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RESEARCH ARTICLE

Moving 'red lines': The Russian–Ukrainian war and the pragmatic (mis-)use of international law

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Abstract
The Russian invasion of Ukraine has widely been seen as a failure of the international legal order, which could neither stop Russia from launching a war of aggression, nor prevent the perpetration of international crimes. In such a reading, great power politics have (once again) trumped international law. We argue instead that international law plays a crucial part in the conflict by providing a semantic infrastructure, which the opposing parties use to justify their actions, try to re-draw limits of permissible action and negotiate changing 'red lines' with the enemy. Drawing on the notion of lawfare, we show how the pragmatic (mis-) use of international law flexibly delineates boundaries and stabilizes expectations between adversaries even as they are contested in the current war. We focus on claims about self-determination and self-defence to justify the use of force; categorizations of combatants; and weapons transfers and the status of third states. That international law can be violated or reinterpreted to breaking point does not make it irrelevant. To the contrary, it recalls its important role as a language of conflict and compromise, beyond strictly legalist as well as dismissive realist views.

Keywords: aggression; international humanitarian law; lawfare; pragmatism; Russia; Ukraine

I. Introduction

The full-blown Russian invasion of Ukraine, launched on 24 February 2022, bluntly disregarded – and continues to violate – some of the most fundamental norms of international law. For some, a resort to international law does not just show that the use of force in this case is clearly illegal and can be condemned; it also enables the investigation and persecution of international crimes, as the arrest warrant issued by the Office of the Prosecutor of the International Criminal Court (ICC) against President

Putin and another high-ranking Russian official illustrates.[1] From this legalist vantage point, it is the strength of international law not to be political and instead set a normative benchmark for international politics. For others, however, the war proves once more that international law is weak since it cannot prevent a great power armed to the teeth from breaking any rules if it wishes to do so. From this realist perspective, the Russian invasion therefore appears to call for an analysis of geopolitics rather than law.[2] The Russian use of the language of international law – justifying the invasion as self-defence, presenting its annexation of territories as self-determination and warning third states against becoming direct parties to the conflict – thus appears as either an expression of a specific 'Russian approach to international law'[3] and part of a general trend towards 'authoritarian international law'[4] and 'inter-imperial rivalry' with the West,[5] or as a case of 'Bullshit, Lies and "Demonstrably Rubbish" Justifications in International Law',[6] meant to sway domestic audiences and perhaps confuse or provoke international observers.[7] In this understanding, international law is ultimately silent in times of war – or, at best, it is the law of great powers.

In this article, we explore an alternative reading of the Russian – as well as Ukrainian and 'Western' – uses of international law in the conflict. We seek to avoid both a strictly *legalist* interpretation of Russian arguments that would rigorously probe, to then likely reject, their validity, and a strictly *realist* analysis that dismisses legal arguments as ineffective 'cheap talk' and instead focuses on 'underlying' geopolitical interests and great power politics. The articulation of international law arguments does not have to be interpreted in terms of their *validity* or *effectiveness* alone. Drawing on critical constructivist and pragmatist approaches, we instead propose to reread publicly presented and contested arguments of international law in the context of the Ukraine war as a means to *communicate* causes, ends and limits to the enemy and others. Indeed, all sides have used international law arguments to warn and chide each other, repeatedly drawing 'red lines' that the other party would better not cross. Even if much of the reasoning of the parties involved in the war in one way or another might arguably reflect geopolitical rather than

[1]International Criminal Court, 'Statement by Prosecutor Karim AA Khan KC on the Issuance of Arrest Warrants Against President Vladimir Putin and Ms Maria Lvova-Belova', 17 March 2023. Available at: <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>.

[2]Malcolm Jorgensen, 'The Weaponisation of International Law in Ukraine', *Völkerrechtsblog*, 15 March 2022. Available at: <https://voelkerrechtsblog.org/the-weaponisation-of-international-law-in-ukraine/#>; see also already Rein Müllerson, 'Ukraine: Victim of Geopolitics' (2014) 13(1) *Chinese Journal of International Law* 133.

[3]Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press, 2015).

[4]Tom Ginsburg, 'Article 2(4) and Authoritarian International Law' (2022) 116 *AJIL Unbound* 130; Tom Ginsburg, '*Authoritarian International Law?*' (2020) 114(2) *American Journal of International Law* 221.

[5]Anastasiya Kotova and Ntina Tzouvala, 'In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law' (2022) 116(4) *American Journal of International Law* 710. For an argument about the emergence of a new multipolar order due to geopolitical shifts, see Müllerson, 'Ukraine: Victim of Geopolitics' (2); Rein Müllerson, *Dawn of a New Order: Geopolitics and the Clash of Ideologies* (London: I.B. Tauris, 2017). For a critique of this approach, see Lauri Mälksoo, 'The Annexation of Crimea and Balance of Power in International Law' (2019) 30(1) *European Journal of International Law* 303.

[6]Fuad Zarbiyev, 'Of Bullshit, Lies and "Demonstrably Rubbish" Justifications in International Law', *Völkerrechtsblog*, 18 March 2022. Available at: <https://voelkerrechtsblog.org/of-bullshit-lies-and-demonstrably-rubbish-justifications-in-international-law>.

[7]Jorgensen, 'The Weaponisation of International Law' (2); Zarbiyev, 'Of Bullshit, Lies and "Demonstrably Rubbish"' (6).

legal concerns, the turn to the language of international law is not accidental, cheap or superfluous: it provides a rich and complex semantic infrastructure of subjects, statuses, constraints, permissions and demarcations that enable communication and understanding, however limited, where otherwise weapons have come to speak. This recalls international law's important role as a language of conflict and compromise, even where some of its key rules are clearly stretched, bent and broken.

The article unfolds in four main sections. In Section II, we briefly outline the theoretical underpinnings of our argument, emphasizing in particular how a critical constructivist and critical legal perspective on international law in use differs from the often-opposed legalist and realist takes. Section III then focuses on Russia's justifications for its use of force, the violation of Ukraine's territorial integrity and the attempted annexation of particular regions of Ukraine. It sheds light on how Russia has not just articulated its grievances and justified its disrespect for the people of Ukraine, but also expressed – shifting – objectives and limits of its use of force and territorial conquest. Section IV turns to *jus in bello* and the diverging arguments about combatant status and legitimate military targets made by Ukraine and Russia, which aim to construct and contest their respective demarcation of groups under particular regimes of protection. Section V probes arguments of Western states and Russia about the former's support by means of weapons transfers in particular, showing how 'red lines' for assisting Ukraine in its self-defence while avoiding becoming a direct party to the conflict were drawn and repeatedly moved, thereby time and again threatening, and avoiding, escalation. A short conclusion summarizes the insights of the article.

II. Moving 'red lines': International law as semantics of international relations

The opposition between international law and politics – between a logic of validity on the one hand and a logic of power on the other – has remained relatively resilient despite constant challenges in both practice and scholarship.[8] It has been expressed in such paradigmatic positions as those of Hersch Lauterpacht that 'all international disputes are, irrespective of their gravity, legal in character'[9] and Hans Morgenthau's notion that law recedes when 'vital interests' and 'national honour' are concerned.[10] Today, these positions live on in the insistence of many international law scholars on clearly distinguishing law from politics, as well as in the view of realist scholars of international politics that law is only respected when it suits the interest of the powerful – and otherwise it is broken and ignored.

These positions have also been reiterated in the context of the war in Ukraine. From a legalistic perspective, Russia's invasion and the conduct of Russian – and Ukrainian –

[8]Filipe dos Reis and Janis Grzybowski, 'The Matrix Reloaded: Reconstructing the Boundaries Between (International) Law and Politics' (2021) 34(3) *Leiden Journal of International Law* 547; Anna Leander and Wouter Werner, 'Tainted Love: The Struggle over Legality in International Relations and International Law' in *The Power of Legality: Practices of International Law and Their Politics*, edited by Nikolas M Rajkovic, Tanja Aalberts and Thomas Gammeltoft-Hansen, 75–98 (Cambridge: Cambridge University Press, 2016); Martti Koskenniemi, 'Law, Teleology and *International Relations*: An Essay in Counterdisciplinarity' (2012) 26(1) *International Relations* 3.

[9]Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 2011 [1933]) 166.

[10]Hans J Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (Leipzig: Universitätsverlag von Robert Noske, 1929) 128.

armed forces must simply be assessed in terms of their respect for or violations of international law. Apart from clear statements and condemnations,[11] evidence for war crimes, for instance, has been documented and led the ICC to issue an arrest wanted against President Putin and Maria Lvova-Belova for the 'unlawful deportation and transfer of Ukrainian children from occupied areas of Ukraine to the Russian Federation'.[12] Moreover, in the optimistic spirit of the continuously progressive development of international law, it has also been argued that the war 'injected much needed energy into an international system of norms and institutions that had lost much of its vigor'.[13] Realist authors, on the other hand, have reiterated that international law only functions within stable balance of power constellations and on the condition that the distinct 'spheres of influence' of great powers are respected,[14] thereby emphasizing and fencing the 'limits of international law'.[15] If the legalist and realist traditions have thus been used to shed light on the role of international law in the war, they tend to focus on their respective domains to the exclusion of the other. As a result, they either evaluate the situation in strictly legal terms without any consideration for the political dynamics at play or they dismiss the language of international law as irrelevant in the face of power politics. Undoubtedly, both of these perspectives are important, and we acknowledge that notably the 'strictly legal' analysis is crucial to condemn aggression and other violations of international law. However, it also appears that neither perspective is concerned with *why* arguments are made on both sides of the conflict time and again in the idiom of international law if these arguments seem to be both normatively distorted and politically powerless.

Recent constructivist research on norms has attempted to bridge these two perspectives by integrating questions of the 'validity' and 'facticity' of norms when discussing their 'robustness'. According to Nicole Deitelhoff and Lisbeth Zimmermann, robustness encompasses 'a norm's validity and facticity; norm robustness is said to be "high" when its claims are widely accepted by norm addressees (validity) and generally guide the actions

[11]See, for example, Institut de Droit International, 'Déclaration de l'Institut de Droit International Sur l'agression En Ukraine', 1 March 2022. Available at: <https://www.idi-iil.org/fr/declaration-de-linstitut-de-droit-international-sur-lagression-en-ukraine>; European Society of International Law, 'Statement by the President and the Board of ESIL on the Russian Aggression against Ukraine', 24 February 2022. Available at: <https://esil-sedi.eu/statement-by-the-president-and-the-board-of-the-european-society-of-international-law-on-the-russian-aggression-against-ukraine>; Adil Ahmad Haque, 'An Unlawful War' (2022) 116 *AJIL Unbound* 155; James A Green, Christian Henderson and Tom Ruys, 'Russia's Attack on Ukraine and the *Jus Ad Bellum*' (2022) 9(1) *Journal on the Use of Force and International Law* 4.

[12]International Criminal Court, 'Statement by Prosecutor Karim AA Khan' (1). For a broader contextualization of the investigations in debates about the ICC's potential selectivity, see Patryk I Labuda, 'Beyond rhetoric: Interrogating the Eurocentric critique of international criminal law's selectivity in the wake of the 2022 Ukraine invasion' (forthcoming) *Leiden Journal of International Law*. Available at: <https://doi.org/10.1017/S0922156523000237>.

[13]Elena Chachko and Katerina Linos, 'International Law After Ukraine: Introduction to the Symposium' (2022) 116 *AJIL Unbound* 129. Moreover, 'The war in Ukraine reiterates and strengthens, rather than undermines, the international order. The strong international response has unequivocally reaffirmed the prohibition on international use of force and the forceful acquisition of territory' (p. 124).

[14]Rein Müllerson, 'What Went Wrong?' (2022) 20(1) *Russia in Global Affairs* 30; John J Mearsheimer, 'The Causes and Consequences of the Ukraine War' (2022) 21 *Horizons: Journal of International Relations and Sustainable Development* 12.

[15]Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

of these addressees (facticity)'.[16] The new focus on norm robustness presents an important shift in perspective compared with earlier (liberal) norms research as the focus has moved from the emergence and stability of norms toward their contestation. This change in focus has been informed by the observation that core norms and institutions of a liberal or 'rules-based' international order have increasingly been challenged, and in some cases have even witnessed open 'backlash'.[17] While our main interest lies not in exploring whether norms can 'withstand current contestation even when it comes from powerful states', or to evaluate empirically when and how norms are robust,[18] emphasizing the contestation of norms opens up important avenues more generally. First, contestation and robustness are no longer understood as opposed to each other since contestation can increase the robustness of norms, and even the violation of a (legal) norm does not necessarily remove it from a central position as a tool for dispute.[19] Second, and more importantly, norms are no longer conceived as internally either 'weak' or 'powerful'. Instead, the question of the 'meaning-in-use' of norms comes to the foreground and, with it, the social and cultural context of their interpretation.[20] Norms are never fully stable because they are constantly interpreted. This also helps understand how Russia and Ukraine can defend widely divergent interpretations of the same concepts and rules of international law.

There have been two important recent takes on diverging interpretations of international law weighing in on the explanation of the Russian invasion of Ukraine. The first is presented by scholarship on so-called 'authoritarian international law', which regards Russia's use of international law as an example of a 'conflict between two approaches of international law',[21] namely a Western-democratic notion and 'authoritarian international law'. This stream of scholarship argues that the judicialization of international affairs[22] has experienced an 'authoritarian backlash'[23] in recent years that might lead, among other things, to 'dejudicialization'.[24] Drawing on the central tenet of democratic

[16]Nicole Deitelhoff and Lisbeth Zimmermann, 'Norms under Challenge: Unpacking the Dynamics of Norm Robustness' (2019) 4(1) 2 *Journal of Global Security Studies* 3.

[17]Karen J Alter and Michael Zürn, 'Conceptualising Backlash Politics: Introduction to a Special Issue on Backlash Politics in Comparison' (2020) 22(4) *The British Journal of Politics and International Relations* 563.

[18]Deitelhoff and Zimmermann, 'Norms under Challenge' (16) 3. For a wide range of empirical case studies testing the robustness of norms, see the articles in the special issue introduced by Deitelhoff and Zimmermann.

[19]Antje Wiener, 'Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations' (2009) 35(1) *Review of International Studies* 175. On the counterfactual validity of (legal) norms, see Friedrich Kratochwil and John Gerard Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986) 40(4) *International Organization* 753.

[20]Wiener, 'Enacting Meaning-in-Use' (19).

[21]Ginsburg, 'Article 2(4) and Authoritarian International Law' (4).

[22]Karen J Alter, Emilie M Hafner-Burton and Laurence R Helfer, 'Theorizing the Judicialization of International Relations' (2019) 63(3) *International Studies Quarterly* 449; Bernhard Zangl, 'Judicialization Matters! A Comparison of Dispute Settlement Under GATT and the WTO' (2008) 52(4) *International Studies Quarterly* 825. For a critical engagement with this stream of scholarship, see the special issue introduced by Knut Traisbach, 'Judicial Authority, Legitimacy and the (International) Rule of Law as Essentially Contested and Interpretive Concepts: Introduction to the Special Issue' (2021) 10(1) *Global Constitutionalism* 75. See also Janis Grzybowski and Filipe dos Reis, 'After states, before humanity: The metapolitics of legality and the International Criminal Court in Iraq, Afghanistan, and Palestine' (forthcoming) *Review of International Studies.* Available at: <https://doi.org/10.1017/S026021052300030X>.

[23]Alter and Zürn, 'Conceptualising Backlash Politics' (17).

[24]Daniel Abebe and Tom Ginsburg, 'The Dejudicialization of International Politics?' (2019) 63(3) *International Studies Quarterly* 521.

peace research, a distinction is made between the international law of democratic hegemons, in particular the United States, and the international law of authoritarian great powers, such as China and Russia.[25] Authoritarian states are said to develop a different kind of international law, including 'legal rhetoric, practices and rules specifically designed to extend … authoritarian rule across space and/or time', and this is how Russia uses international law arguments in the context of Ukraine.[26] A second perspective draws on 'comparative international law', which involves doctrinal, sociological and historical orientations. Starting with the observation that 'international law is different in different places',[27] this 're-emerging subfield' examines, as Anthea Roberts put it in a recent study, 'similarities and differences in the way international law is understood, interpreted, applied, and approached by actors in and from different states'.[28] Roberts focuses mainly on international law scholars and professionals from the five permanent members of the UN Security Council, arguing that the influence of national contexts in the socialisation of international lawyers is often under-estimated. She identifies, for example, divergences in the relevance of English as *lingua franca* for career trajectories or the content of textbooks. This literature also emphasizes how different approaches are influenced by technological, domestic and geopolitical changes.[29] Lauri Mälksoo has explored these dynamics in depth in the case of Russia by focussing on the work of Russian international law scholars and governmental lawyers, as well as on official legal statements. He argues that Russian international legal thought and practice have shifted significantly over the last few decades, from advocating strict non-interference towards a position authorizing interference – and invasion – in its own 'sphere of influence'.[30] From these perspectives, the rationale for the Russian invasion reflects a different – whether uniquely Russian or shared authoritarian – understanding of international law, which stipulates its own validity at the expense of a truly 'international', if not 'universal', notion of international law.[31]

These analyses help us to understand how different approaches to international law have emerged, and potentially clash. However, in this article we are less concerned with analysing the war from the perspective – or as the result – of different approaches to international law, or conflicts between them. Instead, we are interested in exploring how the shared semantics of international law has, despite all differences, allowed for

[25]For a broader evaluation of this research programme, see Anna Geis, Lothar Brock and Harald Müller (eds), *Democratic Wars: Looking at the Dark Side of Democratic Peace* (Basingstoke: Palgrave Macmillan, 2006); Piki Ish-Shalom, *Democratic Peace: A Political Biography* (Ann Arbor, MI: University of Michigan Press, 2013).

[26]Ginsburg, 'Authoritarian International Law?' (4) 228; Ginsburg, 'Article 2(4) and Authoritarian International Law' (4) 130.

[27]David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12(1) *Leiden Journal of International Law* 17.

[28]Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017) 2; Anthea Roberts et al., 'Comparative International Law: Framing the Field' (2015) 109(3) *American Journal of International Law* 467; Martti Koskenniemi, 'The Case for Comparative International Law' (2011) 20 *Finnish Yearbook of International Law* 1.

[29]Roberts, *Is International Law International?* (28) 3.

[30]Mälksoo, *Russian Approaches to International Law* (3). See also Michael Riepl, *Russian Contributions to International Humanitarian Law: A Contrastive Analysis of Russia's Historical Role and Its Current Practice* (Baden-Baden: Nomos, 2022).

[31]For a discussion of the possibility of a (sociologically) 'non-international' but (normatively) 'universal' international law, see Roberts, *Is International Law International?* (29) 21.

pragmatic communication amidst the conflict and violence. That is, even if some references to a universal notion of international law were disingenuous normatively speaking, they could still serve to articulate divergences and agreements through international law's concepts, with their specific logic of demarcation, prohibition and authorization. We therefore do not focus on the divisions between different takes on international law as such, but on how they have emerged and changed in the war by active and interactive boundary-drawing.[32] For this purpose, we move beyond the traditional distinction between (international) law and politics as separate and autonomous spheres. As emphasized by critical legal, sociological and critical constructivist approaches to international law, international law and politics are in fact intimately connected and intertwined. International law is political in its production and application,[33] while international politics, in turn, is shaped by and articulated in terms of international law.[34] From this perspective, legal argumentation is a specific form of practical reasoning[35] mobilizing 'a set of arguments and counter-arguments, rhetorical performances and counter-performances'.[36] International law and its core categories are thus sites of contestation,[37] but also of communication.[38] Especially in a context in which legal arguments are also used by politicians, diplomats and militaries, rather than only by legal professionals, the question is not so much whether they are correct – or whether judges, scholars and other legal professionals consider them to be correct – but what they *do* in these exchanges[39] if they are more than just 'bullshit'[40] – which, of course, they might still be from a strictly legal viewpoint. That is, the misuse of international law in traditional terms might still involve a use for other purposes.

The conduct, justification and contestation of war and violence specifically reflect this complex and rather pragmatic relationship between law and politics, as emphasized by the literature on 'lawfare'. [41] As David Kennedy points out:

[32]Andrew Abbott, 'Things of Boundaries' (19995) 62(4) *Social Research* 857.

[33]David Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue with a new epilogue (Cambridge: Cambridge University Press, 2005).

[34]Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989); Tanja E Aalberts, *Constructing Sovereignty Between Politics and Law* (London: Routledge, 2012).

[35]Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014) 65.

[36]David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton, NJ: Princeton University Press, 2016) 269; David Kennedy, 'Lawfare and Warfare' in *The Cambridge Companion to International Law*, edited by James Crawford and Martti Koskenniemi, 155–83 (Cambridge: Cambridge University Press, 2012) 173.

[37]Helen M Kinsella and Giovanni Mantilla, 'Contestation Before Compliance: History, Politics, and Power in International Humanitarian Law' (2020) 64(3) *International Studies Quarterly* 649; Antje Wiener, *A Theory of Contestation* (Heidelberg: Springer, 2014).

[38]Kratochwil, *Rules, Norms, and Decisions* (34).

[39]Ian Hurd, *How to Do Things with International Law* (Princeton, NJ: Princeton University Press, 2017); see Nicholas Onuf, 'Do Rules Say What They Do? From Ordinary Language to International Law' (1985) 26 (2) *Harvard International Law Journal* 385.

[40]Zarbiyev, 'Of Bullshit, Lies and "Demonstrably Rubbish"' (6).

[41]David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006); Wouter Werner, 'The Curious Career of Lawfare' (2010) 43 *Case Western Reserve Journal of International Law* 61; Nikolas M Rajkovic, 'Performing "Legality" in the Theatre of Hostilities: Asymmetric Conflict, Lawfare and the Rise of Vicarious Litigation' (2020) 21(2) *San Diego International Law Journal* 453.

> Warfare has become a legal institution. At the same time, as law has increasingly become the vocabulary for international politics and diplomacy, it has become the rhetoric through which we debate – and assert – the boundaries of warfare, and insist upon the distinction between war and peace or civilian and combatant.[42]

Law in war legitimates, and thereby enables, certain forms of violence, but it also restrains others, and it can often be employed for either purpose, depending on the context and specific argument.[43] As the 'law of sharp distinctions',[44] the law of war shapes tactics, targets and justifications as it similarly authorizes violence and protects from it. As Helen Kinsella and Giovanni Mantilla observe for international humanitarian law, 'even those treaties and customary norms that command both formal, near-universal agreement and public veneration conceal deep disagreements and indeterminacies'.[45] Contestation shows openness, and openness enables the redrawing of boundaries and communication. This has led to the observation that today's warfare is also very much about lawfare, as law 'has become a tool of strategy for soldiers, statesmen, and humanitarians alike'.[46] Thus, as Kennedy explains, 'We should understand these statements as *arguments*. As messages – but also as weapons. Law – legal categorization – is a communication tool. And communicating the war is fighting the war.'[47] Practitioners and states themselves have explicitly referred to 'lawfare',[48] including the Ukrainian government, which has launched an official 'Lawfare Project' against Russia.[49] While there is thus a strategic dimension to the use and reinterpretation of law for distinct purposes, there is also a communicative dimension to the shared use of this vocabulary of international law by enemies and other states that are not direct parties to the conflict. In contrast to a rational-choice approach to 'signalling',[50] which focuses on the credibility and effectiveness of messages and notably threats, a critical constructivist perspective highlights the permanent reconstitution of the very rules of the game that enable communication in the first place.[51] From this view, it matters more to explore how

[42]Kennedy, *Of War and Law* (41) 5; see also Nathaniel Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43(1) *Columbia Journal of Transnational Law* 1.

[43]For a discussion of the constraining and permissive power of international law in the context of war, see, for example, Hurd, *How to Do Things with International Law* (39) Ch 4.

[44]Kennedy, *Of War and Law* (41) 103.

[45]Kinsella and Mantilla, 'Contestation Before Compliance' (37) 654; Berman, 'Privileging Combat?' (42).

[46]Kennedy, *Of War and Law* (41) 167.

[47]David Kennedy, 'Modern War and Modern Law' (2007) 36(2) 173 *Baltimore Law Review* 183.

[48]Charles J Dunlap, Jr, 'Lawfare Today: A Perspective' (2008) 3(1) *Yale Journal of International Affairs* 146; Werner, 'The Curious Career of Lawfare' (41) 66.

[49]This includes a website documenting the 'legal confrontation with the Russian Federation' across various international courts: see <https://lawfare.gov.ua>. For further discussion, see Jill I Goldenziel, 'An Alternative to Zombieing: Lawfare Between Russia and Ukraine and the Future of International Law' (2022) 108 *Cornell Law Review Online* 1.

[50]James D Fearon, 'Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs' (1997) 41(1) *The Journal of Conflict Resolution* 68; Evan Braden Montgomery, 'Signals of Strength: Capability Demonstrations and Perceptions of Military Power' (2020) 43(2) *Journal of Strategic Studies* 309.

[51]Kratochwil, *Rules, Norms, and Decisions* (34) 7. For a discussion of different notions of intersubjectivity in rational choice and constructivist approaches, see Oliver Kessler, 'Practice, Intersubjectivity and the Problem of Contingency' in *Praxis as a Perspective on International Politics*, edited by Gunther Hellmann and Jens Steffek (Bristol: Bristol University Press, 2022) 166–81.

categories of international law are flexibly used to enable communication than to try to specify the conditions under which particular messages are accepted or rejected.

Importantly, as Wouter Werner puts it, 'The politics of law is therefore not only a politics of norms and decisions; it is a politics of legal language *tout court*.'[52] Uses of legal language also take place outside a strictly legal context such as court proceedings or textbook rules and arguments, and they notably include the public exchange of declarations that we witness in the current conflict. Here, it is largely the rough demarcations – between international and non-international armed conflicts, military support and co-belligerency, one state's territory and another's – that politicians, diplomats and militaries invoke to 'signal' their reasons and goals, their expectations and limits. Even if some arguments, which are couched in legal language, 'misuse' international law in legal terms, they simultaneously make use of it for the practical purpose of communicating their positions. It is this dimension of communication on which we focus in our brief analysis of Russian, Ukrainian and 'Western' arguments presented in the language of international law during the war.

To illustrate the thrust of this line of reasoning for appreciating the role of international law in the Russian-Ukrainian war, but without attempting to comprehensively analyse the vast array of statements from various states and international organizations, we introduce three vignettes that focus on different actors, dimensions and legal regimes mobilized to communicate positions and draw new lines in the idiom of international law. These include, first, the justification of the use of force by Russia, which also conveys its goals, expectations and limits; second, the respective attempts by Russia and Ukraine to narrow or widen the scope of combatants protected by international humanitarian law; and third, the careful calibration and justification of limited arms deliveries to Ukraine by its Western supporters, which Russia warned could easily 'cross the line' and turn these states qua their assistance into direct co-belligerents in the war. As all three vignettes show, international law is used not (only) to make technical legal assessments deemed to be valid, but also to flexibly explain, advance and adjust particular positions in the war, and thus as a means to draw, challenge and acknowledge new 'red lines', to use a key metaphor employed by all sides at various moments of the conflict.

III. Justifying war? Russia on the use of force, territorial integrity, and self-determination

Since before the full-blown invasion of Ukraine that was launched on 24 February 2022, Russia has articulated demands vis-à-vis Ukraine, NATO and the United States, which it presented as its 'red line'.[53] The demands, formulated by Russia toward the United States – thereby ignoring Ukraine as potential interlocutor – in a draft treaty in December 2021 notably included a withdrawal of NATO forces to the 1997 borders of the alliance and an end to NATO expansion, specifically ruling out the accession of Ukraine.[54] These red

[52]Wouter Werner, 'What's Going On? Reflections on Kratochwil's Concept of Law' (2016) 44(2) 258 *Millennium* 268.

[53]'Putin warns Russia will act if NATO crosses its red lines in Ukraine', *Reuters*, 30 November 2021. Available at: <https://www.reuters.com/markets/stocks/putin-warns-russia-will-act-if-nato-crosses-its-red-lines-ukraine-2021-11-30>.

[54]'Russia issues list of demands it says must be met to lower tensions in Europe', *The Guardian*, 17 December 2021. Available at: <https://www.theguardian.com/world/2021/dec/17/russia-issues-list-demands-tensions-europe-ukraine-nato>.

lines were thus based mainly on geopolitical arguments in favour of a 'multipolar' world order, as also articulated in the joint statement released by Russia and China on 4 February 2022, just weeks before the beginning of the invasion – a document in which the two states also took position 'against attempts by external forces to undermine security and stability in their common adjacent regions', thus implicitly arguing for spheres of influence in their neighbouring regions that would exclude the United States and others.[55]

In the televised speech of 24 February 2022 announcing the 'special military operation', however, President Putin resorted to the language of international law to present the fate of supposed Russians in Ukraine and the self-defence of the Russian Federation as two key arguments to legally justify the invasion. Both invoke, albeit in rather doubtful interpretations,[56] prominent exceptions to the prohibition of the use of force. Yet they also present Russia's goals, grievances and conditions for a potential future compromise.

The latter argument invokes self-defence against the supposed threat emanating from the increasing role of the United States and other Western governments in supporting, training and equipping Ukraine militarily since 2014, and thereby threatening Russian sovereignty and security. According to President Putin, 'Russia cannot feel safe, develop, and exist while facing a permanent threat from the territory of today's Ukraine', which is 'a very real threat to our interests' as well as 'to the very existence of our state and to its sovereignty. It is the red line which we have spoken about on numerous occasions. They have crossed it.' Thus, he declared, 'we are acting to defend ourselves from the threats created for us and from a worse peril than what is happening now'. Hence the goal of the operation was supposedly to 'demilitarize' and 'de-Nazify' Ukraine.[57] The question of NATO expansion towards Russia's borders since the 1990s has been a persistent theme of Russian concerns and warnings for some time.[58] Although this justification of preventive 'self-defence' against a potential but not imminent attack has been widely rejected by international law scholars,[59] the invocation of self-defence speaks to the attempt to justify

[55]'Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development', 4 February 2022. Available at: <http://en.kremlin.ru/supplement/5770>; Müllerson, 'Ukraine: Victim of Geopolitics' (2).

[56]'Address by the President of the Russian Federation', 24 February 2022. Available at: <http://en.kremlin.ru/events/president/transcripts/67843>. The justifications for the use of force put forward by the Russian government have clearly been rejected by a vast majority of states in the UN General Assembly on two occasions, by professional associations as well as by international law scholars. See, for instance, Institut de Droit International, 'Déclaration de l'Institut de Droit International sur l'agression en Ukraine' (11); European Society of International Law, 'Statement by the President and the Board of ESIL on the Russian Aggression against Ukraine' (11); Haque, 'An Unlawful War' (11); Green, Henderson, and Ruys, 'Russia's Attack on Ukraine and the *Jus Ad Bellum*' (11). See, however, the condemnation of these statements by the Russian Association of International Law, 'Statement of the Presidium of the Russian Association of International Law', 7 March 2022.

[57]'Address by the President of the Russian Federation, 24 February 2022' 24 (56).

[58]Vincent Pouliot, *International Security in Practice: The Politics of NATO–Russia Diplomacy* (Cambridge: Cambridge University Press, 2010); Joshua R Itzkowitz Shifrinson, 'Deal or No Deal? The End of the Cold War and the US Offer to Limit NATO Expansion' (2016) 40(4) *International Security* 7; Kimberly Marten, 'NATO Enlargement: Evaluating Its Consequences in Russia' (2020) 57(3) *International Politics* 401.

[59]Tamás Hoffmann, 'War or Peace? International Legal Issues Concerning the Use of Force in the Russia–Ukraine Conflict' (2022) 63(3) *Hungarian Journal of Legal Studies* 206. For similar arguments in the situation in Crimea in 2014, see Veronika Bílková, 'The Use of Force by the Russian Federation in Crimea' (2015) 75(1) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 27; Antonello Tancredi, 'The Russian Annexation of the Crimea: Questions Relating to the Use of Force' (2014) 1 *Question of International Law* 5.

the use of force against Ukraine in terms of international law. In fact, Russia and China's 4 February 2022 joint statement not only appeals to the UN Charter but also reaffirms 'their strong mutual support for the protection of their core interests, state sovereignty and territorial integrity, and oppose interference by external forces in their internal affairs'. They go on to express their intention to 'counter interference by outside forces in the internal affairs of sovereign countries under any pretext'.[60] Of course, it is a bitter irony that Russia would not construe its own 'special military operation' in Ukraine as a case of such illegal interference, but rather as a justified response to protect the sovereignty and territorial integrity of *Russia* against the threat it perceived.

This resort to the semantics of international law is even more pronounced in the second line of argument President Putin pursued in his speech announcing the invasion: assistance to the embattled Donbas regions of Luhansk and Donetsk, which 'enjoy the right to self-determination, which is enshrined in Article 1 of the UN Charter,' and which had been recognized as states only days before the invasion. As Putin explained, 'The people's republics of Donbas have asked Russia for help' and 'We had to stop that atrocity, that genocide of the millions of people who live there and who pinned their hopes on Russia.'[61] The invocation of self-determination, oppression – even 'genocide' – and subsequent recognition point, at least implicitly, to the argument of 'remedial secession' that had been invoked in the justification of the recognition of Kosovo's independence from Serbia in 2008.[62] Already the Russian recognition of the Georgian breakaway regions of Abkhazia and South Ossetia had been justified by arguments mirroring the rationale of Western states for the recognition of Kosovo.[63] The reference is also apparent in the speech of 30 September 2022, when Putin announced the 'accession' of four regions of Ukraine to Russia.[64] As he maintains:

> It was the so-called West that trampled on the principle of the inviolability of borders, and now it is deciding, at its own discretion, who has the right to self-determination and who does not, who is unworthy of it.[65]

As for the Ukrainian regions being integrated into Russia, according to Putin, 'It is undoubtedly their right, an inherent right sealed in Article 1 of the UN Charter, which directly states the principle of equal rights and self-determination of peoples.'[66] The sequence of events was the reverse of that in Kosovo, Abkhazia and South Ossetia,

[60]'Joint Statement of the Russian Federation and the People's Republic of China, 4 February 2022' (55).

[61]'Address by the President of the Russian Federation, 24 February 2022'; on the flaws in this argument, see also Júlia Miklasová, 'Russia's Recognition of the DPR and LPR as Illegal Acts Under International Law', 24 February 2022. Available at: <https://voelkerrechtsblog.org/russias-recognition-of-the-dpr-and-lpr-as-illegal-acts-under-international-law>.

[62]Steven R Fisher, 'Towards "Never Again": Searching for a Right to Remedial Secession Under Extant International Law' (2016) 22(1) *Buffalo Human Rights Law Review* 261; Jure Vidmar, 'Remedial Secession in International Law' (2010) 6(1) *St* Antony's International Review 37.

[63]Cedric Ryngaert and Sven Sobrie, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24(2) *Leiden Journal of International Law* 467.

[64]'Signing of Treaties on Accession of Donetsk and Lugansk People's Republics and Zaporozhye and Kherson Regions to Russia', 30 September 2022. Available at: <http://en.kremlin.ru/events/president/news/69465>.

[65]Ibid.

[66]Ibid.

however. In the case of the Donbas regions, they had been first recognized as states because of their supposed oppression, which then in turn allowed them, as sovereign states, to call upon Russian assistance in an effort to organize collective self-defence against Ukraine. The argument is clearly laid out in the 24 February speech justifying the invasion. As Putin states here:

> in accordance with Article 51 (Chapter VII) of the UN Charter, with permission of Russia's Federation Council, and in execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, ratified by the Federal Assembly on February 22, I made a decision to carry out a special military operation.

This argument, presented in the language of international law, had been prepared by the lengthy speech of 21 February, in which Putin explained the decision to recognize the so-called People's Republics of Luhansk and Donetsk as states.[67] In this speech, the Russian President revisited the division and reorganization of territories by the Soviet Union and after its fall, as well as the turn of events in Ukraine after the crisis in 2013–14, to argue that there was no other option but to recognize and defend the separatist territories as sovereign states.[68]

If, from a legalist perspective, these justifications are part of a 'ploy [that] is as transparent as it is legally unpersuasive'[69] – simply 'Bullshit, Lies and "Demonstrably Rubbish" Justifications in International Law'[70] – they still serve a communicative function. They explain the reasoning for the armed attack, occupation and annexation of Ukrainian territory by Russian armed forces, as well as the – from a Russian perspective – *limited* objectives. President Putin claimed that with US and NATO support for Ukraine in the past years, and Ukraine's stance on the Donbas regions, Russia's 'red lines' had been crossed. In the justification for the invasion, and later of the annexation, he also sought to draw new red lines – almost literally – by demarcating the territory that was supposed to be 'integrated' into the Russian Federation, and that would henceforth benefit from the same – potentially nuclear – protection as any other integral part of Russia. President Putin thus used the language of international law not to make a legal argument that would find widespread acceptance, but to articulate a position that spelled out Russia's motives, warned Western states to respect Russia's expanded borders and clarified conditions for a potential end to hostilities.

From the perspective of, for instance, US President Biden, Russia's invasion posed 'a direct challenge to the rules-based international order established since the end of World War Two'.[71] Similarly, the use of force as a means of international politics was widely

[67]'Address by the President of the Russian Federation', 21 February 2022. Available at: <http://en.kremlin.ru/events/president/news/67828>.

[68]To be sure, the subject that is to be defended here is arguably not restricted to the Russian Federation, but involves a Russian 'civilization' that is more encompassing and stretches over borders: see Mälksoo, *Russian Approaches to International Law* (3) 141.

[69]Marc Weller, 'Russia's Recognition of the "Separatist Republics" in Ukraine was Manifestly Unlawful', *EJIL Talk*, 9 March 2022. Available at: <https://www.ejiltalk.org/russias-recognition-of-the-separatist-republics-in-ukraine-was-manifestly-unlawful>.

[70]Zarbiyev, 'Of Bullshit, Lies and "Demonstrably Rubbish"' (6).

[71]'Remarks by President Biden on the United Efforts of the Free World to Support the People of Ukraine', 26 March 2022. Available at: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/26/remarks-by-president-biden-on-the-united-efforts-of-the-free-world-to-support-the-people-of-ukraine>.

rejected in the UN General Assembly.[72] Yet, while international law could thus be mobilized effectively to condemn Russia's actions, it was also used by Russia to articulate its principal goals of territorial acquisition and 'demilitarization' of Ukraine. As the following sections show, it also facilitated communication between Russia, Ukraine and others on various other questions of military conduct and third-party assistance that gained in importance during the war.

IV. Of combatants and civilians: From mercenaries to Ukraine's Territorial Defence Forces

Red lines are also drawn by means of international legal arguments within the armed conflict itself, in particular when it comes to the contested classification of combatants in terms of international humanitarian law. In this section, we highlight Ukrainian attempts to include various armed groups in its Territorial Defence Forces, the military reserve component of the Armed Forces of Ukraine, and thereby designate them as regular combatants. While the Ukrainian government thereby attempted to integrate different groups into its military, Russia opted *not* to integrate paramilitary groups and members of the private military company 'Wagner' into its armed forces, at least until spring 2023, thereby avoiding attribution.

The question of combatant status is traditionally regulated by international humanitarian law – the *jus in bello* – and here specifically in the *Third Geneva Convention* of 1949 (GC III) and Additional Protocol I (AP I) of 1977. Following GC III art. 4, combatants need not be members of the armed forces of the conflict party but can organize themselves voluntarily, as militias, as long as they fulfil the four criteria of following a chain of command, wearing identifiable insignia, carrying weapons openly, and acting according to the laws of wars.[73] During conflict, combatants can be lawfully targeted, wounded and killed by the enemy. However, they enjoy certain rights, including so-called 'combatant immunity': they cannot be prosecuted for taking part in hostilities and, upon capture, must be treated as prisoners of war (PoWs) with all rights this status endows, as specified mainly in GC III and AP I. PoWs are entitled to comprehensive protection and 'must at all times be treated humanely'.[74] While the category of combatant seems clear on a first view, the line between combatants and civilians can appear blurred and be actively contested in practice.[75] Not only must the mentioned criteria be fulfilled by members of particular armed groups for them to benefit from PoW status, but certain others, such as 'mercenaries' or 'spies', are legally excluded from this status of protection if individuals fulfil a set of specific criteria.[76] Then again, during the so-called war on terror, the Bush administration sought to create, against the protest of many international humanitarian law experts, the new category of the unlawful combatant, who could be legitimately targeted

[72]United Nations, 'UN General Assembly Calls for Immediate End to War in Ukraine', 23 February 2023. Available at: <https://news.un.org/en/story/2023/02/1133847>.

[73]Geneva Convention III, Art. 4.a.2. See also Art. 4 of AP I for prisoner of war status. Russia and Ukraine have signed and ratified AP I, although Russia added a reservation regarding fact-finding missions in 2019.

[74]Geneva Convention III, Art. 13.

[75]Emily Crawford, 'Armed Ukrainian Citizens: Direct Participation in Hostilities, Levée En Masse, or Something Else?', *EJIL Talk*, 1 March 2022. Available at: <https://www.ejiltalk.org/armed-ukrainian-citizens-direct-participation-in-hostilities-levee-en-masse-or-something-else>; Kinsella and Mantilla, 'Contestation Before Compliance' (37); Berman, 'Privileging Combat?' (42).

[76]See Art. 45, 46, and 47, AP I.

like regular combatants but would not enjoy combatant immunity or rights as a PoW.[77] Moreover, PoW status depends on the classification of the armed conflict as international, as it does not apply in non-international armed conflicts. In short, the combatant status of some groups and individuals can be contested in practice by different conflict parties, either to draw the circle of protection wider or to narrow it.

For its part, Russia has tried to blur the distinctions in the Ukrainian theatre since the invasion of Crimea in February 2014. That first invasion was carried out by so-called 'little green men', who took all of Crimea within three weeks and created a serious problem of attribution, and hence responsibility, under international law.[78] While these armed troops wore uniforms similar to those of the Russian military, they had no recognizable insignia, so the Russian government could claim, at least initially, that they were local self-defence forces. Russia admitted the participation of regular Russian special forces only later. The deployment of the 'little green men' was part of a longer Russian strategy of a legal hybridization of conflicts that helped Moscow to keep the conflict in a grey zone.[79] On the one hand, this form of 'lawfare helped avoid escalation' as the involvement of regular Russian forces 'would have likely provoked a kinetic response by Ukraine', and very likely would have led to a stronger international reaction.[80] Yet, on the other hand, 'Russia's lawfare put Ukraine in a bind' and prepared the ground for claiming that the Ukrainian government was responsible for further escalation of the 'internal'conflict:

> If Ukraine had fired on the little green men, Russia could have denied involvement and claimed Ukraine was targeting civilians. The little green men obfuscated the line between international and non-international armed conflict, complicating the legality of military actions by Ukraine or international actors.[81]

The strategy of denying its own responsibility while claiming that Ukraine had escalated the conflict has been part of Russian lawfare since then. After the full-scale invasion in February 2022, denying Russia's involvement has become pointless, however, and the armed conflict has evidently turned international. Yet the status of pro-Russian militias and paramilitary groups operating in the Donbas region, as well as the massive involvement of the private military company 'Wagner', still pose questions regarding their status and, especially for a potential war crimes tribunal, their control by Russia, since these forces were, for the most part and at least until summer 2023, never formally integrated into the regular Russian Army.[82]

If Russia has thus kept the circle of its formally acknowledged combatants restricted and left the status of various fighters ambiguous, the strategy of the Ukrainian

[77] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), Ch 6; Berman, 'Privileging Combat?' (42); Oliver Kessler and Wouter Werner, 'Extrajudicial Killing as Risk Management' (2008) 39(2–3) *Security Dialogue* 289.

[78] Riepl, *Russian Contributions to International Humanitarian Law* (30) 219.

[79] J Andres Gannon et al., 'Why Did Russia Escalate Its Gray Zone Conflict in Ukraine?', *Lawfare*, 16 January 2022. Available at: <https://www.lawfareblog.com/why-did-russia-escalate-its-gray-zone-conflict-ukraine>.

[80] Goldenziel, 'An Alternative to Zombieing' (49) 4.

[81] Ibid.

[82] For a discussion, see Winston Williams and Jennifer Maddocks, 'The Wagner Group: Status and Accountability', *Articles of War*, 23 February 2023. Available at: <https://lieber.westpoint.edu/wagner-group-status-accountability>.

government has been diametrically opposed. After the Russian attack of 24 February 2022, the Ukrainian government sought to explicitly expand regular combatant status to as many (pro-)Ukrainian armed groups as possible, thereby seeking to expand the PoW protections to them. It did so in three ways. First, and from the beginning of the invasion in 2022, the Territorial Defence Forces functioned as a traditional military reserve since the Ukrainian military encouraged civilians to take up arms. This seems to have happened in an organized way. A report in the *New York Times* describing this process dating from 26 February 2022 is indicative in this regard:

> The newly armed civilians and members of various paramilitary groups are fighting under the loose command of the military in an organization called the Territorial Defence Forces.
> 'In the city itself, the territorial defense detachments are working quite effectively,' Mykhailo Podolyak, an adviser to the Ukrainian presidential chief of staff, said in a statement Saturday morning. 'It turned out that people are coming out, defending their homes. It wasn't expected by analysts of the Russian General Staff.'
> At an army recruitment center where Kalashnikov rifles were being handed out, several dozen men milled about. Before receiving their guns, they were asked to form ad hoc units of about 10 men each and choose a commander, several of the men in line said.
> One group was dressed in a motley assortment of sweatpants and camouflage jackets, some in tennis shoes and others in hiking boots. But they all *bore yellow arm bands identifying them as members of the Territorial Defence Forces.*[83]

This report describes the transition from civilians to combatants, and how they have been integrated into the Territorial Defence Forces by choosing a command structure, carrying weapons openly and using military insignia.

A second move has been the formal integration of the Azov Regiment (initially Azov Battalion) into the armed forces. Having a history within the Ukrainian far right, Azov fighters have been at the core of Russian justifications to invade Ukraine to 'de-Nazify' it. Founded in May 2014 as a paramilitary militia to fight pro-Russian forces in the Donbas, it was incorporated already in November 2014 into the National Guard of the Ukrainian Ministry of Internal Affairs, and parts of it in April 2022 into the Territorial Defence Forces. It played a crucial role during the three-month siege of Mariupol and, after the fall of the city, many Azov fighters – including its commanders – surrendered on 17 May 2022 to the Russian army. While a spokesperson of Russian President Putin guaranteed that the captured would be treated 'in accordance with international standards', it was not clear whether this would include PoW status.[84] Yet, within both the Russian government and public debate, many called for treatment of the captured not as PoWs according to the Geneva Conventions, but as criminals or terrorists. In accordance with this argument, Russia's Prosecutor General asked the Supreme Court on 17 May

[83]'"Everybody in Our Country Needs to Defend"', *New York Times*, 26 February 2022. Available at: <https://www.nytimes.com/2022/02/26/world/europe/ukraine-russia-civilian-military.html>; see also Crawford, 'Armed Ukrainian Citizens' (75).

[84]'Russian prosecutions of Azov fighters could breach Geneva conventions', *The Guardian*, 18 May 2022. Available at: <https://www.theguardian.com/world/2022/may/18/russian-prosecutions-azov-fighters-geneva-conventions-ukraine>.

2022 to categorize the Azov Regiment as a 'terrorist organization',[85] which the Court did on 2 August the same year by announcing that it would 'recognize the Ukrainian paramilitary unit Azov as a terrorist organization, banning its activities on territory of the Russian Federation'.[86] This judgment set the stage for (show) trials against Azov fighters and their sentencing to decade-long imprisonment.[87] However, these trials eventually did not take place, as Azov fighters captured during the siege of Mariupol, including their commanders, were released in a prisoner exchange in September 2022.[88]

A third instance in which combatant status was contested was the integration of foreign nationals into the Ukrainian armed forces. On 27 February 2022, Ukrainian President Volodymyr Zelensky announced the creation of the International Legion of Territorial Defence, which was immediately integrated into the Territorial Defence Forces. In a statement, the Ukrainian government invited 'all citizens of the world' to join the International Legion of Territorial Defence and thereby to 'protect' Europe – as this 'is a war against Europe, against European structures, against democracy, against basic human rights, against a global order of law, rules and peaceful coexistence' – and to 'fight side by side against Russian war criminals'.[89] By integrating the International Legion of Territorial Defence into the Territorial Defence Forces, its members became soldiers of the Ukrainian army and regular combatants. This was to avoid their categorization as 'terrorists' or 'mercenaries'. As one commentator put it, the 'Ukrainian authorities have obviously been well consulted by IHL specialists prior to the Zelensky call to volunteers' as the formalization of its members as part of the Ukrainian armed forces 'brings them outside of the definition of mercenaries'.[90]

However, this is precisely what the Russian government contests. As the Russian Defense Ministry argued in its immediate reaction to the integration of the legion into regular Ukrainian forces,

> none of the mercenaries the West is sending to Ukraine to fight for the nationalist regime in Kiev can be considered as combatants in accordance with international humanitarian law or enjoy the status of prisoners of war … At best, they can expect to be prosecuted as criminals.[91]

[85]'Russian prosecutor asks court to declare Ukraine's Azov Regiment "terrorist organization," Interfax reports', *Reuters*, 17 May 2022. Available at: <https://www.reuters.com/world/europe/russian-prosecutor-asks-court-declare-ukraines-azov-regiment-terrorist-2022-05-17>.

[86]'Russian Supreme Court designates Azov nationalist battalion as terrorist organization', *TASS*, 2 August 2022. Available at: <https://tass.com/politics/1488031>.

[87]'How Russia Uses Show Trials to Punish Putin's Enemies', *New York Times*, 20 May 2022. Available at: <https://www.nytimes.com/2022/05/20/world/europe/russia-azov-mariupol-trials.html>.

[88]'Russia trades Azov fighters for Putin ally in biggest prisoner swap of Ukraine war', *The Guardian*, 22 September 2022. Available at: <https://www.theguardian.com/world/2022/sep/22/ukrainian-putin-ally-viktor-medvedchuk-exchanged-for-200-azov-battalion-fighters-zelenskiy-says>.

[89]In particular, the statement accuses the Russian military of using 'very vile tactics with all elements of war crimes under Geneva 1949 Convention'. Volodymyr Zelensky, 'Appeal to foreign citizens to help Ukraine in fighting against Russia's aggression', President of Ukraine, 27 February 2022. Available at: <https://www.president.gov.ua/en/news/zvernennya-do-gromadyan-inozemnih-derzhav-yaki-pragnut-dopom-73213>; Ilya Nuzov, 'Mercenary or Combatant? Ukraine's International Legion of Territorial Defence Under International Humanitarian Law', *EJIL Talk*, 8 March 2022. Available at: <https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law>.

[90]Nuzov, 'Mercenary or Combatant?' (89).

[91]'Foreign mercenaries in Ukraine will not have POW status – Russian military', *TASS*, 3 March 2022. Available at: <https://tass.com/politics/1416131>; See also David Malet, 'The Risky Status of Ukraine's

The Ministry's position was also implemented by authorities in the separatist Donetsk region. Captured foreign fighters who were part of the International Legion of Territorial Defence and other units of the Ukrainian Army were not granted PoW status and they were put on trial, and in some cases sentenced to death, by a court of the so-called Donetsk People's Republic.[92] These sentences were not enforced, however, as the prisoners were included in the above-mentioned exchange.[93] Of course, the decision by a court of the Donetsk People's Republic raises the additional question of the status of these entities themselves, and the grounds on which they claim jurisdiction.[94] Apart from the legal issues with these positions, Russia and pro-Russian authorities have thus sent a message to foreign nationals, warning them not to join the Ukrainian armed forces in the war.

Finally, integrating foreign nationals has also been a sensitive issue for the governments of volunteering soldiers, as they may violate domestic laws. For example, at the time UK Foreign Secretary Liz Truss stated on 27 February 2022 that 'if people want to support that struggle, I would support them in doing that'.[95] At the same time, the UK government stressed that it would not send its own troops but that Ukraine would instead be supported to 'fight every street with every piece of equipment we can get to them'.[96] This also raises the question of whether these states could become parties to the conflict, to which we return below.

To sum up, while Russia did not integrate paramilitary groups and members of the private military company 'Wagner' into its armed forces, at least not before summer 2023, seeking to blur the classification of combatants and avoid attribution, the Ukrainian government opted to officially integrate Azov fighters and foreign nationals into the Ukrainian army, thereby trying to extend, inter alia, PoW status and protection under international humanitarian law. However, Russia and pro-Russian separatist groups have contested this move and at times appear prepared to deny this particular status. The strategy of the British government, but also that of other Western governments, has been to avoid becoming a direct party to the conflict, focusing instead on the supply of weapons as an indirect form of support to Ukraine. Yet it is not entirely clear where this military support starts and ends, and its legal implications are contested in yet another area of international law. We address the redrawing of legal boundaries for the purpose of weapons transfers by third states, and the repeated warnings by Russia that these states could become parties to the conflict, in the following section.

Foreign Fighters', *Foreign Policy*, 15 March 2022. Available at: <https://foreignpolicy.com/2022/03/15/ukraine-war-foreign-fighters-legion-volunteers-legal-status>.

[92]'Britons held by rebels in Ukraine plead not guilty', *BBC News*, 16 August 2022. Available at: <https://www.bbc.com/news/uk-62557923>.

[93]'Britons held by Russian forces in Ukraine released', *BBC News*, 22 September 2022. Available at: <https://www.bbc.com/news/uk-62988234>.

[94]Robert Goldman, '"Show" trial of foreign fighters in Donetsk breaks with international law – and could itself be a war crime', *The Conversation*, 13 June 2022. Available at: <https://theconversation.com/show-trial-of-foreign-fighters-in-donetsk-breaks-with-international-law-and-could-itself-be-a-war-crime-184899>.

[95]'Liz Truss criticised for backing Britons who wish to fight in Ukraine', *The Guardian*, 27 February 2022. Available at: <https://www.theguardian.com/world/2022/feb/27/liz-truss-says-she-would-back-britons-going-to-ukraine-to-fight-russia>.

[96]'Liz Truss backs people from UK who want to fight', *BBC News*, 27 February 2022. Available at: <https://www.bbc.com/news/uk-60544838>.

V. The politics of co-belligerency: Weapons transfers and the limits of third-party involvement

A much-discussed area in which Western states and Russia have drawn on international law to demarcate and contest their respective 'red lines' concerns the massive supply of weapons by Western states to Ukraine. This has been crucial as it touches upon the question of when Western states would become parties to the conflict. Western states have supported Ukraine to varying degrees since at least 2014 by providing military training and weapons. However, the amount of support intensified significantly in the months and weeks before the Russian attack on the entire territory of Ukraine, and then again after the invasion was launched.[97] For example, on 17 January 2022, the UK government decided to supply Ukraine with 'next-generation light anti-tank weapons, with a range of a few hundred meters'.[98] The delivery of these defensive weapon systems was still deliberately cautious, to avoid 'preparing a pretext for [an] assault on Ukraine'.[99] A few days later, the US State Department cleared its NATO Baltic partners to send US-manufactured anti-tank guided weapons and (man-portable) air-defence systems.

Turkey and the Czech Republic went one step further as they assisted Ukraine with offensive weapons – Bayraktar TB2 drones in the case of Turkey and artillery in the case of the Czech Republic. Other NATO countries, such as Germany, were significantly more reserved at this stage and refused to supply weapons to Ukraine in general.[100] Since 24 February 2022, Western military support has further increased, however. The Council of the European Union, through the European Peace Facility, granted several tranches to finance military equipment.[101] Germany, traditionally following a policy of not delivering weapons into conflict zones, reversed course and also started to supply Ukraine with several weapons systems.

Weapons transfers have further increased ever since. The UK government announced in September 2022 that it would match its 2022 military support of approximately £2.3 billion also in 2023. Between 24 February and 4 November 2022, the United States supported Ukraine with approximately US$18.2 billion in security assistance.[102] Observers have described the amount of military support for Ukraine as 'impressive'[103] and

[97]Sophia Zademack and Luke James, 'Western Weapons in Ukraine', *Opinio Juris*, 8 February 2022, https://opiniojuris.org/2022/02/08/western-weapons-in-ukraine.

[98]'UK supplying Ukraine with anti-tank weapons, MPs told', *The Guardian*, 17 January 2022. Available at: <https://www.theguardian.com/politics/2022/jan/17/uk-supplying-ukraine-with-anti-tank-weapons-mps-told>.

[99]'Britain says it is supplying anti-tank weapons to Ukraine', *Reuters*, 17 January 2022. Available at: <https://www.reuters.com/world/uk/uk-says-supplying-ukraine-with-weapons-system-defend-against-russia-2022-01-17>.

[100]Zademack and James, 'Western Weapons in Ukraine' (97).

[101]'Ukraine: Council Agrees on further support under the European Peace Facility', Council of the European Union, 17 October 2022. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/10/17/ukraine-council-agrees-on-further-support-under-the-european-peace-facility>. For a discussion of some of the legal background, see Tomas Hamilton, 'Articulating Arms Control Law in the EU's Lethal Military Assistance to Ukraine', *Just Security*, 31 March 2022. Available at: <https://www.justsecurity.org/80862/articulating-arms-control-law-in-the-eus-lethal-military-assistance-to-ukraine>.

[102]'U.S. Security Cooperation with Ukraine', US Department of State, 4 November 2022. Available at: <https://www.state.gov/u-s-security-cooperation-with-ukraine>.

[103]Michael N Schmitt, 'Providing Arms and Material to Ukraine: Neutrality, Co-Belligrency, and the Use of Force', *Articles of War*, 7 March 2022. Available at: <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force>.

'unprecedented',[104] and claimed that many Western states supplied Ukraine 'with a degree of military support unheard of since the American Lend-Lease Program in 1941'.[105] However, it is controversial what *form* of military support would be considered acceptable or unacceptable, hence crossing the line – the line beyond which support of Ukraine could potentially be construed, at least by Russia, as direct participation in the armed conflict. All states supporting Ukraine in its war effort have sought to avoid crossing that threshold. For example, even the US government – Ukraine's largest provider of military assistance – has been reluctant to include long-range missiles. As President Biden reaffirmed in September 2022, the United States is 'not going to send Ukraine rocket systems that strike into Russia'.[106] Biden thereby reacted also to earlier statements from a spokesperson of the Russian Foreign Ministry that, 'If Washington decides to supply longer-range missiles to Kyiv, then it will be crossing a red line, and will become a direct party to the conflict.'[107]

The question of the politico-legal consequence of military assistance generated intense debates in Western states supporting Ukraine – but also among Western international law scholars – in an effort to find strategies that would stretch but not overstretch this form of assistance, and notably avoid becoming a direct party to the war with Russia. For many Western international lawyers, the answer to this question has not been straightforward. For example, in a recent article, Kevin Jon Heller and Lena Trabucco point to the 'dense and complicated international-law landscape governing weapon transfers' as this question touches upon 'at least five regimes of international law' and those 'legal regimes are non-hierarchical and legally independent'.[108] For the authors, the legal regimes include *jus ad bellum*, the law of neutrality, international humanitarian law, state responsibility for complicity in internationally wrongful acts and international criminal law. According to Heller and Trabucco, Western arms support for Ukraine is the 'least problematic' under *jus ad bellum*, state responsibility for complicity in internationally wrongful acts and international criminal law. Concerning the latter two legal regimes, this is the case as long as the foreign suppliers of weapon systems do not have any knowledge that would suggest that the Ukrainian armed forces are committing war crimes with these weapons.[109] The *jus ad bellum* is, according to these authors, the 'most straightforward legal regime' to justify the supplies since Ukraine is defending itself against an ongoing attack by Russia, which legally allows other states to assist in collective self-defence under UN Charter Chapter VII Article 51, and Western arms transfer would thus not violate Article

[104]Hamilton, 'Articulating Arms Control Law' (101).

[105]Kevin Jon Heller and Lena Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' (2022) 13(2) 251 *Journal of International Humanitarian Legal Studies* 273. The United States revived the Land-Lease Act in April 2022. See 'U.S. Congress revives World War Two-Era "Lend-Lease" program for Ukraine', *Reuters*, 28 April 2022. Available at: <https://www.reuters.com/world/us-congress-revives-world-war-two-era-lend-lease-program-ukraine-2022-04-28>.

[106]'U.S. military leaders are reluctant to provide longer-range missiles to Ukraine', *NBC News*, 17 September 2022. Available at: <https://www.nbcnews.com/politics/national-security/us-military-leaders-are-reluctant-provide-longer-range-missiles-ukrain-rcna48072>.

[107]Ibid.

[108]Heller and Trabucco, 'Legality of Weapons Transfers' (105) 253.

[109]However, see Amnesty International, *Ukrainian Fighting Tactics Endanger Civilians*, 4 August 2022. Available at: <https://www.amnesty.org/en/latest/news/2022/08/ukraine-ukrainian-fighting-tactics-endanger-civilians>; Kai Ambos, *Doppelmoral: Der Westen und die Ukraine* (Frankfurt: Westend, 2022); Michael N Schmitt, 'Amnesty International's Allegations of Ukrainian IHL Violations', *Articles of War*, 8 August 2022. Available at: <https://lieber.westpoint.edu/amnesty-allegations-ukrainian-ihl-violations>.

2(4).[110] In terms of international humanitarian law, the matter is more complicated. The West has certainly not become a co-belligerent, which would happen if it would 'establish … or maintain … a no-fly zone over Ukraine' or share 'intelligence that [would] help … select Russian targets for attack'.[111] Heller and Trabucco thereby draw a red line of sorts and argue that by sharing battlefield intelligence the 'US has likely crossed that line at least once since the invasion began'.[112] Finally, under the 'time-honoured law of neutrality',[113] the authors concede that this legal regime has been violated. It does not distinguish between 'aggressor' and 'victim' in an armed conflict and already 'providing material assistance to Ukraine's military violates the duty of impartiality'.[114]

By contrast, for Michael N Schmitt, Professor Emeritus of the US Naval War College and foremost expert behind NATO's Tallinn Manual on Cyberwarfare, Western, and in particular US, 'assistance does not violate the law of neutrality, has not triggered an international armed conflict between the supporting States and Russia, and does not qualify as an unlawful use of force'.[115] While Schmitt's analysis of *jus ad bellum* very much resembles that by Heller and Trabucco and broadly agrees with their analysis of international humanitarian law,[116] he does not regard US intelligence-sharing as a problem. Nevertheless, he is aware that 'at a certain point, support to a belligerent will make the supporting State a party of the conflict. This is a complex matter … Still, some situations are obvious, such as when a supporting State is involved in joint planning' – or when a 'no-fly zone' is established.[117] The contrast is most obvious in Schmitt's analysis of the law of neutrality. According to Schmitt, the law of neutrality has changed substantially since 1907 towards 'qualified neutrality'. This particular kind of neutrality applies when there is a clear aggressor, since the UN Charter allows for collective self-defence, thus undermining classical neutrality.[118] This position is certainly contested, however, and critics have argued that the 'validity of qualified neutrality is questionable and may be seen as

[110]Heller and Trabucco, 'Legality of Weapons Transfers' (105) 254. It would also not violate the International Court of Justice's ruling in the *Nicaragua* case. While the ICJ held that the 'arming and training' of the contras by the United States 'can certainly be said to involve the … use of force', this does not apply to cases of collective self-defence, International Court of Justice, 'Case Concerning the Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America)* (Merits)' (1986), paras 108–109.

[111]Heller and Trabucco, 'Legality of Weapons Transfers' (105) 264.

[112]Ibid 264.

[113]Kai Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and Thus Be Exposed to Countermeasures?', *EJIL Talk*, 2 March 2022. Available at: <https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures>.

[114]Heller and Trabucco, 'Legality of Weapons Transfers' (105). See also Hague Convention XIII Art. 6: 'The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power of war-ships, ammunition, or war material of any kind whatever, is forbidden.' While international law scholars sporadically refer to this body of law, states supporting Ukraine have abstained from doing so.

[115]Schmitt, 'Providing Arms and Material to Ukraine' (103).

[116]With regard to *jus ad bellum*, he also refers to both the UN Charter and the analysis of customary international law in International Court of Justice, *Nicaragua.* (110)

[117]Schmitt, 'Providing Arms and Material to Ukraine' (103).

[118]Ibid. Schmitt follows here the official position of the US government. See U.S. Department of Defence, *Law of War Manual* (2015, updated 2016). Others, such as Hathaway and Shapiro, go a step further and concede a complete change of the law of neutrality in the aftermath of the Kellogg-Briand pact and through the establishment of the UN Charter. In this analysis, there is an even broader notion of neutrality. See Oona A Hathaway and Scott Shapiro, 'Supplying Arms to Ukraine is Not an Act of War', *Lawfare*, 12 March 2022. Available at: <https://www.lawfareblog.com/supplying-arms-ukraine-not-act-war>.

political expediency to allow States to justify their violations of the law of neutrality on moral and ethical grounds as necessary to contain Russian expansionism'.[119] Nevertheless, if the idea of 'qualified neutrality' has blurred the status of neutrality to some extent, Western states have made clear that they do not believe that delivering – certain – weapons to Ukraine would '*per se* trigger co-*belligerency*'.[120] Of course, if co-belligerency can be separated from neutrality, the latter loses some of its significance.[121]

These arguments by international law scholars are not abstract exercises in legal reasoning and intended only for academic circles. As is common for international lawyers, the line between academic and non-academic involvement is fuzzy. They not only rotate between roles in academia and outside of it, but their writing can become a legal source for courts and a framework of justification for governments. The mentioned contributions aim to help governments to understand the possibilities, limits and consequences of weapons transfers, thereby providing expertise on how to avoid escalating the war – and how to communicate the goals and limits of one's policies. Heller and Trabucco, for instance, are clear when they state that their contribution is 'both legally and politically useful to Western leaders' and they express the hope that it 'will assist Western efforts to win not only the military and legal battle with Russia, but the battle for public opinion as well'.[122]

On the other hand, of course, as an anonymous US official put it in March 2022, 'The American legal definition of what constitutes entering the war are not Mr Putin's definitions.'[123] While the United States not only delivers advanced weapons system but also actively shares intelligence information with the Ukrainian military, the no-fly zone demanded by Ukraine – especially immediately after the Russian invasion – has consistently been rejected by all Western countries, precisely because it would draw NATO into the conflict as a direct participant in military operations and, as Biden feared, start World War III. Moreover, unlike in the case of Belarus's assistance to Russia's war effort, no direct operations of the Ukrainian armed forces have been launched from NATO countries. The assistance provided has been carefully justified and calibrated.

At the same time, one can observe how lines have gradually moved.[124] Germany, for example, has started to support Ukraine through weapons transfers that increased step by

[119]Raul (Pete) Pedrozo, 'Is the Law of Neutrality Dead?', *Articles of War*, 31 May 2022. Available at: <https://lieber.westpoint.edu/is-law-of-neutrality-dead>.

[120]Schmitt, 'Providing Arms and Material to Ukraine' (103).

[121]This is, for example, the position of Pedrozo, who refers to the law of state responsibility and argues that by 'applying the law of State responsibility, neutral States can legally violate their neutrality by imposing sanctions and providing weapons and other war-related materials to Ukraine as lawful countermeasures without undoing the traditional law of neutrality and without increasing the risk of widening the conflict'. Pedrozo, 'Is the Law of Neutrality Dead?' (119). Importantly, we are not taking the side of either one of these positions, but rather are interested how different understandings of neutrality broaden or constrain the room for manoeuvring for Ukraine's supporters to provide weapons.

[122]Heller and Trabucco, 'Legality of Weapons Transfers' (105).

[123]'For the U.S., a Tenuous Balance in Confronting Russia', *New York Times*, 19 March 2022. Available at: <https://www.nytimes.com/2022/03/19/us/politics/us-ukraine-russia-escalation.html>; Kirsten E. Eichensehr (ed.), 'The United States and Allies Provide Military and Intelligence Support to Ukraine' (2022) 116 (3) *American Journal of International Law* 650.

[124]For a detailed discussion, including the shifting positions of Western states, see Giulio Bartolini, 'The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice', *EJIL Talk*, 11 April 2023. Available at: <https://www.ejiltalk.org/the-law-of-neutrality-and-the-russian-ukrainian-conflict-looking-at-state-practice>.

step, either directly or by authorizing other NATO partners to supply German-produced weapons to Ukraine. Several countries have decided to provide battle tanks, and some have delivered aircraft or signaled their willingness to do so. Still, Western states remain reluctant to provide weapons systems or ammunition types that can fire deep into Russian territory. Apart from the fear that Ukrainian forces could commit war crimes by firing indiscriminately at civilians or attack targets in Russia itself,[125] this policy is geared towards keeping a line of distinction between assistance and co-belligerency. Governments that have facilitated arms transfers may be accountable under domestic law in their own countries or under international criminal law, but more importantly, they scramble not to become a direct party to the conflict – a Russian 'red line' that could, at worst, lead to the use of nuclear weapons, which the Russian President and other government officials have repeatedly threatened in case Russia itself is attacked or its survival is endangered.

Western support for Ukraine, including massive weapons transfers, has been justified in terms of international law, but it has also been restrained – by denying Ukraine certain types of weapons – in response to Russian warnings about its 'red lines'. These moves have revolved around the question of co-belligerency, a question of legal status and the consequences attached to it. These red lines have occasionally been crossed and blurred, but the resort to different regimes of international law has helped Western states to explain the nature and limits of their support in an effort to demarcate their assistance from participation in the conflict itself.

VI. Conclusion

Russia has launched a full-blown attack on its neighbour Ukraine, clearly violating fundamental norms of international law. Yet it has also continued to justify its positions in terms of international law. Some have seen this as an expression of a genuinely different notion of international law in Russia, whether it is of specifically Russian origins or shared by other authoritarian states that challenge what they regard as a specifically liberal international order. Others argue that the Russian justifications are nothing more than propaganda and 'bullshit'.[126] We have advanced a different line of inquiry in this contribution, proposing a pragmatist reading of the (mis-)use of international law by Russia, Ukraine and Ukraine's Western supporters. From this perspective, the point is not whether the legal arguments publicly presented by either side are deemed correct on legal grounds, but rather how they use concepts and categories of international law to articulate goals, expectations and limits, and thus facilitate communication beyond the fighting on the ground.

As we have shown more particularly in three different areas, the proverbial 'red line' has been invoked by both sides to explain their reasons and goals, advance categories of protection and limitation and warn the respective other side. Russia has presented its

[125]In this context, in a report published in August 2022, Amnesty International accused the Ukrainian army of not always drawing a clear line in its military operations, in particular 'by establishing bases and operating weapons systems in populated residential areas, including in schools and hospitals'. This would provoke indiscriminate Russian attacks and thereby endanger civilians. Amnesty International, *Ukrainian Fighting Tactics Endanger Civilians* (109). The report was received controversially, with the Ukrainian government heavily criticizing it, and Amnesty back-pedalling later the same month. For further discussion, see Ambos, *Doppelmoral* (109) 13; and Schmitt, 'Amnesty International's Allegations of Ukrainian IHL Violations' (n 109).

[126]Zarbiyev, 'Of Bullshit, Lies and "Demonstrably Rubbish"' (6).

resort to the use of force as a means for self-defence and humanitarian assistance to self-determination, with the formal incorporation of four Ukrainian provinces demarcating the potential end-point of its territorial ambitions, at least in face of the failure to overthrow the government and demilitarize Ukraine as a whole. Ukraine and Western states have rejected this rationale and accused Russia of breaching international law in the most violent way, but they have also invoked international law to justify their significant transfer of heavy weapons to Ukraine as collective self-defence – while explicitly restricting it to signal that they did not mean to enter the war themselves as co-belligerents. International humanitarian law has also been mobilized by both Russia and Ukraine to classify the armed conflict and – since Russia cannot deny its international nature since February 2022 – to delineate groups of legitimate combatants, a category of fighters that Russia has sought to keep narrow, and Ukraine has aimed to broaden to cover units integrated into its Territorial Defence Force, including foreign nationals. Finally, third-state assistance has been construed as legally condoned by Western supporters of Ukraine, but also deliberately limited in face of Russian warnings that they might become co-belligerents in the conflict.

In all these areas of international law, the legal claims of either side can be evaluated in strictly legal terms, to probe their validity on technical grounds. Yet, in drawing on the same vocabulary of rules and justifications, permissions and prohibitions, limits and exceptions, all sides have also spoken a language that has allowed them to present their positions, contest those of others and draw their 'red lines'. Beyond any gulf between the international law of authoritarian states or particular great powers and some liberal notion of international law, there is a vocabulary – and institutions – sufficiently widely shared to allow for some basic understanding and regulation, without denying the limitations. The analysis thus suggests that even in times of war, and where international law in the dominant view is constantly bent and broken, it has not exhausted its role in facilitating the articulation of grievances, expectations and, however slim and fragile, restrictions. When the active hostilities eventually cease, the semantics of international law will likely be mobilized again to demarcate statuses and draw new lines and limits.

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