

The Legality of Weapons Transfers to Ukraine Under International Law

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Abstract

This article analyses the legality of Western states providing weapons to Ukraine. It focuses on five areas of international law: (1) the *jus ad bellum*; (2) the law of neutrality; (3) international humanitarian law; (4) state responsibility for complicity in internationally wrongful acts; and (5) international criminal law. It concludes that weapons transfers likely violate the law of neutrality, entitling Russia to respond with countermeasures; that Russia can lawfully target transferred weapons under IHL; and that weapons transfers could lead to state and individual responsibility if evidence comes to light that the Ukrainian military is using weapons previously supplied by the West to commit war crimes. By contrast, providing weapons to Ukraine does not violate the *jus ad bellum* because they are in service of Ukraine's right of self-defence against Russia and does not make the supplying states co-belligerents in Russia's international armed conflict with Ukraine.

Keywords

jus ad bellum – self-defence – law of neutrality – international humanitarian law – international criminal law – weapons transfers – co-belligerency – state responsibility

1 Introduction

Western states have taken unprecedented steps to help Ukraine defend itself against Russia's invasion. Since the invasion began in February 2022, the United States alone (US) has provided \$3.3 billion in security assistance to Ukraine.¹ These assistance packages include training and equipment, advisory efforts to enhance Ukrainian defensive capabilities, and support for cyber defence and strategic communication to counter Russian disinformation campaigns. The Biden administration has also supplied Ukraine with advanced defensive equipment, including Stinger anti-aircraft systems, anti-armor systems, and over 800 drones – including roughly 200 new drones, called 'Phoenix Ghost', which are designed for the terrain in eastern Ukraine and feature enhanced targetability.²

In a departure from recent practice, the European Union (EU) agreed in early 2022 to spend €450 million 'to provide arms – lethal arms, lethal assistance – to the Ukrainian army'.³ The EU's High Representative of the Union for Foreign Affairs and Security Policy has described the expenditure as ending '[t]he taboo that the EU was not providing arms in a war'.⁴ The EU then later doubled that amount.⁵ Individually, more than a dozen European states have supplied or agreed to supply weapons to Ukraine⁶ – a group that notably includes Germany, whose longstanding foreign-policy commitment to not

1 Since 2014, when Russian first invaded Ukraine, the United States has provided \$6.4 billion in security assistance to 'help Ukraine preserve its territorial integrity, secure its borders, and improve interoperability with NATO'. Congressional Research Service, *U.S. Security Assistance to Ukraine* (IF12040, 1, 29 April 2022) <<https://crsreports.congress.gov/product/pdf/IF/IF12040>>.

2 'Phoenix Ghost: What we know about the US's new drones for Ukraine' (*Al Jazeera*, 22 April 2022) <<https://www.aljazeera.com/news/2022/4/22/phoenix-ghost-what-we-know-about-us-new-drones-for-ukraine>>.

3 Council Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force [2022] <<https://eur-lex.europa.eu/eli/dec/2022/338/oj>>.

4 Maia de La Baume and Jacopo Barrigazi, 'EU agrees to give €500M in arms, aid to Ukrainian military in "watershed" move' (*Politico*, 27 February 2022) <<https://www.politico.eu/article/eu-ukraine-russia-funding-weapons-budget-military-aid/>>.

5 Council Decision (CFSP) 2022/471 amending decision 2022/338 [2022], <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022D0471&qid=1648472005088>>.

6 Belgium, Czech Republic, Denmark, Finland, France, the Netherlands, Norway, Portugal, Romania, Slovakia, Spain, and Sweden. See Tomas Hamilton, 'Articulating Arms Control Law in the EU's Lethal Military Assistance to Ukraine' (*Just Security*, 30 March 2022) <<https://www.justsecurity.org/80862/articulating-arms-control-law-in-the-eus-lethal-military-assistance-to-ukraine/>>.

exporting lethal weapons to conflict zones has not prevented it from sending Ukraine, as of July 2022, 1,000 anti-tank rocket launchers, 500 Stinger surface-to-air missiles, nine howitzers, and 14 armoured vehicles.⁷

These contributions signal a major shift in the architecture of both European security and the trans-Atlantic partnership, with Western states re-calibrating their defence and security capabilities and their ability to protect important allies outside of NATO. But the issues are not simply political or strategic. As the security environment continues to evolve and Ukraine continues to receive foreign assistance, Western states supplying weapons to Ukraine will also need to navigate the dense and complicated international-law landscape governing weapons transfers. The goal of this article is thus to provide a map of that landscape, disentangling and critically examining the most important legal issues.

Although Russia has attempted to justify its invasion of Ukraine on multiple grounds – most notably individual self-defence, collective self-defence, and humanitarian intervention – there is widespread agreement that none have merit.⁸ Indeed, 141 states voted in favour of a UN General Assembly ‘Uniting for Peace’ Resolution – Res. ES-11/1 – that explicitly deplored ‘in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter’.⁹ The unlawfulness of Russia’s invasion of Ukraine, however, does not necessarily entitle Western states to provide Ukraine with weapons. On the contrary, weapons transfers implicate at least five regimes of international law: (1) the *jus ad bellum*; (2) the law of neutrality; (3) international humanitarian law (IHL); (4) state responsibility for complicity in internationally wrongful acts; and (5) international criminal law (ICL). Those legal regimes are non-hierarchical and legally independent; as such, it is possible to violate a particular regime without violating any of the others, while respecting a particular regime does not guarantee that any of the others are not violated.

This article addresses two interrelated issues for each legal regime. The first is whether the regime in question permits providing weapons to Ukraine. The second is what the consequences for violating that regime might be. We conclude that weapons transfers likely violate the law of neutrality, entitling Russia to respond with countermeasures; that Russia can lawfully target transferred weapons under IHL; and that weapons transfers could lead to state and

7 Thomas Duthois, ‘Ukraine war: Which countries are sending weapons and aid to forces fighting the Russian invasion?’ (*Euronews*, 4 March 2022) <<https://www.euronews.com/next/2022/03/04/ukraine-war-these-countries-are-sending-weapons-and-aid-to-forces-fighting-the-russian-inv>>.

8 See eg James A Green et al, ‘Russia’s attack on Ukraine and the *jus ad bellum*’ (2022) 9 *Journal on the Use of Force and International Law* 1–28.

9 UNGA Res A/ES-11/L.1, ‘Aggression against Ukraine’ (1 March 2022).

individual responsibility if evidence comes to light that the Ukrainian military is using weapons previously supplied by the West to commit war crimes. By contrast, providing weapons to Ukraine does not violate the *jus ad bellum* because they are in service of Ukraine's right of self-defence against Russia and does not make the supplying states co-belligerents in Russia's international armed conflict with Ukraine.

2 The *Jus Ad Bellum*

The most straightforward legal regime is the *jus ad bellum*. The question here is whether providing weapons to Ukraine violates the prohibition of the use of force in Art. 2(4) of the UN Charter. If it does, then the supplying states are committing an internationally wrongful act¹⁰ and Russia would be entitled to take proportionate countermeasures against them until the weapons-transfers cease.¹¹

Providing weapons to Ukraine constitutes the use of force against Russia. In the *Nicaragua* case, the International Court of Justice (ICJ) specifically held that the United States' (US) 'arming and training' of the *contras* 'can certainly be said to involve the... use of force against Nicaragua'.¹² Although the Court was addressing a non-international armed conflict, not an international one, 'the logic of the Court's holding arguably applies equally to IAC, for if arming and training a non-State group fighting a State is a use of force... why would it not also be a use of force to provide arms to another State engaging in hostilities against that State?'¹³

But that is not the end of the inquiry. Western states are providing weapons to Ukraine to help it defend itself against Russia's ongoing armed attack. Because Ukraine has an individual right of self-defence against Russia, it is entitled to ask other states to act in its collective self-defence.¹⁴ One form of

10 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/>>.

11 International Law Commission, Responsibility of States for Internationally Wrongful Acts (2001) art. 49(1).

12 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v U.S.)* (Merits Judgment) [1986] ICJ Rep 108–09 [228].

13 Schmitt (n 10).

14 See eg 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', Recital 12, <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008E0944&from=EN>> ('States have a right to transfer the means of self-defence, consistent with the right of self-defence recognised by the UN Charter').

15 *Nicaragua* (n 12) [229].

collective self-defence is providing material support, as the ICJ made clear in the *Nicaragua* case.¹⁵ Providing Ukraine with weapons thus cannot be considered an internationally wrongful act – a conclusion supported by Art. 21 of the Articles on State Responsibility, which provides that ‘[t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations’.

It is also important to note that the *jus ad bellum* currently imposes no limits on the quantity or quality of weapons that states can provide to Ukraine. Ukraine’s acts of self-defence against Russia must, of course, comply with the requirements of necessity and proportionality;¹⁶ were Ukraine to exceed those requirements, its attacks on Russian forces would no longer be lawful acts and it would be unlawful for Western states to continue to assist Ukraine by supplying it with weapons.¹⁷ Nevertheless, unless Ukraine manages to successfully repel Russia’s invasion, the invasion’s sheer scale – involving hundreds of thousands of soldiers and the most advanced weaponry Russia possesses – makes it highly unlikely that Ukraine’s acts of self-defence will become unnecessary or disproportionate any time soon.

3 The Law of Neutrality

A similar but formally distinct issue is whether providing weapons to Ukraine violates the law of neutrality. ‘Neutrality’ is the legal status that applies to a state that is not party to an IAC.¹⁸ The law of neutrality is primarily found in two documents adopted at the Second Hague Peace Conference in 1907: Convention (V) Respecting the Rights and Duties of Neutral Powers in Case of War on Land, and Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War. Russia and Ukraine are parties to both Conventions. The law of neutrality is also part of customary international law, per the ICJ’s 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.¹⁹ That is important in the context of Ukraine, because some states that have supplied Kyiv with weapons, such as the UK, are not party to the Conventions.

16 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Rep. 226, [41].

17 Articles on State Responsibility (n 11) art. 16.

18 Lassa Oppenheim, *International Law*, Vol. 2 (H. Lauterpacht ed, Longmans, Green and Company 1952) § 293.

19 *Legality of the Threat or Use of Nuclear Weapons* (n 16) [88].

A few scholars contend that the law of neutrality is no longer valid, either because it has fallen into desuetude²⁰ or was abrogated by the UN Charter.²¹ That contention, however, 'has not been borne out legally or in practice.'²² The desuetude argument is difficult to reconcile with the fact that states have continued to accede to the Hague Conventions since World War II²³ and have continued to invoke the law of neutrality in armed conflict, most recently during the invasion of Iraq in 2003.²⁴ Moreover, although the adoption of the UN Charter might have qualified the law of neutrality in some situations – an issue addressed below – nothing in its text or drafting history indicates a desire to abrogate the law of neutrality entirely. Indeed, the Geneva Conventions, which were drafted after the UN Charter, each impose obligations on neutral states in international armed conflicts.²⁵

When the law of neutrality applies to an IAC, '[n]eutrality is not optional' for a state not party to the conflict.²⁶ In other words, a state is not legally permitted 'to violate single duties of the law of neutrality as it will, or to declare them irrelevant, without having to fear a countermeasure taken by the adversely affected

20 See eg James Farrant, 'Modern Maritime Neutrality Law' [2014] 90 *International Law Studies* 198, 222.

21 See eg Oona Hathaway and Scott Shapiro, 'Supplying Arms to Ukraine is Not an Act of War' (*Lawfare*, 12 March 2002) <<https://www.lawfareblog.com/supplying-arms-ukraine-not-act-war>>; Hans Kelsen, *Principles of International Law* (Rinehart and Company 1952) 87, 88.

22 Tess Bridgeman, 'The Law of Neutrality and the Conflict with Al Qaeda' (2010) 85 *NYU Law Review* 1186, 1208.

23 Marcus Krajewski, 'Neither Neutral Nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine' (*Voelkerrechtsblog*, 9 March 2022) <<https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict/>>. Ukraine itself acceded to Hague Convention V in 1990. *ibid.*

24 Luca Ferro and Nele Verlinden, 'Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties' (2018) 17 *Chinese Journal of International Law* 15, 17. By way of example, the authors quote the then-President of Switzerland's statement on 20 March 2003 that '[t]he coalition led by the US has decided to resort to force without the approval of the UNSC. We are therefore confronted with an armed conflict between states during which the law of neutrality applies'. *ibid.*

25 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, opened for signature 12 August 1949, 75 *UNTS* 31 (entered into force 21 October 1950) art. 63.

26 Michael Bothe, 'The Law of Neutrality', in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd ed OUP 2008) 573; see also James Upcher, *Neutrality in Contemporary International Law* (OUP 2020) 37 ('Customary international law continues to support the view that neutrality becomes obligatory for States that are not parties to an international armed conflict').

27 Bothe (n 26) 573.

state'.²⁷ The law of neutrality does not apply to all IACs, however, because the threshold for the applicability of neutrality is higher than the threshold for the creation of an IAC. An IAC exists whenever one state intentionally uses armed force against another state.²⁸ The law of neutrality, by contrast, requires a 'generalized state of hostilities', understood as conflict between two states that reaches a certain intensity and continues for a certain duration.²⁹

By any standard, the hostilities in Ukraine are sufficiently intense and protracted to trigger the law of neutrality. States not party to the IAC between Russia and Ukraine are thus required to comply with the law of neutrality.

3.1 *What Actions Violate the Law of Neutrality?*

The fundamental principle of the law of neutrality is that a neutral state is prohibited from providing any kind of support to a belligerent that is capable of influencing the outcome of the armed conflict.³⁰ This duty is reflected in Art. 9 of the Hague Convention V, which provides that '[e]very measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents'.

There is currently no indication that any Western state intends to commit its own armed forces to the conflict in Ukraine, which would clearly violate the duty of impartiality.³¹ The prohibition of support, however, is not limited to directly engaging in hostilities. Providing Ukraine with intelligence used to target Russian military objectives almost certainly violates the duty of impartiality.³² The US may well be engaged in such intelligence sharing, despite its insistence that it is 'not providing the kind of real-time targeting' that 'steps over the line' but is instead simply sharing information that helps Ukraine 'inform and develop their military response to Russia's invasion'.³³ Reports

28 See eg Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art. 2.

29 Georgios C Petrochilos, 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality' (1998) 31 *Vanderbilt Transnational Law Journal* 575, 605.

30 Jeremy K. Davis, 'Bilateral Defense-Related Treaties and the Dilemma Posed by the Law of Neutrality' (2020) 11 *Harvard National Security Law Journal* 455, 466 ('Neutral states must refrain from assisting one belligerent to the detriment of the other and must refrain from harming one belligerent and thereby advantaging the other').

31 *ibid* 467.

32 See eg David A. Willson, 'An Army View of Neutrality in Space: Legal Options for Space Negotiation' (2014) 50 *Air Force Law Review* 175, 200 (2001) ('Providing military intelligence to a belligerent is a serious breach of neutrality'); Ferro and Verlinden (n 24) 31; Oppenheim (n 18) § 356.

33 Martin Matishak, 'NSA chief trumpets intelligence sharing with Ukraine, American public' (*The Record*, 10 March 2022, <<https://therecord.media/nsa-chief-trumpets-intelligence-sharing-with-ukraine-american-public/>>).

indicate, for example, that the US has provided Ukraine with ‘near real-time intelligence’ that enabled it to shoot down a Russian transport plane carrying hundreds of soldiers shortly after the invasion began³⁴ and that has been critical to locating and killing a number of Russian generals.³⁵

Providing military advisers to a belligerent also likely violates the duty of impartiality.³⁶ A number of states, including the US, the UK, Canada, Lithuania, and Poland, had military advisers in Ukraine prior to the Russian invasion.³⁷ Reports indicate that most of those states withdrew their advisers as soon as the invasion was imminent.³⁸ But if advisers are still working with the Ukrainian military, the sending states are likely violating their neutral duties. Sending military advisors to Ukraine to coordinate Western weapons transfers, which was recently endorsed by a bipartisan US congressional delegation to Kyiv,³⁹ would also likely be a violation.

Finally, and most relevantly, providing material assistance to Ukraine’s military violates the duty of impartiality. Art. 6 of Hague Convention XIII explicitly provides that ‘[t]he supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.’⁴⁰ That provision applies as conventional law only

34 Ken Dilanian et al, ‘U.S. intel helped Ukraine protect air defenses, shoot down Russian plane carrying hundreds of troops’ (*NBC News*, 26 April 2022) <<https://www.nbcnews.com/politics/national-security/us-intel-helped-ukraine-protect-air-defenses-shoot-russian-plane-carry-rcn26015>>.

35 Julian Barnes et al, ‘U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say’ (*New York Times*, 4 May 2022) <<https://www.nytimes.com/2022/05/04/us/politics/russia-generals-killed-ukraine.html?smid=tw-nytimes&smtyp=cur>>.

36 Bothe (n 26) 585.

37 Helene Cooper and Eric Schmitt, ‘Biden Weighs Deploying Thousands of Troops to Eastern Europe and Baltics’ (*New York Times*, 23 January 2022) <<https://www.nytimes.com/2022/01/23/us/politics/biden-troops-nato-ukraine.html>>.

38 Anne Kaplan, ‘U.S., U.K. Pull Military Trainers Out of Ukraine with Russian Attack Possible “Any Day Now”’ (*Forbes*, 12 February 2022) <<https://www.forbes.com/sites/annakaplan/2022/02/12/us-uk-pull-military-trainers-out-of-ukraine-with-russian-attack-possible-any-day-now/?sh=120ae002155d>>.

39 ‘Lawmakers want US military advisers sent to Ukraine’ (*Singapore Times*, 24 July 2022) <<https://singapore-times.com/lawmakers-want-us-military-advisers-sent-to-ukraine/>>.

40 Hague Convention V, governing war on land, does not contain a similar provision. Nevertheless, the fact that Art. 7 of Hague Convention V specifically permits private actors to export weapons and materiel indicates that states themselves are prohibited from supplying such items on land as well as at sea. See Wolff Heintschel Von Heinegg, ‘Neutrality in the War Against Ukraine’ (*Articles of War*, 1 March 2022) <<https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>>.

to armed conflict at sea, but there is little question that the prohibition applies as a matter of customary international law to all warfighting domains.⁴¹

At a minimum, the prohibition of support applies to ‘weapons *strictu sensu*, i.e. material which is capable of being used for killing enemy soldiers or destroying enemy goods.’⁴² Beyond that, the scope of the prohibition is uncertain.⁴³ According to Castren, ‘[it] would seem that it suffices for a State to refrain from delivering to belligerents material which has, exclusively or at least mainly, a military purpose.’⁴⁴ His interpretation is supported by state practice. Switzerland, for example, deems prohibited war material not only ‘weapons, weapons systems, munitions and military explosives’, but also ‘equipment that has been specifically conceived or modified for use in combat or for the conduct of combat and which is not as a general rule used for civilian purposes.’⁴⁵ A number of scholars, however, extend the prohibition even further – most notably, to include providing a state’s military with ‘massive financial assistance.’⁴⁶

Even interpreted broadly, however, the duty of impartiality does not prohibit all kinds of assistance to a belligerent. For example, states are under no obligation to prevent their nationals from deciding to fight on behalf of one of the belligerents, which has been common in the Ukrainian conflict.⁴⁷ A more difficult issue is whether a state must prevent private corporations from supplying a belligerent with weapons or war materiel that the state itself would be prohibited from supplying – a relevant issue in the Ukraine conflict, given that Elon Musk’s SpaceX has provided the Ukrainian with Starlink satellites it has used to coordinate unmanned drone attacks on Russian tanks and positions.⁴⁸ Under the conventional law of neutrality, the prohibition of support

41 Yves Sandoz, ‘Rights, Powers, and Obligations of Neutral Powers under the Conventions’ in Andrew Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 91.

42 Bothe (n 26) 586.

43 Upcher (n 26) 84.

44 Eric Castren, ‘The Present Law of War and Neutrality’ (1954) 85 *Annales Academiae Scientiarum Fennicae* 474.

45 Switzerland, Federal Act on War Materiel of 13 December 1996 § 5(b) <https://www.fedlex.admin.ch/eli/cc/1998/794_794_794/en>.

46 Upcher (n 26) 88; see also Bothe (n 26) 584; Ferro and Verlinden (n 24) 31.

47 Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention V 18 October 1907) entered into force 26 January 1910, art. 6.

48 Alexander Freund, ‘Ukraine is using Elon Musk’s Starlink for drone strikes’, (*DW*, 27 March 2022) <<https://www.dw.com/en/ukraine-is-using-elon-musks-starlink-for-drone-strikes/a-61270528>>.

does not apply to the private sector. That exclusion is reflected in Art. 7 of Hague Convention V, which provides that '[a] neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet'. A number of scholars nevertheless argue that, as a matter of customary international law, the distinction between governments and private corporations no longer applies. Bothe, for example, notes that '[m]odern state practice accords with the rule of non-separation. Where states took the view that the law of neutrality applied, they did not permit arms exports by private enterprise, nor did they rely on the artificial separation between state and private enterprise. According to the current state of customary law, the correct view is that a state's permission to supply war material constitutes a non-neutral service'.⁴⁹ If those scholars are correct, a state violates its duty of impartiality by permitting export of militarily useful items such as Starlink.

3.2 *Consequences*

The remedy available to a belligerent adversely affected by a state violating the law of neutrality is straightforward: the belligerent is entitled to take proportionate countermeasures against the offending state until it ceases to act non-neutrally.⁵⁰ Traditionally, lawful countermeasures could involve military force as long as they remained within the bounds of proportionality.⁵¹ It is uncontroversial, however, that the adoption of the UN Charter has modified the traditional rule. As summarized by Bothe, the prohibition of the use of force in Art. 2(4) means that 'a reaction against violations of neutrality which would involve the use of force against another state is permissible only where the violation of the law triggering that reaction itself constitutes an illegal armed attack'.⁵² In the absence of an armed attack, in other words, only non-forcible countermeasures are permitted, such as breaching a trade agreement by imposing tariffs or closing airspace to civilian airlines despite international treaties guaranteeing open skies. In 1973, for example, OPEC justified

49 Bothe (n 26) 585–86; see also Upcher (n 26) 83 ('State practice suggests an increasing acceptance of the view that, to the extent that the arms industry is subject to the control or oversight of the State, the State, when neutral, is under a duty to prohibit sale to belligerents').

50 *ibid* 581.

51 Kai 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) <<https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/>>.

52 Bothe (n 26) 581.

imposing an oil embargo on Western states by arguing that their support for Israel during the Yom Kippur War violated the law of neutrality – the duty of impartiality in particular.⁵³

3.3 *Qualified Neutrality*

A second aspect of the traditional approach to countermeasures is particularly important in the context of Ukraine: namely, that even the aggressor in an international armed conflict is entitled to take countermeasures in response to violations of neutrality.⁵⁴ In other words, the law of neutrality has traditionally applied independently of the *jus ad bellum*: a state cannot justify violating its neutral duties by claiming that it was acting in collective self-defence. As Bothe says, to hold otherwise ‘would be contrary to a general principle of the law of war, namely the principle of equality of the parties regardless of the justification of the conflict’.⁵⁵

The separation of the law of neutrality and the *jus ad bellum* has always had its critics. A few states, most notably the US, have long endorsed what is known as ‘qualified neutrality’, the idea that certain neutral duties, particularly the obligation ‘to observe a strict impartiality between parties to a conflict’, do not apply when one of the parties has been the victim of an unlawful act of aggression.⁵⁶

Qualified neutrality clearly applies where the Security Council, acting pursuant to its Chapter VII authority, has explicitly deemed one party to a conflict the aggressor – as it did during the Korean War⁵⁷ and the First Iraq War.⁵⁸ In such a situation, neutrality rules are superseded by Art. 2(5) of the UN Charter,⁵⁹ which provides that ‘[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action’. The Security Council, however, has not deemed Russia the aggressor in its conflict with Ukraine.

53 Ferro and Verlinden (n 24) 33–34.

54 See eg Hersch Lauterpacht, ‘Neutrality and Collective Security’, in Sir Elihu Lauterpacht (ed), *International Law, Vol. 5* (CUP 2004) 619 (‘[I]nternational law in the hundred years preceding the Covenant rejected the idea of qualified neutrality’).

55 Bothe (n 26) 581–82.

56 United States Department of Defense, *US Law of War Manual* (2016) § 15.2.2.

57 UNSC Res. 82 (25 June 1950) UN Doc. S/1501.

58 UNSC Res. 660 (2 August 1990) UN Doc. S/RES/660.

59 See eg Von Heinegg (n 40).

The US argues that qualified neutrality also applies when violating impartiality is required by ‘regional and collective self-defence arrangements’,⁶⁰ such as the North Atlantic Treaty. That extension is controversial,⁶¹ and the Federal Administrative Court of Germany rejected it in the context of Germany providing the UK and US with overflight rights during the invasion of Iraq.⁶² But even if the US is correct, providing weapons to Ukraine would still be inconsistent with neutrality because Ukraine is not part of NATO and is thus not protected by the North Atlantic Treaty’s collective self-defence provision, Art. 5.

The permissibility of Western states providing weapons to Ukraine under the law of neutrality thus depends on whether qualified neutrality can be extended still further, to Ukraine-like situations in which the aggressor may be evident but the states violating their duty of impartiality are not acting pursuant to a Security Council resolution or in response to a binding collective self-defence obligation. Not even the US has argued for such an extension, and prior to Russia’s invasion of Ukraine many scholars rejected it – including a majority of the experts who helped draft the Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare.⁶³ That lack of support is not surprising, because, as Von Heinegg has noted, ‘[i]f neutral States were allowed to absolve themselves from their neutrality obligations by a unilateral determination of the aggressor, the law of neutrality could no longer fulfill its function of effectively preventing an escalation of an IAC’.⁶⁴

It is possible, of course, that the law concerning qualified neutrality will change precisely as a result of the situation in Ukraine. Von Heinegg himself argues that qualified neutrality should apply to the supply of weapons to Ukraine because the Security Council failed to deem Russia the aggressor only

60 Law of War Manual (n 56) § 15.2.4.

61 See eg Jeremy K Davis, “‘You Mean They Can Bomb Us?’ Addressing the Impact of Neutrality Law on Defense Cooperation” (*Lawfare*, 2 November 2020) <<https://www.lawfareblog.com/you-mean-they-can-bomb-us-addressing-impact-neutrality-law-defense-cooperation#:~:text=Neutrality%20law%20regulates%20the%20relationship,Hague%20V%20and%20Hague%20XIII>>.

62 Bundesverwaltungsgericht, Urteil vom 21.06.2005–2 WD 12.04 [4.1.4.1.3] (noting that Germany ‘was not freed from [neutrality law] obligations... by being... a member of NATO’).

63 *Commentary to the HPCR Manual on International Law Applicable to Air and Missile Warfare* (Harvard Program on n Humanitarian Policy and Conflict Research 2010) 50.

64 Von Heinegg (n 40); *but cf* Stefan Talmon, ‘The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine’ (Bonn Research Paper No. 20/2022, 2002) 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4077084> (arguing that Security Council action is not required because ‘[i]n the horizontal and decentralized legal system of international law, it is the responsibility of each State itself to determine violations of the law and to draw the conclusions therefrom’).

because Russia itself vetoed the resolution and – more importantly – because 141 states nevertheless condemned Russia as the aggressor by voting in favour of General Assembly resolution ES-11/1.⁶⁵ The fact nevertheless remains that, to date, no state has explicitly argued that qualified neutrality applies to Ukraine or to a Ukraine-like situation. Although General Assembly resolutions can affect the content of customary international law, Res. ES-11/1 itself is silent concerning both the law of neutrality and the supply of weapons to Ukraine. The stronger legal position, therefore, is that the law of neutrality continues to apply to the IAC between Russia and Ukraine, making the supply of weapons to Ukraine a violation of the duty of impartiality.

4 International Humanitarian Law

Providing weapons to Ukraine also implicates international humanitarian law. There are three key questions here. The first is whether states providing weapon become co-belligerents in the international armed conflict between Ukraine and Russia. The second is whether, regardless of co-belligerency, Russia can lawfully target the weapons Western states are providing to Ukraine. The third is whether the duty to respect and ensure IHL prohibits weapons transfers.

4.1 *Co-Belligerency*

‘Co-belligerency’ refers to a situation in which states involved in an IAC fight alongside each other against a common enemy.⁶⁶ Because a co-belligerent state is a party to the conflict, the rules of IHL apply to it in full. This means that the members of its armed forces possess combatant’s privilege and are entitled to POW status upon capture. But it also means that its soldiers and military objects can be lawfully targeted anytime, anywhere, and with any amount of force.⁶⁷

The question here is whether a state becomes a co-belligerent with Ukraine by providing it with weapons. This is a different issue than whether providing weapons violates the duty of impartiality. As the US Department of Defense’s *Law of War Manual* points out, ‘[a]cts that are incompatible with the relationship between the neutral State and a belligerent State under the law of neutrality need not end the neutral State’s neutrality and bring that State into the

65 Von Heinegg (n 40).

66 Rebecca Ingber, ‘Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda’ (2011) 47 *Texas International Law Journal* 75, 90.

67 Ian Henderson, *The Contemporary Law of Targeting* (Martinus Nijhoff 2009) 87.

conflict as a belligerent'.⁶⁸ In other words, whether a state becomes a co-belligerent is determined by the actions it takes in the armed conflict, not by the law of neutrality.⁶⁹

Some kinds of actions are clearly sufficient to make a state a co-belligerent. The most obvious example is directly participating in hostilities alongside another state, understood as engaging in acts that have a 'sufficiently direct connection to harm to the adversary'.⁷⁰ The direct-participation standard served as the basis for the US considering some but not all of the states that supported the invasion of Iraq in 2003 to be its co-belligerents in the resulting IAC.⁷¹

To date, no Western state has directly participated in hostilities against Russia. There is widespread agreement among scholars, though, that any state that participated in establishing or maintaining a no-fly zone over Ukraine, as Kyiv has requested, would become a co-belligerent if it led to hostilities with Russian forces.⁷² It is also possible that a state could become a co-belligerent by providing Ukraine with intelligence that helped it select Russian targets for attack.⁷³ According to Grignon, 'any indirect military engagement that would consist of taking part in the planning and supervision of military operations of another State' suffices to establish co-belligerency'.⁷⁴ As discussed above in the context of neutrality, the US has likely crossed that line at least once since the invasion began.

There are a few scholars who insist that 'the systematic or substantial supply of war materials, military troops, or financial support' to a state engaged in an international armed conflict makes the supplying state a co-belligerent.⁷⁵

68 Law of War Manual (n 56) § 15.4.1.

69 Nathalie Weizmann, 'Associated Forces and Co-belligerency' (*Just Security*, 24 February 2015) <<https://www.justsecurity.org/20344/isil-aumf-forces-co-belligerency/>>.

70 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) <<https://www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/>>; see also Upcher (n 26) 63 ('To constitute "participation" or "co-belligerency" it seems that direct military support must be given, or there must be some sort of direct, causal link between the neutral's action and an act of belligerency').

71 "'Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention' (2004) 28 *Op OLC* 35, 45 <<https://www.justice.gov/olc/opinion/%E2%80%9Cprotected-person%E2%80%9D-status-occupied-iraq-under-fourth-geneva-convention>>.

72 See eg Schmitt (n 10).

73 Wentker (n 70).

74 Julia Grignon, "Cobelligerency", or when does a State become a party to an armed conflict? (2022) 39 IRSEM Strategic Brief 1, 2.

75 See eg Weizmann (n 69).

But that is a decidedly minority position. Most scholars believe that ‘supplying arms, without more, [does] not have a sufficiently direct operational connection’ with an IAC to qualify as co-belligerency.⁷⁶ Their position is supported both by historical practice and by international jurisprudence. With regard to the former, it is instructive that the US was not considered a party to WW II, despite its massive support for the Allies, until it entered the fight against Germany and Japan directly.⁷⁷ With regard to the latter, the ICTY Appeals Chamber specifically held in the seminal *Tadić* case that ‘equipping’ and financing’ an organized armed group does not internationalize a non-international armed conflict.⁷⁸ If that level of support is not sufficient to create an IAC, it cannot be sufficient for co-belligerency.⁷⁹

It is very unlikely, in short, that foreign states can be considered Ukraine’s co-belligerents simply because they have provided Ukraine with weapons. More is required, such as directly participating in hostilities alongside Ukraine, establishing a no-fly zone over Ukraine, or providing Ukraine with intelligence for use in targeting.

4.2 *Targeting Weapons*

The second important IHL issue is whether Russia can lawfully target the weapons that Western states are providing to Ukraine. Russia’s Foreign Minister has made clear Russia’s position on that issue, asserting ‘that any cargo that will enter the territory of Ukraine, which we will consider ... [carrying] weapons, will become a legitimate target.’⁸⁰ Indeed, this has already become Russian practice. Russia has launched attacks across western and central Ukraine to target infrastructure and supply lines that are used to bring critical supplies into Ukraine.⁸¹

IHL permits the targeting of military objectives, defined as ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military

76 See eg Upcher (n 26) 61; Wentker (n 70).

77 Bothe (n 26) 580–81.

78 *Prosecutor v. Tadić* (Judgment on Appeal) IT-94-I-A-AR77 (27 February 2001) 131.

79 See Schmitt (n 10).

80 ‘Russia’s foreign minister says Russia will target any weapons shipments entering Ukraine’ (*News.AZ*, 18 March 2022) <<https://news.az/news/russias-foreign-minister-says-russia-will-target-any-weapons-shipments-entering-ukraine>>.

81 Paul McLeary and Lara Seligman, ‘Russia targeting Western weapons shipments in Ukraine as Donbas assault begins’ (*Politico*, 25 April 2022), <<https://www.politico.com/news/2022/04/25/russia-western-weapons-shipments-ukraine-donbas-00027663>>.

advantage'.⁸² A particular object qualifies as a military objective, therefore, if it satisfies two requirements: it makes an effective contribution to military action; and attacking it offers a definite military advantage.⁸³

If a state providing Ukraine weapons became Ukraine's co-belligerent, there is no question that the weapons themselves could be lawfully targeted. Objects used by a state's armed forces to conduct hostilities are military objectives by nature, and their destruction always provides the attacker with a definite military advantage.⁸⁴

Even if no Western state currently qualifies for co-belligerency (the US being the most difficult case), Russia is still entitled to target the weapons they provide Ukraine. The weapons would probably not qualify as military objectives by nature until they were in Ukraine's possession. But they would almost certainly qualify as military objectives by purpose – at least once it became evident that they were earmarked for Ukraine. As summarized by Henderson, 'purpose means the intended future use of an object; but purpose does not include the mere potential for use by a belligerent. The standard of proof is whether there is a 'reasonable belief' as to the future use'.⁸⁵ Supplying states have left no doubt they are providing weapons to Ukraine with the expectation that they will be used against Russian forces. That clarity of purpose means not only that the effective-contribution requirement is satisfied, but also that destroying the weapons would provide Russia with a definite military advantage.

Russia has not indicated that it would be willing to attack weapons before they entered Ukrainian territory, and all of its attacks to date have been in Ukraine. An attack outside of Ukraine might be lawful under IHL; the question would be whether Russia had a reasonable belief that the attacked weapons were, in fact, intended for use against its forces (military objective by purpose). But the attack would violate two different regimes of international law: the *jus ad bellum*, because the transfer of weapons cannot be considered an armed attack on Russia; and the law of neutrality, because although providing weapons violates a neutral state's duty of impartiality, countermeasures cannot be forcible. Again, the *jus ad bellum*, the law of neutrality, and IHL are separate, independent, and non-hierarchical legal regimes.

82 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art. 52(2).

83 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC 2019) 92.

84 Henderson (n 67) 54.

4.3 *Common Article 1*

The third issue is whether a state's duty 'to respect and to ensure respect for' IHL prohibits weapons transfers. That duty is contained in Common Article 1 of the Geneva Conventions, as well as in Article 1 of the First Additional Protocol.

It is generally accepted that Common Article 1 imposes a negative obligation on states to avoid encouraging, aiding, or assisting a specific violation of IHL by a party to an armed conflict. That is the position taken by the ICJ in the *Nicaragua* case,⁸⁶ by the European Union Council,⁸⁷ and by the ICRC.⁸⁸ This negative obligation would prohibit Western states from providing weapons to Ukraine 'if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions'.⁸⁹ As indicated by knowledge' and 'would be used', the certainty required by the negative obligation is a high one – likely equivalent to Art. 16 of ASRIWA, a complicity provision discussed more fully below, which requires the sending state to be virtually certain both that 'the particular weapons transferred will be used in breach of IHL and that those weapons will contribute significantly to the wrongful act'.⁹⁰

Credible evidence exists that Ukraine has committed war crimes during the conflict. Videos verified by the *New York Times*, for example, appear to show Ukrainian soldiers unlawfully executing Russian prisoners of war near the village of Dmitrovka, west of Kyiv.⁹¹ There are also reports that Ukrainian soldiers made extensive use of cluster munitions in Husarivka while attempting to retake the town,⁹² which likely qualifies as the war crime of launching an

85 *ibid* 61.

86 *Nicaragua* (n 12) [220].

87 Quoted in Marko Milanovic, 'Intelligence Sharing in Multinational Military Operations and Complicity under International Law' (2021) 97 *International Law Studies* 1269, 1325 ('Common Article 1 of the Geneva Conventions is generally interpreted as conferring a responsibility on third party States not involved in an armed conflict to not encourage a party to an armed conflict to violate international humanitarian law, nor to take action that would assist in such violations').

88 *Commentary on the First Geneva Convention of 12 August 1949* (ICRC 2016) [154].

89 *ibid* [162].

90 Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (2016) Chatham House Research Paper 27.

91 Emmanuel Grynszpan and Faustine Vincent, 'Ukraine's military accused of war crimes against Russian troops' (*Le Monde*, 9 April 2022) <https://www.lemonde.fr/en/international/article/2022/04/09/ukraine-s-military-accused-of-war-crimes-against-russian-troop_5980121_4.html>.

92 Thomas Gibbons-Neff and John Ismay, 'To Push Back Russians, Ukrainians Hit a Village with Cluster Munitions' (*New York Times*, 18 April 2022) <<https://www.nytimes.com>>.

indiscriminate attack.⁹³ Nothing indicates, however, that any of the weapons used in those war crimes were provided by Western states during the conflict or that Ukraine is routinely committing war crimes. It is thus very unlikely that Common Article 1's negative obligation limits the ability of any Western state to provide Ukraine with a particular type of weapon, much less weapons in general.

The ICRC, however, also claims that Common Article 1 imposes a *positive* obligation on states 'to bring an erring Party to a conflict back to an attitude of respect for the Conventions, in particular by using their influence on that Party'.⁹⁴ If this positive obligation exists – a controversial issue –⁹⁵ Common Article 1 may well impose more stringent limits on weapons transfers (and on the transfer of other forms of military assistance)⁹⁶ than the negative obligation or ASRIWA Art. 16. Whereas the negative obligation applies only where a state has 'knowledge' that its weapons 'would be used' to violate IHL, the ICRC believes that the positive obligation prohibits a state from providing another state with weapons 'when there is a foreseeable risk' that those weapons will be used to violate IHL.⁹⁷ It is not clear what qualifies as a foreseeable risk,⁹⁸ but there is no question that the standard requires less certainty than knowledge.⁹⁹ Milanovic, for example, argues that '[t]he risk threshold would certainly be satisfied if it was more likely than not that the assisted partner would commit the wrong and would use the aid provided to do so. It would probably also be satisfied if the risk was below likelihood but was nonetheless serious, substantial, real, or clear'.¹⁰⁰

Common Article 1's positive obligation would complicate Western weapons transfers if evidence emerges that Ukraine is committing war crimes with

com/2022/04/18/world/europe/ukraine-forcesclustermunitions.html#:~:text=The%20attack%20on%20the%20Husarivka,separatists%20in%20the%20country's%20east>.

93 No such war crime exists in the Rome Statute, but indiscriminate attacks are undeniably criminal under customary international law. See ICRC, 'Rule 156. Definition of War Crimes', *Customary International Humanitarian Law Database* <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156>.

94 Commentary on GC I (n 88) [164].

95 See Moynihan (n 90) 27.

96 See Milanovic (n 87) 1338 ('[T]here is no reason of principle why this rule would be confined to weapons transfers – other forms of assistance that can substantially causally contribute to the wrongful act, such as the sharing of intelligence, must be equally covered').

97 Commentary on GC I (n 88) [164].

98 See Milanovic (n 87) 1331.

99 See eg Moynihan (n 90) 27.

100 Milanovic (n 87) 1387.

weapons provided by the West – or that it has committed more war crimes than previously known. If so, Ukraine’s record would then likely suggest the kind of ‘foreseeable risk’ of future war crimes that would prohibit additional weapons transfers.¹⁰¹ As noted above, though, it is unclear whether the positive obligation even exists.

5 State Responsibility

Issues of complicity are not limited to IHL. They are also relevant for states under Art. 16 of ASRIWA, which provides that ‘[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible’. Art. 16 reflects customary international law, per the ICJ in the *Bosnian Genocide* case.¹⁰²

Art. 16 has four cumulative requirements: (1) the provision of aid or assistance to a state that commits an internationally wrongful act; (2) a nexus between the aid or assistance and the wrongful act; (3) the assisting state possessing the necessary mental element; and (4) the act being wrongful if committed by the assisting state itself. ‘Aid and assistance’ is understood broadly, to include the provision of weapons, logistical and technical support, financial aid, and intelligence,¹⁰³ while the nexus requirement is satisfied as long as the aid or assistance ‘contributed significantly’ to the wrongful act.¹⁰⁴

The first, second, and fourth requirements would almost certainly be satisfied if Ukraine used a weapon provided by a Western state to commit a war crime. The critical issue, therefore, would be whether the assisting state possessed the necessary mental element. Unfortunately, as has been widely noted in the literature, the nature of that element is unclear. The text of Art. 16 requires the assisting state to act ‘with knowledge of the circumstances of the internationally wrongful act’, while the ILC Commentary states in one paragraph (¶ 3) that the aid or assistance must also be provided ‘with a view to facilitating the commission of that act’ but in another (¶ 5) that ‘[a] State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of

¹⁰¹ Moynihan (n 90) 27.

¹⁰² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) (2007) ICJ Rep 43 [417].

¹⁰³ Moynihan (n 90) 7.

¹⁰⁴ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 56 UN GAOR Supp No 10, UN Doc A/56/10 (2001) art. 16 cmt. [5].

the wrongful conduct'. The text thus suggests knowledge is enough for international responsibility, while the Commentary seems to additionally require some kind of intent.

An adequate analysis of Art. 16's mental element is beyond the scope of this article. Fortunately, we agree with Milanovic that the tension between the text and commentary is actually a 'false dilemma',¹⁰⁵ because properly understood there is no practical difference between the two interpretations of Art. 16. The text and commentary contradict each other only insofar as 'intent' is interpreted as what the common law normally calls 'purpose' or 'specific intent' and the civil law normally calls '*dolus directus*': the conscious desire to bring about a particular consequence. If that is the meaning of 'intent' in the commentary to Art. 16, it would not be enough for the assisting state to act 'with knowledge of the circumstances of the internationally wrongful act'; it would also have to consciously desire the assisted state to commit the wrongful act. But that is not the only possible interpretation of 'intent'. Neither the common law nor the civil law limit intent to the conscious desire to bring about a particular consequence. The civil law additionally deems 'intent' awareness that a particular consequence is virtually certain to occur as a result of the defendant's action (*dolus indirectus*) and awareness that a consequence is likely or possible to result from the defendant's action (*dolus eventualis*).¹⁰⁶ Similarly, many common law systems make use of what is known as 'oblique intent' – a *mens rea* equivalent to knowledge in common law systems that do not use oblique intent, such as the US,¹⁰⁷ and to *dolus indirectus* in the civil law.¹⁰⁸

As Moynihan notes, examples of complicity offered by states during the drafting of Art. 16 and analogy to the Rome Statute suggest that the ILC viewed 'intent' as encompassing both conscious desire and oblique intent/*dolus indirectus*. If so, the tension between the text and commentary is indeed a false dilemma, because Art. 16's mental element will be satisfied under either the knowledge interpretation or the intent interpretation as long as the assisting state is virtually certain of two things: (1) that the assisted state intends to commit a wrongful act; and (2) that its assistance will facilitate that wrongful act.¹⁰⁹ Similarly, under either interpretation any lesser degree of certainty concerning

¹⁰⁵ Milanovic (n 87) 1308.

¹⁰⁶ See eg Carlos Gómez-Jara Díez and Luis E. Chiesa, 'Spain', in Kevin Jon Heller and Markus Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 501.

¹⁰⁷ Paul Robinson, 'United States', in *ibid* 573.

¹⁰⁸ See eg Jonathan Burchell, 'South Africa', in Heller and Dubber (n 106) 483.

¹⁰⁹ See Milanovic (n 90) 1311.

commission or facilitation – such as recklessness or *dolus eventualis* – will be insufficient to satisfy Art. 16's mental element.¹¹⁰

Thus understood, Art. 16 is less likely to limit the ability of Western states to continue to provide weapons to Ukraine than Common Article 1. Common Article 1 (ostensibly) prohibits weapons transfers 'when there is a foreseeable risk' that those weapons will be used to violate IHL – a standard similar to recklessness/*dolus eventualis*. Art. 16, by contrast, requires virtual certainty – knowledge or *dolus indirectus*. Even acknowledging that Ukraine has committed war crimes during its conflict with Russia, the infrequency of their commission means that, at present, Western states can be neither virtually certain that Ukraine intends to commit future war crimes nor virtually certain that Ukraine will commit those crimes with their weapons. Far more persistent and systematic criminality would be required to implicate Art. 16.

6 Individual Criminal Responsibility

The final relevant legal regime is international criminal law. The Rome Statute¹¹¹ contains two forms of complicity that could limit the ability of Western states to provide Ukraine with weapons: Art. 25(3)(c), aiding and abetting; and Art. 25(3)(d), contributing to a group crime.

6.1 Aiding and Abetting

Art. 25(3)(c) establishes criminal responsibility for an international crime where an individual, '[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'. As with all modes of participation in a crime, aiding and abetting has both an *actus reus* (prohibited act) and *mens rea* (required mental state). The *actus reus* requires an individual to provide some kind of assistance to individuals who commit an international crime that 'furthered, advanced or facilitated the commission of such offence'.¹¹² The assistance must have a causal influence on the commission of the crime – understood as making the crime more likely to be committed – but that influence does not have to be substantial. In that regard, aiding

¹¹⁰ *ibid* 1315.

¹¹¹ Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

¹¹² *Prosecutor v. Bemba et al.*, Pre-Trial Chamber II (Judgment pursuant to Article 74 of the Statute), ICC-01/05-01/13 (21 March 2016) 93.

and abetting at the ICC is easier to establish than at the ICTY and ICTR, both of which adopted a ‘substantial effect’ requirement.¹¹³

There is no question that providing weapons that Ukrainian forces used to commit a war crime would satisfy the *actus reus* of aiding and abetting. It is unlikely, however, that the decision to transfer weapons would satisfy aiding and abetting’s *mens rea* requirement. Art. 25(3)(c) requires the accessory to provide assistance subjectively intending to facilitate the commission of a specific crime; merely knowing that the crime will be committed is not enough.¹¹⁴ As noted above, it is highly unlikely that any Western official would ever transfer weapons to Ukraine intending for them to be used to commit war crimes in general, much less specific ones.

6.2 *Contributing to a Group Crime*

The more relevant mode of participation in the Rome Statute is Art. 25(3)(d), which establishes criminal responsibility for an individual who ‘[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose’, as long as the individual’s contribution was made either ‘with the aim of furthering the criminal activity’ or ‘in the knowledge of the intention of the group to commit the crime’.

The *actus reus* of contributing to a group crime is not substantially different from aiding and abetting – under Art. 25(3)(d), the crime must simply be committed by a group with a common purpose, not by a single individual, and the individual’s contribution to the crime must be ‘significant’.¹¹⁵ The *mens rea* of contributing to a group crime, however, is easier to prove: it is enough that the individual knew that the group intended to commit a specific international crime; the individual did not have to subjectively intend to facilitate it.¹¹⁶ That said, because Art. 25(3)(d)(ii) requires knowledge, the individual must have been virtually certain the group would use his or her contribution to commit a specific international crime; awareness of the possibility or even likelihood does not suffice.¹¹⁷

As noted, there is no indication that any of the weapons involved in Ukrainian war crimes, such as cluster munitions, were provided by Western states during the conflict. Should such evidence (or evidence of other crimes)

113 See Marina Aksenova, ‘Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen’ (2021) 30 Washington International Law Journal 255, 262.

114 See Kai Ambos, *Treatise on International Criminal Law, Vol. 1* (OUP 2013) 165–66.

115 Aksenova (n 113) 266.

116 *ibid* 267.

117 Ambos (n 114) 169.

come to light, however, states would need to reconsider future plans to provide weapons to Ukraine. If they continued to provide weapons despite knowing previous transfers had facilitated criminal acts, the government officials behind the transfers would risk being held criminally responsible under Art. 25(3)(d) for any war crimes Ukraine used the weapons to commit.¹¹⁸ Providing the means of commission clearly qualifies as a significant contribution to a war crime, so the only relevant issue in a prosecution would be whether the defendant official was virtually certain the group intended to use the transferred weapons to commit a particular crime. ‘Virtual certainty’ is a high standard, but an official might find international judges sceptical of the claim that although Ukrainian forces used transferred weapons to commit international crimes before, he or she did not know that they intended to do so again.

7 Conclusion

International armed conflicts of the kind that currently exists between Russia and Ukraine have become extremely uncommon since World War II. It is not surprising, therefore, that shock and horror at Russia’s unprovoked invasion has led many Western states to supply Ukraine with a degree of military support unheard of since the American Lend-Lease Program in 1941.¹¹⁹

That support is both morally and politically justified. Nevertheless, the decision by Western states to provide weapons to Ukraine potentially implicates all five of the legal regimes discussed in this article. The least problematic middle regimes are the *jus ad bellum*, state responsibility for complicity in internationally wrongful acts, and international criminal law: states are entitled to help Ukraine defend itself against Russia’s armed attack, and there is no

¹¹⁸ The Council of Europe, which includes many of the states that have provided weapons to Ukraine, has acknowledged this danger. A leaked Concept Note addressing proposed transfers of lethal weapons states that ‘[t]he proposed assistance measure, like any comparable policy or intervention, carries... a risk of facilitating violations of IHRL/IHL even if there is minimal credible evidence of transgressions by the UAF in the recent period’. General Secretariat of the Council, ‘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, <<https://www.statewatch.org/media/3168/eu-council-ukraine-csdp-epf-military-assistance-concept-note-6661-22.pdf>>.

¹¹⁹ Indeed, the US has recently revived the Lend-Lease Act to facilitate weapons transfers to Ukraine. See Patricia Zengerle, ‘U.S. Congress revives World War Two-era “Lend-Lease” program for Ukraine’ (*Reuters* 28 April 2022) <<https://www.reuters.com/world/us-congress-revives-world-war-two-era-lend-lease-program-ukraine-2022-04-28/>>.

evidence that Ukrainian soldiers are using Western-supplied weapons to commit war crimes. Moreover, in terms of international humanitarian law, states other than the US have yet to support Ukraine in a manner that could even arguably qualify them as co-belligerents – although Russia is clearly entitled to target Western-supplied weapons when they are on Ukrainian territory.

The law of neutrality, by contrast, potentially has legal implications for supplying states. Because the obligations of neutrality are not optional, the Western states that are providing weapons to Ukraine are violating their duty of impartiality and could be targeted by Russian countermeasures. That would not be the case if qualified neutrality applied to the situation in Ukraine despite the absence of Security Council action, but it is difficult to view qualified neutrality as *lex lata* in such a situation, given the absence of supportive state practice. It nevertheless seems unlikely that Russia would actually take countermeasures against European states – at least lawful ones. Countermeasures cannot involve the use of force, and it is not clear, given Russia's increasing economic and political isolation, what kinds of legal obligations Russia could suspend to persuade foreign states to stop transferring weapons to Ukraine. In practice, any Russian response to weapons transfers beyond targeting the weapons themselves would likely involve the use of force and would thus be unlawful.

The analysis in this article should be both legally and politically useful to Western leaders as they decide how to help Ukraine defend itself against Russian aggression. In terms of the law, it is important for states to assist Ukraine in a manner that limits Russia's legal right to take countermeasures and avoids making them co-belligerents in the IAC between Russia and Ukraine – especially the latter, as direct conflict between Russia and Western states runs the risk of a full-scale regional conflict, perhaps even involving the use of nuclear weapons.¹²⁰ In terms of politics, it is important for Western states to mount rhetorically effective responses to Russia's legal justifications for its own conduct and legal criticisms of the West's response. Those justifications and criticisms are largely devoid of merit, but they have a superficial plausibility that requires considerable effort and skill to rebut. We thus hope that the analysis provided herein will assist Western efforts to win not only the military and legal battle with Russia, but the battle for public opinion as well.

120 Jonathan Landay and Michael Martina, 'U.S. cannot "take lightly" threat Russia could use nuclear weapons – CIA chief' (*Reuters*, 14 April 2022) <<https://www.reuters.com/world/us-cannot-take-lightly-threat-russia-could-use-nuclear-weapons-cia-chief-2022-04-14/>>.