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The Combatant Status of the “Little Green Men” and Other Participants in the Ukraine Conflict

Shane R. Reeves and David Wallace

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The internet has no shortage of photographs and videos showing armed men in Crimea who look like members of the Russian military. Their guns are the same as those used by the Russian army, their lorries have Russian number plates and they speak in Russian accents. Yet according to President Vladimir Putin, they are in fact members of “self-defence groups” organised by the locals who bought all their uniforms and hardware in a shop. This poses a challenge to the media covering the crisis: what do you call people who are officially not there?¹

I. INTRODUCTION

On March 1, 2014 a combination of Russian regular armed forces and unidentified operatives occupied the recognized territory of Ukraine on the Crimean peninsula.² Approximately two weeks later Russian forces mobilized along Ukraine’s eastern border in support of separatist forces engaging in hostilities with the Ukrainian government.³ President Vladimir Putin, in eventually acknowledging the Russian occupation of Crimea, argued for

1. Vitaly Shevchenko, “Little Green Men” or “Russian Invaders”?, BBC (Mar. 11, 2014), <http://www.bbc.com/news/world-europe-26532154>.

2. Tim Sullivan & Vladimir Isachenkov, *Russian Troops Take Over Ukraine’s Crimea Region*, YAHOO! NEWS (Mar. 1, 2014), <http://news.yahoo.com/russian-troops-over-ukraines-crimea-region-200052097.html> (“Russian troops took over the strategic Crimean peninsula . . . without firing a shot.”).

3. Steven Lee Meyers & Alison Smale, *Russian Troops Mass at Border With Ukraine*, NEW YORK TIMES (Mar. 13, 2014), http://www.nytimes.com/2014/03/14/world/europe/ukraine.html?_r=1 (“[T]he buildup on Ukraine’s eastern border with Russia signaled possible further moves by the Kremlin to reassert authority by force over territory, also heavily populated by Russians, forfeited in the Soviet Union breakup two decades ago.”).

the legitimacy of the territorial violation by claiming a moral imperative to act on behalf of Russian-speaking minorities on the peninsula.⁴ In contrast, while admittedly in agreement with the pro-Russian secession movement, the Russian Federation denied intervening in the civil war occurring in eastern Ukraine.⁵ As an occupation and a civil war are simultaneously taking place in Ukraine⁶ a particularly vexing international law question is presented: what is the legal status of those involved in the hostilities?

This article is designed to answer that question and to identify the associated rights, duties and responsibilities of the participants in the conflict.⁷ As classifying a conflict is a condition precedent for determining an individual's status in that conflict, it is important to first define the Ukrainian hostilities. Despite clear Russian involvement, this is not a simple task. While the Crimea occupation is clearly international in character,⁸ the con-

4. See, e.g., *Transcript: Putin Defends Russian Intervention in Ukraine*, WASHINGTON POST, (Mar. 4, 2014), http://www.washingtonpost.com/world/transcript-putin-defends-russian-intervention-in-ukraine/2014/03/04/9cadcd1a-a3a9-11e3-a5fa-55f0c77bf39c_story.html (President Putin explaining that the intervention in Ukraine is based upon a request for aid by the deposed legitimate government, as well as for various humanitarian purposes, including protecting citizens from anti-Semitic violence). *But see* Harriet Torry & Bertrand Benoit, *Watchdog Sees No Threat to Ethnic Russians*, WALL STREET JOURNAL, Mar. 12, 2014, at A10 (noting that the Council of Europe, an organization that eschews political judgment, made clear that there was no legal justification for Russia's intervention into Crimea, and quoting Thorbjorn Jagland, Secretary-General of the Council of Europe, as saying "we don't actually see any signs of real threat to the minorities or the Russian majorities [in Ukraine].").

5. *Thousands of Russian Soldiers Sent to Ukraine, Say Rights Groups*, THE GUARDIAN (Sept. 1, 2014), <http://www.theguardian.com/world/2014/sep/01/russian-soldiers-ukraine-rights-groups> (quoting Sergei Nikitin, Director for Amnesty International in Russia, "The Kremlin is determined to muzzle its critics and keep a strong lid on any information which suggests that Russia plays a direct part in the conflict in Ukraine, although evidence to the contrary is mounting every day.").

6. See John Vandiver, *SACEUR: Allies Must Prepare for Russia Hybrid War*, STARS & STRIPES (Sept. 5, 2014), <http://www.military.com/daily-news/2014/09/05/saceur-allies-must-prepare-for-russia-hybrid-war.html> (discussing the combination of tactics used by Russia in Ukraine).

7. See Sean Watts, *The Notion of Combatancy in Cyber Warfare*, in 4TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT 235, 239 (Christian Czosseck, Rain Ottis & Katherine Ziolkowski eds., 2012), available at https://ccdcoe.org/cycon/2012/proceedings/d2r1s10_watts.pdf. Professor Watt's conference paper updates concepts and ideas developed previously in great depth in Sean Watts, *Combatant Status and Computer Network Attack*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 392 (2009).

8. An international armed conflict exists in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties,

flict in eastern Ukraine is more akin to a civil war.⁹ The combination of State and non-State actors battling in the same geographic area¹⁰ makes status determinations for those participating extraordinarily difficult.¹¹ Conducting this analysis requires viewing the Ukrainian hostilities as an international and non-international armed conflict existing in parallel. Through this conflict classification paradigm individual status determinations are possible and, subsequently, concomitant legal responsibilities and protections associated with those determinations are clarified.

even if the state of war is not recognized by one of them” and in “cases of partial or total occupation.” Convention (III) Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. The 1977 Additional Protocol I, which supplements the Geneva Conventions, also applies “in the situation referred to in Article 2,” as well as in those “armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict art. 1(3)–(4), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP I].

9. “Armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” is defined as a non-international armed conflict. *See* GC III, *supra* note 8, art. 3. Additional Protocol II supplements “Article 3 common to the Geneva Conventions,” but limits the applicability of the law to only those situations where “dissident armed forces or other organized armed groups” which are “under responsible command” exercise “control over a part” of a State. *See* Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. It is important to note that the United States has not ratified AP I or AP II, but finds many portions of the protocols to be customary international law. *See generally* Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 419 (1987).

10. With an amalgamation of international and non-international characteristics, the entirety of the Ukraine conflict is perhaps best described as a “hybrid war.” A hybrid war can refer to those conflicts that are a combination of unconventional and conventional tactics. *See, e.g.*, Shane Reeves & Rob Barnsby, *The New Griffin of International Law: Hybrid Armed Conflicts*, HARVARD INTERNATIONAL REVIEW, Winter 2013, at 16, 17. Or it can refer to those that are both international and non-international in character. *See, e.g.*, Steven Haines, *The Nature of War and the Character of Contemporary Armed Conflict*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 9, 23 (Elizabeth Wilmshurst ed., 2012).

11. *See generally* Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment (Int’l Crim. Trib. for the former Yugoslavia July 15, 1999) (highlighting the difficulty of prosecuting individuals when an internal and international armed conflict are taking place simultaneously).

Identifying the actors on the Ukrainian battlefields and outlining their legal responsibilities and obligations is not simply an academic exercise. It is a practical necessity for ensuring that both conflict participants and other persons not engaged in the hostilities are treated in accordance with the well-established humanitarian principles embedded within the law of armed conflict. Further, crystallizing the battlefield status of the actors eliminates any later claims of ignorance, while simultaneously increasing the likelihood of accountability. The importance of determining the status of the actors in Ukraine is one particularly effective method of ensuring that the conflict does not further devolve into unchecked “brutality and savagery.”¹²

As it is important to understand a chronology of the Ukraine conflict, the article begins with a brief background section. Sections on conflict classification and international law as it relates to battlefield status determinations will follow as both are germane to understanding the status of the Ukrainian participants. It concludes with a status determination for each participant in the hostilities and a reminder that all parties to the conflict are obligated to comply with the law of armed conflict.

II. BACKGROUND TO THE UKRAINE HOSTILITIES

On February 7, 2014 the XXII Olympic Winter Games’ opening ceremony took place at the Fisht Olympic Stadium in Sochi, Russia.¹³ Costing billions of dollars,¹⁴ the games were widely seen as an opportunity for President Putin to “show off Russia as a resurgent superpower.”¹⁵ However, the celebration was quickly upset on February 23 with the ouster of Viktor Yanukovich, the pro-Russian President of Ukraine. Political unrest in Ukraine

12. Rob McLaughlin, *The Law of Armed Conflict and International Human Rights Law: Some Paradigmatic Differences and Operational Implications*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 213, 222 (Michael N. Schmitt ed., 2010) (citing UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL ON THE LAW OF ARMED CONFLICT ¶ 1.8 (2004)).

13. *Sochi 2014 Opening Ceremony: Russia Welcomes the World*, OLYMPIC.ORG, <http://www.olympic.org/sochi-2014/opening-ceremony> (last visited Apr. 20, 2015).

14. How much the Sochi Olympics cost is debatable. Some sources have reported the cost at upwards of fifty billion dollars while others dispute this claim. See, e.g., Paul Farhi, *Did the Winter Olympics in Sochi Really Cost \$50 billion? A Closer Look at that Figure*, WASHINGTON POST (Feb. 10, 2014), http://www.washingtonpost.com/lifestyle/style/did-the-winter-olympics-in-sochi-really-cost-50-billion-a-closer-look-at-that-figure/2014/02/10/a29e37b4-9260-11e3-b46a-5a3d0d2130da_story.html.

15. Rick Broadbent & Ben Hoyle, *Olympic Ring Fails to Light, but the Rest is a Red-hot Spectacle*, TIMES (London) (Feb. 7, 2014), <http://www.thetimes.co.uk/to/sport/olympics/article3999518.ece>.

had been simmering since November 2013 when Ukraine rejected a partnership accord with the European Union (EU) in favor of closer ties with Russia.¹⁶ As protests continued throughout the winter the Yanukovich government became increasingly heavy handed, culminating in government snipers killing and wounding hundreds of protestors in Kiev on February 19.¹⁷ The harsh tactics galvanized the anti-government protestors leading thousands to fill Kiev's Independence Square to demand Yanukovich's removal.¹⁸ On February 22, in an emergency session, the Ukrainian parliament voted 380–0 to remove Yanukovich from office, accused him of being “guilty of gross human rights violations and dereliction of duty” and set new presidential elections for May 25.¹⁹

While the deposed Yanukovich fled to his Russian-speaking political base in the Donetsk region of eastern Ukraine,²⁰ the response from many to the political turmoil was overwhelmingly positive. The United States applauded the “constructive work” of the Ukrainian parliament and urged “the prompt formation of a broad, technocratic government of national unity.”²¹ The EU, viewing the Ukraine events as a humiliating geopolitical setback to Putin,²² openly supported the interim government and called on the Russian government to recognize the territorial integrity of Ukraine.²³

16. See James Marson, Alan Cullison & Alexander Kolyandr, *Ukraine President Viktor Yanukovich Driven from Power*, WALL STREET JOURNAL (Feb. 23, 2014), <http://www.wsj.com/articles/SB10001424052702304914204579398561953855036>.

17. See *id.*

18. See William Booth, *Ukraine's Parliament Votes to Oust President; Former Prime Minister Is Freed from Prison*, WASHINGTON POST (Feb. 22, 2014), http://www.washingtonpost.com/world/europe/ukraines-yanukovich-missing-as-protesters-take-control-of-presidential-residence-in-kiev/2014/02/22/802f7c6c-9bd2-11e3-ad71-e03637a299c0_story.html.

19. *Id.*

20. See *id.*

21. Press Release, White House Office of the Press Secretary, Statement by the Press Secretary on Ukraine (Feb. 22, 2014), <http://www.whitehouse.gov/the-press-office/2014/02/22/statement-press-secretary-ukraine>.

22. See Will Englund, *Putin Takes Losses on Ukraine, but Russia Still has Leverage and the Will to Use it*, WASHINGTON POST (Feb. 23, 2014), http://www.washingtonpost.com/world/putin-takes-losses-on-ukraine-but-russia-still-has-leverage-and-the-will-to-use-it/2014/02/23/80d832ba-9cbf-11e3-ad71-e03637a299c0_story.html (discussing the importance of Ukraine to Putin's goal of creating the Eurasian Customs Union, an envisioned economic counterbalance to the EU and the United States).

23. See Stefan Fule, European Commissioner for Enlargement and European Neighbourhood Policy, Remarks during European Parliament Plenary Debate on Ukraine at Strasbourg, France: EU response to events in Ukraine (Feb. 26, 2014), http://europa.eu/rapid/press-release_SPEECH-14-162_en.htm (“[I]t puts a greater re-sponsibility

Western prognosticators, though quietly recognizing the historic and contemporary importance of Ukraine to Russia, saw any military response to the Yanukovich removal as implausible.²⁴ These predictions were quickly proven wrong when on February 27 armed men seized the Crimean parliament²⁵ and raised the Russian flag.²⁶

Simultaneous with the parliamentary take-over, “heavily armed Russian-speaking troops poured into Crimea, seizing airports and other key installations throughout the peninsula.”²⁷ Carrying Russian weapons and wearing Russian uniforms, but with no identifying insignia, these seemingly professional soldiers were dubbed “little green men” by the local Ukrainians.²⁸ While the occupiers quickly swept through the peninsula, Putin denied Russian involvement, claiming the armed men to be local Crimean self-defense forces.²⁹ Despite these denials, on March 1 Putin received authorization from the Russian Federation’s upper house of parliament for use of regular troops already stationed in Crimea to “seize control of the peninsula and its mechanisms of government.”³⁰ In response, the interim President of Ukraine, Oleksandr Turchynov, stated, “[w]e consider the be-

on the new Ukrainian government—interim and beyond—to deliver the changes the people have asked and fought for. It puts also a greater responsibility on the European Union to extend all our support and expertise to ensure that these changes are put on solid ground and will be sustainable.”)

24. See, e.g., Simon Shuster, *No, Russia Will Not Intervene in Ukraine*, TIME (Feb. 25, 2014), <http://time.com/9826/russia-ukraine-putin-intervene/>.

25. Crimea has immense strategic importance to Russia as the home of its Black Sea Fleet, as well as a large contingent of ethnic Russians. See Paul N. Schwartz, *Crimea’s Strategic Value to Russia*, CSIS (Mar. 18, 2014), <http://csis.org/blog/crimeas-strategic-value-russia>.

26. See Gabriela Baczynska, Pavel Polityuk & Raissa Kasolowsky, *Timeline: Political Crisis in Ukraine and Russia’s Occupation of Crimea*, REUTERS (Mar. 8, 2014), <http://www.reuters.com/article/2014/03/08/us-ukraine-crisis-timeline-idUSBREA270PO20140308>.

27. STEVEN WOEHLER, CONGRESSIONAL RESEARCH SERVICE, RL33460, UKRAINE: CURRENT ISSUES AND U.S. POLICY 2 (Sept. 4, 2014) (“Russia responded to the change of government in Kyiv by seizing Ukraine’s Crimean peninsula.”).

28. See Steven Pifer, Opinion, *Watch Out for Little Green Men*, BROOKINGS (July 7, 2014), <http://www.brookings.edu/research/opinions/2014/07/07-watch-out-little-green-men-pifer>.

29. See WOEHLER, *supra* note 27, at 2.

30. See Kathy Lally, Will Englund & William Booth, *Russian Parliament Approves Use of Troops in Ukraine*, WASHINGTON POST (Mar. 1, 2014), http://www.washingtonpost.com/world/europe/russian-parliament-approves-use-of-troops-in-crimea/2014/03/01/d1775f70-a151-11e3-a050-dc3322a94fa7_story.html.

havior of the Russian Federation to be direct aggression against the sovereignty of Ukraine.”³¹ The U.S. Secretary of State John Kerry echoed this sentiment calling the actions an “incredible act of aggression” and a violation of international law.³²

Ignoring these complaints, and rebuffing efforts to solve the crisis,³³ Russia moved to further its control of the peninsula by setting a March 16 referendum for the people of Crimea to vote on whether the Russian Federation should annex the territory.³⁴ Although dismissed by the United States and most of Europe as illegal, 95.5 percent of those voting supported the idea of joining the Russian Federation.³⁵ On March 18, after receiving a standing ovation from the Russian parliament, President Putin agreed to sign a bill to absorb Crimea into the Russian Federation, stating that the peninsula has always been a “part of Russia.”³⁶ In denouncing Russia’s actions, U.S. Vice-President Joe Biden called the annexation “nothing more than a land grab,” while United Kingdom Prime Minister David Cameron stated that “it is completely unacceptable for Russia to use force to change borders on the basis of a sham referendum held at the barrel of a Russian gun.”³⁷ The Ukrainian government, stating that they would never recognize the illegal annexation, declared that the crisis had “moved from the political to the military stage.”³⁸

31. *Id.*

32. Will Dunham, *Kerry Condemns Russia’s “Incredible Act of Aggression” in Ukraine*, REUTERS, (Mar. 2, 2014), <http://www.reuters.com/article/2014/03/02/us-ukraine-crisis-usa-kerry-idUSBREA210DG20140302> (stating “[i]t’s an incredible act of aggression. It is really a stunning, willful choice by President (Vladimir) Putin to invade another country. Russia is in violation of the sovereignty of Ukraine. Russia is in violation of its international obligations.”).

33. See Baczynska, Polityuk & Kasolowsky, *supra* note 26 (noting that warning shots were “fired to prevent an unarmed observer mission sent by the OSCE from entering Crimea” and that Russian forces had become “increasingly aggressive towards Ukrainian troops trapped in bases”).

34. *Id.*

35. See *Crimea Referendum: Voters “Back Russia Union,”* BBC (Mar. 16, 2014), <http://www.bbc.com/news/world-europe-26606097> (stating that many loyal to Kiev boycotted the voting).

36. See *Ukraine Crisis: Putin Signs Russia-Crimea Treaty*, BBC (Mar. 18, 2014), <http://www.bbc.com/news/world-europe-26630062> (“President Putin told parliament that figures from the Crimea vote were ‘more than convincing.’”).

37. *Id.*

38. *Id.*

The occupation of Crimea became just one front in a broader conflict when on March 12 Russian troops were spotted massing along Ukraine's eastern border.³⁹ While eastern Ukraine, particularly in the cities of Donetsk and Luhansk, was the epicenter of pro-Russian protests following the removal of Yanukovych from office,⁴⁰ conventional Russian military action during February and March was confined to Crimea.⁴¹ However, Russia began to shift military attention towards eastern Ukraine as an increasingly aggressive group of demonstrators demanded greater union with the Russian Federation.⁴² As thousands of Russian soldiers sat at the border, the unrest in eastern Ukraine took an ominous turn on April 6 when protestors and armed men stormed and occupied key government buildings and broadcast facilities in Donetsk, Luhansk, Slovyansk and more than a dozen other towns.⁴³ As these groups hoisted Russian flags, the Ukrainian government, the United States and many European nations accused Russia of orchestrating the seizure of the buildings and stoking the agitation.⁴⁴ On April 17 Putin, while admitting that the "little green men" who participated in the early stages of the Crimea crisis were actually Russian soldiers, denied using similar tactics or personnel in eastern Ukraine stating "that all of this is being done by local residents."⁴⁵

Throughout late spring and early summer the intensity and sophistication of the violence in eastern Ukraine exponentially increased. This was highlighted on July 17 when the separatists, using an advanced surface-to-air missile, shot down Malaysian Airlines Flight MH-17 killing all 298 peo-

39. See Steven Lee Myers & Alison Smale, *Russian Troops Mass at Border With Ukraine*, NEW YORK TIMES (Mar. 13, 2014), http://www.nytimes.com/2014/03/14/world/urope/ukraine.html?_r=1.

40. See WOEHREL, *supra* note 27, at 2.

41. See Myers & Smale, *supra* note 39.

42. See WOEHREL, *supra* note 27, at 2.

43. *Id.*

44. See Kathy Lally, *Putin's Remarks Raise Fears of Future Moves Against Ukraine*, WASHINGTON POST (Apr. 17, 2014), http://www.washingtonpost.com/world/putin-changes-course-admits-russian-troops-were-in-crimea-before-vote/2014/04/17/b3300a54-c617-11e3-bf7a-be01a9b69cf1_story.html.

45. See *id.* But see Bojan Pancevski, *Putin's 300 Whip Up Ukrainian Turmoil*, THE SUNDAY TIMES (Apr. 27, 2014), http://www.thesundaytimes.co.uk/sto/news/world_news/Ukraine/article1404493.ece ("Russia has been accused of carrying out an 'invasion from within' of Ukraine using 300 elite special operatives, many of them from its feared GRU military intelligence service.").

ple on board.⁴⁶ The separatists' access to self-propelled artillery, tanks and other heavy weaponry,⁴⁷ coupled with numerous reports of Russian soldiers moving within Ukraine,⁴⁸ led NATO Supreme Commander General Philip Breedlove to state he "believed Russia is playing a leading role in the activities of the armed separatist groups in eastern Ukraine."⁴⁹ The U.S. Ambassador to Ukraine, Geoffrey R. Pyatt, went further in a tweet on August 28, saying that Russian forces were fighting in eastern Ukraine in support of the separatists.⁵⁰ Russia, in responding to the accusations, denied participating in the conflict, but did not refute separatist claims "that up to 4,000 Russians, including active-duty soldiers currently on leave, had been fighting against Ukrainian government forces."⁵¹

On September 5 the Ukrainian government and the separatists agreed to a ceasefire plan that was to be monitored by the Organization for Security and Cooperation in Europe (OSCE).⁵² However, the ceasefire was im-

46. See Margaret Coker, Lukas I. Alpert & Robin Van Daalen, *Investigators Reach Site of Malaysia Airlines Flight 17 Crash: Ukraine Declared One-Day Pause in Fighting Around MH17 Area*, WALL STREET JOURNAL (July 31, 2014), <http://www.wsj.com/articles/ukraine-declares-one-day-pause-in-fighting-around-mh17-crash-site-1406799743>.

47. See William Mauldin, *U.S. Imposes Sanctions, Renews Concerns Over Russian Forces Near Ukraine*, WALL STREET JOURNAL (June 20, 2014), <http://www.wsj.com/articles/u-s-adds-ukrainian-separatists-to-sanctions-list-1403277646> (noting that Ukraine accused the Russians of supplying separatists with tanks and other advanced weaponry).

48. See Neil MacFarquhar & Michael R. Gordon, *Ukraine Leader Says "Huge Loads of Arms" Pour in From Russia*, NEW YORK TIMES (Aug. 28, 2014), <http://www.nytimes.com/2014/08/29/world/europe/ukraine-conflict.html>.

49. WOEHREL, *supra* note 27, at 2.

50. See MacFarquhar & Gordon, *supra* note 48.

51. *Id.* ("That assertion evaded the issue of direct Russian involvement by painting the soldiers as volunteers. It suggests, however, that Moscow still seeks to organize and to some extent control a force that could be operated at arm's length with a backbone of local participation."). See also Alexander Warkentin, *Disowned and Forgotten: Russian Soldiers in Ukraine*, DEUTSCHE WELLE (Aug. 29, 2014), <http://www.dw.de/disowned-and-forgotten-russian-soldiers-in-ukraine/a-17888902> (quoting Lev Schlosberg, representative of the deputy assembly for the Pskov district in northwest Russia, as saying "[t]he community must know what's really happening. . . . [T]he civil authorities as well as the defense ministry are not telling the truth. . . . There is enough evidence that regular Russian troops—disguised as units of self-proclaimed republics of Donetsk and Luhansk—are taking part in the fighting in Ukraine.").

52. See *Ukraine, Pro-Russia Separatist Rebels Sign Ceasefire*, DEUTSCHE WELLE (Sept. 5, 2014), <http://www.dw.de/ukraine-pro-russia-separatist-rebels-sign-ceasefire/a-17904239>. The plan, among other things, allowed for a prisoner exchange and amnesty for those who voluntarily disarmed and had not committed serious crimes. See Neil MacFarquhar,

mediately ignored as the separatists refused to disarm or abandon disputed areas to the Ukrainian government.⁵³ Fierce fighting around the Donetsk airport on September 12 starkly illustrated the ineffectiveness of the cease-fire,⁵⁴ and by November 20 casualties from combat operations approached one thousand since the signing of the agreement.⁵⁵ All pretenses of a truce had disappeared by January 22, 2015 when “an artillery shell hit a bus stopping for passengers in . . . Donetsk” killing multiple civilians,⁵⁶ and continuous combat between Ukrainian forces and the separatists became the norm.⁵⁷ The significant increase in violence prompted a second ceasefire to go into effect on February 15.⁵⁸ While Russia and Western powers continue to argue over responsibility for the conflict, the UN Office of the High Commissioner for Human Rights reports that since the beginning of the violence over five thousand people have been killed, approximately eleven thousand wounded and hundreds of thousands displaced.⁵⁹

Ukraine Deal Imposes Truce Putin Devised, NEW YORK TIMES (Sept. 5, 2014), http://www.nytimes.com/2014/09/06/world/europe/ukraine-cease-fire.html?_r=0.

53. See Volodymyr Verbyany & Ilya Arkhipov, *Ukraine Truce Wobbles as Poroshenko Visits Frontline City*, BLOOMBERG (Sept. 8, 2014), <http://www.bloomberg.com/news/articles/2014-09-06/ukraine-sees-cease-fire-holding-as-russian-troops-poised>.

54. See Ledyard King, *Ukraine Fends Off Rebel Attack Near Donetsk Airport*, USA TODAY (Sept. 13, 2014), <http://www.usatoday.com/story/news/world/2014/09/13/ukraine-state-of-war/15574715/>. The fighting prompted Ukraine Prime Minister Arseniy Yatsenyuk’s to state, “[t]his government is the wartime government. And let me put it bluntly—we are still in the state of war and the key aggressor is the Russian Federation.” *Id.*

55. See *Almost 1,000 Dead Since East Ukraine Truce—UN*, BBC (Nov. 20, 2014), <http://www.bbc.com/news/world-europe-30126207>.

56. *Death Toll in Ukraine Conflict Exceeds 5,000, May be “Considerably higher”—UN*, UN NEWS CENTRE (Jan. 23, 2015), <http://www.un.org/apps/news/story.asp?NewsId=49882#.VMmNPSxKpuV>.

57. See Lucy Westcott, *Ukraine Deaths Top 5,000 After Week of Violence*, NEWSWEEK (Jan. 23, 2015), <http://www.newsweek.com/ukraine-deaths-top-5000-after-week-violence-301675> (noting that the surge in violence between the Ukrainian government and separatists was the most violent since the September 5 ceasefire).

58. See, e.g., Andrey Ostroukh, Gregory L. White & Julian E. Barnes, *Doubt Clouds Ukraine Truce*, WALL STREET JOURNAL, Feb. 13, 2015, at A1.

59. *Death Toll in Ukraine Conflict Exceeds 5,000, May be “Considerably higher”—UN*, *supra* note 56. This is a conservative number with deaths, injuries and displacement most likely significantly higher than reported. See *id.*

III. WHAT TYPE OF CONFLICT EXISTS IN UKRAINE?

The stealth occupation of Crimea, coupled with the Russian involvement with the separatists, makes characterizing the Ukraine conflict extraordinarily difficult.⁶⁰ To accurately classify the hostilities requires recognizing that in both factual and legal terms the occupation and the civil war are separate co-existing conflicts taking place within Ukraine.⁶¹

A. Applicable Law

Before addressing the specific circumstances of the armed violence in Ukraine, it is helpful to briefly consider how conflicts are classified under the law of armed conflict. Prior to 1949, the law of armed conflict or *jus in bello*—somewhat self-evidently—applied during time of war.⁶² It was gener-

60. See, e.g., MacFarquhar, *supra* note 52 (“Kiev and the West have accused Moscow of destabilizing the country, first with a stealth invasion and annexation of Crimea and then by inspiring and covertly arming the rebels in southeastern Ukraine.”); Sohrab Ahmari, *The Weekend Interview: The View From NATO’s Russian Front*, WALL STREET JOURNAL (Feb. 6, 2015) (quoting Lieutenant General Frederick Hodges, commander of United States Army Europe, as calling the conflict in Ukraine “hybrid warfare”).

61. Parallel armed conflicts simultaneously taking place within a single State is not novel; it has been recognized by the International Court of Justice in Nicaragua. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 219 (June 27) (finding that both an international and non-international conflict were simultaneously taking place in Nicaragua) [hereinafter *Nicaragua*]. See also James Summers, *Introduction*, in CONTEMPORARY CHALLENGES TO THE LAW OF WAR: ESSAYS IN HONOUR OF PROFESSOR PETER ROWE 10 (Caroline Harvey, James Summers & Nigel D. White eds., 2014) (noting that a simultaneous international and non-international armed conflict was found to exist in Nicaragua as there were hostilities “between the Nicaraguan government and the Contra rebels within the country and external intervention by the USA”). The International Criminal Court (ICC) came to a similar conclusion in the Uganda case. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment, ¶¶ 563–67 (Mar. 14, 2012). The ICC opinion is particularly relevant as it found “that, while Uganda’s occupation of Bunia airport in the Democratic Republic of the Congo created an international armed conflict, th[ere] existed along-side a separate non-international conflict involving rebel groups in the region.” *Id.*

62. See GEOFFREY S. CORN, VICTOR HANSEN, RICHARD B. JACKSON, CHRIS JENKS, ERIC TALBOT JENSEN & JAMES A. SCHOETTLER JR., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 67 (2012). As noted by the authors, the application of the law of war was not a function of a positive rule. That is, treaties like the 1899 and 1907 Hague Conventions, as well as the 1929 Geneva Conventions, do not specifically define the circumstances that trigger their application. Of course, the question then becomes what is meant by war. Again, the authors note that war, for the purpose of international law, was

ally agreed that this meant regularly declared international war with recognition on both sides that a state of war existed between the belligerent parties.⁶³ The greater context, of course, was that international law was focused on the relationship between States and did not regulate matters within the domestic jurisdiction of States.⁶⁴ Early law of armed conflict accords, such as the Hague Conventions of 1899 and 1907 and the 1929 Geneva Conventions, did not define the specific circumstances triggering their application. Jean Pictet, in his *Commentary* to the First Geneva Convention, highlighted the problem with the historical methodology:

[t]here have been too many cases where the contested legitimacy of the enemy Government, or the temporary disappearances of sovereign States as a result of annexation or capitulation, had been invoked as pretexts for not observing one or other of the Conventions. The need for a remedy to this state of affairs had become urgent.⁶⁵

The remedy came in the form of Common Articles 2 and 3 to the 1949 Geneva Conventions, which trigger the application of the Conventions to international and non-international armed conflicts, respectively.⁶⁶ Common Article 2 provides that the Conventions shall apply to all cases of declared war, international armed conflict and partial or total occupation.⁶⁷ In

defined by renown publicist Lassa Oppenheim as “a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.” *Id.* at 3 (citing 2 LASSA OPPENHEIM, INTERNATIONAL LAW 202 (Hersch Lauterpacht ed., 7th ed. 1952)).

63. COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 28 (Jean Pictet ed., 1952) [hereinafter GC I COMMENTARY].

64. See Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 10, at 32, 33. As noted by the author, civil wars were not real wars. Such conflicts could be regulated by the law of armed conflict in the situation where there was a recognition either by the State involved in the conflict or by a third-party State of the belligerency of the insurgent group. *See id.*

65. *See* GC I COMMENTARY, *supra* note 63, at 28.

66. Common Articles 2 and 3 are today understood as establishing the trigger for the application of treaty and customary international law related to their respective category of armed conflict. *See* CORN, HANSEN, JACKSON, JENKS, JENSEN & SCHOETTLER, *supra* note 62, at 74.

67. *See, e.g.*, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I].

a so-called Common Article 2 armed conflict, all four of the 1949 Geneva Conventions apply.⁶⁸ Accordingly, from 1949 onwards, the broader and more flexible notion of international armed conflict⁶⁹ replaced the concept of “war” as a primary triggering mechanism for the law of armed conflict.⁷⁰

Of particular note to the Ukraine conflict is the categorization of a total or partial occupation of enemy territory as an international armed conflict under Common Article 2.⁷¹ During international armed conflicts, belligerent parties often penetrate, and, if possible, take possession of enemy territory.⁷² These “occupations” are conceived of as a temporary state of affairs existing until the parties to the conflict execute a peace accord.⁷³ However, an occupation does not have to be the result of actual fighting between the parties to a conflict.⁷⁴ History is replete with examples where an occupation occurred as a result of a threat to use force by the occupying power against

68. Additional Protocol I to the 1949 Geneva Conventions, whose provisions supplement the 1949 conventions, also applies for those States that have ratified it.

69. In terms of triggering an international armed conflict, the intensity and duration of the fighting is not controlling in terms of the characterization of the armed conflict. The application is triggered by two or more States using their armed forces against each other. *See* International Committee of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* 1 (Opinion Paper, 2008), available at <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

70. 1 MARCO SASSÓLI & ANTOINE A. BOUVIER, *HOW DOES LAW PROTECT IN WAR?* 108 (2d ed. 2006). The drafters obviously sought to break down the previous formalistic barriers tied to a declaration or state of war and have the protections of the conventions linked to the facts on the ground, with correspondingly broad based application.

71. *See* GC I, *supra* note 67, art. 2. Occupations and conflicts under Article 1(4) of Additional Protocol I are regulated by the law governing international armed conflicts. AP I, *supra* note 8, art. 1(4).

72. *See* YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 1 (2009).

73. *See* Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, in *DETENTION AND OCCUPATION IN INTERNATIONAL HUMANITARIAN LAW* 197 (Michael N. Schmitt & Wolff Heintschel von Heinegg eds., 2012).

74. As to the case of partial or total occupation, Common Article 2 states that an occupation occurs even if it meets no armed resistance. The reference to a lack of armed resistance was intended to cover situations similar to the German annexation of Czechoslovakia prior to World War II. GC I, *supra* note 67, art. 2. *See also* DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 72, at 35; *Occupation and International Humanitarian Law: Questions and Answers*, ICRC (Apr. 4, 2004), <https://www.icrc.org/eng/resources/documents/misc/634kfc.htm> (“[F]or the applicability of the law of occupation, it makes no difference whether an occupation has received Security Council approval, what its aim is, or indeed whether it is called an ‘invasion,’ ‘liberation,’ ‘administration’ or ‘occupation.’ . . . [I]t is solely the facts on the ground that determines its application.”).

the occupied country.⁷⁵ “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”⁷⁶ In an effective occupation, therefore, the occupied power is rendered incapable of exercising its governmental authority over the occupied territory, and the occupying power substitutes its own authority for it.⁷⁷ Occupation law⁷⁸ applies from the moment an occupying power effectively controls all or part of their enemy’s territory.⁷⁹ Most importantly, it is this body of law that determines the rights and obligations of occupying and occupied powers.⁸⁰

For those armed conflicts “not of an international character occurring in the territory of a state,” such as an internal civil war between a State and a non-State armed group,⁸¹ the applicable law is described in Common Article 3. The application of the law of armed conflict to non-international armed conflicts through the implementation of Common Article 3 marked one of the important innovations in the 1949 Geneva Conventions. Called

75. See, e.g., EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 3 (1993); Akande, *supra* note 64, at 44.

76. Regulations Respecting the Laws and Customs of War on Land art. 42, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Regulations].

77. MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 213 (1959).

78. Occupation law is found in the law of armed conflict and particularly in Hague Regulations, *supra* note 76, arts. 42–56; Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 47–78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; AP I, *supra* note 8, arts. 63, 69, 72–92; and customary international law.

79. George Packer, *Occupation*, in *CRIMES OF WAR 2.0*, at 307, 308 (Roy Gutman, David Rieff & Anthony Dworkin eds., 2007).

80. Hans-Peter Gasser, *Protection of the Civilian Population*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 270, 270 (Dieter Fleck ed., 2d ed. 2008).

81. “Armed conflict not of an international character occurring in the territory of the High Contracting Parties” is defined as a non-international armed conflict. See, e.g., GC I, *supra* note 67, art. 3. “Non-international armed conflict generally arises, as the ICTY [International Criminal Tribunal for the former Yugoslavia] noted, ‘within a state,’ although the conflict need not unfold, at least entirely, within one state’s geographic borders.” HELEN DUFFY, *THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW* 222 (2005). The Statute of the International Criminal Court describes a non-international armed conflict as one that takes place in the territory of a State when there is protracted armed conflict between government authorities and organized armed groups or between such groups. Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

a “convention in miniature,”⁸² Common Article 3, along with Additional Protocol II,⁸³ is the primary source of international law in an internal armed conflict.⁸⁴ The international law regulating an internal armed conflict, while providing baseline humanitarian obligations, is far less developed than the law regulating international armed conflicts.⁸⁵ This is primarily due to the internal nature of these conflicts and the continuing applicability of domestic law to the hostilities.

Determining when a non-international armed conflict exists versus a mere “internal disturbance,” such as riots or “isolated and sporadic acts of violence,” is often complicated and subjective.⁸⁶ Similar to their intent with regard to international armed conflicts, the drafters of the Geneva Conventions wanted the scope of application for non-international armed conflicts to “be as wide as possible” to ensure “respect for certain rules” which are

82. *See* COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 34 (Jean Pictet ed., 1960) [hereinafter GC III COMMENTARY] (“Article 3 is like a ‘Convention in miniature.’ It applies to non-international conflicts only, and will be the only Article applicable to them until . . . a special agreement between the Parties has brought into force between them all or part of the other provisions of the Convention.”).

83. Additional Protocol II supplements “Article 3 common to the Geneva Conventions,” but limits the applicability of the law to only those situations where “dissident armed forces or other organized armed groups” which are “under responsible command” exercise “control over a part” a State. AP II, *supra* note 9, art. 1. These formal conditions for applicability are in contrast to the vague and non-binding criteria set forth in the commentaries to the Geneva Conventions. *See infra* note 88. They are the basis of one of the objections the United States has to Additional Protocol II.

84. There are a number of other law of armed conflict treaties addressing non-international armed conflict. *See, e.g.*, Rome Statute, *supra* note 81, art. 8(2)(c), 8(2)(e); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317. Moreover, customary international law provides more robust regulation of non-international armed conflict. *See Akande, supra* note 64, at 33.

85. *See, e.g.*, Sean Watts, *Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 145, 148–49 (Kenneth Watkin & Andrew J. Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies) (stating “in purely quantitative terms, the positive law of NIAC pales in comparison to the law-of-war provisions applicable to conflicts between States”). This is true despite the overwhelming majority of armed conflicts since 1945 being characterized as non-international. *See LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 1* (2002).

86. *See* AP II, *supra* note 9, art. 1(2).

“essential in all civilized countries.”⁸⁷ As a result, there are no universally accepted conditions to objectively distinguish between an internal disturbance and a non-international armed conflict, though there are a number of criteria that may indicate the difference between a domestic police action and a civil war.⁸⁸ In those situations where an armed disturbance does not reach the level of a “conflict” domestic law applies and international humanitarian law is generally irrelevant.⁸⁹

On the other end of the spectrum is the question of when an internal armed conflict may become internationalized. As outlined in the *Tadić* opinion,⁹⁰ and later adopted by the ICC in its *Lubanga* decision,⁹¹ a non-international armed conflict can ripen into an international armed conflict if a State sufficiently controls guerillas participating in a civil war. The amount of control a State must have over a rebel group to internationalize a non-international armed conflict is a point of controversy in international law.⁹² However, the *Tadić* opinion sets forth the “overall control” test for determining when guerilla forces are sufficiently controlled by a State actor

87. See GC III COMMENTARY, *supra* note 82, at 36–37 (“No Government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules . . .”).

88. The commentaries to the Geneva Conventions give a list of non-binding criteria that include: the non-State armed group is an organized military force, under responsible command, with control of territory and respects the law of armed conflict, and the State actor responds with its regular armed forces. See, e.g., GC III COMMENTARY, *supra* note 82, at 36. The Rome Statute of the ICC describes a non-international armed conflict as one that takes place in the territory of a State when there is protracted armed conflict between government authorities and organized armed groups or between such groups. Rome Statute, *supra* note 81, art. 8(2)(f). Others have stated that the two primary criteria for applicability are that the rebel forces must display a minimum level of organization and the fighting must present a minimum of intensity. See, e.g., ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 78 (2008).

89. International Committee of the Red Cross, *What is International Humanitarian Law?* (2004), https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (stating “[i]nternational humanitarian law applies only to [international or non-international] armed conflict; it does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting.”).

90. *Tadić*, *supra* note 11, ¶ 137.

91. *Lubanga*, *supra* note 61, ¶ 211 (adopting the “overall control” test asserted in the *Tadić* opinion).

92. For a more in-depth analysis, see YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 221–24 (5th ed. 2011).

to internationalize a civil war.⁹³ Merely providing “assistance to rebels in the form of the provision of weapons or logistical support” does not necessarily create an international armed conflict.⁹⁴ This gap allows a State providing assistance to a rebel group “some elbow room before its action is considered to be crossing” the threshold into an international armed conflict.⁹⁵

Classifying a conflict is a necessity for determining whether the law of armed conflict is applicable and, if so, the scope of that application.⁹⁶ Again, it is possible to have multiple types of conflicts taking place simultaneously within one State.⁹⁷ So what is the appropriate conflict classification for Russia’s invasion of Crimea and the hostilities in eastern Ukraine?⁹⁸

B. Occupation of Crimea

As discussed in the background section, in late February and early March of 2014 Russian troops took control of the Crimean peninsula, located on Ukraine’s Black Sea coast, in a bloodless, or near bloodless, military takeover. Russian Federation control of Crimea began when unidentifiable soldiers, colloquially called “little green men” by the local population, but later confirmed to be members of the Russian Special Forces (*Spetsnaz*),⁹⁹ stormed the Crimean parliament.¹⁰⁰ Simultaneous with this special opera-

93. *Tadić*, *supra* note 11, ¶ 137.

94. *Nicaragua*, *supra* note 61, ¶ 195.

95. See Yoram Dinstein, *Concluding Remarks on Non-International Armed Conflicts*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY, *supra* note 85, at 399, 411.

96. *See id.*

97. See WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 54 (2012) (stating “the fact that a particular class of conflict is taking place in one part of a country does not presuppose that a similar class of conflict is taking place in another part”).

98. See Baczynska, Polityuk & Kasolowsky, *supra* note 26 (discussing the ongoing conflicts in Crimea and eastern Ukraine).

99. Shevchenko, *supra* note 1.

100. See Harriet Salem, Shaun Walker & Luke Harding, *Crimean Parliament Seized by Unknown Pro-Russian Gunmen*, *THE GUARDIAN* (Feb 27, 2014), <http://www.theguardian.com/world/2014/feb/27/crimean-parliament-seized-by-unknown-pro-russian-gunmen>. According to President Putin, the “little green men” were members of self-defense groups organized by the locals who bought all their uniforms and hardware in commercial shops, notwithstanding the fact that their guns were the same as those used by the Russian army, their lorries had Russian number plates and they spoke in Russian accents. See Shevchenko, *supra* note 1. Despite these claims it is well-established that the unknown gunmen were part of the Russian special forces. See *supra* text accompanying note 44–45.

tion, Russian regular armed forces blockaded Ukrainian military installations in order to facilitate their seizure of airports, government buildings, ports and broadcasters.¹⁰¹ The mobilization of the Russian armed forces within Crimea was relatively easy as stationing agreements executed between Russia and Ukraine allowed for a significant presence of Russian Federation forces in the peninsula.¹⁰² Specifically, these agreements provided Russia with long-term leases for over one thousand naval facilities,¹⁰³ two airfields and a training facility on the Crimean peninsula.¹⁰⁴ Reports put the Russian military presence in Crimea before the takeover at approximately 25,000 personnel, 22 airplanes, 24 artillery complexes, and 132 armored trucks.¹⁰⁵

Within a week after the seizure of the parliament, senior U.S. administration officials estimated Russian ground and naval forces had complete operational control over the entire Crimean peninsula.¹⁰⁶ Russian possession of all key governmental locations and infrastructure supported this assessment.¹⁰⁷ Despite a few incidents, such as on March 8, 2014 when warning shots were fired by Russian forces to prevent an OSCE unarmed observer mission from entering the peninsula,¹⁰⁸ Russian control of Crimea occurred with minimal violence. The formal annexation of Crimea by the Russian Federation on March 21, 2014 officially displaced the Ukrainian

101. See *Ukraine: The End of the Beginning?*, THE ECONOMIST (May 8, 2014), <http://www.economist.com/news/briefing/21598744-having-occupied-crimea-russia-stirring-up-trouble-eastern-ukraine-end>.

102. See *Russia Allowed to have 25,000 Troops in Crimea Since 1999... & Other Facts you May Not Know*, ECONOMICPOLICYJOURNAL.COM (Mar. 5, 2014), <http://www.economicpolicyjournal.com/2014/03/russia-allowed-to-have-25000-troops-in.html>.

103. The most significant naval force in Crimea is the Russian Black Sea Fleet at the port of Sevastopol. See Robert McMahon, *Ukraine in Crisis*, COUNCIL OF FOREIGN RELATIONS (Aug. 25, 2014).

104. See Anna Arutunyan, *Russia's Possible Undercover Military Intervention*, USA TODAY (Mar. 15, 2014), <http://www.usatoday.com/story/news/world/2014/03/15/russias-possible-undercover-military-intervention/6464433/>.

105. *Id.*

106. See Elizabeth Landau, Diana Magnay & Ben Wedeman, *In Russia's "Low-key" Invasion of Crimea, the Fight is Over Information*, CNN (Mar. 3, 2014), <http://www.cnn.com/2014/03/03/world/europe/ukraine-crimea/index.html>.

107. See Uri Friedman, *Putin's Playbook: The Strategy Behind Russia's Takeover of Crimea*, THE ATLANTIC (Mar. 2, 2014), <http://www.theatlantic.com/international/archive/2014/03/putins-playbook-the-strategy-behind-russias-takeover-of-crimea/284154/>.

108. See Baczynska, Polityuk & Kasolowsky, *supra* note 26.

government as the sovereign power, while solidifying Russian control of the peninsula.¹⁰⁹

Given the above circumstances, even though the occupation was “bloodless,” the fact that it was coercive and non-consensual marks it as a belligerent occupation.¹¹⁰ Therefore, a partial belligerent occupation of the Crimean peninsula by the Russian Federation exists and has most certainly implicated the Common Article 2 trigger.¹¹¹ As “military occupation is a matter of fact,”¹¹² the Russian Federation has clearly displaced the Ukrainian government as the governmental authority in Crimea through a military invasion.¹¹³ Russian attempts to evade responsibility are simply irrelevant.¹¹⁴ Occupation is triggered by “conditions on the ground that cannot be dismissed by politics or propaganda.”¹¹⁵ Thus the legal status of Crimea remains unaltered by the Russian annexation.¹¹⁶ Consequently, a Russian occupation of Crimea currently exists triggering all applicable international law.¹¹⁷

109. *Id.*

110. *See supra* notes 74–75 and accompanying text (discussing the low threshold required for the triggering of occupation law).

111. Arguably, one of the most important principles underlying the portion of the law of armed conflict related to belligerent occupation is that the occupying power does not acquire sovereign rights over the occupied territory. Rather, the occupying State exercises only provisional and temporary powers through the administration of the occupied territory.

112. Department of the Army, FM 27-10, *The Law of Land Warfare* ¶ 355 (1956).

113. *See* DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 72, at 38 (stating that an occupation exists when “the contested area is solidly seized by the invader, and the sovereign is actually displaced”).

114. *See the Hostages Case*. United States v. List (Case No. 7), 8 LRTWC 34 (Military Tribunal V, 1948), in 11 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, at 757, 1243 (1951) (“Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government.”).

115. Marc Warren, *Belligerent Occupation*, in *U.S. MILITARY OPERATIONS AND THE LAW* (Geoffrey S. Corn, Shane R. Reeves & Rachael Vanlandingham eds.) (forthcoming 2015).

116. On the issue of annexation and occupation of Crimea, see Robin Geiss, *Russia’s Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 91 *INTERNATIONAL LAW STUDIES* 425 (2015).

117. The corpus of the positive law of belligerent occupation can be found in specific provisions of the Fourth Geneva Convention, as supplemented by Additional Protocol I and the Hague Declarations and Conventions of 1899 and 1907. *See* DANIEL THURER, *INTERNATIONAL HUMANITARIAN LAW: THEORY, PRACTICE AND CONTEXT* 148–49 (2011).

C. Civil War in Eastern Ukraine

The scuttling of the trade agreement with the EU by then-President Yanukovich in November 2013 started an upward spiral of violence in Ukraine.¹¹⁸ By July 2014 the International Committee of the Red Cross (ICRC) had characterized the violence in eastern Ukraine as a non-international armed conflict.¹¹⁹ Although this determination is non-binding, the ICRC's statement is firmly grounded in the law of armed conflict. By any criteria the violence in eastern Ukraine long ago passed the threshold from internal disturbance to non-international armed conflict. The separatists are an organized armed group¹²⁰ in control of significant territory who are engaged in a protracted armed conflict with the Ukrainian military.¹²¹ The intensity of the violence has continually—and often dramatically—increased since the summer of 2014, with casualties mounting for both the Ukrainian military forces and the separatists.¹²² Regardless of whether the non-binding criteria found in the commentaries to the Geneva Conventions, or the more restrictive test established in international jurisprudence, is applied to the circumstances in eastern Ukraine, the existence of a non-international armed conflict is indisputable.¹²³

The more difficult conflict classification question is whether the relationship between the Russian Federation and the pro-Russian separatists has internationalized the internal armed conflict. Determining that the

118. See Antonia Mortensen, *Ukraine Protests: 5 Things you Need to Know*, CNN (Feb. 19, 2014), <http://edition.cnn.com/2013/12/13/business/ukraine-protests-explainer/>. It is believed that Russia threatened Ukraine with trade sanctions if it signed the deal with the EU.

119. See *Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law*, ICRC (July 23, 2014), <https://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm>.

120. See *infra* text accompanying notes 233–35 (explaining why the separatists meet the criteria to be an organized armed group).

121. See, e.g., Ostroukh, White & Barnes, *supra* note 58, at A1. In discussing the February 15, 2015 peace agreement, the authors quote Alexander Zakharchenko, the head of the separatists self-proclaimed Donetsk People's Republic. *Id.* The peace agreement recognizes that the separatists are in control of significant territory in eastern Ukraine and outlines the obligations of the Ukrainian military and the separatists. *Id.*

122. See *supra* text accompanying notes 54–59.

123. Compare GC III COMMENTARY, *supra* note 82, at 36, with *Tadić*, *supra* note 11, ¶ 70, and Rome Statute, *supra* note 81, art. 8(2)(f). See also *supra* text accompanying notes 87–89 (discussing the various approaches to characterizing a non-international armed conflict).

Ukraine civil war qualifies as an international armed conflict is dependent upon whether Russia sufficiently controls the separatists. In particular, the question is whether they have overall control over the separatists.¹²⁴

Russia is, undoubtedly, involved in the ongoing Ukraine civil war. Though they consistently deny these accusations,¹²⁵ there is overwhelming evidence showing the Russians actively equipping, training and even fighting alongside the separatists in eastern Ukraine.¹²⁶ Yet it is difficult to determine the full extent and scope of their control of the separatists, as the Russian-backed rebels are seemingly independent actors.¹²⁷ Without more evidence to clarify the Russian-separatist relationship, it is not known whether Russia is exercising a sufficiently high level of control over the separatists to internationalize the well-established non-international armed conflict.¹²⁸ Given this challenge and because of the overwhelming evidence supporting the existence of a non-international armed conflict, this article considers the situation in eastern Ukraine to qualify as the latter. However, as more advanced Russian weaponry and Russian soldiers pour over the border, it is becoming more difficult to posit that the hostilities are truly internal to Ukraine.¹²⁹

124. *Tadić*, *supra* note 11, ¶ 137.

125. See Alan Cullison & Philip Shishkin, *Ukrainians, Skeptical of Truce, Vow to Rearm*, WALL STREET JOURNAL, Feb. 13, 2015, at A6 (“Moscow denies sending troops or armor into Ukraine.”).

126. See, e.g., Ahmari, *supra* note 60, (noting that the commander of United States Army Europe has said that the separatists have advanced weaponry that only could come from Russia); Cullison & Shishkin, *supra* note 125 (“In Kiev, a Ukrainian military spokesman said that around 50 tanks, 40 missile systems and 40 armored vehicles crossed into Ukraine.”). See also *supra* text accompanying note 51 (discussing the number of Russian soldiers fighting in the Ukrainian civil war).

127. See, e.g., *supra* text accompanying notes 46–50 (discussing the separatist action of shooting down Malaysian Airlines Flight MH-17).

128. But see Robert Heinsch, *Conflict Classification in Ukraine: The Return of the “Proxy War”?*, 91 INTERNATIONAL LAW STUDIES 323, 354–60 (2015) (“The ICTY’s jurisprudence adopting the overall control standard has clarified the circumstances in which the internationalization of a noninternational conflict may be found to have occurred. While greater clarity of information would be desirable, it seems likely that the situation in eastern Ukraine can be qualified as an internationalized non-international armed conflict, i.e., an original non-international armed conflict, which, through the indirect influence of Russia and the support it is providing to, and control it is exercising over, the pro-Russian separatists, has become an international armed conflict.”).

129. See, e.g., Laura Smith-Spark & Nic Robertson, *Is Peace Possible in Ukraine? Key Leaders Meet to Find Out*, CNN (Feb. 11, 2015), <http://edition.cnn.com/2015/02/11/europe/ukraine-conflict/> (accusing Russia of sending heavy weaponry and soldiers

The occupation of Crimea and the non-international armed conflict in eastern Ukraine, though inextricably linked, remain best viewed as parallel international and non-international armed conflicts.

IV. STATUS CLASSIFICATION AND THE LAW OF ARMED CONFLICT

The conflict classification paradigm proposed above allows for battlefield status determinations for those participating in the Ukraine hostilities.¹³⁰ To analyze the status of each of the primary participants in the Ukraine conflict, it is first important to understand how individuals are generally classified under the law of armed conflict.

It must be emphasized, as a preliminary matter, that questions concerning which State is responsible for the Ukraine hostilities have no effect on the rights and obligations of those participating in the hostilities.¹³¹ Once a State is in a “period of war, international armed conflict, or occupation” responsibilities and protections become universal for participants¹³² and “the politics of deciding who has breached that law [prohibiting the use of

into Ukraine). See also Michael R. Gordon, *Armed With Google and YouTube, Analysts Gauge Russia's Presence in Ukraine*, NEW YORK TIMES, May 27, 2015, at A6 (“An unusual investigation using publicly available videos, smartphone photographs and satellite images shows that Russia is continuing to defy the West by conducting protracted military operations inside Ukraine . . .”).

130. GARY SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 149 (2010). The law of armed conflict provides a sophisticated regulatory regime, in terms of both positive and customary law, that classifies individuals based upon their group status and/or individual conduct during armed conflicts with significant practical and policy consequences flowing from such determinations. See *id.*

131. It is important to maintain the bifurcation between *jus ad bellum* and *jus in bello*. In an article in the *International Review of the Red Cross*, Kolb describes the difference between these two areas of the law by stating, “[*jus ad bellum* refers to the conditions under which one may resort to war or to force in general; *jus in bello* governs the conduct of belligerents during a war, and in a broader sense comprises the rights and obligations of neutral parties as well.” Robert Kolb, *Origin of the Twin Terms Jus Ad Bellum/Jus In Bello*, 320 INTERNATIONAL REVIEW OF THE RED CROSS 553, 553 n.1 (1997), available at <http://www.icrc.org/eng/resources/documents/misc/57jnuu.htm>.

132. Brian J. Bill, *Human Rights: Time for Greater Judge Advocate Understanding*, THE ARMY LAWYER 54, 58 (June 2010). For a more in-depth discussion of *jus in bello*, see Shane R. Reeves & David Lai, *A Broad Overview of the Law of Armed Conflict in the Age of Terror*, in THE FUNDAMENTALS OF COUNTERTERRORISM LAW 142 (Lynne Zusman ed., 2014).

force] should not have a bearing on the protection of war victims.”¹³³ It is the *jus in bello*, “predicated on the postulate of equal application of its legal norms to all Parties to the conflict,”¹³⁴ alone that regulates the conduct of the participants.¹³⁵ Violations or breaches of this specialized area of international law “cannot be justified on the ground that the enemy is responsible for commencing the hostilities in flagrant breach of the *jus ad bellum*.”¹³⁶

Jus in bello is built upon the “fundamental” and “intransgressible” principle of distinction.¹³⁷ Additional Protocol I Article 48, which is reflective of customary international law,¹³⁸ provides:

[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.¹³⁹

The preamble to the highly influential St. Petersburg Declaration emphasizes that war is to be waged against the armed forces of the enemy and not against the civilian population.¹⁴⁰ Accordingly, in international armed conflicts individuals are divided into two broad categories—combatants and civilians—which are mutually exclusive and absolutely complementary.¹⁴¹ A third category, albeit not expressed in the law of armed conflict, is that of “unlawful combatant,” which is “a short hand expression . . . de-

133. Andrew J. Carswell, *Classifying the Conflict: A Soldier’s Dilemma*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 143, 152 (2009), available at <http://www.icrc.org/eng/resources/documents/article/review/review-873-p143.htm>.

134. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 4 (2004).

135. *Id.*

136. *Id.* at 4–5.

137. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 78, 79 (July 8).

138. See 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 3–25 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL RULES].

139. AP I, *supra* note 8, art. 48.

140. A.P.V. ROGERS, LAW ON THE BATTLEFIELD 7 (2d ed. 2004). See also St. Petersburg Declaration Renouncing the Use, in Times of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, 138 Consol. T.S. 297, available at http://avalon.law.yale.edu/19th_century/decpeter.asp.

141. Nils Melzer, *The Principle of Distinction Between Civilians and Combatants*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 296 (Andrew Clapham & Paola Gaeta eds., 2014).

scribing those who take up arms without being authorized to do so by international law.”¹⁴² Understanding the general parameters of these status categorizations is a necessity in order to comply with the principle of distinction.¹⁴³

A. Combatants

Combatants are those individuals who “have the right to participate directly in hostilities.”¹⁴⁴ This status, which only exists in an international armed conflict,¹⁴⁵ applies to most members of the armed forces¹⁴⁶ and to certain individuals who take an active part in hostilities regardless of their membership in an armed force.¹⁴⁷ More specifically, combatants include the regular armed forces of a State party to the conflict;¹⁴⁸ members of militia, volunteer corps and organized resistance movements that are under responsible command, have a fixed, distinctive sign recognizable at a distance, carry their arms openly and conduct their operations in accordance with the laws of war;¹⁴⁹ members of a regular armed force who profess

142. SOLIS, *supra* note 130, at 208.

143. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1863 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter AP I COMMENTARY].

144. AP I, *supra* note 8, art. 43(2).

145. CIHL RULES, *supra* note 138, r. 3.

146. Medical and religious personnel, though members of the armed forces, are considered noncombatants. SOLIS, *supra* note 130, at 191–94.

147. Yoram Dinstein, *Unlawful Combatancy*, in 2 THE CONDUCT OF HOSTILITIES IN INTERNATIONAL HUMANITARIAN LAW 227, 227 (Michael N. Schmitt & Wolff Heintschel von Heinegg eds., 2012).

148. “The armed forces of a party to the conflict consist of all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates.” CIHL RULES, *supra* note 138, r. 3. Additional Protocol I words the definition in a slightly different manner. It states, in part, as follows: “Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.” AP I, *supra* note 8, art. 43(2).

149. *See* GC III, *supra* note 8, art. 4(2). *See also* BOOTHBY, *supra* note 97, at 142. Members of other militias and volunteer corps, including those of organized resistance movements, must belong to a party. GC III, *supra* note 8, art. 4(A)(2). They retain combatant status whether they are operating in or outside their own territory, even if this territory is occupied, provided they fulfill the requisite conditions. *Id.* Further, their status does not change whether they are assimilated into the armed forces of a party or act as a distinct organization as long as they continue to comply with the outlined criteria.

their allegiance to a government or authority not recognized by the detaining power;¹⁵⁰ and those inhabitants of a non-occupied territory that form a *levée en masse*.¹⁵¹ Combatant status is only concerned with the legal right to participate in a conflict and not actual conduct during hostilities. As a result, an individual deemed a combatant is a lawful target who is continuously a “legitimate object of attack . . . as long as they are capable of fighting, willing to fight or resist capture.”¹⁵²

If captured, a combatant is entitled to the “status of a prisoner of war . . . subject to the *conditio sine qua non* that he is a lawful combatant.”¹⁵³ As a prisoner of war, the individual enjoys assimilation rights¹⁵⁴ and can

AP I Article 44(3) allows a belligerent to attain combatant status by carrying his arms openly during each military engagement and when visible to an adversary while deploying for an attack. The Additional Protocol standard “lowers the threshold for obtaining combatant status . . . by eliminating the classic requirement for ‘having a fixed distinctive sign recognizable at a distance’” INTERNATIONAL & OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK 17 (2013) [hereinafter HANDBOOK]. The United States, concerned that the elimination of this requirement undercuts the principle of distinction, rejects AP I Article 44(3) as customary law, and maintains the traditional combatant requirements outlined in the Geneva Conventions. *See id.*

150. This provision is a historic artifact from World War II when certain States refused to recognize belligerent combatant units which professed allegiance to a government or authority which these States did not recognize. *See* GC III COMMENTARY, *supra* note 82, at 61. The distinguishing characteristic of this subset of combatant status is that, in the view of their adversary, these individuals are no longer operating under the direct authority of a party to a conflict. *See* LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 63 (2d ed. 2000).

151. A *levée en masse* exists when “[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.” GC III, *supra* note 8, art. 4(A)(6). For a more in-depth discussion of this unique combatant status category, see generally David Wallace & Shane R. Reeves, *The Law of Armed Conflict’s “Wicked” Problem: Levée en Masse in Cyber Warfare*, 89 INTERNATIONAL LAW STUDIES 646 (2013), <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1042&context=ils>.

152. GREEN, *supra* note 150, at 124. *See also* SOLIS, *supra* note 130, at 188 (“[I]f a combatant is home on leave and in uniform, far from the combat zone, and is somehow targeted by an opposing combatant, she remains a legitimate target and may be killed—just as the opposing combatant, if discovered outside the combat zone, may be killed by his enemy.”).

153. DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 134, at 29; Melzer, *supra* note 141, at 305.

154. “POWs are assimilated, for protective purposes, into the armed forces of the detaining state. As such, they are entitled to trial before the same courts, and according to

assert combatant privilege from prosecution. This privilege, often called “combatant immunity,” shields a prisoner of war from any “criminal responsibility for killing or injuring enemy military personnel or civilians taking an active part in hostilities, or for causing damage or destruction to property,” provided their actions complied with the law of armed conflict.¹⁵⁵ Captured combatants are therefore “not . . . regarded as criminals or convicts . . . [but] are guarded as a measure of security and not of punishment.”¹⁵⁶ If there is any doubt as to whether an individual, having committed belligerent acts and having fallen into the hands of an enemy is a combatant as defined by the categories above, his or her status would be determined by a competent tribunal.¹⁵⁷

B. Civilians

The second broad status characterization expressly recognized by the law of armed conflict is that of civilian. The term “civilian” is curiously left undefined in the positive law and, instead, is outlined under the law applicable in international armed conflicts as “any person who does not belong to one of the categories of person referred to in Article 4A(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol.”¹⁵⁸ A civilian is, therefore, defined in the negative as it is any individual who is not a member of the armed forces.¹⁵⁹ The “protection of civilians is one of the main goals” of the law of armed conflict,¹⁶⁰ and if there is any doubt about

the same procedures as member of the regular armed forces of the detaining state.” Derek Jinks, *Protective Parity and the Laws of War*, 79 NOTRE DAME LAW REVIEW 1493, 1506 (2004).

155. *Id.*

156. War Department, Office of the Chief of Staff, Rules of Land Warfare ¶ 60 (1914). It is “especially forbidden” to “declare that no quarter will be given,” to kill or wound “treacherously” an adversary’s armed forces or those who have surrendered. Hague Regulations, *supra* note 76, art. 23.

157. *See* GC III, *supra* note 8, art. 5. Article 5 raises a presumption that individuals who might be prisoners of war shall have the Third Geneva Convention applied to them. *See* SOLIS, *supra* note 130, at 228.

158. AP I, *supra* note 8, art. 50(1).

159. AP I COMMENTARY, *supra* note 143, ¶ 1913.

160. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 1 (2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [hereinafter ICRC INTERPRETIVE GUIDANCE].

the status of an individual the assumption is they are a civilian.¹⁶¹ Civilian status is not absolute and is forfeited “for such time as they take a direct part in hostilities.”¹⁶² Thus, if a civilian chooses to take up arms “or participate[s] actively in hostilities,” they lose benefits associated with their protected status.¹⁶³

Unlike combatant status, civilian status exists in non-international armed conflicts as well as in international armed conflicts.¹⁶⁴ However, where the “protections and obligations of the law of international armed conflict are premised almost entirely on the status of affected persons, the law of non-international armed conflict spurns such classifications, as well as the international armed conflict taxonomy of status-based protection.”¹⁶⁵ As a result, there is a legal difference between those civilians who directly participate in an internal armed conflict and those who do not. Some scholars have attempted to address this difference by adopting the term “fighters” to describe “both members of the regular armed forces fighting on behalf of the government and members of armed groups fighting against the government.”¹⁶⁶ The term is “employed in lieu of ‘combatants’ in order to avoid any confusion with the meaning of the latter term in the context of the international law of armed conflict,” but does not connote lawfulness to participate in the hostilities.¹⁶⁷

161. See API COMMENTARY, *supra* note 143, at 610.

162. API I, *supra* note 8, art. 51(3).

163. DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 134, at 29–30.

164. See AP II, *supra* note 9, art. 13(3) (“Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.”). However, a civilian’s “activities alone cannot constitute a non-international armed conflict, for such a conflict cannot exist without an organized armed group on at least one side. Thus, the category of directly participating civilians only has meaning in the context of an ongoing non-international armed conflict.” See Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY, *supra* note 85, at 119, 135.

165. Watts, *Present and Future Conceptions*, *supra* note 85, at 145, 146 (2012).

166. MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY ¶ 1.1.2 (2006) [hereinafter NIAC MANUAL].

167. *Id.* As noted by the authors of the *Manual*, the term “fighter” does not appear in any binding treaty.

C. *Unlawful Combatants*

The term “unlawful combatant,” also sometimes referred to as “unlawful belligerent,” is not a distinct individual battlefield status¹⁶⁸ and does “not appear in the Geneva Conventions, Additional Protocols, or any other LOAC treaty, convention or protocol.”¹⁶⁹ The term is instead descriptive for those who unlawfully engage in combat activities by taking a part in hostilities “without being entitled to do so.”¹⁷⁰ Unlawful combatants may include spies and saboteurs,¹⁷¹ mercenaries,¹⁷² members of a State armed force who abuse their status,¹⁷³ members of a non-State armed group¹⁷⁴ or civilians who “directly participate in hostilities.”¹⁷⁵

168. See HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 507 [2006] (Isr.), *reprinted in* 46 INTERNATIONAL LEGAL MATERIALS 373, available at http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.htm (noting that according to the state of current international law there is no separate category for unprivileged belligerents).

169. SOLIS, *supra* note 130, at 206–8 (quoting CrimA 6659/06 Anonymous v. State of Israel, 62(4) PD 329 [2008] (Isr.), available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.htm).

170. Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INTERNATIONAL REVIEW OF THE RED CROSS 45 (2003), available at https://www.icrc.org/eng/assets/files/other/irrc_849_dorman.pdf.

171. See Hague Regulations, *supra* note 76, arts. 29–31; AP I, *supra* note 8, art. 46.

172. See AP I, *supra* note 8, art. 47 (stating “a mercenary shall not have the right to be a combatant or a prisoner of war”).

173. See DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 134, at 29 (“[U]nder customary international law, a sanction (deprivation of the privileges of a prisoner of war) is imposed on any combatant masquerading as a civilian in order to mislead the enemy and avoid detection.”). *But see* AP I, *supra* note 8, art. 44(4) (“A combatant who falls into the power of an adverse Party while failing to meet the requirements [to be a combatant] shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war . . .”).

174. See ICRC INTERPRETIVE GUIDANCE, *supra* note 160, at 32–34. Individuals who are members of organized non-State armed groups become unlawful combatants due to their “continuous combat function” within the group. “Membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely conduct of hostilities on behalf of a non-State party to the conflict.” *Id.* at 33. Members of non-State armed groups do not have the privileges affiliated with combatant status. *Id.*

175. AP I, *supra* note 8, art. 51(3). There is much debate concerning what constitutes “a direct part in hostilities.” Compare ICRC INTERPRETIVE GUIDANCE, *supra* note 160, at 5–6 (“The Interpretive Guidance provides a legal reading of the notion of ‘direct participation in hostilities’ with a view to strengthening the implementation of the principle of distinction.”), with Kenneth Watkin, *Opportunity Lost: Organized Armed Groups*

In international armed conflicts, being categorized as an “unlawful combatant” results in a number of adverse consequences. Similar to a combatant, an unlawful combatant remains a legitimate target regardless of their location or activities.¹⁷⁶ However, if captured, an unlawful combatant is not afforded prisoner of war protections or any combatant privileges.¹⁷⁷ Without immunity, the individual “may be prosecuted and punished to the extent that their activities, their membership, or the harm caused by them is penalized under national law,”¹⁷⁸ even if “these acts do not constitute war crimes under international law.”¹⁷⁹ These harsh penalties are intended to “simultaneously reward soldiers for being readily identifiable and deter civilians from entering the fray, thereby keeping the line between combatants and civilians as discernible as possible and maximizing civilian safety.”¹⁸⁰

In non-international armed conflicts, civilians who are “fighters” against the sovereign government are equated to unlawful combatants. As such, they are targetable for the entirety of their membership or their active participation¹⁸¹ without any of the privileges of combatant status. Though

and the ICRC “*Direct Participation in Hostilities*” *Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 641, 641 (2010), and Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 1, 5 (2010) (criticizing the *Interpretive Guidance* recommendations). However, there is agreement that once a civilian directly participates in hostilities, his civilian status and protections are suspended and consequently “may be attacked in the same manner as identified members of an opposing armed force.” HANDBOOK, *supra* note 149, at 20.

176. See INTERNATIONAL & OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, LAW OF ARMED CONFLICT DESKBOOK 134 (2010).

177. See *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942) (“Lawful combatants are subject to capture and detention as prisoners of war,” while “[u]nlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment . . .”).

178. ICRC INTERPRETIVE GUIDANCE, *supra* note 160, at 84.

179. DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 134, at 30 (citing ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 305 (1976) (explaining that unlawful combatants “may be punished under the internal criminal legislation of the adversary for having committed hostile acts in violation of its provisions (e.g. for murder), even if these acts do not constitute war crimes under international law.”).

180. MICHAEL BYERS, WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT 118 (2005).

181. See Schmitt, *The Status of Opposition Fighters*, *supra* note 164, at 132. In a non-international armed conflict the same general rules related to targeting apply as in an international armed conflict through the application of customary international law. See

international law necessitates humane treatment and fair trials if they are captured or are *hors de combat*,¹⁸² there remains a built-in distinction between the government forces and those who fight against it.¹⁸³ “The latter are viewed as traitors and, if captured, are liable to be prosecuted and punished for violations of domestic law. They cannot be expected to be accorded the privileges of prisoners of war status.”¹⁸⁴ Civilians who are either a member of a non-State armed group or directly participate against government forces in a non-international armed conflict therefore assume significant risk as they have greatly diminished protections.

V. WHAT IS THE STATUS OF THE UKRAINE CONFLICT PARTICIPANTS?

As explained in Part III, the Ukraine conflict is both an occupation and a non-international armed conflict. By applying the framework outlined in Part IV to this conflict characterization, it is possible to determine the individual status of those participating in the conflict. These status determinations clarify the legal protections and obligations for each of the primary actors and are discussed below.

A. Russian Regular Forces

On March 21, 2014 Russians celebrated as President Putin, in a nationally televised event, signed legislation to “finalize” the annexation of Crimea.¹⁸⁵ Despite these theatrics, the occupation of Crimea continues,¹⁸⁶ thus the entirety of the law of armed conflict is triggered,¹⁸⁷ including certain rights and obligations for members of the Russian armed forces.¹⁸⁸ As Russian

Jelena Pejic, *Conflict Classification and the Law Applicable to Detention and the Use of Force*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 10, at 102.

182. The overarching requirement of humane treatment, which now reflects customary international law, is based upon Common Article 3(1) and Articles 2(1) and 4(1) of Additional Protocol II. See Pejic, *supra* note 181.

183. Yoram Dinstein, *The System of Status Groups in International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 148 (Wolff Heintschel von Heinegg & Volker Epping eds., 2010).

184. *Id.*

185. See *Putin Signs Laws Completing Procedure to Absorb Crimea into Russia*, REUTERS (Mar. 21, 2014), <http://www.cnbc.com/id/101488951>.

186. See *supra* text accompanying notes 27–38, 103–6.

187. See *supra* text accompanying notes 111–17 (noting that a Russian occupation of Crimea currently exists thus triggering all the law of armed conflict).

188. AP I, *supra* note 8, art. 43(2).

soldiers are members of the armed forces of a party to the conflict, they have “a right to participate directly in [the] hostilities” as combatants.¹⁸⁹ This status applies to all members of the Russian regular armed forces in Ukraine except those with protected status, such as medical and religious personnel.¹⁹⁰ This status imparts the legal right to participate and is unconcerned with conduct; therefore, Russian soldiers are combatants regardless of their particular duties.¹⁹¹ Further, whether the Russian soldier is passively involved in the occupation of Crimea or heavily engaged in combat operations to support the separatists in eastern Ukraine is irrelevant to their status as a combatant. As the Crimea occupation triggered an international armed conflict between Russia and Ukraine, the rights and duties of combatant status apply to the conflict regardless of geographic location.¹⁹²

As a combatant, the Russian regular soldier participating in the Ukraine conflict has all the protections and obligations associated with that status. This includes immunity from “criminal responsibility for killing or injuring” Ukrainian military personnel, civilians taking an active part in hostilities or for causing damage or destruction to property,” provided their actions comply with the law of armed conflict.¹⁹³ Conversely, they may “immediately be targeted without any specific conduct” by Ukrainian forces, assuming they have not surrendered, been captured or are otherwise *hors de combat*.¹⁹⁴ If Ukrainian forces do gain control over a member of the Russian regular forces, that individual soldier must be treated as a prisoner of war if

189. *Id.* See also HANDBOOK, *supra* note 149, at 16 (“Combatants are military personnel lawfully engaging in hostilities in an armed conflict on behalf of a party to the conflict. . . . [They] are also *privileged* belligerents, i.e., authorized to use force against the enemy on behalf of the State.” (emphasis in original)).

190. See SOLIS, *supra* note 130, at 191–94 (noting that medical and religious personnel, though members of the armed forces, are considered noncombatants).

191. Reeves & Lai, *supra* note 132, at 145.

192. See *supra* section III(B) (portion on occupation of Crimea).

193. “[T]hey bear no criminal responsibility for killing or injuring enemy military personnel or civilians taking an active part in hostilities, or for causing damage or destruction to property, provided their acts comply with the LOAC.” HANDBOOK, *supra* note 149, at 16. This privilege is often called “combatant immunity.”

194. See SOLIS, *supra* note 130, at 188 (“[I]f a combatant is home on leave and in uniform, far from the combat zone, and is somehow targeted by an opposing combatant, she remains a legitimate target and may be killed—just as the opposing combatant, if discovered outside the combat zone, may be killed by *his* enemy.” (emphasis in original)). See also GREEN, *supra* note 150, at 124 (stating that combatants are lawful targets who are continuously a “legitimate object of attack, but only as long as they are capable of fighting, willing to fight or resist capture”).

he is operating in accordance with the obligations to attain combatant status.¹⁹⁵

B. “Little Green Men”

The “little green men”—faces covered, wearing unmarked olive uniforms, speaking Russian and using Russian weapons—have played a significant role in both the occupation of Crimea and the civil war in eastern Ukraine.¹⁹⁶ While the Russian Federation initially denied any connection to these armed actors, it is now widely accepted that the “little green men” are *Spetsnaz*.¹⁹⁷ These *Spetsnaz* commandos, practicing *maskirovka* or military deception, use uniforms devoid of any insignia to make it difficult to attribute their actions to Russia.¹⁹⁸ This unconventional method of warfare is intended to cause confusion and disorientation among the Ukrainian government and its allies in hopes of slowing any defensive response.¹⁹⁹ While the tactic has been successful,²⁰⁰ it is questionable whether the unmarked *Spetsnaz* commandos operating in Ukraine are complying with the legal obligations required to receive combatant status.²⁰¹

Similar to other members of the Russian military participating in the Ukraine-Russia international armed conflict, *Spetsnaz* commandos are assumed to be combatants.²⁰² Combatant status, however, is conditioned on

195. See *supra* text accompanying notes 153–56 (discussing combatant rights as a prisoner of war).

196. See *supra* text accompanying notes 27–28, (noting the role of the “little green men” in both Crimea and eastern Ukraine.) See also Editorial, *The Siege of Mariupol*, WALL STREET JOURNAL (Jan. 29, 2015), <http://www.wsj.com/articles/the-siege-of-mariupol-1422490152> (“More recent sightings of ‘little green men’ in insignia-less uniforms suggest the presence of Russian special forces fighting alongside the rebels.”).

197. See, e.g., Lucy Ash, *How Russia Outfoxes its Enemies*, BBC NEWS MAGAZINE (Jan. 28, 2015), <http://www.bbc.com/news/magazine-31020283> (noting that Russian President Vladimir Putin admitted to the use of Russian special forces in Crimea in an April 17, 2014 speech).

198. See *id.* The elements of “maskirovika” are surprise, camouflage, maneuvers intended to deceive, concealment, the use of decoys and military dummies, and disinformation. *Id.*

199. See *id.*

200. See, e.g., *Russia’s Special Ops Invasion of Ukraine Has Begun*, DAILY BEAST (Mar. 15, 2014), <http://www.thedailybeast.com/articles/2014/03/15/russian-commandos-invade-ukraine.html> (discussing the confusion caused by the *Spetsnaz* in Ukraine).

201. See *supra* section IV(A)(discussing the criteria for receiving combatant status).

202. See *supra* text accompanying notes 189–92.

combatants distinguishing themselves from both the civilian population and the opposing armed forces.²⁰³ Distinction, the “foundation on which the codification of the laws and customs of war rests,”²⁰⁴ “ensure[s] respect for and protection of the civilian population and objects”²⁰⁵ and is an inviolable requirement for maintaining combatant status.²⁰⁶ Embedded within this requirement is an absolute obligation for the *Spetsnaz* commandos to clearly delineate themselves from the Ukrainian military and the civilians who unfortunately happen to live in the area of hostilities.²⁰⁷ This duty includes “not only physical separation of military forces and other military objectives from civilian objects . . . but also other actions, such as wearing uniforms.”²⁰⁸ Choosing to ignore this obligation by “masquerading as a civilian in order to mislead the enemy and avoid detection” may lead the *Spetsnaz* commandos to lose the privileges associated with combatant status.²⁰⁹

Yet wearing a uniform with a Russian insignia is not an absolute requirement for the commandos to comply with the principle of distinction.²¹⁰ The law of armed conflict mandates only that belligerents be distin-

203. See GC III COMMENTARY, *supra* note 82, at 52.

The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians. The Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt.

Id.

204. AP I COMMENTARY, *supra* note 143, at 598.

205. AP I, *supra* note 8, art. 48.

206. See DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 134, at 29.

207. MICHAEL BYERS, WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT 118 (2005).

208. W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 493, 514 (2003).

209. DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 134, at 29 (noting that under customary international law deprivation of the privileges of a prisoner of war are imposed to those combatants that fail to comply with the principle of distinction).

210. See Matthew R. Grant & Todd C. Huntley, *Legal Issues in Special Operations*, in U.S. MILITARY OPERATIONS AND THE LAW, *supra* note 115. The authors argue that distinction comes in many forms, “including those forms which would obtain prisoner of war status for militias and organized resistance groups [which] belong to a belligerent state.” See also Parks, *supra* note 208, at 516–17 (noting that although the wearing of uniforms is the

guishable; it does not require that they advertise their nationality.²¹¹ According to law of armed conflict expert Hays Parks:

The law of war regards a uniform as the principal way in which conventional military forces distinguish themselves from the civilian population in international armed conflict. State practice (including US practice), treaty negotiation history, and the views of recognized law of war experts reveal (a) that the law of war obligation is one of distinction that otherwise has eluded precise statement in all circumstances; (b) there is no agreed definition of uniform; (c) the uniform “requirement” is less stringent with respect to Special Forces working with indigenous forces or executing a mission of strategic importance; and (d) a law of war violation occurs only where an act is perfidious, that is, done with an intent to deceive, and the act is the proximate cause of killing, wounding, or capture of the enemy.²¹²

Spetsnaz commandos, carrying Russian manufactured arms openly, wearing unmarked-Russian type uniforms and speaking Russian, are clearly not impersonating the Ukrainian military nor are they attempting to blend into the civilian population.²¹³ Their conduct, a regular tactic for a special operations force, is not perfidious as they remain distinguishable members of the Russian military.²¹⁴ Their singular act of using unmarked uniforms does not constitute a violation of the principle of distinction; therefore, the “little green men” maintain the privileges associated with their status as combatants in the Ukrainian-Russian conflict.

typical means by which combatants distinguish themselves from the civilian population, it is not the only means).

211. AP I, *supra* note 8, art. 44(3)(a)(b) (providing that a combatant retains his status if he carries his arms openly during each military engagement and “during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate”).

212. Parks, *supra* note 208, at 541.

213. See Pifer, *supra* note 28 (noting that the “little green men” carried Russian weapons, wore Russian uniforms and were clearly professional soldiers).

214. See Grant & Huntley, *supra* note 210, at 38–39 (discussing the regularity and legality of non-regular uniform use by Special Force units).

C. Ukraine Military Forces

Simultaneously engaged in an international armed conflict with Russia²¹⁵ and a non-international armed conflict with separatist forces,²¹⁶ Ukrainian military members have a different legal status that depends on whom they are fighting.²¹⁷ The international armed conflict triggered by the occupation of Crimea makes the Ukrainian military members, similar to their Russian counterparts, combatants.²¹⁸ The full panoply of rights and duties associated with combatant status are thus conferred on the Ukrainian forces engaged with Russian forces.²¹⁹ The status of these same Ukrainian military members engaged with separatists in eastern Ukraine is more complicated. Combatant status does not exist in a non-international armed conflict,²²⁰ and the term “fighter,” commonly used to refer to both members of the State and non-State armed group, does not legitimize participation in the hostilities.²²¹ In fact, the current law regulating non-international armed conflict is silent with respect to the status of government forces in these internal wars.²²²

This silence allows the Ukrainian government “to be free from international regulation” concerning the status or nature of the actors they employ against the separatists.²²³ As Ukraine is engaged in an internal threat to its sovereignty, its military members are essentially participating in a domestic

215. See *supra* text accompanying notes 110–17 (explaining the existence of the international armed conflict between Ukraine and Russia).

216. See *supra* text accompanying notes 118–23 (discussing the non-international armed conflict currently taking place in eastern Ukraine).

217. See Summers, *supra* note 61, at 10 (noting that the co-existence of an international and non-international armed conflict in the same geographic region is possible).

218. AP I, *supra* note 8, art. 43(2). Again, medical and religious personnel in the Ukrainian military are noncombatants. See SOLIS, *supra* note 130, at 191–94.

219. See AP I, *supra* note 8, art. 43(2) (“Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.”).

220. CIHL RULES, *supra* note 138, r. 3 (noting that combatant status only exists in international armed conflicts). See also *supra* text accompanying notes 164–67 (discussing the irrelevance of status in a non-international armed conflict).

221. See *supra* text accompanying notes 164–67, 181–84 (explaining who “fighter” refers to in a non-international armed conflict and the reasons for adopting the term).

222. See Watts, *Present and Future Conceptions*, *supra* note 85, at 148–49 (“The NIAC status void is even more pronounced with respect to the status of government actors in NIAC.”)

223. *Id.*

law enforcement operation.²²⁴ Ukrainian military members, in the context of the non-international armed conflict taking place in eastern Ukraine, therefore do not have a legal status as defined by international law.²²⁵ It is domestic law, not the status taxonomy used in an international armed conflict that allows Ukrainian military members the legal right to participate in the civil war.²²⁶ This absence of a combatant status, however, does not absolve Ukrainian military members from certain international legal obligations. They remain accountable in international tribunals for their conduct in the hostilities²²⁷ and bound by numerous treaties for the means and methods used against the separatists.²²⁸ Yet international law is limited to regulating the behavior of Ukrainian forces, with the legality of their participation remaining within the purview of the government of Ukraine.²²⁹

224. *Id.*

225. *Id.* Professor Watts states:

Although States have created rules regulating the conduct of their forces in NIAC, no positive international rules limit the nature of persons or organizations governments may employ in NIAC. Nor does the law of NIAC provide any general status for such forces. In fact, government forces' status in NIAC generally can be said to constitute one of the remaining voids of the international laws of war.

Id.

226. *Id.* at 149. Some argue for a distinction-derived rule that limits direct participation in hostilities in a NIAC to armed forces or militia that, in practicality, results in a combatant-civilian status paradigm. See EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 68 (2010). Professor Watts persuasively argues against this idea for logical, structural and practical reasons. See Watts, *Present and Future Conceptions*, *supra* note 85, at 160–64.

227. *Id.* See also NIAC MANUAL, *supra* note 166, at 1 (“This Manual is a guide for behaviour in action during non-international armed conflict.”); Rome Statute, *supra* note 81, art. 8(2)(c)–(f) (expressing jurisdiction over the conduct of NIAC).

228. See, e.g., Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct 10, 1980, 1342 U.N.T.S. 137, *reprinted in* 19 INTERNATIONAL LEGAL MATERIALS 1523 (expanded to cover certain weapons use in a non-international armed conflict).

229. See Watts, *Present and Future Conceptions*, *supra* note 85, at 149–53 (explaining reasons why government forces' status in a non-international armed conflict remains a void in the laws of war).

D. Separatists

The separatists, similar to the Ukrainian military members, are “fighters” in the civil war. Despite this commonality, the separatists are not the legal equal of the Ukrainian military members. Obviously their participation in the conflict is not condoned by the Ukrainian government, leaving them exposed to prosecution for “any acts that violate domestic law, even if they are not violations of the law of armed conflict.”²³⁰ This includes being prosecuted as a domestic criminal for attacking members of the Ukrainian military. Additionally, if captured, the separatists are not entitled to the robust protections provided to a prisoner of war in an international armed conflict, but rather they may be treated as criminals “subject to the domestic penal regime” of Ukraine.²³¹ Their conduct, appearance and claims to sovereignty are simply irrelevant and will not afford them immunity for their actions. Again, it is domestic law that is the relevant “legal source for both treatment obligations and immunities if any arising from participation in a non-international armed conflict.”²³²

Perhaps more immediately consequential to the separatists is their exposure to being targeted by Ukrainian military forces. The separatists—well-armed with Russian weapons, structured in named groups, such as the United Armed Forces of Novorossiia,²³³ and executing coordinated mili-

230. Schmitt, *The Status of Opposition Fighters*, *supra* note 164, at 121.

231. See Watts, *Present and Future Conceptions*, *supra* note 85, at 148 (“[O]pposition fighters captured in NIAC, no matter their appearance or conduct, are likely to be regarded as mere criminals, fully subject to the domestic penal regime of the territorial State.”); Jelena Pejic, *Status of Armed Conflicts*, in *PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 77–78 (Elizabeth Wilmshurst & Susan Breau eds., 2007) (“This coexistence can highlight the sharp legal differences in the two conflicts so that captured soldiers from an intervening state could be entitled to prisoner of war status, but captured rebels would not.”); NIAC MANUAL, *supra* note 166, ¶ 3.7 (discussing due process obligations applicable to domestic prosecutions for behavior in a NIAC). Interestingly, despite possessing the prerogative to prosecute the separatists as domestic criminals, Russian media sources have reported that the Ukrainian military has conducted “prisoner of war” exchanges with the militia members. See, e.g., *Prisoner Swap between Donetsk Militias and Ukrainian Troops to be Resumed Soon*, TASS (Oct. 16, 2014), <http://tass.ru/en/world/754832>.

232. Watts, *Present and Future Conceptions*, *supra* note 85, at 149. International law does afford the separatists the basic protections outlined in Common Article 3 and Additional Protocol II. See generally *supra* text accompanying note 182.

233. “Novorossiia” is a historic concept that refers to the Russian speaking portion of southeast Ukraine. Vladimir Putin used this reference to note that these regions were not part of Ukraine during the tsarist period inferring that this provides a justification for

tary operations²³⁴—constitute an organized armed group.²³⁵ As members of an organized armed group in a non-international armed conflict, the separatists are “treated as analogous to members of the armed forces, and thereby remain targetable even when not participating” in hostilities.²³⁶ While there is some controversy surrounding the question of when an individual is a member of an organized armed group versus a civilian directly participating in hostilities,²³⁷ the actions of the separatists in eastern Ukraine make this more a theoretical question than a practical concern. Wearing uniforms, openly carrying arms, organized into units and employing military tactics, the separatists have most of the characteristics of a regular armed force, making them easily distinguishable from the civilian population.²³⁸ As a result, it is clear that the separatists are “attackable at any time during the period of their membership.”²³⁹

This analysis of the separatists’ legal status is dependent upon the non-international armed conflict not evolving into an international armed conflict. It is again important to highlight that “if the forces of another State intervene on behalf of the opposition, an international armed conflict en-

military action. See Adam Taylor, “Novorossiya,” *the Latest Historical Concept to Worry about in Ukraine*, WASHINGTON POST (Apr. 18, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/04/18/understanding-novorossiya-the-latest-historical-concept-to-get-worried-about-in-ukraine/>.

234. See, e.g., Mauldin, *supra* note 47.

235. See Schmitt, *The Status of Opposition Fighters*, *supra* note 164, at 128–31. Professor Schmitt notes that “not all groups in a battlespace are ‘organized armed groups.’” *Id.* at 128. For the group to meet the criteria of “organized” the group must exhibit a degree of structure and must act in a coordinated fashion. *Id.* at 129–30. To be “armed” the group must have “the capacity to carry out ‘attacks,’ defined in LOAC as ‘acts of violence against the adversary, whether in offence or in defence.’” *Id.* at 131 (citing AP I, *supra* note 8, art. 49).

236. *Id.* at 127.

237. Compare ICRC INTERPRETIVE GUIDANCE, *supra* note 160, at 33 (adopting the notion that an individual is a member of the organized armed group when they have “continuous function for the group involving his or her direct participation in hostilities”), with Watkin, *supra* note 175, at 641, and Michael N. Schmitt, *The Interpretive Guidance*, *supra* note 175, at 5 (criticizing the *Interpretive Guidance* recommendations). This is not an insignificant debate as an individual deemed a civilian is only targetable while they are directly participating in hostilities. See AP II, *supra* note 9, art. 13.

238. See Andrew Roth, *A Separatist Militia in Ukraine With Russian Fighters Holds a Key*, NEW YORK TIMES (June 4, 2014), <http://www.nytimes.com/2014/06/05/world/eur/ope/in-ukraine-separatist-militia-with-russian-fighters-holds-a-key.html> (describing the Voskok Battalion which is the largest separatist militia in Donetsk).

239. See Schmitt, *The Status of Opposition Fighters*, *supra* note 164, at 132.

sues between the State and the State against whom the pre-existing rebellion is under way; the conflict has been internationalized.”²⁴⁰ While it is currently unknown whether Russia is exercising a sufficiently high level of control over the separatists, if the conflict is internationalized, and if the separatists satisfy all the requisite criteria,²⁴¹ they will become combatants similar to the members of other participating armed forces. This, of course, would be of significant consequence as the separatists would gain prisoner of war status and combatant immunity.

E. Ukraine Nationalist Militias

So-called Ukrainian self-defense militias have recently formed in response to what they view as the “ineffectiveness of the Ukraine Armed Forces in the face of pro-Moscow separatists and Russian troops in the country’s southeast.”²⁴² These militias are not equipped or funded by the Ukrainian government,²⁴³ have an independent command structure²⁴⁴ and exist mostly on an ad hoc basis.²⁴⁵ While the Ukrainian government has not called for these groups to disband, and is seemingly appreciative of their efforts,²⁴⁶ the affiliation between the government forces and the self-defense militias is based only upon their common concern to preserve a unified Ukraine. While these self-defense militias are volunteer groups, it is clear they are not controlled by the Ukrainian government and are better viewed as independent actors in the Ukraine conflict.

240. *Id.* at 121.

241. *See supra* text accompanying note 149 (outlining criteria for a militia members to be given combatant status).

242. Jamie Dettmer, *Ukraine Militias Warn of Anti-Kiev Coup*, DAILY BEAST (Nov. 28, 2014), <http://www.thedailybeast.com/articles/2014/11/28/ukraine-militias-threaten-anti-ukraine-coup.html>.

243. *See* Jacob Resneck, *Pro-Ukraine Militias are Forming to Counter the pro-Russia Separatists*, PRI (May 2, 2014), <http://www.pri.org/stories/2014-05-02/pro-ukraine-militias-are-forming-counter-pro-russia-separatists>.

244. *See id.* (discussing preliminary plans to set up a parallel command and control structure for the militias).

245. *See, e.g.*, Andrew Roth, *Ukraine Faces Struggle to Gain Control of Militias, Including Those on its Side*, NEW YORK TIMES (May 23, 2014), http://www.nytimes.com/2014/05/24/world/europe/ukraine-faces-struggle-to-gain-control-of-militias-including-those-on-its-side.html?_r=0.

246. *See* Dettmer, *supra* note 242 (quoting Ukrainian national security spokesman, Andriy Lysenko, as stating in reference to the militias “they provide their own assistance and we are grateful to them for this”).

As an unaffiliated volunteer group participating in the Ukraine civil war, the self-defense militias do not seem to “belong” to a party to the conflict as required by the law of armed conflict,²⁴⁷ and are similar to other peripheral actors on the battlefield, including individually armed civilians and criminal groups. It can be argued that these self-defense militias, who have a common interest with the Ukrainian government in fighting Russia, are adequately connected to the Ukrainian military through their shared ideology. This argument, however, is unpersuasive as the Ukrainian government does not support these groups and has no oversight of their activities. The self-defense militias fighting in Ukraine, not belonging to the Ukrainian military, are therefore not combatants, but rather civilians choosing to take part in the hostilities.²⁴⁸

VI. CONCLUSION

The occupation of Crimea and the civil war in eastern Ukraine, though inextricably linked, remain best viewed as parallel armed conflicts. This conflict classification paradigm allows for battlefield status determinations for those participating in the hostilities and helps to distinguish between those actively engaged in the Ukraine conflict and the civilians living through the war. The law of armed conflict “is predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations.”²⁴⁹ The balance between these countervailing concepts “permeates throughout the entirety of the law ensuring that force is applied on the battlefield in a manner that allows for the accomplishment of the mission while simultaneously taking appropriate humanitarian considerations into account.”²⁵⁰ Clarifying the legal status of the various actors on the Ukrainian battlefields helps to maintain this delicate balance and reinforces the law of armed conflict as an effective regulatory regime.

247. See GC III, *supra* note 8, art. 4(A)(2) (“Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict . . .”).

248. See Schmitt, *The Status of Opposition Fighters*, *supra* note 164, at 122. On a practical note, it is unlikely these groups would be prosecuted for their actions as they are fighting on behalf of the Ukrainian government. See *supra* text accompanying notes 223–29.

249. DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 134, at 16.

250. Shane R. Reeves & Jeffrey S. Thurmner, *Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity-Humanity Balance*, HARVARD NATIONAL SECURITY JOURNAL (June 24, 2013), http://harvardnsj.org/wp-content/uploads/2013/06/HNSJ-Necessity-Humanity-Balance_PDF-format1.pdf.