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Neutral State Access to Ukraine's Food Exports

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I. INTRODUCTION

On May 14, 2022, the G7 group of industrialized nations met to devise a plan to ensure the export of Ukrainian grain to avert a global hunger crisis.¹ The Russia-Ukraine conflict has created cascading effects on the region and the world; not least is the impact on food security. Russia is the world's top wheat exporter, accounting for 17 percent; Ukraine is fifth, at 8 percent. (The United States is second at 14 percent).² The war has disrupted the flow of exports from Ukraine as Russia's attacks have stymied Ukrainian exports by sea. Before the invasion, Ukraine's Black Sea ports accounted for 95 percent of its exports of grain and oil seeds, such as sunflower oil.³ Russian exports are also down.⁴ Thirty-six countries in the world import more than 50 percent of their wheat from Ukraine and Russia.⁵

Could a humanitarian corridor in the Black Sea open the spigot to get Ukrainian grain to global markets?⁶ Some U.S. lawmakers think so, and the idea raises interesting issues in the law of naval warfare. While Russia may lawfully impose a blockade on Ukraine, neutral States are entitled to continue noncontraband trade with Ukraine. In this balance, does Russia's right to employ a lawful method of warfare trump the rights of neutral States to trade

1. Guy Chazan, *G7 Warns of Global Hunger Crisis Unless Russia Lifts Ukraine Blockade*, FINANCIAL TIMES (May 14, 2022), <https://www.ft.com/content/2d76bbe5-1163-473b-82cf-c327f3672134>.

2. Press Release, Global Food Security Consequences of Russia's War of Aggression Against Ukraine: G7 Foreign Ministers' Commitments, GOV.UK (May 14, 2022), <https://www.gov.uk/government/news/commitments-on-the-global-food-security-consequences-of-russias-war-of-aggression-against-ukraine-g7-foreign-ministers-may-2022>; Daniel Workman, *Wheat Exports by Country*, WORLD'S TOP EXPORTS, <https://www.worldstopexports.com/wheat-exports-country/> (last visited Aug. 31, 2022).

3. William Mauldin, *U.N. Seeks to Ease Russian Blockade of Ukraine Grain Shipping to Avert Food Shortages*, THE WALL STREET JOURNAL (May 16, 2022 3:05 PM EST), <https://www.wsj.com/articles/u-n-seeks-to-ease-russian-blockade-of-ukraine-grain-ship-ping-to-avert-food-shortages-11652717161?page=1>.

4. See U.N. Food and Agriculture Organization, *G7: FAO Puts Forward Proposals to Address Current and Future Food Shortages* (May 13, 2022), <https://www.fao.org/newsroom/detail/g7-fao-food-shortages-agriculture-ukraine-russia-germany/en>.

5. U.N. GLOBAL CRISIS RESPONSE GROUP, BRIEF NO. 1: GLOBAL IMPACT OF WAR IN UKRAINE ON FOOD, ENERGY AND FINANCE SYSTEMS 8 (Apr. 13, 2022), <https://news.un.org/pages/wp-content/uploads/2022/04/UN-GCRG-Brief-1.pdf>.

6. See generally Eddy Wax, *E.U. Plans to Help Ukraine's Food Exports Dodge Black Sea Blockade*, POLITICO (May 10, 2022, 10:13 PM), <https://www.politico.eu/article/eu-plans-to-boost-ukraines-food-exports-black-sea-blockade/>.

with a belligerent? Probably so. While neutral States have a right to continue noncontraband trade, at sea that right inures to neutral flagged vessels and neutral goods but does not guarantee access to belligerent markets. Under the Paris Declaration of 1856, which is accepted as customary law, a neutral flag covers or protects enemy goods from capture (Article 2) and neutral goods may not be seized even if they are carried on enemy merchant ships (Article 3).⁷

II. IMPENDING FOOD CRISIS

Some twenty-five million tons of grain are held up in Ukrainian ports, penned in by Russia's de facto blockade. Wheat futures are up 50 percent this year as Ukraine's normal export of five to six million tons per month has been reduced to just one million tons in April.⁸ Ukraine is also a major exporter of corn (16 percent of world exports) and sunflower oil (42 percent of world exports).⁹ Like all commodities—including oil—grain trades on the margin, so a small shortage in supply has outsized effects on markets, sending prices soaring. Wheat futures contracts, already increasing due to systemic inflation, had climbed 63 percent in the three months from mid-February to mid-May.

Food security for forty-five million people, mostly in Africa and the Middle East, is now at risk. In response, India, the largest grain exporter, banned shipments abroad to ensure supply for itself and neighboring States.¹⁰ With grain exports from Ukraine and now India at a standstill, Egypt, Turkey, and Lebanon could be particularly hard hit, while the situation for Eritrea, Somalia, Madagascar, Tanzania, and Pakistan is dire.¹¹ Over land routes are insufficient. Getting Ukrainian grain to a port on the Baltic, such as Gdańsk

7. Declaration Respecting Maritime Law, Apr. 16, 1856, 115 Consol. T.S. 1, 15 MARTENS NOUVEAU RECUEIL (ser. 1) 791, reprinted in 1 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 89 (1907).

8. Wax, *supra* note 6.

9. Hannah Ritchie, *How Could the War in Ukraine Impact Global Food Supplies?*, OUR WORLD IN DATA (Mar. 24, 2022), <https://ourworldindata.org/ukraine-russia-food#:~:text=Ukraine%20and%20Russia%20both%20play,the%20world's%20dominant%20vegetable%20oils>.

10. Gerry Shih & Niha Masih, *India Bans Wheat Exports Amid Soaring Global Prices*, WASHINGTON POST (May 14, 2022, 3:53 AM EDT), <https://www.washingtonpost.com/world/2022/05/14/india-wheat-ban-ukraine/>.

11. See Qu Dongyu, Director General of the Food and Agriculture Organization of the United Nations, Presentation at the Meeting of the G7 Ministers of Agriculture: Securing

and Gdynia, is slow and expensive.¹² The EU is focusing on developing alternative overland routes.¹³ But opening Ukrainian ports is the only realistic option to maintain the volume of grain, as ground transportation infrastructure—rail and truck—cannot accommodate the volume.¹⁴

As the G7 scrambles to consider an overland route, the UN Food and Agriculture Organization (FAO) is concerned about the next shoe to drop. In July and August, Ukraine was expected to harvest the summer crop of wheat, barley, and corn, including fourteen million tons of grain. The country lacks storage capacity and all that food is destined to go to waste while some of the least developed countries face severe shortages of food. To make matters worse, there is evidence that Russia is attacking Ukrainian grain storage infrastructure.¹⁵ Russia also is reportedly stealing Ukrainian grain.¹⁶

FAO's deputy director for markets and trade, Josef Schmidhuber, said there is enough grain to feed the world, but Russia's blockade is hampering the movement to where it is needed most.¹⁷ "It is an almost grotesque situation that we see at the moment," he said.¹⁸ "In Ukraine, there are nearly 25 million tons of grain that could be exported but they cannot leave the country simply because of the lack of infrastructure and the blockade of the ports. At the same time . . . there is no wheat corridor opening up for exports from Ukraine."¹⁹

Global Food Security in Times of Crisis (May 13, 2022), <https://www.fao.org/3/cc0140en/cc0140en.pdf>.

12. See Wax, *supra* note 6.

13. *Id.*

14. See Sarah Anne Aarup et al., *Ukraine Says E.U. Road Links Won't Make Up For Loss of Black Sea Trade*, POLITICO (Apr. 5, 2022, 6:37 PM), <https://www.politico.eu/article/green-corridor-west-not-save-ukraine-trade/>.

15. See Steve Holland & Michelle Nichols, *Photos Show Russian Attacks on Ukraine Grain Storage—U.S. Official*, REUTERS (Apr. 1, 2022, 12:06 AM), <https://www.reuters.com/world/exclusive-photos-show-russian-attacks-ukraine-grain-storage-us-official-2022-04-01/>.

16. Holly Ellyatt et al., *Ukraine Warns Countries About Buying Its Stolen Grain; U.S. \$40 Billion Aid to Ukraine Faces Delay*, CNBC (May 13, 2022, 3:08 AM), <https://www.cnbc.com/2022/05/12/russia-ukraine-live-updates.html>.

17. Lisa Schlein, *Russian Blockade of Ukrainian Sea Ports Sends Food Prices Soaring*, VOA (May 7, 2022, 12:07 PM), <https://www.voanews.com/a/russian-blockade-of-ukrainian-sea-ports-sends-food-prices-soaring/6561914.html>.

18. *Id.*

19. *Id.*

Odessa is the last Ukrainian port available to export grain. While the brutal siege on Mariupol on the Sea of Azov has received widespread attention, Russia continues to press an unremitting naval assault against Odessa near the Romanian border. The Russian operation appears to be aimed at converting Ukraine into a land-locked State by cutting access to the Sea of Azov and the Black Sea.²⁰ This would connect Russia proper and Russian-occupied eastern Ukraine and Crimea to Transnistria, a pro-Moscow region of Moldova.

To achieve its goals, when Moscow began the current phase of the war in Ukraine it announced on February 25 a restriction on vessel access in northwest Black Sea, north of 45° 21'.²¹ That same day, the Cabinet Ministers of Ukraine issued Order No. 9183-r, closing the country's ports to entry and exit as a defensive wartime measure.²² Lloyd's Joint War Committee has warned vessels to avoid an area stretching from the Romanian-Ukraine border to the Georgia-Russia border in the Black Sea—virtually the entire coastal area except Turkey.²³

III. RUSSIA'S BLOCKADE

While Russia has declared a “restricted zone” that is tantamount to an exclusion zone, some are calling it a “blockade.” Maritime exclusion zones are a lawful method of warfare if they are used to warn merchant and neutral shipping of the hazards inherent in conflict at sea and as a tool to help identify and sort shipping. As my colleague Pete Pedrozo concluded, the same rules

20. See Elena Becatoros & Jon Gambrell, *Russia Pummels Port of Odesa in Attempt to Disrupt Supplies*, AP NEWS (May 10, 2022), <https://apnews.com/article/russia-ukraine-putin-business-nato-moscow-c8e00f7bbc4f24aa40d70a4ac2d97adb>.

21. E-mail from Duty Officer, Navigational Warning Service, Russian Department of Navigation and Oceanography to Navigational Hydrographic Information Center (Feb. 25, 2022), available at <https://gcaptain.com/wp-content/uploads/2022/03/Russian-gmdss-warning.jpg> (last visited Aug. 31, 2022).

22. IMO, Circular Letter No. 4518, Communication from the Government of Ukraine (Feb. 24, 2022), [https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20Associate%20Members%20Communications/Circular%20Letter%20No.4518%20-%20Communication%20From%20The%20Government%20Of%20Ukraine%20\(Secretariat\).pdf](https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20Associate%20Members%20Communications/Circular%20Letter%20No.4518%20-%20Communication%20From%20The%20Government%20Of%20Ukraine%20(Secretariat).pdf).

23. See Lloyd's Market Association Joint War Committee, Circular No. JWLA-030 (Apr. 4, 2022), available at <https://www.lmalloyds.com/lma/jointwar> (scroll down to JWLA-030-Russia).

from the law of naval warfare apply inside the zone as outside the zone.²⁴ Whether Russia's actions are tantamount to a blockade is a matter of fact and law. In practice, Russia's operations look somewhat like a blockade, but the constitutive elements of blockade have not been fulfilled.

As a form of economic warfare, naval blockade of enemy ports seeks to sever sea lines of communication and maritime trade between the coastal State and the rest of the world. Although Russia has imposed restrictions in the Black Sea to prevent the entry or exit of ships from Ukraine, it has not fulfilled the legal elements to perfect a *de jure* blockade. The rules governing blockade are codified in the London Declaration of 1909.²⁵ Blockades are confined to the ports and coasts belonging to or occupied by the enemy.²⁶ Notification and declaration of blockade is required to place all States on notice.²⁷ The belligerent imposing the blockade must communicate the date the order begins, the geographic limits of the coastline subject to the order, and the period of time within which neutrals may exist in the area.²⁸

To be legally binding, a blockade must be effective, which means the belligerent forces must be sufficient to prevent access to the enemy coastline.²⁹ Effectiveness is a question of fact to be determined by a factfinder, such as a prize court or other adjudicatory tribunal. Blockades also must be applied impartially among flags of all nations.³⁰ Warships and neutral vessels in distress may enter and leave a blockaded area.³¹ Although the London Declaration never entered into force, its provisions have been observed during armed conflict and it is generally regarded as customary international law.³²

Like "Operation Pocket Money," the American blockade against Haiphong in May 1972, Russia does not refer to its Black Sea zone as a "block-

24. See Raul (Pete) Pedrozo, *Maritime Exclusion Zones in Armed Conflicts*, ARTICLES OF WAR (Apr. 12, 2022), <https://lieber.westpoint.edu/maritime-exclusion-zones-armed-conflicts/>.

25. Declaration Concerning the Laws of Maritime War, Feb. 26, 1909, 208 Consol. T.S. 338, reprinted in THE DECLARATION OF LONDON, FEBRUARY 26, 1909, at 112 (James B. Scott ed., 1919).

26. *Id.* art. 1.

27. *Id.* arts. 8, 10–11.

28. *Id.* arts. 9–12.

29. *Id.* art. 2.

30. *Id.* art. 5.

31. *Id.* arts. 6–7.

32. See Robert W. Tucker, *Blockade*, 50 INTERNATIONAL LAW STUDIES 283, 285 (1955).

ade” but its restriction regime and enforcement operations appear indistinguishable to a blockade.³³ While blockade is a lawful method of warfare, Russia’s declaration that ships inside the restricted area “would be regarded as a terrorist threat”³⁴ and Russian attacks on Ukrainian and neutral merchant ships³⁵ violate the proscriptions in the law of naval warfare in so far as the vessels apparently were not engaged in the conflict or attempting to breach the blockade.³⁶ Neutral ships are exempt from capture or attack, and Ukrainian ships as civilian objects are exempt from attack unless they support the Ukrainian war effort or resist prize capture.

IV. OPENING UKRAINIAN PORTS

At its meeting on May 14, the G7 Foreign Ministers stated they would support Ukraine in maintaining its agricultural production, storage, and resumption of exports.³⁷ David Beasley, who heads the World Food Program, stated, “The bottom line is, if those ports are not opened up, it’s going to devastate millions of people around the world.”³⁸ “Millions of people around the world will die because these ports are being blocked,” he told CNN.³⁹

Ukraine currently cannot protect Odessa port operations or the onloading of ships. Ukrainian President Volodymyr Zelensky is therefore seeking more military aid, including Harpoon anti-ship cruise missiles, to protect the port and resume normal operations in order to export twelve million tons of

33. See generally Richard M. Nixon, President of the United States, Address to the Nation (May 8, 1972), reprinted in STAFF OF S. COMM. ON FOREIGN RELATIONS, BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM 472–73 (7th rev. ed. 1974).

34. E-mail from Duty Officer, *supra* note 21.

35. See Nick Blenkey, *Russian Attacks on Merchant Ships Reported*, MARINELOG (Feb. 28, 2022), <https://www.marinelog.com/legal-safety/shipping/video-russian-attacks-on-merchant-ships-reported%E2%80%9C/>.

36. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶¶ 7.10, 8.6.2.2 (2022).

37. Press Release, *supra* note 2.

38. Meredith Lee, *Urgency Mounts for U.S. Answer to Russian Blockade*, POLITICO (May 11, 2022, 2:00 PM), <https://www.politico.com/news/2022/05/11/ukraine-russian-blockade-global-food-supplies-00031760>.

39. Nicholas Cecil, U.N. Chief Tells Putin: “Open Black Sea Ports, If You Have Any Heart For Rest of World,” EVENING STANDARD (May 14, 2022), <https://www.standard.co.uk/news/world/russia-blockade-black-sea-ports-food-world-hunger-united-nations-david-beasley-b999846.html>.

agricultural product that will spoil by this fall.⁴⁰ NATO is unwilling to provide a naval force to help even if it could convince Turkey to lift the ban on foreign warships in the Black Sea.⁴¹

On March 3, the International Maritime Organization also proposed establishment of “Blue Safe Maritime Corridors” to give safe passage to some one hundred merchant ships and seafarers stranded in the war zone.⁴² Russia agreed but Ukraine has not responded to this call. Alternatively, President Zelensky has suggested that opening humanitarian maritime corridors from Odessa is the only way to avert the pending grain shortage. U.S. Representative Jason Crow, among others, agrees that reestablishing port operation in the war zone is essential.⁴³ These leaders propose a twenty-mile buffer zone between Romania and Turkey through which ships carrying grain could hug the coast.⁴⁴ Ukraine cannot protect Odessa port operations or the unloading of ships, however, so the vessels must either obtain Russian clearance or assume the risk.

V. CONCLUSION

The importance of Ukrainian agricultural trade to other States and the global market means that in the present conflict there are millions of people dependent on the belligerent State to meet their nutritional needs. While Ukrainians suffer during the present conflict, the harm from Russia’s invasion is spilling over to States dependent on Ukrainian grain and other food commodities. Neutral States not party to the conflict rely on Ukraine, a belligerent under blockade-like conditions, to fulfill their requirements for adequate food. The inability of Ukraine to export its agriculture presents a case of first impression in international humanitarian law.

40. See Lee, *supra* note 38.

41. See James Kraska, *Can Turkey Legally Close Its Straits to Russian Warships? It’s Complicated*, FOREIGN POLICY (Mar. 1, 2022, 4:57 PM), <https://foreignpolicy.com/2022/03/01/turkey-black-sea-straits-russia-ships-ukraine-war/>.

42. See IMO, *IMO Council Decisions on Black Sea and Sea of Azov Situation* (Mar. 11, 2022), <https://www.imo.org/en/MediaCentre/PressBriefings/pages/ECSSstatement.aspx>; Jonathan Saul, *U.N. to Work on Safe Corridor for Ships Stranded by Ukraine Conflict*, REUTERS (Mar. 11, 2022, 7:35 PM), <https://www.reuters.com/world/europe/un-work-safe-corridor-ships-stranded-by-ukraine-conflict-2022-03-12/>.

43. See Lee, *supra* note 38.

44. See *Id.*

While it is unlawful to starve an enemy population, starvation of enemy armed forces is not prohibited.⁴⁵ Generally, international humanitarian law requires belligerents to take various affirmative steps to protect the food supply upon which enemy civilians depend, and to provide food in specific circumstances. For example, food must be provided to detainees,⁴⁶ prisoners of war,⁴⁷ and internees.⁴⁸ Occupying powers also have a duty to ensure the provision of food to the population, especially children.⁴⁹ Occupiers may not requisition food except for use by the force of occupation and then only after the requirements of the civilian population have been considered.⁵⁰ Yet these rules do not address whether neutral States that rely on a belligerent State for its food supply are entitled to access that agricultural produce as a matter of right.

Like all military operations, whether Russian efforts to disrupt access by foreign shipping to Ukrainian agricultural exports are derived from a maritime exclusion zone or blockade against Odessa, they are subject to military necessity, proportionality, and distinction. Military actions by Russia to deprive Ukrainian forces of food are subject to the rule of proportionality in *jus in bello*. States must “refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained.”⁵¹ Belligerents must distinguish between food that sustains the enemy force, which may be a lawful military objective, and food that sustains the civilian population, which is not. The U.S. view on distinction in this context is that “an attack *by any means* against crops intended solely for consumption by noncombatants not contributing to the enemy’s war effort would be unlawful for such would not be

45. *See* OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 17.9.2 (rev. ed. Dec. 2016).

46. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts art. 5(1)(b), June 8, 1977, 1125 U.N.T.S. 609.

47. Convention (III) Relative to the Treatment of Prisoners of War art 26, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

48. Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 89, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War of Land art. 12, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540.

49. Geneva Convention IV, *supra* note 48, arts. 50, 55.

50. *Id.* art. 55.

51. LAW OF WAR MANUAL, *supra* note 45, § 2.4.1.2.

an attack upon a legitimate military objective.”⁵² In the present case, however, the direction of the harm inflicted flows to foreign civilian populations at risk of starvation.

While neutral States may continue to trade with belligerents, this right extends only to the protection of neutral commerce in situ and not a right of access to a belligerent port situated in a zone of conflict. Hence, there is no neutral right per se to enter a Ukrainian port in safety and onload cargo. Secretary-General António Guterres is leading a diplomatic effort involving Russia, Turkey, and other States to resume Ukrainian grain shipments. Guterres suggested Russia permit Ukrainian grain shipments in exchange for easing sanctions against Russian and Belarusian exports of potash fertilizer.⁵³ So far, however, Russia seems not to be negotiating in earnest, and no resolution is in sight.⁵⁴

52. J. Fred Buzhardt, General Counsel, Department of Defense, Letter to Chairman Fulbright, Senate Committee on Foreign Relations, Apr. 5, 1971, 10 INTERNATIONAL LEGAL MATERIALS 1300, 1302 (1971), *quoted in* LAW OF WAR MANUAL, *supra* note 45, at 292 n.612.

53. See Gabriela Galindo, *Why the E.U.'s Potash Sanctions Are Looming Over Supermarket Prices*, POLITICO (Mar. 4, 2022, 12:29 PM), <https://www.politico.eu/article/eu-sanctions-higher-food-prices-potash/>.

54. See Mauldin, *supra* note 3.