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At war? Party status and the war in Ukraine

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Abstract

Military support to Ukraine has been accompanied by debates as to when Western states would find themselves ‘at war’ with Russia. This political and legal discourse reminds us that international law needs concepts to identify who is a party to an international armed conflict. Identifying parties is crucial because the international legal regulation of armed conflict remains, in many ways, structured by reference to party status – even if the legal meaning of being a party today differs significantly from the traditional implications of being ‘at war’. To capture the increasingly complex co-operation patterns of today’s and tomorrow’s wars, this article identifies the contours for a framework of legal criteria for establishing when a state has become a party to an ongoing international armed conflict. To become a party under this framework, a state must knowingly make a contribution to the conflict that is of a character such that it is directly connected to harm caused to the adversary. That contribution must be sufficiently closely co-ordinated with fellow parties to allow for involvement in the decision-making processes regarding co-ordinated military operations. Applying these criteria to key support scenarios, as exemplified in Russia’s war against Ukraine, permits reasonable distinctions, also with a view to future conflicts. More widely, the analysis of party status may enhance our understanding of the architecture of the international legal regulation of armed conflict as a whole, and its ability to respond to the realities of contemporary conflicts.

Keywords: co-belligerency; *jus ad bellum*; *jus in bello*; law of neutrality; parties to the conflict

1. Introduction

In Ukraine’s existential struggle against Russia’s aggression, many states have delivered weapons and other military equipment to Ukraine and trained Ukrainian soldiers to use those materials.¹ Moreover, some states – most notably the US – have shared battlefield intelligence with Ukraine²

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¹J. Garamone, ‘U.S. Troops Train Ukrainians in Germany’, *DOD NEWS*, 29 April 2022, available at www.defense.gov/News/News-Stories/Article/Article/3015610/us-troops-train-ukrainians-in-germany/; D. Sabbagh, ‘Boris Johnson “Tempting Evil” by Revealing Ukrainian Soldiers Trained in Poland’, *Guardian*, 27 April 2022, available at www.theguardian.com/politics/2022/apr/27/boris-johnson-tempting-evil-revealing-ukrainian-soldiers-trained-poland; see also ‘Ukraine: EU launches Military Assistance Mission’, 15 November 2022, available at www.consilium.europa.eu/en/press/press-releases/2022/11/15/ukraine-eu-launches-military-assistance-mission/.

²J. Barnes, H. Cooper and E. Schmitt, ‘U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say’, *New York Times*, 4 May 2022, available at www.nytimes.com/2022/05/04/us/politics/russia-generals-killed-ukraine.html?smid=tw-nytimes&smtyp=cur.

and disrupted Russian cyber operations and communication channels.³ As military assistance to Ukraine has scaled up,⁴ one question has taken centre stage: When would Western states, themselves, be ‘at war’ with Russia?⁵ Western states have emphasized that they would not take steps that would render them parties to the conflict under international law.⁶ Conversely, Russia has warned that it would consider certain Western assistance as participation in the conflict.⁷

This public discourse on the war in Ukraine reveals a need for reflection on how we establish who is ‘at war’. It is a challenging and crucial question because states have always worked together to wage wars.⁸ Facilitated by technological advancements, co-operation is one of the most salient features of contemporary armed conflicts.⁹ The war in Ukraine has been described as ‘the final war of 20th-century militaries’ because of certain means and methods of warfare that have been employed.¹⁰ By contrast, the diverse forms of inter-state support seen in this war will probably remain as characteristic of future conflicts as they are for present ones. We thus need legal concepts for identifying who is ‘at war’ that capture the increasingly complex co-operation patterns of today’s and tomorrow’s wars. More widely, reflecting on party status may enhance our understanding of the architecture of the international legal regulation of armed conflict as a whole and its ability to respond to the realities of contemporary conflicts.

To prompt such reflection, this article, first, briefly explains why it matters, under current international law, whether a state is ‘at war’. Although the legal meaning of party status today differs significantly from conceptions of the classical state of war that the current debates still evoke, party status arguably remains a central reference point for the international legal regulation of armed conflict. Building on that premise, the article, secondly, identifies the contours of a framework of legal criteria for establishing that a state has become a party to an ongoing international armed conflict (IAC) – what would traditionally have been called a ‘co-belligerent’ and what we might label today a ‘co-party’. As will be shown, two key criteria are decisive under this framework. The first criterion is that each potential (co-)party must make a contribution to the conflict that is of an operational character such that it is directly connected to harm caused to the adversary. The second criterion is that the contribution must be co-ordinated with fellow co-parties so that each co-party is involved in the decision-making processes regarding the co-ordinated military operations.

³D. Sanger et al., ‘Arming Ukraine: 17,000 Anti-Tank Weapons in 6 Days and a Clandestine Cybercorps’, *New York Times*, 6 March 2022, available at www.nytimes.com/2022/03/06/us/politics/us-ukraine-weapons.html.

⁴K. Eichensehr, ‘The United States and Allies Provide Military and Intelligence Support to Ukraine’, (2022) 118 AJIL 646, at 649–50.

⁵See, e.g., M. Schmitt, ‘Are We at War?’, *Articles of War*, 9 May 2022, available at www.lieber.westpoint.edu/are-we-at-war/.

⁶Press Briefing by Press Secretary Jen Psaki, 3 March 2022, available at www.whitehouse.gov/briefing-room/press-briefings/2022/03/03/press-briefing-by-press-secretary-jen-psaki-march-3rd-2022/; M. Sermo, ‘La cobelligérance, acte de guerre ou légitime défense collective ?’, *Le Monde*, 26 May 2022, available at https://www.lemonde.fr/idees/article/2022/05/26/la-cobelligerance-acte-de-guerre-ou-legitime-defense-collective_6127767_3232.html (quoting France’s President Emmanuel Macron and the then Minister of the Armed Forces Florence Parly); Address to the Nation by Federal Chancellor Scholz, 8 May 2022, available at www.bundesregierung.de/resource/blob/992814/2037608/883b3ea4c4c65852c8a8da991559c7e4/2022-05-08-bk-ansprache-8-mai-pdf-data.pdf?download=1; ‘Poland Ready to Place All its MIG-29 Jets at the Disposal of U.S.’, *Reuters*, 8 March 2022, available at www.reuters.com/world/europe/poland-ready-place-all-its-mig-29-jets-disposal-us-2022-03-08/ (quoting Poland’s Prime Minister Mateusz Morawiecki); ‘West “Working Hard” to Avoid War’, *Sky News*, 28 June 2022, available at www.youtube.com/watch?v=gRGT5urKrnM (interview with the then UK Prime Minister Boris Johnson); see also ‘Press Point with NATO Secretary General Jens Stoltenberg’, 30 September 2022, available at www.nato.int/cps/en/natohq/opinions_207788.htm.

⁷‘Senior Russian Lawmaker Says U.S. Directly Involved in Ukraine Fighting’, *Reuters*, 7 May 2022, available at www.reuters.com/world/europe/senior-russian-lawmaker-says-us-directly-involved-ukraine-fighting-2022-05-07/.

⁸See, e.g., H. Grotius, *De Jure Belli ac Pacis Libri Tres* (translated by F. Kelsey, 1925) vol. III, at 787 (on Ancient Greece and Rome).

⁹ICRC, *Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War* (2021), 5; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2019), 59–61.

¹⁰P. O’Brien, ‘War Will Never Be This Bulky Again’, *The Atlantic*, 26 May 2022, available at www.theatlantic.com/ideas/archive/2022/05/ukraine-russia-putin-war/638423/.

Although no intent to be a party is required, subjective dimensions of knowledge about the facts and circumstances constituting the co-ordinated contribution are inherent to these two criteria. To illustrate the distinctions that these criteria enable and how they can be operationalized, the article, in a third step, applies them to key support scenarios as exemplified in the Ukraine war.

2. The legal meaning of being ‘at war’ today

In setting out how far they are willing to go in assisting Ukraine against Russia, several NATO member states officially attach their political red lines to the threshold at which they would be parties to the conflict under international law.¹¹ These references make the legal notion of party status a crucial security policy benchmark.¹² In doing so, the political discourse on Ukraine also hints at a particular legal conception of what being a party would mean. That conception is reminiscent of the ‘classical’ pre-Charter era implications of a ‘state of war’. Traditionally, the state of war was envisaged as ‘a legal condition in which it was entirely lawful for the two contending states to rain death and destruction upon one another’.¹³ This legal notion is still at play when concerns are voiced that Western states becoming parties alongside Ukraine would entitle Russia to use force against Western states.¹⁴

Today, however, even once states are parties to an armed conflict, every instance of force by and against them must still be assessed against the *jus ad bellum* prohibition of the use of force, in addition to the *jus in bello*.¹⁵ A competing approach considers that between states that are parties to an international armed conflict, the legality of acts of force is no longer a matter for the *jus ad bellum*, but exclusively governed by the *jus in bello*.¹⁶ That view is difficult to square with the basic structure of the prohibition of the use of force, which applies to individual acts. The prohibition does not make status-based distinctions along the traditional ‘spheres’ of peace and war.¹⁷

Accordingly, where states are permitted to use force under the *jus ad bellum*, it may be lawful for them to perform acts that also make them parties. Put differently, states are not per se prohibited from becoming a party. Conversely, if a state is not entitled to use force against another state under the *jus ad bellum*, being engaged in an armed conflict with that state does not alter that conclusion.¹⁸ Thus, Western states becoming a party alongside Ukraine would not entitle Russia

¹¹See note 6, *supra*.

¹²For a discussion with particular reference to the political debate in Germany see A. Wentker, ‘Kriegspartei? Sicherheitspolitischer Diskurs und Völkerrecht im Ukraine-Krieg’, (2022) 75 DÖV 988 (where some of the ideas developed more fully in this piece have been sketched).

¹³S. Neff, *War and the Law of Nations: A General History* (2005), 178.

¹⁴German Federal Parliament, Stenographic Protocol 20/33, 11 May 2022, at 2954.

¹⁵C. Greenwood, ‘The Relationship between *Ius ad Bellum* and *Ius in Bello*’, (1983) 9 *Review of International Studies* 221, at 222 (‘It is a mistake . . . to assume that the *ius ad bellum* and *ius in bello* continue to operate at different stages. While the former will always operate before the latter comes into play, once hostilities have commenced it is necessary to consider both.’); R. Sloane, ‘The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War’, (2009) 34 *YJIL* 47, at 68; see also Eritrea-Ethiopia Claims Commission, Final Award - Ethiopia’s Damages Claims, 26 RIAA 631 (2009), paras. 311, 333–349 (awarding compensation for acts during an IAC violating the *jus ad bellum* but not the *jus in bello*).

¹⁶V. Heiskanen and N. Leroux, ‘Applicable Law: *Jus ad Bellum*, *Jus in Bello*, and the Legacy of the UN Compensation Commission’, in T. Feighbery, C. Gibson and T. Rajah (eds.), *War Reparations and the UN Compensation Commission* (2015), 51, at 53–5; P. Konchak, ‘U.S. and Allied Involvement in the Russo-Ukrainian War: The Belligerent Status of NATO States and Its Implications’, *OpinioJuris*, 20 July 2022, available at www.opiniojuris.org/2022/07/20/u-s-and-allied-involvement-in-the-russo-ukrainian-war-the-belligerent-status-of-nato-states-and-its-implications/.

¹⁷K.L. Yip, ‘Separation between *jus ad bellum* and *jus in bello* as Insulation of Results, not Scopes, of Application’, (2020) 58 *MLLWR* 31, at 35.

¹⁸See 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3 (AP I), Preamble (‘nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of

to use force against those states since they could lawfully assist Ukraine in collective self-defence against Russia's armed attack.¹⁹

At the same time, under the *jus in bello*, becoming a party would mean that members of the state's armed forces would be targetable as combatants.²⁰ The *jus in bello* legality of such targeting would not remedy the potential illegality under the *jus ad bellum*.²¹ Still, in practice, the *jus in bello* assessment will likely shape operational decision-making since it offers more precise guidance for individuals on how to use force on the battlefield.²²

More widely, identifying whether a state is a party is crucial because the international legal regulation of armed conflicts²³ is, in many respects, organized by reference to whether the addressee of particular rules are parties or connected to parties. This is affirmed by the fact that parties to the conflict are referred to in hundreds of international treaty provisions and frequently addressed by international bodies such as the Security Council.²⁴

Parties bear central sets of international humanitarian law (IHL) obligations, under both the law on means and methods of warfare and the law relating to the protection of individuals.²⁵ In contrast to obligations, the relevance of rights traditionally attached to party status is doubtful today. Even if 'belligerent rights' (including establishing blockades, seizing contraband, or using force in reaction to breaches of neutrality law) are still affirmed by military manuals and operational practice,²⁶ they cannot grant permission for the use of force beyond the confines of the *jus ad bellum*.²⁷

At another level, party status also matters for the legal position of individuals. Accordingly, even as the 'humanization' and 'individualization' of international law in armed conflicts emphasize the increasing relevance of the individual within this body of law,²⁸ party status remains crucial for grasping how individuals are integrated into this legal system. Indeed, the nature of the connection of individuals to an IAC party influences which rules apply to them in the conduct of hostilities²⁹ as well as whether they fall into particular categories

force inconsistent with the Charter of the United Nations'); K. Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (2011), 24.

¹⁹C. Kreß, 'The Ukraine War and the Prohibition of the Use of Force in International Law', (2022) TOAEP Occasional Paper Series No. 13, at 14; A. de Hoog, 'The Elephant in the Room: Invoking and Exercising the Right of Collective Self-Defence in Support of Ukraine against Russian Aggression', *OpinioJuris*, 7 March 2022, available at www.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/.

²⁰See AP I, *supra* note 18, Arts. 43(1)–(2), 48, 50(1); J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (2005), vol. I (ICRC CIHL Study), rules 1, 3.

²¹See Kreß, *supra* note 19, at 14. On the potential violation of the right to life that could follow from acts of targeting by an aggressor see notably UN Human Rights Council, General Comment No. 36 Art. 6 ICCPR, UN Doc. CCPR/C/GC/36 (2018), para. 70.

²²See also E. Lieblich, 'The Facilitative Function of *Jus in Bello*', (2019) 30 EJIL 321, at 328–9.

²³For the implications of party status in domestic legal systems see A. Clapham, *War* (2021), 1–10, 169–233.

²⁴See emblematically UN Security Council, Res. 2532, UN Doc. S/RES/2532 (2020), paras. 1–2; UN Security Council, Res. 2540, UN Doc. S/RES/2540 (2020), paras. 8–9; UN Security Council, Res. 2459, UN Doc. S/RES/2459 (2019), para. 1.

²⁵For an argument on how these obligations play out between co-parties see A. Wentker, 'Partnered Operations and the Positive Duties of Co-Parties', (2022) 27 JCSL 159.

²⁶For thorough reviews see J. Farrant, 'Modern Maritime Neutrality Law', (2014) 90 ILS 198, at 220–300; E. Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (2013), 84–106; P. Drew, 'Blockade? A Legal Assessment of the Maritime Interdiction of Yemen's Ports', (2019) 24 JCSL 35, at 46–61; S. Sivakumaran, 'Exclusion Zones in the Law of Armed Conflict at Sea: Evolution in Law and Practice', (2016) 92 ILS 153, at 176–202; see also note 43, *infra*.

²⁷UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), para. 13.3; J. Upcher, *Neutrality in Contemporary International Law* (2020), 173–5; see also A. Clapham, 'Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law', (2021) 97 ILS 1200.

²⁸T. Meron, 'The Humanization of Humanitarian Law', (2000) 94 AJIL 239; D. Akande, D. Rodin and J. Welsh (eds.), *The Individualisation of War: Ethics, Law, Politics* (forthcoming).

²⁹See note 20, *supra*.

of persons protected by IHL.³⁰ This connection may also feed into establishing international criminal responsibility for specific war crimes that presuppose a specific connection of the individual to a party.³¹ More subtly, the factors developed by international criminal jurisprudence for assessing the nexus requirement for war crimes all entail a specific connection between the perpetrator, victim, or relevant conduct and the parties.³²

In addition to the personal scope of obligations in armed conflict, identifying which states qualify as parties to an IAC is relevant to determining IHL's geographical scope.³³ Party identification is also crucial for applying neutrality law (which has traditionally governed the relations between parties to inter-state conflicts and third states, i.e., neutrals),³⁴ and the obligation of third states under Common Article 1 as well as customary international law to not provide aid, assistance, or encouragement to parties' IHL violations.³⁵ Beyond IHL, being a party can, for example, potentially modify how certain human rights obligations apply to that state, including the right to life and personal liberty and security.³⁶ It can also have implications for applying treaties such as the Montreux Convention – Turkey recently relied on this convention to restrict warship access to the Turkish straits during the Ukraine war³⁷ – which makes different provisions for the passage of warships through the straits 'in times of war' depending on whether Turkey is a 'belligerent'.³⁸

In sum, the importance of party status as a regulatory reference point for international law in armed conflicts suggests that having a clearer understanding of that concept helps one grasp the structure of this regulatory scheme as a whole. Accordingly, properly applying this regulation to an IAC such as the war against Ukraine requires knowing who is, and who is not, a party to that IAC. The stage for an account of the legal criteria for identifying parties is thus set.

3. The legal framework for identifying who is 'at war'

International law presupposes that multiple states can be parties on the same side of an IAC.³⁹ At the same time, international law does not contain rules specifically developed for identifying parties.

³⁰For prisoners of war and persons *hors de combat* see Arts. 21, 118 of the 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135 (GC III); Art. 13(1) of the 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (GC I); Art. 13(1) of the 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (GC II); but see AP I, *supra* note 18, at Arts. 8(a), (b), 44(1). For civilians see Art. 4 of the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (GC IV) (nationality of a party); *Prosecutor v. Tadić*, Appeal Judgment, Case No. IT-94-1-A, A.Ch., 15 July 1999, para. 166 ('allegiance' to a party); for a critical discussion see M. Galvis Martínez, 'The "Allegiance" Test: Judicial Legislation and Interpretation of GCIV', (2021) JCSL 21.

³¹See Art. 8(2)(b)(xi)-(xv), (e)(x), (xii) of the 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3.

³²*Prosecutor v. Kunarac*, Appeal Judgment, Case No. IT-96-23&IT-96-23/1-A, A.Ch., 12 June 2002, para. 59.

³³*Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, A.Ch., 2 October 1995, para. 68 ('territories of the parties'); party status could also feed into a nexus to the IAC, on such a requirement for IHL's geographical scope see, e.g., M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2019), 187–8.

³⁴See in particular 1907 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 205 CTS 299 (HC V), 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, 205 CTS 395 (HC XIII).

³⁵See ICRC CIHL Study, *supra* note 20, rule 144.

³⁶See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, at 240, para. 25.

³⁷N. Oral, 'To Close or Not to Close: The Closing of the Turkish Straits under Articles 19 and 21 of the 1936 Montreux Convention Regarding the Regime of the Straits', *Völkerrechtsblog*, 4 March 2022, available at www.voelkerrechtsblog.org/to-close-or-not-to-close/.

³⁸1936 Convention Regarding the Régime of the Straits, 173 LNTS 213, Arts. 19, 20.

³⁹See GC I-IV, *supra* note 30, at Common Article 2 (CA 2) ('two or more'); see GC IV, *supra* note 30, at Art. 4(2) ('co-belligerent State[s]').

One suggested solution has been to rely on the content of rules prohibiting specific co-operative acts with warring states, notably neutrality obligations to not provide assistance to parties and prevent them from using neutral territory,⁴⁰ at least if violations of such obligations are ‘significant’ and ‘systematic’.⁴¹ Yet, neutrality law violations and the termination of neutral status are best kept separate.⁴² It is conceptually awkward to attach the termination of a status to the violation of an obligation that presupposes the persistence of that status. But more importantly, the very existence of the traditional enforcement measures for violations against a neutral state suggests that states retain their neutral status even after violating neutrality law.⁴³ Moreover, connecting party status to neutrality violations would raise questions regarding conduct that, *prima facie*, is inconsistent with neutrality but is carried out in support of the victim of an aggressor, in (collective) self-defence, covered by a Security Council mandate, or potentially – though this last possibility remains controversial – justified as a third-party countermeasure under the law of state responsibility.⁴⁴ In such settings, neutrality obligations are arguably superseded such that they either do not apply at all or that violations of them are justified. At the same time, these considerations do not provide adequate distinctions regarding party status. This is because such distinctions would constrain the application of the *jus in bello* regarding states acting in conformity with the *jus ad bellum*. This would undermine the former’s very *raison d’être* in an international legal order that prohibits recourse to force, but still has to regulate armed conflict.

Rather than relying on the content of neutrality law, the legal framework for identifying parties must be drawn from the system of the international legal regulation of armed conflict. The framework should reflect that parties are situated as the principal collective subjects in armed conflicts, bearing central sets of obligations regarding that conflict and determining the law applicable to individuals. Extending this status to actors that are only remotely connected to the conflict would distort this conception of centrality. Conversely, an overly narrow conception of party status could yield equally distorted results if collective actors who play a central role in a collaborative setting are not qualified as parties.

Based on an analysis of the structure of the international legal regulation of armed conflict, the remainder of this section sketches the elements of the legal framework for identifying parties in four steps. First, the direct connection to hostilities/military operations will be outlined, secondly, the co-ordination requirement, and thirdly, the subjective dimensions inherent in making a relevant co-ordinated contribution will be addressed. Fourthly, the temporal scope of party status will be clarified, i.e., when does it begin and end.

3.1 First criterion: Direct connection to hostilities

Traditionally, ‘acts of war’ were required for a third state to become a party to an ongoing conflict.⁴⁵ The contours of what this has meant have not received much attention.

⁴⁰E.g., O. Hathaway and S. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017), 91; *Hamilly v. Obama*, 616 F. Supp. 2d 63 (D.C. Cir. 2009), at 75.

⁴¹C. Bradley and J. Goldsmith, ‘Congressional Authorization and the War on Terrorism’, (2005) 118 HLR 2047, at 2112; T. Bridgeman, ‘The Law of Neutrality and the Conflict with Al Qaeda’, (2010) 85 NYULR 1186, at 1200.

⁴²On this distinction see J. Kunz, *Kriegsrecht und Neutralitätsrecht* (1935), 221; H. Lauterpacht, *Oppenheim’s International Law* (1952), vol. II, at 672, 752; C. Chinkin, *Third Parties in International Law* (1993), 306; regarding the war against Ukraine M. Schmitt, ‘Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force’, *Articles of War*, 7 March 2022, available at www.lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/.

⁴³For the traditional notion of self-help by aggrieved belligerents see E. de Vattel, *Le droit des gens, ou, principes de la loi naturelle, appliqués à la conduite aux affaires des nations et des souverains* (translated by C. Fenwick, 1916), vol. III, at 277; E. Castrén, *The Present Law of War and Neutrality* (1954), 442; see also more recently Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (2016, English Version 2019), 62.

⁴⁴For discussion see Upcher, *supra* note 27, at 153–4. On whether assistance to Ukraine violates neutrality obligations see, e.g., S. Talmon, ‘The Provision of Arms to the Victim of Armed Aggression: the Case of Ukraine’, *Bonn Research Papers on Public International Law*, 6 April 2022, available at www.ssrn.com/abstract=4077084.

⁴⁵L. Oppenheim, *International Law: A Treatise* (1906), vol. II, at 314, 388; see Lauterpacht, *supra* note 42, at 671, 752.

It is arguably not necessary for the acts of a (co-)party to meet separately the requirements that would suffice to create an armed conflict, as long as the acts of all (co-)parties, overall, meet these requirements. This point is particularly relevant for co-parties in non-international armed conflicts (NIACs), given the intensity threshold of ‘protracted armed violence’.⁴⁶ Since this requirement relates to the conflict as a whole, it arguably needs not be met separately by each (co-)party.⁴⁷ Regarding inter-state conflicts, the notion of resorting to armed force between states, that gives rise to an IAC,⁴⁸ is not to be understood as an intensity threshold.⁴⁹ Nonetheless, it requires acts of a particular nature or quality. Certain acts that are regulated as hostilities/military operations as part of an ongoing IAC (such as preparatory or auxiliary acts to an actual resort to armed force⁵⁰) would not suffice separately to constitute an IAC in the first place.⁵¹ Conceptually, there is no need to require that a state’s conduct suffices to create a *new* IAC to become a party to a conflict that is ongoing.

Even if the legal criteria for the existence of an armed conflict and for identifying (co-)parties should therefore be distinguished, the conduct must be part of the hostilities or military operations that form the IAC.⁵² Since hostilities/military operations constitute the conflict relationship between adverse parties on an ongoing basis,⁵³ by implication, international law presupposes that the contribution from each (co-)party consists, at a granular level, of acts constituting or forming part of military operations/hostilities. Hostilities/military operations are characterized as ‘means or methods of injuring the enemy’,⁵⁴ that is, ‘acts which by their nature or purpose are intended to cause actual harm to the personnel and equipment of the armed forces’.⁵⁵ This notion covers a broader range of activities than ‘attacks’ (as defined in Article 49(1) AP I),⁵⁶ including non-violent activities preparing for⁵⁷ or supporting attacks.⁵⁸ At the same time, not all activities related to the

⁴⁶See *Tadić* case, *supra* note 33, para. 70.

⁴⁷See also V. Koutroulis, ‘The Fight against the Islamic State and Jus in Bello’, (2016) 29 LJIL 827, at 832–3; R. Van Steenberghe, ‘Les interventions militaires étrangères récentes contre le terrorisme international. Seconde partie: droit applicable (jus in bello)’, (2017) 63 AFDI 37, at 47–8; though see N. Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars* (2017), 90–1; G. Gaggioli and P. Kilibarda, ‘Counterterrorism and the Risk of Over-Classification of Situations of Violence’, (2021) 103 IRRIC 203, at 232.

⁴⁸See *Tadić* case, *supra* note 33, para. 70.

⁴⁹ICRC (ed.), *Commentary on the First Geneva Convention* (2016), para. 240; D. Akande, ‘Classification of Armed Conflicts’, in B. Saul and D. Akande (eds.), *The Oxford Guide to International Humanitarian Law* (2020), 29, at 34–45.

⁵⁰See further notes 56–58, *infra*.

⁵¹C. Greenwood, ‘Scope of Application of Humanitarian Law’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), 45, at 57.

⁵²In treaties and practice, the notions of military operations and hostilities are understood almost synonymously, for references see N. Melzer, *Targeted Killing in International Law* (2008), 271–2.

⁵³For treaty references to the notion of ‘hostilities’ (regarding IACs) see, e.g., GC I, *supra* note 30, at Arts. 17(3)–(4), 23, 28, 31, 36, 40, 48 GC I; GC II, *supra* note 30, Arts. 4, 33, 39; GC III, *supra* note 30, Arts. 4(B)(1), 21(3), 33, 43, 58, 67, 109, 111, 112, 118, 1; GC IV, *supra* note 30, Arts. 14, 15, 45, 46, 49(2), 70, 130, 132, 133, 134, 145, 157; see AP I, *supra* note 18, Arts. 31(4), 33, 34, 40, 43(2), 44(3), 45, 47, 49(4), 51(3), 56(5), 60, 61, 67, 73, 77; for treaty references to the notion of ‘military operations’ (regarding IACs) see GC I, *supra* note 30, Ann. I, Art. 2; see GC III, *supra* note 30, Arts. 23, 75(1); GC IV, *supra* note 30, Arts. 6(2)–(3), 20(2), 28, 40(2), 51(2), 53, 11; AP I, *supra* note 18, Arts. 3, 39(2), 44(3), (5), 51(1), (7), 56(2), 57(1), (4), 58, 59(2), 60(1), (6).

⁵⁴ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) (Interpretive Guidance), 43.

⁵⁵Y. Sandoz, C. Swinarski, and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), para. 1942; see also, e.g., *The Public Committee against Torture in Israel et al. v. the Government of Israel et al.* (Targeted Killings case), HJC 769/02 (2006), para. 33.

⁵⁶M. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017), 415.

⁵⁷For example, see AP I, *supra* note 18, Art. 44(3).

⁵⁸Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2016), 2 (referring to the notion of hostilities as including, amongst others, intelligence gathering and various types of logistical support).

conflict relationship between parties are relevant, and hostilities/military operations are narrower than ‘the entire war effort’.⁵⁹

Against this background, the contribution’s requisite character can be refined as demanding a relationship of ‘directness’ to harm to the adversary, as Greenwood and Upcher have hinted at in the context of IACs,⁶⁰ and the International Committee of the Red Cross (ICRC) in the context of NIACs.⁶¹ To illustrate, regarding the 2003 Iraq invasion, the US considered that another state would not qualify as its ‘co-belligerent’ if its ‘specific contribution ha[d] no *direct nexus* with belligerent or hostile activities’.⁶² The US has later determined its co-party to be a state ‘*directly engaged* with the US in hostilities or *directly supporting* hostilities against a common enemy’⁶³ (subsequently specified as ‘direct operational support’).⁶⁴ Conversely, the perceived absence of such a direct connection was the basis for the Netherlands not to consider Kuwait a party to the Iran/Iraq conflict, despite Kuwait’s wide-ranging military assistance to Iraq.⁶⁵

At the same time, no test for assessing this ‘directness’ of the operational connection in identifying co-parties has yet been established as a matter of international law. One practical way of assessment could be to ask whether the acts directly cause harm to the adversary in one step, or form an integral part of co-ordinated military operations that do so. This test would draw on the ‘direct causation of harm’ criterion advanced by the ICRC as a constitutive element of direct civilian participation in hostilities,⁶⁶ which has also informed the ICRC’s ‘support-based’ approach to identifying parties to a pre-existing NIAC.⁶⁷

The first criterion has specified the conduct that allows for identifying a state as a co-party. The second criterion turns to the requisite character of the relationship between co-parties.

3.2 Second criterion: Co-ordination

To make a state a co-party, its operational contribution must be closely co-ordinated with one or more of the fellow co-parties. As the element that ties together co-operation partners’ contributions, co-ordination sets the foundation for considering them as co-parties to the same armed conflict. Since one state can be simultaneously engaged in separate conflicts, fighting a common adversary is not all it takes to make multiple states co-parties.⁶⁸ By contrast, co-ordination

⁵⁹See Sandoz, Swinarski and Zimmermann, *supra* note 55, para. 1679; see also D. Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’, (2010) 59 ICLQ 180, at 188.

⁶⁰See Greenwood, *supra* note 51, at 58; Upcher, *supra* note 27, at 63.

⁶¹The ICRC’s ‘support-based approach’ requires an intervening state’s actions to be ‘related to the conduct of hostilities’ for that state to be identified as a party, i.e., the actions must have a ‘direct impact on the opposing party’s ability to conduct hostilities’ (T. Ferraro, ‘The Applicability and Application of International Humanitarian Law to Multinational Forces’, (2013) 95 IRRIC 561, at 585). The ICRC has explicitly confined this ‘support-based approach’ to NIACs (T. Ferraro, ‘The ICRC’s legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict’, (2015) 97 IRRIC 1227, at 1228). For suggestions to extend the reasoning to IACs see C. Droege and D. Tuck, ‘Fighting Together and International Humanitarian Law: Setting the Legal framework (1/2)’, *Humanitarian Law and Policy*, 12 October 2017, available at <https://blogs.icrc.org/law-and-policy/2017/10/12/fighting-together-international-humanitarian-law-setting-legal-framework-1-2/>; N. Verlinden, ‘Are We at War?’ *State Support to Parties to Armed Conflict: Consequences under jus in bello, jus ad bellum and Neutrality Law* (2019), PhD thesis, 150–2; Schmitt, *supra* note 5.

⁶²US Office of the Legal Counsel to the President, Memorandum Opinion: ‘Protected Person’ Status in Occupied Iraq Under the Fourth Geneva Convention, 28 Op. OLC (2004), 35, at 45 (emphasis added).

⁶³Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006), Section 948a (1)(i) (emphasis added).

⁶⁴Military Commissions Act, Pub. L. No. 111-84, 123 Stat. 2190 (2009), 10 U.S.C. 948a(3) (2009).

⁶⁵R. Siekmann, ‘Netherlands State Practice for the Parliamentary Year 1986-1987’, (1988) 19 NYIL 279, at 390.

⁶⁶See Interpretive Guidance, *supra* note 54, at 53–5.

⁶⁷See Ferraro, ‘ICRC’s Legal Position’, *supra* note 61, at 1231.

⁶⁸N. Lubell, ‘Fragmented Wars: Multi-Territorial Military Operations against Armed Groups’, in W. Williams and C. Ford (eds.), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (2019), 3, at 25; but see C. Redaelli, ‘A Common Enemy: Aggregating Intensity in Non-international Armed Conflicts’, *Humanitarian Law and Policy*, 22 April 2021, available at <https://www.blogs.icrc.org/law-and-policy/2021/04/22/common-enemy/>.

arguably makes a qualitative difference from the mere parallel fighting of a common enemy, and connects partners' acts such that they intertwine as contributions to one conflict.⁶⁹

In cases when more than two co-parties are on the same side of a conflict, it suffices for them to co-ordinate with one of the other states, if that state, in turn, co-ordinates with others. For example, states A, B, and C can be co-parties if states A and C do not directly co-ordinate but each only co-ordinate with state B. Accordingly, it is sufficient for all the contributions from co-parties to be connected through a link of co-ordination, even if some co-parties do not directly co-ordinate with some of the others.

Regarding the requisite degree of co-ordination, a helpful parameter is whether each co-party has a role in deciding how co-ordinated military operations are conducted.⁷⁰ Emphasizing involvement in the decision-making process is appropriate in light of the legal position that comes with being identified as a (co-)party. Indeed, it is the primary role of parties to ensure that the conflict is fought in accordance with IHL,⁷¹ presupposing that parties determine how the conflict is conducted. This position relates to the conflict relationship with the adverse side, as a whole, which is constituted and shaped by the military operations of all co-parties. It, therefore, seems reasonable to require that co-parties be involved in the strategic, operational, and/or tactical decision-making that determines the (co-ordinated) military operations. This would be the case if partners co-ordinate their decisions to the extent that their contributions effectively build on one another.

To further specify the elements outlined so far, a crucial question remains as to what extent these elements also have subjective dimensions.

3.3 Subjective dimensions

When the above elements are met, party status is an automatic legal consequence, independent of whether parties intend, know, or accept that consequence. On subjective conceptions of the 'state of war', belligerent status depended on states' intent to be at war.⁷² Such conceptions can no longer be reconciled with the basic premise that the application of the contemporary international legal regulation of armed conflict does not depend on whether states want it to apply in a given case.⁷³

Nonetheless, a certain mindset regarding the facts and circumstances constituting the relevant co-ordinated contribution – not the ensuing status consequence – is inherent to the two elements. Knowledge is a plausible candidate for these subjective dimensions. Requirement of activities with a direct connection to harm in sufficiently close co-ordination with one's partners cannot be considered fulfilled when the respective state is unaware of what it is doing, for example as the result of an error or being misled.⁷⁴ In practice, the requisite awareness will usually be inferred objectively from the factual patterns,⁷⁵ unless it is explicitly externally manifested, for example in official statements or documents.

⁶⁹Similarly J. Nikolic, T. de Saint Maurice and T. Ferraro, 'Aggregated Intensity: Classifying Coalitions of Non-State Armed Groups', *Humanitarian Law and Policy*, 7 October 2020, available at <https://blogs.icrc.org/law-and-policy/2020/10/07/aggregated-intensity-classifying-coalitions-non-state-armed-groups/>.

⁷⁰See, in a related context, K. Mačák, *Internationalized Armed Conflicts in International Law* (2018), 102–3.

⁷¹See, e.g., UN Security Council, Res. 2475, UN Doc. S/RES/2475 (2019), Preamble ('Reaffirming that parties to armed conflict bear the primary responsibility to take all feasible steps to protect civilians ...').

⁷²A. McNair, 'The Legal Meaning of War, and the Relation of War to Reprisals', (1925) 11 *Transactions Grotius Society* 29, at 45; K. Strupp, *Grundzüge des positiven Völkerrechts* (1922), 170–1; G. Scelle, 'Règles générales du droit de la paix', (1932) 46 *RCADI* 327, at 677; Q. Wright, 'When Does War Exist?', (1932) 26 *AJIL* 362, at 363.

⁷³See GC I-IV, *supra* note 30, at CA 2 ('even if the state of war is not recognized'). As a caveat, CA 2 still suggests that 'declared wars' remain possible, but they are rare in contemporary practice (for a recent discussion see T. Fazal, K. Irajpanah and K. Schultz, 'Jus in Bello, Jus Ad Bellum, and The Decline in Declarations of War: An Exchange', (2021) 30 *Security Studies* 893).

⁷⁴Arguably, a specific intent cannot be said to be inherent to the elements of a co-ordinated contribution as set out here (though see Schmitt, *supra* note 5).

⁷⁵See similarly ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2015), 8; R. Van Steenberghe and P. Lesaffre, 'The ICRC's "Support-Based Approach": A Suitable but Incomplete Theory', (2019) 59 *QIL* 5, at 14–15.

Having developed elements to identify a state as a (co-)party, a final necessary specification pertains to the extension of this status in time. When does it begin and when does it end?

3.4 Temporal scope of party status

A state's (co-)party status to a pre-existing IAC begins as soon as it has made a sufficiently co-ordinated contribution of the requisite character, as specified above. For contributions consisting of recurrent acts, some repetition may be helpful evidence in establishing that a contribution meets the requirements.⁷⁶

Party status ends with the end of a conflict, but in practice this can be difficult to pin down.⁷⁷ Conversely, even during an armed conflict, an individual state's co-party status may end once its activities no longer meet the requirements for identifying it as a party in the first place. Conceptually, this analysis is simply a reversal of establishing the inception of party status.⁷⁸ It would thus not be necessary for a state to disengage fully from a conflict and stop its co-ordinated contribution entirely, as others have suggested.⁷⁹ A change in the quality of the contribution (such that it no longer meets the requirements) would already mean that the respective state can no longer be considered a party. Nonetheless, it seems reasonable, in practice, to presume that a state remains a co-party until that presumption is rebutted. The presumption would be rebutted by an externally discernible manifestation of a significant change of the contribution or its cessation. A changed pattern over a prolonged period can be helpful evidence. This would avoid the legal uncertainty that could otherwise result from 'revolving door' situations or simply from the fact that the relevant changes may not be instantly evident to other actors that need to make the assessment in the context of ongoing operations.⁸⁰

Finally, the end of a state's party status does not necessarily mean no further legal consequences will flow from this status. The point in time at which a state must have been a party is to be carefully discerned by interpreting the specific rule that attaches legal consequences to party status. While obligations relating to the conduct of hostilities will typically not apply to a former party once it ceases to be a party,⁸¹ many obligations regarding protected individuals will extend beyond this point in time. Some obligations that are activated while a state is a party will still need to be discharged after its party status ends. For example, a former party's obligations to care for a wounded individual do not simply end because it ceases to be a party.⁸² Other obligations may even be activated after the cessation of hostilities but still entail consequences for former

⁷⁶See Ferraro, 'Applicability', *supra* note 61, at 586.

⁷⁷A commonly adopted requirement in IACs is the 'general close of military operations' (which draws on the language of Art. 6(2) GCIV, *supra* note 30), see notably *Prosecutor v. Gotovina*, Trial Judgement, Case No. IT-06-90-T, T.Ch. I, 15 April 2011, para. 1694; see ICRC, *supra* note 49, paras. 277, 494; see also M. Milanovic, 'The End of Application of International Humanitarian Law', (2014) 96 IRRC 163, at 174.

⁷⁸N. Weizmann, 'The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF', (2016) 47 *Columbia Human Rights Law Review* 204, at 225, 232; similarly see Milanovic, *supra* note 77, at 170 (regarding the scope of application of IHL).

⁷⁹For suggestions that a lasting disengagement or a prolonged cessation of the activities is required see T. Ferraro, 'Military Support to Belligerents: Can the Provider Become a Party to the Armed Conflict?', (2019) 49 *Collegium* 47, at 56; Verlinden, *supra* note 61, at 157.

⁸⁰See *Gotovina* case, *supra* note 77, para. 1694 (for parallel considerations regarding the termination of an armed conflict).

⁸¹By contrast, some such party obligations could theoretically already cover conduct *preceding* the beginning of the state's (co-)party status, such as precautionary measures relating to the very military operation through which the state becomes a party. This problem is similar to whether the law of IAC already covers the 'first strike' that gives rise to the IAC (for the debates on this point in the context of the killing of the Irani General Soleimani in early 2020 see, e.g., UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report: Use of Armed Drones for Targeted Killings, UN Doc. A/HRC/44/38 (2020), Ann., paras. 15–39; O. Corten et al., 'L'exécution de Qassem Soleimani et ses suites: aspects de jus contra bellum et de jus in bello', (2020) 124 RGDIIP 41, at 64.

⁸²See, e.g., GC I, *supra* note 30, at Arts. 12, 15; GC II, *supra* note 30, Arts. 12, 18; AP I, *supra* note 18, Art. 10; ICRC CIHL Study, *supra* note 20, rules 109–11.

parties, such as obligations to search for and collect the dead and account for the missing,⁸³ obligations relating to persons deprived of their liberty,⁸⁴ or obligations to take measures regarding explosive remnants of war.⁸⁵

4. Operationalizing the legal framework in and beyond the war in Ukraine

To illustrate how this account of the legal criteria for identifying parties may operate practically, it is helpful to consider the key forms of military assistance that different states have provided to Ukraine and Russia in the current war: weapons and training, intelligence, cyber support, and allowance for the use of territory.⁸⁶ We will see that the suggested legal criteria permit reasonable distinctions that may also resonate with the legal lines that states themselves seem to draw in this war and with a view to future conflicts.

4.1 Weapons and training

Supplying arms to Ukraine does not establish a sufficiently direct connection to hostilities, since only the actual use of the weapons causes harm to Russia. For this assessment, it does not matter what kind of weapons or materials are supplied, or whether Ukrainian soldiers are additionally trained on those weapons.⁸⁷ Repeated affirmations from Western states that such assistance has not made them parties⁸⁸ are therefore in line with the legal framework outlined above. The matter would be different if military advisors participated in the planning of concrete military operations. Such participation could both possess the requisite direct connection to hostilities and attest to a role in the decision-making processes, thus satisfying the co-ordination requirement.

4.2 Intelligence

The case of specific patterns of intelligence co-operation may be different than that of weapons transfers.⁸⁹ The US and other NATO states, for example, apparently upload intelligence to a portal that Ukraine can access in real-time.⁹⁰ Reportedly, such intelligence has included data on the location of specific targets, either confirming requested target locations or pointing to new potential

⁸³See, e.g., GC I, *supra* note 30, at, Art. 15; GC II, *supra* note 30, Art. 18; GC IV, *supra* note 30, Art. 16; AP I, *supra* note 18, Art. 33(1); ICRC CIHL Study, *supra* note 20, rules 112–17.

⁸⁴On the temporal scope of such obligations see GC III, *supra* note 30, Art. 5.

⁸⁵Arts. 3–6 of the 2003 Protocol on Explosive Remnants of War (Protocol V) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 2399 UNTS 100.

⁸⁶For an assessment at an early stage of the conflict see A. Wentker, 'At War: When Do States Supporting Ukraine or Russia become Parties to the Conflict and What Would that Mean?', *EJIL:Talk!*, 14 March 2022, available at www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/.

⁸⁷The same is true regarding the supply of drones to Russia by Iran and the reported provision of training and maintenance on these drones by Iranian advisors in Crimea, see C. Vinograd, 'Iran's Foreign Minister Acknowledges that Drones Were Sent to Russia, but Says it Happened before the War.', *New York Times*, 5 November 2022, available at www.nytimes.com/2022/11/05/world/europe/irans-foreign-minister-acknowledges-that-drones-were-sent-to-russia-but-says-it-happened-before-the-war.html?searchResultPosition=1; J. Borger and D. Sabbagh, 'Iran Provides "Technical Support" for Russian Drones Killing Civilians, Says US', *Guardian*, 20 October 2022, available at www.theguardian.com/world/2022/oct/20/russia-ukraine-war-iran-drones-advisers-crimea.

⁸⁸See note 6, *supra*.

⁸⁹See also Schmitt, *supra* note 5.

⁹⁰N. Bertrand and K. Lillis, 'US Officials Say Biden Administration is Sharing Intelligence with Ukraine at a "Frenetic" Pace after Republicans Criticize Efforts', *CNN*, 4 March 2022, available at www.edition.cnn.com/2022/03/04/politics/us-ukraine-intelligence/index.html; for reports of targeting intelligence provided to Ukraine by Germany's Federal Intelligence Service, albeit not in real-time, see H. Stark, 'Hilfe, die zum Ziel führt', *Zeit*, 28 September 2022, available at www.zeit.de/2022/40/ukraine-russland-krieg-bnd-geheimdienstinformationen.

targets, enabling Ukraine, for example, to take out several Russian generals and the missile cruiser ‘*Moskva*’.⁹¹ Conversely, US intelligence on specific imminent strikes by Russia has reportedly helped Ukraine evade them.⁹²

Target geo-localization and verification are part of the targeting process and thus a prime example of a military operation that directly harms the adversary. The reported patterns of intelligence co-operation also display close-knit co-ordination. US intelligence has been integrated into Ukrainian military operations such that the US has a significant involvement in key aspects of the decision-making. Reports also indicate that the US was aware that its intelligence contribution was part of operations directly harming Russia and that it had a role in the decision-making on these operations.⁹³ Based on these reports, there seems to be a good case for considering the conditions of co-party status fulfilled. The facts can, of course, not be fully ascertained, and the US contends that it did not share intelligence that was sufficiently granular ‘explicitly to target and kill Russian soldiers’.⁹⁴ Implicitly, however, this factual line of defence may indicate that the US considers that such acts could indeed push states closer to the line of becoming a party as a matter of law.⁹⁵ Based on a similar reasoning, Russian officials concluded that through ‘the aid of American intelligence forces’ to Ukraine, ‘Washington is essentially coordinating and developing military operations, thereby directly participating in military actions against our country’.⁹⁶ Both the US’ and Russia’s position suggest that providing targeting intelligence can, in certain circumstances, make a state a co-party. In doing so, both positions hint at criteria that resonate with the legal framework criteria set out above.

4.3 Cyber support

For the reported US cyber support to Ukraine, the Commander of US Cyber Command acknowledged that the US was conducting cyber operations ‘across the full spectrum’, including ‘offensive’ operations to assist Ukraine.⁹⁷ The general did not, however, provide details on the exact nature of the US cyber support and its relationship to Ukraine’s cyber operations. Accordingly, a sufficient operational connection is conceivable, though not publicly known.⁹⁸ Depending on the factual setup, this may either be because the support as such constitutes military operations that directly cause harm, or because it is integrated into kinetic military operations that do so.⁹⁹ Whether there has been sufficiently close co-ordination between cyber support and Ukraine’s military operations is again, not publicly known, but it is certainly imaginable. In principle, therefore, cyber support seems to be capable of meeting the legal criteria for a state providing such support to become a co-party.

⁹¹See Barnes, Cooper, and Schmitt, *supra* note 2; H. Cooper, E. Schmitt and J. Barnes, ‘U.S. Intelligence Helped Ukraine Strike Russian Flagship, Officials Say’, *New York Times*, 5 May 2022, available at www.nytimes.com/2022/05/05/us/politics/moskva-russia-ship-ukraine-us.html?smid=url-copy.

⁹²K. Dilanian et al., ‘U.S. Intel Helped Ukraine Protect Air Defenses, Shoot Down Russian Plane Carrying Hundreds of Troops’, *NBC News*, 26 April 2022, available at www.nbcnews.com/politics/national-security/us-intel-helped-ukraine-protect-air-defenses-shoot-russian-plane-carry-rcna26015.

⁹³M. Milanovic, ‘The United States and Allies Sharing Intelligence with Ukraine’, *EJIL:Talk!*, 9 May 2022, available at www.ejiltalk.org/the-united-states-and-allies-sharing-intelligence-with-ukraine/.

⁹⁴See Bertrand and Lillis, *supra* note 90.

⁹⁵M. Mazzetti et al., ‘For the U.S., a Tenuous Balance in Confronting Russia’, *New York Times*, 19 March 2022, available at www.nytimes.com/2022/03/19/us/politics/us-ukraine-russia-escalation.html.

⁹⁶C. Vakil, ‘Russian Official Claims US Participating in Direct Hostilities with His Country’, *The Hill*, 7 May 2022, available at www.thehill.com/policy/defense/3480589-russian-official-claims-us-participating-in-direct-hostilities-with-his-country/.

⁹⁷A. Martin, ‘US Military Hackers Conducting Offensive Operations in Support of Ukraine, Says Head of Cyber Command’, *Sky News*, 1 June 2022, available at <https://www.news.sky.com/story/us-military-hackers-conducting-offensive-operations-in-support-of-ukraine-says-head-of-cyber-command-12625139>.

⁹⁸See similarly M. Schmitt, ‘U.S. Offensive Cyber Operations in Support of Ukraine’, *Articles of War*, 6 June 2022, available at www.lieber.westpoint.edu/us-offensive-cyber-operations-support-ukraine/.

⁹⁹See Schmitt, *supra* note 56, at 383; ICRC (ed.), *Commentary on the Third Geneva Convention* (2020), para. 288.

4.4 Territory

Finally, the provision of territory is often a crucial form of support in inter-state conflict. When states allow their territory to be used as direct launchpads for military operations by one party against another, this may constitute a sufficiently direct connection to harm to the adversary, and will often require a significant degree of co-ordination. For example, in the 2003 Iraq war the US noted that states would be its ‘co-belligerents’ if they ‘allow their territory to be used as a base for [combat] operations’.¹⁰⁰ On that ground, the US qualified Kuwait and Qatar as its ‘co-belligerents’ but not other states that had merely allowed stopovers, such as Ireland, Italy, and Germany.¹⁰¹ Kuwait denied the underlying factual allegations,¹⁰² though not the potential legal consequences thereof.¹⁰³ Ireland, Italy, and Germany maintained that they had not become parties because of the stopovers.¹⁰⁴

In the war against Ukraine, the use of foreign territory for military operations by the parties seems to have played a greater role on Russia’s side than on Ukraine’s. In the early days of the war, Russia warned that it would consider states allowing Ukraine the usage of airbases as participating in the conflict.¹⁰⁵ Western states do not, however, seem to have allowed Ukraine to launch operations directly from air bases in their territory.¹⁰⁶ By contrast, Russia has launched significant parts of its invasion from Belarusian territory.¹⁰⁷ This could constitute a sufficiently direct connection to the harm caused by the Russian invasion.¹⁰⁸ Accordingly, Belarus’ putting its territory at Russia’s disposal could conceivably make Belarus a party on Russia’s side,¹⁰⁹ depending on how Belarus’ territorial contribution has been co-ordinated with Russia’s military operations, and Belarus’ awareness thereof.

¹⁰⁰See OLC Memo, *supra* note 62, at 44.

¹⁰¹*Ibid.*

¹⁰²UN Security Council, 4726th Meeting, 26 March 2003, UN Doc. S/PV.4726, at 14.

¹⁰³O. Corten, ‘Quels droits et quels devoirs pour les États tiers? Les effets juridiques d’une assistance à un acte d’agression’, in K. Bannelier, T. Christakis and O. Corten (eds.), *L’intervention en Irak et le droit international* (2004), 128.

¹⁰⁴*Horgan v. An Taoiseach et al.* [2003] 2 IR 468, paras. 124–125 (referring the Irish government’s view); ‘Comunicato della Presidenza della Repubblica sulla riunione del Consiglio Supremo di difesa del 19 marzo 2003’, (2003) 86 RDI 904; German Federal Parliament, Stenographic Protocol 15/34, 19 March 2003, at 2728 (statement by the Chancellor).

¹⁰⁵See Sanger et al., *supra* note 3.

¹⁰⁶In the incident that may have triggered Russia’s warning an armed Ukrainian flanker landed on a Romanian airbase and returned unarmed (D. Cenciotti, ‘The Ukrainian Air Force Su-27 That Landed In Romania Flown Back To Ukraine’, *The Aviationist*, 1 March 2022, available at www.theaviationist.com/2022/03/01/ukrainian-su-27-returns-to-ukraine/).

¹⁰⁷Many states have condemned this as aggression under Art. 3(f) of the 1974 Definition of Aggression (Ann. to UN General Assembly, Res. 3314 (XXIX), UN Doc. A/RES/3314 (XXIX) (1974)), see UN General Assembly, Eleventh Emergency Special session, 28 February 2022, UN Doc. A/ES-11/PV.1, at 5–6, 11–16, 20, 22–4, 26–7.

¹⁰⁸For a similar criterion but a different result see W. Benedek, V. Bílková and M. Sassóli, ‘Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine since 24 February 2022’, annexed to OSCE, Note Verbale, 13 April 2022, ODIHR.GAL/26/22/Rev.1, available at www.osce.org/files/f/documents/f/a/515868.pdf, at 5 (‘[T]he Mission considers that as of 1 April [Belarus] is not a party to the IAC, as long as it does not itself commit acts of violence or other acts that would constitute direct participation in the hostilities by persons attributable to Belarus’).

¹⁰⁹Belarus’ own position on this point has been ambiguous, with President Lukashenko acknowledging that Belarus has been ‘participating’ in the war, while insisting that Belarus was not ‘killing anyone’ or ‘sending [its] military anywhere’, see T. Lister, ‘Ukraine Looks Anxiously towards its Northern Border, and a Fresh Influx of Russian Troops into Belarus’, *CNN*, 17 October 2022, available at www.edition.cnn.com/2022/10/17/europe/russia-ukraine-belarus-troops-intl-cmd/index.html. Ukraine’s President Zelenskyy similarly ambivalently considered that ‘[i]n the war that is going on now, [Belarusians] are not on the same side with us’ (President of Ukraine Volodymyr Zelenskyy addressed the citizens of Belarus, 27 February 2022, available at www.president.gov.ua/en/news/prezident-ukrainy-vladimir-zelenskij-obratilsya-k-grazhdanam-73217), while warning that ‘Russia is trying to directly draw Belarus into this war’ (‘It is necessary to Intensify Common Efforts to Create an Air Shield for Ukraine’, Speech by President Volodymyr Zelenskyy at the Video Conference of the Leaders of the Group of Seven and Ukraine, 11 October 2022, available at www.president.gov.ua/en/news/neobhidno-zbilshiti-pilni-zusillya-shob-stvoriti-povityrani-78417).

4.5 Beyond Ukraine

The manifold forms of military co-operation that states use to assist Ukraine and Russia in the current war may add nuance to the claim that this is a war fought with techniques that belong to the past.¹¹⁰ Relatively traditional forms of military co-operation in war, such as weapons deliveries and the provision of territory, will continue to play an important role. Forms of co-operation that involve more advanced military technology, such as the provision of targeting intelligence and co-operation in cyber operations will become increasingly decisive. Accordingly, how states articulate their positions as to when the lines of party status are crossed regarding the war in Ukraine can crucially sharpen the contours of the legal framework for identifying parties in future conflicts.

Given the political sensitivity of the legal determination of party status – both on the international plane and for domestic audiences – states may have an interest in preserving some of the grey space that their past practice in this field has left behind. Yet, precisely because of this sensitivity, political dynamics – internationally as well as domestically – might force states to give up more of that space by setting out their views, if just negatively by further clarifying that their own acts do not make them parties.¹¹¹ As we have seen in the early months of Russia's war against Ukraine, states can perceive a need to address legal issues of party status, among other reasons, to prevent or counter allegations by the other side that the line of party status has been crossed¹¹² or to react to concerns of being 'at war' raised in the domestic political discourse.¹¹³

5. Conclusion

Despite significant changes to the legal meaning of being 'at war', party status remains key to understanding how international law regulates today's wars – even if in different ways than the current political discourse suggests. Many of the complex co-operation patterns that the war in Ukraine displays could likely characterize future conflicts as well. Against that background, the legal framework sketched in this article could serve as an analytical roadmap for establishing who is a party, not only regarding the war in Ukraine but also in future conflicts. The greatest possible certainty on identifying parties benefits the effective implementation of international law in armed conflicts. We can therefore hope that the practical assessments of party status in the war against Ukraine and beyond, including by states, international courts and institutions, and humanitarian organizations, will allow for further specification and operationalization of this roadmap.

¹¹⁰See O'Brien, *supra* note 10.

¹¹¹See note 6, *supra*.

¹¹²See note 7, *supra*.

¹¹³See, for example, the statements by several German cabinet ministers and the Federal chancellor to Parliament (German Federal Parliament, Stenographic Protocol 20/27, 6 April 2022, at 2244, 2274; German Federal Parliament, Protocol 11 May 2022, *supra* note 14, at 2949).