ARTICLES OF WAR

UKRAINE SYMPOSIUM

INTERNATIONAL LAW IN THE CRUCIBLE OF CONFLICT | VOLUME 1

EDITED BY
SEAN WATTS | RONALD ALCALA | MEHMET ÇOBAN

Ukraine Symposium

International Law in the Crucible of Conflict

Volume 1

Edited by

Sean Watts • Ronald Alcala • Mehmet Çoban

WEST POINT
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Keeping the Long Gray Line strong!

Ken (USMA '74) and Lucy Hicks

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FOREWORD

It is with honour that I introduce this edited volume of the *Articles of War's* "Ukraine Symposium." However, I do so with somewhat mixed emotions.

Whilst recognizing the sizable contribution of this academic endeavour, one obviously cannot lose sight of the monumental tragedy that has spawned it. Critics might be forgiven for saying that we hardly need another legal tome to tell us that this is an unlawful war, waged unlawfully. Indeed, the flagrancy, range, and sheer volume of violations can be seen as assaults on the very rule of law itself—hardly a propitious basis for substantive legal debate. But this is, of course, why it is all the more important to defend the international legal order, to stand up for what we believe in, and to hold ourselves to those international law standards that others flout. More than that, we must redouble our efforts as lawyers to make the system work—the international community must be able to get Ukraine the support it needs, to hold other nations and individuals to account for serious violations of international law, and to restore international peace and security.

What marks out this symposium is how it addresses that challenge by providing expert legal analysis on the many practical and pressing issues. Its contributors have provided thoughtful and balanced pieces across a wide range of topics, with great urgency as well as flair. I am gratified that these timely contributions are collated for posterity in this physical volume. They provide an overview of international law issues in the war in Ukraine but are also themselves a valuable contemporary testimony to a year of political upheaval.

John Swords
Legal Adviser and
Director of the Office of Legal Affairs
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INTRODUCTION

The sad human tragedy resulting from Russia's invasion of Ukraine has proved to be both a decisive event for international peace and security and a serious test of the role of law in armed conflict. As the late Professor Yoram Dinstein observed, "The *jus in bello* is facing an unprecedented crisis owing to vast civilian carnage and devastation flagrantly inflicted by a Permanent Member of the Security Council."[1] The conflict undoubtedly marks a pivotal moment in law-of-war development. More than just a test of adherence to law, the Ukraine-Russia conflict has spoken volumes about the law of war as a constantly evolving effort to strike a practical and palatable compromise between the imperatives of military necessity and the urgent demands of humanity.

At the outset of the 2022 phase of Russia's invasion, West Point's Lieber Institute for Law and Warfare launched a symposium to address legal issues arising from the conflict on *Articles of War*, its electronic publication.[2] Initially envisioned as a limited project designed to highlight select developments, the symposium grew to include well over 100 posts. The symposium surveys the full range of topics regulated by treaty and custom, grounded in both the Geneva and Hague traditions of the law of war. It also features posts on adjacent subjects, such as the *jus ad bellum*, international human rights law, international criminal law, and State responsibility. In addition to identifying instances of breach, many of the symposium's posts go deeper, investigating the suitability of the law itself to emerging conditions of combat.

In the spirit of the Lieber Institute's commitment to a pluralistic law of war,[3] we solicited and attracted a diverse collection of perspectives from governments, the armed forces, academia, and humanitarian organizations from around the world. Included are contributions from both established and new voices. Readers of the symposium will discover a rich variety of outlooks and interpretive approaches that enable critical analysis of not only the conflict, but also the international legal regimes that regulate it.

The value of the symposium, not only as a source of current analysis, but also as a tool for training and instruction on the law of war, soon became apparent. During the symposium, we received positive feedback from foreign and defense departments and ministries, as well as members of the armed forces, who are using the contributions in their daily work. Many readers asked whether we planned to publish the symposium as a stand-alone volume.

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[1] Yoram Dinsten, *The Conduct of Hostilities Under the Law of International Armed Conflict: 4th Edition*, Articles of War (Dec. 5, 2022), https://lieber.westpoint.edu/conduct-of-hostilities-loac-4th-edition.

[2] Sean Watts et al., *Symposium Intro Ukraine-Russia Armed Conflict*, Articles of War (Feb. 28, 2022), https://lieber.westpoint.edu/symposium-intro-ukraine-russia-armed-conflict.

[3] Michael N. Schmitt & Sean Watts, *State* Opinio Juris a*nd International Humanitarian Law Pluralism*, 91 Int'l L. Stud. 171 (2015).

The launch of the West Point Press in 2022 presented the opportunity to do so. The West Point Department of Law plans to incorporate the volume into the law of war instruction we provide cadets. Our hope is that academic colleagues elsewhere will find similar uses for this work in their instruction and research. More ambitiously, we hope it proves helpful to law of war practitioners, including military legal advisors, diplomats, and the judiciary.

To facilitate those ends, the symposium can now be found in several formats. First, it will continue to feature on *Articles of War* in its original form. Second, we have compiled the symposium as a single file for download on the Lieber Institute and West Point Press websites. Finally, West Point Press has published printed copies.

We originally published the posts in the order in which we solicited and received them, tracking the conflict's legally significant events. A familiar arc of legal issues emerged. In the conflict's early stages, questions concerning the legality of the invasion, the status and obligations of non-belligerent States, and the conflict's legal status led our coverage. As the conflict intensified and more participants joined the hostilities, questions of individual status featured prominently. Similarly, intensification of the conflict included the use of both new weapons and the expansion of target categories, inspiring posts that evaluate the legality of means and methods of warfare. Then, as the invasion stalled, tragic and seemingly inevitable questions relating to detention, civilian impact and abuse, and obligations during belligerent occupation took on importance.

While sustaining and reflecting on the chronological organization of these legal issues offers a valuable historical account, this volume reorganizes the contributions by subject to enhance its enduring value as a compendium of issues for instruction and research. We hope this format enables readers to investigate discrete legal issues while browsing and consulting adjacent or related topics.

Two cautionary notes are in order. First, the symposium does not cover many instances of blatantly unlawful conduct associated with the conflict. This should not be interpreted as downplaying the legal, political, or moral significance of these condemnable acts. Rather, it reflects our decision to solicit and to prioritize posts addressing legal issues that were in some cases novel, on which doctrinal disagreement could be noted, or that had pressing operational or academic significance.

Second, we caution readers to assess and employ the posts while being mindful of their context. Many were drafted and appeared immediately after or even while the events they addressed unfolded. Accordingly, readers should understand and assess each entry according to the information available at the time of its writing. Further, every post necessarily reflects the inherent limits of the blog format. *Articles of War* is designed to offer concise, even compact, legal discussion and analysis. As a result, most posts manage to outline rather than to treat dispositively their subjects. None is or ever was intended to be a comprehensive exposition of the law in all its complexities.

Of course, we owe an enormous debt of thanks to our contributors. Each gave selflessly of their time and talent, in many cases setting aside competing professional and personal obligations to

write for us. The symposium's success is greatly attributable to their generosity and support of this Lieber Institute project. We owe special thanks in this regard to the contributions of our G. Norman Lieber Distinguished Scholar, Professor Michael Schmitt. His many posts were in every case timely, impeccably written, and expertly researched. Moreover, many posts that do not bear his name profited enormously from his patient coaching and reviews.

We are also grateful to our academic home, the United States Military Academy at West Point. As the symposium gained momentum, we received a crucial injection of support from the 15th Dean of the Academic Board, Brigadier General Shane Reeves, without whom we could not have sustained this effort. We also thank the Office of Legal Affairs at NATO Supreme Headquarters Allied Powers Europe for awarding the Serge Lazareff Prize to COL Winston Williams and LTC Ronald Alcala for their work on the symposium.[4]

As part of the editorial team at *Articles of War*, we owe our deepest thanks to the entire Lieber Institute and to the Department of Law for invaluable editorial support.

The goodwill and collegiality of the faculty and staff of these two organizations is unrivaled. We are also enormously grateful to Professor Eric Talbot Jensen and his students at Brigham Young University Law School for their technical assistance. They were instrumental in helping us convert all hyperlinked references into footnotes for this book. Lastly, we are grateful to our students, the West Point Corps of Cadets. Educating, training, and inspiring them lies at the heart of the Lieber Institute project. It is our great privilege to undertake that project in support of these future leaders.

As with all our work at the Lieber Institute, we offer the symposium and this volume in support of our mission to foster a deeper understanding of the relationship between the law and armed conflict. We hope this work will inspire and support current and future generations to devote rigorous, informed, and considered thought to the delicate legal balance between military and humanitarian interests that the law of war represents.

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[4] Lieber Institute, *NATO SHAPE Serge Lazareff Prize Awarded to COL Williams and LTC Alcala*, Articles of War (Apr. 18, 2022), https://lieber.westpoint.edu/nato-shape-serge-lazareff-prize-williams-alcala.

CHAPTER I

INTERNATIONAL PEACE AND SECURITY

SECTION 1

Law and the International Order

"GREAT POWER COMPETITION" BETWEEN RUSSIA AND UKRAINE: LAW OF ARMED CONFLICT IMPLICATIONS

by Shane Reeves and Robert Lawless | January 19, 2022

In a previous article, we discussed[1] the law-of-war implications arising from what the United States is calling "Great Power Competition" (for example, see Alexander Boroff, *What Is Great-Power Competition, Anyway?*[2] and *Defense 2020: Great Power Competition*[3]). Current events involving Ukraine are a concrete example of such competition and offer an opportunity to expand on our previous analysis. This post clarifies the challenges of regulating "Great Power Competition" while, simultaneously, reminding States of their obligation to comply with the law of armed conflict whatever the character of conflict.

Recent Russian Military Operations Against Ukraine

Over the last few months, Russia has alarmed the United States and its allies by amassing[4] over 100,000 troops along its border with Ukraine. Russian President Vladimir Putin, blaming the West for the rising tensions, recently stated he would consider a military response to any NATO "aggression"[5] in the context of Ukraine. To understand fully the implications of Russia's current troop buildup,[6] it is important to consider the history between these two States. Tension between Russia

[1] Shane Reeves & Robert Lawless, *Reexamining the Law of War for Great Power Competition*, Articles of War (Jan. 27, 2021), https://lieber.westpoint.edu/reexamining-the-law-of-war-for-great-power-competition/.

[2] Alexander Boroff, *What Is Great-Power Competition, Anyway?* Mod. War Inst. (Apr. 17, 2020), https://mwi.usma.edu/great-power-competition-anyway/.

[3] *Defense 2020: Great Power Competition*, Ctr. for Strategic & Int'l Stud. (Jan. 15, 2020), https://www.csis.org/analysis/great-power-competition.

[4] Chandelis Duster & Radina Gigova, *Blinken Warns Russian Aggression in Ukraine Would Trigger 'Serious Consequences',* CNN Politics (Nov. 30, 2021, 9:16 AM), https://www.cnn.com/2021/11/30/politics/antony-blinken-russia-ukraine/index.html.

[5] Andrew Roth, *Putin Warns of Possible Military Response Over 'Aggressive' NATO*, The Guardian (Dec. 21, 2021, 8:17 AM), https://www.theguardian.com/world/2021/dec/21/putin-warns-of-possible-military-response-to-aggressive-nato-russia.

[6] Associated Press, *Why Russia-Ukraine Tensions Have Again Reached a Boiling Point*, NPR (Dec. 7, 2021, 11:25 AM), https://www.npr.org/2021/12/07/1062092373/why-russia-ukraine-tensions-have-again-reached-a-boiling-point.

and Ukraine dates back hundreds[7] of years. In recent decades, Ukraine's cooperation and alignment with NATO and NATO member States (see *Relations with Ukraine*[8]) has been a constant source of friction with Russia. It is through the lens of NATO-Ukraine cooperation that Russia observed 2004 and 2005 anti-government protests in Ukraine, known as the "Orange Revolution."[9] The protests sparked deep concerns in Russia and contributed to rising hostility between the two States. More recently, a series of perceived provocations, beginning in 2014, prompted Russia to deploy forces designed specifically to undermine Ukraine's democratic government.

In February of that year, Ukrainian President Yanukovych fled[10] following massive protests over his pro-Russian positions and heavy-handed response to democratic demands. Due to the strategic and historic importance of Ukraine to Russia, Yanukovych's departure and replacement with a Western-friendly government was untenable for President Putin. Russia quickly counteracted with "a combination of Russian regular forces and unidentified operatives"[11] to occupy "the recognized territory of Ukraine on the Crimean Peninsula." Despite drawing fierce international condemnation, including from then United States Secretary of State John Kerry—who called[12] the invasion a blatant violation of international law—Russia annexed[13] Crimea in March 2014. This occupation, which is ongoing, activated the law of armed conflict between Russia and Ukraine.

Almost simultaneously with its occupation of Crimea, Russia supported[14] separatist militias in the Donetsk and Luhansk regions of eastern Ukraine. The militias' access to sophisticated weapons, coupled with reports of Russian soldiers directly participating in the conflict, led NATO Supreme Allied Commander General Philip Breedlove to state, "Russia is playing a leading role in the activities of the armed separatist groups in eastern Ukraine."[15] Russia denied participating in the conflict but did not refute claims "that up to 4,000 Russians, including active-duty soldiers currently on leave, had been fighting against Ukrainian government forces."[16] Since 2014, the non-international armed conflict[17] between

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7 Brett Forrest, *Russia-Ukraine Conflict Lies in the Bones of 11th-Century Prince*, Wall St. J. (Jan. 1, 2022, 11:00 AM), https://www.wsj.com/articles/russia-ukraine-conflict-lies-in-the-bones-of-an-11th-century-prince-11641052801.

8 *Relations with Ukraine*, North Atlantic Treaty Organization (July 28, 2023), https://www.nato.int/cps/en/natolive/topics_37750.htm.

9 Clifford J. Levy, *Orange Revolution Parties Will Share Power in Ukraine*, N.Y. Times (Oct. 16, 2007), https://www.nytimes.com/2007/10/16/world/europe/16iht-16ukraine.7905935.html?searchResultPosition=7.

10 Shaun Walker, U*kraine's Former PM Rallies Protesters After Yanukovych Flees Kiev*, The Guardian (Feb. 22, 2014), https://www.theguardian.com/world/2014/feb/22/ukraine-president-yanukovych-flees-kiev.

11 Shane R. Reeves & David Wallace, *The Combatant Status of the "Little Green Men" and Other Participants in the Ukraine Conflict*, 91 Int'l L. Stud. 361 (2015), https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1321&context=ils#page=3.

12 Will Dunham, *Kerry Condemns Russia's 'Incredible Act of Aggression' in Ukraine*, Reuters: Emerging Markets (Mar. 2, 2014, 7:13 AM), https://www.reuters.com/article/us-ukraine-crisis-usa-kerry/kerry-condemns-russias-incredible-act-of-aggression-in-ukraine-idUSBREA210DG20140302.

13 Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, N.Y. Times (Mar. 18, 2014), https://www.nytimes.com/2014/03/19/world/europe/ukraine.html.

14 Steven Woehrel, *Cong. Research Serv., RL 33460*, Ukraine: Current Issues and U.S. Policy (Sept. 4, 2014).

15 *Id.*

16 Neil MacFarquhar & Michael R. Gordon, *Ukraine Leader Says "Huge Loads of Arms" Pour in from Russia*, N.Y. Times (Aug. 28, 2014), https://www.nytimes.com/2014/08/29/world/europe/ukraine-conflict.html.

17 Reeves & Wallace, *supra* note 11.

Ukraine and separatist militias in eastern Ukraine has continued almost unabated. The UN Office of the High Commissioner for Human Rights reports[18] that violence has resulted in more than 13,000 deaths and more than 30,000 wounded.

Russia's hostility toward Ukraine—whether the ongoing occupation of Crimea, the violent insurgency in the Donetsk region, or the most recent troop buildup—indicates a willingness to make threats or use force to further strategic interests. Russia's behavior clearly implicates both the *jus in bello*[19] (also known as the law of armed conflict) and the *jus ad bellum*[20] strands of the law of war. More broadly, the conflict offers an opportunity to explore the international legal implications of a Great Power Competition.

It is worth noting further that, while Russia's behavior most obviously relates to the parallel[21] armed conflicts noted above—the belligerent occupation by Russia of Ukraine and the non-international[22] armed conflict between Ukraine and Russian-backed separatists—these developments have important broader implications for other States involved in Great Power Competition. Tension between Russia and Ukraine has always garnered close attention from other powers, such as the United States[23] and the United Kingdom.[24] Russia's recent troop deployments on the Ukrainian border are no less alarming[25] to these States. Accordingly, while the discussion that follows is situated within the context of relations between Russia and Ukraine, it is broadly relevant to other elements[26] of Great Power Competition.

The remainder of this post examines three aspects of Great Power Competition that are relevant to the Russia-Ukraine situation and that also raise important questions related to the law of armed conflict. While Russia's behavior implicates both the *in bello* and *ad bellum* strands of the law of war, except where explicitly noted otherwise, we limit our discussion to *in bello* issues (which we refer to as the law of armed conflict).

"Large-Scale Military Operations" and the Law of Armed Conflict

For some time, references to "grey zones" and operations below the armed conflict threshold[27] have been common in law-of-

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18 *Death Toll Up to 13,000 in Ukraine Conflict, Says UN Rights Office*, Radio Free Eur. Radio Liberty (Feb. 26, 2019, 11:23), https://www.rferl.org/a/death-toll-up-to-13-000-in-ukraine-conflict-says-un-rights-office/29791647.html.

19 U.S. Dep't of Def., Law of War Manual § 1.1.2 (June 2015, updated July 2023) [hereinafter DoD Law of War Manual].

20 *Id.* at § 1.11.

21 Reeves & Wallace, *supra* note 11.

22 *Past Conflicts: Non-International Armed Conflicts in Ukraine*, Geneva Acad. (Oct. 19, 2022), https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-ukraine.

23 Steven Pifer, *Ukraine, Russia and the U.S. Policy Response*, Brookings (June 5, 2014), https://www.brookings.edu/articles/ukraine-russia-and-the-u-s-policy-response/.

24 Foreign & Commonwealth Office & William Hague, *Transcript of William Hague's Oral Statement to Parliament: UK's Response to the Situation in Ukraine*, Gov.UK (Mar. 4, 2014), https://www.gov.uk/government/speeches/uks-response-to-the-situation-in-ukraine.

25 Connor O'Brien & Paul McLeary, *Russian Buildup Sparks New Push to Send Weapons to Ukraine*, Politico (Nov. 24, 2021, 5:24 PM), https://www.politico.com/news/2021/11/24/russia-push-new-weapons-ukraine-523362.

26 The White House, National Security Strategy of the United States of America (Dec. 2017).

27 David A. Wallace & Shane R. Reeves, *Protecting Critical Infrastructure in Cyber Warfare: Is it Time for States to Reassert Themselves?* 53 UC Davis L. Rev. 1607 (2020), https://lawreview.law.ucdavis.edu/issues/53/3/53-3_Wallace_Reeves.pdf.

war discussion[28] and analysis.[29] Moreover, States conduct military operations in domains such as cyber and space where attribution is difficult or impossible and physically destructive effects are rare (at least thus far). In these situations, the difficult political, strategic, and legal calculations we raised in our prior post[30] will persist. No doubt, Russia and others will conduct operations[31] that place pressure on the armed conflict legal threshold to exploit the challenges associated with these calculations.

However, the Russian troop buildup near Ukraine offers an opportunity to examine a separate element of potential great-power armed conflict—large-scale military operations. These operations consist of "extensive joint combat operations in terms of scope and size of forces committed, conducted as a campaign aimed at achieving operational and strategic objectives."[32] The U.S. Army describes such operations on land as involving "sustained combat operations involving multiple corps and divisions"[33] (with corps typically containing[34] two to five divisions of approximately 15,000 soldiers each). The Russian troop buildup on the Ukrainian border easily fits the size and scope envisioned by large-scale combat operations.

Obviously, such conflict would be vast in scale and highly destructive. The law of armed conflict is replete with standards that require judgment to balance competing factors. These include notions of "reasonableness,"[35] "feasibility,"[36] "definite military advantage,"[37] and "civilian harm."[38] Furthermore, these standards are prospective, requiring commanders and other combatants to evaluate their relative weight based on highly ambiguous[39] factual circumstances. The deadliness and destructiveness of large-scale combat operations will impact the way combatants apply these standards.

Consider, for example, Russia's reported deployment[40] of hundreds of tank and field artillery weapons near the Ukrainian border. Such vehicles and weaponry are notoriously

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28 Aurel Sari, *Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats*, 33 Cambridge Rev. Int'l Aff. 846 (2020), https://www.tandfonline.com/doi/full/10.1080/09557571.2020.1752147.

29 Michael N. Schmitt, *Grey Zones in the International Law of Cyberspace*, 42 Yale J. Int'l L. Online 2, https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2017/08/Schmitt_Grey-Areas-in-the-International-Law-of-Cyberspace-1cab8kj.pdf.

30 Reeves & Lawless, *supra* note 1.

31 J. Andres Gannon, Erik Gartzke, Jon Lindsay & Peter Schram, *Why Did Russia Escalate Its Gray Zone Conflict in Ukraine?*, Lawfare (Jan. 16, 2022, 10:01 AM), https://www.lawfaremedia.org/article/why-did-russia-escalate-its-gray-zone-conflict-ukraine.

32 U.S. Dep't of Army, Doctrine Pub. 3-0, Operations para. 1-28 (July 2019), [hereinafter ADP 3-0].

33 *Id.* para. 1-7.

34 *Corps*, U.S. Dep't of Def., https://www.defense.gov/Multimedia/Experience/Military-Units/Army/#army.

35 DoD Law of War Manual § 5.10.2, *supra* note 19.

36 Protocol (I) Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 57, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (entered into force Dec. 7, 1978) (signed by the United States Dec. 12, 1977, not transmitted to U.S. Senate, see S. Treaty Doc. No. 100-2 (1987)).

37 United Kingdom Ministry of Defence, Joint Service Publication 383, The Joint Service Manual of the Law of Armed Conflict (2004), ¶ 5.4 [hereinafter UK LOAC Manual].

38 DoD Law of War Manual § 5.2.3. *supra* note 19.

39 *Id.*

40 Andrew Roth, Dan Sabbagh, David Blood & Niels d Hoog, *Russia-Ukraine Crisis: Where Are Putin's Troops and What Are His Options?* The Guardian (Feb. 14, 2022), https://www.theguardian.com/world/2021/dec/17/russia-ukraine-crisis-putin-troops-visual-guide-explainer.

difficult[41] to destroy.[42] As a result, belligerents must deploy anti-tank weapons and methods of warfare that are highly destructive. The resulting combination of immense military capability and high-stakes battle could compel belligerents to forgo self-restraint. Parties will likely marshal significant combat power[43] toward the goal of quick and complete destruction[44] of the opposing forces.

Importantly, the law of armed conflict anticipates substantial resorts to lethal force. For example, the principle of military necessity[45] recognizes belligerents' authority to apply sufficient combat power to achieve the "complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources." Nor does the law of armed conflict necessarily prohibit extensive collateral damage during such operations. The principle of proportionality[46] only forbids[47] those attacks in which the expected incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, would be *excessive* compared with the concrete and direct military advantage anticipated. Considering the high stakes of such combat operations, belligerent parties may reasonably conclude that substantial military advantage would ensue from such attacks. As always, interpretation and application of the law of armed conflict must account for the nature of war and the character of twenty-first century armed conflict (see Professor Eric Talbot Jensen's comments here).[48]

In this regard, it is worth reiterating, as we argued in our earlier post,[49] that leaders of great powers and the general public must differentiate policy constraints that characterized the counterinsurgency and counterterrorism operations of the last twenty years and legal restraints that govern armed conflict. An armed conflict between Russian and Ukrainian forces—and other States that could join either side—would likely afford less space for the policy constraints of "near certainty" in targeting operations aimed at ensuring civilians would not be injured or killed.

Means and Methods of Warfare

Large-scale military operations necessarily implicate issues related to the means and methods of warfare associated with conventional warfare. As already noted, this includes armored forces capable of massive destruction that feature advanced protective capabilities. But States should also expect significant developments in emerging technology that place further pressure on the law of armed conflict. For

41 Vincent Delany, *On Killing Tanks*, Mod. War Inst. (Mar. 23, 2020), https://mwi.usma.edu/on-killing-tanks/.

42 Kyle Mizokami, *Autonomous Drones Have Attacked Humans. This Is a Turning Point*, Popular Mechanics (Nov. 2, 2021), https://www.popularmechanics.com/military/weapons/a36559508/drones-autonomously-attacked-humans-libya-united-nations-report/.

43 ADP 3-0, *supra* note 32, para 3-46.

44 *Id.*

45 United Kingdom, Manual of the Law of Armed Conflict Amendment 3 (Sept. 2010) [hereinafter UK LOAC Manual Amendment].

46 AP I, *supra* note 36, art. 51,

47 *Id.*, art. 57.

48 Eric Talbot Jensen, *No Plan Survives First Contact. Will the LOAC? Year Ahead—2022*, Lieber Institute for Law & Warfare: Articles of War (Jan. 26, 2022), https://lieber.westpoint.edu/year-ahead-2022/.

49 Reeves & Lawless, *supra* note 1.

example, in early 2021, reports surfaced[50] of a Turkish-made drone equipped with machine learning algorithms that enable it to operate autonomously in some respects. The interim Libyan government reportedly used[51] the drone, known as the Kargu-2, to attack rival, Russia-supported forces. (See Professor Chris Jenks's comments[52] here discussing this and another potential deployment of autonomous systems in the 2020 armed conflict between Armenia and Azerbaijan.) This is perhaps the impetus behind Russia's development of drones capable of engaging other drones[53] directly in combat. Recently, Russia tested[54] this drone technology over Crimea, which most certainly was intended to signal its deployment in a potential Russian invasion of Ukraine.

These technical developments implicate questions related to preserving human control and judgment in the targeting process. To identify just one example of such questions, States must grapple with whether the delegation of some targeting decisions by humans to non-human capabilities such as autonomous weapons systems will be an option under the law of armed conflict. From our vantage point, current estimates about the character of future warfare will render the significant involvement of non-human capabilities in targeting decisions essential to any hope of operational success, at least in some contexts.

The U.S. Army, in developing concepts for future warfighting, anticipates an operational environment[55] in which the speed and tempo of warfare reach levels so far beyond human cognitive capabilities that belligerents must delegate at least some aspects of military decision-making to non-human, algorithmic-based tools[56] and capabilities. This is not to suggest an approach in which humans turn warfighting over to machines. Rather, it suggests a more nuanced situation in which humans monitor a series of complex, interrelated delegations (to both subordinate humans and non-human capabilities) of authority, adjusting such delegations based on operational circumstances.

Multi-Domain Operations

Armed conflict in the context of Great Power Competition undoubtedly will feature military operations conducted through all domains of warfare,[57] including cyber and outer space. Indeed, the United States military is in the midst of a major doctrinal shift to an operational concept[58] marked by multi-domain

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50 Hitoshi Nasu, *Kargu-2 Autonomous Attack Drone: Lethal & Ethical Dimensions,* Articles of War (June 21, 2021), https://lieber.westpoint.edu/kargu-2-autonomous-attack-drone-legal-ethical/.

51 Mizokami, *supra* note 42.

52 Chris Jenks, *Lethal Autonomous Weapons: 2021 and the Road to Nowhere. Year Ahead—2022*, Articles of War (Jan. 26, 2022), https://lieber.westpoint.edu/year-ahead-2022/.

53 Thomas Newdick, *Russia's Predator-Like Drone Is Now Shooting Down Other Drones*, The Drive: The Warzone (Dec. 20, 2021, 4:29 PM), https://www.thedrive.com/the-war-zone/43585/russias-predator-like-drone-is-now-shooting-down-other-drones.

54 *Id.*

55 U.S. Dep't of Army, AFC Pamphlet 71-20-1, Army Futures Command Concept for Maneuver in Multi-Domain Operations, 2028 (July 7, 2020) [hereinafter DA Pam. 71-20-1].

56 *Id.*

57 Cong. Research. Serv., Defense Primer: Army Multi-Domain Operations (MDO) (Nov. 21, 2022) [hereinafter Defense Primer].

58 ADP 3-0, *supra* note 32.

operations[59] (MDO). The MDO concept brings to bear kinetic and non-kinetic combat force to defeat peer and near-peer adversaries in a contested, access-denied operational environment. MDO emphasizes[60] activities across the divide between peacetime and wartime, including the ability to penetrate and disrupt peer adversaries' robust anti-access and area denial systems and exploit the resultant freedom of maneuver.

The shift to MDO is not merely conceptual. It has also played out in practice. As with autonomous systems, recent examples of MDO have provided a glimpse into the future of warfare. For example, during the 2008 armed conflict between Russia and Georgia, Russia—in support of its conventional operations—engaged in cyber operations[61] aimed at Georgian government websites, media entities, and business organizations. A more recent example, although not as part of an armed conflict, involved cyber operations[62] between Israel and Iran. While covert operations between the two States have mostly been aimed at military and government targets, recently the two States have engaged in operations against civilian entities[63] such as a fuel distribution system. Finally, in what is likely preparation for the expansion of armed conflict to outer space, Russia recently launched a missile[64] at an inoperable, 4,400-pound satellite, dispersing thousands of pieces of space debris.

These operational developments indicate that the troop buildup on the border of Ukraine includes a multi-domain aspect in which Russia's cyber capabilities support a potential invasion. This will raise critical questions about targetability of space objects and cyber "objects," and how the law of armed conflict applies in non-kinetic military operations. (For a valuable overview of the international legal framework that applies to Russian cyber operations against Ukraine, see Professor Michael Schmitt's recent *Articles of War* post.)[65]

First, the applicability of many law-of-armed-conflict rules to cyber and space operations will depend—as a threshold matter—on whether such operations constitute "attacks." This question is important because many, if not all, targeting rules under the law of armed conflict are limited to operations that qualify as attacks, defined as "acts of violence against the adversary, whether in offense or in defense."[66] This contested[67] but

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59 Defense Primer, *supra* note 57.

60 U.S. Dep't of Army, TRADOC Pamphlet 525-3-1, U.S. Army in Multi-Domain Operations, 2028 (Dec. 6, 2018).

61 *Georgia-Russia Conflict* (2008), (Sept. 17, 2021), https://cyberlaw.ccdcoe.org/wiki/Georgia-Russia_conflict_(2008).

62 Omid 6, Khazani & Nabih Bulos, *Hacking Slugfest Between Iran and Its Foes Sparks Fears of a Wider Cyberwar*, L.A. Times (Dec. 23, 2021, 11:01 AM), https://www.latimes.com/world-nation/story/2021-12-23/iran-israel-hacking-heightens-fears-cyberwar.

63 Farnaz Fassihi & Ronen Bergman, *Israel and Iran Broaden Cyberwar to Attack Civilian Targets*, N.Y. Times (Nov. 27, 2021), https://www.nytimes.com/2021/11/27/world/middleeast/iran-israel-cyber-hack.html.

64 Christopher J. Borgen, *Russia's ASAT Test and the Development of Space Law*, Articles of War (Nov. 21, 2021), https://lieber.westpoint.edu/russia-asat-test-development-space-law/.

65 Michael N. Schmitt, *Russian Cyber Operations and Ukraine: The Legal Framework*, Articles of War (Jan. 16, 2022), https://lieber.westpoint.edu/russian-cyber-operations-ukraine-legal-framework/.

66 AP I, *supra* note 36, art. 49.

67 Michael N. Schmitt, *Rewired Warfare: Rethinking the Law of Cyber Attack*, Int'l Rev. of the Red Cross (Sept. 2015), https://international-review.icrc.org/articles/rewired-warfare-rethinking-law-cyber-attack.

as yet unresolved question[68] serves as a threshold for the potential legal regulation of many cyber operations.

Prominent scholars have sought to address this and other questions. States must do the same.

Second, even assuming the applicability of targeting rules under the law of armed conflict to non-kinetic cyber and space operations, serious questions remain about how legal terms developed in the age of conventional warfare apply to these new domains. For example, under the principle of distinction[69] and its derivative rules,[70] civilian objects may not be objects of attack. Civilian objects are[71] those objects that do not qualify as military objectives. The latter consist of "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[72]

This legal framework poses significant challenges for operations conducted in the cyber domain, characterized[73] not by a clean demarcation between civilian and military infrastructure, but rather by a geographically vast, interconnected and interdependent network of communication technology often serving both civilian and military purposes. Given the civilian object–military objective framework, it is uncertain how effective the rules related to distinction can be. Rather, protection for cyber and space infrastructure that serves civilian purposes will be furthered primarily[74] through the principle of proportionality,[75] which prohibits attacks which cause excessive collateral damage and requires belligerents to implement feasible precautions to protect civilians and civilian objects.

However, application of these rules in the context of a multi-domain invasion between Great Powers—such as the potential Russian invasion of Ukraine—is no easy task. As discussed above, the likely intense scale of hostilities combined with the perceived stakes of winning or losing will significantly color the belligerents' assessment of terms such as "concrete and direct military advantage."[76] Further, belligerents will be strongly tempted to engage in non-kinetic cyber and space operations against civilian infrastructure, both to preoccupy the adversary with domestic concerns as well as to undermine civilian resolve and support for the State's war efforts. Once again, leading scholars have begun the work of assessing how the law of armed conflict applies in emerging domains of war. Most prominently, the *Tallinn Manual 2.0*[77]

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68 Cordula Droege, *Get off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians*, Int'l Rev. of the Red Cross (June 2012), https://international-review.icrc.org/articles/get-my-cloud-cyber-warfare-international-humanitarian-law-and-protection-civilians.

69 AP I, art. 57, *supra* note 36.

70 *Id.* at art. 52.

71 *Id.*

72 *Id.*

73 Wallace & Reeves, *supra* note 27.

74 *Id.*

75 AP I, *supra* note 36, art. 57.

76 *Id.*

77 Tallinn Manual 2.0 on the Int'l Law Applicable to Cyber Operations (Michael N. Schmitt ed., 2017) [hereinafter Tallinn 2.0].

comprehensively analyzes how international law, including the law of armed conflict (see chapter 17[78]), applies in the cyber domain.

Conclusion

This post's purpose was twofold. First, Russia's recent military buildup at the border of Ukraine afforded us an opportunity to revisit the concept of Great Power Competition and examine its law-of-armed-conflict implications. Indeed, this troubling development provides greater detail and perhaps clarity about what such competition—should it devolve to armed conflict—would look like in practice. It is likely that the combination of belligerents engaged in large-scale military operations and the deployment of emerging forms of battlefield weaponry and technology poses significant interpretive challenges for the law of armed conflict.

Second, and closely related to the first, we wished to highlight the need for Great Powers to be mindful of their legal obligations in the conduct of hostilities under the law of armed conflict. States must give due consideration to these obligations not only during but also before armed conflict. These legal obligations include those highlighted above but also include restrictions on the use of force found in the *jus ad bellum* as well as the threshold questions lying at the heart of the *jus in bello*, such as the classification of armed conflict and the classification of persons and groups on the battlefield.

Great Power Competition and the risk of armed conflict between States of enormous power and resources is not a hypothetical concern, nor is it one which resides in the distant future. Rather, the possibility of such conflict has arrived. The Russian military buildup at the border of Ukraine serves as a prominent example of its arrival. States and scholars concerned with the law of war must wake up to this reality.

[78] *Id.*

ON WAR

by Andrew Clapham | Mar 5, 2022

As the invasion of Ukraine was starting, the Russian Ambassador to the United Nations responded to the Ukrainian Special Envoy, "Don't call this a war. This is called a 'special military operation in Donbass.'"[79] Other Russian ambassadors[80] reiterated the statement beyond the Security Council debate. Reports[81] indicate that the media in Russia were ordered not to use certain words in their reporting. These words were "attack," "invasion," and "war." At the same time, some warned[82] that negative commentary in Russia would be seen as treason, and it has been suggested[83] that some government officials fear that their resignation would be considered treason. Whether or not the Russian Government considers itself to be at war, wartime thinking is omnipresent.

The use of the word war can have significant effects. Not only might it embolden some to think that they are entitled to do anything necessary to win the war, but the word "war" also rightly strikes terror in the minds of those who know they will be the victims of bombardment, shooting, and unconscionable violence. This brief post asks whether there are any legal implications behind the designation "war" in this conflict and beyond. A fuller answer can be found elsewhere.[84]

Of immediate significance is the question of whether the obligations of neutrality can only be triggered by a formal Declaration of War. As explained in another post[85] in this series, the law is uncertain. Those States that are supplying weapons to the Ukrainian Government have not necessarily explained how their actions can be considered to be in conformity with the law of neutrality in time of war. One explanation could be that in the absence of a Declaration of War or a Declaration of Neutrality, the international law obligations of neutrality do not apply. It was often suggested that the absence of a State of War between China and Japan in the 1930s meant the United States could send arms to China without violating the law on neutrality.

A second explanation could be that sending arms is justified as a reprisal to the act of

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79 *Ukraine Events Can't Be Called War, This Is a Special Military Operation—Russian's UN Envoy,* TASS: Military Operation in Ukraine (Feb. 24, 2022), https://tass.com/politics/1409547.

80 Jonisayi Maromo, *It's Not an Invasion—It's a Special Military Operation, Says Russian Embassy in South Africa*, IOL (Feb. 25, 2022), https://www.iol.co.za/news/politics/its-not-an-invasion-its-a-special-military-operation-says-russian-embassy-in-south-africa-fa6750bd-8ac7-4fa1-9b49-230e6adeaf80.

81 Andrew Roth, *'Don't Call It a War'—Propaganda Filters the Truth About Ukraine on Russian Media*, The Guardian (Feb. 26, 2022), https://www.theguardian.com/world/2022/feb/26/propaganda-filters-truth-ukraine-war-russian-media.

82 Anton Troianovski, *Russians Now See a New Side to Putin: Dragging Them into War*, N.Y. Times (Feb. 24, 2022), https://www.nytimes.com/2022/02/24/world/europe/putin-russia-ukraine.html.

83 Marc Bennets, *Putin 'Hid Ukraine Invasion Plan from Cabinet, Who Are Now Too Scared to Resign,'* The Times (Mar. 3, 2022), https://www.thetimes.com/world/russia-ukraine-war/article/putin-hid-ukraine-invasion-plan-from-cabinet-who-are-now-too-scared-to-resign-q9rmxbqgc?region=global.

84 Andrew Clapham, War (2021).

85 Wolff Heintschel von Heinegg, *Neutrality in the War Against Ukraine*, Articles of War (Mar. 1, 2022), https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/.

aggression. This was the argument of the United States to justify its arming of the United Kingdom at the start of the Second World War before the United States entered the war. Today such arming of a belligerent might be seen as "collective countermeasures"[86] in response to "severe violations of collective obligations."

A third explanation would be that States now consider they have an obligation to "cooperate to bring to an end through lawful means any serious breach"[87] of a peremptory norm such as the prohibition of aggression. This is coupled with their obligation not to "render aid or assistance in maintaining that situation."[88] If international law demands that States cooperate to bring to an end a war of aggression and deny help to the aggressor, then it cannot at the same time demand respect for the older laws on neutrality in wartime.

Lastly, the argument could be made that the apparent breach of obligations concerning neutrality is covered by collective self-defence as suggested by Article 21 of the International Law Commission's Articles on State Responsibility.[89]

A connected issue relates to the seizure and confiscation of contraband of war and the operation of prize law. If the law of neutrality applies, then contraband on neutral vessels is subject to seizure. Under the traditional law of war, explained in manuals such as the U.S. *Law of War Manual*,[90] a belligerent State may capture neutral merchant vessels and civil aircraft if they are carrying contraband (goods susceptible to use in armed conflict). In addition, it is said that "Enemy merchant vessels may be captured wherever located beyond neutral territory. §13.5.1."

Applied to the present conflict, such rules would mean that Russia could capture all neutral vessels carrying arms to Ukraine and all Ukrainian merchant vessels outside neutral territory. Russia could then have a Russian prize court adjudicate them as good prize and acquire property rights in rem over these vessels. But it seems incongruous that the new international law that outlaws aggression would yield to an older rule which rewards a party that has chosen to go to war.

I would suggest that it is time to agree that, even if in the past it was accepted that States could keep what they win in war, including territory and booty of war, we should no longer accept that there are international law rules that authorize a belligerent State to acquire neutral or enemy property (public and private). It is not enough to point out that this is customary or that this is simply how wars were fought in the past. There is no justifiable reason to cling to ideas from the era of naval economic warfare. It seems unconscionable that either Russia or Ukraine would have the right to keep whatever it can seize from the other side and claim that it is entitled to it under the laws of war.

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86 James Crawford (Special Rapporteur), *Third Rep. on State Resp.*, U.N. Doc. A/CN.4/507 (2000), https://legal.un.org/ilc/documentation/english/a_cn4_507.pdf.

87 Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, U.N. (2001), [hereinafter Responsibility of States for Internationally Wrongful Acts].

88 *Id.*

89 *Id.*

90 U.S. Dep't of Def., Law of War Manual (July 2023).

Do these laws of war concerning the seizure of ships on the high seas apply today? For some these antiquated laws of war are applicable only in time of a formally Declared War; for others they would also apply to an inter-State conflict of a certain duration and intensity. I have suggested elsewhere[91] an alternative approach. I would argue that these rules should no longer apply in an era in which going to war is illegal and considered both an act of aggression and as constituting the crime of aggression. It makes no sense that, where a State has embarked on a war of aggression, it can seize enemy merchant ships, along with the enemy goods they are carrying, and keep that property once the war is over (whether War is Declared or not).

A word on the "necessities of war." The phrase is still sometimes invoked as if it excuses all kinds of crimes and abuses. It is time to completely entomb the idea of *"Kriegsräson geht vor Kriegsmanier,"* sometimes translated as the "necessities of war take precedence over the rules of war." It should be beyond question that military necessity is only relevant as an excuse for avoiding a humanitarian law commitment where the treaty provision includes such an explicit exception. For example Article 8[92] of Geneva Convention I on the wounded explicitly accepts that access by certain representatives can be denied on grounds of "imperative military necessities." But the vast majority of international humanitarian law provisions allow for no such exception. In the absence of a specific exception, one cannot appeal to military necessity or the necessities of war to get out of international obligations. International humanitarian law knows no general exception of military necessity or necessities of war.

There is obviously no such exception to the prohibition on torture either international humanitarian law or human rights law. The Convention Against Torture[93] reiterates that there is nothing special about wartime: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

Let us continue by looking at human rights law and pick a few circumstances where war is particularly pertinent. Certain human rights treaties abolish the death penalty but allow for exceptions in time of war. The expression "time of war" in this context means a time of Declared War, or a State of War officially proclaimed.

A separate issue arises under the International Covenant on Civil and Political Rights, which demands that "propaganda for war" be prohibited by law. The UN Human Rights Committee has explained[94] that this means

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91 Andrew Clapham, *Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law*, 97 Int'l. L. Stud. 1200 (2021), https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2984&context=ils.

92 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 8, 6 U.S.T. 3114, 75 U.N.T.S. 970 [hereinafter GWS].

93 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 2, 1465 U.N.T.S. 85 [hereinafter CAT], https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading.

94 Office of the High Commissioner for Human Rights, *General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred*, CCPR/art.20 (July 29, 1983), https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf.

that promoting aggression is to be prohibited, while rallying support for sovereign self-defence in the face of an aggressive war would not be considered propaganda for war.

The same treaty protects against the arbitrary deprivation of life. If a life is lost as a result of an act of aggression, an illegal war, then all those killed have had their human rights violated and the State is responsible under international law. This rule complements the international humanitarian law rules that protect civilians and combatants who have laid down their arms. It covers all those combatants and civilians killed whatever threat they posed. This should change how we see the casualties of war. We should care about the soldiers killed by the aggressor in wartime; their human rights have been violated. We should care about the civilians killed as "proportionate collateral damage" in an attack on a military objective; these are human rights violations. The killings are arbitrary deprivations of the right to life because they are committed as part of a violation of the UN Charter in an aggressive war. The UN Human Rights Committee confirmed[95] this in 2019 when it stated, in unambiguous terms:

> States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 [on the right to life] of the Covenant. (para 70).

The idea that disputes should be settled by resorting to war is dead. The old idea that States should be entitled to acquire the territory seized in war is also finished. As stated by consensus by the General Assembly in 1970, "The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force."[96] No territory gained by any side in the Russia-Ukraine conflict can be legally acquired by either State.

The time has come to consign a number of other customs to the legal dustbin. It should no longer be possible for States to seize anyone else's property as prize, or booty of war. Going to war cannot confer international law rights to other peoples' things and territory. And it is time to count everyone's lives in war. Each victim of aggression counts—combatants, civilians, and yes even civilians taking up arms to save their lives and the lives of others. An aggressive war forces us to evaluate some of our assumptions. Ideas about belligerent equality and booty of war are no longer appropriate. The laws of war may never look the same again.

[95] General Comment No. 36 of the Human Rights Committee, CCPR/C/GC/36/Art.6 (Sept. 3, 2019).

[96] U.N. G.A. Res 3314 (XXIX) (Definition of Aggression), U.N. Doc. A/RES/3314 (Dec. 14, 1970).

RUSSIA'S ILLEGAL INVASION OF UKRAINE & THE ROLE OF INTERNATIONAL LAW

by Michael Kelly | Mar 4, 2022

The United States' leadership of Western opposition to Russia's invasion of Ukraine is the correct response. No question. The entire international system of States is based upon Westphalian notions of sovereign equality, border inviolability, territorial integrity, political independence, and autonomy. Russia violated each of these norms in its treatment of Ukraine, and Vladimir Putin is trampling key provisions of the U.N. Charter enshrining them as law.

Putin's Playbook

Moscow's highly orchestrated international legal pirouette looks familiar: (1) denial that Ukraine was even a country prior to Russia's recognition of it, (2) recognition of new independent States dominated by Russian-speaking inhabitants emerging from Ukrainian territory, (3) allegation of atrocities committed upon those people by Ukrainian forces, (4) requests for military assistance by these new governments, and (5) deployment of Russian forces in response to those requests. This same sequence unfolded in 2014 and ended with Crimea's request to join Russia, followed by its annexation—ultimately the same ending that will play out with Ukraine's Donetsk and Luhansk regions.

Much has been made[97] about this entry of Putin's "playbook." Entirely appropriate analogies have been drawn[98] to Germany's absorption of Czechoslovakia's Sudetenland in 1938, ostensibly to protect German-speaking people being abused by the Czech government. To be sure, this would be like Mexico invading southwestern counties in Texas to protect Spanish speakers living there—absurd on its face. But these parts of the playbook are actually quite older than that, and we should be clear-eyed about who wrote them.

It traces at least as far back as the late-19th century era of colonialism. As but one example of that period's nearly unrestrained territorial expansions, even the United States slow-rolled an annexation of Hawaii[99] in the 19th century, allegedly to protect Americans. The United States denied Hawaii's existence as a State prior to our recognition of it in the 1840s, opening the door to U.S. sugar interests consolidating this trade. By the 1890s enough Americans had moved to the islands, taking over key economic sectors, that the monarchy's power became significantly diluted. Eventually, local Americans formed a Committee of Safety that deposed the Queen and requested that the United States land a force to protect them from alleged abuses—which it did, from the *U.S.S. Boston*. A new

[97] Sergei Guneyev, *Ukraine: Putin's Desire to Install a Puppet Government Draws from the Bolshevik Playbook*, The Conversation (Feb. 28, 2022, 3:41 PM), https://theconversation.com/ukraine-putins-desire-to-install-a-puppet-government-draws-from-the-bolshevik-playbook-178060.

[98] Kristen de Groot, *Russia's Attack on Ukraine, Through the Lens of History*, Penn Today (Feb. 25, 2022), https://penntoday.upenn.edu/news/russias-attack-ukraine-through-lens-history.

[99] *Annexation of Hawaii*, History, Art & Archives, U.S. House of Rep, https://history.house.gov/Historical-Highlights/1851-1900/The-annexation-of-Hawaii/.

American-led Hawaiian Republic was formed in 1894 under President Sanford Dole and, after political maneuvering in Washington, gained recognition. Annexation then followed in 1898 with Dole continuing as territorial governor.

Although carried out in an entirely distinguishable international legal context, the United States actually disavowed its own conduct in the takeover of Hawaii in a 1993 congressional resolution[100] signed by the U.S. president apologizing for its actions and recognizing the sovereignty of native Hawaiians. While legally disavowing a troubling piece of international practice further weakens its legitimacy, it seems there is no erasing it from the international relations playbook.

There's also little doubt that President Xi is thumbing through this playbook now with respect to Taiwan, keenly watching both the West's response to Russia's invasion of Ukraine and protests within Russia. How both dynamics play out will surely factor into any move by China against Taiwan—home to foundries that produce 50% of the world's semi-conductors. Xi would not want to botch the incorporation of Taiwan as Mao botched China's annexation of Tibet in 1959. Much as Putin styled invading Ukraine as freeing that country of a drug-addicted government of neo-Nazis, China styled its invasion of Tibet as liberating the Tibetan people from a backward theocratic feudal system. However, Chinese forces failed to capture the Dalai Lama, who set up a government in exile south of the Himalayas, remaining a significant thorn in China's side by successfully keeping the international spotlight on the plight of Tibet for over 60 years. Putin understands history and is circling Kyiv now to make sure President Zelensky is captured for this very reason.

International Security Assurances

The security-based pieces of international law that fall around this conflict like so much recently dusted-up ash from Chernobyl's nuclear cemetery also lead to unsatisfactory applications. The U.N. Charter's Security Council is frozen from action by Russia's veto. NATO's Article 5 collective military response[101] trigger won't be tripped until Russian forces cross into the Baltic States, Poland, or Romania, unless of course cyberattacks are deemed attacks. And the Budapest Memorandum[102] signed by the United States, United Kingdom, Russia, and Ukraine in 1991, providing security assurances to Ukraine for its territorial integrity, political independence, and border inviolability in exchange for Kyiv giving up the nuclear arsenal it inherited from the defunct Soviet Union, has been rolled over by Putin's tanks, leaving the Americans and British emphasizing to the Ukrainians the legal difference between "assurances" and "guarantees." International criminal law and the Geneva Conventions may, however, yield better legal results.

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[100] Pub. L. No. 103-150, 107 Stat. 1510 (1993).

[101] *Collective Defence and Article 5*, North Atlantic Treaty Organization (July 4, 2023), https://www.nato.int/cps/en/natohq/topics_110496.htm.

[102] Steven Pifer, *Budapest Memorandum and U.S. Obligations*, Brookings (Dec. 4, 2014), https://www.brookings.edu/articles/the-budapest-memorandum-and-u-s-obligations/.

Legal Fallout

There is no doubt that Putin can be prosecuted as a war criminal for how this invasion has been executed against civilians and their property without military necessity, just as Serbia's Slobodan Milosevic was prosecuted[103] for his role in orchestrating the Balkan civil wars. The International Criminal Court's prosecutor confirmed[104] that the Court has jurisdiction over war crimes committed by Russian forces in Ukraine. Due to Ukraine's acceptance of the ICC's jurisdiction to investigate and prosecute crimes committed on its territory from 2014 onward, key legal hurdles that stymie the court in other situations are cleared in this case. That said, because of limitations on the court's ability to pursue the crime of aggression,[105] which Russia clearly committed as well, no case could be brought on that basis.

Frustratingly, international law doesn't provide answers so much as frameworks, but they are frameworks within which the world agrees to operate. When great powers depart from such norms, the rules must be enforced against them where possible. If this means unsealing an arrest warrant against a sitting head of State, as the ICC did previously against the president of Sudan[106] for genocide, then all the better for deterrence. It would be yet one more factor for Mr. Xi to consider as he eyes doing the same thing to Taiwan.

103 *United Nations International Criminal Tribunal for the Former Yugoslavia*, U.N. Int'l Residual Mechanism for Criminal Tribunals, https://www.icty.org/en/case/slobodan_milosevic.

104 Martin Farrer, Sam Levin, Gloria Oladipo, Léonie Chao-Fong, Tom Ambrose & Samantha Lock, *US Senator Says Moscow's Plans Are Behind Schedule-as It Happened*, The Guardian (Feb. 28, 2022), https://www.theguardian.com/world/live/2022/feb/28/russia-ukraine-war-latest-news-update-conflict-belarus-putin-nuclear-deterrence-order-kyiv-russian-invasion-live-updates?filterKeyEvents=false&page=with:block-621d4a288f08dd0c86717d1d.

105 *ICC—Crime of Aggression*, Int'l Crim. Ct., https://asp.icc-cpi.int/reviewconference/crime-of-aggression.

106 *Al Bashir*, Int'l Crim. Ct., https://www.icc-cpi.int/darfur/albashir, Prosecutor v. Al Bashir, Case. No. ICC-02/05-01/09, Int'l Crim. Ct. (2009).

COUNTERNORMATIVITY AND THE INTERNATIONAL ORDER

by Dan E. Stigall | May 3, 2022

Aspects of the shifting world order were recently addressed during *The George Washington International Law Review's* 2022 Symposium, "The State of the Nation-State in International Law,"[107] where many discussants noted the range of factors driving changes in the international order. This symposium took place in the shadow of Russia's blatantly illegal invasion of Ukraine.

The world has watched in horror as a country with a permanent seat on the UN Security Council has disregarded basic norms of international law, invaded a peaceful country without provocation, and engaged in war crimes such as the deliberate targeting of civilians. Some observers view Russia's war of aggression as a watershed moment (or "geopolitical earthquake"[108]) that portends a new world order[109] in which "great powers will rely more heavily on the use of force, and perhaps one in which wars will become more common." Former U.S. Ambassador Ryan C. Crocker termed this potential next phase "the world of disorder."[110]

Commentators note that, as China and Russia ascend in power, "autocratic and illiberal projects [will] rival the U.S.-led liberal international system."[111] Authoritarian regimes will increasingly oppose[112] rules and institutions that they view as potential constraints on their actions (such as international human rights[113]) and will advance efforts that permit their governments to implement authoritarian policies without external hindrance. Such regimes will push to displace the United States and other liberal influences in order to shift power dynamics in a way that favors their respective geostrategic objectives.[114] In this effort, international rules and institutions that cannot be co-opted will be rejected or ignored, and such flagrant violations will be framed as "rejecting Western interference and defending each other's security interests."[115]

This post focuses on what is best conceptualized as a counternormativity effort by Russia and China which seeks to undermine the current rules-based international

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107 *George Washington International Law Review 2022 Symposium: State of the Nation-State in International Law*, Geo. Wash. L. Rev. (Mar. 18, 2022, 9:00 AM), https://www.law.gwu.edu/george-washington-international-law-review-2022-symposium-state-nation-state-international-law.

108 Editorial Board, *Another New World Order Quickly Takes Shape as Ukraine War Rages On*, Boston Globe (Mar. 1, 2022), https://www.bostonglobe.com/2022/03/01/opinion/another-new-world-order-quickly-takes-shape-ukraine-war-rages/.

109 Al-Riyadh, *Ukraine and the Emergence of a New World Order*, Media Line (Mar. 7, 2022), https://themedialine.org/mideast-mindset/ukraine-and-the-emergence-of-a-new-world-order/.

110 Damien Cave, *The War in Ukraine Holds a Warning for the World Order*, N. Y. Times (Mar. 4, 2022), https://www.nytimes.com/2022/03/04/world/ukraine-russia-war-authoritarianism.html.

111 Alexander Cooley & Daniel H. Nexon, *How Hegemony Ends: Unraveling of American Power*, Foreign Aff. (June 9, 2020), https://www.foreignaffairs.com/articles/united-states/2020-06-09/how-hegemony-ends.

112 Anastasia Lyrchikova, *Putin and Xi Cement Partnership in Face of Western Pressure*, Reuters (Dec. 15, 2021), https://www.reuters.com/world/china/russia-says-xi-backs-putin-push-western-security-guarantees-2021-12-15/.

113 *Id.*

114 Bradley Jardine & Edward Lemon, *In Post-American Central Asia, Russia and China Are Tightening Their Grip*, War on the Rocks (Oct. 7, 2021), https://warontherocks.com/2021/10/in-post-american-central-asia-russia-and-china-are-tightening-their-grip/.

115 Lyrchikova, *supra* note 113.

order and drives toward a common, authoritarian telos. While this is most evident in the recent Russian invasion of Ukraine, one can also look to China's infringement on fundamental freedoms[116] in Hong Kong, Russian assassinations of political dissidents[117] living overseas, etc. Two specific areas that are especially illuminative of how the Sino-Russian counternormativity effort is undermining international legal norms are (1) authoritarian territorial expansion efforts and (2) the deliberate undermining of the international regime to counter cybercrime.

Russian and Chinese Territorial Expansion

Russia and China have moved aggressively in recent years to expand their territorial claims in violation of a foundational rule of international law—the "territorial integrity norm"—which holds that no State may take territory from another without its consent. This rule is reflected in Article 2(4) of the UN Charter, which states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Commentators note[118] that "[the] ban on aggression, taken from Article 2(4) of the UN Charter, is regarded as the heart of the UN Charter and the basic rule of contemporary public international law." Even these basic principles, however, have been challenged in the past decade as China and Russia have sought to advance their political objectives at the expense of the rules-based international order.

Russia has been actively using military force (and other means) to expand territorially for years. For example, in the 2008 Russo-Georgian War,[119] Russia used military force to assert dominance over South Ossetia and Abkhazia—provinces that are officially part of Georgia but that have separate governments and are now recognized by Moscow as "independent." Russia continues to effectively claim territory in Georgia through the practice of "encroaching occupation."[120]

Russia, likewise, has been illegally annexing Ukrainian territory for years. Prior to Russia's recent invasion, Russia's counternormative territorial expansion included the illegal seizure of the Crimean Peninsula in 2014. In response to what it claimed as threats to its interests, Russia launched a complex hybrid operation utilizing a web of political, intelligence, criminal, and military operatives, including the so-called "little green men," who seized strategic locations[121] on the Crimean Peninsula.

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116 *Hong Kong: Beijing Dismantles a Free Society*, Hum. Rts. Watch (June 25, 2021, 8:00 AM), https://www.hrw.org/news/2021/06/25/hong-kong-beijing-dismantles-free-society.

117 Charles Maynes, *Russian Government Killed Former KGB Agent, Says European Court of Human Rights*, NPR (Sept. 21, 2021, 4:41 PM), https://www.npr.org/2021/09/21/1039393881/russian-government-killed-former-kgb-agent-says-european-court-of-human-rights.

118 The Judge Advocate General's Legal Center & School, Operational Law Handbook 1 (2024).

119 Michael Kofman, *The August War, Ten Years on: A Retrospective on the Russo-Georgian War*, War on the Rocks (Aug. 17, 2018), https://warontherocks.com/2018/08/the-august-war-ten-years-on-a-retrospective-on-the-russo-georgian-war/.

120 Mary Louise Kelly, Kat Lonsdorf, Courtney Dorning & Karen Zamora, *Near Russian-Controlled Areas of Georgia, People Are Watching What Happens in Ukraine*, NPR (Mar. 25, 2022, 4:49 PM), https://www.npr.org/2022/03/25/1088879145/people-in-russia-controlled-georgia-are-watching-whats-happening-in-ukraine-clos.

121 *Remarks by Ambassador Linda Thomas-Greenfield at a UN Security Council Arria-Formula Meeting on the Situation in Crimea*, U.S. Mission to the U.N. (Mar. 12, 2021), https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-un-security-council-arria-formula-meeting-on-the-situation-in-crimea/.

In March 2014, President Vladimir Putin signed a law[122] formalizing Russia's annexation of Crimea. In the words of then-Vice President Joseph Biden, "Russia has offered a variety of arguments to justify what is nothing more than a land-grab."[123] Indeed, as Daniel Treisman noted, "By annexing a neighboring country's territory by force, Putin overturned in a single stroke the assumptions on which the post–Cold War European order had rested."[124]

Russia, however, was not done with Ukraine. In November 2021, Russia began amassing its armed forces—roughly 100,000 troops and an array of heavy weaponry—at the Ukrainian border. This provocative action was coupled with a range of irregular warfare activities, including information operations, sabotage, and aggressive diplomatic language, which portended the eventual invasion. At the time, U.S. National Security Advisor Jake Sullivan noted, "Russia is laying the groundwork to have the option of fabricating a pretext for an invasion, including through sabotage activities and information operations, by accusing Ukraine of preparing an imminent attack against Russian forces in eastern Ukraine."[125] Russia stymied diplomatic efforts to prevent the invasion[126] with "maximalist and non-starter demands" such as "an end to NATO expansion, a rollback of previous expansion, a removal of American nuclear weapons from Europe, and a Russian sphere of influence."

Russia's threat of the use of military force against Ukraine to achieve unreasonable policy objectives was otherworldly. In fact, it was the echo of what Oona Hathaway and Scott Shapiro have termed the "old world order"[127]—a world before the Kellogg-Briand Pact[128] when nations renounced the use of war as an instrument of policy. Not surprisingly, Russia's threats were widely condemned. For instance, the G-7 countries—Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States—and the European Union issued a joint statement declaring, "Any use of force to change borders is strictly prohibited under international law. Russia should be in no doubt that further military aggression against Ukraine would have massive consequences and severe cost in response."[129] Such warnings, however, proved ineffective, and no international rule or institution was capable of chaining the dogs of war. On February 24, 2022, Russia

122 *Ukraine: Putin Signs Crimea Annexation*, BBC (Mar. 21, 2014), https://www.bbc.com/news/world-europe-26686949.

123 Shaun Walker & Ian Traynor, *Putin Confirms Crimea Annexation as Ukraine Soldier Becomes First Casualty*, The Guardian (Mar. 18, 2014), https://www.theguardian.com/world/2014/mar/18/putin-confirms-annexation-crimea-ukrainian-soldier-casualty.

124 Daniel Treisman, *Why Putin Took Crimea*, Foreign Aff. (Apr. 18, 2016), https://www.foreignaffairs.com/articles/ukraine/2016-04-18/why-russian-president-putin-took-crimea-from-ukraine.

125 Rachel Martin, Michele Kelemen & Charles Maynes, *With Russian Troops at Ukraine's Border, Talks to Avert a Conflict End Deadlocked*, NPR (Jan. 14, 2022), https://www.npr.org/2022/01/14/1072980499/with-russian-troops-at-ukraines-border-talks-to-avert-a-conflict-end-deadlocked.

126 *Id.*

127 Oona A. Hathaway & Scott J. Shapiro, The Internationalists (2017).

128 *Id.*

129 *G7 Foreign Ministers' Statement on Russia and Ukraine*, U.S. Dep't of State (Dec. 12, 2021), https://www.state.gov/g7-foreign-ministers-statement-on-russia-and-ukraine/.

launched a full-scale military invasion[130] of Ukraine. Other violations[131] of the law of armed conflict by Russian forces shortly followed, such as indiscriminate attacks, deliberately targeting civilians, and committing "other atrocities."[132]

China, similarly, has undertaken a range of efforts to expand territorially. Notably, since 2012, China has been building military bases[133] in the South China Sea—a valuable trade passage and fishing ground—even though Brunei, the Philippines, Malaysia, Vietnam, and Japan also have competing territorial claims. To support its expansion effort, China established "Sansha City"[134] to "administer the Paracel and Spratly islands, Macclesfield Bank, Scarborough Shoal, and their surrounding waters," and has artificially added thousands of acres of land to existing maritime features.

In 2013, the Philippines brought the issue before the Permanent Court of Arbitration at The Hague. The claims by the Philippines were based on the 1982 U.N. Convention on the Law of the Sea to which both the Philippines and China are parties. In 2016, the Permanent Court of Arbitration ruled in favor of the Philippines and emphasized that China's activities infringed on Philippine sovereignty through various activities, including its building of artificial islands[135] within the exclusive economic zone (EEZ) of the Philippines. The effect of this ruling was to reject China's claims to the areas determined to be part of the Philippines' EEZ and continental shelf.

China, however, immediately disavowed the ruling of the Permanent Court of Arbitration and continued to militarily reinforce its strategic positions in the South China Sea. Recent reports indicate that China has now "fully militarized at least three of several islands it built in the disputed South China Sea, arming them with anti-ship and anti-aircraft missile systems, laser and jamming equipment, and fighter jets in an increasingly aggressive move that threatens all nations operating nearby."[136]

Relatedly, in January 2022, the U.S. State Department released a *Limits in the Seas* study[137] which examines China's expansive maritime claims in the South China Sea. The study concludes that China's claims "are inconsistent with international

130 Pavel K. Baev, *Around the Halls: Implications of Russia's Invasion of Ukraine*, Brookings (Feb. 25, 2022), https://www.brookings.edu/articles/around-the-halls-implications-of-russias-invasion-of-ukraine/.

131 Matthew Lee, *US Finds Russian Troops Have Committed War Crimes in Ukraine*, AP (Mar. 23, 2022, 1:10 PM), https://apnews.com/article/russia-ukraine-biden-europe-antony-blinken-nato-fa0786b41cd876208771017aa1abab13.

132 *Id.*

133 Eleanor Ross, *How and Why China Is Building Islands in the South China Sea*, Newsweek (Mar. 29, 2017, 11:08 AM), https://www.newsweek.com/china-south-china-sea-islands-build-military-territory-expand-575161.

134 Zoe Haver, *China Reclaims Land, Fortifies Coast of S China Sea Base to Prevent Erosion*, Radio Free Asia (Jan. 21, 2021), https://www.rfa.org/english/news/china/southchinasea-woody-01212021155023.html.

135 Jennifer Hansler & Brad Lendon, *US Warns China It Stands Behind South China Sea Ruling and Is Committed to Philippine Defense*, CNN (July 12, 2021, 2:49 AM), https://www.cnn.com/2021/07/12/asia/us-philippines-south-china-sea-intl-hnk/index.html.

136 Jim Gomez & Aaron Favila, *AP Exclusive: US Admiral Says China Fully Militarized Isles*, AP (Mar. 21, 2022, 5:06 PM), https://apnews.com/article/business-china-beijing-xi-jinping-south-china-sea-d229070bc2373be1ca515390960a6e6c.

137 U.S. Dep't of State, Bureau of Oceans and International Environmental and Scientific Affairs No. 150, Limits in the Seas: People's Republic of China: Maritime Claims in the South China Sea (Jan. 2022), https://www.state.gov/wp-content/uploads/2022/01/LIS150-SCS.pdf.

law as reflected in the 1982 United Nations Convention on the Law of the Sea" and "undermine the rule of law in the oceans and numerous universally recognized provisions of international law reflected in the Convention."

Similar Chinese efforts to claim territory on its land borders have also created international tension. In 2020, China deployed troops to areas around the Line of Actual Control (LAC)—the ill-defined and contested demarcation that separates Indian- and Chinese-controlled territory that has been the situs of border clashes for decades. The history and sensitivity[138] of the LAC makes the 2020 Chinese activity even more noteworthy as it also involved various incursions into Indian territory. Subsequent fighting in the region resulted in the deaths[139] of at least four Chinese soldiers and twenty Indian soldiers. High-level talks[140] resulted in an agreement to disengage troops in February 2021, but tensions remain high in the region.

Cyber Convention

Another example of how an asymmetrically multipolar world may impact international law can be seen in Russian and Chinese efforts to shape the norms governing cyberspace, and notably the regime of international law governing the investigation and prosecution of cybercrime. At the international level, China and Russia have advocated for norms that favor "a more authoritarian model with expanded state control" in contrast to liberal democracies which "have historically supported an open, free, and secure internet." Specifically, China and Russia seek to undermine[141] the Convention on Cybercrime of the Council of Europe (the "Budapest Convention"), which "lays out common standards on cybercrime investigations and aims to boost cooperation among criminal justice systems around the globe."[142]

The Budapest Convention facilitates a free and open internet in a number of ways, including by requiring governments to provide for conditions and safeguards in cybercrime investigations that are adequate for protection of human rights,[143] by specifying both the substantive offenses and the procedural tools which law enforcement may employ, by permitting a party to the convention to refuse a request for mutual legal assistance where the request violates domestic law or is related to a political offense, and by emphasizing lawful process[144] through warrants and court orders. Such provisions amalgamate foundational aspects of the liberal world order with the international law

138 Arzan Tarapore, *Crisis After the Crisis: How Ladakh Will Shape India's Competition with China*, Stanford: Walter H. Shorenstein Asia-Pacific Res. Ctr. (May 6, 2021), https://aparc.fsi.stanford.edu/publication/crisis-after-crisis-how-ladakh-will-shape-india's-competition-china-2.

139 *China Admits It Lost Four Soldiers in 2020 India Border Clash*, Al Jazeera (Feb. 19, 2021), https://www.aljazeera.com/news/2021/2/19/china-admits-it-lost-four-soldiers-in-2020-india-border-clash#:~:text=News%7CConflictChina%20admits%20it%20lost%20four%20soldiers%20in%202020%20India%20border,at%20least%2020%20Indian%20soldier.

140 Tarapore, *supra* note 141.

141 Allison Peters, *Russia and China Are Trying to Set the U.N.'s Rules on Cybercrime*, Foreign Pol. (May 6, 2021), https://foreignpolicy.com/2019/09/16/russia-and-china-are-trying-to-set-the-u-n-s-rules-on-cybercrime/.

142 *Id.*

143 Convention on Cybercrime, Nov. 23, 2001, E.T.S. 185 [hereinafter Convention on Cybercrime].

144 *Id.*

governing cyberspace. For instance, Article 15 of the Budapest Convention reads:

> Each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality.

On the other side, China and Russia have been actively pressing for a new global cybercrime treaty at the UN that reflects their opposing vision. In essence, China and Russia—adopting a "data sovereigntist"[145] or "technoauthoritarian" approach—seek to replace[146] "the only global treaty that exists with a common vision for trying to facilitate international cooperation on cybercrime that also aims to protect the rule of law and an open internet" with an alternative treaty that "would allow countries to solidify their hold over information and communications technology within their borders."[147] This alternative treaty would "enabl[e] some countries to further restrict activities and speech on the internet, while also stressing governments' sovereignty in cybercrime investigations." It is notable that the Sino-Russian counter-effort would likely dilute effective international cooperation into cybercrime—a result that would be consistent with Russia's prolific role in facilitating State-backed illegal cyber intrusions.[148]

U.S. efforts to counter this initiative have not met with great success. Russia (with support from China) has successfully advanced toward the objective of legitimizing an alternative[149] to the Budapest Convention in both the Security Council and the General Assembly. In May 2021, the General Assembly formed an Ad Hoc Committee[150] for the purposes of creating and submitting a draft convention on countering cybercrime to the General Assembly in 2023. A State Department press release noted[151] that during the negotiating sessions, "The United States will press for its priority cybercrime policy and legal objectives during these negotiations, including advancing efforts towards a fair, rights-respecting, criminal justice instrument

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145 Jennifer Daskal & Debrae Kennedy-Mayo, *Budapest Convention: What Is It and How Is It Being Updated?* Cross-Border Data Forum (July 2, 2020), https://www.crossborderdataforum.org/budapest-convention-what-is-it-and-how-is-it-being-updated/#_ednref43.

146 Joyce Hakmeh & Allison Peters, *A New UN Cybercrime Treaty? The Way Forward for Supporters of an Open, Free, and Secure Internet*, Council on Foreign Rel. (Jan. 13, 2020, 11:35 AM), https://www.cfr.org/blog/new-un-cybercrime-treaty-way-forward-supporters-open-free-and-secure-internet.

147 *Id.*

148 Frank Bajak, *Microsoft: Russia Behind 58% of Detected State-Backed Hacks*, AP (Oct. 7, 2021, 7:04 AM), https://apnews.com/article/technology-business-china-europe-united-states-e13548edf082992a735a0af1da39b6c8.

149 Hakmeh & Peters, *supra* note 149.

150 *General Assembly Adopts Resolution Outlining Terms for Negotiating Cybercrime Treaty Amid Concerns over 'Rushed' Vote at Expense of Further Consultations*, U.N.: Meetings Coverage and Press Releases (May 26, 2021), https://press.un.org/en/2021/ga12328.doc.htm.

151 *The Ad Hoc Committee to Elaborate a UN Cybercrime Convention*, U.S. Dep't of State: Media Note Off. of the Spokesperson (Feb. 28, 2022), https://www.state.gov/the-ad-hoc-committee-to-elaborate-a-un-cybercrime-convention/.

focused on addressing cybercrime that is built on consensus and informed by experts."

Conclusion

If the existing world order is to survive in this new environment, those seeking to preserve it must find viable mechanisms for countering this negative, illiberal momentum. This will require cooperation as well as confrontation. Liberal democracies will need to band together and adopt policies expressly aimed at preserving an open, multilateral, and rules-based world order. This should include reaching out to democracies beyond the Western horizon to enhance close partnerships with key emerging powers in Asia and Africa that are inclined to share liberal values.

This, however, does not mean abandoning existing international institutions. Defenders of the liberal world order must work in a coordinated fashion to save the existing international institutional architecture from corruption by authoritarian regimes. This means viewing robust engagement and investment in international organizations as a national security imperative, including the empowerment of international courts[152] so that they are able to take action against those who would commit "core crimes" such as war crimes, crimes against humanity, aggression, and genocide.

It is worth noting that the outcome of the conflict in Ukraine will likely be a lynchpin in the defense of the liberal international order. Whether it's China (with its stated goal of reunification[153] with Taiwan) or another authoritarian regime with the desire to annex neighboring territory, the illiberal forces of the world are watching—and the lessons of Ukraine will be influential in their decision-making. If Ukraine is protected, the outcome of Russia's illegal war of aggression will be a degraded Russia that wields less power in global affairs, a revitalized NATO alliance, and recalibration of global power in favor of the liberal international order. If Ukraine falls or is effectively severed, however, then the outcome will be bleak.

The future, therefore, depends on how liberal democracies choose to counter the challenges that now confront the liberal world order. Defenders of the international order may either recognize the crisis and energize coalitions of like-minded countries to counter the "illiberal drift,"[154] or risk further regression to a world characterized by a less constrained model of sovereignty—one akin to that which was known in earlier, more conflict-prone eras. The world for which many generations fought and struggled to build—a world of democracy, human rights, and open markets—is by no means predestined. It must be earned.

152 Lauren Sanders, *Accountability and Ukraine: Hurdles to Prosecuting War Crimes and Aggression*, Articles of War (Mar. 9, 2022), https://lieber.westpoint.edu/accountability-ukraine-hurdles-prosecuting-war-crimes-aggression/.

153 David Sacks, *What Xi Jingping's Major Speech Means for Taiwan*, Council on Foreign Rel. (July 6, 2021, 4:39 PM), https://www.cfr.org/blog/what-xi-jinpings-major-speech-means-taiwan.

154 Rebecca Lissner & Mira Rapp-Hooper, An Open World: How America Can Win the Contest for the Twenty-First Century Order (2020).

CONSISTENCY AND CHANGE IN RUSSIAN APPROACHES TO INTERNATIONAL LAW

by Jeffrey Kahn | Mar 9, 2022

Recent Russian conduct on the world stage—and less metaphorically, on the territory of Ukraine—has been appalling. Violations of international law (such as acts of aggression and unlawful support for insurgents[155] or mislabeled peacekeeping operations[156]) followed assurances that no attack on its neighbor was planned or would occur.

Today one might be forgiven for concluding that Russia's view of its international legal obligations mirrors the quip of former French President Jacques Chirac: "My promises only bind those who believe them."[157] At least Chirac appeared to speak in jest. In international law, *pacta sunt servanda*[158] is a fundamental pillar.

This post introduces elements of consistency and change in Russia's general approach to international law. It then focuses on the particular example of Russia's deteriorating interest in its obligations in the Council of Europe and under the European Convention on Human Rights.

The root of the dilemma of Russian membership in international organizations—particularly those devoted to human rights—has always been apprehension that exclusion was worse than inclusion. No such concern can reasonably now remain.

Imperial and Soviet Pasts

Russia rightly boasts many positive contributions to international law. The 1868 St. Petersburg Declaration frames Sean Watts's discussion in this series on Molotov cocktails.[159] It should be remembered that both the 1899 and 1907 Hague Conferences were convened at the invitation of Tsar Nicholas II.[160] Another is the Martens Clause[161] (named after diplomat and international lawyer Fyodor Fyodorovich Martens) that saved the 1899 conference and pseudonymous convention; reappears in abbreviated form in the Geneva Conventions and Additional Protocols; and describes a fundamental aspect of customary international law in this field. The Martens Clause remains useful in this conflict;

155 Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, Articles of War (Feb. 28, 2022), https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/.

156 Alexander Gilder, *The Abuse of "Peacekeeping"*, Articles of War (Mar. 3, 2022), https://lieber.westpoint.edu/abuse-of-peacekeeping/.

157 Paul Taylor, *Jacques Chirac, France's Lovable Failure*, Politico (Sept. 26, 2019, 5:03 PM), https://www.politico.eu/article/jacques-chirac-france-lovable-failure/.

158 *General Principles of International Law: Pacta Sunt Servanda*, Int'l Judicial Monitor (Sept. 2008), http://www.judicialmonitor.org/archive_0908/generalprinciples.html.

159 Sean Watts, *Are Molotov Cocktails Lawful Weapons?* Articles of War (Mar. 2, 2022), https://lieber.westpoint.edu/are-molotov-cocktails-lawful-weapons/.

160 *Hague Convention*, Britannica: History & Society, https://www.britannica.com/event/Hague-Conventions.

161 Jeffrey Kahn, *"Protection and Empire": The Martens Clause, State Sovereignty, and Individual Rights,* 56 Va. J. Int'l L. 1 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480606.

Air Commodore W. H. Boothby discussed it in this series regarding cluster munitions.[162]

History also holds reminders of Russian irredentism. In late November 1939, the USSR invaded Finland,[163] formerly a grand duchy of imperial Russia (which followed Soviet occupation of eastern Poland and preceded the annexation of Latvia, Lithuania, and Estonia). The Winter War[164] lasted 104 days due to the resilience of vastly overmatched Finnish soldiers, but ultimately led to Finland's defeat and loss of roughly 11% of its territory (which remains part of Russia).

The last meaningful, substantive act of the League of Nations was to expel the Soviet Union (a founding member) for this aggressive war. The USSR denunciation[165] of this "absurd decision" sounds eerily familiar. The Soviet Union accused Western powers of hypocrisy, arguing[166] that "Britain and France have forfeited both the moral and the formal right to talk about anybody's 'aggression.'" The USSR characterized its invasion as a defensive action necessary to the security of Leningrad and the newly recognized "People's Government of the Democratic Republic of Finland" and asserted the intention to protect "the genuine will of the people of Finland" against the "bankrupt" "clique" of its "former rulers."

From USSR to Russian Federation

The collapse of the Soviet Union in December 1991 marked a shift in thinking about the (geographically reduced[167]) Russian Federation's international law obligations. One shift required a new perspective on fourteen non-Russian regions that Soviet leaders (like imperial Russian rulers) had considered subordinate to Moscow. Now they were to be recognized as equal, rights-bearing sovereign States.

Loss of what Russia called the "near abroad" was aggravated by the reignition of frozen conflicts that policies to control non-Russian ethnic groups and the Soviets' nominally federal governance system[168] had managed with varying effectiveness. A highly centralized, one-party State had spent seventy-three years dividing, shifting, and sometimes forcibly deporting Russian and non-Russian populations within faux internal borders. Military, industrial, and other resources were scattered throughout the USSR without anticipating the need to divide the spoils.

Violence between Armenia and Azerbaijan in 1988, for example, predated the Soviet collapse. Other conflicts, such as the Russian imposition in 1992 of a "peacekeeping" military force between the former Soviet republics of Moldova and Ukraine following the creation of a "Pridnestrovian Moldavian

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162 William H. Boothby, *Cluster Munitions and the Ukraine War*, Articles of War (Feb. 28, 2022), https://lieber.westpoint.edu/cluster-munitions-ukraine-war/.

163 *A Short History of the 'Winter War'*, Imperial War Museums (2023), https://www.iwm.org.uk/history/a-short-history-of-the-winter-war.

164 Evan Andrews, *What Was the Winter War?*, History (last updated Sept. 14, 2023), https://www.history.com/news/what-was-the-winter-war.

165 *Appraisal by Authoritative Soviet Circles of Dec. 14 Resolution of League of Nations Council*, Moscow News (Dec. 18, 1939), https://histdoc.net/history/tass.html.

166 *Id.*

167 *Russia is 0.76 Times as Big as Soviet Union*, MapFight.xyz, https://mapfight.xyz/compare/ru-vs-su/.

168 Jeffrey Kahn, *Federalism, Democratization, and the Rule of Law in Russia* (2002).

Soviet Socialist Republic"[169] (Transnistria), presage one modus operandi of the current crisis. The use of "peacekeeping" forces in South Ossetia and Abkhazia to provoke war with Georgia in 2008 provides another example.

Before the Soviet Union collapsed, but after Ukraine's parliament declared its independence, Russian President Boris Yeltsin threatened Ukraine's leadership that departure would open the question of the legitimacy of its borders, especially concerning Crimea and the Donbas. Concern over the Soviet nuclear arsenal, much of which was located in Ukraine, produced the 1994 Budapest Memorandum[170] signed by Ukraine, Russia, the United Kingdom, and the United States. It provided, *inter alia*, that the parties "respect the independence and sovereignty and the existing borders of Ukraine." Other legal arrangements demarcated control of Soviet army and naval installations, including the Black Sea Fleet at Sevastopol on the Crimean peninsula.

Post-Soviet Ambitions: Russia and Europe

Other, more conceptual, shifts led to profound changes in Russia's international relations. The 1993 Russian Constitution moved away from a dualist view of international law to which the Soviet Union adhered to adopt a more monistic approach. Article 15(4)[171] of the Constitution declares:

> The universally recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

Russian law scholars debate[172] the metes and bounds of this change, but it was change nonetheless. Importantly, it opened space for Russia to join the Council of Europe and accede to the European Convention on Human Rights. But the arc of that membership traces a trajectory of change in Russian views toward these treaty obligations.

In 1992, when Russia sought membership,[173] it was desperate to join any organization that would accept it. The conclusion of legal experts and rapporteurs for the Council of Europe's Parliamentary Assembly was that Russia did not meet the legal standards for admission.[174] This was not positively challenged by Russia's 1994 commencement of a brutal military campaign in Chechnya while its application was pending. But political pressure to expand the Council

169 Sarah Reid, *Celebrating a Nation That Doesn't Exist*, BBC: Travel (Feb. 6, 2020), https://www.bbc.com/travel/article/20200205-celebrating-a-nation-that-doesnt-exist.

170 Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum) Dec. 5, 1994, U.N. Treaties No. 52241 [hereinafter Budapest Memo].

171 Constitution of the Russian Federation, art. 15(4).

172 Jeffrey Kahn, *Conflicting Conceptions of Sovereignty: A Response to Professor Blankenagel*, EJIL: Talk! (Jan. 28, 2020), https://www.ejiltalk.org/conflicting-conceptions-of-sovereignty-a-response-to-professor-blankenagel/.

173 Irina Busygina & Jeffrey Kahn, *Russia, the Council of Europe, and the "Ruxit," or Why Non-Democratic Illiberal Regimes Join International Organizations,* 67 Problems of Post Communism 1 (2020), https://www.tandfonline.com/doi/abs/10.1080/10758216.2019.1660186?af=R&journalCode=mppc20.

174 Russia's Application for Membership of the Council of Europe, Doc. 7463 (Jan. 18, 1996).

ultimately won the day with the argument that "integration is better than isolation; co-operation is better than confrontation."

Better Outside or Better In?

Inclusion in the Council of Europe required ratification of the European Convention on Human Rights, which occurred in 1998. Much good came out of that international legal obligation in terms of domestic legal reforms[175] largely accomplished during Vladimir Putin's first presidential term.

But the requirements of membership have proved to be burdens that Russia eventually decided it would not continue to bear. Russia has 17,013 pending cases[176]—more than any other Member State. In 2021, Russia had 232 violations[177] adjudged against it—again a consistent "first-place" among 47 Member States. These violations contributed more than those of any other State to the bottleneck in the Strasbourg Court's overwhelmed docket. Many violations are systemic, recurring failures or indifference to enforcement, bringing to mind the quip of the Russian imperial satirist Saltykov-Shchedrin that "the severity of the laws is compensated by the non-obligatory nature of their observance."[178]

Some violations concern not only the European Convention but resonate with other international conventions and customary norms. The Court recently found Russia responsible for the polonium poisoning of Alexander Litvinenko[179] by its agents in London. Inter-State cases brought by Georgia[180] and Ukraine[181]—themselves Member States of the Council of Europe—raise numerous issues at the core of the law of armed conflict and international human rights law (not least of which is the stealth annexation of Crimea[182]) through the lens of the European Convention.

As Russian violations of the Convention grew, Russia changed its view of its obligations.[183] In 2015, a new Russian law subordinated judgments of the European Court of Human Rights to judgments of the Russian Constitutional Court. Upon a finding by the Russian court of a "discovered contradiction" with the Russian Constitution, compliance with Strasbourg's judgment is forbidden.

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175 Jeffrey Kahn, *The Rule of Law Under Pressure: Russia and the European Human Rights System*, Rev. Central and East Eur. L. (Sept. 5, 2019), https://brill.com/view/journals/rela/44/3/article-p275_275.xml?language=en#ref_FN000039.

176 *Annual Report 2022 of the European Court of Human Rights, Council of Europe* (2021), https://www.echr.coe.int/documents/d/echr/Annual_report_2021_ENG.

177 *Id.*

178 Russian Monuments, *Mikhail Saltykov-Shchedrin House, St. Petersburg*, Russian Culture in Landmarks (Mar. 29, 2019), https://russianlandmarks.wordpress.com/2019/03/29/mikhail-saltykov-shchedrin-house-st-petersburg/.

179 Carter v. Russia, App. No. 20914/07, Judgment, Eur. Ct. H.R. (2021).

180 Georgia v. Russia (II), App. No. 38263/08, Judgment, Eur. Ct. H.R. (2021), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-207757%22]}.

181 *Knowledge Sharing: ECHR-KS*, European Court of Human Rights, https://www.echr.coe.int/en/knowledge-sharing.

182 Jeffrey Kahn, *Hybrid Conflict and Prisoners of War: The Case of Ukraine* (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3127020.

183 Jeffrey Kahn, *The Relationship Between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg*, 30 Eur. J. Int'l L. 933 (2019), available at https://academic.oup.com/ejil/article/30/3/933/5673314?login=true.

Conclusion

Until recently, the Council of Europe has frequently criticized Russia, even briefly denied its representatives' voting right, but been unwilling to cast Russia completely out. The hope has been as it was in the beginning: "integration is better than isolation; co-operation is better than confrontation."

That hope appears even more doubtful. In the words of Alain Pellet, Russia's counsel before the World Court until 23 February, "it has become impossible to represent in forums dedicated to the application of the law a country that so cynically despises it."[184]

[184] Alain Pellet, *Open Letter to My Russian Friends: Ukraine Is Not Crimea*, EJIL: Talk! (Mar. 3, 2022), https://www.ejiltalk.org/open-letter-to-my-russian-friends-ukraine-is-not-crimea/.

SECTION 2

Jus ad Bellum

KEEPING THE UKRAINE-RUSSIA *JUS AD BELLUM* AND *JUS IN BELLO* ISSUES SEPARATE

by Rob McLaughlin | Mar 7, 2022

In any situation of international armed conflict (IAC), such as that between Ukraine and Russia right now, two bodies of law necessarily come into sharp relief: the *jus ad bellum*, which deals with the "why" of the IAC (the legitimacy or otherwise of going to war); and the *jus in bello*, which is about the "how" (the lawful conduct of hostilities through compliance with the law of armed conflict (LOAC)).

The *jus ad bellum* in respect of Russia-Ukraine has been ably analyzed by Mike Schmitt,[185] and deals with issues of national and collective self-defence, the UN Charter—especially Article 2(4) and the Article 51 "armed attack" threshold—and the legality or otherwise of "humanitarian intervention." Traditionally, this assessment has been linked to key questions about lawful authority, right intention, reasonable hope of success, and proportionality as elaborated in the theological-ethical-legal "Just War" doctrine. The focus of these *jus ad bellum* assessments is political and military leaders. And *jus ad bellum* questions closely overlap with—but are nevertheless still separate from—the question of the crime of aggression. While a breach of the *jus ad bellum* and crime of aggression are not always co-present, with respect to Ukraine there is little doubt that Russia has perpetrated both a breach of the *jus ad bellum* and (as the UN General Assembly has affirmed) an act of aggression.[186]

But *Jus in Bello* Focuses on Different Things...

The focus of the *jus in bello*, however, differs in several respects. For example, the *jus in*

185 Schmitt, *supra* note 158.

186 G.A. Res. ES-11/1, U.N. Doc. A/Res/ES-11/1 (Mar. 2, 2022), available at https://digitallibrary.un.org/record/3965290?ln=en&v=pdf.

bello applies equally, at all times, to both the combatant parties (Ukraine and Russia) in their conduct of the armed conflict. There is no "higher" or differential level of potential culpability for *jus in bello* breaches on the aggressor State's forces because they started the war; both belligerents' forces are subject to the same rules and assessment standards. That is, the fact that one side is the clear aggressor does not mean we then assess that side's *jus in bello* conduct differently—more critically—than the *jus in bello* conduct of the victim State's forces. A war crime is a war crime, is a war crime.

Another difference is that where a *jus ad bellum* assessment tends to result in a single, holistic, integrated conclusion—the use of force was legitimate or it was not—the *jus in bello* operates through a series of ongoing, individual assessments of issues such as targeting, civilian and other protections, detention and internment, and person and object status. Interchangeably known as LOAC, international humanitarian law (IHL), or the law of war (although there are some subtle substantive differences that can be read into the label employed), this body of law governs the granular allegations we see emerging from Ukraine regarding artillery and rocket attacks on apartment buildings,[187] targeting of infrastructure,[188] and attacks against civilians.[189]

Therefore We Do Need to Keep *Jus ad Bellum* and *Jus in Bello* Separate...

Consequently, the orthodox—and correct—view is that *jus ad bellum* and *jus in bello* assessments must be kept separate, so that neither contaminates the other. The U.S. Department of Defense *Law of War Manual*,[190] for example, affirms that "[a]s a general matter, *jus in bello* and *jus ad bellum* address different legal issues and should not be conflated" (§ 3.5.1). This is not to say that there are not interlinkages and co-dependencies between the two bodies of law—for example, the *jus ad bellum* concept of "right authority" does have some implications for *jus in bello* issues of command authority and responsibility. But on the whole, the two sets of rules are kept separate and—although the same facts might speak to both rulesets—assessed separately. There is a range of reasons why this is essential.

One reason to keep the two rulesets separate is that LOAC assessments are relevant to everyone's conduct—from rifleman to general, from a farmer taking up arms to a political leader, from computer operator to sniper. *Jus ad bellum* assessments, however, are concerned only with the conduct of those who "order" the use of force which triggers or expands the armed conflict, not with those who then go on to fight it.

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187 Jason Dasey, *The Frightening Moment a Missile Hit a Kyiv Apartment Building, Attacking Ukraine's 'Splendid, Peaceful' Capital*, ABC News (Feb. 26, 2022, 3:55 AM), https://www.abc.net.au/news/2022-02-26/frightening-moment-a-missile-hit-a-residential-building-in-kyiv/100864932.

188 Jacqueline Howard & Kelsie Iorio, *Russia-Ukraine War Updates: Russian Forces Capture Damaged Zaporizhzhia Nuclear Power Station*, ABC News (Mar. 3, 2022, 12:31 PM), https://www.abc.net.au/news/2022-03-04/russia-ukraine-war-invasion-updates/100880512.

189 U.N. Human Rights Office of the High Commissioner, *Civilian Casualty Report* (Mar. 2, 2022), https://ukraine.un.org/sites/default/files/2022-03/Civilian%20casualties%20as%20of%2024.00%201%20March%202022%20ENG.pdf.

190 U.S. DoD, Law of War Manual, *supra* note 19.

Another reason to keep the two rulesets separate is that if the *jus ad bellum* were allowed to infect the *jus in bello*, there is a risk that either or both of the belligerent forces might allow their victimhood to infect their view of the opposing forces, and civilians, as being somehow less worthy of LOAC protection. This is also reflected in the fact that reciprocity[191] in terms of positive LOAC compliance by all belligerents is a fundamental aim of LOAC; reciprocity in a *jus ad bellum* context is often understood more negatively—as a force operating against restraint—and is thus to be discouraged. Indeed, restraint in response to a breach of *jus ad bellum*—such as when South Korea did not respond in kind when North Korea committed an armed attack by sinking the corvette ROKS Cheonan[192] (with the loss of 46 sailors)—is often considered politically laudable.

A third reason to keep these two bodies of law as separate as we can is that the *jus ad bellum* and the *jus in bello* share some essential terminology. But those terms mean quite different things when employed within each ruleset. For example, assessing proportionality in analyses of national self-defense (which looks to correlations and correspondence—but not formal equivalency—between the attack suffered and the force planned or used in response) is a very different thing to assessing proportionality in LOAC contexts. In LOAC, proportionality (as expressed in AP I, art. 51(5)(b),[193] for example) describes both a process and an outcome designed to deliver a judgment that the incidental death, injury, and damage expected to be caused to civilians and civilian objects from a specific attack is not disproportionate to the anticipated military advantage (the legitimate military purposes to be achieved) that will flow from carrying out that attack.

Another shared, but differently nuanced, concept is "attack." In *jus ad bellum* analyses, "armed attack" is a key threshold in that UN Charter Article 51 provides that when a State suffers an "armed attack," its right of national self-defence is activated. In LOAC, an "attack" is an act of "violence against the adversary, whether in offence or in defence."[194] Whilst the same fact situation may indeed speak to both thresholds—the initial Russian fires[195] against Ukrainian air defence capabilities, for example, were both a *jus ad bellum* armed attack and a LOAC attack—these two concepts differ in a number of ways.

First, the *jus ad bellum* concept of armed attack carries with it a requirement of gravity—expressed often in terms of scale and effect—that is absent from the LOAC concept; indeed, a single round fired from a soldier's rifle is a LOAC attack. Second, the main purpose of the armed attack concept is to act as a threshold which triggers the victim State's right to use force in national self-defence. By contrast, the main purpose of the

191 Sean Watts, *Reciprocity and the Law of War*, 50 Harv. Int'l L. J. 365, 367 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400088.

192 Civilian-Military Joint Investigation Group, *Joint Investigation Report: On the Attack Against ROK Ship Cheonan* (2010), http://nautilus.org/wp-content/uploads/2012/01/Cheonan.pdf.

193 AP I, *supra* note 36, art. 51(5)(b).

194 *Id.*, art. 49.

195 Dan Sabbagh & Peter Beaumont, *War in Ukraine: Where Has Russia Attacked?*, The Guardian (Feb. 24, 2022), https://www.theguardian.com/world/2022/feb/24/war-ukraine-kyiv-map-where-has-russia-attacked.

LOAC concept of attack is to enliven certain LOAC obligations in the perpetrator—obligations that precede the attack (do a proportionality assessment), endure during the attack (discontinue if it looks like there might be more collateral damage than expected), and continue after the attack (such as, if there is a suspicion as to war crimes, to investigate). Third, although the same fact situation often speaks to both concepts of attack, not all armed attacks are LOAC attacks. Take, for example, the insertion of a State A infantry company crossing the border into State B territory. The company is not disguising its status as a State A military unit (that is, they are not "little green men"[196]), but its presence is not discovered by State B until the company has dug in. Not a single shot has been fired, and no kinetic or cyber force was used. This is most certainly an armed attack and might also be an act of aggression (UNGA Res. 3314 (XXIX) definition, art. 3(a)); but it is not a LOAC attack.

Although Keeping Them Separate Can Present Some Challenging Issues…

This does not mean that there are no challenges[197] in keeping the two bodies of law separate, and separately assessed. As has been noted previously (here,[198] for example), the threshold of military activity required under LOAC for an IAC—as described in Common Article 2 of the 1949 Geneva Conventions—is astonishingly low. As is classically stated in the Pictet Commentary,[199] LOAC is triggered by

> Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 …. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims.

As noted above, the threshold for an armed attack—a *jus ad bellum* question—is undoubtedly higher than this, and does not include (although this is contested, and also implicates the "no gap" approach to use of force analysis) "mere frontier incidents"[200] (Paramilitaries case, § 195). It is, as a matter of law, possible for the facts on the ground to indicate that Common Article 2 has been triggered in a situation where the *jus ad bellum* armed attack threshold has not. In some respects, this is a consequence of the different priorities these rulesets encapsulate. The *jus ad bellum* is ultimately preventively focused, while LOAC is protectively focused (and simultaneously also mission achievement-focused). Likewise, the spectrum of thresholds for an act of aggression listed in Articles 1 through 3 of

196 Vitaly Shevchenko, *"Little Green Men" or "Russian Invaders"?* BBC News (Mar. 11, 2014), https://www.bbc.com/news/world-europe-26532154.

197 Kai Ambos, *Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and Thus Be Exposed to Countermeasures?*, EJIL: Talk! (Mar. 2, 2022), https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/.

198 Rob McLaughlin, *Common Article 2 as a Paradigmatically Challenging Threshold for the Application of IHL*, ILA Reporter (Nov. 11, 2016), https://ilareporter.org.au/2016/11/common-article-2-as-a-paradigmatically-challenging-threshold-for-the-application-of-ihl-rob-mclaughlin/.

199 GWS, *supra* note 93.

200 Military and Paramilitary Activities in and Against Nicar. (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. 392, (Nov. 26).

the definition in UNGA Res. 3314 (XXIX) has parallels with both the Common Article 2 IAC threshold and the *jus ad bellum* threat of force, use of force, and armed attack thresholds. We must be vigilant in using LOAC thresholds for LOAC assessments, and *jus ad bellum* thresholds for such macro-use of force assessments.

Another challenge to keeping *jus ad bellum* and *jus in bello* assessments separate is the idea of a partial effect-based "double trigger" for LOAC attacks (here,[201] for example). This is essentially an assessment that an individual attack being planned and assessed against LOAC as to lawfulness may still need to pass a broader *jus ad bellum* test as well. This question as to blurred thresholds has also arisen in relation to (national) "self-defence targeting" (here,[202] as Geoffrey Corn notes) and the targeting of satellites (here,[203] as Hitoshi Nasu notes). This concept of a double *jus ad bellum–jus in bello* trigger, however, is different from—and must be kept separate from—the entirely LOAC-referenced approach of assessing the expected military objective to be achieved from an attack on a "campaign" (as opposed to single tactical attack) level. As Australia[204] and others have declared in relation to AP I, art. 51(5)(b), "references to the 'military advantage' are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term 'military advantage' involves a variety of considerations including the security of attacking forces."

Conclusion

Ultimately, *jus ad bellum* and *jus in bello* analyses often rely—at least initially—upon overlapping matrices of conduct, actor, and effect. But it is essential to always recall that these two rulesets serve different purposes, and employ different thresholds, assessment concepts, and methodologies—although these different concepts can sometimes share the same label. And in the current Ukraine-Russia situation, where it is so clear who the aggressor is, it is critical that we rigorously police the borders between these two bodies of law so that we do not allow our conclusions as to *jus ad bellum* culpability to contaminate our impartiality in terms of holding both sides properly to account against the same *jus in bello* standards.

201 Kieran Tinkler, *Concept of Proportionality: Enduring Lessons from the Falklands War*, EJIL: Talk! (Dec. 13, 2017), https://www.ejiltalk.org/understanding-the-use-of-zones-and-the-concept-of-proportionality-enduring-lessons-from-the-falklands-war/.

202 Geoffrey S. Corn, *Self-Defense Targeting: Blurring the Line Between the* Jus ad Bellum *and the* Jus in Bello, 88 Int'l L. Stud. 57, https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1055&context=ils.

203 Hitoshi Nasu, *Targeting a Satellite: Contrasting Considerations Between the Jus ad Bellum and the Jus in Bello*, 99 Int'l L. Stud. 142 (2022), https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=3000&context=ils.

204 AP I, *supra* note 36.

REMARKS ON THE LAW RELATING TO THE USE OF FORCE IN THE UKRAINE CONFLICT

by Terry D. Gill | Mar 9, 2022

Professor Mike Schmitt has addressed the application of the right of self-defense[205] to the Russian invasion of Ukraine. This post adds comments on the application of the law relating to the use of force to the present conflict. Specifically, I address whether there is any other possible justification for the use of force by Russia on the basis of the protection of nationals, humanitarian intervention, intervention by consent, or invitation of the areas of Ukraine that were under control of separatists in the eastern regions of Donetsk and Luhansk. I will argue that none of these purported or potential justifications are relevant to the present conflict between the Russian Federation and Ukraine and that Russia's (implicit) reliance on some or all of them has no basis in either law or fact. I will then argue why the lack of a legal basis for the Russian invasion of Ukraine matters.

Protection of Nationals

The doctrine of protection of nationals is a somewhat controversial basis for the use of force in international law. While pre-UN Charter international law recognized the use of force in the context of protection of nationals, it is open to considerable doubt whether that rather broadly based right was carried over into the Charter era. It is arguable that a much narrower right to use force to conduct a rescue operation now exists where an attack on nationals by using or threatening lethal force against persons on the basis of their nationality or holding persons hostage as a means to coerce the parent State into making concessions can be seen as an attack on the State through their nationals. In such cases, the argument for applicability of self-defense vis-à-vis the territorial State where nationals are located is most plausible when the territorial State is itself directly responsible or implicated in the threat of force against the parent State's nationals, or is clearly not in a position to end the threat of serious harm to foreign nationals by an armed group and there is no realistic prospect of obtaining lawful consent to conduct a rescue operation within the time available to prevent the harm from occurring or continuing. There is also significant State practice whereby States conduct so-called "non-combatant evacuations"[206] in situations where there is a general breakdown in public order due to internal conflict, natural disaster, or meltdown of State authority. These do not normally involve a use of force but may not always have consent from the incumbent government.

The first type of situation whereby an attack on a State's nationals as a means to exact concessions from their parent State can arguably be seen as an armed attack on the parent State which can justify the use of strictly necessary and proportionate force to

[205] Schmitt, *supra* note 158.

[206] Ronald Alcala, *Afghanistan and Noncombatant Evacuation Operations*, Lieber Institute for Law and Warfare: Articles of War (Aug. 5, 2021), https://lieber.westpoint.edu/afghanistan-noncombatant-evacuation-operations/.

conduct a forcible rescue operation on the basis of self-defense is supported by a number of States and authors, including myself.[207] The clearest examples of such operations being accepted as lawful, or at least as not unlawful, were the successful Israeli operation to rescue a group of its nationals taken hostage by a group of terrorists and flown to Uganda and held there with the complicity of the then Ugandan government of Idi Amin in 1976 and the abortive U.S. rescue attempt to free its diplomatic personnel held hostage in Tehran in 1980.

The latter type of situation whereby an emergency situation triggers a normally non-forcible, albeit nonconsensual, evacuation of foreign nationals includes numerous evacuations of foreign nationals in *inter alia* the following situations: Liberia (1990), Albania (1997). Lebanon (2006), and Libya (2011). None of these evacuations were forcibly opposed, although they did not always have clear consent from the territorial State. Opinions differ on the legal basis to conduct them in the absence of consent of the territorial State. My own view is that such non-consensual, (virtually) non-forcible evacuation operations can best be justified on the basis of the doctrine of "state of necessity" as a circumstance precluding wrongfulness under the law of international responsibility.

Be that as it may, neither of these narrow possibilities is applicable to the use of force by Russia in Ukraine. There are at least three reasons for this.

Firstly, the link of nationality between persons of Russian ethnicity in Ukraine and Russia is tenuous at best and more than likely unlawful under the circumstances in which it has been conferred. Russia has conducted a policy of granting nationality wholesale to persons of Russian ethnicity in neighboring States that formerly were part of the Soviet Union, including in Ukraine.

This policy of "passportization"[208] is widely seen as an abuse of the discretionary right of States to confer nationality on the basis of their internal law. The reason is that it has been undertaken without any form of consultation with the State where the persons in question reside and while they are on the territory of the other State. This not only interferes with the domestic legal order of the State where these persons reside and whose nationality they possess, but if undertaken as a prelude and pretext to claim a right of military intervention to "protect" them, is an abuse of rights and quite plausibly a coercive intervention[209] in the internal affairs of the State where the persons in question are located.

Secondly, there is no situation at hand that would justify a military intervention, even assuming a right to protect nationals exists. No action by the Ukraine government can be seen as a targeting of foreign nationals of a specific State to exact concessions. For example, no Russian nationals are being held hostage and threatened with lethal force in order to force Russia to do or abstain from doing something it is entitled to do under international law.

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[207] Terry D. Gill & Dieter Fleck, The Handbook of the International Law of Military Operations, Oxford 210 (2016).

[208] Anne Peters, *Passportisation: Risks for International Law and Stability—Part I*, EJIL: Talk! (May 9, 2019), https://www.ejiltalk.org/passportisation-risks-for-international-law-and-stability-part-one/.

[209] Philip Kunig, *Intervention, Prohibition of, in* Max Planck Encyclopedias of Int'l L. (2008), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1434?rskey=pjSoD0&result=2&prd=MPIL.

Thirdly, the scale of the use of force now employed by Russia ostensibly to protect persons of Russian ethnicity in Ukraine (many, probably most, of whom have no desire much less any need to be "protected") is in no way proportionate to any action which has hitherto been undertaken by Ukraine to restore control over its territory in the context of the ongoing internationalized internal armed conflict in the Donbass region. Even if one accepts that certain aspects of Ukrainian policy relating to the use of the Russian language for official purposes has been less than adequate from the perspective of minority rights protection, this is in no way tantamount to an attack on Russian-speaking Ukrainians or on Russia.

In short, there is no credible evidence of deliberate attacks on persons of Russian ethnicity by Ukrainian government forces which could justify an intervention on their behalf. This justification fails both the grounds of lack of necessity to engage in a rescue of nationals and on the basis of the massive scale of the intervention which has as its aim the overthrow of the lawful incumbent government of a sovereign State and the imposition of a situation of complete subordination of that State to the policy objectives of the intervening State.

Humanitarian Intervention

Humanitarian intervention is an even more controversial basis for the use of force under international law than rescue of nationals is. It has little support in State practice and is generally rejected, or at least viewed with skepticism in academic writing, notwithstanding support by some authors.

"Humanitarian intervention" is defined here as a use of force triggered by acts constituting genocide, crimes against humanity, or large-scale serious violations of the law of armed conflict amounting to war crimes in a foreign State for which no other legal basis in the form of a Security Council resolution authorizing force to halt the violations is available. Where the Security Council is able to take action and does so, there is a recognized legal basis. This is sometimes referred to as "collective humanitarian intervention," but it is a descriptive rather than a legal term since such collectively authorized action has its basis in the Chapter VII enforcement powers of the UN Charter and needs no separate legal justification.

The policy of Responsibility to Protect (R2P), as adopted by the United Nations, refers to such collective authorization as the only way a non-consensual military intervention in response to violation of core human rights can be justified. Consequently, it is more accurate to refer to humanitarian intervention only where military action is undertaken to halt large-scale systematic violation of the right to life in the absence of Security Council authorization.

The handful of cases which match this description have been commented upon by numerous authors and need no further elaboration here.[210] What they all have in common is that force was used in the context of large-scale and serious violations of core human rights and had at least a (partly)

[210] Terry D. Gill, *Remarks on the Law Relating to the Use of Force in the Ukraine Conflict*, Articles of War (Mar. 9, 2022), https://lieber.westpoint.edu/remarks-use-of-force-ukraine-conflict/#_ftn1.

humanitarian outcome in the sense that these large-scale human rights violations were brought to a halt. But in all the cases usually served up as examples of this type of forcible intervention (India in East Pakistan in 1971,Vietnam in Cambodia in 1978, Tanzania in Uganda in 1978/9, NATO in Kosovo in 1999), the States concerned (with only a very few exceptions) did not rely on humanitarian intervention as a justification, nor were these interventions seen as lawful at the time they took place, although the latter two were not generally condemned, which may amount to a degree of tolerance for such interventions in some cases.

In the absence of either a treaty basis for such intervention (the Genocide Convention[211] to which I will return presently contains no reference to military intervention) or a customary law basis, since the cases concerned do not come even close to establishing a customary right for military intervention without Security Council authorization on the basis of the recognized criteria for the establishment of a rule of customary law, there is no plausible legal basis for this type of action. This is so even if in some cases the moral and policy arguments for condoning the outcome have meant that they were not openly condemned by most of the international community. For example, in the Kosovo situation a draft resolution to condemn the NATO intervention put forward in the Security Council by Russia received only three votes in favor with the rest of the Council not prepared to either accept it as lawful or reject it as unlawful.

As stated, the trigger event for humanitarian intervention is violation of core human rights amounting to genocide, crimes against humanity, or serious large-scale violation of the law of armed conflict amounting to war crimes. Russia claims that Ukraine has conducted a policy of genocide against the Russian-speaking population in Ukraine and has used that as a pretext for its invasion. There is, of course, no credible evidence of any act of genocide on the part of Ukraine perpetrated against or aimed at destroying the Russian-speaking population. Moreover, the crime of genocide requires a "special intent" *(dolus specialis)* to destroy a specific group in whole or in part on the basis of race, religion, nationality, or ethnicity, and there is no evidence pointing to such a policy or series of actions by Ukraine.

Likewise, the Ukrainian allegations of genocide in connection with indiscriminate shelling and bombardment of cities do not seem to date to indicate any specific intent on the part of Russia to destroy a particular ethnic group and would not qualify as genocide, although such indiscriminate shelling and bombardment could very likely constitute crimes against humanity and/or war crimes. The question of genocide is, at the time of writing, before the International Court of Justice,[212] and it remains to be seen what action the Court will take, but it is highly unlikely that it will find any basis for the crime of genocide by either party to the conflict. In any case, Russia's claim to be acting to halt a genocide aimed at the Russian-speaking population of Ukraine has no credible basis in either law or fact.

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211 Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

212 *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)*, International Court of Justice (2023), https://www.icj-cij.org/case/182.

Invitation

Russia has also named the invitation of the "governments" of the breakaway "republics" of Donetsk and Luhansk as providing the basis for sending troops into them and conducting what was first referred to as a "peacekeeping" mission[213] and is now dubbed a "special military operation." This potential justification also lacks any basis in law since the two breakaway entities are not States, nor can any invitation or consent granted by the leadership of the two breakaway entities serve either as a basis for the deployment of "peacekeeping" troops onto the territory that was under their de facto control at the time of the invasion or as a lawful basis for Russia to use force against Ukraine or any other State.

International law recognizes the authority of the lawful government of a sovereign State to invite or consent to a military intervention on its territory against a non-State entity, so long as the intervention is not in conflict with any peremptory rule of international law or any international legal obligation of either the consenting State or the intervening State(s). Such consensual intervention finds its legal basis in the sovereignty of the State and its plenary authority over its territory within the bounds of international law and is an attribute of that sovereignty. For example, most UN peace operations are conducted with the consent of the lawful government. Likewise, a government can consent to one or more States conducting an operation against an armed group which is trying to usurp its authority or which otherwise poses a threat to its internal stability. Examples include the consensual intervention of a coalition of States to combat the ISIS entity within Iraq and the French intervention to support the governments of certain countries in the Sahel region against jihadist armed groups.

But invitations issued by entities or individuals other than the lawful government of the State where the intervention takes place have no basis in law. And invitations which are in violation of a peremptory norm such as when a puppet regime is installed to issue an invitation or consent have no legal effect. Moreover, no consensual intervention can serve as a basis for the use of force against another State in the absence of a UN Security Council mandate or a lawful reliance on (collective) self-defence in response to an armed attack.

In the instant case, all of these obstacles to invoking consent as a justification for military intervention are present. The separatist entities in Donetsk and Luhansk are not sovereign States. Their leaders have no authority to invite or consent to a military intervention and since the intervention is conducted against the sovereign State whose territory is being violated. And there is no basis for relying on consent as a justification. The recognition by Russia of the two breakaway entities does not magically transform them into States, and the recognition by Russia was itself an unlawful intervention into the internal affairs of Ukraine and palpably illegal, since it flew in the face of Russian guarantees of Ukrainian sovereignty in *inter alia* the Budapest Memorandum of 1994[214] and the Minsk Agreements of 2014

213 Alexander Gilder, *The Abuse of Peacekeeping*, Articles of War (Mar. 3, 2022), https://lieber.westpoint.edu/abuse-of-peacekeeping/.

214 Budapest Memo, *supra* note 173.

and 2015.[215] In short, consent of a separatist regime, which itself is largely the creation of the intervening State to begin with, in order to conduct any kind of military operation against the lawful government of the State where the intervention is taking place is without any legal basis whatsoever.

Concluding Remarks: Why Does It Matter?

It is clear that Russia's invasion of Ukraine has no basis in international law. Professor Schmitt has shown in his post[216] why the right of self-defense is inapplicable to Russia's actions and why in contrast Ukraine is the victim of an unprovoked armed attack amounting to aggression. I have given reasons here why reliance on any other legal justification which has been (implicitly) raised by Russia, including rescue of nationals, halting genocide, or consent or invitation by the breakaway entities in Eastern Ukraine, has no basis in either law or fact.

While one might then ask whether any of this makes any difference in view of what is currently going on in Ukraine and the cynical disregard for and misuse of the law governing the use of force by the Russian government, I would say that the current situation shows the law matters more than ever. If until only a week ago many persons were under the impression that large-scale wars of conquest between States were a thing of the past, the recent events show the law governing the use of force is still relevant and that States think it is of cardinal importance in preserving the integrity of States and safeguarding individuals from violence. The overwhelming vote on the 11th Emergency Special Session of the UN General Assembly on 2 March reaffirming the principles laid out in the UN Charter relating to the non use of force and respect for the sovereignty, independence, and territorial integrity of all States underlined the fact that States still place great importance in upholding the law on the use of force and why those rules still matter, even if, like most rules of law, they are not always observed.

Concluding Note

The majority of authors do not recognize a stand-alone right of humanitarian intervention without UNSC authorization. These include I. Brownlie, "Humanitarian Intervention" in J. N. Moore (ed.), *Law and Civil War in the Modern World*, Johns Hopkins Univ. Press (1974), 217ff; Y. Dinstein, *War, Aggression & Self-Defence*, CUP (6th ed., 2017), 75–77 and 97–98; C. Henderson, *The Use of Force and International Law*, CUP (2018), 379ff; and O. Schachter, *International Law in Theory and Practice*, Nijhoff (1991), 117–126. There are some authors who do see a right as arising either under a narrow interpretation of Article 2(4) allowing for interventions which aim to promote the "principles and purposes of the Charter" or as customary law or both. Exemplary among these are R. Lillich in Moore, op. cit., "A Reply to Ian Brownlie and a Plea for Constructive Alternatives," 229ff; W. M. Reisman, "Humanitarian Intervention and Fledgling Democracies," 18 *Fordham Int. Law Journal* (1994–95) 794; and F. Teson, *Humanitarian Intervention: An*

215 *Ukraine Ceasefire: New Minsk Agreement Key Points*, BBC News (Feb. 12, 2015), https://www.bbc.com/news/world-europe-31436513.

216 Schmitt, *supra* note 158.

Inquiry into Law and Morality, Transnational Publishers (2nd ed., 1997). For comment on the cases referred to in the text, see, e.g., T. Ruys et al. (eds.), *The Use of Force in International Law: A Case-Based Approach*, OUP (2018).

RUSSIA'S "SPECIAL MILITARY OPERATION" AND THE (CLAIMED) RIGHT OF SELF-DEFENSE

by Michael N. Schmitt | Feb 28, 2022

On 24 February, Russia attacked Ukraine on several fronts. Two days earlier, President Vladimir Putin had announced Russia's recognition of Luhansk and Donetsk People's Republics[217] in the Donbas region and ordered in so-called "peacekeepers." Those breakaway entities had declared independence from Ukraine following Russia's 2014 invasion of Crimea, Crimea's subsequent declaration of independence, and its annexation by Russia.

The day Russia launched its operations, its Permanent Representative to the United Nations notified the UN Secretary-General that the military action was "taken in accordance with Article 51 of the UN Charter in the exercise of the right of self-defence." In explanation, he simply appended a speech[218] Putin had made to the Russian population earlier in the day announcing the commencement of the campaign. The Russian Representative then transmitted the notification to the Security Council (UN Doc. S/2022/154). In turn, the Council voted[219] 11–1 to condemn the Russian action, with China, India, and United Arab Emirates abstaining. Russia's vote against as a Permanent Five member killed the proposed resolution.

In this article, I examine the Russian claim that it is acting in self-defense. If it is not, the Russian attack violates UN Charter Article 2(4)[220] and the customary international law prohibition on the use of force. It thus qualifies as an "internationally wrongful act" under the law of State responsibility.

The Background

Understanding the legal character of the current hostilities requires an understanding of how Russia and Ukraine arrived[221] at this point. The trigger was Crimea. Since the break-up of the Soviet Union, the status of Crimea (and other areas scattered across the former Soviet space) has been contentious. In part, this is because Crimea was part of the Russian Soviet Federative Socialist Republic prior to being incorporated into the Ukrainian Soviet Socialist Republic in 1954. Eventually, Russia and Ukraine agreed to "respect each other's territorial integrity, and confirm the inviolability of the borders between them" in the 1997 Treaty on Friendship, Cooperation and Partnership.[222]

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217 Sammy Westfall & Claire Parker, *Why Is Ukraine's Donbas Region a Target for Russian Forces?*, Wash. Post (Feb. 21, 2022, updated May 3, 2022), https://www.washingtonpost.com/world/2022/02/21/what-is-donbas-donetsk-luhansk-conflict/.

218 *Full Text: Putin's Declaration of War on Ukraine*, Spectator (Feb. 24, 2022), https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine/.

219 Farnaz Fassihi, *Russia Vetoes a U.N. Security Council Resolution Calling on It to Withdraw from Ukraine*, N.Y. Times (Feb. 25, 2022), https://www.nytimes.com/2022/02/25/world/europe/united-nations-russia-withdraw-ukraine.html.

220 Charter of the United Nations, June 26, 1945, art. 2(4) 59 Stat. 1031.

221 Center for Preventative Action, *War in Ukraine*, Global Conflict Tracker (updated Aug. 15, 2023), https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine.

222 Treaty on Friendship, Cooperation and Partnership Between Ukraine and the Russian Federation, May 31, 1997, https://treaties.un.org/doc/Publication/UNTS/Volume%203007/Part/volume-3007-I-52240.pdf.

Despite the treaty, tension between the countries persisted, as it did within Ukraine between those who looked westward towards European and NATO integration and others who saw ties with Russia as preferable. In 2014, protests (the "Euromaidan" protests) broke out in Ukraine when, under pressure from Moscow, then-President Viktor Yanukovych backed away from signing an "Association Agreement" with the European Union. Despite the government's brutal crackdown, Yanukovych had to flee the country to Russia. Ukraine's legislature, the Verkhovna Rada, replaced him temporarily until elections could be held.

Concerned that it might lose access to its Black Sea Fleet base on the Crimean Peninsula (among other reasons), Russia quickly occupied Crimea, which issued[223] its Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol in March. The same month, nearly 97% of the population supposedly voted for annexation by Russia in a referendum. Russia promptly approved annexation. This action was, and remains, condemned throughout the international community (e.g., UN,[224] EU[225]).

Meanwhile, Russia continued its subversion of Ukraine in the Donbas region. Donbas is populated primarily by ethnic Russians. Pro-Russian demonstrations grew into open hostilities between armed separatist groups and government forces, with Luhansk and Donetsk declaring independence in April. As the conflict escalated, Russia moved from providing materiel and volunteers to direct military involvement.

The parties agreed to a ceasefire in September (Minsk I), but quickly violated it. In February 2015, Ukraine, Russia, France, Germany, and the separatist groups negotiated a new agreement, Minsk II.[226] It provided for a ceasefire, withdrawal of heavy weapons from a security zone, OSCE monitoring and verification, and dialogue about autonomy for the Donbas entities. However, arguments persisted over execution of the agreement, and the situation soon became yet another "frozen conflict" in the post-Soviet space, like those in Moldova and Georgia. Sporadic exchanges of fire became the norm, accompanied by dozens of hasty ceasefires. Obviously, the present Russian military action sounded the death knell for Minsk II and its progeny.

Importantly, throughout the crisis, Putin has repeatedly claimed[227] that Ukraine and Russia are one people with a "shared destiny," a claim made to President George W. Bush as early as 2008. Most ominously, in his July 2021 essay,

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223 The Embassy of the Russian Federation to the United Kingdom of Great Britain and Northern Ireland, https://london.mid.ru/en/.

224 G.A. Res. 68/262, U.N. Doc. 68/262 (Mar. 27, 2014), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/455/17/PDF/N1345517.pdf?OpenElement.

225 *Ukraine: Declaration by the High Representative on Behalf of the EU on the Illegal Annexation of Crimea and Sevastopol*, Eur. Council of the Eur. Union (Feb. 25, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/02/25/ukraine-declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-illegal-annexation-of-crimea-and-sevastopol/.

226 *Minsk Agreement on Ukraine Crisis: Text in Full*, The Telegraph (Feb. 12, 2015), https://www.telegraph.co.uk/news/worldnews/europe/ukraine/11408266/Minsk-agreement-on-Ukraine-crisis-text-in-full.html.

227 Duncan Allan, *The Minsk Conundrum: Western Policy and Russia's War in Eastern Ukraine*, Chatham House (May 22, 2020), https://www.chathamhouse.org/2020/05/minsk-conundrum-western-policy-and-russias-war-eastern-ukraine-0/background-minsk.

"On the Historical Unity of Russians and Ukrainians,"[228] Putin argued that no separate Ukrainian nation existed before the creation of the Soviet Union.

Putin's Article 51 Claims

Article 51[229] of the UN Charter provides:

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

Russia's notification complies with the requirement that actions in self-defense be reported promptly to the Security Council. Therefore, the issue is whether the Russian military campaign is a lawful exercise of self-defense pursuant to the first sentence, which reflects customary international law. In this regard, two points are key. First, the condition precedent to the exercise of self-defense is an "armed attack." Second, the use of force in response to that armed attack may be individual or collective. The latter may be exercised in collaboration with the victim State or entirely on behalf of that State.

The Putin Speech

Putin's speech is the key to understanding the nature of Russia's Article 51 claim. He begins by pointing to "the fundamental threats which irresponsible Western politicians created for Russia consistently, rudely and unceremoniously from year to year. I am referring to the eastward expansion of NATO, which is moving its military infrastructure ever closer to the Russian border."

To illustrate the threat this poses, he cites NATO and U.S. operations against the Federal Republic of Yugoslavia, Iraq, Libya, and Syria, all of which, he argues, were contrary to international law. And as to NATO expansion, Putin claims "they have deceived us, or, to put it simply, they have played us."

Looking forward, Putin asks, "[W]hat next, what are we to expect? If history is any guide, we know that in 1940 and early 1941 the Soviet Union went to great lengths to prevent war or at least delay its outbreak .... When it finally acted it was too late." And then he comes to the crux of Russia's legal claim.

> Even now, with NATO's eastward expansion the situation for Russia has been becoming worse and more dangerous by the year. Moreover, these past days NATO leadership has been blunt in its statements that they need to accelerate and step up efforts to bring the alliances infrastructure closer to Russia's borders.... We cannot stay idle and passively observe these developments. This would be an absolutely impossible thing for us to do....

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228 Maria Domańska, *Putin's Article: 'On the Historical Unity of Russians and Ukrainians'*, OSW: Cent. for E. Stud. (July 13, 2021), https://www.osw.waw.pl/en/publikacje/analyses/2021-07-13/putins-article-historical-unity-russians-and-ukrainians.

229 U.N. Charter, *supra* note 223, art. 51.

> Of course, the question is not about NATO itself …. The problem is that in territories adjacent to Russia, which I have to note is our historical land, a hostile "anti-Russia" is taking shape. Fully controlled from the outside, it is doing everything to attract NATO armed forces and obtain cutting-edge weapons ….
>
> They will undoubtedly try to bring war to Crimea just as they have done in Donbass, to kill innocent people just as members of the punitive units of Ukrainian nationalist and Hitler's accomplices did during the great patriotic war. They have openly laid claim to several other Russian regions ….
>
> They did not leave us any other option for defending Russia and our people, other than the one we are forced to use today.

Yet, for Putin, the threat is not just to Russia.

> This brings me to the situation in Donbass …. [Y]ou cannot look without compassion at what is happening there. It became impossible to tolerate it. We had to stop that atrocity, that genocide of millions of people who lived there and who pinned their hopes on Russia, on all of us.
>
> In these circumstances, we have to take bold and immediate action. The people's republics of Donbass have asked Russia for help.

Finally, Putin cites Article 51 and the treaties of friendship and mutual assistance that had just been signed with the Donetsk and Luhansk People's Republic as the basis of Russian action. For Putin, self-defense required a so-called "special military operation" to "demilitarize and denazify Ukraine, as well as bring to trial those who perpetuated numerous bloody crimes against civilians, including against citizens of the Russian Federation.

Individual Self-defense

The primary basis outlined in the Putin speech for Russia's military action is individual self-defense by Russia against the United States and NATO. As those countries have not launched military operations, it is a claim of the right to "anticipatory self-defense."

Anticipatory self-defense has long been a fraught issue in international law. From the various positions that have been set forth by States and scholars, three general approaches emerge. By the first, the text of Article 51 is clear: there is no right to act in anticipation of an armed attack; the attack must be underway.

Yoram Dinstein explains this position in his classic *War, Aggression and Self-Defence*.[230] For him, the right of self-defense only arises once the armed attack has been launched, although he hastens to add that the first shot need not have been fired. Rather, the right of "interceptive self-defence" attaches once an adversary has embarked "upon an apparently irreversible course of action, thereby crossing the legal Rubicon." By this standard, the Russian claim fails, for there is no evidence that any planned NATO military operation had begun at the time Russian forces began their assault.

The more traditional approach to self-defense allows for forcible defensive action in the face of an "imminent" armed attack. The 2002 U.S. National Security Strategy,[231] which

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230 Yoram Dinstein, War, Aggression, and Self-Defence (6th ed. 2017).

231 *The National Security Strategy*, White House (Sept. 2002), https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/.

argued for a new approach to imminency, described this view.

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

In other words, the enemy must be at the gates in a tangible sense. The "indications and warnings" of imminency in this sense are precisely the sort of activities Russian forces were conducting in Russia, Belarus, and the Black Sea.

But again, the United States and NATO were engaged in no activities that would have enabled them to attack Russia on short notice. Even the NATO defensive actions cannot be characterized as such; the limited deployment of forces into the region and on the Russian border did not give NATO a meaningful offensive capability against Russia's forces. Indeed, it is questionable whether they provided any defensive capability beyond ensuring that NATO would enter the fray if the Russians crossed the border.

Finally, with the 2002 National Security Strategy, a new approach to anticipatory self-defense emerged, one gaining increasing traction. By it, a State may act when the "last window of opportunity" to defend itself is about to close. Writing about the approach before its eventual adoption by the United States (see, e.g., here[232]) and other States (e.g., Australia[233]), I explained[234],

> [I]t would be absurd to suggest that international law requires a State to "take the first hit" when it could effectively defend itself by acting preemptively. This being so, the correct standard for evaluating a preemptive operation must be whether or not it occurred during the last possible window of opportunity in the face of an attack that was almost certainly going to occur. Restated, it is appropriate and legal to employ force preemptively when the potential victim must immediately act to defend itself in a meaningful way and the potential aggressor has irrevocably committed itself to attack. This standard combines an exhaustion of remedies component with a requirement for a very high reasonable expectation of future attacks – an expectation that is much more than merely speculative.

The Russian position falters even by this more relaxed standard of anticipatory self-defense (sometimes unfortunately labeled "preemptive self-defense"). The last window of opportunity can only present itself when the other side has decided to attack, and a failure to act might forfeit the chance to mount an effective defense. There is no indication that NATO had decided to attack Russia.

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232 U.S. Dep't of Justice, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force (Nov. 8, 2011), https://irp.fas.org/eprint/doj-lethal.pdf.

233 George Brandis, *The Right of Self-Defence Against Imminent Armed Attack in International Law*, EJIL: TALK! (May 25, 2017), https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/.

234 Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. (2003), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1259&context=mjil.

This is so even if Crimea is considered part of Russia, which, as a matter of law, it is not (see Geiss[235]). There is no indication that NATO, or even Ukraine, had decided to mount an attack to retake Crimea. Moreover, had they so decided, the forces in place to do so effectively were not in place; thus, there was no last window of opportunity. On the contrary, Russia and the West were engaged in a series of negotiations over the situation, throughout which Russia enjoyed the upper hand militarily.

This means that Russia's actions are at best an example of "*preventive* self-defense," at worst, and most accurately, pure aggression. Preventive self-defense occurs when one of the three essential elements of the last window approach is missing: 1) capability to mount an armed attack; 2) a decision to launch an armed attack; and 3) the need to act now lest the opportunity to effectively defend oneself be lost. Preventive self-defense employs force to deprive an adversary of its future ability to mount an armed attack (which the Russians are successfully doing) in a situation that does not allow anticipatory self-defense. Such actions are unlawful. They can, and usually would, qualify as an armed attack giving the targeted State its own right of self-defense, and the corresponding right to look to other States for military assistance in collective self-defense.

Collective Defense

Although Putin's speech spoke of genocide, which suggests a justification on the highly controversial basis of humanitarian intervention, Putin has elected instead to style the Russian operations as collective defense of the Luhansk and Donetsk People's Republics, with which Russia has freshly minted mutual military assistance treaties. In this regard, the existence of the agreements is of little legal significance vis-à-vis collective defense, for military assistance may be provided by another State based on an ad hoc request. As Putin noted, the two so-called republics have requested Russian assistance, thereby satisfying the requirement of request noted by the International Court of Justice in the *Paramilitary Activities*[236] judgment (para. 199).

The problem for Putin is that the right to request military action in self-defense (or intervention of military forces more broadly, as in the case of assistance in fighting an insurgency) is limited to States. In *Paramilitary Activities*[237] (para. 246), the Court emphasized this point: "[T]he principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State."

Non-State groups may get assistance on the basis of humanitarian intervention (but only if such a right even exists in international law, as the United Kingdom[238] urges it does) or pursuant to a Chapter VII[239] authorization

235 Robin Geiss, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 91 Int'l L. Stud. 425 (2015), https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1377&context=ils.

236 Nicar. v. U.S. *supra* note 200.

237 *Id.*

238 Ryan Goodman, *UK Government Issues Major Statement on Legality of Humanitarian Intervention*, Just Security (Jan. 30, 2014), https://www.justsecurity.org/6583/uk-government-issues-major-statement-legality-humanitarian-intervention/.

239 U.N. Charter art. 39-51, *supra* note 223.

by the UN Security Council. Support for insurgent groups in other than those cases is an unlawful intervention into the internal affairs of another State (*Paramilitary Activities*,[240] paras. 202–205, 251), a topic to be addressed by other contributors to this forum.

One hurdle Putin does not have to cross is the timing of the action. Although Russia has just formally recognized the two entities as States, this does not necessarily mean that they did not qualify before the date of recognition (although, as a matter of law, they did not). Thus, Putin could point (incorrectly) to the ongoing hostilities stretching back to 2014 as the "armed attack" against which the collective defense is provided. And as to the Minsk II and other ceasefire agreements, Putin has claimed[241] they "were killed long before yesterday's recognition of the people's republics of Donbas …. And not by us, not by representatives of these republics, but by the current Kyiv authorities." When one party materially breaches a ceasefire agreement, the other side is entitled to resume fighting if it so chooses. The Russian claim would be counter-factual, but there is at least a chain of legal logic to get to the point where the current operation is claimed collective defense supporting the right of the two entities to self-defense.

The fatal flaw in the Russian argument is the status of Luhansk and Donetsk. The question is whether they are States. The international community overwhelmingly considers them part of Ukraine. But in terms of satisfaction of the criteria for Statehood, they fail on the basis of the "independence" criterion. As the late James Crawford has observed,[242] the Statehood of entities created through an unlawful use of force is doubtful. This is especially the case when the entity is "dependent upon its foreign sponsor" because that brings into question the Statehood condition precedent of independence, which Crawford labels as "the central criterion."

Crawford does admit that it is sometimes the case that "military intervention, for the purpose of supporting the right to self-determination, particularly in the context of decolonization, has been accepted in practice." However, he hastens to add that such cases are "not without misgivings." But the principle of self-determination[243] codified in, *inter alia*, Article 1(2)[244] of the UN Charter is hard to apply in the Donbas. Recall Putin's repeated claims about the lack of cultural and other distinctions between Ukrainians and Russians. The right of self-determination only attaches to a distinct "people." Whatever that term might imply (an unsettled contentious issue), Putin's statements asserting that Ukrainians and Russians are a single "people" undercut its application in this case.

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240 Nicar. v. U.S., *supra* note 203, paras. 202–205, 251.

241 *Ukraine Conflict: Biden Sanctions Russia Over 'Beginning of Invasion,'* BBC News (Feb. 23, 2022), https://www.bbc.com/news/world-europe-60488037.

242 James Crawford, *State, in* Max Planck Encyclopedias of Int'l L. (last updated 2011), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1473?rskey=o0k9it&result=1&prd=mpil.

243 Daniel Thürer & Thomas Burri, *Self-Determination, in* Max Planck Encyclopedias of Int'l L. (last updated 2008), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e873.

244 UN Charter art. 1(2), *supra* note 223.

Furthermore, in its 2010 advisory opinion[245] on Kosovo's declaration of independence (para. 81), the International Court of Justice likewise zeroed in on whether the purported State in question is the product of the unlawful use of force.

> [T]the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character *(jus cogens)*.

Factually, it is clear that but for Russia's unlawful use of force in Crimea and the support it subsequently gave insurgents in the Donbas, the Luhansk and Donetsk People's Republics would not exist today.

Finally, even if the two entities had qualified as States, the Russian action in collective self-defense failed to satisfy the two universally accepted criteria of self-defense, necessity and proportionality (see, e.g., *Paramilitary Activities*,[246] paras. 194, 237; *Nuclear Weapons*,[247] para. 41; *Oil Platforms*,[248] paras. 43, 73–74, 76). The necessity criterion requires that forcible action be needed to defend the State facing the armed attack. Yet, active negotiations were underway, and there is no indication that the defensive situation was worsening from the perspective of the two entities. On the contrary, Russian peacekeepers had entered the area, thereby lowering the supposed threat they faced from Ukraine.

As importantly, the scale and scope of the Russian military action far exceed that required to defend the so-called Luhansk and Donetsk People's Republics. Even if the presence of the Russian "peacekeepers" provided an insufficient shield from Ukrainian attack or the People's Republics were acting in self-defense to seize back territory "unlawfully" held by Ukrainian forces, there would have been no reason to attack into Kiev and other regions of Ukraine.

Conclusion

The Russian justification for military action against Ukraine is without any basis in international law. As I have discussed[249] earlier in *Articles of War*, the Russian military attack is merely the continuation of an unlawful use of force against Ukraine that began in 2014. Although the Minsk agreements and subsequent ceasefires may have temporarily suspended hostilities, Ukraine's right of self-defense remained intact. And in any event, Putin acknowledges those agreements are a dead letter.

Therefore, even if false Russian claims of a threat from NATO and/or Ukraine are taken at face value, Ukraine enjoyed a legal right to

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245 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 404 (July 22).

246 Nicar. v. U.S., *supra* note 203, paras. 194, 237.

247 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

248 Oil Platforms (Islamic Republic of Iran v. U.S.), Judgement, 2003 I.C.J. 161 (Nov. 6).

249 Michael N. Schmitt, *Russian Cyber Operations and Ukraine: The Legal Framework*, Articles of War (Jan. 16, 2022), https://lieber.westpoint.edu/russian-cyber-operations-ukraine-legal-framework/.

expel Russian troops from its territory. Such an exercise of self-defense could only qualify as an armed attack if it was disproportionate or unnecessary. Moreover, as Ukrainian territory, it would be lawful for Ukraine to forcibly exert control over the territory controlled by insurgents in the Donbas and ask other States for help in doing so.

And finally, even if NATO is a hostile offensive alliance looming on the borders of Russia (which it is not), any Russian right to self-defense had not yet matured. The Russian attack is quite simply an act of aggression[250] and use of force, an egregious violation of international law.

[250] Frédéric Mégret & Kevin Jon Heller, *A Russian Invasion of Ukraine Would Be an International Crime*, Al Jazeera (Feb. 17, 2022.), https://www.aljazeera.com/opinions/2022/2/17/a-russian-invasion-of-ukraine-would-be-an-international-crime.

THE ABUSE OF "PEACEKEEPING"

by Alexander Gilder | Mar 3, 2022

On 21 February, President Vladimir Putin explained that Russian forces would enter Ukraine to "perform peacekeeping functions."[251] Earlier this year the Collective Security Treaty Organization (CSTO) also deployed "peacekeeping forces"[252] to Kazakhstan, predominately made up of Russian troops.

Peacekeeping has become central to Russia's policy[253] to pursue continued interest in the "near abroad"—former Soviet republics. However, Russian uses of the term "peacekeeping" have drawn criticism. This post explains why the use of this term by Russia is problematic in light of its historical development under the remit of the United Nations (UN) and the principles associated with it.

Russia's "Peacekeeping" Engagement

Russia has a long history[254] of framing its military intervention as peacekeeping, which stems from Russian policy in the early 1990s to protect vital interests around the "near abroad." The wars in the former Yugoslavia put peacekeeping on the Russian foreign policy agenda when Russia made substantial troop contributions[255] to the UN Protection Force (UNPROFOR) in Bosnia.

However, Russia uses the term "peacekeeping" to describe a multitude of different military operations. For example, Russia conducted military operations in Georgia and Moldova in the 1990s that were also described as peacekeeping. Russian intervention came after protests and unrest erupted due to changes in the official language of those States led to armed conflict.

Russia's long-term engagement in Georgia, especially in South Ossetia and Abkhazia, culminated in war in 2008, and Russian forces remain present in Moldova almost thirty years on in the form of the Operational Group of Russian Forces (OGRF) in Transnistria. In 2020, the Moldovan president, Maia Sandu, called for Russian forces to withdraw from the disputed territory in Transnistria.[256] The UN supported these calls for "unconditional"[257] withdrawal of Russian troops, but Russia refused citing the risk of destabilization of the region. During

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251 *Putin Orders Russian Forces to "Perform Peacekeeping Functions" in Eastern Ukraine's Breakaway Regions*, Reuters (Feb. 22, 2022, 1:04 AM), https://www.reuters.com/world/europe/putin-orders-russian-peacekeepers-eastern-ukraines-two-breakaway-regions-2022-02-21/.

252 Paul D. Williams, *Putin's "Peacekeepers"*, Global Observatory: Int'l Peace Inst. (Feb. 23, 2022), https://theglobalobservatory.org/2022/02/putins-peacekeepers/.

253 Dov Lynch, Russian Peacekeeping Strategies in the CIS: The Case of Moldova, Georgia, and Tajikistan (1999).

254 Shahin Jafarli, *Russia's Peacekeeping Operations*, Baku Res. Inst. Soc. (Apr. 12, 2021), https://bakuresearchinstitute.org/en/russias-peacekeeping-operations/.

255 S. Neil Macfarlane & Albrecht Schnabel, *Russia's Approach to Peacekeeping*, 50 Int'l J. 294 (1995).

256 *Moldova's New President Calls for Russian Troops to Withdraw from Territory*, BBC: News (Nov. 30, 2020), https://www.bbc.com/news/world-europe-55135213.

257 *General Assembly Adopts Texts Urging Troop Withdraw from Republic of Moldova, Strengthening Cooperation in Central Asia*, U.N.: Meetings Coverage and Press Releases (June 22, 2018), https://press.un.org/en/2018/ga12030.doc.htm.

the escalation of the conflict in Ukraine, the Ukrainian government feared[258] the OGRF could be used as part of a "false flag" provocation to justify an invasion.

Russian "peacekeeping" missions have been described[259] as part of a "co-ordinated strategy of pursuing influence through the limitation of the sovereignty" of other States in the Commonwealth of Independent States. In Georgia,[260] the impetus for "peacekeeping" by Russian forces was to make the "survival of the Georgian state and regime … largely dependent on the presence of Russian military protectors."

More recently, Russia has been involved in "peacekeeping" efforts in Nagorno-Karabakh after the conflict in late 2020. Russia deployed[261] 1,960 peacekeepers, 90 armored personnel carriers, and 380 vehicles. Russian forces have been credited[262] with providing a "sense of security," and it has been speculated[263] that Azerbaijanis could return to the area under Russian protection. However, this is much to the dismay of Armenia, whose government plunged into political turmoil following the deployment of Russian forces.

"Peacekeeping" in Ukraine

Peacekeeping has also been discussed in relation to the conflict in the Donbas region of Ukraine, following the annexation of Crimea in 2014. Ukraine requested[264] a UN peace operation in 2015, with Putin later stating[265] in 2017 that he "did not see anything wrong" with the presence of UN forces or actors who would provide security to the OSCE Special Monitoring Mission to Ukraine.

Russia submitted a draft resolution[266] to the Security Council in September 2017, proposing a UN Support Mission to Protect the OSCE's Special Monitoring Mission in Southeast Ukraine that would be equipped with small arms and light weapons. It was recently suggested[267] that the Russian proposal "can be seen as a sign of Russia's greater willingness to embrace the primary institution of multilateralism as it is conventionally understood in contemporary international society."

Placing such faith in the use of multilateralism for a peaceful settlement of the conflict in the Donbas was misplaced with Russia's most recent invocation of the term to describe its

258 *Russia Stages Drills in Moldova's Breakaway Transnistria*, Moscow Times (Feb. 1, 2022), https://www.themoscowtimes.com/2022/02/01/russia-stages-drills-in-moldovas-breakaway-transnistria-a76222.

259 MacFarlane & Schnabel, *supra* note 258.

260 *Id.*

261 *Russia Deploys Peacekeepers to Nagorno-Karabakh*, Deutche Welle (Nov. 11, 2020), https://www.dw.com/en/russia-deploys-peacekeepers-to-nagorno-karabakh/a-55559305.

262 Olesya Vartanyan, *A Risky Role for Russian Peacekeepers in Nagorno-Karabakh*, Int'l Crisis Group (Nov. 10, 2021), https://www.crisisgroup.org/europe-central-asia/caucasus/nagorno-karabakh-conflict/risky-role-russian-peacekeepers-nagorno-karabakh.

263 Cong. Research. Serv., R 46651, Azerbaijan and Armenia: The Nagorno-Karabakh Conflict (Jan. 7, 2021).

264 Letter Dated Mar. 30, 2015, from the Permanent Representative of Ukraine to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/225 [hereinafter U.N. Rep. Letter].

265 *Vladimir Putin's News Conference Following BRICS Summit: Transcript of Vladimir Putin,* Johnson's Russia List (Sept. 6, 2017), https://russialist.org/russialink-transcript-vladimir-putins-news-conference-following-brics-summit-kremlinru-also-re-ukraine/.

266 U.N. Rep. Letter, *supra* note 267.

267 Takamitsu Hadano, *Multipolarity and the Future of Multilateralism: Towards 'Thick' Peacekeeping in the Donbas Conflict*, Global Pol., https://www.globalpolicyjournal.com/articles/conflict-and-security/multipolarity-and-future-multilateralism-towards-thick-peacekeeping.

forces in Ukraine as peacekeepers. Speaking to the media[268] on 22 February UN Secretary-General, António Guterres, expressed concern "about the perversion of the concept of peacekeeping." He explained, "When troops of one country enter the territory of another country without its consent, they are not impartial peacekeepers. They are not peacekeepers at all."

When addressing the UN General Assembly on 23 February, Guterres further stated, "We must also be concerned about preserving the integrity of peacekeeping. The United Nations has a long and recognized experience deploying peacekeeping operations—which only take place with the consent of the host country."[269] The U.S. Ambassador, Linda Thomas-Greenfield, also described the suggestion that Russia would carry out peacekeeping functions as "nonsense."[270] This response is due to the fact that neither the current actions in Ukraine nor the historic examples of Russian "peacekeeping'" as part of the foreign policy on the near abroad equate to the UN's conception of peacekeeping.

While many international organizations and coalitions undertake military operations that can fall under the general heading of peacekeeping, it is the UN that has led the way in the development of principles that distinguish peacekeeping from other military action. The record establishes that the UN "has led over 70 peacekeeping operations, more than any other actor."[271] As a result, those involved with UN peace operations recoil at the use of the term by Putin. For example, the former Under-Secretary-General for Peacekeeping Operations, Jean-Marie Guéhenno, abhorred, "Please don't use the word 'peacekeepers' to describe soldiers invading another country."[272]

Peacekeeping Principles

According to the UN, "United Nations Peacekeeping helps countries torn by conflict create conditions for lasting peace,"[273] and "UN Peacekeepers provide security and the political and peacebuilding support to help countries make the difficult, early transition from conflict to peace." As such, UN forces are facilitators and actively strive for peace. They both protect civilians (by providing security) and undertake peacebuilding activities to secure lasting peace.

It is true that contemporary UN peace operations no longer merely observe peace and often "impose their will on recalcitrant armed groups."[274] However, it is not the case

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268 *Secretary-General's Press Encounter on Ukraine: Transcript,* Office of the Commissioner Humanitarian Affairs (Feb. 22, 2022), https://reliefweb.int/report/ukraine/secretary-generals-press-encounter-ukraine-22-february-2022.

269 *Secretary-General's Remarks to the General Assembly on Ukraine: Transcript,* U.N.: Secretary-General (Feb. 23, 2022), https://www.un.org/sg/en/content/sg/statement/2022-02-23/secretary-generals-remarks-the-general-assembly-ukraine.

270 UNTV, *Russian 'Peacekeeping' Claim Is 'Nonsense,' US Envoy Tells UN-Video*, The Guardian (Feb. 22, 2022), https://www.theguardian.com/world/video/2022/feb/22/russian-peacekeeping-claim-is-nonsense-us-envoy-tells-un-video.

271 Paul D. Williams, *Putin's "Peacekeepers,"* Int'l Peace Inst.: Global Observatory (Feb. 23, 2022), https://theglobalobservatory.org/2022/02/putins-peacekeepers/.

272 Jean-Marie Guéhenno (@Jguehenno), Twitter (Feb. 21, 2022), https://twitter.com/JGuehenno/status/1495893195103813633?s=20&t=l5rK8u1LJQtuTeY2fa2INA.

273 *What Is Peacekeeping*, U.N. Peacekeeping, https://peacekeeping.un.org/en/what-is-peacekeeping.

274 Alex J. Bellamy & Charles T. Hunt, *Twenty-First Century UN Peace Operations: Protection, Force and the Changing Security Environment*, 91 Int'l Aff. 1277 (2015).

that peacekeeping includes the overwhelming use of offensive force constituting an invasion that seeks to undermine the victim state and where the intensity of the conflict results in widespread harm to civilians and mass displacement. It difficult to see how Russian forces propose to establish a lasting peace. Instead, there could a lasting occupation.

First laid down in 1958 by Secretary-General Dag Hammarskjöld, the traditional principles of UN peacekeeping include consent, impartiality, and minimal use of force. These principles have been reinterpreted over time as the role and functions of peacekeeping operations have adapted and been reformed, but at their core remain mostly the same.

The majority of UN peace operations today operate under a Chapter VII mandate, with an authorization for the use of force to protect civilians. Resort to Chapter VII to authorize the use of force does not typically require the consent of the State on whose territory force will be used. However, a UN peacekeeping operation will only deploy with the consent of the host state in respect for state sovereignty and territorial integrity. This is because without consent the peace operation would amount to an enforcement action which is often conducted by coalitions of the willing, as authorized under Chapter VII. Importantly, the UN explains that consent by the State(s) involved represents a "commitment by the parties to a political process," which is key in the distinction between peacekeeping and other uses of military force.

Another of Hammarskjöld's principles, impartiality, prevents a UN peacekeeping mission from being used to force a political settlement in the interest of one party to the conflict or influence the balance of power. The principle of impartiality again distinguishes the concept of peacekeeping from, for example, a coalition of the willing authorized under Chapter VII that may involve military action directed against an aggressor state. President Putin urged[275] the Ukrainian military to "take power in your own hands," which has been widely interpreted to be an incitement of coup d'état. Such action clearly contradicts the principle of impartiality.

The third principle of UN peacekeeping is that force must only be used for defensive purposes, where Chapter VII authorization is absent. The use of offensive force would be "beyond the competence" of an operation. With many modern missions holding Chapter VII mandates to protect civilians and use force in defense of the mandate, it has been interpreted[276] to enable UN forces to respond effectively and "silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect." Nonetheless, UN peacekeepers must not take the initiative in the use of force as such action would risk the UN straying into enforcement actions typically undertaken by other actors.

Conclusion

The UN has worked for decades to establish the legitimacy of peacekeeping distinct from other forms of international intervention and uses

275 AFP, *Putin Calls for Ukraine Army to Overthrow Zelensky*, Moscow Times (Feb. 25, 2022), https://www.themoscowtimes.com/2022/02/25/putin-calls-for-ukraine-army-to-overthrow-zelensky-a76598.

276 S.C. Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, U.N. Doc. A/55/305-S/2000/809 (Aug. 21, 2000).

of military force. This is critical for the UN's role in the peaceful settlement of disputes and reconstruction of war-torn societies.

The UN vehemently wishes to distance itself from Russian uses of "peacekeeping" that are inherently linked to foreign policies aimed at keeping former Soviet republics within the sphere of Russian influence. Naturally, this is at odds with the UN's purposes to suppress acts of aggression and ensure the equal rights of all States under international law. Commentators should similarly avoid reproducing any rhetoric that actions undertaken by Russian forces may constitute "peacekeeping."

UN PEACEKEEPERS AND THE ZAPORIZHZHIA NUCLEAR PLANT

by Alexander Gilder | Jan 20, 2023

Europe's largest nuclear power plant has been under Russian control since March 2022. The international community has repeatedly called for a resolution to a situation that could result in a nuclear disaster because the plant is regularly damaged by shelling.

In August, the International Atomic Energy Agency (IAEA) carried out a Support and Assistance Mission to Ukraine's Zaporizhzhia Nuclear Power Plant (ISAMZ) to establish a continuous IAEA presence. Nevertheless, in September, IAEA Director General Rafael Mariano Grossi stated, "[t]he safety of Zaporizhzhya Nuclear Power Plant is hanging by a thread."

The UN Secretary-General led calls in August for the plant to be demilitarized, and the UN provided logistical and security support for the IAEA mission. However, after the Secretary-General had addressed the Security Council on the mounting crisis, Petro Kotyn, the head of Ukraine's nuclear agency Energoatom, called for UN peacekeepers to be deployed to set up and secure the demilitarized zone sought by the UN and other international organizations.

Despite the IAEA claiming to have made progress on establishing the nuclear safety and security protection zone, this month Kotyn reiterated his request for UN peacekeepers because he feels there is no solution at the IAEA and "[t]he process is not going forward."

Professors Mike Schmitt and Tom Dannenbaum discussed the Zaporizhzhia plant earlier in this symposium. Therefore, I will not repeat the coverage of demilitarized zones and violations of IHL at the plant. Instead, I will focus on the merits and demerits of Ukraine's call for UN peacekeepers to secure the plant.

Mandating a UN Peace Operation

UN peace operations are, in most circumstances, mandated by the UN Security Council. Such operations regularly deploy with mandates to use force under Chapter VII of the UN Charter. This is unlikely in the case of Zaporizhzhia given the politics of the current conflict. By contrast, no UN peace operation has been authorized by the UN General Assembly since the UN Emergency Force (UNEF I) deployed to the Egyptian and Israeli border in 1956.

When France and the Soviet Union refused to pay for UNEF I, the International Court of Justice (ICJ), in its Certain Expenses Advisory Opinion, found that both the Security Council and the General Assembly had the competence to mandate peace operations. The former has the primary duty to ensure international peace and security under Article 24(1) of the UN Charter and can authorize coercive use of force. Still, the ICJ concluded there is nothing in the Charter that prevents the General Assembly from recommending the use of a non-coercive peace operation as a method of peaceful settlement.

Traditionally, the General Assembly will not act on a matter of "international peace and security" if the Security Council is seized of the matter. However, in Resolution 377 of 1950 (commonly known as the "Uniting for Peace" Resolution), the General Assembly resolved that if the Security Council was deadlocked with respect to a threat to the peace, breach of the peace, or act of aggression, the Assembly could consider the matter and make appropriate recommendations to member States for collective action, including the use of armed force.

It has been common practice throughout the history of UN peacekeeping to deploy a Chapter VI mission, one that is not authorized to use "all necessary" (forcible) measures, to an inter-State conflict to separate the warring parties. The UN continues to operate Chapter VI missions in inter-State conflicts to this day. For example, UNFICYP is deployed to Cyprus, UNMOGIP to India and Pakistan, and UNDOF maintains a demilitarized zone between Israel and Syria. Such a mission may be deployed by either the Security Council or General Assembly and avoids complicated questions over the General Assembly's competence to authorize the use of force.

Where peacekeepers are deployed under Chapter VI, they can only use force in self-defense.

Whereas missions deployed under Chapter VII can be given mandates to use all necessary measures to protect civilians or ensure the delivery of humanitarian aid. Also, Chapter VI missions are often smaller forces ill-suited to warfighting with States or non-State actors. For instance, UNFICYP and UNDOF have 746 and 1,069 troops respectively, and UNMOGIP has only a small number of observers. Deployments of 10,000+ peacekeepers are usually reserved for Chapter VII missions that require wide-ranging mandates to protect civilians. Even then, most large missions today reiterate that the host State is primarily responsible for protecting civilians since a peacekeeping force cannot protect everyone, everywhere.

For the General Assembly to authorize a small Chapter VI mission to Zaporizhzhia, the situation on the ground would need to change drastically. For example, UNFICYP deployed to Cyprus in 1964 to reduce intercommunal violence and was not prepared for the coup that took place ten years later. The Chapter VI mission worked with communities to establish local level ceasefires but was only able to police a demilitarized zone and corresponding ceasefire following peace talks.

For UN peacekeepers under a Chapter VI mandate to be effective, there would need to be a peace agreement in place that recognizes Zaporizhzhia as a demilitarized zone. If, hypothetically, fighting were to lessen in the Zaporizhzhia and Kherson Oblasts and battlelines were to be become entrenched whilst the efforts of Ukraine and Russia were directed to the Donetsk and Luhansk Oblasts, the UN would likely still require a ceasefire to deploy Chapter VI forces. A mere redirection of the most intense fighting would not assuage the doubts of UN member States who must contribute troops to the mission. The risk of casualties would be too high for troop-contributing countries to stomach, especially if the force were to

be deployed under Chapter VI. We have a long way to go before UN peacekeepers could safely and meaningfully enforce a demilitarized zone or ceasefire.

Even a large deployment authorized under Chapter VII by the Security Council (the largest currently authorized is 17,420 uniformed personnel for MINUSCA) would be incapable of precluding the threat of warfare between Ukraine and Russia and ensuring the safety of UN personnel. Moreover, if either party tried to retake Zaporizhzhia, UN peacekeepers would likely need more equipment, resources, or personnel to defend the plant. It is simply not what peacekeepers are trained and deployed to do.

The Cardinal Principle of Consent

In the past, peacekeepers have successfully served as a deterrent to further escalation. However, with a large Chapter VII mission unlikely due to the Russian veto in the Security Council, this begs the question whether the General Assembly could authorize a smaller, Chapter VI force to enforce a demilitarized zone around Zaporizhzhia and deter shelling of the plant. The simple answer is yes, but it is unlikely to do so.

Casting operational concerns to one side for the moment, a major sticking point would be consent. A foundational principle of UN peacekeeping is that the UN requires the host State's consent. Without consent, the UN would be taking enforcement action. Enforcement mandates are not typically undertaken by UN forces and instead are taken on by coalitions of the willing authorized by the Security Council (such as in the Gulf War). Consent is normally derived from a Status of Forces Agreement (SOFA) between the UN and the host State. This was the approach taken with UNEF I, where Egypt consented to the operation's deployment. The UN withdrew it in 1967 when consent was withdrawn, as is required absent a further mandate to the host State's satisfaction.

It is important to note that consent was originally understood as the consent of "all the parties concerned." By this approach, Russia and Ukraine would both need to consent to the deployment of UN peacekeepers to Zaporizhzhia. In 2008 the UN's Capstone Doctrine spoke of consent as "acceptance of a peacekeeping operation" and "commitment by the parties to a political process." Today, however, missions are regularly deployed to conflicts where a host of non-State armed groups are operating.

It has been suggested that while all parties should consent, consent is not a legal requirement; rather, it is merely desirable. For instance, in Somalia, the government's consent sufficed to deploy UNOSOM I even though the government lacked effective control of the territory concerned. Similar situations have arisen since, as in MONUSCO, where the mission was tasked with disarming numerous militias active in the Congo without the consent of the armed groups.

The defining difference in the current situation is the existence of an inter-State conflict between Ukraine and Russia, as distinct from intra-State conflicts. While, in theory, the consent of both States is not a legal requirement for the deployment of a peacekeeping force by either the Security

Council or General Assembly, the UN would undoubtedly seek the consent of Ukraine and Russia. Increases in peacekeeper casualties make troop-contributing countries less willing to contribute forces in the future. Therefore, the UN is perennially concerned with limiting the risks peacekeepers are exposed to. Currently, Zaporizhzhia presents too great a risk without the consent of both parties guaranteeing peacekeeper safety.

It is not entirely outlandish to speculate that Ukraine could gain support for a resolution in the General Assembly calling for a ceasefire alongside the deployment of UN peacekeepers and a demilitarized zone. In this scenario, the General Assembly would have no legal power to compel Russia to accept the presence of peacekeepers. But there may be political ramifications for any Russian objection. If, in the future, we begin more concrete discussions on a ceasefire, Russia would be hard-pressed to find valid objections as to why such a ceasefire should not come part and parcel with the deployment of UN peacekeepers. After all, UN peacekeepers have a long and distinguished history of ensuring the observance of ceasefires, demilitarized zones, and working with parties to conflicts around the globe.

Concluding Thoughts

Ukraine is correct to raise the request for a UN peacekeeping force. However, that is not to say I believe that the General Assembly should immediately deploy a contingent of UN peacekeepers with the consent of only one State party to the conflict. Instead, it is a possibility that the UN should actively review and reassess as the conflict continues to progress. For instance, if active hostilities were to lessen and negotiations for peaceful settlement to begin sometime in the future, a UN peace operation may become an appropriate mechanism by which to ensure observance of a demilitarized zone at Zaporizhzhia. However, in today's conflict, UN peacekeepers would be ill-suited to the task without assurances from both sides that peacekeepers would not be subject to attack.

Peacekeepers cannot fight a war but can serve as a buffer. For the UN, a smaller peacekeeping force must not be at risk of being overwhelmed by a party to the conflict. However, if the State parties were willing to acquiesce to the presence of UN peacekeepers, the force would serve as a deterrent and ensure that Zaporizhzhia would be off the table in future conflict.

ILLEGALITY OF RUSSIA'S ANNEXATIONS IN UKRAINE

by Lauri Mälksoo | Oct 3, 2022

On 30 September 2022, a ceremony[277] took place in Moscow's Kremlin in which Vladimir Putin, President of the Russian Federation, signed "treaties" with representatives of four entities formed in the territory of Ukraine: the so-called People's Republics of Donetsk and Luhansk and the oblasts of Zaporizhzhia and Kherson. Preceding this ceremony, events took place that Moscow portrayed as referendums[278] in the above-mentioned territories, with the claimed result of popular support in these Ukrainian territories for joining Russia.

The Russian annexation of Ukrainian territory has already widely and rightly been characterized as illegal under international law—illegal first of all because the announcement of annexation was preceded by Russia's use of military force in contradiction with the UN Charter, a *jus cogens* norm in international law. The "referendums" did not correspond to any international standards and should therefore not be called referendums in the first place. Moreover, intense battles are ongoing in the region and already after the ceremony in the Kremlin, Ukrainian forces liberated the "annexed" city of Lyman in Donbas. Even when annexations as unilateral acts were in principle possible according to international law, they were considered problematic when a war was still ongoing.

The aim of this blog post is first to shed further light on the illegality of the Russian annexation of Ukrainian territories. Its second aim is to interpret further Russia's current behavior and rhetoric in the context of international law. As it is so obvious that Russia's annexation of Ukrainian territories can only be characterized as illegal under international law, what is the Kremlin actually up to?

Annexations in Modern Legal History

First, a little bit of history on the illegality of annexations is due. In 1928, when signing the Kellogg-Briand Pact,[279] States renounced recourse to war as an instrument of national policy in their relations with one another. The Soviet Union was not among the initial signatory States of this treaty, but it accepted the same principle in its relations with its Western border States when it initiated and signed the so-called Litvinov Protocol in 1929. Moreover, the Soviet Union initiated the generous Convention for the Definition of Aggression[280] which was signed in London in 1933 between the Soviet Union and its border states. However, on 23 August 1939 the Soviet Union concluded an aggression

277 *Signing of Treaties on Accession of Donetsk and Lugansk People's Republics and Zaporozhye and Kherson Regions to Russia: Transcript of Vladimir Putin,* President of Russia (Sept. 30, 2022), http://en.kremlin.ru/events/president/news/69465.

278 Rob Picheta, *Russian Forces Have Staged Illegal 'Referendums' in Ukraine. What Comes Next?*, CNN (Sept. 28, 2022), https://edition.cnn.com/2022/09/27/europe/ukraine-russia-referendum-explainer-intl/index.html.

279 General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, 94 L.N.T.S. 57.

280 Convention for the Definition of Aggression, July 3, 1933.

pact with Nazi Germany,[281] with a secret protocol[282] dividing countries of East Central Europe between the two revisionist powers in their respective "spheres of influence." Aggressions very soon followed based on this secret protocol, including one after which the Soviet Union was expelled from the League of Nations in 1939—the Soviet war against Finland.

This revealed a problematic instrumental feature in Soviet approaches to international law at the time. Moscow solemnly promised one thing in treaties with its neighbors and then did the opposite when its understanding of *Realpolitik* demanded it. In the 1930s, Soviet international lawyers such as Pashukanis wrote openly that Moscow in its foreign policy was entitled to do anything which would advance the class interests of the proletariat; in this sense, past treaties were not sacrosanct. Thus, formally there was a common understanding between the "capitalist countries" and the Soviet Union that aggression was to be condemned and prohibited. At the same time, the Soviet Union meant something else with international law and treaties as such. They were first and foremost a means of foreign policy and a tool of national propaganda, not an autonomous set of rules constraining Soviet foreign policy.

One of the factors explaining Moscow's behavior in Ukraine since 2014 is that in 1944 and 1945, the Soviet Union received a geopolitical reset from the West as a consequence of being indispensable in the war effort against the Axis Powers. At Nuremberg, Germany's attack against Poland on 1 September 1939 was characterized as a crime against peace. But the Soviets continued to characterize their military invasion in Eastern Poland from 17 September 1939 onward as "liberation." The problem is that to an extent, the Soviet Union got away with this approach. This is possibly the lesson learned in Moscow, which has repercussions in our times and for Putin: at the end of the day, this is how international law works; it is written by the winners. All it takes is to belong to the winners, to become one.

Nevertheless, in 1945, the United Nations Charter[283] was adopted, Article 2, paragraph 4, of which famously stipulates: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[284] It is in the sense of Article 2, paragraph 4 of the UN Charter that Russia's use of force against Ukraine has been blatantly illegal.

Illegality of annexations has been a logical and inevitable corollary to the use of military force, notwithstanding its prohibition under international law. Already in 1932, the United States formulated the so-called Stimson

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281 Treaty of Nonaggression Between Germany and the Union of Soviet Socialist Republics, 23 Aug. 1939, Yale Law School: Lillian Goldman Law Library, https://avalon.law.yale.edu/20th_century/nonagres.asp.

282 Secret Supplementary Protocols of the Molotov-Ribbentrop Non-Aggression Pact, Sept. 1939, Wilson Center: Digital Archive, https://digitalarchive.wilsoncenter.org/document/secret-supplementary-protocols-molotov-ribbentrop-non-aggression-pact-1939.

283 U.N. Charter, *supra* note 223.

284 *Id.*, art. 2(4).

doctrine[285] based on which territorial changes produced by violations of the Kellogg-Briand Pact, such as at the time in Manchukuo, would not be recognized. Later, this approach became widely known and used as the non-recognition doctrine, a corollary of the prohibition of aggression and use of force in international law. Furthermore, in terms of consequences of illegality, the International Law Commission's Articles on State Responsibility (Responsibility of States for Internationally Wrongful Acts[286]), endorsed by the UN General Assembly in 2001, introduce the concept of "serious breaches of international law" (Article 40) and foresee in Article 41, paragraph 2: "No State shall recognize as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation."

Article 41 reflects general international law. But the illegality of Russia's announcement of annexation in Ukraine also becomes evident when taking into account specific treaties and agreements regarding the borders of Ukraine. In the Budapest Memorandum of 1994 between Ukraine, Russia, the United Kingdom, and the United States, the signatory States reaffirmed to Ukraine their commitment "to respect the independence and sovereignty and the existing borders of Ukraine"[287] and reaffirmed "their obligation to refrain from the threat or use of force against the territorial integrity and political independence of Ukraine." Moreover, on 28 January 2003, Russia and Ukraine concluded in Kyiv a border treaty[288] in which Russia recognized the post-Soviet borders of Ukraine, i.e., including Crimea and Donbas, as Ukrainian territories. The treaty carries the signature of President Putin and was duly ratified by both States. Thus, by challenging Ukraine's borders through military force, the Russian government has abandoned its approach taken consistently until 2014.

Russian Legal Manipulations

Nevertheless, one cannot escape the impression that the Russian government has, at least pro forma, tried to create an appearance that the incorporation of the above-mentioned territories could be considered as legal under international law. In principle, the same approach as with the annexation of Crimea in 2014 has been followed. First, Russia recognized the "independence" of the respective territory and then quickly annexed it. For example, the legal act *(ukaz)* of the Russian President of 29 September 2022 which recognized "state sovereignty and independence"[289] of Kherson Oblast, refers to the "generally recognized principles and norms of international law," especially the "principle of equal rights and self-determination of peoples." Historically, already with the illegal annexation of the three Baltic States of Estonia, Latvia, and

285 *Stimson Doctrine, 1932*, U.S. Dep't of State: Archive, https://2001-2009.state.gov/r/pa/ho/time/id/16326.htm.

286 Responsibility of States for Internationally Wrongful Acts, A/56/49(Vol. I)/Corr.4, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

287 Budapest Memo, *supra* note 173.

288 Treaty Between Ukraine and the Russian Federation on the Ukraine-Russian State Border, Ukr.-Russ., Jan. 28, 2003, UN Treaties No. 54132.

289 *Recognizing the Independence and Sovereignty of the Kherson Oblast Area of Ukraine*, Office of the President of Russia (Sept. 29, 2022), http://publication.pravo.gov.ru/Document/View/0001202209300002.

Lithuania, the Soviet Union tried to create an appearance of elections and thus a sort of democratic legitimacy, although all these acts happened after the threat of force and the elections were sham elections only. After 1945 too, Soviet dominance over Eastern Europe was, as a rule, established via sham elections, as Stalin had promised to Roosevelt and Churchill that the people's free will would be taken into account.

President Putin's speech[290] of 30 September 2022 further reveals that the Russian government sees the war in Ukraine as nothing less than a proxy conflict regarding the present and future of the world order. Putin justified the referendums based on Article 1, paragraph 2, of the UN Charter, which stipulates that one of the purposes of the UN is to "develop friendly nations among nations based on respect for the principle of equal rights and self-determination of peoples."[291] Thus, although post-1991 Russia criticized the right of peoples to self-determination as a ground for secession, it now formally refers to it justifying its announcement of annexations at the cost of Ukraine. In the end, Putin's Russia's approach is characterized by a Schmittian decisionism[292] of sorts. International law is what great powers say it is, and Russia wants to (again) be such a great power.

In his speech[293] of 30 September 2022, Putin also offered a massive civilizational critique of the West, arguing *inter alia* that the West wants to determine who can exercise self-determination and who cannot. He claimed that most countries have agreed to become vassals of the United States and the neocolonial West, but that Russia would never succumb to such a humiliating role. Putin also criticized the Western political concept of a "rules-based international order," asking rhetorically and mockingly: "Where were these rules taken from? Who saw these rules, agreed to them?" Putin proudly declared, with the approval of his Russian political elite in the audience, that Russia is a proud country-civilization and will not live "under false rules." Putin further accused that the Western model of governance is still neo-colonialist and based on a division of the world into civilized and uncivilized as in earlier times. One must think about what resonance such words can have in the non-Western world when, for example, China and India abstained on 30 September 2022, as the UN Security Council voted[294] on the draft resolution condemning the Russian annexation. Russia, of course, vetoed the draft resolution, highlighting once again that Russia's war against Ukraine and how third countries relate to it (or do not relate to it) has also become a crisis of the United Nations.

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290 *Signing of Treaties on Accession, supra* note 283.

291 U.N. Charter, *supra* note 223, art.1(2).

292 Jan-Werner Muller, A Dangerous Mind: Carl Schmitt in Post-War European Thought (2003).

293 *Signing of Treaties on Accession, supra* note 283.

294 *Russia Vetoes Security Council Resolution Condemning Attempted Annexation of Ukraine Regions*, U.N. News (Sept. 30, 2022), https://news.un.org/en/story/2022/09/1129102.

Conclusion

In the last decades, international lawyers have conceded that international law can be indeterminate, enabling both utopian and apologist arguments. Putin's Russia has taken this to the extreme and demonstrates what can be done with the "language" of international law either in bad faith or at the time of resurgence of imperial ambitions. The core of the rules-based world order—a notion which the Russian government mocks—is, of course, international law. In 1991, 1994, and 2003, Russia already agreed to Ukraine's post-Soviet borders. As it is now trying to change these borders by force and through unilateral annexations, it is presenting a challenge not only for Ukraine as a sovereign State but also for the international legal system as such.

CHAPTER II

SCOPE OF APPLICATION

CLASSIFICATION OF THE CONFLICT(S)

by Michael N. Schmitt | Dec 14, 2022

The threshold questions in any international humanitarian law (IHL) analysis are whether an armed conflict is underway as a matter of law and, if so, what type. They are determinative questions because the existence of an armed conflict is a condition precedent to IHL's application. Should one exist, the aspects of that law that apply depend on whether the conflict is "international" or "non-international" in character.

The differences between the two forms of conflict are significant. A number of treaties govern both international and non-international armed conflict, although, with the notable exception of the Second Protocol[1] to the 1954 Hague Cultural Property Convention, they deal primarily with weapons (e.g., 1972 Biological Weapons Convention,[2] 1993 Chemical Weapons Convention,[3] 1997 Anti-Personnel Land Mines Convention,[4] 2001 Amendment to the Conventional Weapons Convention,[5] 2008 Cluster Munitions Convention).[6]

But most IHL treaty law is specific to one or the other form of conflict. For instance, during an international armed conflict, the Regulations annexed to the 1907 Hague IV Conventions,[7] the four 1949 Geneva Conventions,[8] and, for Parties, Additional Protocol I[9] to those Conventions apply. During a non-international armed conflict, Common Article 3[10] of the 1949 Geneva Conventions, which contains only basic provisions, and the relatively short

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1 Protocol (II) to the Hague Convention of 1954, For the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 212 [hereinafter Hague Convention Protocol II].

2 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015 U.N.T.S. 163.

3 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317.

4 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997, 2056 U.N.T.S. 241.

5 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, Oct. 10, 1980, 1342 U.N.T.S. 137.

6 Convention on Cluster Munitions, May 30, 2008, art. 1, 48 I.L.M. 357.

7 Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461 [hereinafter 1907 Hague IV Regulations].

8 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 970 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 971; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 972 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 973 [hereinafter GC IV] [collectively, hereinafter Geneva Conventions].

9 Protocol (I) Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (entered into force Dec. 7, 1978) (signed by the U.S. Dec. 12, 1977, not transmitted to U.S. Senate, *see*, S. Treaty Doc. No. 100-2 (1987)).

10 1949 Geneva Conventions, *supra* note 8, art 3.

Additional Protocol II[11] provide the bulk of applicable treaty law. The latter does so only for Parties to the instrument and only in certain types of non-international armed conflicts (see below). Additionally, the body of customary international law applicable in international armed conflict is denser than that governing non-international armed conflict.[12] Finally, and of particular significance for those engaging in hostilities, it is only during an international armed conflict that the notions of combatant[13] and prisoner of war[14] status exist.

In this post, I assess the nature of the conflict in Ukraine from its inception in 2014 through the present. Classification of this conflict, or more accurately, *these conflicts*, is complex, for the situation in Ukraine has at times been "mixed," either because international and non-international conflicts were ongoing contemporaneously ("horizontally" mixed) or occurring sequentially ("vertically" mixed).[15] Moreover, the situation's facts have often been challenging to evaluate because of Russia's efforts to mask its involvement, the claims of separatist groups to independence, and a lack of clarity regarding the relationship between Russia and various organized armed groups fighting the Ukrainian government. Despite these obstacles, I will attempt to disentangle the facts to identify the type of armed conflicts that took, and are still taking, place.

The Bifurcated Typology of Classification

The contemporary typology of armed conflict emerged following the Second World War. Before then, the Parties to the 1907 Hague Convention III relative to the Opening of Hostilities[16] had agreed that "hostilities between themselves must not commence without previous and explicit warning, in the form of either a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war."[17] Concerned that the application of the laws of war not be held hostage to political decisions as to whether to declare war, the 1949 Geneva Conventions adopted a fact-based approach to the existence of an "armed conflict" (a term adopted in lieu of "war") as the condition for application of those instruments.[18] Additionally, the Conventions, for the first time, addressed internal conflict. The decision to do so was partly motivated by the Spanish Civil War, which had been as violent and internationally destabilizing as many State-on-State wars.

To address these concerns, the Geneva Conventions established a bifurcated

11 Protocol (II) Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) (signed by the U.S. Dec. 12, 1977, transmitted to the U.S. Senate Jan. 29, 1987, pending action as S. Treaty Doc. No. 100-2 (1987)).

12 International Committee of the Red Cross, Int'l Humanitarian Law Databases, https://ihl-databases.icrc.org/en/customary-ihl.

13 *Combatants and POWs*, Int'l Humanitarian Law Databases, https://casebook.icrc.org/law/combatants-and-pows.

14 *Prisoners of War: What You Need to Know*, Int'l Comm. of the Red Cross (June 1, 2022), https://www.icrc.org/en/document/prisoners-war-what-you-need-know.

15 Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 40–42 (4th ed. 2022).

16 Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 3 Martens Nouveau Recueil (ser. 3) 437 [hereinafter 1907 Hague II].

17 *Id.* art. 1.

18 1949 Geneva Conventions, *supra* note 8.

typology of war that distinguished between "international" and internal ("non-international") armed conflict. Common Article 2 to the four Geneva Conventions set forth the threshold at which the former occurred.[19] It provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting parties, even if the state of war is not recognized by one of them." The article goes on to note, "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Common Article 3, by contrast, dealt with "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties," and laid out a small number of rules to govern such internal conflicts.[20]

By this bifurcation, the specific rules that apply to a conflict depend on who the parties are. International armed conflict involves hostilities between States, while non-international conflict occurs when violence of a certain intensity takes place between a State and an organized armed group or between organized armed groups. Today, the two articles are universally acknowledged as reflecting customary law, although some difference of opinion exists regarding their precise scope.[21]

In the following discussion, it is essential to remember that hostilities in one area of a country that qualify as an international or a non-international armed conflict extend that conflict throughout the country. Thus, the IHL rules apply everywhere in the belligerent States in the case of an international armed conflict and throughout the State involved during a non-international armed conflict. This is so irrespective of whether there are ongoing hostilities in a location. For instance, once an international armed conflict was underway between Russia and Ukraine due to Russia's invasion of Crimea (see below), there was no need for the situation in the Donbas region to qualify as one before applying the relevant international armed conflict IHL rules to Russian and Ukrainian forces there. Nevertheless, in the following discussion, I will tease out the multiple grounds for conflict characterization in Ukraine to illustrate how they apply.

International Armed Conflict

International armed conflict exists in three circumstances: 1) when there are hostilities between the armed forces or other organs of States, 2) during belligerent occupation of one State by another, and 3) when a State is in "control" of an organized armed group fighting another State. A fourth type of international armed conflict is limited to Parties to Additional Protocol I and involves groups fighting for self-determination.

The Law: In oft-cited text, the International Committee of the Red Cross (ICRC) 1958 Geneva Convention IV *Commentary* to

[19] GC I, *supra* note 8, art. 2; GC II, *supra* note 8, art. 2; GC III, *supra* note 8, art. 2; GC IV, *supra* note 8, art. 2.

[20] GC I, *supra* note 8, art. 3; GC II, *supra* note 8, art. 3; GC III, *supra* note 8, art. 3; GC IV, *supra* note 8, art. 3.

[21] Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 Int'l L. Stud. 1 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375333.

Common Article 2 explains that "[a]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place."[22] The updated 2016 ICRC Geneva Convention I *Commentary* to the article emphasizes that "[e]ven minor skirmishes between the armed forces, be they land, air or naval forces, would spark an international armed conflict and lead to the applicability of humanitarian law."[23] While some commentators suggest that isolated or sporadic uses of force do not suffice, all agree that the intensity and duration threshold is quite low and that the classification assessment is factual.

An international armed conflict can also be triggered (or continued) by belligerent occupation. This is so even if the occupation is unopposed, a caveat that derives in part from the unopposed occupation of Denmark by German forces during the Second World War. As used in Common Article 2, "occupation" has the same meaning as the term's usage in Article 42 of the 1907 Hague Regulations: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[24] The ICRC's 2015 Geneva I Commentary explains that this status requires the satisfaction of three constitutive elements:

- the armed forces of a State are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion;
- the effective local government in place at the time of the invasion has been or can be rendered substantially or completely incapable of exerting its powers by virtue of the foreign forces' unconsented-to presence;
- the foreign forces are in a position to exercise authority over the territory concerned in lieu of the local government.[25]

A third basis for characterizing a conflict as international is "overall control" by one State of an organized armed group fighting another State. In *Tadić*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) described overall control as "going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations."[26] And in Lubanga, the International Criminal Court explained that it involved "a role in organising,

[22] Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary (Jean. S. Pictet ed., 1958) [hereinafter Commentary GC]. See also Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 208 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 1998).

[23] Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, para. 237 (2016) [hereinafter 2016 GC I Commentary], https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4825657B0C7E6BF0C12563CD002D6B0B [hereinafter 2016 Commentary GC I].

[24] Hague IV Regulations, *supra* note 7, art 42.

[25] 2016 Commentary GC I, *supra* note 23, para. 300.

[26] Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 145 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

coordinating, or planning the military actions of the military group."[27] Thus, while the State need not direct individual operations to have overall control of an organized armed group, it must exercise a degree of de facto decision-making authority. Once it does, the existing non-international armed conflict becomes international; it has been internationalized.

Finally, Additional Protocol I controversially extends to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[28] The provision led numerous States (in part), including the United States, to refuse to become a Party to the instrument.[29] Most commentators agree that it does not reflect customary international law. Nevertheless, as Ukraine and Russia are Party to the instrument, they are bound by the provision.

International Armed Conflict Between Russia and Ukraine

In a previous post in this series, I discussed the background to the outbreak of hostilities in 2014.[30] The critical moment regarding the classification of the situation came when the "Euromaidan" protests forced President Victor Yanukovych to flee to Russia in February 2014. Soon thereafter, Russian soldiers without distinctive uniforms or other insignia[31] identifying them as such (the so-called "little green men"[32]) entered Crimea and seized strategic locations, including Crimea's parliament (Verkhova Rada). Although Russia initially denied that its soldiers were involved and branded them as volunteers, President Putin later acknowledged[33] that its troops "stood behind Crimea's self-defence forces" and that the little green men were Russian military personnel.[34] The involvement of Russian forces in the military operations clearly triggered an international armed conflict between Ukraine and Russia.

In March, pro-Russian elements in Crimea issued the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol. That month, nearly 97% of the population supposedly voted for annexation, which Russia promptly approved. The move was widely, and accurately, condemned as unlawful (e.g., UN,[35] E.U.[36]). The fact that Russia stationed troops in Crimea and maintains the

[27] Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, para. 211 (Int'l Crim. Ct. Jan. 2007).

[28] AP I, *supra* note 9, art. 1(4).

[29] National Security Law Department, Judge Advocate General's Legal Center & School, Law of Armed Conflict Documentary Supplement 249 (2022).

[30] Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, Articles of War (Feb. 28, 2022), https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/.

[31] Andrew Higgins, Michael R. Gordon & Andrew E. Kramer, *Photos Link Masked Men in East Ukraine to Russia*, N.Y. Times (Apr. 20, 2014), https://www.nytimes.com/2014/04/21/world/europe/photos-link-masked-men-in-east-ukraine-to-russia.html.

[32] U.S. Army Special Operations Command, *"Little Green Men": A Primer on Modern Russian Unconventional Warfare*, Ukraine 2013–2014, https://www.jhuapl.edu/sites/default/files/2022-12/ARIS_LittleGreenMen.pdf.

[33] *Putin Admits Russian Forces Were Deployed to Crimea*, Reuters (Apr. 17, 2014, 2:56 AM), https://www.reuters.com/article/russia-putin-crimea/putin-admits-russian-forces-were-deployed-to-crimea-idUSL6N0N921H20140417.

[34] Willis Raburu, *Putin Admits Unmarked Soldiers in Ukraine Were Russian; Optimistic About Geneva Talks*, PBS (Apr. 17, 2014, 11:45 AM), https://www.pbs.org/newshour/world/putin-admits-unmarked-soldiers-ukraine-russian-optimistic-geneva-talks.

[35] Territorial Integrity of Ukraine, G.A Res. 68/262 (Mar. 27, 2014).

[36] *Ukraine: Declaration by the High Representative on Behalf of the EU on the Illegal Annexation of Crimea and Sevastopol*, Council of the EU: Press Release (Feb. 25, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/02/25/ukraine-declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-illegal-annexation-of-crimea-and-sevastopol/.

presence today, combined with the fact that it has governed the territory since then, makes it unquestionable that Russia continues to occupy Crimea as a matter of law. Therefore, on that basis alone, the two countries remained in a state of international armed conflict following Russia's initial operations. As noted above, that conflict extended throughout Ukrainian and Russian territory.

Classifying the hostilities in the Donbas region of eastern Ukraine is more complicated. Populated primarily by ethnic Russians, anti-Euromaidan demonstrations descended into open hostilities[37] between armed separatist groups and government forces. In April 2014, Luhansk and Donetsk declared independence and established "People's Republics." As with Crimea, the declarations were of no legal effect. The conflict soon escalated, with Russia shifting from providing materiel and volunteers to direct military involvement.

Putin claimed for some time that Russian forces were not supporting the armed forces of the two rebel governments.[38] But by December 2015, he admitted they were present in the area, although he still insisted they were not regular soldiers.[39] The facts suggest otherwise. For example, the State Department estimated that by late 2015, 400–500 Russian soldiers had been killed in the fighting in the Donbas.[40] Moreover, Ukrainian forces captured Russian soldiers, who were then controversially tried on terrorism charges.[41] And large-scale cross-border shelling took place as well.[42] In my estimation, from mid-2014 on, Russian and Ukrainian forces were engaged in hostilities against each other in the region that provide a further basis for characterizing the two States as involved in an international armed conflict.[43]

Another possible basis for characterizing the hostilities in the east as international is Russia's control over separatist forces in eastern Ukraine. Before 2022, Russian troops tended to support separatist units and provide training and arms.[44] Yet, as noted, financing, training, and equipping an organized armed group does not rise to the level of overall control. And the mere fact of some Russian military support to the separatist forces does not necessarily amount to overall control; the State in question must exert the requisite degree of control over the organized armed groups. Of course, the fighting between Russian and Ukrainian forces itself qualifies the exchanges as an international armed conflict between the two

37 *Conflict in Ukraine's Donbas: A Visual Explainer*, Int'l Crisis Group, https://www.crisisgroup.org/content/conflict-ukraines-donbas-visual-explainer.

38 Raburu, *supra* note 34.

39 Oren Dorell, *Putin Admits to Russian Military 'Tasks' in Separatist-Held Eastern Ukraine*, USA Today (last updated: Dec. 17, 2015, 7:01 PM), https://www.usatoday.com/story/news/2015/12/17/putin-admits-russian-military-tasks-separatist-held-eastern-ukraine/77480364/.

40 M. Bilal Kenasari, *US Says About 500 Russian Soldiers Killed in Eastern Ukraine*, AA (Oct. 3. 2015), https://www.aa.com.tr/en/politics/us-says-about-500-russian-soldiers-killed-in-eastern-ukraine/68091.

41 Alec Luhn, *'Russian Soldiers' Captured in Ukraine to Face Trial on Terrorism Charges*, Guardian (May 18, 2015), https://www.theguardian.com/world/2015/may/18/russian-soldiers-ukraine-trial-terrorism-charges.

42 *Open-Source Sleuths Document Extensive Russian Shelling of Ukraine in 2014*, Radio Free Europe: Radio Liberty (Dec. 21, 2016, 3:01 PM), https://www.rferl.org/a/ukraine-russia-cross-border-shelling-2014-documented-bellingcat/28189372.html.

43 Report on Preliminary Examination Activities, Office of the Prosecutor ¶ 169 (2016), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

44 Michael R. Gordon & Andrew E. Kramer, *Russia Continues to Train and Equip Ukraine Rebels, NATO Official Says*, N.Y. Times (Nov. 3, 2014), https://www.nytimes.com/2014/11/04/world/europe/donestk-luhansk-ukraine-vote-zakharchenko-plotnitsky.html?login=email&auth=login-email.

States, but it does so based on hostilities, not overall control. Over time, however, Russian forces exerted ever-increasing control over separatist forces. Therefore, by early 2022, and perhaps somewhat earlier, it is reasonable to assert that the requisite level of control had been achieved.

In that year, all doubt as to internationalization would be erased. On 21 February, Russia recognized[45] the Statehood of Donetsk and Luhansk and ordered troops (Putin called them "peacekeepers") into the area.[46] Once renewed fighting was underway on February 24, Russia quickly integrated separatist forces into its operations. For example, Russia's 8th Combined Arms Army commanded the separatist units in Donetsk and Luhansk.[47] And separatist troops did most of the fighting in the battle for Mariupol.[48] Thus, early in the second phase of the conflict, the ongoing non-international armed conflict was internationalized (assuming it had not been internationalized already) by virtue of Russia's overall control of separatist operations (see also the thorough RULAC analysis).[49]

Note that on 17 November 2022, the Hague District Court issued a verdict in the case of four defendants accused of involvement in the MH17 shootdown over Ukraine on 17 July 2014. One of the issues the Court dealt with was combatant immunity.[50] As combatant immunity only exists during an international armed conflict, it had to make a finding on the characterization of the conflict in eastern Ukraine, specifically whether the armed conflict had been internationalized based on Russia's overall control of the separatists.

According to an account of the decision (which has yet to be translated), the Court surveyed various evidence to find "that there was an 'abundance of evidence' that the Russian Federation coordinated the DPR's military activities and in fact gave direct instructions to its leadership."[51] Thus, "from mid-May 2014 until at least the shooting down of flight MH17, the Russian Federation exercised overall control over the DPR." The Court went on to find that the defendants were not combatants and therefore did not enjoy combatant immunity.

Which of these characterizations is the sounder one depends on the facts, many of which are likely not available in open sources. If the conflict was internationalized by 2015, the more developed IHL of international armed conflict would apply between Ukrainian forces and the separatist units, and Additional Protocol II (see below) would not.

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45 Andrew Roth & Julian Borger, *Putin Orders Troops into Eastern Ukraine on 'Peacekeeping Duties,'* The Guardian (Feb. 21, 2022, 6:48 PM), https://www.theguardian.com/world/2022/feb/21/ukraine-putin-decide-recognition-breakaway-states-today.

46 Anton Troianovski, *Russia-Ukraine Tensions: Putin Orders Troops to Separatist Regions and Recognizes Their Independence*, N.Y. Times (last updated: Mar. 30, 2022), https://www.nytimes.com/live/2022/02/21/world/ukraine-russia-putin-biden#moscow-orders-troops-to-ukraines-breakaway-regions-for-peacekeeping-functions.

47 Cong. Research. Serv., R 47068, Russia's War in Ukraine: Military and Intelligence Aspects (Sept. 14, 2023), https://crsreports.congress.gov/product/pdf/R/R47068.

48 Michael Kofman & Rob Lee, *Not Built for Purpose: The Russian Military's Ill-Fated Force Design*, War on the Rocks (June 2, 2022), https://warontherocks.com/2022/06/not-built-for-purpose-the-russian-militarys-ill-fated-force-design/.

49 *International Armed Conflict in Ukraine*, Geneva Academy (last updated: June 7, 2023), https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine.

50 *Immunities*, IHL Databases, https://casebook.icrc.org/a_to_z/glossary/immunities.

51 Lachezar Yanev, *The MH17 Judgment: An Interesting Take on the Nature of the Armed Conflict in Eastern Ukraine*, EJIL: Talk (Dec. 7, 2022), https://www.ejiltalk.org/the-mh17-judgment-an-interesting-take-on-the-nature-of-the-armed-conflict-in-eastern-ukraine/.

A further basis for characterizing the conflict as international is the Russian occupation of large swaths of eastern Ukraine. It might be questioned whether Russia occupied eastern Ukraine by proxy[52] before 2022 (see discussion by Heinsch[53]). But as Yoram Dinstein has noted, "[T]here is a double requirement of effective control relating to auxiliary forces: the militias must be in effective control of the territory, and the occupying power has to be in effective control of the militias."[54] He goes on to explain, "[T]he question is whether the militias can be regarded as the de facto organs of the occupying power."

Had Russia been in effective control of the separatists (a threshold higher than overall control), it would have been in belligerent occupation of the area that the separatists controlled, thereby providing yet another ground for characterizing the conflict as international. However, in my view, that degree of control does not appear to have been exercised until, perhaps, sometime in 2022. Nevertheless, once Russia annexed the four regions of Donetsk, Luhansk, Kherson, and Zaporizhzhia in September 2022, any doubt that its forces were in belligerent occupation of territory their forces and the separatists controlled vanished.

Finally, because Ukraine is a Party to Additional Protocol I, an additional basis for the existence of an international armed conflict between it and the separatists that must be considered is self-determination as envisioned in Article 1(4) of that instrument.[55] However, its applicability can quickly be dismissed (on the subject, see the discussion by Chris Borgen).[56]

As is clear from the ICRC *Commentary* to the article,[57] the reference to self-determination in Article 1(4) has the same meaning as in the 1970 UN General Assembly Declaration on Friendly Relations.[58] The Declaration states that the principle of self-determination is not to be understood "as authorizing or encouraging any action which dismembers or impairs, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples … and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." Since the Ukrainian government is independent, represents the whole people, and upholds the principle of equality, the provision does not apply to the efforts of the various regions to break away from Ukraine.

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52 Natia Kalandarishvili-Mueller, *Russia's "Occupation by Proxy" of Eastern Ukraine—Implications Under the Geneva Conventions*, Just Security (Feb. 22, 2022), https://www.justsecurity.org/80314/russias-occupation-by-proxy-of-eastern-ukraine-implications-under-the-geneva-conventions/.

53 Robert Heinsch, *Conflict Classification in Ukraine: The Return of the "Proxy War"?* 91 Int'l L. Stud. 323 (2015).

54 Yoram Dinstein, The International Law of Belligerent Occupation 50 (2009).

55 Christopher J. Borgen, *Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea*, 91 Int'l L. Stud. 216 (2015).

56 *Id.*

57 International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 paras. 81–85 (Yves Sandoz et al. eds. 1987) [hereinafter AP Commentary].

58 G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, U.N. Doc. A/2625 (Oct. 24, 1970).

Non-international Armed Conflict

The Law

As noted, Common Article 3 defines non-international armed conflicts in the negative as those that are "not of an international character." The ICTY further developed the notion in a manner that is generally viewed as reflecting customary international law. Most notably, in *Tadić*, the Tribunal described such conflicts as "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[59] Other international tribunals have adopted the same definition (e.g., International Criminal Tribunal for Rwanda, *Akayesu*;[60] International Criminal Court, *Bemba*[61]), and it appears in the Statute of the International Criminal Court;[62] see also 1957 ICRC *Commentary* to Geneva Convention IV[63]). Accordingly, two essential criteria apply for all non-international armed conflicts—participation by an organized armed group and a particular level of intensity.

As to the first requirement, the ICTY noted in *Limaj*[64] that "some degree of organisation by the parties will suffice to establish the existence of an armed conflict. This degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organization, as no determination of individual criminal responsibility is intended under this provision of the Statute."[65]

And with respect to intensity, it is generally agreed that riots, civil disturbances, or isolated and sporadic acts of violence do not suffice. This conclusion derives from the exclusion of such violence in Article 1(2) of Additional Protocol II[66] (see also, e.g., ICTR, *Akayesu*[67]). Beyond that, no bright line test exists for the requisite level of violence. ICTY decisions have cited such factors as "the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones."[68]

Additional Protocol II set a higher threshold for applicability during a non-international armed conflict than Common Article 3. By Article 1(1), the Protocol applies "to all armed conflicts which are not covered by Article 1 of the [Additional Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized

59 Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

60 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 619 (Int'l Crim. Trib. For Rwanda Sept. 1998).

61 Prosecutor v. Gombo, Case No. ICC-01/05-01-08, Judgment, para. 229 (Int'l Crim. Ct. June. 2009).

62 Rome Statute of the International Criminal Court, art 8(2)(f), July 17, 1998, UN Doc. A/CONF.183/9.

63 2016 Commentary GC I, *supra* note 23.

64 Prosecutor v. Limaj, Case No. IT-94-1, ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 2007).

65 Limaj, para. 89.

66 AP II, *supra* note 11, art 1(2).

67 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, paras. 619–20 (Int'l Crim. Trib. for Rwanda Sept. 1998).

68 Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[69] The requirement of control over territory and the limitation to conflicts with States differentiate Additional Protocol II non-international conflicts from those falling within Common Article 3's reach. Because Russia and Ukraine are Parties to Additional Protocol II, the treaty applies to the extent these further requirements are met.

Non-international Armed Conflict between Ukraine and Separatist Groups

It does not appear that there was sufficient fighting between organized armed groups and Ukrainian forces in Crimea in 2014 to initiate a non-international armed conflict. On the contrary, as discussed above, the civil disturbances were quickly supplanted by the Russian invasion of the area. To the extent separatist organized armed groups were active, they were within days under the overall control of Russia. More to the point, the Russian operations standing alone triggered an international armed conflict.

The situation in the east differed. As noted above, the anti-Euromaidan protests rapidly turned into armed confrontations with Ukraine's armed forces. The separatists seized control of strategic locations and declared the independence, contrary to international law, of the Donetsk and Luhansk People's Republics. They formed proper military units[70] and took control of large areas in the Donbas. By late April, the Ukrainian President announced[71] that most control over the area had been lost, and the counter-terrorist operations by the Ukrainian security services were replaced by a "joint forces operation." [72]

Plainly, the separatist forces were organized at a level well above the threshold required for qualification as a non-international armed conflict. At the same time, the military operations were sufficiently intense, as evidenced by the inability of the Ukrainian armed forces to regain control of the territory in question.[73] As a result, the situation in the Donbas qualified as a horizontal conflict in which Ukraine and Russia were fighting an international armed conflict while Ukraine was engaged in a non-international armed conflict with separatist forces at the same time.

Note that during this period, the parties agreed to two formal ceasefires. In September 2014, they approved the Minsk I ceasefire, but it was quickly violated. Then, in February 2015, Ukraine, Russia, France, Germany, and the separatist groups negotiated a new

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69 AP II, art 1(1), *supra* note 11.

70 *Russia's People's Militias in Ukraine*, Wikipedia (last edited: Oct. 10, 2023), https://en.wikipedia.org/wiki/Russian_people%27s_militias_in_Ukraine.

71 Luke Harding, *Ukraine's Government Has Lost Control of East, Says Acting President*, Guardian (Apr. 30, 2014, 12:43 PM), https://www.theguardian.com/world/2014/apr/30/ukraine-government-lost-control-east-acting-president.

72 Gwendolyn Sasse, *Ukraine's New Military Engagement in the Donbas*, Carnegie Europe: Judy Dempsey's Strategic Europe (May 3, 2018), https://carnegieeurope.eu/strategiceurope/76246.

73 *Id.*

ceasefire agreement, Minsk II.[74] However, the parties regularly disagreed over its execution, and there were frequent exchanges of fire, often followed by hasty ceasefires. Finally, the Russian operations that commenced in February 2022 terminated the ceasefires once and for all.

Although the fighting in the area often dropped below the requisite level of intensity required for a non-international armed conflict during the various ceasefires, it must be remembered that ceasefires are only *temporary* cessations of hostilities. Indeed, there were thousands of violations of its terms (see OSCE monitoring reports).[75] Therefore, in my estimation, the non-international armed conflict continued unabated in the same way that a non-international armed conflict continues during temporary lulls in the fighting.

It might be questioned whether there were different non-international armed conflicts underway against the two central separatist forces or just one against them all. In September, the forces of the self-proclaimed People's Republics formed the United Armed Forces of Novorossiya, with Donetsk's units comprising the 1st Army Corps and Luhansk's making up the 2nd Army Corps.[76] However, the effort to create a unified structure was abandoned in less than a year due to in-fighting. As a result, the conflict between Ukraine and the forces of the two armies are distinct non-international armed conflicts assessed separately against the organization and intensity criteria.

Finally, in both cases, the situations qualified as Additional Protocol II non-international armed conflicts. Separatist units controlled significant territory, could impose discipline through a hierarchical command structure, and conducted sustained and concerted military operations. Further, the Donetsk and Luhansk People's Republics had a judicial system capable of enforcing IHL. As a result, Additional Protocol II governed separatist and Russian actions related to the conflict in addition to applicable customary international law and Common Article 3.

As noted earlier, the non-international armed conflicts with the separatist groups ended once Russia exerted overall control of their operations, and the conflict was internationalized. If the Dutch Court is correct in its assessment that Russia exercised "overall control" as early as July 2017 when MH17 was downed, the non-international armed conflict with the separatists was internationalized by then. If not, internationalization came much later.

Concluding Thoughts

As noted at the outset of this post, conflicts can be of mixed character. Since 2014, there has been an ongoing international armed conflict between Russia and Ukraine throughout the territory of those countries based on the existence of hostilities and Russia's ongoing belligerent occupation of Ukrainian territory. At the same time, there were non-international armed conflicts

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[74] *Minsk Agreement on Ukraine Crisis: Text in Full*, The Telegraph (Feb. 12, 2015, 12:11 AM), https://www.telegraph.co.uk/news/worldnews/europe/ukraine/11408266/Minsk-agreement-on-Ukraine-crisis-text-in-full.html.

[75] *Status Reports of the Special Monitoring Mission to Ukraine*, Organization for Security and Co-operation in Europe (2014–2022), https://www.osce.org/special-monitoring-mission-to-ukraine/157261.

[76] *Russia's People's Militias in Ukraine, supra* note 70.

between Ukraine and separatist groups in Luhansk and Donetsk. The situation was one of horizontally mixed armed conflicts. Consequently, different IHL rules applied between Russia and Ukraine on the one hand and Ukraine and the separatists on the other.

At some point, but certainly, no later than early 2022, the two non-international armed conflicts in the Donbas were internationalized due to Russia's overall control of the separatist forces. The result of the vertically mixed conflicts is that today there is but one armed conflict in Ukraine, an international armed conflict between Ukraine and Russia and its proxies. All forces are now subject to the IHL rules applicable in such conflicts.

APPLICATION OF IHL BY AND TO PROXIES: THE "REPUBLICS" OF DONETSK AND LUHANSK

by Marco Sassòli | Mar 3, 2022

From March 2014 until 23 February 2022, Russia denied any involvement in Ukraine (other than Crimea, which it has annexed). It claimed that hostilities in the Donbas were conducted by forces of the "republics" of Donetsk and Luhansk (the "republics"). Ukraine argued from the very beginning that the "republics" were merely agents of Russia. But Ukraine never recognized that the conflict was therefore an international armed conflict (IAC), nor did it apply to its enemies international humanitarian law (IHL) applicable to IACs.

It is well known that according to the *Tadić* decision of the International Criminal Tribunal for the former Yugoslavia, overall control by Russia over its proxies in Donetsk and Luhansk was sufficient to activate IHL applicable to IACs.[77] Today, after President Putin recognized the "republics" and waged a full-fledged war, allegedly to protect those "republics" and their inhabitants, it is appropriate to discuss what IHL both parties should have applied and whether those requirements were realistic. In this discussion, we will neglect that sometimes Russian soldiers themselves also intervened in this conflict. This post concentrates on the two main remaining differences between IACs and non-international armed conflicts (NIACs): prisoners of war (POWs) and belligerent occupation. How should and could the applicable IHL rules realistically have been respected by both sides?

Ukrainian Soldiers in the Power of the "Republics"

Under the *Tadić* theory, Ukrainian soldiers who fell into the power of the "republics" were legally in the power of Russia and therefore POWs. However, without Russia's involvement (which IHL cannot realistically require because Russia would have by definition refused it), the "republics" which actually detained them would have been unable to comply with the letter of many provisions of Geneva Convention III (GC III).[78] For instance: the POW camp could not have been commanded by a regular officer of the Russian armed forces (Article 39, GC III[79]); any trials against such POWs would have to be conducted before Russian military courts applying Russian military penal law and criminal procedure (Articles 82[80] and 84[81] of GC III); and on many issues POWs had to be treated, under the principle of assimilation, as

[77] Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 208 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 1998).

[78] GC III, *supra* note 8.

[79] *Id.* art. 39.

[80] *Id.* art. 82.

[81] *Id.* art. 84.

Russia's "own" forces (Articles 20,[82] 23(2),[83] 25(1),[84] 46(2),[85] 52(2),[86] and 53(1)–(2)[87] GC III). On all those obligations, to keep them realistic, "Russia" has to be replaced by the "republics," which, concerning the possibility to establish courts and to conduct fair trials, raises all the problems well known when armed groups establish courts.

Members of the Armed Forces of the "Republics" Fallen into the Power of Ukraine

From a policy perspective, it appears to be a fundamental requirement of fairness that members of the proxy-armed group who must comply under the *Tadić* theory with IHL applicable to IACs, including GC III, should also benefit from that law. This presupposes, however, that we twist the existing law in two respects. First, we must accept that in this case, unlike that of members of private military and security companies, an armed group may be considered to belong to a State even if that State denies that the group fights for it. Second, we must recognize, in conformity with the wording of GC III but contrary to past State practice, that Ukraine had to treat even its own nationals as POWs if they were members of an armed group fighting for Russia. The treatment of such POWs raises fewer problems. Nevertheless, many rules of GC III refer to the consent of, decisions of, agreements with, or transmission of information to the power on which the POW depends, which would be Russia in our case. In addition, the letter of GC III would require such POWs to be repatriated[88] to Russia at the close of active hostilities, which does not seem appropriate for most of them.

The "Republics" as Russian Occupied Territory

Whether overall control made not only IHL of IACs applicable but also conduct of the "republics" attributable to Russia is controversial. The answer given by the International Court of Justice in *Bosnia and Herzegovina v. Serbia and Montenegro*, paras. 404–407, is no, while the majority considers that this must be the case because otherwise conduct in an IAC would sometimes not be attributable to one party to the conflict.[89] If the majority is correct, the effective control by the "republics" over parts of Ukraine was attributable to Russia and made Russia an occupying power of those territories. The IHL of military occupation, laid down in particular in the 1907 Hague Regulations (HR)[90] and Geneva Convention IV (GC IV),[91] would apply and had to be respected—legally by Russia and therefore also by the "republics" attributable to it. Here too,

82 *Id.* art. 20.

83 *Id.* art. 23(2).

84 *Id.* art. 25(1).

85 *Id.* art. 46(2).

86 *Id.* art. 52(2).

87 *Id.* art. 53(1)–(2).

88 *Id.* art. 118.

89 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. 43, paras. 404–407 (Feb. 26, 2007).

90 1907 Hague IV Regulations, *supra* note 7.

91 GC IV, *supra* note 8.

however, apart from the unwillingness of the latter to do so and that by definition neither Russia nor the "republics" would accept such classification (as otherwise Russia would not have needed to act through proxies), the question arises whether the "republics" could have respected that law (without asking Russia to establish control on the ground, which would have ended the proxy warfare).

As the "republics" claimed to be States, they should have had the possibility to respect the numerous positive obligations of an occupying power, including to maintain public order and civil life.[92] Local inhabitants were "protected civilians" as they were legally (through the proxies) in the power of Russia, of which they were not nationals,[93] and any attribution of Russian nationality during the occupation would have been without effect for IHL.[94]

Conversely, one must also admit that as representatives of the occupying power, the "republics" could intern civilians for imperative security reasons and adopt the related procedures.[95] In the Donbas it was easier to respect the pre-existing law and tribunals, as they were mainly those of the Ukrainian government and parliament before the Maidan revolution. One may also consider that the "republics" (representing Russia) could introduce new legislation for security and a limited number of other purposes admitted by the law of occupation.[96]

Contrary to the text of GC IV which requires that such laws are applied by properly constituted military courts of the occupying power, we must accept that the "republics" could bring such cases before their own courts (as they represent the occupying power).[97] As long as they were under overall control of Russia, they could, however, not introduce new legislation beyond the limited purposes admissible under IHL nor change the local institutions. The commander-in-chief who could order contributions[98] and the commander in the locality on whose behalf requisitions could have been ordered had to be understood as those of the "republics."[99]

A General Appraisal of the Realism of the *Tadić* Approach

The *Tadić* approach corresponds to legal logic. When applied in practice to a typical situation like that which prevailed in Eastern Ukraine until recently, it raises, however, legal and practical problems. The fact that the proxy and the controlling State—by definition—deny control is only part of the problem. Even a proxy willing to apply IHL will confront serious difficulties. This post has shown that through a sometimes very innovative interpretation, it is possible to respect most of IHL's requirements (although not its letter).

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92 1907 Hague IV Regulations, *supra* note 7, art. 43.

93 GC IV, *supra* note 8, art. 4.

94 *Id.* art. 47.

95 *Id.* art. 78; 1907 Hague IV Regulations, *supra* note 7, art. 43.

96 1907 Hague IV Regulations, *supra* note 7, art. 43; GC IV, *supra* note 8, art. 64.

97 *Id.* art. 66.

98 1907 Hague IV Regulations, *supra* note 7, art. 51(1).

99 *Id.* art. 52(2).

Nevertheless, one may wonder whether the applicability of IHL applicable to IACs is unrealistic and, therefore, erroneous in such a situation. Is this a further example of a theory developed by an international criminal tribunal, after the facts, on IHL issues to facilitate conviction of an accused? Can such standards be applied during the conflict, as they must if they belong to IHL?

If this is not the case, they should be abandoned. Indeed, unrealistic rules do not protect anyone; they undermine the credibility and, therefore, the protective force of the entire IHL regime with the fighting parties. Whether Conventions III and IV should be applied, or whether the *Tadić* theory should be abandoned in an essential part—leaving IHL applicable to NIACs to govern the rights and obligations of (members of) the proxy—remains an open question. The answer cannot be that proxies should not exist and be discouraged. Indeed, the very essence of IHL is that it applies to a situation, namely armed conflict, which should not exist and should be discouraged.

CHAPTER III

LAW OF NEUTRALITY

NEUTRALITY IN THE WAR AGAINST UKRAINE

by Wolff Heintschel von Heinegg | Mar 1, 2022

This contribution briefly addresses the question of whether and to what extent States that are not parties to the war against Ukraine are bound by the law of neutrality. In particular, are these States obliged to refrain from any assistance to Ukraine, including by the supply of military equipment?

The Sources of the Law of Neutrality

The law of neutrality is regulated in two treaties that were adopted at the Second Hague Peace Conference on October 18, 1907. Russia and Ukraine are parties to both. The treaties are

- *Convention (V) Respecting the Rights and Duties of Neutral Powers in Case of War on Land*[1] and
- *Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War*.[2]

In addition to these legally binding instruments, the law of neutrality is dealt with in Articles 39 to 48 of the 1923 *Hague Rules of Air Warfare*,[3] the 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*,[4] and the 2009 *Manual on International Law Applicable to Air and Missile Warfare*.[5]

It is an unsettled issue whether there also exists a set of customary rules supplementing the binding and non-binding instruments, because since the 1990s State practice has been far from uniform. Nevertheless, the fact that the law of neutrality has been included in numerous national military manuals provides sufficient evidence of the general recognition of the continuing validity of the essentials of that branch of the law of armed conflict.

Applicability of the Law of Neutrality

The law of neutrality only applies in situations of international armed conflict (IAC). In an IAC, the parties to the conflict are obliged to respect the sovereignty of neutral States. However, because of the considerably low threshold required for an IAC to come into existence—"any resort to a use of force by one State against another State"—neutral States are bound by the law of neutrality and its core obligations of impartiality only in

[1] Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct.18, 1907, 36 Stat. 2310 [hereinafter Hague V].

[2] Convention (XIII) Concerning the Rights and Duties of Neutral in Naval War, Oct. 18, 1907, 36 Stat. 2415 [hereinafter Hague XIII].

[3] The Hague Rules of Air Warfare, The Hague, December 1922–February 1923.

[4] San Remo Manual on Law Applicable to Armed Conflicts at Sea (1994) [hereinafter San Remo Manual].

[5] Program on Humanitarian Policy and Conflict Research, Air and Missile Warfare Manual (2013) [Air & Missile Manual].

an IAC of a certain duration and intensity. The isolated position that neutral States are bound by those obligations only in cases of a declared war (a formal state of war) has not found sufficient support by other States.

According to the position taken here, the IAC between Ukraine and the Russian Federation began with the annexation of the Crimean Peninsula in 2014 and the Russian military support of the separatists in Luhansk and Donetsk. That IAC escalated considerably on February 23/24, 2022, when Ukraine was attacked and invaded by Russian armed forces, supported by Belarus. It is therefore safe to hold that at least since February 23/24, the intensity and the foreseeable duration of the armed hostilities are sufficient to justify the conclusion that States not parties to the armed conflict are, in principle, bound by the law of neutrality.

Obligations of Neutral States under Hague V and XIII

A neutral State is prohibited from allowing a belligerent party to use its territory as a base of military operations or for any other exercise of belligerent rights. Hague Convention V does not explicitly prohibit a neutral State from supplying a belligerent State with military equipment. Its Article 7 merely deals with the "export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general of anything which can be of use to an army or fleet" by private actors, which a neutral State "is not called upon to prevent." [6] This surprising gap in Hague Convention V, however, does not imply a right of a neutral State to supply a belligerent party with such items. Therefore, Hague Convention V implicitly forbids the transfer of weapons and ammunition to a belligerent.

Article 6 of Hague Convention XIII, which addresses naval warfare, explicitly provides that 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."[7] Moreover, the prohibition of supplying a belligerent with military equipment clearly follows from the overall obligation of impartiality of a neutral State, i.e., not to take sides in favor of one belligerent and to the detriment of the other belligerent.

Neutrality and Aggression

Because of the veto of the Russian Federation, there has been no decision by the UN Security Council based on Chapter VII of the UN Charter that would allow neutral States to deviate from their obligations under the law of neutrality. Therefore, those States that have supplied, and continue to supply, Ukraine with military equipment seem to be acting in violation of their neutral-State obligations.

However, there is a strong view held by several States, including the United States, according to which neutral States are allowed to adopt a position of "qualified" or "benevolent" neutrality, by distinguishing between an aggressor and the victim of aggression.[8] Despite the prohibition of the use of force in Article 2(4) of the UN Charter and of any

[6] Hague V, *supra* note 1, art. 7.

[7] Hague XIII, *supra* note 2, art. 6.

[8] United States, Dep't of Defense Law of War Manual ¶ 15.2.2 (2023) [hereinafter DoD Law of War Manual].

act of aggression as defined in the 1974 UN GA Resolution, the concept of "qualified neutrality" has remained controversial.

Many, including the present author, have continuously opposed it.[9] They have been willing to accept that concept only in case the UN Security Council has authoritatively identified a specific State as an aggressor. Indeed, State practice has shown that without such an authoritative identification, it is often impossible to consider a given State an aggressor because all too often both sides of an IAC justified their military operations as an exercise of their individual or collective right of self-defense. If neutral States were allowed to absolve themselves from their neutrality obligations by a unilateral determination of the aggressor, the law of neutrality could no longer fulfill its function of effectively preventing an escalation of an IAC.

But there are good reasons to take a more nuanced position vis-à-vis "qualified neutrality." The present situation in Ukraine is a game changer insofar as:

- The aggressor State itself prevented the enforcement mechanism under Chapter VII UN Charter to function, although there would have been a sufficient majority within the UN Security Council, with China abstaining and not vetoing a decision.
- With or without an authoritative classification by the UN Security Council, the Russian military operations against Ukraine are apparent acts of aggression—their justification by the Russian President is devoid[10] of any foundation in the facts and in international law.
- The number of States condemning the Russian attacks as violations of international law is overwhelming. The fact that the usual suspects—such as China, Cuba, and Venezuela—seem to be supporting or sympathizing with the Russian position can be neglected.

Accordingly, the many States supplying Ukraine with military equipment—whether defensive or offensive is irrelevant—are not acting contrary to the law of neutrality, nor are they otherwise committing internationally wrongful acts or aiding and assisting such acts.

It may be that the situation in Ukraine is exceptional and unlikely to repeat itself in other parts of the world. Nevertheless, for the reasons given, neutral States can no longer be bound by an obligation of strict impartiality and a prohibition to supply the victim of aggression with the means necessary to defend itself against an aggressor State that is obviously determined to ignore core principles and rules of international law. If the notion of a "rule-based international order" is to be of any significance, States continuing to rely on and believe in international law can no longer stand by and allow an aggressor government to pursue its apparently illegal aims—even if they are threatened by the aggressor with "strategic responses."

[9] Wolff Heintschel von Heinegg, *Benevolent Third States in International Armed Conflicts: the Myth of the Irrelevance of the Law of Neutrality*, *in* International Law and Armed Conflict: Exploring the Faultlines 543–568 (Michael N. Schmitt & Jelena Pejic eds., 2007).

[10] Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense,* Articles of War (Feb 28, 2022), https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense.

IS THE LAW OF NEUTRALITY DEAD?

by Raul (Pete) Pedrozo | May 31, 2022

The 2022 Russia-Ukraine conflict has rekindled the debate about the validity of qualified neutrality during an international armed conflict. The concept is sometimes also referred to as benevolent neutrality.[11] Since Russia's invasion this year, nearly 40 nations,[12] including the United States,[13] have provided Ukraine with billions[14] of dollars in lethal military aid, including weapons and ammunition. Both the European Union[15] and the United States[16] have also imposed economic sanctions on Russia and Russian entities in response to the invasion. These arms transfers and sanctions, which are clearly inconsistent with the traditional law of neutrality, have been justified by several scholars and governments under the concept of qualified neutrality.[17]

Qualified Neutrality v. Traditional Neutrality

Generally, States that are not party to an international armed conflict are considered neutral States. The law of neutrality historically requires neutral States to observe strict impartiality between the parties to the conflict and to abstain from providing war-related goods or other military assistance to the belligerents.[18] However, after war was outlawed as an instrument of national policy,[19] some States took the position that neutrals can discriminate in favor of a State that is the victim of a war of aggression and they are not bound by their obligations of strict impartiality and abstention.[20] Thus, proponents of qualified neutrality argue that neutral States supplying weapons and other war material to the victim of aggression are not acting contrary to the law of neutrality.[21]

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11 Wolff Heintschel von Heinegg, *Neutrality in the War Against Ukraine,* Articles of War (Mar. 1, 2022), https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine [hereinafter von Heinegg, *Neutrality*].

12 *Ukraine Support Tracker*, Kiel Institute for the World Economy, https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker.

13 Emma Nix, Akshat Dhankher & Nancy Messieh, *Ukraine Aid Tracker: Mapping the West's Support to Counter Russia's Invasion*, Atlantic Council (May 13, 2022), https://www.atlanticcouncil.org/commentary/trackers-and-data-visualizations/ukraine-aid-tracker-mapping-the-wests-support-to-counter-russias-invasion.

14 von Heinegg, *Neutrality*, *supra* note 15.

15 The Council of the European Union, Council Regulation (EU) No 269/2014 (Mar. 17, 2014), 78, (2014); *Timeline – EU Restrictive Measures Against Russia Over Ukraine*, Council of the European Union, https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine;, Council Implementing Regulation (EU) 2022/260 The Council of the European Union 43 (Feb. 23, 2022).

16 *Office of Foreign Assets Control Mission*, U.S. Dep't of the Treasury, https://ofac.treasury.gov/ (last visited Nov. 9, 2023); Press Release, *U.S. Treasury Imposes Economic Costs in Response to Actions in the Donetsk and Luhansk Regions*, U.S. Dep't of the Treasury (Feb. 22, 2022), https://home.treasury.gov/news/press-releases/jy0602

17 von Heinegg, *supra* note 15; Michael N. Schmitt, *Providing Arms and Material to Ukraine: Neutrality, Co-Belligerency, and the Use of Force*, Articles of War (Mar. 7, 2022), https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force.

18 Denise Plattner, *ICRC Neutrality and Neutrality in Humanitarian Assistance*, 36 Int'l Rev. Red Cross 161 (1996).

19 General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, 94 L.N.T.S. 57.

20 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Order, 2022 I.C.J. 182 (March 16).

21 The Commander's Handbook on the Law of Naval Operations NWP 1-14M ¶ 7.2.1 (2022) [hereinafter Commander's Handbook].

For example, after Nazi Germany invaded Poland in 1939, President Franklin D. Roosevelt[22] persuaded the U.S. Congress to enact legislation to bypass the U.S. Neutrality Acts[23] to allow Roosevelt to provide military supplies to France and Great Britain while allowing the United States to avoid direct involvement in the war. Although the United States may have taken these actions out of a sense of moral responsibility, it was equally motivated by U.S. national security concerns[24] and a desire to buy time to prepare the U.S. armed forces for any future involvement in the war.[25]

Other States take the position that a State may only violate the law of neutrality if the United Nations (UN) Security Council has authoritatively identified a specific State as an aggressor and has decided to take preventative or enforcement action against the aggressor under Chapter VII of the UN Charter.[26] Article 25 of the Charter requires member States to comply with the decisions of the Security Council, which includes an obligation to support a UN action at the expense of their neutrality. Similarly, Article 2(5) of the Charter requires member States to give the UN "every assistance in any action it takes in accordance with the present Charter" and to "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." Those States that hold this view consider that absent a decision by the UN Security Council, the law of neutrality remains in full force and neutrals must observe strict impartiality between the parties to the conflict.

In the case of the ongoing conflict in the Ukraine, action by the Security Council is precluded. As a permanent member of the Council, Russia can and will veto any resolution that purports to take preventative or enforcement action against Russia under Chapter VII of the Charter for its unlawful invasion of the Ukraine.

Nonetheless, on March 1, 2022, the UN General Assembly passed a resolution[27] by a vote of 141 countries[28] in favor, 5 against, and 35 abstentions. The resolution demanded that Russia, *inter alia*, "immediately cease its use of force against Ukraine and … refrain from any further unlawful threat or use of force against any Member State" and "immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders." Two weeks later on March 16, the International Court of Justice indicated provisional measures[29] against Russia to, *inter alia*, "immediately suspend the military operations that it commenced on 24 February 2022 in the territory of the Ukraine."

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22 Mark Seidl, The Lend-Lease Program, 1941–1945, FDR Library & Museum, https://www.fdrlibrary.org/lend-lease.

23 U.S. Dep't of State, The Neutrality Acts, 1930s, https://history.state.gov/milestones/1921-1936/neutrality-acts.

24 Lend-Lease Act, 223 HR 77A-D13 (1941).

25 *Id.*

26 U.N. Charter ch. VII.

27 Aggression Against Ukraine, Eleventh Emergency Special Session, U.N. Doc A/ES-11/L.1 (Mar. 1, 2022).

28 *General Assembly Resolution Demands End to Russian Offensive in Ukraine*, U.N. News (Mar. 2, 2022), https://news.un.org/en/story/2022/03/1113152.

29 Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order, 2022 I.C.J. (Mar. 16).

Clearly, most States oppose the Russian invasion of Ukraine, but that does not justify turning a blind eye to the rule of law in general or the storied law of neutrality in particular. The validity of qualified neutrality is questionable and may be seen as 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. It is unlikely that we would be having this debate if Belarus (not Russia) had invaded Ukraine. Neutral States can arrive at the same result by applying the law of State responsibility and imposing lawful countermeasures on Russia for its internationally wrongful act of violating Article 2(3) and Article 2(4) of the UN Charter.

Law of Neutrality

The law of neutrality serves important goals. It defines the legal relationship between belligerent and neutral States during an international armed conflict, imposing duties and conferring rights on neutral and belligerent States. By imposing a duty on neutral States to abstain[30] from providing war-related goods or services to the belligerent and to exercise their rights and duties in an impartial[31] manner toward all the belligerents, the law of neutrality is designed to prevent escalation of the conflict.[32]

Neutral States that fail to comply with their obligations may lose their neutral status and become a party to the armed conflict.[33] Nevertheless, a State that violates its neutrality is not automatically brought into the conflict as a co-belligerent.[34] Clearly, conducting an armed attack against one of the belligerents would bring the neutral State into the armed conflict as a party.[35] Similarly, a neutral State that provides actionable intelligence to a belligerent that allows that belligerent to successfully attack the opposing belligerent would become a party to the conflict.[36] However, simply providing weapons and other war-related material to Ukraine does not, in and of itself, mean that any of the State engaged in such conduct have become parties to the armed conflict with Russia.[37]

Nevertheless, if a neutral State engages in conduct that breaches its neutral status, the aggrieved belligerent may (but is not required to) undertake such proportionate self-help enforcement actions as it deems necessary, including countermeasures, to ensure compliance by the neutral State with its obligations of abstention and impartiality under the law of neutrality.[38]

Russia views the provision of weapons and other war-related material to Ukraine as a violation of the law of neutrality. In April 2022, the Kremlin warned the United

30 Hague XIII, *supra* note 2, art. 6.

31 *Id.* art. 6.

32 *Id.* art. 9.

33 Commander's Handbook, *supra* note 34, ¶ 7.2 .

34 DoD Law of War Manual, *supra* note 11, ¶ 15.4.1.

35 Michael N. Schmitt, *Ukraine Symposium – Are We at War?*, Articles of War (May 9, 2022), https://lieber.westpoint.edu/are-we-at-war/.

36 *Id.*

37 Michael N. Schmitt, *Providing Arms and Material to Ukraine: Neutrality, Co-Belligerency, and the Use of Force*, Articles of War (Mar. 7, 2022), https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force.

38 Commander's Handbook, *supra* note 34.

States to stop arming Ukraine, indicating that U.S. and NATO arms shipments were "adding fuel" to the conflict and could have "unpredictable consequences." [39] Then, in May, Russia's Minister of Defense warned that Russia could target NATO transport carrying weapons to the Ukraine. [40] However, to date, Russia has chosen not to exercise its right of self-help under international law, which is understandable given its inability to defeat the Ukrainian armed forces on the battlefield.

State Responsibility

Rather than erode the time-honored law of neutrality, States that elect to provide weapons and other war-related material to Ukraine can justify their actions by applying the law of State responsibility.[41] Under generally accepted principles of international law, States incur responsibility for their internationally wrongful acts.[42] An internationally wrongful act occurs when an act or omission is attributable to a State under international law and constitutes a breach of an international obligation of that State.[43] A State breaches its international obligations when an act of that State does not conform to what is required by those obligations.[44]

All States are required to settle their international disputes by peaceful means so that international peace and security and justice are not endangered.[45] Moreover, all States shall "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[46] These obligations are owed to the international community at large, not just individual States. By engaging in a war of aggression against Ukraine, Russia has endangered international peace and security, an internationally wrongful act for which it bears State responsibility.[47] Russia's breach is even more egregious given its position as a permanent member of the Security Council.

Moreover, according to the International Law Commission (ILC), the prohibition of aggression is a peremptory norm of general international law (*jus cogens*).[48] A peremptory norm of general international law is defined in the draft conclusions of the ILC as a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[49] These peremptory norms "give rise to obligations owed to the international community as a whole …, in relation to which all States have a legal interest."[50]

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[39] Karen DeYoung, *Russia Warns U.S. to Stop Arming Ukraine*, Wash. Post, Apr. 14, 2022, updated Apr. 15, 2022.

[40] Rory Sullivan, *NATO Transport Carrying Weapons in Ukraine Is a 'Target', Warns Russia*, Independent (May 4, 2022).

[41] United Nations, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/109 (2001) [hereinafter ASR].

[42] *Id.* art. 1.

[43] *Id.* art. 2.

[44] *Id.* art. 12.

[45] U.N. Charter art. 2(3).

[46] *Id.* art. 2(4).

[47] ASR, *supra* note 61, art. 28.

[48] United Nations, International Law Commission, Peremptory Norms of General International Law (*jus cogens*), U.N. Doc. A/CN.4//L.967, Conclusion 23 (May 11, 2022) [hereinafter ILC, Peremptory Norms].

[49] *Id.* Conclusion 3.

[50] *Id.* Conclusion 17.1.

Thus, any State has a right to "invoke the responsibility of another State for a breach" of a peremptory norm in accordance with the rules of State responsibility for internationally wrongful acts.[51]

Lawful Countermeasures

The term "countermeasures" refers to the peacetime law of State responsibility, not self-defense. With regard to Russia's act of aggression, which endangers the peace and security of the international community, any member State may take lawful countermeasures against Russia for its internationally wrongful act to induce Russia to comply with its international legal obligations under the UN Charter.[52] Countermeasures may not involve the use of force and must be commensurate with the injury suffered, the gravity of the international wrongful act, and the rights of the injured State being violated.[53] Thus, the imposition of sanctions and the provision of war-related materials, albeit violations of the law of neutrality, would be appropriate countermeasures to convince Russia to withdraw its forces from the territory of Ukraine.

Conclusion

Most States oppose the Russian invasion of Ukraine because it is an afront to the rules-based international order. Arguing that States may qualify their neutrality based on Russia's act of aggression equally undermines the rule of law. 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.

[51] *Id.* Conclusion 17.2.

[52] ILC, Peremptory Norms, *supra* note 68, Conclusion 17.2.

[53] ASR, *supra* note 61, arts. 50–51.

ARE WE AT WAR?

by Michael N. Schmitt | May 9, 2022

Last week, allegations that the United States and a number of other NATO nations are providing intelligence to Ukraine that enables attacks against Russian forces continued to surface. Broadly speaking, the reports of intelligence sharing are credible. As Chairman of the Joint Chiefs of Staff General Mark Milley observed in testimony to Congress on May 3, the United States has "opened the pipes" by sending "a significant amount of intelligence" to Ukraine.[54]

Particularly noteworthy are media reports that U.S. intelligence made possible the killing of Russian generals and the sinking of the Russian cruiser *Moskva*.[55] Concerning the former, the *New York Times* reported that the United States has "focused on providing the location and other details about the Russian military's mobile headquarters, which relocate frequently."[56] Ukrainian forces "combine that geographic information with their own intelligence—including intercepted communications that alert the Ukrainian military to the presence of senior Russian officers—to conduct artillery strikes and other attacks that have killed Russian officers." More generally, "[t]he United States routinely provides information about the movement of Russian troops and equipment, and helps Ukraine confirm the location of critical targets. Other NATO allies also give real-time intelligence to the Ukrainian military."

In response to the report, Pentagon spokesperson John Kirby stated, "The United States provides battlefield intelligence to help Ukraine defend their country…. We do not provide intelligence on the location of senior military leaders on the battlefield or participate in targeting decisions of the Ukrainian military."[57] Although Kirby would not offer examples of the intelligence being shared, he confirmed that "Ukraine combines information that we and other partners provide with the intelligence that they themselves are gathering, and then they make their own decisions and they take their own actions."

As to the sinking of the *Moskva*, NBC first reported that Ukraine had queried the United States as to the ship's identity.[58] The United States identified the vessel as the *Moskva* and confirmed its location but, according to the officials providing the information, did not know Ukraine was going to attack and was not

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54 *WATCH: Defense Secretary Austin, General Milley Defense Leaders Say Russia Is Learning from Mistakes in Ukraine*, PBS (May 3, 2022, 10:50 AM), https://www.pbs.org/newshour/politics/watch-live-defense-secretary-austin-general-milley-testify-on-defense-budget-in-senate-hearing.

55 *Moskva Sinking: US Gave Intelligence That Helped Ukraine Sink Russian Cruiser—Reports,* BBC (May 5, 2022, 10:58 A.M.), https://www.bbc.com/news/world-us-canada-61343044.

56 Julian E. Barnes, Helene Cooper & Eric Schmitt, *U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say*, N.Y. Times (May 4, 2022), https://www.nytimes.com/2022/05/04/us/politics/russia-generals-killed-ukraine.html.

57 Jordan Williams, *Pentagon Denies US Shared Intel to Target Russian Generals*, The Hill (May 5, 2022, 3:20 PM ET), https://thehill.com/policy/defense/3478747-pentagon-denies-us-shared-intel-to-target-russian-generals.

58 Ken Dilanian, Courtney Kube & Carol E. Lee, *U.S Intel Helped Ukraine Sink Russian Flagship Moskva, Officials Say*, NBC News (May 5, 2022, 3:31 PM), https://www.nbcnews.com/politics/national-security/us-intel-helped-ukraine-sink-russian-flagship-moskva-officials-say-rcna27559.

involved in the decision to do so. Rather, they assert that the United States merely delivers maritime intelligence to Ukraine to allow it to defend against the Russian Navy's attacks.

Such reports are not new. For instance, in late April, NBC quoted a former senior intelligence official as acknowledging, "[t]here has been a lot of real-time intelligence shared in terms of things that could be used for specific targeting of Russian forces."[59] The official also cited the use of such intelligence for defensive purposes, noting that Ukraine moved air defense assets and aircraft based on U.S. intelligence before Russian attacks, which has contributed to Russia's inability to attain air supremacy. According to the official, "[t]he Russian military has literally been cratering empty fields where air defenses were once set up.... It has had an enormous impact on the Russian military's ability on the ground." Alexander Wentker usefully identified similar reports last March in his excellent *EJIL: Talk!* piece.[60]

This post builds on an earlier contribution to this symposium in which I disaggregated neutrality, co-belligerency, and the use of force in the context of providing arms and materiel to Ukraine.[61] With respect to cobelligerency, I concluded that although providing arms and materiel did not, "at a certain point, support to a belligerent will make the supporting State a party to the conflict … . [S]ome situations are obvious, such as when a supporting State is involved in joint planning of, and provides assistance essential to, another State's combat operation that would trigger an IAC [international armed conflict] if conducted alone by the supporting State."

In this post, I develop that point. The question is, when does intelligence sharing trigger an international armed conflict (IAC) between the State providing it and that against which it is used.

Side Issues and Framing the Issue

To begin with, sharing intelligence with the Ukrainian armed forces, even to enable particular attacks, is unquestionably lawful, for acting in self-defense is a "circumstance precluding wrongfulness" under the law of State responsibility (Articles on State Responsibility,[62] Article 21). Thus, assuming for the sake of analysis that providing another State operational and tactical level intelligence that it uses in attacks amounts to a "use of force" under international law (UN Charter, Article 2(4),[63] and customary law), which I believe it usually does, the support qualifies as lawful *collective* self-defense (UN Charter, Article 51,[64] and customary international law). Of course, if intelligence is used to commit unlawful acts, issues of complicity

[59] Ken Dilanian, Courtney Kube & Dan De Luce, *U.S. Intel Helped Ukraine Protect Air Defenses, Shoot Down Russian Plane Carrying Hundreds of Troops,* NBC News (Apr. 26, 2022, 10:00 AM), https://www.nbcnews.com/politics/national-security/us-intel-helped-ukraine-protect-air-defenses-shoot-russian-plane-carry-rcna26015.

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

[61] Michael N. Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force,* Articles of War (Mar. 7, 2022), https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/ (last visited Feb. 2, 2024).

[62] ASR, *supra* note 61, art. 21.

[63] U.N. Charter art. 2(4).

[64] *Id.* art. 51.

and State responsibility arise. But no such allegation has been leveled (on the subject, see Milanovic[65]).

Intelligence sharing violates a neutral State's obligations under *traditional* neutrality law (1907 Hague Conventions V[66] and XIII[67] and customary law), although it sometimes may be permissible by the "qualified neutrality" approach outlined in the DoD *Law of War Manual*[68] (see also von Heinegg's[69] and my[70] *Articles of War* pieces). But as I explained in my earlier post, violation of a neutrality obligation does not, as such, make the State involved a party to an IAC.

Once a State becomes a party to an IAC, it loses neutral status and, therefore, the attendant benefits of neutrality law, such as those protecting maritime commerce. Moreover, international humanitarian law (IHL) obligations and protections now apply. For instance, its military personnel and assets may be attacked based on their status as combatants and military objectives, respectively, and the former would enjoy prisoner of war safeguards if detained. In other words, the existence of an IAC is what lawyers label a "choice of law" question, that is, it determines which body of law governs the actions in question.

In the current context, particularly without U.S. or NATO boots on the ground, the practical import of the matter is primarily political. For instance, there have been dueling U.S. and Russian assertions that the conflict is a so-called "proxy war."[71] Nations providing support to Ukraine have been at pains to avoid being seen to be participants in the conflict. However, Secretary of Defense Lloyd Austin's admission[72] (a sensible one) that "[w]e want to see Russia weakened to the degree that it can't do the kinds of things that it has done in invading Ukraine" led Russian Foreign Minister Sergei Lavrov to claim that NATO is "going to war with Russia through a proxy and arming that proxy."[73] On that basis, he engaged in nuclear saber-rattling. So, are the nations involved "at war" with Russia?

The Law

It is essential to understand that the characterizations of States as to whether they are parties to an IAC are not conclusive as a matter of law. This has been so since the adoption of the 1949 Geneva Conventions. To ensure maximum protection for the victims of armed conflict, the drafters made the applicability of those instruments a question of fact, an approach that is today accepted as applicable to IHL more broadly.

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65 Marko Milanovic, *Intelligence Sharing in Multinational Military Operations and Complicity under International Law*, 97 Int'l L. Stud. 1269 (2021).

66 Hague V, *supra* note 1.

67 Hague XIII, *supra* note 2.

68 DoD Law of Manual, *supra* note 11, § 15.2.2.

69 von Heinegg, *Neutrality*, *supra* note 15.

70 Schmitt, *supra* note 89.

71 Olivier Knox, *Why Ukraine Isn't a "Proxy War" (Yet?)*, Wash. Post, May 3, 2022, https://www.washingtonpost.com/politics/2022/05/03/why-ukraine-isnt-proxy-war-yet.

72 Missy Ryan & Annabelle Timsit, *U.S. Wants Russian Military 'Weakened' from Ukraine Invasion, Austin Says*, Wash. Post Apr. 25, 2022, https://www.washingtonpost.com/world/2022/04/25/russia-weakened-lloyd-austin-ukraine-visit.

73 Lucian K. Truscott IV, *Is the U.S. in a Proxy War with Russia? Sergey Lavrov and Lloyd Austin Seem to Think So*, Salon (Apr. 30, 2022, 8:00 AM), https://www.salon.com/2022/04/30/truscott-430-tbd.

The States involved need not hold themselves out as parties to the conflict and may even object to such a characterization.[74] But what matters is whether the situation has factually crossed the armed conflict threshold.[75]

According to Common Article 2 of the four 1949 Geneva Conventions, which provides the universally accepted definition, an IAC consists of "declared war or of any other armed conflict which may arise between two or more [States], even if the state of war is not recognized by one of them."[76] The ICRC's 1960 Commentary to Article 2 of Geneva Convention III explains,

> Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.[77] It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces.

Similarly, the 2020 Commentary asserts that "there is no requirement that the use of armed force between the Parties reach a certain level of intensity before it can be said that an armed conflict exists,"[78] while the ICTY famously observed that an IAC occurs whenever there is a "resort to armed force between States."[79] As is apparent, the threshold of intensity at which an IAC is triggered is relatively low; a single intentional attack by a State would usually qualify. The question at hand is, when does *assistance* to a belligerent during an IAC transform the State concerned into a party to that conflict?

Sir Christopher Greenwood, writing in the second edition of the *Handbook of International Humanitarian Law*, took the position that,

> [s]upport for a third party's acts of war shall generally be rated as an act of war of the supporting state if it is directly related, i.e. closely related in space and time, to measures harmful to the adversary. Cooperation in arms production or other activities to support the armed forces will not suffice.[80]

But he cautioned, "[f]inancial, political, and intelligence support will not have such an effect."

I agree with Greenwood's requirement of directness to harmful measures. I do not, however, believe that intelligence support can never qualify. In my estimation, at issue is the degree of attenuation between the support in question and any supportive actions. In some cases, the provision of intelligence would rise to the requisite level; in others, it would not. The key is identifying the applicable threshold of support that has this effect.

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74 Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III].

75 Boškoski and Tarčulovski, Trial Judgment (International Criminal Tribunal for former Yugoslavia (ICTY)), ¶ 174.

76 GC III, *supra* note 104, art. 2.

77 Commentary: Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Jean Pictet ed., 1960).

78 International Committee of the Red Cross, Commentary on the Third Geneva Convention ¶ 269 (2020).

79 Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995) ¶ 70.

80 The Handbook of International Humanitarian Law (Dieter Fleck ed., 2008).

The Support-based Approach

Support to a party to a conflict has been addressed primarily in the context of non-international armed conflict (NIAC). Nevertheless, in the absence of an accepted normative architecture for assessing when support during an IAC transforms the State providing it into a party, the NIAC discussion is helpful by analogy. Before turning to that discussion, it must be cautioned that control over a party to a NIAC is *not* the issue. The ICTY dealt with that matter in *Tadić*, where the tribunal applied an "overall control" test to determine whether the NIAC had been "internationalized" by virtue of the Federal Republic of Yugoslavia's authority over the Bosnian Serb forces (Appeal Judgment, 1999).[81] In the case of the war between Ukraine and Russia, the United States is self-evidently not in control of Ukrainian forces or operations.

Instead, the issue here is the relationship between the nature of support provided and qualification as a party to the conflict. In its 2015 Challenges Report,[82] the ICRC addressed when a State or multinational force supporting a State that is engaged in a NIAC becomes a party to the conflict. It was of the view that the supporting State or multinational force need not engage in conduct that, standing alone, would make it a party. Instead,

> [t]he decisive element would be the contribution made by such forces to the *collective conduct of hostilities*. A *support-based approach* clearly distinguishes between the provision of support that has a direct impact on the opposing party's ability to carry out military operations and more indirect forms of support, which would allow the beneficiary to build up its military capabilities (page 22, emphasis added; see also 2019 *Challenges Report*, page 75[83]).

The ICRC proffered four criteria against which to judge the situation: 1) the existence of a pre-existing NIAC; 2) that the support is related to the "conduct of hostilities" (an IHL term[84] denoting the weapons and tactics used in combat) in the context of that conflict; 3) that the support benefits a party (a nexus to the conflict); and 4) an official decision by the State or organization concerned to support the party. According to the ICRC (page 23),

> The fulfilment of the above criteria should permit a clear determination of the existence of a genuine belligerent intent on the part of multinational forces. The resulting situation would demonstrate that they are effectively involved in military operations or other hostile actions aimed at neutralizing the enemy's military personnel and assets, hampering its military operations or controlling parts of its territory.

Tristan Ferraro has fleshed out the NIAC support-based approach in two insightful *International Review of the Red Cross* articles,

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81 Prosecutor v. Tarčulovski, Case No. IT-94-1-A, Appeals Chamber Judgment ¶ 131 (Int'l Crim. Trib. for former Yugoslavia July 15, 1999).

82 *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, International Committee of the Red Cross (Oct. 31, 2015), https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts.

83 *ICRC Report on IHL and the Challenges of Contemporary Armed Conflicts*, International Committee of the Red Cross (Nov. 22, 2019), https://www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts.

84 *Conduct of Hostilities*, How Does Law Protect in War?, https://casebook.icrc.org/a_to_z/glossary/conduct-hostilities.

one on multinational forces[85] and the other on foreign intervention.[86] In the former, he explained,

> Direct support also encompasses action that has an impact on the enemy only in conjunction with other acts undertaken by the supported party. In that case, the multinational forces' action should be considered an integral part of specific, coordinated military operations carried out by the supported party which directly inflict harm on the enemy. In other words, there must be a close link between the action undertaken by multinational forces and the harm caused to one of the belligerents by specific military operations undertaken by the opponent. For example, transporting the supported state's armed forces to the front line or providing planes for refuelling jet fighters involved in aerial operations carried out by the supported state do implicate multinational forces in the collective conduct of hostilities and make them a party to the pre-existing NIAC.[87]

Ferraro further described the type of support during a NIAC that would qualify in his follow-on article.

> Such an act must be regarded as an integral part of the pre-existing NIAC. Therefore, actions such as logistical support involving the transportation of the troops of one of the belligerents on the front line, the provision of intelligence used immediately in the conduct of hostilities and the involvement of members of the third power in planning and coordinating military operations conducted by the supported party are all types of support that fall within the scope of application of the ICRC's position—in the same way as direct involvement by the intervening power in combat.[88]

The ICRC has suggested that "[s]imilar reasoning could apply in case of State support to one or more of the Party(ies) to an IAC."[89] This makes sense. After all, it is difficult to understand why actions that would make a State a party to an ongoing NIAC would not have the same effect vis-à-vis an ongoing IAC. Logically, the critical factor in such an assessment should be the collective conduct of hostilities, not the classification of conflict.

Drawing on the ICRC's support-based approach, I suggest looking to the following factors when assessing whether intelligence sharing or other support brings a supporting State into the IAC as a belligerent.

- An *intent* on the part of the supporting State to contribute to specific conduct of hostilities operations by the supported State or frustrate those of the State's adversary;

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85 Tristan Ferraro, *The Applicability and Application of International Humanitarian Law to Multinational Forces*, 95 Int'l Rev. Red Cross 561 (2013) [hereinafter Ferraro 2013].

86 Tristan 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*, 97 Int'l Rev. Red Cross 1227 (2016) [hereinafter Ferraro 2016].

87 Ferraro, *supra* note 119, at 585–586.

88 Ferraro, *supra* note 120, at 1231, 1234.

89 Cordula Droege & David Tuck, *Fighting Together and International Humanitarian Law: Setting the Legal Framework*, Humanitarian Law & Policy (Oct. 12, 2017), https://blogs.icrc.org/law-and-policy/2017/10/12/fighting-together-international-humanitarian-law-setting-legal-framework-1-2.

- The *extent* to which the support benefits specific conduct of hostilities operations of the supported State or hinders those by its adversary;
- The degree to which the support is *integral* to specific conduct of hostilities operations of the supported State or defensive action against its enemy;
- The *degree* of immediacy between the provision of intelligence and its use.

In other words, did the supporting State have a belligerent intent to directly support or hinder particular relatively imminent operations that would trigger (a low threshold) an international armed conflict if standing alone? Did it intend to engage in the "collective conduct of hostilities"?

Applying the Approach to Intelligence Sharing

Each case must, of course, be assessed on its merits against the aforementioned criteria. Those criteria exclude strategic-level intelligence. For instance, providing Ukraine with general information about the overall intentions of Russia or other States would not make the State sharing the intelligence a party to the conflict. Nor would broad intelligence at the operational level of warfare,[90] such as information regarding the overall axes of attack in eastern Ukraine, Russian order of battle in the theater, general disposition of Russian forces, nature of Russian logistics efforts, or morale of Russian troops.

Intelligence passed to Ukraine not meant to facilitate particular Ukrainian offensive or defensive operations likewise would not qualify. Thus, for instance, if the United States did not intend its information to facilitate attacking the *Moskva* or to help Ukraine avoid a specific attack by the cruiser, providing it did not make the United States a party to the conflict, even if Ukrainian forces used it for those purposes.

However, providing actionable intelligence at the tactical level of warfare that enables Ukrainian forces to avoid a specific Russian strike quickly or makes possible a particular attack against a target would cross the IAC threshold by the approach I propose. [91] For instance, sharing intelligence would trigger IAC party status if it precisely geo-locates a Russian target for Ukrainian forces. The key to the approach is whether the intelligence intentionally makes a material and integral contribution to particular attacks or defense against them. Are the States providing and receiving the intelligence operating collectively in the conduct of hostilities?

Concluding Thoughts

If the reports about the United States and other nations providing actionable intelligence making possible specific offensive and defensive tactical operations by Ukrainian forces are accurate, the supporting States arguably have become parties to the conflict. This assertion is tentative for two reasons. First, such assessments are fact-dependent; they must be made on a case-by-case basis.

[90] United States, Dep't of Defense, Dictionary of Military and Associated Terms, U.S. Dept. of Def. (2021).

[91] *Id.*

Sufficient reliable and granular open-source information from which to draw definitive conclusions is presently unavailable.

Second, there is no consensus among States as to when support to a belligerent draws the supporting State into the armed conflict. I believe the approach suggested above is both logical and consistent with the IHL's object and purpose, but it remains a proposed approach unless and until adopted by States. It is offered only to spark further discussion among government lawyers, the ICRC, the NGO community, and academia. It is far from the last word on the subject.

I conclude by emphasizing that this post is not about the lawfulness of intelligence sharing by the United States or any other nation. That said, I confess to seeing *nothing* unlawful in providing intelligence to Ukraine that facilitates its defense against the unlawful armed attack by Russia that has been underway since 2014. Instead, the post's sole purpose is to help identify when a State providing support to a belligerent becomes a party to a conflict. Once it is, the law of neutrality no longer applies between it and the adversary (Russia), and IHL governs the activities of both that have a nexus to the conflict. In other words, the analysis only serves a "choice of law" purpose.

NEUTRAL STATE ACCESS TO UKRAINE'S FOOD EXPORTS

by James Kraska | May 18, 2022

On May 14, the G7 group of industrialized nations met to devise a plan to ensure the export of Ukrainian grain to avert a global hunger crisis.[92] The Russia-Ukraine conflict has created cascading effects on the region and the world, not least is the impact on food security. Russia is the world's top wheat exporter, accounting for 17%;[93] Ukraine is fifth, at 8%.[94] (The United States is second at 14%.) The war has disrupted the flow of exports from Ukraine as Russia's attacks have stymied Ukrainian exports by sea. Before the invasion, Ukraine's Black Sea ports accounted for 95% of its exports of grain and oil seeds, such as sunflower oil.[95] Russian exports are also down.[96] Thirty-six countries in the world import more than 50% of their wheat from Ukraine and Russia.[97]

Could a humanitarian corridor in the Black Sea open the spigot to get Ukrainian grain to global markets?[98] Some U.S. lawmakers think so, and the idea raises interesting issues in the law of naval warfare. While Russia may lawfully impose a blockade on Ukraine, neutral States are entitled to continue noncontraband trade with Ukraine. In this balance, does Russia's right to employ a lawful method of warfare trump the rights of neutral States to trade with a belligerent? Probably so. While neutral states have a right to continue noncontraband trade, at sea that right inures to neutral flagged vessels and neutral goods but does not guarantee access to belligerent markets. Under the Paris Declaration of 1856, which is accepted as customary law, a neutral flag covers or protects enemy goods from capture (Article 2) and neutral goods may not be seized even if they are carried on enemy merchant ships (Article 3).[99]

Impending Food Crisis

Some 25 million tons of grain are held up in Ukrainian ports, penned in by Russia's de facto blockade. Wheat futures are up 50% this year as Ukraine's normal export of 5–6 million tons per month has been reduced to just 1

92 Guy Chazan, *G7 Warns of Global Hunger Crisis Unless Russia Lifts Ukraine Blockade,* Financial Times (May 14, 2022).

93 Global Food Security Consequences of Russia's War of Aggression against Ukraine: G7 Foreign Ministers' Commitments, Press Release, GOV.UK (May 14, 2022), https://www.gov.uk/government/news/commitments-on-the-global-food-security-consequences-of-russias-war-of-aggression-against-ukraine-g7-foreign-ministers-may-2022.

94 Daniel Workman, *Wheat Exports by Country*, World's Top Exports, https://www.worldstopexports.com/wheat-exports-country.

95 William Mauldin, *U.N. Seeks to Ease Russian Blockade of Ukraine Grain Shipping to Avert Food Shortages*, Wall St. J. (May 16, 2022, 3:05 PM ET), https://www.wsj.com/articles/u-n-seeks-to-ease-russian-blockade-of-ukraine-grain-shipping-to-avert-food-shortages-11652717161?page=1 (last visited Feb. 2, 2024).

96 *G7: FAO Puts Forward Proposals to Address Current and Future Food Shortages,* FAO (May 13, 2022), https://www.fao.org/newsroom/detail/g7-fao-food-shortages-agriculture-ukraine-russia-germany/en (last visited Feb. 2, 2024).

97 GCRG Brief No. 1, Global Impact of War in Ukraine on Food, Energy and Finance Systems, U.N. Doc. p. 8 (Apr. 13, 2022), https://news.un.org/pages/wp-content/uploads/2022/04/UN-GCRG-Brief-1.pdf.

98 Eddy Wax, *EU Plans to Help Ukraine's Food Exports Dodge Black Sea Blockade*, Politico (May 10, 2022, 10:33 PM), https://www.politico.eu/article/eu-plans-to-boost-ukraines-food-exports-black-sea-blockade [hereinafter Wax].

99 Declaration Respecting Maritime Law. Paris, 16 April 1856, ICRC Database, Treaties, States Parties and Commentaries, https://ihl-databases.icrc.org/en/ihl-treaties/paris-decl-1856 (last visited Feb. 2, 2024).

million tons in April.[100] Ukraine is also a major exporter of corn (16% of world exports)[101] and sunflower oil (42% of world exports).[102] Like all commodities, including oil, grain trades on the margin, so a small shortage in supply has outsized effects on markets, sending prices soaring. Wheat futures contracts, already increasing due to systemic inflation, had climbed 63% in the three months from mid-February to mid-May.[103]

Food security for 45 million people, mostly in Africa and the Middle East, is now at risk. In response, India, the largest grain exporter, banned shipments abroad to ensure supply for itself and neighboring States.[104] With grain exports from Ukraine and now India at a standstill, Egypt, Turkey, and Lebanon could be particularly hard hit, while the situation for Eritrea, Somalia, Madagascar, Tanzania, and Pakistan is dire.[105] Overland routes are insufficient. Getting Ukrainian grain to a port on the Baltic, such as Gdańsk and Gdynia, is slow and expensive.[106] The EU is focusing on developing alternative overland routes.[107] But opening Ukrainian ports is the only realistic option to maintain the volume of grain, as ground transportation infrastructure—rail and truck—cannot accommodate the volume.[108]

As the G7 scrambles to consider an overland route, the UN Food and Agriculture Organization (FAO) is concerned about the next shoe to drop. In July and August, Ukraine is expected to harvest the summer crop of wheat, barley, and corn, including 14 million tonnes of grain. The country lacks storage capacity, and all that food is destined to go to waste while some of the least developed countries face severe shortages of food. To make matters worse, there is evidence that Russia is attacking Ukrainian grain storage infrastructure.[109] Russia also is reportedly stealing Ukrainian grain.[110]

FAO's deputy director for markets and trade, Josef Schmidhuber, said there is enough grain to feed the world, but Russia's blockade is hampering the movement to where it is needed most.[111] "It is an almost grotesque situation that we see at the moment," he said. "In Ukraine, there are nearly 25 million tons of grain that could be exported but they cannot leave the country simply because of the lack of

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100 Wax, *supra* note 135.

101 *Ukraine and Russia Are Among the World's Largest Exporters of Cereal Crops and Oils*, Our World in Data, https://ourworldindata.org/ukraine-russia-food.

102 *Id.*

103 *Id.*

104 Gerry Shih & Niha Masih, *India Bans Wheat Exports amid Soaring Global Prices*, Wash. Post (May 14, 2022),

105 *Presentation by the Director-General Meeting of the G7 Ministers of Agriculture, U.N. Docs*, Food and Agriculture Org. of the UN (May 13, 2022), https://www.fao.org/3/cc0140en/cc0140en.pdf

106 Wax, *supra* note 135.

107 *Id.*

108 Sarah Anne Aarup, Eddy Wax & Hanne Cokelaere, *Ukraine Says EU Road Links Won't Make Up for Loss of Black Sea Trade*, Politico (Apr. 5, 2022, 6:37 PM), https://www.politico.eu/article/green-corridor-west-not-save-ukraine-trade.

109 Steve Holland & Michelle Nichols, *Exclusive: Photos Show Russian Attacks on Ukraine Grain Storage—U.S. Official*, Reuters (Mar. 31, 2022, 10:16 PM), https://www.reuters.com/world/exclusive-photos-show-russian-attacks-ukraine-grain-storage-us-official-2022-04-01.

110 Holly Ellyatt, Amanda Macias & Chelsea Ong, *Ukraine Warns Countries about Buying Its Stolen Grain; U.S. $40 Billion Aid to Ukraine Faces Delay*, CNBC (May 13, 2022, 3:08), https://www.cnbc.com/2022/05/12/russia-ukraine-live-updates.html.

111 Lisa Schlein, *Russian Blockade of Ukrainian Sea Ports Sends Food Prices Soaring*, VOA News (May 7, 2022, 12:07 PM), https://www.voanews.com/a/russian-blockade-of-ukrainian-sea-ports-sends-food-prices-soaring/6561914.html.

infrastructure and the blockade of the ports. At the same time … there is no wheat corridor opening up for exports from Ukraine."

Odesa is the last Ukrainian port available to export grain. While the brutal siege on Mariupol on the Sea of Azov has received widespread attention, Russia continues to press an unremitting naval assault against Odesa near the Romanian border. The Russian operation appears to be aimed at converting Ukraine into a land-locked State by cutting access to the Sea of Azov and the Black Sea.[112] This would connect Russia proper and Russian-occupied eastern Ukraine and Crimea to Transnistria, a pro-Moscow region of Moldova.

To achieve its goals, when Moscow began the current phase of the war in Ukraine, it announced on February 25 a restriction on vessel access in northwest Black Sea, north of 45° 21'.[113] That same day, the Cabinet Ministers of Ukraine issued Order No. 9183-r, closing the country's ports to entry and exit as a defensive wartime measure.[114] Lloyd's Joint War Committee has warned vessels to avoid an area stretching from the Romania-Ukraine border to the Georgia-Russia border in the Black Sea—virtually the entire coastal area except Turkey.[115]

Russia's Blockade

While Russia has declared a "restricted zone" that is tantamount to an exclusion zone, some are calling it a "blockade." Maritime exclusion zones are a lawful method of warfare if they are used to warn merchant and neutral shipping of the hazards inherent in conflict at sea and as a tool to help identify and sort shipping. As my colleague Pete Pedrozo concluded, the same rules from the law of naval warfare apply inside the zone as outside the zone.[116] Whether Russia's actions are tantamount to a blockade is a matter of fact and law. In practice, Russia's operations look somewhat like a blockade, but the constitutive elements of blockade have not been fulfilled.

As a form of economic warfare, naval blockade of enemy ports seeks to sever sea lines of communication and maritime trade between the coastal State and the rest of the world. Although Russia has imposed restrictions in the Black Sea to prevent the entry or exit of ships from Ukraine, it has not fulfilled the legal elements to perfect a de jure blockade. The rules governing blockade are codified in the London Declaration of 1909.[117] Blockades are confined to the ports and coasts belonging to or occupied by the enemy (Article 1). Notification and declaration of blockade is required to place all States on

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112 Elena Becatoros & Jon Gambrell, *Russia Pummels Port of Odesa in Attempt to Disrupt Supplies*, AP News (May 10, 2022, 9:44 PM), https://apnews.com/article/russia-ukraine-putin-business-nato-moscow-c8e00f7bbc4f24aa40d70a4ac2d97adb.

113 E-mail from NW Service DNO RF to Navigational Hydrographic Information Center (Feb. 26, 2022, 8:00 PM), https://gcaptain.com/wp-content/uploads/2022/03/Russian-gmdss-warning.jpg.

114 Circular Letter No. 4518 from International Maritime Organization to All IMO Members, Intergovernmental Organizations, Non-government Organizations in Consultative Status (Feb. 24, 2022).

115 JJW2022-011 Russia-Related Vessel Exclusion, Joint War Committee, Lloyd's Market Association, https://www.lmalloyds.com/lma/jointwar.

116 Raul (Pete) Pedrozo, *Ukraine Symposium – Maritime Exclusion Zones in Armed Conflict*, Articles of War (Apr. 12, 2022), https://lieber.westpoint.edu/maritime-exclusion-zones-armed-conflicts.

117 Declaration Concerning the Laws of Naval War. London, 26 February 1909, ICRC Database, Treaties, States Parties and Commentaries, https://ihl-databases.icrc.org/en/ihl-treaties/london-decl-1909.

notice (Articles 8, 10–11). The belligerent imposing the blockade must communicate the date the order begins, the geographic limits of the coastline subject to the order, and the period of time within which neutrals may exist in the area (Articles 9–12).

To be legally binding, a blockade must be effective, which means the belligerent forces must be sufficient to prevent access to the enemy coastline (Article 2). Effectiveness is a question of fact to be determined by a factfinder, such as a prize court or other adjudicatory tribunal. Blockades also must be applied impartially among flags of all nations (Article 5). Warships and neutral vessels in distress may enter and leave a blockaded area (Articles 6–7). Although the London Declaration never entered into force, its provisions have been observed during armed conflict and it is generally regarded as customary international law.[118]

Like "Operation Pocket Money," the American blockade against Haiphong in May 1972,[119] Russia does not refer to its Black Sea zone as a "blockade" but its restriction regime and enforcement operations appear indistinguishable to a blockade. While blockade is a lawful method of warfare, Russia's declaration that ships inside the restricted area "would be regarded as a terrorist threat"[120] and Russian attacks on Ukrainian and neutral merchant ships[121] violates the proscriptions in the law of naval warfare in so far as the vessels apparently were not engaged in the conflict or attempting to breach the blockade.[122] Neutral ships are exempt from capture or attack, and Ukrainian ships as civilian objects are exempt from attack unless they support the Ukrainian war effort or resist prize capture.

Opening Ukrainian Ports

At its meeting on May 14, the G7 Foreign Ministers stated they would support Ukraine in maintaining its agricultural production, storage, and resumption of exports.[123] David Beasley, who heads the World Food Program, stated, "The bottom line is, if those ports are not opened up, it's going to devastate millions of people around the world." [124] "Millions of people around the world will die because these ports are being blocked," he told CNN.[125]

Ukraine currently cannot protect Odesa port operations or the onloading of ships.

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118 Robert W. Tucker, *Blockade,* 50 Int'l L. Stud. 283, 285, https://digital-commons.usnwc.edu/ils/vol50/iss1/10.

119 Committee on Foreign Relations U.S. Senate, Background Information Relating to Southeast Asia and Vietnam, S. Rep. No. 92-991 (Dec. 1974) (7th ed.).

120 E-mail from NW Service DNO RF to Navigational Hydrographic Information Center (February 26, 2022, 8:00 PM), https://gcaptain.com/wp-content/uploads/2022/03/Russian-gmdss-warning.jpg.

121 Nick Blenkey, *Video: Russian Attacks on Merchant Ships Reported,* Marine Log (Feb. 28, 2022), https://www.marinelog.com/legal/shipping/video-russian-attacks-on-merchant-ships-reported%EF%BF%BC/ (last visited Feb. 2, 2024).

122 Commander's Handbook, *supra* note 34, §§ 7.10, 8.6.2.2.

123 *Global Food Security Consequences of Russia's War of Aggression Against Ukraine: G7 Foreign Ministers' Commitments, Press Release,* GOV.UK, (May 14, 2022), https://www.gov.uk/government/news/commitments-on-the-global-food-security-consequences-of-russias-war-of-aggression-against-ukraine-g7-foreign-ministers-may-2022.

124 Meredith Lee, *Urgency Mounts for U.S. Answer to Russian Blockade*, Politico (May 11, 2022, 2:00 PM), https://www.politico.com/news/2022/05/11/ukraine-russian-blockade-global-food-supplies-00031760 [hereinafter Lee].

125 Matt Egan, *'If You Have Any Heart at All.' UN Official Warns Putin Millions Will Die if Ukraine's Ports Remain Blocked*, CNN (May 12, 2022), https://www.cnn.com/2022/05/12/economy/food-crisis-ukraine-putin-un/index.html.

Ukrainian President Volodomyr Zelensky is therefore seeking more military aid,[126] including Harpoon anti-ship cruise missiles, to protect the port and resume normal operations in order to export 12 million tonnes of agricultural product that will spoil by this fall. NATO is unwilling to provide a naval force to help even if it could convince Turkey to lift the ban on foreign warships in the Black Sea.[127]

On March 3, the International Maritime Organization also proposed establishment of "Blue Safe Maritime Corridors"[128] to give safe passage to some one hundred merchant ships and seafarers stranded in the war zone.[129] Russia agreed, but Ukraine has not responded to this call. Alternatively, President Zelensky has suggested that opening humanitarian maritime corridors from Odesa is the only way to avert the pending grain shortage. Rep. Jason Crow agrees that reestablishing port operation in the war zone is essential. These leaders propose a 20-mile buffer zone between Romania and Turkey through which ships carrying grain could hug the coast.[130] Ukraine cannot protect Odesa port operations or the onloading of ships, however, so the vessels either obtain Russian clearance or assume the risk.

Conclusion

The importance of Ukrainian agricultural trade to other States and the global market means that in the present conflict there are millions of people dependent on the belligerent State to meet their nutritional needs. While Ukrainians suffer during the present conflict, the harm from Russia's invasion is spilling over to States dependent on Ukrainian grain and other food commodities. Neutral States not party to the conflict rely on Ukraine, a belligerent under blockade-like conditions, to fulfill their requirements for adequate food. The inability of Ukraine to export its agriculture presents a case of first impression in international humanitarian law.

While it is unlawful to starve an enemy population, starvation of enemy armed forces is not prohibited.[131] Generally, international humanitarian law requires belligerents to take various affirmative steps to protect the food supply upon which enemy civilians depend, and to provide food in specific circumstances. For example, food must be provided to detained individuals,[132] prisoners of war,[133] and internees.[134] Occupying powers also have a duty to ensure the provision of food to the population, especially children

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126 Lee, *supra* note 165.

127 James Kraska, *Can Turkey Legally Close Its Straits to Russian Warships? It's Complicated*, Foreign Policy (Mar. 1, 2022, 4:57 PM), https://foreignpolicy.com/2022/03/01/turkey-black-sea-straits-russia-ships-ukraine-war.

128 *IMO Council Decisions on Black Sea and Sea of Azov Situation, Press Briefing*, IMO Council (Mar. 11, 2022), https://www.imo.org/en/MediaCentre/PressBriefings/pages/ECSStatement.aspx.

129 *UN to Work on Safe Corridor for Ships Stranded by Ukraine Conflict*, Reuters (Mar. 11, 2022, 5:35 PM), https://www.reuters.com/world/europe/un-work-safe-corridor-ships-stranded-by-ukraine-conflict-2022-03-12.

130 Lee, *supra* note 165.

131 DoD Law of War Manual, *supra* note 11, § 17.9.2.

132 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, , 1125 U.N.T.S. 609.

133 GC III, *supra* note 104, art. 26.

134 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 89, 75 U.N.T.S. 287 [hereinafter GC IV]; Hague V, *supra* note 1, art. 12.

(GC IV, Articles 50, 55[135]). Occupiers may not requisition food except for use by the force of occupation and then only after the requirements of the civilian population have been considered (GC IV, Article 55[136]). Yet these rules do not address whether neutral States that rely on a belligerent State for its food supply are entitled to access that agricultural produce as a matter of right.

Like all military operations, whether Russian efforts to disrupt access by foreign shipping to Ukrainian agricultural exports are derived from a maritime exclusion zone or blockade against Odesa, they are subject to military necessity, proportionality, and distinction. Military action by Russia to deprive Ukrainian forces of food is subject to the rule of proportionality in *jus in bello*. States must "refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained."[137] Belligerents must distinguish between food that sustains the enemy force, which may be a lawful military objective, and food that sustains the civilian population, which is not. The U.S. view on distinction in this context is that "an attack by any means against crops intended solely for consumption by noncombatants not contributing to the enemy's war effort would be unlawful for such would not be an attack upon a legitimate military objective."[138] In the present case, however, the direction of the harm inflicted flows to foreign civilian populations at risk of starvation.

While neutral States may continue to trade with belligerents, this right extends only to the protection of neutral commerce in situ and not a right of access to a belligerent port situated in a zone of conflict. Hence, there is no neutral right per se to enter a Ukrainian port in safety and onload cargo. Secretary-General António Guterres is leading a diplomatic effort involving Russia, Turkey, and other States to resume Ukrainian grain shipments. Guterres suggested Russia permit Ukrainian grain shipments in exchange for easing sanctions against Russian and Belarusian exports of potash fertilizer.[139] So far, however, Russia seems not to be negotiating in earnest, and no resolution is in sight.[140]

135 GC IV, *supra* note 175, arts. 50, 55.

136 *Id.* art. 55.

137 DoD Law of War Manual, *supra* note 11, § 2.4.12.

138 *Id.* § 5.20.1., n. 711.

139 Gabriela Galindo, *Why the EU's Potash Sanctions Are Looming over Supermarket Prices*, Politico (Mar. 4, 2022, 12:29 PM), https://www.politico.eu/article/eu-sanctions-higher-food-prices-potash.

140 William Mauldin, *U.N. Seeks to Ease Russian Blockade of Ukraine Grain Shipping to Avert Food Shortages,* Wall St J. (May 16, 2022)

PROVIDING ARMS AND MATERIEL TO UKRAINE: NEUTRALITY, CO-BELLIGERENCY, AND THE USE OF FORCE

by Michael N. Schmitt | Mar 7, 2022

Since the outbreak of renewed hostilities on February 24, numerous States have provided Ukraine significant military assistance in its ongoing armed conflict with Russia.[141] NATO members that have approved or transferred lethal weapons to Ukraine include Belgium, Canada, the Czech Republic, Estonia, France, Germany, Greece, Latvia, Lithuania, Netherlands, Poland, Portugal, Slovakia, Slovenia, Turkey, the United Kingdom, and the United States. The scale of the effort is impressive. For instance, the European Union is providing a 450 million Euro lethal support package through the European Peace Facility,[142] while the U.S. security assistance program for Ukraine over the last year stands at one billion dollars.[143]

The outgunned Ukrainian armed forces badly need the assistance. But the effort has also sparked a flurry of legal questions about its significance, especially concerning neutrality, co-belligerency, and the use of force. Unfortunately, some of the discussion is creating confusion, particularly with respect to the relationship between the three issues. In this post, I will tease them loose in the context of assistance to Ukraine and, where possible, provide my views on their applicability.

Neutrality

The treaty law of neutrality is found in two 1907 Hague Conventions—Convention (V) Respecting the Rights and Duties of Neutral Powers in Case of War on Land [144]and Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War.[145] It is well-accepted that a neutral State must not, as Yoram Dinstein has observed, "assist the war effort of one of the belligerents against its adversary through military supplies furnished on an inter-governmental basis."[146] This is so even though Hague V has no provision directly on point, as Hague XIII does for naval warfare (Article 6). However, under Hague V and XIII, States may allow the export and transport of war materiel by the private sector. Should they impose restrictions, they must do so on both parties to the conflict.[147]Like Russia and Ukraine, some of the States providing military equipment are parties to these instruments, but not all. For instance, the United States is a Party to both,

[141] Claire Mills, *Military Assistance to Ukraine since the Russian Invasion, Research Briefing*, House of Commons Library (Jan. 25, 2024, updated since original publication), https://researchbriefings.files.parliament.uk/documents/CBP-9477/CBP-9477.pdf.

[142] Member's Research Services, *European Peace Facility – Investing in International Stability and Security [Policy Podcast]*, European Parliamentary Research Service (July 1, 2021), https://epthinktank.eu/2021/07/01/european-peace-facility-investing-in-international-stability-and-security-policy-podcast/ (last visited Feb. 2, 2024).

[143] Cong. Research Serv., RL 12040, U.S. Security Assistance to Ukraine (Jan. 3, 2024).

[144] Hague V, *supra* note 1.

[145] Hague XIII, *supra* note 2.

[146] DoD Law of War Manual, *supra* note 11, § 15.3.2.1.

[147] Hague V, *supra* note 1, art. 7; Hague XIII, *supra* note 2, art. 7; DoD Law of War Manual, *supra* note 11, § 15.3.2.1.

while the United Kingdom is a Party to neither. This raises the question of whether these neutrality rules are customary in character. Although most experts agree they are, there are three views on their content.

By the first, the rules survive intact in both treaty and customary law. For advocates of this view, States providing military materiel to Ukraine are violating their obligations under neutrality law. According to the second view, neutrality law has fallen into desuetude (or obsolescence) and been replaced by the UN Charter collective security system and the rules regarding the use of force that came into force in the aftermath of the Second World War.[148] This view would allow for deliveries of arms and other assistance unless the Security Council bars assistance.

In my estimation, the first view ignores post–Second World War developments in customary international law, as in the case of the establishment of a collective security regime that allows a victim State to receive assistance in collective self-defense. It would mean that every exercise of collective self-defense breaches the assisting State's neutrality obligations.

But the second throws the baby out with the bathwater. There are situations where UN Charter mechanisms fail to maintain international peace and security. To suggest that the rules of neutrality no longer apply in these cases would open the door to expansions of hostilities and amount to a backward step in shielding non-belligerents from the effects of an armed conflict.

The third, and most defensible view, is that the law of neutrality must be interpreted to accommodate both State practice and the evolution of international law since 1907. In this regard, the DoD *Law of War Manual* notes

> [A]fter treaties outlawed war as a matter of national policy, it was argued that neutral States could discriminate in favor of States that were victims of wars of aggression. Thus, before its entry into World War II, the United States adopted a position of "qualified neutrality" in which neutral States had the right to support belligerent States that had been the victim of flagrant and illegal wars of aggression.[149]

Variants of this argument stretch back to Justice Robert Jackson, then U.S. Attorney General and later prosecutor at the Nuremberg Tribunal. He suggested in 1941 that in light of the 1928 Kellogg-Briand Treaty, in which the Parties renounced war, it was now permissible to distinguish among States.[150] Since belligerents were no longer "equal" in the eyes of the law, the premise of equivalence underlying neutrality law had to give way a bit to the emerging prohibition on the use of force, in which there are wrongdoers and victims.

Today, the view is known as "qualified neutrality." If the Security Council has authorized an enforcement action under

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[148] Jan Wouters & Sten Verhoeven, *Desuetudo*, Max Planck Encyclopedia of Public International Law, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690.

[149] DoD Law of War Manual, *supra* note 11, § 15.2.2.

[150] *Address of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941*, *available at* https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/03-27-1941.pdf.

Chapter VII of the Charter, neutrality rules necessarily yield to the obligation under Charter Article 2(5) to "give the United Nations every assistance in any action it takes in accordance with the present Charter, and … refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action."[151] For example, the Security Council could require States to prevent private entities under their jurisdiction from selling arms to one of the belligerents while allowing sale to its adversaries, a clear violation of traditional neutrality law. And the Security Council could likewise allow States to directly provide military equipment or other assistance to a belligerent, also normally a violation of neutrality law.

The more challenging question is whether qualified neutrality applies when no UN authorization or mandate for an enforcement operation exists. The DoD *Law of War Manual* states, "Regional and collective self-defense agreements may affect States' rights to maintain a neutral status because the States may be required to provide assistance or take military action in collective self-defense until the UN Security Council has taken measures necessary to maintain international peace and security."[152] In other words, UN go-ahead is not always necessary to provide a State assistance consistent with qualified neutrality.

Presumably, the same legal logic would apply in bilateral or ad hoc collective self-defense cases. Although generally skeptical of "qualified immunity," Wolff Heintschel von Heinegg moved in this direction in his recent *Articles of War* post.[153] He points out that Russia, the aggressor State, prevented the Chapter VII enforcement mechanism from functioning by exercising its veto, that the Russian operations are acts of aggression that cannot be justified on the grounds it advances, and that an overwhelming number of States have condemned the Russian attacks as international law violations. In such cases, von Heinegg argues, "[N]eutral States can no longer be bound by an obligation of strict impartiality and a prohibition to supply the victim of aggression with the means necessary to defend itself against an aggressor State that is obviously determined to ignore core principles and rules of international law." I find his analysis convincing.

Thus, some forms of military assistance may violate the law of neutrality, as in the case of Belarus hosting Russian forces to provide access to Kyiv. Others, in my view and von Heinegg's, would not. The former would be "internationally wrongful acts," subject to the remedies available in the law of State responsibility, like countermeasures and reparations.[154]

But do breaches of neutrality law obligations lead to co-belligerency status for the States supporting Ukraine? Jack Goldsmith and Curtis Bradley proposed looking to neutrality law to determine co-belligerency in a well-

151 U.N. Charter art. 2(5).

152 DoD Law of War Manual, *supra* note 11, § 15.2.4.

153 von Heinegg, *supra* note 15.

154 ASR, *supra* note 61, arts. 22, 31.

known 2005 *Harvard Law Review* article.[155] They suggest, "One way that a State can become a co-belligerent is through systematic or significant violations of its duties under the law of neutrality." Rebecca Ingber, by contrast, concluded, correctly in my opinion, that the Goldsmith and Bradley view "rests on flawed doctrinal grounds, both in its application of largely obsolete neutrality law principles designed for states to a modern conflict with a non-State terrorist group, and in its overstating of the consequences of a neutrality breach under that historic body of law." [156]

The critical point is that it is not the *fact* of violation that bears on co-belligerent status (or, more accurately, "party status," as explained below), but rather the underlying *actions*. For instance, conducting attacks on behalf of a belligerent would bring a supporting State into the conflict as a party. But repeatedly failing to intern belligerent soldiers who cross into one's territory for sanctuary would not. The point is that violations of a neutral's obligations by providing military materiel does not per se trigger *co-belligerency* status.

Nor does breach of a neutral's obligation through arms transfer or other assistance to a belligerent, as such acts necessarily amount to an unlawful *use of force* or give the opposing belligerent a right of self-defense. Those matters are likewise subject to a separate legal regime, the *jus ad bellum*, discussed below.

Co-belligerency

Co-belligerency is a different legal question than compliance with neutrality law and is determined by a different body of law, international humanitarian law (IHL). Although the same action by a State may bear on both questions, it is essential not to conflate the two. As noted in the DoD *Law of War Manual*, "Acts that are incompatible with the relationship between the neutral State and a belligerent State under the law of neutrality need not end the neutral State's neutrality and bring that State into the conflict as a belligerent."[157]The term "co-belligerent" refers to allies or other States engaged in an international armed conflict (IAC) with a common enemy. It is sometimes an important IHL concept, for instance, with respect to protected persons or POW status.[158]

But the pertinent question here is when does a State that provides arms or other assistance itself become a "*party to the ongoing IAC*." It is a threshold question that determines whether IHL applies between the State providing the aid and the enemy of the State to whom it is delivered. In other words, it is simply a choice of law issue.

The nature and extent of support that renders the supporting State a party to a conflict is an unsettled issue of IHL. It has been analyzed extensively in the context of non-international armed conflicts, where one State gives support to either insurgents or the State fighting them.[159]

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155 Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 7 (2005).

156 Rebecca Ingber, *Co-Belligerency*, 42 Yale J. Int'l L. 67 (2017).

157 DoD LoW Manual, § 15.4.1.

158 GCC, art. 4.;

159 Ingber, *supra* note 202; Ferraro, *supra* note 120.

However, as the International Committee of the Red Cross (ICRC) has correctly observed, "[F]oreign intervention in support of a party to an international armed conflict (IAC) … raise(s) no specific legal issues concerning the determination of the applicable IHL rules. In such cases, the application of IHL is clear: all the different relationships between belligerents are governed by the law of IAC."[160]

Therefore, it is appropriate to look to the threshold for initiation of an armed conflict. Common Article 2 of the four 1949 Geneva Conventions[161] sets forth the accepted definition of an IAC—"declared war or of any other armed conflict which may arise between two or more [States], even if the state of war is not recognized by one of them." The 1960 ICRC Commentary to Article 2[162] explains,

> [A]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces.

A debate has long raged over the requisite intensity of the violence between States that qualifies an action as triggering an international armed conflict. In the current situation, however, there can be no question that 1) some hostilities must take place between the States in question to qualify as an IAC between them, and 2) the level of violence between Russia and Ukraine has sufficed since 2014.

This leads to two conclusions. First, the mere provision of arms and other materiel support to Ukraine's armed forces does not, standing alone, mean the supporting States are parties to an IAC with Russia; there are no hostilities between the States concerned. This view is analogously supported by the International Criminal Tribunal for the former Yugoslavia's Appeals Chamber judgment in *Tadić*, where the Chamber held that "equipping and financing" a non-State group does not alone "internationalize" a conflict. If materiel assistance to a non-State group in a non-international armed conflict does not initiate IAC between the supporting State and the State against which the arms and equipment will be employed, there is no rationale for saying it would do so in an international armed conflict.

However, at a certain point, support to a belligerent will make the supporting State a party to the conflict. This is a complex matter beyond the scope of this post. Still, some situations are obvious, such as when a supporting State is involved in joint planning of, and provides assistance essential to, another State's combat operation that would trigger an IAC if conducted alone by the supporting State. Additionally, if the supporting State alone engages in operations that qualify, it is a party to the conflict. For instance, if States, perhaps for humanitarian purposes, declare a no-fly zone in sectors of Ukrainian airspace and subsequently use force against Russian

160 Ferraro, *supra* note 120, at 1228.

161 GC III, *supra* note 104, art. 2.

162 *Id.*

aircraft and helicopters to enforce it, an IAC will exist between them and Russia.

Use of Force

A third, and distinct, issue raised by the assistance being provided to Ukraine is whether its provision amounts to an unlawful threat or use of force under Article 2(4) of the UN Charter and customary international law.[163] If so, it will constitute an internationally wrongful act and, as with a breach of neutrality obligations, open the door to countermeasures and reparations. This is an entirely separate determination from the neutrality and co-belligerent questions. For example, an action may violate neutrality obligations, qualify as a use of force, and trigger an armed conflict. Alternatively, it could qualify as a use of force, but not breach neutrality obligations or initiate an IAC.

That *might* be the case here. As noted, the better view is that the provision of materiel assistance to Ukraine is not a breach of neutrality, nor does it initiate an IAC with Russia. However, as the International Court of Justice observed in its *Paramilitary Activities* judgment, "arming and training" guerilla forces "can certainly be said to involve the threat or use of force against Nicaragua."

Of course, that was a *non*-international armed conflict. Plus, ICJ judgments are only persuasive authority for States that are not parties in the case.[164] Therefore, its position on arming and training is not definitively settled. But the logic of the court's holding arguably applies equally to IAC, for if arming and training a non-State group fighting a State is a use of force (as distinct from unlawful intervention, a separate legal question), why would it not also be a use of force to provide arms to another State engaging in hostilities against that State? After all, the harm to the State could be much more severe, thereby meriting equal protection by international law.

But even if the Court's conclusion is accepted, it is clear that providing a State assistance when it is engaged in self-defense according to Article 51 of the UN Charter and customary international law is lawful.[165] Ukraine has enjoyed the right of self-defense, and therefore the right to request even forcible assistance in collective self-defense from other States, since the original Russian "armed attack" in 2014. Since States may lawfully engage in hostilities against Russia in support of Ukraine, they surely may directly provide it with arms and materiel assistance without violating the use of force prohibition. After all, self-defense is a circumstance precluding wrongfulness in the law of state responsibility.[166] This being so, any "wrongfulness" of their support on the basis of the use of force prohibition (or any other basis) would be precluded by the support's qualification as collective self-defense.[167]

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

164 Statute of the International Court of Justice, art. 59.

165 U.N. Charter art. 51.

166 ASR, *supra* note 61, art. 21.

167 Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, Articles of War (Feb. 28, 2022), https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense.

Conclusion

In assessments of the provision of materiel and other assistance to Ukraine, it is essential to carefully distinguish between breaches of neutrality, becoming a party to the conflict, and assistance as a use of force. They are separate issues, none of which depends on characterization under the others. In my estimation, the assistance to date 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.

THE LAW OF CROWDSOURCED WAR: DEMOCRATIZED SUPPLY CHAINS—PART II*

by Gary Corn | Mar 15, 2023

In the first of this two-part post addressing the legal and practical implications of democratized supply chains, I focused on the individual risks that those who engage in these activities incur.[168] I explored whether their actions can amount to direct participation in hostilities with the attendant consequence of forfeiture of the protection against being deliberately attacked. But like General Krulak's famous strategic-corporal,[169] the independent actions of individuals supporting belligerent States can potentially have strategic consequences, enmeshing not just the individual actor in the conflict, but others as well, including the States where they reside, are present, or hold citizenship.

In this post, I turn to the collective risks that democratized supply chains might pose. Specifically, I consider the implications for States under the law of neutrality and the principle of due diligence.

State Responsibility

As I noted in Part I, the likelihood that participation in crowdsourcing efforts will fall back on and put any States at elevated risk of Russian retaliation, at least by means of force, is fairly low, but certainly not nil. And I must again emphasize, under customary international law, assessing whether States bear responsibility for the actions of independent actors is a very fact-dependent inquiry. As such, the observations here are general in nature.

As a starting point, under the law of State responsibility, States are presumptively not liable for the actions of independent, non-State actors. The primary exception to this rule, as set out in Article 8 of the International Law Commission's Articles on State Responsibility, is that States assume direct responsibility for those actions when they are conducted under that State's instructions, direction, or control.[170] Stated slightly differently, a private actor or group of actors' conduct is legally attributable to a State when that State exercises "effective control" over the conduct, i.e., the State determines the execution and course of the specific action and directly enables it or has the ability to order its cessation.[171]

There being little indication that these crowdsourced logistics are being conducted at the behest (other than perhaps of Ukraine), let alone under the effective control of any State not presently part of the conflict,

* Part I appears in chapter VI of this volume.—Eds.

168 Gary Corn, *Ukraine Symposium – The Law of Crowdsourced War: Democratized Supply Chains – Part I*, Articles of War (Mar. 1, 2023), https://lieber.westpoint.edu/law-crowdsourced-war-democratized-supply-chains-part-i.

169 Franklin Annis, *Krulak Revisited: The Three-Block War, Strategic Corporals, and the Future Battlefield,* Modern War Institute (Feb. 3, 2020), https://mwi.westpoint.edu/krulak-revisited-three-block-war-strategic-corporals-future-battlefield.

170 ASR, *supra* note 61, art. 8.

171 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 ¶ 115 (June 27); ASR, *supra* note 61, art. 8, commentary para. 3

the only possible theories of international responsibility would have to flow from a failure to act affirmatively to prevent or disrupt these supply-chain activities. Of course, finding a breach by omission presupposes an international obligation to intervene. Under international law, the potentially relevant sources of such an affirmative duty are the law of neutrality and the principle of due diligence.

The Law of Neutrality

Much has been written on this blog and elsewhere about the specialized body of international law that defines the legal relationship between belligerent and neutral States and prescribes their corresponding rights and obligations.[172] It is a body of law concerned almost exclusively with State, not individual, conduct. At its core, the law of neutrality establishes a duty on the part of neutral States not to participate in hostilities and to engage with belligerent States only on the basis of strict impartiality.

With respect to the Russia-Ukraine conflict, several States, the United States chief among them, have clearly adopted, either explicitly or implicitly, national policies that at a minimum reflect a modified or "qualified" approach to their neutrality obligations—distinguishing between Ukraine as the victim and Russia as the aggressor State to justify their extensive support for the former. Otherwise, the amount of military aid flowing into Ukraine from the United States, its NATO partners, and others simply cannot be squared with strict, traditional notions of neutrality law. Whatever the merits of these positions, the lack of strict fealty to neutrality law has occurred at the macro, interstate level. In contrast, what neutrality law has to say about individuals participating in crowdsourced logistics to support Ukraine is quite limited, and for those States that have already crossed into the territory of qualified or non-neutral status, those individual actions are likely subsumed in those national political decisions.

Even for States that have adhered to their neutrality obligations of non-participation and impartiality, the question is whether neutrality law imposes an affirmative obligation to disrupt private individual efforts when conducted by that State's nationals or from its territory. The short answer is no.

While (truly) "[n]eutral States have an obligation to refrain from providing war-related goods and services to belligerents," that obligation does not extend to "preventing the export or transport, on behalf of one or other of the belligerents, of arms, munitions, or anything that can be of use to an armed force."[173] Such commercial transactions, including shipping of such supplies, whether done by corporations, individual citizens, or residents within a neutral State, are not prohibited so long as exporting the supplies would not require involvement of the neutral State or convert the State's territory into a base of military operations.[174] And while historically some States have enacted domestic legislation proscribing or restricting

[172] Schmitt, *supra* note 25.

[173] DoD Law of war Manual, *supra* note 11, § 15.3.2.1.

[174] *Id.*

exports to or in support of belligerent States, if they do so it must be done consistent with the obligation of impartiality.

Similarly, the duty of a neutral to prevent belligerents from establishing bases of operation on neutral territory[175] or recruiting or forming units of combatants[176] does not encompass an obligation to prevent the transit through neutral territory of individuals seeking to volunteer their services to one belligerent or another. Nor are neutral States under an obligation to prohibit or prevent their nationals from joining the armed forces of belligerent States.[177]

Because neutrality law does not establish an obligation on neutrals to intervene in these individual commercial and volunteer acts, the same would seem to hold true in the case of individuals voluntarily contributing war-sustaining equipment through crowdsourced supply chains.

There is one potential twist, however. When it comes to the use of communications facilities (e.g., the Internet) located in the territory of a neutral State, neutrality law similarly imposes no obligation "to forbid or restrict the use on behalf of the belligerents of [communications facilities] belonging to [the neutral State] or to companies or private individuals."[178] However, where a neutral State permits the transmission of communications through its facilities, it cannot do so in a way that "lends assistance to the belligerents on one side only," and it must apply impartially any prohibitions or restrictions it chooses to place on their use.[179] Not only must the neutral State adhere to the obligation of impartiality in this regard, it "must see to the same obligation being observed by companies or private individuals owning such communication equipment and facilities."[180]

At first blush, to the extent these democratized supply chains are reliant on Internet communications for their execution (which is substantially the case), it would appear that the law of neutrality obliges neutral States to ensure that at least certain individuals within their territory are also adhering to impartiality in the use of Internet infrastructure subject to the neutral State's jurisdiction. That is, to some extent neutrality law can be seen as imposing a duty of due diligence "to prevent any violation of [a neutral's] obligations and duties" by persons within its jurisdiction, at least with respect to the use of communications facilities.[181] Under this theory, failure to do so could be deemed not only a breach of neutrality law with attendant international liability attaching to the neutral State, but the "offending" individuals risk forfeit of the protections derived from being a national of a neutral State. That is, as discussed previously, they might be considered as direct participants in the hostilities or unprivileged belligerents.[182]

175 Hague XIII, *supra* note 2, art. 5.

176 Hague V, *supra* note 1, art. 4.

177 DoD Law of War Manual, *supra* note 11, § 15.5.2.2.

178 Hague V, supra note 1, art. 8.

179 *Id.* § 15.5.3.1.

180 *Id.*; Hague V, *supra* note 1, art. 8.

181 c.f. DoD Law of War Manual, *supra* note 11, § 15.3.2.2., n. 73.

182 *Id.* § 15.6.2.2.

Whether Hague Convention V or customary international law ever imposed a duty to prevent private individuals' use of communications facilities to coordinate actions that might favor one belligerent over another is questionable. And extending such an interpretation to the cyber context, especially to the use of cyber infrastructure to facilitate crowdsourced supply chains, likely proves too much. For starters, the relevant rules are aimed primarily at regulating belligerents' erection and use of communications facilities on neutral territory (and the corresponding duty of neutrals to prevent it), not the communications, hostile or otherwise, of private individuals. At best, the obligation would extend only to those private actors providing access to communications facilities, not individual Internet users. Thus, as the *Tallinn Manual 2.0* notes, the neutrality rules related to the exercise of belligerent rights by cyber means in neutral territory do not apply to private individuals or groups unless their conduct can be attributed to the neutral State under governing principles of State responsibility. [183]

Further, applying neutrality law to the modern cyber context has generally proved quite difficult, with little State practice to draw from and discordance among the few sources considering the question or representing official statements of *opinio juris*. According to the Tallinn experts, Hague Convention V, Article 8, which specifies the lack of a neutral obligation to prohibit or restrict the use of communications facilities "on behalf of a belligerent," applies with equal force to "cyber communications systems."[184] A contrary interpretation would be inconsistent with the underlying rationale motivating States to adopt Article 8 in the first place—that it would be "impractical for neutral States to censor or screen their publicly available communications infrastructure for belligerent traffic."[185] It is also worth noting that, at least according to the United States, furnishing supplies to a belligerent State from outside of its sovereign or occupied territory would not result in forfeiture of the protections stemming from neutral status.[186]

At the risk of redundancy, ultimately context matters. And each case would have to be assessed on its particular facts. For example, the issue might very well be moot where the State involved has already been providing support to Ukraine in a manner inconsistent with strict neutrality principles. And while the enemy always gets a vote, whatever the neutrality-law implications of participating in these supply chains may present, the practical risks of actual blowback against individual States is likely low.

The Principle of Due Diligence

Resting alongside of, and grounded somewhat in similar interests, is the principle of due diligence. This principle, and debates over its normative status in international law, have garnered significant attention over the last decade or so in the context of international law's

[183] Tallinn Manual on International Law applicable to Cyber Operations 2.0 rule 151, commentary (Michael N. Schmitt ed. 2017) [hereinafter Tallinn Manual 2.0].

[184] *Id.* rule 151, comment 4.

[185] DoD Law of War Manual, *supra* note 11, § 16.4.1.

[186] *Id.* § 15.6.2.2.

role in regulating cyber operations.[187] Whatever the relative merits of a purported international obligation of due diligence, what these debates have revealed is a lack of consensus among States that, perhaps beyond a few specific contexts such as environmental law, the principle has achieved the status of generally applicable customary international law. For example, Israel does not consider due diligence to be a binding rule of international law in the cyber context,[188] a position many consider the United States to share.[189] Where Russia stands on due diligence is unclear.[190] Assuming *arguendo* that due diligence constitutes a binding customary international legal obligation, it likely triggers no duty on States to affirmatively prevent or disrupt the crowdsourced logistics activities of private actors.

In broad strokes, due diligence is said to levy an affirmative obligation on States to ensure "territory and objects over which they enjoy sovereignty are not used to harm other States."[191] The concept is reflected in dictum from the International Court of Justice's *Corfu Channel* judgment that a State has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[192] As this quote implies, there are at least two constituent elements to due diligence, both of which present challenges in application to the context of crowdsourcing and democratized logistics: a specific type and threshold of harm and knowledge on the part of the relevant State that the qualifying harm is ongoing and emanating from its territory.

Before turning to the substantive elements of the due diligence principle, there is a strong case that to the extent it is a general rule of international law regulating the relations between States, due diligence is displaced at the outset by the law of neutrality by the legal maxim *lex specialis derogat legi generali*—whereby more specific rules prevail over general rules of international law. For example, debates are legion over whether or the degree to which international human rights law is displaced by the law of armed conflict during war. But outside discussions of the relationship between neutrality law and the UN Charter discussed above, the degree to which neutrality law displaces or modifies other general, interstate legal obligations has received less attention.

Like LOAC, there can be little doubt that the law of neutrality qualifies as a specialized body of law defining at least certain aspects of the relations between belligerent and non-belligerent States. Application of the *lex specialis* maxim would therefore seem to

187 Eric Talbot Jensen & Sean Watts, *Cyber Due Diligence*, 73 Okla L. Rev. 645 (2021), https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=2215&context=olr (last visited Feb. 3, 2024).

188 Roy Schöndorf, *Israel's Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations,* 97 Int'l L. Stud. 395 (2021), https://digital commons.usnwc.edu/cgi/viewcontent.cgi?article=2957.

189 Michael N. Schmitt, *Three International Law Rules for Responding Effectively to Hostile Cyber Operations*, Just Security (July 13, 2021), https://www.justsecurity.org/77402/three-international-law-rules-for-responding-effectively-to-hostile-cyber-operations; Colonel. (ret.) Gary Corn, *International Law's Role in Combating Ransomware?* Just Security (Aug. 23, 2021), https://www.justsecurity.org/77845/international-laws-role-in-combating-ransomware.

190 GAOR, *Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behavior in Cyberspace in the Context of International Security established pursuant to General Assembly resolution 73/266,* U.N. Docs A/76/136 (July 13, 2021).

191 Tallinn Manual 2.0, *supra* note 236, rule 6, commentary.

192 The Corfu Channel Case (U.K. & N. Ir. v. Alb.), 1948 I.C.J. (Mar. 25).

be in order, and as set out above, neutrality law establishes specific obligations of neutral States with respect to non-State actors and activities on or occurring from its territories. Stated differently, it is arguably the law of neutrality that establishes the diligence neutral States owe to belligerent States regarding cross-boundary harms, not due diligence generally.

Setting aside the important and possibly dispositive *lex specialis* analysis, consensus over the substantive contours of due diligence, like its normative status, is similarly lacking. Regarding the knowledge element, the *Tallinn Manual 2.0* contributors agreed that it can be satisfied by either actual or constructive knowledge but rejected a broader duty to monitor cyberinfrastructure and activities in a State's territory in order to intervene when required. Some, however, go further, arguing for a more aggressive duty to prevent covered harms with a concomitant duty to preemptively discover their occurrence. As I've written here,[193] applying such an aggressive view to activities carried out in, or reliant on, the digital domain raises significant concerns about, and potential conflicts with, international human rights obligations regarding, *inter alia*, privacy and free speech. It would also "place an unreasonable expectation on states and substantially broaden their exposure to claims of breach and the attendant, potentially escalatory consequence of countermeasures."

Absent an affirmative preventive duty or being put on actual notice, establishing that any particular State has the requisite knowledge that crowdsourcing activities are occurring from or implicate its territory is clearly a challenge, as both a matter of fact and law. Of course, a victim State can bring the issue to the attention of the State it views as owing it due diligence, but at least in the cyber context, States will often be reluctant to do so for fear of compromising means and methods of intelligence collection. In such cases an allegation of breach would have to rest on a claim that the responsible State is otherwise on actual or constructive notice. On this point, relatedly Russia has argued in its official submissions to the UN Group of Governmental Experts for a high evidentiary bar to attributing malicious cyber operations directly to a State. Whether it would hold itself to such a standard when assessing whether another State has knowledge of crowdsourced logistics activities is at best questionable.

Perhaps more problematic is the issue of whether crowdsourced logistics activities amount to harms within the ambit of the due diligence principle. Difficult in its own right, this question is complicated further by the interaction of the law of neutrality—even if it does not entirely displace due diligence—on the question of whether these activities can be viewed as contrary to Russia's rights as a matter of law.

Consensus among experts and those States that have endorsed the existence of due diligence as a rule of customary international law is that only actions resulting in serious adverse consequences for the victim State will trigger the territorial State's duty to act. Nevertheless, most also agree that the exact threshold of harm

[193] Corn, *supra* note 217.

is unsettled. Acts "causing inconvenience, minor disruption, or negligible expense" are generally considered insufficient.[194] (*Tallinn Manual 2.0*, Rule 6, comment 26). Supporting or enhancing a belligerent's ability to wage war is certainly not trivial, but the disaggregated and geographically dispersed nature of these democratized supply chains, among other factors, arguably diminishes the "seriousness" of the harms flowing from any one State. Given the unsettled nature of the harm threshold, it is difficult to assert that these crowdsourcing activities trip due diligence obligations.

Further, and perhaps more challenging, is the generally held view that transboundary harms at issue must also qualify as unlawful if conducted by the territorial State itself. On this point, the law of neutrality intrudes into the analysis in potentially contradictory ways. On one hand, as noted above, under neutrality law non-belligerent States have an obligation to refrain from providing war-related goods and services to belligerents. On the other, they generally do not have an obligation to prevent private actors from doing so. Levying an obligation through due diligence on States to prevent or disrupt the very actions that neutrality law countenances would not only eschew the *lex specialis* principle, but turn the law on its head.

Finally, once triggered, the due diligence obligation is only one of feasibility, and even then, it is a rule of conduct, not consequence. That is, if it is infeasible for a particular State to identify the source of or take effective action to stop harmful crowdsourced logistics activities emanating from within its borders, it has not breached its obligation of due diligence. Even if it takes responsive measures, so long as they are reasonable—very much a function of each State's specific capacity and capabilities, or lack thereof—it matters not that they are ineffective. This feasibility qualifier substantially limits the circumstances of legal risk to those non-belligerent States implicated by private individuals engaging in supplying logistics to Ukraine.

Concluding Thoughts

Where Russia stands on due diligence is somewhat of an open question. Judging from its UN GGE submissions, and the significant amount of harmful, criminal cyber activity conducted from its territory, it probably is not a fan and would likely reject any assertions that it is legally bound by the principle. But as in all things, duplicitous and opportunistic invocation of international law is not beyond Russia's playbook. The same likely holds true for how Russia might "interpret" other States' neutrality obligations. As they say, in the end the enemy gets a vote.

And just as in the case of DPH and individual risks, the practical risks of Russian retaliation against States, *qua* States, for the crowdsourcing activities of private individuals is a distinct question and likely low, especially given the potentially more significant escalatory dynamics at play, something Russia has thankfully sought to avoid thus far.

[194] Tallinn Manual 2.0, *supra* note 236, rule 6, comment 26.

THE FUTURE LAW OF NEUTRALITY

by Hitoshi Nasu | Jul 19, 2022

Editor's note: The following post highlights a subject addressed in the Lieber Studies volume *The Future Law of Armed Conflict*, which was published 27 May 2022. For a general introduction to this volume, see Professor Matt Waxman's introductory post.[195]

Months into the Russia-Ukraine war that began on February 24, many States cautiously, yet gradually, ramped up military support to help Ukrainian people defend themselves. Mounting external support took various forms from intelligence sharing to financial assistance, supply of weapons, and military equipment. The involvement of third parties in the conflict through such support activities has had various legal implications for their neutral status,[196] as well as associated rights and obligations under international law.

It is arguable that unneutral services are justifiable in light of Russia's open aggression and an overwhelming amount of condemnation against it, as Wolff Heintschel von Heinegg posited in his earlier post.[197] However, many States such as India[198] and Southeast Asian countries[199] remain uneasy about the idea of qualified neutrality. Switzerland is struggling in reconciling its willingness to help Ukraine with its status as a permanent neutral State.[200] And those who support Ukraine are equally walking on a tightrope, as Michael N. Schmitt discussed, between a neutral Good Samaritan and a charlatan foe.[201]

It is not my intention to assess the legality of each support activity under the traditional law of neutrality. Instead, this post considers these activities as indications of evolving practice among States and shows how the boundaries of neutrality law are shifting. Of the four scenarios that I envisaged to unfold in the Future Law of Armed Conflict, the recent State practice appears to be charted into the realm of "benevolent" neutrality, where non-belligerent States find little incentive to strictly adhere to the traditional law of neutrality.[202] A significant factor at play is technological difficulties in restricting and intercepting belligerent access to neutral support and participation in hostile activities. This development has the potential to reduce

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195 Matthew Waxman, *The Law of Armed Conflict in 2040*, Articles of War (May 27, 2022), https://lieber.westpoint.edu/law-of-armed-conflict-2040.

196 Schmitt, *supra* note 54.

197 von Heinegg, *supra* note 13.

198 Ashley J. Tellis, *"What Is in Our Interest": India and the Ukraine War*, Carnegie Endowment for Int'l Peace (Apr. 25, 2022), https://carnegieendowment.org/2022/04/25/what-is-in-our-interest-india-and-ukraine-war-pub-86961.

199 Ian Storey & William Choong, *"Russia's Invasion of Ukraine: Southeast Asian Responses and Why the Conflict Matters to the Region"*, 2022/24 ISEAS Perspective (Mar 9, 2022), https://www.iseas.edu.sg/articles-commentaries/iseas-perspective/2022-24-russias-invasion-of-ukraine-southeast-asian-responses-and-why-the-conflict-matters-to-the-region-by-ian-storey-and-william-choong.

200 John Revill, *Neutral Switzerland Leans Closer to NATO in Response to Russia*, Reuters (May 15, 2022, 11:59 PM), https://www.reuters.com/markets/europe/neutral-switzerland-leans-closer-nato-response-russia-2022-05-15.

201 Michael N. Schmitt, *Ukraine Symposium – Are We at War?*, Articles of War (May 9, 2022), https://lieber.westpoint.edu/are-we-at-war.

202 The Future Law of Armed Conflict (Matthew C. Waxman & Thomas W. Oakley eds, 2022) [hereinafter Waxman & Oakley].

the role that the law of neutrality plays in regulating the relationship between neutral States and belligerent parties.

Neutral Obligations under the Traditional Law of Neutrality

The traditional law of neutrality was developed to enable non-belligerent States to maintain peaceful relations with belligerent parties involved in armed conflict and continue trading without participating in hostilities. As such, neutral States have an obligation to abstain from providing war-related goods and services to belligerent parties.[203] However, this neutral obligation was qualified in three respects when these rules were codified in 1907 under Hague Convention V[204] regarding neutrality in land warfare and Hague Convention XIII[205] regarding neutrality in naval warfare.[206]

First, the obligation of abstention is a specific one, applying to the provision of "munitions of war or supplies"[207] and "warships, ammunition, or war material"[208] or associated services such as forming corps of combatants on its territory[209] and arming vessels within its jurisdiction.[210] This means that under general international law other types of support, such as financial assistance or the provision of goods and services that are unrelated to the conduct of hostilities, fall outside of neutral obligations.[211] For example, Switzerland has provided humanitarian support to the victims of the war in Ukraine,[212] while Japan pledged a total of $600 million in financial assistance.[213]

Second, neutral States are not required to prevent their nationals from rendering assistance outside their territory. The freedom of commercial trade has been preserved under the traditional law of neutrality, allowing private individuals and companies to export or transport weapons and military equipment on behalf of one or the other of the belligerent parties.[214] This also means that neutral States are not in breach of their neutral obligations by allowing their nationals to voluntarily join a belligerent's armed forces, such as the International Legion for the Defense of Ukraine,[215] as long as they are not involved

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203 DoD Law of War Manual, *supra* note 11, § 15.3.2.1.

204 Hague V, *supra* note 1.

205 Hague XIII, *supra* note 2.

206 David Letts, *Ukraine Symposium – Maritime Neutrality in the Russia-Ukraine Conflict*, Articles of War (Apr. 18, 2022), https://lieber.westpoint.edu/maritime-neutrality-russia-ukraine-conflict.

207 Hague V, *supra* note 1 arts. 2, 5.

208 Hague XIII, *supra* note 2 art. 6.

209 Hague V, *supra* note 1, art. 4.

210 Hague XIII, *supra* note 2, art. 8.

211 *C.f.* Convention on Maritime Neutrality. Havana, 20 February 1928, art. 16, *available at* ICRC Database, Treaties, States Parties and Commentaries, https://ihl-databases.icrc.org/en/ihl-treaties/havana-conv-1928/article-16.

212 *Switzerland Approves CHF80 Million in Emergency Aid for Ukraine,* Swiss Info (Mar. 11, 2022, 11:30), https://www.swissinfo.ch/eng/switzerland-approves-chf80-million-in-emergency-aid-for-ukraine/47423096.

213 *Japan to Provide Additional $300 Million to Help Ukraine*, Kyodo News (May 19, 2022, 15:15), https://english.kyodonews.net/news/2022/05/734e7ade5a99-japan-to-provide-additional-300-million-to-help-ukraine.html.

214 Hague V, *supra* note 1, art. 7; Hague XIII, *supra* note 2, art. 7.

215 Petra Ditrichovà & Veronika Bílková, *Status of Foreign Fighters in the Ukrainian Region*, Articles of War (Mar. 15, 2022), https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion.

in recruitment on their own territory.[216] As Nicholas Tsagourias discussed,[217] this exemption would also apply to those individuals who offered their services to the IT Army online.

Third, there is no obligation to prevent the belligerent use of communication stations or apparatus, such as radio-telegraphic stations and telephone cables, established before the commencement of hostilities if these are not used for purely military purposes or if these have been opened for public use.[218] A majority of experts who engaged in the drafting of *Tallinn Manual 2.0* considered that this exception would extend to cyber communication systems as well.[219] SpaceX's Starlink satellite constellation is also likely to qualify under this exception; however, as Timothy Goines and his co-authors pointed out, the belligerent use of such communication infrastructure would convert its enabling assets, such as computer servers and satellites, into legitimate military targets.[220]

Neutral States may also take liberty in imposing further restrictions and prohibitions, but when they do, restrictive measures must be adopted in an impartial and non-discriminatory manner toward all the belligerents.[221] This does not mean that restrictive measures must have equal effect upon the belligerents, nor do they have to be intended as such. Belligerent forces are entitled to exercise repressive measures against neutral subjects engaging in hostile assistance, to which neutral States must acquiesce.[222]

The imposition of unilateral sanctions against Russia, as well as weapons export and intelligence sharing in support of Ukraine, may appear to run contrary to these neutral obligations. So, what does this recent practice mean for the future development of neutrality law?

Weapons Export

The government authorization for the export of weapons and military equipment is a clear example of unneutral support. When the Lend-Lease Act was enacted in 1941 to facilitate arms supply to Great Britain and other countries, it triggered concerns that it would permit departure from neutral obligations under international law.[223] As Quincy Wright observed at that time, the Act constituted "the first legislative endorsement since the Napoleonic period" of the abandonment of impartiality in the interest of American defense.[224] Eighty-one years later, the U.S. Congress passed the Ukraine Democracy Defense Lend-

216 Hague V, *supra* note 1, arts. 4, 6.

217 Nicholas Tsagourias, *Ukraine Symposium – Cyber Neutrality, Cyber Recruitment, and Cyber Assistance to Ukraine*, Articles of War (Apr. 19, 2022), https://lieber.westpoint.edu/cyber-neutrality-cyber-recruitment-cyber-assistance-ukraine.

218 Hague V, *supra* note 1, art. 8.

219 Tallinn Manual 2.0, *supra* note 236, rule 151, comment 4.

220 Timothy Goines, Jeffrey Biller & Jeremy Grunert, *The Russia-Ukraine War and the Space Domain*, Articles of War (Mar. 14, 2022), https://lieber.westpoint.edu/russia-ukraine-war-space-domain.

221 Hague V, *supra* note 1, art. 9; Hague XIII, *supra* note 2, art. 9.

222 Hague V, *supra* note 1, art. 17.

223 Lend-Lease Act, 223 HR 77A-D13 (1941).

224 Quincy Wright, *The Lend-Lease Bill and International Law*, 35 Am. J. Int'l L. 305, 313 (1941).

Lease Act of 2022,[225] authorizing the Biden administration to lend or lease military equipment to Ukraine and other Eastern European countries impacted by Russia's invasion of Ukraine.

The official endorsement of arms export in support of Ukraine indicates a shift in State practice relevant to the law of neutrality. This shift is taking place due to the geopolitical situation surrounding the Russia-Ukraine war. An important geopolitical factor is that Russia, as the disadvantaged belligerent due to this unneutral assistance, is not in a position to enforce its belligerent rights against neutral States. There are various means to enforce belligerent rights against unneutral assistance, such as capture of neutral merchant vessels carrying contraband.[226] However, Russia has not issued contraband lists to restrict shipments to Ukraine, presumably because it has characterized the engagement in Ukraine as a "special military operation."[227] As an alternative, the requirement may be satisfied by a list of exempt goods;[228] yet Russia has been blocking neutral trade entirely.[229]

It comes as no surprise that some States are inclined to lend support to a politically, economically, or ideologically favored belligerent against another. Indeed, the past practices suggest that States have tried to circumvent or abdicate neutral obligations based on the doctrine of "non-belligerency" or "qualified neutrality."[230] As Heintschel von Heinegg observed, such practices on the part of some neutral States deviating from the strict rules of neutrality alone are not sufficient as evidence of a corresponding change in the law of neutrality.[231] However, Russia's unwillingness to take remedial measures (other than targeting imported weapons or jamming satellites in the conduct of hostilities), even when there are means at its disposal to enforce belligerent rights in accordance with the traditional law of neutrality, could be indicative of a change in legal considerations.

The current legal landscape is indeed significantly different from the one in which the traditional law of neutrality was developed. As I discussed elsewhere, contemporary international law allows neutral States to invoke the right of collective self-defense as a justification for violations of neutral obligations by supporting one of the belligerent parties.[232] This means that even without being part of NATO, Ukraine has the inherent right to request military intervention by other States to help defend itself, and other States are entitled to provide support in response to such a

225 Ukraine Democracy Defense Lend-Lease Act of 2022, Pub. L. No. 117-188, 136 Stat. 1184–1185.

226 San Remo Manual, *supra* note 4, ¶¶ 146–152.

227 Martin Fink, *The War at Sea: Is There a Naval Blockade in the Sea of Azov?*, Articles of War (Mar. 24, 2022), https://lieber.westpoint.edu/war-at-sea-naval-blockade-sea-of-azov.

228 Commander's Handbook, *supra* note 34, § 7.4.1.

229 James Kraska, *Ukraine Symposium – Neutral State Access to Ukraine's Food Exports*, Articles of War (May 18, 2022), https://lieber.westpoint.edu/neutral-state-access-ukraines-food-exports.

230 Raul (Pete) Pedrozo, *Ukraine Symposium – Is the Law of Neutrality Dead?* Articles of War (May 31, 2022), https://lieber.westpoint.edu/is-law-of-neutrality-dead.

231 Wolff Heintschel von Heinegg, *Benevolent Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality in* International Law and Armed Conflict: Exploring Faultlines, 543–568 (Michael N. Schmitt & Jelena Pejic 2007).

232 Hitoshi Nasu, *The End of the United Nations? The Demise of Collective Security and Its Implications for International Law*, 24 Max Planck Yearbook Online 110–136 (2021), *available at* https://brill.com/view/journals/mpyo/24/1/article-p110_5.xml [hereinafter Nasu].

request. Self-defense justifies not only a use of force which is otherwise prohibited under customary international law but also non-performance of obligations associated with it as a "circumstance precluding wrongfulness" under the law of State responsibility.[233] As Michael N. Schmitt has explained, a State would not necessarily lose neutral status by providing unneutral support in the exercise of the right of collective self-defense.[234]

The shift toward "benevolent neutrality" appears to be further facilitated due to practical difficulties in controlling or challenging the provision of support. When the traditional law of neutrality was developed, the primary means of transport was shipping, and belligerent parties deployed naval forces to stem the flow of arms trade through maritime routes. In modern days, by contrast, the supply of weapons and military equipment can be airlifted or, with the use of 3D printing,[235] can be locally manufactured through the transmission of necessary data. This trend is likely to continue,[236] with a greater investment in and use of smaller, scalable, and maneuverable unmanned platforms which have proved to be effective against conventional instruments of war.[237] The Russia-Ukraine conflict has demonstrated that neutral States would find little constraint in providing unneutral support when there is no feasible means to detect and intercept such transfer.

Intelligence Sharing

The primary focus of the neutrality law has been the restriction of transgression by a physical act, such as the provision of personnel and arms in support of hostile activities or the belligerent use of neutral territory. In modern conflicts, as has been proved in the Russia-Ukraine war, battlefield intelligence can be equally significant in determining the outcome of battlefield engagement. The United States and NATO allies have reportedly been sharing battlefield intelligence with Ukraine, although the fidelity of information shared and the role it plays in the Ukrainian military's targeting decisions are uncertain.[238] Does this practice have any implications for the law of neutrality?

As emphasized earlier, the neutral obligation of abstention is limited to the provision of war-related goods and services. The question is therefore whether intelligence sharing qualifies as a war-related service that is prohibited under the law of neutrality. The exemption from neutral obligations pertaining to communication stations and apparatus could arguably include the transmission of messages through those facilities. However, the U.S. Department of Defense *Law of War Manual* adopts the position that this "does not imply that the neutral State may use such facilities or permit their use to lend

233 ASR, *supra* note 61, art. 21.

234 Schmitt, *supra* note 50.

235 Amy Feldman, *Putting 3D Printers to Work in Ukraine's War Zone,* Forbes (Mar. 31, 2022, 6:30 AM), https://www.forbes.com/sites/amyfeldman/2022/03/31/putting-3d-printers-to-work-in-ukraines-war-zone/?sh=3bed0fc5015f.

236 Zachary Kallenborn, *Seven (Initial) Drone Warfare Lessons from Ukraine*, Modern War Institute (May 12, 2022), https://mwi.westpoint.edu/seven-initial-drone-warfare-lessons-from-ukraine.

237 Matt Burgess, *Small Drones Are Giving Ukraine an Unprecedented Edge*, Wired (May 6, 2022, 7:00 AM), https://www.wired.com/story/drones-russia-ukraine-war.

238 Jordan Williams, *Pentagon Denies US Shared Intel to Target Russian Generals*, The Hill (May 5, 2022, 3:20 PM), https://thehill.com/policy/defense/3478747-pentagon-denies-us-shared-intel-to-target-russian-generals.

assistance to the belligerents on one side only."[239] A similar view is expressed in the *Commander's Handbook on the Law of Naval Operations*, stating that "[a]ny transmission to an opposing belligerent of information concerning military operations or military forces is inconsistent with the neutral duties of abstention and impartiality and renders the neutral vessel or aircraft liable to capture or destruction."[240]

However, whether the prohibition of intelligence sharing has been established as a neutral obligation under customary international law is far from certain. Extensive research conducted in this area by Heintschel von Heinegg found that State practice regarding such unneutral assistance and its consequences was far from uniform, noting that the transmission of information was equated to the carriage of contraband.[241] The carriage of contraband by neutral merchant vessels was liable to seizure and the condemnation of the goods, but engaging in contraband trade itself was not considered as a violation of international law. As explained above, neutral States are under no obligation to prohibit such a trade. This finding indicates that while the belligerent right to prevent neutral vessels from transmitting information for the adversary is well established, the corresponding neutral obligation is not.

At any rate, the applicability of neutral obligations to the transmission of information in the past was premised upon the fact that there was practical means to detect and seize it due to the physical form it took, such as a letter or a telegram. Modern technological advances have enabled belligerents to seek support from other States by various non-tangible means, such as the transmission of data and imagery through computer networks. Such non-tangible support is difficult to detect and intercept, which would pose practical challenges to the enforcement of belligerent rights if neutral obligations were to extend to the transmission of information in this digital era.

The relevant question, as Marko Milanovic correctly identified, is rather whether the sharing of battlefield intelligence makes the supporting State a participant in the international armed conflict between Russia and Ukraine.[242] However, as Michael N. Schmitt discussed in an earlier post, this is an issue of conflict classification, and a mere breach of neutral obligation does not bring a supporting State into the conflict as a belligerent party. [243] Indeed, a State may lose its neutral status even without violating neutral obligations if the support is integral to the specific conduct of hostilities engaged by a belligerent party.[244] This determination, as I discussed elsewhere, is dependent upon a factual assessment, taking into account

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239 DoD Law of War Manual, *supra* note 11, § 15.5.3.1.

240 Commander's Handbook, *supra* note 34, §7.8.

241 Wolff Heintschel von Heinegg, *Visit, Search, Diversion and Capture in Naval Warfare: Part I, The Traditional Law*, 29 Can. Y.B. In'tl L. 283 (1991).

242 Marko Milanovic, *The United States and Allies Sharing Intelligence with Ukraine*, EJIL: Talk! (May 9, 2022), https://www.ejiltalk.org/the-united-states-and-allies-sharing-intelligence-with-ukraine.

243 Schmitt, *supra* note 50.

244 Schmitt, *supra* note 54.

various factors such as the domestic policies of the State, the materiality of a breach, and the nature of the assistance relative to the act of hostilities.[245]

Concluding Thoughts

The ongoing conflict in Ukraine has provided some insight as to how non-belligerent States might interact with belligerent parties in the modern environment of warfare and how that might shape the boundaries of neutrality law in the future. Various technological advances have transformed the circumstances in which the law of neutrality operates, compared with the time when it was developed and codified. The ability to supply arms and share battlefield intelligence though interconnected infrastructure has the potential to undermine the fundamental premise upon which the entire legal regime was built.

Combined with this technological factor, the involvement of great powers in support of Ukraine has indicated that modern neutrality law might be emerging in a "benevolent" form, where third parties see little constraint in providing unneutral support. This outlook is further reinforced as a result of deep decoupling of Russia from Western economies through the imposition of sanctions, which has reduced the need to maintain trade relations with Russia and hence to strictly adhere to traditional neutrality rules.

Nevertheless, this event alone does not transform the modern law of neutrality, nor does it determine the course of its development. A more frequent involvement of great powers in international armed conflicts as belligerent parties may shift the pattern of practice in a different direction as they take advantage of unneutral assistance without being detected by the adversary. The law of neutrality will then become "apologetic" in that the legal position of neutral States is submissive to subjective interpretation based on their political interests. Alternatively, with further advances in technology, belligerent parties may acquire technological means to detect and intercept the non-tangible means of support, which will enable them to exercise their belligerent rights against neutral States and their subjects.

The chapter that I contributed to the *Future Law of Armed Conflict*[246] maps out four different scenarios in which the future law of neutrality might emerge in a particular form. As expected, the Russia-Ukraine war has demonstrated that the actual reality is far more complex than the simplified scenarios that were developed in the chapter, involving mixed reactions among non-belligerent States. But it has also made clear that the law of neutrality will remain relevant for legal considerations, one way or another, as long as the United Nations Security Council continues to be stymied.

245 Nasu, *SUPRA NOTE* 296.

246 Waxman & Oakley, *supra* note 258.

CHAPTER IV

INDIVIDUAL BATTLEFIELD STATUS AND PROTECTION

SECTION 1

Combatants, Prisoners of War, and Fighters

COMBATANT PRIVILEGES AND PROTECTIONS

by Laurie R. Blank | Mar 4, 2022

Discussions of the status of persons in armed conflict over the past two decades have centered on the paucity of rules for such categorizations and difficult questions of detention authority, treatment obligations, distinction, and identification of members of organized armed groups in non-international armed conflict. International armed conflicts, in which treaty provisions clearly delineate between combatants and civilians and set forth comprehensive rules for their obligations, rights, protections, and treatment, have been infrequent and generally the stuff of Second World War cases and stories. The current conflict between Russia and Ukraine, however, is offering a fresh look at some of "the classics."

In international armed conflict, combatants include members of the regular armed forces, members of volunteer militia and resistance forces meeting certain specified criteria, members of the armed forces of a State not recognized by the detaining power, and civilians forming a *levée en masse*[1] (other posts in this symposium address legal issues relevant to these categories as well).[2] Combatants enjoy important privileges under the law of armed conflict, including prisoner of war status if captured and combatant immunity against domestic prosecution for lawful belligerent acts during wartime. These privileges, however, are just that—privileges that can be lost if a combatant fails to comply with the requisite obligations of lawful combatant status. Reported incidents from the fighting in Ukraine in the first few days of the conflict highlighted both sides of this balance: the essential protections for combatants and

[1] *Levée en Masse*, IHL Databases, https://casebook.icrc.org/a_to_z/glossary/levee-en-masse.

[2] Ronald Alcala & Steve Szymanski, *Legal Status of Ukraine's Resistance Forces*, Articles of War (Feb. 28, 2022), https://lieber.westpoint.edu/legal-status-ukraines-resistance-forces [hereinafter Szymanski & Alcala]; Geoff Corn, *Prisoners of War in Occupied Territory*, Articles of War (Mar. 3, 2022), https://lieber.westpoint.edu/prisoners-of-war-occupied-territory [hereinafter Geoff Corn].

the consequences of combatants' failure to uphold their obligations.[3]

Combatant Privileges: Fighting in the Enemy's Uniform?

Military uniforms have particular significance in the law of armed conflict. The uniform, or other fixed distinctive sign, is a fundamental aspect of combatant status and critical to the implementation of the principle of distinction.[4] Combatants who discard their uniforms and fight in civilian clothing lose their entitlement to prisoner of war status, combatant immunity, and other privileges of lawful combatant status (see Quirin[5] and Krofan,[6] for example). But what about fighting in the enemy's uniform?

News from the second day of the conflict in Ukraine included reports of Russian soldiers in captured Ukrainian military vehicles and wearing Ukrainian military uniforms, driving toward Kyiv. Soldiers might don the enemy's uniform for multiple operational reasons—intelligence collection, protection from discovery and attack, spying, or sabotage and other attacks, for example.[7] Examples from the Second World War include German parachute troops allegedly wearing Belgian or Dutch uniforms when landing behind enemy lines or German troops in British and United States uniforms sowing confusion during the Battle of the Bulge (the Otto Skorzeny case).[8]

The law applicable in international armed conflict forbids "mak[ing] improper use of … the military insignia and uniform of the enemy."[9] Not all uses of enemy uniforms are prohibited therefore; only "improper" uses. For example, wearing enemy uniforms in order to flee the fighting or escape capture does not run afoul of the law.[10] On the other side of the spectrum, engaging in attacks while wearing the uniform of the enemy is flatly prohibited, as affirmed in the treaty law and numerous military manuals,[11] and is a war crime under the Rome Statute.[12]

In between these two clear poles, however, the legal analysis depends on the nature of the acts or intended acts while in enemy uniform and, equally important, whether the conflict is governed by Additional Protocol I to the 1949 Geneva Conventions.[13] In the case of the conflict in Ukraine, both Russia and Ukraine

3 Becky Morton, *Ukraine: Russia Faces War Crimes Investigation*, BBC News (Mar. 2, 2022), https://www.bbc.com/news/world-60597751.

4 Convention (III) Relative to the Treatment of Prisoners of War art. 4, August 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III].

5 *Ex parte* Quirin, 317 U.S. 1 (1942).

6 *Krofan Stanislaus v. Public Prosecutor, Federal Court, 5 October 1966,* ICRC Database, National Practice, Singapore, https://ihl-databases.icrc.org/en/national-practice/krofan-stanislaus-v-public-prosecutor-federal-court-5-october-1966.

7 Brendan Cole, *Russians Wearing Ukrainian Soldiers' Uniforms Driving Toward Kyiv,* Newsweek (Feb. 25, 2022, 3:34 AM), https://www.newsweek.com/russia-ukraine-kyiv-putin-forces-military-vehicles-1682568.

8 *Battle of the Bulge—Ardennes Forest, Belgium*, Military Historical Tours, Inc. (Dec. 19, 2020), *https://miltours.com/index.php?route=information/information&information_id=53* (last visited Feb. 3, 2024).

9 Convention (IV) Respecting the Laws and Customs of War on Land art. 23(f), Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 39, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Statute of the International Criminal Court art. 8(2)(b)(vii), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

10 United States Dep't of Defense, Law of War Manual § 5.23.1.4 (2023) [hereinafter DoD Law of War Manual].

11 United States Army, FM 6-27, The Commander's Handbook on the Law of Land Warfare (2019) [hereinafter FM 6-27]; New Zealand Defence Force, Manual of Armed Forces Law 519 (2017); Canada, Department of National Defence, Joint Doctrine Manual B-GJ-005-104/FP-021, Law of Armed Conflict at the Operational and Tactical Levels (2001).

12 Rome Statute, *supra note 9, art. 8(2)(b)(vii).*

13 AP I *supra* note 9, art. 39.

are parties to AP I, so the rule in Article 39(2) of AP I applies to the conduct of the Russian soldiers in the relevant reports. AP I expands the concept of improper use beyond the use of enemy uniforms while engaging in attacks and further prohibits such use "in order to shield, favour, protect or impede military operations." A broad reading of this provision excludes any use of enemy military uniforms in the context of actual military operations.[14] Indeed, the Commentary to Article 39(2) of AP I explains that the provision covers attacks "in all situations directly related to military operations," and therefore "put an end to the longstanding uncertainty arising from … the imprecise text of The Hague [Conventions] and from unclear customary law."[15]

Most notably, a straightforward reading of Russia's own military manual would preclude any such use of enemy military uniforms. Its 2001 Regulations on the Application of IHL provides that "[w]hen organizing and conducting cover and concealment of military objectives it is prohibited to make use of … the flags, military emblems and uniforms of the enemy."[16] Russian soldiers wearing Ukrainian military uniforms and driving Ukrainian military vehicles into combat areas to participate in any manner in military operations therefore violate the law of armed conflict applicable to this conflict.

Combatant Protections: Photos of POWs?

Enshrined in the Third Geneva Convention, protections for prisoners of war have a long history and are among the most fundamental rules of the law of armed conflict. Although it does not appear that either side in the conflict has captured sizeable numbers of adversary forces and established formal prisoner of war facilities, such large-scale and formal detention operations are not necessary to trigger the application of these key protections. For example, consider the Russian soldiers captured on the first day of the conflict—who we know about because the Ukrainian Ministry of Defence tweeted out their photos that afternoon.[17] The pictures did not show the Russian soldiers suffering any hardship or harm, but did the very publication of those photos violate the law? More recently, news reports reveal that the Ukrainian military is posting photos of captured Russian soldiers, ostensibly to allow Russians "to determine whether the images feature a loved one" and as part of an information campaign to "alert Russians to a devastating war the Kremlin has sought to conceal."[18]

As soon as a party to an international armed conflict captures or receives the surrender of a combatant from the opposing State adversary, that individual is a prisoner of war and entitled

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14 U.K. Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict, JSP 383 § 5.11.1 (2004) [hereafter UK Manual]; Swedish Ministry of Defence, International Humanitarian Law in Armed Conflict with Reference to the Swedish Total Defence System, 187 (1991).

15 International Committee of the Red Cross, Commentary on Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 para. 1574 (Sandoz et al. eds. 1987) [hereinafter AP I Commentary].

16 Moscow Ministry of Defence, Manual on International Humanitarian Law for the Armed Forces of the Russian Federation 93 (2001).

17 Defense of Ukraine (@DefenceU), X (formerly Twitter) (Feb. 24, 2022, 4:42 AM), https://twitter.com/DefenceU/status/14968127480591 60583.

18 Drew Harwell, *The Gory Online Campaign Ukraine Hopes Will Sow Anti-Putin Dissent Probably Violates the Geneva Conventions*, Wash. Post (Mar. 3, 2022, 4:45 PM), https://www.washingtonpost.com/technology/2022/03/03/telegram-russian-war-dead-ukraine-pows [hereinafter Harwell].

to the full protections of the Third Geneva Convention. The key language in Article 4 of that treaty is "fallen into the power of the enemy," which encompasses any situation in which "the Detaining Power exercises some level of physical control or restraint over the person, and … the person is no longer willing or able to participate in hostilities or defend themselves."[19] Soldiers captured by opposing soldiers or units are prisoners of war as of that moment—no formal processing or other procedures are required.

A core theme of the protections for prisoners of war is the preservation of human dignity. In essence, even though an individual fights for the opposing side in the armed conflict, she retains her human dignity and entitlement to humane treatment at all times. In addition to protections obligating the detaining power to provide appropriate shelter, food, medical care, and protection from hostilities, Article 13 of the Third Geneva Convention mandates that "prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults *and public curiosity*" (emphasis added).[20] This prohibition extends to the dissemination of photographs, video recordings or images, or any other personal data, such as the photos of the Russian soldiers tweeted and posted online.

Public dissemination of photos or other visual evidence can cause humiliation and potentially put the prisoners of war or their families at risk during their detention or after their release. Although pictures of captured soldiers can demonstrate that they are alive and safe, provide a record of who has captured and retained custody over them, or serve as evidence in war crimes prosecutions and other accountability mechanism, the Third Geneva Convention sets out a bright line rule. In effect, the law places protection and human dignity above any other considerations and brooks no compromise in pursuit of those goals.

Conclusion: Reminders and Reaffirmations

Combatant privileges and protections stem from the law of war's ancient foundations: good faith, honor, and human dignity. In the midst of the deadly violence in Ukraine, these incidents serve as important reminders of the fundamental goals of minimizing suffering and protecting all persons during armed conflict.

In discussing these incidents and the law of war issues they spotlight, it is important to recognize that reports from the conflict are unconfirmed and may include false or incomplete information.

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[19] International Committee of the Red Cross, 1 Commentary on the Third Geneva Convention para. 961 (2020) [hereinafter 2020 GC III Commentary].

[20] GC III, *supra* note 4, art. 13.

RUSSIAN TROOPS OUT OF UNIFORM AND PRISONER OF WAR STATUS

by Chris Koschnitzky and Michael N. Schmitt | Mar 4, 2022

The presence of Russian troops in civilian clothes[21] or Ukrainian military uniforms has been repeatedly reported during the conflict, especially attempting to enter Kyiv.[22] As Ukrainian forces continue to defend their nation, the detention of Russian troops—including those in civilian clothes or Ukrainian uniforms—will become a growing concern. This post addresses whether international humanitarian law (IHL) requires Ukraine to provide them prisoner of war status if captured out of uniform.

Article 4 of Geneva Convention III

We believe it does not, but the matter is far from settled, as we shall explain. Article 4A of the Third Geneva Convention sets out the eligibility criteria for prisoner of war (POW) status.[23] It has six subparts, the first three of which bear on this issue. Article 4A(1) states that members of the armed forces and regular militia forming part of the State's armed forces are entitled to POW status. It is members of this group that we are addressing.

Article 4A(2) provides that "members of *other* militias and members of *other* volunteer corps, including those of organized resistance movements," are also entitled to POW status *provided that* they meet four conditions. Two of those conditions are relevant to the issue at hand. The most important requirement is that the irregular forces "hav[e] a fixed distinctive sign recognizable at a distance." The other is that the members must "[carry] arms openly." Today, the distinctive sign requirement is typically met with a uniform, although any means of distinguishing oneself from the civilian population will suffice, such as the yellow armbands[24] being worn by Ukrainian defense forces volunteers.

Article 4A(3) pertains to "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." The paradigmatic example is the "Free French" forces loyal to General Charles de Gaulle during the Second World War.[25]

Of the three categories, only Article 4A(2) imposes conditions on forces—the irregular militia and volunteer corps—for POW status. This textual distinction has resulted in competing positions regarding the regular armed forces, uniforms (or other distinctive indicia), and POW status under Article 4A(1). By the first, the wear of the uniform

21 Yaroslav Trofimov, *Ukrainian Forces Repel Russian Attack on Kyiv, Prepare for Next Assault*, Wall St. J. (Feb. 26, 2022, 6:19 PM), https://www.wsj.com/articles/russias-assault-on-ukraine-presses-forward-as-street-battles-rage-in-kyiv-11645864200.

22 Maryam Zakir-Hussain, *Russian Soldiers Dressed in Ukraine Military Uniforms Attempt to Enter Kyiv in Captured Vehicles*, Independent (Feb. 25, 2022), https://www.independent.co.uk/news/world/europe/russian-soldiers-disguised-ukraine-kyiv-b2023087.html.

23 GC III, *supra* note 4, art. 4(a).

24 *AP PHOTOS: Citizen Soldiers Train to Repel Russian Troops*, AP News (Feb. 27, 2022, 12:01 PM), https://apnews.com/article/russia-ukraine-kyiv-europe-15b0583d8653b25aa2d59557c32af116.

25 *Free French*, Britannica: History & Society, https://www.britannica.com/topic/Free-French.

or other distinguishing attire at the time of capture has no bearing upon status as a POW; it is the captured soldier's membership in the enemy armed forces that accords that status. LTC Ronald Alcala and MAJ Steve Szymanski embrace this position in their *Articles of War* post.[26] In our opinion, the better view is that those captured out of uniform are unprivileged belligerents[27] (sometimes labeled "unlawful combatants") and enjoy neither prisoner of war status nor combatant immunity.[28]

Points of Agreement

Before turning to the two positions, it must be noted that there is agreement that Russian soldiers spying or engaging in sabotage in areas controlled by Ukrainian forces forfeit their right to POW status. As noted in the DoD *Law of War Manual*:

> Spies, saboteurs, and other persons engaged in secretive hostile activities behind enemy lines, … by acting clandestinely or under false pretenses, fail to distinguish themselves as combatants generally must do. Thus, persons otherwise entitled to privileges of combatant status, including POW status, forfeit their entitlement to those privileges while engaged in spying, sabotage, or other hostile, secretive activities behind enemy lines.[29]

The negotiating history of Article 4,[30] non-binding expert projects,[31] treaty provisions,[32] and case law[33] support this conclusion. While some of these sources, like Article 46(1),[34] cite only spies, the 2020 ICRC *Commentary to the Third Geneva Convention* points out that "there is a well-established practice that saboteurs are treated in the same way as spies with regard to prisoner-of-war status."[35]

There is also agreement that the requirement for a "distinctive sign" does not require wearing a full military uniform. The DoD *Law of War Manual* explains,

> The requirement does not specify a particular sign or emblem that persons must wear. Wearing a military uniform satisfies this condition. However, a full uniform is not required. The sign suffices if it enables the person to be distinguished from the civilian population. For example, a helmet or headdress that makes the silhouette of the individual readily distinguishable from that of a civilian can meet this requirement. Similarly, a partial uniform (such as a uniform jacket or trousers), load bearing vest, armband, or other

26 Alcala & Szymanski, *Legal Status of Ukraine's Resistance Forces*, Articles of War (Feb. 28, 2022), https://lieber.westpoint.edu/legal-status-ukraines-resistance-forces.

27 *Unprivileged Belligerent,* IHL Databases, https://casebook.icrc.org/a_to_z/glossary/unprivileged-belligerent.

28 *Immunities*, IHL Databases, https://casebook.icrc.org/a_to_z/glossary/immunities.

29 *See* DoD Law of War Manual, *supra* note 10, § 4.17.5.

30 *Id.*

31 *Project of an International Declaration Concerning the Laws and Customs of War*, 27 August 1874 reprinted in 1 Am. J. Int'l L. 54 (1907) [hereinafter *Brussels Declaration*]; *Oxford Manual on the Laws of War on Land*, reprinted in 2 Am. J. Int'l L. 90 (1908) [hereinafter *Oxford Manual*].

32 AP I, *supra* note 9, art. 46(1).Hague IV, *supra* note 9, art. 31.

33 *Ex parte* Quirin, 317 U.S. 1 (1942); Bin Haji Mohamed Ali and Another v. Public Prosecutor [1968] 1 Malayan L. J 107 (Singapore).

34 AP I, *supra* note 9, art. 46(1).

35 2020 GC III Commentary, *supra* note 19, para. 990.

> device could suffice, so long as it served to distinguish the members from the civilian population.[36]

The ICRC agrees.[37]

Finally, wearing enemy uniforms while engaging in attack or to otherwise "shield, favour, protect or impede military operations" is unlawful; it is not otherwise prohibited. For parties to Additional Protocol I, like Ukraine and Russia, the prohibition appears at Article 39(2).[38] The article reflects customary international law.[39] However, mere violation of IHL is not a basis for denial of POW status. Therefore, the POW status of such individuals turns on the discussion that follows.

The Argument Against an Article 4 Uniform (Distinctive Emblem) Requirement

The starting point for those who argue that members of the regular armed forces need not wear uniforms or other distinctive indicia to benefit from POW status is the text itself. Advocates of this approach point to the presence of the criteria in Article 4A(2) but not in 4A(1) or 4A(3) as indicating the drafters intended to limit their applicability to members of militia or volunteer corps, including organized resistance movements, that are not part of the armed forces. For members of the regular armed forces like the Russians who might be captured by Ukrainian forces, the determinative factor is membership in those forces.

Interestingly, the Final Record of the Diplomatic Conference that produced the Convention records a discussion supporting this interpretation.[40] The Soviet representative expressed concern that the text might be interpreted to impose conditions on the regular armed forces to qualify for POW status. His counterpart from Belgium assured him that the intent was that only militia or volunteer corps members would be required to fulfill the four conditions.

Distinguished scholar/practitioners like the late Hays Parks, the U.S. Army's and later Department of Defense's Law of War Adviser, and Major General (ret.) A.P.V. Rogers,[41] former Director of the U.K.'s Army Legal Services, also adopted this position, as has the current Co-Director of the Lieber Institute, Sean Watts.[42] Parks, for example, argued that the "[e]xtension of combatant and prisoner of war status in Article 4A(2) is intentionally and expressly narrower."[43] Parks also cites State practice, suggesting that "[h]istorically, regular military forces' entitlement to prisoner of war status has been absolute and unqualified."[44]

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36 DoD Law of War Manual, *supra note 10,* § 4.6.4.1.

37 2020 GC III Commentary, *supra* note 19, para. 985.

38 AP I, *supra note 9, art.* 39(2).

39 DoD Law of War Manual, *supra* note 10, § 5.23.1.; Jean-Marie Henckaerts & Louise Doswald-Beck, 1 Customary International Humanitarian Law 213–218 (2005) [hereinafter Henckaerts & Doswald-Beck].

40 *Geneva Conventions of 1949: Final Record of the Diplomatic Conference of Geneva of 1949*, 4 U.N. Doc. A/CONF. 20/14 466-67 (1949).

41 Perspectives on the ICRC Study on Customary International Humanitarian Law (Elizabeth Wilmshurst & Susan Breau eds., 2007).

42 Sean Watts, *Who Is a Prisoner of War in* The Geneva Conventions: A Commentary (Andrw Clapham, Paola Gaeta & Marco Sassòli eds. 2015) [hereinafter Watts, *Who Is a POW?*]. Also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801769.

43 W. Hays Parks, *Combatants*, 85 Int'l L. Stud. 247 (2009).

44 *Id.*

The DoD *Law of War Manual* [45] and the U.S. Army and Marine Corps, *Commander's Handbook on the Law of Land Warfare* likewise adopt a "membership approach."[46] For instance, the latter provides, "Members of the armed forces of a State party to a conflict … are entitled to prisoner of war status based on their membership in the armed forces."[47] In neither instrument is this conclusion conditioned on wearing a uniform or other distinctive indicia.

It acknowledges, however, that the conditions

> reflect the attributes common to regular armed forces of a State. By seeking to ensure that participants in hostilities are sufficiently disciplined, law abiding, and distinguishable from the civilian population, these conditions help protect the civilian population from the hardships of war … These conditions may be understood to reflect a burdens-benefits principle, i.e., the receipt of certain benefits in the law of war (e.g., privileges of combatant status) requires the assumption of certain obligations.[48]

The Argument for an Article 4 Uniform (Distinctive Emblem) Requirement

The second position, and in our view, the better one, takes the *Manual's* recognition of the conditions as "attributes" of a regular military a step further. By it, the conditions outlined in Article 4A(2) are implicit in the concept "members of the armed forces." Therefore, there was no need for the drafters of the Third Geneva Convention to add that individual members of the regular armed forces have to wear a "fixed distinctive sign recognizable at a distance" (or meet the other criteria) to benefit from POW status.

Numerous points support this interpretation. Perhaps most significantly, there is near-universal State practice stretching back for centuries of a State's armed forces wearing distinctive indicia, and, later, uniforms. Although the original and primary purpose for uniform wear may not have been to distinguish combatants from civilians, this secondary benefit is likewise a long-standing purpose of uniform wear. By the time the 1899 Hague II Regulations were drafted (from which the language for Article 4 was modeled), members of the armed forces were those fighters who wore uniforms or otherwise distinguished themselves from civilians;[49] *a fortiori*—such was the case when the Third Geneva Convention was being negotiated a half century later. This being so, adding a uniform or other distinctive indicia condition to Article 4A(1) would have been superfluous.

The ICRC's 1960 Pictet *Commentary* on Article 4A(3) makes precisely this point.[50] As noted above, like Article 4A(1), there are no criteria in Article 4A(3). The *Commentary* on the latter explains that

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45 DoD Law of War Manual, *supra* note 10, § 4.5.1.3.

46 FM 6-27, *supra* note 11, para. 3.16.

47 *Id.*

48 DoD Law of War Manual, *supra* note 10, §4.6.1.

49 Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

50 Commentary III Geneva Convention relative to the Treatment of Prisoners of War 61–64 (Jean Pictet et al. eds. 1960) [hereinafter 1960 GC III Commentary].

Article 4A(3) "members of armed forces" differed in "one respect only" from Article 4A(1) regular armed forces, that being "the authority to which they profess allegiance is not recognized by the adversary as a party to the conflict." Otherwise, Article 4A(3) forces "have all the material characteristics and all the attributes of armed forces in the sense of subparagraph (1): they wear uniforms, they have an organized hierarchy and they know and respect the laws and customs of war." Accordingly, "[t]he delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that *there was no need to specify for such armed forces the requirements stated in sub-paragraph 2 (a), (b), (c) and (d)*." In other words, the *Commentary* justifies omitting the criteria vis-à-vis Article 4A(3) by reference to Article 4A(1). For that reason, there would equally be no reason to set forth the requirements in the latter.

This makes sense. After all, and as put forth in a Department of Justice Office of Legal Counsel Opinion, it would be "utterly illogical" to argue that to secure POW status, militia and other volunteer groups not forming part of the armed forces have to be in uniform or display other distinctive indicia, but members of a State's armed forces and members of regular armed forces of an authority that the capturing force does not recognize lose POW status.[51]

Most importantly, in our opinion, teleological interpretation of Article 4A(1) supports the view. Article 31(1) of the Vienna Convention on the Law of Treaties provides that treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in light of its object and purpose*."[52] As noted in the ICRC's 2020 *Commentary*, the primary object and purpose of the Third Geneva Convention are "to mitigate as far as possible, the inevitable rigours [of a war] and to alleviate the condition of prisoners of war."[53]

Interpretive note should also be taken of the principle of distinction, recognized by the International Court of Justice as "intransgressible," the objective of which is to protect civilians from the risks of armed conflict to the extent possible.[54] This is the primary intent in wearing uniforms and other distinctive indicia. Further, it would be difficult "to mitigate *as far as possible*, the evitable rigours" of war without requiring combatants to distinguish themselves from the civilian population visibly. It is simply incongruent for the principle of distinction to loom large in Article 4A(2), but not Article 4A(1) or (3).

The ICRC has taken this position. So too have distinguished scholars. Yoram Dinstein observes, for instance, that "[b]lurring the lines of division between

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51 Opinions of the Office of the Legal Counsel of the United States Department of Justice Consisting of Selected Memorandum Opinions Advising the President of the United States, the Attorney General, and Other Executive Officers of the Federal Government, 26 U.S. Dep't of Justice 2002 (Nathan A. Forrester ed., 2012).

52 Vienna Convention on the Law of Treaties, May. 23, 1969, 1155 U.N.T.S. 331, art. 31(1) (emphasis added) [hereinafter Vienna Convention].

53 2020 GC III Commentary, *supra* note 19, ¶ 144.

54 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

combatants and civilians is bound to result in civilians suffering the consequences of being suspected as covert combatants. Hence, under customary international law, a sanction (deprivation of the privileges of prisoners of war) is imposed on any combatant masquerading as a civilian in order to mislead the enemy and avoid detection."[55] Marco Sassòli takes the same position,[56] as did Waldemar Solf, Karl Partsch, and Michael Bothe.[57] By this approach, Russian troops captured out of uniform, whether spying or engaging in sabotage, or not, would not enjoy POW status.

The Additional Protocol I Requirement

Both Russia and Ukraine are Parties to Additional Protocol I. Article 44(1) of that instrument provides that combatants are entitled to POW status.[58] Article 44(3) imposes an obligation on combatants to "distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack," but then allows them to retain combatant status, and, therefore, entitlement to POW status, when unable to distinguish themselves so long as arms are carried openly in military engagements and while visible to the enemy during deployments to the engagement. Article 44(4) provides that a combatant who fails to distinguish himself as required by Article 44(3) "shall forfeit his right to be a prisoner of war." Finally, Article 44(7) emphasizes that "[t]his article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict."

The 1987 ICRC *Commentary* to Article 44(7) confirms that the 44(3) exception applies to "a combatant of the regular army," and thus Russian soldiers.[59] However, most of the Russian troops in question would not benefit from the exception because Article 46(1) provides, "Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy."[60] Recall that saboteurs are to be treated in the same manner as spies.

So only a Russian soldier engaged in neither spying nor sabotage could qualify, as in the case of one who finds himself behind Ukrainian lines and is trying to evade back to Russian-controlled territory. If that soldier attacks Ukrainian forces (including defending oneself; see Article 49),[61] he would have to wear a uniform or carry arms

55 Yoram Dinstein, *Unlawful Combatancy*, 79 Int'l L. Stud. 151 (2003).

56 Marco Sassòli, International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare 251 (2019) [hereinafter Sassòli].

57 Michael Bothe, Karl Josef Partsch, & Waldemar A. Solf, New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 285 (2d ed. 2013) [hereinafter Bothe et al.].

58 AP I, *supra* note 9, art. 44(1).

59 AP I Commentary, *supra* note 15, para. 1723.

60 AP I, *supra* note 9, art. 46(1).

61 *Id.* art. 49.

openly. The first option is impractical in the circumstances. As to carrying arms openly, note that Ukraine has distributed at least 18,000 weapons among its citizens, with the number growing.[62] In that environment, it is difficult to see how carrying weapons openly while in civilian clothes would meet the intent of distinguishing oneself effectively from the enemy.

Conclusion

Both sides of the "distinctive emblem" as a condition precedent to the POW status debate have mustered strong arguments based on textual analysis, the negotiating record of the treaty, State practice, *opinio juris*, and the object and purpose of the Third Geneva Convention and Article 4. Although reasonable minds differ, we find such a requirement to be the better position, one defensible in law and an approach that makes good operational sense.

The approach also is consistent with the conditions for POW status under Additional Protocol I for Russian and Ukrainian forces. While it is true that Article 44 relaxes the condition, that relaxation is only likely to apply in the rarest of cases. Therefore, under current international law, we believe Ukraine is not required to give POW status to Russian troops in civilian clothes or Ukrainian uniforms.

Finally, we hasten to point out that this IHL condition applies equally to Ukrainian forces, both regular and irregular. The one exception is members of a *levée en masse*, who do not have to wear a distinctive emblem but must carry arms openly to qualify for prisoner of war status under Article 4A(6) of the Third Geneva Convention, the topic of a forthcoming *Articles of War* post.[63] We, therefore, urge all Ukrainian forces who are not in uniform to use the yellow armband to distinguish Ukrainian fighters, thereby obligating Russian forces to accord them POW status upon capture in most cases.

This post was adapted in part from a chapter in the book Prisoners of War in Contemporary Conflict*, edited by Michael N. Schmitt (2023).*

[62] James Marson & Drew Hinshaw, *Ordinary Ukrainians Rally to Defend Homeland from Russia*, Wall St. J. (Feb. 26, 2022, 1:34 PM), https://www.wsj.com/articles/ordinary-ukrainians-rally-to-defend-homeland-from-russia-11645900464 [hereinafter Marson & Hinshaw].

[63] GC III, *supra* note 4, art. 4A(6).

SPECIAL FORCES, UNPRIVILEGED BELLIGERENCY, AND THE WAR IN THE SHADOWS

by Ken Watkin | Mar 8, 2022

The February 24, 2022, invasion of Ukraine resulted in news reports of fear in the streets of Kyiv as Ukrainian forces engaged in "a frantic hunt for spies and traitors,"[64] as well as saboteurs and teams seeking to kill President Zelensky and 23 other leaders within Ukraine.[65] Russian forces are reported to have included special forces troops (in U.S. terminology: Special Operations Forces), as well as private militia from the Wagner Group.[66] In addition to Russians being found in civilian clothes, it is alleged that special forces may have also donned Ukrainian military uniforms and used captured Ukrainian[67] and Organization for Security and Cooperation in Europe vehicles to mask operations.[68]

The Role of Special Forces

The use of such forces and tactics should come as no surprise. A February 15, 2022, Royal United Services Institute report, "The Plot to Destroy Ukraine" identified that Russian covert services including "the Federal Security Service (FSB), Foreign Intelligence Service (SVR), and Military Intelligence (GU) and Special Forces (SSO) … are already operating throughout Ukraine."[69] Ukraine had assessed there were two companies of Russian covert forces in Kyiv, and "Russian agent provocateurs—disguised as demonstrators or police officers—will initiate acts of violence." Sabotage and cyber attacks on critical infrastructure as well as "a decapitation strategy" were expected. In this respect the 1979 Spetsnaz decapitation operation (Operation Storm 333) in Kabul of an allied leader highlights Russian willingness to use special military and paramilitary units to carry out such a strike.[70]

Ukraine also employs military special forces units as part of its defence intelligence structure.[71] It is reported that intelligence officers and agents are calling in air strikes

64 Louis Callaghan, *Fear Stalks Streets of Kyiv in the Hunt for Kremlin Spies,* The Sunday Times (Feb. 27, 2022, 2:50 PM), https://www.thetimes.co.uk/article/volunteers-hunt-traitors-and-kremlin-spies-as-fear-grips-kyiv-snp5r2qjp (last visited Feb. 3, 2024).

65 Timothy Bella, *Assassination Plot Against Zelensky Foiled and Unit Sent to Kill Him 'Destroyed,' Ukraine Says*, Wash. Post (Mar. 2, 2022, 8:42 AM).

66 Manveen Rana, *Volodymyr Zelensky: Russian mercenaries ordered to kill Ukraine's president*, The Times (Feb. 28, 2022, 12:01 AM), https://www.thetimes.co.uk/article/volodymyr-zelensky-russian-mercenaries-ordered-to-kill-ukraine-president-cvcksh79d.

67 Mia Jankowicz, *Ukraine Accuses Russian Soldiers of Stealing Uniforms and Vehicles to Enter Kyiv*, Business Insider (Feb. 25, 2022, 4:21 AM), https://www.businessinsider.com/ukraine-says-russia-soldiers-stole-uniforms-trucks-to-reach-kyiv-2022-2.

68 Allison Quinn, *Putin Sent in Troops Disguised with White Peace Monitor Symbols and Ukrainian Uniforms, Says Kyiv*, The Daily Beast (Feb. 24, 2022, 11:06 AM), https://www.thedailybeast.com/putin-sent-in-troops-disguised-with-ocse-white-peace-monitor-symbols-and-ukrainian-uniforms-says-kyiv.

69 Jack Watling & Nick Reynolds, *The Plot to Destroy Ukraine*, Royal United Services Inst. for Def. & Sec. Stud. (Feb. 15, 2022), https://static.rusi.org/special-report-202202-ukraine-web.pdf.

70 Mark Galeotti, Spetznaz: Russia's Special Forces, 20–22 (2015).

71 Defence Intelligence of the Ministry of Defence of Ukraine, https://gur.gov.ua/en/content/glorious-unit-of-intelligence.html?__cf_chl_tk=_uHmyyXvFvUljdNKUVbckxu_EwKLXOEqfB0DEdYJlTA-1646146752-0-gaNycGzNBr0.

on Russian convoys.[72] The Security Service of Ukraine-SSU (e.g., the Alpha unit) is specifically tasked with "[c]ountering illegal armed groups, terrorists organizations and intelligence and sabotage groups of foreign states."[73] A Ukrainian government website that is no longer accessible had reported on February 27, 2022, that "SSU [Security Service of Ukraine] officers are performing combat missions with other military units, as well as carrying out their classic counterintelligence functions." Further, it is highly likely that Ukrainian military and intelligence specialized units would be tasked with providing support and guidance to any armed resistance groups operating in areas occupied by the invading Russian forces.

Contrary to the view that inter-State warfare solely involves conventional military forces, contemporary conflict frequently involves the widespread use of non-conventional or irregular forces. Special forces engagement in clandestine or covert operations is not unique to this conflict. That a wide variety of special forces and intelligence units can be involved finds its genesis in the array of specialized military and paramilitary units developed during the Second World War to carry out a range of operations from direct action to support for resistance movements in occupied territory (e.g., British SOE, U.S. OSS, Russian Partisans).

The development and deployment of such units was a prevalent part of Cold War conflict and has expanded in the post-9/11 period. The result is that there can be an array of military, paramilitary, intelligence, and even law enforcement specialized forces engaged in hostilities both overtly and behind enemy lines. Some of those activities may be carried out in civilian clothes or in enemy uniforms, and not all personnel involved may be incorporated into the armed forces of the Parties to the conflict.

International Legal Considerations

This inevitably raises questions whether such participation is contrary to international law, the status of its participants, and what accountability mechanisms may be applied. The unconventional nature of such operations raises important questions about whether those involved are lawful combatants or unprivileged belligerents not entitled to prisoner of war (POW) status, and whether some of their activities constitute crimes under international or domestic law.

As discussed in greater detail here,[74] participation in such shadow warfare appears *prima facie* to be the antithesis of the open style of warfare that underpinned the 1907 Hague Land Warfare Regulations[75] criteria for lawful belligerents and which forms the basis for POW status set out in Article 4 of the 1949 Third Geneva Convention[76] (GC

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72 Howard Altman, *Ukraine Jets Hit Russian Column; Russia Has Used Thermobarics, Ukraine Military Says*, Military Times (Mar. 2, 2022), https://www.militarytimes.com/flashpoints/ukraine/2022/03/02/ukraine-jets-hit-russian-column-russia-has-used-thermobarics-ukraine-military-says.

73 Security Service of Ukraine, The Centre of Special Operations "A", https://ssu.gov.ua/en/alfa.

74 Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, Program on Humanitarian Policy and Conflict Research, Occasional Paper Series (2005).

75 Hague IV, *supra* note 9, art. 1.

76 GC III, *supra* note 4, art. 4.

III) as further supplemented by Additional Protocol I (AP I).[77] Regarding status, in his seminal article, "So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs," Richard Baxter defined unprivileged belligerents as "persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949."[78] Unprivileged belligerents can include both civilians and members of a State's armed forces.

The present hostilities are part of an international armed conflict reflecting an expansion of the hostilities commenced[79] in 2014 with the Russian takeover of Crimea. It is a war involving States Parties to the 1949 Geneva Conventions and AP I, as well as bound by customary international humanitarian law. The separation of belligerents from those not engaged in combat reflects the principle of distinction, which is recognized as an intransgressible principle of international customary law (see the 1996 *Nuclear Weapons* case,[80] paras. 78 and 79) and is reinforced in AP I, Article 48.[81] International law has developed a carrot-and-stick approach towards lawful combatant status. It rewards those who distinguish themselves from the civilian population by meeting certain conditions that are largely focused on encouraging the overt conduct of hostilities, while denying POW status and possibly prosecuting those who do not.

The initial effort to codify lawful belligerency in the 1907 Hague Regulations highlighted a fundamental disagreement. Dominant States with universal service championed recognition for large uniformed traditional armed forces, while "patriotic" States concerned about being invaded who relied on a spontaneous resistance to an invader advocated for a more inclusive framework. The result was a compromise providing lawful status for regular armed forces, militia, and volunteers fighting for States; and protection for the *levée en masse* comprised of civilians in non-occupied territory carrying arms openly who spontaneously acted to thwart an invasion.

While not all States agreed with the outcome, the compromise did not provide lawful status to civilians carrying out an insurgency within occupied territory.

The four basic criteria of lawful belligerency for military forces fighting for States are reflected in Article 1 of the 1907 *Hague Regulations*, including: acting under responsible command; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war. In its 2020 GC III *Commentary*[82] the ICRC sets out various interpretations of how

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77 AP I, *supra* note 9, arts. 43-44.

78 Richard Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 328 (1951).

79 *International armed conflict in Ukraine*, RULAC Geneva Academy, https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine.

80 Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 14, paras. 78-79 (8 July).

81 AP I, *supra* note 9, art. 48.

82 2020 GC III Commentary, *supra* note 19, para. 1038.

POW status is attained, including one that suggests since Article 4A(1) of GC III did not specifically refer to these four conditions, they did not apply to State armed forces (para. 1033). However, those conditions would continue to be applicable to other militias, volunteer corps, or organized resistance movements belonging to that same State. An earlier article in this series has suggested this is a "more reasonable approach."[83] This issue requires further analysis, as that interpretation appears to place too much reliance on a strictly textual approach.

The ICRC itself takes the view that the four conditions are "obligations" for regular armed forces, although not collective conditions for POW status.[84] Setting aside the issue of the collective denial of POW status, which the ICRC indicates has rarely happened during international armed conflict, there is little to support the view that these conditions are not required to be followed by regular armed forces, as well as the other units and groups fighting on behalf of the same State. This requirement is set out in the majority of academic writing, case law,[85] State approaches, the ICRC's own 1960 Pictet *Commentary* and the long history of lawful combatancy.[86] Further, AP I, Article 43 has defined armed forces broadly as "all organized armed forces, groups and units" under a command responsible to a Party to the conflict. As Jens Olin notes, under AP I the requirements of distinction and carrying arms openly applies to all combatants and not just militias and volunteer forces.[87]

The U.S. DoD *Law of War Manual* recognizes the textual difference in articles 4A(1) and 4A(2) indicating that combatant status is attained by virtue of membership in the armed forces of a State.[88] However, it also states the four conditions reflect the attributes of States' armed forces, those failing to systematically distinguish themselves from civilians or conduct its operations in accordance with the law of war can expect to be denied combatant privileges, and "members of the armed forces engaged in spying or sabotage forfeit their entitlement to the privileges of combatant status if captured while engaged in those activities." This means that if Russia and Ukraine want to guarantee their regular armed forces, including the special forces, are viewed as lawful combatants, they should continue to meet all the conditions for combatancy.

Given Russia's increasing occupation of Ukrainian territory, the widespread use of organized resistance movements in occupied territory during the Second World War also becomes significant. That reality resulted in incremental efforts to expand combatant status. Such groups were made eligible for POW status if they met the recognized conditions of combatancy, including wearing distinctive signs and carrying arms openly

83 Alcala & Szymanski, *supra* note 2.

84 2020 GC III Commentary, *supra note 19, para. 1038*.

85 Ex parte Quirin 317 U.S. 1 (1942); 1967 Kofran Stanislaus v. Public Prosecutor 1967 (Malaysia); Mohamed Ali v. Public Prosecutor, Privy Council (United Kingdom); U.S. v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).

86 The Geneva Conventions of 12 August 1949 Commentary, Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 48, 52, 62-63 (Pictet et al. eds. 1960).

87 Jens David Ohlin, *The Combatant's Privilege in Asymmetric & Covert Conflicts*, 40 Yale L.J. 337 (2015).

88 DoD Law of War Manual, *supra* note 10, § 4.6.1.3., n 153.

(article 4A(2), GC III). Unfortunately, this provision has also been widely viewed as unrealistic given the normal operational environment within occupied territory. However, the prevalence of irregular warfare during the Cold War led to a reduction of the conditions for lawful combatancy in limited circumstances as set out in AP I, Article 44(3). As a result, where due to the nature of the hostilities (accepted as including occupied territory) armed combatants cannot distinguish themselves, they retain lawful status if arms are carried openly during each military engagement and during the time visible to the enemy while deploying preceding to an attack.

Consequences of Not Wearing Uniforms

Notably any combatants who fail to meet this requirement forfeit their right to be a POW (AP I, Article 44(4)). That State armed forces, frequently special forces, may be engaged in such operations is acknowledged in Article 44(7), which indicates these special provisions do not alter the "generally accepted practice" of regular forces wearing uniforms. Both Russia and the Ukraine are bound by these provisions. That said, the challenge for all States and courts in assessing combatant status is there is little guidance, or common understanding, of what criteria such as "distinctive signs recognizable at a distance" "carrying arms openly," or in the case of the AP I, what the deployment provisions mean. That some Ukrainian irregular forces appear to be wearing yellow arm bands suggests there is a recognition of the need to apply these basic conditions of combatancy.[89]

The impact of failing to qualify as a privileged belligerent has changed somewhat in the aftermath of the Second World War. The 1942 *Quirin* case had indicated they were punishable under the laws of war. By 1950 *The Hostages Case*,[90] although still indicating unlawful belligerents were war criminals, signaled a subtle change by identifying such a belligerent as someone who may render great service to their own country, but who may be seen as a war criminal by the enemy (p. 1245). Notably, both these cases equated unlawful belligerency to spying, a theme relied upon by Richard Baxter to suggest such belligerency was not unlawful but rather "unprivileged." Like spies, unprivileged belligerents should not be considered as acting contrary to international law. Rather they are not privileged by it. They could be denied POW status and be prosecuted under domestic criminal laws. The denial of POW status to spies based on their clandestine activities is reflected in AP I, Article 46. The related approach of "unprivileged belligerents" being punishable under domestic law has gained wide acceptance (see 2019 U.S. Army *Commander's Handbook on the Law of Land Warfare*, para. 1-74).[91]

As with spies, unprivileged belligerents wearing civilian clothes or even enemy uniforms is not in itself unlawful under international law. However, such activity can

89 Maïa De La Baume, *French Volunteers Rally to Zelenskyy's Call to Join War in Ukraine*, Politico (Mar. 3, 2022, 5:17 PM), https://www.politico.eu/article/france-volunteer-rally-zelensky-call-join-war-ukraine/.

90 United States v. List (Wilhelm) and others, Trial Judgment, Case No. 7 (Hostages Case) 11 TWC 757 (1948).

91 FM 6-27, *supra* note 11, at 1-74.

make the unprivileged belligerent more likely to be found in breach of specific provisions of international humanitarian law. Given the reports of Russian special forces operating in civilian clothes, as well as the use of Ukrainian uniform, and Ukrainian military and OSCE vehicles, further investigation is warranted. Considering the reported Russian decapitation strategy, the targeting of Ukrainian leaders raises concerns regarding the unlawful killing of civilian, and the perfidious killing, injuring, or capture of Ukrainian military personnel and civilians who are taking a direct part in hostilities. Consideration would also have to be given to whether there has been an improper use of flags, military emblems, insignia, or uniforms of neutral or other States; and the use of flags, emblems, insignia, or uniforms of an adverse party while engaging in attacks or shielding, favoring, protecting, or impeding military action.

Notably AP I, Article 47, denies POW status to mercenaries, raising questions regarding the status of Wagner Group personnel, as well as foreign volunteers reported[92] to potentially include former special forces personnel being enrolled in the International Legion for the Territorial Defense of Ukraine.[93] However, the definition of mercenary is very technical, and it is likely their combatant status will hinge on whether those groups are part of the armed forces, as well as compliance with the conditions for privileged belligerent status. Lawful combatant status for Russian and Ukrainian intelligence paramilitary and law enforcement agencies engaged in hostilities would also depend upon their being incorporated into the armed forces of those States and compliance with the criteria for lawful belligerency.[94]

While not entitled to POW status, unprivileged belligerents are entitled to considerable rights protection under international humanitarian law. Additional Protocol I, Article 44(4), provides that combatants who fail to meet the more relaxed distinction requirements of the Protocol (Article 44(3)) must be provided the protections equivalent to those of a POW. In respect of occupied territory, Geneva Convention IV (GC IV) protections provided to security internees as well as persons charged with a criminal offence would also apply to unprivileged belligerents.[95]

Those not otherwise protected under the Conventions or AP I would be protected by the extensive human rights provisions, including fair trial guarantees incorporated into humanitarian law by virtue of AP I, Article 75. In a European context, the 2021 *Georgia v. Russia (II)*[96] case indicates that outside of the active hostilities phase (e.g., occupation) the European Convention on

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92 Christopher Miller, *A Team of American and British Special Forces Veterans Are Preparing to Join Ukraine's Fight Against Russia,* BuzzFeed News (Feb. 27, 2022, 10:28 AM), https://www.buzzfeednews.com/article/christopherm51/american-nato-military-veterans-fight-russia-with-ukraine.

93 *The International Legion for the Territorial Defense of Ukraine Was Created*, Visit Ukraine (Feb. 27, 2022), https://visitukraine.today/blog/104/the-international-legion-for-the-territorial-defense-of-ukraine-was-created.

94 AP I, *supra* note 9, art. 43(3).

95 *See e.g.* Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, arts. 5, 64-76, 78-79 75 U.N.T.S. 287 [hereinafter GC IV].

96 Georgia v. Russia (II), App. No. 38263/08, Eur. Ct. H.R. (Jan. 21, 2021).

Human Rights would be applicable.[97] Given the robust provisions regarding the treatment and trial of unprivileged belligerents under international humanitarian law (the *lex specialis*), human rights law could most likely be applied to interpret similar provisions under the Geneva Conventions and AP I, or to fill in gaps in that specialized law.

Conclusion

It is clear that both Russia and Ukraine are employing specialized forces in circumstances where issues related to lawful combatancy and the possible commission of war crimes may arise. Such employment raises complex factual and legal issues that military commanders of both countries, and those seeking to hold them accountable, must direct their attention. In this respect, particularly considering the potential for paramilitary and other groups not part of the armed forces to be engaged in combat, treating all captured fighters to the standard of POWs until their status and disposition can be officially determined provides the most efficient, effective, and humane course of action.

[97] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 &14, (1950) E.T.S. 5.

TARGETING LEADERSHIP

by Mehmet Çoban | Sep 16, 2022

Ukrainian President Volodymyr Zelensky recently spoke at length in *Time* magazine about assassination attempts against him.[98] He indicated that Russian paratroopers had approached his location immediately after the invasion and that he heard nearby firefights from his office. Zelensky told his children that they needed to prepare to flee their home. "We woke them up, it was loud. There were explosions over there." The Ukrainian military informed Zelensky that Russian strike teams had parachuted into Kyiv to kill or capture him and his family. "Before that night, we had only ever seen such things in the movies," says Andriy Yermak, the President's Chief of Staff.

Since then, several media outlets have reported assassination attempts against Zelensky carried out by the Wagner Group as well as Chechen paramilitary forces. The Wagner Group reportedly has strong ties with the Kremlin and is notorious for ruthless actions in Syria, Libya, and Mali.[99] They are currently fighting alongside the Russian army in eastern Ukraine.

President Zelensky was allegedly not alone on the Russian "kill list." The mayor of Kyiv, former boxing heavyweight champion of the world Vitaly "Dr. Ironfist" Klitschko, and his brother—also boxing's former world champion—Vladimir "Dr. Steelhammer" Klitschko have also been identified as targets.[100]

Although targeting heads of State, such as Zelensky, is not new to war, it is rare in modern armed conflict. As the US DoD *Law of War Manual* states, attacks on the national leadership of an enemy State have often been avoided on the basis of comity and to help ensure that authorities exist with whom peace agreements may be concluded.[101]

The most notable recent examples are the attacks directed at Muammar Gaddafi and Saddam Hussein. Gaddafi—former leader of Libya—was killed in a non-international armed conflict between the Libyan government and organized armed groups in 2011. The United States targeted Saddam Hussein—not only head of State but also the commander of the Iraqi Armed Forces—in a 1991 international armed conflict (IAC). He was eventually hanged under a sentence from the Iraqi Special Tribunal in 2006.

This post addresses the lawfulness of targeting political leadership in an IAC. After exploring types of political and military leadership, it describes the two legal bases for targeting leadership. Finally, it addresses the lawfulness of

98 Simon Shuster, *Inside Zelensky's World,* Time (Apr. 28, 2022, 6:00 AM), https://time.com/6171277/volodymyr-zelensky-interview-ukraine-war/ (last visited Feb. 5, 2024); *What Is the Wagner Group, Russia's Mercenary Organisation?* Economist (May 7, 2022), https://www.economist.com/the-economist-explains/2022/03/07/what-is-the-wagner-group-russias-mercenary-organisation.

99 Mary Ilyushina, *In Ukraine, a Russian mercenary group steps out of the shadows*, Wash. Post (Aug. 18, 2022, 2:00 AM), https://www.washingtonpost.com/world/2022/08/17/ukraine-russia-wagner-group-mercenaries.

100 Fraser Watson, *Former Boxing Champions Wladimir and Vitali Klitschko 'Named on Russian Hit List,'* Mirror (Feb. 28, 2022, 15:22, updated 16:02), https://www.mirror.co.uk/sport/boxing/wladimir-vitali-klitschko-ukraine-russia-26349018.

101 DoD Law of War Manual, *supra* note 10, § 5.7.4.

attacks on types of modern leaders, including Zelensky.

Political Leadership

The functions of a head of State or government may be ceremonial, constitutional or political, or they may combine all three.

For targeting purposes, it is important to distinguish exclusively political leaders from those with military affiliations and functions. An important consideration is the leader's respective authority over their government's armed forces. As a general matter, the former may not be targeted lawfully in an IAC, while the latter may be in some circumstances. As Professor Michael N. Schmitt points out, when targeting enemy leadership, the determinative issue is the status of the individual in question; those who are combatants or taking a direct part in hostilities may legally be attacked.[102]

The four most common political and military models for leaders are identified below.

Head of State and Military Chief of Staff

Not every head of State has identical powers in relation to armed forces. While most heads of State in democratic States have traditionally kept more distance from the armed forces, there are also heads of State who—in addition to their political role—also serve as the military chief of staff. For example, Saddam Hussein was not only the leader of Iraq but also the "*mushir*," Iraq's highest-ranking military officer.

Head of State and Commander in Chief

Some heads of State are also military commanders in chief. The President of the United States is such a leader. According to Article II, Section 2, Clause 1 of the Constitution of the United States, "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Nonetheless, the U.S. President does not wear a uniform, nor is he armed. On military matters, the President is advised by a staff as well as the nation's highest-ranking military officer, the Chairman of the Joint Chiefs of Staff.

Head of Government

The title "Head of Government" is often used in parliamentary governments. The ruler of the government's cabinet and leading party is the prime minister. The prime minister does not wear a uniform, nor is he armed. On military matters, the prime minister is advised by a minister of defense.

Head of State and Ceremonial Military Commander

Monarchies in which the king or queen holds a political/military role are not uncommon in Europe. For example, the King of the Netherlands—in accordance with the Dutch Constitution—has a politically decisive role.[103] The King is part of the government and appoints and dismisses the prime minister and other

[102] Michael N. Schmitt, *Targeting and Humanitarian Law: Current Issues*, 80 Int'l L. Stud. 151, 161 (2006).

[103] Constitution of the Kingdom of the Netherlands, 2018.

ministers. Furthermore, the King co-signs all laws and ratifies international treaties. He welcomes heads of State and also delivers the Speech on Princes' Day wherein he narrates the government's policy for the year ahead. The Dutch King has a military background and Dutch service members must swear allegiance to him. Furthermore, he fulfills important military ceremonial roles.

Legal Bases for Lethal Targeting

Irrespective of the leader's official title, there are only two legal bases under the law of armed conflict for targeting national leadership: their possible combatant status or otherwise their involvement in the hostilities, specifically, if they "take a direct part in hostilities."

Combatant Status

The status of a combatant is defined in Article 43(2) of the 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts (AP I), as well as in customary international law as follows:

> Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.[104]

Combatants are authorized to participate and fight during an armed conflict. They are obliged to distinguish themselves from the civilian population while engaged in an attack or in a military operation preparatory to an attack.[105] Combatants are military targets, irrespective of their location or activity. Furthermore, the combatant privilege prohibits prosecution for mere participation in the conflict.

Combatant status may also apply to some other categories, such as the *levée en masse*, as Article 50 of AP I and 1949 Third Geneva Convention Article 4 explain. [106] However, that article does not automatically qualify an enemy political leader as a combatant.

Direct Participation in Hostilities

If a leader does not have combatant status, then according to Article 50(1) of AP I, they are considered to be a civilian and protected against direct attacks.[107] However, a civilian, including such a leader, could lose their protection if they directly participate in hostilities.[108] The law of armed conflict does not define the concept of "direct participation in hostilities," but the International Committee of the Red Cross has offered three cumulative criteria that purport to refine the concept:

a. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);

104 AP I, *supra* note 9, art. 43(2).

105 *Id.* art. 44.

106 *Id.* art. 50; GC III, *supra* note 4, art. 4.

107 AP I, *supra* note 9, art. 50(1).

108 *Id.* art. 51.

b. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and

c. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[109]

A civilian leader is likely to be regarded as no longer protected against direct attack if their acts meet these three cumulative criteria.

Political *and* Military Leader?

A head of State who is also the military Chief of Staff can be defined as a combatant by virtue of membership in the armed forces and is therefore a lawful military target in an IAC. For example, Saddam Hussein was armed, wore a uniform, determined when his forces would be deployed, and determined Iraq's military strategy during the Gulf Wars. A similar position was held by former Cuban leader Fidel Castro. In addition to being the head of State, both were also combatants by their status.

A head of State who is also the Commander-in-Chief is not, however, a combatant by status. Yet that leader may still be targetable due to their conduct. For instance, if a Commander-In-Chief is *directly* involved in military decision-making, he is a lawful target in an IAC. The non-governmental organization Human Rights Watch shares this view, observing that "political leaders would not be legitimate targets of attack unless their office or direct participation in military hostilities renders them effectively combatants…. Thus, political leaders who are effectively commanders of a state's forces would be legitimate targets."[110] An example of direct involvement in military decision-making by a head of State and Commander-in-Chief includes the 1950-1953 Korean War. President Harry S. Truman fired General Douglas MacArthur for ignoring orders, demonstrating his military, operational, and strategic influence on the conduct of the war. This act fulfills the three criteria of the "direct participation of hostilities" concept as a result of:

1. the fact it affected military operations since U.S. troops were no longer pushing North Korea's forces back past the 38th parallel;

2. the direct link between President Truman's act and the heavy casualties to Chinese and North Korean troops following General Ridgway's offensive

3. the fact that the harm followed by the act was specifically designed to support the U.S. and to the detriment of North Korea and China in the Korean War

Decisions like these render a head of State who is also a Commander-in-Chief targetable in an IAC.

A head of government like the Prime Minister of the Netherlands or the United Kingdom (UK) is not a combatant by status

109 *Direct Participation in Hostilities,* IHL Databases, https://casebook.icrc.org/a_to_z/glossary/direct-participation-hostilities.

110 Human Rights Watch, *September 11 Attacks: Crimes Against Humanity: The Aftermath: Legal Issues Arising from the War in Afghanistan and Related Anti-Terrorism Efforts,* https://www.hrw.org/legacy/campaigns/september11/ihlqna.htm.

and therefore may not be directly attacked during an IAC, as they do not take direct part in hostilities. An example of a prime minister who was directly involved in military decision-making, however, was British Prime Minister Margaret Thatcher, who gave the order to attack the Argentinian light cruiser *Belgrano* during the Falklands War.[111] This act fulfills the three criteria of the "direct participation of hostilities" concept because:

1. it reached the threshold of physical harm, as the attack on *Belgrano* cost the lives of 323 Argentinians;

2. the harm was a direct result of Thatcher's order to attack the *Belgrano*;

3. the harm followed by Thatcher's order was specifically designed to support the UK and to the detriment of Argentina in the Falklands War.

This decision made her a lawful target for Argentina during the Falklands War.

A head of State who is also a Military Ceremonial Commander is, despite their military appearance, not a combatant by status. They fulfill important military ceremonial roles, but their military responsibility stops there. For example, the Dutch King is not an active servicemember because he had to renounce his military status to be inaugurated. He does not make any military decisions; therefore, the King has no military powers. As such, he and ceremonial commanders like him are civilians and not lawful targets. They may not be directly attacked during an IAC, as they do not take direct part in hostilities.

President Zelensky

Are Russia's attacks on Zelensky lawful under the law of armed conflict? Zelensky is not a combatant by status, and his involvement in the conflict with Russia is not publicly defined. It does not appear that he is a member of the Ukrainian armed forces, ceremonial or otherwise. It does appear that Zelensky is highly involved in broad political decision-making about the war. But his role in military strategic decision-making is far less clear. The Ukrainian military leadership itself seems to make final operational and tactical level decisions. Because there are doubts about his military involvement, Article 50 (1) of AP I suggests that Zelensky must be considered by AP I parties, such as Russia, a civilian and thus may not be directly attacked.[112] It is worth noting, however, that the United States, perhaps joined by other non-AP I parties, does not regard the AP I, Article 50(1) presumption of civilian status as reflective of customary international law.[113]

Conclusion

As disturbing as attacks on political leaders may sound, targeting a head of State in an IAC is not *per se* unlawful. Legality depends on the very specific military position and the direct military influence a head of State has over their armed forces.

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111 *Falklands: Decision to Sink the* Belgrano, extract from Margaret Thatcher The Downing Street Years (1993), Margaret Thatcher Foundation, https://www.margaretthatcher.org/document/109118.

112 AP I, *supra* note 9, art. 50(1).

113 DoD Law of War Manual, *supra* note 10, § 5.4.2.1.

In sum, a political leader who also acts as the military chief of staff is a leader who is a combatant by status. Other leaders are first and foremost civilians and may only be directly attacked in an IAC if they directly participate in hostilities. Historically, the leader who is also the commander in chief tends to be more involved in military decision-making than a prime minister. A ceremonial leader might appear like an active servicemember, but practice shows that modern ceremonial leaders are not combatants and they do not participate in hostilities.

Zelensky's military position is undefined, and therefore, he seems to be protected by Article 50(1) of AP I. This makes any direct attempts on his life not lawful under the law of armed conflict. Two questions remain: first, whether unlawfulness would actually cause Russia to refrain from further attacks on Zelensky; second, to what extent will prior attempts be enforced or prosecuted as war crimes.

LEGAL STATUS OF UKRAINE'S RESISTANCE FORCES

by Ronald Alcala and Steve Szymanski | Feb 28, 2022

In the lead up to Russia's invasion, Ukraine prepared to defend its territory by, among other things, training its citizens to serve as a "resistance in waiting."[114] The extent to which these resistance forces have engaged Russian invaders to date remains unclear. What is clear is that Ukrainians are determined to mount a tenacious defense.

On 26 February, Ukrainian President Volodymyr Zelensky invited "[a]ll friends of Ukraine who want to join the defense" to help.[115] "We will give you weapons," he said. In recent days, Ukrainian authorities have distributed nearly 18,000 rifles to volunteers in Kyiv.[116] Ukraine's Ministry of Defense has even urged residents of Kyiv to "prepare Molotov cocktails" to deter the advance of Russian forces in the city.[117]

Reports have described Ukraine's resistance forces as comprised of civilian volunteers.[118] This characterization raises important legal questions. What treatment obligations do Russian forces owe to Ukraine's resistance forces under the law of armed conflict? Can Ukrainian resistance forces be lawfully targeted by the Russian military? What status should resistance members be afforded upon capture? This post addresses some general issues related to the legal status of Ukraine's resistance forces. Other posts in this symposium[119] will address many of these questions more specifically.

Detention

Both Russia and Ukraine are parties to the 1949 Geneva Conventions and the 1977 Additional Protocols. Accordingly, they are bound by those instruments, as well as the customary international law of armed conflict. The Third Geneva Convention (GC III) and Additional Protocol I (API) are particularly relevant to the issue of detention given the international character of the conflict.

As a general matter, three broad groups of defenders are likely to be engaged in Ukraine's defense: (1) members of Ukraine's armed forces, (2) members of Ukraine's resistance forces, who are the main subject of this post, and (3) civilian participants in a *levée en masse*. Given recent media reports and striking scenes of ordinary citizens waiting in line to receive rifles, we first examine the possibility that these

114 Andrew E. Kramer, *Training Civilians, Ukraine Nurtures a Resistance in Waiting,* N.Y. Times (Dec. 26, 2021), https://www.nytimes.com/2021/12/26/world/europe/ukraine-russia-civilian-training.html [hereinafter Kramer].

115 Marc Santora, *Ukraine Says It Has Slowed Russia's Advance with the Help of Volunteers,* N.Y. Times (Feb. 27, 2022, 3:43 AM), https://www.nytimes.com/live/2022/02/26/world/ukraine-russia-war#ukraine-says-it-has-slowed-russias-advance-with-the-help-of-volunteers.

116 James Marson & Drew Hinshaw, *Ordinary Ukrainians Rally to Defend Homeland from Russia,* Wall St. J. (Feb. 26, 2022, 1:34 PM ET), https://www.wsj.com/articles/ordinary-ukrainians-rally-to-defend-homeland-from-russia-11645900464.

117 Міністерство оборони України [Ministry of Defense of Ukraine], Facebook (Feb. 25, 2022, 7:49 AM), https://m.facebook.com/100069073844828/posts/263915625920897/ (last visited Feb. 5, 2024).

118 Andrew E. Kramer, *'Everybody in Our Country Needs to Defend,'* N.Y. Times (Feb. 26, 2022), https://www.nytimes.com/2022/02/26/world/europe/ukraine-russia-civilian-military.html (last visited Feb. 5, 2024).

119 Sean Watts, Winston Williams & Ronald Alcala, *Symposium Intro: Ukraine-Russia Armed Conflict*, Articles of War (Feb. 28, 2022), https://lieber.westpoint.edu/symposium-intro-ukraine-russia-armed-conflict.

volunteers constitute a *levée en masse*, or mass uprising, entitled to specific protections under the law of armed conflict.

Levée en Masse

Under Article 4(A)(6) of GC III, "[i]nhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading force" are entitled to be treated as prisoners of war upon capture. The law of armed conflict has long acknowledged the potential for this phenomenon and afforded participants in them prisoner of war status upon capture, provided certain criteria are met.[120] In general, a *levée en masse* must be spontaneous; it must occur in non-occupied territory; it must involve the inhabitants of the territory; and participants must carry arms openly and follow the law of war.

The possibility that the conditions for a *levée en masse* could be satisfied in Ukraine will be fact-dependent. We only briefly discuss the potential *levée en masse* in Ukraine here, as it will be the subject of a more detailed *Articles of War* post in the following days.

First, to constitute a *levée en masse*, the uprising must occur within a limited temporal window—that is, the period of the actual invasion.[121] A *levée en masse* is intended to be a stopgap measure made necessary to forestall an impending occupation. Accordingly, common requirements of lawful combatancy—such as wear of a distinctive sign or organization under a responsible command—can be forgone. On the other hand, participants in a *levée en masse* must carry arms openly and respect the laws and customs of war. Still, the *levée en masse* is a generally disfavored category under the law of armed conflict because its participants need not exhibit all the usual characteristics of other lawful combatants.

A *levée en masse* must also be spontaneous. The ICRC's 2020 *Commentary on the Third Geneva Convention* asserts that "spontaneity does not mean that the invasion or advance of the enemy has to be a surprise."[122] However, participants in the *levée en masse* must not have had time to form themselves into regular armed units. Reports suggesting that many of Ukraine's newly armed inhabitants "are fighting under the loose command of the military in an organization called the Territorial Defense Forces" call into question the spontaneity of at least some of these efforts.[123] Still, spontaneity must be judged on the facts of each case. Note also that non-inhabitants who travel to Ukraine to resist Russian forces are not eligible to form part of a *levée en masse*, as they are not inhabitants.

Even if not recognized as participants in a *levée en masse*, many of Ukraine's recently armed inhabitants nevertheless could be entitled to prisoner of war protection as members of Ukraine's armed forces or as members of other militias or volunteer corps belonging to Ukraine. These possibilities are examined in turn below.

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120 Lieber Code, Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) art. 51 [hereinafter Lieber Code].

121 1960 GC III Commentary, *supra* note 50, at 68.

122 2020 GC III Commentary, *supra* note 19, para. 1066.

123 Kramer, *supra* note 114.

Armed Forces

Under Article 4(A)(1) of GC III, combatants, first and foremost, are entitled to prisoner of war status upon capture. Combatants include members of a State's armed forces, "as well as members of militias or volunteer corps forming part of such armed forces." In Yoram Dinstein's formulation, combatants include "members of the armed forces of a Belligerent Party—whether these forces are regular or irregular, and irrespective of belonging to the standing army or to reserve units—including para-military militias incorporated *de facto* in the armed forces."[124]

Whether mere membership in the armed forces is sufficient to establish entitlement to prisoner of war status is the subject of some debate. Some sources insist that other conditions, particularly the four requirements enumerated in Article 1 of the 1907 Hague Regulations and rearticulated in Article 4(A)(2) of GC III, must also be met before members of a State's armed forces and incorporated groups may be afforded prisoner of war status.[125] The four requirements are that the group:

a. is commanded by a person responsible for subordinates;
b. has a fixed distinctive sign recognizable at a distance
c. carries arms openly; and
d. conducts its operations in accordance with the laws and customs of war.

Others, including Sean Watts, suggest membership alone in a State's armed forces, or a militia or volunteer corps formally incorporated into the State's armed forces, is sufficient to qualify an individual for prisoner of war status under Article 4(A)(1).[126] For various reasons, including those expressed by Professor Watts, this appears to be the more reasonable approach.

Accordingly, members of Ukraine's armed forces and incorporated groups—with the notable exception of medical and religious personnel—qualify as combatants entitled to prisoner of status.[127] The status of the remainder of Ukraine's resistance forces will hinge on the four factors enumerated in Article 4(A)(2) of GC III and as subsequently modified by Article 44(3) of AP I.

Other Resistance Forces

If an individual engaged in the armed defense of Ukraine has not been assimilated into Ukraine's armed forces through membership in its organized armed forces or in a militia or volunteer corps incorporated into the armed forces, the individual may still gain prisoner of war status under the conditions outlined in Article 4(A)(2) of GC III. As noted above, members of these "other militias" and "other volunteer corps," including those belonging to "organized resistance movements," must meet the requirements of responsible command authority, use of a fixed distinctive sign, carrying arms openly, and compliance with the laws and customs

124 Yoram Dinstein, The Conduct of Hostilities Under the Law of Int'l Armed Conflict, 41 (3rd ed. 2016) [hereinafter Dinstein].

125 Hague IV, *supra* note 9, art. 1.

126 Watts, *supra note* 42.

127 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 970 [hereinafter GC I].

of war. Importantly, these groups must also belong to the State. Members of non-State armed groups are not entitled to combatant status in this context, nor may they qualify as prisoners of war under Article 4(A)(2).

Article 44(3) of API is also applicable to the conflict given both Russia's and Ukraine's ratification of API. Article 44(3) modified the fixed distinctive sign and carrying arms openly requirements of GCIII in recognition that "there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself." Under API, therefore, members of an organized resistance movement retain their status as combatants when they carry arms openly "during each military engagement" and "during such time as [they are] visible to the adversary while [they are] engaged in a military deployment preceding the launching of an attack."

In light of these requirements, would individuals forming part of Ukraine's resistance forces be entitled to prisoner of war protection as members of an organized resistance movement? Press reports indicate an astonishing array of Ukrainians have taken up arms to defend their country. One article in the *New York Times* described "[v]ans and cars with armed men without uniforms" traveling the streets, and checkpoints directed by "men and women in civilian clothes, carrying rifles."[128] These "newly armed civilians and members of various paramilitary groups" are apparently fighting "under the loose command of the military" as part of Ukraine's Territorial Defense Forces. Moreover, while many have been operating without uniforms, members of the Territorial Defense Forces conspicuously wear yellow arm bands identifying themselves as members of the group.

If the Territorial Defense Forces cannot be considered incorporated into Ukraine's armed forces, determining the status of these defenders if captured will depend on the criteria outlined in Article 4(A)(2) of GC III and Article 44(3) of API. The command structure of these groups and their current use of a yellow arm band to signify their affiliation will be relevant to determining their status.

Targeting

Determining whether—and when—members of Ukraine's resistance forces can be lawfully targeted will depend on much the same analysis as outlined above for the detention context. If resistance members constitute a *levée in masse*, part of Ukraine's armed forces, or resistance groups that belong to Ukraine, they can be lawfully targeted based on their status as combatants. If, on the other hand, they are considered civilians, they may only be made the object of attack if and while they take a direct part in hostilities.

Combatant Status

Under the law of armed conflict, combatants can be targeted at any time, provided they are not *hors de combat*. Gary Solis asserts, "Combatants may be targeted wherever found, armed or unarmed, awake or asleep, on a front line or a mile or a hundred miles

128 Kramer, *supra* note118.

behind the lines."[129] Under AP I, Article 41(2), a person is *hors de combat* when the individual expresses an intention to surrender or when rendered unconscious or otherwise incapacitated by wounds or sickness. Members of Ukraine's resistance forces who qualify as combatants, therefore, may be targeted consistent with these rules.

Direct Participation in Hostilities

Article 51 of AP I provides that civilians enjoy general protection against dangers arising from military operations. In particular, civilians may not be made the object of attack. Article 51(3), however, stipulates that civilians are only afforded these protections "unless and for such time as they take a direct part in hostilities." In other words, civilians who directly participate in hostilities can be lawfully targeted while they do so.

The ICRC's 1987 *Commentary on the Additional Protocols* has interpreted "direct" participation to mean "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[130] The *Commentary* further maintains that "[i]t is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection under [Section 1 of AP I] …, and he may no longer be attacked."[131]

The U.S. Department of Defense *Law of War Manual*[132] outlines some considerations that may be relevant to determining whether an act by a civilian constitutes taking a direct part in hostilities (see para. 5.8.3). It also provides examples of acts that may (see para. 5.8.3.1) and may not (see para. 5.8.3.2) be considered taking a direct part in hostilities.

Examples in the *Manual* of taking a direct part in hostilities include:

- Taking up or bearing arms against the opposing party, or otherwise personally trying to kill, injure, or capture personnel or damage material belonging to the opposing party;
- Preparing for combat and returning from combat;
- Planning, authorizing, or implementing combat operations against the opposing party, even if the person does not personally use weapons or otherwise employ destructive force in connection with the operation;
- Providing or relaying information of immediate use in combat operations;
- Supplying weapons and ammunition, whether to conventional armed forces or non-State armed groups, or assembling weapons (such as improvised explosive devices) in close geographic or temporal proximity to their use.

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129 Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 Int'l L. Stud. 1 (2007).

130 AP I Commentary, *supra* note 15, art. 51.

131 Alcala & Szymanski, *supra* note 2. Note that the United States, which is not a party to AP I, does not fully subscribe to this interpretation. The U.S. Department of Defense *Law of War Manual* states, "The law of war, as applied by the United States, gives no 'revolving door' protection; that is, the off-and-on protection in a case where a civilian repeatedly forfeits and regains his or her protection from being made the object of attack depending on whether or not the person is taking a direct part in hostilities at that exact time." DoD Law of War Manual *supra* note 10, para. 5.8.4.2.

132 DoD Law of War Manual, *supra* note 10.

Examples in the *Manual* of acts not considered taking a direct part in hostilities include:

- Mere sympathy or moral support for a party's cause
- General contributions made by citizens to their State's war effort (*e.g.*, buying war bonds or paying taxes to the government that will ultimately be used to fund the armed forces);
- Police services (*e.g.*, police officers who maintain public order against common criminals during armed conflict);
- Independent journalism or public advocacy (*e.g.*, opinion journalists who write columns supporting or criticizing a State's war effort);
- Working in a munitions factory or other factory that is not in geographic or temporal proximity to military operations but that is supplying weapons, materiel, and other goods useful to the armed forces of a State;
- Providing medical care or impartial humanitarian assistance.

Yoram Dinstein summarizes the difference between civilians who directly participate in hostilities and combatants by observing that these particular civilians "are not entitled to act the way they do."[133] "But," Dinstein continues, "they do not differ from combatants in that they become lawful targets for attack"[134] As scenarios arise, determining whether individuals have engaged in activity making them liable to attack must be carefully evaluated.

Organized Armed Groups

Lastly, it should be noted that the concept of organized armed groups, groups not qualifying as combatants that may nonetheless be targeted on the basis of their status, may be limited to situations of non-international armed conflict and, therefore, may not be of immediate relevance in the current Russia-Ukraine context. The U.S. *Law of War Manual* appears to leave room in international armed conflict to target members of organized armed groups not qualifying as combatants—so-called "unprivileged belligerents"—on the basis of status.[135] As AP I States parties, however, Ukraine and Russia may not be able to adopt the U.S. view. Article 50(1) of AP I appears to offer only the statuses of combatant and civilian. The question concerning organized armed groups, however, is unsettled, and the extent of agreement may rest in large part on how the conflict is characterized.

If the conflict is conceived as a single international armed conflict in which organized armed groups take part, their legal status for purposes of targeting is unclear. If the conflict were instead parsed into an armed conflict for purposes of hostilities between Ukrainian and Russian armed forces and a non-international armed conflict for purposes of hostilities between Russian armed forces and armed groups not affiliated with the State of Ukraine, the organized armed

133 Dinstein, *supra* note 124, para. 42.

134 *Id.*

135 DoD Law of War Manual, *supra note 10,* paras. 4.3.4; 5.7.3 *et seq.*

group classification would more clearly be available. In any event, the conflict may provoke clarifications on this question.

Conclusion

Uncertainty surrounds the future of Ukraine, and the fallout of this week's events will be enormous and lasting, whatever the outcome. The international legal community should diligently monitor and analyze the legal status of those defending Ukraine every step of the way. Whether characterized as participants in a *levée en masse*, members of the armed forces, or individuals forming part of other militia or volunteer corps of the State, those defending Ukraine must be properly respected throughout the conflict and afforded all the protections provided by the law of armed conflict.

THE FOG OF WAR, CIVILIAN RESISTANCE, AND THE SOFT UNDERBELLY OF UNPRIVILEGED BELLIGERENCY

by Gary Corn | Mar 10, 2022

All across Ukraine, ordinary citizens have been cornered into making a truly draconian, but necessary choice: whether or not to take up arms and actively participate in defending Ukraine from Russia's invasion—a mass escalation of the illegal war which started in 2014.[136] People all over the country are heeding calls from the government and fellow citizens to defend their homeland, placing themselves at mortal risk to repel the Russian forces however they can.

From makeshift infantryman[137] to digital warriors,[138] resistance groups seem to be forming both organically and integrating into existing defense structures like the Territorial Defense Forces (TDF)[139]—an organized, civilian volunteer corps that apparently forms part of the Ukrainian armed forces. In an extremely fluid and fast-evolving environment, assessing the status of these various resistance fighters under the law of armed conflict (LOAC) presents a near Sisyphean task with profound consequences.

Unfortunately, those assessments fall in the first instance to the Russian forces engaging with Ukrainians and there is little reason to believe they will approach them with a modicum of fealty to LOAC and its humanitarian ethos. Nevertheless, as this post explores, whether and how civilians join the hostilities bears directly on the protections they should be accorded under LOAC.

Combatant and Civilian Status under the Law of Armed Conflict

In an earlier contribution to this symposium, Ronald Alcala and Steve Szymanski laid out nicely a map of possible LOAC statuses that might apply to Ukraine's so-called resistance forces.[140] In short, they identify three general categories into which those actively participating in the ongoing hostilities may fall: 1) Ukrainian armed forces; 2) resistance forces; and 3) civilian participants in a *levée en masse*. These categories roughly correspond to three different qualifications for combatant, which they further unpacked with greater detail, including some of the related implications for detention and targeting of those individuals.

Geoffrey Corn added to this discussion, addressing the status of these resistance forces in areas of Ukraine that fall under Russian occupation.[141] As he noted, in addition

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136 Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, Articles of War (Feb. 28, 2022), https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense.

137 Adam Taylor, *As Russians Advance on Kyiv, Ordinary Civilians Heed Calls to Fight for Ukraine However They Can*, Wash. Post (Feb. 25, 2022, 2:07 PM), https://www.washingtonpost.com/world/2022/02/25/ukraine-civilians-weapons-molotov [hereafter Taylor].

138 James Pearson, *Ukraine Launches 'IT Army,' Takes Aim at Russian Cyberspace*, Reuters (Feb. 26, 2022, 5:16 PM), https://www.reuters.com/world/europe/ukraine-launches-it-army-takes-aim-russian-cyberspace-2022-02-26.

139 Kramer, *supra* note 114.

140 Alcala & Szymanski, *supra* note 2.

141 Geoff Corn, *supra* note 2.

to targeting and detention implications, accurate status determinations will (or at least should) bear on each individual's entitlement to combatant immunity. Lawful combatants are shielded from prosecution for their participation in the hostilities, including acts of violence committed in accordance with LOAC.

The architecture of LOAC and its protective regimes are built on a schema of distinct categories of persons, dividing them neatly—at least in theory—into civilians, combatants, and non-combatants. Since at least the Treaty of Westphalia and the consolidation of the legal monopoly of violence in the sovereign, the law has recognized that with very limited exception, only members of a State's armed forces, that is, "those by whose agency the sovereign makes war,"[142] are imbued with the "privilege" to participate in hostilities. In return, only combatants benefit from the attendant immunity from criminal sanction for doing so. Civilians, on the other hand, lack this "privilege" to participate directly in hostilities, and their life should thus be respected and protected.

To give maximal effect to its protective regimes, especially the cardinal principle[143] of distinction (ICJ Nuclear Weapons Advisory Opinion, para. 78), LOAC seeks to draw a bright line between civilians and belligerents, with its greatest emphasis on protecting the former from the harmful effects of war. Civilians benefit from the most extensive array of LOAC protections, such as prohibitions on making them the object of attack, shielding them from maltreatment, and setting substantive and procedural limitations on internment or other restrictions on their liberty. Depending on the circumstances, they receive the full panoply of protections contained in the Fourth Geneva Convention[144] (GC IV).

Notwithstanding the central importance of civilian protection to LOAC, no treaty defined the term until its inclusion in the 1977 Additional Protocol (AP I) to the 1949 Geneva Conventions—an instrument to which both Ukraine and Russia are parties.[145] Article 50 provides a negative definition of civilian—that a civilian is any person not falling within the categories of persons "referred to in Article 4(A)(1), (2), (3) and (6)" of the Third Geneva Convention (GC III) (a subset of those entitled to prisoner of war (POW) status) and in Article 43 of AP I (defining armed forces "*of a Party* to the conflict")(emphasis added).

In other words, combatants are essentially members of organized armed groups (OAG)—armed forces, militias, volunteer corps, and resistance movements—sanctioned by and operating as agents of a State Party to a conflict, whereas civilians are anyone other than combatants (and possibly unprivileged belligerents). Article 50 also provides that in case of doubt as to whether someone is a civilian, that person shall be considered to be a civilian. Although the United States does not consider this presumption to be a part

142 Emmerich de Vattel, The Law of Nations, bk. III, ch. II, § 6 (Joseph Chitty ed., 1834) (Gaunt reprint 2001) (1758).

143 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 226 (8 July).

144 GC IV, *supra* note 95.

145 AP I, *supra* note 9.

of customary international law, Russia and Ukraine are bound by the treaty provision.

But are these categories as distinct and seamless as they appear at first blush, and do they sufficiently reflect the realities of modern warfare? Or do the amorphous and rapidly changing circumstances on the ground in Ukraine expose gaps and seams in the LOAC status framework? Ukrainian civilians are taking up arms to defend their homeland in ways and numbers we have not seen since at least the Second World War. Unsurprisingly, they are doing so in myriad ways—actions such as physically blocking vehicles and convoys,[146] building barricades,[147] preparing Molotov cocktails,[148] and engaging in direct combat, as well as reportedly conducting cyber operations. Add to this fog the involvement of external actors, such as Microsoft,[149] Anonymous,[150] and other hacktivists, and the lines quickly get blurry.

With mounting evidence of Russian war crimes, and its penchant for seeking to paper over its violations with LOAC-couched propaganda, it's highly likely that Russia will seek to exploit these gaps and seams to its advantage and to the detriment of those resisting them.

Transforming from Civilians to Belligerents

In recognition of the realities of warfare, the broad protections afforded civilians are not absolute. They are conditioned on civilians refraining from participating directly in the hostilities. When civilians breach this condition, it fundamentally changes the protective regimes they benefit from. Exactly how and to what degree will depend on what actions they take, and whether they take such actions with the sanction of a Party to the conflict.

Civilians Directly Participating in Hostilities

As set out in Article 51 of AP I, it is prohibited to make civilians—individually or collectively—the object of attack, "unless and for such time as they take a direct part in hostilities." That is, civilians directly participating in hostilities (DPH) may be targeted, and under prevailing views, need not be accounted for in a proportionality analysis or when applying AP I, Article 57 precautionary rules. If captured, subject to certain minimal treatment standards and due process set out in Article 75 of AP I, and where applicable, Article 78 of the Fourth Geneva Convention, directly participating civilians can be detained and prosecuted for their actions.

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146 Lauren Lewis & Will Stewart, *Taking on Tanks with their BARE HANDS! Gutsy Ukrainians Scream 'Invaders, Killers' While Blocking Army Convoy—as a Russian Soldier Fires Warning Shots—While Another Group Fearlessly Leaps on Military Vehicle*, Daily Mail (Mar. 1, 2022, 11:16, updated 11:33), https://www.dailymail.co.uk/news/article-10565103/Taking-tanks-bare-hands-Ukrainians-scream-invaders-killers-blocking-army-convoy.html.

147 Kim Bubello & Chad De Guzman, *'We Are Fighting for Survival.' The Ukrainian Citizens Volunteering to Defend Their Country from Russian Troops*, Time (Mar. 3, 2022, 4:57 AM, updated 8:09 PM), https://time.com/6154068/ukrainian-citizens-fight-russian-troops.

148 Sean Watts, *Are Molotov Cocktails Lawful Weapons?* Articles of War (Mar. 2, 2022), https://lieber.westpoint.edu/are-molotov-cocktails-lawful-weapons [hereinafter Watts, *Molotov Cocktails*].

149 David E. Sanger, Julian E. Barnes & Kate Conger, *As Tanks Rolled into Ukraine, So Did Malware. Then Microsoft Entered the War*, N.Y. Times (Feb. 28, 2022), https://www.nytimes.com/2022/02/28/us/politics/ukraine-russia-microsoft.html.

150 Dan Milmo, *Anonymous: The hacker collective that has declared cyberwar on Russia*, The Guardian (Feb. 27, 2022, 13:51 EST), https://www.theguardian.com/world/2022/feb/27/anonymous-the-hacker-collective-that-has-declared-cyberwar-on-russia.

Notwithstanding these considerable implications, AP I is notoriously silent on both the substantive and temporal meaning of this exception. The exact contours of the DPH exception, both as to the specific meaning of "direct participation" and the temporal parameters of the rule, have been and remain the subject of intense debate. Despite the prominence it has played in the conflicts of the last twenty years, efforts to bring greater clarity to the rule, such as the *ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, have made limited headway.[151] For example, according to the U.S. Department of Defense *Law of War Manual*, "the United States has not accepted significant parts of the ICRC's interpretive guidance as accurately reflecting customary international law."[152]

The parameters of the debate are beyond the scope of this post. Some acts, such as attacking Russian forces with Molotov cocktails, present obvious DPH cases. Others, like building obstacles or blocking convoys are less clear. And as seen in the Commentary to Rule 97 of the *Tallinn Manual 2.0*, applying the rule to non-State cyber actors will prove even more complex.[153] Suffice to say that the challenges of applying this unique conduct-based targeting authority are only exacerbated in the present situation where civilians are under direct assault on a mass scale and forced to take exceptional measures to defend themselves and their nation. Of course, whether an individual is engaged in direct participation is only relevant if he or she does not qualify as a combatant or, as set out below, a non-State OAG.

Levée en Masse

The Ukrainian populace's mass resistance to Russia's invasion has resurrected a near-dormant aspect of LOAC—the concept of the *levée en masse*. Pursuant to Article 4(A)(6) of GC III, "[i]nhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading force" are considered combatants, can be targeted as such, and are entitled to POW status and combatant immunity if captured. As recognized in the 2020 *Commentary to GC III*, this is a unique category of combatant, "as it is the only group of persons recognized under Article 4A with full autonomy from the State."[154] That is, unlike all other categories of combatant, members of a *levée* do not act under State sanction or authority.

Also, in an obvious nod to the *in extremis* circumstances that would necessitate such armed resistance, *levée* combatants are subject to minimal qualifying conditions. They need only carry their arms openly and respect the laws and customs of war. The absence of the more stringent criteria found in Article 4A(2) of GC III—that of having a fixed distinctive sign and being commanded by a person responsible for subordinates—raises clear risks to the principle of distinction and command accountability.

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151 International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (2009).

152 DoD Law of War Manual, *supra* note 10, § 5.8.1.2.

153 Tallinn Manual 2.0 on International Law Applicable to Cyber Operations rule 97 (Michael N. Schmitt ed. 2017) [hereinafter Tallinn Manual 2.0].

154 2020 GC III Commentary, *supra* note 19, para. 1062.

Owing to these risks, as Alcala and Szymanski note, it is generally considered a disfavored category, and some have argued, at least prior to current events, that in the age of modern warfare it is obsolete.[155] Perhaps presciently, the 2020 *Commentary* pushes back on those suggestions, noting that "practice has suggested that even in circumstances where the invading force employs advanced military technology, the approach of an invading army could still prompt civilians to take up arms against it."[156]). Still, because of its unique, autonomous nature, the conditions allowing for a true *levée* are limited, and can rapidly dissipate as the circumstances change, some of which are beyond the participants' control.

As a factual matter, the element of spontaneity presents a challenge in the present circumstances. By any objective measure, Russia and Ukraine have been engaged in an ongoing armed conflict since 2014. Ukrainians have been organizing themselves to varying degrees to deal with that reality for some time, and Vladimir Putin began signaling his intentions with demands, threats, and a substantial troop buildup at least as far back as December 2021.[157] From the outset, President Zelensky has called on Ukrainian citizens to fight, and the government has distributed thousands of weapons.[158]

Further, as Geoffrey Corn detailed, once Russian forces enter a state of occupation (even partial occupation), resistance forces in occupied territories can no longer lay claim to *levée* status.[159] In either case, their entitlement to combatant status and immunity will then depend on whether they belong to groups sufficiently formed, organized, and sanctioned by the State to qualify under Article 4A(2) of GC III and Article 43 of AP I, as will be further discussed below.

Regardless, if some in the resistance "did not have sufficient time to organize themselves in advance [of the current invasion] in conformity with the conditions of Article 4A(2)," it's apparent that many have been hastily doing so to varying degrees and likely with mixed adherence to the Article 4A(2) criteria.[160] So, assuming these individuals qualified as *levée* combatants at some point, once they begin forming into OAGs, what is the impact on their combatant status? If they fail to fully meet the 4A(2) criteria, do they revert back to civilians, possibly engaging in DPH, or do they transition into the controversial status of unprivileged belligerents?

Organized Armed Groups and the Netherworld of Unprivileged Belligerency

In 2002, the terms "unlawful combatant" and "unprivileged belligerent" entered the LOAC lexicon with vigor when President George W. Bush made a blanket determination to deny POW status to all captured Taliban personnel, notwithstanding the fact that GC III applied

155 Alcala & Szymanski, *supra* note 2.

156 2020 GC III Commentary, *supra note 19,* para. 1063.

157 Sophia Ankel, *Ukraine President Says He Will Provide Weapons to Any Citizen Who Wants to Defend the Country*, Business Insider (Feb. 24, 2022, 4:31 AM), https://www.businessinsider.com/ukraine-president-zelensky-will-provide-weapons-to-citizens-2022-2.

158 *Id.*

159 Geoff Corn, *supra* note 2.

160 2020 GC III Commentary, *supra note 19, para. 1066.*

to the initial phases of U.S. combat operations in Afghanistan. The U.S. position and practice since has been that non-state OAGs, even those operating in the context of an international armed conflict, are non-civilian belligerents that may be targeted based on their status as such, can be detained for the pendency of the conflict as a lawful incident of warfare, and subject to prosecution for their participation in the hostilities.[161] The position is not without legal fundament. Nevertheless, debates over the validity and implications of designating members of non-State OAGs as neither civilians nor "lawful" combatants have continued since.

Given the chaotic circumstances on the ground, it is unclear whether all of the resistance groups forming in Ukraine are aware, let alone capable, of adhering strictly to the four criteria set out in Article 4A(2)(a) through (d) of GC III to qualify as combatants. Recall that it was the Taliban's failure to meet these criteria that was cited as the basis for categorically denying them POW status in 2002.[162] As a State Party to AP I, Russia is bound by Article 44(3), which might provide some relief for otherwise non-compliant OAGs in that it eases the obligation of combatants to distinguish themselves where they cannot do so owing to the nature of the hostilities. However, the scope of Article 44(3) application is uncertain. It was and remains a controversial provision of AP I, one that substantially contributed to the U.S. decision not to ratify the treaty and caused several States (although not Russia) to file reservations that would limit its applicability.[163]

Additionally, to qualify for the "right" to engage in hostilities, an OAG must belong to a Party to the conflict, i.e., be operating under the sanction of, and as agents for, the government of Ukraine. For resistance forces that have not been officially incorporated into the Ukraine armed forces, such as the TDF, to qualify as combatants, they "must in fact fight on behalf of" Ukraine,[164] which itself "must accept both the fighting role of the group and the fact that the fighting is done on its behalf."[165]

While the bar is not particularly high—Ukraine's "acceptance" can be tacit and manifested in different ways—"[i]t is essential that there should be a 'de facto' relationship between the resistance organization" and the Ukrainian government.[166] President Zelensky has certainly called for and encouraged active resistance and is unlikely to disavow those responding to those calls. However, whether a *de facto* relationship exists for each OAG forming in the melee of the conflict is a factual matter—one that Russia could seek to exploit to its advantage.

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161 DoD Law of War Manual, *supra* note 10, § 5.8.2. It is by no means the author's intent to equate the Ukrainian resistance fighters with the Taliban, only to point out the precedent of a State denying an OAG combatant status based on failure to meet Article 4A(2) criteria.

162 Gary Corn, *The Fog of War, Civilian Resistance, and the Soft Underbelly of Unprivileged Belligerency*, Articles of War (Mar. 10, 2022), https://lieber.westpoint.edu/fog-of-war-civilian-resistance-unprivileged-belligerency/#_ftn2 [hereinafter Gary Corn].

163 Julie Gaudreau, *The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims,* 849 Int'l Rev. Red Cross 143 (2003).

164 GC III, *supra note 4, art. 4A(1).*

165 2020 GC III Commentary, *supra note 19, para. 1005).*

166 1960 GC III Commentary, *supra note 50, at 57.*

Pointing to the strict dichotomy between civilians and combatants adopted under Article 50 of AP I, Alcala and Szymanski note that as a State Party to AP I, Russia may not have the option of treating resistance fighters as unprivileged belligerents.[167] They must be considered either combatants or civilians subject to the consequences of directly participating in hostilities (with the complicating factor of the temporal limitations of the DPH rule as applied to those who frequently or continuously engage in resistance activities). However, as noted in the 2020 Commentary to GC III, the requirement that combatant OAGs belong to a Party reflects States' "continued interest in ensuring that the status of 'lawful combatants' was not extended to persons engaged in private wars," and it is unclear from the text of AP I, its drafting history, and the 1987 *Commentary* that States Parties intended to eliminate this historically recognized category of belligerents.[168]

Suffice to say that this is an open question, and given the designation of certain OAGs as unprivileged belligerents in recent conflicts, it is quite possible that Russia will apply the Article 4A(2) criteria stringently and treat those resistance forces not strictly meeting them as unprivileged belligerents if captured.

Why Does It Matter?

At first blush, it is a fair question whether any of this matters. As the DoD *Law of War Manual* notes, for purposes of targeting, whether resistance forces are considered civilians directly participating in hostilities or unprivileged members of an OAG, the consequence is essentially the same: "[both civilians directly participating in hostilities and] members of hostile, non-State armed groups may be made the object of attack unless they are placed *hors de combat*."[169] As U.S. experience over the last two decades has borne out, this may be true as a practical matter at the level of tactical combat engagements. But it is a misleading overstatement. Unlike members of a belligerent force, civilians are presumed inoffensive and shielded from attack, unless they engage in specific, identifiable conduct that *temporarily* strips them of that protection. This is a far-more constrained targeting authority than the quote above implies, and certainly in the context of deliberate targeting decisions, placing an individual on a strike list requires different, and periodically updated, validation of continued targetability.

Where resistance forces fall into the hands of Russian forces, the consequences of these status determinations can be significant. As noted several times, as POWs, captured combatants benefit from the full array of protections set out in GC III. And although they are entitled to only minimal due process for determining whether they in fact qualify as POWs in accordance with Article 5 of GC III, and may be held without trial for the pendency of the conflict, they benefit from the shield of combatant immunity.

In contrast, whether captured and held as civilians who directly participated in hostilities or as unprivileged belligerents, resistance

167 Alcala & Szymanski, *supra* note 2.

168 2020 GC III Commentary, *supra* note 19, para. 1002.

169 DoD Law of War Manual, *supra* note 10, § 5.8.2.1.

forces can be criminally tried and subjected to severe penal sanction. However, not only would designation as the latter would not only allow Russia to hold them without charge for the pendency of the conflict, it would also deprive them of the specific protections of both GC III and GC IV, including Article 78's internment standards and procedures. Russia would be bound only by the minimum humane treatment standards of Common Article 3 to the 1949 Geneva Conventions and the slightly more robust protections of Article 75 of AP I. If history is any guide, these are malleable guardrails that Russia will at best manipulate, and at worst ignore, to the detriment of captured Ukrainians.

Conclusion

The Ukrainian citizens taking up arms to repel Russia's aggression understand all too well the risks they are taking. That they may not fit neatly into one of the theoretically distinct categories outlined above is presently the last thing on their minds. But the consequences of the decisions Russia chooses with respect to its LOAC obligations are significant. As Ukrainians continue to organize and resist, they should take all feasible measures to comply with the requirements to qualify as lawful combatants and thereby deprive Russia of any arguments for treating them otherwise. And the world should pay close attention and hold Russia to account.

LEVÉE EN MASSE IN UKRAINE: APPLICATIONS, IMPLICATIONS, AND OPEN QUESTIONS

by David Wallace and Shane Reeves | Mar 11, 2022

On February 24, 2022, facing an existential threat, President Volodymyr Zelensky signed a decree ordering a general mobilization to defend Ukraine against a Russian invasion. Posted on the presidential website, the decree intended "to ensure the defence of the state," putting the entire country on a war footing.[170] The Ukrainian government also announced that men between 18 and 60 years old must remain in Ukraine to help with its defense.

Although it is far too early to adequately assess how effective the Ukrainian population will be against the militarily superior Russian forces, initial reports indicate Ukrainians are heeding the call to arms.[171] The commitment of the civilian population to fight against the Russians is inspiring. Denys Semyroh-Orlyk, a 46-year-old Ukrainian architect, stated, "[w]e will never surrender. We are using every opportunity to train. So, I think Putin should be afraid of us."[172] The Ukrainian government is calling upon civilians to find weapons and make Molotov cocktails to fight the Russian invaders.[173] Ukraine's former president, Petro Poroshenko, has been seen patrolling the streets of Kyiv brandishing an AK-47 assault rifle.[174]

The general mobilization of the civilian population in Ukraine to fight against Russian invaders implicates a law of armed conflict (LOAC) category of fighters seemingly from a bygone era, reflected in the French term, *levée en masse.* A *levée en masse* is a unique and limited battlefield categorization available only during an international armed conflict. Its chief legal significance is to give prisoner of war status and combatant immunity to fighters. *This post will explore the LOAC concept of levée en masse* in the context of the ongoing conflict in Ukraine. It will briefly discuss the characteristics, limitations, and several open questions about its use under LOAC.

Characteristics of a *Levée en Masse*

LOAC recognizes that a *levée en masse* occurs when inhabitants of a non-occupied territory spontaneously take up arms to resist an invading force without an opportunity to form into a regular armed unit. Reflecting patriotic zeal, a *levée en masse* institutionalizes total warfare in so far as otherwise protected civilians lawfully participate in combat during an early and brief period of an international armed conflict, i.e., before the occupation of

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170 David Ljunggren, ed. Chris Reese, *Ukrainian President Signs Decree on General Mobilisation of Population-Interfax*, Reuters (Feb. 24, 2022, 3:21 PM), https://www.reuters.com/world/europe/ukrainian-president-signs-decree-general-mobilisation-population-interfax-2022-02-24.

171 Taylor, *supra* note 137.

172 Jillian Kay Melchior, *Civilians Prepare to Defend Ukraine*, Wall St. J. (Jan. 30, 2022, 4:18 PM), https://www.wsj.com/articles/civilians-prepare-to-defend-ukraine-russia-attack-training-war-putin-kyiv-military-11643566341.

173 Watts, *supra* note 42.

174 Gerrard Kaonga, *Ex-Ukraine President Holds AK-47 as He Vows to Fight on Streets of Kyiv*, Newsweek (Feb. 25, 2022, 7:38 AM), https://www.newsweek.com/petro-poroshenko-ak47-ukraine-former-president-russia-vladimir-putin-1682639.

the invaded territory.[175] The notion of a *levée en masse* is deeply rooted in history. Its origins can be traced to the French Revolution, which marked a shift from dynastic wars deploying professional armies to conflicts involving the mass participation of citizens defending their homelands.[176] The Lieber Code, the Brussels Declaration, the Hague Regulations, and the Third Geneva Convention (GC III) all expressly encapsulate the special status given to *levée en masse* participants. In addition to these treaties, the Department of Defense *Law of War Manual* adopts this special status of combatants.[177]

Article 4A(6) of GC III explicitly entitles inhabitants participating in a *levée en masse*, upon capture, to prisoner of war status. Accordingly, qualification as a prisoner of war by participation in a *levée en masse* means an individual gains combatant status and, as such, is not considered either a civilian or unprivileged belligerent. Inhabitants participating in a *levée en masse* are authorized under the LOAC to kill or wound without penalty, provided the privilege is not abused by unlawful battlefield conduct. Similarly, such participants are subject to being targeted as combatants.

There are several limitations on this battlefield status. The first limitation is temporal. Namely, the status only exists for people who took up arms during the invasion phase of a conflict. As noted in the International Committee of the Red Cross (ICRC) 2020 Commentary to Geneva Convention III,

> [i]f the resistance continues after this window when the inhabitants have had time to organize into regular armed units, Article 4A(6) loses its relevance. The inhabitants must either be replaced by the regular armed forces of their State, formally integrate into them, or form groups which meet the conditions of Article 4A(2).[178]

Second, a *levée en masse* is a spontaneous, unorganized movement acting under emergency conditions. As such, prisoner of war qualification standards from GC III, Article 4(A)(2), and Hague Regulations, Article 1, are relaxed. Namely, participants are neither required to be commanded by a person responsible for their subordinates nor wear a fixed distinctive sign recognizable at a distance. This is understandable, considering the inhabitants of the invaded territory may not have sufficient time to organize into units and adopt distinctive signs. Thus, the requirement to carry arms openly takes on special significance and has more precise implications under LOAC. It is the only distinguishing characteristic between a protected civilian and a *levée en masse* combatant.

Putting a finer point on it, "[r]ecognizing both the realities of a *levée en masse* and the criticality of protecting civilians, the law of armed conflict places singular emphasis on the essential need for those choosing to

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175 David Wallace & Shane R. Reeves, *The Law of Armed Conflict's "Wicked" Problem:* Leveé en Masse *in Cyber Warfare,* 89 Int'l L. Stud. 646 (2013) hereinafter Wallace & Reeves].

176 Emily Crawford, *Leveé en Masse—A Nineteenth Century Concept in a Twenty-First Century World*, Sidney L. Sch. Legal Stud. Rsch. Paper No. 11/31 (2011).

177 DoD Law of War Manual, *supra* note 10.

178 2020 GC III Commentary, *supra* note 19.

participate in a spontaneous uprising to 'carry arms visibly.'"[179] Finally, as noted by Professor Yoram Dinstein, the trajectory of events after the *levée en masse* will proceed in one of three ways.[180] First, the invaded territory is occupied despite the *levée en masse*. Second, the invading army is defeated and repulsed. Finally, the situation stabilizes, and there is sufficient time to meet all four combatant qualification standards from GC III, Article 4(A)(2) and Hague Regulations, Article 1.

Application of *Levée en Masse* to the Ukraine-Russia International Armed Conflict

Some respected publicists have contended that the battlefield category of a *levée en masse* is no longer of any great practical importance in the LOAC.[181] Given the recent developments in Ukraine, those assessments are premature. While the existence of an international armed conflict between Ukraine and Russia may seem self-apparent, it is worth highlighting that conflicts of this magnitude are rare and contribute to the limited circumstances where civilians can be characterized as participants in a *levée en masse* on such a large scale.

Yet even in the context of an international armed conflict, the extent of the number of civilians taking up arms demonstrates the importance and relevance of this special status of combatants. Inhabitants of the unoccupied areas of Ukraine are spontaneously taking up arms to resist the invading Russian forces.[182] Carrying their arms openly, and clearly not part of the regular armed forces, these "ordinary people" are the foundation for a "ballooning popular resistance" to Russia's invasion. Accordingly, with the continuous movement of Russian troops into unoccupied territory, inhabitants who resist this invasion may still meet the criteria for *levée en masse* and receive the concomitant rights and obligations.[183]

Also, the ICRC *Commentaries to Geneva Convention III* indicate that invasion need not be a surprise. Consequently, the call to arms by President Zelensky does not in and of itself prevent the application of a *levée en masse.*[184] Thus, it is clearly too early in the conflict to discount the possibility of this unique and limited combatant status.

However, given the infrequency of a *levée en masse* and dearth of State practice, several critical unanswered questions remain. First, who can participate in a *levée en masse*? GC III, Article 4A(6), refers explicitly to "inhabitants of unoccupied territory." Regrettably, the 1960 and 2020 *Commentaries to Geneva Convention III* are not particularly helpful in determining who precisely is an "inhabitant."[185] Inhabitants are generally understood to be persons that occupy a place regularly or routinely. This raises a question about the status of foreigners participating in defense of Ukraine. Do these individuals qualify for participation in a *levée en masse*?

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179 Wallace & Reeves, *supra* note 175.

180 Dinstein, *supra* note 124.

181 Robert Kolb & Richard Hyde, An Introduction to the International Law of Armed Conflicts (2008).

182 Marson & Hinshaw, *supra* note 62.

183 *Id.*

184 2020 GC III Commentary, *supra* note 19.

185 *Id.*

A second unanswered question is what does "carrying arms openly" mean especially in the age of cyber? A cyber *levée en masse* participant will use their laptop or other cyber infrastructure to participate in hostilities during the invasion. In fact, there are a number of amateur (as well as professional) hackers currently conducting cyber hostilities against Russian government websites.[186] The experts who wrote the *Tallinn Manual 2.0 on International Law Applicable to Cyber Operations* recognized the possibility of a cyber *levée en masse* when drafting that seminal document.[187] However, use of such devices does not distinguish oneself as a fighter in any meaningful way.

When comparing the historical narrative of a *levée en masse*—large numbers of armed citizens spontaneously coalescing to repel invaders—to the cyber version—technically skilled citizens discreetly using their computers from an undisclosed location to attack invaders—with the stark differences highlight the flaws in trying to apply the traditional concept in the cyber domain.[188]

As demonstrated in Ukraine, cyber capabilities and personnel are increasingly vital participants in modern and future armed conflicts, making the issue of cyber *levée en masse* participation more than an academic exercise.

Third, what does "spontaneously" mean in the context of Article 4A(6)? The ICRC 2020 *Commentary to Geneva Convention III* provides some guidance but does not fully answer the question. In describing persons who are responding spontaneously to an approaching and invading enemy, the 2020 *Commentary* states, in part, "those who have not had time to form themselves into regular armed units and who have not been organized in advance by organs of the State, are covered."[189] Moreover, warning the population of the invasion does not change or alter the spontaneity of the response. Of course, left unanswered is how much time is necessary to form into regular armed units? That is, did the inhabitants of unoccupied territory have sufficient opportunity to organize themselves in a manner to meet the qualifications of GC III Article 4A(2)?

Implications for Future Armed Conflicts

Answering the above questions, along with many others (including those related to occupation as a triggering event for the end of a *levée en masse*), will have implications for understanding how this battlefield status will apply in future armed conflicts. But more importantly, considering a paradigmatic shift to a geopolitical environment where peer-to-peer and peer-to-near peer armed conflicts are more likely, the very existence of a wide-scale Ukrainian *levée en masse* will have an immense impact on the regulation of warfare going forward.

For example, the *levée en masse* in Ukraine appears to be relatively effective in stopping, slowing, or otherwise frustrating the Russian

186 Kate Conger & Adam Satariano, *Volunteer Hackers Converge on Ukraine Conflict with No One in Charge*, N.Y. Times (Mar. 4, 2022), https://www.nytimes.com/2022/03/04/technology/ukraine-russia-hackers.html.

187 Tallinn Manual 2.0, *supra note 153*.

188 Wallace & Reeves, *supra* note 175.

189 2020 GC III Commentary, *supra* note 19.

advance. Even though vastly outgunned, and with many civilians having no previous military experience, Ukraine's armed forces and the large number of civilian participants are mounting a spirited defense. [190] Yet what becomes apparent is that a *levée en mass*—despite its effectiveness—intuitively increases the risk to the civilian population.

The only way participants in a *levée en masse* distinguish themselves is by carrying their arms visibly. Unquestionably, LOAC places a particular emphasis on meeting this distinction requirement to qualify for lawful combatant/POW status under a *levée en masse*. And it is most assuredly in the self-interest of the participants to have this status, particularly upon capture. However, the dividing line between combatant and protected civilian is thin with respect to a *levée en masse*, especially in population centers like Kyiv, which are chaotic and ambiguous battlespaces. Logically, this will lead to more death and injuries to the civilian population. Having said the above, it is worth highlighting that Russia appears to be deliberately targeting civilians[191] and civilian objects in the conflict notwithstanding a *levée en masse*.

More broadly, the Ukrainian *levée en masse* indicates that this category of combatant could once again become widely used. The more effective and celebrated a *levée en masse* in Ukraine, the more likely this trend may become a reality. For most of the last decade, discussions of future warfare and battlefields were inextricably linked to references to cutting-edge technologies and weaponry such as cyber capabilities, autonomous weapons, hypersonic missiles, laser weapons systems, etc. It is truly remarkable that a method of warfare rooted in the late 18th Century could be resurrected for future conflicts. Of course, it is important to emphasize and appreciate that a *levée en masse* is a very limited status and only applies during the invasion period ending upon occupation. As such, its utility could be very limited depending on the circumstances.

Conclusion

Although the effectiveness of the Ukrainian *levée en masse* is unknown as of this writing, it is apparent that the use of this seemingly anachronistic combatant category indicates its ongoing legal relevance. Further, the general mobilization of the civilian population in Ukraine to fight against the Russian armed forces highlights the need for further exploring this often-overlooked LOAC category of combatant/POW. Unfortunately, this may become extremely important as the trend toward the total warfare originally envisioned by the *levée en masse* battlefield status characterization becomes a reality.

[190] Zhanna Bezpiatchuk, *Ukraine Conflict: Citizen Volunteers Take up Arms to Fight Russian Invasion*, BBC (Feb. 27, 2022), https://www.bbc.com/news/av/world-60546011; Kramer, *supra* note 118.

[191] Yaroslav Trofimov, *Russia Targets Ukrainian Civilian Areas in Shift to Demoralize Resistance*, Wall St. J. (Mar. 1, 2022, 10:20 PM), https://www.wsj.com/articles/russian-forces-target-ukrainian-civilian-areas-as-missile-hits-central-kharkiv-11646124675.

UKRAINE'S *LEVÉE EN MASSE* AND THE OBLIGATION TO ENSURE RESPECT FOR LOAC

by Jann K. Kleffner | Apr 14, 2022

In its quest to mount military resistance to the Russian invasion, Ukraine has looked beyond its regular armed forces to its citizens and others. The status of some fighting forces, and consequential issues of detention and targeting in accordance with the law of armed conflict, has garnered attention, including in several posts here on *Articles of War*.[192] This post addresses the obligation of Ukraine to ensure that these forces respect the law of armed conflict. In so doing, it focuses on Ukraine's *levée en masse*.

Internal Dimension of the Obligation to Ensure Respect

As Marten Zwanenburg reminds us, High Contracting Parties to the 1949 Geneva Conventions and the 1977 First Additional Protocol are under an obligation "to respect and to ensure respect" for the respective treaties "in all circumstances."[193] While the former obligation to respect is a reaffirmation of the general rule that States may not violate the Conventions and the First Protocol, the obligation to ensure respect has an internal dimension that requires them to cease and take proactive steps to prevent violations. Some advocate a more controversial external dimension that extends to States not party to an armed conflict to ensure respect by *other* States Parties to the Geneva Conventions (GCs) and the First Additional Protocol (AP I). However, it is the internal dimension of the obligation to ensure respect that is the focus of this post.

According to the International Committee of the Red Cross (ICRC) updated *Commentary*, the internal dimension of the obligation to ensure respect leaves some latitude to States in the choice of measures that are taken, except in cases where the GCs and AP I spell out specific obligations.[194] The obligation to ensure respect hence encapsulates a generic obligation, which manifests but does not exhaust itself in a number of specific obligations. The latter include the obligation to disseminate and instruct the armed forces and, if possible, also civilians; the obligation to suppress breaches, including the obligation to search for and either prosecute or extradite alleged perpetrators of grave breaches of the Conventions and the First Additional Protocol; the obligation to appoint legal advisors "when necessary"; and the obligation to "give orders and instructions to ensure observance of the Conventions and … Protocol [I], and [to] supervise their

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192 Petra Ditrichová & Veronika Bílková, *Status of Foreign Fighters in the Ukrainian Legion*, Articles of War (Mar. 15, 2022), https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion; Wallace & Shane Reeves, *supra* note 175; Gary Corn, *supra* note 162; Alcala & Szymanski, *supra* note 2.

193 Marten Zwanenburg, *Common Article 1 and the Conflict in Ukraine*, Articles of War (Mar. 10, 2022), https://lieber.westpoint.edu/common-article-1-conflict-ukraine.

194 International Committee of the Red Cross, Commentary on the First Geneva Convention para. 146 (Jean-Marie Henckaerts et al. eds. 2016) [hereinafter 2016 GC I Commentary].

execution."[195] Other relevant obligations are those pertaining to the appointment of Protecting Powers or their substitutes, and the enquiry procedure.

Importantly, several of the aforementioned specific obligations—and by implication also the more generic internal dimension of the obligation to ensure respect—apply in peacetime as well as during an armed conflict. As the ICRC's updated *Commentary* puts it: "Respecting the Conventions in case of an armed conflict regularly presupposes that preparations have been made in advance."[196] At least equally importantly, both the generic and some of the specific obligations reach beyond the armed forces—both regular and irregular—to include the whole of the population over which a State exercises authority. As regards the latter, the obligation to ensure respect is construed as a due diligence obligation to prevent and repress breaches of the Conventions and AP I, "whose content depends on the specific circumstances, in particular the foreseeability of the violations and the State's knowledge thereof, the gravity of the breach, the means reasonably available to the State and the degree of influence it exercises over the private persons."[197]

Ensuring Respect by Ukraine's *Levée en Masse*

Ukraine has implemented several of the aforementioned obligations. It has, among other adopted national legislation, military instructions and a law of armed conflict manual, and educational programs at military institutes and universities that are designed to give effect to *inter alia* the obligation to instruct the armed forces, to disseminate the law of armed conflict more broadly, to appoint legal advisors, and to suppress law of armed conflict violations. While it is beyond the purview of this post to examine the contours of these implementation measures in any detail, one of the pivotal issues that arises in the current context is whether and to what extent any of these measures are designed adequately to ensure respect by participants in the *levée en masse*.[198]

It is unclear whether citizens who have heeded the call to resist the invading Russian forces have been or are receiving any instructions on or training in the law of armed conflict. Indeed, the pace of the developments preceding the Russian invasion and the hastiness of mobilization suggest that little time and attention was left to do so. The very qualification of parts of the resistance forces constituting a *levée en masse* is indicative of the spontaneous nature of their actions and the lack of time for them to form themselves into regular armed units.

While respect for the law of armed conflict is one of the conditions for members of a *levée en masse* to attain prisoner of war status, it lies in the nature of a *levée en masse* that available measures to ensure such respect differ from those available to ensure the respect of regular armed forces. Mobilization efforts such as the one in Ukraine leave little time and

195 AP I, *supra* note 9, art. 80(2).

196 2016 GC I Commentary, *supra* note 194, para. 145.

197 *Id.* para. 150.

198 Global Rights Compliance, *The Domestic Implementation of International Humanitarian Law in Ukraine (updated)* (Feb. 2021).

opportunity to instruct and train members of the *levée en masse*. Instead, any knowledge of the law of armed conflict will likely stem from those broader dissemination efforts that are addressed to the whole population over which a State exercises authority. It is worthy of note in that regard that a 2021 report on national implementation measures of Ukraine posits that "no significant initiatives by the Government of Ukraine to educate the general public on IHL have taken place. However, serious efforts have been made for the dissemination and training on IHL by the Ukrainian Red Cross Society"[199] which appear to have focused on the provision of humanitarian assistance, the Fundamental Principles of the International Movement of the Red Cross and Red Crescent, and the dissemination of IHL principles for its volunteers, employees, and youth organizations.

It would therefore appear safe to assume that significant gaps in the knowledge about the law of armed conflict exist in the general public. Insufficient knowledge in turn increases the risk for violations. Can members of the *levée en masse* reasonably be expected to act in conformity with the ins and outs of legal restrictions on the use of Molotov cocktails if they have not been instructed or trained?[200] What is the prospect for them to refrain from using prohibited expanding bullets (commonly used as hunting ammunition) when firing their hunting rifles at Russian forces?[201] Are they aware of the prohibition of the use of poison?[202] Do they know the legal requirements for the treatment of persons *hors de combat*, including prisoners of war that they capture, and wounded and sick Russian service personnel that they encounter? While the list of questions is of course much longer, they are indicative of the challenges to the implementation of the obligation to ensure respect with the law of armed conflict in the case of a *levée en masse* and similar situations where parties to an armed conflict rely on the civilian population in their quest to mount resistance.

That is not to suggest that the obligation to ensure respect is devoid of any normative content in such circumstances. To the contrary: it lies in the broad and generic nature of that obligation as explained above that Ukraine is legally obliged to take those measures that can reasonably be expected of it in the current circumstances. Indeed, the degree of influence that it exerts over those who heed the call to resist the Russian forces seems to be such that it can—and therefore shall—be used to ensure respect for the law of armed conflict.

For one, the widespread use of social media by the Ukrainian authorities that proved instrumental in mobilizing and continues to be crucial in their communication with the population—can be used to spread knowledge about the law of armed conflict, officially confirm Ukraine's commitment to it, instruct members of the *levée*

199 *Id.*

200 Watts, *Molotov Cocktails*, *supra* note 148.

201 Brendan Cole, *Ukraine Bill Makes It Legal for Anyone to Kill Russian Soldiers*, Newsweek (Mar. 10, 2022, 7:52 AM), https://www.newsweek.com/russia-ukraine-decree-zelensky-shooting-soldiers-putin-1686696.

202 Chiara Giordano, *Two Russian Soldiers Killed and 28 Seriously Ill 'After Being Given Poisoned Food by Ukrainian Civilians,'* Independent (Apr. 3, 2022), https://www.independent.co.uk/news/world/europe/russian-soldiers-poisoned-civilians-izium-b2049955.html?src=rss.

en masse to act in compliance, and remind everyone of the consequences of breaches of it. Another measure to ensure respect would be to strive for a swift buildup or strengthening within the *levée en masse* of a command structure and disciplinary rules and mechanisms, both essential tools in ensuring compliance. Elements of that endeavour would appear to be envisaged in Ukraine's law "On the foundations of national resistance,"[203] which entered into force on January 1, 2022, but which Ukraine did not have the time to fully implement by the time of the start of the Russian invasion.[204, 205]

Conclusion

The endeavour to strengthen command structure and discipline should aim for a transformation of the *levée en masse* into regular armed units as soon as possible, in line with the transitionary character of a *levée en masse*. Furthermore, the aforementioned measures need to be accompanied by a strict observance of the obligation to suppress breaches of the law of armed conflict, whether committed by its regular armed forces, members of the *levée en masse*, or civilians. It is not only in the interest of Ukraine to do so in order to retain the moral high ground in the face of increasingly disturbing indications of a pattern of widespread and systematic violations of the law of armed conflict by Russian forces. It is also a matter of Ukraine upholding its international legal obligation to ensure respect.

[203] *Law on Foundations of National Resistance Enters into Force in Ukraine,* Freedom (Jan. 1, 2022), https://uatv.ua/en/law-on-foundations-of-national-resistance-enters-into-force-in-ukraine/.

[204] Stephan J. Flanagan & Marta Kepe, *What Kind of Resistance Can Ukraine Mount?* Defense News (Feb. 26, 2022), https://www.defensenews.com/opinion/commentary/2022/02/26/what-kind-of-resistance-can-ukraine-mount/.

[205] *Oleksiy Danilov Held an Interagency Meeting on the Implementation of the Law on National Resistance*, National Security and Defense Council of Ukraine (Dec. 30, 2021), https://www.rnbo.gov.ua/en/Diialnist/5205.html; 2020 GC III Commentary, *supra* note 19.

STATUS OF FOREIGN FIGHTERS IN THE UKRAINIAN LEGION

by Petra Ditrichová and Veronika Bílková | Mar 15, 2022

Among other new resistance groups, Ukraine has formed an International Legion for the Defense of Ukraine (UKR Legion).[206] There are reports that its members come from all over the world, including Canada,[207] Japan,[208] the United Kingdom,[209] the United States,[210] and the European Union.[211] Some of the volunteers are former military personnel; others have no previous combat experience. At the time of publication of this post, the General Staff of the Armed Forces of Ukraine has reported that 20,000 foreigners from 52 different countries have already volunteered to fight in the UKR Legion against the Russian invasion.[212]

In reaction to this development, the spokesman of the Russian Ministry of Defense, Igor Konashenkov, warned that "none of the mercenaries the West is sending to Ukraine to fight for the nationalist regime in Kyiv can be considered as combatants in accordance with international humanitarian law or enjoy the status of prisoners of war…. [A]t best, they can expect to be prosecuted as criminals."[213]

This begs the question as to whether the classification of personnel status discussed previously in this symposium applies to foreign fighters enlisted in the UKR Legion under the law of armed conflict (LOAC). Could they, as Russia suggests, be considered mercenaries without legal protection as prisoners of war (POW) when captured and can they be treated as "unlawful combatants" or "criminals"? This post addresses these issues of personnel status regarding foreign fighters enlisted in the UKR Legion.

Ukraine's Official Position

The establishment of the UKR Legion was announced by the Ukrainian Minister of Foreign Affairs Dmytro Kuleba on February 27, 2022.[214] It followed a decree issued under the legal framework established by Presidential Decree No. 248 of June 10,

206 International Legion for the Defense of Ukraine, https://ildu.com.ua [hereinafter International Legion].

207 Anders Anglesey, *Ukraine Creates Foreign Legion as Volunteers from Abroad Join the Fight*, Newsweek (Feb. 27, 2022, 5:00 AM), https://www.newsweek.com/ukraine-creates-foreign-legion-volunteers-abroad-join-fight-russia-1683024.

208 *70 Japanese Volunteer to Fight for Ukraine Against Russia*, Japan Today (Mar. 3, 2022, 6:45 AM JST), https://japantoday.com/category/national/70-japanese-answer-ukraine%27s-calls-to-arms-against-russia.

209 Timothy Bella & Annabelle Timsit, *Zelensky says 16,000 foreigners have volunteered to fight for Ukraine against Russian invasion*, Wash. Post (Mar. 3, 2022, 8:52 AM), https://www.washingtonpost.com/world/2022/03/03/zelensky-ukraine-16000-foreign-volunteers-russia.

210 Christopher Miller, *A Team of American and British Special Forces Veterans Are Preparing to Join Ukraine's Fight Against Russia*, BuzzFeed News (Feb. 27, 2022, 10:28 AM), https://www.buzzfeednews.com/article/christopherm51/american-nato-military-veterans-fight-russia-with-ukraine.

211 Christopher Miller, *NATO Won't Put Troops in Ukraine, but Western Foreigners are Volunteering to Join the Fight Against Russia*, BuzzFeed News (Jan. 28, 2022, 9:14 AM), https://www.buzzfeednews.com/article/christopherm51/russia-invade-ukraine-western-fighters-nato.

212 *Russia Says It has Killed 180 Foreign Fighters in Ukraine,* Jerusalem Post (Mar. 13, 2022), https://www.jpost.com/breaking-news/article-701157.

213 Jason Lemon, *Russia Vows Prosecution of Foreign Fighters After 16K Join Ukraine*, Newsweek (Mar. 3, 2022, 4:16 PM), https://www.newsweek.com/russia-vows-prosecution-foreign-fighters-after-16k-join-ukraine-1684671.

214 Anglesey, *supra* note 207.

2016.[215] This 2016 decree made it possible for non-Ukrainian citizens to enter the armed forces of Ukraine. President Zelensky appealed to foreign citizens to join the UKR Legion and stated that "a separate subdivision is being formed for foreigners" and that it will be "included in the Territorial Defense Forces of the Armed Forces of Ukraine."[216] His statement indicates that the UKR Legion, unlike some of the other armed groups operating within Ukraine, form part of the armed forces of Ukraine.

This position is confirmed by a statement made by one Ukrainian official who clarified that the government was not hiring any private military contractors, but only accepted volunteers to its own foreign legion.[217] It is further confirmed by the Ukrainian government website created on March 5th, which includes general information on how to join the UKR Legion. The website indicates that volunteers shall "submit an application to enlist for voluntary contract-based military service in the Armed Forces of Ukraine."[218]

POW Status

The legal framework applicable in Ukraine is undoubtedly that of international armed conflict. Belligerent Parties to this conflict, i.e., Ukraine and the Russian Federation, are both bound by the provisions of the four 1949 Geneva Conventions and the 1977 Additional Protocol I as States Parties to these treaties.

According to Article 43 of Additional Protocol I, the armed forces of a Party to a conflict consist of "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates…. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."[219] The forces, groups, and units must have a responsible command, have an established internal disciplinary system for enforcing LOAC, and belong to one party to the conflict. They also must be organized, which excludes individuals operating in isolation that are not *levée en masse*.[220] The UKR Legion, as part of the Ukrainian armed forces, fulfills these criteria.

Article 43(2) of Additional Protocol I further provides that "members of the armed forces of a Party to a conflict … are combatants, that is to say, they have the right to participate directly in hostilities." This provision is applicable to members of the UKR Legion, who are therefore lawful combatants. It is so regardless of their nationality and the motivation with which they decided to join the UKR Legion.

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215 Указ Президента України Про Положення про проходження військової служби у Збройних Силах України іноземцями та особами без громадянства [President of Ukraine, Regulations on military service in the Armed Forces of Ukraine by foreigners and stateless persons], Decree, 248 (June 10, 2016).

216 President of Ukraine, *Appeal to Foreign Citizens to Help Ukraine in Fighting Against Russia's Aggression* (Feb. 27, 2022), https://www.President.gov.ua/en/news/zvernennya-do-gromadyan-inozemnih-derzhav-yaki-pragnut-dopom-73213.

217 Levent Kemal & Ragip Soylu, *Russia-Ukraine War: How Invasion Is Attracting Mercenaries—Not Just Foreign Volunteers*, Middle East Eye (Mar. 3, 2022), https://www.middleeasteye.net/news/russia-ukraine-war-mercenaries-helping-Kyiv-fight.

218 International Legion, *supra* note 206.

219 AP I, *supra* note 9, art. 43.

220 Alcala & Szymanski, *supra* note 2.

If captured by the Russian armed forces, members of the UKR Legion—again regardless of nationality or motivation—are entitled to POW status upon capture. This is explicitly confirmed by Article 44(1) of Additional Protocol I, which stipulates that "any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war."[221] It is also clear that members of the UKR Legion would qualify as POWs under Article 4(A)(1) of the Third Geneva Convention, which refers to "members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."[222]

Article 17 of the Third Geneva Convention requires each Party to a conflict to furnish the persons under its jurisdiction who are eligible for POW status with an identity card.[223] To send a clear signal that members of the UKR Legion are to be treated as POWs upon capture, the Ukrainian government should issue an identity card for members of the UKR Legion in the same way they do for their own armed forces.

If any doubt ensues as to their status, foreign members of the UKR Legion must be treated as POWs until their status is determined by a competent tribunal as required under Article 5 of the Third Geneva Convention.[224] POW status is applicable from the moment of capture and until the final release and repatriation. It gives rise to the right to be treated in accordance with the extensive guarantees provided for in the Third Geneva Convention.

Exceptions

As with any rules, there are exceptions to this obligation on each party to a conflict to accord enemy combatants they have captured the POW status. One such exception under Article 44(3) of Additional Protocol I is when combatants fall into the power of an adversary while failing to distinguish themselves from the civilian population and to carry arms openly during an attack or in a military operation preparatory to an attack.[225] Even then, however, such persons shall be given protection equivalent to that accorded to POWs.[226] Article 75 of Additional Protocol I further provides the final safety net, granting them an extensive catalog of guarantees when they do not benefit from a more favorable treatment.[227] This means that they have to be treated humanely in all circumstances, and the detaining power must grant them fundamental fair trial guarantees.

Another group of persons who are not entitled to POW status—but who are not combatants either—are mercenaries. As previously highlighted, this is the label that the Russian Federation used to describe members of the UKR Legion. This, however, is clearly inappropriate. Article 47(2) of Additional

221 AP I, *supra* note 9, art. 44(1).

222 GC III, *supra* note 4, art. 4(A)(1).

223 *Id.* art. 17.

224 *Id.* art. 5.

225 AP I, *supra* note 9, art. 44(3).

226 *Id.* art. 44(4).

227 *Id.* art. 75.

Protocol I defines a mercenary as any person who:

a. is specially recruited locally or abroad in order to fight in an armed conflict;

b. does, in fact, take a direct part in the hostilities;

c. is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

d. is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

e. is not a member of the armed forces of a Party to the conflict; and

f. has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[228]

Members of the UKR Legion do not meet these conditions. First, it seems highly unlikely that foreigners fighting in the UKR Legion would join this legion for private gain and that they would be promised material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of Ukraine. While foreigners might have different motives to come to fight in Ukraine, nothing indicates that private gain would be prominent among them. Such a gain has been neither promised, nor does it seem likely to materialize.

Second, members of the UKR Legion, as established above, are members of the armed forces of Ukraine, i.e., members of the armed forces of a Party to the conflict. Since the conditions stipulated in Article 47(2) of Additional Protocol I are cumulative and since members of the UKR Legion fail to meet these criteria, they cannot be considered as mercenaries within the meaning of LOAC.

Conclusion

Contrary to the statement of the Russian Ministry of Defense, members of the UKR Legion are not mercenaries. They are combatants who have the right to participate directly in hostilities and who, upon capture, are entitled to the POW status.

228 *Id.* art. 47(2).

MERCENARIES ON THE BATTLEFIELD: WHAT LEGAL ADVISORS MUST KNOW

by Jeffrey S. Thurnher | Dec 2, 2020

Mercenaries … are useless and dangerous. And if a prince holds on to his state by means of mercenary armies, he will never be stable or secure…

— Niccolò Machiavelli, *The Prince*

Mercenaries have been used since the dawn of war. In recent years, however, there has been a tremendous resurgence in the use of mercenary forces on the battlefield.[229] One of the most prolific employers of mercenary groups is Russia, which has used such forces to expand its presence in various world hotspots. Reliance on these opaque forces is intended to provide plausible deniability and shield Russia from responsibility.[230] Russian practices differ fundamentally from how other nations employ private security contractors to accompany their forces. Russia's approach represents a dangerous geopolitical trend and poses unique legal challenges in terms of State responsibility and accountability under the law of armed conflict.

Contemporary Uses of Russian Mercenaries

Russia has a long history[231] of employing mercenaries, but under Vladimir Putin's leadership, the practice has significantly evolved and increased.[232] With Putin's consolidation of Russia's security apparatuses and an abundance of Soviet-era military veterans, the conditions were ripe for an expanded reliance on these semi-State forces.[233] Mercenary groups provide Russia low-cost options to rapidly send forces to support favored authoritarian regimes.[234] Russia views these groups as particularly attractive because they allow for plausible deniability. These dynamics have led to the formation of numerous Russian private mercenary groups.

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229 Sean McFate, *Mercenaries and War: Understanding Private Armies Today*, Nat'l Def. U. Press (Dec. 4, 2019), https://ndupress.ndu.edu/Media/News/Article/2031922/mercenaries-and-war-understanding-private-armies-today.

230 Anna Borshchevskaya, *Russian Private Military Companies: Continuity and Evolution of the Model,* Foreign Pol. Res. Inst. (2019) [hereinafter Borshchevskaya].

231 Kimberly Marten, *Russia's Use of Semi-State Security Forces: The Case of the Wagner Group*, 35 Post-Soviet Affairs 181 (2019), DOI: 10.1080/1060586X.2019.1591142 [hereinafter Marten].

232 Borshchevskaya, *supra* note 230.

233 Candace Rondeaux, *Decoding the Wagner Group: Analyzing the Role of Private Military Security Contractors in Russian Proxy Warfare*, New America (Nov. 7, 2019), https://www.newamerica.org/future-security/reports/decoding-wagner-group-analyzing-role-private-military-security-contractors-russian-proxy-warfare.

234 Borshchevskaya, *supra* note 230.

The most active of these Russian mercenary organizations is the Wagner Group,[235] which is headed by Yevgeny Prigozhin, a close Putin ally.[236] Wagner operates worldwide despite being outlawed under a Russian law prohibiting mercenaries and private military security contractors. To circumvent these prohibitions, Wagner is registered using a series of shell corporations located outside of Russia. Its close ties to Russian security elements provide Wagner access to sophisticated weapons and intelligence.[237] Its worldwide actions are coordinated with Russia to advance its national interests.[238]

Wagner has been instrumental in helping Russia pursue its goals in Syria and Ukraine. In Syria, it participated alongside Syrian regime forces in offensive combat operations years before the official entry of Russian military forces.[239] In Ukraine, elements of Wagner are suspected to have been associated with the "little green men" who supported annexation,[240] and they have fought alongside separatist forces across the Donbas region.[241] Russia employed these mercenaries rather than its military to avoid domestic scrutiny for casualties and, with respect to Ukraine, to falsely claim all fighters were indigenous separatists.[242]

Russia is currently employing this mercenary model in Venezuela and across Africa as it seeks expanded influence and access to natural resources.[243] Wagner is having a big impact in Libya where it is helping a Russian ally in the ongoing civil war. Wagner's mercenaries provided an immediate military advantage on the battlefield, tipping the balance in favor of the Russian-supported militia.[244] The commander of the U.S. Africa Command has condemned Wagner as a "destabilizing" element helping Russia expand its African footprint.[245]

Russia is not the only nation using these shadowy forces.[246] The contemporary use of mercenaries is far reaching, and given the relative success Russia and others have had, one should expect to see mercenaries employed more widely in the future. Lawyers advising commanders and policy makers, therefore, must be familiar with the complicated legal framework surrounding mercenaries.

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235 Marten, *supra* note 231.

236 Dionne Searcey, *Gems, Warlords and Mercenaries: Russia's Playbook in Central African Republic*, N.Y. Times (Sept 30, 2019, updated May 4, 2020), https://www.nytimes.com/2019/09/30/world/russia-diamonds-africa-prigozhin.html.

237 *Id.*

238 General Thomas D. Waldhauser, Statement, U.S. Senate Comm. on Armed Serv., United States Africa Command and United States Southern Command in Review of the Defense Authorization Request for Fiscal Year 2020 and the Future Years Defense Program, 116th Cong., 1st Sess. (Feb. 7, 2019).

239 Rondeaux, *supra* note 233.

240 Borshchevskaya, *supra* note 230.

241 Marten, *supra* note 231.

242 *Id.*

243 Benoit Faucon & James Marson, *Russia Leans on Mercenary Forces to Regain Global Clout*, Wall St. J. (Feb. 23, 2020, 1:29 PM), https://www.wsj.com/articles/russia-leans-on-mercenary-forces-to-regain-global-clout-11582482577.

244 David D. Kirkpatrick, *Russian Snipers, Missiles and Warplanes Try to Tilt Libyan War*, N.Y. Times (Nov. 5, 2019, updated June 18, 2020), https://www.nytimes.com/2019/11/05/world/middleeast/russia-libya-mercenaries.html.

245 General Stephen J. Townsend, Statement, U.S. Senate Comm. on Armed Serv. United States Africa Command and United States Southern Command in Review of the Defense Authorization Request for Fiscal Year 2021 and the Future Years Defense Program, 116th Cong. 2nd Sess. (Jan. 30, 2020).

246 McFate, *supra* note 229.

Applicable Law

The first treaty to detail the legal obligations of mercenaries is the First Additional Protocol to the Geneva Conventions (AP I).[247] Article 47 of AP I prohibits a mercenary from qualifying as a lawful combatant and provides a six-part definition of who meets the criteria to be a mercenary.[248] One of the six requirements is that the person must be motivated by a "desire for private gain." The United States' position, as detailed in the U.S. Defense Department *Law of War Manual*, is that being a mercenary is not a crime under international law.[249] The manual explains that receiving pay for their services does not necessarily disqualify mercenaries of combatant status. On the other hand, mercenaries must follow the law of armed conflict and can be punished for any violations.

While the United States does not recognize the AP I position as being customary, it is important to remember that many U.S. allies are AP I treaty members and do consider it binding law. Additionally, some U.S. partners are also parties to the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, which extended prohibitions against mercenary groups.[250] Understanding partner States' varied legal obligations regarding mercenaries will become increasingly relevant during coalition operations.

Meanwhile, Wagner and similar Russian organizations object to being labeled as mercenaries. Instead, these groups refer to themselves as private military security contractors (PMSCs). While the distinction between mercenaries and PMSCs is not always clear, Russia intentionally blurs these lines to take advantage of perceived definitional gaps.[251]

Unlike mercenaries, security contractors do not have a separate legal classification under international law. Members of PMSCs are either combatants or civilians under the law of armed conflict. Depending on their role and affiliation with a State party to the conflict and their conduct—such as whether they are taking a direct part in hostilities—they can be classified in different ways. Legal advisors must be aware of how these varied statuses affect whether a contractor encountered on the battlefield could be targeted or detained.

The United States and many Western nations have taken steps to address some perceived PMSCs legal gaps. For instance, some States adopted a set of best practices for PMSCs in a 2008 international agreement known as the Montreux Document, which highlighted State obligations regarding security contractors.[252] Notably, Russia refused to sign onto the agreement.[253] Similarly, the PMSCs industry created an international code of conduct that includes a commitment

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247 AP I *supra note 9*.

248 *Id.* art. 47.

249 DoD Law of War Manual, *supra* note 10.

250 G.A. Res. 44/34, annex, International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, (1989).

251 Rondeaux, *supra* note 233.

252 International Committee of the Red Cross, The Montreux Document, *On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* (2009).

253 Rondeaux, *supra* note 233.

by individual signatory companies to follow international law.[254] Wagner has not yet committed to the code.

Russia has instead purposely sought to take advantage of the perceived legal gaps and use groups like Wagner to help it avoid State responsibility.[255] Russia uses disinformation campaigns to deny any ties to Wagner and to disavow any role in directing its activities.[256] Additionally, President Putin decreed that information related to firms cooperating with Russian intelligence would be classified.[257] This action ensured communications between Wagner and Russian officials would remain secret.

There are many benefits for Russia if it succeeds in maintaining the illusion of separation between itself and Wagner. When Russia exclusively uses mercenary groups in an armed conflict, it can claim not to be involved in the conflict. It can thereby deflect scrutiny under the UN Charter's non-interference principles.[258] Furthermore, under international law, the conduct of a group can be attributed to the State if the State directs the group. Russia's deliberate disinformation is intended to help it avoid accountability for any mercenary misconduct.[259] Until the law potentially evolves, one should expect some nations to continue to rely on groups like Wagner.

Providing Legal Advice About Mercenary Groups

Given the growing use of mercenaries, judge advocates and civilian legal advisors must be prepared to address the thorny legal issues that arise when U.S. forces encounter them on the battlefield. The potential for such encounters is not hypothetical. In 2018, U.S. forces in Syria came under an armored assault from several hundred Wagner Group members supporting pro-Syrian regime forces. After a four-hour firefight, estimates indicate more than one-hundred Russian mercenaries were killed.[260] With Russia expanding its worldwide mercenary presence, the potential for future such interactions with U.S. forces will only increase.

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254 The International Code of Conduct for Private Security Service Providers ("The Code"), International Code of Conduct Association, https://icoca.ch/the-code.

255 Andrew S. Weiss & Eugene Rumer, *Nuclear Enrichment: Russia's Ill-Fated Influence Campaign in South Africa*, Carnegie Endowment for International Peace (Dec. 16, 2019), https://carnegieendowment.org/2019/12/16/nuclear-enrichment-russia-s-ill-fated-influencecampaign-in-south-africa-pub-80597.

256 Nathaniel Reynolds, *Putin's Not-So-Secret Mercenaries: Patronage, Geopolitics, and the Wagner Group*, Carnegie Endowment for International Peace (July 8, 2019), https://carnegieendowment.org/2019/07/08/putin-s-not-so-secret-mercenaries-patronage-geopolitics-and-wagner-group-pub-79442.

257 Marten, *supra* note 231.

258 Shane Reeves & Ronald T. P. Alcala, *Five Legal Takeaways from the Syrian War*, Harv. Nat'l Sec. J. Online (Sept 30, 2019), https://harvardnsj.org/wp-content/uploads/2020/04/Reeves-Alcala_Five-Legal-Takeaways-from-the-Syrian-War_FINAL.pdf.

259 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 (2001).

260 Thomas Gibbons-Neff, *How a 4-Hour Battle Between Russian Mercenaries and U.S. Commandos Unfolded in Syria*, N.Y. Times (May 24, 2018), https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html.

The United States also needs to highlight Russia's illicit use of mercenaries and detail how it violates international law and facilitates corruption around the world.[261] Legal advisors must be vigilant for law of armed conflict violations involving mercenaries as Russia's mercenaries have been implicated in several atrocities.[262] Judge advocates can help commands expose these abuses. With this information, America can implicate Russian State responsibility and pressure Russia to reform.

Conclusion

Mercenaries will play a role in future conflicts as they provide the legal ambiguity America's adversaries seek in conflict. To prepare for future combat, legal professionals must remain attentive to these emerging participants of war. Judge advocates must also be vigilant about identifying the legal implications associated with mercenaries for their commanders.

[261] Paul Stronksi, *Late to the Party: Russia's Return to Africa*, Carnegie Endowment for International Peace (Oct. 16, 2019), https://carnegieendowment.org/2019/10/16/late-to-partyrussia-s-return-to-africa-pub-80056.

[262] Searcey, *supra* note 236.

ARE MERCENARIES IN UKRAINE?

by Robert Lawless | Mar 21, 2022

Reports suggest both Russia and Ukraine are recruiting and supplementing forces in ways that potentially implicate international legal rules related to mercenaries. This post, after surveying media reports of mercenaries in Ukraine, examines the law-of-war rules governing mercenaries in armed conflict and explores their relevance to the Ukraine-Russia armed conflict. It identifies Russia's and Ukraine's law-of-war obligations and highlights some challenges the parties may have applying mercenary rules during the conduct of hostilities in Ukraine.

Reports of Mercenaries in Ukraine

Russia reportedly deployed irregular fighters to rebel-held territory in Ukraine to lay the groundwork for its February 24 invasion.[263] Although their precise use is uncertain, officials indicated these individuals may have been intended[264] for sabotage or (ultimately unsuccessful) "false flag" operations.[265] Other officials believe these forces were incorporated directly into local fighting forces that took part in the Russian invasion.[266] Russia's use of such forces before February 24 is relevant legally because the Russian invasion continues an international armed conflict waged between the two States since 2014.[267]

Officials believe that as many as 200 Russian irregular fighters have been killed in combat as of late February.[268] This suggests such forces may already constitute a significant portion of Russia's fighting force. A more recent report asserts that more than 40,000 Syrians are registered to join the Russian side in the conflict.[269]

Russia reportedly is relying on irregular forces in part as a matter of operational necessity. According to U.S. intelligence officials, Russia faces a significant shortfall in military personnel, exacerbated by perceived operational failures.[270] Intelligence officials believe that Russian irregular fighters will increasingly be used in direct combat to support stalled and depleted Russian military

263 Michael Schwirtz & Eric Schmitt, *Russian Mercenaries Have Covertly Entered Separatist Enclaves in Ukraine*, N.Y. Times (Feb. 23, 2022), https://www.nytimes.com/2022/02/23/world/europe/russian-ukraine-mercenaries.html.

264 *Id.*

265 Scott Radnitz, *What Are False Flag Attacks—and Did Russia Stage Any to Claim Justification for Invading Ukraine?* The Conversation (Feb. 24, 2022, 5:48 PM), https://theconversation.com/what-are-false-flag-attacks-and-did-russia-stage-any-to-claim-justification-for-invading-ukraine-177879.

266 Schwirtz & Schmitt, *supra* note 263.

267 *International Armed Conflict in Ukraine*, Geneva Academy (June 7, 2023), https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine.

268 Jessie Yeung, Julia Hollingsworth et al., *March 4, 2022 Russia-Ukraine News* CNN (Mar. 5, 2022, updated 12:12 AM), https://www.cnn.com/europe/live-news/ukraine-russia-putin-news-03-04-22/index.html.

269 Haley Ott, *Over 40,000 Syrians Reportedly Register to Fight for Russia in Ukraine*, CBS News (Mar. 14, 2022, 3:51 PM), https://www.cbsnews.com/news/russia-ukraine-war-syrians-reportedly-register-foreign-fighters.

270 Warren P. Strobel, *Russia Facing Military Shortcomings in Ukraine Invasion, Says U.S. Intelligence Chief,* Wall St J. (Mar. 8, 2022, 2:09 PM), https://www.wsj.com/articles/russia-facing-military-shortcomings-in-ukraine-invasion-says-intelligence-chief-11646757524.

units.[271] Others may be deployed in special missions, such as a reported operation[272] to assassinate Ukrainian President Volodymyr Zelensky in Kyiv. Officials also believe Russia is recruiting Syrians with urban combat skills and experience to contribute to efforts to take Kyiv. Still other recruits are being offered money for six-month deployments to Ukraine to work as guards.[273]

Russia's use of irregular forces is not new, or even a recent development in its armed conflict with Ukraine. For example, Russia used such fighters as a key feature of its seizure of the Crimean Peninsula of Ukraine in 2014 and to support the pro-Russian insurgency that occurred in the Donetsk and Luhansk regions of eastern Ukraine.[274] A significant source of Russian irregulars—both in Ukraine[275] and in other Russian military operations[276]—is the Wagner Group, a privately owned Russian paramilitary organization.[277]

Ukraine's force recruitment and constitution also raise questions about mercenary rules—although, as we shall see, to a lesser extent than Russia's practices. The Ukrainian government is openly recruiting[278] irregular fighters to join militias and volunteer forces, including the International Legion of Defense of Ukraine.[279] According to the Ukrainian government, units of international fighters formally fall under Ukraine's regular armed forces and report to Ukrainian commanders.[280] Russia announced it would consider foreigners fighting for Ukraine to be mercenaries.[281] According to Russian officials, if captured, they would not be entitled to prisoner of war status.

Additionally, there appears to be growing demand for paid security workers in Ukraine.[282] Many of the recruitment efforts seem to be privately funded, although determining the precise source of the funding is difficult. While many of the recruitment programs purport to focus on humanitarian missions, they often involve security elements, which in other contexts have raised thorny questions about the line between security and combat operations.

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271 Yeung et al., *supra* note 268.

272 *What Is the Wagner Group, Russia's Mercenary Organisation?* Economist (Mar. 7, 2022), https://www.economist.com/the-economist-explains/2022/03/07/what-is-the-wagner-group-russias-mercenary-organisation.

273 Editorial Board, *Russia Has Opened the Door to Volunteering in Eastern Syria to Recruit Mercenaries and Send Them to Ukraine*, Dier Ezzor 24 (Feb. 24, 2022), https://deirezzor24.net/en/russia-has-opened-the-door-to-volunteering-in-eastern-syria-to-recruit-mercenaries-and-send-them-to-ukraine.

274 *Syria War: Who Are Russia's Shadowy Wagner Mercenaries?* BBC (Feb. 23, 2018), https://www.bbc.com/news/world-europe-43167697.

275 Matthew Campbell, *Wagner Group: the Russian Mercenaries Hunting Zelensky*, The Times (Mar. 5, 2022, 6:00 PM), https://www.thetimes.co.uk/article/wagner-group-the-russian-mercenaries-hunting-zelensky-dttx20zj6.

276 Ilya Barabanov & Nader Ibrahim, *Wagner: Scale of Russian Mercenary Mission in Libya Exposed*, BBC News Russia & BBC News (Aug. 11, 2021), https://www.bbc.com/news/world-africa-58009514.

277 Danielle Wallace & Peter Aitken, *Wagner Group: What to Know about Russian Mercenary Group in Ukraine*, Fox News (Feb. 28, 2022, 3:12 PM, updated June 24, 2023, 9:48 AM), https://www.foxnews.com/world/wagner-group-russian-paramilitary-group-ukraine.

278 Embassy of Ukraine in the USA/ Посольство України в США, Facebook (Feb. 27, 2022), https://www.facebook.com/ukr.embassy.usa/posts/4950801861629673 (last visited Feb. 6, 2024).

279 Drew Hinshaw & Natalia Ojewska, *Ukraines Return Home to Fight Russia: 'I Have to Go'*, Wall St. J. (Feb. 28, 2022, 5:57 AM), https://www.wsj.com/articles/ukrainians-return-home-to-fight-russia-i-have-to-go-11646045875.

280 Brett Forrest, *Ukraine's New Foreign Legion Takes the Fight to Russian Forces*, Wall St. J. (Mar. 12, 2022, 6:08 AM), https://www.wsj.com/articles/ukraines-new-foreign-legion-takes-the-fight-to-russian-forces-11647083295?mod=series_rusukrainenato.

281 Jason Lemon, *Russia Vows Prosecution of Foreign Fighters After 16K Join Ukraine*, Newsweek (Mar. 3, 2022, 4:16PM, updated Mar. 4, 2022, 5:55 AM), https://www.newsweek.com/russia-vows-prosecution-foreign-fighters-after-16k-join-ukraine-1684671.

282 AP I Commentary, *supra* note 15, art. 47.

The referenced reports use the term "mercenary" liberally in describing irregular fighters in Ukraine. Of course, the use of the term "mercenary" in news reports and political discourse does not necessarily mean that the law-of-war rules related to mercenaries apply. In this regard, the International Committee of the Red Cross (ICRC) 1977 assertion regarding law-of-war discourse continues to resonate: "There are few words which suffer greater misuse these days than the term mercenary."[283]

Mercenary Rules

Historically, the law of war had little to say about mercenaries. The term was not defined in treaty law, nor did the law of war establish "mercenary" as a distinct status with a special legal character. Before 1977, international legal regulation of mercenaries was limited mainly to a requirement—based in the law of neutrality—for States not to facilitate the formation of mercenary groups.

In 1977, the First Additional Protocol to the Geneva Conventions (AP I)[284] significantly changed the law for mercenaries. AP I, Article 47, begins by withholding from a mercenary "the right to be a combatant or a prisoner of war."[285] It defines a mercenary as any person who meets six criteria, specifically any person who:

a. is specially recruited locally or abroad in order to fight in an armed conflict;

b. does, in fact, take a direct part in the hostilities;

c. is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

d. is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

e. is not a member of the armed forces of a Party to the conflict; and

f. has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Both Russia and Ukraine are parties to AP I.[286] Therefore, each is bound by Article 47 in the current armed conflict. Additionally, Ukraine is a party to the 1989 International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries.[287] The 1989 Convention creates a criminal law regime for mercenarism—it identifies and defines criminal offenses, establishes rules of jurisdiction, and obligates enforcement measures. Furthermore, Article 1 of the 1989 Convention[288] expands the AP I, Article 47 definition of "mercenary"

283 H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts,* 72 Am. J. Int'l L. 37 (1978).

284 AP I, *supra* note 9.

285 *Id.* art. 47.

286 *Id.*

287 International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, G.A. Res. 44/34, U.N. Doc. A/RES/44/34 (Dec. 4, 1989) [hereafter Mercenary Convention].

288 *Id.* art. 1.

by removing the condition that a mercenary actually take part in hostilities. Unlike AP I, the 1989 Convention criminalizes direct participation in hostilities by any person who meets the Article 1 definition.[289]

Russia is not party to the 1989 Convention. Thus, unlike Ukraine, Russia is not subject to the Convention's obligations, such as the requirements to criminalize mercenary offenses,[290] cooperate in prevention of such offenses,[291] and notify the UN Secretary-General of potential violations.[292]

It is worth briefly noting two implications of the 1989 Convention with respect to the conflict in Ukraine. First, the fact that Ukraine is a party to the 1989 Convention raises questions concerning the international law of State responsibility.[293] For example, Ukraine's use of mercenaries in the conflict could constitute an internationally wrongful act giving rise to State responsibility.[294] Notably, and perhaps with a view toward such issues, in 2015 Ukraine filed a communication with the Secretary-General of the UN in relation to its obligations under the 1989 Convention.[295] The communication asserted that Ukraine could not guarantee application and implementation of the Convention in those areas of its territory that were targets of Russian acts of "armed aggression."

Second, the fact that Russia is not party to the 1989 Convention raises questions about the interaction between Ukraine's obligations under the 1989 Convention and other law-of-war treaties. These questions are beyond the scope of this article. For present purposes, it suffices to say that, at least for purposes of determining whether captured Russian fighters qualify as mercenaries, the safest route for Ukraine would be to consider the AP I, Article 47(2) definition as controlling rather than the definition in the 1989 Convention.

Reports of Mercenaries in Ukraine

Unworkability of the Definition

Before addressing the allegations of mercenaries in Ukraine directly, it is worth noting some difficulties with applying the AP I, Article 47(2) definition in practice. These challenges have provoked claims of "unworkability."[296]

First, the requirement that a mercenary be motivated to take part in hostilities "essentially by the desire for private gain"—what Professor Yoram Dinstein calls the linchpin of the definition[297]—presents a remarkably demanding task for complainants. It requires proof of a putative mercenary's reason for fighting. This determination may not be made at the group level—recall that the

289 *Id.* art. 3.

290 *Id.* art. 5.

291 *Id.* art. 6.

292 *Id.* arts. 8, 10.

293 Articles of State Responsibility, *supra* note 259.

294 Mercenary Convention, *supra* note 287, art. 5.

295 Ministry of Foreign Affairs of Ukraine, Ukraine Communication, Ref. C.N.614.2015.TREATIES-XVIII.6 (Depository Notification), UN Secretary General (Oct. 20, 2015), https://treaties.un.org/doc/Publication/CN/2015/CN.614.2015-Eng.pdf.

296 Dinstein, supra note 124.

297 *Id.*

Article 47(2) definition applies to individual mercenaries rather than a mercenary group. Assessments must be individualized.

Russia and Ukraine also may not assume that foreign fighters are motivated by private gain. Foreign fighters have come to Ukraine for a multitude of reasons, many of which have little to do with personal financial gain. These reasons include, for example, patriotism, humanitarianism, national duty, hatred, and prejudice.[298] To further complicate matters, fighters' motivations may not have been carefully considered. Reasons may change, perhaps repeatedly or quickly.[299] The motivation element of the Article 47(2) definition requires States not only to ascertain a fighter's individual reasons for fighting, but also their hierarchy of motives—a mercenary must be motivated "essentially" by private gain.

In the chaos of the armed conflict in Ukraine,[300] and given the vast number of irregular and foreign fighters, Russian and Ukrainian armed forces are unlikely to have the resources and capability to make these assessments at scale.[301]

Even aspects of the Article 47(2) definition that may be established objectively—at least in principle—present problems of workability. For example, Russian and Ukrainian forces may struggle to determine alleged mercenaries' compensation levels, let alone whether such compensation is "substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party." Furthermore, individuals' nationality, residency, and precise relation to the armed forces of the belligerent for whom they fight present resource-intensive questions of proof that Ukrainian and Russian forces may not be prepared to answer in the midst of hostilities.

Narrowness of the Definition

Setting aside the workability of the Article 47(2) definition, given its narrowness, publicly available information suggests that many of the foreign fighters noted earlier are not mercenaries.

A member of the armed forces of a belligerent is not a mercenary. The Ukrainian government has formally incorporated the International Legion of Defense of Ukraine into its armed forces. Thus, the Legion's reported 20,000 foreign members[302]—including 3,000 Americans[303]—are not mercenaries under Article 47(2).

Even those foreign fighters who opted to join informal fighting brigades or militias are unlikely to be mercenaries under Article 47(2).[304] It is unclear whether the Ukrainian government funds such groups. But if it does, the amount is unlikely to reach the "substantially in excess" requirement of

298 Lisa Abend/Vilnius, *Meet the Foreign Volunteers Risking Their Lives to Defend Ukraine—and Europe*, Time (Mar. 7, 2022, 5:26 PM EST), https://time.com/6155670/foreign-fighters-ukraine-europe.

299 Forrest, *supra* note 280.

300 Alan Taylor, *Photos: Chaos and Resistance in Ukraine*, Atlantic (Feb. 27, 2022), https://www.theatlantic.com/photo/2022/02/photos-chaos-and-resistance-ukraine/622947/ (last visited Feb. 6, 2024).

301 Ott, *supra* note 269.

302 Forrest, *supra* note 280.

303 Patricia McKnight, *40,000 Syrians Reportedly Signed Up to Fight for Russia Have Yet to Arrive,* Newsweek (Mar. 14, 2022, 11:59 PM, updated Mar. 15, 2022, 4:17 AM), https://www.newsweek.com/40000-syrians-reportedly-signed-fight-russia-have-yet-arrive-1687992.

304 Forrest, *supra* note 280.

Article 47(2). Thus, Russian claims that international fighters fighting for Ukraine were mercenaries are incorrect.[305]

Reports of Russian mercenaries present a closer question. As noted, Russia has an established and apparently systematic practice of relying on non-State groups in recent military operations in conflicts around the world.[306] Irregular fighters in Ukraine, including members of the Wagner Group, may meet several elements of the Article 47(2) definition, including the requirements of motivation and non-Russian nationality, residency, and armed forces status.[307] Yet it is unclear whether they meet the excess compensation requirement.

Recent reports suggest that Russia is offering foreign fighters salaries from $200 to $300 U.S. dollars for terms of six months, plus other unspecified "privileges."[308] This seems unlikely to constitute "compensation substantially in excess" of that paid to Russian regular troops. Given Russia's systemized use of the Wagner Group, its fighters seem most likely to meet the compensation requirement. However, this is far from clear—little is publicly known about members' compensation. Indeed, drawing financial connections between the Russian government and the Wagner Group is difficult, likely by design.[309]

Furthermore, it is unclear whether members of private military and security companies, including the Wagner Group, meet the Article 47(2) requirement to be "specially recruited . . . to fight in an armed conflict."[310] The well-documented trend of outsourcing some aspects of military operations to private contractors has led to a debate about the legal status of private contracting companies, including whether and when members of such groups qualify as mercenaries.[311] The literature on the issue is extensive.[312] It suffices to note that it remains unclear whether members of a private security company—such as the Wagner Group—established before the initiation of armed conflict may qualify as mercenaries under Article 47(2). On one view, the prior formation of such groups or the use of group members in multiple conflicts precludes them from qualifying as "specially recruited" for an armed conflict.

Finally, to qualify as a mercenary, a fighter must be recruited "to fight" in an armed conflict and must, "in fact, take a direct part in the hostilities." These conditions disqualify from mercenary status foreigners in Ukraine serving as equipment technicians or military

305 McKnight, *supra* note 303.

306 Brian Katz, Seth G. Jones et al, *The Expansion of Russian Private Military Companies*, Center for Strategic & Int'l Stud. (Sept 2020), https://russianpmcs.csis.org.

307 *Band of Brothers: The Wagner Group of the Russian State*, CSIS (Sept 21, 2020), https://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state.

308 McKnight, *supra* note 303.

309 Alexander Rabin, *Diplomacy and Dividends: Who Really Controls the Wagner Group?* Foreign Pol. Res. Inst. (Oct. 4, 2019), https://www.fpri.org/article/2019/10/diplomacy-and-dividends-who-really-controls-the-wagner-group.

310 Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 Int'l L. Rev. Red Cross 525 (2006).

311 Peter W. Singer, *Outsourcing War*, Brookings (Mar. 1, 2005), https://www.brookings.edu/articles/outsourcing-war.

312 Joop Voetelink, *Private Military and Security Companies*, Oxford Bibliographies (Sept 25, 2019), DOI: 10.1093/OBO/9780199796953-0190.

advisors. A closer question is presented by individuals who serve in roles, for example, related to weapons transportation and intelligence gathering. The status of individuals would depend on the facts of each case.

Consequences for Mercenaries

The prevalence of mercenaries—in the *law-of-war* sense—may be less than what is suggested in media accounts and in political discourse. But some fighters may qualify, particularly the foreign fighters Russia is recruiting from Syria and other areas of conflict. For those individuals, certain legal consequences follow.

First, AP I, Article 47 does not criminalize individuals or prohibit individuals from becoming mercenaries or taking part in hostilities, nor does it create obligations for belligerents to exclude mercenaries from their fighting forces.[313] Rather, it precludes mercenaries from holding certain law-of-war statuses—namely, combatant and prisoner of war—and withholds the legal consequences of those statuses—such as the combatant's privilege[314] and the protections afforded by the legal regime governing the treatment of prisoners of war.[315]

If a mercenary is not a combatant, what is their legal status? Article 51(1) of AP I defines "civilian" as "any person" who does not fall within a category of persons considered to be combatants.[316] That is, any person who is not a combatant is a civilian. Because Article 47(1) withholds combatant status from a mercenary, Article 51(1) suggests that Ukraine and Russia must accord civilian status to mercenaries. The ICRC's 1987 *Commentary* on Article 47 supports this conclusion.[317]

Certain legal consequences follow from the civilian status of mercenaries, perhaps most significantly under law-of-war targeting rules. It is well understood that a civilian may not be the object of attack based on their civilian status.[318] Rather, a civilian is protected from attack "unless and for such time as they take direct part in hostilities."[319]

Thus, AP I rules suggest that Russia and Ukraine may only target mercenaries based on their conduct and never based on their status. Notwithstanding its clear implication by the treaty text, Ukraine and Russia may well reject this conclusion. Russia especially so, given recent official statements that Russia would show "no mercy for mercenaries wherever they are found on the territory of Ukraine."[320] Even if States accepted this interpretation, further questions arise, such as how to reconcile mercenaries' civilian status with the Article 47(2) condition that mercenaries take a direct part in hostilities.

313 AP I, *supra* note 9, art. 47.

314 DoD Law of War Manual, *supra* note 10, § 4.4.3.

315 *See e.g.* GC III, *supra* note 4.

316 AP I, *supra* note 9, art. 51(1).

317 AP I Commentary, *supra* note 15, art. 47.

318 DoD Law of War Manual, *supra* note 10, § 4.8.

319 AP I, *supra* note 9, art. 51.

320 Susie Blann & Elaine Ganley, *Foreign Fighters in Ukraine Await Weapons in Chaos of War*, ABC News 10 (Mar. 15, 2022, 7:43 AM), https://www.news10.com/news/foreign-fighters-in-ukraine-await-weapons-in-chaos-of-war.

Other open questions include whether a mercenary or group of mercenaries could form part of an organized armed group, and whether members of such a group could be targeted based on their status.

Other consequences follow in the event a mercenary falls into the power of the opposing belligerent. Under Article 47(1), such individuals do not have the right to be a prisoner of war. Yet as noted earlier, the difficulties of applying the Article 47(2) definition coupled with the complexity of the armed conflict suggest that the mercenary status of a captured individual often may not be immediately apparent. Under Article 5 of the Third Geneva Convention, such individuals would be entitled to prisoner of war protection pending the determination of their legal status by a competent tribunal.[321] (AP I, Article 45, goes further, according prisoner of war *status*—not merely protection—in cases of doubt.[322])

These are only a sampling of the legal issues Ukraine and Russia face regarding mercenaries on the battlefield. Not all can be addressed here. Yet this sampling further cements an appreciation of the practical difficulties involved in implementing Article 47.

Conclusion

Given the highly technical and narrowly drawn definition of Article 47(2), it is unlikely there are many mercenaries—in the *legal* sense—in Ukraine. If mercenaries are, in fact, fighting there, the discussion above establishes that Russia and Ukraine have their work cut out with respect to implementing Article 47.

Stepping back, I note that others have argued in separate contexts that AP I's general turn toward technicality and legalism may have unintentional and undesirable effects on the law of war's relevance and impact on the contemporary battlefield.[323] Perhaps Article 47 is an example of this phenomenon—its technicality may risk unworkability; its narrowness, irrelevance. States that are party to AP I may wish to consider this possibility. If concerns about mercenaries are valid, then another approach may be justified.

321 GC III, *supra* note 4, art. 5.

322 AP I, *supra* note 9, art. 45.

323 Sean Watts, *Law-of-War Perfidy*, 219 Mil. L. Rev. 106 (2014).

THE WAGNER GROUP: STATUS AND ACCOUNTABILITY

by Winston Williams and Jennifer Maddocks | Feb 23, 2023

Since Russia commenced its full-scale invasion of Ukraine in February 2022, the Wagner Group has come out of the shadows. Used by the Kremlin as an alternative fighting force since 2014, the private military company (PMC) now operates with a much greater degree of prominence.[324] Not only has the group undergone a rebranding,[325] with a new logo and plush headquarters in St. Petersburg; it also played an important and widely reported role in the Russian offensives to take the town of Soledar,[326] as well as other territory in the vicinity of Bakhmut.[327] After initially crediting conventional forces with the success at Soledar, Russia's Defense Ministry issued a rare statement acknowledging Wagner's role.[328] Meanwhile, the PMC's leader, oligarch Yevgeny Prigozhin,[329] now openly admits his links to the group, even going on a personal recruitment drive in Russian prisons to enroll new fighters.[330]

The Wagner Group's more prominent role in Ukraine raises questions regarding the status of its fighters under the law of armed conflict (LOAC). A recent post flagged these issues in the context of a Wagner fighter who escaped into Norway.[331] Wagner's role in the conflict also highlights questions of accountability. Allegations of LOAC violations involving the group have been numerous, including claims that its fighters played a leading role in the massacres at Bucha,[332] caused the deadly attack on a building that housed Ukrainian prisoners of war,[333] and conducted the brutal execution of a former fighter.[334]

In this post we consider, first, the status of Wagner Group fighters under LOAC before

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324 Neil Hauer, *Russia's Favorite Mercenaries*, Atlantic (Aug. 27, 2018), https://www.theatlantic.com/international/archive/2018/08/russian-mercenaries-wagner-africa/568435.

325 James Kilner, *Wagner Group goes mainstream as infamous Russian mercenaries gain corporate logo and skyscraper HQ,* Telegraph (Nov. 5, 2022, 5:56 PM), https://www.telegraph.co.uk/world-news/2022/11/05/wagner-group-goes-mainstream-infamous-russian-mercenaries-gain.

326 *Russia-Ukraine War: Russian Mercenaries Claim to Take Embattled Eastern Town*, N.Y. Times (Jan. 10, 2023, updated Jan. 11, 2023), https://www.nytimes.com/live/2023/01/10/world/russia-ukraine-news.

327 Shashank Bengali, *Russia's Wagner Fighters Claim Advance Near Bakhmut*, N.Y. Times (Feb. 12, 2023, updated Feb. 14, 2203), https://www.nytimes.com/2023/02/12/world/europe/ukraine-russia-bakhmut-wagner.html.

328 Reuters, *Russian Claims Capture of Soledar, Acknowledges Wagner Role*, EuroNews (Jan. 14, 2023, 11:05, updated 11:40), https://www.euronews.com/2023/01/14/ukraine-crisis-russia-soledar.

329 *Russia's Prigozhin Admits Link to Wagner Mercenaries for First Time*, Reuters (Sept 26, 2022, 3:27 AM), https://www.reuters.com/world/europe/russias-prigozhin-admits-link-wagner-mercenaries-first-time-2022-09-26.

330 Allison Quinn, *'Putin's Chef' Is Personally Touring Russian Prisons for Wagner Recruits to Fight in Ukraine, Reports Say*, Daily Beast (Aug. 6, 2022, 5:05 PM, updated 4:41 PM), https://www.thedailybeast.com/putins-chef-yevgeny-prigozhin-is-touring-prisons-for-wagner-recruits-to-fight-in-ukraine-reports-say.

331 Camilla Cooper, *Ukraine Symposium—A Wagner Group Fighter in Norway*, Articles of War, https://lieber.westpoint.edu/wagner-group-fighter-norway.

332 Sean McFate, *The Mercenaries Behind the Bucha Massacre*, WSJ Opinion (Apr. 12, 2022, 6:32 PM), https://www.wsj.com/articles/mercenaries-behind-bucha-massacre-russia-ukraine-putin-attack-terror-brutality-wagner-group-moscow-geneva-convention-war-crimes-atrocities-11649797041.

333 Luke Harding, *Blast That Killed Ukraine PoWs Was Kremlin Operation, Kyiv Claims*, Guardian (Aug. 3, 2022, 12:14), https://www.theguardian.com/world/2022/aug/03/blast-that-killed-ukraine-pows-was-kremlin-operation-kyiv-claims.

334 Guy Faulconbridge, *Video Shows Sledgehammer Execution of Russian Mercenary*, Reuters (Nov. 13, 2022, 11:27 AM), https://www.reuters.com/world/europe/sledgehammer-execution-russian-mercenary-who-defected-ukraine-shown-video-2022-11-13.

moving to discuss potential individual and State responsibility for their actions.

The Status of Wagner Group Fighters under LOAC

The Wagner Group engages in conflict not only in Ukraine but also around the world. As a preliminary matter, therefore, it is important to recall that any analysis of Wagner members' status while fighting in Ukraine would be limited to that territory and not necessarily applicable to other areas. Even if the group attains a certain status in Ukraine, a separate analysis is required for the group's operations in another conflict environment like Syria or Mali.

Regarding Ukraine, the conflict is international in character.[335] Thus, the Geneva Conventions and Additional Protocol I (AP I) apply given that both Russia and Ukraine are party to these treaties. The status of members of the Wagner Group under LOAC depends primarily on whether they meet the criteria set out in Articles 43 and 44 of AP I. First, however, it is pertinent to consider whether they are mercenaries within the meaning of Article 47 of AP I.

Are Wagner's Members Mercenaries?

Media reports frequently describe the Wagner Group as mercenaries.[336] However, as discussed here,[337] the "unworkability" and "narrowness of the definition" in Article 47 mean that as a matter of law, very few fighters in Ukraine would qualify. While some of the Wagner Group's members might satisfy this definition, it is clear that others will not. For instance, Article 47 requires that a mercenary is not a national of a party to the conflict. Although the PMC's members include a range of nationalities,[338] reporting indicates that many Wagner fighters in Ukraine are Russian convicts.[339] These, therefore, would not qualify as mercenaries under Article 47(2)(d). There is also ambiguity whether Wagner's fighters are motivated to participate in the conflict "essentially by the desire for private gain."

If any members of the Wagner Group do meet the mercenary definition, Article 47 provides that they are not entitled to combatant or prisoner of war status. Assuming, however, that the majority of Wagner's fighters do not qualify as mercenaries, it is necessary to look to AP I, Articles 43 and 44 AP I to ascertain their status.

Are Wagner's Members "Armed Forces of a Party to the Conflict"?

If Wagner Group fighters fall within the definition of "armed forces" in AP I, Article 43 AP I, they are combatants, meaning that they have the right to participate directly in hostilities. This status would grant them immunity from prosecution relating to their combat operations.

335 Michael N. Schmitt, *Ukraine Symposium—Classification of the Conflict(s),* Articles of War, https://lieber.westpoint.edu/classification-of-the-conflicts.

336 *What is Russia's Wagner group, and what has happened to its leader?* BBC (Sept 6, 2023), https://www.bbc.com/news/world-60947877.

337 Robert Lawless, *Are Mercenaries in Ukraine?* Articles of War (Mar. 21, 2022), https://lieber.westpoint.edu/are-mercenaries-in-ukraine [hereinafter Lawless].

338 *Serbia Slams Russia's Wagner Group for Ukraine Recruitment*, Al Jazeera (Jan. 17, 2023), https://www.aljazeera.com/news/2023/1/17/serbia-slams-russias-wagner-group-for-ukraine-recruitment-bid.

339 Felix Light, Filipp Lebedev & Reade Levinson, *A Russian Graveyard Reveals Wagner's Prisoner Army*, Reuters (Jan. 26, 2023, 11:00 AM), https://www.reuters.com/investigates/special-report/ukraine-crisis-russia-graves-wagner.

If they do not attain this status, however, Wagner's members enjoy no international law protection from domestic prosecutions related to their participation in hostilities.

According to Article 43, "[t]he armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates…." The first question to consider, therefore, is whether Wagner Group fighters operate under a command responsible to Russia.

A recent case from the Hague District Court examined whether rebels operating in the Donbas region of Ukraine were "armed forces" within the meaning of Article 43.[340] The Court considered two issues of relevance. First, whether the conflict in the Donbas had been internationalized due to Russia's overall control over the rebels, and second, whether the rebels were entitled to combatant status.

Taking into account the close relationship between the rebel leaders and Russian officials, the material support Russia provided, and their mutually coordinated military operations, the Court concluded that Russia exercised overall control over the rebels, meaning that the conflict was international in character and AP I applied.[341] However, the same facts did not lead the Court to conclude that the rebels were under a command responsible to Russia within the meaning of AP I, Article 43 AP I. The Court determined that the rebels were not entitled to combatant status based on the fact that Russia "denied any control or involvement" with them during the period in question.

This decision has faced criticism due to its heavy emphasis on Russia's statements rather than the evidence of its control over separatist forces.[342] Nonetheless, it implies that more is needed to establish whether a group is under a responsible command for the purposes of Article 43. In other words, equipping, financing, and assisting with planning are not enough to establish responsible command. Instead, a commentary to the Additional Protocols indicates that the key question is whether, in their operations, the forces are "subordinate to a command which is responsible to one of the Parties to the conflict."[343] A footnote to the commentary highlights that "[i]n general, the exercise of such responsibility implies the exercise of effective control over subordinates."

To establish whether members of the Wagner Group are entitled to combatant status, therefore, it is helpful to consider whether they act under Russia's "effective control." Recent reporting assists this assessment, indicating that the PMC clearly acts on Moscow's behalf. For example, Russia's Defense Ministry, which initially took credit for the victory in Soledar, acknowledged that the "mission was successfully accomplished by the courageous and selfless actions of the volunteer assault units of the Wagner private

340 Lachezar Yanev, *The MH17 Judgment: An Interesting Take on the Nature of the Armed Conflict in Eastern Ukraine*, EJIL:Talk! (Dec. 7, 2022), https://www.ejiltalk.org/the-mh17-judgment-an-interesting-take-on-the-nature-of-the-armed-conflict-in-eastern-ukraine.

341 Joëlle Trampert, *Possible Implications of the Dutch MH17 Judgment for the Netherlands' Inter-State Case Before the ECtHR*, EJIL:Talk! (Dec. 12, 2022), https://www.ejiltalk.org/possible-implications-of-the-dutch-mh17-judgment-for-the-netherlands-inter-state-case-before-the-ecthr.

342 Yanev, *supra* note 340.

343 AP I, *supra* note 9, art. 43.

military company."[344] This recognition, coupled with reports that the Wagner Group filled its ranks with Russian convicts,[345] demonstrates close linkages between the group and the Russian government.

Yet these facts are insufficient to determine whether the Wagner Group operates under a command responsible to Russia. Given the focus on "effective control over subordinates," further information is needed regarding the command relationship between Wagner's leaders and the Russian Ministry of Defense.

The details of this relationship remain unclear from reporting and could vary from operation to operation. For instance, one report indicates that "Wagner forces assisted other Russian troops in the Battle of Severodonesk" whereas they "took the lead" in the Bakhmut offensive.[346] These differing roles may have implications for the relevant command relationships. Thus, in operations when Wagner forces assisted other Russian troops, they may have acted under the command of Russian military officers. However, in operations where they took the lead, perhaps they operated under their own separate chain of command. Without knowing the full facts regarding the relationship between Russia and the Wagner Group, it is difficult to reach any firm conclusions regarding the status of Wagner fighters under LOAC.

In addition, even if evidence is available to indicate that Wagner's forces operate under Russian command, Article 43 also requires the group to have an "internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict." It is unclear from media reporting whether such a system exists within the Wagner Group. Indeed, the many allegations against the PMC seem to indicate that it does not have any form of internal disciplinary system that would facilitate LOAC compliance.[347] It is more likely that the reported impunity with which Russia's conventional forces act is replicated within Wagner.[348] Thus, Article 43's requirements may be too high a standard for members of the Wagner Group to meet.

Are Wagner's Members Entitled to Prisoner of War Status?

If the Wagner Group were to meet the definition of an armed force under AP I. Article 43, AP I, the PMC's fighters would be entitled to prisoner of war status. This means that if captured, the detaining power must afford them all the protections included within the 1949 Third Geneva Convention.

Article 44 AP I also lists a number of additional requirements that combatants must meet in order to qualify as prisoners of

344 Leila Sackur, *Victory Claims over Small Ukrainian Town Expose Rift Among Russian Forces*, NBC News (Jan. 14, 2023, 4:44 PM), https://www.nbcnews.com/news/world/russia-ukraine-war-soledar-military-rift-wagner-group-putin-prigozhin-rcna65823.

345 Jonathan Beale, *Russia-Supporting Wagner Group Mercenary Numbers Soar,* BBC (Dec. 22, 2022), https://www.bbc.com/news/world-europe-64050719.

346 Kateryna Stepanenko & Frederick W. Kagan, *Russian Offensive Campaign Assessment, January 22, 2023*, ISW Press (Jan. 22, 2023, 8:30 PM), https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-january-22-2023 [hereinafter Stepanenko & Kagan].

347 Associated Press, *Brutality of Russia's Wagner Gives It Lead in Ukraine War*, AP News (Jan. 27, 2023, 1:49 PM).

348 Fred Pleitgen, Claudia Otto & Ivana Kottasová, *'There Are Maniacs Who Enjoy Killing,' Russian Defector Says of His Former Unit Accused of War Crimes in Bucha*, CNN (Dec. 14, 2022, 4:53 AM), https://www.cnn.com/2022/12/13/europe/russian-defector-war-crimes-intl-cmd/index.html.

war. Thus, combatants lose this status if they fail to distinguish themselves from the civilian population in accordance with Article 44(3). However, it is notable that LOAC violations do not deprive combatants of prisoner of war status. Article 44(2) provides that "[w]hile all combatants are obliged to comply with the rules of international law applicable to armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant."[349] Consequently, despite the numerous allegations of systematic and egregious LOAC violations on the part of Wagner Group fighters, provided they qualify as combatants, these violations would not deprive them of prisoner of war status upon capture.[350]

Accountability for the Wagner Group's LOAC Violations

Wagner Group fighters' status under LOAC determines whether they have combatant immunity, meaning that they cannot be prosecuted for their mere participation in the hostilities. However, it leaves open the issue of accountability regarding the many LOAC violations involving the group. This can be addressed by asking two questions. First, could individual fighters be held to account for the commission of war crimes? And second, in what circumstances would Russia bear State responsibility for the group's LOAC violations?

The distinction between these two forms of accountability is important, as each has different consequences. While a fighter's conviction for war crimes results in penal sanctions, aimed at punishing the individual concerned and deterring future crimes, Russia's State responsibility would lead to wider consequences. These include an obligation on the State to cease[351] its harmful conduct and to make reparation for any damage or injury caused.[352] In addition, only State responsibility would recognize the official nature of the Wagner Group's conduct, performed on behalf of the Russian State.

Individual Criminal Responsibility

The issue of individual criminal responsibility is relatively straightforward. Reporting indicates that like Russia's conventional forces, members of the Wagner Group have committed numerous war crimes during the conflict, including the willful killing of civilians in Bucha.[353] Individual fighters can be prosecuted for such crimes either in Ukraine,[354] at an international forum such as the International Criminal Court,[355] or in another State under the principle of universal jurisdiction.[356] Moreover, those who ordered

349 AP I, *supra* note 9, art. 44(2).

350 *Id.* art. 44.

351 Articles of State Responsibility, *supra* note 259, art. 30.

352 *Id.* art. 31.

353 Brendan Cole, *Russia's Wagner Group Soldier Behind Bucha Killings, German Intel Claims,* Newsweek (Apr. 7, 2022, 11:49 AM EDT), https://www.newsweek.com/der-spiegel-russia-ukraine-troops-bucha-wagner-putin-1695974.

354 *Alleged Wagner Group Fighters Accused of Murdering Civilians in Ukraine*, Guardian (May 25, 2022, 9:36 PM), https://www.theguardian.com/world/2022/may/25/wagner-group-fighters-accused-murdering-civilians-ukraine-war-crimes-belarus.

355 Situation in Ukraine, Investigation, ICC-01/22, ICC (Mar 2, 2022).

356 Mark Kersten, *Universal Jurisdiction in Ukraine: States Should Commit to Using Their Own Courts to Address Russian Atrocities*, Justice in Conflict (Oct. 17, 2022), https://justiceinconflict.org/2022/10/17/universal-jurisdiction-in-ukraine-states-should-commit-to-using-their-own-courts-to-address-russian-atrocities.

the crimes or allowed them to take place can be held to account based on the doctrine of command responsibility.[357]

While achieving individual criminal justice may be time-consuming and imperfect, there is at least the possibility that in due course, Wagner Group fighters might be brought before a court and held to account for their actions.[358]

State Responsibility

The question of Russia's State responsibility is more complex and turns upon the issue of attribution. In other words, is the Wagner Group's conduct in violation of LOAC attributable to Russia, thereby leading to State responsibility? This is an issue that one of us addressed previously, when the Wagner Group was still a shadowy organization with ambiguous links to the Kremlin.[359] At that time, attributing the Wagner Group's conduct to Russia presented considerable difficulties, particularly in view of the opaque relationship between Moscow and the PMC.[360]

Given the Wagner Group's more prominent role in recent months, the question arises whether these changed factual circumstances alter the attribution analysis. The response depends upon the particular basis of attribution. The law of State responsibility includes various grounds on which private conduct may be attributed to a State, but in simple terms, attribution can be based either on the factual relationship between the parties or on the State's domestic law.

Attribution Based on Law

Considering first attribution based on law, it is notable that notwithstanding the greater public links between Russia and the Wagner Group, their legal relationship has not changed. A conclusion that members of the PMC "belong" to Russia for LOAC purposes, or are entitled to prisoner of war status, does not mean that they are de jure State organs under the terms of Russia's domestic law.[361] Russian law still does not authorize or recognize the activities of PMCs such as the Wagner Group.[362] This means that the group's legal status is different from that of Russia's conventional forces. While Russia automatically bears international responsibility for the many LOAC violations committed by its armed forces, which qualify as organs of State, the same is not true of similar violations committed by members of the Wagner Group.

The illegality of PMCs under Russian domestic law also precludes the attribution of the Wagner Group's conduct to Russia on another basis. When a State authorizes a non-

357 Noëlle Quénivet, *Command Responsibility and the Ukraine Conflict*, Articles of War (Mar. 30, 2022), https://lieber.westpoint.edu/command-responsibility-ukraine-conflict.

358 Chris Jenks, *Ukraine Symposium—Comprehensive Justice and Accountability in Ukraine*, Articles of War (Apr. 15, 2022), https://lieber.westpoint.edu/comprehensive-justice-accountability-ukraine.

359 Jennifer Maddocks, *Russia, the Wagner Group, and the Issue of Attribution,* Articles of War (Apr. 28, 2021), https://lieber.westpoint.edu/russia-wagner-group-attribution.

360 Alexander Rabin, *Diplomacy and Dividends: Who Really Controls the Wagner Group?* Foreign Pol. Res. Inst. (Oct. 4, 2010), https://www.fpri.org/article/2019/10/diplomacy-and-dividends-who-really-controls-the-wagner-group.

361 Articles of State Responsibility, *supra* note 259, art. 4.

362 Catrina Doxsee, *Putin's Proxies: Examining Russia's Use of Private Military Companies*, Center for Strategic and Military Studies (Sept 15, 2022), https://www.csis.org/analysis/putins-proxies-examining-russias-use-private-military-companies.

State actor to perform governmental functions on its behalf, the entity's conduct when performing those tasks is attributable to the State.[363] At first glance, this rule of attribution should apply to the Wagner Group's conduct, given that the PMC undertakes combat functions on Russia's behalf, which are governmental in character. Moreover, the group clearly acts with State authorization, as demonstrated by its recruitment drive from Russian prisons[364] and its reliance on Russian military assets.[365] Nonetheless, the rule applies only if the State empowers the entity to act in a manner that accords with its domestic law.[366] As PMCs remain illegal in Russia, it seems that this criterion is not satisfied. Therefore, the rule of attribution does not apply.

Attribution Based on Fact

It is therefore necessary to turn to the factual relationship between Russia and the Wagner Group to ascertain whether this provides a basis for attribution. The PMC's conduct could be attributed to Russia if the fighters responsible for specific LOAC violations acted under Russia's instructions, direction, or control.[367] Given the enduring relationship between Moscow and the PMC, the key question here is whether Wagner Group fighters acted under Russia's control.

The appropriate standard of control for the purposes of this rule of attribution has been the subject of considerable debate. However, the most authoritative test is the "effective control" test formulated by the International Court of Justice.[368] Although this test uses the same language as the Commentary to Article 43 AP I, "effective control" does not necessarily have the same meaning for the purposes of determining both combatant status and attribution.

In the State responsibility context, the effective control test concerns the State's influence over the specific conduct that violates international law and requires a detailed level of State control. In effect, for conduct to be attributed to a State pursuant to this test, State officials must exert tactical control over the operation in which the relevant violations were committed. In the case of the Wagner Group, this would mean that evidence is required, for example, that Russian military officers exercised command and control over the Wagner Group fighters who were involved in the killing of civilians.

It may be that given the more open links between Russia and the Wagner Group, such evidence can be found. Nevertheless, the effective control threshold is extremely high, and often the exact State involvement in an activity remains uncertain. Regarding the

363 Articles of State Responsibility, *supra* note 259, art. 5.

364 Max Seddon, *Russia Admits Vladimir Putin Pardoning Convicts So That They Can Join Wagner in Ukraine*, Financial Times (Jan. 27, 2023), https://www.ft.com/content/82748bdd-5b34-4204-b3ad-d08da2c58982.

365 Kateryna Stepanenko, Karolina Hird et al., *Russian Offensive Campaign Assessment, January 20, 2023*, ISW Press (Jan. 20, 2023, 8:00 PM), https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-january-20-2023.

366 Jennifer Maddocks, *Outsourcing of Government Functions in Contemporary Conflict: Rethinking the Issue of Attribution*, 59 Virginia J. Int'l L. 47 (2019).

367 Articles of State Responsibility, *supra* note 259, art. 8.

368 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J., 43, paras. 396–406 (Feb. 26).

capture of Soledar, for example, if it is correct that the Wagner Group led the assault[369] rather than acting in support of Russian troops, this suggests the PMC may have operated independently from Russia's conventional forces, within its own separate chain of command. [370] If that was the case, the PMC did not act under Russia's effective control, even if the State provided strategic direction and material support toward the offensive.

As when seeking to determine the status of Wagner Group fighters under LOAC, further information is required regarding the command relationship between Wagner's fighters and Russian military forces. Without this, it may prove difficult to establish Russia's effective control over the Wagner Group's conduct in violation of international law. Thus, despite increased clarity regarding the PMC's links to the Kremlin, finding sufficient evidence to establish State responsibility is likely to remain a challenge.

Concluding Thoughts

Russia's evolving use of the Wagner Group demonstrates the PMC's continued importance in promoting Moscow's military and strategic objectives across the globe. In Ukraine, while Russia's conventional forces have foundered,[371] the Wagner Group's brutal methods,[372] including its use of prisoners as "cannon fodder," have met with some degree of success.[373] Unless internal power struggles intervene, it is unlikely that Russia will cease to employ the group any time soon.[374] Indeed, reports that Belarus has created its own PMC,[375] similar to Wagner, indicate that the trend may instead proliferate.

Given the prominent role that groups such as Wagner are likely to play in future conflict, it is critical that military forces understand their status under LOAC. This determination is not straightforward in the case of the Wagner Group in view of the considerable ambiguity that still surrounds the command relationships between Russian officials and the PMC's leaders. On balance, there is currently insufficient information available to conclude that the Wagner Group operates in Ukraine under a command responsible to Russia. It may be that this assessment changes, however, as the group and its activities on Russia's behalf emerge from the shadows.

In addition, accountability is key. International law should not permit States to evade their international legal obligations through the use of unofficial forces like the Wagner Group. While individual fighters should be held

369 Stepanenko & Kagan, *supra* note 346.

370 *Heavy Fighting in Ukraine's Donetsk as Wagner Targets Village*, Al Jazeera (Jan. 29, 2023), https://www.aljazeera.com/news/2023/1/29/control-of-blahodatne-disputed-while-attacks-continue-in-ukraine.

371 Joel Mathis, *Why Russia Is Relying on Wagner Group Mercenaries in Ukraine*, The Week US (Dec. 24, 2022), https://theweek.com/russia/1019561/russias-wagner-group.

372 Ido Vock, *The Brutal Methods of Russia's Wagner Group*, The New Statesman (Jan. 24, 2023), https://www.newstatesman.com/world/europe/ukraine/2023/01/brutal-methods-russia-wagner-group-yevgeny-prigozhin.

373 Olga Podoplelova, *Cannon Fodder for "Putin's Chef,"* The Russian File (Jan. 9, 2023), https://www.wilsoncenter.org/blog-post/cannon-fodder-putins-chef.

374 Riley Bailey, Kateryna Stepanenko et al., *Russian Offensive Campaign Assessment, February 11, 2023*, ISW Press (Feb. 11, 2023, 9:00 PM), https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-february-11-2023.

375 Ukrainska Pravda, *Belarus creates private military company similar to Wagner Group*, Yahoo! Finance (Jan. 11, 2023), https://finance.yahoo.com/news/belarus-creates-private-military-company-135457431.html.

criminally accountable for any war crimes with which they were involved, Russia should also bear State responsibility for the PMC's atrocities. It is only State responsibility that would reflect the official nature of the Wagner Group's acts, which were clearly perpetrated while the group was conducting combat operations on Moscow's behalf. Although attribution remains a challenge, it is possible that the more prominent role that the Wagner Group now plays might increase the likelihood that Russia will, one day, bear international responsibility for the group's many LOAC violations.

A WAGNER GROUP FIGHTER IN NORWAY

by Camilla Cooper | Feb 1, 2023

In the early hours of Friday, January 13th, the alarm went off in a military border guard base in northern Norway. Someone had illegally crossed the border with Russia, and Norwegian conscripts were tasked to find the person. The intruder turned out to be a former commander of the Wagner Group, who, while wearing white camouflage, managed to get into Norway by crossing a river. He described a dramatic escape from Russian border guards and their dogs.

The border, which is almost 200 kilometers long, is in a desolate area. There is no fence, but sources within the Norwegian Army have told the media that it is nearly impossible to cross without being detected by Russian border guards.[376] Once in Norway, the man, later identified as Andrej Medvedev, knocked on the door of a civilian home to ask for help (local media reports that the people of Pasvik now will start to lock their doors at night). Soldiers detained him 3 kilometers from the border and then immediately handed him over to the police. Medvedev then requested asylum and indicated his willingness to testify against Yevgeny Prigozhin, aka "Putin's chef," the founder of the Wagner Group.

International Law

The story reads like the start of a James Bond film, but it is far from clear how it will unfold. At the core of the case are several international legal questions that are now hotly debated in the media and among international law experts. What is the status of the Wagner Group's members? Are they mercenaries, members of militias or other volunteer corps belonging to a Party to the conflict, or members of the Russian armed forces? The answer requires investigation and depends on the role of Medvedev's troop and its connection to Russia and President Vladimir Putin. Currently, Medvedev has the status of a witness, but this may change as the investigation evolves. After a short internment at an immigration center, Norway released him on January 25 pending the outcome of his asylum application and investigation into his role in Wagner.

The Wagner Group is generally described as a brutal group of mercenaries. Legal discourse has focused on how the international community can hold Russia and its leaders responsible for their actions under the law of State responsibility or international criminal

376 Erlend Hykkerud, Morten Hopkins Kræmer et al., *Medvedev avhøres av Kripos:—Preget og sliten* [Medvedev is being interrogated by Kripos:—Distressed and Tired.], Troms og Finnmark (Jan. 21, 2023, 2:42, updated 5:04), https://www.nrk.no/tromsogfinnmark/mannen-som-hevder-han-er-wagner-avhopper-avhores-av-kripos-1.16264581.

law.[377] The current case raises new and different questions, however. Was Medvedev a combatant with combatant privilege or a criminal with no right to use force?[378]

It seems the Wagner Group's role has changed since the Russian invasion of Ukraine. It is no longer a private company with no official ties to the Kremlin. Now President Putin's close ally Prigozhin is open about the fact that he's in charge of Wagner and that they are operating in Ukraine.[379] Russia has also permitted the Wagner Group to recruit new members from prisons.

Before considering specific international law issues, it is worth mentioning that although Norway has criminalized membership of terrorist groups, the categorization of such groups is based on UN and EU lists, on which the Wagner Group does not appear. Mere membership of the group is therefore not a crime under Norwegian law, and Medvedev can only be prosecuted if the investigation proves that he has been involved in criminal activities.

Combatant Status

From a law of armed conflict (LOAC) perspective, the first issue to determine is whether the ties between Russia and the Wagner Group are now of such a nature that Medvedev is a member of the Russian armed forces, or perhaps more likely, a member of a militia or other volunteer corps belonging to a Party to the conflict. The criteria for the latter are set out in Geneva Convention III, Article 4:

a. that of being commanded by a person responsible for his subordinates;

b. that of having a fixed distinctive sign recognizable at a distance;

c. that of carrying arms openly;

d. that of conducting their operations in accordance with the laws and customs of war.[380]

Although it may be debated whether the last requirement, relating to LOAC compliance, is met, the focus here will be on the first: "being commanded by a person responsible for his subordinates." This must be read in light of AP I, Article 43(1) (both Russia and Ukraine are party to AP I), which is also applicable to regular armed forces:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict.

Those who are in this category are combatants, and "have the right to participate directly in

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377 Lawless, *supra* note 337; Jennifer Maddocks, *Ukraine Symposium—State Responsibility for Non-State Actors' Conduct*, Articles of War, https://lieber.westpoint.edu/state-responsibility-non-state-actors-conduct; Ken Watkin, *Special Forces, Unprivileged Belligerency, and the War in the Shadows*, Articles of War, https://lieber.westpoint.edu/special-forces-unprivileged-belligerency-war-shadows/ (last visited Feb. 12, 2024).

378 AP I, *supra* note 9, art. 43(2).

379 Seddon, *supra* note 364.

380 GC III, *supra* note 4, art. 4.

hostilities" (AP I art. 43(2)). This means that they have immunity from prosecution for lawful acts of war, on the basis that they fight on behalf of the State.

How Should Norway Deal with Medvedev?

Combatant status, with all the privileges it entails, is at the core of the question concerning how to deal with Medvedev and other Wagner members. Russia was previously very clear in its position that the Wagner Group was not acting on Russia's behalf and that Russia was not responsible for the group's actions. Despite the information concerning Wagner forces' brutality in Ukraine, it does not appear that Russian leadership is sanctioning their conduct or increasing control over them. In fact, Wagner's position appears to be based on a personal bond between Prigozhin and Putin, a bond that, according to reports by the Institute for the Study of War, is deteriorating.[381] Admittedly, it does not seem like Russia is sanctioning violations by its regular armed forces either, although here the link to the Russian State is undisputed.

Although the Wagner Group is clearly using Russian military equipment and training facilities and it operates alongside Russia's regular armed forces in Ukraine, at this point, there is not enough information to reach a conclusion regarding the group's status. The challenge is that we may never know the exact nature of the connections between the Wagner Group and the Russian authorities, and in the meantime, cases like that unfolding in Norway will continue. So how should we deal with them?

Considering that part of the Wagner Group's purpose has been to offer Russia plausible deniability regarding their actions, it is unlikely that Moscow would ever accept responsibility for their conduct. It is also unlikely that Russia will request that Medvedev is treated as a combatant with combatant immunity. This would entail that the Russian government accepts command responsibility for the Wagner Group's actions or for the failure to prevent the LOAC violations they have committed.[382] The most efficient way to hold someone responsible for the actions of Wagner's members is therefore through individual responsibility and by accepting the Russian narrative that the Wagner Group is not their responsibility.

The Wagner Group's status will affect the investigation into which crimes may have been committed. Although LOAC is strict in the requirement to uphold the principles of distinction and proportionality, and in rules prohibiting indiscriminate attacks, it is also clear that soldiers are assessed on the basis of their knowledge at the time of attack (cf. the Rendulic rule) and that mistakes are tolerated if they are deemed reasonable. As a result, situations which at first glance appear to be an obvious war crime, for instance because of the degree of civilian harm, may prove hard to prosecute.[383] It may be, for example, that the troops thought the

381 Stepanenko & Kagan, *supra* note 346.

382 AP I, *supra* note 9, art. 87.

383 Geoff Corn & Sean Watts, *Ukraine Symposium—Effects-Based Enforcement of Targeting Law,* Articles of War (June 2, 2022), https://lieber.westpoint.edu/effects-based-enforcement-targeting-law [hereinafter Corn & Watts].

civilian buildings were militarized and had been informed that all civilian persons had evacuated. However, if the Wagner fighters involved are, in fact, mercenaries, they have no right to use force in the first place.

The question of war crimes is not only important in respect of a potential prosecution. Medvedev has applied for asylum. Norway does not normally grant asylum if the applicant has committed war crimes. Medvedev claims that he has witnessed atrocities but has not carried them out. Yet he may nonetheless be tried for complicity, for aiding or abetting, or under the international criminal law concept of co-perpetration or "joint criminal enterprise" (JCE, or as critics refer to it: "just convict everybody"). Norwegian criminal law reflects a wide approach to aiding and abetting, a point already raised in relation to war crimes before Norwegian courts (2008–2011), in a case originating in the former Yugoslavia.

Deportation to Russia or Ukraine?

One of the questions that has been raised in Norwegian media is whether Medvedev can be deported to Ukraine or to Russia. According to LOAC, all States are obliged "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."[384] Both Ukraine and Russia could request Medvedev's extradition based on their compliance with this duty. However, as Medvedev is on Norwegian soil, he is under the human rights jurisdiction of Norway, placing additional restraints on Norwegian authorities' options.

With regard to Russia, Medvedev has claimed that there is a real risk to his life if he is returned. If that fear is considered reasonable, the principle of non-refoulement, prohibiting States from returning individuals to a country where there is a real risk of being subjected to persecution, torture, or inhuman or degrading treatment or where any other human rights violation, would apply.[385] The principle is found amongst others in the Convention Against Torture (art. 3) but is also considered to be customary international law.[386] As a result, even if Norway decides that Medvedev has no right to asylum and should be deported, the deportation cannot be effectuated if the risk remains. Norway has experience with this situation before, in the case of Mullah Krekar whom Norway attempted to deport to Iraq.[387] In that case, the issue was solved by an Italian extradition request and criminal prosecution there.

In relation to Ukraine, it is questionable whether Norway could hand over a member of the opposing armed forces to become a prisoner of war. To that end, Medvedev's status under LOAC could be relevant for the application of neutrality law. According to Hague Convention V, Article 11: "A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the

384 GC III, *supra* note 4, art. 129.

385 Guy Faulconbridge, *Video shows sledgehammer execution of Russian mercenary*, Reuters (Nov. 13, 2022, 11:27 AM), https://www.reuters.com/world/europe/sledgehammer-execution-russian-mercenary-who-defected-ukraine-shown-video-2022-11-13.

386 G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

387 *Norway extradites jihadist preacher Mullah Krekar to Italy*, BBC (Mar. 26, 2020), https://www.bbc.com/news/world-europe-52054602.

theatre of war."[388] If Medvedev is considered to belong to the Russian armed forces, he should be detained. However, the Norwegian Ministry of Foreign Affairs expressed in 2022 that they considered the Hague neutrality rules outdated and of limited relevance, and Ukrainian soldiers have been trained in Norway and then permitted to return to Ukraine to continue fighting. It is, in other words, unlikely that neutrality law will be relied upon here.[389]

If, on the other hand, Medvedev is a "mere criminal," questions arise regarding his treatment. Will he, for instance, be given a fair trial? In light of Norwegian support to Ukraine, it would be problematic to suggest otherwise. As the Ukrainian court system is expected to have thousands of other cases to deal with, the practical solution may in any case be for Norway to investigate.

Concluding Thoughts

So what will happen next? As mentioned at the start, it is not clear how this story will end. With the information Medvedev has and his expressed willingness to talk, he will first and foremost be a valuable source for the Norwegian authorities. Whether Norway at some stage has to determine the legal impact of his membership in the Wagner Group, and consequently his status under international law, will depend on what the investigation unveils. Regardless of the outcome, the case is a reminder of the complexities involved in holding individuals responsible for crimes committed during armed conflict.

388 Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Hague, 18 October 1907, art. 11, 36 Stat. 2310, T.S. No. 541.

389 Tidligere utenriksminister Anniken Huitfeldt, *Norsk våpenstøtte til Ukraina og folkeretten* [Norwegian weapon support to Ukraine and international law], Regjeringen.no (Mar. 10, 2022), https://www.regjeringen.no/no/aktuelt/vaapen_folkerett/id2903706.

DEFIANCE OF RUSSIA'S DEMAND TO SURRENDER AND COMBATANT STATUS

by Chris Koschnitzky and Steve Szymanski | Apr 22, 2022

Before its latest shelling of Mariupol, Russia demanded that fighters defending the city surrender, lest they face a "military tribunal."[390] More recently, there were rumblings that Russia was preparing to send law enforcement officers, prosecutors, and court officials to Ukraine.[391] While it is unclear where in Ukraine these officials would go, it seems that any prosecution of the Mariupol fighters would stem from their mere refusal to surrender.

If carried out, Russia's threat would unlawfully deny to Ukrainian combatants two key benefits they enjoy under the law of armed conflict—combatant immunity and prisoner of war (POW) status. Moreover, Russia's actions would constitute a war crime and grave breach of the Third Geneva Convention Relative to the Treatment of Prisoners of War (GC III) because it would "willfully depriv[e] a prisoner of war of the rights of fair and regular trial prescribed in this Convention" (GC III, Article 130).[392]

In this post, we examine the Russian threat in the context of combatant status. We demonstrate that compliance with or defiance of Russia's surrender demand is an irrelevant consideration when determining whether an individual is entitled to that status and its accompanying privileges. Additionally, we explain why, under Article 45(1) of Additional Protocol I (to which Russia and Ukraine are Parties), Russia is required to presume POW status for "any person who takes part in hostilities" that "claims the status of prisoner of war, or … appears to be entitled to such status," or whom Ukraine believes is entitled to POW status and notifies Russia of this belief, up and until that person's status is otherwise "determined by a competent tribunal."[393]

Lawful Combatants, Combatant Immunity, and Prisoner of War Status

The categories of individuals who qualify as combatants are set forth in Article 4A of GC III.[394] Although this provision focuses on POW status, by extension it more broadly encompasses combatant status. Professor Sean Watts has argued for disaggregation of the concepts of POW and combatant.[395] He maintains, "the conceptual coupling of combatant status with POW status seems to have necessarily narrowed the operation

390 *Russia to Wait for Kiev's Response to Measures on Evacuation from Mariupol Until 05:00 am*, TASS (Mar. 20, 2022, 14:26), https://tass.com/defense/1424837?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com.

391 Andrew A. Michta (@andrewmichta), X (FORMERLY TWITTER) (Apr. 2, 2022, 6:36 AM), https://twitter.com/andrewmichta/status/1510234794168303616?s=20&t=jAz_kkXI11wi6yUfW17anw.

392 GC III, *supra* note 4, art. 130.

393 AP I, *supra* note 9, art. 45(1).

394 GC III, *supra* note 4, art. 4(A).

395 Watts, *supra* note 42.

of the core function of GC III, namely, its protective internment regime."[396] However, by one influential account of GC III, "combatant status is not explicitly affirmed, but it is implicitly included in the recognition of POW status."[397]

Three categories are of particular importance *vis-à-vis* the situation in Mariupol (for the status of resistance forces, see the previous posts by Ronald Alcala and Steve Szymanski,[398] Geoff Corn,[399] and Gary Corn[400]):

1. members of the regular armed forces, except some medical and religious personnel;[401]
2. under certain conditions, members of a militia or volunteer corps that are not part of the regular armed forces, sometimes called "irregular militia"[402] and
3. members of a *levée en masse, which consists of* "inhabitants of an area who participate in a kind of popular uprising to defend against foreign invaders;"[403]

Members of the regular Ukrainian armed forces qualify as combatants under Article 4A(1), but arguably only if captured while in uniform.[404] Under Article 4A(2), other Ukrainian fighters might qualify as *"irregular militia"* entitled to combatant status, so long as they satisfy four cumulative conditions (as quoted in the Article):

a. that of being commanded by a person responsible for his/her subordinates;
b. that of having a fixed distinctive sign recognizable at a distance;
c. that of carrying arms openly;
d. that of conducting their operations in accordance with the laws and customs of war.

Article 44 of Additional Protocol I explicitly relaxed these requirements by recognizing a temporal component to the distinction requirement,[405] though this was "aimed at combatants using methods of guerrilla warfare."[406]

And some of Mariupol's inhabitants may have qualified as members of a *levée en masse* pursuant to Article 4A(6). As noted by Brigadier Generals Wallace and Reeves, the term refers to "a spontaneous, unorganized movement acting under emergency conditions."[407] This category would almost certainly have included some of the inhabitants of Mariupol during the initial Russian onslaught. However, after weeks of

396 *Id.* para. 81.

397 AP I Commentary, *supra* note 15, para. 1677.

398 Alcala & Szymanski, *supra* note 2.

399 Corn, *supra* note 2.

400 Corn, *supra* note 162.

401 GC III, *supra* note 4, art. 4(A)(1).

402 *Id.* art. 4(A)(2).

403 *Id.* art. 4(A)(6); DoD LoW Manual, *supra* note 10, § 4.3.3.

404 Chris Koschnitzky & Michael N. Schmitt, *Russian Troops Out of Uniform and Prisoner of War Status*, Articles of War (Mar. 4, 2022), https://lieber.westpoint.edu/russian-troops-out-of-uniform-pow-status [hereinafter Koschnitzky & Schmitt].

405 Alcala & Szymanski, *supra* note 2.

406 AP I Commentary, ¶ 1684.

407 Wallace & Reeves, *supra* note 175.

fighting, they have likely integrated into *the regular armed forces or formed irregular militia, as they are* required *to do if they wish to continue to enjoy combatant status (*2020 ICRC *Commentary on GC III,* para. 1064[408]). Even if they have not, they will still enjoy combatant immunity for lawful conduct of hostilities while being members of the *levée en masse*.

Unlawful combatants who engage in hostilities without qualifying as combatants enjoy neither combatant immunity nor POW status. We will not speculate on whether there are individuals in Mariupol who are better categorized as unlawful combatants.

Lawful combatants enjoy combatant immunity, sometimes referred to as "combatant's privilege."[409] A centuries-old customary element of international law found, for instance, in Hugo Grotius's 1625 treatise,[410] *The Law of War and Peace*, and Article 57 of the Lieber Code,[411] combatant immunity[412] is the notion that lawful combatants are privileged to kill and wound without criminal penalty, so long as their acts do not constitute war crimes.[413] Captured soldiers who have engaged in combat by lawful means become prisoners of war upon capture and may not be criminally prosecuted for their actions.[414] Contemporarily, combatant immunity is reflected in Article 43(2) of Additional Protocol I, providing that (lawful) combatants have a "right to participate directly in hostilities."[415]

Constraints on Denying Combatant Status

It is clear that a State may not impose conditions or criteria that are not recognized in international law for combatant status. Additional Protocol I, Article 45(1) provides that a State must presume POW status for anyone who claims such status or "appears to be entitled to such status," among other categories.[416] Article 45(1) continues that in cases of doubt, the person shall enjoy POW status "until such time as his status has been determined by a competent tribunal."

Case law from around the time GC III was adopted addressing whether additional conditions may be imposed in determining POW (and by extension, combatant) status is scant. However, in 1949, a British military court rejected the notion in the case *In re von Lewinski (von Manstein)*.[417] The court considered whether the defendant, a German commander, could deny POW status to inhabitants of occupied Russia who defied German demands. The court held the Germans lacked this authority and reasoned

408 2020 GC III Commentary, *supra* note 19, para. 1064.

409 Laurie R. Blank, *Combat Privileges and Protections*, Lieber Institute for Law & Warfare: Articles of War (Mar. 4, 2022), https://lieber.westpoint.edu/combatant-privileges-and-protections [hereinafter Blank].

410 Yasuaki Onuma, *Hugo Grotius: Life in Exile: De Jure Belli ac Pacis,* Britannica, https://www.britannica.com/biography/Hugo-Grotius#ref43942.

411 Lieber Code, *supra* note 120, art. 57.

412 *Immunities*, International Committee of the Red Cross Casebook, https://casebook.icrc.org/a_to_z/glossary/immunities.

413 Blank, *supra* note 409.

414 Lieber Code, *supra* note 120, art. 56.

415 AP I, *supra* note 9, art. 43(2); DoD LoW Manual, *supra* note 10, § 4.4.1.

416 AP I, *supra* note 9, art. 45(1).

417 *In re* von Lewinski (von Manstein), 16 Annual Digest and Report of Public International Law Cases 509–525 (1955).

by example that "no notice stating that soldiers who do not report at a certain time or within a certain time will be treated [without POW status] can have any validity." The facts differ from the Russian demand in Ukraine, but the court's finding that a party may not add conditions for POW status is directly applicable.

Opposition to additional criteria for combatant status was also apparent during the drafting of Article 44 of Additional Protocol I.[418] A dispute arose during the diplomatic conference whether to relax the four combatant status criteria for irregular forces.[419] Specifically, it concerned the obligations to wear a "fixed distinctive sign recognizable at a distance" (uniform in most cases) and to carry weapons openly. Entitlement to POW status was one of the issues.

The drafters relaxed the conditions for POW status, a position that the United States and others opposed.[420] For our purposes, though, the relaxation signals opposition to making the criteria for combatant status *more* demanding. On the contrary, the trend is in the other direction. Indeed, should a fighter fail to satisfy the more inclusive criteria, Article 44(4) provides that they should "nevertheless be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol."[421]

Finally, if there is doubt whether a captured detainee is entitled to POW status, Article 5 of the Third Geneva Convention requires the Parties to convene a hearing before a "competent tribunal" to make a status determination.[422] In such cases, the individual concerned must be afforded Third Geneva Convention protections until the tribunal determines otherwise.

Article 45(1) of Additional Protocol I lists individuals to whom the presumption must apply—even in cases of extreme doubt—pending the tribunal's proceeding. This includes captured individuals who merely claim POW status. According to the ICRC Commentary, this section should be read such that the "burden of proof falls upon the captor" that someone is *not* entitled to POW status.[423]

Article 5 provides "little guidance"[424] about what is meant by a "competent tribunal," but such tribunals must make determinations "on a case-by-case basis so as to prevent, for example, the blanket exclusion of units or groups."[425] U.S. Army regulations call for a tribunal of three officers who hear evidence in the detainee's presence.[426] The panel must find by a preponderance of the evidence

418 AP I, *supra* note 9, art. 44.

419 AP I Commentary, *supra* note 15, para. 1684.

420 Message from The President of the United States Transmitting the Protocol II Additional to the Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, Concluded at Geneva on June. 10, 1977, 100th Cong. Senate Treaty Doc. 100-2, § IX (1987).

421 AP I, *supra* note 9, art. 44(4).

422 GC III, *supra* note 4, art. 5.

423 AP I Commentary, *supra* note 15, para. 1730.

424 2020 GC III Commentary, *supra* note 19, art. 5.

425 *Id.* paras. 1123, 1127.

426 United States, Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees para. 1-6 (1997) [hereinafter AR 190-6].

that the detainees are not entitled to POW status before denying them the benefits of that status (and, more generally, combatant status). But there is no basis in law or practice for considering substantive criteria that are not recognized in international law—such as a demand to surrender—when making the determination.

Conclusion

It remains to be seen how Russia will treat fighters captured in the battle for Mariupol and elsewhere. What is clear is that it may not impose supplemental criteria for combatant status beyond those already set forth in the law of armed conflict.

Additionally, it is unlawful for Russia to hold military tribunals for captured fighters who fail to surrender. Most (if not all) of the inhabitants resisting Russian aggression are likely lawful combatants who are entitled to combatant immunity and POW status. Should any doubt as to their status arise, they are entitled to the presumption of POW status until a competent Article 5 tribunal determines otherwise.

While calls for Russia to fully comply with its obligations under GC III and Additional Protocol I increasingly seem to be made in vain, the international community should continue to insist on respect for fundamental law of armed conflict principles and condemn Russia whenever that respect is absent.

THE "I WANT TO LIVE" PROJECT AND TECHNOLOGY-ENABLED SURRENDER

by David Wallace and Shane Reeves | Jan 13, 2023

In their ongoing armed conflict, the Russian Federation and Ukraine have engaged in sustained information campaigns using leaflets, social media posts, radio appeals, text messages, and television spots to provoke surrenders.[427] Further leveraging modern communications technology, Ukraine launched the "I Want to Live" Project in September 2022 to encourage, enable, and empower Russian military personnel to surrender to Ukrainian armed forces. Beyond communicating with Russian soldiers on where and how to surrender, the Ukrainian military has employed drones to guide Russians attempting to surrender.

This post discusses the project and technology-enabled surrender through the law of armed conflict (LOAC).

The "I Want to Live Project"

The project allows Russian soldiers to contact a handler by phone, website, or messenger app to arrange their surrender to Ukrainian forces.[428] There have been several thousand contacts thus far, most made during the evening hours when Russian soldiers have free time. Although all contacts are different, some Russian soldiers have called not to actually surrender but to learn how they might surrender, should the need arise in the future.

For security reasons, precise operational and logistical details of the project are sparse. However, Vitalii Matviyenko, who directs "I Want to Live," has stated that the project is designed to save the lives of Russian soldiers. Given the highly precarious nature and circumstances of surrender, Matviyenko emphasized that Ukraine guarantees complete security of all conversations and correspondence with potential Russian prisoners of war.[429] He emphasized that surrendering Russians are treated consistently with the Geneva Conventions. He further stated that treatment includes three meals a day, medical care, and the opportunity to contact relatives in Russia or the occupied territories of Crimea, Donetsk, and Luhansk oblast.[430]

Not surprisingly, Russia has taken steps to disrupt the Ukrainian initiative. Among other measures, it has blocked phone numbers from being reached inside Russia and has threatened to harshly punish soldiers who contact the Ukrainians to surrender.

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427 Marc Santora, *Surrender to a Drone? Ukraine Is Urging Russian Soldiers to Do Just That,* N.Y. Times (Dec. 20, 2022), https://www.nytimes.com/2022/12/20/world/europe/russian-soldier-drone-surrenders.html [hereinafter Santora].

428 James Waterhouse, *Ukraine War: The surrender hotline for Russian soldiers*, BBC (Nov. 29, 2022), https://www.bbc.com/news/world-europe-63782764.

429 *More Than 4,300 Russian Military Ready to Voluntarily Surrender to Ukrainian Armed Forces—Spokesperson of 'I Want to Live' Project,* Interfax-Ukraine (Dec. 15, 2022), https://en.interfax.com.ua/news/general/878634.html.

430 Olena Mukhina, *Ukraine's 'I Want to Live' Project Gets 2000 Requests from Russian Soldiers Who Want to Safely Surrender*, Euromaidan Press (Sept 30, 2022), https://euromaidanpress.com/2022/09/30/ukraines-i-want-to-live-project-gets-2000-requests-from-russian-soldiers-who-want-to-safely-surrender.

Enter Drones

Ukraine initiated the "I Want to Live" project at a particularly opportune time in the armed conflict, not only for Russian soldiers interested in surrendering but also for the Ukrainians who benefit from a technology-enabled mechanism that promotes and facilitates increased capitulation of Russian soldiers. Worsening weather in Ukraine, coupled with Russian setbacks on the battlefield and the expanded use of military conscripts by Russia, will foreseeably lead an increasing number of soldiers and their families to contact "I Want to Live."

In addition to "I Want to Live" and similar efforts using modern communications channels, the Ukrainian armed forces have used drones to facilitate the surrender of Russian soldiers.[431] In late November 2022, Ukrainian armed forces released footage of a Russian soldier throwing his weapon to the ground, raising his hands, and following a drone to a point of capture.[432] To facilitate such surrenders and to promote the "I Want to Live" project, the Ukrainian armed forces released an instructional video explaining how Russian soldiers can surrender to a Ukrainian drone.[433]

Enter LOAC

The project and the use of drones are laudable efforts of modern communications and unmanned aerial vehicle technologies to save lives in complex and dangerous battlefield situations. Although there is currently limited information on its use and results, the project provides an opportunity to consider a bedrock LOAC concept: the rule of surrender.

The U.S. Department of Defense *Law of War Manual* provides that "combatants placed *hors de combat* must not be made the object of attack."[434] According to the *Manual*, the category of *hors de combat* includes persons who have surrendered.[435] To be effective, surrender must be "(1) genuine; (2) clear and unconditional; and (3) under circumstances where it is feasible for the opposing party to accept surrender."[436]

The roots of these long-standing LOAC rules of surrender run deep and are featured in the Lieber Code,[437] the Brussels Declaration,[438] and the *Oxford Manual*.[439] The Hague Regulations especially forbid killing or wounding a defenseless, surrendering enemy.[440] Additional Protocol I to the 1949 Geneva Conventions also prohibits attacks against persons recognized as *hors de combat*,[441] making such attacks grave breaches.[442] Similar prohibitions

431 Santora, *supra* note 427.

432 *Id.*

433 *Id.*

434 DoD LoW Manual, *supra* note 10, §§ 4.4.1., 5.5.2.

435 *Id.* § 5.9.3.

436 *Id.*

437 Lieber Code, *supra* note 120.

438 *Brussels Declaration*, *supra* note 31.

439 *Oxford Manual*, *supra* note 31.

440 Hague IV, *supra* note 9.

441 AP I, *supra* note 9, art. 41(2).

442 *Id.* art. 85.

are reflected in Common Article 3[443] and Additional Protocol II to the 1949 Geneva Conventions.[444]

Generally speaking, an individual combatant communicates the intent to surrender by laying down arms and raising hands.[445] Both the Hague Regulations[446] and the Rome Statute of the International Criminal Court mention laying down arms as an affirmative act that signifies intent to surrender.[447] Some military manuals also cite waving a white flag as expressing an intention to surrender.[448] Reflecting the customary international law standard, Additional Protocol I, Article 41(2)(c), which addresses safeguarding persons *hors de combat*, provides a person who clearly expresses an intention to surrender shall not be made the object of an attack.

Turning to the "I Want to Live" project, an initial expression of an intent to surrender is made to the Ukrainian handler over the phone, through a website, or on a messenger app. Unlike the typical circumstances of surrender during land warfare, where the expression of intent and the actual physical surrender are close in time and space, surrendering prisoners using "I Want to Live" will coordinate a later time and place for the physical surrender.

Practically and legally speaking, a soldier's expressed intent to surrender using "I Want to Live" does not render that soldier *hors de combat*. Suppose that soldiers rejoined their unit waiting for an opportune time to leave the unit and travel to a location where they will physically surrender. Despite the expression of an intent to surrender, those soldiers are not *hors de combat* and are still a targetable combatants. On the other hand, when a Russian soldier arrives at a prearranged designated location for the capture, the surrender will likely follow the normal affirmative acts constituting a surrender. In both cases, a common-sense application of the rule of surrender is straightforward.

Practical Precedent and Application

Issues related to technology-enabled surrender, and specifically surrendering to aircraft, are not unprecedented. For example, during the First Gulf War, Iraqi soldiers surrendered to U.S. Apache and Kiowa attack helicopters.[449] The overarching issue in such circumstances is when the surrendering soldier is *hors de combat.* Returning to the Ukraine conflict and drone scenario, one might argue that a Russian soldier is expressing an intention to surrender at the time they begin to follow the instructions from "I Want to Live" and start moving to the designated coordinates. But that intentions is, in practical terms, only clearly expressed at the point when the Russian meets the drone, puts

443 GC III, *supra* note 4, art. 3.

444 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609.

445 Dinstein, *supra* note 124.

446 Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, 32 Stat. 1803, T.S. No. 403.

447 Rome Statute, *supra* note 9.

448 Russell Buchan, *The Rule of Surrender in International Humanitarian Law*, 51 Israel L. Rev. 3 (2018) [hereinafter Buchan].

449 J. Michael Kennedy, *U.S. Copters Lead Attack on Iraqis; 500 Prisoners Taken: Gulf War: Skirmishes and a Record Number of Air Sorties Mark an Increasing Tempo of Action.* L.A. Times (Feb. 21, 1991, 12:00 AM), https://www.latimes.com/archives/la-xpm-1991-02-21-mn-2189-story.html.

down their weapon, and follows the drone. If the defenseless Russian soldier abstains from hostile acts or attempts to escape, it is reasonable to conclude they are hors de combat from that time until the actual physical capitulation to Ukrainian forces.

This understanding is consistent with the U.S. position on surrender. The U.S. standard is rooted in a good faith assessment of the information available at the time and hinges on the feasibility of surrender.[450] Recall especially the *Law of War Manual*'s conclusion that "[f]or an offer of surrender to render a person *hors de combat*, it must be feasible for the opposing party to accept the offer." This, of course, can be difficult in combat. Thus, the *Manual* provides illustrations to help explain what is and is not feasible, including where an enemy soldier attempts to surrender to an aircraft.[451] In another example the *Manual* notes,

> a soldier fifty meters from an enemy defensive position in the midst of an infantry assault by his unit could not throw down his weapon and raise his arms (as if to indicate his desire to surrender) and reasonably expect that the defending unit will be able to accept and accomplish his surrender while resisting the ongoing assault by his unit.[452]

While recognizing acceptance of surrender may not be feasible in some circumstances, the *Manual* also makes clear that offers to surrender cannot be refused because it is militarily inconvenient or difficult to guard prisoners of war.[453] Further, the *Manual* reinforces that the point of *hors de combat* status is to recognize a combatant's defenselessness. When Russian soldiers drop their weapons, raise their hands, and follow a drone to Ukrainian forces to be taken into custody, it is clear they are making a good faith effort to surrender and accepting that surrender is feasible.[454]

Conclusion

We leave other challenging LOAC issues involving technology-enabled surrender (for example, questions concerning perfidy, legal compliance, and reprisals) unaddressed in this post. However, our purpose in providing an analysis of the "I Want to Live" project and the rule of surrender is to illustrate how technology is impacting the Ukraine-Russia conflict and the importance of applying the law with rigor and fidelity to seemingly new circumstances. In doing so, we believe this post confirms that while emerging technology is quickly changing the character of warfare, LOAC is, as we have previously written, "a dynamic and fluid regulatory framework capable of addressing the myriad of challenges presented" on the contemporary battlefield.[455]

450 DoD LoW Manual, *supra* note 10, § 5.9.3.3.

451 *Id.*

452 *Id.* § 5.9.3.3.

453 *Id.*

454 *Id.*

455 Dave Wallace & Shane R. Reeves, *Modern Weapons and the Law of Armed Conflict*, in U.S. Military Operations: Law, Policy, and Practice 41–66 (Geoffrey Corn, Rachel E. VanLandingham & Shane R. Reeves eds. 2015).

THE LEGAL AND PRACTICAL CHALLENGES OF SURRENDERING TO DRONES

by William Casey Biggerstaff and Caitlin Chiaramonte | Feb 8, 2023

As part of the *Articles of War* "Year Ahead" series published earlier this year, Board of Advisor member Professor Gary Solis predicted that several legal issues pertaining to the law of armed conflict (LOAC) will likely see significant development soon, icluding drones with "more diverse battlefield functions."[456] Thereafter, in this symposium, Brigadier General (ret.) David Wallace and Brigadier General Shane Reeves, 15th Dean of the Academic Board at West Point, highlighted such expansive use by providing a précis of a nascent Ukrainian initiative inviting Russian soldiers to surrender to drones on the battlefield[457]—the "I Want to Live" project.[458] Seeking "to illustrate how technology is impacting the Ukraine-Russia conflict and the importance of applying the law with rigor and fidelity to seemingly new circumstances," they analyzed the project's intersection with the LOAC rule of surrender. Although recognizing the use of drones presents novel challenges, they concluded that "a common-sense application of the rule of surrender" should guide the analysis.

This post develops the issue by examining the legal and practical challenges pertaining to drone-facilitated surrender that Ukraine's forces may navigate to implement such a program in compliance with LOAC.

The "I Want to Live" Program

Ukraine's Coordinating Headquarters for the Treatment of Prisoners of War developed the "I Want to Live" program to provide a haven for Russian soldiers wishing to surrender voluntarily.[459] The project's website displays a carousel of appealing images illustrating life after surrender and states, "[y]ou are not alone—several thousand servicemen have already saved their lives by surrendering."[460] After listing the protections guaranteed to prisoners of war (POWs), it describes how to surrender with links to social media (Facebook,[461] YouTube,[462] Telegram,[463] etc.) and provides contact information for negotiating surrender by telephone, chatbot, or telegram-bot.

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456 Gary Solis, *Year Ahead—The Coming Year's Law of Armed Conflict Evolution*, Articles of War (Jan. 9, 2023), https://lieber.westpoint.edu/coming-years-law-armed-conflict-evolution.

457 David Wallace & Shane Reeves, *Ukraine Symposium—The "I Want to Live" Project and Technologically-Enabled Surrender*, Articles of War (Jan.13, 2023), https://lieber.westpoint.edu/i-want-to-live-project-technologically-enabled-surrender.

458 Zoe Strozewski, *'I Want to Live' Project Reveals How Hotline Captures Russian Soldiers*, Newsweek (Nov. 16, 2022, 1:06 PM, updated 4:27 PM), https://www.newsweek.com/i-want-live-project-reveals-how-ukraine-hotline-captures-russian-soldiers-1760142.

459 КАБІНЕТ МІНІСТРІВ УКРАЇНИ ПОСТАНОВА [Cabinet of Ministers of Ukraine], Про утворення Координаційного штабу з питань поводження з військовополоненими [On the establishment of the Coordination Headquarters for the Treatment of Prisoners of War] {Із змінами, внесеними згідно з Постановами КМ № 441 від 12.04.2022, № 633 від 28.05.2022} [{with amendments No. 441 (Apr. 12, 2022) and No. 633 (May 28, 2022)}], від 11 березня 2022 р. № 257 [Resolution No. 257 (Mar. 11, 2022)], https://zakon.rada.gov.ua/laws/show/257-2022-п#Text.

460 О проекте «Хочу жить» [About the Project 'I Want to Live'], ХОЧУ ЖИТЬ [I Want To Live], https://hochuzhit.com.

461 Хочу Жить [I Want To Live], Facebook, https://www.facebook.com/hochuzhyt.

462 Проект «Хочу жить» [I Want to Live Project], YouTube, https://www.youtube.com/@hochuzhit.

463 Проект «Хочу жить» [I Want to Live Project], Telegram, https://t.me/hochu_zhyt.

According to an embedded YouTube instructional video, a Russian soldier safely surrenders to a Ukrainian drone by receiving detailed instructions through one of the project's hotlines. Once at a designated rendezvous location, the soldier contacts Ukrainian representatives or waits for a quadcopter to appear. Upon contact, the Russian is expected to establish and maintain visual contact with the drone while raising both hands. At that point, the Ukrainian operator will acknowledge the soldier's indicia of surrender by moving the drone up and down. Once the drone begins flying in an unmistakable direction, a surrendering Russian follows the drone until making contact with Ukrainian soldiers nearby.

According to Ukraine's Ministry of Defense, the program has received 1.2 million inquiries through various channels since September. Although it is unclear how many Russians have surrendered through the program to date, the Ministry of Defense posted a video[464] in November confirming at least one Russian soldier has successfully done so.[465]

The Rule of Surrender

As it relates to Ukraine's program, LOAC imposes a general obligation to accept the surrender of the enemy. The 1907 Hague Convention IV, for example, prohibits killing or wounding an enemy "who, having laid down his arms, or having no longer means of defence, has surrendered at discretion."[466] Similarly, Additional Protocol I to the 1949 Geneva Conventions, to which Ukraine and Russia are parties, proscribes making a person who "clearly expresses an intention to surrender" the object of attack.[467] This standard is widely considered to reflect customary international law.[468]

But as Generals Wallace and Reeves emphasize, that duty is conditioned upon several legal requirements. For the obligation to attach, the enemy must unambiguously express a genuine intent to surrender.[469] While the precise manner of surrender may vary, the burden of demonstrating the requisite clarity rests on the surrendering party. Without a clear expression of genuine intent, belligerents are not obliged to presume the enemy has surrendered.

While LOAC does not prescribe specific methods the surrendering soldier must follow, State practice has identified certain classically accepted indicia for communicating that intent based on the domain in question. In land warfare, for example, soldiers may signal an intention to surrender by laying down their arms and raising their hands above their heads, whereas at sea, crews typically surrender as a unit by lowering the ship's colors. The issue is often more complex, however, when

464 Defense of Ukraine (@DefenceU), X (formerly Twitter) (Nov. 18, 2022, 2:01 PM), https://twitter.com/DefenceU/status/1593710982790107138.

465 Aila Slisco, *Ukraine Trolls Russia with Video of Soldier Surrendering to Drone*, Newsweek (Nov. 18, 2022, 11:21 PM, updated Nov. 19, 2022, 8:16 AM), https://www.newsweek.com/ukraine-trolls-russia-video-soldier-surrendering-drone-1760813.

466 Hague IV, *supra* note 9, art. 23(c).

467 AP I, *supra* note 9, art. 41.

468 *Attacks Against Persons Hors de Combat*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule47; *Practice relating to Rule 47, Attacks Against Persons Hors de Combat*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v2/rule47.

469 DoD LoW Manual, *supra* note 10, § 5.9.3.2.; Yoram Dinstein & Arne Willy Dahl, Oslo Manual on Select Topics of the Law of Armed Conflict Rules and Commentary, paras. 103 (a)–(b) (2020) [hereinafter Dinstein & Dahl].

attempts to surrender cross domains, as they do with Ukraine's use of drones to accept the surrenders of Russian ground forces.

The Feasibility of Surrendering to Drones

To be legally effective, individuals must offer surrender under circumstances in which it is feasible for the enemy to reasonably accept.[470] With respect to this requirement, there is a long-running debate concerning whether ground forces can surrender to aircraft.[471] The issue is whether it is feasible for aircrews to accept the surrender while airborne, as surrender conventionally culminates with the enemy taking personnel into custody.

One approach insists that such attempts are never legally effective. Under this view, surrendering personnel cannot reasonably expect that aircrews are capable of taking them into custody; thus, their attempts to do so are futile.[472] By way of a historical example, Apache pilots during the Second Iraq War infamously killed two insurgents attempting to surrender in reliance on legal advice that ground forces "cannot surrender to aircraft and [were] still valid targets."[473] According to this approach, Russians expressing their intent to surrender through a drone would not effectively surrender until, for example, they reach the custody of Ukrainian ground forces nearby.

Others criticize such a strict interpretation as overly "dogmatic."[474] They adhere to the predominant approach that the feasibility of attempts to surrender to aircraft are contextual and vary case-to-case.[475]

In our view, this latter approach is more persuasive, as it strikes an appropriate balance between the principles of humanity and military necessity. It recognizes there may be reasonable circumstances in which soldiers can successfully surrender to aircrews, even if aircrews lack the capability to take personnel into physical custody, in which case application of the rule benefits both the surrendering soldier (humanity) and his enemy (military necessity).[476] But such a flexible approach also permits commanders, depending on the prevailing circumstances, to reduce risk to their forces and curb the rule's abuse.[477] It is also consistent with historical precedents in which ground forces have, in fact, surrendered to aircraft—including the anecdotal video posted by Ukraine's Ministry of Defense.[478]

With respect to feasibility in the Ukraine scenario, assuming surrender to aircraft is not legally ineffective per se, the central issue is

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470 DoD LoW Manual, *supra* note 10, § 5.9.3.3.; Dinstein & Dahl, *supra* note 469, para. 104; Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare, HPCR (version 2.1 Mar. 2010), available at www.ihlresearch.org/amw [hereinafter HPCR Manual].

471 Dinstein, *supra* note 124, para. 637.

472 Dinstein & Dahl, *supra* note 469, para. 104.

473 Buchan, *supra* note 448.

474 *Id.*

475 HPCR Manual, *supra 470*, para. 15(b); Dinstein & Dahl, *supra* note 469, para. 104.

476 Dinstein & Dahl, *supra* note 469, para. 104.

477 Dinstein, *supra* 124, para. 637; Horace B. Robertson Jr., *The Obligation to Accept Surrender*, 46 Naval War College Rev. 112–113 (1993).

478 David Axe, *Russian Soldiers Are Surrendering to Ukrainian Drones. This Has Happened Before.*, Forbes (Nov. 18, 2022, 6:35 PM), https://www.forbes.com/sites/davidaxe/2022/11/18/russian-soldiers-are-surrendering-to-ukrainian-drones-this-has-happened-before [hereinafter Axe].

whether drones have the necessary capabilities to exercise a sufficient degree of control over personnel purporting to surrender without the aid of nearby ground forces. While the notion of surrender may conventionally entail the immediate physical capture of surrendering personnel, LOAC does not prescribe a precise proximity within which surrender must occur.[479] As Generals Wallace and Reeves prudently observe, surrender is not so much a decisive act as a process. If drones do not possess the requisite capabilities, then Russian soldiers' attempts to surrender remain pending until they reach the custody of Ukrainian ground forces in the final stage of the process described in Ukraine's instructional video. If they do, however, then surrender inures at the point Russian soldiers initially yield to a drone's control.

In our view, considering how Ukraine is employing them, drone operators exercise a degree of constructive, if not physical, control over Russian personnel commensurate with traditional means of accepting surrender, such as a soldier on the ground. In short, they are the functional equivalent of, for instance, a lone infantry soldier sent out to rendezvous with an expected group of Russians and escort them back to their unit. Few would doubt that, in such a scenario, Russian soldiers have effectively surrendered at the point they submit to the soldier's directions.

Once a Russian soldier arrives at the designated location, a remote drone operator can easily use the platform's optical capabilities to visually confirm the soldier intends to surrender by observing he is stationary with his hands raised in the air. The operator also has the ability to acknowledge the surrendering soldier's intent by either maneuvering up or down or, as has been reported, through a loudspeaker.[480] To the extent an operator must rely on flight patterns alone, such movements are not dissimilar from the body language a captor may use to communicate with a foreign enemy. And as is evident, just as an infantry soldiers would do, operators can steadily guide surrendering soldiers to a collection point for further evacuation. Finally, while it is uncertain which models Ukraine is using, drones generally have improved loiter times compared to piloted rotary and fixed-wing aircraft.

As this scenario demonstrates, a drone's combined capabilities enable its operator, although remote, to exercise a modicum of control over surrendering personnel. But as the features of drones vary, it raises the question of whether drones must be armed for such control to be meaningful as a matter of law. We have little difficulty finding that they do not. While a lack of weaponry may bear on the genuineness of an intent to surrender, there is no firm LOAC requirement that a captor be armed or otherwise capable of harming or threatening an individual to accept their surrender. If twenty Russians can surrender to an enemy medic—who may only be lightly armed, if armed at all—for example, there is no sound reason why the law should preclude them from similarly surrendering to the operator of a nonlethal drone. Although an unarmed drone may not be able to prevent escape or target an individual who resumes hostilities,

479 2020 GC III Commentary, *supra* note 19, paras. 960–961.

480 Axe, *supra* note 478.

those are separate legal issues and not gauges of when surrender is legally adequate. Thus, the presence of weaponry is simply a factor to consider in the overall analysis of a surrender attempt's genuineness.

As we see it, in consideration of Ukraine's program as a whole, once a Russian follows Ukrainian commands by appearing at the rendezvous point, raising his hands, and following the drone operator's leads, he is under the control of Ukrainian forces; he has effectively surrendered.

The Legal and Practical Consequences of Surrendering to Drones

Assuming for the sake of argument that drones cannot legally accept the surrender of ground forces, although the consequences may initially seem severe, that fact would likely be of little practical significance to Ukraine. If surrendering to a drone is ineffective, Russians attempting to do so would not be considered *hors de combat* and could technically still be made the object of Ukrainian attacks.[481] It is difficult to imagine a realistic scenario, however, in which Ukraine would not treat Russians surrendering to drones as *hors de combat*, even if it is not required, so long as they are acting in good faith pursuant to the instructions of Ukrainian forces.

On the other hand, if, as we argue, Ukrainian drones can accept surrenders, such a determination would be of pronounced practical importance because it determines when Russian soldiers would be entitled to protected status under Geneva Convention III by virtue of having "fallen into the power of the enemy."[482] That instrument "protects not only 'captured' prisoners of war, but also those who have fallen into the power of the enemy by other means, such as surrender or mass capitulation."[483] In contrast to merely expressing an intent to surrender, once Russian personnel effectively surrender, the Geneva Conventions would affirmatively require Ukraine to, for example, protect, feed, clothe, and treat them.[484]

Although publicly reported details are limited, assuming such obligations apply, it is safe to presume that Ukraine could find it challenging to satisfy them using drones alone. For instance, if surrendered Russians cannot move to a collection point for a prolonged period, would Ukrainian forces be required to airdrop shelter or relief supplies to them in the interim? If operational conditions require surrendered Russians to follow a circuitous route to reach Ukrainian lines, how would the drone operator's unit designate them as *hors de combat* to other friendly forces so they aren't targeted? If some of them are injured, would Ukraine need to maneuver its medical personnel to their location? In the event of a chemical or radiological attack, would they receive protection? With such scenarios in mind, it is critical to emphasize that although an offer of surrender is predicated on the feasibility of taking custody of the surrendering soldier, "offers to surrender may

481 DoD LoW Manual, *supra* note 10, § 5.9.3; Dinstein & Dahl, *supra* note 469, paras. 103–104; HPCR *supra* note 470, para. 15(b).

482 GC III, *supra* note 4, art. 4.

483 2020 GC III Commentary, *supra note 19,* para. 960; DoD LoW Manual, *supra* note 10, § 9.3.4.

484 GC III, *supra* note 4, arts. 26–27, 30.

not be refused because it would be militarily inconvenient or impractical to guard or care for detainees."[485]

While the risks these examples illustrate may seem exaggerated or academic based on how Ukraine employs its drones, practitioners should not dismiss them entirely. Even if Ukraine is operating smaller drones unable to venture far from nearby ground forces, war is unpredictable. Moreover, the program's potential success may encourage more adventurous future uses, especially as Western supporters consider supplying Ukraine with more advanced weaponry.[486] Although negligent failure to comply with the Convention's obligations would not constitute grave breaches under Article 130, Ukraine should nonetheless undertake its best efforts to do so.[487] While it does not appear that any such contingencies have occurred, planning for their possibility in advance is the best way to avoid any violation of LOAC.

Conclusion

Although this post has highlighted some of the challenges that drone-enabled surrender presents, it is essential to emphasize that Ukraine has not violated LOAC by inviting Russians to surrender to its drones. Moreover, by identifying some of the practical difficulties associated with drone-enabled surrenders, this post should not discourage Ukraine's forces from doing so. Ukraine's creativity throughout this conflict has been both admirable and formidable. But as this and other posts highlight,[488] ingenuity in war carries with it certain legal obligations that Ukrainian forces must consider in advance, lest they inadvertently engage in conduct that LOAC seeks to prevent.

485 DoD LoW Manual, *supra* note 10, § 5.9.3.3.

486 Paul McLeary & Lee Hudson, *The Air Force Wants to Send Its Reaper Drones to Ukraine. The Pentagon's Not So Sure.,* Politico (Dec. 9, 2022, 4:40 PM), https://www.politico.com/news/2022/12/09/air-force-reaper-drones-ukraine-00073344.

487 GC III, *supra* note 4, art. 130.

488 Michael N. Schmitt & William Casey Biggerstaff, *Ukraine Symposium—Are Civilians Reporting with Cell Phones Directly Participating in Hostilities?* Articles of War (Nov. 2, 2022), https://lieber.westpoint.edu/civilians-reporting-cell-phones-direct-participation-hostilities; William Casey Biggerstaff, *Ukraine Symposium—Photos of the Dead*, Articles of War (Aug. 29, 2022), https://lieber.westpoint.edu/photos-of-dead [hereinafter Biggerstaff].

DOXING ENEMY SOLDIERS AND THE LAW OF WAR

by Eric Jensen and Sean Watts | Oct 31, 2022

This post was prepared in academic consultation with Major Inna Zavorotko,[489] *a lawyer with the Ukrainian Ministry of Defense Legal Division.*

The term "doxing" is a colloquial shortening of the phrase "dropping documents."[490] It describes the online publication of personal or private identifying information. Doxers often acquire information without consent and publish it to publicly shame, harass, or threaten their victim. It has long been an electronic aspect of interpersonal squabbles,[491] political grudges,[492] and economic feuds.[493] But doxing also increasingly features in modern armed conflict. This post evaluates doxing of enemy soldiers under the law of war. While not *per se* unlawful, doxing enemy fighters requires careful attention to their legal status and a clear link to concrete operational objectives.

Doxing Operations

Near the start of the conflict between Ukraine and the Russian Federation, reports emerged of a doxing campaign against Russian soldiers.[494] Initial accounts attributed the publication of the soldiers' names, dates of birth, addresses, military units, and passport numbers to the private online group Anonymous.[495] Later, Ukrainian media leaked the identifying information of as many as 120,000 Russian soldiers, though the recency and accuracy of the data have been questioned.

More reliable data on Russian soldiers have been doxed by Ukrainian authorities, including the Office of the President of Ukraine, the Main Directorate of Intelligence of the Ministry of Defense, the State Security Service, and the Prosecutor General's Office. These agencies ultimately published a "Book of Executioners of Ukraine"[496] used to dox Russian military leaders suspected of war crimes.[497] Intelligence agency officials also reportedly published information identifying 1,600 Russian troops involved in operations in the town of Bucha,[498] the site

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489 *Maj Inna Zavorotko*, Articles of War, https://lieber.westpoint.edu/about/team/profile/?smid=16984 [hereinafter *Inna Zavorotko Bio*].

490 Mat Honan, *What Is Doxing?* Wired (Mar. 6, 2014, 1:03 PM), https://www.wired.com/2014/03/doxing.

491 The Markup, *Should doxing be illegal?* HLS Clinic Stories (Sept 3, 2021), https://hls.harvard.edu/clinic-stories/legal-policy-work/should-doxing-be-illegal.

492 Bruce Schneier, *The Rise of Political Doxing*, VICE (Oct. 28, 2015, 6:00 AM), https://www.vice.com/en/article/z43bm8/the-rise-of-political-doxing.

493 Liat Clark, *How 'Doxing' Can Destroy Your Reputation and Bring Company Stocks to Their Knees*, Wired (Oct. 20, 2016, 12:13 PM), https://www.wired.co.uk/article/cameron-colquhoun-ethical-intelligence.

494 Hannah Murphy, *Ukraine War Sparks Revival of Hacktivism*, Financial Times (Mar. 4, 2022), https://www.ft.com/content/9ea0dccf-8983-4740-8e8d-82c0213512d4.

495 Andrew Stanton, *Anonymous Apparently Behind Doxing of 120K Russian Soldiers in Ukraine War,* Newsweek (Apr. 3, 2022, 1:38 PM EDT, updated 6:14 PM EDT), https://www.newsweek.com/anonymous-leaks-personal-data-120k-russian-soldiers-fighting-ukraine-1694555.

496 Офіс Президента [Office of the President], Telegram (June 17, 2022, 4:12), https://t.me/OP_UA/6860.

497 *The Book of Executioners of the Ukrainian People,* КНИГА КАТІВ [The Book of Executioners], https://russian-torturers.com/en.

498 Matt Burgess, *Russia Is Leaking Data Like a Sieve*, Wired (Apr. 13, 2022, 7:00 AM), https://www.wired.com/story/russia-ukraine-data.

of numerous suspected Russian atrocities.[499] A second release of data reportedly included names and other information connected to spies working with the Russian FSB security agency.

Wartime doxing has not been limited to Ukraine or to international armed conflicts. In 2015, reports confirmed the online publication of information identifying more than 1,300 U.S. military and other personnel by a pro-Islamic State group.[500] These doxes were apparently designed as kill lists to encourage and facilitate attacks on the service persons identified.[501] A study[502] published by the West Point Countering Terrorism Center[503] concluded that extremist hacking campaigns will continue to resort to doxing. Meanwhile, the U.S. Central Command labeled doxing a "new norm" under which "any CENTCOM teammate or family member could be targeted."[504]

Law of War Applicable to Doxing During International Armed Conflict

If doxing enemy soldiers is indeed a new norm of armed conflict, how is it regulated by the law of war? Doxing clearly implicates privacy. And although war between States often suspends or alters the operation of some civil and human rights, the law of war is not unconcerned with personal privacy and dignity.

The Geneva Conventions' Personal Scope of Protection

The law of war focuses its privacy-related provisions chiefly on persons who fall under belligerents' physical control, such as prisoners of war and civilians under enemy control. Enemy soldiers who have not "fallen into the power of the enemy"[505] by virtue of surrender or capture are not prisoners of war. The 1949 Third Geneva Convention relative to the Treatment of Prisoners of War applies chiefly to fighters who are *hors de combat* by virtue of capture.[506] Therefore, doxing enemies who are otherwise eligible for prisoner of war protection but remain at liberty presents no legal difficulties under the Third Convention.

The 1949 Fourth Geneva Convention relative to Civilians, however, offers a distinct personal scope of protection.[507] Where the Prisoner of War Convention's "fallen into the power" standard clearly anticipates capture and physical custody, the civilian

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499 СБУ ідентифікувала ще 4 військових рф, які чинили звірства на тимчасово окупованій Київщині [The Security Service of Ukraine identified 4 more soldiers of the Russian Federation who committed atrocities in the temporarily occupied Kyiv region], СЛУЖБА БЕЗПЕКИ УКРАЇНИ [Security Service of Ukraine] (July 29, 2022, 12:00), https://ssu.gov.ua/novyny/sbu-identyfikuvala-shche-4-viiskovykh-rf-yaki-chynyly-zvirstva-na-tymchasovo-okupovanii-kyivshchyni.

500 Patrick Tucker, *War by Doxxing*, Defense One (Mar. 23, 2015), https://www.defenseone.com/technology/2015/03/war-doxxing/108238.

501 Adam Goldman & Eric Schmitt, *One by One, ISIS Social Media Experts Are Killed as Result of FBI Program*, N.Y. Times (Nov. 24, 2016), https://www.nytimes.com/2016/11/24/world/middleeast/isis-recruiters-social-media.html.

502 Audrey Alexander & Bennett Clifford, *Doxing and Defacements: Examining the Islamic State's Hacking Capabilities*, 12 CTC SENTINEL 22 (Apr 2019), https://ctc.westpoint.edu/wp-content/uploads/2019/04/CTC-SENTINEL-042019.pdf.

503 Combating Terrorism Center at West Point, HOMEPAGE, https://ctc.westpoint.edu.

504 U.S. Central Command, Facebook (Mar. 21, 2015), https://www.facebook.com/CENTCOM/posts/10153676790449606.

505 GC III, *supra* note 4, art. 4.

506 Matt Montazzoli, *Down Is Not Always Out: Hors De Combat in the Close Fight*, Articles of War (July 8, 2021), https://lieber.westpoint.edu/down-not-always-out-hors-de-combat-close-fight.

507 GC IV, *supra* note 95.

Convention's "in the hands of" standard does not. Under the Fourth Convention a civilian may be a protected person merely by virtue of presence in territory belonging to an enemy power, or their own territory that an enemy power has occupied (or by an expansive view to invaded territory).[508] Thus, by contrast with prisoners of war, civilian protected persons, including persons suspected of or who have engaged in hostile acts, enjoy protection under the Convention even if they are not in the physical custody of an enemy power.[509]

"Respect and Protect" Provisions

Both the Third and Fourth Geneva Conventions include protections reminiscent of privacy concerns, respectively, to prisoners of war and to civilian protected persons. The Third Convention's Article 13, for instance, generally addresses humane treatment of prisoners of war.[510] It requires that they "at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity." Article 27 of the Fourth Convention similarly prohibits insults and exposure to public curiosity. States originally intended these provisions to end the practice of parading captured enemies for propaganda purposes.[511] As recently as the Vietnam War, these parades exposed prisoners of war to physical violence.[512] Article 13 has since been interpreted to apply more broadly, including to publication of photographs and motion pictures as well as to harmful propaganda.

In a 2020 update[513] of its scholarly *Commentary* to the Third Convention,[514] the International Committee of the Red Cross (ICRC) argues that exposure of prisoners of war to the public, even if not accompanied by insult, is "humiliating in itself and therefore specifically prohibited."[515] The ICRC further advises a broad understanding of the Article 13 term "public." It maintains that the term refers not only to the general population but also to anyone not directly involved in prisoner of war internment operations.[516] The *Commentary* contends that even release to members of a Detaining Power's own armed forces may be considered "public."[517] The ICRC concludes, "any materials that enable individual prisoners to be identified must normally be regarded as subjecting them to public curiosity and, therefore, may not be transmitted, published or broadcast."[518]

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508 Kubo Mačák & Mikhail Orkin, *Who Is Protected by The Fourth Geneva Convention? The Case of Civilians in Invaded Territory*, Articles of War (Aug. 15, 2022), https://lieber.westpoint.edu/who-is-protected-civilians-invaded-territory.

509 Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev Red Cross 45 (2003).

510 GC III, *supra* note 4, art. 13.

511 *U.S. Prisoners of War Marched Through Rome Guarded by German Soldiers in Italy (WW2)*, Critical Past (1944), https://www.criticalpast.com/video/65675045019_German-troops_Monte-Cassino_troops-march_troops-gather-at-courtyard .

512 *The Hanoi March and the Consolidation of POWs*, American Experience, https://www.pbs.org/wgbh/americanexperience/features/honor-hanoi-march-and-consolidation-pows.

513 2020 GC III Commentary, *supra* note 19.

514 Sean Watts, *Interpretation in the Updated GCIII Commentary*, Articles of War (Dec. 15, 2020), https://lieber.westpoint.edu/interpretation-updated-gciii-commentary.

515 2020 GC III Commentary, *supra* note 19, para. 1624.

516 *Id.*

517 *Id.*

518 *Id.* para. 1627.

This broad reading of Article 13 should be regarded cautiously. The 2020 *Commentary*'s 1960 predecessor[519] included no such elaborations on the notion of public curiosity nor such an expansive understanding of the term "public."[520] Generally, the 2020 *Commentary* claims to ground its interpretive expansions in State practice subsequent to adoption of the Third Convention and publication of the 1960 *Commentary*.[521] Yet States appear, as supporting notes to the 2020 *Commentary* concede, to have reserved authority to publish images of prisoners of war in many cases.[522] This is particularly so when prisoners will not be individually identified by such images.

Still, because it involves publication of identifying information, doxing likely does not involve the carve-outs lodged by States for anonymous public exposures of prisoners of war. So it is unlikely that doxing prisoners of war and civilian protected persons is consistent with the Third and Fourth Conventions' protections from public curiosity. Just as the original scope of the public curiosity prohibitions evolved from parades to also cover photographic and motion picture exposures of prisoners of war, they may similarly prohibit electronic dissemination of their personal data. Doxing is almost certainly prohibited for the purpose of directing negative attention amounting to insults or public curiosity, toward prisoners of war and civilian protected persons according to the plain meaning of those terms.

Additionally with respect to specific law-of-war rules applicable to situations of control or custody during international armed conflict, 1977 Additional Protocol I, Article 75, affords fundamental treatment obligations to persons "who are in the power of a Party to the conflict."[523] It has been referred to as providing "basic human rights-like" protections,[524] and judged to "*fill gaps* in treaty law" (emphasis in the original).[525] Indeed, the article applies to persons "who do not benefit from more favourable treatment" under the law of war. The United States, for one, has indicated it regards Article 75 as reflective of customary international law.[526]

Article 75 prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment," effects that may well be achieved by some virulent forms of doxing. But like the Third Convention with respect to prisoners of war, the article appears to anticipate conditions of physical custody not only from the term "in the power of" but also by reference to the accompanying protections it affords, nearly all of which relate to conditions of arrest, detention, or internment. Thus, only persons in the physical custody of a State are likely to be protected from doxing through Article 75 and only from effects that

519 1960 GC III Commentary, *supra* note 50.

520 *Id.* art. 13.

521 2020 GC III Commentary, *supra* note 19, para. 93.

522 *Id.* paras. 119–21.

523 AP I, *supra* note 9, art. 75.

524 Sassòli, *supra* note 56, at 200 (2019).

525 Bothe et al., *supra* note 57, at 514.

526 The White House Office of the Press Secretary, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011).

amount to humiliating outrages on their dignity. Publications of identity and anodyne personal information including enlistment in enemy armed forces are unlikely to implicate the article's fundamental protections.

Targeting Law

The law of war prescribes an elaborate regime of precautions applicable to targeting operations.[527] But many of these obligations are limited in their application to operations that amount to "attack." The term "attack" is understood to refer to "violence against the adversary."[528] And it describes "only one specific military operation, limited in time and space" rather than entire campaigns.[529] Meanwhile, violence for purposes of attack has been referred to as "an act that causes injury or damage," with injury referring to "personal … illness or death"[530] and most often resulting from "physical force,"[531] though not always.[532]

While doxing enemy soldiers is certainly directed "against the adversary," it is unlikely to involve direct violence as understood by the attack threshold. And the fact that a doxing operation supports or even forms part of a larger campaign or operation that clearly involves violence does not convert the dox into an attack. Doxing may form part of a campaign against an adversary, but the specific operation involving doxing itself must produce the required violence to be regarded as an attack, an unlikely event in nearly all cases.

A further targeting law limit on operations directed against enemy soldiers concerns offers of rewards for killing. The 1907 Hague Convention IV Regulations[533] have long been interpreted to prohibit putting a price on the head of an enemy.[534] "Dead or alive" solicitations are thought to too greatly risk undisciplined or disordered violence.[535] But mere solicitations to capture have been distinguished as lawful, as have requests for information, even to facilitate later lawful attack.[536] So while enemy soldiers may be doxed to draw out information useful to countering their effectiveness, to permit capture, and even for later attacks, doxing may not support a reward offer to the public for killing them.

All the same, prohibited solicitations for the public to kill must be distinguished from focused efforts by a belligerent itself. The fact that doxing involves identifying and singling out specific enemy soldiers presents no law-of-war–based objections. While it may be true that most war operations are directed

527 Sean Watts, *Law of War Precautions: A Cautionary Note*, *in* The Impact of Emerging Technologies on the Law of Armed Conflict 99 (Eric Talbot Jensen & Ronald T.P. Alcala eds. 2019) also available at https://dx.doi.org/10.2139/ssrn.3202852.

528 AP I, *supra* note 9, art. 49.

529 Bothe et al., *supra* note 57, at 329.

530 Danish Ministry of Defence, Military Manual para. 2.1 (2016).

531 Bothe et al., *supra* note 57, at 329.

532 Tallinn Manual 2.0, *supra* note 153, at 415.

533 Hague IV, *supra* note 9.

534 U.S. Dep't of Army, Field Manual 27-10, The Commander's Handbook on the Law of Land Warfare ¶ 31 (July 18, 1956).

535 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 Yale J. Int'l L. 609, 630-631 (1992) [hereinafter Schmitt 1992].

536 DoD LoW Manual, *supra* note 10, § 5.26.3.1.

against enemy forces without respect to their personal identity, States have long carried out military operations,[537] including lethal attacks against specific enemy individuals.[538]

Law-of-War Principles

Finally, at a far greater level of generality, the law of war addresses the conduct of hostilities through principles. Although States' and others' expressions of the principles of the law of war vary greatly, two principles, "humanity" and "military necessity," are almost universally included.

As the U.S. *Law of War Manual* concedes, "Military necessity is a difficult concept to define and apply."[539] It identifies the principle as that which "justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war."[540] For its part, the Ukrainian *Guidance on Implementation of IHL in the Armed Forces,* Order No. 164, states that the "main purpose of the hostilities is to achieve the enemy's defeat with a minimum loss of time, personnel and physical resources from both parties to the conflict: attacking party as well as attacked party."[541] In this sense, military necessity allows for but, by contrast with the targeting rules discussed above, also functions to limit military operations short of attack.

It's not difficult to imagine how doxing enemy soldiers may contribute to their efficient defeat. Morale, fighting spirit, and the ability to maintain operational and tactical focus are essential components of effective fighting forces. States devote significant resources to preparing and sustaining soldiers in these respects. In addition to tactical training, pre-deployment procedures often involve steps to prepare soldiers' professional, personal, legal, and financial lives for the turmoil of combat. Steps taken to undo this work, to distract enemy soldiers' attention from their fighting duties, or to cause them to doubt their efforts are sustainable in a personal sense, may be quite effective at undermining morale and commitment to their State's war effort and therefore may be entirely necessary. Similarly, publishing enemy soldiers' contributions to an unpopular or internationally unlawful campaign may deter their continued participation and prove in that sense militarily necessary. Ukraine has specifically indicated that encouraging surrender is a goal of their doxing operations. One such project candidly titled "I Want to Live" has reportedly secured more than 2,000 responses.[542]

Humanity, or as it is often negatively expressed, prohibited "unnecessary suffering," is a further, widely recognized law-of-war principle.[543] The United Kingdom *Manual of the Law of Armed Conflict* instructs, "Humanity forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes."[544]

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537 Schmitt 1992, *supra* note 535.

538 DoD LoW Manual, *supra* note 10, § 5.4.6.4., n. 116.

539 *Id.* § 2.2.3.

540 *Id.* § 2.2

541 Ukraine, Guidance on Implementation of IHL in the Armed Forces, Order No. 164 § 10 (2004).

542 Проект, *supra* note 462.

543 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports, 226 (July 8).

544 United Kingdom, Ministry of Defence, Manual of the Law of Armed Conflict para. 2.4.1. (2004).

Classically, the suffering addressed by the law-of-war rules that animate humanity has been associated with physical pain and injury. However, there is increasing attention to adverse mental effects of hostilities on victims of war, including combatants. While doxing is very unlikely to inflict physical suffering or injury in a direct sense, doxing that cruelly reveals extraordinarily sensitive personal details may result in significant mental suffering or anguish—perhaps sufficient to implicate consideration of the principle and the balancing it calls for against military necessity.

Neither the principle nor its implementing rules prohibit such suffering *per se*. Only suffering that is superfluous, not reasonably related to achieving enemy defeat, or clearly disproportionate to resulting military advantage is prohibited. Thus, while gratuitous doxing of especially sensitive personal details of enemy soldiers may be inconsistent with humanity, doxing that produces mental suffering may nonetheless be justified if reasonably expected to achieve a concrete military advantage such as inability, unwillingness, or perhaps even reluctance on the part of enemy soldiers to continue participation in hostilities.

Doxing the Deceased

Further concerns with respect to doxing pertain to treatment of the dead. Reports indicate that Ukraine has posted pictures of dead Russian soldiers online to "combat Kremlin censorship of its deadly invasion."[545] There have also been reports of Ukrainian outreach to the families of the dead. The notifications have included pictures or other documentation.[546] Other recent conflicts have also featured controversial treatment of the dead.[547]

As aptly explained by another post in this symposium, the Third Geneva Convention does not protect soldiers who have died in battle. Yet the First Geneva Convention's Article 15 requires parties to "search for the dead and prevent their being despoiled."[548] For Additional Protocol I parties, Article 34 requires that the remains of the dead be "respected."[549] Further, the ICC's *Elements of Crimes* uses a footnote to include "outrages upon personal dignity" carried out on dead persons as a war crime.[550] The U.S. DoD *Law of War Manual* notes that "Enemy military dead must be protected from disrespectful or degrading acts"[551]

In compliance with the First Convention's requirement to search for the dead, as well

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545 Emily Crane, *Ukrainian officials post grim photos of dead Russian soldiers online*, New York Post (Mar. 2, 2022, 2:57 PM), https://nypost.com/2022/03/02/ukrainian-officials-post-photos-of-dead-russian-soldiers-online.

546 Laura Italiano, *Ukraine is using facial recognition to ID dead Russian soldiers and send photos of corpses home to their moms: report*, Business Insider India (Apr. 15, 2022, 23:51), https://www.businessinsider.in/international/news/ukraine-is-using-facial-recognition-to-id-dead-russian-soldiers-and-send-photos-of-corpses-home-to-their-moms-report/articleshow/90868198.cms.

547 *Video shows what appear to be U.S. Marines urinating on bodies*, CNN (Jan. 11, 2012, 11:35 PM), https://edition.cnn.com/2012/01/11/us/video-marines-urinating/index.html.

548 GC I, *supra* note 127, art. 15.

549 AP I, *supra* note 9, art. 34.

550 Elements of Crimes, International Criminal Court, 17 July 1998, U.N. Doc. ICC-ASP/1/3 (1998), art. 8(2)(b)(xxi), n. 49 [hereinafter Elements of Crimes].

551 DoD LoW Manual, *supra note 10,* § 7.7.1.1).

as to record the "date and place of . . . death" and "particulars concerning [the] cause of death,"[552] Ukrainian armed forces have actively gathered the dead bodies of Russian soldiers.[553] These efforts to identify the dead may include the gathering of specific data such as "measurements and description of the body and its physical features, examination of the teeth, fingerprints, photograph, etc."[554] To that end, Russia and Ukraine have conducted exchanges of the dead.[555] The Ukrainian government has also notified the ICRC, as the Central Tracing Agency, of the names of the dead in compliance with the First Convention, Article 16, obligation.[556]

The First Convention neither commands nor prohibits enemy government notification of the families of the dead directly. It requires only that the Party "transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency."[557] Therefore, the legal standard upon which to review Ukrainian actions is whether this notification qualifies as degrading to or disrespectful toward the dead bodies, or allowing despoliation.

Consistent with its policy of confidentiality, the ICRC—which performs many of the Conventions' tracing and notification functions—has not opined publicly on Ukrainian doxing of dead enemy soldiers. And we are aware of no State practice on this issue nor of prior examples of direct notification of soldier deaths to families by an enemy power. But so long as the Ukrainian government is notifying the families or posting the information online to inform family members, this practice does not amount to a breach of the First Convention. However, publication or notice undertaken to mock the dead or to terrorize families, or for some other non-informational purpose, may be unlawful.

Doxing as Information Operations

Ultimately, doxing enemy soldiers might best be understood as a form of information operation. Information operations (IO) refer to "the use and management of information to pursue a competitive advantage, including both offensive and defensive operations."[558] Although frequently associated with misinformation or disinformation, IOs also use factual information including propaganda for strategic and operational purposes. Reportedly, the latter are often more effective than deceptive operations.[559]

Clearly, doxing may accomplish many of the goals of propaganda such as influencing enemy

552 GC III, *supra* note 4, art. 16.

553 Isabelle Khurshudyan, *Searching for bodies with the Ukrainian captain collecting Russian corpses,* Wash. Post (Oct. 1, 2022, 1:00 AM ET), https://www.washingtonpost.com/world/2022/10/01/ukraine-russia-corpses-collect-war.

554 GC III, *supra* note 4, art. 17.

555 Natalia Zinets, Tom Balmforth & Toby Chopra, *Ukraine and Russia hand over bodies of dead soldiers in frontline exchange*, Reuters (June 8, 2022, 7:09 AM), https://www.reuters.com/world/europe/ukraine-russia-hand-over-bodies-dead-soldiers-frontline-exchange-2022-06-08.

556 ICRC's Central Tracing Agency Bureau for the International Armed Conflict between the Russian Federation and Ukraine: Providing answers to families, homepage, https://www.icrc.org/en/document/central-tracing-agency-missing-persons-ukraine.

557 GC I, *supra* note 127, art. 16.

558 *Defense Primer: Operations in the Information Environment*, Congressional Research Service (Dec. 14, 2023), https://crsreports.congress.gov/product/pdf/IF/IF10771.

559 *Id.*

opinions, achieving psychological effects, and undermining morale. Propaganda, despite recent and enduring bad publicity, are not prohibited by the law of war.[560] However, law of war restraints apply to them, including many of those analyzed above. The U.S. DoD *Law of War Manual* advises, for instance, that propaganda may not be used to expose detainees to public curiosity or to humiliating or degrading treatment.[561] Nor may propaganda be intended or designed primarily to intimidate or terrorize a civilian population. Doxing enemy soldiers to instigate, inflict, or solicit mental or physical harm on enemy fighters' families is also prohibited.

A further consideration of doxing as an information operation may equate it to war crimes wanted posters. In that vein, commentators have defended Ukraine's publication of photos of Russian prisoners of war as legitimate efforts to address alleged war crimes.[562] All States, even States not party to an armed conflict, are required by each of the 1949 Geneva Conventions to search for and to prosecute or extradite persons suspected of committing grave breaches of the Conventions.[563] In some cases, doxing enemy soldiers may prove an effective means of identifying and facilitating efforts to bring war criminals to justice. The Office of the President of Ukraine has couched some of its doxing in these terms, particularly the "Book of Executioners" dox described above. Ukraine has indicated the project has already yielded useful evidence for criminal investigations. The better tailored such doxing is to the goal of enforcing the Conventions, the better its prospects of being justified in these terms.

Conclusion

The impacts of military operations against the private lives and personal information of combatants have not been widely addressed in political, military, or legal literature. Concerns with privacy and data protection during armed conflict are mounting.[564] Yet most analysis concerns the interests of civilians and the private business sector. From a purely humanitarian perspective, an ideal law of war would no doubt insulate combatants from operations that reach beyond their military capacity and into their private and personal lives. Yet today, evidence of such a rule applicable to doxing is lacking.

At present, belligerents enjoy relatively wide license to conduct doxing operations against enemy soldiers who are not *hors de combat* through capture. While prisoners of war and persons who qualify as protected under the Fourth Geneva Convention enjoy protection from doxing that amounts to insults or exposure to public curiosity, soldiers who remain at large are susceptible to releases of personal information intended to reduce their capacity or willingness to fight. Additionally, doxing may be a legitimate means of fulfilling

560 *Twitter and Meta Take Down Pro-US Propaganda Campaign*, BBC (Aug. 26, 2022), https://www.bbc.com/news/technology-62674860.amp.

561 DoD Law of War Manual, *supra* note 10, § 5.26.1.3.

562 Inna Zavorotko & Tymur Korotkyy, *No, Ukraine's Videos of Russian POWs Do Not Contravene the Geneva Convention*, Euromaidan (Nov. 4, 2022).

563 GC IV, *supra* note 95, art. 146.

564 Privacy and Data Protection in Times of Armed Conflict (Russell Buchan & Asaf Lubin eds. 2022) available at https://ccdcoe.org/uploads/2022/06/The-Rights-to-Privacy-and-Data-Protection-in-Armed-Conflict.pdf.

States' obligation to search for and prosecute or extradite soldiers suspected of committing grave breaches of the Geneva Conventions and their First Additional Protocol. While capacious understandings of law-of-war principles, particularly of humanity, may suggest to some that doxing is an intolerable and unconscionable widening of war beyond soldiers' capacity to fight, present State understandings of these principles and lack of clarity concerning their legal effect do not support such views. To be sure, gratuitous and cruel doxing untethered to articulable war aims is unlawful. However, doxing, *per se*, appears to be a lawful form of modern information operation with potentially effective though regrettably personal impacts.

PHOTOS OF THE DEAD

by William Casey Biggerstaff | Aug 29, 2022

As the death toll in the war between Russia and Ukraine climbs, the issue of how to properly treat the remains of dead soldiers has become a recurring theme.[565] Some media reports claim, for example, that Ukrainian forces are publishing photographs of dead Russian soldiers on social media so family members can "determine whether the images feature a missing loved one."[566] Others allege they are identifying fallen Russians using facial recognition software and directly notifying family members of their soldier's death using the scanned photos.[567] Ukrainian officials assert that the notifications are necessary to ensure that Russian soldiers' next of kin, "who have limited access to non-state-controlled media and information," are reliably notified without interference from Russian disinformation and to "dispel the myth of a 'special military operation' in which there are 'no conscripts' and 'no one dies.'"[568]

The law applicable to international armed conflict, including the 1949 Geneva Conventions, Additional Protocol I to those instruments, and customary international law, governs the activities of both Russia and Ukraine. Some observers have condemned the alleged Ukrainian practices and suggest that publishing photos of dead soldiers violates Article 13 of the 1949 Convention Relative to the Treatment of Prisoners of War (GC III),[569] customary international law, or both (e.g., here[570] and here[571]). The dissemination of photos to family members also raises the separate issue of whether doing so violates the process for notifying next of kin outlined in the 1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I).[572] This post examines whether publishing such photos or sending them to family members violates the law of armed conflict.

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565 Robyn Dixon, Sudarsan Raghavan et al., *Russia's war dead belie its slogan that no one is left behind*, Wash. Post (Apr. 8, 2022, 3:00 AM EDT), https://www.washingtonpost.com/world/2022/04/08/russia-war-dead-soldiers-bodies; Joanna Kakissis, Iryna Matviyishyn, & Claire Harbage, *Ukrainians' Discovery of a Dead Russian Soldier Left for Weeks Stirs Anguish and Anger*, NPR (June 14, 2022, 12:53 PM ET), https://www.npr.org/2022/06/14/1104881712/ukraine-russia-war-dead-russian-body-moshchun-kyiv-region.

566 Harwell, *supra* note 18.

567 Drew Harwell, *Ukraine is scanning faces of dead Russians, then contacting the mothers*, Wash. Post (Apr. 15, 2022, 5:00 AM), https://www.washingtonpost.com/technology/2022/04/15/ukraine-facial-recognition-warfare [hereinafter Harwell 2022]; Thomas Brewster, *Ukraine Starts Using Facial Recognition to Identify Dead Russians and Tell Their Relatives*, Forbes (Mar. 23, 2022, 10:02 AM), https://www.forbes.com/sites/thomasbrewster/2022/03/23/ukraine-starts-using-facial-recognition-to-identify-dead-russians-and-tell-their-relatives/?sh=4a68be3c2898 [hereinafter Brewster]; James Clayton, *How facial recognition is identifying the dead in Ukraine*, BBC (Apr. 12, 2022), https://www.bbc.com/news/technology-61055319.

568 Brewster, *supra* note 566.

569 GC III, *supra* note 4, art. 13.

570 Harwell 2022, *supra* note 567.

571 Jason Melanovski & Andrea Peters, *Ukraine Uses US Facial Recognition Technology to Terrorize Families of Dead Russian Soldiers*, World Socialist Web Site (Apr. 20, 2022), https://www.wsws.org/en/articles/2022/04/21/wpvy-a21.html.

572 GC I, *supra* note 127.

Publishing Photos of Enemy Remains and the Law of Armed Conflict

Much of the criticism regarding the publication of the photos implies that the practice violates Article 13 of GC III, which provides that prisoners of war "must at all times be humanely treated" and "protected, particularly against acts of violence or intimidation and against insults and public curiosity."[573] According to those critics, publicly disseminating an enemy soldier's photograph is humiliating and, therefore, strictly prohibited (see International Committee of the Red Cross[574]).

But this assertion does not hold up to close examination because Article 13 does not apply to enemy remains found on the battlefield. Instead, GC III protections only apply to soldiers "who have fallen into the power of the enemy," i.e., prisoners of war, not remains found on the battlefield.[575] As to the issue of family notification, the procedures the Convention sets out only pertain to those "who die as prisoners of war" and "prisoners of war who have died in captivity."[576] GC III does not include any law of armed conflict protections for soldiers who die in battle.

Turning to customary international law, "one of the oldest rules in the law of war" is to treat the remains of fallen soldiers with respect.[577] Although respect is a vague and inherently subjective term, disrespectful treatment typically requires specific indignant acts committed against or with corpses.[578] Rule 113 (*Treatment of the Dead*) of the ICRC's *Customary International Law* study, for example, states, "Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited."[579]

The rule's specificity implies that only acts meeting a certain threshold of disrespect are prohibited. This is consistent with the criminalization of the maltreatment of the dead in international criminal law. Article 8(2)(b)(xxi) of the Rome Statute,[580] and its elements of crimes for example, prohibit humiliating, degrading, or indignant acts against dead bodies "of such a degree as to be generally recognized as an outrage upon personal dignity."[581] The threshold for misconduct involving bodies is, therefore, relatively high.

Although photographs may have a nexus to prohibited misconduct, it is typically the underlying inhumane behavior captured in photographs that violates customary international law, not the photographs themselves. Chief Petty Officer Eddie Gallagher, for example, posed for pictures with a slain fighter he stabbed while the

573 GC III, *supra* note 4, art. 13.

574 2020 GC III Commentary, *supra* note 19, para. 1624.

575 GC III, *supra* note 4, art. 4.

576 *Id.* arts. 120, 122; 2016 GC I Commentary, *supra note 194, para.* 1350.

577 DoD LoW Manual, *supra* note 10, § 7.7.1.

578 *Id.*

579 *Treatment of the Dead,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule113.

580 Rome Statute, *supra* note 9, art. 8(2)(b)(xxi).

581 Elements of Crimes, *supra* note 550.

man was receiving medical assistance, then conducted a reenlistment ceremony over the corpse.[582] He sent one of the photos to a friend with the caption, "I got him with my hunting knife."[583] While Gallagher was ultimately acquitted of murder and other charges, he was convicted of "wrongfully pos[ing] for an unofficial picture with a human casualty."[584] The photograph was not itself criminal; the act of indignantly posing with the body—akin to claiming a kill as a war trophy—was.[585]

This distinction is reflected in the U.S. 2019 *Manual for Military Commissions*, which excludes "photography of a corpse unaccompanied by acts of severe disrespect," such as dismemberment or sexual defilement, from the war crime of intentionally mistreating a dead body.[586] Examples of photographs disseminated by the government are also illustrative. In 2003, for instance, the U.S. Department of Defense released photographs of Saddam Hussein's sons to prove to skeptics that the leaders were, in fact, dead.[587] This was part of a larger Department of Defense effort to encourage Iraqis to cooperate with U.S. forces without fear of reprisal from Baathist sympathizers. Additionally, photographs, even those depicting war crimes, are often published to hold perpetrators accountable.

In sum, while the scope of the customary international law requirement to treat the dead with respect is subjective, it does not categorically proscribe publishing photographs as such. Instead, it prohibits severe desecration, such as mutilation, despoilment, dismemberment, or sexual defilement, which may happen to be documented in photos.

There is no evidence to suggest any of the photos published by Ukraine depicted underlying misconduct prohibited by customary law, such as mutilation or beheading. Though the pictures may be graphic, disturbing, or emotionally distressing, especially to family members, the descriptions in the media do not rise to the level of prohibited conduct. Any claims that Ukraine violated customary international law are, therefore, unfounded.

Using Photos to Notify Next of Kin and the Law of Armed Conflict

As to the notification issue, customary international law imposes broad obligations on States with regard to the dead. As captured in the ICRC's *Customary International Law* study, custom requires States to search for and collect the dead,[588] "endeavor to facilitate the return of the remains of the deceased"

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582 Tara McKelvey, *Edward Gallagher: A Murder Trial That Tore Band of Brothers Apart*, BBC News (July 3, 2019), https://www.bbc.com/news/world-us-canada-48536760; Paul Szoldra, *'I Got Him with My Hunting Knife': SEAL Allegedly Texted Photo Cradling ISIS Fighter's Head*, Task & Purpose (Nov. 15, 2018, 4:02 PM), https://taskandpurpose.com/news/seal-chief-gallagher-isis-execution [hereinafter Szoldra]; Ryan Browne, *Navy SEAL Charged with Murder, Shooting at Noncombatants*, CNN (Nov. 16, 2018, 7:26 PM), https://www.cnn.com/2018/11/16/politics/navy-seal-murder-shooting/index.html.

583 Szoldra, *supra* note 582.

584 Paul Szoldra, *Revealed: Here Is the Charge Sheet for the Navy SEAL Accused of War Crimes In Mosul,* Task & Purpose (Nov. 14, 2018, 8:00 PM EST), https://taskandpurpose.com/news/navy-seal-war-crimes-charge-sheet.

585 DoD LoW Manual, *supra note 10,* § 7.7.1.1.

586 U.S. Department of Defense, Office of Military Commissions, Manual For Military Commissions IV-16 (2019).

587 *US Releases Photos of Saddam Sons,* Guardian (July 24, 2003, 13:09 EDT), https://www.theguardian.com/world/2003/jul/24/iraq.usa2.

588 *Search for and Collection of the Dead*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule112.

upon request,[589] and record information about the fallen before disposing of their remains.[590] In contrast to GC I, however, it does not prescribe a specific process for notifying the next of kin.

The relevant treaty law is found in GC I. Article 15 requires parties to "search for the dead and prevent their being despoiled."[591] Once remains are found, their custodians must create a record containing identifying and other administrative data, which must then be forwarded, along with the deceased's personal effects, to a national "Information Bureau."[592] Information bureaus are official entities created by each party that liaise and coordinate through the Central Tracing Agency,[593] a neutral intermediary organization managed by the ICRC, for the transfer of information and effects between hostile parties concerning prisoners and dead soldiers.[594] Once the Central Tracing Agency forwards information from the custodial party, the deceased soldier's Information Bureau should notify the next of kin.[595]

Ukraine does not appear to be violating customary international law by disseminating photos of dead soldiers to their family members in Russia. On the other hand, it *may* be violating the process outlined in GC I for notifying their next of kin. According to reports, Ukraine's forces are contacting family members without using the Central Tracing Agency as an intermediary. This is arguably a technical violation of GC I, Article 16.[596]

Ukrainian officials assert,[597] however, that direct coordination is necessary to circumvent Russian disinformation, which includes "lying to its citizens about the number of the dead."[598] In their eyes, the notifications are a reliable way to ensure next of kin are informed about their soldiers' fates without Russia obstructing the process. According to Ukraine's view, they are endeavoring to implement the spirit, if not the letter, of GC I.[599]

Critics may counter that Ukraine's purported purposes for distributing the photos are disingenuous; the actions are instead part of an information campaign to attack the will of the Russian people. In light of reports that Russia has "sought to conceal"[600] casualty reports and is abandoning its dead on the battlefield without adequate attempts to search for and collect their remains, however, it is difficult

589 *Return of the Remains and Personal Effects of the Dead,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule114.

590 *Accounting for the Dead,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule116.

591 GC III, *supra* note 4, art. 15.

592 GC I, *supra* note 127, art. 16. DoD LoW Manual, *supra* note 10, § 7.7.2.2.

593 *ICRC Central Tracing Agency: half a century of restoring family links,* ICRC (Apr. 7, 2010), https://www.icrc.org/en/doc/resources/documents/interview/centra-tracing-agency-interview-070410.htm.

594 GC III, *supra* note 9, arts. 122–123; DoD LoW Manual, *supra* note 10, § 9.31.2; AR 190-8, *supra* note 426, paras. 1–7.

595 GC I, *supra* note 127, art. 16; 2016 GC I Commentary, *supra* note 194, para. 1599; GC III, *supra* note 9, art. 123.

596 GC I, *supra* note 127, art. 16.

597 Brewster, *supra* note 567.

598 2016 GC I Commentary, *supra* note 194, para. 1596 (stating "Transmittal may also be suspended where the information is repeatedly (mis)used for propaganda purposes … .").

599 *Id.* (stating "Such suspension is a matter for the [Central Tracing] Agency and not for the Power into whose hands the persons have fallen.")

600 Harwell, *supra* note 567.

to determine with reasonable confidence that Ukraine is operating in bad faith.[601]

Conclusion

Simply publishing photographs of fallen soldiers, unlike the severely disrespectful acts they may depict, does not violate the law of armed conflict. Notifying next of kin outside of the official channel outlined in GC I may do so. Still, it is unclear whether the unique facts of this conflict excuse Ukraine's technical departure from its treaty obligations.

This does not mean that publishing photos of fallen soldiers' remains, whether on social media or to family members, is appropriate behavior. It has undoubtedly caused significant concern to many. And their concerns potentially have policy implications that may not benefit Ukraine.

[601] Sarah Rainsford, *Ukraine War: Bodies of Dead Russian Soldiers Abandoned near Kyiv,* BBC (May 25, 2022), https://www.bbc.com/news/world-europe-61571855.

THE RELEASE OF PRISONERS OF WAR

by Jeroen van den Boogaard | Jul 8, 2022

As announced by Ukrainian authorities on 29 June 2022, the largest exchange of prisoners of war took place since the invasion by the Russian Federation.[602] No fewer than 144 Ukrainian soldiers were reportedly released, including 95 who defended the Azovstal steelworks in Mariupol. In video footage of the released Ukrainian soldiers, it was clear that most of the soldiers were no longer fit to fight. Pictures released by the Ukrainian authorities seem to suggest that the Russian prisoners to be exchanged were in good health, while many of the Ukrainian soldiers arrived in ambulances.[603]

According to news reports, spokesman Denis Pushilin of the so-called pro-Russian separatist Donetsk People's Republic said, "We handed over to Kyiv the same number of prisoners from the Ukrainian armed forces, most of whom were wounded. Our main task is to rescue the fighters who took part in a special military operation."[604] Whereas an exchange of prisoners is typically the result of bilateral negotiations, international humanitarian law contains a number of rules regulating the release of prisoners. Although there is no information publicly available, to my knowledge, whether this exchange was indeed motivated by the observance of these rules, this post examines how international humanitarian law regulates the release of some categories of prisoners of war.

Combatants

There is no doubt that the armed conflict in Ukraine, conducted by the armed forces of the Russian Federation against those of Ukraine, is an international armed conflict. Despite the Kremlin's rhetoric about a "special military operation" and its "recognition" of the Luhansk and Donetsk People's Republics as independent States, the facts on the ground are clear. The two countries are engaging in an international armed conflict and therefore are bound by the four 1949 Geneva Conventions and 1977 Protocol Additional I to the Geneva Conventions (AP I), to which both Ukraine and the Russian Federation are party. Thus, in accordance with Article 4 of the Third Geneva Convention (GC III) and Article 43 of AP I, the members of the armed forces on both sides of the armed conflict qualify as combatants.[605]

Prisoners of War

Captured combatants become prisoners of war. Combatants have the right to participate in hostilities and, therefore, when they are captured must not be prosecuted for that participation. The purpose of their captivity is to prevent them from further participating in

602 Pjotr Sauer, *Ukraine Announces Largest Exchange of Prisoners of War Since Russia Invaded*, Guardian (June 29, 2022, 14:49), https://www.theguardian.com/world/2022/jun/29/ukraine-announces-largest-exchange-of-prisoners-of-war-since-russia-invaded [hereinafter Sauer].

603 Pavel Polityuk, Tom Balmforth & Tomasz Janowsky, *Ukraine Wins Release of 144 Soldiers in Biggest Prisoner Swap of War*, Reuters (June 29, 2022, 4:32 PM), https://www.reuters.com/world/europe/ukraine-wins-release-144-soldiers-biggest-prisoner-swap-war-2022-06-29.

604 Sauer, *supra* note 602.

605 AP I, *supra* note 9, art. 43.

hostilities against the detaining power and is not a punishment. However, if this participation is no longer expected, for example, due to severe injury or sickness, the reasons of military necessity to keep them detained cease to exist. As a result, considerations of humanity demand their release.[606]

The same rationale applies to the obligation to repatriate prisoners of war after the conflict ends.[607] This is to happen as soon as possible after the armed conflict, subject to the consent of the prisoner of war.[608] As the 2020 ICRC Commentary to GC III, Article 118 notes: "This obligation follows on logically from the primary justification for interning prisoners of war, which is to prevent captured enemy personnel from taking up arms again against the Detaining Power while hostilities are ongoing. Once these have ended, this justification no longer exists and captivity must end as soon as possible."[609]

Release Before the End of the Armed Conflict

IHL provides four options to release prisoners of war (POWs) during the armed conflict.

First, able-bodied POWs may be partially or wholly released on parole or promise if national law of the detaining power that of the State of origin of the POW permits this.[610] As explained by the 2020 ICRC Commentary to GC III, Article 21: "Such release typically occurs in exchange for a pledge not to take up arms again in the same conflict. The practice of paroling prisoners of war has declined considerably since 1949. In addition, many States today prohibit members of their armed forces from accepting release on parole."[611] Prisoners of war released on parole are compelled to keep their parole or promise.

Second, States may arrange the exchange or release of able-bodied POWs during the armed conflict in case they have been held in captivity for an especially long period. This may be done through the conclusion of a bilateral agreement, using the good offices of a third party such as a neutral State or the ICRC.[612]

Third, if wounded and sick POWs may be expected to benefit from treatment in a neutral State, they may be released by the Detaining Power and transferred to that third State. However, the detaining power is not required to agree to such an arrangement. [613]

Fourth, and possibly most relevant in the present context of the Russia-Ukraine war, POWs must be repatriated[614] to their country of origin when their further participation in hostilities is not expected due to injury or sickness (art. 109[615]). This is clearly an obligation, not a recommendation. The

606 2020 GC III Commentary, *supra* note 19, para. 4245.
607 2020 GC III Commentary, *supra* note 19, para. 4444.
608 GC III, *supra* note 4, art. 118.
609 2020 GC III Commentary, *supra* note 19, art. 118.
610 GC III, *supra* note 4, art. 21.
611 2020 GC III Commentary, *supra* note 19, para. 1920.
612 GC III, *supra* note 4, art. 109.
613 *Id.* art. 110.
614 *Id.* art. 109.
615 *Id.*

obligation applies to three categories of POWs: those who are incurably wounded or sick; those who are not likely to recover within one year; and those who have recovered, but whose mental or physical fitness seems to have been gravely diminished.

Release of Other Categories of Persons

In addition, the release of medical personnel and chaplains is also subject to a special regime. These persons do not have the status of combatant and thus do not become POWs. They must be repatriated at once, except in case their services are required for the treatment and care of POWs (art. 30,[616] art. 37 GCII[617]).

There are also obligations with regard to the release of detained civilians. Civilians are protected persons during international armed conflict or during belligerent occupation. They may, however, be interned if this is absolutely necessary for the Detaining Power or for the Occupying power's imperative reasons of security (arts. 41,[618] 42,[619] and 78[620]). They must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities (arts. 132-134, GC IV;[621] art. 75(3);[622] Rule 128A-B ICRC *Customary IHL Study*[623]).

Parties to the conflict are encouraged to conclude special agreements to release, repatriate, or relocate particularly vulnerable persons to their original place of residence or to neutral States. This category includes children, pregnant women, mothers with infants and young children, wounded and sick, and internees who have been detained for a long time (art. 132 GCIV[624]).

Conclusion

It is unknown whether the exchange of June 29, 2022, was the result of the warring parties' sense of obligation to respect and ensure respect for their IHL obligations, in particular those of the Third Geneva Convention. It may be that the desire to make the return possible of their own nationals from captivity served as the primary driver to agree to the exchange. It is, however, important to remind parties to the armed conflict of their IHL obligations in this respect. Given the scale and intensity of the war in Ukraine, it seems likely that both parties hold POWs captive that may be eligible for release, in particular those severely wounded.

616 GC I, *supra* note 127, art. 30.

617 Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, art. 37, 75 U.N.T.S. 85.

618 GC IV, *supra* note 95, art. 41.

619 *Id.* art. 42.

620 *Id.* art. 78.

621 *Id.* arts. 132–134.

622 AP I, *supra* note 9, art. 75(3).

623 Henckaerts & Doswald-Beck, *supra* note 39.

624 GC IV, *supra* note 95, art. 132.

SECTION 2

Civilians

THE OTHER SIDE OF CIVILIAN PROTECTION: THE 1949 FOURTH GENEVA CONVENTION

by Jelena Pejic | Mar 7, 2022

The initial stage of an international armed conflict, such as the one in Ukraine, inevitably focuses international attention on the conduct of hostilities. This is to be expected, given the immediate, visible and usually devastating effects of the use of force on the civilian population. Equally grave suffering is experienced, only less transparently, by persons in the power of an adverse party. There has been a dearth of focus by governments and military practitioners over the past several years on how to ensure that IHL/LOAC rules dealing with persons in enemy hands are interpreted and applied with the least possible ambiguity. This post considers the 1949 Geneva Convention on the protection of civilians (GC IV) applicable in international armed conflict (IAC)—in full awareness of the fact that civilian protection in non-international armed conflict (NIAC) is an even greater conundrum.

GC IV was a belated addition to the IHL/LOAC framework. The treaty was only adopted in the wake of the Second World War, after millions of civilians worldwide suffered horribly or were killed as a result (among other things), of the lack of political will of States to reach prior agreement on a text. The Fourth Convention is nevertheless a monumental achievement. It includes over 150 articles elaborating on the foundational principle of humane treatment. The specificity of the legal obligations formulated is impressive, whether one looks at the provisions common to the civilian populations of the countries at war, those on the protection of aliens in the territory of a Party to the conflict, on civilians in occupied territories, or on the treatment and process for internees, to name just a few headings.

In contrast to the 1949 Geneva Third Convention on Protection Relative to Prisoners

of War (GC III), the application of the GC IV is unfortunately open to more legal controversy. Some questions are interpretive in nature. Others reflect the time of the treaty's drafting. And still others have not been resolved in practice. Three will be addressed below, all of which have been, and still present, obstacles to the uniform protection of civilians in IAC.

So-Called "Unlawful Combatants"

The first issue is well-known and relates to the personal scope of application of GC IV. The relevant treaty text (Article 4, para. 1) is clear: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals." The text also states that GC IV does not protect persons who are already covered by one of the other three Conventions of 1949, including prisoners of war. Despite the drafting clarity, controversy centers on whether unprivileged belligerents or unlawful combatants (UCs), terms not found in the text, who fulfill the Article 4 nationality criteria are protected by the Convention upon falling into the power of the enemy. UCs are civilians who take a direct part in hostilities without being authorized to do so under IHL/LOAC.

According to one school of thought, UCs are protected by the Convention. The drafting history of GC IV does not suggest that there was agreement to exclude them, as demonstrated by the unambiguous wording of the definition of a protected person quoted above. Moreover, the treaty provides, in Article 5, that a person suspected of or engaged in activity hostile to the security of a State in its territory may be denied such rights and privileges under the Convention as would, if exercised, be prejudicial to its security. The gist of the formulation relevant to occupied territories is similar, albeit more specific as to the rights that may be "suspended."

According to another view, UCs are a separate category of persons, not covered by either GC III or GC IV. It is believed that their unlawful participation in hostilities sets them apart from "peaceful civilians" and that they can at most claim the protections of customary law: either Common Article 3 of the Geneva Conventions or the fundamental guarantees of Article 75 of Additional Protocol I of 1977, either as customary law or as a matter of policy.

It is submitted that this interpretation disregards the plain language of the already quoted text of Article 4, paragraph 1, defining a protected person. GC IV has enjoyed universal ratification for nearly two decades. Moreover, it may be argued that a rule on hierarchy of international law sources indicates that treaties adopted later in time that achieve universal State ratification supersede prior customary law where the two diverge.[625] In any case, the Geneva Conventions are nowadays deemed to reflect customary law. Thus, the question is: what is the legal justification for persistent reliance on a separate *legal* category of UCs as persons excluded from the Geneva treaty regime?

[625] Richard B. Bilder, Oscar Schachter et al., *Disentangling Treaty and Customary International Law*, 81 JSTOR 157 (1987), http://www.jstor.org/stable/25658360.

Unfortunately, proponents of the approach described have offered scant explanation and, when they did, relied mainly on (rare) domestic court decisions or outdated scholarly articles.[626]

GC IV does not mention or distinguish between UCs and "peaceful civilians." This is presumably because, as demonstrated in the Second World War and in IACs thereafter, some civilians took a direct part in hostilities regardless of lack of IHL/LOAC authority to do so, for a variety of reasons. Such behavior, it should be noted, is not listed as a grave breach of the Fourth Convention, nor is it a war crime under the 1998 Statute of the International Criminal Court. Instead, the IHL/LOAC framework provides several layers of possible, severe sanctions for civilians who take up arms. A UC may be targeted and killed while directly participating in hostilities. They may be subject to a civilian internment regime—anticipated by a significant portion of GC IV—because of the serious threat their activity presents to the security of the detaining Power. They may likewise be prosecuted and tried under the domestic criminal law of the captor for direct participation per se, as well as for any acts of violence committed during that time.

It would be useful to know why the practical and legal consequences of unlawful participation in hostilities provided for in IHL/LOAC are apparently considered insufficient by proponents of the view that UCs are outside the Geneva treaty regime when in enemy hands. It seems this view risks allowing a descent into behavior that would be prohibited as inhumane. As mentioned, detailed legal arguments have been lacking, stifling a common understanding among States on the application of the treaty text, and more importantly, leading to the unequal protection of civilians in practice, based on the Power detaining them.

Invaded Territory

A second challenge involves a normative gap in the text of GC IV arising from its structure. By way of reminder, Part I of the treaty contains general provisions. Part II includes provisions protecting the entirety of the populations of the countries in conflict (e.g., on hospital and safety zones, family news, child welfare), while Part III, by far the bulk of the text, deals with the status and treatment of protected persons as defined in Article 4. The further subdivisions of Part III clearly indicate that the persons referred to are to be found either in Party to the conflict's own territory or in occupied territory.

No provision is made for situations in which civilians may find themselves in enemy hands outside these two territories, such as during the invasion phase of an IAC or a raid into enemy territory. Moreover, practice, including a fairly recent one, has shown that foreign invasions do not necessarily lead to swift occupations and may lead to prolonged forms of control over persons and objects short of occupation. Further, legally classifying a situation as an occupation (under Article 42 of the 1907 Hague Regulations) is often politically rejected by an occupier, making the application of the relevant section of GC IV very difficult in practice.

626 Dinstein, *supra* note 124, p. 121-27.

It would appear based on the drafting history of the Fourth Convention that States specifically intended to focus in Part III on the two groups of persons covered: aliens in belligerent States' own territory and civilians in occupied territory. It is not clear why this approach was taken except, perhaps, that the treaty negotiations reflected the immediately preceding reality of the Second World War during which the dichotomy solidified. It is, nevertheless, inconceivable that civilians who come into contact, or are otherwise under the control of enemy forces outside a belligerent party's own territory or occupied territory, remain outside any legal protection. They are covered by the fundamental guarantees of Article 75 of Additional Protocol I (AP I) for States party to that treaty, or as a matter of customary law or policy, but the protections provided are far more basic than those spelled out in GC IV. While murder and torture are prohibited, for example, Article 75 of AP I does not refer to procedural safeguards for internees or to the prohibition of deportation of civilians.

In 1958 Jean Pictet attempted to "fill" the legal gap in the ICRC's Commentary to the Fourth Convention by stating that the term "occupation" as used in GC IV cannot be equated with the meaning of that word under the Hague Regulations. As Pictet explained,

> The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets. When it withdraws, for example, it cannot take civilians with it, for that would be contrary to Article 49 which prohibits the deportation or forcible transfer of persons from occupied territory. The same thing is true of raids made into enemy territory or on his coasts. The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left.

Pictet's approach is commendable but, being a broad statement, lacks elaboration. The main criticism is that invading forces would not be able to comply with the entirety of the Convention from the beginning. Scholars have since proposed a variety of ways in which the legal gap could be addressed. Thus, Marco Sassòli has suggested using a "functional approach," according to which "a territory may be considered occupied along a sliding scale for the purpose of the applicability of certain rules of IHL for military occupation but not for others" (para 8.221). Other writers have identified specific GC IV rules on occupied territories that would come into play during the invasion phase.

Military manuals usually replicate the dichotomy of GC IV without addressing the issue of the protection of civilians outside a Party's own territory or occupied territory. The International Criminal Tribunal for the former Yugoslavia took

its own approach (paras. 221 and 587[627]), indicating that only rules protecting persons apply in the invasion phase, not those protecting property. The current uncertainty in law and practice on this issue would seem to call for a focused examination by States and other actors with a view to arriving, as a start, at a policy position on the status and treatment of civilians not explicitly covered by GC IV. The normative gap is significant. And so, inevitably, is the protection gap.

Internment

The third question to ponder in relation to GC IV is when the internment of detained protected persons begins. GC IV provides no guidance, and military manuals—*sauf erreur*—do not address the issue. But it is hugely important. While there is no question that a POW as defined in Article 4 of GC III may be interned for posing a threat to the security of the detaining Power based on their very status, the situation of protected persons under GC IV is different in reality and thus in the law. Civilians must pose a threat based on their activity, and a Party to the conflict "may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."[628] Along with assigned residence, internment in a State's own territory or in occupied territory is the severest measure of control that a State may take.

In either case the relevant provisions specify the legal standard on grounds for internment that must be met and the applicable procedural safeguards. Internment involves a process in which the State initially determines whether a detained individual poses a security threat and whether they should be released or kept in detention with further periodic review. Civilian internment must cease as soon as the reasons for it no longer exist and, in any case, after the close of hostilities. Given that civilians who may pose a security threat based on their activity are captured not only in open combat, but in raids and other types of operations, the importance of a review process cannot be overstated.

What may happen in practice, however, is that civilians are detained for a period of time, the duration of which may vary, without being designated as internees or subject to the full procedural safeguards of GC IV. If there is a review process, it depends on the policy approach of the detaining State. It is submitted that the issue of when internment begins needs to be resolved not only because the disparate approaches of States in practice lead to different outcomes in individual cases, but because detention for security reasons without the requisite legal guarantees applied could be deemed unlawful. The claim, heard informally from militaries, that setting up an internment regime is resource intensive is true, but cannot be dispositive. Internment review is a legal obligation under GC IV, and protection of persons in enemy hands cannot be fully accomplished without it.

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627 Prosecutor v. Naletilic & Martinovic, Case No. IT-98-34-T, Judgment, paras. 221, 587 Int'l Trib. for the Prosecution of Persons Responsible for Serious Violations of IHL Committed in the Territory of Former Yugoslavia since 1991 (Mar. 31, 2003).

628 GC IV, *supra* note 95, art. 27(4).

Conclusion

Unfortunately, threats to the safety of civilians do not end with attacks. Civilians remain at enormous risk of harm and mistreatment when belligerents place them under their control. While GC IV reflected a huge step forward in the protection of civilians who find themselves in the hands of their nation's enemy, significant ambiguities and interpretive squabbles leave hampered the Convention's protective regime. The time is ripe for States to resolve these disputes to better protect those who suffer most from the ravages of war. Clarifying the personal and geographic scope of GC IV protections and the internment standard to better protect civilians is a laudable and eminently attainable step toward ensuring humanity in war.

FORCED CONSCRIPTION IN THE SELF-DECLARED REPUBLICS

by Marten Zwanenburg | Aug 8, 2022

The Guardian recently reported that men in the Donbas region in eastern Ukraine are being forcibly conscripted into the armed forces of the self-declared Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR).[629] Although it appears this practice is not entirely new, it has been stepped up as losses on the Russian and separatist side mount in the armed conflict.

The conflict in Ukraine is certainly not the first or the only conflict in which this practice has taken place. However, in eastern Ukraine it appears to now take place on a large scale and in a systematic way.[630] This post discusses this practice from the perspective of international humanitarian law (IHL).

Application of IHL

An analysis first requires an assessment of the applicable legal regime. There is no doubt that at least since the Russian invasion of Ukraine on February 24, 2022, there has been an international armed conflict between Russia and Ukraine. Under a theory offered by the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case, if Russia exercises overall control over the DPR and LDR, then the fighting with those republics is part of an international armed conflict. A mission of experts that investigated alleged violations of IHL and human rights in the conflict for the Organization for Security and Cooperation in Europe concluded that this was indeed the case.[631] Consequently, the IHL regime of international armed conflict is applicable.

This includes the four Geneva Conventions (GC I–IV) as well as Additional Protocol I (AP I), to which both Russia and Ukraine are parties. It also includes the 1907 Hague Convention IV with its annexed Regulations concerning the Laws and Customs of War on Land (Hague Regulations). This is not only because both States are parties to this treaty, but also because the rules of the latter treaty have been considered to reflect customary IHL.[632]

Another way in which the law of international armed conflict would become applicable in the republics is if Russia can be considered an occupying power. This is the case if Russia exercises effective control over the territory in eastern Ukraine. As Marco Sassòli has pointed out, it is controversial whether the exercise of overall control by Russia over the self-declared "republics" made not only IHL of international armed conflicts applicable but

629 Peter Beaumont & Artem Mazhulin, *'They Hunt Us Like Stray Cats': Pro-Russia Separatists Step Up Forced Conscription as Losses Mount*, Guardian (July 20, 2022, 9:01), https://www.theguardian.com/world/2022/jul/20/pro-russian-separatists-step-up-forced-conscription-as-losses-mount.

630 Igor Burdyga & Regina Gimalova, *Ukraine Separatists Draft Anyone They Can*, DW (Apr. 27, 2022), https://www.dw.com/en/how-ukraine-separatists-are-mass-conscripting-anyone-of-fighting-age/a-61608760.

631 Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022, 132/2022 OSCE ODIRH.GAL/26/22/Rev.1 ¶ 5 (Apr. 2022).

632 Report, Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Report S/25704 (May 3, 1993).

also conduct of the "republics" attributable to Russia.[633] He explains that the majority view is that it does and that if the majority is correct, effective control by the "republics" over parts of Ukraine was attributable to Russia and made Russia an occupying power of those territories.

This was also the conclusion of the group of experts under the Moscow mission referred to above (of which Marco Sassòli was one of the members). If Russia is directly or indirectly occupying (part of) eastern Ukraine, then in addition to the IHL regime of international armed conflict, the law of occupation also applies there. The main instruments of the law of occupation are the Hague Regulations and the Fourth Geneva Convention (GC IV).

Forced Conscription Under IHL

Article 23(h) of the 1907 Hague Regulations provides that "[a] belligerent is … forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war."[634] It may be noted that this provision is limited in scope to nationals of the hostile party. For inhabitants of eastern Ukraine who have received Russian nationality, it is thus questionable whether this provision applies to them.

To the extent they have not received that nationality voluntarily, it must be concluded that the conferral of nationality has not been in accordance with international law and must therefore be disregarded. For inhabitants who have received Russian nationality voluntarily, it could still be argued that this was in violation of international law and therefore null and void. If that is not accepted however, an interesting question is whether they have also retained Ukrainian nationality. If that is the case, one approach would be to determine which of the two nationalities is the "dominant" one, as is the practice in the context of diplomatic protection.[635] Another approach would be to read Article 23(h) literally so that the fact that a person has Ukrainian nationality makes it apply, regardless of whether the person concerned also has another nationality. It may or may not be that under Ukraine's domestic law a person who takes part in operations of war directed against it loses his or her Ukrainian nationality. If this is the case, it is an interesting question how this would affect the situation. Arguably, the taking part must have taken place before the loss of nationality takes place, so that the violation of IHL has been committed before that point in time.

Article 23(h) prohibits compelling "to take part in the operations of war." This appears to be more limited than becoming part of the armed forces. For example, a person who has been conscripted but who is still receiving military training away from the front would not seem to be taking part in the operations of war.

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633 Marco Sassòli, *Application of IHL by and to Proxies: The "Republics" of Donetsk and Luhansk*, Articles of War (Mar. 3, 2022), https://lieber.westpoint.edu/application-ihl-proxies-donetsk-luhansk.

634 Hague IV, *supra* note 9, art. 23(h).

635 International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, UN Doc. A/61/10, 26 (2006).

Another relevant IHL provision is Article 51 of GC IV.[636] This provision provides *inter alia* that "[t]he Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted." In contrast to Article 23(h) of the 1907 Hague Regulations, this provision does not apply only to enemy nationals. Rather, it applies to the broader category of "protected persons." Article 4 GC IV defines this category as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[637]

The International Committee of the Red Cross 1958 *Commentary on the Fourth Geneva Convention*, Article 51 points out that the article also diverges from the Hague Regulations in that it refers to serving in the armed or auxiliary forces rather than taking part in the operations of war.[638] As pointed out above, a person can serve in the armed forces while not taking part in operations of war.

Finally, Article 147 of GC IV makes "compelling a protected person to serve in the forces of a hostile Power"[639] a grave breach of the Convention which the High Contracting Parties must criminalize in accordance with Article 146.[640] It would be logical to conclude that this is based on the prohibition in Article 51, were it not that Article 147 is not limited to situations of occupation. This leads to the curious result that on the basis of GC IV, Russia would incur State responsibility for compelling in occupied territory, while outside occupied territory it is "only" obliged to criminalize such conduct. As was seen above, this gap is filled only partly by the Hague Regulations.

All the relevant provisions discussed above use the term "compel." This raises the question of what is meant by this term. The dictionary meaning is "force to do something" or "bring about by force or pressure," (C. Soanes, ed., New Pocket Oxford Dictionary, 9th ed., p. 176). The second sentence of Article 51 appears to imply that "pressure or propaganda which aims at securing voluntary enlistment" must be distinguished from compelling. The U.S. Department of Defense *Law of War Manual* states that compelling does not include measures such as bribing enemy nationals or seeking to influence them through propaganda (§ 5.27.1).[641] It appears difficult, however, to draw a very precise line between compelling and measures short of compulsion in practice. Having said this, some cases will clearly constitute compulsion. The article in *The Guardian*, referred to above, describes the case of a man being dragged into a car to be taken to a conscription center. This is a clear case of compulsion.

In occupied territory, the difference between compulsion and enlistment under pressure

636 Hague IV, *supra* note 9, art. 51.

637 *Id.* art. 4.

638 Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 58 (Jean Pictet ed. 1958) [hereinafter 1958 GC IV Commentary].

639 GC IV, *supra* note 195, art. 147.

640 *Id.* art. 146.

641 DoD LoW Manual, *supra* note 10, § 5.27.1.

which does not reach the level of compulsion is irrelevant to the extent that Article 51 also prohibits pressure or propaganda which aims at securing voluntary enlistment. It is likely that the drafters of the Geneva Conventions had in mind the pressure used by Germany to enlist persons from occupied territory into the German armed forces during the Second World War when adopting this provision. Outside occupied territory, however, the difference remains important.

Forcible recruitment of persons may also violate other rules of IHL. For example, it is likely to constitute a violation of GC IV, Article 27,[642] which provides that protected persons shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Forced recruitment can also amount to physical or moral coercion, which is prohibited by GC IV, Article 31.[643]

Conclusion

In conclusion, the forced conscription as reported by *The Guardian* in territory occupied by Russia, either directly or through the DPR and LPR as proxies, is in violation of GC IV and constitutes a war crime. To the extent that enlistment is not compelled but the result of pressure or propaganda, it is a violation of the Convention but not a war crime as such. The distinction between compulsion, on the one handm and pressure or propaganda, on the other, will not always be easy to make.

If it is not forced conscription, but voluntary conscription into the armed forces of the occupying State, the effect would probably be a criminal law matter for the occupied State, and the person would perhaps lose his or her nationality.

In the context of the wide variety of violations of IHL committed by Russia in Ukraine, this particular category of violations of GC IV by Russia has not received much attention. Considering the need for new recruits against the background of the mounting losses on the side of Russia and its proxies, it unfortunately looks like it will gain importance in the months to come.

642 GC IV, *supra* note 95, art. 27.

643 *Id.* art. 31.

DISPLACEMENT FROM CONFLICT: OLD REALITIES, NEW PROTECTIONS?

by Ruvi Ziegler | Mar 17, 2022

Globally, conflicts are *the* main source of both internal and cross-border displacement. The conflict prompted by Russia's recent invasion of Ukraine, which is a considerable escalation from the original incursion in 2014, has already caused the largest external displacement on the European continent in well over 60 years, with numbers dwarfing arrivals in Europe during the (so-called) 2015 Syrian refugee crisis.[644]

How does international law address cross-border conflict-induced displacement? As I have recently argued, the relationship between international humanitarian law (IHL) and international refugee law (IRL) is both inevitable and challenging.[645] This is due to terminological, institutional, and structural differences and to their being specialized regimes designed to be invoked in *divergent* exceptional circumstances.[646] I have therefore advocated a healthy skepticism in the interpretation of IHL terms of art as part of an IRL assessment, especially in respect of Article 15(c) of the EU Qualification Directive (QD), to which I shall return later.[647]

This post explores *complementary* ways in which IRL and IHL can and should be used to maximize protection for those displaced from Ukraine. For brevity, I will not address internal displacement in Ukraine or the (il)legality, from a human rights law perspective, of preventing all Ukrainian men aged eighteen to sixty from leaving their country of nationality.

Regional Refugee Law Response: Stepping Up to the (Temporary Protection) Plate

Several of the countries bordering Ukraine (Poland, Hungary, Slovakia, and Romania) are European Union (EU) member States. Article 78 of the Treaty on the Functioning of the European Union stipulates that,

> [t]he Union shall develop a common policy on asylum, subsidiary protection, and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement.* This policy must be in accordance with the 1951 Convention and the 1967 Protocol, and other relevant treaties.[648]

All EU member States are signatories to the above-mentioned *global* refugee law

644 Ukraine Refugee Situation, Operational Data Portal, UHCR, https://data.unhcr.org/en/situations/ukraine.

645 Reuven (Ruvi) Ziegler, *International Humanitarian Law and Refugee Protection*, *in* The Oxford Handbook of International Refugee Law, Oxford Academic (Cathryn Costello, Michelle Foster & Jane McAdams eds. 2021).

646 Marko Milanovic, *The Russia-Ukraine War and the European Convention on Human Rights*, Articles of War (Mar. 1, 2022), https://lieber.westpoint.edu/russia-ukraine-war-european-convention-human-rights.

647 Directive 2011/95/EU, of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), O.J. (L 337) 19, 13.

648 Consolidated version of the Treaty on the Functioning of the European Union, O.J. (C 326), 26.

instruments, which define who is a "refugee" and ensuing State obligations. In addition, the QD had created a "subsidiary protection" status in the EU for those who do *not* qualify as refugees pursuant to the 1951 Convention definition. I shall return later to the applicability of both instruments to persons displaced from Ukraine.

Yet determination of refugee and/or subsidiary protection status requires an oft-lengthy process that is arguably less well suited in response to immediate protection needs. That is why, over twenty years ago, in the aftermath of mass displacement from the Balkans, the EU has adopted, as part of its comprehensive asylum framework (the *Acquis*[649]), a Temporary Protection Directive (2001/55/EC of 20 July 2001) (TPD).[650] Yet it had never been activated in response to previous conflicts.

On 4 March 2022, the Council of the EU, acting on a proposal from the European Commission, unanimously agreed to activate the TPD.[651] The implementing decision was made in response to a "mass influx" of "displaced persons," defined as "the arrival in the EU of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the EU was spontaneous or aided." The TPD sets "minimum standards for giving temporary protection" and adopts "measures promoting a balance of efforts between the Member States in receiving such persons and bearing the consequences thereof"—a code for responsibility sharing (see general analysis of the TPD[652] and dissection of the Ukraine-specific decision).[653]

Critically, the TPD will apply not just to "Ukrainian nationals residing in Ukraine who are displaced as of 24 February 2022 following the military invasion by Russian armed forces," but also to "Third-country nationals (TCNs) or stateless persons legally residing in Ukraine who are unable to return to their country or region of origin in safe and durable conditions because of the situation prevailing in that country." *The latter group could include persons enjoying refugee status or equivalent protection or who were asylum seekers in Ukraine at the time of the events leading to the mass influx.* Hence, an asylum seeker from Afghanistan who had resided in Ukraine prior to the Russian invasion will also be covered. One is hard-pressed not to recall that, only last autumn, Polish soldiers at the Polish-Belarus border were violently pushing back asylum seekers from Afghanistan.[654] Family members of Ukrainians, TCNs, or Stateless

649 *Union acquis*, Glossary, European Commission, https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/union-acquis_en.

650 Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, O.J. (L 212).

651 European Commission, Ukraine: Commission proposes temporary protection for people fleeing war in Ukraine and guidelines for border checks, Press Release (Mar. 2, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1469.

652 Gregor Noll & Markus Gunneflo, *Directive 2001/55 Temporary Protection Synthesis Report*, Academic Network for Legal Studies on Immigration and Asylum in Europe, https://odysseus-network.eu/wp-content/uploads/2015/03/2001-55-Temporary-Protection-Synthesis.pdf.

653 Steve Peers, *Temporary Protection for Ukrainians in the EU? Q and A*, EU Law Analysis, http://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html.

654 Amnesty International, Poland: 17 Afghans at the border violently pushed back to Belarus (Oct. 20, 2021), https://www.amnesty.org/en/latest/news/2021/10/poland-17-afghans-at-the-border-violently-pushed-back-to-belarus.

persons meeting the above definition are also eligible for protection.

Importantly, temporary protection is to be granted without prejudice to the recognition of refugee status under the 1951 Refugee Convention.[655] Hence, in theory, it should be possible for any displaced person from Ukraine who believes that they meet the definition in Article 1A(2) (see the discussion below) to apply for asylum in an EU member State at any time. However, the member States are permitted to delay consideration of an application for refugee status until temporary protection has ended. *Realistically, they are likely to do so, except in cases where they wish to exclude* persons from temporary protection on 1951 Refugee Convention grounds (for instance, if anyone seeking protection had participated in war crimes pursuant to Article 1F(1). *However, when the TPD ceases to apply, one can foresee refugees sur place circumstances under which return of, for instance, LGBTQIA+ people, to areas under Russian de jure or de facto control would expose them to a well-founded fear of persecution, thereby qualifying them for refugee protection.*

That the EU has activated the TPD for the first time in this crisis has justifiably prompted both praise (for acting decisively, rapidly, and indeed with unanimity) and criticism (given its inability to agree on similar measures in previous crises[656] and its propensity to actively prevent refugees from arriving on European shores through externalization policies).[657] An authoritative read highlights a critical distinction between Ukrainians and Syrians, Iraqis, Afghans, Eritreans, or indeed any nationals on the top ten refugee-producing countries globally.[658] Prior to February 24, 2022, Ukrainians had enjoyed visa-free (temporary) access to EU member States. Their need for "safe and legal routes" to the EU pertains first and foremost to having such "humanitarian corridors" to Ukraine's borders, not beyond them. Indeed, the EU Council's decision explicitly states that Ukrainian nationals, as visa-free travellers … [can] choose the Member State in which they want to enjoy the rights attached to temporary protection and to join their family and friends across the significant diaspora networks that currently exist across the Union. This will in practice facilitate a balance of efforts between Member States, thereby reducing the pressure on national reception systems.

This sound rationale for permitting (arguably encouraging) movement across EU borders stands in stark contrast to the position under the (in)famous Dublin III Regulation, which generally applies to asylum seekers and which in the main places the responsibility with the EU member State of arrival.[659]

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655 Convention and Protocol Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

656 Ruvi Ziegler, *Asylum seekers are now political pawns in a disharmonious EU*, The Conversation (June 13, 2018, 10:45 AM EDT), https://theconversation.com/asylum-seekers-are-now-political-pawns-in-a-disharmonious-eu-98260.

657 *On Its 70th Anniversary, the Refugee Convention Faces Unprecedented Threats Across Europe*, Faculty of Law Blogs/University of Oxford (July 22, 2021), https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/07/its-70th.

658 Meltem İneli Ciğer, *5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022*, EU Immigration and Asylum Law and Policy (Mar. 7, 2022), https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022.

659 EU Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), O.J. (L 180) 31.

Displacement from Ukraine and the 1951 Refugee Convention Definition

It is worth emphasizing that, contrary to popular myth, international refugee law does *not* require a refugee to seek asylum in the first country they enter, nor is refugee status as such affected by transiting through one or more countries. Indeed, refugee status is declaratory, as the UNHCR Handbook puts it:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition…. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.[660]

Hence, countries beyond Ukraine's neighbors, including those that require Ukrainians to obtain a pre-arrival visa, must consider asylum applications from persons displaced from Ukraine, irrespective of whether they will have transited through one or more countries.[661]

Article 1A(2) of the 1951 Refugee Convention defines a refugee as someone being outside their country of nationality or habitual residence (to cover cases of Statelessness) due to a well-founded fear of persecution for one or more of five reasons (race, religion, nationality, membership of a particular social group, or political opinion) who is unable or unwilling to avail themselves of the protection of their State.

The provision does not refer to an armed conflict as a necessary or as a sufficient eligibility criterion. Yet the UN High Commissioner for Refugees (UNHCR) Handbook states that "[p]ersons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol."

This so-called war flaw has prompted much debate,[662] forcing UNHCR to clarify the above statement in its 2016 Guidelines on International Protection No. 12.[663] In a conceptual reversal, UNHCR now claims that "rarely are modern-day situations of armed conflict and violence characterized by violence that is not in one way or another aimed at particular populations, or which does not have a disproportionate effect on a particular population, establishing a causal link with one or more of the Convention grounds."

Addressing the challenge of squaring mass influx with the individualized character of refugee status, the UNHCR guidelines are unequivocal, stating that "[t]he fact that many or all members of particular communities are at risk does not undermine the validity of any particular individual's claim," rejecting the so-called differential impact test according to which those fleeing armed conflict needed to show the risks they face is over and above the

660 Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, HCR/1P/4/ENG/REV.4 para. 28 (2019).

661 @BestForBritain, X (formerly Twitter) (Mar. 8, 2022, 6:08 AM), https://twitter.com/BestForBritain/status/1501182955498221573.

662 Hugo Storey, *The 'War Flaw' and Why It Matters*, *in* Refuge from Inhumanity? War Refugees and International Humanitarian Law, BRILL 37-56 (2014), https://doi.org/10.1163/9789004261594_003.

663 Guidelines on International Protection No. 12, UN Doc HCR/GIP/16/12, Dec. 2, 2016.

"normal" risks to life and liberty inherent in conflict.[664]

Indeed, in most contemporary armed conflicts, such as the conflict in Syria, very many of those who had fled the conflict will have had a well-founded fear of persecution for several Article 1A(2) 1951 Convention reasons. Consider, for instance, the fate that awaited all Yazidis under ISIS rule. In contradistinction, in the circumstances in Ukraine at the time of writing, the IHL presumption that nationals will not have ordinarily severed their ties to their country of nationality may sit uncomfortably with the 1951 Convention requirement that those seeking protection are unable or unwilling to avail themselves of their State's protection, either because their State is the agent of persecution or because it is unable or unwilling to protect them from persecution emanating from non-State actors. Nevertheless, in those areas of Ukraine presently controlled by Russian forces, those refusing to return cannot in earnest avail themselves of the protection of Ukraine (nor, it appears, can they be expected to enjoy the protection of their occupiers).

The (Hitherto Avoided) Joy of Article 15(c) of the EU Qualification Directive

That the 1951 Convention may not fully protect those fleeing conflict inspired adoption of expansive refugee definitions in regional instruments in Africa (OAU Convention[665]) and the Americas (Cartagena Declaration).[666] In the EU, as previously mentioned, the QD is designed to offer subsidiary protection to "beneficiaries of international protection" who do not qualify as 1951 Convention but in respect of whom "substantial grounds have been shown for believing that" if returned to their country, they would face "a real risk of suffering serious harm." Article 15 stipulates that "serious harm" consists of, *inter alia*, "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15(c))."

By activating the TPD, the EU will have parked, at least for now, the need to consider application of Article 15(c) of the QD to displacement from Ukraine. If one were to nevertheless undertake such an appraisal, the situation in Ukraine clearly qualifies as an armed conflict. Yet "indiscriminate attack" within its IHL meaning sits uncomfortably with the individualized appraisal of "indiscriminate violence" that is purportedly required by the reference in the same provision to "individual threat" (see the ECJ's attempt to square the circle in *Elgafaji*).[667] Moreover, there may be Ukrainians or, indeed, Russian military deserters who would not satisfy the definition of a "civilian" within its IHL meaning were it to be applied in this context.

IHL: Explicit Protection from *Refoulement*

IHL envisages destruction, death, and ultimately displacement. Nevertheless, adherence to and

664 Hugo Storey, *Armed Conflict in Asylum Law: The "War-Flaw"*, 31 Refugee Survey Q. 1 (2012).

665 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45 (Sept 10, 1969).

666 Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, U.N. Doc. (Nov. 22, 1984).

667 Meki Elgafaji & Noor Elgafaji v. Prosecutor, Judgment, Case C-465/07 ECJ Grand Chamber, Feb. 17, 2009.

respect for IHL rules, not least those protecting civilians against the effects of hostilities, can minimize displacement of civilians for reasons related to the armed conflict. The horrid picture emerging from Ukraine of disregard of basic principles of IHL is no doubt contributing to mass displacement.

The clearest IHL articulation of the principle of *non-refoulement* is found in Article 45(4) of the Fourth Geneva Convention: "Protected persons" should "in no circumstances be transferred to a country where [they] may have reason to fear persecution for [their] political opinion or religious beliefs." This provision applies (only) to "civilians who find themselves in the hands of a party to the conflict of which they are not nationals."[668] Hence, it would only apply to Ukrainian nationals in the hands of Russia—and vice versa (see discussion of co-belligerency on this forum).[669] This explicit and unqualified protection from *refoulement* is therefore limited both in scope and, critically, to parties to the conflict.

IHL: Implicit *Non-Refoulement* Obligations

In this international armed conflict between Russia and Ukraine, the applicability of Article 1 Common to the 1949 Geneva Conventions (CA1) is not in doubt. I had previously argued[670] that we must adopt a purposive reading of the CA1 undertaking to "respect and to *ensure respect*" for the convention[s] "in all circumstances," drawing analogies to the ICJ's *Genocide* judgment.[671] I contend that when persons "taking no active part in hostilities" flee to a non-belligerent party from territories where violations of Article 3 Common to the 1949 Geneva Conventions (recognized by the ICJ in *The Paramilitaries Case* as a "minimum yardstick" in both IACs and NIACs[672]) are occurring or likely to be occurring, the obligation to ensure respect requires States Parties not to *refoule* such persons so long as risk of exposure to these violations persists.

The International Committee of the Red Cross agrees.[673] This position is also consistent with the obligations *erga omnes* under Article 146 of the Fourth Geneva Convention to repress grave breaches and indeed the obligation to "take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches."[674]

The grim picture emerging from Ukraine leaves little doubt that, at the time of writing, returning persons to Ukraine could expose them to serious violations. I would argue that in refraining from *refoulement.* High Contracting Parties (HCPs) would be taking clearly lawful action in the exercise

668 GC IV, *supra* note 95, art. 4.

669 Michael N. Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force,* Articles of War (Mar. 7, 2022), https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force.

670 Reuven (Ruvi) Ziegler, *Non-Refoulement Between 'Common Article 1' and 'Common Article 3' in* Refuge from Inhumanity? War Refugees and International Humanitarian Law, Brill 386 (David J. Cantor & Jean-Francois Durieux eds. 2014).

671 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. (Feb. 26).

672 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgment, 1986 I.C.J. (June 27).

673 2016 GC I Commentary, *supra* note 194, art. 3.

674 GC IV, *supra* note 95, art. 146.

of their sovereignty that does not engage with other parties and hence neither requires their cooperation nor is dependent on their behavior. Such action would be legally and, I suggest, morally required (compare, for instance, the expectation in the ICJ *Wall* Advisory, paragraph 159, that HCPs to the Fourth Geneva Convention should "ensure compliance *by Israel* with international humanitarian law").[675]

Non-refoulement at Cessation of Hostilities: Return of POWs

The rebuttable presumption under IHL that nationals enjoy the protection of their country of nationality also applies to their return as soon as reasons for displacement cease to exist, and their right to do so. Yet some prisoners of war (POWs) in the hands of a party to the conflict may fear precisely that scenario. The armed conflict has already seen the capture of thousands of Russians by Ukrainian forces. For our purposes, and notwithstanding this blog's analysis,[676] IHL is rather unequivocal concerning the release and repatriation of those qualifying as POWs after "cessation of active hostilities." According to Article 118 of the Third Geneva Convention, it shall take place "without delay." Yet the 2020 ICRC Commentary rightly notes that while refusal to return cannot be based on "mere convenience," "the obligation to repatriate must be understood as subject to an exception where the prisoners face a real risk of a violation of fundamental rights by their own country," an interpretation which "accords with the principle of *non-refoulement.*"[677]

Concluding Thoughts

The reality of mass external displacement prompted by conflict is not new. The way non-belligerent countries respond, and the extent to which their actions are legally required, rather than purely (morally) desirable, depends both on our adopting purposive interpretations of existing obligations and on (political) willingness to avail ourselves of bespoke protection devices, such as the TPD. It is encouraging to see responsibility-sharing and solidarity manifested in the reception of displaced Ukrainians; one dare hope that the same principles would apply without discrimination to those seeking protection wherever they come from.

When the conflict finally ends, some of those externally displaced will (still) have protection needs, pursuant to eligibility for refugee status under the 1951 Convention, including, increasingly, Russian dissidents—or indeed pursuant to the Third Geneva Convention (think repatriated Russian soldiers). Others who are currently receiving protection pursuant to the TPD in EU member States will have lost family members who were left behind and may be unable to return to obliterated residential areas they had once inhabited. Let us hope that the spirit of generosity by which they had been welcomed will not wane even when formal protection obligations cease.

675 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 9).

676 Koschnitzky & Schmitt, *supra* note 404.

677 2020 GC III Commentary, *supra* note 19, art. 118.

LAW APPLICABLE TO PERSONS FLEEING ARMED CONFLICTS

by Julia Grignon | Mar 15, 2022

As early as February 23rd, the U.S. Ambassador to the United Nations in New York, Linda Thomas-Greenfield, estimated that 5 million people may flee if hostilities erupted in Ukraine.[678] As of March 13, less than three weeks after the Russian Federation launched an unprecedented military offensive into Ukraine, more than 2.8 million people have crossed into neighboring countries.[679] Others are reported to be on the move, both inside and outside Ukraine. Even before the invasion, 854,000 internally displaced people were reported in Ukraine. The situation in Ukraine is claimed to be the fastest-growing refugee crisis in Europe since the Second World War.[680]

This post addresses international law and legal terminology applicable to refugees and displaced persons. What mainly distinguishes refugees from displaced persons is whether they have crossed a border or not. Depending on their situation the applicable law varies. The basics are, however, the same. Under the law of armed conflict, also known as international humanitarian law (IHL), they are chiefly civilians. They are also protected by international refugee law and by international human rights law. In that respect, they must be respected and protected. They must not be targeted. Their dignity must be preserved. They must be treated humanely. And they should be granted impartial humanitarian assistance.

International Humanitarian Law

IHL provides fundamental protections to civilians and others during armed conflict. Many of its foundations are laid in the Geneva Conventions of 1949 and their Additional Protocols of 1977,[681] which specifically mention "refugees" as protected persons. In addition to Article 70,[682] applicable to occupied territories which mentions refugees, Article 44 of the Fourth Geneva Convention (GC IV) states, "the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government."[683] This provision is complemented further by Article 73 of Additional Protocol I (AP I) which provides,

> Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted

678 United States Mission to the United Nations, Remarks by Ambassador Linda Thomas-Greenfield at a UN General Assembly Debate on the Situation in the Temporarily Occupied Territories of Ukraine (Feb. 23, 2022), https://usun.usmission.gov/ambassador-thomas-greenfields-remarks-at-the-un-general-assemblys-debate-on-the-situation-in-the-temporarily-occupied-territories-of-ukraine.

679 *Ukraine Refugee Situation,* Operational Data Portal, UNHCR, https://data.unhcr.org/en/situations/ukraine.

680 Filippo Grandi @FilippoGrandi, X (formerly Twitter), (Mar. 6, 2022, 1:57 AM), https://twitter.com/FilippoGrandi/status/1500395166624010249?s=20&t=H30GIdxzkc6ta80PWfx8LA.

681 *Geneva Conventions of 1949, Additional Protocols and Their Commentaries* ICRC Database, Treaties, States Parties and Commentaries, https://ihl-databases.icrc.org/en/ihl-treaties/geneva-conventions-1949additional-protocols-and-their-commentaries.

682 GC IV, *supra* note 95, art. 70.

683 *Id.* art. 44.

> by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.[684]

What should be understood from these provisions?

First, Article 44 is situated in a section of GC IV dedicated to the protection of aliens in the territory of a party to an armed conflict. It aims to protect nationals of an enemy State who find themselves in the territory of their State's enemy. In the present case, Russian nationals on the territory of Ukraine, including refugees, are protected by Article 44. They should not be treated unfavorably by Ukrainian authorities on the basis of their Russian nationality. Because refugees no longer claim the protection of their country of origin, they are particularly vulnerable in the territory of a State at war with their State of nationality. They become enemy aliens, and Article 44, therefore, affords them specific protection.

In his 1958 *Commentary* on GC IV, Jean Pictet examined the definition of refugee in the newly adopted 1951 Convention on the Status of Refugees. He deemed the definition "too technical and too limited in scope to meet the requirements of the Geneva Convention."[685] He concluded that Article 44 "should be interpreted in [a] broad sense, in accordance with the spirit of the Convention." Later, AP I removed limitations related to the Article 44 material scope of application. Thus from 1977, for Parties to AP I, any person to whom refugee status was afforded prior to hostilities is to be considered a protected person "in all circumstances and without any adverse distinction," be they aliens on the territory of a Party to the conflict or not.[686]

However, while lifting some limitations, Article 73 of AP I includes a temporal one. It applies to persons who became stateless or refugees "*before* the beginning of hostilities" (emphasis added). In the present Ukraine case, this provision would indeed be limited to people to whom refugee status would have been afforded before spring 2014, when the armed conflict started.

The provisions of both GC IV and AP I, therefore, do not adequately address movements of population *generated by* contemporary armed conflicts. However, before moving to another body of law, namely the international refugee law, the interpretation of which has evolved in the sense of being able to afford protection to people fleeing armed conflicts, at least two key elements of IHL remain to be emphasized. First, people on the move who are not combatants, be they refugees or not, in a broad or restrictive sense, are above all civilians. Therefore, they benefit from all the protections of that category of individuals under IHL while they do not take direct part in hostilities. If they do so, they still are civilians, but they lose their protection from direct targeting during their participation.

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684 AP I, *supra* note 9, art. 73.

685 1960 GC III Commentary, *supra* note 50, art. 44.

686 AP I, *supra* note 9, art. 73.

Second, some customary IHL provisions aim to prevent displacement altogether or provide guarantees for those being displaced. For instance, "all possible measures must be taken in order that [they] are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated."[687] Similarly, "[d]isplaced persons have a right to voluntary return in safety to their homes."[688] Neither rule requires a specific status as refugee to accord protection. Each applies widely to civilians.

International Refugee Law

When dealing with protection of people fleeing armed conflicts, international refugee law (IRL) naturally comes to mind. In the aftermath of the Second World War, the United Nations created a High-Commissioner for Refugees (UNHCR) to enhance international protection of refugees. Adopted soon after, the 1951 Convention Relating to the Status of Refugees is the foundation of IRL.[689]

Complemented by a 1967 Protocol, the Convention offers a narrow definition of "refugee."[690] In a nutshell, a refugee is a person who is outside of their country of origin or of habitual residence and who has a well-founded fear of being persecuted on the basis of one of five criteria strictly enumerated at Article 1 of the 1951 Convention. The criteria include race; religion; nationality; membership in a particular social group; and political opinion.

The determination of refugee status is an individual one. To enjoy refugee status under the Convention, each Ukrainian crossing a border to Romania, Hungary, Slovakia, or Poland must demonstrate that they personally fear persecution on the basis of one of the five categories. Such determinations are practically impossible given that hundreds of thousands, even millions, of people are crossing these borders. Broader definitions may be found in the African and Inter-American systems. They encompass people who flee because their lives, safety, or freedom have been threatened by, *inter alia*, generalized violence, massive violation of human rights, or foreign aggression. However, this extended material scope of application is limited in geographical scope and is not applicable to the current situation of armed conflict in Ukraine.

Yet people fleeing *en masse* and seeking refuge in neighboring countries for reasons apart from qualifying persecution are not left without protection. The UNHCR developed, already 60 years ago, a "prima facie" approach to allocating protection. This refers to "the recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin …. [It] acknowledges that those fleeing these circumstances are at risk of harm that brings them within the applicable refugee definition."[691]

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687 *Treatment of Displaced Persons*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule131.

688 *Return of Displaced Persons*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule132.

689 Convention Relating to the Status of Refugees, 189 U.N.T.S. 137 (July 28, 1951).

690 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (Jan. 31, 1967).

691 UN High Commissioner for Refugees, Guidelines on International Protection No. 11, Prima Facie Recognition of Refugee Status, HCR/GIP/15/11 (June 24, 2015).

This approach is mainly used in large-scale situations such as that in Ukraine and bordering States. As a result, all people currently crossing a border to find refuge from the situation in Ukraine benefit from this group determination, and in the absence of evidence to the contrary, they must be considered refugees regardless of nationality, race, or ethnicity. IRL is very clear on this point. Refugee status is afforded to people fleeing a situation occurring in their own country *or* in the country of their habitual residence. And the cornerstone principle of *non-refoulement* applies today to any person seeking refuge.[692] Nobody can be returned to a place where he or she is at risk of irreparable harm upon return. There is no exception to the principle of *non-refoulement*.

Contemplating IRL, the situation of Russian people leaving Russia following the adoption of devastating international sanctions and the adoption of internal arbitrary legislation, such as limiting the freedom of expression and criminalizing any attempt to speak about "war" rather than "special military operations," should be mentioned. If such persons can demonstrate that they are fleeing the Russian Federation because of a fear of being personally persecuted because of their political opinion, for example, they should be granted refugee status.

European Union Response

Given the unprecedented situation, and as a political matter, the European Union (EU) has recently activated a 20-year-old directive relevant to persons fleeing conflict. The EU Council decided on March 4 to implement a temporary protection mechanism, stating, "substantial areas of Ukrainian territory now constitute areas of armed conflict from which thousands of persons have fled or are fleeing."[693] The EU Council "established that there is a mass influx of displaced persons" which requires temporary protection, that is to "allow them to enjoy harmonised rights across the Union that offer an adequate level of protection." Temporary in nature, this protection is to be valid for one year, renewable twice for six months.

A lot could be said about both the content of this directive, which in part distinguishes between Ukrainians and non-Ukrainians, and the political background of its adoption. The EU largely disregarded it in recent contexts such as the influx of people fleeing the conflicts in Syria and Libya. If this is timely and appropriate for all those fleeing the dire situation of Ukraine, it should be pointed out that people from Syria, Afghanistan, Libya, etc., would have deserved such a warm welcome on the European territory. If the EU is ready to accommodate an anticipated 5 million people in the current context, it is hardly understandable that less than 1 million from previous recent armed conflicts were seen as a major crisis for which the EU was not equipped.

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692 Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol, UNHCR (Jan. 26, 2007).

693 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, 2022 O.J. (L 71)1.

Internal Displacement Principles

On a final note, it should not be forgotten that people currently trying to escape indiscriminate attacks or besieged towns of Ukraine are not all crossing an international border. In that case, they cannot be seen as "refugees." However, they remain civilians under IHL and are protected as such. Moreover, given the precarious situations in which they are placed, their protections are also recalled in the 1998 UN Principles on Internal Displacement.[694] Not binding as such, these principles are nonetheless a compilation of relevant IHL and international human rights law (IHRL) rules, excerpted from relevant treaties. They "address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection…. They apply to the different phases of displacement, providing protection against arbitrary displacement, access to protection and assistance during displacement and guarantees during return or alternative settlement and reintegration." The Principles are also a reminder that IHRL does not cease to apply during armed conflicts.

Conclusion

A complex array of terms, definitions, and protections applies to persons displaced during or fleeing armed conflicts such as that in Ukraine. The sum of their international legal protections involves navigation of IHL and IRL treaties, as well as political and soft-law instruments. Although when viewed individually these legal sources may suffer material gaps, collectively they offer a quite thorough legal basis for protection of the most vulnerable populations even in the direst of circumstances.

The basic rules outlined at the beginning of this post are worth reiterating. Displaced persons and refugees must be respected and protected. They must not be targeted. Their dignity must be preserved. They must be treated humanely. And they should be granted impartial humanitarian assistance.

694 Guiding Principles on Internal Displacement, resolution 1997/39, E/CN.4/1998/53/Add.2, UNCHR (July 22, 1998).

RUSSIAN CRIMES AGAINST CHILDREN

by Oleksii Kaminetskyi and Inna Zavorotko | Sep 14, 2022

Since the beginning of Russia's full-scale invasion of Ukraine on February 24, 2022, there has been evidence that indicates Russian political and military leaders, as well as ordinary members of the military, have committed numerous international crimes, including attacks on civilians and civilian objects, use of sexual violence and torture, and forced displacement and deportation. Even the most vulnerable victims have not been safe from these atrocities. For children in Crimea and the Donetsk and Luhansk regions, the experience of a shattered childhood has been a cruel reality. Since the Russian invasion, it has sadly become the shared experience of children all over Ukraine. As outlined below, there is a sufficient basis to believe Russia has committed a wide range of crimes against Ukrainian children during the current armed conflict. This post outlines some of those crimes and calls for an end to these violations against children.

What Are Serious Violations Against Children During Armed Conflict?

United Nations Security Council Resolutions 1261 (1999), 1882 (2009), 1998 (2011), and 2225 (2015) collectively define six serious violations against children during armed conflict. These six violations are analyzed annually in the Secretary-General's Report on "Children and armed conflict" and the "Report of the Special Representative of the Secretary-General for Children and Armed Conflict."

Serious violations against children include:

1. recruitment and use of children in armed conflict;
2. killing and maiming of children
3. attacks on schools, hospitals, and protected persons in relation to schools and/or hospitals;
4. rape and other forms of sexual violence against children;
5. abduction of children;
6. denial of humanitarian access

The question of whether UN Security Council Resolutions are legally binding remains the subject of some debate. Regardless, it is difficult to imagine that under normal circumstances a permanent member of the Security Council would ever freely violate the Council's own decisions. Moreover, all six examples described above violate the law of armed conflict, international human rights law, and the national laws of Ukraine and even Russia. Therefore, depending on their context and motives, they constitute either war crimes, crimes against humanity, or genocide.

Recruitment and Use of Children

The Russian Federation has violated the broad prohibition on recruiting and using children in armed conflict throughout the Russia-Ukraine conflict. Russian authorities have employed a variety of means—including cyber, financial, and emotional—to involve

Ukrainian, and potentially Russian, children in the armed conflict.

The recruitment and use of children in armed conflict is strictly prohibited by the law of armed conflict and by the national law of both Ukraine and the Russian Federation (federal law "On the basic guarantees of the child rights in the Russian Federation").

The prohibition has been further addressed in the jurisprudence of various international criminal courts. For example, in the case of *Prosecutor v. Thomas Lubanga Dyilo*, the International Criminal Court ruled that the active participation of children in armed conflict can include the performance of so-called additional functions, such as serving as a military guard or bodyguard. The Trial Chamber determined that engaging children in these roles constitutes a war crime in violation of Article 8(2)(e)(vii) of the Rome Statute. Although there is no evidence that children have engaged in direct participation in combat activities in the Russia-Ukraine armed conflict, the Russian Federation has used children to perform other combat-related functions.

For example, Russia has been using Ukrainian children for intelligence purposes. An investigation by the Security Service of Ukraine found that the Special Services of the Russian Federation used Ukrainian children to gather information about the location of strategic objects (e.g., checkpoints, transportation routes) using allegedly harmless smartphone games. The games reward users with virtual prizes for locating and then photographing certain objectives that exist in the real world. Additionally, in one formerly occupied Ukrainian town, members of the Russian armed forces induced a twelve-year-old to provide information on the location of Ukrainian armed forces personnel, equipment, and positions in exchange for a monetary reward.

The Russian Federation has also indicated an intent to directly involve Russian children in its war against Ukraine. On March 20, the Minister of Defense of the Russian Federation signed an order "On the organization of the involvement of members of the military-patriotic public movement 'Yunarmiya' in a special operation in Ukraine." The order discusses the preparation of Yunarmiya for activities against Ukraine by reporting on seventeen- to eighteen-year-olds to serve as part of an occupying force in Ukraine. Yunarmiya is a Russian youth military organization supported by the Russian Ministry of Defense whose members include children as young as eight years of age.

Killing and Maiming of Children

The Prosecutor General's Office of Ukraine states that as of 9 September 2022, Russian attacks on Ukraine have killed at least 383 innocent children and injured more than 743 since 24 February 2022. These numbers are not final and do not cover the full extent of atrocities or crimes against children committed in temporarily occupied territories, including towns such as Mariupol and Kherson. Nevertheless, there is ample evidence to show that Russian forces have killed and maimed children using a variety of means and methods, including by intentionally attacking evacuation vehicles marked with the word "Children."

It is well established that children are protected under the law of armed conflict not only as civilians, but as a vulnerable group. Both Russia and Ukraine are parties to the Geneva Conventions and the Additional Protocol I. Accordingly, both States are obliged to follow the law of armed conflict rules on the protection of children as civilians (generally) and as a particularly vulnerable group (specially). More specifically, both Russia and Ukraine must ensure children's basic right to life, respect for children's persons, and respect for children's honor as provided in Articles 27–34 of the Geneva Convention IV and Article 75 of the Additional Protocol I. Moreover, the imperative law of armed conflict principle of distinction protects children from attack.

Nevertheless, children have repeatedly fallen victim to Russia's illegal use of prohibited means and methods of warfare, including targeting of civilian objects (cities, villages, residential buildings, administrative buildings) and targeting of specially protected objects. In the latter category, Russian attacks on kindergartens, schools, educational centers, hospitals, medical transports, and clinics have been particularly horrific and reprehensible. By killing and maiming Ukrainian children, Russian military and political leaders and military personnel have committed a range of war crimes (including, e.g., willful killing, willfully causing great suffering or serious injury to body or health, intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities, etc.), crimes against humanity (including murder, other inhumane acts of a similar character, intentionally causing great suffering or serious injury to body or to mental or physical health), and genocide.

Attacks on Schools, Hospitals, and Protected Persons

Russian attacks on schools and hospitals deprive children of access to education and medical services and are violations of the law of armed conflict principle of distinction. As discussed above, Ukrainian schools and hospitals have been regularly attacked during the conflict. The Ministry of Education of Ukraine states, as of September 9, that 2,177 educational institutions have been bombed or shelled and 284 have been completely destroyed. Additionally, healthcare facilities such as hospitals, clinics, ambulance stations, and blood transfusion stations have been objects of attack by Russian military forces. The Ministry of Health of Ukraine announced, as of September 8, that 826 hospitals have been damaged and 127 have been destroyed.

The widespread destruction of educational and medical facilities is indirect evidence that Russian forces have been targeting civilian objects and damaging infrastructure as a method of warfare. Each of these violations should be evaluated individually, taking into account military necessity and proportionality.

Rape and Other Forms of Sexual Violence Against Children

The UN Secretary-General's Guidance Note on Reparations for Conflict-Related Sexual Violence discusses three general ways in which children may be victimized by conflict-related sexual violence:

1. as direct victims of sexual violence;
2. as witnesses of sexual violence;
3. as children born as a result of sexual violence.

Various reports indicate Ukrainian children have been direct victims of sexual violence and witnesses of sexual violence committed by Russian service personnel. Given the duration of the full-scale invasion of Ukraine so far, no children have yet been born as a result of sexual violence. However, cases of pregnancy, including among girls and young women, have been documented and reported. Tragically, it is only a matter of time before this third category of victims becomes a reality of the conflict. As the Secretary-General's Guidance Note observes, many children born to victims of wartime rape can suffer "grave consequences," such as "infanticide, abandonment, trafficking, statelessness, confusion over identity, and discrimination in accessing family land and inheritance."

Obviously, conflict-related sexual violence committed by Russian military personnel against Ukrainian children violates the law of armed conflict, and depending on the context and motives, the acts could qualify as war crimes, crimes against humanity, or genocide. Various international criminal courts and tribunals have established case law in this area. Landmark cases addressing sexual violence against children include *Prosecutor v. Jean-Paul Akayesu*, *Prosecutor v. Alfred Musema*, *Prosecutor v. Dragoljub Kunarac*, *Prosecutor v. Anto Furundžija*, and *Prosecutor v. Jean-Pierre Bemba*.

Abduction of Children

The abduction of children can occur through unlawful deportation, forcible transfer, and imprisonment. There is sufficient basis to believe Russia uses all these methods to abduct Ukrainian children.

Thousands of children have been unlawfully deported to Russia and Belarus or forcibly transferred to temporarily occupied territories of Ukraine. According to one estimate, nearly 240,000 Ukrainian children have been forcibly taken to Russia. Other sources have reported that nearly 448,000 children have been transferred to Russia. Among them are (1) children deported or transferred together with their parents or other relatives; (2) children deported from orphanages and other family institutions; and (3) children who were orphaned because of the armed conflict and were deported as orphans.

A recent Human Rights Watch report on "filtration" and the crime of forcibly transferring Ukrainian civilians to Russia sums up the prohibition on forcible transfers and deportation as follows:

> The laws of armed conflict prohibit the forcible transfer and deportations of civilians from occupied territory, including children, and prohibit a party to the conflict from evacuating children who are not its own nationals to a foreign country without their parents' or guardians' consent, except temporarily as needed for compelling health and safety reasons.

Accordingly, Russia's conduct violates the law of armed conflict and international human rights law, and potentially implicates various international crimes, such as war crimes (unlawful deportation or transfer or unlawful confinement), crimes against humanity (deportation or forcible transfer of population), and genocide (forcibly transferring children of the group to another group).

These crimes are already being investigated nationally and internationally. However, the most immediate challenge is to establish effective mechanisms for the return of Ukrainian children to their homeland. Unfortunately, international law does not provide any special tools for this, except through the agreement of the parties to the conflict. Current Russian policy, which includes establishing simplified adoption procedures and transferring Ukrainian orphans to Russian families, suggests this approach likely will not succeed.

Denial of Humanitarian Access

Last, the denial of humanitarian access is a crime that harms children and can violate all their basic rights. Among these rights are the right to life; right to health; right to security; right to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development; right to freedom, personal integrity, and dignity; and right to education. This crime against children has been committed in many Ukrainian cities and towns, including Trostyanets, Irpin, Mariupol, and Volnovakha.

Denial of humanitarian access against children violates the law of armed conflict (see, e.g., Articles 55, 60, 61, and 62 of Geneva Convention IV; Articles 14, 69, 70, and 71 of Additional Protocol I; Rule 55 of the ICRC *Customary International Humanitarian Law Study*), as well as the Convention on the Rights of the Child and the domestic law of Ukraine.

As with many of the other crimes already discussed, the denial of humanitarian access could constitute war crimes (intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions), crimes against humanity (extermination and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health), and genocide (deliberately inflicting on the group conditions of life calculated to bring about the group's physical destruction in whole or in part).

Conclusion

Since the beginning of Russia's full-scale invasion of Ukraine on 24 February 2022, there is evidence that indicates that Russian political leaders, military leaders, and military personnel have repeatedly committed the six serious violations against children in armed conflict outlined by the UN Security Council and the Secretary-General. As discussed above, these violations continue to be documented and investigated at national and international levels. More importantly, these crimes against the most vulnerable members of Ukraine—children—must end. Those responsible must be brought to justice, which could be achieved through a joint contribution of Ukraine, foreign countries' bodies, as well as international agencies.

CHAPTER V

WEAPONS

FIELD-MODIFIED WEAPONS UNDER THE LAW OF WAR

by Ronald Alcala | Feb 13, 2023

Combatants in armed conflict may choose to modify weapons in the field for a variety of reasons. They may modify them to improve their reliability. They may alter them to increase their range or accuracy. Or they may adapt them to novel purposes. During the Russia-Ukraine War, both Russia and Ukraine have used field-modified weapons to stunning effect. For example, Ukrainian forces have converted commercial drones to carry grenades that are dropped like bombs from the air.[1] The ability to adapt and innovate using materials on hand proved crucial to slowing Russia's initial offensive, and nearly a year into the conflict, Ukrainian forces continue to experiment with new weapon designs.[2]

The successful use of modified weapons has highlighted the value of initiative and creative problem solving by soldiers at the tactical level. Weapons modified in the field, however, can implicate important rules regulating the means and methods of warfare. This post explores the phenomenon of field-modified weapons, the obligation to review their lawfulness, and the personnel responsible for conducting those reviews.

Weapons Review Requirement

Combatants do not have unfettered discretion to choose their means and methods of warfare in armed conflict. This "basic tenet" of the law of armed conflict lies at the heart of international weapons law.[3] General principles of the law of armed conflict, including the principles of humanity and distinction, may prohibit the use of certain weapons, such as those that cause superfluous injury or unnecessary suffering or that are by their nature indiscriminate. Weapons may also be prohibited by specific treaties. Early weapons bans outlawed particularly devious instruments, including barbed weapons and poison. Current international agreements govern a host of modern weapons, such as landmines, cluster munitions, incendiary weapons, expanding bullets, biological weapons, non-detectable fragments, chemical weapons, and blinding lasers.

States rely on various mechanisms to ensure compliance with international weapons law, including treaty-based arrangements and municipal legislation. Legal reviews of new

[1] Benjamin Fogel & Andro Mathewson, *Will the Drone War Come Home? Ukraine and the Weaponization of Commercial Drones*, Modern War Institute (Aug. 22, 2022), https://mwi.usma.edu/will-the-drone-war-come-home-ukraine-and-the-weaponization-of-commercial-drones/.

[2] Julian Borger, *The Drone Operators Who Halted Russian Convoy Headed for Kyiv*, The Guardian (Mar. 28, 2022, 12:00 AM), https://www.theguardian.com/world/2022/mar/28/the-drone-operators-who-halted-the-russian-armoured-vehicles-heading-for-kyiv; Thomas Gibbons-Neff & Natalia Yermak, *In a Ukraine Workshop, the Quest to Build the Perfect Grenade*, N.Y. Times (Jan. 7, 2023), https://www.nytimes.com/2023/01/07/world/europe/ukraine-russia-war-grenade.html.

[3] Int'l Comm. of the Red Cross, A Guide to the Legal Review of New Weapons, Means and Methods of Warfare (Kathleen Lawand ed., 2006), https://www.icrc.org/en/doc/assets/files/other/icrc_002_0902.pdf.

means and methods of warfare also serve as an important check for lawfulness during the development and procurement of new weapons. Importantly, these reviews may also be required when weapons already adopted by a State are later modified in the field. For States party to Additional Protocol I, the legal review requirement is outlined in Article 36, which states,

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Parties.[4]

Whether the obligation to conduct weapons reviews is also required as a matter of customary international law is unclear. Some sources suggest customary international law includes a weapons review obligation, albeit one narrower in scope than Article 36.[5] Others maintain there is insufficient evidence to find such an obligation under customary international law.[6] The United States subscribes to the latter view. In its response to the Stockholm International Peace Research Institute's (SIPRI) questionnaire on the Article 36 review process, the United States explained that while it "views the review of the legality of weapons, means, and methods of warfare as a best practice for the implementation of customary and treaty law relating to weapons, means, and methods of warfare, [it] does not consider customary law to require these reviews as such."[7] With respect to Russia and Ukraine, determining whether a customary obligation exists is unnecessary because the provisions of Article 36 apply to both States by virtue of their status as parties to Additional Protocol I.

Notably, the law of armed conflict does not define the terms "means of warfare" and "methods of warfare." "Means of warfare" is generally understood to refer to the weapons or devices used to conduct war, and "methods of warfare" normally describes how belligerents conduct war.[8] W. Hays Parks suggested that while "weapons" and "means" are generally regarded as synonymous, "[m]eans of warfare also may refer to tactical means utilized to accomplish a military mission or achieve a military objective."[9] By way of example, Parks offered that "starvation of an enemy nation is a *method of warfare*. Destruction of crops or execution of a blockade are two means by

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[4] Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 36, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[5] *See, e.g.*, William H. Boothby, Weapons and the Law of Armed Conflict 342 (2009); Program on Humanitarian Policy and Conflict Research, Manual on International Law Applicable to Air and Missile Warfare 84 (2013) [hereinafter Air and Missile Warfare Manual].

[6] *See, e.g.*, Natalia Jevglevskaja, *Weapons Review Obligation Under Customary International Law*, 94 Int'l L. Stud. 186, 187–221 (2018).

[7] U.S. Dep't of Defense, Response to Stockholm International Peace Research Institute (SIPRI) "questionnaire on Article 36 review process" (Sep. 1, 2017), at 40 (on file with author).

[8] U.S. Dep't of Defense, Law of War Manual § 5.1.1 (2023) [hereinafter DoD Law of War Manual]; Int'l Comm. of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: Commentary of 1987, ¶ 1957 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987), https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-58/commentary/1987 [hereinafter AP I Commentary]; *see also* Jeffrey T. Biller & Michael N. Schmitt, *Classification of Cyber Capabilities and Operations as Weapons, Means, or Methods of Warfare*, 95 Int'l L. Stud. 195–203 (2019).

[9] W. Hays Parks, *Conventional Weapons and Weapons Reviews*, 8 Y.B. Int'l Humanit. L. 55, 118–119 (2005).

which the *method* may be accomplished."[10]

Weapons Review Authority

Article 36 also does not specify how new weapons reviews must be carried out. The *Commentary* to Additional Protocol I observes that Article 36 "implies the obligation to establish internal procedures," but those "internal procedures" are not further described.[11] A handful of States—for example, the United States, the Netherlands, Sweden, Belgium, Norway, Australia, Canada, Denmark, and Germany—have established formal review mechanisms, but their examples are the exception rather than the rule. Each of these State mechanisms also differs, reflecting a diversity of approaches.

Whatever procedures a State may prescribe, the weapons review process has the potential to become strained during armed conflict, particularly as new and modified weapons are submitted for review. Given the need for urgency of action in combat, how can a State review the lawfulness of field modifications in a way that is both timely and consistent with its international legal obligations during an active armed conflict?

New weapon reviews need not be administratively burdensome, but they must be completed systematically and meet a minimum standard of review. They must also be conducted at a high level of authority. W. Hays Parks suggests that the negotiating history of Article 36 establishes the obligation as a national responsibility. As such, "the legal review of a new weapon or munition must be carried out at the national government level, such as the Ministry of Defence, the Ministry of Foreign Affairs, or a combination thereof."[12]

The United States, for example, requires that legal reviews take place at the military department level—that is, by individual branches of the armed services.[13] By policy, the service Judge Advocates General or their designees perform this function.[14] Australia also assigns responsibility for conducting reviews to a senior military lawyer: the Director General of the Australian Defence Force Legal Services.[15] Other States similarly commit the evaluation process to national-level authorities, either in the form of individual reviewers, review by committee, or through the exercise of executive veto power.[16]

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[10] *Id.* at 119.

[11] AP I Commentary, *supra* note 8, ¶ 1470.

[12] Parks, *supra* note 9, at 108.

[13] DoD Law of War Manual, *supra* note 8, § 6.2.

[14] U.S. Dep't of Army, Regulation 27-53, Legal Review of Weapons and Weapon Systems para. 4(f) (Sept. 23, 2019) [hereinafter AR 27-53]; U.S. Dep't of Air Force, Instruction 51-401, The Law of War para. 2.1.2 (Aug. 3, 2018) [hereinafter AFI 51-401]; U.S. Dep't of Navy, Secretary of the Navy Instruction 5000.2G, Department of the Navy Implementation of the Defense Acquisition System and the Adaptive Acquisition Framework encl. 18, para. 2 (Apr. 8, 2022) [hereinafter SECNAVINST 5000.2G].

[15] Group of Governmental Experts of the High Contracting Parties 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, The Australian Article 36 Review Process, U.N. Doc. CCW/GGE.2/2018/WP.6 (Aug. 30, 2018).

[16] *See* Isabelle Daoust et al., *New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare*, 84 Int'l Rev. Red Cross 345, 354–360 (2002); Justin McClelland, *The Review of Weapons in Accordance with Article 36 of Additional Protocol I*, 85 Int'l Rev. Red Cross 397, 403 (2003).

Field-Modified Weapons

Given the role that national agencies play in the "study, development, acquisition or adoption" of new weapons, it is appropriate that new weapons reviews should occur at the national level. Presumably, national-level reviewers also possess the requisite knowledge and expertise to conduct proper legal reviews.[17] Weapons modified in the field, however, bypass formal study, development, acquisition, and adoption processes in a way that can promote a sense of separation from the norm. Accomplished by soldiers at the tactical level, often operating far from higher headquarters, the field modification of weapons can assume an air of urgency that may seem to demand an exception to ordinary review and oversight processes. In Ukraine, for example, frontline units that engage in modifying drones often face less bureaucracy before they may test and deploy their weapons.[18] According to one report, the modifications can then be quickly "shared with other drone units in chat groups before being used in the field, with little oversight."[19]

Field-modified weapons should be reviewed for legal compliance for the same reasons new weapons are subjected to legal review. Even seemingly minor changes to otherwise lawful weapons can result in noncompliance with a State's international legal obligations or the law of armed conflict. This concern is reflected in the United States' restrictive policy regarding the modification of weapons. The DoD *Law of War Manual* states, "For a variety of reasons, DoD practice has been not to permit the modification of weapons without proper authorization."[20] For the United States, "proper authorization" means permission granted by the original weapons review authority. In the U.S. Army, for example, this would be the Judge Advocate General's designee. U.S. Army regulations state, "If the weapon or weapon system is changed once it has been fielded such that it is no longer the same system or capability described in the legal review request . . . then the legal review is no longer valid and a new legal review from the TJAG [the Judge Advocate General] designee must be obtained … ."[21]

Case Example: Drone-Delivered Grenades

In Ukraine, the alteration of common grenades to be drone delivered has proved dramatically effective. According to various reports, Ukrainian forces have rigged commercial off-the-shelf drones to carry grenades and modified those grenades to drop like bombs and explode on impact. These modest weapons have neutralized Russian tanks and other critical military targets throughout the Ukrainian theater.[22] Determining whether these improvised weapon systems must be reviewed under Article 36 is an important

17 Parks, *supra* note 9, 100–02.

18 Gibbons-Neff & Yermak, *supra* note 2.

19 *Id.*

20 DoD Law of War Manual, *supra* note 8, § 6.3.2.

21 AR 27-53, *supra* note 14, para. 6(f).

22 *See, e.g.*, Andrew E. Kramer, *From the Workshop to the War: Creative Use of Drones Lifts Ukraine*, N.Y. Times (Aug. 10, 2022), https://www.nytimes.com/2022/08/10/world/europe/ukraine-drones.html; David Hambling, *Ukrainian Drone Drops Bomb Through Open Hatch to Score First Kill on Russia's Oldest Tank (updated)*, Forbes (July 7, 2022, 8:55 AM), https://www.forbes.com/sites/davidhambling/2022/07/07/ukrainian-drop-drone-bomb-through-open-hatch-to-score-first-kill-on-russias-oldest-tank/?sh=768fe72136c6; Gibbons-Neff & Yermak, *supra* note 2.

question of compliance under the law of armed conflict.

Ukraine's improvised systems raise multiple issues for consideration. First, are the drone delivery systems lawful weapons (means of warfare)? Second, are the modified grenades lawful weapons? And lastly, is the delivery of the modified grenades by drone a lawful method of warfare?

Drone Modifications

Ukraine is credited as one of the first States to modify commercial drones for kinetic strikes.[23] On the one hand, commercial off-the-shelf drones are not designed to be weapons or weapon systems and, therefore, arguably need not be legally reviewed. Professors Jeffrey Biller and Michael Schmitt explain that weapon systems are "systems specifically designed for effectuating an attack using the weapon in question. That being so, it would be logically impossible to have a weapon system that was not designed to employ a weapon."[24] By way of example, they note that "a standard truck fitted with a rocket launcher or filled with explosives for a suicide attack is not a weapon system, as the truck was not designed to facilitate such attacks."[25] Accordingly, commercial off-the-shelf drones acquired by Ukrainian forces need not be reviewed as new weapons or means of warfare upon procurement or acquisition.

On the other hand, commercial off-the-shelf drones modified to carry air-delivered grenades could be viewed as weapon systems, necessitating their review under Article 36. The U.S. Army defines a weapon system as "the weapon itself, combined with those components required for its operation that permit the weapon to kill, injure, disable or incapacitate enemy personnel or to destroy, damage, or incapacitate enemy facilities, equipment, property or materiel," including "all munitions such as projectiles, small arms, mines, and explosives" needed to accomplish these outcomes.[26] Arguably, a commercial drone that is subsequently designed and modified to carry a grenade constitutes part of a weapon system that must be legally reviewed. Alternatively, pairing drones with air-delivered grenades may represent a new method of warfare, triggering a separate basis for a legal review. In general, the legal review would address and analyze a variety of factual and legal considerations, such as the purpose or mission of the weapon or weapon system (i.e., military necessity), relevant treaty law, and the weapon's or weapon system's compliance with the principles of humanity and distinction.

Grenade Modifications

Like altered drones, modified grenades must also be evaluated for lawfulness. Reports indicate that Ukrainian forces have altered a variety of common grenades, including Soviet-era F-1 anti-personnel hand grenades, RGD-5 anti-personnel fragmentation grenades, RKG-3 anti-tank grenades, VOG-17 fragmentation grenades, and German DM51

23 Fogel & Mathewson, *supra* note 1.

24 Biller & Schmitt, *supra* note 8, at 203.

25 *Id.*

26 AR 27-53, *supra* note 14, at 9.

fragmentation grenades for air delivery.[27] One modification involves encasing a grenade in a "bait bomb"—a plastic container ordinarily filled with bait by fishermen—and setting its fuse to explode on impact. In other instances, Ukrainian forces have converted grenades themselves into bombs by adding attachments, including 3D-printed fins and other parts.[28]

Determining whether alterations like these would subject the modified grenades to a follow-on weapons review will depend on the nature of the changes. If the modifications alter the mission, purpose, or performance parameters of the grenades to the extent that they can no longer be considered the same weapons already reviewed under Article 36, then they must undergo a new legal review. Otherwise, no additional review would be necessary. The conveyance of the grenades by air, on the other hand, might necessitate an Article 36 review of the drone-delivered grenades as a new method of warfare.

Drone Delivery of Grenades

The International Committee of the Red Cross (ICRC) has observed, "A weapon or means of warfare cannot be assessed in isolation from the method of warfare by which it is to be used."[29] Under Article 36, the reviewing State's obligation is to analyze whether the employment of the weapon for its "normal or expected use" would be prohibited "under some or all circumstances."[30] The *Commentary* explains that "[a] State is not required to foresee or analyse all possible misuse of a weapon for almost any weapon can be misused in ways that would be prohibited."[31]

An Article 36 analysis of drone-delivered grenades as a potentially new method of warfare would likely focus on distinction and the prohibition against indiscriminate attacks.[32] Among other things, the review would evaluate whether the drone delivery of grenades can be directed at specific military objectives and whether the effects of such use can be limited. Compliance with the law of armed conflict will depend largely on the ability to discriminate using this method of warfare.

Legal Review of Field-Modified Weapons

As discussed above, the practice of States has been to reserve new weapons reviews to national-level authorities who evaluate new weapons for compliance with the State's treaty obligations and the law of armed conflict. Modified weapons should undergo legal review for the same reasons. However, not all modified weapons will require a *de novo* weapons review. Weapons altered in ways that do not fundamentally change the weapons' intended mission, purpose, or performance parameters arguably should not require a subsequent new weapons

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27 Hambling, *supra* note 22; Fogel & Mathewson, *supra* note 1; Gibbons-Neff & Yermak, *supra* note 2.

28 Kerry Stevenson, *Ukraine Army 3D Prints Adhoc Battlefield Weapons*, Fabbaloo (May 4, 2022), https://www.fabbaloo.com/news/ukraine-army-3d-prints-adhoc-battlefield-weapons.

29 Int'l Comm. of the Red Cross, A Guide to the Legal Review of New Weapons, Means and Methods of Warfare (2006), https://www.icrc.org/en/doc/assets/files/other/icrc_002_0902.pdf.

30 AP I Commentary, *supra* note 8, ¶ 1469.

31 *Id.*

32 AP I, *supra* note 4, art. 51(4).

review. Rather, a *de novo* national review should be required when alterations raise doubt about a modified weapon's legality. In other words, modified weapons should not be treated presumptively as novel weapons and subjected to a blanket requirement for review. Instead, they should first be carefully evaluated to determine whether a subsequent Article 36 review is warranted. When not warranted, modified weapons should be lawfully available for use by the State in the armed conflict.

Not all modifications made to a weapon in the field will jeopardize the initial determination of legality under Article 36. For example, a tweak that increases the durability of a firearm (see, for example, the World War Two–era M3 "Grease" submachine gun)[33] but does not significantly change the weapon's mission, purpose, or performance parameters should not require a *de novo* weapons review. Similarly, a modified artillery round that modestly increases the effective range of a howitzer but does not otherwise alter its expected use should not necessarily be subjected to a follow-on Article 36 review. In contrast, a modification that changes the intended mission or purpose of a weapon or significantly alters the weapon's performance characteristics should trigger a de novo review at the national level. For example, an artillery round that has been modified to scatter submunitions should be subjected to a new Article 36 review.

Some States, such as the United States, strictly prohibit the modification of weapons without proper authority, although prior authorization is not required as a matter of international law. A restrictive approach can allow a State to monitor and control the weapons employed by its forces more closely in combat. This would mean that all weapons fielded by the State's armed forces—including those modified by frontline units—are likely to undergo a national-level review. Strict policy limitations on modifications, however, could have a downside. Requiring forces to obtain authorization prior to modifying a weapon, rather than prior to the weapon's use, can stifle the type of innovation and initiative that Ukrainian defenders have displayed throughout the Russia-Ukraine War.

The experience of Ukrainian forces during the Russia-Ukraine conflict suggests an all-or-nothing approach to weapons modifications and reviews would be impractical and unrealistic for most States. To remain relevant and effective, the requirements of Article 36 cannot be understood to require a de novo national review of any and all weapons modified in the field during armed conflict. While substantial changes to a weapon's intended mission, purpose, or performance parameters should be grounds for a subsequent new weapons review, lesser changes could potentially be evaluated for legal compliance at lower levels of command, echelons below national review authorities.

Preliminary Review by Legal Advisers in the Armed Forces

A preliminary review conducted by a qualified legal adviser could help determine whether a subsequent new weapons review is

[33] Patrick J. Chaisson, *The Controversial M3 Grease Gun*, Warfare History Network (Apr. 2021), https://warfarehistorynetwork.com/article/the-controversial-m3-grease-gun/.

legally required for a field-modified weapon. Potentially, that responsibility could be entrusted to a legal adviser operating with the armed forces in the field. Article 82 of Additional Protocol I, which addresses the role of legal advisers in the armed forces, suggests military legal advisers should be qualified to conduct this type of preliminary review.[34] Article 82 provides,

> The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.[35]

Professor Yoram Dinstein points out that the language of Article 82 is "somewhat unusual" because it "combines a clear-cut obligation (immanent in the phrase 'shall ensure') with a certain degree of flexibility (derived from the unspecified reference to 'the appropriate level' and the qualifying words 'when necessary')."[36] The Commentary to Additional Protocol I acknowledges that State views on when and where to appoint armed forces legal advisers will diverge. The Commentary explains,

> [T]he content of the obligation and the extent of the measures to be taken can certainly vary from one country to another, depending on the importance of the role which these legal advisers are called upon to play. Some may wish to appoint these advisers at all—or nearly all—levels of command, while others intend to appoint them only at the headquarters of large units and at military academies, and still others only envisage their participation in exceptional situations.[37]

The review of weapons is clearly a "choice of arms" question that falls within the purview of the legal adviser. The DoD *Law of War Manual* acknowledges this by ascribing responsibility for weapon reviews to qualified legal advisers in a section dedicated to the "Role of Judge Advocates and Legal Advisers."[38] Because new weapons reviews are considered a national responsibility, however, legal advisers at lower echelons do not have authority to conduct these reviews. On the other hand, determining whether a weapon modified in the field requires a new Article 36 review presents a different question. Arguably, that determination may fall within the competence of lower-level legal advisers in the armed forces.

The *Commentary* to Additional Protocol I notes that Article 82 itself "goes so far as to define in broad terms the qualifications which such legal advisors must possess, since they must be capable of advising, when necessary, the military commanders concerned, on the application of the Conventions and the Protocol."[39] Enabling these legal advisers to

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34 AP I, *supra* note 4, art. 82.

35 *Id.*

36 Yoram Dinstein, *Legal Advisers in the Field During Armed Conflict*, 97 Int'l L. Stud. 917, 919 (2021).

37 AP I Commentary, *supra* note 8, ¶ 3344.

38 DoD Law of War Manual, *supra* note 8, § 18.5.1.3.

39 AP I Commentary, *supra* note 8, ¶ 3344.

give an initial appraisal of modifications—a preliminary review—would also reflect a more realistic and practical approach to the assessment of weapons altered in the field. Timely analysis and decision-making have always been prized in war, and these advisers could provide commanders the legal advice needed to respond decisively and lawfully in the crucible of armed conflict.

This approach appears to have gained some support in the cyber context. The *Tallinn Manual 2.0* notes that a majority of its expert drafters believed a formal legal review was not required before the employment of a cyber capability.[40] Instead, "the advice of a legal advisor at the relevant level of command was deemed … to suffice in lieu of a formal legal review."[41] The manual further explains that "[i]f a means or method of cyber warfare is being developed for immediate operational use, the lawyer who advises the commander planning to use it will be responsible for advising whether the cyber weapon or the intended method of its use accord[s] with the State's international law obligations" (at 466).[42] Professors Biller and Schmitt point out that operations conducted at the "speed of cyber" could nevertheless prove "a significant obstacle to the rendering of meaningful reviews," even with legal advisers embedded in mission planning cells.[43] However, the acknowledgment that legal advisers in the field can and should be involved in the review of weapons suggests they could play a greater role in the evaluation of field-modified weapons and their subsequent use.

Conclusion

The United States' restrictive approach to weapons modifications comes with many benefits, but it can dampen the drive to improvise and innovate on the battlefield. The requirement for national-level authorization serves as an important check before a weapon is modified, and national-level review provides visibility on all weapons changes and consistency in their evaluation. Moreover, these reviews can be conducted rapidly. Parks, who served as the U.S. Army's weapon review authority from 1979 to 2003, said he knew of

> no backlog or delay in providing weapons reviews as a result of the nature of the legal review process utilised by the DoD. In cases where urgency has been an issue and where the weapon has been reviewed previously, a verbal 'review' has been provided, followed up within a day or two by the written legal review.[44]

Other States similarly allow for the fast-tracking of review decisions based on urgent operational needs.[45]

Not every State will control the modification process as tightly as the United States—and none is required to. However, States party

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[40] Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations 465 (Michael N. Schmitt ed., 2017) [hereinafter Tallinn Manual 2.0]; *see also* Biller & Schmitt, *supra* note 8, at 220.

[41] Tallinn Manual 2.0, *supra* note 40, at 465.

[42] *Id.* at 466.

[43] Biller & Schmitt, *supra* note 8, at 220.

[44] Parks, *supra* note 9, 110–111.

[45] *See, e.g.*, Vincent Boulanin, *Implementing Article 36 Weapon Reviews in the Light of Increasing Autonomy in Weapon Systems*, SIPRI Insights on Peace and Security 1, 23 (Nov. 2015).

to Additional Protocol I, including Russia and Ukraine, are responsible for reviewing the lawfulness of new weapons—including weapons that have been altered in ways that change their intended mission, purpose, or key performance characteristics—in accordance with Article 36. Determining when a field modification requires a *de novo* Article 36 review is a question that lower-level legal advisers are arguably competent to answer. It is also one that is likely to become more common as the next generation of arms, to include autonomous weapons, are enhanced by new technologies. Adoption and publication of clear weapon review programs and policies by States, accompanied by policies and legal assessments applicable to field modifications, will prove essential to maintaining long-standing and proven law of armed conflict limits on the means and methods of warfare.

ARE MOLOTOV COCKTAILS LAWFUL WEAPONS?

by Sean Watts | Mar 2, 2022

A frequent feature of violent riots and revolts, the Molotov cocktail has reappeared in reports of Ukraine's preparations to resist the ongoing Russian invasion.[46] Although undoubtedly symbolic of resolve to resist using all means available, whether Ukrainians' use of Molotov cocktails violates the law of war presents a closer question. This post advises that while not unlawful *per se*, Ukrainian and Russian use of Molotov cocktails requires careful consideration of treaty-based limits.

The Molotov Cocktail

The term typically refers to a glass bottle filled with flammable fluid and capped with a lit cloth fuse or wick soaked in alcohol. When thrown against a hard surface, the bottle breaks causing the wick to ignite the cocktail's liquid as well as its vaporized fuel. Other materials such as tar, detergents, Styrofoam, and rubber have been added both to thicken the fuel mixture for adhesion to target surfaces and/or to create additional pressure improving explosive and shrapnel effects.

Modern use of improvised hand-held firebombs traces to the 1936 Spanish Civil War. Spanish Nationalist forces reportedly used them to attack the rubber components of Republican tank tracks.[47] They also used these weapons against tank crews' open hatches and vision slits, burning the occupants or forcing them to evacuate their vehicles. They featured again in the 1939 Winter War between Finland and the Soviet Union. After Soviet Minister of Foreign Affairs Vyacheslav Molotov denied claims that Soviet air forces had used incendiary bombs, branded "Molotov's Bread Baskets" by the Finns, Finnish forces reportedly resorted to their own "Molotov cocktails" against Soviet tanks.

The ready availability of their ingredients made Molotov cocktails favored weapons of loosely organized rioters and criminals but also of ill-equipped resistance movements and sporadically organized armed groups. During the Second World War, Great Britain planned to arm its Home Guard with Molotov cocktails to be "served with plenty of gusto" against an anticipated German invasion.[48]

Weapons Law

Despite the seemingly chaotic and often desperate circumstances of war, States have long acknowledged that the means of armed conflict are not unlimited.[49] Legal limits on weapons date to ancient history, including customary and codified taboos on poisons and barbed weapons. Later, one of the earliest multilateral law-of-war treaties, the 1868 St. Petersburg Declaration, initiated at the

46 The Associated Press, *Ukrainians Prepare Molotov Cocktails in Kyiv*, N.Y. Times (Feb. 27, 2022), https://www.nytimes.com/video/world/europe/100000008230394/ukraine-molotov-cocktails.html.

47 Carl Seaver, *Molotov Cocktail: The Strange History of This Iconic Weapon*, History Defined (Jan. 24, 2023, 11:36 PM), https://www.historydefined.net/the-fascinating-history-of-the-molotov-cocktail/.

48 British Pathé, *Cocktails A La Molotov (1940)*, Youtube (Apr. 13, 2014), https://www.youtube.com/watch?v=uD8Fao_H1gQ.

49 Hague Convention (II) with Respect to the Laws and Customs of War on Land, with Annex of Regulations art. 22 July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Convention II].

behest of Russian Czar Alexander II, banned lightweight explosive projectiles and regarded "the employment of arms which uselessly aggravate the sufferings of disabled men … contrary to the laws of humanity."[50]

Since those early efforts, the law of war has chiefly employed two approaches to weapon regulation. In the tradition of St. Petersburg, a first strain of regulation has produced codified bans on specific weapons. Today, widely—though not universally—ratified agreements have prohibited non-detectable fragments,[51] blinding lasers,[52] chemical weapons,[53] biological weapons,[54] and certain bullets.[55] In the meantime, momentum, though not unopposed, has built for bans on nuclear weapons,[56] anti-personnel landmines,[57] and cluster munitions.[58] Still other instruments have regulated, rather than banned, select weapons including landmines[59] and incendiary weapons.[60] All the while, arms control instruments, usually not considered part of the laws of war, have limited the production and deployment of a wide range of armaments.

A second strain of the law of war has resorted to broad principles to regulate weapons. Each of two cardinal principles—distinction and unnecessary suffering (or humanity)—guides the regulation of weapons not banned or otherwise regulated by the law of war.[61] While these general provisions have proved adaptable, their ambiguity and fluidity have limited, or as seen below, clouded their regulatory effect.

Are Molotov Cocktails Banned Specifically?

Analyzed under law-of-war instruments that specifically ban or regulate discreet weapons, the treaty-based prohibition on undetectable fragments and a separate regulation of incendiary weapons are most

50 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29, 1868, 138 Consol. T.S. 297 [hereinafter St. Petersburg Declaration].

51 Protocol on Non-Detectable Fragments (Protocol I), Annexed 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, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW Protocol I].

52 Protocol on Blinding Laser Weapons (Protocol IV), Annexed 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, Oct. 13, 1995, 1380 U.N.T.S. 370 [hereinafter CCW Protocol IV].

53 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317 [hereinafter CWC].

54 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015 U.N.T.S. 163 [hereinafter Biological Weapons Convention].

55 Declaration (IV,3) Concerning the Prohibition of the Use of Expanding Bullets, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 1002, 187 Consol. T.S. 459 [hereinafter Hague Declaration IV,3].

56 Treaty on the Prohibition of Nuclear Weapons, July 7, 2017.

57 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997, 2056 U.N.T.S. 241 [hereinafter Ottawa Convention].

58 Convention on Cluster Munitions, May 30, 2008, 48 I.L.M. 357.

59 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), as Amended on May 3, 1996, Annexed 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, May 3, 1996, 2048 U.N.T.S. 93 [hereinafter CCW Amended Protocol II].

60 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Annexed 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, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW Protocol III].

61 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

relevant to Molotov cocktails. The 1980 Convention on Certain Conventional Weapons, Protocol on Non-Detectable Fragments (CCW Protocol I) to which both the Russian Federation and Ukraine are Parties, states in full, "It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the body escape detection by X-rays."[62]

It's easy to anticipate that Molotov cocktails made of glass containers can scatter fragments into the human body that would evade or complicate detection by X-ray. Those that use accelerants or substances to enhance explosive effects would undoubtedly do so if used against or in proximity to exposed persons. Yet in most cases, the "primary effect" of the Molotov cocktail is to ignite or burn its target rather than to damage or injure by fragments. Secondary effects, especially the shrapnel-like effects of weapon casings, as opposed to fillings or shrapnel itself, are generally not understood to be relevant to the CCW Protocol I ban. For instance, the U.S. Department of Defense *Law of War Manual* asserts the ban does not apply to "the casing, detonator, or timing mechanism, [that] may be made of nonmetallic parts or other substances that are not detectable by X-rays in order to reduce weight, manufacturing cost, etc."[63]

It's also worth noting that the Assembly of State Parties to the 1998 Rome Statute of the International Criminal Court (Rome Statute) recently adopted an amendment to incorporate the ban on non-detectable fragments into the Court's war crimes provisions applicable to both international and non-international armed conflicts.[64] But to date, neither Ukraine nor Russia has ratified that amendment.[65]

Applied to the current conflict, a Molotov cocktail purposely built and used primarily to injure persons by undetectable fragments, as opposed to burns, would undoubtedly be unlawful under CCW Protocol I. However, most Molotov cocktails, it seems, would not. For example, a standard Molotov cocktail used to ignite a vehicle would clearly not implicate the fragments ban because its primary effect would be to burn the vehicle. Similarly, a Molotov cocktail that incidentally produced shrapnel wounds would not be banned.

Because the primary effect of most Molotov cocktails is incendiary rather than fragmentary, the 1980 Convention on Certain Conventional Weapons Protocol on Use of Incendiary Weapons (CCW Protocol III) is worth considering.[66] Most Molotov cocktails appear to qualify as incendiary weapons under CCW Protocol III. Article 1(1) defines incendiary weapons as "any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target."[67] While the list of definitional examples in Article 1(1) does not name Molotov cocktails, it includes

62 CCW Protocol I, *supra* note 51, States parties and signatories.

63 DoD Law of War Manual, *supra* note 8, § 6.11.1.

64 Amendment to Article 8 of the Rome Statute of the International Criminal Court, Dec. 14, 2017, 2187 U.N.T.S. 90.

65 *Id.* States parties and signatories.

66 CCW Protocol III, *supra* note 60.

67 *Id.* art. 1.

"other containers of incendiary substances" which clearly covers them.

CCW Protocol III does not ban incendiaries entirely. It merely regulates their use. Article 2(2) provides, "It is prohibited in all circumstances to make any military objective within a concentration of civilians the object of attack by air-delivered incendiary weapons."[68] The reference to air delivery applies to incendiary munitions dropped from aircraft. Although frequently thrown, Molotov cocktails are not likely considered to be air delivered for purposes of that article.

Meanwhile, Article 2(3) addresses incendiaries delivered otherwise.[69] It prohibits their use against military objectives, except when clearly separated from "concentrations of civilians." That last phrase refers to "any concentration … be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads."[70] Article 2(3) also requires that all feasible precautions be taken to protect civilian objects from the effects of their use.[71]

Thus, use of a Molotov cocktail against an isolated tank would clearly be lawful under CCW Protocol III. But use against a vehicle moving among or accompanied by civilians, such as a mixed convoy, would likely be prohibited. As noted by West Point's Modern Warfare Institute, incendiary weapons offer unique military advantages in urban warfare. The Institute notes that incendiaries "can penetrate small openings and fill fortified positions with both fire and smoke."[72] Flame weapons have historically been used in urban environments to clear rooms or bunkers.[73] And military commanders have recently expressed an operational need to field them.[74] Yet their use would be unlawful if civilians are known to be present nearby. For example, a Molotov cocktail used against a building or bunker located where civilians remain and are intermingled would violate CCW Protocol III regardless of its otherwise proportionate or discriminate character. On the other hand, were the building or bunker in an abandoned, deserted, or uninhabited urban area, the CCW Protocol I rule would not be applicable.

In sum, States, such as Ukraine, that advocate or facilitate their use, even in their own territory, should ensure those using Molotov cocktails are aware of and observe these limits. They should not design or produce Molotov cocktails that wound primarily by non-detectable fragments. And fighters should use extraordinary caution when employing them as incendiaries in areas where civilians may be present and refrain entirely from using them when it is known that a military objective is not physically separated from civilians.

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68 CCW Protocol III, *supra* note 60, art. 2(2).

69 *Id.* art. 2(3).

70 *Id.* art. 1.

71 *Id.* art. 2(3).

72 Modern War Institute at West Point, homepage, https://mwi.westpoint.edu/.

73 John Spencer, *Why Militaries Must Destroy Cities to Save Them*, Modern War Institute (Nov. 8, 2018), https://mwi.usma.edu/militaries-must-destroy-cities-save/.

74 TRADOC G-2 OE Enterprise, *TRADOC Mad Scientist 2018 Megacities: 1.06 Scenarios, Foundations & Convergence / GEN Townsend*, Youtube (Apr. 12, 2018), https://www.youtube.com/watch?v=ARz0l_evGAE&list=PLx2Zn7hPXT7d1zDzuqt00NOsI4ZzyTXUu&index=11 (at minute 29:20).

Are Molotov Cocktails Banned Generally?

Analyzed under the law-of-war principle of distinction, the Molotov cocktail presents a relatively straightforward case. As explained in this symposium by weapons law expert Air Commodore W. H. Boothby, the law-of-war principle of distinction and its various regulatory incarnations prohibit indiscriminate uses of any weapon.[75] Clearly then, use of a Molotov cocktail to attack a civilian not taking direct part in hostilities or a civilian object would be unlawful.[76] Similarly, use of a Molotov cocktail in circumstances where its effects cannot be directed at a military objective or cannot be limited would be unlawful.[77]

However, under the principle of unnecessary suffering, the case of the Molotov cocktail is far cloudier. While support for the principle of unnecessary suffering is widespread, its precise meaning and regulatory effect are contested. According to Article 35(2) of the 1977 Additional Protocol I to the 1949 Geneva Conventions (AP I) applicable to international armed conflict, "It is prohibited to employ weapons … *of a nature* to cause superfluous injury or unnecessary suffering" (emphasis added).[78] Meanwhile, the English translation of Article 23(e) of the, still in force, Regulations annexed to the 1907 Hague Convention IV (Hague IV) provides, "[I]t is especially forbidden … [t]o employ arms … *calculated to cause* unnecessary suffering" (emphasis added).[79]

Thus, where AP I, Article 35 directs legal analysis of weapons to consider their nature or inherent characteristics, the Hague IV English translation directs analysis to the intentions of the designer, perhaps despite the weapon's possible effects.[80] The United States applies the calculated-to-cause standard to its legal reviews of weapons.[81]

Considered under the calculated-to-cause understanding of unnecessary suffering, the Molotov cocktail might be lawful. For instance, despite potential to inflict horrible burns and suffering, an improvised Molotov cocktail might be designed to achieve a particular military effect. If so, the weapon's design and effects would not be calculated to cause unnecessary suffering but rather to achieve military advantage. By this understanding, such a design would not violate the principle or its related rules because the suffering imposed is necessary to accomplish a legitimate military purpose. Thus, design and use of a Molotov cocktail to achieve an effect or reach a target that other

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[75] William H. Boothby, *Cluster Munitions and the Ukraine War*, Articles of War (Feb. 28, 2022), https://lieber.westpoint.edu/cluster-munitions-ukraine-war/.

[76] AP I, *supra* note 4, arts. 51, 52.

[77] *Id.* art. 51.

[78] AP I, art. 35.

[79] Regulations Respecting the Laws and Customs of War on Land Annexed to Hague Convention (IV), Oct. 18, 1907, 36 Stat. 2277, 15 U.N.T.S. 9 [hereinafter Hague IV].

[80] The English translation of the 1907 Hague Convention reads identically to the preceding 1874 Brussels Declaration which included the phrase "calculated to cause" with respect to unnecessary suffering. The English translation of the 1899 Hague Convention II, Article 23(3), abandoned the Brussels wording in favor of the phrase "of a nature to cause." French, however, is the official language of the 1907 Hague Conventions. The French text of Article 23(e) reads identically in both the 1899 and 1907 editions of the Hague Conventions applicable to land warfare. Meanwhile the preamble of the 1980 CCW, to which the United States is a Party, resorts to the "of a nature to cause" phrasing.

[81] DoD Law of War Manual, *supra* note 8, § 6.6.1.

designs cannot reach would not be unlawful under the calculated-to-cause approach. By contrast, design of and resort to a Molotov cocktail as a means of attack to significantly increase suffering or to deliberately prolong or aggravate suffering would be unlawful. It's worth adding that the Molotov cocktail would also be unlawful if the grave suffering it inflicted were clearly disproportionate to the military advantage it was designed to achieve in the attack.

But because both the Russian Federation and Ukraine are Parties to AP I, the "of a nature to" manifestation of the unnecessary suffering principle applies to each side's weapons including the Molotov cocktail.[82] It is widely acknowledged that burn wounds and deaths are among the most painful and horrific. Between the World Wars a widely supported League of Nations effort nearly banned flamethrowers for this very reason. And while it is indisputably in the nature of the Molotov cocktail to cause enormous, even excruciating suffering, those effects cannot in all circumstances be said to be unnecessary or superfluous even under the AP I standard.

Still, because the AP I of-a-nature-to-cause standard focuses on the characteristics of the weapon rather than the designer's intent, expediency or demanding circumstances might not excuse design of and resort to a Molotov cocktail in the way it might under the calculated-to-cause standard. For instance, under the AP I standard, that the effects of a Molotov cocktail are intended to serve military necessity rather than to aggravate wounds would not excuse its design if the nature of burns it caused were unnecessary. However, the decision of States', including Parties to AP I, decision not to regulate rather than ban incendiaries outright at least suggests a view that burns do not categorically amount to unnecessary suffering. And expressions by AP I States indicating that other incendiaries are in some circumstances lawful, even when they burn persons, suggests Molotov cocktails may in the same circumstances be lawful as well.[83]

All the same, the AP I standard shares the calculated-to-cause standard's consideration of proportionality between military advantage and suffering inflicted. So a weapon that inflicts suffering clearly out of proportion to anticipated military advantage is unlawful under the AP I understanding of unnecessary suffering. But by the same turn, significant or unique military advantage could justify substantial suffering including burns inflicted by a Molotov cocktail. Even so, the United Kingdom *Manual of the Law of Armed Conflict* advises that napalm and flamethrowers "should not be used directly against personnel but against vehicles, bunkers, and built-up emplacements, even though personnel inside may be burnt."[84] It is a position both Ukraine and Russia might strongly consider adopting.

Last, the Rome Statute incorporates the "of a nature to" passage in its war crimes provision on weapons (Article 8(2)(b)(xx)).[85] And while neither Ukraine nor Russia is a Party to the

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82 AP I, *supra* note 4, States parties and signatories.

83 U.K. Ministry of Defence, The Manual of the Law of Armed Conflict § 6.12.6 (2004).

84 *Id.*

85 Rome Statute of the International Criminal Court art. 8(2)(b)(xx), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

Statute, the International Criminal Court's Prosecutor has initiated an investigation into the situation at the behest of other Parties.[86] Yet this provision must be considered cautiously. The same article indicates it is only enforceable "provided that such weapons … are the subject of a comprehensive prohibition and are included in an annex to this Statute."[87] As noted above, Molotov cocktails are not subject to any such prohibition. Additionally, States have not, to date, produced the annex referred to by the article. Thus, their use seems unlikely to constitute a war crime before the Court.

Conclusion

Weapons law has often developed unpredictably. States' decisions to ban or regulate some weapons and not others often seem capricious. Elsewhere, I have attempted to identify some predictive factors for weapons that are regulation tolerant and those that are regulation resistant.[88] For its part, the Molotov cocktail has perhaps proved both regulation resistant and regulation tolerant. No treaty bans the weapon, as such. But rules specific to incendiary weapons regulate its use. At the same time, the cardinal principles of distinction and unnecessary suffering clearly limit use of the Molotov cocktail in important respects.

In the ongoing conflict between Ukraine and the Russian Federation, both parties, but particularly the former in light of recent reports, should carefully control their resort to Molotov cocktails despite the admittedly urgent and desperate circumstances.

[86] Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, ICC, statement, Mar. 2, 2022, https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states.

[87] Rome Statute, *supra* note 85, art. 8(2)(b)(xx).

[88] Sean Watts, *Regulation-Tolerant Weapons, Regulation-Resistant Weapons and the Law of War*, 91 Int'l L. Stud. 540 (2015).

ARE THERMOBARIC WEAPONS LAWFUL?

by Matt Montazzoli | Mar 23, 2022

The Russian Federation has deployed and likely used thermobaric weapons during its invasion of Ukraine.[89] Ukraine's ambassador to the United States alleged that Russia "used the vacuum bomb today, which is actually prohibited by the Geneva Conventions," while American lawmakers and others have cited the use of thermobaric weapons when advocating for direct NATO intervention in the conflict.[90] The White House Press Secretary, responding to "reports of illegal cluster bombs[91] and vacuum bombs being used by the Russians" against civilians, commented that "it would potentially be a war crime."[92]

What are thermobaric weapons? Are they "prohibited by the Geneva Conventions," or otherwise regulated by international law? This post will apply the law of armed conflict (LOAC) to assess the most common criticisms leveled against these munitions, evaluating them as both means and methods of warfare.[93] While the weapons themselves are not unlawful, their use to directly target civilians would violate LOAC.

What Are Thermobaric Weapons?

The term "thermobaric" is a portmanteau of the Greek words for heat and pressure.[94] It refers to weapons that inflict damage by maximizing the shock wave and overpressure associated with an explosion. Overpressure involves waves of energy from an explosion that "produce casualties and damage through crushing, bending, tumbling, and breaking," as opposed to propelling pieces of shrapnel as their primary mechanism of injury.[95]

Thermobaric weapons are commonly known as fuel-air explosives,[96] vacuum bombs,[97] volumetric weapons,[98] dual-stage explosives,

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89 Jack Detsch, *'It Is Horrendous': Russia Prepares Vacuum Bombs to Blitz Ukraine*, Foreign Policy (Mar. 1, 2022, 3:45 PM), https://foreignpolicy.com/2022/03/01/russia-thermobaric-weapons-ukraine/#cookie_message_anchor; Ministry of Defence (@DefenceHQ), X (formerly Twitter) (Mar. 9, 2022), https://twitter.com/DefenceHQ/status/1501621370614173701.

90 *Ukraine U.S. Ambassador Says Russia Used Vacuum Bomb*, Bloomberg (Mar. 1, 2022, 1:04 AM MST), https://www.bloomberg.com/news/videos/2022-03-01/ukraine-u-s-ambassador-says-russia-used-vacuum-bomb-video; @Adam Kinzinger, X (formerlyTwitter) (Mar. 19, 2022, 2:06 PM), https://twitter.com/AdamKinzinger/status/1505274519887527942.

91 Boothby, *Cluster Munitions and the Ukraine War*, *supra* note 75.

92 Press Briefing, Jan Psaki, White House Press Secretary (Feb. 28, 2022), https://www.whitehouse.gov/briefing-room/press-briefings/2022/02/28/press-briefing-by-press-secretary-jen-psaki-february-28-2022/.

93 Jon Jackson, *Are Thermobaric Weapons Illegal? Putin Accused of Vacuum Bombing Ukraine*, Newsweek (Mar. 1, 2022), https://www.newsweek.com/are-thermobaric-weapons-illegal-putin-accused-vacuum-bombing-ukraine-1683682.

94 *Thermobaric,* Oxford English Dictionary, https://doi.org/10.1093/OED/1014588716.

95 Joint Chiefs of Staff, Joint Pub. 3-11, Operations in Chemical Biological, Radiological, and Nuclear Environments, at D-3 (Oct. 29, 2018).

96 Beyond the Press, *Testing Fuel-Air Explosives / Thermobaric Bomb | Finnish MOAB 5 000 000*, YouTube (June 20, 2021), https://www.youtube.com/watch?v=sv0tGx80yLk&t=323s.

97 *What Is a Thermobaric or Vacuum Bomb?* BBC News (Mar. 10, 2022), https://www.bbc.com/news/business-60571395.

98 Torie Rose DeGhett, *A New Kind of Bomb Is Being Used in Syria and It's a Humanitarian Nightmare*, Vice News (Aug. 28, 2015), https://www.vice.com/en/article/zm7nwe/a-new-kind-of-bomb-is-being-used-in-syria-and-its-a-humanitarian-nightmare.

or enhanced blast weapons.[99] These weapons are typically filled with aerosolized solid fuel or a highly combustible slurry. Once they reach their target, an initiating explosion or "scatter charge" spreads a cloud of the fuel across the target, while milliseconds later a secondary combustion causes that cloud of fuel and atmospheric oxygen to detonate.[100] The result is a massive fireball that produces an especially powerful blast wave, to include negative pressure (the vaunted vacuum effect) as the atmospheric oxygen is consumed by the explosion. This extraordinary pressure collapses buildings, ruptures organs, and negates many forms of cover including underground facilities. Thermobaric weapons have the potential to generate causalities that overwhelm military medical systems, to say nothing of their potential to inflict civilian harm.[101]

Thermobaric weapons are renowned "as much for their psychological effect as for their destructive power."[102] Russia, China, the United Kingdom, and the United States are all known to have thermobaric weapons in their arsenals, ranging from multi-launch rocket systems to grenades lobbed by individual soldiers.[103]

Modern thermobaric weapons evolved from the BLU-82 "daisy cutter."[104] These munitions were developed to blast helicopter landing zones out of the Vietnamese jungle, but were later employed against troop concentrations, and supply depots and for mine clearance. Russia deployed thermobaric weapons during their assault on Grozny during the late 1990s, while the Russians and their Syrian client regime both employed Russian-supplied thermobarics to attacks civilians in the course of Syria's catastrophic civil war.[105] The United States has regularly deployed thermobaric

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[99] Human Rights Watch, *Enhanced Blast Weapons in Ukraine* (Mar. 7, 2022), https://www.hrw.org/news/2022/03/07/enhanced-blast-weapons-ukraine. With apologies to engineers, while there are some arcane distinctions between true thermobarics and other forms of enhanced blast weapons, the differences are not significant to this legal analysis and I have chosen to employ thermobaric as a blanket term.

[100] Marcia A. Cooper, Melvin R. Baer et al., WOEB07 Presentation: Understanding Enhanced Blast Explosives: A Multi-Scale Challenge, OSTI.GOV (Nov. 1, 2007), https://www.osti.gov/biblio/1147210#page=10.

[101] Eddie Lopez, *Will Thermobaric Weapons Overwhelm the Military Health System?* War Room (Aug. 8, 2018), https://warroom.armywarcollege.edu/articles/will-thermobaric-weapons-overwhelm-the-military-health-system/.

[102] *BLU-82/B 15,000-lb Bomb Project Commando Vault "Daisy Cutter,"* Global Security, https://www.globalsecurity.org/military/systems/munitions/blu-82.htm.

[103] *What are Thermobaric Weapons, and does Russia have them in Ukraine?* The Economist (Mar. 9, 2022), https://www.economist.com/the-economist-explains/2022/03/09/what-are-thermobaric-weapons-and-does-russia-have-them-in-ukraine; Richard D. Fisher, China's Military Modernization: Building for Regional and Global Reach (2008); Chris Cole, *MoD Accidentally Reveals British Drones Firing Thermobaric Missiles in Syria*, Drone Wars (Feb. 5, 2018), https://dronewars.net/2018/05/02/mod-accidentally-reveals-british-drones-firing-thermobaric-missiles-in-syria/; National Defense Authorization Act for Fiscal Year 2002: Report of the Committee on Armed Services House of Representatives, H.R. Doc. No. 2586, at 245 (Sept. 4, 2001); Eric Tegler, *Russia's TOS-1 Heavy Flamethrower Lobs Brutal Thermobaric Rockets at Close Range*, Forbes (Mar. 2, 2022), https://www.forbes.com/sites/erictegler/2022/03/02/russias-tos-1-heavy-flamethrower-lobs-brutal-thermobaric-rockets-at-close-range/?sh=f3b7b0463432; David Hambling, *Thermobaric Grenade Brings Down the House? (updated)*, Wired (Nov. 13, 2007, 8:20 AM), https://www.wired.com/2007/11/thermobaric-gre/.

[104] Thom Shanker, *Threats and Responses: Weapons; Largest Conventional Bomb Dropped in a Test in Florida*, N.Y. Times (Mar. 12, 2003), https://www.nytimes.com/2003/03/12/us/threats-responses-weapons-largest-conventional-bomb-dropped-test-florida.html; Nat'l Museum of the U.S. Air Force, Bomb Live Unit (BLU-82/B), https://www.nationalmuseum.af.mil/Visit/Museum-Exhibits/Fact-Sheets/Display/Article/196739/bomb-live-unit-blu-82b/.

[105] Lester W. Grau & Timothy Smith, *A 'Crushing' Victory: Fuel-Air Explosives and Grozny 2000*, Marine Corps Gazette (Aug. 2000), https://community.apan.org/cfs-file/__key/docpreview-s/00-00-08-52-45/2000_2D00_08_2D00_01-A-Crushing-Victory_2D00_Fuel_2D00_Air-Explosives-and-Grozny-2000-_2800_Grau-and-Smith_2900_.pdf; Kelsey D. Atherton, *Thermobaric Bombs and Other Nightmare Weapons of the Syrian Civil War*, Popular Science (Oct. 5, 2016), https://www.popsci.com/thermobaric-bombs-and-other-nightmare-weapons-syrian-civil-war/; DeGhett, *supra* note 98; Philippa Webb, *The Security Council Veto in Syria: Imagining a Way Out of Deadlock*, Articles of War (Aug. 12, 2021), https://lieber.westpoint.edu/category/justice-for-syria/.

weapons in Iraq and Afghanistan, to include employing the "mother of all bombs" against an ISIS-K facility in 2017.[106]

Thermobaric Weapons as Means of Warfare

It is an established principle of international law that "the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited."[107] In particular, thermobarics appear to implicate the Convention on Certain Conventional Weapons (CCW), a treaty ratified by both the Russian Federation and Ukraine that regulates the deployment of incendiary weapons.[108] Meanwhile, other instruments and custom prohibit the use of weapons that have indiscriminate effects. Some critics also argue that thermobarics are inherently indiscriminate weapons, and thus unlawful in all circumstances.

Thermobarics Are Not Incendiary Weapons

At first glance, thermobaric weapons might seem to run afoul of Protocol III of the CCW,[109] which limits the use of incendiary weapons.[110] The Protocol defines incendiary weapons as "any munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target."[111] Article 1(b) excludes from that definition munitions "which may have incidental incendiary effects" and "[m]unitions designed to combine … blast … with an additional incendiary effect, such as … explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons."[112]

Thermobaric weapons are not incendiary weapons as defined by the CCW. While they depend on a chemical reaction, they are not "primarily designed to set fire … or to cause burn injury."[113] Instead, thermobarics are primarily designed to generate blast and pressure. While flame and heat are employed as the most efficient way to generate that blast and pressure, thermobaric weapons are not primarily designed to set fire or cause burns. Burns to persons are an incidental effect, and thus thermobarics are not properly categorized as incendiary weapons.

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106 *Afghanistan/U.S, 'Mother of All Bombs'*, How Does Law Protect in War: ICRC, https://casebook.icrc.org/case-study/afghanistanus-mother-all-bombs; Helene Cooper & Mujib Mashal, *U.S. Drops 'Mother of All Bombs' on ISIS Caves in Afghanistan*, N.Y. Times (Apr. 13, 2017), https://www.nytimes.com/2017/04/13/world/asia/moab-mother-of-all-bombs-afghanistan.html.

107 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, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW].

108 *Id.*

109 CCW Protocol III, *supra* note 60.

110 Sean Watts, *Are Molotov Cocktails Lawful Weapons?*, Articles of War (Mar. 2, 2022), https://lieber.westpoint.edu/are-molotov-cocktails-lawful-weapons/.

111 CCW Protocol III, *supra* note 60, art. 1.

112 *Id.* art. 1(b).

113 *Id.* art. 1.

Thermobarics Are Not Inherently Indiscriminate Weapons

Critics charge that thermobarics have an "indiscriminate and uncontained nature."[114] While these weapons may be subject to potentially unlawful methods of employment (addressed below), thermobarics themselves are not inherently indiscriminate.[115] Inherently indiscriminate weapons are those that by their nature are incapable of complying with the principles of distinction and proportionality. Vanishingly few weapons fit that category. A footnote to the U.S. DoD *Law of War Manual* provides as an example a proposal to strap incendiary devices to a flock of live bats, noting that "[i]f that is the best example that can be given of an inherently indiscriminate weapon, there are not very many inherently indiscriminate weapons in existence."[116]

In the *Nuclear Weapons* advisory opinion, the International Court of Justice (ICJ) acknowledged that LOAC "at a very early stage, prohibited certain types of weapons … because of their indiscriminate effect," admitted that "the use of such weapons in fact seems scarcely reconcilable" with LOAC's requirement for discrimination, and yet declined to hold that the effects of nuclear weapons were so indiscriminate as to render their use unlawful.[117] Given that the ICJ did not brand nuclear weapons, with their uniquely awful characteristics including the "ability to cause damage to generations to come," as inherently indiscriminate, thermobaric weapons are almost certainly not *per se* unlawfully indiscriminate.[118]

State practice also argues thermobaric weapons are not by their nature indiscriminate. Article 36 of Additional Protocol I, to which both the Russian Federation and Ukraine are party, requires that States conduct a review to ensure new weapons are not by their nature unlawful, an obligation undertaken by the United States as a matter of policy.[119] The U.S. review process includes assessment of whether "the weapon is inherently indiscriminate,"[120] and similarly the Russian Federation forbids employment of "weapons of an indiscriminate character."[121] The fact both nations employ thermobaric weapons indicates that neither finds them *per se* indiscriminate, and there is no record in the International Committee of the Red Cross customary international law database of a nation expressly adopting that position.[122] Although the United Kingdom reportedly agonized over the legality of thermobaric weapons, no nation has declared them per se unlawful.[123]

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114 Center for Arms Control and Non-Proliferation, Fact Sheet: Russia's Use of Thermobaric Weapons in Ukraine (Mar. 1, 2022), https://armscontrolcenter.org/fact-sheet-russias-use-of-thermobaric-weapons-in-ukraine/.

115 *Rule 71—Weapons That Are by Nature Indiscriminate*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule71.

116 DoD Law of War Manual, *supra* note 8, § 6.7.1, n.151.

117 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).

118 *Id.* at 244.

119 DoD Law of War Manual, *supra* note 8, § 6.2.

120 AR 27-53, *supra* note 14, para. 8.

121 *Rule 71—Weapons That Are by Nature Indiscriminate*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule71.

122 *Customary IHL Databases—ICRC*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl.

123 Joe Glenton, *Thermobaric Weapons Are Truly Terrible, Says the UK. But It Also Uses Them.*, The Canary (Mar. 11, 2022), https://www.thecanary.co/global/world-analysis/2022/03/11/thermobaric-weapons-are-truly-terrible-says-the-uk-but-it-also-uses-them/.

Thermobarics as Method of Warfare

While thermobaric weapons may not be unlawful as a means of warfare, the method of their employment could still run afoul of international law. In both international and non-international armed conflicts, any "attack" implicates the LOAC targeting regime. The most common criticisms of thermobaric weapons implicate rules governing distinction, proportionality, and the principle of humanity/prevention of unnecessary suffering.

Distinction and Proportionality

The LOAC rules governing distinction limit attacks to lawful military objectives.[124] Critics charge that thermobarics "are prone to indiscriminate use, especially in or near populated areas."[125] The same argument can be (and recently has been)[126] advanced against almost any ranged explosive weapon, but ultimately the law of war allows most attacks against military objectives unless the incidental harm anticipated would be excessive compared with the military advantage expected to be gained.[127] This analysis applies to thermobaric weapons no differently from any other method of warfare.

Unnecessary Suffering

Humanity, "defined as the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose," is a cornerstone of LOAC.[128] This rule dates to the 1868 St. Petersburg Convention's condemnation of "arms which uselessly aggravate the sufferings" of combatants, codified by the 1899 Hague Regulations prohibition on "arms, projectiles, or material *of a nature* to cause superfluous injury," refined by the 1907 Hague Regulations prohibition on "arms, projectiles, or material *calculated to cause* unnecessary suffering."[129] The 1993 CCW revises the language back to the 1899 prohibition on means of warfare "*of a nature* to cause superfluous injury or unnecessary suffering," and Article 35 of AP I echoes this *of a nature* framing.[130]

Commentators have pointed out that the subtle linguistic shift has outsized impacts—a ban on weapons *of a nature* to cause unnecessary suffering is a much stricter standard than one only on weapons *calculated to* cause such harm.[131] The United States considers the *calculated to* standard to be a "clearer expression of the intent of governments to focus on design and intended

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124 *Rule 1—The Principle of Distinction Between Civilians and Combatants,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1.

125 Human Rights Watch, *Chechnya Conflict: Use of Vacuum Bombs by Russian Forces* (Feb. 1, 2000), https://www.hrw.org/news/2000/02/01/chechnya-conflict-use-vacuum-bombs-russian-forces.

126 Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas, ICRC (Jan. 27, 2022), https://www.icrc.org/en/event/explosive-weapons-wide-area-effects-deadly-choice-populated-areas.

127 Human Rights Watch, *Explosive Weapons Devastating for Civilians* (Feb. 6, 2020), https://www.hrw.org/news/2020/02/06/explosive-weapons-devastating-civilians.

128 DoD Law of War Manual, *supra* note 8, §2.3.

129 St. Petersburg Declaration, *supra* note 50; 1899 Hague Convention II, *supra* note 49, art. 23; Hague IV, *supra* note 79, art. 23.

130 CCW, *supra* note 107; AP I, *supra* note 4, art. 35.

131 Matthew J. Aiesi, *The Jus in Bello of White Phosphorus: Getting the Law Correct*, Lawfare (Nov. 26, 2019, 8:00 AM), https://www.lawfaremedia.org/article/jus-bello-white-phosphorus-getting-law-correct.

purpose rather than every remote possibility of weapon injury," and evaluates weapons for humanity under the *calculated to* standard.[132]

The overpressure from a thermobaric detonation has been graphically described as a force that "just blows your lungs out of your mouth. It kind of turns you inside out."[133] A more sober, but no less sobering, CIA analysis notes that people not obliterated outright "are likely to suffer many internal, and thus invisible injuries, including burst eardrums and crushed inner ear organs, severe concussions, ruptured lungs and internal organs, and possibly blindness."[134] It is beyond dispute that blast weapons have the capacity to inflict horrific suffering, but as a matter of law they are not *calculated to* inflict suffering beyond that justified by military necessity.

Conclusion

It is difficult to watch Russian forces shell civilians and attack maternity hospitals in the course of an unlawful war of aggression.[135] The use of thermobaric weapons is a tempting addition to the bill of particulars against Russia, but it is important not to conflate the blatant illegality of Russian methods in Ukraine with the lawfulness of the means of warfare they have employed.[136] Thermobaric weapons are designed to destroy an enemy—quickly, over a wide area, and even if that enemy is behind cover. So long as the weapons are targeted at lawful military objectives, accompanied by feasible precautions to protect civilians and civilian objects, and employed in accordance with the principle of proportionality, the fact that they inflict necessary suffering is not a bar to their lawful use.

132 DoD Law of War Manual, *supra* note 8, § 6.1.1., n.124.

133 Larry Greenemeier, *What is the "Mother of all Bombs" that the U.S. Just Dropped on Afghanistan,* Scientific American (Apr. 13, 2017), https://www.scientificamerican.com/article/what-is-the-mother-of-all-bombs-that-the-u-s-just-dropped-on-afghanistan/#:~:text=The%20GBU%2D43%2FB%20Massive,never%20actually%20struck%20the%20ground.

134 *How FAEs Work,* IPCS (Dec. 11, 2001), http://www.ipcs.org/comm_select.php?articleNo=660.

135 Michael Schwirtz et al., *Humanitarian Crisis Worsens for Ukrainians Trapped in Russia's Onslaught*, N.Y. Times (Mar. 7, 2022), https://www.nytimes.com/2022/03/07/world/europe/ukraine-humanitarian-crisis-russia.html; *Russian Airstrike Hits Ukrainian Maternity Hospital*, CBS News (Mar. 9, 2022), https://www.cbsnews.com/video/russian-airstrike-hits-ukrainian-maternity-hospital/; Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, Articles of War (Feb. 28, 2022), https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/; Terry D. Gill, *Remarks on the Law Relating to the Use of Force in the Ukraine Conflict*, Articles of War (Mar. 9, 2022), https://lieber.westpoint.edu/remarks-use-of-force-ukraine-conflict/.

136 Ori Pomson, *The ICJ's Provisional Measures Order: Unprecedented*, Articles of War (Mar. 17, 2022), https://lieber.westpoint.edu/icj-provisional-measures-order-unprecedented/.

DIRTY BOMBS AND INTERNATIONAL HUMANITARIAN LAW

by Michael N. Schmitt | Oct 26, 2022

On October 23, Russian Defense Minister Sergei Shoigu made separate calls to the defense ministers of France, Turkey, the United Kingdom, and the United States.[137] In them, Shoigu claimed that Ukraine intended to conduct a false flag operation with a "dirty bomb" in order to accuse Russia of using a weapon of mass destruction. Russian media has echoed the accusation. France, the United States, and the United Kingdom quickly released a joint statement in which they "made clear that we all reject Russia's transparently false allegations that Ukraine is preparing to use a dirty bomb on its own territory" and that they "remain committed to continue supporting Ukraine's efforts to defend its territory for as long as it takes."[138]

But Russia continues to level the accusation, most recently in a letter to the United Nations that announces it will raise the matter in a closed Security Council session.[139] In the letter, Russia's UN ambassador warns, "We will regard the use of the dirty bomb by the Kyiv regime as an act of nuclear terrorism."[140] Ukraine's President Zelensky characterized the allegation as a sign that Moscow plans a tactical nuclear attack, using the false flag dirty bomb attack to shift the blame to Ukraine.[141] In that regard, the U.S. State Department has warned, "There would be consequences for Russia whether it uses a dirty bomb or a nuclear bomb."[142]

The premise that the claims could serve as a pretext for an escalation of Russian operations is consistent with recent Russian tactical nuclear weapons saber rattling.[143] But the Institute for the Study of War deemed it unlikely that Russia itself was preparing an imminent dirty bomb false flag attack.[144] Instead, the organization believes Shoigu's assertion is a continuation of an information campaign in which "[t]he Kremlin has repeatedly claimed that Western states will help Ukraine conduct a false flag WMD attack."[145] According to the Institute, Shoigu's calls were "likely intended to intimidate Western states into cutting or limiting support for Ukraine as Russia faces continued

137 Annabelle Timsit & Rachel Pannett, *Western Powers Warn Russia Could Use 'Dirty Bomb' Claim to Escalate War*, Wash. Post (Oct. 24, 2022, 9:50 AM), https://www.washingtonpost.com/world/2022/10/24/dirty-bomb-russia-ukraine-war/.

138 U.S. Dep't of State, Office of the Spokesperson, Joint Statement on Ukraine (Oct. 23, 2022), https://www.state.gov/joint-statement-on-ukraine-2/.

139 Jonathan Landay, *Russia Declares End of Ukraine Mobilisation Campaign, U.S. Sending More Arms*, Reuters (Oct. 28, 2022, 5:59 PM), https://www.reuters.com/world/europe/russia-hits-ukraine-homes-evacuates-kherson-warns-escalation-2022-10-24/.

140 *Id.*

141 *Id.*

142 *Id.*

143 David E. Sanger et al., *Western Officials Warn Russia Could Use a Dirty Bomb as a Pretext*, N.Y. Times (Oct. 24, 2022), https://www.nytimes.com/2022/10/24/us/politics/russia-dirty-bomb-west-ukraine.html.

144 Mason Clark, *Russian Offensive Campaign Assessment,* Institute for the Study of War (Oct. 23, 2022, 5:30 PM ET), https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-october-23.

145 *Id.*

military setbacks and the likely loss of western Kherson by the end of the year."[146]

Hopefully, the Institute is correct regarding the likelihood of a dirty bomb attack. And most Western supporters of Ukraine appear to see the claims for what they are—pure disinformation. But the allegations do raise the question of the international humanitarian law (IHL) surrounding so-called dirty bombs. This post teases loose those rules that would govern their use by either side … and those which would not.

Dirty Bombs

A fair degree of confusion surrounds the label "dirty bombs," a weapon that falls into the category of "radiological dispersal devices" (RDD). Dirty bombs combine conventional explosives like dynamite with radioactive material, such as that used at hospitals, research laboratories, and nuclear power stations.[147] The explosive force of detonation disperses the radioactive material, which is typically reduced to powder or pellets. Such weapons are relatively easy to build.

The amount of radiation released would usually not be enough to prove lethal. As noted by the U.S. Nuclear Regulatory Commission (NRC), the immediate health effects of a dirty bomb would "likely be minimal," although those effects would be determined by: the degree of radiation that the body absorbs; the type of radiation (gamma, beta, or alpha); the individual's distance from the source of the radiation; whether the radiation is absorbed by the skin, inhaled, or ingested; and how long the individual is exposed.[148]

Similarly, the Centers for Disease Control concludes, "[o]nly people very close to the blast site would be exposed to enough radiation to cause immediate serious illness. However, the radioactive dust and smoke can spread farther away and could be dangerous to health if people breathe in the dust, eat contaminated food, or drink contaminated water."[149] Usually, the explosive blast poses the most significant risk to individuals in the vicinity of detonation, although a very large bomb could cause considerable radiation illness, even multiple deaths.[150]

Dirty bombs typically are not designed to cover large areas, for, as the NRC points out, as the "radioactive material spreads, it becomes less concentrated and less harmful."[151] Similarly, the BBC explains, "if the particles are too fine or released into strong winds, they will scatter too widely to do much harm."[152] The use of a dirty bomb could, however, contaminate property, thereby rendering the affected area unusable until decontaminated.

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146 *Id.*

147 U.S. Nuclear Regulatory Commission, Backgrounder on Dirty Bombs, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-dirty-bombs.html [hereinafter U.S. NRC].

148 *Id.*

149 CDC, Additional information on radiation emergencies, https://www.cdc.gov/nceh/radiation/emergencies/moretypes.htm.

150 Peter D. Zimmerman & Cheryl Loeb, *Dirty Bombs: The Threat Revisited*, 38 Defense Horizons 1, 1–11 (Jan. 2004), https://ndupress.ndu.edu/Portals/68/Documents/defensehorizon/DH-038.pdf.

151 U.S. Nuclear Regulatory Commission, *supra* note 147.

152 *What Is a 'Dirty Bomb' and Why Is Russia Saying Ukraine Could Use One?* BBC News (Oct. 25, 2022), https://www.bbc.com/news/world-63373637.

Instead, the key to a dirty bomb is its psychological impact from fear of being, or having been, exposed to radiation.[153] In part, this is because radiation cannot be seen, smelled, tasted, or felt. Thus, the NRC concludes that a dirty bomb "is not a 'Weapon of Mass Destruction' but a 'Weapon of Mass Disruption,' where contamination and anxiety are the terrorists' major objectives."[154] Simply put, they are terror weapons that have little conventional utility on the battlefield.

No State has developed the weapon for conventional use by its armed forces. Nor have terrorists successfully employed one despite some attempts to do so.[155]

The Law

Dirty bombs implicate numerous IHL rules, although as will be seen, it is important not to jump to conclusions regarding the applicability of certain rules.

Attacking Civilians and Civilian Objects

There is no question that if either Russia or Ukraine employs a dirty bomb directly against civilians or civilian objects, the operation will violate the treaty[156] and customary law[157] prohibitions on attacking them, for these rules apply regardless of the means (weapon) or method (tactic) of warfare employed. Yet in discussions with colleagues, the legal characterization of a theoretical Ukrainian false flag use has surfaced. The question is whether it would be an IHL violation for Ukraine to target its own people.

IHL targeting rules do not distinguish civilians based on nationality. But that does not mean that every killing of a civilian qualifies as an unlawful attack on civilians under IHL. Particularly relevant in this regard is the issue of motive. Dick Jackson and several of his colleagues explained that to qualify as an "attack" subject to the IHL rules governing them, there must be a *motive* to cause harm to the adversary or other persons in the *conduct of hostilities*.[158] I would emphasize that this requires nexus to the conflict. That is the case here, for a Ukrainian false flag attack would be designed to affect Russian military operations by dramatically enhancing military support for Ukraine. Ukraine would not conduct the operation *but for* its impact on the ongoing hostilities.

Jackson and his colleagues also point to the legal issue of *control*, suggesting that "acts of violence directed at persons or objects under the dominion and control of a belligerent—to include persons who are *hors de combat*—do

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153 U.S. Department of Homeland Security, Radiological Attack (2004), https://www.dhs.gov/xlibrary/assets/prep_radiological_fact_sheet.pdf.

154 Commonwealth of Massachusetts, Nuclear Regulatory Commission (NRC): Fact Sheet on Dirty Bombs, https://www.mass.gov/info-details/nuclear-regulatory-commission-nrc-fact-sheet-on-dirty-bombs.

155 BBC, *supra* note 205.

156 AP I, *supra* note 4, arts. 51(2), 52(1).

157 *Rule 1—The Principle of Distinction Between Civilians and Combatants,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1; *Rule 7—The Principle of Distinction Between Civilian Objects and Military Objectives,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule7.

158 Dick Jackson, *Motive and Control in Defining Attacks*, Articles of War (Nov. 11, 2020), https://lieber.westpoint.edu/motive-control-attacks/.

not qualify as attacks."[159] But they are quick to note, and correctly so, that control over a person is not to be equated with control over *territory*.[160] The former is exemplified by killing an individual in detention, and the latter by targeting individuals living in an area under the attacking party's control, as would be the case in Ukraine.[161]

Accordingly, in my view, a theoretical attack by Ukrainian forces on Ukrainians in order to secure military support would be no less an attack on them than a Russian use of a dirty bomb against those same civilians. Those involved would also be committing murder under Ukrainian domestic law. Of course, if Russian forces conducted a dirty bomb attack in order to blame it on Ukraine as a pretext for escalation, the same result would hold. This is true regardless of whether the attack occurred in Ukrainian or Russian-controlled territory.

Proportionality and Precautions in Attack

Assuming solely for the sake of analysis that either side used a dirty bomb against a military objective, the rule of proportionality and the requirement to take precautions in attack would be triggered.[162] By the former, any resulting expected *incidental* damage to civilian objects or injury to civilians would have to be considered to assess whether it would be *excessive* relative to the anticipated concrete and direct military advantage of the strike. In the collateral damage calculation, I would include the fact that an object is rendered unusable due to being irradiated. Any civilian radiation sickness likewise would qualify as injury. And as with directly targeting them, the fact that *Ukrainian* nationals and objects would be the victims of incidental injury in a Ukrainian attack would not preclude their inclusion in the requisite proportionality calculation.

More problematic legally in a dirty bomb attack is the requirement to take precautions to minimize collateral damage, which would include those same radiation effects. Of particular note, there is a requirement to choose among means and methods of warfare to do so, as long as no potential military advantage is sacrificed.[163]

Because dirty bombs are merely radioactive material added to an explosive device, the only way such a bomb could meet the requirement is if the use of radioactive material enhanced the achievement of a valid *military* purpose. But because explosive force is the primary effect caused by such weapons, that is unlikely to be the case. And the fact that the weapon's use will cause civilian fear or serve as a pretext for future military operations does not qualify as military advantage for the purposes of the rule. Only if the area denial consequence of the radiation affected enemy military operations in a meaningful way

159 *Id.*

160 *Id.*

161 *Id.*

162 AP I, *supra* note 4, arts. 51(5)(b), 57; *Rule 14—Proportionality in Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14; *Rule 15—Principle of Precautions in Attack,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15.

163 AP I, *supra* note 4, art. 57(2)(a)(ii); *Rule 17—Choice of Means of Warfare,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule17; DoD Law of War Manual, *supra* note 8, § 5.11

could the use of a dirty bomb pass muster. Thus, in most conceivable scenarios, using a dirty bomb would violate the rule requiring precautions in attack.

Indiscriminate Attack

Depending on how the dirty bomb attack was conducted, it also could violate the prohibition on indiscriminate attacks.[164] This rule prohibits attacks that are not directed at specific military objectives or combatants, as in not being aimed, and those that cannot be so directed. There is nothing in a dirty bomb that makes violation more likely on these bases.

Instead, it is more likely that a dirty bomb attack would be indiscriminate on the basis that it "employ[s] a method or means of combat the effects of which cannot be limited …; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."[165] Because a dirty bomb uses radioactive powder to disperse radiation, it is susceptible to wind. Should a bomb be large enough to release a significant amount of radiation that places civilians at risk in unpredictable winds, the attack would be indiscriminate, even if it targets a military objective. Although hypothetically possible, this would be unlikely because wind causes radiation to dissipate. Moreover, if the civilian effects could be reasonably estimated because, for instance, wind direction is known, the issue would be proportionality, not indiscriminate attack.

Terror Attack

In a reflection of customary law,[166] Article 51(2) of Additional Protocol I prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population."[167] As there is only limited military utility in including radioactive material in a dirty bomb, it is a paradigmatic terror weapon. There is little rationale for its use by Russia (or Ukraine) beyond terrorizing the population, thereby satisfying the primary purpose requirement.

The fact that the ultimate purpose might be other than to spread terror among the civilian population would not deprive such a use of its terror attack status. For instance, although a Russian false flag attack might be designed to provide a basis for escalation, it could do so only because of the local terror and international shock the attack would generate. Similarly, even if the false Russian claims that Ukraine will use a dirty bomb in a false flag operation to further ostracize Russia were true (they obviously are not), the immediate purpose would be to cause fear and shock as the triggers for achieving that end.

Note that the prohibition extends to *threats* of violence designed to terrorize. I believe Russia has already violated this prohibition by raising the specter of dirty bomb attacks.

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164 AP I, *supra* note 4, art. 51(4); *Rule 11—Indiscriminate Attacks,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule11; DoD Law of War Manual, *supra* note 8, § 5.5.

165 AP I, *supra* note 4, art. 51(4)(c).

166 *Rule 2—Violence Aimed at Spreading Terror Among the Civilian Population,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule2.

167 AP I, *supra* note 4, art. 51(2); *See* DoD Law of War Manual, *supra* note 8, § 5.2.2.

There is no requirement that the party issuing the threat in question intends to carry it out. Thus, even if the Institute for the Study of War is correct that Russia does not intend to employ a dirty bomb, the fact that it is working hard to create the impression that such an attack will occur ensures that the requisite intent to terrorize is satisfied. Moreover, I would suggest that although the threat being issued is that of Ukrainian violence rather than Russian, this does not preclude a finding of a Russian violation. The effect of the claim remains the terrorization of the target civilian population.

Protection of the Natural Environment

The fact that dirty bombs involve the spread of radiation raises the issue of environmental impact. In my view, harm to the natural environment can qualify as collateral damage subject to the rule of proportionality and the requirement to take precautions in attack to minimize harm to civilian objects (see discussion above and my analysis in *Green War*[168]). However, for Parties to Additional Protocol I, like Russia and Ukraine, the environment is subject to "special protection" under Articles 35(3) and 55 of Additional Protocol I.[169]

The former provides that "[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."[170] Although the latter provision sets forth identical criteria, it ties the prohibition to its impact on the civilian population's well-being:

> Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.[171]

In most cases, the environmental consequences of a dirty bomb's use would not satisfy the three cumulative conditions. For instance, the term "long-standing," as used in the protocol, refers to harm lasting decades.[172] That would not be the case in most dirty bomb attacks. And although the *Commentary* contains little guidance regarding the other two criteria, the 2022 U.S. Army Judge Advocate General's School *Operational Law Handbook* suggests the term "widespread" likely "probably means several hundred square kilometers."[173]Again, this is unlikely in most cases for the reasons explained above. And also as explained, most effects would not merit being labeled "severe" in the plain meaning of the term.

Poison Weapons

Poison weapons have been prohibited since ancient times in armed conflict. In modern times, the prohibition has appeared in the Lieber Code and 1899 and 1907 Hague

168 Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 Yale J. Int'l L. 1, 1-109 (1997).

169 AP I, *supra* note 4, arts. 35(3), 55.

170 *Id.* art. 35(3).

171 *Id.* art. 55.

172 AP I Commentary, *supra* note 8, ¶ 1452.

173 Int'l & Operational Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Operational Law handbook (2022).

Regulations.[174] The ICRC properly characterizes it as customary law, as did the International Court of Justice (ICJ) in its *Nuclear Weapons* advisory opinion.[175] And the DoD *Law of War Manual* prohibits their use.[176]

However, to violate the IHL prohibition on poisoning, the consequences of its use should be severe. For instance, the poisons encompassed in the prohibition are those "substances that cause death or disability with permanent effects when, even in small quantities, they are ingested, enter the lungs or bloodstream, or touch the skin," according to the DoD *Law of War Manual*.[177] Similarly, in the analogous context of war crimes (individual instead of State responsibility), Articles 8(2)(b)(xvii) and (e)(xiv) of the Rome Statute of the International Criminal Court prohibit employing poison weapons, but only if the "substance was such that it causes death or serious damage to health" (Elements 2).[178]

The prohibition could encompass poisoning by radiation. Consider the 2006 poisoning of Alexander Litvinenko with polonium-210, which caused a lethal case of acute radiation syndrome, an act for which the European Court of Human Rights found Russia responsible in *Carter v. Russia*.[179] It is certainly possible that a dirty bomb used during the war in Ukraine could be *intended* to *cause* harm of the requisite *severity*. But as such weapons generally are conceived, the primary harmful effect on persons is the explosion, and the type of harm suffered by individuals due to radiation exposure usually is not severe. Each case would have to be evaluated on its merits, but it cannot be said that a dirty bomb necessarily qualifies as a poison weapon.

Superfluous Injury and Unnecessary Suffering

The prohibition on using weapons causing superfluous injury and unnecessary suffering, which the ICJ labeled a "cardinal principle" of IHL in its *Nuclear Weapons* advisory opinion, stretches back to the 1868 St. Petersburg Declaration.[180] It subsequently appeared in the Hague Regulations of 1899 and 1907 and 1977 Additional Protocol I.[181] The ICRC correctly considers it a customary rule, and it is included in the DoD *Law of War Manual*.[182]

Employing a dirty bomb to deny the enemy use of an area would not violate the prohibition. But if used for the *purpose* of causing combatants suffering due to radiation poisoning that is additional to any harm

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174 U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Order No. 100, art. 70, Apr. 24, 1863; 1899 Hague Convention II, *supra* note 49, art. 23(a); Hague IV, *supra* note 79, art. 23(a).

175 *Rule 72—Poison,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule72#Fn_EF11E406_00001; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 80–82 (July 8).

176 DoD Law of War Manual, *supra* note 8, § 6.8.

177 *Id.* § 6.8.1.

178 Rome Statute, *supra* note 85, art. 8(2)(b)(xvii), 8(2)(e)(xiv); International Criminal Court, Elements of Crimes (2013) at 18 (as an element of art. 8(2)(b)(xvii)), 29 (as an element of art. 8(2)(e)(xiv)).

179 *Full Report of the Litvinenko Inquiry*, N.Y. Times (Jan. 21, 2016), https://www.nytimes.com/interactive/2016/01/21/world/europe/litvinenko-inquiry-report.html; Carter v. Russia, App. No. 20914/07, Eur. Ct. H.R., (2021).

180 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8); St. Petersburg Declaration, *supra* note 50.

181 1899 Hague Convention II, *supra* note 49, art. 23(e); Hague IV, *supra* note 79, art. 23(e); AP I, *supra* note 4, art. 35(2).

182 *Rule 70—Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule70#; DoD Law of War Manual, *supra* note 8, § 2.3.

caused them by the explosive effects of the weapon, the rule would be violated. Because dirty bombs would generally cause only low doses of radiation, it is unlikely that the weapons would be used for this reason. Instead, they are more likely to be employed to cause panic in the forces against which they are used. Unlike their use for the same purpose against civilians, terror attacks on combatants (or civilians directly participating in hostilities) are lawful.

Arms Control and Dirty Bombs

In 1979, the UN Committee (now Commission) on Disarmament agreed to include radiological weapons in the definition of "weapons of mass destruction."[183] The Soviet Union and the United States were, at the time, negotiating a treaty to govern the development, production, stockpiling, and use of other than nuclear weapons that could disseminate radioactive material. Unfortunately, the effort proved unsuccessful; a post-9/11 attempt to revive the matter in the UN Commission on Disarmament likewise failed.[184]

Moreover, despite frequently being confused with them, dirty bombs are not nuclear weapons. Nuclear weapons employ fission or fusion[185] to create a massive explosion; dirty bombs do not. In addition to the explosion, the use of a nuclear weapon releases large amounts of radiation over vast areas as irradiated debris spreads, and exposure to a nuclear weapon's radiation, unlike dirty bombs, can often cause severe illness and death. In that dirty bombs are not nuclear weapons, they are not encompassed in the prohibition on the use or threat of use in Article 1(d) of the Treaty on the 2017 Prohibition of Nuclear Weapons, to which neither Russia nor Ukraine are Party in any event.[186]

Concluding Thoughts

It is very difficult to imagine circumstances in which any use of a dirty bomb would be lawful, for they are terror weapons, and IHL unequivocally bans violence, or threats of violence, designed to terrorize the civilian population. Moreover, because the attack would be unlikely to be directed at a military objective because that would diminish its presumptive intended psychological impact, the use of a dirty bomb would violate the rules prohibiting attacks on civilian and/or civilian objects.

But it must be cautioned not to "overcharge" any Russian use of a dirty bomb, for doing so will detract from the otherwise clear IHL violations such use would entail. For instance, it is unlikely, albeit not impossible, that employing a dirty bomb would violate the special protection the environment enjoys under IHL or the prohibition on using poison. Additionally, although dirty bombs are sometimes confused with nuclear weapons in current public discourse, that is a mistake of law.

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183 Rep. of the Comm. on Disarmament, at 1-29, U.N. Doc. A/34/27 (1979).

184 *See generally* Jonathan Herbach, The Evolution of Legal Approaches to Controlling Nuclear and Radiological Weapons and Combating the Threat of Nuclear Terrorism, 17 Y.B. Int'l Humanit. L. 45–66 (2014).

185 *How Do Nuclear Weapons Work?* Union of Concerned Scientists (Sept. 29, 2016, updated Aug. 23, 2023), https://www.ucsusa.org/resources/how-nuclear-weapons-work#toc-fission-fusion.

186 Treaty on the Prohibition of Nuclear Weapons, *supra* note 56, art. 1(d).

Despite this cautionary note, it is evident that Russia has thrown out the IHL rule book. Yet again, it is using offensive lawfare in a condemnable manner.

RUSSIA'S ALLEGATIONS OF U.S. BIOLOGICAL WARFARE IN UKRAINE—PART I

by Robert Lawless | Dec 2, 2022

During its invasion of Ukraine, Russia has accused the United States and Ukraine of collaborating to develop biological weapons in violation of international law. Russia's claims led to a "formal consultative meeting" in Geneva pursuant to Article V of the Biological Weapons Convention.[187]

In this post, which is in two parts, I analyze Russia's biological warfare claims in light of the 1972 Biological Weapons Convention. In Part 1, I narrate the factual dispute between Russia and the United States concerning the development of biological weapons in Ukraine. Then, I review the Convention's rules, obligations, and rights and discuss how they may apply in this case.

In Part 2, I examine the Biological Weapons Convention's dispute resolution mechanisms. Doing so highlights well-known deficiencies in the Convention's means of ensuring compliance and enforcement of its rights and obligations. This discussion affords an opportunity to evaluate the Convention's normative force as an instrument of international law. I argue that one's conclusion about the Convention's value depends in part on one's perspective as to what precisely international law achieves in the context of disputes between States—especially powerful ones—as well as what the realistic prospects are for increasing law's effectiveness.

Background

In March 2022, still in the initial phase of its Ukraine invasion, Russia claimed to have found evidence that the United States and Ukraine developed biological weapons in violation of international law. Russia publicly asserted it found "evidence of an emergency clean-up performed by the Kiev regime," which was "aimed at eradicating traces of the military-biological programme, in Ukraine, financed by" the U.S. Department of Defense.[188] Amplifying Russia's claim, a Chinese Foreign Ministry spokesman stated that Russia uncovered "26 bio-labs and other related facilities in Ukraine," which the U.S. Department of Defense used "to conduct bio-military plans" and over which it had "absolute control."[189]

A White House spokeswoman called the Russian claims "preposterous" and responded that it "does not develop or possess [biological] weapons anywhere."[190] The U.S. State Department described the Russian claims as

187 Biological Weapons Convention, *supra* note 54, art. V.

188 @mfa_russia, X (formerly Twitter) (Mar. 6, 2022), https://twitter.com/mfa_russia/status/1500539810418671626?s=20&t=ky-wlRryBCakXi8Y62UiOg.

189 Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Zhao Lijian, Regular Press Conference (Mar. 8, 2022), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202203/t20220309_10649938.html.

190 Edward Wong, *U.S. Fights Bioweapons Disinformation Pushed by Russia and China*, N.Y. Times (Mar. 10, 2022), https://www.nytimes.com/2022/03/10/us/politics/russia-ukraine-china-bioweapons.html.

"total nonsense," asserting that Ukraine also has no biological weapons labs.[191]

Prior to the invasion, Russia did not use the threat of biological weapons in Ukraine—or U.S. production of such weapons in Ukraine—as a basis for its "special military operation."[192] However, President Vladimir Putin asserted in April that a "network of Western bioweapons labs" constituted one of the justifications for its invasion.[193]

During the war, Russia has repeatedly raised concerns about U.S. biological warfare at the United Nations Security Council. In response, the UN Under Secretary General and High Representative for Disarmament Affairs twice told the Security Council that "there was no evidence of any biological weapons programs in Ukraine."[194]

On June 13, 2022, Russia submitted diplomatic notes to the United States and Ukraine detailing concerns about their compliance with the Biological Weapons Convention.[195] In particular, Russia raised questions about U.S. involvement in "activities of biological laboratories in the territory of Ukraine."[196] The original diplomatic correspondence is not publicly available, but Russia later characterized it as seeking a "bilateral consultative process" with the United States and Ukraine concerning their implementation of Articles I and IV of the Biological Weapons Convention.[197]

On June 29, asserting it had not received the "necessary explanations," Russia requested a formal consultative meeting under Article V of the Biological Weapons Convention.[198] The meeting would aim at "resolving the issues with the United States and Ukraine regarding their compliance" with the Convention "in the context of operation of biological laboratories in the Ukrainian territory."[199]

The formal consultative meeting took place on September 5–9 in Geneva.[200] In addition to Russia, the United States, and Ukraine, more than 80 States attended.[201] The meeting

191 *Id.*

192 Steven Lee Myers & Stuart A. Thompson, *Truth Is Another Front in Putin's War*, N.Y. Times (Mar. 20, 2022), https://www.nytimes.com/2022/03/20/world/asia/russia-putin-propaganda-media.html; Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, *supra* note 135.

193 Steven Lee Myers, *Russia's Unfounded Claims of Secret U.S. Bioweapons Linger On and On*, N.Y. Times (Sept. 4, 2022), https://www.nytimes.com/2022/09/04/technology/russia-bioweapons-geneva.html.

194 *Id.*

195 Notes Verbale dated 29 June 2022 from the Russian Federation to the United Kingdom of Great Britain and Northern Ireland and to the United States of America, BWC/CONS/2022/WP.1 (Sept. 14, 2022) [hereinafter Notes Verbale from the Russian Federation]; Response by the United States of America to the Request by the Russian Federation for a Consultative Meeting Under Article V of the Biological and Toxin Weapons Convention (BWC) (Aug. 22, 2022), available at https://www.state.gov/wp-content/uploads/2022/09/Response-of-the-United-States-to-Questions-Posed-by-the-Russian-Federation.pdf#page=2 [hereinafter Response to Request for Consultative Meeting, August 2022].

196 Response to Request for Consultative Meeting, August 2022, *supra* note 195.

197 Notes Verbale from the Russian Federation, *supra* note 195.

198 *Id.*

199 *Id.*

200 Letter from Chief of the BWC Implementation Support Unit to the Permanent Representatives of the States Parties and Signatory States to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Aug. 5, 2022), https://documents.unoda.org/wp-content/uploads/2022/08/2022-0805-ISU-Ltr-re-FCM-registration.pdf.

201 Formal Consultative Meeting of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Provisional List of Participants, BWC/CONS/2022/MISC.1 (Sept. 7, 2022).

was not open to the public, but rather only involved States Party and signatories to the Biological Weapons Convention.[202] Thus, although States' documentary submissions have been cataloged, details about the Geneva discussions are not publicly available.[203]

According to the U.S. State Department, delegations from 35 of the attending States either dismissed Russia's claims or expressed support for the scientific research the United States and Ukraine were conducting.[204] Some States supported Russia's claims, including Belarus, Cuba, Iran, Nicaragua, Syria, and Venezuela, although the extent of these States' support is not clear.[205] China did not endorse Russia's claims, but its representatives expressed that China was "deeply concerned" about them, calling for an independent international investigation of U.S. biological research.[206]

Russia's accusations are not new, but rather are part of a long-standing and sustained pattern of unsupported declarations of U.S. development of biological weapons. In 1983, Russian intelligence agents placed an anonymous letter in an Indian newspaper alleging that the United States manufactured the virus that causes AIDS in a military experiment at Fort Detrick, Maryland.[207] In 2008, Russia made unproven claims about an American-financed biological laboratory in the former Soviet republic of Georgia.[208] After an exhaustive historical review of Russian allegations, one researcher concluded that, beginning in the aftermath of the Second World War and lasting until its collapse, the Soviet Union "maintained a nearly continuous campaign of false allegations of biological-weapon use by the United States."[209]

A Detailed Review of the Russian-U.S. Dispute

Russian Allegations

As detailed in documents submitted to the United States and Ukraine, Russia claims to have uncovered evidence in Ukraine of U.S. "military-biological activities" that violate the Convention.[210] This evidence includes references to U.S. and Ukrainian development of "dangerous pathogens," such

202 UK Letter from Mission Geneva by Aidan Liddle, Ambassador of the Office of the Permanent Representative to the Conference on Disarmament to States Parties and States Signatories to the Biological and Toxin Weapons Convention (July 28, 2022), https://documents.unoda.org/wp-content/uploads/2022/08/20220728-ArtV-informal-meeting-outcome-2.pdf.

203 United Nations Office for Disarmament Affairs, Biological Weapons Convention—Formal Consultative Meeting (2002) documents, https://meetings.unoda.org/meeting/65052/documents.

204 Steven Lee Myers, *U.S. Rebukes Russia for Claims of Secret Bioweapons in Ukraine*, N.Y. Times (Sept. 13, 2022), https://www.nytimes.com/2022/09/13/technology/russia-ukraine-bioweapons.html.

205 *Id.*

206 *Id.*

207 Myers, *U.S. Rebukes Russia for Claims of Secret Bioweapons in Ukraine*, *supra* note 204.

208 *Id.*

209 Milton Leitenberg, *False Allegations of Biological-Weapons Use from Putin's Russia*, 27 Nonproliferation Rev. 1 (2020), https://doi.org/10.1080/10736700.2021.1964755.

210 Questions to the United States Regarding Compliance with the Obligations Under the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (BTWC) in the Context of the Activities of Biological Laboratories in the Territory of Ukraine, BWC/CONS/2022/WP.2 (Sept. 15, 2022) [hereinafter Questions to the United States on the Biological Weapons Convention]; Questions to Ukraine Regarding Compliance with the Obligations Under the [Biological Weapons Convention] in the Context of the Activities of Biological Laboratories in the Territory of Ukraine, BWC/CONS/2022/WP.3 (Sept. 15, 2022).

as cholera and anthrax.[211] Russia suggests the United States has handled "pathogens of dangerous infectious diseases that are potential agents of biological weapons."[212]

In more detailed passages, Russia further alleges it uncovered evidence in Ukraine of U.S. "projects to study the [possible] spread [of] dangerous infections … through migratory birds and bats (including pathogens of plague, leptospirosis, brucellosis as well as coronaviruses and filoviruses that are potentially infectious to humans) that can be considered as delivery means."[213] Crossing into absurdity, Russia then raises "unanswered" questions respecting a U.S. "unmanned aerial vehicle [UAV] for the aerial release of … infected mosquitos"—that is, "a device (unit) designed … as a technical means of delivery and use of a biological weapon."[214]

These alleged projects are designed to spread "highly contagious" agents, including "bacteria and viruses," that "could wipe out 100 percent of the enemy['s] troops."[215] Russia claims to have evidence that the weaponized mosquitos would "attack" enemy troops, infecting them "with highly contagious diseases via mosquito bites."[216] The U.S. program documents allegedly assert that "[s]ickness can be a very valuable military tool" and "infecting an enemy['s] manpower in such a way would [have] significant military effect."[217]

In conclusion, Russia contends that the U.S. "military-biological activities" in Ukraine fall within the scope of the Biological Weapons Convention and constitute a violation of international law.[218]

U.S. Response

The United States forcefully rejects Russia's factual claims. The United States has denied involvement in biological weapons programs and that it operates "secret biological labs in Ukraine and other countries along Russia's periphery."[219]

Rather, the United States has said that it provides financial and technical assistance "to dozens of countries, including at one point Russia itself, to protect biological security and public health."[220] The United States publicly acknowledges funding biological research and assistance in Ukraine and other former Soviet Union republics under the Biological Threat Reduction Program.[221] The Program, originally designed to dismantle Soviet-era nuclear, chemical,

211 *Id.* at 2.

212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.* at 3.

219 Myers, *U.S. Rebukes Russia for Claims of Secret Bioweapons in Ukraine*, *supra* note 204.

220 U.S. Department of Defense, Fact Sheet on WMD Threat Reduction Efforts with Ukraine, Russia and Other Former Soviet Union Countries, Release (June 9, 2022), https://www.defense.gov/News/Releases/Release/Article/3057517/fact-sheet-on-wmd-threat-reduction-efforts-with-ukraine-russia-and-other-former/; Myers, *U.S. Rebukes Russia for Claims of Secret Bioweapons in Ukraine*, *supra* note 204.

221 U.S. Embassy in Ukraine, Biological Threat Reduction Program, https://ua.usembassy.gov/embassy/kyiv/sections-offices/defense-threat-reduction-office/biological-threat-reduction-program/.

and biological weapons after the Cold War, currently focuses on "supporting biological research laboratories that are crucial to monitor and prevent diseases from spreading."[222]

Furthermore, the United States acknowledges participation in scientific research designed to reduce global biological threats. For example, the United States notes a 2005 agreement with Ukraine to cooperate in researching and developing means to "reduce and eliminate the risk of biological weapons development and proliferation."[223] The latter includes "biological research" and "biological threat agent detection and response" efforts designed to "reduce the risk of threat or unauthorized use of dangerous pathogens" at Ukrainian research facilities.[224]

The United States admonished Russia for "mischaracterizing" U.S. biological research activities and for drawing "little or no connection" between its factual assertions and legal compliance issues related to the Biological Weapons Convention.[225] As one example, the United States explained that personnel in Ukraine that Russia referred to as "biological weapons experts" were, in fact, diplomatic and project management personnel performing duties under publicly available agreements to ensure biological clinical samples were safely collected, stored, and transported.[226]

The Biological Weapons Convention

History and Drafting

After the Second World War, the United Nations called on States to eliminate all weapons "adaptable to mass destruction," including biological weapons.[227] Throughout the 1950s and 1960s, States debated issues related to general disarmament as well as special problems of biological warfare.[228] In 1971, these efforts resulted in the creation of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, known as the Biological Weapons Convention.[229]

The Biological Weapons Convention operates as an arms control and disarmament treaty, prohibiting the development, production, acquisition, transfer, and stockpiling of biological and toxin weapons.[230] It was opened for signature in 1972 and entered into force on March 26, 1975. Currently, the Convention has 183 States Party, including the United States, Ukraine, and Russia, as well as four State signatories.[231]

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222 Myers, *Russia's Unfounded Claims of Secret U.S. Bioweapons Linger On and On*, *supra* note 193.

223 Response by the United States of America to the Request by the Russian Federation for a Consultative Meeting Under Article V of the Biological and Toxin Weapons Convention (BWC), BWC/CONS/2022/WP.4 (Sept. 5, 2022) [hereinafter Response to Request for Consultative Meeting, September 2022], at 3.

224 *Id.* at 2.

225 *Id.*

226 *Id.* at 4.

227 *See* Rep. of the First Committee, General and Complete Disarmament, U.N. Doc. A/72/409 (Nov. 13, 2017).

228 United Nations Office for Disarmament Affairs, Disarmament Commission drafts, documents, and meetings from 1952 to 2021, U.N., https://disarmament.unoda.org/publications/library/disarmament-commission/.

229 United Nations Office for Disarmament Affairs, Biological Weapons Convention, https://disarmament.unoda.org/biological-weapons/.

230 *Id.*

231 Biological Weapons Convention, *supra* note 54, States Parties and Signatories.

The Biological Weapons Convention is not the only international legal instrument governing biological weapons and warfare. In 1925, a League of Nations international convention concluded a Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (known as the Geneva Gas Protocol).[232] The Protocol, which expressly prohibits the use of "bacteriological methods of warfare," has 146 States Party, including the United States, Ukraine, and Russia.[233]

Scope of Applicability

Article I of the Biological Weapons Convention contains the criteria for its scope of applicability. Article I prohibits States from developing, producing, stockpiling, or otherwise acquiring or retaining (1) "microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes," as well as (2) "weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict."[234]

The Convention does not define the terms of Article I, including most notably "microbial agents," "other biological agents," "toxins," and "prophylactic, protective or other peaceful purposes." This absence is significant, as it leads to ambiguity in understanding the Convention's threshold criteria, which serve as the gateway to applying the Convention's rights and obligations. The challenge is especially acute given the risk of ambiguity inherent in efforts to integrate scientific and medical notions in law.

Some have offered definitions for key terms in Article I.[235] For example, in a World Health Organization report published the year before the Convention's completion, "biological agents" is defined as "those that depend for their effects on multiplication within the target organism, and are intended for use in war to cause disease or death in man, animals or plants."[236] Somewhat similarly, a 1969 United Nations expert report on chemical and biological weapons defines "bacteriological (biological) agents of warfare" as "living organisms, whatever their nature, or infective material derived from them, which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked."[237]

An influential 2003 report by the UN Institute for Disarmament Research further offers definitions for both "biological weapon"

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232 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Gas Protocol].

233 *Id.*, States Parties and Signatories.

234 Biological Weapons Convention, *supra* note 54, art. I.

235 Bakhtiyar Tuzmukhamedov, *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, United Nations Audiovisual Library of International Law (2021), https://legal.un.org/avl/pdf/ha/cpdpsbbtwd/cpdpsbbtwd_e.pdf.

236 World Health Organization, Health Aspects of Chemical and Biological Weapons, 12 (1970), https://iris.who.int/bitstream/handle/10665/39444/24039.pdf;jsessionid=6E178AE6968A013022DF85D88A22EDC7?sequence=1.

237 U.N. Secretary-General, *Chemical and Bacteriological (Biological) Weapons and the Effects of Their Possible Use*, ¶ 6 U.N. Doc. A/7575/Rev.1-S/9292/Rev.1 (Aug. 1969).

and "biological agent." [238] According to the report, a "biological weapon" is a "device or vector that delivers biological agents to [a] target."[239] A "biological agent" is "infective material that causes death or incapacitation through its pathogenic effects."[240] Such an agent "can be used against man, animals, or plants" and usually "penetrate[s] the human body through the respiratory or digestive system."[241] Additionally, the report defines "toxins" as "non-living poisonous by-products of plants, animals, micro-organisms, or artificial chemical synthesis."[242]

States have not endorsed or adopted definitions for Article I in a coordinated or systematic way, instead offering guidance on an ad hoc basis. For example, the U.S. Department of Defense *Law of War Manual* does not define "biological agent," but does identify "toxins" as "poisonous chemical substances that are naturally produced by living organisms, and that, if present in the body, produce effects similar to disease in the human body."[243] The North Atlantic Treaty Organization (NATO) defines "biological agent" as a "microorganism or toxin that causes disease in humans, plants, or animals or that causes the deterioration of materiel" (accessible through "search" function).[244] Notably, however, the NATO definition is not expressly linked to the Biological Weapons Convention.

Rights and Obligations under the Treaty

States' main obligation under the Biological Weapons Convention—noted above—is the Article I prohibition against developing, producing, stockpiling, acquiring, or retaining biological agents or toxins, as well as weapons, equipment, and means of delivery designed to use such agents or toxins.[245] Additionally, Article IV requires States to "take necessary measures" to ensure their territory is not used to develop, produce, acquire, or retain biological agents, toxins, or materiel that falls within the scope of the Convention.[246]

Article III of the Convention serves as a rule of complicity, prohibiting States from assisting, encouraging, or inducing another State or international organization to produce or acquire agents, toxins, weapons, or equipment that falls within the scope of Article I.[247] Article VIII invokes the 1925 Geneva Protocol, asserting that States Party to that instrument remain bound by its prohibition against "bacteriological methods of warfare."[248]

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238 Steve Tulliu and Thomas Schmalberger, *Coming to Terms with Security: A Lexicon for Arms Control, Disarmament and Confidence-Building*, UNIDIR (2003), https://unidir.org/files/publication/pdfs/coming-to-terms-with-security-a-lexicon-for-arms-control-disarmament-and-confidence-building-en-547.pdf [hereafter UNIDIR Report].

239 *Id.* at 50–51.

240 *Id.*

241 *Id.*

242 *Id.* at 52.

243 DoD Law of War Manual, *supra* note 8, § 6.9.1.1.

244 *Biological Agent*, NATO Term, https://nso.nato.int/natoterm/content/nato/pages/home.html?lg=en.

245 Biological Weapons Convention, *supra* note 54, art. I.

246 *Id.* art. IV.

247 *Id.* art. III.

248 *Id.* art. VIII; *see* 1925 Geneva Gas Protocol, *supra* note 232.

Finally, under Article X, States retain the right to participate in scientific research concerning biological agents and toxins for peaceful purposes.[249] The article also protects States' ability to cooperate on biological research that furthers disease prevention and scientific discovery, including the economic development associated with such discoveries.[250]

The Convention's Applicability to the U.S.-Russia Dispute

The factual dispute established above makes it difficult to form conclusions regarding U.S. and Russian rights and obligations in this case.

If Russia's allegations are based in truth, its conclusions that the United States and Ukraine violated the Biological Weapons Convention would be supportable. The weaponization of pathogens and infectious diseases to target enemy combatants falls squarely within the scope of Article I and therefore is prohibited under the Convention.[251]

Furthermore, the use of such weapons during armed conflict would undoubtedly violate the 1925 Geneva Protocol's prohibition against "bacteriological methods of warfare."[252] Similarly, the alleged facts would support a finding that the United States violated the complicity prohibition under Article III, and Ukraine breached its obligation under Article IV to prevent unlawful biological weapons development within its territory.

However, if the claims of the United States and Ukraine are to be believed, it seems clear that they have not violated the Biological Weapons Convention. In its filings at the Geneva meeting, the United States asserted that all of its "biological-related activities" in Ukraine and elsewhere "are for peaceful purposes and fully consistent with its obligations under the Convention."[253] Thus, the facts as presented by the United States indicate that its research in and with Ukraine concerns types and quantities of biological agents justified for "prophylactic, protective, or other peaceful purposes."[254] Furthermore, the U.S.-Ukrainian cooperative research as described seems clearly to fall within Article X of the Convention.

As already noted, it is worth emphasizing that Russia has not publicly offered evidence supporting its allegations of U.S. and Ukrainian weaponization of biological agents. In contrast, the United States and Ukraine have offered documentation corroborating their account of lawful biological research.

In Part 2, I will examine the Convention's dispute resolution mechanisms and how and to what effect Russia used those mechanisms in this case.

249 Biological Weapons Convention, *supra* note 54, art. X.

250 *Id.*

251 *See* Biological Weapons Convention, *supra* note 54, art. I; World Health Organization, Biological Weapons, https://www.who.int/health-topics/biological-weapons#tab=tab_1; United Nations Office for Disarmament Affairs, What Are Biological Weapons? https://disarmament.unoda.org/biological-weapons/about/what-are-biological-weapons/.

252 1925 Geneva Gas Protocol, *supra* note 232.

253 Response to Request for Consultative Meeting, September 2022, *supra* note 223, at 2.

254 Biological Weapons Convention, *supra* note 54, art. I.

RUSSIA'S ALLEGATIONS OF U.S. BIOLOGICAL WARFARE IN UKRAINE—PART II

by Robert Lawless | Dec 9, 2022

Part 1 of this post presented the factual dispute regarding Russian allegations of U.S. and Ukrainian collaboration on the development of biological weapons.[255] It also reviewed the rules, obligations, and rights under the 1972 Biological Weapons Convention and indicated how they may apply in the dispute between Russia and the United States.

In this second part, I examine the Convention's dispute resolution mechanisms, and highlight the well-understood deficiencies in the Convention's compliance and enforcement procedures. Then, I raise broader questions about the Convention's value as an international legal instrument.

Dispute Resolution Under the Biological Weapons Convention

Under Article VI of the Biological Weapons Convention, Russia is entitled to lodge a complaint before the United Nations Security Council against the United States and Ukraine asserting breaches of their treaty obligations. Russia did not pursue this course of action, likely for numerous reasons.[256] Article VI imposes an evidentiary burden on Russia, which it may not have been able to meet. Assuming that Russia's allegations are not factually supportable and given the United States' prominent position on the Security Council, Russia may have concluded that submitting its claims to the Security Council would not yield a sufficiently drawn-out airing of its claims without a burden of evidentiary production.

Russia instead chose to assert its claims under Article V of the Convention. In the event of a factual dispute or other disagreement arising between States Party, Article V obligates States "to consult one another and to cooperate in solving any problems which may arise in relation to" the Convention. The treaty does not further elaborate the procedures governing Article V consultations.[257]

In 1986, the Second Review Conference for the Biological Weapons Convention clarified the role of Article V in disputes concerning the Convention's rules and obligations. In its Final Declaration, the Conference "reaffirm[ed] the obligation assumed by States Parties to consult and co-operate with one another in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention."[258] Furthermore, the Conference confirmed "the right of any State

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255 Robert Lawless, *Russia's Allegations of U.S. Biological Warfare in Ukraine—Part I*, Articles of War (Dec. 2, 2022), https://lieber.westpoint.edu/russias-allegations-us-biological-warfare-ukraine-part-i/.

256 Biological Weapons Convention, *supra* note 54, art. VI.

257 *Id.* art. V.

258 Second Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, BWC/CONF.II/13, art. V (Sept. 30, 1986) [hereinafter BWC Second Review].

Party to request that a consultative meeting open to all States Parties be convened at expert level."[259] The Conference also agreed "that a consultative meeting shall be promptly convened when requested by a State Party."[260]

At the Convention's Third Review Conference in 1991, the Conference declared, in its Final Declaration, that a "formal consultative meeting" under Article V could be "preceded by bilateral or other consultations by agreement among those [States] involved in the problems which had arisen."[261] The Conference further asserted that requests for a formal consultative meeting must be addressed to the Convention's depositaries, "who shall immediately inform all States parties of the request and shall convene" the meeting within 60 days of receiving the request.[262]

Thus, the Article V mechanism afforded Russia a forum in which to air its complaints without a formal requirement to produce evidence. Upon submission of its request to the treaty depositories—the United States and the United Kingdom—the conduct of a formal consultative meeting was obligatory.[263] Furthermore, the private character of the meeting allowed Russia to press its claims free from outside review of their merits.[264]

Separate from the plausibility of its factual assertions, Russia's actions likely were designed for purposes beyond definitively establishing that the United States and Ukraine violated the Biological Weapons Convention. Russia may have used the accusations to fuel preexisting attitudes about American dominance in foreign affairs.[265] Additionally, Russia may have sought to sow division and doubt within the international community, as well as deflect blame for the invasion from Russia to the United States and NATO.

The U.S. State Department accused Russia of abusing the Convention's formal review process to spread disinformation and justify its invasion of Ukraine.[266] Indeed, States and commentators appeared to expect little of substance and no formal resolution to come from the meeting, with some believing Russia used it not for truth seeking but rather used the "mere existence of the investigative session, much of which [took] place behind closed doors, to give its claims a patina of legitimacy."[267]

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259 *Id.*

260 *Id.*

261 Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, BWC/CONF.III/23 (Sept. 1991) [hereinafter BWC Third Review].

262 *Id.*

263 Biological Weapons Convention, *supra* note 54, art. XIV.

264 Letter from Secretariat BWC Implementation Support Unit United Nations Office for Disarmament Affairs to the Permanent Representatives of the States Parties and Signatory States to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Aug. 5, 2022), https://documents.unoda.org/wp-content/uploads/2022/08/2022-0805-ISU-Ltr-re-FCM-registration.pdf.

265 Myers, *Russia's Unfounded Claims of Secret U.S. Bioweapons Linger On and On*, *supra* note 193.

266 Myers, *U.S. Rebukes Russia for Claims of Secret Bioweapons in Ukraine*, *supra* note 204.

267 Myers, *Russia's Unfounded Claims of Secret U.S. Bioweapons Linger On and On*, *supra* note 193.

Is the Biological Weapons Convention a "Parody of the Rule of Law"?

A recent episode of the *Digging a Hole* podcast involved a discussion about international law and Russia's invasion of Ukraine.[268] The wide-ranging conversation involved a particularly interesting exchange of views concerning the legitimacy of international law in the context of inter-State force and armed conflict.

On one view expressed during the discussion, powerful States may stretch, manipulate, and even violate international law with virtual impunity. This characteristic was likened to a "get out of jail free card" for powerful States, which ought to be condemned in any legal system as unjust. As one speaker argued, this seems less like an example of the rule of law than a parody of it.

On another view expressed in the episode, observers ought to be clear-eyed about both what the current international legal system achieves as well as the realistic possibilities for its improvement to a more just system. Far from replicating domestic forms of law enforcement, compliance, enforcement, and accountability, the international legal system takes on unique forms, particularly with respect to powerful States. International law may motivate compliance through those forms, perhaps modestly at times, but in nonetheless desirable ways. While criticism of its shortcomings is always acceptable, we must guard against losing sight of the limitations of powerful States' willingness to accept international legal restraint.

Although the podcast discussion addressed a different aspect of the Russian-Ukraine conflict, the views rehearsed above have force with respect to the dispute concerning U.S. compliance with the Biological Weapons Convention in Ukraine. At the center of the podcast discussion was the notion of international law's legitimacy in the context of powerful States' war-making. In the context of the Biological Weapons Convention, it is likewise worth asking how States' use of the Article V formal consultative meeting—and the Convention more broadly—reflects on the legitimacy of international law.

From the initial perspective outlined above, the Convention's dispute resolution mechanism—the Article V formal consultative meeting—may be said to make a mockery of the law. Importantly, on this view it need not matter where the truth lies in the Russia-U.S. dispute about U.S. biological research in Ukraine. On the one hand, if Russia's allegations are true, little of practical consequence has followed for the United States and Ukraine: no findings of fact were rendered; no legal judgment was made; no sanction was incurred by virtue of the meeting. The meeting did not even result in condemnation—beyond the few States that back Russia generally as a matter of course—or any meaningful change in U.S. behavior or practice.

If, on the other hand, Russia's allegations are false, it has arguably manipulated a mechanism designed to resolve disputes about legal compliance to achieve aims unrelated to international law, let alone the Biological Weapons Convention. These aims

[268] Digging a Hole: The Legal Theory Podcast, *Episode 32: Ukraine & Legal Theory* (Feb. 27, 2022), https://www.diggingaholepodcast.com/episodes/ukraine.

may include distracting attention away from Russia's unlawful invasion or allegations that it engaged in widespread violations of the law of war in Ukraine. Thus, whether Russia's assertions are made earnestly or in bad faith, the Convention appears not to serve the interests of compliance and accountability, but rather the unitary interests of a few powerful States. To return to the podcast discussion, such practice seems more like a parody than an example of the rule of law.

However, on the responsive view, we should not too quickly dismiss what international law generally—and the Article V mechanism, in particular—has achieved in this case. After all, the United States, Ukraine, and other States could have resisted or rejected Russia's invocation of Article V of the Convention. Instead, these three (and scores of other) States participated in the meeting, thus opening the door to engagement. Compared with other dispute resolution mechanisms—for example, the use of military force—on this view the use of Article V constitutes a victory for discourse and engagement. Even if Russia's assertions were spurious, Article V offered a relatively innocuous venue in which to handle its claims.

Which of these two perspectives one adopts has implications for how to think about international law more broadly. For example, some theoretical frameworks de-emphasize international law's formal, source-based authority and its capacity to marshal sovereign power to impose sanctions for noncompliance.[269] Such frameworks instead focus on international law as constituting a "social process"—often a "messy" one—in which "decisionmaking in the international realm actually occurs."[270] Such frameworks are perhaps more plausible when viewed from the apologetic perspective discussed above.

Returning to where this section started, the question remains whether the formal constitutive meeting held pursuant to Article V of the Biological Weapons Convention constituted a "parody of the rule of law." The answer depends on what one thinks the meeting achieved, as well as what one expects international law to be able to accomplish, especially with respect to powerful States such as Russia and the United States. Observers are likely to disagree about the answers to these questions. It is important to account for these underlying considerations when evaluating the effectiveness of international law, including the Biological Weapons Convention.

Conclusion

In this post, my first goal was to review the scope of the Biological Weapons Convention, its rights and obligations, and its mechanisms for dispute resolution. This is most immediately relevant to the Russia-U.S. dispute about biological weapons development in Ukraine. However, the Convention is likely to gain prominence in discussions about future armed conflict. Although it is not yet discussed widely in scholarly research, States are deeply committed to research involving biotechnology in future

269 Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 Yale J. Int'l L. 301, 301–329 (2007).

270 *Id.* at 306.

warfare.[271] This includes the development of "synthetic biology," which in part consists of taking "bacterial cells or fungal cells and transform[ing] them to do whatever the mission may require."[272] Accordingly, the Biological Weapons Convention is likely to come into focus among States and legal practitioners, as well as within legal scholarship.

My second goal was to question the role of the Convention in the practice of international law, particularly in cases such as Russia's claims of U.S. biological warfare in Ukraine. The value of the Convention is not obvious, given the ambiguity surrounding its terms and its rather feeble dispute resolution mechanisms. However, as I have argued, in evaluating international law—including the Biological Weapons Convention—we must think carefully and critically about what States use it for and why. Doing so will enrich our evaluation, as well as inform our discussions about the desirability and plausibility of effective change in international law.

271 U.S. Army, Jenna Brady, *Synthetic Biology Research May Enable Future Capabilities for Soldiers* (Nov. 10, 2016), https://www.army.mil/article/178191/synthetic_biology_research_may_enable_future_capabilities_for_soldiers.

272 U.S. Army, CCDC Army Research Laboratory Public Affairs, *Army Scientists Explore Synthetic Biology Potential* (June 24, 2019), https://www.army.mil/article/223495/army_scientists_explore_synthetic_biology_potential.

CLUSTER MUNITIONS AND THE UKRAINE WAR

by William H. Boothby | Feb 28, 2022

There are reports that cluster munitions have been used by both sides during the Ukraine Wars.[273] Is such use lawful?

Cluster munitions can, in general terms, be defined as "weapons that open in mid-air and disperse smaller sub-munitions—anything from a few dozen to hundreds—into an area. They can be delivered by aircraft or from ground systems, such as artillery, rockets and missiles."[274] The submunitions, which are generally explosive in nature, are usually designed to detonate on impact with the ground or with some other solid object. They may also be fuzed to detonate or air-burst at a prescribed height from the ground. The damaging or injurious purpose is achieved by a combination of blast and fragmentation. Blast and fragmentation are not, from a weapons law perspective, controversial methods of warfare.

The footprint of effect of a cluster munition will be determined by the area of land within which the submunitions, or bomblets fall. The fact that a weapon is directed at an area of land as opposed to a specified person or object does not, per se, render the weapon indiscriminate.[275] Military objectives, whether persons or objects, may be concentrated within the footprint of the cluster munition such that the area of land where they are located becomes a military objective.[276]

Weapons law includes, however, a principle of law that prohibits weapons that are, by nature, indiscriminate.[277] This is a principle of customary law that is therefore binding on both Russia and Ukraine. Likewise, the prohibition of indiscriminate attacks is customary and binding on both sides in the conflict.

Cluster munitions have been regarded as militarily effective ways of engaging wide-area or dispersed targets, such as soft-skinned vehicles, concentrations of troops, military vehicles and other military objects, and some kinds of armour. They were used by the Soviet Union and Germany during the Second World War, by the United States in Laos, during Operation Desert Storm in Iraq, by Sudan in Equatoria, by Russia in Chechnya,[278] and by NATO[279] during the Kosovo conflict. Large numbers of the submunitions used during some of these conflicts, however, failed to explode as intended, leaving dangerous

273 Human Rights Watch, *Ukraine: Russian Cluster Munition Hits Hospital* (Feb. 25, 2022, 5:30 PM), https://www.hrw.org/news/2022/02/25/ukraine-russian-cluster-munition-hits-hospital.

274 Congressional Research Service, Cluster Munitions: Background and Issues for Congress, RS22907 (Oct. 25, 2023).

275 AP I, *supra* note 4, art. 51.

276 *See* Hague IV, *supra* note 79, art. 1; AP I, *supra* note 4, arts. 43, 52

277 AP I, *supra* note 4, art. 51.

278 *See* Janes' Air Launched Weapons (1998) (entry relating to BL755); Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 Mich J. Int'l L 85, 91–95 (2000).

279 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, (Int'l Crim. Trib. for the Former Yugoslavia), https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/07/Final-Report-NATO-Bombing-Yugoslavia.pdf.

explosive submunitions strewn around the battlefield, a persistent danger to civilians returning after the conclusion of hostilities.

Moreover, use of cluster munitions, indeed the use of any weapon during an armed conflict, must be in accordance with the law of targeting, and the principle of distinction is the cornerstone of that body of law.[280] Indiscriminate attacks are prohibited. To determine whether an attack breached this prohibition, however, it will be necessary to establish what the target of the attack was, what military advantage was anticipated to accrue from the successful prosecution of the attack, what civilian deaths, injury and/or damage was expected to result, and whether the latter was expected to be excessive in relation to the former.

States party to the Conventional Weapons Convention recognized in the early 2000s the problems posed by what came to be known as "explosive remnants of war," and on 28 November 2003, the Protocol on Explosive Remnants of War (ERW) was adopted.[281] The Russian Federation and Ukraine are both parties to the treaty.

The main focus on the Protocol is on clearance, removal, and destruction of explosive remnants of war, including bomblets lying around on the former battlefield and abandoned munitions. There are additional provisions on recording, retaining, and transmitting information about such remnants, the taking of feasible precautions to protect civilians from them, protection of humanitarian missions from ERW, and cooperation and assistance.[282] Parties to an armed conflict have specified responsibilities with regard to ERW on territory they control.[283] Moreover, users of ordnance that become ERW on enemy territory where the user does not control the territory have assistance obligations to facilitate clearance, removal, and destruction of the ERW.[284]

Having addressed ERW by the adoption of the Protocol, humanitarian concern then focused more specifically on cluster munitions. That concern related to the apparently indiscriminate employment of such weapons and on the humanitarian consequences of high failure rates, so-called dud bomblets.

The States party to the Conventional Weapons Convention agreed on mandates for discussion of the relevant issues in November 2006 and in succeeding years.[285] Having failed to achieve a Protocol by 2011, a group of concerned States initiated an *ad hoc* process which in due course led to a diplomatic conference and the adoption of the Convention on Cluster Munitions.[286] This is an arms control treaty that prohibits not just the use of cluster munitions, but also development, acquisition, stockpiling, retention, and a variety of other activities associated with cluster munitions. At the

280 AP I, *supra* note 4, art. 48.

281 Protocol on Explosive Remnants of War (Protocol V) art. XX, Nov. 28, 2003, 2399 U.N.T.S. 100 [hereinafter CCW Protocol V).

282 *Id.* arts. 4, 5, 6.

283 *Id.* art. 3.

284 *Id.* art. 7.

285 CCW, *supra* note 107.

286 Convention on Cluster Munitions, *supra* note 58.

time of writing, there are 110 States that are party to the Convention, but these do not include the Russian Federation or Ukraine. Accordingly, the Convention's provisions do not bind either Russia or Ukraine as a matter of treaty law. Moreover, it is not yet possible to find a general practice among States, accepted as law, supporting a conclusion that the Convention's provisions bind at the customary law level.

It is, however, well established in IHL that if there is no specific provision of international law dealing with a particular matter, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."[287]

The customary principles that are of most relevance would seem to be the principle of distinction, the principle prohibiting indiscriminate attacks, and the principle prohibiting weapons that are by nature indiscriminate, as discussed above.

Therefore, the following legal conclusions with respect to cluster munitions are clear:

- There is in international law no prohibition on the use of cluster munitions as such by the Russian Federation or by Ukraine.
- If a particular kind of cluster munition is so designed that it cannot be directed at a specific target or that its effects cannot be limited to a specific target and if it is therefore of a nature to strike military objectives and civilians and/or civilian objects without distinction, it is prohibited by weapons law.
- If a sufficient proportion of the individual bomblets fail to detonate and cause civilian death or injury such that the use of the weapon can properly be described as indiscriminate, the weapon per se would be prohibited under the indiscriminate weapons principle.
- If the particular kind of cluster munition is found not to be indiscriminate by nature, its use on a specific occasion may nevertheless breach the prohibition of indiscriminate attacks. Assessing whether that rule has been broken involves a careful application of targeting law. The information that was available to the attacking commander when making the attack decision, the steps taken by that commander to obtain further relevant information, the expected injury to civilians and damage to civilian objects, the anticipated military advantage from the attack, the precautions taken by the attacking commander, and the precautions taken by the opposing authorities against the effects of attacks are among the numerous factors to be considered.
- States that employ explosive weapon systems with high failure rates need to be mindful of the important ERW clearance, removal, destruction, and assistance obligations imposed by Protocol V to CCW.

287 Hague IV, *supra* note 79, ¶ 8.

LANDMINES AND THE WAR IN UKRAINE

by Dario Pronesti and Jeroen van den Boogaard | Mar 20 2023

Human Rights Watch has documented the use of both anti-vehicle and anti-personnel landmines in Ukraine.[288] Following reports that Ukraine is using anti-personnel landmines (APLs) in violation of the Ottawa Convention, the Ukrainian authorities acknowledged this allegation and reaffirmed the State's commitment to its international obligations.[289]

This post addresses the legal framework applicable to the use of landmines in the conflict between Ukraine and Russia. Because Ukraine and Russia have different legal obligations regarding landmines, this framework is complex. What is clear is that the use of APLs by Ukraine is unlawful in all circumstances. For Russia, the legality of employing APLs depends on the way they are used.

Regulating the Use of Landmines

The use of landmines was first regulated in 1980 in the United Nations Convention on Certain Conventional Weapons (CCW). Protocol II to the CCW was one of the three Protocols States originally adopted.[290] Article 2(1) of Protocol II defines landmines as "any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle." Protocol II adopts a design-based approach, clarifying that any munition could be qualified as a mine if it is *designed* to operate in any of the ways indicated. Consequently, only those devices designed to operate as mines are covered by the Protocol, regardless of their labeling. Munitions that may occasionally behave, or be used, as mines are excluded from its regulatory framework provided these are not specifically designed for such use.

Protocol II regulates not just manually emplaced landmines, but also remotely delivered landmines (RDLs) whose use is subject to different restrictions.[291] In summary, Protocol II limits the use of RDLs to areas constituting "a military objective or which contains military objectives" and requires effective advance warning to be given to potentially affected civilian populations.[292]

The restrictions applicable to manually emplaced mine warfare are largely a restatement of the targeting rules contained in Additional Protocol I to the Geneva Conventions.[293] Protocol II to the CCW also provides detailed limitations on the use of landmines

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288 Human Rights Watch, *Ukraine: Russian Landmine Use Endangers Civilians* (June 15, 2022); Human Rights Watch, *Ukraine: Russia Uses Banned Antipersonnel Landmines* (Mar. 29, 2022); Human Rights Watch, *Landmines: Boost Support for Global Ban Treaty* (Nov. 17, 2022); Human Rights Watch, *Ukraine: Banned Landmines Harm Civilians* (Jan. 31, 2023).

289 Human Rights Watch, *Ukraine: Banned Landmines Harm Civilians*, *supra* note 288; Comment of the Ministry of Foreign Affairs Regarding Report of the Human Rights Watch, Ministry of Foreign Affairs of Ukraine (Jan. 31, 2023).

290 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Annexed 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, Oct. 10, 1980 [hereinafter CCW Protocol II].

291 *Id.* art. 5.

292 *Id.*

293 AP I, *supra* note 4.

in populated areas. In particular, Article 4(2) states that mine warfare is prohibited "in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent" unless landmines are placed close to the enemy's military objectives or appropriate measures are taken to protect civilians, such as the posting of warning signs.[294] The Protocol II obligations on recording the location of minefields are rather weak.

Toward a More Civilian-Friendly Regulation of Landmines

Efforts to strengthen the regulation of landmines within the CCW led to the adoption of Amended Protocol II in 1996.[295] It contains specific provisions on the use of APLs, understood as any mine "primarily designed" to be exploded by the presence, proximity, or contact of a person and that will incapacitate, injure, or kill one or more persons. Amended Protocol II prohibits the use of such mines which are "not detectable" as specified in the attached Technical Annex, and which do not comply with specific requirements of self-destruction and self-deactivation.[296]

The prohibition of non-detectable APLs in Amended Protocol II is, however, not absolute. Belligerent parties may still use APLs within perimeter-marked areas, or, under certain conditions, outside of such areas. The evident aim of these exceptions, as noted by Air Commodore Boothby, is to enable belligerent States to continue using APLs that do not comply with the more stringent standards of Amended Protocol II without, however, allowing the employment of long-term APL minefields.[297]

Amended Protocol II also made some useful improvements with regard to mine clearance, making each belligerent party responsible "for all mines…employed by it" and "to clear, remove, destroy or maintain" these in the area it controls after the hostilities.[298] Further, the Amended Protocol strengthens the precautionary obligations to protect civilians from the effects of landmines. It absolutely prohibits the use of landmines against civilians and civilian objects by way of reprisal, and introduces more stringent recording obligations.

In relation to remotely delivered landmines (RDLs), Amended Protocol II introduced a number of restrictions which affect both their design and use. Most notably, it prohibits the use of all such mines which are not fitted with self-deactivation or self-destruction mechanisms. It also significantly improved the recording obligations. With regard to anti-personnel RDLs, Amended Protocol II created a special regulatory framework identical to that of non-remotely delivered APLs, which aims to further restrict their use.

Although Amended Protocol II went to great lengths to reinforce the law applicable to mine warfare, it failed to achieve an outright

294 CCW Protocol II, *supra* note 290, art. 4(2).

295 CCW Amended Protocol II, *supra* note 59.

296 *Id.* at Technical Annex.

297 Boothby, Weapons and the Law of Armed Conflict, *supra* note 5, at 164.

298 CCW Amended Protocol II, *supra* note 59, art. 3.

ban on APLs. This became the overarching goal of the Ottawa Convention, which was negotiated outside the framework of the CCW.[299] It dictates that States parties shall "never under any circumstance" use, nor "develop, produce or otherwise acquire" APLs.[300] Instead, States parties are required to destroy their stockpiles of APLs.

Customary Nature of the Rules

The fact that a number of highly relevant States such as the United States, China, Russia, and India are not party to some of, or all, the instruments described above begs the question whether their norms reflect customary international law. The influential ICRC *Customary Law* study identifies only three basic customary rules applicable to mine warfare.[301] The more developed rules, including the ban on the use of APLs, thus seemingly lack customary status.

The Russia-Ukraine War

Russia and Ukraine have different obligations regarding mine warfare. While Russia and Ukraine both ratified Protocol II and Amended Protocol II, only Ukraine is a party to the Ottawa Convention. Thus, Ukraine may only use anti-vehicle landmines, whether manually or mechanically emplaced or remotely delivered. In doing so, it must comply with all the precautionary and protective measures set out in Amended Protocol II.

Conversely, Russia may lawfully use any type of landmine, including APLs, provided that it observes the specific design, monitoring, and clearance requirements indicated in the Technical Annex of Amended Protocol II. Like Ukraine, Russia is expected and bound to comply with all precautionary and protective measures contained in Amended Protocol II when using landmines of any sort and to observe the strict recording criteria contained in the Technical Annex when manually or remotely positioning APLs.

HPD Anti-Vehicle Mines

An illustrative example of the complex regulation of mine warfare in Russia's war of aggression in Ukraine is whether the belligerents may lawfully use French *Mine Antichar à Haut Pouvoir de Destruction* (HPD) anti-vehicle mines. According to open sources, these mines may detonate if their anti-handling device comes into contact with mine-detector signals.[302] This functionality may give the impression that the use of these mines is unlawful, and indeed, pro-Russian sources have made such allegations against Ukraine. However, Article 3(5) of Amended Protocol II only prohibits the use of landmines that are "specifically designed" to explode by the proximity of "commonly available" mine detectors. The necessary consequence of this language is that mines occasionally operating in this manner (such as HPD mines), but not

299 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Dec. 3, 1997, 36 I.L.M. 1507 [hereinafter Ottawa Convention].

300 *Id.* art. 1.

301 *Rule 81—Restriction on the Use of Landmines*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule81; *Rule 82—Recording of the Placement of Landmines*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule82; *Rule 83—Removal or Neutralization of Landmines*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule83.

302 Roly Evans & Bob Seddon, Explosive Ordnance Guide for Ukraine (2022).

"specifically designed" to do so, are generally exempted from the prohibition. Therefore, provided all due precautions are taken, the use of HPD mines by Ukraine is consistent with Amended Protocol II.

Concluding Thoughts

The use of landmines by Russia and Ukraine is not categorically prohibited. This may seem unsatisfactory from a strictly humanitarian perspective, but the war in Ukraine demonstrates the military utility of landmines. For example, dense Ukrainian minefields near Pavlivka stopped a Russian advance on Vuhledar. Nevertheless, the use of landmines, particularly APLs, during armed conflicts remains a matter of concern. These weapons are inherently unable to distinguish between combatants and civilians, and they may also remain a hazard for the civilian population even after the conflict has ended.

RUSSIAN BOOBY-TRAPS AND THE UKRAINE CONFLICT

by Michael N. Schmitt | Apr 5, 2022

As Russian troops pull back from the Kyiv area, they are leaving behind horrific evidence of international humanitarian law (IHL) violations and war crimes. Images from the suburb of Bucha, including the bodies of dead civilians with hands bound and mass civilian graves, are particularly shocking.[303] U.S. Secretary of State Blinken labeled them a "punch to the gut," while NATO's Secretary-General characterized the situation as "horrific."[304] The UN Secretary-General has called for an independent investigation leading to "effective accountability," and Ukraine has asked the International Criminal Court (ICC) to investigate.[305] In a shameless example of disinformation, the Russian Foreign Ministry countered, "Who are the masters of provocation? Of course the United States and NATO."[306]

In a speech condemning the slaughter, President Zelensky also charged Russian forces with rigging booby traps as they retreated. He alleged that "they are mining all this territory. Mining houses, equipment, even the bodies of killed people. Too many tripwire mines, too many other dangers."[307] The allegations have a ring of truth about them. Ukraine's emergency services have announced that in a single day, they found 1,500 explosives in the village of Dmytrivka.[308] Meanwhile, in Bucha, soldiers are using cables to drag bodies from the street out of fear they might explode.[309]

It is not the first time Russia has been accused of using booby-traps indiscriminately. During the conflict in Afghanistan, Soviet troops allegedly used, among other types, booby-trapped toys designed to attract children.[310] And Russian private military companies "attached explosives to toilet seats, doors and teddy bears, designed to detonate upon touch" during their Libyan operations in 2020.[311]

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303 Human Rights Watch, *Ukraine: Apparent War Crimes in Russia-Controlled Areas* (Apr. 3, 2022), https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas; Carlotta Gall & Andrew E. Kramer, *In a Kyiv Suburb, 'They Shot Everyone They Saw'*, N.Y. Times (Apr. 3, 2022), https://www.nytimes.com/2022/04/03/world/europe/ukraine-russia-war-civilian-deaths.html.

304 Jon Gerberg, *World Leaders Condemn Atrocities Alleged in Bucha, Ukraine*, Wash. Post (Apr. 4, 2022, 1:09 AM), https://www.washingtonpost.com/world/2022/04/03/russia-ukraine-war-news-putin-live-updates/; Mychael Schnell, *NATO Chief Calls Bucha Executions 'Horrific'*, The Hill (Apr. 3, 2022), https://thehill.com/news/sunday-talk-shows/3257583-nato-chief-calls-bucha-executions-horrific/.

305 *Ukraine: Secretary-General Calls for Probe into Bucha Killings*, UN News (Apr. 3, 2022), https://news.un.org/en/story/2022/04/1115442; Annabelle Timsit & Jennifer Hassan, *Signs of Massacre in Bucha Spark Calls for War Crimes Probes*, Wash. Post (Apr. 3, 2022), https://www.washingtonpost.com/world/2022/04/03/bucha-ukraine-graves-war-crimes-calls-icc/.

306 *Russia Says Footage in Ukraine's Bucha Was 'Ordered' to Blame Russia*, Reuters (Apr. 4, 2022), https://www.reuters.com/world/russia-says-footage-ukraines-bucha-was-ordered-blame-russia-2022-04-04/.

307 Volodymyr Zelenskyy, President of Ukraine, Speech Delivered via YouTube: Europe Has No Right to React in Silence to What Is Happening with Our Mariupol (Apr. 2, 2022), https://www.president.gov.ua/en/news/yevropa-ne-maye-prava-reaguvati-movchannyam-na-te-sho-vidbuv-74029.

308 *Zelensky Alleges Russian Troops Leaving Booby Traps Behind as Ukraine Regains Area Near Kyiv*, CBC (Apr. 2, 2022), https://www.cbc.ca/news/world/ukraine-russia-war-april2-2022-1.6406411.

309 *Id.*

310 John Hughes, *The Afghan Child and the Bright Red Plastic Truck*, Christian Science Monitor (Sept. 16, 1987), https://www.csmonitor.com/1987/0916/eafgh.html.

311 Sudarsan Raghavan, *The Libyan War's Lethal Legacy: Booby-Trapped Teddy Bears, Toilets and Soda Cans*, Wash. Post (May 29, 2021), https://www.washingtonpost.com/world/middle_east/libya-war-mines-explosives/2021/05/28/7d64da3c-9bab-11eb-8a83-3bc1fa69c2e8_story.html.

This post examines the IHL rules governing the use of booby-traps in international armed conflicts. As will be seen, they can be used lawfully in some circumstances. However, if the allegations against the Russian forces are true, their use of booby-traps violates IHL and constitutes war crimes on multiple bases.

General IHL Conduct of Hostilities Rules

A booby-trap is "any device or material which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act."[312] This definition includes both "field-expedient" devices, like a hand grenade rigged to explode when a door is opened, and devices explicitly designed as booby-traps, such as one made to look harmless but which explodes when disturbed.[313]

The general rules governing the conduct of hostilities apply fully to the use of booby-traps. Rigging a booby-trap qualifies as an "attack" to which the IHL rules regarding the conduct of hostilities apply. The International Committee of the Red Cross (ICRC) analogously, and correctly, made this point vis-à-vis mines in its 1987 *Commentary* to Additional Protocol I to the 1949 Geneva Conventions' definition of attacks.[314] Thus, using booby-traps intentionally to harm civilians qualifies as an attack on civilians, while using them without regard to whether they will harm combatants or civilians amounts to an indiscriminate attack.[315] Violation of these rules results in State responsibility for the side using them.[316] The conduct also amounts to a war crime for which those involved may be prosecuted.[317] Although early accounts are insufficiently granular to determine whether the Russian forces intended the booby-traps to be activated by civilians, their use in a population center before the entry of Ukrainian troops and emplacement where civilians are likely to be located, such as houses and near civilian bodies, makes violation of the indiscriminate attack prohibition highly likely.

Even when booby-traps are intended to target combatants, the rule of proportionality precludes their use if the expected *incidental* harm to civilians would be excessive relative to the anticipated military advantage of their use against combatants or others who may be targeted lawfully, such as organized armed groups and civilians who are directly participating in hostilities.[318] Indeed, even if an attack utilizing a booby-trap would not violate the proportionality rule, the Party

312 CCW Protocol II, *supra* note 290, art. 2(2); CCW Amended Protocol II, *supra* note 59, art. 2(4).

313 DoD Law of War Manual, *supra* note 8, § 6.12.2.

314 AP I Commentary, *supra* note 8, art. 49.

315 *See* AP I Commentary, *supra* note 8, art. 51; DoD Law of War Manual, *supra* note 8, § 6.12.5.1, 6.12.5.2; *Rule 1—The Principle of Distinction Between Civilians and Combatants*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1; *Rule 11—Indiscriminate Attacks*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule11.

316 Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Rep. of the Int'l L. Comm'n, 53rd Sess., U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10, art. 2 (2001) [hereinafter Articles on State Responsibility].

317 *See, e.g.*, Rome Statute, *supra* note 85, art. 8(2)(b)(1).

318 AP I, *supra* note 4, art. 51(4)(c); *Rule 14—Proportionality in Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14.

considering its use must assess whether there are other feasible means or methods (weapons or tactics) to achieve the same desired effect as the booby-trap while placing civilians at less risk.[319] For instance, if the Russian forces intended the booby-traps to wound or kill Ukrainian soldiers, were there other locations where they might have been placed to lower the risk to civilians?

International humanitarian law includes rules prohibiting various means and methods of warfare designed to protect combatants. For instance, it bans those that cause them superfluous injury or unnecessary suffering.[320] This prohibition would apply, for instance, to a booby-trap containing glass shards or contaminated objects intended to exacerbate injuries. Such acts are war crimes.[321]

It is also prohibited to perfidiously kill or wound the enemy.[322] Perfidy involves killing or wounding by inviting the enemy's confidence that the object, location, or person in question is entitled to protection under IHL. For example, killing Ukrainian troops using booby-trapped dead civilians qualifies, for civilians are protected under IHL, as are dead bodies.[323] Perfidy is a war crime.[324]

Specific IHL Booby-Trap Rules

International humanitarian law does not outlaw booby-traps altogether. However, given the grave risks booby-traps pose to the civilian population, IHL places stringent restrictions on their use. The ICRC, for instance, has concluded, correctly so, that the "use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians" is a violation of customary IHL.[325]

Of greater immediate relevance to the conflict in Ukraine is the 1980 Conventional Weapons Convention's Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices[326] and its 1996 Amended Protocol (II).[327] Russia and Ukraine are Parties to both the Protocol and Amended Protocol (for the U.S. interpretation of the Amended Protocol, see President's Letter of Transmittal).[328] This post focuses on the prohibitions in Amended Protocol II, which generally replicate those in Protocol II.

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319 AP I, *supra* note 4, art. 57; DoD Law of War Manual, *supra* note 8, § 6.12.5.3; *Rule 15—Principle of Precautions in Attack,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15.

320 Hague IV, *supra* note 79, art. 23(e); AP I, *supra* note 4, art. 35(2); DoD Law of War Manual, *supra* note 8, § 6.6; *Rule 70—Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule70.

321 *See, e.g.*, Rome Statute, *supra* note 85, art. 8(2)(b)(xx).

322 Hague IV, *supra* note 79, art. 23(b); AP I, *supra* note 4, art. 37; DoD Law of War Manual, *supra* note 8, § 5.2.2; *Rule 65—Perfidy*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule65.

323 *See Rule 113—Treatment of the Dead,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule113; *see also id.* (treaty sources cited therein).

324 *See, e.g.*, Rome Statute, *supra* note 85, art. 8(2)(b)(xi).

325 *Rule 80—Booby-Traps,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule80.

326 CCW Protocol II, *supra* note 290.

327 CCW Amended Protocol II, *supra* note 59.

328 U.S. President Letter of Transmittal, 105th Cong., S. Treaty Doc. No. 105-1 (Jan. 7, 1997).

Amended Protocol II forbids the use of booby-traps in three booby-trap-unique situations. First, Article 7(3) bans their use in "any city, town, village or other area containing a similar concentration of civilians" if "combat between ground forces is not taking place or does not appear to be imminent."[329] This includes booby-traps intended to harm combatants or other individuals who lawfully may be attacked. The provision contains two exceptions. Booby-traps may be employed to target enemy forces 1) if "placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party" or 2) when "measures are taken to protect civilians from their effects, for example, the posting of warning signs, the posting of sentries, the issue of warnings or the provision of fences."[330]

Most of Russia's reported use of booby-traps violates the provision. Russian troops have retreated from the areas in question and are unlikely to return; therefore, Article 7(3) applies. As to the exceptions, President Zelensky's reference to "equipment" implicates the first. No violation would lie if he was referring to abandoned military equipment (or other military objectives, like military facilities) that the Ukrainian forces would be expected to use. But if the equipment (or other objects) is civilian, as in the case of the houses of which Zelensky spoke, the first exception does not apply.

Moreover, there is no indication that Russian forces took any measures to protect the civilian population from the booby-traps. It is especially doubtful that Russian forces have made any attempt to record the location of the booby-traps, as is required by Article 9, in order to facilitate removal following the end of hostilities.[331] After all, they would, in many cases, be recording IHL violations and war crimes.

Second, booby-traps may not take the "form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached."[332] The U.S. Department of Defense's *Law of War Manual* provides the example of "booby-traps manufactured to resemble items, such as watches, personal audio players, cameras, toys, and the like."[333] It observes that the "prohibition is intended to prevent the production of large quantities of dangerous objects that can be scattered around and are likely to be attractive to civilians, especially children."[334]

In that regard, note that the provision does not bar the booby-trapping of actual harmless objects, such as cameras or houses. The prohibition only applies when the booby-trap is intentionally designed to look harmless, as in a booby-trap made to look like a camera. Nor does it prohibit booby-trapping non-portable harmless things, like a gate. And it only applies to booby-traps designed or otherwise manufactured to serve as a

329 CCW Amended Protocol II, *supra* note 59, art. 7(3).

330 *Id.*

331 *Id.* art. 9.

332 *Id.* art. 7(2).

333 DoD Law of War Manual, *supra* note 8, § 6.12.4.8.

334 *Id.*

booby-trap. Accordingly, it does not apply to field-expedient booby-traps or otherwise improvised ones. More information on the nature of the Russian booby-traps is required to determine whether this particular prohibition has been violated.

Third, booby-traps may not be attached or associated with the following specified objects:[335]

- internationally recognized protective emblems, signs or signals;
- sick, wounded or dead persons;
- burial or cremation sites or graves;
- medical facilities, medical equipment, medical supplies or medical transportation;
- children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
- food or drink;
- kitchen utensils or appliances except in military establishments, military locations or military supply depots;
- objects clearly of a religious nature;
- historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- animals or their carcasses.

The prohibition regarding internationally recognized protective emblems, signs, or signals resembles perfidy but is broader. It does not require harm to manifest and applies to the use of booby-traps targeting both combatants and civilians. Concerning the allegations leveled against the Russian forces, note that booby-trapping bodies is expressly forbidden, whether military or civilian.

Amended Protocol II emphasizes that certain prohibitions and obligations already resident in IHL apply to the use of booby-traps. In part, this was felt necessary because of a degree of disagreement over whether the mere emplacement of a mine, booby-trap, or other similar device constituted an "attack" under IHL and was therefore subject to those rules.[336] Article 3(7) prohibits directing booby-traps against civilians, while Article 3(8) bans indiscriminate use of booby-traps and Article 3(8)(c) applies the rule of proportionality to booby-traps.[337] Article 7(1) notes that the Protocol's prohibitions are "[w]ithout prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy."[338] And Article 3(3) prohibits the use of booby-traps that are "designed to cause superfluous injury or unnecessary suffering."[339]

Finally, Article 3(10) of Amended Protocol II requires "[a]ll feasible precautions [to] be taken to protect civilians from the effects of" booby-traps.[340] This restates the precautions in attack rule in Article 57 of Additional

335 CCW Amended Protocol II, *supra* note 59, art. 7(1).

336 DoD Law of War Manual, *supra* note 8, § 6.12.5.

337 CCW Amended Protocol II, *supra* note 59, art. 3(7), 3(8), 3(8)(c).

338 *Id.* art. 7(1).

339 *Id.* art. 3(3).

340 CCW Amended Protocol II, *supra* note 59, art. 3(10).

Protocol I and customary law.[341] Notably, Amended Protocol II, Article 3(10), defines feasible precautions as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."[342] Since Additional Protocol I contains no definition of feasibility, Article 3(10) is often looked to when assessing the scope of the general precautions in attack obligation.

Although the aforementioned prohibitions also appear in Protocol II, Amended Protocol II, *inter alia*, (1) extends Protocol II's prohibitions to non-international armed conflict (art. 1(2)), (2) imposes a ban on booby-traps "which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors" (art. 3(5)), and (3) adds a provision regarding doubt (art. 3(8)(a)).

As Russia is a Party to the instruments, the 2001 Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation (§ 9) reflect their prohibitions. In particular, the regulations forbid the following during combat operations:

> mines, booby-traps or other devices specially designed to detonate the munition by the presence of mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations;
>
> booby-traps which are placed outside a military objective and in any way attached to, or associated with: the internationally recognized protective emblems (signs or signals); sick, wounded persons or dead bodies; burial or cremation sites, graves; medical facilities, equipment, supplies or transport; children's toys or objects specially designed for children; food or drink; kitchen utensils or appliances (except those in military units); objects of a clearly religious nature; historic monuments, works of art or places of worship; animals or their carcasses;
>
> self-made booby-traps in the form of apparently harmless objects.[343]

If the allegations of Russian use of booby-traps in the manner alleged are substantiated, Russian troops have violated their own rules in addition to international law. Ukraine's 2004 *Manual on the Application of IHL Rules* likewise prohibits the use of "booby-traps which are in any way attached to or associated with: internationally recognized protective emblems, signs or signals, as well as with other apparently harmless objects (e.g. wounded or dead persons, medical equipment, children's toys and so forth)."[344]

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341 AP I, *supra* note 4, art. 57; *Rule 15—Principle of Precautions in Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15.

342 CCW Amended Protocol II, *supra* note 59, art. 3(10).

343 Ministry of Defense of the Russian Federation, Manual on International Humanitarian Law for the Armed Forces of the Russian Federation § 9 (2001).

344 Ministry of Defence of Ukraine, Manual on the Application of the Rules of International Humanitarian Law in the Armed Forces of Ukraine § 1.3.3 (2004).

Conclusion

It is too early to draw definitive conclusions about whether Russian troops engaged in the booby-trapping of which they have been accused. However, if the allegations are true, Russia is irrefutably responsible under international law for having violated multiple IHL rules, and its soldiers have committed war crimes that may, and should, lead to their prosecution.

LAWFUL USE OF NUCLEAR WEAPONS

by Jay Jackson and Kenneth "Daniel" Jones | Apr 26, 2022

The February invasion of Ukraine by Russian forces was followed by an even graver threat to global peace as the Kremlin announced President Vladimir Putin's order to raise Russia's nuclear forces into a higher state of alert. Reportedly, Putin's order enhances his forces' ability to transmit a nuclear launch order, making Russia less vulnerable "to decapitation in the event that either Putin or his top military advisers were dead or incapacitated."[345]

This was reported[346] as the first time such an action had been taken since the Russian Federation was established in 1991, and it coincided with a thinly veiled threat of a nuclear attack, with Putin promising that any nation attempting to stop him would face consequences "such as you have never seen in your entire history."[347] This was all done after Putin oversaw a nuclear forces exercise (including missile launches) just days prior to the invasion.[348]

Such saber rattling by Putin may lead onlookers to wonder about the state of the U.S. nuclear arsenal. What is its purpose? Under what circumstances would it be employed and how? Would (or could) a U.S. nuclear attack comply with the law of armed conflict (LOAC)?

Overview and U.S. Policy

The U.S. nuclear force is a triad of three distinct delivery platforms.[349] The naval component consists of fourteen OHIO-class submarines (SSBNs) armed with submarine-launched ballistic missiles. The OHIO-class SSBNs are scheduled to be replaced by twelve COLUMBIA-class SSBNs, designed to be operationally effective and survivable for decades to come.

The land-based component of the triad consists of 400 single-warhead Minuteman III intercontinental ballistic missiles (ICBMs) deployed in disbursed underground silos. This leg of the triad is also planned for modernization with the Ground-Based Strategic Deterrent (GBSD) program modernizing ICBM launch facilities and replacing the Minuteman III beginning in 2029.

The final component of the triad consists of 46 B-52H and 20 B-2A strategic bombers carrying gravity bombs and air-launched cruise missiles (ALCMs). The B-21 Raider is the next-generation bomber planned to supplement and eventually replace the rest of the bomber force beginning within the next several years.

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345 Missy Ryan, Karoun Demirjian et al., *With Russian Nuclear Forces on Alert, Ukraine Crisis Enters More Dangerous Phase*, Wash. Post (Feb. 27, 2022), https://www.washingtonpost.com/national-security/2022/02/27/ukraine-russia-nuclear-alert/.

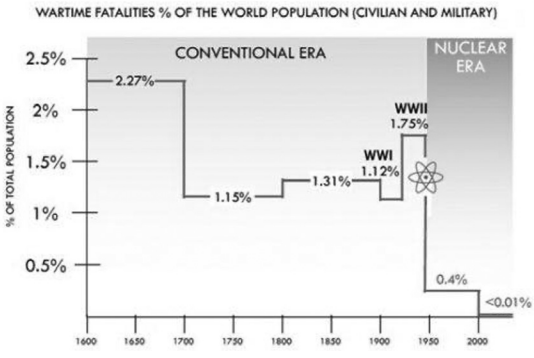
346 Lauren Jackson, *Are We Facing Nuclear War?* N.Y. Times (Mar. 11, 2022), https://www.nytimes.com/2022/03/11/podcasts/ukraine-russia-nuclear-putin.html.

347 Ryan et al., *supra* note 345.

348 Thomas Grove, *Putin Stokes Nuclear Fears with Atomic Weapons Warnings*, Wall St. J. (Mar. 27, 2022), https://www.wsj.com/articles/putin-stokes-nuclear-fears-with-atomic-weapons-warnings-11648381573.

349 Office of the Secretary of Defense, Nuclear Posture Review, IX–X (Feb. 2018), https://media.defense.gov/2018/Feb/02/2001872886/-1/-1/1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.PDF [hereinafter Nuclear Posture Review].

Why maintain such a lethal force? How can members of the United States Strategic Command truly believe in their motto "Peace Is Our Profession"? It may seem counterintuitive, but the deterrent effect of nuclear weapons has made the world a remarkably safer place. Through the introduction of its nuclear umbrella, the United States made essential contributions to the deterrence of nuclear and non-nuclear aggression. The subsequent absence of great power conflict has coincided with a significant and sustained reduction in the number of lives lost to war globally, as demonstrated in the figure below.[350]



This dramatic reduction in wartime fatalities is, of course, a credit not to the use of nuclear weapons but to their deterrent effect. Generally, deterrence "prevents adversary action through the presentation of a credible threat of unacceptable counteraction and belief that the cost of the action outweighs the perceived benefits."[351]

Successful deterrence is a triad itself, requiring capability (the means to influence an adversary's behavior), credibility (the adversary's believability that proposed actions could actually be employed), and communication (transmitting will and capability to the adversary).[352] Nuclear deterrence has historically led to fewer and smaller conflicts, and discouraged the use of weapons of mass destruction, including chemical, biological, radiological, and other nuclear weapons. The United States' historical position is that it would consider employment of nuclear weapons only "in extreme circumstances and for defensive purposes."[353]

Lawfulness of Nuclear Weapons Generally

While the United States has demonstrated its capability to use nuclear weapons and communicated its willingness to do so in certain circumstances, the question remains as to whether such communication is credible in light of the United States' advocacy of and adherence to the rules-based international order. For the United States to credibly state that (1) it adheres to international law and (2) that it would use nuclear weapons if necessary, it follows that any use of nuclear weapons must comply with international law. Nuclear deterrence is diminished if adversaries do not believe that the United States would violate its strongly held respect for the international law in order to use nuclear weapons. Demonstrating that nuclear weapon use would comply with international law therefore increases nuclear deterrence.

350 *Id.* at 17.

351 Joint Chiefs of Staff, Joint Pub. 3-0, Joint Operations, at VI-4 (Jan. 17, 2017) (Change 1, Oct. 22, 2018).

352 *Id.* at xxii.

353 Nuclear Posture Review, *supra* note 349, ¶ 23.

The International Court of Justice (ICJ) offered the most conclusive opinion on the lawfulness of nuclear weapons in a 1996 advisory opinion, *Legality of the Threat or Use of Nuclear Weapons*.[354] The Court observed that the protection of the International Covenant on Civil and Political Rights—and in particular the prohibition against arbitrary deprivation of life—generally does not cease in times of war. However, "the test of what is an arbitrary deprivation of life [is] determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."[355]

This was precisely what the United States argued in its letter to the Court from the Acting Legal Adviser to the State Department: "[V]arious principles of the international law of armed conflict (LOAC) would apply to the use of nuclear weapons as well as to other means and methods of warfare."[356] On balance, the United States argued, LOAC principles do not prohibit the use of nuclear weapons *generally,* and any *specific* prohibition would depend "on the precise circumstances involved in any particular use of a nuclear weapon."

In fact, the nuclear-weapon States appearing before the Court, including the United States, accepted that "their independence to act was indeed restricted by the principles and rules of international law."[357] The Court ultimately reached a number of conclusions relevant here:

> There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;…
>
> There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such; [and] …
>
> A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law.[358]

While some States continue to assert that nuclear weapons are illegal per se, the United States has not accepted any such treaty rule "and thus nuclear weapons are lawful weapons for the United States."[359] It is the U.S. position, consistent with the 1996 ICJ advisory opinion, that LOAC governs the use of nuclear weapons just as it governs the use of conventional weapons.

In light of the conclusion that the use of nuclear weapons does not violate international law *per se*, we next turn to applying LOAC principles to attacks with nuclear weapons. After all, U.S. policy states that if deterrence fails, it would "minimize civilian damage to the extent possible consistent with achieving objectives," and "the initiation and conduct of nuclear operations would

354 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

355 *Id.* at 240.

356 Letter with Written Statement of the U.S. Gov. from Michael J. Matheson, Acting Legal Advisor, U.S. Dept. of State, to Eduardo Valencia-Ospina, Registrar, I.C.J. (June 20, 1995), https://www.icj-cij.org/public/files/case-related/95/8700.pdf [hereinafter 1995 Dept. of State Letter].

357 Advisory Opinion, 1996 I.C.J. at 239.

358 *Id.*

359 DoD Law of War Manual, *supra* note 8, § 6.18.

adhere to the law of armed conflict."[360] The specific LOAC principles discussed below are military necessity, humanity, distinction, and proportionality.

Military Necessity

The LOAC principle of military necessity "justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible" that are not otherwise prohibited by LOAC. Because LOAC seeks to establish general rules of broad applicability, attacking enemy combatants and military objects is generally viewed as satisfying this principle.[361] Military necessity also justifies incidental harm that may result from military action (consistent with the principle of proportionality, described below).[362] Provided that attacks were made against military objectives—that is, enemy combatants or other lawful military targets—use of nuclear weapons to end a conflict and restore deterrence would generally satisfy this LOAC principle since military necessity is based on the "broader imperatives of winning the war and not only the demands of the immediate situation."[363]

Humanity

Humanity may be defined as the principle that forbids "the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose."[364] In effect, humanity is the other side of the military necessity coin—"if certain necessary actions are justified, then certain unnecessary actions are prohibited."[365]

Prior to the ICJ's 1996 advisory opinion, some States argued that "use of nuclear weapons would violate the prohibition on the use of weapons that are of such a nature as to cause superfluous injury or unnecessary suffering."[366] In its response, however, the United States explained that the prohibition against unnecessary injury and suffering is applicable only to *increased* injury and suffering beyond that which is necessary to accomplish the military objective. In other words, the principle of humanity does not prohibit "weapons that may cause great injury or suffering if the use of the weapon is necessary to accomplish the military mission."[367] For example, anti-tank munitions which must penetrate armor with increased kinetic or incendiary effects are not unlawful even though they may also cause severe and painful burns to the tank crew. The ICJ's conclusion that there is no "universal prohibition of the threat or use of nuclear weapons" is consistent with the U.S. position on this point.[368]

Distinction

The principle of humanity provides the foundation of the separate principle of distinction and civilian immunity from attack,

360 1995 Dept. of State Letter, *supra* note 356, at 23.

361 DoD Law of War Manual, *supra* note 8, § 2.2.3.2.

362 *Id.* § 2.2.

363 *Id.* § 2.3.3.1.

364 *Id.* § 2.3.

365 *Id.* § 2.3.1.1.

366 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

367 1995 Dept. of State Letter, *supra* note 356, at 27.

368 Advisory Opinion, 1996 I.C.J. at 266.

since the "inoffensive and harmless character [of civilians] means that there is no military purpose served by attacking them."[369] Under the principle of distinction, combatants may attack "enemy combatants and other military objectives," but not the civilian population or other protected persons and objects.[370] Determining whether a particular target is a military objective involves a two-part test, adopted by Additional Protocol I, Article 52(2), and the DoD *Law of War Manual*.[371]

First, the object must, "by its nature, location, purpose or use," make an effective contribution to military action. "Nature" refers to the type of object, especially those objects that are inherently military, like military aircraft, combatants, or munitions. "Location" refers objects and places of military value because of their geospatial significance, such as a beach that would be used as an embarkation point for an assault. "Purpose" refers to an intended or possible future use, like a bridge which provides the enemy a route of advance. "Use" refers to the object's present function, like using an apartment building as an observation post or for military billeting.[372]

The "effective contribution to military action" made by a military object does not need to be direct or proximate—the contribution may be functionally remote (like a facility that manufactures items intended to be used in war materiel) or geographically remote. Similarly, a military objective is not required to provide immediate tactical or operational gains to the adversary in order to make an effective contribution.

In past conflicts, military objectives have included leadership facilities, communications objects, transportation objects, places of military significance, and economic objects associated with military operations or with war-supporting or war-sustaining industries (though such facilities may not be military objectives in all circumstances).[373] War-supporting or war-sustaining industries like electric power stations and objects associated with petroleum, oil, and lubricant production generally constitute lawful objectives so long as they make an effective contribution to military action.[374]

Second, in order to be a lawful target under LOAC, a proposed military objective must be one "whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[375] "Definite" means concrete and perceptible, "rather than one that is merely hypothetical or speculative."[376] Targets whose destruction is intended solely to cripple civilian morale or the adversary's economy, for example, would not result in a definite military advantage because any resulting military effect would not be concrete and perceptible.

Many objects have both a military and civilian purpose, described as "dual use."

369 DoD Law of War Manual, *supra* note 8, § 2.3.1.

370 *Id.* § 5.5.

371 AP I, *supra* note 4, art. 52(2).

372 DoD Law of War Manual, *supra* note 8, § 5.6.6.1.

373 *Id.* § 5.6.8.

374 *Id.* § 5.6.8.5.

375 *Id.* § 5.6.3.

376 *Id.* § 5.6.7.3.

Airports, ships, aircraft, buildings, roads, bridges, and economic objects associated with military operations may all, depending on the circumstances, constitute objects that are usable by both military forces and the civilian population. Nonetheless, if such an object satisfies the LOAC principle of distinction, it is a military objective and may be attacked. It is still necessary, however, to consider whether such an attack would satisfy the LOAC principle of proportionality.[377]

While the United States does not adopt in either its letter to the Court or the DoD *Law of War Manual* a separate view of distinction for nuclear weapons, thus leaving all lawful objects as targetable subject to the other principles, some target types would be better suited for nuclear attack than others. For example, some targets, based on their size or protection measures, may be better suited to a nuclear weapon than a conventional attack. In addition to legal considerations, policy and operational restraints will impact the decision to use nuclear weapons against certain targets, especially given New Start[378] limits on the number of weapons available.

Proportionality

Proportionality is especially relevant to nuclear operations, since it refers to the principle that "even where one is justified in acting, one must not act in a way that is unreasonable or excessive."[379] This LOAC principle creates an obligation for military forces

> to refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained and to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.[380]

The determination of what amount of harm is "excessive" is a difficult one, since the military commander or planners compare two different variables—"the concrete and direct military advantage anticipated to be gained" and "expected harm incidental to such attacks." For that reason many States have declined to even use the term "proportionality," reasoning that a precise comparison would be impossible. Accordingly, the standard for making a determination of proportionality is due regard or diligence—not an absolute requirement to avoid incidental civilian harm completely—since such harm is "unfortunate and tragic, but inevitable."[381] Judgments of proportionality must be made in good faith and are based on information available at the time of the decision.[382] What is clearly prohibited is wanton disregard for civilian casualties or harm to other protected persons.

To satisfy the LOAC requirement to take "feasible precautions," belligerents may take actions such as an assessment of the risk to civilians, providing advance warning of an

377 *Id.*

378 U.S. Department of State, New START Treaty, https://www.state.gov/new-start/.

379 DoD Law of War Manual, *supra* note 8, § 2.4.

380 *Id.* § 2.4.1.2.

381 *Id.*

382 *Id.* § 5.3.2.

attack, adjusting the timing of an attack, or selecting appropriate weapons or aim points—all with the goal of minimizing civilian harm.[383] Commanders and planners need not account for every possible precaution, only those that are "practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian *and military* considerations (emphasis added).[384]

To demonstrate one example of feasible precautions in nuclear operations, Professors Scott D. Sagan and Allen S. Weiner have described an "accuracy revolution" in missile guidance technology which allows the United States "to place nuclear and conventional warheads much closer to an intended target than was possible during the Cold War."[385] This accuracy revolution has occurred simultaneously with a "low-yield revolution" which has enabled the United States to develop a more flexible nuclear arsenal:

> For example, the Polaris A-1 submarine-launched ballistic missile (SLBM), deployed on U.S. submarines in 1960, had a circle error probable (CEP) of 5,900 feet and carried a 600-kiloton nuclear warhead. Half of the time, therefore, that massive thermonuclear weapon would have detonated over 1.1 miles away from the intended target, killing many civilians. The Polaris A-1 SLBM was an indiscriminate weapon. In contrast, today the United States has deployed a nuclear weapon (the B61-mod 12) with a dial-a-yield capability that reportedly can reduce the yield to 2 percent of the atomic bomb that destroyed Hiroshima, generate less radioactive fallout, and has a CEP of less than 100 feet. Although a vigorous debate has emerged among scholars and in Congress about the policy implications of these technological developments, the basic facts about increased accuracy, lower yield, and reduced fallout are undisputed.[386]

While the authors of this paper do not confirm the specific facts cited in Sagan and Weiner's analysis, the general ideas of increased accuracy and the ability to adjust yield reflect the United States' commitment to proportionality and the minimization of civilian harm.

Reprisals

A final potential, but controversial, use of nuclear weapons is worth mentioning here, one that need not be entirely consistent with the LOAC principles outlined above.[387] In certain circumstances, military forces may take actions that would otherwise be unlawful under LOAC in order to persuade an adversary to cease *its* ongoing violations of LOAC—such acts are known as reprisals.[388]

Some treaties prohibit specific means of reprisal. For example, the 1949 Geneva Conventions prohibit reprisal against "wounded, sick, and shipwrecked persons,"

383 *Id.* § 5.11.

384 *Id.* § 5.2.3.2.

385 Allen S. Weiner & Scott D. Sagan, *The Rule of Law and the Role of Strategy in U.S. Nuclear Doctrine*, 45 Int'l Sec. 126, 126–127 (2021).

386 *Id.*

387 Scott Sagan & Allen Weiner, *The Illegality of Targeting Civilians by Way of Belligerent Reprisal: Implications for U.S. Nuclear Doctrine*, Just Security (May 10. 2021), https://www.justsecurity.org/76049/the-illegality-of-targeting-civilians-by-way-of-belligerent-reprisal-implications-for-u-s-nuclear-doctrine/.

388 DoD Law of War Manual, *supra* note 8, § 18.18.

and the 1954 Hague Cultural Property Convention prohibits reprisal against cultural property.[389] But reprisals are lawful if not otherwise prohibited by treaty when certain conditions are met.

First, reprisal should follow a thorough factual investigation to confirm that the enemy has, in fact, violated the law.[390] Second, reprisal should only be used after other means of securing compliance have been exhausted, like protests, demands, and reasonable opportunity to cease LOAC violations prior to the reprisal.[391] Third, it is recognized that the "authority to conduct reprisal is generally held at the national level" and that individual units and military personnel are not authorized to take reprisal action (reprisal by nuclear weapons, of course, would always satisfy this criterion).[392] Fourth, reprisal must be proportional. This is not the same as the LOAC principle of proportionality described above. The DoD *Law of War Manual* states that proportionality in reprisal may "not be unreasonable or excessive compared to the adversary's violation," although elsewhere, the United States has advocated that proportionality in reprisal is what is "appropriate to bring the wrongdoing State into compliance."[393] Finally, in order to fulfill the purpose of dissuading a State from illegal conduct, reprisals must be communicated clearly and publicly.[394] These conditions would make preplanning reprisal targeting prior to the potential violation, especially the required legal advice, nearly impossible and require national-level guidance.[395]

Conclusion

The United States—along with 190 other States that have signed and ratified the Nuclear Non-Proliferation Treaty—has committed to an eventual "cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery," with the long-term goal of global nuclear disarmament.[396] But as Russia's invasion of Ukraine and nuclear saber rattling demonstrate, the global community today contains rogue actors whose aggression threatens global peace and international order. Until a time when global security conditions allow for responsible and verifiable disarmament, nuclear weapons serve as a critical deterrent to global conflict and guarantor of peace, the use of which is consistent with international law.

389 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4(4), May 14, 1954, 249 U.N.T.S. 240.

390 DoD Law of War Manual, *supra* note 8, § 18.18.2.1.

391 *Id.* § 18.18.2.2.

392 *Id.* § 18.18.2.3.

393 *See id.* § 18.18.2.4; U.S. Dep't of State, Draft Articles on State Responsibility: Comments of the Government of the United States of America ¶ 2.b (Oct. 22, 1997).

394 DoD Law of War Manual, *supra* note 8, § 18.18.2.5.

395 U.S. Dep't Defense, Dir. 2311.01E, DoD Law of War Program (May 9, 2006).

396 Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S 161.

CHAPTER VI

TARGETING

EFFECTS-BASED ENFORCEMENT OF TARGETING LAW

by Geoff Corn and Sean Watts | Jun 2, 2022

The international armed conflict between Russia and Ukraine tragically demonstrates that the European continent is still not immune from war. It also illustrates that the laws of war are only as effective as the leadership and discipline that guides military forces engaged in hostilities. The conflict in Ukraine is a prime example of how any diminishment of either dramatically increases and may even guarantee law-of-war violations and war crimes.

The conflict also reminds us that some of the worst war crimes result from targeting operations. Wars are awful, but some of the most awful wars are those that abandon military logic, humanity, and morality in the use of destructive combat power. Attacks on civilians, use of indiscriminate weapons, and unlawful tactics naturally evoke a visceral demand for accountability.

Condemnation and accountability, however, require evidence that meets the law's standards of proof and persuasion. While it is often instinctive to assume an immediate correlation between civilian casualties and illegality, it is essential to rigorously consider how compliance and violation are credibly and objectively sorted from one another. To that end, the focal point of inquiry related to targeting operations must be the attack *judgment*, not the attack *outcome*.

To be sure, attack effects often provide powerful indicia related to this evaluation. The captivating visual nature of attack effects—especially harm to civilians and civilian property—make them an enticing focal point.[1] But attack effects can also offer incomplete or even misleading impressions of legality. Targeting law tolerates even extensive civilian harm so long as it is incidental to sufficiently compelling anticipated direct and concrete military advantage.

Therefore, sound legal evaluations of attacks demand consideration of the complexities normally associated with the totality of the operational and tactical circumstances—the enemy situation, friendly situation, anticipated civilian risk, available resources and assets, alternative options, timing and pace of operations, urgency, knock-on effects—all of which inform attack decisions.

All the same, as recent operations in Ukraine suggest, in some situations attack effects nearly speak for themselves. Indeed, some deaths and destruction appear to present almost conclusive evidence of law-of-war violations and unlawful attack judgment.

[1] *Documenting Atrocities in the War in Ukraine*, N.Y. Times (May 22, 2022) https://www.nytimes.com/interactive/2022/05/22/world/europe/ukraine-war-crimes.html.

This is particularly true when operations demonstrate an overall, systemic, and pervasive pattern of disregard for legal limits on warfighting. Even in this context, however, drawing *ipso facto* conclusions of illegality solely from attack effects must be done cautiously.

This post emphasizes that decisional analysis is essential to sound enforcement of targeting law. We concede that the evidentiary value of attack effects can increase as patterns emerge that indicate military force is not being used under genuine responsible command.[2] Patterns of effects can be highly probative of leadership and attack judgments that disregard law-of-war obligations. But ultimately, legal evaluations of an attack must be grounded in probative and reliable evidence of the attack judgment itself.

Gotovina, Gaza, and Effects-Based Condemnations

Attack effects, as noted above, are increasingly observable, publicized, and emotive. That lethal and destructive attack effects generate suspicion of war crimes is both understandable and logical. Nonetheless, experience shows that converting suspicions to conclusions based primarily on such effects is a fraught legal path.

This was the controversial road taken by a trial chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Gotovina et al.* Ante Gotovina, a Croatian general ordered to reclaim the breakaway Croatian-Serb area of Krajina, commanded an offensive that involved indirect fire against targets in the Krajina capital city of Knin.[3] Those fires resulted in substantial destruction—mostly inflicted on military objectives but also undeniable collateral damage to civilian property—and an undetermined number of civilian casualties.

The Prosecutor made the Knin attacks the centerpiece of a broader allegation that Gotovina and his co-accused carried out a campaign to terrorize the civilian population and to ethnically cleanse the area. Careful consideration of the operational situation, however, painted a very different picture, one of a commander endeavoring under challenging operational conditions and in good faith to identify and engage military objectives, deliberately located in a population center, in support of a larger effort to defeat enemy-entrenched forces surrounding the city. A group consisting of both operational law experts and experienced combat commanders shared this conclusion.

Nonetheless, the Trial Chamber convicted Gotovina and General Mladen Markač, focusing almost exclusively on attack effects.[4] Most infamously, the Chamber concluded that any munition crater 200 meters (about 700 feet) or more from a putative military objective was *ipso facto* proof of an illegal attack.

The ICTY Appeals Chamber not only reversed that conviction; it also concluded that

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2 Geoffrey S. Corn, *Contemplating the true nature of the notion of "responsibility" in responsible command*, 96 Int'l. Rev. Red Cross 901 (2014).

3 Prosecutor v. Gotovina et al., Case No. IT-06-90 (Int'l Crim. Trib. for the Former Yugoslavia).

4 Prosecutor v. Gotovina et al., Case No. IT-06-90-T, Judgement Vol I of II (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

the evidence was not sufficient to support a rational finding of guilt.[5] The Appeals Chamber did not remand the case but rather made an extremely rare substitution of an acquittal. While procedurally controversial to this day, the primary rationale for this unusual appellate decision was that the same attack effects the Trial Chamber used to convict were, in fact, highly inconclusive in an operationally complex environment and not sufficient alone to justify conviction.

Further and compelling examples of a rush-to-war-crimes judgment based on attack effects have arisen in the periodic and tragic flare-ups of hostilities between Israel and Hamas (and other organized armed groups) in Gaza. It is well documented that Israel Defense Forces (IDF) strikes in Gaza often result in substantial damage and destruction of civilian property and loss of civilian lives. These effects generate public outcry and near-automatic allegations of war crimes. After all, what else could explain such terrible effects from a military as capable as the IDF?

In fact, a lot—not least, an enemy that deliberately nests vital military assets amongst civilians and civilian property to achieve tactical and strategic advantage. In Gaza, IDF hesitation or refrain from attack is a tactical Hamas win. Meanwhile, every attack IDF commanders launch that inflicts incidental civilian death, injury, or collateral damage is a Hamas strategic win, particularly in the information domain.

Are the effects of IDF attacks relevant and probative to war crime assessments? Of course. Are they conclusive? Rarely. Without considering the totality of the situation that frames these attack decisions, particularly how the situation appears to commanders at the time of these decisions, concluding that attack effects prove war crimes is akin to concluding 1 + "I don't know" = 10.

Admittedly, and particularly outside the circle of command involved in a strike, discerning the totality of circumstances surrounding an attack is extremely challenging. Moreover, re-creating the intensely time-sensitive judgment process of combat decision-making and the supporting ex ante legal assessment may often be impossible. But this is an inherent aspect of converting ex ante operational judgments into the basis for criminal responsibility.

Indeed, it is not so different than the challenge confronting any investigator, prosecutor, or juror tasked with assessing the legality of a police officer's use of force, a challenge that often leads to "effects-based" suspicion of wrongdoing without sufficiently compelling evidence to justify criminal condemnation. Yet as challenging as it may be to assess criminality for what we *suspect* to be war crimes, it is essential that investigative and legal assessments resist the powerful pull of affirmation biases and the path of least resistance offered by exclusively effects-based conclusions. To succumb to the temptation of *post-hoc*, effects-based condemnations is to undermine the carefully honed logic of the law of war. Worse, it is to subject commanders to a profoundly unjust standard.

[5] Prosecutor v. Gotovina et al., Case No. IT-06-90-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

Attack Effects in Ukraine

Investigations of the hostilities in Ukraine are already underway. The Prosecutor of the International Criminal Court began an investigation at the behest of over 40 States in March 2022.[6] The Organization for Security Cooperation in Europe has already dispatched a mission of experts who submitted a report on violations of the law of armed conflict, war crimes, and human rights law.[7] Meanwhile, Ukraine itself has opened investigations into hundreds of incidents and has even secured a guilty plea in its first war crimes prosecution of a Russian soldier.[8]

In addition to reports of custodial abuses, deportations, property crimes, and breaches of occupation law obligations, each of these enforcement efforts has already examined or will soon examine the conduct of attacks and their aftermath. In terms of scale, they have their work cut out for them. The conflict has already seen enormous destruction resulting from attacks with grave humanitarian consequences to civilian lives and property. These effects already exceed the consequences of the strikes examined in the Gotovina proceedings and may even rival those resulting from the various stages of the prolonged Gaza conflict. Securing and sifting through the mountains of evidence produced in Ukraine will be a monumental investigative and prosecutorial task.

But these efforts have their legal work cut out for them as well. The scale of human suffering in Ukraine, the heart-wrenching pictures of apparently civilian bodies strewn around targets, and the unshakable images of valuable and even essential infrastructure destroyed by strikes and shelling will inspire a near-irresistible urge for comprehensive accountability.

While lamentable in human terms, as explained above, these effects are rarely sufficient in legal terms to establish breaches of the law of war or war crimes. While often probative of violations of the law-of-war targeting rules, they are almost never dispositive. That "almost" may, however, be rebuttable through evidence that under no circumstances could the object attacked have been reasonably considered a military objective or through evidence that under no circumstances could the foreseeable civilian harm have been legally offset by the anticipated military advantage gained through the attack.

Similarly, as Professor Garraway suggested recently, when a pattern of repeated effects presents clear and compelling evidence that an armed force has not engaged in or systemically does not undertake meaningful precautions in attacks, reliable conclusions may be drawn as to war crimes judgments.[9] In this regard, Ukraine may represent an

6 Situation in Ukraine, ICC-01/22, Investigation (Mar. 2, 2022).

7 Press Release, OSCE, Ukraine appoints mission of experts following invocation of the OSCE's Moscow Mechanism (Mar. 15, 2022), https://www.osce.org/odihr/513973; Wolfgang Benedek, Veronika Bílková & Marco Sassòli, *Report on Violations of International Humanitarian and Human Rights Law*, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022, ODIHR.GAL/26/22/Rev.1 OSCE (Apr. 13, 2022).

8 Pavel Polityuk, *Russian solider pleads guilty in war crimes trial in Ukraine*, Reuters (May 19, 2022), https://www.reuters.com/world/europe/ukraine-holds-first-full-hearing-war-crimes-trial-russian-soldier-2022-05-18/.

9 Charles Garraway, *Fact-Finding in Ukraine: Can Anything Be Learned from Yemen?* Articles of War, https://lieber.westpoint.edu/fact-finding-ukraine-anything-learned-yemen/.

outlying example from the usual decision-focused law-of-war standard, one in which war crimes affirmation bias appears to align consistently and reliably with objective facts relating to decision making.

The Probative Value of Precautions

So how should attack effects be assessed? Effects certainly play an important role in both forming a reasonable suspicion of unlawful attacks and in determining whether guilt for war crimes related to attacks is established beyond a reasonable doubt. But because the ultimate legal question focuses on the suspected defendant's alleged criminal mental state in relation to the attack decision, effects are by definition circumstantial evidence. They support inferences related to the legality of an attack *judgment*. This means that other critically important circumstantial evidence must be considered to determine whether it aligns with or contradicts an effects-based inference of an unlawful attack. Most often, clear evidence of the situation as it appeared to the attacker in the circumstances ruling at the time and a picture of the command measures taken in those circumstances prove most probative in the assessment of whether an attack was unlawful.

In that respect, precautionary measures taken to mitigate risk to civilians play a powerful role in this assessment.[10] Each of us has expressed views on such precautions' value as freestanding legal obligations.[11] But we agree that exercise or failure to exercise "constant care" to minimize risk to and suffering of civilians in hostilities is highly probative to whether commanders and subordinates have met their humanitarian legal requirements.

Like attack effects themselves, precautionary measures are not conclusive as to attack legality. But it is entirely logical to assess whether reasonable attack judgment has been exercised by considering whether feasible precautions were implemented in relation to the attack or the broader combat operation. In short, the greater the evidence that a commander endeavored to mitigate civilian risk through precautionary measures, such as reconnaissance, target assessment and confirmation, warnings and evacuations, weapon choice, and methods and timing of attack, the lower the probability that adverse attack effects were the result of a criminal state of mind.

That final point may be one of the most important facets of the conflict in Ukraine. There are scant objective indications that Russian forces have made meaningful and consistent efforts to implement civilian risk mitigation precautions. Instead, from Vladimir Putin down to what appears to be the very lowest levels of tactical command, indifference (if not outright disdain) for the law of war seems to be the controlling norm.

Comparing this pattern of conduct with the situation in Knin, or with the most recent IDF military campaign against Hamas, presents a

[10] Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 57, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[11] Geoffrey S. Corn, *War, Law and Precautionary Measures: Broadening the Perspective of This Vital Risk Mitigation Principle*, 42 Pepperdine L. Rev. (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2485624; Sean Watts, *Law of War Precautions: A Cautionary Note* (June 7, 2018), http://dx.doi.org/10.2139/ssrn.3202852.

stark contrast. That contrast is arguably the most compelling *indicia* that what we assume we are witnessing in Ukraine is, in fact, exactly what we assume: a campaign involving the unlawful employment of combat power in overall disregard of the law of armed conflict's most fundamental humanitarian obligations.

Conclusion

We applaud efforts underway to establish accountability for war crimes committed in the Ukraine-Russia conflict. At the same time, we urge a cautious legal approach to the conflict's destructive consequences. While we concede that in some circumstances, attack effects may support initiation of investigations or even prosecutions, such cases are extraordinarily rare. Most often, evidence of the circumstances of the attack judgment is required to responsibly and justly verify war crimes. Vigilant and rigorous attention to the evidentiary demands of the law of war, and a cautious, even circumspect approach to attack effects, will best serve justice, avoid the errors of preceding enforcement efforts, and preserve the law of war as a relevant and effective restraint on combat.

AMNESTY INTERNATIONAL'S ALLEGATIONS OF UKRAINIAN IHL VIOLATIONS

by Michael N. Schmitt | Aug 8, 2022

On 4 August, Amnesty International released a report criticizing Ukraine for placing civilians at risk "by establishing bases and operating weapons systems in populated residential areas, including in schools and hospitals."[12] The organization asserted that "such tactics violate international humanitarian law and endanger civilians, as they turn civilian objects into military targets. The ensuing Russian strikes in populated areas have killed civilians and destroyed civilian infrastructure."

The report made headlines[13] and sparked a firestorm of controversy on social media.[14] Unsurprisingly, the Ukrainian government's reaction was quick and condemnatory.[15] President Zelensky claimed the report seeks to "shift the responsibility from the aggressor to the victim," while Foreign Minister Kuleba complained, "This behavior of Amnesty International is not about finding and reporting the truth to the world, it is about creating a false balance between the criminal and the victim." And Presidential Adviser Podolyak's emotive Twitter comment exemplified the reaction of many: "The only thing that poses a threat to Ukrainians is [the Russian] army of executioners and rapists coming to [Ukraine] to commit genocide. Our defenders protect their nation and families."[16]

In this post, I will briefly comment on the controversy. The piece will then turn to the law that applies to the allegations. Although Amnesty International did not delineate the international humanitarian law (IHL) rules Ukraine purportedly violated, the incidents it describes suggest three: the use of human shields, failure to take "passive precautions" to protect the civilian population against the effects of attacks, and misuse of protected places.

Unfair or Misguided Criticism

Much of the criticism directed at Amnesty International is unfair or misguided. Some critics claim the report displays bias. Yet Amnesty International has frequently condemned Russian actions.[17] Even the report in question did so (e.g., its indiscriminate attacks).[18] To suggest Amnesty International is biased against Ukraine is simply unfair.

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12 Amnesty International, *Ukraine: Ukrainian fighting tactics endanger civilians* (Aug. 4, 2022), https://www.amnesty.org/en/latest/news/2022/08/ukraine-ukrainian-fighting-tactics-endanger-civilians/.

13 *See, e.g.*, Isobel Koshiw & Luke Harding, *Ukraine 'endangers civilians' with army bases in residential areas, says Amnesty,* The Guardian (Aug. 4, 2022), https://www.theguardian.com/world/2022/aug/04/ukraine-civilians-army-bases-amnesty-russia-war.

14 *See, e.g.*, Amnesty International (@amnesty), X (formerly Twitter) (Aug. 4, 2022), https://twitter.com/amnesty/status/1555102962623594496.

15 *Amnesty International says Ukraine's tactics have endangered civilian lives, drawing fierce rebuke*, N.Y. Times (Aug. 4, 2022, updated Dec. 8, 2022) https://www.nytimes.com/live/2022/08/04/world/ukraine-russia-news-war?smtyp=cur&smid=tw-nytimes#amnesty-international-says-ukraines-tactics-have-endangered-civilian-lives-drawing-a-fierce-rebuke.

16 Михайло Подоляк (@Podolyak_M), X (formerly Twitter) (Aug. 4, 2022), https://twitter.com/Podolyak_M/status/1555140038379315201.

17 Amnesty International, *Ukraine Russia* search results, https://www.amnesty.org/en/search/ukraine%20russia/.

18 *Indiscriminate attacks*, ICRC Casebook, https://casebook.icrc.org/a_to_z/glossary/indiscriminate-attacks.

Other criticism focused on either the fact that Russia had initiated the conflict or that the conduct of Russian forces has been appalling. It is, of course, indisputable that no legal justification for Russia's invasion exists and that Russian troops have engaged in widespread IHL.[19]

But the criticism is misguided. The law governing the resort to force by States *(jus ad bellum)* and IHL are separate bodies of law. By the principle of equal application, IHL applies to all parties to an armed conflict, even if one side has violated the prohibition on using force (Russia) and the other is acting in self-defense (Ukraine).[20]

The same principle holds that IHL violations by one side (Russia) do not justify those of its opponents (Ukraine). The sole basis for such a claim is the fading customary right of reprisal, which allows a party to violate IHL in narrow circumstances to compel an opponent to cease its own unlawful conduct.[21] Moreover, Russia and Ukraine are Parties to the 1977 Additional Protocol I to the 1949 Geneva Conventions, which has restricted the right of reprisal to the vanishing point.[22]

Furthermore, Article 51(8) of Additional Protocol I provides, "Any violation of [the protection of the civilian population rules] shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians."[23] The IHL rules implicated by the Amnesty International report, at least in part, are for the benefit of civilians. By Article 58, therefore, they bind Ukraine irrespective of Russian IHL violations.

Simply put, Ukraine is no less accountable for IHL violations than Russia is for its systematic unlawful behavior. It is accordingly appropriate for States, human rights organizations like Amnesty International, or other groups or individuals to condemn violations. Doing so strengthens IHL.

There are only two possible bases for criticism of Amnesty International's allegations—the facts and the law. As to the facts, Ukraine's government has labored mightily to protect its civilian population, as in President Zelensky's call for evacuation of the Donbas and his government's efforts in negotiating humanitarian corridors.[24] Moreover, Ukrainian forces sometimes need to operate within population centers to defend effectively against Russian attacks.

But these realities do not mean that Ukrainian forces never engage in questionable activities. And Amnesty International is a mature human

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19 Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-defense*, Articles of War, https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/; Pavle Kilibarda, *Legal Reflections on the Russia-Ukraine Prisoner Exchange*, Articles of War, https://lieber.westpoint.edu/category/ukraine-russia-symposium/.

20 Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure,* 90 Int'l Rev. Red Cross 931 (Dec. 2008); U.N. Charter, art. 2(1-5); U.N. Charter, art. 51.

21 *Reprisals*, ICRC Casebook, https://casebook.icrc.org/a_to_z/glossary/reprisals.

22 AP I, *supra* note 10, art. 20.

23 *Id.* art. 51.

24 Volodymyr Zelenskyy, President of Ukraine, Presidential Address: Recognition of Russia as Terrorist State Needed Not as Political Gesture, but as Effective Defense of Free World (July 30, 2022), https://www.president.gov.ua/en/news/viznannya-rosiyi-derzhavoyu-teroristom-potribne-ne-yak-polit-76797; Marisa Iati, *Humanitarian corridors meant to evacuate civilians in war. But they can be dangerous*, Wash. Post (Mar. 17, 2022), https://www.washingtonpost.com/world/2022/03/17/humanitarian-corridors-ukraine-explained/.

rights organization that, in my experience, is cautious about making factual assertions. I have no reason to doubt the incidents proffered in the report, although Amnesty International should release evidence supporting them as quickly as possible.

This leaves the *law.*

The Law

International humanitarian law reflects a delicate balancing of military considerations and humanitarian interests.[25] It consists of prohibitions, limitations, and obligations that constrain what parties to a conflict may do. Even military necessity, except in limited cases set forth in IHL itself, cannot justify any Ukrainian deviation from the law.[26] With respect to Amnesty International's characterization of Ukraine's conduct as unlawful, therefore, it is necessary to evaluate the claim against the relevant IHL rules.

Human Shields

Amnesty International did not specifically allege that Ukrainian forces have used the civilian population as human shields against Russian attack. Indeed, given the Russian practice of either directly attacking civilians or mounting indiscriminate attacks, trying to shield military operations and personnel through proximity to civilians seemingly would be a futile tactic for Ukraine.

Nevertheless, the fact that soldiers are operating near civilians always raises at least the possibility that they might be trying to shield themselves from attack, as the Russian forces have done repeatedly in this conflict.[27] According to the Amnesty International report, the Ukrainian military has stationed personnel near homes, apartment buildings, agricultural warehouses, medical facilities, and schools and used the civilian areas for lodging, staging areas, and locations from which to mount attacks against Russian forces.[28]

International humanitarian law contains various prohibitions on human shielding.[29] The key prohibition in this context, however, is found in Article 51(7) of Additional Protocol I.

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.[30]

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25 Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 Virginia J. Int'l L. 795 (2010).

26 *Id.*

27 Michael N. Schmitt, *Weaponizing Civilians: Human Shields in Ukraine*, Articles of War (Apr. 11, 2022), https://lieber.westpoint.edu/weaponizing-civilians-human-shields-ukraine/.

28 Amnesty International, *supra* note 13.

29 Geneva Convention Relative to the Treatment of Prisoners of War art. 23, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (prohibiting the use of POWs to "render certain points or areas immune from military operations"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 28, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] ("The presence of a protected person may not be used to render certain points or areas immune from military operations").

30 AP I, *supra* note 10, art. 51(7).

The ICRC's *Customary International Humanitarian Law* study asserts, correctly in my opinion,[31] that human shielding also violates customary IHL.[32] The United States has long accepted this characterization, and the DoD *Law of War Manual* includes the prohibition.[33]

Mere presence of civilians near military operations or personnel does not constitute unlawful shielding. Instead, there must be an intention to use their presence to benefit those forces. As the DoD *Law of War Manual* notes, "in the absence of purposeful action to put protected persons and objects at risk of harm from enemy military operations, there would be no violation" of the prohibition.[34] At least on the facts outlined in the report, no firm basis exists for suggesting Ukraine has violated the human shielding prohibition.

Of course, intent may be reasonably inferred from facts. Most troublesome in this regard is the reported presence of soldiers in hospitals. Amnesty International asserts that "In two towns, dozens of soldiers were resting, milling about, and eating meals in hospitals. In another town, soldiers were firing from near the hospital." But even here, there is no indication of *why* the soldiers might have been there. More facts are needed to make a definitive assessment one way or the other.

Passive Precautions

The Amnesty International report's assertion of IHL violations almost certainly refers primarily to the supposed failure of Ukraine to take "passive precautions." Passive precautions are the other side of the "active precautions" coin. By the latter, attackers must take measures to minimize civilian harm.[35] Passive precautions, by contrast, obligate the defender to take measures to protect the civilian population. In treaty form, the obligation appears in Article 58 of Additional Protocol I:

> The Parties to the conflict shall, to the maximum extent feasible:
>
> a. without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
>
> b. avoid locating military objectives within or near densely populated areas;
>
> c. take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.[36]

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31 Michael N. Schmitt, *Weaponizing Civilians: Human Shields in Ukraine*, Articles of War (Apr. 11, 2022), https://lieber.westpoint.edu/weaponizing-civilians-human-shields-ukraine/; Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 Columbia J. Transnat'l L. 292 (2009).

32 1 Customary International Humanitarian Law r. 97 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

33 Martin P. Dupuis, John Q. Heywood & Michéle Y.F. Sarko, *The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions,* 2 Am. U. Int'l L. Rev. 415 (1987); U.S. Dep't of Defense, Law of War Manual § 5.16 (2023) [hereinafter DoD LoW Manual].

34 DoD LoW Manual, *supra* note 34, § 5.16.2.

35 *See, e.g.*, AP I, *supra* note 10, art. 57; 1 Customary International Humanitarian Law, *supra* note 33, rr. 15–21; DoD LoW Manual, supra note 34, § 5.14.

36 AP I, *supra* note 10, art. 58.

According to the ICRC's *Customary International Humanitarian Law* study, the obligation to "take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attack" is customary,[37] a characterization embraced by the Eritrea-Ethiopia Claims Commission.[38] The rule is also reflected in the DoD *Law of War Manual*, a significant point in light of the fact that the United States is not a Party to Additional Protocol I.

> [P]arties to a conflict should also take feasible precautions to reduce the risk of harm to protected persons and objects from the effects of enemy attacks. In particular, military commanders and other officials responsible for the safety of the civilian population must take reasonable steps to separate the civilian population from military objectives and to protect the civilian population from the effects of combat.[39]

The incidents cited by Amnesty International at least raise the question of whether Ukraine is complying with the obligation, for they suggest that Ukraine intentionally operated near civilians and did not act to remove those in the vicinity of those operations. Yet there is no absolute prohibition on being in the vicinity of civilians and civilian objects or any absolute duty to remove them. To suggest otherwise would be operationally insensible. It would effectively make defending the areas concerned impossible, either because military forces sometimes need to be in the area to operate or because removing nearby civilians sometimes would be impractical or even practically impossible.

Delegates at the Diplomatic Conference who drafted and negotiated the Additional Protocols were cognizant of this reality. It led them to caveat the obligations with the phrase "to the maximum extent feasible." Indeed, some States emphasized during negotiations that Article 58 "should in no way affect the freedom of a State Party to the Protocol to organize its national defence to the best of its ability and in the most effective way."[40]

Feasibility is accordingly the determinative factor when assessing compliance with the obligation. Feasible precautions are commonly described as "those that are practicable or practically possible, taking into account all circumstances ruling at the time."[41] The description also appears in Protocols to the Convention on Certain Conventional Weapons (Incendiary, Article 1[5][42] Amended

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37 1 Customary International Humanitarian Law, *supra* note 33, r. 22.

38 Partial Award: Western Front, Aerial Bombardment and Related Claims—Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 (Eth. V. Erit.), 45 I.L.M. 396, at 330, 344 (Dec. 19, 2005) [hereinafter Eritrea-Ethiopia Claims Commission]. For scholarly treatment, see Eric Talbot Jensen, *Precautions against the effects of attacks in urban areas*, 98 Int'l Rev. Red Cross 147 (Apr. 2016); Marco Sassòli & Anne Quintin, *Active and Passive Precautions in Air and Missile Warfare*, 44 Israel Y.B. Human Rts. 69 (2014); Jean-François Quéguiner, *Precautions under the law governing the conduct of hostilities*, 88 Int'l Rev. Red Cross 793 (2006).

39 DoD LoW Manual, *supra* note 34, § 5.14.

40 International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: Commentary of 1987, ¶ 2243 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987), https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-58/commentary/1987 [hereinafter AP I Commentary].

41 DoD LoW Manual, *supra* note 34, § 5.2.3.2.

42 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) art. 1(5), Oct. 10, 1980, 1342 U.N.T.S. 171 [hereinafter CCW Protocol III].

Mines, Article 3[10][43] Explosive Remnants, Article 5[1][44]), and numerous States included it in Understandings related to their ratification of Additional Protocol I (e.g., Canada,[45] Germany, [46] Netherlands, [47] United Kingdom[48]). What is clear is that parties to a conflict enjoy a wide margin of appreciation when determining which measures are feasible.

The DoD *Law of War Manual* usefully offers a non-exclusive list of circumstances that might bear on feasibility in the passive precautions context:

- the effect of taking the precaution on mission accomplishment;
- whether taking the precaution poses a risk to one's own forces or presents other security risks;
- the likelihood and degree of humanitarian benefit from taking the precaution;
- the cost of taking the precaution, in terms of time, money, or other resources; or
- whether taking the precaution forecloses alternative courses of action.[49]

As these examples illustrate, military factors affect feasibility assessments. This is beyond dispute. The ICRC's *Commentary* to Article 57, for example, notes, "[A] Party to the conflict cannot be expected to arrange its armed forces and installations in such a way as to make them conspicuous to the benefit of the adversary," as might be the case if forces tasked with defending an urban area have to remain outside it.[50] Indeed, in many cases, taking advantage of an urban area's characteristics (e.g., to channel enemy forces into kill zones or conduct ambushes) enhances the defender's ability to repel its enemy. This may necessitate operating near civilians or even using civilian objects for military purposes (in which case they become "military objectives").[51]

The *Commentary* also points out that feasibility can be affected by what is asked of the civilian population. It appropriately cautions that precautions "should not go beyond the point where the life of the population would become difficult or even impossible."[52] This would be so, for instance, if evacuation or other movements from particular areas or locations worked a hardship on the civilian population. In some cases, that hardship would outweigh the risk

43 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 art. 3(10), May 3, 1996, 2048 U.N.T.S. 93.

44 Protocol on Explosive Remnants of War (Protocol V) art. 5(1), Nov. 28, 2003, 2399 U.N.T.S. 100 [hereinafter CCW Protocol V).

45 AP I, States parities and signatories, Canada Reservations made at the time of ratification, ICRC Database, International Humanitarian Law Databases, https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/ca.

46 AP I, States parities and signatories, Germany Declarations made at the time of ratification, ICRC Database, International Humanitarian Law Databases, https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/de.

47 AP I, States parties and signatories, Netherlands Declarations made at the time of ratification, ICRC Database, International Humanitarian Law Databases, https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/nl.

48 AP I, States parties and signatories, United Kingdom of Great Britain and Northern Ireland Declarations and Reservations made at the time of ratification, ICRC DATABASE, INTERNATIONAL HUMANITARIAN LAW DATABASES, https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/gb.

49 Dod LoW Manual, *supra* note 34, § 5.3.2.3.

50 AP I Commentary, *supra* note 41, ¶ 2246.

51 *Rule 8—Definition of Military Objectives*, ICRC Database, International Humanitarian Law Databases, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule8.

52 AP I Commentary, *supra* note 41, ¶ 2245.

caused by the proximity of military forces. As the *Commentary* observes, in some cases, it might make sense to only remove especially vulnerable groups, like children, mothers, the elderly, and the sick.[53]

Notably, the *Commentary* acknowledges that "circumstances of war can change very rapidly."[54] To illustrate, it observes that a "building or installation which does not seem to be of any military interest can quickly become a major military objective."[55] For example, in an urban fight, a building may suddenly become essential to a defender because of the enemy's direction of movement through the city. In such a circumstance, the defending force may have had no choice but to fight from the building and no opportunity to move civilians who might be in the area. Doing so is not a failure to take passive precautions.

Overall, it is difficult to draw definitive conclusions from the incidents Amnesty International describes. Take the example of military bases being established in populated residential areas. The organization presumably believes doing so violates Article 58(b).[56] Clearly, the practice is cause for concern and should generally be avoided. Still, it is only when it would have been militarily feasible to base them elsewhere without sacrificing any benefits derived from the location that violation occurs.

Amnesty International claims that was the case: "Most residential areas where soldiers located themselves were kilometres away from front lines. Viable alternatives were available that would not endanger civilians—such as military bases or densely wooded areas nearby, or other structures further away from residential areas." But as the DoD *Law of War Manual* notes, "Legitimate military reasons often require locating or billeting military forces in urban areas or other areas where civilians are present. For example, forces may be housed in populated areas to take advantage of existing facilities, such as facilities for shelter, health and sanitation, communications, or power."[57]

And, of course, being some distance from the front lines is usually a good idea from a force protection perspective. The unit in question might also be serving as a rapid reaction force that needs to be located where it can reach multiple locations. As to forests, wooded areas are excellent for cover; but it is also challenging to maneuver in them.

The more worrisome Amnesty International assertion is that Ukrainian forces have launched strikes from populated civilian areas. Yet, recall that Russia enjoys operational advantages such as air superiority and the range of fires. If Ukrainian forces had launched those strikes from non-urban areas, it would sometimes have enhanced Russia's ability to locate and destroy them.

Or take the case of "Amnesty International researchers witness[ing] soldiers using a residential building some 20 metres from the entrance of the underground shelter used by

53 *Id.* ¶ 2247.

54 *Id.* ¶ 2249.

55 *Id.*

56 AP I, *supra* note 10, art. 58.

57 DoD LoW Manual, *supra* note 34, § 5.14.1.

the residents [of a tower block] where [an] older man was killed." Unfortunately, the report does not indicate why the soldiers were there or what alternative locations might have been available to them. Moreover, depending on the circumstances, the availability of a nearby underground shelter might have decreased the risk to civilians.

And Amnesty International notes that "[o]ther obligations to protect civilians from the effects of attacks include removing civilians from the vicinity of military objectives and giving effective warning of attacks that may affect the civilian population." But the organization's report does not indicate whether the civilians were willing to relocate, where they would go, whether it was safe to move them, or whether the opportunity to do so presented itself in the circumstances. As the DoD *Law of War Manual* notes, "The evacuation of civilians from areas likely to be attacked is advisable when there is *immediate* danger and where it would be likely to involve *less hardship and danger* to civilians than leaving them in place."[58]

I want to emphasize that I am only saying that there *may* have been sensible military reasons for positioning the Ukrainian troops, equipment, and operations in the vicinity of civilians and Ukraine's failure to evacuate nearby civilians. Yet without more detail about individual incidents, it is impossible to conclude one way or the other whether Ukraine has failed to comply with its passive precautions obligations.

Hospitals and Schools

The Amnesty International report also highlighted Ukrainian forces' use of schools and hospitals. Regarding the former, it found that the,

> [the] Ukrainian military has routinely set up bases in schools in towns and villages in Donbas and in the Mykolaiv area. Schools have been temporarily closed to students since the conflict began, but in most cases the buildings were located close to populated civilian neighbourhoods…. Amnesty International researchers either found soldiers using the premises or found evidence of current or prior military activity—including the presence of military fatigues, discarded munitions, army ration packets and military vehicles.[59]

As the Amnesty International report acknowledges, there is no *per se* prohibition of using schools for military purposes in IHL. However, when the military does so, the facility is converted into a military objective through "use" for military purposes. Assuming the Amnesty International account is accurate, the schools in question became lawfully targetable military objectives during their military-related use (subject to the rule of proportionality[60] and the requirement to take precautions in attack[61]). But was their use unlawful?

The fact that children appear not to have been in the facilities at the time would

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58 *Id.* § 5.14.2 (emphasis added).

59 Amnesty International, *supra* note 20.

60 *Proportionality*, ICRC Casebook, https://casebook.icrc.org/a_to_z/glossary/proportionality.

61 *Precautions in attack*, ICRC Casebook, https://casebook.icrc.org/a_to_z/glossary/precautions-attack.

suggest the absence of intent to engage in human shielding. This means the issue is whether the use of the schools complies with the requirement to take passive precautions.

Assuming some military rationale for using the facilities, the questions would be whether the use placed nearby civilians at greater risk and, if so, whether feasible alternatives to using them existed.

Amnesty International suggests civilians should have been warned and evacuated. But the presence of military personnel at a school would be self-evident in most cases. Moreover, the obligation to take passive precautions is always contextual. For instance, it is unclear whether there were civilians who were unaware of the presence of the soldiers or were willing and able to be evacuated.

Unfortunately, the report does not address these and related matters, making it impossible to offer definitive legal conclusions.

According to Amnesty International's report, Ukrainian forces also misused protected medical facilities. Its researcher

> witnessed Ukrainian forces using hospitals as de facto military bases in five locations. In two towns, dozens of soldiers were resting, milling about, and eating meals in hospitals. In another town, soldiers were firing from near the hospital.
>
> A Russian air strike on 28 April injured two employees at a medical laboratory in a suburb of Kharkiv after Ukrainian forces had set up a base in the compound.

Amnesty International noted that "using hospitals for military purposes is a clear violation of international humanitarian law." Indeed, it has long been the case that medical facilities enjoy "special protection" under IHL (e.g., Hague Convention Regulations, Article 27;[62] Geneva Convention I, Article 19;[63] Geneva Convention IV, art. 18;[64] Additional Protocol I, Articles 12–14;[65] *Customary International Humanitarian Law* study, Rule 28[66]).

The critical provision with respect to the reported behavior is Article 12(4) of Additional Protocol I. It provides, "Under no circumstances shall medical units be used in an attempt to shield military objectives from attack."[67] But the rule is limited. The mere presence of military personnel in or near medical facilities (aside from those guarding the facility or being treated) is not unlawful absent an intent to shield. Amnesty International cites no facts unambiguously demonstrating such an intent, leaving only speculation as to why they were there.

Article 12(4) also provides, "Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil

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62 Regulations Respecting the Laws and Customs of War on Land Annexed to Hague Convention (IV) art. 27, Oct. 18, 1907, 36 Stat. 2277, 15 U.N.T.S. 9 [hereinafter Hague IV].

63 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 27, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC 1].

64 GC IV, *supra* note 30, art. 18.

65 AP I, *supra* note 10, arts. 12–14.

66 1 Customary International Humanitarian Law, supra note 33, r. 28.

67 AP I, *supra* note 10, art. 12(4).

their safety."[68] This provision precludes the placement of medical facilities near military objectives, not the other way around. That said, under Article 13 of the same instrument, the protection of medical units ceases if "they are used to commit, outside their humanitarian function, acts harmful to the enemy" (but only after a warning to desist is issued).[69] In other words, the medical facility that is so used becomes a military objective, and any harm to other than military personnel, equipment, and the facility that is being used for military purposes (like patients and medical equipment) is subject to the rule of proportionality and the requirement to take precautions in attack.

The ICRC *Commentary* observes that the definition of "acts harmful to the enemy" is defined "very broadly. It refers not only to direct harm inflicted on the enemy, for example, by firing at him, but also to any attempts at deliberately hindering his military operations in any way whatsoever".[70] The DoD *Law of War Manual* provides, "For example, a hospital may not be used as a shelter for able-bodied combatants or fugitives, as an arms or ammunition depot, or as a military observation post."[71] Setting up a base in a medical compound would certainly qualify, but whether "resting, milling about, and eating" would is questionable.

Yet the rule simply removes the special protection medical facilities enjoy; absent intent to shield, there is no IHL violation. Of course, whether a medical facility is targetable or not, Ukrainian uses of, or presence near, them invites a Russian attack and triggers the "passive precautions" obligation.

Concluding Thoughts

Amnesty International is a respected human rights organization that deserves praise for advancing respect for international human rights globally. And with respect to this conflict, any suggestion that the organization is biased is simply wrong. Moreover, assertions that the organization erred in pointing to possible Ukrainian IHL violations when Russia is a habitual violator of the *jus ad bellum* and IHL are badly misguided. After all, the principle of equal application is what gives IHL credibility on the battlefield.

That said, Amnesty International's allegation of unlawful conduct by Ukraine is unconvincing. IHL is a nuanced body of law because it must carefully balance two sometimes competing interests—military necessity and humanitarian considerations. Even if the facts in the report are accurate, and there is no reason to believe they are not, it lacks the detail necessary to support the charge.

In my estimation, Amnesty International has acted irresponsibly by making the claim without providing supporting evidence, citing the specific rules that it believes have been violated, or laying out its legal analysis. These failures have deprived Ukraine of a meaningful opportunity to respond and the international community of an ability to properly assess it.

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68 *Id.* art. 12(4).

69 AP I Commentary, art. 12.

70 AP I Commentary, *supra* note 41, ¶ 551.

71 DoD LoW Manual, *supra* note 34, § 7.10.3.1.

I urge the organization to immediately remedy the situation by releasing its evidence and explaining the legal basis for its conclusion that the conduct violates IHL. As the entity leveling a charge of unlawful conduct, some of which could qualify as a grave breach of IHL, Amnesty International bears the burdens of persuasion and proof. It has not met that burden.

THE LAW OF CROWDSOURCED WAR: DEMOCRATIZED SUPPLY CHAINS—PART I*

by Gary Corn | Mar 1, 2023

"Infantry wins battles, logistics wins wars." General Pershing's oft-cited maxim of warfare is once again proving itself out in Ukraine. Thankfully, from the outset of Russia's ill-conceived war of aggression, its progress has been hampered by poorly maintained equipment, fragile supply lines, and dwindling war stocks; weaknesses that Ukraine has deftly exploited. However, despite its poor logistics, Russia still has a decided numerical advantage in combat forces, munitions, and heavy weaponry. And while Ukraine's military has achieved stunning tactical victories—repeatedly defying odds and exceeding expectations with incredible skill, dexterity, and heroic determination—they are a long way from attaining the strategic objective of expelling Russian forces and restoring Ukraine's territorial integrity. As the recent decisions to provide Ukraine main battle tanks attests, the ultimate outcome of this fight will rise or fall on Ukraine's ability to sustain, if not enhance, its combat power.

Much has been written on this blog about the international law implications of the substantial military aid that the United States and other countries have and should continue to provide to Ukraine.[72] These financial and materiel contributions have no doubt been a critical lifeline to Ukraine. But they have not furnished the full array of supplies and capabilities needed to sustain its forces and win. Just as with other aspects of its operations, Ukraine has adeptly leveraged technology and the private sector to address some of its logistics shortfalls.

Crowdsourcing in Support of Ukraine

In myriad ways, Ukraine has turned to the Internet, and the power of crowdsourcing that it enables, to offset Russian military advantage. Not only has Ukraine crowdsourced intelligence,[73] cyber operations,[74] and evidence gathering[75] to support war crimes investigations; it has similarly "democratized" logistics. This should come as little surprise; concerned civilians have been crowdsourcing needed medical and other supplies since Russia initiated hostilities in 2014.[76]

* Part II appears in chapter III of this volume.—Eds.

72 *See, e.g.*, Hitoshi Nasu, *The Future Law of Neutrality*, Articles of War (July 19, 2022), https://lieber.westpoint.edu/future-law-of-neutrality/; Michael N. Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force*, Articles of War (Mar. 7, 2022), https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/; Wolff Heintschel von Heinegg, *Neutrality in the War Against Ukraine*, Articles of War (Mar. 7, 2022), https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/.

73 Alexa O'Brien, *Open Source Intelligence May Be Changing Old-School War*, Wired (May 24, 2022, 12:00 PM), https://www.wired.co.uk/article/open-source-intelligence-war-russia-ukraine.

74 Ryan Gallagher, *Ukraine Says 400,000 Volunteers Aid Hacking Against Russia*, Bloomberg (Mar. 4, 2022, 8:52 AM), https://www.bloomberg.com/news/articles/2022-03-04/ukraine-s-hacker-army-said-to-be-helped-by-400-000-supporters.

75 Vera Bergengruen, *How Ukraine Is Crowdsourcing Digital Evidence of War Crimes*, Time (Apr. 18, 2022, 6:00 AM), https://time.com/6166781/ukraine-crowdsourcing-war-crimes/.

76 Jillian Kay Melchior, *Crowdsourced War*, Tech Crunch (Nov. 23, 2014, 11:00 AM), https://techcrunch.com/2014/11/23/crowdsourced-war/.

More recently, a *Wall Street Journal* article detailed how hundreds of small, decentralized, global networks operating "outside regular military procurement channels" are delivering vital equipment, like small commercial drones, encrypted radios, and Starlink terminals, to Ukrainian military units.[77] The article profiles one Ukrainian civilian, Dmytro Zhlutenko, who has crowdfunded over $700,000 that he uses to procure and deliver drones and other supplies from an international network of suppliers, intermediaries, and transporters. As a further example, Daan Nielander in the Netherlands has knowingly and willingly contributed to these unofficial supply chains, keen to see Russia fail.

Participating in these crowdsourced, cross-border logistics operations does not come without risk, both legal and practical. Of course, the degree of risk presented by each individual's involvement is fact dependent and varies widely. Overgeneralizations provide limited and potentially distorted insights. But as set out below and in a follow-on post, civilians contributing to crowdsourced supply chains implicate individual and collective risks in at least two interrelated ways under international law.

At an individual level, civilians participating in crowdsourced logistics operations can jeopardize both their life and liberty. Not only might their actions run afoul of the domestic criminal regimes of their own and intermediary States (e.g., arms export regimes or neutrality-based laws prohibiting support to belligerents), but Russia might also consider their actions unlawful and prosecutable. Alternatively, and perhaps of greater consequence, Russian forces might target them lethally. Setting aside separate *jus ad bellum* constraints to targeting these civilians outside of Ukraine, materially supporting Ukraine raises, at least facially, the possibility of those participating in these supply chains forfeiting their general protection under the law of armed conflict (LOAC) from being made the object of attack.

Of course, at a practical level, weighing the risk of being lethally targeted must account for the low likelihood that Russia will invest the time and resources to track and target these individuals, especially those outside of Ukraine. Besides, if Russia were to do so, given its demonstrated lack of regard for the civilian protection regimes of LOAC, one might question whether crossing the legal line into direct participation even matters.

At a collective level, under principles of State responsibility, Russia might assert that States owe a duty to prevent or disrupt these activities as a matter of neutrality law or the principle of due diligence. Again, as discussed in my next post, these would be tenuous assertions as a matter of law.

That is not to say that Russia would not make such claims; its track record in this regard is also suspect. One need look no further than its specious claims that it is justified in using force against Ukraine in the first place. Nevertheless, its reluctance thus far to broaden the conflict indicates that the actual risk to civilians assisting Ukraine, at least from outside its borders, is low.

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[77] James Marson, *Crowdfunded Technology Gives Ukraine an Edge on Front Lines*, Wall St. J. (Jan. 10, 2023, 9:55 AM), https://www.wsj.com/articles/crowdfunded-technology-gives-ukraine-an-edge-on-front-lines-11673362520.

Direct Participation in Hostilities

The issue of civilian involvement in armed conflicts is nothing new. From so-called camp followers in the 18th and 19th centuries to Rosie the Riveter in the Second World War, to companies like Microsoft assisting Ukraine with cybersecurity and intelligence today, civilians have often contributed in varying ways and degrees to the war efforts of one belligerent or another.

But through the cardinal principle of distinction, LOAC has long sought to place a protective bubble around individual civilians and civilian populations.[78] As I previously pointed out, it does so by drawing "a bright line between civilians and belligerents, with its greatest emphasis on protecting the former from the harmful effects of war."[79] Among the broad array of protections to which civilians are entitled is the core prohibition against parties to a conflict ever making them the object of direct attacks.[80] And as Michael Schmitt detailed, the LOAC prohibition on indiscriminate attacks (e.g., art. 51(4)), especially the rule of proportionality (e.g., art. 51(5)(b)), offers civilians another layer of protection against the harmful effects of lethal targeting operations.[81]

To give maximum effect to these protections, LOAC broadly defines civilians in the negative as anyone who does not qualify as a combatant, that is, any person not falling within the categories "referred to in Article 4(A)(1), (2), (3) and (6)" of the Third Geneva Convention (GC III) and in Article 43 of the 1977 Additional Protocol I to the 1949 Geneva Conventions (AP I) (defining "armed forces *of a Party* to the conflict")(emphasis added). And at least for parties to AP I such as Russia and Ukraine, when there is doubt as to a person's status, "that person shall be considered to be a civilian."

However, the LOAC protections afforded civilians are not absolute. Nothing in LOAC prohibits civilian participation in hostilities. But doing so does have legal consequence. First, as a matter of both treaty and customary international law, engaging in certain conduct during and related to hostilities can result in civilians forfeiting their immunity from attack and suspension of the attacker's obligation to consider those civilians in a proportionality analysis. Second, civilians directly participating in hostilities do so without the attendant rights of immunity and prisoner of war status accorded to combatants if captured.

With respect to international armed conflicts, this direct-participation-in-hostilities (DPH) rule is found in Article 51(3) of AP I, which simply states, "[c]ivilians shall enjoy the protection [against being made the object of attack], unless and for such time as they take a direct part in hostilities." Yet as consequential as this LOAC provision is, its operative terms are nowhere defined in treaty law, and what specific conduct operates to strip civilians of

78 *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, para. 78 (July 8).

79 Gary Corn, *The Fog of War, Civilian Resistance, and the Soft Underbelly of Unprivileged Belligerency*, Articles of War (Mar. 10, 2022), https://lieber.westpoint.edu/fog-of-war-civilian-resistance-unprivileged-belligerency/.

80 AP I, *supra* note 10, art. 51.

81 Michael N. Schmitt & William Casey Biggerstaff, *Are Civilians Reporting with Cell Phones Directly Participating in Hostilities*, Articles of War (Nov. 2, 2022), https://lieber.westpoint.edu/civilians-reporting-cell-phones-direct-participation-hostilities/.

their presumptive protection against attack is notoriously inexact.

In an effort to elucidate and bound the DPH caveat, the International Committee of the Red Cross published in 2009 its now frequently cited Interpretive Guidance on the Notion of Direct Participation in Hostilities.[82] According to the Interpretive Guidance, for actions to qualify as DPH, they must meet a three-part, cumulative "constitutive elements" test that sufficiently connects a civilian's actions to intentionally advantaging or disadvantaging a specific party to a conflict. These elements are:

1. *Threshold of Harm:* the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack;

2. *Direct Causation:* there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part; and

3. *Belligerent Nexus:* the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.

Depending, of course, on where a civilian fits into a crowdsourced supply chain, one could see where the first and certainly the third of these elements might be satisfied. Far more challenging is establishing that participation in these supply chains is sufficiently direct to meet the Interpretive Guidance's strict causal nexus.

Controversies surrounding its publication aside, consensus has yet to emerge among States on the exact meaning or parameters of DPH, or on whether the Interpretive Guidance elements accurately reflect customary international law. For example, according to the U.S. DoD *Law of War Manual*, "the United States has not accepted significant parts of the ICRC's interpretive guidance as accurately reflecting customary international law."[83] The limited number of States that have addressed the question in their military manuals tend to simply restate the basic rule or at most note that beyond the self-evident case of a civilian committing acts of violence against the forces of a party to a conflict, assessing DPH must be done on a case-by-case basis. Thus, according to Rule 6 of the ICRC's Customary IHL Database, "a clear and uniform definition of direct participation in hostilities has not been developed in State practice."[84]

Nevertheless, certain aspects of the DPH "rule" are fairly well established, both in State practice and in the Interpretive Guidance. First, to qualify as DPH, a civilian's actions must bear some nexus to the conflict. That is, "[a]t a minimum, [DPH] includes actions that are, by their nature and purpose, intended to cause

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82 Int'l Comm. of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (Nils Melzer ed., 2009) [hereinafter ICRC Interpretive Guidance].

83 DoD LoW Manual, *supra* note 34, § 5.8.1.2.

84 *Rule 6—Civilians' Loss of Protection from Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule6.

actual harm to the enemy."[85] As noted above, actively provisioning logistical support to one side of a conflict would seem to meet this minimum nexus requirement. Second, DPH is not limited to the obvious case of engaging in actual violence. It unquestionably extends to a broader range of actions, such as those that, depending on context, "effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations."[86] Third, providing the kind of general support that civilians typically provide to their State's war effort does not amount to DPH.

In contrast to, albeit sharing common aspects with, the Interpretive Guidance elements, the DoD *Law of War Manual* offers five considerations for assessing DPH: (1) the degree to which the act causes harm to the opposing party's persons or objects; (2) the degree to which the act is connected to the hostilities; (3) the specific purpose underlying the act; (4) the military significance of the activity to the party's war effort; and (5) the degree to which the activity is viewed inherently or traditionally as a military one.[87]

The provision of logistical support is one of several examples offered in the DoD *Law of War Manual* of actions that might, depending on context, constitute DPH, a notion at least implicitly offered in the ICRC's Customary IHL Database.[88] However, in the context of diffuse, crowdsourced logistics, it is difficult to see how any but perhaps those individuals working at the very last stages of these democratized supply chains are contributing to the hostilities in a direct enough manner to strip them of their immunity from attack. Rather, these actions seem far more analogous to actions that have typically been interpreted as not rising to the level of DPH, such as working in munitions and materiel factories or other components of traditional "war" supply chains "not in geographic or temporal proximity to military operations."[89]

Ultimately, however, status is in the eye of the targeter. Based on its established track record, if Russia determines that it might derive some advantage from targeting these civilians, there is little reason to believe that anything other than pure practical considerations will drive its decisions; LOAC will not act as a restraint.

As with so many areas of human interaction, the explosion of the digitally interconnected environment of cyberspace has enabled private actors to involve themselves in warfare in unprecedented ways and from relatively safe distances from conflict zones. This trend is unlikely to abate. Whether considering hacktivism, the provision of cybersecurity services or access to satellite and other communications links, or crowdsourced funding and resourcing of logistics, these activities present unique risk profiles and novel challenges to existing legal frameworks. As with all things, States will need to sort out the broader implications of this new reality, including the actual risks it presents, and adapt legal and policy frameworks accordingly.

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85 DoD LoW Manual, *supra* note 34, § 5.8.3.

86 *Id.*

87 *Id.*

88 *Id.* §§ 5.8.3, 5.8.3.1.

89 *Id.* § 5.8.3.2.

State Responsibility

If it is unlikely that participation in these crowdsourcing efforts will amount to DPH and/or put the individuals at actual risk of being attacked, it is even less likely that it will fall back on and put any States at elevated risk of Russian retaliation, legal or otherwise. Again, absent specific facts, anything more than general observations is not possible. For example, without knowing the nationality or location of individuals, let alone the specific acts each is engaged in within a diffuse, crowdsourced network, it is impossible to assess their connection, geographic or otherwise, to any particular State. But alongside the framework of the customary international law of State responsibility, there are two general bodies of arguably interrelated law that are at least implicated: the law of neutrality and the principle of due diligence, both of which will be addressed in Part II of this post.

ARE CIVILIANS REPORTING WITH CELL PHONES DIRECTLY PARTICIPATING IN HOSTILITIES?

by Michael N. Schmitt and William Casey Biggerstaff | Nov 2, 2022

As Russia continues to pummel electric grids and other critical infrastructure from the air, Ukraine is creatively developing methods to defend its skies.[90] One new tool is "ePPO," a new mobile application ("app") that Ukrainian civilians can download on their cell phones to report the locations of incoming missiles or other air threats.[91] It appears to be working. For instance, on October 22, Ukrainian forces reportedly used data from the app to successfully shoot down a Kalibr cruise missile with a mobile air defense system.[92] Such cruise missiles and explosive-laden unmanned aerial vehicles (commonly called "drones") are among Russia's key weapons for targeting critical infrastructure.

Use of the app raises the issue of whether Ukrainian civilians who download and use it to report enemy threats are "directly participating in hostilities" and, therefore, targetable by Russian forces under international humanitarian law (IHL).[93] Moreover, if users qualify as direct participants, Russian forces need not consider any incidental harm to them in the proportionality analysis required before an attack or when assessing feasible precautions to avoid harming civilians.[94] In this post, we examine whether, and if so when, the IHL rule regarding direct participation in hostilities applies to the use of the ePPO app. Our conclusion is that it does—sometimes. We also point out that directly participating in the hostilities, as such, does not violate IHL.

The ePPO App

The use of civilians to identify enemy movements is not new to warfare. In the Second World War, for example, the British employed volunteers as part of the Royal Observer Corps to identify incoming German aircraft and V1 and V2 rockets.[95] Similarly, Somali civilians burned tires to report the approach of U.S. forces in advance of the "Black Hawk Down" raid.[96] Nor is the practice even novel in this conflict.

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90 Holly Ellyatt, Amanda Macias & Rocio Fabbro, *Kyiv reels as 'massive, wave of missile strikes hit Ukrainian cities; wheat prices rise as grain deal stalls*, CNBC (Nov. 1, 2022), https://www.cnbc.com/2022/10/31/ukraines-forces-repel-brutal-russian-offensive-in-donetsk-wheat-prices-rise-after-grain-export-deal-stumbles.html.

91 *See, e.g.,* Dan Sabbagh, *Ukrainians use phone app to spot deadly Russian drone attacks*, The Guardian (Oct. 29, 2022), https://www.theguardian.com/world/2022/oct/29/ukraine-phone-app-russia-drone-attacks-eppo; *New app lets civilians help shoot down drones and missiles in Ukraine*, Jerusalem Post (Oct. 17, 2022), https://www.jpost.com/international/article-719836.

92 *Ingenious mobile app helps down first Russian missile in Ukraine*, Ukrinform (Oct. 26, 2022), https://www.ukrinform.net/rubric-ato/3601566-ingenious-mobile-app-helps-down-first-russian-missile-in-ukraine.html; Claire Parker, Aaron Steckelberg et. al., *What to know about long-range cruise missile Russia says it fired*, Wash. Post (Mar. 24, 2022), https://www.washingtonpost.com/world/2022/03/24/russia-kalibr-cruise-missile-ukraine-weapons/.

93 *Direct participation in hostilities*, ICRC Casebook, https://casebook.icrc.org/a_to_z/glossary/direct-participation-hostilities.

94 *Proportionality*, ICRC Casebook, https://casebook.icrc.org/a_to_z/glossary/proportionalityl; *Precautions in attack*, ICRC Casebook, https://casebook.icrc.org/a_to_z/glossary/precautions-attack.

95 *How the Observer Corps helped win the Battle of Britain*, Imperial War Museums, https://www.iwm.org.uk/history/battle-of-britain-observer-corps.

96 *Why are they burning tires? Signals to the Militia, that we're coming*, Black Hawk Down (2001), Clip Café, https://clip.cafe/black-hawk-down-2001/why-are-burning-tires-s1/.

Prior to the renewal of Russia's invasion in February of this year, for instance, videos posted to social media were used to confirm the staging movements of Russian troops and equipment.[97] But the ePPO app makes such civilian involvement possible on an unprecedented scale and with unparalleled effectiveness.

The app is simple to use.[98] An authenticated user opens it on their cell phone and toggles the applicable category from a menu of options: airplane, helicopter, drone, rocket, or explosion. The user then points the phone in the direction of the incoming object and presses a single button.[99] Using its internal GPS and compass, the phone reports location and trajectory data to nearby air defense units, which use the information to supplement their targeting radars. The additional data is especially useful to defend against Iranian-made Shahed-136 drones, which are difficult to detect by radar due to their low altitude, small size, and largely non-metallic construction.[100] However, their slow speed and loud signature make them vulnerable to detection by observers using the ePPO app.[101]

A Ministry of Defense website contains easy-to-use instructions for the app.[102] Downloaded more than 180,000 times since its release, ePPO is currently available only on Google Android devices.[103] An Apple iOS version is forthcoming.[104] One of the app's developers has asserted that the "aim [is] to enlist 'the entire population' in helping to spot incoming attacks."[105] And in a statement by its Strategic Communications Department, the Office of the Commander-in-Chief of the Armed Forces of Ukraine noted, "Now every citizen of Ukraine can join the anti-missile and anti-aircraft defense of our skies."[106]

The Law of Direct Participation

The app's intended use raises challenging questions regarding participation in the conflict by Ukrainian civilians. According to the 1977 Additional Protocol I to the 1949 Geneva Conventions, to which both Russia and Ukraine are parties, civilians enjoy protection

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97 *See, e.g.,* Paul Sonne, Robyn Dixon & David L. Stern, *Russian troop movements near Ukraine border prompt concern in U.S., Europe*, Wash. Post (Oct. 30, 2021), https://www.washingtonpost.com/world/russian-troop-movements-near-ukraine-border-prompt-concern-in-us-europe/2021/10/30/c122e57c-3983-11ec-9662-399cfa75efee_story.html.

98 *The ePPO application has started working in Ukraine: how to notify the Armed Forces of Ukraine about a missile or drone*, Visit Ukraine (Oct. 27, 2022), https://visitukraine.today/blog/1083/the-eppo-application-has-started-working-in-ukraine-how-to-notify-the-armed-forces-of-ukraine-about-a-missile-or-a-drone.

99 Sabbagh, *supra* note 92.

100 John Hardie & Ryan Brobst, *Iranian Shahed-136 Drones Increase Russian Strike Capacity and Lethality in Ukraine,* FDD's Long War Journal (Oct. 18, 2022), https://www.longwarjournal.org/archives/2022/10/iranian-shahed-136-drones-increase-russian-strike-capacity-and-lethality-in-ukraine.php.

101 Wynne Davis, *What are the suicide drones bombarding Ukraine, and where did Russia get them?* NPR (Oct. 18, 2022,), https://www.npr.org/2022/10/18/1129576360/suicide-drones-ukraine-russia-iran-shahed-kamikaze.

102 Головне управління розвідки Міністерства оборони України [Main Intelligence Directorate Ministry of Defense of Ukraine], Українці через застосунок єППО можуть допомогти зенітникам збивати ворожі дрони та ракети [Ukrainians can help anti-aircraft shoot down enemy drones and missiles through the ePPO application] (Oct. 13, 2022), https://gur.gov.ua/content/ukraintsi-cherez-zastosunok-ieppo-mozhut-dopomohty-zenitnykam-zbyvaty-vorozhi-drony-ta-rakety.html.

103 Sabbagh, *supra* note 92.

104 Jerusalem Post, *supra* note 92.

105 Sabbagh, *supra* note 92.

106 Sakshi Tiwari, *Ukraine Develops 'Revolutionary App' to Battle Drone Menace! Citizens Can Now Use Smartphones to Hunt Russian Missiles, UAVs*, EurAsian Times (Oct. 17, 2022), https://www.eurasiantimes.com/ukraine-develops-revolutionary-app-to-fight-russia-citizens/.

from direct or indiscriminate attacks.[107] When civilians are at risk during an attack on combatants or a military objective, an attacker must consider any harm likely to befall them in the requisite proportionality analysis, which forbids attacks that are expected to cause injury or death that is excessive relative to the concrete and direct military advantage the attacker expects to gain by conducting the operation.[108] Even when civilians are not being directly or indiscriminately attacked, and the anticipated military advantage is such that an attack may continue despite the likelihood of civilian harm, an attacker must consider alternative weapons, tactics, and weapons that might minimize civilian harm.[109] These rules reflect customary law.[110]

Yet in an international armed conflict such as that occurring in Ukraine, these protections cease to apply to civilians "for such time as they take a direct part in hostilities."[111] The rule reflects customary law,[112] and all current U.S. military manuals set forth similar guidance.[113]

The exception's significance, therefore, is that the loss of these protections means direct participants may be attacked.[114] Additionally, they are not treated as civilians when assessing whether an attack is indiscriminate, they do not factor into proportionality calculations, and there is no requirement to try to avoid harming them when attacking a military objective or lawfully targetable individuals. For example, if the app's use amounts to direct participation, and assuming users can be identified, Russian forces can lawfully attack them and would not need to consider their presence if targeting nearby military objectives.

There are three determinative questions when applying the rule of direct participation: to whom does the rule apply, what is direct participation, and for what period does the rule apply? They are issues that animated the ICRC's five-year project leading to the publication of *The Interpretive Guidance on the Notion of Direct Participation in Hostilities*.[115] As will be explained, the use of the ePPO app poses significant interpretive challenges when answering the third question.

To Whom Does the Rule Apply?

The rule only applies to civilians who participate on an individual, ad hoc, or unorganized basis, as opposed to combatants and members of organized armed groups (OAGs), who are

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107 AP I, *supra* note 10, art. 51(2), (4); *see also Civilians*, ICRC Casebook, https://casebook.icrc.org/a_to_z/glossary/civilians; *Indiscriminate attacks*, ICRC Casebook, https://casebook.icrc.org/a_to_z/glossary/indiscriminate-attacks.

108 *Id.* art. 51(5)(b).

109 *Id.* art. 57.

110 *Rules 1, 11, 14, & 15—Customary IHL—ICRC*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1.

111 AP I, *supra* note 10, art. 51(3); *see also* Article 13(3) of Additional Protocol II for non-international armed conflict. Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(3), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

112 *Rule 6—Civilians' Loss of Protection from Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule6.

113 DoD LoW Manual, *supra* note 34, § 5.8; U.S. Dep't of Army, Field Manual 6-27, The Commander's Handbook on the Law of Land Warfare para. 2-2 (Aug. 7, 2019)(Change 1, Sep. 20, 2019) [hereinafter FM 6-27]; U.S. Dep't of Navy, Naval Warfare Publication 1-14M, The Commander's Handbook on the Law of Naval Operations para. 5.4.3 (Mar. 2022) [hereinafter Commander's Handbook on the Law of Naval Operations].

114 AP I Commentary, *supra* note 41, ¶ 1942.

115 ICRC Interpretive Guidance, *supra* note 83.

targetable around the clock.[116] Concerning the latter, the ICRC suggested in its *Interpretive Guidance* that only OAG members with a "continuous combat function," such as those responsible for the group's finances, are targetable in the same manner as combatants.[117] According to this approach, members who do not meet this criterion should be treated like civilians, i.e., targetable only if and when directly participating in hostilities. The ICRC's assertion has been challenged, however, and rightly so.[118] Thus, for the purposes of our analysis, the use of the ePPO app issue is only relevant for civilians who are not members of an OAG. But based on the app's intended audience, most users are likely to fall into this category.

What Is Direct Participation?

The next question is whether users to whom the rule applies are engaged in "direct participation in hostilities." The *Interpretive Guidance* offers three "constitutive elements" of direct participation.[119] Although there is some disagreement over their scope, they amount to fair criteria with which we agree.[120]

Threshold of Harm: First, "[t]he act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack."[121] There is no question that use of the app would satisfy this element.

To begin with, note that the action need only be likely to affect Russian operations. Direct participation does not require that an adverse effect occur. Thus, it would encompass situations in which the threat has already been reported to air defense units or where Ukrainian forces lack the means to attack it.

Moreover, the action must *affect* enemy *military* operations or capacity. Qualifying acts are not limited to those that kill or wound the enemy or damage or destroy military facilities and equipment. Rather, they need only adversely affect enemy operations or capacity, as in "providing or relaying information of immediate use in combat operations, such as acting as a … spotter or member of a ground observer corps or otherwise relaying information to be used to direct an [attack]." Given that the app's primary purpose is to frustrate Russian attacks by enabling Ukrainian air defenses, its use undoubtedly satisfies this element.

Causation: The second element of direct participation is that "there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated

116 *Armed groups*, ICRC Casebook, https://casebook.icrc.org/a_to_z/glossary/armed-groups.

117 ICRC Interpretive Guidance, *supra* note 83.

118 DoD LoW Manual, *supra* note 34, § 5.8.2.1; Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 J. Int'l L. & Politics 641 (2012), https://nyujilp.org/wp-content/uploads/2012/04/42.3-Watkin.pdf; Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 Harvard Nat'l Sec. J. 5 (2010).

119 ICRC Interpretive Guidance, *supra* note 83, at 46; *see also* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 J. Int'l L. & Politics 697 (2010); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 J. Int'l L. & Politics 831 (2010).

120 *See* Cole Rabinowitz, *New Issue: Forum on Direct Participation in Hostilities*, J. Int'l L. & Politics (June 5, 2010), https://www.nyujilp.org/new-issue-forum-on-direct-participation-in-hostilities/.

121 ICRC Interpretive Guidance, *supra* note 83, at 46; see also AP I Commentary, *supra* note 41, ¶ 1944.

military operation of which that act constitutes an integral part."[122] This element has been the source of significant disagreement.

As the ICRC has noted, "[f]or a specific act to qualify as 'direct' rather than 'indirect' participation in hostilities there must be a sufficiently close causal relation between the act and the resulting harm."[123] The question is how close is close enough. For instance, the ICRC suggested that "the assembly and storing of an improvised explosive device (IED) in a workshop" or serving as a voluntary human shield does not amount to direct participation,[124] assertions with which we and others disagree.[125]

With respect to the app, the causal relationship is far from attenuated, even by the ICRC's more demanding approach. As the *Interpretive Guidance* further clarifies, "where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm."[126] During Ukraine's first reported combat use, a Russian missile "invisible to radars" was targeted "a few seconds" after receiving data from the app.[127] As this example illustrates, the causal relationship is necessarily direct because of the limited time available to engage a threat following identification.

Belligerent Nexus: Finally, to amount to direct participation, "the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."[128] Satisfaction of this element is self-evident, for the app was designed as a countermeasure to Russian aerial attacks.

For What Period Does the Rule Apply?

Although answering the first two determinative questions is relatively clear-cut, doing so for the third is more challenging because the rule, and its resultant loss of protections, only applies "for such time" as direct participation endures. There are two facets of this question—the points at which direct participation begins and ends and the temporal scope of involvement.[129]

Beginning and End of Participation: Obviously, protections are lost while a civilian uses the app. The more challenging questions are, does a user lose protection before that point, and for how long after the app has been used is the user still directly participating? For instance, does the period of direct participation begin when the app is downloaded? When the user is authenticated? When it is opened? Or used? Does it end when the report is made? When the app is closed? Only when it is deleted?

There is consensus that the period of direct participation includes preparatory

122 ICRC Interpretive Guidance, *supra* note 83, at 52.

123 *Id.*

124 *Id.* at 54, 56.

125 Michael N. Schmitt, *"Direct Participation in Hostilities" and 21st Century Armed Conflict*, U. Oslo 510 (2004), https://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt_direct_participation_in_hostilties.pdf.

126 ICRC Interpretive Guidance, *supra* note 83, at 54–55.

127 Ukrinform, *supra* note 93.

128 ICRC Interpretive Guidance, *supra* note 83, at 46.

129 *See generally* Bill Boothby, *"And for Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 J. Int'l L. & Politics 741 (2012).

measures.[130] The ICRC, for instance, asserts that such measures "are of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act."[131] Yet agreement on what preparation encompasses is lacking. The ICRC takes a narrow approach, explaining that "it could be said that preparatory measures aiming to carry out a specific hostile act qualify as direct participation in hostilities, whereas preparatory measures aiming to establish the general capacity to carry out unspecified hostile acts do not."[132] Although we would leave it to the ICRC to apply this analysis, the standard would presumably not apply to civilians who are merely prepared to report, such as those who simply download the app or leave it running in the background on the off chance that a Russian system might be spotted. Instead, the individual must be at least actively looking for Russian threats, if not in the process of actually reporting one. This is because only in those cases are the individuals acting to carry out the *specific act* of reporting instead of merely being prepared to report.

It could be argued that the "for such time" period should be interpreted more broadly. Yoram Dinstein, for instance, has suggested that "in demarcating the relevant time span in the course of which a civilian is directly taking part in hostilities, it is necessary to go as far as is reasonably required both 'upstream' and 'downstream' from the actual engagement."[133] Although we agree with the approach in principle, we would reserve it for the (likely rare) case of an individual who downloads the app for the specific purpose of later setting out on a "mission" of spotting Russian systems. In such a scenario, we would not wait until the civilian has physically left to do so before characterizing him as a direct participant.

At the other end of the process, the ICRC opines that direct participation includes a return from where the action was executed if such movement is an "integral part" of the operation.[134] By this approach, which we find reasonable, once the individual is no longer actively looking for Russian systems to report or has finished reporting one just seen, the period of direct participation would end.

The Revolving Door: The remaining question is how to characterize an individual who repeatedly engages in acts of direct participation. For instance, when can we say that a civilian who repeatedly identifies Russian systems is "directly participating"?

Focusing on the "for such time" restraint, the *Interpretive Guidance* suggests that it "necessarily entails that civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities."[135] In other words, civilians are entitled to protection between each act of participation. By this

130 AP I Commentary, *supra* note 41, ¶ 1943.

131 ICRC Interpretive Guidance, *supra* note 83, at 65–66.

132 *Id.* at 66; *see also* AP I Commentary, *supra* note 41, ¶ 1943.

133 Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 176 (3rd ed. 2016); *see also* Boothby, *supra* note 130.

134 ICRC Interpretive Guidance, *supra* note 83, at 67; see also DoD LoW Manual, *supra* note 34, § 5.8.4.1.

135 ICRC Interpretive Guidance, *supra* note 83, at 70.

approach, users of the ePPO app would only forfeit their protections while actively searching for Russian systems or, should they spot one, reporting it. The ICRC claims "the 'revolving door' of civilian protection is an integral part, not a malfunction, of IHL."[136]

This claim has long been disputed, perhaps most memorably by the late Hays Parks.[137] In our view, the revolving door is operationally unworkable and unfounded in law. Instead, as one of us has explained, "[t]he better approach is one whereby a civilian who directly participates in hostilities remains a valid military objective until he or she unambiguously opts out of hostilities through extended non-participation or an affirmative act of withdrawal. He or she may be attacked between episodes of participation."[138] In a scenario where a civilian establishes a pattern of using the app, that individual would be targetable from the moment the first act began (see discussion above) until definitively and permanently ceasing participation.

But what if an individual decides to stop reporting but fails to signal this intent by, for example, deleting the app? Direct participation would end when the civilian decides to desist altogether. But in such a case, the direct participant bears the risk associated with any misunderstanding regarding status, not the adversary.[139] After all, the direct participant had no right to engage in hostilities in the first place under IHL, and its rules are largely based on the premise that civilians do not participate directly in the armed conflict.

Lawfulness of Direct Participation

The preceding analysis raises the issue of whether Ukrainian civilians who use the app to report Russian systems are violating international law. In this regard, it is sometimes asserted that direct participation in hostilities violates international law. Indeed, some Guantanamo defendants were charged with violating the law of the war by attacking U.S. soldiers.[140]

They are not. While civilians do not enjoy a *privilege* to engage in hostilities, engaging in activities that IHL does not otherwise prohibit is not a violation of that body of law. Thus, providing information that enables Ukrainian forces to damage or destroy military objectives, or even kill Russian soldiers, is lawful under international law.

This conclusion may not extend to domestic law. Whether a civilian may be tried for the act(s) which amounted to IHL direct participation depends on whether a prosecuting State has properly exercised prescriptive jurisdiction over the offense and is appropriately exercising adjudicatory jurisdiction over the individual. This depends on many factors, such as the extent of extraterritorial jurisdiction in the domestic legal system and the application of international human rights law; it is a subject

136 *Id.*

137 Sean Watts, *Hays Parks and Direct Participation in Hostilities*, Articles of War (Oct. 7, 2021), https://lieber.westpoint.edu/hays-parks-direct-participation-hostilities/ (Feb. 28, 2024).

138 Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 119, at 38; see also DoD LoW Manual, *supra* note 34, § 5.8.4.2.

139 *See* Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 119, at 38.

140 *See, e.g.,* Case of United States of America v. David Matthew Hicks, Charge Sheet (MC Form 458), CMCR, Feb. 2, 2007.

well beyond the scope of this post.

Finally, we should also point out that there is some disagreement regarding the treatment of civilian direct participants upon capture, a complex issue that is also beyond this post's scope. Suffice it to say that some experts argue that they are unlawful combatants who neither enjoy protection as prisoners of war under Geneva Convention III, nor as civilians under Geneva Convention IV except in occupied territory.[141] Instead, they are protected only by certain minimal safeguards reflected in Article 75 of Additional Protocol I. This is, broadly speaking, the position adopted by the United States.[142] By contrast, the ICRC and many other experts suggest that they continue to qualify as detained civilians entitled to the relevant protections of Geneva Convention IV, a position with which at least one of us (Schmitt) agrees.[143]

Conclusion

Operationally, the development and distribution of the ePPO app make great sense. It has already resulted in successful defensive operations against Russian attacks. And those employing the app to report Russian systems are violating no rule of international law.

But it must be understood that one consequence of Ukraine instituting a modern-day "observer corps" is that the civilian volunteers involved lose the essential protections against attacks and their effects that they would otherwise enjoy. Moreover, depending on the approach taken with the revolving door issue, they may lose that protection for an extended period. This not only places them at risk but could even render Russian attacks lawful that would otherwise be precluded through operation of the proportionality and feasible precaution rules.

Accordingly, suggestions that the ePPO could be used across the entire civilian population should raise particular concerns. Such risks may well be worth taking, particularly when facing an enemy that has shown nothing but disregard for the civilian population. However, Ukraine should assess the practice with eyes wide open, fully sensitive to the practical consequences of the IHL on point.

141 Yoram Dinstein, *Distinction and Loss of Civilian Protection in International Armed Conflicts*, 84 Int'l L. Stud. 183 (2008).

142 DoD LoW Manual, *supra* note 34, § 10.3.

143 *See* Jelena Pejic, *Unlawful/Enemy Combatants: Interpretations and Consequences, in* International Law and Armed Conflict: Exploring the Faultlines 335 (Michael Schmitt & Jelena Pejic eds., 2007).

USING CELL PHONES TO GATHER AND TRANSMIT MILITARY INFORMATION, A POSTSCRIPT

by Michael N. Schmitt | Nov 4, 2022

In a previous post, Major Casey Biggerstaff and I analyzed the legal consequences of Ukrainian civilians using the "ePPO" application (app) to report incoming Russian air strikes.[144] Under Article 51(3) of the 1977 Additional Protocol I to the Geneva Conventions, which binds both Russia and Ukraine, civilians lose their international humanitarian law (IHL) protections from attack "for such time as they take a direct part in hostilities."[145] We concluded that while using the app made great operational sense, ePPO users sometimes qualify as direct participants in hostilities and lose those protections. That means Russia may lawfully target those who do. Moreover, during an attack on another legitimate military objective, Russian forces need not consider any incidental harm to ePPO users during the proportionality and feasible precautions assessments that IHL requires.

Since publication, several IHL practitioners have contacted me regarding variations of the ePPO app scenario. Two merit a postscript to our piece: using an app to warn civilians of an impending attack and crowdsourcing for intelligence reasons when the "crowd" is unsuspecting of the underlying purpose. As will be explained, in most cases, those involved cannot be characterized as directly participating in hostilities and would retain their various IHL protections from attacks.

Warning the Civilian Population

The first scenario involves Sentry, an app used in Syria to warn of Syrian and Russian air strikes.[146] Developed by two Americans who had previously worked with Syrian civilians, it was a response to Russian and Syrian indiscriminate bombing, which they considered "the biggest threat to peace inside of Syria."[147]

Users of the app identify the type of aircraft that is spotted, what it is doing, and its direction. The Sentry program processes the data, estimates the aircraft's trajectory, and transmits a warning through Facebook and Telegram messages, Tweets, and sirens, thereby enabling potentially affected civilians to take shelter.[148] White Helmet rescue workers are also notified when and where the attack is expected to occur.[149] If the area is populated, they inform medical facilities, which can then prepare for the arrival of the wounded and respond themselves.

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144 Michael N. Schmitt & William Casey Biggerstaff, *Are Civilians Reporting with Cell Phones Directly Participation in Hostilities?*, Articles of War (Nov. 2, 2022), https://lieber.westpoint.edu/civilians-reporting-cell-phones-direct-participation-hostilities/.

145 AP I, *supra* note 10, art. 51(3); *see also Rule 6—Civilians' Loss of Protection from Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule6; DoD LoW Manual, *supra* note 34, § 5.8; AP II, *supra* note 112, art. 13(3).

146 Sarah Dadouch, *Air strike warning app helps Syrian dodge death from the skies*, Reuters (Sept. 13, 2018) https://www.reuters.com/article/us-mideast-crisis-syria-warning/air-strike-warning-app-helps-syrians-dodge-death-from-the-skies-idUSKCN1LT2HV/.

147 *Id.*

148 Sentry Syria, nesta, https://www.nesta.org.uk/feature/collective-crisis-intelligence-case-studies/sentry-syria/.

149 The White Helmets, homepage, https://www.whitehelmets.org/en/.

The legal conundrum with such a system is that the military can also leverage the warnings, as in alerting air defenses or evacuating military facilities likely to be struck. This raises the question of whether the app's civilian users are direct participants, a concept examined in greater depth in our earlier post.[150] It suffices here to recall that it consists of three constitutive elements put forth by the ICRC in its *Interpretive Guidance on the Notion of Direct Participation*—threshold of harm, direct causation, and belligerent nexus.[151] Although I take issue with some of the *Interpretive Guidance's* application of the elements, I find them to be a reasonable interpretation of the direct participation rule.[152]

The first element is evidently met. It requires that "[t]he act … be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack."[153] Importantly, this only entails an effect on military operations.

Here, there is no question that the warning could deprive an attacker of the advantages it seeks. For instance, a strike on enemy forces in a building is foiled if they take shelter first because they have been warned. Similarly, the causal connection required by the second element is satisfied, for the relationship between the app's use and defensive actions is plainly direct.[154] After all, the user's report enables the military to act defensively within seconds of receiving the resulting warning.

It is upon the third element, belligerent nexus, that characterization of the reporting as direct participation falters. According to the Interpretive Guidance, "the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."[155] This does not mean that the actor's subjective intent must be to harm one of the parties to the conflict. For instance, a civilian compelled to fight for an insurgent group is no less a direct participant; the civilian may not want to harm the enemy, but the act is such that it is meant to do so.

It is this "*objective purpose*" that is determinative. For example, the ePPO app we addressed in the previous post was designed to help the Ukrainian armed forces defend against attacks (see here[156] and here[157]). Because its objective purpose is to affect Russian military operations, the belligerent nexus element is undeniably satisfied. But here the objective purpose of the Sentry app's intended use is neither to adversely affect Syrian and Russian operations nor to enhance those of the Syrian opposition forces. Although it may have knock-on military consequences, it is meant to protect civilians. Using such an app is akin to telephoning civil defense authorities

150 Schmitt & Biggerstaff, *supra* note 145.

151 ICRC Interpretive Guidance, *supra* note 83.

152 *See* Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 119.

153 ICRC Interpretive Guidance, *supra* note 83, at 46; *see also* AP I Commentary, *supra* note 41, ¶ 1944.

154 ICRC Interpretive Guidance, *supra* note 83, at 52.

155 Id. at 46.

156 Sabbagh, *supra* note 92.

157 *New app lets civilians help shoot down drones and missiles in Ukraine*, Jerusalem Post (Oct. 17, 2022), https://www.jpost.com/international/article-719836.

to enable effective attack warning and consequent sheltering. Surely, IHL does not allow a direct attack on someone telephoning civil defense authorities, even though an air raid alert to warn the population might enable military forces to defend themselves more effectively.

Furthermore, note that Additional Protocol I extends "special protection" to civil defense personnel. They must be "respected," which means they are not subject to attack, and have to be allowed to perform their functions.[158] This special protection extends to "civilians who, although not members of civilian civil defence organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control."[159] They lose that protection only if they engage in acts outside their civil defense duties that are "harmful" to the enemy.[160] And even if a government has not expressly made such an appeal, the "object and purpose" of these and related rules is to help protect the civilian population from attack and facilitate an effective response following one. It would be incongruent to suggest that use of an app like Sentry would nevertheless qualify as direct participation; such an interpretation would fly in the face of that object and purpose.

I would caution that an act may have multiple objective purposes. For example, the purpose of swinging a baseball bat is usually to hit a ball. But it also is capable of being used to harm someone. If a civilian uses a bat to attack an enemy soldier, the objective purpose of the bat *in the way it is used* is to cause human injury. The same result would hold when a civilian misuses a Sentry-like app to warn the military of an attack. The app is *capable* of affecting military operations, and that is how it is being used in this situation. The individual is directly participating in hostilities.

Of course, the issue of doubt is always present when dealing with intent or purpose, whether subjective or objective. If there is a question as to the *objective* purpose of an act, the determination that it qualifies as direct participation must be made "in good faith based on information available to them in light of the circumstances ruling at the time."[161] But a degree of "doubt" about the objective purpose may still persist.

In that regard, both sides in the Russia-Ukraine conflict are bound by Additional Protocol I Article 50(1)'s rule that "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian,"[162] a rule that the DoD *Law of War Manual* (wrongly[163]) argues lacks customary status.[164] This presumption operates whenever the question is whether an individual is targetable, as it is in the case of direct participation.

But the presumption is, in my view, rebuttable. Lieutenant Colonel Michael Schauss and I

158 AP I, *supra* note 10, art. 62(1).

159 *Id.* art. 62(2).

160 *Id.* art. 65(1).

161 DoD LoW Manual, *supra* note 34, § 5.4.3.2.

162 AP I Commentary, *supra* note 41, art. 50(1).

163 Oona A. Hathaway, Marty Lederman & Michael Schmitt, *Two Lingering concerns about the forthcoming Law of War Manual Amendments*, Just Security (Nov. 30, 2016), https://www.justsecurity.org/35025/lingering-concerns-forthcoming-law-war-manual-amendments/.

164 DoD LoW Manual, *supra* note 34, § 5.4.3.2.

have dealt with the issue of doubt elsewhere at great length.[165] We suggest that the degree of doubt regarding status as a targetable person that operates to preclude an attack as a matter of law is context-specific. The determination necessitates consideration of a complex array of factors ranging from the anticipated military advantage to the extent of uncertainty.

However, in the case of the apps, there usually would be little doubt with which to deal. While the ePPO app discussed in the earlier post is designed for belligerent purposes, the type at issue here is not. Only in cases where misuse of the latter to alert military forces is suspected would the issue of doubt as to objective purpose arise.

The Unwitting Participant

The second scenario is suggested by a *Wall Street Journal* report that a private company is paying users of an app to complete basic tasks such as snapping photographs, completing surveys, or reporting the price of food.[166] The data collected is generally provided to private businesses seeking commercial information.

But the company, Premise Data Corp., is now also doing contract work with the United States and other governments using its network of (as of 2019) 600,000 contributors in 43 countries, including Iraq, Afghanistan, Syria, and Yemen. Some of the work is innocuous, as with a project to understand vaccine hesitancy. Yet the *Wall Street Journal* also reported,

> In one pitch on its technology, prepared in 2019 for Combined Joint Special Operations Task Force-Afghanistan, Premise proposed three potential uses that could be carried out in a way that is "responsive to commander's information requirements": gauge the effectiveness of U.S. information operations; scout and map out key social structures such as mosques, banks and internet cafes; and covertly monitor cell-tower and Wi-Fi signals in a 100-square-kilometer area.[167]

And according to the *Wall Street Journal*,

> [d]ata from Wi-Fi networks, cell towers and mobile devices can be valuable to the military for situational awareness, target tracking and other intelligence purposes. There is also tracking potential in having a distributed network of phones acting as sensors, and knowing the signal strength of nearby cell towers and Wi-Fi access points can be useful when trying to jam communications during military operations. Nearby wireless-network names can also help identify where a device is, even if the GPS is off, communications experts say.[168]

As the examples illustrate, data collection could lead directly to consequences reaching the direct participation threshold of harm. Therefore, whether the contributors are participating directly in hostilities depends on whether the belligerent nexus criterion is

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165 Michael N. Schmitt & Michael Schauss, *Uncertainty in the Law of Targeting: Towards a Cognitive Framework*, 10 Harvard Nat'l Sec. J. 148 (2019).

166 Bryon Tau, *App Taps Unwitting Users Abroad to Gather Open-Source Intelligence*, Wall St. J. (June. 24, 2021), https://www.wsj.com/articles/app-taps-unwitting-users-abroad-to-gather-open-source-intelligence-11624544026.

167 *Id.*

168 *Id.*

satisfied. And here the distinction between subjective intent and objective purpose is critical, for according to the report, the "tasks needed to be designed to 'safeguard true intent'—meaning contributors wouldn't necessarily be aware they were participating in a government operation."[169]

One could argue that even though the *contributors* harbor no intention of providing data for military purposes, the *act* (use of the app) has no intended purpose other than enhancing the military operations of the side receiving it. The fact that an individual contributor subjectively lacks hostile intent is legally irrelevant. It is the act that satisfies the objective purpose criterion.

The problem is that in other situations, IHL protects individuals whose actions affect military operations despite the objective purpose of the acts concerned. Consider human shields. The prevailing view (the correct one[170]) is that voluntary human shields must be distinguished from involuntary ones; the latter are not subject to attack, and expected harm to them factors into proportionality and precautions assessments. This is so even though their presence undoubtedly affects the enemy's willingness to attack. In extreme cases, their "act" of being present could so affect the proportionality calculation that an attack would be unlawful.

Or consider civilians ordered to evacuate a city in order to block an enemy advance. Although the underlying purpose of the evacuation is to affect enemy military operations, no reasonable IHL practitioner would suggest they are now subject to attack because the objective purpose of their presence is to block the enemy's advance. Whether the civilians concerned know or are ignorant of how their movement is being exploited does not matter; they retain IHL's protections from attack that they otherwise enjoy as civilians.

Here the *Interpretive Guidance* advances a sound explanation for the apparent incongruity of results. It asserts there are exceptional circumstances where subjective intent matters.[171] Unlike the cases of a civilian forced to engage in combat, here the civilians are "completely deprived of their physical freedom of action" (involuntary human shields, civilians forced to evacuate) or "totally unaware of the role they are playing in the conduct of hostilities" (unwitting human shields or civilians who evacuate based on intentionally false premises). As the *Interpretive Guidance* explains, "[c]ivilians in such extreme circumstances cannot be regarded as performing an action (i.e. as *doing something*) in any meaningful sense and, therefore, remain protected against direct attack despite the belligerent nexus of the military operation in which they are being instrumentalized."[172]

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169 *Id.*

170 Schmitt, *Human Shields in International Humanitarian Law, supra* note 32.

171 ICRC Interpretive Guidance, *supra n*ote 83, at 60.

172 *Id.*

By this logic, civilians engaging in data collection who know or reasonably should know the objective purpose of their actions qualify as direct participants (assuming satisfaction of the first two elements). Those who have no reason to know do not.

Of course, in such cases, the doubt question may loom large because assessing subjective intent (what a person is thinking) can prove challenging. Be that as it may, I nevertheless would take the same approach to resolving that doubt as discussed above.

Conclusion

What distinguishes these two scenarios from that which Major Biggerstaff and I deconstructed in the previous post is the fact that the objective purpose of the ePPO application was to impede Russian operations.[173] Moreover, its users were aware of that purpose and intended to fulfill it. By contrast, civilians who engage in activities that do not have an objective purpose of affecting military operations or capabilities are not direct participants in hostilities. This is so even if their actions have that effect. Thus, employing an app to enhance civilian protection from attacks does not expose its users to loss of IHL's protection. And in exceptional circumstances in which users are unaware that an app is being used for military ends, they likewise retain that protection.

[173] Michael N. Schmitt, *Are Civilians Reporting with Cell Phones Directly Participating in Hostilities?* Articles of War (Nov. 2, 2022), https://lieber.westpoint.edu/civilians-reporting-cell-phones-direct-participation-hostilities/.

WEAPONIZING CIVILIANS: HUMAN SHIELDS IN UKRAINE

by Michael N. Schmitt | Apr 11, 2022

Russia's "special military operation" in Ukraine has become a horrific demonstration of the many ways a State can violate international humanitarian law (IHL) and how individual soldiers and their commanders can commit war crimes.[174] To counter condemnation of its outrages, Russia has engaged in a reprehensible disinformation campaign and expelled human rights organizations.[175] But by now, it is undeniable that Russian forces are directly targeting civilians, mounting attacks designed to terrorize the civilian population, and engaging in indiscriminate attacks in violation of IHL.[176]

These fundamental IHL violations (and war crimes) are but the tip of the iceberg. This *Articles of War* symposium has addressed many others, including those involving children,[177] deportation,[178] displacement,[179] booby-traps,[180] abduction,[181] and nuclear plants.[182] As the catalog of violations and crimes sadly, yet relentlessly, grows, I shall examine another in this post—the use of human shields.

The Allegations

On April 7, the BBC reported that it had found "clear evidence of Russian troops rounding up Ukrainian civilians and using them as human shields."[183] According to the report, Russian soldiers in Obukhovychi, a town near Belarus, were under attack by Ukrainian forces. Going door to door, they forced residents into the town's school, which the Russians were using as a headquarters, in an effort to deter Ukrainian attack.

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174 Noëlle Quénivet, *Command Responsibility and the Ukraine Conflict*, Articles of War (Mar. 30, 2022), https://lieber.westpoint.edu/command-responsibility-ukraine-conflict/; Sean Watts, *A War Crimes Primer on the Ukraine-Russia Conflict*, Articles of War (Apr. 4, 2022), https://lieber.westpoint.edu/war-crimes-primer-ukraine-russia-conflict/.

175 Amanda Seitz & Arijeta Lajka, Amid horror in Bucha, Russia relies on propaganda and disinformation, PBS (Apr. 6, 2022), https://www.pbs.org/newshour/world/amid-horror-in-bucha-russia-relies-on-propaganda-and-disinformation; Human Rights Watch, *Russia: Government Shuts Down Human Rights Watch Office* (Apr. 8, 2022), https://www.hrw.org/news/2022/04/08/russia-government-shuts-down-human-rights-watch-office.

176 Carlotta Gall & Andrew E. Kramer, *In a Kyiv Suburb 'They Shot Everyone They Saw,'* N.Y. Times (Apr. 3, 2022), https://www.nytimes.com/2022/04/03/world/europe/ukraine-russia-war-civilian-deaths.html; Megan Specia, *In Ukraine, Sudden Death on a Train Platform*, N.Y. Times (Apr. 8, 2022), https://www.nytimes.com/2022/04/08/world/europe/ukraine-train-station-attack.html; Amnesty International, *Russian military commits indiscriminate attacks during the invasion of Ukraine* (Feb. 25, 2022), https://www.amnesty.org/en/latest/news/2022/02/russian-military-commits-indiscriminate-attacks-during-the-invasion-of-ukraine/.

177 Véronique Aubert, *War Crimes Against Children*, Articles of War (Apr. 8, 2022), https://lieber.westpoint.edu/war-crimes-against-children/.

178 Michael N. Schmitt, *Deportation of Ukrainian Civilians to Russia: The Legal Framework*, Articles of War (Mar. 24, 2022), https://lieber.westpoint.edu/deportation-ukrainian-civilians-russia-legal-framework/.

179 Gary Corn, *The Law of Crowdsourced War: Democratized Supply Chains—Part II*, Articles of War (Mar. 15, 2023), https://lieber.westpoint.edu/category/ukraine-russia-symposium/page/3/.

180 Michael N. Schmitt, *Russian Booby-Traps and the Ukraine Conflict*, Articles of War (Apr. 5, 2022), https://lieber.westpoint.edu/booby-traps-ukraine-conflict/.

181 Katharine Fortin, *Abducting Dissent: Kidnapping Public Officials in Occupied Ukraine*, Articles of War (Mar. 22, 2022), https://lieber.westpoint.edu/kidnapping-public-officials-occupied-ukraine/.

182 Tom Dannenbaum, *The Attack at the Zaporizhzhia Nuclear Plant and Additional Protocol I*, Articles of War (Mar. 13, 2022), https://lieber.westpoint.edu/attack-zaporizhzhia-nuclear-plant/.

183 Jeremy Bowen, *Ukraine War: 'Russian soldiers held us as human shields,'* BBC (Apr. 7, 2022), https://www.bbc.com/news/world-europe-61020565.

This was not the first report of Russian forces using Ukrainian civilians as human shields.[184] For instance, a Ukrainian Defence Ministry spokesman has charged, "The enemies have been using Ukrainian children as a living shield when moving their convoys, their vehicles, according to reports by local civilians…. Occupiers use those children as hostages as a guarantee that local civilians will not provide the enemy's coordinates to Ukrainian defenders."[185] In one incident, busloads of children reportedly were placed in front of Russian tanks.[186]

True to form, Russia has made similar claims. When the current hostilities began in February, President Putin warned his armed forces not to "allow neo-Nazis and [Ukrainian right-wing radical nationalists] to use your children, wives and elders as human shields."[187] Later, the head of Russia's National Defence Control Centre alleged that "militants of the territorial defence battalions continue to hold more than 4.5 million civilians hostage as a human shield."[188] And on March 7, the Russian Permanent Representative to the OSCE asserted,

> The Ukrainian Government is not taking effective steps to evacuate people and refuses to bring its influence to bear on the nationalists, who continue to use the population as "human shields". Curfews have been imposed in Ukrainian cities; in many of them, bridges that were used by civilians have been blown up, roads leading out of them have been mined, and civilians are threatened with physical reprisals …
>
> …The OSCE cannot stay aloof from this intolerable situation in which civilians are being held hostage as "human shields". We urge the Polish Chairmanship and the Secretary General to exert, without delay, as much pressure as possible on the Kyiv regime and get it to end this criminal practice whereby international humanitarian law is being trampled underfoot.[189]

The allegations are baseless. But they do demonstrate that Russia understands the tactic of using human shields is condemnable and unlawful.

The Act of Human Shielding

Human shielding can take place in multiple ways. For instance, soldiers can place civilians in front of themselves to avoid being shot; use them to block enemy movement physically; hide among civilians, as in traveling among civilians fleeing the fighting; try to alter their

184 Emily Ferguson, *Russian troops carrying out appalling acts on civilians, Liz Truss says, as children used as 'human shields'*, iNews (Apr. 3, 2022), https://inews.co.uk/news/politics/russian-troops-appalling-acts-civilians-liz-truss-children-human-shields-massacre-1554595?ico=in-line_link.

185 Media Center Ukraine Kyiv Eng, *Colonel Oleksandr Motuzyanyk, Spokesman for the Ministry of Defense of Ukraine*, YouTube (Apr. 1, 2022), https://www.youtube.com/watch?v=BLvNV9kdrww.

186 Daniel Boffey, *Ukrainian children used as 'human shields' near Kyiv, say witness reports*, The Guardian (Apr. 2, 2022), https://www.theguardian.com/world/2022/apr/02/ukrainian-children-used-as-human-shields-near-kyiv-say-witness-reports.

187 Neve Gordon & Nicola Perugini, *Why we need to challenge Russia's human shields narrative*, Al jazeera (Apr. 3, 2022), https://www.aljazeera.com/opinions/2022/4/3/why-we-need-to-challenge-russias-human-shields-narrative.

188 *Russia says Ukraine holding more than 4.5 mn civilians as human shields*, Business Standard (Mar. 8, 2022), https://www.business-standard.com/article/international/russia-says-ukraine-holding-more-than-4-5-mn-civilians-as-human-shields-122030801422_1.html.

189 Permanent Mission of the Russian Federation to the OSCE, Statement by Mr. Alexander Lukashevich, Permanent Representative of the Russian Federation, at the 1361st (Special) Meeting of the OSCE Permanent Council 7 March 2022 On the gross and continuous violations of humanitarian law by Ukraine and the Western community's support for these (Mar. 7, 2022).

enemy's proportionality calculation by driving up the number of civilian casualties expected during an attack; or, irrespective of any proportionality calculation, simply attempt to cause the enemy to hesitate to attack.

In treaty law, there are several prohibitions on the practice. Article 23 of the 1949 Third Geneva Convention bars the use of prisoners of war to "render certain points or areas immune from military operations,"[190] while Article 28 of the Fourth Geneva Convention provides the same protection to "protected persons."[191] Protected persons are those "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[192] This includes non-Russians in territory under the control of Russian forces. It is also explicitly forbidden to use medical units as a shield.[193]

However, the broadest protection is found in Article 51(7) of the 1977 Additional Protocol I. It provides,

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.[194]

Thus, the Additional Protocol I rule applies to the use of any civilians to shield military operations. Note that the prohibition addresses only the use of civilians and not civilian objects.

Russia's *Regulations on the Application of International Humanitarian Law* implements the Geneva Conventions and Additional Protocol I prohibitions by noting, "It is prohibited by resorting to perfidy to use the movement of medical units and transports, civilians and prisoners of war or use their presence to shield the movement (manoeuvre) of military units or protect any areas (military objectives) when conducting combat operations."[195]

The International Committee of the Red Cross *Customary IHL* study asserts, and correctly so, that customary law also prohibits the use of human shields.[196] It supports the assertion with extensive practice in its study.[197] The characterization as customary is consistent with the position taken by the United States, a non-Party to Additional Protocol I. The State Department's Deputy Legal Adviser, Michael Matheson, confirmed this view during a well-known 1987 presentation at

190 GC III, s*upra* note 30, art. 23.

191 GC IV, *supra* note 30, art. 28.

192 *Id.* art. 4.

193 AP I, *supra* note 10, 12(4).

194 *Id.* 51(7).

195 Russian Federation, Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation, Ministry of Defence of the Russian Federation, Moscow, § 7 (Aug. 8, 2001).

196 *Rule 97—Human Shields*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule97.

197 *Practice relating to Rule 97, Human Shields*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v2/rule97.

American University in which he outlined U.S. opposition to some aspects of the Protocol.[198] United Nations bodies have also repeatedly condemned the use of human shields as a violation of international law.[199]

Today, the U.S. position is reflected in the DoD *Law of War Manual*:

> Parties to a conflict may not use the presence or movement of protected persons or objects: (1) to attempt to make certain points or areas immune from seizure or attack; (2) to shield military objectives from attack; or (3) otherwise to shield or favor one's own military operations or to impede the adversary's military operations.[200]

The *Manual* explains, "In particular, the civilian population, protected persons under the GC, POWs, fixed medical establishments and medical units, parlementaires and other persons protected by a flag of truce, and cultural property are protected persons and objects that may not be used for the above purposes."[201]

It must be cautioned that the mere *presence* of civilians in the vicinity of military operations does not violate the prohibition. For instance, in urban warfare, it will often be the case that civilians are nearby, as in the case of using a civilian building as a fighting position in a firefight or traveling down a road on which civilians are fleeing the fighting. It may even be the case that a defender is in violation of its obligation to take "passive precautions" to separate military objectives from the civilian population to the extent feasible.[202] But before a violation of the human shielding prohibition lies, there must be intentional co-location of combatants or military objectives with civilians or other protected persons to deter enemy attacks.

Intent is the critical element in the violation, for as noted by the DoD *Law of War Manual*, "[I]n the absence of purposeful action to put protected persons and objects at risk of harm from enemy military operations, there would be no violation" of the prohibition.[203] The Russian actions in rounding up civilians and keeping them where one's soldiers are located qualify as intentional, as does integrating civilians into military vehicle movements to deter an enemy attack.

Russian countercharges of Ukrainian shielding, even if true (which is unlikely), falter on this basis. It is theoretically possible for large numbers of civilians to be used as human shields, as in the case of blocking their departure from a village about to be attacked for the express purpose of deterring that attack or forcing the enemy to adopt sub-optimal tactics to avoid harming them.

However, unlike the Russian actions, there is no indication of Ukrainian specific intent to use

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198 Martin P. Dupuis, John Q. Heywood & Michéle Y.F. Sarko, *The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am U. Int'l L. Rev. 415 (1987).

199 *See, e.g.*, UN Commission on Human Rights, 48th Sess., E/CN.4/RES/1992/71 (Mar. 5, 1992); UN Commission on Human Rights, 51st Sess., E/CN.4/RES/1995/89 (Mar. 8, 1995); UN Commission on Human Rights Res. 2003/6, E/CN.4/2003/L.11 (Apr. 15, 2003); UN Commission on Human Rights, Res. 2004/10, E/CN.4/RES/2004/10 (Apr. 15, 2004).

200 DoD LoW Manual, *supra* note 34, § 5.16.

201 *Id.* § 5.16.1.

202 AP I, *supra* note 10, art. 58.

203 DoD LoW Manual, *supra* note 34, § 5.16.2.

the individuals as human shields, move them to locations where they might serve as such, or compel them to act in that capacity. On the contrary, Ukraine often has been frustrated by Russia in its attempts to evacuate civilians from the vicinity of combat. Moreover, the fact that millions of them have fled to other countries belies the Russian claims. And while it is true that the government is not allowing fighting-age males to leave the country, that is being done to ensure their availability as fighters, not shields.

There have been numerous international criminal cases confirming that the use of human shields is not only an IHL violation but also a *war crime.* These include the U.S. Military Tribunal at Nuremberg's *von Leeb* case (the High Command Trial);[204] the *Karadžić* and *Mladić*,[205] *Blaškić*,[206] and *Naletilić* and *Martinović*[207] cases before the International Criminal Tribunal for the former Yugoslavia; and the Israeli Supreme Court's *Public Committee Against Torture* case.[208] The cases involved, variously, prisoners of war, UNPROFOR peacekeepers, and civilians.

With respect to the U.S. position, the former U.S. Ambassador at Large for War Crimes Issues, David Scheffer, confirmed the status of human shielding as both an IHL violation and a war crime and offered examples during a 2000 address to I Corps soldiers at Fort Lewis:

> Articles 51 and 58 of Protocol I quite properly articulate the principle that a party on the defensive cannot intentionally use civilian noncombatants or civilian property to shield military targets. In one sense, this is simply a refinement of the protected status that civilians and their property enjoy under the laws of armed conflict. (IHL violation). . . .
>
> . . . States that abuse the status of protected persons and objects commit war crimes, period. We saw occasions from the Gulf war where the Iraqi army tried to take advantage of coalition training in the laws of armed conflict by misusing civilian property in exactly this way. Most recently, we have well documented evidence that the forces of Slobodan Milosevic used human shields in Kosovo. I personally listened to the account of one refugee as he described to me how the Serbs stopped a train, in the middle of a field of tanks, which was packed with refugees who had been forced from their homes at gunpoint. There are numerous other accounts that describe the Serbian attempts to shield military equipment from NATO air strikes by parking it adjacent to schools, museums, and civilian housing.[209]

More to the point in the current international armed conflict, the Rome Statute of the International Criminal Court applies to crimes committed on Ukrainian territory. Its Prosecutor has opened an investigation into the situation.[210] Under Article 8(2)(b)

204 The United States of America vs. Wilhelm von Leeb et al., Judgment, 1948 US Military Tribunal Nuremberg (Oct. 27).

205 Prosecutor v. Karadžić & Mladić, Case No. IT-95-5-I, Indictment (Int'l Crim. Trib. for the Former Yugoslavia July 1995).

206 Prosecutor v. Blaškicć, Case No. IT-95-14-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

207 Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-PT, Second Amended Indictment (Int'l Criminal Trib. for the Former Yugoslavia Sept. 2001).

208 HCJ 769/02 Pub. Comm. Against Torture in Israel et al. v. Government of Israel et al. (2006) (Isr.).

209 U.S. Dept. of State, David J. Scheffer, Ambassador at Large for War Crimes Issues, Address to I Corps Soldiers and Commanders (May 4, 2000), https://1997-2001.state.gov/policy_remarks/2000/000504_scheffer_warlaw.html.

210 Ukraine, ICC-01/22, Investigation, 2022 ICC (Mar. 2).

(xxiii) of the Statute, "utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" is a war crime.[211] The Russian actions have exposed the soldiers and commanders involved to prosecution, and deservedly so.

The Effect of Shielding for the Other Side

Article 51(8) of Additional Protocol I provides, "Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57."[212] Although the provision mentions only Article 57's obligation to take precautions in attack to achieve a comparable effect with less risk to civilians, such as striking other targets or using other weapons systems, it logically encompasses other IHL protections. The most important of these are the prohibition on directly targeting civilians[213] and the rule of proportionality.[214] Since Russia is Party to the Protocol, it cannot argue that military necessity somehow relieved its forces of their targeting law obligations.

The DoD *Law of War Manual* agrees but cautions that the use of shields "may impair the attacking force's ability to discriminate and increase the risk of harm to protected persons and objects."[215] This has long been the U.S. position, as noted in the Department of Defense's *Final Report* on the 1991 Gulf War.

> As correctly stated in Article 51(8) of Protocol I, a nation confronted with callous actions by its opponent (such as the use of "human shields") is not released from its obligation to exercise reasonable precaution to minimize collateral injury to the civilian population or damage to civilian objects. This obligation was recognized by Coalition forces in the conduct of their operations.[216]

But then, the Report notes that "this concept tends to facilitate the disinformation campaign of a callous opponent by focusing international public opinion upon the obligation of the attacking force to minimize collateral civilian casualties and damage to civilian objects—a result fully consistent with Iraq's strategy in this regard." Indeed, in this conflict, Russia has been engaged in an aggressive disinformation (lawfare) campaign designed to shift blame for civilian casualties to Ukraine, a campaign to which human shielding might nefariously contribute.[217]

Such concern has led the United States to adopt a cautious stance with regard to the effect of a party's use of human shielding on its opponent's military operations. Thus, the DoD *Law of*

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211 Rome Statute of the International Criminal Court art. 8(2)(b)(xxiii), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

212 AP I, *supra* note 10, art. 51(8).

213 *Id.* art. 51(2).

214 *Id.* arts. 51(5), 57(2).

215 DoD LoW Manual, *supra* note 34, § 5.16.4; *see also id.* § 5.4.4.

216 U.S. Dep't of Defense, Report to Congress on the Conduct of the Persian Gulf War—Appendix on the Role of the Law of War, 31 I.L.M. 612, 627 (1992) [hereinafter Gulf War Study—Appendix on the Role of the Law of War].

217 Stuart A. Thompson, *4 Falsehoods Russians Are Told About the War*, N.Y. Times (Mar. 10, 2022), https://www.nytimes.com/2022/03/10/technology/disinformation-russia-ukraine.html.

War Manual asserts, "[w]hen the attacking force causes harms that are the responsibility of the defending force due to its use of voluntary human shields or due to the employment of civilian personnel in or on military objectives, the responsibility of the defending force is a factor that may be considered in determining whether such harm is excessive."[218]

In other words, the fact that incidental injuries during a lawful attack on a military objective are caused to human shields rather than civilians whom the enemy is not using to shield means the proportionality assessment may be relaxed by discounting the values of those harmed. The U.K.'s *Manual of the Law of Armed Conflict* also adopts the approach,[219] and some distinguished IHL experts like Yoram Dinstein support it.[220]

I and many others have long opposed this interpretation of Article 51(8) or its customary law equivalent on two bases.[221] The first is a practical one. The proportionality assessment is already one of the most challenging determinations commanders and others involved in attacks must make. To suggest the value of civilians must be relaxed in cases of human shielding further complicates the assessment and begs the question, "relaxed how and how much?"

More importantly, the interpretation relies upon an approach to IHL that has long been rejected. IHL rules reflect a balancing of military and humanitarian considerations,[222] the proportionality rule being the paradigmatic example. However, the U.S. interpretation adjusts the rule's application based on a "fair fight" standard, not a balancing of interests. That is a dangerous precedent to set. It is especially problematic in the case of shielding, for it allows a malevolent enemy engaged in a war crime to deprive the very individuals IHL is meant to protect of some of the protection they enjoy as civilians. Indeed, relaxation of the rule would mean that an attacker may conduct an attack expected to cause harm to civilians that is excessive, and therefore otherwise unlawful, relative to the anticipated military advantage of the strike. That cannot be a proper interpretation of the rule.

A second long-debated issue concerning human shields is whether there is a difference in the effect of human shielding by individuals compelled to do so and those who voluntarily shield. There have been no incidents of voluntary shielding reported in the current conflict, and it is unlikely that Ukrainian civilians would voluntarily act as shields. After all, Russian forces have shown a shocking disregard for civilians in their military operations. Therefore, the presence of civilians would have no deterrent effect on a force that is already targeting civilians and engaging in indiscriminate attacks. However, it is conceivable that civilians in the Donbas region, some of whom are loyal to Russia or the so-called Donetsk and Luhansk People's Republics, might engage in voluntary human shielding.

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218 DoD LoW Manual, *supra* note 34, § 5.12.1.4.

219 U.K. Ministry of Defence, The Manual of the Law of Armed Conflict § 2.7.2 (2004) [hereinafter U.K. LOAC Manual].

220 Dinstein, *supra* note 134, at 185.

221 *See, e.g.*, Marco Sassòli, International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare ¶ 8.344 (2019); Schmitt, *Human Shields in International Humanitarian Law, supra* note 32.

222 Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 Virginia J. Int'l L. 795 (2010).

To begin with, any use of human shields is unlawful, whether the shields act voluntarily or involuntarily. Instead, the unsettled question is the effect of voluntary shielding on IHL's proportionality and precautions in attack rules. The ICRC and many scholars are of the view that there is no effect unless the shields physically impede or otherwise directly impact military operations, as in blocking passage over a bridge.[223] By this approach, other voluntary human shields are to be treated fully as civilians when assessing whether the expected harm to them is excessive relative to the advantage the attacker is likely to gain from the attack (the proportionality rule). Moreover, even if that military advantage justifies the attack according to the rule of proportionality, an attacker must still do everything feasible to avoid harming the voluntary shields, so long as no military advantage is sacrificed (the precautions in attack rule).

In my view, and that of other experts, however, individuals who voluntarily shield military objectives are directly participating in the hostilities.[224] According to Article 51(3) of Additional Protocol I and customary international law, civilians lose the protections IHL provides in the face of attacks while they participate directly in the hostilities.[225] Importantly, this means that any expected incidental harm to them during the attack is not factored into the proportionality analysis. Moreover, the attacker need not take precautions to avoid harming them.

This is the approach taken in the DoD *Law of War Manual*. It provides,

> If civilians are being used as human shields, provided they are not taking a direct part in hostilities, they must be considered as civilians in determining whether a planned attack would be excessive, and feasible precautions must be taken to reduce the risk of harm to them. However, the enemy use of voluntary human shields may be considered as a factor in assessing the legality of an attack. Based on the facts and circumstances of a particular case, the commander may determine that persons characterized as voluntary human shields are taking a direct part in hostilities.[226]

Characterization of a voluntary shield as a civilian directly participating in hostilities reflects the reality of combat. Even if a voluntary shield is not physically impeding military operations, shielding can, as a matter of law, prohibit an attack due to the operation of the proportionality rule. Moreover, even when that is not the case, disciplined military forces always hesitate to mount attacks in which civilians are sure to be harmed. This is true both for humanitarian reasons and because the enemy can use the fact of civilian casualties for lawfare purposes. As a result, shielding is often a better *de facto* defense against attack than would be the case if the civilians were using weapons to do so. Therefore, in my estimation, if

223 ICRC Interpretive Guidance, *supra* note 83, at 56–57; *see, e.g.*, Sassòli, *supra* note 222, ¶ 8.345.

224 *See, e.g.*, Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 J. Int'l L. & Politics 697 (2010); Dinstein, *supra* note 134.

225 AP I, *supra* note 10, art. 51(3); *Customary IHL—IHL Databases - ICRC*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl.

226 DoD LoW Manual, *supra* note 34, § 5.12.3.4.

the Russians resort to voluntary human shielding, harm to those involved need not be considered by Ukrainian forces in either their proportionality analysis or when considering feasible precautions and attack.

Of course, if there is doubt about the voluntariness of shielding, the individuals concerned should be presumed to be acting involuntarily. As Yoram Dinstein has observed,

> When no reliable information as to what has propelled civilians to become "human shields" is available, the presumption must be that they act involuntarily, and under-age children must always be deemed to be involuntary "human shields." As for the subjective motivation of (adult) voluntary "human shields", it is immaterial why they act in that fashion.[227]

As Parties to Additional Protocol I, such a conclusion would be required of Ukraine and Russia. Article 50(1) provides, "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."[228] The rule logically extends to situations in which there is doubt about whether the individual is directly participating in the hostilities, thereby losing the protection from attack civilians enjoy.

Conclusion

Assuming the allegations of human shielding made against the Russian forces are accurate, which they likely are, Russia has undeniably violated IHL, and those involved are subject to prosecution as war criminals. Should Russia use *voluntary* human shields in its Eastern Ukraine operations, the presence of the shields would not affect Ukraine's targeting analysis, at least not as a matter of law. But, of course, if Russia resorts to the use of involuntary shields in their future operations in that area, as they might, they again will have violated IHL and committed war crimes.

227 Dinstein, *supra* note 134, at 184.

228 AP I, *supra* note 10, art. 50(1).

ASSASSINATION IN THE LAW OF WAR

by Michael N. Schmitt | Oct 15, 2021

Few lawyers better appreciated the importance of terminological precision than my late friend and law-of-war colleague, Hays Parks. Over three decades ago, he turned his attention to assassination. This post builds on his work by elaborating on the precise meaning of assassination in the context of armed conflict. In doing so, it identifies definitional elements that emphasize the traditional association of assassination with prohibited practices of wartime treachery and outlawry.

Background

In 1977, following revelations of U.S. lethal targeting operations and the ensuing Church (Senate) and the Pike (House) Committee hearings, President Gerald Ford issued Executive Order 11,905.[229] The order prohibited executive branch personnel from engaging in, or conspiring to engage in, political assassination. Subsequent administrations continued the ban. Four years later, President Reagan issued Executive Order 12,333, which, as amended, remains in effect today.[230] It contains the same prohibition, although it limits application to individuals "acting on behalf of" the U.S. government.

The issue of assassination surfaced again in 1989 as the Judge Advocate General's International Affairs Division was rewriting the 1956 Field Manual 27-10, *The Law of Land Warfare*, a project completed in 2019. As part of that effort, Hays Parks, who was then the Chief of the Division's International Law Branch, wrote a memo of law examining the E.O.'s assassination prohibition from the perspective of both peacetime law and the law of war (Hays's preferred term for the latter body of law).[231]

His memo, published in the *Army Lawyer*, became a classic in the field, in part because of its timing. In just over a year, the United States would be at war with Iraq, a conflict during which the issue of assassination occupied center stage. Once the war began in March 1991, the United States launched over 250 missions against sites where Saddam Hussein was believed to be hiding. Yet when Air Force Chief of Staff General Michael Dugan had suggested in September 1990 that because Saddam is "a one-man show" in Iraq, "he ought to be at the focus of our efforts," Secretary of Defense Dick Cheney promptly fired him.[232]

The issue of so-called assassination during armed conflict has not faded with time. The "targeted killing" debates have addressed a panoply of issues that range from conflict classification and the geography of war

229 Exec. Order 11905, United States Foreign Intelligence Activities (Feb. 18, 1976).

230 Exec. Order 12333, United States Intelligence Activities (Dec. 4, 1981).

231 Memorandum of Law, DAJA-1A (27-1a) (1989). https://sites.duke.edu/lawfire/files/2019/01/ParksMemo1989.pdf.

232 Rick Atkinson, *U.S. to Rely on Air Strikes if War Erupts*, Wash. Post (Sept. 15, 1990), https://www.washingtonpost.com/archive/politics/1990/09/16/us-to-rely-on-air-strikes-if-war-erupts/6d3110ea-8425-468a-9546-10c911c90acd/ (last visited Mar. 4, 2024); Eric Schmitt, *Confrontation in the Gulf; Air Force Chief Is Dismissed for Remarks on Gulf Plan; Cheney Cites Bad Judgment*, N.Y. Times (Sept. 18, 1990), https://www.nytimes.com/1990/09/18/world/confrontation-gulf-air-force-chief-dismissed-for-remarks-gulf-plan-cheney-cites.html.

to conduct of hostilities rules and the interplay between the law of war and human rights law.[233] And then there are headline attacks such as the September 2021 Israeli attack on Iranian nuclear scientist Mohsen Fakhrizadeh and the U.S. airstrike on Iranian Revolutionary Guard Major General Qasem Soleimani in January 2020.[234] Despite frequent characterization of such operations as assassination, the term is in fact a *legal* term of art in both the law of peace and the law of war. In the law of war, the concept of assassination is far narrower than its popular usage might suggest, a point Hays explained thoroughly in his memo.

The Early Law of War

The law of war has long countenanced killing the enemy, including enemy leaders, away from the battlefield. For instance, in the 13th century, Saint Thomas Aquinas argued that killing the enemy sovereign was justified when in the common good, while three centuries later Sir Thomas More asserted that "great rewards" awaited those who killed the "enemy prince" during war.[235] And in the 17th century, Hugo Grotius, often considered the father of modern international law, observed in *On the Law of War and Peace*, his classic work in the field, that "Not merely by the law of nature but also by the law of nations … it is in fact permissible to kill an enemy in any place whatsoever; and it does not matter how many there are that do the deed, or who suffer."[236]

But the right to kill one's enemy during war was not considered wholly unregulated. During the 16th century, Balthazar Ayala agreed with Saint Augustine's contention that it "is indifferent from the standpoint of justice whether trickery be used" in killing the enemy,[237] but then distinguished trickery from "fraud and snares."[238] Similarly, Alberico Gentili, writing in the next century, found treachery "so contrary to the law of God and of Nature, that although I may kill a man, I may not do so by treachery."[239] He warned that treacherous killing would invite reprisal. And Hugo Grotius likewise explained that "a distinction must be made between assassins who violate an express or tacit obligation of good faith, as subjects resorting to violence against a king, vassals against a lord, soldiers against him whom they serve, those also who have been received as suppliants or strangers or deserters, against those who have received them; and such as are held by no bond of good faith."[240]

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233 Louise Arimatsu & Michael N. Schmitt, *Attacking 'Islamic State' and the Khorasan Group: Surveying the International Law Landscape,* 53 Columbia J. Transnat'l L. Bulletin 1 (2014).

234 Ronen Bergman & Farnaz Fassihi, *The Scientist and the A.I.-Assisted, Remote-Control Killing Machine*, N.Y. Times (Sept. 18, 2021, updated Oct. 26, 2021), https://www.nytimes.com/2021/09/18/world/middleeast/iran-nuclear-fakhrizadeh-assassination-israel.html; Human Rights Council, U.N. Doc. A/HRC/44/38 (June 29, 2020); Shane Reeves & Winston Williams, *Was the Soleimani Killing an Assassination?* Lawfare (Jan. 17, 2020), https://www.lawfaremedia.org/article/was-soleimani-killing-assassination.

235 Thomas More, Utopia 109 (J. Churton Collins ed., Oxford U. Press 1904) (1516).

236 3 Hugo Grotius, The Law of War and Peace (1625), *quoted in* 1 The Law of War: A Documentary History 16, 39 (Leon Friedman ed., 1972).

237 Balthazar Ayala, Three Books on the Law of War and on the Duties Connected with War and on Military Discipline 84 (John P. Bates trans., Carnegie Institution 1912) (1582).

238 *Id.* at 87.

239 Alberico Gentili, De Jure Belli Libri Tres 168 (John C. Rolfe trans., 1933) (1612).

240 Grotius, *supra* note 237, at 38–39.

By the 18th century, the element of treachery was firmly entrenched as the key to distinguishing assassination from lawful killing during war. Illustrative was Emmerich de Vattel's clarification in *The Law of Nations or the Principles of Natural Law*:

> But in order to reason clearly on this question we must first of all avoid confusing assassination with surprises, which are, doubtless, perfectly lawful in warfare. When a resolute soldier steals into the enemy's camp at night and makes his way to the general's tent and stabs him, he does nothing contrary to the natural laws of war, nothing, indeed, but what is commendable in a just and necessary war….
>
> Hence I mean by assassination a murder committed by means of treachery, whether the deed be done by persons who are subjects of him who is assassinated, or of his sovereign, and who are therefore traitors, or whether it be done by any other agent who makes his way in as a suppliant or refugee, or as a turncoat, or even as an alien; and I assert that the deed is a shameful and revolting one, both on the part of him who executes and of him who commands it.[241]

Thus, as the modern law of war emerged in the mid-19th century, the concept of assassination was already well formed. It was lawful to kill an enemy beyond the battlefield or by employing stealth or trickery, but not lawful to use treachery to do so. Treachery comprised a breach of confidence by the attacker in a situation where the victim had reason to trust that attacker. In that sense, it foreshadowed the distinction between ruses and perfidy that would appear in 20th-century treaties and customary law of war.

The Modern Law of War

The first formal State codification of the ban on assassination appeared in the 1863 Lieber Code, issued by President Lincoln as General Order 100. Article 148, titled "Assassination." It provided,

> The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.[242]

Although the term "treachery did not feature in the article, the sense that certain acts violate the law-of-war principle of chivalry, which is reflected in the work of the earlier scholars, was clear. In Article 101 of the Code, however, the term did appear, demonstrating its centrality to how war was not to be fought: "While deception in war is admitted as a just and necessary means of hostility, and is consistent

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241 2 Emmerich de Vattel, The Law of Nations or the Principles of Natural Law § 155, at 287–288 (Charles Fenwick trans., Carnegie Institution 1916) (1758).

242 U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Order No. 100, art. 148, Apr. 24, 1863 [hereinafter Lieber Code].

with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them."[243] In subsequent national and international codification efforts, treachery assumed a place of prominence in the treatment of assassination, as it had historically.

The Lieber Code sparked other codification projects, particularly in Europe. In 1874, Czar Alexander II of Russia convened an international conference to draft a law-of-war convention. Although the resulting Brussels Declaration was never ratified, its Article 13 provided that, "murder by treachery of individuals belonging to the hostile nation or army" was "especially forbidden."[244] The Declaration influenced the next major codification attempt, the Institute of International Law's 1880 *Oxford Manual*, Article 8 of which outlawed any "treacherous attempt on the life of an enemy; as for example keeping assassins in pay or by feigning surrender."[245]

These documents served as the basis for drafting the 1899 Hague Convention (II) with Respect to the Laws and Customs of War, in which the ban on treacherous killing finally appeared in binding treaty form.[246] Article 23(b) of its annexed Regulations observed that "it is especially prohibited … to kill or wound treacherously individuals belonging to the hostile nation or army."[247] The article also banned denying quarter and attacking a member of the enemy forces who is *hors de combat*. A second Hague Peace Conference in 1907 slightly revised that instrument, although Article 23(b) survived unchanged in the Regulations annexed to its Hague Convention IV.[248]

Following the Second World War, the International Military Tribunal at Nuremberg found that "[t]he rules of land warfare expressed in the Convention undoubtedly represented an advance over existing International Law at the time of their adoption …, but by 1939 these rules … were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war."[249] The International Military Tribunal for the Far East and the International Court of Justice[250] (Nuclear Weapons Advisory Opinion[251]), among other authoritative bodies and eminent scholars, have also validated the customary law character of the Hague IV Regulations rules, and therefore the prohibition on treacherous killing. As such, the rule binds all States today.

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243 *Id.* art. 101.

244 *Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874.*, ICRC Database, Treaties, States Parties and Commentaries, https://ihl-databases.icrc.org/en/ihl-treaties/brussels-decl-1874.

245 The Laws of War on Land art. 8 (1880) [hereinafter Oxford Manual].

246 Hague Convention (II) with Respect to the Laws and Customs of War on Land, with Annex of Regulations, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

247 *Id.* art. 23(b).

248 Hague IV, *supra* note 63, art. 23(b).

249 Judgement: The Law Relating to War Crimes and Crimes Against Humanity, International Military Tribunal for Germany, The Avalon Project, https://avalon.law.yale.edu/imt/judlawre.asp.

250 International Military Tribunal for the Far East, 48, 413 (Nov. 4, 1948), https://crimeofaggression.info/documents/6/1948_Tokyo_Judgment.pdf.

251 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. (July 8).

The most recent comprehensive treaty governing the conduct of hostilities is the 1977 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.[252] Additional Protocol I's Article 37 styles acts during an armed conflict that were previously labeled "assassination" as "perfidy." The article confirms again that the essence of the prohibition is treachery, not mere deception or trickery.

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
   a. the feigning of an intent to negotiate under a flag of truce or of a surrender;
   b. the feigning of an incapacitation by wounds or sickness;
   c. the feigning of civilian, non-combatant status; and
   d. the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.
2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.[253]

The ICRC's Commentary to Article 37 emphasizes that Article 23(b) of the Hague Regulations "has survived in its entirety" and that replacement of the reference to treachery with perfidy occurred because the term *"trahison"* in the French text was "too restricted in its meaning."[254] Therefore, the drafters preferred the term *"perfidie"* as more reflective of their intent. Rule 65 of the ICRC's *Customary International Humanitarian Law* study characterizes the perfidy prohibition as customary in character, and therefore binding on all States irrespective of Additional Protocol I party status.[255] In doing so, it is on firm ground.

Finally, the Statute of the International Criminal Court includes "[k]illing or wounding treacherously individuals belonging to the hostile nation or army" in international armed conflict, as well as "[k]illing or wounding treacherously a combatant adversary" in non-international armed conflict, a war crime.[256] Thus, the statute's drafters reverted to the language of the 1907 Hague IV Regulations

252 AP I, *supra* note 10.

253 *Id.* art. 37.

254 AP I Commentary, *supra* note 41, ¶ 1488.

255 *Rule 65—Perfidy*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule65.

256 Rome Statute, *supra* note 212, art. 8(2)(b)(xi), 8(2)(b)(ix).

and concluded that the prohibition applied in all armed conflicts.

U.S. Treatment

While the United States is not a Party to Additional Protocol I, with one exception (the reference to "capture"), it accepts Article 37 as reflective of customary law. Indeed, well before the adoption of Additional Protocol I, the Army's 1956 Field Manual 27-10, *The Law of Land Warfare*, acknowledged the customary status of the assassination prohibition. Referring directly to Article 23(b) in a section titled "Assassination and Outlawry," the manual observed, "This article is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive'. It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere."[257]

The provision's title distinguishes assassination from outlawry, suggesting a difference between the two. Yet the Lieber Code described assassination in terms of outlawry. Additionally, a footnote to the Additional Protocol I Commentary on Article 37[258] notes that Morris Greenspan, in his classic 1960 work, *The Modern Law of Land Warfare*, interpreted Hague Regulations Article 23(b) as prohibiting

> assassination, recruitment of hired killers, placing a price on the head of an adversary, or the offer of a reward for his capture 'dead or alive'; proscription and outlawry of an enemy, treacherous request of quarter, and the treacherous simulation of death, wound or sickness, or pretended surrender, for the purpose of putting the enemy off his guard and then attacking him.[259]

This would suggest that assassination can include both treacherous acts like perfidy and outlawry, such as placing a price on an enemy's head.

Contemporary U.S. manuals are in accord with FM 27-10. For example, the 2016 Department of Defense *Law of War Manual* provides in Section 5.22 that "[d]uring international armed conflict, it is prohibited to kill or wound the enemy by resort to perfidy," noting that the terms "treachery" and "perfidy" have been used interchangeably.[260] Citing Article 37 of Additional Protocol I as support, it defines perfidy (and thus treachery) as "acts that invite the confidence of enemy persons to lead them to believe that they are entitled to, or are obliged to accord, protection under the law of war, with intent to betray that confidence." As further indication that perfidy is tied to the notion of assassination (killing), the manual limits the prohibition to acts designed to kill or wound the enemy.

An interesting footnote in the *Law of War Manual* dealing with parlementaires (persons communicating with the enemy) illustrates the long-standing centrality of treachery in the prohibition. It reproduces an extract from an 1873 Opinion of the Attorney General to

257 U.S. Dep't of Army, Field Manual 27-10, The Law of Land Warfare para. 31 (July 18, 1956).

258 AP I Commentary, *supra* note 41, at 431, n.6.

259 Morris Greenspan, The Modern Law of Land Warfare 317 (1959).

260 DoD LoW Manual, *supra* note 34, § 5.22.

make that point: "According to the laws of war there is nothing more sacred than a flag of truce dispatched in good faith, and there can be no greater act of perfidy and treachery than the assassination of its bearers after they have been acknowledged and received by those to whom they are sent."

The Army and Marine Corps' 2019 manual, *The Commander's Handbook on the Law of Land Warfare* (FM 6-27/MCTP 11-10CH), adopts the same approach.[261] It explains that "[p]erfidy involves specific requirements: a killing or wounding of the enemy; the intent (mens rea) to act treacherously (i.e., the intent to kill or wound) (H.R. art. 23(b)); an entitlement or obligation under LOAC; and a nexus in time (that is, immediate tactical advantage) between the treacherous action and the killing or wounding." The manual provides numerous examples, including "Soldiers and Marines in civilian clothing may resist an attack so long as they do not kill or wound treacherously, such as by deliberately seeking to feign civilian status or other protected status while fighting."[262]

Both the DoD and Army manuals also prohibit placing a price on the enemy's head.[263]

Conclusions

Assassination during wartime denotes (1) the treacherous, (2) wounding or killing, of (3) individual adversaries, in other words, perfidious attacks. Although the two terms often appear in the disjunctive, it is also reasonable to include "outlawry," such as putting a price on the enemy's head, within the scope of the definition of assassination, as was done in the Lieber Code and suggested by Greenspan. The United Kingdom's 1958 *Military Manual* took this position, and correctly so in my estimation: "In view of the prohibition of assassination, the proscription or outlawing or the putting of a price on the head of an enemy individual or any offer for an enemy 'dead or alive' is forbidden."[264] Similarly, Australia's 2006 *Manual of the Law of Armed Conflict*, in the section titled "Assassination," notes, "[I]t is prohibited to put a price on the head of an enemy individual. Any offer for an enemy 'dead or alive' is forbidden."[265]

Military manuals have occasionally suggested that assassination is limited to non-combatants or requires a particular *mens rea*. For example, the Australian manual provides, "Assassination is the sudden or secret killing by treacherous means of an individual who is not a combatant, by premeditated assault, for political or religious reasons."[266] Similarly, the 2001 *Canadian Law of Armed Conflict Manual* states, "Assassination means the killing or wounding of a selected non-combatant for a political or religious motive."[267]

However, the historical intent of the prohibition during armed conflict was to

261 FM 6-27, *supra* note 114.

262 *Id.* para. 3-19.

263 DoD LoW Manual, *supra* note 34, § 5.26.3.1; FM 6-27, *supra* note 114, para. 2-186.

264 U.K. War Office, Manual of Military Law para. 115 (1958).

265 Australian Defence Headquarters, Australian Defence Doctrine Publication 06.4, Law of Armed Conflict para. 7.25 (2006).

266 *Id.*

267 Canada Department of National Defence, Joint Doctrine Manual B-GJ-005-104/FP-021, Law of Armed Conflict para. 612 (Aug. 31, 2001).

encompass the treacherous killing of the enemy, not just noncombatants. This is clear from the reference in Hague Regulations' Article 23(b)'s reference to "individuals belonging to the hostile nation or army," which would include civilians and members of the armed forces. Additionally, the prohibition of assassination contains no *mens rea* requirement beyond an intent to betray a confidence or to encourage others to kill the individual(s) by placing a price on their head.

Finally, it must be cautioned that the definition of assassination and its prohibition during armed conflict differ significantly from the concept and prohibition in peacetime, a subject I have examined elsewhere.[268] The killing of an individual must be attributable to a State, have political overtones, and evidence transnational character to amount to unlawful peacetime assassination. An example was the 2017 murder of Kim Jong-un's half brother, Kim Jong-nam, using the nerve agent VX in the Kuala Lumpur airport.[269]

This distinction raises the sometimes-complex issue of whether the situation under consideration is one of armed conflict to which the law of war applies or falls short of that threshold and therefore is subject to the law bearing on peacetime assassination, including international human rights and domestic law. An interesting case in this regard, analysis of which is beyond the scope of this article, is the Soleimani airstrike mentioned earlier.[270] But once the conflict classification analysis concludes an armed conflict is underway, the prohibition on assassination in its current law-of-war form comes into play.

Hays Parks's critical point in his prescient 1989 memo is that "assassination" is a *legal* term of art that takes on *different* meanings depending on whether it is used in the context of peace or war. Unfortunately, as no one understood better than Hays, that point is too often missed in contemporary commentary and analysis.

268 Michael Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 Yale J. Int'l L. 609 (1992).

269 *North Korea used VX nerve agent to kill leader's brother, says US*, BBC (Mar. 6, 2018), https://www.bbc.com/news/world-asia-43312052.

270 Reeves & Williams, *supra* note 235.

TERRAIN DENIAL FIRES ON THE MODERN BATTLEFIELD

by Matt Montazzoli | Aug 25, 2021

Stability and counterterrorism operations in Afghanistan, Iraq, and Syria have provided the primary source of operational experience for currently serving American military leaders and legal advisors. Regardless of whether U.S. forces will (or logistically can) conduct continued airstrikes in Afghanistan from "over the horizon" after the collapse of the Afghan government, the techniques developed and employed during the nearly two-decade conflict are likely to impact American military practice in the future.[271] Military leaders and legal advisors will draw on personal and institutional combat experience when deciding how to apply the law of armed conflict (LOAC) on future battlefields.[272]

One such technique is terrain denial fires. Over the years, media reports of "terrain denial" missions in Afghanistan have breathlessly described a campaign "involving manned and unmanned aircraft and unguided and guided munitions" as "a deliberate and coordinated effort to strip away actual terrain features—narrow mountainous paths, rock-topped ridgelines, and even buildings and other man-made structures—that militants might use." [273] They have compared it to the so-called carpet bombing campaigns of prior conflicts.[274] Does "terrain denial" actually mean the U.S. military is using munitions to reshape topography, and if so, would those actions be lawful? What are terrain denial fires, and what is the legal status of targeting … the ground?

This post seeks to define terrain denial fires and analyze the technique's lawfulness under LOAC. It proposes a definition of terrain denial fires based on a review of U.S. military practice and doctrine; analyzes legal issues arising under LOAC and other international law, including an operational vignette; and explores potential prudential and policy considerations that stem from terrain denial fires.

The term "terrain denial fires" does not have an official unclassified definition, nor is it explicitly discussed in U.S. military doctrine. In order to analyze the lawfulness of terrain denial fires, it is necessary to define the concept. A review of reported U.S. practice and available U.S. military doctrine informs

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271 *See* Paul Iddon, *Can the U.S. Provide 'Over-the-Horizon' Air Support for Afghanistan?* Forbes (July 24, 2021), https://www.forbes.com/sites/pauliddon/2021/07/24/how-can-the-us-maintain-over-the-horizon-support-for-afghanistan/; Helene Cooper, Thomas Gibbons-Neff & Eric Schmitt, *U.S. Airstrikes in Afghanistan Could Be a Sign of What Comes Next*, N.Y. Times (Aug. 3, 2021, updated Aug. 10, 2021), https://www.nytimes.com/2021/08/03/us/politics/us-airstrikes-afghanistan.html; David Vergun, *U.S. to Maintain Robust Over-the-Horizon Capability for Afghanistan if Needed*, DOD News (July 6, 2021), https://www.defense.gov/Explore/News/Article/Article/2682472/us-to-maintain-robust-over-the-horizon-capability-for-afghanistan-if-needed/; Susannah George et al., *Afghan government collapses as Taliban sweeps in, U.S. sends more troops to aid chaotic withdrawal*, Wash. Post (Aug. 15, 2021), https://www.washingtonpost.com/world/2021/08/15/afghanistan-taliban-kabul-embassy-jalalabad/.

272 Kyle Rempfer, *Does your combat experience even matter against Chinese and Russian troops?* Military Times (May 9, 2019), https://www.militarytimes.com/news/your-army/2019/05/09/does-your-combat-experience-even-matter-against-chinese-and-russian-troops/.

273 Joseph Trevithick, *B-52s Are Dropping Hundreds of Dumb Bombs in Afghanistan to Literally Shape the Terrain*, The Warzone (June 29, 2019), https://www.twz.com/16470/b-52s-are-dropping-hundreds-of-dumb-bombs-in-afghanistan-to-literally-shape-the-terrain.

274 *Carpet Bombing*, PBS, https://www.pbs.org/wgbh/americanexperience/features/nixon-carpet-bombing/.

the proposed definition, and that definition undergirds the legal analysis.

U.S. Military Practice

Open-source reporting reveals that over the years terrain denial fires have been delivered by a variety of manned and unmanned aerial platforms, including F-16 and F-35 fighter jets, B-52 manned bombers, attack helicopters, and MQ-9 remotely piloted aircraft.[275] When U.S. forces had a presence on the ground, they also used rockets and cannon artillery for terrain denial fires.[276] Terrain denial missions employed unguided "dumb" bombs, as well as sophisticated Global Positioning System (GPS) or laser-guided munitions.

Although the concept of employing fires to prevent the enemy from using key or advantageous terrain is long-standing, the term "terrain denial fires" seems to have originated during recent counterinsurgency and stability operations.[277] Terrain denial fires were commonly employed to deter insurgent indirect fire attacks during the Iraq War.[278] U.S. forces also used terrain denial fires during fighting against the Islamic State in Iraq and Syria (ISIS) as a means to "leave craters in roads that slow down or stop would-be car bombers trying to attack."[279] In addition to Iraq and Syria, terrain denial fires were employed extensively in Afghanistan, where artillery units report "hitting spots historically used as launching pads by insurgents who shoot rockets at" friendly forces.[280] Troops in Afghanistan also conducted terrain denial "to prevent ISIS-[Khorasan][281] fighters from returning to territory they once controlled in eastern Afghanistan," as well as "regularly firing on a mountain pass, for example, to dissuade the enemy from attempting to make use of a route."[282] Thus, a review of contemporary practice reveals that terrain denial fires are not meant to "literally shape the terrain" in a physical sense, but to influence the enemy's use of that terrain.[283]

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275 Kirby Garlitos, *U.S. Military Using B-52 Bombers, F-16 Fighter Jets, and Drones to Reshape Afghanistan; Push Out Taliban*, TopSpeed (Dec. 17, 2017), https://www.topspeed.com/cars/car-news/u-s-military-using-b-52-bombers-f-16-fighter-jets-and-drones-to-reshape-afghanistan-push-out-taliban/; Joseph Trevithick, *USAF F-35As and F-15Es Flatten ISIS "Infested" Island in Iraq with 80K Pounds of Bombs (updated)*, The Warzone (Sept. 11, 2019), https://www.twz.com/29749/usaf-f-35as-and-f-15es-flatten-isis-infested-island-in-iraq-with-80k-pounds-of-bombs; Lara Seligman @laraseligman, X (formerly Twitter) (Nov. 16, 2017), https://twitter.com/laraseligman/status/931237585753587712; *Terrain Denial*, DVIDS (June 20, 2007), https://www.dvidshub.net/video/25382/terrain-denial; The Bureau of Investigative Journalism, AFG514 Unknown Casualties (Sept. 3, 2018), https://www.thebureauinvestigates.com/drone-war/data/afghanistan-reported-us-covert-actions-2018/p14/#strike-22511.

276 *Terrain Denial Mission [Image 2 of 13]*, DVIDS (Sept. 27, 2018), https://www.dvidshub.net/image/4832247/terrain-denial-mission.

277 *The Importance of Area Denial in War*, Rane (Jan. 4, 2016), https://worldview.stratfor.com/article/importance-area-denial-war (last Mar. 5, 2024).

278 Justino Lopez, Jr., *Terriin Denial Missions in OIF III*, Field Artillery (July–Aug. 2005), at 20–21.

279 Loveday Morris & Mustafa Salim, *US-backed Coalition using 'terrain denial strike' strategy to thwart Islamic State in battle to reclaim Mosul*, The Age (Jan. 15, 2017), https://www.theage.com.au/world/usbacked-coalition-using-terrain-denial-strike-strategy-to-thwart-islamic-state-in-battle-to-reclaim-mosul-20170115-gtrned.html.

280 Sean Kimmons, *Dropping steel rain, artillerymen deter enemy rockets in Afghanistan*, U.S. Army (Oct. 8, 2019), https://www.army.mil/article/212751/dropping_steel_rain_artillerymen_deter_enemy_rockets_in_afghanistan; *see also* Andrew Quilty, *The Last Americans Fighting in Afghanistan,* N.Y. Times (Oct. 5, 2018), https://www.nytimes.com/2018/10/05/opinion/sunday/american-military-afghanistan-islamic-state.html.

281 Andrew deGrandpre, *A U.S. service member is killed, others wounded, fighting ISIS in Afghanistan*, Wash. Post (Aug. 16, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/08/16/a-u-s-service-member-is-killed-others-wounded-fighting-isis-in-afghanistan/.

282 Kasey Cordell, *On the Front Line: Embedded with American Female Combat Soldiers in Afghanistan*, 5280 (Nov. 2018), https://www.5280.com/embedded-with-american-female-combat-soldiers-in-afghanistan/.

283 Trevithick, *supra* note 274.

U.S. Military Doctrine

The term "terrain denial" is non-doctrinal. It is absent from the Department of Defense (DoD) internal dictionary, and does not appear in the Army's official operational terms nor the Air Force's glossary.[284] Army doctrine discusses "fires [to] deny the enemy unrestricted use of the terrain and [to] prevent enemy reserves from entering the fight," but does not use the term "terrain denial fires."[285] Aside from brief mention of "area denial" systems such as landmines, the concept is also absent from fire support doctrine.[286] Joint forces doctrine does define "denial measures" as "action to hinder or deny the enemy the use of territory, personnel, or facilities,"[287] while the Army defines "deny" as a "task to hinder or prevent the enemy from using terrain, space, personnel, supplies, or facilities."[288] In doctrine, area denial measures are never directly linked to fires; however, Army doctrine seems to nod at the use of fires for terrain denial, noting that during stability operations "[f]ires may be used more frequently to defend or deny the use of key sites than to seize them."[289]

The most extensive quasi-official discussion of terrain denial fires comes from a 2005 article in a U.S. military professional journal for artillerists.[290] The article describes the employment of terrain denial fires to disrupt insurgent mortar attacks against a U.S. operating base near Mosul, Iraq. The author does not define terrain denial fires, and the article contains no doctrinal quotations or citations. Rather, it describes conducting terrain denial with cannon artillery, mortars, and the guns and rockets mounted to attack helicopters.

Although terrain denial fires are not a doctrinal concept, they have been officially acknowledged. For example, a military spokesperson explained that "terrain denial strikes are useful in enabling freedom of maneuver for our forces, elimination of cover and concealment [for] enemy forces, [and] affecting enemy pattern of life in such a way that allows us to gain invaluable intelligence on their networks."[291]

The best doctrinal fit for terrain denial fires seems to be as a form of interdiction operations or shaping operations. The Army's manual on operations defines shaping operations as any operation that "establishes conditions for the decisive operation through effects on the enemy, other actors, and the *terrain*."[292] Joint doctrine defines interdiction operations as actions "to prevent adversaries from employing surface-based weaponry and reinforcing units at a time and place of their choosing."[293] The

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284 *See, e.g.*, U.S. Dep't of Defense, DoD Dictionary of Military and Associated Terms (Nov. 2021).

285 U.S. Dep't of Army, Field Manual 3-90-1, Offense and Defense, Volume 1, para. 3-73 (Mar. 22, 2013) [hereinafter FM 3-90-1].

286 U.S. Dep't of Army, Army Techniques Publication 3-09.30, Observed Fires at glossary-1 (Sept. 28, 2017) [hereinafter ATP 3-09.30].

287 Joint Publication 3-15, Barriers, Obstacles, and Mine Warfare for Joint Operations at II-7 (Sept. 6, 2016, validated Mar. 5, 2018).

288 U.S. Dep't of Army, Field Manual 3-09, Field Artillery Operations and Fire Support (Apr. 30, 2020) [hereinafter FM 3-09].

289 ATP 3-09.30, *supra* note 287, para. 2-164.

290 Lopez, Jr., *supra* note 279.

291 Trevithick, *supra* note 274.

292 U.S. Dep't of the Army, Army Doctrine Publication 3-0, Operations para. 4-27 (July 31, 2019).

293 Joint Publication 3-03, Joint Interdiction at I-2 (Sept. 9, 2016).

purposes of interdiction include diversion, delay, and destruction of the enemy. As discussed later, the use of fires to destroy the enemy constitutes a strike, and as such falls outside the definition of terrain denial fires. Thus, terrain denial fires are a subset of, not a synonym for, interdiction fires.[294]

A Proposed Definition

Based on reported practice and relevant doctrine, a proposed definition of terrain denial fires is *direct or indirect fires intended to hinder, delay, or prevent the enemy from using terrain, space, or facilities*. This definition necessarily excludes strikes against enemy personnel or facilities that intend to damage, destroy, suppress, or defeat them, as the purposes of those strikes would not be to deny terrain.[295] There is a vigorous, ongoing conversation (and robust legal, doctrinal, and policy framework) surrounding so-called lethal strikes, but there is very little public discussion of terrain denial fires.[296] A working definition of terrain denial fires is a precondition for consideration of the law and policy issues surrounding the concept, issues explored in the remainder of this article.

International Legal Implications

An "Attack"

In both international and non-international armed conflicts, an "attack" implicates the LOAC targeting regime, including rules governing distinction between lawful targets and civilian objects, obligations to take feasible precautions during an attack, and the principle of proportionality.[297]

The exact contours of what constitutes an "attack" under the law of armed conflict are hotly debated and were explored especially well in a 2020 Lieber Institute symposium.[298] Even under the narrow definition of an attack advanced by Colonel (Retired) Dick Jackson, terrain denial fires remain an "attack" because they are "acts of violence against the adversary."[299] While the adversary and his objects may not be present at the location targeted at the moment of the strike, the terrain denial fires are still "against the adversary" because the intent is to "hinder or prevent the enemy from using terrain." Interestingly, Jackson specifically excludes "altering buildings or land to enhance tactical advantage" and "dropping excess ordnance from aircraft in an open and unpopulated

294 FM 3-09, *supra* note 289, sec. II.

295 Joint Publication 3-0, Joint Campaigns and Operations (June 18, 2022).

296 Michael N. Schmitt & Eric Widmar, *The Law of Targeting, in* Targeting: The Challenges of Modern Warfare 121 (Paul A. L. Ducheine et al. eds. 2016); Joint Chiefs of Staff, Joint Targeting School, https://www.jcs.mil/Doctrine/Joint-Training/Joint-Functional-Schools/JTS/; Presidential Policy Guidance, Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

297 *Principle of distinction*, IHL Databases, https://casebook.icrc.org/law/principle-distinction; DoD LoW Manual, *supra* note 34, § 5.11. With the recent collapse of the Afghan government (*Afghan President Ghani flees country as Taliban enters Kabul*, Al jazeera (Aug. 15, 2021)) and continued rumblings about Iraq revoking consent for American military operations (Tamara Qiblawi, Jomana Kardsheh & Arwa Damon, *Iraq has voted to expel US troops. Whether they'll actually be kicked out is far from clear,* CNN (Jan. 6, 2020)), it is possible future terrain denial fires may implicate *jus ad bellum* considerations as well, but this article focuses on *jus in bello* issues.

298 AP I, *supra* note 10, art. 49; Ori Pomson, *Ntaganda Appeals Chamber Judgment Divided on Meaning of "Attack,"* Articles of War (May 12, 2021), https://lieber.westpoint.edu/category/attack-symposium/.

299 Dick Jackson, *Motive and Control in Defining Attacks*, Articles of War (Nov. 11, 2020), https://lieber.westpoint.edu/motive-control-attacks/.

area" from his definition of attack—scenarios that sound a lot like the reported "dropping [of] hundreds of dumb bombs in Afghanistan to literally shape the terrain."[300] However, the intent is what matters. And the intent behind terrain denial fires is to use fires—a form of force or violence—to deny the enemy the use of the terrain.

Lawful Military Objectives?

The LOAC rules governing distinction limit attacks to lawful military objectives.[301] An object—including a piece of terrain—may become a lawful military objective if it makes an effective contribution to military action by its nature, location, purpose, or use, and if the object's partial or total destruction or neutralization offers a definite military advantage in the circumstances ruling at the time.[302] The DoD uses the term "target" to include to a "place … considered for possible engagement or action to alter or neutralize the function it performs for the adversary."[303] Terrain denial fires are usually an example of measures to neutralize an object, rendering it useless to the enemy without capturing or destroying it.[304]

Terrain will generally qualify as a lawful military objective due to its location or use. Even if the enemy has yet to use a piece of terrain, it could be a military objective because of its location alone. For example, a trail across a mountain pass might furnish an infiltration or resupply route, thus making it a lawful military objective even though the enemy has not yet begun movement along the trail.[305] The DoD *Law of War Manual* explicitly states that "[t]he word 'location' also helps clarify that an area of land can be militarily important and therefore a military objective" independent of the land's purpose or use, although actual use for military purposes would only strengthen the case. Little Round Top during the American Civil War battle at Gettysburg was key terrain due to the strategic advantage afforded by its location and height.[306] The U.S. Army could have classified it as a military objective and used fires to deny it to the rebel forces, even before secessionist soldiers moved to occupy the hill.

While the United States does not accept as customary international law AP I's presumption that "in case of doubt" objects normally dedicated to civilian purposes are not military objectives, in practice U.S. forces often adopt a civilian presumption as a matter of policy.[307] Even absent such a presumption, much of the terrain U.S. forces

300 Trevithick, *supra* note 274.

301 *Rule 1—The Principle of Distinction Between Civilians and Combatants*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1.

302 *Rule 8—Definition of Military Objectives*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule8.

303 Joint Publication 3-60, Joint Targeting at GL-8 (Jan. 31, 2013).

304 DoD LoW Manual, *supra* note 34, § 5.6.7.1. Of note, the term "neutralize" is a term of art for both legal and fires professionals, with different meanings: neutralization in the fires context means 10% or greater destruction (FM 3-09, *supra* note 289), while legal parlance draws a distinction between partial or total destruction and neutralization.

305 Marjorie Millace Whiteman, 10 Digest of International Law 427 (1968).

306 James R. Brann, *Defense of Little Round Top (July 2, 1863)*, American Battlefield Trust, https://www.battlefields.org/learn/articles/defense-little-round-top; *View of Hazlett's Battery on Little Round Top,* The Battle of Gettysburg, https://gettysburg.stonesentinels.com/gettysburg-photo-gallery/little-round-top-photo-gallery/view-of-hazletts-battery-on-little-round-top/.

307 Theodore T. Richard, Unofficial United States Guide to the First Additional Protocol to the Geneva Conventions of 12 August 1949, 86 (May 2019); AP I, *supra* note 10, art. 52.

might seek to deny is likely to constitute a civilian object that has lost protections, and as such transformed due to its location or use into a military objective while retaining some civilian function. An object that is both a military objective and a civilian object is referred to as dual use.[308]

U.S. Position on Proportionality and Dual-Use Objects

Proportionality prohibits attacks in which the expected harm to civilians or damage to civilian objects would be excessive as compared with the concrete and direct military advantage expected to be gained.[309] The U.S. position on how proportionality applies to dual-use objects is somewhat contradictory, in that dual use is not a legal classification; either objects are military objectives or they are not military objectives.

The Commander's Handbook on the Law of Land Warfare asserts "the principle of proportionality does not impose an obligation to reduce the risk of harm to military objectives,"[310] a position echoed by the DoD *Law of War Manual*.[311] This means that once a dual-use object is a military objective, the remaining civilian "parts" of the object are stripped of their protections. Thus, proportionality as applied to that object does not prevent the object, including the civilian portions, from being attacked. Proportionality still considers expected harm to nearby civilian objects, such as surrounding buildings. Thus, the *Law of War Manual* warns that nonetheless "it will be appropriate to consider in applying the principle of proportionality the harm to the civilian population that is expected to result from the attack on such a military objective."[312]

The U.S. view of proportionality as it applies to dual-use objects that emerges from reading the handbook and the manual together is, on the one hand, exceedingly narrow, in that it asserts that because a dual-use object is a military objective there is no need to weigh damage to the civilian "parts" of that object. And yet, on the other hand, it is also very broad, in that it requires one to consider the direct, foreseeable harm to the civilian population outside of the object itself. Terrain denial fires complicate this analysis—as illustrated in the vignette later in this article—because terrain is both more and less divisible than a typical "components of a whole" dual-use object, and because terrain always has a civilian (that is, non-military) function. It is hard to conceive of terrain denial fires that are not targeting a dual-use object.

The *Manual* generally comes down in favor of considering all "direct harms foreseeably resulting from the attack" in assessing proportionality, excluding remote effects.[313] This means the "broad" view (harm to civilian population at large) subsumes the "narrow" view (harm to civilian parts of the targeted

308 *Rule 10—Civilian Objects' Loss of Protection from Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule10.

309 AP I, *supra* note 10, art. 57.

310 FM 6-27, *supra* note 114, para. 2-72.

311 DoD LoW Manual, *supra* note 34, § 5.10.

312 *Id.* § 5.6.1.2.

313 *Id.* § 5.12.1.3.

object). As Michael Schmitt has pointed out while arguing for an alternative interpretation, the narrow view of the U.S. position "could lead to situations in which the real impact on civilians of an attack far outweighs the military need to attack the target, but the attack would nevertheless be lawful."[314] Some commentators have called for taking into account indirect or reverberating effects, but the U.S. position excludes remote or speculative harms from the analysis.[315]

As terrain denial fires constitute an attack, there is also a requirement for feasible precautions to avoid damage to civilian objects and foreseeable direct harm to civilians.[316] Further, there is a requirement to provide "effective advance warning of attacks that may affect the civilian population, unless circumstances do not permit."[317]

Environmental Modification?

If terrain denial fires were truly "a coordinated and deliberate effort to strip away actual terrain features" as reported,[318] such environmental modification could run afoul of the U.S. position that "parts of the natural environment may not be destroyed unless required by military necessity."[319] The United States has signed and ratified the UN Convention on the Prohibition of Military or Any Other Use of Environmental Modification Techniques and generally adheres to AP I's prohibition on environmental damage that is "widespread, long-term and severe" as a policy matter while maintaining AP I's prohibition is not customary international law.[320] The U.S. also takes the position that no means or methods of warfare employed by the United States meet that threshold.[321] This almost certainly means the United States would argue that localized terrain denial fires are not "widespread," or that any damage caused to terrain by conventional weapons falls short of the threshold for "severe."

Prudential Concerns and Policy Considerations

Although terrain denial fires may be lawful given the circumstances ruling at the time, a commander may still decide there are policy restrictions or prudential considerations that militate against employing such fires in a given situation. Especially during a stability operation or on a large-scale battlefield where civilians are omnipresent, terrain denial fires are almost certain to be counterproductive.[322]

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314 Schmitt, *supra* note 385.

315 International Law Association Study Group, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 Int'l L. Stud. 322, 352 (2017).

316 *Rule 22—Principle of Precautions Against the Effects of Attacks*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule22.

317 *Rule 20—Advance Warning*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule20.

318 Trevithick, *supra* note 274.

319 *Practice relating to Rule 45, Causing Serious Damage to the Natural Environment*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45.

320 Convention on the prohibition of military or any other hostile use of environmental modification techniques, Dec. 10, 1976, 1108 U.N.T.S. 17119; AP I, *supra* note 10, art. 35; ICRC Database, Customary IHL, *supra* note 396; DoD LoW Manual, *supra* note 34, § 6.10.3.1.

321 ICRC, Jean-Marie Henckaerts, Customary International Humanitarian Law: Vol. 1 Rules, 153 (2005).

322 Daniel R. Mahanty, *Protecting Civilians Still Matters in Great-Power Conflict*, Ctr. for Civilians in Conflict (May 3, 2019), https://civiliansinconflict.org/blog/poc-still-matters/; @leptopterygius, X (formerly Twitter) (June 11, 2020), https://twitter.com/leptopterygius/status/1271190459424092160.

The author of the military journal article cited earlier admits that his "commander directed the [helicopters] to 'rock the neighborhood and knock pictures off of the walls of the houses surrounding the [point of origin]' without causing collateral damage."[323] While the intent was not to place the *fires* on the civilians or civilian objects, it seems the commander sought to target the *effects* of the fires at the civilians, in terms of both physical effects ("rocking") and sowing fear, perhaps as a form of psychological operation. Fires do not have to hit a person to have effects on them—witness the psychological impacts of World War One drumfire.[324] At best, this may have been a counterproductive way to influence the civilian population.[325] The liberal employment of terrain denial has inspired criticism that firing weapons into the landscape actually fosters the sort of disorder and insecurity counterinsurgents seek to dispel.[326] Although large-scale combat operations are expected to be "more chaotic, intense, and highly destructive than those the Army has experienced in the past several decades," protection of civilians will almost certainly (and hopefully) remain a U.S. priority.

Even if terrain denial fires impacting the population at large are conducted lawfully (and the relevant AP I prohibition,[327] which is accepted by the United States[328] as customary international law,[329] cautions that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population" are prohibited), prudence argues against taking actions that feed a narrative of America using terrain denial fires as a form of terror bombing against the civilian population.[330] Army doctrine acknowledges that "civil instability increased by the destruction of civilian property, material, and equipment could have adverse effects on the outcomes of the different elements of decisive action."[331]

Terrain denial fires implicate financial concerns, as well. The dual-use nature of many terrain denial targets means civilians will often pursue claims against the U.S. government for damages.[332] Although combat losses are not

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323 Lopez, Jr., *supra* note 279.

324 No Commentary Gameplay, *War Remains: Dan Carlin Presents an Immersive Memory—Full Experience—No Commentary*, YouTube (May 21, 2020), https://www.youtube.com/watch?v=3dD8jE9eRss&t=335s.

325 The commander's view that his fires may rock the neighborhood "without causing collateral damage" likely represents an overly circumspect understanding of collateral damage. The DoD definition of collateral damage includes any "effect that causes unintentional or incidental injury or damage." (U.S. Dep't of Defense, DoD Dictionary of Military and Associated Terms, *supra* note 285). While there may be room for some debate as to whether the stress or fear inflicted on the population from proximity to terrain denial fires rises to the level of "injury," the fact that this commander is deliberately using fires to inspire terror in the civilian population (as opposed to the enemy) means the effects on the civilians are not collateral, but unlawful. (DoD LoW Manual, *supra* note 34, § 5.2.2).

326 Lee Robinson, *Bull in a China Shop? Attack Aviation and the Coin Battlefield*, Small Wars J. (Aug. 7, 2012), https://smallwarsjournal.com/jrnl/art/bull-in-a-china-shop-attack-aviation-and-the-coin-battlefield.

327 AP I, *supra* note 10, art. 51.

328 DoD LoW Manual, *supra* note 34, § 2.5.

329 USAF, Col. Theodore T. Richard, Unofficial United States Guide to the First Additional Protocol to the Geneva Conventions of 12 August 1949, 87 (May 2019).

330 Justus George Lawler, *Terror Bombing: Shattering the immunity of civilians has become the very definition of terrorism*, American Magazine (Aug. 28, 2006), https://www.americamagazine.org/issue/581/bookings/terror-bombing.

331 FM 3-90-1, *supra* note 286.

332 ACLU, Documents received from the Department of the Army in response to ACLU Freedom of Information Act Request, https://www.aclu.org/sites/default/files/webroot/natsec/foia/log2.html..

compensable[333] under the Foreign Claims Act,[334] the United States regularly makes ex gratia payments for civilian harm.[335] In addition, the weapons themselves incur high costs. One can deduce that U.S. forces have conducted such fires using Hellfire missiles or other precision-guided munitions from the fact that terrain denial fires were employed by MQ-9 Reaper drones and the Reaper is not reported to carry any unguided ordnance.[336] The cost of a typical Hellfire missile[337] is publicly reported as between $71,000 and $160,000, raising questions about whether employing precision-guided munitions to target the ground constitutes prudent stewardship of taxpayer dollars.[338]

Terrain Denial Fires Vignette

The Scenario

Imagine a U.S. commander of a multinational force seeks to conduct terrain denial fires on an agricultural field that furnishes an infiltration lane for an attack on her operating base, but that also provides food for a local village. The enemy has used the infiltration route to stage attacks in the past, but there is no evidence enemy forces are using it now, and the field is located in close proximity to the village. The field is ideally suited to provide a covered and concealed route to attack the base, thanks to its geographic location and the thick growth of crops—the same crops that furnish the food for the villagers. The commander seeks to fire cannon artillery into the field at irregular intervals both to physically deny the enemy the opportunity to infiltrate via the field, and to reduce the amount of cover available to the enemy, as well as to foster awareness among the enemy that U.S. forces can fire into the field at will, with attendant psychological effects.

The Legal Advice

The commander's legal adviser would likely advise her that the field is an object normally dedicated to civilian purposes and that some of the multinational partners will thus operate under a presumption that it remains a civilian object. It is not a military objective based on use because the enemy is not using it now, but the field is a military objective by virtue of its location providing an effective infiltration lane to the enemy.

The commander is not obliged to minimize damage to the field itself from the terrain denial fires because the field is a military objective. That said, it is "appropriate" to weigh the expected harm to the civilians resulting from the fires targeting the crops, including effects that are direct and foreseeable, against the direct, concrete military advantage of denying the terrain and demoralizing the enemy.

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333 U.S. Dep't of Army, Field Manual 3-24, Insurgencies and Countering Insurgencies at 13-13 (May 13, 2014) (Change 1, June 2, 2014).

334 Property loss; personal injury or death: incident to noncombat activities of the armed forces; foreign countries, 10 U.S.C. § 2734.

335 Annie Shiel, *DOD's New Ex Gratia Policy: What's Right, What's Wrong, and What's Next*, Just Security (July 20, 2020), https://www.justsecurity.org/71332/dods-new-ex-gratia-policy-whats-right-whats-wrong-and-whats-next/.

336 @MikeBlack114, X (formerly Twitter) (May 4, 2021, 5:36 PM), https://twitter.com/MikeBlack114/status/1389725748982919170; Air Force, MQ-9 Reaper, https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/.

337 *AGM-114 Hellfire Missile Ultimate Guide: Capabilities, Variants, and Cost*, The Defense Post (Mar. 22, 2021), https://www.thedefensepost.com/2021/03/22/agm-114-hellfire-missile/.

338 @FranticGoat, X (formerly Twitter) (Sept. 13, 2019, 1:37 PM), https://twitter.com/FranticGoat/status/1172595169725747201; David Axe, *Why Did America Drop 40 Tons of Bombs on This Iraqi Island?* Daily Beast (Sept. 13, 2019, 5:31 AM EDT), https://www.thedailybeast.com/why-did-america-drop-40-tons-of-bombs-on-iraqs-qanus-island.

The legal advice would turn on the specific facts, including whether the field furnishes the majority of the villagers' food supplies or economic activity. It would also be appropriate for the commander to consider the direct and foreseeable effects on the villagers beyond the destruction of the crops, to include "rocking the neighborhood" with nearby munitions. If the commander's intent is to frighten the enemy into eschewing the infiltration route, such collateral harm may be acceptable—but deliberately terrorizing the villagers would be unlawful.

Even if the proposed fires satisfy proportionality, the commander must take feasible precautions to avoid direct and foreseeable harm to the civilians. This might include providing effective advance warning to the civilian population before the attack,[339] observing the fires to ensure no civilians are present in the area where effects are expected, delaying the timing of the attack until after the field is harvested, or adjusting the weaponeering to select illumination rounds instead of high explosives. Here again, the feasibility of the precautions will be fact-specific—delaying until after the harvest may not be practical because the same crops that furnish the foodstuffs also furnish cover for the enemy, and the commander may decide illumination is insufficient to deny the terrain. The legal advisor may also highlight prudential concerns—the disruption to the village could be lawful, but ultimately counterproductive thanks to a loss of popular support or grist for enemy propaganda.

Conclusion

The use of direct or indirect fires intended to hinder, delay, or prevent the enemy from using terrain, space, or facilities is a lawful technique, although not free from controversy or legal nuance. Practitioners and scholars should ensure they are familiar with the legal and prudential issues associated with terrain denial fires so they are prepared to "[evaluate] the potential legal consequences resulting from primary and secondary effects"[340] of using fires to deny terrain.

[339] Jon Griffiths, *Warnings as a Precautionary Measure: Gaza,* Lieber Institute for Law & Warfare: Articles of War (June 23, 2021), https://lieber.westpoint.edu/warnings-precautionary-measure-gaza/.

[340] Joint Publication 1-04, Legal Support to Military Operations at II-6 (Aug. 2, 2016).

ATTACKING DAMS—PART I: CUSTOMARY INTERNATIONAL LAW

by Michael N. Schmitt | Jan 31, 2022

The *New York Times* recently reported on a March 2017 airstrike by U.S. forces against the Tabqa Dam, the largest in Syria.[341] At the time of the attack, U.S. forces were supporting Syrian Democratic Forces (SDF) units trying to seize Tabqa, its airfield, and the dam from ISIS. According to the *Times*, special operations Task Force 9 called in the strike using a procedure designed for emergency self-defense situations, thereby circumventing the standard procedure for designating targets and approving strikes. Indeed, the dam was reportedly on a "no-strike" list.

The attack reportedly included the use of artillery and bombs, including a so-called bunker buster with a BLU-109 Hard-Target Warhead.[342] That system is designed to penetrate concrete, following which a delayed-action fuze detonates 550 pounds of explosives inside the target. Fortunately, the weapon did not explode. Had it done so, experts believe the dam might have failed, with disastrous consequences.[343] Instead, witnesses say the attack caused equipment failure that resulted in a dangerous rise in the reservoir's water level, sparked warnings to those downstream, and led Turkey to reduce the upstream flow into the reservoir.

The report follows on the heels of an earlier *New York Times* piece about a strike called in by Task Force 9 under the same procedure that caught the Combined Air Operations Center by surprise.[344] Dozens of civilians were killed. These and other incidents, such as the mistaken drone strike during Kabul's evacuation,[345] motivated Secretary of Defense Austin to issue a directive last week on "Improving Civilian Harm Mitigation and Response."[346]

Commentary on the Tabqa Dam strike has focused on the attack's risk to the civilian population and the use of special procedures for calling in the attack despite being on a no-strike list. However, attacks on dams raise complex international humanitarian law (IHL) issues. The rules governing them depend on the characterization of the conflict as international or non-international and whether the 1977 Additional Protocols I

341 David Philipps, Azmat Khan & Eric Schmitt, *A Dam in Syria Was on a 'No-Strike' List. The U.S. Bombed It Anyway*, N.Y. Times (Jan. 20, 2022), https://www.nytimes.com/2022/01/20/us/airstrike-us-isis-dam.html?referringSource=articleShare..

342 Hill Air Force Base, BLU-109/B Hard-Target Warhead (Jan. 29, 2007), https://web.archive.org/web/20110525133718/http:/www.hill.af.mil/library/factsheets/factsheet.asp?id=5752.

343 OCHA, Syria Crisis: Ar-Raqqa, Situation Update, No. 1 (Jan. 31, 2017).

344 Dave Philipps & Eric Schmitt, *How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria*, N.Y. Times (Nov. 13, 2021, updated Nov. 15, 2021), https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html (last visited Mar .6, 2024).

345 Charlie Savage, Eric Schmitt et al., *Newly Declassified Video Shows U.S. Killing of 10 Civilians in Drone Strike*, N.Y. Times (Jan. 19, 2022), https://www.nytimes.com/2022/01/19/us/politics/afghanistan-drone-strike-video.html.

346 Memorandum from the U.S. Secretary of Defense to Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense Commanders of the Combatant Commands, General Counsel of the Department of Defense Director of Cost Assessment and Program Evaluation, Assistant to the Secretary of Defense for Public Affairs, Deputy Under Secretary of Defense for Policy (Jan. 27, 2022).

and II to the 1949 Geneva Conventions bind the attacking force.[347]

Part I of this series examines the customary international law governing dam attacks. It is the law governing all U.S. operations against dams, including the attack on Tabqa Dam. In the second installment of the series, I will examine the rules for States Parties to the two 1977 Additional Protocols that provide so-called special protection for dams. That group includes most NATO Allies and other key partners of the United States, such as Australia and Japan.

The two posts are meant to help ensure that this and future dam strikes are measured against the proper legal standard. After all, dams will continue to be struck in future conflicts, for, as noted in the U.S. Army and Marine Corps' *Commander's Handbook on the Law of Land Warfare*, "A commander may have a number of reasons to attack them, such as denial of electric power to military sources, use of forces contained therein to damage or destroy other military objectives (such as lines of communication), or to preempt enemy release of the dangerous forces to hamper the movement or advance of friendly forces."[348]

Two points must be made before beginning. First, such attacks raise IHL issues beyond the lawfulness of attacks against them. Examples include whether the placement of military objectives in or near a dam violates either the requirement to take "passive precautions"[349] to protect the civilian population from the effects of enemy attack or the prohibition on shielding.[350] While those issues merit examination, they are beyond the scope of this series.

Second, the no-strike list issue, showcased by reporting, is a legal red herring. Striking a target on a no-strike or restricted-strike list neither violates IHL nor constitutes a war crime.[351] Such attacks may bear on issues like the attacker's intent and whether appropriate "precautions in attack" were taken, but *standing alone*, hitting a no-strike or restricted-strike target is of no international law significance.

International Armed Conflict

Because the United States is not a Party to the 1977 Additional Protocols, customary international humanitarian law governs dam attacks mounted by its forces. The DoD *Law of War Manual* accurately restates the customary rule for international armed conflict,

> Attack of facilities, works, or installations containing dangerous forces, such as dams, nuclear power plants, or facilities producing weapons of mass destruction, is permissible so long as it is conducted in accordance with other applicable rules, including the rules of discrimination and proportionality.[352]

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347 *See* AP I, *supra* note 10; AP II, *supra* note 112.

348 FM 6-27, *supra* note 114, para. 2-117.

349 *Rule 22—Principle of Precautions Against the Effects of Attacks*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule22.

350 Schmitt, *Human Shields in International Humanitarian Law*, *supra* note 32.

351 *See* John Cherry, Kieran Tinkler & Michael Schmitt, *Avoiding Collateral Damage on the Battlefield*, Just Security (Feb. 11, 2021), https://www.justsecurity.org/74619/avoiding-collateral-damage-on-the-battlefield/; Joint Publication 3-60, Joint Targeting (Jan. 31, 2013); Chairman of the Joint Chiefs of Staff Instruction 3160.01A, No-Strike and the Collateral Damage Estimation Methodology (Oct. 12, 2012).

352 DoD LoW Manual, *supra* note 34, § 5.13.

As we shall see in Part II, the "facilities, works, or installations containing dangerous forces" reference is drawn from the 1977 Additional Protocols. Interestingly, the *Law of War Manual* broadens the category to any target containing dangerous forces (like water or radiation), whereas the relevant Additional Protocols rules are, as will be explained, limited to dams, dikes, and nuclear electrical generating stations. Other entities containing dangerous forces, such as the weapon of mass destruction (WMD) production facilities cited in the *Law of War Manual* text, are governed for Parties to those instruments by the targeting rules they contain, which differ only slightly from customary IHL.

Reduced to essentials, the customary rule articulated in the *Law of War Manual* imposes no obligations on an attacker beyond the standard targeting rules. By them, a dam must qualify as a military objective, expected incidental injury to civilians or collateral damage to objects must be factored into the proportionality analysis to ensure it is not "excessive," and an attacker must take precautions.[353] The last requirement obligates the attacker to choose available weapons, tactics, targets, or aim points that will yield the desired effects with the least incidental injury or collateral damage.

In a classic 1978 article appearing in *Naval War College Review*, the late Hays Parks, then a Marine Corps Major, offered an example of how these rules apply.

> During the Vietnam War, for example, the North Vietnamese installed substantial concentrations of antiaircraft guns and missiles on the earthenware dikes and dams surrounding Haiphong and Hanoi. Military necessity warranted airstrikes against these positions. However, attack of the positions with conventional ordnance would destroy not only the enemy positions but the dams as well. This would result in massive flooding and in the probable deaths of several hundred thousand civilians, a cost U.S. authorities concluded was disproportionate to the military advantage to be gained. When the mission finally was approved by President Nixon, it was executed with a clear proviso that only antipersonnel bombs, capable of neutralization of the positions without substantial damage to the dikes, would be used.[354]

The *Law of War Manual* similarly notes that "cluster munitions have been used against military objectives containing dangerous forces, such as dams, in order to reduce the risk that bombardment of these objectives would release such forces and cause incidental harm to the civilian population."[355]

Of course, installations containing dangerous forces merit special consideration during attacks because of the risk that the forces (water in the case of dams) might be released. The *Law of War Manual* highlights this operational reality.

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353 *Rule 8—Definition of Military Objectives*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule8; *Rule 14—Proportionality in Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14; *Rule 15—Principles of Precautions in Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15.

354 Hays Parks, *The 1977 Protocols to the Geneva Convention of 1949*, 31 Naval War College Rev. 17 (1978).

355 DoD LoW Manual, *supra* note 34, § 6.13.

> In light of the increased potential magnitude of incidental harm, additional precautions, such as weaponeering or timing the attack such that weather conditions would minimize dispersion of dangerous materials, may be appropriate to reduce the risk that the release of these dangerous forces may pose to the civilian population.[356]

The Army and Marine Corps' *Commander's Handbook on the Law of Land Warfare* makes precisely the same point.[357]

A slightly different tack is taken in the Navy, Marine Corps, and Coast Guard's *Commander's Handbook on the Law of Naval Operations*. It provides,

> Dams, dikes, levees, and other installations, which if breached or destroyed would release floodwaters or other forces dangerous to the civilian population, should not be bombarded if the anticipated harm to civilians would be excessive in relation to the anticipated military advantage to be gained by bombardment.[358]

In other words, it emphasizes the centrality of the rule of proportionality when attacking dams. Other targeting rules, like the requirement to take precautions in attack, obviously continue to apply.

Non-international Armed Conflict

The strike on Tabqa Dam was governed by the customary law of non-international armed conflict because 1) that is the character of the U.S. hostilities with ISIS and 2) the United States is not a Party to the 1977 Additional Protocol II, a treaty examined in Part II of this series.

During non-international armed conflicts, the approach taken in the customary law of international armed conflict applies equally, a conclusion apparent in the *Law of War Manual*'s acceptance of the rules regarding military objectives, proportionality, and precautions during non-international armed conflicts.[359] The *San Remo Manual on the Law of Non-International Armed Conflict* likewise supports this conclusion: "Attacking dams, dykes, or nuclear electrical generating stations is forbidden if the attack might cause the release of water or radioactivity and, as a result, excessive collateral damage to civilian objects and incidental injury to civilians."[360] Its commentary goes on to note, "particular care must be taken in attacking works and installations containing dangerous forces so as to avoid releasing those forces, thereby causing severe losses among the civilian population."

Particular Care?

Notably, the International Committee of the Red Cross (ICRC) does not suggest that the dangerous forces rules in Additional Protocols I and II (see Part II of the series) reflect customary law. Rather, in Rule 42 of its *Customary International Humanitarian Law* study, the ICRC takes an approach to

356 *Id.* § 5.13.

357 FM 6-27, *supra* note 114, para. 2-118.

358 Commander's Handbook on the Law of Naval Operations, *supra* note 114, § 8.9.1.7.

359 DoD LoW Manual, *supra* note 34, § 17.7.

360 The Manual on the Law of Non-International Armed Conflict § 4.2.3 (Michael N. Schmitt et al. ed., 2006) [hereinafter San Remo NIAC Manual].

dam attacks during both international and non-international armed conflict that is similar to that outlined above:[361]

> Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population.

It might be contended that the ICRC's restatement of customary law raises the threshold at which dam attacks may be launched through use of the mandatory language "must be taken," as distinguished from the *Law of War Manual*'s "may be appropriate."

However, the ICRC's Commentary to Rule 42 explains,

> States' sensitivity to the possibility of the release of dangerous forces is underscored by the fact that when attacks against such works and installations have been carried out in recent decades, the attacker stressed they were executed with the greatest care possible. It is further underlined by the condemnations of such attacks, denials of such attacks and generally by the restraint shown by States with respect to attacks against works and installations containing dangerous forces.[362]

Placement of Tabqa Dam on the no-strike list is an excellent example of the fact that States take "particular care" when attacking targets that risk the release of dangerous forces.

The Army and Marine Corps' *Commander's Handbook on the Law of Land Warfare*'s emphasis on a commander's responsibility during dam attacks supports the ICRC's assertion of State sensitivity: "In light of the risks posed by attacks impacting these objectives, a commander should take additional care when contemplating an attack on a facility, work, or installation containing dangerous forces, or even an object located nearby."[363] JCS Joint Publication 3-60, *Joint Targeting*, also acknowledges this reality as a matter of doctrine: "Attacks against installations containing dangerous forces—including dams, dikes, and nuclear power facilities—*must* be carefully considered for potentially catastrophic collateral damage" (Appendix A, para. 8a).[364] Indeed, in the context of non-international armed conflict, the authors of the *San Remo NIAC Manual*,[365] including myself, adopted the language of the *Customary IHL* study as a fair reflection of the law.[366]

Finally, even if there were a difference as a matter of law between the care already required by IHL distinction rules such as precautions in attack and the "particular care" standard resident in the ICRC's Rule 42, it would be difficult to imagine a situation in which an attacker took *reasonable care in the*

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361 *Rule 42—Works and Installations Containing Dangerous Forces*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule42.

362 *Id.*

363 FM 6-27, *supra* note 114, para. 2-119.

364 JP 3-60, *supra* note 444.

365 San Remo NIAC Manual, *supra* note 361.

366 *Customary IHL—IHL Databases—ICRC*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl.

circumstances, which includes the fact that dangerous forces are at risk of release, but unlawfully failed to take *particular care.*

Conclusion

The customary law rules governing attacks on dams and military objectives in the vicinity of dams are those that govern other attacks on legally targetable persons and objects qualifying as military objectives. As a matter of law, it is not entirely clear that there is a requirement to take "particular care" when mounting such attacks. The better view is that there is, but whatever the case, in practice, IHL's protection during dam attacks will derive primarily from the military objective, proportionality, and precautions in attack rules.

In Part II of the series, I will examine the special protection that dams enjoy under the 1977 Additional Protocols I and II for States Party to those instruments.

ATTACKING DAMS—PART II: THE 1977 ADDITIONAL PROTOCOLS

by Michael N. Schmitt | Feb 2, 2022

A recent *New York Times* report of a 2017 attack by U.S. forces against the Tabqa Dam in Syria has sparked controversy and criticism.[367] In Part I of this series,[368] I described reports of that incident and examined the customary international humanitarian law governing dam attacks during international and non-international armed conflict. I concluded that although attacks on dams and persons or objects in their vicinity merit particular caution considering the potentially disastrous consequences of a dam breach for the civilian population, the same general targeting rules applicable to other attacks govern them.

In this installment, I consider the special protection that dams enjoy during international and non-international armed conflict under 1977 Additional Protocols I and II, respectively.[369] These instruments contain the first treaty provisions directly addressing attacks on dams. Earlier, the International Committee of the Red Cross (ICRC) had included an article on the subject (Article 17) in its 1954 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Times of War.[370] However, States did not adopt those rules. In particular, they viewed the ICRC's suggestion of immunity agreements for dams as impractical, especially during an armed conflict.[371]

Additional Protocols I and II do not bind the United States, but most of its NATO Allies and other key partners, like Australia, Japan, and South Korea, are Party to one or both. So too are potential adversaries, including China, North Korea, Russia, and Syria. Because legal interoperability in coalition operations requires an understanding of the legal constraints on all coalition members, U.S. judge advocates should grasp the nuances of this special protection with a fair degree of granularity.

Additional Protocol I and International Armed Conflict

In an international armed conflict, Additional Protocol I (AP I), Article 56 governs attacks conducted by the armed forces of States Party to that instrument against its enemy's dams *if* the latter is also a Party to the Protocol. Violation of the rule by a State Party is a grave breach (AP I, Article 85), a characterization with important implications that are beyond the scope of this post.[372]

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367 Dave Philipps, Azmat Khan & Eric Schmitt, *A Dam in Syria Was on a 'No-Strike' List. The U.S. Bombed It Anyway*, N.Y. Times (Jan. 20, 2022), https://www.nytimes.com/2022/01/20/us/airstrike-us-isis-dam.html.

368 Michael N. Schmitt, *Attacking Dams—Part I: Customary International Law,* Articles of War (Jan. 31, 2022), https://lieber.westpoint.edu/attacking-dams-part-i-customary-international-law/.

369 AP I, *supra* note 10; AP II, *supra* note 112.

370 *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War. ICRC, 1956*, ICRC Database, Treaties, States Parties and Commentaries, https://ihl-databases.icrc.org/en/ihl-treaties/icrc-draft-rules-1956.

371 *See* Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, New Rules for Victims of Armed Conflicts 394 (2nd ed. 2013).

372 *Grave Breaches*, ICRC Casebook, https://casebook.icrc.org/a_to_z/glossary/grave-breaches; AP I, supra note 10, art. 85.

Party status is a determinative matter in applying Article 56. For example, if a U.S. coalition partner is an AP I State but is conducting operations against a non-Party like Iran, the customary IHL discussed in Part I of the series is the governing legal regime, not Article 56.[373] Of course, the partner may elect to apply the AP I rule as a matter of policy in such circumstances. Similarly, the United States could accept restrictions on its operations along the lines of Article 56 to facilitate operational consistency across the coalition. But doing so would be a matter of operational and policy, not legal, concern.

Article 56 is a highly detailed provision, the key parts (for our purposes) of which provide,

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease:

   a. For a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

   b. For a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

   c. For other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the

[373] Schmitt, *Attacking Dams—Part I*, *supra* note 369.

> sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.[374]

If no military objective is the object of attack, the AP I, Article 52, prohibition on attacking civilian objects would bar attack altogether.[375] Article 56 only applies when either the dam qualifies as a military objective or there are military objectives on or near it. The Korean War strike on the Hwachon hydroelectric dam complex exemplifies an attack on a dam that qualifies as a military objective during an international armed conflict. U.S. Navy aircraft struck the dam in 1951 because North Korea could use it to block the advance of UN forces by flooding the valley downstream.[376] North Korea could also close the dam's gates to lower the downstream water level, thereby making river crossing possible to attack the UN forces' flanks.

In customary international law, a dam that qualifies as a military objective may be attacked subject to the rule of proportionality[377] and the requirement to take precautions in attack[378] (these rules also appear in Articles 51, 52, and 57 of Additional Protocol I).[379] However, Article 56 goes further. It bars attack despite full compliance with these rules. In other words, it imposes an *absolute* standard, not a relative one like the proportionality rule. Yet it does so in a somewhat limited fashion.

First, unlike the customary rule on attacking entities containing dangerous forces (see Part I[380]), Article 56 is limited to three target sets—*dams, dikes, and nuclear electrical generating stations*. The standard targeting rules in Additional Protocol I would govern a strike on any other target containing dangerous forces. For instance, an attack against a factory that might release toxic chemicals would not be subject to Article 56. The limitation to these three target sets was intentional; indeed, several States unsuccessfully pushed for broader coverage, such as inclusion of oil storage facilities.

Second, Article 56 only applies to "attacks," a term of art in IHL.[381] It would not bar the destruction of a Party's own dam, for instance, to flood a potential avenue of attack by the enemy. Use of the term "attack" instead of "destruction" was intended to make this distinction clear-cut.[382]

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374 AP I, *supra* note 10, art. 56.

375 AP I, *supra* note 10, art. 52.

376 Mark L. Evans & C. Ross Bloodsworth, *The Dambusters at Hwachon*, Naval Aviation News (June 2001), https://www.history.navy.mil/content/dam/nhhc/research/histories/naval-aviation/Naval%20Aviation%20News/2000/2001/may-june/korea.pdf.

377 *Rule 14—Proportionality in Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14.

378 *Rule 15—Principle of Precautions in Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15.

379 AP I, *supra* note 10, arts. 51, 52, 57.

380 Schmitt, *Attacking Dams—Part I*, *supra* note 369.

381 AP I, *supra* note 10, art. 49.

382 Bothe, Partsch & Solf, *supra* note 372, at 396.

Third, the prohibition only applies to situations in which the *release* of the dam's water causes losses among this civilian population. If civilians are injured or killed at or near the dam during the attack instead of due to the water's release, the standard targeting rules apply. For instance, if an attacker decides to use anti-personnel or other weapons unlikely to cause a breach of the dam, Article 56 would not apply even if many civilians would likely be killed.

Fourth, the potential harm that bars attack is "*severe* losses among the civilian population." Standard targeting rules govern an attack causing harm to the population below the severe threshold. The ICRC's Article 56 Commentary defines severe as "important" or "heavy," which is not particularly useful.[383] But the Commentary acknowledges as much by pointing out that the "concept is a matter of common sense and it must be applied in good faith on the basis of objective elements such as the proximity of inhabited areas, the density of population, the lie of the land etc."

Unsatisfactory as this may appear, it is not uncommon for IHL rules to express vague thresholds, perhaps most notably that barring "excessive" incidental injury and collateral damage in the proportionality rule that undergirds the customary law on attacking dams. And some cases are undeniably severe, as in the RAF's Second World War attacks against the Möhne and Eder dams, the breaching of which led to 1,300 deaths in Germany's Ruhr Valley.[384] Others are not, as in destroying a dam in a remote area when there is little risk of downstream harm to civilians.

Fifth, only harm to the *civilian population* triggers the prohibition. The severity calculation does not consider severe damage or destruction of civilian property. This conclusion derives from the AP I reference to civilians and civilian objects in both the proportionality (Articles 51 and 57) and precautions in attack (Article 57) rules, but the absence of any reference to civilian objects in Article 56. Therefore, damage to or destruction of civilian objects downstream is subject to the same protection enjoyed by civilian objects elsewhere.

Sixth, Article 56(2) provides that the prohibition does not apply in certain circumstances where *military necessity* justifies attack, as in the case of a dam that is being regularly used to provide significant and direct support to enemy military operations and the only way to counter those operations is to mount an attack against the dam. The ICRC Commentary offers the paradigmatic example, "a road across the top of a dam which could, in combat conditions, become an essential route for the movement of armed forces."[385] Standard targeting rules apply in these cases. Moreover, in addition to the precautions in attack rules set out in Article 57 of AP I, an attacker also must do everything feasible to avoid releasing the waters. This is an unconditional requirement that is not tied to avoiding harm to civilians or civilian objects.

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383 AP I Commentary, *supra* note 41, art. 56. *Article 56—Protection of works and installations containing dangerous forces*, https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-56/commentary/1987.

384 *The Incredible Story of The Dambusters Raid*, Imperial War Museums, https://www.iwm.org.uk/history/the-incredible-story-of-the-dambusters-raid.

385 ICRC Database, Treaties, States Parties and Commentaries, *supra* note 487.

As with the term "severe," the three regular, significant, and direct conditions are subject to interpretation. The ICRC's Article 56 Commentary admits that the "triple qualification … may seem to be subject to subjective interpretation," but notes, "these terms merely express common sense, i.e., their meaning is fairly clear to everyone. They need to be interpreted in good faith on the basis of objective elements."[386] Again, critics may lament the terms' imprecision, but imprecision is a common trait of IHL.

Should an operation fall within the ambit of Article 56 despite these limitations, the article restricts operations against a dam or military objectives in the dam's vicinity to an extent greater than customary law. It does so in two important ways. Most importantly, it prohibits an attack even when the anticipated military advantage of striking the dam or targets in the dam's vicinity is so great that the expected incidental injury and collateral damage is not "excessive" relative to it (the proportionality threshold), and attack is the only means of achieving that advantage. In other words, if Article 56 is triggered, compliance with the proportionality and precautions in attack rules no longer permits attack.

Additionally, Article 56 appears to impose a lower standard of certainty of harm than is the case with the proportionality rule. The latter requires consideration of "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof" that "may be *expected*." By contrast, Article 56(1) is triggered if an attack "*may cause* the release of dangerous forces."

It would be overbroad to interpret the "may cause" text as denoting any possibility whatsoever. This is clear from the Bothe, Partsch, and Solf Commentary (they were participants in the Diplomatic Conference that drafted the Protocols), which notes that the drafting Committee elected to use "may" in lieu of "is likely" to raise the "standard of care to situations where the release of dangerous forces is objectively foreseeable rather than limiting it to cases where such effect is probable."[387] But the Article 56 standard certainly appears less demanding than that residing in the proportionality rule; the former would appear earlier along the uncertainty continuum than the latter.[388]

Seventh, and finally, like medical facilities,[389] Parties to the conflict are permitted to station troops and military equipment at a dam to guard it, for example, against saboteurs. They may not be attacked so long as they only act defensively and are only armed to the extent necessary to counter attacks on the dam. The prohibition applies even if an attack against them would not risk causing the release of water. The ICRC's Commentary helpfully illustrates the protection.

> If the works or installations are at a distance from the combat area, it is mainly a matter of defending them against attacks mounted by combatants who have been infiltrated or parachuted, or against attacks by guided missiles

386 ICRC Database, Treaties, States Parties and Commentaries, *supra* note 487.

387 Bothe, Partsch & Solf, *supra* note 372, at 395–396.

388 *See* Schmitt & Schauss, *supra* note 166 (on targeting uncertainty).

389 *Rule 28—Medical Units*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule28.

> or projectiles dropped from aircraft. Thus there will be needed, on the one hand, a military guard equipped with light individual weapons, and on the other hand, anti-aircraft artillery. In the second case such artillery may only be used against aircraft which are out to attack the protected works or installations, but not against aircraft flying over the works or installations on their way to attacking another military objective. It cannot be denied that this could pose serious difficulties of judgment.
>
> If the works or installations are located within the combat area, the military guard and the anti-aircraft artillery protecting them will of course be part and parcel of the total military system, and it will be difficult to make a clear distinction between military deployments designed to defend the works and installations and other troops fighting in the area.[390]

Of course, as the ICRC notes in the second paragraph, it may be difficult to distinguish between those guarding the dam and other personnel in the target area. Be that as it may, certain personnel and equipment on or near the dam enjoy special protection under Article 56.

The United States has long opposed Article 56. During a well-known presentation in 1987, then Deputy State Department Legal Adviser Michael Matheson explained,

> the United States military based its objections on a pragmatic, real-world estimation of the difference between the two situations. The military perceives that in international conflicts, many situations may arise where it is important to attack and destroy parts of an electric power grid, such as a nuclear or hydroelectric generating station. In internal conflicts, on the other hand, such a significant real-world need will not exist. Preserving the military option in international conflicts where such facilities are more likely to become an object of military attack, therefore, is very important.[391]

The DoD's *Law of War Manual* confirms that this remains the U.S. position.[392]

Additional Protocol II and Non-international Armed Conflict

Article 15 of AP II governs dam attacks during non-international armed conflict for all parties so long as the treaty's applicability threshold has been reached.[393] This is a determinative point because the instrument, and therefore Article 15, only applies when the non-international armed conflict is against an organized armed group that exercises sufficient control over part of the State's territory "as to enable them to carry out sustained and concerted military operations and to implement" the Protocol (AP II, Article 1). For non-international armed conflicts falling below that threshold, the customary law examined in Part I of the series governs dam attacks. As an example, if an organized armed group temporarily occupies a dam but does not control a wider swath of territory, Article 15 would not apply.

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390 AP I Commentary, *supra* note 41, ¶¶ 2175–2176.

391 Martin P. Dupuis, John Q. Heywood & Michéle Y.F. Sarko, *The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. Int'l L. Rev. 415 (1987).

392 DoD LoW Manual, *supra* note 34, § 5.13.1.

393 AP II, *supra* note 112, art. 15.

Article 15 is much simpler than its AP I counterpart. It provides, in its entirety,

> Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.[394]

As is apparent, its text is identical to the first sentence of AP I, Article 56. Therefore, the discussion of the seven limitations applies *mutatis mutandis* to dam attacks by either the organized armed group or the State's armed forces during qualifying non-international armed conflicts.

Yet the remainder of Article 56 is missing. For instance, the text regarding other military objectives in the dam's vicinity is absent; an attack on them would therefore be subject to standard targeting rules even if an attack on them risked breach of the dam. Of course, the proportionality rule would loom large in such a situation. Nor is there a prohibition on attacking personnel or equipment guarding a dam. Again, standard targeting rules would apply to an attack on them.

More importantly, there is no exception for circumstances in which a dam is being used to regularly and directly support military operations in a significant manner. As a result, Article 15 is more stringent than its international armed conflict counterpart. This seems strange, for States are generally much more hesitant to accept limitations on their handling of internal conflicts than is the case for conflicts with other States. However, the ICRC Commentary to the article confirms that this was the drafters' intent; the prohibition was meant to be categorical.[395]

The United States is not as concerned with Article 15 as it is with AP I, Article 56. For instance, after stating that the United States believes that neither provision reflects customary law, the *Law of War Manual* observes,

> the Executive, in submitting AP II to the Senate for its advice and consent to ratification in 1987, did not recommend a reservation from or an understanding applicable to this provision of AP II based on an assessment that preserving the option to attack works or installations containing dangerous forces would not be as important in internal conflicts as preserving that option would be in international armed conflicts.[396]

Nevertheless, the U.S. position today remains that Article 15 does not reflect customary law in non-international armed conflicts, a conclusion supported by the authors of the *San Remo NIAC Manual*[397] and the ICRC's treatment of dam attacks in its *Customary International Humanitarian Law* study.[398]

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394 *Id.*

395 AP I Commentary, *supra* note 41, art. 15.

396 DoD LoW Manual, *supra* note 34, § 17.7.1.

397 San Remo NIAC Manual, *supra* note 361, § 4.2.3.

398 *See* Michael N. Schmitt, *Attacking Dams—Part I: Customary International Law,* Articles of War (Jan. 31, 2022), https://lieber.westpoint.edu/attacking-dams-part-i-customary-international-law/.

Conclusions

In assessing the AP I and II rules regarding dam strikes, it is essential to remember that there may be instances of international and non-international conflict in which Parties to the instruments are *not* bound by the provisions thereof. This may be either because the State is engaged in an international armed conflict with a non-Party or because the non-international armed conflict has not reached a level of intensity that would trigger application of AP II.

Additionally, the various limitations on the applicability of both Articles 56 and 15 mean that even in conflicts during which these instruments are in play, attacks against dams or military objectives in their vicinity will only sometimes be governed by their terms. In many cases, therefore, a dam attack will be subject to IHL prohibitions, obligations, and restrictions that are *de facto* identical to those governing attacks by non-Party States such as the United States.

THE ATTACK AT THE ZAPORIZHZHIA NUCLEAR PLANT AND ADDITIONAL PROTOCOL I

by Tom Dannenbaum | Mar 13, 2022

On 4 March, the International Atomic Energy Agency (IAEA) announced a report by Ukrainian authorities that Russian forces had attacked the Zaporizhzhia Nuclear Power Plant in southeast Ukraine.[399] Russia denied this characterization.[400] The IAEA reported that a building in the vicinity caught fire, but that essential equipment was not damaged and that there were no reported changes in radiation levels at the plant.[401] Later that day, United Nations (UN) Under-Secretary-General for Political and Peacebuilding Affairs Rosemary DiCarlo briefed the Security Council, describing Russia's activities as "highly irresponsible"[402] and in violation of Article 56 of Additional Protocol I.[403] U.S. Ambassador to the UN Linda Thomas-Greenfield characterized the attack as "incredibly reckless and dangerous" due to the threat posed to "the safety of civilians across Russia, Ukraine, and Europe."[404] In the same meeting, French Ambassador to the UN Nicolas de Rivière described the action as "dangerous and illegal."[405] The U.S. Embassy in Kyiv tweeted, "It is a war crime to attack a nuclear power plant."[406]

In this post, I analyze both the legal framework provided in Article 56 of Additional Protocol I and the associated war crime codified in Article 85(3)(c) of the Protocol.[407]

Additional Protocol I

As both the Russian Federation and Ukraine are States Parties, Protocol I is applicable to the international armed conflict between them, pursuant to the terms of Articles 1 and 96.[408] The rule codified in Article 56 of Protocol I is more demanding than is the analogous customary rule, at least as that rule is understood by the International Committee of the Red Cross (ICRC), so my focus here is on the treaty rule. [409] To inform what follows, it may be of some use to

399 International Atomic Energy Agency, Update 10—IAEA Director General Statement on Situation in Ukraine (Mar. 4, 2022).

400 Permanent Mission of the Russian Federation to the United Nations, Statement by Permanent Representative Vassily Nebenzia at UNSC meeting on Ukraine (Mar. 4, 2022), https://russiaun.ru/en/news/040322n_u.

401 IAEA, Update 10, *supra* note 400.

402 United Nations, *Ukraine: 'Military operations around nuclear sites are unacceptable and highly irresponsible'—DPPA*, YouTube at 01:18 (Mar. 4, 2022), https://www.youtube.com/watch?v=5HtVsKwMqrs.

403 *Id.* at 02:04.

404 United States Mission to the United Nations, Remarks by Ambassador Linda Thomas-Greenfield at a UN Security Council Emergency Meeting on Ukraine's Zaporizhzhia Nuclear Power Plant (Mar 4, 2022), https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-un-security-council-emergency-meeting-on-ukraines-zaporizhzhia-nuclear-power-plant/.

405 United Nations, Security Council debates Russian strike on Ukraine nuclear power plant (Mar. 4, 2022), https://news.un.org/en/story/2022/03/1113302.

406 U.S. Embassy Kyiv, @USEmbassyKyiv, X (formerly Twitter) (Mar. 4, 2022, 4:28 AM), https://twitter.com/USEmbassyKyiv/status/1499708231903547394.

407 AP I, *supra* note 10, arts. 56, 85(3)(c).

408 *Id.* States parties and signatories, arts. 1, 96.

409 *Rule 56—Freedom of Movement of Humanitarian Relief Personnel*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule56; see also Dinstein, supra note 134, at 228.

replicate the first two paragraphs of Article 56 in their entirety:

> Article 56—Protection of works and installations containing dangerous forces
>
> 1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.
>
> 2. The special protection against attack provided by paragraph 1 shall cease:
>
> a. for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
>
> b. for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
>
> c. for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.[410]

These first two paragraphs include a core prohibition and narrow exceptions to that prohibition. They are worth evaluating in turn.

The Core Prohibition

The core prohibition is shaped by two extraordinary features. First, attacks are proscribed even if the nuclear power plant "glaringly" qualifies as a military objective under the standard articulated in Article 52.[411] In other words, even if the plant is such that by its "nature, location, purpose or use" it unambiguously makes "an effective contribution to military action," such that its "total or partial destruction, capture or neutralization, in the circumstances ruling at the time, [would] offer a definite military advantage," it is still protected from attack.[412] Second, attacks on military objectives located in the vicinity of the station are also prohibited. In both respects the rule deviates from the ordinary law of armed conflict framework, pursuant to which military objectives may be targeted, with civilians and civilian objects protected from the effects of such targeting by the cumulative requirements of discrimination, proportionality, and precautions in attack.

410 AP I, *supra* note 10, art. 56.

411 Dinstein, *supra* note 134, at 227.

412 AP I, *supra* note 10, art. 52(2).

By prohibiting the targeting of what would otherwise qualify as clear military objectives, Article 56 shifts the rule of distinction. This heightened protective framework is triggered by the combination of two elements. First, the work or installation in question must be a dam, dyke, or nuclear electrical generating station containing dangerous forces. Second, it must be the case that the attack (whether on the installation or on military objectives in its vicinity) "may cause the release of dangerous forces … and consequent severe losses among the civilian population."

The first element is relatively straightforward in the case of the Zaporizhzhia plant. It is the largest nuclear power plant in Europe and the ninth largest in the world.[413] The second element is more complicated. It requires an assessment of the relationship between the attack and the possible release of dangerous forces and any consequences arising from it. In the case of the Zaporizhzhia Nuclear Power Plant, the IAEA reported "no release of radioactive material."[414] However, for reasons elaborated below, this does not dispose of the legal question, as the prohibition attaches to the risk of release *ex ante*.

At first glance, the prohibition in paragraph 1 of Article 56 might look like a specific operationalization of the proportionality rule.[415] As articulated in Article 51(5)(b) of Protocol I, the latter supplements the rules on distinction, discrimination, and precautions by prohibiting "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[416]

However, the core prohibition in Article 56 is different. It is internal to distinction. If the threshold is met, the object is presumptively not a legitimate target and attacking it is prohibited, regardless of the countervailing military advantage and regardless of whether every feasible precaution was taken to minimize civilian loss. Additionally, and of critical importance here, the epistemic threshold is not the same as that applicable to proportionality. Article 56(1) focuses on whether the attack "may" cause the release of those forces and consequent severe losses among the civilian population.[417] That stands in contrast to the use of "may be *expected*" (emphasis added) in Article 51(5)(b).[418]

As such, the Article 56(1) prohibition on targeting nuclear power plants should not be understood to be triggered only when those engaged in the attack expect or ought to expect that their operation will release radioactive material and cause severe civilian loss. It is enough that the attack entails that risk. Put another way, for the prohibition not to attach, it must be the case that the

413 Calla Wahlquist & Donna Lu, *Zaporizhzhia nuclear power plant: everything you need to know,* The Guardian (Mar. 4, 2022), https://www.theguardian.com/world/2022/mar/04/zaporizhzhia-nuclear-power-plant-everything-you-need-to-know.

414 International Atomic Energy Agency, Update 11—IAEA Director General Statement on Situation in Ukraine (Mar. 4, 2022), https://www.iaea.org/newscenter/pressreleases/update-11-iaea-director-general-statement-on-situation-in-ukraine.

415 The Handbook of International Humanitarian Law 228 (Dieter Fleck ed., 4th ed. 2021).

416 AP I, *supra* note 10, art. 51(5)(b).

417 *Id.* art. 56(1).

418 *Id.* art. 51(5)(b).

attacking force is certain that radioactive material will not be released or that if such a release were to occur, the civilian population would not suffer severe losses. As the ICRC *Commentary* puts it, an attack would avoid the Article 56(1) prohibition if it "*cannot* cause severe losses."[419]

Certainty that there will be no radioactive leak is conceivable in the context of a precisely targeted and limited operation that avoids any danger to stocks of radioactive material, to elements essential to the cooling system, or to the core of the installation. Asserting its compliance with this standard in the context of dams and dykes, the Farabundo Martí National Liberation Front (FMLN) claimed in 1988 that its forces focused exclusively on "annihilating the troops stationed" at hydroelectric plants in El Salvador and "damaging the machinery," but specifically not destroying the dams or dykes precisely so as to comply with the requirements of Article 56.[420] As noted below, the Russian Federation appears to have adopted a similar posture in the Zaporizhzhia case.[421]

Alternatively, certainty that a release of the dangerous forces would not cause severe civilian losses could arise if the object were in a remote area without significant civilian habitation.[422] Given the enduring impact of a radioactive leak, such an analysis is more straightforwardly conceivable in the case of dams and dykes. Any such analysis would also need to consider Articles 35(3) and 55 of Protocol I, which prohibit attacks or methods of warfare that "may be expected" to cause "widespread, long-term and severe damage" to the natural environment, regardless of the military advantage such attacks may return.[423]

Early analysis after the reported attack on the Zaporizhzhia plant suggested that the risk of a radioactive release was "low" during the fighting.[424] However, it is less clear that those engaged in the operation could have been certain of that at the time. Certainly, shelling the vicinity does not offer the tight control that might ordinarily underpin certainty that there would be no radioactive release. The Russian Federation has denied engaging in such activity, claiming instead:

> Russian military were heavily fired at from windows of several levels of a training facility building that was located outside the territory of the ZNPP. This was done to provoke retaliation. Russian patrol started retaliatory fire and eliminated the gun posts of Ukrainian sabotage group in the training center. When leaving the building, Ukrainian saboteurs set it on fire. Let me emphasize that the facility was located outside the ZNPP territory.[425]

Notably, IAEA Director General Rafael Mariano Grossi "remained gravely concerned

419 AP I Commentary, *supra* note 41, ¶ 2153 (emphasis added).

420 Sandesh Sivakumaran, The Law of Non-International Armed Conflict 382 (2012).

421 Permanent Mission of the Russian Federation to the United Nations, Statement by Permanent Representative Vassily Nebenzia at UNSC meeting on Ukraine (Mar. 4, 2022), https://russiaun.ru/en/news/040322n_u.

422 AP I Commentary, *supra* note 41, ¶ 2154; Dinstein, *supra* note 134, at 228.

423 AP I, *supra* note 10, arts. 35(3), 55.

424 Calla Wahlquist & Donna Lu, *supra* note 414; Rob Picheta, *How dangerous was Russia's attack at the Zaporizhzhia nuclear power plant?*, CNN (Mar. 4, 2022), https://www.cnn.com/2022/03/04/europe/ukraine-zaporizhzhia-nuclear-plant-attack-explainer-intl/index.html.

425 Permanent Mission of the Russian Federation to the United Nations, *supra* note 422.

about the situation" at the power plant, even once it was established that the initial fighting had not caused a leak.[426] Reporting since this blog post was written has indicated that the attack entailed significant risk and has made the official Russian position difficult to sustain.[427]

Crucially, Article 56(1) imposes an *ex ante* prohibition.[428] The absence of a radioactive leak or severe civilian losses does not preclude the unlawfulness of the attack, if perpetrated despite the risk of such an outcome. The virtue of codifying a rule of this kind is that it preempts the ambiguities inherent in assessments of feasible loss mitigation and proportionality, replacing those ambiguous principles with a simple presumption: do not target nuclear electrical generating stations or military objectives in their vicinity.

Exceptions

Deviation from that presumption is permissible only in two scenarios. The first, as already noted, is when the commander can be certain that the dangerous forces will not be released, or that their release will not cause severe civilian losses. In that case, the heightened protection is not triggered, so the station or objects in its vicinity could qualify as legitimate targets, although any attack would still need to comply with the applicable rules on doubt, discrimination, precautions, and proportionality.

The second basis for deviating from the presumptive ban on attacking nuclear power plants or military objectives located in their vicinity applies even if the plant meets the criteria for heightened protection noted above. This exception is framed slightly differently in its application to attacks on the power plant and to attacks on military objectives in its vicinity.

Paragraph 2(b) of Article 56 specifies that the special protection provided for a station meeting the criteria discussed above shall cease "*only* if it provides electric power in regular, significant and direct support of military operations *and* if such attack is the only feasible way to terminate such support" (emphasis added).[429] By the terms of this provision, there can be no other exception to the heightened protections provided in paragraph 1. Additionally, the exception is a demanding one, including three substantive criteria and one procedural criterion.

Substantively, the station must provide electric power in "direct support of military operations." This requires a significantly tighter connection than is specified in the general definition of military objectives, which refer only to those that "make an effective contribution to military action," whether or not that contribution is direct.[430] It is analogous instead to the permissibility of targeting civilians, which applies only for such time as they take a "direct" part in

426 IAEA, Update 11, *supra* note 415.

427 Geoff Brumfiel et al., *Video analysis reveals Russian attack on Ukrainian nuclear plant veered near disaster*, NPR (Mar. 11, 2022), https://www.npr.org/2022/03/11/1085427380/ukraine-nuclear-power-plant-zaporizhzhia.

428 AP I, *supra* note 10, art. 56(1).

429 *Id.* art. 56(2)(b).

430 *Id.* art. 52(2).

hostilities.[431] An influential (albeit disputed[432]) analysis understands the latter to attach only when the activity is a single causal step from the infliction of harm on the adversary.[433] Interpreted in that light, the threshold would be very difficult to satisfy. In particular, it is disputed whether "merely supplying electricity" to an integrated grid with "pool[ed] generating capacity," from which the military then draws, would be sufficient to constitute "direct support of military operations."[434] Certainly, the electrical supply must directly "benefit military operations themselves and not merely intermediary objectives which themselves would be related to such operations."[435] Even a nuclear power plant delivering power to "industrial works of the defense industry" might be deemed "debatable" on the grounds that "[w]hat directly supports warfare in such a case is the industry supplied with the power, not the power station in itself."[436]

Additionally, the support to military operations must be "regular." This criterion would not be satisfied by the military occasionally drawing on this power source or having it as a backup power source. The ICRC *Commentary* suggests that "there must be some continuity in the use, or at least some rhythm."[437] Finally, on the substantive criteria, the support must be "significant." Here, it must be established that the contribution to military operations is "sizeable" and therefore has "a real and effective impact."[438]

Even when each of these substantive thresholds is satisfied, an attack would still be precluded if there is *any* alternative feasible way to terminate that support. In addition to warnings and requests for cessation, one obvious alternative way to terminate the electrical support of the power station would be to target the main circuit lines or transformer stations at a remove from the station sufficient to eliminate the risk of releasing the dangerous forces contained within.[439]

Paragraph 2(c) of Article 56 applies a similar, but not identical, framework to military objectives at or in the vicinity of the station.[440] Specifically, such objectives may be attacked "*only* if they are used in regular, significant and direct support of military operations *and* if such attack is the only feasible way to terminate such support" (emphasis added). The only significant difference here is that the exception covers support other than the provision of electric power. Each of the substantive and procedural thresholds remains the same. Even when an attack would be permitted under the exclusive permission provided in paragraph 2(c), paragraph 5 of the article clarifies that "installations erected for the sole purpose of defending the protected works or installations from attack" are not

431 *Id.* art. 51(3).

432 *See* Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 119.

433 ICRC Interpretive Guidance, *supra* note 83, at 52–54.

434 AP I Commentary, *supra* note 41, ¶ 2165.

435 *Id.* ¶ 2162.

436 Fleck, *supra* note 522, at 231.

437 AP I Commentary, *supra* note 41, ¶ 2162.

438 *Id.* ¶ 2162.

439 *Id.* ¶ 2166; Fleck, *supra* note 522, at 230.

440 AP I, *supra* note 10, art. 56(2)(c).

to be made the object of attack "provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations." In short, purely defensive installations attached to the nuclear power plant and used in purely defensive ways cannot be understood to qualify as military objectives providing regular, significant, and direct support of military operations.

It has been suggested that military objectives regulated in paragraph 5 are exempt from the standard articulated in paragraph 2(c).[441] However, this is contrary to the text. Paragraph 2(c) is clear in specifying the exclusive context in which military objectives "located at or in the vicinity of" a nuclear power plant may be targeted. Paragraph 5 instead regulates passive precautions and the exceptions thereto. It supplements the prohibition in paragraph 2(c); nothing in the provision suggests that it is meant to create an exception to that prohibition.

Before turning to passive precautions, it is important to emphasize, per the terms of paragraph 3 of Article 56, that the application of this framework at the level of distinction does not replace the requirements of discrimination, precautions, and proportionality.[442] Those are cumulative requirements that would apply to constrain an attack even if it were not precluded by the terms of Article 56.

Notably, the Russian account of the situation makes little attempt to frame the operation in the specific terms of the exceptions in Article 56. Instead, as noted above, the Russian Federation has framed its operations on 4 March as not endangering the plant in the first place.[443]

Passive Precautions

In addition to the rules on targeting military objectives, paragraph 5 of Article 56 also imposes specific passive precautions associated with the location of military objectives in the vicinity of such stations.[444] Specifically, parties to the conflict are to "endeavour to avoid" locating military objectives in that vicinity, but for defensive installations of the kind mentioned above. If Russia's claim to have been "heavily fired at" from the vicinity of the power plant were to be borne out, this could indicate a violation of Article 56(5) on the part of those who initiated that firefight.[445]

Significantly, however, a party's failure to comply with that requirement would not itself eliminate the protection accorded to any military objectives in the vicinity of the power plant. As noted above, paragraph 2(c) lays out the exclusive conditions under which such objectives may be targeted. Defensive installations used defensively cannot be targeted at all, but even military objectives that are not defensive and that ought not to

441 *See, e.g.*, AP I Commentary, *supra* note 41, ¶ 2155.

442 AP I, *supra* note 10, art. 56(3).

443 Permanent Mission of the Russian Federation to the United Nations, *supra* note 528.

444 AP I, *supra* note 10, art. 56(5).

445 Permanent Mission of the Russian Federation to the United Nations, *supra* note 528.

have been located in the vicinity of the power plant cannot be targeted, except as permitted by the terms of Article 2(c).

The explicit specification in paragraph 4 of Article 56 further affirms that it is "prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals."[446] The fact that one side has breached the requirements of paragraph 5 does not allow breach of paragraph 2(c) as a mechanism of law enforcement. This is consistent with the general posture of Additional Protocol I on the protection of the civilian population as articulated in Article 51(8).[447]

A War Crime?

The threshold for the war crime, as specified in the grave breaches regime of Additional Protocol I, is notably higher than is the threshold for the underlying provision. Article 85(3)(c) identifies that breach as "launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii)."[448] Additionally, per the terms of the chapeau, this rises to the level of a grave breach only when the attack is "committed willfully, in violation of the relevant provisions of this Protocol, *and* causing death or serious injury to body or health" (emphasis added).

Three things are worth noting about this articulation of the war crime, as compared to the underlying rule. First, the epistemic threshold is far higher. For an individual to be criminally liable for such an attack, that individual must have acted in the *knowledge* that the attack *will* cause excessive loss, injury, or damage to civilians or civilian objects. This, of course, requires a very different analysis from whether the context was such that dangerous forces *may* be released with severe losses for the civilian population.

Second, the reference to Article 57(2)(a)(iii) indicates that the war crime attaches only to attacks that would cause civilian loss, injury, or damage that would be "excessive in relation to the concrete and direct military advantage anticipated."[449] In other words, it is derivative of a proportionality assessment. The underlying rule, on the other hand, precludes attacks that risk severe losses, regardless of military advantage.

Third, the grave breach has a consequence element—the illegal attack must cause death or serious injury to body or health. To be clear, it need not be established that *severe* civilian losses occurred. It is relevant in that respect that two individuals were reported injured in the Zaporizhzhia operation.[450] However, the underlying rule is violated when an attack is launched despite the risk of releasing dangerous forces with consequent severe civilian losses, whether or not *any* death or serious injury in fact occurs.

446 AP I, *supra* note 10, art. 56(4).

447 *Id.* art. 51(8).

448 *Id.* art. 85(3)(c).

449 *Id.* art. 57(2)(a)(iii).

450 IAEA, Update 11, *supra* note 414.

Conclusion

Ultimately, if it is established that Russian forces engaged in the shelling of the Zaporizhzhia plant or objectives in its vicinity in a way that risked a radioactive leak, it is almost certain that this operation violated Article 56.[451] The Russian Federation, of course, contests the claim that its operation entailed any such risk. It has not, however, provided information indicating that if such a risk were taken, it would have been permitted pursuant to the exception provided in Article 56(2)(c).

It is less likely that the operation satisfied the threshold for the associated war crime, as articulated in Article 85(3)(c).[452] Given that there was in fact no radioactive leak and that there seems to have been relatively little collateral damage, it does not appear that those who engaged in the attack would have *known* at the time that excessive civilian loss would arise from it.

The virtue of the underlying rule is that it provides a bright line to commanders: do not target nuclear power stations or military objectives in their vicinity, except in very rare and specifically identified circumstances. The clarity of the presumption is such that any decision that one of the exceptions applies ought to be made at a high level of command and the justification ought to be clear-cut.[453] In cases such as this, it is crucial not to allow the difficulty of establishing the war crime to muddy the clarity of that underlying prohibition.

451 AP I, *supra* note 10, art. 56.

452 *Id.* art. 85(3)(c).

453 AP I Commentary, *supra* note 41, ¶ 2159.

THE ESCALATING MILITARY USE OF THE ZAPORIZHZHIA NUCLEAR PLANT

by Tom Dannenbaum | Aug 22, 2022

In early March, I argued on these pages that Russian forces' reported attack on the Zaporizhzhia Nuclear Power Plant likely violated the Additional Protocol I provisions protecting works containing dangerous forces, but probably fell short of the associated war crime.[454] Following the attack, Russia quickly gained control of the facility, subsequently drawing scrutiny for its potentially criminal mistreatment of plant officials.[455] The Zaporizhzhia plant has now returned to headlines amid reports that Russia has deployed weapons, troops, and other military assets to the site and is using the facility as a base for strikes against nearby Ukrainian towns.[456] News of further attacks on the plant (attributed by each side to the other, with Ukraine alleging Russian false flag operations) has also emerged.[457] In response, UN Secretary-General António Guterres has called for the parties to agree to a demilitarized zone around the plant.[458] Meanwhile, G7 foreign ministers have demanded immediate Russian withdrawal from the site.[459] Describing Russia's tactics as "unconcealed nuclear blackmail,"[460] Ukrainian President Volodymyr Zelensky has warned: "Every Russian soldier who either shoots at the plant, or shoots using the plant as cover, must understand that he becomes a special target for our intelligence agents, for our special services, for our army."[461]

Supplementing my prior analysis of the law governing attacks on nuclear power plants and military objectives in their vicinity, this post draws on Additional Protocol I and the International Criminal Court (ICC) Statute

454 Dannenbaum, *The Attack at the Zaporizhzhia Nuclear Plant and Additional Protocol I*, *supra* note 183.

455 *Ukraine nuclear plant: Russia in control after shelling*, BBC (Mar. 4, 2022), https://www.bbc.com/news/world-europe-60613438; *Reports say Ukrainian nuclear workers are enduring detentions and brutal interrogations,* Bellona (June 23, 2022), https://bellona.org/news/nuclear-issues/2022-06-reports-say-ukrainian-nuclear-workers-are-enduring-detentions-and-brutal-interrogations.

456 *See* Luke Harding & Christopher Cherry, *'It's madness': Ukraine holds breath as Putin turns nuclear plant into frontline*, The Guardian (Aug. 13, 2022), https://www.theguardian.com/world/2022/aug/13/its-madness-ukraine-holds-breath-as-putin-turns-nuclear-plant-into-frontline; Dan Sabbagh, *Ukraine issues warning to Russian soldiers at Zaporizhzhia nuclear power plant*, The Guardian (Aug. 14, 2022,), https://www.theguardian.com/world/2022/aug/14/ukraine-says-it-will-target-russian-soldiers-at-zaporizhzhia-nuclear-power-plant; Hugo Bachega, *Russia using Zaporizhzhia nuclear power plant as army base—Ukraine*, BBC (Aug. 8, 2022), https://www.bbc.com/news/world-europe-62469740; *Russian troops deliver unknown cargo to Zaporizhzhia NPP, sources say power plant is mined (video)*, The Insider (Aug. 5, 2022), https://theins.ru/en/news/253868; Matt Murphy, *Ukraine war: Zelensky warns Russian soldiers at Zaporizhzhia nuclear plant*, BBC (Aug. 14, 2022), https://www.bbc.com/news/world-europe-62537495.

457 Luke Harding & Christopher Cherry, *supra* note 457; United Nations, Situation at Zaporizhzhia Nuclear Power Plant 'Very Alarming', International Atomic Energy Agency Director General Tells Security Council, SC/14996 (Aug. 11, 2022); *Risks of disaster at nuclear plant 'increasing every day': Mayor*, Al jazeera (Aug. 14, 2022), https://www.aljazeera.com/news/2022/8/14/zaporizhzhia-nuclear-plant-risks-increasing-every-day-mayor; Insider, *supra* note 573; Murphy, *supra* note 457; Sabbagh, *Ukraine issues warning to Russian soldiers at Zaporizhzhia nuclear power plant*, *supra* note 457.

458 United Nations, Secretary-General's Statement on Zaporizhzhia Power Plant (Aug. 11, 2022), https://www.un.org/sg/en/content/sg/statement/2022-08-11/secretary-generals-statement-zaporizhzhia-power-plant.

459 United Kingdom, Zaporizhzhya Nuclear Power Plant in Ukraine: G7 foreign ministers' statement, press release (Aug. 10, 2022), https://www.gov.uk/government/news/ukraine-g7-foreign-ministers-statement-on-zaporizhzhya-nuclear-power-plant.

460 Mary-Kate Findon, *Zelensky says Russia is using Zaproizhzhia plant as 'nuclear blackmail'*, Independent (Aug. 12, 2022), https://www.independent.co.uk/tv/news/war-ukraine-russia-nuclear-power-b2143810.html.

461 Sabbagh, *Ukraine issues warning to Russian soldiers at Zaporizhzhia nuclear power plant*, *supra* note 457.

to analyze the legal issues arising from Russia's alleged military use of the plant, the call for a demilitarized zone, and the threatened Ukrainian response. Both Russia and Ukraine are States Parties to Protocol I, rendering the treaty straightforwardly applicable to the international armed conflict between them.[462] ICC jurisdiction arises from Ukraine's 2015 declaration under Article 12(3)[463] of the Court's statute.[464]

Protocol I and the Co-Location of Military Objectives and Dangerous Forces

Article 58(c) of Additional Protocol I requires that parties to the conflict take "necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."[465] Clarifying the application of this principle to the context at hand (even in contexts in which a nuclear power plant were to qualify as a military objective under the ordinary rules specified in Article 52[466]), Article 56(5) specifies that belligerents must "endeavour to avoid locating any military objectives in the vicinity" of nuclear power plants.[467] Within that provision, an exception is made for

> installations erected for the sole purpose of defending the protected works or installations from attack … provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable *only* of repelling hostile action against the protected works or installations.[468]

The first question this raises is whether Russia's deployment of military assets to the plant qualifies for the exceptional permission to the prohibition articulated in Article 56(5). If so, this would leave only the general passive precautions rule in Article 58. The exception is a narrow one, including a cumulative requirement that the use, purpose, and capability of the military installation be *exclusively* defensive.

Given their apparent offensive use against targets in nearby Ukrainian towns, Russia's deployments at the Zaporizhzhia plant would appear not to fall within that exception. It might also be inferred from the same reports that their deployment is at least partially offensive in purpose. As the requirement for an exclusively defensive use, purpose, and capability is cumulative, this renders the more complicated question of their capability moot. That complexity arises from the plant's proximity to areas of active hostilities. As emphasized in the International Committee of the Red Cross *Commentary to Additional Protocol I*, the requirement that the weapons deployed be capable only of repelling hostile action is most plausibly dispositive when the

462 *See* AP I, *supra* note 10, States parties and signatories, arts. 1, 96.

463 Letter from Pavlo Klimkin as Minister for Foreign Affairs of Ukraine to Herman von Hebel as Registrar of the ICC (Sept. 8, 2015), with attachments, https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

464 Rome Statute, *supra* note 212.

465 AP I, *supra* note 10, art. 58(c).

466 *Id.* art. 52.

467 *Id.* art. 56(5).

468 *Id.* (emphasis added).

protected work is far behind the front lines, in which case defending the installation entails protecting it from "attacks mounted by combatants who have been infiltrated or parachuted, or against attacks by guided missiles or projectiles dropped from aircraft. Thus there will be needed, on the one hand, a military guard equipped with light individual weapons, and on the other hand, anti-aircraft artillery."[469] Equipment other than that would be difficult to justify as solely defensive. It is harder to define the scope of armaments capable *only* of repelling hostile action against the plant when the facility is proximate to the area of combat, given the broader array of threats that could arise in such a scenario.[470]

With the exception inapplicable on the basis of use and probably purpose, the question is whether Russia can be said to have violated the primary prohibition. Here, it is important to emphasize that parties to the conflict are not precluded from locating non-exempt military objectives in the vicinity of nuclear plants in all circumstances. Rather, they are required by the terms of Article 56(5) to "endeavour" to avoid such co-location.[471] As suggested above, this is best understood as a specification of the general passive precautionary requirement that belligerents act to the "maximum extent feasible" to take "necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."[472]

Assessing feasibility (and thus whether a party can be said to have endeavored to avoid co-location) is inevitably context-specific, requiring a careful analysis of alternative locations and the implications of placing military objectives in those positions. In tight conditions of urban warfare, for example, it can be impossible to avoid some proximity between military objectives and protected persons and objects.[473] Precisely this complexity has been central to the controversy surrounding Amnesty International's assessment that Ukraine may be falling short of its passive precautionary obligations in the current conflict.[474] Such determinations can involve multiple points of uncertainty and disagreement.

However, when troops, military equipment, or other military objectives are deliberately located in or around protected persons or objects with a view to deterring attacks, as has been alleged at the Zaporizhzhia plant, the case is clear. The deliberate exploitation of co-location entails an endeavor to co-locate, rather than an endeavor to avoid it, clearly violating the requirements of Article 56(5). As elaborated below, it may also implicate the ban on using human shields.

469 AP I Commentary, *supra* note 41, ¶ 2175.

470 *See, e.g., id.* ¶ 2176.

471 AP I, *supra* note 10, art. 56(5).

472 *Id.* art. 58(3).

473 *See, e.g.*, Human Rights Council, Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1* ** ***, para. 64, U.N. Doc. A/HRC/29/52 (June 24, 2015).

474 *See* Oksana Pokalchuk, *What Amnesty got wrong in Ukraine and why I had to resign*, Wash. Post (Aug. 13, 2022), https://www.washingtonpost.com/opinions/2022/08/13/amnesty-ukraine-civilians-at-risk-why-i-quit/; Michael N. Schmitt, *Amnesty International's Allegations of Ukrainian IHL Violations*, Articles of War (Aug. 8, 2022), https://lieber.westpoint.edu/amnesty-allegations-ukrainian-ihl-violations/; Amnesty International, *Ukraine: Ukrainian fighting tactics endanger civilians* (Aug. 4, 2022), https://www.amnesty.org/en/latest/news/2022/08/ukraine-ukrainian-fighting-tactics-endanger-civilians/.

The War Crime of Using Human Shields

Article 51(7) of Protocol I provides, "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations."[475] The associated ICC war crime prohibits "[u]tilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations."[476]

In evaluating whether Russia's alleged deployments at the Zaporizhzhia plant violate the human shields ban, three legal technicalities warrant consideration. The first relates to whether that Protocol I prohibition and particularly the associated ICC war crime attach to exploiting co-location with protected objects, such as nuclear power plants, as distinct from co-location with protected persons or populations. The second is whether it is plausible that those engaged in the alleged deployment of non-defensive military objectives to the facility might satisfy the criminal intent standard at the ICC. The third goes to the meaning of rendering the shielded military objective "immune" from attack.

On the first point, one of the elements of the ICC war crime specifies that the crime attaches only when "[t]he perpetrator moved or otherwise took advantage of the *location* of one or more *civilians* or other *persons* protected under the international law of armed conflict" (emphasis added).[477] Notably absent from this provision are scenarios in which the perpetrator moved or otherwise took advantage of the location of an *object* protected under the international law of armed conflict, although the latter might be thought to be included in the associated customary prohibition.[478] At the ICC, the exploitation of certain objects may qualify for the separate war crime of "[m]aking improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions" where such improper use results in death or serious personal injury (art. 8(2)(b)(vii)).[479] However, although Article 56(7) of Protocol I recognizes an emblem specific to works or installations containing dangerous forces, a leading interpretation would exclude it from the improper use war crime on the grounds that the dangerous forces emblem, while recognized by Protocol I, is not a distinctive emblem of that treaty or the Geneva Conventions—a status reserved for the red cross, red crescent, and red rystal.[480] In any event, it is not clear that such an emblem is currently displayed at the Zaporizhzhia plant.

Focusing instead on Article 8(2)(b)(xxiii), the difficulty that might be raised is that

475 AP I, *supra* note 10, art. 51(7).

476 Rome Statute, *supra* note 212.

477 International Criminal Court, Elements of Crimes 30 (2013).

478 *See, e.g.*, DoD LoW Manual, *supra* note 34, § 5.16.2.

479 Rome Statute, *supra* note 212, art. 8(2)(b)(vii).

480 Rome Statute of the International Criminal Court: Article-by-Article Commentary 454 (Kai Ambos ed., 4th ed. 2021).

Russian forces appear to be exploiting their military assets' proximity to the plant (and not their proximity to civilians) as a way of gaining special legal, moral, and political protection.[481] The crime, on the other hand, attaches only when the alleged perpetrator takes advantage of the location of civilians or other protected persons to confer immunity on its military objectives.

However, to read the reference to the "presence" or "location" of civilians in the ICC war crime as excluding co-location with a nuclear power plant would be contrary to the object and purpose of the criminal ban, which is to prohibit the deliberate endangerment of civilians for the purpose of deterring enemy military operations.[482] The essence of the ban on attacking nuclear power plants and military objectives in their vicinity inheres also in the imperative to protect civilians from the harms associated with such an attack—it obtains only when the operation "may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population."[483] To shelter military objectives in order to exploit that protection is to deliberately endanger protected persons for the purpose of deterring enemy military operations.

The reference to the "presence" and "location" of civilians in the text of Article 8(2)(b)(xxiii) and the associated element must be read in this light.[484] The nature of nuclear fallout is such that attacks on nuclear power plants can affect civilian populations distant in space and time from the targeted objective. This enables a party to the conflict to take advantage of a particularly expansive location or presence of at-risk civilians. Although civilians may be located at a greater remove from the relevant military objective than is ordinarily the case in a situation of human shielding, the deterrent arising from the co-location of military objectives with a nuclear plant arises from the risk to those populations due to their current or prospective presence or location in a contaminated zone. The status of the plant as an object should not preclude the applicability of this element of the crime.

The second issue warranting attention here is that the war crime of human shielding requires the specific intent to deter attacks through exposing civilians to risk. This is arguably what is meant by "utilising the presence of a civilian … to render certain points, areas or military forces immune from military operations."[485] It is also the implication of the requirement that the perpetrator "moved or otherwise took advantage of" civilian persons' presence, while "intend[ing] to shield a military objective from attack or shield, favour or impede military operations."[486]

This kind of exploitative intent is the central allegation of the Ukrainian authorities

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481 Rome Statute, *supra* note 212, art. 8(2)(b)(xxii).

482 Knut Dörmann, Elements of War Crimes Under the Rome Statute of the International Criminal Court 345 (2003); *see also* DoD LoW Manual, *supra* note 34, § 5.16.2

483 AP I, *supra* note 10, art. 56(1).

484 Rome Statute, *supra* note 212, art. 8(2)(b)(xxiii); ICC, Elements of Crimes, *supra* note 478.

485 Rome Statute, *supra* note 212, art. 8(2)(b)(xxiii).

486 ICC, Elements of Crimes, *supra* note 478, at 30.

in describing Russia's tactics as "unconcealed nuclear blackmail."[487] It is also a plausible inference from the reporting indicating that Russia is using the plant to launch regular attacks on the surrounding area. The prosecutor would, of course, bear the burden of proving *mens rea* of any particular individual in a criminal case, but there is reason to believe that there could be criminal intent in this situation.

The third issue relates to the notion that both the crime and the underlying prohibition attach only when the actor in question seeks to render the relevant points, areas, or military forces "immune from military operations." In the ICC elements, this is framed as the intent to "shield" the relevant military objective or "favour" the relevant military operation.[488]

The ban on attacking military objectives collocated with nuclear power plants is unusually robust.[489] It attaches whenever such an attack "*may* cause the release of dangerous forces … and consequent severe losses among the civilian population."[490] If an attack would risk such losses, it can be undertaken "*only* if [the military assets co-located with the plant] are used in regular, significant and direct support of military operations *and* if such attack is the only feasible way to terminate such support" (emphasis added).[491] Even in that scenario, the ordinary precautions and proportionality requirements would very likely preclude most attacks. For these reasons, deploying military objectives to the plant almost certainly renders them legally immune from most conceivable Ukrainian operations.

However, even if it were thought that the exceptional conditions necessary to provide a legal basis for a Ukrainian strike on military objectives at the plant might obtain, co-location could still implicate the human shields bans. The concept of rendering the objective immune from military operations should be interpreted broadly to include taking advantage of co-location to deter attacks due to their human (or political costs) even if the strike to which the deterrent attaches would not qualify straightforwardly as unlawful.[492] Notably, the elements of the ICC crime do not require the exploitation of formal immunity. Instead, the key element is that the action was taken "to shield a military objective from attack or shield, favour or impede military operations."[493]

In the current case, Russian forces may be focused primarily on exploiting Ukraine's unwillingness to expose its own population to catastrophic fallout from an attack on the plant, rather than on exploiting the legal constraints that would prohibit Ukraine from engaging in such an operation. However, on the question of whether the crime attaches, the distinction is immaterial. What matters is whether Russia is deliberately using the risk to civilians or civilian populations to deter attacks on its military objectives. Doing

487 Findon, *supra* note 461.

488 ICC, Elements of Crimes, *supra* note 478.

489 Dannenbaum, *The Attack at the Zaporizhzhia Nuclear Plant and Additional Protocol I*, *supra* note 183.

490 AP I, *supra* note 10, art. 56(1) (emphasis added).

491 *Id.* art. 56(2)(c) (emphasis added).

492 Dörmann, *supra* note 483, at 345.

493 ICC, Elements of Crimes, *supra* note 478, at 30.

so would amount to shielding the relevant objective and favoring the Russian operations in which it is involved.

Proposals for a Demilitarized Zone

Given the potential for nuclear catastrophe, Secretary-General Gutteres's motivation in urging the establishment of a demilitarized zone (DMZ) in the plant's vicinity is obvious.[494] Vasyl Nebenzia, Russia's permanent representative to the UN, has rejected this call. Two points are of note with respect to this aspect of the situation.[495]

The first is that Russia's dismissal of the proposal implicates two provisions of Protocol I. Article 56(6) provides that the parties "are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces."[496] Article 58(3) requires that belligerents "take … necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."[497] The use of the term "urged" in Article 56(6) indicates that it is hortatory, rather than strictly binding. However, the general precautionary requirement in Article 58(3) might be understood to demand a good-faith consideration of the viability of such an agreement, particularly given the human stakes. It would, of course, be difficult to establish a clear violation of such a requirement in the current case.

The second point of note is that to qualify for demilitarized status, such a zone would need to be agreed by the parties to the conflict. Ordinarily, per the terms of Article 60 of Protocol I, the agreement would (a) require the evacuation of mobile weapons and military equipment, (b) preclude the use of fixed military installations in the zone, (c) prohibit acts of hostility by the authorities or population within the zone, and (d) require the cessation of any activity in the zone linked to the military effort (a condition the meaning of which is to be specified by the parties).[498] An agreement to this effect could heighten the protections applicable in the environs of the Zaporizhzhia plant (and could apply to a broader area than the prohibitions in Article 56). Additionally, per the terms of Article 85(3)(d) of the Protocol, attacking a DMZ can constitute a grave breach of Protocol I.[499]

However, given the apparent violations of existing requirements at the plant, there is reason to be cautious in assuming that the obligations that would follow from a DMZ agreement would improve the situation on the ground. Of course, a specific bilateral commitment may prove to be action-guiding in a way that the general commitments associated with ratification of Protocol I appear not to have been, particularly if the DMZ agreement were combined with a robust independent monitoring mechanism, but even this is far from guaranteed.[500] It is

494 Secretary-General's Statement on Zaporizhzhia Power Plant, *supra* note 459.

495 Ukrainska Pravda, *Russia opposes demilitarization of Zaporizhzhia nuclear power plant*, YAHOO!FINANCE (Aug. 11, 2022), https://finance.yahoo.com/news/russia-opposes-demilitarisation-zaporizhzhia-nuclear-021705058.html.

496 AP I, *supra* note 10, art. 56(6).

497 *Id.* art. 58(3).

498 *Id.* art. 60.

499 *Id.* art. 85(3)(d).

500 Michael Schwirtz & Erika Solomon, *Russia Strikes Odesa Port, Stirring Doubts on Deal to Export Grain*, N.Y. TIMES (July 23, 2022), https://www.nytimes.com/2022/07/23/world/europe/ukraine-russia-odesa-grain-attack.html.

also worth noting that a material breach of the DMZ agreement by one party would release the other from its obligations under the agreement.[501] In that scenario, the zone would lose its demilitarized status, but other protections, including those in Article 56, would continue to apply.[502]

Ukraine's Threat to Russian Forces Involved in the Militarization of the Zaporizhzhia Plant

A final question arises as to how Ukraine might respond to Russia's apparent military use of the nuclear plant. In contrast to the rules applicable to demilitarized zones, a violation by one party of its obligations under Article 56 of Protocol I does not release the adversary from its obligations under the article. Additionally, Article 56(4) precludes reprisals against the works, installations, or military objectives protected by Article 56.[503] As noted above, anything but a narrowly targeted and tightly limited Ukrainian strike on a military objective in the plant's vicinity would almost certainly be prohibited, despite Russia's apparent abuse of the site.[504] Quite apart from the legal reasons not to do so, it seems highly unlikely that Ukraine would consider a prohibited attack on the plant or a military objective in its vicinity, given the profound risk to its own population.

However, as noted above, Ukrainian President Volodymyr Zelensky *has* promised that "[e]very Russian soldier who either shoots at the plant, or shoots using the plant as cover," will become "a special target for our intelligence agents, for our special services, for our army."[505] This appears to be a commitment to use targeted lethal force to punish and deter those involved or potentially involved in the military use of the nuclear facility. There is no basis in the law of armed conflict for using lethal force as an extrajudicial method of punishing the adversary. Moreover, the practice of targeted killing has generated a range of legal concerns,[506] particularly insofar as such strikes are used against persons other than traditional combatants (implicating legal debates as to the contexts in which such persons can be targeted in war and the certainty with which target status must be determined[507]) and in contexts that might be thought to extend beyond the geographic or temporal scope of the armed conflict(s) upon which they are purportedly predicated.[508] Such objections also often implicate debates as to the proper interaction between human rights law and the law of armed conflict.

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501 AP I, s*upra* note 10, art. 60(7).

502 *Id.*

503 *Id.* art. 56(4).

504 Dannenbaum, *The Attack at the Zaporizhzhia Nuclear Plant and Additional Protocol I*, *supra* note 183.

505 Sabbagh, *supra* note.

506 *See, e.g.*, UNHRC, *Use of armed drones for targeted killings: report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc A/HRC/44/38 (Aug. 15, 2020); Craig Martin, *What Was the International Legal Basis for the Strike on al-Zawahiri?* Just Security (Aug. 9, 2022), https://www.justsecurity.org/82605/what-was-the-international-legal-basis-for-the-strike-on-al-zawahiri/.

507 Shane Darcy, *Direct Participation in Hostilities* (May 26, 2016), https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0137.xml.; Adil Ahmad Haque, *Misdirected: Targeting and Attack Under the U.S. Department of Defense Law of War Manual* (Oct. 4, 2017), https://ssrn.com/abstract=3046779.

508 Noam Lubell & Nathan Derejiko, *A Global Battlefield? Drone and the Geographical Scope of Armed Conflict*, 11 J. Int'l Crim. Just. 65 (2013) (discussing geographic scope); Jann K. Kleffner, *The Legal Fog of an Illusion: Three Reflections on "Organization" and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict*, 95 Int'l L. Stud 161 (2019) (discussing temporal scope).

As things stand, however, these concerns are unlikely to be determinative in the current case. An international armed conflict is clearly ongoing in Ukraine, and Zelensky's statement is specific to "soldiers"—i.e., formal combatants in the clearest sense.[509] In such circumstances, Russian forces are lawful targets by their status as combatants until such time as they are discharged from the military or rendered *hors de combat* by wounds, sickness, capture, or surrender.[510] Thus, although punishment is not a legal basis for targeting them, their status as combatants is, and the (retributive or deterrent) motive for such targeting is legally irrelevant. Additionally, although it has generated critical reflection in other contexts, the fact that specific individuals would be identified for targeted killing does not itself implicate any prohibition under the current law of armed conflict.[511]

To be clear, the other rules governing the conduct of hostilities would still apply in constraining operations against such individuals. Moreover, if such individuals were in a situation such that they could be straightforwardly captured rather than killed, it has been argued that the law of armed conflict would require the use of that less harmful means.[512] Certainly, human rights law would demand that level of care, if applied cumulatively with the law of armed conflict or using a process of coordinated interpretation (rather than through the law of armed conflict as *lex specialis*). However, as articulated, Zelensky's statement does not itself indicate that these rules would be violated in operations against soldiers involved in the militarization of the plant.

Conclusion

Ultimately, based on current reporting, the Russian Federation appears to be violating its passive precautionary obligations (both under Article 56 and under Article 58 of Additional Protocol I) by locating non-defensive military objectives in the vicinity of the Zaporizhzhia nuclear power plant. Indeed, there is good reason to believe that Russian forces involved in that co-location could be criminally liable for using human shields under the terms of Article 8(2)(b)(xxiii) of the ICC Statute. A demilitarized zone around the plant would specify a particular and direct commitment and could broaden the protected area and bolster monitoring. However, the necessary agreement for such a zone appears unlikely at this stage, and given the existing flouting of clear rules, it would be no panacea. Even as Russia continues to use the plant to launch attacks, it is likely that anything other than a very tightly targeted Ukrainian response would violate Article 56 of Protocol I. However, Ukraine's threat to target those involved in the military use of the plant is at least potentially compatible with the law of armed conflict, depending on the details of how it is pursued.

509 AP I, *supra* note 10, art. 43(2).

510 *Id.* art. 41.

511 Jeremy Waldron, *Named and Targeted* (N.Y.U. School of Law Pub. L. & Legal Theory Research Paper Series, Working Paper No. 18-50, 2018), https://ssrn.com/abstract=3259352.

512 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 Eur. J. Int'l L. 821 (2013).

UNPRECEDENTED ENVIRONMENTAL RISKS

by Karen Hulme | Apr 12, 2022

Environmental damage in armed conflict is generally caused in four ways: (1) the conduct of hostilities, i.e., the use of means and methods of warfare (weapons and tactics); (2) natural resource extraction and exploitation; (3) the military environmental footprint in manoeuvring around a battlespace; and (4) the governance vacuum.[513] Impacting all these possibilities are scale, intensity, and length of warfare as well as the terrain of conflict (e.g., urban, jungle, desert).[514] Clearly, there are many unknowns at the minute in relation to the conflict in Ukraine, including how long it will last; yet a number of environmental concerns have already arisen from the first month of combat. The most terrifying of these is the "unprecedented danger" from radioactive contamination.[515]

Noting that Ukraine has endured an armed conflict in its eastern Donbas region since 2014, the impacts on the environment are both new and old. For example, existing damage to the Ukrainian environment is clearly being exacerbated by the recent Russian invasion.[516] Principal among those impacts is the extensive damage being caused to ecological areas within Ukraine, such as the many internationally protected wetlands under the 1973 Ramsar Convention as well as biosphere reserves and national nature parks.[517]

The damage caused to these ecological spaces is not prohibited per se by the laws of armed conflict. However, this damage is generally a consequence of the stationing of troops and weapons. Similarly, since 2018, soil and water contamination from flooded abandoned coal mines has taken place in the breakaway regions of Donetsk and Luhansk due to a lack of maintenance.[518] Meanwhile, since the Yunyi Komunar (Yunkom) mine was the location of a controlled 0.3-kiloton nuclear explosion in 1979, there is now the additional threat that if floodwaters overflow, water could spread radiation contamination. Such environmental maintenance and governance vacuums always seem to accompany armed conflict.[519]

Lamentably, there is enormous damage to Ukraine's environment every day as a result

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513 *How does war damage the environment?* Conflict and Environment Observatory (June 4, 2020), https://ceobs.org/how-does-war-damage-the-environment/.

514 *Id.*

515 International Atomic Energy Agency, *IAEA Head Travels to Ukraine to Start Delivery of Nuclear Safety and Security Assistance* (Mar. 29, 2022), https://www.iaea.org/newscenter/pressreleases/iaea-head-travels-to-ukraine-to-start-delivery-of-nuclear-safety-and-security-assistance.

516 OSCE, *Environmental Assessment and Recovery Priorities for Eastern Ukraine* (2017), https://www.osce.org/files/f/documents/4/3/362566_0.pdf; OSCE, *Five Years of Fighting in Eastern Ukraine: Infographics on Environmental Aspect* (Feb. 3, 2020), https://www.osce.org/project-coordinator-in-ukraine/445366.

517 *48 Hours in and we are already seeing a pattern of environmental harm in Ukraine*, Conflict and Environment Observatory (Feb. 25, 2022), https://ceobs.org/ukraine-invasion-rapid-overview-of-environmental-issues/; Ramsar Homepage, https://www.ramsar.org; *Black Sea Biosphere Reserve*, Internet Encyclopedia of Ukraine (updated in 2009), https://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CB%5CL%5CBlackSeaBiosphereReserve.htm.

518 OSCE, *Five Years of Fighting in Eastern Ukraine: Infographics on Environmental Aspect*, *supra* note 517; *Environment and Conflict Alert Ukraine: A first glimpse of the toxic toll of Russia's invasion of Ukraine*, Pax for Peace (Mar. 9, 2022), https://paxforpeace.nl/news/environment-and-conflict-alert-ukraine-a-first-glimpse-of-the-toxic-toll-of-russias-invasion-of-ukraine/.

519 Сергей Савчук, Ядерное наследие Донбасса: Проект «Кливаж» [The nuclear heritage of Donbass: The Fission Project], Geoenergetics.ru (Apr. 10, 2018), https://geoenergetics.ru/2018/04/10/yadernoe-nasledie-donbassa-proekt-klivazh/.

of the conflict. This post will largely focus, however, on an unprecedented threat, namely, key environmental legal concerns raised by the threat of chemical and radiation contamination caused through the conduct of hostilities.

Targeting Polluting Facilities

There have been many reports from Ukraine depicting images of burning infrastructure with huge plumes of smoke billowing across the landscape. However, most such attacks are lawful under the laws of armed conflict. Attacks on military bases, airports/bases, air defence systems, munitions storage facilities, coke plants, and oil/fuel depots at various phases of the conflict have been commonplace.[520] Such attacks cause large toxic smoke clouds as they burn, sometimes lasting for days and spreading for miles, causing respiratory damage.[521] Yet when clearly directed at "military objectives," these attacks generally raise questions of legal violation only in relation to the scale and type of collateral damage caused.[522] While we have witnessed many massive plumes of toxic fumes in the conflict so far, which clearly have an impact on human health and the environment, the scale of fumes damage is generally unlikely to violate the proportionality rule.[523]

The bombing of chemical, pharmaceutical, and other industrial facilities, on the other hand, raises the perennial question of their individual status as military objectives in the given circumstances. The ICRC has recommended that the enhanced protection rule in Article 56, Additional Protocol I (AP I), relating to facilities containing "dangerous forces," be extended also to cover chemical plants and petroleum refineries.[524] That recommendation, however, is not generally supported by States. Thus, the key legal determinations to be made are regarding the criteria for qualification as a "military objective," precautions in attack,[525] and the rule of proportionality.

The Russian attack on the Sumy Khimprom fertilizer plant, for example, damaged a 50-ton gas tank filled with ammonia, which sent a cloud of chemical contaminants into the air and affected an area over a 2.5km radius.[526] Exposure to ammonia in the air can affect the respiratory tract, but a warning by the local mayor to remain indoors and favorable wind conditions helped to ensure that no one was harmed. The Russian Ministry of Defence reportedly denied conducting the attack.[527] It suggested that Ukrainian "nationalists" had placed mines to blow up the ammonia and

520 David L. Stern, Joby Warrick et al., *Russian forces attack airfields in Ukraine as Zelensky pleads for fighter jets*, Wash. Post (Mar. 6, 2022), https://www.washingtonpost.com/world/2022/03/06/russia-ukraine-military-airfields-evacuation/; David L. Stern, Karen DeYoung et al., *Russian missiles strike Ukrainian military range near Poland, killing dozens. Moscow promises further attacks.*, Wash. Post (Mar. 13, 2022), https://www.washingtonpost.com/world/2022/03/13/yavoriv-base-ukraine-russia-attack-nato-lviv/; Reuters, *Russia invasion: Shells hit territory of Avdiivka coke plant, claims Ukraine steel company,* Business Today (Mar. 14, 2022), https://www.businesstoday.in/latest/world/story/russia-invasion-shells-hit-territory-of-avdiivka-coke-plant-claims-ukraine-steel-company-325868-2022-03-14; *Russia hits Ukrainian oil and gas facilities in wave of attacks*, Al jazeera (Feb. 27, 2022), https://www.aljazeera.com/news/2022/2/27/russia-ukraine-oil-gas-fuel-airport-attacks.

521 *Russia-Ukraine war news updates: Fire at Luhansk oil depot after blast | Video*, India Today (Mar. 7, 2022), https://www.indiatoday.in/world/russia-ukraine-war/story/russia-ukraine-war-news-updates-mykolaiv-russian-rockets-fire-explosion-1921571-2022-03-07.

522 AP I, *supra* note 10, art. 52.

523 *Id.* art. 51.

524 ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (2020); AP I, *supra* note 10, art. 56.

525 AP I, *supra* note 10, art. 57.

526 *Ukraine conflict: Russian shelling blamed for corrosive gas leak*, BBC (Mar. 21, 2022), https://www.bbc.com/news/world-europe-60818488; Guardian Staff & Agence France-Presse, *Ukrainian town told to shelter after shelling causes ammonia leak at chemical factory*, The Guardian (Mar. 21, 2022), https://www.theguardian.com/world/2022/mar/21/ukrainian-town-told-to-shelter-after-shelling-causes-ammonia-leak-at-chemical-factory.

527 Guardian Staff & Agence France-Presse, *supra* note 527.

chlorine storage facilities in an attempt to claim a false flag attack.

Nevertheless, similar to the lubricants warehouse at Mykolaiv, the Sumy Khimprom attack is likely justifiable as targeting a military objective, as such materials can be used to make "homemade" bombs and have other military purposes.[528] A fuller analysis is needed to determine if the specific targets indeed made "an effective contribution to military action" for purposes of Article 52(2), AP I, but with limited information at this time, these attacks appear to be justifiable.[529] The same assessment is needed for each industrial target attacked to determine whether it qualified as a "military objective" at the time of attack.

By contrast, the Ukraine Ministry of Ecology and Natural Resources reports that a sewage pumping station was destroyed and untreated wastewater is leaking into the Dnieper River. Targeting water supply treatment and sewerage facilities would more clearly be a breach of AP I, as these facilities are patently not military objectives.

Targeting at Nuclear Facilities

Russian targeting has taken on a whole new, terrifying dimension in this conflict, however, with respect to nuclear facilities. On 4 March 2022, just a week into the Russian invasion of Ukraine, Russian troops broke through Ukrainian defences in the town of Energodar and shelled the Zaporizhzhya Nuclear Power Plant.[530] Damage resulted to buildings on the site, including a training center and laboratory which was set on fire. However, with six nuclear reactors at Zaporizhzhya it is fortunate that none of the reactors was damaged in the shelling and that there was no release of radioactive material.[531]

In fact, only one of the reactors was operating at a significant level (60% power) at the time. As a result of precautionary measures taken by Ukrainian site staff, in accordance with Article 58(c) of AP I, three of the reactors had already been shut down, with two more held in "low power mode."[532] Only two days prior to the attack, the Director General of the International Atomic Energy Agency (IAEA) outlined seven "indispensable pillars of nuclear safety and security" in relation to the conflict in Ukraine.[533] Several of these "indispensable pillars," he later reported, had been put at risk in the attack. Thus, he said, it was time for action in order to stop putting nuclear facilities at severe risk and "potentially endangering the safety of people and the environment in Ukraine and beyond."[534] Whether the Zaporizhzhya attack may have breached the enhanced protection for nuclear electrical generating stations provided by Article 56 of Protocol I has been analysed comprehensively elsewhere,[535] but on this occasion, at least, the local population and

528 *Environmental trends in the Ukraine conflict, 10 days in.*, Conflict and Environment Observatory (Mar. 5, 2022), https://ceobs.org/environmental-trends-in-the-ukraine-conflict-10-days-in/.

529 AP I, *supra* note 10, art. 52(2).

530 *Ukraine nuclear plant: Russia in control after shelling*, BBC (Mar. 4, 2022), https://www.bbc.com/news/world-europe-60613438.

531 IAEA, Update 11, *supra* note 415.

532 *Id.*; AP I, *supra* note 10, 58(c).

533 Joanne Liou, *IAEA Director General Calls for Restraint, Reiterates Need to Ensure Safety of Ukraine's Nuclear Facilities and Their Staff*, IAEA (Mar. 2, 2022), https://www.iaea.org/newscenter/news/iaea-director-general-calls-for-restraint-reiterates-need-to-ensure-safety-of-ukraines-nuclear-facilities-and-their-staff.

534 International Atomic Energy Agency, IAEA Director General Grossi's Initiative to Travel to Ukraine, 21/2022 (Mar. 4, 2022), https://www.iaea.org/newscenter/pressreleases/iaea-director-general-grossis-initiative-to-travel-to-ukraine.

535 Dannenbaum, *supra* note 567.

the environment were spared the horrifying consequences of widespread radioactive contamination.

Radiation levels did spike at Pripyat and Chernobyl, however, on day one of the conflict when Russian special forces captured the former nuclear site following a reportedly short but intense period of fighting with Ukrainian forces.[536] During the fighting, radiation levels twenty times higher than normal were reportedly detected in Chernobyl's c.30km radius Exclusion Zone, likely caused by tanks and other heavy military vehicles disturbing the contaminated soil.[537] As it was the shortest route between the Belarus border and the Ukrainian capital, the prospect of an invasion through Pripyat and Chernobyl had been easily anticipated by Ukrainian forces.[538]

Clearly, Ukraine could have avoided stationing troops in the area altogether and declared it to be a non-defended locality under Article 59 of AP I or sought Russian agreement to confer the status of a demilitarized zone under Article 60, AP I.[539] Either approach might have avoided any threat to the site from active hostilities. With Article 59 protection, Russian troops would likely still have moved through the Chernobyl area to occupy the facility. However, there is an argument that such action would be justified to secure the radioactive waste materials that are stored at the site against possible use in improvised explosives, for example, by opposing forces.

What of specific environmental protections? Article 55 of AP I requires that "care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage."[540] Certainly, the very high damage threshold contained in that provision is well noted and largely renders the provision nugatory.[541] In taking the conflict to Chernobyl, however, and risking a large release of radioactive substances, the Russian actions could arguably breach the provision's precautionary due diligence formula and threshold.

Attacks on other nuclear facilities are much harder to justify. For example, on 26 and 27 February, Ukraine reported missile strikes at radioactive waste disposal facilities near Kharkiv and Kyiv which caused damage to an electrical transformer but thankfully, again, resulted in no release of radiation.[542] If these facilities were directly targeted, it is difficult to see how such radioactive waste facilities would fulfill the definition of a "military objective."

Similarly, the attack on two occasions of the National Science Center Kharkiv Institute of Physics and Technology (KIPT) appears, without more information, to be a clear

536 David Fairhall, *Radioactive Russian dust cloud escapes—archive, 1986*, The Guardian (Apr. 29, 1986), https://www.theguardian.com/environment/1986/apr/29/energy.russia; BBC, *Russian forces seize Chernobyl nuclear power plant* (Feb. 25, 2022), https://www.bbc.com/news/world-us-canada-60514228.

537 Victoria Gill, *Chernobyl: Why radiation levels spiked at nuclear plant*, BBC (Feb. 25, 2022), https://www.bbc.com/news/science-environment-60528828; BBC, Russian forces seize Chernobyl nuclear power plant, *supra* note 537.

538 International Atomic Energy Agency, Update 1—IAEA Director General Statement on Situation in Ukraine, 10/2022 (Feb. 25, 2022), https://www.iaea.org/newscenter/pressreleases/update-iaea-director-general-statement-on-situation-in-ukraine-25-feb-2022.

539 AP I, *supra* note 10, arts. 59, 60.

540 *Id.* art. 55; *see also* Karen Hulme, *Taking care to protect the environment against damage: a meaningless obligation?*, 92 Int'l Rev. Red Cross 675 (Sept. 2010).

541 Michael Bothe, Carl Bruch et al., *International law protecting the environment during armed conflict: gaps and opportunities*, 92 Int'l Rev. Red Cross 569 (Sept. 2010).

542 International Atomic Energy Agency, Update 14—IAEA Director General Statement on Situation in Ukraine, 24/2022 (Mar. 7, 2022).

civilian object.[543] The research facility houses a nuclear reactor that reportedly contains 37 nuclear fuel assemblies. Significant damage to the building was recorded from the 6 and 10 March attacks, including the complete destruction of a 0.4-kV substation, but radiation levels remained unchanged. According to the IAEA, the facility was used for "research and development and radioisotope production for medical and industrial applications."[544]

Assuming the facility was directly targeted, it is difficult to see how it would qualify as a military objective. While it clearly housed a range of science departments, it did not undertake research related to military applications.[545] If somehow it were classifiable as a military objective, a question is then raised as to whether, since it is a nuclear research facility and not a "nuclear electrical generating station," it would fall within the remit of the Article 56 enhanced protections. The answer to this question is unclear. If Article 56 can be taken as recognizing large-scale radiation release as a "dangerous force," then arguably a civilian research facility should be viewed as falling within its scope.

With the Zaporizhzhya plant now under Russian control, the laws and responsibilities of occupation law apply.[546] The principal obligation is, thus, the duty to ensure public order and security, on the one hand, and civil life, including ensuring the welfare of the local population, on the other.[547] Thus, Russian forces have a clear obligation to ensure the security of the facility and to ensure that its workers are able to continue their roles in safety.

Russia is very experienced in overseeing the operation of nuclear power plants, which is of paramount concern in occupations of such dangerous facilities. However, Russia's former occupation of the Chernobyl nuclear facility illustrates shortcomings. As workers at the site did not trust Russian forces to guarantee their safety to return home and vice versa, they refused to rotate shifts for over three weeks.[548] Stress, hunger, and tiredness would undoubtedly have taken their toll on the workers, and the IAEA notably expressed its concern about the growing risk if workers could not safely change shift.[549]

Indeed, before an eventual shift change was facilitated on 20 March,[550] staff at the Chernobyl site reported that they were "no longer carrying out repair and maintenance of safety-related equipment, in part due to their physical and psychological fatigue after working non-stop for nearly three

543 Vitatlii Hnidyi, *Kharkiv nuclear facility safe but war poses big risks, says institute director*, Reuters (Mar. 11, 2022), https://www.reuters.com/world/europe/kharkiv-nuclear-facility-safe-war-poses-big-risks-says-institute-director-2022-03-11/.

544 International Atomic Energy Agency, Update 35—IAEA Director General Statement on Situation in Ukraine, 49/2022 (Mar. 28, 2022).

545 National Science Center "Kharkiv Institute of Physics and Technology,' homepage, https://www.nas.gov.ua/EN/Org/Pages/default.aspx?OrgID=0000516.

546 Gregory H. Fox, *Eyal Benvenisti. The International Law of Occupation*, 24 Euro. J. Int'l L. 435 (Feb. 2013), https://doi.org/10.1093/ejil/cht003.

547 Hague IV, *supra* note 63, art. 43.

548 James M. Acton, *The Most Immediate Nuclear Danger in Ukraine Isn't Chernobyl*, Carnegie Endowment for Intnerational Peace (Feb. 24, 2022), https://carnegieendowment.org/2022/02/24/most-immediate-nuclear-danger-in-ukraine-isn-t-chernobyl-pub-86521.

549 Ben Tobias, *Ukraine war: Chernobyl workers' 12-day ordeal under Russian guard*, BBC (Mar. 7, 2022), https://www.bbc.com/news/world-europe-60638949.

550 International Atomic Energy Agency, Update 27—IAEA Director General Statement on Situation in Ukraine, 40/2022 (Mar. 20, 2022), https://www.iaea.org/newscenter/pressreleases/update-27-iaea-director-general-statement-on-situation-in-ukraine.

weeks."[551] The site also lost connection to outside electrical power (needing to rely on backup diesel generators) and failed to submit radiation levels for several days.[552] The electricity supply is vital to ensure continued operation of the ventilation systems and cooling down of spent nuclear fuel.

It is not clear how the outside electricity cables became damaged. One possibility is due to deliberate damage by the occupying Russian forces. If this were the case, it would suggest that Russian forces did not comply with their legal obligations as an occupying power to maintain security. However, admittedly, information remains patchy at this time. The electricity cables were apparently fixed within a few days by Ukrainian personnel attending the site—and radiation levels remained safe—only reportedly to be damaged again the same day, according to the Ukraine's Ukrenergo National Energy Company.

A further risk has materialized in the Chernobyl area: that of forest fires.[553] The Ukrainian Parliament reported that multiple fires have broken out in the Chernobyl exclusion zone and local vicinity.[554] The IAEA has also reported that it is not receiving any radiation data from the site, since remote monitoring systems went offline in February.[555] Forest fires are quite common in the area, but due to the disruption to local exclusion zone management, the job of extinguishing the fires has been made more difficult.[556] Again, if Russian forces failed to act to extinguish the fires, they would likely have breached their occupation obligations.

Conclusions

The conflict in Ukraine presents all the common wartime threats to the environment, as well as some terrifying new ones due to the presence of chemical plants and nuclear power facilities. Now might be the right time for States to consider strengthening the International Law Commission's Draft Principles on the Protection of the Environment in relation to Armed Conflict to ensure that the legal protections for nuclear facilities are fully considered.[557]

551 International Atomic Energy Agency, Update 20—IAEA Director General Statement on Situation in Ukraine, 32/2022 (Mar. 13, 2022).

552 International Atomic Energy Agency, Update 16—IAEA Director General Statement on Situation in Ukraine, 27/2022, (Mar. 9, 2022).

553 Oliver Milman, *Forest fires erupt around Chernobyl nuclear plant in Ukraine*, The Guardian (Mar. 22, 2022), https://www.theguardian.com/world/2022/mar/22/chernobyl-forest-fires-ukraine-nuclear-plant.

554 RADA Verkhovna Council of Ukraine, Situation at nuclear facilities of Ukraine as of 20.03.2022 (Mar. 21, 2022), https://www.rada.gov.ua/news/razom/220731.html?fbclid=IwAR0uyGFq1bgLO4_Ky5X778QL66Fa-SIqSJPu7XHe7I787cVnn780VZ1zih0; @komonautanet, *11th of March 2022—fire in the Chernobyl "exclusion zone,"* YouTube (Mar. 11, 2022), https://youtu.be/elt9GdRu42U?si=qFKpTS64uq_98Mh_.

555 International Atomic Energy Agency, Update 37—IAEA Director General Statement on Situation in Ukraine, 52/2022 (Mar. 30, 2022).

556 Susan D'Agostino, *Wildfires break out in Chernobyl amid a non-functioning radiation-monitoring system*, Bulletin of the Atomic Scientists, (Mar. 23, 2022), https://thebulletin.org/2022/03/wildfires-break-out-in-chernobyl-amid-a-non-functioning-radiation-monitoring-system/.

557 *States reluctant to strengthen laws protecting the environment from war*, Conflict and Environment Observatory (Mar. 8, 2022), https://ceobs.org/states-reluctant-to-strengthen-laws-protecting-the-environment-from-war/; International Law Commission, Protection of the Environment in Relation to Armed Conflicts, U.N. Doc. A/CN.4/L.937 (June 6, 2019).

ATTACKING POWER INFRASTRUCTURE UNDER INTERNATIONAL HUMANITARIAN LAW

by Michael N. Schmitt | Oct 20, 2022

Over the past few weeks, the scale of Russian attacks against Ukraine's power infrastructure has grown dramatically. The *Washington Post*, for instance, has reported, "[d]ozens of Russian missiles and Iranian-made kamikaze drones have been striking power plants and substations, cutting electricity, heat and hot water in many cities and forcing factories in some areas to temporarily close."[558] And on Tuesday, President Zelensky estimated that "[s]ince Oct 10, 30% of Ukraine's power stations have been destroyed, causing massive blackouts across the country."[559] To defend against the attacks, he has asked for advanced air defense systems from nations providing material support;[560] they have promised Ukraine shall receive them.[561]

There is no question that Russian attacks have killed or injured many Ukrainian civilians, destroyed civilian property, and severely disrupted daily life for the population. They are condemnable. But are they unlawful under international humanitarian law (IHL)? In this article, I will deconstruct this complex question. I conclude that attacks on power infrastructure, such as those Russia is mounting, can be unlawful, and many undoubtedly are, but are not necessarily so.

Past Examples of Power Infrastructure Attacks

There is a long lineage of attacks on power systems during armed conflict.[562] For instance, electrical power was a target of the Zeppelin raids of the First World War; Germany attacked the Soviet electric grid to regain operational initiative following its loss at Stalingrad; the United States conducted such attacks against North Korea for military purposes and to force it to the negotiating table; and power was a key target set during Operations Rolling Thunder and Linebacker I and II during the Vietnam War.

During the First Persian Gulf War in 1991, Coalition forces mounted strikes against Iraq's power infrastructure in accordance with the Joint Force Air Component Commander's designation of "crucial aspects of electricity production facilities that power military and military-related industrial systems" as an air campaign objective.[563] To justify the attacks,

558 Dalton Bennet et al., *The Scales of Russian Attacks on Ukraine's energy infrastructure, visualized*, Wash. Post (Oct. 14, 2022, updated Oct. 17, 2022), https://www.washingtonpost.com/investigations/2022/10/14/ukraine-infrastructure-damage/.

559 Volodymyr Zelenskyy @ZelenskyyUa, X (formerly Twitter) (Oct. 18, 2022), https://twitter.com/ZelenskyyUa/status/1582285715970613248.

560 Joshua Berlinger & Tim Lister, *Zelensky asks G7 for 'air shield' as rockets rain down on Ukraine*, CNN (Oct. 11, 2022), https://edition.cnn.com/2022/10/11/europe/ukraine-russia-attacks-intl/index.html.

561 Sophie Mellor, *NATO countries are sending a trove of weapons to Ukraine after Zelensky's requested air cover. Here's what each country is sending over*, Fortune (Oct. 13, 2022), https://fortune.com/europe/2022/10/13/nato-countries-are-sending-a-trove-of-weapons-to-ukraine-after-zelenskys-requested-air-cover-heres-what-each-country-is-sending-over/.

562 J. W. Crawford, III, *The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems*, 21 Fletcher Forum World Aff. 101 (1997).

563 U.S. Dep't of Defense, Conduct of the Persian Gulf War—Final Report to Congress 125 (Apr. 1992).

the Department of Defense (DoD) explained (at 127),

> Electricity is vital to the functioning of a modern military and industrial power such as Iraq, and disrupting the electrical supply can make destruction of other facilities unnecessary. Disrupting the electricity supply to key Iraqi facilities degraded a wide variety of crucial capabilities, from the radar sites that warned of Coalition air strikes, to the refrigeration used to preserve biological weapons (BW), to nuclear weapons production facilities.
>
> To do this effectively required the disruption of virtually the entire Iraqi electric grid, to prevent the rerouting of power around damaged nodes.[564]

According to the DoD, the "dual-use" nature of the electric grid justified the attacks despite the impact on the civilian population.[565] Nevertheless, criticism followed. For instance, Human Rights Watch (HRW) questioned the attacks' lawfulness based on the proportionality rule, the prohibition of starvation (indirect effect on the water supply), and IHL's requirement to take precautions in attack (the availability of alternative targets in light of Coalition air supremacy).[566]

During NATO's 1999 Operation Allied Force air campaign against the Federal Republic of Yugoslavia (FRY), which was meant to stop the slaughter of Kosovar Albanians, "electrical power" was again a target set. For example, the targets included a transformer station that supplied power to the air defense coordination network and an operations center important to FRY command and control. The Final Report to the ICTY Prosecutor found no basis for initiating a formal investigation into them.[567]

Given the criticism it had encountered in the first Gulf War, during the 2003 Operation Iraqi Freedom campaign, Coalition forces struck only electrical power distribution rather than power generation facilities. Weapons choice was also designed to minimize civilian loss or damage. For instance, they employed the BLU-114 cruise missile that dispensed carbon fiber filaments to short-circuit equipment rather than damage it with an explosive charge. Despite these efforts, criticism of individual attacks followed.[568]

Power Infrastructure as a Military Objective

Power infrastructure has long been considered a valid target. In 1956, the International Committee of the Red Cross (ICRC) included "installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption" in a proposed list of military objective categories.[569] And the DoD *Law of War Manual* provides, "Electric power

564 *Id.* at 127.

565 Gulf War Study—Appendix on the Role of the Law of War, *supra* note 217, at 623.

566 Human Rights Watch, Needless Deaths in the Gulf War ch. 4 (1991), https://www.hrw.org/legacy/reports/1991/gulfwar.

567 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal.

568 Human Rights Watch, Off Target: The Conduct of the War and Civilian Casualties in Iraq 42–45 (2003), https://www.hrw.org/reports/2003/usa1203/usa1203.pdf.

569 AP I Commentary, *supra* note 41, at 632 n.3.

stations are generally recognized to be of sufficient importance to a State's capacity to meet its wartime needs of communication, transport, and industry so as usually to qualify as military objectives during armed conflicts."[570] In this war, Russia's Ministry of Defense has characterized "energy systems" as on par with "military command systems" and "arsenals," both of which are unambiguously lawful military objectives.[571]

But power infrastructure must qualify as a military objective before being directly targeted. Military objectives are "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage."[572]

The United States controversially treats so-called war-sustaining objects as military objectives.[573] These are economic targets that finance the war effort broadly, such as oil destined for export. Power generation and distribution infrastructure that support key industries generating income for the State that, in turn, can be used to support the war effort would qualify.

Most States and international law experts reject extending the military objective definition this far, and rightly so. As noted by an International Law Association Study Group (SG) report, in which I participated, "[t]here is no indication in State practice that objects contributing to the enemy's war-sustaining effort qualify as such as military objectives and the SG believes that this position has no basis in the law as it stands today and should be clearly rejected."[574] Indeed, the danger of the war-sustaining approach is that malevolent States will exploit it to justify attacks, such as Russia appears to be doing in Ukraine.

Undeniably, power infrastructure that supports military installations, equipment, or activities qualifies as a military objective based on the "use" criterion so long as attacking it will benefit the attacking force. This is so even though the system also supports the civilian population (a so-called dual-use object), and even when the extent of civilian use far outweighs military reliance on it. Accordingly, any reliance by Ukrainian forces on energy infrastructure for military purposes renders it a lawful military objective subject to Russian attack.

It is also possible that power infrastructure may become targetable based on the "purpose" criterion, which denotes future use. For instance, the Eritrea-Ethiopia Claims Commission found that a power plant under construction that would provide electricity for an area that included a naval facility qualified as a military objective based on "purpose" (future use).[575]

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570 DoD LoW Manual, *supra* note 34, § 5.6.8.5.

571 Sana Noor Haq, Gul Tuysuz & Uliana Pavlova, *'Massive blackouts' as 30% of Ukraine's power stations destroyed in just over a week, Zelensky says*, CNN (Oct. 18, 2022), https://edition.cnn.com/2022/10/18/europe/russia-ukraine-power-stations-energy-attacks-intl/index.html.

572 AP I, *supra* note 10, art. 52(2); *Rule 8—Definition of Military Objectives*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule8; DoD LoW Manual, supra note 34, § 5.6.

573 DoD LoW Manual, *supra* note 34, § 5.6.6.2.

574 International Law Associate Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 Int'l L. Stud. 322, 341 (2017).

575 Eritrea-Ethiopia Claims Commission, *supra* note 39, ¶¶ 113, 121.

It must be cautioned, however, that a mere possibility of such use is not sufficient; rather, there must be reliable intelligence or other indications (such as inevitability in light of friendly or enemy operations) that lead to a reasonable conclusion that future use for military ends is highly likely.[576] Russia cannot target Ukrainian power infrastructure based on mere speculation that Ukrainian forces might rely on it in the future.

Power infrastructure also raises the issue of separateness. For instance, an electricity grid may comprise a power generation facility, multiple power distribution substations, and infrastructure connecting them to each other and the grid's users. Even though they make up a single grid, those aspects upon which the military usage does not rely and that can be attacked separately are not military objectives. They retain their civilian character, may not be attacked, and any collateral damage to them is factored into the proportionality and precautions in attack assessments (see below).

Obviously, Russia is attacking Ukraine's power infrastructure for reasons other than, or at least in addition to, their military contribution. But in my opinion, the reason(s) an object is being attacked does not bear on its characterization as a military objective so long as the two prongs of the Article 52(2) definition are satisfied—the power infrastructure that is targeted must make an effective contribution to enemy military action, and neutralizing it must yield a definite military advantage to the attacker (the term "military advantage" is explained below in the section on proportionality; it applies *mutatis mutandis* here). Thus, the fact that Russia probably hopes it will undercut Ukrainian civilian support for the war effort and bolster flagging Russian morale does not deprive power infrastructure otherwise meeting the definition of a military objective of that status. (On terror attacks, see below).

That said, it is doubtful that all (or even most of) the power infrastructure under attack qualifies as a military objective. Strikes on power infrastructure that does not qualify as a military objective would run afoul of the unambiguous prohibition on attacking civilian objects found in Additional Protocol I, Article 52(1), and customary law.[577]

Precautions in Attack

Even if a Russian attack is against power infrastructure qualifying as a military objective, it must comply with the requirement to take precautions in attack outlined in Additional Protocol I, Article 57, and customary law.[578] In particular, there is an obligation to select methods (tactics) and means (weapons) of warfare "with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects," although an attacker need not sacrifice likely military advantage in order to comply with the duty.

In the power infrastructure context, the clearest example was the use of carbon

576 *See* Program on Humanitarian Policy and Conflict Research, Manual on International Law Applicable to Air and Missile Warfare 117–118 (2013) [hereinafter Air and Missile Warfare Manual] (commentary to rule 22(c)).

577 AP I, *supra* note 10, art. 52(1); *Rule 7—The Principle of Distinction Between Civilian Objects and Military Objectives,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule7; *see also* DoD LoW Manual, *supra* note 34, § 5.5.2

578 AP I, *supra* note 10, art. 57; *Rule 15—Principle of Precautions in Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15; *see also* DoD LoW Manual, *supra* note 34, § 5.11.

filament bombs by the United States in lieu of explosive munitions to neutralize power. Doing so posed little direct physical risk to nearby civilians or civilian objects. But I am unaware of alternative weapons in the Russian inventory to which Russia could turn to further limit civilian harm when targeting components of the power infrastructure that qualify as military objectives, especially in light of the requirement that use be feasible in the circumstances.

Another Article 57 requirement arises "[w]hen a choice is possible between several military objectives for obtaining a similar military advantage." In such cases, "the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." For instance, in trying to deprive a Ukrainian military facility of power, it might be possible to attack the power generation facility or a distribution substation from which the facility receives its power. If they would both cut power for the period during which Russia wants an outage to occur, an option exists.

But before a particular choice is required, the options must be comparable. For instance, even when one option has a lower likelihood of causing civilian harm, it need not be selected if the risk to the attacking force is greater. The same result would hold if the probability of success against the target risking less collateral damage is measurably lower. We need to know much more about the individual attacks to assess compliance with this requirement.

"Effective advance warning" must also be issued by the attacker if the attack "may affect the civilian population, unless circumstances do not permit."[579] Note that although the other precautions requirements only attach when the attack on power infrastructure can be expected to cause deaths, injury, or physical damage, the requirement here is to warn of attacks that "may affect" the civilian population. Almost every attack against Ukrainian power infrastructure does so, at least through the loss of service.

However, Ukrainian forces have demonstrated an impressive ability to intercept Russian missiles and drones; it will only improve with the arrival of more sophisticated air defense systems from NATO States.[580] This being so, it is fair to say that warning the civilian population of attacks against any power infrastructure probably is not feasible. Even general warnings of attacks in an area would allow Ukrainian forces to reposition their air defense assets, thereby heightening the risk of interception.

It must be emphasized that these requirements are irrelevant to attacks against any power infrastructure that does *not* qualify as a military objective. The mere fact of an attack against them renders the operation unlawful *ab initio*.

Proportionality

According to the customary rule of proportionality, which is captured for Parties in Article 51(5)(b) and repeated in Articles 57(2)(a)(iii) and 57(3) of Additional Protocol I, "[l]aunching an attack which may be expected to cause incidental loss of civilian

579 AP I, *supra* note 10, art. 57(2)(c).

580 *See* Michael Schwirtz, Lara Jakes & Eric Schmitt, *Western Nations Rush Defensive Systems to Ukraine to Counter Russian Missiles*, N.Y. Times (Oct. 12, 2022), https://www.nytimes.com/2022/10/12/world/europe/ukraine-russia-missile-defense.html.

life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited."[581] As with the requirement to take precautions in attack, the rule of proportionality only applies to Russian attacks targeting power infrastructure that constitutes a military objective.

The critical issue is what counts as collateral damage for the purposes of the rule. It is textually unambiguous that only civilian deaths and injuries, or damage to civilian objects, count in the proportionality assessment. "Injuries" include sickness, as in the case of that caused by water contamination or hunger due to loss of power. With winter approaching, any loss of heating could prove dangerous for the Ukrainian population; foreseeable harm to them would also qualify for the purposes of the rule. But the loss of power resulting in mere irritation, inconvenience, or economic loss—even if severe—does not amount to collateral damage as a matter of law.

Qualifying civilian harm that must be considered by Russia when performing proportionality calculations includes both the attack's direct and indirect effects. Direct effects result during the attack, such as the civilian deaths that have been caused by the weapon's blast and fragmentation. Indirect effects (knock-on or reverberating effects) are those with a causal link to the attack but not immediately caused by it. For instance, the Russian attacks on the power system have disrupted medical care and emergency response. Russian forces were obligated to consider foreseeable harm to civilians likely to result from those effects in their proportionality assessments.

Yet, at some point, indirect effects are so remote that they do not factor into assessments. The prevailing view among IHL experts is that foreseeability is the key. As the International Criminal Tribunal for the former Yugoslavia noted in the Galić case, a consequence is foreseeable if "a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."[582] All civilian harm foreseeable before or during the attack on the power infrastructure bears on proportionality of the Russian attack but not any unforeseeable harm, as in the case of the attack causing unforeseeable secondary explosions.

To violate the proportionality rule, the qualifying expected collateral damage must be "excessive" relative to the anticipated "concrete and direct" military advantage. "Concrete" refers to an actual military advantage, whereas "direct" denotes a relatively short chain of causation. In this regard, the ICRC Commentary on Article 57(2) notes that the military advantage must be "substantial and relatively close."[583] It cannot be "based merely on hope or speculation."[584]

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581 *Rule 14—Proportionality in Attack*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14; *see also* AP I, *supra* note 10, arts. 51(5)(b), 57(2)(a)(iii), 57(3).

582 Prosecutor v. Galić, ICTY Case No. IT-98-29-T, Judgement and Opinion, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

583 AP I Commentary, *supra* note 41, ¶ 2209.

584 Air and Missile Warfare Manual, *supra* note 577, at 98 (commentary to rule 14 at ¶ 9).

Given their performance to date, I doubt Russian targeteers are carefully considering whether their operations, assuming they are even against military objectives, are excessive; as a general matter, they appear to be either ignoring IHL altogether or fairly incompetent. But more facts are needed to draw definitive conclusions vis-à-vis the excessiveness of individual strikes.

Concerning such assessments, note that military advantage is always contextual in that it is not the attrition of particular types of targets that matters but rather the effect of its damage or destruction on military operations. In the Russian attacks on power infrastructure qualifying as military objectives, the military advantage would be calculated based on the neutralization of military assets or activities relying upon it for the period during which that neutralization occurs. The military advantage of a strike that deprived a logistics facility of power, for example, would be the impact on, among other things, Ukrainian supply and reinforcement operations until power is restored.

Importantly, any decline in the morale of the Ukrainian civilian population or increase in morale among Russians does not amount to *military* advantage. As the International Law Association Study Group agreed, "the notion of military advantage does not include advantages that are only political, psychological, economic, financial, social, or moral in nature."[585] In the case of the Russian attacks, it is essential to understand that the meaning of "military advantage" in the proportionality context is identical to that in the definition of military objective discussed above.

Other Issues

Terror attacks: Many have labeled the Russian attacks as terrorism. On Thursday, for instance, Ursula von der Leyen, President of the EU Commission, charged, "Cutting off men, women, children of water, electricity and heating with winter coming—these are acts of pure terror. And we have to call it as such." Factually, she is right. But are Russia's power infrastructure strikes "terror" attacks as that term is used in IHL?

Under IHL, "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[586] There is no question that some Russian attacks during this conflict have violated the rule, especially those conducted without any effort to distinguish between military objectives and Ukrainian forces, on the one hand, and civilian objects and civilians, on the other.

However, in the case of the power infrastructure strikes, there is no conclusive open-source evidence that their *primary* purpose is to terrorize the civilian population. Russian forces might hope that terror results (I am sure they do), and they certainly are causing some Ukrainians to be terrified, but this is not the same as launching them for the primary purpose of terrorizing the Ukrainian population. Of course, the absence of clear evidence of their purpose also means

585 International Law Associate Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 Int'l L. Stud. 322, 363 (2017).

586 AP I, *supra* note 10, art. 51(2); *Rule 2—Violence Aimed at Spreading Terror Among the Civilian Population*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule2; DoD LoW Manual, supra note 34, § 5.2.2.

that we cannot exclude the possibility that terror is their primary purpose. And the record of Russian attacks into populated areas with no apparent military purpose certainly bolsters the case that terror might be the primary purpose here.

Indiscriminate Attack: The power infrastructure attacks do not appear to violate the prohibition on attacks that are indiscriminate because they are not directed at a specific target, as in blindly firing into a populated area where military objectives and civilians and civilian infrastructure are co-located. On the contrary, the attacks on power infrastructure appear to be directed at specific targets; and they are hitting those targets. But this latter fact means that an attack on a power infrastructure target that does not qualify as a military objective violates the prohibition on directly attacking civilian objects, which is also a war crime.[587]

Constant Care: As Russia and Ukraine are Party to Additional Protocol I, Russia is obliged to exercise "constant care" to "spare the civilian population, civilians, and objects."[588] As I have explained elsewhere,[589] there is disagreement about whether this is also a customary law rule; I believe it is. Yet even for parties to the instrument, a degree of uncertainty surrounds the nature of the obligation to take constant care to spare.

My own view is that constant care is a "duty for those who participate in military operations, including but not limited to attacks, to take the possibility of negative consequences for the civilian population and/or civilian objects into consideration…. Should there be a potential negative effect, 'feasible' precautions…have to be taken to avoid it."[590]

What this means regarding the power infrastructure attacks is that Russian forces must take into consideration adverse consequences for the Ukrainian civilian population, even though those effects do not qualify as collateral damage in the proportionality rule sense. This would, for instance, include loss of electricity that makes their lives significantly more difficult but does not place them at risk of physical harm, as with the loss of heat during the winter. In such cases, Russian forces mounting the attacks must ask whether there are alternative means or methods of achieving their desired effect (military advantage).

Conclusion

Although there is no prohibition on striking power infrastructure as such in IHL, only that which qualifies as a military objective is lawfully subject to attack. Almost certainly, some of the targets Russia is hitting do not. And even with respect to those targets that are military objectives, Russian forces are obligated to consider alternative weapons, tactics, and targets to achieve the desired effect if the alternative would result in less death, injury, or destruction for the civilian population. Without knowing more facts, compliance with this requirement is difficult

587 AP I, *supra* note 10, art. 52(1); *Rule 1—The Principle of Distinction Between Civilians and Combatants*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1; DoD LoW Manual, *supra* note 34, § 5.5.

588 AP I, *supra* note 10, art. 57(1).

589 Schmitt & Schauss, *supra* note 166.

590 *Id.* at 180.

to assess. But an attempt to avoid civilian harm has not characterized Russian operations.

Russian attacks must also comply with the rule of proportionality, which prohibits an attack when the expected collateral damage is excessive relative to the anticipated concrete and direct military advantage. An effect on civilian morale does not qualify as a military advantage, and almost certainly, some of the expected harm being suffered by the Ukrainian population is excessive to any potential Russian military advantage.

Furthermore, in my opinion, the constant care requirement obligates Russian forces to try to avoid adverse consequences for Ukrainian civilians, even if those consequences do not qualify as collateral damage in the sense of the proportionality rule.

It would seem clear that at least some of the Russian power infrastructure attacks violate IHL. Sadly, this comes as little surprise in light of the rampant (and tragic) Russian practice of ignoring this body of law.

FURTHER THOUGHTS ON RUSSIA'S CAMPAIGN AGAINST UKRAINE'S POWER INFRASTRUCTURE

by Michael N. Schmitt | Nov 25, 2022

On November 23, Russia mounted 70 missile and five drone attacks against Ukraine's power infrastructure. Cities across the nation, including Kyiv, went dark.[591] Without power, water supply and other systems providing for the population's basic needs no longer functioned. And millions of Ukrainians found themselves unable to heat their homes in the below-freezing weather. Sadly, ten civilians died during the onslaught.[592]

In response, the Security Council convened an emergency meeting at which the Under-Secretary-General for Political and Peacebuilding Affairs emphasized, "The United Nations strongly condemns these attacks and demands that the Russian Federation immediately cease these actions."[593] She stressed that "attacks targeting civilians and civilian infrastructure are prohibited under international humanitarian law."[594]

This was the largest attack since November 15, when Russia struck Ukraine's power grid with 100 missiles and drones. The head of Ukraine's national electricity grid, Ukrenergo, has labeled the destruction caused by the six-weeks-long campaign "colossal,"[595] while the *New York Times* reports that "almost no thermal and hydroelectric power plants remain undamaged." The suffering of the Ukrainian people is tragic.[596]

In late October, as the strikes began, I addressed the international humanitarian law (IHL) implications of attacking power infrastructure.[597] I noted that while installations providing energy can qualify as military objectives if relied upon by the armed forces, Russian strikes against those not doing so amounted to IHL violations by Russia and war crimes by those involved. I also discussed other rules, including the prohibitions on terrorizing the civilian population and conducting indiscriminate attacks, but concluded that there was insufficient information to conclude (as yet) that Russia had violated those rules.

The picture has changed in light of the continuation and intensification of the Russian campaign against Ukraine's power infrastructure. In this post, I reassess the attacks and address a new issue that the scope and scale of the attacks have implicated, the protection of objects indispensable to the survival of the civilian population.

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591 Marc Santora & Thomas Gibbons-Neff, *Russian Missile Barrage Cuts Power and Water Across Ukraine*, N.Y. Times (Nov. 23, 2022), https://www.nytimes.com/2022/11/23/world/europe/russia-ukraine-missiles-power.html.

592 Ukrayinska Pravda, *10 People killed in missile attack Ministry of Internal Affairs*, Yahoo!Finance (Nov. 23, 2022), https://finance.yahoo.com/news/10-people-killed-missile-attack-203548928.html.

593 U.N. Under-Secretary-General Rosemary A. DiCarlo, Remarks to the Security Council on Ukraine (Nov. 23, 2022).

594 *Id.*

595 Santora & Gibbons-Neff, *supra* note 592.

596 *Id.*

597 Michael N. Schmitt, *Attacking Power Infrastructure Under International Humanitarian Law*, Articles of War (Oct. 20, 2022), https://lieber.westpoint.edu/attacking-power-infrastructure-under-international-humanitarian-law/.

Attacking Civilian Objects

That power infrastructure may qualify as a military objective if supplying power in support of the enemy's military operations is unquestioned. Additionally, it may qualify as a military objective if it will be used to support military operations in the future. In fact, Russia is relying on those very justifications. For instance, at the Security Council emergency meeting, the Russian Ambassador claimed, "To weaken and destroy the military potential of our opponents, we are conducting strikes with precision weapons against energy and other infrastructure, which is used for the purpose of military supplies to Ukrainian units."[598]

But such assertions increasingly ring hollow, for the Russian attacks have become so widespread that it is difficult to imagine that all the targeted systems and facilities amount to military objectives because they either are being used or will be used to support Ukrainian military operations. In this regard, qualification as a military objective depends on a two-pronged test under Article 52(2) of Additional Protocol I, to which Russia and Ukraine are Party, and that accurately reflects customary international law.[599]

Any use of otherwise civilian objects beyond the de minimis level that makes an "effective contribution to military action" satisfies the first. The term "effective" denotes an actual contribution, as distinct from a particular degree of contribution. It is highly doubtful that the military uses every component of Ukraine's power infrastructure that has been attacked.

And even when the first prong is satisfied, under the second, damaging, destroying, or neutralizing the object must offer the attacker "a definite military advantage." There are two aspects of this condition. On the one hand, the advantage must be "definite." The ICRC's Commentary to Article 52 explains that this precludes an attack "which only offers potential or indeterminate advantages."[600] And on the other, that advantage must be "military" in nature.

In Russia's power infrastructure campaign, the attacks are so widespread that it is doubtful its forces can articulate a definite benefit accruing from every attack, thereby rendering any military advantage only potential or indeterminate for many of them. Moreover, the scale and scope of the campaign mean that it is unlikely that any advantage Russia gains is, again in every case, military in nature. Simply put, Russian forces are almost certainly striking many targets that do not qualify as military objectives.

I would also note that most observers have (reasonably) concluded, as I have, that their motivation is to undercut civilian morale instead of affecting Ukrainian military operations. Although motivation must not be confused with advantage when considering whether an object is a military objective, if affecting civilian morale is the goal underlying the attacks, it is unlikely that Russian forces are fully verifying their targets as military objectives before attacking, a requirement of Article 57(2)(a)(i) of Additional Protocol I.[601]

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598 Santora & Gibbons-Neff, *supra* note 592.

599 AP I, *supra* note 10, art. 52(2); *Rule 8—Definitions of Military Objectives*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule8.

600 AP I Commentary, *supra* note 41, art. 52.

601 AP I, *supra* note 10, art. 57(2)(a)(i).

Moreover, if those forces are not thoroughly assessing power infrastructure targets against the two-pronged criteria, the attacks are indiscriminate. As noted in Article 51(4)(a), one form of indiscriminate attack is the failure of an operation to be "directed at a specific military objective."[602] Since some of the targets probably qualify as military objectives, while some surely do not, mounting a campaign against the nation's entire power infrastructure is plainly an indiscriminate method of warfare. Although I had previously concluded that there was insufficient basis for finding that the power infrastructure attacks were indiscriminate, in light of the scale and scope of the ongoing campaign, it is now difficult not to come to that conclusion.[603]

Terror Attacks

Article 51(2) of Additional Protocol I prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population,"[604] a prohibition that reflects customary international law.[605] In my earlier piece, I suggested that although the attacks factually terrorized some of the civilian population, the missing piece of the puzzle was whether that was the primary purpose behind them.

However, the attacks have gone on for so long, are so widespread, and are so intense, that it is difficult to attribute any purpose to them other than terrorizing the civilian population. As the U.S. Ambassador to the UN charged at the Security Council's emergency meeting, "Putin's motive could not be more clear and more coldblooded. He is clearly—clearly—weaponizing winter to inflict immense suffering on the Ukrainian people. He has decided if he can't seize Ukraine by force, he will freeze the country into submission."[606]

Indeed, as noted above, the attacks have had little impact on ongoing Ukrainian military operations. On the contrary, they come at the cost of exhausting Russia's supply of missiles and drones. The logical explanation is that the Russians are targeting civilian morale (a strategy that seldom succeeds), which, given the intensity and effects of the attacks, amounts to terrorizing the population.

There is no question that the consequences generated by these attacks qualify as "acts of violence" under the rule. As noted by the International Criminal Tribunal for former Yugoslavia in Karadžić, what is required is that "the victims suffer great consequences resulting from the acts or threats of violence, which may include but are not limited to death and/or serious injury to body or health," which loss of access to water and exposure to the harsh winter clearly would.[607] And whether the Russian attacks actually terrorize

602 AP I, *supra* note 10, art. 51(4)(a).

603 Schmitt, *Attacking Power Infrastructure Under International Humanitarian Law*, *supra* note 598.

604 AP I, *supra* note 10, art. 51(2).

605 *Rule 2—Violence Aimed at Spreading Terror Among the Civilian Population,* ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule2; Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, ¶¶ 87–90 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006).

606 United States Mission to the United Nations, Remarks by Ambassador Linda Thomas-Greenfield at a UN Security Council Briefing on Attacks on Ukraine's Critical Infrastructure (Nov. 23, 2022), https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-un-security-council-briefing-on-attacks-on-ukraines-critical-infrastructure/.

607 Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 461 (Int'l Crim. Trib. for the former Yugoslavia Mar. 24, 2016).

the civilian population is irrelevant. All that is required is that terror was intended.[608]

Finally, in addition to being an IHL violation, such acts are war crimes. The International Criminal Tribunal for the former Yugoslavia confirmed this status on multiple occasions.[609]

Objects Indispensable to the Civilian Population

The scale and scope of the Russian campaign have raised a new IHL issue. As *The Washington Post* has observed, Ukraine is "on the brink of a humanitarian disaster this winter as millions of people potentially face life-threatening conditions without electricity, heat or running water" due to the attacks.[610] This reality brings a further prohibition into play.

Pursuant to Article 54(2) of Additional Protocol I:

> It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

Under paragraph 3 of the article, this prohibition does not apply to objects used as sustenance solely for members of the armed forces or in direct support of military action. But even in the latter case, actions against those objects are prohibited if they may be "expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement."

The customary status of the rule is a matter of some uncertainty. The ICRC's *Customary International Humanitarian Law* study styles it as reflective of customary, as did the Eritrea-Ethiopia Claims Commission and the Navy/Marine Corps/Coast Guard's *Commander's Handbook on the Law of Naval Operations*.[611] However, the DoD's 2016 *Law of War Manual* asserts that it is "difficult" to draw this conclusion,[612] although it goes on to note that it supports the "underlying principle" prohibiting starvation as a method of warfare. In any event, as Russia and Ukraine are Party to Additional Protocol I, they are bound fully by the treaty-based rule.

I did not address this prohibition in the earlier piece because the extent to which the campaign affected the power infrastructure had not risen to the requisite level. But again, the scale and scope of the campaign have reached a point where the rule is now implicated. For instance, the power outages are resulting in widespread loss of access to drinking water, a consequence cited in the

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608 Galić Judgement, IT-98-29-A, ¶¶ 103–104.

609 *Practice relating to Rule 2, Violence Aimed at Spreading Terror Among the Civilian Population*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v2/rule2.

610 David L. Stern, Emily Rauhala & Michael Birnbaum, *Ukrainian energy systems on brink of collapse after weeks of Russian bombing* (Nov. 23, 2022), https://www.washingtonpost.com/world/2022/11/23/ukraine-infrastructure-damage-electricity-water-russia/.

611 *Rule 54—Attacks Against Objects Indispensable to the Survival of the Civilian Population*, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule54; Eritrea-Ethiopia Claims Commission, *supra* note 39, ¶¶ 103–105; Naval Commander's Handbook, ¶ 8.3.

612 DoD LoW Manual, *supra* note 34, § 5.20.4.

text of Article 54. Additionally, it is crucial to bear in mind that the items listed in the rule are only illustrative. The prohibition extends further to any object that could affect the civilian population's survival. As an example, the ICRC Commentary notes, "it cannot be excluded that as a result of climate or other circumstances, objects such as shelter or clothing must be considered as indispensable to survival."[613] Power for heating is indispensable to the civilian population for the same reason, given Ukraine's freezing temperatures. And power is so integral to daily life that its loss could affect many other indispensable objects, like networks for food preservation and distribution, water purification and pumping equipment, and medical facilities.

As is clear from the text, the prohibition is linked to an attacker's intent to deny qualifying items to the civilian population, whatever its underlying motivation. It is certainly possible, indeed likely, that Russian forces wish to deprive Ukrainian civilians of, for instance, water or heat, and otherwise disrupt civilian life. After all, imposing severe hardship is how they hope to undercut civilian morale.

But even if this is not the objective of the strikes, and even if the Ukrainian armed forces were relying upon the power grid to conduct their operations, the scale and scope of the attacks are such that if they continue, it is inevitable that the civilian population will be left without adequate food or water. And even if not, conditions would be so harsh, especially during the winter, that civilians will be forced to flee the country to survive. That this is a real risk is evidenced by President Zelensky's announcement of a nationwide drive to establish thousands of shelters called "Points of Invincibility" to provide essential services like communications, heat, water, and first-aid in the event of continued loss of power.[614]

As with the IHL violations discussed above, such actions constitute a war crime for those involved (see, e.g., ICC Statute, art. 8(2)(b)(xxv)) in addition to being an IHL violation by Russia under the law of State responsibility.[615]

Conclusion

Tragically, it is becoming difficult to keep up with the variety and frequency of IHL violations by Russian forces. Their continuing attacks on Ukraine's power infrastructure serve as yet another example of Russian unlawfulness; those participating in them risk prosecution as war criminals. Beyond the law, they are immoral and militarily foolish.

613 AP I Commentary, *supra* note 41, art. 54.

614 Santora & Gibbons-Neff, *supra* note 592.

615 *See, e.g.*, Rome Statute, *supra* note 212, art. 8(2)(b)(xxv).

UKRAINE AND THE DEFENDER'S OBLIGATIONS

by Eric Jensen | Mar 2, 2022

In a recent post,[616] I expressed my concern over the ability of the modern law of armed conflict (LOAC) to continue to not only regulate hostilities, but also do it in a way that survives actual near-peer conflict. I concluded:

> The lack of near-peer hostilities for the past 70+ years has left the increasing regulation of the conduct of hostilities untested in the crucible of actual superpower armed conflict. Let's hope that the rules have remained practical enough to effectively limit warfare in a way that also encourages compliance. More importantly, let's hope that the year ahead doesn't give us a chance to find out.

Unfortunately, we are now in the midst of an armed conflict that will likely provide insight on the will, and also the capability, of two very militarily capable nations to apply LOAC. Much of the scrutiny of the current military operations will rightly be on Russia and its actions with respect to LOAC. However, as the defender in this conflict, Ukraine also has LOAC obligations to its civilian population.

The Law of Defensive Precautions

The rules are commonly referred to as "Precautions in the Defense," and are found in Article 58 of Additional Protocol I (API), a treaty to which both Ukraine and Russia are parties.[617] Article 58 states:

> Article 58—Precautions against the effects of attacks
>
> The Parties to the conflict shall, to the maximum extent feasible:
>
> a. without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
>
> b. avoid locating military objectives within or near densely populated areas;
>
> c. take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.[618]

In addition to the treaty obligation, the International Committee of the Red Cross (ICRC) has argued that the provisions of Article 58 are customary international law in international armed conflicts (Rules 22–24).[619] While not specifically attributing the obligation to either API or Customary law, the U.S. DoD *Law of War Manual* states that:

> military commanders and other officials responsible for the safety of the civilian populations must take reasonable steps to separate the civilian population from military objectives and to protect the civilian population from the effects of combat.[620]

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616 Lieber Institute, *Year Ahead—2022*, Articles of War (Jan. 6, 2022), https://lieber.westpoint.edu/year-ahead-2022/ .

617 AP I, *supra* note 10, art. 58.

618 *Id.*

619 Rules 22–24, ICRC Database, International Humanitarian Law Databases, https://ihl-databases.icrc.org/en/customary-ihl/v1.

620 DoD LoW Manual, *supra* note 34, § 5.14.

As I have written elsewhere, the obligations of the defender under both Article 58 and the U.S. understanding of the LOAC rule can be reduced to two general commitments: 1) the obligation to segregate the civilian population from military operations and 2) the obligation to protect those that you can't segregate.[621] Both of these obligations that are introduced by the mandatory language of "shall" are subject to the limiting language of "to the maximum extent feasible." In the context of precautions, this language is understood to mean that States must do what is practicable, given the circumstances.

Ukraine has the legal obligation to apply these rules, despite the probability that they will likely be outgunned and outmanned by their opposing forces. In fact, the obligation exists despite any potential inconvenience to the defender and even regardless of the actions of the attacker. In other words, Ukraine's obligations remain despite potential Russian violations. On the other hand, as a commentary to API notes, "during the final debate several delegations indicated that in the view of their governments, this article should in no way affect the freedom of a State Party to the Protocol to organize its national defence to the best of its ability and in the most effective way."[622] While these comments have particular application to peacetime organization, there is no indication that this understanding would not also apply to defensive organization in response to a military invasion.

Applying Defensive Precautions

So, in practical terms, what must Ukraine do? Beginning with the obligation in Article 58(a), Ukraine must segregate the civilian population, to the maximum extent feasible, from the vicinity of military objectives. If the military headquarters in Kyiv is near a residential district, the government should, to the maximum extent possible, relocate those civilians. Military telecommunications equipment should be separated, to the maximum extent feasible, from civilian telecommunications equipment. Ukraine's current establishment of a curfew during the hours of darkness is an example of segregating civilians who might otherwise be mistaken for fighting forces at night and become targeted. Of course, it may not be feasible to separate any currently collocated material and civilian objects in the face of a current invasion, but certainly these obligations should be considered as the population moves in response to attacks.

Further, the Ukraine government has an obligation under Article 58(b) to avoid, to the maximum extent feasible, placing military units or weapon systems in the vicinity of civilians. For example, as military assets establish positions throughout the city to form an effective defense, military commanders should, to the maximum extent feasible, establish those positions away from civilian populations. Similarly, if a particular road intersection is a key point defense position, the government should redirect civilian traffic through other roads to avoid civilian traffic in that area. Storing weapons and ammunition in buildings containing civilians

621 Eric Talbot Jensen, *Precautions against the effects of attacks in urban areas*, 98 Int'l Rev. Red Cross 147 (Apr. 2016).

622 AP I Commentary, *supra* note 41, ¶ 2243.

and establishing firing positions in populated areas such as residential neighborhoods or schools would likely violate this obligation, unless those facilities were evacuated. Densely populated areas, such as Kyiv and Kharkiv, add to the complexity of compliance, but do not remove the obligation.

Recognizing that segregation may not always be possible, or feasible, those civilians that the government can't segregate, they must protect from the dangers of military operations. This is clearly not an absolute obligation but is again limited by feasibility. However, it encompasses all civilians in the government's control. Ukraine has already demonstrated attempts to satisfy this obligation by moving civilians into subway tunnels to act as protection from the effects of attacks. Other actions might include maintaining the operation of hospitals, firefighting capabilities, and other protective services. This obligation becomes especially significant in times of sieges or other encirclements, particularly of large populations centers.

Conclusion

While there will certainly, and rightly, be great scrutiny on Russia's compliance with required precautions in the attack, Ukraine's obligations to its civilian population to take precautions against the effects of attacks remain an important legal requirement. While limited by the constraints of feasibility, Ukraine's compliance with Article 58 can significantly facilitate the protection of civilians during current military operations, particularly if combined with Russian compliance with its Article 57 obligations in the attack.[623]

623 AP I, *supra* note 10, art. 57.

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Russia's invasion of Ukraine in February 2022 marked a pivotal moment in the development of the law of war. The military operations that followed provided a test of both sides' commitment to the law and to the role that law plays in armed conflict. The conflict also highlighted the constantly evolving effort to strike a practical and palatable compromise between the imperatives of military necessity and the urgent demands of humanity. This volume features articles initially published on *Articles of War* that address a range of topics arising from the Ukraine-Russia conflict. Among other things, the volume examines subjects associated with the battlefield status and protections afforded to combatants, prisoners of war, foreign fighters, and civilians. It also evaluates the use of particular weapons, such as Molotov cocktails and thermobaric munitions, and it explores questions of targeting, such as the lawfulness of attacks on dams and the use of assassination in war. The volume further examines the conflict from the perspective of the *jus ad bellum* and considers how concepts of neutrality, including qualified neutrality, apply in the context of the conflict.

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