2023

The Role of International Law in the Russia-Ukraine War

Michael Kelly

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Michael Kelly, The Role of International Law in the Russia-Ukraine War, 55 Case W. Res. J. Int’l L. 61 (2023)
Available at: https://scholarlycommons.law.case.edu/jil/vol55/iss1/6

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
THE ROLE OF INTERNATIONAL LAW IN THE RUSSIA-UKRRAINE WAR

Michael J. Kelly*

Table of Contents

Table of Contents ........................................................... 61
I. Introduction ........................................................................ 61
II. Collective Security & Putin’s “Playbook” ................ 62
III. International Security Assurances ........................... 70
IV. Ukraine’s Legal Counter-Attack .............................. 77
    A. The International Court of Justice .............................. 78
    B. The International Criminal Court .............................. 80
V. UKRAINIAN CASES AGAINST RUSSIA IN OTHER TRIBUNALS . 84
VI. Conclusion and the Promise of International Law .. 85
Appendix ........................................................................... 89

I. Introduction

International law ends where realpolitik begins. Acknowledging this inescapable maxim, drawn from a consent-based system of compliance, is the best antidote to fanciful notions of how international law can solve the world’s problems in general or the Russia-Ukraine War in particular. Yet to legally examine this particular conflict, one is stuck by the contrasting outcomes in two international law subfields. In the area of *jus ad bellum*, or the law of going to war (not to be confused with *jus in bello*, or the law of waging war), collective security has been an abject failure. However, in the area of international judicial

* Senator Allen A. Sekt Endowed Chair in Law, Creighton University School of Law. Professor Kelly is a member of the Board of Directors of L’Association Internationale de Droit Pénal (AIDP), a Paris-based society of international criminal law jurists and scholars founded in 1924 that maintains consultative status with the United Nations. A shorter version of the main points in this essay appeared on the Lieber Institute's Articles of War blog at West Point.
process, Ukraine’s ability to mount a credible, and winning, legal counterattack against Russia in multiple judicial fora has so far been a great success.

We begin with a foundational observation: The entire international system of States is based upon Westphalian notions of sovereign equality, border inviolability, territorial integrity, political independence, and autonomy. Although such notions have been challenged or at least qualified in prior situations – notably the American approach to the second war in Iraq, they remain enshrined in the U.N. Charter and therefore binding upon all member states. Russia violated each of these Westphalian norms purposefully and explicitly in its invasion of Ukraine.

II. COLLECTIVE SECURITY & PUTIN’S “PLAYBOOK”

Collective security arrangements implicated by the invasion of Ukraine are of three types: (1) the global, derived from the U.N. Charter, (2) the regional, derived from the North Atlantic Charter, and (3) the specific, derived from the Budapest Memorandum. None of the three could forestall Moscow’s armies


from deploying into Ukrainian territory. On February 24, 2022, Russian military divisions that had been encircling Ukraine for months crossed the border and began a multi-pronged invasion from the North, East, and South, displacing upwards of one third of the population, and sparking the largest refugee crisis since the Second World War, with approximately seven million Ukrainians fleeing the country.


Before we consider weaknesses inherent in the collective security constellation of the *jus ad bellum* firmament, however, we should reflect upon the historical legal frameworks that Putin co-opted in his attempt characterize the Russian invasion as legal. Moscow’s highly orchestrated international legal pirouette leading up to its invasion of Ukraine, worthy of at least a matinee with the Bolshoi, looks very familiar:

1. Denial that Ukraine was even a real country prior to Russia’s recognition of it,
2. Recognition of new independent States dominated by Russian-speaking inhabitants emerging from Ukrainian territory,
3. Allegation of atrocities committed upon those Russian-speaking people by Ukrainian forces,

---

(4) Requests for military assistance by the governments of these newly recognized states, and

(5) Deployment of Russian forces in response to those requests.11

11. For the ridiculous argument equating the de-nazification of Ukraine with de-Ukrainianization, see Тимофей Серге́йцев [Timofey Sergeytsev], Что Россия должна сделать с Украиной [What Should Russia Do With Ukraine?], RIA NEWS (Apr. 3, 2022, 8:00 AM), https://ria.ru/20220403/ukraina-1781469605.html [https://perma.cc/W6J2-WAHG]. Sergeytsev outlines the following points [English translation]:

Denazification will inevitably also be a de-Ukrainization - a rejection of the large-scale artificial inflation of the ethnic component of self-identification of the population of the territories of historical Little Russia and New Russia, begun by the Soviet authorities. Being an instrument of the communist superpower, after its fall, artificial ethnocentrism did not remain ownerless. In this official capacity, he passed under the authority of another superpower (the power standing over the states) — the superpower of the West. It must be returned to its natural boundaries and deprived of political functionality.

To this end, tracking Moscow’s talking points, Sergeytsev makes the following recommendations in furtherance of the policy to liquidate Ukraine’s separate and distinct existence as such:

[T]he necessary initial steps of denazification can be defined as follows:

- liquidation of armed Nazi formations (which means any armed formations of Ukraine, including the Armed Forces of Ukraine), as well as the military, informational, educational infrastructure that ensures their activity;
- formation of bodies of people’s self-government and militia (defense and law enforcement) of the liberated territories, protecting the population from the terror of underground Nazi groups;
- installation of the Russian information space;
- withdrawal of educational materials and the prohibition of educational programs at all levels containing Nazi ideological guidelines;
- mass investigative actions to establish personal responsibility for war crimes, crimes against humanity, the spread of Nazi ideology and support for the Nazi regime;
- lustration, publication of the names of accomplices of the Nazi regime, involving them in forced labor to restore the destroyed infrastructure as a punishment for Nazi activities
This same sequence unfolded in 2014 and was followed by two more steps: Crimea’s request to join the Russian federation, and its annexation. Ultimately the same ending will likely play out with Ukraine’s Donetsk and Luhansk regions. Even so, Russia painting its aggressive invasion of Ukraine as, instead, a reactive and defensive operation, and thereby in compliance with international law, fooled about as many international legal experts as the United States painting its invasion of Iraq in 2003 as anticipatory self-defense and therefore legal.

(from among those who will not be subject to the death penalty or imprisonment);
- the adoption at the local level, under the supervision of Russia, of primary normative acts of denazification “from below,” a ban on all types and forms of the revival of Nazi ideology;
- the establishment of memorials, commemorative signs, monuments to the victims of Ukrainian Nazism, perpetuating the memory of the heroes of the struggle against it;
- the inclusion of a complex of anti-fascist and denazification norms in the constitutions of the new people’s republics;
- creation of permanent denazification bodies for a period of 25 years.

Russia will have no allies in the denazification of Ukraine. Since this is a purely Russian business.

Id.


15. See Kelly, supra note 1, at 367; Ramirez, supra note 2, at 1-7.
Much has been made about this seven-sequence “playbook” Putin is relying upon for legal justification.\textsuperscript{16} Entirely appropriate analogies have been drawn to Germany’s absorption of Czechoslovakia’s Sudetenland in 1938, ostensibly to protect German-speaking people being abused by the Czech government.\textsuperscript{17} To be sure, this would be like Mexico invading southwestern counties in Texas to protect Spanish-speakers living there from abuses by Texan state authorities—absurd on its face. But these parts of the playbook are actually quite older than that, and we should be clear-eyed about who wrote them.

It traces at least as far back as the late-19th Century era of colonialism, when the United States slow-rolled its annexation of the Kingdom of Hawaii, allegedly to protect Americans.\textsuperscript{18} Despite evidence to the contrary,\textsuperscript{19} the United States denied Hawaii’s existence as a State prior to our recognition of it in 1842, opening


\textsuperscript{19} Patrick Dumberry, The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continuity as an Independent State Under International Law, 1 CHINESE J. INT’L L. 655, 656-57 (2002) (“Prior to its annexation, Hawaii was an independent State and had been recognized as such by a number of other States, including the United States (in 1842), and was party to several international treaties.”).
the door to U.S. sugar interests consolidating this trade.\textsuperscript{20} By the 1890s enough Americans had moved to the islands, taking over key economic sectors, that the monarchy’s power became significantly diluted.

Eventually, local Americans formed a Committee of Safety that deposed Queen Lili’uokalani and requested the United States land a force to protect them from alleged abuses—which it did, in the form of a detachment of Marines from the \textit{U.S.S. Boston}.\textsuperscript{21} The monarchy was abolished, and a new American-led Hawaiian Republic was formed in 1894 under President Sanford Dole and, after much-prolonged political maneuvering in Washington, gained recognition.\textsuperscript{22} Annexation then followed in 1898 with Dole continuing as territorial governor.\textsuperscript{23}

A century later, the United States largely disavowed its own conduct in the takeover of Hawaii in a 1993 congressional resolution signed by the U.S. president apologizing for its actions “with the participation of agents and citizens of the United States” and recognizing the sovereignty of native Hawaiians.\textsuperscript{24} While legally disavowing a troubling piece of international practice further weakens the illegal overthrow’s legitimacy, it seems there is no erasing it from the international relations playbook.

Future global implications are inescapable. For example, there is little doubt that President Xi is thumbing through this playbook now with respect to Taiwan, keenly watching both the West’s response to Russia’s invasion of Ukraine and protests within Russia. How both dynamics play out will surely factor into any move by China against Taiwan—home to foundries that


\textsuperscript{22} \textit{Id.} at 11-12.

\textsuperscript{23} \textit{Id.} at 13; Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, \textsc{H.R.J. Res. 55}, 55th Cong., 30 Stat. 750 (1898).

\textsuperscript{24} Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on Behalf of the United States, \textsc{S.J. Res. 19}, 103rd Cong. \S 1, 107 Stat. 1513 (1993).
produce over 50% of the world’s semi-conductors.\textsuperscript{25} Xi would not want to botch the incorporation of Taiwan as Mao botched China’s annexation of Tibet in 1959.\textsuperscript{26} Much as Putin styled invading Ukraine as freeing that country of a drug-addicted government of neo-Nazis, China styled its invasion of Tibet as liberating the Tibetan people from a backward theocratic feudal system.\textsuperscript{27} However, Chinese forces failed to capture the Dalai Lama, who set up a government in exile south of the Himalayas, remaining a significant thorn in China’s side by successfully keeping the international spotlight on the plight of Tibet for over 60 years.\textsuperscript{28}

Putin understands history, which is why his initial plan was to circle Kyiv and capture Ukrainian president Zelensky, who has proven just as adept at marshaling international public support in the cause of Ukraine as the Dalai Lama has in the cause for Tibet.\textsuperscript{29} Structural weaknesses in Russia’s military forces, together with poor equipment design and upkeep and surprisingly strong Ukrainian resistance, have conspired however to prevent

\begin{multicols}{2}
\begin{itemize}
\item \textsuperscript{25} Yen Nee Lee, \textit{2 Charts Show How Much the World Depends on Taiwan for Semiconductors}, CNBC (Mar. 15, 2021, 8:37 PM), www.cnbc.com/2021/03/16/2-charts-show-how-much-the-worlddepends-on-taiwan-for-semiconductors.html [https://perma.cc/U2PU-8CYZ].
\item \textsuperscript{27} See \textsuperscript{id}.
\end{itemize}
\end{multicols}
this part of Putin’s plan coming to fruition. 30 Consequently, absent an improbable breakthrough by either side, a diplomatic coup, or the equally unlikely overthrow of Putin from within Russia, both sides appear to be settling in for a long fight. 31

III. INTERNATIONAL SECURITY ASSURANCES

The security-based pieces of international law fall around this conflict like so much recently dusted up ash from Chernobyl’s nuclear cemetery by Russian tanks. 32 They also lead to equally unsatisfactory applications. The architecture of the post-World War II global collective security apparatus, ostensibly an improvement on the failed League of Nations, only works when the major powers on the U.N.’s Security Council want it to work. In fact, the two times on either side of the Cold War where it actually worked—the Korean War and the first Iraq War—were situations characterized by both Russia and China not exercising their veto powers. 33

In the first instance, the Chinese seat was contested between the Republic of China and the People’s Republic, and the Soviet seat was vacant in protest when the vote to activate Article 42 powers to protect South Korea was taken. 34 The Soviets notably


34. Id. at 324.
never missed another meeting after this. In the second instance, the USSR was in its final days, with Gorbachev desperately working with the West to remain in power and the Chinese in the throes of Deng Xioping’s western investment strategy to reorient their economy into a market-based enterprise; thus, neither Russia nor China were disposed to oppose Britain, France, and the U.S. on the liberation of Kuwait.

Today, in the case of Ukraine, that architecture has been hijacked by one of the five permanent members to pursue an aggressive war. The U.N. Charter’s Security Council is frozen from action by Russia’s veto — the structural Achilles’ heel that dooms global collective security from ever realizing its full promise. It is of course, a cruel irony that Russia chairs the Security Council as it invades a member state. The veto-wielding permanent membership problem has plagued the UNSC from properly executing its collective security function for decades.

Indeed, the latter half of the twenty-first century brought example after example of UNSC stalemate, with the resurrection of old habits such as permanent members protecting their client

35. See Sydney D. Bailey, The UN Security Council: Evolving Practice, WORLD TODAY, MAR. 1978, 100, at 101 (1978). The Soviets has previously boycotted the UNSC in 1946 when Iranian complaints about Soviet interference were being considered. Id.


states: China re: Sudan and Zimbabwe, Russia re: Serbia, Iran, and Syria, U.S. re: Israel. Consequently, it should come as no surprise that Russia will use its raw political power within that body to preserve its geopolitical interests in the wake of invading Ukraine. In this respect, perhaps the League of Nations, institutionally weak as it was, had higher moral ground when it voted collectively to expel the Soviet Union after Moscow’s unprovoked invasion of Finland in December 1939.


From a legitimacy standpoint, the permanent membership of the UNSC is the least representative component of the UN System, yet the Charter makes their resolutions legally binding and supreme over any other international legal commitments the members may have.43 Meanwhile, the General Assembly is the most representative body and their reservations are not legally binding.44

Figure 2: NATO Member States (2022)45

Until adjustments are made to increase the UNSC’s legitimacy deficit, this global aspect of

43. Kelly, supra note 1, at 394.
44. See id.
international collective security is likely to continue failing in situations where the interests of permanent members are involved.46

Regional collective security arrangements fared no better in forestalling Russia’s invasion. Article 5 of the North Atlantic Treaty47 is NATO’s collective military response trigger, requiring all thirty member states to respond militarily when one of them is attacked.48 However, Ukraine is not a member of NATO.49 Consequently, this regional collective security guarantee won’t be triggered until Russian forces physically cross into the Baltic states, Poland, or Romania.50 It was used for the first time in 2002 with the invasion of Afghanistan after the 9/11 attacks on the United States.51

Unless cyberattacks count as attacks under Article 5, which remains unclear, or radioactive contamination spreading into NATO countries from active or dead nuclear power plants Russian forces continue to disturb, shell, occupy, and disrupt are considered attacks, NATO remains on military standby – not in direct confrontation with Russia.52 Which is not to say that NATO cannot supply weapons to Ukraine, which it has, in abundance, since the beginning of the war.53


47. North Atlantic Treaty, supra note 5.

48. Id.

49. See Member Countries, NATO (Oct. 4, 2022), www.nato.int/cps/en/natohq/nato_countries.htm [https://perma.cc/N8DC-R372].

50. See Patrick Wood, A Part of the NATO Treaty Could Turn Russia’s Invasion of Ukraine into a Wider War, NPR (Feb. 26, 2022, 10:03 AM), www.npr.org/2022/02/26/1082964072/russia-ukraine-nato-article-5 [https://perma.cc/TC7P-Y6DN].


52. See LeBlanc, supra note 51.

That said, Article 4, has been triggered by Russia’s invasion of Ukraine. This requires consultations having to do with threat assessment and readiness of armed forces. Conveyance of military supplies and repositioning of troops and assets flowed from these Article 4 consultations’ thus, they are not inconsequential meetings. NATO remains, however, adamant about not setting foot in Ukraine or Russia to defend democracy – indeed, it is not a requirement that NATO members even be democracies: an aspect of the treaty regime that has been tested more recently by the autocratic governments of Victor Orban in Hungary and Recep Tayyip Erdogan in Turkey – both key NATO member states.

On a more specific level, the Budapest Memorandum signed by the United States, United Kingdom, Russia, and Ukraine in 1994, provided security assurances to Ukraine for its territorial integrity, political independence, and border inviolability in exchange for Kyiv giving up the nuclear arsenal it inherited from the defunct Soviet Union – an arsenal that amounted to nearly 2,000 nuclear weapons which then constituted the third largest stockpile in the world behind Russia and the United States. Ironically, the Budapest Memorandum was transmitted to the U.N. by Sergey Lavrov, serving then as Russia’s ambassador to the United Nations and who now, as Russia’s Foreign Minister,
is presiding along with President Putin over the complete violation of that collective security arrangement.\textsuperscript{59}

Because NATO refuses to militarily engage Russia directly over its invasion of Ukraine, this leaves the other two parties to the memorandum, Britain and the U.S., emphasizing to the Ukrainians the legal difference between “assurances” and “guarantees.”\textsuperscript{60} An unsatisfactory \textit{denouement} to this 1994 arrangement. Indeed, the memorandum’s “assurances” did not even translate into the no-fly zones Ukraine urgently requested to slow down Russia’s advance.\textsuperscript{61}

Although \textit{jus ad bellum} multilateral structures have proven incapable of stopping a permanent member of the U.N. Security Council that possesses enough nuclear weapons to destroy the planet from going to war if it wants to, \textit{jus in bello} combined with relevant international legal mechanisms may provide a pathway to accountability. After all, there is no doubt that Putin and his generals can be prosecuted as a war criminals for how this invasion has been executed against civilians and their property absent military necessity,\textsuperscript{62} just as Serbia’s president, Slobodan

\begin{itemize}
\item \textsuperscript{59} See Steven Pifer, \textit{Mr. Lavrov, Russia, and the Budapest Memorandum}, BROOKINGS (Jan. 28, 2016), www.brookings.edu/blog/order-from-chaos/2016/01/28/mr-lavrov-russia-and-the-budapest-memorandum/ [https://perma.cc/3QH6-5NXC].


\item \textsuperscript{61} See Kevin Breuninger, \textit{U.S., U.K. Resist Calls for No-Fly Zone Over Ukraine’s Pleas: ‘Our Goal is to End the War, Not to Expand it’}, CNBC, www.cnbc.com/2022/03/09/us-uk-resist-calls-for-no-fly-zone-over-ukraines-pleas.html (Mar. 9, 2022, 3:52 PM) [https://perma.cc/S7BB-9DA8].

\end{itemize}
Milosevic, was prosecuted for his role in orchestrating the Balkan civil wars.  

IV. UKRAINE’S LEGAL COUNTER-ATTACK

While the collective security component of public international law failed at all levels to address Russia’s invasion, the international judicial process component has robustly demonstrated its capability to do so. Ukraine has launched a legal counterattack against Russia in various international tribunals. While the normally slow-moving, process-heavy gears of international justice are moving at relative lightspeed in response to Russia’s illegal invasion of Ukraine and the global condemnation that quickly followed at the United Nations. While much has been made of the military, economic, and financial resistance against Russia’s invasion, Ukraine’s strategic legal salvos should not be undervalued.

Symbolically, it is important for democracies to take legal action against larger authoritarian adversaries when they are wronged, if for no other reason than to support the notion of the rule of law. Ukraine’s multi-pronged legal strategy involves cases in at least five international tribunals including advocacy by attorneys from prominent U.S. law firms. The two most recent advances have occurred in The Hague at the International Court of Justice and the permanent International Criminal Court.


67. Id.
A. The International Court of Justice

Only two weeks after the invasion of Ukraine, the ICJ held hearings at the Peace Palace on Ukraine’s request for provisional measures—which were essentially a restraining order against further Russian aggression.68 Defending itself against Russian President Vladimir Putin’s allegations of genocide against Russian-speaking peoples in the Donetsk and Luhansk regions, Kyiv opened a case against Moscow by triggering Article 9 in the 1948 Genocide Convention69—thereby activating the Court’s jurisdiction.70 Indeed, in a bit of legal ju-jitsu, Ukraine turned the tables on Russia, noting that the international killing and infliction of serious injury on Ukrainian nationals by Russian forces transgressed at least two of the treaty’s actus reus prohibitions and may suggest genocidal intent by Russia itself.71

Yale Law School’s former dean, Harold Koh, powerfully delivered Ukraine’s closing argument, “[t]he tragedy we are all witnessing in the streets of Kyiv . . . is precisely what our modern international legal system was designed to prevent.”72


Foreshadowing what China might do against Taiwan if Russia succeeds in subjugating Ukraine, Koh stated, “if this Court does not act decisively against this level of aggression and atrocity, based on outrageous abuse of one of the world’s most important human rights treaties . . . why should any Permanent [U.N.] Member see international law as a meaningful obstacle to what it might perceive as ‘necessary military action’?” He then directly challenged the fifteen judges to act swiftly: “[y]ou have undeniable legal authority to act. Anything less would fail to vindicate the rule of international law under these most dire of circumstances . . . . [T]he world awaits your actions.”

Challenging the court’s jurisdiction to hear the case, Russia declined to appear before the Court. The ICJ very quickly ruled on March 16 that “[t]he Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine” and further ordered that it “shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations . . . .”

Within three weeks, Ukraine had assembled a top-flight legal team led by Washington D.C.-based Covington & Burling, requested, argued, and secured a decisive ruling by the World Court that Russia, a permanent member of the Security Council, cease and desist its invasion of Ukraine. This moment starkly

73.  Id. ¶ 39.
74.  Id. ¶¶ 40, 42.
demonstrated that while the political apparatus of the U.N. was unable to address the war, the legal apparatus of the U.N. could.

B. The International Criminal Court

On the other side of The Hague, overlooking a beach on the North Sea, the ICC was abuzz with activity. The new prosecutor, British barrister Karim Kahn, was assembling his team to begin collecting evidence of war crimes, genocide, and crimes against humanity in Ukraine.78 It is happenstance that the ICC was able to tackle this situation. The Court does not always have jurisdiction over atrocities committed by or on the territories of non-State Parties to the Court’s Rome Statute79 such as Russia and Ukraine.80

However, because Ukraine had requested and accepted the ICC’s jurisdiction after Russia annexed Crimea in 2014, and that process was not yet completed, Russian tanks literally rolled into a still-open situation before the Court.81 Mr. Kahn immediately announced his intention to convert this concluded preliminary examination into an investigation – the next step in the process of triggering the Court’s full authority.82 The case was assigned to Pre-Trial Chamber II.83


81. Id.


83. Situation in Ukraine, ICC-01/22-1, Decision Assigning the Situation in Ukraine to Pre-Trial Chamber II (Mar. 2, 2022),
This jurisdictional track on the prosecutor’s initiative is overlaid, and further legitimized, by the sudden opening of a second track by thirty-nine State parties led by Lithuania which separately requested an investigation, and which relieved the prosecutor of mounting the case for securing the investigation on his own authority from the Court. If the Kremlin’s attorneys advised Putin that he was immune from the ICC’s reach, they were as badly mistaken as he was surprised.

The three judges who constitute Pre-Trial Chamber II and who will therefore oversee Mr. Kahn’s investigation are an all-star bench: Antoine Kesia-Mbe Mindua from the Democratic Republic of the Congo, who has deep experience drawn from previous postings at the Rwanda and Yugoslavia war crimes tribunals; Tomoko Akane from Japan, whose work on capacity building and legal systems in addition to prosecuting give her a

---


85. Marchuk & Wanigasuriya, supra note 80.

keen eye toward process and procedure; and Rosario Salvatore Aitala from Italy, whose background in geopolitics and terrorism issues equip him to appreciate a much bigger picture in the Ukraine situation. This chamber will examine the evidence as it comes in, approve cases within the Ukraine situation, and issue summons or arrest warrants.

If the ICC issues an arrest warrant against Vladimir Putin for war crimes, it will be a legal thunderbolt. It is a rare thing for sitting heads of State to come under the jurisdiction of international law, but a decade ago this is exactly what happened to President Omar al-Bashir of Sudan for his role in the Darfur genocide. The ICC’s arrest warrant weakened Bashir both at home and abroad to the point that he was eventually overthrown, leading to negotiations for his transfer to The Hague to stand trial. No one presumes to know whether a similar fate would befall Putin, but it certainly wouldn’t help him.

When despots fall from power, succeeding governments may calculate that it is worth the trade to give up the former leader for international criminal prosecution in exchange for lifting of sanctions imposed during their time in office. This was the case with both Slobodan Milosevic in Serbia and Omar Bashir in Sudan. But the succeeding government must actually have control of the despot in question. For example, Muammar


Gaddafi did not survive his overthrow to be traded by Libya to the ICC.93 And other dictators are offered amnesty to leave, such as Idi Amin departing Uganda for retirement in Saudi Arabia or Baby Doc Duvalier leaving Haiti for retirement in the south of France.94

Thus, an incredibly delicate series of dominoes must fall into place for this to happen: (1) an international tribunal must have jurisdiction, (2) a political will and military ability must exist within the state to overthrow the criminal leader, (3) that criminal leader must survive the overthrow and otherwise not flee the country to a safe location, and (4) the succeeding government must be enticed to hand the criminal leader over. Notably, to date, it has always been a him.95

Such could be the case with Vladimir Putin. Russian history augers in both directions on this remote possibility. Of course, the Romanov dynasty was famously deposed in 1917,96 and an attempted coup in 1991 during the collapse of the Soviet Union was thwarted.97 Thus, such impulses do exist within Russian society. However, Putin has tight control of the Russian media landscape, and it remains unclear how much unfiltered external information actually makes it to the Russian people or whether what does make it is enough to counter the Kremlin’s propaganda machine of Russian nationalism. Moreover, no meaningful political opposition to Putin’s rule has surfaced in recent years.98


98. See, e.g., Christopher Bort, Commentary, How the Kremlin Learned to Defeat Its Opposition, CARNEGIE ENDOWMENT FOR
Consequently, “remote” remains the right word to describe this possibility.

V. UKRAINIAN CASES AGAINST RUSSIA IN OTHER TRIBUNALS

The broader legal front Ukraine has mounted against Russia since the annexation of Crimea also includes previously percolating cases against Russia. In the Law of the Sea Tribunal, Ukraine prevailed against Russia after the Russian Navy had seized three Ukrainian vessels in the wake of Crimea’s annexation on the pretext that the waters surrounding Crimea were, after 2015, Russian waters.99 Russia objected to the Tribunal’s jurisdiction and refused to participate, requesting instead an arbitration before the Permanent Court of Arbitration under Article VII of the Law of the Sea Convention.100 The PCA then overcame similar Russian jurisdictional objections and ordered in July 2022 that the case will continue to the merits.101

Notably, the PCA also serves as a forum for Ukraine to lodge cases against Russia for seizure of Ukrainian assets and investments in Crimea,102 and coastal state rights in the Black


Since the Russian invasion of Ukraine, these cases have re-emerged with new urgency. On March 1, 2022, the European Court of Human Rights also ordered Russia, on Ukraine’s request, to refrain from further military attacks against civilians and civilian property in Ukraine. This judicial admonition was ignored by Russia, prompting the Council of Europe to expel Moscow from its ranks, thereby also expelling it from the European Convention on Human Rights, a treaty it habitually violated, which additionally withdraws Russia from the jurisdiction of the ECHR in any further cases. Nevertheless, Ukraine filed a second application requesting $80 billion in damages against Russia for the wanton destruction of human life and property unleashed by its invasion.

VI. Conclusion and the Promise of International Law

Frustratingly, international law doesn’t provide answers so much as frameworks, but they are frameworks within which the world agrees to operate. When great powers depart from such norms, the rules must be enforced against them where possible. If this means unsealing an arrest warrant against a sitting head of State, then all the better for potential deterrence.

Ukraine’s legal counterattack in an array of international venues has put Russia back on its heels. Not only did Moscow not show up to challenge Ukraine at the ICJ, nor respond to the


85
ICC Prosecutor’s announcement opening a war crimes investigation in Ukraine, Russia has been expelled from the Council of Europe, and is on the verge of being suspended from the World Trade Organization.\textsuperscript{107} The law is designed to serve those who need it in the pursuit of justice. International justice is no exception, and there is no better case than Ukraine’s existential plight. The rule of law is what, in the end, tends to separate democracies from dictatorships.

True, international law has failed with respect to collective security arrangements. Russia invaded and continues to carry on its war in Ukraine with impunity due to its status as the world’s largest nuclear power.\textsuperscript{108} Vladimir Putin used Victory Day commemorations in Moscow to paint this as a war against NATO being fought on Ukrainian territory.\textsuperscript{109} Putin’s use of Soviet rhetoric was entirely appropriate, as both his politics and Russia’s military strategies remain tired echoes of Soviet times.\textsuperscript{110} Indeed, Ukraine has succeeded beyond all expectations in stymying the Russian army’s advances.\textsuperscript{111}

And Ukraine has proven that international judicial mechanisms work, further encouraging the western industrialized world to continue rallying around Kyiv. Therein lies even more


promise for international law to work a positive role in this conflict. Although international law’s role can be defined in terms of failure or success to date, its prospect going forward will be entirely what nations make of it.

For example, increased international legal cooperation in the form of mutual legal assistance could answer a vexing problem facing Ukraine’s judiciary as the war drags on. As of August 2022, Ukraine is investigating over 25,000 incidents of war crimes committed by Russian soldiers. Customary international law provides the basis for Justice Ministries in the 27 E.U. member states to use universal jurisdiction to prosecute Russian war criminals. In addition to the ICC assisting in this effort, countries like Belgium, Italy, France, Poland, and Germany could take on some cases.

Based in The Hague, Eurojust provides the internal EU bureaucracy for mutual legal assistance across borders, and could be turned to engage with the Ukrainian judiciary if the EU decides to deputize it into this role. “Eurojust is particularly well-suited to help Ukraine with coordination efforts.” Moreover, the 1949 Geneva Conventions allow for states parties to transfer POWs to other states parties for prosecution so long as their POW status is respected.


114. Although international law provides the basis for asserting jurisdiction over jus cogens conduct such as war crimes, the best-case scenario is for internal national statutes to recognize and specifically incorporate such bases for prosecution. See generally id. at 328, 332.


116. Id.

117. Id.

member states are party to the Geneva Convention regime. Consequently, international law can play yet more constructive roles concerning the Russia-Ukraine war, both during and after the conflict.

I remain hopeful that international law will help Ukraine preserve itself as an independent state and rebuild at the conclusion of hostilities. Adjustments to our international legal frameworks are sorely needed, and this conflict has brought that fact into high relief. Institutions are only as useful as their structures and constraints allow them to be. The inability of collective security frameworks to stop this conflict are a case in point. Yet the ability of international judicial processes to not only embrace but to decisively work on the issues Ukraine brings forward, sustains this hope further.

of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.”).

APPENDIX

UNIVERSAL

AS

General Assembly
Security Council

Distr.

A/49/768*
S/1994/1399*
19 December 1994
ORIGINAL: ENGLISH

GENERAL ASSEMBLY

Security Council

Forty-ninth session

Forty-ninth year

Agenda items 62 and 70

GENERAL AND COMPLETE DISARMAMENT

MAINTENANCE OF INTERNATIONAL SECURITY

Letter dated 7 December 1994 from the Permanent Representatives of the Russian Federation, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General

Upon instructions from our Governments, we have the honour to transmit herewith the text of the Memorandum on Security Assurance in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, signed on 5 December 1994 by the Presidents of Ukraine, the Russian Federation and the United States of America, and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland (annex I), and the text of the Joint Declaration issued on 5 December 1994 by the leaders of our States (annex II).

We should be grateful if you would have the text of the present letter and its annexes circulated as a document of the General Assembly, under agenda items 62 and 70, and of the Security Council.

(Signed) Anatoli M. ELEKHO
Permanent Representative of Ukraine to the United Nations

(Signed) David NOIRISH
Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations

(Signed) Sergey V. LAVROV
Permanent Representative of the Russian Federation to the United Nations

(Signed) Madeleine K. ALSTON
Permanent Representative of the United States of America to the United Nations

* Reissued for technical reasons.

94-54764 (E) 201224 /...
ANNEX I

[Original: English and Russian]

Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons

Recalling the accession of Ukraine to the Treaty on the Non-Proliferation of Nuclear Weapons as a non-nuclear-weapon State,

Taking into account the commitment of Ukraine to eliminate all nuclear weapons from its territory within a specified period of time,

Noting the changes in the worldwide security situation, including the end of the cold war, which have brought about conditions for deep reductions in nuclear forces,

Confirms the following:

1. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to respect the independence and sovereignty and the existing borders of Ukraine.

2. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations;

3. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to refrain from economic coercion designed to subordinate to their own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind;

4. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their commitment to seek immediate United Nations Security Council action to provide assistance to Ukraine, as a non-nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used;

...
1. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm, in the case of Ukraine, their commitment not to use nuclear weapons against any non-nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an attack on themselves, their territories or dependent territories, their armed forces, or their allies, by such a State in association or alliance with a nuclear-weapon State.

2. Ukraine, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America will consult in the event a situation arises that raises a question concerning these commitments.

This Memorandum will become applicable upon signature.

Signed in four copies having equal validity in the Ukrainian, English and Russian languages.

For Ukraine:
(Signed) Leonid D. KUCHMA

For the Russian Federation:
(Signed) Boris N. YELTSIN

For the United Kingdom of Great Britain and Northern Ireland:
(Signed) John MAJOR

For the United States of America:
(Signed) William J. CLINTON

/...
ANNEX II

Joint Declaration issued on 5 December 1994 at Budapest
by the leaders of the Russian Federation, Ukraine, the
United Kingdom of Great Britain and Northern Ireland and
the United States of America

The leaders of the United States of America, the Russian Federation, Ukraine and the United Kingdom of Great Britain and Northern Ireland met during the summit meeting of the Conference on Security and Cooperation in Europe (CSCE).

The leaders discussed the evolution of European security architecture. They underscored their determination to support the increasingly strong tendencies towards the formation of security based on political partnership, and to cooperate in the further development of a security system that embraced all the CSCE States. This will involve the evolution - given the new realities - of transatlantic and regional mechanisms of security in a manner that enhances the security and stability of all CSCE States.

They are committed to continuing the process of building political, military and economic security in an undivided Europe, in which integration opened for participation and transparency are characteristic.

The leaders confirmed that CSCE commitments in the area of human rights, economics and security represent the cornerstones of the common European security space, and that they help ensure that countries and peoples in this space are not subjected further to the threat of military force or other undesirable consequences of aggressive nationalism and chauvinism.

They noted that the historical changes in the world, including the end of the confrontation between blocs of the cold war, created favourable conditions for the further strengthening of security and stability on the European continent and for deep reductions in nuclear forces.

In this regard, the leaders discussed the implementation of the trilateral statement of 16 January 1994. They noted progress in the implementation of this statement.

The leaders also confirmed that an important contribution to the broader process of strengthening security and stability is also made by such agreements as the Treaty on Conventional Forces in Europe, the open share treaty, and confidence- and security-building measures.

------