ARTICLE

#Genocide: Atrocity as Pretext and Disinformation

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This Article addresses the problem of false accusations of genocide. In the past, scholars and lawyers have fretted about the pernicious impact of genocide denial, but false accusations represent the opposite side of the disinformation coin. Instead of denying the existence of a real genocide (as in Holocaust denial), the new accusations falsely accuse a state of genocide when no such genocide occurred. For example, Russia accused Ukraine of genocide against Russian-speaking civilians in Eastern Ukraine and then used that false accusation as a pretext for launching a military invasion of Ukraine. This Article investigates whether international law can, or should, address genocidal accusations that are used as false pretext and disinformation. The answer is a qualified yes, because such accusations are implicitly prohibited by the Genocide Convention and possibly by a broader requirement of good faith and honesty that applies in all international relations.

By way of background, Part I examines international law's approach to disinformation and shows how the major frameworks—sovereignty, self-determination, and human rights—fail to adequately regulate or capture the distinctive harm of false accusations of genocide. Part II then looks at the specific role that the Genocide Convention might play in prohibiting false accusations and how the International Court of Justice might assert jurisdiction over such a dispute. In that analysis, the Article finds the seeds of a larger "axiomatic" principle under general international law that could prohibit false accusations levelled against other states. Part III then addresses the connection between genocidal accusations and the military campaigns that are launched under their banner. Part III concludes that rather than seeing this use of genocide as the natural outgrowth of the late-1990s debates over humanitarian intervention, we should instead see it as a distinct contemporary phenomenon: hybrid warfare and the use of disinformation to support territorial conquest. The reason for this reframing is that prior debates involved the use of real genocides as a justification for intervention, while the current moment involves wholly fictitious inventions of genocide. Finally, Part IV explores how Russia has used its genocidal accusation as a pretext to wage its own genocidal campaign against Ukraine—the ultimate endgame of a perverse form of disinformation that threatens the international legal order in ways that go beyond the prohibition on the use of force.

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INTRODUCTION

The Russian invasion of Ukraine involved multiple strategic components beyond the simple movement of infantry, armored vehicles, and other military assets across an international territorial boundary. These military movements were accompanied by non-military activities that were less visible on the battlefield but were no less essential to the overall strategy of the invasion. This multi-layered approach should not be surprising, since diplomats and scholars have long understood that military activities are supported by non-military components. In recent years, U.S. military strategists, and scholars who write about them, have used the term "hybrid warfare" to describe international conflict across multiple domains, encompassing traditional military engagements, cyber-attacks and cyber-defenses, and political interferences of various kinds.[1] But even stripped of this new label, this general insight regarding the deeper context behind military engagement is not terribly new.[2] In prior generations, diplomats, intelligence analysts, lawyers, and scholars might simply have described this as statecraft.[3]

In excavating the deeper context behind the military strategy of Russia's invasion of Ukraine, some components loom larger than others. One particularly noteworthy—possibly essential—element of the larger strategic campaign is the use of international legal arguments in support of the invasion.[4] In one sense, international legal arguments are always used on the international stage, so their appearance in military conflict is by no means surprising.[5] But the question is which legal arguments are deployed, how, and what impact they have on the larger strategic conflict.

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1. *See*, *e.g.*, Rodrigo Vázquez Beníteza, Kristian W. Murraya, & Pavel Kriz, *The Use of Law as an Instrument of Power in the Context of Hybrid Threats and Strategic Competition*, 5 ARMY LAW. 51, 52 (2021) ("In the context of strategic competition, the challenges posed by hybrid threats—and their materialization in Hybrid Warfare and Grey Zone environments—have blurred the traditional border between peace and war."); H.R. McMaster, U.S. Nat'l Sec. Advisor Address at Atlantic Council (Apr. 4, 2018) (describing hybrid warfare as "a pernicious form of aggression that combines political, economic, informational, and cyber assaults against sovereign nations.").

2. *See* Robert Wilkie, *Hybrid Warfare: Something Old, Not Something New*, 23 AIR & SPACE POWER J. 13, 14 (2009).

3. *See generally* HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 445 (1948).

4. *See* Waseem Ahmad Qureshi, *Lawfare: The Weaponization of International Law*, 42 HOUS. J. INT'L L. 39, 63 (2019) (discussing lawfare as one component of hybrid warfare, especially in the Russian context); Jill I. Goldenziel, *Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare*, 106 CORNELL L. REV. 1085, 1141 (2021) (noting that "[s]ince the Cold War, Russia has spoken out against Western use of international law and called out the West for hypocrisy in using and flouting it" and arguing that "Russia has developed a lawfare strategy to defend itself against these Western actions and also to offensively and proactively achieve its own military goals.").

5. *See generally* ISABEL V. HULL, A SCRAP OF PAPER: BREAKING AND MAKING INTERNATIONAL LAW DURING THE GREAT WAR (2014) (discussing and ultimately demonstrating the role that international law played in great power decision-making during World War I).

Russia's invasion of Ukraine was not simply based on miliary superiority but also based on an argument designed to both legally justify the invasion to an international audience and normalize, to a domestic political audience, the blood and treasure expended on the campaign.[6] To accomplish these twin aims, the Russian legal architecture for the invasion is based primarily on the concept of genocide—a concept with a distinctive rhetorical appeal as a particularly evil threat that sometimes requires extraordinary intervention.[7] Many international lawyers, and certainly the public at large, consider genocide to be "special" as a unique danger to international society, either because it involves the destruction of peoples that have an inherent worth, or because it often involves widescale violence against a civilian population.

One particularly noteworthy element of Russia's invocation of genocide as a defense for its territorial campaign was that it was entirely pretextual.[8] The Kremlin provided no factual foundation for the claim at all; it was, in other words, a complete fiction.[9] Putin stated multiple times that the Ukrainian government had engaged in a genocide against Russian-speaking individuals in Eastern Ukraine, and that the Ukrainian government was overrun with fascists and Nazis.[10] Each of these factual claims was a lie—not just unsupported by evidence but indeed somewhat nonsensical.[11] Then, the Russian government asserted that its invasion of Ukraine was justified as a

6. *See* Boris N. Mamlyuk, *The Ukraine Crisis, Cold War II, and International Law*, 16 GERMAN L.J. 479, 494 (2015) (noting that Russian disinformation is aimed not just at foreign audiences but also its domestic population).

7. For a discussion of the allure of genocide as an exceptional legal category, see Alexandra A. Miller, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 PENN. ST. L. REV. 349, 362 (2003) (arguing that states are more likely to believe that intervention is appropriate or even required if a genocide has occurred).

8. *See* Humeyra Pamuk and Simon Lewis, *U.S. Warns Against Russian False Claims Being Used as Pretext for Ukraine Invasion*, REUTERS (Feb. 16, 2022), https://www.reuters.com/world/europe/us-warns-against-russian-false-claims-being-used-pretext-ukraine-invasion-2022-02-16/ (noting that U.S. Administration officials have warned Russia about using genocide as a pretext for military action against Ukraine).

9. *See* Office of the Spokesperson, *Fact vs. Fiction: Russian Disinformation on Ukraine*, U.S. DEP'T OF STATE (Jan. 20, 2022), https://www.state.gov/fact-vs-fiction-russian-disinformation-on-ukraine/ [hereinafter *State Dep't Fact Sheet*] (specifically describing as "fiction" Russian claims that Ukraine is the aggressor in the conflict).

10. *Id.* at 3 (asserting that "[t]here are no credible reports of any ethnic Russians or Russian speakers being under threat from the Ukrainian government").

11. In a teleconference meeting with representatives from the permanent members of the UN Security Council, President Putin described the Ukrainian government as a "gang of drug addicts and neo-Nazis that have settled in Kiev and that have taken the Ukrainian people hostage." *See* The Kremlin, *Meeting with Security Council Permanent Members*, PRESIDENT OF RUSS. (Feb. 25, 2022), http://en.kremlin.ru/events/president/news/67851. For the U.S. reaction to this speech, see *To Vilify Ukraine, The Kremlin Resorts to Antisemitism*, U.S. DEP'T OF STATE (July 11, 2022), https://www.state.gov/disarming-disinformation/to-vilify-ukraine-the-kremlin-resorts-to-antisemitism/.

response to that genocide, thereby using genocide as a pretext for launching a war of aggression against a strategic adversary along its border.[12]

This is not the first time that a state has made a pretextual assertion of genocide, but the centrality of the genocide argument for Russia's overall strategic effort was particularly noteworthy.[13] Genocide provided a potential justification that was political, diplomatic, moral, and legal, in the sense that Russia argued that its invasion was not an act of aggression at all but rather a lawful act of remediation in the face of Ukraine's illegal campaign of genocide against Russian-speaking individuals in Eastern Ukraine.[14] It allowed the Kremlin to cloak its efforts with the patina of legal legitimacy in an era when international diplomacy and relations is increasingly pursued within the normative discourse of international law.[15] In today's world, the perceived legal legitimacy of military operations is viewed as critical to the success of those military operations.[16]

It is worth asking, why would Putin care whether his invasion was viewed, internationally, as consistent with international law? Indeed, the Kremlin has the military strength to deploy its military assets as it wishes and does not appear particularly swayed by international legal arguments when its behavior is deemed illegal.[17] Why then does the language of

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12. Vladimir Putin, President of Russ., Address by the President of the Russian Federation (Feb. 24, 2022), (transcript available at http://en.kremlin.ru/events/president/news/67843) [hereinafter Putin Address on Ukraine (Feb. 24)] (referring to the "genocide of the millions of people who live there and who pinned their hopes on Russia.").

13. *See* John Reid, *Putin, Pretext, and the Dark Side of the "Responsibility to Protect,"* WAR ON THE ROCKS (May 27, 2022), https://warontherocks.com/2022/05/putin-pretext-and-the-dark-side-of-the-responsibility-to-protect/ (noting that "[e]xpansionist state leaders have long justified invasions or annexations by claiming the responsibility to protect supposedly persecuted favored ethnic groups within another nation's borders" and concluding that "[t]his history is most stark in Central and Eastern Europe, beginning with Hitler and Stalin.").

14. For a response to Putin's invocation of genocide, see Izabella Tabarovsky and Eugene Finkel, *Statement on the War in Ukraine by Scholars of Genocide, Nazism and World War II*, JEWISH J., Feb. 27, 2022 (rejecting "the Russian government's cynical abuse of the term genocide, the memory of World War II and the Holocaust, and the equation of the Ukrainian state with the Nazi regime to justify its unprovoked aggression.").

15. *See* Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L. L. 109, 132 (1995) (describing institutionalism as a school of thought in international relations that argues that the rules and institutions of the global legal order, including formal rules and informal conventions, shape the expectations of state actors and influence their behavior).

16. *See* U.S. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0: JOINT OPERATIONS app. A (Oct. 22, 2018), https://irp.fas.org/doddir/dod/jp3_0.pdf (including among "principles of joint operations" the principle of "legitimacy…which can be a decisive factor in operations" and "is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences"); *see* Thomas E. Ayres, *A United States Perspective*, 110 AM. SOC'Y. INT'L. L. PROC. 257, 263 (2016) (noting that legitimacy was added as a principle in 2011).

17. *See* William Burke-White, *Putin Tried to Break the International Order—It Will Hold Him Accountable*, THE HILL (Mar. 4, 2022), https://thehill.com/opinion/international/596626-putin-tried-to-break-the-international-order-it-will-hold-him/.

international law ripen into a full-blown domain of conflict? The answer, of course, is that neither Russia nor Ukraine is completely alone. Success or failure for either side depends, to a large extent, on how other states react to the conflict.[18] As Lawrence Freedman has written, any comprehensive definition of military power must include "the degree to which a belligerent can mobilize and maintain support for its own cause, both domestically and externally, and undermine that of the enemy, tasks that require constructing compelling narratives…"[19] Third-party states are offering military, intelligence, economic, and diplomatic support to Ukraine—without which the Ukrainian government would surely have been militarily defeated already.[20] That support only occurred because third-party states were extraordinarily motivated to provide it, in part because of their assessment that Russia's behavior was not just morally wrongful, but egregiously *illegal* under international law.[21] So, international legal norms have helped to structure the conversation over what level of support Ukraine should receive and how much effort states should expend in pushing back against Russian behavior.[22]

The international and domestic audiences for international legal argument reveal that information is a crucial domain for warfighting.[23] This is the insight of hybrid warfare.[24] Of course, this is not a new development, as states have always used arguments flowing from international law as a way

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18. *See* Karel Janicek, *By Invading Ukraine, Putin Loses Allies in Eastern Europe*, AP NEWS (Feb. 24, 2022), https://apnews.com/article/russia-ukraine-russia-hungary-prague-czech-republic-dfe9b03ce3553e899da79e4974fd93d7 (noting that "Russia's invasion of Ukraine has shocked the former Soviet satellite states of Central and Eastern Europe, drawing strong condemnation even from the region's most pro-Kremlin politicians.").

19. *See* Lawrence Freedman, *Why War Fails: Russia's Invasion of Ukraine and the Limits of Military Power*, 101 FOREIGN AFF. 10, 12 (2022).

20. *See* Mark C. Cancian, *What Does $40 Billion in Aid to Ukraine Buy?*, CTR. FOR STRATEGIC & INT'L STUD. (May 23, 2022), https://www.csis.org/analysis/what-does-40-billion-aid-ukraine-buy (describing extensive military and other aid to Ukraine).

21. For example, the Council of Europe Congress strongly criticized Russia for violating international law by invading Ukraine. *See* Cong. Loc. & Reg'l Auths., *The Russian Federation's War Against Ukraine*, Declaration 5, 42nd Sess. (2022), https://rm.coe.int/0900001680a5ec3d (referring to invasion as "blatant breach of international law").

22. *See G7 Statement on Support for Ukraine*, GOV'T OF CAN., https://www.international.gc.ca/news-nouvelles/2022/2022-statement-g7-ukraine-declaration.aspx?lang=eng (last modified June 27, 2022) (decrying the attack as a "blatant violation of international law" and a "grave breach of the United Nations Charter" that "seriously undermines the international rules-based system.").

23. *See* Sara Dillon, *The Propaganda Conundrum: How to Control This Scourge on Democracy*, 23 OR. REV. INT'L. L. 123, 135 (2022) ("Information warfare is the most prevalent form of aggressive state behavior in our time."). *But see* Martin C. Libicki, *Cyberspace Is Not A Warfighting Domain*, 8 I/S: J.L. & POL'Y FOR INFO. SOC'Y 321, 325-26 (2012) (arguing against the view that cyberspace is a warfighting domain).

24. *See, e.g.*, Morten M. Fogt, *Legal Challenges or "Gaps" by Countering Hybrid Warfare—Building Resilience in Jus Ante Bellum*, 27 SW. J. INT'L L. 28, 33 (2021) (describing, as one aspect of hybrid warfare, the "use of 'lawfare' in terms of promoting one's own actions as legitimate and opponents' reactions as unlawful").

of justifying their behavior and delegitimizing the behavior of strategic adversaries.[25] But though not new, the Russian pretextual claim of genocide is so brazen, and so universally rejected, that it has caused both international lawyers and diplomats to take notice and ask critical questions about the way that international legal norms can be manipulated in service of a larger disinformation campaign.[26]

But it is not just the international arena that is influenced by the discourse of international law. There is a domestic audience in Russia for this narrative. The Kremlin has used its pretextual argument of a Ukrainian genocide as a tool of domestic disinformation, suggesting to its own population that the special military operation is deserving of support and worthy of collective sacrifice.[27] And the Kremlin has the tools to amplify this argument through effective communication channels, including the RT television network,[28] and covert social-media disinformation campaigns.[29] The combination of the pretextual assertion of genocide, and the media channels to burnish it, has succeeded in convincing a majority of the Russian domestic population of the alleged legitimacy of the military campaign, though a sizable and growing minority opposes it.[30] Through these efforts, the Kremlin has subtly maintained domestic legitimacy and control.

At this point, it is crucial to distinguish two ways of thinking about international law as it relates to disinformation. The first is whether international law can be used as an element of disinformation. The second is whether international law can be used as a solution, in part, to its own manipulation as disinformation. As to this second category, are there tools that international law might bring to bear regarding this behavior?[31] This broader

25. *See id.* (noting that "[n]one of these components of a 'hybrid' threat or warfare is new").

26. *See id.* at 46.

27. *See* Putin Address on Ukraine (Feb. 24), *supra* note 12 (specifically accusing NATO of violating international law and stating that "some Western colleagues prefer to forget them, and when we mentioned the event, they prefer to avoid speaking about international law, instead emphasising the circumstances which they interpret as they think necessary.").

28. *See generally* Mona Elswah & Philip N. Howard, *"Anything that Causes Chaos": The Organizational Behavior of Russia Today (RT)*, 70 J. COMMC'N 623, 625 (2020) (noting that the television network operates using "Soviet-style controls").

29. For a discussion of Russian-backed social media troll farm activities, see Office of the Spokesperson, *Rewards for Justice—Reward Offer for Information on Russian Interference in U.S. Elections*, U.S. DEP'T OF STATE (July 28, 2022), https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-russian-interference-in-u-s-elections/ (offering reward for information regarding Internet Research Agency and Yevgeniy Viktorovich Prigozhin).

30. *See* Claire Parker, *58 Percent of Russians Support the Invasion of Ukraine, and 23 Percent Oppose it, New Poll Shows*, WASH. POST (Mar. 8, 2022), https://www.washingtonpost.com/world/2022/03/08/russia-public-opinion-ukraine-invasion/.

31. For a discussion of this question, see David Goldberg, *Responding to "Fake News": Is There an Alternative to Law and Regulation?*, 47 SW. L. REV. 417, 440 (2018) (discussing the merits of legal regulation versus non-legal regulation); Merten Reglitz, *Fake News and Democracy*, 22 J. ETHICS & SOC. PHIL. 162, 181 (2022) (discussing obligations of democratic institutions to take disinformation); Aziz Z. Huq,

question is directly raised by Russia's pretextual assertion of genocide as a justification for invading Ukraine. One possibility is that international law has no distinctive posture towards false accusations. In other words, international law might conclude that a pretextual claim is not true, but not otherwise condemn it as a violation of a binding norm. So, in the example of Russia's pretextual assertion of genocide, international law might conclude that no genocide occurred, that the use of force was not justified, and that the military campaign was therefore an aggression, but assert nothing more about the pretext. Under this view, international law has nothing more profound to say about using the legal machinery of genocide as a tool of misinformation.

But there is another possibility, which is a more direct normative confrontation with pretextual invocations of genocide, as a distinct problem that international law might specifically condemn. If there is something particularly harmful about false claims of genocide, then perhaps the legal machinery, developed post-World War II to combat the evil of genocide,[32] might outlaw it. Specifically, did Russia perpetrate a legal wrong—i.e., did it violate international law—when it falsely accused Ukraine of genocide? The difference between the two approaches boils down to exonerating Ukraine from having violated international law, versus concluding that *Russia* violated international law by falsely accusing Ukraine of genocide. The former does not logically entail the latter, so the question is whether there is a plausible argument to establish the latter as a separate violation of international law. This Article answers that question in the affirmative, though finding the evidence for that answer requires nuance and subtlety.

This Article grapples with this phenomenon and this larger question, with some notable conclusions. The legal prohibition against genocide, and the legal institutions where such claims can be adjudicated, *can* be marshalled to confront this problem. None of this suggests that the legal machinery can stop pretextual claims of genocide from occurring, but simply that international law has norms regarding this behavior. In developing this account regarding genocide, the Article then asks whether genocide as misinformation is unique under international law, or whether these tools might be generalized and apply to other false arguments or pretextual invocations outside of the genocide context. The legal arguments regarding genocide and disinformation are on firmer ground, given the development of treaty-

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International Institutions and Platform-Mediated Misinformation, 23 CHI. J. INT'L. L. 116, 127 (2022) (discussing avenues for international law to regulate misinformation).

32. *See* Steven R. Ratner, *Labeling Mass Atrocity: Does and Should International Criminal Law Rank Evil?*, 54 WAYNE L. REV. 569, 569 (2008) (noting that genocide was codified as a crime following World War II by the Genocide Convention, following the recognition of the crime by the International Military Tribunal).

based norms prohibiting genocide, so the larger point about international legal misinformation generally is necessarily more speculative and uncertain.

The argument develops in four parts. Part I canvasses the potential legal frameworks that international law can use to regulate disinformation campaigns. Part IA focuses on the principle of sovereignty and the duty of non-intervention, while Part IB outlines the collective right of self-determination as a pathway to prohibiting disinformation campaigns. What is revealed in both inquiries is the limited nature of these arguments; while some disinformation campaigns might be prohibited by these legal frameworks, each one falls short of generating a general prohibition on disinformation. Part IC turns from the international impact of disinformation to the domestic context, focusing on the way that international legal norms, especially pretextual claims of genocide, can be used as a *domestic* tool of disinformation. Putin has used the fictitious claim about a Ukrainian genocide in the Donbas region as a narrative to his own population that both justifies the military action and legitimates the extraordinary domestic power that his regime enjoys over the Russian nation. Maintaining domestic control and support is essential for any war effort.[33] When a state faces existential threats, extraordinary powers, both internationally and domestically, are required to confront it—at least according to the government assuming this power.[34] Part IC assesses the role that International Human Rights Law (IHRL) might play in prohibiting domestic disinformation and war propaganda, even in the absence of foreign harm.

Part II focuses on the false claims of genocide and how such claims should be evaluated under the Genocide Convention and international law generally. There is a nontrivial argument that false claims of genocide constitute "disputes" arising under the Genocide Convention and therefore such legal disputes may be resolved by the International Court of Justice, which has treaty-based jurisdiction to resolve genocide disputes. This theory of the ICJ's jurisdiction entails a broader reading of what is, and is not, prohibited by the Genocide Convention. It suggests the provocative claim that the Genocide Convention codifies a background norm to be truthful regarding genocide and that false claims of genocide violate the Convention. In this way, the Genocide Convention may be read as a treaty-based tool in the new fight against misinformation. Part II then asks whether this genocide-specific obligation can be generalized into a broader international legal obligation to respect the truth, and act in good faith, in all international

33. *See generally* Beatrice De Graaf et al., *Introduction: Shaping Societies for War: Strategic Narratives and Public Opinion*, *in* STRATEGIC NARRATIVES, PUBLIC OPINION AND WAR: WINNING DOMESTIC SUPPORT FOR THE AFGHAN WAR 3 (Beatrice De Graaf et al. eds., 2015).

34. *See generally* OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006).

dealings. If yes, this would represent a profound development in general international law. Objections to this broader theory will be raised and debated, with the conclusion that this broader theory might represent the leading edge of tomorrow's international legal regulation of disinformation, as opposed to a firmly entrenched existing rule of today.

Part III focuses on the connection between invocations of genocide and justifications for military force. In prior conflicts, some international lawyers, and some states, have argued that genocidal attacks justify a military response to alleviate the genocidal threat. Many of these arguments have been pursued under the general label of "unilateral humanitarian intervention," or the idea that in some cases individual states may, consistent with international law, use military force against another state,[35] even in the absence of a claim of self-defense or in the absence of a Security Council referral, the two conditions for lawful military force laid out in the UN Charter.[36] For example, some states have argued that the genocide occurring in the former Yugoslavia justified NATO intervention in the region, even though the Security Council had not authorized the use of military force. This uncomfortable precedent has inspired some scholars to suggest that if Russia is using genocide as a pretext, it is merely lengthening a path first broken by Europe and the United States, which collectively used genocide as a legal pretext for undermining the strict rules regarding jus ad bellum as codified in the UN Charter.[37] Furthermore, some have even gone so far as to suggest that the entire Russian invasion, and the role played by genocide in it, suggests that international law is in crisis because jus ad bellum (and the criminalization of aggression) has taken a back seat to the development of International Human Rights Law and International Humanitarian Law, both of which have allegedly eclipsed the jus ad bellum regime.[38] Part III

35. For a general discussion, see Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 CALIF. L. REV. 1171, 1196 (2009); Paul R. Williams & Meghan E. Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?*, 40 CASE W. RSRV. J. INT'L. L. 97, 98 (2008); George A. Critchlow, *Stopping Genocide Through International Agreement When the Security Council Fails to Act*, 40 GEO. J. INTL. L. 311, 315 (2009) (discussing the need for a new treaty to authorize unilateral humanitarian intervention); Margaret M. DeGuzman, *When Are International Crimes Just Cause for War?*, 55 VA. J. INT'L. L. 73, 75 (2014) (arguing that humanitarian intervention should apply even in cases that fail to qualify as genocide or other international crimes).

36. *See* U.N. Charter art. 39 (authorizing the Security Council to make determinations that a breach or threat to international peace and security exists or has occurred); U.N. Charter art. 42 (authorizing the Security Council to authorize member states to take military action to restore international peace and security); U.N. Charter art. 51 (authorizing military force when an armed attack "occurs").

37. *See generally* Samuel Moyn, *The 'Rules-based International Order' Doesn't Constrain Russia—or the United States*, WASH. POST (Mar. 1, 2022), https://www.washingtonpost.com/outlook/2022/03/01/ukraine-international-order-un/.

38. *See* Ingrid Wuerth, *International Law and the Russian Invasion of Ukraine*, LAWFARE (Feb. 25, 2022), https://www.lawfareblog.com/international-law-and-russian-invasion-ukraine (stating that an "examination of Russia's legal justifications shows that well-meaning (or apparently well-meaning)

analyzes and critically evaluates both of these arguments in order to determine how international law should respond to the problem of genocidal pretext—develop new avenues for adjudicating such claims, as Part II outlined, or discontinue the international "fixation" on human rights, humanitarian conduct in warfare, and especially humanitarian intervention, as the new critics suggest.

Finally, Part IV evaluates one collateral consequence of a pretextual claim of genocide—distraction from real genocides. In the case of Russia and Ukraine, there is a complicated relation between fictitious and real genocides. After arguing that Ukraine committed a genocide, the Kremlin has gone further and articulated its own genocidal justification for a complete annexation of Ukraine, *viz.* that the Ukrainian people do not exist as a people, that they are Russian, that they have no claim to independent statehood and are therefore historically part of Russia.[39] These startling claims, when combined with a military campaign to bring to fruition that destructive vision, suggest that it is the Russian government, not Ukraine, that has come precipitously close to committing genocide in Ukraine or has already crossed that line.[40] The heart of the situation is the unambiguous assertion of genocidal intent—the mens rea for the crime—articulated in full view of the world stage. Part IV evaluates why the Kremlin would be so public in announcing their own genocidal intent in destroying a people who they claim have no legitimate right to exist. The answer, of course, is that articulating their genocidal intent is just a collateral consequence of the overall disinformation campaign described above. It is perhaps the height of irony when a fictitious claim of genocide is used as a cover for a state's own perpetration of genocide.

When pulled together, these diverse strands paint a picture of genocide—as a legal concept—in partial crisis. Used as a pretext for a war of aggression, aimed at justifying at home and abroad Russian military adventurism, and then used as a cover for a real genocide, the Russian invocation of genocide is a disturbing and cynical attempt to weaponize the

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actions by the United States (and others) purportedly designed to promote humanitarian and human rights objectives have eroded international legal norms").

39. *See* Vladimir Putin, *On the Historical Unity of Russians and Ukrainians*, PRESIDENT OF RUSS. (July 12, 2021), http://en.kremlin.ru/events/president/news/66181 [hereinafter Putin, *Historical Unity*] (reiterating his prior statement that "Russians and Ukrainians were one people—a single whole" and explaining that "[t]hese words were not driven by some short-term considerations or prompted by the current political context" and concluding that "[i]t is what I have said on numerous occasions and what I firmly believe").

40. Remarks in an Exchange with Reporters in Des Moines, Iowa, 2022 DAILY COMP. PRES. DOC. 1 (Apr. 12, 2022), https://www.govinfo.gov/content/pkg/DCPD-202200276/pdf/DCPD-202200276.pdf ("[I]t's become clearer and clearer that Putin is just trying to wipe out the idea of even being able to be a Ukrainian… we'll let the lawyers decide internationally whether or not it qualifies [as genocide], but it sure seems that way to me.").

international legal prohibition against genocide. But this Article will do more than simply describe this unfortunate situation: it will also chart the surprising ways that the legal concept of genocide, and the various legal institutions and practices that have developed around it, has fought back against its own misuse. This may provide a roadmap for a more general response to the problem of international misinformation even in cases that have nothing to do with genocide.

I. DISINFORMATION UNDER INTERNATIONAL LAW

In February of 2022, Russian President Vladimir Putin addressed his nation on multiple occasions and outlined his justification for the "special military operation" that he ordered against the territory of Ukraine.[41] During that address, Putin complained bitterly about Ukrainian attacks against Russian-speaking civilians in Eastern Ukraine, stating that "[t]he killing of civilians, the blockade, the abuse of people, including children, women and the elderly, continues unabated" and declared that "there is no end in sight to this."[42] He called this state of affairs a "horror" and a "genocide" against 4 million people and complained that the rest of the world was "ignoring" it.[43] Putin expanded on his allegation of genocide, boldly asserting that the purpose of his invasion was to "protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime," to "demilitarise and denazify Ukraine," and to "bring to trial those who perpetrated numerous bloody crimes against civilians, including against citizens of the Russian Federation."[44] He noted that the invasion was the only way to stop the "atrocity" and "genocide" in the Donbas, because the "millions of people who live there and who pinned their hopes on Russia," were the "main motivating force behind our decision to recognize the independence of the Donbass people's republics."[45]

The problem is that none of these allegations were true. Although there has been a civil war raging in the Eastern Ukraine for several years due to a Russian-funded separatist movement in the Donbas, there is absolutely no evidence that Russian-speaking residents in that region were suffering from a genocide or genocidal treatment.[46] Genocide requires the commission of a predicate offense performed with genocidal intent, i.e., "the intent to

41. *See* Putin Address on Ukraine (Feb. 24), *supra* note 12.

42. Vladimir Putin, President of Russ., Address by the President of the Russian Federation (Feb. 21, 2022), (transcript available at http://en.kremlin.ru/events/president/news/67828) [hereinafter Putin Address on Ukraine (Feb. 21)].

43. *Id.*

44. Putin Address on Ukraine (Feb. 24), *supra* note 12.

45. *Id.*

46. *See State Dep't Fact Sheet*, *supra* note 9.

destroy, in whole or in part, a national, ethnical, racial, or religious group."[47] The relevant predicate offenses include killing, causing serious bodily or mental harm to members of the group, forcibly transferring children from the protected group, inflicting conditions calculated to bring about physical destruction of the group in whole or in part, or imposing measures intended to prevent births within the group.[48] There is no evidence that Ukraine, or its government, engaged in any of these predicate acts with genocidal intent. And putting the legal technicalities of the legal definition of genocide to the side, there is no evidence that the Ukrainian government and its security forces have engaged in the intentional targeting of Russian-speaking civilians that would constitute either a crime against humanity or a systematic violation of the laws of war.[49]

Given the extraordinary concern over disinformation, one could be tempted to assume that its regulation and prohibition under international law is well studied, well understood, and settled. While it is well studied and arguably well understood, its legal treatment is far from settled. The goal of Part I is to explore the general rules of public international law pertaining to disinformation. Part IA examines the principle of sovereignty to determine whether disinformation campaigns violate a prohibition against unlawful interferences against sovereignty. Part IB examines the right of self-determination and the circumstances under which a disinformation campaign might violate that collective right. Finally, Part IC examines the role of human rights law to determine whether domestic disinformation campaigns might violate that body of law. Each of these legal principles are implicated by disinformation campaigns, though none of them capture the distinctive harm associated with the Russian disinformation campaign against Ukraine. More importantly, none of these legal arguments are ones that Ukraine may assert before the International Court of Justice due to jurisdictional obstacles. The task of identifying a legal argument cognizable before the International Court of Justice will be left for exploration in Part II.

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47. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 [hereinafter Genocide Convention]. For a discussion of the issues, see Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 AM. J. INT'L. L. 369, 384-85 (1984).

48. Genocide Convention, *supra* note 47, art. II.

49. *See State Dep't Fact Sheet*, *supra* note 9 ("There are no credible reports of any ethnic Russians or Russian speakers being under threat from the Ukrainian government. There are, however, credible reports that in Russia-occupied Crimea and in the Donbas, Ukrainians face suppression of their culture and national identity and live in an environment of severe repression and fear. In Crimea, Russia forces Ukrainians to assume Russian citizenship or lose their property, their access to healthcare, and their jobs. Those who peacefully express opposition to Russia's occupation or control face imprisonment on baseless grounds, police raids on their homes, officially sanctioned discrimination, and in some cases torture and other abuses. Religious and ethnic minorities are investigated and prosecuted as 'extremists' and 'terrorists.'").

A. Disinformation as Sovereignty Violation

The first option for evaluating disinformation is to consider it an illegal violation of another state's sovereignty, i.e., as an illegal infringement of what international lawyers refer to as the *domaine réservé* of the victim state.[50] Formally, this rule is usually described as a prohibition against illegal "intervention," also known as the "non-intervention" rule.[51] For example, some international lawyers concluded that the Russian interference in the 2016 election constituted a violation of sovereignty.[52] But as the following analysis demonstrates, there are multiple reasons why this paradigm fails to condemn most forms of disinformation.

International law generally forbids territorial infringements by military forces. Even non-military territorial infringements are presumptively illegal.[53] The more complicated sovereignty violations involve no meaningful territorial infringements—in which case the conduct must be evaluated to separate the lawful and unlawful violations of state sovereignty.[54] Clearly, it would be absurd if every action that influences the sovereignty of another state violated international law; in today's interconnected world, almost everything that a state does on the world stage has an impact on other states, but that impact alone is not a conclusive indicium of illegality. To separate the lawful from the unlawful, international law generally requires that the conduct have some coercive element to it.[55] So, for example, the ICJ concluded in *Nicaragua v. United States* that U.S. naval mines in the harbors of

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50. *See* William Ossoff, *Hacking the Domaine Réservé: The Rule of Non-Intervention and Political Interference in Cyberspace*, 62 HARV. INTL. L.J. 295, 297 (2021); Diane P. Wood et al., *The Internationalization of Domestic Law: The Shrinking Domaine Réservé*, 87 AM. SOCY. INTL. L. PROC. 553, 553 (1993).

51. *See* Stephen Townley, *Intervention's Idiosyncrasies: The Need for A New Approach to Understanding Sub-Forcible Intervention*, 42 FORDHAM INTL. L.J. 1167, 1170 (2019) (noting disputes over the principle's vagueness or precision); Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT'L L. 345, 345 & n.1 (2009); Duncan Hollis, *The Influence of War; The War for Influence*, 32 TEMP. INT'L COMP. L.J. 31, 39-40 (2018) (noting difficulties in application of the principle of non-intervention).

52. *See, e.g.*, Steven Wheatley, *Foreign Interference in Elections Under the Non-Intervention Principle: We Need to Talk About "Coercion,"* 31 DUKE J. COMP. & INTL. L. 161, 196 (2020) (concluding that "sustained disinformation campaigns are unlawful where the objective is to frustrate the target state's capacity for meaningful democratic deliberation" and "where there is evidence that a foreign power is using sock puppets, such as individuals pretending to be local citizens, and spreading disinformation, this clearly violates the non-intervention rule"); Steven J. Barela, *Cross-Border Cyber Ops to Erode Legitimacy: An Act of Coercion*, JUST SECURITY (Jan. 12, 2017), https://www.justsecurity.org/36212/cross-border-cyber-ops-erode-legitimacy-act-coercion/.

53. *See* Note, *International Law and Military Operations Against Insurgents in Neutral Territory*, 68 COLUM. L. REV. 1127, 1127 (1968) (noting that "[i]t is well established that an infringement upon the territory of a sovereign state is an illegal violation of its territorial integrity").

54. For a discussion of the relationship between legitimate humanitarian intervention and sovereignty, see Hawa K. Allan, *Paradoxes of Sovereignty and Citizenship: Humanitarian Intervention at Home*, 20 CUNY L. REV. 389, 402 (2017).

55. For a discussion of the coercion requirement, see Wheatley, *supra* note 52, at 171.

Nicaragua were illegal because the conduct was designed to coerce the Nicaraguan government into changing its policy.[56] In the absence of coercion, it is difficult to establish a prohibited intervention against another state.[57]

There is one possible exception to the coercion requirement. The *Tallinn Manual* concluded that a state violates international law when it engages in cyber-behavior that "usurps" an inherently governmental function from the victim state.[58] So, the classic example would be a cyber-attack that targets election voting machines and either renders them inoperable or changes their vote tabulation results.[59] This would constitute a usurpation of an inherently governmental function because conducting an election is a key governmental function in a democratic society.[60] By disrupting that process by directly interfering in the tabulation of votes, the *Tallinn Manual* and other sources suggest that a violation of international law has occurred.[61]

Some scholars have also argued that disinformation campaigns may violate a "stand-alone" principle of sovereignty.[62] This would be in addition to the "non-intervention principle" just described. The existence of a stand-alone principle of sovereignty is hotly debated, with some state officials and scholars opining that there is no such rule,[63] or classifying it as a broad

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56. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 205 (June 27) ("A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.").

57. *See* Wenqing Zhao, *Cyber Disinformation Operations (CDOs) and A New Paradigm of Non-Intervention*, 27 U. C. DAVIS J. INTL. L. & POL'Y 35, 54 (2020) (noting that cyber disinformation operations are "not currently considered coercive, and therefore are unlikely to be covered by the customary international law of non-intervention").

58. *See* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 23 (Michael M. Schmitt & Liis Vihul eds., 2017) [hereinafter TALLINN MANUAL 2.0].

59. *Id.* at 22 (referring to "changing or deleting data such that it interferes with the delivery of social services, the conduct of elections, the collection of taxes, the effective conduct of diplomacy, and the performance of key national defence activities").

60. *See* Michael N. Schmitt, *"Virtual" Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law*, 19 CHI. J. INTL. L. 30, 45 (2018) (noting that "a paradigmatic example of an inherently governmental function is the holding of elections").

61. TALLINN MANUAL 2.0, *supra* note 58, at 22.

62. *See, e.g.*, Sean Watts & Theodore Richard, *Baseline Territorial Sovereignty and Cyberspace*, 22 LEWIS & CLARK L. REV. 771, 794 (2018) ("No treaty comprehensively defines territorial sovereignty or expresses it as a stand-alone international legal concept. It is chiefly a creature of customary international law derived from the general and consistent practices of States, carried out from a sense of legal duty or obligation."); TALLINN MANUAL 2.0, *supra* note 58, at 17 (listing as rule 4, "[a] State must not conduct cyber operations that violate the sovereignty of another State."); Michael N. Schmitt & Liis Vihul, *Respect for Sovereignty in Cyberspace*, 95 TEX. L. REV. 1639, 1647 (2017) (arguing that some cyber-operations may violate sovereignty as a "primary rule" of international law, though without specifically discussing influence operations or disinformation).

63. *See* Jeremy Wright, UK Att'y Gen., Cyber and International Law in the 21st Century, Address at Chatham House Research Event (May 23, 2018) (transcript available in official government speech archives located at www.gov.uk/government/speeches).

principle but not a rule,[64] or rejecting it if it is interpreted as being more restrictive than non-intervention,[65] or asking whether the principle of sovereignty is basically the non-intervention rule but under a different label.[66] Deciding among these various options is not important right now. The key point is that if there is a stand-alone principle of sovereignty, there is little evidence that the criteria for finding violations of that stand-alone principle are that much different for finding violations of the principle of non-intervention.[67] If the stand-alone principle of sovereignty was more prohibitive than the non-intervention principle, then there would be nothing for the non-intervention principle to do. The non-intervention principle would be useless because it would be swamped by the stand-alone principle of sovereignty, which would do all the legal work in any analysis. This reason alone should make us suspicious that there is some mysterious stand-alone principle of sovereignty which is more prohibitive than the already well-established non-intervention principle.

When applying the non-intervention principle to the Kremlin's disinformation campaign about Ukraine, it is critical to evaluate the extraterritorial impact of the disinformation. There was a foreign audience for the Kremlin's disinformation campaign and a transboundary harm—though the latter came more from the military invasion than it did from the actual disinformation. There is also a strong case for concluding that the disinformation had an extortionary aspect, since Russia's disinformation campaign was coupled with a military campaign designed to bend the will of the Ukrainian government to Russia's desired outcome.[68] Essentially, the goal of Russia's state policy was to force Ukraine to cede control of Eastern

64. *See* Henning Lahmann, *On the Politics and Ideologies of the Sovereignty Discourse in Cyberspace*, 32 DUKE J. COMP. & INTL. L. 61, 91 (2021) (suggesting that the principle of sovereignty may be an "abstract principle" rather than a rule).

65. *See* Oona A. Hathaway, Preston J. Lim, Alasdair Phillips-Robins, & Mark Stevens, *The Covid-19 Pandemic and International Law*, 54 CORNELL INTL. L.J. 151, 214 (2021) (noting that "the stand-alone sovereignty argument is not widely accepted").

66. *See* Dan Efrony & Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice*, 112 AM. J. INTL. L. 583, 645 (2018) (expressing uncertainty about the classification of the principle of sovereignty as the non-intervention rule under a different label).

67. *See* Hathaway et al., *supra* note 65, at 215 (noting that "[s]ome commentators have attempted to save the idea of sovereignty-as-rule by exempting *de minimis* territorial intrusions").

68. *See* Samuel Charap, *Moscow's Calibrated Coercion in Ukraine and Russian Strategic Culture*, GEORGE C. MARSHALL EUROPEAN CENTER FOR SECURITY STUDIES: SECURITY INSIGHTS, no. 63, Sept. 2020, https://www.marshallcenter.org/sites/default/files/files/2020-09/PDF_SI%2363_v3.pdf (defining and describing the concept of "calibrated coercion" to explain Russia's state policy towards Ukraine); Ihor Hurak & Paul D'Anieri, *The Evolution of Russian Political Tactics in Ukraine*, 69 PROBS. POST-COMMUNISM 121, 121-32 (2022) (discussing coercion among other tactics); Ralph Janik, *Putin's War against Ukraine: Mocking International Law*, EJIL: TALK! (Feb. 28, 2022), https://www.ejiltalk.org/putins-war-against-ukraine-mocking-international-law ("Behind the rhetorical masquerade of self-defense and protecting Russians in the East of Ukraine are ambitions to extort concessions by Ukraine to stay outside of NATO. Any such agreement with Ukraine would, however, be invalid due to the preceding coercion (see Article 52 Vienna Convention on the Law of Treaties).").

Ukraine to Russia,[69] or even sovereign control over the entire country, or face invasion and existential destruction. Putin made no secret of these demands—in fact, he made them publicly.[70] That is extortion *par excellence*.

But the extortionary aspect of Russia's disinformation campaign against Ukraine only comes into sharp focus once it is combined with its military cousin. When viewed in isolation without the military conduct, the disinformation itself is denuded of its extortionary impact. Viewing the disinformation campaign in pure isolation thus complicates the question of its illegality under international law, at least when evaluated under the principle of non-intervention. This is a common assessment for disinformation campaigns—the lack of an extortionary element prevents other states from condemning the behavior as illegal under international law.[71] For example, Russia's cyber-interference in the U.S. political system, including the elections of 2016, 2018, and 2020, constituted transboundary harms but arguably lacked an element of extortion.[72] In fact, President Barack Obama publicly criticized Russia's interference in the 2016 election but called it a violation of established "norms" of international relations and specifically declined to refer to it as a violation of international law.[73] Also, the Obama administration's penalties imposed on Russia were mostly styled as retorsions rather than countermeasures, again because of uncertainty over whether the interference violated international law.[74] The most likely legal explanation for the

69. *See* Eray Alim, *"Decentralize or Else": Russia's Use of Offensive Coercive Diplomacy against Ukraine*, 182 WORLD AFFS. 155, 157-82 (2020).

70. *See* Putin Address on Ukraine (Feb. 24), *supra* note 12.

71. Discussing this issue, see Manuel Rodriguez, *Disinformation Operations Aimed at (Democratic) Elections in the Context of Public International Law: The Conduct of the Internet Research Agency During the 2016 US Presidential Election*, 47 INTL. J. LEG. INFO. 149, 190 (2019) (arguing that "[s]tates that are victims of such disinformation operations need to clearly define such acts as internationally wrongful (for instance, the Obama administration and the Trump administration have both failed to do so)").

72. *See* Jens David Ohlin, *Did Russian Cyber Interference in the 2016 Election Violate International Law?*, 95 TEX. L. REV. 1579, 1592 (2017) (arguing that "there are substantial impediments to concluding that the Russian hacking in the 2016 election constituted illegal coercion"); William Banks, *State Responsibility and Attribution of Cyber Intrusions After* Tallinn 2.0, 95 TEX. L. REV. 1487, 1511 (2017) ("Because it is unclear whether the Russian interference in the U.S. elections amounted to the coercion that is necessary to establish an international law violation, the Putin government could and did act with relative impunity."). *But see* Mohamed S. Helal, *On Coercion in International Law*, 52 N.Y.U. J. INTL. L. & POL. 1, 67 (2019) (arguing that Russia's alleged interference in the U.S. presidential election satisfies this first prong of the test).

73. *See* Statement by the President on Actions in Response to Malicious Cyber Activity and Harassment by the Russian Government, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 29, 2016), https://www.govinfo.gov/content/pkg/DCPD-201600883/pdf/DCPD-201600883.pdf.

74. *See, e.g.*, Christina Lam, *A Slap on the Wrist: Combatting Russia's Cyber Attack on the 2016 U.S. Presidential Election*, 59 B.C.L. REV. 2167, 2183 (2018) (discussing use of retorsions under international law).

reticence to call Russian interference illegal was the lack of an extortionary element to the interference.[75]

In conclusion, states can be found responsible under international law for interfering with another state's sovereignty when there is a transboundary harm, a violation of the victim state's *domaine réservé*, and either extortion of the victim state or usurpation of one of its traditional governmental activities.[76] While these criteria are not universally accepted, they are widely endorsed as appropriate yardsticks for determining whether cyber-activities, including disinformation campaigns, violate the sovereignty of foreign states. Given these doctrinal limitations, it is important to evaluate other applicable international rules that may prohibit disinformation campaigns.

B. Disinformation as Self-Determination Violation

In other work, I have argued that the Russian interference in the 2016 election was illegal because it violated the United States' right of self-determination, not because it violated the sovereignty of the United States.[77] Although this position has gained considerable support, its application to concrete cases is limited.[78] As this Part will demonstrate, interference in elections may violate the right of self-determination,[79] but it is hard to generalize this legal prohibition in such a way that it would widely prohibit disinformation generally. It is, and remains, a niche legal framework for very specific circumstances.

The right to self-determination is widely recognized as a core right of international law, codified in multiple treaties and conventions, and certainly elevated to jus cogens status.[80] It is explicitly referred to in the International

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75. For a discussion of the decision-making of the Obama Administration on this issue, see Michael N. Schmitt, *Foreign Cyber Interference in Elections*, 97 INT'L L. STUD. 739, 762 (2021) (defining retorsion as "an act that, albeit unfriendly, does not violate international law," noting that "the Obama administration imposed sanctions, expelled 'diplomatic' personnel, and closed Russian facilities in response to Russia's election meddling" and concluding that "[b]ecause retorsion involves acts that international law does not prohibit, a State may engage in it without establishing that the underlying activities violate its international legal rights" and "[t]his may be why the Obama administration elected that course of action.").

76. *See generally* Elizabeth K. Kiessling, *Gray Zone Tactics and the Principle of Non-Intervention: Can "One of the Vaguest Branches of International Law" Solve the Gray Zone Problem?*, 12 HARV. NAT'L SEC. J. 116, 159 (2021) (noting that "[b]ecause the principle of non-intervention seeks to protect a state's right to 'decide freely' matters of domestic affairs, the lack of conclusive evidence of the provoking state's intent to subvert this freedom of choice would make claims under the principle difficult, though not impossible").

77. Ohlin, *supra* note 72, at 1595.

78. For a more full-length treatment of the theory, see generally JENS DAVID OHLIN, ELECTION INTERFERENCE: INTERNATIONAL LAW AND THE FUTURE OF DEMOCRACY (2020).

79. *Id.* at 116.

80. *See* Tekau Frere et. al., *Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati*, 129 YALE L.J. FORUM 648, 649 (2020) (concluding that the "right of

Covenant on Civil and Political Rights (ICCPR),[81] the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[82] and the UN Charter.[83] Indeed, it is the only human right that is explicitly codified in all three documents, which provides some indication of its centrality within public international law.[84]

Self-determination was considered a preeminent right during the era of decolonization because it grounded the right of territories and possessions to demand and negotiate new forms of political association, up to and including secession, independence, and internationally recognized statehood.[85] The international community uniformly rejected the idea that imperial powers could control, without consent, territories in distant lands and could govern these territories without the popular consent of the people on those territories. Because of the right of self-determination, many states renegotiated their relationship with these territories, with the result of either granting independence or negotiating new political arrangements on more equal terms.[86]

But since that time, the right has largely slid into irrelevance,[87] despite the noble efforts of some international lawyers to resurrect it.[88] The reluctance of some international lawyers to deal with the right of self-determination can be traced to multiple factors. First, some lawyers believe that the right of self-determination has little application now that the process of decolonization is largely complete.[89] Second, and relatedly, most lawyers

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peoples to self-determination is a fundamental right in international law, amounting to a *jus cogens* norm").

81. International Covenant on Civil and Political Rights art. 1, *opened for signature* Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

82. International Covenant on Economic, Social and Cultural Rights art. 1, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

83. *See* U.N. Charter art. 1, ¶ 2 (describing as one purpose of the United Nations: "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace").

84. *See also* African (Banjul) Charter on Human and Peoples' Rights art. 20, *adopted* June 27, 1981, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

85. *See* Dr. Mohotaj Binte Hamid & Dr. Bruno Zeller, *Right to Self-Determination: Extended Roles of the United Nations Through the Decolonization Process*, 42 HOUS. J. INTL. L. 479, 490 (2020) (stating that "[t]he right to self-determination allows people of the colonized territory to choose their political status and to determine their own form of economic, social and cultural development free from outside interference").

86. *Id.* at 491.

87. *See* Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 STAN. J. INTL. L. 255, 257 (1996) (arguing that "[i]t is not simply that the parties have ignored international law, but that the international law of self-determination itself has become hopelessly confused and anachronistic").

88. *See generally* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995).

89. *See* Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 EMORY INTL. L. REV. 133, 146 (1995) ("By placing the right to self-determination firmly in the context of colonialism, the resolution defines self-determination as a

assume that once a people gain statehood, the right to self-determination is largely irrelevant because it recedes into the background and gets replaced by the protections of state sovereignty.[90] Third, the right of self-determination has been hampered by its relative proximity to the concept of peoples and nations, who enjoy the right of self-determination. Compared with the concept of statehood, which is well-understood under international law, and even subject to its own treaty (the Montevideo Convention),[91] peoples and nations are frustratingly indeterminate and vague.[92] Most lawyers would prefer to avoid any discussion of peoples and nationhood, and by extension, the idea of self-determination.

Despite this reluctance, though, it remains the case that self-determination is a core collective right, and it provides meaningful guidance for understanding disinformation in the context of election interference. Elections are the mechanism for democratic societies to select their governmental representatives.[93] In a deeper sense, elections are the mechanism by which societies determine their own destiny—i.e., selecting among competing visions for the future and deciding how to implement that vision. When a foreign state interferes in another state's election by, for example, spreading disinformation specifically intended to alter the outcome of that election, that conduct violates the target state's collective right of self-determination.[94] Several states, including Russia, China, and Iran, have interfered in foreign elections by using social media troll farms to produce or amplify divisive conduct.[95] Given the low cost associated with creating these social media

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right to decolonization."); Jerome Wilson, *Ethnic Groups and the Right to Self-Determination*, 11 CONN. J. INTL. L. 433, 462 (1996) (arguing that "[t]he United Nations system achieved this political result by refusing to recognize the sub-state interpretation of self-determination outside the colonial context").

90. *See* Nicholas Tsagourias, *Electoral Cyber Interference, Self-Determination, and the Principle of Non-intervention in Cyberspace*, *in* GOVERNING CYBERSPACE: BEHAVIOR, POWER AND DIPLOMACY 45, 51-52 (Bibi van den Berg & Dennis Broeders eds., 2020) (suggesting that self-determination and non-intervention flow from the same basic legal architecture); Patrick C. R. Terry, *Voting by Proxy-Meddling in Foreign Elections and Public International Law*, 29 IND. J. GLOB. LEG. STUD. 69, 74 (2022) (rejecting self-determination as a framework because state interests are protected by the principle of non-interference once a state is created but agreeing that some forms of election interference are illegal under international law because deception can qualify as a form of coercion in some circumstances).

91. Convention on the Rights and Duties of States (Montevideo Convention), *signed* Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934). For a discussion, see Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L. L. 403, 457 (1999).

92. *See* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INTL. L. 1, 2 (1993) (recognizing that "no contemporary norm of international law has been so vigorously promoted or widely accepted" but lamenting that the "right remains as vague and imprecise as when it was" first announced).

93. *See* Amy E. Eckert, *Free Determination or the Determination to Be Free? Self-Determination and the Democratic Entitlement*, 4 UCLA J. INTL. L. & FOREIGN AFF. 55, 59 (1999) (noting the view that "the right to self-determination forms the foundation of the right to democracy").

94. *See* OHLIN, *supra* note 78, at 97-104.

95. *See, e.g.*, Daniel Mack, *An Era of Foreign Political Interference: Impulsive, Overcompensation of Australia, and A Comparison of Legislative Schemes with the United States*, 34 EMORY INTL. L. REV. 367, 369 (2020);

troll farms, a state can have a measurable impact for a relatively modest financial investment, especially compared with other modes of statecraft.[96]

Social media disinformation is often pursued covertly.[97] States rarely announce to the outside world that they are creating troll farms to interfere in another state's election.[98] Nor do the social media posts produced by these troll farms identify themselves as being written by Russian-speaking individuals located in Russia.[99] In fact, many of these posts are written surreptitiously to conceal the identity of the author.[100] The impact of the disinformation is negated if readers or viewers are aware of the poster's identity. The impact is only realized if viewers or readers interpret the poster as a domestic commentator, so the posts will often select handle names, profile pictures, and colloquial expressions to provide the impression that they represent home-grown activism, rather than foreign government sponsored activity.[101] The covert nature of the disinformation campaign distinguishes the activity from governments who issue formal statements urging foreign governments, or their voters, to adopt a particular policy or course of action. Such statements do not compromise the collective right of self-determination, whereas covert social-media disinformation precludes the possibility that an election will faithfully reflect the will of the electorate. Instead, the election risks expressing the will of the foreign state that has intervened in the election.

By intervening in the 2016 and 2020 U.S. elections, the Russian government violated the collective right of self-determination.[102] There were troll farms operated by the Internet Research Agency (IRA) that produced or spread social media postings viewed by millions of users that deepened divisions and discouraged some voters from participating in the election, all in the hopes of swaying the election in a direction that would be helpful to Russian strategic interests.[103] But it should be clear from the above

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Todd Carney, *Establishing A United Nations Convention to Stop Foreign Election Interference*, 17 LOY. U. CHI. INTL. L. REV. 21, 45 (2021) (referring to China and Iran).

96. *See* CHRISTINA NEMR & WILLIAM GANGWARE, WEAPONS OF MASS DISTRACTION: FOREIGN STATE-SPONSORED DISINFORMATION IN THE DIGITAL AGE 24 (Rhonda Shore & Ryan Jacobs eds., 2019) (noting the success of recent state-sponsored disinformation campaigns over social media).

97. *See* Michael R. Sinclair, *The Rising Dragon and the Dying Bear: Reflections on the Absence of a Unified America from the World Stage and the Resurgence of State-Based Threats to U.S. National Security*, 46 SYRACUSE J. INTL. L. & COM. 115, 154 (2018) (describing Russian interference as covert activity).

98. *See* Kristen E. Eichensehr ed., *Government Agencies and Private Companies Undertake Actions to Limit the Impact of Foreign Influence and Interference in the 2020 U.S. Election*, 115 AM. J. INTL. L. 310, 312 (2021) (describing U.S. response to covert activities, including Treasury Department sanctions).

99. *See* ROBERT S. MUELLER III, DEPARTMENT OF JUSTICE SPECIAL COUNSEL, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 27 (2019) [hereinafter SPECIAL COUNSEL REPORT].

100. *Id.* at 22-28.

101. *Id.*

102. *See* OHLIN, *supra* note 78, at 104.

103. *See* SPECIAL COUNSEL REPORT, *supra* note 99, at 25.

paragraphs that this legal conclusion is limited to the election interference context.[104] It cannot be reformulated to produce a general theory of disinformation. Disinformation more broadly will not necessarily violate the collective right of self-determination.

This is especially true if one considers the Russian disinformation campaign regarding Ukraine. If Russia spread disinformation during a Ukrainian political campaign, that would certainly violate the right of self-determination.[105] For example, Russia may be spreading disinformation targeting residents in Eastern Ukraine to encourage them to support a civil war there and to encourage them to welcome Russian military forces as liberators.[106] But Russian lies about a fictitious genocide in Eastern Ukraine have also targeted *other* audiences; Russia has lied about a supposed Ukrainian genocide to both an international and Russian audience.[107] The Russians have focused on an international audience because they hope to legitimate their military activities there as consistent with international law and established norms of international relations.[108] The Russians have also focused on a domestic audience because the Russian government needs to justify the invasion to its own domestic population as a way of consolidating and enhancing its own legitimacy.[109] But this pretextual assertion of genocide is not about self-determination and certainly has little to do with elections. If international law prohibits this disinformation campaign, it will do so under a different rubric.

C. Disinformation as Internal Human Rights Violation

As opposed to the prior two frameworks, which mostly focused on transnational harm, disinformation can also have a domestic component. A

104. *Cf.* OHLIN, *supra* note 78, at 102.

105. *Id.*

106. *See* META, QUARTERLY ADVERSARIAL THREAT REPORT (Aug. 2022), https://about.fb.com/wp-content/uploads/2022/08/Quarterly-Adversarial-Threat-Report-Q2-2022.pdf (discussing shutdown of accounts emanating from Russian troll farm spreading disinformation about Ukraine).

107. *See Disinformation About Russia's invasion of Ukraine - Debunking Seven Myths spread by Russia*, DELEGATION OF THE EUROPEAN UNION TO THE PEOPLE'S REPUBLIC OF CHINA (Mar. 18, 2022), https://www.eeas.europa.eu/delegations/china/disinformation-about-russias-invasion-ukraine-debunking-seven-myths-spread-russia_en?s=166 (concluding that allegations of genocide committed in eastern Ukraine against Russian-speaking individuals by the government of Ukraine have been "unequivocally debunked").

108. *See* Marc Weller, *A Perversion of Both the Facts and the Law: Russian Attempts to Invoke International Law Dismantled*, UNIV. OF CAMBRIDGE (Mar. 9, 2022), https://www.cam.ac.uk/stories/weller-ukraine (noting, and debunking, Russia's attempt to justify invasion on the basis of humanitarian intervention).

109. For a discussion of how disinformation is used within Russia, see Iuliia Alieva, J.D. Moffitt & Kathleen M. Carley, *How Disinformation Operations Against Russian Opposition Leader Alexei Navalny Influence the International Audience on Twitter*, 12 SOC. NET. ANALYSIS & MINING 79 (2022).

government can tell lies to its own population.[110] This dimension of the disinformation dilemma is less obviously a target for regulation by public international law since the gravamen of that body of law is typically transnational relations between sovereign states. The internal impact of disinformation is less likely to cause a disruption to international relations or generate an international dispute, but it is no less likely to be dangerous or worthy of sustained scholarly attention.

While it was once true that public international law focused almost entirely on conduct producing transnational harm, that portrait of the field is mostly outdated.[111] International law's focus now includes the internal behavior of states towards their own citizens.[112] Gone are the days when such internal conduct could be dismissed as the sovereign prerogative of a government, entirely free from outside criticism or regulation. In the place of this laissez faire attitude, human rights law now constrains how states act towards their own citizens.[113] (Similarly, humanitarian law restricts how a state might act towards its own citizens during a rebellion or civil war, though such rules might be less codified than the rules applicable during an international armed conflict.)

Human Rights Law could have a major role to play in prohibiting disinformation in the domestic context.[114] For example, consider the impact of the Kremlin's misinformation about the rationale for the war in the Ukraine. Certainly, one goal of the misinformation campaign is to influence international audiences in the hopes that they will become more sympathetic to the Russian view of the military operation. But an even more salient goal is to influence the Russian domestic political conversation and thereby consolidate Putin's control over the domestic population.[115] There are dual audiences for the disinformation.

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110. *See* Freek van der Vet, *Spies, Lies, Trials, and Trolls: Political Lawyering Against Disinformation and State Surveillance in Russia*, 46 L. & SOC. INQUIRY 407, 410, 413-14 (2021) (discussing disinformation as political control in Russia, including through social media).

111. *See* Ryan Liss, *A Right to Belong: Legal Protection of Sociological Membership in the Application of Article 12(4) of the ICCPR*, 46 N.Y.U. J. INTL. L. & POL. 1097, 1104 (2014) (noting that initially "international regulation was aimed at avoiding conflicting grants of nationality by states and the disputes that arose therefrom… [however] recent developments demonstrate a trend toward regulation concerned with the interests of individuals").

112. *See* Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INTL. L.J. 237, 248-50 (1998) (noting transition of international law from a system that was deferential to state conduct to one that scrutinizes internal behavior, though remnants of the prior view still haunt the system).

113. *See* Beth Stephens, *Accountability Without Hypocrisy: Consistent Standards, Honest History*, 36 NEW ENG. L. REV. 919, 922 (2002) (stating that "international norms now govern a state's treatment of its own citizens").

114. *See* Barrie Sander, *Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of A Human Rights-Based Approach to Content Moderation*, 43 FORDHAM INTL. L.J. 939, 966-68 (2020) (discussing a human rights law approach to the disinformation problem); *see also* Michael N. Schmitt, *Foreign Cyber Interference in Elections*, 97 INT'L L. STUD. 739, 755 (2021).

115. *See* Alieva et al., *supra* note 109, at 79.

The Kremlin has spent years honing the distribution channels needed to spread disinformation domestically. There are few truly independent media organizations in Russia and most residents get their news from Russia Today, also known as the RT television network.[116] Programming on the RT network has consistently provided airtime to Putin's view of the conflict and echoed his fictitious claims about Ukrainian mistreatment of Russian-speaking residents in the Donbas region.[117] The disinformation strategy on RT is subtle and not always obvious because multiple viewpoints are presented and conversation is encouraged. But the conversation is designed to push in a predetermined direction that emphasizes the political illegitimacy of Russia's strategic adversaries, whether the United States or Ukraine, for one reason or another.[118] Often the programming focuses on the political, social, and cultural faults in foreign societies as a subtle way of emphasizing Russian cultural superiority.[119] RT programming focused extensively on the Russian invasion of the Ukraine and almost always in a way that supported the Kremlin's position.[120] While occasionally allowing dissenters who criticized—or worried about—Russian military missteps during the invasion,[121] the RT network presenters mostly accepted the Russian myth that Ukraine had engaged in genocidal conduct against Russian-speaking civilians in Eastern Ukraine.[122]

Although independent surveys regarding public opinion are rare and difficult to interpret,[123] the ones that have been published reveal a surprising

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116. *Letting State TV Dominate, Russia Chokes Free Media*, FRANCE 24 (Oct. 3, 2022), france24.com/en/live-news/20220310-letting-state-tv-dominate-russia-chokes-free-media (quoting representative from Reporters Without Borders as saying that "President Vladimir Putin needs to put all the media on a battle footing in order to justify the invasion of Ukraine to Russian citizens by concealing the war's victims").

117. Robert Coalson, *"Military Brainwashing": Russian State TV Pulls Out the Stops to Sell Kremlin's Narrative on the War in Ukraine*, RADIO FREE EUROPE (Mar. 29, 2022), https://www.rferl.org/a/russia-ukraine-war-tv-brainwashing/31776244.html.

118. *Cf.* OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, BACKGROUND TO "ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS": THE ANALYTIC PROCESS AND CYBER INCIDENT ATTRIBUTION, at 12 (2017) (noting that "RT hires or makes contractual agreements with Westerners with views that fit its agenda and airs them on RT" and abandoned its earlier approach of focusing its programming on matters directly related to Russia).

119. *Id.*

120. As an example, see *Russian Military Attack on Ukraine: How we Got There*, RT NETWORK (Feb. 24, 2022), https://www.rt.com/russia/550493-ukraine-donbass-military-operation-prehistory/.

121. *See* Paul Farhi*, RT was Russia's Answer to CNN. Now its Pro-Putin Spin on Ukraine is Sparking New Outrage*, WASH. POST (Feb. 26, 2022), https://www.washingtonpost.com/media/2022/02/26/rt-america-putin-ukraine/ ("In the run-up to Russia's invasion, RT repeated Putin's baseless claims that Russian-speaking nationals in breakaway regions of eastern Ukraine were subject to 'genocide' by Ukrainian forces.").

122. *Id.*

123. *See* Philipp Chapkovski & Max Schaub, *Do Russians Tell the Truth When They Say They Support the War in Ukraine? Evidence From a List Experiment*, LSE BLOG (Apr. 6, 2022), https://blogs.lse.ac.uk/europpblog/2022/04/06/do-russians-tell-the-truth-when-they-say-they-support-the-war-in-ukrai

level of public support for the Russian invasion and acceptance of Putin's view regarding the necessity of invading Ukraine.[124] Media scholars have speculated that the strong public support for Putin can be attributed to the ubiquity of RT news programing and the lack of a widely available news alternative.[125] One piece of evidence in support of this thesis is that support for Putin's regime is strongest among the older generation in Russia.[126] In addition to being pensioners who rely on state support for monthly checks—and are presumably less likely to be critical of the government—older residents are also most likely to watch RT.[127] In contrast, younger residents are more likely to get their information from the internet and are less likely to own a TV or to watch TV programming.[128]

Some Russians have criticized the war and even protested it publicly, leading to mass arrests and incarceration for opposing the regime and its policies.[129] These protests are particularly daring since there is no meaningful free-speech legal mechanism to protect dissent in Russia.[130] Protestors have been detained in Russian jail even though their sole "crime" was expressing disagreement with government policy.[131] Members of this

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ne-evidence-from-a-list-experiment/ (noting that it is difficult to determine if respondents are reporting their sincere views).

124. Rachel Treisman, *What Russians Think of the War in Ukraine, According to an Independent Pollster*, NPR (Apr. 18, 2022), https://www.npr.org/2022/04/18/1093282038/russia-war-public-opinion-polling.

125. *See* J. Paul Goode, *How Russian Television Primed the Public for War*, INST. OF EUROPEAN, RUSSIAN & EURASIAN STUD. (Mar. 24, 2022), https://carleton.ca/eurus/2022/how-russian-television-primed-the-public-for-war-paul-goode/ (reporting empirical results concluding that "[b]y the time the decision to go to war had been taken, mentions of genocide soared on state-owned and pro-government television channels").

126. *See* Peter Dickinson, *More than Three-Quarters of Russians Still Support Putin's Ukraine War*, ATL. COUNCIL (June 6, 2022), https://www.atlanticcouncil.org/blogs/ukrainealert/more-than-three-quarters-of-russians-still-support-putins-ukraine-war/ (reporting survey results indicating that "Sixty percent of 18-24 year old respondents voiced their support, rising to eighty three percent of those aged over 55.").

127. *See* Cat Zakrzewski & Gerrit De Vynck, *Some Russians are Breaking Through Putin's Digital Iron Curtain*, WASH. POST (Mar. 19, 2022), https://www.washingtonpost.com/technology/2022/03/19/russia-vpn-internet/.

128. *Id.*

129. *See Thousands Detained at Anti-War Protests Across Russia*, RADIO FREE EUROPE (Mar. 6, 2022), https://www.rferl.org/a/russia-1000-protesters-arrested-ukraine-invasion/31738786.html (referring to report from Russian government announcing 4,888 detentions for illegal protest).

130. *See* Brett Samuels, *Psaki: 'Deeply Courageous' for Russians to Protest Ukraine Invasion*, THE HILL (Feb. 24, 2022), https://thehill.com/homenews/administration/595772-psaki-deeply-courageous-for-russians-to-protest-ukraine-invasion/ (quoting White House spokesperson as saying: "To publicly protest against President Putin and his war is a deeply courageous act. Their actions show the world that despite the Kremlin's propaganda, there are Russian people who profoundly disagree with what he is doing in Ukraine.").

131. *See Russia: Brutal Arrests and Torture, Ill-Treatment of Anti-War Protesters*, HUM. RTS. WATCH (Mar. 9, 2022, 8:57 AM), https://www.hrw.org/news/2022/03/09/russia-brutal-arrests-and-torture-ill-treatment-anti-war-protesters (describing mass protests and mass detentions by Russian police forces).

opposition movement are mostly younger and middle-aged residents, perhaps because they are less dependent on RT as a news and information source and are more likely to hunt around the internet for outside perspectives.[132]

But even the internet is not a perfect antidote to the information control on state-sponsored televised newscasts. Some major social media platforms such as Facebook are blocked in Russia, preventing residents from using Facebook to engage with news posts from outside Russia.[133] In addition to these explicit forms of censorship, the Russian government also employs more subtle techniques to influence the information space. The Kremlin deploys a sophisticated social-media strategy to amplify sources that are friendly to the government's position and buries sources that are critical.[134] Troll farms backed by Putin, or his supporters, generate thousands of posts and accounts that push favorable content and swamp negative content.[135] While the U.S. media has focused (for obvious reasons) on Russian use of troll farms to target foreign audiences to influence U.S. elections, the same or similar techniques are used by the Russian government on its own population. Social media control is not just a tool of foreign policy but also a tool of domestic governance.[136]

Putin's domestic disinformation campaign proceeds against a general background of information control. The government-backed disinformation about Ukraine is most successful because alternate sources of information have been blocked, discouraged, or outlawed. Protestors who oppose the war are arrested and detained.[137] Independent media outlets are regulated out of existence, threatened, or harassed.[138] Political opponents who generate any sizeable support are harassed by government agents or, in

132. *See* Anthony Halpin, *The World Younger Russians Knew Is Over*, BLOOMBERG (Mar. 11, 2022), https://www.bloomberg.com/news/newsletters/2022-03-11/the-world-younger-russians-knew-is-over.

133. *See* Will Oremus, *The Real Reason Russia is Blocking Facebook: The Kremlin's Crackdown Isn't About the Social Network. It's a Gambit with a Broader Aim*, WASH. POST (Mar. 5, 2022) https://www.washingtonpost.com/technology/2022/03/05/russia-facebook-block-putin-ban-roskomnadzor/ (arguing that the goal of the governmental shutdown of Facebook is to coerce other social media companies into accepting government restrictions rather than face total blocking).

134. *See* Xymena Kurowska & Anatoly Reshetnikov, *Neutrollization: Industrialized Trolling as a Pro-Kremlin Strategy of Desecuritization*, 49 SEC. DIALOGUE 345, 346 (2018) (arguing that "[r]ather than advocating a distinct political agenda," the Kremlin trolling strategy of "neutrollization" negates any attempt by opponents of the regime to cast the government as a threat, with the result that "[p]olitical mobilization thus becomes absurd" and ineffective).

135. *Id.*

136. *See generally* Seva Gunitsky, *Corrupting the Cyber-Commons: Social Media as a Tool of Autocratic Stability*, 13 PERSPS. ON POL. 42 (2015) (discussing the various ways that social media campaigns bolster regime legitimacy).

137. *See Russia: Brutal Arrests and Torture, Ill-Treatment of Anti-War Protesters*, *supra* note 131.

138. *See generally* IVAN ZASSOURSKY, MEDIA AND POWER IN POST-SOVIET RUSSIA (2016).

extreme cases, assassinated using covert methods reminiscent of the KGB.[139]

Taken together, these tools of political repression violate International Human Rights Law. Article 19 of the ICCPR protects freedom of expression, including the freedom to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[140] Although Russia has not ratified the ICCPR, Article 19 articulates a legal rule that carries jus cogens status and applies even to non-state parties.[141] Consequently, even if the Russian government's pretextual invocation of genocide does not violate IHRL by itself, the pretextual invocation is necessarily combined with tools of political repression that violate IHRL.[142]

In some cases, IHRL might directly prohibit disinformation, rather than simply prohibiting its ancillary political repression. For example, the ICCPR also includes an international obligation to prohibit war propaganda.[143] Russia's false accusation against Ukraine could qualify as "war propaganda," since the accusation was used as a legal and political justification for the invasion.[144] Unfortunately, there are some complications regarding IHRL's treatment of war propaganda. Article 20 of the ICCPR states that war propaganda "shall be prohibited by law."[145] This wording is ambiguous.[146] It could mean that the state is under a negative obligation not to publish or promulgate war propaganda.[147] Or it could mean that the state is under a positive obligation to pass a statute prohibiting private individuals from

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139. *See* Kristen Eichensehr ed., *Biden Administration Imposes Sanctions and Seeks to Cement Alliances to Counter China and Russia*, 115 AM. J. INT'L. L. 536, 537 (2021) (noting that "Navalny, Putin's most prominent critic," was likely poisoned in August 2020).

140. *See* ICCPR, *supra* note 81, art. 19.

141. *See* Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L. L. 331, 364 (2009) (describing freedom of expression as a jus cogens norm, applicable to all states regardless of state consent, though subject to limitations and balancing).

142. *See* Robert B. Ahdieh & H. Forrest Flemming, *Toward A Jurisprudence of Free Expression in Russia: The European Court of Human Rights, Sub-National Courts, and Intersystemic Adjudication*, 18 UCLA J. INT'L. L. & FOR. AFFS. 31, 33 (2013) (discussing lack of freedom of expression and related civil rights in Russia).

143. *See* ICCPR, *supra* note 81, art. 20.

144. *See* Monroe E. Price & Adam P. Barry, *Combating Russian Disinformation in Ukraine: Case Studies in A Market for Loyalties*, 8 J. INT'L MEDIA & ENT. L. 71, 73 (2019) (explicitly describing Russian disinformation regarding Ukraine as a form of "propaganda").

145. *See* ICCPR, *supra* note 81, art. 20.

146. *See* David Kaye, *Online Propaganda, Censorship and Human Rights in Russia's War Against Reality*, 116 AJIL UNBOUND 140, 141 (2022) (noting lack of clarity over the meaning of Article 20).

147. *But see* Natalie Holland, *Freedom of Expression and Opinion in Wartime: Assessing Ukraine's Ban on Citizen Access to Russian-Owned Websites*, 33 AM. U. INT'L L. REV. 943, 968–69 (2018) ("Ukraine's concern regarding Russian utilization of internet platforms to spread propaganda does not prevail over a citizen's right to freely seek and impart information on the Internet. While evidence does show that the Russian-owned platforms disseminate or restrict content to present more favorable information on Russia, these actions do not serve a sufficient national security justification for banning the websites.").

engaging in war propaganda.[148] Or it could mean both. The positive obligation to prohibit war propaganda would be limited by the right of free expression. For example, in the United States, the First Amendment would severely restrict the ability of the government to pass a law prohibiting private individuals from publishing war propaganda.[149] In foreign jurisdictions with less absolutist freedom of speech protections, such statutes might be permissible. Indeed, the ICCPR codification of the right to free expression recognizes that limitations are appropriate when necessary for the protection of the "rights or reputations of others," national security, public order, public health, or public morals.[150] This expansive list of exceptions suggests that state regulations prohibiting war propaganda could be consistent with an international right of free speech.

But does Article 20 include a negative obligation not to engage in war propaganda?[151] Arguably yes, because a state's negative obligation to respect the rights contained in the ICCPR is codified in the umbrella obligation of Article 2, which states that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[152] Scholars, courts, and state parties have all interpreted the phrase "undertakes to respect" as codifying a negative obligation not to violate, while "ensure" codifies a positive obligation to take legal measures to suppress violations by private actors.[153] When combined with Article 20, Article 2 therefore arguably provides the negative obligation to respect the right to be free from war propaganda. If this legal interpretation is correct, it represents a substantial international regulation of disinformation about armed conflict—even when the audience in question is purely domestic.

Unfortunately, the more difficult question is whether the ICCPR negative obligation not to engage in war propaganda is a jus cogens obligation that would apply to non-state parties, including Russia. On this point, the evidence is far more questionable. There is little evidence that the prohibition on propaganda has been elevated to jus cogens status. At least one legal

148. *See, e.g.*, Amal Clooney & Philippa Webb, *The Right to Insult in International Law*, 48 COLUM. HUM. RTS. L. REV. 1, 17 (2017) (arguing that Article 20 codifies a positive obligation); Sander, *supra* note 114, at 973 (suggesting that social media platforms should ban whatever states are required to prohibit under the ICCPR provision on war propaganda).

149. *See* Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. UNIV. J. INT'L HUM. RTS. 1, 7 (2005).

150. *See* ICCPR, *supra* note 81, art. 19(3).

151. *See generally* G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037, 1050 (2020) (arguing that international law directly prohibits states from engaging in war propaganda, which "by implication we may understand it to mean some sort of persuasive or even manipulative communication, in this case one designed to get persons protected by the convention to join the military services").

152. *See* ICCPR, *supra* note 81, art. 2.

153. *See* Radu Mares, *Defining the Limits of Corporate Responsibilities Against the Concept of Legal Positive Obligations*, 40 GEO. WASH. INT'L L. REV. 1157, 1197 (2009).

scholar has described international law's regulation of war propaganda as "largely toothless."[154] Even for state parties to the ICCPR, the Article 20 obligation regarding war propaganda would presumably be subject to any applicable reservations and understandings filed at the time of ratification. Perhaps, in time, the negative obligation not to engage in war propaganda will ripen into a jus cogens norm applicable beyond the narrow confines of the ICCPR as a specific legal instrument.

The situation regarding the European Convention is somewhat more complicated. Although Russia never ratified the ICCPR, Russia signed and ratified the European Convention and for many years participated in court cases before the European Court of Human Rights (ECHR).[155] Russia has recently withdrawn from the European Convention and no longer considers itself a state party, so its terms no longer apply moving forward.[156] Even if the ECHR did apply, the application of its terms are uncertain. Like the ICCPR, the ECHR protects freedom of speech, but it does not include a specific reference to propaganda.[157] Furthermore, the European Convention's Article 11 protection of freedom of assembly and association, and the Article 10 protection of freedom of expression, both include parallel exceptions for restrictions "necessary in a democratic society in the interests of national security or public."[158] Although Russia may not fully qualify as a "democratic society," given the level of repression of political opposition, the broader point is that the European Convention explicitly assumes some limitations on civil rights during moments of armed conflict and national emergency.[159]

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154. Jon M. Garon, *When AI Goes to War: Corporate Accountability for Virtual Mass Disinformation, Algorithmic Atrocities, and Synthetic Propaganda*, 49 N. KY. L. REV. 181, 216 (2022) (also noting that the "United Nations charter failed to address the potency of 'pernicious propaganda' despite its critical role in both the first and second world wars"). *See also* Sinha, *supra* note 151, at 1049 (discussing the fate of propaganda under international law and noting the lack of a definition of the legal concept in major instruments).

155. *See* Jesse W. Stricklan, *Testing Constitutional Pluralism in Strasbourg: Responding to Russia's "Gay Propaganda" Law*, 37 MICH. J. INT'L L. 191, 194 (2015) (describing Russia as the ECHR's "most problematic member").

156. *See* Michael Plachta, *Council of Europe Terminates Membership of the Russian Federation*, 38 INT'L ENF'T L. REP. 164, 166-67 (2022) (stating that "the so-called 'Ruxit' from the CoE means Russia will no longer be a signatory to the European Convention on Human Rights, and its citizens will no longer be able to file applications to the European Court of Human Rights (ECHR). The ECHR released a statement after Russia's withdrawal, saying the court had 'decided to suspend the examination of all applications against the Russian Federation,' until the legal implications of Russia leaving had been considered.").

157. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). [hereinafter ECHR].

158. *Id.* art. 11.

159. *See generally* Christopher Michaelsen, *Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction?*, *in* POST 9/11 AND THE STATE OF LEGAL EMERGENCIES 287-314 (Aniceto Masferrer ed., 2012).

Consequently, domestic disinformation, when viewed entirely in isolation and interpreted narrowly, may violate specific provisions of the ICCPR, but may not constitute a jus cogens violation applicable to Russia. But when viewed with a broader lens to encompass the government's prohibition of public dissent, which is necessary to amplify the government's disinformation, there is a violation of international law under the auspices of IHRL and its jus cogens protection of free expression and related civil rights. The domestic disinformation that is the main course may not constitute a jus cogens violation, but the side-dishes that come with it more clearly violate international law. This is perhaps not surprising, since freedom of expression has long been protected by IHRL, but the problem of domestic disinformation is of more recent vintage.

D. Conclusion Regarding Venue for Remedies

This Part has considered three different aspects of disinformation and analyzed the legality of each under international law. Disinformation is illegal as a violation of sovereignty or non-intervention only if the disinformation campaign is coercive. Disinformation is potentially illegal as a violation of self-determination if conducted in the context of an election campaign. Disinformation may constitute war propaganda that is prohibited by the ICCPR, though Russia is not a state party to that Convention. In any of these contexts, the question arises whether there is a legal forum for Ukraine to vindicate its allegation that Russia has violated international law by falsely accusing it of genocide.

The problem with each of these arguments is that Russia is no longer a party to the European Convention, so a suit before the ECHR is no longer viable.[160] Although the ICJ generally hears claims regarding violations of sovereignty, non-intervention, and the collective right of self-determination, Russia is not a state party to the ICJ Statute and subject to the Court's plenary jurisdiction.[161] So, even if the disinformation campaign violates international law, Ukraine would have a strong legal case without a legal forum where it could demand adjudication of it. Although the lack of a court with jurisdiction to consider a claim is no stranger to international law, the legal

160. Committee of Ministers, *CM/Res(2022)3 on Legal and Financial Consequences of the Cessation of Membership of the Russian Federation in the Council of Europe*, COUNCIL OF EUROPE 1, 2 (Mar. 23, 2022), https://rm.coe.int/resolution-cm-res-2022-3-legal-and-financial-conss-cessation-membershi/1680a5ee99?msclkid=60a33447ab8d11ec9c8f9bc54d5831c1.

161. *See* Hilary Charlesworth & Margaret A Young*, National Encounters with the International Court of Justice: Introduction to the Special Issue*, 21 MELB. J. INT'L L. 502, 515 (2021) (noting that "[o]f the five Security Council permanent members, Russia has not submitted a declaration recognising as compulsory the jurisdiction of the ICJ, while China, France and the US have withdrawn their consent to the compulsory jurisdiction in 1972, 1974 and 1985 respectively").

profession is also a pragmatic enterprise. It would be better, all things being equal, if international legal arguments had an available forum where they could be adjudicated. This situation suggests that we consider renewed attention to other less obvious legal theories that might yield jurisdictional fruit.

To find that jurisdictional fruit, it is important to recall that the domestic and international audiences for disinformation need not—and should not—be viewed in isolation from each other. This Part mostly considered the two elements in isolation from each other. Part IA and Part IB most focused on the international audience for Russian disinformation, while Part IC focused on the domestic audience. But the two audiences might be considered in tandem to open new possibilities for analysis. Indeed, there is a dynamic feedback loop between the external and internal audiences for Russia's accusations against Ukraine. Putin uses disinformation about genocide as a way of selling the invasion to his domestic audience. It becomes part of a legitimation game with both external and internal pitches.

Genocide is, at the end of the day, a concept with legal origins, even if its definition has now permeated other normative regimes, including politics, diplomacy, and morality.[162] Claims and arguments about genocide sound in a legal register even when spoken by non-lawyers. The concept and crime of genocide was invented by an international lawyer named Raphael Lemkin,[163] so when Russia falsely accuses Ukraine of genocide, it is twisting and deploying international law for its strategic benefit, even if Putin is not citing or referring to legal treaties and cases when he speaks to the Russian population about Ukraine's alleged genocidal conduct.

The international audience has mostly rejected Russia's false accusations against Ukraine.[164] Even China, a strategic ally of Russia, has not accepted or repeated Russian justifications for its invasion, preferring instead to complain about the unfairness of "western" sanctions against Russia.[165] But complaining about the repercussions imposed on Russia is not the same thing as siding with Russia's invasion and accepting its justification for it. In

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162. *See* Jeffrey S. Morton, *The International Legal Adjudication of the Crime of Genocide*, 7 ILSA J. INT'L & COMP. L. 329, 333 (2001) (noting that genocide as a concept can have a broader definition than its technical, legal definition).

163. *See generally* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS (1944).

164. *See Countering Disinformation with Facts - Russian Invasion of Ukraine*, GOV'T OF CAN., *available at* https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crises/ukraine-fact-fait.aspx?lang=eng (last visited Mar. 11, 2023) (describing official responses from the Government of Canada regarding Russian deceptions pertaining to its invasion of Ukraine and the armed conflict with Ukraine).

165. *See Chinese Official Calls Sanctions on Russia Increasingly "Outrageous,"* REUTERS, (March 19, 2022, 1:47 PM), https://www.reuters.com/world/chinese-official-calls-sanctions-russia-increasingly-outrageous-2022-03-19/.

contrast, the domestic audience has accepted the Kremlin justification, in part because the Russian government enjoys more control over the domestic information space than it does over the international information space. As for the content of its domestic messaging, the Kremlin has used international law cynically, and falsely, to maintain control over the domestic narrative regarding the armed conflict in Ukraine. It then portrays itself as a victim of both Ukraine and the international community and argues that a military operation is the only way for Russia to push back against this multifaceted oppression that it faces. The more the Russian genocide claim is rejected by the international community, the more the Russian government portrays itself as a victim of international oppression headlined by NATO, the United States, and the western European powers most influential in NATO decision-making.[166]

The task of Part II of this Article is to drill down and focus on the specific context of genocide to determine whether disinformation in this context is subject to any genocide-specific rules and genocide-specific obligations. This inquiry should focus on both the domestic and international audiences together.

II. DISINFORMATION AS GENOCIDAL PRETEXT

What recourse does Ukraine have for these false accusations of genocide? Many observers, while bemoaning the Russian use of the language of genocide as a tool of misinformation, simply assumed that Ukraine could do little more than deny the accusations and therefore assert that Russia had no justification for its invasion. However, an alternate view provides a pathway for Ukrainians to marshal the machinery of international law to push back against the use of genocide as a pretext for invasion.

A. The Structure of the Genocide Convention and its Jurisdictional Clause

Ukraine filed an application with the International Court of Justice (ICJ), asserting that the World Court had jurisdiction over this new "dispute" with Russia.[167] Although the preceding sentence sounds relatively

166. *See* Putin Address on Ukraine (Feb. 24), *supra* note 12 ("It is a fact that over the past 30 years we have been patiently trying to come to an agreement with the leading NATO countries regarding the principles of equal and indivisible security in Europe. In response to our proposals, we invariably faced either cynical deception and lies or attempts at pressure and blackmail, while the North Atlantic alliance continued to expand despite our protests and concerns. Its military machine is moving and, as I said, is approaching our very border.").

167. Allegations of Genocide Under Convention of Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Application Instituting Proceedings, ¶ 4 (Feb. 26, 2022), https://www.icj-

uncontroversial, the move was novel and required an expansive reading of international jurisdiction.[168] Ukraine laid out a legal argument for how the ICJ could assert jurisdiction over the dispute, even though Ukraine complained not about the existence of a genocide—the typical genocide-related dispute that a party might bring before the ICJ—but rather Russia's *lying* about a genocide that did not, in fact, exist.[169]

The law regarding the ICJ's jurisdiction is outlined in both the ICJ Statute[170] and in individual treaties that cover subject-matter specific jurisdiction of the court.[171] The ICJ Statute makes clear that full members of the Court voluntarily subject themselves, by virtue of their consent, to its plenary jurisdiction.[172] This means that full members are entitled to take to the ICJ any dispute regarding international law that they have with other full members of the court; in exchange for the right to sue other full members, full members are reciprocally subject to litigation by other states who make the same commitment.[173] Also, a pair of states may voluntarily consent to an ad hoc ICJ jurisdiction to resolve a particular dispute between the states. In this case, neither of these avenues confer jurisdiction over Russia, since Russia is not a full member of the ICJ, nor has Russia consented to jurisdiction regarding any dispute with Ukraine.[174]

The ICJ may also exercise jurisdiction pursuant to a specific conferral of jurisdiction in a treaty.[175] The basic paradigm for these clauses is a bilateral or multilateral treaty that creates binding norms between the parties to the treaty; to resolve disputes arising under the treaty, a clause, or a separate protocol attached to the treaty, confers jurisdiction on the ICJ. The

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cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf [hereinafter cited as "Ukraine Application"].

168. *See generally* Deepak Raju, *Ukraine v. Russia: A "Reverse Compliance" Case on Genocide*, EJIL: TALK! (Mar. 15, 2022), https://www.ejiltalk.org/ukraine-v-russia-a-reverse-compliance-case-on-genocide/ (describing the case and its jurisdictional argument as "novel").

169. *See* Ukraine Application, *supra* note 167, at ¶ 21 (asserting that "[t]here is no factual basis for the existence of genocide in the Luhansk and Donetsk oblasts, and Russia has advanced no evidence to substantiate its allegation" and also noting that "reports on the human rights situation in Ukraine by the OHCHR do not mention any evidence of genocide in Ukraine").

170. Statute of the International Court of Justice art. 36, Oct. 24, 1945, 59 Stat. 1055, T.S. No. 993 [hereinafter ICJ Statute].

171. *See* Medellin v. Texas, 552 U.S. 491, 500 (2008) (discussing consent to ICJ jurisdiction provided by specific treaty).

172. *Id.*

173. *See* Beth Van Schaack, *Teaching International Law in Pursuit of Justice*, 54 CASE W. RSRV. J. INT'L L. 201, 211 (2022) (discussing ICJ plenary jurisdiction and states that have withdrawn from it).

174. *UN Court Has No Right to Consider Russia's Special Operation—Foreign Ministry*, TASS RUSSIAN NEWS AGENCY (Mar. 7, 2022), https://tass.com/politics/1418359 (quoting a Russian official as saying that "[w]e believe that the court has no jurisdiction of the subject of the special military operation, which the Ukrainian side wants to be considered").

175. ICJ Statute, *supra* note 170, art. 36(1) (referring to jurisdiction provided by "treaties and conventions").

Genocide Convention is one such example.[176] Moreover, states that have eschewed joining the ICJ Statute, or have withdrawn from its general jurisdiction, have nevertheless been more comfortable maintaining their party status to the Genocide Convention, and with it, the ICJ jurisdiction attached thereto, though a few states have attached reservations to their Genocide Convention ratifications that limit ICJ jurisdiction.[177] The widespread acceptance of ICJ jurisdiction under the Genocide Convention has something to do with the centrality of the anti-genocide norm in international law, and perhaps the reputational costs associated with repudiating the Genocide Convention, given its near-universal status and the presumed jus cogens status of its underlying norms.[178]

States may pick and choose amongst various obligations within a multilateral treaty through strategic deployment of treaty reservations, and the ICJ has held that a state may use a reservation to exempt itself from ICJ jurisdiction under the Genocide Convention.[179] The conferral of jurisdiction to the ICJ does not go to the core of that treaty, and a reservation to that clause would therefore not undermine the object and purpose of it.[180] Consequently, a state may reject ICJ jurisdiction and still maintain party status under the Genocide Convention.[181] In the absence of the possibility of reservations, potential state parties would be presented with a stark choice: either stay within the treaty and accept all of its elements, or withdraw from the treaty entirely and therefore undermine the goal of establishing the treaty in the first instance.[182] It is therefore noteworthy and meaningful that Russia is both a member of the Genocide Convention and did not exempt itself from ICJ jurisdiction at the time of ratification, despite Russia's overall hesitation to accept ICJ jurisdiction in other contexts.[183]

B. Jurisdiction Based on Pretext and Misinformation

176. *See* Genocide Convention, *supra* note 47, art. IX.

177. *See* Dan Hammer, Comment, *Allowing Genocide?: An Analysis of Armed Activities on the Territory of the Congo, Jurisdictional Reservations, and the Legitimacy of the International Court of Justice*, 16 MINN. J. INT'L L. 495, 507 (2007).

178. *See* Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1847 (2003).

179. Armed Activities on Territory of Congo (Dem. Rep. Congo v. Rwanda), Judgement, 2000 I.C.J. 6, ¶ 70 (Feb. 3) (concluding that it lacked jurisdiction because Rwanda made a reservation to the jurisdictional clause of the Genocide Convention).

180. *Id.* at ¶ 67.

181. *Id.* at ¶ 69 (noting that there is no jus cogens norm in existence that requires a state to accept ICJ jurisdiction for violations of the Genocide Convention).

182. *See* Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28) (noting that failure to allow reservations would prevent the Genocide Convention from receiving widespread adoption).

183. *See* Robert J. Delahunty, *The Crimean Crisis*, 9 UNIV. ST. THOMAS J. L. & PUB. POL'Y 125, 181 (2014) (noting that Russia is hardly alone in rejecting ICJ jurisdiction because most Security Council states have declined to join the ICJ's plenary jurisdiction).

While the ICJ has jurisdiction over Russia in cases pertaining to the Genocide Convention, that simple conclusion is not enough to bring the dispute between Russia and Ukraine before the ICJ. The Genocide Convention outlines several legal obligations, including the duty to refrain from committing genocide,[184] a duty to criminalize genocide under domestic penal law,[185] including its forms under different modes of liability, such as conspiracy and incitement,[186] and the duty to prosecute, before competent domestic or international tribunals, individuals for acts genocide,[187] and to punish them.[188]

In the first days of Russia's invasion of Ukraine, when Putin asserted, pretextually, that Ukraine had engaged in a genocide, there was little evidence to suggest that Russia had engaged in its own genocide (this subject would need to be reexamined later after Russian forces engaged in deliberate atrocities during the military invasion and occupation of Ukrainian territory).[189] Some observers assumed that there was no violation of one of the above-mentioned norms under the Genocide Convention, and therefore no jurisdiction for the ICJ to hear a case. Indeed, there appeared to be an *absence* of a violation, because Ukraine publicly asserted that Russia was lying when it accused Ukraine of violating the Genocide Convention.[190] (However, it should be noted that from the beginning of the invasion, Ukraine asserted that Russia's invasion was genocidal in nature, due to the announced goals of the Kremlin to destroy Ukraine.[191])

Ukraine filed an application before the ICJ that asserted that, despite the lack of a genocide, the ICJ nonetheless had jurisdiction over the dispute

184. *See* Genocide Convention, *supra* note 47, art. I (requiring states to "prevent" genocide).

185. *Id.* art. V.

186. *Id.* art. III.

187. *Id.* art. VI.

188. *Id.* art. IV.

189. *See* Ewelina U. Ochab, *Is Putin Committing Genocide In Ukraine?*, FORBES (Apr. 4, 2022) https://www.forbes.com/sites/ewelinaochab/2022/04/04/is-putin-committing-genocide-in-ukraine/?sh=118e970c557b.

190. Russia has made similar points, arguing that a diplomatic dispute regarding the existence, or not, of an act of genocide, does not trigger a legal dispute per se under the Genocide Convention. *See* Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide, (Ukr. v. Russ.), Document (with Annexes) from the Russian Federation Setting Out its Position regarding the Alleged "Lack of Jurisdiction" of the Court in the Case, 20 (Mar. 7, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf [hereinafter Russia Jurisdictional Filing] (arguing that "[a] reference to genocide is not equal to the invocation of the Convention or the existence of a dispute under it, since the notion of genocide exists in customary international law independently of the Convention").

191. *See* Ukraine Application, *supra* note 167, at 24 (noting that "[t]hese acts must be viewed together with President Putin's vile rhetoric denying the very existence of a Ukrainian people, which is suggestive of Russia's intentional killings bearing genocidal intent").

between Russia and Ukraine.[192] The application urged the Court to carefully scrutinize the text and clear meaning of Article IX of the Convention:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.[193]

Ukraine asked that this provision be interpreted literally.[194] The Article grants the ICJ jurisdiction over disputes regarding the application of the Convention, and such a dispute clearly existed between Russia and Ukraine.[195] Russia, in *applying* the Convention's norms to the facts on the ground regarding Ukraine, falsely asserted that Ukraine had committed a genocide there, and Ukraine disagreed, thus generating a legal dispute regarding the application of the Convention.[196] It mattered little that Ukraine also asserted the existence of a genocide perpetrated by Russia in its legal filing; it was more relevant that it demonstrated that Russia had made a public accusation of genocide against Ukraine and Ukraine denied it, which thus created a dispute between the parties.[197]

Was this a legal dispute arising under the Convention, or simply a diplomatic dispute between two warring states? The counterargument to Ukraine's position is that the Genocide Convention does not include an explicit norm prohibiting a state from lying about the existence of a genocide, or falsely accusing another state of genocide.[198] If the negotiators of the Convention had wanted to outlaw genocide as misinformation, they presumably could have done so through the drafting of an explicit clause that prohibited such false accusations.

Ultimately, the ICJ dismissed such concerns and concluded that a bona fide dispute between the state parties existed and therefore the ICJ enjoyed jurisdiction. In its March 16, 2022, order, the ICJ referred to Putin's speeches and his references to genocide, and concluded that:

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192. *See id.* at ¶ 12 (noting that "[a] dispute has therefore arisen relating to the interpretation and application of the Genocide Convention, as Ukraine and Russia hold opposite views on whether genocide has been committed in Ukraine, and whether Article I of the Convention provides a basis for Russia to use military force against Ukraine to 'prevent and to punish' this alleged genocide").

193. *See* Genocide Convention, *supra* note 47, art. IX.

194. *See* Ukraine Application, *supra* note 167, at ¶ 7.

195. *See* Ukraine Application, *supra* note 167, at ¶ 11.

196. *See* Ukraine Application, *supra* note 167, at ¶ 21.

197. *Id.*

198. *See* Russia Jurisdictional Filing, *supra* note 190, at ¶ 21 (noting that "the jurisdiction of the Court does not extend to allegations of violation of the customary international law on genocide").

> The statements made by the State organs and senior officials of the Parties indicate a divergence of views as to whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention.[199]

Ukraine's jurisdictional theory, and the ICJ's acceptance of it, is in keeping with the Court's recent jurisprudence on genocide. Despite the Court's refusal to find jurisdiction in *DRC v. Rwanda*,[200] more recent cases demonstrate the Court's overall tendency to interpret jurisdiction expansively where the prohibition of genocide is concerned. For example, The Gambia brought Myanmar to the Court over Myanmar's treatment of the Rohingya minority.[201] The Gambia had no connection to Myanmar's genocide; the Rohingya were not located on The Gambia's territory, nor had Myanmar armed forces engaged in any hostilities on Gambian territory or against Gambian forces.[202] The Gambia's jurisdictional argument came awfully close to treating the ICJ as a court of universal jurisdiction, at least for cases of genocide.[203]

The ICJ ultimately accepted The Gambia's jurisdictional argument, in part because the obligations codified in the Genocide Convention are not bilateral but instead are *ergo omnes*.[204] When applied to the context of genocide, the principle of *ergo omnes* entails that the Convention is not just a series of overlapping bilateral promises not to subject another party's citizens to a genocide, but rather a general promise to the world community to refrain

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199. *See* Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Order on Provisional Measures, ¶ 45 (Mar. 16, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf. [hereinafter cited as "Order on Provisional Measures"],

200. Armed Activities on Territory of Congo (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6., ¶ 70 (Feb. 3) (declining to find jurisdiction under Article IX of the Genocide Convention).

201. *See generally* Application of Convention on Prevention and Punishment of Genocide (Gam. v. Myan.), Application Instituting Proceedings, (Nov. 11, 2019), https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf.

202. *Id.*

203. *Id.* at ¶ 123 (noting that "the rights and obligations enshrined by the Convention are rights and obligations erga omnes" and thus asserting that all states "have a legal interest in the protection of the rights involved").

204. *See* Application of Convention on Prevention and Punishment of Genocide (Gam. v. Myan.), Judgment Regarding Preliminary Objections, ¶ 109 (July 22, 2022), https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf ("For the purpose of the institution of proceedings before the Court, a State does not need to demonstrate that any victims of an alleged breach of obligations *erga omnes partes* under the Genocide Convention are its nationals.").

from, and suppress, the crime of genocide.[205] (While these two frameworks sound similar, they arguably have different implications for establishing a court's jurisdiction.) It is not necessary to assert a connection to a genocidal wrong to trigger the ICJ's jurisdiction, if there is a "dispute" arising under the Genocide Convention.[206] In this case, the dispute took the following form: The Gambia believed that Myanmar had engaged in a genocide against the Rohingya, and the Myanmar vigorously disagreed. That was enough to generate a legal "dispute" under the Convention.[207]

If that was enough to establish the Court's jurisdiction in *The Gambia v. Myanmar*, one can see how jurisdiction is easily established in *Ukraine v. Russia*. In the former, there was a genocide, but the application came from a party that was not directly harmed by it.[208] In the second, there was no genocide perpetrated by the applicant, but instead a false accusation of one.[209] The two cases are different, but commonalities are readily apparent. Both cases stand for the proposition that a state need not be victimized by a genocide to trigger the Court's jurisdiction under the Convention. Also, the Court now interprets the "dispute" language of the Convention's jurisdictional clause literally, and without requiring a specific showing of harm. On this last point, Ukraine's application was arguably in a *stronger* position than the Gambian application, since Ukraine asserted that it was directly harmed by Russia's behavior, i.e., that Russia falsely accused Ukraine of genocide and then used that accusation as a pretext for a devastating invasion.[210] The harm imposed on Ukraine by Russia's behavior was not just cognizable by the Court, it was downright existential.[211] ICJ jurisdiction in *Ukraine v. Russia* is far less surprising than *The Gambia v. Myanmar*.

The ICJ's jurisdiction over Russia was about more than just misinformation, it also went to the heart of Russia's use of genocide as a pretext for military action. Ukraine used the misinformation as a wedge to bring before the court the overall legality of Russia's military operation per se.[212] Normally, a dispute over central questions of jus ad bellum, and alleged violations of Article 2(4) of the UN Charter, would not fall under the Genocide

205. *Id.* at ¶ 107.

206. *Id.* at ¶ 111.

207. *Id.* at ¶ 114.

208. *Id.* at ¶ 111 (no requirement that the state bringing the application to the I.C.J. under the Genocide Convention must be "specially affected" by the alleged violation).

209. *See* Order on Provisional Measures, *supra* note 199, at ¶ 42 (noting that Ukraine "'strongly denies Russia's allegations of genocide' and disputes 'any attempt to use such manipulative allegations as an excuse for Russia's unlawful aggression'").

210. *See* Ukraine Application, *supra* note 167, at ¶ 26 (asserting that Russia's action "violates Ukraine's right to be free from unlawful actions, including military attack, based on a claim of preventing and punishing genocide that is wholly unsubstantiated").

211. *Id.* at ¶ 24 (accusing Russia of turning the Genocide Convention "on its head" because Russia was in fact perpetrating a genocide while falsely accusing Ukraine of perpetrating one).

212. *Id.* at ¶ 23 (discussing the harm created by the military operation).

Convention, but rather would be adjudicated only if the state was a permanent member of the ICJ and thus subject to plenary jurisdiction, or subject to jurisdiction under some other treaty regulating the use of force.[213] Typically, that would not include the Genocide Convention, which does not, by its explicit terms, regulate the use of force per se, or acts of aggression, unless those actions rise to the level of genocide, in which case they are then prohibited by the Convention.[214]

Ukraine's position was that it was not just Russia's false accusations that were before the court, but also the military operation itself (because its purported justification was a false assertion of genocide): "Ukraine submits that there is an urgent need to protect its people from the irreparable harm caused by the Russian Federation's military measures that have been launched on a pretext of genocide."[215] The ICJ appeared to tacitly agree with this expansive interpretation, since the ICJ issued a provisional order requiring Russia to cease its military operations and withdraw troops from Ukrainian territory.[216]

It is worth stepping back and re-assessing, for a moment, the content of the Genocide Convention considering these developments. First, Ukraine's argument, and the ICJ's acceptance of it, suggests that the Genocide Convention includes an unspoken or implied obligation not to falsely accuse another state of genocide. In other words, it includes a background norm of truthfulness regarding allegations of genocide. Second, the argument implies that the Convention includes an implied obligation not to use a false claim of genocide as a pretext to take actions that would otherwise violate international law, especially violations of jus ad bellum. If either of these unwritten norms are violated, the machinery of the Genocide Convention is activated, and with it, any institutions empowered to apply and enforce it. Through this innovative theory, the ICJ is empowered to pass judgment on not just Putin's campaign of misinformation but also the resulting military operation.[217]

The ultimate endpoint of this argument is so noteworthy because the ICJ is historically very cautious about passing judgment regarding the use of military force.[218] Typically, it has deferred such contentious questions to the

213. *See generally* Michael T. Wawrzycki, *The Waning Power of Shared Sovereignty in International Law: The Evolving Effect of U.S. Hegemony*, 14 TUL. J. INTL. & COMP. L. 579, 583 (2006).

214. *See* Dan Hammer, *Allowing Genocide?: An Analysis of Armed Activities on the Territory of the Congo, Jurisdictional Reservations, and the Legitimacy of the International Court of Justice*, 16 MINN. J. INTL. L. 495, 520 (2007).

215. *See* Ukraine Application, *supra* note 167, at ¶ 26.

216. *See* Order on Provisional Measures, *supra* note 199, at ¶ 68.

217. *Id.* at ¶ 81 (ordering Russia to "suspend" all military operations in Ukraine).

218. *See* Hammer, *supra* note 214, at 520.

Security Council,[219] which has primary "responsibility" under the UN Charter to determine the existence of any breach or threat to international peace and security and to order any measures necessary to resolve these breaches and threats.[220] This reluctance is at its zenith when the military dispute is ongoing (as opposed to a prior military confrontation), because the Security Council enjoys the best hope for resolving an intense international crisis.[221] Nonetheless, despite this traditional hesitation about usurping the power and responsibility of the Security Council, the ICJ waded directly into those contentious waters and asserted jurisdiction over an ongoing military controversy.[222]

Of course, the ICJ's new-found willingness to engage on such questions might be based purely on its legal interpretation of the Genocide Convention, or it might also have been influenced by collateral factors, including Russia's involvement in the underlying dispute.[223] Since Russia is a permanent member of the Security Council, and enjoys a veto over any resolution brought before that body, the Security Council was never going to pass a resolution criticizing Russia's invasion or ordering measures against it.[224] A deadlocked Security Council might have added an extra layer of motivation to the ICJ and its willingness to accept Ukraine's unique legal approach in the case. But in prior cases where the Security Council was deadlocked due to major power interests, the ICJ remained mostly in the background.[225]

Is the ICJ's interpretation of the Genocide Convention a plausible one? The Genocide Convention has no article explicitly prohibiting lying about genocide, nor does it say anything about using genocide as a pretext for military action.[226] As one judge of the ICJ observed, "it is difficult to link

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219. *See* Kathleen Renée Cronin-Furman, *The International Court of Justice and the United Nations Security Council: Rethinking A Complicated Relationship*, 106 COLUM. L. REV. 435, 437 (2006).

220. U.N. Charter art. 42.

221. Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Provisional Measures, 1992 I.C.J. 114, 124 (Apr. 14) (declining to order provisional measures due to Security Council action in the case). *See also* Cronin-Furman, *supra* note 219, at 463.

222. *See* Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Declaration of Judge Xue, ¶ 6 (Mar. 16, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-03-EN.pdf (asking, "in the context of an armed conflict … how those provisional measures can be meaningfully and effectively implemented by only one Party to the conflict" and predicting that "[w]hen the situation on the ground requires urgent and serious negotiations of the Parties to the conflict for a speedy settlement, the impact of this Order remains to be seen").

223. *See* Order on Provisional Measures, *supra* note 199, at ¶ 68.

224. *See* Devika Hovell, *Council at War: Russia, Ukraine and the UN Security Council*, EJIL: TALK!, (Feb. 25, 2022), https://www.ejiltalk.org/council-at-war-russia-ukraine-and-the-un-security-council/ (describing and discussing the Security Council deadlock and suggesting action by General Assembly would be appropriate).

225. *See also* Cronin-Furman, *supra* note 219, at 462 (listing cases).

226. A few ICJ judges expressed skepticism of Ukraine's jurisdictional argument. *See, e.g.*, Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v.

the question of the legality of the use of force in international relations, as such, to the Genocide Convention,"[227] and that "artificially linking a dispute concerning the unlawful use of force to the Genocide Convention does nothing to strengthen that instrument."[228] But this objection fails to take seriously the distinctive aspect of Ukraine's position. Ukraine's application to the Court did more than seek review of the legality of Russia's military operation, it also sought review of Russia's false accusations. And that aspect of the jurisdictional argument still stands even if the Court had rejected Ukraine's invitation to pass judgment on the military invasion per se.

One might argue that Russia's false accusations of genocide did not constitute the legal basis for Russia's military invasion and that there is a distinction to be made between Putin's political speeches and his government's official legal rationale. For example, Judge Xue suggested that Ukraine's position was "based on a mischaracterization of the Russian Federation's position on its military operations."[229] Judge Xue went on to note that Russia's "official" position is that its invasion of Ukraine is justified by "self-defense" under Article 51 of the UN Charter.[230] The problem with Xue's argument is that it assumes, without argument, that only the "official" position is relevant. Ukraine has complained about Putin's public accusations of genocide as creating a dispute arising under the Genocide Convention. One may agree or disagree about whether the Genocide Convention includes a de facto obligation not to falsely accuse another state of genocide, or use a genocide as a pretext for a military invasion, but there is no reason to think that if such a norm exists it would only apply if the accusation were rendered through "official" channels. Furthermore, Putin has the authority to speak for his country such that official addresses to the country, over the airways, may still constitute "official" statements cognizable under international law. Finally, Xue's argument assumes, incorrectly, that self-defense and genocide are mutually exclusive arguments in this context. Is it not possible—indeed likely—that the Kremlin is relying on *both* self-defense *and* genocide as legal concepts to justify its military operation?

Russ.), Declaration of Judge Bennouna, ¶ 2 (Mar. 16, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-02-EN.pdf ("I am not convinced that the Convention on the Prevention and Punishment of the Crime of Genocide … was conceived, and subsequently adopted, in 1948, to enable a State, such as Ukraine, to seise the Court of a dispute concerning allegations of genocide made against it by another State, such as the Russian Federation, even if those allegations were to serve as a pretext for an unlawful use of force.").

227. *Id.* at ¶ 9.

228. *Id.* at ¶ 11.

229. *See* Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Declaration of Judge Xue, ¶ 3 (Mar. 16, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-03-EN.pdf.

230. *Id.*

In the end, there is a strong argument that the Convention's object and purpose, which is to suppress and prevent genocide, should inform our interpretation of its core provisions, including the Article VIII entitlement of any state party to "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."[231] Article VIII articulates a nexus between the prohibition on genocide and remedial action taken to prevent and eliminate acts of genocide.[232] Falsely accusing another state of genocide does nothing to suppress genocide; in fact, it does the opposite. It turns the legal concept of genocide into a pretext for violating international law, thus weakening the core prohibition against the perpetration of genocide.[233] The underlying impulse of the Genocide Convention is to stop genocides from occurring and to build a legal infrastructure—domestically and through transnational penal cooperation—to ensure that genocide is suppressed.[234] Allowing false claims of genocide to proliferate ends up weakening the legal prohibition against genocide. By accusing Ukraine of genocide, Putin and the Kremlin implicitly invoked the core legal duty enshrined in the Genocide Convention, thus clearly establishing the existence of a "dispute" arising under the Convention.

C. A New Era of International Regulation of Misinformation

The international community has considered lies about genocide in the past, but usually those lies have run in the opposite direction: claims that a genocide never occurred. So, for example, many states have passed laws making Holocaust denial a domestic crime.[235] The criminalization of Holocaust denial is disfavored in the United States, where the First Amendment enjoys a privileged place within the constitutional order.[236] But in other legal systems with more modest protections for free speech, courts have held that the right to speak freely must be balanced against other competing social interests, one of which is the value of historical truth, the need to stop the spread of disinformation, and the spread of fascistic ideologies.[237] Of course, the need to stop misinformation can be used as its own pretext to

231. *See* Genocide Convention, *supra* note 47, art. VIII.

232. *Id.*

233. *See* Ukraine Application, *supra* note 167, at ¶ 24.

234. *See* Genocide Convention, *supra* note 47, art. I.

235. *See* Paolo Lobba, *Holocaust Denial Before the European Court of Human Rights: Evolution of an Exceptional Regime*, 26 EUR. J. INTL. L. 237, 242 (2015).

236. *See* Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35 (1997).

237. Garaudy v. France, 2003-IX Eur. Ct. H.R. 369 (2003).

eliminate or reduce political speech,[238] or to stop individuals from critiquing their own government,[239] and reasonable lawyers can disagree on how far a government may go in regulating political speech.[240] In any event, Holocaust denial presents a different fact pattern from the Ukraine situation. The former involves lying about an actual genocide, while the latter involves lying about a fictitious genocide. The law should distinguish between the two, because the latter is especially destabilizing to the international order. The former involves a threat to the historical truth, and other abstract though important values, whereas the latter can be used as a pretext for launching a military campaign in violation of the UN Charter, making it especially pernicious and deserving of legal scrutiny.

What would it mean to extend this interpretive move to other international treaties or customary obligations in other areas of international law? This is unclear, although one can imagine the contours of a more general prohibition on disinformation or pretext.[241] Every international treaty contains within it a set of binding norms that each party to the treaty or convention is bound to respect. If one party falsely accuses another party of violating that treaty, the underlying norms of the treaty are thereby invoked, and either party may then assert the existence of a dispute under the treaty. This legal consequence is most strong in cases where the treaty is explicit in referring to "disputes" arising under the treaty, but even in cases where no such explicit language exists, we must assume the existence of a general background norm of truthfulness and good faith in international relations.[242] This background norm is perhaps too general, too abstract, too obvious, and too vague to be codified in every treaty, but perhaps that is the point. There are plenty of background norms that are axiomatic because international law cannot function without them; one cannot, on pain of circularity, look for a justification of their existence in the positive law when they are a prerequisite for the positive law to function properly.[243]

A classic example of these axiomatic norms is the principle of *pacta sunt servanda*, or the idea that parties are obligated to respect binding treaty

238. *Cf.* Marko Milanovic & Michael N. Schmitt, *Cyber Attacks and Cyber (Mis)information Operations During A Pandemic*, 11 J. NATL. SEC. L. & POL'Y 247, 276 (2020) (discussing the problem of overregulating misinformation and restricting legitimate political speech).

239. *Id.*

240. *Id.*

241. *Cf.* Ashley C. Nicolas, *Taming the Trolls: The Need for an International Legal Framework to Regulate State Use of Disinformation on Social Media*, 107 GEO. L.J. ONLINE 36, 50 (2018).

242. *See* Michael Bowman, *"Normalizing" the International Convention for the Regulation of Whaling*, 29 MICH. J. INTL. L. 293, 374 (2008) (describing the principle of good faith).

243. *See* Vijay M. Padmanabhan, *The Human Rights Justification for Consent*, 35 U. PA. J. INT'L L. 1, 2 (2013) (describing consent as one such norm); J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1066 (2020) (discussing good faith).

commitments.[244] Although this principle is articulated in the Vienna Convention, the only way the Vienna Convention can be understood to be binding is if we have already accepted *pacta sunt servanda* as true.[245] Similarly, honesty and truthfulness in international relations should be considered a necessary prerequisite for international legal adjudication, and certainly the basis for international dispute resolution generally.[246] If parties to a treaty were not required to deal with each other with truthfulness and good faith—and if deceit and dishonesty were acceptable—then the machinery of public international law would grind to a halt.[247] Indeed, the requirement of dealing "in good faith" is codified in the Vienna Convention.[248] Some have even suggested that the principle of good faith is the foundation of international law.[249]

The coming years will determine if a prohibition on pretext and disinformation gains currency as a specific application of the more general requirement of acting in good faith in international relations. The dispute between Russia and Ukraine over its pretextual invocation of genocide may be the inspiration for a deeper conceptual understanding of the foundations of international law. And it may require recapturing older discussions about the same topic but under different descriptions and labels. For example, in 1936 several states drafted and signed a legal convention prohibiting broadcasting against peace.[250] The Convention includes an obligation not to use broadcasting to incite war or more broadly to incite actions that would lead to

244. *See* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

245. *See* Hans Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 288 (1958).

246. For one example of this obligation under international law, see G. Alex Sinha, *Euphemism and Jus Cogens*, 19 NW. U.J. INT'L HUM. RTS. 1, 18 (2020) (discussing the problem of euphemistic descriptions of jus cogens violations of international law, especially torture).

247. *See* Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L. L. 117, 148 (2001) (describing, as an axiomatic element of international law, "good faith implementation of treaties"); Nicholas Greenwood Onuf, *Recueil des Cours de L'academie de Droit International de la Haye, 1989. 5 Vols. (Vols. 213-217 of the Collection.) Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. vol. I, 407; vol. II, 398; vol. III, 416; vol. IV, 416; vol. V, 451*, 86 AM. J. INTL. L. 834, 837 (1992) (discussing customary obligation to respect "established norms of diplomatic intercourse").

248. *See* Vienna Convention, *supra* note 244, art. 31 (requiring that treaties shall be interpreted in good faith).

249. *See, e.g.*, Frédéric G. Sourgens, *Reconstructing International Law as Common Law*, 47 GEO. WASH. INTL. L. REV. 1, 7 (2015).

250. *See* International Convention Concerning the Use of Broadcasting in the Cause of Peace art. 2, *opened for signature* Sept. 23, 1936, 1938 U.N.T.S. 302 (requiring states to stop broadcasts that "incite the population of any territory to acts incompatible with the internal order or the security of a territory of a High Contracting Party").

war.[251] It also requires states to prohibit incorrect statements that are "likely to harm good international understanding."[252] Taken together, these obligations codify a duty to engage in truthful and good-faith speech as it concerns international relations.

As has been noted elsewhere, Russia signed the Broadcasting Convention but appended a reservation rejecting the jurisdiction of the World Court to resolve disputes arising under the Convention.[253] So the Broadcasting Convention is not, by itself, sufficient to establish the ICJ's jurisdiction over Ukraine's dispute with Russia.[254] But it is helpful for a deeper and more important purpose—establishing the existence of a norm of international law that prohibits false accusations, especially those that are calculated to bring about or to support a war. This prohibition is evident once one recognizes the cluster of related principles that are already recognized as flowing from treaty or customary law: the requirement to act in good faith, the prohibition on war propaganda, the prohibition on broadcasting incorrect statements, and the requirement to submit disputes arising under some treaties to the World Court. Taken together, this cluster establishes that truth and good faith—the very foundations of international relations—are formally protected by the international legal order.

III. PAST INVOCATIONS OF GENOCIDE AS LEGAL JUSTIFICATION FOR UNILATERAL MILITARY INTERVENTION

Russia's invocation of genocide as a justification for its military intervention in Ukraine did not occur in a vacuum. Rather, it occurred against the background of recent legal practice regarding unilateral humanitarian intervention. This section will explicate that past practice and explore the argument that the seeds of pretextual genocide were sowed during an earlier

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251. *Id.* at art. 2 (requirement "to ensure that transmissions from stations within their respective territories shall not constitute an incitement either to war against another High Contracting Party or to acts likely to lead thereto").

252. *Id.* at art. 3 (requirement to "mutually undertake to prohibit and, if occasion arises, to stop without delay within their respective territories any transmission likely to harm good international understanding by statements the incorrectness of which is or ought to be known to the persons responsible for the broadcast").

253. *See* Talita de Souza Dias, *Russia's "Genocide Disinformation" and War Propaganda are Breaches of the International Convention Concerning the Use of Broadcasting in the Cause of Peace and Fall within the ICJ's Jurisdiction*, EJIL: TALK! (Mar. 4, 2022), https://www.ejiltalk.org/russias-genocide-disinformation-and-war-propaganda-are-breaches-of-the-international-convention-concerning-the-use-of-broadcasting-in-the-cause-of-peace-and-fall-within-the/.

254. *Id.* (noting that "the ICJ would not have automatic jurisdiction to hear cases concerning Russia's violation of the International Convention Concerning the Use of Broadcasting in the Cause of Peace, including its genocide disinformation and war propaganda with respect to Ukraine" and concluding that "all parties to any such a potential dispute, including Russia, would have to specifically consent to the ICJ's jurisdiction to hear the case").

period during the debates over humanitarian intervention. During those legal discussions, some lawyers and states argued that the commission of ongoing atrocities permitted or required the use of military force to stop those atrocities.[255] In Part IIIA, this article will first critically evaluate the alleged connection between the humanitarian intervention discourse and the current problem of genocidal pretext. Then, in Part IIIB, this article will examine the more aggressive argument that the problem of genocidal pretext reveals a fundamental strategic problem with international law: its focus on human rights abuses such as genocide and its alleged lack of focus on jus ad bellum and aggressive war.

A. Genocide and Humanitarian Intervention

During the NATO intervention in Kosovo in the former Yugoslavia, the Security Council did not authorize the use of military force, pursuant to its Chapter VII authority under the UN Charter,[256] and both Russia and China were against the deployment of international forces there.[257] This placed NATO and its member states, including Britain, the United States, and Belgium, in a particularly difficult legal position.[258] Self-defense under Article 51 was arguably not available as a legal justification, since the conflict was an internal civil war within Serbia rather than an armed attack crossing international boundaries and instigated by a foreign state.[259] Similarly, defense of others, though conceptually plausible, was not available as a legal rationale for reasons substantially similar to self-defense, i.e., the lack of an armed attack crossing international borders.[260] The excuse of necessity, though initially explored by Belgium in ICJ proceedings,[261] was never fully

255. *See, e.g.*, Susan H. Bitensky, *For Recognition of a Peoples' Right to U.N. Authorized Armed Intervention to Stop Mass Atrocities*, 16 WASH. U. GLOBAL STUD. L. REV. 245, 264 (2017).

256. *See* Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L. L. 824, 825 (1999) (noting that "NATO decided that not asking for authorization was preferable to having it frustrated by veto, which might have complicated diplomatic efforts to address the crisis and would have rendered consequent military action politically more difficult").

257. *Id.* at 825 (noting that Russia and China would have vetoed an authorization).

258. *See* Matthew Emery, *Ukraine: Analyzing the Revolution and NATO Action in Light of the U.N. Charter and Nicaragua*, 30 EMORY INT'L L. REV. 433, 455 (2016) (noting the legal justifications offered by Belgium).

259. *See* Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 B.U. INT'L L.J. 207, 218 (2001) (noting that "Article 51 was difficult to apply in its literal form").

260. *But see* Jens David Ohlin, T*he Doctrine of Legitimate Defense*, 91 INT'L L. STUD. 119, 120 (2015) (arguing for a broad reading of Article 51 that includes defense of others).

261. *See* Oral Pleadings of Belgium, Legality of Use of Force (Yugo. v. Belg.), 1999 I.C.J. Pleadings 15 (May 10, 1999).

developed as a legal rationale, and was hampered by the fact that its application in the jus ad bellum context is severely contested.[262]

NATO ultimately launched multiple air campaigns to stop atrocities in Kosovo, and the sovereign states who participated in the campaign offered different legal justifications.[263] Some lawyers relied on the fact that NATO was engaged in multilateral action, rather than unilateral (one state action),[264] thus suggesting a greater degree of moral and political credibility for the intervention, though there is little legal basis for thinking that a multilateral jus ad bellum violation is somehow more legitimate than a unilateral one.[265] Other arguments for humanitarian intervention suggested that the NATO action was technically illegal but "legitimate" in some deeper sense,[266] or acceptable under a broader notion of international morality.[267]

While the legal debates pushed in different directions, the factual arguments were far more unified. Regardless of which theory was advanced, proponents of the NATO intervention relied on the fact that forces within Serbia were engaged in atrocities against civilians that amounted to war crimes, crimes against humanity, and even genocide.[268] The exact details of these crimes were exhaustively chronicled at the ICTY, and other tribunals including the Kosovo Specialist Chambers, though some of the details were not yet uncovered at the moment when NATO engaged in its intervention. But there was sufficient evidence of widespread atrocities and genocide for NATO members to argue, publicly, that the commission of international crimes within the former Yugoslavia justified, or even required, intervention,[269] even though the conditions for the lawful exercise of military force under the UN Charter (Security Council authorization or Article 51 self-defense) were not satisfied.[270]

The lessons to be learned from this pivotal moment for international law are uncertain, but some scholars would link this episode with the

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262. For a discussion of necessity as a jus ad bellum defense, see Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT'L L. 447, 447 (2012).

263. *See* Emery, *supra* note 258, at 455 (noting member states offered different rationales).

264. *See* Jonathan E. Davis, *From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era*, 44 VAND. J. TRANSNAT'L L. 217, 271 (2011).

265. *See* Jeremy A. Haugh, *Beyond R2P: A Proposed Test for Legalizing Unilateral Armed Humanitarian Intervention*, 221 MIL. L. REV. 1, 41 (2014) (noting that "[e]ven a multilateral organization, like NATO, does not confer legality on a humanitarian intervention").

266. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, AND LESSONS LEARNED 4 (2000) [hereinafter KOSOVO REPORT].

267. *See, e.g.*, Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community*?, 10 EUR. J. INT'L L. 23 (1999).

268. *See* KOSOVO REPORT, *supra* note 266, at 6-16.

269. *Id.*

270. *Id.*

Russian invocation of genocide.[271] At first glance, the connection would appear to be tenuous, but the connection can and should be clarified. In the humanitarian intervention debate, genocide is sometimes invoked as a basis for creating an exception to Article 2(4) of the UN Charter.[272] Some scholars have explicitly stated that genocide gives rise to a legal permission, or perhaps even a legal obligation, to act.[273] A growing legal movement advocated for this approach under the banner of the legal concept "Responsibility to Protect" (R2P), which holds that the international community has an obligation to protect innocent civilians from the negative impact of war and other humanitarian disasters.[274] Under one version (or application) of R2P, the doctrine would even justify military action in the absence of Security Council authorization,[275] though not all proponents of R2P subscribe to this view.[276]

The connection between genocide and intervention, therefore, is not new. There is undoubtedly a linkage between the Kosovo precedent and the current dilemma regarding Ukraine.[277] For example, Sam Moyn has stated that Putin's citation of the Kosovo precedent was "cynical but not untruthful."[278] But this legal and moral equation fails to take sufficient stock of the underlying factual misalignment between the precedents. The difference between the two is that Russia's invocation of genocide was fictitious, while NATO's accusation of genocide was grounded in well-documented facts about what happened in Kosovo and other locations during the Balkan Wars.[279]

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271. *See, e.g.*, Masha Gessen, *How the Kosovo Air War Foreshadowed the Crisis in Ukraine*, NEW YORKER (Feb. 15, 2022), https://www.newyorker.com/news/our-columnists/how-the-kosovo-air-war-foreshadowed-the-crisis-in-ukraine (claiming that the world in which the Ukraine crisis could occur was "forged jointly by Russia and the United States, starting twenty-three years ago"); Jade McGlynn, *Why Putin Keeps Talking About Kosovo*, FOREIGN POL'Y (Mar. 3, 2022, 11:39 AM), https://foreignpolicy.com/2022/03/03/putin-ukraine-russia-nato-kosovo/ (describing the NATO intervention as the "West's original sin" and a "humiliating affront" to Russia).

272. *See U.S. Adoption of New Doctrine on Use of Force*, 97 AM. J. INT'L L. 203, 204 (2003).

273. *Cf.* Mai-Linh K. Hong, *A Genocide by Any Other Name: Language, Law, and the Response to Darfur*, 49 VA. J. INT'L L. 235, 238 (2008) (arguing that calling a conflict a "genocide" leads to a legal obligation under certain international treaties).

274. *See* KOSOVO REPORT, *supra* note 266, at 10.

275. *See* Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT'L L. 319, 329 (2012) (discussing a 2009 UN Secretary-General's report which "highlighted the capacity of the General Assembly under the Uniting for Peace procedure to act when the Security Council fails to do so")

276. *See id.* at 329-30 (noting that the report triggered much debate and received only a measured endorsement by the General Assembly).

277. *See* McGlynn, *supra* note 271.

278. *See* Samuel Moyn, *The 'Rules-based International Order' Doesn't Constrain Russia—Or the United States*, WASH. POST (March 1, 2022), https://www.washingtonpost.com/outlook/2022/03/01/ukraine-international-order-un/ (noting that the NATO operation in Kosovo was not approved by the Security Council and concluding that "[w]hen Putin, in his irate harangue days before the Ukraine invasion, pointed to American hypocrisy about the use of force, he was being cynical but not untruthful").

279. *See* Gessen, *supra* note 271.

The question, then, is whether the strict jus ad bellum regime was undermined by NATO in Yugoslavia to such an extent that what is happening in Ukraine is just the logical conclusion of a story whose previous chapter was written two decades ago. Perhaps so, but it is important to distinguish between two very different uses of the phrase "pretext." One might call the NATO invocation of genocide a pretext, if one likes, but if so, it was a pretext in a special sense. It did not involve a fictitious reference to events that did not occur, but rather an aggressive legal argument on which legal experts were very much split, i.e., whether a genocide can provide a legal exception to the UN Charter's strict jus ad bellum regime.[280] Contrast that sense of "pretext" with the *factual* pretextual claim made by Russia about Ukraine, which was integral to Ukraine's argument that it had been *falsely* accused of a genocide by Russia and that Russia was then using a fictitious genocide as a legal pretext for an invasion. Say what you will about the NATO intervention, it bears little resemblance to the Ukrainian situation. The fictitious nature of the Russian accusation is precisely what gave rise to a dispute arising under the Genocide Convention, and which Russia used as a strategic pretext to launch an invasion of Ukraine. If Russia had invoked a real genocide perpetrated by Ukraine, that would place the current situation on all fours with the NATO intervention, but that is not the situation in Ukraine.[281]

B. Refocusing International Law

Some scholars have taken the argument even further, suggesting that Russia's invocation of genocide shows that international law is far too focused on alleviating human rights abuses and atrocities during armed conflict,[282] which collectively are regulated by the legal regimes of International Human Rights Law (IHRL), International Humanitarian Law (IHL), International Criminal Law (ICL), and the Law of Armed conflict (LOAC). These critics believe that international law should refocus its energy on suppressing illegal war and promoting the prohibition on aggression.[283] Once the focus of the law of war during the Nuremberg era, which focused on crimes against peace, the crime of aggression has fallen into disuse in the intervening decades.[284] In its place, IHL, LOAC, and ICL have pushed forward with developing and applying the jus in bello, which is now codified in many

280. *See* Cassese, *supra* note 267, at 23-30.

281. *See Countering Disinformation with Facts*, *supra* note 164.

282. *See* Wuerth, *supra* note 38 (advising that the "international community should reinvest in norms of territorial integrity and sovereignty through international law, even at the occasional expense of humanitarian objectives").

283. *Id.*

284. *See* Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 72-73 (2010) (listing various obstacles to creating an international legal definition of "aggression").

treaties, prosecuted at international tribunals, and advocated for by the ICRC and many other non-governmental organizations.[285] By way of comparison, the amount of time and energy focused on the jus ad bellum allegedly pales in comparison.[286]

What international law should "focus" on is a legitimate subject of debate for scholars and for international lawyers generally. But is it really the case that international law's achievements in the areas of human rights and humanitarian law have paved the way for Russia to weaponize the law of genocide? Scholars such as Ingrid Wuerth and Samuel Moyn have likely overstated their case when they suggest that international law's focus on human rights has weakened the prohibition on the jus ad bellum, and that what we now need to do is refocus on the principle of sovereignty and the prohibition on the use of force.[287] While there is nothing wrong with focusing on the use of force and its prohibition in the UN Charter, we should be suspicious of any argument that blames our current predicament on an alleged "tradeoff" between the legal regimes of jus ad bellum and jus in bello.

The Wuerth and Moyn critiques assume that public international law has made certain strategic choices and that those choices came with collateral consequences.[288] These critics imagine an alternate universe where an opposite strategic choice was made, one that prioritized jus ad bellum, and strengthened the prohibition against aggressive war, and decentered the legal concept of genocide. In that alternate universe, one might imagine, Putin has less room to maneuver, less room to use genocide as a pretext for an unlawful aggression, since the currency of law in that universe is built around the legal concept of aggression rather than the legal concept of genocide.[289] In that universe, perhaps, Putin cannot rely on genocide in that way because genocide has not been placed in that privileged position as a crime above all others. Perhaps Russia's pretextual use of genocide was only possible

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285. *See id.* at 111 (suggesting that there is greater precision in jus in bello provisions than in aggression provisions and criticizing a recent aggression provision for "papering over… differences" in a manner inconsistent with the principle of legality in criminal prosecutions).

286. *See generally* SAMUEL MOYN, HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR (Farrar et al. eds., 1st ed. 2021) (arguing that international law has focused on humanizing war instead of focusing on prohibiting it).

287. *See* Moyn, *supra* note 278 ("[T]wo wrongs don't make a right: America's flouting of U.N. rules in no way justifies the Russian invasion of Ukraine. But two wrongs do make a pattern. That these militarily powerful nations find it so easy to do an end-run around U.N. prohibitions on aggressive war should cause some reflection.").

288. For example, Moyn argues in his book that "[t]he intense focus of advocacy groups and administration lawyers alike on the legal niceties of humane detention and treatment contributed significantly to a perverse outcome." *See* MOYN, *supra* note 286, at 285.

289. *See* David Kaye, *A Review of Samuel Moyn's* Humane: How the United States Abandoned Peace and Reinvented War, AM. J. INT'L L. (forthcoming) (manuscript at 6) (on file with *Virginia Journal of International Law* Association) (musing that "[i]n light of the Russian aggression against Ukraine, which came months after the book's publication, one can ruefully imagine the power of an official American voice against the war rooted in a counterfactual history of American restraint and lawfulness.").

because of the relative roles played by the concepts of genocide and aggression in the current ecosystem of international legal doctrine. But let us now critically evaluate this argument.

First, the diagnosis is wrong. Some wars are going to occur no matter what, and jus in bello does not promote wars, it simply regulates them.[290] Strengthening the legal prohibition against genocide does not serve to increase the number of wars being fought; it merely makes it less likely that genocides will occur, and advances avenues for redress when they do occur.[291] Although Russia's invasion is wrongful as a matter of jus ad bellum, it is also the case that war crimes and crimes against humanity have made the war much more dangerous and deadly for civilians caught in its wake.[292] So, international law is rightly concerned with the full panoply of illegality occurring in this and other wars: the violation of jus ad bellum, the violation of the UN Charter, the violation of jus in bello, and the commission of genocide and other atrocities. These are all legitimate subjects of concern (and focus) for international law.

Second, the argument functions to distract from the problem of pretextual assertions of genocide. One does not occur at the expense of the other; developing the jus in bello, and strengthening the prohibition on genocide, does not entail a reduction of effort for jus ad bellum and aggression.[293] International law is not a zero-sum game. Focusing on human rights does not reduce our attention on aggression; focusing on the prohibition against genocide does not entail weakening the protection against unlawful military force. Simply put, every international lawyer, and every state, recognizes the centrality of the prohibition on the unlawful use of military force as outlined in article 2(4) of the UN Charter.

Third and finally, it would be disappointing if international law could not distinguish between legitimate and fictitious claims of genocide. One cannot properly understand the illegality of Russia's behavior without

290. For a criticism of Moyn's thesis along these lines, see Robert Howse, *Polemical Pacifism: The Wonkfare of Samuel Moyn*, JUST SEC. (Sept. 28, 2021), https://www.justsecurity.org/78367/polemical-pacifism-the-wonkfare-of-samuel-moyn/ (arguing that for Moyn, "[t]he idea that wars can go on and on *because* they are conducted in accord with humanitarian law is simply a hypothesis and is asserted rather than argued for, albeit with considerable repetition.") (emphasis in original).

291. *Id.*

292. *See* Office of the High Commissioner for Human Rights, *Plight of Civilians in Ukraine*, UNITED NATIONS (May 10, 2022), https://www.ohchr.org/en/press-briefing-notes/2022/05/plight-civilians-ukraine (asserting that "parties must in the conduct of operations take constant care to spare the civilian population, civilians and civilian objects and commit to protecting every civilian woman, man and child and those hors de combat that fall under their control").

293. *See* Tejasvi Nagaraja, *Review of Samuel Moyn's Humane*, *in* ROUNDTABLE 13-10 ON *HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR* 15, 16 (May 23, 2022), https://issforum.org/roundtables/13-10 ("The book posits a war-abolitionist versus brutality-concern binary. This stark, zero-sum binary does not hold up for evaluating historical protagonists and contentions.").

focusing on the falsity of Russia's argument. Indeed, Ukraine's entire submission to the ICJ is based around the *falsity* of Russia's statements.[294] Facts matter to the law, to any legal system, and to international law.

One reason why it is important to understand the true causes of Russia's invocation of genocide is that it threatens to distract us from seeing the available responses that international law might bring to bear on the problem. If Russia's pretextual claim to genocide is just the next stone in a path first laid by NATO, then there might be a temptation to view it as another discursive move made in the "game" of international law, and one that it is just as legitimate as any other move made in the game.[295] But such a cynical approach should be rejected. Regardless of the outcome of the great humanitarian intervention debates of the 1990s, falsely asserting the existence of a genocide that never occurred should be recognized as a distinct phenomenon, and one that international law can and should directly confront by announcing, and developing, a general background norm of truthfulness and good faith in international relations.

IV. DISINFORMATION AS GENOCIDAL DISTRACTION

It is ironic that Russia accuses Ukraine of having engaged in genocidal conduct in Eastern Ukraine.[296] Not only is the accusation false, but it also serves to distract international and domestic audiences from the hard truth that Russia has engaged in its own genocidal conduct in Ukraine.[297] This is no mere contingent irony. Rather, a false accusation of genocide is an ideal deflection for a genocidal program, in part because it helps justify the military campaign and paints Russia as a victim rather than as an aggressor. People who believe that Ukraine has perpetrated a genocide against Russian-speaking residents in Eastern Ukraine will be less likely to believe that Russia's military response constitutes a genocide. This is Russia's genocidal disinformation playbook.

Russia reuses this playbook often and does not confine its use to Ukraine. For example, in 2022, a federal grand jury in the United States indicted a Russian operative, Aleksandr Ionov, for acting as an unregistered

294. *See* Ukraine Application, *supra* note 167, at ¶ 10 (quoting official statement from Ministry of Foreign Affairs that "Russia's claims are baseless and absurd").

295. *Cf.* Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1507 (2020) (referring to the "range of discursive moves that global actors use to argue about and justify" interpretations of customary law).

296. *See* Ukraine Application, *supra* note 167, at ¶ 24 (stating that "Russia's lie is all the more offensive, and ironic, because it appears that it is Russia planning acts of genocide in Ukraine.").

297. *Id.*

foreign agent.[298] Among other things, Ionov was accused of building political support for a grassroots organization that would accuse the United States of engaging in genocide against African peoples.[299] These activities included the creation of a petition protesting U.S. genocidal behavior that would be signed by as many people as possible and then forwarded to the United Nations.[300] Ionov also allegedly engaged in advocacy on behalf of the Russian separatist "government" in the Donetsk region of Ukraine,[301] and made speeches saying that the Russians invaded Ukraine only to stop the Nazis in power there from continuing their killings of innocent Russian civilians.[302]

Russia's covert behavior described in the Ionov indictment is different from the Kremlin's pretextual accusation of genocide against Ukraine. For one, the Russian disinformation campaign outlined in the Ionov case was performed surreptitiously by an operative who did not publicly disclose his connections with the Russian state, while Russian accusations regarding Ukraine are public and officially acknowledged by state organs. But despite these differences, the commonalities are striking; both are attempts to distract from a genocidal military campaign by Russian military forces. When a state engages in an international crime, the best defense in the information space is to accuse your opponent of the same crime, with the hoped-for result that an audience has no idea what to think.

This Part will outline the ways in which the Russian military operation in Ukraine turned out to be genocidal. The legal requirements for the crime of genocide are outlined in the Genocide Convention and have been elucidated in several legal cases before the ICTY, the ICTR, the ICJ, and other international or hybrid tribunals.[303] Part IVA focuses on the act requirement for genocide, including the list of predicate acts that qualify as well as the requisite connection between the organs of state power and the physical perpetrators. Part IVB focuses on the mental elements, including the specific intent to bring about the destruction, in whole or in part, of a protected group.

A. Act Requirement and Contextual Elements

298. *See* Grand Jury Indictment, United States v. Aleksandr Viktorovich Ionov, No. 8:22-cr-00259-WFJ-AEP (M.D. Fla. Jul. 26, 2022) at ¶ 4.

299. *Id.* at ¶ 21(d).

300. *Id.* at ¶ 21(g).

301. *Id.* at ¶ 21(ss).

302. *Id.* ¶ 21(aaa).

303. *See generally* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2009) (providing an overview of the origins of the legal prohibition of genocide beginning after World War I).

For a legal finding of genocide to occur, at least one of the following predicate acts must have been committed:

> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[304]

The list of predicate acts is diverse, with killing only being explicitly referenced in the first example, though a killing could implicitly qualify as a predicate act under one of the other examples too, such as a killing that causes serious harm to members of the group or a killing that represents the deliberate infliction on the group of conditions "calculated to bring about its physical destruction."[305] But the broader point is that the predicate act need not necessarily include killings and some of the predicate acts, such as forcibly transferring children to another group, explicitly involve situations that need not involve killings.[306]

During the invasion of Ukraine, Russian military forces conducted several predicate acts that could be the basis for a genocide finding.[307] The Russian military did not limit its attacks to military targets but rather targeted entire civilian neighborhoods.[308] While in some cases indiscriminate attacks against civilians might merely be evidence of war crimes, the distinguishing characteristic is the mental element behind the attack.[309] As will be explored in greater depth in Part IVB, the Russian government appears to have attacked civilians as a deliberate part of its overall strategy to terrorize the

304. Genocide Convention, *supra* note 47, art. II.

305. *Id.*

306. *Cf.* SCHABAS, *supra* note 303, at 271 (explaining how the drafters chose to limit the language of Article II to acts of "physical and biological" genocide even though it is possible to imagine a State attempting to destroy a group of people by "eliminating its political structures, economy and culture…").

307. *See generally* Yonah Diamond et al., *An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent*, NEW LINES INSTITUTE AND THE RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS, May 2022 at 2 (such predicate acts included, for instance, documented mass murders in which civilian victims were found with their hands tied and with close-range bullet wounds to the head, or deliberate or indiscriminate attacks on shelters, residential areas, and evacuation routes); *see also* Kristina Hook, *Why Russia's War in Ukraine Is a Genocide: Not Just a Land Grab, but a Bid to Expunge a Nation*, FOREIGN AFF. (July 28, 2022), https://www.foreignaffairs.com/ukraine/why-russias-war-ukraine-genocide (describing the "massacring, raping, torturing, deporting, and terrorizing" of a "vulnerable civilian population" in Ukraine); *and see* Claire Parker, *Russia Has Incited Genocide in Ukraine, Independent Experts Conclude*, WASH. POST (May 27, 2022), https://www.washingtonpost.com/world/2022/05/27/genocide-ukraine-russia-analysis/ (citing evidence that Russian authorities "[rewarded] soldiers suspected of mass killings in Ukraine").

308. *See* Diamond et al., *supra* note 307, at 2.

309. *Id.* at 28.

civilian population and to make life as a Ukrainian people impossible.[310] In addition to the shelling and bombardment, Russian forces have attacked civilians on the streets,[311] and used rape, sexual violence, and torture as deliberate tactics of war.[312] Some of these atrocities were committed against Ukrainian civilians, while others were committed against Ukrainian military forces who were *hors de combat*, i.e.,. unable to engage in combat due to injury or detention.[313] In other armed conflicts, some atrocities have been dismissed as evidence of war crimes and attributed to lack of professionalism among conscripted armies. The difference here is the strong evidence that the atrocities were motivated by group-level hatred and animosity against the Ukrainian people, seeded by rhetoric and orders from Russian military commanders and government officials.[314]

There is strong evidence that the Russian Army has used widescale destruction of entire civilian neighborhoods to destroy the Ukrainians.[315] Shelling and bombardment of civilians were not the product of simple mistakes, or overzealous infantry personnel on the ground.[316] The killings and destruction were a deliberate strategy that came from the chain of command.[317] There is also strong evidence that such tactics were in keeping with official Russian government positions. For example, a Russian Embassy tweeted video of people saying that Ukrainian fighters should not just be killed but should be made to suffer a "humiliating death."[318] These statements were then combined with a heavy dose of misinformation in the form of accusations that Ukraine was filled with Nazis and that the goal of the military operation was to "#StopNaziUkraine."[319] This tweet was a good example of the link between misinformation, the destruction of the Ukrainian people, and the military attacks needed to bring about that destruction. The official position of the Russian government is that the Ukrainian people need to be destroyed because the Ukrainians are just Russians who have

310. *Id.* at 2-3.

311. *Id.* at 25.

312. *Id.* at 3.

313. *See* Dalton Bennett & Ellen Francis, *"Horrific" Video Apparently Showing Castration of Ukrainian Fighter Condemned*, WASH. POST (July 30, 2022), https://www.washingtonpost.com/world/2022/07/30/ukraine-russia-video-castration-soldier/ (describing international condemnation after video of mistreatment surfaced).

314. *See* Diamond et al., *supra* note 307, at 36-37.

315. *Id.*

316. *See* Press Release, U.N. High Comm'r for Hum. Rts., Bachelet Urges Respect for International Humanitarian Law amid Growing Evidence of War Crimes in Ukraine, U.N. Press Release (Apr. 22, 2022) (noting pattern of civilian killings).

317. *See* Diamond et al., *supra* note 307, at 27-28.

318. *See* Russian Embassy in the United Kingdom (@RussianEmbassy), TWITTER (July 29, 2022, 3:00PM), https://twitter.com/RussianEmbassy/status/1553093117712162828.

319. *Id.*

been corrupted by fascism and Nazism; they have no legitimate claim to independent existence.[320]

In other words, the goal of the military operation was not just to seize Ukrainian territory or to subjugate the enemy into surrender in an abstract sense but to eliminate the Ukrainian people and absorb its surviving components into the fabric of Russia.[321] If that is not "conditions of life" designed to bring about the physical destruction of the group, then nothing is. Consequently, there is compelling evidence that Russian forces have committed predicate acts in categories (a), (b), and (c).

It should be noted that genocide does not require a nexus with armed conflict.[322] By law, a genocide could occur during times of peace when there are no armed hostilities between two states or non-state actors.[323] In the case of Russia's invasion of Ukraine, there is clearly an armed conflict, but the lack of a nexus requirement is still relevant because there could be private acts of violence not "connected" to the overall armed conflict. It matters not whether the predicate acts strategically push forward the military aims of one party to the armed conflict, what matters is simply whether the predicate acts are committed with the required mens rea, i.e., the intent to bring about the destruction of the protected group in whole or in part.[324] And that destruction can occur within the four corners of the armed conflict or outside of it, through acts of military personnel as part of a defined military strategy or actions of military personnel outside of that defined military strategy.

However, for state responsibility to apply under international law, there must be some element of control over the predicate acts, even if there need not be a nexus with an armed conflict.[325] In other words, there must be some linkage between the physical perpetrators—whether armed forces, militias, or civilian perpetrators—and organs of state power.[326] The required linkage is not spelled out in the Genocide Convention and judicial

320. Putin, Historical Unity, *supra* note 39 (denying that Ukrainians are a separate people from the Russians because they are "a single whole").

321. *Id.*

322. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INTL. L. 239, 263-64 (2000) ("That the Genocide Convention dispensed with the nexus to armed conflict is particularly significant because crimes against humanity overlap to a considerable extent with the crime of genocide.").

323. For a discussion of the early drafting negotiations on this issue, see William Schabas, *Nuremberg and the Drafting of the Genocide Convention*, 21 WASH. U. GLOB. STUD. L. REV. 71, 87 (2022).

324. Melanie Partow, *Minding the Impunity Gap in Domestic Prosecutions of Crimes Against Humanity Under Customary International Law: Reflections on Mariano Gaitán's Analysis of Argentine Jurisprudence*, 27 SW. J. INT'L L. 303, 313 (2021) (noting that genocide requires only the connection to genocidal mens rea). *See also* Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Appeal Judgment, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001).

325. For a discussion, see Marko Milanovic, *State Responsibility for Genocide*, 17 EUR. J. INTL. L. 553, 568 (2006).

326. *Id.*

institutions have disagreed sharply over the definition of the required linkage.[327] For example, the ICJ in several cases has relied on the doctrine of effective control, meaning that state officials have effective control over the physical perpetrators committing the predicate acts.[328] In contrast, the ICTY suggested in a series of decisions that genocide could occur in the absence of effective control if state officials had "overall control" over the activities of the physical perpetrators.[329] Although the exact difference between the two legal standards is not always clear in its application, some broad generalizations can be drawn. Effective control arguably requires a level of operational control at a granular level, i.e., setting strategic goals and staying in regular contact with forces on the ground regarding how those strategic goals are pursued, though how regular that contact need be requires law application to fact.[330] In contrast, the overall control standard simply requires that state officials enjoy the global control that flows from providing money, military equipment, or other resources needed to carry out the campaign, without necessarily staying in close contact regarding how the campaign is carried out at the level of individual tactical operations.[331] For example, under the overall control standard, it would be enough to provide a group with money and guns to perpetrate a genocide without directing their behavior at the level of specific tactical decisions.[332] Despite an implicit invitation from the ICTY to adopt the overall control standard, the ICJ has steadfastly reiterated that public international law requires effective control.[333]

Although a court would need to engage in factfinding on this point, there is substantial evidence that Russian government control is sufficient to qualify under either the overall or effective control standards.[334]

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327. Oona A. Hathaway, Emily Chertoff, Lara Domínguez, Zachary Manfredi, & Peter Tzeng, *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539, 552 (2017).

328. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 86-115 (June 27); Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 208 (Feb. 26).

329. *See* Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Appeal Judgement, ¶¶ 83-89 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

330. Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability*, 51 HARV. INTL. L.J. 113, 192 (2010).

331. Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649, 667 (2007).

332. *Id.* at 666.

333. Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 208 (Feb. 26).

334. *See* Natia Kalandarishvili-Mueller, *Russia's "Occupation by Proxy" of Eastern Ukraine—Implications Under the Geneva Conventions*, JUST SEC. (Feb. 22, 2022), https://www.justsecurity.org/80314/russias-occupation-by-proxy-of-eastern-ukraine-implications-under-the-geneva-conventions/ (discussing Ru-ssian control over separatist rebels in Eastern Ukraine for the purpose of establishing either state responsibility or the existence of an international armed conflict).

Communications intercepts make clear that decisions to flatten entire neighborhoods were made by military commanders, thus placing those decisions within the chain of command, rather than outside of it.[335] In addition, Kremlin statements regarding Ukraine have not included apologies for these actions and have placed responsibility for Ukraine's destruction at the hands of Ukrainian leaders who are defying Russia's annexation program.[336]

For individual liability for genocide in a criminal court, different standards apply. Instead of overall or effective control, the defendant would need to be connected to the relevant physical perpetrator through some mode of liability recognized under the criminal law being applied in that jurisdiction.[337] For example, the ICTY and ICTR have applied Joint Criminal Enterprise (JCE) to defendants who were part of a collective endeavor to carry out a genocide.[338] Other international courts have concluded that JCE is recognized by customary international law and may be applied in times and locations before statutory enactment.[339] The International Criminal Court applies the Control Theory of Perpetration, which asks whether the defendant solely, jointly, or indirectly perpetrated the crime through or with others.[340] Specifically, the *Organisationsherrschaft* version of indirect perpetration is applied to defendants who control a bureaucratic or other apparatus of power to perpetrate an international crime.[341] This doctrine might be especially relevant in a criminal prosecution of Russian officials for genocide. Finally, domestic modes of liability, including conspiracy and accomplice liability, could be used to connect a defendant to the physical perpetrators in a domestic criminal case.[342]

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335. *See* Katya Bandouil & Richard Hall, *"Cover the Town with Artillery Fire": Online Sleuths are Intercepting Russian Radio Communications and Revealing Potential War Crimes*, INDEPENDENT (Mar. 2, 2022), https://www.independent.co.uk/world/ukraine-russia-putin-radio-civilians-b2027256.html (reporting that in a phone transcript "which is filled with military language and call signs, a commander appears to order artillery fire on a populated area").

336. *See, e.g.*, Khaleda Rahman, *Russian Ambassador Blames Ukraine for Civilian Deaths in Bucha*, NEWSWEEK (Apr. 4, 2022), https://www.newsweek.com/russian-ambassador-blames-ukraine-civilian-deaths-bucha-1694651.

337. *See generally* Pamela J. Stephens, *Collective Criminality and Individual Responsibility: The Constraints of Interpretation*, 37 FORDHAM INTL. L.J. 501, 516 (2014).

338. Fausto Pocar, *Notes on Joint Criminal Enterprise Before the International Criminal Tribunal for the Former Yugoslavia*, 48 U. PAC. L. REV. 189, 191 (2017).

339. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/1 (Special Trib. for Lebanon, Feb. 16, 2011).

340. Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01//07, Decision on the Confirmation of Charges ¶¶ 495-99 (Sept. 30, 2008).

341. For a discussion of this mode of liability, see Neha Jain, *The Control Theory of Perpetration in International Law*, 12 CHI. J. INT'L L. 159 (2011).

342. *See* Tae Hyun Choi & Sangkul Kim, *Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and an Overview of the South Korean Implementing Legislation of the ICC Statute*, 19 MICH. ST. J. INTL. L. 589, 591 (2011) (describing relevance of domestic modes of liability in domestic war crimes prosecutions).

The crime of genocide does not include a result requirement in the form of a completed genocide.[343] It is enough that there is a predicate act committed with the requisite genocidal intent. There is no requirement that a completed genocide occur, i.e., that the protected group be destroyed.[344] This adds a built-in inchoate flavor to the category of genocide.[345] The fact that Ukraine resisted its own destruction, and for some time succeeded in this resistance, is no bar to a legal finding of genocide.

B. Mental Elements

The mental elements for genocide include the applicable mental state for the predicate act, plus the "chapeau" mens rea for genocide, which is the intent to destroy, in whole or in part, a protected group.[346] As for the mental element for the predicate acts,[347] this can sometimes be hard to discern since the predicate acts are not drawn from traditional legal categories but were instead drafted out of whole cloth for their relevance to the concept of genocide. So, on the one hand, the first predicate act is codified in the Genocide Convention as "killing," but international courts have clarified that the relevant criminal category is murder (and its associated mental state of intent to cause death).[348] On the other hand, "deliberately" inflicting conditions "calculated" to bring about its physical destruction suggests not one but two demanding mental requirements.[349] Presumably, a recklessly created condition, or one created for some other reason and not "calculated" to bring about physical destruction of the group, would not qualify.[350] These heightened mens rea requirements apply not just for individual criminal responsibility against defendants but also for state responsibility under public international law.[351]

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343. Florian Jessberger, *The Definition and the Elements of the Crime of Genocide*, *in* THE U.N. GENOCIDE CONVENTION—A COMMENTARY 87, 95 (Paola Gaeta ed., Oxford Univ. Press 2009).

344. *Id.*

345. *See* Jens David Ohlin, *Attempt to Commit Genocide*, *in* THE U.N. GENOCIDE CONVENTION—A COMMENTARY 193, 194 (Paola Gaeta ed., 2009, Oxford Univ. Press 2009).

346. *See* Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 AM. J. INTL. L. 369, 370 (1984).

347. *See* MARK D. KIELSGARD, RESPONDING TO MODERN GENOCIDE 49 (2015).

348. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 500 (Sept. 2, 1998). For a discussion of this holding, see Randle C. DeFalco, *Conceptualizing Famine as a Subject of International Criminal Justice: Towards A Modality-Based Approach*, 38 U. PA. J. INT'L L. 1113, 1187 (2017).

349. *See* Wolfgang Schomburg, Ines Peterson, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 AM. J. INTL. L. 121, 129 (2007).

350. For a general discussion of the issue of recklessness and genocide, see SANGKUL KIM, A COLLECTIVE THEORY OF GENOCIDAL INTENT 22 (2016).

351. *See* Rafael Leme, *Individual Criminal Liability and State Responsibility for Genocide: Boundaries and Intersections*, 34 AM. U. INTL. L. REV. 89, 131 (2018). *But see* Ines Gillich, *Between Light and Shadow: The International Law Against Genocide in the International Court of Justice's Judgment in Croatia v. Serbia (2015)*, 28

The chapeau mens rea for genocide, the *dolus specialis*, is more complicated. It requires the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.[352] This is an amalgamation of at least three elements: intent, destruction in whole or in part, and a protected group. Taking these in reverse order, the existence of a protected group is probably the least controversial. While it can sometimes be hard to identify whether a group constitutes a racial or religious group, the same complexities do not occur for national groups. Ukrainians constitute a national group because they have enjoyed their own nation for many years, view themselves as belonging to a Ukrainian nation, and have resisted the Russian annexation and invasion as a Ukrainian nation, i.e., in a collective effort organized under Ukrainian nationhood.[353] Even the Russian government views the Ukraine as composed of a Ukrainian nation and seeks their destruction on that basis.[354] In other words, it's not as if the predicate acts were committed for some other reason—e.g., resource control—without any direct connection to the Ukrainian nation. Indeed, the primary rationale for the invasion was to eliminate the Ukrainian nation.

At this point, one could object that the Kremlin does not believe that the Ukrainian people constitute a nation because some of the most disturbing rhetoric coming from the Kremlin has denied the historic independence of Ukraine and declared it to be inseparable from Russia, and therefore destined to be reabsorbed into it.[355] Could one argue that these statements negate any inference that the Russian state believes that it is seeking to destroy a protected group? A deeper evaluation of the Kremlin misinformation campaign reveals a subtle combination of descriptive and normative claims. The Kremlin tacitly acknowledges the *fact* of Ukraine's existence but argues that it *should* not exist, i.e., that it should be absorbed into the Russian whole.[356] The tacit recognition of the descriptive reality is not only consistent with genocidal intent, but it also establishes it.

Lastly, the overall intent requirement, i.e., the intent to bring about the group's destruction in whole or in part, does not require that the Kremlin desired to destroy the entire group—even partial destruction would be

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PACE INTL. L. REV. 105, 124 (2016) (discussing complications from transposing mental elements from international criminal law to the law of state responsibility).

352. *See* Dermot Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?*, 31 FORDHAM INTL. L.J. 911, 918 (2008) (arguing that "[g]enocide's elusive *dolus specialis*, coupled with a paucity of cases from which to take guidance, makes the crime difficult to investigate and adjudicate").

353. *See* Independent Legal Analysis, *supra* note 307, at 1 (asserting that "[t]he Ukrainian national group is recognized domestically, internationally, and expressly by Russia in formal interstate relations" and concluding that it is "thus protected under the Genocide Convention").

354. *Id.* at 36.

355. *See* Putin, Historical Unity, *supra* note 39.

356. *Id.*

enough, such as the destruction of the Ukrainian people in the Donbas region.[357] There is no formal requirement for a grandiose genocidal program that literally wipes out an entire protected group from the face of the globe. A subset of that protected group, limited in time and place, is certainly enough.[358] However, the Russian invasion of Ukraine displayed the Kremlin's ambitions quite transparently—the goal was to capture and occupy not just Eastern Ukraine, but the whole country.[359] Military units attacked Kiev, the capital, in the hopes of performing a leadership decapitation that never occurred.[360] Russian military forces attacked other key cities but ultimately withdrew in the face of stiff Ukrainian military resistance. Only after these failures did the Russian military strategy pivot towards Eastern Ukraine.[361] The first goal, the official goal, was the destruction of Ukrainian nationality per se.[362]

Aside from the "whole or in part" element of the *dolus specialis*, the use of the term "intent" in the chapeau element raises complex questions of legal interpretation owing to the differences in how the concept of "intent" is understood and applied across legal cultures. To a lawyer educated or practicing criminal law in a common-law system, the term "intent" sounds unambiguously like a reference to "purpose" or some other heightened mental state, with terms such as knowledge, recklessness, and negligence used when lower mental states need to be referenced.[363] But in some civil-law jurisdictions, the language of intent is broader and is sometimes used to cover the same conceptual ground as purpose, knowledge, and recklessness—a broad usage that is unfamiliar to the common-law ear.[364] For example, civil-law lawyers will often describe *dolus eventualis*—a mental state

357. *See* Independent Legal Analysis, *supra* note 307, at 3.

358. *Id.* at 2.

359. *See* Mary Glantz, *Russia's Ukraine War Has Narrowed—But Not its Goals: Putin Remains Fixed on Erasing Ukraine. Ideas for Peace Talks Can't Ignore That*, U.S. INST. OF PEACE (July 18, 2022), https://www.usip.org/publications/2022/07/russias-ukraine-war-has-narrowed-not-its-goals ("Combined with Putin's insistence that Ukraine is not a real state, this indicates Putin and the Russian government are prepared for a long campaign, taking and digesting Ukraine chunk by chunk."). *But see* John J. Mearsheimer, *The Causes and Consequences of the Ukraine War*, RUSSIA MATTERS (June 23, 2022), https://www.russiamatters.org/analysis/causes-and-consequences-ukraine-war (arguing, incredibly, that the goal of the Russian invasion was not to destroy the Ukrainian state and providing as evidence that the Russian invasion force was ultimately too small and ineffectual).

360. *See* Phil Stewart & Idrees Ali, *Russia plans to "Decapitate" Ukraine Government—U.S. Defense Official*, REUTERS (Feb. 24, 2022 4:48 P.M.), https://www.reuters.com/world/us-believes-russia-planning-decapitate-ukraines-government-2022-02-24/.

361. *See* Aaron Steckelberg et al., *Why Russia Gave up on Urban War in Kyiv and Turned to Big Battles in the East*, WASH. POST (Apr. 19, 2022), https://www.washingtonpost.com/world/interactive/2022/kyiv-urban-warfare-russia-siege-donbas/.

362. *See* Independent Legal Analysis, *supra* note 307, at 3.

363. *See* Michael S. Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 179, 195-96 (R.A. Duff & Stuart P. Green eds., 2011).

364. *See generally* Jens D. Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79 (2013).

identical to, or close to, recklessness—as a "form" of intent, perhaps because in *dolus eventualis* the actor intentionally performs an action but then resigns himself or herself to the harm that may result from it.[365]

The uncertainty regarding the broadness or narrowness of intent has impacted the interpretation and application of several international crimes. Though the issue is controversial, international tribunals make use of the mental state of *dolus eventualis* when interpreting the legal requirements for some international crimes.[366] In the context of genocide, though, the better view is that the overall mental element required for genocide is a heightened one, hence the use of the phrase *dolus specialis*, or special intent.[367] The overall structure of the definition suggests that it is not enough for a state or individual perpetrator to accidentally back their way into a genocide that just occurs as a collateral consequence of some other state policy.[368] In other words, neither recklessness nor *dolus eventualis* is enough. The state needs to desire the destruction of the protected group, in whole or in part, and then take some action on the predicate list to bring it about, though the ultimate destruction need not occur.

In applying this strict *dolus specialis* standard, the Russian invasion of Ukraine qualifies as genocidal, and the evidence for this intent can best be seen in the disinformation campaign waged in the background of the invasion. The Russian government accused Ukraine of engaging in a genocide to justify why Ukraine needed to be de-nazified, then augmented that fiction with a grand-historical narrative about Ukraine's lack of identity as a discrete nation and its rightful place as a part of the Russian family.[369] It is certainly ironic that Russia has accused Ukraine of genocide and then used this fictitious genocide as a pretext for launching its own genocidal campaign.[370] But, "irony" does not adequately express the relationship between the two disinformation parts. The best way to deflect attention from a genocide is to accuse your victim of engaging in a genocide, and then recasting your genocide as a redress against the original genocide. It is statecraft based on the principle that the best defense is a good offense, but with disinformation as the specific play. If Russia can successfully recast Ukraine as a country of Nazis, then the world will view them as perpetrators of genocide, rather than victims.

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365. *Id.* at 92.

366. *See* Prosecutor v. Brdjanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber Mar. 19, 2004).

367. *See* Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109, 125 (2007) (arguing that *dolus eventualis* is insufficient for a finding of genocide regardless of the mode of liability applied).

368. *Id.*

369. *See* Putin, Historical Unity, *supra* note 39.

370. *See* Ukraine Application, *supra* note 167, at para. 24.

CONCLUSION

Information, and information conflict, is not external to the concept and phenomenon of genocide—it is internal. This Article has shown the ways that information structures any legal account of genocide and can therefore be manipulated and weaponized to suit the interests of statecraft. While strategic contest in the information domain is not new at all—international lawyers and diplomats always seek to cast the position of their state in the best possible light—recent invocations of genocide suggest a more radical relationship between law and truth. Genocide is a powerful legal category that often flirts with a state of exception, so it is perhaps not surprising that some states would turn to genocide as the ultimate weapon of disinformation.

Is international law powerless to respond? If states always shade the truth in the service of advocacy, is this not old wine in new bottles? Perhaps, but the failure to tell truth from fiction, when taken to logical extremes, would ultimately doom international law, as surely it would doom any legal order. The task, then, is to build out a lexicon, doctrine, and state practice to support an insistence on good faith in international relations. States could jump start that process, if they wish, by vigorously contesting Russian misbehavior in a very particular way. In short, they could accuse Russia not just of violating *jus ad bellum* and not just of engaging in genocide in Ukraine (as they already have), but also of strategically manipulating the crime of genocide, and international law generally, in a way that is itself illegal.

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