

INTERNATIONAL LAW GOES TO WAR IN UKRAINE

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“My plan for today is to put the current war in Ukraine into historical context. I will begin by explaining what the world used to look like under what I will call the Old World Order. I will then explain how the world transitioned from the Old World Order to the New World Order. Finally, I will turn to the current war in Ukraine. I will discuss what we have learned about the challenges that the war poses to the current global legal order and what impact it has had so far.

“First, the Old World Order. Here, my remarks draw on *The Internationalists*, a book I co-authored with my colleague Scott Shapiro.¹ The book examines how we came to have the global legal order that we have, and it puts our current global order into historical perspective. One of the key figures in the book is Hugo Grotius. If you are an international lawyer, you have likely heard of Hugo Grotius. There are named lectures for Hugo Grotius, statues of Hugo Grotius, and awards named after him. He is sometimes known as the ‘father of international law.’ And if you know anything about Grotius, you probably know that he is best known for his Just War theory.

“We tried to show in the book that Grotius’s idea of a just war is very different from what we would think of as a just war today. In Grotius’s view, a just war was a war that was undertaken to right a wrong. War was a permissible remedy for wrongdoing, in his telling: ‘[W]ar is just for the very reason that it tends toward the attainment of rights; and in seizing prize or booty, we are attaining through war that which is rightfully ours.’² A central idea of his work

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¹ OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017). Much of the description of the history in this piece is based on *The Internationalists*.

² HUGO GROTIUS, *DE JURE PRAEAE COMMENTARIUS [COMMENTARY ON THE LAW OF PRIZE AND BOOTY]* 68 (Gwladys L. Williams trans., Oxford at the Clarendon Press 1950) (1604).

was that states could wage war to right wrongs. Doing so was lawful and legitimate.

“It was not just that Hugo Grotius said that states could wage war to right wrongs. States actually did so. We gathered hundreds of war manifestos that states used to issue when they would go to war.³ These war manifestos were often quite flowery statements laying out the justifications for war in an effort to explain it to their own people and sometimes to foreign adversaries and other states. States used the manifestos to explain the wrong that they were trying to right through war. Some of the reasons they gave are familiar. In particular, self-defense was a justification they often gave, and that justification is still a lawful reason for going to war, although what they counted as self-defense was much broader than what is lawfully permitted as self-defense under the U.N. Charter today.⁴ Indeed, most of the reasons states commonly gave for going to war would not be accepted as lawful today.

“For example, states went to war to ‘defend the true religion,’ respond to law of war violations, seek compensation for tortious wrongs, or enforce treaty obligations, to name just a few. That last justification is very interesting from an international lawyer’s perspective because people commonly argue that international law is not enforced and therefore it is not law. But back in the Old World Order, treaties could be enforced—with war. As we are going to see in a moment, it is *international law itself* that is the reason that war can no longer be used to enforce treaties. Ironically, then, international law is the source of its own challenges today.

“In the Old World Order, the privilege to use force lay at the core of the international legal order, and all the other rules of the international legal order logically followed from that core principle. I will outline the four key rules that defined the Old World Order, each of which flowed from this central principle.

“First, if war is legal, then conquest is legal. Consider, for example, the U.S. war against Mexico, in which the United States seized much of what is now the Southwest of the United States from Mexico. The legal justification the United States gave for launching the war was debt collection. Mexico owed the United States a lot of money: some of it because Mexico had forfeited on various

³ Oona A. Hathaway, William Holste, Scott J. Shapiro, Jacqueline Van De Velde, Lisa Wang, *War Manifestos Database* (2017), <http://documents.law.yale.edu/manifestos>.

⁴ U.N. Charter art. 51. For more on war manifestos, see Oona Hathaway et al., *War Manifestos*, 85 CHICAGO L. REV. 1139 (2018).

obligations, some of it because there had been torts of various kinds, including seizures of U.S. citizens' property for which the Mexican government was being held responsible. There was a formal arbitration and Mexico agreed that it would pay off its debts. Mexico made the first few payments and then defaulted. That failure to pay was the lawful justification for the war. At the end of the war, the United States lawfully seized land from Mexico as repayment for the debt, plus the cost of collection—the war itself. Because the United States took a bit too much land, it paid Mexico twenty million dollars. To be clear, this conquest is utterly reprehensible from our modern-day perspective. But it is important to understand that, at the time it happened, this was considered a lawful action to right the wrong of Mexico's failure to pay its debts.

“Second, if war is legal, then gunboat diplomacy is legal. Commodore Matthew Perry, fresh off of the war with Mexico, was ordered to go to Japan by the U.S. Congress.⁵ Japan had been closed to nearly all foreign trade for over two hundred years.⁶ At the time, the United States was dependent on British-held ports, in particular Hong Kong. Congress wanted Perry to negotiate a treaty of friendship and navigation with Japan so that the United States would have access to ports in Asia that were not controlled by the British.⁷ This ‘treaty of friendship’ was not optional. Perry showed up with modern steamships. Because Japan had been closed for hundreds of years to outside commerce, most people in Japan had never seen a steamship before. He made clear that if Japan did not sign a treaty, he would attack Edo, which is now known as Tokyo. The shōgun's chief minister signed the treaty on Japan's behalf only after concluding that there was no other choice.

“That type of gunboat diplomacy was common at the time. Many treaties were negotiated at the point of a gun, and those treaties were considered lawful. They could be enforced with armed force. If a state entered a treaty and it then failed to comply with it, war was a lawful remedy.

“Third, if war is legal, then there cannot be a ‘crime of aggression.’ After World War I, there was a brief effort to hold Kaiser Wilhelm II criminally responsible for launching the war. Yet the Dutch would not hand him over. They argued that trying him criminally was not lawful because there was no such thing

⁵ *The United States and the Opening to Japan, 1853*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1830-1860/opening-to-japan> (last visited June 6, 2024).

⁶ *Id.*

⁷ *Id.*

as a crime of aggression. The waging of an aggressive war was not a criminal act. So, they refused to turn him over.

“Fourth, if war is legal, states cannot favor either side if they wish to remain neutral. In order to maintain neutrality, states have to remain completely impartial. They cannot favor one side. They cannot put in place trade sanctions against an unlawful aggressor. To begin with, there is no such thing as an unlawful aggressor if war is legal. A state that puts sanctions on one side in a war violates its obligations as a neutral. It therefore has wronged the side that it disadvantaged; that state can now use war as a means of righting the wrong against it.

“President Woodrow Wilson emphasized the importance of impartiality during World War I, before the United States entered the war. He declared:

The United States must be neutral in fact, as well as in name, during these days that are to try men’s souls. We must be impartial in thought, as well as in action, must put a curb upon our sentiments, as well as upon every transaction that might be construed as a preference of one party to the struggle before another.⁸

The obligation of impartiality was so strong that he suggested Americans should not even think partial thoughts, lest they risk violating the United States’ obligations of neutrality.

“These four rules do not reflect how the world works today. We are living in a very different international legal order, what I will call the New World Order. That New World Order came about as a result of the decision to outlaw war.

“There is a figure that we talk about in *The Internationalists*, Salmon O. Levinson. Levinson was a bankruptcy lawyer in Chicago. He did not have any kind of formal government position. He just had a deep conviction. He had two sons who fought in World War I and he desperately wanted to bring the scourge of war to an end. He got the idea of not just regulating war, but outlawing war. He wrote that ‘The real disease of the world is the legality and availability of war We should have, not as now, laws *of* war, but laws *against* war; just as

⁸ Woodrow Wilson, An Appeal by the President of the United States to the Citizens of the Republic, Requesting Their Assistance in Maintaining a State of Neutrality During the Present European War (Aug. 19, 1914) in S. DOC. NO. 566–63, at 3–4 (1914).

there are no laws *of* murder or *of* poisoning, but laws *against* them.”⁹ He formed a movement to support this cause. He started writing to people who he knew. He wrote for the *New Republic*. He formed a non-governmental organization that he funded with his own money. He fought for the idea of outlawing war for over a decade.

“His efforts eventually led to the Kellogg-Briand Pact of 1928. If you have heard of the Kellogg-Briand Pact, it is probably as an example of the ridiculousness of international law. How could those who proposed this treaty possibly believe they could outlaw war? And was it not obviously a complete failure, given that a second world war erupted just over a decade later?

“We argue in the book that this is a misunderstanding of what the treaty accomplished. At the time, it was the most ratified treaty in the world, even though it was a radical rejection of the way in which the world had long operated. By ratifying the treaty, states renounced the use of war as a lawful means to right wrongs. But the mistake that the treaty’s advocates made was that they did not understand how much rested on the privilege to use force. They did not quite fully appreciate that when they pulled the rug out from under the international system and replaced the permission to use force with a prohibition on it, so much else had to change.

“The story of the period from the ratification of the Kellogg-Briand Pact until World War II is a story of figuring out what the rules would have to look like in order for the international legal system to make some sense. As I have explained, the Old World Order placed the privilege to use force at its core and all the rest of the rules logically followed from it. The New World Order replaced that core rule with its opposite. As a result, everything else had to flip on its head.

“The advocates of peace quickly discovered how much they had to work out. Japan and China had both signed the Pact and yet in 1931, in clear violation of the Kellogg-Briand Pact, Japan invaded Chinese Manchuria. Japan owned and operated a railway that ran through Chinese Manchuria. The Japanese claimed that Chinese brigands had set a charge on this railway. In fact, it later turned out that it was low-level Japanese troops that had done it in an effort to provoke a war, which they succeeded in doing. Japan took over all of Manchuria and tried to set up a puppet government. The world was faced with the challenge of how

⁹ Letter from Salmon O. Levinson to Jacob Schiff (Aug. 25, 1917) (on file with the University of Chicago Library), *quoted in* OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 108 (2017).

to respond. The old answer to how states would respond to a violation of a treaty is that they would go to war. After all, that is how treaties were enforced in the Old World Order. But how do you enforce a treaty *not to go to war*? You cannot very well go to war to enforce a treaty that prohibits states from going to war.

“The answer they came up with was the idea of non-recognition. You may have studied the Stimson doctrine in high school history. Henry Stimson, who at the time of Japan’s invasion of Manchuria was the Secretary of State, issued identical notes to Japan and China. In them, he stated that the United States would not ‘recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris.’¹⁰ (The Pact of Paris is another name for the Kellogg-Briand Pact.) Thus, he made clear that the United States was not going to recognize the conquest because the land had been seized in violation of the Pact of Paris.

“This was a major shift. It used to be if a state conquered territory, that land became part of the conquering state. Conquest was common. If you look at maps over history, you will see the lines constantly changing; states are constantly seizing land from one another. So, this was a pretty radical to move to say that the United States is not going to recognize the conquest of Manchuria and that Manchuria remains Chinese territory in the United States’ view. And it was not just the United States; the League of Nations very quickly followed suit.

“As a result, where there had once been a right of conquest, it was now replaced with the opposite: no right of conquest. As a result, force could no longer create a legal right to land.

“Next let us turn to gunboat diplomacy. In the identical notes that Stimson sent to Japan and China, he said the United States is also not going to recognize a *treaty or agreement* brought about by means contrary to the Pact of Paris. This is a rejection of gunboat diplomacy, a rejection that was reinforced in the Vienna Convention on Law of Treaties. Article 52 says, a ‘treaty is void if its conclusion has been procured through threat or use of force . . .’¹¹ Today we take that for granted, but if you look at the commentary to the early draft of the Vienna Convention authored by Hersch Lauterpacht, he explains that this prohibition on

¹⁰ Letter from Henry Stimson, U.S. Sec’y of State, to Japan and China (Jan. 7, 1932), in *The Stimson Note of January 7, 1932*, 26 AM. J. INT’LL. 342, 48 (1932).

¹¹ Vienna Convention on the Law of Treaties art. 52, May 23, 1969, 1155 U.N.T.S. 331.

coerced treaties was necessary because war was outlawed.¹² He explained that since it was unlawful to enforce legal rights using war, it was therefore also unlawful to use force to compel states to enter treaties. So, where gunboat diplomacy used to be perfectly legal and legitimate, gunboat diplomacy was no longer lawful thanks to the decision to outlaw war.

“The next piece of the puzzle is neutrality. In the Old World Order, neutrality required impartiality. In the early days of World War II, when the United States was not yet a party to the war, the United States wanted to support the Allies through the Lend Lease program. However, it did not want to become party to the conflict. Attorney General Robert Jackson, who later became a Supreme Court Justice and was a prosecutor at Nuremberg, said that providing support would not violate neutrality because neutrality no longer required impartiality: ‘The Treaty for the Renunciation of War [Kellogg-Briand Pact] . . . by altering fundamentally the place of war in international law, ha[s] affected a parallel change in the law and status of neutrality.’¹³ Jackson recognized that this rule, too, flipped to its opposite as a result of the decision to outlaw war. Whereas neutrality used to require complete impartiality, now neutrality permitted partiality.

“The final piece of the puzzle is the crime of aggression. As World War II was winding down, there was the question of whether the allies could criminally prosecute the Germans and Japanese for waging the war. Recall that at the end of World War I, it was determined that the Kaiser could not be tried for the crime of waging an aggressive war. Had anything changed? The answer was, yes, something important had changed: the world had outlawed war. Indeed, the first count of the Nuremberg Indictment specifically stated, ‘[a]ll these invasions had been specifically planned in advance, in violation of the terms of the Kellogg-Briand Pact of 1928.’¹⁴ This is a linchpin on which the Nuremberg trials relied,

¹² See Hersch Lauterpacht, *Law of Treaties*, [1953] 2 Y.B. INT’L L. COMM. 148, 149, U.N. Doc. A/CN.4/SER.A/1953/ADD.1 (“[I]n so far as war or force or threats of force constitute an internationally illegal act, the results of that illegality—namely a treaty imposed in connection with or in consequence thereof—are governed by the principle that an illegal act cannot produce legal rights for the benefit of the law-breaker.”).

¹³ Robert H. Jackson, Address of Robert H. Jackson, Attorney General of the United States (March 27, 1941), in 35 AM. J. INT’L L. 348 (1941).

¹⁴ Indictment, United States et al. v. Hermann Wilhelm Goering et al., Int’l Mil. Trib. (1946), in *Nuremberg Trial Proceedings, Volume 1*, THE AVALON PROJECT, <https://avalon.law.yale.edu/imt/count1.asp> (last visited June 7, 2024).

(“[T]he aggressive war prepared for by the Nazi conspirators through their attacks on Austria and Czechoslovakia was actively launched by their attack on Poland. . . . [T]hey caused the German armed forces to invade Denmark and Norway on 9 April 1940; Belgium, the Netherlands, and Luxembourg on 10 May 1940;

making it possible to hold the Nazis responsible for their aggressive war. Thus, where there had once been a license to kill, now aggression could be criminally prosecuted.

“You might wonder what all of this has to do with our current moment. We do not talk about the Kellogg-Briand Pact anymore, but these ideas are the foundation on which the United Nations Charter is built. When we talk about the United Nations Charter today, we tend to forget this pre-history. But this history is essential to understanding the Charter. Without the Kellogg Briand Pact, you would not have Article 2(4), which prohibits states from resorting to the use of force against other states.¹⁵ Indeed, as we explain in the book, the very same person who ghost-wrote the Kellogg-Briand Pact also wrote the first draft of the UN Charter—James T. Shotwell.

“This brings us to the war in Ukraine. The war of aggression by Russia in Ukraine today is the most fundamental challenge to the modern international legal order since World War II. Understanding the history of the prohibition on war is critical to understanding why this invasion is such a deep challenge to the modern legal order. The prohibition on war, after all, is not just one rule among many. It is the foundational principle of the modern legal order.

“On February 24, 2022, Russia invaded Ukraine and very quickly gained ground. Many predicted that this war would be over in days. Some commentators quickly proclaimed that this was the end of the global legal order.

“That was premature. We still do not know how the war is going to end. This war presents the greatest challenge to the global legal order that we have seen since World War II. However, it is important to remember that it is not just the violation that matters, but the response. With law, we do not just ask whether we can point to violations. In domestic law, we would not say, ‘well, because people steal things, there is no point in having laws prohibiting theft.’ We say, ‘people do not always get caught, but when they do get caught, there are consequences.’ And so the question is, what follows from the violation? What are the consequences of the violation? What follows?

Yugoslavia and Greece on 6 April 1941. All these invasions had been specifically planned in advance, in violation of the terms of the Kellogg-Briand Pact of 1928.”)

¹⁵ U.N. Charter art. 2(4) (“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.”).

“There are four ways in which the world has responded to the war in Ukraine. These responses suggest that international law has proven to be Ukraine’s greatest weapon in its effort to defend itself against Russia.

“First, condemnation. Around the globe, the world gathered to condemn the war. On March 2, 2022, the U.N. General Assembly passed a resolution denouncing the war, condemning the Russian invasion as a violation of international law and as a violation of the Charter.¹⁶ The resolution specifically identified that this war was a violation of Article 2(4) of the U.N. Charter. So it was not just deploring it or expressing concern. 141 states voted in favor and only five against, an overwhelming vote in favor. There have been several additional resolutions since then, and most have maintained the same margins, with a few exceptions.

“Second, outcasting. This draws on some work that I have also done with Scott Shapiro that predates our book together. We developed a theory that when states violate international law, the remedy is what we call ‘outcasting.’¹⁷ International law does not generally rely on the use of military force to enforce its rules because the use of force is generally prohibited. Instead, international law relies on withdrawing the benefits of cooperation from states that violate international law. A quick example to make this a little bit more concrete: if a state puts in place an unlawful tariff, the remedy is not to send in the World Trade Organization’s army, because there is none. Instead, a state that is harmed can bring a case to the WTO dispute settlement body. If it finds that the other side violated the rules, then it can authorize what is called a countermeasure. A countermeasure is basically a right to violate the rules in response. So, if a state puts in place an unlawful tariff, the state that is harmed might be allowed to put in place a tariff that would otherwise be an unlawful back unless and until the first state ceases its violation. That response is a lawful countermeasure. The state that broke the law in the first place is deprived of the benefits to which it would otherwise be entitled because it has broken the rules. That is a countermeasure. Countermeasures are very common in international law enforcement.

¹⁶ See G.A. Res. ES-11/1, at 2 (Mar. 18, 2022).

¹⁷ Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement of Domestic and International Law*, 121 *YALE L. J.* 252 (2011).

“There have been massive economic sanctions put in place against Russia since its invasion of Ukraine.¹⁸ There have been a number of other consequences for Russia for its illegal war. For example, Russia has been excluded from the Council of Europe,¹⁹ as well as the Human Rights Council,²⁰ in return for its violation of the Charter. The decision to exclude Russia from the Council of Europe was pretty extraordinary. Russia has been the subject of cases in the European Court of Human Rights for years. In fact, more than half of its docket has been cases against Russia. Yet Russia had not been expelled for the many violations that it had engaged in. Here, finally, the Council of Europe said, ‘Enough. You have so fundamentally violated the core obligations of international law that we are suspending your membership.’

“Third, assisting. In addition to penalizing Russia through outcasting, the allies of Ukraine have armed and financed Ukraine. They have sent military aid and money. All of this is enabled by the fact that the General Assembly condemned the war as illegal. If it were not for that, I think states would not have the confidence to provide such ongoing substantial support—to send arms, tanks, and ammunition. This support is the key reason that Ukraine has been able to stand up to the assault from its much larger and better resourced neighbor. If it were not for this support, it would almost certainly have collapsed long ago.

“Fourth, prosecuting. The International Criminal Court (ICC) has opened an investigation into the situation in Ukraine. Ukraine is not a party to the ICC, but it granted jurisdiction to the ICC back in 2014. The prosecutor is investigating crimes against humanity, war crimes, and genocide.²¹ The ICC has already issued an arrest warrant for Putin for his role in the unlawful transfer of children from occupied areas of Ukraine. Many more charges are likely coming.

“The ICC is not able to investigate the crime of aggression even though that crime is one of the four crimes under its jurisdiction. That is because jurisdiction over the crime of aggression is limited to states that are a party to the Rome

¹⁸ Chad P. Brown, *Russia's War on Ukraine: A Sanctions Timeline*, PETERSON INST. FOR INT'L ECON. (Dec. 21, 2023, 11:00 AM), <https://www.piie.com/blogs/realtime-economic-issues-watch/russias-war-ukraine-sanctions-timeline>.

¹⁹ *The Russian Federation is Excluded from the Council of Europe*, COUNCIL OF EUR. (Mar. 16, 2022), <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>.

²⁰ *UN General Assembly Votes to Suspend Russia from the Human Rights Council*, UN NEWS (Apr. 7, 2022), <https://news.un.org/en/story/2022/04/1115782>.

²¹ Mike Corder & Raf Casert, *International Criminal Court Issues Arrest Warrant for Putin over Ukraine War Crimes*, PBS (Mar. 17, 2023, 1:45 PM), <https://www.pbs.org/newshour/world/international-criminal-court-issues-arrest-warrant-for-putin-over-ukraine-war-crimes>.

Statute (the treaty that creates the ICC) that have accepted the relevant amendments. There have been some efforts to create a Special Tribunal to try the Crime of Aggression.²² Part of the reason I think creating such a court matters is that aggression is in many ways the fundamental crime. It is the crime without which the others would not exist. If it were not for the unlawful war, you would not have the crimes against humanity. You would not have the war crimes. You would not have the genocide. You would not have any of the other crimes without that initial unlawful act. To fail to provide accountability for the crime of aggression is a big loss, particularly given the fundamental role that the prohibition on war plays in the international legal order.

“This brings me to the challenges to the global legal order that the war in Ukraine has revealed. Without having international law on its side, I think Ukraine would not still exist as an independent country. Nonetheless, there are a lot of challenges that have arisen in the conflict.

“One challenge is to the effectiveness of the sanctions as a tool of international law enforcement. I mentioned there are all these sanctions in place. Hundreds of billions of Russian central bank assets are frozen. Russian firms are banned from being able to do business as usual, and there is an effort to bend the long-term cost curve by refusing to provide technology that is important to the long-term growth of the Russian economy. Yet this has been undercut by the fact that there are a number of countries that have *increased* their trade with Russia, even as the European Union and Western countries have put in place sanctions.

“China and India in particular have increased their imports of Russian oil, which has brought significant amounts of money into Russia’s reserves and allowed it to counter some of the losses it would otherwise suffer.²³ China and India are getting lower priced oil in exchange. Although very few countries will sell arms to Russia, North Korea and Iran have filled some of that gap. Indeed, one of the weaknesses of outcasting as a tool of enforcement is that if you do not have everyone participating in outcasting, there are ways of evading the

²² See, e.g., Oona A. Hathaway, *Russia’s Crime and Punishment*, FOREIGN AFFS. (Jan. 17, 2023), <https://www.foreignaffairs.com/ukraine/russia-crime-and-punishment-illegal-war-in-Ukraine>.

²³ Shruti Menon, *Ukraine Crisis: Who is Buying Russian Oil and Gas?*, BBC NEWS (May 23, 2023), <https://www.bbc.com/news/world-asia-india-60783874>; Isaac Levi, *July 2023 – Monthly Analysis on Russian Fossil Fuel Exports and Sanctions*, CTR. FOR RSCH. ON ENERGY & CLEAN AIR (Aug. 22, 2023), <https://energyandcleanair.org/july-2023-monthly-snapshot-on-russian-fossil-fuel-exports-and-sanctions/>.

outcasting regime. That does not totally defeat the point of those sanctions by any means, but it does lessen their impact.

“The war has also posed a challenge to the global economy. Some worry that what we are seeing is a splitting of the global economy in two.²⁴ We have a significant number of countries that are sanctioning Russia, refusing to do business with it. But then we see some states that are continuing or even doing more business with Russia. There is a concern that this could cause a splintering of the global economy, particularly if the United States were to deploy secondary sanctions. If that were to happen, states would have to make a choice: either do business with Russia or with U.S. banks. You cannot do both. Such sanctions are very powerful. They were used in the past to push Iran to the negotiating table for the Joint Comprehensive Plan of Action, otherwise known as the Iran Nuclear Deal. Iran was excluded from global markets by the deployment of secondary sanctions. The United States has not yet fully deployed secondary sanctions against Russia, in part because doing so requires sanctioning anyone who does business with Russia. It is a very powerful weapon. Secondary sanctions also do not make you a lot of friends. If the United States did deploy such sanctions, it would heighten the impact of the outcasting regime, but it would at the same time further the global economic split. So there remain questions about what the long-term impact of the sanctions against Russia is going to be for the global economy.

“A third challenge raised by the war is a ‘West versus the Rest’ dynamic. If you look at the overwhelming votes against Russia in the U.N. General Assembly on a map, it becomes clear that, while the West is united in supporting Ukraine, there is much less support in Africa and Asia.²⁵ This should lead us to ask why. What is leading to this dynamic? While there is not a single answer to that question, we should recognize that a number of these states do not feel as fully invested in the international legal order as the West does. And why is that? Answering this question requires some introspection about the international legal order we have generated.

²⁴ Michael Schuman, *The World is Splitting in Two*, ATLANTIC (Mar. 28, 2022), <https://www.theatlantic.com/international/archive/2022/03/ukraine-war-china-covid-lockdowns/629401/>; see also Philip Aldrick, *Putin’s War is Splitting the World Along Economic Lines*, BLOOMBERG (June 4, 2022, 6:45 AM), <https://www.bloomberg.com/news/newsletters/2022-06-04/putin-s-ukraine-war-splits-world-along-economic-lines-new-economy-saturday>.

²⁵ See Press Release, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, U.N. Press Release GA/12407 (Mar. 2, 2022) (“The measure was adopted by a vote of 141 in favour to 5 against (Belarus, Democratic People’s Republic of Korea, Eritrea, Russian Federation, and Syria) with 35 abstentions”).

“Fourth, there is a question as to whether international criminal law institutions are going to be up to the task. The ICC has taken on the biggest investigation in its history. It has never done something of this magnitude before. The prosecutor has been openly critical of the efforts that I have been engaged in, along with many others, to create a Special Tribunal to try the Crime of Aggression.²⁶ I think one concern is that there are not enough resources to go around, and the new court would be in competition with the ICC for resources and support. However, both courts are part of an effort to provide accountability and the infighting undermines the clarity of the message of the international community that there should be accountability for Russia’s violations.

“Last, there is a real question as to whether Ukraine can survive this next stage of the war. There is a fight in Washington right now about continued U.S. support for Ukraine. That support is a lifeline for Ukraine. If the United States fails to continue its support, either now or in the future, that is going to be a major hit to Ukraine, and it is highly unlikely that other allies are going to be able to make up the difference. Putin has predicted that Ukraine would last a week.²⁷ While that is almost certainly wrong, there is no doubt that withdrawing support would deprive Ukraine of the capacity to defend itself over the long term.

“So, what is the impact of the war on the global order so far? This war is nowhere near over. And so, it is hard to know exactly what the long-term impact is going to be. But we can nonetheless assess where we are at this moment. First, we have seen a revitalization of the United Nations General Assembly. This is part of a longer-term trend rise of the General Assembly in the face of the failures of the Security Council. The Security Council at the United Nations has been unable to act because Russia is one of the permanent five members that can veto any enforcement action by the Security Council. In the face of that challenge, something important has happened: The Uniting for Peace Resolution, which passed in the 1950s and allows the General Assembly to take up a matter when it is vetoed in the Security Council, has been revived. There has been a move to create a standing resolution, known as the Veto Initiative, that provides that whenever a resolution is vetoed in the Security Council, it is automatically

²⁶ Molly Quell, *ICC Prosecutor Opposes EU Plan for Special Ukraine Tribunal*, ASSOCIATED PRESS (Dec. 5, 2022, 10:44 AM), <https://apnews.com/article/russia-ukraine-war-crimes-netherlands-the-hague-ursula-vonder-leyen-9e83e1107064ef6e9c375576b998373a>.

²⁷ *Putin Says Ukraine Would Last ‘A Week’ if Western Military Support Stops*, ALJAZEERA (Oct. 6, 2023), <https://www.aljazeera.com/news/2023/10/6/putin-says-ukraine-would-last-a-week-if-western-military-support-stops>.

referred to the General Assembly. The General Assembly then has an opportunity to debate it, discuss it, and perhaps take action on it. Together, these initiatives have helped revitalize the role of the General Assembly in securing international peace and security.

“We have also seen the revitalization of the ICC. There have been long term tensions between United States and the ICC, but that relationship has considerably warmed during the war in Ukraine.²⁸ The United States is working with the ICC to support accountability. It is working with the prosecutor to gather evidence. Large numbers of states have supported the referral of the matter in Ukraine to the ICC in an unprecedented show of support. So, this is an exciting moment for the Court. Yes, there is a question of whether the Court will live up to the moment, but it has an opportunity it has never had before.

“The war in Ukraine has also brought renewed attention to the prohibition on war. In my view, the prohibition on war is the central underlying principle of the international legal order. This war has made many realize how much that principle matters. More than 140 nations have denounced Russia’s violation of Article 2(4) of the U.N. Charter. The war is a wakeup call: Russia’s blatant violation of Article 2(4) has helped states realize that this critical foundation of international law is fragile and needs protecting.

“Yet there is so much we do not yet know. Will the global economy fracture or will the forces holding it together prevail? Will Ukraine’s allies, most importantly the United States, stay the course in supporting Ukraine in its effort to defend itself? What will China do? China has not voted with Russia but has instead abstained on all the U.N. General Assembly resolutions. It has been engaging in trade with Russia, but it has not been selling arms, which is one reason that Russia has had to turn to North Korea and Iran for a lot of its arms. But we do not yet know what its long-term position will be. We also do not know whether Putin can sustain internal support. For a moment, the attempted coup seemed to suggest that his control was fragile, but in the months since he has reasserted his authority. As the oligarchs who surround him are increasingly sanctioned, their yachts are seized, and the world turns against them, what impact is that going to have on Putin’s support in the long term? Will the international justice mechanisms live up to their promise? And then there is the war in Gaza: the atrocities committed by Hamas and Israel’s brutal response

²⁸ Oona Hathaway, *The U.S. Finally Sees the Point of the International Criminal Court*, WASH. POST (Apr. 13, 2022, 11:46 AM), <https://www.washingtonpost.com/outlook/2022/04/13/war-crimes-russia-ukraine-icc/>.

could divert global attention and drain support for Ukraine. It could create a conflagration that further undermines the foundational principles of the global order.

“The answers to these questions are going to determine the ultimate answer to the question of ‘what is the future of the international legal order?’ Let me leave you with this. These events can feel very outsized. They can feel very out of our control. It can feel like none of us can really do much about what is happening. But when I feel that way, I look back to the ordinary people who helped create our global legal order a century ago. Consider Samuel Levinson. He was just an ordinary bankruptcy lawyer in Chicago who had an idea that he was passionate about—what he called the ‘outlawry of war.’ He changed the course of history as a result. We learn from history that ordinary people with ideas and convictions can make a real difference in the world. I encourage you all to not give up hope and to carry on the project of building a more peaceful world.”

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