

# What You Need to Know:

## Unpacking the Law in Russia's War Against Ukraine



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## What You Need to Know

*What You Need to Know* takes up major legal issues arising out of Russia's war against Ukraine and the global response to that conflict. In brief question-and-answer interviews with leading experts, the Reiss Center on Law and Security and *Just Security* probe some of the most urgent and unsettled legal questions in a tragic conflict that threatens to reshape the international legal and political landscape for years to come. The series was created by Tess Bridgeman, Rachel Goldbrenner, and Ryan Goodman.

*Note to readers:* hyperlinks can be accessed on the PDF version of the series.

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## What You Need to Know: Unpacking the Law in Russia's War Against Ukraine

# International Humanitarian Law and Russia's Termination of the Black Sea Grain Initiative

Tom Dannenbaum | July 28, 2023



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### What are the most important ways that international humanitarian law (IHL) guards against food insecurity?

Before answering this question, it is worth noting the context. Russia's invasion of Ukraine is a war of [aggression](#) in violation of article 2(4) of the United Nations (U.N.) [Charter](#) and customary international law. Aggressive war is also an international crime ([Rome Statute](#) of the International Criminal Court (Rome Statute), article 8*bis*). These are continuing violations, which is to say that the perpetuation of the illegal war is part of the aggregate *jus ad bellum* violation, even when its specific components do not violate IHL. Along these lines, the Human Rights Committee has [reasoned](#) (correctly in my view) that *all* killings in an aggressive war violate the right to life. Logically, the same

principle can be extended to components of the illegal war that impair other rights, including those [relating](#) to food security.

Having said that, the focus of our exchange is IHL, which also has several rules that are critical to limiting the effect of armed conflict on food security. Those rules apply equally to both parties to the conflict. Moreover, unlike the crime of aggression, which attaches only to a narrow category of persons in leadership roles, IHL applies to individual participants throughout the command chain. Serious violations can qualify as war crimes.

Several IHL rules are tailored to preserving food security in armed conflict. [Additional Protocol I](#) (1977)—applicable here as Ukraine and Russia are among the treaty's 174 parties—[prohibits](#) the starvation of civilians as a method of warfare, provides enhanced legal protection to “[objects indispensable to the survival of the civilian population](#)” (including food and food infrastructure), and regulates [humanitarian access](#) to populations in need (including with reference to consent to humanitarian action and the facilitation of access when consent is granted). On the applicability of these rules to Russian actions earlier in the war, see [here](#) and [here](#). [Geneva Convention IV](#) (1949)—also applicable to the conflict in Ukraine and ratified by 196 states—requires occupying powers, such as Russia in several Ukrainian regions, to ensure that the occupied population is [supplied with food](#) and other essentials, including by bringing resources in and, where supplies remain inadequate, [granting humanitarian access](#). Geneva Conventions [III](#) and [IV](#) require detaining authorities to ensure [food rations](#) of sufficient quantity, quality, and variety to keep detainees in good health and to prevent weight loss or nutritional deficiencies. With the requisite intent, starvation of civilians as a method of warfare qualifies as a [war crime](#) ([Rome Statute](#), article 8(2)(b)(xxv)).

**“Several IHL rules are tailored to preserving food security in armed conflict.”**

Compliance with the core rules of [distinction](#), [proportionality](#), and [precautions](#) are also important to limiting the impact of war on food security. For example, even when food is not targeted, belligerents are required to take [all feasible precautions](#) to limit attacks' incidental damage to civilian food and food systems as well as incidental civilian injury or death. The attack may not go ahead if those expected incidental impacts [would be excessive](#) in relation to the concrete and direct military advantage anticipated. Damage to food and food infrastructure should weigh heavily in the latter analysis, given its indispensability to human survival. Although not their primary focus, the [heightened protections](#) accorded to [dams, dykes, and nuclear plants](#), as well as the rules [protecting the environment](#) in armed conflict also help to protect water and food systems.

**Since terminating the Black Sea Grain Initiative (BSGI), Russia is reported to have engaged in multiple attacks on food and food export infrastructure in Ukraine's Black Sea ports and on alternative food shipping routes. What does IHL have to say about those attacks?**

The attacks on food and food-specific infrastructure very likely violate the prohibition on targeting civilian objects and almost certainly violate the framework of heightened protection accorded to objects indispensable to civilian survival. The legality of attacks on general export infrastructure is harder to ascertain without more information, but there are at least questions as to its compatibility with the requirements of distinction, precautions, and proportionality.

Pursuant to the foundational IHL rule of distinction, belligerents [may only target](#) objects that, by their nature, location, purpose, or use, make an effective contribution to military action, such that their destruction, capture, or neutralization would return a definite military advantage. Any food or export infrastructure that does not satisfy those criteria is protected as a civilian object. Targeting such an object would be unlawful. Done with the requisite level of intent, it would be a war crime ([Rome Statute](#), article 8(2)(b)(ii)). If there is [doubt](#) as to its civilian status, it should be presumed protected.

Ordinarily, an object that has a civilian use, but also contributes militarily pursuant to the standard just mentioned—a “dual-use object”—would qualify as a military objective. As such, it can be targeted, as long as the rules mentioned above regarding proportionality and precautions are satisfied. However, as I will explain, food is subject to heightened protection.

The most likely argument in defense of Russia's attacks on grain stores and food-specific infrastructure is that Ukrainian food exports provide an effective military contribution through sustaining the war effort economically. This argument is not persuasive.

The United States asserts that “war-sustaining” objects qualify as military objectives (Department of Defense [Law of War Manual](#) §§ 5.6.6.2, 5.6.8.5). For the most comprehensive defense of that view, see [Goodman](#). However, this assertion has not gained traction with most states and is rejected by the majority of experts, for whom a tighter connection to military action is required (e.g. [Dinstein](#), pp.126-127). For that reason, in the absence of a more proximate military contribution, a strong argument can be made that the strikes are straightforwardly illegal as attacks on civilian objects.

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Even if one were to assume the war-sustaining theory of military objectives in general, that theory could not support attacks on food or food-specific infrastructure, such as grain silos. First, as objects indispensable to civilian survival, food and food-specific infrastructure cannot be targeted for their sustenance value unless they provide sustenance *exclusively* to combatants (Protocol I, [article 54\(2\)](#), [54\(3\)\(a\)](#)). To the extent that Russia has targeted food and food infrastructure to put pressure on global (civilian) food supplies and thereby [elicit an alleviation](#) of certain economic sanctions, this targeting of indispensable objects for their sustenance value would be prohibited. Second, food and food infrastructure can only be targeted for reasons *other than sustenance value* if they provide “direct support to military action,” and even then, only if the targeting does not cause civilian starvation (Protocol I, [article 54\(3\)\(b\)](#)). Whatever one’s view on the war-sustaining theory of military objectives, general support to the economy is clearly not *direct* support to military action. There is also reason to believe that the elimination of Ukraine’s [capacity to supply the world](#) with grain [will lead to starvation](#) in areas of the world with greatest need. However, given the relative complexity of that causal link (discussed below), the lack of direct support to military action provides a

more straightforward basis for the strikes’ illegality. Any Russian invocation of alleged Ukrainian IHL violations to defend its attacks as lawful reprisals would be irrelevant here, as food and food infrastructure may not be the target of reprisals (Protocol I, [article 54\(4\)](#)).

In contrast, the general export infrastructure of Ukraine’s Black Sea ports is not likely to qualify as indispensable to civilian survival. Therefore, it would be analyzed under the ordinary rule of distinction. Although maritime ports are often characterized as military objectives ([Dinstein](#), p.142), this must be assessed on a case-by-case basis. Certainly, port infrastructure that is being (or is going to be) used for channeling military supplies or launching military operations qualifies as a military objective by use or purpose, without any need to resort to the war-sustaining theory. However, it is doubtful that this describes the infrastructure targeted since the termination of the BSGI. Depending on their strategic criticality, it is also possible for certain ports or port elements to qualify as military objectives by location. However, even assuming some of Ukraine’s port infrastructure might qualify as military objectives on one of these grounds, it would be unlawful to attack without satisfying the requirements of proportionality and precautions. Those, of course, are highly fact-specific evaluations, some of the details of which I’ll revisit below.

**In terminating the BSGI, Russia has indicated that it will now obstruct the passage of food from Ukraine to the world and has stated that “all ships en route to Ukrainian ports in the Black Sea will be considered as potential carriers of military cargo.” Is its new posture compatible with IHL? Given the critical role of Ukraine as a supplier of global nutrition, is Russia—“[weaponizing food](#),” as some have argued?**

It is important to emphasize at the outset that Russia’s warning to vessels sailing in the waters of the Black Sea to Ukrainian ports cannot, under any circumstances, create a “free-fire zone.” Nor, for that matter, can [Ukraine’s](#) tit-for-tat response threatening ships en route to Russian ports. Beyond that, an IHL analysis of Russia’s operations in the Black Sea depends on whether it is engaged in a legal blockade under the law of naval warfare. Parenthetically,



to revisit a point made at the outset, a blockade lacking *ius ad bellum* basis is an enumerated act of aggression in both the [Rome Statute](#) definition of the crime of aggression (article 8bis(2)(c)) and the UN General Assembly [Definition of Aggression](#) (article 3(c)). This should not be lost in the IHL analysis that follows.

To qualify as a blockade, Russia's operation must have been declared with specificity as to the starting time, geographical limits, and period for neutral vessel exit ([San Remo Manual](#), paras 93-94; [Newport Manual](#), § 7.4.2). The [San Remo Manual commentary](#) notes that this would ordinarily include a Notice to Mariners and communication to the International Maritime Organization (IMO) (pp. 172, 177). The [London Declaration concerning the Laws of Naval Warfare](#) (1909) specifies direct notification to neutral states and local authorities (article 11). It is at least questionable that the Russian Ministry of Defense [message on Telegram](#) specifying that "all vessels sailing in the waters of the Black Sea to Ukrainian ports will be regarded as potential carriers of military cargo" after 00.00 Moscow time on Jul. 20, 2023 was addressed or specified in the ways necessary to satisfy these criteria. No declaration of blockade appears to have been [circulated](#) via the IMO. Additionally, to qualify as a legal blockade under the law of naval warfare, the encirclement must be enforced effectively and impartially on ships of all nations ([San Remo Manual](#), paras 95, 100; [Newport Manual](#), §§ 7.4.3, 7.4.4). If it does not satisfy those requirements, Russia's operation would not gain the broader law-of-blockade permissions regarding the capture or targeting of neutral merchant vessels carrying Ukrainian exports.

Assuming the blockade criteria are not met, Russia would have the right to visit and search neutral merchant vessels, at least when it has a reasonable suspicion that there are grounds for the vessels' capture, such as that they are carrying arms or contraband (although the need for such suspicion is disputed) ([San Remo Manual](#), para 118; [Newport Manual](#), § 9.9). However, in the absence of a blockade, it could not subject those vessels to capture simply by virtue of their carrying Ukrainian food exports ([San Remo Manual](#), paras 147, 150(c); [Newport Manual](#), § 9.6.2.3). Moreover, assuming such vessels are merely carrying those

exports (and are not under Ukrainian control or direction, or otherwise supporting the war effort, such as through providing intelligence), they would not become targets, except by actively resisting lawful Russian efforts to visit and search ([San Remo Manual](#), para. 67; [Newport Manual](#), § 8.6.5). Finally, although Russia may warn ships away from specified areas when militarily necessary and consistent with rights of neutral navigation, vessels that travel into such areas are not transformed into lawful military objectives and do not lose their protection from attack ([Newport Manual](#), § 7.2.1.2).

In contrast to neutral ships, Ukrainian merchant vessels could be captured and condemned under the law of prize, granting Russia full property rights ([San Remo Manual](#), para 135; [Newport Manual](#), §§ 9.1, 9.4)—a legal reality that Andrew Clapham has [persuasively criticized](#) as [outdated](#), particularly (although not exclusively) as applied to an aggressor. Even assuming the general applicability of the law of prize, there is a question as to its application to vessels carrying food. The [San Remo Manual](#) provides that the exemption of food from this regime applies only pursuant to the prior consent of the belligerents ([San Remo Manual](#), para 136(c)(ii)). However, a good argument could be made that the prohibition on starvation of civilians as a method of warfare places an additional limit on Russia's authority under the law of prize (see below on blockades). In any event, Ukrainian merchant vessels' liability to condemnation as prize would not make them lawful targets of attack, unless they were to engage in other actions, such as actively resisting visit, search, or capture ([San Remo Manual](#), para 60(e); [Newport Manual](#), § 8.6.3).

If Russia's operation were to qualify as a blockade in legal terms, the key change would be to the situation of neutral merchant vessels. On a widely held view, an attempt to breach the blockade would ordinarily render a neutral merchant vessel liable to capture and condemnation or diversion ([San Remo Manual](#), para 146(f); [Newport Manual](#), § 7.4.7, 9.10; but see [Clapham](#) pp.1255-1258). Moreover, were such a vessel to attempt to resist visit or capture following a warning, it could qualify as a lawful target under the law of naval warfare ([San Remo Manual](#), para 67(a); [Newport Manual](#), §§ 7.4.7, 8.6.5, 9.11; again, but see [Clapham](#) pp.1255-1258).



However, even under the law of blockade, certain humanitarian protections apply. There is broad consensus, even in relatively conservative restatements, that a blockade cannot be issued with the sole or primary purpose of starving civilians or depriving them of objects indispensable to their survival, such as food ([San Remo Manual](#), para. 102; [Newport Manual](#), § 7.4.5). Such obstruction would violate the prohibition of starvation of civilians as a method of warfare—the legal category most proximate to the notion of “weaponizing food,” which is not itself a legal term of art ([San Remo Manual commentary](#), p. 179). Here, Russia appears to be blocking food to coerce third states into alleviating sanctions, which could mean that the blockade’s primary purpose is indeed to deprive civilians of the quintessential object indispensable to survival. However, if the primary purpose of the blockade is instead to strangle Ukraine’s economy—one of the traditional purposes of blockade—with the denial of food a secondary or collateral consequence, there is more scope for debate.

**“Ukraine’s importance as a grain supplier is such that Russia’s actions will surely exacerbate severe food crises in several regions of the world. However, this is not a straightforward impact when viewed through the narrow lens of IHL.”**

I have [argued elsewhere](#) that the ban on starvation of civilians as a method of warfare precludes the deprivation of food by blockade pursuant to the same rules that govern the protection of food from attack (see above). Among other things, this would mean that the purposive denial of food to a civilian population would be prohibited whether or not that is the *primary* or *sole* purpose of the blockade. However, even in adopting the latter (narrower) prohibition, the influential [San Remo Manual](#) precludes establishing a blockade that would inflict disproportionate civilian damage and requires the blockading party to grant passage to food when the “civilian population of the blockaded territory is inadequately provided” with it (pursuant to certain technical arrangements) (paras 102-103). The more recent [Newport Manual](#) takes an even narrower view than the San Remo Manual on this point, denying the

applicability of proportionality or any duty to allow the passage of food to civilians (§ 7.4.5). In my view, the latter position is incompatible with the ban on starvation of civilians as a method of warfare.

Whichever of these approaches prevails, a complicating factor in applying the humanitarian protections of blockade law to the current case is that the paradigm on which legal analysis has focused is that of cutting off an encircled population from external supply. This is apparent most obviously in the San Remo requirement to allow the passage of food when the *blockaded* population is inadequately supplied. In Russia’s blockade of Ukraine’s Black Sea ports, the prominent danger is the other way around. The blockaded region is the food *supplier*. In addition to raising a question as to the applicability of the legal protection, this complicates analyzing the blockade’s impact on affected (but not blockaded) populations. Ukraine’s importance as a grain supplier is such that Russia’s actions will [surely exacerbate](#) severe food crises in several regions of the world. However, this is not a straightforward impact when viewed through the narrow lens of IHL.

**On that point, does it matter in this case that the civilians who would be affected by the lost grain (as distinct from those who would be affected by the lost revenue) are primarily the nationals and residents of states that are not party to the conflict? Does the answer to this question differ depending on whether the question relates to attacks on food or to the obstruction of efforts to bring food to market?**

The operations under analysis are clearly occurring within the geographic area of the ongoing armed conflict between Russia and Ukraine. In my view, the nationality and location of those who will endure exacerbated food insecurity due to Russia’s actions since the termination of the BSGI does not affect the legal analysis. However, the related issues of causation and foreseeability might have an impact, particularly insofar as the analysis turns either on proportionality or on whether actions were taken despite the expectation that civilians would be left in starvation conditions.

Under Geneva Convention IV, many of the provisions protecting civilians are [contingent](#) on their being nationals of the adversary. Even those of its provisions not subject to that limitation [apply only](#) to the “populations of the countries in conflict.” In contrast, Additional Protocol I—the source of the key rules under consideration here—is more capacious in its protection, [defining civilians](#) to include anyone who is not a combatant, without regard to nationality or territory. The key limitations are instead that IHL applies only to actions associated with an armed conflict ([Sassòli](#), pp. 200-203) and the scope of its protection is often contingent on foreseeability and clarity of causation ([Gillard](#), paras. 37-60). Together, these are important premises in the current context.

Regarding the illegality of attacking food for its sustenance value, the belligerent nexus is clear and the violation attaches to the reason for the attack and the nature of the objects, not the identity or distance of those dependent upon them. The same can be said of attacks on civilian objects on land (port infrastructure) or at sea (merchant vessels), as well as attacks on food not providing “direct” non-sustenance support to military action. Again, the relative remoteness of the civilians dependent on those objects is legally irrelevant. One or another of these categories likely characterizes most of the attacks on food and food systems following the BSGI’s termination.

However, for attacks that do not violate those requirements, the complexity of the causal chain between the attack and the harm to civilians suffering food insecurity makes the latter’s impact on IHL illegality less clear-cut. Per the analysis above, such a determination would rely either on an expectation that the attack would cause starvation or that it would cause disproportionate civilian death, injury, or destruction of objects. In my view, these assessments must incorporate the harm associated with the unavailability of that portion of food that would have been allocated directly to those in need (including, most obviously, the [725 thousand metric tons](#) of grain channeled through the World Food Programme to Afghanistan, Djibouti, Ethiopia, Kenya, Somalia, Sudan, and Yemen [during the functioning](#) of the BSGI). However, much of the food security impact of the attacks is likely to occur through the intervening factors

of global market forces and [price inflation](#) (combined with the [policies](#) and practices of other key food suppliers)—a causal route that may be too complex for the ultimate impacts to play a role either in IHL proportionality analysis as commonly understood, or in an analysis of whether the attacks are likely to leave civilians so inadequately supplied as to cause starvation (itself a high threshold).

**“[I]t might be suggested that denying food to external populations to strong-arm non-belligerent states into alleviating economic sanctions is too tangential to the armed conflict to be classified as a ‘method of warfare.’ Analyzing the current situation, I take a different perspective.”**

A distinct complication may be thought to arise in any analysis of whether the obstruction of grain through encirclement would implicate the ban on starvation of civilians as a method of warfare. In my view, any denial of food that is purposeful or includes food destined for civilians who may otherwise be expected to face starvation or displacement implicates the [crux of the ban](#). However, it might be suggested that denying food to external populations to strong-arm non-belligerent states into [alleviating](#) economic sanctions is too tangential to the armed conflict to be classified as a “method of warfare.” Analyzing the current situation, I take a different perspective. The use of blockade or other tools of naval warfare is itself shaped by and dependent upon the fact of armed conflict. Here, if the goal is to elicit sanctions relief, those methods are being used purposefully to deny food to civilian populations with a view to facilitating progress in the war by reducing one of its key costs (the attached sanctions). This ought to be understood straightforwardly to qualify as using food deprivation as a method of warfare. The location and identity of the affected civilians should not obscure that reality. 🌐



## What You Need to Know: Unpacking the Law in Russia's War Against Ukraine

# What International Law Has to Say About Assistance to Russia's War Against Ukraine

Catherine Amirfar | May 2, 2023



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**Given Russia's aggression against Ukraine is such a clear and egregious violation of Article 2(4) of the United Nations Charter, legal scholars have explained since the outset of the full-scale invasion in February 2022 that states who support Russia's actions in Ukraine could themselves face legal consequences. Nevertheless, in the months since then, a number of states have provided assistance to Russia. As a general matter, when is it unlawful under international law to support a party to an armed conflict?**

As your question implies, the U.N. Charter is of paramount importance when evaluating the lawfulness of supporting a party to an armed conflict. Article 2(4) of the Charter prohibits the "use of force against the territorial integrity or political independence of any state." There are very few exceptions to this rule: individual or collective self-defense under Article 51 of the Charter; authorization by the United Nations Security Council acting under Chapter VII; and potentially also state "consent" to the use of force on its territory.

Looking at Russia's war in Ukraine, it is well-established that Ukraine may lawfully call on other states to aid in its collective self-defense against Russia under Article 51. Russia, on the other hand, is not entitled to invite other states to use force to assist it as it has no valid claim to self-defense against Ukraine. Accordingly, any state that uses force in support of Russia would violate Article 2(4) of the Charter, given that no other exception applies.

More debated is whether the supply of weapons to a party to an armed conflict *itself* amounts to a use of force under Article 2(4), where otherwise not justified under Article 51. While the International Court of Justice ("ICJ") has so far held only that the provision of weapons amounts to a violation of the customary international law prohibition on the use of force in the context of non-international armed conflicts, commentators have suggested that the same rule may apply to the supply of weapons in international conflicts, such as Russia's war in Ukraine.



**“[I]t is well-established that Ukraine may lawfully call on other states to aid in its collective self-defense against Russia under Article 51. Russia, on the other hand, is not entitled to invite other states to use force to assist it as it has no valid claim to self-defense against Ukraine.”**

Liability for supporting a party to an armed conflict may be incurred in three main circumstances.

First, under the law of state responsibility, States may be responsible where they “aid or assist” another state that commits violations of international law, including violations of Article 2(4), as well as breaches of international humanitarian law (“IHL”) and human rights law. Article 16 of the International Law Commission’s (“ILC”) [Articles on State Responsibility](#), which the ICJ [recognized](#) as customary international law, sets out a standard for what is effectively state “complicity” in international law. Under this rule, states are responsible where they “aid or assist” another state with “knowledge of the circumstances of” the other state’s violation of international law. Article 41(2) of the [Articles](#) reinforces this provision in the context of violations of peremptory norms of international law by providing that States shall neither “recognize as lawful a situation created by [such] a serious breach” nor “render aid or assistance in maintaining that situation.” The ICJ has previously applied these duties of non-recognition and non-assistance in relation to illegal occupations in both the [Consequences for States of the Continued Presence of South Africa in Namibia](#) Advisory Opinion and in the [Construction of a Wall](#) Advisory Opinion. In the *Namibia* opinion, the ICJ held that states were under an obligation “to recognize the illegality and invalidity of South Africa’s continued presence in Namibia ... [and] to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia,” and in the *Wall* opinion, the ICJ found that states were under an obligation not to render aid and assistance in maintaining the illegal situation resulting from Israel’s construction of a wall in the occupied Palestinian territory.

Second, under IHL, Common Article 1 to the 1949 Geneva Conventions provides that parties have a “duty to ensure respect” for the Conventions. According to the 2020 [Commentary](#) to Geneva Convention III, this includes both a “negative” obligation—i.e., an obligation not to “aid or assist in violations of the Conventions by Parties to a conflict”—as well as a “positive” obligation—i.e., an obligation to “do everything reasonabl[e] ... to prevent and bring such violations to an end.” The ICJ recognized the “negative” limb of Common Article 1 in its [Nicaragua](#) judgment, where it held that states are under an obligation “not to encourage” violations of the Geneva Conventions. In the context of lending assistance, Common Article 1 therefore means that states may not provide support to parties to an armed conflict engaged in known or foreseeable IHL violations. The [Arms Trade Treaty](#) effectively [mirrors](#) this obligation by prohibiting states from supplying weapons to other parties knowing that they will be used in the commission of serious IHL violations and other offenses.

Finally, states (and any involved individuals) may also incur international criminal liability for supporting another party to an armed conflict where they “aid or abet” certain crimes, including war crimes and crimes against humanity, as detailed in the statutes of various international criminal tribunals.

**Let’s take a closer look at the actions by a handful of states in Russia’s war in Ukraine. First, [Belarus](#) has reportedly provided support to Russia in the form of [hosting Russian troops, weapons, and other equipment; providing tanks; mobilizing drivers and mechanics to repair Russian military equipment; permitting the use of its territory for Russian supply lines; providing medical care to Russian troops; and enabling Russia to use Belarusian territory as a launching ground for its missiles and armed forces](#). In January, the two countries engaged in [joint military drills](#), although the [Belarusian Defense Ministry](#) [claimed](#) the “joint military grouping” and drills were “solely in the interests of strengthening the protection and defense” of Belarus. Does this support make Belarus a co-belligerent of Russia’s in the conflict and, in turn, an aggressor in the eyes of international law?**

Before diving into this question, it is worth noting that Belarus may well be liable in relation to these actions under the various sources of international law I've just mentioned. "Co-belligerency," by contrast, is a concept specific to IHL which is not directly connected to the issue of illegality, but which instead refers to joint participation in hostilities. Because co-belligerents are, [factually speaking](#), "parties" to the conflict, IHL applies to them. This application of IHL in turn renders the co-belligerent's military forces and objects susceptible to targeting.

The issue of when exactly a state providing support to a party to an armed conflict becomes a co-belligerent remains heavily contested. On the one hand, active participation in hostilities [clearly](#) amounts to co-belligerency, as might be involved in enforcing a [no-fly zone](#). More complicated is determining whether less direct forms of support also result in co-belligerency. Reasoning from the "overall control" standard for determining when an indirect intervention [results in](#) an international armed conflict, as well as the IHL [standard](#) for direct participation in hostilities by civilians, [commentators](#) have attempted to draw some lines. While participating in decision-making about attacks, supplying [information](#) sufficient to enable attacks, and allowing the use of military or air bases to enable attacks may all potentially amount to co-belligerency, financing, equipping, or training parties to an armed conflict are alone generally considered insufficient.

**"The issue of when exactly a state providing support to a party to an armed conflict becomes a co-belligerent remains heavily contested."**

To the extent that in addition to hosting [thousands](#) of Russian troops, Belarus takes steps to execute a joint attack across Ukraine's northern border, as certain sources have warned, or to make good on its [threat](#) to send forces to fight alongside Russia, Belarus would be hard-pressed in those circumstances to argue that it was not a co-belligerent of Russia.

The question of aggression is considerably more straightforward. The [Definition of Aggression](#), adopted by the U.N. General Assembly, includes "the action of a State in allowing its territory ... to be used by ... [an]other State for perpetrating an act of aggression against a third State." Accordingly, if Belarus' conduct can be characterized as enabling Russian attacks on Ukraine via its territory, such conduct likely [would fall](#) within the definition of aggression.

[Next, let's look at another example farther from Ukraine's borders: Iran has had an increasing role in supplying Russia with drones and reportedly providing personnel to assist in their operation on the ground. Iran is also reported to be entering into a new agreement to manufacture additional drones in Russia. Does Iran's assistance to Russia violate international law? What are the potential repercussions if so? We assume the answers to this question can also elucidate the general legal framework that would apply to other state's conduct, including China's.](#)

First, as noted at the outset, Iran's supply of weapons to Russia may constitute a violation of Article 2(4), given Russia's lack of a justification for the use of force.

Second, Iran's transfer of drones likely also runs afoul of Common Article 1, which [prohibits](#) states from transferring weapons with "[recklessness](#)" to parties likely to commit violations of IHL. That is so particularly given the well-documented and frequent pattern of Russia's indiscriminate [attacks](#) on civilians and civilian infrastructure in Ukraine.

Third, Iran's actions may also render it liable under Article 16 of the ILC's [Articles](#) especially as they amount to a [significant](#) or [material](#) contribution to Russia in its commission of internationally wrongful acts. While commentators have [debated](#) whether the required mental element under Article 16 is "knowledge" or "intent," in these circumstances, it would be difficult to claim [unawareness](#) of Russia's illegal war and related violations, meaning that Iran can be presumed to intend the foreseeable consequences of its assistance—namely, assisting Russia's commission of these acts. The commentary to the ILC's Article 41(2) further supports

this view as it notes in the context of peremptory breaches of international law, it is “hardly conceivable” that a state lending support would not have notice of those breaches.

As for potential consequences, Iran and other states that have rendered illegal support to Russia may face countermeasures, which could be taken by Ukraine, the injured state, or potentially by third states. Such third-party countermeasures could be justified under a theory of enforcing *erga omnes* obligations, or the [notion](#) of collective self-defense of Ukraine. In addition, ILC Article 41(1) [potentially](#) imposes a positive duty on third states to “cooperate to bring an end to” serious breaches of international law, though the relevant Commentary recognizes that such a duty may still be developing under customary international law.

**“Individuals engaging in illegal assistance may also risk international criminal liability for ‘aiding and abetting’ various crimes...Such individuals may also face sanctions...”**

Individuals engaging in illegal assistance may also risk international criminal liability for [“aiding and abetting”](#) various crimes, as noted previously. Such individuals may also face sanctions, and in fact the United States has already applied sanctions to dozens of Belarussian [individuals and entities](#) believed to have facilitated Russia’s invasion, as well as [several firms](#) and individuals involved in the [production and transfer](#) of Iranian drones to Russia.

**What does international law have to say about providing assistance to a victim of aggression? Is there any legal reason why assistance to Ukraine has been circumscribed? For example, there are reports that the United States has limited the range on Himars rocket launchers it has provided to Ukraine, presumably to ensure Ukraine can’t use U.S. weaponry to strike Russian territory. Do you think this move is primarily about policy concerns over escalation risks in the war? Or are there legal risks that need to be weighed as well? And is the distinction between “offensive” and “defensive” weapons meaningful as a legal matter when a country is engaging in military operations to regain its own occupied territory?**

These decisions are likely informed by both policy and legal concerns, given Russia’s [dangerous threats](#) concerning nuclear weapons, as well as Russia’s [rhetoric](#) appealing to legal concepts, and the desire to give wide berth in the event of any [disagreement](#).

In relation to the supply of weapons to Ukraine, one key legal issue which I haven’t yet mentioned is neutrality. In the wake of Russia’s invasion of Ukraine, commentators have disagreed about whether the law of neutrality is at all relevant to the provision of support to Ukraine. Briefly stated, while [some](#) have maintained that the law of neutrality [does not](#) apply following the outlawing of war and the adoption of the U.N. Charter, [others](#) have suggested that the provision of support to Ukraine *does* breach neutrality, but that Russia would at most only be permitted to take countermeasures in response, not resort to the use of force. For its part, the U.S. government has [adhered](#) to a “qualified neutrality” position, which [allows](#) for assistance to states that are victims of aggression.

As a practical matter, it is difficult to discern the difference in the context of active hostilities between “defensive” and “offensive” weapons. Nevertheless, one potential reason for limiting the provision of weapons to those which might be considered “defensive” may be to make abundantly clear that U.S. provision of weapons to Ukraine is solely for purposes of defending Ukraine from Russia’s aggression, thus squarely falling within the confines of “qualified neutrality” and the previously mentioned justification of Ukraine’s right of collective self-defense under Article 51. As one [commentary](#) has pointed out, ILC [Article](#) 21 furthermore precludes certain acts from being considered violations of international law if performed in the exercise of self-defense under the U.N. Charter. 🌐

*The author wishes to thank Beatrice Walton for her assistance and comments on this article.*





## What You Need to Know: Unpacking the Law in Russia's War Against Ukraine

# IHL Compliance in Russia's War in Ukraine

Jelena Pejic | April 7, 2023



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**Tragically, there have been myriad reports of international humanitarian law (IHL) violations in Russia's war in Ukraine, including widespread reports of attacks directed against civilians and civilian objects, torture, and mistreatment of prisoners of war. What issues of IHL application or interpretation do you think have been most important thus far in the full-scale conflict?**

The ongoing hostilities are an international armed conflict (IAC) to which the full range of relevant IHL treaties apply, as both Russia and Ukraine are parties to the four [Geneva Conventions](#) of 1949 and of their [Additional Protocol I](#) of 1977. The latter provides well-established rules on targeting aimed at sparing civilians and civilian objects from the effects of hostilities to the extent possible. These include the obligation of distinction (between civilians and combatants and civilian objects and military objectives), the prohibition of indiscriminate and/ or disproportionate attacks, and the duty to take precautions in attack.

While violations of IHL, especially those serious enough to be classified as war crimes, cannot be ascertained without a proper investigation on the ground, it appears from the effects of Russian operations—i.e., the number of civilian deaths and the extensive damage to or destruction of residential buildings, [medical facilities \(including maternity hospitals\)](#), [cultural monuments](#), among other examples—that the basic tenets of the conduct of hostilities have in many cases not been observed. There seem to have also been deliberate and extensive attacks on what is popularly called “critical” civilian infrastructure such as [electrical grids](#) and [water processing plants](#) aimed at breaking civilian morale, which would be unlawful. Patterns of abuse have also been reported in relation to the treatment of persons in enemy hands: the [execution](#) of civilians, [mistreatment](#) in places of detention, [deportations](#) of children, and so on.

The vast majority of violations have occurred against civilians and civilian objects in Ukraine, because hostilities are for the most part taking place in its territory. It may be asked whether disregard of the rules by the Russian armed forces and their “affiliates” is purely deliberate or could also

be due to insufficient knowledge of and proper training in IHL up and down the chain of command. It may be all of the above, which in any case is no excuse. The important thing to note is that, as in other armed conflicts, proper application of existing law is lacking and not the law as such.

Being an IAC—and not, for example, the so-called “war on terror,” parts of which can be classified as discrete non-international armed conflicts—fighting in Ukraine has not, in my view, thrown up completely unheard of legal and practical issues (on cyber operations—see below). Hostilities in some eastern parts of the country have actually resembled World War I trench warfare despite modern technology. The dizzying array of weapons being used and those being mentioned for potential use should also not cloud our judgment. The employment of any means or method of warfare must conform to IHL, and in the case of new weapons, States are obliged to check for possible [prohibitions](#).

The war has, not surprisingly, highlighted some specific already known gaps. Among them, but not limited to, are uncertainty about the exact protection due to civilians in the invasion phase of an IAC, the weakness of the definition of mercenaries, the utility of the notion of a *levée en masse*, queries as to the application of the nationality criterion in case of dual or multiple nationals with regard to POW status, the war crime of forced conscription of civilians, and the lack of a universally accepted prohibition on certain types of weapons, such as [cluster munitions](#).

### **Are there particular IHL issues that have been overlooked or merit deeper analysis as the conflict continues?**

I would perhaps note two. The first is the contribution of cyber operations, including attacks, to the conduct of the war by both sides. As is well-known, views on some aspects of IHL applicability and application to cyber operations are still being [developed](#) by experts. This is enhanced by the opacity of facts, as the belligerents and third States continue to closely guard the extent to and ways in which cyber means are being employed. There is little doubt that the current conflict will be mined for practical and legal lessons learned in the future. However, a discrete question

that may be said to have emerged already is the protection of civilians digitally involved in the conflict by transmission of tactical targeting information to their armed forces via laptops or cell phones (e.g. the Ukrainian IT “[army](#)” or individual “hacktivists”). Are they directly participating in hostilities such that they may be attacked and killed by the adversary? Is there an [obligation](#) of the relevant authorities to warn them of this and other possible consequences? It is submitted that the answer is yes on both counts, but there is as yet insufficient analysis and public explanation given by practitioners or experts, especially from States.

**“IHL needs to be respected in the heat of battle. How to achieve that goal—and reduce civilian suffering during hostilities instead of counting the dead in a courtroom—should in my view become an urgent focus of international attention in the future.”**

The second topic relates to the precise rules governing “screening” operations for security reasons in armed conflicts, both international, as in this case, and non-international. In the Russia-Ukraine conflict, thousands of Ukrainian civilians have [reportedly](#) been subject to screening (“[filtration](#)”) operations characterized by various forms of ill-treatment and extremely poor conditions of detention, the duration of which could range from several hours to several weeks. IHL rules and procedural safeguards on internment may kick in depending on the context, but it would appear that screening processes need to be the subject of more detailed legal and practical examination.

Screening presupposes the collection and evaluation of personal data. Some questions that should be addressed are: what are the lawful purposes of screening? How long can it last? Who can lawfully carry it out and under what material and procedural conditions? What about the protection of the civilian data collected? These and other queries need responses if the necessary civilian protection is to be ensured.

A final, abiding issue which must be mentioned, but cannot be elaborated on here, is why compliance with IHL by all States and other actors is not better on the ground and how to improve it. An extraordinary amount of energy by eminent [international experts, scholars and diplomats](#) has in the past year been devoted to examining and debating where the Russian President Vladimir Putin and his associates could be tried, including after the International Criminal Court's announcement in March of an arrest warrant for Putin. Accountability for atrocities is indispensable, of course. But it happens largely after the fact, and IHL needs to be respected in the heat of battle. How to achieve that goal—and reduce civilian suffering during hostilities instead of counting the dead in a courtroom—should in my view become an urgent focus of international attention in the future. 🌐







## What You Need to Know: Unpacking the Law in Russia's War Against Ukraine

# Asset Seizure in Russia's War in Ukraine

Chimène Keitner | April 3, 2023



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**Russia's intensified military campaign against Ukraine has now been going on for over a year. What should international lawyers be focusing on at this point in the conflict?**

The most important question for lawyers and policymakers, in my view, is how to stop a veto-wielding member of the United Nations Security Council from destroying a neighboring country without triggering a global armed conflict or nuclear war. International legal regimes for individual and state responsibility have clearly failed to deter Russia's egregiously unlawful conduct. Nonetheless, they still provide an important basis for punishing individuals and enabling Ukraine to seek restitution, compensation, and satisfaction. For those lawyers and policymakers who are not directly involved in trying to bring about an end to the bloodshed, it makes sense to think about what comes next.

**Over the past few weeks there have been renewed calls to use Russian assets held abroad as a source of reparation for the effects of Russia's unlawful aggression, or for other purposes. But seizing Russian assets raises**

**complex international legal issues, most prominently when those assets are owned by the Russian state. What are the key legal issues that remain to be addressed and how should States proceed with respect to Russian assets in their jurisdiction that have been frozen?**

As a matter of international law, Russia bears state responsibility for the damage caused by its invasion of Ukraine. That means Russia is liable under international law, as well as Ukrainian domestic law. (States that have aided and assisted Russia also bear state responsibility.) That said, voluntary restitution by Russia is unthinkable under the current regime, and would likely be politically unfeasible for a future regime. Recognizing this, states that have jurisdiction over Russian assets within their territory have sought to ensure that such assets will be available to help repair at least some of the damage caused by Russia's aggression. Some have even suggested that those assets should be made available to Ukraine to fund its self-defense.

As a threshold matter, foreign states themselves generally have immunity in other countries' courts for their non-commercial acts. Ukrainian courts have held that this rule [does not apply](#) in the circumstances of Russian aggression. In any event, Russian assets [inside Ukraine](#) are clearly inadequate to compensate victims and “re-establish the situation which existed before the wrongful act was committed,” which is the goal of restitution. Hence the efforts to identify Russian assets located elsewhere that could be used for this purpose.

**“As a matter of international law, Russia bears state responsibility for the damage caused by its invasion of Ukraine.”**

As Scott Anderson and I explained in a [prior post](#), and as Paul Stephan further [explored](#), there are different categories of Russia-related assets located in foreign jurisdictions. Each of these raises legal and policy questions that merit careful consideration. For example, foreign central bank assets enjoy strong immunity protections under international law, as [documented](#) by Ingrid (Wuerth) Brunk. Although there is some room for debate about whether merely freezing assets implicates immunity doctrines, it is much more difficult in my view to argue that seizing assets does not amount to an exercise of enforcement jurisdiction that would run afoul of foreign sovereign immunity (although some have taken the [position](#) that jurisdictional immunities only constrain actions by courts, whereas inviolability and other international law doctrines may constrain other governmental actors). Moreover, “de-dollarization” in response to U.S. sanctions—which Russia has [pursued](#) since 2014—arguably erodes U.S. global economic power and future leverage, suggesting that there may be policy downsides to freezing and seizing Russia's sovereign assets as well.

Seizing non-sovereign assets (like an oligarch's yacht) does not generally raise immunity concerns, but it must have a valid basis under domestic law. Countries that have enacted expedited procedures for seizing assets of Russian oligarchs must respect domestic constitutional protections

for private property. As a practical matter, due process challenges brought by the owners of the seized assets in domestic courts can be time consuming and expensive to litigate. As a matter of principle, the rule of law prohibits governments from disregarding procedural and substantive protections for individual rights in the name of expediency.

Asset forfeiture (whether civil or criminal) is certainly a potential consequence of engaging in criminal activity. The [U.S. Department of Justice](#) has predicated some of its seizures on charges of sanctions evasion and money laundering, among other violations. Similar efforts have been pursued by [Canadian authorities](#) using a newly enacted asset forfeiture law. In addition to complying with domestic legal protections, seizure of foreign private assets must comply with the international law governing expropriation. International law generally requires that an expropriation of foreign private assets serve a public purpose and be non-discriminatory, and that the host government provide prompt, adequate, and effective compensation. Civil or criminal asset forfeiture in compliance with domestic law would not generally amount to an unlawful expropriation, but host countries need to be mindful of potential legal challenges—especially since they do not want to cede the ability to argue in favor of compensation for their own nationals whose assets might be located abroad.

**Some have argued that oligarchs' wealth should not be treated as private property to begin with, because it is traceable to Putin's corrupt exploitation of Russia's public resources. Does that argument carry weight?**

Corruption and authoritarianism often go hand in hand. The extreme wealth of many politically-connected Russian oligarchs is allegedly the product of [financial crime](#) whose concealment has been facilitated by permissive legal, auditing, and banking regimes in other countries. And as a matter of both law and fairness, the resources required to rebuild Ukraine should come from Russia, especially from those who have enriched themselves at the public's expense and enabled Vladimir Putin's destructive conduct. Effectuating this redistribution is, however, much more complicated than it might at first appear. As a legal matter, there isn't



currently a basis for treating privately held assets as public and therefore somehow beyond the reach of due process and expropriation protections. Moreover, while expropriation law generally protects private assets, sovereign immunity presumptively protects [foreign state assets](#) used for non-commercial purposes from execution.

**“[T]he resources required to rebuild Ukraine should come from Russia, especially from those who have enriched themselves at the public’s expense and enabled Vladimir Putin’s destructive conduct. Effectuating this redistribution is, however, much more complicated than it might at first appear.”**

All of this is not to say that countries should give up on the possibility of seizing Russian assets. There are creative arguments to be made that seizure amounts to a permissible countermeasure designed to induce Russia to comply with its legal obligations, including the obligation to provide restitution. The U.N. General Assembly has [recognized](#) that, as a matter of international law, Russia must “bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury.” (As readers will know, Russia holds a veto in the Security

Council, meaning that the General Assembly has become the voice of the international community on issues arising from Russia’s aggression in Ukraine.) It is also possible that an international tribunal will eventually award damages to Ukraine, for example in Ukraine’s [pending case](#) against Russia in the International Court of Justice and its [cases](#) in the European Court of Human Rights. Using frozen assets to satisfy such a damages award could potentially alleviate some of the legal and policy concerns associated with unilateral seizures.

Under the current international legal framework, Russia’s veto on the Security Council blocks the path envisioned by the U.N. Charter to enforce international law against recalcitrant states. The renewed impetus to find creative legal workarounds to induce permanent members of the Security Council to comply with their international legal obligations should be welcomed. That said, given the nature of international law and legal claims, we should expect that any justifications advanced to seize state or private property in these circumstances [will be invoked](#) in future situations. How lawyers, policymakers, and political leaders articulate the [international legal justification](#) for our actions today will shape the substantive legal rules surrounding asset seizure in the future, as well as creating new pathways for decentralized enforcement in the absence of an effective Security Council. 🌐





## What You Need to Know: Unpacking the Law in Russia's War Against Ukraine

# U.S. Intervention in *Ukraine v. Russia* at the ICJ

Chimène Keitner | September 27, 2022



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You've been following closely the International Court of Justice (ICJ) case *Ukraine v. Russian Federation*, brought under the Genocide Convention—including writing about it for *Just Security* several times. On Sep. 7, the United States filed a declaration of intervention in the case; a number of other States have done the same in recent months. Is the fact of the U.S. intervention notable? And what happens from here?

Yes, it's very notable—in fact, I'm not aware of any previous ICJ case in which the United States has sought to intervene. This case has served as a focal point for European and Five Eyes countries' legal support of Ukraine, as evidenced by their [May](#) and [July](#) joint statements in support of the proceedings. The recent flurry of interventions shows that the ICJ proceeding continues to serve as a rallying point for Ukraine's supporters.

The U.S. written intervention addresses both the jurisdictional question and the merits of the case. Ultimately, the ICJ will have to decide (1) whether the Genocide Convention gives the ICJ jurisdiction to adjudicate Ukraine's claim

that Russia unlawfully invaded it based (at least in part) on pretextual allegations of genocide; (2) whether Russia in fact unlawfully invaded Ukraine based on pretextual allegations of genocide (and, if so, whether Russia is responsible under the Genocide Convention for the harm it has inflicted on Ukraine); and (3) what Russia owes Ukraine as a result of its unlawful acts. Ukraine's [application](#) instituting proceedings in February did not accuse Russia of violating the Genocide Convention by committing genocide, although it noted that Russia appeared to be “planning acts of genocide in Ukraine,” and that the intentional killing and infliction of serious injury on Ukrainians “must be viewed together with Russian President Vladimir Putin's vile rhetoric denying the very existence of a Ukrainian people, which is suggestive of Russia's intentional killings bearing genocidal intent” (para. 24). So, it is possible that Ukraine will at some point in the ICJ proceedings formally accuse Russia of committing genocide, but it has not done so yet.

Like the other States seeking to intervene in this case, the United States relies on [Article 63 of the ICJ Statute](#), which gives any State party to the Genocide Convention “the right



to intervene in the proceedings,” with the caveat that “the construction given by the judgment will be equally binding” upon an intervening State, not just the States directly party to the dispute. This intervention mechanism is different from that provided in Article 62, under which a State may request to intervene in a case if it has “an interest of a legal nature which may be affected by the decision in the case.”

**“This case has served as a focal point for European and Five Eyes countries’ legal support of Ukraine... The recent flurry of interventions shows that the ICJ proceeding continues to serve as a rallying point for Ukraine’s supporters.”**

A declaration to intervene doesn’t necessarily mean that the ICJ will take the views of the intervening State(s) into account—the Court must first rule on the admissibility of the intervention(s). Brian McGarry [noted](#) in September 2020 that the Court has admitted 20 percent of Article 62 applications and roughly 29 percent of Article 63 declarations, even though Article 63 is framed in terms of a State’s “right” to intervene. As a procedural matter, the parties to the case are [given an opportunity](#) to “furnish their written observations” on a declaration of intervention, and the Court then decides whether the declaration is admissible. The States that have sought to intervene in *Ukraine v. Russia* have offered their substantive legal views along with their declarations. Although the ICJ has not yet posted Ukraine’s memorial on its website (and will not do so [until](#) the opening of oral proceedings), it is [posting](#) declarations of intervention as they are filed. This means that the written interventions also serve to create an additional public record of arguments in support of Ukraine’s legal position.

So far, Russia has not formally participated in the case, although it did submit a [document](#) at the provisional measures stage that the Court has posted on its website. Even though Russia clearly does not accept that the Court has jurisdiction over Ukraine’s claims under the Genocide Convention, the Court [has not](#) bifurcated the proceedings, which means that it will address any jurisdictional objections

together with the merits. (Ukraine has already [submitted](#) its memorial, and Russia’s counter-memorial is due on Mar. 23, 2023.) The Court [found](#) at the provisional measures stage (without prejudging the questions of jurisdiction, admissibility of the application, or the merits themselves) 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.” That is what gave the Court authority to issue its provisional measures [order](#).

**Are there especially significant points in the U.S. submission?**

Two significant points in the U.S. submission are (1) its position on jurisdiction and (2) what the United States says—and doesn’t say—about military intervention to prevent and punish genocide.

First, Ukraine bases jurisdiction on the Genocide Convention’s compromissory clause—that is, the clause by which parties have agreed to submit to dispute resolution. In its submission, the United States argues that, because “the provisions of the Convention are obligations *erga omnes*,” “all States Parties have a significant interest in ensuring the correct interpretation, application, or fulfilment of the Genocide Convention” (para. 9). In other words, unlike most contentious cases involving bilateral disputes, a dispute arising under the Genocide Convention implicates the interests of (at least) the 153 States party to the Convention. The U.S.’ declaration also highlights “the United States’ long history of supporting efforts to prevent and punish genocide” (para. 10). (This also raises the question whether the United States might seek to intervene in other cases involving genocide. To date, only Canada and the Netherlands have [indicated](#) an intention to intervene in the other pending [case](#) concerning the Genocide Convention brought by Gambia against Myanmar, which the ICJ found [admissible](#) in July 2022.)

The U.S. submission identifies the jurisdictional question whether Article IX provides the ICJ with jurisdiction over a dispute “where a Contracting Party commits aggression against another Contracting Party *on the pretext* of preventing or punishing genocide” (para. 16, emphasis added).

In other words—as I'll discuss more in response to the next question—the issue is whether Russia's pretextual misuse of genocide allegations creates jurisdiction under the Genocide Convention. It's notable here that the United States—which is generally cautious about ceding jurisdiction to international courts—has joined other intervening countries to advocate for broader jurisdiction and encourage the Court to answer “yes.”

**“[T]he issue is whether Russia's pretextual misuse of genocide allegations creates jurisdiction under the Genocide Convention. It's notable here that the United States—which is generally cautious about ceding jurisdiction to international courts—has joined other intervening countries to advocate for broader jurisdiction and encourage the Court to answer ‘yes.’”**

The submission also identifies the question “relevant to the merits” of whether the treaty obligations to prevent and punish genocide, and to punish persons committing genocide or any other enumerated acts, “permit[] one Contracting Party to commit aggression against another Contracting Party on the pretext of preventing or punishing genocide” (para. 16). The U.S. answer to the latter question is clearly “no,” given that the Genocide Convention “expressly provides Contracting Parties recourse where they believe another Contracting Party is responsible for genocide”—namely, calling upon “the competent organs of the United Nations” (para. 27). The United States does not further explore what recourse States might have if those organs (notably, the United Nations Security Council) fail to act.

Interestingly, the underlying questions alluded to here—whether and to what extent the Genocide Convention authorizes intervention to prevent and punish genocide—is one on which various States intervening on the side of Ukraine have different views. The United States has not endorsed a doctrine of humanitarian intervention, while the [United Kingdom](#), among others, has.

However, because Russia's genocide allegations were so obviously pretextual, in this case the Court can—and likely will, if the order on preliminary measures is any indication—avoid that broader question here. Indeed, the United Kingdom, in its [submission](#) to the ICJ, advocates for exactly that approach, arguing that, “in construing the Genocide Convention the Court is not called upon to engage in any broader analysis of the international legality of uses of force in response to, for example, grave humanitarian crises, including under the doctrine of humanitarian intervention” (para. 62). The United States offers the (hopefully indisputable) view that “[n]o provision of the Genocide Convention, properly interpreted in good faith, explicitly or implicitly authorizes a Contracting Party, acting on the pretext of preventing or punishing genocide, to commit aggression, including territorial acquisition resulting from aggression” (para. 29). In addition, the submission presents U.S. views on the applicable principles of treaty interpretation, as well as its interpretation of other articles in the Convention.

**As previewed above, the United States argues for the more expansive view of jurisdiction in this case. What might some of the considerations be behind adopting this view? If the ICJ does adopt the broader view, what might the potential results be in future cases, whether arising under the Genocide Convention or under other treaties with similar compromissory clauses?**

Typically, applicants in treaty-based contentious cases argue for broad constructions of compromissory clauses, whereas respondents argue for narrow constructions. In recent years, the United States has more often found itself in the respondent's position.

An important factual predicate to the existence of a dispute about the “interpretation, application, or fulfillment of the Genocide Convention” in this case is the extent to which Russia's February 2022 invasion of Ukraine was actually based on the pretext that Ukraine was in the course of committing genocide. To be sure, Ukraine has amassed an impressive catalog of Russian statements to that effect, including by Putin. Those statements practically handed Ukraine a jurisdictional hook for its case, which would likely

not exist otherwise given that ICJ jurisdiction is based on State consent. The ICJ's willingness to impose provisional measures suggests that the Court is willing to take Putin's rhetoric at face value, perhaps especially since other U.N. organs appear to be unwilling or unable to act decisively in the face of Russian aggression.

The U.S. more expansive approach to the compromissory clause in this case is likely informed by its desire to support Ukraine's legal efforts and show solidarity with other like-minded countries, as well as the limited legal risk that an expansive interpretation of the compromissory clause in the Genocide Convention would result in a case proceeding against the United States in the ICJ. This is both because the United States is unlikely to invade another country on the pretext that the country is committing genocide (with due acknowledgment of the thin legal rationale for the Iraq War), and because the United States entered a [reservation](#) upon ratifying the Genocide Convention that, "with reference to article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case." For this reason, the ICJ [found](#) that it lacked jurisdiction when Yugoslavia sought to bring an action against the United States under the Genocide Convention for acts associated with the intervention in Kosovo. One could argue that, because of this reservation, the United States would not be affected directly by the Court's eventual interpretation of the compromissory clause in *Ukraine v. Russia*, although it could be affected (and would be bound, subject to its treaty reservations) by the interpretation of other treaty provisions. And persuading the ICJ that it has jurisdiction in this case is not necessarily inconsistent with arguing that it lacks jurisdiction under other similarly worded compromissory clauses. That said, if the ICJ finds that it has jurisdiction here, States might think twice before using another State's alleged violation of a multilateral treaty as a pretext for invading that State.

Even though the United States does not endorse the doctrine of humanitarian intervention, it has participated in cross-border military activities that were either arguably (Iraq) or clearly (Kosovo) not authorized by the Security

Council. The U.N. Charter itself does not have a compromissory clause, and the United States withdrew its limited consent to the ICJ's so-called "compulsory" jurisdiction in 1985. Two of the current pending cases against the United States were brought under a bilateral treaty (by Iran), whereas the third was brought under a multilateral treaty to which the United States does not recognize the applicant as a party (Palestine). Whether Ukraine's case widens the aperture for ICJ cases under multilateral treaties remains to be seen, but the extraordinary circumstances prompting this case suggest that the floodgates will not open.

**“Whether Ukraine’s case widens the aperture for ICJ cases under multilateral treaties remains to be seen, but the extraordinary circumstances prompting this case suggest that the floodgates will not open.”**

Whether, if the Court ends up reaching the merits, it will interpret provisions of the Genocide Convention in ways that are not congenial to the intervening States also remains to be seen. It seems unlikely that the Court's pronouncements one way or the other will dramatically affect the U.S. legal framework for ascertaining when and whether to characterize particular acts as amounting to genocide, although ICJ jurisprudence certainly plays an important role in shaping States' legal understandings of both treaties and customary international law.

**There have been a number of proposals for accountability and reparations owed to victims of Russia's aggressive war. How does the ICJ case, and decisions by members of the international community to throw weight behind it via these interventions, fit within that broader conversation?**

Countries that support Ukraine have been pursuing multiple avenues for potential reparations, some of which might ultimately compete with each other and with [domestic](#) reparations judgments. The establishment of some sort of [claims commission](#) strikes me as the most promising way forward, although it is far from straightforward to implement. If the ICJ finds that it has jurisdiction over the



dispute between Ukraine and Russia, and that Russia has violated the Genocide Convention, then the Court would have the legal authority to order some form of compensation. Although the ICJ itself ultimately lacks coercive power to enforce such an order, and although Russia's total disregard for the ICJ's preliminary measures order does not bode well for potential future compliance, the approach at the moment seems to be to create as many legal fora as possible to adjudicate the legal responsibility of Russia and its officials. Ukraine has been fighting this war on many fronts—on the battlefield, in the court of public opinion, in the ICJ, and more. Although the military battle will likely prove the most decisive, these parallel fights are also an important part of Ukraine's broader strategy.

One of the biggest challenges for a claims commission will be obtaining assets for the commission to distribute. It is impossible to foresee the duration of this war, or whether the current political leaders will be the ones to negotiate an eventual resolution. An ICJ judgment could offer an opportunity for a future Russian regime to restore relations with

its European neighbors and obtain some certainty about liability, if the ICJ accepts Ukraine's invitation to adjudicate the lawfulness of Russia's invasion. That said, the sheer scale of damage that has been—and is still being—inflicted on Ukraine will inevitably make any eventual award seem utterly inadequate. In theory, however, it could provide an additional legal basis upon which to obtain title over Russian assets located in countries that would treat an ICJ decision as enforceable domestically, subject to [other applicable laws](#).

In the meantime, we will have to wait and see if Russia submits a counter-memorial (which is unlikely), or whether it circulates another unofficial “response” to Ukraine's arguments and those of the intervenors. If the Court schedules oral hearings, there will be another opportunity for Ukraine and like-minded States to excoriate Russia on the world stage—although unfortunately, to date, Putin seems to take such criticism as a badge of honor, rather than a reason to change course. 🌐





## What You Need to Know: Unpacking the Law in Russia's War Against Ukraine

# Ukraine and How Russia's War Reverberates at the United Nations

Richard Gowan | September 20, 2022



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**This is the first United Nations General Assembly annual meeting since Russia's full-scale invasion of Ukraine in February 2022, more than half a year ago. What can be done at the General Assembly about the situation in Ukraine? Should we expect to see any formal action taken related to the war, either to help manage the consequences of the invasion or hold Russia accountable?**

The General Assembly week is not an opening for peace-making between Russia and Ukraine. As of now, both sides seem bent on pushing for military victory. Secretary-General António Guterres [warned](#) at a pre-General Assembly press conference that the chances of a peace deal in the near term are nil. This is a wartime General Assembly, and both Ukraine's allies and the Russians are in town to gain political advantage, not talk peace.

Ukraine's friends have one overarching agenda to pursue in New York: Bolstering support for Kyiv among non-Western countries, which have appeared increasingly disengaged from the war as it has dragged on longer than most foresaw.

In March, the United States and Europeans were able to get 141 General Assembly members to [back a resolution](#) condemning Russia's aggression. While skeptics noted that big non-Western countries like India and China abstained—and the resolution imposed no concrete penalties on Russia—this was still a marked improvement on 2014, when only 100 states [backed a resolution](#) opposing Russia's takeover of Crimea. This April, 93 states [backed Moscow's suspension](#) from the Human Rights Council. That was a solid score given that even some supporters of Ukraine, such as Mexico, argue on principle that isolating countries at the U.N. only makes diplomacy harder.

But Western diplomats admit that they were already encountering "Ukraine fatigue" by the late spring. A lot of African, Asian and Latin American countries were initially willing to deplore Russia's offensive, but have not wanted to endanger their security and economic relationships with Moscow by doing so repeatedly. The Ukrainian mission in New York is frustrated that the General Assembly has not said more about the war since April. Kyiv's allies



see little gain in pushing through resolutions that would secure diminishing support.

On the upside, 101 General Assembly members [voted last week](#) in favor of allowing Ukrainian President Volodymyr Zelenskyy to address the high-level session by video (ironically, all leaders had to speak via video in 2020, thanks to COVID-19, but the U.N. has been keen to get back to in-person-only sessions). Most African states abstained or did not vote on the issue, but some notable non-Western powers such as India backed the proposal. At the end of the day, I think most diplomats recognized that it is common sense that a leader in a country under siege should be able to give a speech without trekking to New York.

**“Ukraine’s friends have one overarching agenda to pursue in New York: Bolstering support for Kyiv among non-Western countries, which have appeared increasingly disengaged from the war as it has dragged on longer than most foresaw.”**

More broadly, a lot of non-Western U.N. members are nervous about this year’s food price crisis, the broader economic downturn, and the probability that major aid donors will cut assistance to poor states to divert money to Ukraine. These fears surfaced in the first weeks of the war—I recall talking them through with a European ambassador in mid-March—but a lot of Western officials were too focused on the Russian threat to address them sympathetically at the time. As Crisis Group [warned at the end of March](#), European officials were hurting their own cause by going into U.N. meetings on challenges like famine in the Horn of Africa and insisting on talking about Ukraine.

The Biden administration was one of the first Western powers to grasp that this messaging was counter-productive. Secretary of State Antony Blinken hosted some well-received talks about food issues in New York in May 2022. One Arab diplomat privately made an interesting point at the time, which was that the United States focus on global food prices stood in positive contrast to the Trump

administration’s maladroit handling of COVID-19 in multi-lateral forums in 2020. But the United States and Ukraine’s other allies still have to work hard to convince the Global South that they can both pursue hardball diplomacy over Ukraine and help vulnerable states navigate global economic turmoil too.

On that front, it is notable that the United States, European Union and African Union are jointly co-hosting [a summit](#) on food security at the General Assembly this week. The General Assembly is friendly “home turf” for Washington and its friends, as Western leaders will be out in force in New York (after a dash to London for Queen Elizabeth’s funeral) whereas Vladimir Putin and Xi Jinping are [absent](#) from the General Assembly meeting. It’s a helpful platform for a high-level pro-Ukrainian “hearts and minds” campaign, where the United States and EU can cajole leaders from non-Western countries to see things their way. It helps that global food prices have stabilized in recent months, mainly because markets are pricing in a global recession. But the General Assembly is a rare opportunity for President Biden and his friends to reach out to a big group of counterparts from the Global South.

Russian Foreign Minister Sergey Lavrov—a former ambassador to the U.N.—will be at the General Assembly this week to press Moscow’s case over the war. Over the course of the year, we have seen Russia playing up its claim to be a friend of post-colonial African countries like Mali (where Russian military contractors are backing the government). Lavrov will presumably hit similar notes in New York. We’ve seen that Moscow can play up memories of the colonial era—and Soviet support for anti-colonial movements—quite effectively.

In the end, this week offers the U.S. space to promote its political messages, but the struggle for non-Western support over Ukraine won’t end one way or another this week.

**How far does the geopolitical fall-out from the Russian invasion, which has largely pitted Russia against the West, spread through the U.N. system? Are we seeing new fissures, or just extensions of old ones? What are the anticipated and perhaps unanticipated ways in**

## which the war may shape business at the U.N. during the General Assembly?

Ukraine's friends have made an enormous effort to isolate Russia at the U.N. since February. At various points in the last six months, I've heard of initiatives to strip Russian officials of roles in U.N. processes on road safety and the protection of wetlands that are homes for wildfowl. To be honest, I think some of this is a bit pointless. The war for the future of Ukraine won't be shaped by who is making policy proposals on safeguarding storks' nests in swamps.

I think what has got lost amidst a lot of this diplomatic noise is that one much-maligned part of the U.N. system is working better than we expected in the context of this war. That is the United Nations Security Council. As Crisis Group has noted, the Council has been predictably gridlocked over Ukraine, but has kept up a sort of [minimal functionality](#) on other crises this year. It has passed some noteworthy resolutions updating the frameworks for international support to Afghanistan (where the U.N. assistance mission is now the world's residual point of contact with the Taliban) and Somalia. It has kept rolling over the mandates of U.N. peacekeeping missions in Africa. We have seen a nasty breakdown with the Chinese and Russians over U.S. proposals to impose more sanctions on North Korea, and Russia used its veto this July to block a proposal to extend [U.N. aid supplies to rebel-held North-West Syria](#) for one year. But the Russians did at least agree to a six-month extension of the aid mandate, and Moscow has not been swinging its veto around entirely egregiously (other than with respect to Ukraine).

There are a few explanations for this. We hear that French and Chinese diplomats have been quietly working to minimize Council frictions behind the scenes. Some elected members, such as Ireland and Norway, have done hard but necessary work coaxing out compromises on contentious files like humanitarian assistance to Syria. More fundamentally Russia, the United States and the other veto-wielding permanent members (the P5) seem to see that they have shared national interests in preventing the Ukraine mess from poisoning talks on other issues.

Earlier this month in advance of the General Assembly, U.S. Ambassador to the U.N. Linda Thomas-Greenfield delivered remarks decrying Russia's aggression and violations of the U.N. Charter and committing the United States to a number of principles for leadership at the U.N., including "efforts to reform the Security Council... The Security Council should also better reflect the current global realities and incorporate more geographically diverse perspectives." In articulating its view of what it means to recommit itself to "defending the U.N. Charter" and "protecting the U.N.'s principles," is the United States exercising meaningful leadership? Can it live up to the six principles it has set for itself? What realistically could be in store if the United States is "recommitted" to Security Council reform but Russia is not? Or do you see this more as a rhetorical strategy that won't have much impact in practice?

I doubt that Washington has a model for what it would like to come out of talks on Security Council reform. U.S. officials [say](#) they are making a "serious call" for reform discussions, but that is about it. That said, I presume that the United States recognized that, given the Council's obvious impotence over Ukraine this year, a "business as usual" approach to the U.N. would go down pretty badly when Biden speaks to the General Assembly. Biden is likely to echo Ambassador Thomas-Greenfield's words in his General Assembly speech, but it is still unclear whether the United States will invest real diplomatic energy in reform following a brief moment of excitement.

**"Russia, the United States, and the other veto-wielding permanent members (the P5) seem to see that they have shared national interests in preventing the Ukraine mess from poisoning talks on other issues."**

I think that the United States has to be careful about appearing to indulge in what we might call "diplomatic populism" on Security Council reform. It is well known that China hates the idea of opening up reform talks because Beijing worries that these could lead to one or both of its regional

rivals Japan and India gaining permanent seats in the Council. This is awfully unlikely. After all, the U.N. Charter grants all P5 members a veto over any Charter reform. But it is a genuinely neuralgic concern for Chinese officials in New York. The United States can win some easy points by ostensibly championing Council reform, albeit in vague terms, and then blaming its geopolitical rivals for the fact that this is impossible. (I predicted that the United States would do this in a book chapter in 2020, but it's only [available in Japanese](#), so my acute predictive powers have been overlooked elsewhere). The United States may score some points in this way, but could also hurt its very tenuous relation with China in Turtle Bay as a result.

That said, my colleagues at Crisis Group and I have been probing ways that the U.N. could improve its organizational structures' performance after this year's shocks. We are [intrigued](#) by the Secretary-General's call for a "New Agenda for Peace" to report on what collective security may mean today in an unpromising environment. And we would never rule out the possibility that Security Council reform, especially with U.S. support, could be a good thing. But we have been around these issues long enough to know that we should not say it's anything close to a panacea either.

At the end of the day, Russia's war on Ukraine has highlighted the organization's weaknesses, but they were flaws anyone who has studied the organization knew were there. I wrote [a](#)

[piece](#) for *Just Security* about how the Security Council would fail on Ukraine back in January that was sadly prescient (in fairness I underestimated how much support Kyiv would get in the General Assembly early on). But I take some comfort from the fact the council has managed to keep up diplomacy on other topics, which I [was not sure](#) would be possible in the first quarter of the year. I have also been pleasantly surprised by the way that Secretary-General Guterres has played a useful role on efforts to mitigate the effects of the war, such as helping mediate the Black Sea Grain deal, which I have [discussed elsewhere](#).

**“I understand that a lot of people—and a lot of governments—look at the U.N. this year and see a profound mess. It would be nice to design a better global institution. But I still value the residual resilience of what we've got.”**

If you work in the U.N., you learn to appreciate the organization's small wins, and endure its major failures. I understand that a lot of people—and a lot of governments—look at the U.N. this year and see a profound mess. It would be nice to design a better global institution. But I still value the residual resilience of what we've got. 🌐



## What You Need to Know: Unpacking the Law in Russia's War Against Ukraine

# Genocide Determinations and Ukraine

Todd Buchwald | June 14, 2022



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**To begin, how does the U.S. government ordinarily make decisions whether to say, or not to say, that genocide has occurred in a particular situation?**

There is no formal policy governing how this is done but a *de facto* process has emerged over time. Traditionally, decisions have been made at very senior levels, typically by the Secretary of State, based on information that is developed, marshaled and analyzed by relevant State Department bureaus, including the relevant regional bureau, the Office of Global Criminal Justice, Bureau of Intelligence and Research and the Office of the Legal Adviser. In at least some cases, the Department has supplemented the available information with reports from investigators it has commissioned to conduct interviews with displaced victims to better understand the situation. However, this *de facto* process appears not to have happened in connection with President Biden's [statement](#) that genocide was being committed in Ukraine.

**Was the president correct when he declared that genocide was being committed in Ukraine?**

In fairness, Biden [said](#) at the time that this was simply his view and he would “let the lawyers decide internationally whether or not it qualifies.”

That said, the answer to the underlying question depends as much on what one thinks constitutes “genocide” as what one thinks has happened on the ground in Ukraine. On the one hand, colloquial understandings of the term are based largely on subjective factors—for example, the extent to which the conduct in question evokes the crimes committed by the Nazis, feels as if it stands at the pinnacle of evil, or warrants an obligation by the international community to intercede. The sheer number of victims is often highlighted and there is a general sense that genocide includes an eliminationist element—that the perpetrators aim to eliminate the relevant group—but no agreed understanding of what “eliminate the relevant group” means.

Such colloquial understandings of genocide are not “wrong,” but they do not match the definition traditionally applied by international lawyers, or the U.S. State Department, who instead use the definition in the [1948 Genocide Convention](#) as their point of departure. That definition has gained



only more stature over time, and is included virtually verbatim in such instruments as the Statutes of the *ad hoc* Tribunals for [Former Yugoslavia](#) and [Rwanda](#) (ICTY and ICTR) and the [Rome Statute of the International Criminal Court](#).

**“[T]he answer to the underlying question depends as much on what one thinks constitutes ‘genocide’ as what one thinks has happened on the ground in Ukraine.”**

At the same time, although the Convention’s definition of genocide is widely accepted, it is not altogether clear. For Russian conduct to come within its terms, three tests must be met. First, a perpetrator must commit one of the predicate acts that are enumerated in the definition, such as killing members of any of the kinds of groups listed in the definition. As to this test, the conclusion that there have been “killings” in Ukraine is self-evident.

Second, the target must be a “national, ethnical, racial or religious” group. The drafters of the Convention thus decided that the intent to destroy numerous other types of groups—e.g., political, economic or linguistic groups—would not qualify. Of the types of groups that the Convention does cover, the most relevant here are “national” or “ethnical.” Russia might well challenge the conclusion that Ukrainians qualify—e.g., it might argue that “national group” refers to national minorities in the sense of the treaties that followed World War I rather than persons who share citizenship. But President Putin himself appears to refer to Ukrainians in a way—e.g., speaking about them in the same breath as “[Tatars, Jews and Byelorussians](#)”—that would make such a challenge difficult.

Third, the killings (or other predicate acts) must be committed with a specific intent “to destroy, in whole or in part, [the relevant group], as such.” This third test is the most difficult, and has often been a source of debate and misunderstanding.

**What are the key interpretive issues under this third test?**

There is a fuller discussion in [the report](#) that Adam Keith and I produced for the United States Holocaust Museum. In the first place, the fact that the intent must be to destroy the group “as such” means that the targets must be being attacked *because* they are members of the group—e.g., the Ukrainians are being attacked *because* they are Ukrainians—as opposed to being attacked because they stand in the way of (for example) military conquest. This is why military campaigns aimed at subjugating foreign nations, awful as they are, generally are not by themselves talked about as genocide.

In addition to the interpretation of “as such,” key issues include—

- What does the Convention mean when it says that, to constitute genocide, the killings must be committed with the intent to “destroy” the relevant group?
- What does the Convention mean when it speaks about destroying the relevant group “in part”?
- How clear should the evidence about intent be in order to conclude that genocide has been committed?

**Let’s address these questions in turn. First, what does “destroy” mean?**

The key question here is whether—to fall within the Convention’s definition—the perpetrator must intend to destroy the members of the group in a physical or biological sense, or whether it is sufficient to destroy the group in the sense of preventing its members from continuing to function as a group.

For its part, the International Court of Justice (ICJ) has said that the intent must be to destroy the group in a physical or biological sense, and that this interpretation is based on the Convention’s negotiating history. The concept of “cultural genocide”—destroying the ability of the group to continue functioning as a group—was clearly reflected in [Raphael Lemkin’s original conception](#) of “genocide.” It was similarly reflected in the so-called [Ad Hoc Committee draft](#) of what eventually became the Genocide Convention, which contained an entire bracketed section—entitled “Cultural Genocide”—under which acts such as prohibiting use of a group’s language or destroying its places of worship would

qualify as genocide if committed with the requisite intent to destroy the group. But the section on cultural genocide did not survive, and the international courts have read its deletion as evidence that only destruction of a group in a physical or biological sense suffices. (See paragraph 135 et seq of the ICJ's 2015 Judgment in *Croatia v Serbia*.) This has also been the [understanding](#) of the U.S. State Department when it assesses whether genocide has occurred in a country.

It is worth noting that, while this conclusion is widely held, it is not beyond debate. For example, one ICTY Judge reasoned that although the drafters had deleted acts of cultural genocide (e.g., prohibiting use of a group's language or destroying their places of worship) from the list of predicate acts that could qualify, it does not follow that they intended to exclude the commission of acts that were retained on the list (e.g., killing members of the group) if committed for the purpose of destroying the ability of the group to function as a group. (See paragraph 45 et seq of Judge Shahabuddeen's [partial dissent](#) in *Prosecutor v Krstic*.) In other words, the fact that widespread efforts to prevent use of the language or to destroy places of worship with the goal of destroying the group's ability to function as a group would not qualify as genocide does not necessarily mean that widespread killing of its members with that same goal would not qualify.

**“[T]he fact that the intent must be to destroy the group ‘as such’ means that the targets must be being attacked because they are members of the group—e.g., the Ukrainians are being attacked because they are Ukrainians—as opposed to being attacked because they stand in the way of (for example) military conquest.”**

The approach suggested by Judge Shahabuddeen's partial dissent would leave more scope for a finding of genocide in Ukraine today. Under it, the “destroy” part of the definition could be satisfied if it were established that the Russian campaign was directed toward

destroying the ability of Ukrainians to continue existing as a national or ethnical group. That said, a conclusion based on a premise that the ICJ had rejected could risk criticism that the decision-making had been politicized.

**Second, assuming the requirement to “destroy” entails physical or biological destruction, what does it mean to destroy a group “in part”? How large a “part” of the overall group must the perpetrator intend to destroy in order to fall within the Convention's definition of genocide?**

There is no clear answer to this question. In the U.S. ratification process, the Senate adopted an [Understanding](#) that the perpetrator must intend to destroy a “*substantial* part” of the wider group. [U.S. legislation](#) implementing the Convention into domestic law provides that, to qualify as substantial, the part must be “of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.” For its part, the ICJ has similarly said that “the part targeted must be significant enough to have an impact on the group as a whole,” while also saying that the requirement of substantiality “is demanded by the very nature of the crime of genocide.” (See paragraph 198 of the Judgment in *Bosnia and Herzegovina v Serbia and Montenegro*.)

There is some tension between these approaches to “substantiality” and the idea that the Convention is concerned only with the physical or biological destruction of the members of the group. They would appear to leave greater scope for a finding of genocide if it could be established that the perpetrator intended to kill a sufficient number of persons so as to prevent “Ukrainians” as a group from continuing to function as such as an objective of a policy of “de-Ukrainization.”

Importantly, international courts have found that considerations beyond numerical size may also be relevant in assessing substantiality. For example, in the context of Srebrenica, the ICTY concluded that even though the Bosnian Muslims in Srebrenica formed only a relatively small percentage of the total number of Bosnian Muslims

in the country, it was appropriate to consider a series of qualitative factors in assessing whether their slaughter constituted genocide. These factors included the prominence of the Bosnian Muslims of Srebrenica within the overall group of Muslims in Bosnia, whether the Bosnian Muslims of Srebrenica were emblematic of the group as a whole, whether their survival was essential to the survival of the wider group, and the area of the perpetrator's activity and control. In the specific case of Srebrenica, the Tribunal looked to what it saw as the immense strategic importance of the area to the perpetrators, its prominence in the eyes of the international community, the fact that it had been declared a safe area by the United Nations Security Council, the example its vulnerability and defenselessness would serve to other Bosnian Muslims, and the fact that the geographic area of the perpetrators' operations was limited. (See paragraphs 12-16 of [Prosecutor v Krstić](#).)

**“Importantly, international courts have found that considerations beyond numerical size may also be relevant in assessing substantiality ... it is possible to imagine a prosecutor arguing that the perpetrators intended to make an example of the vulnerability and defenselessness of the Ukrainian population in Mariupol as part of a plan aimed at the destruction of Ukrainians as a national or ethnical group.”**

Could one apply a similar approach in analyzing events in Mariupol, Bucha or elsewhere? The mix of factors identified by the ICTY does not lend itself to a clear, easily applied legal test, and any factual assessment would need to account for intelligence and other information that is not publicly available. That said, it is possible to imagine a prosecutor arguing that the perpetrators intended to make an example of the vulnerability and defenselessness of the Ukrainian population in Mariupol as part of a plan aimed at the destruction of Ukrainians as a national or ethnical group.

**Third, how clear must the evidence be that the intent and other criteria have been satisfied in order to justify a determination that genocide has occurred?**

Again there is no definitive answer, but at least three considerations warrant mention.

First, it is widely accepted internationally that the perpetrator would need to have “specific intent.” From the perspective of the United States, this is reflected in both the [Senate’s resolution of advice and consent](#) and the [U.S. legislation](#) implementing its obligations in domestic law. Knowing that the destruction of the group is likely is not the same as *specifically intending* to cause it. A state accused of genocide might well argue that its conduct was part of a military strategy simply to overrun the enemy, as opposed to a specific intent to destroy a group, and that even if the strategy included the illegal targeting of civilians, that would not by itself overcome this line of defense. In some cases (as with the Nazis), the perpetrators are open about their objectives, but in other cases, the fact that the definition requires specific intent can complicate the ability to draw the necessary conclusions.

The second consideration involves the burden of proof. At least at times, the courts have set the bar quite high in terms of how clear the evidence must be before they will infer that the conduct was carried out with the requisite genocidal intent. For example, the ICJ said in the [Croatia v Serbia](#) case that it would infer genocidal intent only where the evidence is “fully conclusive” and where “this is the only inference that could reasonably be drawn from the acts in question.” (See paragraphs 143-148 of [Croatia v Serbia](#) and paragraph 373 of [Bosnia and Herzegovina v Serbia and Montenegro](#).) Particularly in combination with the difficulty in establishing specific intent, this high burden of proof presents a formidable obstacle. To be sure, it does not necessarily follow that the United States or other states should apply the same standard in their own assessments, but this does reflect some sense that a finding of genocide is ordinarily viewed as exceptional and should be subject to a high burden of proof.

The third consideration involves the fact that different actors may be acting for different purposes. In any actual criminal proceeding, the particular defendant's individual circumstances would have to be examined with precision, including on questions of whether he or she acted with the requisite intent, or whether the circumstances were such that the genocidal intent of other actors should be imputed to the defendant. A simple statement that genocide has been committed in a country does not necessarily reveal whether it is senior leaders or local actors who are thought to be criminally responsible.

### What have other states said about whether Russian actions constitute genocide?

Most States do not typically make public statements about whether genocide has been committed in a country, though there are exceptions. For example, the U.K. has periodically made [statements](#) that such determinations are a matter for competent courts, but it nevertheless made [statements](#) regarding genocide by ISIS. States have been relatively forthcoming in making such statements about Ukraine and *Just Security* recently published an excellent [survey](#) by Elizabeth Whatcott. The statements are not easy to summarize. Many are from parliamentary sources that, in general diplomatic practice, would not be taken as a formal indication of a state's views. Of those made by executive officials, there is a mix. Some say flatly that genocide has been committed but do not specify the interpretation of the definition that they applied in reaching that conclusion; others—like the [statement by Polish President Duda](#)—are relatively specific and may have been framed with an eye on the definition in the Convention. Some of the statements talk about growing indications of the existence of evidence of genocide, without actually concluding that there has been genocide, or walk up to the line by suggesting that there are precursors or hallmarks of genocide. Some, like [the statement](#) by French President Macron, specifically avoid use of the word genocide, perhaps with an eye on [leaving political space](#) for an eventual rapprochement with Russia. Finally, some of the statements—like [Biden's](#)—are framed as reflecting the speaker's opinion, and not necessarily a formal view by the state of which he is the leader.

### Could international courts eventually decide the issue?

Yes, they could. The International Criminal Court (ICC) clearly has criminal jurisdiction over individuals who commit genocide in Ukraine. Interestingly, the ICC Prosecutor's [announcement](#) in late February that he would pursue an investigation of crimes in Ukraine said only that there was sufficient evidence to pursue charges of war crimes and crimes against humanity, but genocide was thereafter mentioned in both the [formal referral](#) to the Prosecutor submitted by 39 states and the Prosecutor's [announcement](#) to formally open an investigation on Mar. 2.

Meanwhile, the ICJ could address the issue of Russia's responsibility for genocide under Article IX of the Convention, which allows any Genocide Convention party to bring a dispute against any other party relating to the interpretation, application or fulfillment of the Convention. The United States could not bring such a case because it took a [reservation](#) to Article IX when it joined the Convention, but Ukraine or any other Genocide Convention party that has accepted Article IX could do so. For example, there is an ongoing [case brought against Myanmar](#) by Gambia, a state that many people would not routinely consider as having a direct interest, but the theory is that all parties owe obligations under the Convention to all other parties.

To this point, Ukraine has pursued a different strategy and brought an ICJ [case](#) based on Russia's wrongful claim that genocide by the Ukrainians legally justified Russian invasion. The Court has not yet addressed the merits of the claim, but very notably—by a 13-2 vote—issued an [order](#) that Russia suspend its military operations in the interim.

### Would a conclusion that Russian actions constitute or may constitute genocide trigger significant legal obligations for the United States or other states?

The U.S. government's answer to this question would be no. Parties have several specific obligations under the Genocide Convention—e.g., to enact the necessary domestic law to implement their obligations, to try persons charged with committing genocide in their countries, and to grant extradition requests in accordance with their laws and treaties in



force. But the United States has either already implemented these obligations or could easily do so if the situation arose.

More controversial is the scope of the obligation to “prevent and punish” genocide under Article 1 of the Convention. The United States has rejected arguments that this entails an obligation to prevent genocide in areas outside its territory, as stated for example in a 2004 [memorandum](#) prepared in connection with Secretary of State Colin Powell’s eventual decision to state publicly that genocide had occurred in Darfur.

The ICJ has been more forward-leaning, saying that a state incurs liability if it has “manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide,” though it noted that the capacity to influence events “varies greatly from one State to another.” Read literally, this language could be understood to require military intervention—at least in cases where military intervention would otherwise be lawful and within the capacity of a state to undertake. But the sweeping language is likely a product of the particular circumstances regarding the broad influence that Belgrade at the time had over the Bosnian Serb perpetrators, and it seems doubtful that the Court would consider the broad array of support already being provided by the United States and others to Ukraine as insufficient to meet any such obligation that might exist.

In practice, different states will inevitably assert very different conceptions of what should be done to prevent or stop genocide in a given situation. For example, one state might argue that it is essential to terminate purchases of oil and natural gas, another might argue that such sanctions will only exacerbate the situation, and yet another might argue that purchases should be reduced but not terminated because the effect of termination on its economy would be too severe.

Importantly, the ICJ has said that a State’s obligation to prevent does not depend on genocide having already occurred, but instead arises “at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.” (See paragraph 431

of [Bosnia v Serbia](#).) This is in keeping with the idea that a key goal of the Convention is to *prevent* genocide. From this perspective, the question whether genocide has already occurred is too narrow, and it is at least equally important to focus on the level of risk of genocidal acts (or other atrocities), or whether [eliminationist rhetoric](#) or a campaign of vilification—*e.g.*, about “[de-nazification](#)”—is contributing to a climate in which the risk of such atrocities increases.

### Even if there is no legal obligation to act, would such a conclusion trigger political or moral responsibilities for action by the United States?

This is a more complicated question. In the “[Responsibility to Protect](#)” principles adopted at the 2005 U.N. World Summit, states indeed agreed that the international community has a responsibility to use appropriate means to protect populations from genocide, but the text applies equally to war crimes, ethnic cleansing, and crimes against humanity. In this sense, the responsibility would be no greater or less in the context of genocide than in the context of these other crimes.

That said, the question of political and moral responsibility is complicated. A finding that genocide has occurred is widely perceived as carrying a special stigma, and as entailing an imperative to treat the conduct in question as the worst of the worst. It can often increase expectations of a robust response, galvanize political pressures to act, and frame the kind of responses and policies that the United States and other states would have the political space to pursue in the period going forward. The extent to which that is true in connection with Ukraine is unclear, as the response of western countries has been robust, even if short of direct military intervention.

At the end of the day, my view is that the U.S. government should draw conclusions based on its best assessment of the facts and the law, not colored by these other considerations; should straightforwardly explain its conclusions—and the policies it plans to pursue in light of those conclusions—to the American people and the international community; and should be prepared to apply the legal tests it applies in Ukraine consistently as other situations arise in the future. 🌐



## What You Need to Know: Unpacking the Law in Russia's War Against Ukraine

# Russian Threats and Cybersecurity

Beth George | May 13, 2022



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**Should we expect to see an increase in Russian cyber-attacks against the United States and other countries providing support to Ukraine as the crisis draws on? If so, what kinds of attacks would you predict we'll see, and do you think potential targets—particularly private companies—are sufficiently prepared?**

Since the earliest days of the Russian invasion of Ukraine, the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA) has been issuing prominent warnings about the potential for an increase in Russian attacks against U.S. companies. They launched a campaign called "[Shields Up](#)" to provide warning and guidance to companies regarding potential Russian threats.

Interestingly, in the private sector, what we noticed around the time of the Russian invasion was a decrease in attacks that cybersecurity professionals generally attributed to Russian state-sponsored and state-affiliated hacking organizations, particularly regarding ransomware. Last fall, ransomware attacks [appeared to be at their highest](#), with attacks against private companies happening on a routine basis, although many of the attacks were not existential

for the company involved or didn't compromise major systems. (Anecdotally, in October 2021, multiple forensic companies I work with reported that they were at capacity for ransomware attacks and were unable to take on additional clients.) But by the time of the invasion, ransomware attacks had [significantly dropped off](#), and those of us who work in the private cybersecurity sector remarked quietly among ourselves that it was disconcertingly quiet. It is unclear—at least based on publicly available information—whether this is related to Russian state-sponsored and state-affiliated hackers focusing their efforts on the war in Ukraine or if there has been some other type of disruption in their operations, perhaps due to [efforts](#) by the U.S. government to address ransomware gangs.

Regardless of how quiet it has generally been for the U.S. private sector in the past few months, Russia is clearly not out of the hacking game. Earlier this week, the U.S. and U.K. governments formally attributed [an attack against ViaSat](#) – a private internet satellite company—to the Russian government. In that case, the attack appeared largely intended to disrupt Ukrainian military activity, but it has secondary effects in several countries including, for

example, disabling remote access to thousands of German windmills that relied on the same technology.

As to whether private companies are sufficiently prepared for Russian cyber operations, the reality is that it is incredibly difficult for companies to pivot quickly to protect themselves from sophisticated state sponsored attacks. Building cybersecurity controls is a multi-year, and, in some cases, multi-million dollar investment. For companies that have underinvested in cybersecurity for years, getting basic controls in place to prevent or mitigate an attack is not something that can be done in a matter of days or weeks. That said, CISA is doing an excellent job of putting out information about [known, exploited vulnerabilities](#) putting out [industry-specific](#) and actionable threat intelligence. All companies would be well-advised to review CISA's public guidance and digest it into their cyber risk management processes.

**“[T]he reality is that it is incredibly difficult for companies to pivot quickly to protect themselves from sophisticated state sponsored attacks. Building cybersecurity controls is a multi-year, and, in some cases, multi-million dollar investment.”**

**How serious are the potential threats to critical infrastructure in the United States from hostile cyber operations, and do you anticipate Russia targeting U.S. critical infrastructure?**

There have been efforts across multiple administrations to raise awareness of cybersecurity threats to critical infrastructure, to share threat information with companies that own or operate critical infrastructure, and to improve private-public partnerships to further harden and protect these companies. Most recently, on Mar. 15, 2022, President Biden [signed](#) into law the [Cyber Incident Reporting for Critical Infrastructure Act of 2022](#) (within the Consolidated Appropriations Act), which will require entities determined to be critical infrastructure to report substantial cyber incidents within 72 hours and ransomware payments within 24 hours to CISA. But it's unlikely that it will have an impact any time soon—the statute allows the CISA

director until September 2025 to establish implementing regulations. And because passage of the bill was [strongly criticized](#) by the Department of Justice and the FBI, there could be significant interagency fighting about the scope and content of the proposed rulemaking.

Perhaps more importantly, in June 2021, after the [Colonial Pipeline](#) ransomware attacks, [Biden warned Russian President Putin](#) that 16 critical infrastructure sectors should be off-limits from cyberattacks. Although it is not clear what the Biden administration has planned or specifically warned in the event of a critical infrastructure attack attributed to Russia, the presidential notice clearly raises the stakes for Russia: Putin must certainly expect that such attacks will have a significant response from the United States. In that warning, however, the [administration took pains to differentiate](#) between “destructive” hacks and “conventional digital espionage operations carried out by intelligence agencies worldwide.”

In March of this year, Deputy National Security Advisor Anne Neuberger [issued a public warning](#) that the U.S. government is observing “threat intelligence that the Russian government is exploring options for potential cyberattacks on critical infrastructure in the United States.” One can imagine that what the United States is observing is Russia conducting the very espionage activities that the United States was careful to distinguish as not off limits, but whether the Kremlin decides to exploit any vulnerabilities it has found or accesses it has established is what matters.

Regardless of Biden's warning, Putin certainly understands that there is a big difference between hacking private email accounts of administration officials and dumping the emails for an embarrassment campaign, compared to an attack that impacts water, electricity, or communications systems in the United States. Russia will always want the option to disable the critical infrastructure in the United States—much the same way other countries proactively seek to understand weaknesses in their adversaries' defenses. But I would be surprised if Putin were to take action against U.S. critical infrastructure because of the potential for it to result in significant escalation, whether of the conflict in Ukraine or more generally.

So despite the necessary focus on preparing for critical infrastructure cyberattacks, I would be more concerned about attacks on private companies or further disinformation campaigns. For companies that have made a noisy exit from Russia, Putin may wish to exact revenge or seek to embarrass them, not unlike [North Korea's attack on Sony](#). For the Biden administration and the country, the November elections will be critical, and Russia has spent years honing its disinformation activities around U.S. elections. Seeking to further punish Democrats for their support of Ukraine through electoral losses would be an easy tool in Putin's toolbox, for which the response from the United States is highly unlikely to be as severe (or as bipartisan) as a response for an attack on critical infrastructure.

**You have served in several high-level legal positions in the U.S. government, in two administrations, including most recently as Acting General Counsel of the Department of Defense at the start of the Biden administration. When the U.S. government conducts cyber operations, how do the lawyers for the departments or agencies involved think about evaluating the legality of the proposed operation? How much technical expertise is required?**

The U.S. government has a deep bench of lawyers who have been thinking about these issues for a long time. Retaining that crucial, long-term memory and experience that exists in the civil service is incredibly important; and, under the current administration, it is complemented by a tech-savvy and seasoned political appointee team.

It is my experience that the vast majority of the lawyers in this area do not necessarily have technical backgrounds. Although having technological knowhow certainly helps, it is arguably far more important to have honed legal skills, including the ability to develop a full factual understanding of the scenario at issue. Often, as is the case in many areas of law, your clients provide you only with the facts that they think you need, and perhaps not the entire picture (usually in an effort to be efficient with your time or because they may not have sufficient understanding of the law to appreciate what other facts truly matter).

One of the key issues in applying law to cyber operations is grappling with the effects, both intended and foreseeable-but-unintended. Understanding that a particular activity doesn't start or end with the 1s and 0s being transmitted across the wire is a must; and it is crucial to have enough experience to ask the probing, and sometimes iterative, questions needed to evaluate fully what effects a particular operation is intended to have, or could unintentionally produce. There can be challenges in what can get lost in translation between the policy and legal worlds—for example, a client's use of the word “metadata” cannot be assumed to equal “noncontent” information under the Fourth Amendment. In the case of a complex cyber operation, it's imperative to ask enough questions to determine whether an activity is likely to merely affect one small portion of complicated machinery, for example, or could have follow-on effects. And in some cases, it's incumbent upon the lawyers to push back on clients when the operational uncertainty is too great; when it's not possible to fully understand the range of potential impacts of a cyber operation, it may not be possible to ascertain its legality. Simply wishing for the best possible outcome is not an appropriate course of action.

**“Understanding that a particular activity doesn't start or end with the 1s and 0s being transmitted across the wire is a must; and it is crucial to have enough experience to ask the probing, and sometimes iterative, questions needed to evaluate fully what effects a particular operation is intended to have, or could unintentionally produce.”**

But all of these things are true for non-cyber operations as well. Whether it's lawyering traditional kinetic use of force, or merely delving into an area of a complex litigation regarding an intellectual property or financial dispute, basic lawyering skills are about understanding your clients, the language that they use, how to communicate with them, and how to get the facts you need to best advise them. These skills translate across subject matter. 🌐







## What You Need to Know: Unpacking the Law in Russia's War Against Ukraine

# The Use of Cluster Munitions

Stephen Pomper | May 4, 2022



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**You served as senior director in the White House office responsible for human rights and multilateral affairs during the Obama administration's second term and in that capacity worked on issues relating to U.S. cluster munitions policy. To begin, what are cluster munitions and how are they governed by international law?**

Cluster munitions are conventional explosives that break apart in flight and scatter bomblets called submunitions. They have a deserved reputation as an especially ugly weapon of war because of the danger they pose to civilians. In densely populated urban areas they disperse at random, imperiling residents. In rural regions, their undetonated remnants contaminate the countryside, creating a lingering hazard for farmers, herders and others. The ICRC has [noted](#) that children in particular are “attracted by the shape, size and colour” of the munitions.

As a matter of international law, the primary treaty governing the use of cluster munitions is the [Convention on Cluster Munitions](#) (CCM), which was concluded at Oslo in 2008 and came into force in 2010. The product of [years of effort](#) by civil society and supportive States, the CCM prohibits State parties from developing, producing, acquiring, using, transferring or stockpiling cluster munitions. While 23 NATO powers—including France, Germany, and the U.K.—are parties to the CCM, the United States is not.

Neither is Russia or Ukraine. The CCM was drafted so that NATO members that became parties could continue to cooperate militarily with the United States. It expressly permits “military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State party.”

**“[Cluster munitions] have a deserved reputation as an especially ugly weapon of war because of the danger they pose to civilians.”**

Beyond the CCM, the use of cluster munitions is also governed by customary international law. Some experts in the arms control and human rights communities see clusters as [inherently indiscriminate and thus illegal](#). They argue that their wide and imprecise deployment makes it impossible to reliably mitigate the impact on civilians, and that unexploded (or “dud”) submunitions can remain on the ground for years, presenting a lethal threat to non-combatants who come into contact with them.

While the United States does not consider uses of cluster munitions to be per se illegal, it does recognize that they are governed by the customary international law requirements that uses of force must be [discriminate](#) (i.e., targeting only lawful military objectives) and [proportionate](#) (i.e., not

excessive in relation to the concrete and direct military advantage anticipated). These requirements are also codified in Additional Protocol I to the Geneva Conventions, to which both Russia and Ukraine are parties, but which the United States has not joined.

### Russia has reportedly been using cluster munitions in Ukraine, particularly in populated civilian areas. Is that unlawful?

Reports from the [United Nations](#), the Organization for Security and Cooperation in Europe, human rights organizations, and the [media](#) suggest that Russia has used cluster munitions in populated areas including near [hospitals](#) and [schools](#). There are far fewer reports about the use of cluster munitions by Ukraine but the New York Times recently carried [an account](#). Although reaching specific legal conclusions is best left for a court of law, the repeated use of cluster munitions near objects that appear to be entirely civilian in nature—such as a medical facility or kindergarten—certainly creates the appearance of grave international humanitarian law violations.

### How has the United States responded to Russia's use of cluster munitions? What does U.S. law and policy say about the use of cluster munitions?

When reports emerged that Russia had used cluster munitions in Ukraine, the United States struggled with how to criticize it. At first, the U.S. Ambassador to the U.N., Linda Thomas-Greenfield, made a sweeping [condemnation](#), saying that cluster munitions are “banned under the Geneva Convention” and have “no place on the battlefield.” But the Biden administration quickly walked back that remark. It footnoted the [official transcript](#) to make clear that the United States considers use of the munitions unlawful when “directed against civilians”—a much narrower statement than Thomas-Greenfield’s original formulation.

U.S. officials no doubt struggled to find the right formulation because of the United States’ own complicated posture when it comes to cluster munitions. On the one hand, the United States has demonstrated in both word and deed that it sees the humanitarian and reputational risks in

using these weapons. It [stopped](#) using them in Afghanistan in 2002 and Iraq in 2003. Expressing concern about the humanitarian consequences of dud munitions, Secretary of Defense Robert Gates issued an [order](#) in 2008 that required the U.S. military to phase out—over the course of ten years—munitions with an unexploded ordnance rate (UXO) of greater than one percent. The Obama administration [affirmed](#) this policy in 2011. Congress has [enacted](#) a series of export restrictions on cluster munitions with a UXO in excess of one percent. Arms manufacturers have [rolled up production and distanced themselves](#) from cluster-related activities like stockpile testing.

**“When reports emerged that Russia had used cluster munitions in Ukraine, the United States struggled with how to criticize it. ... U.S. officials no doubt struggled to find the right formulation because of the United States’ own complicated posture when it comes to cluster munitions.”**

On the other hand, the Pentagon has strenuously resisted efforts to fully curtail the availability of cluster munitions to the U.S. military. U.S. officials have argued that they are an important tool for channeling or slowing the advance of massed enemy forces by denying them access to wide swathes of territory. In 2008, one State Department official [remarked](#) that “U.S. forces simply cannot fight by design or by doctrine without holding out at least the possibility of using cluster munitions.” The United States refused to participate in the negotiation of the CCM, even as an observer, and [angered CCM supporters](#) when it threw its weight behind the development of a much weaker parallel treaty that might have diverted states away from the toothier CCM. (The United States eventually abandoned the effort.)

Perhaps most strikingly, the Pentagon never did implement the cluster munitions policy that the Secretary of Defense announced in 2008. The reasons for this failure are murky. Part of the problem may have been that the 2008 order is a sparse document: it does not provide benchmarks for the reduction of stockpiles or requirements for public reporting

on progress toward the 2018 objective. Another partial explanation might be that when the Obama administration [announced](#) that it would come largely into compliance with the Ottawa Mine Ban Treaty (except for activities on the Korean peninsula), defense officials may have started thinking of cluster munitions as a way to compensate for that perceived loss of capability. But it is also hard not to question whether the Pentagon was fully committed to implementing its own cluster munitions policy in the first place.

**“On the one hand, the United States has demonstrated in both word and deed that it sees the humanitarian and reputational risks in using these weapons. ... On the other hand, the Pentagon has strenuously resisted efforts to fully curtail the availability of cluster munitions to the U.S. military.”**

In any event, the 2008 policy did not survive the Trump administration. In November 2017, Deputy Secretary of Defense Patrick Shanahan [announced](#) that the military would not meet the 2018 deadline for phasing out non-compliant clusters, writing *inter alia* that “[c]luster munitions are legitimate weapons with clear military utility,” and declined to offer a new deadline. The Obama administration’s landmine policy did not survive either. In 2020, Secretary of Defense Mark Esper [canceled](#) Presidential Policy Directive-37, which memorialized that policy, giving the Pentagon renewed space to develop, procure, and use “smart” landmines—i.e., mines with self-destruction and self-deactivation features.

As for where we are today, the Biden administration has indicated a strong inclination to roll back some or all of the Trump administration’s 2020 decision on landmines, subject to a still-ongoing [formal review](#), but it has been oddly silent on the issue of cluster munitions. Reviewing one weapons system in the absence of the other would be a mistake. If the administration looks at landmines without also examining its policy on cluster munitions, history suggests that the reliance on the latter for planning and

perhaps other purposes could well become entrenched or even expand. Given the humanitarian and reputational implications, that is a result worth avoiding.

**Does the U.S. government’s position on its own lawful ability to use cluster munitions preclude the Biden administration from being able to assert that Russia’s use of cluster munitions is unlawful?**

The U.S. government’s ambivalent posture concerning cluster munitions lends itself to the kind of garbled messaging that characterized its initial statements about Russian usage in Ukraine, but it still leaves open some maneuvering room. U.S. officials cannot very effectively criticize Russia for failing to join the CCM (because the United States is not a party) or argue that the use of cluster munitions is a *per se* violation of international humanitarian law (because the United States takes the contrary position). They can, however, argue that specific uses of cluster munitions violate international humanitarian law if they appear disproportionate or indiscriminate. For example, the United States will be on very firm ground in calling out the use of clusters in the vicinity of schools and hospitals that are being used to provide services to civilians.

**Would it be advisable for the Biden administration to alter or elaborate the U.S. position on the use of cluster munitions? What are the main policy considerations?**

Yes, the Biden administration should complement its review of U.S. landmines policy with a review of its cluster munitions policy. Among other things this would help avoid creating a perverse dynamic where the abrogation of landmines results in greater reliance on cluster munitions.

In both cases, it will be important for U.S. officials to consider lessons emerging from the conflict in Ukraine. The Pentagon has previously contended—with some [support](#) from outside experts—that both weapons systems may be necessary in an era of resurgent great power competition, when the potential need to confront peer or near-peer militaries could require the United States to deploy them. The unfolding war in Ukraine, however, raises questions about these claims. Without anything near the fighting



capacity that the United States and its NATO allies can muster, Kyiv has thus far managed to outperform expectations against an invading Russian force without materially relying on clusters (isolated reports notwithstanding) and while appearing to comply with the Mine Ban Treaty, to which it is a party.

**“[T]he Biden administration should complement its review of U.S. landmines policy with a review of its cluster munitions policy...In both cases, it will be important for U.S. officials to consider lessons emerging from the conflict in Ukraine.”**

The question for U.S. policymakers should be: If Ukraine can do this in a war with Russia, how big a risk would it be for the United States to alter course with respect to these weapons systems? In forming an answer, the U.S. government should also consider what it loses diplomatically by

failing to present a more united front with the bulk of its NATO allies on these issues, particularly when seeking to cast itself as part of a coalition bound by common values.

If the United States decides to revisit its cluster munitions policy, it should consider lessons from the past. Any policy that it implements requiring the destruction of stocks should include benchmarks and reporting requirements so that implementation progress can be monitored. Although Senate politics make treaty accession virtually impossible to contemplate, officials should also consider how close the United States could come in pledging adherence to the CCM itself rather than pursuing a course of action that focuses exclusively on unexploded ordnance metrics. While reducing the dud rate for U.S. munitions is preferable to doing nothing, focusing on that to the exclusion of other measures could miss an opportunity to strengthen a treaty regime that has resulted in the destruction of hundreds of thousands of cluster munitions, to the benefit of civilian protection efforts around the world. [🌐](#)







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