REMARKS OF ROBERT K. GOLDMAN INTERNATIONAL CRIMES AND THE RUSSIAN INVASION OF UKRAINE

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Before addressing the serious international crimes Russia's armed forces have committed in the ongoing armed conflict in Ukraine, I think it helpful to briefly cover the basic principles and rules of the law governing that conflict, which is International Humanitarian Law.

International Humanitarian Law (IHL) is that branch of International Law that regulates the conduct of warfare and seeks to protect persons who do not or no longer directly engage in the fighting. International Humanitarian Law is also known as the law of war or the law of armed conflict.

International Humanitarian Law is the product of centuries of warfare from which rules governing the conduct of hostilities have developed and crystalized. Principles of restraint in the waging of war can be found in early Judeo-Christian, Oriental, Hindu and Islamic teaching. For example, in the 4th century BCE, Sun Tzu in his classic work "The Art of War" admonished combatants to care for the wounded and prisoners of war. He also warned against committing atrocities as they infuriated the enemy and increased his fighting ability, rather than paralyzing them with fear. Experienced military planners have come to realize that violence and destruction which are superfluous to securing a military advantage are not only immoral and wasteful of resources, but also are counterproductive to the attainment of the political objectives for which military force is used.

Early rules of warfare were generally issued in the form of orders by sovereigns to their own soldiers. Over time, similar limitations imposed by other sovereigns became regarded as rules binding on them all. These rules became known as the *jus in bello,* or the law of war. It is important to distinguish the *jus in bello* from the *jus ad bellum,* or justification for resort to war.

The doctrine of the Just War or *jus ad bellum*, was first formulated as a theological rather than a legal concept. This doctrine was developed by Catholic theologians who accepted the reality that Christian rulers would go to war. While the doctrine mostly dealt with conditions justifying the resort to war, it also stipulated that a just war should not be fought without restraint, but rather must conform to the principles of discrimination and proportion. Discrimination meant that the innocent, including peaceable civilians, should be immune from direct attack. Proportion signified that the amount of force used should not be disproportionate. These two principles gradually became rules of customary law binding on the parties to all armed conflicts.

It should be noted that modern IHL is **not** concerned with the legality of the use of force by States. This important issue is today exclusively governed by the United Nations Charter and state practice thereunder.

The modern law of armed conflict has two branches which are commonly referred to as Hague law and Geneva law. Hague law consists of rules regulating methods and means of warfare,i.e. the *jus in bello*. In the late 19th and early 20th centuries, States began to codify these rules in treaties. The most comprehensive codification of these rules at that time are found in the Regulations annexed to the Hague Convention No. IV of 1907 respecting the laws and customs of war on land. It was not until 1977 that the law governing the conduct of armed conflicts was updated to reflect the realities and increasing lethality of modern warfare.

Geneva law sets forth rules for the protection of victims of armed conflict and is essentially the humanitarian component of IHL. These rules, which are of more recent origin, were largely the product of the efforts of the International Committee of the Red Cross (ICRC), which was established in 1863 in Switzerland. The first such Geneva law

instrument was the Convention for the Amelioration of the Condition of the Wounded Armies in the Field of 22 August 1864.

In the wake of World War II, States approved the four 1949 Geneva Convention which protect the wounded, sick and shipwrecked, prisoners of war, and civilians. As these Conventions have been ratified by virtually every state in the world, they have universal acceptance and application.

In 1977, The Geneva Conventions were updated and further developed in two new treaties: Additional Protocol I (AP I), which applies to victims of international armed conflicts and Additional Protocol II (AP II), which applies to victims of non-international armed conflicts. These two treaties merged both Hague and Geneva law, thus bringing the law governing the conduct of hostilities and law for the protection of war victims under the same system of treaty obligations.

In additional to these agreements, other sources of IHL include instruments that prohibit the use of certain weapons and military tactics or seek to protect certain categories of persons and goods. These treaties include: the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, plus two protocols; the 1972 Biological Weapons Convention; the 1980 Conventional Weapons Convention and its five protocols; the 1993 Chemical Weapons Convention; the 1997 Ottawa Convention on anti-personnel mines; and the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

Finally, there is a large body of customary IHL, not codified in the aforementioned treaties, which is binding on all states.

Before discussing the notion of armed conflict, it is important to note that IHL does not apply to so-called situations of internal disturbances and tensions. Examples of such situations are riots, mass demonstrations, and isolated and sporadic acts of violence, during which the military frequently assist the police in maintaining order**.** Serious situations of internal tensions and disturbances are frequently the precursor of armed conflict or can occur during situations of armed conflict. Typically, such situations have one or more of the following characteristics: declarations of states of siege or emergency; large- scale arrests; a large number of political prisoners; enforced disappearances; ill-treatment of

detainees and inhuman conditions of detention; and the suspension of many fundamental rights, especially, judicial guarantees.

Some recent examples of such situations include the "Arab Spring," where mass demonstrations led to the fall of the governments in Egypt and Tunisia in 2011, and the recent demonstrations in Thailand, Myanmar, Hong Kong, as well as in Chile, Nicaragua and Venezuela.

Internal disturbances and tensions are *not* governed by IHL, but rather by domestic law, international human rights law and possibly international criminal law.

International Humanitarian Law divides armed conflict into two kinds - International armed conflicts (IACs) and Non-International armed conflicts (NIACS). International armed conflicts are those waged between states. Under Article 2 common to the Geneva Conventions, IAC rules apply to all cases of declared war or to "any other armed conflict which may arise" between two or more states even if a state of war is not recognized by one of them. IAC rules also apply to situations of belligerent occupation, even if that occupation meets no armed resistance.

Examples of recent IACs are the 1982 war between the United Kingdom and Argentina in the South Atlantic over the Malvinas/Falkland Islands; the US invasion of Afghanistan in 2001; the wars between Iraq and the US and its coalition partners in 1992 and 2002; and the ongoing hostilities between Russian and Ukraine since 2014, resulting in Russia's occupation of Crimea.

International armed conflicts are governed by the Geneva Conventions, AP I (for State Parties thereto) and a large body of customary law, including the Hague Regulations, as well as the aforementioned weapons conventions.

Whereas an IAC entail hostilities between two or more states, a NIAC involves fighting between a state's armed forces and an armed opposition group(s) (non-state actor), such as rebels or insurgents, or between such groups occurring in the territory of a particular state.

Non-international armed conflicts have occurred with far greater frequency than IACs since the end of World War II. Moreover, such conflicts have become increasingly more complex both in terms of the parties involved and their territorial scope. Reflecting this reality, the

ICRC has identified at least seven variants of Common Article 3 NIACs. Examples of such conflicts are El Salvador in the 1980s, Peru in the 1990s, and the recently concluded hostilities with the FARC in Colombia.

Once an armed conflict begins, IHL applies equally to and binds all the warring parties, whatever the nature of the conflict. Accordingly, in NIACs both the state's armed forces and those of armed non-state actors, such as rebels and insurgents, have the same rights and obligations.

It is a common misconception that IH applies only in areas of active combat. To the contrary, IHL applies throughout the territory of all the warring states in an IAC, and in the case of a NIAC within the territory under the control of the parties involved, whether or not actual fighting takes place there.

During situations of armed conflict, IHL divides all persons into two categories –civilians and combatants. In IACs, civilians are all persons who are not members of the armed forces of the states involved in the conflict. Similarly, in a NIAC, civilians comprise all persons who are not members of the state's armed forces or the armed forces of organized armed opposition groups (non-state actors).

Civilians enjoy the highest level of protection under IHL. They cannot be lawfully attacked "unless and for such time as they *directly participate in hostilities*." Interestingly, no IHL instrument defines the terms "direct participation in hostilities." The ICRC in 2009 issued a publication entitled *Interpretive Guidance on The Notion of Direct Participation in Hostilities under International Humanitarian Law*, which expresses its views on this complex subject. Essentially, civilians directly participate in hostilities when they assume the role of a combatant, whether armed or unarmed, and pose an immediate threat of harm to the adversary.

It is important to understand that while civilians forfeit their immunity from attack while they directly participate in hostilities, they, nonetheless, retain their status as civilians. And, unlike combatants, once civilians cease their hostile acts, they regain their immunity from attack.

Although civilians cannot be intentionally attacked, IHL envisions that they might be killed or wounded incidental to an attack against a

legitimate military target. While such civilian casualties are regrettable, such "collateral damage", if not excessive, does not violate IHL.

One of the major differences between the law governing International and Non-International armed conflicts is that there is no *de jure* prisoner of war status in NIACs. In an International armed conflict, members of armed forces who are captured by the enemy are entitled to prisoner of war status and enjoy immunity from prosecution for their lawful acts of war. In contrast, members of non-state armed forces in a NIAC can be tried by the government for treason and all their hostile acts, even those complying with IHL. They must, however, be treated humanely and given a fair trial as mandated by Common Article 3, AP II and human rights law.

Unlike civilians, combatants in all armed conflicts are subject to direct attack at all times until they are *hors de combat.* A combatant is *hors de combat* when captured by or expresses an intention to surrender to the enemy, or when rendered unconscious or incapacitated by wounds or sickness and therefore is incapable of engaging in hostile acts. All such persons become non-combatants and as such can no longer be attacked.

Combatants do have certain protections under IHL. The warring parties cannot use weapons that cause superfluous injury and suffering, including exploding bullets, chemical and biological weapons, and blinding laser weapons. IHL rules also prohibit the use of poisoned weapons, denial of quarter, perfidious killing, wounding and capture of combatants, and the murder and mistreatment of POWs.

There are two basic principles that underlie the law of armed conflict: the principle of military necessity and the principle of humanity. The principle of military necessity justifies those measures of regulated violence, *not forbidden by international law*, which are indispensable to securing the prompt submission of the enemy with the least possible expenditure of economic or human resources. Accordingly, military necessity cannot legally be invoked to justify the violation of a specific prohibitory rule. The principle of humanity both complements and inherently limits the doctrine of military necessity. This principle forbids the infliction of suffering, injury or destruction not actually necessary for achieving a definite military advantage. This principle also confirms

the immunity of the civilian population and individual civilians from being intentionally attacked.

Taken together, these principles require that the warring parties must always distinguish between civilians and combatants and civilian objects and military objectives and only direct their attacks against combatants and military objectives.

The drafters of Additional Protocol I were keenly aware that advances in weaponry and the complex nature of modern warfare were increasing placing the civilian population at heightened risk of harm. They therefore sought to update the rules governing means and methods of warfare so as to enhance the protection of the civilian population against the effects of hostilities.

Specifically, Article 51 of Protocol I seeks to protects civilians by prohibiting indiscriminate attacks. Such attacks include those which are not directed at a specific military objective, such as intentional attacks against civilians and civilian objects, such as schools, hospitals, and civilian dwellings.

The prohibition of indiscriminate attacks also include those which use a weapon which cannot be directed at a specific military target or is of such a nature to strike civilians and civilian objects and military objectives without distinction. An example of such an attack would be the use of cluster munitions in a densely populated civilian area.

Article 51 also for the first time defines the rule of proportionality as it relates to collateral civilian casualties and damage to civilian objects. It treats as an indiscriminate attack one that foreseeably may cause incidental loss of civilian life and damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated from the destruction, capture or neutralization of the military objective targeted.

In order to protect civilians from indiscriminate attacks, Article 57 of Protocol I requires, inter alia, the attacking party to take precautions to verify that the objects to be attacked are military objectives and to choose a weapon that will avoid or at the very least minimize foreseeable collateral damage to civilians and civilian objects. This requirement essentially mandates that a party possessing smart or precision guided munitions should use them when attacking military targets in

urban centers – something the Russians manifestly have not done despite having such weapons.

Finally, it is worth noting that while the law governing international conflicts is far more detailed and developed that that for NIACS, it is well established today that any method and means of warfare prohibited in an IAC would similarly be prohibited in a NIAC.

During international armed conflicts, the four 1949 Geneva Conventions provide detailed rights and safeguards to certain categories of persons expressly protected under these instruments, namely, the wounded, sick and shipwrecked, prisoners of war, and civilians. These persons are entitled to respect for their lives and their physical and mental integrity and must be treated humanely in all circumstances. Protected persons cannot be the object of reprisals, nor can they renounce the rights and protection afforded them by the Conventions.

The Conventions require, inter alia, that the wounded, sick or shipwrecked must be collected and receive the medical care and attention required by their condition with no adverse distinction; that medical personnel, supplies, hospitals and ambulances must be protected; that prisoners of war and civilians detained by the enemy must be given adequate food, clothing, shelter, and medical care, and have the right to exchange messages with their families.

The Geneva Conventions oblige states to disseminate IHL to its armed forces and the public at large. The Conventions similarly require states to prevent and punish IHL violations, which in turn requires the states' armed forces to exercise effective command and control over their troops.

States also must enact laws to criminalize grave breaches of the Conventions, which are serious war crimes committed against persons or property protected by these instruments. Grave breaches are crimes of universal jurisdiction entailing the individual criminal responsibility of the perpetrator. Importantly, Protocol I imposes liability up the chain of command for commanders who fail to prevent and/or punish grave breaches. Such breaches under the Conventions include, inter alia, willful killing; torture or inhuman treatment; biological experiments; willfully causing great suffering; and serious injury to body or

health. These and other serious violations of AP I are crimes within the subject matter jurisdiction of the International Criminal Court.

As noted, IHL contemplates a regime of penal sanctions at the domestic and international level to repress and punish serious violations of the law. As such and unlike human rights law, neither the Geneva Conventions, nor their Additional Protocols establish an individual complaint procedure available to victims of IHL violations. Not surprisingly, these victims in recent years have turned with increasing frequency to international and regional human rights treaty bodies having such procedures to seek a remedy for violation of their rights occurring during armed conflicts. This raises the question of the complex relationship between IHL and human rights law, which I will briefly touch on.

International humanitarian law and human rights law (HRL) share a common purpose of upholding human life and dignity and are complementary legal regimes. However, they have developed separately and have different legal frameworks and scope of application.

There are important differences between these two bodies of law. Specifically, HRL applies at all times, including during armed conflicts, while IHL only applies during recognized situations of armed conflict. Human rights law permits states to derogate, ie., temporarily suspend, many rights during armed conflicts. In contrast, IHL rules are not derogable and violations by one of the warring parties does not free the other side from its duty to respect the law. Importantly, HRL *de jure* binds only states and their agents, such as armed forces, during armed conflicts and does not impose the same legal obligations on non-state actors. In contrast, IHL binds and applies equally to all the parties in all armed conflicts, including non-state actors. Whereas HRL establishes state responsibility (civil liability) for violations, IHL establishes individual criminal responsibility for serious violations, such as war crimes.

Another very important distinction between IHL and HRL involves the rules governing the use of lethal force. Under the so-called law enforcement model applied by most human rights treaty bodies, lethal force is in principle a last resort, only used when absolutely necessary in self-defense or to prevent loss of life to others. Law enforcement agents cannot therefore lawfully plan and carry out an operation whose

purpose is to kill. In contrast, IHL rules governing the use of lethal force are far more permissive in warfare. As previously noted, combatants are targetable at all times unless rendered *hors de combat*. Civilians are similarly targetable while they directly participate in hostilities.

Human rights law is essentially peacetime law and was not conceived to govern the conduct of warfare. Specifically, human rights law contains no rules defining or distinguishing civilians from combatants or civilian objects from military objectives. Human rights law also is silent on when civilians lose immunity from attack or when a civilian object becomes a military objective. These important matters are exclusively the province of IHL. Properly viewed, HRL should be regarded as the *lex generalis* and IHL, particularly Hague law, as the *lex specialis* during armed conflicts.

As noted, human rights treaty bodies have received in recent years numerous complaints alleging violations of protected rights, especially the right to life, to liberty, and to property, occurring during armed conflicts. Virtually all these treaty bodies have found their respective instruments to apply extraterritorially**,** even in situations of armed conflict**.** However, these bodies have no common approach on how IHL and HRL interrelate when states are engaged in NIACs within their own territory, much less in NIACs or IACs abroad. This is still very much a work in progress.

International humanitarian and human rights law should be viewed as constituting a complementary and mutually reinforcing regime of protections that should be interpreted and applied *as a whole* so as to accord individuals during armed conflicts the most favorable standards of protection.

Finally, it should be understood that these human rights treaty bodies have jurisdiction to decide ***only*** cases involving claimed rights violations attributable to a state and its agents. Comparable violations by non-state actors, unless plausibly attributable to the state itself, are not justiciable by these bodies. This situation leaves a gap in protection to persons whose rights have been violated during hostilities by non-state actors and for whom there also may be no effective redress under IH

With this background information on the relevant law, I would like to turn to the four kinds of international crimes that Russia and/or its

leaders have most likely committed during the ongoing hostilities with Ukraine.

The first is the crime of aggression. In this regard, Article 4(2) of the UN Charter prohibits one state from using armed force against another state with two notable exceptions. The first exception is when the Security Council under Chapter 7 of the UN Charter authorizes a state(s) to use forces, such as it did in 1992 which permitted a coalition of states to liberate Kuwait from Iraqi occupation. The second exception is found in Article 51 of the UN Charter which authorizes states to exercise individual and collective self-defense in response to an armed attack by another state.

Neither exception applies to Russia's invasion of Ukraine which began in 2014. Russia's hostile acts against Ukraine are in fact and law a textbook example of the crime of aggression as that term is understood and codified in the Statute of the International Criminal Court (ICC). Accordingly, Putin and those members of the military who planned and launched the invasion are answerable for this crime; however, Russian soldiers participating in the hostilities are not. Since Russia is not a party to the ICC statute, it is doubtful that Putin and his generals will ever be brought to trial for this crime before that body.

It is also worth noting that Belarus's head of state, Alexander Lukashenko, is similarly responsible for aggression against Ukraine as he willingly permitted his country's territory to be used by Russia to launch its most recent invasion of Ukraine.

The second kind of crimes committed by Russia's military are war crimes. There is ample evidence that Russian forces have intentionally targeted civilians and civilian objects, including schools, houses, apartment buildings, hospitals, cultural sites and churches. The Russian military have also launched indiscriminate attacks against military targets located in densely populated urban areas, utterly failing to take the requisite precautions to avoid, much less minimize, foreseeable civilian casualties. They similarly have used weapons, such as cluster munitions, in urban areas that cannot be directed against a specific military target.

The Russian military may also be responsible for crimes against humanity. Unlike war crimes, which can be committed against civilians or combatants, crimes against humanity entail intentional widespread

and systematic attacks directed against a civilian population. Such crimes include, inter alia, murder, torture, rape and other forms of sexual violence, enforced disappearances, forcible transfer of a population, and other inhumane acts of a similar nature that intentionally cause great suffering or serious injury to body or to mental or physical health.

Recent credible reports from Bucha and other towns liberated from Russian forces indicate that over 400 Ukrainian civilians were summarily executed and many women were raped, often repeatedly, by Russian troops. Combined with the number of documented attacks to date by Russian forces against civilian, a pattern of systematic attacks against Ukraine's civilian population is clearly emerging.

The fourth crime is Genocide, which is incorporated into the statute of the International Criminal Court. This egregious crime requires, inter alia, the intentional destruction of all or part of a national, ethnical, racial, or religious group. It encompasses not only killings, but also causing serious bodily or mental harm to members of the group (in this case Ukrainians), or deliberately inflicting on the group conditions calculated to bring about its physical destruction in whole or part. Importantly, genocide also includes the forcible transfer of children of the targeted group to another group. Establishing a specific genocidal intent of Putin and other high Russian officials may be difficult to prove. However, a plausible case can be made based on Putin's words and his military's deeds in Ukraine. Specifically, Putin has repeatedly denied and demeaned the idea of Urkrainian statehood and identity. His military has summarily executed hundreds of innocent civilians, arguably used rape as a weapon of war, and significantly transferred hundreds of Ukrainian children to Russia for unknown purposes. As the conflict is still ongoing, additional evidence of a genocidal intent may well be forthcoming.

Thank you for your attention, and I would be pleased to answer any questions you might have.