, it will examine that issue in relation to three international legal regimes: (i) the law on the use of force, (ii) the law of neutrality, and (iii) the regulation of international arms transfers.

2. The law on the use of force

It is questionable whether Article 51 of the UN Charter is relevant for Western states to justify their military assistance to Ukraine in relation to the law on the use of force. Self-defence is indeed only meaningful if it serves as a lawful justification for a (defensive) use of force. If successfully pleaded, its effect is indeed to prevent any use of force from falling into the scope of the prohibition provided under Article 2, §4 of the UN Charter. In other words, Articles 51 and 2, §4 of the UN Charter are the two sides of the same coin: both are relevant only in relation to the use of force by a state against another state. Any action justified under collective self-defence must accordingly involve such a use of force. Yet, it is unclear whether military assistance provided by supporting states to a victim state defending itself against an armed attack by a third state amounts to a use of force against that third state, when such assistance merely takes the form of the provision of intelligence information or military supplies, like in the Ukrainian situation.

Although several arguments might be put forward in favour of qualifying military assistance by Western states to Ukraine as a use of force under Article 2, §4 of the UN Charter, those arguments remain disputable. A first argument raised in legal scholarship[11] is derived from the case law of the International Court of Justice (ICJ). In both the *Nicaragua* and *Armed Activities* cases, the Court qualified as a use of force the '[supply] of weapons or logistical or other support' provided by a state to a belligerent party involved in an armed conflict against another state.[12] However, in those cases, the supported belligerent was an armed group. The assistance was provided by a foreign state to such a group without the consent of the territorial state against which the armed group was fighting in the context of an internal armed conflict. Moreover, the ICJ's holdings were intrinsically linked to the violation of the principle of non-intervention in the internal affairs of that territorial state due to such support. Indeed, the Court stated that 'acts which breach the principle of

violation, mise en cause ou réaffirmation de la Charte des Nations unies?' (2022) 6918 *Journal des tribunaux*, at 714.

11 See Schmitt, 'Providing Arms. . .' (n 10).

12 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment of 27 June 1986, *ICJ Reports 1986* ('*Nicaragua* case') 14, at 104, s 195. See also ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, *ICJ Reports 2005* ('*Armed Activities* case') 168, at 227, s 164.

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"'.[13] These considerations cannot be transposed to the Ukraine scenario, since foreign support is not provided to Ukraine on Russian territory and does not therefore raise the issue of the concurrent violation of the principle of non-intervention in the internal affairs of Russia.

A second argument may be derived from the UNGA resolution 3314 (XXIX) that defines the notion of aggression.[14] That resolution indeed mentions an indirect use of force, resulting from interstate support, as a type of aggression and, therefore, as an (unlawful) use of force under Article 2, section 4 of the UN Charter. According to Article 3, (f) of the resolution, an act of aggression may result from '[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State'. While this corresponds to the action taken by Byelorussia, which allows Russia to use its territory to resort to force against Ukraine[15] and which can then be seen as responsible for an act of aggression against Ukraine, this is not the case of military assistance provided by Western states to the Ukrainian authorities, since that assistance consists in military and intelligence supply. Resolution 3314 (XXIX) does not therefore prove relevant to solve the issue of the qualification of such assistance as a use of force.

A third argument is state practice taking the form of state declarations. In certain declarations, made unilaterally or through international organisations to which they belong (especially the EU), states invoked justifications that came close to reliance on collective self-defence. For example, in the conclusions of its 23–24 June 2022 meeting, the European Council expressed its determination to remain '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'.[16] Several states adopted a similar discourse before the UN Security Council[17] or at the domestic level.[18] Furthermore, in the 2008 Common Position on arms exports, the

[13] *Armed Activities* case, ibid, at 227, s 164.

[14] UNGA Res. 3314 (XXIX), (14 December 1974).

[15] See eg R Hamilton, 'The Crime of Aggression: Putting Lukashenko and His Senior Officials on Notice' <www.justsecurity.org/83564/the-crime-of-aggression-putting-lukashenko-and-his-senior-officials-on-notice/> accessed 21 April 2023.

[16] European Council meeting (23–24 June 2022)—Conclusions, EUCO 24/22, CO EUR, 21 CONCL 5, Brussels, (24 June 2022) <www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf> accessed 21 April 2023, at 2.

[17] See eg United Kingdom, UN Doc S/PV.9080, (28 June 2022), at 8; France, UN Doc S/PV.9104, (29 July 2022), at 8; Norway, UN Doc S/PV.9127, (8 September 2022), at 16–17; the United States, UN Doc S/PV.9256, (8 February 2023), at 12.

[18] See state declarations quoted in G Bartolini, 'The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice' (*EJIL* Talk!, 11 April 2023) <www.ejiltalk.org/the-law-of-neutrality-and-the-russian-ukrainian-conflict-looking-at-state-practice/> accessed 21 April 2023, at 2–3.

European Council had already stated that '[s]tates have a right to transfer the means of self-defence, consistent with the right of self-defence recognised by the UN Charter'.[19] However, states stopped short of expressly invoking the right of collective self-defence and informing the UN Security Council that they were acting in the exercise of that right.[20] It is worth emphasizing in this context, as the ICJ did,[21] that, although non-compliance with the UN Security Council notification requirement does not affect the legal validity of military action taken in collective self-defence, it may serve as an indication that the action was not actually undertaken pursuant to that legal basis.

In fact, the main reason why states did not expressly invoke collective self-defence is, arguably, that doing so would implicitly mean that they are a party to an international armed conflict against Russia alongside Ukraine, a scenario that most—if not all states—would truly want to avoid. This suggests that the qualification of the military assistance provided to Ukraine as a use of force under *jus ad bellum* might closely be related to the issue, currently debated in international humanitarian law (IHL), of the conditions under which a state that supports a party to an international armed conflict becomes a new party to that conflict due to its support.[22] The Western assisting states indeed strongly oppose that they are a party to that conflict.[23] Admittedly IHL (*jus in bello*) and the regulation on the use of force (*jus ad bellum*) must be kept separated, according to the well-known principle of separation between these two bodies of law. However, it is argued here, in accordance with the *Tadic* definition of an international armed conflict as 'a resort to armed force between States',[24] that the test for determining when a supporting state is a party to an existing international armed conflict under *jus in bello* could prove useful in assessing whether such support amounts to a use of force under *jus ad bellum*. Although

[19] Council Common Position (CFSP) 2008/944/CFSP, (8 December 2008), preamble, al. 12.

[20] See nonetheless the declaration from Albania before the UN Security Council, which refers to the right of collective self-defence as a valid legal basis for 'whatever assistance to a country exercising its inherent right to self-defence' (UN Doc S/PV.9256, (8 February 2023), at 11). However, no formal notification has been made by Albania to the UN Security Council.

[21] *Nicaragua* case (n 12), at 105, s 200.

[22] On that debate, see eg Schmitt, 'U.S. Offensive Cyber Operations…' (n 10); A Wentker, 'At War: When Do States Supporting Ukraine or Russia become Parties to the Conflict and What Would that Mean?' (*EJIL* Talk!, 14 March 2002) <www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/> accessed 21 April 2023; R van Steenberghe and J de Hemptinne, 'L'assistance militaire à l'Ukraine: sa légalité en droit international et la participation de ses auteurs au conflit contre la Russie' (2022) 6918 *Journal des tribunaux*, at 733–36.

[23] See eg the US refusal to admit that they are directly involved in the targeting operations of Ukraine, quoted in M Milanovic, 'The United States and Allies Sharing Intelligence with Ukraine' (*EJIL* Talk!, 9 May 2022) <www.ejiltalk.org/the-united-states-and-allies-sharing-intelligence-with-ukraine/> accessed 21 April 2023.

[24] ICTY, *Prosecutor v Dusko Tadić*, Appeals Chamber, Decision on the defence Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995), IT-94-1, s 70.

uncertainties remain about that test under IHL, it is increasingly argued, notably in light of state practice, that the support provided by the assisting state must be 'direct', meaning that such support must contribute to a specific military action taken by the supported state against its adversary.[25]

Accordingly, where military support to Ukraine does not meet this 'direct-participation' test, such as providing weapons for non-specific military operations, that support would not amount to any use of force under *jus ad bellum* and no legal justification would be needed under that regulation. By contrast, when the support is specific in nature, such as providing Ukraine with intelligence about a specific Russian military target in order to enable Ukrainian forces to destroy that target, such support would arguably amount to a use of force against Russia. Then, the justification based on collective self-defence would be meaningful for justifying that support. In particular, this justification would be valid because the conditions for states to act in collective self-defence to help Ukraine defend itself against Russia are fulfilled:[26] (i) as acknowledged by more than 140 states, Ukraine has been the object of an armed attack by Russia, since no valid legal ground can justify Russia's use of force against Ukraine under international law;[27] (ii) Ukraine expressly acknowledged that it has been the victim of an armed attack by Russia;[28] (iii) Ukrainian authorities have formally requested other states to help them resist Russia's armed attack;[29] and (iv) no other lawful means, less coercive than collective self-defence, are arguably available in practice to successfully protect Ukraine.[30]

[25] See eg above (n 22). See also Russian statements about the military support provided by Western states to Ukraine where Russia refers to the test of direct participation/involvement in the hostilities, in considering in certain cases that states have become parties to the conflict due to their support (see eg UN Doc S/PV.9135, (22 September 2022), at 17–18) and in other cases that they are close to becoming a party to the conflict (see eg UN Doc S/PV.9202, (23 November 2022), at 12). For the implicit positions of Western states on this matter, see eg above (n 23).

[26] On those conditions, see eg *Nicaragua* case (n 12), at 103–105, ss 195–99.

[27] See the UNGA Resolution ES-11/1, (2 March 2022), UN Doc A/RES/ES-11/1, s 2. For a detailed analysis of the legal grounds invoked by Russia, see eg J A Green, C Henderson and T Ruys, 'Russia's Attack on Ukraine and the *jus ad bellum*' (2022) 9 *Journal on the Use of Force and International* Law 4, at 4–30.

[28] See eg UN Doc S/PV.8979, (25 February 2022), at 16.

[29] See eg Council Decision (CFSP) 2022/338 (n 2), preamble, al. 5.

[30] See eg P Doubek, 'War in Ukraine: Time for a Collective Self-Defense?' (*Opinio Juris*, 29 March 2022) <http://opiniojuris.org/2022/03/29/war-in-ukraine-time-for-a-collective-self-defense/> accessed April 2023. This is required by the condition of necessity for triggering action in self-defence (see eg R van Steenberghe, *La légitime défense en droit international public* (Larcier 2012), at 189–92). Once self-defence has been lawfully triggered, its exercise must still fulfil the other customary conditions of necessity and proportionality (ibid, at 193–94). Regarding the procedural condition of informing the UN Security Council, see above (n 21).

3. The law of neutrality

The Western states' assistance to Ukraine may also raise concerns in relation to the law of neutrality. That law pursues a specific objective, namely to avoid any extension of an international armed conflict, by imposing obligations on both belligerents and neutrals. The main obligation owed by belligerents under that law is to respect the inviolability of the territory of neutrals,[31] while neutrals are mainly bound by an obligation of abstention and impartiality towards the belligerents.[32] This obligation of impartiality means that the belligerents have the right to be treated without any discrimination by neutrals.[33] It is therefore questionable whether military assistance by Western states to Ukraine breaches that right and would require any specific legal justification in order to be lawful.

That issue must firstly be addressed in light of the debate about the impact of the contemporary *jus ad bellum* and the UN Charter on the law of neutrality. Indeed, that law was mainly codified at the very beginning of the twentieth century,[34] when international law did not provide any prohibition on the use of force[35] and when no worldwide collective security mechanism, like the United Nations, existed. However, while it is generally agreed that contemporary law has impacted the law of neutrality, disagreements remain on the extent of such impact. It is argued in legal scholarship that the recognition of the right of collective self-defence under international law has rendered the obligation of impartiality under the law of neutrality meaningless.[36] In particular, in relation to the Ukrainian armed conflict, it is contended that, since it is lawful to use force against an aggressor state in order to help the victim state defend itself against the armed attack on the basis of collective self-defence, it would be

[31] See Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 October 1907, entered into force 26 January 1910) available online at <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-v-1907?activeTab=default>, art 1, accessed 21 April 2023.

[32] ibid, arts 5–8; Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, entered into force 26 January 1910) <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-xiii-1907> art 6, accessed 21 April 2023.

[33] For such formulation, as a right to the benefit of the belligerent states, see eg W Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality' in MN Schmitt and J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Brill 2017), at 552.

[34] See Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (n 31); Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (n 32).

[35] This was a particular period with respect to *jus ad bellum*, since international law did not regulate the resort to force by states, which were therefore free to go to war; see eg Q Wright, 'The Outlawry of War' (1925) 19 *American Journal of International Law*, at 76.

[36] See eg K Ambos, 'Will a state supplying weapons to Ukraine become a party to the conflict and thus be exposed to countermeasures?' (*EJIL:* Talk!, 2 March 2022)<www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/> accessed 21 April 2023.

paradoxical that merely providing weapons or military intelligence to that victim state would amount to a violation of international law.[37] In other words, who can do more can do less. However, this well-known *de majore ad minus*[38] argument is flawed for two main reasons. Firstly, this confuses two bodies of law that pursue different objectives: (i) the law of self-defence, whose purpose is to regulate the use of force of a state that has chosen to become a belligerent by resorting to force against an aggressor state to the benefit of the victim state, and (ii) the law of neutrality, whose purpose is to avoid a state, which has chosen not to become a belligerent, from being involved in an ongoing international armed conflict and to prevent any extension of that conflict. As a result, although the right of collective self-defence is available to the assisting Western states when they chose to use force against Russia and to become (co-)belligerents, the lawfulness of their assistance must still be assessed in light of the law of neutrality whenever that assistance does not involve such use of force and those states remain neutral. Secondly, from a more technical perspective, collective self-defence as based on Article 51 of the UN Charter cannot be invoked to justify any violation of the law of neutrality. Article 51 is only available to justify a use of force, which would otherwise fall into the scope of the prohibition provided in Article 2, §4 of the UN Charter. States made that clear in the context of the drafting of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[39] Article 51 is seen as a primary norm of international law, recognizing an 'inherent' right of states to use force. Admittedly, Article 21 of ARSIWA, which also refers to self-defence, has been included in ARSIWA with the purpose of enabling states acting in self-defence to justify any other conduct than their use of force.[40] Certain scholars then refer to it in the Ukrainian context as a legal justification for any potential violation of the law of neutrality by the assisting Western states.[41] Contrary to Article 51 of the UN Charter, that Article indeed envisages the right of self-defence as a secondary norm of international law, namely as a circumstance precluding the wrongfulness of a prior violation of international law,[42] which cannot be the violation of the prohibition on the use of force.[43] Yet, like Article 51, that Article implies that the state invoking it resorted to force against another state. It could not therefore be invoked to justify any violation of the law of neutrality since that law would no longer be applicable as the assisting state would have become a (co-)belligerent due to its use of force.

[37] See eg Zwanenburg (n 10).

[38] For scholars considering and refuting such *de majore ad minus* argument, see eg Heintschel von Heinegg (n 33), at 552.

[39] See van Steenberghe (n 30), at 126, fn 456.

[40] See commentary to art 21 of ARSIWA, UN Doc A/56/10, 2001, at 74, s 2.

[41] See eg A Clapham, 'On War' (*Articles of War*, 5 March 2022) <https://lieber.westpoint.edu/on-war/> accessed 21 April 2023; Milanovic (n 23); Ambos (n 36).

[42] See eg T Christakis, 'La légitime défense comme circonstance excluant l'illicéité' in R Kherad (ed), *Les légitimes défenses* (LGDJ 2007), at 233–56.

[43] See art 26 of ARSIWA. For scholars arguing that the prohibition on the use of force has a peremptory nature, see eg van Steenberghe (n 30), at 118–40.

That being said, it is undisputable that the obligation of impartiality provided under the law of neutrality might be displaced in certain circumstances, in particular when states are obliged by the UN Security Council to take measures against one belligerent.[44] This is the case when the UN Security Council has adopted collective measures that consist either in requiring states to take sanctions against one belligerent[45] or in requiring states to assist those engaged in military operations that it authorised under Chapter VII of the UN Charter.[46] Those UNSC measures must indeed prevail over the requirement of impartiality provided under the law of neutrality according to Article 103 of the UN Charter or at least, if not expressed as obligations, according to Articles 2, §5,[47] and 49 of the UN Charter. Yet, in the Ukrainian case, no such measures have been adopted by the UN Security Council—in large part because of Russia's veto power.

Two kinds of arguments may nonetheless still be considered in order for neutral Western states to justify any potential violation of the right of Russia not to be treated with discrimination under the law of neutrality. The first is based on two closely but distinct doctrines, both of which take argument from the evolution of *jus ad bellum*, without however grounding any justification on the assisting states' right of collective self-defence. The first doctrine is known as the doctrine of 'non-belligerency'. It originates from the idea that the law of neutrality, which was drafted at a time when international law did not regulate the use of force between states and therefore did not allow for a distinction to be made between an aggressor and a victim state, has evolved since the emergence of the prohibition on the use of force and its exceptions, notably self-defence. It has been argued that, in the contemporary legal order, states should be able to assist a state responding to an armed attack without being party to the armed conflict against the aggressor state, by opting for a status that is neither neutrality nor belligerency but 'non-belligerency'. Under that status, states are no longer bound by the obligation of impartiality and 'may provide non-belligerent assistance to the victim of [an] armed attack'.[48] This approach has been extended to situations other than military assistance to a state that is a victim of an armed attack, as illustrated by the declaration of non-belligerency issued by Italy in 2003 in order to justify its support to the USA in relation to its

[44] For rare state declarations in that sense, see eg Switzerland, 'Clarté et orientation de la politique de neutralité. Rapport du Conseil fédéral en réponse au postulat 22.3385 de la Commission de politique extérieure du Conseil des États du 11 avril 2022' (26 October 2022) <www.newsd.admin.ch/newsd/message/attachments/73618.pdf> accessed 21 April 2023, at 6.

[45] See eg UNSC Res. 661 (1990), ss 3–4.

[46] See eg UNSC Res. 678 (1990), s 3; UNSC Res. 1973 (2011), s 9. See also in that sense M Bothe, 'The Law of Neutrality' in D Fleck (ed), *The Handbook of International Law* (3rd edn, OUP 2013) 549, at 553.

[47] See J Upcher, *Neutrality in Contemporary International Law* (OUP 2020), at 155.

[48] ibid. The author refers to D Schindler, 'Transformation in the Law of Neutrality Since 1945' in AJM Delissen and GJ Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead* (Martinus Nijhoff 1991) 367, at 373.

invasion of Iraq.[49] The USA did not indeed justify that invasion on the basis of self-defence but provided a controversial interpretation of UNSC resolutions.[50] However, the doctrine of 'non-belligerency' faces several problems. Firstly, it is considered as not confirmed by enough state practice to be part of customary law.[51] Secondly, the doctrine has been strongly criticised on the basis that it creates a third status, between the neutral and belligerent, and makes neutrality purely optional.[52] Finally, it does not seem to adequately correspond to the position implicitly endorsed by Western states in the Ukrainian situation. Although those states did not articulate any clear legal argument on the matter, they repeated, as already emphasised,[53] that their support was only aimed at helping Ukraine exercise its right of self-defence against the illegal armed attack committed by Russia.

The second doctrine, known as the doctrine of 'qualified neutrality' seems more suitable. It better fits the discourse of the Western states and is less radical than the doctrine of 'non-belligerency' in two main respects. Firstly, it allows states to deviate from their obligation of impartiality only when they intend to support a state that is clearly victim of an armed attack, like in the Ukrainian case. This approach was notably adopted by the USA before it decided to become a party to World War II. In order to justify its support to the UK against Germany, the then US Attorney General stated that '[i]n the light of the flagrancy of current aggressions, which are apparent on their face, ... the United States and other states are entitled to assert a right of discriminatory action by reason of the fact that, since 1928 so far as it is concerned, the place of war and with it the place of neutrality in the international legal system have no longer been the same as they were prior to that date'.[54] That view is still shared by the USA today as evidenced by its military manual.[55] Secondly, the doctrine of 'qualified neutrality' is also less radical than non-belligerency since it does not create a third status and does not purport to make neutrality optional: the assisting state keeps its neutral status but is allowed to discriminate in favour of the victim state. It is illustrative in this respect that, while adopting the position of 'qualified neutrality' before engaging in World War II, the US rejected a proposal made by Argentina of a collective declaration of 'non-belligerency',

[49] See N Ronzitti, 'Italy's Non-Belligerency during the Iraqi War' in M Ragazzi (ed), *International Responsibility Today: Essays in memory of Oscar Schachter* (Martinus Nijhoff 2005) 197, 200–02.

[50] See eg van Steenberghe (n 30), at 158–59 and 380.

[51] See eg M Bothe, 'Neutrality, Concept and General Rules' in *Max Planck Encyclopaedia of Public International Law*, October 2015, <http://opil.ouplaw.com> accessed 21 April 2023, s 5.

[52] See eg Upcher (n 47), at 22–30.

[53] See eg above (n 7 and 16-18).

[54] Address of Robert H Jackson, 'Attorney General of the United States, Inter-American Bar Association' Havana, Cuba, 27 March 1941, (1941) 35 *American Journal of International Law* 348, at 353–54.

[55] *Law of War Manual*, *Department of Defense*, June 2015, at 935, s 15.2.2.

notably since it considered that proposal as a breach of international law.[56] Admittedly, it is also controversial whether the doctrine of 'qualified neutrality' may be considered as being part of customary law given the claimed lack of sufficiently uniform general state practice. However, the current practice of numerous and varied states assisting Ukraine in light of Russia's aggression could be viewed as supporting the emergence of such customary norm. Particularly pertinent here is the fact that, with the only exception of Switzerland, which has a specific permanent neutrality status,[57] no state, including Russia, has expressed the view that such assistance is a breach of the obligation of impartiality.[58]

The second argument that is available to the neutral Western states to justify any potential violation of their obligation of impartiality is to be found in Article 22 of ARSIWA. That Article refers to countermeasures as a circumstance precluding wrongfulness.[59] It allows states to disregard certain obligations towards another state in reaction to a prior violation of international law by that state towards them. Accordingly, any breach of the law of neutrality by Western states due to their assistance to Ukraine would be precluded because such a breach would be in response to Russia's blatant violation of the prohibition on the use of force. Admittedly, Western states are not 'injured State[s]' in the meaning of Article 42 of ARSIWA. They are not indeed 'specially affected'[60] by Russia's violation of the prohibition on the use of force. On its face, such a violation only affects the territorial integrity and sovereignty of Ukraine. However, the prohibition on the use of force is, arguably, a *jus cogens* obligation[61] and is, further, an obligation *erga omnes*, that is, an obligation due to all states. Put simply, Russia's violation is not just against Ukraine, but it is also against states that are not directly injured by the violation. Accordingly, those states that have provided military assistance to Ukraine but have not been directly subject to an armed attack by Russia can still nonetheless claim that Russia has committed an internationally wrongful act against them. The issue here, however, is whether 'states other than [the] injured [one]', in the meaning of Article 48 of ARSIWA, may take countermeasures against Russia, thus precluding any wrongfulness that Western states' assistance to Ukraine may occasion under the law of neutrality. This is the well-known issue of 'collective countermeasures', which was not solved by the International Law Commission (ILC) when drafting the ARSIWA.[62] Although the legality of such (collective)

[56] See eg JS Tulchin, 'The Argentine Proposal for Non-Belligerency, April 1940' (1969) 11 *Journal of Inter-American Studies* 4, at 575.
[57] Switzerland (n 44), at 21.
[58] The lack of any clear discussion by states on the law of neutrality could hardly be interpreted as meaning that this law is now obsolete, given recent practice of states still referring to it; for such practice, see eg Switzerland (n 44), at 6, fn 12.
[59] For the rare scholars mentioning it, see Clapham (n 41).
[60] art 42, (b), (i) of ARSIWA.
[61] See eg van Steenberghe (n 30), at 118–40.
[62] art 54 of ARSIWA. See also its commentary, ILC (n 40), at 137.

countermeasures still remains uncertain, it has been increasingly resorted to in practice, which has led scholars to argue that they are now recognised under international law.[63]

In any case, were Western states to be considered in breach of the law of neutrality, the right of Russia to respond to such a violation would be strongly limited by *jus ad bellum*. Although the traditional law of neutrality allows the belligerent victim of a breach of that law to take countermeasures, including reprisals,[64] such countermeasures must now respect the regulation on the use of force. Put differently, Russia cannot take any countermeasure against those states that would have violated the law of neutrality, which would involve the use of force, such as disregarding the inviolability of the territory of those states. Indeed, the military assistance rendered by the neutral Western states to Ukraine could never be qualified as an armed attack against Russia, which would enable it to respond in self-defence.

4. The regulation of arms transfers

Military assistance to Ukraine has involved, and continues to involve, a massive transfer of arms. It has been specifically argued by Russia that such conduct violates the applicable international regulations on arms transfer.[65] Here, the main relevant regulations include the 2008 EU Council Common Position at the European level (A), the Arms Trade Treaty (ATT) (2013) (B), and Common Article 1 to the four Geneva Conventions (1949) (C).

A. The 2008 EU Council Common Position

Arms transfers are regulated at the EU level by the 2008 EU Council Common Position, which defines the 'common rules governing control of exports of military technology and equipment'.[66] As stated above, most deliveries of arms to Ukraine by European states take place within the regulatory and financial framework

[63] See eg F Paddeu, 'Countermeasures' in *Max Planck Encyclopaedia of Public International Law*, September 2015, <http://opil.ouplaw.com> accessed 21 April 2023, s 40. One remaining issue is whether such disregard of the law of neutrality and discrimination against the aggressor state on the basis of *jus ad bellum* considerations is compatible with the principle of equality between belligerents, according which both the aggressor and the victim states must have the same rights and obligations under IHL, irrespective of the legality of their resort to force (see eg Bothe (n 51), s 29). However, it is argued that the law of neutrality is distinct from IHL and does not fall into the scope of the principle of equality (see eg H Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (Pedone 1970), at 323–29).

[64] See eg Bothe (n 51), s 29.

[65] See eg above (n 9).

[66] Council Common Position, (n 19), title.

established by the EU. This framework explicitly requires that arms exports must comply with the 2008 Common Position. The main concerns raised by military assistance to Ukraine with respect to that regulation stem from the application of two criteria set out in the Common Position: firstly, the obligation to refuse to export 'if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious [IHL] violations' (Article 2, criterion 2);[67] and, secondly, the obligation to assess whether 'a risk [exists] that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions' (Article 2, criterion 7).[68]

It is indeed questionable whether EU states should have refused to export arms to Ukraine or, at least, should have been more cautious in light of these two criteria. At the time they took their decision, on 28 February 2022, there was already a risk that the delivered arms could be used to commit serious IHL violations and could be diverted. A briefing note sent to EU delegations on 27 February 2022 on a proposal for military assistance to Ukraine expressly referred to these two types of risks.[69] Moreover, the past conduct of Ukraine and of European states confirm the existence of such risks. Regarding the risk of serious IHL violations by the Ukrainian army, that risk could not be ignored given the questionable practices followed by the Ukrainian army when fighting against separatists in eastern Ukraine since 2014. It must be observed that, when assessing this risk, the Common Position's User's Guide expressly recommends European states to take into account the recipient state's past compliance with IHL[70] and, *inter alia*, information provided by the Office of the United Nations High Commissioner for Human Rights and the International Criminal Court (ICC) in this respect.[71] Yet, the reports of both the Human Rights Monitoring Mission,[72] which has been deployed on Ukrainian territory since 2014, and the

[67] ibid, art 2, s 2(c).
[68] ibid, art 2, s 7.
[69] The note indicates, among the '[r]isks linked to the effects of the assistance, [the risk that the] equipment provided ends up in the wrong hands [and the risk that the supported] units commit or are accused of [IHL] violations …', Concept Note for 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, (27 February 2022) <www.statewatch.org/media/3168/eu-council-ukraine-csdp-epf-military-assistance-concept-note-6661-22.pdf> accessed 21 April 2023 ('Concept Note').
[70] User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment (29 April 2009) <https://data.consilium.europa.eu/doc/document/ST-9241-2009-INIT/en/pdf> accessed 21 April 2023, at 44.
[71] ibid, at 47.
[72] See eg OHCHR, Report on the human rights situation in Ukraine 16 February–15 May 2016, (3 June 2016) <www.ohchr.org/sites/default/files/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf> accessed 21 April 2023, at 9ff; Report on the human rights situation in Ukraine 16 May–15 August 2018, (1 September 2018) <www.ohchr.org/sites/default/files/Documents/Countries/UA/ReportUkraineMay-August2018_EN.pdf> accessed 21 April 2023, at 5, ss 23–24.

Office of the Prosecutor of the International Criminal Court (ICC)[73] strongly suggest that the Ukrainian armed forces have committed serious IHL violations in eastern Ukraine prior to the Russian invasion, including indiscriminate attacks. Regarding the risk of the diversion of the supplied arms, it should be noted that, fearing that weapons might be diverted, EU member states had consistently refused to supply such weapons to the Ukrainian authorities prior to the Russian invasion of February 2022 when they had been fighting separatist forces in eastern Ukraine since 2014.[74]

Although measures have been taken by the EU to mitigate or even neutralise those risks, it remains unclear, as suggested by certain recent developments, whether these measures have been effective. Concerning the risk of serious IHL violations being committed by means of the delivered weapons, the EU High Representative is reported to have concluded arrangements with Ukraine under the 28 February 2022 decision, whereby the Ukrainian authorities undertook to abide by IHL and mandated the ceasing of aid if that commitment was not respected.[75] However, recent reports by the Human Rights Monitoring Mission suggest that IHL violations continue to be committed in eastern Ukraine, albeit to a much lesser extent than those perpetrated by Russian forces.[76] In any case, it seems that, in order to truly neutralise the risk posed by arms supplies, European states should make more demanding requests on Ukraine, such as requesting it to adopt a more proactive attitude, which would mean, *inter alia*, that Ukraine should take all appropriate measures to sanction IHL violations committed by its forces in the course of hostilities, especially when indiscriminate attacks are launched.

Concerning the risk of the diversion of supplied arms, the EU High Representative has pointed out before the European Parliament that the EU has required that the weapons delivered to Ukraine have to be exclusively used

[73] See eg ICC, Report on Preliminary Examination Activities (2016), (14 November 2016), at 39, ss 178–79; ICC, Report on Preliminary Examination Activities (2017), (4 December 2017), at 23–24, ss 105–06; ICC, Report on Preliminary Examination Activities (2018), (5 December 2018), at 24–25, ss 83, 84 and 86; ICC, Report on Preliminary Examination Activities (2019), (5 December 2019), at 70, ss 274 and 275; ICC, Report on Preliminary Examination Activities (2020), (14 December 2020), at 71, s 280.

[74] See eg declarations of states quoted in *European arms export control in a changing European defence landscape, COARM-NGO Forum*, Saferworld, (16 June 2022) <www.saferworld.org.uk/resources/publications/1402-european-arms-export-control-in-a-changing-european-defence-landscape-a-coarm-ngo-forum> accessed 21 April 2023, at 3.

[75] See Council Decision (CFSP) 2022/338, (n 2), art 3.

[76] See OHCHR, Update on the human rights situation in Ukraine, 24 February–26 March 2022, (26 March 2022) <www.ohchr.org/sites/default/files/2022-03/HRMMU_Update_2022-03-26_EN.pdf> accessed 21 April 2023, at 3, ss 8 and 9; Situation of human rights in Ukraine in the context of the armed attack by Russian Federation, 24 February–15 May 2022, (29 June 2022) <www.ohchr.org/en/documents/country-reports/situation-human-rights-ukraine-context-armed-attack-russian-federation> accessed 21 April 2023, at 10, s 25 and at 11–12, ss 27, 29 and 30.

by the Ukrainian armed forces, that they cannot be transferred to other armed forces or re-exported, that their storage has to be protected and that their use has to be monitored by the EU.[77] However, several intelligence agencies, such as Interpol and Europol,[78] have expressed serious concerns that the delivered arms could fall into the hands of criminal or even terrorist organisations, while stressing that significant efforts have been made to prevent such eventualities.[79]

All of this suggests that EU states have followed a flexible approach to the EU's regulation on arms transfers to Ukraine, particularly when compared to their approach before the Russian armed attack. It is indeed striking to observe the shift from a categorical refusal to support Ukraine through equipment of a lethal nature in the fight against secessionist forces since 2014 to a massive transfer of such equipment to counter the Russian invasion since February 2022. Such a total reversal in attitude may arguably be explained by the exceptional circumstances of the situation, namely the blatant armed attack by Russia and the ensuing need to help Ukraine defend its sovereignty. The briefing note sent to European delegations on 27 February 2022 confirms that the European states did take such considerations into account. Indeed, it appears that EU states balanced the competing interests at stake: the risk of serious IHL violations being committed with the delivered weapons and the diversion of these weapons on the one hand, and the military benefits likely to result from the use of those weapons on the other. This is evidenced by the following statement in the aforementioned note: 'The provided equipment responds to the operational needs of the [Ukrainian armed forces], responding to an external aggression [and the Ukrainian] government is in a better position to maintain its internationally recognised sovereignty over its territory'.[80] Considerations pertaining to *jus ad bellum* therefore might have played a role in the decision of European states to assist Ukraine despite the risks raised by their military assistance.

This does not, however, give rise to any problem with respect to the risk of diversion. Such a balancing test seems to have been expressly admitted by the 2008 Common Position itself, since it mentions 'the legitimate national defence and security interests of the recipient country' among the elements to be taken into account in the assessment of that risk.[81] By contrast, this is not provided with respect to the assessment of the risk that the delivered weapons could be used to commit IHL violations. In any case, even if such a risk was established, which remains disputable, and when balanced against *jus ad bellum*

[77] See Answer given by High Representative/Vice-President Borrell i Fontelles on behalf of the European Commission, (9 August 2022) <www.europarl.europa.eu/doceo/document/E-9-2022-002300-ASW_EN.pdf> accessed 21 April 2023.

[78] See 'Arms sent to Ukraine will end up in criminal hands, says Interpol chief', *The Guardian* (2 June 2022) <www.theguardian.com/world/2022/jun/02/ukraine-weapons-end-up-criminal-hands-says-interpol-chief-jurgen-stock> accessed 21 April 2023.

[79] See Europol statement on the cooperation with Ukraine, (22 July 2022) <www.europol.europa.eu/media-press/newsroom/news/europol-statement-cooperation-ukraine accessed 21 April 2023.

[80] Concept Note (n 69), at 5.

[81] Council Common Position (n 19), art 2, 7, (a).

considerations, the decision to transfer weapons to Ukraine was taken by consensus between the EU member states and could not therefore imply any violation of the relevant EU regulation, in particular the 2008 Council Common Position. According to the hierarchy of EU sources, decisions and common positions are at the same hierarchical level. In other words, decisions taken in the specific case of Ukraine may be viewed as reflecting a flexible interpretation or at most an adaptation of the previously existing EU rules on arms exports.

B. The Arms Trade Treaty

If the arms transfers to Ukraine by EU states do not violate EU law, contrary to what has been alleged by Russia,[82] it remains to be seen whether such transfers, like those made by other states, comply with the regulation applicable at the global level, including the ATT (2013). That treaty, which entered into force on 24 December 2014, has been ratified by most states that have provided Ukraine with arms, with the notable exception of the United States. Two preliminary issues, concerning the scope of application of the ATT, must be examined before analysing its substantive content.

Firstly, it is necessary to consider whether the ATT applies to arms transfers that take the form of gifts, as is usually the case with military assistance to Ukraine. Indeed, at first sight, the ATT only regulates 'trade' in arms, as indicated in the title of the treaty. Article 2, §2 of the ATT also refers to 'international trade activities'. However, that Article includes 'export, import, transit, trans-shipment and brokering' under the generic term of 'transfer'. Moreover, when ratifying the treaty, several states issued an interpretative declaration indicating that these terms, in their view, 'include, in light of the object and purpose of this Treaty and in accordance with their ordinary meaning, monetary or non-monetary transactions, such as gifts, loans and leases'.[83] Secondly, the applicability of the treaty may also be questioned since the arms are being supplied to a state, Ukraine, which is not a party to the ATT. Admittedly, some provisions of the ATT only make sense if both the exporting and importing states are bound by the treaty. This is the case, for example, with respect to the obligation imposed on the exporting state to carry out an assessment of the risk of the diversion of the weapons 'taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1)'.[84] However, these provisions remain marginal and are not essential to the fulfilment of the main obligations provided by the ATT. Consequently, states parties must arguably comply with all the obligations that are materially applicable to them, as an exporting, importing, transit, transhipment or brokering

[82] See above n 9.

[83] See Switzerland, Interpretative Declaration for the ATT, <www.newsd.admin.ch/newsd/message/attachments/38166.pdf> accessed 21 April 2023.

[84] art 7, s 1.

state, even if the state to which they are 'transferring' arms did not ratify the treaty. Indeed, this would be consistent with the object and purpose of the ATT as articulated in Article 1. As a result, it does not come as a surprise that states,[85] including Russia,[86] as well as scholars[87] refer to the ATT when assessing arms supply to Ukraine under international law.

Like the 2008 EU Common Position, the ATT contains provisions that aim to prevent both the diversion of the delivered arms and the use of those arms to commit serious IHL violations. However, the ATT's provisions on diversion put more emphasis on the obligation to take positive measures to prevent such diversion or to stop arms transfers if diversion is detected.[88] It is not easy to verify whether such obligations have been respected in the Ukrainian case as they are obligations of conduct, the respect of which must be assessed in light of all the circumstances at the time. Moreover, as already noted, some arms-supplying states, including European states, have taken measures to mitigate, or even neutralise, any risk of diversion. On the other hand, the ATT appears to be as demanding as the EU regulation with regard to the risk that serious IHL violations will be committed with the delivered weapons, when those violations amount to 'grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which [the transferring state] is a Party'.[89] Article 6 of the ATT indeed formally prohibits states from authorising the transfer of arms if they have 'knowledge at the time of authorization that the arms or items *would be used* in the commission of [such violations]'.[90] This suggests that absolute certainty is not required and that, as in the case of the Common Position, the prohibition already applies as soon as there is a 'substantial' risk that the arms will be used to commit the relevant violations.[91] In this regard, it is clear that the indiscriminate attacks allegedly committed by Ukrainian armed forces fall within the category of war crimes envisaged in Article 6, either under 'attacks directed against civilian objects or civilians protected as such' (in accordance with the interpretation given to these terms by the International Criminal Tribunal for the Former Yugoslavia),[92] or under

[85] See eg implicit references in statements made at the Eighth Conference of States Parties (CSP8) to the Arms Trade Treaty (ATT), including the EU statement (below n 94) <https://thearmstradetreaty.org/statements-CSP8> accessed 21 April 2023.

[86] See eg UN Doc S/PV.9127, (8 September 2022), at 7.

[87] See eg Hamilton (n 10).

[88] See art 11.

[89] See art 6, s 3.

[90] Emphasis added.

[91] See eg the interpretation provided to the term 'knowledge' by Switzerland (Interpretative Declaration (n 83)). That term has been interpreted as meaning 'that the State Party concerned shall not authorise the transfer if it has reliable information providing substantial grounds to believe that the arms or items would be used in the commission of the crimes listed'.

[92] See eg ICTY, *Prosecutor v Stanislav Galić*, Appeals Chamber, Judgement, IT-98-29-A, (30 November 2006), ss 132–33.

'other war crimes as defined by international agreements to which [the transferring state] is a Party'. In this respect, it is worth nothing that most states parties to the ATT are also states parties to the Rome Statute of the ICC, which considers indiscriminate attacks as a war crime in international armed conflicts.[93]

It is not excluded that the assisting states truly assessed that the IHL violations committed by the Ukrainian army, when fighting against the secessionists before the Russian invasion and during that invasion, were not sufficient to conclude to the existence of a 'substantial' risk that such violations could be committed through the delivered weapons in contravention of Article 6 of the ATT. However, as suggested when examining the implementation of the EU Common Position, it cannot be excluded either that a substantial risk existed and that states nonetheless decided to proceed with the transfers of arms or to continue such transfers due to considerations pertaining to *jus ad bellum*, namely the need to help Ukraine in defending itself against Russia's armed attack.[94] However, while such a decision would not be contrary to EU law, as it would result from a consensus among EU member states, it would be problematic in relation to the ATT. Indeed, it would likely constitute a violation of Article 6 that could hardly be justified by any considerations based on *jus ad bellum*. Indeed, as already stressed, according to the principle of separation between *jus ad bellum* and *jus in bello*, the rules on the use of force cannot have any impact on the applicability or respect of IHL. In other words, the qualification of a state party to an armed conflict as the aggressor state under *jus ad bellum*, like Russia, does not allow the victim state or those supporting that state, like Western states supplying arms to Ukraine, to no longer respect their obligations under IHL, in particular Article 6 of the ATT. Admittedly, this Article is not part of IHL as such. However, it appears to be closely related to IHL since its sole purpose is to ensure compliance with that body of law. As a result, no circumstance precluding wrongfulness, including (collective) countermeasures taken in response to the violation of the prohibition on use of force by Russia, could be invoked by the Western states to justify any unlawful relaxation of Article 6. Neither can this be altered by the fact that the ATT mentions '[t]he inherent right of individual or collective self-defence' as the first of the principles with which the states parties have decided to comply in their action.[95]

[93] See Rome Statute, arts 8, 2, (b).

[94] For an implicit reference to such considerations in relation to the Treaty, see the EU statement at the Eighth Conference of states parties to the Arms Trade Treaty (22–26 August 2022), which refers to the right of self-defence (<www.thearmstradetreaty.org/statements-CSP8> accessed 21 April 2023, in Agenda Item 6: Treaty Universalization).

[95] A similar problem arises with respect to potential interpretations of art 7 of the ATT. This article concerns the specific case of arms exports—and not of any kind of transfer—and is intended to prevent the risk of any serious IHL violation—and not just the risk of commission of the war crimes mentioned in art 6. It requires states not to authorise such exports if, after assessing the situation and considering the adoption of certain measures, they consider that, despite these measures, there remains 'an

C. Common Article 1 to the four Geneva conventions (1949)

The ATT mentions another principle, namely, the obligation to respect and ensure respect for IHL.[96] This obligation is set out in Common Article 1 to the four Geneva Conventions (1949) and is also considered to be customary in nature.[97] Three main obligations may be inferred from it. The first is a general negative obligation not to render aid or assistance in violations of IHL. This obligation is similar to that contained in Article 16 of ARSIWA, which deals with state responsibility in case of complicity, except that the element of intent, which is required for the implementation of Article 16 according to the ILC,[98] would not be required for complicity in the field of IHL.[99] Irrespective of those controversies, it is clear that none of the assisting states that supplied arms to Ukraine could be accused of having breached this obligation or to have been complicit in any potential IHL violation committed by Ukraine, contrary to what has been argued by Russia.[100] Indeed, this would imply that the assisting states at least knew that their assistance was used to commit an internationally wrongful act and that they had actually facilitated the commission of that wrongful act. While it is arguable that Western states were well aware of a risk that the transferred weapons could be used to commit serious IHL violations, there is no indication (yet) that these weapons were indeed used to commit such violations and even less that these assisting states were aware of this.

The second obligation derives from the obligation to ensure respect for IHL and represents a general positive duty for states to take all feasible measures to stop or even prevent IHL violations by the parties to an armed conflict.[101] This is an obligation of conduct, the respect of which must be assessed according to the circumstances at the time, including the ability of states to exert influence on the parties to the conflict. It has been emphasised in this respect that states supplying arms to a party to an armed conflict are in a well-suited position for

overriding risk' that the exported arms will be used to 'commit or facilitate the commission of a serious [IHL] violation'. The term 'overriding' rather than 'clear' or 'substantial' was chosen to avoid establishing an absolute threshold and to allow states to balance the risk of such IHL violations against other interests, including the need to assist a state resisting an armed attack on the basis of its right to self-defence (see, in this regard, S Casey-Maslen, 'Article 7. Export and Export

[96] Principle five.

[97] See J-M Henckaert and L Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules* (ICRC, CUP 2005), at 509. It is also contained in Article 1 (1) of the 1977 First Additional Protocol to the four 1949 Geneva Conventions.

[98] UN Doc A/56/10 (n 40), at 65, ss 3 and 5.

[99] See eg the Update ICRC Commentary to art 1 of the 1949 Geneva Convention III, <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-1/commentary/2020?activeTab=undefined#_Toc42428174> accessed 21 April 2023, ss 192–93.

[100] See eg UN Doc S/PV.9104, (29 July 2022), at 16.

[101] ICRC (n 99), s 197.

inducing that party to respect IHL.[102] The existence of that obligation nonetheless remains controversial.[103] Whatever the uncertainties about it, one must note that many states that have supplied Ukraine with arms, in particular EU states, have sought to induce Ukraine to comply with IHL, in particular by making their arms supply conditional on compliance with IHL. However, it cannot be ruled out, as stressed above, that the European states should request a more proactive attitude from Ukraine in this respect.

Finally, according to the International Committee of the Red Cross (ICRC), the obligation to ensure respect for IHL also implies a particular negative obligation, specific to arms transfers. According to the ICRC, this is the obligation incumbent on states to 'refrain from transferring [weapons] … [if] there is a substantial or clear risk that … the recipient is likely to use the weapons to commit IHL violations'.[104] In fact, very early in the discussion on 'the challenges raised by the spread of small arms',[105] IHL experts expressed concern about regulating arms transfers on the basis of Common Article 1 to the four Geneva Conventions (1949). Indeed, this provision was cited and emphasised when efforts were made to adopt the ATT, which explains why it is mentioned among the principles of that treaty. In the ICRC's view, Common Article 1 nonetheless retains an autonomous scope[106] that may complement the regulation provided by the ATT. Common Article 1 indeed has a broader personal and material scope: it is binding upon any state, as a customary rule, and therefore binds states not party to the ATT, like the USA; and it applies whenever there is a substantial risk of any IHL violation and not merely of certain war crimes. Moreover, unlike Article 6 of the ATT, Common Article 1 to the four Geneva Conventions (1949) constitutes an IHL rule as such. Any potential non-compliance with Common Article 1 could never be justified on the basis of *jus ad bellum* considerations, including through (collective) countermeasures (as detailed above), since such a justification would directly conflict with the entrenched principle of separation between *jus ad bellum* and *jus in bello*.

5. Conclusion

The mere law-like discourse used by Western states to justify their military assistance to Ukraine is that such assistance is intended to help Ukraine exercise its right of self-defence in response to the blatant armed attack committed by

[102] ICRC, *Understanding the Arms Trade Treaty from a Humanitarian Perspective* (ICRC, 2017), at 13.

[103] See eg C Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 *European Journal of International Law* 1, at 126–57.

[104] ICRC (n 102), at 12.

[105] See K Dörmann and J Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2014) 895/896 *International Review of the Red Cross* 96, at 732–35.

[106] ibid, at 733.

Russia. It is hard to qualify this unelaborated discourse as falling under any specific legal justification under international law. It is even questionable whether any such justification is needed. When not amounting to a use of force, military assistance does not logically need to be justified in relation to *jus ad bellum* and no argument, such as collective self-defence, is therefore required. Regarding the issue of neutrality, the controversial position claiming that the contemporary *jus ad bellum* regime and the UN Charter have superseded the law of neutrality would render meaningless any justification of a prior breach of that law. Finally, regarding adherence with regulations on arms transfers, no particular justification is required if it is established that no clear or substantial risk exists that the delivered weapons could be used to commit serious IHL violations and that adequate measures have been taken to prevent the diversion of those weapons.

Yet, this is an oversimplified picture. Legal justifications might be needed and some of those justifications, mainly in relation to arms transfer, seem disputable. Firstly, it is not excluded that certain acts of assistance by Western states directly helped Ukraine to conduct a specific military operation against Russia and then arguably amounted to a use of force between that state and the assisting Western states. Then, the discourse used by those states seems sufficiently flexible to be interpreted as an argument based on collective self-defence in order to validly justify those uses of force against Russia. Secondly, debates remain about the extent to which the contemporary international legal order has impacted the law of neutrality and there is a strong argument that Russia still benefits from the right not to be treated with discrimination by the neutral Western states under that law. Then, legal justifications are also available to those states in that respect. The first justification, which clearly fits the discourse of these states, is the doctrine of 'qualified neutrality'. Moreover, although it may be objected that this doctrine has not reached the status of a customary norm yet, even in light of the current practice of the Western states combined with similar past practice, those states may rely on another and more robust justification, namely (collective) countermeasures. Thirdly, it is unclear whether regulations on arms transfers have been breached, mainly because there might have been a clear or substantial risk that the supplied weapons could be used to commit serious IHL violations but were, effectively, ignored by assisting states. Yet, any of such breach could not arguably be justified by the discourse of assisting states, at least at the global level, since such discourse involves *jus ad bellum* considerations.