

# THE RUSSIAN INVASION OF UKRAINE AND THE TOTTERING PRINCIPLES OF INTERNATIONAL LAW: RUSSIA'S ASSAULT ON WORLD NORMS

FREDERICK V. PERRY\*

## ABSTRACT

What is the “rule of law”? Does it protect us? Should we, as citizens of the world, be worried, or encouraged, if it changes? “The rules governing resort to force form a central element within international law, and together with other principles such as territorial sovereignty and the independence and equality of states provide the framework for international order.”<sup>1</sup> Russia seems not to have respected any of these principles recently.

On February 24, 2022, Russia invaded the sovereign state of Ukraine, even as the Security Council was meeting to try to avoid conflict.<sup>2</sup> Speaking at that Security Council meeting, the Ukrainian ambassador said: “It is the responsibility of this body to stop the war. . . . I call on every one of you to do everything possible to stop the war.”<sup>3</sup> Of course, the body was powerless to stop anything, since Russia vetoed a council resolution condemning Russian actions the next day. The stakes are very high, broader than the future of Ukraine; they include some of the foundations of international law and relations, the norms that have made our world work as it does.

The purpose of this paper is not to examine international norms in depth, nor to provide an official indictment of Russian or Russian President Vladimir Putin’s actions. Its purpose is simply to take a broad look at the backdrop of that invasion, what we know so far from the reporting, and some of the major rules of international law that are in play

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\* Frederick V. Perry, MBA, J.D. PhD., is a professor of law at the College of Business at Florida International University.

<sup>1</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW*, 982, (Cambridge Uni. Press 9th ed. 2021).

<sup>2</sup> Farnaz Fassihi, *The U.N. Security Council Met to Prevent Military Action by Putin. Russia Invaded Ukraine as They Spoke*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/world/europe/un-security-council-russia-ukraine.html?searchResultPosition=9> [https://perma.cc/U97A-T5DJ].

<sup>3</sup> *Id.*

and some of the shortcomings of the system ostensibly designed to prevent the use of armed force, that is, the visible problem with the application of the rule of law on the international scene. Additionally, this paper will explore some suggested methods of dealing with Russian actions in this invasion and will suggest some opportunities for improvement in the broader system of international norms. The other question here is whether the world should have expected this invasion.

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## INTRODUCTION

“The ‘rule of law’ is a concept at the very heart of the [United Nations] mission.”<sup>6</sup> “It is on the battlefields in Ukraine that the future rules of this world are being decided.”<sup>7</sup> What are the “rules of the world”? What

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<sup>4</sup> U.N. Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>5</sup> Marc Santora & Roger Cohen, *Momentum in Ukraine is Shifting in Russia’s Favor*, N.Y. TIMES (June 11, 2022), <https://www.nytimes.com/2022/06/11/world/europe/russia-momentum-ukraine.html> [<https://perma.cc/66PK-5BG5>].

<sup>6</sup> U.N. Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>7</sup> Marc Santora & Roger Cohen, *Momentum in Ukraine is Shifting in Russia’s Favor*, N.Y. TIMES (June 11, 2022), <https://www.nytimes.com/2022/06/11/world/europe/russia-momentum-ukraine.html> [<https://perma.cc/66PK-5BG5>].

is the “rule of law”? Do they protect us? Should we as citizens of the world be worried or encouraged if they change? “The rules governing resort to force form a central element within international law, and together with other principles such as territorial sovereignty and the independence and equality of states provide the framework for international order.”<sup>8</sup> Russia seems not to have respected any of these principles.

On February 24, 2022, Russia invaded the sovereign state of Ukraine, even as the Security Council was meeting to try to avoid conflict.<sup>9</sup> Speaking at that Security Council meeting, the Ukrainian ambassador said: “It is the responsibility of this body to stop the war. . . . I call on every one of you to do everything possible to stop the war.”<sup>10</sup> Of course, the body was powerless to stop anything, since Russia vetoed a council resolution condemning Russian actions the next day.<sup>11</sup>

As Professor Tanisha Fazal has written, the territorial integrity of sovereign states has been widely respected since World War II, such that borders were generally accepted and the capture of territory was a thing of the past.<sup>12</sup> This fact removed one of the principle causes of those wars in the past: conquest. Russia is turning this principle on its head. This war reminds of the past, not of today.

If the community of states allows Russia to take over Ukraine, states everywhere may be encouraged to use force to contest their borders and new wars may erupt, former empires may be restored, and more countries may be done away with altogether.<sup>13</sup> This may bring us a violent era that we will not welcome. Even though many states cannot be bothered to criticize Russia for this aggression, either because they side with Russia in some fashion, they believe that maybe NATO provoked this invasion, or they fear that their economic interests are at stake if they do join in the sanction regime, there is little doubt that the territorial integrity of states, one of the very foundational principles of international law is at stake.<sup>14</sup>

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<sup>8</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW*, 982, (Cambridge Uni. Press 9th ed. 2021).

<sup>9</sup> Fassihi, *supra* note 2.

<sup>10</sup> *Id.*

<sup>11</sup> Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, U.N. Press Release SC/14808 (Feb. 25, 2022).

<sup>12</sup> Tanisha M. Fazal, *The Return of Conquest: Why the Future of Global Order Hinges on Ukraine*, FOREIGN AFFAIRS, May/June 2022. [https://www.foreignaffairs.com/articles/ukraine/2022-04-06/ukraine-russia-war-return-conquest?check\\_logged\\_in=1](https://www.foreignaffairs.com/articles/ukraine/2022-04-06/ukraine-russia-war-return-conquest?check_logged_in=1).

<sup>13</sup> Tanisha M. Fazal, *The Return of Conquest? Why the Future of Global Order Hinges on Ukraine*, FOREIGN AFFS. (Apr. 6, 2022), [https://www.foreignaffairs.com/articles/ukraine/2022-04-06/ukraine-russia-war-return-conquest?check\\_logged\\_in=1](https://www.foreignaffairs.com/articles/ukraine/2022-04-06/ukraine-russia-war-return-conquest?check_logged_in=1) [<https://perma.cc/828N-E7LK>].

<sup>14</sup> *Id.*

The purpose of this paper is not to examine those “rules of the world” in depth, nor to provide an official indictment of Russian or Russian President Vladimir Putin’s actions, rather simply to take a broad look at the backdrop of that invasion, what we know so far from the reporting, some of the major rules of international law that are in play and some of the shortcomings of the system ostensibly designed to prevent the use of armed force, that is, the visible problem with the application of the rule of law on the international scene. Additionally, this paper will explore some suggested methods of dealing with Russian actions in this invasion and opportunities for improvement in the broader system of international norms will be suggested. The other question here is whether the world should have expected this invasion.

After Russia took over Crimea in 2014, then US President Barack Obama said that Russia was simply a regional power and that taking over Crimea was a sign of weakness and not strength.<sup>15</sup> This challenge may have lent fuel to the fire burning in the mind of Russian President Vladimir Putin. Whatever effect it may have had on President Putin, the attitude displayed by Obama has changed in the United States. In 2017, the US National Security Strategy,<sup>16</sup> then, in 2018, the National Defense Strategy,<sup>17</sup> and, in 2018, the US Nuclear Posture Review (NPR) estimated that Russia is a threat to US national interests and to world peace.<sup>18</sup> The 2022 National Defense Strategy stated that Russia is an acute threat.<sup>19</sup>

Russia considers the United States and the North Atlantic Treaty Organization (NATO) to be the principal threats to its contemporary geopolitical ambitions.<sup>20</sup> Russian strategy and doctrine emphasize the

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<sup>15</sup> CNN, *Obama: Russia a regional power*, YOUTUBE (Mar. 25, 2014), <https://www.youtube.com/watch?v=PkQUzeZbLEs> [<https://perma.cc/9SAJ-3VLF>].

<sup>16</sup> See OFF. OF THE PRESIDENT, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017).

<sup>17</sup> See DEP’T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2018).

<sup>18</sup> See OFF. OF THE SEC’Y OF DEF., NUCLEAR POSTURE REVIEW (2018).

<sup>19</sup> See DEP’T OF DEF., 2022 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2022).

<sup>20</sup> *Russia Sees Major Threats from NATO, US*, VOA LEARNING ENGLISH (Jan. 7, 2015), <https://learningenglish.voanews.com/a/russia-sees-major-threats-from-nato-and-us/2587464.html> [<https://perma.cc/NPH4-KMBV>]; see Shannon Bugos, *Russia Releases Nuclear Deterrence Policy*, ARMS CONTROL ASS’N (July/Aug. 2020); see ВОЕННАЯ ДОКТРИНА РОССИЙСКОЙ ФЕДЕРАЦИИ [The Military Doctrine of the Russian Federation], (Feb. 5, 2010).

potential coercive and military uses of nuclear weapons.<sup>21</sup> The additional potential danger is the current belief that Russian conventional missiles have a high fail rate and lack precision, and that after one year of war, their stockpile is now running low, giving rise to the danger of some use of nuclear weapons.<sup>22</sup> Russia's strategy and doctrine assesses that the threat of nuclear escalation or actual first use of nuclear weapons would serve to "de-escalate" a conflict on terms favorable to Russia. The United States Nuclear Policy Review call these positions mistaken perceptions that increase the prospect for dangerous miscalculation and escalation.<sup>23</sup>

## I. THE INVASION

Tensions over a possible invasion of Ukraine were building since 2021, but Russia denied that it had any plans of doing so, though Russia's spokesman stated that "threats from Ukraine" might require military action.<sup>24</sup> After months of Russian forces building up along the borders of Ukraine, as the world watched, Russia invaded on February 24, 2022.<sup>25</sup> Many have accused President Putin and the Russians of committing war crimes.<sup>26</sup> The Russian invasion has killed hundreds, perhaps thousands, of civilians, many apparently deliberately.<sup>27</sup> Civilian buildings, houses and

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<sup>21</sup> See Основы государственной политики Российской Федерации в области ядерного сдерживания [Basic Principles of State Policy of the Russian Federation on Nuclear Deterrence] (June 2, 2020).

<sup>22</sup> Lydia Wachs, *Die Rolle von Nuklearwaffen in Russlands strategischer Abschreckung [The Role of Nuclear Weapons in Russia's Strategic Deterrence]*, STIFTUNG WISSENSCHAFT UND POLITIK [GERMAN INST. FOR INT'L AND SEC. AFFS.] (Nov. 2022), <https://www.swp-berlin.org/en/publication/the-role-of-nuclear-weapons-in-russias-strategic-deterrence> [<https://perma.cc/XB8V-TW53>].

<sup>23</sup> OFF. OF THE SEC'Y OF DEF., *supra* note 18, at 8; *Id.*

<sup>24</sup> Fareed Zakaria *On GPS: Will Russia Invade Ukraine*, CNN (Jan. 16, 2022), <https://www.cnn.com/videos/tv/2022/01/16/exp-0116-russia-ukraine-dmitry-peskov-kremlin.cnn>.

<sup>25</sup> Holly Ellyatt, *Russian Forces Invade Ukraine*, CNBC (Feb. 24, 2022), <https://www.cnbc.com/2022/02/24/russian-forces-invade-ukraine.html> [<https://perma.cc/9N4B-CS7N>].

<sup>26</sup> See Editorial Board, Opinion, *Document the War Crimes in Ukraine*, N.Y. TIMES (Apr. 6, 2022), <https://www.nytimes.com/2022/04/06/opinion/war-crimes-ukraine-putin.html?searchResultPosition=2> [<https://perma.cc/5W4L-EBAA>]; James Hookway, *What Is a War Crime? Russia Faces Accusations as Civilian Casualties in Ukraine Grow*, WALL ST. J. (Apr. 5, 2022), <https://www.wsj.com/articles/what-are-war-crimes-russia-ukraine-11646680445> [<https://perma.cc/8WGG-PG3M>].

<sup>27</sup> See Luke McGee, Nathan Hodge, Lauren Kent, Claudia Otto & Nadine Schmidt, *Russian Troops Discussed Killing Ukrainian Civilians in Radio Transmissions Intercepted by Germany*, *Source Says*, CNN (Apr. 7, 2022), <https://www.cnn.com/2022/04/07/europe/ukraine-russian-intercepts-killing-civilians-germany-intl/index.html> [<https://perma.cc/7L22-9NJ6>]; Stephanie Stamm & Emma Brown, *Mass Graves in Ukraine Reveal Mounting Death Toll*, WALL ST. J. (May 6, 2022),

infrastructure have been targeted,<sup>28</sup> and by March of 2022, millions of civilians had been uprooted creating millions of refugees and displaced persons, generating a humanitarian crisis.<sup>29</sup> One Russian soldier has pleaded guilty to an unprovoked murder of an innocent civilian and was sentenced by a Ukrainian court.<sup>30</sup> The International Criminal Court in the Hague has opened an investigation into Russian actions in Ukraine.<sup>31</sup> The Europeans also are serious about such prosecutions.<sup>32</sup> As of this writing, forty-five states are helping to investigate the twenty-three thousand war crimes that are alleged to have occurred in Ukraine.<sup>33</sup>

If one examines Russia's past actions and concept of law, especially international law, and Putin's past actions and speeches, it appears clear that the world should have expected the invasion, even before the Russia started massing of troops on its border with Ukraine. Despite considerable lip service and written declarations to the contrary, Russia appears not to see itself constrained by, what most would consider,

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<https://www.wsj.com/articles/mass-graves-in-ukraine-reveal-mounting-death-toll-11651829402> [https://perma.cc/U2MY-ER9F]; Brett Forrest & James Marson, *Horrors of Ukraine's Bucha Laid Bare on Yablunska Street*, WALL ST. J. (Apr. 7, 2022), [https://www.wsj.com/articles/russian-invasion-war-crimes-horrors-of-ukraines-bucha-laid-bare-on-yablunska-street-11649365202?mod=article\\_inline](https://www.wsj.com/articles/russian-invasion-war-crimes-horrors-of-ukraines-bucha-laid-bare-on-yablunska-street-11649365202?mod=article_inline) [https://perma.cc/AFB4-BX5V].

<sup>28</sup> See Alan Cullison, *Russian Airstrike Hits Maternity Hospital in Ukrainian City of Mariupol*, WALL ST. J. (Mar. 10, 2022), [https://www.wsj.com/articles/russia-presses-offensive-as-ukrainians-try-to-evacuate-11646819525?mod=Searchresults\\_pos16&page=2](https://www.wsj.com/articles/russia-presses-offensive-as-ukrainians-try-to-evacuate-11646819525?mod=Searchresults_pos16&page=2) [https://perma.cc/M42A-4NXW]. While unforeseeable and unavoidable accidents do often occur in war, too many civilian structures, houses and apartment buildings have been destroyed for such activity to be accidental.

<sup>29</sup> Alan Cullison, Isabel Coles, & Matthew Luxmoore, *Russia's Assault on Ukraine Uproots 10 Million People*, WALL ST. J. (Mar. 20, 2022), [https://www.wsj.com/articles/russias-halting-progress-in-attack-on-ukraine-puts-focus-on-resupply-efforts-11647775418?mod=Searchresults\\_pos10&page=2](https://www.wsj.com/articles/russias-halting-progress-in-attack-on-ukraine-puts-focus-on-resupply-efforts-11647775418?mod=Searchresults_pos10&page=2) [https://perma.cc/MC7U-3DKJ].

<sup>30</sup> See Valerie Hopkins, *A Ukrainian Court Convicts a Russian Soldier of War Crimes and Sentences Him to Life in Prison*, N.Y. TIMES (May 23, 2022), <https://www.nytimes.com/2022/05/23/world/europe/russian-soldier-war-crimes-guilty.html?searchResultPosition=3> [https://perma.cc/NUA7-LN48].

<sup>31</sup> Jess Bravin, *International Criminal Court Launches Probe into Possible War Crimes in Ukraine*, WALL ST. J. (Mar. 1, 2022), [https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-01/card/international-criminal-court-launches-probe-into-possible-war-crimes-in-ukraine-QGtkrbtPUD6BJVcRbS2f?mod=article\\_inline](https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-01/card/international-criminal-court-launches-probe-into-possible-war-crimes-in-ukraine-QGtkrbtPUD6BJVcRbS2f?mod=article_inline) [https://perma.cc/E7M5-2KXY].

<sup>32</sup> See Gabriela Baczynska, *Threat of Prosecution Hangs 'Forever' over Ukraine War Crimes Perpetrators, EU's Top Justice Official Says*, REUTERS (July 18, 2022), <https://www.reuters.com/world/europe/threat-prosecution-hangs-forever-over-ukraine-war-crimes-perpetrators-eu-2022-07-18/> [https://perma.cc/97ZX-QAEF].

<sup>33</sup> *Ukraine War Crimes Investigation Receives Support of 45 Nations*, ALJAZEERA (July 14, 2022), <https://www.aljazeera.com/news/2022/7/14/45-nations-pledge-to-coordinate-evidence-of-war-crimes-in-ukraine> [https://perma.cc/6AYZ-RFWA].

the rules of international law.<sup>34</sup> Russian views insist “that international law—like forms of governance—develops on cultural and civilizational, not universal, bases” and Russia does not view all states as having true sovereignty, rather truly sovereign states are only the powerful ones that can essentially do what they want.<sup>35</sup>

Should “the West” do any more than provide economic support and weapons? There are dangers. The trouble is nuclear weapons. As JFK said in his most important foreign policy speech, just months after the Cuban missile crisis, “Above all, while defending our own vital interests, nuclear powers must avert those confrontations which bring an adversary to a choice of either a humiliating retreat or a nuclear war.”<sup>36</sup> If those were the only two options between which President Putin had to choose, there is no guarantee that he would pick the former. Although US President Joe Biden has carefully avoided forcing President Putin to that point, events are now moving toward what the Russian leader could see as such a crossroad. If the facts of war on the ground leave President Putin with no alternatives other than losing this war or shocking Ukrainians and the

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<sup>34</sup> See Full Text: *Putin's Declaration of War on Ukraine*, THE SPECTATOR (Feb. 24, 2022), <https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine/> [https://perma.cc/2X66-CJET]; Further, the scholar of Russian law, Professor Lauri Mälksoo, has said:

The understanding of international law in each country cannot be detached from the understanding of law generally. For example, in Russia, there has been an historical tendency to see in law a means in the hands of the powerful rather than an autonomous end in itself—the cultural-philosophical fixation has been on the idea of justice rather than law. This partly helps to explain the obvious fluctuations and contradictions in Russian international legal positions and arguments in *jus ad bellum* over the last years—from Kosovo to Crimea. International legal arguments change when state interests change (or are interpreted in a new way)—consistency of arguments over time is not seen as a key problem because international law, in the end, is about defending national interest, not about consistency over time. I imagine that some western realists would counter that this is what all great powers do—they violate international law if it is in their interest and they can afford it, so to speak. Yet a study of legal culture also reveals that international law is even easier to violate if domestic constraints to the executive are weak, the mass media can more easily be manipulated, and cultural expectations to law as an autonomous field are not high to start with—like in Russia, for example.

See Lauri Mälksoo, *Comparative International Law: Lessons Learned from Russia*, 109 PROC. OF THE ASIL ANN. MEETING 3, 5 (2015).

<sup>35</sup> PHILIP REMLER, *Russia's Concept of International Law*, in RUSSIA AT THE UNITED NATIONS: LAW, SOVEREIGNTY, AND LEGITIMACY (Carnegie Endowment for Int'l Peace 2020).

<sup>36</sup> John F. Kennedy, President, Commencement Address at American University (June 10, 1963) (transcript available at John F. Kennedy Presidential Library and Museum Website), <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/american-university-19630610> [https://perma.cc/66HT-KEEV].

world with a tactical nuclear attack, at least one writer has said that it would be foolish to bet against President Putin selecting the latter.<sup>37</sup>

## II. THE USE OF FORCE UNDER INTERNATIONAL LAW

The use of force was traditionally not proscribed by international law; later it's use was limited by the notion of "just war."<sup>38</sup> At the end of World War I, the League of Nations did not entirely rule out the use of force, but put a variety of obstacles in its path and simply called it war.<sup>39</sup> The state parties to the Covenant of the League of Nations agreed that "if there should arise between them any dispute likely to lead to a rupture," they would "submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision."<sup>40</sup>

Not convinced that that pact was sufficient to do away with war, feeling perhaps awkward about the United States not joining the league, and seemingly concerned that a previous treaty between France and the United States would require the United States to come to the aid of France if it were attacked, the secretary of state of the United States, proposed a multi-party treaty of peace.<sup>41</sup> In this way, waging aggressive war could be more clearly outlawed, but the United States would not be unilaterally obligated to go to the aid of France. So on August 27, 1928, the Kellogg-Briand Pact was signed in Paris,<sup>42</sup> prohibiting all wars of aggression.<sup>43</sup> This treaty preserved the right of self-defense and the right to go to war against

<sup>37</sup> Graham Allison, *Putin's Doomsday Threat*, FOREIGN AFFS. (Apr. 5, 2022), [https://www.foreignaffairs.com/articles/ukraine/2022-04-05/putins-doomsday-threat?utm\\_medium=newsletters&utm\\_source=fatoday&utm\\_campaign=The%20Next%20Sino-Russian%20Split?&utm\\_content=20220405&utm\\_term=FA%20Today%20-%20112017](https://www.foreignaffairs.com/articles/ukraine/2022-04-05/putins-doomsday-threat?utm_medium=newsletters&utm_source=fatoday&utm_campaign=The%20Next%20Sino-Russian%20Split?&utm_content=20220405&utm_term=FA%20Today%20-%20112017) [https://perma.cc/HQ2D-CJM3].

<sup>38</sup> The notion of just war was a combination of Greek, Roman and then Christian philosophies, described by St. Augustine (354-430 AD) and then St. Thomas Aquinas. MALCOLM N. SHAW, INTERNATIONAL LAW 1119 (Cambridge Uni. Press 6th ed. 2008).

<sup>39</sup> League of Nations Covenant art. 11.

<sup>40</sup> *Id.* art. 12

<sup>41</sup> Some say that it was the French Foreign Minister who proposed it first. See J.-B Duroselle, *France and the United Nations*, 19 INT'L ORG. 695, 695 (1965).

<sup>42</sup> Aristide Briand was French Minister of Foreign Affairs, and Frank B. Kellogg was U.S. Secretary of State. See *The Kellogg-Briand Pact, 1928*, U.S. DEP'T OF STATE OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/kellogg> [https://perma.cc/8YC3-MLNQ].

<sup>43</sup> General Treaty for Reunification of War as an Instrument of National Policy, Aug 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. Russia is an adherent of the treaty, and thus bound. *Id.*

a violator of the treaty.<sup>44</sup> Not only is this treaty still in effect, but as Ian Brownlie has said, it “now embodies a customary rule of international law which places any war of aggression beyond the realm of lawful action.”<sup>45</sup> Further, the treaty does not contain a provision for either renunciation or lapse.<sup>46</sup> Hence, the Kellogg-Briand Pact was used as law to prosecute defendants in the war crimes trials at the end of World War II.<sup>47</sup>

The Charter of the United Nations of 1945 is broader than both the Covenant of the League of Nations and Kellogg-Briand Pact; in Article 2(4), it outlaws the “threat or use of force,”<sup>48</sup> not just “war,” as in the Kellogg-Briand Pact. The provisions of Article 2(4), with its broader prohibition on the “threat or use of force,” is also “regarded as a principle of customary international law and as such is binding upon all states in the world community.”<sup>49</sup> By prohibiting the threat or use of force, the “provision does not simply prohibit the launching of aggressive wars, but also covers those acts involving the use of force that fall short of war.”<sup>50</sup>

The Charter has been signed by 193 states, all binding themselves to the standard that the use of force is outlawed; large states and small states, powerful states, and weaker states, all have agreed to be bound by that proposition.<sup>51</sup>

Not only is the prohibition found in the Charter of the United Nations, a similar prohibition is found in the United Nations Convention on the Law of the Sea,<sup>52</sup> the United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation

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<sup>44</sup> Krzysztof Jan Skubiszewski, *Use of Force by States. Collective Security. Law of War and Neutrality*, in *MANUAL OF PUBLIC INTERNATIONAL LAW*, 739, 744 (Max Sørensen ed. 1968).

<sup>45</sup> *Id.*; see Ian BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 730 (7th ed. 2008).

<sup>46</sup> Skubiszewski, *supra* note 44; BROWNIE, *supra* note 45.

<sup>47</sup> See Skubiszewski, *supra* note 44.

<sup>48</sup> U.N. Charter art. 2, ¶ 4.

<sup>49</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW* 986 (9 ed. 2021).

<sup>50</sup> CHRISTIAN HENDERSON, *THE USE OF FORCE AND INTERNATIONAL LAW* 16 (2018).

<sup>51</sup> Today, there are 193 members of the United Nations, that is, signatories to the Charter of the United Nations, the multi-lateral treaty creating the institution. *Growth in United Nations Membership*, UNITED NATIONS, <https://www.un.org/en/about-us/growth-in-un-membership> [<https://perma.cc/J8YL-E4MK>]. Article 26 and the Preamble to the Vienna Convention on the Law of Treaties (of which Russia is a state Party) binds treaty parties to their treaty agreements. Article 2 (4) of the Charter of the United Nations outlaws the use of force; furthermore, the outlawing of the use of force is considered a peremptory norm under International Law. See HENDERSON, *supra* note 50, at 24–26.

<sup>52</sup> United Nations Convention on the Law of the Sea art. 301, Dec. 10, 1982, 1833 U.N.T.S. 397.

among States in Accordance with the United Nations Charter,<sup>53</sup> the Rome Statute of the International Criminal Court,<sup>54</sup> the definition of aggression as set forth in the general assembly resolution on the matter,<sup>55</sup> and the Helsinki Final Act.<sup>56</sup>

Furthermore, the International Court of Justice has also observed in the *Nicaragua* case that “principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law,”<sup>57</sup> therefore “both the Charter and customary international law flow from a common fundamental principle outlawing the use of force in international relations.”<sup>58</sup> The court said that the General Assembly Resolution on the Declaration of Friendly Relations Among States (G.A. Res. 2625 [1970]) amounted to the acceptance by the members of the general assembly that this reflects customary international law.<sup>59</sup> Consequently, there is very little doubt that the use of force is prohibited, except as provided in the charter.<sup>60</sup>

However, as Malcolm Shaw has pointed out, “[r]eliance has to be placed on consent, consensus, reciprocity and good faith.”<sup>61</sup> Further, legal definitions are often unclear or simply omitted. There continue to be disagreements over the definition of force against territorial integrity, when self-defense is justified, how much self-defense force is appropriate, and what constitutes aggression? When does the right of self-defense end, that is, when must the use of justified force end? Does armed intervention to protect a state’s nationals abroad amount to permissible self-defense? None of these matters are clearly defined in the charter or other treaties. What seems clear is that states, when they engage in the use of force,

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<sup>53</sup> G.A. Res. 2625 (XXV), at 122-23 United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the UN Charter (Oct. 24, 1970).

<sup>54</sup> Rome Statute of the International Criminal Court, art. 8 bis, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>55</sup> G.A. Res. 3314 (XXIX), art.1., Definition of Aggression (Dec. 14, 1974).

<sup>56</sup> Conference on Security and Co-operation in Europe: Final Act, art. 1(a)(II), Aug. 1, 1975, DEP’T ST. BULL. 323 (1975) at 324 [hereinafter Helsinki Accords].

<sup>57</sup> Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgement, 1984 I.C.J. 392, ¶ 73 (Nov. 26).

<sup>58</sup> Military and Paramilitary Activities in and Against Nicaragua, (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14, ¶ 181 (June 27).

<sup>59</sup> *Id.* ¶ 191.

<sup>60</sup> See JAN KLABBERS, INTERNATIONAL LAW 209 (Cambridge Uni. Press 2d ed. 2017).

<sup>61</sup> SHAW, *supra* note 49, at 982.

normally feel themselves compelled to justify their actions under the law,<sup>62</sup> and “the vast mass of actual use of force reveals that states almost always agree on the content of the applicable law; it is on the application of the law to the particular facts or on the facts themselves that states disagree.”<sup>63</sup> When it comes to the use of force,

[m]ore or less consciously, more or less willingly, all governments give up some autonomy and freedom and accept international law in principle as the price of “membership” in international society of having relations with other nations. For that reason, too, they accept basic traditional international law, undertaking to do (or not to do) unto others what they would not have done (or not done) unto them.<sup>64</sup>

In 1967, after the Six-Day War, the Security Council, in a unanimous resolution, made it clear that it was unlawful for a state to conquer territory by means of force.<sup>65</sup> It is noteworthy that the Soviet Union was part of that vote.<sup>66</sup>

Of course, there are critics, some might say cynics, regarding the effectiveness or even existence of international law as law;<sup>67</sup> however, as Henkin pointed out well over forty years ago, “almost all nations observe almost all principles of international law and almost all their obligations almost all of the time.”<sup>68</sup> It seems that most states, most of the time, in other words, agree that the law regarding the use of armed force is the law, and they do not normally say that they are doing something in spite of the law or that the law does not matter.<sup>69</sup> As mentioned above, it appears that they normally justify their actions in some way in terms of the law.

But when states engage in the use of force, as the case of Russia in Ukraine for example, whatever justification they might give, “it may be argued that condemnation of a particular use of force by the Security council or General Assembly is conclusive, or at least persuasive as to illegality.”<sup>70</sup> With the current Russian invasion of Ukraine, a condemnation resolution was presented to the Security Council, and

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<sup>62</sup> HENDERSON, *supra* note 50, at 3.

<sup>63</sup> CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 14 (4th ed. 2018).

<sup>64</sup> *See* LOUIS HENKIN, *HOW NATIONS BEHAVE* 60 (2d ed. 1979).

<sup>65</sup> S.C. Res. 242 (Nov. 22, 1967).

<sup>66</sup> *Id.*

<sup>67</sup> *See* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005); *see* HANS MORGENTHAU, *POLITICS AMONG NATIONS* (5th ed., rev. 1978).

<sup>68</sup> HENKIN, *supra* note 64, at 47.

<sup>69</sup> *Id.*

<sup>70</sup> GRAY, *supra* note 63, at 22.

supported by the overwhelming majority of its members, but vetoed by Russia.<sup>71</sup> The general assembly then overwhelmingly condemned Russia's invasion of Ukraine.<sup>72</sup> Such condemnation had no effect on the invasion.

Russia has been accused of using cluster munitions in Ukraine, indiscriminately killing scores of civilians.<sup>73</sup> While Russia is not a signatory nor a state party to the Convention on Cluster Munitions,<sup>74</sup> their use is almost undoubtedly a violation of international humanitarian law.<sup>75</sup> And all parties to the war "are obliged to respect the ban on the use of inherently indiscriminate weapons that forms part of customary international humanitarian law."<sup>76</sup>

### III. RUSSIAN TREATY OBLIGATIONS

Russia is bound by a number of treaty obligations that they appear to be violating. Among the major ones are the following.

The Helsinki Accords of 1975. This document was signed at the closing meeting of the Conference on Security and Cooperation in Europe.<sup>77</sup> The pact enumerated ten principles:

Sovereign equality, respect for the rights inherent in sovereignty

<sup>71</sup> Farnaz Fassihi, *Russia Vetoes a U.N. Security Council Resolution Calling on it to Withdraw from Ukraine*, N.Y. TIMES (Feb. 25, 2022), <https://www.nytimes.com/2022/02/25/world/europe/united-nations-russia-withdraw-ukraine.html> [https://perma.cc/77T3-KAW8]. Of the 15 members, "[e]leven member countries voted in favor of the resolution. China, India and the United Arab Emirates abstained. Russia, which has the veto power as one of five permanent members of the council, voted against it." *Id.*

<sup>72</sup> Farnaz Fassihi, *The U.N. General Assembly Passes a Resolution Strongly Condemning Russia's Invasion*, N.Y. TIMES (Mar. 2, 2022), <https://www.nytimes.com/2022/03/02/world/europe/russia-un-invasion-condemn.html> [https://perma.cc/4RJQ-ZA3M]; Margaret Besheer, *UN General Assembly Overwhelmingly Condemns Russia's Invasion of Ukraine*, VOA NEWS (Mar. 2, 2022), <https://www.voanews.com/a/un-general-assembly-overwhelmingly-condemns-russia-s-invasion-of-ukraine-/6467348.html> [https://perma.cc/YU4X-JYG2].

<sup>73</sup> Julia Conley, *'War Crimes': Amnesty Probe Details Hundreds Killed by Russia's Indiscriminate Bombing of Kharkiv*, RAW STORY (June 13, 2022), <https://www.rawstory.com/war-crimes-amnesty-probe-details-hundreds-killed-by-russia-s-indiscriminate-bombing-of-kharkiv/> [https://perma.cc/8ZC7-GDT2].

<sup>74</sup> See Convention on Cluster Munitions, Dec. 3, 2008, 2688 U.N.T.S. 40–41; see Kevin Riordan, *Convention on Cluster Munitions*, UNITED NATIONS: AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, <https://legal.un.org/avl/ha/ccm/ccm.html> [https://perma.cc/PV8G-SPPH].

<sup>75</sup> See *Cluster Munitions and International Humanitarian Law: The Need for Better Compliance and Stronger Rules*, HUM. RTS. WATCH (July, 2004), <https://www.hrw.org/legacy/background/arms/clusters0704/clusters0704.pdf> [https://perma.cc/TWL8-LVRX].

<sup>76</sup> Conley, *supra* note 73.

<sup>77</sup> Helsinki Accords, *supra* note 56.

Refraining from the threat or use of force

Inviolability of frontiers

Territorial integrity of states

Peaceful settlement of disputes

Non-intervention in internal affairs

Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief

Equal rights and self-determination of peoples

Co-operation among States

Fulfillment in good faith of obligations under international law[.]<sup>78</sup>

The Paris Charter of 1990, which created the commission on Security and Cooperation in Europe.<sup>79</sup> The Budapest Memorandum of 1994, pursuant to which Ukraine gave up the nuclear weapons on its soil for assurances by Russia, the United Kingdom, and the United States, all of whom confirmed:

1. The United States of America, the Russian Federation, and the United Kingdom of Great Britain and Northern Ireland, reaffirm their commitment to Ukraine, in accordance with the principles of the CSCE [Commission on Security and Cooperation in Europe] Final Act, to respect the Independence and Sovereignty and the existing borders of Ukraine.
2. The United States of America, the Russian Federation, and the United Kingdom of Great Britain and Northern Ireland, 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-defense or otherwise in accordance with the Charter of the United Nations.<sup>80</sup>

Additionally, of course Russia, who considers itself the continuer of the obligations and privileges of the USSR,<sup>81</sup> is bound by the Charter of the United Nations and the Geneva Conventions on International

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<sup>78</sup> *Id.*

<sup>79</sup> *See Who We Are: History, ORG. FOR SEC. & COOP. IN EUR.*, <https://www.osce.org/history> [<https://perma.cc/JEQ7-RUHG>].

<sup>80</sup> Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Dec. 5, 1994, 3007 U.N.T.S. 167–170.

<sup>81</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW*, 165 (8<sup>th</sup> ed.).

Humanitarian Law (that is, the law of behavior in war). Furthermore, based on what Russia is broadly accused of doing in Ukraine, Russia itself and its military may be guilty of violation of the statute of the International Criminal Court.<sup>82</sup> Despite the fact that neither Russia nor Ukraine are signatories of the Rome Statute, which created the court, Ukraine has accepted jurisdiction under Article 4(2) and Article 12(3), which would bring any act in violation of the statute occurring in the territory of Ukraine within the jurisdiction of the International Criminal Court.<sup>83</sup> Such crimes could include genocide,<sup>84</sup> crimes against humanity,<sup>85</sup> war crimes,<sup>86</sup> and the crime of aggression.<sup>87</sup> The actions taken by the Russians in Ukraine seem to be violations of their obligations under the Geneva Conventions, amounting to grave breaches as therein described.<sup>88</sup> Article 49 of Geneva Convention I (to which the other three conventions have similar provisions) reads<sup>89</sup>:

Each High Contracting Party shall be under the obligations to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons,

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<sup>82</sup> Rome Statute, *supra* note 54. “The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression.” *About the Court*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/the-court> [<https://perma.cc/H5PQ-Y2R9>].

<sup>83</sup> *See Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Since 20 February 2014*, INT’L CRIM. CT. (Sept. 8, 2015), <https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014> [<https://perma.cc/N9CK-BCEF>]. On 8 September 2015, the Minister of Foreign Affairs of Ukraine, H.E. Mr. Pavlo Klimkin presented to the Registrar of the International Criminal Court (ICC), a declaration of Ukraine accepting the ICC’s jurisdiction with respect to alleged crimes committed in its territory since 20 February 2014. The declaration was lodged under article 12(3) of the Rome Statute, the founding treaty of the ICC, which enables a State not party to the Statute to accept the exercise of jurisdiction of the Court. *Id.*

<sup>84</sup> Rome Statute, *supra* note 54, art. 6.

<sup>85</sup> *Id.* art. 7.

<sup>86</sup> *Id.* art. 8.

<sup>87</sup> *Id.* art. 8 *bis*.

<sup>88</sup> Geneva Convention (I) for The Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>89</sup> ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 58 (2007).

regardless of their nationality, before its own courts (or hand them over to another High Contracting Party).<sup>90</sup>

All states have ratified the Geneva Conventions.<sup>91</sup> Further, Russia is bound by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,<sup>92</sup> which means that all the crimes—or at least the vast majority of them—related to the invasion of Ukraine do not have a proscription period, they are perpetual in their applicability. Accordingly, no matter how long it takes to find and arrest guilty parties under such crimes, they can be prosecuted. In fact, responsibility for the commission of international crimes in general “is not subject to prescription.”<sup>93</sup>

#### IV. THE LAW IN RUSSIA

Law in Russia, since Czarist times, has had an instrumental rather than a normative function. That is, it is an instrument of state control. In other words, all law means what the state says it means.<sup>94</sup> Some have said that international law is a language.<sup>95</sup> If that is so, as a language, it is spoken with different accents in different places and subject to culturally derived standards of interpretation. It is thus not the same everywhere,

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<sup>90</sup> Geneva Convention (I) for The Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; see Richard van Elst, *Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions*, 13 LEIDEN J. INT'L LAW 815, 817 (2000).

<sup>91</sup> LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT 12 (2013).

<sup>92</sup> G.A. Res. 2391 at preamble (XXIII) (Nov. 26, 1968) (“[I]t is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity.”).

<sup>93</sup> CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 89, at 84.

<sup>94</sup> See Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT'L & COMP. L. 511, 520 (2008). In describing the legal “reforms” that came after the fall of the Soviet Union, Professor Jeffrey Kahn has stated that: “Russia is not starting from scratch, certainly has advantages, but it has the disadvantage of a lot of bad legal habits. Worst of these is a historical attachment to bare legal positivism as a tool for state control.” He later said in describing the coming problems he foresaw resulting from the difference he perceived between the rule of law in Europe, and what type of law existed in Russia, “it is a basic difference in an *attitude* about law that is unchanged in Russian history since before the time of Falconet’s Bronze Horseman. Russia’s rulers see law as a tool or a weapon.” Jeffrey Kahn, *The Rule of Law under Pressure: Russia and the European Human Rights System*, 44 REV. CENT. & E. EUR. L. 275, 277 (2019).

<sup>95</sup> Hannah Birkenkötter, *International Law as a Common Language Across Spheres of Authority*, 9 GLOB. CONSTITUTIONALISM 318 (2020).

rather it is often interpreted and applied differently by states.<sup>96</sup> So much so that the phenomenon has given rise to something called comparative international law.<sup>97</sup> “To some degree, this situation is a matter of curiosity since international law and comparative law share the same openness to the world and are both confronted by the diversity of domestic legal cultures and state practice.”<sup>98</sup> In fact, it was partly because of such potential divergence in approaches to international law that the International Law Commission was created in 1947.<sup>99</sup> Accordingly, in the best of times, Russia’s approach or interpretation of what constitutes its obligations under international law, might vary, from the approach of the United States or national obligations as seen from Mexico’s point of view. We are not living in the best of times.

At least one expert has said that “[i]t has been a persistent theme in Russia to have an explicit ideology to guide the ship of state. . . . The current constitution forbids an official State ideology, but there is still a quest to conceptualize the political basis of the State.”<sup>100</sup> As mentioned, the law was always considered an instrument of state power, rather than a source of peoples’ rights. “Nothing before the revolutions of 1917 seriously restricted the imperial autocracy founded on the principle of divine right, and little in the Soviet approach before the mid-1980s changed the culture of unaccountable rulership.”<sup>101</sup>

From at least the time of World War I, the Russian notion of war, that is its justification, has been one of war being a relative but not absolute evil, sometimes necessary and even obligatory.<sup>102</sup> Often, Russians have considered war as sacred, especially when the cause is just, and it involves

<sup>96</sup> See generally COMPARATIVE INTERNATIONAL LAW (Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, and Mila Versteeg eds., 2018); ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017); David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT’L L. 9 (1999).

<sup>97</sup> See ROBERTS, *supra* note 96, at xix.

<sup>98</sup> Mathias Forteau, *Comparative International Law within, Not against, International Law: Lessons from the International Law Commission*, 109 AM. J. INT’L L. 498, 498 (2015).

<sup>99</sup> See G.A. Res. 174 (II) (Nov. 21, 1947); see U.N. Secretary-General, *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, 11, U.N. Doc. A/CN.4/1/Rev.1 (Feb. 10, 1949) (showing that it later became clearer that interpretations were diverging); See Sompong Sucharitkul, *Legal Multiculturalism and the International Law Commission*, in MULTICULTURALISM AND INTERNATIONAL LAW 301, 313–14 (Sienho Yee & Jacques-Yvan Morin eds., 2009).

<sup>100</sup> JANE HENDERSON, THE CONSTITUTION OF THE RUSSIAN FEDERATION 14 (1st ed. 2011).

<sup>101</sup> *Id.* at 16.

<sup>102</sup> Paul Robinson & Mikhail Antonov, *In the Name of State Sovereignty? The Justification of War in Russian History and the Present*, in THE JUSTIFICATION OF WAR AND INTERNATIONAL ORDER: FROM PAST TO PRESENT 400, 404 (Lothar Brock & Hendrik Simon eds., 2021).

self-sacrifice for the higher good.<sup>103</sup> The Russian church extols martial virtue. On its website, the Russian Orthodox Church has stated:

Christians involuntarily come to face the vital need to take part in various battles. While recognising war as evil, the Church does not prohibit her children from participating in hostilities if at stake is the security of their neighbours and the restoration of trampled justice. Then war is considered to be necessary though undesirable but means. In all times, Orthodoxy has had profound respect for soldiers who gave their lives to protect the life and security of their neighbours. The Holy Church has canonised many soldiers, taking into account their Christian virtues.<sup>104</sup>

One of Russia's most famous writers declared that sometimes war is a salvation.<sup>105</sup> He said, "It is not war, but peace, a prolonged peace that bestializes and hardens people," and "war strengthens every soul with the spirit of self-sacrifice and the spirit of the entire nation."<sup>106</sup>

There are of course other visions of war and peace in Russia, and Russia sees itself as a defender of the international legal concept of sovereignty and decries the intervention of Western states in relation to humanitarian intervention. However, Russia appears to have no qualms about enhancing its own situation by ignoring the sovereignty of other states, especially that of its neighbors.<sup>107</sup> So, when the Russians look to their history and their philosophy, they find justification for flexibility in the state's approach to international affairs and the waging of war.<sup>108</sup>

In Soviet times, under Marxist philosophy, law did not have an intrinsic or lasting social value; until full communism was reached, it was a means by which the ruling class subjugated the other classes; the end justified the means.<sup>109</sup> A constitution was only considered useful in a particular stage of the dialectic progress, with no lasting value,<sup>110</sup> and "law in the Soviet Union existed subject to the necessities of the state."<sup>111</sup> Rights

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<sup>103</sup> *Id.*

<sup>104</sup> *The Basis of the Social Concept: VIII 2., THE RUSS. ORTHODOX CHURCH: DEP'T FOR EXTERNAL CHURCH RELS.*, <https://old.mospat.ru/en/documents/social-concepts/viii/> [<https://perma.cc/4XDJ-YSME>].

<sup>105</sup> KENNETH LANTZ, *THE DOSTOEVSKY ENCYCLOPEDIA* 183 (2004).

<sup>106</sup> *Id.* at 938.

<sup>107</sup> Robinson & Antonov, *supra* note 102, at 406–07.

<sup>108</sup> *Id.* at 416.

<sup>109</sup> See Vladimir Gsovski, *The Soviet Concept of Law*, 7 *FORDHAM L. REV.* 1, 3 (1938).

<sup>110</sup> *Id.* at 42.

<sup>111</sup> Anna Isaeva, *Contradictions and Incompleteness in Russian Legal Discourses*, in *RUSSIAN DISCOURSES ON INTERNATIONAL LAW* 25, 32 (P. Sean Morris ed., 2019).

and freedoms—normally granted by constitutions in the West—were granted to an individual by the state.<sup>112</sup>

The situation or status of law in Post-Soviet Russia has changed little in that regard. The 1993 Constitution of the Russian Federation provides:

Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.<sup>113</sup>

However, the constitutional revisions of 2020, altered this language with a new Article 79:

The Russian Federation in conformity with relevant treaties may participate in international associations and delegate to them part of its powers, if this does not limit the rights and freedoms of the individual and the citizen or contradict the fundamentals of the constitutional system of the Russian Federation. Decisions of interstate bodies, adopted on the basis of provisions of international treaties of the Russian Federation, where construed in a manner contrary to the Constitution of the Russian Federation, shall not be subject to enforcement in the Russian Federation.<sup>114</sup>

It appears clear now that any provision of an international treaty or judgement of an international tribunal or actions of any international organization of which Russia is a member that are, in the judgment of the Constitutional Court, in conflict with the constitution, or in conflict with the “foundations of public legal order,” will not be respected or given effect in or by Russia.<sup>115</sup> This amendment and the notion behind it seems to stem from adverse decisions of the European Court of Human Rights, whereby Russian court decisions had been overturned.<sup>116</sup> This change occurred despite the fact that Russia joined the Council of Europe in 1996 and ratified the European Convention on Human Rights in 1998.<sup>117</sup> Adherence to international treaties seemed to be too much of a strait jacket, despite the earlier constitutional provisions. A number of decisions by the

<sup>112</sup> *Id.*

<sup>113</sup> КОНСТИТУЦИЯ РОССИЙСКОЙ ФЕДЕРАЦИИ [KONST. RF] [CONSTITUTION] art. 15 (Russ.).

<sup>114</sup> Lauri Mälksoo, *International Law and the 2020 Amendments to the Russian Constitution*, 115 AM. J. INT’L L. 78, 86-87 (2021).

<sup>115</sup> *See id.* at 88.

<sup>116</sup> *Id.*; *see* Markin v. Russia, App. No. 30078/06 Eur. Ct. H.R. 1 (2012).

<sup>117</sup> Mälksoo, *supra* note 114, at 88.

European Court of Human Rights adverse to Russian court decisions were not given effect, notwithstanding the provision of Article 46 of the European Convention on Human Rights disallowing any such failure to respect its decisions:

Binding Force and Execution of Judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.<sup>118</sup>

The Convention then goes on to stipulate what happens to the state party that does not respect such judgements.<sup>119</sup> The Venice Commission criticized this new Russian constitutional provision, stating that a member state of the convention has an obligation to abide by judgements of the European Court of Human Rights, and any attempt to do otherwise contravenes such obligations.<sup>120</sup> The Venice Commission considered the new constitution in its drafting stage and told the Russian government that the commission was alarmed by the new language and that

[i]n addition, the Commission is concerned that the proposed amendments enlarge the possibilities for the Russian Constitutional Court to declare that decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation which collide with the Constitution may not be executed in the Russian Federation. Indeed, the proposed amendments use the notion “contrary to the Constitution”, which is too broad a formula, broader than that of current Article 79 (“limit[ing] the rights and freedoms of the individual and the citizen or contradict[ing] the fundamentals of the constitutional system of the Russian Federation”).<sup>121</sup>

Such action also appears to be a violation of Article 27 of the Vienna Convention on the Law of Treaties,<sup>122</sup> of which Russia is a state

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<sup>118</sup> European Convention on Human Rights, art. 46 para. 1, Nov. 4, 1950, Council of Eur.

<sup>119</sup> *Id.* arts. 3–5.

<sup>120</sup> Venice Commission of the Council of Europe, COUNCIL OF EUR., [https://www.venice.coe.int/WebForms/pages/?p=01\\_Presentation](https://www.venice.coe.int/WebForms/pages/?p=01_Presentation) [<https://perma.cc/9BGN-9QL7>] (“The role of the Venice Commission (so-called as it meets in Vienna) is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law”).

<sup>121</sup> Venice Commission, *Opinion on the Draft Amendments to the Constitution (As Signed by the President of the Russian Federation on 14 March 2020)*, Opinion No. 981/2020.

<sup>122</sup> Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 (entered into force on Jan. 27, 1980) (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46”).

party.<sup>123</sup> One commentator on Russian approaches to international law has said, “With its [courts’] practice since 2015 and the constitutional amendments of 2020, Russia stepped back toward the earlier Soviet interpretation propagated by Andrey Vyshinski,<sup>124</sup> suggesting that Soviet law took priority over treaty obligations.”<sup>125</sup>

Ella Paneiakh, a professor of the sociology of law at The Higher School of Economics, St. Petersburg, Russia, believes that, in Russia, “judges display the utmost servility in their relations with the executive branch and put up no resistance to political orders.”<sup>126</sup> Another prominent Russian academic, Yelena Luk’ianova, made it clear that the annexation of Crimea and Sevastopol were in violation of both Russian law and international treaty commitments.<sup>127</sup>

The Danish Institute for Human Rights posts the names of the signatories of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>128</sup> Russia is listed as a signatory.<sup>129</sup> Shortly after Russia invaded Ukraine on February 24, 2022,<sup>130</sup> the Council of Europe suspended Russia on March 3, 2022, since, according to Marija Pejcinovic Buric, the Council’s Secretary General, the Russian invasion of Ukraine “goes against everything we stand for and is a violation of our statute and of the European Convention on Human Rights.”<sup>131</sup> Russia left the Council of Europe a few days later, on March 10.<sup>132</sup> Upon leaving, Russia complained that the Council was hostile to Russia, claiming that it

<sup>123</sup> See *id.* ch. XXIII (discussing Soviet Union’s accession to Treaty).

<sup>124</sup> Mälksoo, *supra* note 114, at 92.

<sup>125</sup> *Id.*

<sup>126</sup> Ella Paneiakh, *Evolution of the Russian Judicial System in 2014*, 53 *RUSS. POL. & L.* 84, 86–87 (2015).

<sup>127</sup> Yelena Luk’ianova, *Law Sidelined*, 53 *RUSSIAN POL. & L.* 66 (2015).

<sup>128</sup> *Signatories for European Convention for the Protection of Human Rights and Fundamental Freedoms*, THE DANISH INST. FOR HUM. RTS, <https://sdg.humanrights.dk/en/instrument/signees/2465> [<https://perma.cc/73AS-UE8V>].

<sup>129</sup> *Id.*

<sup>130</sup> Famaz Fasihi, *The U.N. Security Council Met to Prevent Military Action by Putin. Russia Invaded Ukraine as They Spoke*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/world/europe/un-security-council-russia-ukraine.html?searchResultPosition=9> [<https://perma.cc/PW63-BZTC>].

<sup>131</sup> Steven Erlanger, *The Council of Europe Suspends Russia for Its Attack on Ukraine*, N.Y. TIMES (Mar. 3, 2022), <https://www.nytimes.com/2022/03/03/world/europe/council-of-europe-russia-suspension.html?searchResultPosition=1> [<https://perma.cc/J7HG-AHT7>].

<sup>132</sup> *Russia Leaves the Council of Europe*, CVV NEWS (Mar. 10, 2022), <https://cvvnews.com/russia-leaves-the-council-of-europe/#:~:text=Russia%20leaves%20the%20Council%20of,Europe%20March%2010%2C%202022%20in%20World> [<https://perma.cc/QT88-HFPX>].

was being controlled by NATO and by the EU.<sup>133</sup> That same day, Tass, the official Russian news agency reported that “Russia will not participate in the transformation of the oldest European organization by NATO members that the EU bloc obediently follows.”<sup>134</sup>

This attitude might seem odd, since Russia highly values its membership in the United Nations and its position as a Permanent Member of the Security Council with veto power. If it loses that status, it could be relegated to a less significant role on the world stage.<sup>135</sup> Indeed, its position on the Security Council is a way to showcase its relevance and importance in world affairs. Further, the “2016 Conception of Foreign Policy,” which would have been motivated by and approved by the President, and which presumably has a normative effect in Russia, states:

The Russian Federation is conducting a foreign policy directed towards the creation of a stable and firm system of international relations on the basis of generally-recognized norms of international law and principles of equality, mutual respect, noninterference in internal affairs of States for the purpose of ensuring the reliable and equal security of every member of the world community. . . .

Russia consistently favors the strengthening of the legal foundations of international relations and complies in good faith with international-legal obligations. The maintenance and strengthening of international legality is one of the priority orientations of its activity in the international arena. The supremacy of law in international relations is called upon to ensure peaceful and fruitful cooperation of States.<sup>136</sup>

Additionally, Article 15(4) of the 1993 Constitution of the Russian Federation states that “commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system.”<sup>137</sup> And treaties are of great significance, since “[i]f other rules have been established by an international treaty of the Russian Federation than provided for by a law, the rules of the international treaty shall apply.”<sup>138</sup> But in President Putin’s

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> W.E. Butler, *Foreign Policy Discourses as Part of Understanding Russia and International Law*, in *RUSSIAN DISCOURSES ON INTERNATIONAL LAW* 185 (P. Sean Morris ed., 2019).

<sup>136</sup> *Conception of Foreign Policy of the Russian Federation*, (W.E. Butler trans.), W.E. Butler, *Foreign Policy Discourses as Part of Understanding Russia and International Law*, in *RUSSIAN DISCOURSES ON INTERNATIONAL LAW* 185 (P. Sean Morris ed., 2019).

<sup>137</sup> JANE HENDERSON, *THE CONSTITUTION OF THE RUSSIAN FEDERATION: A CONTEXTUAL ANALYSIS* 230 (2d ed. 2022).

<sup>138</sup> *Id.* at 230–31.

view, Ukraine is not a legitimate state, rather, spiritually and in a variety of other ways, it is part of Russia. This is something he has maintained for years.<sup>139</sup>

The Cold War was an ideological confrontation: capitalism versus communism. That is long since over, but as the Australian foreign policy analyst Bobo Lo has stated, we are now witnessing a confrontation of conservative nationalism versus liberal internationalism.<sup>140</sup> President Putin, makes a cultural—or perhaps ideological—argument by referring to his interpretation of history when he clamors that Russia and Ukraine are one civilization, one people with historical, linguistic, and spiritual roots.<sup>141</sup>

Further, Russia has always been primordially concerned with its national security. It is a landlocked country, and the borders are basically flatlands.

The Russian myth of supreme sacrifice for the fatherland is a national theme as celebrated by Colonel-General Valery Manilov:

Every nation loves its motherland, but our nation, in view of its difficult historical fate, has had this special feeling from time immemorial. Love for one's motherland includes diligence, heroism, long suffering, endurance, humility, devotion, selflessness—in a word, everything that over the course of centuries has been perceived as the inscrutable spirit of our nation, piously devoted to our fatherland and honoring it more than life itself. . . .

Selflessness in defense of the fatherland is a national value owing to the countless military experiences that have befallen Russia. Recall the distinctive features of the warriors Alexander Nevsky, Dimitri Donskoj, Peter I, and Alexander Suvorov, and the much-extolled nation-wide heroism during the first and second world wars. At one time Prussian Emperor and military leader Frederick II, involuntarily and, one must assume, with admiration, declared that one had to shoot

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<sup>139</sup> Robyn Dixon, *In Long Speech, Putin Recognizes Two Ukrainian Regions as Independent, a Pretext for War*, WASH. POST (Feb. 21, 2022), <https://www.washingtonpost.com/world/2022/02/21/putin-speech-ukraine/>.

<sup>140</sup> Bobo Lo, *Going Legit? The Foreign Policy of Vladimir Putin*, LOWY INST. (Sep. 17, 2018), <https://www.lowyinstitute.org/publications/going-legit-foreign-policy-vladimir-putin> [<https://perma.cc/R96W-AQQV>].

<sup>141</sup> See *Meeting of the Valdai International Discussion Club*, KREMLIN (Sep. 19, 2013), <http://en.kremlin.ru/events/president/news/19243> [<https://perma.cc/7S49-3BDN>]; See also *Visit to Lebedinsky GOK*, KREMLIN (July 24, 2017), <http://en.kremlin.ru/events/president/transcripts/55052> [<https://perma.cc/63VR-JFZE>] (Putin stating that “I believe that we are one nation with practically no differences. There are some cultural differences, and the linguistic colouring is a little different . . . But in essence . . . we are one people”).

a Russian soldier twice and then push him before he would finally fall. The loss of this value would be equivalent to the loss of one of the essential bases of the defense capacity and greatness of Russia.<sup>142</sup>

The General also laments the loss of the buffer states to the West (the Baltic republics and Belorussia, Ukraine, and Moldovia), inasmuch as they were the sites for the placements of troops, missiles, and Russia's early warning systems.<sup>143</sup>

He goes on to explain that the interests of Russia clearly do not coincide with those of the West, especially those of the United States in its desire to secure itself as the leading force in the world.<sup>144</sup> Russia wishes to influence world affairs and "reclaim" its status as an exalted and powerful state.<sup>145</sup>

Mixed signals coming from Russia are the norm. In June of 2016, the Russian Federation and the People's Republic of China issued The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law.<sup>146</sup> In that declaration, the two states "reiterate their adherence and respect for, in general, the tenets of Article 2 of the Charter of the United Nations; they speak of their full commitment to the principles of international law as they are reflected in the United Nations Charter."<sup>147</sup> The two states "reaffirm the principle that States shall refrain from the threat or use of force in violation of the United Nations Charter and therefore condemn unilateral military interventions."<sup>148</sup> They "fully support the principle of non-intervention in the internal or external affairs of States . . . [and] reaffirm the principle of peaceful settlement of disputes."<sup>149</sup>

Post-Soviet Russia has not endeavored to project an image of a peace-loving, friendly country. Following the dissolution of the Soviet Union, Russia militarily intervened in civil wars in Moldova and Georgia and supported Armenia in its fight against Azerbaijan for Nagorno-Karabakh. It fomented separatist conflicts in the former two. In the second

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<sup>142</sup> Valery Manilov, *National Security of Russia*, <https://www.belfercenter.org/publication/national-security-russia> [<https://perma.cc/RWS4-3GWV>] (last visited Apr. 5, 2023).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *See id.*

<sup>146</sup> Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, China -Russ. (June 25, 2016), [https://www.mid.ru/en/foreign\\_policy/news/1530748/?lang=en](https://www.mid.ru/en/foreign_policy/news/1530748/?lang=en) [<https://perma.cc/TE4G-EPXK>].

<sup>147</sup> *Id.* ¶ 1.

<sup>148</sup> *Id.* ¶ 3.

<sup>149</sup> *Id.* ¶¶ 4–5.

half of the 1990s, Russia fought two brutal civil wars against its own Chechen separatists. In August 2008, Moscow successfully invaded parts of Georgia.<sup>150</sup> Furthermore, Russian forces were present in the Western Balkans, originally as United Nations peacekeepers after the 1995 Dayton peace agreement.<sup>151</sup> In June 1999, following the peak of the Kosovo crisis, some of these troops made the bold move of occupying Pristina's airport.<sup>152</sup> From 2015 on, Russian troops have been fighting in Syria, since 2020 also in Libya, and Russian paramilitary formations (including the infamous Wagner Group<sup>153</sup>, formally a private military company) have been active in more than a dozen African countries.<sup>154</sup>

## V. PUTIN'S INTERPRETATION OF HISTORY

After the Maiden Square protests in Kyiv,<sup>155</sup> the flight of the former pro-Russian president Victor Yanukovich, and the subsequent democratic election of a new president, a very influential foreign affairs specialist in Russia, Andrei Fursov said: "this was no revolution but rather a U.S.-inspired coup d'état."<sup>156</sup> Fursov frequently speaks of a conspiracy

<sup>150</sup> *In Russia and Georgia, Hostilities Smoldered Quietly for Years*, N.Y. TIMES (Aug. 11, 2008), <https://www.nytimes.com/2008/08/11/world/europe/11iht-assess.1.15173752.html?searchResultPosition=13> [<https://perma.cc/2XM9-WEK6>].

<sup>151</sup> Craig R. Whitney, *Moscow and NATO in Accord on Russian Troops in Bosnia*, N.Y. TIMES (Nov. 29, 1995), <https://www.nytimes.com/1995/11/29/world/balkan-accord-nato-moscow-and-nato-in-accord-on-russian-troops-in-bosnia.html?searchResultPosition=8> [<https://perma.cc/2LSK-YE6E>].

<sup>152</sup> Robert G. Kaiser & David Hoffman, *Secret Russian Troop Deployment Thwarted*, WASH. POST (June 25, 1999), <https://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/stories/russians062599.htm> [<https://perma.cc/QLG8-BFMU>].

<sup>153</sup> According to British Military Intelligence, 1000 members of the Wagner Group have been deployed to Ukraine. In recent years, they have been deployed in Syria, Ukraine and African countries and have been repeatedly accused of war crimes and human rights abuses. This is a group of mercenaries, reportedly bankrolled by Russian military intelligence, but who the Kremlin disavows, reportedly sending them in and then saying "it's not us." *What is Russia's Wagner Group of Mercenaries in Ukraine?*, BBC NEWS (Apr. 23, 2023), <https://web.archive.org/web/20220405094607/https://www.bbc.com/news/world-60947877> [<https://perma.cc/EGR2-B6V5>]; It is variously described as a private military company, a network of mercenaries, or a de facto private army of Russian President Vladimir Putin." *Wagner Group*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Wagner\\_Group](https://en.wikipedia.org/wiki/Wagner_Group) [<https://perma.cc/FPG7-6WQU>] (last visited Mar. 30, 2023).

<sup>154</sup> András Rác, *Russia's Power is Increasingly Defined by Its Military Might*, INTERNATIONALE POLITIK Q. (Mar 31, 2022), <https://ip-quarterly.com/en/russias-power-increasingly-defined-its-military-might> [<https://perma.cc/P7R4-GG8H>].

<sup>155</sup> *Ukraine crisis: What happened in Maidan Square?*, BBC NEWS, (Feb. 11, 2015), <https://www.bbc.com/news/av/world-europe-31420249> [<https://perma.cc/6ES8-U2PA>].

<sup>156</sup> Andrei Fursov, *Thirty Days That Changed the World: The Ukrainian Crisis, Its Instigators, and Hidden Codes*, 53 RUSS. POL. & L. 47, 52 (2015).

to destroy Russia once and for all, and that the breakup of the Soviet Union was the first step in that undertaking. He tells the world, “Even Russia in its current form, let alone a reborn historical Russia, is the sole obstacle in the path of Atlanticist elites to geopolitical world domination.”<sup>157</sup> He speaks of a four century European/US conspiracy—which included the Nazis under Hitler—to destroy Russia and its greatness.<sup>158</sup> Fursov goes on to say: “What happened in Ukraine between February 19 and 22, 2014,<sup>159</sup> was indisputably a concealed (though not a very well-concealed) form of American aggression against the Russian World, a continuation of the implementation of the Anaconda Plan for encircling, squeezing, and finally suffocating Russia.”<sup>160</sup>

In the midst of the current war in Ukraine and the Russian propaganda, Mark Kuldkepp, associate professor of history and politics at University College, London, says that “Putin’s Russia believes itself to be a major economic and military power, feared and respected around the globe. It is also obsessed with its glorious history, especially with the Great Patriotic War—as it calls World War II—and is convinced that it can somehow never be defeated on the battlefield.”<sup>161</sup>

Putin believes himself to have a historical mission and has likened himself to Peter the Great in connection with his invasion of Ukraine, comparing his actions with those of the former Czar who allegedly invaded Sweden to take back territory.<sup>162</sup> “In response to Putin’s comments, Mykhailo Podolyak, a senior advisor to Ukrainian President Volodymyr Zelensky, tweeted that Putin’s musings prove that the war’s true aim was

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<sup>157</sup> *Id.* at 64.

<sup>158</sup> *Id.* at 48–49.

<sup>159</sup> He refers to the activity after the demonstrations against President Victor Yanukovich, who had just agreed to renege on an agreement to turn toward the E.U., and the ensuing demonstrations, which caused him to resign and flee to Russia. This introduced western style democracy to Ukraine. Many anti-Yanukovich protestors were killed by the government between these dates. Nadia Diuk, *Euromaidan: Ukraine’s Self-Organizing Revolution*, 176 *WORLD AFFAIRS* 9, 11 (2014).

<sup>160</sup> Fursov, *supra* note 156, at 62. The Anaconda Plan was a plan conceived by the Union Army at the outset of the American Civil War to encircle the South and choke off its ability to trade and wage war. *The Anaconda Plan*, *N.Y. TIMES*, June 6, 1863, at 4.

<sup>161</sup> Mark Kuldkepp, *Stop Falling for Russia’s Delusions of Perpetual Victory*, *FOREIGN POL’Y* (May 10, 2022), [https://foreignpolicy.com/2022/05/10/russia-blind-spots-ukraine-propaganda/?utm\\_source=PostUp&utm\\_medium=email&utm\\_campaign=Editors%20Picks%20OC&utm\\_term=42296&tpcc=Editors%20Picks%20OC](https://foreignpolicy.com/2022/05/10/russia-blind-spots-ukraine-propaganda/?utm_source=PostUp&utm_medium=email&utm_campaign=Editors%20Picks%20OC&utm_term=42296&tpcc=Editors%20Picks%20OC) [https://perma.cc/L9W9-CLET].

<sup>162</sup> Snezana Farberov, *Putin Compares Himself to Peter the Great to Justify Ukraine War*, *N. Y. POST* (June 10, 2022), <https://nypost.com/2022/06/10/vladimir-putin-compares-himself-to-peter-the-great> [https://perma.cc/4322-WJJK]

to steal land, not to defend Russian-speaking Ukrainians, or to ‘denazify’ Ukraine.”<sup>163</sup>

Russian military doctrine of 2010 approved the use of force in order to protect the interests of Russians outside Russia.<sup>164</sup> The Russian National Security Strategy of late 2015 (the “Strategy”) is also instructive, highlighting official attitudes toward a variety of factors that lay a groundwork for potential future bellicose attitudes and actions.<sup>165</sup>

Because of his interpretation of history and culture—a matter that Vladimir Putin recently harangued the French president about<sup>166</sup>—the strategy is to restore Russian greatness, to restore its empire. The Russian language is to be defended and its use spread. The Russian culture is extolled and to be defended and spread. The invasion of Ukraine seems to be a step in that process.

Putin may see himself as a follower in a long line of Russian conquerors. The historian and political commentator, Paul Berman, has said: “To invade one’s neighbors is not, after all, a novel thing for a Russian leader to do. It is a customary thing.”<sup>167</sup> According to Berman, Putin’s actions in Ukraine are likely due to Putin’s attempt to solve the perpetual Russian problem, that is, to solve the riddle presented by what he calls the imbalance, which “consists on one side, the grandeur of Russia’s civilization and its geography, which are massive strengths, and, on the other side, a strange and persistent inability to construct a resilient and reliable state, which is a massive weakness.”<sup>168</sup>

<sup>163</sup> *Id.*

<sup>164</sup> *Military Doctrine of the Russian Federation*, EMBASSY OF THE RUSSIAN FEDERATION TO THE U.K. OF GR. BRIT. AND N. IR. (June 29, 2015), [https://london.mid.ru/en/press-centre/gb\\_en\\_fnapr\\_1947/](https://london.mid.ru/en/press-centre/gb_en_fnapr_1947/) [<https://perma.cc/W48Z-ER64>].

<sup>165</sup> *English Translation of the 2015 Russian National Security Strategy*, RUSS. MATTERS, <https://www.russiamatters.org/node/21421> [<https://perma.cc/HD6C-63ZH>].

<sup>166</sup> (Putin) gave him five hours of historical revisionism,” said one of the two sources, describing how the Kremlin leader laid out his belief that the West had broken commitments to Russia since 1997 with the enlargement of NATO to include former Soviet bloc states. “So he goes on for hours rewriting history from 1997 on. He drowns you in these long monologues. And the president (Macron) kept on going back to the issues of the day,” said the source.

Michael Rose, *In Moscow, Putin Found A Different, Tougher Putin*, REUTERS (Feb. 10, 2022), <https://www.reuters.com/world/europe/moscow-macron-found-different-tougher-putin-2022-02-10> [<https://perma.cc/62GP-HHAQ>].

<sup>167</sup> Paul Berman, *The Intellectual Catastrophe of Vladimir Putin*, FOREIGN POL’Yat 52, 53 (Mar. 2022), also available at: <https://foreignpolicy.com/2022/03/13/putin-russia-war-ukraine-rhetoric-history>.

<sup>168</sup> *Id.*

According to this concept, Russian leaders throughout history, as an antidote to the imbalance, have created “the most thuggish of tyrannies, in the hope that brutality would compensate for the lack of resilience.”<sup>169</sup> This was accompanied by a unique policy, not exactly based on the notion of physical military attack by its neighbors, rather on a fear that liberal political philosophy—read democracy—from the West will infiltrate the psyche of the Russian people, thereby causing a cataclysm, a clash of culture, politics, and philosophy that will be the undoing of the Russian state and its leaders.<sup>170</sup> Neighboring states that harbor such notions must be invaded in order to root out the diseased cheerleaders of such nonsense.<sup>171</sup> The Czar Nicolas I did it by invading Poland in the mid nineteenth century because liberal ideas from a new French Revolution had spread to the country, on the border of Russia.<sup>172</sup> The Czar did not want such ideas infiltrating Russia. He invaded Poland and annexed it. He invaded Hungary for a similar reason.<sup>173</sup>

In the Czar's view, these invasions were acts of defense, not of offense.<sup>174</sup> Stalin, after World War II, did the same, crushing the rise of liberal ideas in the territories under his influence and control.<sup>175</sup> Later, when Hungary started thinking about some faint liberal ideas, Khrushchev did what Nicholas I did; he invaded Hungary to protect Russia from incipient liberal ideas.<sup>176</sup>

Later, when liberal political ideas inspired Czechoslovakian leaders, Brezhnev invaded the country, defending communism and the Russian state, keeping its political philosophy uncorrupted.<sup>177</sup>

Putin did the same in Georgia and in Crimea.<sup>178</sup> According to the American political writer Paul Berman,

Every one of those invasions in the 19th, 20th, and 21st centuries was intended to preserve the Russian state by preventing a purely philosophical breeze of liberal thoughts and social experiments from

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 53–54.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 54.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 54.

wafting across the border. And the same reasoning has led to the most ferocious invasion of all, which is the one going on right now.<sup>179</sup>

While those earlier Russian leaders articulated rational reasoning behind their invasions: to protect monarchy and the true religion—Orthodoxy—or communism, Putin has struggled with communicating coherent reasons, giving a variety of them, often based on his interpretation of history, though he has said he was protecting Russian citizens, to whom he is accused of granting passports in order to manufacture them.<sup>180</sup> The Czar and the Communist leaders in their construction of reasons behind their invasions offered hope for the future—for those who shared their vision. Putin’s reasoning appears not to provide hope to anyone other than to those who share his view of history and the need to “restore” Russia’s greatness, its empire. There are of course those states who support Putin in this war. “Yet no one at all shares the idea that Ukraine’s destruction will usher in a new and better era.”<sup>181</sup> Except maybe China. For the world to accept such notions that a state can conquer territory that it believes to have once been part of that state would be to countenance the invasion by Britain of Kenya, the United States, and a host of other countries, France to invade Quebec, and several African countries. What about Spain, Belgium, or Germany? And the list goes on. Modern International Law does not countenance such bloody, bellicose baloney. Those are, we thought, outmoded ideas of a bygone era.

However, therein lies the true problem, says Berman. The Russian state has collapsed twice before, in 1917 and then after the fall of the Berlin Wall.<sup>182</sup> Both times it was due to “radical ideas.” Putin is afraid of radical ideas destroying the Russian state once again, according to Berman. “It is in short, a belief that the dangers to the Russian state are external and ideological, instead of structural and internal.”<sup>183</sup>

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<sup>179</sup> *Id.*

<sup>180</sup> James A. Green, *Passportisation, Peacekeepers and Proportionality: The Russian Claim of the Protection of Nationals Abroad in Self-Defense*, in CONFLICT IN THE CAUCUSES: IMPLICATIONS FOR INTERNATIONAL LEGAL ORDER 54, 55 (James A. Green & Christopher P.M. Waters, eds., 2010).

<sup>181</sup> Berman, *supra* note 167.

<sup>182</sup> The year 1917 marked the beginning of the Russian Revolution, the fall of the Czar and with him the Russian Empire. The Fall of the Berlin Wall marked the demise of the then current Russian empire, the Soviet Union. *Id.*

<sup>183</sup> *Id.*

NATO has not shown to be a belligerent, or war-like entity, rather a defensive coalition.<sup>184</sup> Even so, using Berman's logic, its spread seems to have created an expanding area "infected" with liberal ideas that could not easily be pacified, defeated or destroyed, since NATO territory is an area out of bounds for Russian incursion. Such territory is close enough to Russia that those ideas could filter through the border and infect Russians' thinking with no safe way for Russia to stop them.

The trouble with the end of the Cold War is that the "winners," the Western democracies, always considered it a question of good versus evil, and having won, hubris took over. Simply telling the Russians—who were living in a broken structure, not used to market economies or entrepreneurship—that merely leaving everything to the free market would end all their woes, did not serve the Russian population well. It was chaotic. Out of that chaos a new leader, Vladimir Putin, emerged.

Was NATO wrong in expanding? Certainly, culture matters; not everyone views a particular phenomenon in the same way. Not everyone ascribes the same implications to any particular phenomenon. Vladimir Putin certainly did not interpret NATO expansion nearer to Russia the same way NATO members did. He said expansion was hostile to Russia and provided a danger he had to confront, he had to stop.<sup>185</sup> Of course, in this case it may have backfired if the objective was to contain NATO against further expansion, since both Sweden and Finland have now applied for membership thereby accomplishing the opposite of what he wanted.<sup>186</sup>

Like most autocrats, President Putin evokes a vision of the past that validates him, confirms his "mission." His repeated version of Ukrainian history—and of Peter the Great—is indicative of that. Putin has talked of Russia's security as one of his sprawling reasons for the invasion, but his

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<sup>184</sup> Even the bombings in the former Yugoslavia were to protect residents of Kosovo, not to take territory. See *1999 NATO Bombs Yugoslavia*, HISTORY (July 21, 2010), <https://www.history.com/this-day-in-history/nato-bombs-yugoslavia> [<https://perma.cc/PSL5-KW8S>]; see Neil A. Lewis, *A Word Bolsters Case for Allied Intervention*, N.Y. TIMES (Apr. 4, 1999), <https://archive.nytimes.com/www.nytimes.com/library/world/europe/040499kosovo-legal.html> [<https://perma.cc/G99D-7HVY>].

<sup>185</sup> Vladimir Putin, President of the Russian Federation, Address to the Russian Federation (Feb. 21, 2022), <http://en.kremlin.ru/events/president/transcripts/67828> [<https://perma.cc/5TD3-2ZP7>].

<sup>186</sup> Rob Picheta & Joshua Berlinger, *Sweden and Finland Are on the Cusp of Joining NATO. Here's Why that Matters, and What Comes Next*, CNN (June 30, 2022), <https://www.cnn.com/2022/06/29/europe/nato-sweden-finland-summit-explainer-intl/index.html> [<https://perma.cc/7T7S-AJ6G>].

“invasion has damaged Russian security by breaking the rules on which the neutrality of Finland and Sweden had been for so long premised.”<sup>187</sup>

After the fall of the Berlin Wall and the break-up of the Soviet Union, Samuel P. Huntington in 1993, said, “A West at the peak of its power confronts non-Wests that increasingly have the desire, the will and the resources to shape the world in non-Western ways.”<sup>188</sup> In that same article he may have been prescient as he went on to say that there would be on-going tensions between Ukraine and Russia, when he mentioned: “In 1991 and 1992 many people were alarmed by the possibility of violent conflict between Russia and Ukraine over territory, particularly Crimea, the Black Sea fleet, nuclear weapons and economic issues.”<sup>189</sup> Huntington called Russia a “torn Country,” primarily because of the repetitive violent upheaval of the past invasions of the country, but also because “the question of whether Russia is part of the West or the leader of a distinct Slavic-Orthodox civilization has been a recurring one in Russian history.”<sup>190</sup> In 1997, former National Security Director to President Jimmy Carter, Zbigniew Brzezinski famously said that “without Ukraine Russia ceases to be an empire.”<sup>191</sup>

Russia has been “severed from its social, economic and cultural roots . . . (numerous) times in its tumultuous and long history.”<sup>192</sup> First, the Mongol invasion of the twelfth century led to 400 years of brutal subjugation.<sup>193</sup> Napoleon invaded. World War II, or what the Russians call the “Great Patriotic War” killed 97 percent of males born between 1920 and 1925.<sup>194</sup>

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<sup>187</sup> Ngaire Woods, *What the Mighty Miss: The Blind Spots of Power*, FOREIGN AFFS. (July/Aug. 2022), <https://www.foreignaffairs.com/articles/russian-federation/2022-06-21/what-mighty-miss> [<https://perma.cc/8WR6-PDUX>].

<sup>188</sup> Samuel P. Huntington, *The Clash of Civilizations*, FOREIGN AFFS. (Summer 1993), <https://www.foreignaffairs.com/articles/united-states/1993-06-01/clash-civilizations> [<https://perma.cc/8F89-WL7V>].

<sup>189</sup> *Id.* at 38.

<sup>190</sup> *Id.* at 43.

<sup>191</sup> Anna Reid, *Putin’s War on History*, FOREIGN AFFS. (May/June 2022), <https://www.foreignaffairs.com/articles/ukraine/2022-04-06/putins-war-history-ukraine-russia> [<https://perma.cc/N2FB-ND8Z>].

<sup>192</sup> MARTIN J. GANNON, UNDERSTANDING GLOBAL CULTURES 335 (3d ed. 2004).

<sup>193</sup> *Id.*

<sup>194</sup> MARTIN WALKER, THE WAKING GIANT: SOVIET UNION UNDER GORBACHEV, at xix (1987).

## VI. VLADIMIR VLADIMIROVICH PUTIN

In Russia, the leader, that is, the president, decides what is law and how it is to be applied.<sup>195</sup> Under the theory of Kenneth M. Waltz of looking to the individual within the state for the motivation for state action,<sup>196</sup> and considering the realities of today's Russia, it is clear that the President, Vladimir Putin, made the decision to go to war in Ukraine, or to engage in what he for nearly a year called euphemistically a "special military operation."<sup>197</sup> A year into the war he surprised everyone by calling it "war."<sup>198</sup> "The Russian president has made it clear that his country is a revisionist power. In a March 2014 speech marking Crimea's annexation, Putin put the West on notice that Russia was on the offensive in staking out its regional claims."<sup>199</sup>

In a public rally shortly after the invasion of Ukraine, Putin attempted to sell the war, extol the troops, and inspire the crowd with patriotic fervor. He praised the army and their current actions, quoting from the Gospel of John: "Greater love hath no man than this, that a man lay down his life for his friends."<sup>200</sup> He pointed out that he ordered the military action "to spare people from this suffering, from this genocide—this is the main reason, motive and purpose of the military operation that we launched in the Donbas [an eastern Ukrainian region] and Ukraine."<sup>201</sup> He reminded the crowd of a very religious admiral, Fyodor Ushakov, later canonized by the Orthodox Church, who was instrumental in defeating the Ottomans in the eighteenth century to win back Crimea. "He once said that

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<sup>195</sup> KONSTITUTSIYA ROSSIĬSKOĬ FEDERATSII [KONST. RF] [CONSTITUTION] ch. 4 art. 27 (Russ.).

<sup>196</sup> See KENNETH M. WALTZ, *MAN, THE STATE AND WAR*, ch. 2 (rev. ed. 2001).

<sup>197</sup> Andrew Osborne & Polina Nikolskaya, *Russia's Putin Authorises 'Special Military Operation' against Ukraine*, REUTERS (Feb. 24, 2022), <https://www.reuters.com/world/europe/russias-putin-authorises-military-operations-donbass-domestic-media-2022-02-24/> [<https://perma.cc/8VAT-88D5>].

<sup>198</sup> Maria Ilyushina, *Putin Declares 'War' – Aloud – Forsaking His Special Euphemistic Operation*, WASH. POST (Dec. 22, 2022), <https://www.washingtonpost.com/world/2022/12/22/putin-war-ukraine-special-operation/> [<https://perma.cc/UAW2-2864>].

<sup>199</sup> Fiona Hill & Angela Stent, *The World Putin Wants: How Distortions about the Past Feed Delusions about the Future*, FOREIGN AFFS. (Aug. 25, 2022), <https://www.foreignaffairs.com/russian-federation/world-putin-wants-fiona-hill-angela-stent> [<https://perma.cc/37TY-8TTZ>].

<sup>200</sup> Grayson Quay, *Putin Quotes Jesus to Justify Invasion of Ukraine*, THE WEEK (Mar. 19, 2022), <https://theweek.com/russia/1011510/putin-quotes-jesus-to-justify-invasion-of-ukraine> [<https://perma.cc/VH66-DL4B>].

<sup>201</sup> Tara John et al., *Onslaught of Ukraine*, CNN (Mar. 18, 2022), <https://www.cnn.com/2022/03/18/europe/russia-putin-ukraine-invasion-rally-intl/index.html> [<https://perma.cc/V4DA-Z4AX>].

the storms of war would glorify Russia,” Putin told the crowd. “That is how it was in his time; that is how it is today and will always be!”<sup>202</sup>

When analyzing the actions of an authoritarian state like Russia,<sup>203</sup> which now appears to be a dictatorship, governed by the will of one man,<sup>204</sup> one might try to understand that man’s apparent mindset and motivations. Putin tells in his “biography” *FIRST PERSON*, that he was stationed, in Dresden, East Germany as a KGB lieutenant colonel.<sup>205</sup> When word came of the Berlin Wall being torn down and noisy crowds were approaching his building, he was taken over by panic and something close to hopelessness. There were plenty of Soviet troops in Dresden at the time. He requested military support; something had to be done to contain and quell the rebellion and disorder but was told nothing could be done without orders from Moscow, but Moscow said nothing.<sup>206</sup> He felt as if his country and its system were disappearing before his eyes. It was a feeling of near desperation.<sup>207</sup> He was overcome by the feeling that the Soviet Union suffered from “a terminal disease without a cure—a paralysis of power.”<sup>208</sup> As president, years later, he repeated the idea when he announced the invasion of Ukraine, which he called a “special military operation,” necessary because the “paralysis of power and will is the first step towards complete degradation and oblivion.”<sup>209</sup>

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<sup>202</sup> *The New Russian Cult of War*, THE ECONOMIST (Mar. 26, 2022), <https://www.economist.com/briefing/2022/03/26/the-new-russian-cult-of-war> [<https://perma.cc/M9Q2-8MHE>].

<sup>203</sup> See Bobo Lo & Lilia Sheystova, *Russia as a Global Challenge*, in *A 21<sup>ST</sup> CENTURY MYTH: AUTHORITARIAN MODERNIZATION IN RUSSIA AND CHINA* 13–30 (2012); see also Grigorii V. Golosov, *Russia’s Regional Legislative Elections 2003-2006: Authoritarianism Incorporated*, 63 EUROPE-ASIA STUD. 397 (2011); but see Stephen Kotkin, *Comment: From Overlooking to Overestimating Russia’s Authoritarianism?*, 68 SLAVIC REV. 548, 551 (2009).

<sup>204</sup> See, e.g., Bard Amundsen, *Russia Has Become a Classic Dictatorship*, SCI. NORWAY (Feb. 26, 2022), <https://sciencenorway.no/politics-war/russia-has-become-a-classic-dictatorship/1988901> [<https://perma.cc/L9TC-BDB8>]; Vladimir Putin Has Shifted from Autocracy to Dictatorship, THE ECONOMIST (Nov. 13, 2021), <https://www.economist.com/briefing/2021/11/13/vladimir-putin-has-shifted-from-autocracy-to-dictatorship> [<https://perma.cc/LB4T-XS5D>].

<sup>205</sup> VLADIMIR PUTIN ET AL., *FIRST PERSON: AN ASTONISHINGLY FRANK SELF-PORTRAIT BY RUSSIA’S PRESIDENT* 72 (Katherine A. Fitzpatrick trans. 2000); David Hoffman, *Putin’s Career Rooted in Russia’s KGB*, WASH. POST (Jan. 30, 2000), <https://www.washingtonpost.com/wp-srv/inatl/longterm/russiagov/putin.htm> [<https://perma.cc/J457-G5GJ>].

<sup>206</sup> PUTIN ET AL., *supra* note 205, at 79.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Vladimir Putin, President, Russian Federation, Address by the President of the Russian Federation (Feb. 24, 2022) (transcript available at <http://en.kremlin.ru/events/president/news/67843>) [<https://perma.cc/ZZV9-LS2KJ>].

According to Putin, Russia and the world are at a dangerous crossroads:

The problem is that in territories adjacent to Russia, which I have to note is our historical land, a hostile “anti-Russia” is taking shape. Fully controlled from the outside, it is doing everything to attract NATO armed forces and obtain cutting-edge weapons. For the United States and its allies, it is a policy of containing Russia, with obvious geopolitical dividends. For our country, it is a matter of life and death, a matter of our historical future as a nation. This is not an exaggeration; this is a fact. It is not only a very real threat to our interests but to the very existence of our state and to its sovereignty. It is the red line which we have spoken about on numerous occasions. They have crossed it.<sup>210</sup>

In his speech of February 24, 2022, he appears to be justifying his invasion of Ukraine on at least three grounds: the belligerent attitude and slow encroachment of Western forces ever and ever closer to Russia, thereby causing severe security threats; the deliberate influence of Western thought and culture on the Russians to cause them to forget their Russianness; and the genocidal actions of the “illegitimate” government in Kiev against Russian speakers in Ukraine, in general, and against the People’s Republics of Donbas who had “asked Russia for help.” For this last reason, he uses the excuse of collective self-defense.<sup>211</sup> However, it is questionable whether the argument of collective self-defense would justify the wide-ranging destruction and killing the Russian army is accused of in Ukraine.

Putin went on to say:

In this context, in accordance with Article 51 (Chapter VII) of the UN Charter, with permission of Russia’s Federation Council, and in execution of the treaties of friendship and mutual assistance with the Donetsk People’s Republic and the Lugansk People’s Republic, ratified by the Federal Assembly on February 22, I made a decision to carry out a special military operation.<sup>212</sup>

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<sup>210</sup> *Id.*

<sup>211</sup> U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

<sup>212</sup> Putin, *supra* note 209.

These particular treaties, he says, are worthy of respect. Putin announced on Russian television on February 24, that, in response to a request by the heads of the Donbass republics, he had made a decision to order this “special military operation” in order to safeguard people “who have been suffering from abuse and genocide by the Kiev regime for eight years.” He said at the time that he did not plan to occupy Ukrainian territories. Rather he merely wanted to “de-nazify” and demilitarize the country.<sup>213</sup>

But given the law against the unlawful use of force, how does Putin view his country’s obligations—or risks—or indeed his own, under international law? Do treaties matter? Does the Charter of the United Nations matter? Does *erga omnes* matter? Apparently not, since he said recently that “the old treaties and agreements are no longer effective.”<sup>214</sup> According to *The Economist*, “The nearly 70-year-old Russian leader saw the war as an opportunity to reestablish Russian dominance on the global stage.”<sup>215</sup>

We know that the Constitution of the Russian Federation appears to submit the state to the control of international law, and various Russian political documents have stated similar things. Further, Russia’s membership in the United Nations and especially its status as a permanent member of the Security Council with a veto gives the Russian state special prominence in world affairs. Despite its possession of nuclear weapons, its political and economic power since the end of the Cold War, would not seem to justify such prominence. In light of all the well-documented “lip service” seeming to stand for an outsized respect for international law, why then the clear abandonment of any such notions of restraint by invading neighboring states and murdering its population?

A look at the events that occurred after the end of the Cold War may provide some explanation. Before the turn of the millennium, NATO bombed Belgrade in an attempt to stop its ethnic cleansing actions in Kosovo.<sup>216</sup> Since some of those carrying out the bombing were permanent

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<sup>213</sup> *Ukraine Seen by West as Stronghold for Attacking Russia – Serbian Diplomat*, TASS (Mar 11, 2022), <https://tass.com/world/1420777> [<https://perma.cc/6X5C-LY2G>].

<sup>214</sup> Putin, *supra* note 209.

<sup>215</sup> Dmitri Alperovitch, *The Dangers of Putin’s Paranoia*, FOREIGN AFFS. (Mar. 18, 2022), [https://www.foreignaffairs.com/articles/russia-fsu/2022-03-18/dangers-putins-paranoia?utm\\_medium=newsletters&utm\\_source=fatoday&utm\\_campaign=The%20Case%20for%20Ukrainian%20Neutrality&utm\\_content=20220318&utm\\_term=FA%20Today%20-%20112017](https://www.foreignaffairs.com/articles/russia-fsu/2022-03-18/dangers-putins-paranoia?utm_medium=newsletters&utm_source=fatoday&utm_campaign=The%20Case%20for%20Ukrainian%20Neutrality&utm_content=20220318&utm_term=FA%20Today%20-%20112017) [<https://perma.cc/46DM-R25E>].

<sup>216</sup> See PREBEN BONNEN, TOWARDS A COMMON EUROPEAN SECURITY AND DEFENSE POLICY (Robert Momich et al. eds., 2003).

members of the Security Council, the Security Council did not sanction such actions even though they were in violation of both Article 2(4) of the charter and customary international law. NATO said they were doing it for humanitarian reasons, an unlawful tactic, though according to the Kosovo Report, it was an illegal but legitimate approach.<sup>217</sup> Putin used that same argument of “protecting Russians” as one of his excuses for intervention in South Ossetia and his incursion in Crimea.<sup>218</sup> Later he observed the United States’ invasion of Afghanistan, which was justified on the grounds of the war on terror and self-defense.<sup>219</sup> Most of public opinion in the international community accepted that US justification,<sup>220</sup> but such a claim is specious under international law, since aggression had ceased, and after the US incursion once al Qaeda was dispersed and, on the run, any such self-defense justification ceased, and it certainly did not justify destroying the Taliban government. Lawful self-defense under international law requires:

1. A significant actual armed attack has occurred or is occurring;

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<sup>217</sup> INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2002); See also Mary E. O’Connell, *The UN, NATO, and International Law after Kosovo*, 22 HUM. RTS. Q. 57, 72 (2000).

<sup>218</sup> Neil Melvin, *Russia’s Policy of Passport Proliferation*, RUSI (May 1, 2020), <https://rusi.org/explore-our-research/publications/commentary/russias-policy-passport-proliferation> [https://perma.cc/ZZXX-XY4P] (pointing out that the people to whom Russia had issued passports, had little or no connection to Russia, other than maybe speaking Russian and/or the passport).

<sup>219</sup> U.S. Ambassador to the U.N. John Negroponte informed the Security Council of this attack and its justification. Permanent Rep. of U.S. to the U.N., Letter dated Oct. 7, 2001 from the Permanent Rep. of U.S. to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001); This note to the Security Council seemed also to inform the Council that the United States seemed to be claiming an ongoing right of self-defense in its war on terror. *Id.*: Indeed, in a June 2002 speech to the West Point Military Academy, President Bush claimed the right of the United States to “confront the worst threats before they emerged” to launch pre-emptive strikes before the United States had been attacked. George W. Bush, President, Remarks at the 2002 Graduation Exercise of the United States Military Academy at West Point (June 1, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/text/20020601-3.html> [https://perma.cc/QYX8-2BWR]; Of course, “The coalition partners (also). . . attempted to assert a lingering right to use force under Security Council resolutions authorizing collective force to liberate Kuwait in 1990 and 1991. The authorization to use force in those resolutions, however, was for liberating Kuwait, not invading Iraq.” Mary E. O’Connell, *Preserving the Peace: The Continuing Ban on War Between States*, 38 CAL. W. INT’L L.J. 41, 50 (2007); Some states, like the United States, push the envelope and engage in what might be characterized as retaliatory actions. See John Ismay, *U.S. Launches Two Airstrikes in 24 Hours Against Iranian-Backed Forces in Syria*, N.Y. TIMES (Aug. 24, 2022), <https://www.nytimes.com/2022/08/24/us/politics/us-airstrike-syria-iran.html>.

<sup>220</sup> HENDERSON, *supra* note 50, at 285.

2. The armed response is aimed at the armed attacker or those legally responsible for the attacker;
3. The response has the purpose of stopping the on-going attack and/or the next imminent attacks;
4. The response is necessary to remove the threat and is proportional in the circumstances.<sup>221</sup>

Overthrowing the government of a sovereign state seems to be out of proportion to the 9/11 attacks. The question asked by the United States should have been who controlled the attack or attackers, since the International Court of Justice ruled on more than one occasion that the test of attribution is control.<sup>222</sup> Neither the speech of President George W. Bush announcing the invasion,<sup>223</sup> nor the congressional authorization used by the president for military operations, alleged control of Al Qaeda by the Afghan government.<sup>224</sup>

Then in March of 2003, Putin witnessed the invasion of Iraq by the United States and the United Kingdom, who both unsuccessfully tried to get prior Security Council approval. It became clear that several members would not support it, and France signaled a veto, so it was withdrawn. The invasion went ahead with the United States, the United Kingdom, Australia, and Poland leading the charge. The United States used several arguments to legalize the invasion, perhaps the most creative was one of “pre-emptive self-defense.”<sup>225</sup> In these cases, the United States appears not to have acted as if international law did not matter, rather the United States attempted to justify its actions under international law. There is no mention, either in the Charter of the United Nations, other treaties, or customary international law of “pre-emptive self-defense,” or what

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<sup>221</sup> Mary E. O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 889–90 (2002).

<sup>222</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 113 (June 27); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 160 (Dec. 19); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 391 (Feb. 26).

<sup>223</sup> President George W. Bush, Statement Given after the Start of the U.S. and British Military Strikes on Targets in Afghanistan (Oct. 7, 2001), <http://putlearningfirst.com/language/20rhet/bushat.html> [<https://perma.cc/7Y9F-RU74>].

<sup>224</sup> See S.J. Res. 23, 107th Cong. (2001).

<sup>225</sup> See NAT’L SEC. COUNCIL, EXEC. OFF. OF THE PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA § V (2002), <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/> [<https://perma.cc/TPJ3-L3RR>].

some have called “anticipatory self-defense.”<sup>226</sup> Generally, only a handful of states, Iraq (in the Iran-Iraq War of the 1980s), the United States, the United Kingdom, Israel,<sup>227</sup> and South Africa have previously used such an argument.<sup>228</sup> Anticipatory self-defense remains controversial,<sup>229</sup> though the majority of states have not accepted the concept as giving authority for the use of armed force under Article 51 of the United Nations Charter.<sup>230</sup>

Among other motives, including, of course, his take on history and nationalism, President Putin gave that of self-defense or pre-emptive self-defense for the invasion of Ukraine in February 2022, since he claimed that NATO expansion and “nazis” governing Ukraine posed an imminent threat to Russia.

He appears to have been instructed by these “causes,” used by both NATO and the United States, but he appears not to have learned the larger lesson, by examining the results of the US-led invasions of Afghanistan and Iraq. Indeed, the invasion by the Soviet Union of Afghanistan in 1979 was a disaster for the aggressor as were the foregoing wars instigated by the United States. Ukraine is a modern European country with a more sophisticated and better trained and equipped military than the target countries of those wars.<sup>231</sup>

The Tufts University International Politics professor, Daniel W. Drezner, wrote a provocative and perhaps insightful piece appearing in a recent edition of *Foreign Affairs*. He suggested a different reason for the Ukraine invasion.<sup>232</sup> He wrote that governments and states that are optimistic about the future tend not to engage in the unlawful use of force,

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<sup>226</sup> See Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 547 (2002) (arguing that positions supporting a right to anticipatory self-defense under the U.N. Charter are unpersuasive).

<sup>227</sup> GRAY, *supra* note 63, at 170.

<sup>228</sup> *Id.* at 173

<sup>229</sup> *Id.* at 175.

<sup>230</sup> U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. . .”); Hill & Stent, *supra* note 199, at 114.

<sup>231</sup> See Adrian Boneberger, *Ukraine's Military Pulled Itself Out of the Ruins of 2014*, FOREIGN POL'Y (May 9, 2022, 12:55 PM), <https://foreignpolicy.com/2022/05/09/ukraine-military-2014-russia-us-training/> [<https://perma.cc/WHW8-GL2U>]; see also Ben Watson, *U.S. Trains an Army in the West to Fight in the East*, DEF. ONE (Oct. 15, 2017), <https://www.defenseone.com/threats/2017/10/ukraine-us-trains-army-west-fight-east/141577/> [<https://perma.cc/3C2A-WS48>].

<sup>232</sup> Daniel W. Drezner, *The Perils of Pessimism: Why Anxious Nations are Dangerous Nations*, FOREIGN AFFS., July–Aug. 2022, at 34, 42.

whereas the opposite tends to occur with pessimistic states and their leaders.<sup>233</sup> He went on to say:

Pessimism is also a major contributing factor to the war in Ukraine. For all his talk about restoring Russian greatness, Russian President Vladimir Putin has a pessimistic worldview, and this explains his decision to invade. Russia's 2014 interventions in Crimea and Eastern Ukraine backfired badly. Instead of returning to the Russian fold, Ukraine responded by bolstering its military capabilities and drawing closer to NATO and the European Union. As Ukraine's westward drift accelerated, Putin felt he had to act quickly—and with military force—before Kyiv completely escaped Russia's sphere of influence.<sup>234</sup>

Looking at history and reviewing Putin's actions and declarations, Fiona Hill and Angela Stent say that:

the West must understand that it is dealing with a leader who is trying to change the historical narrative of the last hundred years—not just of the period since the end of the Cold War. Vladimir Putin wants to make Ukraine, Europe, and indeed the whole world conform to his own version of history. Understanding his objectives is central to crafting the right response.<sup>235</sup>

## VII. PREVIOUS ACTIONS BY RUSSIA

President Putin has engaged in the unlawful use of force in the recent past and gotten away with it; his experience has shown him that he can engage in such behavior with impunity.<sup>236</sup> In August 2008, after military action was commenced by Georgian troops to restore order and protect its territorial integrity in its semi-autonomous territory of South Ossetia, Russia sent in troops, claiming to do so to protect its nationals residing there in South Ossetia. Despite Russia's argument that the protection of a state's nationals abroad can justify the use of force as self-defense under Article 51 of the U.N. Charter,<sup>237</sup> Russian incursion likely

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<sup>233</sup> *Id.* at 42–43.

<sup>234</sup> *Id.* at 42.

<sup>235</sup> Hill & Stent, *supra* note 199, at 110.

<sup>236</sup> GRAY, *supra* note 63, at 168.

<sup>237</sup> Article 51 does not explain what the conditions or methods of self-defense are, but it speaks of an “inherent right of self-defense,” which of course existed under customary international law long before the Charter of the United Nations. Customary international law does permit the protection of nationals abroad, but any action of self-defense must take into account and be accomplished under the doctrines of immediacy, necessity and proportionality. The United States defends such an argument. See CHRISTINE D. GREY, *INTERNATIONAL LAW AND THE USE OF FORCE* 169 (4th ed. 2018).

did not occur for the protection of nationals—South Ossetian citizens would not have been recognized as Russian citizens under international law.<sup>238</sup> Additionally, Russia went far beyond protecting anyone and occupied large swaths of South Ossetia and Georgian territory for months, long after any protection that might have been required would have taken place.<sup>239</sup> Russia's invasion of South Ossetia and Georgia therefore appear to be violations of international law.<sup>240</sup>

It also appears that Russia, under Putin, has engaged in widespread human rights violations in the territory that it has occupied in Eastern Ukraine since 2014.<sup>241</sup> Even if Russia could argue in this and other cases that it is protecting Russian nationals, the use of force can only be sustained “until the Security Council has taken measures necessary to maintain international peace and security.”<sup>242</sup> The requirement is that

[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>243</sup>

But Russia is still in Crimea and still in Ukraine, defying the terms of the United Nations Charter and customary international law. The United Nations Office of the High Commissioner for Human Rights has reported “killings, abductions, ill-treatment, sexual violence, forced labor, ransom and extortion of money.”<sup>244</sup>

Not only did the West, after protestations and some sanctions, not do much about the Ukraine invasion and annexation, but later, shortly after Russia annexed Crimea in 2014, Gerhard Schröder, the former chancellor

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<sup>238</sup> See Robert P. Chatham, *Defense of Nationals Abroad: The Legitimacy of Russia's Invasion of Georgia*, 23 FLA. J. INT'L L. 75, 97 (2011).

<sup>239</sup> *Id.* at 98; see also GRAY, *supra* note 63, at 169.

<sup>240</sup> Chatham, *supra* note 238, at 98.

<sup>241</sup> ‘Persistent and Grave’ Human Rights Violations in Eastern Ukraine, U.N. NEWS (June 1, 2015), <https://news.un.org/en/story/2015/06/500292-persistent-and-grave-human-rights-violations-eastern-ukraine-un-report> [https://perma.cc/3X99-EHDS].

<sup>242</sup> U.N. Charter art. 51.

<sup>243</sup> *Id.*

<sup>244</sup> Press Release, High Comm’r for Hum. Rts. on High Numbers of Civilian Casualties in Ukraine Raise Concerns that Attacks by Russia are Not Complying with International Humanitarian Law, U.N. Press Release (Dec. 15, 2014); and Off of the High Comm’r for Hum. Rts., Report on the Human Rights Situation in Ukraine 15 Dec. 2014 (Dec. 15, 2014), [www.ohchr.org/Documents/Countries/UA/OHCHR\\_eighth\\_report\\_on\\_Ukraine.pdf](http://www.ohchr.org/Documents/Countries/UA/OHCHR_eighth_report_on_Ukraine.pdf) [https://perma.cc/4T82-DQT9].

of Germany celebrated his own birthday with Putin in Putin's hometown, St. Petersburg. Later Silvio Berlusconi, former Italian prime minister was in Crimea drinking local wines with Putin.<sup>245</sup> In other words, life carried on as usual for most of the world, everyone except the Ukrainians, having apparently forgotten about the matter.

### VIII. KEEPING THE PEACE, THE UNITED NATIONS AND THE USE OF FORCE

The primary purpose of the founding of the United Nations was to “maintain international peace and security.”<sup>246</sup> Indeed, the charter states that the founding members established the institution in order “to save succeeding generations from the scourge of war.”<sup>247</sup> The International Court of Justice has held that Article 2(4) is a cornerstone of the United Nations Charter.<sup>248</sup> That section of the Charter says: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The wording was designed “to state in the broadest terms an absolute all-inclusive prohibition.”<sup>249</sup> The prohibition of the use of force is a peremptory norm, or what the Vienna Convention on the Law of Treaties

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<sup>245</sup> Daniel Treisman, *Putin Unbound: How Repression at Home Presaged Belligerence Abroad*, FOREIGN AFFS. (May/June 2022), [https://www.foreignaffairs.com/articles/ukraine/2022-04-06/putin-russia-ukraine-war-unbound?utm\\_medium=newsletters&utm\\_source=fabackstory&utm\\_content=20220515&utm\\_campaign=FA%20Backstory\\_051522\\_The%20Backstory:%20Vladimir%20Putin%20Tightens%20His%20Grip&utm\\_term=fa-backstory-2019](https://www.foreignaffairs.com/articles/ukraine/2022-04-06/putin-russia-ukraine-war-unbound?utm_medium=newsletters&utm_source=fabackstory&utm_content=20220515&utm_campaign=FA%20Backstory_051522_The%20Backstory:%20Vladimir%20Putin%20Tightens%20His%20Grip&utm_term=fa-backstory-2019) [https://perma.cc/YVC6-7U3S].

<sup>246</sup> U.N. Charter art. 1, ¶ 1; *see also* CHRISTIAN HENDERSON, THE USE OF FORCE AND INTERNATIONAL LAW, 15–16 (1st ed. 2018).

<sup>247</sup> U.N. Charter Pmb1.

<sup>248</sup> Armed Activities on the Territory of Congo, (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 4, at 59 (Dec. 19).

<sup>249</sup> United Nations Conference on International Organization, San Francisco, 1945, Summary Report of Eleventh Meeting Committee I/1, 6 U.N.I.C.O. Doc. 3520, Doc. 784, ¶ 7 (English) I/1/27 (June 4, 1945); *See also* CHRISTIAN HENDERSON, THE USE OF FORCE AND INTERNATIONAL LAW, 21 (1st ed. 2018).

calls a *jus cogens* norm,<sup>250</sup> and has been upheld as such by numerous international tribunals and writers.<sup>251</sup>

The “Security Council remains the global symbol of collective security, and the UN represents the hope of many whose security is threatened.”<sup>252</sup> Certainly the major role, in fact the most important role, of the United Nations Security Council is that of the supervision and maintenance of international peace and security, and the supervision of collective security.<sup>253</sup> But in this case, following the Russian invasion of Ukraine, the Security Council is not fulfilling its role of supervision; not only is the supervision bad, there is none.

At the time of the invasion, a resolution was introduced to the Security Council, that demanded that Russia “immediately cease its use of force against Ukraine” and “immediately, completely, and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders.”<sup>254</sup> Russia vetoed that resolution.<sup>255</sup> The Security Council is, in other words, worthless. Security Council action and supervision fail simply because one or more of the permanent members vetoes it, despite a super majority of the members of the council being in favor of it.

But “the drafters of the Charter recognized that it was unrealistic to attempt to establish a system of United Nations enforcement action which would be effective in the event a major power violated the peace. Actually, most felt that the United Nations should not even attempt to take

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<sup>250</sup> The treaty defines *jus cogens* as “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 334. These two terms generally mean the same thing and refer to rules of international law that are so basic to the preservation of a peaceful international community that states cannot opt out of compliance with them. In other words, they are obligatory. See DINAH SHELTON, *JUS COGENS* (1st ed. 2021).

<sup>251</sup> ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW*, 50 (2008); see also Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits), ICJ Reports (1986) 14, para 190.

<sup>252</sup> CHRISTINE CHENKIN & MARY KALDOR, *INTERNATIONAL LAW AND NEW WARS*, 23 (2017).

<sup>253</sup> See U.N. Charter arts. 39–40.

<sup>254</sup> Michelle Nichols & Humeyra Pamuk, *Russia Vetoes U.N. Security Action on Ukraine as China Abstains*, REUTERS (Feb. 25, 2022), <https://www.reuters.com/world/russia-vetoes-un-security-action-ukraine-china-abstains-2022-02-25/> [https://perma.cc/4PFX-SARK].

<sup>255</sup> Farnaz Fassihi, *Russia Vetoes a U.N. Security Council Resolution Calling on It to Withdraw from Ukraine*, N.Y. TIMES (Feb. 25, 2022), <https://www.nytimes.com/2022/02/25/world/europe/united-nations-russia-withdraw-ukraine.html?searchResultPosition=1> [https://perma.cc/SA53-KYQ6].

action if those powers were not in agreement.”<sup>256</sup> In other words, the drafters of the charter were mindful that the system of collective security that they were developing would not function well if a major power were the one to violate the peace.<sup>257</sup>

Accordingly, any action of the United Nations system of preserving peace always depends on the will of the five permanent members. So it is that the veto power removes the possibility of any law enforcement actions against any of the five permanent members or against allies of those permanent members.<sup>258</sup>

The system to protect “international peace and security” is what Mark Klamburg, the Norwegian legal scholar, has called a “primitive system,” inasmuch as the United Nations, or the Security Council, is at the same time the legislator (making its own rules), the judge (deciding on who has violated the peace and whether anything or what should be done), and the executive (it can send peacekeepers or troops to enforce a cessation of hostilities or do nothing).<sup>259</sup> Hans Morgenthau agreed with this “primitive” assessment and also called it decentralized.<sup>260</sup> But the trouble is that such decisions are not judicial or legal, they are political.<sup>261</sup> A further problem, when it comes to any actions to settle disputes, or to find anyone guilty of transgressions after the fact for any kind of restitution, is that states must consent to the jurisdiction of the International Court of Justice.<sup>262</sup> The powerful players, China, Russia, and the United States among them, have not consented to the optional clause making the court’s jurisdiction compulsory over them, so Russia cannot be compelled to appear before the International Court of Justice.<sup>263</sup> “Putin invaded Ukraine

<sup>256</sup> LELAND M. GOODRICH, EDVARD HAMBRO, & ANNE PATRICIA SIMONS, *CHARTER OF THE UNITED NATIONS; COMMENTARY AND DOCUMENTS* 291 (3d ed. 1969).

<sup>257</sup> JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY* 110 (2010).

<sup>258</sup> See Catherine Haguenu-Moizard & Yoan Sanchez, *The Principle of Proportionality in European Law*, in *POWER AND LAW IN INTERNATIONAL SOCIETY: INTERNATIONAL RELATIONS AS THE SOCIOLOGY OF INTERNATIONAL LAW* 142, 156 (Mark Klamburg, Sofia Ranchordás, & Boudewijn de Ward eds., 2016).

<sup>259</sup> *Id.* at 156–157.

<sup>260</sup> MORGENTHAU, *supra* note 67, at 281.

<sup>261</sup> HENKIN, *supra* note 64, at 168–185.

<sup>262</sup> Statute of the International Court of Justice, art. 36 (June 26, 1945), <https://www.icj-cij.org/en/statute> [<https://perma.cc/H6YX-ZQM2>].

<sup>263</sup> See Int’l Ct. J., *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, <https://www.icj-cij.org/en/declarations> [<https://perma.cc/NP7U-PTPX>] (last accessed Apr. 4, 2023).

knowing that the UN could do little or likely would do nothing to punish Russia for violating its Charter."<sup>264</sup>

The formation of the United Nations really did very little to set up a system of centralized law enforcement, since it always depends on the desires of the permanent five members. The clause in the charter which allows "the inherent right of individual or collective self-defence" exception to prohibition on the use of force,<sup>265</sup> is an example of decentralized law enforcement; it is up to the victim to act. But as Morgenthau pointed out, the permission was not only new to international law at the time (1945), but it may be seen as a confirmation of the old principle that it is up to the injured state to enforce the law against the lawbreaker.<sup>266</sup>

Can anything be done at the level of the United Nations given the impasse in the Security Council? Of course, Articles 11 and 12 of the Charter of the United Nations make it clear that the Security Council has primary responsibility for international peace and security.<sup>267</sup> But, under Article 14,<sup>268</sup> the general assembly has deemed itself to have secondary responsibility in such matters in situations of inaction by the Security Council, from time to time. In those circumstances it has acted to maintain or restore international peace and security. The International Court of Justice has endorsed such general assembly activity.<sup>269</sup>

The repeated failure of the Security Council to act in positive ways during the Cold War led the general assembly to take on a larger role than originally envisioned.<sup>270</sup> In 1950, during the Korean War, at first a Security Council resolution condemning the invasion of South Korea by North Korean forces, was passed in the absence of a boycotting Soviet Union (over its objection to The Republic of China (Taiwan) being seated on the Security Council instead of the People's Republic of China). The Soviet

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<sup>264</sup> Woods, *supra* note 187.

<sup>265</sup> U.N. Charter art. 51.

<sup>266</sup> MORGENTHAU, *supra* note 67, at 309.

<sup>267</sup> U.N. Charter art. 11–12.

<sup>268</sup> Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

U.N. Charter art. 14.

<sup>269</sup> See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 27–28 (July 9).

<sup>270</sup> GRAY, *supra* note 63, at 267.

Union later returned to the Council and thereafter the Soviet Union vetoed all Security Council resolutions respecting the aggression, causing an impasse in the Security Council.

The Security Council was thus powerless to take any further collective action to restore international peace and security in the Korea crisis. At the urging of the US Secretary of State, Dean Acheson, the general assembly, in an emergency special session, claimed for itself a subsidiary role in the maintenance of international peace and security. It issued General Assembly Resolution 377 V, called the Uniting for Peace Resolution.<sup>271</sup> In that resolution, the general assembly stated that it was conscious of the fact that “failure of the Security Council to discharge its responsibilities on behalf of all the Member States . . . does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security.”<sup>272</sup>

The general assembly thus resolved

that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.<sup>273</sup>

Accordingly, “although the shifting of responsibilities to the General Assembly may not be consistent with the original intentions of the drafters of the Charter, it is today fully accepted that emergency special sessions have become an integral part of the legal order of the United Nations.”<sup>274</sup> The resolution was designed to provide an alternative to taking action in the event of impasse or inaction on the part of the Security Council in the

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<sup>271</sup> G.A. Res. 377 (V), Uniting for Peace (Nov. 3, 1950).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> Christian Tomuschat, *Uniting for Peace Resolution 377V: Introductory Note*, U.N. AUDIOVISUAL LIBR. OF INT’L L., (Oct. 2008) <https://legal.un.org/avl/ha/ufp/ufp.html> [<https://perma.cc/AW8S-C4CS>].

case of an emergency, and has been invoked at least five times, not always to the liking of the United States.<sup>275</sup>

### IX. THE BROADER PROBLEM

Of course, Russia is a problem here, but not the world's worst, rather simply a manifestation of one of the world's worst problems. That problem is the ability of a state to engage in war, or "the use of force," with impunity, especially a state with Security Council veto power.

The world community has outlawed war in various treaties, not the least of which is the Charter of the United Nations, however it often fails because it does not provide for any penalties if a state engages in war. Only the Security Council can do that if and only they wish to. But we do have rules of war, such as those set forth in the statute of the International Criminal Court and the Geneva Conventions, and there is customary international law. They make up what is called International Humanitarian Law (IHL) or *jus in bello*.<sup>276</sup> Such laws are designed to protect those who cannot protect themselves, like civilians or prisoners. One might ask a broader question like whether war is a humanitarian matter at all. It is, after all, what most normal people would call nothing more than organized mass murder. This is an issue that needs addressing. A fundamental principle of IHL is the complete separation of *jus ad bellum* and *jus in bello*. Certainly, both sides in an armed conflict claim that they are fighting with just cause. No matter the purpose of the conflict, the victims still need protection. Now IHL applies uniformly regardless of the causes of the clash, and *jus ad bellum* principles have no connection to the application of IHL in a conflict. For this reason, it cannot be claimed that a war was unjustified and therefore all killings of combatants or anyone else are war crimes or violations of IHL,<sup>277</sup> that is, just plain murder. One area of law has nothing to do with the other in this regard.

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<sup>275</sup> See Camron Hunt, *The Veto Charade*, ZNET (Mar. 26, 2023, 8:00 AM), <https://zcomm.org/znetarticle/the-veto-charade-by-cameron-hunt/> [<https://perma.cc/BHR8-25ZD>].

<sup>276</sup> See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT*, at xxi (Cambridge Univ. Press 2010) (we think so much of these rules that we even give them a Latin name. Some call it the Law of Armed Conflict, and that is the name most often used in U.S. Military parlance); Valerie Epps, *International Law* 385 (4th ed. 2009) (*jus in bello* is the Latin term for the law governing the conduct of armed conflict and the protection of persons and things during such conflicts. *Jus ad bellum* is the term for the law defining when a state may resort to armed force).

<sup>277</sup> ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE*, 287 (Cambridge Univ. Press 3d ed. 2014).

We find, therefore, a major problem in the system: the operation of the Security Council within the United Nations System. The veto power exists because—what were considered in 1945—the “Great Powers” wanted to protect their national interests and thus the four states creating and negotiating the charter, the US, the UK, China, and the USSR,<sup>278</sup> said they would not join without such power. Since the idea had been first finalized at the Yalta Conference, it was known as the Yalta Formula.<sup>279</sup>

The five permanent members of the Security Council generally have the ability to do what they want when it comes to the use of force and to allow their allies the same option, through their veto power.<sup>280</sup> It is noteworthy that it is some of the five permanent members who regularly engage in unlawful behavior, especially through the use of force: the United States in Grenada,<sup>281</sup> Panama,<sup>282</sup> and Iraq; China appropriating and militarizing open ocean in the South China Sea; the United Kingdom in Iraq; France in a variety of countries in Africa; and Russia in Georgia and Ukraine.<sup>283</sup>

So far, the veto power has hindered the ability of the Security Council to dispatch troops under Article 43 of the charter and it thwarts the ability of the Security Council to even question the conduct of a permanent member. The veto has been criticized for some time,<sup>284</sup> prompting the thought that there is “a growing sense that the veto is outdated, unproductive and its use is incompatible with the Council’s

<sup>278</sup> See generally Andrew Williams, *France and the Origins of the United Nations, 1944–1945: “Si La France ne compte plus, qu’on nous le dise”* 28 *DIPL. & STATECRAFT* 215, 215–234 (2017) (France was weakened, with a government in exile, and with a leader, Charles De Gaulle, that the Allies did not particularly like. Thus, France was mostly left out of the creation of the United Nations until near the very end).

<sup>279</sup> Thomas Schindlmayr, *Obstructing the Security Council: The Use of the Veto in the Twentieth Century*, 3 *J. HIST. INT’L L.* 218, 219 (2001).

<sup>280</sup> It is up to the Security Council, when instances of aggression are presented to it, to determine who of the belligerents is the guilty party and if they choose, to condemn the actions, order them stopped or order that action be taken. If one of those parties is an ally of a permanent member, that member can veto any vote taken in this regard, thereby allowing the ally to operate with impunity. *SECURITY COUNCIL REPORT, THE UN SECURITY COUNCIL HANDBOOK* 34 (2019).

<sup>281</sup> See U.N. Doc. S/16076 (Oct. 25, 1983) (justified in part, the United States said, in order to protect its nationals); CHRISTIAN HENDERSON, *THE USE OF FORCE AND INTERNATIONAL LAW* 249, 250 (2018) (the U.S. had a veto power, so the Security Council did not condemn its actions).

<sup>282</sup> JAN KLABBERS, *INTERNATIONAL LAW*, 189 (Cambridge Univ. Press 3d ed. 2014).

<sup>283</sup> See generally CHRISTIAN HENDERSON, *THE USE OF FORCE AND INTERNATIONAL LAW*, chs. 1, 3, 6 and 7 (2018).

<sup>284</sup> S.D. Bailey & S. Daws, *THE PROCEDURE IN THE UN SECURITY COUNCIL* 249 (3d ed. 1998); *Security Council Veto Power Attacked*, *CBC NEWS* (Mar. 26, 2023, 9:00 PM) <https://www.cbc.ca/news/world/security-council-veto-power-attacked-1.1357042> [<https://perma.cc/E7A3-LVRX>].

'primary responsibility' for the maintenance of international peace and security under the Charter."<sup>285</sup> Critics contend that "the Council's limited membership, opaque working methods and controversial sanctions regimes have led to the perception that it suffers from a significant accountability deficit."<sup>286</sup> The charter shifted the authority to use force from states to the Security Council, and "[t]he paradox is that the shift to international authority for the use of force is hugely weakened by its lack of legitimacy."<sup>287</sup> This situation has caused some commentators to pronounce that the Article 2(4) prohibition on the use of force is either dead or in very serious shape.<sup>288</sup>

## X. CONCLUSION

A number of encouraging events occurred after World War II. The Kellogg-Briand Pact, outlawing acts of aggression was applied in the war crimes trials. The United Nations Charter made it clear that the use of force was unlawful in nearly every situation. One person who found events to be encouraging was the Polish scholar, international lawyer, and the first minister of foreign affairs of the Third Republic of Poland after the fall of the Berlin Wall, Krzysztof Skubiszewski. He wrote in 1968:

Thus, the very possibility of resorting to force contributed to the relativity and insecurity of the totality of rights enjoyed by each state under international law, including the state's right to its territory and to independent existence. Between 1919 and 1945 an effort has been made to remove this basic fallacy of international law. At the present moment the society of states has behind it the stage of eliminating force from the arsenal of lawful means of action on the international plane, and lawyers can no longer enjoy themselves in inventing legal concepts for what amounts, as it always amounted, to plain murder. But the society of states has not yet reached the next stage, which is the orderly settlement of disputes through the decision of an international organ where negotiation of the parties have failed to end the dispute. Abolition of violence in international law has not yet been

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<sup>285</sup> Philippa Webb, *Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria* 19 J. CONFLICT & SEC. L. 471, 472 (2014).

<sup>286</sup> *Id.*

<sup>287</sup> CHRISTINE CHENKIN & MARY KALDER, *INTERNATIONAL LAW AND NEW WARS*, 78 (Cambridge Univ. Press 2017).

<sup>288</sup> See Thomas Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L., 809 (1970); Jean D'Aspermont, *Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law*, 31 U. PA. J. INT'L L., 1089, 1089 (2014).

followed by the institution of reliable and effective means of settling controversies.<sup>289</sup>

Has anything changed since those words appeared in 1968? States continue to waffle and tip-toe around the seventeenth century notion of sovereignty, which they use as a shield, behind which they do whatever mischief they can contrive and beyond which many of them inflict pain, death, and destruction with impunity. If law is anything, it is meant to protect, especially the vulnerable and the weak. Surely law, international law, cannot rightly be interpreted to mean that it allows such heinous behavior. We ought to do better, be better, act like adults—as we tell our quarreling five-year-old children to do.

We can invent artificial intelligence, put people on the moon, construct mobile phones that can do more things for you than your mother ever thought of doing. Why not use our intellect for something that really matters: peace, prosperity, fairness, tolerance, and understanding?

The Charter of the United Nations tells us that the Security Council is to ensure, maintain, or restore international peace and security. But it gives five states the power to ignore that chore and wondrous powers to inflict harm.

The rules of the Security Council should be amended. It seems counter to the purpose of the United Nations and of the International Criminal Court that a member can block a referral to the International Criminal Court if most of the council wish otherwise. This may require an amendment of Chapter VI of the Charter of the United Nations,<sup>290</sup> since referrals made by the Security Council have been “[a]cting under Chapter VII of the Charter of the United Nations.”<sup>291</sup> In such an amendment process, the veto power should also be eliminated, calling only for majority votes, or perhaps in certain instances, a supermajority. It should be required that all members of the United Nations, by being members,

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<sup>289</sup> Skubiszewski *supra* note 44, at 747.

<sup>290</sup> Article 27

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

U.N. Charter art. 27.

<sup>291</sup> See S.C. Res. 1593 (Mar. 31, 2005) (votes are taken in accordance with Chapter VI, Art. 26 (3), since this would not likely be considered a procedural matter).

automatically submit to the mandatory jurisdiction of the International Court of Justice and of the International Criminal Court. That would be a good start. Of course, the latter would require an amendment of the Charter of the United Nations, the Statute of the International Court of Justice and of the Rome Statute of the International Criminal Court. Under the charter, all the foregoing would require the agreement of the “great powers,” as they were called in 1945.<sup>292</sup> All of this may well cause some, or even most, of the powerful countries to threaten or engage in withdrawal from these institutions.

Today, there are many more rising and economically powerful states. If the five permanent members of the Security Council do not agree, maybe the “great powers” are no longer so great and should be left out in the cold until they modify their behavior and philosophy. It is, after all, those “great powers” who create or allow many of the problems regarding the use of force. Of course, this would require strong political will on the part of the remaining states, many of whom are strongly affected by trade with aid from and other ties to the five permanent members.

Trade and commercial interconnectivity and interdependence have often been touted as a way to eradicate war, by making it inconvenient, counter-productive, unthinkable. To be sure, that was the very basis for the founding of the European Union and its predecessors.<sup>293</sup> However, sometimes realities overcome good intentions:

Russia's aggression has upended many assumptions that influenced thinking about international relations in the post-Cold War era. It has ended the holiday from history in which wars between countries were rare. It has hollowed out the norm against countries' acquiring territory by force. And it has demonstrated that economic interdependence is no bulwark against threats to world order. Many believed that Russia's reliance on western European markets for its energy exports would encourage restraint. In reality, such ties did no better in moderating Russian behavior than they did in preventing the outbreak of World War I. Worse yet, interdependence proved to be more of a constraint on countries that allowed themselves to grow reliant on Russia (above all, Germany) than on Russia itself.<sup>294</sup>

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<sup>292</sup> See U.N. Charter art. 109(2) (“Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.”).

<sup>293</sup> See JONATHAN OLSEN, *THE EUROPEAN UNION: POLITICS AND POLICIES*, (7th ed. 2021).

<sup>294</sup> Richard Haas, *The Dangerous Decade: A Foreign Policy for a World in Crisis*, 101 FOREIGN AFFS. 25, 28, (2022).

The world must find another way, a more comprehensive way.

What else can be done? Theoretically, and often in practice, states are responsible for the harm caused to other states. State responsibility is fundamental in international law, arising out of the doctrine of sovereignty and the equality of states. The doctrine provides that when one state commits an unlawful act under international law, that offense gives rise to responsibility and a requirement for reparation.<sup>295</sup> According to the International Court of Justice, the lack of a court with jurisdiction over the matter does not affect the fact that a binding obligation exists.<sup>296</sup> As early as 1928, the Permanent Court of International Justice in the *Chorzow Factory* case said that the possibility of being held responsible for internationally wrongful acts causing harm was the price a state had to pay for being able to participate in international law.<sup>297</sup> That court early on held that when a state commits an internationally wrongful act against another state, international responsibility is established “immediately as between the two states,”<sup>298</sup> and the International Court of Justice has applied the concept repeatedly in cases before it.<sup>299</sup>

Accordingly, the notion of state responsibility has been accepted as customary international law.<sup>300</sup> In an attempt to codify these rules, the International Law Commission drafted articles that

[seek] to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules,

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<sup>295</sup> SHAW, *supra* note 1, at 677.

<sup>296</sup> Application of the Convention on the Prevention and Punishment of the Crime Against Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, 46 (Feb. 3).

<sup>297</sup> Factory at Chorzow (Claim for Indemnity) (Merits) (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

<sup>298</sup> Phosphates in Morocco (It. v. Fr.), Judgment, 1938 P.C.I.J. (ser. A/B) No. 74, at 28 (Mar. 30); See also S.S. “Wimbledon” (Gr. Brit. et al. v. Ger.), Judgment, 1923 P.C.I.J. (ser. A) No. 1, at 30 (Aug. 17); Factory at Chorzów (Jurisdiction) (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 21 (Feb. 8); and *id.* at 29.

<sup>299</sup> The Corfu Channel Case (Merits) (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 23 (Apr. 9); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), Judgment, 1986 I.C.J. 14, ¶¶ 283, 149 (June 27); The Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. 38, ¶ 47 (Sept. 25).

<sup>300</sup> SHAW, *supra* note 1, at 684.

whose codification would involve restating most of substantive customary and conventional international law.<sup>301</sup>

In other words, these articles set forth what the commission<sup>302</sup> has called “secondary rules.”<sup>303</sup> For example, the primary rules might be those which require the protection of diplomats, or an obligation set forth in a treaty. It is easy to see when a breach of such rule has occurred, but what happens then? What are the responsibilities of the breaching party, are there any? How is the breach repaired? These secondary rules attempt to codify the answers to such questions, using and elaborating on the rules set down by the Permanent Court of International Justice (PCIJ) regarding the consequences flowing from internationally wrongful acts.

It is clear from all accounts that Russia has committed flagrant aggression against the Ukraine, and there is mounting evidence of what appears to be war crimes. States must be held accountable for such behavior if international law, the rule of law, are to persist as meaningful brutal atrocities cannot be allowed to be committed with impunity.<sup>304</sup> It is obvious that the state of Ukraine and its infrastructure have suffered enormous damage from this invasion, but civilian buildings, housing and cultural artifacts and structures have also been destroyed. Many civilians have lost everything, up to and including their lives.

The world must focus on Russia's state responsibility and construct procedures to hand over the enormous sums of money necessary to rebuild Ukraine, and to compensate Ukraine and individual Ukrainians for the dreadful attacks, loss of life, and general destruction the Russian invasion has caused.

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<sup>301</sup> Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. DOC. A/56/10, at 32 (2001).

<sup>302</sup> James Crawford, *Articles of State Responsibility for Internationally Wrongful Acts*, U.N. AUDIOVISUAL LIBR. INT'L., (Aug. 2012), <https://legal.un.org/avl/ha/rsiwa/rsiwa.html#:~:text=By%20resolution%2056%2F83%20of%2012%20December%202001%2C%20the,as%20a%20treaty%20text%20or%20other%20appropriate%20action> [https://perma.cc/6WZ3-GJG3] (“Assembly resolution 62/61 of 6 December 2007 noted with appreciation such compilation, further commending the Articles to the attention of Governments and resolving to further examine the question of a convention on the responsibility of States for internationally wrongful acts, or other appropriate action on the basis of the Articles. A similar position was taken by General Assembly resolution 65/19 of 6 December 2010. Although some delegations have pressed for a diplomatic conference to consider the Articles, others have preferred to maintain their status as an ILC text approved ad referendum by the General Assembly. In fact, they have been very widely approved and applied in practice, including by the International Court of Justice.”).

<sup>303</sup> Int'l L. Comm'n, *supra* note 301.

<sup>304</sup> Laurie Blank, *War Reparations for Ukraine: Key Issues*, JUST SECURITY (May 2, 2022), <https://www.justsecurity.org/81341/war-reparations-for-ukraine-key-issues/> [https://perma.cc/2KYQ-KB8X].

War reparations are payments by one state to another (or, sometimes, in modern practice, to individuals) at the end of a conflict, intended to compensate for the damage and injury inflicted during the war. Also once called war indemnities, such payments have a long history and were the primary or only mechanism for compensation in the aftermath of armed conflict until the 20th century. . . . As a matter of law, the obligation for states to make reparations for breaches of international law is a fundamental tenet of international law, as the Permanent Court of International Justice set forth in the *Chorzow Factory case*,<sup>305</sup> and as international courts continue to recognize today.<sup>306</sup>

How that would work is unclear, since after World War II, there have not been many war reparations cases. In the past, a triumphant state simply imposed reparation or indemnity payments on the vanquished state in a peace treaty or other settlement. The idea was to compensate the winner for the cost of the war. Until the aftermath of World War II, this consisted of transfers of money or property from one state to the other, and individuals, however aggrieved they might have been, were not involved. But after that war, Germany, through a variety of procedures, paid money directly to individuals. A peace settlement with Russia could be a method of accomplishing this, but doubts persist that Russia would agree to that, and whether that ultimately happens would depend on a variety of factors.

After the First Gulf War, the Security Council created The United Nations Compensation Commission (UNCC) to compensate those suffering damages as a result of Iraq's invasion of Kuwait, and the funds were to come from Iraqi oil revenues.<sup>307</sup> After the Iraqi invasion of Kuwait, the Security Council in a resolution condemning the invasion, stated clearly "that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq."<sup>308</sup> It was adopted by thirteen votes, with only Cuba and Yemen abstaining. The USSR was a member then and voted for state responsibility in the event of unlawful aggression toward a neighboring state. Russia seems to have forgotten.

The UNCC received and evaluated claims and disbursed monies to victims, then was dissolved in 2022 by the Security Council.<sup>309</sup> While it

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<sup>305</sup> Concerning the Factory at Chorzow (Ger. v. Pol. Rep.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26).

<sup>306</sup> Blank, *supra* note 304.

<sup>307</sup> S.C. Res. 687, ¶¶ 16–19 (Apr. 3, 1991).

<sup>308</sup> S.C. Res. 674, ¶ 8 (Oct. 29, 1990).

<sup>309</sup> S.C. Res. 2621, ¶ 8 (Feb. 22, 2022).

is unlikely that the Security Council could create such a commission in this case given Russia's veto power, the general assembly presumably could under Article 14 of the charter. The international community, through a multilateral treaty, could create such a commission, but it would be fraught with difficulties both in amassing the funds necessary and in enforcing its will on Russia. It could be accomplished through judicial process. Providing there is jurisdiction, the International Court of Justice could award compensation. The International Criminal Court could do so in a criminal proceeding.<sup>310</sup>

It is unlikely that Russia would consent to jurisdiction before the International Court of Justice, but the general assembly could presumably ask it for an advisory opinion, as it has in the past. Such request could be to examine the invasion of Ukraine and to determine whether there have been any violations of international law. While it likely would not issue—or could not enforce—any order that guilty parties pay compensation, at least a finding could make it clear to the international community that such actions as those taken by Russia are condemned by the court.

Domestic criminal courts could award compensation, and civil lawsuits for damages in domestic courts could do the same. Surely, many cases will be filed in Ukrainian courts. Indeed, as already mentioned, more than one Russian soldier has already been tried and convicted of war crimes by Ukrainian courts.<sup>311</sup>

States, especially Ukraine, can institute legal proceedings in its domestic courts against the Russian Federation and specific state actors, including its president, for damages, money to compensate victims, and to help rebuild the destruction caused by the war. States could also presumably institute proceedings to compensate them for taking care of refugees caused by the war. But where does the money come from? European countries have seized around US\$1 billion worth of Russian

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<sup>310</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, art. 75, U.N. DOC. A/CONF.183/9 (July 17, 1998).

<sup>311</sup> Valerie Hopkins, *2 Russian Soldiers Sentenced in Ukrainian War-Crimes Trial*, N.Y. TIMES (May 31, 2022), <https://www.nytimes.com/2022/05/31/world/russian-soldiers-war-crimes-trial.html> [<https://perma.cc/S23S-EKZ3>]; See also Rachel Treisman, *A Russian Soldier Is Sentenced to Life in Prison in Ukraine's First War Crimes Trial*, NPR (May 23, 2022), <https://www.npr.org/2022/05/23/1100664381/vadim-shishimarin-life-sentence-war-crimes-trial> [<https://perma.cc/3CM5-DPUY>].

assets.<sup>312</sup> Additionally, more than half of Russia's foreign reserves, worth over US\$284 billion, have been frozen by various countries.<sup>313</sup>

Certainly, if Russia agrees to compensation, it will simply be up to the Russian state to figure that out. Given the current situation on the ground, that is unlikely to happen. What if that does not happen? Some in the United States have argued that the billions in frozen assets should be used,<sup>314</sup> citing both the International Emergency Economic Power Act of 1977 of the United States,<sup>315</sup> and a few prior actions by United States presidents. But that law in section 1702(c) only allows the president to confiscate funds "when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals."<sup>316</sup> So unless one could get a court to agree that Russian cyberattacks are an "attack" under the statute, that would not likely work.<sup>317</sup>

However, as recently as February of 2022, the International Court of Justice ordered Uganda to pay compensation for its invasion and occupation of parts of the Democratic Republic of the Congo.<sup>318</sup> The notion that states are responsible for their actions and must compensate aggrieved states therefore is still a currently valid principle of international law.

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<sup>312</sup> Greg Heilman, *What Are the Main Money Accounts Seized from the Russian Government?*, AS (Mar. 18, 2022), [https://en.as.com/en/2022/03/19/latest\\_news/1647644948\\_220545.html](https://en.as.com/en/2022/03/19/latest_news/1647644948_220545.html) [<https://perma.cc/Z9FY-DNAX>].

<sup>313</sup> Monica Hersher & Joe Murphy, *Graphic: Russia Stored Large Amounts of Money with Many Countries. Hundreds of Billions of it Are Now Frozen*, NBC NEWS (Mar. 17, 2022), <https://www.nbcnews.com/data-graphics/russian-bank-foreign-reserve-billions-frozen-sanctions-n1292153> [<https://perma.cc/B26E-AFFG>].

<sup>314</sup> Laurence H. Tribe & Jeremy Lewin, *\$100 Billion: Russia's Treasure in the U.S. Should Be Turned Against Putin*, N.Y. TIMES (Apr. 15, 2022), <https://www.nytimes.com/2022/04/15/opinion/russia-war-currency-reserves.html> [<https://perma.cc/A4HP-3C58>]; Simon Johnson & Oleg Ustenko, *A Basic Income for Ukrainians, Paid for with Frozen Russian Assets*, POLITICO (Mar. 2, 2022), <https://www.politico.com/news/magazine/2022/03/02/frozen-russian-assets-humanitarian-relief-00013286> [<https://perma.cc/WL6P-2SMC>].

<sup>315</sup> 50 U.S.C. § 1701.

<sup>316</sup> 50 U.S.C. § 1702(a)(1)(C).

<sup>317</sup> See Andrew Boyle, *Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets Are Legally Unavailable*, JUST SECURITY (Apr. 18, 2022) <https://www.justsecurity.org/81165/why-proposals-for-u-s-to-liquidate-and-use-russian-central-bank-assets-are-legally-unavailable/> [<https://perma.cc/8436-98PH>]; see also Paul Stephan, *Giving Russian Assets to Ukraine—Freezing Is Not Seizing*, LAWFARE (Apr. 26, 2022), <https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing> [<https://perma.cc/NNH4-L4ZH>].

<sup>318</sup> Int'l Ct. Just., *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, <https://www.icj-cij.org/case/116> (last visited Apr. 4, 2023).

The world is, it seems, at a crossroad. States can choose to work on fixing some of the most acute problems that have plagued mankind for millennia. Those problems are exacerbated as years wobble on and weapons grow ever more destructive. The record has not been good in this matter. Will states do, as they have often done, and simply sweep the current conflict under the rug, forget about it, and blunder on, waiting for the next flare-up and hope that it will not give rise to nuclear world-wide conflagration?

At least one Russian commentator believes that President Putin “is deluding the people, that it can turn Russia into a self-sufficient, self-isolating, expansionist rogue state, based on the idea of Russian superiority over other nations.”<sup>319</sup> Indeed, there seems little difference in what the Russian president has done in Ukraine from the motivations that started the conflagration of World War II: unbridled nationalism and a desire to either create or to “restore” lost visions of empire. Accordingly, many believe that President Putin will not stop with Ukraine if he is victorious there. Certainly, if Putin sees himself to have succeeded in getting away with this invasion without much real retaliation or push-back—as he did on more than one occasion already—he will continue emboldened,<sup>320</sup> believing that the constraints of international law, as understood by most, do not apply to Russia. Some believe that this will cause more than one

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<sup>319</sup> Andrei Kolesnikov, *Russians at War: Putin's Aggression Has Turned a Nation Against Itself*, FOREIGN AFFS. (Apr. 18, 2022), [https://www.foreignaffairs.com/articles/russian-federation/2022-04-18/russians-war?utm\\_medium=newsletters&utm\\_source=fatoday&utm\\_campaign=Russians%20at%20War&utm\\_content=20220418&utm\\_term=FA%20Today%20-%20112017](https://www.foreignaffairs.com/articles/russian-federation/2022-04-18/russians-war?utm_medium=newsletters&utm_source=fatoday&utm_campaign=Russians%20at%20War&utm_content=20220418&utm_term=FA%20Today%20-%20112017) [https://perma.cc/KZU5-2358]; Andrei Kolesnikov is a Senior Fellow at the Carnegie Endowment for International Peace. It is debated whether there is dangerous (to Putin) dissent among the top Kremlin leaders. *See, e.g.:*

The war started with Putin holding a televised security council meeting in which he humiliated Sergei Naryshkin, the chief of the foreign intelligence service, for insufficient enthusiasm about the invasion. Two weeks later, with Russian forces facing high casualties and unexpected resistance, Putin placed two generals of Russia's Federal Security Service (FSB) under house arrest and began an investigation into bad intelligence and the misuse of funds designated for cultivating pro-Kremlin groups in Ukraine. He also forced a deputy commander of the National Guard to resign, apparently because of a criminal investigation. In early April, one of the FSB generals who had been placed under house arrest was transferred to Lefortovo prison.

Andrei Soldatov and Irina Borogan, *Could the Siloviki Challenge Putin?* FOREIGN AFFS. (Apr. 11, 2022), <https://www.foreignaffairs.com/articles/russian-federation/2022-04-11/could-siloviki-challenge-putin> [https://perma.cc/DV66-X7B2].

<sup>320</sup> Thomas Kika, *Russia Expert Warns of Putin Expanding War Beyond Ukraine as Donbas Pounded*, NEWSWEEK (June 11, 2022), <https://www.newsweek.com/russia-expert-warns-putin-expanding-war-beyond-ukraine-donbas-pounded-1714953> [https://perma.cc/L4W5-BE2E].

other state to strive for nuclear weapons, since they will see it to be a necessary defensive mechanism when States can invade them with impunity if they do not have such weapons.<sup>321</sup> This would, says *The Economist*, make a future nuclear war more likely, whatever Putin chooses to do this time.<sup>322</sup>

In domestic law, or what international lawyers call “municipal law,” if someone breaks the law, there is a remedy, and it is typically meted out, whether it be damages in tort, or a fine or imprisonment—or in some states, death—in criminal cases. Law creates predictability, but when law breaks down, very little is predictable. Living in an unpredictable world is uncomfortable for most of us.

Certainly not all states condemn the Russian action in Ukraine and many have not sided with NATO and the EU either in condemning the invasion, imposing economic sanctions on Russia, or providing aid, either in the way of military equipment or otherwise to the Ukrainian defenders or its general population.<sup>323</sup> But it is unlikely that the great majority of states will be happy at the prospect of tearing the international legal order asunder, of reverting to the eighteenth century notions of conquest, where neighbors can attack neighbors at will and capture territory, subjugating its inhabitants as they please. A world where states are permitted to attack one another with impunity, murdering people at will just because they can, is not a pleasant thing to contemplate, even by those who might not condemn Russia’s current actions in Ukraine. If the Russian invasion either is successful or is permitted to go with impunity, then that will very likely re-order the rule of law as the world has known it since the end of World War II. China may be encouraged to follow through with its continual threat to attempt a military takeover of Taiwan. After all, who will stop it, and who will long remember its actions if it is successful?

If the reporting is true, Russia is guilty of war crimes in Ukraine. Of course, the rule of law—and the concept of natural law—tells us that everyone is innocent until proven guilty, or *nulla poena sine culpa*. Accordingly, all of the alleged perpetrators, and the alleged mastermind of the aggression are entitled to—and should receive—a fair trial. If prosecutors believe that a crime or crimes have been committed, they should be indicted and tried. The law and simple fairness require it. The

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<sup>321</sup> *A New Nuclear Era*, THE ECONOMIST, June 4, 2022, at 9.

<sup>322</sup> *Thinking the Unthinkable*, THE ECONOMIST, June 4, 2022, at 16.

<sup>323</sup> Howard W. French, *Why the World Isn’t Really United Against Russia*, FOREIGN POL’Y (Apr. 19, 2022), <https://foreignpolicy.com/2022/04/19/russia-ukraine-war-un-international-condemnation/> [https://perma.cc/BTH5-5PTU].

trouble is that—despite the fact that the Nuremberg tribunal of the late 1940s set the standard for the prosecution of war crimes, and many have subsequently been prosecuted, but all that notwithstanding as a practical matter—the chances that the perpetrators in this case, especially the very high-ranking ones, will be brought to justice are not great.

“Perpetrators almost never arrive in the dock unless they are delivered there by the victors in a war or power struggle that has deposed them.”<sup>324</sup> So long as a government remains in power, even proven war crimes against them are little more than symbolic. Many such crimes have gone unpunished. The powerful who remain powerful are, for all intents and purposes, immune.<sup>325</sup> Ukraine’s president, Volodymyr Zelensky, after asking the United Nations for assistance in stopping the aggression with no success, told the Security Council: “dissolve yourself altogether.”<sup>326</sup>

There are a number of problems with the way international law either works or not, is either respected or not today. One major problem is that when one state or set of states accuses a law breaker but has engaged in similar activities themselves. Another is that of “interpretations” of the law of self-defense, and the apparent freedom of interpretation.

Of course, since the Article 51 exception of self-defense is the only exception to the prohibition of the use of force, there is little wonder that states are creative in their interpretation.<sup>327</sup> It is also not surprising that other states object to those interpretations. Some states take a positivist approach and argue that they are bound strictly by what they agreed to, and no more, that is, to the precise language of the Charter of the United Nations and provable customary international law.<sup>328</sup>

Others take what some have called a purposive, goal-directed or policy-oriented approach. They say that the charter was created in a different era,<sup>329</sup> and the impunity of five members of the Security Council, along with their veto power, negates many things that the very charter of the United Nations stands for. Additionally, and along these lines, there is the controversial concept of humanitarian intervention, or Responsibility

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<sup>324</sup> Max Fisher, *Why Calls for War Crimes Justice Over Ukraine Face Long Odds*, N.Y. TIMES (Apr. 10, 2022), <https://www.nytimes.com/2022/04/10/world/europe/russia-ukraine-war-crimes.html> [https://perma.cc/V999-9JZW].

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> CHENKIN & KALDER, *supra* note 252, at 134; GRAY, *supra* note 63, at 120.

<sup>328</sup> CHENKIN & KALDER, *supra* note 252, at 134.

<sup>329</sup> *Id.* at 134–35.

to Protect (R2P),<sup>330</sup> in violation of the old norm of state sovereignty. It remains controversial, since unless there is Security Council sanction, such action would be a violation of the prohibition of the use of force appearing in the charter. However, the Independent International Commission on Kosovo determined that the bombing campaign carried out by NATO was illegal but legitimate.<sup>331</sup> An example of Security Council sanctioning R2P operations is the bombing of Colonel Gaddafi's forces by NATO was sanctioned by the Security Council in order to protect the civilian population from gross violations of human rights that Gaddafi was inflicting.<sup>332</sup>

As for the February invasion of Ukraine, the world should have seen this coming, and the world community needs to do better in enforcing the law. Currently the world simply does not enforce the law to which it gives lip service. States should be serious when they use the word law. Traffic lights under domestic law are not simply suggestions, neither should international rules be suggestions. The leaders of the world community need courage and political will, both of which are currently in short supply.

The world must do much better, and as the philosopher William Macaskill, from Oxford University recently said in *Foreign Affairs*, “Staving off the risk of World War III while also achieving unprecedented innovations in international governance is a tall order.”<sup>333</sup>

We must walk a tightrope. We must ensure that global cooperation reduces the risk of global catastrophe . . . while maintaining the

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<sup>330</sup> Responsibility to Protect means

Clear and unambiguous acceptance by all governments of the collective international responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Willingness to take timely and decisive collective action for this purpose, through the Security Council, when peaceful means prove inadequate and national authorities are manifestly failing to do it.

Fact Sheet, 2005 World Summit Outcome. From High Level Plenary Meeting, Sept. 14–16, 2005; *See What Is R2P?*, GLOB. CENTRE FOR THE RESP. TO PROTECT, <https://www.globalr2p.org/what-is-r2p/> (last visited Mar. 24, 2022) [<https://perma.cc/DYH8-T6YX>]; *see also R2P and the UN*, UNITED NATIONS, <https://www.un.org/en/chronicle/article/r2p-and-un> [<https://perma.cc/7J7J-D7F2>] (last visited Mar. 24, 2022).

<sup>331</sup> THE INDEP. INT’L COMM’N ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 290 (2000). This was a commission established by the government of Sweden after the Kosovo War to assess the bombing and the capability of international law and institutions to deal with such conflicts as occurred in Kosovo.

<sup>332</sup> S.C. Res. 1973, § 4 (Mar. 17, 2011).

<sup>333</sup> William Macaskill, *The Beginning of History: Surviving the Era of Catastrophic Risk*, FOREIGN AFFS. (Aug. 11, 2022), <https://www.foreignaffairs.com/world/william-macaskill-beginning-history> [<https://perma.cc/HD69-QCTZ>].

freedom and diversity of thought and social structures that would enable us to build a future that our grandchildren's grandchildren would thank us for. Contemplating large-scale political change is daunting, but past innovations in governance, such as the UN system and the EU, provide reasons for hope.<sup>334</sup>

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<sup>334</sup> *Id.* at 24.

