

ARTICLES OF WAR

UKRAINE SYMPOSIUM

INTERNATIONAL LAW IN THE CRUCIBLE OF CONFLICT | VOLUME 2



EDITED BY
SEAN WATTS | RONALD ALCALA | MEHMET ÇOBAN

Ukraine Symposium

International Law in the Crucible of Conflict

Volume 2

Edited by

Sean Watts • Ronald Alcala • Mehmet Çoban



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Ukraine Symposium: International Law in the Crucible of Conflict, Volume 2

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INTRODUCTION

More than four years since we began our online *Articles of War* series covering the Ukraine-Russia war, and twelve years after its opening phase, the conflict rages on.¹ Like the war itself, many of the challenges it has presented to the international security system and the legal regimes designed to support it have so far proved intractable and, in the estimations of some, existential. From the beginning of the series, we have attempted to provide readers both fine-grained analyses of these challenges and broader observations on the conflict's significance for the regulation of war now and in the future. Through more than 100 posts, we have convened many of the brightest and best-informed legal minds for this effort, providing what we hope has been a valuable contribution to law-of-war instruction and development.

Early in our coverage, many readers asked whether we would compile our posts into a single, published source. The value of such a project soon became apparent to us, and the launch of the West Point Press provided precisely the means to accomplish it. In 2025, we published *Ukraine Symposium: International Law in the Crucible of Conflict, Volume 1*. That volume compiled *Articles of War* posts addressing the *jus ad bellum* and neutrality law, as well as a host of general *jus in bello* subjects, including conflict classification, battlefield status, and weapons and targeting law. We were particularly pleased to include a variety of contributors from military, diplomatic, academic, and humanitarian backgrounds. Feedback on *Volume 1* has been overwhelmingly positive.

We continue that effort with this second volume, covering legal regimes applicable to various domains of warfare, as well as several specialized regimes of the *jus in bello*. Readers will find posts addressing law regulating the cyber, maritime, air, and space domains. Additionally, they will find coverage of the law of belligerent occupation, law of war enforcement, including State and individual responsibility, and issues arising from starvation, siege, deception, reprisals, and ceasefires. We are confident that readers will find *Volume 2* instructive and helpful in their efforts to understand and apply our shared field of practice and study.

Like its predecessor, this volume will appear in both a downloadable electronic form on the West Point Press website and in print free of charge. Additionally, each post can still be viewed as it appeared originally on the *Articles of War* website. Two cautionary notes from the *Volume 1* Introduction bear repeating. First, this compilation is not an effort to exhaustively catalog legal issues or, for that matter, law-of-war breaches related to the Ukraine-Russia conflict. Instead, we have prioritized issues that were either novel or likely to provoke doctrinal disagreement. Second, we ask readers to remain mindful of the timing and context of the posts when they originally appeared. Many posts were published in the immediate aftermath of events, when information now public may not have been available. The posts also reflect the limitations of the brief blog

¹ Sean Watts et al., *Symposium Intro Ukraine-Russia Armed Conflict*, ARTICLES OF WAR (Feb. 28, 2022), <https://lieber.westpoint/symposium-intro-ukraine-russia-armed-conflict>.

format of *Articles of War*, where comprehensive or definitive analysis of every legal complexity is not always possible.

We are, of course, greatly indebted to the authors who contributed these posts. They were not only expert in their contributions but also extraordinarily generous with their time and perfectly agreeable during the editing process. We wish to single out Professor Michael Schmitt, then our Guido Norman Lieber Distinguished Scholar, for his many series-defining contributions. The series simply would not have been possible without his work. In addition to his own writing, many posts authored by others also benefited from his generous feedback and mentorship.

We are also grateful to the editing team at *Articles of War*, who provided world-class editorial and research support to the original posts. Our site enjoys the reputation it does largely due to their professional, timely, and always collegial work and correspondence. We are especially indebted to Ms. Liisi Adamson, then Senior Editor and now Managing Editor of *Articles of War*, for her selfless, supremely capable, and tireless work leading our blog.

We are equally thankful to our academic home, the United States Military Academy at West Point, the Office of the Dean, and the West Point Press. We have had unfailing support for our work from them and commend the Press to anyone in search of a professional and author-focused publication house.

Finally, and certainly not least, let us mention the *raison d'être* of the Lieber Institute and *Articles of War*: the Corps of Cadets at West Point. The Lieber Institute's mission of fostering a deeper understanding of the complex and evolving relationship between law and warfare serves them. As our nation's future combat leaders, they will soon be the end users of this crucial body of law that is like no other. We dedicate *Volume 2* to them and to the work of preparing them to serve.

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CHAPTER VII

DOMAINS

SECTION 1

Cyber

TERMINOLOGICAL PRECISION AND INTERNATIONAL CYBER LAW

by Michael N. Schmitt | Jul 29, 2021

The recent spate of hostile cyber operations by States, non-State groups affiliated with States, and non-State groups operating on their own has resulted in a cacophony of pronouncements and commentary by political leaders, pundits, journalists, and legal experts. As illustrated by cyber operations such as SolarWinds¹ and the Microsoft Exchange operations attributed² to China, much of the discussion reveals a misunderstanding of how international law applies to cyber operations. This misunderstanding can often be traced to misuse of legal terms like attribution, countermeasures, below-the-threshold operations, due diligence, use of force, self-defense, cyberwar (armed conflict),

and attack. Frequently, the terminological imprecision leads to confusion over the legal character of hostile cyber operations and the response options that international law allows targeted States.

In this post, I offer an abbreviated lexicon of the legal terms that are most frequently misused. It is far from a comprehensive discussion of these terms; *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* offers deeper analysis of each, and readers are directed there for a full explanation of them.³ Instead, my objective here is merely to sensitize readers to the legal content of the terms and highlight certain unsettled legal issues regarding them.

¹ Michael Schmitt, *Top Expert Backgrounder: Russia's SolarWinds Operation and International Law*, JUST SECURITY (Dec. 21, 2020), <https://www.justsecurity.org/73946/russias-solarwinds-operation-and-international-law/>.

² The White House, *The United States, Joined by Allies and Partners, Attributes Malicious Cyber Activity and Irresponsible State Behavior to the People's Republic of China*, WHITEHOUSE.GOV (July 19, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/19/the-united-states-joined-by-allies-and-partners-attributes-malicious-cyber-activity-and-irresponsible-state-behavior-to-the-peoples-republic-of-china/>.

³ TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 2.0 (Michael N. Schmitt ed. 2017 [hereinafter TALLINN MANUAL 2.0]).

Attribution

There are three types of attribution—technical, political, and legal.

Technical attribution refers to using technology to identify a cyber operation's originator. No evidential standard exists for technical attribution as a matter of law. Instead, the degree to which a cyber expert can attribute a hostile cyber operation to a particular individual or entity bears on both political and legal attribution.

Political attribution involves one or more States accusing another of conducting a hostile cyber operation or being behind an operation undertaken by non-State actors. There is no legal requirement for a particular quantum of technical and other evidence before a State engages in political attribution, for international law does not prohibit political attribution that is poorly supported or even knowingly wrong. Instead, States engaging in political attribution assess whether the perceived value of publicly attributing a cyber operation outweighs the cost of possibly misattributing that operation.

Legal attribution, by contrast, is one of two requirements for characterizing a hostile cyber operation as unlawful—in legal terms, an “internationally wrongful act.” The other is the breach of a primary rule of international

law like the obligation to respect sovereignty or the prohibitions on intervention and the use of force.⁴

The customary international law of attribution has been reliably restated in the International Law Commission's Articles on State Responsibility,⁵ which includes extensive commentary⁶ on each rule. Of note among the bases for attribution are Articles 4 and 8. The former provides that the acts of State organs, like intelligence agencies or the armed forces, are attributable to the State.⁷ The latter stipulates that non-State actors' actions conducted pursuant to a State's “instructions, or direction or control” are attributable to that State.⁸

A cyber operation attributable to a State (“responsible State”) that breaches an international law rule opens the door to a number of remedies for the victim State (“injured States”). These include, as appropriate, cessation of the hostile operation, assurances and guarantees of non-repetition, and reparations, which may take the form of restitution, compensation, and satisfaction.⁹ Moreover, such operations sometimes open the door to countermeasures, an option described below.¹⁰ If a hostile cyber operation either is not attributable to a State or does not breach an international law rule, the target State is generally limited to responding with acts of

⁴ *Id.* rules 4, 66, & 68.

⁵ 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, (2001) [hereinafter *Articles on State Responsibility*].

⁶ Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

⁷ *Articles on State Responsibility*, *supra* note 5, art. 4.

⁸ *Id.* art. 8.

⁹ *Id.* arts. 30–31, 35–37.

¹⁰ *Id.* arts. 22, 49–53.

retorsion—unfriendly but lawful actions.¹¹ The paradigmatic example is sanctions.

In certain limited circumstances, violation of international law does not require attribution of the hostile cyber operation to a State. The two key examples are law of armed conflict violations by a non-State actor that is a party to the conflict¹² and international criminal law violations—including war crimes, crimes against humanity, and genocide—by individuals.¹³

Countermeasures

The term countermeasures is often used in a non-legal sense to refer to actions taken by armed forces to defeat hostile operations during both peacetime and armed conflict.¹⁴ However, the term has a particular meaning in the legal context. In international law, a countermeasure is an “act” (which includes both actions and omissions) that would be unlawful but for the fact that it is meant to compel another State to cease its unlawful conduct and/or secure reparations for harm suffered.¹⁵ Numerous other requirements, such as proportionality between the harm sustained and that caused by the countermeasure, exist.¹⁶ Countermeasures are only available in response to cyber operations that constitute internationally wrongful acts; thus, they are unavailable as a response to non-State actor cyber operations that are not

attributable to a State (but see due diligence below).

In the cyber context, countermeasures are often thought of as hack-backs. While some cyber countermeasures may involve targeting the cyber infrastructure used to conduct the hostile operation, there is no requirement that this is so.¹⁷ For instance, countermeasures may be directed against other cyberinfrastructure to convince the State engaging in an unlawful cyber operation to desist. An example would be conducting damaging cyber operations against private cyber infrastructure in response to a hostile cyber operation by the State’s armed forces. The intent would be to pressure that State to terminate the operation. Indeed, countermeasures need not even be in-kind. Non-cyber countermeasures are permissible in response to unlawful cyber operations and vice versa. For example, a State might close its airspace to another State’s aircraft even if access to that airspace is provided for by treaty, at least until the latter has terminated its unlawful cyber operations and made good any harm suffered by the former.

An unsettled issue is whether *collective* countermeasures are permissible. A collective countermeasure would involve one or more States assisting a State that is lawfully taking countermeasures. It may even involve the former conducting countermeasures on behalf of the latter. States are split on this

¹¹ Thomas Giegerich, *Retorsion*, OXFORD PUBLIC INTERNATIONAL LAW (Sep. 2020), <https://www.opil.oup.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e983>.

¹² *Non-International Armed Conflict*, ICRC CASEBOOK, <https://www.casebook.icrc.org/law/non-international-armed-conflict#chapter9>.

¹³ *International Criminal Law*, ICRC CASEBOOK, https://www.casebook.icrc.org/a_to_z/glossary/international-criminal-law.

¹⁴ Wikipedia, *Countermeasure (Computer)* (Oct. 17, 2023), [https://www.en.wikipedia.org/wiki/Countermeasure_\(computer\)](https://www.en.wikipedia.org/wiki/Countermeasure_(computer)).

¹⁵ Articles on State Responsibility, *supra* note 5, art. 49.

¹⁶ *Id.* arts. 51–53.

¹⁷ TALLINN MANUAL 2.0, *supra* note 3, rule 23 (commentary).

issue. For example, in NATO, France rejects collective countermeasures,¹⁸ while Estonia embraces them.¹⁹ Professor Sean Watts and I have analyzed this issue in some depth and concluded that the better view is that they are permissible.²⁰

As between parties to an armed conflict, the concept of countermeasures seldom applies (minor exceptions exist). This is because during armed conflicts the parties are entitled to engage in activities, such as destroying military objectives and harming combatants, that would otherwise be unlawful. Therefore, there is no need for cyber operations against the enemy to qualify as countermeasures to avoid violating international law.

Due Diligence

The term “due diligence” in the cyber context refers to the obligation of States to

1. take feasible measures to
2. put an end to
3. ongoing hostile cyber operations that are
4. conducted from or through cyber infrastructure located on their territory,
5. of which they know, and that are having
6. serious adverse consequences for a
7. right under international law, like sovereignty, of another State.²¹

Although the obligation applies to cyber operations by both States and non-State actors, the duty is somewhat limited. For example, it does not require States to *prevent* the use of their territory for such operations or to *monitor* cyber operations from that territory. Moreover, there is no requirement to address every hostile cyber operation. Only those causing serious consequences in another State concerning a right that the State enjoys under international law need to be stopped. Finally, the obligation is only to engage in remedial measures that the State is reasonably capable of taking in the circumstances.

Due diligence is of particular importance when a hostile cyber operation cannot be attributed to a State. Although countermeasures are unavailable in response to cyber operations by non-State actors, if the State from which they are launched is in breach of its due diligence obligation, that internationally wrongful act opens the door to countermeasures.²² Those countermeasures can take the form of either cyber operations into the State’s territory directly against the non-State actors or cyber operations designed to pressure the State to comply with its duty to terminate the operations.

Most States that have spoken to the issue of due diligence accept its status as a rule of international law (recent examples include

¹⁸ Michael Schmitt, *France’s Major Statement on International Law and Cyber: an Assessment*, JUST SECURITY (Sep. 16, 2019), <https://www.justsecurity.org/66194/frances-major-statement-on-international-law-and-cyber-an-assessment/>.

¹⁹ Michael Schmitt, *Noteworthy Releases of International Cyber Law Positions—Part I: NATO, ARTICLES OF WAR* (Aug. 27, 2020), <https://lieber.westpoint.edu/nato-release-international-cyber-law-positions-part-i>.

²⁰ Michael Schmitt & Sean Watts, *Collective Cyber Countermeasures?*, 12 HARV. NAT’L SEC. J. 176 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3881151.

²¹ TALLINN MANUAL 2.0, *supra* note, rule 6.

²² Michael Schmitt, *In Defense of Due Diligence in Cyberspace*, YALE L. J. FORUM (June 22, 2015), https://www.yalelawjournal.org/pdf/Schmitt_PDF_g9pv96jc.pdf.

Germany²³ and Japan²⁴). Israel takes the opposite position,²⁵ while many other States have refrained from adopting a firm stance. There is widespread agreement, however, that whether or not due diligence is a legally binding obligation under international law, it is at least a “voluntary, non-binding norm of responsible State behavior” (see discussion²⁶). In other words, responsible members of the international community *should* act consistent with the rule.

During an international armed conflict, the law of neutrality will sometimes supplant the due diligence obligation. Under that long-standing body of law, a neutral State is responsible for putting an end to belligerent operations, including cyber operations, from its territory.²⁷ Should it fail to comply with this duty, and if the consequences of the cyber operations from neutral territory are significant, the aggrieved belligerent may engage in self-help, including forcible measures, to terminate those operations.²⁸

Below/Above-the-Threshold

The terms “below” and “above-the-threshold” are the cause of significant confusion because those who use them often fail to indicate the

threshold to which they are referring. For instance, the terms can refer to the threshold of lawfulness—as in whether a remotely conducted hostile cyber operation trips over the threshold for a breach of sovereignty.²⁹ The terms can also indicate the thresholds at which a cyber operation qualifies as a use of force or entitles a State to use force in self-defense against a hostile cyber operation. And the terms sometimes denote the point at which cyber operations qualify as either an international or non-international armed conflict.

Each of these thresholds is discussed below. The critical point here, however, is that every discussion of a “threshold issue” must be accompanied by a reference to the threshold in question to ensure those involved in the discussion are considering the same point of law.³⁰

Use of Force

Article 2(4) of the UN Charter and customary law prohibit “uses of force” except when authorized by the UN Security Council under Chapter VII of the UN Charter, engaged in with the consent of the State in which it occurs, or qualifying as an act of self-defense (see below).³¹ It is well accepted that

²³ Michael Schmitt, *Germany's Positions on International Law in Cyberspace Part I*, JUST SECURITY (Mar. 9, 2021), <https://www.justsecurity.org/75242/germanys-positions-on-international-law-in-cyberspace/>.

²⁴ Min. of Foreign Affairs of Japan, *Basic Positions of the Government of Japan on International Law Applicable to Cyber Operations* (May 28, 2021), <https://www.mofa.go.jp/files/100200935.pdf>.

²⁵ Michael Schmitt, *Israel's Cautious Perspective on International Law in Cyberspace: Part I (Methodology and General International Law)*, EJIL TALK! (Dec. 17, 2020), <https://www.ejiltalk.org/israels-cautious-perspective-on-international-law-in-cyberspace-part-i-methodology-and-general-international-law/>.

²⁶ Michael Schmitt, *The Sixth United Nations GGE and International Law in Cyberspace*, JUST SECURITY (June 10, 2021), <https://www.justsecurity.org/76864/the-sixth-united-nations-gge-and-international-law-in-cyberspace/>.

²⁷ U.S. DEP'T OF DEF., LAW OF WAR MANUAL (Dec. 2016) [hereinafter 2016 DoD LAW OF WAR MANUAL].

²⁸ TALLINN MANUAL 2.0, *supra* note 3.

²⁹ TALLINN MANUAL 2.0, *supra* note 3, at 17–26.

³⁰ Michael Schmitt, *'Below the Threshold' Cyber Operations: The Countermeasures Response Option and International Law*, 54 VIRGINIA J. INT'L L. 697 (2014), https://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2353898.

³¹ Charter of the United Nations, June 26, 1945, art. 2(4), 59 Stat. 1031 [hereinafter U.N. Charter].

cyber operations causing significant physical damage or injury are uses of force.³² Most States would also agree that cyber operations resulting in substantial permanent loss of cyber infrastructure's functionality qualify as unlawful uses of force.³³ It must be cautioned that a non-State actor's hostile cyber operation at the use of force level does not violate the use of force prohibition absent attribution to a State. Instead, such operations are primarily violations of domestic law.

The unsettled issue in international law is, absent these circumstances, when do operations nevertheless qualify as a use of force? Very few States have addressed this issue head-on. The *Tallinn Manual 2.0* experts concluded that until consensus develops among States as to the appropriate threshold for qualifying a cyber operation as a use of force, a number of factors will bear on the likelihood that States will characterize a particular cyber operation as a use of force. These include severity, immediacy, directness, invasiveness, measurability of effects, military character, State involvement, identity of the attacker, record of cyber operations by the attacker, and nature of the target.³⁴ Except for severity, no one factor is determinative. Rather, these and others will be considered

together on a case-by-case basis. Several States have adopted the approach, typically by referring to the "scale and effects" of the cyber operation in question (e.g., Australia,³⁵ Finland,³⁶ Germany,³⁷ the Netherlands,³⁸ and New Zealand³⁹). France has gone further by endorsing many of the factors identified by the *Tallinn Manual 2.0* experts.⁴⁰

There are two key takeaways concerning uses of force in the cyber context. First, there is a growing consensus that uses of force need not be physically destructive or injurious, although the circumstances in which such an operation amounts to the use of force remain unsettled. Second, cyber uses of force do not necessarily open the door to responses based on self-defense. Only uses of force that qualify as "armed attacks" do so. The sole purpose of determining whether a cyber operation is a use of force is to determine whether the State to which the operation can be attributed has violated that prohibition.

Self-defense

The term self-defense is often misused to mean any defensive response to hostile cyber operations. However, in international law, self-defense is a concept limited to situations

³² 2016 DoD LAW OF WAR MANUAL, *supra* note 27, § 16.3.1.

³³ TALLINN MANUAL 2.0, *supra* note 3, rules 68–69.

³⁴ *Id.* rule 69 (commentary).

³⁵ Australian Government, *Annex B: Australia's Position on How International Law Applies to State Conduct in Cyberspace* (last visited Jan. 25, 2024), <https://www.internationalcybertech.gov.au/our-work/annexes/annex-b>.

³⁶ Min. of Foreign Affairs of Finland, *International Law and Cyberspace: Finland's National Positions* (last visited Nov. 20, 2023), https://um.fi/documents/35732/0/KyberkannatPDF_EN.pdf/12bbbbde-623b-9f86-b254-07d5af3c6d85?t=1603097522727.

³⁷ Schmitt, *Germany's Positions on International Law in Cyberspace Part I*, *supra* note 23.

³⁸ Min. of Foreign Affairs of the Netherlands, *Letter to the parliament on the international legal order in cyberspace*, GOVERNMENT OF THE NETHERLANDS (Jul 5, 2019), <https://www.government.nl/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace>.

³⁹ Michael Schmitt, *New Zealand Pushes the Dialogue on International Cyber Law Forward*, JUST SECURITY (Dec. 8, 2020), <https://www.justsecurity.org/73742/new-zealand-pushes-the-dialogue-on-international-cyber-law-forward/>.

⁴⁰ Schmitt, *France's Major Statement on International Law and Cyber: An Assessment*, *supra* note 18.

in which a State targeted by a use of force (see above) at the “armed attack” level may lawfully respond with its own forcible actions—whether cyber or non-cyber—despite the aforementioned prohibition on the use of force.⁴¹ The response must be both necessary and proportionate.⁴² Necessity denotes a need to respond at the use of force level, while proportionality refers to a degree of force that is no greater than required in the circumstances to respond to the armed attack.

The customary right of self-defense, which exists in treaty form in Article 51 of the UN Charter, includes collective defense.⁴³ Thus, States facing an armed attack in cyberspace may look to other States to defend them or to assist in their defense, whether by cyber or non-cyber means. Article 51 provides the basis for Article 5 of NATO’s North Atlantic Treaty,⁴⁴ which allows⁴⁵ the Alliance to come to the defense of its members.

The critical question concerning the right of self-defense in the cyber context is when does a hostile cyber operation rise to the level of an “armed attack?” No consensus exists on this matter. Most States, however, accept the International Court of Justice’s characterization of armed attacks in its

Paramilitary Activities judgment.⁴⁶ There the Court described them as the “most grave forms of the use of force.”⁴⁷ In other words, wherever the use of force line lies, the armed attack threshold that gives the target State the right of self-defense is above it. Thus, while there is no reason to exclude cyber operations that are not physically destructive or injurious from the ambit of armed attacks, fewer would qualify as armed attacks than is the case with characterization as a use of force.

Notably, the United States has never accepted⁴⁸ the premise that an armed attack is a severe form of use of force.⁴⁹ For the United States, there is no difference between a use of force and an armed attack; all unlawful uses of force are armed attacks. Therefore, by its interpretation, the United States believes it may lawfully respond forcibly, whether by cyber or non-cyber means, to any unlawful cyber operation that amounts to a use of force.⁵⁰

A key unsettled issue about the right of self-defense against cyber armed attacks, one that also exists in the non-cyber context,⁵¹ is whether the right of self-defense is available to a State facing cyber operations at the armed attack level by non-State actors who

⁴¹ TALLINN MANUAL 2.0, *supra* note 3, rule 71.

⁴² *Id.* rule 72.

⁴³ U.N. Charter, *supra* note 31, art. 51.

⁴⁴ North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

⁴⁵ Michael Schmitt, *The North Atlantic Alliance and Collective Defense at 70: Confession and Response Revisited*, 34 EMORY INT’L L. REV. 85 (2019), <https://scholarlycommons.law.emory.edu/eilr/vol34/iss0/7>.

⁴⁶ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14 (June 27).

⁴⁷ *Id.* para. 191.

⁴⁸ Ryan Goodman, *Cyber Operations and the U.S. Definition of “Armed Attack,”* JUST SECURITY (Mar. 8, 2019), <https://www.justsecurity.org/53495/cyber-operations-u-s-definition-armed-attack/>.

⁴⁹ 2016 DoD LAW OF WAR MANUAL, *supra* note 27, § 16.3.3.1.

⁵⁰ *Id.* § 16.3.3.2.

⁵¹ Adil Ahmad Haque, *Self-Defense Against Non-State Actors: All Over the Map: Insights from UN Security Council Arria-Formula Meeting*, JUST SECURITY (Mar. 24, 2021), <https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/>.

are not acting “by or on behalf” of a State, or with a State’s “substantial involvement.”⁵² The U.S. view is that the right of self-defense extends to cyber operations by both States and non-State actors; this is the better view as a matter of law. Relatedly, it is unsettled whether a State may respond into another State’s territory against non-State actors conducting cyber operations at the armed attack level. The U.S. position is that it may, based on the so-called “unwilling or unable” test.⁵³ Again, this is a defensible approach.

Cyberwar (Armed Conflict)

“Cyberwar” is perhaps the most misused of the terms drawn from international law. In fact, most operations characterized as cyberwar or acts of war are not.⁵⁴

In international law, the term war has been supplanted by “armed conflict”⁵⁵ since adoption of the 1949 Geneva Conventions. Armed conflicts may be either international or non-international. The significance of qualification as one of these types of armed conflicts is that once a situation is an armed conflict, the law of armed conflict applies. In

other words, armed conflict is a *choice of law* concept.

A situation of international armed conflict⁵⁶ exists when there are hostilities between States or between a State and a non-State group under a State’s “overall control.”⁵⁷ In the cyber context, the critical issue is the point at which a cyber operation qualifies as an exchange of “hostilities.”⁵⁸ A degree of uncertainty exists over this matter. Indeed, to date, no State has publicly claimed it is in an armed conflict solely based on being targeted by another State’s hostile cyber operation. The *Tallinn Manual 2.0* international group of experts took a practical approach to the matter. It held that a cyber operation that qualifies as an “attack” under the law of armed conflict (see below) amounts to engaging in hostilities and therefore generally initiates an international armed conflict.⁵⁹

The law applicable in an international armed conflict is more developed than that which applies during non-international armed conflicts.⁶⁰ Nevertheless, there is a fair degree of congruency between the two bodies of law, especially with respect to the conduct of hostilities. A non-international armed

⁵² Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, para. 195 (June 27).

⁵³ TALLINN MANUAL 2.0, *supra* note 3, rule 71 (commentary).

⁵⁴ See, e.g., Schmitt, *Top Expert Backgrounder*, *supra* note 1.

⁵⁵ ICRC, *How Is the Term “Armed Conflict” Defined in International Humanitarian Law?*, INT’L COMM. RED CROSS OPINION PAPER (Mar. 2008), <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>.

⁵⁶ Geneva Academy, *International Armed Conflict* (last updated Aug 30, 2017), <https://www.rulac.org/classification/international-armed-conflict>.

⁵⁷ Sylvain Vit  , *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*, 91 INT’L REV. RED CROSS 69 (2009), <https://www.icrc.org/en/doc/assets/files/other/irrc-873-vite.pdf>.

⁵⁸ TALLINN MANUAL 2.0, *supra* note 3, rule 82.

⁵⁹ *Id.* rule 82 (commentary).

⁶⁰ *Non-International Armed Conflict*, ICRC CASEBOOK, *supra* note 12.

conflict⁶¹ exists when a State and an organized armed group,⁶² or multiple organized armed groups, are engaged in protracted hostilities at a relatively high degree of intensity.⁶³ Because of the intensity required for qualification as a non-international armed conflict, it is unlikely, albeit not impossible, that a cyber exchange standing alone would have that status. Instead, the more likely scenario is one in which the law of armed conflict governs cyber operations because they are part of an ongoing kinetic non-international armed conflict, as in the case of cyber operations directed at ISIS.⁶⁴

Attack

The term “attack” is frequently used to refer to any hostile cyber operation. This creates confusion because in international law the term has a specific meaning in two situations. First, as discussed, an “armed attack” is the condition precedent to the exercise of self-defense. Most hostile cyber operations fall below the level of an armed attack and therefore do not open the door

to a response involving the use of cyber or non-cyber force. To label them “attacks” risks misunderstanding the response options available to the victim State.

Second, in the law of armed conflict, “attacks” is a term of art that refers to “acts of violence against the adversary, whether in offense or in defense.”⁶⁵ This is significant because many of the law of armed conflict “conduct of hostilities” rules apply only to operations that are attacks as a matter of law.⁶⁶ For instance, it is prohibited to attack civilians⁶⁷ or civilian objects,⁶⁸ but these rules do not apply to cyber operations that fail to qualify as attacks. As a result, certain cyber operations directed at the civilian population are permissible, as with most psychological operations conducted by cyber means such as social media.⁶⁹ Other fundamental obligations that are limited to cyber “attacks” include the prohibition on indiscriminate attacks,⁷⁰ the rule of proportionality,⁷¹ and the requirement to take precautions⁷² in attack to minimize harm to civilians and civilian objects.

⁶¹ Geneva Academy, *Non-International Armed Conflict* (last updated Sep. 11, 2017), <https://www.rulac.org/classification/non-international-armed-conflicts>.

⁶² *Non-International Armed Conflict*, ICRC CASEBOOK, *supra* note 12.

⁶³ *Prosecutor v. Tadić*, Case No. IT-94-I-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁶⁴ See, e.g., David E. Sanger, *U.S. Cyberattacks Target ISIS in a New Line of Combat*, N.Y. TIMES (Apr 24, 2016), <https://www.nytimes.com/2016/04/25/us/politics/us-directs-cyberweapons-at-isis-for-first-time.html>; Helen Warrell, *UK Targeted ISIS Drones and Online Servers in Cyber Attack*, FINANCIAL TIMES (Feb. 7, 2021), <https://www.ft.com/content/360a8e1c-b241-40f7-b944-45a4f8854ac5>; Stephanie Borys, *Australian Cyber Soldiers Hacked Islamic State and Crippled Its Propaganda Unit—Here's What We Know*, ABC (Dec. 17, 2019), <https://www.abc.net.au/news/2019-12-18/inside-the-secret-hack-on-islamic-state-propaganda-network/11809426>.

⁶⁵ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 49, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (generally considered reflective of customary law).

⁶⁶ 2016 DoD LAW OF WAR MANUAL, *supra* note 27, § 16.5.1.

⁶⁷ Rule 1—*The Principle of Distinction between Civilians and Combatants*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1>.

⁶⁸ *Id.* rule 7.

⁶⁹ 2016 DoD LAW OF WAR MANUAL, *supra* note 27, § 16.5.2.

⁷⁰ Rule 11—*Indiscriminate Attacks*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule11>.

⁷¹ Rule 14—*Proportionality in Attack*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14>.

⁷² Rule 15—*Principle of Precautions in Attack*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15>.

Unfortunately, the question of whether cyber operations that do not cause physical damage or injury constitute “attacks” under IHL remains unsettled. Israel, for instance, is of the view that only those that have such consequences are attacks.⁷³ France, by contrast,

considers that a cyberoperation is an attack where the targeted equipment or systems no longer provide the service for which they were implemented, whether temporarily or permanently, reversibly or not. If the effects are temporary and/or reversible, the attack is characterised where action by the adversary is necessary to restore the infrastructure or system (repair of equipment, replacement of a part, reinstallation of a network, etc.).⁷⁴

This issue has long been contentious.⁷⁵ The point, however, is that whether a hostile cyber operation qualifies as an attack during an armed conflict has significant consequences for the civilian population; therefore, the term should be used with great care.

Conclusion

A lack of sensitivity to the legal meaning of the aforementioned terms has complicated both unofficial and official discourse over cyber matters, at times even creating the impression that cyber incidents allow responses that international law does not countenance. Clearly, terminological confusion can prove internationally destabilizing. States and others involved in cyber affairs should choose their words carefully.

That said, it would be naïve to hope the international community will eventually employ these terms solely in their legal context. Instead, this post aims to sensitize readers to the challenge presented by terms that coexist in the legal and non-legal environment. Hopefully, it will help alert members of the legal community to the necessity of being “bilingual” when providing advice about cyber matters. They should be especially sensitive to the fact that their non-law colleagues may be using the terms in ways that deviate substantially from their international law meaning.



⁷³ Michael Schmitt, *Israel's Cautious Perspective on International Law in Cyberspace: Part II (jus ad bellum and jus in bello)*, EJIL TALK! (Dec. 17, 2020), <https://www.ejiltalk.org/israels-cautious-perspective-on-international-law-in-cyberspace-part-ii-jus-ad-bellum-and-jus-in-bello/>.

⁷⁴ Schmitt, *France's Major Statement on International Law and Cyber: An Assessment*, *supra* note 18.

⁷⁵ See Michael Schmitt, *Wired Warfare 3.0: Protecting the Civilian Population During Cyber Operations*, 101 INT'L REV. RED CROSS 333 (2019), <https://international-review.icrc.org/articles/wired-warfare-30-protecting-civilian-population-during-cyber-operations>.

CYBER NEUTRALITY, CYBER RECRUITMENT, AND CYBER ASSISTANCE TO UKRAINE

by Nicholas Tsagourias | Apr 19, 2022

The war between Russia and Ukraine has given rise to many challenging international humanitarian law (IHL) questions. In this post I will focus on its cyber dimension and consider how certain customary law obligations imposed on belligerents and neutrals under the law of neutrality apply to the current armed conflict.

More specifically I will examine how the obligation not to form corps of combatants or recruit on neutral territory (Article 4 of Hague Convention V)⁷⁶ applies to the formation of the Ukraine-supporting IT Army⁷⁷ and how the obligation not to supply war material (Article 6 of Hague Convention XIII,⁷⁸ which lays down a general customary law duty extending beyond naval warfare, but also Article 2 of Hague Convention V⁷⁹ in relation to land warfare) applies to cyber assistance. Neutral States have provided technical assistance to Ukraine, for example,

by dispatching⁸⁰ cyber security experts to assist in forestalling cyber attacks, providing⁸¹ technical support and threat intelligence or financial aid to enhance its cyber security, or accepting Ukraine as a contributing participant to the NATO Cooperative Cyber Defence Centre of Excellence (CCDCOE).⁸²

In view of the fact that publicly available information is quite scarce, I will also use these events as a platform to consider the intricacies as well as difficulties in applying the law of neutrality to the cyber domain, a subject that has received scant attention (see Antonopoulos, ch. 6⁸³ and Turns⁸⁴).

Before I proceed, two caveats are in order. First, this post will not consider the broader question of the interrelation between the law of neutrality and the UN collective security system, the concept of benevolent neutrality, or the concept of permanent neutrality (for

⁷⁶ Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, art. 4, 36 STAT. 2310 [hereinafter Hague V].

⁷⁷ Sam Schechner, *Ukraine's 'IT Army' Has Hundreds of Thousands of Hackers, Kyiv Says*, WALL ST. J. (Mar. 7, 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-04/card/ukraine-s-it-army-has-hundreds-of-thousands-of-hackers-kyiv-says-RfpGa5zmLtavrot27OWX>.

⁷⁸ Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, art. 6, 36 Stat. 2415 [hereinafter Hague XIII].

⁷⁹ Hague V, *supra* note 76, art. 2.

⁸⁰ Joe Tidy, *Ukraine: EU Deploys Cyber Rapid-Response Team*, BBC News (Feb. 22, 2022), <https://www.bbc.com/news/technology-60484979>.

⁸¹ EU External Action, *Foreign Affairs Council: Press Remarks by High Representative Josep Borrell After the Meeting* (Feb. 21, 2022), https://www.eeas.europa.eu/node/111226_fr.

⁸² NATO Cooperative Cyber Defence Centre of Excellence, *Ukraine to Be Accepted as a Contributing Participant to NATO CCDCOE* (last visited Nov. 11, 2023), <https://ccdcoe.org/news/2022/ukraine-to-be-accepted-as-a-contributing-participant-to-nato-ccdcoe/>.

⁸³ Constantine Antonopoulos, *Ch. 6—Neutrality and Cyber Warfare*, NON-PARTICIPATION IN ARMED CONFLICT (Feb. 24, 2022), <https://www.cambridge.org/core/books/abs/nonparticipation-in-armed-conflict/neutrality-and-cyber-warfare/00DB4FB539B8EF16DB91D33CFB739080>.

⁸⁴ *Research Handbook on International Law and Cyberspace* (Nicholas Tsagourias and Russell Buchan eds., Edward Elgar Publishing, 2nd ed. 2021), <https://www.e-elgar.com/shop/usd/research-handbook-on-international-law-and-cyberspace-9781789904246.html>.

such discussion see the earlier posts by Wolff Heintschel von Heinegg⁸⁵ and Michael N. Schmitt⁸⁶). Second, this post treats Russia and Ukraine as belligerents whereas all other States are neutrals.

Cyber Recruitment

People from across the world joined the IT Army following an invitation by the Ukrainian government.⁸⁷ The question I will examine is whether Ukraine and neutral States whose nationals joined the IT Army (assuming the IT Army falls within Ukraine's Regulations on Military Service in the Armed Forces by Foreigners and Stateless Persons)⁸⁸ have breached Article 4 of 1907 Hague Convention V.

The first issue to consider is whether online recruitment qualifies as recruitment for purposes of Article 4 of Hague Convention V. The answer is yes. Recruitment describes the process of building an armed force. Its first phase is that of attracting or requesting someone to join, which can be done online through advertisement and online applications. Its next phase is that of selection, which involves physical and aptitude tests and training. All this can be done online.

The second and more critical issue is whether online recruitment on neutral servers but from sites controlled by Ukraine (for example, by functionally controlling or exclusively

managing the site) breaches Article 4 of Hague Convention V. It should be recalled that Article 4 prohibits the opening of recruitment agencies on neutral territory, with opening denoting the establishment of agencies and their active recruiting. In this case, Article 4 of Hague Convention V is breached, and the neutral State's Article 5 of Hague Convention V obligation of prevention is triggered. If, however, online recruitment takes place from sites under Ukrainian jurisdiction and control, the answer is in the negative because Article 4 of Hague Convention V localizes forbidden recruitment to neutral territory.

Would Article 4 of Hague Convention V apply if those recruited online remain physically within the neutral State? If physical presence in the neutral territory is central to the application of this rule, one can say that the first limb of Article 4 of Hague Convention V is fulfilled in that a corps of combatants is formed on neutral territory. If, however, one wants to look beyond the physical boundaries of the law and look at their digital version in the form of digital persona and digital territory as determined, for example, by IP addresses, it is possible to argue that Article 4 of Hague Convention V does not apply because those recruited are digitally operating outside neutral territory.

If, on the other hand, neutral citizens joined Ukraine's IT Army voluntarily and did so

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/>.

⁸⁶ Michael 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/>.

⁸⁷ Russel Buchan & Nicholas Tsagourias, *Ukrainian 'IT Army': A Cyber Levée en Masse or Civilians Directly Participating in Hostilities?*, EJIL TALK! (Mar. 9, 2022), <https://www.ejiltalk.org/ukrainian-it-army-a-cyber-levee-en-masse-or-civilians-directly-participating-in-hostilities/>.

⁸⁸ *Presidential Decree of Ukraine No. 248/2016: About approval of the Regulations on passing of military service in the Armed Forces of Ukraine foreigners and stateless persons* (June 10, 2016), <https://cis-legislation.com/document.fwx?rgn=86889#A4OO0GJ839>.

without the involvement of a belligerent or neutral State, Article 4 of Hague Convention V is not engaged. Volunteering is not prohibited under the law of neutrality because it constitutes private conduct (Article 6 of Hague Convention V).⁸⁹ The requirement to cross the neutral frontier “separately” in such a case highlights the lack of State involvement in organizing these people if compared, for example, with corps of combatants being formed or recruited on neutral territory. There is also no obligation on a neutral State under international law to prevent volunteering in particular involving belligerent nationals on neutral territory although they may decide to regulate volunteering by their nationals under their national law.

In the case of the International Legion for the Defense of Ukraine,⁹⁰ it is assumed that many have crossed the neutral frontier to join the IT Army. But if they offered their services to the IT Army online while physically remaining on neutral territory, would that constitute volunteering? The preceding discussion is pertinent in this respect.

It can be said that these people have departed digitally because they have crossed their own State’s cyber frontier (through interconnected cyber infrastructure) and entered the territory of a belligerent State. If this interpretation is accepted, then Article 6 will apply to this situation; they will be volunteers

who provide services to a belligerent army by crossing the neutral’s digital frontier.

If, however, the traditional approach to physical borders is followed, Article 6 will not be engaged. Would Article 4 of Hague Convention V apply in this case? It all depends on the level of belligerent or neutral State involvement. Although there is no clear threshold, there must be some kind of organized process by a State in forming a corps of combatants or recruiting to extend Article 4 prohibition, whereas, in contrast, Article 6 applies to individuals acting on their own volition and to unorganized groups. This is also in line with the private-public dichotomy that defines the law of neutrality.

Consequently, the mere fact that the U.K. government expressed its support does not amount to organization;⁹¹ neither does Latvia’s law to allow its citizens to fight in Ukraine.⁹² The latter relates to what was said earlier about the potential punishment under national law.

These persons will, however, lose their neutral status according to Article 17 of Hague Convention V and be subject to attacks.

With regard to Ukraine as a belligerent State, the initial invitation would not be sufficient to engage Article 4 of Hague Convention V, but upon joining the IT Army, if they formed a corps of combatants, that may be brought within its scope if they stay within neutral territory. In this case neutral States must take

⁸⁹ Hague V, *supra* note 76, art. 6.

⁹⁰ Petra Ditrichová & Veronika Bílková, *Statute of Foreign Fighters in the Ukrainian Legion*, LIEBER INST. WEST POINT (Mar. 15, 2022), <https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion/>.

⁹¹ Bethan McKernan, *Ukraine appeals for foreign volunteers to join fight against Russia*, GUARDIAN (Feb. 27, 2022), <https://www.theguardian.com/world/2022/feb/27/ukraine-appeals-for-foreign-volunteers-to-join-fight-against-russia>.

⁹² Reuters, *Latvia Allows Its Citizens to Fight in Ukraine* (Feb. 28, 2022), <https://www.reuters.com/world/europe/latvia-allows-its-citizens-fight-ukraine-2022-02-28/>.

measures to disband them, terminate their activities (Article 5 of Hague Convention V), or intern them (Article 11 of Hague Convention V). Otherwise, they will be in breach of their neutrality. These persons will also lose their neutral status according to Article 17 of Hague Convention V and be subject to attacks.

Cyber Assistance

The second issue to consider is whether cyber assistance provided to Ukraine violates Article 6 of Hague Convention XIII, which prohibits the supply of “war materials of any kind whatsoever” by neutrals to the belligerents. As I said, this prohibition constitutes customary law that applies beyond naval warfare. The questions I will consider are, first, what constitutes forbidden cyber war material and, second, whether private trade in cyber war material is prohibited.

The use of the words “war material of any kind whatever” means the prohibition is broader than cyber weapons, such as malware. However, there is no definition of what cyber war material is, bearing also in mind that cyber material may be dual use. In principle, hardware and software used or intended to be used to conduct hostilities (for example computers, servers, networks, routers, mobile phones, industrial equipment, or systems that are designed to employ or support a cyber weapon) constitute war material. The supply of services (for example, maintenance, non-

military training, non-military purpose build cyber technology) is in principle excluded.

That having been said, international practice, although not settled, indicates that not all war material is prohibited but only substantial or, as Bothe put it, “weapons *stricto sensu*.”⁹³ The older distinction of the law of contraband, between absolute contraband, which includes items used exclusively for military purposes, and relative contraband, which includes dual-use items, may be of assistance here.⁹⁴ Consequently the supply of lethal cyber weapons will be prohibited according to Article 6 of Hague Convention XIII but not the supply of defensive cyber weapons or cyber defence systems, because the latter are not used to prosecute the war.

Contemporary practice also demonstrates that war material may be supplied if there is a pre-existing agreement (for U.K. practice regarding the Iran-Iraq war, see the 1986 *British Yearbook of International Law*⁹⁵). This will also extend to the exchange of information on vulnerabilities or threats through Computer Emergency Response Teams (CERTs) or other agreed mechanisms, even if such information relates to specific military operations or to operations that can be used to pursue the conduct of hostilities and thus assist a belligerent. It should be noted that the word “supply” in Article 6 of Hague Convention XIII is broader than selling.

⁹³ See Michael Bothe et al., *The Law of Neutrality*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, Ch. 18 (Dieter Fleck ed., 4th ed., Oxford University Press, Feb. 2021), <https://opil.ouplaw.com/display/10.1093/law/9780198847960.001.0001/law-9780198847960-chapter-18>.

⁹⁴ See *Declaration concerning the Laws of Naval War*, London, 26 February 1909, 208 *Consol. T.S.* 338, <https://ihl-databases.icrc.org/en/ihl-treaties/london-decl-1909?activeTab=undefined>.

⁹⁵ 1986 BRIT. Y.B. INT'L L. 534, <https://academic.oup.com/bybil>.

The supply of non-war exclusive cyber material is not prohibited, but it may be caught by export control regimes. This leads us to the next issue, which concerns the private trade in cyber war material.

A neutral has no obligation in principle to prevent private citizens from selling cyberwar material to belligerents provided that any restrictions are applied impartially (Article 7 of Hague Convention V⁹⁶ and Article 7 of Hague Convention XIII⁹⁷). This may apply to Elon Musk's sending Starlink satellite internet kits to Ukraine⁹⁸ which can also be used for war purposes (although little information exists as to whether funding was exclusively private). However, the private trade in war material may be subject to belligerent rights, for example, seizure.

That having been said, if a belligerent places a particular order to a neutral company to manufacture cyber war material to be used to attack a particular cyber weapon or military cyber system of the other belligerent, for example, malware, and the order is accepted by that company, the neutral State's duty of prevention arises according to Article 8 of Hague Convention XIII⁹⁹ if read also in conjunction with Article 2 of Hague Convention V. Article 8 represents customary law extending beyond naval warfare and applying to the sale of all arms in general. The reason for this is that by placing the specific

order for what amounts to war material, the company is acting under the orders of the belligerent, and neutral territory is used for the war (see Antonopoulos, p. 97).¹⁰⁰ This duty of prevention is a due diligence duty of conduct and not of result and depends on knowledge and the availability of means.

Another question that arises in relation to private trade is how private trade interacts with export control regimes such as those on dual use goods and technologies (see, for example, Regulation (EU) 2021/821 of 2021).¹⁰¹ In my opinion, the law of neutrality and export control regimes should remain separate because the scope of the obligations they impose on States differs (customary law obligations by the law of neutrality which also apply in all circumstances, whereas treaty law by export control regimes); because their scope of application differs (export regimes are designed to apply during peacetime and war time); and also because what falls within each regime may differ, although there may be overlaps.

The critical question, however, is whether such regimes change the character of the private transaction and make it governmental in nature, placing it thus within the prohibitions of Article 6 of Hague Convention XIII. In my opinion, this is what happens because export regimes serve States' public, not commercial, interests (see also Upcher, Neutrality in

⁹⁶ Hague V, *supra* note 76, art. 7.

⁹⁷ Hague XIII, *supra* note 78, art. 7.

⁹⁸ Alexander Freund, *Ukraine using Starlink for drone strikes*, DW (Mar. 27, 2022), <https://www.dw.com/en/ukraine-is-using-elon-musks-starlink-for-drone-strikes/a-61270528>.

⁹⁹ Hague XIII, *supra* note 78, art. 8.

¹⁰⁰ Antonopoulos, *supra* note 83, at 97.

¹⁰¹ EU, Regulation 2021/821, *Setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items*, May 20, 2021, PE/54/2020/REV/2 (last updated May 26, 2023), <https://eur-lex.europa.eu/eli/reg/2021/821/oj>.

Contemporary International Law, pp. 80–83). Consequently, if the cyber war material which is subject to export controls also falls within the scope of prohibited cyber war material as discussed previously, the neutral State should prohibit its sale according to Article 6 Hague Convention XIII. But as was said previously, the pool of prohibited cyber war material is quite narrow.

If the cyber material does not fall within the scope of prohibited cyber war material, its private sale may fall under the export control regime provided that the exporting State is party to such a regime. It has been reported, for example, that Israel blocked the private sale of spyware to Ukraine.¹⁰² The prohibition will be in line with Article 6 of Hague Convention XIII if the spyware constitutes cyberwar material. Otherwise, it will be compliant with Israel's national and/or international law obligations on export controls. Israel justified its decision by also invoking adherence to international agreements.

Would the trade of data between a neutral private company and a belligerent violate the law of neutrality? If data are intangible and indeed a collection of symbols or numbers whose processing constitutes information, one can say that the trade in data is a private transaction not violating the law of neutrality as discussed earlier. Its transfer through neutral infrastructure is not prohibited according to Article 8 of Hague Convention V¹⁰³ provided

that it is done impartially according to Article 9 of Hague Convention V.¹⁰⁴

If data are objects that can also be weapons, as in malware (see also U.S. Department of Defense Data Strategy¹⁰⁵), their trade on the open market remains in principle private and therefore not prohibited, as explained previously; however, if a belligerent places an order to a neutral company to transfer specific data to be used in the war and the company accepts it, Article 8 of Hague Convention XIII¹⁰⁶ would be implicated as explained above if read also in conjunction with Article 2 of Hague Convention V. The neutral State should prevent the departure of such data from its jurisdiction. Of course, discharging such a duty in cyberspace is difficult, but as was explained previously, it is a due diligence duty of conduct and not of result, meaning that the State should act if it has knowledge and has the means to do so.

Finally, in relation to financial assistance to enhance Ukraine's cyber defense, this does not involve assistance to the prosecution of the war, and therefore it is not prohibited. Even if it does, financial assistance by neutral States or neutral citizens is not regulated as such under the law of neutrality, and moreover, State practice is ambivalent. During the Second World War, neutral States supported the belligerents financially, whereas during the Iran-Iraq war, financial support to Iraq was criticized but not as violation of

¹⁰² Stephanie Kirschgaessner, *Israel blocked Ukraine from buying Pegasus spyware, fearing Russia's anger*, GUARDIAN (Mar. 23, 2022), <https://www.theguardian.com/world/2022/mar/23/israel-ukraine-pegasus-spyware-russia>.

¹⁰³ Hague V, *supra* note 76, art. 8.

¹⁰⁴ *Id.* art. 9.

¹⁰⁵ U.S. Dep't of Def., *Executive Summary: DoD Data Strategy: Unleashing Data to Advance the National Defense Strategy* (Sep. 30, 2020), <https://media.defense.gov/2020/Oct/08/2002514180/-1/-1/0/DOD-DATA-STRATEGY.PDF>.

¹⁰⁶ Hague XIII, *supra* note 78, art. 8.

the law of neutrality.¹⁰⁷ Also, commentators who contend that financial assistance to belligerents is prohibited speak of substantive assistance.¹⁰⁸

Conclusion

This contribution has revealed the intricacies and difficulties in applying the traditional law of neutrality to cyber recruitment and cyber assistance because the law of neutrality is based on the traditional notion of territoriality and its physical borders. It is

premised on a relatively clear understanding of what constitutes war material. However, these notions are challenged in the cyber domain. Consequently, how the law of neutrality applies to cyber warfare requires more attention. Lawyers and policymakers need to proceed with care but also with some imagination in analogizing, adapting, and reinterpreting existing law. However, in my opinion this should not involve the creation of a new *à la carte* law.



¹⁰⁷ See Francis Boyle, *International Crisis and Neutrality: United States Foreign Policy Toward the Iran-Iraq War*, 43 MERCER L. REV. 523 (1992), https://digitalcommons.law.mercer.edu/cgi/viewcontent.cgi?article=1130&context=jour_mlr.

¹⁰⁸ See Bothe, in THE HANDBOOK OF INT. HUMANITARIAN LAW, *supra* note 93.

U.S. OFFENSIVE CYBER OPERATIONS IN SUPPORT OF UKRAINE

by Michael N. Schmitt | Jun 6, 2022

Last Wednesday, General Paul Nakasone, Commander of United States Cyber Command and Director of the National Security Agency, opened the NATO Cooperative Cyber Defense Centre of Excellence's annual CyCon Conference. In his address, General Nakasone discussed the “defend forward” and “persistent engagement” operational concepts set forth, *inter alia*, in Cyber Command's 2018 vision statement, *Achieve and Maintain Cyberspace Superiority*¹⁰⁹ (see my thoughts on the concepts here¹¹⁰ and here¹¹¹).

While General Nakasone's address generated a great deal of discussion about the U.S. strategy's lawfulness among those of us attending the conference (the answer depends on the nature of the operations), that issue had been on the table for a period measured in years. However, he also gave an interview to Sky News that quickly refocused attention on the war in Ukraine when it was published the following day. In it, General Nakasone reportedly acknowledged that “he is concerned ‘every single day’ about the risk of a Russian cyber attack targeting the US and said that . . . hunt forward activities were an effective way

of protecting both America as well as allies.”¹¹² To the extent “hunting” refers to intelligence collection, such operations are lawful, for espionage does not violate international law (for sources and discussion see *Tallinn Manual 2.0*, Rule 32 commentary¹¹³).

But General Nakasone is also reported to have admitted that the United States had been mounting cyber operations in support of Ukraine: “We've conducted a series of operations across the full spectrum; offensive, defensive, [and] information operations.” Although he did not describe them, the General stated that the operations were lawful and conducted with the approval of the appropriate civilian authorities. The comments immediately drew the attention of the cyber and international law communities.

At the White House, Press Secretary Karine Jean-Pierre was asked about the comments, in particular, whether offensive U.S. cyber operations were inconsistent with the administration's decision not to engage Russian forces directly and signaled a policy change. She responded,

¹⁰⁹ U.S. Cyber Command, *Achieve and Maintain Cyberspace Superiority, Command Vision for U.S. Cyber Command* (last visited Nov. 20, 2023), <https://www.cybercom.mil/Portals/56/Documents/USCYBERCOM%20Vision%20April%202018.pdf?ver=2018-06-14-152556-010>.

¹¹⁰ Michael Schmitt, *The Defense Department's Measured Take on International Law in Cyberspace*, JUST SECURITY (Mar. 11, 2020), <https://www.justsecurity.org/69119/the-defense-departments-measured-take-on-international-law-in-cyberspace/>.

¹¹¹ Charlie Dunlap, *Don't miss this podcast: Mike Schmitt on "Inside the Enemy's Camp: 'Offensive' Cyber Ops and International Law."* LAWFIRE (Mar. 5, 2020), <https://sites.duke.edu/lawfire/2020/03/05/dont-miss-this-podcast-mike-schmitt-on-inside-the-enemys-camp-offensive-cyber-ops-and-international-law/>.

¹¹² Alexander Martin, *US military hackers conducting offensive operations in support of Ukraine, says head of Cyber Command*, SKY NEWS (Jun 1, 2022), <https://news.sky.com/story/us-military-hackers-conducting-offensive-operations-in-support-of-ukraine-says-head-of-cyber-command-12625139>.

¹¹³ TALLINN MANUAL 2.0, *supra* note 3, rule 32 (commentary).

[W]e just don't see it as such. We have talked about this before. We've had our cyber experts, here at the podium, lay out what our plan is. That has not changed. So, the answer is just simply: No.¹¹⁴

Offensive Cyberspace Operations

Without knowing the operations to which General Nakasone was referring, it is impossible to assess them fully. However, his reference to “offensive” operations is telling, for it is a term of art in U.S. military doctrine. Joint Publication 3-12,¹¹⁵ *Cyberspace Operations* (2018 (JP 3-12)), states that U.S. cyber forces have three missions:

1. Department of Defense information network operations (DODIN).

Operations to secure, configure, operate, extend, maintain, and sustain Department of Defense cyberspace to create and preserve the confidentiality, availability, and integrity of the Department of Defense information network.
2. Defensive cyberspace operations (DCO).

Missions to preserve the ability to utilize blue cyberspace capabilities and protect data, networks, cyberspace-enabled devices, and other designated systems by defeating ongoing or imminent malicious cyberspace activity.
3. Offensive cyberspace operations (OCO).

Missions intended to project power in and through cyberspace.

So we know what offensive cyber operations are not (DODIN and DCO). And elsewhere, the publication also notes that OCO “project power *in and through foreign cyberspace* through actions taken in support of CCDR or national objectives” (emphasis added). CCDR refers to Combatant Commanders like the Commander of European Command, who has responsibility for the area.

JP 3-12 goes on to explain:

OCO may exclusively target adversary cyberspace functions or create first-order effects in cyberspace to initiate carefully controlled cascading effects into the physical domains to affect weapon systems, C2 processes, logistics nodes, high-value targets, etc. All CO missions conducted outside of blue cyberspace with a commander's intent other than to defend blue cyberspace from an ongoing or imminent cyberspace threat are OCO missions. Like DCO-RA missions, some OCO missions may include actions that rise to the level of use of force, with physical damage or destruction of enemy systems. Specific effects created depend on the broader operational context, such as the existence or imminence of open hostilities and national policy considerations. OCO missions require a properly coordinated military order and careful consideration of scope, ROE, and measurable objectives.

Assuming solely for the sake of analysis that General Nakasone was using the term “offensive” in a manner consistent with U.S. doctrine, and not to refer colloquially

¹¹⁴ Press Briefing by Press Secretary Karine Jean-Pierre, June 1, 2022, the White House, <https://www.whitehouse.gov/briefing-room/press-briefings/2022/06/01/press-briefing-by-press-secretary-karine-jean-pierre-june-1-2022/>.

¹¹⁵ U.S., *Cyberspace Operations*, JP 3-12 (June 8, 2018).

to operations outside U.S. territory, the JP 3-12 explanations allow for a degree of legal analysis. I want to emphasize, however, that the analysis is limited to the types of operations described above as offensive cyberspace operations and that I do not know the kinds of operations in which U.S. Cyber Command is actually engaging.

Neutrality Violation?

This *Articles of War* symposium¹¹⁶ has repeatedly addressed the issue of neutrality (see here,¹¹⁷ here,¹¹⁸ and here¹¹⁹). Those posts demonstrate that the legal community is split between supporters of a strict interpretation of neutrality law (as reflected in Convention (V) Respecting the Rights and Duties of Neutral Powers in Case of War on Land,¹²⁰ Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War,¹²¹ and customary law) and others, like myself, who have embraced a “qualified neutrality” approach.

By the former, neutral States may not support a belligerent to the detriment of its adversary, for as Yoram Dinstein has observed, “The two pillars of the laws of neutrality are non-participation and non-discrimination.”¹²²

Offensive cyber operations against Russian forces would undoubtedly qualify as a breach of the prohibition on participation.

Yet, it is indisputable that Ukraine enjoys a right of self-defense under Article 51 of the UN Charter¹²³ and customary international law (see my analysis here¹²⁴). And assuming, for the sake of analysis, that Ukraine requested the U.S. cyber operations and that they fall within the four corners of that request, the U.S. operations qualify as collective self-defense measures. They, therefore, benefit from the fact that acting in self-defense, including collectively, is a “circumstance precluding wrongfulness” under the law of State responsibility.¹²⁵ This being so, the operations do not violate the law of neutrality by the strict approach to neutrality law.

The other approach, qualified neutrality, is supported by the United States. As noted in the Department of Defense’s *Law of War Manual*, “[t]he Charter of the United Nations and decisions by the U.N. Security Council may, in certain circumstances, qualify rights and obligations under the law of neutrality.”¹²⁶ It offers the example of acting in support of a belligerent pursuant to a UN Security Council decision under

¹¹⁶ Michael Schmitt, *Territorial Acquisition and Armed Conflict*, ARTICLES OF WAR (Aug. 29, 2023), <https://lieber.westpoint.edu/category/ukraine-russia-symposium/>.

¹¹⁷ Schmitt, *Providing Arms and Material to Ukraine*, *supra* note 86.

¹¹⁸ Heintschel von Heinegg, *supra* note 85.

¹¹⁹ Raul Pedroz, *Is the Law of Neutrality Dead?*, ARTICLES OF WAR (May 31, 2022), <https://lieber.westpoint.edu/is-law-of-neutrality-dead/>.

¹²⁰ Hague V, *supra* note 76.

¹²¹ Hague XIII, *supra* note 78.

¹²² YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (6th ed. 2017).

¹²³ U.N. Charter, *supra* note 31, art. 51.

¹²⁴ Michael 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/>.

¹²⁵ Articles on State Responsibility, *supra* note 5, art. 21.

¹²⁶ 2016 DoD LAW OF WAR MANUAL, *supra* note 27, at § 15.2.3.2.

UN Charter Chapter VII or a collective self-defense arrangement.

In my view, the notion of qualified neutrality only operates when it is crystal clear that the State being assisted is the victim of unlawful aggression by its adversary. Otherwise, qualified neutrality would be an exception that would often swallow the rule. But despite this limited application of the approach, recall that of the 193 UN members, 141 States voted¹²⁷ for a General Assembly resolution condemning the Russian actions and demanding immediate and unconditional withdrawal.¹²⁸ Thirty-five abstained (likely for political, not legal, reasons), while only five (Belarus, North Korea, Eritrea, Russia, and Syria) voted against the resolution. More to the point, the Russian justification for its actions is legally nonsensical.

Therefore, by the qualified neutrality approach, States may assist Ukraine, including by cyber means, without violating the law of neutrality. At a certain point, the nature of that support may make the supporting State a co-belligerent, a topic addressed below. Should that occur, the law of neutrality no longer applies between the State providing the support and the adversary of the supported State because the supporting State has become a party to the conflict. Whether the U.S. offensive cyber operations have reached that point is, as will be explained, difficult to determine.

Wrongful Use of Force?

For the same reason, even destructive or injurious U.S. cyber operations would not violate the use of force prohibition in Article 2(4) of the UN Charter¹²⁹ and customary international law. Self- and collective defense are exceptions to the use of force prohibition that are expressly provided for in Article 51 and acknowledged universally as customary in character. Accordingly, even if the U.S. cyber operations rise to the level of a use of force, a complicated issue, they are lawful (for discussion of cyber uses of force, see *Tallinn Manual 2.0*, Rule 69 Commentary).

I would note that the United States has not claimed to be acting in collective self-defense. This may be for policy reasons beyond the scope of this post or because the United States does not believe it needs to rely on self-defense as a justification for its actions yet. Still, the failure to do so does not preclude subsequent assertions that its actions were justifiable on that basis.

Armed Conflict?

Once a State becomes a party to an international armed conflict (IAC), the laws of neutrality no longer apply. They are supplanted by those of international humanitarian law (IHL). Regarding the U.S. cyber operations in question, this could occur in two ways.

First, the operations themselves might be at the level of “armed force,” a legal threshold that triggers an IAC. As understood in this

¹²⁷ U.N. News, *General Assembly resolution demands end to Russian offensive in Ukraine* (Mar. 2, 2022), <https://news.un.org/en/story/2022/03/1113152>.

¹²⁸ General Assembly, Eleventh Emergency Special Session, Agenda Item 5, U.N. Doc. A/ES-11/L.1 (Mar. 1, 2022).

¹²⁹ U.N. Charter, *supra* note 31, art. 2(4).

context, armed force includes certain cyber operations standing alone, that is, that are not a component of kinetic operations (for sources and discussion, see *Tallinn Manual 2.0*, Rule 82 commentary). Cyber operations that cause physical damage or injury cross the threshold.

But it is unclear where the threshold lies for operations not generating those effects. As noted by the International Committee of the Red Cross in its 2020 Commentary¹³⁰ to Article 2 of the 1949 Third Geneva Convention:

Without physically destroying or damaging military or civilian infrastructure, cyber attacks might also disrupt their operation. Could these still be considered as a resort to armed force under Article 2(1)? Would the low intensity approach still be appropriate for hostile actions carried out only through cyber operations? Would the threshold of harm tolerated by States affected by cyber operations be different depending on the military or civilian nature of the ‘targeted’ object? For the time being, these questions are left open and the law is uncertain on the subject. Therefore, it remains to be seen if and under what conditions States will treat such cyber operations as armed force amounting to armed conflict under humanitarian law in future operations.¹³¹

The challenge for our purposes is that, as is clear from the JP 3-12 extract above, the term “offensive cyberspace operations” can refer to those below the level of a use of

force, like one that merely disrupts Russian command and control or logistics. Indeed, a cyber operation might be “offensive” for U.S. doctrinal purposes but not “armed force” for IHL purposes.

Thus, without knowing more about the operations to which General Nakasone was referring, and in light of the uncertainty as to the threshold at which cyber operations initiate an IAC, no definitive conclusion regarding whether the U.S. operations standing alone initiated an armed conflict between the United States and Russia is possible (assuming one is not already underway as a matter of law, see here¹³²).

Second, U.S. offensive cyber operations could make the United States a party to the IAC between Russia and Ukraine based on so-called “co-belligerency,” a subject I addressed in a prior post¹³³ in this series. That post was prompted by reports that the United States shared intelligence that enabled Ukrainian forces to engage in lethal and destructive targeting, including against Russian generals and the cruiser *Moskva*.

In my view, a State supporting a belligerent sometimes may become a party to the conflict even though the former has not engaged in operations that themselves reach the IAC threshold. I have suggested looking to the following factors in making the assessment.

- Any *intent* on the part of the supporting State to contribute to specific “conduct of hostilities” [combat] operations by the

¹³⁰ Commentary of 2020 on Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, ¶ 290.

¹³¹ Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III].

¹³² Michael Schmitt, *Are We at War?*, ARTICLES OF WAR (May 9, 2022), <https://lieber.westpoint.edu/are-we-at-war/>.

¹³³ *Id.*

supported State or frustrate those of the State's adversary;

- 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; and
- The degree of *immediacy* between the provision of intelligence and its use.

In other words, the question is whether the supporting State harbored a belligerent intent to directly and integrally support operations that would have triggered an IAC if one had not already broken out? If so, the supporting and supported States are engaged in “collective conduct of hostilities,” and both are now parties to the conflict.

This is an easier case to make in the context of the war in Ukraine because there is no question that Ukraine is mounting the type of combat operations that would have done so. But again, it is not possible to render any definitive conclusions on collective conduct of hostilities without knowing the type of “offensive” operations being conducted by Cyber Command or whether they were in direct support of Ukrainian operations of the requisite nature.

Conclusion

General Nakasone's comments on U.S. offensive cyber operations in support of Ukraine may have sparked controversy in the cyber and international law communities.

But several points are essential to bear in mind when considering them.

First, the facts necessary to draw most legal conclusions remain unavailable to those without the required security clearances. Accordingly, commentators would be well-served to be prudent in rendering opinions about the legal effects of the U.S. operations to which General Nakasone referred.

Second, the operations did not violate the law of neutrality. This is because they either qualified as lawful collective self-defense, a circumstance precluding wrongfulness, or because they are consistent with the notion of qualified neutrality. As to the former basis, the fact that the United States has not indicated it is operating in self-defense is not an obstacle to this conclusion, at least not as a matter of law.

Third, even if the operations were themselves lethal or destructive (and we have no evidence one way or the other on this matter), they were not unlawful because, so long as Ukraine requested them, the operations can qualify as actions taken in collective self-defense.

Finally, absent further information on the U.S. offensive cyber operations supporting Ukraine, no definitive conclusion can be drawn on whether they may have triggered an international armed conflict between the United States and Russia, if one was not already underway. But it is crucial to understand that the existence of an IAC is a question of fact based on the nature of the exchange. Characterization of the situation as an IAC or not by the States concerned does not bear on whether one is underway as a matter of international law.



RUSSIAN CYBER OPERATIONS AND UKRAINE: THE LEGAL FRAMEWORK

by Michael N. Schmitt | Jan 16, 2022

Last week, hostile cyber operations targeted approximately 70 Ukrainian government websites, including that of the Cabinet.¹³⁴ Affected sites included *Diia*, the most widely used site for handling online government services. The operations included posting the message, “Ukrainians! All your personal data was uploaded to the internet. All data on the computer is being destroyed. All information about you became public. Be afraid and expect the worst.”¹³⁵ Cyberwire has suggested that “[t]he attacks seem to be simple defacements, an influence operation, and not the data-destruction and doxing the message claims.”¹³⁶ Most services are back online.

The operations were launched the day after diplomatic talks between Russia and the West over Russian troop concentrations along Ukraine’s border broke down. To date, they have not been officially attributed to Russia. However, suspicion of Russian government involvement looms large, especially given that State’s role in past cyber operations against Ukraine, like the 2014 national elections hack,

operations against its power grid in 2015 and 2016, and the 2017 NotPetya attack,¹³⁷ which resulted in over \$10 billion in losses around the world. A Ukrainian Foreign Ministry official told Reuters that “It’s too early to draw conclusions, but there is a long record of Russian (cyber) assaults against Ukraine in the past.”¹³⁸ And Ukraine’s Security Service, the SBU, has indicated that preliminary investigation points to “hacker groups linked to Russia’s intelligence services.”¹³⁹

NATO’s Secretary-General, Jens Stoltenberg, “strongly condemn[ed] the cyber attacks on the Ukrainian Government” and noted that NATO has long worked with Ukraine to strengthen its cyber defenses.¹⁴⁰ He confirmed that “Allied experts in country are also supporting the Ukrainian authorities on the ground” and that NATO and Ukraine will soon “sign an agreement on enhanced cyber cooperation, including Ukrainian access to NATO’s malware information sharing platform.” Stoltenberg pledged continued “strong political and practical support for Ukraine.”

¹³⁴ Pavel Polityuk, *Massive cyberattack hits Ukrainian government websites as West warns on Russia conflict*, REUTERS (Jan. 14, 2022), <https://www.reuters.com/technology/massive-cyberattack-hits-ukrainian-government-websites-amid-russia-tensions-2022-01-14/>.

¹³⁵ Andrew E. Kramer, *Hackers Bring Down Government Sites in Ukraine*, N.Y. TIMES (Jan. 14, 2022), <https://www.nytimes.com/2022/01/14/world/europe/hackers-ukraine-government-sites.html>.

¹³⁶ Cyberwire, *Russo-Ukrainian Tension and the Future of Open Source Software* (last visited Jan. 25, 2024), <https://thecyberwire.com/stories/19910f85280047eca9f049c3045b1164/russo-ukrainian-tension-and-the-future-of-open-source-software-security>.

¹³⁷ Michael Schmitt & Jeffrey Biller, *The NotPetya Cyber Operation as a Case Study of International Law*, EJIL TALK! (July 11, 2017), <https://www.ejiltalk.org/the-notpetya-cyber-operation-as-a-case-study-of-international-law/>.

¹³⁸ Polityuk, *supra* note 134.

¹³⁹ Reuters, *Ukraine: Some Signs That Cyber Attack Linked to Hacker Groups Associated with Russia* (Jan. 14, 2022), <https://www.reuters.com/world/europe/ukraine-some-signs-that-cyber-attack-linked-hacker-groups-associated-with-russia-2022-01-14/>.

¹⁴⁰ NATO, *Statement by the NATO Secretary General on cyber attacks against Ukraine* (Jan. 14, 2022), https://www.nato.int/cps/en/natohq/news_190850.htm.

The incident raises many complex issues about the legal character of the cyber operations. Until further information about their source(s), nature, and consequences is made public, it is impossible to reliably assess them with the legal granularity they demand. Therefore, this post is limited to discussing the broad legal framework for cyber operations against Ukraine. The question is which bodies of international law govern which cyber operations targeting Ukraine, now and in the future.

Jus ad Bellum

The operations against Ukraine do not directly implicate the *jus ad bellum* prohibition on the “use of force” found in Article 2(4) of the UN Charter¹⁴¹ and customary international law. This is so for two reasons. First, although the threshold at which a cyber operation amounts to a use of force is unsettled,¹⁴² it is unlikely that States would consider a short, non-destructive and non-injurious denial of service operation as qualifying. While several countries, notably France¹⁴³ and Norway,¹⁴⁴ have confirmed a willingness to treat cyber operations that cause neither physical damage

nor injury as a use of force, the operations about which they have opined are of a “scale and effects” that far exceeds those experienced by Ukraine (the standard for assessment that appears to be emerging).¹⁴⁵

More importantly, cyber operations at the use of force level attributable to Russia—either because they are conducted by State organs like the GRU or by non-State actors operating pursuant to Russian “instructions or direction or control”¹⁴⁶—would be subsumed within the ongoing use of force violation that began with Russia’s 2014 unlawful occupation of Crimea and its actions elsewhere in Ukraine.¹⁴⁷

The same logic applies to the right of self-defense against an “armed attack” under Article 51 of the UN Charter¹⁴⁸ and customary international law, including the right of collective defense by other States at the request of Ukraine. In my view, Ukraine’s right of self-defense was triggered by the Russian non-cyber armed attack against the country and remains intact due to the ongoing belligerent occupation of Ukrainian territory and other hostile Russian operations, including cyber operations. Therefore, whether individual

¹⁴¹ U.N. Charter, *supra* note 31, art. 2(4)

¹⁴² See TALLINN MANUAL 2.0, *supra* note 3, rule 69.

¹⁴³ Schmitt, *supra* note 46.

¹⁴⁴ 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 Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly resolution 73/266, transmitted to the General Assembly, Seventy-sixth Session, U.N. Doc. A/76/136 (July 13, 2022), <https://front.un-arm.org/wp-content/uploads/2021/08/A-76-136-EN.pdf> [hereinafter Compendium of Voluntary National Contributions].

¹⁴⁵ See, e.g., Australian Government, *supra* note 41; Ministry of Foreign Affairs of Finland, *supra* note 42; German Federal Foreign Office & German Federal Min. of Def. in cooperation with the German Federal Min. of the Interior, Building and Community, *On the Application of International Law in Cyberspace* (Mar. 2021), <https://www.auswaertiges-amt.de/blob/2446304/32c7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf>; Min. of Foreign Affairs of the Netherlands, *supra* note 38; Schmitt, *New Zealand Pushes the Dialogue on International Cyber Law Forward*, *supra* note 39.

¹⁴⁶ See Articles on State Responsibility, *supra* note 5, arts. 4, 8.

¹⁴⁷ Geneva Academy, *Military occupation of Ukraine by Russia* (last updated Jan. 12, 2023), <https://www.rulac.org/browse/conflicts/military-occupation-of-ukraine>.

¹⁴⁸ U.N. Charter, *supra* note 31, art. 51.

cyber operations or campaigns by Russian intelligence or military organizations, or by non-State hacker groups acting “on behalf or with the substantial involvement of Russia” (the ICJ’s standard for attribution of an armed attack in *Paramilitary Activities*¹⁴⁹), rise to the level of an armed attack (see *Tallinn Manual 2.0*, Rule 71¹⁵⁰) has no bearing on a Ukrainian response. Instead, the proper law of self-defense question would be whether a Ukrainian response that *otherwise* would be unlawful is “necessary” and “proportionate” when considered in the context of its overall right of self-defense against the ongoing Russian armed attack (on those criteria, see *Tallinn Manual 2.0*, Rule 72¹⁵¹). This would be very unlikely, especially since, in my view, States enjoy a wide margin of appreciation in responding to unambiguous armed attacks of such severity that it loses control of sovereign territory.

Finally, only States violate the use of force prohibition. Non-State cyber operations that are not attributable under the law of State responsibility to Russia would accordingly not violate international law. Rather, they may violate the domestic law of States enjoying prescriptive jurisdiction (see *Tallinn Manual 2.0*, Rules 9 and 10¹⁵²) over the activity. As to self-defense, non-State cyber operations reaching the armed attack level,

which the current ones do not, would trigger the right to self-defense. This is the U.S. position and that of numerous other States.¹⁵³ Still, it must be cautioned that some States and international law experts would limit application of the right of self-defense to armed attacks mounted by non-State actors that meet the aforementioned *Paramilitary Activities* criterion. This appears to be the view of the majority of the ICJ’s judges.¹⁵⁴

International Humanitarian Law

The *jus ad bellum* is a body of law distinct from international humanitarian law (IHL). Therefore, whether cyber operations are an aspect of an ongoing use of force and armed attack or not, IHL will apply as long as an international armed conflict between Russia and Ukraine continues.

IHL applies upon a declaration of war, belligerent occupation by one State of the territory of another, or existence of “hostilities” between two or more States (1949 Geneva Conventions, Common Article 2).¹⁵⁵ Without question, an international armed conflict is underway between Russia and Ukraine based on Russia’s occupation of Ukrainian territory. But for the occupation, Russia’s support of Ukrainian rebel forces in eastern Ukraine, standing alone, might also qualify the situation as international armed

¹⁴⁹ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, para. 195 (June 27).

¹⁵⁰ *TALLINN MANUAL 2.0*, *supra* note 3, r. 71.

¹⁵¹ *Id.* r. 72.

¹⁵² *Id.* rr. 9 & 10.

¹⁵³ *Compendium of Voluntary National Contributions*, *supra* note 144.

¹⁵⁴ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 139 (July 9); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 146 (Dec. 19).

¹⁵⁵ See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter GC I].

conflict based on Russia's "overall control" of those forces.¹⁵⁶ However, analysis of that issue is unnecessary given Russia's belligerent occupation.

This presents the question of whether IHL governs *cyber* operations against Ukraine. It is simply incontrovertible that IHL encompasses cyber operations. Nearly all States that have spoken directly to the issue (see, e.g., the 2021 Group of Governmental Experts Report Compendium) have confirmed the position.¹⁵⁷ So too have NATO¹⁵⁸ and the EU.¹⁵⁹ As the ICRC noted in its 2019 submission to the UN Open-Ended Working Group,

[T]here is no question that IHL applies to, and therefore limits, cyber operations during armed conflict—just as it regulates the use of any other weapon, means and methods of warfare in an armed conflict, whether new or old. This holds true whether cyberspace is considered as a new domain of warfare similar to air, land, sea and outer space; a different type of domain because it is man-made while the former are natural; or not a domain as such.¹⁶⁰

There was a bit of a hiccup on the matter during the 2016–2017 UN GGE, when a number of States, including China and Russia, refused to

include the term "international humanitarian law" in the report that was to have been issued by the group.¹⁶¹ That unfortunate interlude was resolved by the 2019–2021 GGE in its 2021 Report:

The Group noted that international humanitarian law applies only in situations of armed conflict. It recalls the established international legal principles including, where applicable, the principles of humanity, necessity, proportionality and distinction that were noted in the 2015 report. The Group recognised the need for further study on how and when these principles apply to the use of ICTs by States and underscored that recalling these principles by no means legitimizes or encourages conflict.¹⁶²

With the applicability of IHL to cyber operations during an armed conflict definitively settled, the question becomes which operations are subject to IHL? In my view, it is indisputable that so long as there is a *nexus* between cyber operations and an ongoing armed conflict, those operations are subject to IHL's prohibitions, limitations, and obligations. By "nexus," I mean that the cyber operations are being carried out for reasons related to the armed conflict.

¹⁵⁶ Prosecutor v. Tadić, Case No. IT-94-I-A, Judgement, para. 140 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

¹⁵⁷ Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States, U.N. Doc. A/76/136 (July 13, 2021).

¹⁵⁸ NATO, *Warsaw Summit Communiqué* (July 9, 2016), https://www.nato.int/cps/en/natohq/official_texts_133169.htm.

¹⁵⁹ EU, *EU Statement—United Nations 1st Committee: Thematic Discussion on Other Disarmament Measures and International Security* (Oct. 26, 2018), https://www.eeas.europa.eu/node/52894_en.

¹⁶⁰ ICRC, *International Humanitarian Law and Cyber Operations during Armed Conflicts*, ICRC POSITION PAPER (Nov. 2019), https://unoda-web.s3.amazonaws.com/wp-content/uploads/2020/01/icrc_ihl-and-cyber-operations-during-armed-conflicts.pdf.

¹⁶¹ Michael Schmitt & Liis Vihul, *International Cyber Law Politicized: The UN GGE's Failure to Advance Cyber Norms*, JUST SECURITY (Jun 30, 2017), <https://www.justsecurity.org/42768/international-cyber-law-politicized-gges-failure-advance-cyber-norms/>.

¹⁶² Rep. of Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security, transmitted to the General Assembly, Seventy-sixth Session, U.N. Doc. A/76/135 (July 14, 2021), https://front.un-arm.org/wp-content/uploads/2021/08/A_76_135-2104030E-1.pdf.

International tribunals have developed the concept of nexus during war crimes trials. Absent a nexus between an act and an armed conflict, the act cannot be a war crime, but instead is governed by domestic criminal law. The International Criminal Tribunal for the former Yugoslavia (ICTY) has explained, “the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”¹⁶³ With respect to the applicability of IHL, the French Ministry of the Armies has similarly observed, “IHL applies to all cyberoperations carried out in, and in connection with, an armed conflict situation.”¹⁶⁴

By this understanding, a cyber operation cannot be considered part of an armed conflict without some connection to that conflict beyond its occurrence while the conflict is underway. For instance, even if conducted by a belligerent State, a cyber operation designed to steal intellectual property from its opponent *solely* for economic gain would lack a nexus to the conflict and would not be considered part thereof. Such operations are not subject to IHL’s strictures, but instead must adhere to the law governing peacetime cyber operations, such as the obligation to

respect sovereignty¹⁶⁵ and the prohibition on intervention into the internal or external affairs of other States.¹⁶⁶

Cyber operations without a nexus to the armed conflict that are conducted by or attributable to a State are unlikely, for, in my view, every cyber operation intended to alter the relative likelihood of victory between the two States has a nexus to the conflict. These may take many forms. Obviously, cyber operations to weaken the enemy militarily in a direct fashion qualify, as in the case of targeting enemy command and control. The nexus may be less direct, as in mounting cyber operations that affect civilian economic activities or the provision of power when the intent is to generate unrest or distress among the enemy population. Even a cyber operation with no motivation other than maliciously hurting the enemy civilian population, as in using cyber to interfere with the delivery of social services, qualifies. The practical point is that absent a rationale wholly *unrelated* to the armed conflict, a cyber operation by one party to an armed conflict against its opponent will almost always qualify as an activity that is part of the armed conflict (and thus within the reach of IHL).

Note that most of the hostile cyber operations into Ukraine have not targeted military objectives,¹⁶⁷ nor were they necessarily

¹⁶³ See *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, para. 58 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002); see also *Prosecutor v. Rutaganda*, Case No. ICTR 96-3-A, Judgement, para. 570 (Int’l Crim. Trib. for Rwanda May 26, 2003).

¹⁶⁴ French Min. of Armies, *International Law Applied to Operations in Cyberspace* (last visited Nov. 24, 2023), [https://ceipfiles.s3.amazonaws.com/pdf/CyberNorms/LawStatements/International+Law+Applied+to+Operations+in+Cyberspace+\(Statement+by+France\).pdf](https://ceipfiles.s3.amazonaws.com/pdf/CyberNorms/LawStatements/International+Law+Applied+to+Operations+in+Cyberspace+(Statement+by+France).pdf).

¹⁶⁵ TALLINN MANUAL 2.0, *supra* note 3, ¶¶ 1–5.

¹⁶⁶ *Id.* ¶ 66.

¹⁶⁷ James Pearson & Christopher Bing, *The Cyber War Between Ukraine and Russia: An Overview*, REUTERS (May 10, 2022), <https://www.reuters.com/world/europe/factbox-the-cyber-war-between-ukraine-russia-2022-05-10/>.

launched by Russian combatants.¹⁶⁸ However, there is no requirement that an operation be directed at the enemy armed forces or mounted by military personnel before IHL applies. This is clear from the IHL prohibitions (and their related war crimes) on, *inter alia*, attacking civilians, the civilian population, civilian objects, and other protected persons and objects, which apply to anyone engaged in the prohibited acts. Moreover, an act of “direct participation in hostilities”¹⁶⁹ by civilians, an IHL term of art used to identify civilians who are subject to lawful attack, occurs when it is “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.”¹⁷⁰ Accordingly, cyber operations against Ukrainian non-military government or civilian cyber infrastructure, and those mounted by individuals such as so-called “patriotic hackers” who act entirely on their own, are governed by IHL rules so long as the operations have a nexus to the armed conflict.

Those rules are complex, as illustrated by the fact that the *Tallinn Manual* team (International Group of Experts, or IGE) identified 75 cyber-relevant IHL rules and provided nearly 200 pages of commentary on them. Some rules remain unsettled in the cyber context, like whether data is an “object”

such that civilian data enjoys the protection of the rule prohibiting attacks on civilian objects. Robust discussion of how IHL’s rules apply to the past and future cyber operations in this conflict is beyond the capacity of this post.

However, one issue occupies a place of prominence. The fact that most of the operations into Ukraine have not been physically destructive or injurious raises the contentious issue¹⁷¹ of whether such cyber operations can amount to an IHL “attack.”¹⁷² If so, it is subject to the prohibition on attacking civilians, civilian objects, and other protected persons and objects; the prohibition on indiscriminate attacks; the rule of proportionality; and the requirement to take precautions in attack. There is widespread consensus that cyber operations causing “damage” do qualify as IHL attacks.

The concept of “damage” in the cyber context is increasingly understood as extending to the permanent loss of the affected cyber infrastructure’s functionality, as well as a loss of functionality necessitating physical repair (but see the Israeli position¹⁷³). Examples include operations requiring the replacement of the cyber infrastructure or components thereof like hard drives. Below that threshold, consensus breaks down as to the nature and severity of harm that amounts to damage

¹⁶⁸ Rule 3—*Definition of Combatants*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule3>.

¹⁶⁹ Michael Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 INT’L LAW AND POLITICS 697 (2010), <https://nyujilp.org/wp-content/uploads/2012/04/42.3-Schmitt.pdf>.

¹⁷⁰ INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 46 (Nils Melzer ed., 2009) [hereinafter ICRC INTERPRETIVE GUIDANCE].

¹⁷¹ Michael Schmitt, *Wired warfare 3.0: Protecting the civilian population during cyber operations*, 101 INT’L REV. RED CROSS 333 (Apr. 2019), <https://international-review.icrc.org/articles/wired-warfare-30-protecting-civilian-population-during-cyber-operations>.

¹⁷² AP I, *supra* note 65.

¹⁷³ Roy Schondorf, *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&context=ils>.

under IHL.¹⁷⁴ France has taken what is thus far the broadest approach to “attacks” in the cyber context.

[France] considers that a cyberoperation is an attack where the targeted equipment or systems no longer provide the service for which they were implemented, whether temporarily or permanently, reversibly or not. If the effects are temporary and/or reversible, the attack is characterised where action by the adversary is necessary to restore the infrastructure or system (repair of equipment, replacement of a part, reinstallation of a network, etc.).¹⁷⁵

This and other uncertainty as to the precise application of IHL rules in the cyber context will hinder conclusive analysis of the cyber operation against Ukraine, but the applicability of IHL rules to those having a nexus to the conflict is incontestable.

Finally, note that lawful combatants¹⁷⁶ who plan, approve, or execute cyber operations against military objectives in a manner consistent with IHL enjoy combatant immunity;¹⁷⁷ they may not be prosecuted for their actions in domestic or international courts. However, others enjoy no such immunity.

Cyber Operations Beyond Belligerent Territory

Some of the operations against Ukraine have generated consequences well beyond the belligerent territory of Ukraine and Russia. The bleed-over effects of NotPetya, for instance, were global and hugely costly.¹⁷⁸ However, the fact that consequences were caused beyond belligerent territory has no bearing on whether the cyber operations causing them are subject to IHL rules. The question is whether the nexus condition is met. So long as that condition is satisfied, consequences manifesting outside belligerent territory still matter in the application of IHL to the cyber operation, as in the case of assessing incidental injury and collateral damage pursuant to the proportionality rule.

The more problematic question is whether bleed-over of effects into neutral States violates the law of neutrality,¹⁷⁹ which prohibits the exercise of “belligerent rights” on neutral territory.¹⁸⁰ The *Tallinn Manual* IGE struggled with this issue. Its members concluded that in some cases, bleed-over consequences into neutral territory could breach the neutrality of the State concerned. But for most of them, no breach occurs if those consequences are unforeseeable. The relationship between the law of neutrality and cyber operations is a matter that merits

¹⁷⁴ See TALLINN MANUAL 2.0, *supra* note 3, r. 92.

¹⁷⁵ See Michael N. Schmitt, *Terminological Precision and International Cyber Law*, ARTICLES OF WAR (July 29, 2021), <https://lieber.westpoint.edu/terminological-precision-international-cyber-law/>.

¹⁷⁶ GC III, *supra* note 131, art. 4.

¹⁷⁷ ICRC, *Immunities*, HOW DOES LAW PROTECT IN WAR, https://casebook.icrc.org/a_to_z/glossary/immunities.

¹⁷⁸ Mike McQuade, *The Untold Story of NotPetya, the Most Devastating Cyberattack in History*, WIRED (Aug. 22, 2018), <https://www.wired.com/story/notpetya-cyberattack-ukraine-russia-code-crashed-the-world/>.

¹⁷⁹ THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS NWP 1-14M, ch. 7 (2022) [hereinafter COMMANDER'S HANDBOOK].

¹⁸⁰ TALLINN MANUAL 2.0, *supra* note 3, r. 151.

further study, not only concerning the bleed-over issue but also regarding when a State's support to a belligerent against its enemy's cyber operations breaches the obligation to maintain neutrality.¹⁸¹

Concluding Thought

Unfortunately, the legal consequences of the Russian occupation of Crimea and other hostile Russian actions seem to have been forgotten or are being conveniently

ignored by many States and commentators. But as a matter of international law, Russia is still using unlawful force against Ukraine, Ukraine has a continuing right of self-defense, other countries may come to its assistance in collective defense, and Russia and Ukraine are at war. Any analysis of the legal character of cyber operations that have occurred, and will occur, since 2014 is therefore subject to both the *jus ad bellum* and IHL.



¹⁸¹ *Id.* r. 152.

MILITARY NETWORKS AND CYBER OPERATIONS IN THE WAR IN UKRAINE

by Heather Harrison Dinniss | Apr 29, 2022

When Russia launched a full-scale invasion of Ukraine in February, many expected that the kinetic military action would be accompanied by extensive cyber operations. After all, the Sandworm group, an advanced persistent threat (APT) team forming part of Russia's Military Intelligence service (GRU), had been responsible for attacks against the Ukrainian power grid in 2015 and 2016. They are also alleged to be behind releasing the NotPetya worm in 2017 that targeted government ministries, banks, and energy companies in Ukraine, before causing damage in several other States.¹⁸²

To date, the cyber operations in Ukraine have appeared somewhat muted. In the early hours of February 24, as Russian troops moved across the borders into Ukraine, satellite internet connections were disrupted,¹⁸³ recently attributed by U.S. officials to the Russian military.¹⁸⁴ A number of wiper viruses (HermeticWiper,¹⁸⁵ IsaacWiper,¹⁸⁶

and CaddyWiper¹⁸⁷) of varying degrees of sophistication have been unleashed at Ukrainian targets, including government departments at the start of the campaign (following an earlier wiper, WhisperGate,¹⁸⁸ directed against government networks in January). These have been accompanied by a plethora of distributed denial of service (DDOS) attacks and website defacements, launched by both States and their proxy forces against Ukraine.

The Russian Federation's view on the application of LOAC to cyber operations is somewhat complex; however, they have agreed that the main principles of humanity, necessity, proportionality, and distinction apply.¹⁸⁹ As far as these cyber incidents have a nexus to the armed conflict, they are covered by LOAC. However, the cyber operations they have conducted to date have played out at the boundaries of some of the most debated issues in the law relating to cyber

¹⁸² Catalin Cimpanu, *US charges Russian hackers behind NotPetya, KillDisk, Olympic Destroyer attacks*, ZDNET (Oct. 19, 2020), <https://www.zdnet.com/article/us-charges-russian-hackers-behind-notpetya-killdisk-olympicdestroyer-attacks/>.

¹⁸³ Matt Burgess, *A Mysterious Satellite Hack Has Victims Far Beyond Ukraine*, WIRED (Mar. 23, 2022), <https://www.wired.com/story/viasat-internet-hack-ukraine-russia/>.

¹⁸⁴ Ellen Nakashima, *Russian Military Behind Hack of Satellite Communication Devices at War's Outset*, WASH. POST (Mar. 24, 2022), <https://www.washingtonpost.com/national-security/2022/03/24/russian-military-behind-hack-satellite-communication-devices-ukraine-wars-outset-us-officials-say/>.

¹⁸⁵ ESET Research, *IsaacWiper and HermeticWizard: New wiper and worm targeting Ukraine*, WE LIVE SECURITY (last updated Mar. 24, 2022), <https://www.welivesecurity.com/2022/03/01/isaacwiper-hermeticwizard-wiper-worm-targeting-ukraine/>.

¹⁸⁶ Malwarebytes Labs, *Double header: IsaacWiper and CaddyWiper* (Mar. 18, 2022), <https://www.malwarebytes.com/blog/threat-intelligence/2022/03/double-header-isaacwiper-and-caddywiper>.

¹⁸⁷ Alex Scroxton, *CaddyWiper is fourth new malware linked to Ukraine war*, COMPUTERWEEKLY.COM (Mar. 16, 2022), <https://www.computerweekly.com/news/252514678/CaddyWiper-is-fourth-new-malware-linked-to-Ukraine-war>.

¹⁸⁸ Charlie Osborne, *Researchers break down WhisperGate wiper malware used in Ukraine website defacement*, ZDNET (Jan. 24, 2022), <https://www.zdnet.com/article/researchers-break-down-whispergate-wiper-malware-used-in-ukraine-website-defacement/>.

¹⁸⁹ Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, para. 28(d), U.N. Doc. A/70/174 (July 22, 2015).

operations—what constitutes an object in cyberspace and whether the disruption of functionality amounts to an “attack” as understood in the context of LOAC.

Attack on the Satellite Communications Systems

A recent incident report revealed the details of a cyber operation first conducted as the current Russian invasion of Ukraine began.¹⁹⁰ Ukrainian armed forces reportedly rely heavily on satellite communications provided by the KA-SAT satellite network. Although details are minimal in the public domain, the operation, launched against the ground-based modems linking users to the communications network, allegedly caused a massive disruption to military communications at the outset of the invasion.¹⁹¹

What *is* known is that several thousand civilians in Ukraine were also affected as well as tens of thousands of other broadband customers across Europe (including, for example, the remote monitoring systems of a German windfarm) as their systems were knocked offline by an attack that “overwrote key data in the flash memory on the modems,” rendering the modems unusable.¹⁹² The satellite modem hack has resulted in ViaSat shipping over 30,000 replacement units to

customers. The retrieved damaged units are then refurbished and reused; others have been repaired by issuing software updates to fix the modems remotely.

The first question is what military objective was being targeted. Without access to Russian military strategy, one must rely on general patterns.¹⁹³ Although the method of the operation was the disabling of end-user modems, the “object of the attack” was the communications network, used by the Ukrainian armed forces, rather than the modems themselves. This is an important difference. The network is a “dual-use” object, used by military and civilians alike; however, that is not a term of LOAC. Under the law, either something meets the definition of a military objective,¹⁹⁴ or it is a civilian object.¹⁹⁵ The use of the network by the armed forces, and the subsequent military advantage obtained by neutralizing the ability of the defending forces to communicate at the outset of the campaign, clearly brings it within the definition of a military objective. The remaining effect on civilian users of the network (whether inside or outside Ukraine) is to be considered in relation to the proportionality rule.¹⁹⁶ Had the object of the attack been the modems, it would have constituted an indiscriminate attack.¹⁹⁷

¹⁹⁰ Viasat, Inc., *KA-SAT Network cyber attack overview* (Mar. 30, 2022), <https://news.viasat.com/blog/corporate/ka-sat-network-cyber-attack-overview>.

¹⁹¹ Raphael Satter, *Satellite outage caused ‘huge loss in communications’ at war’s outset—Ukrainian official*, REUTERS (Mar. 15, 2022), <https://www.reuters.com/world/satellite-outage-caused-huge-loss-communications-wars-outset-ukrainian-official-2022-03-15/>.

¹⁹² Viasat, Inc., *supra* note 190.

¹⁹³ Charles Garraway, *Fact-Finding in Ukraine: Can Anything Be Learned from Yemen?*, ARTICLES OF WAR (Mar. 14, 2022), <https://lieber.westpoint.edu/fact-finding-ukraine-anything-learned-yemen/>.

¹⁹⁴ *Rule 8—Definition of Military Objectives*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule8>.

¹⁹⁵ AP I, *supra* note 65, art. 52.

¹⁹⁶ *Id.* art. 57.

¹⁹⁷ *Id.* art. 51.

The second question is whether the operation amounts to an attack at all under LOAC. Attacks are defined in Article 49 of Additional Protocol I as “acts of violence against the adversary, whether in offence or in defence.”¹⁹⁸ It is the intended consequences of the act rather than the means of violence itself that are of relevance in determining whether an attack has taken place. It has been a significant area of debate as to which types of cyber operations might meet this threshold. All sides of the debate are agreed that cyber operations which cause death or injury to people or physical damage to objects above a *de minimis* level would constitute an attack.¹⁹⁹ However, there are differing views on whether an attack that causes a loss of functionality *without* causing physical damage constitutes an attack under LOAC.²⁰⁰ As the cyber operations launched against Ukraine illustrate, it is these attacks against functionality that are the norm, rather than those which result in physical damage or destruction.

In the case of the KA-SAT operation, the modems were bricked (rendered useless) without any physical harm or replacement of physical components required. While Viasat has been replacing the physical modems, they have since stated that replacement of the modem is a matter of business efficiency rather than necessity, muddying the waters somewhat. Had it been *necessary* to replace the modems, there would be no question that the operation would have met the definition of an attack, having caused the requisite damage.

As it stands, it is clear that many users lacked the skills to fix the modems they had—customers were offline for several weeks while Viasat organized its replacement response. In my opinion, this is enough to qualify as damage for the purposes of Article 49. A modem that has had its functionality destroyed and is rendered unusable by code is just as unusable as one that has had its functionality destroyed by kinetic means. Others may argue that the fact that they are not permanently disabled should play some role in determining whether the operation constitutes an attack. Such a question is misplaced because it is not a mere question of turning a switch back on, but rather involves rebuilding or resetting the modem.

Wiper Attacks against Governmental Systems

A clearer example of the destructive power of code on the functionality of a system can be seen in the wiper viruses unleashed against Ukrainian targets. Wipers are an extremely destructive form of malware, rendering computer systems inoperable by wiping and rewriting data, including the master boot record of the computer so that it cannot operate. The malware destroys functionality without physical damage of any kind. So are these attacks?

As noted above, some commentators have suggested that the operation must result in damage that requires the replacement of physical components to qualify as an attack (see, e.g., *Tallinn Manual 2.0*, Rule 92

¹⁹⁸ *Id.* art. 49.

¹⁹⁹ TALLINN MANUAL 2.0, *supra* note 3, r. 92.

²⁰⁰ *Id.* r. 92 (commentary, paras. 10–12).

Commentary, para. 10, for a breakdown of the varying opinions within that group²⁰¹). The International Committee of the Red Cross is of the view that during an armed conflict, an operation designed to disable a computer or computer network constitutes an attack, whether it is disabled through kinetic or cyber means.²⁰²

Under the first approach, it is worth noting that *none* of the cyber operations so far recorded in Ukraine would qualify as “attacks,” as there is no physical damage caused as a result. This author has argued elsewhere that cyber operations that destroy the functionality of a computer system without causing physical damage could constitute an attack under the IHL.²⁰³

The waves of wipers have targeted banks, government departments, government contractors and other organizations. Details of the targets are not available in the public domain; however, it is clear that not all systems affected would constitute legitimate military objectives. This raises the second extensively debated issue—whether data itself can be an objective. This question is distinct from, albeit related to, the question of whether the wiper malware amounts to an attack.

While the issue is of importance, unfortunately the lack of detail about the systems that have been affected makes any

proper analysis impossible. It is interesting to note that of the three wipers deployed to date, only HermeticWiper appears to be sophisticated enough to target particular data within a system. Likewise, although the initial access vectors are as yet unknown, it appears that different vectors may have been used for different organizations, indicating a more targeted approach than an indiscriminate spread of malware.²⁰⁴ The lateral movement and spread of HermeticWiper, for example, is restricted to the local area network initially targeted.

Denial of Service Attacks and Website Defacements

The final category of cyber operations is the denial of service and website defacements conducted by both parties to the armed conflict, their proxies, and many onlookers from around the world. Cyber operations which merely block access to a system or website, such as these DDOS attacks, are more akin to electronic jamming and do not, without more, cause damage and therefore do not qualify as an attack within the meaning of IHL. Cyber operations that merely cause inconvenience or irritation to the civilian population do not rise to the level of an attack.²⁰⁵

²⁰¹ See, e.g., *id.* r. 92 (commentary, para. 10).

²⁰² See, e.g., International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 41 (Oct. 31, 2015), <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>.

²⁰³ Heather A. Harrison Dinniss, *The Nature of Objects: Targeting Networks and the Challenge of Defining Cyber Military Objectives*, 48 *ISR. L. REV.* 39–54 (2015), <https://www.cambridge.org/core/journals/israel-law-review/article/abs/nature-of-objects-targeting-networks-and-the-challenge-of-defining-cyber-military-objectives/A0E60CDE115C4EACB3D8F7F1305D94F5>.

²⁰⁴ ESET Research, *supra* note 185.

²⁰⁵ See TALLINN MANUAL 2.0, *supra* note 3, r. 92.

Conclusion

The cyber operations launched against Ukraine thus far have been fewer in number and less sophisticated than many expected given the previous history in the area. However, they exemplify some of the most difficult issues with respect to the legal evaluation of cyber operations—namely,

what is the nature of the objective targeted, what constitutes an attack, and the difficulties caused by the intermingling of civilian and military uses across networks, systems, and indeed borders. With few details available in the public domain, the answers to these questions will emerge over time.



THE UKRAINE CONFLICT AND THE FUTURE OF DIGITAL CULTURAL PROPERTY

by Ronald Alcalá | May 13, 2022

Various international instruments explicitly provide for the protection of cultural property in armed conflict. As conceived, the law was formulated to protect physical works from damage or destruction in war. Events in Ukraine, however, have demonstrated that armed conflict can endanger digital material as well. Some digital creations might even qualify as a digital form of cultural property—that is, *digital* cultural property. Given the growing prevalence of digital material and the threat posed to all forms of cultural works in war, how should States approach their legal obligation to protect digital cultural property in the event of armed conflict?

Digital Cultural Heritage

Though theoretically applicable to digital works, it is unclear exactly how rules designed to protect physical objects should extend to digital creations. Digital works differ qualitatively from tangible works. They exist in time and space differently from physical things, and they can be reproduced relatively easily in great quantities and with absolute exactness. Nevertheless, the cultural value of at least some digitally created works is unquestionable. The preamble of UNESCO's Charter for the Preservation of the Digital Heritage recognizes that "resources of information and creative expression are

increasingly produced, distributed, accessed and maintained in digital form, creating a new legacy—the digital heritage."²⁰⁶ It further acknowledges that preserving digital heritage "for the benefit of present and future generations is an urgent issue of worldwide concern."

Russia's invasion of Ukraine has made this starkly evident. In Ukraine, groups such as Saving Ukrainian Cultural Heritage Online (SUCHO) have been racing to save digital cultural information from destruction. Led by three cultural heritage professionals—Quinn Dombrowski, Anne E. Kijas, and Sebastian Majstorovic—and staffed by volunteers, SUCHO is dedicated to identifying and archiving "at-risk sites, digital content, and data in Ukrainian cultural heritage institutions."²⁰⁷ The group relies on a combination of technologies, such as the Internet Archive's Wayback Machine and the Browsertrix crawler, to crawl and archive the digital information of these organizations. Their goal is to back up digital heritage information, including content from websites, digital exhibits, and digitized journal articles, to ensure it is not irretrievably lost in the ongoing conflict.

The destruction of physical cyber infrastructure, such as internet servers, can result in the loss of cultural information. The

²⁰⁶ Charter on the Preservation of Digital Heritage, Oct. 15, 2003, <https://en.unesco.org/about-us/legal-affairs/charter-preservation-digital-heritage>.

²⁰⁷ Saving Ukrainian Cultural Heritage Online, *About SUCHO*, <https://www.sucho.org/about>.

bombardment of Ukrainian cities has raised this concern, adding urgency to SUCHO's mission. For example, hours after SUCHO volunteers backed up the contents of the State Archives of Kharkiv's website, the site suddenly went offline.²⁰⁸ Among other things, the site featured digital scans of rare books important to Ukraine's cultural heritage.

Hostile cyber operations can also damage or destroy cultural information. The *Tallinn Manual 2.0* recognizes this possibility and explicitly acknowledges the obligation to protect cultural property in armed conflict.²⁰⁹ Rule 142 of the *Tallinn Manual 2.0* states:

The parties to an armed conflict must respect and protect cultural property that may be affected by cyber operations or that is located in cyberspace. In particular, they are prohibited from using digital cultural property for military purposes.²¹⁰

It is unclear whether any digital cultural information has been lost as a result of cyber operations in the conflict so far. To date, Russia has not deployed cyber capabilities as extensively as many anticipated before

the invasion.²¹¹ Nevertheless, hostile cyber operations directed against Ukraine in the past, including attacks linked to Russia against Ukrainian banks²¹² and government websites,²¹³ suggest digital cultural information remains vulnerable to damage or destruction as a result of these activities.

Nature of Digital Works

In discussing the law applicable to cultural property in armed conflict in an earlier post,²¹⁴ Dick Jackson reiterated the definition of cultural property provided in Article 1 of the 1954 Hague Cultural Property Convention.²¹⁵ Strictly speaking, the Article 1 definition is limited to the 1954 Hague Convention and its protocols, though it commonly serves as the starting point for evaluating cultural property in armed conflict.²¹⁶ The *Tallinn Manual 2.0* observes that the definition "reflects customary international law."²¹⁷

Article 1's definition, however, presents challenges when evaluating digital works. As I emphasize in an article in the *International Review of the Red Cross*, "[d]igital technology . . . has begun to strain our

²⁰⁸ Heather Stephenson, *Preserving Ukraine's Cultural Heritage Online: A Tufts librarian leads an international effort to save digital information threatened by Russia's invasion*, TUFTS NOW (Mar. 22, 2022), <https://now.tufts.edu/2022/03/22/preserving-ukraines-cultural-heritage-online>.

²⁰⁹ TALLINN MANUAL 2.0, *supra* note 3.

²¹⁰ *Id.* r. 142.

²¹¹ Heather Harrison Dinniss, *Military Networks and Cyber Operations in the War in Ukraine*, ARTICLES OF WAR (Apr. 29, 2022), <https://lieber.westpoint.edu/military-networks-cyber-operations-war-ukraine/>.

²¹² See, e.g., David Uberti, *Ukrainian Defense Ministry, Banks Hit by Suspected Cyberattacks, Officials Say*, WALL ST. J. (Feb. 15, 2022), <https://www.wsj.com/articles/ukrainian-defense-ministry-banks-hit-by-suspected-cyberattacks-officials-say-11644960352>.

²¹³ See, e.g., Michael 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/>.

²¹⁴ Dick Jackson, *Cultural Property Protection in the Ukraine Conflict*, ARTICLES OF WAR (Apr. 14, 2022), <https://lieber.westpoint.edu/cultural-property-protection-ukraine-conflict/>.

²¹⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Cultural Property Convention].

²¹⁶ See, e.g., 2016 DoD LAW OF WAR MANUAL, *supra* note 27, § 5.18.1; U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT §§ 5.26, 5.26.2 (2004) [hereinafter U.K. LOAC MANUAL].

²¹⁷ TALLINN MANUAL 2.0, *supra* note 3, at 534.

understanding of what constitutes cultural property,” in part because we interact with digital works differently and because digital material can be reproduced with relative ease and exactness.²¹⁸ Digital creations do not exist in time and space like tangible objects, which are affected by their physical presence in the environment. For example, digital works cannot accrue patina like a bronze statue or be worn smooth like the steps of an ancient temple. Because digital works are essentially re-created anew each time their program is executed, they do not record or manifest evidence of their existence over time.

For these reasons, digital works arguably lack what Walter Benjamin called “aura”²¹⁹ and “authenticity.”²²⁰ Both are qualities that define unique, physical creations—singular works—and cannot be transferred or exist in a copy. As Benjamin remarked, “Even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be.”²²¹ Writing in the early 20th century, Benjamin leveled his criticism at photography, but his arguments could apply equally to digital creations. Like a photograph produced from a negative, the copy (or re-creation) of a digital work is essentially a “most perfect reproduction” of the initial work. Does this mean that we should discount the value of digital creations? Are digital works any less significant because

they do not—and cannot—exhibit qualities of aura and authenticity?

Applying traditional notions of aura and authenticity, scarcity and value, to digital creations will undoubtedly leave gaps in the protection of digital cultural property. Whether initially created in a digital medium (“born-digital”), created to replicate physical works in a digital medium (“digital surrogate”), or compiled as a collection of recorded data (“digital data”), digital material does not fall neatly into the categories of “movable and immovable” cultural property outlined in Article 1 of the 1954 Hague Cultural Property Convention. Nevertheless, digital works of “great importance to the cultural heritage of every people” deserve to be protected as fully and as vigorously as more familiar forms of physical cultural property.²²²

Duty to Safeguard and Respect Cultural Property

Addressing the challenge of protecting digital cultural property will require a more considered and purposeful approach by States. In particular, States must act deliberately to identify and designate digital cultural property in advance of armed conflict. If possible, States should also mark such property with a special identifier to indicate its protected status under the law of armed conflict.

²¹⁸ Ronald Alcalá, *Cultural evolution: Protecting “digital cultural property” in armed conflict*, 104 INT’L REV. RED CROSS 1083–1119 (2022), <https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/cultural-evolution-protecting-digital-cultural-property-in-armed-conflict/93B1DEF3857119141404ACD193484B1E>.

²¹⁹ Mike Young, *Aura*, UNIVERSITY OF CHICAGO: THEORIES OF MEDIA, <https://csmt.uchicago.edu/glossary2004/aura.htm>.

²²⁰ Erin Nicholson, *Authenticity*, UNIVERSITY OF CHICAGO: THEORIES OF MEDIA, <https://csmt.uchicago.edu/glossary2004/authenticity.htm>.

²²¹ Walter Benjamin, “The Work of Art in the Age of Mechanical Reproduction,” in WALTER BENJAMIN, *ILLUMINATIONS* 169 (Hannah Arendt ed., Harry Zohn trans., 2019).

²²² See Hague Cultural Property Convention, *supra* note 215, art. 1(a).

Article 2 of the 1954 Hague Convention explains that protecting cultural property comprises two components: the duty to safeguard (Article 3) and the duty to respect cultural property (Article 4).²²³ States can pursue a variety of preparatory measures to safeguard cultural property, including the preparation of inventories and the designation of competent authorities responsible for safeguarding the State's cultural property.²²⁴

In practice, however, States are not always diligent about disseminating information about their cultural property, including what items have been designated as such. As UNESCO's *Protection of Cultural Property Military Manual* explains, "almost no state party to the 1954 Convention indicates explicitly, for the benefit of potential parties to an armed conflict on its territory, all the precise objects, structures and sites that it deems 'cultural property.'"²²⁵ Despite this, States are nevertheless obligated to respect cultural property situated within other States' territory. This duty to respect includes refraining from exposing such property to "destruction or damage in the event of armed conflict" and from directing "any act of hostility" against such property.²²⁶

In the absence of a State's notification to others of its cultural property, the *Protection of Cultural Property Military Manual* recommends that "commanders and other

military personnel should treat all objects, structures and sites of historic, artistic or architectural significance on foreign territory as 'cultural property.'"²²⁷ While this solution might prove workable with respect to physical objects, expecting an adversary—in particular its commanders and military personnel—to discern what constitutes an opponent's digital cultural property seems unreasonable. The effective protection of digital cultural property, therefore, will require States to fully commit to and observe the obligation to safeguard digital forms of cultural property as outlined in Article 4 of the 1954 Hague Convention.

Digital Distinctive Emblem

The use of a distinctive digital identifier akin to the 1954 Hague Convention's distinctive emblem could help in this regard. Like the Convention's blue shield emblem, a digital identifier could be used to mark a State's digital cultural property and put other States on notice.²²⁸

Article 6 of the Convention provides that "cultural property may bear a distinctive emblem so as to facilitate its recognition."²²⁹ Article 16 prescribes the appearance of the distinctive emblem, and Article 17 outlines the parameters for its use.²³⁰ Although no digital equivalent of the blue shield emblem currently exists, the utility of such a device is

²²³ *Id.* art. 2.

²²⁴ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 5, 2253 U.N.T.S. 172, March 16, 1999.

²²⁵ ROGER O'KEEFE ET AL., PROTECTION OF CULTURAL PROPERTY MILITARY MANUAL 13 (2016).

²²⁶ Hague Cultural Property Convention, *supra* note 215, art. 4.

²²⁷ PROTECTION OF CULTURAL PROPERTY MILITARY MANUAL, *supra* note 225, at 14.

²²⁸ UNESCO, *Distinctive Emblem of the 1954 Hague Convention*, <https://en.unesco.org/node/349796>.

²²⁹ Hague Cultural Property Convention, *supra* note 215, art. 6.

²³⁰ *Id.* arts. 16 & 17.

clear. The *Tallinn Manual 2.0*, for example, notes that “use of a digital marking equivalent that places attackers on notice that the digital items qualify as protected cultural property is appropriate.”²³¹ In the absence of such an emblem, the *Tallinn Manual 2.0* suggests the use of “technological solutions,” including file-naming conventions and data tagging, to identify digital cultural property.²³²

The lack of a special digital identifier for cultural property is an issue States can and should address. States could potentially amend the 1954 Hague Convention (Article 39) to create a new distinctive digital identifier and formally add the identifier to Article 16 as an additional emblem of the Convention.²³³ Alternatively, States could revise the regulations governing implementation of the Convention to establish the new identifier. States pursued the latter approach, which does not entail formal amendment of the Convention, when they created a distinctive emblem for cultural property under enhanced protection in the guidelines for the implementation of the 1999 Second Protocol.²³⁴ Regardless how States choose to

proceed, States should seriously explore the creation of a digital identifier to enable and facilitate the protection of digital cultural property.

Concluding Thoughts

Some works created digitally, either now or in the future, undoubtedly will be regarded as having great importance to the cultural heritage of every people. In other words, they will come to be regarded as digital cultural property. Events in Ukraine have highlighted the vulnerability of digital material and the need for greater State attention to the protection of digital cultural works. “[T]here are certainly materials we’ve captured that don’t exist in the physical world,” Quinn Dombrowski of SUCHO explained to me in a recent email.²³⁵ Preventing the loss of these works and fulfilling the promise of cultural protection will require States to acknowledge the significance of digital culture and to act with purpose to safeguard digital creations before armed conflict occurs.



²³¹ TALLINN MANUAL 2.0, *supra* note 3, at 536.

²³² *Id.*

²³³ Hague Cultural Property Convention, *supra* note 215, art. 39.

²³⁴ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Sixth Meeting of the Parties, CLT-15/6.SP/CONF.202/Decisions, 18 Jan. 2016.

²³⁵ Email from Quinn Dombrowski, Saving Ukrainian Cultural Heritage Online (SUCHO), to author (Apr. 29, 2022) (on file with author).

DATA-RICH BATTLEFIELDS AND THE FUTURE LOAC

by Shane Reeves and Robert Lawless | Sep 12, 2022

Alongside the physical conflict in Ukraine, the parties are waging a ruthless data war. Russia continues to deploy its formidable “information war machine” to “confuse and disable,”²³⁶ while Ukraine and non-State actors such as news organizations, think tanks, and NGOs counter these tactics through the use of extensive, open-source battlefield data. In effect, we are watching the future of warfare—data-rich battlefields in which information is a critical component of military operations—emerge in real time.

To gain military advantage from this emerging characteristic of warfare will require significant investment by States in data-gathering and processing technology. In fact, that effort is well underway. For example, the U.S. Army’s XVIIIth Airborne Corps advertises that it is becoming a data-centric operational unit²³⁷ and is accordingly committing significant resources toward that aim. With States envisioning increased and broadened use of data in military operations, the exploitation of data in the Ukraine-Russia conflict provides an opportune example to identify legal considerations. In this post, we briefly describe the data-rich character of the

modern battlefield, examine legal issues that arise under the law of armed conflict (LOAC), and offer some thoughts on how international law may address perceived legal gaps.

The Ubiquity of Data

The pervasiveness of data in contemporary warfare is due in part to a multi-decade trend toward social and information technology (IT) networking. The vehicles, devices, and objects we use in daily life are transforming into computers connected to the Internet. The “internet of things”²³⁸ has had a profound impact on all aspects of society. Militaries are no exception—weapons systems, logistics operations, and command and control systems incorporate and are heavily reliant upon IT network connections.

This interconnectedness generates enormous amounts of data. Capturing and processing these data is a key component of any contemporary military operation. Indeed, in modern warfare, data are referred to as a weapon system.²³⁹ The U.S. Department of Defense touts itself as a “data-centric organization that uses data at speed and scale for operational advantage and increased

²³⁶ Matt Freear, *OSINT in an Age of Disinformation Warfare*, RUSI (Mar. 14, 2022), <https://rusi.org/explore-our-research/publications/commentary/osint-age-disinformation-warfare>.

²³⁷ Matthew Visser, *Reinventing Modern Deployment: Soldiers leverage Army Vantage to make data-driven decisions*, U.S. ARMY (July 30, 2022), https://www.army.mil/article/258912/reinventing_modern_deployment_xviii_airborne_corps_troops_leverage_army_vantage_to_make_data_driven_decisions_at_the_edge.

²³⁸ Steve Ranger, *What is the IoT? Everything you need to know about the Internet of Things right now*, ZDNET (Feb. 3, 2020), <https://www.zdnet.com/article/what-is-the-internet-of-things-everything-you-need-to-know-about-the-iot-right-now/>.

²³⁹ Jason Crist, *From the Server to the Battlefield, How Data Scientists Are Key to Winning Future Conflicts*, U.S. ARMY (Aug. 2, 2021), https://www.army.mil/article/249036/from_the_server_to_the_battlefield_how_data_scientists_are_key_to_winning_future_conflicts.

efficiency.”²⁴⁰ The United States is not alone in this view. NATO conducts interoperability exercises as part of a “digital transformation,” which will allow it to take full advantage of data-rich environments in future conflicts.²⁴¹

Data and the Ukraine-Russia Conflict

The Ukraine-Russia armed conflict presents glimpses, though likely not a full picture, of what warfare looks like in a hyperconnected, data-rich world. Drones have played a prominent role in Ukrainian targeting operations—not only as weapon systems, but also as data-gathering tools²⁴² to aid Ukraine in identifying and prioritizing Russian targets. Ukrainian drones clearly serve in direct combat as well, as was the case in the Ukrainian drone attack against Russia’s Black Sea fleet in Crimea.²⁴³ Likewise, reports suggest that Russia is using data catalogs of NATO military equipment in its reconnaissance and targeting operations.²⁴⁴

Some reporting suggests that Russia may be using artificial intelligence-driven drones.²⁴⁵ As one report noted, “Out in the fields and tree lines of eastern Ukraine, drones have become ubiquitous on the Ukrainian side, outnumbering, soldiers say, Russia’s arsenal of pilotless craft. Drones have almost wholly replaced reconnaissance patrols and are used daily to drop ordnance.”²⁴⁶ AI-driven tools and weapons require substantial training and operational data to make accurate battlefield assessments and, increasingly, decisions.²⁴⁷

Militaries are not the only contributors to the data-soaked battlefields of Ukraine. The role of “open-source intelligence” is well documented with Ukraine using publicly available data and intelligence to drive its operational decision-making.²⁴⁸ Other States—including the United States—are also contributing their own data collection to Ukraine’s war efforts. The United States has “flooded the zone” in Ukraine with declassified data²⁴⁹ to counter Russian tactics

²⁴⁰ U.S. Dep’t of Def., *DoD Data Strategy 2* (2020), <https://media.defense.gov/2020/Oct/08/2002514180/-1/-1/0/DOD-DATA-STRATEGY.PDF>.

²⁴¹ NATO, *NATO Accelerates Its Digital Transformation by Harnessing Data as a Strategic Asset* (June 23, 2022), <https://www.act.nato.int/article/nato-accelerates-its-digital-transformation-by-harnessing-data-as-a-strategic-asset/>.

²⁴² Yaroslav Trofimov, *Ukraine’s Drone Spotters on Front Lines Wage New Kind of War*, WALL ST. J. (Aug. 7, 2022), <https://www.wsj.com/articles/ukraines-drone-spotters-on-front-lines-wage-new-kind-of-war-11659870805>.

²⁴³ Ann M. Simmons & Isabel Coles, *Drone Hits Headquarters of Russia’s Black Sea Fleet in Crimea*, WALL ST. J. (Aug. 20, 2022), <https://www.wsj.com/articles/drone-hits-headquarters-of-russias-black-sea-fleet-in-crimea-11660991264>.

²⁴⁴ Gregory C. Allen, *Russia Probably Has Not Used AI-Enabled Weapons in Ukraine, but That Could Change*, Center for Strategic and International Studies, CSIS (May 26, 2022), <https://www.csis.org/analysis/russia-probably-has-not-used-ai-enabled-weapons-ukraine-could-change>.

²⁴⁵ Will Knight, *Russia’s Killer Drone in Ukraine Raises Fears About AI in Warfare*, WIRED (Mar. 17, 2022), <https://www.wired.com/story/ai-drones-russia-ukraine/>.

²⁴⁶ Andrew 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>.

²⁴⁷ Timothy McCullough, *Assuming Risk—Artificial Intelligence on the Battlefield*, ARTICLES OF WAR (Aug. 26, 2022), <https://lieber.westpoint.edu/assuming-risk-artificial-intelligence-battlefield/>.

²⁴⁸ Alexa O’Brien, *Open Source Intelligence May Be Changing Old-School War*, WIRED (May 24, 2022), <https://www.wired.com/story/open-source-intelligence-war-russia-ukraine/>.

²⁴⁹ Michèle Flournoy, *America’s Military Risks Losing Its Edge*, FOREIGN AFFAIRS (Apr. 20, 2021), <https://www.foreignaffairs.com/articles/united-states/2021-04-20/flournoy-americas-military-risks-losing-its-edge>.

(in effect successfully counteracting Russian false flag efforts²⁵⁰). Furthermore, civilian infrastructure and data collection capacity are playing an important role in the war. One prominent example is Ukraine's use of the Starlink satellite system—a civilian rather than military system—to connect military forces and share data.²⁵¹ Another is the use of open-source intelligence methods to investigate alleged war crimes in Ukraine.²⁵²

The importance (and availability) of data in the Ukraine-Russia conflict ensures States will seek to increase the efficiency of collecting, processing, and analyzing data. Furthermore, States surely will continue efforts to push as many sensors onto the battlefield as quickly as possible, as well as take advantage of the preponderance of civilian data-gathering devices in and near conflict zones. Accordingly, with States' ability to obtain and use data, it is likely that doctrine, training, and planning will evolve to account for this emerging characteristic of modern warfare.

LOAC Implications of Data War

As would be expected, the increasing importance of data on the contemporary battlefield raises international legal issues. Addressing these issues is not merely a theoretical or academic exercise. As the

ongoing Ukraine-Russia conflict and military doctrinal developments make clear, their import is operationally pressing. In this section, we highlight three key LOAC issues related to the data-rich battlefields of Ukraine and the future.

Limiting Rules

When belligerents flood the battlefield with information—as is happening in the Ukraine-Russia conflict—the legality of the operation is highly circumstance-dependent.²⁵³ It is clear that LOAC presents no legal obstacle, per se, to belligerents' use of information to influence opinions or to gather militarily valuable intelligence. Propaganda and reconnaissance operations are staples of military campaigns. As distinct from attacks, information may lawfully be directed toward a civilian population. For example, U.S. efforts to undermine Russian false flag operations may in part constitute an effort to shape public opinion about the justification for Russia's invasion of Ukraine.²⁵⁴

However, there are important international legal limits on information operations in conflict. Information cannot be used to incite law-of-war violations such as attacks against civilians. Some Russian propaganda may cross this line insofar as it constitutes "threats of violence whose primary purpose is to spread

²⁵⁰ Scott Radnitz, *What are false flag attacks—and did Russia stage any to claim justification for invading Ukraine?* THE CONVERSATION (Feb. 24, 2022), <https://theconversation.com/what-are-false-flag-attacks-and-did-russia-stage-any-to-claim-justification-for-invading-ukraine-177879>.

²⁵¹ Christopher Miller, Mark Scott & Bryan Bender, *UkraineX: How Elon Musk's space satellites changed the war on the ground*, POLITICO (June 9, 2022), <https://www.politico.com/news/2022/06/09/elon-musk-spacex-starlink-ukraine-00038039>.

²⁵² Deb Amos, *Open-source intelligence methods are being used to investigate war crimes in Ukraine*, NPR (June 12, 2022), <https://www.npr.org/2022/06/12/1104460678/open-source-intelligence-methods-are-being-used-to-investigate-war-crimes-in-ukr>.

²⁵³ 2016 DoD LAW OF WAR MANUAL, *supra* note 27.

²⁵⁴ Radnitz, *supra* note 250.

terror among the civilian population.”²⁵⁵ For example, Russian propaganda adopting the language of “annihilation and extermination” with respect to Ukraine seems designed, at least in part, to instill terror among Ukrainians.²⁵⁶ If this is Russia’s intent, then this use of information on the battlefield could be unlawful.

Additionally, information may also not be used in a manner that violates other law-of-war rules. Such operations may not, for example, violate the rule against perfidious or treacherous killing or injuring. Perfidy is the invitation of enemy confidence in an entitlement to or an obligation to accord law-of-war protection, with the intent to betray that confidence resulting in death or injury.²⁵⁷ It is unlawful to kill or injure an enemy by resort to perfidy. The perfidy prohibition could be implicated if a belligerent were to disseminate false information indicating that a particular battlefield area contained a significant number of protected persons (such as civilians or combatants *hors de combat*). The data might be disseminated with the intent to lure the enemy into the area, for example to clear the battlefield and conduct security operations. If the enemy entered the battlefield area under the belief that it was obligated to accord legal protection to the protected persons, and if that trust was betrayed to commit an attack resulting

in death or injury, then the information operation could constitute unlawful perfidy.

In sum, while not prohibited per se, information operations are regulated by LOAC rules. Still, it is apparent there is wide latitude to use data to gain a military advantage during armed conflict. The above discussion—clearly not an exhaustive exploration of the LOAC rules covering these types of military operations—is intended to remind belligerents of the need to be acutely aware of the particular legal rules applicable in a data-rich combat environment.

Aiding Targeting Decision-Making

One of the great potential benefits of a data-rich battlefield is the opportunity for belligerents to better comply with their legal obligations in targeting operations. LOAC principles and rules robustly govern targeting operations.²⁵⁸ The most important of these finds expression in the principle of distinction, at times characterized as fundamental or “intransgressible,”²⁵⁹ which requires States to direct their attacks against enemy combatants and military objectives and forbids attacking civilians and civilian objects.²⁶⁰

This is not to say that civilian death and destruction are flatly prohibited during armed conflict. The principle of proportionality

²⁵⁵ 2016 DoD LAW OF WAR MANUAL, *supra* note 27, § 5.26.1.3.

²⁵⁶ Alexey Kovalev, *Russia’s Ukraine Propaganda Has Turned Fully Genocidal*, FOREIGN POLICY (Apr. 9, 2022), <https://foreignpolicy.com/2022/04/09/russia-putin-propaganda-ukraine-war-crimes-atrocities/>.

²⁵⁷ Sean Watts, *Law of War Perfidy*, 19 MIL L. REV. 106 (last revised Aug. 27, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220380.

²⁵⁸ 2016 DoD LAW OF WAR MANUAL, *supra* note 27, § 5.4.1.

²⁵⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 [hereinafter ICJ Nuclear Weapons Advisory Opinion].

²⁶⁰ AP I, *supra* note 65.

reflects this idea, prohibiting attacks in which the anticipated collateral civilian death and destruction are excessive in relation to the concrete and direct military advantage expected to be gained.²⁶¹ Proportionality is operationalized by the rule requiring belligerents to take feasible precautions in attack to avoid or at least mitigate civilian death, injury, and destruction.²⁶² As one of us has written previously, feasibility means practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.²⁶³

Battlefield data harvesting can greatly enhance the humanitarian aspects of targeting operations. The prevalence of battlefield sensors discussed above affords a means to gather, process, and analyze such data. Emerging advances in AI and machine learning algorithms will aid military decision-makers in taking advantage of this wealth of data. Command and control networks, such as the U.S. Department of Defense's emerging Joint All-Domain Command and Control system, will afford combatants across the battlefield with exponentially increased understanding of the operational environments in which they fight.²⁶⁴ These powerful tools have already arrived, to some extent. Russia has established an "unprecedented" command and control

network to manage and coordinate its military operations across Ukraine.²⁶⁵ In short, commanders and fighters may potentially enjoy an unmatched ability to understand the battlefield, thus enhancing their ability to make accurate and therefore militarily advantageous and humane targeting decisions.

However, the success of enhanced targeting decision-making on the contemporary and future battlefield is not a foregone conclusion. States understand the risks associated with increased battlefield awareness. Accordingly, they will seek to exploit emerging technology to create what could be called "information chaos." States will employ deception techniques to minimize, alter, and deceptively magnify battlefield signatures, which could undermine the trustworthiness of the data harvested by sensors and other information-gathering methods.

In effect, an arms race of sorts is underway, in which States are seeking both to develop information-gathering methods as well as to undermine potential adversaries' ability to do the same. This is happening in real time in Ukraine, with both sides conducting an information war designed to sow confusion and chaos among the opponent's ranks.²⁶⁶

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Robert Lawless, *The US Legal Obligation to Take Precautions to Minimize Civilian Harm*, ARTICLES OF WAR (Feb. 18, 2022), <https://lieber.westpoint.edu/us-legal-obligation-precautions-minimize-civilian-harm/>.

²⁶⁴ Congressional Research Service, *Joint All-Domain Command and Control (JADC2)* (last updated Jan. 21, 2022), <https://sgp.fas.org/crs/natsec/IF11493.pdf>.

²⁶⁵ Tim Ripley, *Ukraine conflict: Russian military adapts command-and-control for Ukraine operations*, JANES (Mar. 7, 2022), <https://www.janes.com/defence-news/news-detail/ukraine-conflict-russian-military-adapts-command-and-control-for-ukraine-operations>.

²⁶⁶ Charlie Wazel, *The Information War Isn't Over Yet*, ATLANTIC (Mar. 8, 2022), <https://www.theatlantic.com/technology/archive/2022/03/russia-ukraine-war-propaganda/626975/>.

Accountability

Finally, data-rich battlefields could impact efforts to ensure accountability for individuals who violate LOAC. Battlefield sensors and other information-gathering means and methods present an extraordinary amount of data from which to draw evidence of violations. Non-governmental groups such as Bellingcat have reportedly tracked evidence of Russia's unlawful use of cluster munitions against civilians.²⁶⁷ Furthermore, systems have been designed to “crowdsource” evidence of war crimes, such as a centralized database created by Ukraine's Prosecutor General.²⁶⁸ Separate but related, a Ukrainian human rights organization trains volunteers to document eyewitness testimony by collecting, preserving, and verifying evidence found through open-source information.²⁶⁹

This abundance of war crimes evidence could lead to unprecedented enforcement through war crimes prosecutions against alleged offenders. Indeed, recent reports indicate that such efforts have begun. Ukraine's Prosecutor General recently stated publicly that she was receiving between 200 and 300 reports of war crimes each day, and that there are currently

up to 21,000 alleged war crimes being investigated.²⁷⁰ Furthermore, prosecutions have begun with unrivaled speed, albeit sometimes with due process and other concerns.²⁷¹ However, while the enforcement effort in Ukraine is proceeding with speed, significant challenges remain.²⁷²

The prevalence of data on the battlefield will put significant pressure on existing LOAC paradigms. The vast amounts of data available to commanders and other military decision-makers could impact the legal standard regarding certainty in targeting and other operational decisions. The law of armed conflict does not require decision-makers to be clairvoyant or all-knowing. Rather, they must carry out their legal duties—including, for example, following the targeting rules highlighted above—in good faith based on the information reasonably available to them at the time of the decision.²⁷³

This standard leaves plenty of room for interpretation. One could argue that data-rich operational environments in armed conflict will decrease the “fog of war,” thereby allowing decision-makers to make more accurate decisions and be less prone to factual

²⁶⁷ Lauren Baillie, *Ukraine: Justice for War Crimes Must Begin with Evidence*, U.S. INSTITUTE OF PEACE (Apr. 7, 2022), <https://www.usip.org/publications/2022/04/ukraine-justice-war-crimes-must-begin-evidence>.

²⁶⁸ Vera Bergengruen, *How Ukraine Is Crowdsourcing Digital Evidence of War Crimes*, TIME (Apr. 18, 2022), <https://time.com/6166781/ukraine-crowdsourcing-war-crimes/>.

²⁶⁹ *Id.*

²⁷⁰ Yaroslav Lukov, *Ukraine war: 21,000 alleged war crimes being investigated, prosecutor says*, BBC (July 6, 2022), <https://www.bbc.com/news/world-europe-62073669>.

²⁷¹ See Chris Jenks, *The Atrocity Crimes Advisory Group & Ukrainian Prosecutions of Russian POWs—Part 1*, ARTICLES OF WAR (June 22, 2022), <https://lieber.westpoint.edu/atrocity-crimes-advisory-group-ukrainian-prosecutions-russian-pows-part-1/>; Chris Jenks, *The Atrocity Crimes Advisory Group & Ukrainian Prosecutions of Russian POWs—Part 2*, ARTICLES OF WAR (June 24, 2022), <https://lieber.westpoint.edu/atrocity-crimes-advisory-group-ukrainian-prosecutions-russian-pows-part-2/>; Chris Jenks, *The Atrocity Crimes Advisory Group & Ukrainian Prosecutions of Russian POWs—Part 3*, ARTICLES OF WAR (June 28, 2022), <https://lieber.westpoint.edu/atrocity-crimes-advisory-group-ukrainian-prosecutions-of-russian-pows-part-3/>.

²⁷² Valerie Hopkins, *Investigators of War Crimes in Ukraine Face Formidable Challenges*, N.Y. TIMES (July 3, 2022), <https://www.nytimes.com/2022/07/03/world/europe/ukraine-war-crimes-russia.html>.

²⁷³ Shane Reeves & Ward Narramore, *The UNHRC Commission of Inquiry on Syria Misapplies the Law of Armed Conflict*, LAWFARE (Sep. 15, 2017), <https://www.lawfaremedia.org/article/unhrc-commission-inquiry-syria-misapplies-law-armed-conflict>.

mistakes. This in turn could lead to a more stringent standard of reasonable decision-making. In other words, commanders with more information will have less excuse for making factual errors, and any such errors would come with potentially increased legal liability. This potential liability could be brought to bear on Russian commanders in Ukraine who have directed attacks against targets with a high risk for civilian harm.²⁷⁴

However, it is far from clear this is the direction in which the law is headed. Access to voluminous amounts of information does not necessarily mean that commanders and decision-makers will understand, appreciate, or have the time to process such data. As is currently the case, future commanders will rely on a vast array of staff members and data processing systems to help them understand the battlefield. The quality of staffs and such processes will obviously vary—even within particular armed forces.²⁷⁵ As a result, commanders may at times make decisions based on incomplete or incorrect information, contrary to data within the possession of their State's armed forces. This will not necessarily change simply due to access to data.

Conclusion

The Ukraine-Russia conflict is a harbinger of the importance of data in warfare. Data-rich battlefields will be a part of any conflict, with the State best able to harness and take advantage of the information environment having a significant military advantage. To remain relevant to the conduct of contemporary military operations, the development and application of the LOAC must keep pace.

In this post, we highlighted a few potential “legal gaps” that may result from the increased importance of data in armed conflict. While these gaps need to be addressed, it is important to avoid a heavy-handed approach to filling them. Rather, States should be afforded time and space to consider fully the operational implications of data-rich battlefields, and evaluate how LOAC rules should apply in light of the delicate balance reflected in the law between military and humanitarian considerations.²⁷⁶ It is thus critically important for States not to overlook these considerations as data on the battlefield grows in importance.



²⁷⁴ Diane Cole, *Russia's 226 attacks on health-care targets in Ukraine are part of a larger pattern*, NPR (May 24, 2022), <https://www.npr.org/sections/goatsandsoda/2022/03/16/1086982186/russias-strike-on-ukraine-maternity-hospital-is-part-of-a-terrible-war-time-tradi>.

²⁷⁵ John Merriam & Michael Schmitt, *Israeli Targeting: A Legal Appraisal*, 68 NAVAL WAR COLLEGE REV. 15 (2015), <https://digital-commons.usnwc.edu/nwc-review/vol68/iss4/4>.

²⁷⁶ Michael Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA J. INT'L L. 795 (May 4, 2010), <https://ssrn.com/abstract=1600241>.

SECTION 2

Maritime

MARITIME NEUTRALITY IN THE RUSSIA-UKRAINE CONFLICT

by David Letts | Apr 18, 2022

Most of the reporting and commentary regarding the conflict between Russia and Ukraine has so far focused on the land domain of warfare. However, there are significant maritime legal aspects to the conflict.

An earlier post in this symposium briefly touched on maritime neutrality, in which Professor Heintschel von Heinegg addressed the prohibition upon neutral powers supplying warships, ammunition, or war material to a belligerent.²⁷⁷ This post deals with some of the other prohibitions and obligations imposed on belligerent parties that arise under the law of maritime neutrality.

The Law of Maritime Neutrality

The law regarding neutrality, as it is applied in the case of naval warfare, deals with the

rights and duties of neutral States and belligerent States. Hague Convention XIII (1907), to which both the Russian Federation and Ukraine are party, sets out many of its rules and is supplemented by customary international law.²⁷⁸ These rules are premised on the fundamental concept that while belligerents are involved in an armed conflict at sea, there is an ongoing requirement for maritime trade and commerce to continue among neutral States and between neutral States and belligerent parties with as little interruption as possible.

The fact that the two main maritime regions that are directly affected by the conflict are reasonably remote from major global sea lanes of communication does not alter the legal issues that arise under the law of maritime neutrality applicable during an international armed conflict. In the present case, there are

²⁷⁷ Heintschel von Heinegg, *supra* note 85.

²⁷⁸ Hague XIII, *supra* note 78.

two primary sea areas relevant to the conflict. The first of these is the Sea of Azov, which is an internal sea entirely bordered by Russia and Ukraine, with access to the Black Sea only available through the Kerch Strait. Questions of neutral waters (i.e., territorial waters that are under the sovereignty of a neutral State) do not arise in the Sea of Azov as the only States that have any territorial seas there are Russia and Ukraine.

However, in the Black Sea a quite different story emerges. In addition to Russia and Ukraine, four other States border the Black Sea: Romania, Bulgaria, Turkey, and Georgia. As each of these States is entitled to claim up to 12 nautical miles territorial sea, there are significant areas of neutral waters in the Black Sea where belligerent acts by either Russia or Ukraine are prohibited.

Article 1 of Hague XIII requires belligerents to “respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.”²⁷⁹ Article 2 of that treaty reinforces and states: “Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.”²⁸⁰ The combined effect of these two articles is that the maritime areas of operations in which Russia and Ukraine can legitimately conduct their naval

operations are restricted to the internal waters of both belligerents, their territorial seas, and areas outside the territorial seas of neutral States.

At the time of writing, there has only been one maritime incident involving an act of hostility in neutral waters, when Russian naval forces reportedly captured two Ukrainian-flagged vessels in the Romanian territorial sea.²⁸¹ If this report is accurate, it represents a clear breach of Romanian neutrality by Russia, as the act of intercepting and capturing a belligerent’s merchant vessel in a neutral State’s territorial sea is forbidden.

Romania, like Russia, was one of the original signatories to Hague XIII in 1907, while Ukraine acceded to the Convention in 2015.²⁸² The three other Black Sea–bordering States are not party to this Convention. Romania’s status as a State party to Hague XIII is important as Article 3 of that Convention places an obligation on a neutral Power to “employ . . . the means at its disposal to release the prize (i.e., the vessel) with its officers and crew, and to intern the prize crew” if the vessel(s) is still within its jurisdiction.²⁸³

On one view, it can be implied that Article 3 implies an obligation for the neutral State to maintain a certain level of vigilance over its territorial sea so that the State can fulfill its Article 3 obligations. This interpretation is not without support, as the famous Corfu

²⁷⁹ *Id.* art. 1.

²⁸⁰ *Id.* art. 2.

²⁸¹ Ship & Bunker News Team, *Russia Seizes Ukraine-Flagged Tanker and Bulker in Black Sea*, SHIP & BUNKER (Feb. 28, 2022), <https://shipandbunker.com/news/emea/402595-russia-seizes-ukraine-flagged-tanker-and-bulker-in-black-sea>.

²⁸² Hague XIII, *supra* note 78.

²⁸³ *Id.* art. 3.

Channel case found that such a general obligation existed in the circumstances that pertained in that case.²⁸⁴ At the very least, there is an obligation on the part of a neutral State to use the “means at its disposal” to take action against the belligerent warships that have breached its neutrality through their act of capturing a vessel in the neutral State’s waters.

However, the obligations that arise under Article 3 do not stop at this point as the article also states: “If the prize is not in the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.”

It would seem that this limb of Article 3 is less proscriptive in terms of the obligation that is placed on the belligerent State, as it only becomes operative if the neutral State places a “demand” on the captor government. The article does not specify what circumstances need to exist for such a demand to be placed, presumably leaving such questions as a matter for the neutral State to determine according to its own assessment of the political and strategic situation.

Applying these first three clauses of Hague XIII to the reported capture of the Ukrainian-flagged vessels in the Romanian territorial sea, the following points can be made (assuming the report is accurate):

- The capture of Ukrainian-flagged vessels by Russian naval forces in the Romanian

territorial sea constitutes a violation of neutrality (Article 1 and Article 2);

- Obligation to use the “means at its disposal” to release a captured vessel arises for Romania if belligerent acts, such as capture, occur in its territorial sea (Article 3);
- Russia is required to release the Ukrainian-flagged vessels upon demand from Romania (Article 3).

Naval Mines

Mine warfare is another aspect of the law of maritime neutrality that has emerged from the conflict. The first issue relates to the reports that have emerged of free-floating naval mines being found in neutral waters (Turkey, Bulgaria, and Romania) in the Black Sea.²⁸⁵ It is not clear from these reports which State or States are responsible for laying mines in the Black Sea,²⁸⁶ but it is possible that both Russia and Ukraine may have done so.

The use of naval mines by belligerents during an international armed conflict is permitted. However, restrictions on the use of naval mines do apply. In the case of automatic submarine contact mines, these restrictions are set out in Hague Convention VIII (1907) and include the prohibition on the use of unanchored automatic contact mines that do not become harmless within an hour of control of the mine being lost, and the prohibition on the use of anchored automatic

²⁸⁴ Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4 (Apr. 9).

²⁸⁵ Tayfun Ozberk, *Turkish MPA Detects the 3rd Sea Mine off Turkey Coast in the Black Sea*, NAVAL NEWS (Apr. 6, 2022), <https://www.navalnews.com/naval-news/2022/04/turkish-mpa-detects-the-3rd-sea-mine-off-turkey-coast-in-the-black-sea/>.

²⁸⁶ Tayfun Ozberk, *Opinion: Is There a Serious Sea Mine Threat in the Black Sea?*, NAVAL NEWS (Mar. 27, 2022), <https://www.navalnews.com/naval-news/2022/03/opinion-is-there-a-serious-sea-mine-threat-in-the-black-sea/>.

contact mines that do not become harmless as soon as they break loose from their moorings.

Laying automatic contact mines off the coast and ports of the enemy, with the sole purpose of intercepting commercial shipping, is also forbidden. It is arguable that these fundamental principles of naval mine warfare apply to all types of naval mines as a matter of customary international law and would therefore apply in the present conflict between Russia and Ukraine.

The second issue relates to the laying of mines by neutral States off their coasts. This is also expressly permitted under Article 4 of Hague Convention VIII (1907), to which Romania alone among the six Black Sea littoral States is party, but is arguably supported by customary international law. However, in such cases, an obligation to notify the presence of naval mines to international shipping arises, along with the obligation to remove such mines once hostilities have ceased.

Concluding Thought

Hague XIII contains a range of other rules dealing with relations between neutral States and belligerent States (and their vessels), but in the current context of the conflict between Russia and Ukraine, these remaining rules do not seem particularly relevant—although it is quite possible that this situation could change.

It was mentioned at the start of this post that the maritime domain of the conflict between Russia and Ukraine has not been as prominent as the land domain. Nevertheless, the potential for the conflict to escalate and involve States that are ostensibly neutral at the moment cannot be ignored. It is incumbent on all parties involved, belligerent and neutrals, to ensure that conflict does not spread further into a wider region and that the conflict ends with as little further destruction and death as possible.



MARITIME EXCLUSION ZONES IN ARMED CONFLICTS

by Raul (Pete) Pedrozo | Apr 12, 2022

Since the early 1900s, belligerents have established maritime zones during armed conflict to control access to broad ocean areas and to shape battlespace management. Regardless of their label—exclusion zone, restricted area, operational zone, war zone—all zones have a common purpose: to control or prohibit access of foreign ships and aircraft into the zone.

As part of its war effort in Ukraine, Russia has established restricted areas that affect freedom of navigation of foreign-flag shipping in both the Black Sea and the Sea of Azov. The legality of such zones depends largely on the function of the zone and the enforcement measures applied by the belligerents to vessels and aircraft that enter the zone.

Russian Exclusion Zones

On February 24, 2022, the Russian Federal Agency for Maritime and River Transport (Rosmorrechflot) announced that “due to a warning received from the Russian Defense Ministry’s Black Sea Fleet amid the beginning of antiterrorist operations . . . on February 24, navigation in the Sea of Azov was suspended until further notice.”²⁸⁷ The following day, Russia declared a maritime zone to prohibit

navigation in the northwest portion of the Black Sea north of 45° 21' “due to counterterrorist operations carried out by the Russian Navy” and that any ship or vessel “in this area will be regarded as terrorist threats.”²⁸⁸

Russia’s decision to establish maritime exclusion/war zones (MEZs) in the Sea of Azov and the Black Sea is not a novel method of warfare. MEZs have been routinely employed during armed conflicts since the beginning of the 20th century, most recently by the United Kingdom (U.K.) and Argentina during the Falklands/Malvinas War, by Iran and Iraq during the Tanker War, and by the United States during the First and Second Gulf Wars.²⁸⁹ Whether and to what extent these zones are consistent with the law of naval warfare depends on their function and the measures used by the belligerents to enforce them.²⁹⁰

The Function of Maritime Zones

MEZs have been used in the past to warn vessels and aircraft to avoid an area of naval operations, which reduces the possibility that neutral vessels will be mistakenly identified as a military objective and attacked.²⁹¹ To the extent MEZs serve to warn neutral vessels and

²⁸⁷ Fatima Bahtic, *Russian Navy’s operations restrict shipping in Sea of Azov amid conflict with Ukraine*, NAVAL NEWS (Feb. 24, 2022), <https://www.navaltoday.com/2022/02/24/russian-navys-operations-restrict-shipping-in-sea-of-azov-amid-conflict-with-ukraine/>.

²⁸⁸ Photograph of MSI Message of 26 February 2022 by Russia Department of Navigation and Oceanography, <https://gcaptain.com/wp-content/uploads/2022/03/Russian-gmdss-warning.jpg>.

²⁸⁹ U.S. NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES app. C (2013), <https://dnnlgwick.blob.core.windows.net/portals/0/NWCDepartments/Stockton%20Center%20International%20Law/2013-Zones-Manual.pdf?sr=b&si=DNNFileManagerPolicy&sig=sWtSUKeqZaEKhaVvWPx0bCSByt6FQnC6k3YHksLx9I%3D>.

²⁹⁰ 2016 DoD LAW OF WAR MANUAL, *supra* note 27, § 13.9.

²⁹¹ COMMANDER’S HANDBOOK, *supra* note 179, app. A.

aircraft away from belligerent activities, thereby reducing their exposure to collateral damage and incidental injury, and to the extent they do not unreasonably interfere with legitimate neutral commerce or create a “free fire zone,” the United States believes they are lawful.²⁹²

In other words, a merchant ship, neutral or enemy, does not become a lawful target simply because it has entered the MEZ. Before attacking ships in the MEZ, belligerents must still ensure that they are legitimate military objectives.²⁹³ Thus, while a MEZ may help to sort neutral and enemy ships, the same rules of the law of armed conflict apply inside and outside the zone.

Moreover, the extent, location, and duration of an MEZ and the measures used to enforce the zone should not exceed what is required for military necessity.²⁹⁴ Neutral vessels and aircraft must also be guaranteed safe passage through the MEZ if the zone significantly impedes free and safe access to neutral ports, although they are subject to the belligerent’s right of visit and search as explained below.²⁹⁵

War zones declared by Iran and Iraq during the Tanker War were, in effect, “free fire zones” where no distinction was made between military objectives and protected vessels, thereby violating the principle of distinction. Iraq indicated it would “attack all vessels” appearing in the zone and that all tankers, regardless of flag, docking at Kharg Island

would be considered legitimate targets.²⁹⁶ Likewise, Iran declared that all its waters were a war zone and that it would “bear no responsibility for merchant ships” entering the Persian Gulf and failing to comply with the routing instructions. The declaration of these zones was impermissible given that it authorized attacks on neutral merchant ships that simply ventured into the zone.²⁹⁷

Similarly, during the Falklands/Malvinas War, both Argentina and the U.K. declared legally questionable exclusion zones. Argentina threatened to attack any British vessel in its declared war zone, which extended to the entire South Atlantic.²⁹⁸ The U.K. Total Exclusion Zone (TEZ) was equally problematic. The U.K. declared any military or civilian ship or aircraft, regardless of flag found within the TEZ without the permission of the U.K. Ministry of Defence, would “be regarded as operating in support of the illegal occupation” of the Falklands and would “be regarded as hostile” and liable to attack by British Forces.²⁹⁹

Despite its apparent overreach, however, the TEZ was located away from the main shipping lanes in the South Atlantic and was of relatively short duration. Arguably, the TEZ was designed to support British military operations in the Falklands by facilitating the identification of legitimate military targets rather than target all contacts in the zone. In this regard, the British declaration indicated

²⁹² *Id.* § 7.9.

²⁹³ 2016 DoD LAW OF WAR MANUAL, *supra* note 27, § 13.9.2.

²⁹⁴ *Id.* § 13.9.4.

²⁹⁵ COMMANDER’S HANDBOOK, *supra* note 179, § 7.9.

²⁹⁶ MARITIME OPERATIONAL ZONES, *supra* note 289, app. C.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

that ships or aircraft within the zone were warned of possible attacks, and there is no evidence that foreign-flag vessels within the TEZ were actually attacked by British forces.

Compare these zones with the Maritime Safety Zone (MSZ) established by U.S. forces in the eastern Mediterranean Sea in March 2003 (HYDROLANT 597/03). The MSZ warned all ships that U.S. forces were “conducting combat operations in international waters that pose a hazard to navigation” and advised all ships to “remain clear” of the designated operation area. The United States declaration further advised all vessels to “maintain a safe distance from U.S. forces,” noting that any vessel entering the MSZ and approaching U.S. forces or whose intentions were unclear were subject to visit and search, and that vessels approaching U.S. forces should maintain radio contact via Channel 16. Non-compliance with these instructions would authorize “appropriate measures in self-defense if warranted by the circumstances.”³⁰⁰

The MSZ served as a warning to commercial shipping to stand clear of the immediate area of operations to reduce the risk of exposure to an inadvertent attack but made clear it was not a free fire zone and that self-defense measures would only be employed by U.S. forces “if warranted by the circumstances.” Experience shows that most legitimate merchant ships will avoid a declared exclusion zone and comply with any established restrictions. Furthermore, merchant shipping typically observes warning areas, which are widely disseminated by industry groups and insurance entities, known as P&I (protection and indemnity)

clubs. Therefore, the presence of an unknown contact may be probative in assessing its status and hostile intentions.

Maritime Enforcement Measures

Belligerents enforcing these maritime zones must comply with the law of naval warfare. This body of law restricts enforcement measures differently with respect to enemy merchant vessels and neutral merchant vessels.

Enemy Merchant Vessels

Belligerents may capture enemy merchant ships anywhere outside neutral waters for adjudication as prize. Enemy merchant ships operating within or outside the MEZ may not, however, be attacked or destroyed unless the vessel:

1. persistently refuses to heave to after being ordered to do so;
2. actively resists visit and search or capture;
3. sails under convoy of enemy warships;
4. is armed with weapons systems beyond that required for self-defense against criminal threats;
5. is incorporated into, or assists in any way, the enemy’s military intelligence system;
6. acts in any capacity as an enemy naval or military auxiliary; or
7. is integrated into the enemy’s war-fighting/war-supporting/war-sustaining effort.³⁰¹

³⁰⁰ *Id.*

³⁰¹ COMMANDER’S HANDBOOK, *supra* note 179, § 8.6.2.2.

In destroying enemy merchant vessels, belligerents must first place passengers, crew, and the ship's papers in a place of safety, unless an enemy merchant ship persistently refuses to stop when ordered to do so or actively resists visit and search or capture.³⁰² This requirement does not apply, however, if under the circumstances at the time of the attack, the warship would be subject to imminent danger or would otherwise be precluded from accomplishing its mission.³⁰³

There have been no reports of Ukrainian merchant vessels being attacked at sea. However, Russia claims that two Russian-flagged merchant ships—the ore/oil carrier *SGV Flot* (IMO 8033089) and the general cargo ship *Seraphim Sarovskiy* (IMO 8867222)—were hit by Ukrainian missiles in the Sea of Azov on February 24, 2022.³⁰⁴ Although the attack has not been verified by independent sources, the Russian Federal Security Services alleged the missiles were fired from Mariupol in response to the Russian invasion. A fire broke out on board the *SGV Flot*, and a member of the crew was injured. Both ships returned to ports in the Sea of Azov. Absent evidence that these merchant ships were engaged in intelligence collection, were employed as a naval auxiliary, or were integrated into Russia's war-fighting, war-supporting, or war-sustaining effort, the missile attack would be inconsistent with the law of naval warfare.

Neutral Merchant Vessels

A neutral merchant ship that enters the MEZ is subject to the belligerent right of visit and search by Russian and Ukrainian warships to determine the enemy character of the ship or its cargo, but it may not be captured or attacked unless it engages in certain prohibited conduct. A neutral merchant ship may be captured if it:

1. avoids an attempt to establish identity;
2. resists visit and search;
3. is carrying contraband;
4. breaches or attempts to breach blockade;
5. presents irregular or fraudulent papers, lacks necessary papers, or destroys, defaces, or conceals papers during a visit and search;
6. violates regulations established by a belligerent within the immediate area of naval operations;
7. carries personnel in the military or public service of one of the belligerents;
8. communicates information in the interest of one of the belligerents.³⁰⁵

If a neutral merchant ship resists capture, belligerent warships may use force to compel compliance. Neutral merchant ships may also be attacked or captured if they take a direct part in the hostilities on the side of

³⁰² *Proces-Verbal*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/ihl-treaties/submarine-warfare-rules-pv-1936/proces-verbal>.

³⁰³ COMMANDER'S HANDBOOK, *supra* note 179, § 8.6.2.2.

³⁰⁴ Insurance Marine News, *Russia claims two commercial ships hit by Ukrainian missiles* (Feb. 28, 2022), <https://insurancemarinenews.com/insurance-marine-news/russia-claims-two-commercial-ships-hit-by-ukrainian-missiles/#:~:text=The%203%2C300%20dwt%20ore%20Foil,February%2024th%202022%20as%20part>.

³⁰⁵ COMMANDER'S HANDBOOK, *supra* note 179, § 7.10.

the enemy or if they act in any capacity as an enemy naval or military auxiliary.³⁰⁶ Similarly, neutral merchant ships can be captured or attacked if they operate directly under the control, orders, charter, employment, or direction of the enemy or resist an attempt to establish their identity, including resisting visit and search.³⁰⁷

There have been numerous independent reports of neutral merchant ships being attacked in the Black Sea without warning. It is unlikely that these attacks originated from the Ukraine, but rather were most likely conducted by Russian warships of the Black Sea Fleet. The first reported attack occurred on February 24, 2022. The Turkish-owned, Marshall Islands (RMI)-flagged bulk carrier M/V *Yasa Jupiter* suffered significant damage to the bridge and deck area after it was hit by a missile 50 nautical miles south of Odessa while en route to Romanian waters.³⁰⁸ The incident prompted the RMI Maritime Administrator to issue a Ship Security Advisory warning vessels, *inter alia*,

- To avoid any transit or operation within the exclusive economic zone of Ukraine or Russia within the Black Sea.
- That access to the Sea of Azov through the Kerch Strait is blocked by Russian forces.

- That all Ukrainian ports are closed and that ships may not enter or leave port.
- That access to northwest Black Sea, north of 45° 21', has been restricted by the Russian Navy and that transit in this area should be avoided.
- To ensure their automatic identification system (AIS) is always transmitting.
- To comply fully with instructions if hailed by military vessels.
- To not embark armed security personnel while operating in the Black Sea.³⁰⁹

The following day, on February 25, the Japanese-owned, Panamanian-flagged bulk carrier M/V *Namura Queen*, which was en route to the port of South to load grain, was seriously damaged when it was struck by a missile at the port of Pivdennyi (Yuzhnyi) outer anchorage.³¹⁰ A fire broke out on the ship, and at least two crew members were injured. A second Panamanian-flagged bulk carrier, the M/V *Lord Nelson*, suffered minor damages after being hit by a missile while at anchor.³¹¹ That same day, the Moldovan-flagged bunker tanker M/V *Millenium Spirit* was also hit by a missile while it was in international waters in the Black Sea, forcing the crew to abandon ship after the vessel

³⁰⁶ *Id.* § 7.5.1.

³⁰⁷ *Id.* § 7.5.2.

³⁰⁸ Reuters, *Turkish-Owned Ship Hit by Bomb off Coast of Odessa, No Casualties—Turkish Authority* (Feb. 24, 2022), <https://www.reuters.com/world/turkish-owned-ship-hit-by-bomb-off-coast-odessa-no-casualties-turkish-authority-2022-02-24/>.

³⁰⁹ IRCCLASS Indian Register for Shipping, *Technical Circular 035/2022* (last visited Jan. 24, 2024), <https://www.irclass.org/technical-circulars/rmi-ssa-no-02-22-rev8-reg-geopolitical-conflict-ukraine-black-sea-sea-of-azov/>.

³¹⁰ Reuters, *Cargo ship Namura Queen hit by rocket off Ukraine—local agent* (Feb. 25, 2022), <https://www.reuters.com/world/europe/cargo-ship-namura-queen-hit-by-rocket-off-ukraine-local-agent-2022-02-25/>.

³¹¹ Ukrinform, *Russian ship fires on Sanzhiyka, then announces 'security guarantees' for passage of ships* (Feb. 25, 2022), <https://www.ukrinform.net/rubric-ato/3439809-russian-ship-fires-on-sanzhiyka-then-announces-security-guarantees-for-passage-of-ships.html>.

caught fire.³¹² Two crew members, including the master, were in critical condition.

Two additional attacks were reported on March 2, 2022. The Estonian-owned, Panamanian-flagged general cargo ship *M/V Helt* was hit by a missile 16 nautical miles southeast of Odessa.³¹³ Six crew members were rescued, but the ship sank. Earlier that day, the Bangladesh-flagged bulk carrier *M/V Banglar Samriddhi* was hit by a missile in the port of Olvia south of Mykolaiv, killing one of its 29 crew members.³¹⁴

There is no indication that any of these vessels were engaged in activities that would render them subject to capture or attack by either of the belligerents. Therefore, these indiscriminate attacks (purportedly by Russia) on neutral shipping do not comport with the law of naval warfare, in particular the principle of distinction.

Control of the Immediate Area of Naval Operations

MEZs should not be confused with a belligerent's right to control the immediate area of naval operations, which is defined as the "area within which hostilities are taking place or belligerent forces are actually operating."³¹⁵ To ensure proper battlespace management and force protection objectives,

a commander may restrict the activities of neutral vessels and aircraft within the immediate vicinity of naval units and, if required by military necessity, may prohibit their entry into the area altogether.

This includes control over the communications (except legitimate distress communications) of neutral merchant ships and civil aircraft if those communications might endanger or jeopardize the success of the operation. Merchant ships and civil aircraft that fail to conform to a commander's restrictions may be considered to have acquired enemy character and may be liable to attack or capture.³¹⁶ A commander may not, however, exercise this right to close off access to a neutral State or to close an international strait to neutral shipping, unless a route of similar convenience is available to neutral commerce.

It appears that the Russian Navy may have employed this authority in the northwestern Black Sea. On February 26, it was reported that Russian naval vessels had used VHF channel 16 to notify all merchant vessels that it was conducting a "counterterrorist operation" and demanded all ships located in the Odesa and Danube areas to proceed immediately to the Bosphorus.³¹⁷ It appears from the interactive map on the Marine Traffic website that neutral shipping has complied with the demand and cleared the area.³¹⁸

³¹² Xavier Vasseur, *Two Civilian Vessels Hit by Russian Missiles off Odessa—Ukraine MoD*, NAVAL NEWS (Feb. 25, 2022), <https://www.navalnews.com/naval-news/2022/02/two-civilian-vessels-hit-by-russian-missiles-off-odessa-ukraine-mod/>.

³¹³ Al Jazeera, *One killed as two cargo ships hit by explosions off Ukraine* (Mar. 3, 2022), <https://www.aljazeera.com/news/2022/3/3/two-cargo-ships-hit-by-explosions-around-ukraine-one-killed>.

³¹⁴ *Id.*

³¹⁵ COMMANDER'S HANDBOOK, *supra* note 179, § 7.8.

³¹⁶ 2016 DoD LAW OF WAR MANUAL, *supra* note 27, § 13.8.2.

³¹⁷ Tayfun Ozberk, *Russia-Ukraine Conflict: What Happened in the Black Sea So Far?*, NAVAL NEWS (Feb. 27, 2022), <https://www.navalnews.com/naval-news/2022/02/russia-ukraine-conflict-what-happened-in-the-black-sea-so-far/#:~:text=On%20February%2026%2C%20a%20Turkish,proceed%20immediately%20to%20the%20Bosphorus>.

³¹⁸ *Id.*

Conclusion

The use of MEZs is not prohibited by the law of naval warfare. To the extent MEZs are used to warn neutral vessels and aircraft to reduce their exposure to collateral damage and incidental injury and are enforced consistent with the relevant principles of the law of armed conflict, they are a lawful method of naval warfare. Russia must, therefore, ensure that the extent, location, and duration, as well as the measures employed to enforce the zones, do not exceed what is required by military necessity. In any event, Russia may not treat an MEZ as a free fire zone and must apply the principle of distinction to ensure that any ship or aircraft engaged in the zone, regardless of flag, is a legitimate military objective. The declared MEZs may also not intentionally and unreasonably interfere with legitimate neutral commerce in the Black Sea.

On March 11, 2022, the International Maritime Organization (IMO) proposed that the parties to the conflict establish a “blue safe maritime corridor” to allow for the safe evacuation of neutral ships and their crews

from the high-risk areas in the Black Sea and Sea of Azov.³¹⁹ Russia has agreed with the proposal and has informed the IMO that it will establish a humanitarian corridor on March 27 to ensure safe passage for merchant vessels from the Ukrainian ports of Chernomorsk, Kherson, Mykolaiv, Ochakov, Odesa, and Yuzhne.³²⁰ The maritime traffic lane is 80 miles long and 3 miles wide, beginning at an assembly area just outside the Ukrainian territorial sea southeast of Odesa and continuing to the south to an exit area in international waters. Moscow has indicated that the corridor will remain open daily from 8 a.m. to 7 p.m. and has requested Ukrainian authorities “to provide for the safety and security of the merchant vessels and their crews transiting to the assembly area.”

The proposal appears to be consistent with Russia’s obligation to ensure neutral vessels are guaranteed safe passage through the established MEZ in the northwest Black Sea. However, there has been no response from the Ukrainian side on whether ships will be allowed to leave Ukrainian ports.



³¹⁹ International Maritime Organization, *IMO Council decisions on Black Sea and Sea of Azov situation* (Mar. 11, 2022), <https://www.imo.org/en/MediaCentre/PressBriefings/pages/ECSSStatement.aspx>.

³²⁰ IMO, *Circular Letter No. 4543* (Mar. 28, 2022), [https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20Associate%20Members%20Communications/Circular%20Letter%20No.4543%20-%20Communication%20From%20The%20Government%20Of%20The%20Russian%20Federation%20\(Secretariat\).pdf](https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20Associate%20Members%20Communications/Circular%20Letter%20No.4543%20-%20Communication%20From%20The%20Government%20Of%20The%20Russian%20Federation%20(Secretariat).pdf).

THE WAR AT SEA: IS THERE A NAVAL BLOCKADE IN THE SEA OF AZOV?

by Martin Fink | Mar 24, 2022

Although land operations have garnered most attention, the war between Ukraine and the Russian Federation also rages at and from the sea. During these last weeks, several merchant vessels were attacked and seized,³²¹ some apparently within the territorial sea of a NATO Member State.³²² Naval mines have been spotted, amphibious operations undertaken,³²³ naval fires used³²⁴ on objectives on land, and in the weeks leading up to the war much mention was made of Russia effectively blockading the Sea of Azov.³²⁵ Talks of blockade have since continued, also within the context of the need to find safe corridors for civilians and seafarers to escape the war.³²⁶ But is there really a naval blockade in the Sea of Azov?

Naval Blockade

Undoubtedly, the law of naval warfare applies to this international armed conflict. This specialized section of the law of armed conflict includes the law of blockade. Apart from one rule in the Paris Declaration, drafted after

the end of the Crimean War of 1853–1856, the law of naval blockade remains uncoded under customary international law.

It is widely accepted that a blockade, to be legally established, requires notification and enforcement in an effective and impartial manner. The purpose of a blockade is to stop all ingress and egress of vessels of all States from an enemy coast or port. The legal point to note is that once a blockade is legally established, it creates belligerent rights against other users of the sea, such as the seizure and capture of vessels irrespective of their flag. Also, vessels attempting to breach a blockade become liable to attack by the blockading force. Considering the requirements of notification, effectiveness, and impartiality, what then is the situation in the Sea of Azov?

Situation

On February 24, Russia announced suspension of commercial traffic in the Sea of Azov.³²⁷ Since the war broke out, commercial

³²¹ Ship & Bunker News Team, *supra* note 281.

³²² Administration of the State Border Guard Service of Ukraine, *State Border Guard Service: Russian warships pirate two Ukrainian civilian ships* (Feb. 27, 2022), <https://www.kmu.gov.ua/en/news/derzhprrikordonsluzhba-rosijski-pirati-zahopili-dva-ukrayinskih-sudna-iz-mirnimi-ekipazhami>.

³²³ Ashish Dangwal, *Russian Navy Joins Invasion! Images of Amphibious Warship Arriving in Seized Ukrainian Port City Go Viral*, EURASIAN TIMES (Mar. 15, 2022), <https://www.eurasiantimes.com/russia-amphibious-warship-arriving-in-seized-ukrainian-port-city/>.

³²⁴ Sam Lagrone & Dzirhan Mahadzir, *Russian Warships Shelling Towns Near Odesa as Naval Activity Increases in Northern Black Sea*, USNI NEWS (Mar. 16, 2022), <https://news.usni.org/2022/03/16/russian-warships-shelling-towns-near-odesa-as-naval-activity-increases-in-northern-black-sea>.

³²⁵ John Paul Rathbone & Ben Hall, *Military Briefing: Ukraine Seeks Way to Break Russia's Black Sea Blockade*, FINANCIAL TIMES (May 19, 2022), <https://www.ft.com/content/8151ba97-5c07-4cef-9ad9-234c532b2481>.

³²⁶ Alexander Lott, *Russia's Blockade in the Sea of Azov: A Call for Relief Shipments for Mariupol*, EJIL TALK! (Mar. 14, 2022), <https://www.ejiltalk.org/russias-blockade-in-the-sea-of-azov-a-call-for-relief-shipments-for-mariupol/>.

³²⁷ Reuters, *Russia confirms suspension of movement of commercial vessels in the Azov sea—Interfax* (Feb. 24, 2022), <https://www.reuters.com/article/ukraine-crisis-russia-shipping-grains-az-idAFR4N2U2026/>.

vessels and their crews have been stranded in Ukrainian ports, unable to sail. It has been speculated that Russian warships will fire at any vessel that moves in the area and that ships are locked in ports because the surrounding waters are mined, making navigation unsafe.³²⁸

Logistical challenges have also been raised to the International Maritime Organization (IMO), which reported that “Ukraine closed its seaports effectively trapping merchant ships without the services such as tugs and harbor pilots to depart and straining the ability to re-provision the ships.”³²⁹ The Ukraine government sent a letter to the IMO a day after the war broke out indicating that all Ukrainian ports are closed for entry and exit.³³⁰ Others have observed that “[s]ome 140 cargo ships are stuck at Ukraine’s now-closed ports, unable to leave because traveling through the Black Sea involves extreme risk.”³³¹

This dire situation, in which vessels and their crews appear to be blocked for several reasons, does not, however, mean a naval blockade actually has been established.

Notification

Apart from the suspension of maritime traffic, there is no further information

available indicating the establishment of a blockade that would satisfy the notification requirement, such as an announcement of the commencement, location, and extent of the blockade. Also, the warnings of NAVAREA III (responsible for the Black Sea area) issued respecting mined areas (NAVAREA III 2022/0118 and 2022/0092) and other danger areas because of ongoing military operations (NAVAREA III 2022/0093) do not refer to the existence or notification of a Russian naval blockade. Neither does the IMO, which appears seriously worried about the safety of seafarers in the area and has pleaded for a maritime corridor to ensure that merchants can safely leave ports with their vessels.³³² Apart from an unspecified announcement of suspension, nothing more indicates that Russia has established a blockade that might give Russian naval and air forces enforcement powers against merchant vessels.

Effectiveness and Impartiality

Effectiveness and impartiality aim at stopping all maritime traffic irrespective of flag, including merchant ships of the blockading power.³³³ The Sea of Azov is of considerable size, spanning about 360 km by 180 km. The ports in the Azov Sea include not only Ukrainian ports, but also Russian ports still

³²⁸ Karen McVeigh, *Calls for ‘blue corridor’ to let stranded seafarers leave Ukraine war zone*, GUARDIAN (Mar. 16, 2022), <https://www.theguardian.com/environment/2022/mar/16/ukraine-russia-war-black-sea-azov-blue-corridor-stranded-seafarers>.

³²⁹ The Maritime Executive, *IMO Calls Extraordinary Session as Seafarers Remain Caught in Ukraine* (Mar. 4, 2022), <https://www.maritime-executive.com/article/imo-calls-extraordinary-session-as-seafarers-remain-caught-in-ukraine>.

³³⁰ IMO, *Circular Letter No. 4518* (Feb. 24, 2022), [https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20Associate%20Members%20Communications/Circular%20Letter%20No.4518%20-%20Communication%20From%20The%20Government%20Of%20Ukraine%20\(Secretariat\).pdf](https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20Associate%20Members%20Communications/Circular%20Letter%20No.4518%20-%20Communication%20From%20The%20Government%20Of%20Ukraine%20(Secretariat).pdf).

³³¹ Elisabeth Braw, *The Invasion of Ukraine Is Causing Crisis at Sea*, FOREIGN POLICY (Mar. 7, 2022), <https://foreignpolicy.com/2022/03/07/ukraine-shipping-supply-war/>.

³³² I.M.O., *supra* 320.

³³³ SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA para. 100 (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL].

in operation.³³⁴ Geographical features allow the sea to be easily closed off by blocking the Kerch Strait. It has been reported, however, that traffic through the Strait is not suspended, but rather minimized.³³⁵ Furthermore, vessels are indeed massing at the approaches of the Kerch Strait. Meanwhile, Russia is allowing ships to leave the Sea of Azov to the Black Sea.³³⁶ As one source describes it, “Kerch Strait is closed for vessels passing north into the Sea of Azov, but vessels heading south are permitted to transit.”³³⁷

First, this would indicate that Russia is not blocking *all* traffic and is not applying a blockade impartially. Second, if it did, one should question whether blocking the entrance of the Sea of Azov amounts to blocking the ingress and egress of all maritime traffic from the enemy ports or coasts, having in mind again that the Sea of Azov is considerable in size with several commercial ports, including Russian ports. The challenge of leaving port is rather a combination of an announcement of suspension of navigation, threats, security, logistical challenges, and a restrictive entrance procedure at the Kerch Strait.

It appears, therefore, that although different factors have effectively minimized maritime traffic into and from the Ukrainian ports in the Sea of Azov, Russia has not established a naval blockade in the Sea of Azov. As a

consequence, Russia cannot invoke any belligerent rights that may derive from a legally established blockade to enforce a blockade against vessels.

Maritime Operational Zones (MOZ)

If not a naval blockade, another concept we might look into is a maritime zone. The concept of maritime zones, used previously during the Falklands/Malvinas and the Iraq-Iran conflicts, hasn’t quite crystalized as a matter of law. Its main purpose is to manage maritime battlespace in an area where belligerent naval operations take place. The suspension of navigation in the Sea of Azov, and blocking inward navigation, would arguably fit somewhat better as a maritime zone rather than a naval blockade.

Regarding the legal character of zones, it is argued that the belligerent—in order to fight, minimize neutral interference, and maximize security of its assets—is allowed to control shipping within the vicinity of its operations.³³⁸ In other words, establishing such as a zone interferes with the freedom of navigation guaranteed under Article 87 of the Law of the Sea Convention.³³⁹ This is quite imaginable, for example, when an amphibious fleet is preparing an assault on a coastline to attack Berdyansk. But the extent to which the establishment of a maritime

³³⁴ Wikipedia, *Category: Ports and Harbours of the Sea of Azov* (last visited Jan. 25, 2024), https://en.wikipedia.org/wiki/Category:Ports_and_harbours_of_the_Sea_of_Azov.

³³⁵ Interfax, *Navigation in Kerch Strait not suspended—Russian agency* (Feb. 24, 2022), <https://interfax.com/newsroom/top-stories/174036/>.

³³⁶ Eliza Mackintosh, Jack Bantock, Sana Noor Haq, Helen Regan, Adrienne Vogt, Mike Hayes & Kathleen Magramo, *June 7, 2022 Russia-Ukraine News*, CNN (June 8, 2022), https://www.cnn.com/europe/live-news/russia-ukraine-war-news-06-07-22/h_8b8a8e30ce226b93b488de58372e1548.

³³⁷ Jamie Wallace, *Ukraine / Russia—Port update*, STANDARD CLUB (Feb. 25, 2022), <https://www.standard-club.com/knowledge-news/ukraine-russia-port-update-4179/#::-:text=Navigation%20in%20the%20Sea%20of,allowed%20within%20the%20port%20limits>.

³³⁸ SAN REMO MANUAL, *supra* note 333, para. 108.

³³⁹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

zone can be justified, in this case affecting the whole Sea of Azov, depends on the necessity and proportionality of such an act, balancing military requirements against impact on navigation for other users of the sea.

In any case, even if the suspension of navigation in the Sea of Azov should be considered as a form of maritime zone, it still does not absolve a belligerent from its duties under the law of armed conflict, nor does Russia acquire any belligerent rights under the law of blockade. Merchant vessels are therefore still exempt from attack.

The Wider Maritime Dimension

An earlier post in this symposium pressed for doing away with belligerent rights at sea for the aggressor.³⁴⁰ Whatever one might think of this option, belligerent rights at sea still exist. We can conclude that, at this stage of conflict, the instruments of the law of naval warfare are still left unused.

But there are some challenging “what ifs.” For instance, what if Russia decides to use its belligerent rights under the law of naval warfare? What if Russia decides to publish contraband lists? Would it restrict any arms shipments to Ukraine from the sea? Obviously, no shipment could possibly arrive from the sea to Ukraine if a naval blockade were to be imposed, but must we still accept that the doctrine of continuous voyage on ultimate destination applies if these shipments first arrive in the port of Rotterdam and are then transported over land or air to Ukraine? And what if a convoy of neutral warships protects against visit and search of transporting vessels on which contraband is being carried? The possible issues to consider in the war at sea might just be wider than the Black Sea Basin alone but could start already off the coasts of our own States.



³⁴⁰ Andrew Clapham, *On War*, ARTICLES OF WAR (Mar. 5, 2022), <https://lieber.westpoint.edu/on-war/>.

THE MONTREUX CONVENTION AND TURKEY'S IMPACT ON BLACK SEA OPERATIONS

by Adam Aliano and Russell Spivak | Apr 25, 2022

Weeks into Russia's military campaign into Ukraine, the role homeported Black Sea maritime forces are playing is well documented. Reuters recently published a story in which the Russian Defense Minister confirmed that Russia struck Ukraine with Kalibr cruise missiles from ships in the Black Sea.³⁴¹ The *Moscow Times*, an ardent anti-Putin paper, also published a report discussing Ukrainian naval forces' use of mines in and around ports to ward off Russian littoral-based attacks.³⁴² *Al Jazeera* is reporting that Ukrainians have placed mines along the shore of the Black Sea outside of Odessa.³⁴³ And just recently, the world watched the toppling of the *Moskva*, Russia's flagship vessel in the Black Sea, which the Pentagon confirmed was the result of a successful Ukrainian missile strike.³⁴⁴

But a critical feature of this conflict has received little attention, despite the fact that it may become a central tenet of the war: Turkey's legal authority to control transits through the Turkish Straits that have a direct bearing on maritime operations in the Black

Sea. To date, only a handful of articles have analyzed this issue (see, for example, Mark Nevitt's February 28 post on *Just Security*,³⁴⁵ Raul [Pete] Pedrozo's March 3 post on *Articles of War*,³⁴⁶ and Cornell Overfield's March 5 post on *Lawfare Blog*³⁴⁷). Each lays out the history and central tenets of the Montreux Convention (formally known as the 1936 Convention Regarding the Regime of the Straits), which governs the transit of commercial and military vessels alike through the Turkish Straits.

Montreux Convention Articles 19, 20, and 21

There are three provisions in the Montreux Convention that set out Turkey's legal authority to control transits through the Turkish Straits: Articles 19, 20, and 21.

Article 19, which applies "[i]n a time of war" when "Turkey is not a belligerent," provides that non-belligerent States' "warships shall enjoy complete freedom of transit and navigation through the Straits" just as they

³⁴¹ Reuters, *Russia strikes Ukraine with cruise missiles from two seas* (Mar. 20, 2022), <https://www.reuters.com/world/europe/russia-strikes-ukraine-with-cruise-missiles-black-sea-caspian-sea-2022-03-20/>.

³⁴² AFP, *Russia Warns of Ukrainian Mines in Black Sea*, *MOSCOW TIMES* (Mar. 19, 2022), <https://www.themoscowtimes.com/2022/03/19/russia-warns-of-ukrainian-mines-in-black-sea-a77002>.

³⁴³ *Al Jazeera*, *Mines, sandbags and roadblocks: Odesa fortifies for Russian war* (Mar. 17, 2022), <https://www.aljazeera.com/news/2022/3/17/mines-sandbags-roadblocks-odesa-prepares-for-russian-attack>.

³⁴⁴ Ellen Mitchell, *Pentagon backs Ukraine's claim it hit Russian warship with two missiles*, *THE HILL* (Apr. 15, 2022), <https://thehill.com/policy/defense/3269904-pentagon-backs-ukraines-claim-it-hit-russian-warship-with-two-missiles/>.

³⁴⁵ Mark Nevitt, *The Russia-Ukraine Conflict, the Black Sea, and the Montreux Convention*, *JUST SECURITY* (Feb. 28, 2022), <https://www.justsecurity.org/80384/the-russia-ukraine-conflict-the-black-sea-and-the-montreux-convention/>.

³⁴⁶ Raul Pedrozo, *Closing the Turkish Straits in Times of War*, *ARTICLES OF WAR* (Mar. 3, 2022), <https://lieber.westpoint.edu/closing-turkish-straits-war/>.

³⁴⁷ Cornell Overfield, *Turkey Must Close the Turkish Straits Only to Russian and Ukrainian Warships*, *LAWFARE* (Mar. 5, 2022), <https://www.lawfaremedia.org/article/turkey-must-close-turkish-straits-only-russian-and-ukrainian-warships>.

do under peacetime rules, while belligerent States' "warships shall not . . . pass through the Straits" unless (1) they are acting under lawful collective defense rights or obligations, or (2) they are forced to make the voyage to return to their home base.

Article 20, which applies when Turkey deems itself a belligerent in the conflict in question, suspends certain peacetime rules and provides that the "passage of warships shall be left entirely to the discretion of the Turkish Government."

Finally, Article 21 straddles Articles 19 and 20, applying when Turkey "considers itself to be threatened with imminent danger of war." In such situations, as Overfield states, "peacetime rules on warship navigation are suspended under Article 21," though "ships separated from their bases by the [S]traits must generally be allowed to transit to return home."

By the time Nevitt, Pedrozo, and Overfield published their pieces, Turkey had already declared the conflict between Russia and Ukraine a "war" for the purposes of the Montreux Convention.³⁴⁸ As Nevitt notes, this triggers Article 19, meaning that Russian and Ukrainian ships—as warships of a designated "belligerent" State—would *only* be permitted to transit the Straits to return to their home bases. Resultantly, Moscow

ordered several ships of the Black Sea fleet to return to their home ports in the Black Sea.

In early March, Russia attempted to use this justification as a cover story to bring additional ships into the theater. Turkey ferreted out the Kremlin's plan and objected to those ships transiting the Straits because they were not heading "home."³⁴⁹

It is essential to acknowledge that the Montreux Convention affords wide latitude for Turkey to determine the nature and scope of a conflict unilaterally. This allows Turkey to effectively dictate which of these powers, if any, are triggered based on its own subjective assessment of current events. Thus, the text of Montreux yields significant leverage to the Turkish government, which, in turn, can manifest an outsized operational impact on interested maritime nations. This matters for two interrelated yet independent reasons.

Implications for Future Attacks against NATO Nations

First, there is potential that the North Atlantic Treaty (Article 5 in particular) impacts Turkey's application of the Montreux Convention—yielding significant strategic effects. NATO Member States bordering Ukraine faced the imminent prospect of Russian attacks spilling onto their territory as hostilities commenced in February.³⁵⁰ Similarly, throughout the conflict, there have

³⁴⁸ Jared Malsin, *Turkey Says War Exists in Black Sea, Allowing It to Block Russian Navy*, WALL ST. J. (Feb. 27, 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-02-26/card/uDQC9dMZsNGZLQsfWYg>.

³⁴⁹ Al Jazeera, *Russia cancelled Black Sea passage bid of four warships: Turkey* (Mar. 2, 2022), <https://www.aljazeera.com/news/2022/3/2/russia-cancelled-black-sea-passage-bid-warships-turkey>.

³⁵⁰ Reuters, *Attack near Polish border aimed at creating panic, Poland's PM says* (Mar. 14, 2022), <https://www.reuters.com/world/europe/attack-near-polish-border-aimed-creating-panic-polands-pm-says-2022-03-14/>.

been notable examples of Russian military activities spreading to the shores of NATO Member States.³⁵¹

Though Russia ostensibly shifted its focus to Eastern Ukraine in recent days—thus decreasing the threat to NATO Member States—the potential that they resume campaigning near Polish, Romanian, or Slovakian territory remains. Accordingly, Poland has increased its military exercises in recent days in preparation for hostilities,³⁵² while Slovakia may be seen as giving aid to Ukraine with its recent “donation” of anti-aircraft weaponry to Ukraine—inviting Russian ire.³⁵³

In its last several official statements, NATO assertively reaffirmed its “iron-clad” commitment to Article 5 and assured that its Member States remain firmly committed to united defense.³⁵⁴ Should Russian hostility *actually* spill into the aforementioned territory, Turkey is treaty-bound to at least consider those attacks as attacks on itself.³⁵⁵ (This is a substantially lesser concern with regard to Hungary, another NATO member that borders Ukraine, as Hungarian Prime Minister Viktor Orban is considered by some to be aiding Russia.³⁵⁶)

Article 5 of the North Atlantic Treaty provides that if one “NATO ally is the victim of an armed attack, every other member of the Alliance will consider this act of violence as an armed attack against *all* members and will take the actions it deems necessary to assist the Ally attacked.”(emphasis added).³⁵⁷ Following military activity taking place within the territory of a NATO Member State, the organization will “meet to discuss whether they agree that actions on the ground rise to the level of invoking Article 5.”

Importantly, in recent years, NATO affirmed a more expansive view of what constitutes an “armed attack.” In its June 2021 communiqué, NATO stated that it would convene a meeting in the wake of hybrid or cyber attacks to consider if the matter rose to the level of an “armed attack”³⁵⁸—at least somewhat broadening Article 5’s aperture. If NATO signatories agree that the attack in question rises to such a level, and NATO formally invokes Article 5, Turkey could squarely declare itself a belligerent in the Montreux context, unlocking Article 20.

Should this happen, Article 20 allows Turkey to take *whatever* action it deems appropriate concerning straits transit. Article 5 does not require one NATO nation’s actions to be

³⁵¹ Al Jazeera, *Turkey finds second mine off its coast near Bulgaria* (Mar. 28, 2022), <https://www.aljazeera.com/news/2022/3/28/turkey-finds-second-mine-off-its-coast-near-bulgaria>.

³⁵² 60 Minutes Australia, *Exclusive Access to Poland’s Frontline Amid Fears of Russian Invasion* (Apr. 10, 2022), <https://www.youtube.com/watch?v=ITh16zyDolI>.

³⁵³ Andrew Higgins, *Hiding in Plain Sight, a Soviet-Era Air Defense System Arrives in Ukraine*, N.Y. TIMES (Apr. 14, 2022), <https://www.nytimes.com/2022/04/14/world/europe/ukraine-russia-nato-s300.html>.

³⁵⁴ NATO, *Statement by NATO Heads of State and Government* (Mar. 24, 2022), https://www.nato.int/cps/en/natohq/official_texts_193719.htm.

³⁵⁵ North Atlantic Treaty, *supra* note 44.

³⁵⁶ Joshua Askew, *Hungary ‘helping Putin’ in the war, says Ukraine’s foreign ministry*, EURONEWS (July 4, 2022), <https://www.euronews.com/2022/04/07/hungary-helping-putin-in-the-war-says-ukraine-s-foreign-ministry>.

³⁵⁷ NATO, *Collective Defense and Article 5* (last updated July 4, 2023), https://www.nato.int/cps/en/natohq/topics_110496.htm.

³⁵⁸ NATO, *Brussels Summit Communiqué* (June 14, 2021), https://www.nato.int/cps/en/natohq/news_185000.htm.

calibrated with those of other States. The text of Article 5 yields that in the wake of an “armed attack,” each allied nation “will assist the Party or Parties so attacked by taking forthwith, *individually* and in concert with the other Parties, such action as *it* deems necessary . . . to restore and maintain the security of the North Atlantic area.” (emphases added). In other words, post-consensus, a nation retains discretion on what form of support it will provide and the attendant quality and quantity of that support.³⁵⁹

This reading not only is supported by the text of the Article itself but has been interpreted as such. According to Edgar Buckley, NATO’s Assistant Secretary General for Defence Planning and Operations from 1999–2003, when Article 5 was debated in 2001 following the September 11 attacks, NATO’s legal advisor issued a memorandum to all Member States instructing that should Article 5 be officially invoked and a consensus reached, it “was [then] up to each Ally to judge for itself what action needed to be taken, although such action should be appropriate to the scale of the attack, the means of each country and the steps necessary to restore peace and security.”³⁶⁰ So even if some view Turkey’s actions in the Straits as unsuitably escalatory in the wake of an Article 5 invocation, it matters not.

Turkey can arguably go a step further with the collective defense commitment under Article 5. Reading both NATO Article 5 and Montreux Convention provisions together, there is little codified in either agreement

to stop Ankara from suggesting that it is “threatened with imminent danger of war” when another NATO Member State is subject to Russian hostilities near its border. Thus, Turkey could theoretically argue that it is obligated to act in anticipatory defense of a NATO ally, triggering Article 21.

This argument may be somewhat textually difficult, however. Moreover, in December, NATO re-asserted that the Alliance would act as a collective body toward Russia—preventing a piecemeal approach to the application of the treaty.³⁶¹ That being said, there is nothing limiting Turkish discretion in the applicable agreements or historical precedent. This is to simply say that Turkey *could* attempt to support an invocation of Article 21—which is largely unchecked, as mentioned—with an anticipatory defense argument derived from the NATO Treaty. That is not to say that Turkey would be *correct* or *incorrect* in this interpretation, but rather simply putting forward how Turkey could interpret the world it faces and its treaty obligations.

A Threat to Turkey

The expansion of both potential and actual hostilities in Ukraine more broadly, even absent an attack on a NATO nation and an invocation of NATO Article 5, lays the groundwork for Turkey to “[consider] itself to be threatened with imminent danger of war” and invoke Montreux Article 21. Russian mines washing ashore in Turkish territory

³⁵⁹ Louis Jacobson, *Could a strike by Russia on Poland trigger Article 5 and bring NATO into war?* POLITIFACT (Mar. 14, 2022), <https://www.politifact.com/article/2022/mar/14/could-russian-strike-poland-trigger-article-5-and-/>.

³⁶⁰ NATO, *Edgar Buckley* (last visited Nov. 25, 2023), <https://www.nato.int/cv/is/asg-dpo/buckley.htm>.

³⁶¹ NATO, *Statement by the North Atlantic Council on the situation in and around Ukraine* (Dec. 16, 2021), https://www.nato.int/cps/en/natohq/news_190373.htm?selectedLocale=en.

certainly adds credence to a potential Article 21 invocation.

To date, Turkey has only given murky comments about its position vis-à-vis “imminent danger”—typifying the outsized discretion it retains under the Montreux Convention. On February 28, Turkish Foreign Minister Mevlüt Çavuşoğlu “warned all riparian and non-riparian countries not to let warships go through the Straits.”³⁶² Pedrozo argued that Turkey went beyond the confines of Article 19 and *de facto* bled into Article 21.³⁶³ We agree with his assessment. So far, Turkey has only affirmatively invoked Article 19 (i.e., there is a war, and the belligerents, Russia and Ukraine, must not transit warships through the Straits but for returning to homeport). But the Foreign Minister’s declaration of a transit prohibition for *all* States, though likely de-escalatory, necessitates invocation of either Article 20 or 21 of the Convention. But because Turkey has not yet overtly declared that it is in immediate danger, and because no NATO nation has suffered an armed attack by Russia, Article 20 is unavailable, leaving Article 21 by process of elimination. Hence agreeing with Pedrozo that working backward unlocks the state of affairs.

Overfield disagrees. Let’s go back to the full text of the first paragraph of Article 21 itself:

Should Turkey consider herself to be threatened with imminent danger of war she shall have the right to apply the

provisions of Article 20 of the present Convention.

Overfield may or may not be correct in stating that “[i]nternational law has a well-established definition of ‘imminent threat of use of force.’”³⁶⁴ We would argue that ongoing discourse in the international law community regarding the nature of cyber and hybrid attacks evidences that this question is far from settled. Regardless of its accuracy, though, Overfield’s argument as to why Turkey cannot invoke Article 21 pursuant to such constraints is actually inapposite. It’s important to highlight that the concept of “threat or use of force” as codified in the UN Charter and attendant jurisprudence is likely untethered to Turkey’s interpretation of Montreux-related events. As such, there is no available precedent on point to guide or even check Turkish decisions in the Montreux framework.

Any legal review of wartime clause activation heretofore would be a case of subjective discretion. Those familiar with the concepts of the UN charter may be tempted to apply the UN Charter’s Article 2(4) framework here, which broadly holds that nations “shall refrain in their international relations from the threat or use of force.” However, there is no codified law or precedent related to Turkey’s determination of “imminent danger” in the Black Sea that would tether its interpretations. Once again, Turkey is operating without precedent and codified standards, enabling it to be the captain of its own fate. As such,

³⁶² Mumin Altas, *Turkiye warns all countries against warships going through Turkish Straits*, AA (Feb. 28, 2022), <https://www.aa.com.tr/en/russia-ukraine-crisis/turkiye-warns-all-countries-against-warships-going-through-turkish-straits/2518827>.

³⁶³ Pedrozo, *supra* note 347.

³⁶⁴ Yale Law School Lillian Goldman Library, *The Caroline*, THE AVALON PROJECT (last visited Nov. 25, 2023), https://avalon.law.yale.edu/19th_century/br-1842d.asp.

Turkey can be as sensitive to the growing warzone as it so chooses, including the belief that Black Sea maritime operations can pose a direct threat to the nation.

It is worth anchoring briefly on the potential that Turkey *does* explicitly invoke Article 21—appropriately so. In light of ongoing hostilities in Ukraine, some authors have already contemplated the possibility that Russia will divert non-Black Sea warships through the Turkish Straits to support its Ukrainian offensive;³⁶⁵ indeed, there are already signs that Russian naval forces recently transited the Japanese Straits,³⁶⁶ suggesting that assets could already be en route to the Black Sea. This act would directly threaten Turkish sovereignty and flies in the face of Turkey’s invocation of Article 19 in late February. Thus, there is a distinct possibility that Turkey could legitimately invoke Article 21 should a perceptible Russian threat of running the Straits arise.

This possibility necessarily raises the issue of enforceability. Turkish rules of engagement (ROE) in the Straits (found in the “Joint Air and Missile Defense Directive of the Turkish Armed Forces”) *does* afford Turkish forces the ability to block entry of ships into the Straits who are deemed in violation of the Montreux Convention.³⁶⁷ The Directive states that “Foreign warships that are found to be in violation of the rules of the Montreux

Convention are blocked before entering the Straits. After entering the Straits, these vessels are accompanied or closely monitored during their passage when a situation is found to be contrary to the rules of the Montreux Convention.”

There is a dearth of historic examples wherein Turkey used force to protect “improper” transit of the Straits in violation of Montreux. In one rare example during World War II, Turkey, at the behest of Allied nations, intercepted and searched a group of German warships disguised as merchant vessels during transit of the Straits.³⁶⁸ Turkish authorities discovered various military equipment and weaponry during their search and ultimately escorted the units out of the Straits.

Checks on Turkish Invocation of Montreux Article 21

Overfield’s last remaining refuge would be Montreux Article 21’s backstop: The Convention requires support (or at least no objection) from countries party to the Convention as well as a greater international body. But upon inspection, this provision is *also* likely ineffective, leaving Turkey’s discretion unchecked. The operative paragraphs of Article 21 read:

Should the Turkish Government make use of the powers conferred by the first paragraph of the present Article,

³⁶⁵ Jared Samuelson, *Sea Control 330—Ukraine and Naval Guerrilla Warfare with David Strachan*, CENTER FOR INTERNATIONAL MARITIME SECURITY (Mar. 24, 2022), <https://cimsec.org/sea-control-330-ukraine-naval-guerrilla-warfare-with-david-strachan/>.

³⁶⁶ Kyodo News, *Russian ships seen in Japan strait, may be carrying troops to Ukraine* (Mar. 16, 2022), <https://english.kyodonews.net/news/2022/03/881ede8c6a58-russian-ships-seen-in-japan-strait-may-be-carrying-troops-to-ukraine.html>.

³⁶⁷ Abdullah Bozkurt, *Rules of engagement authorized blocking of warships before entry into Turkish straits*, NORDIC MONITOR (Mar. 6, 2022), <https://nordicmonitor.com/2022/03/rules-of-engagement-authorized-blocking-of-warships-before-entry-into-turkish-straits/>.

³⁶⁸ Kurtulus Yucel, *The Legal Regime of the Turkish Straits: Regulation of the Montreux Convention and Its Importance on the International Relations after the Conflict of Ukraine*, Johann Wolfgang Goethe—University Frankfurt am Main, PhD dissertation (2019), <https://d-nb.info/1187833509/34>.

a notification to that effect shall be addressed to the High Contracting Parties and to the Secretary-General of the League of Nations.

If the Council of the League of Nations decide by a majority of two-thirds that the measures thus taken by Turkey are not justified, and if such should also be the opinion of the majority of the High Contracting Parties signatories to the present Convention, the Turkish Government undertakes to discontinue the measures in question as also any measures which may have been taken under Article 6 of the present Convention.

Closer inspection of the clause forecloses its safety valve. The first condition in this Clause is that Turkey's decision can be overturned by a two-thirds majority vote of the "Council of the League of Nations." To be sure, as Overfield points out, the United Nations adopted a Resolution in 1946 purporting to transfer powers and obligations from the League of Nations (and its organs) to itself,³⁶⁹ which he argues means "some element of the United Nations, beginning with the General Assembly, might take up the issue."³⁷⁰ But picking up on and running with Overfield's hedging, this is far from certain.³⁷¹

The Resolution begins with the following preamble:

Under various treaties and international conventions, agreements and other

instruments, the League of Nations and its organs exercise, or may be requested to exercise, numerous functions or powers for the continuance of which, after the dissolution of the League, it is, or may be, desirable that the United Nations should provide.³⁷²

In other words, the UN was keenly aware that some League of Nations powers may have been entrusted to a sub-organ of its body.

Yet the UN Resolution speaks only to those powers conferred to the League of Nations as a whole:

The General Assembly will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character (*italics omitted*).

A cursory textual interpretation of the resolution yields that the UN carved out a narrow path for reviewing matters formerly entrusted to the League of Nations. That is to say, UN adjudication of these cases is purposefully not guaranteed.

Nevertheless, there is precedent suggesting the UN Security Council could assume the role expected of the League Council under the Montreux Convention or, as the

³⁶⁹ U.N. General Assembly, *Transfer of Certain Functions, Activities and Assets of the League of Nations*, U.N. Doc. A/RES/24 (Feb. 12, 1946), <https://www.refworld.org/docid/3b00f09443.html>.

³⁷⁰ Overfield, *supra* note 347.

³⁷¹ Teoman Ertugrul Tulun, *Functionality of 'imminent danger of war' clause of Montreux Convention*, DAILY SABAH (Mar. 6, 2020), <https://www.dailysabah.com/opinion/op-ed/functionality-of-imminent-danger-of-war-clause-of-montreux-convention/amp>.

³⁷² U.N. Doc. A/RES/24, *supra* note 369.

International Court of Justice indicated in the *Namibia* advisory opinion,³⁷³ in the exercise of its general powers under Article 24 of the UN Charter (paras 110–114). The Security Council could thus review Turkey's invocation of Article 21 if this comes to pass.

Should Turkey refuse to obey, a sovereign may initiate a review of the Turkish decision by petitioning the UN General Assembly. The General Assembly would then likely examine the case and, should it choose, submit it for judicial adjudication by the International Court of Justice, from which the General Assembly may ask for an advisory opinion. As Tulun notes, this process was previously activated when the “question concerning the international status of southwest Africa (today's Namibia) had been referred for an advisory opinion to the Court by the UNGA through its resolution of December 6, 1949.” But the referral of this matter to a UN body is not mandatory, and therefore Turkey's decision may well be left unchallenged.

The final nail in the coffin may simply be the UN's implied acquiescence to Turkey's actions regarding the Montreux Convention to date. Turkey's declaration that *no* warship, regardless of flag, could transit the Straits absent invocation of Articles 20 or 21 has yet to be discussed by the body. It is cliché to say that silence speaks volumes. But in this case, it's true. The data points on which we rely have been public for days, and indeed the international community is attuned to what is occurring in the region, including Turkey's actions. That no country—including Russia, which stands to lose a military advantage

from Turkey's decision to close the Straits—has requested the UN take up the issue of Turkey's closure buttresses the idea that the body may be unwilling to dictate Turkey's interpretations of Montreux.

In an interesting hypothetical scenario, if the matter of Turkey's implicit invocation of Article 21 was brought to a UN vote (assuming that the UN Security Council *does* take up this issue as successor to the League Council), it's feasible that the U.S., U.K. and/or France *would* support the challenge in an effort to curtail Article 21 restrictions on its warships. If the Security Council successfully challenged and voided Article 21 invocation, allied warships could enter the Black Sea while Article 19 prohibitions remain in place and unchecked—restricting Russian warships from transiting the Straits.

Conclusion

The upshot is that Turkey retains wide latitude to interpret current events unilaterally. The Montreux Convention is heavy on legal ambiguity but light on historical precedent. At bottom, Turkey's sole discretion in controlling a vital narrow sea likely yields an outsized strategic impact on allied nations during a period of hostility. For example, Turkey's tacit “invocation” of Article 21 has, to date, succeeded in halting all warship traffic—regardless of nationality—into the Black Sea. Moreover, as we are in a pseudo-Article 21 regime, it is feasible—though legally questionable—that Turkey retains the authority to open the Straits to warships of specific nations as it deems appropriate,

³⁷³ Legal Consequences for States of the Constituted Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21, 1971).

providing a strategic military advantage for designated States. To that end, we have seen Turkey avail itself of its singular position and exercise its discretion accordingly.

Though the nation's actions are debatably positive insofar as they mitigate escalation, the implicit or tacit invocation of its authority to do so may well be at odds with the spirit of Montreux. To realign its actions and keep the global community apprised of its thinking, Turkey should publicly and explicitly clarify its position with regard to Montreux in the coming days and weeks. To start, Turkey should provide its justification, however scant,

for the stretching of Article 19 to prevent *all* warships from transiting the Straits.

Given Turkey's opacity to date, it would behoove the United States and NATO allies to attain a clear line of communication with the Turkish government to garner their real-time intent with regard to the Convention and plan maritime strategy accordingly. Reliance on said communications with a historically mercurial ally carries its own strategic risk for which the United States and NATO allies must account.



CLOSING THE TURKISH STRAITS IN TIMES OF WAR

by Raul (Pete) Pedrozo | Mar 3, 2022

On February 21, 2022, Russian President Vladimir Putin recognized the self-proclaimed Donetsk People's Republic and Luhansk People's Republic as independent States and purportedly deployed Russian "peacekeeping" troops to the breakaway Ukrainian regions to maintain the peace.³⁷⁴ Three days later, Russian forces launched a full-scale invasion of Ukraine,³⁷⁵ prompting Ukraine's ambassador in Ankara to request that Turkey close the Turkish Straits (the Bosphorus, Dardanelles, and the Sea of Marmara) to Russian warships.³⁷⁶

The passage of ships through the Turkish Straits is regulated under the 1936 Montreux Convention.³⁷⁷ Although initially noncommittal to the Ukrainian request,³⁷⁸ Turkey closed the Turkish Straits to warship transits on March 1, 2022.³⁷⁹ It is unclear, however, whether Turkey has barred transit of all warships³⁸⁰ or just Russian and Ukrainian warships.³⁸¹ This post considers the legality of Turkey's decision in light of its rights

and obligations under the 1936 Montreux Convention.

The Passage of Warships under the 1936 Montreux Convention

Russian naval forces can gain access to the Black Sea via two routes—one from the Caspian Sea (via the Lenin Volga-Don Shipping Canal and the Sea of Azov) and the other from the Mediterranean Sea (via the Turkish Straits). Passage through the Volga-Don Canal is under the exclusive control of Russian authorities, which allows Russian warships from the Caspian Flotilla to conduct unimpeded naval exercises and operations with warships from the Black Sea Fleet.³⁸² Access to the Black Sea from the Mediterranean, however, is under the exclusive control of Turkey and is regulated by the 1936 Montreux Convention.³⁸³

The Convention upholds the "principle of freedom of transit and navigation" through

³⁷⁴ Laura Kelly, *Putin recognizes independence of Ukraine breakaway regions*, THE HILL (Feb. 21, 2022), <https://thehill.com/policy/international/595189-putin-to-recognize-independence-of-ukraine-breakaway-regions/>.

³⁷⁵ Elliot Davis Jr., *EXPLAINER: Why Did Russia Invade Ukraine? Experts say the cause of the military conflict can be tied to a complicated history, Russia's tensions with NATO and the ambitions of Vladimir Putin*, U.S. NEWS (Feb. 24, 2023), <https://www.usnews.com/news/best-countries/articles/2022-02-24/explainer-why-did-russia-invade-ukraine>.

³⁷⁶ TASS, *Kiev asks Ankara to close Turkish straits to Russian warships* (Feb. 24, 2022), <https://tass.com/politics/1409585>.

³⁷⁷ Convention Regarding the Regime of Straits, with Annexes and Protocol, July 20, 1936, 173 L.N.T.S 215 [hereinafter Montreux Convention].

³⁷⁸ Ragıp Soylu, *Russia-Ukraine war: Turkey denies closing Black Sea to Russian warships*, MIDDLE EAST EYE (Feb. 26, 2022), <https://www.middleeasteye.net/news/russia-ukraine-war-turkey-denies-closing-black-sea-russian-warships>.

³⁷⁹ Tayfun Ozberk, *Turkey Closes the Dardanelles and Bosphorus to Warships*, NAVAL NEWS (Feb. 28, 2022), <https://www.navalnews.com/naval-news/2022/02/turkey-closes-the-dardanelles-and-bosphorus-to-warships/>.

³⁸⁰ The National, *Turkey blocks warships from Bosphorus and Dardanelle straits amid Russia-Ukraine crisis* (Feb. 28, 2022), <https://www.thenationalnews.com/world/2022/02/28/turkey-blocks-warships-from-bosphorus-and-dardanelle-straits/>.

³⁸¹ Ozberk, *supra* note 379.

³⁸² TASS, *Russian Black Sea Fleet, Caspian Flotilla to hold live-fire exercise* (Jan. 25, 2022), <https://tass.com/defense/1392921>.

³⁸³ Montreux Convention, *supra* note 377.

the straits, subject to certain limitations in time of war.³⁸⁴ If Turkey is not a belligerent, all merchant ships, regardless of flag or cargo, may transit the straits in time of war,³⁸⁵ subject to the same conditions applicable to merchant ships in time of peace.³⁸⁶ If Turkey is a belligerent, neutral merchant vessels may transit the straits by day through designated routes, but only if they do not assist the enemy.³⁸⁷

In time of peace, warships also enjoy passage rights through the Straits but must provide advance notice to Turkey (8 days for Black Sea States and 15 days for other States) before beginning their transit.³⁸⁸ Submarines of non-Black Sea States, however, may not pass through the Straits.³⁸⁹ The convention also imposes maximum aggregate tonnage restrictions and limitations on the number of non-riparian naval forces that can pass through the Straits at one time,³⁹⁰ as well as maximum aggregate tonnage limitations that non-riparian States can have in the Black Sea at one time.³⁹¹ Additionally, warships of non-riparian States may only stay in the Black Sea for 21 days.³⁹²

Thus, the passage through the Straits of three Ropucha-class tank landing ships

(RFS *Minsk* (127), RFS *Korolev* (130), and RFS *Kaliningrad* (102)), two Ropcha-class amphibious ships (RTS *Georgy Pobedonosets* (016) and RTS *Olenegorsky Gornyak* (012)), an Ivan Gren-class landing ship (RTS *Pyotr Morgunov*), and a Kilo-class diesel-electric attack submarine (RTS *Rostov-na-Donu* (B-237)) in early February to participate in a naval exercise in the Black Sea prior to the onset of hostilities was permissible under the Convention.³⁹³

In time of war, if Turkey is not a belligerent, foreign warships enjoy complete freedom of transit and navigation through the Straits under the same conditions that apply in peacetime, with one exception—Turkey may prohibit the transit of warships belonging to the belligerent powers unless it is a warship returning to its home port in the Black Sea.³⁹⁴ If Turkey is a belligerent, the passage of foreign warships is left entirely to the discretion of the Turkish Government.³⁹⁵ Finally, if Turkey considers itself to be threatened with imminent danger of war, it may apply the provisions of Article 20.³⁹⁶

³⁸⁴ *Id.* art. 1.

³⁸⁵ *Id.* art. 4.

³⁸⁶ *Id.* arts. 2 & 3.

³⁸⁷ *Id.* art. 5.

³⁸⁸ *Id.* art. 13.

³⁸⁹ *Id.* art. 12.

³⁹⁰ *Id.* art. 14.

³⁹¹ *Id.* art. 18.

³⁹² *Id.*

³⁹³ H.I. Sutton, *6 Russian Warships and Submarine Now Entering Black Sea Towards Ukraine*, NAVAL NEWS (Feb. 8, 2022), <https://www.navalnews.com/naval-news/2022/02/6-russian-warships-and-submarine-now-entering-black-sea-towards-ukraine/>.

³⁹⁴ Montreux Convention, *supra* note 377, art. 19.

³⁹⁵ *Id.* art. 20.

³⁹⁶ *Id.* art. 21.

Turkey's Decision under the Montreux Convention

Turkey views the Montreux Convention as an essential element of Black Sea security and stability³⁹⁷ and has faithfully implemented the provisions of the Convention for eighty-six years. Consistent with its role as gatekeeper of the Turkish Straits, Turkey announced on February 28, 2022, it was restricting passage of warships belonging to Ukraine and Russia through the Straits unless said ships were returning to their bases in the Black Sea.³⁹⁸ Thus, Russian warships based in other regions and currently operating in the Mediterranean Sea, like the Slava-class cruisers RTS *Marshal Ustinov* (055) from the Northern Fleet and RFS *Varyag* (011) from the Pacific Fleet, are now prohibited from entering the Black Sea.³⁹⁹

Turkey's announcement to close the Straits to Russian and Ukrainian warships is consistent with Article 19 of the Montreux Convention. However, Foreign Minister Mevlüt Çavuşoğlu also indicated that Turkey had warned both riparian and non-riparian States not to pass warships through the Straits.⁴⁰⁰ Prohibiting the transit of all warships, whether belonging

to the belligerents or not, would exceed Turkey's authority under Article 19.

The only plausible argument Turkey may make to justify closing the Straits to all warships is to invoke Article 21 on the basis that its own security is threatened due to the danger of war. Nonetheless, given Turkey's amicable relations with both the Ukraine and Russia, it would be difficult for Ankara to make a convincing argument that it considers itself threatened with imminent danger of war.

Conceivably, Turkey could argue that allowing NATO warships to transit the Straits while prohibiting Russia's access to the Black Sea could result in an armed attack by Russian forces and therefore application of Article 21 is warranted. It is more likely, however, that Turkey has invoked Article 21 as a political expediency to temper adverse repercussions from Moscow. Nevertheless, invoking Article 21 could result in long-term unintended consequences if Turkey does not truly believe there is an imminent threat of danger of war against it.



³⁹⁷ Turkey Min. of Foreign Affairs, *Implementation of the Montreux Convention* (last visited Nov. 25, 2023), <https://www.mfa.gov.tr/implementation-of-the-montreux-convention.en.mfa>.

³⁹⁸ Ozberk, *supra* note 379.

³⁹⁹ Heather Mongilio, *Turkey Closes Bosphorus, Dardanelles Straits to Warships*, USNI News (Feb. 28, 2022), <https://news.usni.org/2022/02/28/turkey-closes-bosphorus-dardanelles-strait-to-warships>.

⁴⁰⁰ The National, *Turkey blocks warships from Bosphorus and Dardanelle straits amid Russia-Ukraine crisis* (Feb. 28, 2022), <https://www.thenationalnews.com/world/2022/02/28/turkey-blocks-warships-from-bosphorus-and-dardanelle-straits/>.

THE ATTACK ON THE VASILY BEKH AND TARGETING LOGISTICS SHIPS

by James Kraska | Jul 11, 2022

On June 17, Ukrainian forces successfully used a U.S.-supplied Harpoon anti-ship cruise missile to attack and sink⁴⁰¹ a Russian resupply ship that “almost certainly”⁴⁰² carried weapons and reinforcements bound for Snake Island in the Black Sea. Two weeks later, on June 30, Russian troops evacuated the small outpost.⁴⁰³ Moscow had claimed the retreat from Snake Island was a “gesture of goodwill” in advance of recognizing a humanitarian corridor to permit the safe export of grain from Ukraine. But Ukraine said the Russians were forced out as their position on the barren rock had become untenable without logistical support. Ukraine raised its flag on Snake Island on July 4.⁴⁰⁴

The setback for Russia was apparently tied to the oldest of military challenges—force sustainment during combat. The capture of Snake Island may help Ukraine to position anti-ship cruise missiles south of Odessa

to weaken the Russian stranglehold on the port city.⁴⁰⁵

The Attack

The resupply ship that never reached Russian forces on the island is believed to be the Russian naval tugboat *Spasatel Vasily Bekh*.⁴⁰⁶ The ship had a loaded displacement of 1,670 tons. Part of the Black Sea Fleet, the *Vasily Bekh* was launched in 2016 and commissioned in 2017.⁴⁰⁷ The tugboat is designed to provide towing services for ships in distress, firefighting at sea and ashore, freshwater and electrical supply to other vessels, and to evacuate injured personnel. It carried a complement of 20 crew members with capacity for 36 more people and could carry tons of supplies.

Coming after the sinking of the Black Sea flagship *Moskva* on April 14, the strike on the *Vasily Bekh* underscores the Russian Navy’s inability to establish sea control in the

⁴⁰¹ Heather Mongilio, *DoD: Ukraine Sinks Russian Supply Ship with Harpoon Missile*, USNI News (July 1, 2022), https://news.usni.org/2022/07/01/dod-ukraine-sinks-russian-supply-ship-with-harpoon-missile?utm_source=USNI+News&utm_campaign=ea45d08f55-USNI_NEWS_DAILY&utm_medium=email&utm_term=0_0dd4a1450b-ea45d08f55-230852577&mc_cid=ea45d08f55&mc_eid=962cf58401.

⁴⁰² Stephen McIlkenny, *Ukraine Conflict: MoD Confirm Destruction of Russian Vessel near Snake Island as Ukrainian Forces ‘Neutralise Russia’s Ability to Establish Sea Control’*, THE SCOTSMAN (June 21, 2022), <https://www.scotsman.com/news/world/ukraine-conflict-mod-confirm-destruction-of-russian-vessel-near-snake-island-as-ukrainian-forces-neutralise-russias-ability-to-establish-sea-control-3739250>.

⁴⁰³ CBS News, *Russia Abandons Strategic Snake Island, the Early Symbol of Ukrainian Defiance* (June 30, 2022), <https://www.cbsnews.com/news/russia-snake-island-early-symbol-ukrainian-defiance/>.

⁴⁰⁴ Reuters, *Ukraine Now Says No Troops Yet on Recovered Snake Island to Raise Its Flag* (July 4, 2022), <https://www.reuters.com/world/europe/ukraine-flag-raised-again-snake-island-military-says-2022-07-04/>.

⁴⁰⁵ France 24, *Russia quits Snake Island, in blow to blockade of Ukraine ports* (June 30, 2022), <https://www.france24.com/en/live-news/20220630-russia-quits-snake-island-in-blow-to-blockade-of-ukraine-ports>.

⁴⁰⁶ Tayfun Ozberk, *Ukraine Strikes Russia’s Vasily Bekh Rescue Tug with Antiship Missiles*, NAVAL NEWS (June 17, 2022), <https://www.navalnews.com/naval-news/2022/06/ukraine-strikes-russias-vasily-bekh-rescue-tug/>.

⁴⁰⁷ KCHF. RU, *Rescue Tug Spasatel Vasily Bekh (SB-739)* (last visited Nov. 25, 2023), <https://www.kchf.ru/eng/ship/rescue/sb739.htm>.

western area of the Black Sea.⁴⁰⁸ The *Moskva* was the largest Russian warship damaged by enemy fire since 1941, when the Luftwaffe damaged a Soviet battleship in Kronshtadt.⁴⁰⁹ The Russian withdrawal from Snake Island also demonstrates the importance of combat logistics. While Russia maintains internal lines of communication that can feed the Russian war machine inside Ukraine, the Russian element that occupied Snake Island had to be supplied from the sea, raising questions about the rules for targeting ships supporting the armed forces in war.

Targeting Combat Logistics

As a Russian Navy tugboat, the *Vasily Bekh* was a public vessel and naval auxiliary of the armed forces, and therefore was lawfully subject to attack by the armed forces of Ukraine.⁴¹⁰ Auxiliary vessels are not warships, but they are owned or under the exclusive operation or control of the armed forces.⁴¹¹ Such State-owned or State-operated ships are used for the time being only on government non-commercial service and provide support to military forces, including provision of troops, fuel, armament, ammunition, and other supplies into the combat zone. They can also be used as floating bases and sustainment platforms for some types of naval operations, such as the mine countermeasures.

Auxiliaries are under the command of a civilian master rather than a naval officer. While they enjoy sovereign immunity, they are not protected from attack during armed conflict. Civilian mariner crew members of such ships are accredited to the armed forces and if captured are protected as prisoners of war.⁴¹² If naval auxiliaries are captured, title to the ship vests immediately in the captor government, and they may be converted directly for use by the enemy as war booty without the requirement to go through a prize court in admiralty.⁴¹³ Unlike warships, however, naval auxiliaries are not entitled to belligerent rights at sea, such as the right to capture enemy merchant ships as prize or the right to attack the enemy.⁴¹⁴

Targeting Civilian Merchant Ships

In light of the shortfall in naval logistics and force sustainment during the current conflict, Russia has been exploring options for optimizing a mixture of public and private ships to meet fleet combat requirements. On May 20, Russian Deputy Prime Minister Yury Borisov stated that Russia is reviewing its naval doctrine to expand the role of the Russian-flagged merchant fleet in support of the armed forces.

Merchant ships are those vessels not owned or operated exclusively by the State and are engaged in normal commercial trade, fishing,

⁴⁰⁸ Carole Landry, *The Sinking of the Moskva*, N.Y. TIMES (Apr. 14, 2022), <https://www.nytimes.com/2022/04/14/briefing/russia-ukraine-war-flagship-mariupol.html>.

⁴⁰⁹ Reuters, *The 'Moskva', Russia's lost Black Sea Fleet flagship* (Apr. 14, 2022), <https://www.reuters.com/world/europe/moskva-russias-lost-black-sea-fleet-flagship-2022-04-14/>.

⁴¹⁰ COMMANDER'S HANDBOOK, *supra* note 179, § 8.6.1

⁴¹¹ *Id.* § 2.3.1.

⁴¹² *Id.* § 11.6

⁴¹³ *Id.* § 8.6.1.

⁴¹⁴ *Id.* § 2.2.1.1.

passenger transportation, and other non-military operations. The experience of the Russian Navy during the current “special military operation” in Ukraine illustrates the value of employing civilian vessels as a force multiplier to the Military-Maritime Fleet (Voyenno-Morskoy Flot—VMF). Borisov stated that all Russian-flagged commercial ships should be built or refurbished so that they are dual-use vessels normally involved in civilian trade but called up to aid the Russian Navy when necessary. Although the civilian fleet has always been available to supplement the Russian Navy during armed conflict, Admiral Vladimir Valuyev, a former commander of Russia’s Baltic Fleet, said the change in policy could facilitate the transition.

As the Russian Navy turns toward its merchant fleet to provide combat logistics, it raises a different set of rules than those that apply to naval auxiliaries. During armed conflict at sea, enemy-flagged merchant ships, or neutral merchant ships owned or operating on behalf of the enemy, have enemy character.⁴¹⁵ This status means that they are liable to prize capture by opposing belligerent forces anywhere outside of neutral territorial seas. These ships are subject to capture if they are enemy flagged or are owned or operated by the enemy but flagged in a neutral State. Enemy merchant ships may be diverted by belligerent forces to a designated port or may be captured at sea with a prize crew installed. The documents of the captured vessel, including the log and cargo manifest, should

be secured. These papers should be used in court proceedings during prize adjudication. Unlike in the case of captured naval auxiliaries, prize adjudication is required before an enemy merchant ship can be converted to the use of the enemy. When military circumstances prevent capture and adjudication as prize, the merchant ships may be destroyed after all possible measures have been taken to provide for the safety of passengers and crew.⁴¹⁶

While naval auxiliaries may be targeted at all times outside of neutral territory based on their status as part of the enemy fleets, enemy merchant ships are liable to attack only if they take a direct part in the hostilities or take action against enemy vessels and aircraft. Likewise, if the Russian naval forces use merchant ships flagged in a neutral State, those vessels may also be liable to capture as prize or attacked as lawful targets if they resist visit and search or take a direct part in hostilities.

Merchant vessels that are owned or controlled by a belligerent possess enemy character and are liable to prize capture.⁴¹⁷ (Neutral ships that resist the belligerent right of visit and search to determine the enemy character of the ship or cargo also acquire enemy character.) Neutral merchant vessels taking a direct part in the hostilities on the side of the enemy or acting in any capacity as a naval or military auxiliary to the enemy forces are subject to attack.⁴¹⁸

⁴¹⁵ *Id.* § 7.5.

⁴¹⁶ *Id.* § 8.6.2.1.

⁴¹⁷ *Id.* § 7.5.2.

⁴¹⁸ *Id.* § 7.5.1.

Conclusion

The strike on the *Vasily Bekh* highlights the importance of logistics ships in armed conflict, the status of these vessels during armed conflict, and the rules for their prize capture or targeting. Naval auxiliaries like the *Vasily Bekh* are public vessels of the armed forces. Such ships may be targeted during armed conflict due to their status alone. The U.S. Military Sealift Command also operates dedicated naval auxiliaries that perform a variety of support functions, and they too are liable to attack (or capture as war booty). The U.S. Military Sealift Command operates strategic sealift auxiliaries to supply the force, including container ships, dry cargo and ammunition, and roll-on/roll-off ships, and other combat support ships to ensure the flow of forces in theater. Like the *Vasily Bekh*, these ships are subject to attack in an armed conflict and protecting them from Russian submarines would pose a defining challenge to NATO defensive operations.

Russia's plans to leverage greater support from merchant ships also implicates the law of naval warfare. Russian-flagged merchant ships are liable to capture by Ukrainian naval forces, and they may be converted to use after adjudication of prize in a court of admiralty jurisdiction.

The Russian merchant fleet has 1,155 ships and 7.7 million deadweight tons and could serve as an effective force multiplier for the Russian military services.⁴¹⁹ China's merchant fleet is among the top ten largest in the world, with 87 million deadweight tons and 4,881 ships.⁴²⁰ Decimated by uncompetitive costs of operation resulting from the Jones Act, the U.S. fleet is shockingly small and shrinking. The number of U.S. oceangoing commercial ships in the U.S. merchant fleet fell from 282 vessels to 182 ships since 2000.⁴²¹ This means that while Russia and China can supplement their auxiliary naval forces with national-flagged merchant ships, the United States would find that option more challenging.

This situation is ironic because unlike Russia and China, which enjoy internal lines of communication, U.S. requirements for force replenishment depend on a massive logistical flow to Asia and Europe. American forces operate forward, along the first island chain running from Japan to the Philippines, and on NATO's eastern border in Europe. Sustainment of these forces likely would require merchant shipping. Like Russia, the United States may also resort to contracts with merchant carriers to provide force sustainment. These merchant ships would also be liable to be captured by the enemy during armed conflict, and they may be attacked and destroyed if they resist capture.



⁴¹⁹ PortNews, *Russian-flagged fleet numbers 1,155 cargo ships with total deadweight of 7.7 million tonnes* (July 27, 2020), [https://en.portnews.ru/news/299357/#:~:text=As%20of%201%20July%202020,CNIIMF\)%2C%20told%20IAA%20PortNews](https://en.portnews.ru/news/299357/#:~:text=As%20of%201%20July%202020,CNIIMF)%2C%20told%20IAA%20PortNews).

⁴²⁰ Lloyd's List, *Top 10 flag states 2019* (Dec. 3, 2019), <https://lloydslist.com/LL1129840/Top-10-flag-states-2019#:~:text=PANAMA%20remains%20at%20the%20top,of%20the%20second%2Dplace%20holder>.

⁴²¹ Loren Thompson, *Dwindling U.S. Merchant Fleet Is a Crisis Waiting to Happen*, FORBES (Oct. 8, 2021), <https://www.forbes.com/sites/lorenthompson/2021/10/08/dwindling-us-merchant-fleet-is-a-crisis-waiting-to-happen/>.

OIL TANKERS AS “ENVIRONMENTAL TIME BOMBS,” OR NOT

by Mark Jessup | Aug 12, 2022

Last month, Russian forces used two anti-ship missiles to target an abandoned cargo tanker adrift in the northern Black Sea. The vessel was loaded with around 600 tons of diesel fuel. An earlier Russian missile airstrike had already disabled the same vessel during the initial invasion in late February, causing her to remain damaged and without a crew for over four months. According to the Interfax-Ukraine News Agency, the abandoned tanker, with its thousands of barrels of diesel fuel, constituted an “environmental time bomb.”⁴²² This post examines the incident and the existing environmental protections at issue under the law of armed conflict. It then provides a historical context for determining whether targeting oil tankers is sufficiently likely to cause long-term environmental damage to make attacks on them illegal in an armed conflict.

Background

The *Millennial Spirit* is a small (2,200-ton) Moldovan-flagged fuel oil tanker with a crew of about a dozen. On February 25, the day after Russia invaded Ukraine, Russian warships shelled the tanker and set it ablaze. Maritime tracking services put her last broadcast location at just over 12 nautical miles from Odessa, which places her just outside the territorial sea of Ukraine during

the initial attack. Videos of her aflame were available on Twitter that same day.⁴²³ A Ukrainian rescue craft reportedly rescued the crew, who were apparently all Russians. Several of the crew members suffered serious burn injuries.

Ukrainian authorities state that the vessel has been adrift in the Black Sea for over four months due to the ongoing conflict and Russia’s blockade of Ukraine’s ports. There she remained until last month, when she was hit during an airstrike by a Russian Kh-3 missile. *The Naval Institute Guide to World Naval Weapon Systems* describes this as the first supersonic anti-ship missile that could be launched by tactical aircraft.⁴²⁴ The vessel’s exact location at the moment of the second strike is not publicly known at this time.

Setting aside the obvious *jus ad bellum* violations of Russia’s aggression, there is no obvious military justification for this attack, and the Russian authorities apparently have not offered any explanation. It is also unclear whether the tanker was actually a lawful military objective, which would be a prerequisite to a lawful targeting. However, assuming that the vessel was a valid military objective and the strike met the criterion of military necessity, should Russia have been prohibited from striking it based

⁴²² Interfax, *Occupiers hit Moldavian tanker ‘Millennial Spirit’ with missile, drifting with remains of diesel fuel on board in Black Sea, remains of cargo burning—task force* (July 7, 2022), <https://interfax.com.ua/news/general/844365.html>.

⁴²³ OCINT&CC COE, X (formerly Twitter) (Feb. 25, 2022), https://twitter.com/ua_intelligence/status/1497206869986787330?s=20&t=GaUtrUMc-302EaA7IgXYDw.

⁴²⁴ Norman Friedman, *Naval Institute Guide to World Naval Weapon Systems* (U.S. Naval Institute, 5th ed., May 15, 2006), <https://www.usni.org/press/books/naval-institute-guide-world-naval-weapon-system>.

on environmental concerns? What is the appropriate balance of military necessity when considering the impact of thousands of barrels of oil being set ablaze or spilling into the sea?

Development of Existing Protections

Protecting the environment has increasingly become a significant concern during an armed conflict. Indeed, knowingly launching an attack that will cause “widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” is considered a *war crime* by the International Criminal Court.⁴²⁵

Almost all existing environmental protections post-date the Vietnam War’s Operation Ranch Hand,⁴²⁶ during which the U.S. sprayed over 20 million gallons of various herbicides like Agent Orange, covering over 4 million acres of land in the span of a decade. While the Environmental Modification Convention of 1976 sought to address the modification of the environment as a *means* of warfare, a few provisions in Additional Protocol I (AP I) of 1977 were designed to protect the environment as the *victim* of warfare.⁴²⁷ These have even been determined to have become customary international law by the ICRC’s

2005 study.⁴²⁸ However, these environmental protection provisions remain controversial. Several of the major powers, including the United States, France, and Great Britain, have all expressed some degree of reservation at their inclusion in AP I, and some have spoken out against their inclusion as customary law. Nonetheless, most States (including Russia and Ukraine) are bound by them.

When discussing the means and methods of warfare, Article 35(3) of AP I states the “basic rule” as follows: “It 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.” While “widespread” and “severe” remain somewhat vague terms, the Commentary to the Additional Protocols clarifies the understood meaning of “long-term” to be a period of decades or longer.⁴²⁹ Given the conjunctive, Article 35(3) only prohibits attacks that are expected to cause severe, widespread, *and* decades-long damage to the environment. This prohibition is restated again in Article 55, but there it is couched in terms of protecting the environment as a means to preserve the health and survival of the civilian population.

Some scholars agree with the U.K.’s *Law of War Manual* that the only difference of substance is “while Article 35 relates to all methods of

⁴²⁵ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁴²⁶ History.com Editors, *Agent Orange* (last updated May 16, 2019), <https://www.history.com/topics/vietnam-war/agent-orange-1>.

⁴²⁷ AP I, *supra* note 65.

⁴²⁸ ICRC, *Customary International Humanitarian Law* (Oct. 29, 2010), <https://www.icrc.org/en/document/customary-international-humanitarian-law-0#:.:text=A%20study%20published%20by%20the%20ICRC%20in%202005,today%20are%20non-international%20this%20is%20of%20particular%20importance.>

⁴²⁹ ICRC, *Commentary of 2016 on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016>.

warfare whether on land, sea, or in the air wherever in the world they are utilized, Article 55 only relates to environmental damage on the territory or in the territorial sea of a state party to the conflict.”⁴³⁰ Would that make a difference in contemplating a strike on an oil tanker outside the territorial sea of Ukraine? None at all. Both provisions *prohibit* means or methods expected to cause widespread, long-term, severe damage. But would the burning or spilling of large amounts of diesel fuel oil meet this threshold?

Burning or Spilling Oil

The damage caused by oil to the environment was contemplated when drafting AP I’s environmental protections. The Commentary to AP I indicates that there were delegations that wanted the heightened protection of Article 56’s “works or installations containing dangerous forces” to apply to “oil production installations and storage facilities for oil products.” However, this was not met with enough support for incorporation into the list with dams, dykes, and nuclear electrical generating stations, though oil facilities would obviously still be subject to the prohibitions on widespread, long-term, and severe damage. As the Commentary states,

There is no doubt that Article 55 ‘(Protection of the natural environment)’ will apply to the destruction of oil rigs resulting in oil gushing into the sea and leading to extensive damage such as that described in that article. As regards the destruction and setting alight of refineries and petroleum storage

facilities, it is hardly necessary to stress the grave danger that may ensue for the civilian population.

This Commentary on oil gushing in the sea or being lit on fire, published in the late 1980s during the Tanker Wars, serves as an ominous oracle of what would happen next.

The Gulf War

In 1991, Iraqi forces intentionally leaked over 240 million gallons of oil into the Persian Gulf, and upon retreat from Kuwait, set more than 700 oil wells ablaze as they left. It remains “one of the worst environmental disasters in recent memory.”⁴³¹ To put the Russian strike against the *Millennial Spirit* into perspective, the tanker was first struck while carrying around 600 tons of diesel fuel, which is over 4,000 barrels. The amount of oil that Iraqi forces intentionally released into the gulf was over 4 million barrels. When they lit the Kuwaiti oil fields on fire, oil burned at a rate of about 5 million barrels *per day*, and some fires continued to burn for several months. The destruction cannot be overstated. In fact, in February 1993 the United Nations published resolution 47/34:

Expressing its deep concern about environmental damage and depletion of natural resources, including the destruction of hundreds of oil-well heads and the release and waste of crude oil into the sea, during recent conflicts.

Noting that existing provisions of international law prohibit such acts, [and]

⁴³⁰ U.K. LOAC MANUAL, *supra* note 212.

⁴³¹ Youssef M. Ibrahim, *Most Oil Fires Are Out in Kuwait, but Its Environment Is Devastated*, N.Y. TIMES (Oct. 19, 1991), <https://www.nytimes.com/1991/10/19/world/most-oil-fires-are-out-in-kuwait-but-its-environment-is-devastated.html>.

Stressing that destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law.⁴³²

Similar sentiments regarding proportionality in any destruction of the environment were echoed a few years later in the ICJ's 1996 advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons*: "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives."⁴³³ Regardless of ratification of any specific treaty, the issue of proportionality—balancing excessive loss against military necessity—is embedded in environmental protections for every nation. The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, published around the same time as these other documents, was the very first IHL text to explicitly include "damage to or destruction of the natural environment" as part of the definition for "collateral damage."⁴³⁴

Unsurprisingly, this 1995 manual cites how "the experience of the Gulf War (1991) showed very clearly that there was at least an emerging rule forbidding the use of the marine environment as an instrument of warfare or making it an object of attack during an armed conflict at sea."

That manual, specifically applicable to the maritime arena, sets the "basic rule" as follows:

"Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited." These requirements apply equally to surface ships, submarines, and aircraft in an armed conflict at sea.

Prohibited vs. Proportional

It is generally accepted, then, that the test for lawfulness is the one reflected in the ICRC's customary Rule 43: "Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited." So, if the environmental damage is excessive compared to the anticipated military advantage, the strike is unlawful. Now what about when the military advantage is existentially high, but the damage to the environment is expected to cause widespread, long-term, and severe damage? This highlights the objections to these provisions. For those States party to AP I and that acknowledge their environmental protections as customary law, they would be bound by ICRC Rule 45: "The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited."

For a nation like the United States, however, the concern is that these absolute prohibitions

⁴³² G.A. Res. 47/37, Protection of the environment in times of armed conflict (Feb. 9, 1993), <https://docs.un.org/en/A/RES/47/37>.

⁴³³ ICJ Nuclear Weapons Advisory Opinion, *supra* note 259.

⁴³⁴ SAN REMO MANUAL, *supra* note 333.

“fail to acknowledge that use of such weapons is prohibited only if their use is clearly excessive in relation to the concrete and direct overall military advantage anticipated,” as expressed in the DoD *Law of War Manual*.⁴³⁵ The United States would make these strikes always a matter of *proportionality*, never *prohibition*. The U.S. response to the ICRC’s Customary IHL Study uses the following illustration:

Suppose that country A has hidden its chemical and biological weapons arsenal in a large rainforest, and plans imminently to launch the arsenal at country B. Under such a rule, country B could not launch a strike against that arsenal if it expects that such a strike may cause widespread, long-term, and severe damage to the rainforest, even if it has evidence of country A’s imminent launch, and knows that such a launch itself would cause environmental devastation.⁴³⁶

Therefore, the United States, and nations with similar reservations, find these provisions overly broad and ambiguous, and therefore do not accept this maximum cap on proportionality calculations. But is this distinction on proportionality and prohibition even necessary for our discussion on oil tankers? According to the U.K. *Law of War Manual*, the environmental protection provisions “do not automatically prevent certain types of military objectives such as nuclear submarines or supertankers from

being legitimate targets.” But if a supertanker was a military objective, how much environmental damage caused by striking it would be necessary for it to become an unlawful target? And even then, could it ever do so much damage that it became a *prohibited* target under AP I’s severe, long-term, and widespread analysis?

Long-Term Oil Spills?

During the Gulf War, millions of barrels’ worth of oil were spilled into the sea, and millions of barrels worth of oil were burned *per day*. The damage was certainly widespread and severe, but was it long-term? The world was rightfully horrified and assumed that this would cause irreparable damage for the foreseeable future. But as Prof. Dinstein states, “[S]ince then, many observers have concluded that—while the damage caused by Iraq was undeniably widespread and severe—the ‘long-term’ test (measured in decades) was not satisfied.”⁴³⁷ This was also the official finding of the U.S. Department of Defense in its *Report to Congress on the Conduct of the Persian Gulf War*.⁴³⁸ Boothby draws the same conclusion in *The Law of Targeting*, stating that “while the widespread and severe elements of the rule would seem to be satisfied, the evidence suggests that the long-term element was not breached. This may provide some assistance to those seeking to interpret the rule and apply it in

⁴³⁵ 2016 DoD LAW OF WAR MANUAL, *supra* note 27.

⁴³⁶ John B. Bellinger III & William J. Haynes II, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 89 INT’L REV. RED CROSS 443–471 (2007), https://international-review.icrc.org/sites/default/files/irrc_866_11.pdf.

⁴³⁷ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed. (Apr. 2016), <https://www.cambridge.org/core/books/conduct-of-hostilities-under-the-law-of-international-armed-conflict/6F968AB75832E7A46CD4FEE7CA86BB8F>.

⁴³⁸ U.S. DEP. OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (Apr. 1992), <https://www.globalsecurity.org/military/library/report/1992/cpgw.pdf>.

practice.”⁴³⁹ Accordingly, the environmental devastation of the Gulf War is a benchmark for oil damage.

Setting aside the burning oil fields and looking solely into the sea: If there was ever an oil spill that would trigger these “long-term” prohibitions, it would have been that one. It is estimated that the oil slick was roughly 100 miles by 40 miles, and at certain places was 5 inches thick. That was the world’s largest oil spill. Several times larger than that of the *Exxon Valdez*, and even bigger than that of *Deepwater Horizon*. So would Russia’s sinking the *Millennial Spirit* and spilling her oil be considered an “environmental time bomb?” As discussed in *The International Law of the Sea* by Rothwell and Stephens, tanker spills like *Exxon Valdez*’s have attracted a great deal of attention:

However, such oil spills account for only about 10 percent of the oil released into the environment each year, and tend to be mostly localised in their impacts. Moreover, although some local effects from these casualties may be evident across many decades, a major proportion of the initial pollution is relatively quickly degraded in the marine environment. A much greater volume of oil entering the marine environment comes from discharges from the normal operation of vessels.⁴⁴⁰

In perspective, the damage done by an oil tanker spill, while concerning, might not warrant the dramatic shock that we should reserve for an environmental time bomb.

Even if this term were just contemplating the pollution caused by the burning of oil, rather than its spillage, it does not even begin to compare with the devastation of the Kuwaiti oil fields. Thus, the environmental risk of striking the *Millennial Spirit* is a factor to consider, but the strike would not be prohibited on that basis.

Targeting Time Bombs

For those who have not ratified the Additional Protocols or expressed reservations to the environmental protections, and who have continued to speak out against deeming their (still controversial) prohibitions “customary,” sinking an oil tanker will *always* be a potentially lawful target if proportionality allows and military necessity dictates. This would be true whether bearing the small load of the *Millennial Spirit*, less than 5,000 barrels, or even a supertanker, which holds about 2 million barrels. As Professor Gary Solis summarizes in *The Law of Armed Conflict*, “[A] supertanker whose sinking would cause untold environmental damage could be targeted if [it] were used for military purposes, as long as military necessity and proportionality considerations were satisfied.”⁴⁴¹

However, the same would almost certainly be true for those nations bound by the environmental protections of API. It does not seem remotely plausible for the sinking or burning of a supertanker to cause more environmental damage than Iraq caused in the Gulf War, which has been widely

⁴³⁹ WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* (2012).

⁴⁴⁰ DONALD R. ROTHWELL & TIM STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* (2nd ed. 2016).

⁴⁴¹ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* (3rd ed. 2021).

determined to have fallen short of the “long-term” test for damage to the environment that remains widespread and severe for decades. Oil spills unrelated to armed conflicts have caused significant damage in diverse and sensitive ecosystems around the globe, but none with damage of the caliber that would trigger these prohibitions, had they applied. Accordingly, as Boothby concludes, the application of traditional targeting principles like necessity and proportionality apply with environmental protections, but “the attack of super-tankers is not, however, prohibited by international law.”⁴⁴²

Conclusion

There are myriad environmental concerns that can arise in preparing for and prosecuting an armed conflict. When AP I ultimately excluded oil production installations and storage facilities from the works and installations containing dangerous forces, the Commentary notes that “extending the special protection to such installations

would undoubtedly have posed virtually insoluble problems.” While these discussions contemplated oil damage being subject to prohibition under Article 55, historical analysis has since provided the benchmark of application in the Gulf War. Compared to fields of burning oil and flooded gulfs, even industrial supertankers remain potential valid military objectives, let alone a small abandoned tanker in the Black Sea. As always, military necessity and proportionality govern.

Our environment is precious. We have a duty to steward it well. Having spent time in the Black Sea for a military exercise, I want it to remain as vibrant as ever. But even Jean Pictet said, “Nothing is more dangerous than ‘unbridled humanitarianism’ acting from the best intentions, but remote from reality.”⁴⁴³ Accordingly, we must accept that if a tanker of this size ever became a valid military objective, the law of armed conflict would consider it a potential target, not a prohibited time bomb.



⁴⁴² BOOTHBY, *supra* note 439.

⁴⁴³ Jean Pictet, *The Formation of International Humanitarian Law*, INT’L REV. RED CROSS 526, 528 (Jan.–Feb. 1985), <https://international-review.icrc.org/sites/default/files/S002086040007279Xa.pdf>.

“DAMN THE TORPEDOES!”: NAVAL MINES IN THE BLACK SEA

by Ben Rothchild and Mark Jessup | Mar 15, 2023

For over a century the immortal battle cry of Rear Admiral Farragut has sounded throughout naval lore—“Damn the torpedoes! Full speed ahead.”⁴⁴⁴ As it turns out, what Admiral Farragut was damning are what we would today refer to as naval contact mines. Since that era, the means and methods of naval mining have gone largely unchanged, and similarly, so has the law regulating it. Currently, reports indicate that hundreds of rudimentary sea mines have been deployed in the Black Sea since the Russian invasion of Ukraine in February 2022.⁴⁴⁵ Many of these mines subsequently came untethered from their moorings, with claims that roughly 400 R-421-75-type automatic contact mines had gone adrift near the outset of the war,⁴⁴⁶ in a contemporary and perilous take on the age-old “Anchors Aweigh.”

Subsequent reports of suspected mine strikes on floating vessels and civilian deaths have been attributed to these stray sea mines and give rise to the inference that these mines lack appropriate fail-safes or self-neutralizing technology.⁴⁴⁷ The associated risk to maritime trade has also resulted in the rise of transportation and insurance costs^{448, 449} for any future maritime shipping. To make matters worse, the Ukrainian government has claimed that these mines were intentionally set adrift in a false-flag attempt by Russia to frame Ukrainian forces and hold global trade hostage.⁴⁵⁰ Setting ownership or responsibility for these mines aside, the mere suggestion that a belligerent could hold much of the world ransom by using a major threat to maritime trade raises unease.

In light of the concerning use of naval mines in the Russian-Ukrainian conflict, and the recent

⁴⁴⁴ Tamara Moser Melia, *Damn the Torpedoes: A Short History of the U.S. Naval Mine Countermeasures, 1777–1991*, CONTRIBUTIONS TO NAVAL HISTORY 4 (1991), <https://www.ibiblio.org/hyperwar/NHC/NewPDFs/USN/USN,%20DAMN%20THE%20TORPEDOES,%20Naval%20Mine%20Countermeasures,%201777-1991.pdf>.

⁴⁴⁵ Charlie Dunlap, *Guest Post: Prof. Pete Pedrozo on Dangerous Waters: Use of Naval Mines in the Russia-Ukraine Conflict*, LAWFIRE (June 15, 2022), <https://sites.duke.edu/lawfire/2022/06/15/guest-post-prof-pete-pedrozo-on-dangerous-waters-use-of-naval-mines-in-the-russia-ukraine-conflict/>.

⁴⁴⁶ The Monitoring Group of the Black Sea Institute of Strategic Studies, *WARNING! Real danger at sea: Russia has mined the recommended routes from the Bosphorus to Odessa, blaming it on Ukraine*, BLACK SEA NEWS (Mar. 19, 2022), <https://www.blackseanews.net/en/read/186754>.

⁴⁴⁷ Jennifer Hassan, *Explosive Mines Bring Dangerous Beach Season to Ukraine*, WASH. POST (June 19, 2022), <https://www.washingtonpost.com/world/2022/06/19/ukraine-beaches-mines-russia-war/>.

⁴⁴⁸ Ann Koh & Alaric Nightingale, *The Cost of Insuring Black Sea Shipping Is Out of Control*, BLOOMBERG (Apr. 8, 2022), <https://www.bloomberg.com/news/articles/2022-04-08/ships-entering-the-black-sea-are-becoming-almost-uninsurable?leadSource=uverify%20wall>.

⁴⁴⁹ Reuters, *Explainer: Obstacles to overcome before Ukraine grain deal eases global food crisis* (Aug. 1, 2022), <https://www.reuters.com/markets/commodities/obstacles-overcome-before-ukraine-grain-deal-eases-global-food-crisis-2022-08-01/>.

⁴⁵⁰ Ministry of Foreign Affairs of Ukraine, *Statement of the Ministry of Foreign Affairs of Ukraine on the illegal activities of the Russia's navy in the Black Sea* (Mar. 30, 2022), <https://mfa.gov.ua/en/news/statement-ministry-foreign-affairs-ukraine-illegal-activities-russias-navy-black-sea>.

proliferation of mine-laying tactics⁴⁵¹ and equipment,⁴⁵² this post examines the existing legal framework regulating naval mines in an armed conflict, and aims to determine whether the current rules governing their use are sufficient to alleviate humanitarian concerns related to their indiscriminate use.

A Brief History

Naval mining has been a part of warfare for centuries, though it rose to prominence in the late 1800s. The American Civil War saw both the tactical and strategic implementation of naval mines, but it wasn't until their widespread use in the Russo-Japanese War (1904–1905) that nations began to express international concern with their regulation. During and immediately following the war, naval mines had a devastating impact on innocent commercial shipping, which led many nations to seek an agreement on their use and emplacement. Accordingly, most major powers joined the Hague Convention VIII of 1907 Relative to the Laying of Automatic Submarine Mines (Hague VIII),⁴⁵³ though conspicuously not Russia. The five short substantive provisions of Hague VIII remain the only existing form of treaty law governing the employment of naval mines, with the remainder of restrictions on the use of naval mines found in customary international law. The framework for our current legal

restrictions on naval mines remains today the same as it was articulated in the preamble of Hague VIII in 1907:

Inspired by the principle of the freedom of sea routes, the common highway of all nations;

Seeing that, although the existing position of affairs makes it impossible to forbid the employment of automatic submarine contact mines, it is nevertheless desirable to restrict and regulate their employment in order to mitigate the severity of war and to ensure, as far as possible, to peaceful navigation the security to which it is entitled, despite the existence of war.⁴⁵⁴

Accordingly, the parties to the Convention codified this desire for international freedom of the seas and security for peaceful navigation in the provisions following.

Hague VIII

Article 1⁴⁵⁵ addresses potential indiscriminate damage by mines, forbidding the use of armed unanchored (free-floating) mines that don't become harmless after an hour of emplacement, or in the case of an anchored mine that accidentally breaks free from its mooring, immediately become harmless.

Articles 2 and 3 address the protection of commercial shipping, forbidding its

⁴⁵¹ Prakash Nanda, *Taiwan Is Deploying 'Cheap' Minelayers & Their Mines with US Help to Target 'Expensive' Chinese Warships*, EURASIAN TIMES (Feb. 6, 2023), <https://www.eurasiantimes.com/taiwan-is-deploying-cheap-minelayers-their-mines-with-us-help-to-target-expensive-chinese-warships/>.

⁴⁵² Rojoef Manuel, *BAE, Iveco Introduce Amphibious Combat Vehicle to International Market*, DEFENSE POST (May 18, 2023), https://www.thedefensepost.com/2023/05/18/amphibious-combat-vehicle-international-market/?expand_article=1.

⁴⁵³ Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, U.S.T.S. 541, 2 A.J.I.L. Supp. 138 [hereinafter Hague VIII].

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* art. 1.

intentional targeting.^{456, 457} These articles require belligerents to take active precautions to protect its security, to include notifying governments and ship owners of all “danger zones.”⁴⁵⁸

Article 4 addresses the obligation of neutral powers that mine their own coasts to observe the same rules and take the same precautions as belligerents.⁴⁵⁹ At the end of the conflict, Article 5 requires all parties to do their utmost to remove any mines they laid, and provide notification of any mines laid in another nation’s waters, for their prompt removal.⁴⁶⁰

These short provisions make up the entirety of treaty-based regulations specific to the employment of naval mines. The only other “operative” obligation is in Article 6, which states that any powers that don’t have mines capable of disarming themselves after loss of control will “undertake to convert the ‘matériel’ of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements.”⁴⁶¹

The primary emphasis of naval mine regulation was, and remains, ensuring that no armed mines drift freely in the water, and providing precise protection and precautions for commercial shipping. This was to be accomplished by ensuring every naval

mine was capable of disarming itself when control was lost and prohibiting all means of indiscriminate employment. While this would seem an appropriate solution to ameliorate all international concern, Article 7 states that only treaty members are bound to follow these provisions, and even then only when all belligerents are also treaty members.⁴⁶² Because this clause notably excludes both Russia and Ukraine, the incorporation of these principles into customary international law will now be examined.

San Remo Manual

Since the Great White Fleet set out to circumnavigate the globe in 1907, there have been major technological revolutions in sea power, but no ratifications of modern treaties specifically regulating naval warfare.⁴⁶³ The *San Remo Manual* was adopted in 1994 “to provide a contemporary restatement of international law applicable to armed conflicts at sea,” as explained in the manual’s introduction.⁴⁶⁴ Although the manual itself is not binding on States, it is the result of several years of the world’s leading experts convening to distill and articulate the current state of the law governing naval operations. Similar present-day discussions have been underway to create the upcoming *Newport Manual on the Law of Naval Warfare*, years

⁴⁵⁶ *Id.* art. 2.

⁴⁵⁷ *Id.* art. 3.

⁴⁵⁸ Collins Dictionary, *Danger Zone* (last visited Jan. 19, 2024), <https://www.collinsdictionary.com/dictionary/english/danger-zone>.

⁴⁵⁹ Hague VIII, *supra* note 453, art. 4.

⁴⁶⁰ *Id.* art. 5.

⁴⁶¹ *Id.* art. 6.

⁴⁶² *Id.* art. 7.

⁴⁶³ Naval History and Heritage Command, *The Great White Fleet* (Jan. 3, 2022), <https://www.history.navy.mil/research/histories/ship-histories/the-great-white-fleet.html>.

⁴⁶⁴ SAN REMO MANUAL, *supra* note 333.

in the making.⁴⁶⁵ These manuals not only look at historic treaties like Hague VIII, but also look at consistent State practice over time, a cornerstone of customary international law.

Regarding naval mines, the *Manual's* section on Means of Warfare⁴⁶⁶ is essentially a modernized Hague VIII, incorporating the core principles of the law of armed conflict, and articulating the Hague Regulations, use of the now-universal maritime zones and navigational obligations of the United Nations Convention on the Law of the Sea (UNCLOS).⁴⁶⁷ So, while some States may not have joined Hague VIII, its provisions now have binding legal authority under customary international law. Even the International Court of Justice has cited Hague VIII in asserting a State's responsibility to provide notice of danger zones caused by naval mines.⁴⁶⁸ These obligations from Hague VIII are also reflected in many State military manuals, including the United States' *DoD Law of War Manual*⁴⁶⁹ and *The Commander's Handbook on the Law of Naval Operations*,⁴⁷⁰ as well as those of the United Kingdom,⁴⁷¹ Denmark,⁴⁷² France,⁴⁷³ and Germany,⁴⁷⁴ and to highlight their binding customary nature, States that did *not* ratify Hague VIII like Canada⁴⁷⁵ and Australia.⁴⁷⁶

So are these regulations sufficient to protect the freedom of the seas? Have their principles become dated by emerging technology? In its preliminary remarks regarding naval mines, the *San Remo Manual* comments on the formulation of Hague VIII:

At the time the Convention was drafted, it was deplored that no absolute prohibition could be agreed upon. The fact that restrictions as formulated in the Convention only apply to one specific category of mines (automatic contact mines) is commonly considered to be a major defect, although practice by belligerents in the first Gulf War showed that the provisions of the Convention have continued validity in modern naval warfare.

Thus, an examination of recent conflicts can illustrate the applicability of these century-old proscriptions in a technologically modernized context. Operationally, the Gulf War serves as a prime example of the great utility of naval mines for use in sea denial, but from a humanitarian lens, it also highlights the concomitant cost associated with clearing dangerous zones after the conflict.

⁴⁶⁵ Jeanette Steele, *U.S. Naval War College Hosts Conference on Revisions to Legal Manual Regarding Armed Conflict at Sea*, U.S. NAVAL WAR COLLEGE (Dec. 31, 2019), <https://usnwc.edu/News-and-Events/News/US-Naval-War-College-Hosts-Conference-on-Revisions-to-Legal-Manual-Regarding-Armed-Conflict-at-Sea>.

⁴⁶⁶ SAN REMO MANUAL, *supra* note 333, paras. 78–92.

⁴⁶⁷ UNCLOS, *supra* note 339.

⁴⁶⁸ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14 (June 27).

⁴⁶⁹ 2016 DoD LAW OF WAR MANUAL, *supra* note 27.

⁴⁷⁰ COMMANDER'S HANDBOOK, *supra* note 179.

⁴⁷¹ U.K. LOAC MANUAL, *supra* note 212.

⁴⁷² Danish Min. of Def., *Military Manual on international law relevant to Danish armed forces in international operations*. (2016).

⁴⁷³ Ministère Des Armées (French Min. of Arms), *Manual of the Law of Military Operations* (2022).

⁴⁷⁴ Bundesministerium der Verteidigung (German Min. of Def.), *Law of Armed Conflict Manual* (2013).

⁴⁷⁵ Défence Nationale (Canadian National Def.), *Law of the Armed Conflict at the Operational and Tactical Levels* (2001).

⁴⁷⁶ Australian Def. Force, *Executive Series ADDP 06.4 Law of Armed Conflict* (May 11, 2006).

Examples in Modern Naval Warfare

As an example highlighting the utility of naval mines, in the years following the Gulf War the U.S. General Accounting Office published a congressional report on budget realignment for Navy Mine Warfare.⁴⁷⁷ It explained how the two mines that damaged two U.S. warships during 1991's Desert Storm cost \$10,000 and \$1,500, but collectively inflicted \$21.6 million in damage. The report then concluded, "Naval mines are extremely economical weapons and are readily available on the world's arms market."

For conceptual clarity's sake, *modern* naval warfare does not necessarily imply the use of *modern* naval mines. Many of the mines used against the United States in the Gulf were from the WWI era. This further highlights the utility of naval mines, as their simple design can remain an effective deterrent for several decades after their construction. Even in 1950, very primitive sea-mining operations by the communist forces in the Korean War were able to halt all ship movement off the coast of Wansong, Korea. As a result, Americans attempting amphibious operations with hundreds of ships were delayed offshore for several days. This inconceivable frustration led the Amphibious Task Force Commander, Rear Admiral Smith, to proclaim, "We have lost command of the sea to a nation without

a navy, using weapons that were obsolete in World War I, laid by vessels that were used at the time of the birth of Jesus Christ."⁴⁷⁸

However, as required by the principle of proportionality, the anticipated military advantage to be gained must be weighed against expected incidental loss of civilian life, injury to civilians, or damage to civilian objects. Between 1980 and 1988 the parties to the Iran-Iraq War collectively released hundreds of naval mines in unmarked minefields across the Arabian Gulf and millions more landmines along their borders. Similar to the current crisis in the Black Sea, drifting mines in the Arabian Gulf presented a major chokepoint for the global fuel market, freedom of navigation, and trade for otherwise closed-off nations bordering its coasts. In addition to the damage caused by prohibiting navigation, these mines alone reportedly resulted in damage to as many as 35 ships over the course of the war.⁴⁷⁹

In response, the UN Security Council condemned the attacks on neutral shipping vessels and called for a ceasefire in 1986,⁴⁸⁰ and following the initiation of the ceasefire in 1988,⁴⁸¹ the Security Council appointed a technical observer group, called the UN Iran-Iraq Observer Group (UNIIMOG),⁴⁸² to supervise the end of hostilities. This group consisted of over 400 members with 350 UN Military Observers from over 26

⁴⁷⁷ U.S. Gov't Accountability Off., *Navy Mine Warfare Budget Realignment Can Help Improve Countermine Capabilities* (Mar. 1996).

⁴⁷⁸ National Research Council, *Oceanography and Mine Warfare*, WASHINGTON, DC: THE NATIONAL ACADEMIES PRESS (2000).

⁴⁷⁹ Anthony H. Cordesman, *Chapter XIV—the Tanker War and the Lessons of Naval Conflict*, THE IRAN-IRAQ WAR (May 1, 1990), https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/media/csis/pubs/9005lessonsiraniraqii-chap14.pdf.

⁴⁸⁰ S.C. Res. 582 (1986), <https://digitallibrary.un.org/record/116401?ln=en>.

⁴⁸¹ S.C. Res. 619 (1988), <https://digitallibrary.un.org/record/44162>.

⁴⁸² United Nations Iran-Iraq Military Observer Group, Background (last visited Dec. 5, 2023), <https://peacekeeping.un.org/sites/default/files/past/uniimogbackgr.html#two>.

countries and maintained a land, air, and naval presence.⁴⁸³ From 1988 to 1991, as part of its UN mandate, this group was able to facilitate the exchange of information between parties to the conflict regarding the location of unmarked minefields along the States' borders. Meanwhile, other UN members unilaterally provided assistance in the Arabian Gulf clearing drifting naval mines as well as moored mines, the locations of which were not properly disclosed.

Back to the Black Sea

As videos continue to surface of unanchored naval mines detonating near coastal towns in the Black Sea,^{484, 485} it is clear that the “effective neutralization” required by international law is not occurring. Originally highlighted over a century ago, the aim of regulating the emplacement of sea mines remains entirely unaltered by modern technology or any current geopolitical tensions: “to ensure, as far as possible, to peaceful navigation the security to which it is entitled.”

So how should this humanitarian aim be balanced against military necessity? As demonstrated above, sea mines remain an overwhelmingly effective and economic means of sea denial. Their benefit in deterring naval operations cannot be overstated. However, the existing regulations already incorporate the core principles of distinction and necessity in their framework. Militarily, there is little operational advantage to an

uncontrolled naval mine compared to a controlled one, so neutralization after loss of control would not detract from the concrete military advantage gained. Thus, if the current proscriptive regime were adhered to, military objectives would still be met, but civilian populations and objects would be protected from unnecessary risk. Thus, today's humanitarian struggle is not whether the existing law sufficiently regulates modern naval mining, but whether the existing international order sufficiently enforces that existing law.

The world is witnessing a prolonged large-scale international armed conflict (entirely based on an act of unlawful aggression by a member of the UN Security Council, no less) in which allegations of law of armed conflict violations are widespread. Accordingly, the international response to this conflict will serve not only to ensure accountability for recent actions, but to reinforce a new norm for any future conflicts on the horizon. State practice serves to set expectations in conflict. Irresponsible and indiscriminate mining cannot be an expectation any military or civilian population, for that matter, carries forward.

The existing legal regime governing naval mines is sufficient, but the status quo must change to avoid catastrophic consequences posed by both ongoing and looming conflicts. A potential means of international supervision would be the creation of an even

⁴⁸³ Anthony Cordesman, *Chapter X—the Combination of Iraqi Offensives and Western Intervention Force Iran to Accept a Cease-Fire: September 1987 to March 1989, THE IRAN-IRAQ WAR* (Sep. 26, 2003), https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/media/csis/pubs/9005lessonsiraniraqii-chap10.pdf.

⁴⁸⁴ Meduza, *Drifting sea mine explodes off Georgia's Black Sea coast near Batumi* (Feb. 13, 2023), <https://meduza.io/en/news/2023/02/13/drifting-sea-mine-explodes-off-georgia-s-black-sea-coast-near-batumi>.

⁴⁸⁵ Tayfun Ozberk, *Sea Mine Explodes on Turkey's Black Sea Coast*, NAVAL NEWS (Feb. 14, 2023), <https://www.navalnews.com/naval-news/2023/02/sea-mine-explodes-on-turkeys-black-sea-coast/>.

less-flattering acronym, UNRUMOG (i.e., a UN Russia-Ukraine Military Observer Group), to serve as a collective of neutral UN members to enforce international legal obligations. Pertinently, this UNRUMOG could serve as an intermediary that gathers information on unmarked naval minefields and provides notices to mariners and the international community of resulting dangers to peaceful navigation.

Additionally, through this cooperation and exchange of information, the observer group could require the retrieval of any mines that slip from their moorings and wander afield. Although this UNRUMOG would precede a ceasefire, this would not be the first time the UN has appointed Military Observers in an active conflict through a UN Security Council Resolution.⁴⁸⁶ While there may be cause for concern that Russia would quickly veto this proposal, the resolution would not

condemn or condone Russia's actions, as it would merely create a neutral entity that ameliorates the harmful effects of the ongoing conflict—humanitarian support that any belligerent would be hard-pressed to justify denying.

Concluding Thoughts

In the face of the growing proliferation of minelaying systems and tactics, the international community *must* place a heightened emphasis on enforcing existing regulations on naval mines. Altogether, this new status quo would reinforce the rule of law, deter violations (such as false-flag mine deployments), increase attribution, protect against threats to peaceful navigation, and alleviate the very humanitarian concerns articulated in 1907: *freedom of the seas and peaceful navigation*.



⁴⁸⁶ S.C. Res. 1925 (May 28, 2010), <http://unscr.com/en/resolutions/1925>.

UKRAINE'S "SUICIDE DRONE BOATS" AND INTERNATIONAL LAW

by Charles Layne | Jan 25, 2023

Aside from the sinking of the Russian cruiser *Moskva* early in the conflict, no aspect of the naval dimensions of the Russia-Ukraine war has seized the attention of defense analysts more than the events of October 29 near Sevastopol. Using seven unmanned surface vessels (USVs), in concert with unmanned aerial systems (UASs), Ukraine launched a coordinated attack on Russian naval forces, including the minesweeper *Ivan Golubets* and the new Black Sea Fleet flagship *Admiral Makarov*.⁴⁸⁷

The strike set off a flurry of commentary from defense experts, although not for the damage it inflicted.⁴⁸⁸ Indeed, Russian losses in the attack appear inconsequential. Instead, analysts found compelling the strike's implications for the future of naval warfare. The world's navies are now on notice: Low-cost, dynamically maneuverable "suicide" USVs could hold multimillion-dollar, even billion-dollar, warships at risk. As defense analyst H.I. Sutton observed,

Putting a warhead on a small USV and ramming an enemy warship should have been obvious. But for political reasons, and possibly a lack of imagination in

some quarters, that's not what navies were asking for. That may now change.

As straightforward as it all sounds, lurking behind the basic operational concept Sutton describes are important international law issues. This post will explore those issues. But before doing so, it's necessary to say more about the new craft attracting so much attention.

Ukraine's "Shadowy Kamikaze Drone Boats"

The Sevastopol attack wasn't the first time boats have been packed with explosives and hurled toward an enemy. Sir Francis Drake, the Germans in World War I, and the Houthis all employed the technique with varying success.⁴⁸⁹ But the Ukrainian attack stands out for bringing so many elements together: operational nuance, modern technology, number of craft, small size, and, above all, extremely low cost and low risk to the attacking force.

Two weeks after the attack, Ukraine lifted the veil on its new weapon in a sleek United24⁴⁹⁰ crowdsourcing campaign aimed at building

⁴⁸⁷ Howard Altman, Stetson Payne & Tyler Rogoway, *Ukraine Unleashes Mass Kamikaze Drone Boat Attack on Russia's Black Sea Fleet Headquarters*, THE WARZONE (Oct. 29, 2022), <https://www.thedrive.com/the-war-zone/ukraine-unleashes-mass-kamikaze-drone-boat-attack-on-russias-black-sea-fleet-headquarters>.

⁴⁸⁸ Tyler Rogoway, *Ukraine's Unprecedented Mass Drone Boat Attack Was a Wakeup Call*, THE WARZONE (Nov. 1, 2022), <https://www.thedrive.com/the-war-zone/ukraines-unprecedented-mass-drone-boat-attack-was-a-wakeup-call>.

⁴⁸⁹ Christopher P. Cavas, *New Houthi weapon emerges: a drone boat*, DEFENSE NEWS (Feb. 19, 2017), <https://www.defensenews.com/digital-show-dailies/index/2017/02/19/new-houthi-weapon-emerges-a-drone-boat/>.

⁴⁹⁰ United24, Homepage (last visited Dec. 5, 2023), <https://u24.gov.ua/>.

more.⁴⁹¹ The “jet-black, very low-slung, jet-drive propelled”⁴⁹² craft are 18 feet long and weigh about 1 ton. According to the United24 website,⁴⁹³ each USV can travel 500 miles with a top speed of 50 mph. Each can carry a “combat load” of 440 pounds, though it isn’t clear how such a payload reduces range or speed. Further, experts have identified “bow-mounted impact detonation sensors”⁴⁹⁴ and speculated that a SpaceX Starlink satellite internet antenna adorns the rear.⁴⁹⁵ Described as craft that “can be built in almost any garage,”⁴⁹⁶ the Ukrainian USVs employ civilian, off-the-shelf components.

Details on exactly how the navigation system works are not disclosed, for obvious reasons. But the basic specifications indicate that the USVs are guided via satellite and inertial navigation and can also be piloted remotely using a video system. It is believed the craft employ a hands-off concept in which the USV is guided to the general area of its target with GPS, at which time a pilot picks up control for the terminal attack run.⁴⁹⁷ Indeed, a promotional video on the United24 website shows an operator at a console.⁴⁹⁸

Moreover, footage from the Sevastopol attack shows the craft maneuvering to avoid overhead fire.⁴⁹⁹ Notably, the USVs have autonomous features. But based on the available information, autonomy extends only to navigation. That is, it appears the craft do not have the controversial capability of identifying, selecting, and engaging targets autonomously.

Finally, how much damage a single USV can inflict on a warship is up for debate. Here, the sinking of *Moskva* is instructive. Following its demise, analysts questioned professionalism and damage control standards on Russian warships, especially among a largely conscripted force.⁵⁰⁰ Others have speculated that Russian ship designers sacrificed survivability in their drive to pack as much firepower aboard vessels as possible.⁵⁰¹ Accordingly, it’s conceivable that a lone USV could sink a Russian warship. More likely, Ukraine will continue to use USVs in swarms—and possibly in numbers exceeding those at Sevastopol—to overwhelm conventional defensive systems.

⁴⁹¹ United24, *A Fundraiser That Will Become a Game-Changer Join the Formation of the World’s First Naval Fleet of Drones* (last visited Dec. 5, 2023), <https://u24.gov.ua/navaldrones>.

⁴⁹² Howard Altman, *Ukraine’s Shadowy Kamikaze Drone Boats Officially Break Cover*, THE WARZONE (Nov. 11, 2022), <https://www.thedrive.com/the-war-zone/ukraines-shadowy-kamikaze-drone-boats-officially-break-cover>.

⁴⁹³ United24, *supra* note 490.

⁴⁹⁴ H.I. Sutton, *Ukraine’s New Drone Boats That Will Change Naval Warfare, Explained* (YouTube, Oct. 31, 2022), https://www.youtube.com/watch?v=C_tvZufo4hE.

⁴⁹⁵ Joseph Trevithick, *Mystery Drone Boat Washes Up Near Home of Russia’s Black Sea Fleet (Updated)*, THE WARZONE (Sep. 21, 2022), <https://www.thedrive.com/the-war-zone/mystery-drone-boat-washes-up-near-home-of-russias-black-sea-fleet>.

⁴⁹⁶ H.I. Sutton, *Why Ukraine’s Remarkable Attack on Sevastopol Will Go Down in History*, NAVAL NEWS (Nov. 17, 2022), <https://www.navalnews.com/naval-news/2022/11/why-ukraines-remarkable-attack-on-sevastopol-will-go-down-in-history/#:~:text=On%20October%2029%202022%20seven,frigate%20and%20minesweeper%20were%20hit>.

⁴⁹⁷ Altman, *supra* note 492.

⁴⁹⁸ United24, *supra* note 490.

⁴⁹⁹ Guardian News, *Footage Appears to Show Drone Boat Attack on Russian Ships in Crimea* (YouTube, Oct. 30, 2022), <https://www.youtube.com/watch?v=VeqsZwkqhSo>.

⁵⁰⁰ Tayfun Ozberk, *Analysis: Chain of Negligence Caused the Loss of the Moskva Cruiser*, NAVAL NEWS (Apr. 17, 2022), <https://www.navalnews.com/naval-news/2022/04/analysis-chain-of-negligence-caused-the-loss-of-the-moskva-cruiser/>.

⁵⁰¹ Perun, *The Naval War in Ukraine—the Moskva, Missiles & Lessons* (YouTube, Oct. 23, 2022), <https://www.youtube.com/watch?v=YrgCPsock6w>.

Legal Status of USVs

Scholars analyzing USVs under international law usually begin with the question of whether these craft qualify as “ships” under the law of the sea, and if so, whether they qualify as “warships” (see *U.S. Navy/Marine Corps/Coast Guard Commander’s Handbook*⁵⁰² § 2.2.1 and § 2.3.5; subsequent cites to *Commander’s Handbook*).

The main advantage flowing from ship status is navigational rights, which allow for free and efficient movement around the world. For example, if USVs qualify as ships, they would enjoy the regime of transit passage through international straits and, in peacetime, innocent passage through foreign territorial seas (United Nations Convention on the Law of the Sea,⁵⁰³ Articles 38 and 17). In times of war, ships of a belligerent may also enjoy mere passage through a neutral State’s territorial sea,⁵⁰⁴ though a neutral State can restrict or even prohibit this passage altogether so long as it does so on a nondiscriminatory basis (*Commander’s Handbook*⁵⁰⁵ § 7.3.4). The neutral State may not, however, suspend passage in international straits or archipelagic sea lanes (at § 7.3.4).

As to warship status, the principal advantage flowing from that designation is belligerent rights. Namely, USVs qualifying as warships would be entitled to attack enemy targets

at sea and enforce blockades, among other hostile activities.

Ship Status

The USVs described above are not “ships” for one basic reason: Ukraine has taken no action to flag them as such. As has been observed, “the UNCLOS regime is built on the principle of flag state primacy and subsequent regulation of ships.”⁵⁰⁶ Under Article 91 of UNCLOS, each state sets the conditions for the registration of ships in its territory.⁵⁰⁷ Thus, if Ukraine has not flagged its USVs as ships—and to all appearances it has not—then the craft are not ships under the law.

In the future, conditions could evolve to change this result. For example, States could begin flagging their USVs as ships in large numbers. The customary understanding of “ship” might then expand to include most types of USVs. In that circumstance, Ukrainian USVs not flagged would still be sovereign property, but their legal ability to exercise belligerent rights (as discussed below) would be in doubt. As matters stand, though, State practice has not reached a point where this is a concern.

Regardless, ship status and navigation rights matter little to Ukraine at the moment. Most importantly, their USVs have limited range. Currently, they do not have the technical capability to navigate beyond the Turkish Straits (to say nothing of limits imposed by

⁵⁰² COMMANDER’S HANDBOOK, *supra* note 179.

⁵⁰³ UNCLOS, *supra* note 339.

⁵⁰⁴ Hague XIII, *supra* note 78.

⁵⁰⁵ COMMANDER’S HANDBOOK, *supra* note 179.

⁵⁰⁶ Jennifer Parker, *Autonomous Vessels and International Law*, AUSTRALIAN NAVAL INSTITUTE (Jan. 14, 2022), <https://navalinstitute.com.au/20335-2/>.

⁵⁰⁷ UNCLOS, *supra* note 339.

Türkiye under the Montreux Convention⁵⁰⁸). Further, given the geography of the Black Sea, there is no territorial sea or international strait standing between Ukraine and the Russian ships it targets. So far, Ukraine's maritime attacks have been clustered off Ukraine's coast and near Crimea. There's every reason to think this situation will persist, leaving Ukraine no reason to concern itself with navigation rights and passage regimes.

Warship Status

If Ukraine *had* designated its USVs as ships, the next crucial step would have been to designate them as “warships.” Absent this additional step, the USVs could not strike Russian targets without Ukraine's incurring responsibility for an internationally wrongful act.⁵⁰⁹ This is because under international law, warships are the only ships lawfully entitled to exercise belligerent rights (*Commander's Handbook*⁵¹⁰ § 2.2.1.1). To be a warship, a ship must belong to the armed forces of a State, bear external marks of nationality, be under the command of a commissioned officer, and be manned by a crew subject to regular armed forces discipline (U.N. Convention on the Law of the Sea,⁵¹¹ Article 29). Of note, the United States takes the position that unmanned craft *may* meet these requirements

(*Commander's Handbook*⁵¹² § 2.3.5). But as noted above, there is no indication Ukraine has flagged its USVs as ships—or warships.

Ukrainian USVs as a Means of Warfare

Given that the Ukrainian USVs are not ships or warships, we now turn to whether the Ukrainian USVs are lawful as a means of warfare. First, some groundwork is necessary. Ukraine and Russia are plainly engaged in an international armed conflict, so the law of armed conflict applies (see, e.g., DoD *Law of War Manual*⁵¹³ § 3.4 and *Commander's Handbook*⁵¹⁴ § 5.1.2.1). Further, Ukraine has used its USVs in an “attack”⁵¹⁵ on its Russian adversary. As a result, the USVs clearly qualify as a “means of warfare”⁵¹⁶ under Additional Protocol I to the Geneva Conventions⁵¹⁷—a treaty to which Ukraine and Russia are both party. Article 36 of that treaty 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 Party.⁵¹⁸

⁵⁰⁸ Adam Aliano & Russell Spivak, *The Montreux Convention and Turkey's Impact on Black Sea Operations*, ARTICLES OF WAR (Apr. 25, 2022), <https://lieber.westpoint.edu/montreux-convention-turkeys-impact-black-sea-operations/>.

⁵⁰⁹ Articles on State Responsibility, *supra* note 5.

⁵¹⁰ COMMANDER'S HANDBOOK, *supra* note 179, § 2.2.1.1.

⁵¹¹ UNCLOS, *supra* note 339, art. 29.

⁵¹² COMMANDER'S HANDBOOK, *supra* note 179, § 2.3.5.

⁵¹³ 2016 DoD LAW OF WAR MANUAL, *supra* note 27.

⁵¹⁴ COMMANDER'S HANDBOOK, *supra* note 179, § 5.1.2.1.

⁵¹⁵ AP I, *supra* note 65, art. 49.

⁵¹⁶ ICRC, *Means of Warfare, How Does Law Protect in War?* (last visited on Dec. 10, 2023), https://casebook.icrc.org/a_to_z/glossary/means-warfare.

⁵¹⁷ AP I, *supra* note 65.

⁵¹⁸ *Id.* art. 36.

Accordingly, Ukraine was obliged to review its USVs for compliance with international law before using them in combat. Whether Ukraine conducted such a review is difficult to know, as many States do not make such reviews public.

The most important question with respect to the legality of the systems is *whether the craft are capable of being directed at a specific military objective* like a Russian warship.⁵¹⁹ From what we can tell, the USVs are remotely piloted after a virtual hand-off and maneuvered toward their target using a camera feed with night vision capability. The agility one USV shows in skimming across the water and evading Russian fire in videos, such as this one,⁵²⁰ is the strongest evidence on this point. It shows that the craft are agile enough to be directed at a specific military objective.

Additionally, as observed by Schmitt and Goddard,⁵²¹ a review should also take into account the characteristics of the environment into which the candidate weapons system will be introduced. Here, the war has reduced civilian traffic in the Black Sea between Odesa and Crimea.⁵²² The unique environment thus further supports the conclusion that USVs would be sufficiently precise to discriminate between lawful military objectives like Russian warships and civilian vessels.

Hague VIII and Torpedoes

A further question is whether the USVs would violate any specific weapons prohibitions under international law. Some, following the approach put forward by Nasu and Letts,⁵²³ will contend that because the USVs are meant for one-way strike missions, they share characteristics with a torpedo. On this view, the USVs must comply with the relevant law for torpedoes found in the 1907 Hague Convention VIII.⁵²⁴ That treaty, which has become customary international law, prohibits torpedoes that do not become harmless after missing their target.⁵²⁵

Those supporting Hague VIII applicability contend that, like torpedoes, the Ukrainian USVs (a) travel through water, (b) with the goal of striking enemy vessels, and (c) can become a danger to civilian traffic if they miss their target. Thus, interpreting the treaty teleologically based on its object and purpose would bring the Ukrainian craft under Hague VIII. This approach would advance the protective goals of the law of armed conflict and is the stronger position.

On the other hand, those opposing Hague VIII applicability assert that the treaty (a) doesn't define "torpedo" and (b) only sought to protect against the sort of "dumb" threats contemplated at the time of the treaty in 1907—that is, basic torpedoes and mines

⁵¹⁹ *Id.* art. 51(4)(b)–(c).

⁵²⁰ Guardian News, *supra* note 499.

⁵²¹ Michael N. Schmitt & David S. Goddard, *Int. Law and the Military Use of Unmanned Maritime Systems*, 98 INT'L REV. RED CROSS 567–592 (2016), https://international-review.icrc.org/sites/default/files/irc98_10.pdf.

⁵²² Michael Ovaska & Reade Levinson, *Traffic Resumes from Ukrainian Ports*, REUTERS (Aug. 2, 2022), <https://www.reuters.com/graphics/UKRAINE-CRISIS/GRAIN/dwpmkrwglvm/>.

⁵²³ Hitoshi Nasu & David Letts, *The Legal Characterization of Lethal Autonomous Maritime Systems: Warship, Torpedo, or Naval Mine?* 96 INT'L L. STUD., 79–97 (2020), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2918&context=ils>.

⁵²⁴ GC VIII, *supra* note 442.

⁵²⁵ COMMANDER'S HANDBOOK, *supra* note 179, § 9.4; SAN REMO MANUAL, *supra* note 333, art. 79.

(see Schmitt and Goddard,⁵²⁶ which discusses the issue, generally). On this view, the treaty wouldn't touch advanced surface vessels guided by satellite technology and remote operators.

Assuming for the sake of argument that Hague VIII applies, compliance would logically hinge on factors such as range with a combat load, the ability to steer the vessel safely to a place where it can be pulled from the water, or the ability to defuse or detonate the warhead remotely.

Overall, we still don't know much about the USVs (including, for example, how and from where they were launched). Nevertheless, there is no obvious impediment to their qualifying as lawful weapons under international law.

Looking Ahead

In developing USVs, navies have largely proceeded methodically. They also have prioritized intelligence, surveillance, and reconnaissance missions. But with national survival at stake, necessity compelled Ukraine to employ USVs in a strike role. Though the Sevastopol attack may have done little damage, Russia's response indicates it takes the new threat seriously. Indeed, the Black Sea Fleet has largely remained in a protective crouch, and Russia struck Ukrainian civilian infrastructure with missiles in the aftermath of the attack.

Whether modern navies will adopt the Ukrainian USV model to complement their existing fleets remains to be seen. Last year, the United States Navy took a step in that direction,⁵²⁷ announcing an effort to “rebalance the fleet away from exquisite, manpower-intensive platforms toward smaller, less-expensive, yet lethal ones,” as commentators had urged.⁵²⁸

The asymmetric benefits of that model cannot be lost on one U.S. partner in particular—Taiwan. Given the roughly 100-mile width of the Taiwan Strait, the USVs employed at Sevastopol appear well suited to counter a Chinese amphibious invasion. As with the situation in the Black Sea, there would be little need for Taiwan to concern itself with navigation rights and “ship” status. Rather, a key legal challenge for USVs in a Taiwan Strait scenario would concern problems with identifying lawful military objectives. Given the uncertain volume of civilian traffic in that waterway at the time of an invasion, as well as China's propensity to employ fishing vessels and other civilian craft for military purposes,⁵²⁹ which qualifies them as military objectives, distinguishing lawful targets from civilian vessels could prove difficult.

“Swarm” tactics, should they be employed, may present another legal challenge. Commentators have for several years highlighted the challenges such tactics will present to a traditional fleet. Swarming relies on “large numbers of relatively low-

⁵²⁶ Schmitt & Goddard, *supra* note 521.

⁵²⁷ U.S. Navy, Chief of Naval Operations, *Navigation Plan* (2022), <https://www.dvidshub.net/publication/issues/64582>.

⁵²⁸ James Kraska & Raul Pedrozo, *Disruptive Technology and the Law of Naval Warfare*, OXFORD UNIV. PRESS (Mar. 29, 2022), <https://global.oup.com/academic/product/disruptive-technology-and-the-law-of-naval-warfare-9780197630181?cc=us&lang=en&>.

⁵²⁹ James Kraska & Michael Monti, *The Law of Naval Warfare and China's Maritime Militia*, 91 INT'L L. STUD. 450 (2015), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1406&context=ils>.

cost, expendable agents that can be used to overwhelm an adversary.”⁵³⁰ Importantly, a true swarm acts without a human operator, the basic idea being that the unmanned devices continually coordinate with each other to make the most effective strike.⁵³¹ From what is currently known, the USVs employed by Ukraine lack this level of sophistication; human operators likely steered them toward their target. But should similar USVs take on the level of artificial intelligence necessary to carry out a true swarm attack, this may challenge compliance with the principles of distinction, proportionality, and precautions in attack under the law of naval warfare (*U.S. Naval Commander’s Handbook*⁵³² §§ 5.3.4, 5.3.3, and 8.31). For instance, would USVs be able to identify a hospital ship in a chaotic environment? Could a swarm attack be suspended or called off if it appeared a civilian ferry was close by and likely to be damaged?

On the other hand, the small size and weapons payload of some USVs may make them the preferred—and, potentially, the required—means of attack in some circumstances. For example, a USV may present less risk to civilian objects near a targeted military objective than, say, a cruise missile (see Schmitt and Goddard, *International Law and the Military Use of Unmanned Maritime Systems*⁵³³). Taiwan’s ability to counter a cross-strait invasion may very well hinge on its ability to employ weapons systems similar to those Ukraine has employed in the Black Sea—and to extend that model with new software and swarm tactics. Then as now, the legal issues are less likely to be about ship and warship status and more likely to concern the application of traditional the law of armed conflict concepts (such as distinction and even the law governing torpedoes) to new weapons systems.



⁵³⁰ Thomas McCullan, *How Swarming Drones Will Change Warfare*, BBC NEWS (Mar. 15, 2019), <https://www.bbc.com/news/technology-47555588>.

⁵³¹ *Id.*

⁵³² COMMANDER’S HANDBOOK, *supra* note 179, §§ 5.3.4, 5.3.3, & 8.31.

⁵³³ Schmitt & Goddard, *supra* note 521, at 22.

WHAT'S IN A NAME? GETTING IT RIGHT FOR THE NAVAL “DRONE” ATTACK ON SEVASTOPOL

by Caroline Tuckett | Jan 23, 2023

On October 29, 2022, various media outlets around the world were full of pictures and grainy footage of an attack on the Russian Black Sea Fleet in Sevastopol using a combination of unmanned maritime and air assets.⁵³⁴ Described by a former Ukrainian Navy captain as “having no equivalent in the history of naval warcraft,”⁵³⁵ the attack resulted in significant damage to Russian warships and vessels, notably *Admiral Makarov*,⁵³⁶ the Black Sea Fleet flagship. The headlines, however, were almost as confusing and blurred as some of the footage, in particular when it came to referring to the maritime assets that were used for the attacks. These assets were often referred to as “drones,”⁵³⁷ but also as “uncrewed surface vessels,”⁵³⁸ “low tech boats,”⁵³⁹ or “unmanned vehicles,”⁵⁴⁰ the most colourful description being “a cross between a canoe and a jet ski.”⁵⁴¹ The use of several terms highlights the ongoing debate regarding the use of remote-controlled and

autonomous maritime systems—namely, what do we call them?

From the legal perspective, such descriptions, and the terms used for them, matter. As this post explains, each term carries with it legal implications, which in turn will determine how these assets may be lawfully used. There really are two viable options, depending on whether maritime assets are employed under the UN Convention on the Law of the Sea (UNCLOS)⁵⁴² for a peacetime construct or in the context of the law of naval warfare. Either these “drones” are a piece of equipment—which includes such terms as “weapon,” “device,” “vehicles,” or even “boat.” Or they are vessels. A vessel cannot also be a piece of equipment, and vice versa. Of note, in the English version of UNCLOS, both “ship” and “vessel” are used (as opposed to the French version, which only uses the word *navire*) and are therefore considered synonymous.

⁵³⁴ Hugo Bachega & James Gregory, ‘Massive’ Drone Attack on Black Sea Fleet—Russia, BBC NEWS (Oct. 29, 2022), <https://www.bbc.com/news/world-europe-63437212>.

⁵³⁵ Francis Farrell, *Ex-Navy Captain: Ukraine’s Drone Attack in Sevastopol ‘Has No Equivalent in the History of Naval Warcraft,’* KYIV INDEPENDENT (Nov. 8, 2023), <https://kyivindependent.com/former-navy-captain-ukraine-drone-attack-in-sevastopol-has-no-equivalent/>.

⁵³⁶ Roland Oliphant, *How Ukraine’s Drone Navy Is Outsmarting Russia’s Superior Black Sea Forces*, TELEGRAPH (Aug. 4, 2023), <https://www.telegraph.co.uk/world-news/2022/11/26/how-ukraines-drone-navy-menacing-russias-superior-black-sea/>.

⁵³⁷ Bachega & Gregory, *supra* note 523.

⁵³⁸ H.I. Sutton, *USVs at Work in the Black Sea*, U.S. NAVAL INST., Vol. 148/12/1, 438 (Dec. 2022), <https://www.usni.org/magazines/proceedings/2022/december/usvs-work-black-sea>.

⁵³⁹ Leela Jacinto, *Exploding, Low-Tech Boats Roil Russia’s Black Sea Interests and Standing*, FRANCE24 (Mar. 11, 2022), <https://www.france24.com/en/europe/20221103-exploding-low-tech-boats-churn-russia-s-black-sea-interests-and-standing>.

⁵⁴⁰ Trevor Hollingsbee, *Mass Drone Attack on Russian Navy’s Black Sea Fleet*, BAIRD MARITIME (Nov. 2, 2022), <https://www.bairdmaritime.com/work-boat-world/maritime-security-world/unmanned-systems/mass-drone-attack-on-russian-navys-black-sea-fleet/>.

⁵⁴¹ H.I. Sutton, *Russian Navy Pulls Warships from Black Sea into Port After Attacks*, USNI NEWS (Nov. 7, 2022), <https://news.usni.org/2022/11/07/russian-navy-pulls-warships-from-black-sea-into-port-after-attacks>.

⁵⁴² UNCLOS, *supra* note 339.

Option 1: Equipment (Including the Terms “Vehicle,” “Device,” “Weapon System,” “Drone”)

While there is no definition of “drone,” “vehicle,” or indeed “device” in international maritime law, these terms are often used to refer to systems with an autonomous capability. The references to such “equipment” are limited in UNCLOS, mainly in the context of marine scientific research. However, what can be gleaned from UNCLOS and supporting treaties is that a vessel enjoys the legal status to operate independently, whereas equipment such as a “device” is subsidiary to and distinguishable from a vessel (see, for example, Article 209 of UNCLOS⁵⁴³), often as an object to be “launched” or “landed” (Article 19(1)(f) of UNCLOS).⁵⁴⁴

A commonly used example of equipment would be the gliders operated by both the U.S. Navy and U.K. Royal Navy,⁵⁴⁵ often for military data-gathering purposes, and in the case of the U.S. Navy, infamously seized by the PLA(N) in the South China Sea.⁵⁴⁶ Provided the equipment is being used in exclusively governmental non-commercial purposes, then the operating State can claim sovereign immunity under customary international law. The United States indeed claimed that the glider seized was a piece of

sovereign immune equipment, and ultimately this led to the return of the glider.

However, in the Black Sea, these items are being operated in a time of conflict to achieve a kinetic effect. The concept of using weapons systems that are driven through the water toward an enemy target is not new. Up until 1808, for example, the U.K. Royal Navy had “fire ships”⁵⁴⁷ as a designated class of ship in the fleet: old merchant ships bought by the government, set on fire, and sent off (hopefully) in the direction of the enemy. Torpedoes are the more modern example often cited; so are naval mines. If these assets are to be used as weapons systems, several legal obligations result, primarily *before* use and then *during* use.

In the *before* category, if the maritime asset is a new weapon, or at least a revised means or method of warfare, Ukraine as a party to Additional Protocol I to the Geneva Conventions must conduct a weapon review under Article 36.⁵⁴⁸ According to this provision, any new means or method of warfare should not be “prohibited by this protocol” or “any other rule of international law” applicable to that party. Ukraine is a signatory to a number of international treaties prohibiting different types of weapons, such as the Chemical Weapons Convention⁵⁴⁹ and

⁵⁴³ *Id.* art. 209.

⁵⁴⁴ *Id.* art. 19(1)(f).

⁵⁴⁵ Naval Technology, *Royal Navy to Test Underwater Gliders in North Atlantic* (Mar. 1, 2020), <https://www.naval-technology.com/news/royal-navy-to-test-underwater-gliders-in-north-atlantic/?cf-view>.

⁵⁴⁶ Sam LaGrone, *Updated: Chinese Seize U.S. Navy Unmanned Vehicle*, USNI NEWS (Dec. 16, 2016), <https://news.usni.org/2016/12/16/breaking-chinese-seize-u-s-navy-unmanned-vehicle>.

⁵⁴⁷ Wikipedia, *List of Fireships in the Royal Navy* (last visited Dec. 10, 2023), https://en.wikipedia.org/wiki/List_of_fireships_of_the_Royal_Navy.

⁵⁴⁸ AP I, *supra* note 65, art. 36.

⁵⁴⁹ Arms Control Association, *Chemical Weapons Conventions Signatories and State-Parties* (last reviewed June 2018), <https://www.armscontrol.org/factsheets/cwcsig>.

the Anti-Personnel Land Mine Convention.⁵⁵⁰ As a specific maritime example, while Ukraine is not a signatory to the 1907 Hague Convention VIII, its provisions are considered binding as a matter of customary international law.⁵⁵¹ Therefore, Ukraine must ensure that *if* these assets were to be labeled as torpedoes, they must become harmless if they miss their mark.⁵⁵² Alternatively, if the assets were a form of automatic contact mine, then they too must become harmless at most one hour after they are no longer under control.⁵⁵³

During use, regardless of the classification of weapon system (mine, torpedo, missile, or other), the weapon system must be deployed against a lawful target in accordance with the law of naval warfare. While this legal regime is not governed directly by Additional Protocol I, conduct of hostilities rules (Article 49(3) of Additional Protocol I), it is widely accepted that customary law counterparts of the rules do apply at sea.⁵⁵⁴

It is not known the extent to which the payload being deployed by these assets was, in itself, autonomous. The law surrounding the use of lethal autonomous weapons systems (LAWS) is also subject to intense debate, but one that is separate to that on the debate regarding the nomenclature of autonomous maritime systems. It is also still a developing

area, but consensus from the UN Group of Experts is that there is a requirement for human involvement in the decision-making process.⁵⁵⁵ Regarding the events at Sevastopol, it has been commented, “[T]hese drones are under the direct, precise control of their operator right up until the moment of impact.”⁵⁵⁶ This would indicate that a human was heavily involved in the decision-making process, up until the moment the explosive was detonated.

Option 2: Vessels

There are three specific reasons why use of the word “vessel” has important legal implications—and although the debate here arises out of an event in armed conflict, UNCLOS is the initial guiding reference for three reasons.

The first reason is the freedom of navigation. UNCLOS states that all ships or vessels have the right to the freedom of navigation, including innocent passage, transit passage, and archipelagic innocent passage and archipelagic sea lane passage.⁵⁵⁷ Therefore, if a State wishes to exercise the freedom of navigation rights with an autonomous system, it needs to be formally classified as a vessel or a ship.

⁵⁵⁰ Arms Control Association, *The Ottawa Convention: Signatories and State-Parties* (last reviewed Sep. 2022), <https://www.armscontrol.org/factsheets/ottawasigs>.

⁵⁵¹ Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332 [hereinafter Hague Convention VIII].

⁵⁵² *Id.* art. 1(3).

⁵⁵³ *Id.* art. 1(1).

⁵⁵⁴ See SAN REMO MANUAL, *supra* note 333.

⁵⁵⁵ Rep. of the 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, U.N. Doc. CCW/GGE.1/2018/WP.3, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/082/05/pdf/G1808205.pdf?OpenElement>.

⁵⁵⁶ Farrell, *supra* note 535.

⁵⁵⁷ UNCLOS, *supra* note 339, arts. 17, 38, 52, 53.

The second reason is sovereign immunity. UNCLOS Articles 32, 95, and 96 provide that warships and government vessels on non-commercial service have the privilege of sovereign immunity. Therefore, such ships or vessels are protected from other States trying to exert their jurisdiction on them—either in territorial waters or out on the high seas. It also means that should the sovereign vessel sink, then the wreck is also protected and cannot be tampered with unless express permission is given. Both the first and second reasons are of interest when operating in peacetime.

Finally, and noting the context in which this post is written, we turn to the law of naval warfare. As a matter of customary international law, only warships have belligerent rights. There is no defined list of these rights, but as identified by the *San Remo Manual*, they broadly cover kinetic strike, visit board search and seizure (VBSS), laying mines, amphibious operations against enemy-held coast, and blockade enforcement.

For those three legal privileges to apply, an asset must be classified as a vessel. There is no single definition of vessel and this author has counted at least 13 different definitions in international law. By way of example, International Regulations for Preventing Collisions at Sea, Rule 5, defines a vessel as “every description of water craft, including

non-displacement craft, Wing-In-Ground craft and seaplanes, used or capable of being used as a means of transportation on water.”⁵⁵⁸ The International Convention for the Prevention of Pollution from Ships, Article 2(4), defines a ship as “a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft, and fixed and floating platforms.”⁵⁵⁹ In the 2005 Convention on Suppression of Unlawful Acts at Sea, Article 1(1)(a), a ship is “a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft.”⁵⁶⁰ U.K. domestic law has perhaps tried to encapsulate all of these. Section 313 of the Merchant Shipping Act of 1995 states that a ship includes “every description of vessel used in navigation.”⁵⁶¹ For the purposes of this post, suffice to say that States are taking a flexible approach to the definition, and as one example, the U.K. Royal Navy has 23 different “vessels” on its Defence Shipping Register, all of varying descriptions and uses.⁵⁶²

If the assets used in the Black Sea were vessels, Ukraine would have two further options. The vessels would be classed either as government vessels on non-commercial service or as warships. UNCLOS does not define “government ships operated for non-

⁵⁵⁸ Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 1050 U.N.T.S. 16, <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800fcf87>.

⁵⁵⁹ International Convention for the Prevention of Pollution from Ships as Modified by the Protocol of 1978 Relating Thereto, 1973, IMO (092.1)/M27, <https://digitallibrary.un.org/record/246517>.

⁵⁶⁰ *Protocol to the Convention of 10 March 1988 for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf*, Rome, 10 March 1988, *United Nations Treaty Series*, vol. 1678, No. 29004, <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800b9af3>

⁵⁶¹ Merchant Shipping Act 1995, 21 U.K. Pub. Gen. Acts § 313 (1995), <https://www.legislation.gov.uk/ukpga/1995/21/contents>.

⁵⁶² U.K. International Relations and Defense Committee, *UNCLOS: The Law of the Sea in the 21st Century*, ch. 6, HL PAPER 159 (Mar. 1, 2022), <https://committees.parliament.uk/publications/9005/documents/159002/default/>.

commercial purposes,” but from a military perspective the term is often synonymous with “auxiliary.” The *San Remo Manual* defines an auxiliary vessel as “a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service.”⁵⁶³ Being classed as an auxiliary would allow for the ability to claim freedom of navigation rights and sovereign immunity, but not, noting how the assets were used in this context, to cause damage in the exercise of belligerent rights.

As yet, no State has openly declared an autonomous maritime vessel as a warship. Article 29 of UNCLOS defines a warship as follows:

For the purposes of this Convention, “warship” means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent and manned by a crew which is under regular armed forces discipline.

The requirement for a commissioned officer in command and a crew has led to some discussion as to whether it is possible to have an autonomous, or unmanned, warship.⁵⁶⁴ The United Kingdom⁵⁶⁵ and the United

States⁵⁶⁶ have both made public assertions that it is possible to have an autonomous maritime asset as a warship and still meet the requirements of Article 29. In the case of the United Kingdom, the arguments to support this contention can be summarised as:

1. *State Responsibility.* The intent of Article 29 is to confirm state responsibility for the actions of warships and requires that the State has an accountable system of discipline to control the actions of those who operate them. This is achieved through the crew subject to service discipline and the commissioned officer in command, even if ashore at the time of operation.
2. *The principle of distinction under the law of armed conflict.* The wording of Article 29 is a direct lift from a treaty governing activities in armed conflict, namely 1907 Hague Convention VII regarding the conversion of merchant ships to warships.⁵⁶⁷ By ensuring the crew and commanding officer are both in the armed forces, that means any belligerent action taken by the autonomous warship is conducted by lawful combatants.
3. Therefore, provided the commanding officer and crew are accountable for the actions of the autonomous warship, in the same way as applies to warships currently, then they can be ashore, rather than onboard. Clearly, for Article 29

⁵⁶³ SAN REMO MANUAL, *supra* note 333, art. 13(h).

⁵⁶⁴ Schmitt & Goddard, *supra* note 521.

⁵⁶⁵ U.K. Ministry of Defense, *Written Evidence (UNC0018)* (Received Nov. 11, 2021), <https://committees.parliament.uk/writtenevidence/40830/html/>.

⁵⁶⁶ COMMANDER'S HANDBOOK, *supra* note 179, § 2.3.5.

⁵⁶⁷ Hague Convention (VII) Relative to the Conversion of Merchant Ships into War Ships, Oct. 18, 1907, 2 A.J.I.L. Supp. 133, <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-vii-1907>.

to have effect, the commanding officer would still need to be a commissioned officer, and the crew would be serving members of the Royal Navy.

Concluding Thoughts

To conduct the attack in Sevastopol on the Russian Black Sea Fleet lawfully, the operators did not require full navigational rights as provided for under UNCLOS. They were operating as a party to a conflict, in their own territorial seas, under the regime of the law of naval warfare. The operators did require the ability, in law, to act in a belligerent manner—something that can be achieved

either by classing the assets used as weapons/pieces of equipment or by registering them as autonomous warships on the respective national register.

It is early days, and there is no evidence of State practice regarding autonomous warships, yet. However, the statements made by the United Kingdom and the United States arguably provide an opening for Ukraine to do the same should it wish or need to. In the absence of such a step being taken, the “cross between a canoe and a jet ski” should be viewed as a State-operated piece of equipment or weapon system. It should not be referred to as a vessel.



WAR SANCTIONS STEADILY DEGRADE THE RUSSIAN MARITIME SECTOR

by James Kraska | Jun 7, 2022

When Russia (re)invaded Ukraine in February, national sanctions imposed on Russian shipping companies and designated Russian-owned vessels and financial institutions began degrading the country's maritime sector. These sanctions include the launch of "Task Force Kleptocapture" by the U.S. Treasury Department on March 2 to seize luxury yachts owned by oligarchs close to Putin.⁵⁶⁸ The next day, the world's three largest container lines, A.P. Moller-Maersk A/S, MSC Mediterranean Shipping Co., and CMA CGM S.A., joined Hapag-Lloyd AG and Asia's Ocean Network Express Pte. Ltd. in stopping service to Russia. These companies represent 47% of the global shipping trade, and their suspension of cargo routes to Russia is slowly bleeding Russia's economy.⁵⁶⁹

War-related sanctions have banned Russian-flagged and Russian-controlled vessels from ports in the United States, the European Union, and other countries. The sanctions are impacting Russian commodity traders, container shipping, dry bulk carriers and natural gas. Because the Russian fleet of containerships is modest, however, the greatest challenges for Moscow come from the

cessation of foreign container lines operating in Russian domestic commerce. Before the current phase of the Russia-Ukraine conflict, foreign operators also performed all the voyages to ports in the northwest and south of Russia. As these carriers withdraw, Russian cabotage shipping is impaired. Presumably, Russian hulls would take over the trade.

This alternative approach, however, is no longer feasible because of a move on March 11 by the International Association of Classification Societies (IACS) to expel the Russian Maritime Register of Shipping (RMRS) from the organization.⁵⁷⁰ The governing Council of IACS determined RMRS membership was "no longer tenable."⁵⁷¹ The remaining 11 major registry members of IACS cover more than 90% of global merchant shipping and include: American Bureau of Shipping (ABS, United States); Bureau Veritas (BV, France); China Classification Society (CCS, China); Croatian Register of Shipping (CRS, Croatia); DNV (Norway-Germany); Indian Register of Shipping (IRS, India); Korean Register of Shipping (KR, South Korea), Lloyd's Register (LR, United Kingdom); Polish Register of Shipping (PRS, Poland); Registro Italiano

⁵⁶⁸ MSNBC, *DOJ's 'Task Force KleptoCapture' Seizes Russian's Yacht in New Push* (Apr. 4, 2022), <https://www.youtube.com/watch?v=uOaCv-S5ubU>.

⁵⁶⁹ Pamela Glass, *Ocean Shipping to and from Russia Halted by Container Lines*, WORKBOAT (Mar. 3, 2022), https://www.workboat.com/bluewater/ocean-shipping-to-and-from-russia-halted-by-container-lines?utm_source=marketo&utm_medium=email&utm_campaign=newsletter&utm_content=newsletter&mkt_tok=NzU2LUZXS0wNjEAAAGC8YZJylsgWelqUuyjFGIdVumXiA73guksMm36ey5ssjQNu-Eu-5JQQ6TM_BfbzAmqDPnrz4oildlQR5W6MTJTET1LZpOa8A8OoW4rl_sueX5w8zWM.

⁵⁷⁰ Richard Meade, *Russian Class Expelled from IACS*, LLOYD'S LIST (Mar. 11, 2022), <https://lloydslst.com/LL1140123/Russian-class-expelled-from-IACS>.

⁵⁷¹ *Id.*

Navale (RINA, Italy); and Nippon Kaiji Kyokai (ClassNK, Japan).

IACS is a technical international organization that sets standards and helps national registries ensure compliance with technical and engineering standards in the construction, design, equipping, and manning of ships, offshore units, and port facilities. For example, member classification societies conduct surveys of ships flying the flag of national registries to ensure the vessels are “in class,” or in compliance with generally accepted international rules and standards for operations at sea, such as the Safety of Life at Sea Convention (SOLAS).⁵⁷² The individual societies and IACS also participate in the development of revisions to international conventions and provide technical support to member States of the International Maritime Organization (IMO). This extent of the reach of the IACS is the most powerful mechanism in the world to eliminate the operation of substandard ships.

IACS is domiciled in London and subject to the United Kingdom sanction regime, hence the reason it removed RMRS. RMRS is the largest provider of classification services to vessels under the ownership or control of Russia, covering some 77.78% of Russian ships.⁵⁷³ RMRS is followed by RINA (4.42%), DNV (3.75%), and then Bureau Veritas (3.27%) in coverage of Russian ships. After RMRS was expelled from IACS, Lloyd’s Register (LR) withdrew from Russia, followed by DNV, stating that it was winding

down “business that is not in line with our values.”⁵⁷⁴ Most U.S. and U.K. carriers have already issued notices of cancellation for shipments into and out of Russia and Ukraine through the Black Sea and Sea of Azov.

The expulsion of RMRS from IACS means that the registry members and other registries have begun to drop Russian-controlled shipping from class, essentially expiring or withdrawing ship certifications across some 50 separate international maritime conventions. This process steadily makes it more difficult for Russian ships to maintain insurance coverage. Insurance coverage is typically afforded only to vessels in class or meeting the standards set by one of the major classification societies that are members of IACS, assuring that international safety, security, and environmental requirements set forth in maritime conventions are being met. The decision to withdraw RMRS from IACS required concurrence of 75% of the members.

While IACS is the global standard for ship surveys and classification, non-IACS members may pick up the business since they are not subject to the sanctions regime. Russian vessels potentially may seek ship surveys and classification from open registries, such as Liberia. But it is not clear that even these open registries will deal with Russian ships now that they do not have current ship surveys from an IACS member. A spokesman for the Liberian flag said, “Liberia is a sovereign nation that closely follows and applies international

⁵⁷² International Convention for the Safety of Life at Sea with Annexed Regulations, Nov. 1, 1974, 1184 UNTS 2.

⁵⁷³ Richard Meade, *Class Societies Start Pulling out of Russia*, LLOYD’S LIST (Mar. 10, 2022), <https://lloydslst.com/LL1140117/Class-societies-start-pulling-out-of-Russia>.

⁵⁷⁴ *Id.*

sanctions guidelines as long as they are not in direct contravention with its national laws. The registry conducts rigorous due diligence regarding sanctions compliance and assesses non-sanctioned entities on a case-by-case basis.⁵⁷⁵ If a Protection and Indemnity (P&I) Club cancels or suspends insurance coverage due to an unacceptable sanctions risk or violation of the Club rules, a ship will be stuck in port.⁵⁷⁶

The sanctions are having a cascading effect on Russian maritime commerce, similar to what occurred when UN sanctions under Resolution 1718 began to strangle North Korea's maritime sector.⁵⁷⁷ For example, while Lloyd's List has no discrete deadline to withdraw class from Russian ships, it is not providing new certificates to Russian clients going forward, notifying relevant flag Administrations as the withdrawals of class take effect. The removal of class on each ship invalidates existing certificates issued on behalf of the flag state Administration and compels ship owners to reinstate insurance coverage. Coverage through non-IACS insurers, however, is severely limited, especially in light of the added risks brought on by the ongoing conflict and a reluctance of many societies to deal with Russian entities.⁵⁷⁸ Many insurers and financiers require that a ship be in class with an IACS member,

effectively halting Russian ship operations or forcing the Russian ships to scramble for insurance coverage. Ships that are not in class can expect to pay higher costs of ship surveys. The decision also bars the ships from entering many ports throughout the world, prevents completion of transactions, and imposes obstacles on receipt, delivery, and payment for goods and services.

The decision to remove RMRS from IACS will not have an immediate impact, like turning off a light.⁵⁷⁹ Rather, it is slowly bogging down Russia's shipping sector by making foreign clients reluctant to deal with Russian-owned or -managed entities and raising the cost of doing business, frustrating trade and hampering the economy. Shipowners and shipbrokers are beginning to proactively communicate that they are not using Russian ships or companies subject to sanctions, forcing Russian shippers to find substitutes at higher risk premiums. These changes reflect the follow-on effects of sanction on the Russian maritime industry and will increase costs of supply inside the country, contributing to skyrocketing inflation.⁵⁸⁰

Yet some of the workarounds by Russia to circumvent the effect of maritime sanctions also appear to be effective, with Russian shipping data at odds with the confident

⁵⁷⁵ Meade, *supra* note 570.

⁵⁷⁶ Sean T. Pribyl, Jonathan M. Epstein, Christopher R. Nolan & J. Michael Cavanaugh, *U.S. Sanctions on Russia: Impact on Shipping Business and Contractual Considerations*, HOLLAND & KNIGHT (Mar. 7, 2022), <https://www.hklaw.com/en/insights/publications/2022/03/us-sanctions-on-russia-impact-on-shipping-business>.

⁵⁷⁷ S.C. Res. 1718 (2006), Designated Vessels List (last visited Dec. 10, 2023), <https://www.un.org/securitycouncil/sanctions/1718/materials/1718-Designated-Vessels-List>.

⁵⁷⁸ Jack Willard, *R.S. Class's Removal from IACS Has Consequences for Shipping Clients: CRC Group*, REINSURANCE NEWS (Apr. 1, 2022), <https://www.reinsurancene.ws/r-s-classes-removal-from-iacs-has-consequences-for-shipping-clients-crc-group/>.

⁵⁷⁹ Ana Swanson, *Russian Shipping Traffic Remains Strong as Sanctions Take Time to Bite*, N.Y. TIMES (May 13, 2022), <https://www.nytimes.com/2022/05/13/business/economy/russia-shipping-sanctions.html>.

⁵⁸⁰ Moscow Times, *Russia Hikes Social Welfare Payments to Mitigate Rocketing Inflation* (May 30, 2022), <https://www.themoscowtimes.com/2022/05/30/russia-hikes-social-welfare-payments-to-mitigate-rocketing-inflation-a77838>.

predictions of Western leaders. While Treasury Secretary Janet L. Yellen said the Russian economy was “absolutely reeling,” vessel traffic data appear down just 6% since the invasion.⁵⁸¹ Furthermore, alternative markets for Russia’s raw materials, especially oil and gas, exist in India and China and

elsewhere. Over time, however, the effects on the supply chain should amplify as multiple maritime services unwind. The expiration of vessel certificates, suspension of port access, and insurance challenges will escalate transaction costs and erode the Russian economy.



⁵⁸¹ Swanson, *supra* note 579.

SECTION 3

Air

A NO-FLY ZONE OVER UKRAINE AND INTERNATIONAL LAW

by Michael N. Schmitt | Mar 18, 2022

In an impassioned address to the U.S. Congress on March 16, Ukraine's President, Volodymyr Zelensky, asked the United States for additional military assistance, including the establishment of a no-fly zone.

This is a terror that Europe has not seen, has not seen for 80 years, and we are asking for a reply, for an answer to this terror from the whole world. Is this a lot to ask for, to create a no-fly zone over Ukraine to save people? Is this too much to ask, humanitarian no-fly zone, something that Russia would not be able to terrorize our free cities? If this is too much to ask, we offer an alternative.⁵⁸²

The address follows on the heels of one to Canadian parliamentarians in the House of

Commons the previous day. In that speech, he called out Western States for their inaction:

Can you imagine when you call your friends, your friendly nations, and you ask "Please close the sky. Please close the airspace. Please stop the bombing? How many more cruise missiles have to fall on our cities until you make this happen?" And they, in return, express their deep concerns about the situation. When we talk with our partners, they say "Please hold on. Hold on a little longer."⁵⁸³

Zelensky's pleas for a no-fly zone have garnered significant support. For instance, the Estonian Parliament voted in favor of a resolution that urged "immediate steps to establish a no-fly zone in order to prevent massive civilian casualties in Ukraine," an

⁵⁸² Catie Edmondson, *Annotated Transcript: Zelensky's Speech to Congress*, N.Y. TIMES (Mar. 16, 2022), <https://www.nytimes.com/2022/03/16/us/politics/transcript-zelensky-speech.html>.

⁵⁸³ The Canadian Press, *Verbatim: Ukrainian President Volodymyr Zelenskyy's address to Canada's Parliament* (Mar. 15, 2022), <https://www.cp24.com/news/verbatim-ukrainian-president-volodymyr-zelenskyy-s-address-to-canada-s-parliament-1.5820366>.

understandable position for a small NATO nation bordering Russia.⁵⁸⁴ In the United States, 27 senior international security experts signed an “open letter” calling on “the Biden administration, together with NATO allies, to impose a limited No-Fly Zone over Ukraine starting with protection for humanitarian corridors.”⁵⁸⁵ Signatories include a former NATO Commander, former Commanding General of U.S. Army Europe, former Under Secretaries of Defense and State, two former U.S. Ambassadors to NATO, and two former U.S. Ambassadors to Ukraine. Some members of Congress echo their openness to such an operation.⁵⁸⁶

Yet most States remain opposed to a no-fly zone. The Biden administration has made it clear that the United States will not intervene militarily, even by means of a no-fly zone designed to facilitate evacuation of civilians and stop Russia’s targeting of Ukraine’s civilian population.⁵⁸⁷ White House Press Secretary Jen Psaki explained, “A no-fly zone is escalatory and could prompt a war with Russia, a major nuclear power.”⁵⁸⁸

Similarly, U.K. Prime Minister Boris Johnson has warned, “This is a time where miscalculation and misunderstanding is all too possible.”⁵⁸⁹ And NATO Secretary-General

Jens Stoltenberg has been unambiguous about the NATO position.

[W]e have made it clear that we are not going to move into Ukraine, neither on the ground, or in Ukrainian airspace. And of course, the only way to implement a no-fly zone is to send NATO planes, fighter planes into Ukrainian airspace, and then impose that no-fly zone by shooting down Russian planes. And our assessment is that we understand the desperation. But we also believe that if we did that, we’ll end up with something that could end in a full-fledged war in Europe, involving many more countries, and causing much more human suffering. So that’s the reason why we make this painful decision to impose heavy sanctions, provide significant support, stepping up support. But at the same time not involving NATO forces directly in the conflict in Ukraine, neither on the ground, or in their airspace.

This post first explains the nature of no-fly zones, drawing on five such zones that have been conducted. It then discusses the legal bases for conducting such operations, including a possible Ukraine no-fly zone. Finally, it highlights the knock-on legal

⁵⁸⁴ Sten Hankewitz, *The Estonian Parliament Demands a No-Fly Zone in Ukraine*, ESTONIAN WORLD (Mar. 14, 2022), <https://estonianworld.com/security/the-estonian-parliament-demands-a-no-fly-zone-in-ukraine/>.

⁵⁸⁵ Zack Beauchamp, *Why Even a “Limited” No-Fly Zone Is a Bad Idea*, VOX (Mar. 10, 2022), <https://www.vox.com/policy-and-politics/22967674/russia-ukraine-no-fly-zone-limited-nuclear-war#:~:text=Ukraine%20signed%20by-,27%20leading%20experts,-%2C%20including%20a%20former.>

⁵⁸⁶ See Jordan Williams & Brett Samuels, *Debate Over Ukraine No-Fly Zone Heats Up*, THE HILL (Mar. 4, 2022), <https://thehill.com/policy/defense/596942-why-the-us-and-nato-refuse-to-declare-a-no-fly-zone-for-ukraine/?rl=1>.

⁵⁸⁷ Susan Milligan, *Biden Stands Firm Against No-Fly Zone as Zelenskyy Prepares to Address Congress*, U.S. NEWS (Mar. 15, 2022), <https://www.usnews.com/news/politics/articles/2022-03-15/biden-stands-firm-against-no-fly-zone-as-zelenskyy-prepares-to-address-congress>.

⁵⁸⁸ The White House, *Press Briefing by Press Secretary Jen Psaki* (Mar. 15, 2022), <https://www.whitehouse.gov/briefing-room/press-briefings/2022/03/15/press-briefing-by-press-secretary-jen-psaki-march-15-2022/>.

⁵⁸⁹ North Atlantic Treaty Organization [NATO], *Press Conference with NATO Secretary General Jens Stoltenberg, the Prime Minister of Estonia, Kaja Kallas and UK Prime Minister Boris Johnson at Tapa Military Base in Estonia* (Mar. 1, 2022), https://www.nato.int/cps/en/natohq/opinions_192584.htm.

consequences should one be established in Ukrainian airspace.

No-Fly Zones

It is essential to understand what a no-fly zone is and what it is not. A no-fly zone is not an aerial blockade. Aerial blockades, such as those implemented during the Gulf War of 1990–1991, are designed to block aircraft entry to or exit from specified airfields or coastal areas that the enemy controls. Their primary purpose is to prevent neutral aircraft from transporting material to the enemy.⁵⁹⁰

Instead, no-fly zones are a three-dimensional piece of airspace in which designated aircraft are prohibited from flying.⁵⁹¹ Such zones have usually been established without the consent of the State concerned. For example, Operations Provide Comfort⁵⁹² (1991–1997), Northern Watch⁵⁹³ (1997–2003), Southern Watch⁵⁹⁴ (1992–2003), and NATO’s 2011 Operation Unified Protector⁵⁹⁵ were mounted without the consent of Iraq or Libya, respectively. But no-fly zones may also be consensual, an example being NATO’s 1993 Operation Deny Flight⁵⁹⁶ over Bosnia and Herzegovina. As these operations illustrate, they may be

enforced by “coalitions of the willing” or a regional organization like NATO.

The purpose of a no-fly zone is usually humanitarian, as was the case with Operations Provide Comfort, Northern Watch, and Southern Watch over Iraq. However, it may also be motivated, at least in part, by military considerations. For example, it is arguable that Operations Deny Flight and Unified Protector both sought to shift the balance of power on the ground. Indeed, the former proved unsuccessful and eventually led in 1995 to direct NATO strikes against Bosnian Serb forces during NATO’s Operation Deliberate Force.⁵⁹⁷

When a no-fly zone has been lawfully established (see below), it may be enforced with lethal force, subject to international humanitarian law (IHL) rules in an armed conflict. Rules of engagement often provide for enhanced means of verification and escalation of force procedures before firing on an aircraft in the zone. Yet lethal force has been used, most notably in 1994 when NATO aircraft shot down four of six Bosnian Serb aircraft that had dropped bombs while within Operation Deny Flight’s zone.

⁵⁹⁰ See PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE, sec. V (2013) [hereinafter AIR AND MISSILE WARFARE MANUAL]; Michael Schmitt, *Aerial Blockades in Historical, Legal and Practical Perspective*, 2 USAFA J. LEGAL STUD. 21 (1991), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600662; Wolff Heintschel von Heinegg, *Aerial Blockades and Zones*, 43 ISR. Y.B. HUM. RTS. 263–295 (Dec. 2, 2013), <https://brill.com/display/book/edcoll/9789004242081/BP000012.xml>.

⁵⁹¹ See Michael Schmitt, *Clipped Wings: Effective and Legal No Fly-Zone Rules of Engagement*, 72 INT’L LAW STUD. 12 (1998), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1459&context=ils>; Michael Schmitt, *Wings Over Libya: The No-Fly Zone in Legal Perspective*, 36 YALE J. INT’L L. 45–58, <https://bpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2017/01/o-36-schmitt-wings-over-libya-2dzjhs0.pdf>.

⁵⁹² Wikipedia, *Operation Provide Comfort* (last visited Dec. 10, 2023), https://en.wikipedia.org/wiki/Operation_Provide_Comfort.

⁵⁹³ Wikipedia, *Operation Northern Watch* (last visited Dec. 10, 2023), https://en.wikipedia.org/wiki/Operation_Northern_Watch.

⁵⁹⁴ Wikipedia, *Operation Southern Watch* (last visited Dec. 10, 2023), https://en.wikipedia.org/wiki/Operation_Southern_Watch.

⁵⁹⁵ NATO, *NATO No-Fly Zone Over Libya Operation Unified Protector* (last visited Dec. 10, 2023), https://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110325_110325-unified-protector-no-fly-zone.pdf.

⁵⁹⁶ Government of Canada, *Operation DENY FLIGHT* (last updated Dec. 11, 2018), <https://www.canada.ca/en/department-national-defence/services/military-history/history-heritage/past-operations/europe/deny-flight.html>.

⁵⁹⁷ Wikipedia, *Operation Deliberate Force* (last visited Dec. 10, 2023), https://en.wikipedia.org/wiki/Operation_Deliberate_Force.

And no-fly zones may be established during an international armed conflict, as is being proposed by Ukraine. In this regard, the experts who participated in the *Manual on the International Law Applicable to Air and Missile Warfare* (AMW) project (including me) agreed that,

A Belligerent Party may establish and enforce a no-fly zone in its own or in enemy national airspace. The commencement, duration, location and extent of the no-fly zones must be appropriately notified to all concerned. . . . [A]ircraft entering a no-fly zone without specific permission are liable to be attacked.⁵⁹⁸

The Legal Basis for No-Fly Zones

The possible establishment of a no-fly zone over Ukraine must be analyzed from three perspectives. First, any such decision requires consideration at the strategic level. Opponents fear escalation, while supporters highlight the human tragedy and worry that failure to act will only embolden Russian President Putin. Both views are reasonable, although I lean toward the latter.

Second, the execution of a no-fly zone is complex operationally. Mark Nevitt⁵⁹⁹ has made this point based on his experience as a

Navy aviator enforcing Operation Southern Watch,⁶⁰⁰ as have I in light of my experience as the Staff Judge Advocate (SJA) for the Air Component of Operation Provide Comfort⁶⁰¹ and Task Force SJA for Operation Northern Watch.⁶⁰² Nevitt and I agree that the fog of war is thick in no-fly zones, as tragically illustrated by the 1994 Blackhawk shootdown in the relatively benign environment of northern Iraq.⁶⁰³

A third perspective from which to consider a no-fly zone is legal. A no-fly zone is undoubtedly lawful when authorized by the UN Security Council under Chapter VII of the UN Charter. According to Article 39, the Security Council may determine whether a situation amounts to a “threat to the peace, breach of the peace, or act of aggression.”⁶⁰⁴ Once it makes such a determination, and if non-forcible measures to address the situation have failed or are unlikely to succeed, the Security Council may authorize “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security” under Article 42.⁶⁰⁵

Such an authorization was the legal basis for Operations Deny Flight and Unified Protector. The former was conducted pursuant to Security Council Resolution 781 (1992),⁶⁰⁶ while Security Council Resolution

⁵⁹⁸ AIR AND MISSILE WARFARE MANUAL, *supra* note 590, ¶¶ 108–110.

⁵⁹⁹ Mark Nevitt, *The Operational and Legal Risks of a No-Fly Zone Over Ukrainian Skies*, JUST SECURITY (Mar. 10, 2022), <https://www.justsecurity.org/80641/the-operational-and-legal-risks-of-a-no-fly-zone-over-ukrainian-skies/>.

⁶⁰⁰ Wikipedia, *supra* note 594.

⁶⁰¹ Wikipedia, *supra* note 592.

⁶⁰² Wikipedia, *supra* note 593.

⁶⁰³ U.S. Gov’t Accountability Off., *Operation Provide Comfort: Review of U.S. Air Force Investigation of Black Hawk Fratricide Incident*, GAO/OSI-98-4 (Nov. 1997), <https://www.gao.gov/assets/osi/98-4.pdf>.

⁶⁰⁴ U.N. Charter, *supra* note 31, art. 39.

⁶⁰⁵ *Id.* art. 42.

⁶⁰⁶ S.C. Res. 781, Bosnia and Herzegovina (Oct. 9, 1992), S/RES/781 (1992), <http://unscr.com/en/resolutions/781>.

1973 (2011) authorized the no-fly zone over Libya,⁶⁰⁷ expressly allowing for “all necessary measures” to enforce it, which is a phrase used by the UN to permit the use of force.

Because UN Security Council authorization is the clearest basis for establishing and enforcing a no-fly zone, States work hard to justify their operations on this ground. To illustrate, Operation Provide Comfort, the first of the Iraq no-fly zones, was justified based on Security Council Resolutions 678,⁶⁰⁸ 687,⁶⁰⁹ and 688.⁶¹⁰ They, respectively, authorized the use of force against Iraq in 1990, set out the terms of the 1991 ceasefire, and condemned Iraq’s attacks on the Kurds as a threat to “international peace and security in the region.” The three were read together in a creative and therefore controversial justification that held that the initial use of force authorization remained in place, Iraq’s actions violated the ceasefire, and Iraqi attacks opened the door to forcible measures to protect the Kurds.⁶¹¹

As Russia is the aggressor in Ukraine, there will be no Security Council resolution authorizing the establishment of a no-fly zone. However, at least in theory, it is possible that such a

zone could be established in accordance with UN General Assembly Resolution 377(V),⁶¹² the Uniting for Peace Resolution.⁶¹³ The resolution provides a hotly debated basis for the use of force. Its proponents suggest that it allows the General Assembly to authorize action when the Security Council has failed to exercise its responsibility for the maintenance of international peace and security because of a veto by a permanent member. Although its use would overcome the Russian veto obstacle, such a resolution is unlikely.

But UN authorization, in the form of a Security Council resolution under Chapter VII or a Uniting for Peace Resolution, is unnecessary. Ukraine has a sovereign right to determine which aircraft may be present in its national airspace. Therefore, it may lawfully invite the combat aircraft of other States into that airspace, and did so in, *inter alia*, the speech to Congress by President Zelensky. The invitation qualifies as “consent,” which is a ground for the preclusion of wrongfulness under the law of State responsibility.⁶¹⁴ And, of course, Ukraine also enjoys a sovereign right to prohibit the entry into its airspace of Russian aircraft unless international law justifies their presence. As noted earlier in this

⁶⁰⁷ S.C. Res. 1973 (2011), S/RES/1073 (2011), https://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110927_110311-UNSCR-1973.pdf.

⁶⁰⁸ S.C. Res. 678 (1990), S/RES/678 (1990), <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap%20VII%20SRES%20678.pdf>.

⁶⁰⁹ S.C. Res. 687 (1991), S/RES/687 (1991), <https://www.un.org/Depts/unmovic/documents/687.pdf>.

⁶¹⁰ S.C. Res. 688 (1991), S/RES/688 (1991), <http://unscr.com/en/resolutions/688>.

⁶¹¹ Schmitt, *supra* note 591.

⁶¹² G.A. Res. 377(V), GA/RES/377(V) (Nov. 3, 1950), [https://www.un.org/en/sc/repertoire/otherdocs/GAres377A\(v\).pdf](https://www.un.org/en/sc/repertoire/otherdocs/GAres377A(v).pdf).

⁶¹³ *Id.*; see Larry D. Johnson, *United Nations Response Options to Russia’s Aggression: Opportunities and Rabbit Holes*, JUST SECURITY (Mar. 1, 2022), <https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/>; Rebecca Barber, *What can the UN General Assembly do about Russian aggression in Ukraine?* EJIL TALK! (Feb. 26, 2022), <https://www.ejiltalk.org/what-can-the-un-general-assembly-do-about-russian-aggression-in-ukraine/>; Devika Hovell, *Council at War: Russia, Ukraine and the UN Security Council*, EJIL TALK! (Feb. 25, 2022), <https://www.ejiltalk.org/council-at-war-russia-ukraine-and-the-un-security-council/>.

⁶¹⁴ Articles on State Responsibility, *supra* note 5, art. 20.

symposium,⁶¹⁵ Russia's justifications for their "special military operation" are without merit.

However, consent only determines the legal character of the *presence* of enforcement (lawful) and Russian (unlawful) aircraft. Whether enforcement aircraft may *use force* against Russian aircraft is a separate question.

First, it is necessary to dispense with one red herring. It is sometimes asserted that the use of force by one country (enforcement aircraft) against another (Russian aircraft) in the territory of a third (Ukraine) is a use of force against that country. However, there is broad consensus that a State may consent to the use of force on its territory so long as that use is otherwise lawful. The debate is irrelevant in this situation.

Similarly, Ukraine's consent obviates any need to look to the very controversial doctrine of humanitarian intervention as a basis for establishing a no-fly zone. Although a minority of States, including the United Kingdom,⁶¹⁶ are of the view that humanitarian intervention is permissible in extreme cases (which the Ukrainian situation qualifies as now that Russia is directly attacking civilian population centers), resort to the doctrine is only necessary to "preclude the wrongfulness" of the sovereignty violation that the intervening States' action would otherwise constitute. Ukraine's consent

already does that work under the law of State responsibility.

This brings the analysis around to the crux of the matter, the use of force against Russian aircraft by aircraft enforcing a no-fly zone. The law is crystal clear. Ukraine enjoys a right of self-defense against Russia's "armed attack" under Article 51 of the UN Charter⁶¹⁷ and customary international law. That right, in my opinion, stretches back to the Russian 2014 operations that resulted in the occupation of Crimea. And Article 51 expressly allows for "collective" self-defense at the request of, and according to the parameters set forth by, a State that has a right of individual self-defense. Ukraine has made that request in the form of a plea for a no-fly zone. It makes no difference whether the purpose of the zone would be humanitarian or to support Ukrainian forces, for attacking Ukrainian civilians is no less the continuation of Russia's initial armed attack than engaging in hostilities against the Ukrainian armed forces. Simply put, Ukraine's request for a no-fly zone allows enforcement States' aircraft to 1) be present in Ukrainian airspace and 2) employ force against Russian aircraft violating that zone.

Legal Consequences of a No-Fly Zone

A challenging question is whether a no-fly zone would violate the law of neutrality. Wolff

⁶¹⁵ Michael 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/>.

⁶¹⁶ 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/>.

⁶¹⁷ U.N. Charter, *supra* note 31, art. 51.

Heintschel von Heinegg,⁶¹⁸ Brian Finucane,⁶¹⁹ and I⁶²⁰ have taken the position, one consistent with the Department of Defense's Law of War Manual (§ 15.2.2),⁶²¹ that States do not violate their neutrality obligations by providing arms to the victim of *unequivocal* aggression by another State. Russian action qualifies in that regard, as evidenced by the UN Security Council's vote on the matter⁶²² (Russia vetoing) and the subsequent General Assembly resolution demanding an end to Russian operations.⁶²³ This being so, it would surely not be a violation to conduct a no-fly zone for humanitarian purposes. But even if it were, establishment of the zone would not *as such* result in the State concerned becoming a party to the conflict. Instead, a violation of neutrality obligations is only an internationally wrongful act under the law of State responsibility.⁶²⁴

Of course, the question remains whether establishing and enforcing a no-fly zone would trigger an international armed conflict.⁶²⁵ Merely declaring a no fly-zone and operating in Ukrainian airspace, if framed purely in humanitarian terms, would not bring those States contributing enforcement assets into

the ongoing conflict. However, as soon as their aircraft engaged in combat operations to enforce the zone, an international armed conflict would exist between them and Russia.

This would be so, for instance, if enforcement aircraft downed a Russian helicopter or military aircraft or conducted "suppression of enemy air defenses" (SEAD)⁶²⁶ strikes to terminate a Russian threat to enforcement aircraft. Relatedly, if the no-fly zone served military purposes, like performing "combat air patrols" meant to deter Russian attacks on Ukrainian forces, the involvement would be at a level where the States concerned would likely be considered a party to the conflict (see my discussion here⁶²⁷). And if Russian forces attacked the enforcement aircraft first, an international armed conflict would likewise be triggered.

Once the international armed conflict was underway, IHL would govern the conduct of hostilities by both sides. As noted by the AMW experts, "A Belligerent Party is not absolved of its obligations under the law of international armed conflict by establishing 'exclusion zones' or no-fly zones" (§105).⁶²⁸

⁶¹⁸ Heintschel von Heinegg, *supra* note 85.

⁶¹⁹ Brian Finucane, *Ukraine and War Powers: A Legal Explainer*, JUST SECURITY (Mar. 3, 2022), <https://www.justsecurity.org/80438/ukraine-and-war-powers-a-legal-explainer/>.

⁶²⁰ Schmitt, *supra* note 86.

⁶²¹ 2016 DoD LAW OF WAR MANUAL, *supra* note 27, § 15.2.2.

⁶²² Farnaz Fassihi, *Russia Vetoes a UN 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>.

⁶²³ U.N. News, *General Assembly Resolution Demands End to Russian Offensive in Ukraine* (Mar. 2, 2022), <https://news.un.org/en/story/2022/03/1113152>.

⁶²⁴ Articles on State Responsibility, *supra* note 5, art. 2.

⁶²⁵ ICRC, *International Armed Conflict* (last visited Dec. 15, 2023), https://casebook.icrc.org/a_to_z/glossary/international-armed-conflict#:~:text=An%20international%20armed%20conflict%20occurs,of%20the%20situation%20is%20required.

⁶²⁶ Christopher Bolkcom, *Military Suppression of Enemy Air Defenses (SEAD): Assessing Future Needs*, CRS REPORT FOR CONGRESS (updated May 11, 2005), <https://sgp.fas.org/crs/weapons/RS21141.pdf>.

⁶²⁷ Schmitt, *supra* note 86.

⁶²⁸ AIR AND MISSILE WARFARE MANUAL, *supra* note 590, para. 105.

It must be cautioned that under IHL, the military assets of the enforcing States would be military objectives by “nature” and subject to Russian attack, even if located outside Ukrainian territory.⁶²⁹ Similarly, civilian entities that were being used for military purposes, or even intended for future use, like an airfield used by both military and civilian aircraft, would become military objectives by virtue of their “use” and “purpose” (future use) under IHL.⁶³⁰ Whether Russia would conduct operations beyond Ukraine is debatable, but it must be understood that doing so would be lawful under the law of armed conflict.

Finally, it is my view that because the enforcement aircraft would be performing a humanitarian mission and lawfully be in Ukrainian airspace, any *initiation* of hostilities against them by Russian aircraft or ground forces would qualify as a wrongful use of force by Russia in violation of Article 2(4) of the UN Charter⁶³¹ and customary international law. This is because the aircraft would lawfully be in Ukrainian airspace at the time. For instance, the aircraft might be conducting reconnaissance and surveillance in the vicinity of humanitarian corridors and be

fired on with Russian surface-to-air missiles. Such a Russian use of force might even rise to the level of an “armed attack,” thereby giving the State of the aircraft an independent right of self-defense (separate from Ukraine’s) under Article 51⁶³² and customary law.

Of course, a practical difficulty would be distinguishing enforcement aircraft from Ukrainian combat aircraft, which are lawful targets. This is so even though there are means to distinguish the enforcement aircraft, for example, by notifying Russian forces of their presence. The point is that the fact that there is an ongoing armed conflict in Ukraine does not necessarily mean that Russia may attack enforcement aircraft.

Conclusion

Time will tell whether the deteriorating situation on the ground in Ukraine causes States to rethink their position on the establishment of a no-fly zone. But if they do, they would be on sound legal footing. The issue is the will, or lack thereof, of those States in the face of Russian war crimes, not international law.



⁶²⁹ AP I, *supra* note 65.

⁶³⁰ Michael Schmitt, *Targeting Dual-Use Structures: An Alternative Interpretation*, ARTICLES OF WAR (June 28, 2021), [https://lieber.westpoint.edu/targeting-dual-use-structures-alternative/#:-:text=To%20resolve%20this%20dilemma%2C%20the,function%20of%20the%20object%20\(such](https://lieber.westpoint.edu/targeting-dual-use-structures-alternative/#:-:text=To%20resolve%20this%20dilemma%2C%20the,function%20of%20the%20object%20(such).

⁶³¹ U.N. Charter, *supra* note 31, art. 2(4).

⁶³² *Id.* art. 51.

A UKRAINE NO-FLY ZONE: FURTHER THOUGHTS ON LAW AND POLICY

by Terry D. Gill | Mar 23, 2022

In a recent post, my friend and colleague Professor Michael Schmitt set out some of the legal issues relating to the imposition of a no-fly zone over Ukraine. This post reemphasizes some of the points he raised. It also introduces a note of caution into the discussion on whether or not to impose a no-fly zone or to otherwise take steps which would or likely could result in an international armed conflict between some or all NATO member States and Russia in the absence of an attack on a NATO member State.

I am in substantial agreement with the legal analysis made by Professor Schmitt regarding the potential legal basis for implementing a no-fly zone. However, I want to reemphasize some points he made and add some points regarding the law. I also wish to address policy aspects of introducing a no-fly zone. I am not convinced of the necessity or wisdom of a course of action which once initiated, could very easily lead to a full-scale war which would have devastating and far-reaching consequences and cause much more human suffering than we are currently witnessing as a result of the manner in which Russia is conducting hostilities.

The Law

A no-fly zone is obviously an empty gesture and meaningless unless it is enforced. As Professor Schmitt points out, the clearest legal basis for a no-fly zone is a UN Security Council (UNSC) resolution under Chapter

VII authorizing the imposition and—most importantly—the enforcement of such a zone. This would provide not only a legal basis for presence in Ukrainian airspace alongside that State's consent, but more to the point would provide a clear basis to enforce such a zone on behalf of the international community. A UNSC resolution under Chapter VII authorizing the use of force against a State, in this case in order to enforce a no-fly zone, has the effect of not only providing an unequivocal legal basis for the use of force, but pursuant to Articles 24 and 25 of the UN Charter is a decision on behalf of the UN as a whole which binds all member States and would constitute an action taken on behalf of the international community as a whole. That makes it unique in that if such a resolution were feasible it would not be a measure taken by one State or group of States, but a measure on behalf of the entire international community.

But as Professor Schmitt also points out, there is no chance of such a UNSC resolution being adopted. Russia would certainly oppose the adoption of such a measure allowing for the enforcement of a no-fly zone over Ukraine, which on its own would be sufficient to prevent it being adopted. Additionally, China would almost certainly join Russia in opposing such a measure, and several other current members would also very probably abstain or even oppose any resolution which would likely lead to a military confrontation

with a nuclear armed permanent member of the Council. As a result, the discussion of a possible resolution imposing a no-fly zone by the Security Council is purely academic, and the past examples where such authorization was forthcoming are of little relevance.

Professor Schmitt also discussed the possibility of a resolution under Uniting for Peace serving as a potential legal basis and dismissed it as unlikely. I would additionally emphasize that the possibility that the UN General Assembly resolution under Uniting for Peace which was recently adopted by a very large majority on 2 March could provide a legal basis for a no-fly zone, much less enforcement of such a zone, is in my opinion *nihil*. There is absolutely nothing in either the text of the resolution or the statements made by member States leading up to the adoption of that landmark resolution which can be construed as providing, implying, or even contemplating such an authorization.

Meanwhile, I fully agree with both Professors Schmitt⁶³³ and Heintschel von Heinegg that the General Assembly resolution in the present circumstances can arguably serve as a basis for “qualified neutrality” whereby the delivery of defensive arms to Ukraine and imposition of sanctions on Russia does not signify loss of non-belligerent status for the States which have taken such measures. But that is a far cry from an authorization to use force to enforce a no-fly zone or for any other purpose.

Professor Schmitt also referred to the consent of Ukraine as a basis for the imposition of a no-fly zone and pointed out that consent does

not provide an independent legal basis for such action. As he states, a government can consent to the presence of foreign military forces on its territory which includes national airspace. Consent can also serve as a basis for the use of force to assist the host State in preventing the usurpation or overthrow of its authority by non-State actors such as autonomous armed groups. But the use of force by one or more States against one or more other States can only be based on either a mandate from the UN Security Council authorizing force for a specific purpose in the context of the maintenance or restoration of international peace and security, or in reaction to an (impending) armed attack on the basis of (collective) self-defense.

That brings us to the question of whether (collective) self-defense could serve as a basis for the imposition and enforcement of a no-fly zone. There is no doubt that Ukraine has been subjected to an ongoing armed attack and has the right under the UN Charter and customary international law to take all necessary and proportionate measures to repel the attack and forestall repeated attack from Russia. It also has the right to call for assistance and any State which elects to come to its assistance will become a co-belligerent alongside Ukraine and would be bound by the same principles of necessity, immediacy, and proportionality as apply to Ukraine in the exercise of self-defense, alongside the obligations arising from the law of armed conflict and other applicable international law. In short it would be lawful to engage in collective self-defense.

⁶³³ Schmitt, *supra* note 93.

Political and Operational Considerations

Let there, however, be no mistake that co-belligerency brings a host of consequences with it, both of a legal nature and in diplomatic, political, and operational terms. As Professor Schmitt pointed out, force used by Russia against any State engaged in lawful self-defense would be unlawful in terms of the *jus ad bellum* since there is no self-defense against self-defense. However, the territory of the States which had become co-belligerents would no longer be inviolate and all persons and objects subject to attack located on the territory of a co-belligerent State would become lawful targets under the law of armed conflict. Any thought that Russia would be willing to have its aircraft shot down over Ukraine without itself taking action against NATO member States and retaliating with considerable force, both inside and outside Ukraine, is a fanciful delusion in my view.

The possibility of a robust reaction by Russia occurring, including attacks on NATO territory by airstrikes or missiles in the event of armed clashes over Ukraine is obvious. And while no one has a crystal ball to tell the future, the potential for such a conflict escalating into a full-scale war, possibly including the use of nuclear weapons, is real and would be increasingly likely the longer the conflict lasted and intensified as both parties strove to neutralize the threat posed by the other.

Moreover, the unity of the West, which until now has been almost unprecedented, would likely dissipate quickly as a result of intervention in the Ukraine conflict. It is

highly doubtful that all NATO members would be willing to support or participate in such an intervention. This would mean that any action taken to enforce a no-fly zone would more than likely be undertaken by a coalition of those member States willing to engage in such an intervention on the side of Ukraine and not by the alliance as a whole.

Likewise, the very broad condemnation of Russia for its aggression against Ukraine within the wider international community would also likely begin to evaporate if individual NATO member States chose to widen the conflict by intervention, notwithstanding the legality as such of engaging in collective self-defense. Both of these consequences would only serve to weaken the unity of the Western alliance and the measures taken as a response to Russia's aggression.

Finally, but by no means least important, the number of civilian victims of the conflict would only increase, perhaps exponentially, as a consequence of widening and intensifying the conflict. No one, including the beleaguered civilians in Ukraine, would be helped by heaping fuel on the fire.

A Plea

To conclude, I would urge clarity, consistency, and a careful weighing of consequences before stumbling into war. The West should continue to make clear it will not intervene directly in the conflict unless in the event of attack on a NATO member. It should continue providing all possible assistance to Ukraine short of direct intervention. It should build as solid and as broad an international coalition as possible to increase

the diplomatic and economic pressure on Russia to halt the war. And it should make clear to the Russian population and the wider international audience that there is no conflict sought with Russia, but that this war is a war of aggression and is the result of a deliberate choice by Russia's government, and not the result of any failing on the part of Ukraine or the policy of NATO since the end of the Cold War.

The plight of Ukraine's population moves any right-thinking person deeply and the bravery of its population, armed forces, and leadership evokes unmitigated respect and admiration. But that was no less the case in 1956 when Hungary was overrun and later in 1968 when it was the turn of Czechoslovakia to be illegally invaded and occupied to "restore

socialist achievements." The West could do even less than to prevent those illegal uses of force occurring than it can now in supporting Ukraine. This support is very substantial and virtually unprecedented, including providing arms, sharing intelligence, imposing far-reaching sanctions, and providing sanctuary to millions of war refugees. The plea to do more and the moral repugnance felt against the naked aggression and solidarity with the victims should not blind us to the consequences of engaging in a course of action which could well lead to a much wider and more destructive war. In short, be careful what you wish for because as the saying goes, "the road to hell is paved with good intentions."



MILITARY MARKINGS AND UNMANNED AERIAL VEHICLES

by Mateusz Piatkowski | Jun 21, 2022

The duty to distinguish oneself from non-combatants and civilians (e.g., by wearing a uniform or distinctive emblem) is a characteristic of every domain of warfare, including the aerial environment. In naval and air warfare, the main focus of distinction is on objects, including warships and military aircraft. International law grants military aircraft a unique legal character, but to operate lawfully, they must satisfy certain conditions. One such requirement is the traditional rule regarding military markings.

Early Treatment of Military Aircraft

Military aviation emerged during turbulent times for the *jus in bello*. The first air platforms had limited combat capabilities, which resulted in the marginalization of airpower at the Hague Peace Conferences of 1899 and 1907. In 1899, States even tried to ban air bombardment as a method of warfare by adopting a moratorium,⁶³⁴ which was extended in 1907. (The moratorium later fell into desuetude even though, interestingly, the United Kingdom and the United States are still technically bound by it.⁶³⁵) In 1907, the only provision that could have related to air power could be found in Article 25 of the Hague Regulations,⁶³⁶ which prohibited the bombardment of undefended towns—

though it is unclear whether the drafters had air attacks in mind at all.

However, a group of scholars at the L'Institut de Droit International, including the French jurist Paul Fauchille, seemed to better understand the potential of aircraft during armed conflict than States. In 1901, he emphasized the similarities between the status of aircraft and ships in times of war, while highlighting the uniqueness of air warfare in comparison with land warfare. Fauchille in his previous works (*Le domaine aérien et le régime juridique des aérostats*) largely derived his ideas on aviation law (at that time there was no distinction between international aviation law and the law of air warfare) from the application of law of the sea provisions and concepts.

Fauchille's main idea was to assimilate the rules of naval warfare with air warfare. The legal position of the warship and its overall characteristic (the inability to operate on land or to occupy a territory) seemed to him largely similar to the status of military aircraft. In 1911, Fauchille introduced a code on the law of air warfare in which he argued that only military aircraft have the right to be involved in hostilities.⁶³⁷ To be considered a military aircraft, the main distinctive requirement was that the aircraft had to “carry clearly distinctive

⁶³⁴ Declaration (IV, 1) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, July 29, 1899, 32 Stat. 1839.

⁶³⁵ Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, Oct. 18, 1907, 36 Stat. 2439.

⁶³⁶ Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, annex, at 2295.

⁶³⁷ Institute of Int'l Law, *Rules and Regulations of the Institute* (Apr. 1911), <https://www.idi-iiil.org/app/uploads/2017/05/4025-24-OCR-min-TBU.pdf>.

and distinct markings” (*Annuire L’Institut de Droit International* 1911, p. 28).⁶³⁸

The prominent British military aviator and lawyer James Malory Spaight later expanded the research⁶³⁹ of the *L’Institut de Droit International* shortly before the outbreak of the First World War. Spaight proposed a definition for military aircraft according to which a military aircraft must (1) operate under the control of the military, (2) display a visible national insignia, and (3) be manned by air crew subjected to military discipline and that respects the laws of war. The Hague Rules of Air Warfare⁶⁴⁰ adopted Spaight’s proposal, which remains intact today. For example, the HPCR Harvard Manual on International Law Applicable to Air and Missile Warfare defines “military aircraft” as “any aircraft (i) operated by the armed forces of a State; (ii) bearing the military markings of that State; (iii) commanded by a member of the armed forces; and (iv) controlled, manned or preprogrammed by a crew subject to regular armed forces discipline.”⁶⁴¹ (See also *San Remo Manual* Rule 13(j).⁶⁴²)

The definition of military aircraft was actually one of the few uncontested *de lege lata* provisions in the HRAW of 1923. Although

the rules were not ratified by any State due to perceived problems with the regulation of air bombardment,⁶⁴³ the duty to mark military aircraft became accepted as customary international law and a constitutive element of the military aircraft definition.

The First Military Aircraft Markings

James Malory Spaight’s observations coincided with rise of the first aerial units. In 1912, French military aviation was established, and a parliamentary bill set forth France’s characteristic three-color roundel.⁶⁴⁴ In 1913, German aviation introduced the famous *Eiserne Kreuz* (later *Balkenkreuz*) as a symbol, and in 1914, the United Kingdom’s Royal Flying Corps followed the French example by adopting similar types of markings.⁶⁴⁵ The American Expeditionary Forces used the color scheme of its European Allies in 1917–1918.⁶⁴⁶

The practice of marking by belligerents was, therefore, uniform and constant. After the war, every State that created aerial units employed unique national identifiers to demarcate their military aircraft. For example, use of a red-and-white “checkboard” emblem for Polish aviation was one of the first decisions

⁶³⁸ *Id.* at 28.

⁶³⁹ J. M. Spaight, *Aircraft in War* (Macmillan & Co., Ltd., 1914), <https://archive.org/details/aircraftinwar00spai/page/116/mode/2up>.

⁶⁴⁰ *Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare*, International Committee of the Red Cross, <https://ihl-databases.icrc.org/en/ihl-treaties/hague-rules-1923> [https://perma.cc/3FJY-3DAQ].

⁶⁴¹ AIR AND MISSILE WARFARE MANUAL, *supra* note 590.

⁶⁴² See also SAN REMO MANUAL, *supra* note 333, art. 13(j).

⁶⁴³ Heinz Marcus Hanke, *The 1923 Hague Rules of Air Warfare—A contribution to the development of international law protecting civilians from air attack*, INT’L REV. RED CROSS 12–44 (1993), <https://international-review.icrc.org/articles/1923-hague-rules-air-warfare-contribution-development-international-law-protecting>.

⁶⁴⁴ Wikipedia, *French Aircraft During World War I, Flying Over German Held Territory (1915)* (last visited Dec. 15, 2023), https://en.wikipedia.org/wiki/French_Air_and_Space_Force#/media/File:C02797Watt1915.jpg.

⁶⁴⁵ Photograph of Royal Air Force Military Aircraft Roundel Insignia on Deviant Art (last visited Jan. 25, 2024), <https://www.deviantart.com/maxhitman/art/Royal-Air-Force-Roundel-1914-Today-593133236>.

⁶⁴⁶ Photograph of U.S. Military Aircraft Roundel Insignia on Deviant Art (last visited Jan. 25, 2024), <https://www.deviantart.com/maxhitman/art/USA-Air-Force-Roundels-1915-Today-593131823>.

adopted by Polish military authorities after Poland regained its independence in 1918.⁶⁴⁷ Characteristic color schemes, patterns, and symbols (roundel,⁶⁴⁸ disk,⁶⁴⁹ flame,⁶⁵⁰ checkboard,⁶⁵¹ star,⁶⁵² coat of arms⁶⁵³) were generally used to indicate nationality and military character as required by the Hague Rules of Air Warfare.

As noted above, the use of markings to distinguish military aircraft came to be regarded as obligatory as a matter of customary international law. The employment of emblems, flags, and insignias was already standard in naval warfare. The rule now extended to air warfare as well.

Evolution of Military Aircraft Markings during the Second World War

The Second World War confirmed the customary character of military markings. However, two varieties of this obligation began to emerge as permissible exceptions. First, the Hague Rules of Air Warfare and the

practice followed during the First World War indicated that markings should be applied to all surfaces of an aircraft (bottom, top, and sides) (art. 7).⁶⁵⁴ However, during the Second World War, the United States marked its aircraft with the “national star insignia” in a non-symmetric way,⁶⁵⁵ and the Soviet Union did not paint the “red star” on the upper surface of its aircrafts’ wings, placing instead double markings on the fuselage.⁶⁵⁶ Later, some Warsaw Pact members similarly followed this scheme.⁶⁵⁷

The irregular placement of markings is not a violation of the requirement to mark military aircraft. Rather, based on State practice, it is an accepted variety of the rule. Given the fact that aircraft designs are becoming more sophisticated, it is at times technically impossible to paint the insignia on the fuselage. The minimum requirement is that at least some marks need to be present.

Second, around this time, belligerents began to test camouflage patterns on military aircraft. For instance, Polish military aviation

⁶⁴⁷ Wikiwand, *Szachownica Lotnicza* (last visited Dec. 15, 2023), https://www.wikiwand.com/pl/Szachownica_lotnicza.

⁶⁴⁸ Photograph of Roundel of Italy in Wikipedia, *Roundel of the Italian Air Force* (last visited Dec. 15, 2023), https://en.wikipedia.org/wiki/Italian_Air_Force#/media/File:Roundel_of_Italy_%E2%80%93_Low_Visibility_%E2%80%93_Type_1.svg.

⁶⁴⁹ Photograph of Roundel of Japan in Wikipedia, *Photograph of Roundel of Japan* (last visited Dec. 15, 2023), https://en.wikipedia.org/wiki/Japan_Air_Self-Defense_Force#/media/File:Roundel_of_Japan.svg.

⁶⁵⁰ Photograph of Roundel of Hungary in Wikipedia, *Roundel of the Hungarian Air Force* (last visited Dec. 15, 2023), https://en.wikipedia.org/wiki/Hungarian_Air_Force#/media/File:Roundel_of_Hungary.svg.

⁶⁵¹ Photograph of Roundel of Poland in Wikipedia, *The Polish Aviation Checkerboard Pattern Which Has Been in Force Since 1993* (last visited Dec. 15, 2023), https://pl.wikipedia.org/wiki/Szachownica_lotnicza#/media/Plik:Roundel_of_Poland.svg.

⁶⁵² Photograph of Roundel of the Soviet Union in Wikipedia, *Roundel of the Soviet Air Forces, Air Defense Forces, and Naval Aviation (1945–1991)* (last visited Dec. 15, 2023), [https://en.wikipedia.org/wiki/Soviet_Air_Forces#/media/File:Roundel_of_the_Soviet_Union_\(1945%E2%80%931991\).svg](https://en.wikipedia.org/wiki/Soviet_Air_Forces#/media/File:Roundel_of_the_Soviet_Union_(1945%E2%80%931991).svg).

⁶⁵³ Photograph of Roundel of Slovakia in Wikipedia, *Coat of Arms of Slovakia* (last visited Dec. 15, 2023), https://en.wikipedia.org/wiki/Slovak_Air_Force#/media/File:Coat_of_arms_of_Slovakia.svg.

⁶⁵⁴ *Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare*, *supra* note 640.

⁶⁵⁵ ImageWerX.us, *Curtiss P-40 Warhawk Air to Air* (last visited Jan. 25, 2024), <https://imagewerx.us/product/curtiss-p-40-warhawk-air-to-air/>.

⁶⁵⁶ Wikipedia, *MiG-3* (last visited Jan. 25, 2024), <https://pl.wikipedia.org/wiki/MiG-3>.

⁶⁵⁷ Michał Fiszer & Jerzy Gruszczyński, *Su-22 Aircraft in the Polish Air Force* (March 2020), <https://zbiam.pl/artykuly/samolot-su-22-w-lotnictwie-polskim/>.

applied the first low-visibility markings during the invasion of Poland in 1939.⁶⁵⁸ In order to harmonize the intense red-and-white “checkboard” with the rest of the “Polish-blue” camouflage paint, the white of the “checkboard” was not applied to the undersides of Polish military aircraft.⁶⁵⁹

Some military markings, especially very decorative insignias, are clearly inconsistent with cloaking paints. The desire to camouflage aircraft therefore forced States to consider, as Poland had done, low-visibility markings. Though still physically present, the markings are stripped of their bright and decorative elements or are applied in grey scale or in muted color palettes

Today, the military aircraft of the U.K. RAF,⁶⁶⁰ USAF,⁶⁶¹ multiple NATO members,⁶⁶² and other States⁶⁶³ display low-visibility markings. Although they are *prima facie* inconsistent with Article 7 of Hague Rules of Air Warfare, no State has protested the widespread use of low-visibility markings (see M. Schmitt, W. Heintschel von Heinegg,⁶⁶⁴ and the HPCR Manual).

Markings form a “protective umbrella” for crews operating military aircraft, including those who fly the platforms and those who control them remotely. The protecting role of the marking ensures the status of the combat crew even in the absence of uniforms.⁶⁶⁵ As per the HPCR Manual Commentary to Rule 117, “markings of the military aircraft are sufficient indication of combatant status.”⁶⁶⁶ Flying in unmarked aircraft is much more risky for the crew. If a crew member is not wearing a uniform, his status will depend on whether mere membership in the regular armed forces is enough to grant the combatant privilege.⁶⁶⁷

More complicated is the case of the crew member who is uniformed but flying an unmarked aircraft. In my opinion, while involved in attack, despite wearing a uniform the crew member might lose combatant status. In air warfare the duty to distinguish is fulfilled by the markings of the aircraft. For the external observer the markings on an aircraft during air combat have the same value as the uniform in land warfare. This is in line with the “protective umbrella” role of the markings: They grant even

⁶⁵⁸ @marjnoda, PINTEREST (last visited Jan. 25, 2024), <https://www.pinterest.com/marjnoda/skalski/>.

⁶⁵⁹ Photograph of PZL P.11c in Wikipedia (last visited Jan. 25, 2024), [https://pl.wikipedia.org/wiki/PZL_P.11#/media/Plik:PZL_P.11c_39_-2'_\(14336386246\).jpg](https://pl.wikipedia.org/wiki/PZL_P.11#/media/Plik:PZL_P.11c_39_-2'_(14336386246).jpg).

⁶⁶⁰ Photograph of Royal Air Force Low Visibility Roundel in Wikipedia (last visited Dec. 15, 2023), <https://pl.wikipedia.org/wiki/Plik:Low-visibility-RAF-Roundel.svg>.

⁶⁶¹ Photograph of US Air Force Low Visibility Roundel in Wikimedia Digital Commons (last visited Dec. 15, 2023), [https://commons.wikimedia.org/wiki/File:Roundel_of_the_USAF_\(low-vis\).svg](https://commons.wikimedia.org/wiki/File:Roundel_of_the_USAF_(low-vis).svg).

⁶⁶² Photograph of Royal Canadian Air Force Low Visibility Roundel in Wikimedia Digital Commons (last visited Dec. 15, 2023), https://commons.wikimedia.org/wiki/File:Roundel_of_Canada_%E2%80%93_Low_Visibility.svg.

⁶⁶³ Photograph of Low-Visibility Roundel of the People's Liberation Army Air Force in Wikimedia Digital Commons (last visited Dec. 15, 2023), https://commons.wikimedia.org/wiki/File:Roundel_of_China_%E2%80%93_Low_Visibility.svg.

⁶⁶⁴ AIR AND MISSILE WARFARE MANUAL, *supra* note 590.

⁶⁶⁵ Ian Henderson, Jordan den Dulk & Angeline Lewis, *Emerging Technology and Perfidy in Armed Conflict*, 91 INT'L L. STUD. 468 (2015), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1407&context=ils>.

⁶⁶⁶ AIR AND MISSILE WARFARE MANUAL, *supra* note 590.

⁶⁶⁷ Ken Watkin, *Special Forces, Unprivileged Belligerency, and the War in the Shadows*, ARTICLES OF WAR (Mar. 8, 2022), <https://lieber.westpoint.edu/special-forces-unprivileged-belligerency-war-shadows/>.

un-uniformed crew members combatant status. Undoubtedly, from the operational perspective, following both requirements—markings for aircraft and uniform for crew—is recommended (see *The Law of Air, Space and Cyber Operations*⁶⁶⁸).

Additionally, the customary law of air warfare does not consider flying under false markings a lawful ruse of war. In this regard it is important to distinguish between protected emblems under international law (such as the symbol of the United Nations or medical signs) and enemy markings. While killing or injury caused while using protected markings could constitute perfidy⁶⁶⁹ under Article 39 of Additional Protocol I to the 1949 Geneva Conventions (AP I),⁶⁷⁰ the use of the enemy military markings is a separate violation (as a misuse), but it is not perfidious (enemy markings are not protected emblems).

Unmanned Aircraft and Military Markings

During the Second World War, belligerents started to test the first unmanned platforms,

such as the de Havilland *Queen Bee*,⁶⁷¹ aircraft of the Aphrodite program,⁶⁷² and the sophisticated German Luftwaffe *Mistel* program.⁶⁷³ Existing documentation confirms that even in cases of pilotless aircraft, military markings were still applied. After the Second World War, the practice of States started to vary. Recent photographic evidence of unmanned aerial vehicles (UAVs) confirms that markings are still displayed on various unmanned platforms (e.g., Predator,⁶⁷⁴ Reaper⁶⁷⁵).

In the ongoing Ukrainian-Russian war, Ukrainian Air Force markings are applied to the Bayraktar TB2 drone,⁶⁷⁶ and Russia's older Tu-141s⁶⁷⁷ and Orion UCAVs⁶⁷⁸ display the “red star” roundel. However, smaller UAVs, like the Russian Orlan, and commercial drones deployed by both sides have not borne military markings.⁶⁷⁹

It is unclear why larger drones such as the Bayraktar and Orion have military markings while smaller ones do not. Perhaps the small size of these UAVs precludes the use of such markings. However, if one could classify them

⁶⁶⁸ Jeffrey A. Rockwell & Christopher A. Brown, *The Law of Air, Space, and Cyber Operations*, 4th ed., p. 19, JAG CORPS. (2020), https://www.afjag.af.mil/Portals/77/documents/Publications/AFOPSLAW%202020%20Web3c.pdf?ver=E_fCdUrdLtN4Upnj--Anfw%3d%3d.

⁶⁶⁹ *Practice Relating to Rule 65: Perfidy*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule65>.

⁶⁷⁰ AP I, *supra* note 65, art. 39.

⁶⁷¹ Armed Conflicts, *De Havilland D.H.82B Queen Bee* (last updated 2010), <https://www.armedconflicts.com/De-Havilland-D-H-82B-Queen-Bee-t71054>.

⁶⁷² Wikipedia, *Operation Aphrodite* (last visited Dec. 15, 2023), https://en.wikipedia.org/wiki/Operation_Aphrodite.

⁶⁷³ Wikipedia, *Mistel* (last visited Dec. 15, 2023), <https://pl.wikipedia.org/wiki/Mistel>.

⁶⁷⁴ Wikipedia, *General Atomics MQ-9 Reaper* (last visited Dec. 19, 2023), https://en.wikipedia.org/wiki/General_Atomics_MQ-9_Reaper.

⁶⁷⁵ Craig Hoyle, *UK Confirms Deal to Double Reaper UAV Fleet*, FLIGHT GLOBAL (Dec. 9, 2010), <https://www.flightglobal.com/uk-confirms-deal-to-double-reaper-uav-fleet/97384.article>.

⁶⁷⁶ Umair Aslam (@Defense785), TWITTER (May 1, 2022), <https://twitter.com/Defense785/status/1520709689947967489>.

⁶⁷⁷ Johan Danforth (@johandanforth), Twitter (May 10, 2022), <https://twitter.com/johandanforth/status/152415054245227248>.

⁶⁷⁸ @EuromaidanPress, TWITTER (Apr. 9, 2022), <https://twitter.com/EuromaidanPress/status/1512729943473639425>.

⁶⁷⁹ Samuel Bendett (@sambendett), X (May 7, 2022), <https://twitter.com/SamBendett/status/1522918032900861953>.

as aircraft (and there are valid arguments for such a conclusion⁶⁸⁰) and use them in hostilities, in order to be involved in combat operation under the law of air warfare they should fulfill the requirements of the military aircraft.

This practice of not marking certain types of drones should be further studied in light of a possible emerging interpretation of existing rules as new types of weapons are deployed on the battlefield, such as loitering munitions or kamikaze drones.⁶⁸¹ It is important to understand whether these weapons should be classified as “aircraft” in the context of air warfare. This is not very clear; some research suggests that they are “something of a hybrid between UAVs and guided missiles.”⁶⁸² Under the DoD Directive 3000.09 (*Autonomy in Weapon Systems*), the loitering munition could be classified as a “guided munition.”⁶⁸³ If such devices are aircraft, then they should follow the core principle: If an unmanned aviation vehicle is involved in hostilities, it should comply with the full spectrum of requirements established by the military aircraft definition.⁶⁸⁴

One might wonder why military markings should still be painted on in an era of unmanned aviation and the marginal role visual identification plays in contemporary air warfare. The operational function of markings

as a tool of recognition is very limited in contemporary BVR (beyond-visual-range) air warfare. Typical physical markings could be replaced by e-markings—that is, some form of electronic or radar signature that signals the military character of the UAV. Such identification is already used in the context of medical transport.⁶⁸⁵

Nevertheless, in times of war it is dangerous to rely completely on electronic, IFF (identification friend-or-foe) systems, or radar signatures, as they are easily interrupted or jammed. As per visual recognition, in case of destruction, physical markings are a *prima facie* sign of nationality and status as a military aircraft. Thus, they serve as ultimate verification of an aircraft’s nature. This, in some circumstances, might be a fundamental factor when determining the status of the crew (as highlighted above).

Other Actors and Aircraft

It is accepted that the status of military aircraft does not exist in non-international armed conflicts. Meanwhile, in international armed conflicts, other actors besides States may engage as parties to the conflict, such as a “peoples fighting for self-determination” (art. 1(4) AP I) or an international governmental organization.

⁶⁸⁰ International Civil Aviation Organization, *Unmanned Aircraft Systems*, Cir 328 AN/190 (2011), https://www.icao.int/meetings/uas/documents/circular%20328_en.pdf.

⁶⁸¹ Jesus Roman (@jesusfroman), X (May 13, 2022), <https://twitter.com/jesusfroman/status/1525002869354684416>.

⁶⁸² PAX for Peace, *Where to Draw the Line: Increasing Autonomy in Weapon Systems—Technology and Trends* (Nov. 2017), <https://paxforpeace.nl/wp-content/uploads/sites/2/import/import/pax-report-where-to-draw-the-line.pdf>.

⁶⁸³ U.S. Dep’t of Def., *DoD Directive 3000.9 Autonomy in Weapons Systems* (Effective Jan. 25, 2023), <https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodd/300009p.pdf>.

⁶⁸⁴ See WILLIAM H. BOOTHBY, *WEAPONS AND THE LAW OF ARMED CONFLICT* (2nd ed. 2016).

⁶⁸⁵ Annex 1 Regulations Concerning Identification to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, 30 November 1993, <https://ihl-databases.icrc.org/en/ihl-treaties/api-amended-annex-i-1993>.

In the 1960s and 1970s during the decolonization period, separatist entities such as Katanga⁶⁸⁶ and Biafra⁶⁸⁷ organized their own air detachments and adopted military markings just like States' air forces. While by definition only States can deploy military aircraft, if a party to the conflict is recognized as a belligerent or represents the "peoples fighting for self-determination," they should also have a right to deploy military aircraft with corresponding markings. The status of international organizations is more ambiguous. However, as showcased by the newly acquired NATO RQ-4D Phoenix UAV, the NATO Alliance also follows the customary duty to mark military aircraft belonging to the organization.⁶⁸⁸

Conclusion

Even in an era of unnamed military aircraft, State practice has confirmed the customary rule requiring the marking of aircraft engaged in hostilities. However, small new UAVs and similar devices present an area for further study. It is unclear whether such platforms must also be marked.

Markings are an integral part of what defines a military aircraft, and the requirement to mark, with some light modifications, could easily apply to other types of aerial military machines. States should heed this important requirement as the omission of markings could endanger the status and protections afforded to crews operating these aircraft.



⁶⁸⁶ Wikipedia, *Katangese Air Force* (last visited Dec. 15, 2023), https://en.wikipedia.org/wiki/Katangese_Air_Force.

⁶⁸⁷ Wikipedia, *Biafran Armed Forces* (last visited Dec. 15, 2023), https://en.wikipedia.org/wiki/Biafran_Armed_Forces.

⁶⁸⁸ NATO, *Alliance Ground Surveillance* (AGS) (last updated Sep. 4, 2023), https://www.nato.int/cps/en/natohq/topics_48892.htm.

SECTION 4

Space

THE RUSSIA-UKRAINE WAR AND THE SPACE DOMAIN

by Timothy Goines, Jeffrey Biller, and Jeremy Grunert | Mar 14, 2022

As demonstrated by this symposium, every domain of the ongoing Russia-Ukraine War presents critical legal questions. This post focuses on the potential consequences of the war on the space domain.

Although Russia continues to play a vital role in the development and operation of outer space activities, the invasion of Ukraine and the international response to that invasion are likely to have long-lasting implications on Russian activities in outer space. Additionally, recent technological developments pose challenging questions on the application of international law to the space domain during armed conflicts.

This post examines three aspects: (1) the space-related law of war implications of private actor involvement in the conflict; (2) Russian threats against the International

Space Station, and (3) potential effects of sanctions on the Russian space program.

Private Company Provision of Satellite Internet Support to Belligerents

Prior to Russia's invasion of Ukraine, recent practice suggested the Russian military would quickly move to degrade Ukrainian internet access.⁶⁸⁹ Although some Ukrainian government web services, as well as portions of the financial sector, have been disrupted from distributed denial of service operations,⁶⁹⁰ Ukraine has yet to experience widespread internet outages. Nevertheless, persistent fears of massive outages remain. To combat those fears, Ukraine's Vice Prime Minister, Mykhailo Federov, requested on the third day of the conflict that Elon Musk

⁶⁸⁹ Reuters, *Ukraine: Cyberattack on Communications, MPs Phones Blocked*, CNBC (Mar. 4, 2014), <https://www.cnbc.com/2014/03/04/ukraine-cyberattack-on-communications-mps-phones-blocked.html>.

⁶⁹⁰ Sean Lyngaas, *Key Ukrainian Government Websites Hit by Series of Cyber Attacks*, CNN (Feb. 24, 2022), <https://www.cnn.com/2022/02/23/europe/ukraine-government-commercial-organizations-data-wiping-hack/index.html>.

“provide Ukraine with Starlink stations.”⁶⁹¹ Just two days later, Federov tweeted a picture of the arrival of Starlink stations along with a statement of his appreciation.⁶⁹²

A Starlink station is the ground receiver connecting to a network of over 2,000 low earth orbit small satellites providing internet access at broadband speeds. While there are no indications that Ukraine is using Starlink for military purposes, the potential exists. Director General Dmitry Rogozin of Roscosmos, Russia’s space agency, criticized the move. Rogozin intimated that Starlink might no longer be considered “purely civilian,” questioning the status of such satellites should Ukraine use them for purposes related to the armed conflict.⁶⁹³ As the United States has expressed a clear desire not to become a party to the conflict, there are also potential neutrality issues as well.

In a previous post for this series, Wolff Heintschel von Heinegg provided an excellent overview of the foremost neutrality issues present in the conflict.⁶⁹⁴ Here, we build on that analysis to look specifically at the potential military use of Starlink by Ukrainian forces. Prof. von Heinegg lays out several provisions of the Convention (V) Respecting the Rights and Duties of Neutral Powers in Case of War on Land (Hague V)

potentially relevant to belligerent support by private actors.⁶⁹⁵

The first is Article 7 of Hague V, which provides that a neutral State is not required to prevent 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. Although this preclusion of obligation might seem to settle the Starlink neutrality question for the United States, it is complicated when the support is provided in the space domain. This is because Article VI of the Outer Space Treaty (OST) places international responsibility and requirements for authorization and continued supervision of non-governmental space activities on the State.⁶⁹⁶

Because Starlink is licensed and “supervised” by the United States, it is unclear whether, and for what purposes, this OST requirement might convert responsibility for Starlink service from a private company to that of a State. The application of Article VI of OST could override Article 7 neutrality law exemptions if the support provided qualifies as export or transport in support of belligerent activities, leading to a potential breach of neutrality by the United States. The same question arises in the event private companies granted Ukraine access to synthetic aperture

⁶⁹¹ Mykhailo Fedorov (@fedorovmykhailo), X (Feb. 26, 2022), <https://twitter.com/FedorovMykhailo/status/1497543633293266944>.

⁶⁹² BBC, *Elon Musk’s Starlink Arrives in Ukraine but What Next?* (Mar. 1, 2022), <https://www.bbc.com/news/technology-60561162>.

⁶⁹³ Jason Murdock, *Russian Space Chief Calls Elon Musk a ‘Pentagon Contractor’ and Says SpaceX Starlink Satellites Will Be Used by U.S. Military*, NEWSWEEK (Apr. 27, 2020), <https://www.newsweek.com/elon-musk-spacex-roskosmos-russia-chief-dmitry-rogozin-rocket-pricing-starlink-1500387>.

⁶⁹⁴ Heintschel von Heinegg, *supra* note 85.

⁶⁹⁵ Hague V, *supra* note 76.

⁶⁹⁶ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280128cbd>.

radar (SAR)⁶⁹⁷ to help them track the movement of Russian troops.⁶⁹⁸

Hague V also contains an exemption under Article 8 for the provision of “use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.”⁶⁹⁹ Unlike Article 7, this provision applies explicitly to both States and private companies. However, this use of an “apparatus” must be provided equally to all parties to the conflict. Should Russia be impeded from using Starlink services, which is likely under current sanctions, the provision of services to Ukraine could again be viewed as a breach of neutral party obligations by the United States.

The second question raised by Starlink use in Ukraine is the potential qualification of Starlink satellites as military objects. It is important to note that while breaches of neutrality are an internationally wrongful act, they do not necessarily make the offending State a party to the conflict. Should Starlink satellites qualify as military objects, they become targetable under the law of armed conflict.⁷⁰⁰ Given the statements of Rogozin and Russia’s demonstrated anti-satellite weapons capability,⁷⁰¹ this is more than an academic exercise. Military objectives include “those objects which by their nature, location,

purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁷⁰² Should the Ukrainian government begin using Starlink services in a manner fitting this definition (for example, for military command and control), regardless of their state of registration, these satellites would become legitimate military objectives for Russian forces.

Importantly, should Starlink satellites qualify as a military objective, Russia would then arguably be under an AP I, Article 57, obligation to take reasonable precautions in attack.⁷⁰³ If feasible in the circumstances, Russia should request that SpaceX terminate the use of Starlink by Ukraine prior to targeting the now-dual-use Starlink satellites. The role the U.S. government should play in the decision to terminate Ukrainian use in such a situation is unclear, but it again raises the issue of State responsibility under Article VI of the OST. What is clear is that SpaceX, a private company associated with the United States through its national space licensing laws, has interjected itself into an international armed conflict in a manner that has raised the interest of both belligerents. Given the particular role States play in all space activities, the United States would do

⁶⁹⁷ Eric Mack, *Ukraine Asks Commercial Satellite Operators for Help Tracking Russian Troops*, CNET (Mar. 2, 2022), <https://www.cnet.com/science/space/ukraine-asks-commercial-satellite-operators-for-help-tracking-russian-troops/>.

⁶⁹⁸ Eric Mack, *Ukraine Asks Commercial Satellite Operators for Help Tracking Russian Troops*, CNET (Mar. 2, 2022), <https://www.cnet.com/science/space/ukraine-asks-commercial-satellite-operators-for-help-tracking-russian-troops/>.

⁶⁹⁹ Hague V, *supra* note 83, art. 8.

⁷⁰⁰ Charlie Dunlap, *Are Commercial Satellites Being Used for Intelligence-Gathering in Attack Planning Targetable?*, LAWFIRE (Mar. 5, 2021), <https://sites.duke.edu/lawfire/2021/03/05/are-commercial-satellites-used-for-intelligence-gathering-in-attack-planning-targetable/>.

⁷⁰¹ Deganit Paikowsky, *Why Russia Tested Its Anti-Satellite Weapon*, FOREIGN POLICY (Dec. 26, 2021), <https://foreignpolicy.com/2021/12/26/putin-russia-tested-space-asat-satellite-weapon/>.

⁷⁰² *International Humanitarian Law Database Homepage*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl>.

⁷⁰³ AP I, *supra* note 65, art. 57.

well to clarify its position regarding these important questions.

Russian Threats Against the International Space Station

On 24 February, Dmitry Rogozin responded to President Biden's sanctions announcement (see below) with a series of tweets about the International Space Station (ISS).⁷⁰⁴ Rogozin appeared to threaten to shut off the ISS's Russian-controlled propulsion systems. Such an action could have the effect of the ISS falling to Earth in an uncontrolled deorbit and landing on territory within the United States, Europe, China, or India. Rogozin's statement is not the first time Russia has threatened similar action, making similar threats in 2014⁷⁰⁵ and 2021.⁷⁰⁶ These threats have left many to wonder: Can the Russians lawfully do that, and what would be the legal consequences if they did?

Two sources govern the operation of the ISS: international law (principally the four relevant space treaties—the OST, the Rescue Agreement,⁷⁰⁷ the Liability Convention,⁷⁰⁸ and the Registration Convention⁷⁰⁹—but also

the wider body of international law) and the 1998 Intergovernmental Agreement⁷¹⁰ (IGA) among the parties involved with the ISS. These two sources impose four primary duties implicated by Russia's threatened actions.

First, Article 10 of the IGA imposes a duty on each partner to operate the elements of the ISS it provided in a "safe, efficient, and effective" manner.⁷¹¹ The OST imposes a similar duty in Article IX to conduct all space activities "with due regard to the corresponding interests of all other States Parties to the Treaty."⁷¹² Both provisions prescribe a fairly amorphous duty to behave responsibly. Russian termination of the ISS propulsion systems and the ensuing threat of deorbit would breach this duty and violate Russia's IGA and OST obligations.

Second, in addition to exercising due regard, Article IX of the OST requires State Parties to the Treaty to engage in international consultation before conducting any activity that "would cause potentially harmful interference" with other State Parties' peaceful exploration and use of outer space.⁷¹³ Undoubtedly, deorbiting the ISS would cause such harmful interference for the many

⁷⁰⁴ @Rogozin, TWITTER (Feb. 24, 2022), <https://twitter.com/Rogozin/status/1496933548372209669>.

⁷⁰⁵ TIME Video, *Russia Threatens to Cut Ties to International Space Station Over U.S. Sanctions* (May 14, 2014), <https://time.com/99509/russia-threatens-nasa/>.

⁷⁰⁶ Jake Rudnitsky, *Russian Space Chief Says U.S. Sanctions Keep Satellites Grounded*, BLOOMBERG (June 7, 2021), <https://www.bloomberg.com/news/articles/2021-06-07/russian-space-chief-says-u-s-sanctions-keep-satellites-grounded>.

⁷⁰⁷ *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, 1969, U.N. Treaty Series, vol. 672, No. 9574, <https://treaties.un.org/doc/Publication/UNTS/Volume%20672/volume-672-I-9574-English.pdf>.

⁷⁰⁸ Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. No. 13810, <https://treaties.un.org/doc/Publication/UNTS/Volume%20961/volume-961-I-13810-English.pdf>.

⁷⁰⁹ Convention on Registration of Objects Launched into Outer Space, Nov. 12, 1974, 2 U.N.T.S. Ch. XXIV, https://treaties.un.org/doc/Treaties/1976/09/19760915%2003-08%20AM/Ch_XXIV_01p.pdf.

⁷¹⁰ Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station, Jan. 29, 1998, T.I.A.S. 12927.

⁷¹¹ *Id.* art. 10.

⁷¹² Outer Space Treaty, *supra* note 696.

⁷¹³ *Id.*

partners of the ISS (to include the United States, Canada, Japan, and the European Space Agency).

Third, seven personnel are currently aboard the ISS (four American astronauts, two Russian cosmonauts, and one European Space Agency flight engineer). Article V of the OST declares astronauts as “envoys of mankind” and imposes a duty to render “all possible assistance to the astronauts of other States Parties.”⁷¹⁴ Article 3 of the Rescue Agreement takes this a step further, requiring contracting parties to “extend assistance in search and rescue operations” of personnel of a spacecraft in need of assistance. While the treaties do not contemplate purposefully deorbiting a spacecraft with personnel on board, the provisions’ intent and purpose clearly suggest prohibiting such acts. Additionally, the remainder of international law, incorporated by reference to space activities within Article III in the OST, must also be considered.⁷¹⁵ Intentionally deorbiting a spacecraft with the likely death of those on board and the incidental destructive impact on the territory of a target State is a clear violation of Article 2(4) of the United Nations Charter.

Finally, Article VII of the OST and Articles II and III of the Liability Convention establish a liability framework for damage caused by space objects on the surface of the Earth, in terrestrial airspace, or in outer space.⁷¹⁶ Article II of the Liability Convention provides that

a launching State bears absolute liability for damages caused to the surface of the Earth. Liability, therefore, centers on the launching State, defined as the State that launches or procures the launching of a space object or from whose territory or facility the object is launched. This makes sense in the case of single-State space stations or for lone space objects potentially “launched” by multiple States. However, the multilateral nature of the ISS, with multiple modules launched and operated by different States but amalgamated into one combined space station, makes a formal determination of liability extremely complicated.

The IGA *does* implement a cross-waiver of liability in Article 16, whereby ISS partner States waive all claims against each other for damage arising out of “protected space operations.”⁷¹⁷ The cross-waiver, however, explicitly *excludes* claims for damage caused by willful misconduct.⁷¹⁸ A Russian shutdown of the ISS’s propulsion systems without the permission or consent of the remaining partners would constitute “willful misconduct,” exposing Russia to liability claims from its ISS partner States. To put it all together, should Russia intentionally deorbit the ISS, causing damage to a third-party State, Article IV of the Liability Convention would impose joint and several liability on the ISS member States for the damage. However, the other ISS partner States would have a claim against Russia to recover the damages.

⁷¹⁴ *Id.* art. 5.

⁷¹⁵ *Id.* art. 3.

⁷¹⁶ *Id.* art. 7.

⁷¹⁷ Space Station Treaty, *supra* note 707, art. 16.

⁷¹⁸ *Id.*

Sanctions Affecting the Russian Space Program

Unprecedented economic sanctions are playing a pivotal role in the international response to the conflict. President Biden announced the imposition of wide-ranging sanctions, including on Russia's military technology sector.⁷¹⁹ Biden claimed that the new sanctions would halve Russia's high-tech imports and would "degrade their aerospace industry, including their space program."⁷²⁰ Yet, despite the announcement, the precise nature of the sanctions likely to affect Russia's space program remains unclear. At least part of the sanctions regime focuses on denying Russia access to semiconductor chips, which play a crucial role in satellites and other space technologies.⁷²¹ Indeed, the market for space-related semiconductors is estimated to grow by a billion dollars over the next five years.⁷²²

The sanctions imposed by the United States and NATO are unlikely to affect the Russian space program in the short term to a significant degree. Their possible longer-term effects, however, depend on several questions, including the precise nature of the sanctions themselves; how long the ongoing Russia-

Ukrainian War lasts, as well as whether (and how quickly) sanctions are reduced or removed should the conflict draw to a close; and whether Russia finds international partners (such as the People's Republic of China) to increase alternative sources of supply for sanctioned space-related items.

The effect of sanctions on Russian *actions*, however, has been immediate. Russia has suspended all Soyuz launch cooperation with Europe and withdrawn its approximately 87 Russian employees from the launch facility operated jointly by the European Space Agency and the National Center for Space Studies in French Guiana.⁷²³ Additionally, Russia has suspended business relationships with the private companies of States involved in the anti-Russia sanctions campaign. For example, Russia halted a contracted launch of OneWeb satellites at the Baikonur Cosmodrome, demanding both a guarantee that the satellites would not be used for military purposes *and* that the United Kingdom completely divest from its shares in the company.⁷²⁴ Additionally, as of 3 March, Russia cut off the supply of RD-180 and

⁷¹⁹ Michael D. Shear & Zolan Kanno-Youngs, *Biden Announces New Sanctions: Putin and Russia 'Will Bear the Consequences' of Their War*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/us/politics/sanctions-on-russia-biden.html>.

⁷²⁰ Jeff Foust & Brian Berger, *Biden: Sanctions Will "Degrade" Russian Space Program*, SPACE NEWS (Feb. 24, 2022), <https://spacenews.com/biden-sanctions-will-degrade-russian-space-program/>.

⁷²¹ Aime Williams, Eleanor Olcott & Kathrin Hille, *Chip Sanctions Aim for Russia's Military and Its Tech Industry Hopes*, FINANCIAL TIMES (Feb. 27, 2022), <https://www.ft.com/content/1d0e97dd-b7e3-416c-98a0-a823838fbc96>.

⁷²² Fortune Business Insights, *Space Semiconductor Market Size, Share & Covid-19 Impact Analysis, by Type (Radiation Hardened Grade, Radiation Tolerant Grade, and Others), by Component (Integrated Circuits, Discrete Semiconductors Devices, Optical Device, Microprocessor, Memory, Sensors, and Others), by Application (Satellite, Launch Vehicles, Deep Space Probe, and Rovers and Landers), and Regional Forecast, 2021–2028* (Nov. 2021), <https://www.fortunebusinessinsights.com/space-semiconductor-market-105223>.

⁷²³ Jeff Foust, *Russia Halts Soyuz Launches from French Guiana*, SPACE NEWS (Feb. 26, 2022), <https://spacenews.com/russia-halts-soyuz-launches-from-french-guiana/>.

⁷²⁴ BBC, *OneWeb: UK Rejects Russian Demand to Sell Share in Satellite Firm* (Mar. 2, 2022), https://www.bbc.com/news/uk-politics-60587154?xtor=AL-72-%5Bpartner%5D-%5Bbbc.news.twitter%5D-%5Bheadline%5D-%5Bnews%5D-%5Bbizdev%5D-%5Bisapi%5D&at_medium=custom7&at_custom2=twitter&at_custom3=%40BBCWorld&at_campaign=64&at_custom4=F7C914A4-9A61-11EC-B304-9AA6923C408C&at_custom1=%5Bpost+type%5D.

RD-181 rocket engines used by the United Launch Alliance and Northrop Grumman.⁷²⁵

Conclusion

Despite the potential costs to space operations, there is little from a legal perspective to hinder the imposition of anti-Russia sanctions or Russia's counter-sanctions. Despite occasional arguments that sanctions constitute impermissible "collective punishment" on populations, most States do not consider that international law constrains the use of sanctions in any meaningful way.⁷²⁶ As the conflict in Ukraine continues, we should expect continued use of sanctions by

both sides. A critical question is how these sanctions will ultimately affect the Russian space program and, more broadly, the space programs of Russia's former trade partners.

As the Russia-Ukraine War continues, the questions examined in this post will likely only increase in importance. All sides to the conflict—not only the belligerent parties themselves, but also third States interacting with them—have seen that outer space is a critical part of the economic and actual battlefield. We should expect to continue to see further fallout from the conflict in the space domain.



⁷²⁵ Christian Davenport, *Russia Cuts Off Rocket Engine Supply and Threatens Space Station Partnership*, WASH. POST (Mar. 3, 2022), <https://www.washingtonpost.com/technology/2022/03/03/russia-nasa-rocket-engines-rogozin-ukraine/>.

⁷²⁶ U.N., *Civilians Suffering Due to Sanctions Must Be Spared 'Collective Punishment' Urges UN Rights Expert* (Nov. 8, 2018), <https://news.un.org/en/story/2018/11/1025201>.

THE RISK OF COMMERCIAL ACTORS IN OUTER SPACE DRAWING STATES INTO ARMED CONFLICT

by Tara Brown | Jul 8, 2022

Prior to the Russian invasion of Ukraine, the satellite communications firm Viasat confirmed a distributed denial of service (DDoS) attack⁷²⁷ that is suspected to have caused a partial outage in its broadband services across KA-SAT,⁷²⁸ a network that provides internet coverage over much of Europe. The attack impacted Ukrainian government internet websites, banks, and several thousand residential customers. The Five Eyes⁷²⁹ (United Kingdom, United States, Canada, Australia, and New Zealand) intelligence-sharing community attributed the attack to the Russian government.⁷³⁰ More recently, an attack against Ukrtelecom, Ukraine's largest telecommunications provider geographically, saw its connectivity collapse to 13% of prewar levels.⁷³¹

In the midst of these challenges, Elon Musk responded to the Ukrainian government's tweet⁷³² requesting that he offer internet services through his constellation of 2,400 SpaceX Starlink satellites.⁷³³ The Starlink satellites are positioned in Low Earth Orbit⁷³⁴ (LEO) and are launched from inside the United States.⁷³⁵ Starlink is able to provide a faster internet broadband capability than traditional fiber-optic cables or single satellites operating out of the Geostationary Orbit⁷³⁶ (GEO). SpaceX made its services available first to the Ukrainian armed forces and emergency services and then to the wider populace. The service has been highly effective so far, impervious to bombardment and shelling in Mariupol and Chernihiv, as well as jamming attempts by Russia.⁷³⁷

⁷²⁷ Viasat, *KA-SAT Network Cyberattack Overview* (Mar. 30, 2022), <https://news.viasat.com/blog/corporate/ka-sat-network-cyber-attack-overview>.

⁷²⁸ Viasat, *KA-SAT Satellite* (last visited Dec. 20, 2023), <https://www.viasat.com/space-innovation/satellite-fleet/ka-sat/>.

⁷²⁹ Katherin Haan, *What is the Five Eyes Alliance?*, FORBES (Oct. 5, 2023), <https://www.forbes.com/advisor/business/what-is-five-eyes/>.

⁷³⁰ UK Foreign, Commonwealth & Development Office & the Rt. Hon. Elizabeth Truss MP, *Russia Behind Cyberattack with Europe-Wide Impact an Hour Before Ukraine Invasion* (May 10, 2022), <https://www.gov.uk/government/news/russia-behind-cyber-attack-with-europe-wide-impact-an-hour-before-ukraine-invasion>.

⁷³¹ Chris Vallance, *Ukraine War: Major Internet Provider Suffers Cyberattack*, BBC (Mar. 28, 2022), <https://www.bbc.com/news/60854881>.

⁷³² Mykhailo Fedorov, *supra* note 691.

⁷³³ Starlink, *World's Most Advanced Broadband Satellite Internet* (last visited Dec. 20, 2023), <https://www.starlink.com/technology>.

⁷³⁴ The European Space Agency, *Low Earth Orbit* (Mar. 2, 2020), [https://www.esa.int/ESA_Multimedia/Images/2020/03/Low_Earth_orbit#:~:text=A%20low%20Earth%20orbit%20\(LEO,very%20far%20above%20Earth's%20surface](https://www.esa.int/ESA_Multimedia/Images/2020/03/Low_Earth_orbit#:~:text=A%20low%20Earth%20orbit%20(LEO,very%20far%20above%20Earth's%20surface).

⁷³⁵ SpaceX, *Upcoming Launch: Starlink Mission* (last visited Dec. 20, 2023), <https://www.spacex.com/launches/>.

⁷³⁶ The European Space Agency, *The Geostationary Orbit* (last visited Dec. 20, 2023), https://www.esa.int/Education/3._The_geostationary_orbit.

⁷³⁷ Valerie Insinna, *SpaceX Beating Russian Jamming Attack Was 'Eyewatering': DoD Official*, BREAKING DEFENSE (Apr. 20, 2022), https://breakingdefense.com/2022/04/spacex-beating-russian-jamming-attack-was-eyewatering-dod-official/?utm_campaign=Northrop%20Grumman&utm_medium=email&_hsmt=211819600&_hsenc=p2ANqtz-_cTa6h8q8sDjnCvNT5Pqy9aZPt--Mzs7YdfCQDxPoWx6gOT4WKpQ7ogOPn_FlXGJbIGjtoWwtPlfZWa7RqDWgnViuYw&utm_content=211819600&utm_source=hs_email.

However, the provision of Starlink services raises questions about the U.S. role or responsibility in the conflict. This post examines State responsibility for Starlink operations under the Outer Space Treaty (OST), the law of neutrality, and co-belligerency. These issues bear on the legal risk of the United States being drawn into armed conflict by the actions of commercial actors in space.

The Outer Space Treaty and State Responsibility

The United States, Ukraine, and Russia are 3 of the 110 States that have ratified the OST, with another 23 States being signatories to the instrument.⁷³⁸ In addition to its treaty status, some States believe that the entire OST has customary international law (CIL) status (see, e.g., the German comments⁷³⁹ during a 2014 session on the Committee on the Peaceful Uses of Outer Space (COPUOS)). Other States only accept “fundamental” rules in the OST as having attained such status.

Under Article VI of the OST, States bear international responsibility for “national activities” in outer space, whether or not such activities are by governmental agencies or by non-governmental entities (NGEs).⁷⁴⁰ The term “international responsibility” is widely regarded as synonymous with “State Responsibility” under the Draft

Articles on Responsibility of States for Internationally Wrongful Acts (IWAs),⁷⁴¹ which was in the decades-long process of being drafted when the OST was opened for signature. Additionally, under Article VI of the OST, States are responsible for “assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty,” which includes, through application of Article III of the OST, compliance “with international law.” Where activities are carried out by NGEs, Article VI amplifies that States must authorize and continually supervise such activities.

Concerning the concept of international responsibility in Article VI of the OST, there are three key matters requiring consideration: (1) State responsibility for national activities; (2) the obligation on States to ensure that national activities conform with the provisions of the OST, and international law more widely; and (3) the obligation on States to ensure that they authorize and continually supervise the activities of NGEs.

(1) The OST’s attribution standard of State Responsibility for national activities

Number (1) is a special attribution rule that differs from that which applies in other domains pursuant to the law of State responsibility. The OST *travaux*

⁷³⁸ U.N., *Status of international agreements relating to activities in outer space as at 1 January 2022*, A/AC.105/C.2/2022/CRP.10, https://www.unoosa.org/res/oosadoc/data/documents/2022/aac_105c_22022crp/aac_105c_22022crp_10_0_html/AAC105_C2_2022_CRP10E.pdf.

⁷³⁹ U.N., *Responses to the set of questions provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space*, Vienna (Apr. 10, 2015), A/AC.105/C.2/2015/CRP.11, https://www.unoosa.org/pdf/limited/c2/AC105_C2_2015_CRP11E.pdf

⁷⁴⁰ Outer Space Treaty, *supra* note 696, art. 6.

⁷⁴¹ U.N. Int’l Law Commission, *supra* note 6.

*préparatoires*⁷⁴² provides insight into the negotiations, revealing that the Soviet Union opposed any use of outer space by private entities, whereas the United States took a contrary position. Article VI was the compromise reached between the then space superpowers (see Professor Von Der Dunk's piece⁷⁴³ for a discussion on "private activity but public responsibility"). In other domains, State responsibility would depend upon whether commercial providers were in fact acting on the instructions of, or under the direction or control of, the State (Article 8, Draft Articles on Responsibility of States for IWAs⁷⁴⁴), which requires consideration of the "effective control" standard⁷⁴⁵ set out by the International Court of Justice (ICJ) in *Paramilitary Activities*⁷⁴⁶ and endorsed in the *Bosnian Genocide* case.⁷⁴⁷

In outer space, however, State responsibility depends on whether the activity carried out by an NGE is a "national activity." The OST does not define the term "national activities," but State practice demonstrates that it often includes activities from within the State's territorial jurisdiction or by its nationals (see, e.g., the United Kingdom Space Industry Act 2018,⁷⁴⁸ which would include commercial providers of satellite communication). Differing interpretations of what type of

activity will constitute a "national activity" for the purpose of State responsibility are summarized in detail by Professor Von Der Dunk⁷⁴⁹ and summarized below.

The first interpretation focuses on the use of the word "national" and holds States responsible for all activities conducted by its nationals (including persons and NGEs), irrespective of the level of control that the State may or may not exercise. The second interpretation conflates international responsibility within Article VI with international State liability in Article VII and concludes that "national activities" should refer to activities in which the State was a "launching State." This interpretation is problematic and does not take account of the different language used in the two clauses. The third interpretation draws on the obligation on States to "authorize and continually supervise" the activities of NGEs and holds States internationally responsible only where they have the tools to control such activities, i.e., where the activities fall within the jurisdiction of the State. These three schools of thought may be applied to the Starlink situation.

The correct view lies somewhere between the first and third interpretations. While States should not be responsible for *all* activities

⁷⁴² U.N. Office for Outer Space Affairs, *United Nations Treaties and Principles on Outer Space: Travaux Préparatoires* (last visited Jan. 9, 2024), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/travaux-preparatoires.html>.

⁷⁴³ Frans G. von der Dunk, *The Origins of Authorisation: Article VI of the Outer Space Treaty and International Space Law* (2011), SPACE, CYBER, AND TELECOMMUNICATIONS LAW PROGRAM FACULTY PUBLICATIONS 69, <https://digitalcommons.unl.edu/spacelaw/69>.

⁷⁴⁴ U.N. Int'l Law Commission, *supra* note 14.

⁷⁴⁵ 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 1227–1252 (2015), https://international-review.icrc.org/sites/default/files/irc_97_900-13.pdf.

⁷⁴⁶ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14 (June 27).

⁷⁴⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Judgment, I. C. J. Reports 1996, p. 595.

⁷⁴⁸ U.K. Space Industry Act, 5 U.K. Pub. Gen. Acts (2018), <https://www.legislation.gov.uk/ukpga/2018/5/introduction/enacted>.

⁷⁴⁹ Dunk, *supra* note 743.

of their nationals—i.e., the hacking of a satellite by a private individual—it should be recognized that commercial operators, such as Starlink, could not operate in space without the authorization of the appropriate State, and therefore its space activities will constitute “national activities.” This view is consistent with the State practice of regulating commercial satellite providers and meets the intent of the drafters of Article VI to ensure States couldn’t hide behind proxies to avoid State responsibility, as discussed above.

By this view, States are internationally responsible for activities carried out by such NGEs in respect of the State’s obligations under international law, including for IWAs.

(2) The Article VI OST obligation on States to ensure that national activities conform with the provisions of the Treaty and international law more widely

Compliance with the provisions of the OST includes, for example, the obligation in Article IX of the OST to conduct activities with due regard for the corresponding interests of other States. In late December 2021 the activities of Starlink necessitated that China’s space station, on two occasions, maneuver to avoid a collision.⁷⁵⁰ China called upon the UN Secretary-General to remind States of their

State responsibility obligations under Article VI of the OST.⁷⁵¹ Notably, China did not assert that the behaviour was in breach of Article IX—probably to avoid its own behaviour being called into question, such as Beijing’s 2007 ASAT demonstration⁷⁵² or the more recent failure to reserve enough propellant to allow a controlled rocket re-entry to Earth.⁷⁵³

Compliance with the provisions of the OST also includes Article III of the OST, which requires that States carry on activities in accordance with international law more generally, including that of the UN Charter, such as the obligation under Article 2(4) of the Charter prohibiting the threat or use of force.⁷⁵⁴

(3) The Article VI obligation on States to ensure they authorize and continually supervise the activities of NGEs

By ensuring compliance with the more onerous OST attribution, this standard necessitates that States adopt a supervisory role over commercial entities operating in outer space. States, including the United States, Ukraine, and Russia, have implemented domestic legislation relating to the launching and operation of satellites,⁷⁵⁵ enabling them to oversee domestic NGEs and ensure conformity with the States’ OST obligations.

⁷⁵⁰ Andrew Jones, *China’s Space Station Maneuvered to Avoid Starlink Satellites*, SPACENEWS (Dec. 28, 2021), <https://spacenews.com/chinas-space-station-maneuvered-to-avoid-starlink-satellites/>.

⁷⁵¹ U.N., *Verbal Note: Information furnished in conformity with the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (Dec. 6, 2021), A/AC.105/1262, https://www.unoosa.org/res/oosadoc/data/documents/2021/aac_105/aac_1051262_0_html/AAC105_1262E.pdf.

⁷⁵² Leonard David, *China’s Anti-Satellite Test: Worrisome Debris Cloud Circles Earth*, SPACE.COM (Nov. 17, 2021), <https://www.space.com/3415-china-anti-satellite-test-worrisome-debris-cloud-circles-earth.html>.

⁷⁵³ Reuters, *‘Irresponsible’: Nasa chides China as rocket debris lands in Indian Ocean*, GUARDIAN (May 9, 2021), <https://www.theguardian.com/science/2021/may/09/chinese-rocket-debris-earth-indian-ocean>.

⁷⁵⁴ U.N. Charter, *supra* note 31, art. 2(4).

⁷⁵⁵ U.N. Office for Outer Space Affairs, *National Space Law* (last visited Jan. 1, 2024), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/index.html>.

For example, in the United States, federal licenses are required for launches and re-entry of space vehicles in the United States and for any U.S. citizens regardless of the site of the launch.⁷⁵⁶

The fact that the United States bears international responsibility for the actions of commercial providers operating from within its jurisdiction under Article VI of the OST means that Musk's provision of Starlink services to Ukraine is attributable to the United States. This is pertinent to the traditional law of neutrality, under which the United States assumes neutral obligations to abstain from providing material support to belligerent parties.

(Qualified) Neutrality

The section that follows will explain why the provision of Starlink services does not undermine either traditional or qualified neutrality. The law of neutrality is found in two 1907 Hague Conventions—Convention V applies in the land domain,⁷⁵⁷ and Convention XIII applies in the maritime domain.⁷⁵⁸ However, the overarching principle of neutrality is applicable to all international armed conflict as a matter of customary law (see paragraph 89 of the Nuclear Weapons Advisory Opinion⁷⁵⁹), including in outer space.

General principles and obligations found in the two Conventions are reflective of their customary counterparts that apply in space. Article VI of Convention XIII prohibits the

supply, by a neutral power to a belligerent, of war material.⁷⁶⁰ By one view, the provision of military materiel to Ukraine violates obligations under neutrality law; by another, it may fall within the parameters of qualified neutrality.

The pertinent questions are whether (1) the provision of access to internet services amounts to the supply of war material, (2) whether the Article VI attribution rule binds the neutral state notwithstanding the freedom of commercial trade practiced under the traditional law of neutrality, and (3) whether the provision of Starlink meets the criteria necessary to bestow qualified neutrality.

As to (1), a total of 15,000 Starlink terminals were delivered to Ukraine, and the service has directly impacted military operations. On that basis, the assistance is capable of being equated to military material.

As to (2), there is a telecommunications exemption in Article VIII of Convention V which provides that a neutral power is not required to prevent or restrict the belligerents access to telegraph or telephone cables or wireless telegraphy apparatus belonging to it or to companies or to private individuals. The focus of the language on cables and apparatus is simply due to the passage of time of over a century since the Convention was entered into. Modern telecommunication systems would also fall within the scope of the exemption, a position that is consistent with the approach in the Tallinn Manual 2.0

⁷⁵⁶ 51 U.S.C. § 50904 (2024).

⁷⁵⁷ Hague V, *supra* note 76.

⁷⁵⁸ Hague XIII, *supra* note 78.

⁷⁵⁹ ICJ Nuclear Weapons Advisory Opinion, *supra* note 259.

⁷⁶⁰ Hague XIII, *supra* note 78.

(Rule 151) relating to the use of networks for military purposes, which confirms that Article VIII applies to cyber communication systems. As such, the provision of Starlink does not trigger a breach of traditional neutrality.

A short analysis will be given on question (3) as to qualified neutrality, as it may be of relevance to future activities by NGEs. Under the DoD Law of War Manual⁷⁶¹ (§ 15.2.2),⁷⁶² qualified neutrality permits neutral States to discriminate in favor of States that are victims of aggression, a position consistent with the views of Professor Michael Schmitt in a recent *Articles of War* post.⁷⁶³

Under the United Nations Charter, qualified neutrality would be foreshadowed by a Chapter VII finding of a threat to the peace, breach of the peace, or act of aggression.⁷⁶⁴ However, in this case, Russia used its veto power as a permanent member of the United Nations Security Council (UNSC) to block a proposed UNSC Resolution under Chapter VII condemning Russia.⁷⁶⁵ In such cases, Schmitt and Wolff Heintschel von Heinegg argue that application of qualified

neutrality still makes sense if it is otherwise clear that the State being assisted is the victim of aggression.⁷⁶⁶ If this position is accepted, States may provide the victim State with certain assistance, including arms and military equipment, while maintaining a neutral status. (But for a discussion of some protentional limitations of the concept, see Professor Terry Gill's⁷⁶⁷ and Raul (Pete) Pedrozo's⁷⁶⁸ posts.)

How far that assistance may go to favor the victim State without breaching qualified neutrality obligations requires a case-by-case analysis. It is at least arguable that recent intelligence data provided by the United States and NATO allies to Ukraine used to lethally target Russian generals⁷⁶⁹ and destroy Russia's flagship missile cruiser⁷⁷⁰ would fall outside the parameters of neutrality law, although not necessarily render the measures unlawful (on intelligence sharing and neutrality, see Schmitt⁷⁷¹ and Milanovic⁷⁷²). Professor Schmitt concludes that the provision of military material falls on the other side of the spectrum and does not violate qualified neutrality. Simply providing

⁷⁶¹ 2016 DoD LAW OF WAR MANUAL, *supra* note 27.

⁷⁶² *Id.* § 15.2.2.

⁷⁶³ Schmitt, *supra* note 86.

⁷⁶⁴ U.N. Charter, *supra* note 31 at Ch. 7.

⁷⁶⁵ Michelle Nichols & Humeira Pumak, *Russia vetoes U.N. Security action on Ukraine as China abstains*, REUTERS (Feb. 25, 2022), <https://www.reuters.com/world/russia-vetoes-un-security-action-ukraine-china-abstains-2022-02-25/>.

⁷⁶⁶ Heintschel von Heinegg, *supra* note 85.

⁷⁶⁷ Terry D. Gill, *A Ukraine No-Fly Zone: Further Thoughts on Law and Policy*, ARTICLES OF WAR (Mar. 23, 2022), <https://lieber.westpoint.edu/a-ukraine-no-fly-zone-further-thoughts-on-law-and-policy/>.

⁷⁶⁸ Pedrozo, *supra* note 119.

⁷⁶⁹ 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>.

⁷⁷⁰ BBC, *Moskva sinking: US gave intelligence that helped Ukraine sink Russian cruiser—reports* (May 5, 2022), <https://www.bbc.com/news/world-us-canada-61343044?xtor=AL-72-%5Bpartner%5D-%5Bgbl.newsletters%5D-%5Bheadline%5D-%5Bnews%5D-%5Bbizdev%5D-%5Bisapi%5D&xtor=ES-213-%5bBBC%20News%20Newsletter%5d-2022May6-%5btop+news+stories%5d>.

⁷⁷¹ Schmitt, *supra* note 132.

⁷⁷² Marko Milanovich, *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/>.

a substitute means of internet access after an aggressor destroys the victim State's original network is even further removed from the provision of military material, particularly where that service is also available to the civilian population and does not violate qualified neutrality.

Co-Belligerency

Still, even if Musk's provision of Starlink to Ukraine were to violate the United States' neutrality obligations, that of itself does not render the United States a party to the existing international armed conflict (IAC) between Ukraine and Russia.

The criteria for the existence of an IAC are set out in Common Article 2 of the four Geneva Conventions, which is reflective of customary international law. An IAC exists in "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."⁷⁷³

The International Committee of the Red Cross (ICRC) 2016 Commentary to Common Article 2 makes clear that there is no requirement that the use of force reach a certain level of intensity and it would cover even "minor skirmishes" and possibly "any unconsented-to military operations."⁷⁷⁴ The rationale for a low threshold in determining that an IAC exists is to ensure maximum application to those protected under various international humanitarian law (IHL) instruments, which govern the

conduct of hostilities during an armed conflict. IHL, otherwise referred to as the law of armed conflict (LOAC), sets forth various obligations and protections, and its application has ramifications on matters such as prisoner of war status and targetability. For example, Russia could legitimately launch an attack, meaning an "act of violence" (Article 49(1),⁷⁷⁵ Additional Protocol I (AP I) to the Geneva Conventions) against U.S. armed forces and military objectives if the United States was party to the conflict.

In light of the international support offered to Ukraine in recent months, there have been numerous observations as to when assistance to a belligerent during an IAC brings the State rendering assistance into the IAC as a co-belligerent. As the financial and arms support to Ukraine by the United States does not violate qualified neutrality as noted above, *a fortiori*, it does not trigger an IAC between the U.S. and Russia. Likewise, because the provision of Starlink services benefits from the telecommunications exemption, it too does not cause the United States to become a co-belligerent in the conflict. This conclusion also follows when examined under a slightly different analysis.

Article VI attribution is expressly concerned with State responsibility for IWAs and does not impose responsibility for *all* purposes, including conflict classification. The International Criminal Tribunal for the Former Yugoslavia in the case of Tadić⁷⁷⁶ (a case concerning when a NIAC may become

⁷⁷³ GC I, *supra* note 155, art. 2.

⁷⁷⁴ ICRC, *supra* note 429.

⁷⁷⁵ AP I, *supra* note 65, art. 49.

⁷⁷⁶ 1995 Tadić Decision, *supra* note 63.

internationalized) expressly adopted a different standard to State responsibility on the question of conflict characterization, relying on a test of “overall control.” As Schmitt notes, when determining whether the provision of support by a state not party to the conflict may cause the non-party to lose that status and join the conflict, “at issue is the degree of attenuation between the support in question and any supportive actions.”⁷⁷⁷

He draws on the ICRC support-based approach as outlined in its 2019 *Challenges Report*⁷⁷⁸ of assessing when a NIAC has become internationalized and acknowledges there is no consensus amongst States as to where the precise boundary lies in judging when support to a belligerent draws the supporting state into a conflict. However, the NIAC analogy is helpful where there is a lack of state practice or jurisprudence in an IAC setting. The mere provision of internet and communication services would not make the United States a party—facilitating the service does not demonstrate intent to contribute to specific conduct of hostility operations, and it is enduring so there is no immediacy between the support and its military use.

As reflected in the exploration of this specific case, the possibility of commercial satellite providers implicating States in a future

conflict would depend on the degree of connection between the support and specific conduct of hostility operations and whether the actions of the NGE are under the “overall control” of the State.

Conclusion

The application of Article VI of the OST is limited to the question of State responsibility and does not bear on conflict classification. However, as China’s comment on Starlink being “militarized”⁷⁷⁹ demonstrates, while they may not consider the United States as a co-belligerent, they are watching the activities of commercial actors in outer space and cognizant that commercial actors may become legitimate military objectives.

Article VI is a unique attribution rule which applies to all IWAs and engages State responsibility for acts or omissions of NGEs as if they had been carried out directly by the State. This highlights the need for States to act robustly when authorizing and continually supervising the activities of NGEs to ensure compliance with the provisions of the OST and international law. Here, Musk’s actions do not constitute a violation of the United States’ neutrality obligations; with different facts a commercial actor could bring a non-State party into a conflict.



⁷⁷⁷ Schmitt, *supra* note 132.

⁷⁷⁸ ICRC, *ICRC Report on IHL and the Challenges of Contemporary Armed Conflicts* (Nov. 22, 2019), <https://www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts>.

⁷⁷⁹ Meera Suresh, *PLA Warns World to Be Wary of US Militarizing Starlink Satellites*, INT’L BUSINESS TIMES (May 6, 2022), <https://www.ibtimes.com/pla-warns-world-be-wary-us-militarizing-starlink-satellites-3496955>.

CAN STARLINK SATELLITES BE LAWFULLY TARGETED?

by Tara Brown | Aug 5, 2022

In an earlier post,⁷⁸⁰ I discussed the special attribution regime in Article VI of the Outer Space Treaty (OST)⁷⁸¹ and the risk of activities of commercial actors drawing States into existing armed conflicts. This analysis stemmed from Elon Musk providing Starlink services to Ukraine in order to fill in a communication gap for the Ukrainian military and its civilians after Russia destroyed key components of Ukraine's internet infrastructure. The second part to this series will examine whether Russia may lawfully target Starlink satellites as a valid military objective under international law (as international law is expressly applicable to space by Article III of the OST⁷⁸²) and what this would mean for the United States.

Starlink as a Lawful Target

The question of whether Starlink satellites are valid military objectives is an important one because States are paying attention to the Starlink system and its implications for future conflict. As noted in the earlier post, China's People's Liberation Army (PLA) has accused the United States of "militarizing" the Starlink program.⁷⁸³ More recently,

the *South China Morning Post* reported that China must have the capability to destroy Starlink if it threatens their national security.⁷⁸⁴ The report was prompted by a paper published by researchers affiliated with China's defense industry that proposed ways in which China could develop hard-kill and soft-kill capabilities for use against Starlink.⁷⁸⁵ China is no doubt acutely cognizant of the potential for Starlink to aid Taiwan, as it has aided Ukraine, in a possible future China-Taiwan armed conflict. Thus, the underlying legal question of possible characterization of Starlink as a military objective has broader implications than just in the context of the current Russia-Ukraine war.

Military Objective

Article 52(2) of Additional Protocol I (AP I), which reflects customary international law, sets forth the definition of a military objective. To qualify as such, Starlink must by its nature, location, purpose, or use make an effective contribution to (Ukraine's) military action and its total or partial destruction, capture, or neutralization, in the circumstances ruling

⁷⁸⁰ Tara Brown, *The Risk of Commercial Actors in Outer Space Drawing States into Armed Conflict*, ARTICLES OF WAR (July 8, 2022), <https://lieber.westpoint.edu/commercial-actors-outer-space-armed-conflict/>.

⁷⁸¹ Outer Space Treaty, *supra* note 689, art. 6.

⁷⁸² *Id.* art. 3.

⁷⁸³ Suresh, *supra* note 771.

⁷⁸⁴ Stephen Chen, *China Military Must Be Able to Destroy Elon Musk's Starlink Satellites if They Threaten National Security: Scientists*, SCMP (May 25, 2022), https://www.scmp.com/news/china/science/article/3178939/china-military-needs-defence-against-potential-starlink-threat?module=perpetual_scroll_0&pgtype=article&campaign=3178939.

⁷⁸⁵ Ren Yuan-Zhen, Jin Sheng, Lu Yao-bin, Gao Hong-wei & Sun Shu-yan, *The Development Status of Starlink and Its Countermeasures*, MODERN DEFENCE TECHNOLOGY, vol. 50, No. 2 (Apr. 2022), <https://drive.google.com/file/d/1Vww66LyK88nLwOnvL5utRxMASaB a11/view>.

at the time, must offer (Russia) a definite military advantage.⁷⁸⁶

In the Russia-Ukraine war context, these requirements are met: Starlink is being used to provide Ukrainian military forces with high-speed internet and communication, which effectively contributes to their military operations. For example, it has enabled interception of Russian battlefield communications,⁷⁸⁷ facilitated Ukrainian C2 and information operations, and assisted a Ukrainian drone unit to destroy Russian tanks.⁷⁸⁸ One Ukrainian soldier described Starlink as having changed the war in Ukraine's favor.⁷⁸⁹ Denying Ukraine this capability would undoubtedly offer Russia a definite military advantage.

It is the agility of Starlink which sets it apart from its competitors. It is also an aspect that affects the legal analysis. There are currently over 2,000 functional satellites within the constellation,⁷⁹⁰ and as it operates in the low earth orbit (LEO), SpaceX is able to quickly replace a satellite if required. An attack on a single satellite is unlikely to cause anything more than a negligible or *de minimus* disruption to the system. Thus, it is difficult

to see how an isolated attack on one Starlink satellite would provide definite military advantage.

For the purposes of this post, it will be assumed that an attack on Starlink will be sophisticated and broad enough to cause a measured degradation of the system. It will also be assumed that the attack will involve the use of lethal force because, so far, Starlink has continued to operate despite Russian jamming attempts, by dynamically changing its electromagnetic posture⁷⁹¹ (a move described as “eyewatering” by the Pentagon). Russia has the capability to target satellites kinetically, as demonstrated by its direct-ascent anti-satellite (DA-ASAT) mission⁷⁹² in November 2021 and by its rendezvous and proximity operations (RPO); the United States has assessed that a projectile fired from Russian satellite Cosmos 2543 could be used to target satellites.⁷⁹³

The civilian use of Starlink has no bearing on it constituting a valid military objective, but a lawful attack must comply with the requirements of proportionality and the obligation to take precautionary measures.

⁷⁸⁶ AP I, *supra* note 65, art. 52.

⁷⁸⁷ Greg Myre, *How Does Ukraine Keep Intercepting Russian Military Communications?*, NPR (Apr. 26, 2022), <https://www.npr.org/2022/04/26/1094656395/how-does-ukraine-keep-intercepting-russian-military-communications>.

⁷⁸⁸ Huileng Tan, *Elon Musk's Starlink Satellites Are Helping Ukraine's Elite Drone Unit Destroy Russian Tanks and Trucks in the Night: Report*, BUSINESS INSIDER (Mar. 20, 2022), <https://www.businessinsider.com/elon-musk-starlink-ukraine-drone-unit-russia-tanks-war-2022-3>.

⁷⁸⁹ Thomas Barrabi, *Ukrainian Soldier Says Elon Musk's Starlink 'Changed the War' with Russia: Report*, THE N.Y. POST (Apr. 28, 2022), <https://nypost.com/2022/04/28/ukrainian-soldier-says-elon-musks-starlink-changed-the-war-with-russia/>.

⁷⁹⁰ Ry Crist & Trey Paul, *Starlink Explained: What You Need to Know About Elon Musk's Satellite Internet Service*, CNET (June 20, 2023), <https://www.cnet.com/home/internet/starlink-satellite-internet-explained/>.

⁷⁹¹ Insinna, *supra* note 737.

⁷⁹² U.S. Space Command Public Affairs Office, *Russian Direct-Ascent Anti-Satellite Missile Test Creates Significant, Long-Lasting Space Debris* (Nov. 15, 2021), <https://www.spacecom.mil/Newsroom/News/Article-Display/Article/2842957/russian-direct-ascent-anti-satellite-missile-test-creates-significant-long-last/>.

⁷⁹³ Todd Harrison, Kaitlyn Johnson, Joe Moye & Makena Young, *Space Threat Assessment 2021*, CSIS AEROSPACE SECURITY PROJECT (Apr. 2021), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210331_Harrison_SpaceThreatAssessment2021.pdf?gVYhCn79enGCOZtcQnA6MlkeKlcwqkqs.

Proportionality— Incidental Damage

By Article 51(5)(b) of AP I, any incidental loss of civilian life, injury to civilians or damage to civilian objects, or a combination thereof, must not be excessive in relation to the concrete and direct military advantage anticipated.⁷⁹⁴ In some circumstances, one may be able to separate an object into civilian and military components and only target the military element. A communications satellite, however, is not severable in this way, and an attack would result in a loss of use of that satellite's services for both military users as well as civilians.

The International Committee of the Red Cross (ICRC) published a report in which a group of international experts discussed the proportionality principle and concluded that while a dual-use object is a military objective, the impact of the attack on simultaneous civilian use or function (such as in the case of a bridge or an electricity station used for both military and civilian purposes) must also be taken into consideration in the assessment of proportionality. This position is consistent with the approach taken by the United States, as set out in the Joint Targeting Directive, (JP3-60, paragraph 6(2)(a)).⁷⁹⁵

But only consequences that meet the standard set out in Article 51(5)(b), i.e., death, injury, or destruction, will factor into the proportionality assessment. In some circumstances it will be foreseeable that the civilian loss of function will result in these consequences. Consider, for example,

an attack against a power plant providing electricity that is used to operate hospitals and treat water and sewage. Mere loss of internet services does not per se qualify as collateral damage in the proportionality analysis.

Synchronized attacks against the Starlink constellation could cause significant harm to civilians in those countries that do not have a backup system for their internet service, such as Tonga, which has relied on the Starlink service since the December 2021 tsunami for humanitarian operations and, of course, Ukraine whereby the loss of service would impact its emergency services and civil defense warnings. The latter example is of particular importance in this case.

In sum, it is possible that the civilian loss of use caused by an attack against Starlink may cause collateral harm to the extent that it will feature in the proportionality assessment. However, even if the examples feature in the calculation, that of itself is not a convincing argument that an attack would be excessive and fall afoul of the proportionality requirement due to the scale of concrete and direct military advantage Russia would garner by denying Ukraine this capability.

Proportionality— Indiscriminate Attacks

Article 51(4) prohibits indiscriminate attacks.⁷⁹⁶ This includes (a) where the attack is not directed at a specific military objective, or (b) where the attack employs a method or means of combat which cannot be directed at a

⁷⁹⁴ AP I, *supra* note 65, art. 51.

⁷⁹⁵ U.S. Joint Targeting, 31 Jan. 2013, JP 3-60, A-5, https://www.justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf#page=91.

⁷⁹⁶ AP I, *supra* note 65, art. 51.

specific military objective, or (c) attacks which employ a means or method of combat the effects of which cannot be limited and, as such, may strike military objectives and civilians or civilian objects without distinction.

An attack against satellites within the Starlink constellation will introduce further debris into outer space. The most recent figures provided by the European Space Agency estimate that there are currently approximately 36,500 large (greater than 10 cm) pieces of space debris and 130 million smaller pieces.⁷⁹⁷ Orbiting debris travels at an incredible velocity and is likely to render any satellite that it collides with inoperable.

The debris resulting from an attack against a satellite cannot be controlled, and it has long-lasting consequences. China's 2007 DA-ASAT demonstration against a single Chinese defunct weather satellite created approximately 35,000 pieces of debris.⁷⁹⁸ NASA predicted that the debris would remain in orbit for approximately 40 years.⁷⁹⁹ As recently as last year, the International Space Station (ISS) had to maneuver to avoid a collision with space debris.⁸⁰⁰ As there are currently no affordable means of cleaning up debris, these consequences are not easily mitigated.

To date, there have been a limited number of debris and satellite conjunctions, one example being a French satellite damaged by debris caused by an exploded French rocket in 1996.⁸⁰¹ Therefore, an attack against a single satellite would be unlikely to fall afoul of Article 51(4)(c). However, an attack against the constellation would introduce an unprecedented amount of debris, which would render collision avoidance unmanageable and would therefore violate the prohibition against indiscriminate attacks.

Proportionality— Environmental Considerations

Article 35(3) of API prohibits the employment of means or methods of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment.⁸⁰² Further, Article 55(1) requires that care be taken in warfare to protect the natural environment against widespread, long-term, and severe damage.⁸⁰³

No definition is provided as to the scope of the “natural environment,” but Article II of the Environmental Modification Convention (ENMOD),⁸⁰⁴ of which both

⁷⁹⁷ European Space Agency, *Space Debris by the Numbers* (last visited Jan. 25, 2024), https://www.esa.int/Space_Safety/Space_Debris/Space_debris_by_the_numbers.

⁷⁹⁸ T.S. Kelso, *Analysis of the 2007 Chinese ASAT Test and the Impact of Its Debris on the Space Environment*, 2007 AMOS CONFERENCE—ORBITAL DEBRIS, p. 321 (2007), <https://celestrak.org/publications/AMOS/2007/AMOS-2007.pdf>.

⁷⁹⁹ NASA, *UN Committee Accepts Space Debris Mitigation Guidelines*, 11 ORBITAL DEBRIS QUARTERLY NEWS 3 (July 2007), <https://orbitaldebris.jsc.nasa.gov/quarterly-news/pdfs/odqnv11i3.pdf>.

⁸⁰⁰ Joey Roulette, *The Space Station Just Dodged Debris from a 2007 Chinese Weapons Test*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/11/10/science/china-debris-space-station.html>.

⁸⁰¹ NASA, *10 Things: What's That Space Rock?* (July 21, 2022), <https://science.nasa.gov/solar-system/10-things-whats-that-space-rock>.

⁸⁰² API, *supra* note 65, art. 35.

⁸⁰³ *Id.* art. 55.

⁸⁰⁴ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 1108 U.N.T.S. 151, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800385c9>.

Russia and the United States are parties,⁸⁰⁵ includes outer space within the scope of the term “environment.” The 2016 ICRC Commentary interprets “widespread” as meaning an area encompassing several hundred square kilometers; “long-lasting” as meaning a period of months, or approximately a season; and “severe” as involving serious or significant disruption or harm to human life, natural economic resources, or other assets.⁸⁰⁶

Russia, being a State party to AP I, is bound by these prohibitions. The United States, as a non-State party, takes into account environmental considerations during targeting decisions, albeit to a much lower standard. JP3-60 (paragraph 8(b)) sets out:

It is generally lawful under the laws of war to cause collateral damage to the environment during an attack on a legitimate military target. However, the commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practical to do so consistent with mission accomplishment.

The Nuclear Weapons Advisory Opinion affirmed that respect for the environment is one of the elements considered when assessing whether an action is in conformity with the principles of necessity and proportionality.

Cascading debris is a live issue whereby the debris in LEO is expected to multiply by a factor of five within this century.⁸⁰⁷ An attack

that takes out hundreds of Starlink satellites within the constellation will introduce debris of such magnitude in an already congested area that it could jeopardize access to the LEO. Whether such environmental damage will reach the “widespread, long-term and severe” threshold is yet to be seen, but as debris from one ASAT is expected to remain for 40 years, debris created by the destruction of 2,400 would likely exceed a season and involve serious disruption to civilian services, and so it is certainly foreseeable.

Precautions in Attack

There are several requirements to take precautions in an attack, two of which would be pertinent to an attack against Starlink:

1. Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects (Article 57(2)(iii)).⁸⁰⁸
2. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and civilian objects (Article 57(3)).⁸⁰⁹

A viable alternative to a kinetic attack against Starlink would be jamming or spoofing.

⁸⁰⁵ U.N. Treaty Collection, *Status as at 25 Jan. 2024*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-1&chapter=26&clang=_en.

⁸⁰⁶ ICRC, *supra* note 429.

⁸⁰⁷ Donald J. Kessler, Nicholas L. Johnson, J.-C. Liou & Mark Matney, *The Kessler Syndrome: Implications to Future Space Operations*, (Preprint) AAS 10-016 (last visited Jan. 1, 2024), <https://aquarid.physics.uwo.ca/kessler/Kessler%20Syndrome-AAS%20Paper.pdf>.

⁸⁰⁸ AP I, *supra* note 65, art. 57.

⁸⁰⁹ *Id.*

However, despite Russia's advanced electronic warfare capabilities, it has so far failed to overcome Starlink. A co-orbital ASAT, which involves placing the weapon into orbit and then maneuvering it into or near its target, would be less destructive than a DA-ASAT launched from Earth. Russia could also target the Starlink terminals in Ukrainian territory. However, the problem for Russia is that approximately 10,000 Starlink terminals have been shipped to Ukraine, and they are likely to be widely dispersed. Therefore, it may not be feasible to target these terminals due to their amount and dispersion.

Conclusion

The United States is keen to avoid conflict spilling into outer space. In demonstration of this commitment, they unilaterally pledged not to conduct any further DA-ASAT tests⁸¹⁰ and are also developing tenets of responsible space behaviors.⁸¹¹ However, States must also be cognizant of the risk of commercial satellite systems becoming valid military objectives, particularly where the State relies on that system for its own military activities.

The U.S. Army already has a contract with Starlink.⁸¹² Similarly, the U.S. Air Force has funded testing of Starlink's interoperability with military aircraft under encryption,⁸¹³ and further testing is ongoing with the contract being worth around \$40 million per experiment.⁸¹⁴ Starlink was also relied on during the U.S. evacuation operations in Afghanistan.⁸¹⁵ General Dickinson, head of U.S. Space Command, has publicly acknowledged what Starlink offers in terms of capability⁸¹⁶—the potential military value that Starlink could provide to the United States is indisputable.

The Starlink constellation is a valid military objective, but as for Russia targeting it, a kinetic attack levied against an entire constellation would be of such a scale that it is difficult to imagine the attack would not run afoul of the principle of proportionality.

However, while Russia has not yet succeeded in deploying non-kinetic methods of attack in space, China is watching closely and already holds a robust arsenal of counterspace capabilities.⁸¹⁷ Chinese defense-affiliated

⁸¹⁰ Theresa Hitchens, *US Pledges No Destructive ASAT Missile Tests, Urges International Norm*, BREAKING DEFENSE (Apr. 18, 2022), <https://breakingdefense.com/2022/04/us-pledges-no-destructive-asat-missile-tests-urges-international-norm/>.

⁸¹¹ Frank Wolfe, *Austin Directs U.S. Space Command to Develop Guidance on Space Tenets of Behavior*, DEFENSE DAILY (July 23, 2021), <https://www.defensedaily.com/austin-directs-u-s-space-command-to-develop-guidance-on-space-tenets-of-behavior/space/>.

⁸¹² Maxine Baen, *Army Tests Commercial Satellite Internet in Pilot Program*, U.S. ARMY (Feb. 28, 2022), https://www.army.mil/article/254316/army_tests_commercial_satellite_internet_in_pilot_program.

⁸¹³ Michael Sheetz, *SpaceX Prepares for Air Force Test Connecting an Aircraft to Its Starlink Satellite Internet*, CNBC (Mar. 12, 2021), <https://www.cnbc.com/2021/03/12/spacex-prepares-for-air-force-test-of-starlink-satellite-internet.html>.

⁸¹⁴ Sandra Erwin, *U.S. Air Force to Fund Demonstrations of Space Internet Services That Integrate Multiple Constellations*, SPACE NEWS (Feb. 1, 2022), <https://spacenews.com/u-s-air-force-to-fund-demonstrations-of-space-internet-services-that-integrate-multiple-constellations/>.

⁸¹⁵ Thomas Karol, *Starlink Increase Comm Capabilities at RAB*, RAMSTEIN AIR BASE (Sep. 24, 2021), <https://www.ramstein.af.mil/News/Article-Display/Article/2787344/starlink-increases-comm-capabilities-at-rab/>.

⁸¹⁶ Sandra Erwin, *U.S. General: Starlink in Ukraine Showing What Megaconstellations Can Do*, SPACE NEWS (Mar. 8, 2022), <https://spacenews.com/u-s-general-starlink-in-ukraine-showing-us-what-megaconstellations-can-do/>.

⁸¹⁷ Todd Harrison, Kaitlyn Johnson, Makena Young, Nicholas Wood & Alyssa Goessler, *Space Threat Assessment 2022*, CSIS AEROSPACE SECURITY PROJECT (Apr. 2022), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/220404_Harrison_SpaceThreatAssessment2022.pdf?K4A9o_D9NmYG2Gv98PxNigLxS4oYpHRa.

researchers have called for the development of vigorous countermeasures, including kinetic countermeasures, for use against Starlink. The U.S. military will wish to preserve and protect

the utility of Starlink and avoid a situation in which China employs such a capability.



CHAPTER VIII

BELLIGERENT OCCUPATION

THE LAW OF BELLIGERENT OCCUPATION

by David Wallace | Mar 8, 2023

The ongoing conflict in Ukraine has raised important and timely issues regarding the application, implementation, and enforcement of the law of armed conflict. Particularly relevant is the law of occupation. Unfortunately, this discrete subset of the law of armed conflict is often shrouded in myth, is misconstrued, and inevitably has a pejorative connotation in public opinion.¹

The most persistent and common misunderstanding is that occupation is an anomaly in warfare. It is not. Although there have been many occupations since the Second World War, the most well-known and scrutinized examples have been the occupation of Iraq principally by the United States and the United Kingdom beginning in 2003 and Israel's occupation of Arab territories starting in 1967.² Russia's occupation of portions of Ukraine, beginning as early as 2014 with its occupation of Crimea, not only highlights the continued relevance and importance of this area of law but also reflects egregious

violations of its fundamental norms by Russia, reminiscent of the horrors that occurred in occupied territories in the Second World War.

Legal Thresholds

Provisions of the law of belligerent occupation are embodied in treaties and customary international law. Most notably, it is codified in Articles 42–56 of the 1907 Hague Regulations³ and Articles 47–78 of the 1949 Fourth Geneva Convention.⁴ Other law of armed conflict treaties address aspects of the law of occupation, including the 1977 Additional Protocol I⁵ and the 1954 Hague Cultural Property Convention.⁶ Occupation law is also fleshed out further in military regulations, policy, and judicial opinions. Finally, international human rights law is applicable and relevant to occupations.⁷

The portions of the Hague Regulations and the Fourth Geneva Convention addressing occupations emphasize different underlying

¹ See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 1 (2nd ed. 2019); MARCO SASSÒLI, *INTERNATIONAL HUMANITARIAN LAW* 304 (2019).

² DINSTEIN, *supra* note 1, at 13–16.

³ Regulations Respecting the Laws and Customs of War on Land Annexed to Hague Convention (IV), arts. 42–56, Oct. 18, 1907, 36 Stat. 2277, 15 U.N.T.S. 9 [hereinafter Hague IV].

⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 47–78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

⁵ Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

⁷ U.S. DEP'T OF ARMY, FIELD MANUAL 6-27, COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE (August 2019) (Change 1, Sep. 20, 2019) [hereinafter FM 6-27].

purposes. Formulated before two world wars, the Hague Regulations focus on property rights and the sovereignty of States. The Fourth Geneva Convention, adopted in the aftermath of the atrocities committed in occupied territories in the Second World War, rewrote, expanded, and transformed the law of occupation, emphasizing humanitarian aims.

The first critical thresholds of application of the law of occupation are Articles 42 and 43 of the Hague Regulations. Article 42 provides the trigger and scope of occupation law. Specifically, it provides that territory is occupied when “it is actually placed under the authority of the hostile army.” Thus, the legal regime of occupation law is triggered once an invading force establishes effective control over all or part of its enemy territory, thereby implicating “a complicated, trilateral set of legal relations between the Occupying Power, the temporarily ousted sovereign authority, and the inhabitants of occupied territory.”⁸

The existence of an occupation is a matter of fact. Characterizations by the occupying or occupied powers are not controlling. The scope of occupation is limited to the territory where authority has been established and can be exercised. By contrast, Article 43 provides as follows:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless

absolutely prevented, the laws in force in the country.⁹

Put differently, the law of occupation rests on the fundamental premise that an occupation is a temporary arrangement, and any alteration of the existing order should be minimal.

Another key threshold in applying the law of occupation is found in Common Article 2 (CA 2) of the Fourth Geneva Convention, which provides that the Convention shall apply to all cases of partial or total occupation. Considering the events of the Second World War, with their disastrous consequences for civilians, the Fourth Geneva Convention was the first multilateral treaty devoted to protecting the civilian population. Before 1949, the Geneva Conventions were chiefly concerned with combatants who became *hors de combat*.¹⁰

Notably, the Fourth Geneva Convention does not invalidate the Hague Regulations on occupation but supplements them. If one conceives of the law of occupation as a trusteeship (which some respected commentators reject because it is not a relationship built on trust), the Fourth Geneva Convention makes civilians and the civilian population the primary beneficiaries of the trust. Article 27 of the Fourth Geneva Convention specifies safeguards for protected persons in occupied territories. They are, in part, as follows:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights,

⁸ U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL § 11.4 (2016) [hereinafter 2016 DoD LAW OF WAR MANUAL].

⁹ Hague IV, *supra* note 3, art. 43.

¹⁰ GC IV, *supra* note 4, art. 2.

their religious convictions and practices, and their manners and customs. They 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.¹¹

The Situation in Ukraine

In applying Hague IV, Article 42 and CA 2 standards to Russia's occupation of Ukraine, distinct geographical and temporal places and periods are relevant. The first period began in March 2014 when a combination of Russian regular armed forces and unidentified operatives—so-called “little green men”—occupied territory of Ukraine on the Crimean Peninsula. That is, the armed forces of Russia were physically present on Ukrainian territory, without consent, exercising authority, while displacing the governmental authorities. The second period began in February 2022 when Russian armed forces invaded and occupied large territories in south and east Ukraine. Additionally, for a relatively brief period of time after the initial invasion, Russian forces controlled areas in northern Ukraine near Kyiv and Kharkiv. Finally, it is important to note that some of the above areas have been and continue to be controlled by Russian proxies.

It is almost impossible to overstate the scale and scope of Russia's egregious violations of the law of occupation in Ukraine. A particularly graphic illustration of Russia's malicious violence occurred in Bucha, a small city several miles northwest of Ukraine's capital, Kyiv. Russian forces occupied Bucha for a short time after their initial invasion. Ultimately, Russian troops were forced to withdraw from Bucha in response to a Ukrainian counteroffensive.¹² During their control of Bucha, video evidence strongly suggested that Russian paratroopers summarily executed a group of Ukrainian captives.¹³

Once Ukrainian forces liberated Bucha, evidence quickly mounted that it was a landscape of horrors. In brief, “[w]hen a defeated and demoralized Russian Army finally retreated, it left behind a grim tableau: bodies of dead civilians strewn on streets, in basements or in backyards, many with gunshot wounds to their heads, some with their hands tied behind their backs.”¹⁴ Satellite images revealed what appears to be a mass grave in Bucha with the remains of nearly 300 people.¹⁵ Given the larger area and the length of the occupation in eastern Ukraine by Russian forces, the severity and magnitude of abuses of the civilian population most

¹¹ *Id.* art. 27.

¹² Matt Seyler, ‘Sickening’ Atrocities in Bucha, Nearly 70% of Russian Troops Near Kyiv Have Withdrawn: Pentagon Update Day 40, ABCNews (Apr. 4, 2022), <https://abcnews.go.com/Politics/sickening-atrocities-bucha-70-russian-troops-kyiv-withdrawn/story?id=83866706>.

¹³ Yousur Al-Hlou, Masha Froliak, Evan Hill, Malachy Browne & David Botti, *New Evidence Shows How Russian Soldiers Executed Men in Bucha*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/world/europe/russia-bucha-ukraine-executions.html>.

¹⁴ Carlotta Gall, *Bucha's Month of Terror*, N.Y. TIMES (Apr. 11, 2022), <https://www.nytimes.com/interactive/2022/04/11/world/europe/bucha-terror.html>.

¹⁵ Mike Wall, *Mass Grave in Ukraine Seen from Space (Satellite Photos)*, SPACE.COM (Apr. 4, 2022), <https://www.space.com/ukraine-mass-grave-bucha-satellite-photos>; Katie Balevic, *Nearly 300 People Were Buried in Mass Graves in Bucha, Where the Streets Are 'Littered with Corpses,' a Ukrainian Mayor Said*, BUSINESS INSIDER (Apr. 3, 2022), <https://www.businessinsider.com/nearly-300-people-buried-mass-grave-bucha-kyiv-mayor-says-2022-4>.

likely will exceed the abuses at Bucha and other areas around Kyiv.¹⁶

Additionally, it has been alleged that Russia conducted unlawful transfers and deportations of Ukrainian nationals in violation of the law of occupation.¹⁷ Some reports put the number forcibly deported between 900,000 and 1.6 million, including 260,000 children. Russia has acknowledged that 1.5 million Ukrainians are in Russia but claims they were evacuated for safety.

In a report published in 2023 by the Humanitarian Research Lab at Yale School of Public Health, Russia is alleged to be operating a large-scale systematic network of camps and other facilities that have held 6,000 Ukrainian children within Russian-occupied Crimea and mainland Russia (with some being in Siberia and along Russia's far eastern Pacific coast).¹⁸ Among the purposes of the facilities is to re-educate the Ukrainian children to make them more pro-Russian in

their personal and political views. Russia's deportation of Ukrainians violates a vital tenet of the law of occupation, Article 49 of the Fourth Geneva Convention, which provides that "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

In addition to the above two examples, there are other blatant Russian violations of occupation law, including efforts to annex Russian-occupied territories¹⁹ in violation of Article 43 of the Hague Regulations. In the fullest of time, Russia's violations of the law of occupation will come into more precise focus, thereby reinforcing its importance to the normative framework regulating warfare and its aftermath.



¹⁶ Human Rights Watch, *Ukraine: Russian Invasion Causing Widespread Suffering for Civilians* (Jan. 12, 2023), <https://www.hrw.org/news/2023/01/12/ukraine-russian-invasion-causing-widespread-suffering-civilians>; Gall, *supra* note 14.

¹⁷ Conor Finnegan, *US Formally Accuses Russian Forces of Committing War Crimes in Ukraine*, ABCNEWS (Mar. 23, 2022), <https://abcnews.go.com/Politics/us-formally-accuses-russian-forces-committing-war-crimes/story?id=83627208>.

¹⁸ Ukraine Conflict Observatory, *Russia's Systemic Program for the Re-Education and Adoption of Ukraine's Children* (Feb. 14, 2023), <https://hub.conflictobservatory.org/portal/apps/sites/#/home/pages/children-camps-1>.

¹⁹ Anton Troianovski, *Russia Signals Annexation of Parts of Ukraine, Raising Stakes in Fighting*, N.Y. TIMES (Sep. 20, 2022), <https://www.nytimes.com/2022/09/20/world/europe/russia-annex-ukraine-referendum.html>.

PRISONERS OF WAR IN OCCUPIED TERRITORY

by Geoff Corn | Mar 3, 2022

It seems increasingly likely that the international armed conflict raging in Ukraine will devolve into a partial Russian occupation of large portions of Ukrainian territory. President Putin may very well declare annexation—or reincorporation—of that territory into Russia. But such a move would clearly violate international law and be void *ab initio*. It seems equally likely that the occupation will be a bloody endeavor as the result of Ukrainian resistance efforts.

This likely evolution of events, coupled with the influx of weapons, ammunition, and volunteer fighters into Ukraine to resist Russian aggression,²⁰ will almost certainly implicate complex questions related to the rights and status of resistance fighters.

Historical Experience

Other authors have addressed the status of civilians who rise to resist an invasion as part of a *levée en masse*.²¹ However, at some point the spontaneity and lack of the opportunity to organize must dissipate. Such progression of an operational situation—initial spontaneous resistance morphing into resistance to occupation—was sadly all too common during the Second World War. Nearly all of continental Europe, huge swaths of China,

and Southeast Asia were subjected to enemy invasion followed by occupation. In all these areas, resistance movements, often backed by the governments they continued to support or the United States and United Kingdom, conducted operations against the occupying forces.

When these resistance fighters fell into enemy hands, their fate was often sealed. If lucky, they would be imprisoned, but more often they faced summary execution. Axis forces considered such resistance as illegal, violating the obligation to submit to the authority of the occupying (or in many cases annexing) power.

These captives were not considered prisoners of war (POWs) precisely because their resistance occurred in areas subject to occupation. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War²² defined who qualified for such status by cross-referencing the definition of who was vested with the “privilege” to engage in hostilities included in the Regulations Annexed to the 1907 Hague Convention IV.²³ According to Article 1 of these regulations, the privilege of belligerency (cross-referenced in the 1929 Prisoner of War Convention to indicate who qualified as prisoners of war) applied

²⁰ Visit Ukraine, *The International Legion for the Territorial Defense of Ukraine Was Created* (Feb. 27, 2022), <https://visitukraine.today/blog/104/the-international-legion-for-the-territorial-defense-of-ukraine-was-created>.

²¹ Ronald Alcalá & Steve Szymanski, *Legal Status of Ukraine's Resistance Forces*, ARTICLES OF WAR (Feb. 28, 2022), <https://lieber.westpoint.edu/legal-status-ukraines-resistance-forces/>.

²² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074.

²³ Hague IV, *supra* note 3.

not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.²⁴

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army.”

The inclusion of militia and volunteer corps suggests resistance fighters, at least those who comply with those four conditions, should have qualified as POWs when captured by occupying forces. But the 1929 Convention also cross-referenced Article 2 of the Annexed Regulations, which provided that:

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.²⁵

The implication of restricting this extension of belligerent status to individuals who participate in a *levée en masse*, but only in

areas *not* subject to enemy occupation, was that no such status applied to resistance forces during occupation.

Updating POW Status during Occupation

This inference, and the routine denial of prisoner of war status with the accordant immunity from criminal sanction for hostile actions committed in compliance with the laws and customs of war (for example, attacking occupying forces), led to a substantial addition to the Prisoner of War Convention when it was revised in the aftermath of the war. Instead of defining who qualifies as a POW by cross-referencing the definition of privileged belligerent in the 1907 Annexed Regulations, Article 4 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War provided an express definition of POW.²⁶

Article 4 included within the definition of POW the categories of privileged belligerents in the Annexed Regulations. However, it also included two significant expansions that were responsive to the experience of the Second World War. First, Article 4.A.(2), like the Annexed Regulations, addressed “militia or volunteer corps” personnel belonging to a Party to the conflict. However, it specifically included within this category members of resistance movements, even those operating in occupied territory. Specifically, the provision includes within the POW definition:

²⁴ *Id.* art. 1.

²⁵ *Id.* art. 2.

²⁶ Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict *and operating in or outside their own territory, even if this territory is occupied*, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (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 (emphasis added).²⁷

This express inclusion of members of organized resistance groups operating in areas of enemy occupation will likely become significant in the weeks, months, and perhaps years of occupation that will likely grip part of Ukraine. Quite simply, the combination of patriotism, courage, and the influx of lethal aid flowing into Ukraine will almost certainly lead to a robust resistance effort. If the situation in Ukraine does evolve along the same trajectory as the occupations and resistance movements in the Second World War, the members of such groups will have an undeniable claim to POW status, with its accordant combatant immunity, so long

as they comply with the four qualifying conditions of Article 4.A.(2).

Of course, this is not to say that compliance with these requirements is a given. Indeed, even at the time of the Convention's revision there were critics who believed it was unrealistic to impose these requirements of resistance fighters. Nonetheless, failure to comply with them will deprive captives of a claim to POW status. Article 44(3) of the 1977 Additional Protocol I to the Geneva Conventions ostensibly mitigates the negative impact of such a failure to satisfy these requirements.²⁸ This provision extends combatant and POW status to individuals when

owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.²⁹

As a Party to Additional Protocol I, this provision would deny Russia the legitimate authority to deny POW status to resistance fighters based on an assertion they did not *constantly* distinguish themselves from the civilian population by carrying arms openly.³⁰

²⁷ *Id.* art. 4(A)(2).

²⁸ AP I, *supra* note 5, art. 44(3).

²⁹ *Id.*

³⁰ ICRC, *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, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties>.

Prospects of Compliance

However, it should not be assumed that Russian captors will acknowledge POW status even when members of the resistance groups do comply with either Article 4.A.(2) or Article 44(3) of Additional Protocol I. Based on the apparent disregard for the most basic obligations of the law of armed conflict already being manifested by Russian indiscriminate attacks on civilian population centers, we should expect Russian forces will deny such status if and when they capture such fighters. This will most likely be based on an assertion that the captives failed to comply with the four qualifying requirements.

Regrettably, Russia may find support for a blanket denial of POW status by reference to the decision by President Bush, reflected in his February 7, 2002, Memorandum on the status and treatment of captured Taliban and al Qaeda personnel, concluding that no Taliban captive could qualify for POW because the Taliban, as an organization, failed to comply with these qualifications. Accordingly, the most compelling claim to POW status will require resistance forces to commit themselves to consistent compliance with the Article 4.A.(2) qualification requirements, or at the very least the requirements of Additional Protocol I. Doing so provides the best case for exposing the invalidity of any denial of POW status or punishment for participating in hostilities.

Article 4.A.(3) of the 1949 Convention added another significant expansion of POW qualification: "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." This expansion was responsive to the experience of armed forces who continued to

fight on behalf of exile governments, especially after the nation under whose flag they initially fought formally capitulated to the enemy.

The most obvious example were the Free French forces fighting under the command of General Charles De Gaulle. When captured, these forces could be denied POW status based on the fact that they were not fighting on behalf of a "Party to the conflict." Other examples included armed forces who fought on behalf of governments in exile after collaboration governments took power in their national territory, such as Norwegian forces; or armed forces that fought on behalf of a government in exile after their home territory was annexed by the enemy, such as Czech forces.

The two latter examples may prove potentially significant in Ukraine. If Russia were to illegally annex further Ukrainian territory (as it already did in Crimea), or install a collaboration governing authority in Ukraine, members of the Ukrainian armed forces would retain their claim to POW status and combatant immunity if captured so long as the displaced Ukrainian government continued to assert lawful authority.

To date, it seems highly unlikely that government will go quietly into the night should Russia take such actions, and equally unlikely the Ukrainian armed forces would lay down their arms in response to an annexation or a demand from a collaboration government. Accordingly, even if Russia refused to recognize the legitimacy of the displaced Ukrainian government, these armed forces would qualify for POW status pursuant to this important addition to the Prisoner of War Convention.



FORCED CIVILIAN LABOR IN OCCUPIED TERRITORY

by Michael N. Schmitt | Aug 2, 2022

On July 27, the Institute for the Study of War reported that “Russian occupation officials are likely leveraging food aid and other humanitarian assistance to force occupied populations to cooperate with and work for Russian occupiers.”³¹ According to the report, the Mariupol City Council has announced “that Russian forces stopped providing humanitarian assistance to Mariupol residents to force residents to demine and clear rubble on behalf of the occupation administration in exchange for food.”³² If true, the allegations raise the issue of whether occupation forces may compel the population of territory over which it exercises control to work, and if so, under what circumstances.

International humanitarian law (IHL) addresses various types of compulsory labor. For example, it sets forth rules regarding using prisoners of war³³ and certain protected civilians, such as aliens in the territory of a party to the conflict and internees.³⁴ IHL also prohibits deportation from occupied territory, including for the purpose of work.³⁵ And compelled labor is subject to certain

limitations even during a non-international armed conflict.³⁶

In this post, however, I unpack the specific IHL rules on compelling the civilian inhabitants of occupied territory to work. Assuming for the sake of analysis that the Russians are forcing the Ukrainian inhabitants to work, I conclude with an assessment of the policy’s compliance, or lack thereof, with those rules.

A Tragic Lineage

There is a long and tragic history of forced civilian labor during armed conflicts. In the First World War, for instance, mobilization and the need to produce armaments led to labor shortages in industry and agriculture.³⁷ When the use of prisoners of war and the entry of women and children into the workforce failed to satisfy the shortages, Germany, the Hapsburg Empire, and Russia turned to forced labor in the territories they occupied or deported civilians to work elsewhere.

This practice provided a template for the more shocking use of forced civilian labor

³¹ Kateryna Stepanenko, Grace Mappes, Katherine Lawlor, George Barros & Frederick W. Kagan, *Russia Offensive Campaign Assessment*, July 27, ISW (July 27, 2022), <https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-july-27>.

³² *Id.*

³³ GC III, *supra* note 26, arts. 49–68.

³⁴ GC IV, *supra* note 4, arts. 39, 40, 89, 90, 95 & 143.

³⁵ See Michael 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/>.

³⁶ See, e.g., Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 5(1)(e), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]; *Rule 95—Forced Labour*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule95>; Rome Statute of the International Criminal Court art. 8(2)(b)(xv), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

³⁷ Jens Thiel & Christian Westerhoff, *Forced Labour*, INT’L ENCYCLOPEDIA OF THE FIRST WORLD WAR (Oct. 8, 2014), https://encyclopedia.1914-1918-online.net/article/forced_labour.

during the Second World War. As noted by the Nuremberg Tribunal in 1946,

In the early stages of the war, manpower in the occupied territories was under the control of various occupation authorities, and the procedure varied from country to country. In all the occupied territories compulsory labour service was promptly instituted. Inhabitants of the occupied countries were conscripted and compelled to work in local occupations, to assist the German war economy. In many cases they were forced to work on German fortifications and military installations. As local supplies of raw materials and local industrial capacity became inadequate to meet the German requirements, the system of deporting labourers to Germany was put into force. By the middle of April, 1940, compulsory deportation of labourers to Germany had been ordered in the Government General; and a similar procedure was followed in other Eastern territories as they were occupied.³⁸

Particularly horrific was the “annihilation through work” policy, according to which prisoners were worked to death.³⁹ At the Mauthausen concentration camp, for example, “emaciated prisoners were forced

to run up 186 steps out of a stone quarry while carrying heavy boulders.” Many of the cases heard by the (subsequent) U.S. Military Tribunal at Nuremberg dealt with incidents of forced labor and deportation (see, e.g., *Pohl*, List (*Hostage*), Milch, Krauch (*IG Farben*), Krupp, and *Von Leeb* (*High Command*)).⁴⁰

The practice continued during the armed conflicts that followed. For instance, forced labor was commonplace throughout the conflicts of the 1990s in the Balkans. Accordingly, the International Criminal Tribunal for the former Yugoslavia handled numerous cases involving compelled work, especially by detainees. Typical was one in which civilian detainees were forced, “at great risk to their lives, to perform various dangerous military support tasks . . . including: digging trenches, building defences with sandbags, carrying wounded or killed . . . soldiers, carrying ammunition and explosives across the confrontation line, and placing them in front of [enemy] positions” during the conflicts of the 1990s in the Balkans. Beyond the battlefield, they were also forced to engage in such activities as construction and maintenance, including for private residences of soldiers, and building defensive positions for the forces detaining

³⁸ International Nuremberg Principles Academy, *Nuremberg Declaration on the Crime of Aggression*, <https://www.nurembergacademy.org/news/detail/b75fc3207d3463bbf20b452732f6bb0e/nuremberg-declaration-on-the-crime-of-aggression-680/>.

³⁹ U.S. Holocaust Memorial Museum, *Forced Labor: An Overview*, <https://encyclopedia.ushmm.org/content/en/article/forced-labor-an-overview>.

⁴⁰ See, e.g., U.S. Holocaust Memorial Museum, *Subsequent Nuremberg Proceedings, Case #4: the Pohl Case*, <https://encyclopedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings-case-4-the-pohl-case>; U.S. Holocaust Memorial Museum, *Subsequent Nuremberg Proceedings, Case #7, the Hostage Case*, <https://encyclopedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings-case-7-the-hostage-case>; U.S. Holocaust Memorial Museum, *Subsequent Nuremberg Proceedings, Case #2, the Milch Case*, <https://encyclopedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings-case-2-the-milch-case>; U.S. Holocaust Memorial Museum, *Subsequent Nuremberg Proceedings, Case #6, the IG Farben Case*, <https://encyclopedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings-case-6-the-ig-farben-case>; U.S. Holocaust Memorial Museum, *Subsequent Nuremberg Proceedings, Case #10, the Krupp Case*, <https://encyclopedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings-case-10-the-krupp-case>; U.S. Holocaust Memorial Museum, *Subsequent Nuremberg Proceedings, Case #10, the High Command Case*, 2023), <https://encyclopedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings-case-12-the-high-command-case>.

them.⁴¹ United Nations bodies repeatedly condemned these practices as the conflicts were underway.⁴²

And the allegations of forced labor by Russia mentioned above are not the first that have been leveled during this conflict. Notably, last March, U.K. Foreign Secretary Liz Truss accused Russia of the “abduction and deportation” of Ukrainians from Mariupol.⁴³ Inna Sovsun, a member of Ukraine’s Parliament, explained, “They are sending them through what are called the ‘filtration camps’ and then they are being relocated to very distant parts of Russia, where they are being forced to sign papers (saying) that they will stay in that area for two or three years and they will work for free in those areas.”⁴⁴

The Law

To begin with, it is not unlawful per se to compel inhabitants of an occupied territory to work. On the contrary, as early as the 1899 Hague Convention II, IHL explicitly allowed an occupying force to turn to the civilian population for support.⁴⁵ Article 52 of the Annexed Regulations to that instrument provided,

Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.

These requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.⁴⁶

In 1907, this provision was repeated nearly verbatim in Hague Convention IV’s Annexed Regulations.⁴⁷ Thus, in situations of strict necessity, inhabitants who were compensated could be made to perform non-military work for the occupying forces.

This was the rule in place during the Second World War. Under Article 6(b) of the 1945 Nuremberg Charter, “ill-treatment or deportation to slave labour or for any other purpose of the civilian population of or in occupied territory” amounted to a

⁴¹ Prosecutor v. Naletilić & Martinović, ICTY, IT-98-34-PT, Second Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia Sep. 2001).

⁴² See, e.g., S.C. Res. 1019, Violations of Int’l Humanitarian Law in the Former Yugoslavia (Nov. 9, 1995); S.C. Res. 1034, Violations of International Humanitarian Law and of Human Rights in the Territory of the Former Yugoslavia (Dec. 21, 1995); G.A. Res. 50/193, Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro) (Mar. 11, 1996).

⁴³ Adam Forrest, *Liz Truss Condemns ‘Abduction and Deportation’ of Ukrainians into Russia*, INDEPENDENT (Mar. 21, 2022), <https://www.independent.co.uk/news/uk/politics/vladimir-putin-russia-liz-truss-volodymyr-zelensky-tass-b2040154.html>.

⁴⁴ *Id.*

⁴⁵ 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 [hereinafter 1899 Hague Convention II].

⁴⁶ *Id.* art. 52.

⁴⁷ Hague IV, *supra* note 3, art. 52.

war crime.⁴⁸ The Nuremberg Tribunal held that the “policy of the German occupation authorities was in flagrant violation” of Article 52 of the 1907 Annexed Regulations, which in turn meant there was a breach of Article 6(b) of the Charter in the context of individual criminal responsibility.

In light of the horrific practices during that war, the International Committee of the Red Cross (ICRC) proposed new rules governing the requisition of civilian services. The ICRC did not, however, urge the elimination of the practice altogether, for “it did not appear likely that their complete elimination would be agreed to by governments.”⁴⁹ This practical approach resulted in the adoption of more granular rules in the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.⁵⁰

Article 51 is at the heart of that effort.⁵¹ It forbids compulsory service in the Occupying Power’s military (although voluntary enlistment is not prohibited). Although forcing an individual to serve in the enemy’s armed forces was long banned, Article 52 extends the prohibition to active recruiting.⁵² Violation is not only an “internationally wrongful act” by the State concerned but

also a “grave breach”⁵³ of the Convention (art. 147),⁵⁴ thereby obligating all States Party to prosecute violators or turn them over to another State or appropriate entity for prosecution (art. 146).⁵⁵ The Statute of the International Criminal Court confirms that compelled military service is a war crime (art. 8(2)(a)(v)),⁵⁶ as did, for instance, Article 2 of the Statute for the International Criminal Tribunal for the Former Yugoslavia.⁵⁷

Beyond the ban on military service, Article 51 of Geneva Convention IV does not prohibit voluntary labor for or on behalf of the Occupying Power. Yet it set forth a series of 10 stringent cumulative prohibitions and obligations:

1. Workers must be at least 18 years of age.⁵⁸
2. The work must be necessary for a) the needs of the Occupying Power, b) “public utility services,” or c) “feeding, sheltering, clothing, transportation, or health of the population.”⁵⁹ With regard to the needs of the occupying forces, acceptable duties include “those connected with billeting and the provision of fodder, transport services, the repairing of roads, bridges, ports and railways and laying telephone

⁴⁸ Charter for the International Military Tribunal, art. 6(b), Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

⁴⁹ COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, art. 51 (Jean Pictet ed. 1958) [hereinafter GC IV Commentary of 1958].

⁵⁰ GC IV, *supra* note 4.

⁵¹ *Id.* art. 51.

⁵² See also 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.20.1.1.

⁵³ ICRC, *Grave Breaches*, https://casebook.icrc.org/a_to_z/glossary/grave-breaches.

⁵⁴ GC IV, *supra* note 4, art. 147.

⁵⁵ *Id.* art. 146.

⁵⁶ Rome Statute, *supra* note 36, art. 8(2)(a)(v).

⁵⁷ Statute of the International Criminal Tribunal for the former Yugoslavia art. 2, S.C. Res. 827 (May 25, 1993) [hereinafter ICTY Statute].

⁵⁸ See also 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.20.2.

⁵⁹ See also *id.*

and telegraph lines.”⁶⁰ In addition, the DoD *Manual* offers the examples of “providing telephone, water, or electricity services to the facilities of the occupation army from which the occupied territory is administered, or providing support to prisons, police stations, and other facilities necessary for the maintenance of order among the civilian population.”⁶¹ As the ICRC’s Commentary notes, “It is the maintenance needs of the army of occupation and not its strategic or tactical requirements which are referred to.”⁶² The DoD *Manual* makes precisely the same point.

Although Article 51 does not illustrate the term “public utilities services,” it was reasonably interpreted during negotiations as including “water, gas and electricity services, transport, health and similar services.” Moreover, the ICRC Commentary suggests that communications such as telephone services should be included. In the modern context, this would extend to the internet and other ICT services.⁶³

The final form of labor included in Article 51 (feeding, etc.) refers to activities solely for the benefit of the occupied population; it may be compelled only when necessary. Such work is intended to maintain, for instance, important industrial and agricultural production. Thus, it is consistent with the Occupying

Power’s obligations to, for example, provide food for the inhabitants of the occupied territory, ensure public health, and maintain sanitation.⁶⁴

The DoD *Law of War Manual* provides additional granularity on the types of compelled work that are permissible:

The services that may be obtained from inhabitants by requisition include those of professionals, such as engineers, physicians, and nurses; and of artisans and laborers, such as clerks, carpenters, butchers, bakers, and truck drivers. The officials and employees of

- railways, trucking companies, airlines, canals, and river or coastal steamship companies;
- cable, telegraph, telephone, radio, postal, and similar services;
- gas, electric, and water works; and
- sanitary authorities;

whether employed by the State or private companies, may be requisitioned to perform their duties only so long as the duties required do not directly concern the operations of war against their own country.

The Occupying Power may also requisition labor to restore the general condition of the public works to that of peace, including the repair of roads, bridges, railways, and telecommunication networks, and to perform services on behalf of the local population, such as the care of the wounded and sick, and the burial of the dead.⁶⁵

⁶⁰ GC IV Commentary of 1958, *supra* note 49, art. 51.

⁶¹ 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.20.2.1.

⁶² GC IV Commentary of 1958, *supra* note 49, art. 51.

⁶³ *Id.*

⁶⁴ GC IV, *supra* note 4, arts. 55, 56.

⁶⁵ 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.20.2.1.

3. The *Manual* also observes that “police, firefighters, prison guards, and others who provide services essential to good order and security in occupied territory may be compelled by an Occupying Power to continue to provide those services.”⁶⁶ After all, the Occupying Power is obligated to maintain public order and safety in occupied territory.⁶⁷ But there is no legal basis for compelling inhabitants of occupied territory to work for the benefit of the Occupying Power’s economy in any way.

The work must not involve taking part in military operations.⁶⁸ This prohibition is broader than the related one found in Article 52 of the Hague Regulations, which encompassed only “military operations against their own country.”⁶⁹ Geneva Convention IV expanded the ban to include any activities facilitating military operations. This was done in part to preclude claims by an occupying force that it is no longer directing its operations against the occupied State and, therefore, the prohibition is inoperative. Moreover, the prohibition helps ensure civilians do not qualify as direct participants in hostilities who lose key IHL conduct of hostilities protections.⁷⁰

The difficulty in applying the prohibition is that both the Hague Conventions and Geneva Convention IV permit compelling civilians to provide for the non-operational needs of the Occupying Power, such as cooking, cleaning, and administrative duties. Unfortunately, the line separating permitted from forbidden work is undefined.

However, any activity directly enhancing the occupying force’s military wherewithal or detracting from that of the occupied State is prohibited. The 1958 ICRC Commentary mentions reviving the war industry and producing war materiel,⁷¹ while the DoD *Law of War Manual* offers the examples of “construction of fortifications, entrenchments, and military airfields, or the transportation of supplies or ammunition in the zone of operations.”⁷² A helpful way to describe the scope of the prohibition using the *patois* of targeting law is that it comprises any activity that involves “war-fighting” or “war-supporting.”⁷³ Of course, compelling any action that would qualify as “direct participation in hostilities”⁷⁴ likewise would be unlawful.

4. Workers may not be compelled to guard installations where they perform

⁶⁶ *Id.* § 11.20.2.2.

⁶⁷ See Hague IV, *supra* note 3, art. 43, which reflects customary law.

⁶⁸ See also 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.20.1.5.

⁶⁹ Hague IV, *supra* note 3, art. 52.

⁷⁰ ICRC, *Direct Participation in Hostilities*, IHL DATABASES, https://casebook.icrc.org/a_to_z/glossary/direct-participation-hostilities.

⁷¹ GC IV Commentary of 1958, *supra* note 49.

⁷² 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.20.1.5.

⁷³ Michael Schmitt & Eric W. Widmar, “On Target”: Precision and Balance in the Contemporary Law of Targeting, 7 J. NAT’L SEC. L. & POL’Y 379 (2014), https://jnslp.com/wp-content/uploads/2015/03/Precision-and-Balance-in-the-Contemporary-Law-of-Targeting_2.pdf.

⁷⁴ ICRC, *Direct Participation in Hostilities*, https://casebook.icrc.org/a_to_z/glossary/direct-participation-hostilities.

compulsory labor.⁷⁵ The prohibition includes any location where they work, including those that are not military.

5. Compelled work may only be carried out in the occupied territory. In other words, deportation for the purpose of work, which was widespread during the Second World War, is prohibited.
6. To the extent possible, workers must be kept in their usual place of employment.
7. Workers must be paid a fair wage. The International Labour Organization⁷⁶ suggested this and the following provisions on work conditions.⁷⁷
8. The work must be appropriate to the worker's "intellectual and physical capabilities."
9. Working conditions must comply with legislation in force in the occupied territory concerning "such matters as wages, hours of work, equipment, and preliminary training, and compensation for occupational accidents and diseases."
10. The forced labor may not result in the "mobilization of workers in an organization of a military or semi-military character."⁷⁸ The purpose of this final condition "was to avoid the resurrection of organizations, formed during the last war, of a character quite incompatible with the civilian status of their members." In other words, there was concern that the nature of the compelled

work might lead to questions as to whether those involved were entitled to the various protections that IHL affords individuals qualifying as civilians.

Thus, while Article 51 is more demanding than its Hague Conventions equivalents regarding the treatment of workers and conditions of work, it is more permissive regarding the type of work that can be required. Whereas the Hague Conventions limited labor to that necessary to support the occupying forces, Geneva Convention IV allows inhabitants to be compelled to perform duties in support of the occupied population.

Article 51 does not prohibit inhabitants of an occupied territory from voluntarily working for the occupation forces. However, to preclude *de facto* compulsion, Article 52 provides, "All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited."⁷⁹

This text was included in light of measures taken during the Second World War that artificially created unemployment or made it more difficult to find work. The ICRC's Commentary cites the examples of setting up employment monopolies, closing industries, and causing a shortage of raw materials needed for production.⁸⁰ Yoram Dinstein has emphasized that the intent must be to create a situation in which inhabitants must work for

⁷⁵ See also 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.20.1.2.

⁷⁶ ILO, *home page* (last visited Jan. 27, 2024), <https://www.ilo.org/global/lang-en/index.htm>.

⁷⁷ See also 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.20.3.

⁷⁸ See also *id.* at § 11.20.1.3.

⁷⁹ GC IV, *supra* note 4, art. 52; see also 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.20.5.2.

⁸⁰ GC IV Commentary of 1958, *supra* note 49, art. 52.

the occupant. He points to de-Baathification by the Coalition Provisional Authority during the Gulf War (CPA Order #2).⁸¹ Although it created widespread unemployment, the policy was not designed to drive those affected to work for the CPA or occupation forces; therefore, it did not violate Article 52.⁸²

Finally, Article 52 allows workers to seek intervention by the “Protecting Power” if its provisions are violated.⁸³ A Protecting Power is a neutral State that the belligerents designate to foster the implementation of, *inter alia*, the Geneva Conventions. Should such a State not be designated, the ICRC or another humanitarian organization may serve as the Protecting Power.⁸⁴ In most cases, the ICRC performs this role.

The 1907 Hague Regulations and 1949 Geneva Conventions prohibitions and obligations undoubtedly reflect customary international law that binds all States. As noted by the International Court of Justice in its *Nuclear Weapons* Advisory Opinion, “these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because

they constitute intransgressible principles of international customary law.”⁸⁵ In this regard, the ICRC’s *Customary International Humanitarian Law* study approaches the subject carefully.⁸⁶ Article 95 of the study merely states, “Uncompensated or abusive forced labour is prohibited.”⁸⁷ In my estimation, any violation of the prohibitions and obligations would qualify as “abusive” and, therefore, breach both treaty and customary IHL rules.

Finally, non-IHL instruments beyond the scope of this article also bear on the issue of forced labor. These include, depending on the circumstances, the Forced Labour Convention (art. 1),⁸⁸ the Convention concerning the Abolition of Forced Labour (arts. 1 and 2),⁸⁹ the International Covenant on Civil and Political Rights (art. 8(3)),⁹⁰ and regional agreements like the European Convention on Human Rights (art. 4).⁹¹ Of course, the principle of “*lex specialis*” applies, thereby allowing the IHL rules to prevail in most situations (although applicable rules from different legal regimes might not clash or the State concerned may have derogated).⁹²

⁸¹ Wikipedia, *Coalition Provisional Authority Order 2* (last visited Jan. 27, 2024), https://en.wikipedia.org/wiki/Coalition_Provisional_Authority_Order_2.

⁸² DINSTEIN, *supra* note 1, at 193.

⁸³ See also 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.20.5.1.

⁸⁴ GC IV, *supra* note 4, arts. 9, 11.

⁸⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 79 (July 8).

⁸⁶ I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

⁸⁷ Rule 95—*Forced Labour*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule95>.

⁸⁸ Convention (No. 29) concerning Forced or Compulsory Labor, as Modified by the Final Articles Revision Convention, Geneva, 28 June 1930, U.N.T.S., vol. 39, No. 612, p.55, art. 1.

⁸⁹ Convention (No. 105) Concerning Abolition of Forced Labour, arts. 1 & 2, June 5, 1957, 320 U.N.T.S. 291.

⁹⁰ International Covenant on Civil and Political Rights, art. 8(3), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁹¹ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, Nov. 4, 1950, 213 U.N.T.S. 222.

⁹² ICRC, *Lex Specialis*, IHL DATABASES, https://casebook.icrc.org/a_to_z/glossary/lex-specialis.

Assessing the Alleged Russian Actions

It might surprise some that IHL countenances an Occupying Power forcing civilian inhabitants of the territory it controls to work. In particular, the premise that an Occupying Power may force them to labor in support of the occupying armed forces seems particularly repugnant. But that is the law.

Nevertheless, considering the horrific abuses the practice has engendered, IHL places the strict limits on forced labor that have been outlined above. If the reports are correct, Russia is in clear violation of various IHL rules, like those prohibiting starvation,⁹³ requiring the Occupying Power to ensure food is available,⁹⁴ and prohibiting interference with relief supplies⁹⁵

As to the work reportedly being demanded, clearing rubble falls within permissible tasks. However, requiring civilians to engage in demining, unless that activity is somehow already their duty (as in the case of emergency ordnance disposal teams), is prohibited. It is inconsistent with Article 51's requirement that the work concerned be consistent with intellectual (knowledge and training) capacity. Presumably, such dangerous work would also violate Ukraine's workplace health and safety rules, which remain in force under Article 51. And, of course, Article 51 requires payment for work, which cannot possibly take the form of food and humanitarian assistance

that the Occupying Power is already required to provide.

Moreover, although Article 51 does not directly address dangerous work, the requirement can be inferred. To begin with, it would certainly qualify as "abusive," the term employed by the ICRC in its *Customary International Humanitarian Law* study, to force inhabitants to engage in hazardous tasks.⁹⁶ And Article 52 of Geneva Convention III, which governs, in part, prisoner of war work, provides, "unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature. . . . The removal of mines or similar devices shall be considered as dangerous labour."⁹⁷ It would be incongruent for IHL to allow civilian inhabitants of occupied territory to be forced to perform duties deemed too dangerous under that body of law for captured military personnel.

I close by emphasizing that this article has zeroed in on the issue of forcing civilian inhabitants who are not interred to work involuntarily. As noted, there are also restrictions on forcing others, such as prisoners of war and civilian internees, to work, and there are numerous additional IHL rules that bear on the practice beyond those that directly deal with forced labor. If the Russians are engaging in practices like those of which they have been accused, there is no doubt that they are violating IHL.



⁹³ See Michael Schmitt, *Weaponizing Food*, ARTICLES OF WAR (Mar. 28, 2022), <https://lieber.westpoint.edu/weaponizing-food/>.

⁹⁴ GC IV, *supra* note 4, art. 55.

⁹⁵ *Id.* art. 60.

⁹⁶ Rule 95—*Forced Labour*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule95>.

⁹⁷ GC III, *supra* note 26, art. 52.

ABDUCTING DISSENT: KIDNAPPING PUBLIC OFFICIALS IN OCCUPIED UKRAINE

by Katharine Fortin | Mar 22, 2022

In the last two weeks, it has been reported that Russian occupying forces have abducted up to three Ukrainian mayors with new mayors installed in their place. On Friday, 11 March, it was reported that Russian soldiers occupying the city of Melitopol had taken the mayor.⁹⁸ According to Ukraine's parliament, the reason for the abduction was that he had refused "to cooperate with the enemy." On Sunday, 13 March, it was reported that the mayor of the Ukrainian town of Dniprorudne had been abducted after the town was invaded by Russian forces.⁹⁹

The President of the European Council, Charles Michel, immediately condemned in the strongest terms the two abductions, calling them "kidnappings." On 16 March, it was reported that the mayor of Skadovsk and his deputy had been abducted.¹⁰⁰ On the same date, it was reported that Ukrainian forces had managed get the Melitopol mayor released,¹⁰¹ and a top Ukrainian official said that he would return to work soon. The mayor of Skadovsk has now issued a video message indicating that he has been released.¹⁰²

This spate of mayoral abductions raises questions about the status of public officials in Ukraine, how they are protected, and their ability to refuse to cooperate with Russian authorities on grounds of public conscience. They also raise questions about the authority of the Russian forces to dismiss public officials and replace them with individuals more allied to their cause. This post analyzes these questions with reference to international humanitarian law (IHL) although they may also be applicable human rights law norms.

IHL Prohibits Hostage Taking

The abduction of mayors or other public officials by the Russian Federation is clearly contrary to IHL. There is no suggestion that the individuals have been interned or placed in assigned residence according to any regular procedure in accordance with Geneva Convention IV (GC IV). Instead, news stories indicate that Russian forces abducted the officials and held them in undisclosed locations.

Article 34 of GC IV prohibits the taking of hostages, which is defined broadly in Jean

⁹⁸ Marc Santora & Neil MacFarquhar, *The Russians Might Have Expected a Warm Welcome. Instead the Mayor Labeled Them 'Occupiers,'* N.Y. TIMES (Mar. 12, 2022), <https://www.nytimes.com/2022/03/12/world/europe/ukraine-mayor-kidnapped-ivan-fyodorov.html>.

⁹⁹ Katie Balevic, *Russian forces have abducted a second Ukrainian mayor, this one from the town of Dniprorudne, Ukrainian Foreign Affairs Minister says,* BUSINESS INSIDER NEDERLANDS (Mar. 13, 2022), <https://www.businessinsider.nl/russian-forces-have-abducted-a-second-ukrainian-mayor-this-one-from-the-town-of-dniprorudne-ukrainian-foreign-affairs-minister-says/>.

¹⁰⁰ Santora & MacFarquhar, *supra* note 103.

¹⁰¹ Meredith Deliso, *Kidnapped Ukrainian Mayor Freed in 'Special Operation,' Officials Say,* ABCNEWS (Mar. 17, 2022), <https://abcnews.go.com/International/kidnapped-ukrainian-mayor-freed-special-operation-ukrainian-government/story?id=83486933>.

¹⁰² The Kyiv Independent, *Mayor of Occupied Skadovsk in Kherson Oblast Says He's Been Released* (Mar. 16, 2022), <https://kyivindependent.com/mayor-of-occupied-skadovsk-in-kherson-oblast-says-hes-been-released/>.

Pictet's 1958 Commentary as "taking hostages as a means of intimidating the population in order to weaken its spirit of resistance and to prevent breaches of the law and sabotage in order to secure the security of the Detaining Power."¹⁰³ Pictet's Commentary states that the most common type of hostage taking involves prominent persons taken hostage to prevent disorder. Article 75 of Additional Protocol I also prohibits hostage taking.¹⁰⁴

It may be noted that the definition of hostage taking in the 1958 Commentary to Article 34 of GC IV is much wider than the definition given in the International Committee of the Red Cross (ICRC) 2020 Commentary to common Article 3, which also contains a prohibition of taking hostages.¹⁰⁵ It also seems a bit broader than the definition offered by the Commentary to Article 75 of Additional Protocol I.¹⁰⁶ Both these later commentaries emphasize the idea that hostage taking must be intended to "compel a third party to do or abstain from doing 'any act.'" This element is not explicitly spelled out in the 1958 Commentary to Article 34 but is implied by the examples given.

On the basis that the abduction of the Ukrainian mayors has been apparently carried

out instrumentally to achieve goals specifically mentioned in the 1958 Commentary—i.e., to weaken the spirit of resistance in the towns from which they come *and* to ensure the security of the invading force—it seems likely that these acts of abduction constitute "hostage taking." It is noteworthy that hostage taking constitutes a grave breach of GC IV¹⁰⁷ and a war crime under the Rome Statute of the International Criminal Court.¹⁰⁸ The abduction of public officials may also constitute the crime of "unlawful confinement," which is a grave breach¹⁰⁹ of GCIV and a war crime¹¹⁰ under the Rome Statute.

Public Officials May Not Be Subject to Sanctions, Coercion, or Discrimination

There has been some discussion on this blog and other blogs about whether Section III of GC IV, which applies to occupied territories, currently applies in Ukraine or parts of it.¹¹¹ Relying on Benvenisti's writing, Favuzza has shown that there are good arguments to be made that the areas under control of the Russian forces in Ukraine can be considered as occupied territories.¹¹² When this position is accepted, the abductions of public officials from cities and towns which are now under

¹⁰³ GC IV Commentary of 1958, *supra* note 49, art. 34.

¹⁰⁴ AP I, *supra* note 5, art. 75.

¹⁰⁵ COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, art. 3 (Knut Dörmann et al. eds., 1958) [hereinafter GC III Commentary of 2020].

¹⁰⁶ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977, art. 75 (Yves Sandoz et al. eds., 1987).

¹⁰⁷ GC IV, *supra* note 4, art. 147.

¹⁰⁸ Rome Statute, *supra* note 36.

¹⁰⁹ GC IV, *supra* note 4, art. 147.

¹¹⁰ Rome Statute, *supra* note 36.

¹¹¹ See Jelena Pejic, *The Other Side of Civilian Protection: The 1949 Fourth Geneva Convention*, ARTICLES OF WAR (Mar. 7, 2022), <https://lieber.westpoint.edu/other-side-civilian-protection-fourth-geneva-convention/>; Federica Favuzza, *Is Russia Occupying Ukraine?*, SIDIBLOG (Mar. 4, 2022), <http://www.sidiblog.org/2022/03/04/is-russia-occupying-ukraine/>.

¹¹² See Eyal Benvenisti, *Occupation, Belligerent*, MAX PLANCK ENCYCLOPEDIAS OF INT'L LAW (updated May 2009), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e359>.

the effective control of Russian forces in Ukraine—such as Dniproprudne, Melitopol, and Skadovsk—are violations of Article 54 of GC IV.¹¹³

The rules set out in Section III of GC IV, when taken together with the 1907 Hague IV Regulations (particularly Article 43), are designed to recognize that any state of occupation will be temporary. They are also intended to prevent an occupying force from taking any steps that would have the effect of integrating the occupied territory into its own territory on a more permanent basis by transferring its own population into the area, changing the laws in force in the country without justifications, or interfering with the functioning of criminal courts and tribunals.¹¹⁴ The provisions are designed to attend to the interests of the territorial State, the Occupying Power, and the civilian population (Benvenisti,¹¹⁵ para. 69). Scholars writing on the occupation framework have often noted that reconciling the interests of this triangle of actors is no mean feat, as they will very often be opposed.

One of the rules that plays a role in attending to these different interests is Article 54 of GC IV on judges and public officials.¹¹⁶ Article 54 states, “The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply

sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.” While neither Article 54 nor these earlier documents refer to “mayors,” there seems little doubt that the term “public officials” in Article 54 would include mayors.¹¹⁷ Read on its face, it would seem that Article 54 prohibits exactly the sort of coercive actions taken by Russian forces when kidnapping the mayors of cities under occupation who refuse to cooperate.

Although Article 54 is not found in the 1907 Hague IV Regulations, it is not a “new rule” of IHL. A similar rule protecting public officials was included in documents predating the Hague Regulations such as the 1874 Brussels Convention¹¹⁸ and the Oxford Manual on the Laws of War on Land (1880).¹¹⁹ These earlier documents did not so explicitly protect public officials. In fact, by indicating that public officials could not be punished *unless they failed to carry out their functions*, they essentially made it possible for public officials to be punished if they failed to carry out their functions. In that sense, Article 54 of GC IV provides much wider protection to public officials, because it protects public officials’ right to abstain from fulfilling their functions for reasons of conscience without being punished. In reality, it constitutes a right to resign.

¹¹³ GC IV, *supra* note 4, art. 54.

¹¹⁴ See Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT’L L. 4, 661 (2005), <http://www.ejil.org/pdfs/16/4/313.pdf>; ANDREW CLAPHAM, PAOLA GAETA & MARCO SASSÒLI, *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* (2015); DIETER FLECK, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* (4th ed. 2021).

¹¹⁵ Benvenisti, *supra* note 112.

¹¹⁶ GC IV, *supra* note 4, art. 54.

¹¹⁷ See Fleck, *supra* note 114, at 316; GC IV Commentary of 1958, *supra* note 49, at 306.

¹¹⁸ Project of an International Declaration concerning the Laws and Customs of War, Aug. 27, 1874, <https://ihl-databases.icrc.org/en/ihl-treaties/brussels-decl-1874>.

¹¹⁹ THE LAWS OF WAR ON LAND (1880) (U.K.).

Occupying Power Can Remove Public Officials

The fact that public officials cannot be subject to coercion or sanctions if they refuse to cooperate does not mean that they can insist that they remain in place. Indeed, Article 54 explicitly allows Occupying Powers to “remove public officials from their posts.”¹²⁰ This exception is noted by the Commentary to be a “right of very long standing” and is found in the earlier documents stated above (i.e., the Brussels Declaration and Oxford Manual).¹²¹ The Commentary to Article 54 does not provide guidance on the situations in which the right of removal can be exercised except to say that the occupation authorities may exercise it “for reasons of their own.” It also seems to indicate that an Occupying Power could use this right in circumstances where a public official is using their authority, “in a manner detrimental to the Occupying Power.” However, any changes that an Occupying Power makes in this regard must be guided by Article 47 of GC IV, which indicates that any change introduced into the institutions or government of the territory as a result of its occupation must not deprive the persons living in that territory of their benefits under the Convention.¹²²

Occupying Power Can Compel Public Officials to Work

While the abducted mayors in Ukraine seem to want to keep working, it is also relevant to consider what should happen if public

officials refuse to work. Article 51 of GC IV sets out the circumstances in which an Occupying Power can compel individuals to work in occupied territory.¹²³ The most well-known rule is that the Occupying Power may not compel protected persons to take part in any of its military operations.

Article 51 also confirms that an Occupying Power may compel individuals over 18 years old to carry out work “necessary either for the needs of the army of occupation, or for the public utility services, for the feeding, sheltering, clothing, transportation or health of the population of the occupied territory.” Referring to Article 51, the Commentary to Article 54 acknowledges that there is a tension between Article 54 on the one hand (which seemingly allows public officials to decide *not to work*) and Article 51 on the other (which permits Occupying Powers *to compel public officials to work*).¹²⁴ The Commentary asks which rule should take priority. Can Occupying Powers require the public officials mentioned in Article 54 to remain in their posts even when they have exercised their right to resign?

In an attempt to answer these questions, the Commentary indicates that if refusal to work leads to the paralysis of “the whole judicial and administrative machinery . . . protected persons would be the first to suffer.” It recalls that Article 51 primarily refers to individuals working in public utility services whose services are essential to the civilian

¹²⁰ GC IV, *supra* note 4, art. 54.

¹²¹ GC IV Commentary of 1958, *supra* note 49, art. 54.

¹²² GC IV, *supra* note 4, art. 47.

¹²³ *Id.* art. 51.

¹²⁴ GC IV Commentary of 1958, *supra* note 49, art. 54.

population (e.g., provision of water, gas, transport, health services, etc.). Article 51 also mentions several other services that are equally essential (i.e., relating to the feeding, sheltering, clothing, transportation, or health of the population). Because the purpose of the article is to meet the interests of the population, the Commentary suggests that the Occupying Power would be reasonably justified in refusing the resignation of public officials, despite Article 54. However, it acknowledges that there are a whole host of further individuals who are not named in Article 51 who also play an “essential role in the life of the public, for example, of local, district and provincial officials, of mayors, of officials in the registry of births, deaths and marriages, of police officers, prison staff and social welfare officers . . . judges and members of the judiciary.”

Unable to satisfactorily reconcile this conflict of legal norms, the Commentary takes a different approach to the debate, stating, “it is therefore agreed that it is [these individuals’] *moral duty* to remain in their

posts in the interests of their fellow citizens; such a requirement is all the more justified as the non-political nature of their duties is generally such as to remove any conscientious scruples that they have.”¹²⁵ It is unclear how a modern commentary of Article 51 would approach this issue. Certainly, the ICRC today is not in the habit of setting out its view on individuals’ moral duties.

Conclusions

In sum, this post indicates that the law of occupation does not prohibit the removal of public officials, including mayors, if they are exercising their authority in a manner detrimental to the Occupying Power. However, IHL certainly does prohibit the abduction of public officials, either as a means to intimidate a civilian population or weaken their spirit of resistance or as a means of punishing a public official for refusing to cooperate with the Occupying Power on the grounds of conscience.



¹²⁵ *Id.* at 306.

DEPORTATION OF UKRAINIAN CIVILIANS TO RUSSIA: THE LEGAL FRAMEWORK

by Michael N. Schmitt | Mar 24, 2022

The United Nations estimates that the conflict in Ukraine has displaced over 10 million people. As of March 16, there are an estimated 6.4 million *internally displaced persons* (IDPs) within the country.¹²⁶ The UN Guiding Principles on Internal Displacement sets out protections for them that are implicit in international human rights law and in international humanitarian law (IHL).¹²⁷ In contrast, residents of Ukraine who have fled across borders to escape the hostilities are *refugees*.

As of March 22, nearly 4 million have fled to other countries, with over 2 million refugees in Poland alone.¹²⁸ They are protected by refugee law such as the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, human rights law, and IHL.¹²⁹ These two categories of victims have been

well-addressed in this symposium by Ruvi Ziegler¹³⁰ and Julia Grignon.¹³¹

However, allegations have now surfaced that Russian forces are deporting Ukrainian nationals into Russia itself. For example, on March 19, an official in the besieged city of Mariupol charged that Russia had taken “between 4,000 and 5,000 Mariupol residents forcibly across the border to Taganrog.”¹³² The Ukrainian Ministry of Foreign Affairs labeled the action “a gross violation of international law,”¹³³ while the U.S. Ambassador to the United Nations observed that, if true, “It is unconscionable for Russia to force Ukrainian citizens into Russia and put them in what will basically be concentration and prisoner camps.”¹³⁴

Ukraine’s Prosecutor General has also accused Russia of “the forcible transfer of 2,389 children from temporarily occupied territories

¹²⁶ ReliefWeb, *Update on IDP Figures in Ukraine 18 March 2022 [EN/UK]* (Mar. 18, 2022), <https://reliefweb.int/report/ukraine/update-idp-figures-ukraine-18-march-2022-enuk>.

¹²⁷ U.N., *Guiding Principles on Internal Displacement* (Sep. 2004), <https://www.unhcr.org/us/media/guiding-principles-internal-displacement>.

¹²⁸ Operational Data Portal, *Ukraine Refugee Situation* (last visited Jan. 27, 2024), <https://data.unhcr.org/en/situations/Ukraine>.

¹²⁹ U.N.H.C.R., *The 1951 Refugee Convention* (last visited Jan. 27, 2024), <https://www.unhcr.org/us/about-unhcr/who-we-are/1951-refugee-convention>.

¹³⁰ Ruvi Ziegler, *Displacement from Conflict: Old Realities, New Protections?*, ARTICLES OF WAR (Mar. 17, 2022), <https://lieber.westpoint.edu/displacement-conflict-old-realities-new-protections/>.

¹³¹ Julia Grignon, *Law Applicable to Persons Fleeing Armed Conflicts*, ARTICLES OF WAR (Mar. 15, 2022), <https://lieber.westpoint.edu/law-applicable-persons-fleeing-armed-conflicts/>.

¹³² Yulia Kesaieva & Nathan Hodge, “A Trap for Our Defenders”: Mariupol Adviser Accuses Russia of Offering False Evacuation Corridors, CNN (Apr. 18, 2022), https://www.cnn.com/europe/live-news/ukraine-russia-putin-new-04-18-22/h_cc69ded8fd2946568c9dab3e93901c8e.

¹³³ Samantha Lock, Maanvi Singh, Gloria Oladipo, Léonie Chao-Fong & Martin Belam, *US Condemns Moscow’s Refusal to Rule Out Use of Nuclear Weapons—As It Happened*, GUARDIAN (updated Mar. 22, 2022), <https://www.theguardian.com/world/live/2022/mar/22/russia-ukraine-war-zelenskiy-urges-talks-with-putin-biden-flags-clear-sign-russia-considering-chemical-weapons-live>.

¹³⁴ Ted Hesson & Richard Cowan, *U.S. Envoy to U.N. Decries Reports of Ukrainians Deported to Russia*, REUTERS (Mar. 20, 2022), <https://www.reuters.com/world/us-envoy-un-decries-disturbing-claims-ukrainians-deported-russia-2022-03-20/>.

of Ukraine to Russia.”¹³⁵ Citing Ukraine’s Ministry of Foreign Affairs statement on the matter,¹³⁶ the U.S. Embassy in Kyiv acknowledged the claim, adding that the children were from “Donetsk and Luhansk oblasts” and stated, “This is not assistance. It is kidnapping.”¹³⁷

Expectedly, the Russian Embassy to the United States has denied the accusations.¹³⁸ Instead, Russia’s Defence Ministry has suggested that they are “refugees” from Mariupol.¹³⁹ More broadly, Russian officials assert that Ukrainians are fleeing to Russia willingly. For instance, the head of Russia’s National Defence Control Center¹⁴⁰ has claimed that over 7,800 Ukrainians “expressed their desire to escape to the Russian Federation” on March 19 alone.¹⁴¹ Overall, the Defence Ministry asserts that 2.6 million people have asked to be evacuated to Russia.¹⁴²

Assuming for the sake of analysis that Russia has conducted forced deportations (in light of Russian conduct in the conflict, it is a credible assumption), this post surveys the international law governing the forced movement of nationals from their country

during an armed conflict. It examines applicable prohibitions and offenses, and the exceptions to them. Of course, as the reports are fresh, and in light of the misinformation and disinformation that has characterized the conflict, more facts are needed to fully assess the Russian actions. However, as will be explained, the *law* on the matter is unequivocal.

The Prohibition

The IHL prohibition on deporting individuals is long-standing. For example, Article 23 of the 1863 Lieber Code prohibits “private citizens” from being “carried off to distant parts.”¹⁴³ And in 1919, the Report of the Commission on Responsibility of the Authors of the War, which the Versailles Conference created following the First World War, labeled the “deportation of civilians” a “violation of the laws and customs of war.”¹⁴⁴

But it is Article 49 of Geneva Convention IV that sets out the key prohibition applicable in this conflict.¹⁴⁵ It provides that “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory

¹³⁵ Iryna Venediktova (@VenediktovaIV), X (Mar. 21, 2022), <https://twitter.com/VenediktovaIV/status/1505988764023377920>.

¹³⁶ Min. of Foreign Affairs of Ukraine, *Statement of the Ministry of Foreign Affairs of Ukraine on the Illegal Deportation of Ukrainian Children to Russia* (Mar. 21, 2022), <https://www.kmu.gov.ua/en/news/zayava-mzs-shchodo-nezakonnogo-vivezennya-ukrayinskih-ditej-na-teritoriyu-rosiyi>.

¹³⁷ U.S. Embassy of Kyiv (@USEmbassyKyiv), X (Mar. 22, 2022), <https://twitter.com/USEmbassyKyiv/status/1506214727394988032>.

¹³⁸ AFP, *Russia Denies Deporting Ukrainian Children but Admits Hundreds of Thousands Are on Its Territory*, RADIO FREE EUROPE RADIO LIBERTY (Jan. 23, 2024), <https://www.rferl.org/a/russia-deporting-ukrainian-children-un-committee/32788804.html>.

¹³⁹ Reuters, *Mariupol Says Russia Forcefully Deported Thousands of People* (Mar. 19, 2022), <https://www.reuters.com/world/europe/ukraines-mariupol-says-russia-forcefully-deported-thousands-its-people-2022-03-20/>.

¹⁴⁰ Wikipedia, *National Defense Management Center*, https://en.wikipedia.org/wiki/National_Defense_Management_Center.

¹⁴¹ Kesaieva & Hodge, *supra* note 132.

¹⁴² Reuters, *supra* note 139.

¹⁴³ U.S. Department of War, *Instructions for the Government of Armies of the United States in the Field*, General Order No. 100, art. 23, Apr. 24, 1863.

¹⁴⁴ *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT’L L. 95 (1920), <https://www.jstor.org/stable/2187841>.

¹⁴⁵ GC IV, *supra* note 4, art. 49.

to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.” Transfer refers to the involuntary movement of individuals from occupied territory to locations within the country concerned. Deportation denotes the forcible movement of such individuals into other countries, as Russia has been accused of doing. The provision undoubtedly applies in occupied Ukrainian territory, for all States are Party to the treaty. And even if that were not the case, in its Nuclear Weapons Advisory Opinion, the International Court of Justice observed that the four Geneva Conventions are “fundamental rules . . . to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”¹⁴⁶

This being so, the prohibition is widely acknowledged. In the United States, the Department of Defense Law of War Manual,¹⁴⁷ Army and Marine Corps *Commander's Handbook on the Law of Land Warfare*,¹⁴⁸ and Navy, Marine Corps, and Coast Guard *Commander's Handbook on the Law of Naval Operations*¹⁴⁹ all paraphrase the Article 49 rule.

Military manuals of other nations, such as the United Kingdom's *Manual of the Law of Armed Conflict*, do as well.¹⁵⁰ Concerning this conflict, Ukraine's 2004 IHL Manual states, “It shall be prohibited to issue orders and instructions regarding forcible movement of civilian persons in connection with the armed conflict unless this is required by the considerations of their security.”¹⁵¹ Section 75 of the 2001 Russian Federation's Regulations on the Application of IHL similarly provides, “Deportation of the civilian population from the occupied territory to the territory of another state shall be prohibited.”¹⁵²

It is indisputable, therefore, that the International Committee of the Red Cross (ICRC) 2005 *Customary International Humanitarian Law Study* correctly confirmed the customary law status of the prohibition. Rule 129 of that work notes, “Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.”¹⁵³

Several points about the prohibition merit mention. The prohibition only applies to 1) protected persons taken from 2) occupied territory. Article 4 of Geneva Convention IV defines the term “protected persons” as

¹⁴⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 79 (July 8).

¹⁴⁷ 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.12.3.

¹⁴⁸ FM 6-27, *supra* note 7, ¶ 6-72.

¹⁴⁹ THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS NWP 1-14M, ¶ 6-72 (2022) [hereinafter COMMANDER'S HANDBOOK].

¹⁵⁰ U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 11.55 (2004) [hereinafter U.K. LOAC MANUAL].

¹⁵¹ MINISTRY OF DEFENSE OF UKRAINE, MANUAL ON THE APPLICATION OF THE RULES OF INTERNATIONAL HUMANITARIAN LAW IN THE ARMED FORCES OF UKRAINE ¶ 1.4.16 (2004); *see also id.* ¶ 1.8.5.

¹⁵² Ministry of Defense of the Russian Federation, Manual on International Humanitarian Law for the Armed Forces of the Russian Federation § 75 (2001).

¹⁵³ Rule 129—*The Act of Displacement* ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule129>.

“those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of persons a Party to the conflict or Occupying Power of which they are not nationals.”¹⁵⁴

The article goes on to exclude nationals of the State in whose hands they find themselves; nationals of neutral or co-belligerent States, so long as their State maintains diplomatic relations with the State exercising control over them; the wounded, sick, and shipwrecked; and prisoners of war.¹⁵⁵ Protection for these individuals lies in the remaining three 1949 Geneva Conventions or other international law.

Most of the individuals Russia allegedly deported certainly qualify as protected persons. The one possible exception would be Russian nationals, many of whom are present in Ukraine. However, the “passportization”¹⁵⁶ (and purported naturalization) of nearly a million Ukrainians, especially from the Donbas region¹⁵⁷ of eastern Ukraine, is highly questionable as a matter of law, as Anne Peters has pointed out at *EJIL: Talk!*.¹⁵⁸ Any claim that deportation of those individuals does not violate the rule because of Russia’s mass naturalization program in Ukraine would be badly flawed. Instead, the legal issue as to them would be voluntariness (see below).

The other limitation in Article 49 is that the transfer or deportation must have been from occupied territory. Article 42 of the 1907 Hague Regulations sets forth the accepted conditions for the existence of occupation: “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.”¹⁵⁹

The precise circumstances surrounding the deportations to Russia are unclear. However, the alleged mass round-up of civilians is suggestive of the ability of Russian forces to administer at least the area from which they transported the individuals. This logic applies equally to situations in which civilians might flee from, for instance, Mariupol into Russian-held territory before being moved to Russia.

Even if the Russian forces were not quite at the point where they could exercise the requisite occupation authority, the so-called “Pictet theory” could apply. It holds that during the invasion phase of hostilities, certain occupation law protections attach once enemy forces exercise effective control over individuals, even if not yet over territory.¹⁶⁰ The approach has not been universally embraced, but in the context of deportation and transfer, it comports with the rule’s object

¹⁵⁴ GC IV, *supra* note 4, art. 4.

¹⁵⁵ See also 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.12.3.2.

¹⁵⁶ Fabian Burkhardt, *Russia’s “Passportisation” of the Donbas*, SWP (Aug. 3, 2020), <https://www.swp-berlin.org/10.18449/2020C41/>.

¹⁵⁷ AP, *Russia Has Issued 720,000 Fast-Track Passports in Separatist-Held Areas of Eastern Ukraine*, Euronews (Feb. 16, 2022), <https://www.euronews.com/2022/02/17/russia-has-issued-720-000-fast-track-passports-in-separatist-held-areas-of-eastern-ukraine>.

¹⁵⁸ Ann 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/>.

¹⁵⁹ Hague IV, *supra* note 3, art. 42.

¹⁶⁰ See OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 24–26 (Tristan Ferraro ed. 2012), <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf>.

and purpose. Application in this situation would make sense.

Lastly, the International Criminal Tribunal for former Yugoslavia (ICTY) Appeals Chamber, in its *Stakić* judgment, drew on related case law and many of the sources cited in this post to make two critical findings.¹⁶¹ Although *Stakić* and other relevant cases applied international criminal law in an enforcement proceeding against an individual, the court's conclusions bear directly on the parameters of the IHL prohibition, that is, on whether the Russian Federation has committed an "internationally wrongful act."¹⁶²

First, the Appeals Chamber found that deportation need not be, nor be intended to be, permanent.¹⁶³ Second, and more important in this case, it held that the deportation must be coerced; it may not be voluntary.¹⁶⁴ That said, coerciveness is a relatively low standard. As the Chamber noted,

[T]he term "forced", when used in reference to the crime of deportation, is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological

oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.¹⁶⁵

The DoD *Law of War Manual* also highlights the inapplicability of the prohibition to voluntary movement by protected persons.¹⁶⁶ In this regard, recall that Russia claims the civilians in question have requested transportation to Russia. If that is true for any of them, or if the children are being sent to Russia at the request of their families, their movement to Russia would not qualify as unlawful deportation.

Finally, note that the prohibition on deportation also appears in human rights law. Of particular note is Protocol 4 to the European Convention on Human Rights,¹⁶⁷ to which both Russia and Ukraine are Party.¹⁶⁸ It provides, "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national."¹⁶⁹ However, the option of remedial action by victims before the European Court of Human Rights is likely to be negatively affected¹⁷⁰ by Russia's expulsion from the Council of Europe.¹⁷¹

¹⁶¹ Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

¹⁶² Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 2, Rep. of the Int'l L. Comm'n, 53rd Sess., U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10, (2001) [hereinafter Articles on State Responsibility].

¹⁶³ Stakić Appeals Judgment, *supra* note 161, ¶¶ 278, 307.

¹⁶⁴ *Id.* ¶ 279.

¹⁶⁵ *Id.* ¶ 281.

¹⁶⁶ 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.12.3.4.

¹⁶⁷ Protocol No. 4 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Strasbourg, 16 September 1963, U.N.T.S. vol. 2206 [hereinafter Protocol No. 4].

¹⁶⁸ *Id.*

¹⁶⁹ Protocol No. 4, *supra* note 167, art. 3.

¹⁷⁰ Jannika Jahn, *The Council of Europe Excludes Russia: A Setback for Human Rights*, EJIL: TALK! (Mar. 23, 2022), <https://www.ejiltalk.org/the-council-of-europe-excludes-russia-a-setback-for-human-rights/>.

¹⁷¹ Council of Europe, *Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe* (Mar. 16, 2022), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51.

Indeed, the European Court of Human Rights has suspended its examination of petitions against Russia while considering the legal consequences of the action.¹⁷²

The Exceptions

Article 49 of Geneva Convention IV sets forth the exceptions to the prohibition:

[T]he Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.¹⁷³

Thus, there are but two exceptions, both labeled “evacuation” in IHL terms. The first applies when the movement of the individuals is for their own good. The ICRC’s *“Pictet”* Commentary explains, “If therefore an area is in danger as a result of military operations or is liable to be subjected to intense bombing, the Occupying Power has the right and . . . the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge.”¹⁷⁴

For instance, Russia would be entitled to evacuate civilians from an area that is likely to be shelled by Ukrainian artillery because of

the presence of Russian forces. Yet, there is no indication that such a situation presents itself.

The second exception is based on the existence of “imperative military necessity.” The Commentary cites an example in which “the presence of protected persons in an area hampers military operations.” For instance, civilians who are on or near a road vital to the force’s maneuver may be moved. It is essential to understand that the adjective “imperative” sets a high standard. Mere military convenience or even good sense does not suffice. Imperative military necessity means that an operation may falter, or forces may be threatened, if the action is not taken. It is hard to imagine how the deportation of Ukrainian nationals might be justified on this basis.

However, even if the alleged deportations of Ukrainian nationals were for their own safety or reasons of imperative military necessity, Article 49 makes it clear that movement into Russia would be unlawful unless it is impossible to move them elsewhere in the occupied area, or just facilitate their safe evacuation into unoccupied Ukrainian territory. And the claim that children are being deported begs the question of whether they are being separated from their families involuntarily in violation of the obligation not to do so.

The DoD *Law of War Manual*¹⁷⁵ captures these exceptions, as does the Army and Marine Corps’ *Commander’s Handbook on*

¹⁷² *Russia’s War Is a Lesson for Europe’s Rights System*, Amnesty International (May 9, 2022), <https://www.amnesty.org/en/latest/news/2022/05/russias-war-is-a-lesson-for-europes-rights-system/>.

¹⁷³ GC IV, *supra* note 4, art. 49.

¹⁷⁴ GC IV Commentary of 1958, *supra* note 49, art. 49.

¹⁷⁵ 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.12.3.1.

the Law of Land Warfare,¹⁷⁶ and the U.K.'s *Manual of the Law of Armed Conflict*.¹⁷⁷

International Criminal Law

The actions discussed above breach a belligerent State's obligation to refrain from forcible transfer or deportation. If substantiated, the actions would qualify as an internationally wrongful act by the Russian Federation. However, those involved may also bear individual criminal responsibility under international criminal law.

Article 147 of the Geneva Convention IV confirms that "unlawful deportation or transfer . . . of a protected person" is a grave breach of the Convention.¹⁷⁸ Article 85(4) (a) of the 1977 Additional Protocol I to the 1949 Geneva Conventions restates that characterization to drive the point home.¹⁷⁹ The DoD *Law of War Manual*¹⁸⁰ and Army and Marine Corps *Commander's Handbook on the Law of Land Warfare*¹⁸¹ also label the offense a "grave breach," a characterization that requires all States to exercise *universal* jurisdiction or extradite, even when the State concerned has no connection with the case.

Numerous international criminal tribunals have exercised subject matter jurisdiction (jurisdiction *ratione materiae*) over

deportation or forcible transfer. For example, Article 6(b) of the 1945 Charter of the International Military Tribunal at Nuremberg included "deportation to slave labour or for any other purpose of civilian population of or in occupied territory" in its list of war crimes, while Article 6(c) recognized that deportation was a "crime against humanity" whether "before or during war."¹⁸²

Principle VI(b) and (c) of the International Law Commission's (ILC) 1950 Nuremberg Principles confirmed that status.¹⁸³ The ILC returned to the matter in its 1996 Draft Code of Crimes against the Peace and Security of Mankind, noting that "deportation or transfer . . . of protected persons" is a war crime (art. 20(a)(vii)) and "arbitrary deportation or forcible transfer of population" is a crime against humanity (art. 18(g)).¹⁸⁴

Statutes of more recent international criminal tribunals likewise encompass deportation and forcible transfer. For instance, the Rome Statute of the International Criminal Court (ICC) lists deportation among war crimes within its jurisdiction (art. 8(2)(a)(vii)), while its crimes against humanity provision includes "[d]eportation or forcible transfer of the population."¹⁸⁵ The latter offense, like all crimes against humanity, requires that it

¹⁷⁶ FM 6-27, *supra* note 7, ¶¶6-72, 6-73.

¹⁷⁷ U.K. LOAC MANUAL, *supra* note 150, ¶ 11.55.

¹⁷⁸ GC IV, *supra* note 4, art. 147.

¹⁷⁹ AP I, *supra* note 5, art. 85(4)(a).

¹⁸⁰ 2016 DoD LAW OF WAR MANUAL, *supra* note 8, § 11.12.3.

¹⁸¹ FM 6-27, *supra* note 7.

¹⁸² Nuremberg Charter, *supra* note 48, art. 6(b).

¹⁸³ United Nations, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle VI(b) and (c), (1950), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf.

¹⁸⁴ United Nations, Draft Code of Crimes against the Peace and Security of Mankind, arts. 20(a)(vii) & 18(g), (1996), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf.

¹⁸⁵ Rome Statute, *supra* note 36.

be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹⁸⁶ In extreme cases, the forcible transfer of children falls within the reach of the ICC Statute’s genocide provision.¹⁸⁷ Similarly, the Statute of the ICTY treats such actions as a war crime (art. 2(g)) or crime against humanity (art. 5(d)).¹⁸⁸

The domestic law of many States, including that of Russia and Ukraine, also criminalizes deportation and forcible transfer. Article 356(1) of Russia’s 1996 Criminal Code makes “deportation of the civilian populations” a crime, while “forcible transfer of children” as part of a campaign of genocide violates Article 357.¹⁸⁹ In Ukraine, deportation of the civilian population for the purpose of forced labor is a violation of Article 438(1) of the 2001 Criminal Code.¹⁹⁰ Like Russia, Ukraine also criminalizes the transfer of children during a genocide (art. 442).

International and criminal tribunals have heard numerous cases involving the

offense (see the ICRC’s comprehensive IHL practice database on Rule 129¹⁹¹). The *Stakić* judgment cited above is of particular relevance to any defense that Russians might proffer on the basis that they were acting to safeguard Ukrainian civilians. There, the Appeals Chamber noted, “[D]isplacement for humanitarian reasons is justifiable in certain situations [but] the Appeals Chamber agrees with the Prosecution that it is not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused’s own unlawful activity.”¹⁹²

Conclusion

More facts are necessary to fully evaluate the accusations leveled at Russian forces. But if they are substantiated, it is difficult to see how they would not amount to a violation by Russia of its IHL obligations and a war crime, or even a crime against humanity, by those involved. Clearly, the matter merits serious and immediate investigation.



¹⁸⁶ *Id.* art. 7(1)(d).

¹⁸⁷ *Id.* art. 6(e).

¹⁸⁸ ICTY Statute, *supra* note 57, arts. 2(g) & 5(d).

¹⁸⁹ The Criminal Code of the Russian Federation, No. 63-Fz of June 13, 1996 (Russ.).

¹⁹⁰ Ukraine Criminal Code, Law No. 2341-III.

¹⁹¹ Rule 129—*The Act of Displacement*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule129>.

¹⁹² Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment ¶ 287 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

RUSSIA'S FORCIBLE TRANSFER OF CHILDREN

by Alison Bisset | Oct 5, 2022

Earlier last month, the European Parliament adopted a resolution condemning the forced transfer of Ukrainian children to Russia.¹⁹³ The resolution follows months of reporting that Russian authorities have been separating children from their parents, conducting abductions from Ukrainian orphanages, hospitals, and other children's institutions,¹⁹⁴ and putting children up for adoption in Russia.¹⁹⁵ Some estimate that as many as 448,000 children have entered Russia from Ukraine.¹⁹⁶ It is reported that President Putin has issued decrees simplifying procedures for granting Russian citizenship to Ukrainian children without parental care and enabling their adoption by Russian families.¹⁹⁷ These reports add another deeply disturbing dimension to the horrifying litany of crimes emerging from Ukraine. They are all the more shocking for their direction against children.

Russia's alleged actions are strictly prohibited under international law. This post will demonstrate that they constitute violations of international humanitarian law (IHL) and international human rights law and may give rise to prosecutions under international

criminal law. Yet, notwithstanding the very serious nature of these violations, it is likely to prove difficult to facilitate the return of children whose status may have been "legally" altered and who lack documentation evidencing Ukrainian nationality.

Children under IHL

IHL recognises children as a group that is particularly vulnerable during conflict. Under the 1949 Geneva Conventions, children, as members of the civilian population, are recognised as "protected persons" when in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Attacks against them are forbidden, and they are to be treated humanely, with respect for their lives and for their physical and moral integrity.¹⁹⁸

This general protection is further developed in Article 77 of Additional Protocol I of 1977, which created an obligation for all states to treat children affected by armed conflict with special respect and to provide them with the care and aid they require:

Children shall be the object of special respect and shall be protected against

¹⁹³ European Parliament, Resolution on Human Rights Violations in the Context of the Forced Deportation of Ukrainian Civilians to and the Forced Adoption of Ukrainian Children in Russia, 14 September 2022, RC-B9-0388/2022.

¹⁹⁴ Agence France-Presse in Kyiv, *Kyiv Accuses Moscow of Mass Abduction of Ukrainian Children*, GUARDIAN (Aug. 23, 2022), <https://www.theguardian.com/world/2022/aug/23/kyiv-accuses-moscow-of-mass-abduction-of-ukrainian-children>.

¹⁹⁵ Michael Schnell, *Ukraine: Deported Children Facing Threat of 'Illegal Adoption' in Russia*, THE HILL (Apr. 14, 2022), <https://thehill.com/policy/international/3267579-ukraine-deported-children-facing-threat-of-illegal-adoption-in-russia/>.

¹⁹⁶ Human Rights Watch, "We Had No Choice": "Filtration" and the Crime of Forcibly Transferring Ukrainian Civilians to Russia (Sep. 1, 2022), https://www.hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians#_ftn29.

¹⁹⁷ Federico Fubini, "Stolen" Children in Ukraine, *Putin's Decree Authorizing Adoption*, TIME (May 31, 2022), <https://time.news/stolen-children-in-ukraine-putins-decree-authorizing-adoption-time-news/>.

¹⁹⁸ GC IV, *supra* note 4, art. 27.

any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.¹⁹⁹

The need to protect children flows across the provisions of the Fourth Geneva Convention and Additional Protocol I, prioritising them for the receipt of aid and medical treatment,²⁰⁰ regulating their involvement in hostilities,²⁰¹ and considering the situation of those who are orphaned or separated.²⁰² These instruments also protect family unity. They stipulate that interned and detained families should be kept together,²⁰³ systems must be set up to identify and register separated children,²⁰⁴ and families are entitled to give news to each other.²⁰⁵ The temporary evacuation of children—which should be to a neutral State—is strictly regulated and requires the consent of parents or guardians, as well as a system to register the whereabouts of any evacuated children.²⁰⁶ Importantly, changing the family or personal status, including nationality or civil status, of children is prohibited.²⁰⁷

This is the legal framework in which Russia is internationally obligated to operate. Yet to date, Russia's actions in Ukraine demonstrate a deplorable departure from and disdain

for IHL rules which require protection of and respect for children. There are reports that under its system of “filtration,” Russia has separated children from their parents in contravention of the Fourth Geneva Convention as described above.²⁰⁸ Abduction of children and transfer to Russia are at variance with the overarching obligations of Geneva Convention IV and Additional Protocol I to treat children humanely and with special respect and care. Altering nationality and citizenship and facilitating adoptions by Russian families are flagrant violations of Article 50 of Geneva Convention IV and contravene the principles embodied within the Fourth Convention that family unity is to be protected and respected.

Forcible Transfer and Deportation under International Law

Forcible transfer and deportation of civilians, including children, is prohibited under the Fourth Geneva Convention (art. 49(1)).²⁰⁹ Under the Fourth Geneva Convention and Additional Protocol I, deportation or transfer of the civilian population of an occupied territory is a grave breach of these instruments, which ought to be prosecuted, unless the security of the civilians or imperative

¹⁹⁹ AP I, *supra* note 5, art. 77.

²⁰⁰ GC IV, *supra* note 4, arts. 17 & 41; AP I, *supra* note 5, art. 70(1).

²⁰¹ AP I, *supra* note 5, art. 77(2).

²⁰² GC IV, *supra* note 4, arts. 24 & 50.

²⁰³ *Id.* art. 82.

²⁰⁴ *Id.* art. 24.

²⁰⁵ *Id.* art. 25.

²⁰⁶ *Id.* art. 24; AP I, *supra* note 5, art. 78.

²⁰⁷ GC IV, *supra* note 4, art. 50.

²⁰⁸ Claire Parker, *Russia's “Filtration” System in Ukraine Detailed in New Reports*, WASH. POST (Sep. 1, 2022), <https://www.washingtonpost.com/world/2022/09/01/russia-ukraine-filtration-forced-transfer/>.

²⁰⁹ GC IV, *supra* note 4, art. 49(1).

military reasons require relocation.²¹⁰ There is, however, nothing to suggest that the deportation of children to Russia is motivated by any security or military imperative.

Forcible transfer and deportation constitute crimes incurring individual criminal responsibility under the Statute of the International Criminal Court.²¹¹ In an international armed conflict, the “deportation or transfer [by the Occupying Power] of all or parts of the population of the occupied territory within or outside this territory” is a war crime under Article 8(2)(b)(viii).²¹² It can also constitute a crime against humanity under Article 7(1)(d) where it is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge.²¹³ Reports on the numbers of children involved, the organized methods of abduction and separation from parents and guardians, and the domestic laws in place in Russia for expedited citizenship and adoption processes suggest that the thresholds for crimes against humanity may well be met in this situation.²¹⁴

In addition, forcibly transferring children of a national group to another group, with intent to destroy that national group in whole or

in part, may constitute genocide, as defined under Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), and replicated in Article 5 of the ICC Statute.²¹⁵ The continuation of any group depends upon its children. The transfer of Ukrainian children to Russia, their subsequent adoption, and the potential for their nationalities to be erased, their language, customs, and religion changed, has serious implications for the Ukrainian national group. When considered against the backdrop of Russian rhetoric on the destruction of the Ukrainian people, the possibility of genocide must be considered.²¹⁶ Similarities can be drawn here with the UN Commission of Inquiry on the Syrian Arab Republic, which concluded that the Islamic State (IS) group had committed genocide against the Yazidi through the forcible transfer of Yazidi girls as sex slaves and Yazidi boys as IS fighters.²¹⁷

Although Russia is not a State Party to the ICC, the crimes under consideration here form part of customary international law by which all States are bound. Moreover, Ukraine has accepted the ICC’s jurisdiction with respect to alleged crimes committed on its territory since November 2013, giving the Court jurisdictional reach over the

²¹⁰ *Id.* art. 147; AP I, *supra* note 5, art. 85(4)(a).

²¹¹ Rome Statute, *supra* note 36.

²¹² *Id.* art. 8(2)(b)(viii).

²¹³ *Id.* art. 7(1)(d).

²¹⁴ Antony J. Blinken, *Press Statement: Russia’s “Filtration” Operations, Forced Disappearances, and Mass Deportations of Ukrainian Citizens*, U.S. DEP’T OF STATE (July 13, 2022), <https://www.state.gov/russias-filtration-operations-forced-disappearances-and-mass-deportations-of-ukrainian-citizens/>.

²¹⁵ Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Jan. 12, 1951, 78 U.N.T.S. 277; Rome Statute, *supra* note 36, art. 5.

²¹⁶ Ksenia Svetlova, *Russia’s Chilling Manifesto for Genocide in Ukraine*, HAARETZ (Apr. 7, 2022), <https://www.haaretz.com/world-news/europe/2022-04-07/ty-article-opinion/russias-chilling-manifesto-for-genocide-in-ukraine/00000180-5b96-d97e-a7fb-7bd7cf700000>.

²¹⁷ U.N. Human Rights Council, “*They came to destroy: ISIS Crimes Against the Yazidis*,” 15 June 2016, A/HRC/32/CRP.2, https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf.

crimes under consideration here.²¹⁸ The ICC Prosecutor opened an investigation into the situation in Ukraine in March 2022.²¹⁹

Violations of International Children's Rights Law

Equally relevant in this situation is international human rights law, particularly the United Nations Convention on the Rights of the Child (CRC).²²⁰ Russia is a State Party to the CRC and, as such, is obligated to respect and ensure to all children within its jurisdiction a full range of civil, political, economic, social, and cultural rights (art. 2).²²¹ There is no general derogation clause under the CRC, meaning that the rights of children are to be respected at all times, including during public emergencies and armed conflict. The Committee on the Rights of the Child²²² has already called for Russia to cease its aggression and military action in Ukraine and to uphold its obligations to protect children from physical and psychological violence.²²³

Every aspect of children's lives is impacted by conflict, but of pertinence here are the CRC's many provisions aimed at protecting and maintaining family units and connections. These are integral to ensuring one of the CRC's guiding principles: the best interests of the

child (art. 3). Under the CRC, children have rights to a name and nationality and to know and be cared for by their parents (art. 7(1)). States Parties undertake to respect the right of the child to preserve the child's identity, including name, nationality, and family relations, without unlawful interference (art. 8(1)). States must ensure that children are not separated from their parents against their will, other than in accordance with due process and where this would serve their best interests (art. 9(1)). Generally, no child is to be subjected to arbitrary or unlawful interference with their privacy, family, or home (art. 16(1)). If accurate, allegations that Russia has arbitrarily separated children from parents and caregivers, deported them, and imposed Russian citizenship upon them suggest manifest contravention of CRC standards and failure to adhere to international legal obligations. It would also violate IHL, as described above.

Adoption is also regulated under the CRC (art. 21) and operates around the child's best interests as the paramount consideration. Adoption is not permitted in the absence of an evaluation regarding the child's status concerning parents, relatives, and legal guardians (art. 21(a)), and intercountry adoption is to be considered as a last resort (art. 21(b)). Ukraine has already suspended

²¹⁸ ICC, *Ukraine*, ICC 01-22, <https://www.icc-cpi.int/situations/Ukraine>.

²¹⁹ ICC, *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* (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

²²⁰ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

²²¹ U.N., *Convention on the Rights of the Child Status as at Jan. 28, 2024* (last visited Jan. 28, 2024), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en.

²²² U.N., *Committee on the Rights of the Child* (last visited Jan. 28, 2024), <https://www.ohchr.org/en/treaty-bodies/crc>.

²²³ U.N., *Ukraine: UN Committee Urges End to Killings of Children*, OHCHR (Mar. 4, 2022), <https://www.ohchr.org/en/press-releases/2022/03/ukraine-un-committee-urges-end-killings-children>.

intercountry adoption.²²⁴ UNICEF and Save the Children have called for a moratorium among receiving States on intercountry adoption of children uprooted by the war in Ukraine, stressing that in conflict situations children are at increased risk of exploitation, abuse, and trafficking, and that unaccompanied children should not be assumed to be orphans.²²⁵

The UN Guidelines for the Alternative Care of Children make clear that in emergency situations children should not be moved to a country other than their habitual residence for alternative care except for compelling health, medical, or safety reasons.²²⁶ If they must be moved, they should stay as close as possible to their home, be accompanied by a parent or caregiver, and have a clear plan for return. Again, if accurately reported, Russian actions in fast-tracking adoption of Ukrainian children by Russian families contravene internationally accepted laws and guidelines and would amount to a violation of its CRC obligations.

Returning Children

When the Russia-Ukraine conflict ends, and even perhaps before, the international community will face enormous challenges in

facilitating the return of displaced children. The right to return is a customary rule under IHL, and as discussed, the need to maintain and reinstate family unity is a central theme in Geneva Convention IV.²²⁷

It is closely connected to the international human right of all persons to enter the territory of the State of which they are a national, which is recognized in most international and regional human rights instruments.²²⁸ The CRC provides for the right of the child to leave any country and to enter his or her own country and mandates States Parties to deal with such requests in a positive, humane, and expeditious manner.²²⁹

The legal framework and moral imperative of returning displaced children is clear. However, the practical obstacles to return are significant. It will require the creation of formal channels to identify, trace, and repatriate children. This is itself an enormous task, but coupled with potential Russian obstruction and the complexities of domestically recognized adoptions, it will be even more challenging.

Conclusion

The scale of international wrongdoing examined even in this brief post is staggering,

²²⁴ Happy Child Foundation, *Ukraine Suspends International Adoption—Ombudswoman* (May 24, 2022), <https://deti.zp.ua/eng/a.php?n=900244>.

²²⁵ UNICEF, *Guidance for Protecting Displaced and Refugee Children in and Outside of Ukraine* (Nov. 1, 2022), <https://www.unicef.org/emergencies/guidance-protecting-displaced-children-ukraine>; Save the Children, *Ukraine Crisis: Save the Children Calls for Immediate Halt on Intercountry Adoptions to Keep Children Safe* (Mar. 22, 2022), <https://www.savethechildren.net/news/ukraine-crisis-save-children-calls-immediate-halt-intercountry-adoptions-keep-children-safe>.

²²⁶ G.A. Res. 64/142, Guidelines for the Alternative Care of Children (Feb. 24, 2010) (adopted Dec. 18, 2009).

²²⁷ Rule 132—*Return of Displaced Persons*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule132>.

²²⁸ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 13(2) (Dec. 10, 1948); ICCPR, *supra* note 90, art. 12; G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(ii) (Dec. 21, 1965); African Charter on Human and Peoples' Rights, art. 12(2), June 27, 1981, 21 I.L.M. 58; American Convention on Human Rights, art. 22(5), Nov. 22, 1969, 1144 U.N.T.S. 123; Protocol No. 4, *supra* note 167, art. 3.

²²⁹ Convention on the Rights of the Child, *supra* note 220, art. 10(1).

and the consequences for the children who are victim to it are grave. Russia's actions in targeting children demonstrate a callous disregard for the rules that regulate conduct in war and suggest violations of international legal obligations across IHL, international human rights law, and international criminal law.

It is now incumbent upon all States to seek an end to this conflict, ensure accountability for wrongdoers, ensure redress for victims, and prioritize the rights, needs, and interests of children in post-conflict settlements.



CHAPTER IX

ENFORCEMENT

SECTION 1

State Responsibility

UKRAINE'S LEGAL COUNTERATTACK

by Michael Kelly | Mar 17, 2022

Beyond its endurance on the battlefield, Ukraine has launched a legal counterattack against Russia in the courts. The normally slow-moving, process-heavy gears of international justice are now moving at relative lightspeed in response to Russia's illegal invasion of Ukraine and the global condemnation that quickly followed at the United Nations.¹ While much has been made of the military, economic, and financial resistance against Russia's invasion, Ukraine's strategic legal salvos should not be undervalued.

Symbolically, it is important for democracies to take legal action against larger authoritarian adversaries when they are wronged, if for no other reason than to support the notion of the rule of law. Ukraine's multi-pronged

legal strategy involves cases in at least five international tribunals including advocacy by attorneys from prominent U.S. law firms. The two most recent advances have occurred in The Hague at the International Court of Justice (ICJ) and the permanent International Criminal Court (ICC).

The International Court of Justice

The ICJ held hearings at the Peace Palace last week on Ukraine's request for provisional measures—essentially a restraining order against further Russian aggression.² Defending itself against Russian President Vladimir Putin's allegations of genocide against Russian-speaking peoples in the Donetsk and Luhansk regions, Kyiv opened a case against Moscow by triggering Article 9

¹ *General Assembly resolution demands end to Russian offensive in Ukraine*, UN NEWS GLOBAL PERSPECTIVE HUMAN STORIES (Mar. 2, 2022), <https://news.un.org/en/story/2022/03/1113152>.

² Press Release Unofficial, Int'l Court of Justice, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation): Conclusion of the public hearing on the request for the indication of provisional measures submitted by Ukraine (Mar. 7, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220307-PRE-01-00-EN.pdf>.

in the 1948 Genocide Convention activating the Court's jurisdiction.³ Indeed, in a bit of legal *ju-jitsu*, Ukraine turned the tables on Russia, noting that the international killing and infliction of serious injury on Ukrainian nationals by Russian forces transgressed at least two of the treaty's *actus reus* prohibitions and may suggest genocidal intent by Russia itself.

Yale Law School's former dean, Harold Koh, powerfully delivered Ukraine's closing argument: "The tragedy we are all watching in the streets of Kyiv . . . is precisely what our modern international legal system was designed to prevent." Foreshadowing what China might do against Taiwan if Russia succeeds in subjugating Ukraine, Koh stated, "If this Court does not act decisively against this level of aggression and atrocity, based on outrageous abuse of one of the world's most important human rights treaties . . . why should any Permanent U.N. Member see international law as a meaningful obstacle to what it might perceive as 'necessary military action?'" He then directly challenged the fifteen judges to act swiftly: "You have undeniable legal authority to act. Anything less would fail to vindicate the rule of international law under these most dire of circumstances. . . . [T]he world awaits your

actions." Russia declined to appear before the Court.⁴

The International Criminal Court

On the other side of The Hague, overlooking a beach on the North Sea, the ICC was abuzz with activity. The Prosecutor, British barrister Karim Kahn, assembled his team to begin collecting evidence of war crimes, genocide, and crimes against humanity in Ukraine. It is happenstance that the ICC is able to tackle this situation. The Court does not always have jurisdiction over atrocities committed by or on the territories of non-State Parties to the Court's Statute such as Russia and Ukraine.⁵ However, because Ukraine had requested and accepted the ICC's jurisdiction after Russia annexed Crimea in 2014,⁶ and that process was not yet completed, Russian tanks literally rolled into a still-open situation before the Court. Mr. Kahn immediately announced his intention to convert this examination into an investigation,⁷ and the case was assigned to Pre-Trial Chamber II.⁸ If the Kremlin's attorneys advised Putin that he was immune from the ICC's reach, they were as badly mistaken as he was surprised.

This jurisdictional track on the prosecutor's initiative is overlaid, and further legitimized, by the sudden opening of a second track by

³ Convention on the Prevention and Punishment of the Crime of Genocide, art. 9, Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

⁴ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Public Sitting, Verbatim Record (Corrected), CR 2022/5 I.C.J. (Mar. 7, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220307-ORA-01-00-BI.pdf>.

⁵ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

⁶ Situation in Ukraine (Investigation), ICC-01/22 (Mar. 2, 2022), <https://www.icc-cpi.int/situations/ukraine>.

⁷ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation," Int'l Crim.Ct. (Feb. 28, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

⁸ Decision assigning the situation in Ukraine to Pre-Trial Chamber II, Presidency, Decision, ICC-01/22-1 (Mar. 2, 2022), <https://www.icc-cpi.int/court-record/icc-01/22-1-1>.

thirty-nine State parties led by Lithuania, which separately requested an investigation.⁹ The three judges who will oversee Mr. Kahn's investigation are an all-star bench: Antoine Kesia-Mbe Mindua (DRC), who has deep experience drawn from previous postings at the Rwanda and Yugoslavia war crimes tribunals; Tomoko Akane (Japan), whose work on capacity building and legal systems in addition to prosecuting gives her a keen eye toward process and procedure; and Rosario Salvatore Aitala (Italy), whose background in geopolitics and terrorism issues equips him to appreciate a much bigger picture in the Ukraine situation. This chamber will examine the evidence as it comes in, approve cases within the Ukraine situation, and issue summons or arrest warrants.

If the ICC issues an arrest warrant against Vladimir Putin for war crimes, it will be a legal thunderbolt. It is a rare thing for sitting heads of State to come under the jurisdiction of international law, but a decade ago this is exactly what happened to President Omar al-Bashir of Sudan for his role in the Darfur genocide.¹⁰ The ICC's arrest warrant weakened Bashir both at home and abroad to the point that he was eventually overthrown, leading to negotiations for his transfer to The Hague to stand trial. No one presumes

to know whether a similar fate would befall Putin, but it certainly wouldn't help him.

Other Tribunals

The broader legal front Ukraine has mounted against Russia since the annexation of Crimea also includes previously percolating cases against Russia in the Law of the Sea Tribunal for illegal annexation of Ukraine's sovereign territorial waters and the fisheries and energy resources therein,¹¹ and in the Permanent Court of Arbitration for seizure of Ukrainian assets and investments in Crimea.¹² These have re-emerged now with new urgency. Not insignificantly, on March 1st the European Court of Human Rights also ordered Russia, on Ukraine's request, to refrain from further military attacks against civilians and civilian property in Ukraine.¹³

Legal Impact

Ukraine's legal counterattack in an array of international venues has put Russia back on its heels. Not only did Moscow not show up to challenge Ukraine at the ICJ, nor respond to the ICC Prosecutor's announcement opening a war crimes investigation in Ukraine, but Russia has withdrawn from the Council of Europe—a precursor to denouncing the European Convention on Human Rights—

⁹ 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, Int'l Crim. Ct. (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

¹⁰ Prosecutor v. Al Bashir, ICC-02/05-01/09, Case Information Sheet: Situation in Darfur, ICC-PIDS-SUD-02-006/18_Eng (updated July 2021).

¹¹ Concerning the detention of three Ukrainian naval vessels (Ukr. v. Russ.), Case No. 26, Order 2019, <https://www.itlos.org/en/main/cases/list-of-cases/case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures/>.

¹² Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, PCA Case Repository, <https://pca-cpa.org/en/cases/149/>.

¹³ Press Release, European Court of Human Rights, Expansion of Interim Measures in Relation to Russian Military Action in Ukraine (Apr. 1, 2022).

and is on the verge of being suspended from the World Trade Organization.

The law is designed to serve those who need it in the pursuit of justice. International justice is no exception, and there is no better case

than Ukraine's existential plight. The rule of law is what, in the end, tends to separate democracies from dictatorships.



LITIGATING RUSSIA'S INVASION OF UKRAINE

by Lawrence Hill-Cawthorne | Apr 27, 2022

Since the commencement of Russia's invasion of Ukraine at the end of February, different international courts and tribunals have been engaged as means to invoke international responsibility for the various violations of international law that have occurred. As is often the case in international law, however, the proceedings initiated before these tribunals reflect a very particular legal framing of the broader invasion and conduct of hostilities (I wrote on this theme a few years ago in relation to the post-2014 litigation between Ukraine and Russia).¹⁴ This is a consequence of the absence in international law of a single, integrated judicial system with compulsory jurisdiction. Instead, there are many different courts that, for the most part, have limited subject-matter jurisdiction.

Since the February invasion, cases have already been initiated before the International Court of Justice, European Court of Human Rights, and International Criminal Court. The first two of these courts deal with Russia's responsibility as a State, whereas the third deals with the responsibility of individual perpetrators of crimes. While the speed with which these courts have started their

investigations is promising, many obstacles lie along the path to accountability. This post outlines these proceedings and considers some of the key obstacles that they face.

International Court of Justice

The day after Russia's invasion began, Ukraine submitted an application to the International Court of Justice (ICJ).¹⁵ Ukraine alleges that Russia is in violation of the 1948 Convention Against Genocide, on the grounds that Russia has falsely accused Ukraine of committing genocide in the East and used this as a pretext for its invasion. The 1948 Convention, of course, contains a compromissory clause granting the ICJ jurisdiction over disputes concerning its interpretation, application, or fulfilment. Ukraine must, therefore, frame its dispute (which is really one concerning the use of force and conduct of hostilities) as one concerning the Convention Against Genocide. Indeed, similar legal framing was also necessary in its earlier ICJ application regarding Russia's annexation of Crimea and activities in Eastern Ukraine, which Ukraine brought on the basis of the Convention on the Elimination of All Forms of Racial Discrimination and the International

¹⁴ Lawrence Hill-Cawthorne, *International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study*, 68 INT'L COMP. L.Q. 779, 815 (2019).

¹⁵ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Public Sitting, Verbatim Record (Corrected), 2022 CR 2022/5 I.C.J. (Mar. 7), <https://www.icj-cij.org/public/files/case-related/182/182-20220307-ORA-01-00-BI.pdf>.

Convention on the Suppression of the Financing of Terrorism.¹⁶

Ukraine faces a number of challenges in its application, however. Most importantly, the Genocide Convention does not clearly prohibit wrongful allegations of genocide against another State; rather, it requires States to prosecute persons responsible for genocide. It is not clear, therefore, that Russia's actions violate the Genocide Convention as such.

Nonetheless, Ukraine was able to convince the Court in its application for the indication of provisional measures that the Genocide Convention granted the Court *prima facie* jurisdiction and that its rights thereunder had plausibly been affected. The Court consequently issued its Order on 16 March that Russia “immediately suspend the military operations” against Ukraine.¹⁷ As Marko Milanovic has noted, the Order is especially noteworthy for going beyond what Ukraine had requested, requiring the suspension of all its military operations and not just those based on the pretext of genocide in the Donbas.¹⁸

Judges Xue and Gevorgian dissented, arguing that rights under the Genocide Convention were not implicated here, whilst Judge Bennouna's declaration was admirably honest, in that he “felt compelled by the

tragic situation” to vote with the majority but doubted whether the Genocide Convention could indeed grant the Court jurisdiction over Ukraine's claims.¹⁹ This might suggest a tougher path for Ukraine at the later, preliminary objections stage when it will have to argue in full that the Convention grants the Court jurisdiction. However, unlike when seeking provisional measures (which are designed to protect specific rights), Ukraine may be able to argue that the dispute is one of “fulfilment” of the Convention (that is, Ukraine's fulfilment) without the need to ground its claim in an assertion of a right *not* to be accused of genocide as such.

European Court of Human Rights

In addition to bringing a claim against Russia before the ICJ, Ukraine has also brought a claim before the European Court of Human Rights (ECtHR). This joins four other sets of pending cases brought by Ukraine against Russia before the ECtHR in relation to the annexation of Crimea and Russian actions in Eastern Ukraine since 2014. A number of cases have also been brought against Russia by individuals in Ukraine since the start of the invasion, which join thousands of individual cases against Russia in relation to the events from 2014.

¹⁶ Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Application Instituting Proceedings, 2017 I.C.J. Rep. 166 (Jan. 16), <https://www.icj-cij.org/public/files/case-related/166/166-20170116-APP-01-00-EN.pdf>.

¹⁷ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J. (Mar. 16), <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.

¹⁸ Marko Milanovic, *ICJ Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelled from the Council of Europe*, EJIL:Talk! (Mar. 16, 2022), <https://www.ejiltalk.org/icj-indicates-provisional-measures-against-russia-in-a-near-total-win-for-ukraine-russia-expelled-from-the-council-of-europe/>.

¹⁹ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Declaration of Judge Bennouna, 2022 I.C.J. Rep. 182 (Mar. 16), <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-02-EN.pdf>.

All of these cases allege that Russian actions in Ukraine violate its obligations under the European Convention on Human Rights (ECHR). However, a number of States, including the United Kingdom, have long pushed back against the idea that the ECHR can extend to their extraterritorial conduct or to the regulation of armed conflict. Though the Court takes the view that the ECHR does, in certain cases, regulate extraterritorial action, in its *Georgia v Russia (II)* judgment of last year, it took a distinctly narrow view of the application of the ECHR to killings during the invasion phase of an international armed conflict (though the Court was heavily divided).²⁰ Ukraine may find this precedent problematic when it comes to arguing its latest case in full, at least for those of its claims invoking the substantive right to life during active hostilities.

Like the ICJ, however, the ECtHR has already issued an order on interim measures (which it has subsequently interpreted and expanded) requiring Russia to refrain from attacks against civilians and civilian objects, to provide safe evacuation routes (within Ukraine), and to allow humanitarian aid through.

Litigation before the ICJ and ECtHR takes a notoriously long time, and it will be some

years before any substantive judgment on the merits of these cases is given. However, these initial orders against Russia issued by both courts are likely what Ukraine really sought, at least for now. Such clear denunciations of Russia's actions from international courts add to the political and diplomatic pressure exerted on Russia.

International Criminal Court

In addition to Russia's responsibility as a State for its various violations of international law, the International Criminal Court (ICC) Prosecutor confirmed soon after the February invasion that he was opening an investigation into alleged international crimes committed on Ukraine's territory, based on Ukraine's earlier acceptances of the Court's jurisdiction in 2014 and 2015.²¹ We have seen many reports alleging war crimes during the conflict. These include reports of attacks on medical facilities such as the maternity and children's hospital in Mariupol, murder and sexual violence in Russian-controlled areas, and the killing of civilians in Bucha.²² International efforts at evidence gathering are already underway and include the newly created UN International Commission of Inquiry²³ and the recent report of the Mission

²⁰ *Geor. v. Russ. (II)* [GC], Eur. Ct. H.R. 38263/08, Judgment (Jan. 21, 2021).

²¹ 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, Int'l Crim. Ct. (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

²² See Kate Polglase, Gianluca Mezzofiore & Livvy, and Doherty, *Anatomy of the Mariupol hospital attack*, CNN (Mar. 17, 2022), <https://edition.cnn.com/interactive/2022/03/europe/mariupol-maternity-hospital-attack/index.html>; *Ukraine: Apparent War Crimes in Russia-Controlled Areas: Summary Executions, Other Grave Abuses by Russian Forces*, HUMAN RIGHTS WATCH (Apr. 3, 2022), <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>; Jennifer Rankin & Daniel Boffey, *Killing of civilians in Bucha and Kyiv condemned as 'terrible war crime'*, GUARDIAN (Apr. 3, 2022), <https://www.theguardian.com/world/2022/apr/03/eu-leaders-condemn-killing-of-unarmed-civilians-in-bucha-and-kyiv>.

²³ *Human Rights Council to establish Commission of Inquiry on Ukraine*, UN NEWS (Mar. 4, 2022), <https://news.un.org/en/story/2022/03/1113292>.

of Experts established under the OSCE's Moscow Mechanism.²⁴

Again, however, there are many obstacles, both legal and practical, to accountability. With respect to legal obstacles, prosecuting military and political leaders for their roles, in addition to individual soldiers, poses difficulties. Establishing the individual responsibility of political or military leaders requires evidencing either an order to commit international crimes²⁵ or knowledge/willful blindness of those crimes as well as a failure to take reasonable and necessary measures to prevent or respond to them.²⁶ Given the widespread reporting of alleged war crimes, together with examples of Russia's blanket denials in response, there does appear to be some evidence of willful blindness and failure to take reasonable measures.²⁷

However, the ICC could not, of course, prosecute President Putin or other Russian political or military leaders for the crime of aggression, given that Russia itself is a party neither to the Rome Statute nor to the Kampala amendments on aggression (a limitation on the power of the ICC supported by a number of States, including the United Kingdom).²⁸

Regarding practical obstacles, as is frequently the case, the ICC would no doubt struggle to gain custody of defendants even after evidence has been collected and arrest warrants issued. The widespread political support for prosecutions for war crimes in Ukraine might offer some help with this, as there is more likely to be cooperation with the ICC and transfer of defendants to the Court should they travel to another State. Yet this will further delay trials proceeding.

Though a Special Tribunal to prosecute the Russian leadership for aggression in Ukraine has been proposed,²⁹ and a domestic Ukrainian "special mechanism" to prosecute international crimes is being established,³⁰ it is not clear that these would overcome the obstacles already faced by the ICC.

A Long Road Ahead

Many obstacles lie on the path to accountability for international law violations in Ukraine. However, the speed with which these international courts have initiated their proceedings does offer some hope, and in the short-term they add to the political pressure on Russia. This immediate political pressure should not be underestimated,

²⁴ Wolfgang Benedek, Veronika Bilkova & Marco Sassòli, *Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since Feb. 24, 2022: Summary of the Report by a Mission of Experts under the OSCE Moscow Mechanism* EJIL:Talk! (Apr. 19, 2022), <https://www.ejiltalk.org/violations-of-international-humanitarian-and-human-rights-law-war-crimes-and-crimes-against-humanity-committed-in-ukraine-since-24-february-2022-summary-of-the-report-by-a-mission-of-experts-under-t/>.

²⁵ Rome Statute, *supra* note 5, art. 25(3)(b).

²⁶ *Id.* art. 28.

²⁷ Andrew Roth, *Kremlin reverts to type in denial of alleged war crimes in Ukraine's Bucha*, GUARDIAN (Apr. 4, 2022), <https://www.theguardian.com/world/2022/apr/04/kremlin-reverts-to-type-in-response-to-alleged-war-crimes-in-ukraine>.

²⁸ Dapo Akande & Antonios Tzanakopoulos, *Treaty Law and ICC Jurisdiction over the Crime of Aggression*, EUR. J. INT'L L. (Aug. 2018), at 29, 939–959, <https://doi.org/10.1093/ejil/chy059>.

²⁹ Patrick Wintour, *Ukraine backs international tribunal plan to try Putin for crime of aggression*, GUARDIAN (Mar. 4, 2022), <https://www.theguardian.com/world/2022/mar/04/ukraine-backs-plan-for-international-tribunal-to-try-putin-for-of-aggression>.

³⁰ Volodymyr Zelenskyy initiates creation of a special mechanism to help bring to justice those involved in crimes against the Ukrainian people, PRESIDENT OF UKRAINE VOLODYMYR ZELENSKYI OFFICIAL WEBSITE (Apr. 3, 2022), <https://www.president.gov.ua/en/news/volodimir-zelenskij-iniciyuje-stvorennya-specialnogo-mehaniz-74057>.

and it contributes to Ukraine's diplomatic retaliation. In the long-term, while one should not dismiss the possibility of international courts contributing to a resolution of armed conflict,³¹ Russia's refusal to participate in the initial ICJ hearings on provisional measures (instead submitting a note setting

out its position),³² and its indication that it may also refuse to participate in any future proceedings,³³ could severely limit the ability of the Court to act as a forum for genuine dispute resolution.



³¹ Silvia Steininger & Nicole Deitelhoff, *Against the Masters of War: The Overlooked Functions of Conflict Litigation by International Courts*, 84 L. & CONTEMP. PROBS. 95–122 (2022).

³² Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.) Questions of Jurisdiction and/or Admissibility, I.C.J., <https://www.icj-cij.org/case/182/jurisdiction-admissibility>.

³³ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J. (Mar. 23) <https://www.icj-cij.org/public/files/case-related/182/182-20220323-ORD-01-00-EN.pdf>.

THE ICJ'S PROVISIONAL MEASURES ORDER: UNPRECEDENTED

by Ori Pomson | Mar 17, 2022

On March 16, 2022, the International Court of Justice (ICJ) rendered its provisional measures order in the application brought by Ukraine against Russia under the Genocide Convention, arguing, *inter alia*, that Russia's invasion was an unlawful abuse of its obligation under the Convention to prevent genocide. In its order, by 13 votes to 2, the Court ordered that Russia "shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine."³⁴ While the ICJ has previously rendered provisional measures orders in high-profile situations—the Tehran Hostage Crisis,³⁵ U.S. military activities against Nicaragua,³⁶ armed clashes between Burkina Faso and Mali,³⁷ Uganda's invasion of Congo,³⁸ and Russia's invasion of Georgia³⁹—it would be no exaggeration to say that the present order is the most breathtaking one it has ordered to date.

The purpose of the present post is twofold: It will first summarize the ICJ's order and then offer some commentary. However, before doing so, it is useful to provide some background on the ICJ's power to render provisional measures orders.

Background on Provisional Measures Orders

Article 41(1) of the ICJ Statute provides that "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."⁴⁰ While for many years it was debated whether such measures are binding, the Court settled this question affirmatively in its 2001 *LaGrand* judgment,⁴¹ in the context of the U.S. state of Arizona's execution of a German national despite a provisional measures order rendered to the contrary.⁴²

³⁴ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J. (Mar. 16), ¶ 86, <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf#page=21>.

³⁵ United States Diplomatic and Consular Staff in Tehran (U.S. v. Islamic Rep. of Iran), Order, 1979 I.C.J. (Dec. 15), <https://www.icj-cij.org/public/files/case-related/64/064-19791215-ORD-01-00-EN.pdf>.

³⁶ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Order, 1984 I.C.J. 169 (May 10), <https://www.icj-cij.org/public/files/case-related/70/070-19840510-ORD-01-00-EN.pdf>.

³⁷ Frontier Dispute (Burk. Faso v. Mali), Order, 1986 I.C.J. 3 (Jan. 10), <https://www.icj-cij.org/public/files/case-related/69/069-19860110-ORD-01-00-EN.pdf>.

³⁸ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Order, 2000 I.C.J. 111 (July 1), <https://www.icj-cij.org/public/files/case-related/116/116-20000701-ORD-01-00-EN.pdf>.

³⁹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Order, 2008 I.C.J. 353 (Oct. 15), <https://www.icj-cij.org/public/files/case-related/140/140-20081015-ORD-01-00-EN.pdf>.

⁴⁰ Statute of the International Court of Justice, art. 41(1), Apr. 18, 1946, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

⁴¹ *LaGrand* Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 506 (June 27), <https://www.icj-cij.org/public/files/case-related/104/104-20010627-JUD-01-00-EN.pdf#page=44>.

⁴² *LeGrand* Case (Ger. v. U.S.), Order, 1999 I.C.J. (Mar. 3), <https://www.icj-cij.org/public/files/case-related/104/104-19990303-ORD-01-00-EN.pdf>.

Since provisional measures orders are rendered before the case has been fully adjudicated, serving to protect potential rights of a party in the interim, the Court's jurisdiction and the validity of the claimed rights cannot be definitively established. However, the prospect of the Court ordering a State to act—accentuated by the *LaGrand* finding that such measures are binding thereon—necessitates that provisional measures have some nexus with the prospects of the case (Judge Lauterpacht in *Interhandel*;⁴³ Judge Abraham in *Pulp Mills*⁴⁴). For such reasons, the ICJ has developed a number of conditions which must be met for provisional measures to be rendered.⁴⁵

The Court's Order

Initial Observations

Before addressing the cumulative conditions for the indication of provisional measures, and in addition to its standard summary of the procedural history, the Court—reminiscent of its 1999 orders in cases brought by Yugoslavia against NATO States⁴⁶—expressed its concern regarding the human tragedy in Ukraine and stated that it “is profoundly concerned about

the use of force by the Russian Federation in Ukraine, which raises very serious issues of international law.”⁴⁷ The Court also expressed regret regarding Russia's non-appearance in the proceedings, while observing that it nevertheless made a written communication to the Court laying out its position.⁴⁸

After these observations, the Court assessed whether the conditions for the indication of provisional measures were met. These will be surveyed in turn.

Prima Facie Jurisdiction

First, the ICJ “may indicate provisional measures only if the provisions relied on by the applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.”⁴⁹ It is not sufficient that both States consented to the ICJ's jurisdiction in the form of the compromissory clause of the Genocide Convention.⁵⁰

Additionally, the Court must “ascertain . . . whether it appears that the acts complained of by the Applicant are capable of falling within the scope of that convention *ratione*

⁴³ *Interhandel* (Switz. v. U.S.), Separate Opinion Sir Hersch Lauterpacht, 1957 I.C.J. 2, <https://www.icj-cij.org/public/files/case-related/34/034-19571024-ORD-01-02-EN.pdf#page=2>.

⁴⁴ *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Separate Opinion Abraham, 2006 I.C.J. (July 13) <https://www.icj-cij.org/public/files/case-related/135/135-20060713-ORD-01-02-EN.pdf#page=3>.

⁴⁵ See CAMERON A. MILES, PROVISIONAL MEASURES BEFORE INTERNATIONAL COURTS AND TRIBUNALS 174 (2017).

⁴⁶ *Legality of Use of Force* (Yugoslavia v. Belg.), Provisional Measures, 1999 I.C.J. 124 (June 2).

⁴⁷ *Allegations of Genocide Under the Convention of the Prevention and Punishment of the Crime of Genocide* (Ukr. v. Russ.), Order, 2022 I.C.J. 5, ¶ 18 (Mar. 16).

⁴⁸ *Id.* ¶ 20.

⁴⁹ *Id.* ¶ 24.

⁵⁰ See Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by the General Assembly of the United Nations on 9 December 1948, 1527 U.N.T.S. 272; Letter from E. Shevardnadze, Minister of Foreign Affairs of the USSR, to the Secretary-General of the United Nations (Feb. 28, 1989), 1525 U.N.T.S. 190–192; *Allegations of Genocide Under the Convention of the Prevention and Punishment of the Crime of Genocide* (Ukr. v. Russ.), Order, 2022 I.C.J. Rep. 5, ¶ 27.

materiae.”⁵¹ Thus, the question was whether the dispute between the parties *prima facie* relates to Article I of the Genocide Convention, which stipulates: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”⁵²

Russia had contended that its accusations of genocide occurring in certain regions of Ukraine did not reference the Convention, claiming that the concept of genocide also has different meanings under customary international law and various domestic laws.⁵³ Moreover, it argued that its military operation was based on an invocation of the right of self-defense, rather than on the Genocide Convention.⁵⁴

However, after surveying various statements of the parties, dating back to 2014, the ICJ considered that they

indicate a divergence of views as to whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the

use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention.⁵⁵

Plausibility of Rights and Link between Rights and Measures of Protection

Second, for provisional measures to be rendered, the Court must be “satisfied that the rights asserted by the party requesting such measures are at least plausible.”⁵⁶ The Court introduced this condition in 2009,⁵⁷ seemingly as a counterweight to its finding in *LaGrand* that provisional measures are binding.⁵⁸

The essential question was whether Russia plausibly has a duty, in the present case and under the Convention, “*not to act* in the name of preventing and punishing genocide.”⁵⁹ In addressing this question, the Court first recalled that while States parties have an obligation under Article I of the Genocide Convention to prevent and punish genocide, they “must implement this obligation in good faith, taking into account other parts of the

⁵¹ Allegations of Genocide Under the Convention of the Prevention and Punishment of the Crime of Genocide, ¶ 29; *see also* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.), Order (Dec. 7, 2021) ¶ 20.

⁵² Genocide Convention, *supra* note 3, art. 1.

⁵³ Allegations of Genocide Under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), at 6.

⁵⁴ *Id.* at 4.

⁵⁵ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J., ¶ 11 (Mar. 16).

⁵⁶ *Id.* ¶ 50.

⁵⁷ Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Order, 2009 I.C.J. Rep. 139, ¶ 57 (May 28).

⁵⁸ Pulp Mills, Separate Opinion of Abraham, at 139.

⁵⁹ Allegations of Genocide Under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Verbatim Record, at 41 (emphasis in original); *see also* Cameron Miles, *Provisional Measures and the ‘New’ Plausibility in the Jurisprudence of the International Court of Justice*, BRITISH Y.B. INT’L L. (Aug. 4, 2018), <https://doi.org/10.1093/bybil/bry011>.

Convention.”⁶⁰ These latter include “call[ing] upon the competent organs of the United Nations” to take necessary action (art. XIII),⁶¹ as well as proceedings before the ICJ itself (art. IX).⁶² While emphasising that other measures may be available to States to implement their obligation to prevent and punish genocide, it added, quoting from *Bosnia v Serbia*,⁶³ that “every State may only act within the limits permitted by international law.”⁶⁴

Intriguingly, instead of referring to Article 2(4) of the UN Charter,⁶⁵ which enshrines the prohibition of the use of force, the Court stated that measures for the prevention and punishment of genocide under the Convention “must be in conformity with the spirit and aims of the United Nations.”⁶⁶ While also observing the lack of evidence substantiating Russia’s allegation of genocide in Ukraine, it stated that “it is doubtful that the Convention . . . authorizes a Contracting Party’s unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide.”⁶⁷

On this basis, the Court concluded that “Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine.”⁶⁸

In addition to the plausibility of the rights themselves, a link must exist between the measures requested and the plausible rights.⁶⁹ This condition caused the ICJ little trouble, given the measures Ukraine requested were for halting the invasion on the basis of an alleged genocide.⁷⁰

Risk of Irreparable Harm and Urgency

Third, the Court “has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences.”⁷¹ Additionally, the risk of irreparable harm must be urgent, “in the sense that there is a real and imminent risk that irreparable prejudice will be caused

⁶⁰ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J., ¶ 56 (Mar. 16).

⁶¹ Genocide Convention, *supra* note 3, art. XIII.

⁶² *Id.* art. IX.

⁶³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep 221, ¶ 430 (Feb. 26).

⁶⁴ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J., ¶ 57 (Mar. 16).

⁶⁵ Charter of the United Nations, <https://www.icj-cij.org/charter-of-the-united-nations>.

⁶⁶ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J., ¶ 58 (Mar. 16).

⁶⁷ *Id.* ¶ 59.

⁶⁸ *Id.* ¶ 60.

⁶⁹ See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.), Order, 2021 I.C.J. Rep. 361, ¶ 67 (Dec. 7).

⁷⁰ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J., ¶ 63 (Mar. 16).

⁷¹ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), ¶ 65; see also Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Rep. of Iran v. U.S.), Order, 2018 I.C.J. Rep. 26, ¶ 74 (Oct. 3).

to the rights claimed before the Court gives its final decision.”⁷²

Here, too, the Court had little difficulty, noting that “any military operation, in particular one on the scale carried out by the Russian Federation on the territory of Ukraine, inevitably causes loss of life, mental and bodily harm, and damage to property and to the environment.”⁷³ The Court further highlighted the deteriorating humanitarian situation in Ukraine, *inter alia*, referring to the concern expressed by the UN General Assembly in Resolution A/RES/ES-11/1.⁷⁴

Measures Ordered

Having found the necessary conditions fulfilled, the Court indicated its provisional measures, recalling it may resort to measures different from those requested by the applicant.⁷⁵ In this regard, the Court ordered Russia to “immediately suspend the military operations,” as well as to “ensure that any military or irregular armed units which may be directed or supported by it . . . take no steps

in furtherance of the military operations.”⁷⁶ Finally, as is often its practice,^{77,78,79} it ordered both parties to “refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve” (*cf.* Judge ad hoc Daudet’s critique⁸⁰ of directing the order to *both* parties).

Comment

The Court’s decision to indicate provisional measures was certainly not expected by the present author.⁸¹ Moreover, as Mike Becker has pointed out, the Court’s unqualified indication of provisional measures for the suspension of Russia’s military operations, rather for the suspension of operations on the basis of preventing genocide, even goes beyond what Ukraine requested.⁸² It would also seem fair to say that a blanket order, demanding the suspension of a full-scale invasion, is unparalleled in the World Court’s 100-year history.⁸³

Legally, perhaps most remarkable was the Court’s analysis of the plausibility

⁷² Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), ¶ 66; *see also* Passage Through the Great Belt (Fin. v. Den.), Order, 1991 I.C.J. 9, ¶ 23 (July 29).

⁷³ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), ¶ 74.

⁷⁴ *Id.*

⁷⁵ *Id.* ¶ 79; *see also* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.), Order, 2021 I.C.J. Rep. 361, ¶ 90 (Dec. 7).

⁷⁶ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J. Rep. 21, ¶ 86 (Mar. 16).

⁷⁷ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.), Order, 2011 I.C.J. 22 (July 18).

⁷⁸ Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Order, 2011 I.C.J. 24 (Mar. 8).

⁷⁹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.), Order, 2021 I.C.J. Rep. 405, 425 (Dec. 7).

⁸⁰ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Declaration of Judge ad hoc Daudet, 2022 I.C.J. (Mar. 16).

⁸¹ @OriPomson, X (FORMERLY TWITTER), (Feb. 27, 2022), <https://twitter.com/OriPomson/status/1497950720640835587?s=20&t=IpHshPww89siiRKDLFoROA>.

⁸² @mabecker17, X (FORMERLY TWITTER), (Mar. 16, 2022), <https://twitter.com/mabecker17/status/1504162073042989056?s=20&t=IpHshPww89siiRKDLFoROA>.

⁸³ *Permanent Court of International Justice*, Int’l Ct. of Just., <https://www.icj-cij.org/pcij>.

requirement. The Court considered that Article I of the Genocide Convention, which only expresses an obligation to prevent and punish genocide, plausibly creates an (additional?) obligation not to rely on that provision for committing—at least certain—acts contrary to international law. It is one thing, as in *Bosnia v Serbia*,⁸⁴ to interpret the provision as only obligating positive measures conforming to external obligations under international law; it is another to interpret it as *prohibiting* measures not conforming to obligations under international law.

Actually, it seems the Court's order contradicts its approach at the provisional measures stage in *Equatorial Guinea v France* in late 2016. In requesting that the Court order France to suspend criminal proceedings against its Vice President (and the President's son), Equatorial Guinea had sought to interpret into the UN Convention against Transnational Organized Crime⁸⁵ an obligation not to conduct criminal proceedings under that Convention in violation of immunities under international law. Actually, that Convention even included

a stipulation that “States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.”⁸⁶ However, albeit under the related rubric of *prima facie* jurisdiction,⁸⁷ the Court considered that the said provision “does not . . . incorporate rules of customary international law concerning those immunities.”⁸⁸

Nevertheless, it would be foolish to consider that the Court's approach to corruption proceedings against a “playboy son”⁸⁹ of a dictator would be the same as that to a ruthless and shocking invasion of a neighbouring State.⁹⁰ While it remains to be seen whether the Court will ever replicate the legal reasoning in the present order, it is at least hoped that circumstances of the kind giving rise to the present order will not replicate themselves.



⁸⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep. 43, 182 (Feb. 26).

⁸⁵ United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, 2004.

⁸⁶ *Id.* art. 4(1).

⁸⁷ C.f. Massimo Lando, *Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice*, 31 LEIDEN J. INT'L L. 641, 658 (2018), <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/plausibility-in-the-provisional-measures-jurisprudence-of-the-international-court-of-justice/D84809A540DD8369900C6407CE197A3F/share/2b26f5b02a54173966d825c533d2c95914be34b1>.

⁸⁸ Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), Order, 2016 I.C.J. Rep. 1148. ¶ 49 (Dec. 7).

⁸⁹ Agence France-Presse, *Supercars, Houses and Suits: Equatorial Guinea's Teodorin Obiang*, VOA News (Feb. 10, 2020), https://www.voanews.com/a/africa_supercars-houses-and-suits-equatorial-guineas-teodorin-obiang/6184016.html.

⁹⁰ C.f. Allegations of Genocide Under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Declaration of Judge Bennouna, 2022 I.C.J. (Mar. 16).

RUSSIAN PRELIMINARY OBJECTIONS AT THE ICJ: THE CASE MUST GO ON?

by Ori Pomson | Oct 13, 2022

As readers of *Articles of War* may recall, Ukraine instituted proceedings against Russia before the International Court of Justice (ICJ) on February 26, 2022, on the basis of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).⁹¹ Ukraine requested the ICJ to adjudge and declare that Ukraine did not commit genocide in eastern Ukraine and that Russia, by invading Ukraine on the pretext of it committing genocide, violated the Genocide Convention. Additionally, Ukraine requested the ICJ to indicate a provisional measure, which on March 16, 2022, the Court granted by ordering Russia to “immediately suspend the military operations that it commenced.”⁹² It goes without saying that Russia has ignored this legally binding order.⁹³

In a very important development, Russia submitted preliminary objections⁹⁴ to the ICJ

on the jurisdiction of the Court on October 3, 2022 (see also Russia MFA statement⁹⁵ and Stephanie van den Berg’s report⁹⁶ for Reuters). This post explains the significance of this development in light of the context of the case and the consequences of this development for the case moving forward.

Background

In any given case, one of the first actions the Court takes, after consulting the parties, is setting time limits in which the parties must submit their written pleadings. Usually, when the respondent at the outset of the case rejects the ICJ’s jurisdiction—as Russia made no secret about to the Court⁹⁷—pursuant to its power under Article 79 of the Rules of Court,⁹⁸ the ICJ directs the parties to submit a memorial and counter-memorial dedicated to the question of jurisdiction (see, e.g., *Icelandic Fisheries*,⁹⁹ *Marshall Islands v. Pakistan*,¹⁰⁰

⁹¹ Allegations of Genocide Under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Application, 2022 I.C.J. Rep. (Feb. 26).

⁹² Allegations of Genocide Under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J. Rep. 21, ¶ 86 (Mar. 16).

⁹³ LaGrand Case (Germ. v. U.S.), Judgment, 2001 I.C.J. Rep. 44 (June 27).

⁹⁴ CIJ_ICJ @CIJ_ICJ, X (formerly Twitter) (Oct. 6, 2022), https://twitter.com/CIJ_ICJ/status/157797219813177536?s=20&t=u85rWQBIAyI8yWvVWXwazw.

⁹⁵ Press Release, The Ministry of Foreign Affairs of the Russian Federation, press release on the filing of Russia’s written objections to the jurisdiction of the International Court of Justice in the case initiated by Kiev in February 2022 under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Oct. 5, 2022), https://www.mid.ru/en/foreign_policy/news/1832628/.

⁹⁶ *Russia submits objections to Ukraine genocide case in World Court*, REUTERS (Oct. 6, 2022), <https://www.reuters.com/world/russia-submits-objections-ukraine-genocide-case-world-court-2022-10-06/>.

⁹⁷ Allegations of Genocide Under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Response, 2022 I.C.J. (Mar. 7).

⁹⁸ Rules of Court (1978), I.C.J., <https://www.icj-cij.org/rules>.

⁹⁹ Fisheries Jurisdiction Case (U.K. v. Ice.), Order, 1972 I.C.J. (Aug. 18, 1972).

¹⁰⁰ Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), Order, 2014 I.C.J. (July 10).

*Jerusalem Embassy*¹⁰¹). Only if the Court finds it has jurisdiction can the case then proceed to the merits. This procedure also means that a decision on the merits of the case can only occur at a later phase of the case.* This is no small matter, since the ICJ procedure is a lengthy one. States are given months¹⁰²—if not years¹⁰³—to file their written pleadings at each stage of the case. The close of the written proceedings is followed by oral proceedings, sometimes occurring several months after submission of the final written pleading¹⁰⁴ and, finally, followed by a judgment, which is usually rendered approximately half a year from the close of oral proceedings. It is thus apparent that bifurcating proceedings drags out the case since it means duplicating this process for the different stages of the case.

An interesting aspect of the present proceedings was that the Court ordered (what could be called) ordinary time limits: setting a date for the applicant party—Ukraine—to submit a memorial laying out its case on the merits and for the respondent party—Russia—to submit a counter-memorial.¹⁰⁵ In these circumstances, under

Article 79*bis* of the Rules of Court,¹⁰⁶ the respondent has three months from the delivery of the memorial by the applicant to submit preliminary objections. Only in these circumstances will the proceedings be bifurcated; the proceedings on the merits are suspended, and the applicant will generally have around four months to submit written observations on the preliminary objections (see ICJ Practice Direction V¹⁰⁷). While it is common for respondent States to file preliminary objections, there were several reasons to believe Russia would not.

Reasons for Doubt

To begin, Russia remained ambiguous whether it would formally participate in any way in the proceedings, as opposed to its informal communications and outside-of-court remarks. As readers may recall, Russia refused to appear before the Court in the provisional measures stage of the proceedings. In a communication to the Court on March 7, 2022, shortly before the provisional measures were indicated, Russia was somewhat guarded, simply criticizing the ICJ for scheduling oral proceedings on Ukraine's request for provisional measures at a very short notice.¹⁰⁸ However, two days later, the Russian Ministry of Foreign Affairs tweeted, "In light of the apparent absurdity of the lawsuit, we decided

* Though well beyond the scope of this post, it is worth highlighting that a recent development in the pending *Guyana v. Venezuela* case demonstrates that a party can still prevent the case from directly proceeding to the merits by raising an objection to the admissibility of the case, despite the Court ruling it has jurisdiction under the procedure provided in Article 79.

¹⁰¹ Relocation of the United States Embassy to Jerusalem (Pal. v. U.S.), Order, 2018 I.C.J. (Nov. 15).

¹⁰² Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.), Order, 2022 I.C.J. (Jan. 21).

¹⁰³ Guatemala's Territorial, Insular and Maritime Claim (Guat. v. Belize), Order, 2022 I.C.J. (June 24).

¹⁰⁴ Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, 2018 I.C.J. 13 (Oct. 1).

¹⁰⁵ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J. (Mar. 23).

¹⁰⁶ Rules of Court (1978), I.C.J., <https://www.icj-cij.org/rules>.

¹⁰⁷ Practice Directions, I.C.J., <https://www.icj-cij.org/practice-directions>.

¹⁰⁸ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), 2022 I.C.J. (Mar. 7), <https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf>.

not to attend [the hearing].”¹⁰⁹ Otherwise, in the standard management meeting with the President of the Court shortly after the provisional measures order, where the parties are consulted regarding time limits for written submissions, Russia’s ambassador to the Netherlands indicated that “the question of the participation of the Russian Federation in the proceedings was still under consideration.”¹¹⁰ Elsewhere, in a UN Security Council meeting in June—attended, among others, by the President of the ICJ, Judge Joan Donoghue—Russia indicated its lack of faith in the ICJ proceedings. It declared that “under a powerful political pressure, the Court may take inconsistent decisions,” while accusing Western States in their support for Ukraine’s submissions of “an unprecedented attempt to influence the Court’s position in favor of Ukraine.”¹¹¹

There are also practical issues which militated against Russia participating in the proceedings. In previous ICJ¹¹² and inter-State arbitral¹¹³ proceedings, Russia instructed some of the most experienced international lawyers in inter-State litigation to serve as counsel on its behalf, such as Alain Pellet and Samuel Wordsworth, KC. Yet, in a highly publicized letter¹¹⁴ shortly following Russia’s invasion, Pellet announced his resignation from representing Russia. Information provided on the website of the Permanent Court of Arbitration indicates that Russia’s foreign counsel, including Wordsworth, in its two pending inter-State arbitral proceedings^{115, 116} resigned *en masse* on March 17, 2022. It has also been reported that several law firms, previously providing services to Russia or government-owned entities, have withdrawn from providing their services following the invasion.^{117, 118}

¹⁰⁹ MFA Russia @mfa_russia, X (formerly Twitter) (Mar. 9, 2022).

¹¹⁰ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J. (Mar. 23), at 2.

¹¹¹ Permanent Mission of the Russian Federation to the United States, *Statement by Permanent Representative Vassily Nebenzia at UNSC open debate “Strengthening accountability and justice for serious violations of international law”* (June 2, 2022), <https://russiaun.ru/en/news/020622n>.

¹¹² Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Public Sitting, 2019 I.C.J. (June 3).

¹¹³ An Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (Ukraine v. The Russian Federation), Award Concerning the Preliminary Objections of the Russian Federation, 2020 PCA Case Repository, No. 2017-06.

¹¹⁴ 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/>.

¹¹⁵ Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), 2016 PCA Case Repository.

¹¹⁶ Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation), 2019 PCA Case Repository.

¹¹⁷ Cosmo Sanderson, *Herbert Smith Freehills withdraws from Nord Stream 2 case*, Global Arbitration Rev. (Mar. 18, 2022), <https://globalarbitrationreview.com/hsf-withdraws-nord-stream-2-case>.

¹¹⁸ The Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments Dated 27 November 1998 and The Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (JSC CB PRIVATBANK v. The Russian Federation), Procedural Order, 2022 PCA Case Repository No. 2015-21, <https://pcacases.com/web/sendAttach/40843>.

Now, a State has complete freedom in determining who will plead on its behalf before the ICJ.¹¹⁹ Yet, the fact remains that a very small circle of lawyers almost exclusively from Western Europe and the United States—an “invisible bar”¹²⁰ or “mafia”¹²¹—are usually instructed to plead before the Court. Thus, in these circumstances, Russia is unlikely to have access to the expertise and experience that are habitually called upon when a State appears before the ICJ.¹²² This deficit was apparent in Russia’s March 7 communication to the ICJ. While Russia did make substantive arguments why the Court should not indicate provisional measures, it failed to draw upon any of the ICJ’s most recent jurisprudence concerning plausibility of rights as a condition for provisional measures (see prior post¹²³ for more detail on this condition), despite this jurisprudence being (very) favorable to Russia.

Finally, in what was very likely a tactical (and perfectly legitimate) move to further outpace Russia, Ukraine delivered its memorial on the merits of the case on July 1, 2022,¹²⁴ despite having until September 23, 2022, to do so. Thus, while Russia could have potentially had almost until Christmas to file its preliminary objections, the clock on the three-month

time limit to submit these objections began to tick almost three months earlier.

Significance Moving Forward

With this backdrop, the reported filing of preliminary objections by Russia on October 3, 2022, is very significant, even if the content of these objections will remain confidential until the start of oral proceedings (see art. 53(2) of the Rules¹²⁵). *First*, it will likely drag out the case for some time. After all, the effect of these preliminary objections is the bifurcation of the proceedings. Moreover, if the ICJ upholds Russia’s preliminary objections, the objections could potentially torpedo any proceedings on the merits.

Second, the filing of preliminary objections may indicate the beginning of formal participation by Russia in the proceedings, marking a contrast to Russia’s disdain for these very proceedings. However, it remains to be seen whether Russia will formally participate further in the proceedings, such as appearing at oral sittings and, if the ICJ does not uphold Russia’s preliminary objections, by submitting a counter-memorial on the merits of the case. Indeed, it is possible that the submission of preliminary objections was precisely aimed at dragging out the proceedings.

¹¹⁹ *Acts and Documents Concerning the Organisation of the Court*, Publications De La Cour Permanente De Justice Internationale [Publications of the Permanent Court of International Justice], at 84 (Jan. 30 to Mar. 24, 1922), https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_D/D_02_preparation_reglement.pdf#page=84.

¹²⁰ James Crawford, *The International Law Bar: Essence Before Existence?*, University of Cambridge Faculty of Law Research Paper No. 19/2014 (Jan. 2014), <http://dx.doi.org/10.2139/ssrn.2364104>.

¹²¹ Alain Pellet, “Adieu, James Crawford,” in 20 L. & PRAC. INT’L CTS. & TRIBUNALS 465 (2021), https://brill.com/view/journals/lape/20/3/article-p465_1.xml.

¹²² *Allegations of Genocide Under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.)*, 2022 I.C.J. (Mar. 7).

¹²³ Ori Pomson, *The ICJ’s Provisional Measures Order: Unprecedented*, ARTICLES OF WAR (Mar. 17, 2022), <https://lieber.westpoint.edu/icj-provisional-measures-order-unprecedented/>.

¹²⁴ MFA of Ukraine @MFA_Ukraine, X (formerly Twitter) (July 1, 2022), https://twitter.com/MFA_Ukraine/status/1542899251616911361?s=20&t=rQiU86XcYAwAYrz76l9G5Q.

¹²⁵ Rules of Court (1978), I.C.J., <https://www.icj-cij.org/rules>.

Third, it is important to place Russia's submission of preliminary objections in the context of another substantial development in the case: the unprecedented mass intervention of third parties in the case—18 and (potentially) counting—pursuant to Article 63 of the ICJ Statute.¹²⁶ It is beyond the scope of this post to detail the significance and challenges raised by this development (rather see, in particular, Brian McGarry's¹²⁷ and Juliette McIntyre's¹²⁸ respective analyses). However, the bifurcation of proceedings given Russia's preliminary objections will compel the Court to answer the somewhat controversial question whether intervention is permitted at a jurisdictional stage of proceedings.¹²⁹ It should also be noted that the mass intervention may also further extend the duration of the case, since if Russia objects to these declarations of intervention, the Court will need to hold oral proceedings on these declarations before deciding whether

the interventions are admissible (see art. 84(2) of the Rules¹³⁰).

Conclusion

Russia's filing of preliminary objections removes at least one uncertainty regarding the procedure of the case, by compelling bifurcated proceedings. Nevertheless, there are still unanswered questions, such as whether Russia intends to formally participate in other parts of the proceedings and whether third States seeking to intervene in the case will be permitted to participate in the jurisdictional phase of the proceedings. However, one thing seems fairly certain: If Ukraine will eventually prevail in whole or in part in this case, by this one—albeit otherwise very standard—act of submitting preliminary objections, Russia has probably delayed any such victory by around two years.



¹²⁶ ICJ Statute, *supra* note 40, art. 63.

¹²⁷ Brian McGarry, *Mass Intervention?: The Joint Statement of 41 States on Ukraine v. Russia*, EJIK:Talk! (May 30, 2022), <https://www.ejiltalk.org/mass-intervention-the-joint-statement-of-41-states-on-ukraine-v-russia/>.

¹²⁸ Juliette McIntyre, *The New Wave of Article 63 Interventions at the International Court of Justice*, EJIK:Talk! (Aug. 16, 2022), <https://www.ejiltalk.org/the-new-wave-of-article-63-interventions-at-the-international-court-of-justice/>.

¹²⁹ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S., Dissenting Opinion of Judge Schwebel, 1984 I.C.J. 13 [Oct. 4]).

¹³⁰ Rules of Court (1978), I.C.J., <https://www.icj-cij.org/rules>.

PORTENDING GENOCIDE IN UKRAINE?

by Adam Oler | Mar 21, 2022

As Russian forces continue their brutal invasion of Ukraine, worrisome signs are emerging about the prospect of genocide. While the term is used rather freely in the media, the prospect of actual genocide returning to Europe for the first time in nearly thirty years is now quite real. There is thus value in revisiting what the legal term “genocide” entails, remembering why declarations of genocide are rare, and examining what current events in Ukraine may portend.

What Is Genocide?

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 specifies the crime’s elements:¹³¹

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The law was largely the work of one man, Raphael Lemkin, a Jewish lawyer who fled the Nazi regime, but lost his family to the Holocaust. Even during his youth, Lemkin had long been troubled by atrocities such as the massacres of Armenians during World War I. (His remarkable life and efforts are told by Ambassador Samantha Power in her Pulitzer Prize-winning book entitled *“A Problem from Hell”*¹³²).

Lemkin, who lived and studied for a time in Lviv, sought a legal mechanism to pierce the defense of international sovereignty. Until the Second World War, international law and custom did not afford States meaningful avenues to hold other States responsible for war crimes, especially if those crimes occurred within the latter’s borders. Despite the creation of the United Nations system of collective security, concerns over sovereignty prevented U.S. ratification and implementation of the Genocide Convention until 1988. Even then, Congress included reservations that threatened the Convention’s utility.

While the term “genocide” is ubiquitous now, it was not until the late 1970s that the crime entered American consciousness and genocide causation and prevention became a field of

¹³¹ Genocide Convention, *supra* note 3, art. II.

¹³² SAMANTHA POWER, *“A PROBLEM FROM HELL”*: AMERICA AND THE AGE OF GENOCIDE (2013).

study.¹³³ After the success of the Nuremberg criminal proceedings, only the end of the Cold War permitted international war crimes trials to resume. While the success of recent tribunals is mixed, the ability to detect the early signs of genocide has come a long way. Advances in technology, scholarship, and social awareness have proved helpful. Still, the world's capacity to declare and stop ongoing genocide remains underdeveloped, making its early detection and prevention paramount.

What Are the Constraints?

Several factors often limit a State's willingness to declare mass atrocities as genocide. First, the Convention's language excludes political groups. Though politically motivated murder was originally included by Lemkin, the language was excised to secure Soviet ratification.¹³⁴ The implications of this omission are legally important. For instance, while the last two presidential administrations branded China's treatment of the Uighurs as genocide,¹³⁵ other entities have not.¹³⁶ If China's actions are rooted in, hypothetically, the Uighurs alignment with Political Islam, the crime may not meet the law's definition. Should Russia engage in politically motivated crimes in the coming weeks and months, they

also might not meet the Convention's Article II elements.

A second constraint concerns language in the Convention's first article, which requires that contracting parties undertake steps to prevent and punish genocide, once identified.¹³⁷ Though vague, this requirement kept the Clinton Administration from recognizing the 1994 Rwandan genocide. In a step seen now as farcical, at one point the administration described the ongoing Hutu murder of 800,000 ethnic Tutsi as "acts of genocide" as opposed to "genocide"—solely to prevent further calls for American intervention. Similar concerns delayed a declaration of genocide by the United States during the first four years of the Bosnian civil war¹³⁸ and recent ISIS attacks against the Yazidis.¹³⁹

A less talked about aspect of genocide concerns policy implications arising from the term's use. Once an opposing party is branded genocidal, it becomes politically unpalatable to negotiate with it. Unlike the vague "do something" requirement in the Convention, the tarring effect of the term "genocide" can be quite real. Famously, U.S. diplomat Richard Holbrook once recounted how shaking the hands of Radovan Karadžić and Ratko Mladić—two men responsible for the Bosnian genocide—

¹³³ Edward Linenthal, 'In the Beginning There Was No Holocaust,' HUMANITIES (Dec. 2002), [https://www.google.com/books/edition/Humanities/79rs3ZJzoksC?hl=en&gbpv=1&dq=Edward+Linenthal,+\"In+the+Beginning+There+was+No+Holocaust,\"+Humanities+\(January/February+2003\)&pg=RA2-PA42&printsec=frontcover](https://www.google.com/books/edition/Humanities/79rs3ZJzoksC?hl=en&gbpv=1&dq=Edward+Linenthal,+\).

¹³⁴ Amy E. Randall & Anton Weisse-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention*, 124 AM. HIST. REV. 632 (Apr. 2019), <https://doi.org/10.1093/ahr/rhz092>.

¹³⁵ Edward Wong & Chris Buckley, *U.S. Says China's Repression of Uighurs Is 'Genocide'*, N.Y. TIMES (Jan. 19, 2021), <https://www.nytimes.com/2021/01/19/us/politics/trump-china-xinjiang.html>.

¹³⁶ Randall & Weisse-Wendt, *supra* note 134.

¹³⁷ Genocide Convention, *supra* note 3, art. I.

¹³⁸ Ivo H. Daalder, *Decision to Intervene: How the War in Bosnia Ended*, BROOKINGS (Dec. 1, 1998), <https://www.brookings.edu/articles/decision-to-intervene-how-the-war-in-bosnia-ended/>.

¹³⁹ Michelle Boorstein, *Some are pushing to call the Islamic State's actions 'genocide.' What would that mean?*, WASH. POST (Feb. 24, 2016), <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/02/24/some-are-pushing-to-call-the-islamic-states-actions-genocide-what-would-that-mean/>.

offended him.¹⁴⁰ Declaring genocide may thus be counterproductive, as it limits the ability to negotiate and to end conflict. It also disincentivizes alleged perpetrators from surrendering, thus prolonging the violence.

Warning Signs

Much research has been done in recent years to identify genocide's warning signs. A joint initiative by the Simon-Skjodt Center for the Prevention of Genocide at the U.S. Holocaust Memorial Museum and the Dickey Center for International Understanding at Dartmouth College produces an annual report identifying the countries that are most at risk.¹⁴¹ Known as the Early Warning Project, the team relies on 30 variables based on events since the Second World War, and provides a qualitative assessment.¹⁴²

The United Nations Office on Genocide Prevention and the Responsibility to Protect uses its Framework of Analysis for Atrocity Crimes,¹⁴³ which identifies fourteen risk

factors.¹⁴⁴ The Canadian-based Sentinel Project's Early Warning System also developed a risk factor list, which iteratively examines political, economic, sociocultural, and conflict and upheaval drivers.¹⁴⁵ The risk assessment leads to three additional phases, including operational process monitoring, vulnerability assessment, and forecasting. A comprehensive, if now slightly dated, list of third-party organizations committed to genocide detection and prevention is available in Stephen Wisniew's monograph, which he produced as a School of Advanced Military Studies student.¹⁴⁶

Using the UN framework, events in Ukraine over the past two weeks should raise alarm bells. First, Putin is deliberately "otherizing" Ukraine's Western-leaning government and its constituents. Branding them as Nazis,¹⁴⁷ accusing them of developing nuclear weapons and biological agents,¹⁴⁸ and depicting them as existential threats to Russia are textbook efforts at dehumanization. Dehumanization itself is often the first critical step on the

¹⁴⁰ *The Capture of Rodovan Karadzic, Ambassador Recalls 1995 Meeting with Kardzic*, NPR (July 23, 2008), <https://www.npr.org/transcripts/92829536>.

¹⁴¹ *About the Simon-Skjodt Center for the Prevention of Genocide*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/genocide-prevention/simon-skjodt-center>.

¹⁴² *Countries at Risk for Mass Killing 2021–22: Early Warning Project Statistical Risk Assessment Results*, EARLY WARNING PROJECT, Nov. 29, 2021, <https://earlywarningproject.ushmm.org/reports/countries-at-risk-for-mass-killing-2021-22-early-warning-project-statistical-risk-assessment-results>.

¹⁴³ UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, *FRAMEWORK OF ANALYSIS FOR ATROCITY CRIMES* (2014), https://www.un.org/en/genocideprevention/documents/our-work/Doc.1_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

¹⁴⁴ UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, *FRAMEWORK OF ANALYSIS FOR ATROCITY CRIMES* (2014), https://www.un.org/en/genocideprevention/documents/our-work/Doc.1_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

¹⁴⁵ *Early Warning System*, THE SENTINEL PROJECT, <https://thesentinelproject.org/what-we-do/early-warning-system/>.

¹⁴⁶ MAJ Stephen Matthew Wisniew, *Early Warning Signs and Indicators to Genocide and Mass Atrocity*, SCHOOL OF ADVANCED MILITARY STUDIES U.S. ARMY COMMAND AND GEN. STAFF COLL. (2012), <https://apps.dtic.mil/sti/pdfs/ADA570182.pdf>.

¹⁴⁷ Peter Pomerantsev, *What Putin's Nazi Talk Reveals About His Plans for Ukraine*, TIME (Mar. 4, 2022), <https://time.com/6154853/putins-nazi-talk-reveals-plans-for-ukraine/>.

¹⁴⁸ Matthew Goldenberg & William C. Potter, *Russian Misinformation About Ukrainian Radiological Weapons Capabilities and Intentions*, MIDDLEBURY INST. OF INT'L STUDIES AT MONTEREY, <https://nonproliferation.org/russian-misinformation-about-ukrainian-radiological-weapons-capabilities-and-intentions/>.

road to atrocities.¹⁴⁹ The charge of Nazism is particularly dangerous, given Russian losses during the Second World War.¹⁵⁰ In particular, it suggests Putin is unlikely to meet with Zelensky and his allies, a further indication of dehumanization. Putin's call for "natural self-cleaning" of Russian society in the context of misperceptions about "higher race" is especially chilling.¹⁵¹

The reported influx of mercenaries and paramilitaries from Russia is another indicator.¹⁵² In Poland and the Soviet Union (1941–1944), Rwanda (1994), and Bosnia (1992–1994), killing squads were often comprised of unconventional units. The massive flow of refugees—whether a concerted effort at ethnic cleansing or not—risks turning these groups into Stateless persons. Denial of statehood has been a tool of genocide perpetrators from the Nazis to the Burmese persecutors of the Rohingya today.¹⁵³

Another important indicator is the production of “kill lists.” In a letter from Ambassador Crocker to the UN High Commissioner for Human Rights, the United States noted

Russia's production of enemy lists identifying opponents in Ukraine. Such lists were a tactic used in Cambodia and Rwanda to identify people destined for placement in camps or murder.

One Group Faces Heightened Risk

The expanding threat to Ukraine's LGBT community merits special attention. In recent years Putin has used the suppression of the rights of homosexuals as a way to garner support from far-right elements in Europe and America. In the lead-up to last month's invasion, Putin's actions became increasingly nefarious. Last April, he formally banned same-sex marriages through a series of constitutional amendments.¹⁵⁴ In October he called teaching gender fluidity a crime against humanity, once again using the type of rhetoric too often seen in advance of mass atrocities and genocide.¹⁵⁵ Putin's execution list allegedly includes members of Ukraine's LGBT community, making it the only minority specifically identified as an enemy.¹⁵⁶

¹⁴⁹ *Genocide begins with 'dehumanization,' no single country is immune from risk, warns UN official*, UN NEWS: GLOBAL PERSPECTIVES HUMAN STORIES (Dec. 9, 2014), <https://news.un.org/en/story/2014/12/485822>.

¹⁵⁰ *World War II Casualties by Country 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/world-war-two-casualties-by-country>.

¹⁵¹ Rebecca Cohen & Natalie Musumeci, *Putin Says Russia Must Undergo a 'Self-Cleansing of Society' to Purge 'Bastards and Traitors,'* MILITARY NEWS (Mar. 16, 2022), <https://www.military.com/daily-news/2022/03/16/putin-says-russia-must-undergo-self-cleansing-of-society-purge-bastards-and-traitors.html>.

¹⁵² David Vergun, *Defense Official Says Russians Reportedly Recruiting Syrian Mercenaries*, DOD NEWS, U.S. DEPARTMENT OF DEFENSE (Mar. 7, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/2958107/defense-official-says-russians-reportedly-recruiting-syrian-mercenaries/>.

¹⁵³ Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar's Rohingya*, 23 PAC. RIM L. & POL'Y J. 683 (2014), <https://digitalcommons.law.uw.edu/wilj/vol23/iss3/8>.

¹⁵⁴ Michael K. Lavers, *Putin Formally Bans Same-Sex Marriages in Russia*, WASH. BLADE (Apr. 6, 2021), <https://www.washingtonblade.com/2021/04/06/putin-formally-bans-same-sex-marriages-in-russia/>.

¹⁵⁵ Amy Cheng, *Putin Slams 'Cancel Culture' and Trans Rights, Calling Teaching Gender Fluidity 'Crime Against Humanity.'* WASH. POST (Oct. 22, 2021), <https://www.washingtonpost.com/world/2021/10/22/putin-valdai-speech-trump-cancel-culture/>.

156 *Read: U.S. Letter to the U.N. Alleging Russia Is Planning Human Rights Abuses in Ukraine*, WASH. POST (Feb. 20, 2022), https://www.washingtonpost.com/context/read-u-s-letter-to-the-u-n-alleging-russia-is-planning-human-rights-abuses-in-ukraine/93a8d6a1-5b44-4ae8-89e5-cd5d328dd150/?itid=lk_inline_manual_4.

What's Next?

The United States and NATO, in partnership with the media, human rights organizations, and other NGOs, should prioritize efforts to identify and publicize genocide's warning signs. While many groups are at risk, the Ukrainian leadership, its supporters, and

the LGBT community appear the most vulnerable. Although its material reach remains limited to the enumerated elements, the Genocide Convention remains a powerful legal and political tool to combat the “crime of all crimes.”



STATE RESPONSIBILITY FOR NON-STATE ACTORS' CONDUCT

by Jennifer Maddocks | Nov 4, 2022

The conflict in Ukraine is international in character, but it nevertheless involves numerous private individuals and groups. These include Ukrainian civilians acting to protect their homeland,¹⁵⁷ foreign fighters,^{158, 159} military contractors,¹⁶⁰ and private hackers conducting operations in cyberspace.¹⁶¹

Some of these non-State actors may have acted in a way that violates the law of armed conflict (LOAC). For instance, reporting indicates that members of the Wagner Group¹⁶² played a leading role in the killing of civilians at Bucha.¹⁶³ Other reports suggest that the group caused the explosion that

killed at least fifty Ukrainian prisoners of war in late July 2022.¹⁶⁴

Alternatively, consider the actions of Ukraine's "IT Army" in launching offensive cyber operations against Russian websites.¹⁶⁵ Individual hackers may have acted in a way that violated LOAC by targeting Russian civilian infrastructure such as banks and retailers.¹⁶⁶ These operations could amount to unlawful attacks against civilian objects if they are reasonably expected to cause injury or damage,¹⁶⁷ or they might otherwise breach the duty to take constant care to protect civilians and civilian objects.¹⁶⁸

¹⁵⁷ Sam Mednick, *Russia-Ukraine: The Civilians Fighting on Kyiv's Front Lines*, AL JAZEERA (Mar. 23, 2022), <https://www.aljazeera.com/features/2022/3/23/the-civilian-fighters-taking-up-arms-on-ukraines-front-lines>.

¹⁵⁸ Kareem Chehayeb, *In Syria, Russia Leads Effort to Recruit Fighters for Ukraine*, AL JAZEERA (Apr. 1, 2022), <https://www.aljazeera.com/news/2022/4/1/in-syria-moscow-leads-effort-to-recruit-fighters-for-ukraine>.

¹⁵⁹ Isaac Chakyan Tang, *The Latest in a Long Line: Ukraine's International Legion and a History of Foreign Fighters*, 2022 HARVARD INT'L REV. (Sept. 2), <https://hir.harvard.edu/the-latest-in-a-long-line-ukraines-international-legion-and-a-history-of-foreign-fighters/>.

¹⁶⁰ Bernd Debusmann Jr., *Private Military Firms See Demand in Ukraine War*, BBC NEWS (Mar. 9, 2022), <https://www.bbc.com/news/world-us-canada-60669763>.

¹⁶¹ Erica D. Longergan, *Cyber Proxies in the Ukraine Conflict: Implications for International Norms*, COUNCIL ON FOREIGN RELATIONS (Mar. 21, 2022), <https://www.cfr.org/blog/cyber-proxies-ukraine-conflict-implications-international-norms>.

¹⁶² *What Is Russia's Wagner Group, and What Has Happened to Its Leader?* BBC NEWS (Sept. 6, 2023), <https://www.bbc.com/news/world-60947877>.

¹⁶³ Brendan Cole, *Russia's Wagner Group Soldiers Behind Bucha Killings, German Intel Claims*, NEWSWEEK (Apr. 7, 2022), <https://www.newsweek.com/der-spiegel-russia-ukraine-troops-bucha-wagner-putin-1695974>.

¹⁶⁴ *Russia's Wagner Group Behind Deadly Attack on POW Prison: Ukraine Officials*, POLSKIE RADIO PL (July 29, 2022), <https://www.polskieradio.pl/395/9766/Artykul/3011102,Russia's-Wagner-Group-behind-deadly-attack-on-POW-prison-Ukraine-officials>.

¹⁶⁵ Sam Schechner, *Ukraine's 'IT Army' Has Hundreds of Thousands of Hackers, Kyiv Says*, WALL ST. J. (Mar. 7, 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-04/card/ukraine-s-it-army-has-hundreds-of-thousands-of-hackers-kyiv-says-RfpGa5zmLtavrot27OWX>.

¹⁶⁶ Stefan Soesanto, *The IT Army of Ukraine: Structure, Tasking, and Ecosystem*, CENTER FOR SECURITY STUDIES (CSS), ETH ZURICH (June 2022), <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/Cyber-Reports-2022-06-IT-Army-of-Ukraine.pdf>.

¹⁶⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

¹⁶⁸ *Id.* art. 57.

Other posts in this symposium¹⁶⁹ have addressed the legal status^{170, 171} of the non-State actors engaged in the Ukraine conflict.^{172, 173} This post considers their involvement in the hostilities from a different perspective, namely whether their conduct in potential breach of LOAC is attributable to Russia or Ukraine.

The Issue of Attribution

When a private individual or group acts in a way that violates LOAC and the relevant conduct is attributable to a State, that State bears international responsibility for the breach. Certain consequences then follow under the law of State responsibility. These include an obligation on the responsible State to cease its harmful conduct¹⁷⁴ and to make reparation for any damage or injury caused.¹⁷⁵

For a State to bear international responsibility, two criteria must be satisfied. First, the conduct must breach an international obligation that is binding on the State. Second, the conduct must be attributable to that State. To determine whether Russia bears

international responsibility for the Wagner Group's harmful conduct, therefore, it is necessary to assess each incident of concern to establish whether these two conditions are met. Regarding the explosion at the prison camp, for instance, there is little doubt that intentionally causing the deaths of prisoners of war violates the LOAC protections afforded to such individuals under the Third Geneva Convention.¹⁷⁶ So, the more difficult question relates to attribution. Assuming that it can be established as a matter of fact that members of the Wagner Group caused the explosion, when would the law of State responsibility attribute such conduct to Russia?

Similarly, if members of Ukraine's "IT Army" violated LOAC by conducting harmful cyber operations against the Moscow Stock Exchange,¹⁷⁷ for example, when is such conduct attributable to Ukraine?

Organs of State

The first question to ask when addressing the issue of attribution is whether the individuals concerned are integrated into the State under

¹⁶⁹ Sean Watts, Winston Williams & Ronald Alcalá, *Symposium Intro: Ukraine-Russia Armed Conflict*, ARTICLES OF WAR (Feb. 28, 2022), <https://lieber.westpoint.edu/symposium-intro-ukraine-russia-armed-conflict/>.

¹⁷⁰ 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/>.

¹⁷¹ Ronald Alcalá & Steve Szymanski, *Legal Status of Ukraine's Resistance Forces*, ARTICLES OF WAR (Feb. 28, 2022), <https://lieber.westpoint.edu/legal-status-ukraines-resistance-forces/>.

¹⁷² David Wallace & Shane Reeves, *Levée en Masse in Ukraine Applications, Implications, and Open Questions*, ARTICLES OF WAR (Mar. 11, 2022), <https://lieber.westpoint.edu/levee-en-masse-ukraine-applications-implications-open-questions/>.

¹⁷³ Robert Lawless, *Are Mercenaries in Ukraine?*, ARTICLES OF WAR (Mar. 21, 2022), <https://lieber.westpoint.edu/are-mercenaries-in-ukraine/>.

¹⁷⁴ Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 30, Rep. of the Int'l L. Comm'n, 53rd Sess., U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001) [hereinafter Articles on State Responsibility].

¹⁷⁵ *Id.* art. 31.

¹⁷⁶ Geneva Convention Relative to the Treatment of Prisoners of War, art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

¹⁷⁷ Zhiyuan Sun, *Drawbacks of Centralization: Moscow Stock Exchange Remains Offline Amid Ongoing Russo-Ukrainian War*, COINTELEGRAPH (Mar. 2, 2022), <https://cointelegraph.com/news/drawbacks-of-centralization-moscow-stock-exchange-remains-offline-amid-ongoing-russo-ukrainian-war>.

the terms of the State's domestic laws.¹⁷⁸ A State's armed forces fall within this category, meaning that if soldiers, sailors, or airmen act in a way that violates LOAC, their conduct is always attributable to the State. This is the case even if the individual concerned acts in disobedience to orders. It is clear, therefore, that Russia bears international responsibility for the many LOAC violations committed by its armed forces in Ukraine.¹⁷⁹

The State organ categorization extends further than a State's conventional forces. Many Ukrainian citizens joined the Territorial Defence Force,¹⁸⁰ which is a branch of Ukraine's armed forces under Ukrainian domestic law. Members of this organisation, therefore, are State organs of Ukraine, meaning that all their conduct performed in an official capacity is attributable to the State. The same is true of foreign nationals who traveled to Ukraine to fight as part of the "international legion."¹⁸¹ Cyber operators who are integrated into the State also meet this classification, such as members of Russia's military intelligence.¹⁸² In each case, the position on attribution is clear. The conduct of members of these groups is attributable to the State to which they belong. If they

violate LOAC when performing their official functions, their actions engage the State's responsibility.

The respective States' domestic laws, however, do not designate all the individuals participating in the conflict as organs of State. It is likely that some of the Ukrainian citizens acting to protect their homeland did not join the Territorial Defence Force. Many of the cyber operators acting on behalf of Russia or Ukraine do not fall into this category. And Russian law does not categorize members of the Wagner Group as State organs.¹⁸³

Nevertheless, it is possible that these individuals and groups could qualify as State organs due to their factual relationship with the State, rather than their status under domestic law. The International Court of Justice (ICJ) affirmed this *de facto* State organ status in its *Paramilitary Activities*¹⁸⁴ and *Bosnian Genocide*¹⁸⁵ judgments. But the test the ICJ formulated is stringent. An entity qualifies as a *de facto* State organ only if it exhibits "complete dependence" on the relevant State, and that State exerts "strict control" over the entity's entire range of activities. In other words, the entity must act

¹⁷⁸ Articles on State Responsibility, *supra* note 174, art. 4.

¹⁷⁹ Press Release, United Nations Ukraine, UN Commission Concludes That War Crimes Have Been Committed in Ukraine, Expresses Concern About Suffering of Civilians (Sept. 23), <https://ukraine.un.org/en/200623-un-commission-concludes-war-crimes-have-been-committed-ukraine-expresses-concern-about>.

¹⁸⁰ Igor Kossow, *Ukraine's New Military Branch: Citizens Protecting Their Neighborhood*, POLITICO (Feb. 13, 2022), <https://www.politico.eu/article/ukraine-russia-military-citizen-reservist-defense/>.

¹⁸¹ Will Hazell, *Ukraine International Legion: Volodymyr Zelensky Calls on Foreign Volunteers to Fight Russian Invasion*, INEWS (Feb. 27, 2022), https://inews.co.uk/news/world/ukraine-international-legion-foreign-volunteers-fight-russia-invasion-president-zelensky-1486818?ico=related_stories.

¹⁸² *Russia Behind Cyber Attack with Europe-wide Impact an Hour Before Ukraine Invasion*, NATIONAL CYBER SECURITY CENTRE (May 10, 2022), <https://www.ncsc.gov.uk/news/russia-behind-cyber-attack-with-europe-wide-impact-hour-before-ukraine-invasion>.

¹⁸³ András Rácz, *Band of Brothers: The Wagner Group and the Russian State*, CSIS (Sept. 21, 2020), <https://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state>.

¹⁸⁴ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 109–112 (June 27).

¹⁸⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007, I.C.J. 43, ¶¶ 391–398 (Feb. 26).

with no real autonomy of its own and rely wholly on the State in all its areas of activity.

It is challenging from an evidential perspective to prove that these demanding thresholds are met. Regarding the Wagner Group, for example, it may prove difficult to satisfy these tests in view of the funding the group receives from foreign governments,¹⁸⁶ the role private oligarchs play in managing the group's contracts and recruiting, and the degree of impunity with which its members appear to act.¹⁸⁷

Delegation of Public Functions

If an individual or group does not qualify as a State organ, the second inquiry when addressing the issue of attribution is whether the entity concerned was legally empowered to perform public functions on the State's behalf.¹⁸⁸ This requires an assessment, first, whether the entity was performing public functions at the relevant time and, second, whether the State delegated those functions to the entity in accordance with its domestic laws.

On the first question, the combat functions performed by the Wagner Group and by the Ukrainian citizens acting to defend their homeland are clearly public in character.

Fighting on behalf of a State is an inherently governmental act. Cyber operations linked to the conflict may also qualify as public acts due to their close nexus to the hostilities. For instance, hackers linked to Moscow conducted hostile cyber operations against the satellite company Viasat, timed to coincide with Russia's military invasion.¹⁸⁹ However, the status of other cyber operations, with weaker links to a State's kinetic activities, is less clear.

Assuming the acts concerned can be classified as public rather than private, it is next necessary to assess the steps the relevant State may have taken to authorize the private entity to perform such functions on its behalf. In its extensive work on the law of State responsibility, the International Law Commission concluded that attribution on this basis is appropriate only if the State empowers the entity to act in a manner that accords with its domestic laws. Thus, the State must either enact legislation or delegate its governmental functions to the entity through another means that complies with its domestic law, such as via contract.

As I have written previously,¹⁹⁰ this "empowerment by law" requirement is a key limiting factor that reduces the rule's effectiveness in holding States to account.¹⁹¹ When States empower individuals or groups

¹⁸⁶ Kimberly Marten, *Where's Wagner? The All-New Exploits of Russia's "Private" Military Company*, PONARS EURASIA (Sept. 15, 2020), <https://www.ponarseurasia.org/where-s-wagner-the-all-new-exploits-of-russia-s-private-military-company/>.

¹⁸⁷ Elian Peltier, Mandy Camara & Christiaan Triebert, *'The Killings Don't Stop.' In Mali, a Massacre with a Russian Footprint*, N.Y. TIMES (May 31, 2022, updated June 1, 2022), <https://www.nytimes.com/2022/05/31/world/africa/mali-massacre-investigation.html?acti> on=click&module=RelatedLinks&pgtype=Article.

¹⁸⁸ Articles on State Responsibility, *supra* note 174, art. 5.

¹⁸⁹ Sam Cohen, *AcidRain Malware and Viasat Network Downtime in Ukraine: Assessing the Cyber War Threat*, JUST SEC. (Sept. 12, 2022), <https://www.justsecurity.org/83021/acidrain-malware-and-viasat-network-downtime-in-ukraine-assessing-the-cyber-war-threat/>.

¹⁹⁰ 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/>.

¹⁹¹ Jennifer Maddocks, *Outsourcing of Governmental Functions in Contemporary Conflict: Rethinking the Issue of Attribution*, VIRGINIA J. INT'L L., Vol. 59:47, https://vjil.org.files.wordpress.com/2019/09/maddocks_final.pdf.

to perform public functions on their behalf, they frequently do so via informal means, rather than via their internal laws. For example, States' relationships with non-State actors operating in the cyber domain are rarely formalized in law. Thus, although a Ukrainian government minister announced the creation of the "IT Army,"¹⁹² the precise links between the organization and the Ukrainian government remain unclear, including whether the group is properly empowered to act on the State's behalf in accordance with Ukraine's domestic law.¹⁹³

The same issue hinders the attribution of the Wagner Group's conduct in violation of LOAC to Russia.¹⁹⁴ Far from receiving legal authorization to act, private military companies remain illegal under Russia's domestic law. This means that even if Wagner Group fighters are clearly performing public functions on Russia's behalf and their conduct is endorsed by the State, in the absence of legal empowerment this rule of attribution does not apply.

Instructions, Direction, or Control

In the event that an entity does not qualify as an organ of State and it is not empowered by law to perform public functions on a State's behalf, its conduct could nevertheless be attributable to a State if it acts under that State's instructions, direction, or control.¹⁹⁵ This rule of attribution focuses on the

State's influence over the specific operation during which the potential international law violations occur, rather than the wider relationship between the entity and the State.

The rule's narrow focus is replicated in its effects, as it attributes to the State only those acts that are performed under the State's instructions, direction, or control. Any unauthorized conduct that is not directly influenced by the State remains private in character and does not lead to State responsibility. In other words, if the non-State actor contravenes the State's instructions or otherwise acts in a way that goes beyond the mission it is performing for the State, the rule of attribution does not apply.

The instructions element of the rule is relatively clear. If a State instructs a private entity to perform an act that violates the State's international legal obligations, that act is attributable to the State. To illustrate, consider the actions of Ukraine's "IT Army." Reporting indicates that members of the group receive "clear online instructions" explaining key targets and offering software they should use for a coordinated strike.¹⁹⁶ If State officials provide those instructions and they command the group to launch harmful attacks against civilian targets, the group's actions when following the instructions, in potential violation of LOAC, are attributable to Ukraine.

¹⁹² Matt Burgess, *Ukraine's Volunteer 'IT Army' Is Hacking in Uncharted Territory*, WIRED (Feb. 27, 2022), <https://www.wired.com/story/ukraine-it-army-russia-war-cyberattacks-ddos/>.

¹⁹³ SOESANTO, *supra* note 166.

¹⁹⁴ COLE, *supra* note 163.

¹⁹⁵ Articles on State Responsibility, *supra* note 174, art. 8.

¹⁹⁶ Yuriy Zalinzyak, *Ukraine's Volunteer 'IT Army' Responds to Russian Hackers, Minister Says*, ABC News (Aug. 25, 2022), <https://abcnews.go.com/International/ukraines-volunteer-army-responds-russian-hackers-minister/story?id=88651955>.

The direction and control elements of the rule are more ambiguous. These are commonly considered together, but international courts and tribunals have reached divergent views regarding their meaning. On one view, the test for determining attribution is identical to the test for deciding when a conflict is internationalized through a State's support to a non-State actor. This overall control test applies only to hierarchically organized groups and looks to the level of support the State provides to the entity as well as the State's involvement in the coordination and planning of its activities.¹⁹⁷ The test is relatively loose and includes no requirement for the State to plan or direct the particular private conduct that violates its international legal obligations. Given the significant links between Russia and the Wagner Group, therefore, this test could lead to the attribution of the group's harmful conduct in Ukraine to Russia.

There is, however, a more authoritative test for the purposes of determining attribution. In its *Bosnian Genocide* judgment,¹⁹⁸ the ICJ rejected the overall control test and reaffirmed the test of effective control it had previously articulated in *Paramilitary Activities*.¹⁹⁹ This is a much stricter test, which requires the State to exercise a detailed or tactical level of control over the specific acts that violate international law.

Given its specificity, the effective control test must be applied to non-State actors'

conduct on a case-by-case basis to determine whether State officials exerted the requisite level of control over the individuals' activities at the time they committed the potential LOAC violations. This requirement creates significant evidential hurdles for injured States that have suffered harm due to a non-State actor's conduct. Often, the precise State involvement in an activity remains unclear. Thus, even if Ukraine has intelligence to indicate that members of the Wagner Group were "working closely" with Russian intelligence agencies when they destroyed the building housing prisoners of war,²⁰⁰ Ukraine might find it difficult to prove that Russian officials exercised a detailed level of control over Wagner Group fighters at the time the operation occurred.

Other Rules of Attribution

In addition to the rules of attribution previously discussed, there are three other grounds on which private conduct could be attributed to a State. These, however, have a limited scope of application and are unlikely to apply to the conduct of private actors operating in Ukraine.

The first relates to conduct carried out in "the absence or default" of the official authorities.²⁰¹ It applies to the actions of individuals who step in to perform public functions when the official authorities cannot do so due to an armed conflict or other emergency. For instance, if Ukrainian citizens

¹⁹⁷ *Prosecutor v. Du (Ko Tadi)*, Judgments U.N. Admin. Trib., IT-94-1-A, ¶¶ 116–145 (1999).

¹⁹⁸ *Bosnian Genocide* Judgment, *supra* note 185, ¶¶ 396–406.

¹⁹⁹ *Military and Paramilitary Activities* Judgment, *supra* note 184, ¶ 115.

²⁰⁰ Luke Harding, *Blast That Killed Ukraine POWs Was Kremlin Operation, Kyiv Claims*, 2022 GUARDIAN, Aug. 3, <https://www.theguardian.com/world/2022/aug/03/blast-that-killed-ukraine-pows-was-kremlin-operation-kyiv-claims>.

²⁰¹ Articles on State Responsibility, *supra* note 174, art. 9.

used their hunting rifles to fight against the invading Russian forces and fired expanding bullets, which are commonly used as hunting ammunition but widely prohibited in armed conflict, the rule could attribute this conduct in potential violation of LOAC to Ukraine.²⁰² It would only do so, however, if all the rule's requirements are satisfied, including a finding that the individuals' actions were "called for" in the circumstances. In essence, this means that the private conduct must have been necessary in the circumstances, to fulfill an essential public function that would otherwise not be performed due to the absence of the official authorities.

The second rule of attribution is not relevant to the conflict in Ukraine. This relates to the conduct of successful insurrectional movements and applies when a rebel group takes power and becomes the State.²⁰³ It might have been applicable, therefore, had rebels in the Donbas succeeded in establishing a new State in part of Ukraine's territory.

Finally, the third rule applies when a State "acknowledges and adopts" private conduct as its own.²⁰⁴ To illustrate, if a Ukrainian official made a clear statement endorsing and accepting responsibility for a harmful cyber

operation launched by members of the "IT Army," the rule might attribute that conduct to Ukraine. In practice, however, it is rare for States to assume responsibility for private actors' conduct. Indeed, one of the reasons States choose to act so frequently via proxy is to benefit from the ambiguity and plausible deniability that it offers.

Conclusion

This post outlined the six different grounds on which private conduct can be attributed to a State, thereby leading to State responsibility. All but one of these rules could apply to the conflict in Ukraine. But in reality, if the entity concerned is not designated as a State organ under the terms of the State's domestic law, attribution is often a challenge. This is due, in part, to the strict interpretation of the rules of attribution by the ICJ and by the International Law Commission. The very high attribution thresholds raise severe evidential difficulties for injured States. Moreover, they fail to reflect the realities of States' interactions with private individuals and groups in contemporary conflict.



²⁰² *Declaration (IV,3) Concerning Expanding Bullets. The Hague, 29 July 1899*, ICRC Int'l Humanitarian L. Databases, <https://ihl-databases.icrc.org/en/ihl-treaties/hague-decl-iv-3-1899/declaration>.

²⁰³ Articles on State Responsibility, *supra* note 174, art. 10.

²⁰⁴ *Id.* art. 11.

THE COMPLICITY OF IRAN IN RUSSIA'S AGGRESSION AND WAR CRIMES IN UKRAINE

by Marko Milanovic | Oct 19, 2022

In recent days Russia has attacked Kyiv and other Ukrainian cities²⁰⁵ using Iranian-made “kamikaze drones” or loitering munitions.²⁰⁶ While the EU is looking for “concrete evidence” that Iran has sold these weapons to Russia, a spokesman for the Iranian Foreign Ministry has denied that Iran had done so,²⁰⁷ saying that, “The published news about Iran providing Russia with drones has political ambitions and it’s circulated by Western sources. We have not provided weaponry to any side of the countries at war.”

But these denials ring hollow. The open-source evidence available²⁰⁸ incontrovertibly shows that Iranian Shahed-136 drones have been used in Ukraine.²⁰⁹ And despite official denials, social media outlets affiliated with the Iranian State have openly boasted about the use of Iranian drones in Ukraine.²¹⁰ It also seems incontrovertible that Iran has sold or bartered these Shahed-136 drones to Russia many months into Russia’s invasion of Ukraine; i.e., these were not weapons that Russia had purchased before the war had

started, when Iran could not know how they would be used. If such was the case, the Iranian officials who authorized the arms transfer must have been aware that Russia intended to use the drones in its war of aggression against Ukraine. Similarly, and on the basis of a documented and publicized pattern of Russia’s deliberate or indiscriminate attacks on civilians and civilian objects in Ukraine,²¹¹ the relevant Iranian officials must have been aware that the drones they provided would be used in violation of the rules of international humanitarian law (IHL).

I will argue in this post that by providing the weapons, which have now unlawfully been used by Russia against Ukraine, Iran incurred State responsibility for complicity in Russia’s internationally wrongful acts. That responsibility is twofold. First, under the customary rule articulated in Article 16 of the International Law Commission’s Articles on State Responsibility (ASR), Iran has provided assistance to Russia’s continuing violation of the prohibition on the use of force in Article

²⁰⁵ Daniel Boffey, *An Explosion, a Burst of Flames, Then Screams: Kamikaze Drones Rain Down on Kyiv*, GUARDIAN (Oct. 17, 2022), <https://www.theguardian.com/world/2022/oct/17/fear-kyiv-deadly-kamikaze-drones-rain-down-ukraine>.

²⁰⁶ Annabelle Timsit & Isabelle Khurshudyan et. al., *What Are Kamikaze Drones? Here’s How Russia and Ukraine Are Using Them*, WASH. POST (Oct. 18, 2022), <https://www.washingtonpost.com/world/2022/10/17/kamikaze-drones-russia-ukraine/>.

²⁰⁷ *Brussels Seeks Hard Evidence of Iranian Involvement in Ukraine War, Says EU’s Top Diplomat*, RADIOFREEEUROPE RADIO LIBERTY (Oct. 17, 2022), <https://www.rferl.org/a/ukraine-iran-war-involvement-eu-borrell/32087658.html>.

²⁰⁸ Jack Detsch, *All It Takes Is One’: Iran Gives Russia Help from the Air*, FOREIGN POLICY (Oct. 12, 2022), <https://foreignpolicy.com/2022/10/12/iran-drones-russia-ukraine-war/>.

²⁰⁹ Stephano D’Urso, *Shahed 136 ‘Kamikaze’ Drone Caught Seconds Before Hitting Target in Ukraine*, AVIATIONIST (Oct. 17, 2022), <https://theaviationist.com/2022/10/17/shahed-136-kamikaze-drone-photo/>.

²¹⁰ Neil MacFarquhar, *Drones Embody an Iran-Russia Alliance Built on Hostility to the U.S.*, N.Y. TIMES (Oct. 17, 2022), <https://www.nytimes.com/2022/10/17/world/europe/russia-iran-alliance-drones.html?smid=nytcore-ios-share&referringSource=articleShare>.

²¹¹ *Independent International Commission of Inquiry on Ukraine*, UNITED NATIONS HUMAN RIGHTS COUNCIL, <https://www.ohchr.org/en/hr-bodies/hrc/iicir-ukraine/index>.

2(4) of the UN Charter, which is of such gravity that it rises to the level of aggression. Iran is moreover in violation of Article 41 ASR, which requires States to refrain from providing assistance to violations of peremptory norms of international law, such as the prohibition of aggression. Second, Iran has violated both Article 16 ASR and Common Article 1 of the Geneva Conventions by providing weapons that Russia has used contrary to the targeting rules of IHL, specifically the principles of distinction, proportionality, and precaution.

Aggression and the ILC Articles on State Responsibility

A number of different rules of international law prohibit certain types of State complicity in the acts of other States. First, Article 16 ASR (regarded by the ICJ²¹² as reflecting customary law) provides that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

Article 41 ASR complements this provision and categorically prohibits State aid and assistance to maintaining situations created by a serious breach of a peremptory norm of international law, like the prohibition on waging a war of aggression.

The constituent elements of these complicity rules have been extensively discussed in the literature (see, e.g., Aust,²¹³ Jackson,²¹⁴ Lanovoy,²¹⁵ and Moynihan²¹⁶). Two such elements are relevant here. First, the assistance provided by the assisting State to the assisted State must causally contribute to the latter's wrongful act, i.e., must facilitate it. That causal nexus must be neither too high nor too low; the most common formulations used in that regard are that the assistance significantly, substantially, or materially contributed to the commission of the wrongful act. Second, the assisting State must provide the assistance with the required level of culpability or fault. I have addressed this fault element at great

²¹² Application of the Convention on the Prevention and Punishment of Genocide (Bosn. & Herz. v. Serb. and Montenegro), 1996 I.C.J.

²¹³ Helmut Philipp Aust, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* (2011).

²¹⁴ Miles Jackson, *COMPLICITY IN INTERNATIONAL LAW* (2015).

²¹⁵ Vladyslav Lanovoy, *COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY* (2016), <https://www.bloomsbury.com/uk/complicity-and-its-limits-in-the-law-of-international-responsibility-9781782259374/>.

²¹⁶ Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, Nov. 2016, <https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf>.

length in my work on intelligence sharing in military operations.^{217,218,219} To make a long story short, the work of the ILC (much of it internally inconsistent), State positions, and the views of scholars have vacillated between intention and knowledge as the culpability element of Article 16. On the first approach, an assisting State would only be responsible if its officials *intended* to facilitate the wrongful act; on the second, an assisting State would be responsible if its officials *knew* that the assistance would facilitate the wrongful act. The first approach is narrower than the second and would inhibit fewer State interactions.

But that apparently stark dilemma is in my view a false one.²²⁰ Even if intent was the proper culpability element of Article 16, that notion can in my view encompass three distinct modes of fault: purpose/direct intent; oblique/indirect intent; and willful blindness, defined as purpose to avoid acquiring information but for which the assisting State would have acted with indirect intent (see also Moynihan²²¹). In particular, the notion of oblique intent—commonly regarded as a species of intent in many legal systems—considers that an individual is acting *intentionally* with regard to a consequence if he or she is practically certain that this consequence will result from his or her actions, even if the individual is indifferent

to whether the consequence will occur. For example, if I put a bomb on a civilian airliner in order to kill one specific individual aboard that plane, I do so with the *purpose* (or direct intent) of killing that individual. But I am also obliquely or indirectly intending to blow up the plane and kill all other passengers aboard, because that is an inevitable consequence of my action, which I am practically certain will occur, and I decide to place the bomb despite that certainty.

In the case of Iran providing drones to Russia, purpose/direct intent is not the appropriate form of fault—there is no reason to believe that Iran has provided those weapons with the conscious object of assisting Russia's aggression against Ukraine. But oblique intent (and potentially willful blindness) is very much relevant. Iran can be said to intentionally assist Russia's aggression even in the absence of purpose to assist the commission of the wrongful act. If Iran (i.e., officials acting on its behalf) was practically certain that Russia would commit or continue committing the acts constitutive of aggression against Ukraine, practically certain that its own action of providing the assistance would facilitate the commission of the wrongful act, and chose to provide the assistance despite this practical certainty, then the State of Iran provided the assistance with the (oblique or indirect) intent to facilitate

²¹⁷ Marko Milanovic, *The International Law of Intelligence Sharing in Multinational Military Operations: A Primer*, EJIL: TALK! (Oct. 21, 2021), <https://www.ejiltalk.org/the-international-law-of-intelligence-sharing-in-multinational-military-operations-a-primer/>.

²¹⁸ Marko Milanovic, *Intelligence Sharing in Multinational Military Operations*, ARTICLES OF WAR (Oct. 21, 2021), <https://lieber.westpoint.edu/intelligence-sharing-multinational-military-operations/>.

²¹⁹ Marko Milanovic, *Intelligence Sharing in Multinational Military Operations and Complicity under International Law*, 97 INT'L L. STUD. 1269 (2021), <https://digital-commons.usnwc.edu/ils/vol97/iss1/48/>.

²²⁰ Marko Milanovic, *The International Law of Intelligence Sharing in Multinational Military Operations: State Fault in Complicity*, EJIL: TALK! (Oct. 25, 2021), <https://www.ejiltalk.org/the-international-law-of-intelligence-sharing-in-multinational-military-operations-state-fault-in-complicity/>.

²²¹ MOYNIHAN, *supra* note 216.

Russia's aggression. And as I explained above, there is no doubt that Iran acted with such practical certainty. Russia's aggression is unfolding on our TV screens, the weapons were sold after the aggression had started, and the only reason why Russia would be getting the Iranian drones would be to use them in Ukraine, after it had depleted its own munition stocks. Even a court (let alone the courtroom of public opinion) would easily find that the factual predicate for the culpability element of complicity was met, without having to rely on any particularly exotic forms of fact-finding.

Note, in this regard, that Iran's practical certainty regarding Russia's commission of a wrongful act and how Russia would use the weapons provided to it has to relate solely to the underlying facts, and not to any subjective belief that Russia is acting unlawfully. That Russia considers it had the right to invade Ukraine is irrelevant, because the illegality of its conduct is a matter of objective assessment. Similarly, that Iran might not be entirely convinced that Russia acted unlawfully in invading Ukraine—Iran abstained in the vote on the first UN General Assembly resolution overwhelmingly condemning Russia's aggression against Ukraine,²²² and refrained from voting on the most recent one²²³—is also irrelevant. Article 16 ASR does not require the accomplice to subjectively believe that the principal is acting unlawfully, but only to intend the facilitation of conduct that is unlawful objectively. And, as explained,

the inference that Iranian officials (obliquely) intended to facilitate Russia's use of force against Ukraine is inescapable.

It is unnecessary at this stage to examine any other issues that arise under Article 16 ASR, such as the causal contribution of the assistance provided to the facilitation of the wrongful act. There is simply no doubt whatsoever that providing weapons to an aggressor State materially facilitates the (ongoing) commission of aggression. The same applies if Iran's responsibility were assessed from the standpoint of the duty under Article 41(2) ASR to refrain from rendering "aid or assistance in maintaining" a situation created by a serious breach of a peremptory norm of international law, i.e., the situation created by Russia's ongoing aggression and war of territorial conquest.

Complicity in Violations of IHL

The discussion regarding Iran's complicity under general international law in Russia's aggression against Ukraine is applicable *mutatis mutandis* to Iran's complicity in Russia's violations of the targeting rules of IHL, viz. the principles of distinction, proportionality, and precaution. But of relevance here is also an IHL-specific complicity rule that is in some respects arguably less demanding than Article 16 ASR.²²⁴ Under Common Article 1 (CA 1) of the Geneva Conventions (to which Russia and Iran are parties), States "undertake to respect and to ensure respect" for the Conventions in all circumstances.

²²² *UN Resolution Against Ukraine Invasion: Full Text*, AL JAZEERA (Mar. 3, 2022), <https://www.aljazeera.com/news/2022/3/3/unga-resolution-against-ukraine-invasion-full-text>.

²²³ *Ukraine: UN General Assembly Demands Russia Reverse Course on 'Attempted Illegal Annexation'*, UN NEWS (Oct. 12, 2022), <https://news.un.org/en/story/2022/10/1129492>.

²²⁴ MILANOVIC, *supra* note 220.

Essentially the same rule binds all States under customary law—see Rules 139 and 144 of the ICRC Customary IHL Study.²²⁵ The so-called “external dimension” of this overarching obligation has been much debated. The *positive* duty of States to exercise influence on other States in order to put an end to their violations of IHL remains controversial.²²⁶ But CA 1 also imposes a different (and much less controversial) *negative* obligation on States—not to assist third parties in their violations of IHL. This obligation is categorically different from any positive duty to exercise influence because it requires nothing more than restraint on behalf of the (potentially) assisting State.

Thus, for example, in the *Paramilitary Activities* case, at para. 220, the International Court of Justice held that the United States was under a duty not to encourage parties to the conflict in Nicaragua to commit violations of IHL. Similarly, according to the ICRC’s 2016 Commentary on the First Geneva Convention, para. 158:

Pursuant to common Article 1, the High Contracting Parties have certain negative obligations, which means they must abstain from certain conduct. In particular, they may neither encourage nor aid or assist in violations of the Conventions. It would be contradictory if common Article 1 obliged the High Contracting Parties to ‘respect and to ensure respect’ by their own armed forces while allowing them to contribute

to violations by other Parties to a conflict.²²⁷

Again, disputes regarding the demanding positive duty to exercise influence on third parties tell us nothing about the *negative* duty to avoid assisting violations by third parties, which only requires restraint—e.g., not selling weapons or sharing intelligence when these would facilitate violations of IHL. Accepting the existence of the negative duty does not entail acceptance of the positive one.

The culpability element of the CA 1 complicity rule can only be less demanding, and not more demanding,²²⁸ than that of the generally applicable complicity rule in Article 16 ASR. In particular, at least as far as complicity in serious violation of IHL is concerned, complicity under CA 1 can be based on conscious risk-taking akin to recklessness—the State providing assistance to its partner, while consciously disregarding a risk that the partner would commit a serious violation of IHL, would be liable for complicity if the partner does, in fact, commit such an act and the aid provided (e.g., weapons) does facilitate it. If the risk ultimately materializes—the facilitated harm occurs—the assisting State will become complicit in it.

On the facts of Iran’s provision of kamikaze drones to Russia, the factual question of whether the relevant Iranian officials were *practically certain* that the drones would be used by Russia to commit violations of IHL is somewhat more difficult than with regard

²²⁵ ICRC Int’l Humanitarian L. Databases, Customary IHL Database, <https://ihl-databases.icrc.org/en/customary-ihl>.

²²⁶ Michael N. Schmitt & Sean Watts, *Common Article 1 and the Duty to “Ensure Respect,”* 96 INT’L L. STUD. 674 (2020), <https://digital-commons.usnwc.edu/ils/vol96/iss1/22/>.

²²⁷ COMMENTARY ON THE FIRST GENEVA CONVENTION, ¶ 158 (Knut Dörmann et al. eds., 2016) [hereinafter GC I Commentary of 2016].

²²⁸ Milanovic, *supra* note 219.

to their use to further Russia's aggression (which can be done even in an IHL-compliant manner). Perhaps Iran did not (obliquely) intend its weapons to facilitate Russia's war crimes in Ukraine. But, at a minimum, Iran's officials must have been aware of a serious risk that Russia would use the weapons in a manner contrary to IHL, e.g., to attack civilians or civilian objects deliberately or indiscriminately, because of a documented pattern of such violations by Russia prior to the arms transfer. There is, by contrast, no evidence of any attempt by Russia to acknowledge and correct any errors in its targeting process, nor of any attempt by Iran to implement mitigation measures that conceivably could have reduced the risk that the weapons provided would be used unlawfully. This again leads us to the inescapable inference that, at least *prima facie*, Iran provided the drones to Russia while consciously disregarding the risk that they would be used by Russia unlawfully. As Russia has now in fact used the drones in violation of IHL, i.e., the wrongful act has materialized, Iran has also become complicit under CA 1 (and possibly also under Article 16 ASR).

Conclusion

The international legal framework governing State responsibility for complicity in the wrongful conduct of third parties is undoubtedly complex. But Iran's provision of kamikaze drones to Russia is a relatively easy, straightforward case of complicity, especially with regard to assisting a war of aggression

and territorial conquest. To be clear, Iran's responsibility as an accomplice is derivative; it depends on Russia's underlying (and undoubted) violations of international law, which have now fully materialized and are ongoing. Iran's responsibility is also limited in the sense that Iran is responsible only for its own wrongful conduct of providing assistance, and not for everything that Russia is doing. But the consequences of Iran's assistance are particularly harmful for Ukraine and its civilian population, and like any responsible State Iran now has a duty to cease any wrongful activity and provide reparation for the injury it has caused. Iran moreover has a duty not to repeat such conduct, even though it appears to be on the verge of doing so; the *Washington Post* thus reports,

An intelligence assessment shared in recent days with Ukrainian and U.S. officials contends that Iran's armaments industry is preparing a first shipment of Fateh-110 and Zolfaghar missiles, two well-known Iranian short-range ballistic missiles²²⁹ capable of striking targets at distances of 300 and 700 kilometers, respectively, two officials briefed on the matter said. If carried out, it would be the first delivery of such missiles to Russia since the start of the war.²³⁰

If such an arms transfer were to proceed, Iran would again become complicit in Russia's aggression and any violations of IHL committed by these weapons, whether under Articles 16 and 41 ASR or pursuant to CA 1 of the Geneva Conventions. The unlawful attacks that Russia has conducted

²²⁹ *Missiles of Iran*, MISSILE THREAT CSIS MISSILE DEFENSE PROJECT (Aug. 10, 2021), <https://missilethreat.csis.org/country/iran/>.

²³⁰ Joby Warrick, Ellen Nakashima & Shane Harris, *Iran Plans to Send Missiles, Drones to Russia for Ukraine War, Officials Say*, WASH. POST (Oct. 16, 2022), <https://www.washingtonpost.com/national-security/2022/10/16/iran-russia-missiles-ukraine/>.

using Iranian-supplied drones would dispel any uncertainty (even if such uncertainty existed) that the new weapons would be used lawfully. In short, by assisting Russia, Iran is not only behaving immorally or contrary to some nebulous norms of responsible State

behavior. Rather, Iran is clearly acting *illegally* by providing such assistance, and other States should unambiguously call out that illegality.



THE IMPACT OF SANCTIONS ON HUMANITARIAN AID

by Alexandra Francis | Jan 27, 2023

The war in Ukraine highlights how humanitarian need and restrictive trade measures typically emerge simultaneously in times of conflict—and how the latter can interfere with the ability of humanitarian organizations to provide principled humanitarian assistance. This post addresses the complex legal framework of U.S. trade restrictions and financial sanctions that have the greatest impact on humanitarian action in Ukraine. It concludes with several recommendations to reduce the impact of humanitarian activities in situations of armed conflict.

Sanctions: A Tool of First Resort

Over recent decades, restrictive economic measures have become a “tool of first resort”²³¹ in U.S. foreign policy. In part, this is the result of broad congressional delegation to the president to declare national emergencies and subsequently impose trade restrictions and economic sanctions to achieve foreign policy aims.²³² The United States has deployed such measures to achieve foreign policy goals related to counterterrorism, non-proliferation, human rights, anti-corruption, and other aims. Critically, these restrictive economic measures have also become key U.S. foreign policy tools to dissuade acts of aggression, such as the Russian invasion of Ukraine.

The United States leverages a variety of restrictive economic measures to achieve its policy goals. These tools include financial sanctions, arms embargoes, and restrictions on the export and import of certain items. Financial sanctions are particularly impactful. The United States leverages its position in the global economy by limiting economic activity in two ways: by restricting virtually all financial and trade activity in a territory (known as comprehensive sanctions) or by freezing the assets of and restricting dealings with specific entities and individuals (known as targeted sanctions).

Comprehensive sanctions and targeted sanctions that restrict financial and other transactions with governing entities or critical service providers (i.e., banks) typically have the greatest impact on humanitarian action. In addition to financial sanctions, certain export controls administered by the Department of Commerce can negatively impact humanitarian assistance by prohibiting the export of U.S.-controlled items essential to humanitarian activities. When deployed in the context of armed conflict, as in Ukraine, these trade restrictions can produce negative collateral consequences for humanitarian operations.

The U.S. government is committed to mitigating the impact of restrictive measures on humanitarian efforts. One effective

²³¹ U.S. DEP’T OF THE TREASURY, THE TREASURY 2021 SANCTIONS REVIEW (2021), <https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf>.

²³² The International Emergency Economic Powers Act: Origins, Evolution, and Use, CONG. RSCH. SERV. (Sept. 28, 2023), <https://sgp.fas.org/crs/natsec/R45618.pdf>.

method deployed by the U.S. government is to issue humanitarian authorizations permitting activities that would otherwise be prohibited by U.S. sanctions and export control laws and regulations.

The Office of Foreign Assets Control (OFAC) within the Department of the Treasury administers two types of authorizations: general licenses and specific licenses. General licenses are public authorizations available to all persons or entities meeting the conditions in OFAC-administered regulations. Specific licenses are authorizations issued on a case-by-case basis to a specific person or entity in response to a written application. The Bureau of Industry and Security (BIS) within the Department of Commerce administers license exceptions within the Export Administration Regulations (EAR). BIS also has the authority to issue licenses to specific parties. These authorizations allow for activities that align with U.S. foreign policy to be carried out in regions subject to restrictive measures, including certain legitimate humanitarian activities.

Certain Trade Restrictions and Economic Sanctions in Ukraine

The United States enacts restrictive economic measures to “disrupt, deter, and prevent actions that undermine U.S. national security.”²³³ In Ukraine, the United States

seeks to disrupt the invasion by isolating the Russian economy; to deter additional threats, such as the appropriation of Ukrainian assets and territory, by restricting targeted parties from accessing funds and equipment; and to prevent war financing by prohibiting dealings with certain Russian banking sector assets. These restrictions can have profound collateral impacts on humanitarian action. Below, this piece sets out recent measures related to the Ukraine-Russia conflict that have the greatest impacts.

Donetsk People’s Republic and Luhansk People’s Republic

In 2014, separatist groups mobilized against the Ukrainian government and sought to control areas in two industrial oblasts: Luhansk and Donetsk.²³⁴ The United States responded by issuing Executive Order (E.O.) 13660,²³⁵ which declared a national emergency arising from the U.S. foreign policy and national security threat posed, in part, by persons who “undermine democratic processes and institutions in Ukraine; threaten its peace, security, stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets.”

In a series of Executive Orders, the United States enacted a framework to impose targeted sanctions on certain individuals and entities engaged in these activities (see E.O. 13660,²³⁶

²³³ TREASURY 2021 SANCTIONS REVIEW, *supra* note 231 at 2.

²³⁴ Andrew E. Kramer, *Amid Much Uncertainty, Separatists Prepare for Voting in Eastern Ukraine*, N.Y. TIMES (May 10, 2014), <https://www.nytimes.com/2014/05/11/world/europe/managing-every-detail-separatists-prepare-for-voting-in-eastern-ukraine.html>.

²³⁵ Blocking Property of Certain Persons Contributing to the Situation in Ukraine, Executive Order No. 13660, 79 Fed. Reg. 13,493 (Mar. 10, 2014).

²³⁶ *Id.*

E.O. 13661,²³⁷ and E.O. 13662²³⁸). Among the targeted Specially Designated Nationals (SDNs) were two Russian-backed political entities: the so-called Donetsk People's Republic (DNR) and Luhansk People's Republic (LNR).²³⁹ Pursuant to E.O. 13660, the assets of these entities were blocked, and U.S. persons were prohibited from dealing with them unless authorized by OFAC. At this point, the political entities themselves were targeted, but not the regions they sought to control.

In February 2022, the Russia-Ukraine conflict escalated dramatically when Russia recognized the so-called LNR and DNR as independent States²⁴⁰ and shortly thereafter launched a full-scale invasion of Ukraine.²⁴¹ In response to the "purported recognition" of these two regions, the United States enacted E.O. 14065,²⁴² which prohibited virtually all activities and transactions in the so-called LNR and DNR. These comprehensive sanctions prohibit persons subject to U.S. jurisdiction from engaging in virtually all activities and transactions in these two regions. This measure was similar to the comprehensive sanctions previously imposed on Crimea in

response to the Russian annexation of the peninsula in 2014 (see E.O. 13685²⁴³).

OFAC administers general licenses that authorize certain humanitarian action in the so-called LNR and DNR regions. These general licenses include authorizations for the official business of certain international organizations and entities, including the United Nations and the International Committee of the Red Cross (General License 20; E.O. 14065); certain transactions in support of nongovernmental organizations' activities (General License 23; E.O. 14065); and the export or reexport of certain agricultural commodities, medicine, and medical devices and supplies (General License 18; E.O. 14065).

The Department of Commerce implemented these sanctions by enacting an embargo on the so-called LNR and DNR regions,²⁴⁴ which is administered by BIS through the EAR (15 CFR § 746.6²⁴⁵). The embargo prohibits all exports, reexports, or transfers of items subject to U.S. jurisdiction under the EAR²⁴⁶ to or within the so-called LNR and DNR regions, other than certain food and

²³⁷ Blocking Property of Additional Persons Contributing to the Situation in Ukraine, Exec. Order No. 13661, 79 Fed. Reg. 15,535 (Mar. 16, 2014).

²³⁸ Blocking Property of Additional Persons Contributing to the Situation in Ukraine, Exec. Order No. 13662, 79 Fed. Reg. 16,169 (Mar. 24, 2014).

²³⁹ Press Release, Announcement of Treasury Sanctions on Entities Within the Financial Services and Energy Sectors of Russia, Against Arms or Related Materiel Entities, and Those Undermining Ukraine's Sovereignty, U.S. Dep't of the Treasury (July 16, 2014).

²⁴⁰ *Russia-Ukraine Tensions Putin Orders Troops to Separatist Regions and Recognizes Their Independence*, N.Y. TIMES (Feb. 21, 2022, updated Mar. 30, 2022), <https://www.nytimes.com/live/2022/02/21/world/ukraine-russia-putin-biden>.

²⁴¹ David Leonhardt, *War in Ukraine*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/briefing/ukraine-russia-invasion-putin.html>.

²⁴² Blocking Property of Certain Persons and Prohibiting Certain Transactions with Respect to Continued Russian Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, Exec. Order No. 14065, 87 Fed. Reg. 10,293 (Feb. 23, 2022).

²⁴³ Blocking Property of Certain Persons and Prohibiting Certain Transactions with Respect to the Crimea Region of Ukraine, Exec. Order No. 13685, 79 Fed. Reg. 77,357 (Dec. 24, 2014).

²⁴⁴ Implementation of Sanctions Against Russia Under the Export Administration Regulations, 87 Fed. Reg. 12,226 (Mar. 3, 2022).

²⁴⁵ 15 C.F.R. § 746.6 (2022).

²⁴⁶ 15 C.F.R. § 734.3.

medicine or “software necessary to enable the exchange of personal communications over the internet.”²⁴⁷ With respect to the so-called LNR and DNR regions, BIS administers a license exception for certain humanitarian donations made by U.S. charitable organizations (see 15 CFR § 746.6(c)(3);²⁴⁸ 15 CFR § 740.12(b)²⁴⁹).

Additional Measures

Also in response to the full-scale Russian invasion, the United States imposed targeted sanctions on entities and persons involved in Russian “harmful foreign activities” pursuant to E.O. 14024.²⁵⁰ Despite the adoption of E.O. 14024 before the invasion of Ukraine, most new designations related to the Russia-Ukraine conflict in 2022 were imposed using this authority.²⁵¹

Over 1,000 persons and entities were targeted for sanctions pursuant to E.O. 14024 in 2022.²⁵² Unless authorized by OFAC, humanitarian organizations must take care to avoid dealing with sanctioned individuals or entities (and in certain cases those entities owned 50 percent or more by blocked parties), including when providing aid.²⁵³ This can be particularly burdensome

for humanitarian organizations operating in areas with many sanctioned individuals, such as in Russia and the so-called LNR and DNR regions of Ukraine.

Key Russian financial institutions and private banks were among the parties targeted under E.O. 14024. (See, e.g., designations targeting Sberbank and Alfa-Bank pursuant to E.O. 14024;²⁵⁴ see also Directive 4 of E.O. 14024, prohibiting virtually all transactions “involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, or the Ministry of Finance of the Russian Federation”²⁵⁵). Such restrictions on financial institutions can interfere with humanitarian operations by leaving organizations with limited options for transferring money into regions that require humanitarian assistance or preventing their staff from engaging in normal business transactions.

To address these concerns, OFAC administers exceptions and general licenses that facilitate certain legitimate humanitarian activities. For example, E.O. 14024 contains a carveout for “transactions for the conduct of the official business of the Federal Government or the United Nations” (see Section 9,

²⁴⁷ 15 C.F.R. § 746.6(a)(1)(i).

²⁴⁸ 15 C.F.R. § 746.6(c)(3) (1996).

²⁴⁹ 15 C.F.R. § 740.12 (1996).

²⁵⁰ Blocking Property with Respect to Specified Harmful Foreign Activities of the Government of the Russian Federation, Exec. Order No. 14024, 86 Fed. Reg. 20,249 (Apr. 15, 2021).

²⁵¹ Emily Kilcrease & Jason Bartlett et al., *Sanctions by the Numbers: Economic Measures against Russia Following Its 2022 Invasion of Ukraine*, CNAS (June 16, 2022), <https://www.cnas.org/publications/reports/sanctions-by-the-numbers-economic-measures-against-russia-following-its-2021-invasion-of-ukraine>.

²⁵² *Id.*

²⁵³ U.S. DEP’T OF THE TREASURY, Office of Foreign Asset Control, <https://ofac.treasury.gov/>.

²⁵⁴ Press Release, Dep’t of the Treasury, U.S. Treasury Escalates Sanctions on Russia for Its Atrocities in Ukraine (Apr. 6, 2022), <https://home.treasury.gov/news/press-releases/jy0705>.

²⁵⁵ Publication of Directive 4 (as Amended) Under Executive Order 14024 of April 15, 2021, 88 Fed. Reg. 36,648, 36,649 (June 5, 2023).

E.O. 14024²⁵⁶). Likewise, among other helpful authorizations, General License 5 authorizes all transactions that would otherwise be prohibited by E.O. 14024 for the official business of certain international organizations and entities, including the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.²⁵⁷

Humanitarian Impact of Restrictive Measures

As illustrated above, certain regions of Ukraine are subject to comprehensive territorial-based sanctions and export embargoes. Two governing entities that control territory—the LNR and DNR—are targeted as SDNs. Moreover, certain Russian financial institutions and service providers important to reaching regions in need of humanitarian action are also subject to economic sanctions. Even where authorizations for humanitarian activities exist, these restrictions can still have a profound adverse impact on principled humanitarian action in a number of ways.

International humanitarian law (IHL) seeks to ensure humanitarian action and medical care for civilians caught in armed conflict. However, sanctions and other restrictive measures can make it impossible for humanitarian organizations to operate in certain jurisdictions, such as Ukraine, in accordance with the principles of impartiality, neutrality, and independence.

Humanitarian operations in heavily sanctioned regions can require navigating complex and overlapping regulatory regimes, which can interfere with the ability of organizations to swiftly address pressing humanitarian needs. In Ukraine, humanitarian organizations must understand and comply with regulations administered by both OFAC and BIS. They also must take care to comply with laws and regulations enacted by other countries. Often, authorizations provided by a single authority may not be sufficient for the activities a humanitarian organization wishes to undertake.

For example, a non-U.S. humanitarian organization seeking to repair water and sanitation infrastructure in the LNR (and engaging in related transactions otherwise prohibited under U.S. sanctions, such as the transfer of funds through U.S. banks) may benefit from an OFAC authorization (see, e.g., General License 23, E.O. 14065). However, the non-U.S. organization would not benefit from the BIS license exception for humanitarian donations (see 15 CFR § 740.12(b)(3)²⁵⁸) and therefore may still need to apply to receive licensing to export certain necessary materials, such as U.S.-origin water pumps, seals, or valves. Moreover, non-U.S. humanitarian organizations bringing other items essential for humanitarian action (such as navigation systems, computers, or radios) into the sanctioned regions could likewise present compliance issues if those items are subject to U.S. jurisdiction. In such cases,

²⁵⁶ Blocking Property with Respect to Specified Harmful Foreign Activities of the Government of the Russian Federation, Exec. Order No. 14024, 86 Fed. Reg. 20,249, 20,252 (Apr. 15, 2021).

²⁵⁷ *Russian Harmful Foreign Activities Sanctions*, U.S. DEP'T OF THE TREASURY, <https://ofac.treasury.gov/sanctions-programs-and-country-information/russian-harmful-foreign-activities-sanctions>.

²⁵⁸ 15 C.F.R. 740.12(b)(3) (1996).

obtaining specific approval from BIS can often take months and impede a timely humanitarian response. Navigating this compliance burden also leads to increased overhead and legal costs, which can divert much-needed funding from operations.

Even where adequate humanitarian authorizations are in place, financial institutions and commercial actors may decline to assume the legal risk of dealing in heavily sanctioned jurisdictions, hampering relief efforts. This practice is known as “de-risking”²⁵⁹ and can impede or delay humanitarian operations.

Moreover, donor policies can exacerbate the impact of restrictive measures. Encouraged practices, such as beneficiary vetting, are frequently adopted as donor requirements.²⁶⁰ In some cases, humanitarian organizations report that cash-based assistance programs were discontinued in regions where donors required beneficiary vetting.²⁶¹ These requirements can prevent humanitarian actors from operating with impartiality and can negatively affect aid access and acceptance.²⁶²

Similarly, to manage their own legal risk, humanitarian organizations may simply choose not to serve populations in heavily sanctioned jurisdictions. While unrelated

to the Ukraine-Russia conflict, the Harvard Law School Program on International Law and Armed Conflict undertook an illustrative empirical survey on the impact of counterterrorism measures (including sanctions) on humanitarian action. The survey, which was distributed to humanitarian actors, found that “69 percent of survey respondents indicated that counterterrorism measures had chilled or curtailed their work,” while “38 percent of respondents stated that counterterrorism laws had caused their organization to forgo, alter, or cease activities and programming.”

These adverse impacts may dissuade humanitarian organizations from operating in heavily sanctioned territories altogether. This chilling effect on humanitarian action can “deprive people in need of humanitarian services and undermine the ability of humanitarian organizations to operate in an impartial manner.”²⁶³

What Needs to Be Done

Restrictive measures, such as trade restrictions and economic sanctions, are a critical and effective tool in U.S. foreign policy. As the 2021 Sanctions Review recognized, “[a]t their core, sanctions allow U.S. policymakers to impose a material cost on adversaries to

²⁵⁹ Natalie Weizmann, *Respecting International Humanitarian Law and Safeguarding Humanitarian Action in Counterterrorism Measures: United Nations Security Council Resolutions 2462 and 2482 Point the Way*, 103 INT’L REV. RED CROSS 325 (2022), <https://international-review.icrc.org/articles/respecting-international-humanitarian-law-safeguarding-humanitarian-action-916>.

²⁶⁰ Emanuela-Chiara Gillard, Sangeeta Goswami et al., *Screening of Final Beneficiaries—a Red Line in Humanitarian Operations. An Emerging Concern in Development Work*, 103 INT’L REV. RED CROSS 517 (2022), <https://international-review.icrc.org/articles/screening-of-final-beneficiaries-a-red-line-in-humanitarian-operations-916>.

²⁶¹ Emma O’Leary, *Politics and Principles: The Impact of Counterterrorism Measures and Sanctions on Principled Humanitarian Action*, 103 INT’L REV. RED CROSS 459 (2022), <https://international-review.icrc.org/articles/politics-and-principles-the-impact-counterterrorism-measures-on-principled-humanitarian-action-916>.

²⁶² UNITED NATIONS SECURITY COUNCIL COUNTER-TERRORISM COMMITTEE EXECUTIVE DIRECTORATE, *THE INTERRELATIONSHIP BETWEEN COUNTER-TERRORISM FRAMEWORKS AND INTERNATIONAL HUMANITARIAN LAW* (2022), https://www.un.org/securitycouncil/ctc/sites/www.un.org/securitycouncil.ctc/files/files/documents/2022/Jan/cted_ihl_ct_jan_2022.pdf.

²⁶³ WEIZMANN, *supra* note 259.

deter or disrupt behavior that undermines U.S. national security and signal a clear policy stance.”²⁶⁴

Despite the natural tension between broad restrictive measures and humanitarian action, the Biden administration strives to harmonize its use of such measures with its humanitarian policy objectives. To achieve this goal, the Department of the Treasury resolved to “expand sanctions exceptions to support the flow of legitimate humanitarian goods and assistance and provide clear guidance” on the scope of sanctions authorities.²⁶⁵ The Treasury asserted that “this effort is worthy of significant time and effort to ensure the world understands that the provision of legitimate humanitarian assistance reflects American values.” The various general licenses issued by the Treasury for humanitarian action in Ukraine represents major progress toward this goal. I propose several additional measures that would immediately advance this priority and help facilitate legitimate humanitarian action in Ukraine.

First, the Departments of Commerce and the Treasury should seek to mitigate the regulatory burden on humanitarian organizations by harmonizing authorizations across their respective jurisdictions. The need to obtain approval from both agencies to engage in certain activities can interfere with timely humanitarian action. To resolve this issue, and avoid duplication, the Department of Commerce should provide a license exception for any humanitarian activities authorized by

OFAC. This type of regulatory action has precedent (see, e.g., 15 CFR 746.7(a)(2)²⁶⁶).

Second, OFAC should expand existing general licenses to encompass U.S. contractors undertaking humanitarian action on behalf of our allies. The American business community can be a powerful diplomatic asset, but in many heavily sanctioned jurisdictions (including in the so-called LNR and DNR) current restrictive measures would prevent U.S. companies from providing certain humanitarian services on behalf of allied nations without a specific license. This is the case even where an authorization would be available if the same work was undertaken on behalf of the U.S. federal government or by a nongovernmental organization. Authorizing such activities by American contractors through general licenses would improve humanitarian coordination and foster goodwill with our allies. Further tailoring sanctions authorizations will also maintain the competitiveness of U.S. businesses abroad.

Third, given the complex and overlapping issues arising from restrictive economic measures, the administration should also facilitate ways for humanitarian organizations to express their concerns or questions without raising their risk of being targeted for anti-compliance measures.

Finally, the administration should continue advocating for the financial community to allow authorized transactions for humanitarian action. The Biden administration can do this by continuing

²⁶⁴ TREASURY 2021 SANCTIONS REVIEW, *supra* note 231, at 1.

²⁶⁵ *Id.* at 5.

²⁶⁶ 15 C.F.R. § 746.7(a)(2) (2009).

to direct agencies to proactively provide financial institutions with clear guidance about existing authorizations.

Humanitarian organizations should be equipped to act decisively and quickly in response to humanitarian need. Sustained focus on the impact that restrictive measures can have on humanitarian activities will help organizations gain the clarity to confidently engage in legitimate and authorized humanitarian activity in heavily sanctioned jurisdictions.

Conclusion

The conflict in Ukraine demonstrates the often-simultaneous presence of humanitarian need and restrictive economic measures during times of war. It also illustrates how trade restrictions and sanctions can hinder the ability of humanitarian organizations to provide impartial assistance as foreseen by international law.

To effectively address the tension between restrictive measures and humanitarian needs,

it is crucial for the United States to establish clear and consistent frameworks for neutral humanitarian access. This not only ensures legal availability for humanitarian action, but also allows humanitarian organizations to focus their resources on providing aid, rather than on navigating complicated regulations and processes. The Biden administration's attention to this issue is commendable, but sustained focus on these issues will be important to fully address the complex challenges in this area.

Authors Note: The information provided in this blog post does not, and is not intended to, constitute legal advice. All information included in this blog post is intended for general informational purposes only. The author recommends that any humanitarian organizations (or other entities) that have questions about specific operations or programs in Ukraine engage a law firm or call the OFAC hotline for guidance.



REPARATIONS FOR WAR: WHAT OPTIONS FOR UKRAINE?

by Luke Moffett | Nov 15, 2022

On 14 November, the UN General Assembly received a resolution calling for international support and cooperation on reparations for Ukraine.²⁶⁷ For thousands of years, reparations have attempted to settle grievances and secure peace between warring nations.²⁶⁸ However, the experience of the First World War has soured large-scale reparations for international armed conflicts. While claims can be settled or waived, such as between the United Kingdom and Argentina over the Falkland Islands/Las Malvinas war, examples of inter-State reparations are few and far between. Instead, since the Second World War, most conflicts have been non-international armed conflicts, involving a range of domestic reparation programs.

A Legal Basis for Reparations

Despite the lack of international experience on the award of reparations for international armed conflicts, there is a strong legal basis for reparations in Ukraine. Establishing the legal basis is important to determine who is responsible for making reparations, for what violations, and who are the eligible victims. The most persuasive legal authority is to base reparations on Russia's internationally

wrongful act in violating the UN Charter by waging an aggressive war.

On a number of occasions, the UN Security Council has recognized that States responsible for acts of aggression have an obligation to make full reparations.²⁶⁹ The most notable example of a reparation program established on this basis is the UN Claims Commission (UNCC) formed following Iraq's invasion of Kuwait in 1990.²⁷⁰ If a similar Commission could be established for Ukraine, based on Russia's act of aggression, it could assess the direct losses suffered by the Ukrainian State, as well as by companies, international organisations, other States, and individuals, including, potentially, Ukrainian soldiers. Yet, as discussed below, the likelihood of a similar body to the UNCC being established for Ukraine is doubtful.

Other violations of international law during the Ukrainian conflict can also form the basis of reparations claims. However, under the laws of war, the legal basis for reparations is more limited. Despite Additional Protocol I of the Geneva Conventions recognizing that a responsible party should pay compensation for breaches, and recent cases like *DRC v. Uganda* at the International Court of Justice awarding reparations for war crimes,²⁷¹ the

²⁶⁷ *Furtherance of Remedy and Reparation for Aggression Against Ukraine*, 2022 UN, <https://www.un.org/pga/77/wp-content/uploads/sites/105/2022/11/Draft-UNGA-UA-RoD-07-Nov-2022.pdf>.

²⁶⁸ Luke Moffett, *Reparations and War* (Jan. 20, 2023), <https://global.oup.com/academic/product/reparations-and-war-9780192865588?q=Luke%20Moffett&lang=en&cc=gb>.

²⁶⁹ G.A. Res. 580 (Dec. 30, 1985), <https://digitallibrary.un.org/record/112407?ln=en>.

²⁷⁰ UNITED NATIONS COMPENSATION COMMISSION, <https://uncc.ch/home>.

²⁷¹ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2022 I.C.J. (Feb. 9), <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf>.

law of war provides no right to reparations for individual victims.²⁷²

Alternatively, human rights law does allow individuals and groups who have had their personal and property rights violated during conflict to claim reparations. For instance, the European Court of Human Rights has heard such mass claims related to armed conflict.²⁷³ Like the International Criminal Court, however, human rights bodies are not able to award large-scale reparations in an effective and timely manner.

The remainder of this post outlines some options for reparations for the war in Ukraine before addressing some of the challenges. These options, together with their associated strengths and weaknesses, are expanded in more detail in this working paper.²⁷⁴

Options for Reparations

In light of the possible legal bases for reparations outlined above and past practices, four potential options for reparations present themselves:

1. A United Nations Claims Commission for Ukraine
2. A domestic reparation program—the Ukrainian National Reparation Directorate
3. A Ukraine–Russia Mixed Arbitration Commission

4. An Independent Investigative Mechanism, Registry, and Trust Fund for Ukraine with the Ukrainian National Reparation Directorate

UN Claims Commission for Ukraine

A United Nations established mechanism could receive claims and distribute funds from frozen and confiscated assets for the benefit of those affected by the war in Ukraine. This mechanism would mirror to some extent the UNCC related to Iraq's invasion of Kuwait. It would allow individuals, corporations, and other legal entities to bring claims for the harm they have suffered, including violations of personal integrity, investment losses, and property damage.

However, a UN claims commission for Ukraine would need to be established by the UN Security Council, where Russia has a veto power. Given the current political climate and ongoing conflict, it is unlikely to obtain sufficient backing.

Moreover, unlike the UNCC, a claims commission would face difficulties in securing funding from frozen assets or from the proceeds of levies imposed on Russian oil and gas imports. This is due to the need for either UN Security Council authorization or a bilateral agreement between countries using sanctions imposed on frozen assets to transfer the funds to such a commission.

²⁷² Christian Marxsen, Anne Peters et al. *Reparations for Victims of Armed Conflict: Impulses from the Max Planck Trialogues*, SSRN MAX PLANCK INST. FOR COMPAR. PUB. L. AND INT'L L. (MPIL), Sept. 10, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239462.

²⁷³ *Georgia v. Russia*, App. No. 13255/07 (Jan. 31, 2019), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-189019%22%5D%7D>.

²⁷⁴ L. Moffett, *Reparations Options for the War in Ukraine*, QUEEN'S UNIV. BELFAST (2022), https://pureadmin.qub.ac.uk/ws/portalfiles/portal/382764025/Reparation_Options_for_the_War_in_Ukraine_2_5_2.pdf.

Ukrainian National Reparation Directorate

A second option is a domestic reparation program to deliver a range of reparation measures to victims. This would be made up of three parts: a founding legal basis, an administrative body with a registry, and an inter-ministry coordination body.

The body would require a presidential decree or legislation to give it legal authority to draw down funds to pay for staff, services, and other benefits to victims. The administrative body would likely be a directorate with organizational responsibility for the claims process (applications, verification, assessment, and implementation), and act as a registry to catalogue victims' applications and supporting evidence against other corroborating data held in government and public records. The third element, an inter-ministry coordination body, would act as a monitoring body and also facilitate data access and coordinate the implementation of certain forms of reparations, such as medical rehabilitation and housing.

The national reparations directorate would aim to award victims individual and collective reparations. These would consist of monetary awards, along with a range of services and symbolic measures to comprehensively (as far as possible) remedy their harm. Such collective measures would complement any individual compensation lump sum or pension paid to victims, so as to maximize its benefits through the delivery of specialist services that victims need, such as housing, healthcare, and the recovery of remains. The directorate would

face two main challenges: funding and the continued occupation of Ukrainian territories.

Given the scale of violations, it is likely that reparations would cost tens of billions of dollars and would need to be carried out over the coming decades, especially if the war is protracted. In addition, a directorate would not have the capacity or funding to address investor and company losses. These would need to rely instead upon investor-State dispute settlement processes.

Ukraine-Russia Mixed Arbitration Commission

A third option would be the establishment of an arbitration body with the consent of both parties to settle claims arising from the conflict. Such an adjudication body could be created through a bilateral agreement between Ukraine and Russia, with provisions on the nature, scope, procedure, adjudication, and enforcement of claims.

There is a range of practice relating to postwar adjudication of outstanding claims, such as after the First World War and with the Eritrea-Ethiopia Claims Commission (EECC). The Permanent Court of Arbitration (PCA) could be involved in the arbitration of claims relating to the Ukraine conflict, especially where Russia is unwilling to appoint arbitrators or accept Ukraine's nominations. However, there are dangers of non-enforcement of any awards that are determined, leaving affected victims and other claimants no better off. This is apparent with current outstanding claims before the PCA between investors and Russia over the occupation of Crimea.²⁷⁵

²⁷⁵ Everest Estate LLC et al. v. The Russian Federation, Case No. 2015-36, PCA Case Repository, <https://pca-cpa.org/en/cases/133/>.

Independent Investigative Mechanism, Registry, and Trust Fund for Ukraine

A fourth option would be to establish a hybrid mechanism to coordinate international cooperation with the delivery of reparations through a domestic program. With the UN Security Council unlikely to establish a claims commission, the UN General Assembly could establish an independent mechanism to help document violations to support any domestic claims process, with an external registry to collate victims' claims.

This hybrid approach, involving an international mechanism to support the collection and collation of evidence of violations, would complement a national reparation program in Ukraine. It would also assist in funding reparations by acting as a repository for confiscated assets, through agreements with relevant countries. This would likely require a bilateral agreement between such countries and the mechanism, as well as with Ukraine. The draft UN General Assembly resolution proposes an international register of damages, but a more specific body that complements domestic efforts would be more effective.

In all, a domestic reparation program with some international cooperation to assist with evidence collection and collation, along with liquidation of assets to provide funding, remains the most viable option given the ongoing hostilities. There is some recent guidance on how to implement such a

program.²⁷⁶ There are a number of challenges, however, that will impact upon any chosen reparation mechanism.

Other Challenges

Any reparation program or claims body will face difficulties concerning eligibility, evidence, and funding. In terms of eligibility, reparation programs often delimit the scope of a victim population to maximize the resources available to those who need them the most. The war in Ukraine has caused millions of people to flee their homes, with over 7 million refugees in the rest of Europe and 6.5 million people internally displaced in Ukraine. In Colombia, where more than one-fifth of the population is registered as a victim,²⁷⁷ the inclusion of such displaced persons in the reparation program has meant that it will now take decades for redress to be delivered.

A reparation program for Ukraine will also need to consider when it will accept reparations claims: from 2014 or 2022? Will it be only for victims in the territory of Ukraine or also those who had to flee Belarus and Russia? Will nationals from other countries be able to claim under the program, such as the victims of the shooting down of airline MH-17? Will the relatives of Ukrainian soldiers who are killed, or mistreated Ukrainian and Russian prisoners of war (POWs), be able to claim?²⁷⁸ Under the UNCC, coalition forces were able to claim compensation if they were mistreated

²⁷⁶ Dr. Luke Moffett, *Belfast Guidelines on Reparations in Post-Conflict Societies, Reparations, Responsibility & Victimhood in Transitional Societies*, SCHOOL OF L. QUEEN'S UNIV. BELFAST, https://reparations.qub.ac.uk/assets/uploads/QUB_BelfastGuidelines_Booklet.pdf.

²⁷⁷ *Portal de la Unidad para las Víctimas del conflicto Armando*, <https://www.unidadvictimas.gov.co/es/>.

²⁷⁸ Shane Darcy, *Accident and Design: Recognising Victims of Aggression in International Law*, 70 INT'L & COMPAR. L. Q., 103–132 (2021), <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/accident-and-design-recognising-victims-of-aggression-in-international-law/60C8B5B7B1BE92359651ABB20C2EAE1D>.

as POWs, and at the EECC both countries were awarded compensation for mistreatment of their own POWs by the other party. How will the process deal with collaborators who have suffered violations? Domestic reparation programs have some experience of dealing with such complex victims in compliance with human rights law.²⁷⁹

In Ukraine, there are already hundreds of compensation claims underway since the 2014 invasion, as well as numerous applications to the European Court of Human Rights.²⁸⁰ With mass displacement and ongoing fighting, it is incredibly difficult for victims to evidence their claims to a level required for a private claim before the courts. A mass claims program at the international or domestic level is intended to make it easier for victims to claim, through a lower evidential threshold, but it will still need access and the collation of a range of evidential sources to reduce the evidential burden on victims.

A final issue is funding. Reparations for the war in Ukraine are likely to cost tens of billions of dollars, requiring not only compensation to be paid, but also the creation of institutions to recover remains, rehouse those displaced, and restore their land rights. There is additionally a requirement for a range of specialist services, some of which for disabled victims will need to last for decades to support them for the rest of their lives.

In other contexts, the experience has been that trust funds supported by international donors are not sustainable. Instead, there is a need for a dedicated funding budget,²⁸¹ whether this is through using assets and/or a dedicated funding stream from the Ukrainian government's annual budget.

Funding of reparations requires not only covering the cost of reparations measures, but also the institutions to deliver them, as well as support to victim organizations to mobilise those affected and support their applications.²⁸²

Concluding Thoughts

Reparations are not punitive measures. They are intended to be a form of accountability, ensuring that those responsible remedy the harm they cause by their wrongdoing, which in turn upholds the law and encourages non-repetition.

At the same time, reparations perform a political function by providing a medium for wrongdoers to rehabilitate their image and standing, reintegrating them into society or the international community. For victims, reparations cannot undo the past or the continuing harm they suffer, but they can at least alleviate the consequences and recognize that they did not deserve such harm. For Ukraine, it is likely that any reparations will

²⁷⁹ Luke Moffett, *Reparations for 'Guilty Victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms*, 10 INT'L J. TRANSITIONAL JUST. 146, <https://doi.org/10.1093/ijtj/ijv030>.

²⁸⁰ *Pursuing Compensation for Properties Damaged or Destroyed as a Result of Hostilities in the Armed Conflict in Eastern Ukraine: Gaps and Opportunities*, NORWEGIAN REFUGEE COUNCIL, Mar.–Oct. 2018, https://www.nrc.no/globalassets/pdf/reports/0.2-pursuing-compensation-for-properties-damaged-or-destroyed-as-a-result-of-hostilities-in-the-armed-conflict-in-eastern-ukraine-gaps-and-opportunities/nrc-study_pursuing-compensation-for-damaged-or-destroyed-property_eng.pdf.

²⁸¹ *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, U.N. Doc. A/69/518, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/564/67/PDF/N1456467.pdf?OpenElement>.

²⁸² Dr. Luke Moffett, *Handbook on Civil Society Organisations and Donors Engagement on Reparations: Reparations, Responsibility & Victimhood in Transitional Societies*, <https://reparations.qub.ac.uk/assets/uploads/QUB-CSO-Handbook-English.pdf>.

have to be conditional on the removal of all Russian troops from its territory and other security guarantees. For Russia, it will have to contribute substantially toward a reparation bill for the consequences of its wrongdoing. Such a contribution does not necessarily have to be from sanctioned assets, but accessing such frozen funds can be a way of

leveraging compliance in paying reparations. In the end, reparations are a way to secure balance between warring parties, to settle their grievances and find a new way to move forward.



SECTION 2

Individual Responsibility

A WAR CRIMES PRIMER ON THE UKRAINE-RUSSIA CONFLICT

by Sean Watts and Hitoshi Nasu | Apr 4, 2022

More than a month into the conflict between Russia and Ukraine, allegations of war crimes have proliferated from media,²⁸³ advocacy groups, international organizations,²⁸⁴ and even States.²⁸⁵ Meanwhile, the Prosecutor of the International Criminal Court has initiated an investigation into war crimes that have allegedly been committed in Ukraine.²⁸⁶ While the chaotic conditions of combat complicate collection and evaluation of factual evidence, it is not too soon to survey legal bases for these allegations.²⁸⁷

This post examines select war crimes recognized in international law that may be relevant to the conflict in Ukraine. We focus on offenses adopted as grave breaches under the Geneva Conventions system, since both Russia and Ukraine have ratified these treaties and many states have incorporated their war crimes provisions into their national penal codes. We offer preliminary points worth legal emphasis for each with a view toward informing States' obligations and prosecutors' charging decisions. We necessarily rely on open-source research; new facts may emerge in connection with the many investigations underway that would alter the potential war

²⁸³ Becky Morton, *Ukraine: Russia Faces War Crimes Investigation*, BBC (Mar. 2, 2022), <https://www.bbc.com/news/world-60597751>.

²⁸⁴ *European Council Conclusions on the Russian Military Aggression Against Ukraine, 24 March 2022*, Conclusions, EUROPEAN COUNCIL, Mar. 25, 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/european-council-conclusions-on-the-russian-military-aggression-against-ukraine-24-march-2022/>.

²⁸⁵ Press Statement, Anthony J. Blinken, U.S. Dep't of State, War Crimes by Russia's Forces in Ukraine (Mar. 23, 2022), <https://www.state.gov/war-crimes-by-russias-forces-in-ukraine/>.

²⁸⁶ Jess Bravin, *International Criminal Court Launches Probe into Possible War Crimes in Ukraine*, WALL ST. J. (Mar. 1, 2022), https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-01/card/international-criminal-court-launches-probe-into-possible-war-crimes-in-ukraine-QGtKrBtPUD6BJVcRbS2f?mod=article_inline.

²⁸⁷ 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/>.

crimes characterization of many of these incidents.

The Grave Breaches System

Although a foundational feature of the law of war since the late nineteenth century, the Geneva Conventions regime did not include an internal mechanism for individual criminal responsibility until a post–Second World War diplomatic conference adopted the four Geneva Conventions in 1949. It was always clear that violations of the various iterations of the Conventions were wrongful acts on the part of States. But their status as individual crimes was not. As a direct response to this gap, the 1949 Conventions introduced the notion of “grave breaches” as a basis for enforcement against individuals.²⁸⁸

Although the Conventions comprise well over 400 articles that regulate armed conflict, only a small fraction of those provisions amount to grave breaches when violated. The same holds true for Additional Protocol I (AP I) of 1977, which supplements the Conventions with respect to international armed conflict. AP I—which both Ukraine and Russia have ratified—incorporates the grave breaches system, identifying additional violations for individual criminal enforcement.²⁸⁹

Grave breaches activate important legal obligations for States Parties to the Conventions and AP I. All Parties to those instruments, whether belligerent Parties or neutral States to the conflict, are obliged to enact criminal sanctions for grave breaches. They must also search for and either bring before their courts or extradite persons responsible for them.²⁹⁰

Because the situation in Ukraine is an international armed conflict to which the Conventions and AP I clearly apply, all States, by virtue of universal ratification, owe substantial enforcement obligations with respect to grave breaches of the 1949 Conventions in that conflict. Meanwhile, the 174 States Parties to AP I must carry out the same obligations with respect to grave breaches of AP I.²⁹¹

The Offenses Recognized by the 1949 Conventions

As with the overwhelming majority of the 1949 Conventions, the grave breaches of the Wounded and Sick²⁹² (also at Sea²⁹³), Prisoner of War,²⁹⁴ and Civilian Conventions²⁹⁵ focus on offenses that take place when a victim is in the hands of a party to the conflict. Each grave breach thus assumes exercise of a

²⁸⁸ ICRC, *Geneva Conventions of 1949, Additional Protocols and Their Commentaries*, INTERNATIONAL HUMANITARIAN LAW DATABASES, <https://ihl-databases.icrc.org/en/ihl-treaties/geneva-conventions-1949additional-protocols-and-their-commentaries>.

²⁸⁹ AP I, *supra* note 167, art. 85.

²⁹⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; GC III, *supra* note 176, art. 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

²⁹¹ AP I, States Signatories.

²⁹² GC I, *supra* note 290.

²⁹³ GC II, *supra* note 290.

²⁹⁴ GC III, *supra* note 176.

²⁹⁵ GC IV, *supra* note 290.

degree of control over the victim. Further, the Geneva grave breaches regime applies only to “persons or property protected by the . . . Convention[s].” As such, only offenses against victims protected by the respective convention (wounded or sick combatants, shipwrecked, prisoners of war, and protected persons) amount to grave breaches. The circumstances of each victim must also meet personal conditions of application (*ratione personae*) outlined by the respective Convention to prove a grave breach.²⁹⁶ Civilians of Ukrainian nationality in the hands of Russian forces qualify as protected for purposes of any grave breach of the Fourth Geneva Convention on Civilians.

Wilful Killing, Torture, or Inhuman Treatment

As an example of only one of many emerging reports charging custodial abuse, it is alleged that in early March, Russian forces abducted a Ukrainian journalist²⁹⁷ working for a French radio station and subjected him to electric shocks, beatings with an iron bar, and mock execution over the course of nine days.²⁹⁸ And more horrific images have been emerging as

Russian forces retreated from Kyiv regions, showing evidence of summary execution and cruel violence.²⁹⁹

The Fourth Convention enumerates both torture and inhuman treatment of such persons as a grave breach.³⁰⁰ Other international instruments define torture;³⁰¹ however, for purposes of the Fourth Convention, it has been described as “more than mere assault.”³⁰² The U.S. Department of Defense *Law of War Manual* identifies torture as infliction of either physical or mental “severe pain or suffering . . . or the threat of imminent death.”³⁰³ A widely accepted, though perhaps now dated, analysis indicates torture for purposes of a grave breach involves “infliction of suffering . . . to obtain . . . confessions or information.”³⁰⁴ A more current understanding is likely not limited to these specific motives. Instead, punishment, intimidation, discrimination, or coercion are also sufficient motives.³⁰⁵ Absent the listed motives, severe physical or mental pain and suffering may amount to “inhuman treatment,” also a grave breach when committed against a protected person.

²⁹⁶ GC I, *supra* note 290, art. 13; GC II, *supra* note 290, art. 13; GC III, *supra* note 176, art. 4; GC IV, *supra* note 290, art. 4.

²⁹⁷ Haley Ott, *Journalist Reportedly Kidnapped and Tortured by Russian Soldiers in Ukraine*, CBS News, Mar. 22, 2022, <https://www.cbsnews.com/news/ukraine-journalist-reportedly-kidnapped-tortured-by-russia-soldiers-rsf-says/>.

²⁹⁸ *Id.*

²⁹⁹ *Ukraine: Apparent War Crimes in Russia-Controlled Areas*, HUMAN RIGHTS WATCH, Apr. 3, 2022, <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>.

³⁰⁰ GC IV, *supra* note 290, art. 147.

³⁰¹ G.A. Res. 2200A (XII), International Covenant on Civil and Political Rights, Resolution (Dec. 16, 1966), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>; G.A. Res. 39/64, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (Dec. 10, 1984), <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>.

³⁰² COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 598 (Jean S. Pictet ed., 1958) [hereinafter GC IV Commentary of 1958].

³⁰³ U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL § 8.2.4, n. 38 (2016) [hereinafter 2016 DoD LAW OF WAR MANUAL].

³⁰⁴ GC IV Commentary of 1958, *supra* note 302, at 598.

³⁰⁵ International Criminal Court, Elements of Crimes, art. 8(2)(a)(ii) (2013) [hereinafter ICC Elements of Crimes].

Unlawful Confinement of a Protected Person Civilian

On 11 March, media reports claimed that Russian forces had abducted the mayor of the city of Mariupol.³⁰⁶ Similar abductions of government officials were subsequently reported in Dniprorudne.³⁰⁷

Historically, invading forces have resorted to arbitrary and cruel confinement, particularly in situations of occupation, to harass, threaten, and subdue local populations.³⁰⁸ While the grave breach of unlawful confinement clearly seeks to repress such abuse, the Convention also acknowledges belligerents' authority to intern.³⁰⁹ When other measures of control are inadequate, belligerents may intern or assign civilians to residences if absolutely necessary for security reasons. A highly influential commentary by Jean Pictet observes, "The illegal nature of confinement would therefore be very difficult to prove in view of the extensive powers granted in this matter to States."³¹⁰

Internment should not, however, be equated with incarceration or penal confinement. The

Convention prescribes an elaborate regime of protections and conditions for internments that reflect minimal measures of control rather than punishment. An entirely arbitrary resort to conditions that amount to incarceration of protected persons would amount to a grave breach.

Unlawful Deportation or Transfer

Beyond the refugee and displacement crisis the conflict has provoked, reports have emerged of deportations of Ukrainian citizens to Russian territory.³¹¹ A report alleges that Russian forces deported 4,000–5,000 Mariupol residents across the Russia-Ukraine border.³¹² Meanwhile, the alleged removal of 2,389 Ukrainian children from Donetsk and Luhansk to Russia has provoked particular outrage.³¹³

The grave breach of deportation refers chiefly to violations of Article 49 of the Fourth Convention.³¹⁴ Deportation generally refers to removal, transfer, or resettlement of protected persons from territory. As a post by Professor Michael N. Schmitt makes clear, the deportation prohibition of Article 49 applies

³⁰⁶ Marc Santora & Neil MacFarquhar, *The Russians Might Have Expected a Warm Welcome. Instead the Mayor Labeled Them 'Occupiers.'* N.Y. TIMES (Mar. 12, 2022), <https://www.nytimes.com/2022/03/12/world/europe/ukraine-mayor-kidnapped-ivan-fyodorov.html>.

³⁰⁷ Katie Balevic, *Russian Forces Have Abducted a Second Ukrainian Mayor, This One from the Town of Dniprorudne, Ukrainian Foreign Affairs Minister Says*, BUSINESS INSIDER NEDERLAND (Mar. 13, 2022), <https://www.businessinsider.nl/russian-forces-have-abducted-a-second-ukrainian-mayor-this-one-from-the-town-of-dniprorudne-ukrainian-foreign-affairs-minister-says/>.

³⁰⁸ Katherine Fortin, *Abducting Dissent: Kidnapping Public Officials in Occupied Ukraine*, ARTICLES OF WAR (Mar. 22, 2022), <https://lieber.westpoint.edu/kidnapping-public-officials-occupied-ukraine/>.

³⁰⁹ GC IV, *supra* note 290, arts. 27(4) & 42.

³¹⁰ GC IV Commentary of 1958, *supra* note 302, at 599.

³¹¹ Robert Wall, *Ukraine Refugee Figures Reach New High*, WALL ST. J. (Mar. 26, 2022, last updated Mar. 28, 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-25/card/ukraine-refugee-figures-reach-new-high-ZCMS998MdzufgZpQmKxC>.

³¹² *Mariupol Says Russia Forcefully Deported Thousands of People*, REUTERS (Mar. 19, 2022), <https://www.reuters.com/world/europe/ukraines-mariupol-says-russia-forcefully-deported-thousands-its-people-2022-03-20/>.

³¹³ *Ukraine War: Kyiv Claims Moscow Forcefully Deporting Thousands of Ukrainian Children to Russia*, SKY NEWS (Mar. 22, 2022), <https://news.sky.com/story/ukraine-war-kyiv-claims-moscow-forcefully-deporting-thousands-of-ukrainian-children-to-russia-12572666>.

³¹⁴ GC IV, *supra* note 290, art. 49.

only to occupied territory.³¹⁵ Moreover, to constitute a grave breach, deportation must be involuntary or coercive. Coercion need not be particularly severe or involve physical force. Threats, orders, or psychological pressure may be sufficiently coercive to constitute a breach of the treaty. Finally, it is not necessary to prove that deportation is permanent; even temporary displacement or resettlement that does not amount to unavoidable evacuations for imperative security reasons may amount to a grave breach.

Taking of Hostages

It has been alleged that on March 15, Russian forces seized the Mariupol Regional Intensive Care Hospital, holding its patients hostage. Article 34 of the Fourth Convention (and Article 75 of AP I) prohibits hostage taking which, as a prior post explains, involves “a means of intimidating the population in order to weaken its spirit of resistance and to prevent breaches of the law and sabotage in order to secure the security of the Detaining Power.”³¹⁶ To qualify as a grave breach, hostage taking requires more than mere deprivation of liberty. The hostage taker must threaten further or prolonged detention or harm³¹⁷ and, usually in the form of some communication to officials or the population,

compel them to act or refrain from acting as an explicit or implicit condition for the safety or the release of hostages.³¹⁸

Additional Protocol I

Additional Protocol I of 1977 supplemented the respect and protect provisions of the 1949 Conventions in several respects. But its most significant accomplishment was to add limits on the conduct of hostilities and targeting operations to the Conventions’ catalog of protections. The grave breaches of AP I thus focus on crimes related to attacks during combat operations. Most important for present purposes are the prohibitions against deliberately targeting civilians or civilian objects and against indiscriminate attacks.

*“[M]aking the civilian population or individual civilians the object of attack.”*³¹⁹

Many war crimes allegations have concentrated on indiscriminate attacks, showing footage of death, injured civilians, and damaged civilian buildings.³²⁰ Allegations of indiscriminate attack have been made, for example, against the air strikes on the preschool in Okhtyrka,³²¹ the small public square in Chernihiv,³²² the residential area

³¹⁵ 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/>.

³¹⁶ 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/> (quoting Pictet’s *Commentary* of 1958).

³¹⁷ GC IV Commentary of 1958, *supra* note 302, at 600.

³¹⁸ ICC Elements of Crimes, *supra* note 305, art. 8(2)(a)(viii).

³¹⁹ AP I, *supra* note 167, art. 85(3)(a).

³²⁰ *Ukraine*, BELLINGCAT, <https://www.bellingcat.com/tag/ukraine/>.

³²¹ *Ukraine: Cluster Munitions Kill Child and Two Other Civilians Taking Shelter at a Preschool*, 2022 AMNESTY INT’L, <https://www.amnesty.org/en/latest/news/2022/02/ukraine-cluster-munitions-kill-child-and-two-other-civilians-taking-shelter-at-a-preschool/>.

³²² *Ukraine: Russian ‘Dumb Bomb’ Air Strike Killed Civilians in Chernihiv—New Investigation and Testimony*, AMNESTY INT’L, Mar. 9, 2022, <https://www.amnesty.org/en/latest/news/2022/03/ukraine-russian-dumb-bomb-air-strike-kills-civilians-in-cherernihiv-new-investigation-and-testimony/>.

in Sumy,³²³ and the maternity and children's hospital in the city of Mariupol.³²⁴ Abhorrent as these events might be, civilian casualties alone do not prove deliberate attacks against civilians. As Charles Garraway discussed, result or purely effect-based fact-finding is a methodologically flawed approach to proving the war crime of attacks on civilians.³²⁵

For war crimes on this ground, it must be established that the intended target was not a legitimate military objective. The presence of civilians alone is not dispositive to this determination. In fact, civilians may become lawful targets when they take direct part in hostilities.³²⁶ The mere fact that civilians are fired upon as they flee from the exchange of fires does not necessarily prove that they were the object of the unlawful attack.³²⁷ Civilian casualties resulting from human errors do not qualify either. Instead, willful targeting of protected civilians, as the underlying intent of the attack, is the determining factor of this grave breach of AP I.

Assuming a legitimate military target, one may also take the position that a direct attack against civilians can be inferred from the indiscriminate character of the weapon

used.³²⁸ The case for an indiscriminate attack depends on the accuracy of the weapon used and the environment in which it was used. For example, early in the conflict, it was reported that 9M79 Tochka ballistic missiles³²⁹ were deployed for a strike in the vicinity of a hospital building in Vuhledar, killing four civilians and wounding ten more.³³⁰ The 9M79 Tochka (also known as SS-21 Scarab) is a Russian-made, guided short-range ballistic missile and is reported to be capable of hitting a target with less than 95m circular error probability (meaning that it has a 50 per cent chance of falling within a radius of 95m around its average impact point).³³¹ As with any other guided-weapons, whether use of this particular missile in Vuhledar would amount to an indiscriminate attack depends on the proximity of the intended target to civilian buildings, including the hospital.

³²³ *War Crimes of the Russian Federation: As a Result of an Air Strike on the Residential Sector Killed 21 Civilians, Including 2 Children*, UKRAINE CRISIS MEDIA CENTER (Aug. 3, 2022), <https://uacrisis.org/en/voyenni-zlochyny-rf16>.

³²⁴ *Ukraine War: Three Dead as Maternity Hospital Hit by Russian Air Strike*, BBC (Mar. 10, 2022), <https://www.bbc.com/news/world-europe-60675599>.

³²⁵ Charles Garraway, *Fact-Finding in Ukraine: Can Anything Be Learned from Yemen?*, ARTICLES OF WAR (Mar. 12, 2022), <https://lieber.westpoint.edu/fact-finding-ukraine-anything-learned-yemen/>.

³²⁶ Sean Watts, *Hays Parks and Direct Participation in Hostilities*, ARTICLES OF WAR (Oct. 21, 2021), <https://lieber.westpoint.edu/hays-parks-direct-participation-hostilities/>.

³²⁷ Ukraine: Russian Assault Kills Fleeing Civilians, HUMAN RIGHTS WATCH (Mar. 8, 2022), <https://www.hrw.org/news/2022/03/08/ukraine-russian-assault-kills-fleeing-civilians>.

³²⁸ *Prosecutor v. Galić*, IT-98-29-A, Judgement, ¶ 132 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006).

³²⁹ *TOCHKA-U SS-21 SCARAB 9M79*, GLOBAL DEF. NEWS (updated Jan. 8, 2026), <https://www.armyrecognition.com/military-products/army/missiles/ss-21-scarab-russia-UK>.

³³⁰ *Russian Military Commits Indiscriminate Attacks During the Invasion of Ukraine*, Amnesty Int'l (Feb. 25, 2022), <https://www.amnesty.org/en/latest/news/2022/02/russian-military-commits-indiscriminate-attacks-during-the-invasion-of-ukraine/>.

³³¹ Army Recognition, *supra* note 329.

*“[L]aunching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.”*³³²

An attack, even when directed against legitimate military targets, may nonetheless constitute a war crime if it was known with certainty that it would cause excessive civilian harm relative to the military advantage anticipated.³³³ One must not equate this standard with the extensiveness of damage caused. It is not necessarily a war crime or grave breach to cause extensive death or injury to civilians and destruction or damage to buildings if the anticipated military advantage is significant enough. Civilian harm may not be considered excessive, for example, if a high value military objective (such as weapons and radar stations) located in the vicinity was the ultimate target. Rather, it has to be established that the attack was expected to cause disproportionate harm to civilian lives and civilian objects weighed against the military advantage anticipated from it.

Allegations have been made that war crimes were committed due to the use of blast weapons, such as cluster munitions³³⁴ and thermobaric weapons.³³⁵ As Bill Boothby and Matt Montazzoli have discussed previously, it is not necessarily unlawful to use cluster munitions and thermobaric weapons.³³⁶ The extensive damage that may be caused by these systems does not necessarily render the attack disproportionate. To establish a war crime on this ground, an inquiry must be made into the military advantage Russian forces anticipated to gain from the attack, their estimate of incidental civilian harm that would have resulted, and whether feasible precautions were exercised to minimize or reduce collateral damage.

*“[L]aunching 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.”*³³⁷

War crimes allegations have been made regarding attacks on or near nuclear power plants and related facilities.³³⁸ On March 3, for example, Russia conducted artillery strikes on the Zaporizhzhia Nuclear Power

³³² AP I, *supra* note 167, art. 85(3)(b).

³³³ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977, para. 3479 (Yves Sandoz et al. eds., 1987) [hereinafter Additional Protocols Commentary].

³³⁴ *Ukraine Cluster Munitions Launched into Kharkiv Neighborhoods*, HUMAN RIGHTS WATCH (Mar. 4, 2022), <https://www.hrw.org/news/2022/03/04/ukraine-cluster-munitions-launched-kharkiv-neighborhoods>.

³³⁵ Patricia Zengerle, *Ukraine, Rights Group Says Russia Used Cluster & Vacuum Bombs*, REUTERS (Mar. 1, 2022), <https://www.reuters.com/world/europe/ukraines-ambassador-us-says-russia-used-vacuum-bomb-monday-2022-02-28/>.

³³⁶ William H. Boothby, *Cluster Munitions and the Ukraine War*, ARTICLES OF WAR (Feb. 28, 2022), <https://lieber.westpoint.edu/cluster-munitions-ukraine-war/>; Matt Montazzoli, *Are Thermobaric Weapons Lawful?*, ARTICLES OF WAR (Mar. 23, 2022), <https://lieber.westpoint.edu/are-thermobaric-weapons-lawful/>.

³³⁷ AP I, *supra* note 167, art. 85(3)(c).

³³⁸ *US Embassy in Ukraine calls nuclear power plant attack ‘war crime’*, REUTERS (Mar. 5, 2022), <https://www.reuters.com/world/us-embassy-ukraine-calls-nuclear-power-plant-attack-war-crime-2022-03-04/>.

Plant, hitting various buildings, including the first power unit.³³⁹ As the U.S. State Department announced, the deliberate targeting of civilian objects, such as nuclear power plants, may amount to a war crime in certain circumstances under the Additional Protocol I grave breaches regime.³⁴⁰

However, the special protection regime under Article 56 of AP I, addressed by Professor Schmitt with respect to dams, does not prohibit targeting nuclear power plants entirely, where legitimate military objectives are located at or in the vicinity of these installations.³⁴¹ As Tom Dannenbaum correctly assessed, even if these attacks were to be found unlawful, it is difficult to establish that individuals who engaged in this operation acted in the knowledge that the attack would cause excessive civilian loss, injury, or damage, especially given that there appears to have been relatively little collateral damage.³⁴²

*“[M]aking a person the object of attack in the knowledge that he is hors de combat.”*³⁴³

A report of Ukrainian forces shooting Russian prisoners of war implicates the grave breach of attacking one who is unable to continue fighting due to injury or sickness or has expressed the clear intent to surrender.³⁴⁴ Additionally, a warning issued by the Ukrainian Special Operations Forces that it will no longer capture Russian artillerymen appears to have generated confusion regarding the scope of this protection.³⁴⁵

There is no obligation to capture enemy combatants per se. Assertions that “no more death, injury, or destruction be caused than is actually necessary for the accomplishment of a legitimate military purpose” (made originally in the controversial International Committee of the Red Cross *Interpretive Guidance on the Notion of Direct Participation in Hostilities* and later recalibrated as an issue of *hors de combat* by Ryan Goodman³⁴⁶) have been subject to extensive debate,³⁴⁷ including critique by the late Hays Parks.³⁴⁸

³³⁹ *Security Council Debates Russian Strike on Ukraine Nuclear Power Plant*, U.N. GLOBAL NEWS (Mar. 4, 2022), <https://news.un.org/en/story/2022/03/1113302>.

³⁴⁰ Alia Slisco, *Feds Assessing Whether Russian Attack on Nuke Plant Was a War Crime*, NEWSWEEK (Mar. 4, 2022), <https://www.newsweek.com/feds-assessing-whether-russian-attack-nuke-plant-was-war-crime-1685168>.

³⁴¹ Michael N. Schmitt, *Attacking Dams—Part II: The 1977 Additional Protocols*, ARTICLES OF WAR (Feb. 2, 2022), <https://lieber.westpoint.edu/attacking-dams-part-ii-1977-additional-protocols/>.

³⁴² 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/>.

³⁴³ AP I, *supra* note 167, art. 85(3)(e).

³⁴⁴ *Does Video Show Russian Prisoners Being Shot?*, BBC NEWS (Mar. 30, 2022), <https://www.bbc.com/news/60907259>.

³⁴⁵ Saeed Bagheri, *Treatment of Persons Hors de Combat in the Russo-Ukrainian War*, EJIL: TALK! (Mar. 7, 2022), <https://www.ejiltalk.org/treatment-of-persons-hors-de-combat-in-the-russo-ukrainian-war/>.

³⁴⁶ Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819-853 (Aug. 2013), <https://doi.org/10.1093/ejil/chr048>.

³⁴⁷ W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 INT'L L. & POL. 769 (2010).

³⁴⁸ Sean Watts, *Hays Parks and Direct Participation in Hostilities*, ARTICLES OF WAR (Oct. 7, 2022), <https://lieber.westpoint.edu/hays-parks-direct-participation-hostilities/>.

A grave breach in this respect is committed only when a person is engaged in a deliberate attack against the adversary, causing “death or serious injury to body or health,” and knowing the target is unable to defend themselves due to injury or sickness or despite a clear expression of genuine and unconditional surrender where it is feasible to accept their surrender.³⁴⁹ Additionally, violence directed against prisoners of war or other persons *hors de combat* may amount to grave breaches under the respective 1949 Conventions (see above).

*“[T]he perfidious use of a distinctive emblem.”*³⁵⁰

We are aware of no reporting of misusing protective emblems, such as the Red Cross and Red Crescent, for the purpose of killing, injuring, or capturing an adversary. However, it is important to reiterate that it is not a war crime to fight in civilian clothing or enemy uniform under AP I. As discussed in a previous post by Chris Koschnitzky and Professor Schmitt³⁵¹ (see also the post by Ken Watkin³⁵²), however, it may well be unlawful to engage in attack while wearing civilian clothing or enemy uniform, in the sense of this being a breach of the treaty. As such, those who are engaging in such conduct may well be denied prisoner-of-war status and the

various privileges that come with that status. This conduct alone does not constitute a grave breach of the treaties. All that said, the drafters of the Rome Statute of the International Criminal Court at Article 8(2)(b)(vii) made it a war crime to make “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” so long as this conduct results in death or serious personal injury.

*“[M]aking the clearly-recognized historic monuments, works of art or places of worship constituting the cultural or spiritual heritage the object of attack, causing extensive destruction.”*³⁵³

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has reported and condemned attacks that have caused damage to cultural heritage sites in the cities of Kharkiv and Chernihiv.³⁵⁴ On March 16, a missile strike hit the Donetsk Regional Drama Theater, where 1,000–1,200 civilians were sheltering in the besieged city of Mariupol.³⁵⁵ Apart from whether these attacks amounted to war crimes due to indiscriminate attacks or attacks with disproportionate effects on civilians, the

³⁴⁹ Matt Montazzoli, *Down Is Not Always Out: Hors de Combat in the Close Fight*, ARTICLES OF WAR (July 8, 2022), <https://lieber.westpoint.edu/down-not-always-out-hors-de-combat-close-fight/>.

³⁵⁰ AP I, *supra* note 167, art. 85(4)(f).

³⁵¹ 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/>.

³⁵² Ken Watkin, *Special Forces, Unprivileged Belligerency, and the War in the Shadows*, ARTICLES OF WAR (Mar. 8, 2022), <https://lieber.westpoint.edu/special-forces-unprivileged-belligerency-war-shadows/>.

³⁵³ AP I, *supra* note 167, art. 85(4)(d).

³⁵⁴ Catherine Hickley, *Unesco ‘Gravely Concerned’ About Damage to Ukrainian Cultural Heritage*, ART NEWSPAPER (Mar. 4, 2022), <https://www.theartnewspaper.com/2022/03/04/unesco-gravely-concerned-about-damage-to-ukrainian-cultural-heritage>.

³⁵⁵ Hugo Bachega, *Russia Attacks Theatre Sheltering Civilians, Ukraine Says*, BBC NEWS (Mar. 17, 2022), <https://www.bbc.com/news/world-europe-60772331>.

cultural or spiritual significance of those buildings itself may cause those responsible for ordering or carrying out these operations to face war crimes allegations.

To establish war crimes by virtue of the cultural or spiritual significance of the target, it must be ascertained that the object was clearly recognized as the cultural or spiritual heritage of the people, ideally with the display of the distinctive blue shield emblem.³⁵⁶ Second, the attack must be directed against it and cause extensive destruction. Damage caused indirectly, for instance as a result of destroying a legitimate military objective nearby, does not meet the requirement. Third, this grave breach of AP I cannot be established if there is evidence of adversary use of the cultural property in support of their military effort or if the cultural object is located in the immediate vicinity of military objectives.

Conclusion

Despite its lofty aims, the grave breaches system has in many respects proved a disappointment. Few States have met their obligations either to fully legislate sanctions or to exercise jurisdiction as envisioned by the Conventions. The United States, for example, has not fully implemented these obligations, rendering its War Crimes Act a “dead letter” and significantly limiting its relevance to the conflict in Ukraine.³⁵⁷ Meanwhile, recent prosecutions of grave breaches have been

plagued by contentious legal questions. From the mid-1990s until very recently, the International Criminal Tribunal for former Yugoslavia wrestled endlessly with challenges to the applicability of the grave breaches regime to the various branches of the Balkan conflicts. And the complex combinations of nationalities and ethnicities involved in those conflicts stretched the language, if not the logic, of the notion of a protected person under this regime beyond the original intent of the Conventions.

But the abundantly clear classification of the conflict in Ukraine and the fact that, as envisioned by the Conventions, so many putative victims of alleged grave breaches in Ukraine meet the Conventions’ personal criteria generally present a far easier case for the application of the grave breaches system.

However, the daunting task of collecting and preserving the evidence required to prove grave breaches to the high standard required for criminal conviction remains. While the Conventions’ grave breaches often set demanding elements of proof, particularly with respect to the accused’s knowledge or mental state in the chaotic and uncertain conditions of combat, the grave breaches system offers some prospect for justice, particularly if the community of States resolves to implement it as so hopefully envisioned in 1949.



³⁵⁶ *Background to Protection of Cultural Property*, U.S. COMM. BLUE SHIELD, <https://uscbs.org/background/>.

³⁵⁷ Beth Van Schaack, *Animating the U.S. War Crimes Act*, 97 INT’L L. STUD. 1541 (2021), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2989&context=ils>.

RESULTS OF A FIRST ENQUIRY INTO VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN UKRAINE

by Marco Sassòli | Apr 14, 2022

On 3 March 2022, the Moscow Mechanism of the human dimension of the Organization for Security and Co-operation in Europe (OSCE) was invoked by Ukraine supported by forty-five participating States. This mechanism mandated a mission of experts, undertaken by Professor Wolfgang Benedek, Professor Veronika Bílková, and the undersigned, to enquire into violations of international human rights law (IHRL) and international humanitarian law (IHL), as well as to establish facts and circumstances of possible cases of war crimes and crimes against humanity.

On 13 April 2022, the Mission presented its report to the OSCE Permanent Council (the Report).³⁵⁸ This post presents my personal account, as of one of the Mission's experts, on the main findings of the Mission on International Humanitarian Law.

Preliminary Remarks

Timeframe of the Report

The events covered by the Report took place from 24 February to 1 April 2022. At the time of the completion of the Report, the conflict was still ongoing, and new developments continued to unfold dynamically. For example, Russian troops withdrew from the areas surrounding Kyiv, in particular, from

Bucha, Irpin, and Borodyanka. In those towns allegations and images of horrifying scenes of summary executions of large numbers of civilians, as well as allegations of widespread sexual violence, were uncovered. The Report, however, does not address the possible IHL violations that occurred in these areas since the evidence was uncovered after the Report's formal completion.

Practical Difficulties Faced by the Mission

In collecting the information for and drafting the Report, the Mission faced several practical difficulties and obstacles. First of all, the time allotted to preparing the Report was limited to three weeks, during which time active hostilities were occurring throughout the whole territory of Ukraine and new reports of violations were published around the clock.

Second, the Mission could not travel to Ukrainian territory since the OSCE advised the experts not to visit Ukraine. Safe access to the places of potential violations could not be provided, and as the OSCE no longer had an expatriate field presence, it could not arrange meetings in Ukraine. A "field visit" would therefore have largely been symbolic.

Third, the Mission wished to receive firsthand accounts of both parties' positions. However, the Russian Federation informed the Mission

³⁵⁸ WOLFGANG BENEDEK, VERONIKA BÍLKOVÁ & MARCO SASSÒLI, REPORT ON VIOLATIONS OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, WAR CRIMES AND CRIMES AGAINST HUMANITY, ODIHR.GAL/26/22/Rev.1 (Apr. 13, 2022), <https://www.osce.org/files/f/documents/t/a/515868.pdf>.

that it considered the Moscow Mechanism largely outdated and redundant and declined to nominate a liaison person. This made it impossible for the Mission to take account of the Russian position, except as stated by officials in open-source publications. Ukraine's ability to fully cooperate was also limited because of the ongoing hostilities on its territory. I particularly regretted not having any contact with the Ukrainian military, which would have been crucial to evaluating certain violations of IHL on the conduct of hostilities.

Finally, the Mission was confronted with a large amount of disinformation and propaganda disseminated through various channels in relation to the conflict. The Mission therefore made great effort to gather and compare information from a variety of available sources and carefully evaluated the quality of sources.

Distinction between Jus ad Bellum and Jus in Bello

To correctly understand current public discussions on IHL in Ukraine and the findings of the Report, a remark is necessary on the constant mixing up of the terms *jus ad bellum* (the law on when war may be conducted, prohibiting, *inter alia*, aggression) and *jus in bello* (the law on how war must be conducted). IHL is part of *jus in bello*. It has to be kept completely separate and distinct from *jus ad bellum*.

IHL applies equally to both belligerents. It may be particularly difficult to accept this in Ukraine, where Russia is the aggressor and therefore responsible for all the human

suffering in the conflict, whether resulting from violations of IHL or even when directly caused by Ukraine; such suffering would not have occurred if Ukraine had not had to defend itself from the Russian invasion. The principle of equal application nevertheless must be preserved. Ensuring the effectiveness of IHL to protect war victims requires that both sides comply with its rules equally.

Findings of the Mission on IHL Issues

The Mission's overall conclusion was that during the period under consideration, violations occurred on both the Ukrainian and Russian sides. In many instances, both sides also respected IHL and publicly expressed their commitment to comply with their obligations under IHL.

The violations committed by the Russian Federation, however, are by far larger in scale and nature. Due to the time limitation and means at the disposal of the Mission, the Mission was not able to conduct a detailed assessment of most allegations of IHL violations concerning particular incidents. Nevertheless, the Mission found clear patterns of IHL violations by Russian forces on many of the issues investigated—and some violations committed by Ukraine.

Conduct of Hostilities

Under IHL, the assessment of whether the rules regulating the conduct of hostilities were violated is based not on the results, e.g., what was *destroyed* or who was *killed* or *injured*, but on what and who was *targeted*. *Targeting*

civilians or civilian objects is a violation of IHL and a war crime.

The Mission found evidence that the victims were *targeted* in only a limited number of instances, including instances when civilians were shot at individually, outside buildings, or summarily executed when in the control of Russian forces. Beyond where violations in specific instances could be found, it is inconceivable that so many civilians would have been killed and injured, and so many civilian objects—including houses, hospitals, cultural property, schools, multistory residential buildings, administrative buildings, penitentiary institutions, police stations, water stations, and electricity systems—would have been damaged or destroyed if Russia had respected its IHL obligations in terms of distinction, proportionality, and precautions in conducting hostilities in Ukraine. This is particularly the case when destruction and deaths occurred far away from the actual fighting. Even in cases where fighting opposed confronted both parties, such as the conduct of the siege of Mariupol, we found examples of clear violations.

Use of Explosive Weapons with a Wide-Area Effect in Urban Warfare

Under IHL, even when a weapon is not per se prohibited, its use must comply with the rules on distinction, proportionality, and precautions. The Mission considered the use of explosive weapons with a wide-

area effect in the conflict and drew some conclusions. The Mission determined that even if certain targets were, hypothetically, military objectives and combatants, it is highly implausible that the undisputed use of cluster munitions, munitions with a large blast radius—such as large bombs or missiles, unguided missiles, artillery and mortars, multiple launch rocket systems (MLRS), and dumb bombs released from aircrafts—and the alleged use of incendiary weapons, white phosphorus, and thermobaric or vacuum bombs, in densely populated areas, was in each case the only feasible choice for the Russian commander, especially considering the wide choice of weaponry Russia possesses. Therefore, the Mission concluded that Russia did not take all feasible precautionary measures, as it should have under IHL.

The ICRC leads a campaign aimed at a political commitment by States not to use explosive weapons in densely populated areas unless sufficient mitigation measures are taken to limit their wide-area effects and the consequent risk of civilian harm.³⁵⁹ In 2021, Ireland circulated a “Draft Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences that can arise from the use of Explosive Weapons with Wide Area Effects in Populated Areas.”³⁶⁰ It remains controversial whether the declaration merely reflects existing law or contains, or should contain, new legal obligations. Many States remained, at least before 24 February 2022, opposed to new legal obligations. I hope that

³⁵⁹ See *Explosive Weapons: Civilians in Populated Areas Must Be Protected*, INT’L COMM. RED CROSS (Jan. 26, 2022), <https://www.icrc.org/en/document/civilians-protected-against-explosive-weapons>.

³⁶⁰ Irish Dep’t of Foreign Aff., *Draft Political Declaration on Strengthening the Protection of Civilians from Humanitarian Harm arising from the use of Explosive Weapons in Populated Areas* (Mar. 17, 2020), <https://www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/Draft-Political-Declaration-17032020.pdf>.

their current reaction to Russian practices in Ukraine evidences a change in their attitude.

The Law of Occupation

The applicability of IHL of military occupation during the invasion phase to parts of Ukrainian territory over which Russia gained control since 24 February 2022 is controversial. In the Report, the Mission applied a functional concept of occupation to the invasion phase. Under this approach, certain rules of IHL of military occupation gradually started to apply as soon as Russia obtained control over the issues regulated by those rules. Under a sliding scale of obligations that apply according to the degree of control, negative obligations to abstain apply as soon as the conduct they prohibit is materially possible (such as when the person benefiting from the prohibition falls into the hands of the invading forces), while positive obligations to provide and to guarantee would apply only at a later stage when a greater level of control is gained.

Such an approach, in contrast to the traditional “all or nothing” approach, captures the fluid and dynamic realities of modern warfare and the absence of defined frontlines. It allowed the Mission to apply IHL of military occupation to all abuses by Russian forces concerning civilians in Ukraine who were, even if only temporarily, in the power of Russian forces. The Mission concluded that much of the conduct of Russian forces in the parts of Ukraine it occupied both before and after 24 February 2022, including through its proxies—the self-proclaimed “republics” of Donetsk and Luhansk—violated certain rules of IHL of military occupation.

Prisoners of War

Very limited information was available to the Mission with regard to prisoners of war (POWs) held by both parties to the conflict. The Mission was astonished by the small number of POWs acknowledged by both parties and expressed its regrets that these POWs do not yet benefit from the ICRC visits prescribed by Geneva Convention III. Some violations and problems were also identified regarding practices of Ukraine on the treatment of POWs. The Mission was particularly concerned by the fact that captured POWs were originally considered criminals and treated in ways that are incompatible with Geneva Convention III.

Arming the Civilian Population

The Ukrainian authorities called upon civilians to prepare Molotov cocktails to fight the Russian invaders, without incorporating such persons into the armed forces. Such a call was not appropriate under IHL because it made those persons lose protection against attacks without gaining combatant status. If Russian forces expected that every civilian was ready to receive them with Molotov cocktails, then other civilians and civilian residences would be put at risk of attacks.

A Few Words on Human Rights

The Mission also considered the impact of the current conflict on IHRL. While it was not able to verify all the reported incidents involving alleged violations of IHRL, it found credible evidence suggesting that such violations, including violations of fundamental human rights (right to life, prohibition against torture and other inhuman and degrading treatment

and punishment), were committed, mostly in areas under the effective control of Russia.

The Mission also concluded that the impact of the conflict on the enjoyment of human rights has gone beyond the direct violation of these rights. By causing a high level of destruction and by interfering with the provision of vital services (education, healthcare, etc.), the conflict has made it very difficult for Ukraine to effectively respect, protect, and fulfill the human rights of its inhabitants. Finally, the Mission discovered that while the conflict has affected the population of Ukraine as a whole, it has had a particularly negative effect on individuals belonging to vulnerable groups, such as women, children, older persons, and persons with disabilities.

A Few Words on War Crimes and Crimes against Humanity

Legally, violations of IHL are committed by States. In reality, they are committed by human beings. A war crime can only be found if an individual perpetrator can be determined, and only a court can find such a perpetrator guilty of a war crime. Apart from that, certain war crimes may also constitute crimes against humanity if they are committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”

The Mission was unable to determine such individual perpetrators or persons fulfilling the necessary conditions for command responsibility. Our Report contains findings on violations of IHL by Russia and Ukraine and simply mentions which violations would

constitute war crimes, if the responsible individuals can be identified.

A General Mechanism for Collecting Evidence for Criminal Accountability

In my opinion, instead of creating specific new mechanisms concerning the international armed conflict in Ukraine, existing mechanisms, such as the International Humanitarian Fact-Finding Commission (IHFFC) and the International Criminal Court (ICC), should be used. On one of the rare lacunas, there have been proposals from two conferences organized by the International Commission of Jurists and the Netherlands to strengthen international accountability mechanisms by extending and transforming existing fact-finding mechanisms. The International, Impartial and Independent Mechanism for Syria (IIIM) and the Independent Investigative Mechanism for Myanmar (IIMM) could be converted into permanent mechanisms without geographical limitations focused on collecting evidence for international and domestic criminal proceedings. Germany wants to promote this proposal in the context of the G7. This avenue deserves serious consideration.

An Unprecedented Commitment to Ensure Respect

All States, including those that are not involved in the armed conflict, must do everything reasonably within their power to prevent and bring to an end IHL violations committed by Russia and Ukraine. The Mission noted an unprecedented willingness

of States to take such measures to end Russia's violations of IHL. I can only hope that such commitment will equally exist in other armed conflicts, where the violation of *jus ad bellum* is not so blatant, but where violations

of IHL as serious as those we witnessed in Ukraine occur.



FACT-FINDING IN UKRAINE: CAN ANYTHING BE LEARNED FROM YEMEN?

by Charles Garraway | Mar 14, 2022

On 4 March 2022, the United Nations Human Rights Council voted to establish a Commission of Inquiry to investigate “all alleged violations and abuses of human rights and violations of international humanitarian law, and related crimes in the context of the aggression against Ukraine by the Russian Federation, and to establish the facts, circumstances and root causes of any such violations and abuses.”³⁶¹ This raises questions about the overlap between human rights law and the law of armed conflict/international humanitarian law. Such questions have been faced before, not least in Yemen, and it may be useful to look at that experience to see whether any lessons can be drawn from it which may be of use to the Commission of Inquiry in Ukraine.

The Yemen Fact-Finding Experience

On September 29, 2017, the Human Rights Council, after several years of discussion on the growing crisis in Yemen, decided to intervene with a fact-finding mission.³⁶² The move was fiercely resisted by some Arab States, and the compromise was to set up a “Group of Eminent Experts” (GEE), who would report directly to the High Commissioner for

Human Rights with the first report due in September 2018.

The mandate, as in Ukraine, was wide and required the Group to carry out “a comprehensive examination of all alleged violations and abuses of international human rights and other appropriate and applicable fields of international law committed by all parties to the conflict since September 2014.” In the light of the ongoing hostilities between the Saudi-led Coalition and the Houthi forces in control of Sana’a, this inevitably required an examination of the law of armed conflict and to some extent its relationship with international human rights law. This posed little real problem in relation to “Geneva Law,” that dealing with the protection of victims, as it is in many ways similar to international human rights law.³⁶³ Torture is torture, and indeed, if anything, the law of armed conflict definition is slightly wider. However, there are clear tensions between international human rights law and “Hague Law” dealing with the conduct of hostilities.³⁶⁴

This tension inevitably affected the methodology of fact-finding. Whereas under “Geneva Law” it is normal to start with the result—for example, a torture victim—and

³⁶¹ G.A. Res. 49/1, Situation of Human Rights in Ukraine Stemming from the Russian Aggression (Mar. 7, 2022), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/277/44/PDF/G2227744.pdf>.

³⁶² G.A. Res. 36/31, Resolution Adopted by the Human Rights Council on 29 September 2017, 36/31. Human Rights, Technical Assistance and Capacity-Building in Yemen, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/289/51/PDF/G1728951.pdf>.

³⁶³ *How Does Law Protect in War?*, *Law of Geneva*, ICRC, https://casebook.icrc.org/a_to_z/glossary/law-geneva.

³⁶⁴ *How Does Law Protect in War?*, *Law of the Hague*, ICRC, https://casebook.icrc.org/a_to_z/glossary/law-hague. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/252/79/PDF/G1825279.pdf?OpenElement>.

work backwards from there, that methodology does not work necessarily for “Hague Law” allegations, particularly the laws on targeting. Most fact-finding has tended to concentrate on the principle of proportionality, but therein lies a problem for the fact finder. The principle is best defined in Article 51(5) (b) of Additional Protocol I which describes as indiscriminate “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.”³⁶⁵ However, the fact that a particular object has been hit by an air strike does not tell you whether it was the intended target, and still less what might have been the anticipated military advantage or the expected civilian loss and damage from that particular strike. That is information that could only be gained from the attacking side. As Russia voted against the establishment of the Ukraine Commission of Inquiry, it is highly likely that they will not cooperate with it.

However, it is comparatively rare in fact-finding missions to receive full cooperation from both sides of a conflict, particularly where that cooperation may require opening up to public examination sensitive military information such as detailed targeting processes. In relation to Yemen, the Saudi-led Coalition was not prepared to grant the

GEE such detailed access. Some innovative thinking was therefore required to avoid falling into the trap of making assumptions without the necessary foundation of fact.

At least one previous fact-finding mission had run into difficulties when drawing conclusions from looking at only one side, namely, the United Nations Fact Finding Mission on the Gaza Conflict.³⁶⁶ That Mission sought to draw conclusions from the results of attacks, but following information subsequently released by Israel, which had refused to cooperate with the Mission, Richard Goldstone, who chaired the Mission, stated that “if I had known then what I know now, the Goldstone report would have been a very different document.”³⁶⁷

The Yemen GEE approached things from a different angle, concentrating more on Article 57 of Additional Protocol I which requires that in the conduct of military operations “constant care shall be taken to spare the civilian population, civilians and civilian objects.”³⁶⁸ In their first Report, although due to the lack of detailed targeting information on individual strikes, it was not possible to reach definite conclusions on any particular incident, it was possible to look at patterns.³⁶⁹ These revealed, as a result of the number of civilian casualties, the timing of some attacks, and the choice of weapons, that there were “serious concerns” about the targeting

³⁶⁵ AP I, *supra* note 167, art. 51.

³⁶⁶ *United Nations Fact Finding Mission on the Gaza Conflict*, United Nations Human Rights Council, <https://www.ohchr.org/en/hr-bodies/hrc/special-sessions/session9/fact-finding-mission>.

³⁶⁷ Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST, Apr. 1, 2011, https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html.

³⁶⁸ AP I, *supra* note 167, art. 57.

³⁶⁹ Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014, Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/39/43 (Aug. 17, 2018) [hereinafter Yemen GEE First Report].

process itself.³⁷⁰ The GEE went on to say, “If there are errors in the targeting process that effectively remove the protections provided by international humanitarian law, these would amount to violations.”³⁷¹ The GEE also drew a distinction between “violations” of the law of armed conflict, a matter of State responsibility, and war crimes, involving individual criminal responsibility. Not every violation is a war crime.³⁷²

Unfortunately, for bureaucratic reasons, the Yemen GEE were not able to publish their detailed legal analysis at the time of their first report. This had to await the second Report, and the accompanying Conference Room Paper in 2019.³⁷³ That paper devoted a section to applicable legal principles and, in particular, targeting law.³⁷⁴ It outlined in detail the principles of distinction and proportionality and dealt as well with precautions in attack and weapons use. In the Report itself, the Group reiterated that the airstrikes “raised concerns about the identification of military objectives and respect for the principles of proportionality and precautions in attack.”³⁷⁵ The Group went on to say that the fact that the patterns they had observed had continued “casts a serious doubt about whether the targeting process adopted by the coalition complied with these fundamental provisions of international humanitarian law.”

It followed that while it was not possible, with rare exceptions, to make a judgement on individual air strikes due to the lack of information from the attacking side, it was possible to use the evidence gained from general patterns to identify possible flaws in the targeting process. While the nature of those flaws could not be identified without a detailed analysis of the targeting process, which the Group would not be able to do because of lack of cooperation, the continuation of the patterns would indicate with increasing clarity that the flaws were continuing, and no remedial steps had been taken to remedy the situation. These patterns were again noted in 2020 with the Group in their Report noting that “[e]ven if it were confirmed that the coalition were directing attacks against legitimate military targets in some of these airstrikes, the extent of civilian casualties that could have been anticipated raises significant questions as to the proportionality of the attacks and whether all feasible precautions in attack were taken.”³⁷⁶

Reaction to the Yemen Reports

The Coalition attacked the Group’s findings, “characterising them as based on ‘assumptions,’” but the key point here was that the Group was avoiding the assumptions that had inevitably to be made in drawing conclusions in relation to individual strikes.

³⁷⁰ *Id.* ¶ 38.

³⁷¹ *Id.* ¶ 39.

³⁷² Sanders, *supra* note 287.

³⁷³ Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014, Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen, U.N. Doc. A/HRC/42/CRP.1 (Sept. 3, 2019) [hereinafter Yemen GEE Second Report]

³⁷⁴ *Id.* ¶¶ 61–80.

³⁷⁵ *Id.* ¶ 30.

³⁷⁶ Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014, Report of the Group of Eminent International and Regional Experts on Yemen (Advance Edited Version), ¶ 31, U.N. Doc. A/HRC/45/6 (Sept. 28, 2020).

Here, hard evidence on the ground was being used to reveal patterns, and it was these patterns, not the individual strikes themselves, that caused the concern. No assumptions were made as the facts spoke for themselves.

This change of approach made the final conclusions harder to dismiss. While mistakes are inevitable in war and do not amount necessarily to war crimes or even violations of the law of armed conflict, if the same mistakes are repeated over a lengthy period, then it is necessary to ask what steps have been taken to mitigate the risk of such mistakes. Failure to take steps would seem to be incompatible with the obligation to take “constant care” contained in Article 57. This takes away the emphasis on the individual strikes and concentrates on the process itself. This new approach seems to have been broadly welcomed although the Yemen GEE was stopped in its tracks by the decision of

the Human Rights Council on October 7, 2021, not to renew the mandate.³⁷⁷

Conclusion

The Ukraine Commission will be faced with similar difficulties. While the Commission may manage to get access to the ground—though even that cannot be guaranteed as the Yemen GEE found—it is unlikely that access to targeting information will be granted. However, this is not necessarily disastrous as the Yemen GEE have shown. By concentrating on patterns rather than individual strikes, it is still possible to come to conclusions based on the facts disclosed by those patterns. Such an approach also enables the Commission to present a wider picture of the effect of the conflict on the lives of the Ukrainian people, and that in itself is a necessary part of the wider response to the crisis.



³⁷⁷ Press Release, U.N. Human Rights Off. High Comm’r, Statement by Group of Experts on Yemen on HRC rejection of resolution to renew their mandate (Oct. 8, 2021), <https://www.ohchr.org/en/press-releases/2021/10/statement-group-experts-yemen-hrc-rejection-resolution-renew-their-mandate?LangID=E&NewsID=27636>.

DOCUMENTATION AND INVESTIGATION RESPONSES TO SERIOUS INTERNATIONAL CRIMES

by Brianne McGonigle Leyh | Jul 13, 2022

The armed conflict in Ukraine dates to 2014 when Russia invaded Crimea.³⁷⁸ Since that time, a number of important documentation and investigation efforts began, both nationally and internationally. These included efforts undertaken by civil society organizations like Euromaidan SOS/Center for Civil Liberties,³⁷⁹ national criminal investigations undertaken by Ukraine's Prosecutor General's Office, and preliminary examinations carried out by the International Criminal Court (ICC) in response to Ukraine's Article 12(3) declarations,³⁸⁰ which allow the Court to exercise jurisdiction despite Ukraine not having ratified the Rome Statute.

Fast forward to 2022, when new reports about documentation and accountability initiatives and developments in relation to war crimes and crimes against humanity emerge every few days.³⁸¹ More than 8,000 criminal investigations have been opened³⁸²

with over 600 suspects already identified³⁸³ (many of them high level), and no less than a dozen States or international bodies claim criminal jurisdiction over alleged crimes.

The robust, multi-actor, and multi-level network response to document, investigate, and prosecute the tsunami of war crimes allegations made against Russian forces during an ongoing conflict situation is extraordinary. The international community has learned important lessons for coordinating investigative responses from the Syrian conflict.³⁸⁴ And the geographic and historical context of Ukraine has ensured Western State engagement on these issues. For the moment, it is an "all systems go" mentality. Yet, the complex nature and sheer scale of documentation and investigations work are unprecedented in many ways. This post sheds light on these responses and the networks of cooperation forming to help ensure accountability. It also highlights concerns

³⁷⁸ European Parliament resolution of 13 March 2014 on the invasion of Ukraine by Russia, Eur. Parl. Doc. 2014/2627(RSP) (2014), https://www.europarl.europa.eu/doceo/document/TA-7-2014-0248_EN.html.

³⁷⁹ William Worley, *How Ukrainian civil society is documenting alleged Russian war crimes*, DEVEX (Apr. 20, 2021), <https://www.devex.com/news/how-ukrainian-civil-society-is-documenting-alleged-russian-war-crimes-102832>.

³⁸⁰ Situation in Ukraine, ICC-01/22, Investigation (Mar. 2, 2022), <https://www.icc-cpi.int/situations/ukraine>.

³⁸¹ See Lorenzo Tondo, Emma Graham-Harrison & Isobel Koshiw, *Crimes against civilians: documenting the scale of abuse in Ukraine*, GUARDIAN (June 20, 2022), <https://www.theguardian.com/world/2022/jun/20/crimes-against-civilians-documenting-scale-abuse-ukraine>; Glenn Thrush, *Garland, Visiting Ukraine, Names Prosecutor to Investigate Russian War Crimes*, N.Y. TIMES (June 21, 2022), <https://www.nytimes.com/2022/06/21/world/europe/merrick-garland-ukraine-war-crimes.html>; Joel Gunter, *Ukraine's prosecutors wrestle with a new role: war crimes investigators*, BBC (June 10, 2022), <https://www.bbc.com/news/world-europe-61749877>.

³⁸² Erika Kinetz, *The woman who would make Putin pay*, L.A. TIMES (Apr. 22, 2022), <https://www.latimes.com/world-nation/story/2022-04-22/war-crimes-watch-the-woman-who-would-make-putin-pay>.

³⁸³ *Press conference of the ICC Prosecutor and Eurojust with joint investigation team on alleged core international crimes in Ukraine*, Int'l Crim. Ct., May 27, 2022, <https://www.icc-cpi.int/news/press-conference-icc-prosecutor-and-eurojust-joint-investigation-team-alleged-core>.

³⁸⁴ Emma Beals, *How the Lessons of the Syria War May Safeguard Lives in Ukraine*, CARNEGIE MIDDLE EAST CENTER (Apr. 27, 2022), <https://carnegie-mec.org/2022/04/27/how-lessons-of-syria-war-may-safeguard-lives-in-ukraine-pub-87005>.

arising from over-documentation, the urgent need to prioritize coordination among the various groups, and the steps undertaken to date.

National Responses

The primary responsibility for investigating allegations of serious crimes lies with both Ukraine and Russia. While Russia is unlikely to investigate crimes allegedly committed by Russian forces, Ukraine has taken huge strides to do so (importantly, Ukraine is also responsible for investigating allegations against Ukrainian forces as well³⁸⁵). Already in 2019, Ukraine established a national war crimes unit to investigate conflict-related crimes. And in May 2021, Ukraine's Parliament approved Bill 2689, which would bring international criminal law into Ukraine's Criminal Code.³⁸⁶ Until the Bill is signed into law by Ukrainian President Volodymyr Zelenskyy, national investigations and prosecutions are moving forward based on Article 438 of its national criminal code, which provides a general provision on conflict-related crimes.³⁸⁷ As noted by others though, this article is insufficient for prosecuting

conflict-related sexual violence both as a war crime and crime against humanity.³⁸⁸

Notwithstanding these limitations, the Prosecutor General's Office, under the leadership of Iryna Venediktova, is investigating tens of thousands of allegations of war crimes and has brought several cases against captured Russian soldiers already.³⁸⁹ These important steps undertaken by Ukrainian national authorities are crucial in the fight against impunity for serious international crimes. Yet the sheer volume of allegations, just in the last few months, has meant that national responses alone will be inadequate. Ukraine will need to work with a network of actors and institutions to address this mass criminality, a process already underway.

Joint Investigation Team—Including the ICC

Never before, during an armed conflict, has the legal community responded with what Ladislav Hamran, President of Eurojust, referred to as concerted "determination."³⁹⁰ For instance, six days after the February 2022 invasion, Lithuania, Poland, and Ukraine formed a Joint Investigation Team

³⁸⁵ Mark Kersten, *It's in Ukraine's interest to prosecute its own alleged crimes*, AL JAZEERA (June 10, 2022), <https://www.aljazeera.com/opinions/2022/6/10/its-in-kyivs-interest-to-investigate-war-crimes-by-ukrainians>.

³⁸⁶ Parliamentarians for Global Action, *Comparative Table to the Draft Law of Ukraine "On Amendments to Certain Legislative Acts on the Enforcement of International Criminal and Humanitarian Law," Bill No. 2689*, <https://www.pgaction.org/pdf/2021/en-bill-2689-10-03-2021.pdf>.

³⁸⁷ Harshita Malik, *Ukraine Adopts Law on War Crimes: Filling the Glaring Gaps in the Domestic Legislation*, OXFORD HUMAN RIGHTS HUB (June 21, 2021), <https://ohrh.law.ox.ac.uk/ukraine-adopts-law-on-war-crimes-filling-the-glaring-gaps-in-the-domestic-legislation/#:~:text=As%20a%20result%2C%20war%20crimes,national%20wealth%20on%20occupied%20territory>.

³⁸⁸ Erin Farrell Rosenberg, *Response to Conflict-Related Sexual Violence in Ukraine: Accountability and Reparations*, OPINIO JURIS (June 21, 2022), <http://opiniojuris.org/2022/06/21/response-to-conflict-related-sexual-violence-in-ukraine-accountability-and-reparations/>.

³⁸⁹ *Ukraine files eight more war crimes cases to court-prosecutor*, REUTERS (June 8, 2022), <https://www.reuters.com/world/europe/ukraine-has-filed-more-eight-war-crimes-cases-court-prosecutor-2022-06-08/>.

³⁹⁰ EUR. UNION AGENCY CRIM. JUST. COOP., <https://www.eurojust.europa.eu/>.

(JIT). A JIT “is an international cooperation tool based on an agreement between competent authorities—both judicial (judges, prosecutors and investigative judges) and law enforcement authorities—of two or more states, established for a limited duration and for a specific purpose, that conducts criminal investigations”³⁹¹ (art. 13 EU Convention on Mutual Assistance in Criminal Matters;³⁹² art. 1 Framework Decision on JITs;³⁹³ art. 20 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters³⁹⁴). While they may take on various forms, JITs remove a number of obstacles associated with traditional forms of mutual legal assistance, including the need for specific letters of request for each measure sought. In this sense they are beneficial because they allow information to be shared freely and quickly. Another benefit is that they are flexible and supported by Eurojust. Their effectiveness in terms of how well they build successful cases, however, will depend upon the level of cooperation between the JIT members.

In May 2022, one month after the formal JIT agreement was signed between the three States, the ICC took the unprecedented step of joining the JIT as well. This is the

first time the ICC has joined a JIT, and according to Eurojust, the framework agreement establishing the JIT has sought to reflect the impartial and independent nature of the Court. Whether and how this is done is unclear because the agreement is not publicly available. In any case, Prosecutor Khan has recently stressed that he envisions the ICC not as an apex court but rather as a hub, cooperating with international and national authorities as well as civil society organizations.³⁹⁵ The ICC has now sent forty-two investigators to assist with investigations and is looking to establish an office in Kiev.³⁹⁶ Again, this is the largest-ever team of experts sent by the Court to a situation country. In June, three additional EU member States, Estonia, Latvia, and Slovakia, joined the JIT, with Eurojust inviting more States to join.³⁹⁷

Other International and Regional Efforts

Other international and regional documentation and investigatory efforts are also ongoing. On 4 March 2022, the Human Rights Council established an Independent International Commission of Inquiry on Ukraine (Resolution 49/1). The Commission

³⁹¹ Publications Office of the European Union, *Joint Investigation Teams Practical Guide* (2021), https://www.eurojust.europa.eu/sites/default/files/assets/joint_investigation_teams_practical_guide_2021_en.pdf.

³⁹² *Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union—Council Declaration on Article 10(9)—Declaration by the United Kingdom on Article 20*, OFF. J. 197, 12/07/2000, 0003-0023 (2000), [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0712\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0712(01)&from=EN).

³⁹³ Council Framework Decision of 13 June 2002 on joint investigations teams, OJ L 162, 20.06.2002, 0001-0003 (2002), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002F0465&from=EN>.

³⁹⁴ Council of Europe, Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, CETS No. 182, <https://rm.coe.int/168008155e>.

³⁹⁵ *International Criminal Court at 20: Reflections on the Past, Present and the Future*, Int'l Crim. Ct., <https://www.icc-cpi.int/icc-20a-cpi>.

³⁹⁶ Statement, ICC Prosecutor Karim A.A. Khan QC announces deployment of forensics and investigative team to Ukraine, welcomes strong cooperation with the Government of the Netherlands, Int'l Crim. Ct. (May 17, 2022), <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine>.

³⁹⁷ *Estonia, Latvia and Slovakia become members of joint investigation team on alleged core international crimes in Ukraine*, Eurojust (May 31, 2022), <https://www.eurojust.europa.eu/news/estonia-latvia-and-slovakia-become-members-joint-investigation-team-alleged-core-international>.

is mandated to complement, consolidate, and build upon the work of the UN Human Rights Monitoring Mission in Ukraine (HRMMU), established in 2014, in close coordination with the Office of the United Nations High Commissioner for Human Rights.³⁹⁸

Likewise, regional bodies have also joined efforts to document and support investigations. The Council of Europe's Directorate General Human Rights and Rule of Law established an expert advisory group to support the Prosecutor General's Office of Ukraine.³⁹⁹ The Organization for Security and Cooperation in Europe (OSCE),⁴⁰⁰ which is the world's largest regional security-oriented inter-governmental organization, has also created an expert mission to document human rights abuses.⁴⁰¹ Similarly, the EU, UK, and U.S. have set up an Atrocity Crimes Advisory Group (ACA),⁴⁰² which also includes Mobile Justice Teams (MJTs), composed of both international and Ukrainian experts, which, upon request of the Office of the Prosecutor General, can deploy to assist the Ukrainian War Crimes

Unit and other investigators on the ground. In addition to these expert advisory groups, leading human rights lawyers have joined together to form an international Working Group on accountability for international crimes committed in Ukraine, which also seeks to support national investigation and accountability efforts.

Additionally, no less than six EU member States,⁴⁰³ including the Netherlands⁴⁰⁴ and Germany, and a number of non-EU member States, such as Switzerland⁴⁰⁵ and the United States, have opened their own investigations under universal jurisdiction or have taken a strong stance in support of other investigation efforts (including the United States dedicating 80 million USD to war crimes accountability efforts and the Netherlands sending a forensic investigation team). Universal jurisdiction⁴⁰⁶ allows for the domestic prosecution of certain crimes regardless of where the crimes occurred or the nationality of the alleged perpetrator or victims. Many commentators, including Sergey Vasiliev, see universal jurisdiction as a viable option in the fight against impunity in Ukraine and note the value of structural

³⁹⁸ *UN Human Rights in Ukraine*, U.N. Human Rights Off. High Comm'r, <https://www.ohchr.org/en/countries/ukraine/our-presence#:~:text=The%20UN%20Human%20Rights%20Monitoring,occupied%20by%20the%20Russian%20Federation.>

³⁹⁹ *Council of Europe expert advisory group starts its work supporting Ukraine's Prosecutor General Office*, Council of Europe (Apr. 21, 2022) <https://www.coe.int/en/web/portal/-/council-of-europe-expert-advisory-group-starts-its-work-supporting-ukraine-s-prosecutor-general-office>.

⁴⁰⁰ ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, <https://www.osce.org/>.

⁴⁰¹ *Ukraine appoints mission of experts following invocation of the OSCE's Moscow Mechanism*, OSCE (Mar. 15, 2022), <https://www.osce.org/odihr/513973>.

⁴⁰² *Questions and Answers: Atrocity Crimes Advisory Group (ACA) for Ukraine*, European Union External Action (May 25, 2022), https://www.eeas.europa.eu/eeas/questions-and-answers-atrocity-crimes-advisory-group-aca-ukraine_en.

⁴⁰³ *How Universal Jurisdiction Can Punish Putin and His Minions for War Crimes in Ukraine*, EUROPEAN PRAVDA (June 6, 2022), <https://www.eurointegration.com.ua/eng/news/2022/06/6/7140690/#:~:text=We%20now%20know%20of%2012,States%2C%20and%20the%20United%20Kingdom.>

⁴⁰⁴ *Netherlands to send forensic investigation team to Ukraine*, Ministry of Defence (Apr. 29, 2022), <https://english.defensie.nl/latest/news/2022/04/29/netherlands-to-send-forensic-investigation-team-to-ukraine>.

⁴⁰⁵ *Switzerland investigates war crimes in Ukraine*, SWISSINFO (June 12, 2022), <https://english.defensie.nl/latest/news/2022/04/29/netherlands-to-send-forensic-investigation-team-to-ukraine>.

⁴⁰⁶ *The Princeton Principles on Universal Jurisdiction*, PROGRAM IN L. AND PUB. AFF. (2001), https://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

investigations in many of these countries' specialized crime divisions.⁴⁰⁷

Civil Society Organizations

Finally, civil society organizations (CSOs) are also documenting crimes and collecting vast amounts of information. Notable examples include Ukrainian organizations like the Euromaidan SOS/Center for Civil Liberties⁴⁰⁸ and Truth Hounds, which began their activities long before the 2022 invasion, as well as international NGOs like the Human Rights Watch.⁴⁰⁹ Other civil society groups, such as Mnemonic,⁴¹⁰ help with digital infrastructure support by archiving information. Global Rights Compliance⁴¹¹ and the Public International Law & Policy Group⁴¹² are involved with both documentation and training Ukrainian civil servants on how to properly document evidence of possible war crimes. Digital Open-Source Investigation organizations, such as Bellingcat⁴¹³ and Amnesty International's Crisis Evidence Lab,⁴¹⁴ are also collecting, verifying, and analyzing allegations of crimes.

Over-Documentation?

Combined, it is clear this will be one of, if not the most documented armed conflicts ever. While the multi-actor and multi-level response is welcome (and hopefully a model for future responses to crimes unfolding outside of Europe), the risk of overdocumentation, particularly when it comes to the collection of statements, is a concern. Over-documentation involves situations where victims are repeatedly asked to recount their experiences to different individuals, often without fully understanding who is recording their story or what it will be used for.

Two main concerns associated with overdocumentation have to do with the safety and well-being of statement providers as well as with the accuracy of the information provided. Investigators should adhere to the "do no harm" principle and take concrete steps to recognize, prevent, and reduce any unintended negative effects of their investigations on individuals or communities.⁴¹⁵ As noted by Alexa Koenig, there are essential ethical questions that every documenter or investigator needs to ask when carrying out investigations. These extend far beyond a checklist of criteria.

⁴⁰⁷ See, e.g., Sergey Vasiliev, *The Future of Justice for Ukraine Is Domestic*, JUSTICEINFO.NET (Mar. 29, 2022), <https://www.justiceinfo.net/en/89434-future-justice-for-ukraine-domestic.html>.

⁴⁰⁸ William Worley, *How Ukrainian civil society is documenting alleged Russian war crimes*, DEVEX (Apr. 20, 2022), <https://www.devex.com/news/how-ukrainian-civil-society-is-documenting-alleged-russian-war-crimes-102832>.

⁴⁰⁹ *Ukraine: Executions, Torture During Russian Occupation*, Human Rights Watch (May 18, 2022), <https://www.hrw.org/news/2022/05/18/ukraine-executions-torture-during-russian-occupation>.

⁴¹⁰ MNEMONIC, <https://mnemonic.org>.

⁴¹¹ *MATRA-Ukraine Project*, GLOBAL RIGHTS COMPLIANCE, <https://globalrightscpliance.com/project/matra-ukraine-project/>.

⁴¹² *War Crimes Prosecution & Transitional Justice*, Pub. Int'l L. & Pol. Group (PILPG), <https://www.publicinternationalallawandpolicygroup.org/war-crimes-prosecution-transitional-justice>.

⁴¹³ *Investigations*, BELLINGCAT, <https://www.bellingcat.com/category/news/>.

⁴¹⁴ *A guide to how Amnesty International verifies Russian military attacks in Ukraine*, Amnesty Int'l (Mar. 18, 2022), <https://www.amnesty.org/en/latest/news/2022/03/a-guide-to-how-amnesty-verifies-military-attacks-in-ukraine/>.

⁴¹⁵ Brienne McGonigle Leyh, *Changing Landscapes in Documentation Efforts: Civil Society Documentation of Serious Human Rights Violations*, 33 UTRICHT J. 44–58 (2017), <https://doi.org/10.5334/ujel.365>.

They require difficult ethical, practical, and logistical assessments to be made. A growing collection of materials, such as the Murad Code⁴¹⁶ which emphasizes survivor-centered documentation, is now available to help guide actors involved with these processes.⁴¹⁷

Coordination as Priority

To counter the risks that come from over-documentation and duplication of effort, there is an urgent need for coordination among the myriad of actors. Here, Ukraine's Prosecutor General's Office, together with Eurojust and the ICC, will play the key roles. Eurojust is particularly well-suited to help Ukraine with coordination efforts. Eurojust has more than twenty years of experience coordinating large-scale criminal justice operations. It is a logical actor to assist with coordination efforts.

However, to do so properly, the EU Parliament amended Eurojust's regulations in May 2022.⁴¹⁸ From 1 June forward, Eurojust is able to centralize all collected information and evidence, including from non-JIT members. They can assist with collection, verification, storage, and analysis to ensure prosecution teams are aware of who collected what information and how to access it. The Parliament's amendment allows for

a core international crimes database, a huge step forward in the fight against impunity for serious international crimes. It allows for a more structured approach to complex collection efforts. Currently, it provides legal, financial, and technical support to the Ukraine JIT, including the interpretation of collected information and forensic reports so that all parties to the JIT can contribute.

Prosecutor Khan from the ICC, together with the Netherlands and the European Commissioner Didier Reynders, will co-host a ministerial conference on accountability for Ukraine at the World Forum in The Hague on 14 July.⁴¹⁹ Here, the ICC and Eurojust will present guidelines for gathering and storing evidence by national authorities and provide guidance to civil society organizations on how to strengthen collaboration among the various actors involved with investigations. This meeting builds upon the 27 April, Arria-formula meeting, held by the UN Security Council, which was convened by the Permanent Missions of Albania and France in cooperation with Ukraine.⁴²⁰

Conclusion

All of these developments are necessary and urgent. This is the biggest and most complex intertwined investigation unfolding during

⁴¹⁶ *Murad Code Project*, Murad Code, <https://www.muradcode.com/>.

⁴¹⁷ See also PILPG's *Guide to Human Rights Documentation*, Pub. Int'l L. & Pol. Group (PILPG), <https://www.publicinternationallawandpolicygroup.org/pilpg-guide-human-rights-documentation>; *Civil Society Space and the United Nations Human Rights System*, Off. High Comm'r for Human Rights (Oct. 2014), https://www.ohchr.org/sites/default/files/Documents/AboutUs/CivilSociety/CS_space_UNHRSysstem_Guide.pdf.

⁴¹⁸ Press Release, European Commission, Russian war crimes in Ukraine: Commission welcomes European Parliament's adoption of Eurojust's reinforced mandate (May 19, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3180.

⁴¹⁹ Gov't of the Netherlands, *The Netherlands to co-host international accountability conference for Ukraine* (June 13, 2022), <https://www.government.nl/latest/news/2022/06/13/the-netherlands-to-co-host-international-accountability-conference-for-ukraine>.

⁴²⁰ Philippa Webb, *Ukraine Symposium—Building Momentum: Next Steps Towards Justice for Ukraine*, ARTICLES OF WAR (2022), <https://lieber.westpoint.edu/building-momentum-next-steps-justice-ukraine/>.

a conflict. So while documentation efforts may be “decentralized,”⁴²¹ these steps support statements made by Beth Van Schaack,⁴²² the U.S. Ambassador for War Crimes, who emphasized the high level of communication among the various parties involved. This high level of communication is crucial not only for

coordinating investigation efforts but also for addressing the significant hurdles inherent in complex serious crimes prosecutions in order to ultimately bring high-level suspects to trial.⁴²³



⁴²¹ THRUSH, *supra* note 381.

⁴²² U.S. DEP'T OF STATE, BIOGRAPHY OF BETH VAN SCHAACK (Mar. 17, 2022), <https://www.state.gov/biographies/beth-van-schaack/>.

⁴²³ Sanders, *supra* note 287.

COMPREHENSIVE JUSTICE AND ACCOUNTABILITY IN UKRAINE

by Chris Jenks | Apr 15, 2022

As the war between Russia and Ukraine enters its second month, there are increasing allegations of serious law of armed conflict (LOAC) violations. The allegations, amplified by graphic images and videos which are sometimes even narrated by purported witnesses, have sparked two different accountability lines of effort. The first effort is by parties to the conflict, the Russian Federation⁴²⁴ and Ukraine.⁴²⁵ The second is a range of proposals for collective/international post-conflict accountability mechanisms, including a regional tribunal and/or referral to the International Criminal Court. The first effort line has acknowledged and encouraged⁴²⁶ the second, while proposals for the second line seem to envision collective/international mechanisms as the beginning, middle, and end of accountability efforts.

Both lines are important and necessary, but they are unlikely to be sufficient or yield a consensus that accountability has attached and justice delivered. That's because the number of alleged offenses is already well beyond what Russia and Ukraine can address. While international tribunals may have an important role to play, realistically that role

only encompasses a relatively limited number of offenses and offenders.

States that are not parties to the armed conflict could occupy this space between the accountability lines. Without their intervention, the accountability lines would create a two-legged stool. A two-legged stool can function, but only if the weight to be borne is considered in advance and balanced throughout the stool's use.⁴²⁷ At the same time, we cannot be surprised when a two-legged stool collapses.

This post highlights both the importance and limitations of the two accountability lines and the need for a third.

Accountability Efforts by the Parties

Much has been said in terms of the scope and application of LOAC accountability requirements on parties to the conflict. Subject to a reminder and a caveat, more need not be said given the work of, among others, Mike Schmitt, the Turkel Commission, Sean Watts,⁴²⁸ and more recently a group of experts

⁴²⁴ The Investigative Comm. of Russia, <https://en.sledcom.ru>.

⁴²⁵ *Ukraine already investigating almost 4,500 alleged Russian war crimes*, CBS News (Apr. 6, 2022), <https://www.cbsnews.com/news/ukraine-russia-war-crimes-investigation/>.

⁴²⁶ Amanda Macias, *Zelenskyy calls for Nuremberg-style tribunal to investigate and prosecute Russian war crimes*, CNBC (Apr. 5, 2022), <https://www.cnbc.com/2022/04/05/zelenskyy-calls-for-a-nuremberg-style-tribunal-to-prosecute-war-crimes.html>.

⁴²⁷ Lizzie Parry, *Would YOU sit on this chair to live longer? Two-legged design forces people to move—reducing risk of cancer and heart disease*, DAILY MAIL (Dec. 12, 2014), <https://www.dailymail.co.uk/health/article-2871334/Would-sit-chair-live-longer-Two-legged-design-forces-people-reducing-risk-cancer-heart-disease.html>.

⁴²⁸ Sean Watts, *Domestic Investigation of Suspected Law of Armed Conflict Violations: United States Procedures—Policies and Practices*, SSRN (Oct. 15, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971413&msclid=b03a5685b9b611eca2f3b1ff7bbff6a2.

at the Geneva Academy in explaining the requirements.

The reminder is that Russia and Ukraine are both States Parties to Additional Protocol I (AP I) to the Geneva Conventions. Additional Protocol I expands and informs the accountability obligations from the Geneva Conventions. In particular, AP I requires military commanders take action to prevent, and where necessary, report, investigate, and suppress LOAC violations.

The caveat is that while Russia and Ukraine are most certainly obligated to effectively and promptly investigate and respond to credible allegations of LOAC violations during the armed conflict, what constitutes a LOAC violation may need recalibration.

As Alon Margalit wrote in discussing the *Turkel Report* and LOAC accountability obligations,

Clearly, under LOAC, not every death during armed conflict indicates a legal breach as deaths of combatants and civilians who take a direct part in hostilities, as well as civilian deaths which fall within proportionate collateral damage, are lawful. Civilian casualties that are the result of erroneous attacks normally do not trigger criminal responsibility as well.⁴²⁹

Additionally, for over twenty years, non-international armed conflicts (NIAC) have been the norm, while Russia-Ukraine is, of course, an international armed conflict (IAC). This is not to suggest there is a different standard for LOAC violations based

on conflict classification. But we should avoid conflating policy-driven lower thresholds for initiating investigations in NIAC with the LOAC requirement to do so.

It's hard to overstate the importance of accountability efforts by parties to a conflict. Because these efforts occur *during* the conflict, the lessons learned may prevent or mitigate reoccurrence.

Additionally, the parties to a conflict are able to document what happened and why closer in time to the events' occurrence. The passage of time (and the more combat actions that occur) complicates subsequent efforts to investigate, as participants and witnesses may be killed and relevant property and equipment damaged or destroyed.

But there are limits to what parties to the conflict can reasonably be expected to do. Ukraine, for example, claims to be investigating over 4,500 allegations of LOAC violations during an ongoing armed conflict, which will, of course, yield more.

The second line of accountability, regional or international tribunals, can play an important role. But while important, this role is by definition and design, limited.

Collective and International Accountability Efforts

As mentioned at the outset, a two-legged stool can work—if there is balance and coordination. But neither is evident in the host of proposals for regional and international tribunals or referrals to the

⁴²⁹ Alon Margalit, *Some Observations on the Turkel Report and the Investigation of Wrongdoing by the Armed Forces*, EJIL: Talk! (Mar. 13, 2013), <https://www.ejiltalk.org/some-observations-on-the-turkel-report-and-the-investigation-of-wrongdoing-by-the-armed-forces/>.

ICC. Portraying regional and/or international criminal tribunals as the exclusive or even majority source of accountability for LOAC violations is a weight those mechanisms simply cannot bear.

That's not a criticism; it's a statement of fact. Regional and international tribunals have never provided the bulk of post-conflict accountability.

We tend to forget, for some of us willfully, the inherent limitations of regional or international criminal tribunals. This "misremembering" often starts with post–Second World War accountability mechanisms against the Nazis.

The focus tends to be singularly on the International Military Tribunal (IMT). The victorious Allies created the IMT for the "just and prompt trial and punishment of the major war criminals of the European Axis." From the IMT Charter adoption in August 1945, the Tribunal issued its first indictments in October 1945 and over the course of a year indicted twenty-four and prosecuted twenty-two defendants (one of those indicted was determined to be incompetent to stand trial, and another committed suicide before trial).⁴³⁰

After the IMT, Britain, France, the then-Soviet Union, and the United States all conducted

their own tribunals. Czechoslovakia, Hungary, Poland, and Romania, among others, also held criminal proceedings. Following Germany's split into East and West Germany in 1949, West Germany held over 900 prosecutions.⁴³¹ Ultimately, while the IMT prosecuted twenty-two individuals, the non-IMT prosecutions from various nations totaled in the tens of thousands.⁴³²

In the 1990s, the United Nations Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to prosecute those responsible for, among other offenses, serious LOAC violations.

For the ICTY those violations occurred chiefly during civil wars,⁴³³ which came to define modern ethnic cleansing and which killed approximately 100,000, saw tens of thousands of women raped, and over 2 million displaced. Between 1993 and 2017, the ICTY indicted 161 individuals. Meanwhile, Bosnia,⁴³⁴ Croatia, and Serbia created national war crimes chambers, each of which prosecuted significantly more offenders than the ICTY.

For the ICTR the violations occurred during a genocide which killed over 800,000 and saw 250,00 women raped.⁴³⁵ Between 1994 and 2015, the ICTR held criminal proceedings for

⁴³⁰ Memorium nürnberg prozesse museen der stadt nürnberg, <https://museums.nuernberg.de/memorium-nuremberg-trials/the-nuremberg-trials/the-international-military-tribunal/the-defendants>.

⁴³¹ *Postwar Trials*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/war-crimes-trials>.

⁴³² *Id.*

⁴³³ Florence Hartmann, *Bosnia, CRIMES OF WAR*, <https://web.archive.org/web/20150509083402/http://www.crimesofwar.org/a-z-guide/bosnia/>.

⁴³⁴ *Narrowing the Impunity Gap*, Human Rights Watch (Feb. 11, 2007), <https://www.hrw.org/report/2007/02/11/narrowing-impunity-gap/trials-bosnias-war-crimes-chamber>.

⁴³⁵ *Rwandan Genocide*, HISTORY.COM (Oct. 14, 2009, updated May 19, 2023), <https://www.history.com/topics/africa/rwandan-genocide>.

82 accused.⁴³⁶ But several *million* people were alleged to have participated in the killings and sexual assaults. Conventional Rwandan courts prosecuted over 10,000 people for genocide-related crimes, while community-based Gacaca courts prosecuted just under 2 million.⁴³⁷

The preceding recitation is not intended as a critique of international criminal law but as a factual expression of its inherent limits. That regional or international criminal tribunals can play several important roles and directly prosecute a small number of offenders is not in doubt. But more importantly, those tribunals facilitate and enable a range of national efforts. Ideally, the accountability stool has three legs.

The Missing Line of Effort

This symposium has already indicated that while every State has legal obligations under the Geneva Conventions grave breach regime, very few are in compliance.⁴³⁸

The grave breaches regime requires all High Contracting Parties (i.e., every country in the world) to enact all legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches and to either prosecute them or allow another State to do so. Additionally, the international

community agreed to take necessary measures for the suppression of other violations of the Conventions.

There is no point in disputing the obvious—that the vast majority of States (including the United States) do not care about this obligation, or at least don't care enough to actually take the action they agreed to take. This collective apathy applies not only to the grave breach regime from the Geneva Conventions, but also to the Genocide Convention under which the world agreed to prevent and punish genocide but which the world has largely failed to do even when faced with glaring cases of genocide.

But the grave breach regime was to be the foundation on which contemporary international criminal law was to be built. That the foundation doesn't actually exist partially explains why the accountability focus in terms of Russia and Ukraine is on regional or international criminal tribunals.

States are not positioned to remind Russia and Ukraine of their LOAC accountability obligations under the grave breach regime without exposing hypocrisy. And States remain unwilling or unable to meet their own obligations. Accordingly, and no doubt to the delight of international criminal law experts, States are going “all in” on the regional and international criminal tribunal line of effort.

⁴³⁶ *Key Figures of Cases*, U.N. Int'l Residual Mechanism for Criminal Tribunals (last updated Oct. 2019), <https://unictr.irmct.org/en/cases/key-figures-cases>.

⁴³⁷ *Rwanda: Justice After Genocide—20 Years On*, Human Rights Watch (Mar. 28, 2014), https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years#_ftn9.

⁴³⁸ Sean Watts & Hitoshi Nasu, *Ukraine Symposium—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/>; Steve Szymanski & Peter C. Combe, *The Siren Song of Universal Jurisdiction: A Cautionary Note*, ARTICLES OF WAR (Apr. 1, 2022), <https://lieber.westpoint.edu/siren-song-universal-jurisdiction-cautionary-note/>.

Conclusion

So, while history showcases the need for a third accountability line of effort between the efforts by parties to the conflict and regional and international criminal tribunals, until now that effort is not being discussed. As noted in the introduction, a two-legged stool can work if there is balance and coordination.

Perhaps that coordination will come in the future and provide that balance.

But focusing exclusively on regional and international criminal tribunals troublingly suggests that stool leg can bear most of the accountability weight. It can't and won't.



BUILDING MOMENTUM: NEXT STEPS TOWARDS JUSTICE FOR UKRAINE

by Philippa Webb | May 2, 2022

Author's Note: I am a member of the Legal Task Force on Accountability for Crimes Committed in Ukraine, alongside Amal Clooney and other international lawyers and academics. I am writing in my own capacity.

On 27 April, 63 days after the Russian invasion, the UN Security Council held an Arria-formula meeting convened by the Permanent Missions of Albania and France in cooperation with Ukraine. The aim was to “bring together Member States and key actors involved in the documentation of crimes committed in Ukraine in order to identify how such efforts can be supported and coordinated so as to ensure the effective investigation and prosecution of those responsible for atrocities.”⁴³⁹ As an Arria-formula meeting, it was an informal meeting with a range of participants, including civil society representatives.

Amal Clooney, representing the Clooney Foundation for Justice, made a powerful intervention, which you can watch here.⁴⁴⁰ In this post, I will draw attention to the practical steps that Amal outlined for sustaining and escalating the momentum for a better system of justice because, as she noted, “Peace—like

war—must be waged. And justice, too, is something we must fight for.”

Amal set out seven concrete actions that governments should take. I will briefly elaborate, from my own perspective, on each of them.

1. “Powerful states including the United States should support the International Criminal Court [ICC]—clearly and unequivocally—by dropping unprincipled objections to its jurisdiction and offering resources and evidence to support the prosecutor’s work.”

The context for this point is that until recently, the United States has argued that the ICC cannot prosecute nationals of a State that has not joined the ICC, unless there is a referral of a situation by the Security Council.⁴⁴¹ Interestingly, in the 27 April meeting, Ambassador Beth Van Schaack expressed strong support for international investigations into atrocities in Ukraine, including those conducted by the ICC.⁴⁴²

⁴³⁹ Concept Note, Permanent Mission of the Republic of Albania to the United Nations—New York and Mission Permanente de la France Auprès de Nations Unies à New York, United Nations Security Council Arria-formula meeting on: Ensuring accountability for atrocities committed in Ukraine (Apr. 27, 2022), [https://s3-eu-west-1.amazonaws.com/upload.teamup.com/908040/VTFGPxhWQCil3VSzwMwQ_Concept-20note-20Arria-20--20Ensuring-20accountability-20for-20atrocities-20committed-20in-20Ukraine-20\(1\).pdf](https://s3-eu-west-1.amazonaws.com/upload.teamup.com/908040/VTFGPxhWQCil3VSzwMwQ_Concept-20note-20Arria-20--20Ensuring-20accountability-20for-20atrocities-20committed-20in-20Ukraine-20(1).pdf).

⁴⁴⁰ CFJ Co-Founder Amal Clooney Addresses the UN on Accountability for War Crimes in Ukraine, CLOONEY FOUNDATION FOR JUSTICE (Apr. 28, 2022), <https://cfj.org/news/cfj-co-founder-amal-clooney-addresses-the-un-on-accountability-for-war-crimes-in-ukraine/>.

⁴⁴¹ Rebecca Hamilton, *Pressing US Officials on Russia and Int’l Criminal Court: The Interview We Should Be Hearing*, JUST SEC. (Apr. 6, 2022), <https://www.justsecurity.org/80981/pressing-us-officials-on-russia-and-intl-criminal-court-the-interview-we-should-be-hearing/>.

⁴⁴² @rgoodlaw, X (FORMERLY TWITTER) (Apr. 27, 2022), <https://twitter.com/rgoodlaw/status/1519422667413237762>.

2. “States must ensure that those responsible for the crime of aggression—who are currently beyond the reach of the ICC—can also be brought to justice before a court of law.”

The ICC currently has jurisdiction over war crimes, crimes against humanity, and genocide pursuant to Ukraine’s ad hoc acceptance of the Court’s jurisdiction under Article 12(3) of the ICC Statute. The Court cannot exercise jurisdiction over the crime of aggression of a State not party to the Statute (art. 15*bis* (5)). Jurisdiction over aggression could be achieved through a referral of the situation in Ukraine by the Security Council (art. 15*ter*), but that is rendered impossible by the Russian veto.

Other options are therefore being explored.^{443,444,445,446} These include a special aggression tribunal formed by pooling the jurisdiction over aggression of various States or created in cooperation with the UN General Assembly, as well as a hybrid tribunal established as part of the Ukrainian judicial system with the support of the Council of Europe⁴⁴⁷ or another body. There is also the option of prosecutions by Ukraine or

by some of the twenty States that have universal jurisdiction over aggression in their domestic law.⁴⁴⁸ Each of these options has advantages and disadvantages, which are being hotly debated, including the challenge of overcoming the personal immunity of high-level officials, the obstacles to securing custody over those officials, and the prospect of *in absentia* trials.

3. “States should file interventions in support of Ukraine’s cases against Russia at the European Court of Human Rights and the International Court of Justice.”

Until recently, interventions before international courts in contentious cases were rare and driven by a specific legal interest in the subject matter of the case, such as potential encroachment on a boundary claim. But the legal framework exists for a greater volume of interventions aimed at standing up for the values of the international community.

Article 63 of the International Court of Justice (ICJ) Statute gives the “right” to intervene in proceedings where the “construction of a convention” to which a State is a party “is in question.” In the *Gambia v. Myanmar* case,

⁴⁴³ Alexander Komarov & Oona A. Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SEC. (Apr. 11, 2022), <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>.

⁴⁴⁴ Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine*, JUST SEC. (Mar. 10, 2022), <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/>.

⁴⁴⁵ Off. Gordon & Sarah Brown, Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine, <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>.

⁴⁴⁶ Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022), <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

⁴⁴⁷ PACE calls for the setting up of an ad hoc international criminal tribunal to hold to account perpetrators of the crime of aggression against Ukraine, PACE (Apr. 28, 2022), <https://pace.coe.int/en/news/8699/pace-calls-for-the-setting-up-of-an-ad-hoc-international-criminal-tribunal-to-hold-to-account-perpetrators-of-the-crime-of-aggression-against-ukraine>.

⁴⁴⁸ Jenifer Trahan, *A Reminder of the Importance of the Crime of Aggression: Considering the Situation of Russia and Ukraine*, OPINIO JURIS (Feb. 4, 2022), <http://opiniojuris.org/2022/02/04/a-reminder-of-the-importance-of-the-crime-of-aggression-considering-the-situation-of-russia-and-ukraine/>.

the Maldives,⁴⁴⁹ Netherlands, and Canada⁴⁵⁰ have announced their intention to intervene in support of Gambia's case that Myanmar is responsible for genocide against the Rohingya people. And some States have indicated their interest in intervening in the *Ukraine v. Russia* cases at the ICJ and the European Court of Human Rights.⁴⁵¹ Well-coordinated, focused, and pertinent interventions have the potential to be very useful in developing legal and, depending on the type of intervention, factual aspects of the cases.

4. "The UN General Assembly should make clear that sovereign immunity should not prevent Russian state assets being made available to Ukraine and its people—and that the assets of all those who support the war are at risk."

Currently, \$600 billion of Russian foreign currency are frozen in foreign jurisdictions,⁴⁵² with about half of that amount believed to be frozen by restrictions imposed on Russia's central bank. In general, State property benefits from immunity from jurisdiction and enforcement, subject to narrow exceptions such as State consent or when the assets are being used for commercial purposes.

Central bank assets, in particular, tend to enjoy extensive immunity from enforcement. Further, the ICJ has held that "customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces or other organs of the State in the course of conducting an armed conflict" (para. 78).⁴⁵³

But there are options for overcoming this high bar, which are being explored by lawyers and scholars. First, as Ingrid Wuerth⁴⁵⁴ and Tom Ruys⁴⁵⁵ have argued, immunity from jurisdiction and enforcement pertains to judicial proceedings, but immunity does not appear to be a bar to the freezing of assets through executive action. Alternatively, legislative action that is not linked to a judicial proceeding may be able to freeze, seize, and repurpose frozen assets. This is because, as the ICJ has observed, "the rules of State immunity are procedural in character and are confined to determining whether or not *the courts of one State* may exercise jurisdiction in respect of another State" (para. 93, emphasis added).⁴⁵⁶

⁴⁴⁹ Fathmath Shaahunaz, *Maldives, Gambia discuss case against Myanmar at ICJ*, EDITION (Mar. 25, 2020), <https://edition.mv/news/15727>.

⁴⁵⁰ Joint statement of Canada and the Kingdom of the Netherlands regarding intention to intervene in the *Gambia v. Myanmar* case at the International Court of Justice, Gov't Netherlands (Sept. 2, 2020), <https://www.government.nl/documents/diplomatic-statements/2020/09/02/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice>.

⁴⁵¹ La France à l'ONU (@franceonu), X (FORMERLY TWITTER), (Mar. 25, 2022), <https://twitter.com/franceonu/status/1507464479273103365>.

⁴⁵² Richard Partington, *Russia 'preparing legal action' to unfreeze \$600bn foreign currency reserves*, GUARDIAN (Apr. 19, 2022), <https://www.theguardian.com/business/2022/apr/19/russia-preparing-legal-action-to-unfreeze-600bn-foreign-currency-reserves>.

⁴⁵³ Jurisdictional Immunities of the State (Ger. v. It., Greece intervening), Judgment, 2012 I.C.J. (Feb. 3), <https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-00-EN.pdf>.

⁴⁵⁴ Ingrid (Wuerth) Brunk, *Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?*, LAWFARE (Mar. 7, 2022), <https://www.lawfaremedia.org/article/does-foreign-sovereign-immunity-apply-sanctions-central-banks>.

⁴⁵⁵ Tom Ruys, Immunity, Inviolability and Countermeasures—A Closer Look at Non-UN Targeted Sanctions (SSRN, June 19, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198688.

⁴⁵⁶ Jurisdiction Immunities of the State, Judgment, 2012 I.C.J. (Feb. 3), *supra* note 453.

There is more work to be done here, including consideration of what legal regimes *do* apply to such action if the law on immunity does not, including notions of inviolability, sovereign equality, due process, and possibly expropriation. Second, any action against assets that is at first glance unlawful could potentially be justified as third-party countermeasures or an act in collective self-defence. This would benefit from further in-depth analysis.

And customary international law *does* change, and States can play a role in accelerating that change. The UN General Assembly has a role to play in this regard because its resolutions can have normative force and constitute evidence of State practice. A carefully worded resolution could signal a change in how the majority of States view the entitlement to immunity in these exceptional circumstances, opening the way to judicial, legislative, and executive action in pursuit of resources that would allow Ukraine and its people to rebuild their lives.

5. “States should ensure that they are a hostile environment for war criminals” by (a) signing the Crimes against Humanity Convention to allow for prosecutions of this crime in national

courts and better evidence-sharing between states; (b) expanding national laws to capture more perpetrators of international crimes.

Amal noted that there have only been two successful prosecutions for international crimes in the United Kingdom, and the United States has had only three cases⁴⁵⁷ under the Torture Act⁴⁵⁸ and zero cases⁴⁵⁹ charging genocide. This contrasts with the practice of, for example, Germany.⁴⁶⁰

In December 2019, the UN General Assembly took note of the International Law Commission’s draft articles on prevention and punishment of crimes against humanity. The articles are focused on a clear gap in international criminal law⁴⁶¹ (as compared to the treaties on war crimes and genocide) and rely extensively on provisions that States have accepted previously in treaties such as the 1984 Convention against Torture and the 2003 Convention against Corruption. There has been limited progress to date,⁴⁶² but the time would seem ripe for this treaty to come into being.

On the domestic level, Amal cited as a positive example of expanding national laws the proposed legislation by Senator Durbin

⁴⁵⁷ *U.S. Criminal Prosecution of Michael Sang Correa*, THE CENTER FOR JUSTICE & ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/u-s-criminal-prosecution-of-michael-sang-correa/#:~:text=On%20June%2011%2C%202020%2C%20the,of%20conspiracy%20to%20commit%20torture.&text=Correa%20is%20also%20only%20the,extraterritorial%20torture%20statue%2C%2018%20U.S.C.>

⁴⁵⁸ 18 U.S.C. § 2340A.

⁴⁵⁹ *ASIL Task Force on Policy Options for U.S. Engagement with the ICC*, AM. SOC’Y INT’L L. (Apr., 2021), <https://www.asil-us-icc-task-force.org/uploads/2021-ASIL-Task-Force-Report-on-US-ICC-Engagement-FINAL.pdf>.

⁴⁶⁰ Lenora Chu and Dominique Soquel, *Justice found? Germany sentences war criminal, bringing hope to Syrians*, CHRISTIAN SCI. MONITOR (Jan. 31, 2022), <https://www.csmonitor.com/World/Europe/2022/0131/Justice-found-Germany-sentences-war-criminal-bringing-hope-to-Syrians>.

⁴⁶¹ Sean Murphy, *Striking the Right Balance for a Draft Convention on Crimes against Humanity*, JUST SEC. (Sept. 17, 2021), <https://www.justsecurity.org/78257/striking-the-right-balance-for-a-draft-convention-on-crimes-against-humanity/>.

⁴⁶² Leila Nadya Sadat & Akila Radhakrishnan, *Crimes Against Humanity: Little Progress on Treaty as UN Legal Committee Concludes Its Work*, JUST SEC. (Dec. 7, 2021), <https://www.justsecurity.org/79415/crimes-against-humanity-little-progress-on-treaty-as-un-legal-committee-concludes-its-work/>.

and supported by Senator Graham in the United States.⁴⁶³

6. “The United Nations should establish a compensation commission.”

There have been various compensation and claims commissions established over the years, dating back to the Mixed Claims Commissions under the 1794 Jay Treaty. The UN played a prominent role in one of the most successful examples—the United Nations Compensation Commission (UNCC), which operated from 1991 until earlier this year. It provided payments (sourced in part from funds from the export of Iraqi petroleum) to individuals, corporations, governments, and international organizations. The Iran-US Claims Tribunal is another model, which used the involvement of a third-party intermediary (Algeria) to bring the parties to the negotiating table. There are also models, such as the Housing the Property Claims Commission (Kosovo) where State consent was not needed.

7. “States should extend a welcoming hand to its refugees—until it’s safe enough for them to go home.”

Poland, with a population of 38 million people, has already taken in more than 2.9 million Ukrainian refugees since 24

February.⁴⁶⁴ The overall impression has been one of generosity and warm support to people fleeing in horrific circumstances, but challenges lie ahead in terms of resources, logistics, and sustainability. The United Kingdom has been criticized for a limited and delayed response to the refugee crisis, leading to an apology by the Home Secretary. The UNHCR⁴⁶⁵ has recently launched a Regional Refugee Response Plan seeking \$1.85 billion to support a projected 8.3 million refugees in Hungary, the Republic of Moldova, Poland, Romania, Slovakia, Belarus, Bulgaria, and the Czech Republic.⁴⁶⁶

Conclusion

The horrors taking place in Ukraine, which we see scrolling across our screens on an hourly basis, can either galvanize us into action or render us numb. The Russian invasion and the ongoing violations of international law present an imposing task for international justice. In her powerful statement to the UN Security Council–hosted meeting, Amal offered States a compelling roadmap for improving the prospects for Ukraine and its people. States are well advised to consider and adopt these proposals to keep building the momentum towards justice.



⁴⁶³ *Following the Atrocities in Bucha, Durbin to Introduce Legislation to Hold Russian War Criminals Accountable*, DICK DURBIN UNITED STATES SENATOR ILLINOIS (Apr. 5, 2022), <https://www.durbin.senate.gov/newsroom/press-releases/following-the-atrocities-in-bucha-durbin-to-introduce-legislation-to-hold-russian-war-criminals-accountable>.

⁴⁶⁴ *UNHCR Help*, Operational Data Portal Ukraine Refugee Situation, <https://perma.cc/9L3U-XBZ8>.

⁴⁶⁵ *UNHCR and partners call for urgent support for refugees from Ukraine and their hosts*, UNHCR The UN Refugee Agency (Apr. 26, 2022), <https://www.unhcr.org/news/briefing-notes/unhcr-and-partners-call-urgent-support-refugees-ukraine-and-their-hosts>.

⁴⁶⁶ Rajeev Syal & Amelia Gentleman, *Priti Patel apologises for low number of Ukraine refugees arriving in UK*, GUARDIAN (Apr. 8, 2022), <https://www.theguardian.com/uk-news/2022/apr/08/ukraine-refugees-uk-12000-arrived-visa-schemes>.

WAR CRIMES AGAINST CHILDREN

by Véronique Aubert | Apr 8, 2022

For the 452 million children living in conflict zones (1 in 6 globally), the effects of conflict are multiple, wide-ranging, and devastating.⁴⁶⁷ With an increase in asymmetric warfare globally, children are targets of horrific acts of violence, including killing, conscription, rape, sexual slavery, unlawful detention, abduction, disappearance, and torture. Millions of children every year are also killed and maimed in indiscriminate onslaughts against civilian populations and civilian objects. Schools and hospitals are too often illegitimately targeted.

Owing to their unique vulnerabilities related to age, capacity, and dependency on adults, children suffer egregious harms from crimes during conflict. In more than 30 conflict situations since 2005, the United Nations Security Council–created monitoring and reporting mechanism (“MRM”) has verified 266,000 cases of grave violations against children across Africa, Asia, the Middle East, and Latin America.⁴⁶⁸

Systemic Accountability Failings

Despite these grueling numbers, investigations and prosecutions of crimes affecting children have not received the attention from States

that they deserve. It is to be recalled that States bear the principal responsibility of holding perpetrators to account. They must engage with international accountability mechanisms as analyzed in *Advancing Justice for Children: Innovations to Strengthen Accountability for Violations and Crimes Affecting Children in Conflict*,⁴⁶⁹ the recently released report* by Save the Children and Oxford University.⁴⁷⁰

These mechanisms include UN fact-finding and investigative bodies and international criminal courts and tribunals set up to serve as complementary accountability tools to domestic processes. However, limited political support from States for accountability weakens the rule of law and undermines long-term peace and stability efforts, essential to the safety and development of children. Lack of State support also deprives children of their right to be heard and their access to effective remedies.

Children and the crimes that affect them continue to be excluded from critical discussions of accountability. For example, most mechanisms have effectively failed so far to capture the full scope of children’s intersectional and multi-dimensional experiences in conflict settings. Most

⁴⁶⁷ Mariam Kirolos, Caroline Anning et al., *The War on Children*, SAVE THE CHILDREN INT’L (2018), https://www.savethechildren.org.uk/content/dam/global/reports/education-and-child-protection/war_on_children-web.pdf.

⁴⁶⁸ Children and Armed Conflict, Monitoring and Reporting on Grave Violations, <https://childrenandarmedconflict.un.org/tools-for-action/monitoring-and-reporting/>.

⁴⁶⁹ Sareta Ashraph & Veronique Aubert, *Advancing Justice for Children: Innovations to strengthen accountability for violations and crimes affecting children in conflict*, SAVE THE CHILDREN INT’L (Mar. 2021), <https://resourcecentre.savethechildren.net/document/advancing-justice-children-innovations-strengthen-accountability-violations-and-crimes/>.

⁴⁷⁰ Véronique Aubert, *Ukraine Symposium—War Crimes Against Children*, ARTICLES OF WAR (Apr. 8, 2022), https://lieber.westpoint.edu/war-crimes-against-children/#_ftn1.

mechanisms have failed to account for the fact that children of different ages, sexual orientation, gender identity and expression, disability, ethnicity, or demography have been targeted and affected differently from one another. They have also neglected the necessary gender- and age-disaggregated analysis. This results in the experiences of children in wars remaining invisible or reduced to few and unrepresentative instances of victimization. The lack of age disaggregated, gender-related data due to poor or non-existent documentation is one of the key obstacles to systematic and thorough documentation investigations and prosecutions of crimes affecting children.

Further, such international accountability mechanisms deny children, who have the intellectual and emotional maturity and capacity, their right to participate in these justice processes. Children, often labeled as too vulnerable, unable to testify, or having inaccurate memories, are left out of international justice processes despite accounting for half or most of the world population affected by conflict. Children are rights-holders whose voices need to be heard and perspectives understood.

The diversity of crimes experienced by children goes far beyond sexual and gender-based violence and child recruitment. It is critical that such crimes be recognized to include enslavement, murder, deprivation of liberty, torture, abduction, and crimes that

specifically target children, such as attacks on students, teachers, schools, and universities. Currently, such crimes are often not captured by international accountability mechanisms. The Global Coalition to Protect Education from Attack (GCPEA) compiled over 11,000 reports of attacks on education between 2015 and 2019, including attacks on school buildings and over 22,000 teachers and students killed, recruited, raped, or deprived of education in wars.⁴⁷¹ However, perpetrators have only very rarely been investigated and brought to justice for such crimes.

Ukraine is currently in the global spotlight for the devastating impacts of war. On the question of accountability, could harmful trends in accountability be reversed in the case of Ukraine, so that investigation and prosecution of international crimes committed against children will finally become a priority?

Children in the Ukraine-Russia Conflict

Since February 2022, children's lives in Ukraine have been devastated. Reported civilian casualties, including more than a hundred children killed, continue to grow, with real numbers feared to be much higher than the official record.⁴⁷² An alarming scale of displacement raises further concerns for the 7.5 million children in Ukraine.⁴⁷³

⁴⁷¹ Press Release, *Widespread Attacks on Education Worldwide More Than 11,000 Attacks in Past 5 Years*, GLOBAL COALITION TO PROTECT EDUCATION FROM ATTACK (July 9, 2022), <https://protectingeducation.org/news/widespread-attacks-on-education-worldwide-more-than-11000-attacks-in-past-5-years/>.

⁴⁷² *Ukraine: civilian casualty update 1 April 2022*, OCHA (Apr. 1, 2022), <https://www.ohchr.org/en/news/2022/04/ukraine-civilian-casualty-update-1-april-2022>.

⁴⁷³ 'Unprecedented' number of traumatized people flee Ukraine, UN NEWS (Mar. 4, 2022), <https://news.un.org/en/story/2022/03/1113342>.

Civilian areas and infrastructure have been attacked, including schools and hospitals, and indiscriminate use of explosive weapons, such as ballistic missiles and cluster bombs, has caused mass destruction.⁴⁷⁴ Dozens of health care facilities and hundreds educational facilities have been damaged or destroyed, including kindergartens and nurseries.⁴⁷⁵ The nationwide closure of schools and education institutions has affected the entire school-aged population—5.7 million students between 3 and 17 years old.⁴⁷⁶

Armed conflict started on the Ukrainian territory in 2014. Since 2014, UNICEF and other agencies have reported that the conflict in eastern Ukraine's Donbas region produced serious consequences for children's rights. Since 2014, 39 children have been killed and 137 injured due to mines and explosives, and many children have been left with disabilities and invisible psychological scars. Furthermore, between 2014 and February 24, 2022, the conflict in Eastern Ukraine destroyed, damaged, or forced the closure of more than 750 schools.⁴⁷⁷ This has disrupted access to education for thousands of children, with many too scared to attend and distressed by the presence of armed soldiers in and around their schools. GCPEA's *Education*

under Attack 2020 report found Ukraine to be among the countries affected by attacks on education in 2015–2019.

A Global Effort to Guarantee Justice for Children in War

The new ICC Prosecutor, Karim Khan QC, reacted to the Ukraine conflict promptly by opening an ICC investigation into the Situation in Ukraine⁴⁷⁸ following 41 referrals by States Parties.⁴⁷⁹ The Office of the Prosecutor has launched a portal where information can be submitted,⁴⁸⁰ and the Prosecutor and his team have made official visits to Ukraine and Poland.⁴⁸¹ To speed up investigation of potential international crimes committed in Ukraine, the recent appointment of a new Prosecutor provides an opportunity to finally operationalize the Office's 2016 Policy on Children, which comprehensively articulates what it terms "a child-sensitive approach" to accountability for international crimes.

Since his appointment, the new Prosecutor has invigorated efforts to prioritize crimes against and affecting children. The Prosecutor recently confirmed that his office received the first contributions to the dedicated Trust Fund

⁴⁷⁴ *UN political affairs chief warns of 'utter devastation' facing Ukraine cities by Russian forces*, UN NEWS (Mar. 11, 2022), <https://news.un.org/en/story/2022/03/1113812>.

⁴⁷⁵ *Ukraine: Humanitarian Impact*, OCHA (Mar. 7, 2022), https://reliefweb.int/sites/reliefweb.int/files/resources/2022-03-07_Ukraine_Humanitarian_Impact_SitRep_final.pdf.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Ukraine: Attacks on Schools in Ukraine Endangering Children's Lives and Futures*, Save the Children (Feb. 27, 2022), <https://www.savethechildren.org/us/about-us/media-and-news/2022-press-releases/ukraine-attacks-on-schools>.

⁴⁷⁸ Statement of ICC Prosecutor, *supra* note 9.

⁴⁷⁹ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Additional Referrals from Japan and North Macedonia; Contact portal launched for provision of information, Int'l Crim. Ct. (Mar. 11, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and>.

⁴⁸⁰ *Id.*

⁴⁸¹ Statement of ICC Prosecutor, Karim A.A. Khan QC, on his visits to Ukraine and Poland: "Engagement with all actors critical for effective, independent investigations," Int'l Crim. Ct. (Mar. 16, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-his-visits-ukraine-and-poland-engagement-all-actors>.

for Advanced Technology and Specialized Capacity, with a total of 14 States Parties having already made contributions or stated their wish to do so. The first contributions will be in part deployed for dedicated and specialized capacity in investigating crimes against children.⁴⁸²

To complement the ICC investigation, other accountability efforts for Ukraine have been established very quickly. This includes an Independent International Commission of Inquiry to investigate all alleged violations of human rights in the context of the Russian Federation's aggression against Ukraine.⁴⁸³ The Commission is composed of three human rights experts appointed by the President of the UN Human Rights Council for an initial duration of one year.⁴⁸⁴

In addition, the Eurojust initiative⁴⁸⁵ on the investigation of war crimes, crimes against humanity, and other core international crimes committed in Ukraine and the International Court of Justice case *Ukraine v. Russian Federation*⁴⁸⁶ are also due to examine the Ukraine situation. The ICC's foundational principle of

complementarity to national processes also invites a multiplicity of justice efforts.⁴⁸⁷ This means that some States might choose to act if a person suspected of involvement in Ukraine-Russia war crimes were to seek refuge in their country,⁴⁸⁸ as seen when Germany recently tried Syrians in its courts on charges of war crimes committed in Syria.⁴⁸⁹ Ukraine could prosecute crimes committed in its territory and against its people,⁴⁹⁰ consolidating its own domestic process.

The simultaneous pursuit of these different avenues for criminal accountability could facilitate investigations and prosecutions that focus on crimes committed against children and lead to justice for the many boys and girls impacted by the conflict. It is therefore essential for the United Nations Members States and for the Members of the Assembly of States Party to the ICC to support international accountability mechanisms, notably in supporting the appointment of child-dedicated expertise so that all alleged abuses, violations, and crimes in Ukraine committed against children can be documented and prosecuted where relevant.

⁴⁸² Statement of ICC Prosecutor, Karim A.A. Khan QC: Contributions and support from States Parties will accelerate action across our investigations, Int'l Crim. Ct. (Mar. 28, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-contributions-and-support-states-parties-will>.

⁴⁸³ Press Release, U.N. Human Rights Off. High Comm'r, Human Rights Council establishes an Independent International Commission of Inquiry to investigate all alleged violations of human rights in the context of the Russian Federation's aggression against Ukraine (Mar. 4, 2022), <https://www.ohchr.org/en/press-releases/2022/03/human-rights-council-establishes-independent-international-commission>.

⁴⁸⁴ Independent International Commission of Inquiry in Ukraine, U.N. Human Rights Off. High Comm'r, <https://www.ohchr.org/en/hr-bodies/hrc/iicir-ukraine/index>.

⁴⁸⁵ Press Release, Eurojust, Statement of Eurojust President Mr Ladislav Hamran following visit of EU Ministers of Justice on Ukraine (Mar. 24, 2022), <https://www.eurojust.europa.eu/news/statement-eurojust-president-mr-ladislav-hamran-following-visit-eu-ministers-justice-ukraine>.

⁴⁸⁶ Press Release, International Court of Justice, Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening), <https://www.icj-cij.org/case/182>.

⁴⁸⁷ Rome Statute, *supra* note 5, pmbl., para 4.

⁴⁸⁸ Diane Marie Amann, *Time for a New War Crimes Commission?*, ARTICLES OF WAR, (Mar. 18, 2022) <https://lieber.westpoint.edu/time-for-new-war-crimes-commission/>.

⁴⁸⁹ *Syria*, ECCHR, <https://www.ecchr.eu/en/topic/syria/>.

⁴⁹⁰ Amann, *supra* note 488.

It is clear from past examples that whenever child-dedicated expertise is deployed to support documentation and investigation, the mainstreaming of violations affecting children and the public reporting of crimes affecting children increase significantly.⁴⁹¹ The Commission of Inquiry on Ukraine and the Office of the High Commissioner for Human Rights (OHCHR)—the leading UN entity on human rights which appointed it—should ensure that dedicated expertise and analysis regarding crimes committed against children are included in the work of the Commission, despite the absence of a child rights expert included in the list of positions currently advertised. Child rights expertise should systematically be included in the structure and work of Commissions of Inquiry.

Overcoming Barriers to Accountability Mechanisms

For States and mechanisms to bridge the accountability gap for children in armed conflict and live up to their commitments to hold perpetrators to account, global support should:

(1) ensure that crimes and violations affecting children, including attacks on students and teachers, are systematically enshrined into the mandates of accountability mechanisms and accompanied by the inclusion of child-specific expertise into the structures of these mechanisms;

(2) tackle funding obstacles that deprioritize the deployment of expertise and the provision of training to guarantee the adoption of child-competent approaches to the documentation and investigation of crimes and violations affecting children; and

(3) promote systematic sharing of relevant expertise and the development of effective collaboration strategies between the ICC, all the various UN and regional mechanisms being established, and domestic accountability efforts dedicated to the Ukraine situation, in order to prevent negative experiences for the victims and maximize the chance for successful justice processes.⁴⁹²

The Security Council has underscored “the responsibilities of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes and other egregious crimes perpetrated against children” (UNSCR 1612⁴⁹³) and the need “for alleged perpetrators of crimes against children in situations of armed conflict to be brought to justice through national justice systems and, where applicable, international justice mechanisms and mixed criminal courts and tribunals in order to end impunity” (UNSCR 2068⁴⁹⁴). The ICC, all the various UN and regional mechanisms being established, and domestic accountability efforts dedicated to the Ukraine situation must ensure that crimes against children are the forefront as a priority. The children in Ukraine deserve nothing less.

⁴⁹¹ U.N. Human Rights Council, “They have erased the dreams of my children”: Children’s rights in the Syrian Arab Republic*, Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic (Jan. 13, 2020), https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_43_CRP.6_EN.pdf.

⁴⁹² ASGRAPH & AUBERT, *supra* note 427.

⁴⁹³ S.C. Res. 1612 (July 26, 2005).

⁴⁹⁴ S.C. Res. 2068 (Sept. 19, 2012).

Note

* Further details on these solutions are Acts and Documents Concerning the Organisation of the Court, in *Advancing Justice for Children: Innovations to Strengthen Accountability for Violations and Crimes Affecting Children in Conflict*,⁴⁹⁵ the recently released report by Save the Children and the Oxford Programme on International Peace and Security at the Blavatnik School of Government's Institute

for Ethics, Law, and Armed Conflict (ELAC). The study identifies strategies and solutions to overcome barriers to the investigation, documentation, and indictment of violations and crimes affecting children in conflict and other situations of protracted armed violence, including war crimes, crimes against humanity, and genocide.



⁴⁹⁵ Ashraph & Aubert, *supra* note 469.

THE ATROCITY CRIMES ADVISORY GROUP & UKRAINIAN PROSECUTIONS OF RUSSIAN POWS—PART 1

by Chris Jenks | Jun 22, 2022

On 25 May 2022, the European Union, the United States, and the United Kingdom announced the establishment of the Atrocity Crimes Advisory Group for Ukraine (ACA).⁴⁹⁶ According to the announcement, “[t]he overarching mission of the ACA is to support the War Crimes Units of the Office of the Prosecutor General of Ukraine . . . in its investigation and prosecution of conflict-related crimes.”

Ukraine has already conducted two trials against three Russian prisoners of war (POWs) for pre-capture violations of the rules of warfare. According to the Ukrainian Prosecutor General, War Crimes Units are preparing to prosecute 49 more POWs⁴⁹⁷ as well as members of the private military company Wagner Group.⁴⁹⁸ These prosecutions are the initial results of Ukrainian efforts to investigate “close to 13,000 cases which are connected to war crimes” stemming from Russia’s invasion. To document the crimes in support of current national prosecutions and potential future international tribunals, as well as to build a historical record, Ukraine is collecting

testimony from thousands of victims and witnesses.⁴⁹⁹

It’s difficult to overstate the challenges in investigating and prosecuting alleged law of war violations in general, let alone while an armed conflict is being waged within your country. As the ACA announcement acknowledged, “Ukrainian prosecutors and investigators are very capable and have been doing outstanding work. Nevertheless, the scale of what is happening now is unprecedented and is placing huge demands on the Office of the Prosecutor General. Such demands would prove challenging for any law enforcement authorities in any country.”

Some of the alleged violations involve kidnapping, torture, and murder of families, including children. Others involve sexual assault and rape.⁵⁰⁰ Such misconduct, while violating the law of armed conflict (LOAC), is completely divorced from the conduct of active hostilities.

Other cases, including the first two trials, involve misconduct with a stronger nexus to the armed conflict. That stronger nexus yields

⁴⁹⁶ Remarks and Releases, U.S. Dep’t of State, the European Union, the United States, and the United Kingdom establish the Atrocity Crimes Advisory Group (ACA) for Ukraine (May 25, 2022), <https://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine/#:~:text=The%20ACA%20is%20an%20operational,multilateral%20effort%20to%20support%20Ukraine>.

⁴⁹⁷ David Brennan, *Forty-Eight More Russian Soldiers Will Face War Crime Trials, Ukraine Says*, NEWSWEEK (May 23, 2022), <https://www.newsweek.com/forty-eight-russian-soldiers-face-war-crime-trials-ukraine-iryna-venidiktova-1709113>.

⁴⁹⁸ *What is Russia’s Wagner Group, and what has happened to its leader?*, BBC (Sept. 6, 2023), <https://www.bbc.com/news/world-60947877>.

⁴⁹⁹ Loveday Morris, *An ‘unprecedented’ effort to document war crimes in Ukraine. But what chance of justice?*, WASH. POST (May 28, 2022), <https://www.washingtonpost.com/world/2022/05/28/ukraine-war-crimes-investigations/>.

⁵⁰⁰ Lara Jakes, *In Ukraine War, a Long Journey Begins in Prosecuting Rape*, N.Y. TIMES (Apr. 29, 2022), <https://www.nytimes.com/2022/04/29/us/politics/ukraine-rape-war-crimes.html>.

a comparatively greater need to understand the conduct of legitimate military combat operations and the LOAC.

The first trial involved a Russian soldier who, on the orders of at least one and possibly a second military superior, shot and killed an unarmed Ukrainian civilian incorrectly suspected of using his cell phone to report the Russian troops' location. The second trial involved two Russian soldiers who were members of an artillery unit that fired rockets which damaged or destroyed several Ukrainian civilian buildings.

For its part, Russia has begun prosecutions of Ukrainian "foreign fighters"⁵⁰¹ in occupied portions of Ukraine. Russia also announced the pending prosecution of captured Ukrainian service members to take place in Russia but has not yet begun those proceedings.⁵⁰² However, given the establishment of the ACA, and because there is much more information available in English on the Ukrainian trials, they are the focus of this post.

The two Ukrainian trials implicated a range of LOAC issues including the role of superior orders, direct participation in hostilities, explosive weapons in populated areas, the combatant's privilege and immunity, and requirements for prosecuting POWs. These issues do not appear to have been fully developed at trial, which may be partially attributable to the Russian soldiers having pled guilty.

But these LOAC issues may resurface on appeal from the first two trials or in subsequent cases where the accused plead not guilty and the prosecution is required to prove guilt. Ultimately this post suggests that the first two trials may help inform the ACA's efforts to provide expertise, mentoring, and advice to the Ukrainian War Crimes Unit.

This three-part post addresses Ukraine's decision to prosecute Russian POWs via a civilian/domestic court before reviewing the first two trials. The discussion of the first two trials primarily relies on Ukrainian media accounts, including Ukrainian journalists livestreaming/reporting the proceedings. The live streams are, of course, not official transcripts, nor do they purport to be. Some of the livestream reflects paraphrasing and summarizing of court actions and testimony, while at other times, journalists provide direct quotes. Additionally, the Ukrainian journalists wrote their accounts in Ukrainian, though their publication converts the livestream to English.

The Ukrainian journalists' accounts, after being translated, were then filtered through this English-speaking law professor, trained and experienced in American conceptions of criminal justice. This post assumes the perhaps considerable risk of misunderstanding what may have resulted. It does so to identify as many potential issues as the context permits. Where this post asks flawed questions, those more knowledgeable about the first two trials and the Ukrainian criminal justice system should feel free to provide correction

⁵⁰¹ Dan Bilefsky & Valerie Hopkins, *3 Foreign Fighters in Ukraine's Army Sentenced to Death in Russian-Held Territory*, N.Y. TIMES (June 9, 2022), <https://www.nytimes.com/2022/06/09/world/europe/ukraine-army-death-sentence-russia.html>.

⁵⁰² Ivan Nechepurenko, *Russia Opens 1,100 Cases Against Ukrainian P.O.W.s, Raising Fears of Show Trials*, N.Y. TIMES (June 9, 2022), <https://www.nytimes.com/2022/06/09/world/europe/russia-trials-ukrainian-soldiers.html>.

and clarification. But where this post raises potentially viable issues, it does so in the spirit of providing assistance to the ACA and the Ukrainian War Crimes Unit.

Why Is Ukraine Prosecuting Russian POWs in Civilian, Domestic Courts?

The 1949 Third Geneva Convention provides,

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.⁵⁰³

Ukraine abolished its military justice system in 2010 and added military-related articles to its domestic criminal code. As a result, Ukrainian prosecutions of members of the armed forces, Russian or Ukrainian, are only through civilian courts. Accordingly, Ukrainian prosecutions of Russian POWs in civilian court comply with the Third Geneva Convention.

The Trial of Sergeant Vadim Shishimarin

The primary source for information on the first trial was the Ukrainian news site *Graty*.⁵⁰⁴ On 23 May, a three-judge trial panel from the Solomensky District Court of Kyiv sentenced 21-year-old Russian Army Sergeant Vadim Shishimarin to confinement for life for

violating the rules of war and the murder of a 62-year-old Ukrainian civilian, Alexander Fedorovich Shelipov (Mr. Shelipov).

Background

Shishimarin, serving as a tank commander in the Russian Army's 4th Kantemirovskaya Tank Division, participated in the Russian invasion of Ukraine. Between 24 and 28 February, Shishimarin and his unit fought with elements of the Armed Forces of Ukraine in the northeast of Ukraine, roughly 180 miles east of Kyiv. Following Ukrainian attacks on the morning of 28 February, Shishimarin was one of approximately fifteen Russian soldiers from several different units left without a vehicle. The fifteen subdivided into several groups, one of which included:

- (1) Lieutenant (LT) Kalinin (superior in rank to Shishimarin)
- (2) Kufakov (unknown to Shishimarin and Maltisov but they believed him to be an officer and superior in rank to them)
- (3) Warrant Officer (WO) Makeev (superior in rank to Shishimarin)
- (4) Private (PVT) Maltisov
- (5) Sergeant (SGT) Shishimarin

Later that morning, a Ukrainian civilian drove toward Shishimarin's group in a Volkswagen Passat. One or more members of the group shot at the car, hitting and damaging it. The driver stopped, left the car,

⁵⁰³ GC III, *supra* note 176, art. 84.

⁵⁰⁴ *The first Russian military man to be tried for the murder of a civilian Ukrainian. The case of Vadim Shishimarin*, GRATY (May 13, 2022), <https://graty.me/ru/online/pervyj-rossijskij-voennyj-kotorogo-sudyat-za-ubijstvo-grazhdanskogo-ukrainca-delo-vadima-shishimarina/>.

and hid on the side of the road. The Russians seized the car: Makeev drove, Kufakov was in the front passenger seat, Shishimarin and Maltisov occupied the rear seats, and for some unexplained reason Kalinin climbed into the trunk of the car.

The group's destination is unclear, but they drove a visibly damaged civilian car to a nearby Ukrainian village while wearing Russian Army uniforms. In the village, Makeev was the first to see Mr. Shelipov, a local resident. Mr. Shelipov was unarmed, wearing civilian clothes, and riding a bicycle while talking on a cell phone. Mr. Shelipov was a few dozen meters from his house and on his way to assess whether explosions the night before had damaged his car.

Makeev, believing that Mr. Shelipov was using his phone to report the Russians' location, ordered Shishimarin to shoot Mr. Shelipov. Shishimarin initially refused. Kufakov repeated the order and then, in a tone Shishimarin would later characterize as threatening, emphasized that Shishimarin was to shoot Mr. Shelipov. While the car was driving approximately 50 kilometers an hour, Shishimarin leaned out the window and fired 3-4 rounds from his AK 47 assault rifle at Mr. Shelipov. One of the rounds hit Ms. Shelipov in the head, killing him.

Kalinin, still in the trunk, yelled to the others to place their weapons on safe. The Russians drove on for roughly four miles to the outskirts of the next village. There, residents ambushed the Russians on a bridge, killing Kufakov and

prompting Kalinin, Makeev, Maltisov, and Shishimarin to leave the car and flee toward a nearby pig farm. It's not clear what happened to Kufakov's body, but the surviving Russian troops hid the remainder of 28 February. The morning of 1 March, they went to a nearby village and surrendered.

The Charges against SGT Shishimarin

On 11 May, following a Ukrainian Security Service (SBU) investigation, the Ukrainian Prosecutor General's Office announced via the Telegram message⁵⁰⁵ application that Shishimarin would face criminal charges for the events of February 28th. Ukraine charged Shishimarin with "violating the laws and customs of war, *combined with* premeditated murder" under Part 2 of Article 438 of the Ukrainian Criminal Code (emphasis added).⁵⁰⁶

Article 438 is titled "violations of the rules of warfare" and is subdivided into two parts. Part 1 criminalizes

Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, *or any other violations of rules of warfare recognized by international instruments consented to as binding by the Parliament of Ukraine*, and also giving an order to commit any such actions. (emphasis added)

⁵⁰⁵ Офіс Генерального прокурора [Office of the Prosecutor General] @Офіс Генерального прокурора, TELEGRAM (May 11, 2022), https://t.me/pgp_gov_ua/4070.

⁵⁰⁶ Criminal Code of Ukraine, U.S. Dep't of Justice (reproduced), https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/criminal_code_0.pdf.

Violations of Part 1 are punishable by imprisonment for a term of eight to twelve years. Part 2 criminalizes “[t]he same acts [from Part 1] accompanied with an intended murder” and is punishable by imprisonment for a term of ten to fifteen years or life imprisonment.

This post understands the structure of Article 438 and the Attorney General’s Office announcement to mean that Shishimarin committed two criminal acts: the first, an unspecified violation of one or more rules of warfare, and the second, the intentional murder of Mr. Shelipov.

SGT Shishimarin’s Trial

On 13 May, the Ukrainian court held a pretrial hearing. Shishimarin attended the hearing and was represented by an appointed Ukrainian defense counsel and was provided an interpreter. Shishimarin elected a trial by a three-judge panel (as opposed to a trial by one judge or by a jury).

The trial took place the following week and lasted roughly six hours spanning 18 through 20 May. On the first day of the proceedings, the Ukrainian prosecutor acknowledged that Shishimarin was a lawful combatant under the Geneva Conventions and read a factual narrative of the events leading up to and on 28 February.

The narrative included that,

Mistakenly believing that a civilian wants to inform the Armed Forces of Ukraine about them, Kufakov ordered Shishimarin to kill a civilian.

Shishimarin shot 3–4 times at Shelipov from his weapon, a Kalashnikov assault rifle, leaning out of the car window.

As a result, Shelipov received a wound of the parietal-temporal part on the left, crushing of the cranial vault and destruction of the brain. The cause of death was a gunshot wound to the head.

Although this narrative does not seem to have included the specific criminal charges, following the recitation one of the judges asked Shishimarin how he pled. Shishimarin replied “guilty.”

The prosecution called several witnesses, including a resident of the village who had witnessed the shooting and Mr. Shelipov’s widow. The prosecution introduced Mr. Shelipov’s cell phone and evidence that the SBU investigation had traced his 28 February call, but the journalist’s account of the trial does not specify with whom Mr. Shelipov was on the phone. The prosecution also introduced weapons the Russian service members had been carrying. The prosecution informed the court that Shishimarin had cooperated with the SBU investigation and had identified the weapon he used to shoot Mr. Shelipov.

Shishimarin testified and was questioned by the prosecution, the defense, the court, and Mr. Shelipov’s widow. Shishimarin claimed that he didn’t mean to kill Mr. Shelipov and that he fired his weapon on orders first from Makeev and then Kufakov. In an exchange with the court, Shishimarin acknowledged that he knew Mr. Shelipov was a civilian and agreed that he could have employed less-than-lethal force.

The prosecution also called Maltisov. During prosecution and defense questioning, Maltisov testified that Makeev initially ordered Shishimarin to shoot Mr. Shelipov. He indicated that Kufakov repeated the command. Based on the journalist's summary, Maltisov appears to have thought the order was illegal, though it was not clear when he formed that view.

Maltisov testified that there was no prior coordination between Makeev, who was driving, and Kalinin, who was in the trunk, regarding the order to shoot. Kufakov's first name and rank were never established, though Maltisov testified that he believed Kufakov to be an officer. Along with that confusion, the ranking officer in the car was also not established. Kalinin and Makeev were superior in rank to Maltisov and Shishimarin, both of whom believed Kufakov was as well.

The defense then attempted to call Kalinin and Makeev as witnesses. However, the prosecution announced that Ukraine had returned the two officers to Russia as part of a prisoner exchange. According to contemporaneous accounts, the defense stated that the prosecution's announcement was the first notice the defense had that the two officers would not be available to testify.

The journalists' accounts do not reflect any discussion whether Ukraine exchanging two potential witnesses such that they couldn't testify violated Shishimarin's rights under the Criminal Procedure Code of Ukraine to "request that witnesses for the defense be summoned and examined at the same conditions as witnesses for the prosecution."

Moments later the trial moved to closing arguments. The prosecution acknowledged Shishimarin's admission of guilt and sincere repentance as mitigating factors but requested that the court impose the maximum sentence of life imprisonment. The juxtaposition of the prosecution acknowledging those mitigating factors while requesting the maximum sentence is particularly interesting given the Ukrainian Criminal Code. Under Article 69-1, where an offender has surrendered or displayed sincere repentance (Shishimarin seemingly qualified on both counts) and admitted guilt (which the prosecution conceded), "[t]he term of punishment may not exceed a period of two thirds of the maximum term of the heaviest punishment prescribed."

Based on the journalist's summary, the prosecution did not identify or claim any aggravating factors. The Ukrainian Criminal Code lists thirteen circumstances deemed to be aggravating. The list is exclusive; a court is prohibited from finding any circumstance other than those listed as aggravating. By contrast, the Code lists nine circumstances deemed to be mitigating but authorizes a court to consider other circumstances.

The defense argued that under Russian Federal Military Regulations, Shishimarin was obliged to follow the orders of Makeev and Kufakov, and that Ukraine should have prosecuted Makeev and Kalinin. He emphasized Shishimarin's age and inexperience and the stress and confusion at the time of the shooting. The defense claimed that Shishimarin had not intended to kill Mr. Shelipov and that it wouldn't have been possible to fire aimed shots out of the window

of a moving, damaged car. The defense urged the court to find that Shishmarin was innocent of the charge of murder under Article 438, Part 2.

Shishmarin reiterated his apology and regret for killing Mr. Shelipov. He said that he was nervous and didn't want to kill Mr. Shelipov but acknowledged that he did. In rebuttal, the prosecution challenged the legality of the order to shoot Mr. Shelipov and argued that Shishmarin could have fired fewer rounds or left the car and taken Mr. Shelipov's phone.

Following closing arguments, the court recessed for three days. On 23 May, the court reconvened to announce and briefly explain the verdict.

The court held that Shishmarin had carried out a "criminal order" by a soldier of higher rank.⁵⁰⁷ The court did not find Shishmarin's claim that he didn't intend to kill credible. In the view of the court, Shishmarin only partially admitted his guilt, which meant his repentance was not sincere. As a result, the court found the only mitigating factor was his cooperation. If and how the court considered that Shishmarin surrendered is unclear.

The court held that the trial fully confirmed Shishmarin's guilt for violating a rule of warfare combined with the murder of Mr. Shelipov. The court sentenced Shishmarin to the maximum punishment of life imprisonment, stating that "[g]iven that the crime committed is a crime against peace, security, humanity and the international legal order . . . the court does not see the possibility of imposing a [shorter] sentence

of imprisonment." The trial summaries do not make any reference to the prosecution proving that Shishmarin committed a crime against peace, security, humanity, and the international legal order, and those conditions are not listed as aggravating factors in the Ukrainian Code.

Following the announcement, the defense attorney told the media that he would appeal the verdict and that there were no grounds for the finding that Shishmarin's actions violated the rules of warfare.

Questions Specific to Shishmarin's Trial

Violating Rules of War as a Criminal Offense

The Ukrainian court found Shishmarin guilty of (1) violating a rule of warfare and (2) murdering Mr. Shelipov. To provide adequate notice of the charge, the prosecution needed to specify which rule of warfare Shishmarin was alleged to have violated. Additionally, that rule must articulate a specific crime. For example, the Rome Statute for the International Criminal Court (ICC) categorizes war crimes: Article (2)(a)(i) War crime of willful killing; Article (2)(a)(ii)-1 War crime of torture, etc.

In ordinary practice, the specific offense must be broken down into elements. For example, elements of the ICC crime of willful killing are:

- (1) The perpetrator killed one or more persons.

⁵⁰⁷ Patrick Jackson & James Waterhouse, *Ukraine War: Russian soldier Vadim Shishmarin jailed for life over war crime*, BBC (May 23, 2022), <https://www.bbc.com/news/world-europe-61549569>.

- (2) Such person or persons were protected under one or more of the Geneva Conventions of 1949.
- (3) The perpetrator was aware of the factual circumstances that established that protected status.
- (4) The conduct took place in the context of and was associated with an international armed conflict.

Only with a specific offense broken down into constituent elements would Shishimarin have adequate notice of the charge such that he could prepare a defense or make an informed decision to plead guilty.

As discussed above, the text of Article 438, Part 1, includes “any other violations of rules of the warfare recognized by international instruments consented to as binding by the Parliament of Ukraine.” Ukraine is a State Party to numerous LOAC treaties and conventions. But which part of which international instrument Shishimarin violated does not appear to have been disclosed or, as the defense counsel noted, proved.

This is significant on several levels. There are the obvious notice issues already mentioned. Additionally, the life sentence is the result of Shishimarin being found guilty of Article 438, Part 2. Part 2 requires one or more acts from Part 1 accompanied by an intended murder. But the Part 1 act was the unspecified violation of the rules of warfare. Without Part 1, it does not seem that there can be a violation of or informed plea to Part 2.

Only a violation of Part 2 triggers the potential of life imprisonment implicated. Without a Part 1 violation, Shishimarin

appears to have at most committed domestic murder, which Ukraine defines as willfully and unlawfully causing the death of another person. The punishment range for domestic murder is seven to fifteen years, far less than life imprisonment.

Providence of Shishimarin's Guilty Plea

As discussed above, after the prosecution read a factual narrative on the first day of trial, the court asked Shishimarin if he was pleading guilty and Shishimarin confirmed that he was. But the factual predicate was that Shishimarin *killed* Mr. Shelipov, not that he murdered him. Based on the journalist's account, Shishimarin acknowledged “guilt” only to the fact of killing, not to the charge of murder (or to the charge of violating the rules of warfare).

While the journalist's account may be incomplete and/or there may be issues resulting from translation, subsequent events at trial reinforce that there was confusion as to which if any charges Shishimarin pled guilty. Shishimarin later told the court that he did not intend to kill Mr. Shelipov, which is at odds with acknowledging guilt for intentional murder. Similarly, in his closing argument the defense attorney contended Shishimarin was innocent of murder.

The prosecution does not appear to have introduced evidence regarding violation of the rules of warfare and focused its efforts on proving that the killing was intentional. One possible answer is that the prosecution operated on the understanding that Shishimarin had pled guilty to violating

the rules of warfare and of killing (but not murdering) Mr. Shelipov.

Yet the prosecution in closing argument acknowledged Shishimarin's admission of guilt despite Shishimarin denying the requisite *mens rea* for intentional murder and the defense counsel claiming innocence. The court's subsequent announcement that Shishimarin had only partially accepted responsibility reflects that he could not be guilty of murder under Ukrainian law if he did not intend to kill.

The guilty plea confusion seems significant. If Shishimarin did not plead guilty to violating the rules of warfare, where was the evidence of his guilt on that charge? Alternatively, if Shishimarin was attempting to plead guilty to murder, the court could have paused following his testimony that he didn't intend to kill. Defense counsel could have explained to Shishimarin that if he didn't intend to kill, then he can't plead guilty to murder, which meant he would not qualify for mitigation of his sentence. At that point the court could resume questioning Shishimarin with everyone having a shared understanding of which charge(s) his acceptance of guilt was provident.

Direct Participation in Hostilities

The court's verdict referred to the order that Shishimarin shoot Mr. Shelipov as a criminal order. At trial, Shishimarin was questioned whether he was obligated to follow an "obviously illegal" order, to which Shishimarin replied that he was not. But Shishimarin's answer does not reveal whether he believed the order to be illegal.

Whether the order was illegal and whether Shishimarin knew or should have known it was illegal was at the core of the case. Maltisov's testimony conveys the sense that he believed the order was illegal, but it's not clear if he formed that view at the time or after the fact.

The prosecution acknowledged that the order to shoot Mr. Shelipov was based on the mistaken belief that Mr. Shelipov was using his mobile phone to report the Russians' location. But there was no discussion of mistake of fact. Significantly, there was also no acknowledgment that real-time reporting of tactical information, like location, even if done by unarmed civilians, may constitute direct participation in hostilities, which renders even an unarmed civilian permissibly targetable with lethal force.

The International Committee of the Red Cross (ICRC) discussed a very similar scenario in its interpretive guidance on direct participation (DPH): "For example, an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably have to be regarded as directly participating in hostilities."

To be clear, there is no indication that Mr. Shelipov was reporting the Russian's location; the belief that he was appears erroneous. The belief may have even been objectively unreasonable. But to establish that required inquiry, not simply a conclusion. If the belief, while mistaken, was not unreasonable, the ramifications are massive—neither the order to shoot Mr. Shelipov nor shooting him would be illegal.

Defense of Superior Orders

Even if the order was illegal, the Ukrainian Code recognizes that certain circumstances exclude criminality. One of those circumstances is obeying an order or command under Article 41. While the order to shoot was repeatedly mentioned during the trial, the issue does not appear to have been analyzed under the Code. This is surprising because how Article 41 applied would seem dispositive of Shishimarin's liability (or lack thereof) and would have potentially implicated Makeev.

In Ukraine "[w]here a person was not and could not be aware of the criminal nature of an order or command, the criminal liability for the act committed in pursuance of such order or command shall arise only with respect to the person who gave the criminal order or command." That means that if Shishimarin, at the time of the order to shoot Mr. Shelipov, was not aware (and should not have been aware) that the order was illegal, then Shishimarin did not commit a crime, but Makeev and Kufakov did. The analysis of Shishimarin's awareness should, but does not appear to, have considered his age, rank, experience, and the circumstances and context at the time of the order.

By contrast, if an order is patently criminal, the Ukrainian Code does not provide a defense ("A person, who obeyed a patently criminal order or command, shall be criminally liable on general grounds for the acts committed in pursuance of such order or command").

Perhaps the court did not consider Article 41 because the court believed the order to be patently criminal. The court may have even said as much, with the word "patently" in Ukrainian being translated to "obviously" in English.

If so, such an assessment, without support or explanation, seems unreasonable. Patently (or manifestly) criminal orders by definition are easily, even instinctively, recognizable. An Israeli judge wrote that manifestly illegal orders flew "like a black flag" and constituted "a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself."⁵⁰⁸

Given the ICRC's position, the order may not even have been illegal and thus by definition could not be patently criminal. The proceedings do not appear to have established whether Shishimarin, at the time of the shooting, believed the order to be unlawful. Similar to the direct participation in hostilities discussion above, the issue of obeying an order or command seems to have warranted further exploration and clarification.

Exchanged/Missing Witnesses

It would seem problematic if, as one journalist recounted, Ukraine not only exchanged Kalinin and Makeev before trial, but the prosecution also failed to inform the defense until the attempt to call the two as witnesses at trial. Kalinin and Makeev were two of the surviving four occupants of the car and presumably could have clarified Kufakov's identity, the rank hierarchy in the car, why

⁵⁰⁸ The Attorney General v. Adolf, son of Karl Adolph, Eichmann, 40 Crim. L. Rep. 61 (Dist. Ct. Jerusalem 1961), https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgement_11-12-1961.pdf.

Makeev issued the initial order to shoot, and what if anything Kalinin could have done to countermand the order. But however problematic the POW exchange was in terms of the rights and process owed Shishimarin under Ukrainian law, there may be a separate issue under Additional Protocol (AP) I to the Geneva Conventions.

Both Shishimarin and Maltisov testified that Makeev initially ordered Shishimarin to shoot. When Shishimarin refused, Kufakov then repeated the order. The court considered the order to shoot criminal, even obviously so. Given the results of the order, in terms of both Mr. Shelipov's death and Shishimarin receiving life imprisonment, why didn't the prosecution charge Makeev for issuing the order to shoot? The failure to charge Makeev is particularly hard to understand given that Article 438, Part 1, also criminalizes "giving an order to commit any such actions."

As previously mentioned, the rank hierarchy in the car was not clearly explained at trial. At times Maltisov and Shishimarin seemed to be saying that LT Kalinin in the trunk was the ranking officer. Kalinin yelling from the trunk to the occupants to safety their weapons after the shooting, and their subsequent compliance, would seem to validate him as the ranking officer. What could Kalinin hear from the trunk? He obviously heard the shots fired. Did he hear Makeev's initial order,

Shishimarin's refusal, or Kufakov's follow-on order?

If the answer is yes, then why didn't Kalinin countermand the orders? If the answer is no—that he couldn't hear the various verbal exchanges—isn't that Kalinin's fault for climbing into the trunk in the first place? If the Makeev/Kufakov orders were illegal and Kalinin knew or should have known of the illegal order and countermanding it was feasible, Kalinin may be liable under a theory of command responsibility.

Makeev's order to shoot Mr. Shelipov may qualify as a war crime under AP I.⁵⁰⁹ Kalinin's failure to prevent the shooting warranted further inquiry but could potentially also constitute a violation⁵¹⁰ of the AP I's duty of commanders provision.⁵¹¹

Ukraine, as a State Party to the Geneva Conventions and also AP I, was obliged to investigate a possible grave breach and a possible command responsibility failure. If the investigation concluded that Makeev and/or Kalinin committed the violations, Ukraine would then have a legal obligation either to prosecute the alleged offender(s) or to transfer him/them to a State that would. There is no indication that Russia intends to investigate let alone prosecute Makeev and Kalinin.



⁵⁰⁹ AP I, *supra* note 167, art. 85.

⁵¹⁰ *Id.* art. 86.

⁵¹¹ *Id.* art. 87.

THE ATROCITY CRIMES ADVISORY GROUP & UKRAINIAN PROSECUTIONS OF RUSSIAN POWS—PART 2

by Chris Jenks | Jun 24, 2022

A prior post recounted the recent trial and guilty plea by Russian Army Sergeant Shishimarin in Ukraine.⁵¹² That post identified a number of important substantive and procedural legal considerations from those proceedings. This post provides similar attention to a subsequent Ukrainian trial of two Russian artillery soldiers for war crimes.

The Trial of Private Alexander Bobikin and Corporal Alexander Ivanov

The primary sources for information on the second trial were Ukrainian media outlets *Susipline News*⁵¹³ and *Graty*.⁵¹⁴ On 31 May, a Kotelevsky District Court Judge sentenced Bobikin and Ivanov to 11½ years confinement for violating the rules of warfare. The underlying misconduct stems from their roles as a driver (Bobikin) and gunner (Ivanov) in a Russian artillery unit. That unit's rocket fire damaged or destroyed several civilian buildings in Ukraine but did not cause any physical injuries to persons.

Background

Bobikin and Ivanov served in an unspecified Russian artillery unit. The media accounts do not list their ages, but given their rank, they are likely young. There are six enlisted ranks for soldiers in the Russian Army. Bobikin is a private, the lowest rank, and Ivanov is a corporal, two levels above private. By comparison, both Bobikin and Ivanov are junior to Shishimarin, the 21-year-old Sergeant that Ukraine previously sentenced to life on a guilty plea.

Bobikin and Ivanov were assigned to a BM-21 battery. The BM-21, known as the “Grad,” is a self-propelled 122-mm multiple rocket launcher.

The Grad fires 2.8-meter-long rockets with different 20-kg warheads, though the most common is high explosive. The range of the Grad firing high-explosive rockets is 20 kilometers. The Grad is an area fire weapon, the employment of which uses a large number of rockets fired by multiple launchers at area, not pinpoint/specific targets. Bobikin and Ivanov's battery was comprised of 6 Grads capable of collectively firing 240 rockets in a single volley.

⁵¹² Chris Jenks, *Ukraine Symposium—The Atrocity Crimes Advisory Group & Ukrainian Prosecutions of Russian POWS—Part 1*, ARTICLES OF WAR (June 22, 2022), <https://lieber.westpoint.edu/atrocity-crimes-advisory-group-ukrainian-prosecutions-russian-pows-part-1/>.

⁵¹³ Ігор Ізотов [Ihor Izotov] & Дарина Литвак [Darina Litvak], У суді на Полтавщині розглядають справу щодо двох російських військових [A court in Poltava Oblast is considering a case involving two Russian soldiers], СУСПІЛЬНЕ НОВИНИ [Community News] (May 19, 2022), <https://suspline.media/241072-u-sudi-poltavsini-rozgladaut-spravu-sodo-dvoh-rosijskih-vijskovih/>.

⁵¹⁴ «Не оскаржують обвинувачені». Двох російських військових визнали винними у першому артилерійському обстрілі Харківської області [“The accused do not appeal.” Two Russian soldiers were found guilty of the first artillery shelling of the Kharkiv region], graty.me (May 31, 2022), <https://graty.me/news/ne-oskarzhuyut-obvinuvacheni-dvoh-rosijskih-vijskovih-viznali-vinnimi-u-pershomu-artilerijskomu-obstrili-harkivskoi-oblasti/>.

According to Bobikin, in December 2021, his Grad battery notified unit members of a “training exercise” to occur in February. In early February, the unit deployed first to Kursk and then to Malinovka, near the Russia/Ukraine border north of Kharkiv. On 23 February, their battery commander informed the unit they would be attacking Ukraine the next day and confiscated the soldiers’ cell phones and watches. The commander deployed the Grad battery less than five miles from the border with Ukraine.

At 5 a.m. on 24 February, the battery commander ordered the Grad crews to open fire, but the journalists’ accounts of the trial do not specify the intended target(s). Bobikin claimed that the unit fired 38 rockets in the first attack. Ivanov claimed that unspecified portions of the battery refused the initial order to fire. The Grad battery then moved across the border and fired additional rockets. Referring to the missions conducted while inside Ukraine, Ivanov testified that the soldiers in the unit were no longer able to refuse the order to fire.

Later, on the 24th, the Ukrainian armed forces attacked the Grad battery while it was in Ukraine. During the engagement, Bobikin and Ivanov’s vehicle was damaged and caught fire, wounding Bobikin. The vehicle went into a ditch, and the two hid in bushes until the next day. On 25 February, Ivanov surrendered. Bobikin, wounded,

continued to hide for the next ten days, first in a children’s medical center on the outskirts of Kharkiv and then in an empty apartment, before also surrendering.

Both Bobikin and Ivanov cooperated with the Ukrainian investigation. While in Ukrainian custody, Bobikin and Ivanov also agreed to be interviewed by a Ukrainian blogger. During the interview, which was posted on YouTube on 27 April, Ivanov explained his role as a Grad gunner:

Do you know how [the] Grad shoots? [I just] see dry numbers, [specific targets] are not brought to light, they are not coordinated. The commander of the vehicle receives numbers [over] the radio, the commander of the vehicle [relays] these numbers to the gunner. The gunner aim[s], the commander check[s].⁵¹⁵

Criminal Charges Against Private Bobikin and Corporal Ivanov

On 7 May, the Prosecutor General announced via Facebook the completion of the investigation and charges against Bobikin and Ivanov for violating the rules of warfare under Part 1 of Article 438 of the Ukrainian Criminal Code.⁵¹⁶ As previously discussed in the first post in this series, violations of Part 1 are punishable by imprisonment for a term of eight to twelve years.⁵¹⁷

⁵¹⁵ Volodymyr Zolkin, ПОБЕГ из Украины через Россию в НОРВЕГИЮ [Escape from Ukraine through Russia to NORWAY], YouTube (Apr. 27, 2022), <https://www.youtube.com/watch?v=09WB4clBYMl>.

⁵¹⁶ @Харківська обласна прокуратура [Kharkiv Regional Prosecutor’s Office], FACEBOOK (May 7, 2022), <https://www.facebook.com/prokuraturakharkiv/posts/358545419640181>.

⁵¹⁷ Jenks, *supra* note 512.

Trial

On 17 May, the Ukrainian court held a pretrial hearing. Both Bobikin and Ivanov attended, were individually represented by an appointed Ukrainian defense counsel, and provided an interpreter. Both requested trial by a single judge.

The trial lasted approximately two hours spread over two days. On 19 May, Bobikin and Ivanov pled guilty in a trial session lasting 90 minutes, which was livestreamed on the court's website. On 26 May, Bobikin, Ivanov, their lawyers, and the prosecution made sentencing arguments in a trial session lasting thirty minutes.

At trial, the prosecution read out the indictment, but the journalists' accounts reported little of the content besides that Bobikin and Ivanov were accused of using their Grad to fire rockets into Ukraine on 24 February, which damaged or destroyed civilian objects. The objects struck vary depending on the news account, with most including some combination of apartment buildings, a cultural educational center, a power station, and/or a veterinary school.

Following the indictment, first Ivanov then Bobikin pled guilty and made comments that call into question what crime they understood themselves to have committed. Similar to Shishimarin's trial, the specific rule of warfare Bobikin and Ivanov were alleged to have violated does not appear to have been identified. Both soldiers claimed they didn't know the intended targets they fired at and

only learned of the damage to civilian objects during the investigation.

After Ivanov's testimony, the prosecution made a request which was translated as asking to be excused from openly discussing the circumstances (time, place, effects) of the rocket fire. The court recessed for ten minutes to allow the defense to consider the request. When the trial resumed, the defense said it did not object to the trial progressing without the defense examining "non-appealing" evidence. With that, some portion of the investigative file was introduced into evidence.

According to the *Wall Street Journal* (but not discussed in the primary Ukrainian live stream blogs of the proceedings), the investigative file reflected the recovery of "shell fragments that hit civilian buildings, which forensic teams linked to the positions the Russian [Grad] battery was firing from—but *not* to Corporal Ivanov and Private Bobikin's vehicle"⁵¹⁸ (emphasis added).

When the court questioned Bobikin, he acknowledged the rocket fire had been "coordinated" within the Grad battery. No witnesses other than Ivanov and Bobikin testified. After the two Russians responded to questions, the trial adjourned.

Eight days later the trial resumed. The prosecution acknowledged that Bobikin and Ivanov pled guilty but requested that the court impose the maximum sentence, twelve years confinement. The prosecution's rationale was that their crime was committed by "a group of persons upon prior conspiracy," which is an aggravating factor under the Ukrainian

⁵¹⁸ Ian Lovett, *Two Russian Soldiers Convicted in Second Ukrainian War-Crimes Trial*, WALL ST. J. (May 31, 2022), <https://www.wsj.com/articles/two-russian-soldiers-convicted-in-second-ukrainian-war-crimes-trial-11654002069>.

Code. Additionally, where there is an aggravating factor, the court is not obligated to limit the sentence to two-thirds the maximum punishment as would otherwise be the case where, as here, Bobikin and Ivanov qualified for the mitigating factors of surrender and cooperation and pleading guilty.

The journalists' accounts of the trial do not explain what the prosecution meant by "a group of persons upon prior conspiracy." Based on the court's comments on sentencing discussed below, the prosecution was referring to the Grad battery unit members conducting coordinated rocket attacks.

Both Bobikin and Ivanov reiterated their guilt and expressed remorse. Their lawyers highlighted that they had pled guilty and cooperated and that they were subject to physical or mental coercion, a complete defense recognized by the Ukrainian Code. The defense lawyers requested that the court sentence the two to the minimum term, eight years confinement.

On 31 May, the court announced a sentence of 11½ years. The court claimed that guilt had been fully proved "by the evidence in the case file" and was not disputed by the defense. The court noted the soldiers' repentance as a mitigating factor but rejected the duress claim. The court found the rocket fire had been carried out by prior agreement, thus constituting an aggravating circumstance.

Similar to Shishimarin, if and how the court considered that Bobikin and Ivanov surrendered is unclear. According to one news site, the court also directed the prosecution recover procedural costs and the Bokarius Institute⁵¹⁹ recover forensic examination costs, presumably from Bobikin and Ivanov.

Questions Specific to Second Trial

Combatant's Privilege/ Immunity from Prosecution

The start point for the potential problems and confusion at trial may flow from seemingly not recognizing Bobikin and Ivanov's status as members of the Russian armed forces engaged in an international armed conflict (IAC) with Ukraine. As the International Committee of the Red Cross (ICRC) summarizes, "[i]n IAC, combatants are members of the armed forces of a party [to the armed conflict]. The main feature of their status is that they have the right [or are privileged] to directly participate in hostilities."⁵²⁰ The primary way Russian soldiers assigned to a Grad battery directly participate in hostilities is by firing rockets.

Not recognizing the combatant's privilege led the trial court not to consider the immunity attached to it. Again, per the ICRC, "[c]ombatant immunity bars the prosecution of combatants⁵²¹ for mere participation in hostilities.⁵²² Thus, they are immune from prosecution⁵²³ for murder *and destruction*

⁵¹⁹ National Scientific Centre "Hon. Prof. M.S. Bokarius Forensic Science Institute" (NSC FSI), Eur. Network of Forensic Science Inst., <https://enfsci.eu/member/kharkiv-research-institute-of-forensic-examinations-khrife/>.

⁵²⁰ *Combatants and POWs*, ICRC, <https://casebook.icrc.org/law/combatants-and-pows>.

⁵²¹ *Combatants*, ICRC, https://casebook.icrc.org/a_to_z/glossary/combatants.

⁵²² *Direct participation in hostilities*, ICRC, https://casebook.icrc.org/a_to_z/glossary/direct-participation-hostilities.

⁵²³ *Individual criminal responsibility*, ICRC, https://casebook.icrc.org/a_to_z/glossary/individual-criminal-responsibility.

of property committed as part of an armed conflict,⁵²⁴ unless such acts constitute war crimes⁵²⁵ (emphasis added).

It is invalid to claim that the mere fact that rockets from the Grad battery struck civilian objects equates to the strikes being illegal. This is not to say that the rocket fire was legal, but simply that illegality was not established and thus couldn't (or shouldn't) have resulted in criminal liability for Bobikin and Ivanov. The analytical start point should have been the recognition of their combatant's privilege. From that mooring, whether any, all, or none of the strikes violated the LOAC could be examined.

Use of explosive weapons in populated areas is controversial. Some seek to render such use, including specifically the Grad, *per se* illegal. But unless and until that happens, rocket fire in a populated area, even when it damages or destroys civilian objects, is not by itself presumptively violative of LOAC.

Without the presumption, proving the Grad rocket strikes violated the LOAC required a considerable amount of evidence, to be either proved by the prosecution or admitted to by the accused. The court should not have been able to properly assess the legality of the strikes without considerably more information than was at least publicly disclosed at trial. This information includes:

- What was the Grad battery's missions for each strike?
- What were the Grad battery's targets?

- How effective/accurate were the Grad battery's attacks?
- Was the efficacy/accuracy normal?
- What was the anticipated military advantage from attacking the targets?
- What were the expected civilian casualties and property damage as a result of the attack?
- At the time of the fire mission order, what information did the commander have (or should the commander reasonably have had)?

There is no evidence that Bobikin or Ivanov knew the answers to any of those questions. The limited evidence at trial was not what they knew (target coordinates) but what they didn't know (specific target and rationale). This is hardly surprising. Lower-ranking enlisted soldiers would not know, nor should they be expected to know, the information above.

For this reason, when an individual faces criminal liability for artillery strikes, it is the commander who ordered it. Indeed, other than this case, initial research has not identified a single instance where criminal liability was imposed on lower-ranking enlisted members of an artillery unit, specifically a gunner and even more so a driver, for firing artillery during an IAC and as the result of orders from a military superior.

A brief discussion of artillery and artillery operations helps explain why that is so and informs the other questions below.

⁵²⁴ *Armed conflict*, ICRC, https://casebook.icrc.org/a_to_z/glossary/armed-conflict.

⁵²⁵ *War crimes*, ICRC, https://casebook.icrc.org/a_to_z/glossary/war-crimes.

Artillery is referred to as the “King of Battle” because of its importance to a military commander. The reference stems from the role of the King in chess—if you lose your king, you lose the match. By way of illustrating artillery’s destructive power, the U.S. Army Medical Command assessed that during the Second World War, artillery and mortar fire accounted for 65% of the American casualties in the European and Mediterranean theaters and 47% in the Pacific.

As important as artillery is to military commanders on one side of an armed conflict, neutralizing that artillery is very often near, if not at, the top of the opposing military commanders’ high-value target list. One way military commanders protect their artillery assets is to minimize the time they are stationary and without camouflage and to move them after a firing mission. Preparing to fire often entails repositioning individual artillery pieces into the open and removing some of or all the camouflage, increasing the chances of detection.

When artillery fires, the chance of detection drastically increases. The sound and smoke of the firing obviously increase the chance of visual identification. But potentially much more problematic is that many armed forces employ “counter battery radars” which detect incoming artillery projectiles and precisely determine their point of origin.

Once the point of origin is identified, it is standard military practice to immediately direct combat power to the firing location. If the members of an artillery unit wish to

maximize their chance of survival, they will frequently relocate and reposition. Emblematic of the precarious nature of artillery operations in combat, consider that while Bobikin and Ivanov survived, the Grad battery appears to have been neutralized within hours of its first fire mission, and multiple launchers didn’t survive to the second day of the war.

On the receiving end, one thinks in terms of an artillery “strike,” while at the battery itself, the actions to send the projectiles on a certain trajectory, range, and explosive charge are referred to as a “fire mission.” Proficient artillery units conduct fire missions, meaning to fire several rounds, in less than a minute.⁵²⁶ The fire mission process is highly prescribed and choreographed. On one hand, the commander wants to ensure safety at the firing position and that the artillery is properly oriented. On the other hand, time is of the essence.

For a gunner like Ivanov, the following commands may well comprise *all* the information he knows about a fire mission and what he is shooting at. It’s all the information he needs to perform his duties as a gunner.

Fire Mission: [alerts crews]

Pieces to Fire: [which system(s) will fire]

Projectile: [the type of projectile]

Ammunition Lot: [designates the manufacturer/date of the ammo]

Charge: [amount of propellant]

⁵²⁶ Stephen W. Miller, *Shoot and Scoot*, ARMADA INT’L (Aug. 28, 2017), <https://www.armadainternational.com/2017/08/shoot-scoot-artillery/>.

Fuze: [fuze type]

Fuze setting: [fuze setting, generally time or proximity]

Deflection: [what direction (left or right) to traverse the tube]

Quadrant: [how much to raise or lower the tube]

Method of fire: [indicates the number of rounds and type of ammunition to be used]

All together this could sound like:

FIRE MISSION, PLATOON ADJUST,
NUMBER 3, 1 ROUND, SHELL HE
[HIGH EXPLOSIVE], LOT A/H, CHARGE
4, FUZE QUICK, DEFLECTION
3024, QUADRANT 347, 2 ROUNDS
IN EFFECT

Those commands are for a U.S. Army artillery battery firing shells and no doubt differ from those of a Russian Army unit firing rockets. But it provides an illustration of the type and amount of information known by soldiers like Bobikin and Ivanov. Is the fire mission above, which is an order, illegal? Is it manifestly or patently illegal?

The point is that during a fire mission all soldiers have an identified role and assigned tasks. For soldiers like Bobikin and Ivanov, they are micro tasks involving their individual Grad. Other soldiers, in command posts, fire direction centers, and forward observation points, all have different macro tasks, including identifying targets, determining the most effective way to attack those targets, and assessing the effectiveness of a strike through a battle damage assessment (BDA).

The BDA informs the commander whether the strike accomplished its purpose. If so, the unit can reposition and shift to other targets. If not, the commander has to determine whether to reengage the target with the original firing unit, and if so, whether they should do so immediately or reposition first.

On 24 February, based on the soldiers' testimony, if the battery commander received BDA from the first strike, he does not appear to have further disseminated it down to Bobikin and Ivanov's level. If correct, this would hardly be surprising, particularly as applied to Bobikin, a private serving as a driver. Ivanov, a corporal serving as the gunner, may have recognized that the firing coordinates for subsequent fire missions were different than for the first. From that perhaps he inferred that the first strike accomplished its purpose. But without knowing the answers to the questions listed above, Ivanov would not have possessed the information to know that his actions in firing rockets violated the rules of warfare.

Ultimately, failing to recognize Bobikin and Ivanov were privileged to fire rockets meant that there could not be a valid assessment of whether and when the rocket fire became unlawful. It also made it difficult, if not impossible, for the prosecution to specify which rule of warfare the two allegedly violated.

Unspecified Charge

Bobikin and Ivanov were convicted of violating an unspecified rule of warfare under Part 1 of Article 438. This is problematic

for the reasons discussed in my first post,⁵²⁷ which described Shishimarin's trial.

Two possible rules come to mind, the prohibition against indiscriminate attack under Additional Protocol I to the 1949 Geneva Conventions (AP I) and of property destruction under the 1907 Hague Convention's Regulations. While Ukraine is a State Party or acceded to both AP I and the 1907 Hague Convention, obviously the Prosecution didn't charge a violation of a rule from either international instrument. Without knowing the contents of the portions of the investigative file admitted into evidence, it's impossible to know for sure if such a charge would have been viable, but it seems doubtful.

Under AP I, it is a grave breach to "*launch* an indiscriminate attack affecting the civilian population or civilian objects *in the knowledge* that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects"⁵²⁸ (emphasis added).

Under the Hague Convention, it is prohibited to "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."⁵²⁹ In terms of breaking down that prohibition into elements, the International Criminal Court (ICC) does so as follows:

- (1) The perpetrator *directed* an attack.
(emphasis added)

- (2) The object of the attack was civilian objects, that is, objects which are not military objectives.
- (3) The perpetrator *intended* such civilian objects to be the object of the attack. (emphasis added)
- (4) The conduct took place in the context of and was associated with an international armed conflict.
- (5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

It's not clear that low-ranking soldiers like Bobikin and Ivanov can "launch" an attack, and they certainly did not direct it. There was a *mens rea* component to their actions in firing rockets. They knew they were firing rockets, and they intended to fire rockets. But violating AP I requires knowing (awareness of a near certainty) that the strike will cause not just damage but excessive harm to civilians or civilian objects. Violation of the 1907 Hague Convention requires that Bobikin and Ivanov intended, or had as their purpose in firing, that civilian objects would be struck. Based on journalists' accounts of the trial, there was no discussion of what Bobikin knew, and the discussion as to Ivanov was that he never knew the target specifics.

If the *Wall Street Journal* report that a forensic examination of rocket fragments recovered from the civilian objects could not connect the rockets to Bobikin and Ivanov's Grad was accurate, it's even harder to understand how their actions were criminal.

⁵²⁷ Jenks, *supra* note 512.

⁵²⁸ AP I, *supra* note 167, art. 85.

⁵²⁹ Hague IV Reg, art. 23.

For Ivanov, in failing to strike or damage civilian objects, he seems to at most be guilty of an attempt. The Ukrainian Code defines attempt in part as a “directly intended act.” There is evidence that Ivanov intended to fire Grad rockets but no evidence that he intended to strike civilian objects. He obviously knew the rockets would land somewhere, but without knowing the answers to at least some of the questions previously raised, it seems too large a leap to infer a criminal *mens rea*.

Assessing Bobikin’s potential liability as a driver is even harder. Bobikin driving the Grad facilitated, at least in part, Ivanov being able to fire the rockets. In that sense Bobikin appears to be an accomplice analogous to the getaway driver for a group robbing a bank. But the getaway driver is only an accomplice if they knew or should have known of the robbery and they intended their driving to be of assistance to that endeavor. Bobikin obviously intended to drive the Grad and position it such that Ivanov could fire. But again, firing rockets is not a crime. There was no evidence that Bobikin drove the Grad with the intent of facilitating an illegal strike.

If drivers are to face criminal liability, it’s hard to reconcile the disposition of Makeev vs. Bobikin. Makeev, an officer, drove the car from which Shishimarin shot Mr. Shelipov. Makeev first identified Shishimarin and issued what a Ukrainian court labeled an illegal order to shoot, yet Makeev was not even charged. By contrast, Bobikin, a private, appears to have only driven the Grad, under orders, and received an 11½-year sentence.

The lack of clarity concerning which rule of warfare Bobikin and Ivanov allegedly violated

only increases when the absence of evidence that their rockets struck civilian objects is considered.

It was never established that the rockets which struck civilian objects violated LOAC. But even assuming *arguendo* that they did, under what theory may criminal liability be imposed on Bobikin and Ivanov (who missed) for damage caused by rockets from other Grads fired by other crews? This seems dangerously close to violating the widely accepted rule that “[n]o one may be convicted of an offence except on the basis of individual criminal responsibility.”

Superior Orders

Unlike Shishimarin, where the defense of superior orders was at least raised, there was minimal discussion of the defense in Bobikin and Ivanov’s trial.

As discussed in the Part 1 post on the trial of Shishimarin, a superior orders discussion requires establishing whether an order was illegal, and if so, whether it was patently so. Absent a patently illegal order, what the accused thought of the order’s legality at the time it was issued should also be considered.

Without the answers to the questions discussed above, the artillery commander’s order that the Grad battery fire rockets into Ukraine cannot be assessed as patently illegal. Accordingly, what Bobikin and Ivanov thought (or should have thought) regarding the order’s legality at the time it was issued was extremely important. But it does not appear to have been established by the court.

We don’t know what Bobikin, an artillery driver, and Ivanov, an artillery gunner, knew

or should have known regarding an order to fire rockets at targets kilometers away and well beyond the line of sight. Bobikin, for the reasons already discussed, likely knew nothing about the targets, nor should he have. Per his interview with the Ukrainian blogger, Ivanov knew coordinates to an aim point but beyond that claimed to not know what the unit was targeting. Why portions of the Grad battery refused to conduct the initial fire mission does not seem to have been explored.

Without establishing that the order to fire was illegal and that Bobikin and Ivanov knew or should have known it was, the complete defense of obeying an order or command seems to have been available but not considered.

Punishment

Despite having surrendered, cooperated, apologized, and pled guilty, Bobikin and Ivanov received close to the maximum sentence—11½ years out of a maximum possible punishment of 12 years. As mentioned earlier, the punishment range for domestic murder in Ukraine is seven to fifteen years. Thus, Bobikin and Ivanov, who at worst caused property damage without physical injury, received a term of confinement in the middle of the range for murder.

One of the reasons the court cited in imposing the sentence was the aggravating factor of Bobikin and Ivanov committing a crime as part of “a group of persons upon prior conspiracy.”

The presence of the aggravating factor obviated the requirement under the Code to limit the sentence to two-thirds the maximum sentence. But this aggravating factor seems hugely problematic, and in levels.

Under the Ukrainian Code, “[a] criminal offense shall be held to have been committed by a group of persons upon prior conspiracy where it was jointly committed by several (two or more) persons who have conspired in advance, that is prior to the commencement of the offense, to commit it together.”

What criminal offense did Bobikin and Ivanov or any member of the Grad battery conspire to commit? As previously discussed, firing artillery in wartime is not per se a crime, even where civilian objects are damaged or destroyed. That Bobikin and Ivanov, along with the other members of the unit, fired rockets into Ukraine reflects an agreement in advance to do so. But there is no evidence that the agreement was to fire rockets into Ukraine in a manner which violated the LOAC.

Without a criminal offense, there cannot be a criminal offense jointly committed. As a result, the aggravating factor does not appear to have properly applied. Without the aggravating factor, and with rockets fired by the accused having missed civilian objects, increasing Bobikin and Ivanov’s punishment because of the actions of others seems akin to impermissible collective punishment.⁵³⁰



⁵³⁰ Rule 103. *Collective Punishments*, ICRC INT’L HUMANITARIAN L. DATABASES, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule103>.

THE ATROCITY CRIMES ADVISORY GROUP & UKRAINIAN PROSECUTIONS OF RUSSIAN POWS—PART 3

by Chris Jenks | Jun 28, 2022

In two previous posts (here⁵³¹ and here⁵³²), I addressed guilty pleas by three Russian soldiers recently processed by two Ukrainian domestic, civilian courts. This post synthesizes the previous posts' observations into considerations for the recently formed Atrocity Crimes Advisory (ACA) Group to assist future Ukrainian war crimes prosecutions.

Suggested Considerations for the ACA and Ukrainian War Crimes Units

As explained in the introduction, Ukrainian journalists' summaries of legal proceedings translated into English and an American lawyer's understanding of a translated version of the Ukrainian Criminal Code are the foundations for the suggestions which follow. Realistically, some of the suggestions may well be flawed or are not applicable. But even the prospect that some suggestions turn out to be appropriate and can be incorporated seems ample justification for this endeavor.

The suggestions are listed in the order of application to the stages of the criminal justice process, beginning with investigations, pretrial activities, and then trial and punishment.

ACA LOAC Advisors

The ACA and Ukrainian War Crimes Units should consider where to use LOAC expertise. LOAC expertise could both assist efforts at investigating alleged war crimes and advise the trial and appellate courts, prosecution, and defense. One specific suggestion is to focus on cases like the first two, where the misconduct has a stronger nexus to the conduct of hostilities.

The LOAC advisors working with investigators could assist in identifying the type and amounts of evidence necessary to support a charge that a specific rule of warfare was violated.⁵³³ The LOAC advisors working with courts, prosecution, and defense could assist in understanding norms of military combat operations (like firing of artillery in urban environments) and the role (and limits) of the combatant's privilege and superior orders.

Criminal Charge Specificity

Ukraine must inform Russian POWs of the nature and cause of the criminal charge(s) against them. Charging unspecified violations of the rules of warfare not only doesn't meet that requirement, it sets the conditions for confusion throughout trial.

⁵³¹ Jenks, *supra* note 512.

⁵³² Chris Jenks, Ukraine Symposium—The Atrocity Crimes Advisory Group & Ukrainian Prosecutions of Russian POWs—Part 2, ARTICLES OF WAR (June 24, 2023), <https://lieber.westpoint.edu/atrocity-crimes-advisory-group-ukrainian-prosecutions-russian-pows-part-2/>.

⁵³³ Joel Gunter, *Ukraine's prosecutors wrestle with a new role: War crimes investigators*, BBC (June 10, 2022), <https://www.bbc.com/news/world-europe-61749877>.

Ukrainian Code, Article 438, Part 1 criminalizes “any other violations of rules of warfare recognized by international instruments consented to as binding by the Parliament of Ukraine.” That language could be the start of a criminal charge, but standing alone it fails to provide adequate notice.

At a minimum, that language should be followed by recitation of a specific rule of warfare. For example,

Violating a rule of warfare recognized by international instruments consented to as binding by the Parliament of Ukraine, to wit: violating [insert specific rule] from [insert the international instrument in which the rule appears] which was consented to as binding by the Parliament of Ukraine on [insert date the Ukrainian Parliament ratified/acceded to the instrument].

Once the rule violation is framed as a criminal offence it may be broken into constituent elements. The International Criminal Tribunals for the former Yugoslavia⁵³⁴ (ICTY) and Rwanda⁵³⁵ (ICTR) and the International Criminal Court⁵³⁶ all offer elements of crimes examples.

Only with that level of specificity does the prosecution know what is required to be proved to establish guilt and is the accused able to prepare a defense. Even where the accused elects to plead guilty, it’s critically important to understand what such a plea entails and requires.

Geneva Conventions POW Prosecution Provisions

Ukraine should ensure and even publicize its compliance with the Geneva Conventions provisions on prosecuting POWs.⁵³⁷ This includes:

- (1) Specifying and communicating the charges to the accused in a language they understand;
- (2) Ensuring that a defense counsel is appointed at least two weeks before the opening of the trial;
- (3) Providing that guilt will only be based on individual criminal responsibility; and
- (4) Ensuring there will not be collective punishment.

The journalists’ accounts of the first two trials do not discuss these requirements, and Ukraine may already be in compliance. But if so, Ukraine should consider publicly acknowledging and highlighting their Geneva Conventions obligations.

Additionally, the Geneva Conventions require equivalent procedures and processes between how a State prosecutes its own armed forces and POWs. It’s not clear why the first two courts didn’t consider the defenses either of superior orders or of duress, as they are both recognized under the Ukrainian Code. Defenses which are available to Ukrainian

⁵³⁴ *Mandate and Crimes under ICTY Jurisdiction*, U.N. Int’l Residual Mechanism for Crim. Tribunals: U.N. Int’l Crim. Tribunal for Former Yugoslavia, <https://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction>.

⁵³⁵ *Elements of the Crimes*, U.N. Int’l Residual Mechanism for Crim. Tribunals, <https://cld.irmct.org/notions/show/304/elements-of-the-crimes#>.

⁵³⁶ Int’l Crim. Ct., *Elements of Crimes* (2013), <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

⁵³⁷ GC III, *supra* note 176, art. 105.

service members prosecuted by Ukraine must also be available to Russian POWs.

Combatant Immunity

The ACA should consider discussing with the Ukrainian Prosecutor General whether to adopt a uniform position on the application of the combatant's privilege to Russian POWs alleged to have committed pre-capture crime(s) connected to the conduct of hostilities.

In the first trial, the prosecution acknowledged Shishimarin was a lawful combatant under the Geneva Conventions and Additional Protocol I. But in the second trial, the prosecution not only didn't acknowledge that the Russian artillerymen were lawful combatants but claimed their status as members of the Grad battery that fired rockets into Ukraine was an aggravating factor warranting increased punishment.

There should be a consistent national position on the status of enemy POWs subject to criminal prosecution.

Witness Tracking/Availability

While this issue may well extend outside the War Crimes Units' control, Ukraine should consider reviewing whatever witness tracking mechanisms are being used. This specifically refers to other Russian POWs who are deemed to not have committed a crime. They may have relevant information that either inculpates or exculpates other Russians, as well as contributes to the factual record of hostilities.

Before Ukraine transfers or exchanges any Russian POWs, Ukraine should coordinate with the Prosecutor General and War Crimes Units and potentially individual courts and defense counsel.

Obedience to Orders

To the extent that the issue of obedience to an order or command arises in future cases, Ukraine should consider clearly noting the issue and making findings on its applicability or lack thereof. The findings should include the contents of the specific order and the basis for claiming the order is illegal. The court should make a separate finding if the order is deemed patently criminal. It's also important to assess whether the accused, at the time of the order, knew or should have known of the order's legality.

Ukraine may wish to consider noted commentator Professor Leslie C. Green's suggestion⁵³⁸ that the assessment of whether the accused should have known of an order's illegality include:

- (1) The conditions existing at the time of and before the order;
- (2) The nature of hostilities (length/location/intensity);
- (3) The accused's age, rank, education, and military experience.

Conduct of Guilty Pleas

Ukraine may want to also consider distinguishing parts of a guilty plea. One

⁵³⁸ L.C. Green, *Superior Orders and the Reasonable Man*, CAMBRIDGE UNIV. PRESS (Mar. 9, 2016), <https://www.cambridge.org/core/journals/canadian-yearbook-of-international-law-annuaire-canadien-de-droit-international/article/abs/superior-orders-and-the-reasonable-man/D80F7042BA32F798C78E4D220AFC5A64>.

part of the guilty plea could be a stipulation of relevant facts. This would involve the prosecution introducing the background underpinning the charge(s). Essentially the stipulation of fact would explain how the accused committed the elements of the charged offense(s). Depending on the given case, the stipulations can also explain whether certain defenses and mitigating and aggravating factors apply. The stipulations not only are useful in the specific case but could also help document the conduct of hostilities more broadly.

Another part of the guilty plea might include the accused agreeing that they committed specific charged offense(s). As part of this process, the court could question the accused about any of the elements for which the stipulation was not sufficiently clear as well as discuss the factual components to potentially relevant defenses and mitigating and aggravating factors.

Punishment

The ACA may wish to discuss punishment approaches with Ukraine. Punishment approaches include both the sentence the prosecution requests and that which the court imposes.

In the first two trials, the accused surrendered, cooperated, apologized, and pled guilty. Yet the prosecution requested the maximum punishment in both. If that is the approach the War Crimes Unit elects for future cases, that is, of course, their prerogative. But doing so greatly reduces the accused's incentive

to plead guilty, so the prosecution should not be surprised if in future cases Russian POWs plead not guilty. This would mean the prosecution must prove guilt, which given the ongoing armed conflict could pose additional challenges.

Imposition of the maximum or near-maximum punishment further reduces if not eliminates the accused's incentives to cooperate and plead guilty. Ukrainian courts should determine sentences consistent with Ukrainian law and procedure. But it may be useful for the ACA to point out maximum or near-maximum punishments for young, junior soldiers who surrendered, cooperated, and pled guilty in whole or in part may foster a negative perception of Ukrainian criminal accountability mechanisms in both the short and long terms.

In the short term, while not minimizing the loss of a life in the first trial and the property damage in the second, requesting and imposing harsh sentences would seem to make it difficult to differentiate gradations of crime and harm in future cases involving multiple victims and offenders who may not have surrendered, cooperated, or pled guilty.

In the longer term, the Russia-Ukraine armed conflict may well yield an international criminal tribunal. One would expect that tribunal to address senior officials alleged to have committed particularly egregious misconduct involving multiple victims. If convicted, one would also expect that the sentences such a tribunal imposed would be comparable to those from the ICTY,⁵³⁹

⁵³⁹ *Judgement List*, U.N. Int'l Residual Mechanism for Crim. Tribunals: U.N. Int'l Crim. Tribunal for Former Yugoslavia, <https://www.icty.org/en/cases/judgement-list>.

the ICTR,⁵⁴⁰ and the ICC.⁵⁴¹ In particular, the punishment Ukraine imposed on Shishimarin for one murder is significantly greater than that imposed by international tribunals against senior offenders who did not plead guilty and who were responsible for the deaths of hundreds and even thousands.

Conclusion

It's obviously important, on a number of levels, that Ukraine's accountability efforts are in accord with domestic and international

law. These initial efforts will provide a template for future cases, and it seems there will be many. While Ukraine should not let international perception dictate how they conduct criminal proceedings, the larger the disparity between domestic and potential international proceedings—and results—the greater the risk that Ukraine will sacrifice some of the legitimacy “high ground” Ukraine has fought so hard, literally, to secure.



⁵⁴⁰ *The Sentences*, <https://genevaconference-tpir.univ-paris1.fr/the-sentences/408.html>.

⁵⁴¹ *31 Cases*, Int'l Crim. Ct., <https://www.icc-cpi.int/cases>.

PUTTING “OVERALL CONTROL” TO THE TEST OF THE THIRD GENEVA CONVENTION

by Alessandra Spadaro | Jul 6, 2022

Detention is a common feature of both international and non-international armed conflicts (IAC and NIAC). Despite the increasing convergence in the regulation of the two types of conflicts as a matter of customary law, the rules on detention remain different. The classification of a situation as an IAC or NIAC therefore has important consequences in this respect.

This post will first inquire whether Ukraine and the self-proclaimed People’s Republics of Donetsk and Luhansk (D/LPR) are engaged in an IAC, on the basis of the overall control test. Second, it will reflect on the implications of this classification, focusing on some of the difficulties arising from the interpretation, and from the application by the D/LPR, of the Third Geneva Convention (GC III) regulating the treatment of prisoners of war (POWs). These reflections—which add to the ones by Marco Sassòli on this blog⁵⁴²—far from being theoretical, have important practical repercussions, as demonstrated by the recent show trial at the end of which a DPR court sentenced three foreign members of the Ukrainian armed forces to the death penalty.⁵⁴³

Classification of the Conflict

Ukraine has been engaged in several armed conflicts in the last few years. In addition to the IAC triggered by the Russian invasion of 24 February 2022, Russia has occupied Crimea since 2014. Since then, Ukraine has also faced an armed conflict in the Donbas region with the D/LPR, two pro-Russian separatist armed groups. Based on the organization of the armed groups and the intensity of the hostilities between the D/LPR and the Ukrainian governmental forces (*Tadić*, para. 70⁵⁴⁴), the situation in Donbas since 2014 reaches the threshold for the existence of a NIAC and the application of Common Article 3 and the customary rules of international humanitarian law (IHL) of NIAC.

Russia has been involved in the conflict in Donbas since before the 2022 invasion. The exact contours of this involvement are crucial to understand for the classification of the conflict, which could be classified as a NIAC between Ukraine and the D/LPR alongside an IAC between Ukraine and Russia, or, alternatively, solely as an IAC due to the D/LPR acting on behalf of Russia. Since the *Tadić* case,⁵⁴⁵ the overall control test is widely used to

⁵⁴² 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/>.

⁵⁴³ *Ukraine/Russia: “Death sentences” against three foreign members of Ukrainian forces by separatists’ “courts” a blatant violation of international law*, Amnesty Int’l (June 9, 2022), <https://www.amnesty.org/en/latest/news/2022/06/ukraine-russia-death-sentences-against-three-foreign-members-of-ukrainian-forces-by-separatists-courts-a-blatant-violation-of-international-law/>.

⁵⁴⁴ *Prosecutor v. Tadić*, Case No. IT-94-I-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁵⁴⁵ *Prosecutor v. Tadić*, Case No. IT-94-I-A, Judgement (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

classify a conflict which would be a *prima facie* NIAC as an IAC. Based on this test, a State has overall control over an armed group if, in addition to equipping and financing it, it also coordinates or helps in the general planning of its military activities, even if no specific orders or instructions relating to single military operations are issued (para. 137; also ICRC, para. 443⁵⁴⁶). Against this background, it is important to recall that the classification of the conflict in Donbas as an IAC would depend exclusively on the D/LPR being Russian proxies and not on the illegal recognition of the two entities as independent by Russia.⁵⁴⁷

A double classification of the Donbas conflict as an IAC between Russia and Ukraine and a NIAC between Ukraine and the D/LPR was initially suggested in the 2016 *Report on Preliminary Examination Activities* of the Prosecutor of the International Criminal Court (ICC) (para. 169).⁵⁴⁸ The ICC Prosecutor, however, in 2019 considered that Russia “may have exercised overall control over armed groups in eastern Ukraine for some or all of the armed conflict,” which would thus be a single IAC (para. 277⁵⁴⁹; see also 2020 report, para. 281⁵⁵⁰). A recent 400-page legal opinion by Global Rights Compliance convincingly argues that while

a NIAC existed between Ukraine and the D/LPR starting in April 2014, the conflict became an IAC already in July 2014 due to Russia’s overall control over the D/LPR armed groups (pp. 204–205).⁵⁵¹

More recently, a mission appointed by the Organization for Security and Co-operation in Europe (OSCE), in its report concerning the period since the February 2022 invasion,⁵⁵² affirmed laconically that the D/LPR are under the overall control of Russia, without, however, explaining on the basis of which elements it reached this conclusion (pp. 5, 6, 7, 13, 18, and 51). Although, of course, the classification of the conflict depends on the facts on the ground and not on the characterization by one the parties, this finding was notably welcomed by Ukraine in its comments to the report (annex, p. 2, para. 2).

In this post, I do not definitively answer the question of whether the relationship between Russia and the D/LPR meets the conditions of the overall control test, or whether this test is indeed the correct one to classify the conflict. However, I would like to reflect on the potential implications of this test for the interpretation of GC III in this situation.

⁵⁴⁶ COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, para. 443 (Knut Dörmann et al. eds., 2020) [hereinafter GC III Commentary of 2020].

⁵⁴⁷ Marc Weller, *Russia’s Recognition of the ‘Separatist Republics’ in Ukraine was Manifestly Unlawful*, EJIL: TALK! (Mar. 9, 2022), <https://www.ejiltalk.org/russias-recognition-of-the-separatist-republics-in-ukraine-was-manifestly-unlawful/>.

⁵⁴⁸ *Report on Preliminary Examination Activities (2016)*, Int’l Crim. Ct. (Nov. 14, 2016), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

⁵⁴⁹ *Report on Preliminary Examination Activities (2019)*, Int’l Crim. Ct. (Dec. 5, 2019), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/191205-rep-otp-PE.pdf>.

⁵⁵⁰ *Report on Preliminary Examination Activities (2020)*, Int’l Crim. Ct. (Dec. 14, 2020), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>.

⁵⁵¹ *International Law and Defining Russia’s Involvement in Crimea and Donbas*, GLOBAL RIGHTS (Feb. 13, 2022), <https://globalrightscpliance.com/wp-content/uploads/2022/05/International-Law-and-Russia-Involvement-in-Crimea-and-Donbas-1.pdf>.

⁵⁵² *Report of the OSCE Moscow Mechanism’s mission of experts entitled ‘Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022,’* Org. for Sec. and Co-operation in Eur. (Apr. 13, 2022), <https://www.osce.org/odihr/515868>.

Members of the Ukrainian Armed Forces in the Hands of the D/LPR

The United Nations Human Rights Monitoring Mission in Ukraine reported that by mid-March 2022 the D/LPR were holding hundreds of Ukrainian POWs, although it was unable to verify the exact number (para. 50⁵⁵³). In May, according to news sources, Ukrainian POWs in the hands of the D/LPR were several thousands.⁵⁵⁴

Under IHL, the category of POWs only exists in IAC. Individuals belonging to one of the categories listed in Article 4 of GC III are protected under this Convention when they fall in the power of the enemy, irrespective of their nationality⁵⁵⁵ (see also arts. 43 and 44, Additional Protocol I⁵⁵⁶). With its 143 articles, GC III provides an incredibly detailed regulation of the treatment of POWs, ranging from their conditions and places of internment to the food and clothing that need to be provided to them, to their labor, financial resources, relationships with the exterior, and discipline, as well as the beginning and end of their captivity.

Authority to Intern POWs

Article 21 of GC III contains a “strong permission”⁵⁵⁷ to intern POWs during IAC (Quintin, Chapter 6⁵⁵⁸). No equivalent permission can be found in the law of NIAC, which does not authorize armed groups to deprive enemy fighters of liberty, but does impose obligations for the treatment of those who fall in their hands (Common Article 3;⁵⁵⁹ arts. 4 and 5, Additional Protocol II⁵⁶⁰). States have been careful not to grant any rights or privileges to armed groups under IHL.

Anne Quintin suggested that, following the logic of the overall control test, the permission to intern POWs would be transferred to the proxy group,⁵⁶¹ although the State whose armed forces members are being held might not recognize the authority of the armed group to intern their soldiers. Indeed, whether armed groups act on behalf of a foreign State or not, States most likely continue considering them as criminals, terrorists, or traitors (especially if the groups’ members are nationals of the State against which they fight), but certainly not as equals.

⁵⁵³ HRMMU Update on the human rights situation in Ukraine, 24 February–26 March 2022, U.N. Human Rights Off. High Comm’r (Mar. 28, 2022), <https://www.ohchr.org/en/documents/country-reports/hrmmu-update-human-rights-situation-ukraine-24-february-26-march-2022>.

⁵⁵⁴ *Separatist republics hold 8,000 Ukrainian POWs—TASS cites separatists’ official*, REUTERS (May 26, 2022), <https://www.reuters.com/world/europe/separatist-republics-hold-8000-ukrainian-pows-tass-cites-separatists-official-2022-05-26/>.

⁵⁵⁵ GC III, *supra* note 176, art. 4.

⁵⁵⁶ AP I, *supra* note 167, arts. 43 & 44.

⁵⁵⁷ GC III, *supra* note 176, art. 21.

⁵⁵⁸ Anne Quintin, THE NATURE OF INT’L HUMANITARIAN L., 97–128 (2020), <https://www.e-clgar.com/shop/gbp/the-nature-of-international-humanitarian-law-9781839107436.html>.

⁵⁵⁹ See, e.g., GC I, *supra* note 292, art. 3.

⁵⁶⁰ Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, arts. 4 & 5, June 8, 1977, 1125 U.N.T.S. 609.

⁵⁶¹ Anne Quintin, *Symposium: Reflections on Classification*, OPINIO JURIS (Jan. 16, 2019), <http://opiniojuris.org/2019/01/16/symposium-reflections-on-conflict-classification/>.

On a closer look, Quintin's proposal appears to ask the overall control test to do more than it is meant to. If an armed group is under the overall control of a State, an IAC exists between two States, not between a State and the other State's proxy (Cassese, p. 655; ICRC, para. 306⁵⁶²). This means that *legally* the authority to intern POWs in this case would still pertain to Russia and would not be transferred to the D/LPR. Although the D/LPR would be able to capture Ukrainian soldiers, it is Russia that ultimately has the legal authority to intern them as POWs. In fact, in a recent statement,⁵⁶³ the Ukrainian Ministry of Foreign Affairs refers to Ukrainian POWs held "by the Russian side" generally.⁵⁶⁴

This interpretation is supported by Article 12 of GC III, which indicates that POWs "are in the hands of the enemy Power, but not of the individuals or military units who have captured them"⁵⁶⁵ and that "the Detaining Power is responsible for the treatment given them" (ICRC, paras. 1510, 1530⁵⁶⁶). The responsibility for the internment and treatment of Ukrainian POWs is Russia's and not its *de facto* agents and organs. This solution is also in line with other GC III provisions, as I will explain in the following sections.

The Camp Commander

Article 39 of GC III requires POW camps to be "under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power."⁵⁶⁷ According to the abovementioned OSCE mission report (pp. 13–14) and to the ICRC (para. 2483⁵⁶⁸), a literal interpretation of this provision should be discarded in favor of one that considers the reference to "regular armed forces" to include also groups under the overall control of a party to a conflict. Sean Watts understandably took issue with this and similar interpretations of GC III,⁵⁶⁹ which depart from both the plain meaning of the provisions and the subsequent practice of the State parties.

The wording of Article 39 of GC III was meant to specifically avoid POW camps being placed under the authority of noncommissioned officers or members of paramilitary or nonmilitary organizations (ICRC, paras. 2481–2482⁵⁷⁰; UK LOAC manual, para. 8.44⁵⁷¹). If the drafters had wanted to allow someone other than a "commissioned officer belonging to the regular armed forces" to be in charge of POW camps, they would have said so explicitly, but they did not. To

⁵⁶² Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649, 655 (2007); GC III, *supra* note 176, art. 2.

⁵⁶³ Comment of the MFA of Ukraine on the treatment of Russian prisoners of war, Ministry of Foreign Aff. of Ukr. (June 6, 2022), <https://mfa.gov.ua/en/news/comment-mfa-ukraine-treatment-russian-prisoners-war>.

⁵⁶⁴ *Ukraine demands from Russia humane treatment of POWs—MFA*, UKRINFORM (June 6, 2022), <https://www.ukrinform.net/rubric-ato/3501047-ukraine-demands-from-russia-humane-treatment-of-pows-mfa.html>.

⁵⁶⁵ GC III, *supra* note 176, art. 12.

⁵⁶⁶ GC III Commentary of 2020, *supra* note 546, paras. 1510, 1530.

⁵⁶⁷ GC III, *supra* note 176, art. 39.

⁵⁶⁸ GC III Commentary of 2020, *supra* note 546, para. 2483.

⁵⁶⁹ Sean Watts, *Interpretation in the Updated GCIII Commentary*, ARTICLES OF WAR (Dec. 15, 2020), <https://lieber.westpoint.edu/interpretation-updated-gciii-commentary/>.

⁵⁷⁰ GC III Commentary of 2020, *supra* note 546, paras. 2481–2482.

⁵⁷¹ U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT § 8.44 (2004) [hereinafter U.K. LOAC MANUAL].

me, this suggests that Article 39 of GC III does not allow for POW camps to be placed under the authority of a member of the D/LPR proxies unless the latter were integrated in the regular armed forces of Russia. In order to comply with this provision, POW camps must be put under the authority of a Russian commissioned officer. This does not seem an unrealistic requirement given that Russian forces are undoubtedly present in Donbas, although accurate information concerning their interactions with the D/LPR is unavailable.

Discipline and Treatment of POWs

GC III contains several provisions on disciplinary and penal sanctions that can be imposed on POWs (arts. 82–108). These rules are based on the so-called “principle of assimilation,” which requires POWs to be subjected “to the laws, regulations and orders in force in the armed forces of the Detaining Power” (art. 82, GCIII⁵⁷²). Marco Sassòli proposed interpreting these obligations, in order “to keep them realistic,”⁵⁷³ as referring to the D/LPR rather than to Russia. I wonder whether this actually is a realistic solution.

To start with, I do not think any State would agree that Article 82 of GC III should be interpreted to allow the assimilation of their captured soldiers with the armed forces

of an armed group, rather than of a State. In this specific case, I doubt that Ukraine would accept Ukrainian POWs being treated pursuant to the regulations of the D/LPR.

Additionally, as I have discussed elsewhere (pp. 15–17),⁵⁷⁴ the application of the provisions on the disciplinary regime for POWs by armed groups encounters several difficulties, including the fact that the GC III system needs to be implemented through domestic military law and informed by human rights standards (Rowe, pp. 1026–1027⁵⁷⁵). While the existence of disciplinary rules and systems has been considered a factor indicating the organization of armed groups parties to a NIAC (e.g., *Haradinaj*, para. 60⁵⁷⁶), IHL does not require armed groups to adopt a system equivalent to national military law.

Finally, the fact that an armed group is under the overall control of a State does not imply that it is better organized or otherwise better able to comply with the law of IAC than an armed group party to a NIAC. Armed groups might lack the capacity to comply specifically with the GC III system on disciplinary and penal sanctions of POWs (which includes several rules on courts, procedure, and penalties), as well as more generally with the many articles of GC III which painstakingly regulate the treatment of POWs. While the law of NIAC contains minimum guarantees

⁵⁷² GC III, *supra* note 176, art. 82.

⁵⁷³ 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/>.

⁵⁷⁴ Alessandra Spadaro, *Punish or Be Punished? The Paradox of Command Responsibility in Armed Groups*, 28 J. INT’L CRIM. JUST. 15–17 (2020), <https://doi.org/10.1093/jicj/mqz059>.

⁵⁷⁵ Peter Rowe, *The 1949 Geneva Conventions: A Commentary* (Andrew Clapham et al. eds. 2015), <https://opil.ouplaw.com/display/10.1093/law/9780199675449.001.0001/law-9780199675449-chapter-50>.

⁵⁷⁶ *Prosecutor v. Haradinaj*, IT-04-84-T, Judgement, ¶ 60 (Int’l Trib. for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Apr. 3, 2008), <https://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>.

for the treatment of individuals deprived of liberty, the parties to a NIAC might decide to bring into force only parts of the Convention by virtue of a special agreement (Common Article 3, para. 3⁵⁷⁷). Presumably, they would choose to bring into force provisions that can realistically be applied also by the armed group.

Conclusion

With this post, I hope to have prompted the readers' reflections on the difficulties that arise from interpreting the rules of GC III in armed conflicts fought by proxy. If we use the overall control test to classify a conflict as an IAC, and if this test is satisfied in relation to Russia and the D/LPR, we need to make sure that the overall control test does not overpromise and underdeliver when it comes to the treatment of POWs.



⁵⁷⁷ GC III, *supra* note 176, art. 3.

COMMAND RESPONSIBILITY AND THE UKRAINE CONFLICT

by Noëlle Quénivet | Mar 30, 2022

The news on the conflict in Ukraine is replete with violations of international humanitarian law (IHL), conveying the impression that soldiers either have been ordered to commit these crimes or have been allowed to do so (or a combination thereof). In the latter case, their commanders could be held responsible for their crimes. Commanders are considered particularly empowered to ensure compliance with IHL (*Bemba* 2016, para. 172⁵⁷⁸). Therefore, they are responsible for crimes committed by their subordinates should they fail to take measures to prevent or punish the commission of such crimes. As van der Wilt and Nybondas explain, “[a] commander within the military organisation is aware that his position carries with it a number of responsibilities, also towards his subordinates, and accepts these responsibilities when embarking upon his duties” (p. 334).⁵⁷⁹

This post examines the responsibility of *military* commanders in the conflict in

Ukraine in light of Article 28(a) of the Statute of the International Criminal Court (ICC).⁵⁸⁰ After defining command responsibility, this post categorizes the forces present on the ground. It then delves into and applies the elements of command responsibility to the categories of forces present in Ukraine.

Concept of Command Responsibility

The concept of command responsibility, also known as superior responsibility, stems from IHL (see Amann⁵⁸¹), being rooted in Article 1(1) of the 1899 Hague Regulations⁵⁸² and eventually codified in 1977 in Articles 86(2) and 87 of Additional Protocol I (AP I).⁵⁸³ It is now deemed a norm of customary nature applicable to all States.⁵⁸⁴

While the Allies prosecuted commanders after the Second World War (e.g., *Yamashita*,⁵⁸⁵ *von Leeb*⁵⁸⁶), one had to await the Statute of the International Criminal Tribunal for the

⁵⁷⁸ Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Judgment, ¶ 172 (Mar. 21, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

⁵⁷⁹ Harmen van der Wilt & Maria Nybondas, Military Operations and the Notion of Control Under International Law 329–347 (Rogier Bartels et al. eds., 2020), https://link.springer.com/chapter/10.1007/978-94-6265-395-5_16.

⁵⁸⁰ The Rome Statute of the ICC addresses superior responsibility for civilian leaders separately in Article 28(b). This post restricts analysis to military commanders under Article 28(a).

⁵⁸¹ Diane Marie Amann, *On Command*, 35 Temple Int'l & Compar. L. J. 121 (2021), https://digitalcommons.law.uga.edu/fac_artchop/1349.

⁵⁸² Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, art. 1(1), ICRC INT'L HUMANITARIAN L. DATABASES, <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899/regulations-art-1>.

⁵⁸³ AP I, *supra* note 167, arts. 86 & 87.

⁵⁸⁴ See Rule 153—*Command Responsibility for Failure to Prevent, Repress or Report War Crimes*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule153>.

⁵⁸⁵ *In re Yamashita*, 327 U.S. 1 (1946).

⁵⁸⁶ *United States v. von Leeb*, et al. (High Command Case), 10 Trials of War Criminals 3, 11 Trials of War Criminals 528 (1948).

former Yugoslavia (ICTY) (art. 7(3))⁵⁸⁷ and that of the International Criminal Tribunal for Rwanda (art. 6(3))⁵⁸⁸ for a codified and refined definition of command responsibility. The latest international iteration is found in Article 28 of the Statute of the ICC.⁵⁸⁹ The Court has clearly stated that command responsibility is a *sui generis* mode of liability used to hold criminally responsible military superiors for the crimes committed by their subordinates (paras 171, 174).⁵⁹⁰

Both Ukraine and the Russian Federation are States Parties to AP I and are therefore bound by its command responsibility provisions. In March 2021, Ukraine adopted a law entitled “On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of Norms of International Criminal and Humanitarian Law.”⁵⁹¹ The amendments introduced a new Article 31-1 whose wording, though slightly different from Article 28(a) of the ICC Statute, provides for criminal liability of military commanders and other persons. It is, however, unclear whether a similar provision exists in Russian law. Although the ICRC Practice Relating to Rule 153 in the Russian Federation refers to the Internal Service Regulations of the Armed Forces of the Russian Federation,⁵⁹²

the wording does not seem to indicate that command responsibility is a mode of liability. The Criminal Code of the Russian Federation similarly does not include any provision on command responsibility.⁵⁹³

While Article 86(2) of AP I refers to three conditions to be fulfilled for command responsibility to apply (see also Commentary to art. 86(2) of AP I, para. 3543⁵⁹⁴), the ICC developed a six-element test in the *Bemba* case (para. 170⁵⁹⁵). This post applies the latter test, with the exception of element (a) which is that the crimes be within the ICC jurisdiction, as this post focuses on commanders rather than on the Court’s jurisdictional matters.

Forces Fighting in the Conflict

To determine whether military personnel can be held responsible for acts of their subordinates, it is important to develop the concept of subordination. Two caveats must be underlined. First, at trial, the Court would conduct a case-by-case examination of the facts. As this post aims to explore in general terms the possibility of applying command responsibility in Ukraine, a much broader approach will be taken. Second, to quote Professor Gary Corn, “In an extremely

⁵⁸⁷ Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7(3), S.C. Res. 827 (May 25, 1993) [hereinafter ICTY Statute].

⁵⁸⁸ Statute of the International Criminal Tribunal for Rwanda, art. 6(3), S.C. Res. 955, annex (Nov. 8, 1994) [hereinafter ICTR Statute].

⁵⁸⁹ Rome Statute, *supra* note 5, art. 28.

⁵⁹⁰ See Prosecutor v. Bemba (2016).

⁵⁹¹ Про внесення змін до деяких законодавчих актів України щодо імплементації норм міжнародного кримінального та гуманітарного права [On making changes to some legislative acts of Ukraine regarding the implementation of international criminal norms and humanitarian law], <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=67804&pf35401=516286>.

⁵⁹² Practice relating to Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War Crimes, ICRC INT’L HUMANITARIAN L. DATABASES, pt. III, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule153?country=ru>.

⁵⁹³ Criminal Code of the Russian Federation, June 13, 1996, <https://www.legal-tools.org/doc/8eed35/pdf>.

⁵⁹⁴ Additional Protocols Commentary, *supra* note 333, para. 3543.

⁵⁹⁵ See Prosecutor v. Bemba (2016), ¶ 170.

fluid and fast-evolving environment, assessing the [existence, composition and structure] of these various resistance fighters [in relation to command responsibility] presents a near Sisyphean task with profound consequences.”⁵⁹⁶ To facilitate this task, I will identify and examine six categories of fighting organizations in the conflict.

Category 1 covers members of the armed forces of Ukraine and of the Russian Federation as well as groups and militias that are part of those armed forces. For example, a Belarussian volunteer battalion joined the Ukrainian armed forces,⁵⁹⁷ and are thus treated as members of the Ukrainian armed forces. This category of fighters is trained in armed conflict, is organized in a hierarchical structure, and follows the orders of a military commander.

Category 2 refers to special units such as the Federal Security Service (see here, p. 8⁵⁹⁸) on the Russian side and the Security Service of Ukraine (see here⁵⁹⁹) on the Ukrainian side. They usually do not fight directly but at times

carry out combat missions with military units. They are organized, structured, and, if engaged in fighting, likely to follow the orders of a member of the armed forces.

Category 3 includes the Territorial Defence Forces (TDF) of Ukraine. Originally, the TDF were a paramilitary group trained and meant to train the local population to fight against a potential aggressor.⁶⁰⁰ When the conflict started, the TDF recruited civilians fighting under their loose command (see here⁶⁰¹ and here⁶⁰²). Yet, it was reported that “[b]efore receiving their guns, they were asked to form ad hoc units of about 10 men each and choose a commander.”⁶⁰³ Later, Ukrainian President Zelensky referred to the “Territorial Defense Forces of the Armed Forces [sic] of Ukraine.”⁶⁰⁴ The TDF were described as “an organized, civilian volunteer corps that apparently forms part of the Ukrainian Armed Forces.”⁶⁰⁵ If these members follow orders from the Ukrainian military command hierarchy or form part of the armed forces, they fall within category 1. Whether all TDF do is, however, unclear.

⁵⁹⁶ 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/>.

⁵⁹⁷ The Kyiv Independent (@KyivIndependent), X (FORMERLY TWITTER) (Mar. 26, 2022), <https://twitter.com/KyivIndependent/status/1507643950932410375>.

⁵⁹⁸ Jack Watling & Nick Reynolds, *The Plot to Destroy Ukraine* ¶ 8 (Royal United Services Inst. for Def. and Sec. Studies, Feb. 15, 2022), <https://static.rusi.org/special-report-202202-ukraine-web.pdf>.

⁵⁹⁹ Ken Watkin, *Special Forces, Unprivileged Belligerency, and the War in the Shadows*, ARTICLES OF WAR (Mar. 8, 2022), <https://lieber.westpoint.edu/special-forces-unprivileged-belligerency-war-shadows/>.

⁶⁰⁰ Nils Adler, *In a Ukrainian city near Russia, a civilian army prepares for war*, AL JAZEERA (Jan. 24, 2022), <https://www.aljazeera.com/news/2022/1/24/kharkiv-prepares-for-civil-resistance-amid-fears-of-invasion>.

⁶⁰¹ RONALD ALCALA & STEVE SZYMANSKI, *supra* see note 71.

⁶⁰² Emily Crawford, *Armed Ukrainian Citizens: Direct Participation in Hostilities, Levée en Masse, or Something Else?*, EJIL:Talk! (Mar. 1, 2022), <https://www.ejiltalk.org/armed-ukrainian-citizens-direct-participation-in-hostilities-leeve-en-masse-or-something-else/>.

⁶⁰³ President of Ukraine Volodymyr Zelenskyy, 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>.

⁶⁰⁴ *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>.

⁶⁰⁵ Corn, *The Fog of War*, *supra* note 596.

Category 4 covers foreign fighters. Following a call by President Zelensky,⁶⁰⁶ non-Ukrainian nationals have volunteered to join the armed forces of Ukraine as part of the UKR Legion (see here,⁶⁰⁷ here,⁶⁰⁸ and here⁶⁰⁹). The UKR is a separate subdivision in the TDF. It has been reported that “[t]he international units are a component of the country’s regular armed forces and report to its general staff. Foreigners serve under Ukrainian officers.”⁶¹⁰ On the Russian side it appears that some foreign professional fighters have been paid to fight,⁶¹¹ and it seems that they have been integrated into the armed forces.

Category 5 includes independent groups that seemingly have no links to armed forces. For example, the troops of Ramzan Kadyrov, a Russian and Chechen politician, “highlight that they are under the command of Kadyrov, not the Russian military hierarchy.”⁶¹² They are hierarchically structured and obey local commanders. The private military group Wagner might also be present on the ground,⁶¹³ but little is known about them but for the fact that they are organized similarly to

armed forces but are not part of the Russian Federation’s armed forces.

Finally, category 6 refers to individuals who took part in the *levée en masse* at the inception of the conflict. Under Article 4(A)(6) of Geneva Convention III,⁶¹⁴ they are not yet organized, nor do they necessarily take orders from a commander as the very idea of *levée en masse* is that, as Alcalá and Szymanski emphasize, the “participants . . . must not have had time to form themselves into regular armed units.”⁶¹⁵ This category is thus dismissed for the purpose of an examination on command responsibility.

Military Commander or a Person Effectively Acting as a Military Commander

Turning to the elements of command responsibility, first it must be demonstrated that the accused is either a military commander or a person effectively acting as a military commander.

Military commanders are persons formally or legally appointed to a military commanding

⁶⁰⁶ President of Ukraine, *supra* note 604.

⁶⁰⁷ Ilya Nuzov, *Mercenary or Combatant? Ukraine’s International Legion of Territorial Defense under International Humanitarian Law*, EJIL:Talk! (Mar. 8, 2022), <https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law/>.

⁶⁰⁸ Petra Ditrichová & Veronika Bílková, *Status of Foreign Fighters in the Ukraine Region*, ARTICLES OF WAR (Mar. 15, 2022), <https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion/>.

⁶⁰⁹ Robert Lawless, *Are Mercenaries in Ukraine?*, ARTICLES OF WAR (Mar. 21, 2022), <https://lieber.westpoint.edu/are-mercenaries-in-ukraine/>.

⁶¹⁰ Brett Forrest, *Ukraine’s New Foreign Legion Takes the Fight to Russian Forces*, WALL ST. J. (Mar. 12, 2022), https://www.wsj.com/articles/ukraines-new-foreign-legion-takes-the-fight-to-russian-forces-11647083295?mod=series_rusukrainenato.

⁶¹¹ Lawless, *supra* note 609.

⁶¹² Emma Graham-Harrison, *Chechnya’s losses in Ukraine may be leader Ramzan Kadyrov’s undoing*, GUARDIAN (Mar. 22, 2022), <https://www.theguardian.com/world/2022/mar/22/chechnyas-losses-in-ukraine-may-be-leader-ramzan-kadyrovs-undoing>.

⁶¹³ *British intelligence says Russia’s Wagner Group deployed to eastern Ukraine*, REUTERS (Mar. 28, 2022), <https://www.reuters.com/world/europe/british-intelligence-says-russias-wagner-group-deployed-eastern-ukraine-2022-03-28/>.

⁶¹⁴ GC III, *supra* note 176, art. 4.

⁶¹⁵ Alcalá & Szymanski, *supra* note 171.

function and have been referred to as de jure commanders (*Prosecutor v. Bemba* 2016, para. 176;⁶¹⁶ see also ICC *Commentary*). Commanders of groups in categories 1–4 are likely to be de jure commanders (for de jure commanders of foreign fighters, see *Delić* 2008, paras. 364–368⁶¹⁷). The term also applies to those appointed in non-governmental irregular forces (*Bemba* 2016, para. 176⁶¹⁸) and could be relevant to category 5. Their specific ranks are not relevant to the question of command; command at either a high or low level of leadership is sufficient (*Prosecutor v. Bemba* 2009, para. 408⁶¹⁹).

Yet, the “[f]ormal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person’s de facto, as well as de jure, position as a commander” (*Delalić* 1998, para. 370⁶²⁰). The reality on the ground means that often individuals assume command over units; command in a formal sense arises from factual circumstances (*Prosecutor v. Limaj* 2005, para. 522⁶²¹).

Even de facto commanders, who have not assumed formal command designation, qualify as “persons effectively acting as a military commander” since they exercise effective control over subordinates through

a chain of command (*Bemba* 2009, para. 409⁶²²). This broad category covers persons responsible for paramilitary units not incorporated into the armed forces (see ICC *Commentary*) and individuals not performing exclusively military functions (*Bemba* 2016, para. 177⁶²³). It would thus include commanders of category 2 (depending on their powers), category 3 (in cases where individuals have assumed such a role while deployed), and category 5.

In conclusion, while the majority of those in command are likely to be de jure commanders, many may qualify as de facto commanders.

In Effective Command and Control or Effective Authority and Control over the Forces

Second, the accused must be in “effective command and control,” or in the case of the person effectively acting as a military commander, in “effective authority and control.” It has been observed that effective authority and control “encapsulates the ‘qualitative test’ as to the nature of the superior-subordinate relationship as such” (ICC *Commentary*). While “command and control” relates to issuing orders and conveys the idea of a chain of command and “authority and control” appears to cover a broader range

⁶¹⁶ See *Prosecutor v. Bemba* (2016), ¶ 176.

⁶¹⁷ *Prosecutor v. Delić*, Judgement, IT-04-83-T, ¶¶ 364–368 (Sept. 15, 2008), <https://www.icty.org/x/cases/delic/tjug/en/080915.pdf>.

⁶¹⁸ See *Prosecutor v. Bemba* (2016), ¶ 176.

⁶¹⁹ *Prosecutor v. Jean-Pierre Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC 01/05-01/08, ¶ 408 (June 15, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF.

⁶²⁰ *Prosecutor v. Delalić et al.*, Judgement, IT-96-21-T, ¶ 370 (Nov. 16, 1998), https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf.

⁶²¹ *Prosecutor v. Limaj*, Judgement, IT-03-66-T, ¶ 522 (Nov. 30, 2005), <https://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>.

⁶²² See *Prosecutor v. Bemba* (2009), ¶ 409.

⁶²³ See *Prosecutor v. Bemba* (2016), ¶ 177.

of situations, the ICC explained in *Bemba* (2009, para. 412⁶²⁴) that “‘command’ and ‘authority’ under the two expressions has no substantial effect on the required level or standard of ‘control.’”

What matters is whether the control is effective and whether a superior-subordinate relationship can be established. Effective control refers to the material ability or power to control subordinates. In the case of de jure military commanders, a formal capacity to control is assumed as the command position authorizes the commander to issue binding orders (*Delalić* 2001, para. 197⁶²⁵).

Nonetheless, authority is not in itself sufficient. Actual ability to exercise control is required to establish command responsibility (*Bemba* 2016, paras. 183, 189⁶²⁶). “[S]ubstantial influence as a means of control” is not enough either (*Bemba* 2016, para. 183⁶²⁷). The material ability is tested on a case-by-case basis, using concrete evidence (*Blaškić* 2004, para. 69⁶²⁸). The ICC has listed indicators to assess the actual possession of powers of control (*Bemba* 2016, para. 188⁶²⁹) and the application of these factors to foreign fighters *Delić* 2008, paras. 364–368⁶³⁰), as well as the

lack of effective control (*Bemba* 2016, para. 190⁶³¹) over the actions of subordinates.

Without further information on the structure of each of the abovementioned categories, it is difficult to determine whether commanders are in actual, effective control over the forces. However, if there are instances of disobedience or non-compliance by subordinates (*Bemba* 2016, para. 190⁶³²; *Hadžihasanović* 2008, para. 230⁶³³) such as the report that a Russian brigade commander was attacked by his own troops,⁶³⁴ then it appears that the commander does not exercise effective control. The fact that some groups work as specialized units (see Categories 2 and 5 to some extent), hold a special position, or enjoy autonomy does not mean that commanders do not wield effective control. The opportunity to set out operational goals, explain how to achieve them, and coordinate units while leaving discretion to the units to carry out operations on the ground independently may nonetheless amount to effective control (*Delić* 2008, para. 465⁶³⁵).

Although Article 28(a) of the ICC Statute refers to “forces,” thereby conveying the impression that it might be limited to armed

⁶²⁴ See *Prosecutor v. Bemba* (2009), ¶ 412.

⁶²⁵ *Prosecutor v. Delalić et al.*, Judgement, IT-96-21-A, ¶ 197 (Feb. 20, 2001), <https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

⁶²⁶ See *Prosecutor v. Bemba* (2016), ¶ 183, 189.

⁶²⁷ *Id.* ¶ 183.

⁶²⁸ *Prosecutor v. Blaškić*, Judgement, IT-95-14-A, ¶ 69 (July 29, 2004), <https://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf>.

⁶²⁹ See *Prosecutor v. Bemba* (2016), ¶ 188.

⁶³⁰ See *Prosecutor v. Delić*, at ¶¶ 364–368.

⁶³¹ See *Prosecutor v. Bemba* (2016), at ¶ 190.

⁶³² *Id.*

⁶³³ *Prosecutor v. Hadžihasanović*, Judgement, IT-01-47-A, ¶ 230 (Apr. 22, 2008), https://www.icty.org/x/cases/hadzhasanovic_kubura/acjug/en/had-judg080422.pdf.

⁶³⁴ Christina Gallardo, *Russian brigade commander killed by his own forces*, Politico (Mar. 25, 2022), <https://www.politico.eu/article/russian-brigade-commander-killed-by-his-own-forces/>.

⁶³⁵ See *Prosecutor v. Delić*, ¶ 465.

forces, case law establishes a broad range of “fighters” (ICC *Commentary*) who qualify as forces. In fact, the Court uses forces and subordinates as synonyms (*Bemba* 2009, para. 428⁶³⁶). The word “forces” would then cover all five categories considered in this post.

Thus, commanders of “forces” in the five categories could potentially be deemed to be in effective command and control or effective authority and control.

Knew or Should Have Known

Third, the accused must know or should have known that their forces were committing or were about to commit crimes. These two situations are referred to as actual knowledge and constructive knowledge.⁶³⁷

Actual knowledge that a crime was about to be committed or was committed cannot be assumed (*Bemba* 2016, para. 191⁶³⁸) though “actual knowledge may be proven if, ‘a priori, [a military commander] is part of an organised structure with established reporting and monitoring systems’” (*Bemba* 2009, para. 431⁶³⁹). Following this latter view, it may be assumed that commanders of armed forces such as those mentioned under categories 1, 3, and 4 have such actual knowledge. Recent radio communications between Russian troops certainly show that commanders are

aware of crimes being committed (e.g., attack on a residential neighbourhood).⁶⁴⁰ Only a total lack of communication between military commanders and armed forces could absolve commanders of their responsibility based on actual knowledge.

The ICC has emphasized that it is the knowledge of the accused that must be established; the fact that the public or other organisations are aware of the crimes does not necessarily attribute knowledge to the commander (*Bemba* 2016, para. 193⁶⁴¹). Either direct or circumstantial evidence of knowledge must be adduced (*Bemba* 2016, para. 191⁶⁴²). The ICC has listed a number of relevant factors for evaluating knowledge (*Bemba* 2016, para. 193;⁶⁴³ see also *Mucić* 1998, para. 386⁶⁴⁴). Such knowledge could be difficult to prove in category 3, as it is unclear how civilian elements of the group report to military commanders and therefore how commanders know that crimes are about to be committed or were committed. It would, however, be less difficult for the other categories that appear to have established reporting mechanisms.

Commanders may also be held responsible based on constructive knowledge of their subordinates’ offenses. While the ICTY used the “reason to know” standard (see e.g.,

⁶³⁶ See *Prosecutor v. Bemba* (2009), ¶ 428.

⁶³⁷ See *Rule 153—Command Responsibility for Failure to Prevent, Repress or Report War Crimes*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule153>.

⁶³⁸ See *Prosecutor v. Bemba* (2016), ¶ 191.

⁶³⁹ See *Prosecutor v. Bemba* (2009), ¶ 431.

⁶⁴⁰ Robin Stein, Christiaan Triebert et al. *Under Fire, Out of Fuel: What Intercepted Russian Radio Chatter Reveals*, N.Y. TIMES (Mar. 23, 2022), <https://www.nytimes.com/video/world/europe/100000008266864/russia-army-radio-makariv.html>.

⁶⁴¹ See *Prosecutor v. Bemba* (2016), ¶ 193.

⁶⁴² *Id.* ¶ 191.

⁶⁴³ *Id.* ¶ 193.

⁶⁴⁴ *Prosecutor v. Delalić*, ¶ 386.

Delalić 2001, para. 241⁶⁴⁵), the ICC Statute refers to cases in which the accused “should have known,” which “requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, *regardless of the availability of information*” (*Bemba* 2009, para. 433, emphasis added⁶⁴⁶). Accordingly, commanders can be held responsible if they fail to apprise themselves of the conduct of their subordinates (*Bemba* 2009, para. 432⁶⁴⁷). Many of the cases in categories 1–5 are likely to involve analysis under the constructive knowledge standard as even if monitoring and reporting procedures are in place.

Failure to Take All Necessary and Reasonable Measures

Fourth, when commanders know or should have known of crimes by their subordinates, they are obliged to take all necessary and reasonable measures: (1) to prevent the commission of the crimes, (2) to repress the commission of the crimes, or (3) to submit the matter to the competent authorities for investigation and prosecution. While this ICC formulation is slightly different from other statutes, the duties upon the commander are the same (see *ICC Commentary*), and their obligations are considered along a time continuum: before, during, and after the unlawful act.

The first duty is to prevent subordinates from planning and preparing a prospective crime. This can be done by, for example, ensuring that the forces are aware of IHL rules, securing reports that the law is being complied with, effectively addressing criminal conduct, postponing military operations, suspending or excluding subordinates so that they do not have the opportunity to commit crimes, and taking disciplinary measures to prevent the perpetration of crimes (*Bemba* 2009, para. 438⁶⁴⁸).

The duty to repress obliges commanders not only to stop the ongoing commission of the crime but also to appropriately address offenders after the commission of crimes (*Bemba* 2009, para. 439⁶⁴⁹). This obligation includes imposing appropriate sanctions, conducting an investigation, and securing a follow-up to that investigation, as well as fostering an environment of discipline and respect for IHL (*Orić* 2006, para. 336⁶⁵⁰).

After the commission of the crime, the duty to submit the matter to competent authorities requires the commander to take active steps to ensure that the perpetrators are brought to justice. This is viewed as an alternative to punishment meted out by commanders, thereby remedying a situation where commanders do not have the ability or authority to sanction their forces or where the measures are inadequate (*Bemba* 2009, paras. 440, 442⁶⁵¹).

⁶⁴⁵ *Id.* ¶ 241.

⁶⁴⁶ See *Prosecutor v. Bemba* (2009), ¶ 433.

⁶⁴⁷ *Id.* ¶ 432.

⁶⁴⁸ *Id.* ¶ 438.

⁶⁴⁹ *Id.* ¶ 439.

⁶⁵⁰ *Prosecutor v. Orić*, Judgement, IT-03-68-T, ¶ 336 (June 30, 2006), <https://www.icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf>.

⁶⁵¹ See *Prosecutor v. Bemba* (2009), ¶¶ 440, 442.

Necessary and reasonable measures within the power of the commander must be evaluated in conjunction with the concept of effective control. Indeed, corrective measures will depend on the position of the commander and thus “[w]hat constitutes such measures is not a matter of substantive law but of evidence” (Blaškić 2004, para. 72⁶⁵²). It boils down to: What would have any commander objectively done *in concreto* in these circumstances and which measures were “within his material possibility” (Bemba 2009, para. 443⁶⁵³)?

Whether the measures are necessary and reasonable must be evaluated against *inter alia* the number of crimes, the reliability and probative value of the evidence, the limitations faced by a commander located some distance from where the crimes occur, and, most importantly, whether the measures were within the commander’s authority (Bemba 2018, paras. 181, 183, 189⁶⁵⁴). While it is generally agreed that “[s]ince a superior is duty bound only to undertake what appears appropriate under the given conditions, he or she is not obliged to do the impossible” (Orić 2006, para. 329⁶⁵⁵), the Bemba Appeals judgment has been criticized (see, e.g., Amann, pp. 130–131;⁶⁵⁶ Murphy, p. 118⁶⁵⁷) for setting too low the bar of what is expected of commanders, allowing them “to make a cost/benefit analysis when deciding which measures to take, bearing in mind their

overall responsibility to prevent and repress crimes committed by their subordinates” (Bemba 2018, para. 170⁶⁵⁸).

In relation to the conflict in Ukraine, this can only be evaluated on a case-by-case basis. For categories 1, 2, and 4, military commanders of armed/special forces have (usually) the powers to prevent and repress the crimes as well as submit the matter to the relevant authorities. Examples include providing instruction in IHL, supervising the monitoring system, imposing disciplinary and penal measures, redeploying the troops in an area where they are less likely to commit such crimes, etc. In contrast, commanders of other categories might be more limited in the type of actions that they can take, especially those commanding “civilian” elements in category 3. Also, commanders of category 5 may find it difficult to report crimes to the competent authorities though they would be able to prevent or repress the crime.

Causal Link

Last, the ICC Statute stipulates that the crimes committed by the forces must have been a result of the failure of the commander to exercise control properly over them, a provision that stands in contrast to the case law of the ad hoc tribunals, which only required a relation to be established between the commander’s failure to exercise control

⁶⁵² See Prosecutor v. Blaškić, at ¶ 72.

⁶⁵³ See Prosecutor v. Bemba (2009), ¶ 443.

⁶⁵⁴ Prosecutor v. Jean-Pierre Bemba, ICC-01/05-01/08 A, ¶ 181, 183, 189 (June 8, 2018), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF.

⁶⁵⁵ See Prosecutor v. Orić, at ¶ 329.

⁶⁵⁶ AMANN, *supra* note 581, ¶¶ 130–131.

⁶⁵⁷ Ray Murphy, *Command Responsibility after Bemba*, NEW ZEALAND Y.B. OF INT’L L., ¶¶ 94–118, https://doi.org/10.1163/19789004387935_008.

⁶⁵⁸ See Prosecutor v. Bemba (2018), ¶ 170.

and the crime. The ICC has clarified that “[t]here is no direct causal link that needs to be established between the superior’s omission and the crime committed by his subordinates. Therefore, the Chamber considers that it is only necessary to prove that the commander’s omission increased the risk of the commission of the crimes charged” (*Bemba* 2009, para. 425⁶⁵⁹).

The fact that crimes committed by Russian armed forces go unpunished gives the wrong signal to members of the armed forces who are then emboldened into committing further crimes. Yet, again, this assessment needs to be carried out on a case-by-case basis and requires a much better knowledge of the situation on the ground.

Conclusion

In summary, although it is possible to some extent to argue that *military* commanders of the five categories (armed forces, special forces, TDF of Ukraine, foreign fighters, and independent groups) can be held responsible for the war crimes committed by their subordinates, one needs to remember that any such legal assessment must be carried out based on established facts. In the absence of such reliable and credible evidence, this examination and application of the law can only touch the surface and provide an overview of the potential issues.



⁶⁵⁹ Prosecutor v. Bemba (2009), ¶ 425.

ACCOUNTABILITY AND UKRAINE: HURDLES TO PROSECUTING WAR CRIMES AND AGGRESSION

by Lauren Sanders | Mar 9, 2022

Social media and news outlets are replete with examples of misconduct occurring during the Russian invasion of Ukraine.⁶⁶⁰ In fact, this conflict is being conducted under the public eye—more so even than recent conflicts in Syria or Iraq⁶⁶¹—given the absence of communications denial in the conflict area so far. In the lead-up to the invasion, the United States took the unusual step of making its intelligence public,⁶⁶² with the intent of stemming the potential for Russia to use disinformation to legitimize its unlawful entry into Ukraine. As the conflict continues to unfold online, so too do reports of breaches of the laws of armed conflict. The documentation by open-source intelligence (OSINT) agencies,⁶⁶³ such as Bellingcat,⁶⁶⁴ seeking to provide a service to, among other things, support the eventual prosecution of war crimes committed in the conflict,⁶⁶⁵

reinforces a new paradigm for furthering accountability for these crimes.

Separately, the President of the International Criminal Court (ICC) announced that he would commence an investigation into the allegations of war crimes and crimes against humanity⁶⁶⁶ that he has “a reasonable basis to believe” have occurred in Ukrainian territory since at least 2014.⁶⁶⁷ As Ukraine is not a member of the ICC, the normal route for an ICC investigation would be a United Nations Security Council Resolution (UNSCR); however, this will obviously not be forthcoming due to Russia’s status as a permanent member with a veto power. However, as Ukraine voluntarily subjected itself to the jurisdiction of the ICC for offenses committed on its territory since April 2014,⁶⁶⁸ the Prosecutor was able to open a

⁶⁶⁰ Roger Cohen, *A Surge of Unifying Moral Outrage Over Russia’s War*, N.Y. TIMES (Mar. 1, 2022, updated Mar. 3, 2022), <https://www.nytimes.com/2022/03/01/world/europe/zelensky-ukraine-war-outrage.html>.

⁶⁶¹ Emerson T. Brooking & P.W. Singer, *War Goes Viral*, ATLANTIC (Nov. 2016), <https://www.theatlantic.com/magazine/archive/2016/11/war-goes-viral/501125/>.

⁶⁶² Stephen Long, *Sharing top-secret intelligence with the public is unusual—but helped the US rally the world against Russian aggression*, THE CONVERSATION (Mar. 2, 2022), <https://theconversation.com/sharing-top-secret-intelligence-with-the-public-is-unusual-but-helped-the-us-rally-the-world-against-russian-aggression-178084>.

⁶⁶³ Billy Perrigo, *How Open Source Intelligence Became the World’s Window into the Ukraine Invasion*, TIME (Feb. 24, 2022), <https://time.com/6150884/ukraine-russia-attack-open-source-intelligence/>.

⁶⁶⁴ *Documenting and Debunking Dubious Footage from Ukraine’s Frontlines*, BELLINGCAT (Feb. 23, 2022), <https://www.bellingcat.com/news/2022/02/23/documenting-and-debunking-dubious-footage-from-ukraines-frontlines/>.

⁶⁶⁵ Peter Aldhous & Christopher Miller, *How Open-Source Intelligence Is Helping Clear the Fog of War in Ukraine*, BUZZFEEDNEWS (Mar. 2, 2022, updated Mar. 2, 2022), <https://www.buzzfeednews.com/article/peteraldhous/osint-ukraine-war-satellite-images-plane-tracking-social>.

⁶⁶⁶ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation,” Int’l Crim. Ct. (Feb. 28, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

⁶⁶⁷ Becky Sullivan, *The ICC says it will open an investigation into alleged war crimes in Ukraine*, NPR (Feb. 28, 2022), <https://www.npr.org/2022/02/28/1083598057/icc-ukraine-investigation>.

⁶⁶⁸ Press Release, ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) declaration, Int’l Crim. Ct. (Sept. 29, 2015), <https://www.icc-cpi.int/news/icc-prosecutor-extends-preliminary-examination-situation-ukraine-following-second-article-123>.

preliminary examination of the conflict. This examination concluded with the Prosecutor indicating he would seek authorization to commence an investigation into the situation. Subsequently, thirty-nine countries promptly referred the situation to the Court,⁶⁶⁹ which enlivened the jurisdiction of the Prosecutor to investigate the situation without requiring either a UNSCR or Court decision and giving him authority to investigate serious breaches of the laws of armed conflict.

Hurdles for Accountability

Despite these positive steps to hold perpetrators of crimes to account, there remain significant hurdles to achieving accountability for those who have breached the laws of war during this conflict. First, while the ICC has jurisdiction and authority to investigate serious breaches occurring in this conflict, this does not mean that the ICC will prosecute every breach of the law of armed conflict that occurs. The Court was established to deal with the worst and most egregious breaches of international law and is intended to prosecute cases where the offending State is either unwilling or unable to act in those cases that reach this gravity threshold.⁶⁷⁰ In the absence of an international, hybrid, or other ad hoc criminal tribunal being established, prosecutions will largely rely on Russia and Ukraine trying their own military forces domestically.

Second, not every breach of the laws of armed conflict will result in the commission of a crime. International criminal law is intended to deal with the most serious and egregious breaches, while the laws of war contain more prohibited actions than just the grave breaches that are codified in the Rome Statute or are derived from the Geneva Conventions. Most domestic criminal law only creates offences derived from international criminal law, as compared to every act prohibited by the laws of war.

After establishing jurisdiction and identifying a crime has occurred, the final hurdles deal with enforcement, that is, trying the perpetrator and having evidence to support those charges. Holding individuals to account is predicated upon obtaining physical custody of alleged perpetrators. This will prove difficult, and an obvious necessity when giving effect to any punishment issued, even if a trial is held *in absentia* (which some States contend is possible for these kinds of offences, through relying on the doctrine of universal jurisdiction⁶⁷¹).

Challenges exist in collecting evidence in a conflict zone, even when that conflict appears to have been recorded, documented real-time, and broadcast on the internet. The complications surrounding authenticity of content given the increasing use of deepfakes in armed conflict create problems in respect

⁶⁶⁹ 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, Int'l Crim. Ct. (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

⁶⁷⁰ Megumi Ochi, Gravity Threshold Before the International Criminal Court: An Overview of the Court's Practice: ICD Brief 19 (Jan. 2016), <https://www.internationalcrimesdatabase.org/upload/documents/20160111T115040-Ochi%20ICD%20Format.pdf>.

⁶⁷¹ Mohamed El Zeidy, *Universal Jurisdiction in Absentia: Is It a Legally Valid Option for Repressing Heinous Crimes?*, Oxford U. Compar. L. Forum 4 (2003), <https://ouclf.law.ox.ac.uk/universal-jurisdiction-in-absentia-is-it-a-legally-valid-option-for-repressing-heinous-crimes/>.

of reliance upon OSINT materials for the purpose of prosecutions.⁶⁷²

The ICC Threshold

The ICC is designed to deal with “serious breaches.” The Court acknowledges a gravity threshold for prosecutions, as it is expected—and required under international law⁶⁷³—that States will prosecute breaches of international criminal law themselves. The Court’s work is said to be complementary to, rather than a replacement of, the enforcement work of States.

This leaves other options for enforcement through either domestic criminal trials, the establishment of an ad hoc criminal tribunal as seen previously with Rwanda and the former Yugoslavia, or the establishment of hybrid tribunals such as those in Cambodia. These kinds of ad hoc tribunals have generally been established where the State concerned is unable to conduct the prosecutions, through consent of the parties, or by UNSCR—again, unlikely because of the Russian power of veto.

It is unclear if any military tribunals have been conducted by Russia in response to allegations of war crimes committed by its personnel (in uniform or otherwise⁶⁷⁴) in Crimea stemming back to 2014. Recent

military and jury trials involving murders of civilians during the Chechen conflict have resulted in the conviction of Russian service personnel,⁶⁷⁵ demonstrating a possibility that Russian forces could be held to account by the Russian military for their misconduct. However, prosecution of minor offenders is still likely to be limited.

As for the crime of aggression, the ICC will not have jurisdiction. It is a recently added core crime⁶⁷⁶ of the Rome Statute that deals with acts where armed force is used by another State against “the sovereignty, territorial integrity or political independence of another State.”⁶⁷⁷ It is committed by a person in a position to direct or control the actions of the State or military.

By all objective measures, Vladimir Putin has committed the crime of aggression in his invasion of Ukraine, despite him making false international law claims seeking to justify his conduct.⁶⁷⁸ While this crime falls within the ICC’s competence, the ICC will not have jurisdiction over Putin because neither Russia nor Ukraine is party to the ICC Statute, and the Court’s chief mechanism for jurisdiction (a UNSCR) would be vetoed by Russia. This gap has resulted in calls to establish a Special Tribunal to prosecute this offense,⁶⁷⁹

⁶⁷² Hitoshi Nasu, *Deepfake Technology in the Age of Information Warfare*, ARTICLES OF WAR (Mar. 1, 2022), <https://lieber.westpoint.edu/deepfake-technology-age-information-warfare/>.

⁶⁷³ Jan Wouters, *The Obligation to Prosecute International Law Crimes*, <https://www.law.kuleuven.be/iir/nl/onderzoek/opinions/obligationtoprosecute.pdf>.

⁶⁷⁴ Chris Koschnitzky & Michael N. Schmitt, *Russian Troops out of Uniform and Prisoner of War Status*, ARTICLES OF WAR (Mar. 4, 2023), <https://lieber.westpoint.edu/russian-troops-out-of-uniform-pow-status/>.

⁶⁷⁵ Nikolai P. Kovalev, *Trial by Jury in Russian Military Courts*, J. POWER INST. POST-SOVIET SOCIETIES (2008), <https://doi.org/10.4000/pipss.1533>.

⁶⁷⁶ *The Crime of Aggression*, COALITION FOR INT’L CRIM. CT., <https://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression>.

⁶⁷⁷ Rome Statute, *supra* note 5, art. 8 *bis*(2).

⁶⁷⁸ 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/>.

⁶⁷⁹ BROWN & BROWN, *supra* note 445.

using a similar mechanism as established for the International Military Tribunal and Nuremberg trials following the Second World War. Although the special tribunal approach might close the jurisdictional hole, it is still affected by the issue of physical access to the perpetrators, as well as the evidentiary issues discussed below.

Not Every Breach of the Laws of Armed Conflict Is a Crime

Of the breaches of the laws of war that have been identified, not all of them amount to a crime. International criminal law deals with four “core” crimes, which are also reflected in the Rome Statute: crimes against humanity, war crimes, genocide, and the crime of aggression. Domestic criminal jurisdictions often mirror these offenses in their own laws. Other misconduct, which may amount to a breach of international law or the laws of armed conflict, must be dealt with using other mechanisms. In the case of armed forces’ conduct, these include administrative sanction or military tribunals where conduct could be considered in breach of the disciplinary code of those forces.

The Ukrainian Ambassador to the United Nations cited examples of Russian forces targeting hospitals⁶⁸⁰—a breach of the laws

of armed conflict given that hospitals retain special protection from attack. This conduct, if proved, could amount to a war crime, and the perpetrators of the attack could be the subject of a criminal trial. Other allegations include attacking journalists⁶⁸¹—who are, like other civilians, protected under the laws of armed conflict; attacking facilities that contain dangerous forces, such as nuclear power plants;⁶⁸² and allegations of rape, murder, and torture. This conduct could all amount to specific breaches of the laws of armed conflict, susceptible to criminal prosecution from the individual soldiers responsible, including the chain of command that plans or is otherwise responsible for their conduct.

Contrastingly, the Ukrainians are documented as having used social media to post videos of Russian prisoners of war for the purpose of informing their families of their whereabouts and mobilizing the Russian population against Putin’s invasion⁶⁸³—an information operation in the name of exposing and countering Russian disinformation—but an information operation using prisoners of war for public curiosity, nonetheless. Similarly, the Russian separatists held parades of Ukrainian prisoners of war in Donetsk in 2014.⁶⁸⁴ Although subjecting prisoners of war to acts of public curiosity constitutes a breach

⁶⁸⁰ Alex Leff, *Read the impassioned plea from Ukraine’s U.N. ambassador to Russia to stop the war*, NPR (updated Feb. 24, 2022), <https://www.npr.org/2022/02/24/1082806285/ukraine-ambassador-russia-security-council>.

⁶⁸¹ *Ukraine war: Sky News journalist Stuart Ramsay and team shot at in ambush*, BBC (Mar. 5, 2022), <https://www.bbc.com/news/uk-60627841>.

⁶⁸² Andrew Drake et al., *Attack on Ukrainian nuclear plant triggers worldwide alarm*, AP NEWS (Mar. 4, 2022), <https://apnews.com/article/russia-ukraine-war-nuclear-plant-attack-33b6c1709dee937750f95c6786832840>.

⁶⁸³ Pjotr Sauer, *‘I had no idea he was there’: families’ shock at video of captured Russian soldiers*, GUARDIAN (Feb. 27, 2022), <https://www.theguardian.com/world/2022/feb/27/ukrainian-officials-upload-videos-of-captured-russian-soldiers-on-telegram>.

⁶⁸⁴ Carl Schreck, *Donetsk POW March: When Is a Parade a War Crime?*, RADIOFREEEUROPE RADIO LIBERTY (Aug. 25, 2014), <https://www.rferl.org/a/ukraine-pow-march-war-crime/26548667.html>.

of the laws of armed conflict,⁶⁸⁵ this offense does not appear in the ICC Rome Statute, nor does it amount to a grave breach under the Geneva Conventions.

Bringing Offenders into Custody

The ability to actually bring individuals and commanders to account for their misconduct during the Ukrainian conflict is dependent largely upon two factors: access to the alleged perpetrators and evidence to support the investigation and prosecution of the offenses.

Although there are multiple ways in which jurisdiction over the offending party can be established for these offenses, a basic principle of justice and fundamental human right is that an alleged perpetrator is entitled to a fair trial,⁶⁸⁶ which includes the opportunity of being physically present at their hearing.⁶⁸⁷

While not inconceivable, it seems unlikely that Russia will voluntarily surrender its personnel to Ukrainian domestic courts for trial. In the event that an international, ad hoc, or Ukrainian hybrid tribunal is established, Russian forces will likely be shielded from extradition or arrest by other States, in the same way that most States seek to retain jurisdiction over their personnel.

While the prosecution of individuals is the ideal international criminal law outcome, issuing indictments and arrest warrants against individuals can still have the effect of curbing impunity for these crimes. Even if a court does not gain physical custody of the alleged perpetrator in the near term, this action effectively makes those individuals international pariahs and impacts their freedom of movement to other States in the long term.

Collection and Verification of Evidence

Ongoing access to internet services during this conflict is creating a real-time record of the conflict and is being dubbed by some as a “social media war.”⁶⁸⁸ The capacity to track the progress of the invasion, document alleged misconduct of Russian soldiers, and record the conduct and aftermath of attacks against civilians, civilian objects, and military operations more generally is unprecedented.

The use of OSINT as a pathway to enforcement, as compared to the use of social media to create support for the conduct of operations, is relatively novel.⁶⁸⁹ In most conflicts, and doctrinally for many militaries, one of the first services to be denied during conflict is that of communications. While novel, this is not the first instance⁶⁹⁰ of using

⁶⁸⁵ Laurie R. Blank, *Combatant Privileges and Protections*, ARTICLES OF WAR (Mar. 4, 2022), <https://lieber.westpoint.edu/combatant-privileges-and-protections/>.

⁶⁸⁶ *Universal Declaration of Human Rights*, UNITED NATIONS, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

⁶⁸⁷ *International Covenant on Civil and Political Rights*, U.N. Human Rights Off. High Comm'r. (Dec. 16, 1966), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

⁶⁸⁸ Peter Suciu, *Is Russia's Invasion of Ukraine the First Social Media War?*, FORBES (Mar. 1, 2022), <https://www.forbes.com/sites/petersuciu/2022/03/01/is-russias-invasion-of-ukraine-the-first-social-media-war/?sh=6d594bae1c5c>.

⁶⁸⁹ Emerson T. Brooking & P.W. Singer, *War Goes Viral*, ATLANTIC (Nov. 2016), <https://www.theatlantic.com/magazine/archive/2016/11/war-goes-viral/501125/>.

⁶⁹⁰ Ioannis Kalpouzos, *The Yemen Project: Open Source Investigations and the Law of War*, JUST SEC. (Sept. 23, 2019), <https://www.justsecurity.org/66258/the-yemen-project-open-source-investigations-and-the-law-of-war/>.

open-source intelligence to support criminal investigation of breaches of IHL;⁶⁹¹ however, the ability to distinguish between “real” and “fake” content poses additional challenges for the collection of evidence for prosecutions.

Separately, preservation of evidence in armed conflict is always challenging. This is grounded in the practical problems of identifying and collecting evidence in a war zone. In recognition of this challenge, the UN Human Rights Council has voted to create an independent international commission of inquiry—an increasingly common phenomenon—to aid in the identification and preservation of admissible evidence by investigating violations and abuses of human rights, the laws of armed conflict, and any related crimes.⁶⁹²

The ICC has already dispatched an investigative team to Ukraine.⁶⁹³ These actions can be attributed not only to an increasing concern for accountability in armed conflict, but also to recognition of the inherent difficulties associated with the collection of evidence during and

after conflict.⁶⁹⁴ Specifically, access to conflict zones, destruction of crime scenes, preservation and chains of custody of evidence, and the independence of inquiry by nation States who are party to a conflict have proved enormously challenging to evidence collection and preservation.

Concluding Observations

Regardless of the jurisdictional technicalities and enforcement challenges, it is evident that the Ukrainian conflict has focused the international community on accountability measures—fueled in some part by the social media phenomenon broadcasting the fighting to the world in almost real time. Despite this increasing focus, and the benefits of conducting investigations almost contemporaneously with the alleged misconduct supported by this coverage, there remain significant hurdles in ensuring the enforcement of international criminal law in Ukraine.



⁶⁹¹ Swansea University, *The future of human rights investigations: Using open source intelligence to transform the documentation and discovery of human rights violations*, U.K. RSCH. & INNOVATION (Sept. 18–Feb. 21), <https://gtr.ukri.org/projects?ref=ES%2FR00899X%2F1#tabOverview>.

⁶⁹² Ted Piccone, *U.N. Human Rights Commissions of Inquiry: The Quest for Accountability*, BROOKINGS INST. (Dec. 8, 2017), https://www.brookings.edu/wp-content/uploads/2017/12/fp_20171208_un_human_rights_commissions_inquiry.pdf.

⁶⁹³ *ICC prosecutor: Team leaves to investigate war crimes in Ukraine*, REUTERS (Mar. 4, 2022), <https://www.reuters.com/world/europe/icc-prosecutor-advance-team-has-left-begin-work-ukraine-investigation-2022-03-03/>.

⁶⁹⁴ Oleksandr Ratushniak, *Civilians are being killed in Ukraine. So, why is investigating war crimes so difficult?*, CONVERSATION (Mar. 1, 2022), <https://theconversation.com/civilians-are-being-killed-in-ukraine-so-why-is-investigating-war-crimes-so-difficult-178155>.

UKRAINE SYMPOSIUM—REBEL PROSECUTIONS OF FOREIGN FIGHTERS IN UKRAINE

by René Provost | Jul 15, 2022

On 1 July 2022, Russian state media reported that two British nationals captured by the “Donetsk People’s Republic” in eastern Ukraine would be prosecuted for “mercenary activities,” in violation of the laws of Donetsk.⁶⁹⁵ This comes a few weeks after two British men and one Moroccan man were sentenced to death by the Supreme Court of the Donetsk People’s Republic for their involvement in the war on behalf of Ukraine. It is likely that these are only the first of a large number of convictions by Russia and its allies of Ukrainians and foreign fighters from a range of other countries, signaling a dangerous unraveling of the tenuous protection granted under international law to combatants in warzones. More generally, it adds to Russia’s frontal assault on the prohibition of war underpinning the international legal order created on the ashes of the Second World War, calling for a united and considered response by the international community.

Rebel Courts

The first challenging aspect of the announced prosecutions and earlier convictions is that

they were issued by the supreme court of an unrecognized entity, the Donetsk People’s Republic. Both Donetsk and Luhansk are self-proclaimed “people’s republics” that have had de facto autonomy since 2014, when non-State armed groups engaged in a non-international armed conflict with Ukraine managed to gain territorial control over these two regions with support from Russia. Donetsk and Luhansk each adopted a constitution in 2014 which acts as the foundation of the legal orders in the regions. The Ukrainian government ordered all state courts to suspend their operations in areas under rebel control, and these were progressively replaced by rebel courts of the autonomous Donetsk and Luhansk authorities, including appeal and supreme courts. Information on the administration of justice in these territories has proved extremely difficult to obtain, but reports by the UN⁶⁹⁶ and international NGOs⁶⁹⁷ paint a glum picture of justice before the courts of Donetsk and Luhansk.

As I have argued in a recent book, *Rebel Courts*,⁶⁹⁸ the creation and operation of such rebel courts applying the laws of an

⁶⁹⁵ Joseph Lee & Marie Jackson, *Two more captured Britons charged by pro-Russian rebels, says reports*, BBC NEWS (July 2, 2022), <https://www.bbc.com/news/uk-62015954>.

⁶⁹⁶ Права людини в контексті відправлення правосуддя у кримінальних справах, пов’язаних з конфліктами в Україні (Human rights in the context of justice in conflict-related criminal cases in Ukraine), Управління Верховного комісара Організації Об’єднаних Націй з прав людини (Office of the United Nations High Commissioner for Human Rights) (квітень 2014–квітень 2020 (April 2014–April 2020)), <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/Ukraine-admin-justice-conflict-related-cases-en.pdf>.

⁶⁹⁷ *Advocates under occupation*, Advocates under occupation: Situation with observing the advocates’ rights in the context of the armed conflict in Ukraine (UKRAINIAN HELSINKI HUMAN RIGHTS UNION 2018), https://www.helsinki.org.ua/wp-content/uploads/2019/04/Report_Advocates_under_occupation-Engl.pdf.

⁶⁹⁸ René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, OXFORD UNIV. PRESS (2021), https://books.google.ca/books?id=pm8vEAAAQBAJ&newbks=1&newbks_redir=0&lpg=PP1&dq=provost%20rebel%20courts&pg=PP1#v=onepage&q&f=false.

unrecognized entity are not in themselves a violation of international law. Common Article 3 of the Geneva Conventions prohibits “the passing of sentences and the carrying out of sanctions without previous judgment pronounced by a regularly constituted court,”⁶⁹⁹ and it is generally accepted that armed groups can “regularly constitute” their own courts if they do so by way of a deliberate and general decision, as opposed to acting in an ad hoc fashion (*Rebel Courts*, pp. 195–200).

The Donetsk Court

In the case of the courts of the Donetsk People’s Republic, there is every indication that these were indeed regularly constituted some years ago. They can thus lawfully administer justice, but they must do so in a manner that respects due process guarantees imposed by international humanitarian law and human rights law, including having courts that are independent and impartial. There is strong evidence that the three men convicted earlier were not provided with effective legal counsel, were not permitted to mount a full defense, and that the convictions generally cannot be considered the result of a fair trial. These conclusions are not fundamentally altered by the transformation of the non-international armed conflict into an international one following the Russian invasion on 24 February 2022, or even if Russia’s influence over rebels in eastern Ukraine had reached a threshold internationalizing that conflict at an earlier date.⁷⁰⁰

A second, distinct problematic aspect of these convictions and announced prosecutions is the crimes that the men are alleged to have committed. On that front, the fact that the war in Ukraine has become an international armed conflict is critically significant. The Russian Foreign Minister has said that the initial trio were convicted of violating the laws of the Donetsk People’s Republic. Here again, it is not per se unlawful for an unrecognized entity like Donetsk to adopt and enforce its own laws, but these in turn must not violate binding international law. It is reported that the men were found guilty of violating laws of Donetsk that criminalize the attempt to overthrow the government of Donetsk and prohibit terrorism.⁷⁰¹ The court found that the men were mercenaries, not prisoners of war protected against prosecution. It is here that the broader context of an international armed conflict and the status of the three men become of central importance in relation to these three crimes.

First, under international humanitarian law, regular combatants enjoy absolute immunity from prosecution for lawful acts of war. In other words, individual soldiers cannot be held accountable for serving in the armed forces of a country at war. The two British and the Moroccan accused were members of the Ukrainian marines. As members of the armed forces of Ukraine, they cannot be accused of a crime like “attempt to overthrow the government of Donetsk.”

⁶⁹⁹ See, e.g., GC III, *supra* note 176, art. 3.

⁷⁰⁰ Natia Kalandarishvili-Mueller, *Russia’s “Occupation by Proxy” of Eastern Ukraine—Implications Under the Geneva Conventions*, JUST SEC. (Feb. 22, 2022), <https://www.justsecurity.org/80314/russias-occupation-by-proxy-of-eastern-ukraine-implications-under-the-geneva-conventions/>.

⁷⁰¹ *Britons, Moroccan sentenced to death in separatist-held Ukraine*, AL JAZEERA (June 9, 2022, updated June 10, 2022), <https://www.aljazeera.com/news/2022/6/9/foreign-fighters-sentenced-to-death-in-separatist-held>.

Second, a mercenary is a concept precisely defined in international law. The definition does refer to individuals who do not hold the nationality of the State on whose behalf they are fighting, but it does not authorize a party to a conflict to prohibit involvement of any and all foreigners. The French Foreign Legion is a long-standing example of the accepted practice of incorporating foreigners into national armed forces. The only accepted exception concerns the ability of a State to punish its own nationals joining the enemy in wartime. Under Additional Protocol I, in addition to being a foreigner, a mercenary must be paid substantially more than local soldiers and not be a member of the State's regular armed forces. It seems undisputed that the three men were regular soldiers, and as such they cannot be characterized as mercenaries.

Third, terrorism, like any other war crime, may be committed by anyone, including regular combatants. No one has immunity against prosecution for war crimes, including prisoners of war. As we saw, for example, with prosecutions by the Free Syrian Army of war crimes committed by Syrian government soldiers, it is not per se unlawful for rebel courts to sanction war crimes.⁷⁰² But terrorism is a concept that is quite narrowly defined in international law, and there is no evidence of any kind that the three accused committed anything resembling terrorism. A party to a conflict, whether it be a State or non-State armed group, cannot convict a prisoner of war of a crime of terrorism, or any other international crime, using a definition that is

wider than the accepted concept of that crime under international law.

All of this turns on the prisoner of war status of the men convicted or detained, which in turn depends on the characterization of the conflict as international rather than non-international. If they fought and were captured in a non-international armed conflict, then they enjoy no immunity against prosecution for violating the laws of the Donetsk People's Republic. Can they be lawfully prosecuted for an "attempt to overthrow the government of Donetsk," in other words for taking part in hostilities against Donetsk on the side of Ukraine? In *Rebel Courts* (pp. 264–271), I argue that the idea of rebel jurisdiction comes to limit the legislative reach of armed groups, such that they cannot claim to bind enemy fighters when these are, in fact, not under any measure of rebel authority. This conforms to the practice of armed groups, which very rarely will seek to prosecute government soldiers ex officio.

Others, like Alessandra Spadaro,⁷⁰³ do not agree and find no issue with rebels prosecuting government soldiers for merely participating in the conflict. In any case, it should be noted that such a stance would be inconsistent with Donetsk's claim to be an independent State, now recognized as such by Russia, leading to the conclusion that this is an international armed conflict. Even if one rejects Donetsk's claim to statehood, surely a sound interpretation of applicable principles of international law, it is unconvincing to claim that a non-international armed conflict between Ukraine and Donetsk

⁷⁰² Mark Klamburg, *The Legality of Rebel Courts during Non-International Armed Conflicts*, 16 J. INT'L CRIM. JUSTICE 235, 263 (2018), <https://doi.org/10.1093/jicj/mqy012>.

⁷⁰³ Alessandra Spadaro, "Rebel Courts" *Book Symposium—The Prosecution of Conflict-Related Offences by Courts of Armed Groups*, ARMED GROUPS & INT'L L. (June 2, 2022), <https://www.armedgroups-internationalallaw.org/2022/06/02/rebel-courts-book-symposium-the-prosecution-of-conflict-related-offences-by-courts-of-armed-groups/>.

endures alongside the international armed conflict between Ukraine and Russia. There is no evidence of any distinct conduct of hostilities, or indeed of any autonomy, on the part of Donetsk that would support that claim.

The fact that the convictions issued against the three men are so manifestly unlawful is a matter of great concern, not only because of the individual injustice against them but also because Russia, far from acknowledging this illegality, seems intent on replicating it, perhaps on a wider scale. There is little doubt that the recent convictions of Russian soldiers for war crimes by Ukrainian courts⁷⁰⁴ contributed to a hardened Russian stance. The laws may not be silent in war, but they are undoubtedly fragile, and the risk of a tit-for-tat downward spiral of violations is enormous.

On the Russian side, disregard for fair trial requirements compounds the egregious breach, with the invasion itself, of the prohibition against the use of force in international law. Moves to have the European Court of Human Rights intervene, in the form of provisional measures ordering Russia to stay the execution of these men,⁷⁰⁵ appear unlikely to yield concrete results,⁷⁰⁶ given Russia's impending expulsion from the Council of Europe as of 16 September

2022.⁷⁰⁷ Other States must weigh carefully how they react to disregard by a permanent member of the Security Council of some of the most central and solidly entrenched rules of international law.

A Remedy

One response might be to reinvest in the rule of law by reviving the Nuremberg model and creating a transnational tribunal bringing together countries like the United Kingdom, Canada, Argentina, Kenya, and others, to try authors of war crimes and crimes against humanity committed by any side in the war in Ukraine. The universal jurisdiction attaching to these crimes provides an unassailable legal foundation for such a tribunal, which could deliver justice on a scale that the International Criminal Court cannot handle. This is distinct from a proposal to establish a special tribunal for aggression against Ukraine, which has been criticized on a number of valid grounds.⁷⁰⁸ A transnational war crimes tribunal would not only relieve the Ukrainian judiciary, never especially strong to begin with,⁷⁰⁹ but it would also bring legitimacy to any resulting convictions and, ultimately, help to strengthen a weakened international legal order.



⁷⁰⁴ Sarah Rainsford, *Russian soldier pleads guilty in first war crimes trial of Ukraine conflict*, BBC News (May 18, 2022), <https://www.bbc.com/news/world-europe-61496428>.

⁷⁰⁵ Press Release, European Court grants urgent measures in cases lodged by two British prisoners of war sentenced to death in the so-called "Donetsk People's Republic," Eur. Ct. Human Rights 222 (June 30, 2022), <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-7374152-10078472%22%5D%7D>].

⁷⁰⁶ *Britons captured in Ukraine must not face death penalty—European court*, BBC News (June 30, 2022), <https://www.bbc.com/news/world-europe-61997383>.

⁷⁰⁷ *Russia Ceases to Be a Party to the European Convention on Human Rights on 16 September 2022*, Newsroom COE (Mar. 23, 2022), <https://www.coe.int/en/web/portals/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022>.

⁷⁰⁸ Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, OPINIO JURIS (Mar. 7, 2022), <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>.

⁷⁰⁹ Kai Ambos, *Ukrainian Prosecution of ICC Statute Crimes: Fair, Independent and Impartial?*, EJILTalk! (June 10, 2022), <https://www.ejiltalk.org/ukrainian-prosecution-of-icc-statute-crimes-fair-independent-and-impartial/>.

TIME FOR A NEW WAR CRIMES COMMISSION?

by Diane Marie Amann | Mar 18, 2022

The shock of invasion remains fresh and raw. And yet it must cede room for new shocks, for the quotidian tremors caused by reports that Russian troops have shelled homes and maternity hospitals, dropped cluster bombs on schools, seized nuclear plants, and forced more than 3 million Ukrainians to flee. This war is less than a month old, and yet already its criminality cries out for investigation, prosecution, and punishment of all responsible.

An Accountability Gap

The International Criminal Court (ICC) is doing its part.⁷¹⁰ But the ICC's Rome Statute limits its reach in Ukraine-Russia, and its global docket limits the attention it can devote solely to that conflict.⁷¹¹ The same is true of the International Court of Justice⁷¹² and the European Court of Human Rights.⁷¹³ Both have issued preliminary rulings instructing Russia to fulfill obligations it

assumed by joining the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. But Russia has just been expelled from the organization of which the latter court is a part, and in any event neither of these courts has power to punish an individual for commission of an international crime.⁷¹⁴

In short, a criminal justice accountability gap looms large. Already this has prompted an array of gap-filling proposals, among them establishing a brand-new special tribunal (here⁷¹⁵ and here⁷¹⁶) and amending the ICC statute.⁷¹⁷ I would add another: the U.S. Senate,⁷¹⁸ whose members on Tuesday unanimously approved a resolution welcoming “the ICC or other appropriate international tribunal to take any appropriate steps to investigate war crimes and crimes against humanity”⁷¹⁹—albeit only crimes by

⁷¹⁰ Situation in Ukraine, *supra* note 6.

⁷¹¹ Rome Statute, *supra* note 5.

⁷¹² Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.) Questions of jurisdiction and/or admissibility, I.C.J., <https://www.icj-cij.org/case/182/jurisdiction-admissibility>.

⁷¹³ Press Release, Decision of the Court on requests for interim measures in individual applications concerning Russian military operations on Ukrainian territory, Eur. Ct. Human Rights 073 (Mar. 4, 2022), <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-7277548-9913621%22%5D%7D>].

⁷¹⁴ Press Release, The European Court of Human Rights decides to suspend the examination of all applications against the Russian Federation, Eur. Ct. Human Rights (Mar. 16, 2022), <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-7287047-9930274%22%5D%7D>].

⁷¹⁵ BROWN & BROWN, *supra* note 445.

⁷¹⁶ Jennifer Trahan, *U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal for Ukraine: Nuremberg Is Not the Model*, JUST SEC. (Mar. 7, 2022), <https://www.justsecurity.org/80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model/>.

⁷¹⁷ Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, JUST SEC. (Mar. 16, 2022), <https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/>.

⁷¹⁸ Darryl Coote, *Senate passes resolution to condemn Russia's invasion, support war crimes probes*, UPI (Mar. 16, 2022), https://www.upi.com/Top_News/US/2022/03/16/Senate-condmns-Putin-over-Ukraine/4871647413219/.

⁷¹⁹ S. Res. 546, 117th Cong. (2023), <https://www.congress.gov/congressional-record/volume-168/issue-46/senate-section/article/S1180-1>.

the Russian side—could do far more good by giving its advice and consent to the Rome Statute so that the United States finally could become a full and unequivocal supporter of the court.

All those proposals require time to implement, however. Now and going forward, accountability could be enhanced by setting up a clearinghouse for gathering, cataloging, and preserving evidence, with an aim to eventual prosecutions in multiple national, regional, and international systems. The idea is not new; indeed, a useful model may be found in a Second World War-era institution known as the United Nations War Crimes Commission (UNWCC).⁷²⁰

A Special Need, a Special Approach

Before proceeding to explore the UNWCC model's potential utility, it is necessary to address why there is a special need in this conflict for a coordinated, comprehensive criminal justice response.

On February 24, 2022, a permanent member of the United Nations Security Council, acting without any plausible pretense of legal justification, ordered its own national army to launch a full-on invasion of another UN member. This makes the Ukraine-Russia conflict different from all others in the UN's 77-year history. (I say this as one who believes that the Iraq invasion was illegal—and yet

that it was different from Russia's invasion, both because it was bottomed on a web of legal arguments seeking to justify it, and because it was pursued by a coalition of many member States of the United Nations.) The P-5 member's unprecedented act of apparent aggression—in UN Charter terms,⁷²¹ Russia's "use of force against the territorial integrity" and "political independence of" Ukraine, in a "manner inconsistent with the Purposes of the United Nations"—pushed past a line so stark, so fundamental to the post-Second World War order, that institutions within that order have no choice but to push back.

The UNWCC (1943–1948)

One precedent for such a clearinghouse came into being in London in October 1943, a year after President Franklin D. Roosevelt announced that the United States would "cooperate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes."⁷²² The commission's establishment was the result, Daniel Marc Segesser wrote in a 2004 chapter, of the insistence by Polish and Czech governments—forced into exile by Nazi aggression—on accountability for the crimes of the world war then still raging.⁷²³ As described in a 2018 Leiden doctoral thesis by Catherine E.M. Harwood:

The Commission had three committees with different functions. Committee I (Facts and Evidence) examined charges

⁷²⁰ *Human Rights after Hitler: The Story of the UNWCC*, Human Rights After Hitler, <https://unwcc.org>.

⁷²¹ U.N. Charter art. 2 (1)–(5).

⁷²² Franklin D. Roosevelt, *Statement on the Plan to Try Nazi War Criminals*, THE AM. PRESIDENCY PROJECT (Oct. 7, 1942), <https://www.presidency.ucsb.edu/documents/statement-the-plan-try-nazi-war-criminals>.

⁷²³ Roger Chickering & Stig Förster et al., *A World at Total War*, Cambridge Univ. Press (Jan. 2013), <https://doi.org/10.1017/CBO9781139052382>.

submitted by national offices; Committee II (Enforcement) was concerned with measures to ensure the apprehension, trial and punishment of war criminals while Committee III (Legal) advised on issues of international law.⁷²⁴

Commissioners—among them René Cassin, Lord Wright, Herbert Pell, and Wellington Koo—assigned the task of actual investigation to States within a group of seventeen Allied powers, and then reviewed this work and reported back to States. The commission was by no means perfect: it faced collective-action challenges, as Narelle Morris and Aden Knaap have explained, and it did not address Allied crimes.⁷²⁵ But its output was impressive. By the time it closed shop in 1948, the UNWCC had considered information regarding tens of thousands of individuals. Operating in parallel to the well-known postwar trials of high-ranking accused at Nuremberg, the commission made possible thousands of trials of persons of lower rank, held in the Allies' zones of occupation and in the courts of countries on whose territory crimes had occurred.

Justice for the Crimes of War in the Ukraine-Russia Conflict

Even if aggression had been the only crime committed in Russia's invasion of Ukraine, that alone would compel pushback by international justice institutions. As is well known, however, the crime of starting an illegal war soon was followed by crimes within war: seizures of territory, indiscriminate attacks on civilians, violent closures of humanitarian corridors, and naval blockades of supposed-to-be-open ports. It is high time for a concerted global effort to assure accountability for all of these crimes, against as many perpetrators and on behalf of as many victims as possible.

The ICC will be crucial to accountability, and Prosecutor Karim Khan QC deserves kudos for swift action: opening an ICC investigation into the Situation in Ukraine⁷²⁶ amid 41 referrals by States parties;⁷²⁷ launching a portal where information can be provided;⁷²⁸ and making official visits to Ukraine and Poland.⁷²⁹ But the ICC's work will have to be supplemented by the work of others:

- First, as Khan himself has said, the ICC cannot adjudicate the criminality that

⁷²⁴ Catherine Harwood, *Navigating Between Principle and Pragmatism: The Roles and Functions of Atrocity-Related United Nations Commissions of Inquiry in the International Legal Order*, at 22 (Nov. 7, 2018), <https://www.universiteitleiden.nl/en/research/research-output/law/navigating-between-principle-and-pragmatism-the-roles-and-functions-of-atrocity-related-united-nations-commissions-of-inquiry-in-the-international-legal-order>.

⁷²⁵ Narelle Morris & Aden Knaap, *When Institutional Design Is Flawed: Problems of Cooperation at the United Nations War Crimes Commission, 1943–1948*, *EUR. J. INT'L L.* 513, 534 (May 2017), <https://doi.org/10.1093/ejil/chx028>.

⁷²⁶ 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, *Int'l Crim. Ct.* (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

⁷²⁷ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Additional Referrals from Japan and North Macedonia; Contact portal launched for provision of information, *Int'l Crim. Ct.* (Mar. 11, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and-macedonia>.

⁷²⁸ *Id.*

⁷²⁹ Statement of ICC Prosecutor, Karim A.A. Khan QC, on his visits to Ukraine and Poland: "Engagement with all actors critical for effective, independent investigations," *Int'l Crim. Ct.* (Mar. 16, 2023), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-his-visits-ukraine-and-poland-engagement-all-actors>.

spawned this war; that is, the crime of aggression.⁷³⁰ Although Ukraine has accepted the Court's jurisdiction over alleged crimes committed on its territory since November 2013, because neither Ukraine nor Russia is an ICC State party, the court's statute precludes it from prosecuting charges of aggression. It is for that reason that calls for a special tribunal on aggression deserve serious consideration.

- Second, the ICC's foundational principle of complementarity invites a multiplicity of justice efforts.⁷³¹ The principle recognizes the power and duty of States to prosecute crimes, not to mention the budgetary and personnel constraints of a permanent, global court. Some States thus might choose to act if a person suspected of Ukraine-Russia war crimes were to seek refuge in their country, just as Germany recently has tried some Syrians in its courts, on charges of war crimes in Syria.⁷³² Complementarity also requires the ICC to yield when a national system with jurisdiction is willing and able to mount its own prosecution; enabling Ukraine to lead prosecutions for crimes committed against its land and its people would constitute a profound repudiation of Russia's attempt to erase Ukraine's sovereignty.

Simultaneous pursuit of these different avenues could promote the investigation and prosecution of persons accused at all levels, rank-and-file as well as rear admirals. But it will require consultation and exchange of information among a number of national, regional, and international systems. The collection and evaluation of evidence will benefit from cooperation. There likewise may be efficiency in coordinated trainings, on issues as varied as case construction, state-of-the-art investigative techniques, and contemporary standards on working with vulnerable witnesses.

The ICC cannot be expected to take on all these functions for all potential criminal justice forums, any more than a new tribunal on aggression could be expected to build capacity beyond its immediate needs. Nongovernmental organizations have stepped in at times to bridge prior gaps in training or investigation. But in this instance less fragmentation, more coordination, will be required if comprehensive accountability is to be achieved. As presaged in a 2014 special issue of *Criminal Law Forum* and a 2018 International Bar Association War Crimes Committee report, the UNWCC experience suggests a way forward.⁷³³ A new multilateral War Crimes Commission—one that investigates all sides of the Ukraine-Russia conflict—could fill the bill.

⁷³⁰ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have been closely following recent developments in and around Ukraine with increasing concern," Int'l Crim. Ct. (Feb. 25, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following>.

⁷³¹ Rome Statute, *supra* note 5, pmbl., para 4.

⁷³² *Syria*, ECCHR, <https://www.ecchr.eu/en/topic/syria/>.

⁷³³ 25 Crim. L. F. 25 (June 2014), <https://link.springer.com/journal/10609/volumes-and-issues/25-1>; Shannon Raj Singh & Kakoly Pandé, The IBA War Crimes Committee's submissions and recommendations to major multilateral conventions on atrocity crimes (June 21, 2018), <https://www.ibanet.org/article/14ED065E-2DA9-484E-9C45-DD5033C94C12>.

This is not to say that the international community must create an entirely new institution, although that is one possible way to achieve this goal. It might instead choose to add the evidence-gathering and capacity-building functions of the old UNWCC to the mandate of an institution that already exists—or of one that soon will come into being, such as the Commission of Inquiry just established by the UN Human Rights Council.⁷³⁴ Names are not essential. But the

core function is, specifically, the conduct of investigations aimed at preserving evidence and facilitating criminal prosecutions of suspects at all levels, for all potential offenses, and before any number of national, regional, and international systems willing and able to afford the persons they accuse a full and fair trial.



⁷³⁴ *Minute of Silence*, U.N. NEWS (Mar. 4, 2022), <https://news.un.org/en/story/2022/03/1113292#:~:text=In%20a%20resolution%20adopted%20on,which%20was%20presented%20by%20Ukraine>.

CHAPTER X

MISCELLANEOUS

COMMON ARTICLE 1 AND THE CONFLICT IN UKRAINE

by Marten Zwanenburg | Mar 10, 2022

The Russian invasion of Ukraine and the ensuing armed conflict raise a host of questions related to international humanitarian law (IHL). Some of these concern the legal relationship between Russia and Ukraine only. Others are also directly relevant for States that are not parties to the conflict. The issue of responsibilities that arise for States under common Article 1 of the four Geneva Conventions falls in the latter category. The obligation to “respect and ensure respect” is repeated in Article 1 of Additional Protocol I (AP I). This post posits that States Parties to the Geneva Conventions must “respect and ensure respect” for the Conventions in all circumstances and explores the implications of this legal interpretation in the context of the recent (and currently ongoing) Russian invasion.

Common Article 1

Common Article 1 states, “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”¹ While there is some debate whether this obligation only applies to international armed conflicts (IACs), or also to non-international armed conflicts

(NIACs),² it is clear that the Russia-Ukraine conflict is an IAC, and, therefore, there is no question that Article 1 applies to it.

The Duty to Respect

The duty to “respect” is a reflection of the obligation under general international law for a State party to a treaty to perform its treaty obligations in good faith. This is the so-called rule of “*pacta sunt servanda*,”³ which is laid down in Article 26 of the Vienna Convention on the Law of Treaties.⁴ The obligation to respect in common Article 1 thus does not add anything to what States Parties are already bound to under treaty law.

Russia and Ukraine are both parties to the four Geneva Conventions and to AP I. In the context of the conflict in Ukraine, it follows from the obligation to “respect” that Russia and Ukraine may not violate the Conventions or AP I. There would be such a violation if conduct that is attributable to one of the parties breaches one of its obligations. Relatedly, there have been reports alleging that Russia has committed breaches of IHL, and Russia has accused Ukraine of violating Articles 51 and 58 of AP I.⁵ The International

¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I].

² Michael N. Schmitt & Sean Watts, *Common Article 1 and the Duty to “Ensure Respect,”* 96 INT’L L. STUD. 674 (2020), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2936&context=ils>.

³ Anthony Aust, *Pacta sunt servanda*, MPEPIL (2007), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1449>.

⁴ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, May 23, 1969 [hereinafter VCLT].

⁵ *Explanation of vote by Permanent Representative Vassily Nebenzia after the UNSC vote on a draft resolution on Ukraine*, Permanent Mission of the Russian Federation to the United Nations (Feb. 25, 2022), <https://russiaun.ru/en/news/250222nu>.

Criminal Court Prosecutor has opened an investigation into the situation in Ukraine.⁶

For other States, it follows from the obligation to respect that they must not breach any obligations they have in relation to the conflict. By way of example, other States must allow and facilitate rapid and unimpeded passage of all relief consignments, equipment, and personnel destined for territory under control of one of the parties to the conflict (AP I, art. 70 (2)⁷).

The Duty to Ensure Respect

The answer to the question of what is required of States on the basis of the obligation to “ensure respect” is much less straightforward and hotly debated.⁸ It is uncontroversial that the obligation to ensure respect has an “internal dimension.” This means that States Parties must cease and take proactive steps to prevent violations. This not only covers their own armed forces and other persons or groups acting on their behalf but extends to the whole of the population over which they exercise authority, i.e., also to private persons whose conduct is not attributable to the State. (See ICRC updated commentary GC I.⁹)

What is very controversial, however, is whether there is also an “external dimension.”

This refers to an obligation for States to ensure respect for the Conventions and AP I by other States Parties, and possibly even by organized armed groups. The ICRC considers that there is such an obligation. This is reflected in the updated ICRC Commentary to Geneva Conventions I–III. A number of States, however, have made clear that they do not recognize any such “external dimension.” This includes the United States, the United Kingdom, and Denmark. Some experts (such as Schmitt and Watts¹⁰) agree with the latter interpretation. I have argued elsewhere that, on balance, the available practice is sufficient to support the conclusion that common Article 1 includes an external dimension.¹¹

If indeed the obligation to ensure respect has an external dimension, the question is what such an obligation would require of States Parties in general, and in relation to the conflict between Russia and Ukraine in particular. One question in this context is whether the external dimension only has a negative aspect, or also a positive aspect. The negative aspect refers to an obligation to refrain from certain conduct, namely not to encourage or assist in violations of the Conventions or AP I. The International Court of Justice, in its judgment in the *Paramilitaries* case,¹² derived

⁶ 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, Int'l Crim. Ct. (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

⁷ Protocol Additional (I) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 70, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

⁸ Dale Stephens & Eve Massingham, *Military Partners and the Obligation to “Ensure Respect” for IHL*, ARTICLES OF WAR, <https://lieber.westpoint.edu/military-partners-obligation-ensure-respect/>.

⁹ COMMENTARY ON THE FIRST GENEVA CONVENTION, art. 1 (Knut Dörmann et al. eds., 2016) [hereinafter GC I Commentary of 2016].

¹⁰ SCHMITT & WATTS, *supra* note 2.

¹¹ Marten Zwanenburg, *The “External Element” of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation*, 97 Int'l. L. Stud. 621 (2021), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2966&context=ils>.

¹² Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. (Nov. 26), <https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf>.

an obligation not to encourage violations of common Article 1.

Its Wall Advisory Opinion¹³ can also be read as acknowledging that the obligation to ensure respect encompasses a duty not to render aid or assistance to violations of the Conventions.

The ICRC takes the position that the external dimension of the obligation to ensure respect also has a positive aspect. According to the ICRC, this means that States Parties

must take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions, in particular by using their influence on that Party. This obligation is not limited to stopping ongoing violations but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred. (para. 197)¹⁴

This view finds some support in academic literature as well.

Although such a positive aspect can be seen as a demanding obligation, it must be noted that the obligation to ensure respect is a due diligence obligation. This means that a State has a duty to take only such steps as can reasonably be expected of it given the circumstances. What is reasonable for one State may not be reasonable for another.

Common Article 1 and Ukraine

What does all this mean for the conflict in Ukraine? The following discussion accepts for the sake of argument that the obligation to ensure respect has both an internal and external dimension, and that the external dimension includes a positive element.

In the context of the Ukraine conflict, the internal dimension of the obligation to ensure respect is of particular relevance for Russia and Ukraine. Each must clearly ensure respect by its own organs and armed forces. And for Russia it also means the Russian government and its organs must take steps to ensure that forces of the self-declared Peoples' Republics do not violate the Geneva Conventions and Additional Protocol I. This is part of the internal rather than the external dimension because of the control that Russia exercises over the self-declared Peoples' Republics, their forces and population.

For other States that are not parties to the conflict, the external dimension of the obligation to ensure respect is relevant. They must not encourage parties to the conflict to violate IHL, nor aid or assist them in doing so. This is particularly relevant for Belarus, which is aiding and assisting Russia *inter alia* by permitting the latter to operate from its territory.

Other States must also take reasonable proactive steps to bring violations of the Conventions to an end and prevent new violations. As stated above, what is reasonable may differ from State to State. It will

¹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Int'l Ct. J., <https://www.icj-cij.org/case/131>.

¹⁴ COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Knut Dörmann et al. eds., 2020) [hereinafter GC III Commentary of 2020].

depend among other things on the type and seriousness of the violation, on the influence of the State over the party violating IHL, and on its resources. A relatively straightforward measure is calling on the parties to respect IHL or to publicly denounce violations. An example is the statement by the Greek Ministry of Foreign Affairs calling on Russia to respect IHL.¹⁵ A further step would be a formal diplomatic protests of violations.

Imposing sanctions could also constitute a measure to fulfill the obligation to ensure respect. Although the EU and a number of States have imposed sanctions on Russia,¹⁶ these were in reaction to Russia's military aggression and do not seem to be linked to the prevention or stopping of violations of IHL. States could also put IHL obligations on the agenda of an international organization. Reference may be made to AP I, Article 89¹⁷ in this regard, which provides that in situations of serious violations of the Conventions or of

AP I, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter.

Arguably, the duty to ensure respect also has consequences for States that are providing arms to the parties to the conflict, in the sense that they must take the likelihood that those weapons will be used to commit violations of IHL into account.

Conclusion

It can be concluded that common Article 1 and the obligation to "respect and ensure respect" are relevant to the conflict in Ukraine. How far this relevance goes, and whether it extends to States that are not parties to the conflict, depends on the interpretation of the obligation "to ensure respect" that is adopted.



¹⁵ *Athens calls on Moscow to respect international law, says embassy statement "totally unacceptable,"* EKATHIMERINI, <https://www.ekathimerini.com/news/1178575/athens-calls-on-moscow-to-respect-international-law-criticizes-embassy-statement/>.

¹⁶ Press Release, Council of the EU, Russia's military aggression against Ukraine: EU imposes sanctions against President Putin and Foreign Minister Lavrov and adopts wide ranging individual and economic sanctions (Feb. 25, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/02/25/russia-s-military-aggression-against-ukraine-eu-imposes-sanctions-against-president-putin-and-foreign-minister-lavrov-and-adopts-wide-ranging-individual-and-economic-sanctions/>.

¹⁷ AP I, *supra* note 7, art. 89.

PROTECTED ZONES IN INTERNATIONAL HUMANITARIAN LAW

by Michael N. Schmitt | Aug 24, 2022

Ongoing hostilities between Russia and Ukraine are placing the Zaporizhzhia nuclear power plant, which lies in Russian-occupied territory, at great risk. Damage to the facility could be so catastrophic that U.N. Secretary-General Guterres has warned, “We must tell it like it is—any potential damage to Zaporizhzhia is suicide.”¹⁸

In light of that reality, he has repeatedly called on the parties to address the situation. Last Thursday, for instance, he urged,

The facility must not be used as part of any military operation. Instead, agreement is urgently needed to reestablish Zaporizhzhia as purely civilian infrastructure and to ensure the safety of the area. . . . Military equipment and personnel should be withdrawn from the plant. Further deployment of forces or equipment to the site must be avoided. The area needs to be *demilitarized*. (emphasis added)

Sadly, Russian opposition makes the establishment of a demilitarized zone highly unlikely.¹⁹

In this series on Ukraine, Professor Tom Dannenbaum has twice analyzed the situation at the plant under international humanitarian law (IHL).^{20,21} Therefore, in this “explainer” on IHL zones, I will limit any discussion of Zaporizhzhia to the legal framework for demilitarized zones. I then widen the aperture to survey other types of protected zones, such as hospital zones, safety zones, neutralized zones, and non-defended localities. Finally, I will briefly mention safe areas that are declared outside the framework of IHL.

Although the emphasis is on the law governing zones in international armed conflict, parties to a conflict may establish them by special agreement during a non-international armed conflict. Common Article 3(3) of the four 1949 Geneva Conventions expressly provides for this possibility.²² And the ICRC asserts, reasonably so, that the Rules in its *Customary International Humanitarian Law* study regarding attacks on protected zones that I cite below also apply in non-international armed conflict.²³

¹⁸ Press Release, Secretary General, Secretary-General’s remarks to the Press at Lviv, Ukraine Press Conference [as delivered] (Aug. 18, 2022), <https://www.un.org/sg/en/content/sg/press-encounter/2022-08-18/secretary-generals-remarks-the-press-lviv-ukraine-press-conference-delivered>.

¹⁹ *Russia Calls UN Proposal to Demilitarize Zaporizhzhia Nuclear Plant “Unacceptable,”* RADIO FREE EUROPE RADIO LIBERTY (Aug. 18, 2022), <https://www.rferl.org/a/zaporizhzhia-nuclear-demilitarize-russia-rejects-un/31994360.html>.

²⁰ Tom Dannenbaum, *The Attack at the Zaporizhzhia Nuclear Plant and Additional Protocol I*, LIEBER INST. L. & WARFARE: ARTICLES OF WAR (Mar. 13, 2022), <https://lieber.westpoint.edu/attack-zaporizhzhia-nuclear-plant/>.

²¹ Tom Dannenbaum, *Ukraine Symposium—The Escalating Military Use of the Zaporizhzhia Nuclear Plant*, LIEBER INST. L. & WARFARE: ARTICLES OF WAR (Aug. 22, 2022), <https://lieber.westpoint.edu/escalating-military-use-zaporizhzhia-nuclear-plant/>.

²² Geneva Convention Relative to the Treatment of Prisoners of War, art. 3(3), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

²³ ICRC INT’L HUMANITARIAN L. DATABASES, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl>.

Before turning to the zones themselves, it must be emphasized that other IHL rules providing protection to persons, objects, and activities continue to apply fully in them. The protection offered by establishing a zone is *additional* to that already in operation. Sadly, however, it is when the parties to a conflict are not complying with those IHL protections that the establishment of protected zones is usually considered.

Demilitarized Zones

Demilitarized zones are areas that may not be occupied or used for military operations. They may be established where no forces are present or where they are currently located. In the former case, the area may not be used for military operations following establishment, whereas in the latter, troops and equipment involved in operations must be withdrawn. Typically, demilitarized zones are located some distance from the hostilities (unlike the neutralized zones discussed below), although, as the Zaporizhzhia case illustrates, this need not always be the case.

Such zones have been created by treaty as part of an armistice or for political reasons, as with the Korean DMZ agreed to in the 1953 Armistice Agreement.²⁴ However, the ICRC's 1987 Commentary points out that the zones contemplated in IHL "have a humanitarian and not a political aim; they are specially intended to protect the population

living there against attacks."²⁵ In the case of Zaporizhzhia, that protection would be from the danger posed by a radioactive release that extends well beyond the local area, even into Russia.

Article 60 of the 1977 Additional Protocol I to the 1949 Geneva Conventions, to which both Russia and Ukraine are Party, provides for such zones.²⁶ They are established through an express agreement between the parties that may be executed verbally or in writing. Parties to the conflict can directly negotiate them, or negotiations can be conducted through an intermediary such as a Protecting Power²⁷ or an "impartial humanitarian organization" like the ICRC. In practice, the ICRC is usually heavily involved. Potential adversaries also may negotiate such an agreement during peacetime, although the ICRC's 1987 Commentary to the article labels that possibility "rather theoretical."²⁸

While the parties may tailor individual agreements to the circumstances, Article 60 describes what a typical demilitarized zone agreement should include. It should, of course, set out its boundaries. Further, the agreement would typically require the removal of combatants, weapons, and mobile military equipment from the area; prohibit the use of military installations and establishments within the zone for military purposes; ban acts of hostility into or in the zone by the parties or the population; and require the cessation

²⁴ Armistice Agreement, Dem. People's Rep. of Kor.–Rep. of Kor., Vol. I (1953). https://peacemaker.un.org/sites/peacemaker.un.org/files/KP%2BKR_530727_AgreementConcerningMilitaryArmistice.pdf.

²⁵ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977, art. 60 (Yves Sandoz et al. eds., 1987) [hereinafter Additional Protocols Commentary].

²⁶ AP I, *supra* note 7, art. 60.

²⁷ *Protecting Powers*, ICRC CASEBOOK, https://casebook.icrc.org/a_to_z/glossary/protecting-powers#:~:text=A%20%22Protecting%20Power%22%20is%20a,Power%20under%20international%20humanitarian%20law.

²⁸ Additional Protocols Commentary, *supra* note 25, art. 60.

of any activities in the zone related to military operations. In addition, demilitarized zones should be visibly marked in a manner agreed upon by the parties.

If one of the parties “materially breaches” (see Vienna Convention on Treaties, art. 3(3)²⁹) the terms of the agreement, the other party may terminate it, should it so wish. In such a case, the zone is no longer demilitarized. Still, as noted earlier, persons and objects protected by IHL, like civilians,³⁰ civilian objects,³¹ and nuclear electrical generating stations³² such as Zaporizhzhia, would continue to enjoy the protections to which IHL otherwise provides. These include the prohibition on direct targeting, the benefits of the rule of proportionality,³³ and the requirement to take precautions in attack³⁴ to minimize the risk of collateral damage to them during an attack on a lawful military objective.

In addition to the limits and requirements outlined in Article 60, the ICRC’s *Customary International Humanitarian Law* study observes that customary law prohibits “directing an attack against a demilitarized zone agreed upon between the parties to the conflict” (Rule 36³⁵), a prohibition that is implicit in Article 60.

Hospital Zones and Localities for Wounded and Sick Members of the Armed Forces

Article 23 of the 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field contemplates establishing hospital zones and localities to protect wounded and sick combatants and medical personnel³⁶ (see also DoD *Law of War Manual*, § 5.14.3.2³⁷). The establishment of such zones may occur before the conflict (never done to my knowledge) or by agreement on or following the outbreak of hostilities. Importantly, occupying powers may create a hospital zone or continue one its adversary established before occupation. Protecting Powers, if any, and the ICRC may facilitate the adoption of an agreement and subsequent recognition of hospital zones and localities.

The zones should not contain military objectives, and targetable combatants must not seek shelter within them. An Annex to the Convention contains a detailed draft agreement, Article 2 of which provides, “No persons residing, in whatever capacity, in a hospital zone shall perform any work, either within or without the zone, directly connected with military operations or the production

²⁹ VCLT, *supra* note 4, art. 3(3).

³⁰ *The Principle of Distinction between Civilians and Combatants*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 1, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1>.

³¹ *The Principle of Distinction between Civilian Objects and Military Objectives*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 7, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule7>.

³² AP I, *supra* note 7, art. 56.

³³ *Proportionality in Attack*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 14, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14>.

³⁴ *Principle of Precautions in Attack*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 15, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15>.

³⁵ *Demilitarized Zones*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 36, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule36>.

³⁶ GC I, *supra* note 1.

³⁷ U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL, § 5.14.3.2, (2016) [hereinafter 2016 DoD LAW OF WAR MANUAL].

of war material.”³⁸ Other provisions ban the transport of military personnel or equipment through the zone and forbid defending them militarily (art. 5³⁹). The zones should “comprise only a small part of the territory governed by the Power which has established them;” be sparsely populated; be distant from “military objectives, or large industrial or administrative establishments;” and be located in areas unlikely to become of military importance (art. 4⁴⁰).

Although Article 23 does not address marking, the draft agreement provides that the zones must be marked with a Red Cross, Red Crescent, or Red Crystal (art. 6,⁴¹ as modified by Additional Protocol III⁴²). Failure to be so marked does not deprive a medical facility or location of IHL protection if the enemy is aware of its use for medical purposes. Perfidious misuse⁴³ of these emblems is an IHL violation and a grave breach, which is discussed below (Additional Protocol I, art. 85(3)(f)⁴⁴).

The ICRC’s *International Humanitarian Law* study cites the creation of hospital zones during conflicts in Bangladesh, Cambodia, Chad, Cyprus, Nicaragua, Lebanon, Sri Lanka, and the former Yugoslavia.⁴⁵ Interestingly, during the Falkland/Malvinas war between the United Kingdom and Argentina, the parties negotiated a location at sea (the so-called “Red Cross Box”⁴⁶) where hospital ships were located and the wounded could be exchanged. This was so even though the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea⁴⁷ contains no provision analogous to Article 23 of GC I.

Rule 35 of the ICRC’s *Customary International Law* study convincingly provides that “[d]irecting an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited” under customary law.⁴⁸ Note that the rule would apply equally to the hospital and safety zones for civilians and neutralized zones discussed in subsequent sections.

³⁸ GC I, *supra* note 1, annex I, art. 2.

³⁹ *Id.* annex I, art. 5.

⁴⁰ *Id.* annex I, art. 4.

⁴¹ *Id.* annex I, art. 6.

⁴² Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, 2404 U.N.T.S. 1 [hereinafter AP III].

⁴³ *Perfidy*, ICRC CASEBOOK, https://casebook.icrc.org/a_to_z/glossary/perfidy.

⁴⁴ AP I, *supra* note 7, art. 85.

⁴⁵ *Hospital and Safety Zones and Neutralized Zones*, ICRC INT’L HUMANITARIAN L DATABASES, Rule 35, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule35>.

⁴⁶ Christopher Albon, *The Red Cross Box*, U.S. NAVAL INST. BLOG (June 29, 2011), <https://blog.usni.org/posts/2011/06/29/the-red-cross-box#:~:text=What%20was%20this%20place%3F,sides%20could%20operate%20in%20safety..>

⁴⁷ 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 [hereinafter GC II].

⁴⁸ *Hospital and Safety Zones and Neutralized Zones*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 35, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule35>.

Hospital and Safety Zones and Localities for Civilians

Article 14 of the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons⁴⁹ provides for zones to protect the wounded, sick, elderly (undefined), children under fifteen years of age, expectant mothers, and mothers of children under seven (see also DoD *Law of War Manual*, § 5.14.3.1⁵⁰). As the ICRC's 1958 Commentary explains, "[t]hese various categories among the civilian population are based on a very simple criterion: they are persons who are taking no part in the hostilities and whose weakness makes them incapable of contributing to the war potential of their country; they thus appear to be particularly deserving of protection."⁵¹

Hospital zones and localities serve the same function as those discussed above for wounded or sick combatants. Safety zones are areas where the individuals enumerated in Article 14 can seek shelter. Although the provision cites specific categories of especially vulnerable persons, IHL does not bar other civilians from finding shelter in the zones, so long as they comply with the limits described below.

Like the zones for wounded and sick military personnel, these zones may be established during peacetime, although that has not

occurred. The parties may also agree to their establishment and recognition upon the outbreak of, or during, the conflict. Article 14 provides that Protecting Powers and the ICRC may facilitate establishing and recognizing such zones and localities.

As with GC I, GC IV contains a draft agreement in an annex.⁵² It includes provisions tracking those in GC I's draft agreement. The draft bars persons residing in a hospital or safety zone from performing work related to military operations or the production of war materials, including when they perform that work outside the zone (art. 2⁵³). The party that established the zone should also "take all necessary measures" to bar individuals who are not residing in the zone from entering it (art. 3⁵⁴). And the draft agreement imposes the same limitations described above for military hospital zones regarding size, population density, proximity to military objectives, and likelihood of becoming the site of hostilities (art. 4⁵⁵), while also prohibiting the transportation of military personnel and material through the area and defending it militarily (art. 5⁵⁶).

Civilian hospital and safety zones should be marked with oblique red bands on a white background placed on buildings and in other visible areas. Additionally, facilities exclusively used to treat the wounded and sick must be

⁴⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 14, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

⁵⁰ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.14.3.1.

⁵¹ COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, art. 14 (Jean S. Pictet ed., 1958) [hereinafter GC IV Commentary of 1958].

⁵² GC IV, *supra* note 49.

⁵³ *Id.* annex I, art. 2.

⁵⁴ *Id.* annex I, art. 3.

⁵⁵ *Id.* annex I, art. 4.

⁵⁶ *Id.* annex I, art. 5.

marked, like their military counterparts, with a Red Cross, Red Crescent, or Red Crystal (annex, art. 6⁵⁷). Perfidious misuse of medical marking⁵⁸ is, as with those on military medical facilities, a violation of IHL by the party concerned and a grave breach (Additional Protocol I, art. 85(3)(f)⁵⁹).

Although such zones are established for civilians, the medical facilities concerned may treat wounded combatants without forfeiting the zone's protected status. The same is true analogously for hospital zones established for military personnel; they may treat civilians without losing their protected status.

Both the Russian and Ukrainian IHL manuals recognize the protection to which hospital and safety zones are entitled (see here⁶⁰).

Neutralized Zones

Geneva Convention IV also provides for neutralized zones in areas where hostilities are occurring (see also DoD *Law of War Manual*, § 5.14.3.3⁶¹). According to Article 15,⁶² a party may propose the establishment of a zone in the vicinity of the fighting to protect the 1) wounded and sick, whether military or civilian, and 2) civilians who take

no part in the hostilities and, while residing in the zone, perform no “work of a military character.” Neutralized zones are typically used as quick, temporary solutions when hostilities pose an immediate and serious risk to these individuals. In this sense, they differ from hospital and safety zones, which are more permanent and usually further removed from the hostilities.

The reference to “no part in hostilities” predated the advent of the term “direct part in hostilities” in the 1977 Additional Protocols that was the subject of the somewhat controversial (see vol. 42(3)⁶³) 2009 ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities*⁶⁴ (AP I, art. 51.3;⁶⁵ AP II, art. 13(3)⁶⁶). In its 1958 Commentary to Article 15,⁶⁷ the ICRC gives the example of members of a *levée en masse*⁶⁸ or an organized resistance movement. Nevertheless, those who qualify as direct participants in the current sense of the term would also be excluded from the neutralized zone.

As they are generally responsive to a tactical situation where fighting is occurring, neutralized zones are established only during armed conflict. Article 15 refers to a written

⁵⁷ *Id.* annex I, art. 6.

⁵⁸ ICRC CASEBOOK, *supra* note 43.

⁵⁹ AP I, *supra* note 7, art. 85(3)(f).

⁶⁰ *Practice relating to Rule 35, Hospital and Safety Zones and Neutralized Zones*, ICRC INT'L HUMANITARIAN L. DATABASES, rule 35, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule35>.

⁶¹ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.14.3.3.

⁶² GC IV, *supra* note 49, art. 15.

⁶³ 41-50 N.Y. UNIV. J. INT'L L. & POL. (2017–2018), <https://www.nyujilp.org/print-edition/volumes-50-41/>.

⁶⁴ Nils Melzer, Int'l Comm. Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009), <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>.

⁶⁵ AP I, *supra* note 7, art. 51.

⁶⁶ Protocol Additional (II) to the Geneva Conventions of August 12, 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].

⁶⁷ GC IV Commentary of 1958, *supra* note 51, art. 15.

⁶⁸ *Levée en masse*, ICRC CASEBOOK, https://casebook.icrc.org/a_to_z/glossary/levee-en-masse.

agreement, but the ICRC's Commentary clarifies that verbal agreements (e.g., by radio) are permissible in emergency situations.⁶⁹ The agreement should set the zone's location, administration, food supply, and supervision. It may be negotiated directly or facilitated by a neutral state (not limited to a Protecting Power) or a humanitarian organization like the ICRC. Since a neutralized zone is generally set up on a temporary basis, the agreement would indicate its duration.

The area concerned need not be completely de-militarized before being protected unless provided for in the agreement. This is because of the speed with which one may need to be set up to provide protection from the hostilities. But the ICRC's Commentary emphasizes that "any activity which helped current military operations, directly or indirectly, would be incompatible with the very idea of neutralized zones."⁷⁰ Clearly, attacks into the zone are prohibited so long as the terms of the agreement are materially honored. If they are not, the aggrieved party may terminate the agreement, although doing so is not required. While Article 15 does not set forth a method of marking a neutralized zone, the Commentary suggests doing so in the same manner as provided for in the Geneva Convention for annex regarding hospital and safety zones and localities.

Note that zones may have multiple purposes. For instance, the 1991 Agreement between Croatia and the Socialist Federal Republic of Yugoslavia on a Protected Zone around the Hospital of Osijek⁷¹ was adopted in accordance with Article 23 of GC I and Articles 14 and 15 of GC IV. Placed under ICRC supervision, the area was open only to

sick and wounded civilian and military personnel; family members visiting patients recovering in the hospital; persons aged over 65 years, children under 15, expectant mothers and mothers of children under seven, taking no part in the hostilities; medical and administrative personnel of the hospital of Osijek; [and] ICRC delegates and ICRC local staff. (para. 4(1)).

Non-defended Localities

Article 59 of Additional Protocol I provides for non-defended localities that parties to the conflict are prohibited from attacking "by any means whatsoever."⁷² They consist of inhabited areas "near or in a zone where armed forces are in contact" that a party declares "open" for occupation by its adversary.

The prohibition in Article 59 draws on Article 25 of the Regulations annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land: "The attack or bombardment, by whatever means, of towns,

⁶⁹ GC IV Commentary of 1958, *supra* note 51, art. 15.

⁷⁰ ICRC INT'L HUMANITARIAN L. DATABASES, *supra* note 60.

⁷¹ Agreement Relating to the Establishment of a Protected Zone Around the Hospital of Osijek, Yugoslavia-Croat., Dec. 27, 1991, <https://www.peaceagreements.org/viewmasterdocument/1880>.

⁷² AP I, *supra* note 7, art. 59.

villages, dwellings, or buildings which are undefended is prohibited”⁷³ (see also 1899 Hague II Regulations, art. 25⁷⁴). As the DoD *Law of War Manual* explains,

Historically, open or undefended status for a town, village, or city would be sought as opposing military forces approached and the military forces previously controlling the city abandoned it. Undefended or open status would essentially surrender the city to the opposing force; this minimized injury to the inhabitants and damage to civilian objects within the city because the city could be occupied without resistance or bypassed (§ 5.15.1).⁷⁵

It must be cautioned that the non-defended zone must be near or in a zone of hostilities and open for occupation. The *Law of War Manual* emphasizes this point:

Thus, a city in rear areas behind enemy lines cannot be ‘undefended.’ For example, a party to a conflict cannot declare a city or other population center to be undefended if it is several hundred miles behind the area of ground conflict where it would not be feasible for opposing ground forces to occupy it (§ 5.15.3.1).

To enjoy non-defended status, all combatants (except the wounded and sick), weapons, and mobile military equipment must be removed

from the area; fixed military installations may not be used for hostile purposes; local authorities and the civilian population must refrain from acts of hostility; and activities supporting military operations have to be forbidden (AP I, art. 59(2)⁷⁶ and DoD *Law of War Manual*, § 5.15.4⁷⁷).

The party declaring the zone must transmit its declaration to the adversary, which must acknowledge and respect it so long as the aforementioned conditions are satisfied. The ICRC’s 1987 Commentary to Article 59 discusses procedures for situations in which the adversary objects that the requisite conditions have not been satisfied.⁷⁸ In rare cases, however, the parties may agree that certain conditions need not be fulfilled fully before the protections of non-defended locality status apply (as in the case of ongoing removal of military forces, see DoD *Law of War Manual*, § 5.15.5⁷⁹). Non-defended localities should be marked as agreed upon between the parties.

It should be cautioned that the failure to have an agreement in place does not permit an attack on a location that is undefended. As the DoD *Law of War Manual* points out, “[a]lthough there is no explicit treaty requirement that a city be declared undefended before achieving that status, the practice has been to make such declarations to the opposing party” (§5.15.3.2).

⁷³ Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, art. 25, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter HR IV].

⁷⁴ 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 [hereinafter Hague Convention II].

⁷⁵ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.15.1.

⁷⁶ AP I, *supra* note 7, art. 59.

⁷⁷ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.15.4.

⁷⁸ Additional Protocols Commentary, *supra* note 25, art. 59.

⁷⁹ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.15.5.

Humanitarian Corridors

While IHL does not expressly provide for humanitarian corridors,⁸⁰ the parties may negotiate their establishment to facilitate safe passage through an area for a set time. For example, they may be used to allow evacuation of a besieged area or the transportation of humanitarian assistance into an area.

Such corridors have been established in the Russia-Ukraine war with the assistance of the ICRC and the United Nations. Most notable in this regard was the evacuation of over 10,000 civilians in March 2022 from Sumy and Mariupol. They also have been used in other conflicts, as in the 2016 evacuation of 25,000 civilians from Eastern Aleppo in an operation facilitated by the ICRC and the Syrian Red Cross.⁸¹

Safe Areas

The previous zones are expressly provided for in IHL treaty law, much of which reflects customary law. But a practical limiting factor is that their establishment requires a degree of agreement between the parties. Indeed, the requirement for agreement accounts, as in the case of Zaporizhzhia, for the infrequency of

zones being established. This explains why several types of “safe areas” (also labeled “safe havens” or “safe humanitarian zones”) have been established without the parties’ consent (see Emanuela-Chiara Gillard⁸²).

The soundest legal basis for the non-consensual establishment of a protective zone is when the U.N. Security Council exercises its authority under Chapter VII⁸³ of the U.N. Charter (see discussion in 1999 Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict⁸⁴). This was most memorably done in 1993 when the Security Council established one for Srebrenica and surrounding areas in Bosnia and Herzegovina (S/RES 819⁸⁵). The Council soon extended it to various other locations, including Sarajevo and Tuzla (S/RES/824⁸⁶). Although the Security Council authorized the U.N. Protection Force (UNPROFOR⁸⁷) to use force to protect the safe areas (S/RES/836⁸⁸), it failed to do so when in July 1995 the Bosnian Serb army massacred 8,000 Bosniak men and boys in Srebrenica.⁸⁹

Sometimes, the legal basis for establishing a safe area has been questionable, leading

⁸⁰ *How humanitarian corridors work to help people in conflict zones*, Int’l Comm. Red Cross (June 3, 2022), <https://www.icrc.org/en/document/how-humanitarian-corridors-work>.

⁸¹ *Syria: The Inside Story of the Aleppo Evacuation*, ICRC NEW DELHI (Apr. 7, 2017), <https://blogs.icrc.org/new-delhi/2017/04/07/syria-inside-story-aleppo-evacuation/>.

⁸² Emanuela-Chiara Gillard, “Safe areas”: *The international legal framework*, 906 INT’L REV. RED CROSS 1075–1101 (Dec. 2017), https://international-review.icrc.org/sites/default/files/906_11.pdf.

⁸³ U.N. Charter.

⁸⁴ U.N. Secretary-General, *Report to the Security Council on the protection of civilians in armed conflict*, U.N. Doc. S/1999/957 (Sept. 8, 1999), <https://digitallibrary.un.org/record/279462?ln=en>.

⁸⁵ S.C. Res. 819 (1993) (Apr. 16, 1993), <https://digitallibrary.un.org/record/164939?ln=en>.

⁸⁶ S.C. Res. 824 (May 6, 1993), <https://digitallibrary.un.org/record/166133?ln=en8>.

⁸⁷ Statement on Former Yugoslavia—UNPROFOR, Dep’t Pub. Info., U.N. (Sept. 1996), https://peacekeeping.un.org/en/mission/past/unprof_b.htm.

⁸⁸ S.C. Res. 836 (June 4, 1993), <https://digitallibrary.un.org/record/166973?ln=en>.

⁸⁹ *From the Field: A genocide timeline; Srebrenica massacre remembered*, U.N. News (July 20, 2021), <https://news.un.org/en/story/2021/07/1096092>.

some to label them “unlawful but legitimate.” Noteworthy in this regard were the safe havens enforced in part by no-fly zones over northern and southern Iraq established following the first Gulf War (Provide Comfort, Southern Watch, Northern Watch).⁹⁰ Provide Comfort⁹¹ was ostensibly based on Security Council Resolution 688,⁹² which required Iraq to afford access to humanitarian assistance. But the legal basis for using ground and air forces to secure the humanitarian zones was somewhat less definitive.⁹³

International Criminal Law

Although attacking the zones described above may constitute an internationally wrongful act by the State concerned, in some cases, those involved may also be individually criminally responsible.

Under Additional Protocol I, “making non-defended localities and demilitarized zones the object of attack” is a “grave breach”⁹⁴ (art. 85(3)(d)⁹⁵). As a grave breach, Parties to the treaty must adopt legislation criminalizing such attacks, search for those who have engaged them, and bring those individuals before its courts or extradite them to another State. All States enjoy jurisdiction over grave breaches. The ICRC’s 2016 Commentary

appears to suggest that the status would equally apply to attacks on hospital and safety zones,⁹⁶ presumably regardless of whether for combatants or civilians (§ 1909). By this approach, with which I agree, attacking a neutralized zone would also amount to a grave breach.

The prohibition also appears in the Rome Statute of the International Criminal Court.⁹⁷ Article 8(2)(b)(v) makes “[a]ttacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives” a war crime. Further, “[i]ntentionally directing attacks against . . . hospitals and places where the sick and wounded are collected, provided they are not military objectives,” is a war crime under Articles 8(b)(ix) (international armed conflict) and 8(2)(e)(iv) (non-international). Of course, attacking civilians is a war crime regardless of whether they are in a protected zone (arts. (8)(2)(b)(i) and 8(2)(e)(i)). Other tribunals likewise treat such actions as war crimes. For instance, Article 3(c) of the Statute of the International Tribunal for the Former Yugoslavia qualifies an “attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings” as such.⁹⁸

⁹⁰ John T. Correll, *Northern Watch*, AIR & SPACE FORCES MAG. (Feb. 1, 2000), <https://www.airandspaceforces.com/article/0200northern/>.

⁹¹ Daniel L. Haulman, *Crisis in Iraq: Operation PROVIDE COMFORT*, U.S. DEP’T DEF. (Aug 23, 2001), <https://media.defense.gov/2012/Aug/23/2001330108/-1/-1/0/Op%2520Provide%2520Comfort.pdf>.

⁹² S.C. Res. 688 (Apr. 5, 1991), <https://digitallibrary.un.org/record/110659?ln=en>.

⁹³ Michael N. Schmitt, *Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement*, 72 INT’L L. STUD., <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1459&context=ils>.

⁹⁴ *Grave breaches*, ICRC CASEBOOK, https://casebook.icrc.org/a_to_z/glossary/grave-breaches.

⁹⁵ AP I, *supra* note 7, art. 85.

⁹⁶ GC I Commentary of 2016, *supra* note 9, art. 23.

⁹⁷ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

⁹⁸ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 25 May 1993, ICRC INT’L HUMANITARIAN L. DATABASES, art. 3, <https://ihl-databases.icrc.org/en/ihl-treaties/icty-statute-1993/article-3>.

Finally, the International Law Commission's 1996 Draft Code of Crimes against Peace and Security of Mankind provides that "[a]ttack, or bombardment, by whatever means, of . . . demilitarized zones"⁹⁹ is a war crime (art. 20(e)(iii)).

Concluding Thoughts

Except for the limited humanitarian corridors that were tortuously negotiated, the conflict in Ukraine has sadly seen the establishment of none of the protected zones described above. This fact signals the weakness inherent in requiring agreement between the parties for the establishment of IHL zones. And the presence on the U.N. Security Council of

Russia, which wields a veto and is engaged in repeated IHL violations, illustrates the baked-in challenge of establishing safe areas outside the IHL framework.

However, the absence of protected zones to date does not detract from the possible benefits they may offer later in this conflict or future ones. Given the requirement that such zones not be used for military purposes, there is little reason for belligerents to oppose their establishment, so long as all sides are willing to respect them. They deserve far greater attention than they have enjoyed.



⁹⁹ Draft Code of Crimes against the Peace and Security of Mankind: 1996, U.N. (2005), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf.

DECEPTION AND THE LAW OF ARMED CONFLICT

by William Casey Biggerstaff | Sep 8, 2022

As Ukraine continues to defend against Russian invasion, its armed forces are increasingly turning to deception operations to minimize their asymmetrical disadvantages with Russian forces. As part of the campaign to regain control of Kharkiv, for example, Ukraine's forces employed mannequins strapped to trees and other cover wearing military fatigues and armed with fake rifles to "confuse attacking Russian forces."¹⁰⁰ While the decoys obviously look fake at close range, they have been "mostly effective against helicopters and aircraft" that engage forces from greater distances. In other areas, similar "scarecrow soldiers" armed with mock portable anti-aircraft missiles have also fooled Russian pilots wary of being shot down by Stinger missiles.¹⁰¹

More recently, Ukraine has protected its High Mobility Artillery Rocket Systems (HIMARS¹⁰²)—high-value targets due to their impact on Russia's combat operations¹⁰³—using wooden decoys¹⁰⁴ to fool Russia into exhausting its cruise missile stocks. Because the inexpensive decoys are nearly indistinguishable from the real systems when spotted by Russian unmanned aerial vehicles,

Russian warships are needlessly expending cruise missiles against them. Indeed, Russia has mistakenly "claimed to have hit more HIMARS than [the U.S. has] even sent."¹⁰⁵

Such deception operations raise the issue of whether Ukraine is committing acts of perfidy prohibited by the law of armed conflict or conducting lawful ruses long permitted in war. This post provides a brief overview of how the law of armed conflict regulates military deception and explains why Ukraine's use of mannequins and decoys is lawful.

Unlawful Deceptions Under the Law of Armed Conflict

Generally, parties to an armed conflict must observe the principle of "good faith" with their enemies (DoD *Law of War Manual*, § 5.21¹⁰⁶). Two notable deceptions that breach this rule of conduct are perfidy and misuse of distinctive emblems. While practitioners often conflate them because they both involve false pretenses, they are distinct violations. Russia and Ukraine are Parties to the 1907 Hague Convention IV's Annexed Regulations, the 1949 Geneva Conventions,

¹⁰⁰ Alia Shoaib, *Decoy mannequins with weapons photographed in Kharkiv, as Ukraine say it has forced Russian troops into retreat*, BUS. INSIDER (May 14, 2022), <https://www.businessinsider.com/photos-of-decoy-mannequins-with-weapons-in-kharkiv-as-russia-retreats-2022-5>.

¹⁰¹ Charlie Parker, *Phoney warriors fool Ukrainian and Russian armies*, TIMES (Apr. 14, 2022), <https://www.thetimes.co.uk/article/phoney-warriors-fool-ukrainian-and-russian-armies-s9mfd5dk3>.

¹⁰² HIMARS: *The long-range, mobile, precision fires launcher interoperable with C2 systems*, LOCKHEED MARTIN, <https://www.lockheedmartin.com/en-us/products/himars.html>.

¹⁰³ *Ukraine: What are Himars missiles and are they changing the war?*, BBC (Aug. 30, 2022), <https://www.bbc.com/news/world-62512681>.

¹⁰⁴ John Hudson, *Ukraine lures Russian missiles with decoys of U.S. rocket system*, WASH. POST (Aug. 30, 2022), <https://www.washingtonpost.com/world/2022/08/30/ukraine-russia-himars-decoy-artillery/>.

¹⁰⁵ *Id.*

¹⁰⁶ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.21.

and their 1977 Additional Protocol I, which contain the relevant treaty law for both perfidy and misuse of distinctive emblems.

Perfidy

With respect to perfidy, Article 23 of the Annexed Regulations states that soldiers may not “kill or wound treacherously” the enemy.¹⁰⁷ Seven decades later, Article 37 of Additional Protocol I¹⁰⁸ refined this rule by replacing the term treachery with perfidy and including capture as a prohibited activity (see ICRC Commentary, ¶ 1488¹⁰⁹). It provides,

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.

As is apparent, the prohibition has multiple components. First, perfidy requires a *false claim to protection* under the law of war, such as those prescribed by the Geneva Conventions or Additional Protocol I (see U.S. DoD *Law of War Manual* § 5.22.1¹¹⁰). A soldier placed *hors de combat* due to becoming wounded, for example, may not be made the object of attack (Geneva Convention I, art. 12¹¹¹). Feigning injury, therefore, would be a

false claim to this protection (see AP I, art. 37(1)(b)¹¹²). Similarly, wrongfully wearing a Red Cross, a distinctive emblem under the Geneva Conventions and Additional Protocol I, would be a false claim to the protections provided for personnel performing medical functions (see, e.g., Geneva Convention I, arts. 24, 25, 38, and 39¹¹³).

Ukraine is not claiming its decoys are entitled to any international legal protections. Indeed, its claims are quite the opposite—armed forces and their artillery systems are undeniably military objectives liable to attack (see generally DoD *Law of War Manual*, § 5.6¹¹⁴). Thus, the Ukrainian deception operations under consideration do not qualify as perfidy.

Next, an offender must intend to deceive by betraying the enemy’s confidence in the falsely claimed legal protection (see ICRC 1987 Commentary, ¶ 1500¹¹⁵). In other words, the purpose of the false claim must be to *exploit the particular status* at issue. Feigning injury or misusing a distinctive emblem, for example, may “invite the enemy’s confidence” that the individual or object concerned enjoys protection under the law of armed conflict, but those acts would not constitute perfidy unless the offender commits them with an intent to leverage the enemy’s reliance on their respective protections.

¹⁰⁷ HR IV, *supra* note 73, art. 23.

¹⁰⁸ AP I, *supra* note 7, art. 37.

¹⁰⁹ Additional Protocols Commentary, *supra* note 25, art. 37.

¹¹⁰ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.22.1.

¹¹¹ GC I, *supra* note 1, art. 12.

¹¹² AP I, *supra* note 7, art. 37(1)(b).

¹¹³ See, e.g., GC I, *supra* note 1, arts. 24, 25, 38 & 39.

¹¹⁴ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.6.

¹¹⁵ Additional Protocols Commentary, *supra* note 25, ¶ 1500

While Ukraine's forces are admittedly intending to deceive their enemy, they are not intending to betray Russians' confidence in the rules of war. Accordingly, in addition to the absence of a false claim to legal protections, Ukraine's actions lack the requisite intent to constitute perfidy.

Finally, the law of armed conflict does not proscribe all perfidious acts. Absent a causal nexus to *killing, wounding, or capturing*, it does not prohibit them (see ICRC 1987 Commentary, ¶¶ 1490–1491¹¹⁶). In this case, the intent is merely to cause the enemy to waste valuable resources and confuse its targeting analysis.

Readers should note there is a “permanent controversy” surrounding this requirement because it provides a “considerable number of possibilities to indulge in perfidious conduct . . . not directly aimed at killing, injuring or capturing” the enemy (ICRC 1987 Commentary, ¶ 1492;¹¹⁷ see also Watts, pp. 144–147¹¹⁸). It does not prohibit, for example, feigning an injury to escape the enemy during battle (DoD *Law of War Manual*, § 5.22.1.1¹¹⁹). Further, it is unclear whether

perfidy includes *attempts* to kill, wound, or capture (see ¶¶ 1491–1495¹²⁰). Strictly construed, Article 37 does not proscribe failed attempts to achieve an intended result (see ¶ 1492;¹²¹ Watts,¹²² p. 146; but see ¶ 1493¹²³). Hague IV's Annexed Regulations, on the other hand, expressly prohibit attempts to kill or wound (see Article 23¹²⁴).

The question of whether unlawful perfidy under customary law includes the act of *capturing* the enemy is not well-settled. In its *Customary International Humanitarian Law* study, the ICRC claims that the “killing, injuring, or capturing [of] an adversary by resort to perfidy is prohibited” (Rule 65¹²⁵). Thus, in its view, the customary prohibition mirrors Additional Protocol I, Article 37.¹²⁶

But some States that are not Parties to the Protocol, including the United States, argue that the prohibition has historically only applied to killing or wounding (see DoD *Law of War Manual*, § 5.22.2.1;¹²⁷ Rule 65's Commentary¹²⁸). For instance, the 1883 Lieber Code, which purported to codify customary practice, only condemned “clandestine or treacherous attempts to

¹¹⁶ Additional Protocols Commentary, *supra* note 25, ¶ 1490–1491.

¹¹⁷ *Id.* ¶ 1492.

¹¹⁸ Sean Watts, *Law-of-War Perfidy*, 219 MIL. L. REV. 144–147 (2014), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/milrv219&div=6&cid=&page=>.

¹¹⁹ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.22.1.1.

¹²⁰ Additional Protocols Commentary, *supra* note 25, ¶ 1491–1495.

¹²¹ *Id.* ¶ 1492.

¹²² SEAN WATTS, *supra* note 118 at 146.

¹²³ Additional Protocols Commentary, *supra* note 25, ¶ 1493.

¹²⁴ HR IV, *supra* note 74, art. 23.

¹²⁵ *Perfidy*, ICRC INT'L HUMANITARIAN L. DATABASES, Rule 65, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule65>.

¹²⁶ AP I, *supra* note 7, art. 37.

¹²⁷ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.22.2.1.

¹²⁸ ICRC DATABASE, *supra* note 125.

injure an enemy” (Article 101;¹²⁹ see also 1874 Brussels Declaration, art. 13(b);¹³⁰ 1880 *Oxford Manual*, art. 8(b)¹³¹). This exclusion of capture is also consistent with the treatment of perfidy as a war crime under international criminal law (see *Elements of Crimes*,¹³² Rome Statute, art. 8(2)(b)(xi)). This debate is moot in the Russia-Ukraine conflict because both parties are bound by Article 37 of Additional Protocol I.¹³³

To summarize, Ukrainian forces are deliberately using deception to gain military advantages that could potentially lead to the death, injury, or capture of Russian troops. But, as explained above, they are not doing so “by resort[ing] to perfidy.”

Misuse of Emblems

In some cases, deception operations that do not qualify as perfidy are nevertheless unlawful on other grounds. Article 23 of Hague Convention IV’s Annexed Regulations forbids the “improper use” of the “distinctive badges of the [1906] Geneva Convention.”¹³⁴

Additional Protocol I extends this proscription to “the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the [1949 Geneva] Conventions or by this Protocol,” as well as to unauthorized use of the “distinctive emblem of the United Nations” (art. 38¹³⁵).

Customary international law contains similar prohibitions (see ICRC’s *Customary International Humanitarian Law* study, Rules 59,¹³⁶ 60,¹³⁷ 61¹³⁸). Although neither Article 23 nor Article 38 defines improper use, the term’s customary interpretation is “any use other than that for which the distinctive emblems were intended” (ICRC’s *Customary International Humanitarian Law* study, Rule 59¹³⁹). Thus, emblems may only be used to identify applicable personnel, equipment, or locations (see DoD *Law of War Manual*, § 5.24.2–6¹⁴⁰). To illustrate, the rule prohibits applying a red cross on a vehicle not exclusively used for medical purposes (see Rule 59;¹⁴¹ Geneva Convention I, arts. 35 and

¹²⁹ *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, 24 April 1863., ICRC INT’L HUMANITARIAN L. DATABASES, art. 101, <https://ihl-databases.icrc.org/en/ihl-treaties/liebercode-1863/article-101>.

¹³⁰ *Project of an International Declaration Concerning the Laws and Customs of War. Brussels, 27 August 1874.*, ICRC INT’L HUMANITARIAN L. DATABASES, art. 13, <https://ihl-databases.icrc.org/en/ihl-treaties/brussels-decl-1874/article-13>.

¹³¹ *The Laws of War on Land. Oxford, 9 September 1880.*, ICRC INT’L HUMANITARIAN L. DATABASES, art. 8, <https://ihl-databases.icrc.org/en/ihl-treaties/oxford-manual-1880/article-8>.

¹³² INT’L CRIM. CT., ELEMENTS OF CRIMES (2011), <https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf>.

¹³³ AP I, *supra* note 7, art. 37.

¹³⁴ HR IV, *supra* note 73, art. 23.

¹³⁵ AP I, *supra* note 7, art. 38.

¹³⁶ *Improper Use of the Distinctive Emblems of the Geneva Conventions*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 59, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule59>.

¹³⁷ *Improper Use of the United Nations Emblem or Uniform*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 60, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule60>.

¹³⁸ *Improper Use of Other Internationally Recognized Emblems*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 61, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule61>.

¹³⁹ ICRC INT’L HUMANITARIAN L. DATABASES, Rule 59, *supra* note 136.

¹⁴⁰ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.24.2–6.

¹⁴¹ ICRC INT’L HUMANITARIAN L. DATABASES, Rule 59, *supra* note 136.

39;¹⁴² DoD *Law of War Manual*, § 5.24.2¹⁴³). Thus, misuse of emblems condemns false claims to special legal protections provided by international humanitarian law.

In contrast to perfidy, however, the misuse of emblems is a per se law-of-war violation that does not require a particular result, such as killing, wounding, or capturing the enemy (see AP I, art. 38;¹⁴⁴ ICRC's *Customary International Humanitarian Law* study, Rules 59,¹⁴⁵ 60,¹⁴⁶ 61;¹⁴⁷ see also DoD *Law of War Manual*, § 5.24¹⁴⁸). Returning to the example above, the rule prohibits applying a Red Cross to a non-medical military vehicle, even if forces are not using it to attack the enemy (see ICRC 1987 Commentary, ¶ 1532¹⁴⁹). But if the pretense deliberately results in the enemy's death, injury, or capture, it constitutes both misuse *and* perfidy.

Regarding Ukraine's mock soldiers and equipment, its forces are self-evidently not misusing any distinctive emblems. In fact, the use of HIMARS decoys is so effective because Russian troops are "invited" to target them as supposed military objectives. Ukraine is undoubtedly trying to fool Russia's reconnaissance efforts, but not by abusing

the legal protections afforded distinctive emblems.

Ruses and the Law of Armed Conflict

Ukraine's forces may not be resorting to perfidy or misusing distinctive emblems, but they are intentionally misleading Russians in an effort to even the odds. Unlike perfidy and misuse, however, such "ruses of war" are permissible under long-standing rules of both treaty and customary international law (see, e.g., Hague IV's Annexed Regulations, art. 24;¹⁵⁰ ICRC's *Customary International Humanitarian Law* study, Rule 57;¹⁵¹ DoD *Law of War Manual*, § 5.25.1¹⁵²). As stated in Additional Protocol I, 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" (art. 37¹⁵³).

Although perfidy and ruses intend to confuse or mislead the enemy, ruses do not exploit an enemy's good-faith reliance on international legal protections (e.g., civilians, wounded and sick, emblems, etc.). Nor can the tricks

¹⁴² GC I, *supra* note 1, arts. 35 & 39.

¹⁴³ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.24.2.

¹⁴⁴ P I, *supra* note 7, art. 38.

¹⁴⁵ ICRC INT'L HUMANITARIAN L. DATABASES, Rule 59, *supra* note 136.

¹⁴⁶ ICRC INT'L HUMANITARIAN L. DATABASES, Rule 60, *supra* note 137.

¹⁴⁷ ICRC INT'L HUMANITARIAN L. DATABASES, Rule 61, *supra* note 138.

¹⁴⁸ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.24.

¹⁴⁹ Additional Protocols Commentary, *supra* note 25, ¶ 1532.

¹⁵⁰ HR IV, *supra* note 73, art. 24.

¹⁵¹ *Ruses of War*, ICRC INT'L HUMANITARIAN L. DATABASES, Rule 57, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule57>.

¹⁵² 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.25.1.

¹⁵³ AP I, *supra* note 7, art. 37.

ruses employ violate any other rules under the law of armed conflict (ICRC's *Customary International Humanitarian Law* study, Rule 57¹⁵⁴; DoD *Law of War Manual*, § 5.25.1.2¹⁵⁵). For example, "although fighting in the enemy's uniform would not be perfidy since enemy military personnel are not generally protected by the law of war, fighting in the enemy's uniform also would not be a ruse, since such action would infringe upon the rule against improper use of the enemy's uniform" (§ 5.25.1.2¹⁵⁶).

As the long lineage of these rules implies, militaries have commonly employed ruses¹⁵⁷ throughout history for various purposes (see DoD *Law of War Manual*, § 5.25.1.1¹⁵⁸). For instance, to ensure the success of the D-Day invasion of Normandy during the Second World War, the Allies relied on surprise, camouflage to disguise forces, disinformation (e.g., Operation Bodyguard¹⁵⁹), false intercepts (e.g., Operation Mincemeat¹⁶⁰), a "Ghost Army"¹⁶¹ of inflatable tanks, and dummy paratroopers imitating an airborne assault (Operation Titanic¹⁶²), among other misleading tactics. In sum, forces may

lawfully surprise, trick, confound, or mislead the enemy so long as such deceptions are not perfidious and do not otherwise violate the law of armed conflict.

The use of mannequins and wooden decoys to fool Russia's forces are classic ruses. As illustrated by the DoD *Law of War Manual*, "inducing enemy forces to waste their resources" and "misleading the enemy as to the planned targets or locations of military operations" are textbook examples of lawful ruses intended to mislead the enemy or cause him to act recklessly (§ 5.25.1.1¹⁶³). Ukraine's mannequins and scarecrows are "confus[ing] incoming [Russian] forces that might try to make a push"¹⁶⁴ against Ukraine-controlled territory. Similarly, Russian forces are targeting wooden replicas they believe to be high-value HIMARS artillery systems that have devastatingly impacted their operations.¹⁶⁵ As a result, they are expending valuable cruise missiles without success, thereby reducing their inventories for use against Ukraine's actual forces.

Ukraine's mannequins, scarecrows, and decoys are plainly lawful. But their success

¹⁵⁴ ICRC INT'L HUMANITARIAN L. DATABASES, Rule 57, *supra* note 151.

¹⁵⁵ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.25.1.2.

¹⁵⁶ *Id.* § 5.25.1.2.

¹⁵⁷ Rémy Héméz, *To Survive, Deceive: Decoys in Land Warfare*, WAR ON THE ROCKS (Apr. 22, 2021), <https://warontherocks.com/2021/04/to-survive-deceive-decoys-in-land-warfare/>.

¹⁵⁸ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.25.1.1.

¹⁵⁹ Christopher Klein, *Fooling Hitler: The Elaborate Ruse Behind D-Day*, HISTORY (June 27, 2023), <https://www.history.com/news/fooling-hitler-the-elaborate-ruse-behind-d-day>.

¹⁶⁰ BP Perry, *Operation Mincemeat: How a 'Drowned' Man with Faked Documents Tricked Hitler*, SKY HISTORY, <https://www.history.co.uk/article/operation-mincemeat>.

¹⁶¹ Graham Jaehnig, *An inflatable Army helped D-Day to succeed*, DAILY MINING GAZETTE (June 6, 2019), <https://www.mininggazette.com/news/2019/06/an-inflatable-army-helped-d-day-to-succeed/>.

¹⁶² Peter Suci, *Meet the Dummy Paratroopers of D-Day*, THE NAT'L INTEREST (June 5, 2020), <https://nationalinterest.org/blog/buzz/meet-dummy-paratroopers-d-day-160901>.

¹⁶³ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.25.1.1.

¹⁶⁴ *Ukraine Deploys Decoy Mannequins to Fool Russian Forces*, SOFREP (May 19, 2022), <https://sofrep.com/news/ukraine-deploys-decoy-mannequins-to-fool-russian-forces/>.

¹⁶⁵ BBC, *supra* note 103.

is also remarkable considering Russians traditionally pride themselves as masters of military deception, or what they call *maskirovka*.¹⁶⁶ By confusing Russian forces using mannequins “likely scavenged from destroyed buildings,”¹⁶⁷ Ukraine’s forces are ironically turning Russians’ favorite tactic against them.¹⁶⁸

Conclusion

Ukraine’s use of HIMARS decoys to trick Russian forces into wasting their missile inventory is a classic example of a lawful

ruse of war. Unlawful perfidy prohibits using international law’s protections as a sword instead of a shield. It requires a false claim to protections under the law of war that results in the enemy’s death, injury, or—if Additional Protocol I applies—capture. Ukraine’s deceptions do not implicate these requirements, nor do they violate any other provisions of the law of armed conflict. Accordingly, Ukraine’s use of decoys is permissible under international law.



¹⁶⁶ Lucy Ash, *How Russia outfoxes its enemies*, BBC News (Jan. 29, 2015), <https://www.bbc.com/news/magazine-31020283>.

¹⁶⁷ SOFREP, *supra* note 164.

¹⁶⁸ Josh K. Elliot, *Theatricality and deception: How Russia uses ‘maskirovka’ to shake the world*, Global News (June 9, 2018), <https://globalnews.ca/news/4260938/russia-strategy-maskirovka-military-politics-putin/>.

DESTRUCTIVE COUNTER-MOBILITY OPERATIONS AND THE LAW OF WAR

by Sean Watts and Winston Williams | May 5, 2022

Decades of experience have greatly improved familiarity with, if not always fidelity to, law of war rules applicable to attacks on enemy forces. Less well appreciated is the law of war regime applicable to other acts of violence including destruction or demolition of objects in circumstances that do not immediately involve enemy forces. As the international community investigates potential war crimes committed in Ukraine,¹⁶⁹ it's worth recalling how the law differentiates attacks against enemies from mere destruction or demolitions conducted out of contact with enemy forces, a point fine in fact but fundamental in law.

Defensive Destruction in Ukraine

In the earliest stages of the Ukraine-Russia conflict, Ukrainian forces carried out destructive defensive preparations that involved widespread damage to Ukrainian property and infrastructure.¹⁷⁰ The purpose of these acts was to obstruct the path of

Russian forces or to prevent their offensive use of infrastructure.

One of the earliest such acts involved the 25 February destruction of a bridge over the Teteriv River, 30 miles north of Kyiv.¹⁷¹ Another report identified a claim by the Ukrainian General Staff that a military engineer was killed when he heroically detonated explosives while still on a bridge in the Kherson region to slow an imminent Russian advance.¹⁷² Loss of bridges has reportedly driven Russian forces to resort to time-consuming diversions or to pontoon bridging operations, which have been foiled by Ukrainian attacks.¹⁷³

Ukrainian forces have built other obstacles along likely avenues of advance. They have emplaced so-called Czech hedgehogs,¹⁷⁴ salvaged steel beams welded together at odd angles, to slow tanks. More destructively, trees have been hastily felled across roads to block Russian movement.¹⁷⁵

¹⁶⁹ 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, Int'l Crim. Ct. (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

¹⁷⁰ Sudarsan Raghavan & Siobhán O'Grady et al., *In a Kyiv under siege, neighbors dig trenches to raise barriers to brace for Russian assault*, WASH. POST (Feb. 28, 2022), <https://www.washingtonpost.com/world/2022/02/28/ukraine-russia-kyiv-defense/>.

¹⁷¹ Sophia Ankel, *Ukrainian forces blew up a bridge near Kyiv to cut off one route for Russian tanks advancing on the city*, BUS. INSIDER (Feb. 25, 2022), <https://www.businessinsider.com/ukraine-blows-up-kyiv-bridge-try-stop-russia-tanks-2022-2>.

¹⁷² Jon Jackson, *'Heroic' Ukrainian Soldier Blows Up Bridge, Himself to Halt Russia Advances*, NEWSWEEK (Feb. 25, 2022), <https://www.newsweek.com/heroic-ukrainian-soldier-blows-bridge-himself-halt-russia-advances-1682810>.

¹⁷³ Paul P. Murphy, *Ukrainians thwart Russian attempt toward Kyiv on pontoon bridge, satellite image shows*, CNN (Mar. 13, 2022), https://www.cnn.com/europe/live-news/ukraine-russia-putin-news-03-13-22/h_31431ec0d0acc2e9b12807abc196a6b1#:~:text=With%20the%20main%20bridge%20crossing%20the%20Irpina%20River,of%20the%20main%20bridge%20across%20the%20Irpina%20River.

¹⁷⁴ Shira Li Bartov, *Ukraine Using 'Hedgehogs' to Combat Russian Tanks*, NEWSWEEK (Mar. 10, 2022), <https://www.newsweek.com/ukraine-using-hedgehogs-combat-russian-tanks-1686936>.

¹⁷⁵ Liz Cookman, *On the road in eastern Ukraine, everywhere is the front line*, AL JAZEERA (Mar. 2, 2022), <https://www.aljazeera.com/news/2022/3/2/eastern-ukraine-mariupol-dnipro-russia-war>.

Meanwhile, by early March, reports and images of extensive flooding north of Kyiv along the Dnieper River emerged.^{176,177} Accounts of the cause of flooding vary,¹⁷⁸ but some sources claim that Ukraine deliberately released the waters to slow the advance of Russian ground forces.¹⁷⁹ While no doubt damaging to Ukrainian infrastructure, flooding may have contributed to the now infamous miles-long back up of a Russian armored column and saved the city of Kyiv.^{180,181,182}

Defensive preparatory destruction has been a regular part of warfare since ancient times. A recent study estimates that one-third of floods in a region of the Netherlands between the years 1500 and 2000 were a result of military strategic flooding.¹⁸³ Thought to be the largest scale act of defensive destruction, in 1938 Nationalist Chinese forces breached levees along the Huang He River to slow a Japanese advance.¹⁸⁴ The resulting flooding,

famine, and disease is estimated to have cost as many as 800,000 lives.

Despite radical changes in warfare across the ages, military doctrine has consistently advised defenders to resort to destruction to impede invasions and assaults. Current U.S. military doctrine prescribes a wide range of defensive and preventive preparations, many of which involve widespread destruction of objects, natural resources, and property.¹⁸⁵ Joint Publication 3-15, *Barriers, Obstacles, and Mine Warfare for Joint Operations*,¹⁸⁶ lists a number of obstacles that are used in defensive operations including demolition obstacles “created by the detonation of explosives.” Some examples include bridge demolitions, road craters, and abatis. Their purpose is to counter enemy mobility or to channel movement into an engagement area for later targeting.¹⁸⁷ Effective employment of demolition obstacles offers a compelling military advantage to the defending force.

¹⁷⁶ Reis Thebault & Dylan Moriarty, *Satellite images show flooding north of Kyiv in possible sign of ‘hydraulic warfar,’* WASH. POST (Mar. 9, 2022), <https://www.washingtonpost.com/world/2022/03/09/ukraine-intentional-flooding/>.

¹⁷⁷ @wammezz, X (FORMERLY TWITTER) (Mar. 8, 2022), <https://twitter.com/wammezz/status/1501240713975156742>.

¹⁷⁸ Timothy Bella, *Ukrainian agency, urging removal of road signs, posts fake photo with real message for Russia*, WASH. POST (Feb. 27, 2022), <https://www.washingtonpost.com/world/2022/02/26/russia-ukraine-war-news-updates/#link-7WOGHGTZPRE65H5F535MARHTEA>.

¹⁷⁹ Siobhán O’Grady & Karoun Demirjian, *Seemingly stuck Russian convoy hides mysteries*, WASH. POST (Mar. 7, 2022), <https://www.washingtonpost.com/national-security/2022/03/07/russian-convoy-ukraine/>.

¹⁸⁰ *Id.*

¹⁸¹ Luke McGee, *Here’s what we know about the 40-mile-long Russian convoy outside Ukraine’s capital*, CNN (Mar. 3, 2022), <https://www.cnn.com/2022/03/03/europe/russian-convoy-stalled-outside-kyiv-intl/index.html>.

¹⁸² Andrew E. Kramer, *They Flooded Their Own Village, and Kept the Russians at Bay*, N.Y. TIMES (Apr. 27, 2022), https://www.nytimes.com/2022/04/27/world/europe/ukraine-russia-war-flood-infrastructure.html?te=1&nl=the-morning&emc=edit_nn_20220428.

¹⁸³ Press Release, Eur. Geoscience Union, *Floods as war weapons—Humans caused a third of floods in past 500 years in SW Netherlands* (June 9, 2015), <https://www.egu.eu/news/174/floods-as-war-weapons-humans-caused-a-third-of-floods-in-past-500-years-in-sw-netherlands/>.

¹⁸⁴ Steven I Dutch, *The Largest Act of Environmental Warfare in History*, ENV’T & ENG’G GEOSCIENCE (2009) 15 (4) 287–297, <https://doi.org/10.2113/gsegeosci.15.4.287>.

¹⁸⁵ U.S. Dep’t of Def., Joint Publ’n 3-15, *Barriers, Obstacles, and Mine Warfare for Joint Operations* (2016), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_15.pdf?ver=E4f110ixlYTx2M2qO8vWYQ%3D%3D.

¹⁸⁶ *Id.*

¹⁸⁷ U.S. Dep’t Army, FM 3-34, *Engineer Operations* (2020), https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN31353-FM_3-34-000-WEB-1.pdf.

Attacks Distinguished

In relative terms, targeting law—the body of rules applicable to attacks during the conduct of hostilities—is among the more refined regimes of the law of war. Treaties and customary international law include extensive restraints on targeting operations. These include very basic rules such as the requirement to distinguish lawful targets from protected civilians and civilian property. They also include important definitions such as those of civilian persons¹⁸⁸ and of military objectives.¹⁸⁹ Targeting law also prescribes highly elaborate rules including, among others, a finely-wrought regime of precautionary measures that must be undertaken prior to and during strikes.¹⁹⁰

While perhaps eye-catching as prescriptions for the military operations generally, targeting rules lie behind an important threshold of application. In both its conventional and customary incarnation, targeting law applies only to operations that amount to attack.

Article 49 of Additional Protocol I to the 1949 Geneva Conventions (AP I) defines attacks as “acts of violence against the adversary, whether in offence or in defence.”¹⁹¹ This definition is widely regarded as customary and therefore applies to all States.

But it is also clear that only violence directed at an enemy implicates the rules applicable to attack. In fact, at the diplomatic conference that adopted Article 49, States convincingly

rejected a proposal to broaden the concept of attack by deleting the phrase “against the adversary” from its agreed definition (para. 1877).¹⁹² Therefore, violent acts resulting in destruction or damage conducted out of contact with an enemy or against objects under a force’s own control do not amount to attacks for purposes of targeting law. The legal upshot is to exempt these operations from the targeting law regime.

True, AP I intermingles into targeting law other protections applicable to non-attack operations, such as the requirement that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”¹⁹³ But the term attack remains a critical definitional threshold for much of targeting law, appearing consistently in expressions of targeting rules. Applying targeting rules to operations short of attack amounts to fundamental legal error.

Turning to the present conflict, although undoubtedly violent acts, many of Ukraine’s destructive defensive preparations are likely not regulated by targeting law. Because most of Ukraine’s preparatory demolition of bridges was conducted against its own property, not controlled by enemy forces, it is unlikely those operations amounted to attacks in the legal sense. Ukraine’s destruction of most bridges preceded their use or capture by Russian forces. Additionally, although directed to accomplish the legitimate military objective

¹⁸⁸ AP I, *supra* note 7, art. 50.

¹⁸⁹ *Id.* art. 52.

¹⁹⁰ *Id.* art. 57.

¹⁹¹ *Id.* art. 49.

¹⁹² Additional Protocols Commentary, *supra* note 25, ¶ 1877.

¹⁹³ AP I, *supra* note 7, art. 57.

of slowing enemy advance, Ukrainian flooding operations were not carried out in contact with enemy forces, were not directed at the enemy itself, and were not directed at objects belonging to or controlled by Russia. Therefore, they do not cross the attack threshold that activates rules applicable to targeting operations.

The concept of attack features in international criminal law as well. By comparison, however, international criminal law uses the term attack more broadly. For instance, Article 8 of the Rome Statute of the International Criminal Court (ICC) identifies war crimes including “[i]ntentional attacks against” a variety of persons and objects seemingly without regard to their relationship to an adversary.¹⁹⁴

Debate over the legal significance of the term flared recently at the ICC. An appeals chamber of the Court addressed the extent to which the Rome Statute’s use of the term “attack” should be equated with the targeting law concept of attack but did not produce an unequivocal answer.¹⁹⁵ The Court’s judgment was at best a “stalemate”¹⁹⁶ on the definition of attack under the Statute, leaving its meaning for purposes of the Rome Statute unclear. *Articles of War* hosted a series of posts that addressed both sides of the ICC attack question in the context of criminal enforcement against individual persons.¹⁹⁷

At present, the soundest practical approach is to equate the meaning of attack between the law of war and the international criminal law instruments that enforce it. But the issue is certainly ripe for expressions¹⁹⁸ of *opinio juris*¹⁹⁹ (a sense of legal obligation) by States.

Destruction Distinguished

Failure to qualify as attack does not render an operation unregulated, however. The law of war includes elaborate regulatory regimes applicable to a broad range of military operations short of attack, including but not limited to internment, interrogation, requisition, confiscation, evacuation, and spying. The most significant difference between these non-attack-related regimes and the law of targeting may be that the former regimes generally do not preclude directing efforts at civilians and civilian objects. Although significant limits and treatment obligations apply, belligerents may intern civilians, they may requisition civilian property, and they may collect information on civilians consistently with the law of war.

Alongside its regulation of other non-attack operations, the law of war addresses destruction most directly in Regulations annexed to the 1907 Hague Convention IV. Article 23 indicates “it is especially forbidden . . . [t]o destroy or seize the enemy’s property unless such destruction be

¹⁹⁴ Rome Statute, *supra* note 97, art. 8.

¹⁹⁵ Prosecutor v. Ntaganda, ICC-01/04-02/06 A A2, Judgment (Mar. 30, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_03027.PDF.

¹⁹⁶ Ori Pomson, *Ntaganda Appeals Chamber Judgment Divided on Meaning of “Attack,”* LIEBER INST. L. & WARFARE: ARTICLES OF WAR (May 12, 2021), <https://lieber.westpoint.edu/ntaganda-appeals-chamber-judgment-divided-meaning-attack/>.

¹⁹⁷ *Attack Symposium*, LIEBER INST. L. & WARFARE: ARTICLES OF WAR, <https://lieber.westpoint.edu/category/attack-symposium/>.

¹⁹⁸ Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 INT’L L. STUD. 171 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605309.

¹⁹⁹ *Opinio juris*, OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100251755>.

imperatively demanded by the necessities of war” (para. g).²⁰⁰ Meanwhile, the 1949 Geneva Conventions address destruction in the context of belligerent occupation, prohibiting it “except where such destruction is rendered absolutely necessary by military operations.”²⁰¹ The Conventions also include “extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly” as a grave breach.²⁰² And the ICC Rome Statute enumerates a war crime nearly identical to the Hague Regulations Article 23 expression.

Military necessity is the operative limit on demolitions or destruction of property outside the context of attack. It is a notoriously vague standard.²⁰³ A widely shared elaboration advises, “*Military necessity* may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible” (§ 2.2).²⁰⁴ (emphasis in original). Another influential source indicates, “Military necessity is now defined as “the principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war” (§ 2.2).²⁰⁵

But the Hague Regulations’ reference to destruction that is “imperatively demanded” likely indicates a heightened necessity standard. In that sense, bare necessity is

insufficient to justify destruction of property; the fact that destruction is merely useful or conducive to military success would not justify it. Under this view imperative demand would likely require that no other option or act short of destruction be available to a belligerent to achieve a given war aim—in other words, the belligerent is compelled under the circumstances to destroy the object. Because destruction is often irreversible, prudence likewise counsels a heightened necessity standard for destruction. The U.S. Department of Defense *Law of War Manual* appears to adopt such a heightened view of necessity with respect to destruction. The *Manual* notes that when law of war instruments refer to absolute or imperative necessity, “*military necessity* must not be conflated with mere convenience” (§ 2.2.2.2)²⁰⁶ (emphasis in original).

Despite its apparent demand for a heightened showing of necessity, the law of war destruction standard reflects in many senses a less demanding legal standard than its counterpart applicable to attack operations. First and foremost, the destruction standard admits operations directed at civilian property. As distinct from operations that amount to attack, destructive operations that do not amount to attack are not limited to military objectives. Attacks may only be directed against objects that make an effective contribution to military action such that

²⁰⁰ HR IV, *supra* note 73, art. 23(g).

²⁰¹ *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, ICRC INT’L HUMANITARIAN L. DATABASES, art. 53.

²⁰² *Id.* art. 147.

²⁰³ NOBUO HAYASHI, *MILITARY NECESSITY: THE ART, MORALITY AND LAW OF WAR* (2020), <https://doi.org/10.1017/9781108689359>.

²⁰⁴ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 2.2.

²⁰⁵ U.K. Ministry of Def., JSP 383, *Manual of the law of armed conflict* (2013), <https://www.gov.uk/government/collections/jsp-383>.

²⁰⁶ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 2.2.2.2.

if destroyed they offer a definite military advantage. While the necessity component of the latter prong seems encompassed by the destruction rule's reference to imperative demands of military necessity, the former effective contribution prong is not. To destroy an object under his own control, a commander need not articulate how that object has been or imminently will make an effective contribution to enemy action.

Second, the destruction standard does not feature an expressed proportionality component. The law of war rules that expressly forbid or require cancellation of attacks expected to cause harm to civilians and civilian objects that is excessive in relation to anticipated military advantage lie behind the targeting law attack threshold. Only if one regards proportionality as either an uncoded rule of custom applicable to all military operations or if one regards the overarching principle of proportionality (§ 2.4)²⁰⁷ to have a rule-like effect, can one say that proportionality calculations are required for mere destruction or demotion of objects.

Third, and related, the destruction rule does not feature the elaborate procedural measures of precaution that are an increasingly emphasized aspect of targeting law. While attacks must be preceded by warnings when feasible, by feasible efforts at target verification, including for Parties to AP I a presumption of civilian status, and by feasible measures to minimize harm to civilians and civilian objects, no similar precautionary measures are explicitly required by the destruction rule.

All the same, the heightened necessity component of the destruction rule surely carries *some* inherent or implied obligations of a procedural nature. That is, to determine whether destruction is indeed imperatively demanded, a belligerent must identify a specific military advantage to be gained, must make a reasonable effort to determine the measures available to secure that advantage, and must conclude that destruction is required, or perhaps, the *only* way to achieve the required effect on the enemy.

Finally, the Hague Regulations destruction standard is notable for its limited scope of application. By its terms, it only applies to operations against enemy property. That term most clearly encompasses objects belonging to an adversary belligerent and its population. The rule does not reach destruction of a belligerent State's own property or of property belonging to its population. Similarly, destruction of a property belonging to a co-belligerent or neutral State's property or property of its citizens does not fall within the ambit of the rule. The rule's enemy-friendly distinction presumably rests on an assumption that other legal regimes including municipal law, the law of neutrality, and general public international law regulate destruction of the property not belonging to an enemy belligerent.

Some military legal doctrine papers over the attack-destruction distinction. For example, U.S. legal doctrine advises that applying attack rules to destructive acts that do not amount to attack may provide commanders and their soldiers effective legal top cover

²⁰⁷ *Id.* § 2.4.

(§5.17.2.1).²⁰⁸ The U.S. view appears to conclude that any destruction of property that satisfies the more restrictive targeting law regime would necessarily meet the comparatively permissive military necessity standard strictly applicable to demolition or destruction. The *Manual* observes, “if sufficient military necessity exists to justify attacking an object as reflected by that object meeting the definition of military objective, then imperative military necessity would also exist to justify seizing or destroying that object measures short of attack” (§5.17.2.1). While perhaps a useful measure to guarantee legal compliance, it should be emphasized that such doctrinal policies cannot alter the applicable *legal* landscape. Enforcement efforts, such as those underway with respect to the Ukraine conflict, must apply the prevailing law of war attack-destruction distinction, including its comparatively stark necessity requirement, carefully and rigorously.

Conclusion

In sum, destruction of a belligerent’s own property, public or private, when out of contact with enemy forces does not implicate the targeting law regime of the law of war. A belligerent’s destruction of *enemy* property while out of contact, and not in the status of an occupying power, is expressly regulated by the Hague Regulations Article 23(g) imperative military necessity standard.

Ukraine’s extensive defensive operations undertaken to prevent Russian advances,

and their apparent effectiveness, confirm the important role that defensive destruction and demolitions conducted out of contact with enemy forces continue to play in armed conflict. While the extensively destructive and violent nature of these operations may reflexively or intuitively attract analysis under the law of targeting, the law of war includes a distinct, though comparatively less-developed, legal regime applicable to destruction that does not amount to attack on an enemy force. That regime applies only to destruction of enemy property and prohibits all destruction not imperatively demanded by military necessity.

To the consternation of some, to the comfort of others, many law of war rules are highly ambiguous. By comparison with the carefully honed regime of modern targeting law, law of war provisions applicable to defensive destruction present an admittedly indeterminate regime of rules, governed at its essence by the notoriously vague, and often morally fraught, concept of military necessity.²⁰⁹ But, far from an oversight or “gap” in the law, the attack-destruction distinction appears to have been a deliberate calculation by States. The vital and highly commendable work of enforcing the law of war in the Ukraine context is well-advised to apply the attack-destruction distinction carefully.



²⁰⁸ *Id.* § 5.17.2.1.

²⁰⁹ HAYASHI, *supra* note 203.

THE THeMIS BOUNTY PART I: SEIZURE OF ENEMY PROPERTY

by Christopher Malis and Hitoshi Nasu | Dec 12, 2022

Modern technological advances play a critical role on the battlefield. They increase the efficiency and lethality of attacks, enhance situational awareness, protect friendly forces, and increase the chance of survival for victims of war. Recently, Azerbaijan received praise²¹⁰ for its effective use of Turkish Bayraktar TB2 drones and loitering munitions to exploit the weaknesses of Armenian air defense assets during the 2020 Nagorno-Karabakh conflict.²¹¹ Ukraine has also leveraged technological capabilities, such as the Switchblade²¹² and GIS Arta,²¹³ to defend itself from Russian invasion. The demonstrated value of these advanced systems makes them a prime target for seizure by enemy forces.

The Tracked Hybrid Modular Infantry System (THeMIS) is a further example of new technology used to gain military advantage. THeMIS is a small, tracked unmanned vehicle that is 6.5 feet long and 3 feet high and manufactured by an Estonian defense contractor, Milrem Robotics.²¹⁴ Its

diesel-electric engine can propel THeMIS to nearly 22 mph. With a 1,500-pound payload, THeMIS can be configured to meet a variety of functions, such as a drone launcher, a firefighting tool, a medevac, and an anti-tank missile launcher.

It forms part of the EU research project on Integrated Modular Ground Systems,²¹⁵ which develops the autonomous properties of unmanned systems and human-machine cooperation. This advanced technology allows THeMIS to be remotely piloted or to operate in a “follow” mode—autonomously traveling behind a specific person. Milrem Robotics has already delivered one THeMIS vehicle to an unspecified Ukrainian charitable organization in a casualty evacuation configuration to help with labor-intensive casualty evacuation activities.²¹⁶ Germany has paid for an additional fourteen THeMIS vehicles scheduled to be delivered to Ukraine by the end of the year,²¹⁷ to be used for both casualty evacuation and route clearance.

²¹⁰ Robyn Dixon, *Azerbaijan's drones owned the battlefield in Nagorno-Karabakh—and showed future of warfare*, WASH. POST (Nov. 11, 2020), https://www.washingtonpost.com/world/europe/nagorno-karabakh-drones-azerbaijan-aremenia/2020/11/11/441bcbd2-193d-11eb-8bda-814ca56e138b_story.html.

²¹¹ Eado Hecht, *Drones in the Nagorno-Karabakh War: Analyzing the Data*, 7 Mil. Strategy Mag. 4, ¶ 31–37 (2022), <https://www.militarystrategy magazine.com/article/drones-in-the-nagorno-karabakh-war-analyzing-the-data/>.

²¹² *Switchblade 300 Block 20 Loitering Munition*, AEROVIRONMENT, <https://www.avinc.com/lms/switchblade>.

²¹³ *GIS “ARTA” automated command and control system*, GIS ARTA, <https://gisarta.org/en/>.

²¹⁴ Kelsey D. Atherton, *This Estonian Tankette Is a Modular Body for War Robots*, POPULAR SCI. (Mar. 3, 2016), <https://www.popsi.com/estonian-tankette-is-modular-body-for-war-robots/>.

²¹⁵ Pekka Kinnunen, “*Ei tarvitse kahvitaukoja*”—*puolustusvoimat esitteli miehittämättömän maa-ajoneuvon ja dronen yhteistoimintaa tiedustelussa* [“No need for coffee breaks”—the defense forces presented the joint operation of an unmanned ground vehicle and a drone in reconnaissance], YLE (Mar. 30, 2022), <https://yle.fi/a/3-12382919>.

²¹⁶ Alexander Stronell, *Ukraine conflict: THeMIS robot delivered to Kyiv as Russia announces bounty for system's capture*, JANES (Sept. 5, 2022), <https://www.janes.com/defence-news/news-detail/ukraine-conflict-themis-robot-delivered-to-kyiv-as-russia-announces-bounty-for-systems-capture>.

²¹⁷ Charles R. Davis, *Ukraine is getting more THeMIS robots, ground vehicles that Russian troops have been offered \$16,000 to capture*, BUS. INSIDER (Nov. 29, 2022), <https://www.businessinsider.com/ukraine-to-receive-themis-robots-russian-troops-encouraged-to-capture-2022-11?amp>.

To fill gaps in Russian technological knowledge, Russia's Centre for Analysis of Strategies and Technologies (CAST) has offered a cash reward for the capture of a THeMIS.²¹⁸ CAST recognizes that Russia is lagging in the development of autonomous vehicles and intends to use a captured THeMIS to speed the development of Russian technology.

An attempt to steal cutting-edge enemy technology with a cash bounty might seem a clever strategic move to exploit wartime opportunities. But it also raises questions about the legality of seizing and appropriating enemy property under international law. This post will address whether such action is lawful during armed conflict. Could a bounty and seizure be justified by the necessities of war, or is it more akin to prohibited pillage? If the sole purpose of using THeMIS is medical transportation, could its seizure be justified based on the necessities of war?

To address these questions, care must be taken to distinguish two separate issues that are entangled in the bounty against THeMIS: one regarding the legality of seizing the THeMIS vehicle itself, and the other as to whether Russia can then claim ownership of the THeMIS as booty of war and steal technology used by the adversary. This distinction is crucial as it could be the case that the THeMIS is subject to lawful seizure but without the capturing party being entitled to claim ownership. This post

addresses the first issue, explaining how the necessities of war and humanitarian interests in the protection of medical equipment are balanced under the law of war concerning the seizure of enemy property. A second post will then discuss whether, upon seizure, Russia could claim ownership of the property or otherwise appropriate it for research purposes.

Seizure of Enemy Property

It has long been established that putting a price on the head of an enemy individual is treacherous and forbidden under the law of war.²¹⁹ However, there is no equivalent prohibition for a bounty issued against enemy property. Consequently, it is problematic to assert that Russia is acting in violation of the law of war for the actions taken by CAST in issuing a bounty against THeMIS. Problems arise instead if the Russian military were to act on such a bounty by seizing the THeMIS vehicle and transferring it to CAST for research purposes.

The seizure of enemy property must be distinguished from launching an attack in warfighting. Many readers of this post may be familiar with the notion of attack, defined in Article 49(1) of Additional Protocol I to the Geneva Conventions as an act of violence against an adversary,²²⁰ whether in offense or in defense. It is a specific type of military operation to which various rules of targeting law apply, such as the requirements

²¹⁸ Charles R. Davis, *Russian think tank offers \$16,000 bounty for the capture 'by any means' necessary of a robotic vehicle deployed in Ukraine*, BUS. INSIDER (Sept. 7, 2022), <https://www.businessinsider.com/russian-researchers-offer-bounty-for-capture-of-themis-robot-ukraine-2022-9>.

²¹⁹ Michael N. Schmitt, *Assassination in the Law of War*, LIEBER INST. L. & WARFARE: ARTICLES OF WAR (Oct. 15, 2021), <https://lieber.westpoint.edu/assassination-law-of-war/>.

²²⁰ AP I, *supra* note 7, art. 49.

of distinction, proportionality, and the duty to exercise feasible precautions in attack.

Seizure, on the other hand, is the taking of property as part of a military operation when not in contact with the enemy that does not necessarily result in destruction or damage. Professor Sean Watts and Colonel Winston Williams drew a distinction between an attack and the mere destruction of property, concluding that the latter is not regulated by targeting law.²²¹ Similarly, Professor Gary Corn explained in a prior post²²² that seizure and destruction of property are regulated distinctly under the law of war and are not subject to targeting law requirements.

The legality of seizing or destroying enemy property depends instead on whether there is an imperative demand due to the necessities of war (U.S. Department of Defense, *Law of War Manual*, § 5.17.2;²²³ 1907 Hague Regulations, art. 23(g);²²⁴ International Committee of the Red Cross (ICRC) *Customary International Humanitarian Law Study*, Rule 50²²⁵). In principle, certain property, such as medical facilities, hospital ships, and private real or personal property in occupied territory, enjoys protection under

the 1949 Geneva Conventions (GC I, arts. 19, 33, and 34; GC II, arts. 22–28, 38, and 39; GC IV, art. 53). Absent imperative demand by the necessities of war, extensive destruction and appropriation carried out against such property could constitute a grave breach of these Conventions (GC I, art. 50;²²⁶ GC II, art. 51;²²⁷ GC IV, art. 147²²⁸) and a war crime under Article 8(2)(b)(xiii) of the 1997 Rome Statute of the International Criminal Court.²²⁹

Imperative demand by the necessities of war aligns closely with the concept of military necessity (U.S. Department of Defense *Law of War Manual*, § 5.17.2²³⁰). This military necessity standard has been acknowledged since Francis Lieber adopted it in the first modern codification of the laws of war. It consists “in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war” (General Order No. 100: The Lieber Code, art. 14²³¹). Military necessity is not restricted to military demands that arise in a specific situation but encompasses the broader imperatives of winning the war as quickly and efficiently as possible (2019 *Commander’s Handbook on the*

²²¹ Sean Watts & Winston Williams, *Ukraine Symposium—Destructive Counter-Mobility Operations and the Law of War*, ARTICLES OF WAR (May 5, 2022), <https://lieber.westpoint.edu/destructive-counter-mobility-operations-law-of-war/>.

²²² Gary Corn, *Ukraine Symposium—The Ukraine Conflict, Smart Phones, and the LOAC of Takings*, ARTICLES OF WAR (Apr. 7, 2022), <https://lieber.westpoint.edu/ukraine-conflict-smart-phones-loac-of-takings/>.

²²³ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.17.2.

²²⁴ HR IV, *supra* note 73, art. 23(g).

²²⁵ *Destruction and Seizure of Property of an Adversary*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 50, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule50>.

²²⁶ GC I, *supra* note 1, art. 50.

²²⁷ GC II, *supra* note 47, art. 51.

²²⁸ GC IV, *supra* note 49, art. 147.

²²⁹ Rome Statute, *supra* note 97, art. 8(2)(b)(xiii).

²³⁰ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.17.2.

²³¹ U.S. Dep’t War & Francis Lieber, Gen. Ord. No. 100, A Code for the Government of Armies in the Field (1863).

Law of Land Warfare, § I-27;²³² 1914 Rules of Land Warfare ¶¶ 9-11; *NATO Glossary of Terms and Definitions*, p. 2-M-6²³³).

It is thus plausible to justify seizing any property located in enemy territory as enemy property regardless of its ownership, including enemy land, buildings, or means of transport for military use (U.S. Department of Defense, *Law of War Manual*, § 5.17.2.2²³⁴). As such, it would be lawful to seize THeMIS for use in military operations, for example, by converting it into a reconnaissance vehicle. However, military necessity seems dubious if the purpose of the seizure is to steal advanced technology and produce a Russian copy of THeMIS.

In essence, the question turns on how broadly the military necessity standard could be stretched to justify a seizure under the modern condition of warfare, where new technologies are increasingly playing a critical role. Seizing a THeMIS vehicle itself does not, on its face, appear to be indispensable for securing the ends of war. On the other hand, it is conceivable that acquisition of the technology used in the vehicle could contribute to Russia's broader goal of eventually winning the war by assisting Russia to develop a wide range of military capabilities, such as autonomous armored personnel carriers, anti-aircraft platforms, or autonomous armored vehicles. Ultimately, as will be explored in the second post, the legality of seizure for such purposes depends on whether the taking can be justified as booty of war or requisition.

Seizure of Medical Equipment

A private charitable organization is using the first THeMIS vehicle delivered to Ukraine to evacuate casualties. Future vehicles will be used for both casualty evacuation and tasks such as route clearance. Even if the necessities of war imperatively demand seizure of THeMIS, its function as a medical transport raises the question of whether the vehicle is protected from seizure.

Article 35 of Geneva Convention I provides:

Transports of wounded and sick or of medical equipment shall be respected and protected in the same way as mobile medical units.

Should such transports or vehicles fall into the hands of the adverse Party, they shall be subject to the laws of war, on condition that the Party to the conflict who captures them shall in all cases ensure the care of the wounded and sick they contain.

The civilian personnel and all means of transport obtained by requisition shall be subject to the general rules of international law.

This provision applies to medical transports on land used by armed forces, whether those transports belong to the armed forces or are acquired from civilians (ICRC 2016 Commentary on Geneva Convention I, para. 2418²³⁵). Article 21 of Geneva Convention IV applies the same protection to medical

²³² U.S. DEP'T OF ARMY, FIELD MANUAL 6-27, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE ¶ I-27, 2-131 (Aug. 7, 2019) (Change 1, Sep. 20, 2019) [hereinafter FM 6-27].

²³³ North Atlantic Treaty Organization, NATO Standardization Agency, AAP-06, NATO Glossary of Terms and Definitions (English and French) (2013), https://www.jcs.mil/Portals/36/Documents/Doctrine/Other_Pubs/aap6.pdf.

²³⁴ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.17.2.2.

²³⁵ GC I Commentary of 2016, *supra* note 9, para. 2418.

transports used for civilian casualties.²³⁶ Articles 12 and 21 of Additional Protocol I to the Geneva Conventions extend this protection to civilian medical units²³⁷ and vehicles²³⁸ when a party to the conflict recognizes the medical activity. The duty to “respect and protect” medical transports is considered binding under customary international law, whether these are used by military forces or for civilian medical activities (U.S. Department of Defense, The Joint Chiefs of Staff Review of AP I, pp. 5–6; ICRC *Customary International Humanitarian Law Study*, Rule 29²³⁹).

Here, the duty to “respect and protect” is broader than a simple prohibition of direct attacks aimed at medical transports. It also prohibits arbitrarily obstructing passage.²⁴⁰ The U.S. interpretation of “respect and protect” supports this interpretation, stating that a medical activity must not be “unnecessarily interfered with” (§ 7.3.3 fn. 56).²⁴¹ Similarly, Germany recognizes that the “unhampered employment”²⁴² of medical service vehicles must be ensured at all times. Israel also acknowledges a duty to refrain from interference with the administration of medical aid.²⁴³

According to this interpretation, the duty to “respect and protect” medical equipment prohibits Russia from seizing the THeMIS

vehicle while it evacuates the wounded and sick. For example, such an engagement is prohibited when THeMIS is actively used to ferry wounded soldiers or civilians away from the location of an attack. An attempt to seize the vehicle while it is moving with wounded persons constitutes an impermissible interference with a medical evacuation.

One might argue that a seizure is not arbitrary or unnecessary if it is imperatively demanded by the necessities of war, as discussed previously. Indeed, Article 35 of Geneva Convention I notes that such transports or vehicles are subject to the laws of war upon capture when “such transports or vehicles fall into the hands of the adverse Party.” The question then turns on whether Russia could argue that the THeMIS vehicle has “fallen into their hands” when Russian forces actively search for it and deliberately interfere with its medical activity.

The U.S. Department of Defense *Law of War Manual* interprets this provision to mean that an adverse party may seize (military) medical transports as enemy property so long as the wounded and sick are cared for and distinctive emblems are removed (§ 7.11.2).²⁴⁴ Likewise, Norway’s *LOAC Manual* permits the seizure of “medical materials like ambulances and field hospitals, subject to the condition that sick and injured enemy soldiers, and civilians,

²³⁶ GC IV, *supra* note 49, art. 21.

²³⁷ AP I, *supra* note 7, art. 12.

²³⁸ *Id.* art. 21.

²³⁹ *Medical Transports*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 29, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule29>.

²⁴⁰ *Id.*

²⁴¹ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 7.3.3.

²⁴² *Medical Units*, ICRC INT’L HUMANITARIAN L. DATABASES, Practice Relating to Rule 28, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule28>.

²⁴³ *Id.*

²⁴⁴ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 7.11.2.

must be provided with necessary care” (§ 9.13).²⁴⁵ By acknowledging the presence of wounded persons, this condition could be seen as contemplating a situation where a medical transport is seized while actively engaged in its mission.

However, such an interpretation appears contrary to the object and purpose of the protection accorded to medical units and transports. The term “fall into the hands of the adverse party” also appears in Article 14 of Geneva Convention I concerning the protection of the wounded and sick as prisoners of war²⁴⁶ and in Article 28, which addresses the retention of medical and religious personnel.²⁴⁷ In its 2016 Commentary on Geneva Convention I, the ICRC distinguishes between these two provisions,²⁴⁸ despite their almost identical wording, in light of the obligation to search for and collect the wounded and sick under Article 15 of Geneva Convention I.²⁴⁹ The absence of such an obligation in relation to medical and religious personnel indicates the incidental nature of their capture and possible subsequent retention (para. 2163). In the same vein, it would be reasonable to conclude that the protection of medical transports is waived only when the seizure is incidental to a military operation. Like a “medical hunt,”²⁵⁰ actively searching for medical transports to capture them would be incompatible with the object of Article 35.

Both medical transports and medical units are protected based on their function—as a component of casualty evacuation and treatment. Their seizure is only permissible when it is incidental. For example, a Russian offensive might reach an area where THeMIS is stored and not in service. Alternatively, Russia could incidentally seize a THeMIS vehicle in active use as the battle lines shift. These scenarios differ from the conduct of a military operation with the express purpose of capturing THeMIS. Based upon the bounty for Russian forces to capture THeMIS “by any means necessary,” it is likely that a Russian seizure would not be incidental, but rather it would violate the law of war.

The additional fourteen THeMIS vehicles scheduled for delivery to Ukraine by the end of the year will be used for both casualty evacuation and route clearance. It is unclear whether some vehicles will be used exclusively for medical transport and others for route clearance, or whether the THeMIS vehicles will share duties. In the latter scenario, the protections afforded to medical transports would not apply because Article 35 requires vehicles to be assigned exclusively to the transportation of the wounded and sick or of medical equipment.²⁵¹

²⁴⁵ Norwegian Def.Univ. Coll./Norwegian Def. Command & Staff, *MANUAL OF THE LAW OF ARMED CONFLICT*, at § 9.13 (English ed. 2018) (Dec. 28, 2013), https://usnwc.libguides.com/ld.php?content_id=47416967 [hereinafter Norway LOAC Manual 2013].

²⁴⁶ GC I, *supra* note 1, art. 14.

²⁴⁷ *Id.* art. 28.

²⁴⁸ GC I Commentary of 2016, *supra* note 9, art. 28.

²⁴⁹ GC I, *supra* note 1, art. 15.

²⁵⁰ GC I Commentary of 2016, *supra* note 9, ¶ 2163.

²⁵¹ *Id.* ¶¶ 2372–2373

Concluding Thoughts

It is doubtful that the seizure of a THeMIS vehicle serving as a medical transport could be justified under the modern law of war. Its use as a medical transport protects it from seizure unless it is incidentally captured during a military operation. Even if there are imperative demands for seizing it due to the necessities of war, Russia would be prohibited from deliberately interfering with the medical function that THeMIS is performing while actively engaging in evacuating wounded persons.

Such vehicles, when actively engaged, provide a service that directly supports a primary purpose of the Geneva Conventions—to protect wounded soldiers and civilians. Intercepting medical transports creates a grave risk that lifesaving treatment will be interrupted or delayed. Modern military medicine has succeeded by focusing on the speed with which lifesaving care can be brought to bear.²⁵² As technology continues

to evolve, more advanced tools will become available to evacuate and treat soldiers on the battlefield.²⁵³ A greater awareness regarding the applicability of these legal protections to unmanned vehicles is thus significant.

However, the illegality of seizure itself does not resolve the question of whether, upon capture, the technology within THeMIS can be studied by Russia to improve their military capabilities. As noted above, Article 35 of Geneva Convention I provides that such transports are subject to the laws of war upon capture. This body of law refers to the rules on booty of war and requisition. In other words, the application of these rules decides whether Russia can confiscate the medical transport and treat it as their own or otherwise use it for their service should it fall into the hands of Russian troops. A subsequent post will address this issue by considering if and to what extent the law of war extends its reach to the protection of enemy technology.



²⁵² Wynand Kortterink, *100 Years of changing combat, changing health care*, NATO REV. (June 23, 2014), <https://www.nato.int/docu/review/articles/2014/06/23/100-years-of-changing-combat-changing-health-care/index.html>.

²⁵³ Janet A. Aker, *How drones will transform battlefield medicine, save lives*, AIR FORCE (July 17, 2022), <https://www.af.mil/News/Article-Display/Article/3095337/how-drones-will-transform-battlefield-medicine-save-lives/>.

THE THEMIS BOUNTY PART II: STEALING ENEMY TECHNOLOGY

by Christopher Malis and Hitoshi Nasu | Dec 16, 2022

In Part I of this post,²⁵⁴ we considered whether the seizure of the Tracked Hybrid Modular Infantry System (THEMIS)²⁵⁵ by Russian troops on the battlefield of Ukraine, acting on a bounty issued by Russia's Centre for Analysis of Strategies and Technologies (CAST), could be justified under the law of war. We concluded that THEMIS is protected from seizure during active use as a medical transport unless it is incidentally captured during a military operation.

Ordinarily, belligerents might execute a battlefield seizure in order to obtain a near-term military advantage. However, due to the strategic and tactical benefits that technological advantages offer, belligerents are likely to find that the autonomous technologies of an unmanned system, such as video tracking systems and multi-sensor intelligence gathering capabilities, are far more valuable than the ground vehicle itself. While the fact that technology is useful for military purposes is not itself relevant to the law, it introduces a different motive for seizure, that is, replication or dissemination

to private technology sectors rather than for direct military use.

This calls into question whether the law of war extends its reach to the protection of technology held by an enemy State and its civilians. The significance of this issue is obvious when States increasingly safeguard advanced technologies and protest the theft of intellectual property in peacetime.²⁵⁶ The Russian government has issued a decree²⁵⁷ allowing Russian businesses to use the intellectual property rights from “unfriendly countries”²⁵⁸ without paying compensation. And while numerous prosecutions have been brought against entities tied to the People's Republic of China for intellectual property theft,²⁵⁹ these acts might become lawful once an international armed conflict is triggered.

As we emphasized in our previous post, the rules of seizure under the law of war do not necessarily give rise to an entitlement to enemy property or the right to acquire its ownership. Rather, the question turns on whether the property, including the technology as an integral part, can be claimed as “booty of war” or is subject to requisition,

²⁵⁴ Christopher Malis & Hitoshi Nasu, *Ukraine Symposium—The THEMIS Bounty Part I: Seizure of Enemy Property*, LIEBER INST. L. & WARFARE: ARTICLES OF WAR, <https://lieber.westpoint.edu/themis-bounty-part-i-seizure-enemy-property/>.

²⁵⁵ Atherton, *supra* note 214.

²⁵⁶ H.R. 824, 117th Cong. (2021).

²⁵⁷ *Impact of Russia's Intellectual Property Decree Against Businesses from “Unfriendly Countries,”* LEWIS BRIBOIS (May 11, 2022), <https://lewisbrisbois.com/newsroom/legal-alerts/impact-of-russias-intellectual-property-decree-against-businesses>.

²⁵⁸ Cici Cui & Eirene Vlahogiannis, *Intellectual Property Rights in Wartime*, ALLENS LINKLATERS (May 5, 2022), <https://www.allens.com.au/insights-news/insights/2022/05/intellectual-property-rights-in-wartime/>.

²⁵⁹ U.S. Dep't Justice Nat'l Sec. Div., *Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018* (Nov. 19, 2021), <https://www.justice.gov/archives/nsd/information-about-department-justice-s-china-initiative-and-compilation-china-related>.

meaning an official order laying claim to the use of property. If neither of these can justify the taking, it would be prohibited as pillage. This post explains how these rules operate for the appropriation of THeMIS vehicles in Ukraine and the technology within them under the law of war. Any legal issues and implications associated with intellectual property rights protected under national law are beyond the scope of this post.

Booty of War

There is a long tradition of “war booty,” allowing belligerent parties to claim any movable public property they seize on the battlefield as their own property. When it is claimed as a booty of war, the transfer of title over the property is automatic and, unlike prize claims against merchant vessels, does not require adjudication for the transfer of title (Dinstein, pp. 323–334²⁶⁰). Although there is a view that States should abandon this practice altogether,²⁶¹ both Russia and Ukraine are justified in collecting and using weapons and military equipment left behind by opposing forces after withdrawal from the battlefield.²⁶²

However, the modern law of war remains unsettled when it comes to taking ownership of movable private property after it is captured on the battlefield. Thus, views

might be divided as to whether the THeMIS vehicle, once seized on the battlefield, can be claimed as booty of war where the title vests in the capturing state,²⁶³ considering that the unmanned vehicle belongs to a charitable organization, rather than the Ukrainian government.

According to the U.S. Department of Defense *Law of War Manual*, war booty can be claimed against any movable public property that belongs to an enemy State or an agency of that State, excluding private property on the battlefield.²⁶⁴ However, the U.S. position makes an exception when the private property is susceptible to “direct military use; i.e., it is necessary and indispensable for the conduct of war” (§ 5.17.3). This category expressly includes means of transportation, such as THeMIS. For Denmark, whether the seized equipment is used in military operations is determinative, rather than who owns it (p. 408).²⁶⁵ It is therefore plausible to claim a THeMIS vehicle as booty of war if an adversary uses it directly to conduct military operations. In *Al Nawar v. Ministry of Defence*, Judge Shamgar of the Israeli High Court went further by broadly labeling as war booty all private property “actually used for hostile purposes (*or which may be useful for hostile purposes*)” (emphasis added).²⁶⁶

²⁶⁰ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 323–334 (2022).

²⁶¹ Andrew Clapham, *On War*, LIEBER INST. L. & WARFARE: ARTICLES OF WAR (Mar 5, 2022), <https://lieber.westpoint.edu/on-war/>.

²⁶² Yaroslav Trofimov, *Ukraine’s New Offensive Is Fueled by Captured Russian Weapons*, WALL ST. J. (Oct. 5, 2022), <https://www.wsj.com/articles/ukraines-new-offensive-is-fueled-by-captured-russian-weapons-11664965264>.

²⁶³ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.17.3.

²⁶⁴ *Id.*

²⁶⁵ Danish Ministry of Def., *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (Jes Rynkeby Knudsen ed., 2016) (Dec. 29, 2023), https://usnwc.libguides.com/ld.php?content_id=59166472 [hereinafter *Danish Military Manual*].

²⁶⁶ *Al Nawar v. Minister of Defence*, H.C. 574/82, Judgment, Sup. Ct. Isr., <https://casebook.icrc.org/case-study/israel-al-nawar-v-minister-defence>.

On the other hand, Australia (§ 7.45),²⁶⁷ Canada (§ 622),²⁶⁸ New Zealand (§ 8.10.36),²⁶⁹ and Norway (§§ 9.13, 9.40)²⁷⁰ restrict booty of war to enemy movable public property captured or found on a battlefield. According to this position, THeMIS, as private property, does not become booty of war, and therefore the property rights over it do not automatically transfer to the capturing force, even if there is a potential for military application.

Under either view, booty of war, when its seizure is justified by military necessity, belongs to the capturing State and does not become the property of private individuals or entities (U.S. Department of Defense, *Law of War Manual*, § 5.17.3.2).²⁷¹ If individual soldiers seize a THeMIS vehicle for private use or personal gain (including the financial gain that the bounty promises), the conduct is prohibited as pillage (1907 Hague Regulations, art. 47;²⁷² 1949 GC IV, art. 33;²⁷³ U.S. Department of Defense, *Law of War Manual*, § 5.17.4.1).²⁷⁴ It is the same as stealing, which is an offense even in wartime (UK *LOAC Manual*, § 15.23.1).²⁷⁵

Pillage is punishable under military law or general criminal law in numerous countries. It is widely considered to be prohibited under customary international law (ICRC *Customary International Humanitarian Law* Study, Rule 52²⁷⁶) and constitutes a war crime under Article 8(2)(b)(xvi) of the Rome Statute of the International Criminal Court.²⁷⁷

In the medieval age, pillage served as a form of compensation for private armies, but this practice came to an end as a result of the widespread adoption of standing armies at the end of the 18th century (U.S. Department of Defense, *Law of War Manual*, § 5.17.4.2;²⁷⁸ 2019 *Commander's Handbook on the Law of Land Warfare*, § 2-197²⁷⁹). The prohibition of pillage is general in scope. As the International Committee of the Red Cross notes,²⁸⁰ it encompasses both individual acts of pillage and organized pillage, requiring States to prohibit the ordering as well as the authorization of pillage (p. 226).

Russian forces could find and exploit a legal loophole by orchestrating a seizure, condemning THeMIS as booty of war for direct military use, and then passing it on

²⁶⁷ Australian Def. Force, *Law of Armed Conflict*, Exec. Ser. ADDP 06.4, at ¶ 7.45, <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/AUS-Manual-Law-of-Armed-Conflict.pdf>.

²⁶⁸ Can. Nat'l Def., *Law of Armed Conflict at the Operational and Tactical Levels*, at ¶ 622, https://www.ficnl.org/fileadmin/_migrated/content_uploads/Canadian_LOAC_Manual_2001_English.pdf.

²⁶⁹ N.Z. Def. Force, *Manual of Armed Forces Law Vol. 4 Law of Armed Conflict*, DM 69 (2d ed.), at § 8.10.36 (https://usnwc.libguides.com/ld.php?content_id=47364407 [hereinafter NZ LOAC Manual]).

²⁷⁰ Norway LOAC Manual 2013, *supra* note 245, at §§ 9.13, 9.40.

²⁷¹ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.17.3.2.

²⁷² HR IV, *supra* note 73, art. 47.

²⁷³ GC IV, *supra* note 49, art. 33.

²⁷⁴ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.17.4.1.

²⁷⁵ U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* § 15.23.1 (2004) [hereinafter U.K. LOAC MANUAL].

²⁷⁶ *Pillage*, ICRC INT'L HUMANITARIAN L. DATABASES, Rule 52, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule52>.

²⁷⁷ Rome Statute, *supra* note 97, art. 8(2)(b)(xvi).

²⁷⁸ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.17.4.2.

²⁷⁹ FM 6-27, *supra* note 232, ¶ 2-197.

²⁸⁰ GC IV Commentary of 1958, *supra* note 51, art. 33.

to CAST for study and replication. Once ownership is acquired as booty of war, the ultimate disposition of the property is a matter reserved for the domestic law of the capturing State (p. 499).²⁸¹

Such conduct appears to run contrary to the spirit of the pillage rule since belligerent parties must not permit acts of pillage (Eritrea-Ethiopia Claims Commission Partial Award, para. 36²⁸²) and are even required to prevent and stop such acts (German *LOAC Manual*, § 911;²⁸³ Armed Activities in the Congo, para. 246²⁸⁴). This obligation, by implication, means that Russian forces must not act on behalf of CAST in seizing a THeMIS vehicle nor permit CAST to take ownership of the system for private research. However, existing law is not strict enough to prohibit belligerent parties from transferring the ownership of legitimate booty of war to private entities.

Requisition

In cases where a THeMIS vehicle is captured in areas under Russian occupation, requisition offers an alternative legal basis for justifying its use. Under the law of belligerent occupation, private property may be seized and appropriated as long as a receipt is

given or compensation paid for the service rendered (1907 Hague Regulations, art. 52²⁸⁵). This includes means of transport that belong to private individuals (1907 Hague Regulations, art. 53(2)²⁸⁶). In other words, even if the private property is not susceptible to direct military use, belligerent parties may appropriate it on the condition that receipts are given and compensation paid (U.S. Department of Defense, *Law of War Manual*, § 5.17.3.1;²⁸⁷ New Zealand *LOAC Manual*, § 8.10.37²⁸⁸). This practice is well established and has been affirmed by the judiciary in numerous countries (pp. 498–499).²⁸⁹

In the absence of such receipt and payment, the appropriation of a THeMIS vehicle would be deemed unlawful. However, the fact that THeMIS is an unmanned vehicle presents a novel situation in which the capturing force might be unable to communicate with, or hand a receipt to, the person who owns the vehicle. The lack of human presence at the time when the unmanned vehicle is seized may pose practical difficulties in effecting requisitions. The taking of food, for example, is considered lawful if no time is available for ordinary requisitions or if the local inhabitants have fled so that ordinary requisitions are unavailable (2019 *Commander's Handbook*

²⁸¹ William Gerald Downey, Jr., *Captured Enemy Property: Booty of War and Seized Enemy Property*, AJIL 44, 3 (July 1950), ¶ 499, <https://www.jstor.org/stable/2194026#page=13>.

²⁸² United Nations, Reports of International Arbitral Awards, Eritrea-Ethiopia Claims Commission—Partial Award, Vol. XXVI, 291–349, at ¶ 246, https://legal.un.org/riaa/cases/vol_XXVI/291-349.pdf.

²⁸³ Bundesministerium der Verteidigung (Federal Ministry of Defence), Law of Armed Conflict Manual, Joint Serv. Regul. (ZDv) 15/2 (May 2013), at ¶ 911, https://usnwc.libguides.com/ld.php?content_id=5616055 (last visited Dec. 29, 2023) [hereinafter German LOAC].

²⁸⁴ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, at ¶ 246 (Dec. 19), <https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>.

²⁸⁵ HR IV, *supra* note 73, art. 52.

²⁸⁶ *Id.* art. 53.

²⁸⁷ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.17.3.1.

²⁸⁸ NZ LOAC MANUAL, *supra* note 269, at § 8.10.37.

²⁸⁹ DOWNEY, *supra* note 281, ¶ 498–499.

on the Law of Land Warfare, § 2-197²⁹⁰). A similar argument could be made in relation to the THeMIS vehicle, namely that ordinary requisitions were unavailable due to the absence of a human controller in the area.

However, requisitions are justified only “for the needs of the army of occupation” (1907 Hague Regulations, art. 52²⁹¹). Considering that CAST is not a component of the Russian armed forces, it would be illegal to requisition THeMIS on behalf of CAST (Krupp trial, p. 1344²⁹²).

Requisition also falls short of transferring ownership of the unmanned technology (Dinstein, pp. 243–254²⁹³). There is a general obligation to respect private property and, as such, requisition must not result in the confiscation of private property by claiming ownership over it (1907 Hague Regulations, art. 46;²⁹⁴ German *Manual*, para. 554²⁹⁵). This rule does not distinguish between the confiscation of physical property and spoilation resulting from the acquisition of intangible property, such as stock ownership (I.G. Farben Trial, p. 1133²⁹⁶). In light of the general obligation to respect private property, this prohibition reasonably extends to the protection of technology integral to the construction and operation of THeMIS.

Requisition of Medical Equipment

As in the previous post with respect to the legality of seizure, we must consider whether THeMIS is legally protected from requisition when it performs a medical transport function. The third paragraph of Article 35 of Geneva Convention I reads, “The civilian personnel and all means of transport obtained by requisition shall be subject to the general rules of international law.” This provision suggests that medical transports are subject to requisition by the adverse party if seized in occupied territory (ICRC 2016 Commentary on Geneva Convention I, para. 2420²⁹⁷).

Article 14 of Additional Protocol I to the Geneva Conventions,²⁹⁸ to which both Russia and Ukraine are parties, prohibits the requisition of civilian medical units, their equipment, matériel, or services, as long as these resources are necessary for the medical care of the civilian population. Yet this prohibition does not extend to medical vehicles, which are treated separately under Article 21 of Additional Protocol I.²⁹⁹ The latter provision requires medical vehicles to be respected and protected but otherwise does not prohibit their requisition when seized in occupied territory as long as local medical activities are not unnecessarily interfered with (U.S. Department of Defense, *Law of War*

²⁹⁰ FM 6-27, *supra* note 232, § 2-197.

²⁹¹ HR IV, *supra* note 73, art. 52.

²⁹² U.S. v. Krupp, et al., (Case X), Mil. Trib. Nuremberg (July 31, 1948), 1344.

²⁹³ YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* (2019).

²⁹⁴ HR IV, *supra* note 73, art. 46.

²⁹⁵ GERMAN LOAC, *supra* note 283, § 554.

²⁹⁶ U.S. v. Krauch, Case No. 6, Int'l Mil. Trib. Nuremberg (July 30, 1948), 1133.

²⁹⁷ GC I, *supra* note 1, art. 35.

²⁹⁸ AP I, *supra* note 7, art. 14.

²⁹⁹ *Id.* art. 21.

Manual, §7.3.3 fn. 56³⁰⁰; Chad *Instructor's Manual 2006*, p. 88³⁰¹).

Nevertheless, the fact that one THeMIS vehicle presently in Ukraine was provided to an unspecified Ukrainian charitable organization is a relevant consideration. Under Article 34 of Geneva Convention I,³⁰² the right of requisition recognized under the law of belligerent occupation may not be exercised against the property of aid societies except in case of urgent necessity. This restriction applies not only to medical units and establishments, but also to the medical transports used by such societies (ICRC 2016 Commentary on Geneva Convention I, para. 2343³⁰³).

If this charitable organization is duly recognized as an aid society by Ukraine and authorized to render assistance to medical service,³⁰⁴ THeMIS would be protected against enemy requisition unless there is an urgent necessity for its use. In other words, when the medical transport used by a charitable organization is requisitioned to meet the urgent necessities of war, its legitimate use is limited to the care of wounded and sick military personnel (ICRC 2016 Commentary on Geneva Convention I, para. 2350³⁰⁵). Thus, it would be impermissible for Russia to requisition a THeMIS vehicle for research purposes when it is seized in occupied territory.

Concluding Thoughts

The taking of the THeMIS vehicle by Russian troops, when they are acting on the bounty issued by CAST, is likely to be considered as pillage to the extent that individual soldiers conduct the seizure for personal gain. If captured in occupied territory, it is plausible to justify the seizure as requisition for the care of the wounded and sick or other urgent use out of military necessity. However, requisition cannot justify the use of THeMIS for research purposes, as it is protected as the private property of an aid organization.

Advanced technology itself is not otherwise legally protected and can be claimed as war booty on the grounds that it is susceptible to direct military use (if the seizing State adopts such a position) or, if seized in occupied territory, can be requisitioned upon the provision of a receipt and appropriate compensation. Private companies may therefore feel constrained to deploy such unmanned vehicles in medical-only configurations for fear that their advanced technology could be stolen to the advantage of the adverse party. The limited protection afforded under the modern law of war increases the risks that advanced technology will become the prime target of seizure and appropriation during an armed conflict.



³⁰⁰ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 7.3.3.

³⁰¹ *Practice relating to Rule 29, Medical Transports*, ICRC Int'l Humanitarian L. Databases, Rule 29 at ¶ 88, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule29>.

³⁰² GC I, *supra* note 1, art. 34.

³⁰³ GC I Commentary of 2016, *supra* note 9, ¶ 2343.

³⁰⁴ *Id.* art. 26.

³⁰⁵ *Id.* ¶ 2350.

THE UKRAINE CONFLICT, SMART PHONES, AND THE LOAC OF TAKINGS

by Gary Corn | Apr 7, 2022

According to at least one report,³⁰⁶ in the course of their operations Russian forces entered residential complexes in the suburbs of Kyiv, displaced residents from their apartments, held them captive in basements, and seized many of their cell phones and laptops (personal digital devices or PDDs for short) under threat of summary execution. Although these deprivations may pale in comparison to the catalog of other atrocities the Russians are perpetrating—not the least of which are disturbing reports, like those coming out of Bucha, of the torture and murder of civilians³⁰⁷—in an age of dependence on digital interconnectivity, they are worth exploring. This post focuses on the Law of Armed Conflict (LOAC) relevant to these specific takings.

In a word, the LOAC does not prohibit per se the taking of enemy property (understood to encompass all property, private or public, located in enemy territory (U.S. DoD *Law of War Manual*, § 5.17.1)), including personal movable property from civilians. As discussed further below, property seizures can be justified by military necessity. Unfortunately, the relevant LOAC rules governing such seizures are not a model of clarity, draw subtle and confusing distinctions between seizures effected in or outside of areas of occupation,

and do not directly account for the unique nature and value PDDs have come to occupy in people's daily lives or their potential use in armed conflict.

Personal Digital Devices and Daily Life

To be fair, the author is aware of only one report of Russian forces seizing PDDs from Ukrainian civilians. It is possible that this was an inaccurate report or isolated incident, and like any allegation of potential war crimes, would require investigation. However, the report is worthy of analysis both because the Russians' record thus far of LOAC non-compliance lends credibility to it, but perhaps more importantly because of the unique importance that personal computing devices play in the modern era.

Chances are that anyone reading this post is doing so digitally over a PDD. Today, according to some estimates, over seven billion people around the world own mobile phones—roughly 92% of the world's population, with over six-and-a-half billion owning smart phones.³⁰⁸ As the U.S. Supreme Court noted in *Carpenter v. United States*, PDDs, especially mobile phones, “and the services they provide are such a pervasive and

³⁰⁶ Brenna Smith & Masha Froliak, *Russian Soldiers Took Their City, Then Their Homes*, N.Y. TIMES (Mar. 23, 2022), <https://www.nytimes.com/2022/03/20/world/europe/russian-soldiers-video-kyiv-invasion.html>.

³⁰⁷ 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>.

³⁰⁸ *Number of Smartphone & Mobile Users Worldwide (Billions)*, BANKMYCELL, <https://www.bankmycell.com/blog/how-many-phones-are-in-the-world>.

insistent part of daily life that carrying one is indispensable to participation in modern society.” PDDs have become the primary means by which people engage in many of the most fundamental aspects of managing their daily lives—from finances to healthcare to work, education, and social services—and of course the communication of and access to news and information. These devices have been described as near appendages. Removing PDDs risks isolating people, cutting them off from critical societal functions and activities, and thus presents distinct risks to their physical and mental well-being in unique ways.

LOAC Rules Governing the Taking of PDDs

There are several specific treaty and customary international law provisions relevant to assessing the lawfulness of property takings. Takings refer to the temporary or permanent deprivation, by actual or constructive dispossession or destruction, of a rightful owner’s possessory interest in property. At one level these provisions appear straight forward. As noted, there is no per se prohibition against taking enemy property, especially where it is “imperatively demanded by the necessities of war” (Hague IV, art. 23(g)³⁰⁹).

On further look, there is some devil in the details—details such as whether the taking is for the purpose of converting the property to the taking-Party’s own purposes

or to deprive the enemy of its use, whether property is movable or immovable, public or private, whether the taking is permanent or temporary, involves seizure or destruction, and whether it is effected prior to or during occupation. This post walks through some of the nuances, and arguable discordance of these rules, focusing solely on takings of non-public, movable property in the form of PDDs.

Takings vice Attacks

As a starting point, the LOAC rules related to the taking of enemy property should be distinguished from the more detailed and rigorous provisions of so-called targeting law that prohibit conducting attacks, as that term is defined in Article 49 of Additional Protocol I, against any object that does not qualify as a military objective, i.e., civilian objects. As detailed in a separate *Articles of War* symposium,³¹⁰ that core protection of civilians and their property does not extend to all dispossessions of property that a Party to a conflict may effect or that its operations may cause.

The better understanding, one proffered here³¹¹ and seemingly endorsed by the International Criminal Court Appeals Chamber in its *Prosecutor v. Bosco Ntaganda* judgment,³¹² is that to qualify as an attack as defined in Article 49, a hostile action must: 1) involve violent acts directed at (i.e., have the motive of) harming the adversary, including

³⁰⁹ HR IV, *supra* note 73, art. 23(g).

³¹⁰ POMSON, *supra* note 196.

³¹¹ *Prosecutor v. Ntaganda*, ICC-01/04-02/06 A A2, Submission of Observations to the Appeals Chamber Pursuant to Rule 103 (Sept. 18, 2020), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_05312.PDF#page=6.

³¹² *Prosecutor v. Ntaganda*, ICC-01/04-02/06 A A2, Judgment (July 8, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_03027.PDF.

the civilian population and civilian objects, through physical injury or destruction; and 2) be directed at persons or objects *outside* the dominion or control of the belligerent. Outside of these specific circumstances, one must look to other LOAC rules to assess the legality of property deprivations (or injury or death to persons) realized against civilian objects “within the power” of a Party to a conflict—that is, over which the belligerent exercises physical dominion, control, or restraint.

The basic factual circumstance of a Party exercising dominion, control, or restraint over enemy persons or property should be distinguished from the legal circumstance of belligerent occupation, which involves a Party’s control over enemy territory. Occupation occurs where enemy territory “is actually placed under the authority of the hostile army” (Hague IV, art. 42³¹³). In general terms, it requires an invading Party to actually and effectively supplant the authority “of the legitimate government in the territory invaded” (FM 27-10, para. 355³¹⁴). Such a circumstance triggers the LOAC sub-*lex specialis* of occupation law, which contains certain provisions specific to the issue of this post. Outside of an established circumstance of occupation, general LOAC rules regulating the conduct of hostilities govern.

General Prohibitions and the Imperative Military Necessity Exception

Although the LOAC does not prohibit all property takings, it does set a strong general presumption against the lawfulness of taking civilian property with some explicit proscriptions and limitations. Consistent with a Party’s general obligations to respect and protect civilians, including an obligation to accord them “protection against dangers arising from military operations” and to take “constant care . . . to spare” them from conflict-related harms,^{*} Parties must also respect private property. Therefore, the taking of private (or public) movable property for private or personal use, defined in the LOAC as pillage or looting, is specifically and strictly prohibited during any phase of armed conflict (1907 Hague IV Reg., arts. 28, 47;³¹⁵ 1949 Fourth Geneva Convention (GC IV), arts. 16, 33³¹⁶). As the United Kingdom’s *Manual of the Law of Armed Conflict* notes, “Nothing is more subversive of military discipline than plundering or looting. Theft and robbery remain punishable crimes in peace and war. The soldier in an enemy country must observe the same respect for civilian property as he would at home” (para. 11.76.2).

Nor may a Party to the conflict pursue devastation or destruction of property as an end in itself (U.S. DoD *Law of War Manual*, § 5.17.2). Property deprivations not grounded in the “strict necessities of war” are considered war crimes and may rise to the level of a grave breach where destruction

³¹³ HR IV, *supra* note 73, art. 42.

³¹⁴ U.S. Dep’t Army, *The Law of Land Warfare*, FM 27-10 (July 18, 1956), at ¶ 355, <https://archive.org/details/Fm27-101956>.

³¹⁵ HR IV, *supra* note 73, arts. 28 & 47.

³¹⁶ GC IV, *supra* note 49, arts. 16 & 33.

and appropriation of property are extensive and carried out unlawfully and wantonly (GC I, art. 50;³¹⁷ GC II, art. 51;³¹⁸ GC IV, art. 147³¹⁹). So, when are takings of private property sanctioned by LOAC?

Property Takings During the Conduct of Hostilities

Distinct from the prohibitions outlined above, enemy property may be seized, that is, temporarily dispossessed, or destroyed, when justified by imperative military necessity—a “long-standing rule of customary international law already recognized in the Lieber Code and the Brussels Declaration and codified in the Hague Regulations” (International Committee of the Red Cross (ICRC) Customary International Humanitarian Law Database, Rule 50³²⁰). There are two alternate bases that might establish imperative military necessity: seizing property for the Party’s own military use; or seizing or destroying things such as warfighting or sustaining infrastructure to deprive the enemy of its use and benefit.

At the outset, there is some uncertainty regarding the exact meaning of imperative military necessity. The baseline LOAC principle of military necessity is commonly understood as justifying “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” (U.S. DoD

Law of War Manual, § 2.2). With respect to property seizures or destruction, the inclusion of the modifier “imperatively” in Hague IV, Article 23(g),³²¹ and the consistent description of its customary international law analog as requiring “imperative” military necessity, suggests some greater degree of need than the general standard just described.[†] So too do descriptions in case law, such as *Menzel v. List*,³²² which held that conversion of civilian property to a Party’s own use must be necessary and *indispensable*.

Where a belligerent already exercises control over property, subjecting seizures or non-attack destruction to a higher standard seems to make sense, especially within occupied territory where the “strict necessities of war” will likely manifest differently. Where a Party is able to exercise dominion or control, presumably it will have more options to achieve its ends, both as to whether and how to effect property seizures or destruction, than having to resort to attacking it. It can impose various control measures and manage collateral impacts differently, and as such one might expect the general principle of humanity should take on greater relative weight in relation to military imperatives.

However, this is far from clear. “Simple” military necessity has long been understood to permit the seizure or destruction of enemy property so long as there is “some reasonable connection between” doing so “and the

³¹⁷ GC I, *supra* note 1, art. 50.

³¹⁸ GC II, *supra* note 47, art. 51.

³¹⁹ GC IV, *supra* note 49, art. 147.

³²⁰ *Destruction and Seizure of Property of an Adversary*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 50, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule50>.

³²¹ HR IV, *supra* note 73, art. 23.

³²² *Menzel v. List*, 49 Misc. 2d 300 (N.Y. Sup. Ct. 1966), <https://casetext.com/case/menzel-v-list-2>.

overcoming of enemy forces” (U.S. DoD *Law of War Manual*, § 5.17.2, citing *U.S. v. List et al.* (The Hostage Case)³²³). And numerous military manuals describe these different articulations of the standard as in essence synonymous.

Consistent with an equivalency approach, the U.S. DoD *Law of War Manual* states that “if sufficient military necessity exists to justify attacking an object” because it qualifies as a military objective, it stands to reason that imperative military necessity would also exist to justify its seizure or destruction “by measures short of attack” (§ 5.17.2.1). Nevertheless, this assertion should be approached with some caution.

It is true that the necessity to seize or destroy enemy property may overlap with the necessity to attack objects that qualify as military objectives, giving this statement some surface resonance. However, the syllogism is misleading in a number of respects, and the different approaches should not be conflated.

First, the categories of property that may be subject to seizure or destruction for reasons of imperative military necessity are broader than those that may be attacked when not within a Party’s control. For example, to support its own operations a Party may seize items such as civilian buildings or means of transportation that, standing alone, make no effective contribution to the enemy’s military action and therefore, among other reasons, do not qualify as military objectives *stricto sensu*. Second, where property qualifies as a military objective, it is by definition not (or is no

longer) civilian and therefore not protected from acts of hostilities in the same way.

Precisely because a Party does not exercise dominion or control over military objectives, attacks on those objects are subject to much stricter regulation to mitigate potential collateral harms. There is no indication that destruction of property under a Party’s control, as opposed to being subject to attack, would even permit incidental harm to civilians or other civilian objects whether non-excessive or otherwise. Certainly, such non-attack deprivations do not trigger the panoply of targeting law and the obligation to ensure the proportionality of an attack. Therefore, the imperative military necessity to seize or destroy civilian property must be assessed on its own accord, taking into account the often-distinct factual circumstances of occupation or other exercises of control.

The LOAC imposes no obligation to compensate civilians for personal property seized or destroyed based on imperative military necessity, although if feasible, a record should be made of the use or damage so that the property may be returned or, “in the event of funds being provided by either belligerent,” some restitution may be paid to the owner at the close of hostilities (U.S. DoD *Law of War Manual*, § 5.17.5.1). Still, feasible precautions should be taken to mitigate the burdens on civilians from the property taking.

Adding yet another twist of lexicon and uncertainty, the U.S. DoD *Law of War Manual* (citing to FM 27-10) adds the term “appropriation” into the mix, stating that

³²³ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.17.2.

private enemy property “not susceptible to direct military use (e.g., arms, ammunition, military papers, or military equipment) may be appropriated only to the extent such taking is permissible in occupied areas” (§ 5.17.3.1). This seems to suggest that such property would have to be necessary to the appropriating Party’s own military operations, specifically related to its occupation duties and obligations. However, the passage does not specify whose military use the property must be susceptible to, and as discussed below, the cross-reference to occupation law is somewhat circular and does not offer much clarity.

The remaining rules relevant to taking PDDs, at least as a matter of treaty law, are specific to situations of occupation.

The Twists of Occupation Law

Regarding private property of the inhabitants of occupied territory, an occupying power assumes both rights and duties, again starting with the obligation of respect (U.S. Army Field Manual 6-27/MCTP 11-10C, para. 6-95). Here, the 1907 Hague Regulations add still another term to the discussion. Article 46 states simply that private property “cannot be confiscated,”³²⁴ which is understood to mean permanently taken, whether actually or constructively, without providing compensation. Temporary dispossession of private property, on the other hand, is permissible, at least where required for “direct use in military operations” (U.S. DoD *Law of War Manual*, § 11.18.2.2). This suggests

that within situations of occupation, control measures imposed on private property may only be temporary in nature and contemplate return of the property when feasible. Were that it were so simple.

Destruction of property is obviously a permanent measure, but not outright prohibited. Echoing Article 23(g) of Hague IV, the Fourth Geneva Convention establishes a qualified prohibition against such permanent deprivations of any enemy property within occupied territory, permitting destruction when “rendered absolutely necessary by military operations” (GC IV, art. 53³²⁵).[‡] According to the 1958 Commentary to GC IV, this rule may be compared with the prohibition of pillage, discussed above (p. 301). It seems to follow that temporary deprivations, obviously less impactful than destruction, can also be justified when absolutely or imperatively demanded by the necessities of war. As for temporary dispossessions, LOAC sets certain limitations as to the scope and processes to be followed.

As a general rule, temporary takings should be made through requisitions (yes, another term). Where an occupying power requires goods or services for its maintenance or the due administration of the occupied territory (such as fuel, food, clothing, tools, vehicles, etc.), it may order the provision of such private goods and services subject to compensating the rightful owner at fair value (Hague IV, art. 52;³²⁶ GC IV, art. 55³²⁷). The decision

³²⁴ HR IV, *supra* note 73, art. 46.

³²⁵ GC IV, *supra* note 49, art. 53.

³²⁶ HR IV, *supra* note 73, art. 52.

³²⁷ GC IV, *supra* note 49, art. 55.

to requisition must be made in good faith on the authority of the local commander, should be paid for immediately in cash where possible (or at a minimum upon issuance of a receipt), must take into account the needs of the civilian population and therefore be in proportion to available resources, and may not require civilians to take part in hostilities against their own country (Hague IV, art. 52;³²⁸ GC IV, art. 55³²⁹).

Certain essential items, such as foodstuffs, medical supplies, and any other “article necessary to support life,” are given particular attention (GC IV Commentary, p. 310).³³⁰ It is the responsibility of an occupying power to ensure the provision of these necessities to the civilians in occupied territory, and it may only requisition them for its own use if the needs of the civilian population have been accounted for (GC IV, art. 55³³¹). Requisitions are not a valid means to deprive the enemy the use of property.

Application to Personal Digital Devices

Reports are emerging that Russian forces are experiencing severe breakdowns of communications, leading them to adopt makeshift solutions including the use of mobile phones.³³² Under such circumstances, whether in occupation or during non-occupation hostilities, it is possible that Russian forces might have an imperative

need to seize mobile phones or other PDDs to support their own communications. This would require further factual development, but on its face it seems a stretch. Converting individuals’ PDDs to military use presents likely technical (encryption, password protections, etc.) and practical challenges.

Perhaps of direct relevance to this point, 1907 Hague IV, Article 53,³³³ permits the seizure of, *inter alia*, private movable property “adapted for the transmission of news”—items such as “cables, telephone and telegraph facilities, radio, television, telecommunications and computer networks and equipment” (U.S. DoD *Law of War Manual*, § 11.18.6.2; U.K. *Law of Armed Conflict Manual*, § 11.81.1). Cell phones and other PDDs appear to fall squarely within this provision. As noted in the *Tallinn Manual 2.0*, “[t]oday, every cell phone or computer connected to the Internet is capable of transmitting news” (Rule 149, comment 8). The unprecedented volume of open-source information flowing out of Ukraine, in the form of Tweets, photos, IMs, videos, etc., much of which provides valuable battlefield intelligence and feeds broader internal and external influence efforts, would seem to support this view.

However, the *Tallinn* experts did not consider this provision as extending to PDDs, as in their opinion such an interpretation would run counter to the object and purpose of the underlying treaty provision. Instead, the

³²⁸ HR IV, *supra* note 73, art 52.

³²⁹ GC IV, *supra* note 49, art. 55.

³³⁰ GC IV Commentary of 1958, *supra* note 51, at 310.

³³¹ *Id.*

³³² Sam Cranny-Evans & Dr. Thomas Withington, *Russian Comms in Ukraine: A World of Hertz*, RUSI (Mar. 9, 2022), <https://rusi.org/explore-our-research/publications/commentary/russian-comms-ukraine-world-hertz>.

³³³ HR IV, *supra* note 73, art. 53.

Tallinn experts considered Article 53's ambit to encompass only equipment and facilities actually used by journalists and operated by the news organizations to which they belong. Further, citing to Article 53, the U.S. DoD *Law of War Manual* states that private property susceptible to direct military use may be seized subject to providing a receipt and compensation, implying that the use must be for that of the seizing Party (§ 11.18.6–11.18.6.2). If this position is correct, it implies that PDDs are not subject to seizure, at least in occupied territory. However, it is unclear whether the exclusion of PDDs from Article 53's coverage would have any bearing on the general dictates of Hague IV, Article 23(g).³³⁴

In the latter case, there is certainly an argument to be made that a Party to a conflict might need to impose control measures, including possible seizures of communications devices, on the flow of information in and out of a zone of combat operations, and perhaps to a lesser degree zones of occupation. According to U.S. doctrine, “[t]he information environment is the aggregate of individuals, organizations, and systems that collect, process, disseminate, or act on information” and information operations are a standard method of influencing, disrupting, corrupting, or usurping the decision-making of target audiences to support operational objectives (U.S. *Joint Publication 3-13*). Imposing control measures by means of seizing PDDs suspected of being used to disseminate information harmful to one's own operations or beneficial to the enemy's would

seem to satisfy baseline military necessity (see U.S. DoD *Law of War Manual*, § 11.18.3).

This would seem to be the result most consistent with military realities, State practice, and *opinio juris* regarding LOAC takings. Notwithstanding the often-confusing particularities of occupation law, where there is a bona fide need to deprive an enemy of the use and benefit of private movable property, seizure and destruction of the item or items are not prohibited so long as imperatively demanded. What is triggered in occupation are the rules against confiscating property for a Party's own use unless doing so as and within the confines of requisitions or other means of compensation.

Conclusion

None of these rules, crafted before the digital age, addresses the seizure of PDDs or specifically accounts for the central role these devices play in modern societies. One would have to look to other LOAC takings provisions that address particular humanitarian concerns potentially raised by such seizures such as limitations on requisitioning items essential to civilian health and welfare, and more general humane treatments standards set out in Common Article 3 to the Four Geneva Conventions and Article 75 of Additional Protocol I.

Nor do the rules adequately account for the interplay of the international human right of free expression, including the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the

³³⁴ HR IV, *supra* note 73, art. 23(g).

form of art, or through any other media of his choice” (International Covenant on Civil and Political Rights (ICCPR), art. 19; European Convention on Human Rights (ECHR), art. 10).³³⁵ Russia is bound by the ICCPR³³⁶ and European Court of Human Rights decisions (2021 *Georgia v. Russia (II)* case³³⁷) for its actions within occupied territory, and arguably with regard to Ukrainian civilians that fall within its power during the conduct of hostilities. Of course, the right of expression is not unlimited, being subject to specific security-related restrictions and possible derogation. Whether and how this right applies and interacts with LOAC takings law is beyond the scope of this post, as is the problem of enforcement Marko Milanovic addressed.³³⁸

Given the isolated nature of the report of PDD seizures and the limited facts available, let alone the somewhat convoluted set of LOAC rules regulating them, it is difficult to conclude that they were not justified by imperative military necessity. However, given the Russians’ track record thus far, color me skeptical.

Notes

* These obligations are set out in Additional Protocol I, Articles 51 and 57, which Russia is bound by. According to the U.S. DoD *Law of War Manual*, “Although [the constant care] obligation is susceptible to a range of interpretations, Parties to AP I may also interpret it in a manner that is consistent with the discussion in” Section 5.2: Overview of Rules for the Protection of Civilians.

† See, e.g., Dictionary.com, defining the adjective “imperative” as something that is absolutely necessary or required; unavoidable.

‡ Again, introduction of the term “absolutely” might suggest another standard of military necessity, but as laid out in the commentary to Article 53, “the occupying forces may . . . undertake the total or partial destruction of certain private or public property in the occupied territory when imperative military requirements so demand” (Commentary of 1958, at 302).



³³⁵ International Covenant on Civil and Political Rights, art. 19, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 312 U.N.T.S. 221 [hereinafter ECHR].

³³⁶ U.N. Human Rights Off. High Comm’r, U.N. Human Rights Treaty Bodies, Ratification Status for CCPR—International Covenant on Civil and Political Rights, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en.

³³⁷ *Georgia v. Russia (II)*, App. No. 38263/08 (Jan. 29, 2021), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-207757%22%5D%7D>.

³³⁸ Mark 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/>.

SIEGE LAW

by Sean Watts | Mar 4, 2022

Images of the million or more persons who have fled toward neighboring States highlight the tragic humanitarian impact of the ongoing armed conflict between Ukraine and Russia.³³⁹ However, a worse fate could await those unable to flee. Despite a slower than expected advance,³⁴⁰ Russian forces appear to be maneuvering to lay siege to several Ukrainian cities.³⁴¹ Reports indicate the port city of Mariupol is already under siege, cut off from critical supplies and support.³⁴²

The term siege refers generally to a military effort to surround and cut off an area, often but not always a city, to deny external access or egress, and secure the defender's submission by deprivation or isolation.

Because of their devastating human costs, sieges have inspired specific law of war rules and legal considerations. But as with legal limits on war generally, these rules reflect a compromise between human needs and military demands. Siege rules fully vindicate neither humanity nor military necessity; each concedes something to the other. The current conflict may well reveal whether these rules, and the compromises they reflect, are relevant,

practical, and optimal in both military and humanitarian terms.

Why Siege?

Siege—or encirclement as military doctrine refers to it—is an essential aspect of modern military operations. Armies resort to the tactic for a variety of reasons. But chief among them is to avoid slow, costly, and bloody urban ground assaults.^{343,344} Military planners usually estimate that significant numerical advantage is required for successful assaults. Encircling and waiting out an enemy, rather than attacking prepared positions, can lower those numerical demands significantly, reducing losses and freeing forces, weapons, and supplies for other efforts.

Historically, isolation has been the key to effective siege; indeed, it's probably its *sine qua non*. History is packed with examples of imperfectly isolated sieges that have failed, including at Vienna, Leningrad, Sarajevo, and Grozny just to name a few *roughly* Eastern European examples (the Mongol Empire successfully sieged and sacked Kyiv by assault in 1240). Even slight cracks in the besieging force's effort to seal off its target can

³³⁹ Marc Santora, *What Happened on Day 8 of Russia's Invasion of Ukraine*, N.Y. TIMES (Mar. 30, 2022), <https://www.nytimes.com/live/2022/03/03/world/russia-ukraine>.

³⁴⁰ Nancy A. Youssef, *Russian Advance on Kyiv Stalled, U.S. Defense Official Says*, WALL ST. J. (Mar. 1, 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-01/card/russian-advance-on-kyiv-stalled-u-s-says-BBsVR5ATba81sDftETfj#>.

³⁴¹ *Russian forces laying siege to Kyiv and Kharkiv, says Ukrainian official*, REUTERS (Mar. 1, 2022), <https://www.reuters.com/world/europe/russian-forces-laying-siege-kyiv-kharkiv-says-ukrainian-official-2022-03-01/>.

³⁴² Joel Gunter, *Mariupol under siege: 'We are being completely cut off'*, BBC (Mar. 3, 2022), <https://www.bbc.com/news/world-europe-60601235>.

³⁴³ John Spencer, *Why Militaries Must Destroy Cities to Save Them*, MODERN WAR INST. (Nov. 8, 2018), <https://mwi.usma.edu/militaries-must-destroy-cities-save/>.

³⁴⁴ *Urban Warfare Project*, MODERN WAR INST., <https://mwi.usma.edu/urban-warfare-project/>.

tip the balance in favor of the besieged force, buoying morale and will to resist.

It's unsurprising then that military doctrine instructs planners and commanders to achieve complete isolation early and to maintain it throughout a siege. Current U.S. operational doctrine speaks of physical, psychological, and most recently electronic isolation. Each form of isolation is essential to achieving the enemy attrition that in assaults is achieved by direct attack. Simply put, isolation is paramount to effective siege.

Means and Methods Law and Siege

The law of war treaties and customs that regulate the means and methods of attacks apply fully to siege operations. These rules have matured into an elaborate collection of duties and precautions too prolific to fully address here. But the Regulations annexed to both the 1899 Hague Convention II³⁴⁵ and 1907 Hague Convention IV³⁴⁶ adopted a rule specific to siege. It outlines duties applicable to both besieging and besieged forces. Article 27 of the Hague Regulations reads:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

The article's extensive list of protected objects is eye-catching. Less prominent, but just as important however, are its caveats. The important facilities the article protects are only spared until they are used for military purposes. In practice, the almost inevitable intermingling of city defenders and besieged forces with their urban surroundings and their need to use everything at their disposal to resist cut deep into the article's protective scheme. Subsequent rules have elaborated on defenders' duties,³⁴⁷ as explained in this symposium contribution by Professor Eric Jensen,³⁴⁸ to separate their forces from civilians and civilian objects. But the congested context of siege invariably limits defenders' options in this respect.

The literal phrasing of the Article 27 obligation to spare is promising in humanitarian terms. However, it is likely that interpretation of the phrase "as far as possible" has been tamed in practice to mean "as far as feasible." In law of war terms, feasibility increasingly refers to what can be done in very practical terms considering a wide range of military and humanitarian factors including competing demands on time, people, and other resources. What is "possible" is not likely to include everything that can be done in light of the full economic and military potential of the State. Rather it refers only to what can

³⁴⁵ Hague Convention II, *supra* note 74.

³⁴⁶ HR IV, *supra* note 73.

³⁴⁷ GUNTER, *supra* note 342.

³⁴⁸ Eric Jensen, *Ukraine and the Defender's Obligations*, ARTICLES OF WAR (Mar. 2, 2022), <https://lieber.westpoint.edu/ukraine-defenders-obligations/>.

be done with what is immediately on hand and consistently with both the overall and immediate goals of the operation.

Spotty application and qualified practice aren't limited to the besieging force's Article 27 obligations. The defender's duties to visibly identify protected objects does not seem to have been widely practiced either. Other treaties, including the 1954 Hague Convention for the Protection of Cultural Property, have enhanced and somewhat clarified that obligation but with similarly limited practice or real implementation in combat.³⁴⁹ Technology, however, may offer parties greater potential to communicate protected sites through other means. This potential may be tested in the current conflict by brave humanitarian intermediaries.³⁵⁰

Though it's not dedicated exclusively to sieges, a law of war rule that addresses starvation has special relevance to them. Article 54(1) of Additional Protocol I to the 1949 Geneva Conventions, to which both Ukraine and Russia are parties, provides, "Starvation of civilians as a method of warfare is prohibited."³⁵¹ That seemingly simple rule finds support elsewhere including likely status as a customary prohibition applicable to all States and in a more recent expression of war crimes law. States included the civilian

starvation prohibition in the war crimes jurisdiction of the International Criminal Court.³⁵² Neither Ukraine nor Russia is a party to the Court's statute; however, in 2014 and 2015 Ukraine filed declarations committing its situation to the Court's jurisdiction.^{353,354}

Of course, the devil of the starvation rule is in its details and interpretation. Frankly, it's unclear how the imposed deprivations at the heart of siege fare under this rule. By one interpretation, the rule prohibits *any* starvation of civilians, including as an incidental effect of an effort to starve defending forces into submission. But another interpretation maintains that only starvation directed specifically at civilians is prohibited. By this view incidental though foreseeable effects of civilian starvation are not prohibited, although they must not be disproportionate, that is, excessive in relation to anticipated military advantage. Although this latter view is held by the United States (§ 5.20³⁵⁵), it reduces the rule's humanitarian effect, perhaps to the vanishing point.

Still, the military implications of this debate may be enormous. The former expansive interpretation of the starvation rule could well render siege impossible as it has historically been known.³⁵⁶ The steps required in terms of evacuation, or admitting relief to the

³⁴⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Cultural Property Convention].

³⁵⁰ INT'L COMM. RED CROSS, <https://www.icrc.org/>.

³⁵¹ AP I, *supra* note 7, art. 54(1).

³⁵² Rome Statute, *supra* note 97, art. 8(2)(b)(xxv).

³⁵³ Press Release, INT'L CRIM. CT., Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014 (Sept. 8, 2015), <https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014>.

³⁵⁴ Ukraine, COAL. INT'L CRIM. CT., <https://www.coalitionfortheicc.org/country/ukraine>.

³⁵⁵ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.20.

³⁵⁶ Sean Watts, *Under Siege: International Humanitarian Law and Security Council Practice concerning Urban Siege Operations*, BROOKINGS (May 2014), <https://archive.blogs.harvard.edu/cheproject/files/2013/10/CHE-Project-IHL-and-SC-Practice-concerning-Urban-Siege-Operations.pdf>.

besieged area that will almost certainly find its way to the besieged force, render isolation practically impossible. For instance, the U.S. Department of Defense only repealed in 2015 legal guidance that permitted besieging forces to fire on persons escaping a besieged area. The former guidance, no doubt in appreciation of the isolation imperative, had advised, “Persons who attempt to leave or enter a besieged place without obtaining the necessary permission are liable to be fired upon, sent back, or detained” (para. 44a.)³⁵⁷

No rule applicable to siege perhaps illustrates in starker terms the compromise required between military and humanitarian interests.

Humanitarian Relief Law during Siege

Three further law of war rules are also either directed specifically to or are especially relevant to sieges.

First, Article 17 of the Fourth Geneva Convention states,

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.³⁵⁸

While a promising commitment and addressed to the most vulnerable persons in siege, the rule’s caveats of “endeavour” and “agreements”

greatly limit its legal and practical import. By its plain meaning the article’s legal obligation is only to try or make attempts at agreements. And both the besieging force and the besieged force must have agreed for the evacuations and passages of relief to be compulsory. Additionally, substantial classes of persons not named in the article do not benefit from its obligation. Otherwise healthy civilian adults may be forced to stay in the besieged area by either the besieging or besieged force.

Second, Article 23, also of the Fourth Geneva Convention, complements the Article 17 limited evacuation and relief passage agreement scheme. It is lengthy and somewhat convoluted but essentially requires that parties to a conflict allow passage of a limited class of relief supplies for civilians, and more for particularly vulnerable classes of persons. But, not surprisingly, it operates only if the parties are satisfied no advantage will result “to the military efforts or economy of the enemy. . . .”³⁵⁹

Last, Article 70 of an Additional Protocol that updates the Geneva Conventions, including the Fourth Convention, addresses humanitarian relief actions. Mitigating the limits of preceding rules, it requires that parties admit a wider range of relief supplies. Although it prioritizes vulnerable groups, it also speaks to civilians more broadly. Still, the article does not offer an unlimited guarantee of relief. Its obligations operate, again unsurprisingly, “subject to the agreement of the Parties concerned. . . .”³⁶⁰

³⁵⁷ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE, para. 44(a) (15 July 1956).

³⁵⁸ GC IV, *supra* note 49, art. 17.

³⁵⁹ *Id.* art. 23.

³⁶⁰ AP I, *supra* note 7, art. 70.

The military imperative of isolation looms large over the chances that any of the above obligations will take effect. Surely the need for isolation explains the limited reach and reduced humanitarian promise of siege rules. An important and increasingly influential United Nations–sponsored academic product, the *Oxford Guidance on the Law Relating to Humanitarian Relief Operations*, lends more bite to these obligations.³⁶¹ It understands the agreement elements of each rule in a more compulsory sense, offering significant humanitarian potential. Yet it's still unclear how well that study reflects the legal opinions of States and how well it accounts for the isolation imperative, a question I've addressed elsewhere.³⁶²

In, for now, an encouraging sign, Ukraine and Russia have reportedly agreed to organize safe corridors to evacuate civilians and deliver humanitarian supplies.³⁶³ The extent to which these agreements will be observed or hold as pressure mounts to maintain isolation of besieged cities will be important not only to the fate of war's victims but also to the law.

Conclusion

As a reactive regime, the law of war has made progress regulating sieges. For most of historical experience, the customs of war tolerated merciless looting and the deliberate

murder of defeated military personnel and civilians alike following sieges. Fortunately, siege law has abandoned these customs, and adoption of the rules highlighted in this post have softened siege, if only slightly and sporadically. Nonetheless, the legal truth, difficult for many to accept, is that a harsh legal regime applies to sieges. It is law best understood, interpreted, and applied through military operational realities, especially the isolation imperative.

But it is also law that may be out of touch with prevailing sensibilities. While not determinative, civil society's reactions to the suffering involved in sieges, including those currently or soon to be underway in Ukraine, may inspire a reexamination of siege law by States. But meanwhile, fidelity to that law as we find it, rather than as we wish it was, seems best for legal discourse and advice, leaving political and policy-based improvements to their respective fora.

In that vein, on 31 March and 1 April the West Point Lieber Institute, the Harvard Law School Program on International Law and Armed Conflict,³⁶⁴ and the Washington, D.C., Regional Delegation of the International Committee of the Red Cross³⁶⁵ will co-host a workshop on Siege and the Law of War. We will convene not only some of the world's leading academic

³⁶¹ *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, UNIV. OXFORD, <https://www.law.ox.ac.uk/content/oxford-guidance-law-relating-humanitarian-relief-operations-situations-armed-conflict>.

³⁶² Sean Watts, *Humanitarian Logic and the Law of Siege: A Study of the Oxford Guidance on Relief Actions*, 95 INT'L L. STUD. 1 (2019), <https://digital-commons.usnwc.edu/ils/vol95/iss1/1/>.

³⁶³ Maksym Levin & Pavel Pilotyuk, *Ukraine and Russia agree on evacuation corridors as U.S. punishes oligarchs*, REUTERS (Mar. 3, 2022), <https://www.reuters.com/markets/europe/top-wrap-10-ukraine-seeks-ceasefire-humanitarian-corridors-talks-with-russia-2022-03-03/>.

³⁶⁴ *Program on International Law and Armed Conflict*, Harvard Law School, <https://pilac.law.harvard.edu/>.

³⁶⁵ *The ICRC regional delegation in Washington*, Int'l Comm. Red Cross, <https://www.icrc.org/en/doc/where-we-work/americas/united-states/overview-washington.htm>.

legal minds and humanitarian professionals but also an impressive contingent of military commanders, planners, and experts. We hope this truly pluralistic approach will reveal

helpful insights into the sadly but truly relevant content of siege law.³⁶⁶



³⁶⁶ SCHMITT & WATTS, *supra* note 198.

WEAPONIZING FOOD

by Michael N. Schmitt | Mar 28, 2022

The conflict in Ukraine is threatening the world's food system.³⁶⁷ For instance, Ukraine and Russia supply around 30% of global wheat and barley exports.³⁶⁸ And over 40% of Ukrainian wheat export goes to Africa, where food shortages are endemic.³⁶⁹ In a March 25 update, the UN Food and Agriculture Organization explained the risk.

In Ukraine, the escalation of the conflict raises concerns on whether crops will be harvested and products exported. The war has already led to port closures, the suspension of oilseed crushing operations and the introduction of export licensing requirements for some products. All of these could take a toll on the country's exports of grains and vegetable oils in the months ahead. . . .

[T]here are also concerns that the conflict may result in damages to inland transport infrastructure and seaports, as well as storage and processing infrastructure. This is all the more so given the limited capacity of alternatives, such as rail transport for seaports or smaller

processing facilities for modern oilseeds crushing facilities, to compensate for their lack of operation.³⁷⁰

Thus, as the UN World Food Program (WFP) Director has warned, "The bullets and bombs in Ukraine could take the global hunger crisis to levels beyond anything we've seen before."³⁷¹

More immediately, the Ukrainian people are facing dire food shortages. The WFP is racing against time to get food stocks into Kyiv, Kharkiv, and Dnipro in the face of what a senior WFP spokesperson labeled "medieval tactics of besiegement."³⁷² Its Emergency Food Coordinator for Ukraine has observed that it is probably too late for Mariupol. Starvation is on the horizon for at least parts of Ukraine should the conflict continue for much longer.

And the conflict's economic impact on Ukraine's agricultural exports will be devastating. In 2021, they comprised 41% of Ukraine's exports and topped \$27 billion.³⁷³ Agriculture's share in Ukraine's Gross

³⁶⁷ Jack Nicas, *Ukraine War Threatens to Cause a Global Food Crisis*, N.Y. TIMES (Mar. 20, 2022), <https://www.nytimes.com/2022/03/20/world/americas/ukraine-war-global-food-crisis.html?referringSource=articleShare>.

³⁶⁸ Chris Clayton, *Ukraine's Impact on Global Ag Markets*, PROGRESSIVE FARMER DTN (Mar. 1, 2022), <https://www.dtnpf.com/agriculture/web/ag/news/business-inputs/article/2022/03/01/analysts-worry-ukraines-crop-export>.

³⁶⁹ Agnieszka Maciejewska & Katarzyna Skrzypek, *Ukraine agriculture exports—what is at stake in light of invasion?*, S&P GLOBAL (Mar. 7, 2022), <https://www.spglobal.com/marketintelligence/en/mi/research-analysis/ukraine-agriculture-exports-what-is-at-stake.html>.

³⁷⁰ Food and Agriculture Organization of the United Nations, *The importance of Ukraine and the Russian Federation for global agricultural markets and the risks associated with the current conflict* (Mar. 25, 2022), <https://openknowledge.fao.org/server/api/core/bitstreams/3d62caef-1749-404e-8217-6ac4783a135b/content>.

³⁷¹ *WFP ramps up food operation for Ukraine and warns the world's hungry cannot afford another conflict*, World Food Programme (Mar. 4, 2022), <https://www.wfp.org/news/wfp-ramps-food-operation-ukraine-and-warns-worlds-hungry-cannot-afford-another-conflict>.

³⁷² Lizzy Davies, *Aid agencies race to get food supplies to Ukrainian cities at risk of siege*, GUARDIAN (Mar. 17, 2022), <https://www.theguardian.com/global-development/2022/mar/17/aid-agencies-race-food-to-ukraine-cities-kyiv-kharkiv-dnipro>.

³⁷³ Veronica Nigh, *Ukraine, Russia, Volatile Ag Markets*, FB (Mar. 16, 2022), <https://www.fb.org/market-intel/ukraine-russia-volatile-ag-markets#:~:text=Ukraine%20is%20the%20world's%20largest,a%20September%20and%20October%20harvest..>

Domestic Product exceeded 10%, the largest of any sector in the economy.³⁷⁴

Targeting Food?

The mere fact of war is therefore threatening hunger and economic crises in Ukraine and abroad. But making matters worse, Russia is intentionally attacking agricultural infrastructure, according to the European Union's Agriculture Commissioner.³⁷⁵ In formal remarks on March 23, he echoed the allegation of a Ukrainian deputy minister who accused Russia of using "Ukrainian soil . . . as a weapon of war."³⁷⁶ In the subsequent press conference, the Commissioner concluded that the only "interpretation [of Russia's actions] is that they want to create hunger and use this as a method of aggression."³⁷⁷ He ominously pointed to the Soviet Union's use of starvation as a tactic from 1932 to 1933 against the people of Ukraine and Kazakhstan; millions died.³⁷⁸

His colleague, the European Commissioner for Trade, likewise accused Russia of "deliberately targeting and destroying Ukraine's food stocks and food storage."³⁷⁹ He went on to warn, "Russia's relentless aggression not only means

more food shortages for suffering Ukrainians; it also means supply disruptions that affect the whole world, particularly lower-income countries that now have to pay more for their basic food imports."

This post asks whether the Russian tactic of targeting or otherwise disrupting Ukraine's food production and distribution system is lawful under international humanitarian law (IHL). The answer is more complex than it might seem at first glance. But as will be explained, it is difficult to imagine how the Russian actions could be lawful given IHL's prohibitions on attacking civilian objects and conducting military operations designed to starve the civilian population.

Food as a Military Objective?

Distinction is, in the words of the International Court of Justice, a "cardinal principle" of IHL (*Nuclear Weapons*, ¶ 78³⁸⁰). A customary rule of law³⁸¹ codified in Article 48 of Additional Protocol I to the 1949 Geneva Conventions,³⁸² it requires parties to a conflict to distinguish between military objectives and combatants on one hand and civilian objects and civilians on the other.

³⁷⁴ *Share of agriculture in Ukraine's GDP exceeded 10%*, UKRINFORM (Feb. 10, 2022), <https://www.ukrinform.net/rubric-economy/3401224-share-of-agriculture-in-ukraines-gdp-exceeded-10-leshchenko.html>.

³⁷⁵ Natasha Foote, *Russia deliberately targets Ukraine's food supply to create hunger, says Commission*, EURACTIV (Mar. 28, 2022), <https://www.euractiv.com/section/agriculture-food/news/russia-deliberately-targets-ukraines-food-supply-to-create-hunger-says-commission/>.

³⁷⁶ *Address by Mr. Januz Wojciechowski on the adoption of the European Commission Communication "Safeguarding food security and reinforcing the resilience of food systems"*, European Comm'n (Mar. 23, 2022), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_1991.

³⁷⁷ FOOTE, *supra* note 375.

³⁷⁸ Patrick J. Kiger, *How Joseph Stalin Starved Millions in the Ukrainian Famine*, HISTORY (Apr. 16, 2019), <https://www.history.com/news/ukrainian-famine-stalin>.

³⁷⁹ FOOTE, *supra* note 375.

³⁸⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

³⁸¹ See *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>.

³⁸² AP I, *supra* note 7, art. 48.

Distinction is operationalized by, *inter alia*, rules forbidding attacks on civilians or civilian objects (Additional Protocol I, Articles 51 and 52,³⁸³ respectively, and customary law³⁸⁴).

It would seem axiomatic that food and its associated infrastructure, including agricultural products and infrastructure, qualify as civilian objects protected from attack. In 1971, the Department of Defense General Counsel made precisely this point in testimony before Congress: “[A]n 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” (DoD *Law of War Manual*, fn. 711³⁸⁵).

Yet, there are circumstances in which it is permissible to attack food and associated infrastructure, a point Russia may raise to justify its actions. To refute any such justification, it is necessary to understand when that is so.

Article 52(1) of Additional Protocol I, a treaty to which both Ukraine and Russia are Party, defines civilian objects as those objects that “are *not* military objectives.”³⁸⁶ Military objectives are defined in Article 52(2): “In so far as objects are concerned, military objectives are limited to 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.”³⁸⁷

Applying this universally accepted definition, food and associated infrastructure may qualify as a military objective if *used*, at least in part, for military purposes (a so-called “dual-use target”). For instance, a rail line that transports military equipment and agricultural products qualifies as a military objective based on its military usage.

Even food itself may qualify on this basis. This possibility is acknowledged in Article 54(2) of Additional Protocol I, which prohibits attacks on objects indispensable to the civilian population (see discussion below).³⁸⁸ It contains an exception for indispensable objects, such as “foodstuffs,” used “as sustenance solely for the members of [the enemy’s] armed forces.”³⁸⁹ In such a case, the food has acquired status as a military objective and is targetable, subject to the other IHL rules governing attacks.

Similarly, an agricultural area may qualify as a military objective by *location*. As an example, agricultural land adjacent to a road that is intentionally flooded to force the enemy vehicles to remain on the road, thereby rendering them susceptible to attack,

³⁸³ AP I, *supra* note 7, arts. 51 & 52.

³⁸⁴ *Rules*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1>.

³⁸⁵ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, n.711.

³⁸⁶ AP I, *supra* note 7, art. 52(1).

³⁸⁷ *Id.* art. 52(2).

³⁸⁸ *Id.* art. 54(2).

³⁸⁹ *Id.* art. 54(3)(b).

is a military objective.³⁹⁰ Food and associated infrastructure also may qualify by *purpose* (future use). For instance, a bridge over which agricultural or food products are being transported, but not military equipment or personnel, is nevertheless a military objective by “purpose” if the enemy will inevitably use it later as a military “line of communication.”³⁹¹

It is even possible that food and associated infrastructure could amount to a military objective by *nature*. Examples would include rations specially designed for the armed forces, such as the American “meals ready-to-eat” (MRE), and purpose-built facilities in which rations are transported or stored, like military transport vehicles or warehouses on a military base.

Some of these situations may apply in Ukraine, particularly for attacks against dual-use military objectives like lines of communications. Yet, it cannot be the case that qualification as a military objective would justify more than a fraction of the Russian operations generating outrage. After all, it would be difficult for *lawful* attacks on food-related targets to cause the scale of hunger about which the European officials are warning. And even with respect to attacks on food-related military objectives, it must be remembered that the rule of proportionality

(arts. 51 and 57³⁹² and customary law³⁹³) and the requirement to take precautions in attack (art. 57³⁹⁴ and customary law³⁹⁵) apply if they would foreseeably result in civilian physical suffering or death due to denial of food; in some cases, the operation of those rules alone could bar attack.

War-sustaining Objects?

A controversial issue in targeting law surrounds so-called “war-sustaining” military objectives. Universal consensus exists that “war-fighting” (e.g., military equipment) or “war-supporting” objects are military objectives. Food products for, and food infrastructure serving, the enemy forces illustrate the latter.

However, the United States has taken the position that war-sustaining objects also qualify as military objectives; these are objects that “indirectly but effectively [support] the enemy’s overall war effort” (*AMW Manual*, Rule 24³⁹⁶). The DoD *Law of War Manual* explains, “It is not necessary that the object provide immediate tactical or operational gains or that the object make an effective contribution to a specific military operation. Rather, the object’s effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient”

³⁹⁰ Siobhán O’Grady & Karoun Demirjian, *Seemingly stuck Russian convoy hides mysteries*, WASH. POST (Mar. 7, 2022), <https://www.washingtonpost.com/national-security/2022/03/07/russian-convoy-ukraine/>.

³⁹¹ JOINT CHIEFS OF STAFF, JOINT PUB. I-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 271 (April 12, 2001, amended Sept. 30, 2010).

³⁹² AP I, *supra* note 7, arts. 52 & 57.

³⁹³ Rule 14—*Proportionality in Attack*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14>.

³⁹⁴ AP I, *supra* note 7, pt. IV.

³⁹⁵ Rule 15—*Principle of Precautions in Attack*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15>.

³⁹⁶ PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE, r. 24, (2013) [hereinafter AIR AND MISSILE WARFARE MANUAL].

(§ 5.6.6.2).³⁹⁷ The *Manual* includes war-sustaining industries amongst such targets (§ 5.6.8.5).³⁹⁸ Examples of other target sets said to have qualified as military objectives on this basis include ISIS oil export from territory it controlled (see discussion by Watkin³⁹⁹) and narcotics production by the Taliban in Afghanistan (see discussion by Schmitt⁴⁰⁰).

Ukraine's agricultural sector would arguably qualify as war-sustaining given the extent to which the Ukrainian economy relies upon agricultural exports—\$27 billion annually, 10% of GDP, 41% of exports. Clearly, the agricultural sector indirectly provides a significant portion of the financing for Ukraine's armed forces. Therefore, it will be difficult to argue that the sector does not qualify as war-sustaining if the war continues for any appreciable time. This is so despite the DoD General Counsel's slight tempering of the U.S. approach in 2016 (see discussion here⁴⁰¹).

Most States and scholars in the field believe the war-sustaining approach misinterprets

the concept of military objective (but see Goodman⁴⁰²). For instance, a majority of the international experts who prepared the Harvard *Manual on the International Law Applicable to Air and Missile Warfare*,⁴⁰³ *Tallinn Manual on the International Law Applicable to Cyber Warfare*,⁴⁰⁴ and *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*⁴⁰⁵ rejected the approach. In addition, the International Law Association Study Group on the Conduct of Hostilities in the 21st Century concluded that “application of the definition . . . would violate the principle of distinction.”⁴⁰⁶

I participated in all four groups, agreed with their conclusions, and have long opposed the notion of war-sustaining military objectives. In my estimation, Professor Yoram Dinstein's assertion in his classic *The Conduct of Hostilities Under the Law of International Armed Conflict*⁴⁰⁷ that the approach “goes too far” is accurate. As he noted, “For an object to qualify as a military objective, there must exist a proximate nexus to ‘war-fighting.’

³⁹⁷ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.6.6.2.

³⁹⁸ *Id.* § 5.6.8.5

³⁹⁹ Kenneth Watkin, *Targeting “Islamic State” Oil Facilities*, INT'L L. STUD. 499 (2014), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1009&context=ils>.

⁴⁰⁰ Michael N. Schmitt, *Targeting Narcinsurgents in Afghanistan: The Limits of International Humanitarian Law*, in 12 Y.B. INT'L HUMANIT. L. 1 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600255.

⁴⁰¹ Oona A. Hathaway, Marty Lederman & Michael Schmitt, *Two lingering concerns about the forthcoming Law of War Manual amendments*, JUST SEC. (Nov. 30, 2016), <https://www.justsecurity.org/35025/lingering-concerns-forthcoming-law-war-manual-amendments/>.

⁴⁰² Ryan Goodman, *The Obama Administration and Targeting “War-Sustaining” Objects in Noninternational Armed Conflict*, CAMBRIDGE UNIV. PRESS (Mar. 29, 2017), <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/obama-administration-and-targeting-warsustaining-objects-in-noninternational-armed-conflict/5C44F4EFD6C034976CF5C47ECD56A8F0>.

⁴⁰³ AIR AND MISSILE WARFARE MANUAL, *supra* note 396.

⁴⁰⁴ TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL].

⁴⁰⁵ TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt ed., 2017) [hereinafter TALLINN MANUAL 2.0].

⁴⁰⁶ *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INT'L L. STUD. 322, 341 (2017), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1709&context=ils>.

⁴⁰⁷ DINSTEIN, CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, *supra* note 260, at 109.

Crops and other agricultural produce as such do not qualify as military objectives.”⁴⁰⁸ Any assertion that Russian targeting of the agricultural sector might be justified because it qualifies as a military objective would, in my estimation, be legally unsupportable.

Objects Indispensable to the Survival of the Civilian Population

In addition to the prohibition on attacking civilian objects, Article 54 of Additional Protocol I, which binds Russia, bears on the accusations made by the European Union officials and others. It provides special protection to objects that the civilian population relies upon to survive, especially food and water.⁴⁰⁹ The prohibitions are set forth in the article’s first two paragraphs.

1. Starvation of civilians as a method of warfare is prohibited.
2. 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.

It is essential to understand that the prohibition on starvation applies only when employed as a “method of warfare.” The ICRC Commentary to the article explains, “To use it as a method of warfare would be to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies” (§ 2089⁴¹⁰). It is the use of starvation as a “weapon to annihilate or weaken the population” (§ 2090⁴¹¹) or, as noted in the text, to force the civilian population to move elsewhere. In the naval warfare context, the prohibition must be assessed in light of the law of blockade, but, as Martin Fink has noted in this symposium, Russia has not legally established a blockade of Ukrainian ports.⁴¹² Therefore, even in the maritime environment, the prohibition applies as discussed below

As the ICRC correctly asserts in its *Customary International Humanitarian Law* study, the prohibition on starvation as a method of warfare against civilians is customary in character (Rule 53⁴¹³), a conclusion the Eritrea-Ethiopia Claims Commission also arrived at in its *Aerial Bombardment* partial

⁴⁰⁸ *Id.*

⁴⁰⁹ AP I, *supra* note 7, art. 54.

⁴¹⁰ Additional Protocols Commentary, *supra* note 25, § 2089.

⁴¹¹ *Id.* § 2090.

⁴¹² Martin Fink, *The War at Sea: Is There a Naval Blockade in the Sea of Azov?*, LIEBER INST. L. & WARFARE: ARTICLES OF WAR (Mar. 24, 2022), <https://lieber.westpoint.edu/war-at-sea-naval-blockade-sea-of-azov/>.

⁴¹³ Rule 53—*Starvation as a Method of Warfare*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule53>.

award (§ 105⁴¹⁴). The Department of Defense agrees:

Starvation specifically directed against the enemy civilian population, however, is prohibited. For example, it would be prohibited to destroy food or water supplies for the purpose of denying sustenance to the civilian population (DoD *Law of War Manual*, § 5.20.1;⁴¹⁵ see also Army and Marine Corps *Commander's Handbook on the Law of Land Warfare*, §§ 2-130, 2-131⁴¹⁶).

The second paragraph of the article is a rule of application that makes the general principle prohibiting starvation operative for Parties to the instrument (Commentary, § 2091⁴¹⁷). Four points distinguish Article 54(2) from the IHL rule prohibiting attacks on civilian objects.⁴¹⁸ Two render the rule more protective than that which prohibits attacking civilian objects.

First, the operation in question need not qualify as an “attack” under IHL (Additional Protocol I, Article 49⁴¹⁹), as is the case with the prohibition on attacking civilian objects previously discussed. In its Commentary to the article, the ICRC pointed out that “the verbs ‘attack’, ‘destroy’, ‘remove’ and ‘render useless’ are used in order to cover all possibilities,

including pollution, by chemical or other agents, of water reservoirs, or destruction of crops by defoliants” (§ 2101⁴²⁰). For instance, intentionally contaminating farmland would qualify.

Second, even when indispensable objects like food qualify as military objectives (for instance, because the enemy relies upon them), they may only be attacked if 1) used for sustenance *only* by the enemy or 2) if not used as sustenance, used in “direct support” of enemy “military action.” Concerning the former (Article 54(3)(a)⁴²¹), starvation of enemy forces has long been a lawful method of warfare (see, e.g., 1863 Lieber Code, art. 17⁴²²). The article now limits that tactic to situations in which the items are exclusively sustenance for the enemy.

The latter exception is found in Article 54(3)(b).⁴²³ It applies when the enemy is not using the indispensable object for sustenance. An example would be the use of irrigation ditches or agricultural fields as cover for ambushes. In such a case, enemy forces could destroy the ditches or fields. But the article walks that exception back somewhat by noting that “in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food

⁴¹⁴ United Nations *Reports of International Arbitral Awards*, Eritrea-Ethiopia Claims Commission—Partial Award, vol. XXVI, 291–341, ¶105, https://legal.un.org/riaa/cases/vol_XXVI/291-349.pdf.

⁴¹⁵ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.20.1.

⁴¹⁶ FM 6-27, *supra* note 232, §§ 2-130, 2-131.

⁴¹⁷ Additional Protocols Commentary, *supra* note 25, § 2091.

⁴¹⁸ AP I, *supra* note 7, art. 54(2).

⁴¹⁹ *Id.* art. 49.

⁴²⁰ Additional Protocols Commentary, *supra* note 25, § 2101.

⁴²¹ AP I, *supra* note 7, art. 54(3)(a).

⁴²² U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Order No. 100, art. 17, Apr. 24, 1863 [hereinafter Lieber Code].

⁴²³ AP I, *supra* note 7, art. 54(3)(b).

or water as to cause its starvation or force its movement.”⁴²⁴

But in two regards, the rule is more limited than the prohibition on attacking civilian objects. The first is the *mens rea* requirement. By it, the rule only applies when its specific purpose is to deny the indispensable objects because of their sustenance value to the civilian population or the adversary State (denial that would prevent that State from feeding the civilian population). Jelena Pejic has offered the example of “deployment of landmines in agricultural areas or in irrigation works with the specific purpose of precluding their use for the sustenance of the civilian population would likewise constitute a violation.”⁴²⁵ But consider the situation mentioned earlier in which farmland is flooded to canalize enemy forces into a kill zone.⁴²⁶ The rule would not bar the operation because the objective is not denial of sustenance to the enemy forces or civilian population. Similarly, the rule would not prohibit attacking a rail line that carried both military supplies and food for the civilian population to deprive the enemy of those supplies.

The second narrowing is inapplicable in the Ukraine case. Found in Article 54(5), it permits “scorched earth” tactics by a Party when required by “imperative military

necessity” in the face of an invasion of its national territory.⁴²⁷ This provision would apply to Ukrainian actions to deprive Russian forces of essential supplies from the land but not to Russian actions against indispensable objects.

It must be noted that neither Ukraine nor Russia has submitted declarations or reservations to Article 54.⁴²⁸ Equally important, Article 54(4) prohibits reprisals against objects indispensable to the civilian population’s survival. And prohibitions against both starvation and operations against indispensable objects appear in the 2001 *Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation* (§§ 7, 22⁴²⁹). Russia’s military manual likewise states, “The prohibited methods of warfare include . . . using starvation of civilians to achieve military objectives” (§ 5(r)⁴³⁰). Thus, Russia would have no basis for claiming that Article 54 is inapplicable to its operations in Ukraine.

While there is no debate over starvation per se, the customary status of Article 54(2) is uncertain. Rule 54 of the ICRC’s *Customary International Humanitarian Law* study provides, “Attacking, destroying, removing or rendering useless objects indispensable

⁴²⁴ *Id.*

⁴²⁵ Jelena Pejic, *The right to food in situations of armed conflict: The legal framework*, 83 INT’L REV. RED CROSS 1097, 1099 (2001), <https://www.icrc.org/en/doc/assets/files/other/irrc-844-pejic.pdf>.

⁴²⁶ *Canalize (US DoD Definition)*, MIL. FACTORY, https://www.militaryfactory.com/dictionary/military-terms-defined.php?term_id=831.

⁴²⁷ AP I, *supra* note 7, art. 54(5).

⁴²⁸ *State Parties*, 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, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties>.

⁴²⁹ Aleksei Romanovski, trans., *Manual on International Humanitarian Law for the Armed Forces of the Russian Federation* (2001), 99 INT’L L. STUD. 773 (2002).

⁴³⁰ *Id.* at 785–786.

to the survival of the civilian population is prohibited.”⁴³¹ But France⁴³² and the United Kingdom⁴³³ stated upon ratification that the rule applies only to attacks with a *specific purpose* of denying sustenance to the civilian population. This interpretation limits Article 54(3)(b)’s exclusion to situations where the enemy is not using the object for sustenance, but the adversary nevertheless attacks it to deny sustenance to the civilian population. In other Article 54(3)(b) cases, the rule of proportionality and requirement to take precautions in attack would govern the attack.

For its part, the United States would allow operations against food and associated infrastructure that qualify as military objectives subject to application of the rule of proportionality and the requirement to take precautions in attack (DoD *Law of War Manual*, § 5.20.2;⁴³⁴ see also Army and Marine Corps *Commander’s Handbook on the Law of Land Warfare*, ¶¶ 2-122, 2-133⁴³⁵). As a non-Party to Additional Protocol I, it cautions,

Given the intricacy of this provision of AP I, it would be difficult to conclude that all of its particulars reflect customary international law. Nonetheless, the United States has supported the

underlying principle that starvation of civilians may not be used as a method of warfare.

I agree with Professor Sean Watts’s observation in this symposium that the U.S. position “reduces the [starvation] rule’s humanitarian effect, perhaps to the vanishing point.”⁴³⁶ The differences and debates are important for *Articles of War* readers to grasp, but are not relevant in the Ukraine conflict given the applicability of Additional Protocol I.

Conclusion

Many other IHL rules could apply to operations affecting the availability of food. Under the Fourth Geneva Convention, for instance, occupiers are responsible for the care of civilians in occupied territory (see, e.g., Geneva Convention IV, art. 55⁴³⁷). Or operations that cause damage to agricultural areas may run afoul of the environmental protection (see, e.g., Additional Protocol I, arts. 35 and 55⁴³⁸). And numerous IHL rules provide special protection to humanitarian assistance (see Watts⁴³⁹ and Pejic⁴⁴⁰).

But assuming the allegations made against Russia about the weaponization of access by Ukraine’s civilian population to food are

⁴³¹ 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>.

⁴³² *State Parties and Signatories—France*, Protocol Additional to the Geneva Conventions of 12 August 1949, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/fr>.

⁴³³ *State Parties and Signatories—United Kingdom of Great Britain and Northern Ireland*, Protocol Additional to the Geneva Conventions of 12 August 1949, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/gb>.

⁴³⁴ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.20.2.

⁴³⁵ FM 6-27, *supra* note 232, ¶¶ 2-122, 2-133.

⁴³⁶ Sean Watts, *Siege Law*, ARTICLES OF WAR (Mar. 4, 2022), <https://lieber.westpoint.edu/siege-law/>.

⁴³⁷ GC IV, *supra* note 49, art. 55.

⁴³⁸ AP I, *supra* note 7, arts 35 & 55.

⁴³⁹ WATTS, *supra* note 436.

⁴⁴⁰ PEJIC, *supra* note 425.

accurate (and there is no reason to believe they are not), Russia is violating both the prohibition on attacking civilian objects and the prohibition on using starvation as a method of warfare; it will be responsible under international law for its “internationally wrongful acts” in this regard (Articles on State Responsibility, art. 2⁴⁴¹).

Finally, Russian military personnel and officials would also do well to remember that starvation is a war crime. With respect

to civilians in territory under Russian occupation, “wilful killing” and “inhumane treatment” are grave breaches of the Geneva Convention IV (art. 147⁴⁴²). More broadly, starvation as a method of warfare, wherever it occurs, is punishable by the International Criminal Court (Rome Statute, art. 8(b)(xxv)⁴⁴³), which enjoys jurisdiction that might even reach actions and decisions taken beyond Ukraine’s borders (see EJIL:Talk!⁴⁴⁴).



⁴⁴¹ Int’l L. Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 2, Rep. of the Int’l L. Comm’n, 53rd Sess., U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10, (2001) [hereinafter Articles on State Responsibility].

⁴⁴² GC IV, *supra* note 49, art. 147.

⁴⁴³ Rome Statute, *supra* note 97, art. 8(b)(xxv).

⁴⁴⁴ See *Territorial Jurisdiction of the International Criminal Court over the Russian Leadership: Locus Delicti in Complicity Cases*, EJIL:Talk! (Mar. 24, 2022), <https://www.ejiltalk.org/territorial-jurisdiction-of-the-international-criminal-court-over-the-russian-leadership-locus-delicti-in-complicity-cases/>.

CULTURAL PROPERTY PROTECTION IN THE UKRAINE CONFLICT

by Dick Jackson | Apr 14, 2022

Cultural heritage is once again in the crosshairs of an invading army. The Ukrainians, while concentrating on defending their homeland and their people, have nonetheless dedicated considerable efforts to the protection of cultural property, both movable and unmovable. And, much like previous warfare in the former Yugoslavia, religious and cultural ties are a significant aspect of the information and kinetic warfare in the region.

This post will address various issues related to the protection of cultural property, including the treaty law that applies, the practical issues that arise from those binding international law obligations, and the potential for war crimes prosecutions after the fact as a sanction or a deterrent for such conduct. The post will examine the obligations of both parties to the war in Ukraine and answer basic questions, such as what efforts have the defenders made to protect cultural property? Is the obligation to protect cultural property separate from or paramount to the clear obligation to refrain from attacking civilians and other civilian objects? And what can be done to hold parties who violate these rules of warfare accountable?

Cultural Context

The cultural and religious ties between Ukraine and Russia are at the heart of Vladimir Putin's rhetoric and justification for attacking Ukraine. In his recent speech on Ukraine he emphasized the unity of Ukraine and Russia: "Since time immemorial, the people living in the southwest of what has historically been Russian land have called themselves Russians and Orthodox Christians."⁴⁴⁵ The founding of the Russian Orthodox Church by Prince Vladimir as the church of the Kievan Rus, a Slavic empire created along the Dnieper River in the 10th century, has very much been the focus of Putin's religious and cultural justification for war.⁴⁴⁶ Putin has cited the recognition of a separate Ukrainian Orthodox Church by the Ecumenical Patriarch in Constantinople as a reason to realign Ukrainians, both politically and religiously.⁴⁴⁷ And his speeches have emphasized that the Ukrainians have allegedly sought to assimilate and destroy the Russian culture and religion within Ukraine into a manufactured Ukrainian culture.⁴⁴⁸

The recent renewal of conflict in Nagorno-Karabach should have emphasized the importance of preserving religious sites to Putin. In that conflict, Putin supported

⁴⁴⁵ Max Fisher, *Word by Word and Between the Lines: A Close Look at Putin's Speech*, N.Y. TIMES (Feb. 23, 2022), <https://www.nytimes.com/2022/02/23/world/europe/putin-speech-russia-ukraine.html>.

⁴⁴⁶ Peter Smith, *Explainer: How is Russia-Ukraine war linked to religion?*, AP NEWS (Feb. 27, 2022), <https://apnews.com/article/russia-ukraine-vladimir-putin-kyiv-europe-nationalism-ff22c6c17784674a5ead0f0a1ff17ca>.

⁴⁴⁷ John Daniszewski, *Analysis: Putin's take on history may lay groundwork for war*, AP NEWS (Feb. 22, 2022), <https://apnews.com/article/russia-ukraine-europe-russia-poland-vladimir-putin-f00872897f338dbedd857cd1d880e9d3>.

⁴⁴⁸ FISHER, *supra* note 445.

Christians who claimed to be the object of attack and whose cultural sites were allegedly destroyed.⁴⁴⁹ In Ukraine, some religious representatives have already claimed that churches have been the object of attack.⁴⁵⁰ The religious ties, especially between Orthodox Christians, should give all the more reason for both sides to protect iconic sites like the Monastery of the Caves and Saint-Sophia Cathedral, UNESCO World Heritage Sites near Kyiv.⁴⁵¹ But it is unclear whether any form of protection for this and other sites will prevail against the indiscriminate shelling of civilian objects and civilians in general.

In the first week of the war, the Ukrainians claimed that the Russians attacked a television tower in Kharkiv and caused collateral damage to a religious site commemorating the Holocaust.⁴⁵² Meanwhile, Ukrainians have made great strides in protecting both movable and immovable cultural property.⁴⁵³

Nevertheless, UNESCO and world leaders in cultural heritage protection have expressed significant concerns about the potential for damage to cultural property in Ukraine.⁴⁵⁴

They insist that the parties must live up to their international obligations to protect the heritage of all mankind embodied in cultural objects throughout the battlespace.⁴⁵⁵

International Law

But what are the treaties applicable under the Law of War, or the Law of Armed Conflict? Both Russia and Ukraine are parties to the 1954 Hague Cultural Property Convention,⁴⁵⁶ and Ukraine is a party to the Second Protocol.⁴⁵⁷ The Cultural Property Convention and its Second Protocol are the most specific treaties on the protection of cultural property. Both States are also parties to the more general Law of Armed Conflict treaties that contain protections for cultural property: the 1907 Hague Rules (HR) and the 1977 Additional Protocol I to the Geneva Conventions (AP I).⁴⁵⁸ Finally, while neither party is a member of the International Criminal Court, both States are parties to the European Convention on Human Rights (ECHR), which has enforced LOAC provisions in previous Russian conflicts (see

⁴⁴⁹ Simon Maghakyan, *A Vicious Circle of Cultural Erasure in Azerbaijan*, WALL ST. J. (Mar. 24, 2022), https://www.wsj.com/articles/a-vicious-circle-of-cultural-erasure-azerbaijan-armenia-culture-muslim-christian-sites-11648151998?mod=opinion_lead_pos10.

⁴⁵⁰ Smith, *supra* note 446.

⁴⁵¹ *Kyiv: Saint-Sophia Cathedral and Related Monastic Buildings, Kyiv-Pechersk Lavra*, UNESCO, <https://whc.unesco.org/en/list/527/>.

⁴⁵² Rachel Treisman, *Russia bombards a Kyiv TV tower and the Babyn Yar Holocaust memorial site*, NPR (Mar. 1, 2022), <https://www.npr.org/2022/03/01/1083733323/russia-bombards-a-kyiv-tv-tower-and-the-babyn-yar-holocaust-memorial-site>.

⁴⁵³ Isabel Coles & Francis X. Rocca, *Russia's War Rages, Putting Ukraine's Cultural Sites at Risk*, WALL ST. J. (Mar. 15, 2022), <https://www.wsj.com/articles/russias-war-rages-putting-ukraines-cultural-sites-at-risk-11647342931>.

⁴⁵⁴ Angelica Villa, *UNESCO Says It Is 'Gravely Concerned' for Cultural Heritage Sites in Ukraine*, ARTNEWS (Mar. 4, 2022), <https://www.artnews.com/art-news/news/unesco-world-monuments-fund-ukraine-heritage-sites-1234621092/>.

⁴⁵⁵ United Nations, *UNESCO bolsters protection for Ukrainian heritage under fire* (Mar. 9, 2022), <https://news.un.org/en/story/2022/03/1113602>.

⁴⁵⁶ Cultural Property Convention, *supra* note 349.

⁴⁵⁷ *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* *The Hague*, 26 March 1999, ICRC INT'L HUMANITARIAN L. DATABASES, <https://ihl-databases.icrc.org/en/ihl-treaties/hague-prot-1999>.

⁴⁵⁸ ICRC INT'L HUMANITARIAN L. DATABASES, IHL TREATIES, Jan. 15, 2024, <https://ihl-databases.icrc.org/en/ihl-treaties> [hereinafter IHL Treaties].

Marko Milanovic's excellent post in this series regarding ECHR application⁴⁵⁹).

Under the 1907 Hague Rules, cultural property, along with other civilian objects, must be protected, provided they have not been converted to military objectives by the opposition:

Article 27: In sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.⁴⁶⁰

And Article 23(g) makes clear that destruction (or seizure) of civilian property can only be accomplished when "imperatively demanded by the necessities of war." The Hague Rules (in Article 28) also prohibited the age-old practice of looting territory that has been seized in war. These obligations of the attacker and defender have only been strengthened by subsequent treaties.

After the horrendous destruction of cultural heritage in the Second World War (see *Rape of*

Europa, by Lynn Nichols⁴⁶¹), the international community sought to strengthen the protection of movable and immovable cultural property in the 1954 Hague Cultural Property Convention. The Convention expanded the definition of cultural property to include "movable and immovable property of great importance to the cultural heritage of every people," to include "monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books . . . ; as well as scientific collections" and the buildings that house them, along with centers containing monuments and collections (art. 1).

Ukraine has all these types of cultural property, beginning with the UNESCO World Heritage Sites mentioned above, ranging from religious and secular sites to libraries and collections of art, and including monuments to the Holocaust and the "Holodomor," the great famine caused by Stalin that killed millions of Ukrainians. In fact, early in the war, UNESCO raised the alarm about threats to these sites⁴⁶² and warned of the need to mark them with the Blue Shield emblem that was adopted by the 1954 Hague Cultural Property Convention (art. 6) to protect cultural heritage.⁴⁶³

⁴⁵⁹ Marko Milanovic, *The Russia-Ukraine War and the European Convention on Human Rights*, LIEBER INST. L. & WARFARE: ARTICLES OF WAR (Mar. 1, 2022), <https://lieber.westpoint.edu/russia-ukraine-war-european-convention-human-rights/>.

⁴⁶⁰ HR IV, *supra* note 73, art. 27.

⁴⁶¹ LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994).

⁴⁶² Press Release, UNESCO, Endangered heritage in Ukraine: UNESCO reinforces protective measures (Apr. 20, 2023), <https://www.unesco.org/en/articles/endangered-heritage-ukraine-unesco-reinforces-protective-measures#:~:text=Press%20release-,Endangered%20heritage%20in%20Ukraine%3A%20UNESCO%20reinforces%20protective%20measures,report%20was%20released%20on%20Tuesday..>

⁴⁶³ Distinctive Emblem of the 1954 Hague Convention, UNESCO, <https://en.unesco.org/node/349796>.

The 1954 Hague Convention requires State parties to safeguard and respect cultural property (arts. 2–4). These provisions include obligations to refrain from attacks on cultural property and from damaging or directing “any act of hostility,” looting, or reprisal against such property. Defenders are required to not only mark but also to refrain from military use of cultural sites and ensure that military objectives are located away from these sites. Despite these legal obligations, Russian forces have already been accused of attacking a 16th-century cave complex and monastery in the Donetsk region and damaging the mosque of Sultan Suleiman the Magnificent in Mariupol.⁴⁶⁴ Russian forces also allegedly looted the Vasylivka Historical and Architectural Museum, also known as the Popov Manor house, according to the museum director.

Imperative Military Necessity

Few of these Russian operations, on their face, seem justifiable for reasons of “imperative military necessity,” the standard for targeting or turning a cultural site into a valid military objective in the 1907 Hague Rules and the 1954 Hague Convention. AP I adds targeting rules to assist the commander in interpreting the obligations with regard to respect of cultural property.⁴⁶⁵ Although Articles 52 (General Protection of Civilian Objects) and 53 (Protection of Cultural Objects and Places of Worship) add little substantively to the definitions and requirements of the Hague Rules and the 1954 Cultural Property Convention, they reinforce the rules outlined above.

But the definition of military objectives, in Article 52, generally informs “military necessity”:

- (2) Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to 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.
- (3) In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

These provisions from AP I are relevant to the attacker and the defender. Defenders should presume that they have put cultural property at risk if they convert that property to a military objective, principally by use. Additionally, the “precautionary measures” contained in Articles 57 and 58 provide guidance to prevent attacks on cultural property. Concomitantly, the attacker can analyze a cultural object to determine whether it is significantly contributing to military action and whether its destruction offers a definite military advantage; under AP I, cultural property, like other civilian objects, is presumed to not qualify for direct attack.

⁴⁶⁴ Coles & Rocca, *supra* note 453.

⁴⁶⁵ AP I, *supra* note 7.

Obligations of an Occupying Power

The 1907 Hague Rules, the 1954 Hague Convention, the Geneva Convention (IV) for Protection of Civilians (GC IV),⁴⁶⁶ and AP I all provide guidance for occupying powers that reinforces the requirements to safeguard and respect cultural property. The Hague Rules require the occupying power to restore public order and safety (art. 43), respect public buildings (art. 55), and protect public institutions devoted to religion, charity, arts, and historic monuments (art. 56). The occupation rules of the 1954 Hague Convention require the occupier to support “competent authorities,” preserve cultural property, in close cooperation with those authorities, and to ensure the military respects cultural property (art. 5).

It is too soon in the conflict to analyze how and where the Russians have complied with these provisions. Suffice it to say, the occupying power generally is required to restore the *status quo ante* after the occupation has ended; under occupation law, once it exercises effective control over occupied territory, Russia has substantial obligations to mitigate damage and work with “competent authorities” to further preserve and protect the cultural heritage of this region.

War Crimes

Have Russian forces committed war crimes in Ukraine with regard to the destruction

of cultural property? The jury is certainly out on this issue, as the “circumstances ruling at the time” are yet to be determined. Any prosecutor will have to prove that the perpetrator intentionally targeted protected cultural property or (in the alternative) that the destruction of that property was extensive and wanton, requiring gross negligence in targeting. Ukraine’s 2014 ad hoc acceptance of ICC jurisdiction on its territory and the ICC Prosecutor’s initiation of an investigation bring into play the provisions of Rome Statute Articles 2(a)(iv) (Grave Breaches from the Geneva Conventions, including wanton destruction) and 2(b)(ix) (intentionally directing attacks against cultural property). Both the International Criminal Tribunal for the former Yugoslavia (in the Dubrovnik Case⁴⁶⁷) and the ICC (in the Mali Case⁴⁶⁸) have established jurisprudence in this area.

Furthermore, these crimes have, as their origin, an obligation to prevent and punish crimes outlined in the Geneva Conventions and API, both of which have been adopted by the parties to this conflict. As such, Russia and Ukraine will be required to establish sanctions for this misconduct, and the crimes will be the object of universal jurisdiction where States have adopted that approach. The grave breach provisions of the GC IV, Article 147, include “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” AP I, in Article 85, classifies as a grave breach willful destruction

⁴⁶⁶ *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949, ICRC INT’L HUMANITARIAN L. DATABASES, <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949>.

⁴⁶⁷ United Nations Int’l Crim. Trib. for Former Yugoslavia, Dubrovnik and Crimes against Cultural Heritage, <https://www.icty.org/en/outreach/documentaries/dubrovnik-and-crimes-against-cultural-heritage>.

⁴⁶⁸ Press Release, Int’l Crim. Ct., Al Mahdi case: ICC Trial Chamber VIII issues reparations order (Aug. 17, 2017), <https://www.icc-cpi.int/news/al-mahdi-case-icc-trial-chamber-viii-issues-reparations-order>.

of civilian objects, when death or serious bodily injury results. And the 1954 Hague Convention requires State parties to “take all necessary steps to prosecute and impose penal sanctions” on individuals responsible for breaches of the Convention. Where there is a national will to punish war crimes, those crimes will be pursued; interested States, like Germany or Spain, may choose to apply their national law, via universal jurisdiction, to punish those who believe they are free from national or international jurisdiction.

International Committee of the Blue Shield

What is the role of civil society in ensuring that cultural property is protected? The Second Protocol to the 1954 Hague Cultural Property Convention, along with adopting the Blue Shield to protect cultural property, adopts the “Red Cross” model for the protection of cultural property during armed conflict. Article 11 of the Second Protocol recognizes the special expertise of the International Committee of the Blue Shield (ICBS) in providing advice to UNESCO and the implementing committee of the Second Protocol.⁴⁶⁹ ICBS consists of constituent civil society organizations that represent museum, monument, archival, archaeological, and library communities throughout the world.

The United States has established a U.S. Committee of the Blue Shield (USCBS⁴⁷⁰)^{*} to be a national representative to the ICBS and interface between the military and civil society organizations and individuals to enhance the protection of cultural property

in armed conflict. The USCBS has assisted the U.S. military and NATO, for example, in establishing the “experts” required by the 1954 Hague Convention, training them, and identifying sites of protected cultural property all over the world (enabling the establishment of “No-Strike Lists” within the targeting system, while still protecting those sites from the prying eyes of looters). These organizations are an important means of ensuring that the expertise resident in civil society communicates with governmental officials to ensure the protection of cultural heritage.

Conclusion

Cultural property, like all civilian property, is protected from direct attack. But the States party to the 1954 Hague Cultural Property Convention have adopted safeguards that require States to go above and beyond in the obligation to respect and protect the cultural heritage of a nation during armed conflict. There is certainly much to protect in Ukraine. Hopefully, awareness of the existence of cultural heritage and attention to the international obligations of the parties will prevent the needless destruction of the tangible heritage of this great nation.

Note

^{*} In the interest of full disclosure, the author was the Vice President of USCBS from 2010 to 2019.



⁴⁶⁹ Blue Shield Int'l, <https://theblueshield.org/about-us/history/international-committee-of-the-blue-shield-icbs/>.

⁴⁷⁰ U.S. Comm. Blue Shield, <https://uscbs.org/>.

REPRISALS IN INTERNATIONAL HUMANITARIAN LAW

by Michael N. Schmitt | Mar 6, 2023

The scale and scope of international humanitarian law (IHL) violations by Russian and associated forces during the conflict in Ukraine are staggering. Yet, Russia has justified some of its operations as retaliatory responses to alleged Ukrainian misdeeds. For instance, concerning its unlawful attacks on Ukraine's power infrastructure (see my analysis [here](#)⁴⁷¹ and [here](#)⁴⁷²), President Putin quipped, "Yes, we are doing this. But who started it? . . . Who struck the Crimean Bridge? Who blew up the power lines of the Kursk nuclear power station?"⁴⁷³ He warned, "To leave such acts without a response is simply impossible."⁴⁷⁴ Claims that the attacks on Ukrainian cities were launched as retaliation for the Kerch bridge attack (see Milanovic & Schmitt⁴⁷⁵) and other Ukrainian strikes have drawn praise from Russia's hardliners.⁴⁷⁶

The false narrative that Russian operations are justified as revenge for Ukrainian abuses has seeped down to the tactical level. Recall the horrific April 2022 Russian attack on the Kramatorsk train station,⁴⁷⁷ which was being used by civilians fleeing the hostilities. Fifty-eight people died, and more than a hundred were wounded. Investigation revealed that the cluster bomb used in the attack had been spray-painted with the message "payback for our children."⁴⁷⁸

At times, Russia's allegedly retaliatory attacks have been directed at members of Ukraine's armed forces. For instance, in January 2023, the Russian Defense Ministry claimed a missile strike that supposedly killed 600 Ukrainian soldiers in Kramatorsk⁴⁷⁹ was a revenge attack for a New Year's Day Ukrainian attack on a facility housing Russian troops in the so-called Donetsk People's Republic (on

⁴⁷¹ Michael N. Schmitt, *Ukraine Symposium—Attacking Power Infrastructure Under International Humanitarian Law*, LIEBER INST. FOR L. & WARFARE: ARTICLES OF WAR (Oct. 20, 2022), <https://lieber.westpoint.edu/attacking-power-infrastructure-under-international-humanitarian-law/>.

⁴⁷² Michael N. Schmitt, *Ukraine Symposium Further Thoughts on Russia's Campaign Against Ukraine's Power Infrastructure*, LIEBER INST. FOR L. & WARFARE: ARTICLES OF WAR (Nov. 25, 2022), <https://lieber.westpoint.edu/further-thoughts-russias-campaign-against-ukraines-power-infrastructure/>.

⁴⁷³ Francesca Ebel, *Putin admits attacks on civilian infrastructure, asking: 'Who started it?'*, WASH. POST (Dec. 8, 2022), <https://www.washingtonpost.com/world/2022/12/08/russia-attacks-ukraine-infrastructure-putin/>.

⁴⁷⁴ Peter Beaumont, Charlotte Higgins & Artem Mazhulin, *Putin warns of further retaliation as Ukraine hit by massive waves of strikes*, GUARDIAN (Oct. 10, 2022), <https://www.theguardian.com/world/2022/oct/10/explosions-kyiv-ukraine-war-russia-crimea-putin-bridge>.

⁴⁷⁵ Marko Milanovic & Michael N. Schmitt, *Ukraine Symposium—The Kerch Strait Bridge Attack, Retaliation, and International Law*, LIEBER INST. FOR L. & WARFARE: ARTICLES OF WAR (Oct. 12, 2022), <https://lieber.westpoint.edu/further-thoughts-russias-campaign-against-ukraines-power-infrastructure/>.

⁴⁷⁶ Ivan Nechepurenko & Anton Troianovski, *Russian hawks celebrate, casting the strikes as revenge for the Crimea bridge attack*, N.Y. TIMES (Oct. 10, 2022), <https://www.nytimes.com/2022/10/10/world/europe/ukraine-strikes-crimea-bridge-revenge.html>.

⁴⁷⁷ *Death at the Station, Russian Cluster Munition Attack in Kramatorsk*, HUMAN RIGHTS WATCH (Feb. 21, 2023), <https://www.hrw.org/video-photos/interactive/2023/02/21/death-at-the-station/russian-cluster-munition-attack-in-kramatorsk>.

⁴⁷⁸ Nick Schiffrin, Dan Sagalyn et al., *Zelenskyy delivers call for Ukrainians to stay resilient a year into Russia's invasion*, PBS NEWS HOUR (Feb. 24, 2023), <https://www.pbs.org/newshour/show/zelenskyy-delivers-call-for-ukrainians-to-stay-resilient-a-year-into-russias-invasion>.

⁴⁷⁹ Hritika Mitra, *Russia claims to kill more than 600 Ukrainian soldiers in revenge attack*, INDIA TV (Jan. 8, 2023), <https://www.indiatvnews.com/news/world/russia-ukraine-war-moscow-claims-to-kill-more-than-600-ukrainian-soldiers-in-revenge-attack-putin-zelenskyy-latest-updates-2023-01-08-837593>.

Ukraine's response see here⁴⁸⁰). Indeed, even Russia's current offensive campaign has been labeled "big revenge" for Ukrainian resistance to the February 2022 invasion.⁴⁸¹

This post examines when retaliatory strikes, including those that might violate IHL, are lawful. In IHL terms, this is the law of reprisal, a fraught topic on which the United States and some of its closest allies part legal ways. Discussion begins with a brief mention of the history of reprisals. The post then lays out the general conditions applicable to reprisals that are not prohibited by treaty or customary law. A catalog of treaty prohibitions on reprisals follows; of particular importance are those contained in Additional Protocol I to the 1949 Geneva Conventions, which binds both Parties to the conflict in Ukraine. The post concludes with a discussion of the customary status of the reprisal rules, a subject of great importance to the United States and other non-Parties to the Protocol.

History of the Prohibition on Reprisals

As a general matter, "*tu quoque*" (you too) arguments, by which the enemy's IHL violation justifies one's own, have no place in international humanitarian or international criminal law (the principle of non-reciprocity). Moreover, a material breach of an IHL treaty obligation does not excuse

termination or suspension of the treaty in question (ICTY, 2000, Kupreškić, ¶¶ 511, 515–20;⁴⁸² Vienna Convention on the Law of Treaties, art. 60(5)⁴⁸³). Yet, in one situation, IHL countenances violations of its rules based on the enemy's violation, albeit for a single purpose and with strict limitations—qualification as a reprisal.

A reprisal is an act or omission that would otherwise violate IHL, like the prohibition on attacking civilian objects. Still, it is permitted in order to compel the enemy to desist in its own unlawful conduct (see DoD *Law of War Manual*, § 18.18.1⁴⁸⁴). The acceptance of reprisal as a self-help tool is a historical response to the absence of a reliable and timely IHL enforcement mechanism. In theory, the availability of reprisals will both deter future IHL violations and compel the termination of those that are underway. However, as reprisals involve an intentional breach of an IHL prohibition or obligation by the victim State, strict conditions are imposed on them.

The 1863 Lieber Code highlighted both points.

Art. 27.⁴⁸⁵ The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means

⁴⁸⁰ Veronika Melkozerova, *Russian claims of revenge attack on Ukraine debunked*, POLITICO (Jan. 9, 2023), <https://www.politico.eu/article/russian-claims-of-revenge-attack-on-ukraine-kramatorsk-debunked-war/>.

⁴⁸¹ *Ukraine's Zelenskyy says Russia's 'big revenge' has begun*, AL JAZEERA (Jan. 30, 2023), <https://www.aljazeera.com/news/2023/1/30/ukraines-zelenskyy-says-russias-big-revenge-has-begun>.

⁴⁸² *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgement, ¶¶ 511, 515-20 (Int'l Crim. Trib. for the Former Yugoslavia, Jan. 14, 2000).

⁴⁸³ VCLT, *supra* note 4, art. 60(5).

⁴⁸⁴ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 18.18.1.

⁴⁸⁵ Lieber Code, *supra* note 422, ¶ 27.

of securing himself against the repetition of barbarous outrage.

Art. 28.⁴⁸⁶ Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

Accordingly, for example, reprisals against Confederate soldiers for murdering and enslaving Union soldiers were authorized by the United States during the Civil War (DoD *Law of War Manual*, § 18.18.1⁴⁸⁷). The permissibility of reprisals was later recognized in Article 86 of the non-binding 1880 *Brussels Manual*.⁴⁸⁸ Indeed, the various Hague Conventions of 1899 and 1907 are silent on the issue,⁴⁸⁹ thereby implicitly acknowledging their acceptability in certain situations. And the utility of reprisals was even conceded in

the post–Second World War trials of war criminals, in which those accused tried to justify their horrific abuses on that basis. For instance, the French Permanent Military Tribunal at Dijon observed, “It was admitted that ‘reprisals between belligerents cannot be dispensed with, for the effect of their use and of the fear of their being used cannot be denied.’ It would thus appear that, in the present stage of its growth, international law still recognises reprisals, admittedly within certain conditions and limitations” (Trial of Franz Holstein and Others at 28⁴⁹⁰).

But over time, States began to impose prohibitions and limitations on reprisals. For example, Article 2 of the 1929 Geneva Convention on Prisoners of War prohibited reprisals against POWs.⁴⁹¹ Two decades later, all four of the 1949 Geneva Conventions included prohibitions on reprisals,⁴⁹² as did the 1977 Additional Protocol I to those instruments (see discussion below).⁴⁹³

Reprisals Generally

General international law countenances certain violations by a State in the face of violations by another State. The law of State responsibility, for instance, allows for non-forcible and proportionate countermeasures

⁴⁸⁶ *Id.*, ¶ 28.

⁴⁸⁷ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 18.18.1.

⁴⁸⁸ *The Laws of War on Land. Oxford, 9 September 1880*, ICRC INT’L HUMANITARIAN L. DATABASES, art. 86, <https://ihl-databases.icrc.org/en/ihl-treaties/oxford-manual-1880/article-86?activeTab=undefined>.

⁴⁸⁹ *Hague Conventions*, ICRC, https://casebook.icrc.org/a_to_z/glossary/hague-conventions.

⁴⁹⁰ United Nations War Crimes Commission, Law Reports of Trials of War Criminals (1949), <https://www.jewishvirtuallibrary.org/jsource/Holocaust/Hostages-Trial.pdf>.

⁴⁹¹ *Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929*, ICRC INT’L HUMANITARIAN L. DATABASES, art. 2, <https://ihl-databases.icrc.org/en/ihl-treaties/gc-pow-1929/article-2?activeTab=undefined>.

⁴⁹² *The Geneva Conventions of 1949 and Their Additional Protocols Overview*, Int’l Comm. Red Cross (Oct. 29, 2010), <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

⁴⁹³ *Protocols I and II Additional to the Geneva Conventions*, Int’l Comm. Red Cross (Jan. 1, 2009), <https://www.icrc.org/en/doc/resources/documents/misc/additional-protocols-1977.htm#:~:text=Additional%20Protocol%20I%20concerns%20international,of%20force%20in%20those%20conflicts>.

(formerly known as peacetime reprisals), which are acts or omissions that would be unlawful but for the fact that they are designed to directly or indirectly compel another State to desist in its own unlawful conduct or secure any reparations that may be due (Articles on State Responsibility, arts. 22, 49⁴⁹⁴). The wartime analog to a countermeasure is a reprisal calculated to cause the enemy to cease an IHL violation.

The IHL rules permitting reprisals apply only during international armed conflict. They do not govern responses to international law violations in non-international armed conflicts (see discussion below) or peacetime. Nor are reprisals available during an international armed conflict in response to breaches of rules other than those found in IHL.

For the sake of clarity, a lawful action taken in retaliation for enemy operations is not a reprisal. Thus, for example, an operation targeting a valid military objective—including combatants, members of organized armed groups, and civilians directly participating in hostilities—that complies with IHL rules such as proportionality and the requirement to take precautions in attack is not a reprisal. Relatedly, responses to the enemy's lawful military operations cannot qualify as reprisals. Accordingly, the Russian operations against Ukrainian troops purportedly in response to the New Year's Day attack would not need to qualify as a reprisal to be lawful,

for enemy troops, so long as not *hors de combat*, are targetable. Similarly, Russia's "big revenge" cannot be styled as a reprisal because it is neither in response to Ukrainian IHL violations nor per se unlawful under IHL (although individual aspects of the operation may be, and it surely is a continuation of the unlawful use of force against Ukraine under the *jus ad bellum*⁴⁹⁵).

Widespread agreement exists that certain conditions attach to reprisals. Most importantly, the sole permissible purpose of a reprisal is to compel the enemy into compliance with IHL (DoD *Law of War Manual*, § 18.18.1.3⁴⁹⁶). In particular, revenge or punishment cannot justify reprisal, an important point with respect to the Russian attacks. This limitation on purpose also means that IHL violations unlikely to have that effect cannot qualify as reprisals. It also necessarily implies that reprisals cannot be launched in anticipation of enemy violations and cannot occur in the absence of a reasonable belief that a violation(s) that has taken place is but one in a related series of violations, as is the case with Russian attacks against civilians, civilian objects, and other protected persons and objects. As soon as the enemy complies with IHL, the right to engage in reprisals expires (*Kupreškić*, ¶ 535⁴⁹⁷).

Considering the coalition operations that characterize much of modern warfare, the purpose limitation raises the question of which party to the conflict is entitled to

⁴⁹⁴ Int'l L. Comm'n, Responsibility of States for Internationally Wrongful Acts at ¶ 22, 49, U.N. Doc. A/56/49 (2001), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

⁴⁹⁵ Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, LIEBER INST. FOR L. & WARFARE: ARTICLES OF WAR (Feb. 28, 2022), <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>.

⁴⁹⁶ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 18.18.1.3.

⁴⁹⁷ *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgement, ¶ 535 (Int'l Crim. Trib. for the Former Yugoslavia, Jan. 14, 2000).

engage in reprisal and against which of its adversaries. Professor Yoram Dinstein suggests that any member of a coalition or alliance may engage in a reprisal against an enemy violating IHL “if such an action is perceived to be an effective deterrence in the common interest of the allies” (*Conduct of Hostilities*, 4th ed., at 341⁴⁹⁸). This is a sensible conclusion for several reasons, not the least of which is that the State that has been the target of the enemy IHL violations may lack the means to effectively conduct a reprisal (e.g., air assets capable of penetrating enemy air space or artillery systems with the necessary range).

However, Professor Dinstein goes on to suggest that reprisals may be conducted against an ally of the offending State. While acknowledging historical practice supporting the position (Cysne arbitration and practice in the Second World War⁴⁹⁹), the International Committee of the Red Cross (ICRC) is of the view that “resort to such reprisals is no longer valid” (Customary IHL Study, Rule 145 commentary⁵⁰⁰). It points to the limitation of countermeasures to the responsible State and to numerous military manuals that either disallow reprisals against other than the offending State or define reprisals as actions taken against an offending State. In my view, support for the ICRC’s argument is somewhat weak as a strict matter of law,

especially in light of most States’ failure to take a position on point. That said, given the general trend against reprisals outlined below, it is the approach likely to prevail over time.

There is universal consensus, however, that neutral States may neither engage in reprisals on behalf of the victim State nor be the target of them by that State. This was the issue in the 1930 Cysne arbitration,⁵⁰¹ which held that Germany’s destruction of a Portuguese (neutral) vessel as reprisal for the United Kingdom’s violation of international law was unlawful (p. 1056).

A second condition is that a reprisal must be the last resort of the victim State; that is, resort to an otherwise unlawful act or omission is the only measure available to put an end to the enemy’s violation(s). For instance, the DoD *Law of War Manual* cites the possibility of “protests and demands, retorsion, or reasonable notice of the threat to use reprisals before resorting to reprisals” (§ 18.18.2.2).⁵⁰² Indeed, a warning of some sort is required to establish that the reprisal is the last resort (1928 Naulilaa arbitration at 1025–1026;⁵⁰³ *Kupreškić*, ¶ 535⁵⁰⁴). As indicated by the use of “or” in the DoD *Law of War Manual*,⁵⁰⁵ the requirement is less a formal warning than one means of ensuring that the offending State understands it faces reprisals unless it desists. This point is also indicated in the *Manual*’s requirement to make public the reprisal to

⁴⁹⁸ DINSTEIN, CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, *supra* note 260, at 341.

⁴⁹⁹ United Nations Reports of International Arbitral Awards, Portugal-German Claims Commission, vol. II, 1035–1077, https://legal.un.org/riaa/cases/vol_II/1035-1077.pdf.

⁵⁰⁰ *Reprisals*, ICRC INT’L HUMANITARIAN L. DATABASES, Rule 145, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule145>.

⁵⁰¹ REPORTS OF INTERNATIONAL ARBITRAL AWARDS, *supra* note 499.

⁵⁰² 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 18.18.2.2.

⁵⁰³ REPORTS OF INTERNATIONAL ARBITRAL AWARDS, *supra* note 499, ¶ 1052–1026.

⁵⁰⁴ Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 535 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

⁵⁰⁵ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 18.18.2.5.

dissuade the enemy from additional IHL violations (§ 18.18.2.5).

Further, a reprisal must be proportionate to the enemy's violation. This has long been a cornerstone requirement in the law governing reprisals (1880 *Oxford Manual*, art. 86;⁵⁰⁶ Naulilaa arbitration,⁵⁰⁷ 1996 Nuclear Weapons Advisory Opinion, art. 46,⁵⁰⁸ *Kupreškić*, ¶ 535⁵⁰⁹). Proportionality, however, does not require reprisals to be in-kind with respect to the IHL rule that is being violated, the means used to violate it, or the nature of the violation. Instead, as noted in the DoD *Law of War Manual*, proportionality is a question of harm caused by the enemy's breach: "A reprisal should not be unreasonable or excessive compared to the adversary's violation" (§ 18.18.2.4⁵¹⁰).

Of course, unreasonableness and excessiveness are highly subjective thresholds. Sometimes, the disproportionate nature of operations is evident, as in the case of the German Einsatzgruppen killing 2,100 Jews in alleged reprisal for the killing of 21 German soldiers (*U.S. v. Ohlendorf et al.*, U.S. Military Tribunal, 1949, at 493–494⁵¹¹). However, given the admissibility of reprisals that are not in-kind, and the difficulty in quantifying most forms of harm, the DoD approach is

operationally sound. As its *Law of War Manual* notes in explaining the term "excessive" in the context of the proportionality rule, the determination "involves both professional military judgments as well as moral and ethical judgments" (§ 5.12.3⁵¹²). To illustrate, even if Ukraine had violated IHL, the scale and scope of the Russian responses preclude them from qualifying as lawful reprisals.

Finally, only those at the highest levels of government are entitled to authorize reprisals. The 1880 *Oxford Manual*, for instance, required a decision by the "commander in chief" (art. 86⁵¹³). In *Kupreškić*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) explained that reprisals "may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders" (¶ 535⁵¹⁴). The DoD *Law of War Manual* similarly states, "authority to conduct reprisal is generally held at the national level. Service members and units are not to take reprisal action on their own initiative" (§18.18.2.3⁵¹⁵), while the United Kingdom's *Manual of the Law of Armed Conflict* provides, "commanders and commanders-in-chief are not to take reprisal action on their own initiative. Requests for authority to take

⁵⁰⁶ THE LAWS OF WAR ON LAND (1880) (U.K.), art. 86.

⁵⁰⁷ 2 REPORTS OF INTERNATIONAL ARBITRAL AWARDS (1928), ¶ 1052–1026.

⁵⁰⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ¶ 46, 1996 I.C.J. 226 (July 8), <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>.

⁵⁰⁹ Prosecutor v. Kupreškić, Case No. IT-95-16-T, ¶ 535.

⁵¹⁰ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 18.18.2.4.

⁵¹¹ U.S. v. Ohlendorf, 4 Int'l Mil. Trib. Nuremberg, Judgment (Apr. 9, 1949), ¶ 473–494, http://www.worldcourts.com/imt/eng/decisions/1948.04.09_United_States_v_Ohlendorf.htm.

⁵¹² 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 5.12.3.

⁵¹³ THE LAWS OF WAR ON LAND, *supra* note 506, art. 86.

⁵¹⁴ Prosecutor v. Kupreškić, Case No. IT-95-16-T, ¶ 535.

⁵¹⁵ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 18.18.2.3.

reprisal action must be submitted to the Ministry of Defence and require clearance at Cabinet level” (§ 16.19.2⁵¹⁶). Thus, to be lawful as reprisals, the Russian actions would need to have been approved by President Putin, Minister of Defence General Sergei Shoiгу, or someone else at the highest level of government.

Specific Treaty Law Prohibitions

The four 1949 Geneva Conventions, which bind States Party like Ukraine and Russia, prohibit reprisals against the following specified protected persons and objects. The prohibitions unquestionably reflect customary law that is binding on all States.

1. Personnel, buildings, or equipment protected by Geneva Convention I on the Wounded and Sick in the Field⁵¹⁷ (art. 46). These include the wounded and sick (art. 13), the dead (art. 15), medical and religious personnel attached to the armed forces (art. 24), personnel of aid societies (art. 26), and medical personnel of societies of neutral countries (art. 27). Protected property includes fixed medical establishments and mobile medical units (arts. 19, 33, and 34); hospital ships (art. 20); and medical transport, including aircraft (arts. 35 and 36).
2. Personnel, vessels, or equipment protected by Geneva Convention II on the Wounded, Sick, and Shipwrecked at Sea⁵¹⁸ (art. 47). These include the wounded, sick, and shipwrecked (arts. 12 and 13); the dead (art. 18); religious, medical and hospital personnel of hospital ships and their crews (art. 36); and religious, medical and hospital personnel assigned to the medical or spiritual care of the persons designated in Articles 12 and 13 (art. 37). Protected objects include hospital ships (arts. 22, 24, 25, 33); neutral vessels assisting the rescue effort (art. 21); coastal, rescue craft, and their coastal installations (art. 27); sick bays (art. 28); and medical transport, including aircraft (arts. 38 and 39).
3. Prisoners of War (GC III, 13).⁵¹⁹
4. Persons and their property protected under Geneva Convention IV on Civilians (art. 33).⁵²⁰ This prohibition applies to all protected persons, whether in occupied territory or the territory of a party to the conflict (see 1958 ICRC Commentary⁵²¹). On the subject of protected persons, see *Articles of War*, Mačák and Orkin.⁵²²

⁵¹⁶ U.K. LOAC MANUAL, *supra* note 275, § 16.19.2.

⁵¹⁷ GC I, *supra* note 1.

⁵¹⁸ GC II, *supra* note 47.

⁵¹⁹ GC III, *supra* note 22, art. 13.

⁵²⁰ GC IV, *supra* note 49, art. 33.

⁵²¹ GC IV Commentary of 1958, *supra* note 51.

⁵²² Kubo Mačák & Mikhail Orkin, *Who Is Protected by the Fourth Geneva Convention? The Case of Civilians in Invaded Territory* (Aug. 15, 2022), LIEBER INST. FOR L. & WARFARE: ARTICLES OF WAR, <https://lieber.westpoint.edu/who-is-protected-civilians-invaded-territory/>.

Additional Protocol I⁵²³ develops the prohibition on reprisals in Article 20⁵²⁴ for Parties to the instrument (including Russia and Ukraine) by prohibiting reprisals against any persons or objects protected by its Part II, which deals with the wounded, sick, shipwrecked, medical personnel, religious personnel, and medical units. It is, in part a gap-filler for the failure of the 1949 Geneva Conventions to encompass certain categories, such as civilian wounded and sick and civilian medical facilities and transports. Other provisions of the instrument bar reprisals against civilians (art. 51(6)), civilian objects (art. 52(1)), cultural objects and places of worship (art. 53(c)); objects indispensable to the survival of the civilian population (art. 54); the natural environment (art. 55); and works and installation containing dangerous forces (art. 56—dams, dykes, and nuclear electrical generating stations).⁵²⁵ The U.S. Army/Marine Corps *Commander's Handbook on the Law of Land Warfare* emphasizes that buildings and materiel used for civil defense purposes are civilian objects and, therefore, cannot be the subject of reprisal by Parties to Additional Protocol I (FM 6-27/MCTP 11-10C, ¶ 5-60⁵²⁶).

Interestingly, the United Kingdom, which is a Party, issued a reservation to the Additional Protocol I prohibitions, noting, “[i]f an adverse party against which the United Kingdom

is engaged makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question.”⁵²⁷ It went on to acknowledge that such a response, which would clearly be a reprisal action, is subject to the various conditions described above.

Certain other treaty law rules prohibit reprisals. Article 4(4) of the 1954 Convention for the Protection of Cultural Property prohibits them against cultural property “of great importance to the cultural heritage of a people.”⁵²⁸ Article 3(7) of the 1996 Protocol II to the Convention on Certain Conventional Weapons⁵²⁹ bars the reprisal use of mines, booby-traps, and other devices against civilians (see also Amended Protocol II, art. 3(7), which further encompasses non-international armed conflict⁵³⁰).

Customary Status

It must be recalled that the foundational premise of reprisals is that they afford parties to a conflict a means of self-help enforcement in the face of IHL violations. However, as the ICTY noted in *Kupreškić*,

⁵²³ AP I, *supra* note 7.

⁵²⁴ *Id.* art. 20.

⁵²⁵ *Id.* arts. 51(6), 52(1), 53(c), 54, 55 & 56.

⁵²⁶ FM 6-27, *supra* note 232, at ¶ 5-60.

⁵²⁷ AP I, *supra* note 7.

⁵²⁸ Cultural Property Convention, *supra* note 349, art. 4.

⁵²⁹ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), art. 3(7), 10 Oct 1980, 1342 U.N.T.S. 168 (as amended on May 3, 1996).

⁵³⁰ *Id.*

It should be added that while reprisals could have had a modicum when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner. A means of inducing compliance with international law is at present more widely available and, more importantly, is beginning to prove fairly efficacious: the prosecution and punishment of war crimes and crimes against humanity by national or international courts (§ 530⁵³¹).

This reality, *inter alia*, has led to increasing acceptance of customary law limitations and prohibitions on reprisals.

As noted, the 1949 Geneva Conventions prohibitions are well-recognized as reflecting customary international law. Thus, for instance, those who are *hors de combat* because they are wounded or prisoners of war may not be the object of reprisal action. The question today is whether the additional reprisal rules found in Additional Protocol I and elsewhere have attained customary law status (a topic that merits far greater analysis than is possible here). Some States are skeptical. For example, the DoD's *Law of War Manual* notes that the United States "has expressed the view that API's

provisions on reprisal are counterproductive and that they remove a significant deterrent that protects civilians and war victims on all sides of a conflict" (§ 18.18.3.4,⁵³² citing State Department Legal Adviser Abraham Sofaer's 1987 comments on AP I⁵³³).

On the one hand, it must be acknowledged that there has been very little practice of reprisal since 1949. A notable exception was the Iran-Iraq War of the 1980s, during which both sides attacked cities claiming a right to reprisal (see, e.g., UN Doc. S/15743 (4 May 1983); Doc. S/18704 (18 Feb. 1987); Doc. S/18648 (2 Feb. 1987); Doc. S/18721 (25 Feb. 1987); Doc. S/18728 (27 Feb. 1987); Doc. S/18945 (24 June 1987)). A few other examples are set forth in the late Frits Kalshoven's classic work, *Belligerent Reprisals* (ch. VI).⁵³⁴ Overall, though, reprisals are rare.

But on the other hand, there appears to be continuing acceptance that reprisals are not forbidden altogether. In 2007, for instance, the ICTY Trial Chamber affirmed the position taken in *Kupreškić*⁵³⁵ that certain reprisals (albeit not against civilians) continued to be permissible subject to very stringent conditions (Martić ¶¶ 465–467,⁵³⁶ confirmed in 2008 by Appeals Chamber, ¶¶ 263–267⁵³⁷). As noted, the United States agrees (DoD *Law of War Manual*, § 18.18⁵³⁸). To illustrate a

⁵³¹ Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 530 (Int'l Crim. Trib. for the Former Yugoslavia, Jan. 14, 2000).

⁵³² 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 18.18.3.4.

⁵³³ Martin P. Dupuis, John Q. Heywood & Michèle 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. UNIV. INT'L L. REV. 415 (1987), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1660&context=auilr>.

⁵³⁴ FRITS KALSHOVEN, *BELLIGERENT REPRISALS*, ch. VI (2005).

⁵³⁵ Prosecutor v. Kupreškić, Judgement.

⁵³⁶ Prosecutor v. Martić, ICTY IT-95-11-T, Judgment, ¶ 465–467 (June 12, 2007).

⁵³⁷ Prosecutor v. Martić, ICTY IT-95-11-A, Judgment, ¶ 263–267 (Oct. 8, 2008).

⁵³⁸ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 18.18.

reprisal that would not be prohibited, both the U.S. Navy/Marine Corps/Coast Guard *Commander's Handbook on the Law of Naval Operations* and the *Commander's Handbook on the Law of Land Warfare* cite the “use of weapons forbidden by the 1907 Hague Regulations to counter the use of the same weapons by an enemy on combatants who have not yet fallen into the hands of the enemy” (§ 8-80⁵³⁹ and § 6.2.4,⁵⁴⁰ respectively).

But which particular prohibitions beyond those in the Geneva Conventions have achieved customary law status? The most important of the reprisal rules in Additional Protocol I is that forbidding reprisals against civilians. In its *Customary International Humanitarian Law* study, the ICRC observed (commentary to Rule 146⁵⁴¹),

[I]t is difficult to conclude that there has yet crystallized a customary rule specifically prohibiting reprisals against civilians during the conduct of hostilities. Nevertheless, it is also difficult to assert that a right to resort to such reprisals continues to exist on the strength of the practice of only a limited number of states, some of which is also ambiguous. Hence, there appears, at a minimum, to exist a trend in favour of prohibiting such reprisals.

Accordingly, the ICRC only asserted that reprisals against persons protected by the

Geneva Conventions are prohibited under customary law.

Yet, in *Kupreškić*,⁵⁴² the ICTY Trial Chamber held that the customary prohibition of reprisals against civilians in the hands of the adversary that is reflected in Geneva Convention IV has broadened to include all civilians (see also *Martić*, ICTY 1996, Rule 61 Decision, ¶¶ 15–17⁵⁴³). The Tribunal opined, “[I]t is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result, belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts” (§ 529⁵⁴⁴). It further noted that “principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent” (§ 528⁵⁴⁵). Thus, while the Additional Protocol I, Article 51(6), prohibition may not have been customary in 1977, two decades later, it purportedly had achieved that status. In 2011, the International Criminal Court found that the prohibition equally applies in non-international armed conflict (*Mbarushimana*, Decision on Confirmation of Charges, ¶ 143⁵⁴⁶).

⁵³⁹ NAVAL COMMANDER'S HANDBOOK, § 6.2.4.

⁵⁴⁰ FM 6-27, *supra* note 232, ¶ 8-80.

⁵⁴¹ Rule 146—*Reprisals against Protected Persons*, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule146>.

⁵⁴² Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

⁵⁴³ Prosecutor v. Martić, ICTY IT-95-11-I, Decision, ¶¶ 15–17 (Mar. 8, 1996).

⁵⁴⁴ *Id.* ¶ 529.

⁵⁴⁵ *Id.* ¶ 528.

⁵⁴⁶ Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 143 (Dec. 16, 2011).

The ICTY's assertion of customary law status drew a sharp rebuke from the United Kingdom in its *Manual of the Law of Armed Conflict*,⁵⁴⁷ which asserts, "the court's reasoning is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists. The UK does not accept the position as stated in this judgment" (§ 16.20). And the U.S. *Commander's Handbook on the Law of Naval Operations* takes the position that "[u]nder customary international law, members of the enemy civilian population, other than protected persons covered under the Fourth Geneva Convention, may be legitimate objects of reprisal" (§ 6.2.4⁵⁴⁸).

Yoram Dinstein has split the baby, and appropriately so. He suggests that the fact that a *State* has violated IHL does not mean that the rights of *individuals* are lost because their State of nationality is breaching an IHL obligation (§ 1044). By his approach, civilians (and others enjoying individual rights like POWs) remain safeguarded against reprisals even beyond the protections resident in treaty law. But Professor Dinstein distinguishes such reprisals from those directed at civilian objects: "The exclusion of civilian persons from the lawful scope of belligerent reprisals, spurred by basic precepts of human rights law, does not imply that every inanimate civilian object must be equally protected" (§ 1059).

I agree on the basis that the logic outlined in *Kupreškić* is far less compelling in the case of objects. It also merits noting that in the Martić case, the shelling of Zagreb was considered unlawful as a reprisal because it was disproportionate, not because it targeted civilian objects (Judgment, ¶¶ 467–468⁵⁴⁹). And the ICRC's *Customary IHL* study's Rule 147 only asserts that the prohibitions on reprisals against objects cited in the 1949 Geneva Conventions and 1954 Hague Cultural Property Convention enjoy customary law status.⁵⁵⁰

Professor Dinstein also suggests that all of mankind has an interest in protecting the environment. This being so, "the fact that State A has caused unlawful damage to the natural environment cannot possibly justify compounding the injury by State B" (§ 1045⁵⁵¹). Again, I find merit in the argument, for to argue otherwise would be to permit reprisal-related harm to States that are not violating IHL, including neutrals.

The status of reprisals against cultural property for States that are neither Party to Additional Protocol I nor the Cultural Property Convention is less well established. Professor Dinstein accurately notes that the prevailing view is that they are prohibited under customary law (§ 1047⁵⁵²). One prominent source taking that position is UNESCO's Military Manual on Protection of Cultural Property, which labels such reprisals

⁵⁴⁷ U.K. LOAC MANUAL, *supra* note 275, § 16.20.

⁵⁴⁸ NAVAL COMMANDER'S HANDBOOK, § 6.2.4.

⁵⁴⁹ Prosecutor v. Martić, ICTY IT-95-11-T, Judgment, ¶¶ 467–468 (June 12, 2007).

⁵⁵⁰ Rule 147—Reprisals against Protected Objects, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule147>.

⁵⁵¹ DINSTEIN, CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, *supra* note 260, § 1045.

⁵⁵² *Id.* § 1047.

“absolutely prohibited” (p. 47⁵⁵³). While the *Tallinn Manual* experts, including me, could not achieve consensus on the matter, I believe that States are likely to view any future reprisal attack on cultural property as both a treaty and customary law violation.⁵⁵⁴ So does the ICRC (see commentary accompanying ICRC Customary IHL Study, Rule 147⁵⁵⁵).

Reprisals during Non-international Armed Conflicts?

Treaty law does not directly address reprisals during non-international armed conflict, such as that which occurred in eastern Ukraine prior to Russia assuming “overall control” of the insurgent forces in the area. However, the ICRC asserts that the parties to such a conflict “do not have the right to resort to belligerent reprisals” (ICRC, Customary IHL Study, Rule 148⁵⁵⁶). As support, it points to Common Article 3 of the 1949 Geneva Conventions,⁵⁵⁷ which prohibits violence to life and person, taking hostages, outrages on personal dignity, and the denial of a fair trial. It also requires humane treatment of those not directly participating in the hostilities. The provision undoubtedly reflects customary law.

More broadly, the ICRC argues,

There is insufficient evidence that the very concept of lawful reprisal in non-

international armed conflict has ever materialized in international law. All practice describing the purpose of reprisals and conditions for resort to them refers to inter-State relations and originates from practice in the 19th and early 20th centuries. Recent practice relating to non-international armed conflicts has in no way supported the idea of enforcing the law in such conflicts through reprisals or similar countermeasures, but, on the contrary, has stressed the importance of the protection of civilians and persons *hors de combat*, of respect for human rights law and of diplomatic means to stop violations (Rule 148 commentary⁵⁵⁸).

I find this argument compelling. It must be remembered that reprisal operates as a circumstance precluding the wrongfulness of an otherwise unlawful act or omission under IHL. Thus, this is not a case of needing to find State practice and *opinio juris* to establish crystallization of a *prohibition*. After all, that which is not prohibited is generally lawful in international law. Instead, they relate to the existence of an *exception* to extant IHL prohibitions. In the absence of State practice and *opinio juris*, therefore, conventional legal reasoning would support the ICRC position (see also Sassòli, International Humanitarian Law at 83–84⁵⁵⁹).

⁵⁵³ UNESCO, PROTECTION OF CULTURAL PROPERTY MILITARY MANUAL 47 (2016).

⁵⁵⁴ See TALLINN MANUAL 2.0, *supra* note 405.

⁵⁵⁵ Rule 147—Reprisals against Protected Objects, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule147>.

⁵⁵⁶ Rule 148—Reprisals in Non-International Armed Conflict, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule148>.

⁵⁵⁷ See, e.g., GC I, *supra* note 1, art. 3.

⁵⁵⁸ Rule 148—Reprisals in Non-International Armed Conflict, ICRC DATABASE, CUSTOMARY IHL, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule148>.

⁵⁵⁹ MARCO SASSÒLI, INTERNATIONAL HUMANITARIAN LAW 83–84 (2019).

Concluding Thoughts

It goes without saying that there is no justification for Russia's cacophony of IHL violations in the law of reprisal. As a Party to Additional Protocol I, it is bound by robust limitations therein. But even if it were not, its operations do not satisfy the strict conditions applicable to whatever reprisals remain permissible in customary law. Any attempt by Russia to legally style its purported retaliatory operations as reprisals is untenable.

But the Russian claims of retaliation should cause States to pause when considering their position on reprisals. Those States that maintain reprisals are permissible in certain circumstances seek to preserve their supposed deterrent utility. In doing so, however, they leave the door open to claims by malevolent States like Russia, unfounded though they might be, that their IHL violations are justified as reprisals.

And there is always a risk that reprisal actions will lead to an escalatory spiral. Indeed, the State against which a reprisal is taken might believe in good faith that its original conduct was lawful and, in turn, conclude that it is entitled to engage in reprisals based on the enemy's unlawful response. This risk was tragically illustrated during the air war of the Second World War, which included target area bombing of civilian population centers (see discussion in Kalshoven, ch. V⁵⁶⁰). Thus, the DoD *Law of War Manual* requires reprisals

to be "resorted to only after a careful inquiry into the facts to determine that the enemy has, in fact, violated the law" (§ 18.18.2.1;⁵⁶¹ see also FM 6-27, ¶ 8-82⁵⁶²).

Finally, the DoD *Law of War Manual* wisely cautions that even lawful reprisals might lead to adverse political and operational consequences (§ 18.18.4.⁵⁶³). It warns that they can,

- "Divert valuable and scarce military resources from the military struggle and may not be as effective militarily as steady adherence to the law;"
- "Usually have an adverse impact on the attitudes of governments not participating in the conflict;"
- "Only strengthen enemy morale and will to resist;"
- "Frequently lead only to further unwanted escalation of the conflict by an adversary or a vicious cycle of counter-reprisals;" and
- "Render resources of an adversary less able to contribute to the rehabilitation of an area after the cessation of hostilities."

States considering their position on any remaining right to reprisal in IHL would be well-advised to consider these realities carefully.



⁵⁶⁰ KALSHOVEN, *supra* note 534, ch. V.

⁵⁶¹ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 18.18.2.1.

⁵⁶² FM 6-27, *supra* note 232, ¶ 8-82.

⁵⁶³ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 18.18.4.

THE RUSSIA-UKRAINE WAR AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

by Marko Milanovic | Mar 1, 2022

As with the 2008 Russia-Georgia conflict, the war between Russia and Ukraine—likely to last much longer and be far more brutal than the Georgian conflict—is fought by two States Parties to the European Convention on Human Rights (ECHR).⁵⁶⁴ Both are subject to the compulsory jurisdiction of the European Court of Human Rights.⁵⁶⁵ And just as it has already filed a case based on the Genocide Convention against Russia before the International Court of Justice (ICJ),⁵⁶⁶ which requests the ICJ to issue provisional measures of protection, so has Ukraine filed a new interstate case against Russia before the European Court, asking for interim measures under Rule 39 of the Rules of Court.⁵⁶⁷ The Court has now granted them:

The Court has regard to the current military action which commenced on 24 February 2022 in various parts of Ukraine and considers that it gives rise to a real and continuing risk of serious violations of the Convention rights of the civilian population, in particular under Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment or punishment) and 8 (right to respect for private and family life) of

the European Convention on Human Rights.

With a view to preventing such violations and pursuant to Rule 39 of the Rules of Court (see *Georgia v. Russia (II)* (no. 38263/08), interim measure, 12 August 2008, *Ukraine v. Russia* (no. 20958/14), interim measure, 13 March 2014, *Armenia v. Azerbaijan* (no. 42521/20), interim measure, 29 September 2020, and *Armenia v. Turkey* (no. 43517/20), interim measure, 6 October 2020), the Court decides, in the interests of the parties and the proper conduct of the proceedings before it, to indicate to the Government of Russia to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops.⁵⁶⁸

This is the tenth interstate case brought by Ukraine against Russia—coupled with a case

⁵⁶⁴ ECHR, *supra* note 335.

⁵⁶⁵ European Court of Human Rights, <https://www.echr.coe.int/home>.

⁵⁶⁶ Marko Milanovic, *Ukraine Files ICJ Claim Against Russia*, EJIL:Talk! (Feb. 27, 2022), <https://www.ejiltalk.org/ukraine-files-icj-claim-against-russia/>.

⁵⁶⁷ European Court of Human Rights, Rules of Court, r. 39, Sept. 15, 2025, https://www.echr.coe.int/documents/d/echr/rules_court_eng.

⁵⁶⁸ Press Release, Eur. Ct. Human Rights, The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory (Mar. 1, 2022), <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22%3A%22003-7272764-9905947%22%7D>].

brought by Russia against Ukraine⁵⁶⁹—that deals with prior episodes of the conflict. Most recently the European Court held hearings in the jurisdiction and admissibility phase of the *Netherlands and Ukraine v. Russia* case, which deals with Eastern Ukraine and the downing of the MH17 flight (disclosure: Nottingham's Human Rights Law Centre, which I co-direct, is acting as *amicus curiae* in that case⁵⁷⁰). Previously the Court declared admissible the interstate case dealing with Crimea (see more here⁵⁷¹). Also pending before the Court is a series of interstate cases between Armenia, Azerbaijan, and Turkey regarding the 2020 Nagorno-Karabakh conflict.

Enforcing the ECHR in Armed Conflict

This horrible war, fought in the shadow of the ECHR, raises questions of both the enforcement machinery of human rights law and its substance. The first question is how the Court, and the Council of Europe more generally, will handle the Russian invasion and its fallout. The Committee of Ministers has already suspended Russia's membership in the Council,⁵⁷² although this does not affect its obligations under the ECHR, any cases before the Court, or the participation of the Russian judge at the Court. It is, however, increasingly likely either that Russia will be expelled from the Council of Europe or

that it will withdraw of its own volition and denounce the ECHR.

The reputational costs of doing so that once seemed unimaginable now appear trivial compared with those that Russia has already incurred due to its war on Ukraine. And if Russia does leave the Council and the Convention, any pending cases before the Court would still proceed, and its judgments would remain legally binding. Yet if this happens, Russia is likely to ignore the Convention's machinery altogether, whatever the law might say (for more detailed analysis, see here⁵⁷³).

Substance of the ECHR in Armed Conflict

What, then, of substance? How does the ECHR apply to the Russo-Ukrainian war, regardless of the problem of enforcement? Answering this question raises two distinct issues, which unfortunately are often conflated. First, when does the Convention apply extraterritorially to the conduct of a State affecting individuals outside its sovereign territory? Second, what do *specific* rules of human rights law (and the European Convention in particular) say on *specific* problems arising during armed conflict? And how do they interact with the relevant rules of international humanitarian law (IHL)? How

⁵⁶⁹ Marko Milanovic, *Russia Files Interstate Complaint Against Ukraine in Strasbourg*, EJIL:Talk! (July 26, 2021), <https://www.ejiltalk.org/russia-files-interstate-complaint-against-ukraine-in-strasbourg/>.

⁵⁷⁰ Marko Milanovic & Sangeeta Shah, *Ukraine and the Netherlands v. Russia re MH17, Amicus Curiae Brief on behalf of the Human Rights Centre of the University of Nottingham*, SSRN (Jan. 25, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775402.

⁵⁷¹ Marko Milanovic, *ECtHR Grand Chamber Declares Admissible the Case of Ukraine v. Russia re Crimea*, EJIL:Talk! (Jan. 15, 2021), <https://www.ejiltalk.org/ecthr-grand-chamber-declares-admissible-the-case-of-ukraine-v-russia-re-crimea/>.

⁵⁷² *Council of Europe suspends Russia's rights of representation*, Council of Europe (Feb. 25, 2022), <https://www.coe.int/en/web/porta/-/council-of-europe-suspends-russia-s-rights-of-representation>.

⁵⁷³ Kanstantsin Dzehtsiarou, *The Closing Door in Strasbourg*, VÖLKERRECHTSBLOG (Feb. 26, 2022), <https://voelkerrechtsblog.org/the-closing-door-in-strasbourg/>.

do, for example, human rights rules on the deprivation of life and liberty interact with those of IHL (see more here⁵⁷⁴ and here⁵⁷⁵)?

These two issues are conceptually separate. The threshold extraterritoriality issue arises equally in peacetime—does the ECHR apply, for example, when British intelligence agencies intercept the communications of individuals outside the UK, or when Russian assassins kill people outside Russia, e.g., in the UK (see more here on the Court's recent judgment on the killing of Alexander Litvinenko⁵⁷⁶)?

Similarly, the issue of the concurrent application of human rights and IHL exists equally in *intra*-territorial situations as in *extra*-territorial ones—after all, from Ukraine's perspective, virtually all of the conflict is taking place on its own sovereign territory. But as I said, the two issues are conflated all the time. The European Court has produced dozens of contradictory and confusing judgments on these matters. In particular, it has drawn shifting and arbitrary lines, using the jurisdictional extraterritoriality threshold to shield itself from deciding difficult questions of law and fact, often wary of political backlash.

Some powerful Western states—including the United States and United Kingdom—have themselves, like the Russian Federation, resisted the growing trend of applying human rights extraterritorially and in armed conflict. Much of that resistance is either wrong in principle or based on misapprehensions.

The basic point that human rights, which are grounded in universal and inherent human dignity, are not extinguished just because two States are at war cannot seriously be disputed. Indeed, the very text of the derogation clause in Article 15(1) ECHR confirms the Convention's continuing applicability in wartime. It expressly allows States to derogate from their obligations, but only to the extent strictly required by the exigencies of the situation, in “time of *war* or other public emergency threatening the life of the nation.” And Article 15(2) further allows for derogation from the right to life “in respect of deaths resulting from lawful acts of war,” an option no state has used so far (at least not explicitly so⁵⁷⁷). Neither Ukraine nor Russia has derogated from the Convention in respect of the ongoing situation.

The Court's most recent pronouncement on extraterritoriality and the applicability of the Convention in armed conflict was its January 2021 judgment in *Georgia v. Russia No. 2*,⁵⁷⁸

⁵⁷⁴ Marko Milanovic, *Norm Conflicts, International Humanitarian Law and Human Rights Law* (January 5, 2010), XIX/1 HUMAN RIGHTS & INT'L HUMANITARIAN L.: COLLECTED COURSES ACAD. EUR. L. (Jan. 5, 2010), <https://ssrn.com/abstract=1531596>.

⁵⁷⁵ Marko Milanovic, *The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law*, THEORETICAL BOUNDARIES ARMED CONFLICT & HUMAN RIGHTS (July 10, 2014), <https://ssrn.com/abstract=2463957>.

⁵⁷⁶ Marko Milanovic, *European Court Finds Russia Assassinated Alexander Litvinenko*, EJIL:Talk! (Sept. 23, 2021), <https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/>.

⁵⁷⁷ Marko Milanovic, *Extraterritorial Derogations from Human Rights Treaties in Armed Conflict*, FRONTIERS HUMAN RIGHTS: EXTRATERRITORIALITY & ITS CHALLENGES: COLLECTED COURSES ACAD. EUR. L. (June 9, 2014, rev. July 17, 2015), <https://ssrn.com/abstract=2447183>.

⁵⁷⁸ *Georgia v. Russia*, App. No. 38263/08, Judgment (Jan. 21, 2021, rectified Jan. 29, 2021), [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-207757%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-207757%22]}).

dealing with the 2008 conflict (for extended analysis see here⁵⁷⁹). The Court's bottom line was that it excluded purely kinetic operations from the scope of the Convention, at least insofar as Russia's extraterritorial actions were concerned. The Court found that the Convention couldn't apply in what it called a "context of chaos," the active hostilities phase of an international armed conflict. Thus, the Court refused to examine whether particular attacks by Russia were compliant with the right to life or any other Convention right; one bizarre possible consequence of the Court's position might actually be that the aggressor has fewer human rights obligations than the victim, in the sense that its "context of chaos" reasoning might not apply equally to the territorial state.

But, however questionable it is on kinetic uses of force, the Court's approach actually went beyond its previous restrictive decision on the same issue, *Bankovic v. Belgium and others*, which dealt with the 1999 NATO bombing of the Belgrade TV station. Even though it did not want to be the final arbiter of every use of force in the Georgian war, the Court nonetheless held that the procedural positive obligation to effectively and independently investigate potentially unlawful killings continued to apply even during the active hostilities phase of the conflict, that any person detained in the course of the hostilities was protected by the Convention, and that the Convention applied fully after the hostilities had ended and Russia had established control over the territories it occupied.

The upshot of the Court's current approach is simply that it wants to discourage litigation about the conduct of military operations. In its opinion, judging those operations under the right to life, interpreted in light of IHL, would be too difficult a task, for which the Court lacks expertise and reliable fact-finding tools. That means that, for example, the shelling of Ukrainian cities would not, under the *Georgia v. Russia No. 2* approach, be regarded as falling within the jurisdictional scope of the Convention.⁵⁸⁰

But that position is in my view entirely unsustainable, as a matter of legal principle or even purely pragmatically. The Grand Chamber that decided the *Georgia v. Russia* case was very much split, with some powerful dissenting opinions. And the turnover on the bench means that the precedential value of the judgment is uncertain.

On a proper interpretation of Article 1 ECHR, kinetic operations—like any deprivations of life—should fall within the scope of the Convention, and the Court must look at the substance of such cases, applying the Convention and using IHL as an interpretative aid in doing so. It will, however, take many years for any cases arising out of the current conflict to be litigated on the merits, and as explained above it is very possible that Russia will soon be denouncing the Convention in any event.



⁵⁷⁹ Marko Milanovic, *Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Context of Chaos*, EJIL:Talk! (Jan. 25, 2021), <https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/>.

⁵⁸⁰ @christogrozen, X (formerly Twitter) (Feb. 28, 2022), <https://twitter.com/christogrozev/status/1498286881544577024>.

NEGOTIATING AN END TO THE FIGHTING

by Michael N. Schmitt | May 24, 2022

As the conflict in Ukraine grinds on with no end in sight, speculation over the possibility of negotiating an end to the fighting continues. Most discussion has centered on the terms of any such agreement. Issues on the table have included, *inter alia*, the withdrawal of Russian troops,⁵⁸¹ external guarantors,⁵⁸² the status of the so-called Donetsk and Luhansk People's Republics,⁵⁸³ and Russian sovereignty over Crimea.⁵⁸⁴

Unfortunately, the track record of agreement between Russia and Ukraine is far from encouraging. Recall that the two countries 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.⁵⁸⁵ Yet, in 2014, Russia occupied Crimea, which promptly issued a Declaration of Independence and was soon annexed by Russia. That same year, armed separatist groups in Luhansk and Donetsk (the Donbas

region), supported by Russia militarily, declared independence.⁵⁸⁶

The cease-fire that followed soon thereafter (Minsk I) proved short-lived. It was followed by Minsk II in 2015,⁵⁸⁷ which provided for a cease-fire, withdrawal of heavy weapons from a security zone, OSCE monitoring and verification, and dialogue about autonomy for Luhansk and Donetsk. Despite the agreement, sporadic hostilities broke out, leading to a “frozen conflict” like those in other post-Soviet States (Moldova, Georgia, and Azerbaijan/Armenia). The Russian “special military operation” launched in February of this year sounded the death knell for Minsk II.

Intermittent negotiations between the belligerents have been underway since then but are now stalled. Although President Zelensky indicated on Saturday that an end to the conflict would require a diplomatic solution,⁵⁸⁸ his Chief of Staff quickly clarified that a cease-fire was off the table for the time

⁵⁸¹ *No Ukraine ceasefire deal without Russian withdrawal: Zelenskyy*, AL JAZEERA (May 4, 2022), <https://www.aljazeera.com/news/2022/5/4/zelenskyy-no-ceasefire-deal-without-russian-withdrawal>.

⁵⁸² Press Release, President of Ukraine, During the negotiations with Russia, the Ukraine delegation officially outlined its proposals for a new system of security guarantees for our country (Mar. 29, 2022), <https://www.president.gov.ua/en/news/na-peregovorah-iz-rosiyeyu-ukrayinska-delegaciya-oficijno-pr-73933>.

⁵⁸³ John Drennan, *How Territorial Issues Could Impact Security Guarantees to Ukraine*, USIP (Apr. 27, 2022), <https://www.usip.org/publications/2022/04/how-territorial-issues-could-impact-security-guarantees-ukraine>.

⁵⁸⁴ AL JAZEERA, *supra* note 581.

⁵⁸⁵ Treaty on Friendship, Cooperation and Partnership, Ukr.-Russ., art. 2, May 31, 1997, 3007 U.N.T.S. 147.

⁵⁸⁶ *What you need to know about Ukraine’s separatist regions*, CBS News (Feb. 22, 2022), <https://www.cbsnews.com/news/ukraine-breakaway-regions-russia-donbas-donetsk-luhansk/>.

⁵⁸⁷ *Minsk agreement on Ukraine crisis: text in full*, TELEGRAPH (Feb. 12, 2015), <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/11408266/Minsk-agreement-on-Ukraine-crisis-text-in-full.html>.

⁵⁸⁸ Steven Erlanger, Andrew E. Kramer & Katrin Bennhold, *As Biden Signs \$40 Billion Aid Package for Ukraine, Calls Grow for a Cease-Fire*, N.Y. TIMES (May 21, 2022), <https://www.nytimes.com/2022/05/21/world/biden-ukraine-zelensky-ceasefire-russia.html>.

being, at least if it involved any territorial concessions.⁵⁸⁹

An international armed conflict can end through unconditional surrender, as was the case with Germany and Japan during World War II. *Debellatio*,⁵⁹⁰ which denotes the complete occupation of a defeated country that no longer has a meaningful armed force or government, also signals the end of such a conflict. And as a general matter, the applicability of most international humanitarian law ceases upon the “general close of military operations,” which is usually understood as the “final end of all fighting between all those concerned” (GC IV, commentary to art. 6;⁵⁹¹ see also 1987 Additional Protocol I, commentary to art. 3;⁵⁹² UK *Manual of the Law of Armed Conflict*, ¶ 3.10⁵⁹³).

This post examines three *negotiated* modalities for ending the fighting—cease-fires, armistice agreements, and peace treaties. As will be explained, the first merely suspends the fighting, while the other two end the armed conflict altogether. Moreover, their requirements and limitations differ, making them suitable for differing circumstances. But the discussion must begin with the confusing

terminology used to describe agreements to end hostilities.

Terminology

The U.S. Department of Defense *Law of War Manual* distinguishes between an armistice and a peace treaty, suggesting that the former only suspends operations, whereas the latter ends the armed conflict (§ 12.11.1.1⁵⁹⁴). As to armistices, the *Manual* observes that the term also “has been referred to as a truce, local truce, cease-fire, cessation of hostilities, and suspension of arms” (§ 12.11.1.2;⁵⁹⁵ see also Leslie Green, *Contemporary Law of Armed Conflict*, 3rd ed., p. 104–108;⁵⁹⁶ Sassòli et al., *How Does Law Protect*⁵⁹⁷).

Yet, the *Law of War Manual*’s binary terminological division is not universally accepted. For example, “armistice” is sometimes used to refer to an agreement that suspends hostilities with an eye toward a permanent end to the armed conflict, while “cease-fire” occasionally refers only to agreements to suspend hostilities for other purposes.

Confusing matters is the fact that the *Manual*’s approach does not reflect the way the terms have been used in practice over the last century. As Yoram Dinstein has

⁵⁸⁹ Lorenzo Tondo, *Ukraine rules out any ceasefire deal that involves ceding territory to Russia*, GUARDIAN (May 22, 2022), <https://www.theguardian.com/world/2022/may/22/ukraine-russia-ceasefire-deal-territory-donbas>.

⁵⁹⁰ Michael N. Schmitt, *Debellatio*, MAX PLANCK ENCYCLOPEDIAS OF INT’L LAW (Oct. 2009), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e283?rskey=4k3KUf&result=1&prd=MPIL>.

⁵⁹¹ GC IV Commentary of 1958, *supra* note 51, art. 6.

⁵⁹² Additional Protocols Commentary, *supra* note 25, art. 3.

⁵⁹³ U.K. LOAC MANUAL, *supra* note 276, ¶ 3.10.

⁵⁹⁴ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 12.11.1.1.

⁵⁹⁵ *Id.* § 12.11.1.2.

⁵⁹⁶ LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 104–108 (3d ed. 2008).

⁵⁹⁷ “Armistice” in Marco Sassòli et al. eds, *How Does Law Protect in War?*, ICRC, https://casebook.icrc.org/a_to_z/glossary/armistice; *id.* at “Ceasfire,” https://casebook.icrc.org/a_to_z/glossary/ceasfire; *id.* at “Truce,” https://casebook.icrc.org/a_to_z/glossary/truce.

explained in his classic work *War, Aggression and Self-Defence* (6th ed., p. 36–64),⁵⁹⁸ in contemporary usage “cease-fires” suspend hostilities, “armistices” terminate the armed conflict, and “peace treaties” restore peaceful relations between the belligerents (see also *Max Planck Encyclopedia* entries by Dinstein⁵⁹⁹ and Bell;⁶⁰⁰ *Handbook of Humanitarian Law*, Fleck, 4th ed., § 3.31–3.32;⁶⁰¹ *N.Y. Times*⁶⁰²).

In my estimation, Dinstein’s typology best replicates current State practice and is of greater practical use. Therefore, I adopt it in this post. However, my purpose here is not to resolve the unfortunate terminological dissonance. Instead, I write to highlight the three fundamental avenues of approach for negotiating an end to the fighting—suspending hostilities, ending the conflict, and restoring peace.

Suspension of Hostilities: Cease-fires

Factually, parties to a conflict may simply stop fighting for reasons ranging from operational pauses or stalemates to inclement weather that temporarily makes combat impossible. But hostilities can also be *suspended* by legal means. Traditionally, the term “truce” or “armistice” denoted an agreement between

the parties to stop fighting temporarily. Yet, as will be explained in the next section, the latter term has come to refer to one form of agreement that terminates an international armed conflict altogether. Today, the expression “cease-fire” is colloquially used to indicate a suspension of hostilities through agreement; it encompasses the older term “truce.”

Cease-fires are provided for (albeit using the term “armistice”) in Articles 36–41 of the Regulations annexed to the 1899 Hague Convention II⁶⁰³ and the 1907 Hague Convention IV,⁶⁰⁴ which reflect customary law and are therefore binding on all States (Nuremberg IMT Judgment;⁶⁰⁵ Nuclear Weapons Advisory Opinion, para. 80;⁶⁰⁶ Meron⁶⁰⁷). The numbering and substance of the articles are identical in the two instruments, with only a few words distinguishing them.

Such agreements come into effect either at the date and time agreed upon or, if none, once the forces of both sides have been notified (Art. 38). The Hague Regulations provide that a cease-fire agreement may be for a set period or an indefinite duration. In the latter case, either party may resume hostilities whenever it chooses, so long as the other party is warned according to the notice

⁵⁹⁸ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 36–64 (6th ed. 2017).

⁵⁹⁹ Yoram Dinstein, *Armistice*, MAX PLANCK ENCYCLOPEDIAS OF INT’L LAW (Sept. 2015), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e245?rskey=tX3Of9&result=1&prd=MPIL>.

⁶⁰⁰ Christine Bell, *Ceasefire*, MAX PLANCK ENCYCLOPEDIAS OF INT’L LAW (Dec. 2009), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e263?rskey=MLsWdO&result=2&prd=MPIL>.

⁶⁰¹ THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, § 3.31–3.32 (Dieter Fleck ed., 4th ed. 2021).

⁶⁰² Patrick J. Lyons, *Truce, Cease-Fire and Armistice: The Legal Nuances*, N.Y. TIMES (Feb. 22, 2016), <https://www.nytimes.com/2016/02/23/world/middleeast/truce-cease-fire-and-armistice-the-legal-nuances.html>.

⁶⁰³ Hague Convention II, *supra* note 74.

⁶⁰⁴ HR IV, *supra* note 73.

⁶⁰⁵ U.S. v. Göring, 1 Int’l. Mil. Trib. Nuremberg (Oct. 1, 1946), <https://www.legal-tools.org/doc/45f18e/pdf/>.

⁶⁰⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 266, ¶ 80.

⁶⁰⁷ Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT’L L. 348 (1987).

period provided in the agreement (Art. 36). Should one of the parties seriously violate the cease-fire, its opponent may denounce the agreement and, if necessary in the circumstances, immediately resume hostilities (Art. 40). Additionally, the agreement should establish how communications between the parties are to take place (Art. 39).

It must be cautioned that only a serious material breach justifies the resumption of hostilities. Moreover, should “private persons acting on their own initiative” violate the terms of the cease-fire, the “injured party” may only demand punishment or compensation for losses it may have sustained as a result of that breach. It may not resume hostilities against its adversary on that basis unless the conduct of the “private persons” is attributable to the adversary (Art. 41).

Cease-fires may be “general” or “local” (Art. 37). Local cease-fires are restricted to a limited area and used for purposes such as making possible negotiations between the parties, recovering bodies, or facilitating humanitarian relief. At times, the parties to the Ukraine-Russia conflict have negotiated temporary local cease-fires, most notably during the siege of Mariupol (e.g., see here⁶⁰⁸). And last week, Italy presented a plan to the UN Secretary-General calling for local cease-fires to enable civilian evacuations, as well as a broader agreement leading to peace.⁶⁰⁹

Some local cease-fire purposes are provided for in law. Of particular note in the Ukraine-

Russia conflict is Article 15 of the 1949 Geneva Convention I. Using the traditional term “armistice” but referring to a suspension of hostilities, and therefore a cease-fire as the term is used in this post, provides in relevant part,

Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.

Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area.⁶¹⁰

General cease-fires suspend hostilities between the parties everywhere. Their purposes range from allowing for negotiations to merely recognizing a mutual desire to end the fighting without formal acquiescence to any consequence of the conflict, such as territorial gain.

General cease-fires are typically written but need not be. They usually set out the agreed disposition of forces at the time they come into effect. A cease-fire may also indicate which operations are permissible and which are not during the cease-fire period. For instance, the 1991 cease-fire agreement between Coalition forces commanders and their Iraqi

⁶⁰⁸ Rachel Siegel et al., *Evacuations begin from Mariupol plant as shelling in east continues*, WASH. POST (Apr. 30, 2022), <https://www.washingtonpost.com/national-security/2022/04/30/ukraine-russia-azovstal/>.

⁶⁰⁹ Eric Sylvers, *Italy Circulates 4-Point Peace Plan*, WALL ST. J. (May 20, 2022) <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-05-20/card/italy-circulates-4-point-peace-plan-h2o9EfwULf6P1mwDbjdn>.

⁶¹⁰ GC I, *supra* note 1, art. 15.

counterparts that preceded Security Council Resolution 687⁶¹¹ (containing formal cease-fire terms) allowed Iraq to use helicopters, but not fixed-wing aircraft.⁶¹² That judgment error made possible their use against the Kurds and Marsh Arabs and motivated the establishment of no-fly zones in northern and southern Iraq. Similarly, the 1999 Military Technical Agreement between the International Security Force (‘KFOR’) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (‘MTA’) set forth terms, such as the establishment of air and ground safety zones, that made ending the fighting between NATO and the FRY viable.⁶¹³

As the DoD *Law of War Manual* notes (§ 12.11.4.5), in the absence of such prohibitions, a belligerent is allowed:

- to make movements of forces within its own lines;
- to receive reinforcements;
- to construct new fortifications, installations, and bases;
- to build and repair transportation and communications facilities;
- to seek information about the enemy;
- to bring up supplies and equipment; and

- in general, to take advantage of the time and means at its disposal to prepare for resuming hostilities.⁶¹⁴

There have been numerous calls for general cease-fires in this conflict. For instance, Secretary of Defense Lloyd Austin urged Russia’s Defense Minister, General Sergei Shoigu, to accept one during their May 13 phone call.⁶¹⁵ Unfortunately, it fell on deaf ears. And in addition to the local cease-fires cited above, Italy has offered a plan leading to peace that would begin with a general cease-fire and demilitarization of the frontlines.⁶¹⁶

It must be emphasized that as a matter of law, the armed conflict continues during a cease-fire; the fighting is merely suspended until the cease-fire ends by its own terms or a Party breaches a material term and the opponent elects to resume hostilities. However, a cease-fire can, but need not, precede a permanent end to the hostilities by means of an armistice or even a peace treaty.

End of the Armed Conflict: Armistice

As noted, the term “armistice” historically denoted a suspension of hostilities. Since the Second World War, however, it refers to an agreement that ends the armed conflict without fully restoring peace between the belligerents. Yoram Dinstein has noted⁶¹⁷

⁶¹¹ S.C. Res. 689 (Apr. 8, 1991).

⁶¹² *The Gulf War*, PBS: FRONTLINE (Feb. 4, 1997), https://www.pbs.org/wgbh/pages/frontline/gulf/script_b.html.

⁶¹³ *Military Technical Agreement between the International Security Force and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia*, NATO (Aug. 2, 1999), <https://www.nato.int/kosovo/docu/a990609a.htm>.

⁶¹⁴ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 12.11.4.5.

⁶¹⁵ Idrees Ali, *In first since Ukraine invasion, Pentagon chief speaks with Russian counterpart*, REUTERS (May 13, 2022), <https://www.reuters.com/world/europe/us-defense-chief-urged-immediate-ukraine-ceasefire-call-with-russian-counterpart-2022-05-13/>.

⁶¹⁶ Sylvers, *supra* note 609.

⁶¹⁷ DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 598.

that the trend began with the Armistice of 11 November 1918,⁶¹⁸ which ended the First World War. However, the restoration of peaceful relations with Germany was only achieved with the 1919 Treaty of Versailles.⁶¹⁹ This trend continued during and after the Second World War, as illustrated by Italy's declaration of war on Germany in October 1943, a month after it concluded an armistice with the Allies. The declaration of war was only possible because the armistice had ended the armed conflict with Allied forces. In 1947, Italy and the Allies concluded the Paris Treaty of Peace.⁶²⁰

Unlike a cease-fire, an armistice agreement may not be concluded solely at the discretion of operational commanders. It is a formal instrument qualifying as a treaty and, therefore, must be executed on behalf of the governments concerned. And because it ends the armed conflict permanently, it may not be local or of limited duration, it cannot be denounced, and material breach does not allow the aggrieved party to resume hostilities. Accordingly, under an armistice agreement, the parties lose the right to resume hostilities altogether.

Should hostilities subsequently break out between the Parties to an armistice, a new armed conflict will be triggered. Moreover,

since hostilities have ended permanently, any resumption would qualify as an unlawful "use of force" under Article 2(4) of the UN Charter⁶²¹ and customary law unless authorized by the UN Security Council under Chapter VII of the UN Charter⁶²² or engaged in pursuant to the customary right of self-defense reflected in UN Charter Article 51.⁶²³ To illustrate, the 1953 Korean War Armistice ended the war between North and South Korea (and China and the UN Command) as a matter of law,⁶²⁴ but restoration of peace between the two countries awaits a peace treaty. If North Korea attacks, it will violate the UN Charter prohibition on the use of force and trigger a new international armed conflict.

Several steps contained in the previously mentioned Italian peace plan proposal could be included in an armistice agreement between Ukraine and Russia (or even a broader peace treaty).⁶²⁵ They include a conference leading to Ukraine's acceptance of neutrality, an external security guarantee, a bilateral agreement between Russia and Ukraine to clarify the situation in the Donbas and Crimea, and a multilateral agreement between the European Union and Russia that provides for the staged withdrawal of Russian troops and the lifting of sanctions on Russia.

⁶¹⁸ 1 UNITED STATES ARMY IN THE WORLD WAR, 1917–1919: THE ARMISTICE AGREEMENT AND RELATED DOCUMENTS 52 (1948), https://history.army.mil/html/books/023/23-15/CMH_Pub_23-15.pdf.

⁶¹⁹ Treaty of Peace between the Allied and Associated Powers and Germany, June 28, 1919, 225 Consol. T.S. 188.

⁶²⁰ The Treaties of Peace of 1947, 45 INT'L L. STUD. 1, <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2181&context=ils>.

⁶²¹ U.N. Charter art. 2(4).

⁶²² *Id.* ch. 7.

⁶²³ *Id.* art. 51.

⁶²⁴ Agreement between the Commander-in-Chief, United Nations Command, on the One Hand, and the Supreme Commander of the Korean People's Army and the Commanders of the Chinese People's Volunteers, on the Other Hand, Concerning a Military Armistice in Korea, July 27, 1953 (1953), <https://www.archives.gov/milestone-documents/armistice-agreement-restoration-south-korean-state>.

⁶²⁵ Sylvers, *supra* note 609.

But an armistice does not necessarily settle matters between the former belligerents once and for all; that usually is accomplished through the mechanism of a peace treaty. For instance, the aggressor in the conflict may have seized territory in violation of international law, as in the case of Russia's unlawful seizure of Crimea, parts of southern Ukraine, and most of the Donbas region. An armistice would not necessarily signal an acknowledgment of Russia's (or its proxy People's Republics') claims to the territory, nor could it, for a treaty may not sanction territorial acquisition by conquest (see below). However, such an agreement would likely contain lines of demarcation separating forces or territory under the control of the respective Parties that serve as *de facto* borders.

Restoration of Peace: Peace Treaty

As Jann Kleffner has observed, "much as declarations of war have become the exception and contemporary international armed conflicts between States regularly begin without such formal pronouncements of the actual outbreak of hostilities between States, wars and international armed conflicts are often terminated by less formalized modes than by peace treaties."⁶²⁶ Nevertheless, there is no question that they remain formal instruments of international law serving particularly useful purposes. Indeed, Italian Prime Minister Mario Draghi discussed the possibility of a Ukraine-Russia peace treaty

with President Biden during his mid-May visit to the United States.⁶²⁷

Peace treaties need not be preceded by an armistice, although in many cases they are, as with the World Wars (see above). And sometimes, peace treaties come long after the armed conflict is over. For example, the Second World War peace treaty between Germany and the Allied nations was executed only in 1990.

A peace treaty always terminates the armed conflict if not already accomplished through armistice or conduct (see below). However, unlike an armistice, a peace treaty also reestablishes peaceful relations between the parties. They, therefore, may contain an array of terms, ranging from the means by which borders are to be settled to the payment of reparations.

However, the *sine qua non* characteristic of a peace treaty is that it legally reestablishes regular state-to-state relations between the Parties, which Dinstein labels "normalization."⁶²⁸ For instance, the Italian peace plan submitted to the UN Secretary-General contains some proposed provisions that could appear, as discussed above, in either an armistice or a peace treaty.⁶²⁹ Others, like autonomy for Crimea and Donbas, cultural and language rights provisions, and a "guarantee [of] the free movement of people, goods and capital," would be more likely to appear in a peace treaty.

⁶²⁶ Jann K. Kleffner, *Peace Treaties*, MAX PLANCK ENCYCLOPEDIAS OF INT'L LAW, ¶ 9 (Mar. 2011), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e367?rskey=k9kpYO&result=3&prd=MPIL>.

⁶²⁷ Chiara Albanese & Nancy Cook, *Draghi Urges Biden to Foster Long-Term Peace Plan for Ukraine*, BLOOMBERG (May 10, 2022), <https://www.bloomberg.com/news/articles/2022-05-10/draghi-says-ukraine-war-to-bring-drastric-change-to-europe>.

⁶²⁸ DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 598.

⁶²⁹ Sylvers, *supra* note 609.

Normalization does not necessarily mean relations are warm. But over time, that is often the result. Recall that alongside some of its former adversaries, the Federal Republic of Germany joined NATO in 1955 and has been a European Union member since 1958. Yet, it was only with the reunification of Germany that a peace treaty became possible.

Like an armistice, a peace treaty is an international agreement. As such, it is subject to rules outlined in the 1968 Vienna Convention on the Law of Treaties for Parties to that instrument and to the customary law reflected in it for non-Parties like the United States.⁶³⁰ The most significant provision bearing on peace treaties is Article 52. It provides that “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”⁶³¹ As explained in Mark Villiger’s *Commentary on the 1969 Vienna Convention*, the term “procured . . . requires a direct causal relationship between coercion and the conclusion of the treaty, *i.e.*, the treaty would not have been concluded if there had not been a threat or use of force” (p. 645).⁶³² This means, for example, that while victors may impose treaties of peace on their adversary, States that have violated the prohibition on the use of force may not do so. For example, if Russia prevailed in this conflict, it could not compel Ukraine to execute a peace treaty.

It is important to note that Article 52 provides that such a treaty is “void,” which means that the instrument’s provisions have no “legal force” (art. 69(1)).⁶³³ The Villiger *Commentary* observes that even “subsequent approval of a treaty procured by coercion does not appear possible” (p. 647).⁶³⁴ Thus, for instance, a peace treaty imposed on Ukraine by Russia that purported to cede territory to Russia or require recognition of the so-called People’s Republics would be of no legal effect. Further, Article 44(5) confirms that treaties secured by an aggressor are not severable. Accordingly, no provision of such a treaty between Russia and Ukraine would be valid, even one favoring Ukraine. Only a peace treaty that involved no duress by Russia would bind the parties.

As it stands now, the prospect of territorial sacrifice to secure a peace treaty is off the table. On 22 May, for instance, Ukraine’s lead negotiator in talks with Russia confirmed, “Any concession to Russia is not a path to peace, but a war postponed for several years. Ukraine trades neither its sovereignty nor territories and Ukrainians living on them.”⁶³⁵

In that regard, it is clear that the acquisition of territory through the unlawful use of force cannot result in the transfer of sovereignty. This is a long-standing rule of law recognized in the U.S. Military Tribunal’s 1949 *Greifelt (RuSHA)* judgment:

⁶³⁰ VCLT, *supra* note 4.

⁶³¹ *Id.* art. 52.

⁶³² MARK. E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 645 (2009).

⁶³³ VCLT, *supra* note 4, art. 69(1).

⁶³⁴ VILLIGER, *supra* note 632, at 647.

⁶³⁵ Tondo, *supra* note 589.

Any purported annexation of territories of a foreign nation, occurring during the time of war and while opposing armies were still in the field, we hold to be invalid and ineffective. Such territory never became a part of the Reich but merely remained under German military control by virtue of belligerent occupancy. (p. 154)⁶³⁶

Article 4 of Additional Protocol I to the 1949 Geneva Conventions, to which Russia and Ukraine are Party, makes the same point: “Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.”⁶³⁷ The ICRC’s 1987 Commentary (§ 172) to the article explains,

Everyone recognized this principle as an uncontested principle of international law which was, moreover, underlying both the Hague Regulations and the fourth Convention. Nowadays it follows from the inadmissibility of the use of force, as laid down in the Charter of the United Nations, and elaborated in the Declaration on Principles of International Law concerning friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Resolution 2625 (XXV) of the United Nations General Assembly). The only question that was disputed by a minority was whether it was appropriate and necessary to repeat this principle in the present article.⁶³⁸

Unnegotiated End to the Conflict

As a matter of law, and as noted, it is not necessary to negotiate a formal agreement to terminate an international armed conflict. Rather, an international armed conflict ends “with a general close of military operations, with no real likelihood of a resumption in hostilities” (Milanovic, p. 174;⁶³⁹ see also DoD *Law of War Manual*, § 3.8.1.2⁶⁴⁰). This could occur, as noted, through unconditional surrender or *debellatio*.

Indeed, hostilities may simply come to an end *de facto*. However, standing alone, an extended pause in the hostilities does not suffice to terminate the armed conflict. The absence of hostilities only does so when accompanied by evidence of the intention of the parties to end the conflict conclusively, as in the case of re-establishing diplomatic relations or a declaration by one (if met with no objection) or both of the parties that the armed conflict is over. As Marco Sassòli has explained, “[w]ithout declarations or agreements, a relatively long time must pass before it can be determined whether an absence of hostile military operations corresponds to a close or just to a lull” (pp. 191–192).⁶⁴¹

The same logic applies to the reestablishment of peaceful relations. For instance, the resumption of robust trade, cultural exchanges, the provision of foreign aid, or the adoption of a mutual defense agreement could signal the return of peaceful relations.

⁶³⁶ U.S. v. Greifelt et al., U.S. Mil. Trib. Nuremberg (Mar. 10, 1948), at 154, <https://www.legal-tools.org/doc/1t2qsr/pdf>.

⁶³⁷ AP I, *supra* note 7, art. 4.

⁶³⁸ Additional Protocols Commentary, *supra* note 25, § 172.

⁶³⁹ Marko Milanovic, *The end of application of international humanitarian law*, 893 INT’L REV. RED CROSS (Sept. 2015), <https://international-review.icrc.org/articles/end-application-international-humanitarian-law>.

⁶⁴⁰ 2016 DoD LAW OF WAR MANUAL, *supra* note 37, § 3.8.1.2.

⁶⁴¹ SASSÒLI, *supra* note 559, at 191–192.

Conclusion

As noted, there have been repeated calls for cease-fires throughout the conflict in Ukraine, usually for humanitarian reasons.⁶⁴² Sadly, only a few have been heeded. Hopefully, more will be negotiated, and in that regard, it is crucial to understand that there are many purposes for suspending the fighting, including the negotiation of a more permanent end to the conflict. But it will continue to be an uphill battle to negotiate even a temporary halt to the fighting. As a senior adviser to President Zelensky has warned,

The war will not stop (after any concessions). It will just be put on pause for some time. After a while, with renewed intensity, the Russians will build up their weapons, manpower and work on their mistakes, modernise a little, fire many generals. . . . And they'll start a new offensive, even more bloody and large-scale.⁶⁴³

When the international armed conflict, as distinct from the fighting, finally ends, it is likely to occur through an armistice agreement (as that term is used in this post). The question is how long will President Putin be willing to continue to pursue his aggressive war against Ukraine despite its failure to achieve its original objectives and the costs being imposed on it and the Russian people.

And there is a legal fly in the ointment. It is clear from Common Article 2 of the 1949 Geneva Conventions and customary international law that an international armed conflict continues during the belligerent occupation of a party's territory.⁶⁴⁴ Therefore, if an armistice agreement between Ukraine and Russia is to end the armed conflict, it would have to either provide for the withdrawal of Russian troops or include implicit or explicit Ukrainian consent to their continuing presence, thereby changing the situation from one of occupation to consensual basing. Should the agreement not adopt either course of action, it would effectively amount to a general cease-fire because the international armed conflict would continue, as a matter of law, despite the indefinite suspension of hostilities. In my view, this is the likeliest scenario.⁶⁴⁵

Finally, a peace treaty in the foreseeable future is unthinkable. Given the horrific abuses that Russian forces have committed, it is difficult to imagine Ukraine agreeing to the normalization of relations any time soon. And voluntary territorial concessions by Ukraine appear out of the question. So for the time being, a general cease-fire is the best negotiated solution for which we can hope.



⁶⁴² See Rohit Ranjan, *Russia-Ukraine war: ICRC calls for ceasefire in Mariupol to avoid "worst-case scenario,"* REPUBLIC WORLD (Mar. 14, 2022), <https://www.republicworld.com/world-news/russia/russia-ukraine-war-icrc-calls-for-ceasefire-in-mariupol-to-avoid-worst-case-scenario-articleshow>; *UN chief calls for cease-fire in Moscow visit*, DW (Apr. 26, 2022), <https://www.dw.com/en/ukraine-un-chief-calls-for-cease-fire-in-visit-to-moscow-as-it-happened/a-61590982>; Press Release, Eur. Comm'n Directorate-Gen. for Eur. Civ. Prot. & Humanitarian Aid Operations, Ukraine—Russia's war on Ukraine, RELIEFWEB (Apr. 1, 2022), <https://reliefweb.int/report/ukraine/ukraine-russias-war-ukraine-dg-echo-un-ocha-icrc-media-echo-daily-flash-01-april-2022>.

⁶⁴³ Tom Balmforth, *Ukrainian negotiator rules out ceasefire or concessions to Russia*, REUTERS (May 21, 2022), <https://www.reuters.com/world/europe/ukrainian-negotiator-rules-out-ceasefire-or-concessions-russia-2022-05-21/>.

⁶⁴⁴ *E.g.*, GC I, *supra* note 1, art. 2.

⁶⁴⁵ See also Hans Binnendijk & Alexander Vershbow, *A prolonged ceasefire may be the likely endgame in Ukraine*, DEF. NEWS (May 16, 2022), <https://www.defensenews.com/opinion/commentary/2022/05/16/a-prolonged-ceasefire-may-be-our-best-hope-for-an-endgame-in-ukraine/>.

LESSONS FROM SYRIA'S CEASEFIRES

by Marika Sosnowski | Jul 12, 2022

Ceasefires are generally seen by academics, policy makers, and military and political personnel as being humanitarian and positive, or at worst, benign. However, increasing research⁶⁴⁶ and first-hand experience⁶⁴⁷ show that, in fact, the consequences of ceasefires are diverse and often not particularly positive.⁶⁴⁸ As a Syrian negotiator I interviewed bluntly put it, “If there is a ceasefire, people know the devil is coming.” Likewise, a military official working with NATO in Afghanistan told me numerous anecdotes based on years of first-hand experience that ceasefires had been used by the Taliban, local leaders, and the Afghan government to consolidate their own authority rather than to simply halt fighting.

In this post, I draw from experience with ceasefires in the Syrian civil war to offer three broad considerations for other conflict zones, particularly Ukraine. At the same time, I agree with Lawrence Freedman’s recent point that “[c]ontext is always essential when trying to understand the range of options available to policy-makers and the effectiveness of those chosen.”⁶⁴⁹ Conflicts have their own specific dynamics, histories, and relationships. As such, I am conscious to avoid “West-splaining” Ukraine to those with greater

knowledge of the intricacies of that particular country and conflict.⁶⁵⁰

The first consideration urges broader thinking about the ramifications of ceasefires beyond only stopping violence for a period of time. This may include how they affect local governance, smuggling networks, citizenship, and property rights as well as military deployments. The second advocates for greater skepticism concerning terms such as humanitarian/safe corridors, reconciliation, or de-escalation that have often been used, but in the Syrian case particularly, to lull the international community into a false sense of legality, legitimacy, and changes to the nature of violence brought about by such ceasefires. Finally, I discuss conundrums of monitoring mechanisms—now a common feature of ceasefire agreements—worthy of consideration.

Varied Consequences

Ceasefires rarely only “cease fire.” They are part of complex military and political contestations for control of the State. Ceasefires are not only used as military tools to stop violence. They are also political tools

⁶⁴⁶ Emma Beals, *Approach with caution: Lessons for Ukraine from the Russian approach to ceasefires and humanitarian access in Syria*, EUR. LEADERSHIP NETWORK (Mar. 7, 2022), <https://www.europeanleadershipnetwork.org/commentary/approach-with-caution-lessons-for-ukraine-from-the-russian-approach-to-ceasefires-and-humanitarian-access-in-syria/>.

⁶⁴⁷ Reem Turkmani, (@Rim_Turkmani), X (FORMERLY TWITTER) (May 16, 2022), https://twitter.com/Rim_Turkmani/status/1526173608925663232.

⁶⁴⁸ @verobellin, X (FORMERLY TWITTER) (Oct. 30, 2017), <https://twitter.com/verobellin/status/924933818028523520>.

⁶⁴⁹ Lawrence Freedman, *Spirits of the Past*, COMMENT IS FREED (June 12, 2022), <https://samf.substack.com/p/spirits-of-the-past?s=r>.

⁶⁵⁰ Patryk I. Labuda, *On Eastern Europe, “Whataboutism” and “West(s)plaining”: Some Thoughts on International Lawyers’ Response to Ukraine*, EJIL:Talk! (Apr. 12, 2022), <https://www.ejiltalk.org/on-eastern-europe-whataboutism-and-westsplaining-some-thoughts-on-international-lawyers-responses-to-ukraine/comment-page-1/>.

that actors in civil wars use for their own ends. These ends are invariably much broader than winning or losing militarily. Because they are not purely military instruments, ceasefires have been used in Syria (and other cases such as Myanmar⁶⁵¹ and Israel/Palestine⁶⁵²) to justify the seizure of property, to consolidate political power, and to challenge or change rights to citizenship⁶⁵³ and demographic engineering.⁶⁵⁴

In Syria, ceasefires have given the Assad regime pretexts to enact discriminatory laws, to destroy property documents (such as land titles),⁶⁵⁵ and to administer prejudicial reconstruction projects.⁶⁵⁶ In the Syrian case, a raft of presidential decrees has been enacted to permanently reappropriate properties seized under local ceasefires.⁶⁵⁷ For example, the Basila City (which ironically means “Peace City” in old Aramaic), Marouta, and Homs Dream development projects (and others like them) prevent the return of residents evacuated under ceasefire deals and formalizes their permanent displacement. These development plans and associated legislation concerning property in areas subjected to local ceasefire agreements such as Old Homs and Daraya deliberately and

permanently reconfigure property rights in the regime’s interest. The written terms of the ceasefire agreements provide the conditions for and help establish this reality.

Further, rather than halt violence, ceasefires can merely shift violence to new targets. For example, the consequences of the 2016 Cessation of Hostilities in southern Syria suggest that the type of violence and actors morphed in response to the ceasefire.⁶⁵⁸ The temporary halt in large-scale hostilities afforded by the ceasefire relieved the Syrian regime of the burden of fighting on multiple fronts simultaneously. It enabled the regime to reallocate troops and resources away from the south and to strategically target rebel-held areas that it had been unable to recapture.

These included communities around Damascus and eventually Aleppo. At the same time, in the south during the ceasefire the Syrian regime shifted from indiscriminate aerial bombardment or large ground assaults to a campaign that specifically targeted local political and rebel group leaders to stunt local governance efforts. These assassinations were carried out by small sleeper cells using IEDs, which put minimal pressure on the regime’s

⁶⁵¹ ‘With only our voices, what can we do?’: *Land confiscation and local response in southeast Myanmar*, Karen Human Rights Group: Documenting the voices of villagers in rural Burma (June 30, 2015), <https://www.khrg.org/2015/06/with-only-our-voices-what-can-we-do-land-confiscation-and-local-response>.

⁶⁵² Policy Briefing, International Crisis Group, *Ending the War in Gaza* (Jan. 5, 2009), 0BE98E697F7CA2298525753500778477-Full_Report.pdf.

⁶⁵³ *Samer Abboud Examines the Politics of Exclusion in Syria [VIDEO]*, STAN. FREEMAN SPOGLI INST. INT’L STU. (May 12, 2020), <https://fsi.stanford.edu/news/samer-abboud-examines-politics-exclusion-syria>.

⁶⁵⁴ [‘I’m not going to die’], Amnesty Int’l (2017), <https://www.amnesty.org/en/wp-content/uploads/sites/9/2021/05/MDE2473092017ARABIC.pdf>.

⁶⁵⁵ A. Al Zien, *Legal Obstacles to Housing, Land and Property Rights in Syria*, PAX FOR PEACE (Mar. 6, 2019), <https://paxforpeace.nl/wp-content/uploads/sites/2/import/import/legal-obstacles-policy-brief-pax.pdf>.

⁶⁵⁶ Steven Heydemann, *Beyond Fragility: Syria and the Challenges of Reconstruction in Fierce States*, BROOKINGS, https://www.brookings.edu/wp-content/uploads/2018/06/fp_20180626_beyond_fragility.pdf.

⁶⁵⁷ Jihad Yazigi, *Destruct to Reconstruct, How the Syrian Regime Capitalises on Property Destruction and Land Legislation*, FRIEDRICH EBERT STIFTUNG (July 2017), <https://library.fes.de/pdf-files/iez/13562.pdf>.

⁶⁵⁸ Marika Sasnowski, *The Trouble with Ceasefires*, PURSUIT, <https://pursuit.unimelb.edu.au/articles/the-trouble-with-ceasefires>.

limited resources. A safety and security officer working for an organization that ran cross-border programs and deliveries from Jordan into Syria said, “The targeting [of local leaders] became so frequent during the ceasefire that many members of armed groups took to driving around in civilian vehicles rather than their usual, more noticeable and common four-wheel drives. This allowed them to travel with more obscurity.”

Weasel Words

Despite the relative simplicity of the concept of a ceasefire, there has been little agreement, and much confusion, concerning its nomenclature. Historically, the terms truce and armistice were used as synonyms.⁶⁵⁹ But in more recent history, new names have been added to the lexicon that essentially describe the same phenomenon, “a temporary cessation of violence that does not settle the larger conflict but is intended as a step in that direction.”⁶⁶⁰ These include cessation of hostilities,⁶⁶¹ humanitarian pause,⁶⁶² de-escalation,⁶⁶³ and (more creatively)

Days of Tranquility,⁶⁶⁴ Safe Zones, Safe Corridors,⁶⁶⁵ and Windows of Silence.⁶⁶⁶ Despite the convoluted terminology, so far all of the above have featured predominantly in relation to how they affect violence.⁶⁶⁷ This approach ipso facto assumes the ramifications of ceasefires to be an inevitable humanitarian good. Consequently, we remain blinkered as to how ceasefires can be used for less positive ends.

For example, the terms of the May 2017 Memorandum on the creation of de-escalation zones in the Syrian Arab Republic created four territorial delimited zones across the country. This ceasefire produced an initial decrease in armed hostilities.⁶⁶⁸ But it also enabled Syrian and Russian troops to refocus their attention on one specific zone at a time to besiege, bombard, and eventually force them into signing strangle contracts that they called reconciliation agreements.⁶⁶⁹

These so-called reconciliation agreements were very effective in bifurcating the population along lines of political allegiance, expelling

⁶⁵⁹ Michael N. Schmitt, *Ukraine Symposium—Negotiating an End to the Fighting*, ARTICLES OF WAR (May 24, 2022), <https://lieber.westpoint.edu/negotiating-end-to-fighting/>.

⁶⁶⁰ Shane Smith, *Ceasefire*, BEYOND INTRACTABILITY (Oct. 2003), <https://www.beyondintractability.org/essay/cease-fire>.

⁶⁶¹ Cessation of Hostilities Framework Agreement between the Government of the Republic of Indonesia and the Free Aceh Movement, Sept. 12, 2022, <https://www.peaceagreements.org/viewmasterdocument/325>.

⁶⁶² Annie Slemrod, *UN calls for ‘humanitarian pause’ in Yemen as conditions in capital deteriorate*, NEW HUMANITARIAN (Dec. 4, 2017), <https://www.thenewhumanitarian.org/news/2017/12/04/un-calls-humanitarian-pause-yemen-conditions-capital-deteriorate>.

⁶⁶³ Memorandum on the creation of de-escalation areas in the Syrian Arab Republic, June 5, 2017, <https://www.peaceagreements.org/viewmasterdocument/2093>.

⁶⁶⁴ Press Release, U.N. Advance Mission in Sudan, The UN call for days of tranquility bears fruit; More than five million children have been vaccinated against Poliomyelitis in Sudan (Jan. 16, 2005), <https://reliefweb.int/report/sudan/un-call-days-tranquility-bears-fruit-more-five-million-children-have-been-vaccinated>.

⁶⁶⁵ Geoff Gilbert & Anna Magdalena Rüsçh, *Creating safe zones and safe corridors in conflict situations: Providing protection at home or preventing the search for asylum?*, Kaldor Ctr. for Int’l Refugee L. (June 2017), https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_brief_Creating_safe_zones_and_safe_corridors.pdf.

⁶⁶⁶ *OSCE mirror patrols: Windows of hope in Eastern Ukraine*, OSCE (Apr. 12, 2017), <https://www.osce.org/stories/osce-mirror-patrols-windows-of-hope-eastern-ukraine>.

⁶⁶⁷ Univ. of Birmingham: GSDRC Applied Knowledge Services, <https://gsdrc.org/>.

⁶⁶⁸ *Syria from Within*, Chatham House, <https://kalam.chathamhouse.org/tags/syria-from-within/>.

⁶⁶⁹ Marika Sosnowski, *Besiege, bombard, retake: Reconciliation agreements in Syria*, MIDDLE EAST EYE (Mar. 28, 2018), <https://www.middleeasteye.net/opinion/besiege-bombard-retake-reconciliation-agreements-syria>.

those that could not “reconcile” via the now infamous green buses to Idlib.⁶⁷⁰ Because of the deliberate use and positive connotations of weasel words like “de-escalation” and “reconciliation,” immediate relief efforts to communities by organizations such as the UN Office for the Coordination of Humanitarian Affairs were not prioritized. The Syrian regime also tailors its own governmental services to citizens in areas that have signed reconciliation agreements along political lines. Predominantly Sunni communities that played an active role in the revolution remain cut off from many services they need while remaining drip-fed necessities by Damascus to keep them dependent.⁶⁷¹

A number of ceasefires and humanitarian corridors have already been proposed and/or implemented during Russia’s invasion of Ukraine. For example, barely one week into the war in Ukraine, Russia agreed to implement humanitarian corridors to allow people from the besieged city of Mariupol to evacuate.⁶⁷² Shortly afterward, however, Ukraine’s President Volodymyr Zelensky accused Russia of laying landmines within the corridors to thwart civilians’ ability to flee.⁶⁷³ The Syrian civil war has been a testing ground for Russia, and other States, to see how much they can get away with under the guise of

using supposedly humanitarian ceasefires for violent ends.

Perils and Pitfalls of Monitoring Mechanisms

Contemporary ceasefire agreements often establish some sort of mechanism to monitor violations of the ceasefire. These can be made up of a wide variety of actors including UN bodies, the Organization for Security Cooperation in Europe, and the African Union, as well as local groups and organizations. The common premise is that these mechanisms report on the compliance of signatories with the terms of the ceasefire.⁶⁷⁴ However, because the monitoring mechanism and framework are often implemented by a third-party to the conflict, agreement concerning who, what, where, when, and why the monitoring mechanism will operate can be elusive. For example, despite the United States and Russia sharing monitoring responsibilities for the 2016 Cessation of Hostilities in Syria, a member of the diplomatic corps in Jordan told me that dialogue between the two States remained cursory. Likewise, a hotline, set up by the U.S. State Department to record reported breaches of the ceasefire, was criticized for lacking native Arabic speakers. Abu Odei al-Homsi, an activist from the Homs countryside, called

⁶⁷⁰ Anne Barnard & Hwaida Saad, *Stark Choice for Syrians in Rebel Areas: “Doom” or the Green Bus*, N.Y. TIMES (Oct. 29, 2016), <https://www.nytimes.com/2016/10/30/world/middleeast/once-propelled-by-hope-for-a-modern-syria-green-buses-now-run-on-tears.html>.

⁶⁷¹ *Syria’s Economic Meltdown*, Policy Brief, NEW LINES INST. (June 2020), <https://newlinesinstitute.org/wp-content/uploads/NLISAP-Syrian-Economic-Meltdown-June2020.pdf>.

⁶⁷² Khaleida Rahman, *Evacuation Route Offered to Fleeing Ukrainians Was Mined—Red Cross*, NEWSWEEK (Mar. 7, 2022), <https://www.newsweek.com/evacuation-route-offered-fleeing-ukrainians-mined-1685418>.

⁶⁷³ *Zelensky Accused Russia of Mining Humanitarian Corridors*, NOVINITE (Mar. 8, 2022), <https://www.novinite.com/articles/214156/Zelensky-accused+Russia+of+Mining+Humanitarian+Corridors>.

⁶⁷⁴ Antonia Potter, *Ceasefire monitoring and verification: identifying best practice*, CTR. FOR HUMANIT. DIALOGUE (June 10, 2004), <https://hdcentre.org/insights/ceasefire-monitoring-and-verification-identifying-best-practice/>.

the hotline but said, “We don’t think they understood what we were saying.”⁶⁷⁵

Third parties also provide the belligerents political scapegoats for their own shortcomings in agreeing to and/or failing to abide by the terms of the ceasefire agreement, and monitoring mechanisms can themselves become part of the dynamics of the conflict. For example, while the United Nations Supervision Mechanism for Syria (UNSMIS⁶⁷⁶), which was established by Kofi Annan’s six-point plan, was relatively ineffectual and lasted less than two months in-country,⁶⁷⁷ the head of the mission Norwegian Major General Robert Mood later said, “The parties we met in Syria seemed to seek support and arguments through our presence and activities, and they sought to confirm the validity of their respective narratives rather than implement Annan’s proposal.”⁶⁷⁸ Barely a month after Robert Mood and the UNSMIS monitors left, the Syrian regime began to drop bombs on bread lines. While Kofi Annan’s ceasefire might have created an optical win for its signatories, the illusion of an ongoing peace process and the presence of the UN monitoring mechanism concealed the fact that violence on the ground was escalating.

Conclusion

In May 2013, the Public International Law and Policy Group published the *Ceasefire Drafter’s Handbook*.⁶⁷⁹ A large portion of this document is reserved for a ceasefire template that offers particular phrasing and clauses that a negotiator can transplant (with relevant changes and additions) into a ceasefire they are negotiating. However, rather than operate from a path dependency that proscribes the inclusion of stock ceasefire terms, negotiators and interveners in conflict zones should be equipped with deep knowledge of the particular conflict arenas and actors they are engaging with in order to understand how the terms of particular ceasefires affect broad conflict dynamics.

My guess is that none of the above considerations will be particularly surprising to those that have direct experience with how ceasefires operate in civil wars. While conflict-specific approaches are touted as best practice, rote approaches to ceasefires are more often than not used. Likewise, despite military personnel and others having direct experience with the practical ramifications of ceasefires and their diverse consequences, the use of weasel words to obfuscate criminal acts, and the potential hazards encountered by monitoring mechanisms, many of the

⁶⁷⁵ Osoma Abu Zeid, Orion Wilcox & Kristen Demilio, *On the line with the State Department ceasefire hotline: “America has no idea what’s happening on the ground in Syria,”* SYRIA DIRECT (Mar. 2, 2016), <https://syriadirect.org/on-the-line-with-the-state-department-ceasefire-hotline-america-has-no-idea-whats-happening-on-the-ground-in-syria/>.

⁶⁷⁶ S.C. Res. 250 (Apr. 23, 2012).

⁶⁷⁷ *UN suspends monitoring activities in Syria amid escalating violence*, U.N. News (June 16, 2012), <https://news.un.org/en/story/2012/06/413402>.

⁶⁷⁸ Robert Mood, *My Experiences as Head of the UN Mission in Syria*, CARNEGIE MIDDLE EAST CTR. (Jan. 21, 2014), <https://carnegie-mec.org/diwan/54238>.

⁶⁷⁹ PUB. INT’L L. & POLICY GROUP, *THE CEASEFIRE DRAFTER’S HANDBOOK: AN INTRODUCTION AND TEMPLATE FOR NEGOTIATORS, MEDIATORS, AND STAKEHOLDERS* (2013), <https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/5b730a224fa51ab1083c22bb/1534265892577/PILPG+Ceasefire+Drafter%27s+Handbook+%28Including%2BTemplate%2BCeasefire%2BAgreement%29-2.pdf>.

world's conflict negotiators continue to stick to a rather formulaic approach.

Of course, ceasefires always turn on a paradox: Their potential for short-term relief often comes at the expense of their impact on other, more enduring and complex dynamics. It is for conflict negotiators, policy makers, and

military personnel to more astutely navigate this tightrope in every specific context. If Syria's ceasefires have taught us anything, it is that the assumption that ceasefires are inherently positive is naïvely misguided.



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Keeping the Long Gray Line strong!

Ken (USMA '74) and Lucy Hicks

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*, the Lieber Institute for Law and Warfare's digital publication, that address a range of topics arising from the Ukraine-Russia conflict. Among other things, the volume examines subjects associated with the role of cyber technology in the war and what it can teach us about its implementation in combat. It also evaluates maritime conflicts, including issues concerning neutrality and exclusion zones, as well as the use of instruments such as naval mines, torpedoes, and drones at sea. The volume further examines the conflict as it has been fought from the air and space, along with issues arising from Russian occupation in eastern Ukraine, the enforcement of local and international laws, the effects of the conflict on children, and the erosion of human rights.

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