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Before

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Subcommittee on Europe, Energy, the Environment and Cyber

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Chair Keating, Ranking Member Fitzpatrick, Members of the Subcommittee:

My name is Anthony Clark Arend. I am a Professor of Government and Foreign Service and Chair of the Department of Government at Georgetown University. It is my honor to be speaking before the Subcommittee today on international humanitarian law and war crimes as they relate to the Russian invasion of Ukraine.

International human rights law is a relatively recent addition to the corpus of international law. Prior to the Second World War, there were few—if any—legal restrictions on how states treated their own nationals. There were, however, legal rules relating to the conduct of states during armed conflict. This law of war —sometimes referred to as the *jus in bello*, or the Law of Armed Conflict (LOAC), or International Humanitarian Law (IHL)—can be traced back centuries. The first formal international

agreement in this area was the Geneva Convention of 1864; it was followed by a host of other multilateral conventions. While states could be held accountable for violations of the laws of war, the concept of holding *individuals* personally responsible for such violations was not clearly established until after World War II.<sup>1</sup>

This Testimony will explore the legal framework for addressing violations of the laws of war under contemporary international law. Part One will set forth the general legal framework for human rights and for international humanitarian law. Part Two will explore mechanisms for enforcing international humanitarian law.

## Part I: Legal Framework

### 1. General Human Rights Law

With the unspeakable atrocities of the holocaust on their minds, the framers of the [United Nations Charter](#) sought to enshrine international human rights law in the normative structure of the new international organization that was being established as World War II was coming to an end. In the Preamble to the Charter, the member states pledged their determination to “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . . .” Subsequently, the United Nations General Assembly adopted the [Universal Declaration of Human Rights in 1948](#) setting forth an “international bill of rights.” While the Universal Declaration was non-binding, it set the stage for significant binding international agreements. These include two broad

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<sup>1</sup> While the Treaty of Versailles did call for the prosecution of Kaiser Wilhelm, he was never released from the Netherlands. And even though there were a series of German-run trials in Leipzig, those trials were generally regarded as ineffective.

conventions: The [Covenant on Civil and Political Rights](#) (1966) and the [Covenant on Economic, Social, and Cultural Rights](#) (1966). In addition, there have been a wide variety of conventions that address specific areas of human rights, including: the [Genocide Convention](#) (1948), the [Torture Convention](#) (1984 ), the [International Convention on the Elimination of All Forms of Racial Discrimination](#) (1965), the [Convention for the Elimination of All Forms of Discrimination Against Women](#) (1979), and the [Convention on the Rights of the Child](#) (1989).

## 2. International Humanitarian Law

As general rules relating to human rights were being codified under the United Nations structure, international humanitarian law was also being further refined. Underlying international humanitarian law are several fundamental legal principles<sup>2</sup>: 1) Military Necessity; 2) Humanity; and 3) Chivalry. While military necessity allows states to use lethal force to use “any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money,” military necessity is limited by the other two principles. The Principle of Humanity requires, among other things, that combatants discriminate between military and non-military targets, that under the concept of proportionality they use only the amount of force that is necessary to achieve the military objective and nothing beyond that, and that they avoid means and methods of combat that cause “unnecessary suffering.” The Principle of Chivalry “forbids dishonorable means, expedients or conduct.”

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<sup>2</sup> There are a variety of different ways to conceptualize the principles of international humanitarian law. These principles are taken from the US Army Field Manual FM 27-10 from 1940. The quotes are from that document.

Over the years, the principles have been refined and are now incorporated into two main frameworks for international humanitarian law that have universal or near universal acceptance: The Hague Convention Framework and the Geneva Convention Framework.

#### A. The Hague Framework

The 1907 Hague Conference produced a series of conventions relating to international humanitarian law. Perhaps the most significant for the current conflict is the [Hague Convention IV on the Laws and Customs of War on Land](#). In the appended Regulations, the basic presumption of combatant behavior is set forth. Article 22 provides: “The right of belligerents to adopt means of injuring the enemy is not unlimited.” Article 23 the proceeds to prohibit specific actions, including the use of “poison or poisoned weapons,” killing or wounding “treacherously,” killing or wounding “an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion,” declaring “that no quarter will be given,” “employ[ing] arms, projectiles, or material calculated to cause unnecessary suffering,” and “destroy[ing] or seiz[ing] the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.” Article 25 further provides: “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.”

#### B. The Geneva Framework

Following the first Geneva Convention in 1864, the international community has adopted more detailed treaties dealing with international humanitarian law. The current

[Geneva framework consists of four Conventions](#) that have universal acceptance:

Geneva I (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field), Geneva II (Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea). Geneva III (Convention relative to the Treatment of Prisoners of War), and Geneva IV (Convention (IV) relative to the Protection of Civilian Persons in Time of War). Taken together these Conventions affirm and elaborate upon the Hague Principles and set forth a specific regime for taking care of injured members of the military, prisoners of war, and civilians.

### 3. War Crimes, Crimes Against Humanity and Genocide

Following the Second World War, the international community began to delineate certain violations of international humanitarian law for which individuals could be held criminally responsible. The best articulation of these crimes can be found in the [Rome Statute](#), which established the International Criminal Court. The Rome Statute lists three violations of international humanitarian law: a) War Crimes; b) Crimes Against Humanity; and c) Genocide.

#### a) War Crimes

War Crimes consist of violations of the laws of war in both international conflict and conflict that is not of an international character. As such, under Article 8 of the Rome Statute, war crimes are “grave breaches” of the Geneva Conventions of 1949 or other violations of the law of war. Accordingly, war crimes include: “Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities . . .”, “[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives . . .”, and “[a]ttacking or bombarding, by

whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives.”

#### b) Crimes Against Humanity

Crimes Against Humanity consist of a variety of offenses against civilians that do not need to take place in the context of armed conflict. Under Article 7 of the Rome Statute, they include act such as: murder; extermination; enslavement; deportation or forcible transfer of population; “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;” torture; rape, sexual slavery, enforced prostitution, “forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; enforced disappearance of persons; and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” To constitute a Crime Against Humanity, these acts must be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”

#### c) Genocide

Originating with the [1948 Genocide Convention](#) and reiterated in numerous legal instruments, including the Rome Statute, Genocide has a very specific legal definition.

As Article 6 of the Statute notes:

“[G]enocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

As can be seen from this definition, there is a very high bar for an act to be regarded as an act of genocide. There must be an *intent* on the part of the actor to destroy in whole or in part the defined group. In the current conflict, there does not truly seem to be that intent on the part of the Russians or any other party.

## II Enforcement Mechanisms

While there is no one central mechanism to enforce international humanitarian law, there are two major ways in which those rules can be enforced– through international tribunals and through domestic courts.

### 1. International Tribunals

#### a. The International Court of Justice

The International Court of Justice (ICJ) addresses disputes between states relating to violations of international law. The ICJ only has jurisdiction over a dispute if the parties to the dispute have explicitly accepted the jurisdiction of the Court. States may accept the jurisdiction of the ICJ in three ways: acceptance of the compulsory jurisdiction of the Court in general<sup>3</sup>, acceptance for a particular case, or by being a party to a treaty that

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<sup>3</sup> [Article 36\(2\) of the Statute](#), the so-called Optional Clause, provides:

has compulsory ICJ jurisdiction. In the current case, because Russia has alleged that genocide is taking place, [Ukraine is invoking the Genocide Convention to give the ICJ jurisdiction](#). At this point, Ukraine has requested “provision measures”-- the international equivalent of an injunction-- asking the Court to order Russia to cease and desist its military actions in Ukraine. Two points, however, should be noted. First, even if the ICJ were to issue provisional measures calling upon Russia to cease its activities, enforcement of ICJ decisions is vested in the Security Council, where Russia has a veto. Second, any measures indicated by the ICJ would be against the state of Russia and not against individuals.

b. The International Criminal Court

Established by the Rome Statute, the International Criminal Court has jurisdiction over War Crimes, Crimes Against Humanity, and Genocide. The ICC has the ability to indict, try, and convict individuals for these crimes. While neither Russian nor Ukraine is a party to the Rome Statute, because Ukraine has in the past accepted the jurisdiction of

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2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

1. the interpretation of a treaty;
2. any question of international law;
3. the existence of any fact which, if established, would constitute a breach of an international obligation;
4. the nature or extent of the reparation to be made for the breach of an international obligation.

the ICC on an ad hoc basis and the offenses are occurring in Ukraine, the ICC has begun an investigation in this case<sup>4</sup>.

c. Ad Hoc Tribunals

In the past, another mechanism for the enforcement of international humanitarian law has been ad hoc tribunals that were established to address specific conflicts. For example, the Security Council created the [International Criminal Tribunal for Yugoslavia](#) and the [International Criminal Tribunal for Rwanda](#). There was also a [Special Court for Sierra Leone](#) created by an agreement between the Security Council and the Government of Sierra Leone. It seems unlikely that an ad hoc tribunal would be possible in the current situation because the consent of Russia would be needed. It is, of course, possible that in a post-Putin Government, Russia could consent to such a tribunal—much in the way that Serbia consented to turn Slobodan Milosevic over to the ICTY after he was no longer in power.

2. Domestic Mechanisms

a. Universal Criminal Jurisdiction

Under international law, certain crimes— like piracy, slave trade, war crimes, genocide, and crimes against humanity— are regarded as crimes of universal jurisdiction. What this means is that any state— whether it is directly connected to those crimes or not, can prosecute a person who commits one of those crimes. This means that one possible way to bring persons connected to violations of international humanitarian law in Ukraine would be for individual states to prosecute those persons in their domestic courts. In the United States, the most relevant statute for such prosecutions is the War

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<sup>4</sup> See, [Situation in Ukraine, ICC-01/22](#) for a discussion of the jurisdiction of the ICC in this case,

Crimes Act. Codified at [18 U.S.C. sec. 244](#), the War Crimes Act gives federal courts jurisdiction over persons committing war crimes<sup>5</sup> if either the perpetrator or the victim is a US citizen. Accordingly, a non-national could only be prosecuted if the victim had US citizenship. While most of the offenses committed in Ukraine are being committed against Ukrainian citizens, there may be some crimes that are being committed against American nationals.

b. Civil Jurisdiction: The Alien Tort Statute (ATS)

Originally part of the Judiciary Act of 1789, the [Alien Tort Statute](#) provides that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” This means that a non-US national can bring a civil suit in US courts against any person for tort violations of international law– either embodied in customary international law (the “law of nations”) or a treaty to which the US is a party. Given that the US is a party to the Hague and Geneva conventions, Ukrainian nationals would presumably be able to bring suit against Russian nationals who were responsible for committing War Crimes or Crimes Against Humanity. Judgment in the US would be possible if the Russian national were in the US or had assets in the United States. It should be noted that in [Kiobel v. Royal Dutch Petroleum \(2012\)](#), the Supreme Court ruled that there was a presumption against extraterritorial application of the ATS. This, however, could be overcome if Congress were

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<sup>5</sup> The US statutory definition of war crimes is largely consistent with– but slightly different from– the definition in the Rome Statute.

to adopt a statute specifically calling for the application of the ATS to actions in the Russian-Ukraine War.

### III Conclusion

In light of the previous discussion, it seems clear that there is a well-developed body of international law that addresses human rights and international humanitarian law. The real challenge— especially when confronted with violations by a permanent member of the Security Council, whose veto could block any action by the Council— is enforcement. While Vladimir Putin remains in power in Russia, the possibility of any effective international enforcement seems remote. There may, however, be an opportunity for domestic enforcement in the United States through the War Crimes Act and the Alien Tort Statute. Other states may also domestic enforcement mechanisms that they could use.