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Aid and Assistance as a
“Use of Force” Under the
Jus Ad Bellum

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I. INTRODUCTION

Following Russia’s renewed invasion of Ukraine in February 2022, States have rushed to provide Ukraine with an “unprecedented”¹ amount of aid and assistance.² A testament to its depth and breadth, nearly fifty contributing States have invested over \$45 billion in Ukraine’s defense.³ Notable lethal arms packages have included long-range rocket artillery systems,⁴ air defense capabilities,⁵ and an expanding spectrum of light to heavy armored

1. Press Release, Anthony J. Blinken, Secretary of State, Significant New U.S. Military Assistance to Ukraine (Jan. 19, 2023), <https://www.state.gov/significant-new-u-s-military-assistance-to-ukraine/>; Calin Trenkov-Wermuth & Jacob Zack, *Ukraine: The EU’s Unprecedented Provision of Lethal Aid Is a Good First Step*, UNITED STATES INSTITUTE OF PEACE (Oct. 27, 2022), <https://www.usip.org/publications/2022/10/ukraine-eus-unprecedented-provision-lethal-aid-good-first-step>.

2. As used in this article, the term “aid” denotes materiel or financial support, such as the provision of weapons. “Assistance” refers to an action by the State providing it, such as sharing intelligence.

3. This is the U.S. Department of State’s calculation as of March 20, 2023. Fact Sheet, U.S. Dep’t of State, Bureau of Political-Military Aff., *U.S. Security Cooperation with Ukraine* (Mar. 20, 2023), <https://www.state.gov/u-s-security-cooperation-with-ukraine/> (frequently updated).

4. Aleksandar Vasovic, *Ukraine Gets More U.S., German Rocket Launcher Systems—Minister*, REUTERS (Aug. 1, 2022), <https://www.reuters.com/world/ukraine-gets-more-us-german-rocket-launcher-systems-minister-2022-08-01/>; U.K. Ministry of Defense, *UK to Give More Multiple Launch Rocket Systems and Guided Missiles to Ukraine*, GOV.UK (Aug. 11, 2022), <https://www.gov.uk/government/news/uk-to-give-more-multiple-launch-rocket-systems-and-guided-missiles-to-ukraine>; *Ukraine: What are Himars Missiles and Are They Changing the War?*, BBC NEWS (Aug. 30, 2022), <https://www.bbc.com/news/world-62512681>; Sakshi Tawari, “Better” Than HIMARS, *Ukraine Gets New Laser-Guided MLRS From Turkey That Can Even Strike Moving Targets*, EURASIAN TIMES (Dec. 1, 2022), <https://eurasianimes.com/better-than-himars-ukraine-gets-new-laser-guided-mlrs/>; Yusuf Çetiner, *The First French LRU Multiple Launch Rocket System (MLRS) Arrives in Ukraine*, OVERT DEFENSE (Dec. 5, 2022), <https://www.overtdefense.com/2022/12/05/the-first-french-lru-multiple-launch-rocket-system-mlrs-arrives-in-ukraine/>.

5. C. Todd Lopez, *\$400 Million Security Package Headed to Ukraine*, DOD NEWS (Nov. 10, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3216745/400-million-security-package-headed-to-ukraine/>; Jim Garamone, *U.S., Allies Work to Supply Ukraine Air Defense Needs*, DOD NEWS (Nov. 29, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3231049/us-allies-work-to-supply-ukraine-air-defense-needs/>; Becky Sullivan & Tom Bowman, *The U.S. Will Send a Patriot Air Defense System to Ukraine. How Will it Help?*, NATIONAL PUBLIC RADIO (Dec. 21, 2022), <https://www.npr.org/2022/12/21/1144662505/us-ukraine-patriot-missile-system>; Sakshi Tiwari, *Powerful, Modern & Effective: Ukraine’s Air Defense Operator Thrilled With “Kill Rate” Of German IRIS-T*

vehicles.⁶ And as of March 2023, some States are beginning to transfer fighter jets to Ukraine.⁷ The provision of non-materiel assistance, such as training, consulting, and advising services, has been equally remarkable. Intelligence-sharing with Ukraine has been so “revolutionary,”⁸ for instance, that the head of U.S. Cyber Command and the National Security Agency observed that he has never seen “a better sharing of accurate, timely and actionable intelligence than what has transpired with Ukraine.”⁹

With respect to its impact, aid and assistance from supporting States have been highly consequential, enabling Ukrainian forces to defy early predictions about how long they could resist Russia’s aggression by inflicting

System, EURASIAN TIMES (Jan. 23, 2023), <https://eurasianimes.com/powerful-modern-effective-ukraines-air-defense-operator-thrilled/>; Clement Charpentreau, *Italy, France Finalize MAMBA Air Defense System Delivery to Ukraine*, AEROTIME (Jan. 23, 2023), <https://www.aerotime.aero/articles/italy-france-finalize-mamba-air-defense-system-delivery-to-ukraine>.

6. Christoph Hasselbach, *What Type of Armored Vehicles Are Being Sent to Ukraine?*, DEUTSCHE WELLE (Jan. 7, 2023), <https://www.dw.com/en/what-type-of-armored-vehicles-are-being-sent-to-ukraine/a-64305881>; John Harney, *U.S. Is Sending Ukraine Armored Vehicles in \$2.5 Billion Package*, BLOOMBERG (Jan. 19, 2023), <https://www.bloomberg.com/news/articles/2023-01-20/us-is-sending-ukraine-armored-vehicles-in-2-5-billion-package>; Christopher Woody & Jake Epstein, *Hundreds of Armored Vehicles Are Now Heading to Ukraine to Help Fight Off a Looming Russian “Onslaught,” U.S. Officials Say*, BUSINESS INSIDER (Jan. 26, 2023), <https://www.businessinsider.com/western-armored-vehicles-going-to-ukraine-to-fight-russian-onslaught-2023-1>; Peter Zimonjic, *Canada Announces It Will Donate 200 Armoured Vehicles to Ukraine*, CANADIAN BROADCASTING CORPORATION (Jan. 18, 2023), [https://www.cbc.ca/news/politics/canada-ukaine-armoured-personnel-carriers-donation-1.6717597](https://www.cbc.ca/news/politics/canada-ukraine-armoured-personnel-carriers-donation-1.6717597); Joseph Trevithick, *Meet the Tanks and Other Armor the U.K. Is Sending to Ukraine*, THE DRIVE (Jan. 16, 2023), <https://www.thedrive.com/the-war-zone/meet-the-tanks-and-other-armor-the-u-k-is-sending-to-ukraine>.

7. James Black, *What Difference Will Polish, Slovakian Fighter Jets Make to Ukraine*, DEFENSE NEWS (Mar. 23, 2023), <https://www.defensenews.com/opinion/commentary/2023/03/23/what-difference-will-polish-slovakian-fighter-jets-make-to-ukraine/>; *Slovakia Delivers First Four Soviet-Era MiG-29 Jets to Ukraine*, AL JAZEERA (Mar. 24, 2023), <https://www.aljazeera.com/news/2023/3/24/slovakia-delivers-first-4-soviet-era-mig-29-jets-to-ukraine>.

8. Lieutenant General Scott Berrier, Director of the U.S. Defense Intelligence Agency, Testimony Before the House Armed Services Subcommittee on Intelligence (Mar. 17, 2022), *quoted in* John Grady, *Intel Sharing Between U.S. and Ukraine “Revolutionary” Says DIA Director*, USNI NEWS (Mar. 18, 2022), <https://news.usni.org/2022/03/18/intel-sharing-between-u-s-and-ukraine-revolutionary-says-dia-director>.

9. General Paul Nakasone, Commander of U.S. Cyber Command, Testimony Before the House Armed Services Subcommittee on Intelligence (Mar. 17, 2022), *quoted in* Grady, *supra* note 8.

significant losses on its invading forces. For instance, “real-time” intelligence, which “includes satellite imagery and reporting gleaned from sensitive U.S. sources,”¹⁰ has been instrumental in attacks on high-ranking Russian military leaders and the sinking of the *Moskva*, the flagship of Russia’s Black Sea Fleet.¹¹ Moreover, not only did the support help blunt Russia’s initial offensive, but it has further empowered successful Ukrainian counteroffensives, resulting in the liberation of key occupied territories.

Predictably, the provision of aid and assistance to Ukraine by predominantly North Atlantic Treaty Organization (NATO) members attracted condemnation from Russia, which claims supporting States have crossed a “red line” in a deliberate attempt to undermine Russia’s power, authority, and influence.¹² North Korea used similar language to denounce what it sees as a “proxy war” against Russia.¹³ While falling short of such criticism, some legal scholars have also questioned the legal implications of Western aid and assistance to Ukraine.¹⁴

The provision of this aid and assistance raises multiple international law issues. A key issue is whether the provision of such aid and assistance reaches the threshold of a “use of force,” as that term is understood in Article 2(4) of the United Nations Charter.¹⁵ The question lies at the heart of the *jus ad bellum*, the body of international law that governs when States may resort to

10. Shane Harris & Dan Lamothe, *Intelligence-Sharing With Ukraine Designed to Prevent Wider War*, WASHINGTON POST (May 11, 2022), <https://www.washingtonpost.com/national-security/2022/05/11/ukraine-us-intelligence-sharing-war/>.

11. *Moskva Sinking: U.S. Gave Intelligence That Helped Ukraine Sink Russian Cruiser—Reports*, BBC NEWS (May 6, 2022), <https://www.bbc.com/news/world-us-canada-61343044>; Julian E. Barnes et al., *U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say*, NEW YORK TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/us/politics/russia-generals-killed-ukraine.html>.

12. See Vassily Nebenzia, Permanent Representative of Russia to the United Nations, Remarks at a U.N. Security Council Meeting (Sept. 8, 2022), <https://russiaun.ru/en/news/080922/>.

13. *North Korea Condemns U.S. Sending Battle Tanks to Ukraine*, AL JAZEERA (Jan. 28, 2023), <https://www.aljazeera.com/news/2023/1/28/north-korea-condemns-us-sending-battle-tanks-to-ukraine>.

14. See, e.g., Kevin Jon Heller & Lena Trabucco, *The Legality of Weapons Transfers to Ukraine Under International Law*, 13 JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 251, 254 (2022); CLAUS KREB, TOAEP OCCASIONAL PAPER: THE UKRAINE WAR AND THE PROHIBITION OF THE USE OF FORCE IN INTERNATIONAL LAW 15 (2022).

15. U.N. Charter art. 2(4) (“All Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”).

force as an instrument of their national policy. In this article, we take that question on; specifically, through the lens of support to Ukraine's use of force in self-defense, we assess whether, and if so when, aid or assistance that contributes to another State's use of force rises to a use of force by the supporting State.

As aid and assistance to Ukraine grow in scale, sophistication, and combat effectiveness, the question looms large, for a State's use of force constitutes an "internationally wrongful act"¹⁶ unless one of two universally accepted "circumstances precluding wrongfulness" exists: a Security Council authorization or mandate under Chapter VII of the UN Charter or individual or collective self-defense under Article 51 of the Charter and its customary law analog.¹⁷ Absent one of them, the use of force is generally considered unlawful, thereby opening the door to responses by the "injured State" that would otherwise be prohibited ("countermeasures").¹⁸ When appropriate, offending States may also owe reparations to the injured State.¹⁹ And if the wrongful use of force reaches the level of an "armed attack," it is lawful for the injured State to respond with its own necessary and proportionate use of force in self-defense.²⁰

Within this context, our sole purpose is to explore the threshold question of the legal status aid or assistance may have under the *jus ad bellum*. Accordingly, we do not address the lawfulness of the aid and assistance to Ukraine, although it is our view that the wrongfulness of any support that amounts to

16. Internationally wrongful acts require 1) attribution to the "responsible State" and 2) breach of a legal obligation owed by that State to the "injured State." Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II, pt. 2, art. 2 [hereinafter Articles on State Responsibility].

17. U.N. Charter ch. VII, art. 51.

18. Articles on State Responsibility, *supra* note 16, art. 22.

19. *Id.* art. 31.

20. U.N. Charter art. 51.

a use of force as a matter of law is “precluded” by Ukraine’s request²¹ for assistance in collective self-defense.²²

Nor do we address several other important, yet separate, international law issues that are beyond the article’s scope. For instance, support may, depending on the attendant circumstances, make the aiding or assisting State a party to the ongoing international armed conflict. However, the mere fact that support qualifies as a use of force does not necessarily do so, as different criteria apply to each determination.²³ Similarly, if support to a State involved in an international armed conflict violates the law of neutrality, that would

21. On the requirement of a request, *see* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 199 (June 27) [hereinafter Paramilitary Activities]. Ukraine has repeatedly called on other nations to come to its defense, as in the March 22 speech of President Zelensky to the U.S. Congress, where he asked for, *inter alia*, the establishment of a no-fly zone. *See* Volodymyr Zelensky, President of Ukraine, Address to the U.S. Congress (Mar. 22, 2022), in *Annotated Transcript: Zelensky’s Speech to Congress*, N.Y. TIMES (Mar. 16, 2022), <https://www.nytimes.com/2022/03/16/us/politics/transcript-zelensky-speech.html>.

22. Self-defense, whether individual or collective, is a circumstance precluding the wrongfulness of the use of force. Articles on State Responsibility, *supra* note 16, art. 21; *cf.* Richard Mills, Dep. Rep. of the U.S. to the U.N., Remarks at a U.N. Security Council Briefing (Feb. 9, 2023), <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-called-by-russia-on-prospects-for-a-peace-settlement-in-light-of-western-arms-shipments-to-ukraine/> (“Colleagues, defense of the UN Charter is not just about words written on paper, but about the principles at the heart of the Charter and actions to back them up. For some, that has meant standing up for Ukraine diplomatically during votes in the UN General Assembly. For others, that has meant supporting Ukraine’s efforts to defend itself against Russia’s brutal, unprovoked war of aggression. The inherent right to individual and collective self-defense is, as others have said, reflected in Article 51 of the Charter. These are inconvenient realities for a Russia desperate to find a narrative, any narrative, other than the one it is stuck in.”). Indeed, it is our view that Ukraine’s request would similarly preclude the wrongfulness of most other violations of international law. For example, even assuming that providing aid and assistance to Ukraine violates neutrality law (we believe it does not), Ukraine’s request would preclude the wrongfulness of any States that do so. On this issue, *see* Russell Buchan, *Non-Forcible Measures and the Law of Self-Defense*, 72 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1 (2023).

23. Michael N. Schmitt, *Providing Arms, and Materiel to Ukraine: Neutrality, Co-belligerency, and the Use of Force*, LIEBER INSTITUTE FOR LAW & WARFARE: ARTICLES OF WAR (Mar. 7, 2022), <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>. An example would be the characterization of a non-destructive cyber operation as a use of force by a State that has adopted a low threshold for uses of force, but that treats the international armed conflict harm threshold as requiring some form of violence.

not necessarily mean the aiding or assisting State has used force.²⁴ Again, different criteria apply to these assessments.

Furthermore, the article does not examine issues regarding aid or assistance under the law of State responsibility, which can arise in two contexts. First, a State may be responsible for the contribution its support makes to another State's "internationally wrongful act," such as the latter's unlawful use of force or violation of the law of armed conflict.²⁵ Rather, our concern is whether the aid or assistance itself amounts to a use of force requiring a "circumstance precluding wrongfulness," like self-defense, to be lawful.²⁶

Second, under certain circumstances, several States may be responsible for the same internationally wrongful act.²⁷ The International Law Commission's commentary on the Articles on State Responsibility offers the example of "two or more States [that] combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation."²⁸ But, here, we are concerned only with whether aid or assistance provided to a supported State, *standing alone*, amounts to a use of force under the *jus ad bellum*.

Finally, we caution that this is a thought piece designed to spark discussion among States and reflection within academia. To date, States have yet

24. For a discussion on the law of neutrality in the cyber context, see Raul (Pete) Redrozo, *Is the Law of Neutrality Dead?*, LIEBER INSTITUTE FOR LAW & WARFARE: ARTICLES OF WAR (May 31, 2022), <https://lieber.westpoint.edu/is-law-of-neutrality-dead/>; Wolff Heintschel von Heinegg, *Neutrality in the War Against Ukraine*, LIEBER INSTITUTE FOR LAW & WARFARE: ARTICLES OF WAR (Mar. 1, 2022), <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>.

25. Articles on State Responsibility, *supra* note 16, art. 16. For instance, to what extent do Belarus or Iran shoulder legal responsibility for contributing to Russia's international law violations? See Aliaksandr Kudrytski, *Why Belarus Is Backing Russia in Its War in Ukraine*, BLOOMBERG (Dec. 30, 2022), <https://www.bloomberg.com/news/articles/2022-12-30/why-is-belarus-supporting-russia-in-its-war-in-ukraine>; Danica Kirka, *U.S. Officials Point to Russia Using Iranian Drones in Ukraine*, AP NEWS (Feb. 14, 2023), <https://apnews.com/article/russia-ukraine-iran-politics-defense-intelligence-agency-drones-fecf53c964f09e24bd9a187715ac8598>. It is important to emphasize that by this secondary rule of international law, the State is not responsible for the unlawful act but instead only for its contribution to it. Responsibility would only lie where the supporting State provided the aid or assistance "with knowledge of the circumstances of the internationally wrongful act" and "[t]hat act would be internationally wrongful if committed by that State." Articles on State Responsibility, *supra* note 16, art. 16.

26. For further discussion of this distinction, see *infra* text accompanying and following note 49 and accompanying notes 69–70.

27. Articles on State Responsibility, *supra* note 16, art. 47.

28. *Id.* art. 47 commentary ¶ 2.

to grapple with the issue head-on. Yet, Russia’s implied charges that support qualifies as a use of force through the depiction of supporting States as parties to the conflict demonstrates the urgency and need for clarity.²⁹ And although the scope and scale of aid and assistance to Ukraine are unprecedented, Russia’s flagrant violations of international law incite so much bias that it is difficult to normatively assess how States are characterizing the support Ukraine is receiving with any degree of objectivity. Bad facts make bad law. Our purpose, then, is to offer thoughts on the factors that States might *objectively* look to when deciding how to characterize aid or assistance, as such, vis-à-vis the use of force threshold.

II. THE USE OF FORCE RULE

Article 2(4) of the UN Charter, which codifies the customary prohibition,³⁰ provides, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”³¹ This cornerstone of modern international law is widely

29. See Sergei Lavrov, Russian Foreign Minister, Remarks at a U.N. Security Council Meeting (Sept. 22, 2022), https://www.mid.ru/en/press_service/minister_speeches/1830851/. Although whether a State is using force and whether that State is a party to an armed conflict are separate legal questions with different applicable standards, see *supra* note 23 and accompanying text, if a State is a party to an armed conflict as a matter of law, the *facts* underlying that determination would generally support a conclusion that the State is also engaged in the use of force.

30. Paramilitary Activities, *supra* note 21, ¶¶ 187–90. States agree on the existence of a separate rule prohibiting force in customary international law. For instance, as noted by the International Court of Justice, both parties in the *Paramilitary Activities* case were of the view that “the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law.” *Id.* ¶ 188. The court also looked, in part, to the Friendly Relations Declaration, which incorporated the text of Article 2(4), as *opinio juris* further supporting the proposition that the prohibition is customary in character. *Id.* (citing G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]). Note that the Charter and the customary law rules do not overlap perfectly, but the essentials are the same. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 103–5 (6th ed. 2017).

31. U.N. Charter art. 2(4).

considered a peremptory norm of customary international law, from which derogation is prohibited.³²

Although no authoritative definition of the use of force exists, there are a number of important indicators of its meaning. To begin with, the Charter's *travaux préparatoires* indicate that the prohibition was not meant to regulate political or economic pressure.³³ While such measures may violate other prohibitions, like that of intervention into the internal affairs of another State,³⁴ they are generally considered beyond the scope of Article 2(4).

Instead, the traditional interpretation was that the rule proscribes using *armed force*.³⁵ Not only does the Charter refer to armed force in the preamble and other articles,³⁶ but subsequent treatment of the issue by States also supports such a construction. For instance, in elaborating on the essentials of the prohibition, the General Assembly's 1970 Friendly Relations Declaration limits its exemplary descriptions to physical, trespassory actions.³⁷ In contrast, it cites other means of coercion, such as political or economic pressure,

32. Paramilitary Activities, *supra* note 21, ¶ 190; Int'l Law Comm'n, Rep. on the Work of the Second Part of the Seventeenth Session, Draft Articles on the Law of Treaties with Commentaries, Commentary to Article 50, INTERNATIONAL LAW COMMISSION YEARBOOK 1966, vol. II, at 247; Int'l Law Comm'n, Rep. on the Work of its Seventy-First Session, U.N. Doc. A/74/10, at 142 (2019) (draft conclusion 2 of the peremptory norms of general international law: "A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

33. For a discussion and analysis of the Charter's *travaux préparatoires* in this context, see Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 885, 905–12 (1998–1999).

34. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 161–65 (Dec. 19) [hereinafter *Armed Activities*]; Paramilitary Activities, *supra* note 21, ¶ 202; Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 35 (Apr. 9); Friendly Relations Declaration, *supra* note 30, princ. 3; Int'l Law Comm'n, Declaration on Rights and Duties of States, annexed to G.A. Res. 375 (IV), art. 3 (Dec. 6, 1949).

35. Schmitt, *Computer Network Attack*, *supra* note 33, at 908; see also Michael N. Schmitt, *Cyber Operations and the Jus Ad Bellum Revisited*, 56 VILLANOVA LAW REVIEW 569, 573 (2011); Oliver Dörr, *Prohibition of Use of Force*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW, ¶¶ 11–13 (Aug. 2019), <https://opil.ouplaw.com/display/10.1093/law:epil/978019231690/law-978019231690-e427?rskey=Hy8nuX&result=2&prd=MPIL>.

36. U.N. Charter pmbl., arts. 41, 44; see also *id.* art. 51 (referencing "armed attack"). The preamble provides that "armed force shall not be used, save in the common interest." Article 44 implies that force involves the employment of "armed forces."

37. See Friendly Relations Declaration, *supra* note 30.

when clarifying the scope of the principle of non-intervention.³⁸ In States’ original understanding, therefore, “use of force” typically denoted physically coercive actions by military means.

Military aid or assistance to a State using force does not fit neatly into this framework. In many cases, the supporting State’s armed forces are neither involved in, nor integral to, the forcible operations that employ the support. And where military forces are involved, as is the case with some support to Ukraine, the aid or assistance may not bring them into direct confrontation with the supported State’s enemy.³⁹ If the use of force was limited to direct physical coercion by military or paramilitary forces, it would be clear that aid or assistance to Ukraine falls outside the prohibition.

Emerging interpretations, however, are beginning to bend the traditional notion of force. In the cyber context, for instance, technological advances are placing outward pressure on the premise that force must be physical, kinetic, or involve armed forces or conventional arms. As a case in point, numerous States and NATO have expressed the view that cyber operations may constitute uses of force when their “scale and effects” are comparable to those caused by conventional military forces.⁴⁰ For them, it is not the tool of coercion that is determinative, but rather both the consequences of the actions taken and the context in which they occur.

38. *See id.*

39. For example, much of the training States are providing Ukrainian forces takes place in countries like Germany, the United Kingdom, and the United States. *See, e.g.,* Elaine Monaghan & Lidia Kelly, *Ukraine Talks Further Aid with U.S. as Training on Modern Tanks Starts*, REUTERS (Feb. 13, 2023), <https://www.reuters.com/world/europe/top-ukraine-general-talks-aid-training-with-us-commander-nato-2023-02-13/>; CLAIRE MILLS, RESEARCH BRIEFING: MILITARY ASSISTANCE TO UKRAINE SINCE THE RUSSIAN INVASION 22 (Feb. 15, 2023), <https://researchbriefings.files.parliament.uk/documents/CBP-9477/CBP-9477.pdf>; Meghann Myers, *Ukrainian Troops Heading to Oklahoma for Patriot Missile Training*, DEFENSE NEWS (Jan. 10, 2023), <https://www.defensenews.com/news/your-military/2023/01/10/ukrainian-troops-heading-to-oklahoma-for-patriot-missile-training/>.

40. *See, e.g.,* NATO, Allied Joint Publication 3.20, Allied Joint Doctrine for Cyberspace Operations, ¶ 3.7 (ed. A, ver. 1 2020); *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States*, U.N. Doc. A/76/136* (July 13, 2021) [hereinafter *Official Compendium*] (Australia at 5, Estonia at 25, Germany at 34, Netherlands at 58, Norway at 69, Romania at 77, Singapore at 83–84, Switzerland at 88). The approach was first suggested by the (first) Tallinn Manual’s international group of experts. *See* TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, r. 11 (Michael N. Schmitt gen. ed., 2013) [hereinafter TALLIN MANUAL 1.0].

The relevant considerations that play into assessments of scale and effects are multi-faceted. For instance, in 2019, France's Ministry of the Armies stated,

In the absence of physical damage, a cyber-operation can be considered a use of force in light of several criteria, notably the prevailing circumstances at the time of the operation, such as the origin of the operation and the nature of the instigator (military or non-military), the degree of intrusion, the effects caused or sought by the operation, or the nature of the target. These criteria are, of course, not exhaustive. For example, penetrating military systems with a view to weakening French defense capabilities, or to finance or train individuals so that they can perpetrate cyberattacks against France could well qualify as the use of force.⁴¹

As of 2022, France and Norway have even stated that a cyber operation having no physical effects, but generating widespread economic consequences, could qualify as a use of force,⁴² a position the Netherlands said could not be "ruled out."⁴³

These examples illustrate that States are increasingly willing to shift their interpretive focus from the nature of the means employed to the attendant context and the quantitative and qualitative effects produced. Indeed, for many, the use of force need not involve using the State's military or paramilitary forces at all. Further, States that have spoken to the matter appear to support (as in the cyber context) taking a holistic look at a situation by referencing a variety of non-exclusive factors when making use of force determinations.⁴⁴

41. France, Ministry of the Armies, *International Law Applied to Operations in Cyberspace*, ¶ 1.1.2 (2019) (French original available at <https://www.justsecurity.org/wp-content/uploads/2019/09/droit-internat-appliqu%C3%A9-aux-op%C3%A9rations-cyberespace-france.pdf>).

42. *Official Compendium*, *supra* note 40, at 70 (Norway). France even takes the position that such an operation could rise to the level of an armed attack in the law of self-defense, which necessarily means the operation would be a use of force. *International Law Applied to Operations in Cyberspace*, Paper Shared by France with the Open-ended Working Group Established by Resolution 75/240, ¶ 1.2.1, <https://documents.unoda.org/wp-content/uploads/2021/12/French-position-on-international-law-applied-to-cyberspace.pdf> (last visited Apr. 5, 2023).

43. *Official Compendium*, *supra* note 40, at 58 (Netherlands).

44. The approach was developed by the (first) Tallinn Manual's international group of experts, which set forth some relevant factors in the cyber context. TALLINN MANUAL 1.0, *supra* note 40, at 48–51. It was based on an approach suggested in Schmitt, *Computer Network Attack*, *supra* note 33.

Our approach to assessing support to a State's use of force is likewise holistic. In our estimation, States are likely to consider several non-exclusive factors when concluding whether aid or assistance is or is not a use of force by the supporting State, such that it triggers the previously cited legal issues. However, we believe the requisite threshold for what we label the "indirect" use of force is high. But before addressing the quantum at which it qualifies as such, it is necessary to assess whether indirect force can qualify as a use of force as an initial matter.

III. MILITARY AID OR ASSISTANCE AS AN INDIRECT USE OF FORCE

In the decades since the UN Charter was drafted, State practice, supported by persuasive International Court of Justice interpretation of what constitutes the use of force, confirms that the prohibition extends to indirect uses of force. By "indirect force," we mean certain aid or assistance to another State's use of force, or to an armed group's actions that would qualify as such a use if engaged in by States. Of course, not all support will qualify; to the contrary, most will not.

As an initial consideration, characterizing indirect force as a use of force for Article 2(4) purposes is not inconsistent with the Charter's text. In particular, whereas other sections of the instrument specify "armed force," Article 2(4) employs the term "force" without qualification.⁴⁵ The distinction is telling. The two operative articles in which "armed force" appears (41 and 46) both deal with Chapter VII enforcement mechanisms, or in other words, direct uses of force to enforce Security Council decisions. In such situations, it is necessary to distinguish the resort to the armed forces from other enforcement mechanisms contemplated in that chapter, such as interruption of economic relations or severance of diplomatic relations.⁴⁶ By contrast, Article 2(4) operates and applies differently by simply proscribing the unqualified "use of force." Moreover, considering the World War that was still underway at the time of its drafting, it is a prohibition that is reasonably understood to be broad—a point reflected in its inclusion of mere "threats" to use force.

45. *Compare* U.N. Charter pmb., arts. 41, 46, *with* art. 2(4).

46. *Id.* art. 41.

Looking to the text in this manner comports with the rule of interpretation found in Article 31(2) of the Vienna Convention on the Law of Treaties.⁴⁷ That provision indicates that treaties must be understood in context, which includes considering an instrument's preamble, text, and annexes as a whole. Thus, the deliberate omission of "armed" in Article 2(4), considering its presence elsewhere in the Charter, may be interpreted as admitting of more than armed force.

Further, the Vienna Convention provides that subsequent agreement between the parties regarding the proper interpretation of a treaty and application of its provisions may also be taken into account.⁴⁸ Of particular note, the Friendly Relations Declaration, when addressing the threat or use of force, proffers actions that are, by their nature, indirect and non-kinetic:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.⁴⁹

Although "incursion into the territory of another State" by "irregular forces or armed bands" and "acts of civil strife or terrorist acts" clearly relate to the application of armed force (if engaged in by a State), that is not the focus of these illustrations; rather, it is *supporting* States' activities that cross the *indirect* use of force threshold by aiding or assisting those groups or their actions. In other words, a breach of the prohibition by a supporting State does not depend on attribution of the supported State's use of force but instead upon the former's *own actions* in support of the latter's use of force.

47. Although the United States is not a party to the treaty, it recognizes many of the instrument's provisions as reflective of customary international law binding on the United States. See U.S. Dep't of State, *Vienna Convention on the Law of Treaties*, <https://2009-2017.state.gov/s/1/treaty/faqs/70139.htm> (last visited Apr. 5, 2023).

48. Vienna Convention on the Law of Treaties art. 31(3)(a), May 23, 1969, 1155 U.N.T.S. 331.

49. Friendly Relations Declaration, *supra* note 30. Article 4 of the International Law Commission's Draft Declaration on Rights (1954) contains similar language. See G.A. Res. 375 (IV), Draft Declaration on Rights and Duties of States, annex, art. 4 (Dec. 6, 1949).

Consequently, subsequent agreement by the States supporting the resolution, which the General Assembly adopted without a vote, strengthens a textual interpretation according to which force and armed force do not perfectly overlap; instead, they are concentric, with the former extending further than the latter. That the International Court of Justice later looked to States’ adoption of the Friendly Relations Declaration as evidence of the customary law character of the Charter’s use of force prohibition provides further support to this position.⁵⁰

Beyond Article 2(4), the adjacent concept of State aggression also counsels in favor of a broad reading of the use of force. Although “[i]t has never been settled whether aggression of itself must consist of use of force,”⁵¹ the two concepts are closely related.⁵² Given this relationship, States’ understanding of aggression’s scope helps inform their assessments of whether the prohibition on using force includes certain indirect support to another State’s use of force.

Pursuant to Article 1(1) of the UN Charter, a specified purpose of the United Nations is to suppress, inter alia, “acts of aggression or other breaches of the peace.”⁵³ The process for doing so is laid out in Chapter VII, whereby the Security Council determines the existence of such acts (or a threat to the peace) and the appropriate action to maintain or restore “international peace and security.”⁵⁴ As with the use of force, there is no authoritative definition of aggression.⁵⁵ We can, however, look to States’ subsequent interpretations to clarify the term’s scope.

In 1974, for example, the UN General Assembly adopted a definition of aggression to assist the Security Council with its Chapter VII duties.⁵⁶ Outlined in terms of “armed force,” the resolution notably cites examples of

50. *Paramilitary Activities*, *supra* note 21, ¶ 188.

51. Yoram Dinstein, *Aggression*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW, ¶ 1 (Sept. 2015), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e236?prd=EPIL&q=aggression>.

52. But they must be distinguished from the international criminal law offense of aggression, which involves individual criminal responsibility rather than State responsibility. *See, e.g.*, Rome Statute of the International Criminal Court art. 8 *bis*, July 17, 1998, 2187 U.N.T.S. 90.

53. U.N. Charter art. 1(1).

54. *Id.* art. 39.

55. And although the Security Council has referenced the term in resolutions relating to States’ conduct, it has never made a formal finding under Article 39 that a State has committed a qualifying act. Dinstein, *Aggression*, *supra* note 51, ¶ 9.

56. G.A. Res. 3314 (XXIX), Definition of Aggression (Dec. 14, 1974).

both direct and indirect acts constituting State aggression. In addition to invasions, attacks, bombardments, and blockades (i.e., direct uses), it includes “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts [of armed force], or its substantial involvement therein.”⁵⁷ Such activity is, for our purposes, indirect.

The inclusion of indirect activity in the resolution is highly probative, as it was a matter of substantial controversy during the deliberations of the Special Committee on the Question of Defining Aggression, the UN body charged with submitting a draft definition for the General Assembly’s consideration. A significant number of delegations proposed that indirect forms of force should be included, in some manner, within the definition.⁵⁸ In the view of one group of them, for instance,

[A]cts of indirect aggression . . . would imply a use of force which was prohibited in Article 2, paragraph 4, of the Charter; if a State used force, even through the agency of volunteers, terrorists and the like, it would, according to the conception on which [one draft] proposal was based, be violating that provision of the Charter.⁵⁹

Others States took the position that including indirect acts in the definition would create confusion by “branding as aggression trivial cases of use of force, whereas it did not really permit States to use their right of self-defence.”⁶⁰ For them, indirect force should not be seen as rising to the level of aggression, lest it implicate a State’s right to self-defense under Article 51 because, according to the authentic French text of the article, the right of self-defense is triggered in the face of *aggression armée*.⁶¹ One such proposal, for example,

57. *Id.* annex, art. 3(g).

58. Rep. of the Special Comm. on the Question of Defining Aggression, 25 GAOR Supp. No. 19, ¶ 51, U.N. Doc. A/8019 (1970), https://digitallibrary.un.org/record/722812/files/A_8019-EN.pdf [hereinafter 1970 Aggression Report].

59. *Id.* ¶ 27; *see also* Rep. of the Special Comm. on the Question of Defining Aggression, ¶ 72, U.N. Doc. A/7185/Rev.1 (1968) [hereinafter 1968 Aggression Report] (“Some [representatives] stressed, as a major fault of both drafts, their failure to apply to use of force by one state against another, directly or indirectly, through such means as infiltration of armed bands, terrorism, or subversion. In the view of these delegations, no definition would be acceptable which did not deal adequately with such cases of aggression. Other delegations held this view untenable.”).

60. 1968 Aggression Report, *supra* note 59, ¶ 101.

61. 1970 Aggression Report, *supra* note 58, ¶ 27.

did not ignore acts of indirect aggression, but did not treat them as acts of aggression; in particular, it deprived States of their right under the Charter and under general international law to have recourse to individual or collective self-defence when they were the victims of subversive or terrorist acts by irregular bands.⁶²

Despite a lack of consensus on how to define aggression, the debate suggests that the opposition of States that lobbied against including indirect acts in the definition tended not to be based on the interpretation of the term "use of force," but instead arose with respect to its relevance in the context of the higher threshold⁶³ of "armed attack" in Article 51.⁶⁴

In general, then, the Friendly Relations Declaration and the Definition of Aggression reflect a hospitable approach by States to including indirect force within the use of force framework. The International Court of Justice has embraced a similar interpretation of force, albeit based on customary international law, that also includes indirect mechanisms. In its 1986 *Military and Paramilitary Activities in and Against Nicaragua* judgment, the court famously held that the United States wrongfully used force in violation of the prohibition based on the nature of its support to the *contras* in their insurgency against the Nicaraguan government.⁶⁵

While the judgment was criticized on other grounds,⁶⁶ this aspect of the court's analysis met with little disapproval. Indeed, Nicaragua and the United

62. *Id.*; see also 1968 Aggression Report, *supra* note 59, ¶ 101.

63. In *Paramilitary Activities*, the International Court of Justice distinguished between "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms." *Paramilitary Activities*, *supra* note 21, ¶ 191.

64. States not participating in the Special Committee held similar views. Following the Second World War, for example, Greece accused neighboring countries of endangering international security by supporting guerilla movements threatening its sovereignty. In response, the General Assembly called on Albania, Bulgaria, and Yugoslavia to discontinue their support to the guerillas fighting the Greek government, labeling such aid a danger to peace in the Balkans and "inconsistent with the purposes and principles of the Charter of the United Nations." G.A. Res. 193 (III) (Nov. 27, 1948); see also CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 176 (3d ed. 2008) ("In state practice the supply of arms, money, and logistic support have not generally been treated as armed attacks in the context of collective self-defence").

65. *Paramilitary Activities*, *supra* note 21, ¶ 228.

66. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 266 ¶ 1 (June 27) (dissenting opinion by Schwebel, J.) (criticizing the Court's "armed attack" analysis) [hereinafter *Schwebel Dissent*]; *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 543–44 (June 27) (dissenting opinion by Jennings, J.) (same).

States each claimed the other was engaging in force by assisting non-State armed groups.⁶⁷ Over a decade later, the court similarly found in *Armed Activities on the Territory of the Congo* that Uganda violated the “principle[] of the non-use of force” through its “training and military support given” to a non-State armed group in the Democratic Republic of the Congo.⁶⁸

It is critical to note that, like the Friendly Relations Declaration, neither judgment imposed responsibility for violating the prohibition on the basis of attribution of the non-State actors’ conduct according to the secondary rules of State responsibility.⁶⁹ On the contrary, the court found that the United States and Uganda respectively violated a primary rule of international law by engaging in indirect force *themselves*, citing the declaration’s duty to “refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State.”⁷⁰

The fact that States sometimes have supported armed groups or other States since the Charter’s adoption does not necessarily undermine this conclusion.⁷¹ In many cases, doing so is lawful, as when acting in collective self-defense. The United States, for example, argued that arming and training the *contras* was justified on this basis;⁷² the court rejected that argument on the facts, but not the law.⁷³ The same position is available to States that are openly aiding and assisting Ukraine, should their actions qualify as a use of

67. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Counter-Memorial of the U.S., Pleadings, Oral Arguments, Documents, vol. II, ¶ 189 (Aug. 17, 1984) [hereinafter U.S. Counter-Memorial] (“Nicaragua solemnly denies that it is engaged in armed attacks on its neighbors. The current Nicaraguan Government, however, has for years provided guerillas in neighboring countries—particularly El Salvador—with arms, munitions, finance, logistics, training, safe havens, planning and command and control support.”); Paramilitary Activities, *supra* note 21, ¶ 228 (discussing Nicaragua’s claim).

68. Armed Activities, *supra* note 34, ¶¶ 161–63.

69. See, e.g., Paramilitary Activities, *supra* note 21, ¶ 116; see also *supra* text accompanying notes 26 and 49.

70. *Id.* ¶ 228; Armed Activities, *supra* note 34, ¶ 161.

71. See DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 30, ¶¶ 274–78; see also Ashley Deeks, *Arming Syrian Rebels: Lethal Assistance and International Law*, LAWFARE (May 1, 2013), <https://www.lawfareblog.com/arming-syrian-rebels-lethal-assistance-and-international-law> (commenting on a lack of public discussion about the relevance of Article 2(4) in the context of arming Syrian rebels). For a brief description of States’ increasing preference for the use of indirect force for military and political reasons, see Oliver Dörr & Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 211 (Bruno Simma et al. eds., 3d ed. 2012).

72. See U.S. Counter-Memorial, *supra* note 67, ¶ 202; Paramilitary Activities, *supra* note 23, ¶ 165.

73. Paramilitary Activities, *supra* note 21, ¶ 238.

force. In contrast, States that cannot benefit from collective self-defense as a circumstance precluding wrongfulness, such as Iran and North Korea, have denied, or at least minimized, allegations that they are providing lethal arms to Russia or its associated forces.⁷⁴

Moreover, as the court observed in *Paramilitary Activities*, the fact that a purported rule sometimes is violated does not necessarily lead to the conclusion that it lacks the status of a rule. For instance, it noted that “trespass” against the rule of intervention was “not infrequent.”⁷⁵ But the court went on to confirm the existence and parameters of the rule based on *opinio juris*, State practice in conformity with the rule, and the reaction of other States in situations where it had been violated. In addition to the evidence highlighted by the court, scholarly authority notably continues to weigh heavily in favor of treating aid or assistance as an indirect use of force despite such behavior.⁷⁶

Finally, while the treatment of indirect uses of force, as exemplified above, has focused on State support of non-State groups, we see no reason to differentiate those situations from ones in which aid or assistance is provided to a State. International law is primarily a body of law meant to govern relations among States and designed to foster “international peace and security” within the community of nations. This being so, limiting the prohibition of indirect force to situations involving non-State groups would run counter

74. Zubaidah Abdul Jalil, *North Korea Denies Supplying Weapons to Russia*, BBC NEWS (Sept. 22, 2022), <https://www.bbc.com/news/world-asia-62873987>; Timothy W. Martin, *North Korea Denies Sending Weapons to Russia*, WALL STREET JOURNAL (Nov. 7, 2022), <https://www.wsj.com/articles/north-korea-denies-sending-weapons-to-russia-11667879505>; Niamh Kennedy et al., *Iran Denies Supplying Russia With Weapons for Use in Ukraine*, CNN (Oct. 15, 2022), <https://www.cnn.com/2022/10/15/europe/iran-denies-supplying-russia-weapons-ukraine-intl-hnk/index.html>; *North Korea Denies Arming Russia’s Wagner Group*, AL JAZEERA (Jan. 29, 2023), <https://www.aljazeera.com/news/2023/1/29/north-korea-denies-arming-russias-wagner-group>.

75. *Paramilitary Activities*, *supra* note 21, ¶ 202.

76. Rosalyn Higgins, *Legal Limits to the Use of Force by Sovereign States United Nations Practice*, 37 BRITISH YEAR BOOK OF INTERNATIONAL LAW 269, 278 (1961); DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 30, ¶¶ 237–38; Dörr & Randelzhofer, *supra* note 71, at 211 (“As a result of their efforts it is virtually undisputed today, both in international legal writings and in UN practice, that the scope of Art. 2 (4) extends to the use of indirect force”); Michael N. Schmitt, *Legitimacy Versus Legality Redux: Arming the Syrian Rebels*, 7 JOURNAL OF NATIONAL SECURITY LAW & POLICY 139, 140–42 (2014). *But see* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 370 (1963) (“However, in cases in which aid is given but there is no agency established, and there is no exercise of control over the rebels by the foreign government, it is very doubtful if it is correct to describe the responsibility of that government in terms of a use of force or armed attack”).

to the object and purpose of the rule prohibiting the use of force between States.

Indeed, while the sources above reference only support to non-State actors (e.g., the examples in the Friendly Relations Declaration), the prohibition of the use of force applies *only* between States.⁷⁷ Consequently, the inclusion of indirect force in the concept of the use of force is even more compelling when all the actors are States.⁷⁸ After all, the harm caused by support to another State (even if lawful) can be (and is likely to be, in most cases) more severe than that caused by support to an armed group.

To summarize, while there may be some residual ambiguity surrounding other aspects of indirect force, such as whether it can amount to an armed attack, the prevailing view is that support to a party to an armed conflict can rise to the level of a use of force under Article 2(4) and customary international law. What is less clear are the conditions under which aid or assistance violates the prohibition.

IV. KEY CONSIDERATIONS IN THE INDIRECT USE OF FORCE ASSESSMENT

As it pertains to States' military aid or assistance, we interpret the applicable threshold for the indirect use of force to be relatively high. Indeed, the International Court of Justice indicated in *Paramilitary Activities* that indirect force as a use of force has its limits.

77. There have been relatively few international armed conflicts since the adoption of the Charter. Instead, the trend throughout the post-Charter era has been a rapid growth in intrastate conflicts involving non-State armed groups assisted indirectly by States. Accordingly, by the time the drafting committees presented their proposals, many States insisted on including examples of such activities to preclude States from using indirect force to circumvent the Charter. *See, e.g.*, Rep. of the Special Comm. on Principles of Int'l Law Concerning Friendly Relations and Co-operation Among States, ¶¶ 46–48, U.N. Doc. A/7326 (1968).

78. This is especially true considering the growing number of States that recognize that traditional neutrality law has been displaced, in whole or in part, by the outlaw of war and the use of force framework embodied in the Charter. *See, e.g.*, Robert H. Jackson, Attorney General of the United States, Address at the First Conference of the Inter-American Bar Association (Mar. 27, 1941), <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/03-27-1941.pdf>; *see also* Memorandum from Hersch Lauterpacht to Robert H. Jackson, Attorney General of the United States, *Memorandum on the Principles of International Law Governing the Question of Aid to the Allies by the United States* (Jan. 15, 1941), in 5 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 645 (Elihu Lauterpacht ed., 2004).

In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua . . . does not in itself amount to a use of force.⁷⁹

This differential treatment begs the question of how to assess whether, or more precisely, when, particular support is or is not an indirect use of force. In other words, what criteria should be applied to distinguish an indirect use of force from an act that falls short of that threshold? Unfortunately, States have said little in the decades since the Charter was drafted to refine indirect force's boundaries. Their silence is especially noteworthy given the International Court of Justice's judgments in the *Paramilitary Activities* and *Armed Activities* cases, which in the decades since have emphasized the need for greater clarity in the indirect use of force sphere.

In our view, the most pragmatic approach to operating in the face of this ambiguity is to identify *factors* that States are likely to consider when deciding whether to characterize support as indirect force. While States may consider a range of factors, the most compelling, we suggest, are based in the nature of the relationship between the aid or assistance provided and the ultimate application of force by the supported State.

Of course, any determination that a supporting State is using indirect force would necessarily be highly context-driven. Nevertheless, certain factors identified below would generally predominate. We emphasize that they are not exhaustive, nor should they be treated as necessary criteria, as with elements of a crime. Instead, they are simply factors that would likely influence States in assessing whether particular military aid or assistance crosses the threshold of a use of force under Article 2(4) and customary international law. As the law in this area develops and States begin to articulate their respective positions, their assessments of the valence of the factors set forth below will become clearer, and additional considerations will emerge.

Before turning to the factors, note that we are not proposing this approach out of whole cloth. Rather, it is analogous to that taken by the so-called "International Groups of Experts" responsible for the two *Tallinn*

79. *Paramilitary Activities*, *supra* note 21, ¶ 228.

Manuals (1.0 and 2.0).⁸⁰ There, the experts proposed a set of non-exclusive factors that States would likely consider when deciding whether to characterize a cyber operation as a use of force or armed attack.⁸¹ It is an approach that has generally found favor with States, such as members of NATO.⁸² Accordingly, we anticipate that States will find a similar approach in the aid or assistance context insightful and useful.

A. Intent

A key factor likely to prove influential as States assess support is the degree to which the supporting State objectively intends to contribute to the supported State's direct use of force. While it is impossible to quantify the factor, the clearer the intent to meaningfully contribute to a supported State's use of force, the greater the likelihood that States will consider aid or assistance a discrete use of indirect force. Conversely, States are unlikely to treat support that only inadvertently or unexpectedly contributes to a use of force as sufficient to cross the threshold.

As intent is a term fraught with ambiguity in international law, particularly regarding the use of force,⁸³ it is critical to clarify its import. For the purpose of our analysis, a supporting State objectively *intends* to assist another's direct use of force when its actions are purposely and consciously designed to enhance the supported State's forcible operations.

Intent must be distinguished from motive, for the two concepts are often conflated. As used here, motive denotes the subjective reason a State engages in a particular behavior. In aiding or assisting Ukraine, for instance, States may be driven by various motives. Possibilities include supporting Ukraine in the face of Russian aggression, undermining Russian influence in European affairs, deterring Russia from attacking the Baltic States or Moldova, etc. A case in point, the U.S. Secretary of Defense has stated, "We want to see Russia weakened to the degree that it can't do the kinds of things that it

80. TALLINN MANUAL 1.0, *supra* note 40; TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS, r. 69 (Michael N. Schmitt gen. ed., 2017) [hereinafter TALLIN MANUAL 2.0].

81. TALLINN MANUAL 2.0, *supra* note 80, r. 69.

82. ALLIED JOINT DOCTRINE FOR CYBERSPACE OPERATIONS, *supra* note 40, ¶ 3.7.

83. *See, e.g.*, Michael Wood et al., *Use of Force*, 76 INTERNATIONAL LAW ASSOCIATION REPORTS OF CONFERENCES 648, 652 (2014); INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 59–60 (2009) (in the context of direct participation in hostilities).

has done in invading Ukraine.”⁸⁴ And different motives may underlie the support each nation provides.

Intent, by contrast, deals with the foreseeable consequences of a State’s actions without regard for its underlying motivations. It denotes the *result* the supporting State seeks that will advance whatever motive underlies its decision to provide support. For instance, despite the motive of supporting Ukrainian defenses against Russian aggression, the United States has been at pains to limit the foreseeable consequences of its support, as in the case of altering weapon systems to limit their effective range to within Ukrainian territory.⁸⁵ Even when determining a State’s intent is not straightforward, perhaps because of its silence on the matter, it is generally reasonable to infer that the State objectively intends the natural and probable consequences of its actions. This is so notwithstanding any ulterior motive(s) that might exist.

Further distinguishing intent from motive is the fact that a State’s intent in using indirect force is, in large part, contextual. A State’s intentions can only definitively be determined in relation to the circumstances prevailing at the time of the aid or assistance. This is because the calculations underpinning the supporting State’s intent depend on the information available when deciding to render aid or assistance. Sometimes, the supporting State must make assumptions about how its support will be used.

To illustrate, the intent of States providing weapons and other support to Ukraine is to enhance operations against Russia’s invading forces; it is reasonable to assume that Ukraine will employ them to forcibly defend its territory. But consider a hypothetical case in which Ukraine further used the aid or assistance against States supporting Russia, such as Belarus or Iran. Even if the diversion of support might be consistent with the *motives* of some States (like countering regional State aggression), it cannot be reasonably said that those States *intended* their assistance to be used in that manner (at least not absent some advanced indication that Ukraine was considering expanding the conflict).

Looking at the assistance States have provided Ukraine, an intent to engage in the indirect use of force against Russia is more apparent in some

84. Missy Ryan & Annabelle Timsit, *U.S. Wants Russian Military “Weakened” From Ukraine Invasion, Austin Says*, WASHINGTON POST (Apr. 25, 2022), <https://www.washingtonpost.com/world/2022/04/25/russia-weakened-lloyd-austin-ukraine-visit/>.

85. Michael R. Gordon & Gordon Lubold, *U.S. Altered Himars Rocket Launchers to Keep Ukraine From Firing Missiles Into Russia*, WALL STREET JOURNAL (Dec. 5, 2022), <https://www.wsj.com/articles/u-s-altered-himars-rocket-launchers-to-keep-ukraine-from-firing-missiles-into-russia-11670214338>.

States' actions than in others. On one end of the spectrum, for example, much of the aid provided by NATO member-States has consisted of lethal military equipment, such as anti-armor munitions (e.g., Javelins), advanced rocket systems (e.g., High Mobility Artillery Rocket Systems (HIMARS)), and combat vehicles.⁸⁶ Regardless of the motive behind lending these and similar systems, their intended end use is self-evident; tanks, after all, serve but one purpose—conducting armored operations. In our view, such cases of clearly manifested intent will likely carry significant weight in States' assessments of the indirect force threshold.

But identifying a supporting State's intent is not always so straightforward, especially when the aid or assistance, as such, has limited probative value. Some States, for example, have declined to provide lethal equipment from which intentions vis-à-vis Ukraine's use of force are readily discernable. Austria and Ireland, for example, have offered body armor and fuel.⁸⁷ Japan has similarly only provided reconnaissance assets, helmets, and military uniform items.⁸⁸ Compared to the lethal systems supplied by other supporting States, these items are more innocuous or defensive in nature. The causal nexus between their provision and the application of force against Russia is more attenuated than, say, missiles or tactical intelligence. As a result, support of this nature would probably weigh less heavily in other States' determination as to whether the supporting State is employing indirect force, irrespective of the latter's motive(s).

This is not to say, however, that either lesser degrees of, or uncertainty as to, a State's intent are necessarily determinative. There may be circumstances in which States conclude that a supporting State has indirectly used force despite the lack of an overt or otherwise clear intention to do so. States

86. Helene Cooper & Eric Schmitt, *As Russia Pounds Ukraine, NATO Countries Rush in Javelins and Stingers*, NEW YORK TIMES (Mar. 4, 2022), <https://www.nytimes.com/2022/03/04/us/politics/russia-ukraine-weapons.html>; *HIMARS and Howitzers: West Helps Ukraine With Key Weaponry*, AP NEWS (July 21, 2022), <https://apnews.com/article/russia-ukraine-zelenskyy-nato-sergey-lavrov-dd7bc9324e465a15209940c146a859b3>; Sanya Mansoor, *Why U.S. Bradleys Are Just the Fighting Vehicles That Ukraine Needs*, TIME (Jan. 9, 2023), <https://time.com/6245649/us-bradleys-vehicles-ukraine/>.

87. Joseph Gedeon, *The Weapons and Military Aid the World Is Giving Ukraine*, POLITICO (May 10, 2022), <https://www.politico.com/news/2022/03/22/ukraine-weapons-military-aid-00019104>; Stijn Mitzer & Joost Oliemans, *Aid From Asia: Japan's Military Support To Ukraine*, ORYX (Sept. 8, 2022), <https://www.oryxspioenkop.com/2022/09/aid-from-asia-japans-military-support.html>.

88. Gedeon, *supra* note 87.

may find, for instance, that support crosses the indirect use of force threshold when a supporting State *knows* that its assistance will contribute to a direct use of force, even if such a result is not the conscious *purpose* of the supporting State, as when the supporting State is indifferent to how its support will be used.

Similarly, States might even conclude that aid or assistance qualifies as an indirect use of force when a supporting State consciously disregards a substantial risk that it will enable or contribute to a supported State’s use of force.⁸⁹ Indeed, even if a supporting State does not know that its aid or assistance will enhance a supported State’s use of force, if it should have known in the attendant circumstances that it would do so, that fact may contribute to the conclusion by other States that it has used force indirectly. This is especially so where the behavior of the supporting State is aggravated or reckless.

But contrast such a situation with South Korea’s and Israel’s provision of aid and assistance for humanitarian purposes after declining to provide military arms or equipment.⁹⁰ Assuming *arguendo* that Ukraine could convert their support to a forceful purpose without their consent, that fact would likely weigh as a mitigating factor in the indirect use of force assessment.

To illustrate these points, it is helpful to consider the various ways States have shared intelligence with Ukraine. The United States, for example, insists that it is not involved in selecting Ukraine’s targets despite providing “time-sensitive” intelligence on the location of “supply depots and logistics hubs” to its forces.⁹¹ According to a senior U.S. Air Force official, “We would pass on where some of this equipment was, and then it was up to them whether they wanted to target it or not.”⁹² Under such an agnostic approach, the

89. Cf. William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE JOURNAL OF INTERNATIONAL LAW 295, 302 (2004) (“States have a right of self-defense so that they can protect their national security and deter attacks against them, concerns that are implicated just as much when States are subjected to indiscriminate attacks as when they are subjected to targeted attacks”).

90. Press Release, Republic of Korea, Ministry of Foreign Aff., *Korea Sends Additional Medical Supplies to Ukraine* (Apr. 20, 2022), https://www.mofa.go.kr/eng/brd/m_5676/view.do?seq=322033&page=1; Emily Rose, *Israel Offers Help With Air-Attack Alerts, but Ukraine Wants Interceptors*, REUTERS (Oct. 19, 2022), <https://www.reuters.com/world/israel-edges-toward-air-defence-assistance-ukraine-2022-10-19/>.

91. Paul McLeary, *Ukraine Has Shot Down 55 Russian Warplanes, U.S. General Says*, POLITICO (Sept. 19, 2022), <https://www.politico.com/news/2022/09/19/ukraine-has-shot-down-55-russian-warplanes-00057569>.

92. General James Hecker, Remarks to Media at the 2022 Annual Air Force Association Conference, *quoted in id.*

United States could claim that its intelligence sharing lacks the intent to assist in Ukraine's direct use of force against Russians.

But this is a specious argument given that the United States knows that its intelligence is, at a minimum, likely to contribute to Ukraine's targeting processes. The claim is especially unpersuasive considering the West has provided Ukraine with the means to kinetically act on the intelligence it is providing. As noted in one media report, "In the early days of the war Ukrainian forces were having a hard time hitting those targets, which were behind the front lines and out of range of much of their artillery. 'But then they got HIMARS.'"⁹³ And in February 2023, Ukrainian officials acknowledged that their use of advanced U.S. rocket systems relied upon coordinates that the United States "provided or confirmed."⁹⁴ If accurate, an intent to contribute to attacks on the targets is self-evident. Thus, there is little doubt that the United States, at a minimum, *knows* its intelligence will contribute to the use of force against Russian targets, even if it lacks target specificity.

To summarize, States, after consideration of the totality of circumstances, are likely to evaluate the intent factor based on its *degree*, for intent exists along a continuum. Discrimination in terms of degree is consistent with the object and purpose of the rule. In particular, intent may weigh more heavily in an indirect use of force calculation than mere knowledge or recklessness. Still, the latter conditions may push the determination in the direction of concluding that aid or assistance is an indirect use of force.

We cannot overemphasize that intent is but one consideration among many likely to influence States' assessments of aid or assistance as qualifying as the indirect use of force. Other factors likely contribute to the determination, and we urge that all of them, and others, be considered ensemble and in context when making the assessment.

B. *Timing*

A further relevant consideration is the timing of aid or assistance relative to the consequences of its use by the supported State. The more immediate the impact the support has on that State's direct use of force, the greater the weight other States are likely to accord it when determining whether to char-

93. *Id.* (internal quotation marks omitted).

94. Isabelle Khurshudyan et al., *Ukraine's Rocket Campaign Reliant on U.S. Precision Targeting, Officials Say*, WASHINGTON POST (Feb. 9, 2023), <https://www.washingtonpost.com/world/2023/02/09/ukraine-himars-rocket-artillery-russia/>.

acterize aid or assistance as an indirect use of force. Equally, the more temporarily removed the aid or assistance is from the consequences of its use, the less likely it will be characterized as an indirect use of force.

In many cases, the immediacy of the support will be evident. For instance, aid or assistance of immediate or imminent tactical use during an ongoing armed conflict will result in the timing factor weighing more heavily in the indirect use of force calculation than in situations where the onset of effects is more delayed or attenuated.

As an example, the rapidity with which the Western States have supported Ukraine since Russia’s renewed invasion in February 2022 is staggering. As of March 2023, the United States has provided more than \$32 billion in security assistance.⁹⁵ Over the same period, other nations contributed over \$13 billion, including long-range artillery systems, tanks, armored vehicles, and associated munitions.⁹⁶ While these combined totals are measured in months, much of the assistance was delivered within days or weeks.⁹⁷ In those cases that took longer, a limiting factor preventing immediate use of lethal military equipment was often simply the minimum time it took to train (often in a condensed fashion) Ukrainian forces on how to use it safely and effectively.⁹⁸

Even more immediate, supporting States have also provided aid and assistance in real-time. In fact, the United States instructed its defense and intelligence agencies “to clear the way of any bureaucratic roadblocks to information sharing” after Congress expressed concerns that U.S. officials were not providing intelligence quickly enough.⁹⁹ With respect to assistance in the form of advice or consulting services, Western States are hosting live chat

95. U.S. Dep’t of State Fact Sheet, *supra* note 3.

96. *Id.*

97. For example, when preparing to send eight National Advanced Surface-to-Air Missile Systems (NASAMS) to Ukraine in November, a U.S. official claimed they would be delivered in the “very near future.” Lawrence Richard, *U.S. to Provide Ukraine With Two NASAMS in the “Very Near Future,” Six More Later: Official*, FOX NEWS (Nov. 2, 2022), <https://www.foxnews.com/world/us-provide-ukraine-with-two-nasams-very-near-future-six-more-later-official>.

98. *See, e.g.*, Ellen Mitchell, *Ukrainian Troops Begin Patriot Missile Training at Oklahoma Army Base*, THE HILL (Jan. 17, 2023), <https://thehill.com/policy/defense/3816973-ukrainian-troops-begin-patriot-missile-training-at-oklahoma-army-base/>.

99. *See* Warren P. Strobel & Michael R. Gordon, *Biden Administration Altered Rules for Sharing Intelligence with Ukraine*, WALL STREET JOURNAL (Mar. 8, 2022), <https://www.wsj.com/articles/biden-administration-altered-rules-for-sharing-intelligence-with-ukraine-11646744400>.

sessions with Ukrainian mechanics responsible for repairing disabled or in-operative vehicles or equipment, including Bradley fighting vehicles and Patriot air defense batteries.¹⁰⁰ Ukrainian soldiers claim these chat sessions are responsible for keeping highly effective HIMARS rocket systems provided by the United States operational.¹⁰¹ Assistance has also been immediate in the cyber context. According to open-source reports, the United States “has helped unearth thousands of warning indicators of potentially compromised Ukrainian computer networks.”¹⁰²

In contrast to these immediate effects, the passage of time can attenuate the relationship between the support and the supported State’s direct use of force, thereby dissuading States from characterizing support as an indirect use of force. For instance, beyond the confines of ongoing hostilities, we are aware of no State practice in which peacetime military aid has been characterized as an indirect use of force.

Consider security assistance relationships, including between the United States and Ukraine, that exist prior to the outbreak of an armed conflict. While U.S. aid and assistance to Ukraine during the conflict has sometimes yielded immediate or near-immediate effects, the impact of similar support provided before Russia’s 2014 invasion of Crimea (or between 2014 and 2022) was less immediate. Between 2001 and 2013, for instance, the United States provided Ukraine between \$100–245 million annually in aid, a substantial portion of which included defense-related activities.¹⁰³ These sums are considerably higher than the value of support provided to Ukraine by

100. Nancy A. Youssef & Stephen Kalin, *Battlefield Hotlines Let U.S. Military Keep Ukraine’s Weapons Firing*, WALL STREET JOURNAL (Sept. 24, 2022), <https://www.wsj.com/articles/battlefield-hotlines-let-u-s-military-keep-ukraines-weapons-firing-11664009094>; Jen Judson, *U.S. Army Goes Virtual to Help Ukraine Maintain Weapons*, DEFENSE NEWS (Jan. 31, 2023), <https://www.defensenews.com/land/2023/01/31/us-army-goes-virtual-to-help-ukraine-maintain-weapons/>.

101. Youssef & Kalin, *supra* note 100.

102. Julian E. Barnes, *The Pentagon Says It Has Helped Ukraine Thwart Russian Cyberattacks*, NEW YORK TIMES (Dec. 19, 2022), <https://www.nytimes.com/2022/12/19/world/europe/ukraine-cyber-national-mission-force.html?referringSource=articleShare&smid=ny-tcore-ios-share>.

103. U.S. Dep’t of State & U.S. Agency for Int’l Development, *U.S. Foreign Assistance By Country: Ukraine*, FOREIGNASSISTANCE.GOV, <https://foreignassistance.gov/cd/ukraine/2001/disbursements/0> (last visited Apr. 5, 2023) (use the drop-down menus to select the appropriate Fiscal Year and select “Disbursements” from the Funding Phase menu); *see also The United States and Allies Provide Military and Intelligence Support to Ukraine*, 116 AMERICAN JOURNAL OF INTERNATIONAL LAW 646, 646–47 (June 27, 2022).

some other States since February 2022.¹⁰⁴ But when considering their respective weight vis-à-vis the question of whether it constitutes an indirect use of force, the relevance of the former is slight compared to the latter.

To further illustrate this distinction, contrast the military assistance the United States has provided Ukraine with similar support in the Indo-Pacific theater. Over the past several months, the United States has provided substantial arms, training, and related assistance to strategic partners, such as Taiwan, South Korea, Japan, and Australia, to deter Chinese and North Korean aggression. The support has included, inter alia, HIMARS rockets, Tomahawk cruise missiles, and nuclear technology for powering submarines.¹⁰⁵ The United States also maintains a significant military presence across the territories of these partners through which it routinely conducts joint training exercises to enhance lethality, readiness, and interoperability.¹⁰⁶ Yet, despite the quantity and nature of the support, no State has suggested it might qualify as a use of force. In great part, this is because there is no ongoing or imminent use of force by or against the supported States.

Accordingly, like the factor of intent, States are likely to evaluate the timing of aid or assistance along a temporal spectrum. The more immediate the effects of aid or assistance are felt, the higher the likelihood that such support will be considered an indirect use of force.

104. See Gedeon, *supra* note 87.

105. Mike Cherney, *Australia to Deploy U.S. Himars Rocket System Being Used in Ukraine*, WALL STREET JOURNAL (Jan. 4, 2023), <https://www.wsj.com/articles/australia-to-deploy-u-s-himars-rocket-system-being-used-in-ukraine-11672892032>; Alastair Gale & Chieko Tsuneoka, *Japan to Spend Billions on U.S. Tomahawk Missiles in Military Buildup*, WALL STREET JOURNAL (Dec. 23, 2022), <https://www.wsj.com/articles/japan-to-spend-billions-on-u-s-tomahawk-missiles-in-military-buildup-11671784716>; President Joseph Biden, Prime Minister Scott Morrison & Prime Minister Boris Johnson, Remarks Announcing the Creation of AUKUS (Sept. 15, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/15/remarks-by-president-biden-prime-minister-morrison-of-australia-and-prime-minister-johnson-of-the-united-kingdom-announcing-the-creation-of-aukus/>.

106. See, e.g., Dzirhan Mahadzir, *U.S. Joins South Korea, Australia, Japan, Canada for Missile Defense Exercise Following RIMPAC*, USNI NEWS (Aug. 16, 2022), <https://news.usni.org/2022/08/16/u-s-joins-south-korea-australia-japan-canada-for-missile-defense-exercise-following-rimpac>; Stephen Wright, *Australia, United States to Invite Japan Into Three-Way Military Exercises*, RADIO FREE ASIA (Dec. 6, 2022), <https://www.rfa.org/english/news/pacific/aus-us-jpn-exercises-1206202210714.html>.

C. Directness

In addition to scrutinizing the supporting State's intent and the temporality of the support's effects, States are also likely to consider the causal nexus between aid or assistance and the supported State's direct use of force. The more direct the connection, the greater the likelihood that other States will consider aid or assistance an indirect use of force.

As this implies, causation in the context of indirect force, like intent and timing, is a matter of degree. When dealing with indirect force, there will always be at least one intermediate step inherently separating the assistance from the use of force—the use of the aid or assistance by the supported State. Depending on the form and timing of the support, there may be more. As with the other considerations, this reality demands a flexible approach by which the directness of the causal relationship is but one variable bearing on the assessment.

The utility of such a flexible standard is illustrated in the various mechanisms by which States are arming Ukraine. The United States, for example, can provide aid in different ways with varying degrees of attenuation. Although their causal directness may vary, they can each produce a similar result—enhancing the use of force against Russians.¹⁰⁷

The Excess Defense Articles Program and Presidential Drawdown Authority provide the most direct aid forms. Both programs supply defense equipment directly to Ukraine from the Department of Defense's stock.¹⁰⁸ Accordingly, the relationship between the support provided under such programs and its use by Ukraine is objectively proximate. Other programs are similarly direct. Foreign Military Sales, for instance, are government-to-government agreements in which the United States procures defense articles and services from defense manufacturers on behalf of Ukraine.¹⁰⁹

Some programs, however, are more causally attenuated. For example, in addition to intergovernmental agreements, Ukraine has also procured defense equipment through the Direct Commercial Sales and Third-Party Transfers programs. Instead of transferring arms and equipment to Ukraine through government-executed transactions, these programs authorize defense manufacturers or other States that possess U.S.-origin equipment to

107. U.S. Dep't of State Fact Sheet, *supra* note 3.

108. *See* Foreign Assistance Act of 1961, 22 U.S.C. §§ 2321j, 2318.

109. *See* Arms Export Control Act, 22 U.S.C. §§ 2751–54; *see also* Nathan J. Lucas & Michael J. Vassalotti, Cong. Rsch. Serv., *Transfer of Defense Articles: Foreign Military Sales* (Feb. 21, 2020), <https://sgp.fas.org/crs/weapons/IF11437.pdf>.

contract with Ukraine directly.¹¹⁰ Canada, for instance, purchased \$406 million worth of advanced air defense systems from U.S. manufacturers on Ukraine’s behalf.¹¹¹ Using these latter mechanisms, the United States merely permits other actors to assist Ukraine using American-made equipment.

Germany is also a helpful example. In contrast to its reluctance to directly transfer lethal arms to Ukraine in hopes of “avoid[ing] a backlash from Moscow,” Germany has been more apt to provide offensive equipment, such as BMP-1 infantry fighting vehicles, using third-party transfers.¹¹² Residual concerns remain, however. For instance, Germany initially resisted international pressure to permit Poland to re-export German-made Leopard tanks to Ukraine before eventually relenting.¹¹³ Had Poland executed the transfers without Germany’s consent, which it threatened to do, that fact would have been a mitigating consideration in an indirect German use of force assessment. These examples illustrate that, although varying forms of aid can produce substantially similar consequences, their directness may vary.

Lastly, one must bear in mind that while directness is distinct from the immediacy of the aid or assistance, the two factors are related. As time passes, additional factors are likely to intervene in the chain of causation. And equity will weigh heavily in any calculation where forceful effects are far removed from the support that enabled them. Consider, for example, media reports that Western-made components were found inside Iranian drones used by Russia to attack Ukrainian infrastructure.¹¹⁴ It would be absurd to suggest that such a remote connection is sufficient to establish an indirect

110. See Nathan J. Lucas & Michael J. Vassalotti, Cong. Rsch. Serv., *Transfer of Defense Articles: Direct Commercial Sales* (Mar. 2, 2020), <https://sgp.fas.org/crs/weapons/IF11441.pdf>; see also *Foreign Military Sales vs Direct Commercial Sales*, NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, <https://www.ndia.org/policy/issues/international/fms-vs-dcs> (last accessed Mar. 31, 2023).

111. Richard Raycraft, *Canada to Purchase U.S. Missile Defence System for Ukraine*, CANADIAN BROADCASTING CORPORATION (Jan. 10, 2023), <https://www.cbc.ca/news/politics/canada-purchase-missile-system-1.6709115>.

112. Tanmay Kadam, *German Rheinmetall Ready To Supply Leopard Tanks To Ukraine To Battle Russia; Awaits Final Nod From Berlin*, EURASIAN TIMES (Apr. 13, 2022), <https://eurasianimes.com/german-ready-to-supply-leopard-tanks-to-ukraine-to-battle-russia/>.

113. Drew Hinshaw et al., *Germany’s Standoff Over Tanks for Ukraine Overshadows West’s Arms-Deal Meeting*, WALL STREET JOURNAL (Jan. 19, 2023, 3:19 PM), <https://www.wsj.com/articles/poland-suggests-it-would-send-german-made-tanks-to-ukraine-without-berlins-consent-11674123217>.

114. Natasha Bertrand, *A Single Iranian Attack Drone Found to Contain Parts From More Than a Dozen U.S. Companies*, CNN (Jan. 4, 2023, 1:51 PM), <https://www.cnn.com/2023/01/04/politics/iranian-drone-parts-13-us-companies-ukraine-russia/index.html>.

use of force by, for instance, the United States against Ukraine. Thus, as with the timing factor, the degree to which assistance is causally attenuated from the supported State's use of force will likely prove influential in auguring against characterization as an indirect use of force.

D. Nature of the Aid or Assistance

Relatedly, the nature of the support provided, which has a causal component, is also a significant consideration. Some aid or assistance is of a nature that directly contributes to the application of force by the supported State. It differs from that which, for example, sustains the supported State's war effort or broadly increases its military capacity. This consideration perhaps explains why the International Court of Justice, which has not expressly articulated its reasoning, famously distinguished financing from other prohibited forms of assistance in its *Paramilitary Activities* judgment.¹¹⁵ Whereas arming and training were directly related to the *contras'* armed actions, the nexus between U.S. financial assistance, which included humanitarian and administrative aid, and those activities was, in our assessment, more attenuated.

Consider, for example, the different types of war materiel States have provided Ukraine. Lethal equipment such as rocket launchers, artillery systems, and anti-armor munitions are used to conduct attacks against Russian forces. By contrast, items such as body armor, helmets, and military uniforms may contribute to Ukraine's general capacity to use force, but they do not directly enable such use. Fuel, as another example, may be used to power lethal assets like tanks and attack helicopters, but it can equally support logistical convoys, heaters, or hospital generators. Such functions merely maintain Ukraine's potential to use force against Russia; they are not always integral to the use of force itself. This being so, States are less likely to characterize their provision as an indirect use of force than aid or assistance of a nature that translates seamlessly into conducting attacks.

Aside from war materiel, the nature of intangible assistance, such as intelligence, training, or advice, can also influence use of indirect force assessments. One factor among many is the level of war—tactical, operational, or strategic—to which the assistance is aligned. For instance, although the West is providing Ukraine with “time-sensitive” intelligence on the operational

115. *Paramilitary Activities*, *supra* note 21, ¶ 228.

disposition of Russian forces, in many cases, such information must be combined with Ukraine’s intelligence to be actionable at the tactical level.¹¹⁶ As noted by a U.S. spokesperson, “Ukraine combines information that we and other partners provide with the intelligence that they themselves are gathering, and then they make their own decisions and they take their own actions.”¹¹⁷

Similar examples demonstrate how the level of war may factor into the causal analysis. The United States, for example, participated in “war games,” analytical exercises intended to test operational courses of action or strategies, with Ukrainian forces to perfect their plans before mounting a counter-offensive to recapture occupied territory.¹¹⁸ And the Director of the U.S. Central Intelligence Agency has traveled to Ukraine to brief President Zelensky “on his expectations for what Russia is planning militarily” to inform the reconstitution and marshaling of Ukraine’s forces.¹¹⁹ In such operational-strategic level-of-war cases, Western assistance may play only a minor or indirect role in targeting Russian forces.

In more tactical scenarios, however, the causal connection may be more acute. For example, in contrast to the examples above, “[t]here has been a lot of real-time intelligence shared in terms of things that could be used for specific targeting of Russian forces.”¹²⁰ Because intelligence of this nature directly contributes to Ukrainian attacks, it would likely feature heavily in the indirect force assessment. As these divergent circumstances indicate, as-

116. McLeary, *supra* note 91; see also Michael N. Schmitt, *Are We at War?*, LIEBER INSTITUTE FOR LAW & WARFARE: ARTICLES OF WAR (May 9, 2022), <https://lieber.westpoint.edu/are-we-at-war/>.

117. John Kirby, Pentagon Press Secretary, Remarks to the Media (May 5, 2022), *quoted in* Jordan Williams, *Pentagon Denies U.S. Shared Intel to Target Russian Generals*, THE HILL (May 5, 2022), <https://thehill.com/policy/defense/3478747-pentagon-denies-us-shared-intel-to-target-russian-generals/>.

118. Katie Bo Lillis & Natasha Bertrand, *U.S. War-Gamed With Ukraine Ahead of Counteroffensive and Encouraged More Limited Mission*, CNN (Sept. 1, 2022), <https://www.cnn.com/2022/08/31/politics/ukraine-us-wargames-counteroffensive/index.html>.

119. John Hudson, *CIA Director Holds Secret Meeting With Zelensky on Russia’s Next Steps*, WASHINGTON POST (Jan. 19, 2023), <https://www.washingtonpost.com/national-security/2023/01/19/cia-william-burns-zelensky-ukraine-russia/>.

120. Ken Dilanian et al., *U.S. Intel Helped Ukraine Protect Air Defenses, Shoot Down Russian Plane Carrying Hundreds of Troops*, NBC NEWS (Apr. 26, 2022), <https://www.nbcnews.com/politics/national-security/us-intel-helped-ukraine-protect-air-defenses-shoot-russian-plane-carry-rcna26015> (quoting an unnamed, former senior U.S. intelligence official).

sessing intelligence support is largely fact-driven; the nature of the intelligence in the surrounding circumstances will determine the weight States accord it in the use of indirect force assessment.

E. Geopolitical Context

Not all considerations pertain to the relationship between the supporting State's military aid or assistance and the use of force by the supported State. For example, the geopolitical context in which the support is rendered will also likely shape assessments of whether support qualifies as an indirect use of force.

As used in this context, "geopolitical" refers to those variables—such as geography, economics, demographics, history, and security—that affect relations between States. Like other factors, geopolitical considerations can be complex, dynamic, and contextual. Their influence on the characterization of military assistance as a use of force will accordingly vary based on the conflict underway.

Geopolitical context overlaps substantially with other considerations, like intent and timing. Yet it is helpful to disaggregate them, for they are distinct forms of influence on indirect use of force assessments. For instance, intent and timing are transactional in nature. They focus on the qualitative and quantitative correlations between the provision of aid or assistance and the ultimate application of force by the supported State. Geopolitical context, by contrast, examines the setting in which such interactions occur. Recall the distinction between intent and motive. The former is transactional in that it involves the extent to which a State understands that its assistance will likely contribute to the use of force by the supported State. Conversely, motive is the product of geopolitical factors; it reflects the subjective reasons States provide their support.

At the risk of oversimplification, geopolitical relations can be characterized into three categories for the purpose of assessing the indirect use of force between States: cooperation, competition, and conflict. These categories exist along a spectrum of intensity and are not mutually exclusive. For example, while the United States characterizes its overall relationship with China as one of competition, it nonetheless emphasizes that it "will always

be willing to work with the PRC where [their] interests align.”¹²¹ Even predominantly cooperative relations between allies or partners can assume a competitive character in certain spheres, as in the British withdrawal from the European Union. But as a general matter, the more interactions move across the spectrum towards conflict, the more likely States will view aid or assistance as an indirect use of force.

As it pertains to the question of indirect use of force, geopolitical context involves the examination of at least two discrete interstate relationships. The first is between the supported State and its adversary, whose relations certainly rise to the level of a geopolitical conflict because of the direct use of force. The more complex geopolitical consideration, however, pertains to the relations between *supporting* States and the supported State’s adversary. The tense competition between NATO allies and Russia provides a helpful illustration. After all, the geopolitical rivalry that existed even before the initiation of the second phase of the invasion in 2022 has exerted significant influence on NATO member-States’ resolve to deter Russian aggression, inside and outside Ukraine’s borders, by assisting in its defense.¹²²

Whether the relationship has reached the point of “conflict” on the spectrum remains an open question. For instance, during a meeting of the Council of Europe, Germany’s foreign minister remarked, “We are fighting a war against Russia.”¹²³ Though Germany later clarified that she was simply using the phrase to emphasize NATO’s aid and assistance to Ukraine, Russian officials capitalized on the comment as proof that the West “was waging a ‘premeditated war against Russia.’”¹²⁴

121. JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY STRATEGY 25 (2022).

122. See, e.g., Lisa Ferdinando, *NATO Unified, Resolute in Face of Russia’s “Illegal” Ukraine Invasion, Austin Says*, DOD NEWS (Oct. 13, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3188194/nato-unified-resolute-in-face-of-russias-illegal-ukraine-invasion-austin-says/>; Paul Belkin, Cong. Rsch. Serv., *Russia’s Invasion of Ukraine: NATO Response* (Mar. 21, 2022), <https://crsreports.congress.gov/product/pdf/IN/IN11866>; Transcript of Interview with NATO Secretary General Jens Stoltenberg in the Sixth Edition of the Financial Times’s Global Boardroom Event, NATO NEWSROOM (Dec. 7, 2022, 12:51), https://www.nato.int/cps/en/natohq/opinions_209984.htm.

123. Annalena Baerbock, German Foreign Minister, *quoted in Germany Says It Is Not a Warring Party in Ukraine*, DEUTSCHE WELLE (Jan. 27, 2023), <https://www.dw.com/en/germany-says-it-is-not-a-warring-party-in-ukraine/a-64541484> (remarks made at a meeting of the Council of Europe).

124. Maria Zakharova, Russian Foreign Ministry Spokesperson, *quoted in DEUTSCHE WELLE, Germany Says It Is Not a Warring Party in Ukraine, supra* note 123 (remarks made in a post on her Telegram messaging channel and cited by Russian State news agency TASS).

Still, there is no doubt that the relationship has been steadily traveling in that direction for over a decade. The United States, for example, pursuant to its view that Russia “poses an immediate and persistent threat to international peace and stability,” has worked with allies and partners to “marshall[] near-record levels of security assistance to ensure Ukraine has the means to defend itself” and “to make Russia’s war on Ukraine a strategic failure.”¹²⁵ In response, Russia’s foreign minister has openly accused NATO of “in essence, [engaging] in a war with Russia through a proxy and is arming that proxy.”¹²⁶

Russia’s obsession with NATO and the extent to which NATO members’ support to Ukraine has dominated international attention are telling. But NATO members are not the only ones supporting Ukraine militarily. Non-NATO States like Japan and Australia, for example, have provided Ukraine with reconnaissance assets, protective equipment, armored vehicles, missiles, and training.¹²⁷ Yet Russia generally has limited its recriminations to assistance by the United States and its NATO allies. This discrimination between supporting States exposes the extent to which geopolitical context can influence how States characterize the provision of aid or assistance during armed conflict. So, too, does the international focus on the NATO-Russia dynamic.

F. *Impact*

While there may be others, the final consideration we highlight focuses on the *impact* of military aid or assistance on the direct use of force by the supported State. Aside from the procedural and transactional aspects of support (e.g., intent, timing, causation, etc.), it is essential to examine the extent to

125. BIDEN, *supra* note 121, at 25–26.

126. Sergei Lavrov, Russian Foreign Minister, *quoted in* Rebecca Falconer, *Russia Accuses NATO of “Proxy War” in Ukraine*, AXIOS (Apr. 26, 2022), <https://www.axios.com/2022/04/26/russia-accuses-nato-of-proxy-war-in-ukraine> (remarks made to Russian State media).

127. Mitzer & Oliemans, *supra* note 87; Daniel Hurst & Amy Remeikis, *Australia’s Military Aid to Ukraine Has Been Ramping Up—Here’s How It Compares With Other Nations*, THE GUARDIAN (Oct. 5, 2022), <https://www.theguardian.com/australia-news/2022/oct/06/australias-military-aid-to-ukraine-has-been-ramping-up-heres-how-it-compares-with-other-nations>; Press Release, Australian Ministry of Defence, *Additional Support for Ukraine* (Oct. 27, 2022), <https://www.minister.defence.gov.au/media-releases/2022-10-27/additional-support-ukraine>.

which the support in question meaningfully contributes to, and sometimes enables, the supported State’s use of force.

In our assessment, impact is likely to be the predominant factor States will weigh when evaluating the indirect use of force. The more consequential the impact of the supporting State’s contributions in terms of the supported State’s forcible actions, the more likely that aid or assistance will be characterized as an indirect use of force. Of course, consequentiality is relative and contextual, so determining the weight of impact in the indirect use of force assessment will, we foresee, always occur on a case-by-case basis.

Impact can be the product of the quantity or quality of aid or assistance. Concerning the former, the sheer volume of aid or assistance may drive the degree of impact on the supported State’s operations. While many factors contribute to a belligerent’s success in war, the size of its war chest looms large. After all, “quantity has a quality all its own.”¹²⁸

For example, coupled with global sanctions that have limited Russia’s ability to resource new supplies, the exchange of fire between Russian and Ukrainian forces is exhausting Russia’s combat power. As a result, it has been forced to reduce its rate of fire by up to 75 percent as it looks to older Cold War-era stockpiles internally and abroad to boost its dwindling supply.¹²⁹ Ukraine has an opportunity to exploit the situation, but it is now dependent on external supplies of artillery shells, having depleted its own ammunition stocks in the attritive “artillery war” with Russia.¹³⁰ As this example illustrates, the mere *quantity* of aid or assistance can significantly impact the course of a conflict.

This begs the question of how States will assess the *quantitative* impact of military aid or assistance. As a preliminary observation, that States will likely

128. This quote is traditionally attributed to Joseph Stalin. *See, e.g.,* Zoya Sheftalovich, *Russia Has Mobilized. What Happens Now?*, POLITICO (Sept. 21, 2022), <https://www.politico.eu/article/putin-mobilizes-russia-ukraine-war-options/>.

129. Natasha Bertrand et al., *Russian Artillery Fire Down Nearly 75%, U.S. Officials Say, in Latest Sign of Struggles for Moscow*, CNN (Jan. 10, 2023, 6:00 AM), <https://www.cnn.com/2023/01/10/politics/russian-artillery-fire-down-75-percent-ukraine/index.html>; Julian E. Barnes, *Russia Is Buying North Korean Artillery, According to U.S. Intelligence*, NEW YORK TIMES (Sept. 5, 2022), <https://www.nytimes.com/2022/09/05/us/politics/russia-north-korea-artillery.html>.

130. Major General Vadym Skibitsky, Deputy of Ukraine’s Defense Ministry Intelligence Directorate, *quoted in* Isobel Koshiw, *We’re Almost Out of Ammunition and Relying on Western Arms, Says Ukraine*, THE GUARDIAN (June 10, 2022), <https://www.theguardian.com/world/2022/jun/10/were-almost-out-of-ammunition-and-relying-on-western-arms-says-ukraine>. Russia’s military had ten to fifteen times as many artillery pieces as Ukraine when the most recent phase of the conflict began in 2022. *Id.*

aggregate all aid or assistance provided to the supported State when considering whether the indirect use of force threshold has been crossed is manifest. In the analogous context of cyber operations, for example, NATO nations have agreed that “the impact of significant malicious *cumulative* cyber activities might, in certain circumstances, be considered as amounting to an armed attack.”¹³¹ Since all armed attacks under the law of self-defense are equally uses of force, aggregation in the latter context is appropriate, at least from NATO’s perspective.¹³²

Beyond aggregation, the remaining issue is how States will quantify the impact of a particular State’s aid or assistance. By gross volume, for instance, the United States is by far Ukraine’s leading supporter. Between February 2022 and March 2023, the United States provided Ukraine with over \$32 billion in military aid and assistance.¹³³ This is over twice the amount of the combined aid and assistance that the nearly fifty other supporting States provided over the same period.¹³⁴ Thus, with respect to the sheer quantity of such support, it would not be unreasonable to suggest that the United States’ contributions have been more consequential than any other State’s.

But if one assesses the provision of aid or assistance by reference to a supporting State’s gross domestic product, as another example, the United States is outpaced by several European countries and Canada.¹³⁵ Remarkably, the tiny Baltic nations of Estonia and Latvia lead all States in assisting

131. Press Release, NATO, *Brussels Summit Communiqué*, ¶ 32 (June 14, 2021), https://www.nato.int/cps/en/natohq/news_185000.htm. The approach is not limited to NATO members. *See, e.g., Official Compendium, supra* note 40, at 84 (Singapore). *See also, generally*, Paramilitary Activities, *supra* note 21, ¶ 231 (addressing whether several border incursions “may be treated for legal purposes as amounting, singly or collectively, to an ‘armed attack’”); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 62 (Nov. 6) (addressing the United States’ argument that a “series” of forceful acts by Iran constituted an armed attack); *see also* Schwebel Dissent, *supra* note 66, ¶ 171. For more background on the aggregation or accumulation of a series of events in the use of force and armed attack contexts, *see* Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 5–6 (Jan. 1972); DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 30, ¶¶ 554–56.

132. Paramilitary Activities, *supra* note 21, ¶ 191.

133. U.S. Dep’t of State Fact Sheet, *supra* note 3.

134. According to the U.S. Department of State, nearly fifty other States have provided over \$13 billion as of Feb. 3, 2023. *Id.*

135. Jonathan Masters & Will Merrow, *How Much Aid Has the U.S. Sent Ukraine? Here Are Six Charts*, COUNCIL ON FOREIGN RELATIONS (Dec. 16, 2022), <https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts>.

Ukraine militarily.¹³⁶ By such a measurement, Estonia’s support to Ukraine, although modest in volume, is, dollar-for-dollar, arguably more consequential than that of the United States. As is apparent from these contrasting approaches (there are likely others), assessing the materiality of the support in question is not necessarily straightforward.

From a use of force perspective, the *quality* of the support provided sometimes may likely impact the supported State’s use of force more than its quantity. In particular, quality can directly affect the effectiveness of critical military capabilities. The West’s evolving aid and assistance to Ukraine are emblematic. States have deliberately tailored their support throughout the various phases of the war to mitigate Ukraine’s vulnerabilities and capability gaps while countering Russia’s strengths and exploiting its weaknesses.

Following the culmination of Russia’s initial offensive, for instance, the United States and the United Kingdom jointly decided to provide “longer range precision weapons” such as HIMARS and Multiple Launch Rocket Systems (MLRS) to “offer a significant boost in capability for the Ukrainian forces” in preparation for their eastern counteroffensive to liberate occupied territories.¹³⁷ Other States, like Germany, followed their lead.¹³⁸ These modern systems had over twice the range of conventional artillery batteries and became Ukraine’s preferred tool for attacking Russian logistical hubs and command and control elements, comprising up to 70 percent of Ukraine’s front lines firepower despite their relatively modest number.¹³⁹ Attacks on supply lines and ammunition depots enabled by these systems have proven especially disruptive to Russia’s ability to gain or hold territory;¹⁴⁰ it has been estimated that, but for Western-supplied rockets systems, Ukraine would not have been able to liberate much of the occupied regions of Kharkiv and

136. *Id.*

137. MILLS, *supra* note 39, at 14; see Gordon & Lubold, *supra* note 85.

138. Sebastian Sprenger, *Under Pressure, Germany Pledges More Military Aid to Ukraine*, DEFENSE NEWS (Sept. 15, 2022), <https://www.defensenews.com/global/europe/2022/09/15/under-pressure-germany-pledges-more-military-aid-to-ukraine/>.

139. Stephen Kalin, *A Rare Look at Ukraine’s Himars on the Front Lines*, WALL STREET JOURNAL (Sept. 29, 2022), <https://www.wsj.com/video/a-rare-look-at-ukraine-himars-on-the-front-lines/445D369D-CE60-4936-A03D-1FA3ADD6E5BB.html>; BBC News, *What Are Himars Missiles*, *supra* note 4.

140. See C. Todd Lopez, *U.S.-Provided HIMARS Effective in Ukraine*, DOD NEWS (July 15, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3095394/us-provided-himars-effective-in-ukraine/>; BBC NEWS, *What Are Himars Missiles*, *supra* note 4; Sanya Mansoor, *Why U.S. HIMARS Rockets Are Becoming Increasingly Decisive for Ukraine*, TIME (Jan. 5, 2023), <https://time.com/6244479/himars-rockets-ukraine-russia/>.

Kherson.¹⁴¹ In short, their qualitative advantages make it difficult to overstate these systems' consequential impact.

A further testament to the qualitative responsiveness of Western aid has been its effectiveness in undermining Russia's recurring waves of long-range missiles and Iranian-made suicide drones. Hundreds of attacks using these systems have caused "colossal" harm in which "almost no thermal and hydroelectric power plants remain undamaged."¹⁴² Some analysts speculate that Russia may be "trying to compensate for territorial losses and to create a sense of war fatigue among Ukraine's European NATO allies in the hope that they will eventually pressure Kyiv to make concessions and slow arms shipments that enabled Ukrainian victories."¹⁴³

States supporting Ukraine have responded by significantly enhancing its air defense capabilities with a suite of advanced defensive systems, including National Advanced Surface-to-Air Missile Systems (NASAMS), counter-unmanned aerial systems, and ship- and air-launched air defense missiles.¹⁴⁴ In

141. See Mansoor, *HIMARS Rockets*, *supra* note 140. Lithuania's Foreign Minister attributes the strategic-level agreement to permit Ukrainian grain shipments through the Black Sea, in part, to HIMARS' effectiveness. Gabrielius Landsbergis, Lithuanian Foreign Minister, *quoted in* John Psaropoulos, "The Russians Have Nothing Equivalent": How HIMARS Help Ukraine, AL JAZEERA (July 26, 2022), <https://www.aljazeera.com/news/2022/7/26/the-russians-have-nothing-equivalent-how-himars-help-ukraine>. These and similar systems have been so effective that countries such as Poland, Estonia, Latvia, Lithuania, and Australia have agreed to purchase them to deter further aggression from Russia or other adversaries. Joe Gould, *Lithuania Signs \$495 Million Deal to Buy HIMARS, ATACMs*, DEFENSE NEWS (Dec. 16, 2022), <https://www.defensenews.com/pentagon/2022/12/16/lithuania-signs-495-million-deal-to-buy-himars-atacms/>; Mike Cherney, *Australia to Deploy U.S. Himars Rocket System Being Used in Ukraine*, WALL STREET JOURNAL (Jan. 4, 2023), <https://www.wsj.com/articles/australia-to-deploy-u-s-himars-rocket-system-being-used-in-ukraine-11672892032>; Psaropoulos, *supra* (Poland, Estonia, Latvia).

142. Volodymyr Kudrytskyi, CEO of Ukrenergo, *quoted in* Marc Santora & Thomas Gibbons-Neff, *Russian Missile Barrage Cuts Power and Water Across Ukraine*, NEW YORK TIMES (Nov. 23, 2022), <https://www.nytimes.com/2022/11/23/world/europe/russia-ukraine-missiles-power.html>.

143. David L. Stern et al., *Ukrainian Energy Systems on Brink of Collapse After Weeks of Russian Bombing*, WASHINGTON POST (Nov. 23, 2022), <https://www.washingtonpost.com/world/2022/11/23/ukraine-infrastructure-damage-electricity-water-russia/>.

144. Ron Popeski, *Ukraine Receives U.S. Air Defense System*, REUTERS (Sept. 22, 2022), <https://www.reuters.com/world/europe/ukraine-receives-us-air-defence-system-2022-09-25/>; Richard, *supra* note 97; Phil Stewart & Idrees Ali, *Russia Trying to Exhaust Ukraine's Air Defense, Pentagon Official Says*, REUTERS (Nov. 19, 2022), <https://www.reuters.com/world/europe/russia-trying-exhaust-ukraines-air-defenses-pentagon-official-says-2022-11-19/>; Heather Mongilio, *U.S. Sending Ukraine Sea Sparrow Missiles in Latest Aid Package*, USNI NEWS

conjunction, U.S. forces announced they would train Ukrainian troops to use Patriot missile batteries transferred to Ukraine “as part of a broader effort by the United States and the international community to provide Ukraine with the air defense capabilities it needs to defend its population and its armed forces.”¹⁴⁵

The ongoing support appears to have stymied Russia’s shift in strategy. To illustrate, between September and December 2022, Ukraine shot down more than five hundred drones using Western-supplied munitions. In the first week of 2023, dozens of similar attacks were repelled.¹⁴⁶ As a senior Pentagon official noted in response to Russia’s purported strategy, “We know what the Russian theory of victory is, and we’re committed to making sure that’s not going to work by making sure that the Ukrainians get what they need to keep their air defenses viable.”¹⁴⁷

And as the war begins to enter a “grinding, attritional phase . . . where breakthroughs are becoming harder,”¹⁴⁸ Western nations are attempting to “change the dynamic”¹⁴⁹ by, for instance, providing Ukrainian forces with tanks and other armored vehicles. Coupled with the necessary training to “boost Ukraine’s ability to maneuver on the battlefield with a more modern style of warfare” and refine their combined arms capabilities,¹⁵⁰ the support,

(Jan. 6, 2023, 5:03 PM), <https://news.usni.org/2023/01/06/u-s-sending-ukraine-sea-sparrow-missiles-in-latest-aid-package>.

145. Brigadier General Pat Ryder, Pentagon Press Secretary, *quoted in* C. Todd Lopez, *Ukrainian Troops Headed to U.S. for Patriot Missile Training*, DOD NEWS (Jan. 10, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3264235/ukrainian-troops-headed-to-us-for-patriot-missile-training/>.

146. See Ian Lovett, *Ukraine Repels Russian Drone Attacks With Help From Western-Supplied Air Defenses*, WALL STREET JOURNAL (Jan. 3, 2023), <https://www.wsj.com/articles/western-supplied-air-defense-helps-ukraine-repel-russian-drone-attacks-11672750680>.

147. Colin Kahl, U.S. Under Secretary of Defense for Policy, *quoted in* Stewart & Ali, *supra* note 144.

148. Mansoor, *Bradleys*, *supra* note 86.

149. Karen DeYoung & Alex Horton, *U.S. Pledges \$3 Billion in Arms to Help Ukraine “Retake Territory”*, WASHINGTON POST (Jan. 6, 2023), <https://www.washingtonpost.com/national-security/2023/01/06/ukraine-bradley-howitzer-missiles/>.

150. Dan Lamothe & Karen DeYoung, *Pentagon Eyes Major Expansion of Ukraine Military Training*, WASHINGTON POST (Dec. 1, 2022, 5:56 PM), <https://www.washingtonpost.com/national-security/2022/12/01/ukraine-us-military-training/>; see also Gordon Lubold & Daniel Michaels, *U.S., Allies Say Armored Vehicles Will Give Ukraine’s Troops an Edge*, WALL STREET JOURNAL (Jan. 5, 2023), <https://www.wsj.com/articles/u-s-allies-say-armored-vehicles-will-give-ukraines-troops-an-edge-11672958229>.

which has led to warnings of “consequences” from Russian officials,¹⁵¹ has the potential to be highly effective.

Other forms of assistance are also enhancing their operations. For instance, the Chairman of the Joint Chiefs of Staff reported to Congress that the United States has sent “a significant amount of intelligence” to Ukraine.¹⁵² The intelligence has enabled Ukraine to contest Russia’s sea control in the Black Sea by sinking the *Moskva* and deny Russia air superiority by protecting Ukrainian mobile air defense assets.¹⁵³ According to a former U.S. intelligence official, “[t]he Russian military has literally been cratering empty fields where air defenses were once set up. . . . It has had an enormous impact on the Russian military’s ability on the ground.” Similarly, “near real-time intelligence-sharing paved the way for Ukraine to shoot down a Russian transport carrying hundreds of troops in the early days of the war, . . . helping repel a Russian assault on a key airport near Kyiv.¹⁵⁴ Such anecdotes demonstrate that the quantity and quality of intelligence-sharing is a combat multiplier supported States can leverage to inflict, albeit indirectly, oft-outsized impacts on an adversary.

Finally, concerning the threshold of indirect use of force, it is necessary to distinguish the gravity of the situation from the impact of military aid or assistance. There is no question that Ukraine is facing an existential threat. But, in our view, the gravity of the threat bears on issues such as whether the threshold for an “armed attack” under the law of self-defense has been reached, thereby opening the door to aid or assistance in collective defense. With respect to the *indirect use of force threshold*, once the supported State has begun using force, the question becomes the extent to which the aid or assistance has impacted that use of force. In other words, how has the supported State’s use of force meaningfully benefitted from the military support

151. See Matthew Luxmoore & Georgi Kantchev, *Ukraine Under New Missile Barrage as Russia Warns West About Tank Pledges*, WALL STREET JOURNAL (Jan. 26, 2023), <https://www.wsj.com/articles/ukraine-under-new-missile-barrage-as-russia-warns-west-about-tank-pledges-11674727074>.

152. *Review of the President’s Fiscal Year 2023 Funding Request and Budget Justification for the Department of Defense: Hearing Before the Subcomm. on Defense of the S. Comm. on Appropriations*, 117th Cong. (May 3, 2022) (testimony of General Mark A. Milley, Chairman of the Joint Chiefs of Staff), <https://www.appropriations.senate.gov/hearings/a-review-of-the-presidents-fiscal-year-2023-funding-request-and-budget-justification-for-the-department-of-defense> (at 01:32:30); see also Schmitt, *Are We at War*, *supra* note 116.

153. See Schmitt, *Are We at War*, *supra* note 116.

154. Dilanian et al., *supra* note 120.

provided by other States? Of course, as with all the factors we have addressed, and many others that might influence the characterization of aid or assistance as an indirect use of force, impact is but one consideration, even if its weight may be disproportionately heavy compared to others.

V. CONCLUDING THOUGHTS

The prohibition of the use of force is a “cornerstone” of international law.¹⁵⁵ Yet, despite the rule’s significance, what constitutes a “use of force” is both nebulous and evolving. While it has always been undisputed that the term includes direct, armed force, such as that employed by conventional military forces, an exclusive, means-based paradigm does not apply seamlessly to all forms of State coercion. Therefore, evolving approaches to the prohibition have embraced a more flexible, adaptive understanding of the notion of the use of force—one supported by the UN Charter’s text, *travaux préparatoires*, and subsequent interpretation and practice by States, and reinforced by the persuasive reasoning of the International Court of Justice. They confirm that the use of force extends to indirect force, including some forms of aid or assistance to States engaged in forcible operations.

Still, notwithstanding this consensus, States have yet to meaningfully contend with the concept of indirect force, much less its precise contours. There is no doubt that it has its limits. But, despite pervasive interstate security cooperation and assistance activities, there has been little dialogue regarding when such support qualifies as a use of force. Accordingly, this article is intended to stimulate deliberation and debate amongst States, from which further clarity will hopefully emerge.

Much as States have reacted in the cyber context, we foresee they will likely approach indirect force assessments holistically by considering a range of relevant factors collectively and in the appropriate context. In our estimation, the most influential and salient among them will address the nature of the relationship between the aid or assistance provided and the application of direct force by the supported State. However, we cannot stress enough that the factors we have identified are neither exhaustive nor exclusive; but we anticipate that they will be at the forefront of States’ minds when considering whether aid or assistance crosses the threshold of the use of force.

155. Armed Activities, *supra* note 34, ¶ 148.

Finally, we must emphasize why the issues pertaining to indirect force deserve more robust debate by States and reflection in academia. If the judgments against the United States and Uganda in the *Paramilitary Activities* and *Armed Activities* cases have not instilled a sense of urgency in the international community to clarify the scope and threshold of indirect force, the conflict in Ukraine should. States are providing Ukraine with aid and assistance on a scale, and of such an impact, far exceeding any since the last World War. Moreover, States have largely dismissed, if not ignored, Russia's accusations (which are gaining sympathy from others) that such support has crossed legal lines. That may be because providing aid or assistance at the request of the victim of self-evident State aggression is undoubtedly lawful. But the preliminary question remains—does the aid and assistance States are providing constitute a use of force in the first place?

While this inquiry has not attracted much attention (political or legal) in the Russia-Ukraine conflict due to Russia's blatant violation of peremptory norms of international law, identifying the aggressor in a future conflict may be less straightforward. Without collective self-defense to fall back upon, the question of whether, and if so, when, aid or assistance constitutes a use of force in such cases would be of greater moment. Accordingly, we believe States should begin to consider the issue now in order to guide future State behavior. Circumstances may not always be as generous to supporting States as they are currently.