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EXAMINING UKRAINE’S RIGHT OF COLLECTIVE  
SELF-DEFENSE:  
CAN IT BE INVOKED OR IS IT ALREADY  
IN EXERCISE?

Nabangsu Chakma

ABSTRACT

The invasion of Ukraine by Russia in 2022 constituted an egregious violation of one of the fundamental principles of international law: the prohibition of the use of force against the territorial integrity or political independence of any State, enshrined in Article 2(4) of the UN Charter. This violation capacitates Ukraine to rightfully invoke the right of collective self-defense under Article 51 of the UN Charter. This Article finds that some of the criteria to invoke and exercise this right have been fulfilled, and the rest can also be fulfilled – allowing other countries to lawfully engage in Ukraine’s collective self-defense. Additionally, the Article argues that despite claiming to aid in Ukraine’s individual self-defense, through the significant military aid and logistical support amounting to the use of force provided to Ukraine, the assisting States are already indirectly practicing the right of collective self-defense, albeit without formally invoking it.

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## I. INTRODUCTION

Russia laid the foundation for its 2022 invasion of Ukraine on February 21, when Russian President Vladimir Putin formally announced the recognition of Donetsk and Luhansk, two eastern Ukrainian regions, as independent countries.<sup>1</sup> Right before the announcement, to create a pretext for deploying military forces in those regions, Putin rejected the statehood of Ukraine and accused the Ukrainian government of committing genocide against the people living in Donetsk and Luhansk.<sup>2</sup> Following the declaration, troops were swiftly deployed to perform so-called “peacekeeping functions” in those regions.<sup>3</sup> These actions were immediately met with harsh criticism by the UN Security Council.<sup>4</sup> In the early morning of February 24, the invasion began

1. *Russia Recognizes Independence of Ukraine Separatist Regions*, DW (Feb. 21, 2022), <https://www.dw.com/en/russia-recognizes-independence-of-ukraine-separatist-regions/a-60861963>.

2. Robyn Dixon, *In Long Speech, Putin Recognizes Two Ukrainian Regions as Independent, A Potential Pretext for War*, WASH. POST (Feb. 21, 2022), <https://www.washingtonpost.com/world/2022/02/21/putin-speech-ukraine/>.

3. *Putin Orders Russian Troops into Eastern Ukraine*, DW (Feb. 21, 2022), <https://www.dw.com/en/putin-orders-russian-troops-into-eastern-ukraine-separatist-regions/a-60866119>; Maria Kiselyova, *Putin Orders Russian Forces to “Perform Peacekeeping Functions” in Eastern Ukraine’s Breakaway Regions*, REUTERS (Feb. 22, 2022), <https://www.reuters.com/world/europe/putin-orders-russian-peacekeepers-eastern-ukraines-two-breakaway-regions-2022-02-21/>.

4. Rosemary DiCarlo, Under-Secretary-General for Political and Peacebuilding Affairs, stressed that the UN Secretary-General unequivocally believes “the decision of the Russian Federation to recognize the independence of certain areas of the Donetsk and Luhansk regions to be a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the

when Putin announced a “special military operation” in Ukraine.<sup>5</sup> He invoked collective self-defense in defense of the Donetsk and Luhansk People’s Republics, two breakaway regions in eastern Ukraine.<sup>6</sup> Putin claimed that the North Atlantic Treaty Organization’s (NATO) expansion was a real threat to Russia and that Ukraine was home to neo-Nazis who would “crawl into the Crimea” to kill Russians.<sup>7</sup>

The aim of the “special military operation” was to allegedly “protect people who have been subjected to abuse and genocide by the regime in Kyiv,” and to achieve this aim, Russia would “pursue the demilitarisation and denazification of Ukraine, as well as bringing to justice those who committed numerous bloody crimes against civilians, including citizens of the Russian Federation.”<sup>8</sup> Shortly after Putin’s announcement, Russia launched the invasion of Ukraine by intensively bombarding Ukrainian territory with cruise missiles, artillery, and other military weapons.<sup>9</sup>

Looking through the prism of international law, Russia’s invasion of Ukraine is unjustifiable on all grounds—whether for individual self-defense, collective self-defense, or humanitarian intervention—as none of these justifications made by Russia have any merit.<sup>10</sup> This invasion is a conquest aimed at forcibly occupying and annexing certain territories of Ukraine and seizing and robbing the whole nation of its independence and sovereignty.<sup>11</sup> Historical accounts of aggression, as was seen in World War II, suggest that “once an aggressor starts out on the path of territorial expansion, attaining a rapid and facile success, it develops an appetite for further conquests.”<sup>12</sup> Given Russia’s appetite for further territorial expansion and conquest, there is widespread concern that Moldova, the Baltic States, Finland, Poland, and

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principles of the Charter of the United Nations.” In addition to this criticism, several nations, including the United States, Albania, France, the United Kingdom, Ireland, Kenya, Gabon, Norway, Ukraine, and Germany, voiced further denouncements. See U.N. SCOR, 77th Sess., 8970th mtg., at 13, U.N. Doc. S/PV.8970 (Feb. 21, 2022).

5. “No Other Option”: Excerpts of Putin’s Speech Declaring War, AL JAZEERA (Feb. 24, 2022), <https://www.aljazeera.com/news/2022/2/24/putins-speech-declaring-war-on-ukraine-translated-excerpts>.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Russia Invades Ukraine*, THE ECONOMIST (Feb. 24, 2022), <https://www.economist.com/europe/2022/02/24/russia-invades-ukraine>.

10. See James A. Green, Christian Henderson & Tom Ruys, *Russia’s Attack on Ukraine and the Jus Ad Bellum*, 9 J. ON USE OF FORCE AND INT’L L. 4 (2022).

11. Ingrid (Wuerth) Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 AM. J. INT’L L. 691 (2022).

12. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 281 (4th ed., 2012).

other countries that once were part of the Russian empire could be the next target after Ukraine.<sup>13</sup>

To dissuade Russia from further territorial expansion, Ukraine must emerge victorious in this war. Ukraine has invoked its right to self-defense, which permits it to use force against Russian aggression in a lawful manner.<sup>14</sup> Additionally, Ukraine's right to collective self-defense is also open to invocation. Collective self-defense, outlined in Article 51 of the UN Charter, is a mechanism designed to defend a State with the help of other States when it faces an armed attack.<sup>15</sup>

Thus, invoking and exercising collective self-defense to support Ukraine can be a potent way to secure Ukraine's victory in this conflict. It will allow Ukraine's allies to provide more robust help, including deploying troops and imposing a no-fly zone over Ukraine without legal hindrance. Their collective effort and force can be employed against Russia's aggression without being legally questioned. Surprisingly, even though States have previously invoked collective self-defense in similar situations where they have become victims of armed aggression,<sup>16</sup> the States aiding Ukraine with weapons and logistics are reluctant to invoke collective self-defense.

To prevent the ongoing Russian attacks, experts have expressly advocated for invoking collective self-defense in support of Ukraine.<sup>17</sup> Others have argued whether the weaponry and logistics support to

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13. See Vanessa Gera, *Estonia's Foreign Minister Says the Baltics Have 3 or 4 Years to Prepare for Russian 'Test' of NATO*, AP NEWS (Feb. 15, 2024), <https://apnews.com/article/poland-estonia-russia-nato-putin-bf0bc50554182f9c9bd5ea9b1a5cf2ef>; Fiona Hill & Angela Stent, *The Kremlin's Grand Delusions: What the War in Ukraine Has Revealed About Putin's Regime*, FOREIGN AFF. (Feb. 15, 2023), <https://www.foreignaffairs.com/ukraine/kremlins-grand-delusions>; William Courtney, *Russia's Appetite May Extend Beyond Ukraine*, THE HILL (Feb. 16, 2023), <https://thehill.com/opinion/international/3861479-russias-appetite-may-extend-beyond-ukraine/>.

14. On February 25, 2022, Ukraine expressly invoked its right to self-defense in the UN Security Council: "Ukraine has been exercising its right to self-defence under Article 51 of the Charter. Russia does not have that excuse." U.N. SCOR, 77th Sess., 8979th mtg., at 16 U.N. Doc. S/PV.8979 (Feb. 25, 2022).

15. See U.N. Charter art. 51.

16. For example, on the events of Iraq's invasion of Kuwait and Al Qaeda's terrorist attacks in the U.S., the right of collective self-defense was invoked and exercised. See Letter dated 12 August 1990, *infra* note 136; Letter dated 13 August 1990, *infra* note 138; Daley, *infra* note 135.

17. See André de Hoogh, *The Elephant in the Room: Invoking and Exercising the Right of Collective Self-Defence in Support of Ukraine against Russian Aggression*, OPINIO JURIS (Mar. 7, 2022), <http://opiniojuris.org/2022/03/07/the-elephant-in-the-room-invoking-and-exercising-the-right-of-collective-self-defence-in-support-of-ukraine-against-russian-aggression/>; Pavel Doubek, *War in Ukraine: Time for a Collective Self-Defense?*, OPINIO JURIS (Mar. 29, 2022), <http://opiniojuris.org/2022/03/29/war-in-ukraine-time-for-a-collective-self-defence/>.

Ukraine amounts to the use of force, and if it does, whether it can be or would have to be justified under collective self-defense.<sup>18</sup>

Either way, invoking collective self-defense or justifying the provision of weapons and logistics to Ukraine under collective self-defense is contingent upon meeting certain legal criteria. Part II of this article scrutinizes whether Ukraine meets these criteria and asserts that some criteria have been satisfied and the remaining others can also be fulfilled. Part III carefully examines the legal scope of invoking and exercising collective self-defense in support of Ukraine, meticulously inspecting the legal viability of whether Ukraine's right of collective self-defense can be exercised without a collective defense treaty and the Security Council's authorization. Part IV analyzes the nature of the military aid provided to Ukraine, finding the aid amounted to the use of force, and argues that the aid, despite being claimed to be assistance provided for Ukraine's individual self-defense, indeed constituted an indirect exercise of collective self-defense. Part V addresses the hesitancy of the assisting allies of Ukraine and explains the underlying factor hindering the formal invocation of collective self-defense in support of Ukraine. The Article concludes in Part VI, summarizing the overall discussions.

## II. EXAMINING UKRAINE'S RIGHT OF COLLECTIVE SELF-DEFENSE

The right of collective self-defense is enshrined in Article 51 of the UN Charter in the following words:

*“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the*

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18. See, e.g., Kevin Jon Heller & Lena Trabucco, *The Legality of Weapons Transfers to Ukraine Under International Law*, 13 J. INT'L HUMANITARIAN LEGAL STUD. 251, 254–55 (2022); James A. Green, *The Provision of Weapons and Logistical Support to Ukraine and the Jus Ad Bellum*, 10 J. ON USE OF FORCE AND INT'L L. 3, 4–6 (2023); Christian Schaller, *When Aid or Assistance in the Use of Force Turns into an Indirect Use of Force*, 10 J. ON USE OF FORCE AND INT'L L. 177, 185, 197 (2023); Claus Krefß, *The Ukraine War and the Prohibition of the Use of Force in International Law*, (Torkel Opsahl Academic EPublisher, Occasional Paper Series No 13, 2022) 15–17; Raphaël van Steenberghe, *Military Assistance to Ukraine: Enquiring the Need for Any Legal Justification under International Law*, 28 J. CONFLICT AND SEC. L. 231, 232–33 (2023).

*present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*"<sup>19</sup>

This provision is an exception to the principle of prohibition of the use of force enshrined in Article 2(4) of the UN Charter. In the event of an armed attack, the right of collective self-defense allows any State to assist the victim State by providing military aid, including using force to defend it, without needing a treaty or Security Council authorization.<sup>20</sup> Given Russia's large-scale invasion of Ukraine, Ukraine possesses the *prima facie* option to invoke its right to collective self-defense, as stipulated in Article 51 of the UN Charter, thereby allowing other States to rally behind and assist Ukraine, forming a collective effort to counter Russia and put an end to the ongoing conflict. However, before readily jumping to the conclusion that Ukraine and its allies can invoke and exercise collective self-defense, it is of utmost importance to inquire whether Ukraine can legally invoke and exercise collective self-defense against Russia.

Invoking and exercising the right of collective self-defense in support of Ukraine depends on satisfying the criteria primarily outlined by the UN Charter and confirmed by the International Court of Justice (ICJ) in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.<sup>21</sup> The criteria encompass the following elements: (1) the existence of an armed attack;<sup>22</sup> (2) declaration by the victim State of becoming a victim of an armed attack, *i.e.*, declaration of victimhood;<sup>23</sup> (3) request for assistance by the victim State from another State;<sup>24</sup> (4) observance of the principles of necessity and proportionality;<sup>25</sup> (5) reporting to the UN Security Council the actions taken in the exercise of collective self-defense;<sup>26</sup> and (6) compliance with the "until clause" of Article 51.<sup>27</sup>

In the following discussion, whether the requirements for collective self-defense under international law are fulfilled or can be fulfilled

19. U.N. Charter art. 51.

20. No condition of having any formal treaty between the victim State and the assisting State has been attached in Article 51 of the UN Charter to invoke or exercise collective self-defense.

21. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ Rep. 14, (June 27) [hereinafter *Nicaragua*].

22. *Id.* ¶ 195.

23. *Id.*

24. *Id.* ¶¶ 196–99, 232.

25. *Id.* ¶¶ 176, 194.

26. *Id.* ¶ 200, 235.

27. The "until clause" stipulates that collective self-defense can be exercised "until the Security Council has taken measures necessary to maintain international peace and security." *See* U.N. Charter art. 51.

in the context of the Russian invasion of Ukraine will be examined. If, after scrutiny, the criteria are deemed duly satisfied or can be satisfied, Ukraine and its allies will have the right to carry out collective self-defense of Ukraine without facing any legal hurdles.

#### A. Existence of Armed Attack

The Russian invasion of Ukraine using land, air, and maritime forces was unprecedented in scale and scope, constituting the largest military attack by one State against another in Europe since World War II.<sup>28</sup> In *Nicaragua*, the ICJ, while referring to the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX), inquired into the meaning of the term “armed attack” in the context of irregular forces, as opposed to regular forces. The Court held that “an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the 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 (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.”<sup>29</sup> The ruling establishes the actions of a State’s regular forces as a benchmark for defining an “armed attack” in relation to the activities of armed bands, groups, irregulars, or mercenaries. Thus, it implies that any armed action carried out by a regular force across an international border is tantamount to an “armed attack.”

Regarding gravity of the use of force, the ICJ ruled that “the most grave forms of the use of force” constitute an “armed attack” in *Nicaragua*.<sup>30</sup> With this rationale, the transborder full-fledged war that has been waged against Ukraine for more than two years, causing 10,582 civilian deaths and injuring 19,875 people through the use of artillery shellings, tanks, multiple launch rocket systems (MLRs), cruise and ballistic missiles, air strikes, loitering munitions and unmanned aerial vehicles (UAVs)—leaves no room to doubt that Russia’s actions constitute an armed attack.<sup>31</sup>

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28. *Russian Forces Launch Full-scale Invasion of Ukraine*, AL JAZEERA (Feb. 24, 2022), <https://www.aljazeera.com/news/2022/2/24/putin-orders-military-operations-in-eastern-ukraine-as-un-meets>.

29. *Nicaragua*, *supra* note 21, ¶ 195.

30. *Id.* ¶ 191. This ruling was reaffirmed in the *Oil Platforms* case. *Oil Platforms* (Iran v. U.S.), Merits, 2003 ICJ Rep. 161, ¶¶ 51, 64. (Nov. 6) [hereinafter *Oil Platforms*].

31. TWO-YEAR UPDATE - PROTECTION OF CIVILIANS: IMPACT OF HOSTILITIES ON CIVILIANS SINCE 24 FEBRUARY 2022, U.N. OHCHR (2024), <https://www.ohchr.org/sites/default/files/2024-02/two-year-update-protection-civilians-impact-hostilities-civilians-24.pdf>.



## B. Declaration of Victimhood

The second criterion necessitates that the victim State must declare itself to be the victim of an armed attack. Ukraine has consistently met this criterion since the onset of the Russian invasion. Throughout this period, Ukraine categorically proclaimed itself as a victim of Russia's armed attack on multiple occasions. This proclamation began as soon as Russia formally recognized the Donetsk and Luhansk regions as independent States, prompting Ukraine to convene an urgent meeting.<sup>32</sup> During this pivotal meeting, the Ukrainian delegate vehemently rejected Russia's declaration of recognition for Donetsk and Luhansk as independent States. The delegate characterized this move as an armed attack on "the entire membership of the United Nations" and unequivocally labeled Russia's actions as "violations of the sovereignty and territorial integrity of Ukraine."<sup>33</sup>

Following Putin's announcement of a "special military operation" in defense of the Donetsk and Luhansk People's Republics on February 24, 2022, and the subsequent commencement of Russian full-scale invasion of Ukraine, Ukraine's President Volodymyr Zelenskyy addressed the nation that evening, stating that "[Russian] military has started a war. The war in [Ukraine]."<sup>34</sup>

The following day, as the first day of Russia's attacks came to a close, President Zelenskyy once again spoke to the nation. During his address, he conveyed, "Today Russia attacked the entire territory of our state . . . . [Russia] strikes not only at military facilities, as it claims, but also at civilians. They kill people and turn peaceful cities into military targets. This is vile and will never be forgiven."<sup>35</sup> As the large-scale war entered its second morning, President Zelenskyy, in another address to the nation, remarked, "At 4:00 am, Russian forces continued to launch missile strikes on the territory of Ukraine. They say that civilian objects are not a target for them. This is a lie. In fact, they do not distinguish in which areas to operate. Just as yesterday, the military and civilians are equally under Russian attack."<sup>36</sup>

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32. On February 21, 2022, Russia declared Ukraine's eastern regions, Donetsk and Luhansk, independent States. Following this event, the Security Council's 8970<sup>th</sup> meeting was convened on the same day. See U.N. SCOR, *supra* note 4.

33. *Id.* at 13.

34. Ukraine Pres. Off. Press Release, Address by the President of Ukraine (Feb. 24, 2022), <https://www.president.gov.ua/en/news/zvernennya-prezidenta-ukrayini-73137>.

35. Press Release, Volodymyr Zelenskyy, President of Ukraine, Address by the President to Ukrainians at the End of the First Day of Russia's Attacks (Feb. 25, 2022), <https://www.president.gov.ua/en/news/zvernennya-prezidenta-do-ukrayinciv-naprikinci-pershogo-dnya-73149>.

36. Press Release, Volodymyr Zelenskyy, President of Ukraine, Address by the President

At a Security Council meeting, the Ukrainian delegate addressed the dire situation in Ukraine, stating, “At the very same moment, deadly air strikes were dropped on civilian heads across my country and Russian troops crossed the Ukrainian border from the territory of Russia.”<sup>37</sup> The delegate further drew parallels between Russian armed attacks and the Nazi attacks in 1941 against Kyiv.<sup>38</sup>

In a separate address, President Zelenskyy issued a stern warning that the Russian invasion was not just an attack on Ukraine but on Europe itself and the fundamental human rights of its people.<sup>39</sup> He said that, for the second consecutive day, Ukrainian cities were bombarded by rockets, and, for the first time since World War II, Europe was facing tank columns and air strikes.<sup>40</sup> Up to this point, Ukraine has repeatedly and unequivocally declared itself as a victim of Russia’s armed attacks on numerous occasions, both within its borders and on the international stage, including at the UN and other relevant forums.<sup>41</sup>

### C. Request for Assistance

In *Nicaragua*, the International Court of Justice (ICJ) explicitly ruled that the victim State must make an “express request” for collective self-defense if it desires another State to assist it.<sup>42</sup> Ukraine has not yet explicitly requested assistance in collective self-defense. However, it has repeatedly reached out to other States and NATO, requesting troop deployment, establishment of a no-fly zone, and lethal weapons delivery to defend its sovereignty and territorial integrity. On February 24, 2022, the very day when the Russian invasion of Ukraine commenced, President Zelenskyy reached out to world leaders, appealing

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on the Second Morning of the Large-Scale War (Feb. 25, 2022), <https://www.president.gov.ua/en/news/zvernennya-prezidenta-na-drugij-ranok-masshtabnoyi-vijni-73153>.

37. U.N. SCOR, *supra* note 14, at 14–15.

38. *Id.* at 15.

39. Press Release, Volodymyr Zelenskyy, President of Ukraine, Address by the President of Ukraine (Feb. 25, 2022), <https://www.president.gov.ua/en/news/zvernennya-prezidenta-ukrayini-73165>.

40. *Id.*

41. See Press Release, Volodymyr Zelenskyy, President of Ukraine, We Withstood: Address by the President of Ukraine on the Third Day of the War (Feb. 26, 2022), <https://www.president.gov.ua/en/news/mi-vistoyali-zvernennya-prezidenta-ukrayini-u-tretij-den-vij-73197>; U.N. SCOR, *supra* note 4, at 8–9; Press Release, Volodymyr Zelenskyy, President of Ukraine, Address by President of Ukraine Volodymyr Zelenskyy (Feb. 28, 2022), <https://www.president.gov.ua/en/news/zlo-ozbroyene-raketami-bombami-j-artileriyeyu-treba-zupiniti-73257>; U.N. SCOR, 77th Sess., 8983th mtg. at 14–16, U.N. Doc. S/PV.8983 (Feb. 28, 2022); Micaela Del Monte, European Parliament Briefing, Russia’s War on Ukraine: Speeches by Ukraine’s President to the European Parliament and National Parliaments, at 1–8 (Apr. 1, 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729354/EPRS\\_BRI\(2022\)729354\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729354/EPRS_BRI(2022)729354_EN.pdf).

42. *Nicaragua*, *supra* note 21, ¶ 232.

for large-scale defense assistance to defend Ukraine's airspace from Russian armed attacks.<sup>43</sup> He emphasized the critical nature of this assistance by underlining, "If you don't help us now, if you fail to offer a powerful assistance to Ukraine, tomorrow the war will knock on your door."<sup>44</sup>

In parallel, the Ukrainian government sought NATO's assistance, including the deployment of troops.<sup>45</sup> Simultaneously, Ukraine's Defense Minister made a direct appeal to the U.S. Congress, urging them to facilitate the delivery of anti-aircraft and anti-tank missiles to Ukraine through Poland in an effort to bolster its defenses against Russia's military offensive.<sup>46</sup> Ukraine's Ambassador to the United States, Oksana Markarova, also implored their allies to continue and potentially increase their military and defensive aid.<sup>47</sup> In addition, President Zelenskyy went as far as appealing directly to U.S. President Joe Biden, requesting the imposition of a no-fly zone over Ukraine to counter the Russian air attacks.<sup>48</sup> Ukraine even appealed to the President of the UN Security Council to impose no-fly zones to protect "nuclear power plants and other critical infrastructure" and deploy "an international peacekeeping and security operation" within Ukraine.<sup>49</sup>

On March 5, 2022, President Zelenskyy convened a meeting with the U.S. Congress via a Zoom call, during which he reiterated his request for a no-fly zone and, in the absence of such a measure, requested the provision of aircraft and drones to help Ukraine defend

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43. *Ukrainian President Volodymyr Zelensky Pleads for Help Fending Off Russian Attack*, ECON. TIMES (Feb. 24, 2022), <https://economictimes.indiatimes.com/news/defence/ukrainian-president-volodymyr-zelensky-pleads-for-help-fending-off-russian-attack/articleshow/89797808.cms>.

44. See Yuras Karmanau, Jim Heintz, Vladimir Isachenkov & Dasha Litvinova, *Russia Presses Invasion to Outskirts of Ukrainian Capital*, ASSOCIATED PRESS (Feb. 25, 2022), <https://apnews.com/article/russia-ukraine-putin-attack-a05e7c4563ac94b963134bba83187d46>.

45. See Cain Burdeau, *Russia Attacks Ukraine, Bringing War Back to Europe*, COURTHOUSE NEWS SERV. (Feb. 24, 2022), <https://www.courthousenews.com/russia-attacks-ukraine-bringing-war-back-to-europe/>.

46. Joe Gould, *'We Need as much Stinger and Anti-Tank Weapons as Possible,' Says Ukraine's Defense Minister*, DEF. NEWS (Feb. 25, 2022), <https://www.defensenews.com/global/europe/2022/02/24/we-need-as-much-stinger-and-anti-tank-weapons-as-possible-says-ukraines-defense-minister/>.

47. *Id.*

48. See Jonathan Swan, Zachary Basu & Sophia Cai, *Scoop: Zelensky pushes Biden on no-fly zone*, AXIOS (Feb. 28, 2022), <https://www.axios.com/2022/02/28/ukraine-no-fly-zone-zelensky-biden-russia>.

49. Permanent Rep. of Ukraine to the U.N. Letter dated Mar. 4, 2022 from the Permanent Rep. of Ukraine addressed to the President of the Security Council, U.N. Doc. S/2022/186 (Mar. 8, 2022).

itself.<sup>50</sup> Since February 28, 2022, President Zelenskyy has persistently appealed to the United States and its allies for a no-fly zone to “close the skies,” limiting the ability of Russian warplanes to target Ukrainian cities.<sup>51</sup> He has sought advanced missile defense systems, aircraft, tanks, and anti-ship weapons to defend Ukraine against Russian air attacks.<sup>52</sup> He has even implored NATO to come to Ukraine’s defense despite not holding formal membership in the collective self-defense alliance.<sup>53</sup> Although Ukraine has not explicitly requested assistance in collective self-defense, the aforementioned appeals can reasonably be considered requests for collective self-defense, as existing law does not mandate that State’s explicitly request collective self-defense.<sup>54</sup>

#### D. Necessity and Proportionality

The principles of necessity and proportionality are indispensable for invoking collective self-defense. These general principles of law,<sup>55</sup> which have acquired customary status,<sup>56</sup> have received consistent

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50. Catie Edmondson, *Meeting with Congress, Zelensky Asks for More Jets and a No-Fly Zone.*, N.Y. TIMES (Mar. 5, 2022), <https://www.nytimes.com/2022/03/05/us/politics/zelensky-congress-no-fly-zone.html#:~:text=Zelensky%20stressed%20the%20need%20for,send%20fighter%20jets%20to%20Ukraine>; Suzanne Malveaux, Jeff Zeleny, Kevin Liptak & Veronica Stracqualursi, *Zelensky Calls for No-Fly Zone and Harsher Sanctions on Russia in Zoom Meeting with US Lawmakers*, CNN (Mar. 5, 2022), <https://edition.cnn.com/2022/03/05/politics/ukraine-russia-zelensky-us-lawmakers/index.html>.

51. See Courtney McBride, *Zelensky Asks Americans for Help, Fighter Jets*, in *ABC Interview*, WALL ST. J. (Mar. 8, 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-07/card/zelensky-asks-americans-for-help-fighter-jets-in-abc-interview-iYhmrr0mzczRj4FttxB>; Chad De Guzman, *Why Establishing a No-Fly Zone Over Ukraine Would Be Very Dangerous and Costly*, TIME (Mar. 8, 2022), <https://time.com/6156060/ukraine-no-fly-zone-russia/>; Robin Wright, *Zelensky Invokes Pearl Harbor and 9/11 As He Pleads for More from Washington*, NEW YORKER (Mar. 16, 2022), <https://www.newyorker.com/news/daily-comment/zelensky-invokes-pearl-harbor-and-911-as-he-pleads-for-more-from-washington>; Dan Mangan, *Ukraine President Zelenskyy Invokes Pearl Harbor, Sept. 11 in Asking U.S. Congress to Help Fight Russia Invasion*, CNBC (Mar. 16, 2022), <https://www.cnbc.com/2022/03/16/ukraine-president-zelenskyy-makes-speech-to-congress-on-russia-war.html>; Anthony Zurcher, *Ukraine War: Zelensky Invokes 9/11 in Plea to US Congress*, BBC (Mar. 16, 2022), <https://www.bbc.com/news/world-us-canada-60762022>.

52. See Oleksandr Kozhukhar & Sergiy Karazy, *Zelenskiy Demands Western Nations Give Arms to Ukraine, Asks If They're Afraid of Moscow*, REUTERS (Mar. 27, 2022), <https://www.reuters.com/world/europe/ukraine-leader-demands-western-nations-give-arms-asks-if-theyre-afraid-moscow-2022-03-26/>.

53. See Michael D. Shear, *Zelensky Calls on NATO Members to Do More to Help Ukraine's Military.*, N.Y. TIMES (Mar. 24, 2022), <https://www.nytimes.com/2022/03/24/world/europe/ukraine-zelensky-nato-alliance.html>.

54. See JAMES A. GREEN, *COLLECTIVE SELF-DEFENCE IN INTERNATIONAL LAW* 228, 231 (Larissa van den Herik & Jean d'Aspremont, eds., 2024).

55. See Mary Ellen O'Connell, *The Limited Necessity of Resort to Force*, in *IMAGINING LAW: ESSAYS IN CONVERSATION WITH JUDITH GARDAM* 46, 50 (Dale Stephens & Paul Babie eds., 2016).

56. See Adil Ahmad Haque, *Necessity and Proportionality in International Law*, in *THE*

recognition by the ICJ in a number of cases, including *Nicaragua*,<sup>57</sup> *Oil Platforms*,<sup>58</sup> the *Nuclear Weapons* advisory opinion,<sup>59</sup> and *Armed Activities on the Territory of the Congo (DRC v. Uganda)*.<sup>60</sup>

### 1. Necessity

The principle of necessity allows using force only as a last resort in individual self-defense or collective self-defense when a State has reasonably exhausted all other peaceful means or diplomatic efforts that have proven ineffective.<sup>61</sup> Ukraine, time and again, sought to prevent and deescalate Russia's aggression through peaceful means. Following Russia's formal recognition of the Donetsk and Luhansk regions as independent states, Ukraine's delegate strongly called for peace and insisted on the full-fledged operations of the OSCE Special Monitoring Mission to Ukraine to prevent provocations and further escalation.<sup>62</sup> The delegate conveyed their unwavering commitment to a political-diplomatic settlement, refusing to be drawn into provocations.<sup>63</sup> He reaffirmed their firm commitment to pursuing a peaceful and diplomatic solution, stating, "We are committed to a peaceful and diplomatic path and will not waver."<sup>64</sup>

Disregarding Ukraine's earnest plea for a peaceful resolution, Russia initiated its invasion of Ukraine on February 24, 2022. The next day, during the 8979<sup>th</sup> meeting of the UN Security Council, despite Ukraine's decision to sever diplomatic ties with Russia in strong condemnation of Russia's aggression, Ukraine's delegate conveyed their willingness to engage in negotiations as a permanent solution.<sup>65</sup>

President Zelenskyy has consistently pleaded for peace, urging Russia to engage in meaningful dialogue to bring an end to the invasion.<sup>66</sup> Unfortunately, no peace talks have materialized, primarily due to Ukraine's rightful refusal to compromise on its territorial integrity

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CAMBRIDGE HANDBOOK OF THE JUST WAR 259 (Larry May ed., 2018).

57. *Nicaragua*, *supra* note 21, ¶¶ 176, 194.

58. *Oil Platforms*, *supra* note 30, ¶ 51.

59. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (Jul. 8) [hereinafter *Nuclear Weapons*].

60. See *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, 2005 I.C.J. 168, ¶ 147 (Dec. 19) [hereinafter *Armed Activities*].

61. See TOM RUYTS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTION IN CUSTOMARY LAW AND PRACTICE 95 (2010).

62. U.N. SCOR, *supra* note 4, at 13.

63. *Id.*

64. *Id.*

65. U.N. SCOR, *supra* note 14, at 16.

66. *Russia, Ukraine 'Close to Agreement' in Negotiations, Says Turkey*, AL JAZEERA (Mar. 20, 2022), <https://www.aljazeera.com/news/2022/3/20/turkey-says-russia-ukraine-close-to-agreement>.

and sovereignty, and on the other hand, President Putin's rigid and unjustifiable stance, persisting in his goal of achieving complete dominance over Ukraine.<sup>67</sup>

In support of Ukraine, the U.S. and its allies have taken a series of non-forcible measures in response to Russia's invasion of Ukraine. These actions encompass a range of sanctions and economic measures, including imposing sanctions on Russian banks and oligarchs, instituting export controls targeting Russia, limiting Russia's ability to settle its outstanding debts using U.S. dollar reserves held in American banks. This prompted several private companies to withdraw from their operations in Russia, resulting in the following consequences: imposing bans on the import and export of specific goods and technologies; prohibiting new investments in any sector in Russia; banning Russian energy imports; revoking Most-Favored-Nation (MFN) status; and isolating Russia from the international financial system.<sup>68</sup>

Furthermore, Ukraine has taken proactive steps on the international stage to hold Russia and its officials accountable for violations of international law. Following the invasion, Ukraine initiated legal proceedings against Russia in the ICJ and the European Court of Human Rights (ECHR).<sup>69</sup> On February 26, 2022, Ukraine filed a case against Russia in the ICJ, alleging that Russia had falsely accused Ukraine of committing genocide in the Luhansk and Donetsk regions and had used this accusation as a pretext to justify its unilateral military actions in Ukraine.<sup>70</sup> As a result, on March 16, 2022, the ICJ issued provisional measures ordering Russia to "immediately suspend the military operations that it commenced on February 24, 2022, in the territory of Ukraine" and to "ensure that any military or irregular armed units under its direction or support, as well as any organizations or individuals subject to its control or direction, refrain from taking any further steps related to the military operations."<sup>71</sup>

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67. Kim Hjelmgaard, *What are the Peace Plans for Ukraine? The Vatican, China and Ukraine itself have Ideas. Will any Work?*, USA TODAY (Jul. 3, 2023), <https://www.usatoday.com/story/news/world/2023/07/03/ukraine-russia-peace-deal/70367740007/>.

68. For a detailed discussion, see *United States and Allies Target Russia and Belarus with Sanctions and Other Economic Measures*, 116 AM. J. INT'L L. 614 (2022).

69. Lawrence Hill-Cawthorne, *Litigating Russia's Invasion of Ukraine*, LIEBER INST. W. POINT (Apr. 27, 2022), <https://lieber.westpoint.edu/litigating-russias-invasion-ukraine/>; *International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses*, 116 AM. J. INT'L L. 631, 631–32 (2022).

70. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide, (Ukraine v. Russia), Request for the Indication of Provisional Measures, 2022 I.C.J. Rep. 211, ¶¶ 30–31 (Mar. 16).

71. *Id.* at ¶ 86.

Ukraine formally approached the ECHR on February 28, 2022, requesting the ECHR to direct urgent interim measures against Russia in relation to “massive human rights violations being committed by the Russian troops in the course of the military aggression against the sovereign territory of Ukraine.”<sup>72</sup> Considering the military actions initiated by Russia on February 24, 2022, and the real and ongoing risk it posed to the fundamental rights of civilians, the ECHR took action on March 1, 2022. The Court directed Russia “to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops.”<sup>73</sup>

Despite all the non-forcible measures taken, Russia remains undeterred and continues its aggressive and unjust war against Ukraine. Per the principle of necessity, Ukraine and its allies have exhausted all available peaceful means, and their diplomatic efforts have proven unsuccessful. The use of force becomes necessary for self-defense when an armed attack has begun or is ongoing, and the UN Security Council has failed to take the steps required to preserve international peace and security.<sup>74</sup> Ukraine has thus far used force within the bounds of its individual right of self-defense under Article 51,<sup>75</sup> but has been unsuccessful in overcoming this aggression alone. Ukraine requires assistance from other States to counter Russia’s aggression. Therefore, the invocation and exercise of collective self-defense in favor of Ukraine has become necessary and meets the necessity criterion in this context.

## 2. Proportionality

In principle, force must be necessary and proportionate to the attack in its scope, method, and objective to invoke collective self-defense lawfully.<sup>76</sup> The rules governing the exercise of self-defense

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72. Press Release, *The European Court Grants Urgent Interim Measures in Application Concerning Russian Military Operations on Ukrainian Territory*, Eur. Ct. H. R. (Mar. 1, 2022), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7272764-9905947&filename=The%20Court%20grants%20urgent%20interim%20measures%20in%20application%20concerning%20Russian%20military%20operations%20on%20Ukrainian%20territory.pdf>.

73. *Id.*

74. See Haque, *supra* note 56, at 257.

75. See U.N. SCOR, *supra* note 14, at 16 (“Ukraine has been exercising its right to self-defence under Article 51 of the Charter. Russia does not have that excuse.”).

76. Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L.

fall under the *jus ad bellum* regime.<sup>77</sup> Proportionality *jus ad bellum* refers to the use of force required for the victim State to defend itself in response to an armed attack.<sup>78</sup>

There are two main approaches that are used in the assessment of proportionality in *jus ad bellum*. The first approach, known as the quantitative approach,<sup>79</sup> seeks to ensure that the responding act is not excessive to the attack that provoked it, often colloquially referred to as “tit for tat,” “just desserts,” or “eye for an eye” proportionality.<sup>80</sup> The general idea behind this approach is that “the response must be proportionate to the act that provoked it.”<sup>81</sup>

However, this approach faces a backlash because it may prevent the victim State from protecting itself effectively.<sup>82</sup> This backlash leads us to consider the second approach, the functional or teleological approach, which strives to balance the defensive action and its intended objective.<sup>83</sup> It is often referred to as “means-ends proportionality” as it focuses primarily on the necessity of the amount of force that can be used to achieve legitimate ends.<sup>84</sup> According to this approach, the harm caused in self-defense must be proportionate to achieving the desired outcome.<sup>85</sup>

Proportionality is inherently tied to necessity. The first connection between the two principles concerns whether resorting to self-defense is necessary.<sup>86</sup> The proportionality criterion is only met when resorting to force becomes necessary for the self-defense of the victim State, as necessity determines the boundaries of proportionate action. The

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REV. 113 (1986).

77. See Int'l. Comm. H.R., *What are Jus ad Bellum and Jus in Bello?* (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0%Ef%BB%BF>.

78. See Raphaël van Steenberghe, *Proportionality under Jus ad Bellum and Jus in Bello: Clarifying their Relationship*, 45 ISR. L. REV. 107, 115 (2012); RUYS, *supra* note 61, at 115–16.

79. CHRISTOPHER O'MEARA, *Proportionality, in Necessity and Proportionality and the Right of Self-Defence in International Law* 97, 101 (2021).

80. David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT'L L. 235, 238 (2013).

81. *Id.*

82. RUYS, *supra* note 61, at 112.

83. O'MEARA, *supra* note 79, at 102.

84. Kretzmer, *supra* note 80, at 238.

85. *Id.*

86. See Theodora Christodoulidou & Kalliopi Chainoglou, *The Principle of Proportionality from a Jus ad Bellum Perspective*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 1187, 1192 (2015); Christopher Greenwood, *Self-Defence*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶¶ 26–27, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e401#law-9780199231690-e401-div1-3>; CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 150 (3rd ed., 2008); Van Steenberghe, *supra* note 78, at 114.



second connection, inextricably intertwined with functional proportionality, concerns what actions are necessary to achieve the legitimate ends of self-defense.<sup>87</sup> In self-defense, it is believed by Special Rapporteur Ago, which has been supported by many, that “[w]hat matters is the result to be achieved by the defensive action, and not the forms, substance and length of the action itself . . . . Its lawfulness cannot be measured except by its capacity for achieving the desired result.”<sup>88</sup>

Since the unilateral use of force is only permitted in self-defense under Article 51 of the UN Charter, functional proportionality, which entails the proportional use of force to achieve legitimate ends, seems appropriate to apply in this context.<sup>89</sup> The primary legitimate objective of a State acting in self-defense is to repel and halt an ongoing armed attack.<sup>90</sup> Ukraine seems to be effectively using force aiming to halt and repel the continued Russian armed attacks.<sup>91</sup> When an aggressor halts its attacks and retreats, it is understood that the defending State has achieved its objective of halting and repelling the attacks, and therefore, its use of force should also cease.<sup>92</sup> However, mere halting and repelling as the sole objective of self-defense are suitable only on a limited scale of ongoing attacks. In the case of a wide-scale ongoing attack or an ongoing full-fledged war, where the aggressor persistently demonstrates clear hostile intent by continuously attacking the victim State, halting and repelling become ineffective in achieving the legitimate ends of

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87. See Van Steenberghe, *supra* note 78, at 114; Ruys, *supra* note 61, at 112.

88. Special Rapporteur Ago first adopted the functional approach when interpreting the principle of proportionality, stating, “It would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters is the result to be achieved by the defensive action, and not the forms, substance and length of the action itself . . . . Its lawfulness cannot be measured except by its capacity for achieving the desired result.” Roberto Ago, *Addendum to the Eighth Report on State Responsibility*, 2 Y.B. INT’L L. COMM’N, at ¶ 121, U.N. Doc. A/CN.4/318/Add.5–7 (Part 1). There are many who endorse Ago’s view. Among them are for instance, Kretzmer, *supra* note 80, at 238–39, 269–70; STUART CASEY-MASLEN, *JUS AD BELLUM: THE LAW ON INTER-STATE USE OF FORCE* 170 (2020); O’MEARA, *supra* note 79, at 102–4; TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 148 (2005); OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 488 (2nd ed., 2021); Van Steenberghe, *supra* note 78, at 113.

89. See Kretzmer, *supra* note 80, at 239.

90. See Ago, *supra* note 88; Van Steenberghe, *supra* note 78, at 115–16; GRAY, *supra* note 86.

91. Jim Garamone, *U.S. Will Not Back Down on Support for Ukraine*, Dep’t of Def. (Mar. 19, 2024), <https://www.defense.gov/News/News-Stories/Article/Article/3711625/us-will-not-back-down-on-support-for-ukraine/>.

92. Tom Ruys, *In Defence of the ‘Halt and Repel’ Formula? A Reply to Yishai Beer*, 33 EUR. J. INT’L L. 917, 918 (2022).

self-defense.<sup>93</sup> In such situations, the objective expands to eliminate immediate threats and eradicate foreseeable future ones.<sup>94</sup> The expulsion of invaders and restoration of the victim State to its pre-war status are also within the purview of legitimate ends of self-defense.<sup>95</sup>

The objective of degrading Russia's military capabilities beyond the borders of Ukraine may also not be deemed excessive concerning the legitimate aim of liberating Ukraine from Russian aggression, as this may serve as an elimination of future attacks. During Kuwait's collective self-defense, it was believed that the response to Iraqi military capabilities could not be confined solely to Kuwaiti territory.<sup>96</sup> For achieving the legitimate end of liberating Kuwait from Iraqi aggression, it was necessary to target Iraqi troops and engage in bombing campaigns to destroy military installations, facilities, and equipment within Iraq itself, making it infeasible for Iraq to launch future attacks on Kuwait.<sup>97</sup>

However, despite the apparent lawfulness of taking actions on Russian territory, there is a potential risk that such actions could prove to be counterproductive, considering Russia's repeated warnings of possible nuclear weapon use in response to threats against its sovereignty or territorial integrity.<sup>98</sup> Pursuing the legitimate objective of disabling Russia's future attack capacity by taking action on its territory may inadvertently trigger dangerous repercussions, such as retaliatory nuclear strikes from Russia, which could far outweigh the desired outcome.

In my view, therefore, while Ukraine can lawfully target and attack Russian military and logistical units inside and beyond the territory of Ukraine, its supporting allies should not. Ukraine has already evidently adhered to these objectives while exercising self-defense. It claims to have successfully disabled about 33% of Russia's warships, amounting to 24 disabled ships and one submarine, and has also effectively taken down 342 Russian airplanes and 325 helicopters.<sup>99</sup> However, Ukraine's

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93. See Kretzmer, *supra* note 80, at 270.

94. See *id.* at 280.

95. JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 156 (2004).

96. See CHRISTOPHER GREENWOOD, COMMAND AND THE LAWS OF ARMED CONFLICT 7–8 (1993), cited in GARDAM, *supra* note 95, at 164.

97. See Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT'L L. 514 (1991).

98. Yuliya Talmazan, *Biden Warns the Threat of Putin's Using Tactical Nuclear Weapons is 'Real'*, NBC NEWS (Jun. 20, 2023), <https://www.nbcnews.com/news/world/putin-nuclear-weapons-threat-real-biden-warns-rcna90114>; Russia's Lavrov Says West Needs Continual Reminder of Risks of Nuclear War, AL JAZEERA (Aug. 19, 2023), <https://www.aljazeera.com/news/2023/8/19/russias-lavrov-says-west-needs-continual-reminder-of-risks-of-nuclear-war>.

99. Svitlana Vlasova & Brad Lendon, *Ukraine's Drones Sink Another Russian Warship, Kyiv Says*, CNN (Mar. 6, 2024), <https://edition.cnn.com/2024/03/05/europe/>

allies, who might act under the right of collective self-defense, should focus only on defensive actions aimed at expelling Russian troops and neutralizing its military capabilities within Ukraine.

#### E. Reporting to the UN Security Council

Article 51 of the UN Charter specifies that measures taken by States in the exercise of the right of self-defense “shall be immediately reported to the UN Security Council.” Using the words “shall” and “immediately” appears to create a mandatory obligation for States to promptly report such actions to the Security Council.

However, in *Nicaragua*, the ICJ clarified that reporting to an international body detailing the actions taken by States claiming to exercise individual or collective self-defense is not a strict obligation under customary international law.<sup>100</sup> The ICJ also stated that, even though reporting is not an absolute requirement, it is expected to be observed and that the failure to report may constitute one of the indicators to assess whether the invoking State itself was convinced that it was genuinely acting in self-defense.<sup>101</sup>

In his dissenting opinion, Judge Schwebel determined that the reporting requirement, being a procedural condition, cannot impair the inherent right of self-defense since this right is substantive in nature, and failure of reporting cannot turn defensive actions into aggressive ones.<sup>102</sup> Saying, “A State cannot be deprived, and cannot deprive itself, of its inherent right of individual or collective self-defence because of its failure to report measures taken in the exercise of that right to the Security Council,” he asserted that the failure to report should not deprive a State of its inherent right to self-defense.<sup>103</sup>

The reporting requirement merely serves a directory or evidentiary purpose. It cannot be considered a substantive obligation because if it were mandatory under the Charter, it would create a conflict or

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*russian-warship-destroyed-ukraine-intl-hnk-ml/index.html#:~:text=Earlier%20in%20February%2C%20Ukraine%20claimed,in%20the%20Black%20Sea%20Fleet*, Vitaly Shevchenko, *Ukraine War: Ukraine Reports Jump in Number of Downed Russian Planes*, BBC (Feb. 28, 2024) <https://www.bbc.com/news/world-europe-68423990>.

100. See *Nicaragua*, *supra* note 21, ¶¶ 200, 235.

101. *Id.* ¶ 200.

102. *Nicaragua*, *supra* note 21, Diss. Op. Schwebel, J., ¶ 227. (“The term in question is a procedural term; of itself it does not, and by the terms of Article 51, cannot, impair the substantive, inherent right of self-defence, individual or collective. The measures of the U.S. in assisting El Salvador by, among other means, applying force against Nicaragua, are not transformed from defensive into aggressive measures by the failure to report those measures to the Security Council.”).

103. *Id.* ¶ 230.

inconsistency between the Charter and customary international law since a corresponding rule under customary international law is non-existent.<sup>104</sup> Even the obligation to report does not arise until actions in self-defense have been taken, so it would be irrational to think that the absence of observing the obligation would make those actions illegal.<sup>105</sup> Reporting does not establish the lawfulness of actions taken by a defending State. Instead, it plays a supporting role in establishing their lawfulness but does not serve as a primary means of establishing their legality.<sup>106</sup>

Thus far, the failure to comply with the reporting requirement has been consistently viewed as a sign of bad faith by the ICJ and States alike. To illustrate, in *Nicaragua*, the ICJ criticized the United States for failing to report to the Security Council.<sup>107</sup> This failure cast doubt on the authenticity of the United States' collective self-defense actions since it had previously asserted against the 1979 instance of Soviet actions in Afghanistan.<sup>108</sup> In another event, during the conflict between the United States and Libya in April 1986, the United States questioned the legality of Libyan attacks, citing the absence of a report to the Security Council regarding these attacks.<sup>109</sup> Conversely, Libya questioned the actions of the United States within its territory, highlighting the lack of reporting to the Security Council while referencing the United States' previous non-compliance with reporting requirements in *Nicaragua*.<sup>110</sup> Similarly, during the onset of the Kashmir conflict between India and Pakistan in 1948, India also questioned Pakistan's actions in Kashmir on the grounds of its failure to report to the Security Council.<sup>111</sup>

Essentially, the failure or non-compliance with the reporting requirement to the UN Security Council raises questions about the lawfulness of a State's self-defense actions. While the absence of reporting may not invalidate a State's self-defense actions entirely, it weakens the State's claim of self-defense, as it creates doubts about the legitimacy of those actions. The perspective that the reporting obligation is

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104. D. W. Greig, *Self-Defence and the Security Council: What Does Article 51 Require?*, 40 INT'L & COMP. L. Q. 366, 384 (1991).

105. RUYS, *supra* note 61, at 70.

106. See James A. Green, *The 'ratione temporis' elements of self-defence*, 21 J. ON USE OF FORCE AND INT'L L. 97 (2015).

107. *Nicaragua*, *supra* note 21, ¶ 235.

108. *Id.*

109. U.N. SCOR, 41th Sess., 2671th mtg., ¶ 38, U.N. Doc. S/PV.2671 (Mar. 31, 1986).

110. U.N. SCOR, 41th Sess., 2674th mtg., ¶ 9, U.N. Doc. S/PV.2674 (Apr. 15, 1986).

111. U.N. Department of Political and Security Council Affairs, *Repertoire of the Practice of the Security Council 1946–1951*, at 448–49 (1954).

directory rather than mandatory is also evidenced by State practice.<sup>112</sup> However, data reveals that after the judgment was issued, between 1986 and 2019, States significantly increased their reporting frequency to the Security Council, averaging approximately four reports per year during this period.<sup>113</sup> Hence, State practice regarding the reporting requirement has changed.

The reporting may, referring to the invocation of the right of self-defense in response to an armed attack, take the form of a plain notification without the necessity of including specific evidence regarding the existence of the armed attack.<sup>114</sup> Because the reporting requirement is not necessarily mandatory for States engaged in individual or collective self-defense, as long as other prerequisites are satisfied, the act of self-defense remains legal even in the absence of reporting. However, failing to comply with this obligation still constitutes an outright violation of the UN Charter.<sup>115</sup>

In Ukraine's best interests, States that may act in collective self-defense should immediately report to the UN Security Council after taking action. Their immediate reporting would provide the Security Council with the earliest possible opportunity to assess the measures taken in collective self-defense and enable it to act accordingly to stop the ongoing hostilities and re-establish peace between parties.<sup>116</sup> Compliance with the reporting requirement would demonstrate the genuineness of their actions and bolster the legitimacy of their collective self-defense response, which would ultimately show respect for and uphold the authority of the Security Council in fulfilling its mandate to preserve international peace and security.

#### F. Compliance with the "Until Clause" of Article 51

The "until clause" restricts States from exercising their right to self-defense by allowing such actions only "until the Security Council has taken measures necessary to maintain international peace and security." The temporal limitation on exercising the right to self-defense

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112. Greig, *supra* note 104, at 385. Before the judgment on the merits in Nicaragua in 1986, States were negligent in reporting to the Security Council. This is exemplified by the absence of State reports to the Security Council before 1958 and the subsequent infrequent reports with intervals of up to two to three years until 1985. See GRAY, *supra* note 86, at 121; see also Nick van der Steenhoven, *Conduct and Subsequent Practice by States in the Application of the Requirement to Report under UN Charter Article 51*, 6 J. ON USE OF FORCE AND INT'L L. 250 (2019).

113. Van der Steenhoven, *supra* note 112, at 250.

114. Ruys, *supra* note 61, at 237.

115. Greenwood, *supra* note 86, ¶ 31.

116. See Mitchell Knisbacher, *The Entebbe Operation: A Legal Analysis of Israel's Rescue Action*, 12 J. INT'L L. & ECON. 57 (1977).

indicates that this right is an interim or provisional measure designed to safeguard the victim State, and it should cease as soon as the Security Council begins to take necessary measures to protect the victim State.<sup>117</sup> This right, as a provisional measure against armed attacks, indicates that it cannot supplant the collective action authority vested in the UN.<sup>118</sup>

The drafting history of Article 51 indicates that the drafters of the Article appear to have, by the term “necessary measures,” intended to mean “adequate measures” or “effective action” that will be capable of maintaining international peace and security.<sup>119</sup> The right of self-defense should continue until international peace and security are entirely restored.<sup>120</sup> Contrary to the belief that self-defense actions should only continue until the Security Council begins taking measures to maintain international peace and security, the historical drafting records suggest that the authors of Article 51 intended for self-defense actions to continue even during the period when the Security Council is taking the necessary measures to restore international peace and security.<sup>121</sup>

Rostow believes that “the customary law of self-defence is not impaired in any way by the Charter but remains intact until the Council

117. D. W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 195 (1958). See also RUYSS, *supra* note 61, at 74; Asif Ezdi, *Self-defence under Article 51 of the United Nations Charter: A critical Analysis*, 27 PAKISTAN HORIZON 50 (1974); Green, *supra* note 106, at 8–9.

118. Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 800 (1948).

119. Minutes of the Forty-eighth Meeting (Executive Session) of the United States Delegation Held at San Francisco, May 20, 1945, in *Foreign Relations of the United States, Diplomatic Papers* (1945) vol. I, 814, 817 (During the drafting of Article 51, General Embick initially proposed the inclusion of “adequate” or “effective” before the term “measures” instead of using it in isolation. Following extensive discussions on the phrasing of the draft, Mr. Pasvolsky from the U.S. delegation put forth a statement that asserted, “In the event that armed attack occurs against a member state, nothing impairs the exercise of the inherent right of self-defence, either individual or collective, during the period elapsing between the attack and the time the Security Council takes adequate measures to restore international peace and security.” Senator Connelly, expressing his contentment with the statement, stated that he believed the right to self-defense continued “until the Security Council took adequate measures.” He further noted that, in his perspective, the exercise of the right to self-defense should not be limited “until the Security Council took effective action.” Senator Vandenberg fully endorsed this standpoint).

120. The drafting history further suggests that the drafters wanted to include the word “restore” alongside the word “maintain.” The delegate of the U.K., Lord Halifax, took the view that “the word “restore” should be retained, that is that the right of self-defence should continue during the period of restoration as well as up to the point where the Security Council was taking action to restore the peace.” However, the delegate of the Soviet Union, Mr. Gromyko, opposed retaining the word “restore,” arguing that the word “maintain” encompassed the concept of “restore” and the latter was in effect unnecessary.” Both the French and Chinese delegations also expressed their preference for retaining the word “restore.” Nevertheless, Lord Halifax ultimately conveyed that, even though the majority of delegates favored including “restore” he would not push the issue any further to prevent division within the delegation. *Id.* at 824.

121. See *id.*

has successfully dealt with the controversy before it. That cautious reading of Article 51 seems inevitable not only because of its language but also because of its position in the Charter as a proviso limiting the earlier parts of chapter VII and because of its context in history.<sup>122</sup>

The customary practice of States also seems to support this view, reaffirming that a State's right to self-defense persists until the Security Council has taken adequate and effective measures to restore international peace and security.<sup>123</sup> Halberstam goes a step further to refine the understanding of the term "necessary measures," suggesting that it likely means actions encompassing the use of force.<sup>124</sup> This interpretation is more pragmatic than the idea that non-forceful measures, such as a ceasefire or withdrawal of forces under Article 40 or economic sanctions or termination of diplomatic ties under Article 41, qualify as "necessary measures."<sup>125</sup> This is because the State practice shows that unless the Security Council adopts measures in the form of military action, aggressor States do not typically refrain from using force.<sup>126</sup>

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122. Rostow, *supra* note 97, at 511.

123. For instance, during the Indo-Pakistani War of 1965, Pakistan stressed to the President of the Security Council that "Pakistan would exercise its inherent right of self-defence until the Security Council had taken effective measures to restore peace and security." 1965 UNYB 163–64, U.N. Sales No. 66.I.1. Also, during a Security Council meeting on questions concerning the situation in the region of the Falkland Islands, Argentina argued that, following Article 51, unilateral use of force must cease once the Security Council has taken necessary measures (in this case, the adoption of SC Resolution 502). In response, the U.K. countered that since Argentina had not withdrawn its military forces from the occupation of the islands, the measures failed to be effective; therefore, they retained the right to continue exercising their self-defense rights under Article 51. See U.N. Department of Political and Security Council Affairs, *Repertoire of the Practice of the Security Council, Supplement 1981–1984*, at 326 (1992); U.N. SCOR, 37th Sess., 2360th mtg., at 6, 10 ¶¶ 55–56, 102, U.N. Doc. S/PV.2360 (May 21, 1982); U.N. SCOR, 37th Sess., 2362th mtg., at 23–24, ¶¶ 266–67, U.N. Doc. S/PV.2362 (May 22, 1982).

124. Malvina Halberstam is an emeritus professor of law at the Benjamin N. Cardozo School of Law, Yeshiva University. She specializes in international law, U.S. foreign policy, and national security and terrorism. Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT'L L. 246 (1996).

125. Some experts have expressed the view that non-forceful measures under Articles 40 and 41 are within the ambit of the term "necessary measures." See, e.g., Kathryn S. Elliott, *The New World Order and the Right of Self-Defense in the United Nations Charter*, 15 HASTINGS INT'L & COMP. L. REV. 68 (1991); Nico Schrijver, *Responding to International Terrorism: Moving the Frontiers of International Law For 'Enduring Freedom'?*, 48 NETH. INT'L L. REV. 281 (2001); L. C. Green, *Iraq, the U.N. and the Law*, 29 ALBERTA L. REV. 565 (1991). See also DINSTEN, *supra* note 12, at 238–39 (Dinstein explicitly endorses the view that economic sanctions imposed by the Security Council cannot take away the right to self-defense. A State's right to self-defense shall remain intact until a Security Council order ceases the hostilities and restores international peace and security).

126. This practice is evident in the event of Iraqi invasion of Kuwait. Despite the Security Council's adoption of the Resolutions 660 and 661 demanding the immediate withdrawal of the Iraqi forces from Kuwait and imposing a comprehensive economic sanction on Iraq, Iraq continued its aggression against Kuwait. Failure of these resolutions in preventing Iraq from

The trend of customary practice illustrates that aggressor States tend to disregard the Security Council's non-forceful measures. One plausible reason behind this may be that non-forceful measures are ineffective in affecting an aggressor State's capability of continuing its aggression against a victim State. From the perspective of the aggressor State, such measures may not be perceived as a severe penalty, allowing it to continue its aggression undeterred. When non-forceful measures fail to achieve the desired result of stopping the aggressor State from continuing aggression, it would be illogical to consider such measures to be qualified as "necessary measures."<sup>127</sup> Therefore, non-forceful measures can only qualify as "necessary measures" when an aggressor State ceases aggression by obeying the Security Council's mandates. Otherwise, in cases where non-forceful measures prove ineffective, Security Council actions, typically involving the use of force aimed at decisively eliminating threats to the victim State, should be qualified as "necessary measures."

A general interpretation of the "until clause" implies that, given the Security Council's role in maintaining international peace and security and a victim State owing the obligation to cease self-defense actions when the Security Council initiates adequate and effective measures, it stands to reason that the authority to decide whether the measures undertaken constitute adequate or effective lies *prima facie* with the Security Council.<sup>128</sup> However, a victim State may differ from

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continuing its aggression led the Security Council to adopt Resolution 678 which authorized the U.S.-led coalition to use "all necessary means" if Iraq fails to withdraw its forces within a specific time period, implying authorization for military action against Iraq. See S.C. Res. 660 (Aug. 2, 1990); S.C. Res. 661 (Aug. 6, 1990); DINSTEN, *supra* note 12, at 299. See also Christopher Greenwood, *Iraq's Invasion of Kuwait: Some Legal Issues*, 47 THE WORLD TODAY 42 (1991); MARC WELLER, *IRAQ AND THE USE OF FORCE IN INTERNATIONAL LAW* 31 (2010). Likewise, during the Libyan Civil War of 2011, the Security Council first imposed economic sanctions and other non-forceful measures to prevent the Libyan authorities from continuing acts of violence and use of force against their civilians. However, when these measures failed to deter the Libyan authorities from committing further acts of violence and using force against their civilians, the Security Council had no choice but to adopt measures in the form of military action to address the situation. However, when these measures failed to deter the Libyan authorities from committing further acts of violence and using force against their civilians, the Security Council had no choice but to adopt measures in the form of military action to address the situation. See S.C. Res. 1970 (Feb. 26, 2011); S.C. Res. 1973 (Mar. 17, 2011).

127. Greenwood casts doubt on whether non-forceful measures, such as economic measures, will have the same effect as forceful ones. He constructively argues that if economic measures were deemed adequate in the context of Kuwait, Resolution 661 would have debarred Kuwait and its allies from exercising self-defense actions, and nobody has made such an absurd suggestion. See Greenwood, *supra* note 126, at 164.

128. See Abram Chayes, *The Use of Force in the Persian Gulf*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 6 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); Elliot, *supra* note 125, at 68; Greig, *supra* note 104, at 390; RUYS, *supra* note 61, at 82; GRAY, *supra* note 86,



the Security Council in its view of what measures constitute adequate or effective.<sup>129</sup> It is suggested that it is up to the States to decide what qualifies as necessary measures.<sup>130</sup>

In the context of Russian aggression against Ukraine, the Security Council could not take any measures, be they forceful or non-forceful, due to the Russian veto. This deadlock failed in the adoption of the draft resolution demanding the immediate cessation of using force and the complete withdrawal of Russian troops from Ukrainian territory.<sup>131</sup> The Russian veto also makes it impossible for the Security Council to take any actions in favor of Ukraine, mandating Russia stop its aggression in the future, rendering the Security Council practically inoperative.

Consequently, the Security Council cannot take any “necessary measures.” Under these circumstances, Ukraine’s inherent right to self-defense will not cease so long as Russia continues its aggression, allowing Ukraine to keep using lawful force to eliminate the ongoing Russian aggression.<sup>132</sup> As the UN is blocked from taking adequate

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at 124–25. *See also* HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 803 (1950) (“It was probably not the intention of the legislator to confer upon the attacked state the power to decide whether the measures taken by the Security Council are adequate.”).

129. KELSEN, *supra* note 128. This view was reflected in the Falklands War when the U.K. argued that measures necessary to maintain international peace could “only be taken to refer to measures which are actually effective to bring about the stated objective. The Security Council’s decision in its resolution 502 (1982) has not proved effective. The United Kingdom’s inherent right of self-defence is thus unimpaired.” U.N. SCOR, 37th Sess., 2362th mtg., at 23, ¶¶ 265, U.N. Doc. S/PV.2362 (May. 22, 1982). A similar stance was observed in 1958 when Lebanon faced alleged subversive threats from the United Arab Republic; the Security Council responded to a plea from the Lebanese Government by passing Resolution 128 (1958). This resolution authorized an observation group to ensure that there was no illegal infiltration of personnel or arms into Lebanese territory. However, dissatisfied with these measures, Lebanon urged the Security Council “to take more effective measures than those it had already taken” to prevent any arms or armed men from entering Lebanese territory from foreign territories. S.C. Res. 128 (Jun. 11, 1958); 1958 UNYB 39, U.N. Sales No. 66.I.1.

130. Greig argues that the primary authority lies with the States to judge whether the measures taken have been sufficient unless the international community has expressed the contrary through the Security Council. Correspondingly, Ruys posits that if the Security Council adopts provisional measures, the power to decide what qualifies as necessary belongs to the States, although this is subject to the review of the international community and judicial scrutiny. Greig, *supra* note 104, at 392; RUYS, *supra* note 61, at 83.

131. On February 25, 2022, a Security Council draft resolution condemning the Russian invasion in the strongest terms, which had the potential capacity to stop the Russian aggression, bitterly failed to be adopted due to the Russian veto. The Draft Resolution, explicitly condemning the Russian invasion, demanded the immediate cessation of Russian use of force against Ukraine, the complete withdrawal of Russian forces from Ukraine, and the reversal of the declaration of independence in Donetsk and Luhansk. *See* S.C. Res. 155 (Feb. 25, 2022) (draft res.), <https://digitallibrary.un.org/record/3958806?ln=en>.

132. *See* DINSTEN, *supra* note 12, at 238 (“Should the Council be paralyzed and fail to take

measures due to the Russian veto, Ukraine's right to self-defense will remain unfettered. This principle extends to other States willing to support Ukraine through collective self-defense. In this paralyzed state of the Security Council, taking any measures necessary to maintain international peace and security is out of the question. Therefore, the issues of what qualifies as "necessary measures" or who can decide if the measures taken by the Security Council meet the standard of adequacy and effectiveness have become irrelevant and impractical.

The Russian veto's influence in rendering the Security Council completely non-functional has also made the operation of the "until clause" ineffective. Hence, Ukraine and its allies, who will be willing to offer support, can theoretically exercise individual and collective self-defense for an indefinite period as long as the Russian aggression persists.

### III. CAN UKRAINE'S RIGHT OF COLLECTIVE SELF-DEFENSE BE INVOKED AND EXERCISED?

#### A. Without a Collective-defense Treaty

There are many instances where States have invoked collective self-defense. These include the Soviet Union's intervention in Hungary (1956), the U.S. intervention in Lebanon (1958), the U.K. intervention in Jordan (1958), the U.K. intervention in the South Arabian Federation (1964), the U.S. intervention in Vietnam (1961–75), the Soviet Union's intervention in Czechoslovakia (1968), the Soviet Union's intervention in Afghanistan (1979), France's intervention in Chad (1983, 1986), the intervention led by the U.S. and its allies in Kuwait (1991), Uganda's intervention in Democratic Republic of Congo (1998), and the U.S. and its allies intervention in Afghanistan (2001).<sup>133</sup> Of these many instances where collective self-defense has been invoked, only two, the interventions in Kuwait (1991) and Afghanistan (2001), have gained wide recognition as legitimate by the global community.<sup>134</sup> Among these two,

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any measure necessary to maintain international peace and security, the legal position is equally obvious: a Member State exercising the right of self-defence may persist in the use of force.”). See also Greig, *supra* note 104, at 393 (“If the aggressor continues with the hostilities, the victim is still entitled to respond within the ambit of self-defence.”).

133. GRAY, *supra* note 86, at 167; Aadhithi Padmanabhan & Michael Shih, *Collective Self-Defense: A Report of the Yale Law School Center for Global Legal Challenges*, at 8, 16–26 (Dec. 10, 2012), [https://law.yale.edu/sites/default/files/documents/pdf/cglc/GLC\\_Collective\\_SelfDefense.pdf](https://law.yale.edu/sites/default/files/documents/pdf/cglc/GLC_Collective_SelfDefense.pdf).

134. Padmanabhan & Shih, *supra* note 133, at 1; During the military intervention carried out by the U.S.–led coalition against ISIL is an instance where also the right of collective self-defense was invoked. However, it has neither met with universal acceptance nor rejection. See Oliver

the Kuwait intervention stands out as the sole example where States have invoked and exercised collective self-defense without relying on a collective defense treaty.<sup>135</sup> When Iraq invaded Kuwait in 1990, Kuwait formally requested military assistance from other States.<sup>136</sup> In response to this request, the United States<sup>137</sup> and the United Kingdom,<sup>138</sup> in the absence of any collective defense treaty with Kuwait, deployed military forces to the Gulf region, exercising the inherent right of collective self-defense as recognized in Article 51.<sup>139</sup> This particular collective self-defense practice has proven that States have a right to use force to defend and be defended by their allies, even without a formal treaty or geographic proximity. It is unnecessary for a UN member State to have signed a collective defense treaty in order to invoke and exercise collective self-defense under Article 51 of the UN Charter. Since the criteria for invoking collective self-defense against the Russian invasion and

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Corten, *The Military Operations Against the 'Islamic State' (ISIL or Da'esh)—2014*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH* 897 (Tom Ruys, Olivier Corten & Alexandra Hofer eds., 2018).

135. In the case of Afghanistan, collective self-defense was invoked based on treaties. The North Atlantic Treaty Organization (NATO) invoked Article 5 of its treaty for the first and only time in history, declaring the September 11 terrorist attacks an “armed attack” against all NATO members. Subsequently, the U.S. also invoked the collective self-defense provision of the Rio Treaty (formally known as the Inter-American Reciprocal Assistance Treaty). See Suzanne Daley, *For First Time, NATO Invokes Joint Defense Pact with U.S.*, N.Y. TIMES (SEP. 13, 2001), <https://www.nytimes.com/2001/09/13/us/after-attacks-alliance-for-first-time-nato-invokes-joint-defense-pact-with-us.html>; Roger Francisco Noriega, *Invoking the Rio Treaty: Remarks to the OAS Permanent Council*, OAS (Sep. 19, 2001), <https://2001-2009.state.gov/p/wha/rls/rm/2001/4976.htm>.

136. Letter dated 12 August 1990 from the Permanent Representative of Kuwait to the United Nations addressed to the President of the Security Council, U.N. Doc. S/21498 (Aug. 13, 1990) (“In the exercise of its inherent right of individual and collective self-defence and pursuant to Article 51 of the Charter of the United Nations, Kuwait should like to notify you that it has requested some nations to take such implementation of Security Council resolution 661 (1990).”).

137. Items relating to the situation between Iraq and Kuwait, Repertoire of the Practice of the Security Council, at 580 (1989–1992) (The Permanent Representative of the United States of America to the United Nations referring to the UN Doc. S/21492 asserted that “the United States had deployed military forces to the Gulf region; that those forces had been dispatched in exercise of the inherent right of individual and collective self-defense, recognized in Article 51, in response to developments and requests from Governments in the region, including requests from Kuwait and Saudi Arabia, for assistance.”).

138. Letter dated 13 August 1990 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/21501 (Aug. 13, 1990) (“In accordance with Article 51 of the Charter of the United Nations, I wish on behalf of my Government to report that the United Kingdom has deployed military forces to the Gulf. These forces have been dispatched in exercise of the inherent right of individual and collective self-defence, recognized in Article 51, in response to developments and requests from Governments in the region, including requests from Kuwait, Saudi Arabia and Bahrain for assistance and by agreement with Oman.”).

139. WELLER, *supra* note 126, at 24.

ongoing aggression have already been satisfied or can be satisfied, in accordance with Article 51 of the UN Charter, Ukraine and its willing allies can invoke and exercise collective self-defense without a collective defense treaty.<sup>140</sup>

#### B. Without the Security Council's Authorization

As per Article 51 of the UN Charter, the Security Council's authorization is not a requisite for the exercise of the right. As previously discussed, as long as the criteria for invoking and exercising collective self-defense are satisfied, the Security Council's authorization is not needed for the invocation and exercise of the right of collective self-defense. The inessentiality of the Security Council authorization was demonstrated in the Kuwait intervention. After Iraq's invasion of Kuwait, the Security Council, by its Resolution 661, expressly "[a]ffirm[ed] the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."<sup>141</sup> When Resolution 678<sup>142</sup> authorized member States collaborating with the Government of Kuwait to use "all necessary means," it tacitly recognized the presence of troops on the field, exercising the inherent right of collective self-defense.<sup>143</sup> Under Resolutions 660, 661, and 678, the Security Council viewed its actions as a complement to, rather than a replacement for, collective self-defense operations led by the United States.<sup>144</sup> In doing so, it did not claim exclusive authority for ensuring compliance with Article 2(4) of the Charter.<sup>145</sup> Instead, it acknowledged the dual nature of the UN as a political entity, recognizing that both the Security Council and the States that chose to exercise their rights of individual and collective self-defense possess the capacity to take action.<sup>146</sup>

Given Kuwait's right of collective self-defense, the Council's approval or authorization to use force against Iraq was not essential.

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140. The criteria of the existence of an armed attack, declaration of victimhood, request for assistance, and necessity have already been met. The remaining criteria of proportionality, reporting to the Security Council, and compliance with the "until clause" can also be satisfied readily while or after taking collective self-defense measures.

141. S.C. Res. 661 (Aug. 6, 1990).

142. S.C. Res. 678 (Nov. 29, 1990) ("Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph I above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore International peace and security in the area.").

143. Chayes, *supra* note 128, at 9.

144. Rostow, *supra* note 97, at 510.

145. *Id.*

146. *Id.*

Instead, it functioned as a constraint on the countries cooperating with Kuwait, compelling them to withhold their military engagement until January 15, 1991.<sup>147</sup> However, the Council's eventual authorization added a more robust political justification<sup>148</sup> and legitimacy to the collective self-defense intervention against Iraq.<sup>149</sup>

Even during the U.S. invocation of collective self-defense in response to the September 11, 2001 attacks, the Security Council's endorsements through Resolutions 1368, 1373, and 1386, which all repeatedly affirmed the inherent right of individual or collective self-defense, were not essential.<sup>150</sup> The endorsements only provided strong backing for the U.S. invocation of this right.

In light of the above discussion, it is apparent that Ukraine and its allies do not need to rely on any prior approval from the Security Council for their invocation and exercise of collective self-defense. They can certainly take collective self-defense measures to protect Ukraine without any Security Council authorization.

#### IV. IS MILITARY ASSISTANCE TO UKRAINE AN EXERCISE OF COLLECTIVE SELF-DEFENSE?

##### A. Military Assistance Amounting to the Use of Force

While the United States and other Western States have adopted an apathetic stance toward deploying their troops to defend Ukraine, they have not turned away from assisting Ukraine with the provision of arms, intelligence, and defense equipment. From January 2022 to April 2024, the United States alone has allocated \$54 billion dollars for security assistance, weapons, and military equipment.<sup>151</sup> In addition, European

147. Yoram Dinstein, *The Gulf War, 1990–2004 (And Still Counting)*, 81 INT'L L. STUD. 339 (2006). See also S.C. Res. 678 (Nov. 29, 1990) (The Resolution holding off its authorization for the use of force till January 15, 1991, as a pause of goodwill, granted Iraq a window of time to withdraw its forces).

148. See Thomas L. Friedman, *Allies Tell Baker Use of Force Needs U.N. Backing*, N.Y. TIMES (Nov. 8, 1990), <https://www.nytimes.com/1990/11/08/world/mideast-tensions-allies-tell-baker-use-of-force-needs-un-backing.html>.

149. CHRISTINE CHINKIN & MARY KALDOR, INTERNATIONAL LAW AND NEW WARS 140 (2017).

150. See S.C. Res. 1368 (Sep. 12, 2001); S.C. Res. 1373 (Sep. 28, 2001); S.C. Res. 1386 (Dec. 20, 2001) (Resolutions 1368 and 1373 explicitly recognized “the inherent right of individual or collective self-defence.” However, Resolution 1386 did not explicitly mention recognizing “the inherent right of individual or collective self-defence.” Instead, it explicitly supported “international efforts to root out terrorism” and “Authorize[d] the Member States participating in the International Security Assistance Force to take all necessary measures.” The Resolution reaffirmed Resolutions 1368 and 1373, thereby indirectly recognizing “the inherent right of individual or collective self-defence” of the U.S.).

151. PIETRO BOMPRESZI, IVAN KHARITINOV & CHRISTOPH TREBESCH, KIEL INSTITUTE FOR THE WORLD ECONOMY, UKRAINE SUPPORT TRACKER - METHODOLOGICAL UPDATE & NEW RESULTS ON AID

countries have allocated \$51 billion dollars to bolster Ukrainian defense capabilities.<sup>152</sup> Besides delivering non-lethal weapons, the provision of weaponry included main battle tanks, combat vehicles, air defense systems like the Patriot missile system, the Soviet-era S-300 surface-to-air systems, National Advanced Surface-to-Air Missile System (NASAMS), StarStreak short-range surface-to-air missiles, Stinger missiles, and various artillery units like M142 HIMARS, M777 howitzers, and anti-tank weapons such as Javelin missiles, Next Generation Light Anti-tank Weapons (NLAW), Switchblade and Phoenix Ghost drones.<sup>153</sup>

In addition to arms support and training,<sup>154</sup> the United States has provided Ukraine with intelligence assistance. Many former and current U.S. officials have claimed that the U.S. military has deployed massive intelligence, surveillance, and reconnaissance assets to the neighboring countries of Ukraine to gather information on Russian forces, command posts, ammunition depots, logistic nodes, and warship movements, and provide the information to assist Ukraine in its counteroffensive efforts.<sup>155</sup>

Providing weapons, training, and intelligence to Ukraine is of utmost importance. This is because in the event that assistance constitutes a threat or use of force under Article 2(4) of the Charter, it may have to be justified based on the right to exercise collective self-defense. The ICJ in *Nicaragua* held that “assistance to rebels in the form of the provision of weapons or logistical or other support . . . may be regarded as a threat or use of force.”<sup>156</sup> Based on this view, Heller and Trabucco concluded that “[the provision of] weapons to Ukraine

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“ALLOCATION,” 6–7 (2024), [https://www.ifw-kiel.de/fileadmin/Dateiverwaltung/Subject\\_Dossiers\\_Topics/Ukraine/Ukraine\\_Support\\_Tracker/Ukraine\\_Support\\_Tracker\\_-\\_Research\\_Note.pdf](https://www.ifw-kiel.de/fileadmin/Dateiverwaltung/Subject_Dossiers_Topics/Ukraine/Ukraine_Support_Tracker/Ukraine_Support_Tracker_-_Research_Note.pdf).

152. *Id.*

153. David Brown, Jake Horton & Tural Ahmedzade, *Ukraine Weapons: What Tanks and Other Equipment Are Countries Giving?*, BBC (Sep. 22, 2023), <https://www.bbc.com/news/world-europe-62002218>; Bernd Debusmann Jr, *What Weapons Has the US Given Ukraine - and How Much Do They Help?*, BBC (Apr. 21, 2022), <https://www.bbc.com/news/world-us-canada-60774098>; Phoenix Ghost: *What We Know About the US's New Drones for Ukraine*, AL JAZEERA (Apr. 22, 2022), <https://www.aljazeera.com/news/2022/4/22/phenix-ghost-what-we-know-about-us-new-drones-for-ukraine>.

154. C. Todd Lopez, *DOD Official Says Training for Ukrainians Is Ongoing*, DOD (Mar. 30, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3347269/dod-official-says-training-for-ukrainians-is-ongoing/#:~:text=%22Since%20Russia's%20unprovoked%20invasion%20of,armed%20forces%2C%22%20Ryder%20said>.

155. Ken Klippenstein & Sara Sirota, *U.S. Quietly Assists Ukraine With Intelligence, Avoiding Direct Confrontation with Russia*, INTERCEPT (Mar. 17, 2022), <https://theintercept.com/2022/03/17/us-intelligence-ukraine-russia/>; Julian E. Barnes & Helene Cooper, *Ukrainian Officials Drew on U.S. Intelligence to Plan Counteroffensive*, N.Y. TIMES (Sep. 10, 2022), <https://www.nytimes.com/2022/09/10/us/politics/ukraine-military-intelligence.html>.

156. *Nicaragua*, *supra* note 21, ¶ 195.

constitutes the use of force against Russia.”<sup>157</sup> Schmitt and Biggerstaff point out that the ICJ’s interpretation can be applied to international armed conflicts like the current Russia-Ukraine conflict, leading to the affirmation that “the use of force extends to indirect force, including some forms of aid or assistance to States engaged in forcible operations.”<sup>158</sup> However, the threshold for determining the indirect use of force in international armed conflicts will be relatively higher than in non-international armed conflicts.<sup>159</sup>

Schmitt and Biggerstaff have suggested factors by which States may determine whether aid or assistance has amounted to the use of force based on “the relationship between the aid or assistance provided and the ultimate application of force by the supported State.”<sup>160</sup> The factors include intent, timing, directness, nature, geopolitical context, and impact.<sup>161</sup> Similarly, Schaller has also proposed three elements, two of which are arguably refined versions of “impact” and “intent” factors formulated by the former authors. And the other one is equivalent to the “directness” factor.

Based on the shared factors,<sup>162</sup> I assess the military aid and logistical support provided to Ukraine to determine whether they have crossed the threshold of the use of force and resulted in the indirect use of force against Russia.

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157. Kevin Jon Heller is an international law and security professor at the University of Copenhagen’s Centre for Military Studies. Lena Trabucco is a visiting scholar at the Stockton Center for International Law at the U.S. Naval War College. Heller & Trabucco, *supra* note 18, at 254.

158. Michael N. Schmitt is a Charles H. Stockton Distinguished Scholar-in-Residence at the U.S. Naval War College, a professor of public international law at the University of Reading and serves as the G. Norman Lieber Distinguished Scholar at the Lieber Institute of the U.S. Military Academy at West Point. W. Casey Biggerstaff holds the position of a military professor in the Stockton Center for International Law at the U.S. Naval War College and also serves as a judge advocate in the U.S. Army. See Michael N. Schmitt & W. Casey Biggerstaff, *Aid and Assistance as a “Use of Force” Under the Jus Ad Bellum*, 100 INT’L L. STUD 227 (2023).

159. *Id.* at 204; Schaller, *supra* note 18, at 187.

160. Schmitt & Biggerstaff, *supra* note 158, at 205.

161. *Id.* at 206–20.

162. Schmitt and Biggerstaff proposed the factors on the basis of the Tallinn Manuals (1.0 and 2.0), which have been well-received by States, including NATO members, in determining whether a certain cyber operation has amounted to the use of force or armed attack. On the other hand, Schaller suggested the factors based on the International Law Commission’s Articles on State Responsibility. I believe, therefore, that States and analysts are more likely to rely on these shared factors over others when assessing if particular military aid and logistical support qualify as the use of force. See Schmitt & Biggerstaff, *supra* note 158, at 205–6; Schaller, *supra* note 18, at 189–90, 192–93.

## 1. Intent

Schmitt and Biggerstaff believe that “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.”<sup>163</sup> They also propose that in some circumstances, when clear intention is absent, the conscious purpose of the supporting State is not necessary; knowledge or constructive knowledge of contribution to the direct use of force may be enough.<sup>164</sup>

Schaller rejects their ideas in favor of a higher threshold for establishing the indirect use of force. He argues that indirect use of force is only established if the assisting State intends to use force through its aid and to implement its will or policy on the attacking State.<sup>165</sup> Schaller advocates for a “coercive intent” standard, suggesting that the assisting State is likely acting with coercive intent when a hostile relationship exists between the attacking State and the assisting State, and the assisting State has taken initiatives to enforce its will upon the other.<sup>166</sup> This standard creates a much higher bar than mere intent, knowledge, or constructive knowledge. In Schaller’s opinion, the supporting States’ intent to halt Russian aggression and safeguard Ukraine’s sovereignty through the supply of arms and logistical support qualifies as coercive intent.<sup>167</sup>

NATO was originally founded during the Cold War to deter Soviet expansion into Europe.<sup>168</sup> Even during the post-Cold War era, NATO’s role has not changed much. It serves as a security framework for Europe but is viewed as a threat by Russia.<sup>169</sup> The existence of a hostile relationship between the NATO members and Russia is self-evident. Thus, the coercive intent of the NATO members is clearly reflected in their aim of aiding Ukraine to protect themselves from Russian potential aggression.

Their coercive intent is not limited to helping Ukraine defend itself but further extends to securing Europe’s safety and independence from potential Russian aggression. For instance, during a crisis

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163. Schmitt & Biggerstaff, *supra* note 158, at 206.

164. *Id.* at 208–9.

165. Christian Schaller is an international law expert who is currently a senior fellow at the German Institute for International and Security Affairs (SWP) in Berlin. Schaller, *supra* note 18, at 193, 195.

166. *Id.* at 195–96.

167. *Id.* at 195.

168. *A Short History of NATO*, NATO, [https://www.nato.int/cps/en/natohq/declassified\\_139339.htm](https://www.nato.int/cps/en/natohq/declassified_139339.htm).

169. S. Neil MacFarlane, *NATO in Russia's Relations with the West*, 32 *Sec. Dial.* 287 (2001).



meeting in support of Ukraine held in Paris, where French President Macron announced the creation of a coalition to provide Ukraine with missiles to carry out deep strikes, he said, “We are convinced that the defeat of Russia is indispensable to security and stability in Europe.”<sup>170</sup> According to Josep Borrell, the High Representative of the European Union for Foreign Affairs and Security Policy, “Ukraine prevailing against the Russian aggression is the best security guarantee for Europe . . . With our assistance, Ukraine can consign Russia’s imperial ambitions to the pages of history.”<sup>171</sup>

## 2. Direct Nexus

Schmitt and Biggerstaff view the nexus between the aid provided and the direct use of force as likely to indicate the indirect use of force.<sup>172</sup> In their words, “The more direct the connection, the greater the likelihood that other States will consider aid or assistance an indirect use of force.”<sup>173</sup>

Western governments are providing military aid directly through various legislations and agreements. The United States, for instance, delivered weapons to Ukraine through congressional legislation such as the Ukraine Supplemental Appropriations Act of 2022, the Continuing Appropriations and Ukraine Supplemental Appropriations Act of 2023, and Ukraine Security Supplemental Appropriations Act of 2024.<sup>174</sup> In addition, through the Presidential Drawdown Authority scheme, the U.S. President authorized the delivery of weapons and logistics to Ukraine under section 506(a)(1) of the Foreign Assistance Act.<sup>175</sup> The United Kingdom, Germany, and France have signed ten-year bilateral security agreements with Ukraine worth \$3.2 billion, \$1.22 billion, and \$3.23 billion, respectively, to provide military assistance.<sup>176</sup>

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170. Jaroslav Lukiv, *Macron Says Russian Defeat in Ukraine Vital for Security in Europe*, BBC (Feb. 27, 2024), <https://www.bbc.com/news/world-europe-68410219>.

171. Josep Borrell, *The War Against Ukraine and European Security*, EEAS (Jan. 23, 2024), [https://www.eeas.europa.eu/eeas/war-against-ukraine-and-european-security\\_en](https://www.eeas.europa.eu/eeas/war-against-ukraine-and-european-security_en).

172. Schmitt & Biggerstaff, *supra* note 158, at 214.

173. *Id.*

174. Ukraine Supplemental Appropriations Act, 2022, Pub. L. No. 117–128; Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Pub. L. No. 117–180; Ukraine Security Supplemental Appropriations Act, 2024, Pub. L. No. 118–50.

175. U.S. DEPARTMENT OF STATE, *Use of Presidential Drawdown Authority for Military Assistance for Ukraine*, (Sept. 6, 2024), <https://www.state.gov/use-of-presidential-drawdown-authority-for-military-assistance-for-ukraine/>.

176. *Ukraine, Britain Announce Security Agreement During Kyiv Visit by PM Sunak*, AL JAZEERA (Jan. 12, 2024), <https://www.aljazeera.com/news/2024/1/12/uk-to-increase-military-funding-for-ukraine-as-pm-sunak-visits-kyiv>; *Ukraine Signs French Security Pact After Similar Agreement with Germany*, AL JAZEERA (Feb. 16, 2024), <https://www.aljazeera.com/news/2024/2/16/>

In the current conflict, Ukraine has been effectively using many lethal weapons directly provided by NATO members against Russia, which establishes a strong basis for a direct nexus between the aid and the direct use of force. For example, the U.S. has provided HIMARS. This satellite-guided multiple-rocket launcher system, currently operated by Ukrainian soldiers, has destroyed Russian barracks, ammunition depots, and command centers, along with killing or wounding hundreds of Russian troops.<sup>177</sup>

Ukrainian troops have effectively used British-made NLAWS in destroying Russian tanks with a 90 percent hit rate.<sup>178</sup> Because the CAESAR self-propelled howitzers sent by France are efficiently attacking Russian columns,<sup>179</sup> the Ukrainian defense ministry hailing its effectiveness tweeted, “Clear message from artilleryists of “Caesar” self-propelled howitzer: Go home or 155 mm shell has no mercy.”<sup>180</sup>

Besides lethal weapons, the United States has provided Ukraine with significant intelligence assistance, which suggests a direct causal nexus with Ukrainian offensives against Russia. If intelligence is provided to Ukraine regarding specific Russian military targets, thus facilitating a Ukrainian attack on these targets, then such contribution could potentially be considered a use of force.<sup>181</sup> The near real-time and real-time intelligence-sharing and consulting proved to be a game changer for Ukraine, helping it to achieve impressive results. To target Russian ammunition depots and camps for HIMARS and other similar precision-guided artillery strikes, “Ukrainian forces almost never launch the advanced weapons without specific coordinates provided by U.S. military personnel from a base elsewhere in Europe.”<sup>182</sup> U.S.

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*ukraine-signs-french-security-pact-after-similar-agreement-with-germany.*

177. Matthew Mpoke Bigg & Eric Schmitt, *A U.S.-Made Long-Range Rocket System Has Helped Give Ukraine Momentum in the War.*, N. Y. TIMES (Jan. 2, 2023), <https://www.nytimes.com/2023/01/03/world/europe/himars-rockets-us-ukraine-war.html>; Stephen Kalin & Daniel Michaels, *Himars Transform the Battle for Ukraine—and Modern Warfare*, WALL ST J. (Oct. 8, 2022), <https://www.wsj.com/articles/himars-transform-battle-for-ukraine-modern-warfare-11665169716>.

178. Michael Savage, *How British ‘Tank-Busters’ Are Helping Ukraine Halt Russian Attack*, THE GUARDIAN (Mar. 20, 2022), <https://www.theguardian.com/world/2022/mar/20/how-british-tank-busters-are-helping-ukraine-halt-russian-attack>.

179. David Axe, *In Avdiivka, Ukrainian Caesar Howitzers Shoot And Scoot To Foil Russian Assaults*, FORBES (Oct. 30, 2023), <https://www.forbes.com/sites/davidaxe/2023/10/30/in-avdiivka-ukrainian-caesar-howitzers-shoot-and-scoot-to-foil-russian-assaults/?sh=5a8f55bc4aa2>.

180. Defense of Ukraine (@DefenceU), X (Oct. 13, 2023, 5:00 AM), <https://twitter.com/DefenceU/status/1712800354599833817>.

181. Van Steenberghe strongly highlights the “direct” contribution of assistance to the supported State’s military actions, which he terms the “direct participation” test. See Van Steenberghe, *supra* note 18, at 236.

182. Isabelle Khurshudyan, Dan Lamothe, Shane Harris & Paul Sonne, *Ukraine’s Rocket Campaign Reliant on U.S. Precision Targeting, Officials Say*, WASH. POST (Feb. 9, 2023), <https://>

officials have confirmed that they have provided near real-time and real-time intelligence in the downing of a Russian transport airplane transporting hundreds of soldiers, sinking Moskva—the flagship of the Black Sea Fleet—and targeting and killing high-ranking Russian military generals.<sup>183</sup>

### 3. Impact

Schmitt and Biggerstaff emphasize the impact of military aid in terms of its meaningfully contributing and enabling capacity to the supported State's direct use of force.<sup>184</sup> Schaller opposes their view, arguing that “meaningfully contributing” is a broadly defined standard unsuitable for an indirect use of force in a State-to-State context, since it blurs the distinction between the level of contribution required by Article 16 of Articles on State Responsibility and that necessary for an indirect use of force.<sup>185</sup> Instead, he suggests the “essentiality” standard to determine whether “the contribution made is a *sine qua non*” for the supported State's direct use of force.<sup>186</sup> If a contribution of military aid intensifies or increases the recipient State's direct use of force, then the contribution can be regarded as essential.<sup>187</sup>

The impact of a contribution can arise from the quantity or quality of the aid or assistance provided to the supported State.<sup>188</sup> The aid of lethal weapons—individually or collectively, quantitatively or qualitatively—provided by the NATO members has essentially contributed to the direct use of force against Russia. Moreover, the aid is not only essentially contributing to the Ukrainian direct use of force, it is so vital for Ukraine's defense that without the military aid of NATO members, Ukraine cannot sustain its defense in the long run.<sup>189</sup> The importance

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[www.washingtonpost.com/world/2023/02/09/ukraine-himars-rocket-artillery-russia/](https://www.washingtonpost.com/world/2023/02/09/ukraine-himars-rocket-artillery-russia/)

183. Ken Dilanian, Courtney Kube, Carol E. Lee & Dan De Luce, *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>; Helene Cooper, Eric Schmitt & Julian E. Barnes, *U.S. Intelligence Helped Ukraine Strike Russian Flagship, Officials Say*, N.Y. TIMES (May 5, 2022), <https://www.nytimes.com/2022/05/05/us/politics/moskva-russia-ship-ukraine-us.html>; Julian E. Barnes, Helene Cooper & Eric Schmitt, *U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/us/politics/russia-generals-killed-ukraine.html>.

184. Schmitt & Biggerstaff, *supra* note 158, at 220–21.

185. Schaller, *supra* note 18, at 190.

186. *Id.*

187. *Id.* at 191.

188. Schmitt & Biggerstaff, *supra* note 158, at 221; Schaller, *supra* note 18, at 191.

189. See Jonathan Beale, *The Impact Will Be Felt in Ukraine War If US Aid Dries Up*, BBC NEWS (Dec. 12, 2023), <https://www.bbc.com/news/world-europe-67690616>.

of U.S. military aid extends to the point that high-ranking officials from both the U.S. and Ukraine fear that Ukraine may lose the war if the United States fails to deliver military aid on time.<sup>190</sup> White House National Security Adviser Jake Sullivan remarked that Ukraine can achieve victory, but it depends on the Western allies' delivery of "the tools that it needs."<sup>191</sup> In other words, Ukraine's ability to use force in self-defense now essentially depends on Western military aid.

## B. Indirect Exercise of Collective Self-defense

The military assistance, falling within the ambit of the use of force, can be seemingly justified under collective self-defense. Interestingly, no state has explicitly justified its provision of weapons, training, and intelligence to Ukraine as an act of collective self-defense. Instead of justifying their arms and logistical assistance to Ukraine based on collective self-defense, States have preferred their aid to advance Ukraine's individual self-defense rights. Germany has unequivocally claimed that its government and allies are providing weapons to Ukraine to support Ukraine's individual right to self-defense, not collective self-defense.<sup>192</sup> NATO has reaffirmed the same position, stressing that it is assisting "Ukraine [to] defend itself against Russia's aggression by coordinating Ukraine's requests for assistance and supporting Allies in the delivery of humanitarian and non-lethal aid . . . helping Ukraine to uphold its right of self-defense."<sup>193</sup>

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190. See Jonathan Landay & Tom Balmforth, *Ukraine Sees 'Big Risk' of Losing War If U.S. Congress Postpones Vital Aid*, REUTERS (Dec. 5, 2023), <https://www.reuters.com/world/europe/ukraine-sees-big-risk-losing-war-if-us-congress-postpones-vital-aid-2023-12-05/>; David Lawder, *Yellen Says U.S. Would Be 'Responsible For Ukraine's Defeat' If Aid Fails In Congress*, REUTERS (Dec. 6, 2023),

<https://www.reuters.com/world/us/yellen-says-us-would-be-responsible-ukraines-defeat-if-aid-fails-congress-2023-12-06/>.

191. Kelly Garrity, *'Of Course Ukraine Can Still Win': Sullivan Nudges Congress to Pass Aid Package*, POLITICO (Feb. 25, 2024), <https://www.politico.com/news/2024/02/25/ukraine-sullivan-congress-aid-00143195>

192. On May 18, 2022, the Secretary of State at the Federal Foreign Office of Germany, Susanne Baumann, was asked the following written parliamentary question: "Why has the Federal Government neither invoked the right of collective self-defence with regard to arms deliveries to Ukraine nor informed the United Nations Security Council about the arms deliveries?" To which Baumann replied: "The Federal Government and its partners are supporting Ukraine by supplying weapons in exercising its right of individual self-defence against Russia's war of aggression. These supporting measures that comply with international law do not cross the threshold of an exercise of the right of collective self-defence." Schriftliche Fragen [Written Questions], Deutscher Bundestag: Drucksachen [BT] 20/1918, 39, <https://dsserver.bundestag.de/btd/20/019/2001918.pdf>.

193. *NATO's Response to Russia's Invasion of Ukraine*, NATO, [https://www.nato.int/cps/en/natohq/topics\\_192648.htm](https://www.nato.int/cps/en/natohq/topics_192648.htm) (last accessed on Jul. 19, 2024, 3:46 PM).

Similarly, the EU has declared that it is “strongly committed to providing further military support to help Ukraine exercise its inherent right of self-defence against the Russian aggression and defend its territorial integrity and sovereignty.”<sup>194</sup> With the sole purpose of bolstering Ukraine’s defensive capabilities, the EU has additionally established a “Military Assistance Mission in support of Ukraine (EUMAM Ukraine)” so that it can effectively defend its “territorial integrity within its internationally recognized borders, effectively exercise its sovereignty and protect civilians.”<sup>195</sup> Diplomats and representatives of several countries in the Security Council have also defended and reaffirmed their support for the provision of arms assistance on the grounds of Ukraine’s individual right to self-defense in response to concerns expressed by Under-Secretary-General and High Representative for Disarmament Affairs, Izumi Nakamitsu, about the fear of potential escalation of the conflict.<sup>196</sup>

One plausible argument is that the absence of reporting to the Security Council regarding assistance to Ukraine may be self-evident, indicating that the supporting States do not perceive their assistance as exercising collective self-defense.<sup>197</sup> Yet, as previously discussed, the reporting obligation is not strictly mandatory but only indicates a State’s good faith in exercising collective self-defense, provided other prerequisites are fulfilled.

Schaller cites six State practice incidents, including Ukraine’s, based on which he argues that State practice shows that States do not rely on invoking collective self-defense to justify their military assistance to a belligerent.<sup>198</sup> However, it is important to note that none of the cases of

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194. European Council, European Council Meeting (23 and 24 June 2022) - Conclusions, CO EUR 21 CONCL 5, at 2 (Jun. 24, 2022), <https://www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf>.

195. European Council Press Release, Ukraine: EU Sets Up a Military Assistance Mission to Further Support the Ukrainian Armed Forces (Oct. 17, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/10/17/ukraine-eu-sets-up-a-military-assistance-mission-to-further-support-the-ukrainian-armed-forces/>.

196. The proponents of provision of arms assistance for Ukraine at the Security Council comprise representatives from Japan, Albania, the United States, Ukraine, France, and the United Kingdom. U.N. SCOR, 78th Sess., 9256th mtg., at 10–13, U.N. Doc. S/PV.9256 (Feb. 8, 2023); U.N. SCOR, 78th Sess., 9325th mtg., at 6, 10, 12–13, U.N. Doc. S/PV.9325 (May 18, 2023); U.N. SCOR, 78th Sess., 9364th mtg., at 15–17, 19–21, U.N. Doc. S/PV.9364 (Jun. 29, 2023); U.N. SCOR, 78th Sess., 9399th mtg., at 9–10, 13–14, U.N. Doc. S/PV.9399 (Aug. 17, 2023); U.N. SCOR, 78th Sess., 9415th mtg., at 11–13, 15, U.N. Doc. S/PV.9415 (Sep. 12, 2023); U.N. SCOR, 78th Sess., 9436th mtg., at 10, 12, 15–16, U.N. Doc. S/PV.9436 (Oct. 13, 2023).

197. Green, *supra* note 18, at 11.

198. The incidents are (1) the Soviet Union’s arms transfer to Egypt and Syria in 1973; (2) France’s delivery of fighter aircraft, tanks, and weapons to Iraq during the Iran-Iraq War (1980–1988); (3) the U.S. political, economic, diplomatic and military assistance to Iraq during

State practice examples cited by Schaller involved the victim State formally requesting military assistance, except for Ukraine. For this reason, his argument that none of the assisting States cases “saw any reason to rely on the right to collective self-defence” is somewhat irrational.<sup>199</sup> In those cases, as the States provided military assistance without a formal request, they did not see any reason to rely on the right to collective self-defense. Ukraine’s context is fundamentally different, as it has formally requested military assistance not just once but multiple times.

Whereas the requisites for individual self-defense and collective self-defense are similar, declaration of victimhood and request for assistance are two extra requirements that are exclusive to collective self-defense.<sup>200</sup> The prerequisite of requesting assistance from other States stems from the Inter-American Treaty of Reciprocal Assistance<sup>201</sup>—the collective self-defense treaty that followed the Act of Chapultepec—which functioned as the basis for the inclusion of the collective self-defense system in the UN Charter.<sup>202</sup> By expressly declaring itself as a victim of an armed attack and requesting assistance from other States for self-defense, Ukraine has fulfilled both requirements.

Since requesting assistance is one of the preconditions for invoking collective self-defense, it would be only reasonable to construe that responding to such a request with substantial military aid, such as delivering significant lethal weapons, training, and logistical support, should be considered an action taken in exercise of collective self-defense. Responding to a request for military assistance should be regarded as an act of collective self-defense, as evidenced in State practice, *e.g.*, in the collective self-defense of Kuwait. When Kuwait requested military

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the Iran-Iraq War; (4) the U.S. military aid and assistance to the U.K. during the Falkland Islands conflict; (5) Western military and logistical assistance during the U.S.-led invasion of Iraq in 2003; Military aid and assistance of Western countries to Ukraine during the Russian invasion of Ukraine. See Schaller, *supra* note 18, at 180–85.

199. *Id.* at 187.

200. Laura Visser, *Intervention by invitation and collective self-defence: two sides of the same coin?*, 7.2 J. ON USE OF FORCE AND INT’L L., 292, 301–2 (2020); GREEN, *supra* note 54, at 143.

201. The ICJ in Nicaragua reached the decision that requesting assistance by the victim State is an essential precondition to collective self-defense and no customary international law permits the exercise of collective self-defense without it, based on the Inter-American Treaty of Reciprocal Assistance (also known as the Rio Treaty, 1947). See *Nicaragua*, *supra* note 21, ¶¶ 196–99.

202. The Act of Chapultepec served as the blueprint for incorporating the collective self-defense mechanism into the UN Charter. The Inter-American Treaty of Reciprocal Assistance subsequently replaced and formalized this Act. See Documents of the U.N. Conference on International Organization, San Francisco, 1945, vol. XII, 680–81, <https://digitallibrary.un.org/record/1300969/files/UNIO-Volume-12-E-F.pdf?ln=en>; Act of Chapultepec, *Oxford Reference*, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095602782>; Manuel R. Garcia-Mora, *The Law of the Inter-American Treaty of Reciprocal Assistance*, 20 FORDHAM L. REV. 1, 3–5 (1951).

assistance,<sup>203</sup> the aiding States acted in collective self-defense by sending military forces.<sup>204</sup> Although the assisting States deployed troops in Kuwait's collective self-defense, it is not necessary that such actions involve troop deployment or any form of direct use of force to qualify as collective self-defense measures. Even material assistance, such as the supply of arms, training, financing, and logistical support, can be considered collective self-defense actions.<sup>205</sup> Both NATO and the EU have explicitly acknowledged that their contribution is in response to Ukraine's request for military assistance.<sup>206</sup>

Therefore, while States claim to be assisting Ukraine only in its individual self-defense as opposed to collective self-defense, evidence suggests they are already exercising the latter. They are exercising collective self-defense in support of Ukraine without formally invoking the right, thus acting indirectly. Otherwise, their assistance substantially aligns with the criteria for collective self-defense, which furnishes a valid premise for their intervention.<sup>207</sup> Whereas the victim State uses force in individual self-defense, it is the assisting States that use force in collective self-defense. If their aid did not amount to the use of force, the argument that they are providing military assistance in the advancement of Ukraine's individual self-defense and not collective self-defense could be tenable. However, it has indeed amounted to the use of force.<sup>208</sup> Russia also considers the significant assistance to

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203. Kuwait formally requested military assistance from other States, including the U.S. and the U.K. See Letter dated 12 August 1990, *supra* note 136.

204. In response to this request, the U.S. and the U.K. deployed military forces to the Gulf region, exercising the inherent right of individual and collective self-defense as recognized in Article 51. See Repertoire of the Practice of the Security Council, *supra* note 137; Letter dated 13 August 1990, *supra* note 138.

205. The United States in *Nicaragua* claimed that its assistance with arms, training, finance, and logistics to El Salvador, Honduras, and Costa Rica was in response to their request for assistance. The Court decided that such aid could be justified under collective self-defense if Nicaragua had been giving support to the armed rebel groups which constituted an armed attack on El Salvador. Therefore, in the Court's view, providing arms, training, finance, and logistics to a victim State can be deemed a form of collective self-defense if the criteria are satisfied. See *Nicaragua*, *supra* note 21, ¶¶ 126–27.

206. NATO's Response, *supra* note 193; European Council Press Release, *supra* note 195.

207. See Tomas Hamilton, *Defending Ukraine with EU Weapons: Arms Control Law in Times of Crisis*, 1 EUR. LAW OPEN 635, 642 (2022).

208. Green believes that the provision of arms and logistical support to Ukraine does not amount to the use of force, and, therefore, such action cannot be an exercise of collective self-defense. But cautious scrutiny of the nature of the provision of weapons and logistical support to Ukraine suggests that it has indeed amounted to an *ad bellum* use of force. See Green, *supra* note 18, at 16 (“On balance, my own view is that the current provision weapons and logistical support to Ukraine does not amount to an *ad bellum* use of force, and thus that action need not be (and, arguably, cannot be) an instance of collective self-defence either.”).

Ukraine as constituting an indirect use of force against itself and thus considers NATO members an indirect party to the conflict.<sup>209</sup>

In addition, although NATO members supplying Ukraine with arms and logistical support claim to be aiding in the individual self-defense of Ukraine, they firmly believe that they are also safeguarding their own security.<sup>210</sup> In essence, Ukraine's self-defense is protecting them from potential Russian aggression. Therefore, Europe's safety and independence have been deemed intertwined with Ukraine's defense,<sup>211</sup> meaning that by offering assistance, they are also defending themselves, which is an exercise of collective self-defense.<sup>212</sup> The attacks and aggression on Ukraine's sovereignty and the threat Russia poses to Europe's security ultimately also endanger the vital interests of the United States, the superpower leading NATO and the Western countries.<sup>213</sup> From this point of view, the United States is also indirectly using force by providing military aid and logistical support to safeguard itself, its interests, and the global order, which consequently constitutes an act of collective self-defense nonetheless.<sup>214</sup>

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209. Russia, taking the nature of such assistance into account as constituting the use of force, seems to recognize the assisting States as co-belligerents. See Guy Faulconbridge, *Russia is now fighting NATO in Ukraine, Top Putin Ally Says*, REUTERS (Jan. 10, 2023), <https://www.reuters.com/world/europe/putin-ally-patrushev-says-russia-is-now-fighting-nato-ukraine-2023-01-10/> (Russian Security Council Secretary Nikolai Patrushev, referring to the assisting States in an interview, said, “*De facto* they have already become an indirect party to this conflict, pumping Ukraine with weapons, technologies, intelligence information and so on.”); Alexei Nikolskiy, *NATO countries are party to Ukraine conflict—Russian security chief*, TASS (Mar. 27, 2023), <https://tass.com/politics/1594731> (In another interview Nikolai Patrushev said, “In reality, NATO countries are parties to the conflict.”).

210. Pavlo Zhovnirenko, *No European security without Ukrainian victory*, ATL. COUNCIL (Jan. 23, 2024), <https://www.atlanticcouncil.org/blogs/ukrainealert/no-european-security-without-ukrainian-victory/> (“The most immediately obvious Ukrainian contribution to European security is the country’s role as Europe’s first line of defense against Russian aggression.”); Borrell, *supra* note 171; Lukiv, *supra* note 170. President Macron appealed to the European leaders to provide unwavering support in order to ensure Europe’s collective security, see Sylvie Corbet, *Putting Western Troops on the Ground in Ukraine Is Not ‘Ruled Out’ in the Future, French Leader Says*, AP NEWS (Feb. 27, 2024), <https://apnews.com/article/paris-conference-support-ukraine-zelenskyy-c458a1df3f9a7626128cdeb84050d469>.

211. Press statement by President von der Leyen with Ukrainian President Zelenskyy, European Commission (May 9, 2023), [https://neighbourhood-enlargement.ec.europa.eu/news/press-statement-president-von-der-leyen-ukrainian-president-zelenskyy-2023-05-09\\_en](https://neighbourhood-enlargement.ec.europa.eu/news/press-statement-president-von-der-leyen-ukrainian-president-zelenskyy-2023-05-09_en) (President of European Commission Ursula von der Leyen said, “Kyiv as the capital of Ukraine is the beating heart of today’s European values. Ukraine is on the front line of the defence of everything we Europeans cherish: our liberty, our democracy, our freedom of thought and of speech.”).

212. Dinstein views that collective self-defense in the form of the defense of self of the assisting State is performed when the assisting State’s security and sovereignty are considered fundamentally dependent on the victim State’s self-defense. See DINSTEIN, *supra* note 12, at 280–81.

213. For a detailed analysis see Joshua Shiffrin, *What Is America’s Interest in the Ukraine War?*, NATIONAL INTEREST (Oct. 30, 2022), <https://nationalinterest.org/feature/what-americas-interest-ukraine-war-205555>.

214. Dinstein suggests an armed attack on any country can be a threat to a superpower



## V. WHAT OBSTRUCTS THE FORMAL INVOCATION OF COLLECTIVE SELF-DEFENSE?

At the Munich security conference on February 17, 2023, Ukrainian President Volodymyr Zelenskyy drew a compelling analogy between his country's ongoing struggle against Russia and the iconic biblical narrative of David and Goliath.<sup>215</sup> In drawing this comparing analogy, President Zelenskyy cleverly pointed out the striking similarities between David, a small and inexperienced individual, and Ukraine, a less powerful nation grappling with a much stronger adversary. By considering the discernible military power disparity between the two nations, Zelenskyy's comparison holds.<sup>216</sup> Regarding military might, Russia far surpasses Ukraine in size and strength. Russia is ranked second in the world in terms of military power, with the largest collection of nuclear weapons at its disposal.<sup>217</sup>

But, unlike the biblical David, Ukraine does not have to face this unjust war alone. International law under Article 51 of the UN Charter offers a pathway for a State to seek help from other States in times of armed attack. Similar to Kuwait, Ukraine is now facing overwhelming aggression from a superior aggressor.<sup>218</sup> For Ukraine, assistance from

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since it threatens international peace and global order. In such a situation, the superpower's actions can be seen as an act of collective self-defense. See DINSTEIN, *supra* note 12, at 280–81. See also C. Todd Lopez, *Two Years in, Russia's War on Ukraine Continues to Pose Threat to Global Security*, DEPT. OF DEF. (Feb. 24, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3686148/two-years-in-russias-war-on-ukraine-continues-to-pose-threat-to-global-security/> (“Russia’s war in Ukraine is not just a threat to Ukraine or the nations that share a border with it. Russia’s war in Ukraine serves as a threat to all of Europe and the rest of the world, including the United States.”).

215. Erika Solomon, *At A Security Conference in Munich, Zelensky Invokes the Battle of David and Goliath*, N.Y. TIMES (Feb. 17, 2023), <https://www.nytimes.com/2023/02/17/world/europe/at-a-security-conference-in-munich-zelensky-invokes-the-battle-of-david-and-goliath.html>.

216. For a detailed discussion, see *Comparison of Ukraine and Russia Military Strengths* (2023), GLOB. FIREPOWER (2023), <https://www.globalfirepower.com/countries-comparison-detail.php?country1=ukraine&country2=russia>; Kieran Devine, *Russia-Ukraine crisis: How Big are Their Militaries?*, SKY NEWS (Feb. 24, 2022), <https://news.sky.com/story/russia-ukraine-crisis-how-big-are-their-militaries-12542052>; Angela Dewan, *Ukraine and Russia's Militaries are David and Goliath. Here's How They Compare*, CNN (Feb. 25, 2022), <https://edition.cnn.com/2022/02/25/europe/russia-ukraine-military-comparison-intl/index.html>.

217. *2024 Russia Military Strength*, GLOB. FIREPOWER (2024), [https://www.globalfirepower.com/country-military-strength-detail.php?country\\_id=russia](https://www.globalfirepower.com/country-military-strength-detail.php?country_id=russia); Guy Faulconbridge, *Russia's Nuclear Arsenal: How Big Is It, And Who Controls It*, REUTERS (Oct. 5, 2023), <https://www.reuters.com/world/europe/russias-nuclear-arsenal-how-big-is-it-who-controls-it-2023-10-05/>.

218. When Kuwait was illegally invaded and occupied by Iraq, Iraq was militarily one of the most powerful countries. According to Sir David Hannay, the U.K. representative at the Security Council during the Gulf War, “In global terms Iraq has the fourth largest army in the world, after the Soviet Union, China, and the United States.” U.N. SCOR, 46th Sess., 2977th mtg., ¶ 73, U.N. Doc. S/PV.2977 (Part II) (closed) (Feb. 14, 1991).

other States appears to be necessary, as it was in the case of Kuwait. Similar to the liberation of Kuwait from Iraqi occupation, if other States assist with troops, ammunition, and establishment of no-fly zones by invoking collective self-defense in support of Ukraine they can drive out Russian forces.<sup>219</sup>

After Ukraine was attacked, the United States and NATO<sup>220</sup> turned down these requests by refraining from sending troops or establishing a no-fly zone despite multiple formal appeals for assistance. They rejected the requests because such actions would mean direct participation in the war, making them co-belligerent in the conflict and necessitating participation on the legal basis of collective self-defense. In that case, the United States and NATO must formally invoke the right to collective self-defense.

Had the aggressor's military been of comparatively weaker strength, and most importantly, lacked nuclear capabilities like Iraq or Afghanistan,<sup>221</sup> the United States and its allies would likely not have hesitated to send troops or establish a no-fly zone, thereby invoking collective self-defense.

The main reason behind the United States' reluctance to deploy its troops in Ukraine is the fear that confrontation with Russian troops may escalate to a catastrophic global war, potentially involving nuclear weapons.<sup>222</sup> Fear of war with Russia has also kept NATO at bay from making humanitarian intervention in Ukraine, unlike in other countries where it previously intervened for humanitarian reasons.<sup>223</sup>

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219. See Repertoire of the Practice of the Security Council, *supra* note 137; Letter dated 13 August 1990, *supra* note 138; Dana Priest, *U.S. Fires Missiles at Iraqi Jets in 'No-Fly' Zone*, WASH. POST (Jan. 6, 1999), <https://www.washingtonpost.com/wp-srv/inatl/longterm/iraq/stories/nofly010699.htm>.

220. As for NATO, it cannot act unless one of its member States has become a victim of an armed attack. The delineation for the application of collective self-defense is defined by Article 5 of the North Atlantic Treaty, which exclusively restricts such actions to NATO member States. See North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

221. Despite Iraq being the fourth-largest army at the time it attacked Kuwait, it lacked nuclear weapons capabilities. See U.N. SCOR, 46th Sess., 2977th mtg., ¶ 73, U.N. Doc. S/PV.2977 (Part II) (closed) (Feb. 14, 1991). ("In global terms Iraq has the fourth largest army in the world, after the Soviet Union, China, and the United States."). Regarding the intervention in Afghanistan, the U.S.-led allies could easily invoke and exercise collective self-defense against Al Qaeda terrorists sheltered by the Taliban because the U.S. and its allies far surpassed the Taliban and Al Qaeda in defense capabilities.

222. Barbara Plett Usher, *Ukraine Conflict: Why Biden won't Send Troops to Ukraine*, BBC (Feb. 25, 2022), <https://www.bbc.com/news/world-us-canada-60499385>; Paul LeBlanc, *Why the US Isn't Sending Troops into Ukraine*, CNN (Feb. 28, 2022), <https://edition.cnn.com/2022/02/27/politics/us-troops-ukraine-russia-what-matters/index.html>.

223. Victor Rud, *Why Is NATO scared of Russia?*, THE HILL (Jul. 27, 2023), <https://thehill.com/opinion/international/4122981-why-is-nato-scared-of-russia/>.

Being able to sense the horror that may ensue, Antonio Guterres, the UN Secretary-General, has given a chilling warning, saying, “The prospect of nuclear conflict, once unthinkable, is now back within the realm of possibility.”<sup>224</sup> The United States desperately wants to avoid any direct confrontation with Russia. Thus, U.S. President Biden displayed reluctance in sending troops to evacuate American citizens from Ukraine in fear of confrontation. Days before the commencement of the Russian full-scale invasion, when President Biden was asked the circumstances under which the United States could send troops to Ukraine to evacuate Americans, he replied, “There’s not. That’s a world war when Americans and Russia start shooting at one another.”<sup>225</sup>

Following the Russian invasion, President Biden made it clear that the United States would not deploy forces in Ukraine, saying, “Our forces are not and will not be engaged in the conflict. [They] are not going to Europe to fight in Ukraine but to defend our NATO allies and reassure those allies in the East.”<sup>226</sup> On a subsequent occasion, he emphasized, “We will not fight a war against Russia in Ukraine. Direct conflict between NATO and Russia is World War III, [it is] something we must strive to prevent.”<sup>227</sup> During a NATO press conference on March 23, 2022, the NATO Secretary General expressed similar wariness, stating, “[W]e have a responsibility to ensure that the war does not escalate beyond Ukraine and become a conflict between NATO and Russia. This would cause even more death and even more destruction.”

Regarding the issue of imposing a no-fly zone, he further added that “[O]n the call for a no-fly zone, we have stated that we are not

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224. Humeyra Pamuk, *U.N. Chief: Prospect of Nuclear Conflict Back ‘Within Realm of Possibility’ over Ukraine*, REUTERS (Mar. 14, 2022), <https://www.reuters.com/world/un-chief-says-prospect-nuclear-conflict-back-within-realm-possibility-over-2022-03-14/>.

225. Teaganne Finn, *Biden Warns Americans in Ukraine to Leave, Says Sending Troops to Evacuate would be ‘World War’*, NBC NEWS (Feb. 11, 2022), <https://www.nbcnews.com/politics/white-house/biden-warns-americans-leave-ukraine-russia-troops-world-war-rcna15781>. After the commencement of the Russian invasion, to avoid confrontation with Russian forces, the Pentagon also immediately ordered its troops deployed in Ukraine to leave the country and elsewhere in Europe. See Amanda Macias, *Pentagon Orders Departure of U.S. Troops in Ukraine as Russia Crisis Escalates*, CNBC (Feb. 12, 2022), <https://www.cnbc.com/2022/02/12/pentagon-orders-departure-of-us-troops-in-ukraine.html>.

226. Zachary B. Wolf, *Here’s What Biden Has Said About Sending US Troops to Ukraine*, CNN (Feb. 24, 2022), [https://edition.cnn.com/2022/02/24/politics/us-troops-ukraine-russia-nato/index.html?utm\\_term=PRV-1646008888349a6676650a2d2&utm\\_source=cnn\\_What+Matters+for+February+27%2C+2022&utm\\_medium=email&bt\\_ee\\_preview=hbFduul55Q%2FFX-rgsCF5h9Njy3K0GbQv4fI%2FGq%2Fc6jwbQ8qAiF%2BQDuXeXbSU%2F5YMFj&bt\\_ts\\_preview=1646008888356](https://edition.cnn.com/2022/02/24/politics/us-troops-ukraine-russia-nato/index.html?utm_term=PRV-1646008888349a6676650a2d2&utm_source=cnn_What+Matters+for+February+27%2C+2022&utm_medium=email&bt_ee_preview=hbFduul55Q%2FFX-rgsCF5h9Njy3K0GbQv4fI%2FGq%2Fc6jwbQ8qAiF%2BQDuXeXbSU%2F5YMFj&bt_ts_preview=1646008888356).

227. Brett Samuels, *Biden: Direct Conflict Between NATO and Russia would be ‘World War III’*, THE HILL (Mar. 11, 2022), <https://thehill.com/policy/international/597842-biden-direct-conflict-between-nato-and-russia-would-be-world-war-iii/>.

going to impose a no-fly zone because we believe that will most likely trigger a full-fledged war between NATO and Russia. A no-fly zone means that we need to take out Russian air defence systems in Russia, which are covering their airspace over Ukraine. And it means that we have to be ready to shoot down Russian planes. That will most likely lead to a full-fledged conflict.”<sup>228</sup> Due to similar concerns, NATO members and others in their individual capacities have also abstained from sending their forces or imposing a no-fly zone in Ukraine.

For the same reasons, the assisting States have stayed away from justifying their military and logistical aid and assistance on collective self-defense even though such aid and assistance have amounted to the use of force. Their unwillingness to establish their support based on collective self-defense is understandable, as doing so may run the risk of formally becoming a co-belligerent in the conflict,<sup>229</sup> eventually leading to a greater peril of widening the conflict, which no State is willing to advance.<sup>230</sup>

## VI. CONCLUSION

After thoroughly examining the Russia-Ukraine conflict, this Article finds that some of the essential requisites to invoke collective self-defense of Ukraine: the existence of an armed attack, declaration of victimhood, request for assistance, and necessity, have already been duly satisfied. The remainder, such as proportionality, reporting to the UN Security Council, and compliance with the “until clause” can also be effectively addressed at any time. Therefore, NATO members that are helping Ukraine can directly participate in the conflict by invoking Ukraine’s right to collective self-defense as no legal obstacles obstruct

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228. Press Release, *Press Conference by NATO Secretary General Jens Stoltenberg previewing the extraordinary Summit of NATO Heads of State and Government*, NATO (Mar. 23, 2022), [https://www.nato.int/cps/en/natohq/opinions\\_193610.htm](https://www.nato.int/cps/en/natohq/opinions_193610.htm).

229. Despite the fear of formally becoming a co-belligerent in the conflict, the assisting States are said to be already co-belligerents in the conflict since the military and logistical assistance provided by the West have been qualified as the use of force. See Peter S. Konchak, *U.S. and Allied Involvement in the Russo-Ukrainian War: The Belligerent Status of NATO States and Its Implications*, OPINIO JURIS (Jul. 20, 2022), <https://opiniojuris.org/2022/07/20/u-s-and-allied-involvement-in-the-russo-ukrainian-war-the-belligerent-status-of-nato-states-and-its-implications/>. Russia, taking the nature of such assistance into account, seems to recognize the assisting States as co-belligerents. See Faulconbridge, *supra* note 209; Nikolskly, *supra* note 209.

230. In the face of persistent nuclear threats emanating from Russia, the possibility of escalating the conflict to a nuclear war cannot be easily dismissed. See Alexandra Sharp, *Putin Threatens Nuclear War if Foreign Troops Deploy to Ukraine*, FOREIGN POL’Y (Feb. 29, 2024), <https://foreignpolicy.com/2024/02/29/putin-threat-nuclear-weapons-nato-warning-war-russia/>; Anton Troianovski, *Putin Says West Risks Nuclear Conflict if It Intervenes More in Ukraine*, N.Y. TIMES (Feb. 29, 2024), <https://www.nytimes.com/2024/02/29/world/europe/putin-speech-ukraine-nuclear-conflict.html>.

them. They can invoke and exercise collective self-defense without the UN Security Council's authorization and without concluding a collective defense treaty with Ukraine. Invoking collective self-defense in support of Ukraine would clearly mean that Ukraine's allies are willing to use force directly against Russia.

However, the widespread fear that their confrontation with Russia might spark another World War has dissuaded them from directly being involved in support of Ukraine. A careful assessment made in this Article suggests that the assistance of NATO members to Ukraine, due to the assistance's nature and quality, already surpassed the use of force threshold. Therefore, the assisting States' clever yet seemingly lawful justification that they are supplying Ukraine arms, training, and intelligence not in collective self-defense but in support of Ukraine's individual self-defense is fallacious. This Article argues that the assisting States, with their significant military, logistical, and intelligence support, are indirectly using force against Russia to protect themselves from potential Russian aggression, which amounts to an act of collective self-defense.

Surprisingly, despite perceiving Ukraine's allies as co-belligerents, Russia has not attacked any of them. This could be for numerous reasons. Maybe Russia wants to avoid dragging Ukraine's allies into the war and is unwilling to escalate the war of its own volition. Russia has been calculative with the risks associated with the escalation that may outweigh its prospective gains.<sup>231</sup> Thus, Russia is self-deterred from targeting and attacking them.<sup>232</sup> Instead, Russia has only chosen to target and attack the military supplies provided by these countries.<sup>233</sup>

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231. For a detailed discussion, see Austin Carson, *The Missing Escalation in Ukraine: In Defense of the West's Go-Slow Approach*, FOREIGN AFF. (Sep. 14, 2023), <https://www.foreignaffairs.com/eastern-europe-caucasus/missing-escalation-ukraine>. See also Bryan Frederick, Mark Cozad & Alexandra Stark, *Understanding the Risk of Escalation in the War in Ukraine*, RAND (Sep. 21, 2023), [https://www.rand.org/pubs/research\\_briefs/RBA2807-1.html](https://www.rand.org/pubs/research_briefs/RBA2807-1.html).

232. Although Russia views the Western supply of arms and logistical support "as direct intervention of a kind that requires retaliation," so far, Russia has not retaliated against the supplying countries. See Toby Helm Luke Harding, Daniel Boffey & Julian Borger, *Defiant Putin Warns the West: Your Sanctions Are Akin to An Act of War*, THE GUARDIAN (Mar. 5, 2022), <https://www.theguardian.com/world/2022/mar/05/defiant-putin-warns-the-west-your-sanctions-are-akin-to-an-act-of-war>. Putin believes that by sending billions of dollars' worth of weapons to Ukraine, NATO is actively participating in the conflict. See Aitor Hernández-Morales, *Putin Accuses NATO of Participating in Ukraine Conflict*, POLITICO (Feb. 26, 2023), <https://www.politico.eu/article/vladimir-putin-accuse-nato-participate-ukraine-conflict-war-russia/>.

233. Paul McLeary & Lara Seligman, *Russia Targeting Western Weapons Shipments in Ukraine As Donbas Assault Begins*, POLITICO (Apr. 25, 2022), <https://www.politico.com/news/2022/04/25/russia-western-weapons-shipments-ukraine-donbas-00027663>; Peter Beaumont & Julian Borger, *Russian Airstrikes Target Western Arms Arriving in Ukraine*, THE GUARDIAN (May 4, 2022), <https://www.theguardian.com/world/2022/may/04/russian-airstrikes-target-western-arms-arriving-in-ukraine>.

At present, Western allies of Ukraine are likely less concerned with the legal implications of becoming a party to the conflict for their provision of arms and logistical support amounting to the use of force.<sup>234</sup> Russia also seems unconcerned with the legalities. Instead, the West and Russia are more concerned with the conflict's practical political implications. So long as the assisting States are not actively participating in the conflict by directly attacking Russian military personnel or equipment or formally invoking Ukraine's right to collective self-defense, they are unlikely to be targeted or attacked by Russia.<sup>235</sup> The assisting allies seem to be carefully avoiding actions that could be seen as crossing this threshold.

The trajectory of the conflict suggests that the formal invocation of collective self-defense is not beyond the realms of possibility. Should NATO or any State decide to participate directly in the conflict, they must invoke collective self-defense. During the NATO summit of 2023 in Vilnius, former NATO Chief Anders Rasmussen hinted at the possibility of direct participation by Poland and the Baltic States in support of Ukraine.<sup>236</sup> If Ukraine's defense falls, it is feared that it will also jeopardize the defense of the Baltic States, Finland, Moldova, and other neighboring countries. If such a situation occurs, NATO's confrontation with Russia will be inevitable.<sup>237</sup>

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234. See Alexander Wentker, *At War: When Do States Supporting Ukraine or Russia become Parties to the Conflict and What Would that Mean?* EJIL: TALK! (Mar. 14, 2022), <https://www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/>.

235. Press Secretary for President Putin Dmitry Peskov warned that there would be conflict between Russia and NATO if European members of NATO deploy troops in Ukraine. He made this warning following French President Macron's remark on the possibility of sending troops to Ukraine. See Guy Faulconbridge, *Kremlin Warns of Conflict with NATO if Alliance Troops Fight in Ukraine*, REUTERS (Feb. 27, 2024), <https://www.reuters.com/world/europe/kremlin-warns-conflict-with-nato-if-alliance-troops-fight-ukraine-2024-02-27/>.

236. Patrick Wintour, *Nato Members May Send Troops to Ukraine, Warns Former Alliance Chief*, THE GUARDIAN (Jun. 7, 2023), <https://www.theguardian.com/world/2023/jun/07/nato-members-may-send-troops-to-ukraine-warns-former-alliance-chief>; Martha McHardy, *Nato Countries 'Could Send Troops to Ukraine in Coalition of the Willing' Former Alliance Chief Warns*, INDEPENDENT (Jun. 7, 2023), <https://www.independent.co.uk/news/world/europe/ukraine-russia-war-nato-summit-b2353453.html>.

237. Aila Slisco, *NATO Will Be Drawn into War With Russia if Ukraine Loses: Lloyd Austin*, NEWSWEEK (Feb. 29, 2024), <https://www.newsweek.com/nato-will-drawn-war-russia-if-ukraine-loses-lloyd-austin-1874913> (The U.S. Defense Secretary Lloyd Austin during a House Armed Services Committee hearing in Washington, D.C. said, "If you're a Baltic state, you're really worried about whether or not you're next . . . They know Putin, they know what he's capable of . . . And quite frankly, if Ukraine falls, I really believe that NATO will be in a fight with Russia.").

Since Ukraine meets the criteria for invoking collective self-defense, any form of aid or assistance will be lawful under international law, including sending troops and establishing a no-fly zone. Given the current political reality and associated risks, the possibility of a formal invocation of collective self-defense may be very low but never zero. The right to invoke collective self-defense for Ukraine is ever present and always available as long as the conflict continues.