

## Editorial comment

### The provision of weapons and logistical support to Ukraine and the *jus ad bellum*

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#### ABSTRACT

This editorial considers the support currently being supplied to Ukraine following Russia's ongoing full-scale invasion, which began in February 2022. Western states have provided significant aid to Ukraine in the form, *inter alia*, of modern weapons and training. This editorial asks whether that support is *in itself* a use of force in *prima facie* violation of Article 2(4) of the UN Charter and customary international law. A related question that is also considered is whether NATO member states (and others) are currently exercising the right of collective self-defence in relation to their support for Ukraine.

#### KEYWORDS

use of force; collective self-defence; Ukraine; Russia; NATO; weapons

## 1. Introduction

This editorial considers the support currently being provided by western states to Ukraine following Russia's ongoing full-scale invasion, which began in February 2022.<sup>1</sup> NATO members, the EU and other states have afforded significant aid to Ukraine in the form, *inter alia*, of the supply of modern weapons and training.<sup>2</sup> That support, too, is ongoing at the time of writing.<sup>3</sup> It is also worth noting that there have been recent suggestions that China may soon

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\* All websites accessed 29 March 2023.

<sup>1</sup> 'Russia invades Ukraine', *The Economist* (24 February 2022) [www.economist.com/europe/2022/02/24/russia-invades-ukraine](http://www.economist.com/europe/2022/02/24/russia-invades-ukraine).

<sup>2</sup> See Claire Mills, 'Military Assistance to Ukraine Since the Russian Invasion' *House of Commons Library*, Research Briefing (17 October 2022).

<sup>3</sup> See David Brown, Jake Horton and Tural Ahmedzade, 'Ukraine weapons: What tanks and other equipment are the world giving?', *BBC News* (18 February 2023) [www.bbc.co.uk/news/world-europe-62002218](http://www.bbc.co.uk/news/world-europe-62002218); James Gregory, 'EU gives Ukraine €2bn of ammunition after shell plea', *BBC News* (21 March 2023) [www.bbc.co.uk/news/world-europe-65018434](http://www.bbc.co.uk/news/world-europe-65018434).

begin to provide some similar forms of ‘lethal support’ to aid Russia’s war effort,<sup>4</sup> although as of March 2023 that remains extremely speculative.

To date western states have, of course, stopped short of imposing a no-fly zone over Ukrainian territory and have stopped *well* short of NATO boots on the ground. The risks of escalation inherent in NATO *et al* taking such steps are vast,<sup>5</sup> but should it ever do so, those actions would constitute use of forces in *prima facie* breach of Article 2(4) of the UN Charter and customary international law.<sup>6</sup> As such, more ‘robust’ NATO support for Ukraine of this sort would need to be justified as collective self-defence.<sup>7</sup>

The focus of this editorial, however, is whether the current support for Ukraine in the form of weapons and logistical support is *in itself* an *ad bellum* use of force, and the related question of whether NATO member states (and others) thus are *already* exercising the right of collective self-defence, whether they acknowledge this or not.

## 2. Engaging with some recent scholarship

Some scholars have already reached the conclusion that western aid to Ukraine – in its current form – qualifies as a use of force, albeit a legally justified one.<sup>8</sup> In their recent *Journal of International Humanitarian Legal Studies* article, for example, Kevin Jon Heller and Lena Trabucco assertively conclude that ‘[p]roviding weapons to Ukraine constitutes the use of force against Russia’,<sup>9</sup> and do so based on just one paragraph of analysis.<sup>10</sup> They then go on to argue that it is, however, a justified use of force amounting to an exercise of collective self-defence.<sup>11</sup>

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<sup>4</sup> See ‘Ukraine war: What support is China giving Russia?’, *BBC News* (21 February 2023) [www.bbc.co.uk/news/60571253](http://www.bbc.co.uk/news/60571253).

<sup>5</sup> See Patrick M Butchard and Jasmin J Nessa (eds), ‘Digest of State Practice: 1 January – 30 June 2022’ (2022) 9 *Journal on the Use of Force and International Law* 423, 446.

<sup>6</sup> See Mark Nevitt, ‘The Operational and Legal Risks of a No-Fly Zone Over Ukrainian Skies’, *Just Security* (10 March 2022) [www.justsecurity.org/80641/the-operational-and-legal-risks-of-a-no-fly-zone-over-ukrainian-skies](http://www.justsecurity.org/80641/the-operational-and-legal-risks-of-a-no-fly-zone-over-ukrainian-skies); Michael N Schmitt, ‘Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force’, *Articles of War* (7 March 2022) <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force>.

<sup>7</sup> See Pavel 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>.

<sup>8</sup> See, e.g. Agnieszka Szpak *et al*, ‘Reaction to the Russian Aggression against Ukraine: Cities as International Standards’ Supporters’ (2022) *Journal of Contemporary European Studies*, advance access version, [www.tandfonline.com/doi/full/10.1080/14782804.2022.2126445](http://www.tandfonline.com/doi/full/10.1080/14782804.2022.2126445), 2; Tomas Hamilton, ‘Defending Ukraine with EU Weapons: Arms Control Law in Times of Crisis’ (2022) 1 *European Law Open* 635, 637, 641–4, 654; Kevin Jon Heller and Lena Trabucco, ‘The Legality of Weapons Transfers to Ukraine Under International Law’ (2022) 13 *Journal of International Humanitarian Legal Studies* 251, 254–5.

<sup>9</sup> *Ibid.*, 254.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, 254–5.

I am certainly with Heller and Trabucco (and others making similar points elsewhere)<sup>12</sup> when it comes to the second conclusion here. If western support for Ukraine is *prima facie* an unlawful use of force, then it is one that can be justified as collective self-defence. The legal requirements for the collective self-defence would seem to be pretty clearly present in relation to the current situation in Ukraine. There is little question that Russia's full-scale invasion is an unlawful use of force<sup>13</sup> rising to the level of an armed attack.<sup>14</sup> The current provision of support would be hard to see as anything other than a necessary and proportionate response to that attack (if anything, it might be said to fall short of what is necessary to defend Ukraine and to be insufficient in proportion to that defensive need).<sup>15</sup> The exercise of collective self-defence also requires that the 'victim' state *requests* aid,<sup>16</sup> of course, but Ukraine undoubtedly has done that too, repeatedly.<sup>17</sup> Indeed, the only absentee from the 'checklist' of legal criteria for collective self-defence would seem to be the failure of the states supporting Ukraine to report their actions to the UN Security Council,<sup>18</sup> which is not generally considered to be an obligation that is decisive as to the lawfulness of a self-defence action.<sup>19</sup> Overall, there seems little question that current support for Ukraine could qualify as collective self-defence, at least when measured against the legal criteria for the exercise of that right.

What I am far less sure of – less sure than Heller and Trabucco, anyway – is whether the provision of weapons and logistical support to Ukraine is a use of force in the first place. Other scholars have shared my uncertainty.<sup>20</sup> Writing in *Articles of War*, Michael Schmitt, for

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<sup>12</sup> See sources cited at n.8.

<sup>13</sup> See UNGA Res ES-11/1, UN Doc A/RES/ES-11/1 (2 March 2022); James A Green, Christian Henderson and Tom Ruys, 'Russia's Attack on Ukraine and the *Jus ad Bellum*' (2022) 9 *Journal on the Use of Force and International Law* 4.

<sup>14</sup> Heller and Trabucco (n 8) 254, 273.

<sup>15</sup> Doubek (n 7).

<sup>16</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Rep 14, paras 165-166, 195, 199, 231; James A Green, 'The "Additional" Criteria for Collective Self-Defence: Request but not Declaration' (2017) 4 *Journal on the Use of Force and International Law* 4.

<sup>17</sup> See, e.g. 'Ukraine's Zelenskiy urges West to consider no-fly zone for Russian aircraft', *Reuters* (28 February 2022) [www.reuters.com/world/europe/ukraines-zelenskiy-says-it-is-time-consider-no-fly-zone-russian-aircraft-2022-02-28](http://www.reuters.com/world/europe/ukraines-zelenskiy-says-it-is-time-consider-no-fly-zone-russian-aircraft-2022-02-28); 'Zelenskiy attacks Nato "weakness" for refusing no-fly zone over Ukraine – video', *The Guardian* (5 March 2022) [www.theguardian.com/world/video/2022/mar/05/zelenskiy-attacks-nato-weakness-for-refusing-no-fly-zone-over-ukraine-video](http://www.theguardian.com/world/video/2022/mar/05/zelenskiy-attacks-nato-weakness-for-refusing-no-fly-zone-over-ukraine-video).

<sup>18</sup> For further discussion, see n 60 – n 62 and accompanying text. On the reporting requirement for self-defence in general, see Nick van der Steenhoven, 'Conduct and Subsequent Practice by States in the Application of the Requirement to Report under UN Charter Article 51 (2019) 6 *Journal on the Use of Force and International Law* 242; James A Green, 'The Article 51 Reporting Requirement for Self-Defense Actions' (2015) 55 *Virginia Journal of International Law* 463.

<sup>19</sup> See *ibid.*, 592–6; D W Greig, 'Self-Defence and the Security Council: What Does Article 51 Require?' (1991) 40 *International and Comparative Law Quarterly* 366, 387–8.

<sup>20</sup> See, e.g. Claus Kieß, 'The Ukraine War and the Prohibition of the Use of Force in International Law' (2022) *Torkel Opsahl Academic EPublisher, Occasional Paper Series* No. 13, 1, 12–9; Doubek (n 7); Schmitt (n 6).

example – while seemingly leaning somewhat towards the Heller/Trabucco view (on this point, anyway) – is more circumspect when he notes that the provision of weapons and logistical support ‘could qualify as a use of force [and] ... [t]hat *might* be the case’ in relation to Ukraine.<sup>21</sup>

This question of whether the provision of weapons and logistical support to Ukraine is a use of force will be returned to, but first it is worth noting that if it is *not*, then common wisdom would dictate that such support also is not an action of collective self-defence either. The general view has long been that any measure taken in self-defence (individual or collective) will, of itself, necessarily amount to a use of force, albeit a legally excused one. It is usually said that self-defence ‘almost by its very nature involves the use of armed force’,<sup>22</sup> meaning that it is fundamentally characterised by the fact that it is ‘an exception to the prohibition against the use of force in international relations...’<sup>23</sup> The paradigm as near-ubiquitously conceived is ‘self-defence = force in response to force’. This means that if the current support for Ukraine is not a ‘use of force’ then it need not be (indeed, *cannot* be) justified as collective self-defence after all.

However, this common ‘self-defence = force in response to force’ conception has been challenged significantly in an article that was just published by Russell Buchan in the *International and Comparative Law Quarterly*.<sup>24</sup> Buchan therein argues that self-defence can be exercised by *non-forcible* means. If he is correct in that regard, one could perhaps conclude that even if the provision of weapons and logistical support to Ukraine is not a use of force it could still nonetheless amount to an exercise of collective self-defence.

Buchan’s challenge to the ‘self-defence = force in response to force’ conception will be seen as quite radical by some, but personally, I have a lot of sympathy for it. Indeed, Francis Grimal and I argued over a decade ago that self-defence can be exercised by way of an (otherwise unlawful) *threat* of force, not just by the use of force, eschewing the usual ‘self-defence = force in response to force’ view, at least to an extent.<sup>25</sup>

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<sup>21</sup> *Ibid* (emphasis in original).

<sup>22</sup> Report of the International Law Commission, 32nd sess, UN Doc A/35/10 (1980).

<sup>23</sup> Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission, 53rd sess, UN Doc A/56/10 (2001) 74 (commentary to Article 21). Having said this, see *ibid* (‘[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’).

<sup>24</sup> Russell Buchan, ‘Non-Forcible Measures and the Law of Self-Defence’ (2023) 72 *International and Comparative Law Quarterly* 1.

<sup>25</sup> James A Green and Francis Grimal, ‘The Threat of Force as an Action in Self-Defense under International Law’ (2011) 44 *Vanderbilt Journal of Transnational Law* 285.

However, Buchan effectively – and not unreasonably, given both appear in the same breath in Article 2(4) – considers ‘threat’ and ‘use’ as one and the same thing in this context.<sup>26</sup> He goes further than we did, and advances a case for other non-forcible acts qualifying as self-defence beyond just threats of force, such as (otherwise unlawful) ‘[e]conomic sanctions, security barriers and cyber operations’.<sup>27</sup> That case is multi-faceted and unpicking it goes well beyond the scope of the present discussion, but it can be said that, for me, some of Buchan’s arguments chime louder than others. For example, his claim that, historically, self-defence was not restricted only to forcible action<sup>28</sup> is surely correct, as is his view that it is difficult to see the text of Article 51 of the UN Charter as ruling out non-forcible measures of self-defence.<sup>29</sup> Less convincing for me are the examples Buchan draws on from state practice to support his thesis,<sup>30</sup> which seem thin.

In any event, without necessarily wishing to promote other journals in an editorial written for this one, I would urge our readers to engage with Buchan’s article. He makes a strong – if perhaps not watertight – case, and at the very least we would be wise to follow his lead and continue to probe at the conventional view of self-defence as a purely ‘forcible’ endeavour.

Buchan’s work on this issue is important and super-current, and so required some brief discussion here. Yet wherever one lands on his arguments, ultimately, they may be something of a diversion for the matter in hand, because it is not necessarily evident that they are directly engaged by the support currently being provided to Ukraine. This is because self-defence must be acting to justify otherwise unlawful conduct of some sort, even if one might debate whether or not that conduct has to involve the use of force. If the supply of weapons *does* amount to a use of force, then the question Buchan raises is not relevant here; if the supply of weapons *does not* amount to a use of force, it is not entirely clear what internationally wrongful act collective self-defence would be acting to justify. The activity would appear simply to amount to the lawful supply of arms to another sovereign state in furtherance of its own exercise of individual self-defence.<sup>31</sup>

Admittedly, the provision of weapons and other support to Ukraine certainly raises questions regarding the law of neutrality, and there is ongoing debate as to whether obligations

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<sup>26</sup> Buchan (n 24) 2 (presenting the usual conception as being that self-defence ‘can be engaged only when States threaten or use *force* to resist an armed attack’, emphasis in original).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, 7–11.

<sup>29</sup> *Ibid.*, 11–2.

<sup>30</sup> *Ibid.*, 13–21.

<sup>31</sup> Kreß (n 20) 15.

of impartiality are being breached that go beyond the scope of this editorial.<sup>32</sup> But if they *are* being breached, it would seem a poor fit to argue that collective self-defence could act to justify that breach given the appropriate and (usually accepted) distinction between questions of neutrality and questions of *ad bellum*.<sup>33</sup> Similarly, if the weapons being supplied to Ukraine were used unlawfully – say, to perpetrate war crimes – the supplying state also may be legally responsible, at least if it did so with knowledge of that potential unlawful use.<sup>34</sup> Even if one concurs with Buchan that self-defence is not limited only to uses of force, though, it would again seem a stretch to argue that collective self-defence could legally justify complicity in war crimes, as opposed to, say, the kinds of economic sanctions taken in ‘self-defence’ that he envisages. Ultimately, then, the key question in relation to the current support for Ukraine remains ‘is it a use of force’?

### 3. What is ‘force’?

Asking whether the provision of weapons and logistical support to Ukraine amounts to a *prima facie* unlawful use of force necessarily engages the wider question of what constitutes a ‘use of force’ under the *jus ad bellum*. That question has been repeatedly explored throughout the UN era,<sup>35</sup> and that analysis has involved engaging with a number of sub-questions. One might recall, for example, debates – especially early in the UN era – over whether ‘economic force’ or ‘political force’ amounted to a violation of the prohibition of ‘force’,<sup>36</sup> the more recent equivalent question of whether ‘cyber force’ counts,<sup>37</sup> or the entrenched debate over whether

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<sup>32</sup> Enzo Cannizzaro and Aurora Rasi, ‘Europe at War’ (2022), (2021) 6 *European Papers* 1523, 1523–4; Schmitt (n 6); Kreß (n 20) 16–9; Heller and Trabucco (n 8) 255–63.

<sup>33</sup> *Ibid.*, 262.

<sup>34</sup> See *ibid.*, 269–71. See generally UN Doc A/56/10 (n 23) 65–7 (Article 16 and commentary); Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing, 2016) particularly 92–161; Miles Jackson, *Complicity in International Law* (Oxford University Press, 2015) 136–47 (regarding, specifically, complicity in relation to an act of aggression).

<sup>35</sup> For discussion, see, e.g. ILA, Use of Force Committee (2010-2018), Final Report on Aggression and the Use of Force, Sydney Conference (2018) <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=11391&StorageFileGuid=6a499340-074d-4d4b-851b-7a56871175d6>, 4–5; Christian Henderson, *The Use of Force and International Law* (Cambridge University Press, 2018) 50–81; Andrzej Jacewicz, ‘The Concept of Force in the United Nations Charter’ (1977–1978) 9 *Polish Yearbook of International Law* 137.

<sup>36</sup> See, e.g. James A Delanis, ‘“Force” under Article 2(4) of the United Nations Charter: The Question of Economic and Political Coercion’ (1979) 12 *Vanderbilt Journal of Transnational Law* 101; Tom J Farer, ‘Political and Economic Coercion in Contemporary International Law’ (1985) 79 *American Journal of International Law* 40.

<sup>37</sup> See, e.g. Michael N Schmitt, ‘Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework’ (1999) 37 *Columbia Journal of Transnational Law* 885; James A Green, ‘The Regulation of Cyber Warfare under the *Jus ad Bellum*’, in James A Green (ed), *Cyber Warfare: A Multidisciplinary Analysis* (Routledge, 2015), 96, 98–107.

there is, in general, a *de minimis* threshold for acts to qualify as ‘force’.<sup>38</sup> It is perhaps unsurprising that the meaning of ‘force’ in the *jus ad bellum* has been referred to as ‘the subject of controversy par excellence in international law’.<sup>39</sup> This editorial is definitely not the place to engage with the meaning of ‘force’ in international law in general.

The related but more specific question at issue with regard to Ukraine is whether *minoris generis* assistance to support another state’s own use of force is, itself, a use of force. That question is a difficult one. As Claus Kreß phrases it, what is

the point at which support for the use of force by another State amounts to a use of force by the supporting State. For as soon as a State uses force, it must be able to rely on an exception to the prohibition of the use of force. If, however, a State merely assists another State in that latter’s use of force, this assistance is lawful without a need to rely on an exception, provided that the supported use of force itself is lawful. *The delineation in question is not crystal clear.*<sup>40</sup>

Heller and Trabucco reach the conclusion that assisting another state’s use of force in this way is itself a use of force by reference to the 1986 *Nicaragua* decision of the International Court of Justice (ICJ).<sup>41</sup> That decision certainly does support their position: the ICJ was of the view that, while such activity did not constitute an ‘armed attack’ sufficient to trigger the right of self-defence, ‘assistance to rebels in the form of the provision of weapons or logistical or other support ... may be regarded as a threat or use of force’.<sup>42</sup>

As a result, the Court concluded that ‘the arming and training of the *contras* [by the US] can certainly be said to involve the threat or use of force against Nicaragua.’<sup>43</sup> It then went on to consider whether ‘the acts in question of the United States are justified by the exercise of

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<sup>38</sup> See, e.g. Tom Ruys, ‘The Meaning of Force and the Boundaries of the *Jus ad Bellum*: Are Minimal Uses of Force Excluded from UN Charter Article 2(4)’ (2014) 108 *American Journal of International Law* 159; Mary Ellen O’Connell, ‘The True Meaning of Force’ (2014) 108 *AJIL Unbound* 141; Tom Ruys, ‘The True Meaning of Force: A Reply to Mary Ellen O’Connell’ (2014) 108 *AJIL Unbound* 148; Mary Ellen O’Connell, ‘The True Meaning of Force: A Further Response to Tom Ruys in the Interest of Peace’ (2014) 108 *AJIL Unbound* 153; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2nd edn 2021) 62–90.

<sup>39</sup> Pål Wrange, ‘Law, Force and Contingency – Notes on a Bold Monograph on Article 2(4) and the Problems of Finding a Proper Basis for International Legal Reasoning’ (1992-1993) 61 *Nordic Journal of International Law* 83, 83.

<sup>40</sup> Kreß (n 20) 15 (emphasis added).

<sup>41</sup> Heller and Trabucco (n 8) 254.

<sup>42</sup> *Nicaragua* (merits) (n 16) para 195.

<sup>43</sup> *Ibid*, para 228.

its right of collective self-defence...'<sup>44</sup> Although the Court concluded that such actions by the US could not be justified in this way, this was on the basis that Nicaragua had not perpetrated an armed attack triggering the exercise of the right of self-defence.<sup>45</sup> The clear implication of this was that the Court was of the view that if the other legal criteria *had* been met, the arming and training of the *contras* by the US would have (or at least could have) been justified as an action of collective self-defence.

The ICJ's conclusion that the provision of weapons or logistical support can qualify as a use of force has not generally been controversial in the literature.<sup>46</sup> As with any view expressed by the Court, though, this reading of the law is not necessarily conclusive.<sup>47</sup> Indeed, it might be noted that elsewhere in the *Nicaragua* judgment,<sup>48</sup> the ICJ held that the *funding* of an insurgent group (as opposed to arming or training them) did *not* constitute a use of force.<sup>49</sup> For me, drawing such a distinction between giving weapons to a group and giving them the money to buy weapons feels like splitting hairs, and there is no clear basis for it in practice.<sup>50</sup>

Some scholars have argued, *contra* the Court, that not only funding but the provision of weapons and other material assistance falls below the level of a use of force.<sup>51</sup> Indeed, I have previously expressed scepticism of this aspect of the *Nicaragua* decision myself, stating, in the same article co-authored with Francis Grimal previously mentioned, that

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<sup>44</sup> *Ibid*, para 229 (emphasis added).

<sup>45</sup> *Ibid*, paras 229-238.

<sup>46</sup> See, e.g. Louis B Sohn, 'How New is the New International Legal Order' (1992) 20 *Denver Journal of International Law and Policy* 205, 210; Terry D Gill, 'The Second Gulf Crisis and the Relation between Collective Security and Collective Self-Defense' (1989) 10 *Grotiana* 47, 65; Eustace Chikere Azubuike, 'Probing the Scope of Self-Defense in International Law' (2011) 17 *Annual Survey of International and Comparative Law* 129, 178; Abdul Ghafur Hamid and Khin Maung Sein, 'Combating Terrorism and the Use of Force against a State: A Relook at the Contemporary World Order' (2015) 8 *Journal of East Asia and International Law* 107, 111. Indeed, to the extent that there has been critique of this aspect of the decision, it has largely been focused on the idea that the provision of weapons and logistical support should *not only* have been viewed as a use of force by the ICJ, but *also* as an armed attack. See, e.g. *Nicaragua* (merits) (n 16) dissenting opinion of Judge Schwebel, para 171; Nicholas Rostow, '*Nicaragua* and the Law of Self-Defense Revisited' (1986) 11 *Yale Journal of International Law* 437, 453; John Norton Moore, 'The Secret War in Central America and the Future of World Order' (1986) 80 *American Journal of International Law* 43, 89.

<sup>47</sup> See Statute of the International Court of Justice (1945) 33 UNTS 93, Article 59 ('[t]he decision of the Court has no binding force except between the parties and in respect of that particular case'); James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009) 24-5; Schmitt (n 6).

<sup>48</sup> *Nicaragua* (merits) (n 16) paras 228, 242.

<sup>49</sup> See discussion in Green (n 47) 36-7.

<sup>50</sup> See Henderson (n 35) 61.

<sup>51</sup> See, e.g. Paul S Reichler and David Wippman, 'United States Armed Intervention in *Nicaragua*: A Rejoinder' (1986) 11 *Yale Journal of International Law* 462, 470-1; Domingo E. Acevedo, 'Collective Self-Defense and the Use of Regional or Subregional Authority as Justification for the Use of Force' (1984) 78 *American Society of International Law Proceedings* 69, 71; Green and Grimal (n 25) 293.



[i]t is unlikely that either the provision of weapons or other forms of logistical support involve the actual use of force. For example, if state A supplies machine guns to a paramilitary organization for use against state B, there has been no use of force by state A against state B, even indirectly.<sup>52</sup>

Others have pointed out that the Court's pronouncement in *Nicaragua* concerning weapons and logistical support relates specifically to the provision of such support to a non-state actor, in the context of a non-international armed conflict.<sup>53</sup> This is perhaps not a material difference in terms of the logic of the ICJ's analysis,<sup>54</sup> but it may indicate that the Court's 'position on arming and training is not definitively settled'<sup>55</sup> in the context of the provision of arms to another state. In this regard one also might note that while the 1970 Friendly Relations Declaration makes it very clear that support for non-state actors can constitute an indirect 'use of force',<sup>56</sup> there is no equivalent provision (therein, or elsewhere) in relation to assistance provided to another state.<sup>57</sup>

Equally, the state practice in this regard is far from clear, and in my view it neither conclusively establishes that *minoris generis* assistance to another state is or is not a *prima facie* use of force. For example, in 2008, the European Union, in the abstract, concluded 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.'<sup>58</sup> It is equally possible to read this as referring to the idea that the provider of the equipment merely is facilitating the attacked state's right of individual self-defence, or as a reference to the transfer of arms as an exercise, in itself, of collective self-defence.<sup>59</sup>

#### **4. The views of the states in relation to the support being provided to Ukraine**

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<sup>52</sup> *Ibid.*

<sup>53</sup> See, e.g. Kreß (n 20) 16; Schmitt (n 6).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV), UN Doc A/RES/2625 (24 October 1970) annex.

<sup>57</sup> Kreß (n 20) 16, footnote 73.

<sup>58</sup> Council of the European Union, 'Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment', *Official Journal of the European Union* (13 December 2008) recital 12.

<sup>59</sup> See, e.g. Hamilton (n 8) 642; Heller and Trabucco (n 8) 254, footnote 14. Of course, even if one takes the latter interpretation, whether this further implies the view on the part of the EU that such action is a use of force depends on whether or not one accepts Buchan's arguments, as touched on in section 2.

Returning to the specific situation of the current support provided to Ukraine by NATO members *et al*, it has already been noted that the only absentee from the checklist of lawful requirements for the exercise of collective self-defence is that the states providing support have failed to report this to the Security Council.<sup>60</sup> This in itself is not determinative as to the legal character of their actions, again, not least because it is widely accepted that a failure to report does not act to transform an otherwise lawful action of self-defence into an unlawful one.<sup>61</sup> Nonetheless, the fact that the western states involved have not reported their acts as instances of collective self-defence is arguably an indication that they do not consider themselves to be acting in collective self-defence in the first place.<sup>62</sup> Again, this further would imply that they do not consider themselves to be using unlawful force (subject, of course, to whether one accepts Buchan's diversion from the orthodox conception of self-defence).

Instead, the actions of the western states have been self-defined as support for Ukraine's right of individual self-defence. NATO has indicated that its members are 'helping [Ukraine] to uphold its fundamental right to self-defence',<sup>63</sup> rather than itself invoking collective self-defence. Individual member states have made the same point, with US President Joe Biden saying that the alliance has been 'delivering critical military capabilities to Ukraine so it can defend itself',<sup>64</sup> while German Foreign Minister Annalena Baerbock stated that 'sei die Lieferung schwerer Waffen kein Kriegseintritt, weil damit das in der UN-Charta verbrieftete Recht der Ukraine auf Selbstverteidigung unterstützt werde'.<sup>65</sup> Indeed, the German government has explicitly asserted that neither Germany nor its partners are acting in collective self-defence:

Die Bundesrepublik Deutschland und ihre Partner unterstützen die Ukraine durch die Lieferung von Waffen bei der Ausübung ihres individuellen Selbstverteidigungsrechts gegen den völkerrechtswidrigen Angriffskrieg Russlands. Diese

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<sup>60</sup> See n 12 – n 19 and accompanying text.

<sup>61</sup> See Green (n 18) 592–6; Greig (n 19) 387–8.

<sup>62</sup> Kreß (n 20) 15–6 (making this point specifically with regard to Germany, but it applies to all of the states in question).

<sup>63</sup> 'NATO's response to Russia's invasion of Ukraine', *North Atlantic Treaty Organization*, statement (last updated 24 February 2023) [www.nato.int/cps/en/natohq/topics\\_192648.htm](http://www.nato.int/cps/en/natohq/topics_192648.htm).

<sup>64</sup> 'Statement from the President on Delivery of Air Defense Systems to Ukraine', *The White House*, Briefing Room, Statements and Releases (8 April 2022) [www.whitehouse.gov/briefing-room/statements-releases/2022/04/08/statement-from-the-president-on-delivery-of-air-defense-systems-to-ukraine](http://www.whitehouse.gov/briefing-room/statements-releases/2022/04/08/statement-from-the-president-on-delivery-of-air-defense-systems-to-ukraine).

<sup>65</sup> 'Baerbock zur Hilfe für Ukraine: Panzerlieferung war "kein Schnellschuss"', *Tagesschau* (27 April 2022) [www.tagesschau.de/inland/bundestag-baerbock-101.html](http://www.tagesschau.de/inland/bundestag-baerbock-101.html).

völkerrechtskonformen Unterstützungsmaßnahmen *überschreiten nicht die Schwelle zu einer kollektiven Ausübung des Selbstverteidigungsrechts*.<sup>66</sup>

Likewise, in debates in the UN Security Council, western support for Ukraine has generally been characterised as the furtherance of Ukraine's own right of individual self-defence, rather than as collective self-defence. For example, during the 8 September 2022 meeting, Ireland spoke of the lawfulness of the 'military support provided by the European Union *to help Ukraine exercise its inherent right of self-defence* and defend its territorial integrity and sovereignty.'<sup>67</sup> Also speaking at the Council in the same session, Mexico 'acknowledge[d] the natural right to legitimate self-defence [possessed by Ukraine] and [the right for it to] acquire arms to that end.'<sup>68</sup> A few weeks later, in another meeting of the Council, the US chose its words carefully even while explicitly invoking Article 51, in that it asserted that 'more than 40 nations have come together *to help the Ukrainian people defend themselves*, which is a right enshrined in Article 51 of the Charter.'<sup>69</sup>

This position on the part of (most) states is perhaps unsurprising, given the significant and inherent risks of any direct confrontation – actual or just perceived – between nuclear powers.<sup>70</sup> Belligerent status to a conflict and rules of *jus ad bellum* are differing legal considerations that do not necessarily overlap, and the common view in scholarship is that the provision of weapons is, itself, insufficient to establish co-belligerency under International Humanitarian Law.<sup>71</sup> Therefore, even if one takes the view that such actions do amount to uses of force this would still not mean that states supplying weapons to Ukraine have thereby become parties to the conflict.

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<sup>66</sup> *Deutscher Bundestag*, Drucksache 20/1918, Susanne Baumann (Secretary of State at the Federal Foreign Office) (18 May 2022) 39 (response to question 56) (emphasis added).

<sup>67</sup> UNSC Verbatim Record, UN Doc S/PV.9127 (8 September 2022) 16 (emphasis added).

<sup>68</sup> *Ibid.*, 11.

<sup>69</sup> UNSC Verbatim Record, UN Doc S/PV.9135 (22 September 2022) 10 (emphasis added).

<sup>70</sup> See, e.g. 'Press conference by NATO Secretary General Jens Stoltenberg previewing the extraordinary Summit of NATO Heads of State and Government', *North Atlantic Treaty Organization* (23 March 2022) [www.nato.int/cps/en/natohq/opinions\\_193610.htm](http://www.nato.int/cps/en/natohq/opinions_193610.htm) ('...we have a responsibility to ensure that the war does not escalate beyond Ukraine, and become a conflict between NATO and Russia. This would cause even more death and even more destruction'); Lauren Turner, 'Ukraine invasion: UK troops will not fight against Russia says Wallace', *BBC News* (25 February 2022) [www.bbc.co.uk/news/uk-60522745](http://www.bbc.co.uk/news/uk-60522745).

<sup>71</sup> Heller and Trabucco (n 8) 265; Alexander Wentker, 'At War: When Do States Supporting Ukraine or Russia Become Parties to the Conflict and What Would that Mean?', *EJIL:Talk!* (14 March 2022) [www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/](http://www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/); Schmitt (n 6). See also James Upcher, *Neutrality in Contemporary International Law* (Oxford University Press, 2020), 57–63 (albeit making this point in relation to indirect participation more generally and giving the example of logistical and financial support rather than the provisions of weapons specifically).

However, in practice – and, crucially, in terms of perception – if a state can be said to be *using force* (even if it is doing so lawfully in collective self-defence) this certainly would provide an opposing belligerent state a greater basis to advance a case that it had become a party to the conflict (meaning, not least, that it could be targeted).<sup>72</sup> Again, therefore, it is hardly a shock that NATO states have been keen to avoid, and in some instances have outright denied, any suggestion that they have been using ‘force’ and/or are acting in collective self-defence. Nonetheless, the legal conceptualisations by states of the support being provided to Ukraine should not be dismissed as legally immaterial simply because they are rooted in politics and strategy. That NATO *et al* do not consider that they are using force *matters* terms of our understanding of the legal reality, even if it is not wholly determinative of it.

It is worth noting that there have been some mixed messages in this regard, however. For example, returning to discussions in Security Council meetings during September 2022, while many states, as noted previously, were careful to situate the provision of weapons and logistical support as the furtherance of *Ukraine’s* right of individual self-defence, others used language that could be interpreted as referencing the exercise of collective self-defence by the states supporting it. Norway, for instance, stated that

Ukraine has a right to defend itself against Russia’s armed attack, as enshrined in Article 51 of the Charter of the United Nations. *Other States are entitled to respond positively to Ukraine’s call for assistance* in the exercise of its legitimate right to self-defence.<sup>73</sup>

A few weeks later, also in the Council, Norway further noted that it would ‘stand up for Ukraine’s right to defend itself against onslaught and aggression, just as we will defend *our right to support Ukraine* in its self-defence.’<sup>74</sup> Albania used similar language:

Article 51 of the Charter is clear. It provides an unquestionable legal basis for individual States to offer any assistance to a country exercising its inherent rights to self-defence and the defence of its sovereignty and territorial integrity.<sup>75</sup>

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<sup>72</sup> Jack Detsch and Robbie Gramer, ‘Biden administration debates legality of arming Ukrainian resistance’, *Foreign Policy* (24 February 2022) <https://foreignpolicy.com/2022/02/24/biden-legal-ukraine-russia-resistance>; Kreß (n 20) 14.

<sup>73</sup> UN Doc S/PV.9127 (n 67) 16–7 (emphasis added).

<sup>74</sup> UN Doc S/PV.9135 (n 69) 7–8 (emphasis added).

<sup>75</sup> UN Doc S/PV.9127 (n 67) 12.

These passages can certainly be read as amounting to the invocation of collective self-defence, truly so-called, but they also could be viewed as just other ways of phrasing the ‘in support of individual self-defence’ conceptualisation of the situation that NATO has very carefully advanced. It is perhaps telling that collective self-defence was not *explicitly* advanced by any of the states discussing the matter in the Security Council.

The European Parliament, however, *did* explicitly reference collective self-defence, when it adopted a report in June 2022 that asserted that

partners and allies should step up their military support to Ukraine and their provision of weapons, which is in line with Article 51 of the UN Charter that allows individual *and collective* self-defence.<sup>76</sup>

This could imply that the EU may already consider western support for Ukraine to be an exercise in collective self-defence after all. Once more, though, this is uncertain: the language used could simply have amounted to a rote reiteration of the wording of Article 51, noting the right of self-defence as it is presented therein, *in toto*. Moreover, it is worth recalling that matters of foreign and security policy are more appropriately the remit the Council of the EU rather than the European Parliament.<sup>77</sup>

Taking all this together, the states supporting Ukraine appear to have stopped short of suggesting that their provision of weapons and training can be seen as a use of force, and similarly have not claimed (or even have denied) that they are acting in collective self-defence. Having said that, it has to be acknowledged that some of the ‘messaging’ in this regard has been far from clear.

It also is important to note Russia’s position, which has been unsurprisingly very different to the stance taken by the NATO states *et al*, albeit that it could be said to be equally unclear. So far as I can tell, Russia has not used explicit *ad bellum* language in the sense of, say, arguing that western states are ‘using force in breach of Article 2(4)’ by supplying arms to Ukraine. Nor has Russia explicitly rejected the idea that support for Ukraine could justified as

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<sup>76</sup> European Parliament Resolution of 8 June 2022 on Security in the Eastern Partnership Area and the Role of the Common Security and Defence Policy (2021/2199(INI)), Texts adopted P9\_TA(2022)0236, [www.europarl.europa.eu/doceo/document/TA-9-2022-0236\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-9-2022-0236_EN.html), T (emphasis added).

<sup>77</sup> That said, see ‘Foreign policy: aims, instruments and achievements’, Fact Sheets on the European Union: European Parliament (2023), [www.europarl.europa.eu/factsheets/en/sheet/158/foreign-policy-aims-instruments-and-achievements](http://www.europarl.europa.eu/factsheets/en/sheet/158/foreign-policy-aims-instruments-and-achievements).

collective self-defence, as one might expect. Given that NATO states *et al* appear not to have advanced the justification of collective self-defence, though, that is perhaps not as surprising as it initially might appear: to denounce it would serve merely to raise (and thus highlight the potential applicability of) it.

However, where Russia has been explicit (on more than one occasion) is in asserting that it currently considers itself to be ‘at war’ not just with Ukraine but *with NATO*.<sup>78</sup> Irrespective of whether Russia has used *ad bellum* language in framing this conceptualisation, it would at least imply that it considers NATO to be using unlawful force against it.

## 5. Conclusion

Ultimately, I remain sceptical of the view expressed by the ICJ (and applied to the Ukraine situation by Heller and Trabucco, amongst others) that the mere provision of weapons or logistical support constitutes a use of force. I am not sure I am convinced by the associated conclusion that NATO states *et al* are currently exercising collective self-defence in relation to the war in Ukraine either. This is not least because there is little evidence that the states involved themselves perceive such action in these terms. The ICJ’s approach also leads to a need to make hair-thin distinctions between the *provision* of weapons and *funding* for weapons, which I have always struggled with. It potentially could risk unnecessary escalation, too, when considered as a matter of policy, because it at least may create the perception (if likely not the legal reality) that NATO states are party to the conflict.

That said, my view on the question of whether the provision of weapons/support is a use of force (in regard to Ukraine or generally) is certainly open to question. Even leaving aside the ICJ’s view and the general acceptance of it in scholarship, the state practice can hardly be said to be entirely clear in this regard. There is thus no question that the conclusion reached by Heller and Trabucco *et al* on this point can be defended: as Kreß put it mildly in the passage that I quoted previously, ‘[t]he delineation in question is not crystal clear.’<sup>79</sup> As such, I suppose my issue was not that Heller and Trabucco reached the conclusion that they did on this point, but that they did so with such certainty and brevity – given that for me it remains far from a straightforward matter. On balance, my own view is that the current provision weapons and

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<sup>78</sup> See, e.g. Zoe Strozewski, ‘Russia Is at War With NATO: Kremlin Official’, *Newsweek* (10 August 2022) [www.newsweek.com/russia-war-nato-kremlin-official-1732679](https://www.newsweek.com/russia-war-nato-kremlin-official-1732679); Guy Faulconbridge, ‘Russia is now fighting NATO in Ukraine, top Putin ally says’, *Reuters* (10 January 2023) [www.reuters.com/world/europe/putin-ally-patrushev-says-russia-is-now-fighting-nato-ukraine-2023-01-10](https://www.reuters.com/world/europe/putin-ally-patrushev-says-russia-is-now-fighting-nato-ukraine-2023-01-10).

<sup>79</sup> Kreß (n 20) 15.

logistical support to Ukraine does not amount to an *ad bellum* use of force, and thus that action need not be (and, arguably, *cannot* be) an instance of collective self-defence either.

### **Acknowledgements**

This editorial includes some material that was developed while I was funded by a British Academy Mid-Career Fellowship [MF21\210131] to undertake a project entitled ‘Collective Self-Defence in International Law’. I gratefully acknowledge that funding from the British Academy. Thanks go to my fellow editor-in-chief, Tom Ruys, for the helpful comments that he provided on an initial draft of this editorial.