

# **INTERNATIONAL LAW AND THE INVASION OF UKRAINE: EXAMINING RELEVANT LEGAL FRAMEWORKS**

Webinar Presentation by

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## **Introduction**

I am pleased to be able to present this webinar, and to share the virtual stage with my friend and colleague, Arthur Appleton. There has been a great deal of rhetoric that we have all heard in recent weeks about the Russian invasion of Ukraine, and although international law does not offer definitive answers to all of the questions that our political leaders, and that we as responsible citizens, hope to address, the legal regime developed over the past decades is critical to any coherent analysis. Professor Appleton and I hope to use this time to persuade you that this is true, and that international law should be not just a part, but a vital part, of any thinking about what has happened, and what should happen next.

This presentation by the Student International Law Society at SAIS is the first of three such webinars. The second, featuring our colleague Prof. Nina Gardner, will focus on refugee and human rights issues, including the role of the business community in responding to the invasion. And the third, which Professors Jeff Pryce and Dan Magraw have been invited to host, will look into international humanitarian law, and concerns over the conduct of this war of aggression. The dates of these events will be posted in the coming days.

Both Professor Appleton and I will be pleased to answer questions after my presentation, and I hope listeners will feel free to post their questions and comments to the “Q&A” box, or will ask them orally after we have presented our prepared remarks. We hope to encourage a dialogue among our SAIS community and others in attendance.

So let me now turn the floor over to Prof. Arthur Appleton, our professor of international trade law at the SAIS campus in Bologna. He is known to most of you not only for his prominence in the field of trade, but for his thoughtful, informed approach to international law generally. I am especially eager to hear what he has to say. Arthur...

## My Presentation

Thanks, Prof. Appleton, for starting us off, and for framing the issues that we all need to be thinking about. I propose to divide my remarks into three sections. First, I will address the legality of the invasion, both in principle and as it is unfolding. Second, I will explore the question of accountability: assuming that what is happening in Ukraine is the blatant violation of binding international norms that I believe it to be, is there any mechanism for bringing the violators to justice?

Finally, I want to spend some time thinking out loud about “the big question” that the invasion raises, about international law as a field of study and practice. It is quite reasonable to ask, in light of the invasion and the global reactions to it, whether international law is still important, or even relevant, to the world we live in. In short, the Russian war in Ukraine brings into very sharp relief the question with which I begin all of my classes here at SAIS: is international law really law at all?

### Legality

If there is anything unequivocal in the body of international law that has emerged from the years since World War Two, it is that states are absolutely prohibited from uninvited armed activities on the territory of other states. That fundamental principle is enshrined in the very first article of the Charter of the United Nations, which recites that the purpose of the organization is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The Charter declares, at Article 2(4), that “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.” This is a binding undertaking, subscribed by every state that has been accepted for membership in the United Nations organization.

So an act of armed aggression, such as the one we are witnessing in Ukraine, is illegal, pure and simple. Nor are there exceptions that are relevant to this situation. This is not a case of self-defense, a right recognized in Article 51 of the Charter as inherent in states’ sovereignty, but which may be invoked only in response to an armed attack (and even then, only until the Security Council is able to take collective measures to restore peace).

Russia has not been attacked. And invented allegations that policies entertained by the government of Ukraine – including but not limited to eventual application for membership in NATO – pose some kind of existential threat to Russia do not remotely justify the destruction of Ukrainian cities, much less the kinds of devastation that is now under careful investigation to determine whether war crimes are being committed. The Charter makes no provision for anticipatory self-defense. More on that in a moment.

But the investigation of legality does not end here. Already, Ukraine has brought an action before the International Court of Justice, the judicial arm of the United Nations. The action is based not on violations of the Charter, but rather on the Genocide Convention, a treaty that currently has well over 150 parties, including Russia (which ratified it in 1954), Ukraine, and the United States. And that is relevant here, because Vladimir Putin has repeatedly and loudly claimed that his invasion was justified because of a genocide allegedly perpetrated against Russian speakers, or persons of Russian ethnicity, especially in the area of eastern Ukraine called the Donbass. Ukraine went to the Court shortly after the invasion began, seeking a declaration that the Convention was not a legally acceptable basis for waging war against it.

Before addressing the merits of Ukraine’s case, the Court needed to satisfy itself that it has jurisdiction to hear the matter. As all of my students are well aware, states may be required to appear before the ICJ in three situations. They may agree amicably to have their disputes resolved there, or they may accept the jurisdiction of the Court in advance, for all cases or for cases of particular categories. But Russia, of course, has indicated no willingness to have its actions reviewed by a neutral body, and it has never executed what is generally called an “optional clause” conferring general jurisdiction on the Court.

However, many treaties include “compromissory clauses,” by which States parties agree that any dispute concerning the interpretation of the treaty may be heard by the Court. The Genocide Convention contains such a provision. So the case before the Court, at least in the first instance, concerns whether the invocation of the Convention by Putin was consistent with its terms.

While the Convention obligates states parties to criminalize genocide under their domestic legal systems, and to prosecute those accused of this heinous crime, it nowhere permits states to take the law into their own hands by attempting to stop a genocide on another state’s territory by force of arms. While many NATO allies, including the United States, did just this in their effort to abate ethnic cleansing in Bosnia in the 1990s, the “responsibility to protect” doctrine has never won broad acceptance as an exception to the basic principles of the Charter. And I suspect that whatever else is true, “R2P” has already been a casualty of President Putin’s war in Ukraine. Perhaps this is a subject for another day, but in my view, its demise should not be mourned.

Russia showed its disregard for international law and institutions by boycotting the ICJ proceedings. But the Court is fully empowered to determine its own jurisdiction whether or not

the respondent state attends, and it did so. By a vote of 13 to 2 (with the Russian judge and, most shamefully the Chinese judge, dissenting), the International Court of Justice rejected Putin's attempt to masquerade his aggression as a lawful response to a non-existent genocide. On March 16, the President of the Court, Joan Donohue, issued an order directly and clearly instructing the Russian Federation "immediately to suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine."

The order was read in open court. The table reserved for the respondent state was empty. Russia's longtime advocate before the ICJ resigned from his position, stating publicly that he could no longer represent in matters of international law a state that so flagrantly holds it in contempt.

One other point deserves mention, if only briefly. We have all heard another one of President Putin's contrived excuses for the violence that his military is inflicting on the Ukrainian people: the insistence that Ukraine is not really a state, and therefore the border between it and Russia is not an international frontier at all. But the President's knowledge of history is as weak as his logic. It was the Soviet Union that insisted, as early as the founding of the United Nations in 1945, that Ukraine deserved its own seat and its own vote in the General Assembly. This argument was made – and was grudgingly accepted by the west – on the premise that the constituent republics of the USSR were even then sovereign states, which had the right to withdraw from the Union and proclaim their independence at their discretion, and at any time. Ukraine was therefore already a member of the United Nations when the Soviet Union dissolved. And membership in the UN is open, of course, only to states.

The invasion of Ukraine by the Russian Federation is, without question and without qualification, an internationally illegal act. But one might well wonder: what does this actually mean, since Russia continues to thumb its nose at the UN Charter, at the International Court of Justice, and even at the specific commitments it made in the treaties and instruments that Prof. Appleton described to you, including the Minsk Agreements of 2014 and 2015, to refrain from military action on Ukrainian soil? The word "illegal," after all, has normative force only for those who agree to abide by the law, or who might be coerced into doing so, or violators who may be punished for their illegal actions. The condemnation of an act as illegal, it might well be argued, is empty, unless there is some procedure, some institution, some mechanism that can enforce accountability, or to use a more common synonym for that big word, justice.

Let me turn to that issue next.

### **Accountability**

The notion that individuals who are the architects of gross violations of international law may be held personally liable traces its origins to the trials that took place in Nuremberg and Tokyo

following the Allied victory in World War Two. It has developed in numerous ways since then. Not only the Genocide Convention that I mentioned, but also the Convention Against Torture, for example, require states parties to treat violations of international law as crimes in their own domestic legal systems. That means that individuals who are guilty of genocide or torture, or slavery or other such offenses, are enemies of all mankind – *hostes humani generis* – and may be tracked down and prosecuted wherever they may seek shelter.

After the carnage that attended the breakup of Yugoslavia, and during the bloodshed in Rwanda, the United Nations established ad hoc criminal tribunals, which heard cases against those accused of some of the most heinous crimes of the post-War era. The spreading belief that the prosecution of these kinds of offenses is a legitimate matter of international concern led, in the late 1990s, to the establishment of the International Criminal Court. The ICC takes the internationalization of offenses of this magnitude to a new level, because its mandate is not restricted to specific circumstances, or to specific geography.

The ICC is, however, limited by the fact that it was created by a treaty, which of course is binding only those states that are parties to it. Russia is not a party, and neither is the United States. Ukraine, although it has not joined the Rome Statute, has indicated that it accepts the jurisdiction of the ICC, and therefore crimes committed on Ukrainian soil may form the basis for prosecution before that Court.

The remit of the ICC embraces war crimes, torture, and crimes against humanity. There is mounting evidence that Putin's war fighters have committed all of these. It includes genocide as well, and although the burden of proof to establish liability for that crime is very heavy, investigators are even now weighing the facts. President Biden has already used the word "genocide" to describe the carnage in Ukraine, although whether the legal prerequisites for that description have been met remains to be seen.

But since 2010, the ICC also has jurisdiction to hear charges of the crime of aggression. That term is defined by the Rome Statute to embrace "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

The Statute goes on to provide examples of the crime of aggression, including "The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof." There is no doubt that these prerequisites have been met during the invasion of Ukraine, and that the presumptive guilt of Vladimir Putin has been reinforced every single day since his war began.

Incidentally, although the International Criminal Court has had the power to hear crimes of aggression only for the past decade or so, the notion that aggression is within the proper ambit of international criminal law is nothing new. Here is what the Nuremberg Tribunal had to say about aggression, in 1946:

The charges in the indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime: it is the **supreme** international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

It is, of course, difficult to imagine a situation in which Vladimir Putin will stand as an accused war criminal in the dock in The Hague. This is not least because, at the insistence of the United States, the Rome Statute does not give the Court jurisdiction over aggression committed by nationals of non-parties.

But the ICC is not the only forum before which justice might be pursued. Already, prosecutors in several European countries have begun to explore the possibility of bringing criminal cases in their domestic courts, under the doctrine of universal jurisdiction. Serious attention is being dedicated to the creation of an ad hoc court – something for which there is ample recent precedent – to hear allegations of war crimes, torture, and crimes against humanity in Ukraine.

Here in the United States, there is a bill before Congress that would waive the sovereign immunity of Russia in civil cases arising from its aggression: were that bill to pass, lawsuits could be brought against the Russian state, and successful plaintiffs could then levy on the billions of dollars of Russian assets that are present in this country, including but not limited to those currently frozen under the various orders issued by President Biden. I should add that, in my view at least, this possibility does not obtain under existing law, but would require new legislation. Yet there very well may be sufficient interest among our lawmakers to make this a reality.

Whether accountability takes the form of criminal prosecutions or civil actions, whether it results in the imprisonment of perpetrators or the seizure of assets, I think it is safe to say that international law does, in fact, provide mechanisms to achieve some form of justice. It will not, of course, erase from our memories the horrors we witness on television every day. It will not mitigate the ongoing threats to other countries on which Putin may have set his expansionist sights, such as Moldova and Georgia in the immediate run, and perhaps the Baltic states after that. It will obviously not bring back the lives lost, or restore the cities and towns in Ukraine that have been, and are being, destroyed.

But the isolation of Russia from the world community – its expulsion from even the most benign forms of international cooperation, not to mention its exclusion from international banking protocols, the imposition of punitive economic sanctions of all kinds, the turning away of its trading partners – all of these make Russia an international pariah, precisely because – and this is the key point – **it has broken the law.**

The United States and our allies have other non-military weaponry in our arsenal. The Administration is reportedly considering whether to designate Russia a “state sponsor of terrorism,” which would have devastating consequences, including the imposition of criminal penalties on anyone in the United States who provides “material support” to it. The measures already taken, and those being contemplated, are **legal** responses to **illegal** actions. They will continue, and they will increase in quality and quantity, so long as Russia shows itself to be contemptuous of the rule of law.

### **Conclusion**

The invasion of Ukraine reminds us that we must be precise and realistic in our expectations of what international law can and cannot do. There is no international police force that can restrain a state bent on violating basic principles from carrying out its atrocities. There is no international army that reflects the universal consensus that illegal military force must be countered. There is no international court that can compel the attendance of those accused of such crimes, and no prison to which those convicted can be sentenced.

Yet it is too simple to think of any legal system, domestic or international, as simply based on threats of coercive or retaliatory measures against those who break the law. Rather, a critical feature of legal systems is that they articulate broadly shared standards of conduct. Subjects of the law may adhere to those standards because they fear the official consequences if they do not. But the vast majority of us do not refrain from killing and stealing because we do not want to go to jail. We do so because the law reflects our own beliefs about how society should be organized. And we know that our neighbors and our community, by and large, agree with us. Their condemnation of us for violating the law may be a stronger disincentive even than the threat of arrest, trial, and punishment.

International law shares these features. It does not lack coercive power because there is no helmeted, uniformed, armed officer of the law empowered to insist that it be obeyed. The life-altering sanctions that nations around the world are imposing against Russia are grounded precisely in the claim – one that I hope I have defended adequately here – that what Russia is doing in Ukraine is illegal.

Vladimir Putin appears to be learning to his surprise that international law does have coercive power. Yes, Russia can veto Security Council resolutions condemning its war, but it cannot prevent the General Assembly from declaring that war as a violation of the United Nations Charter. Yes, Putin can boycott the hearings of the International Court of Justice, but he cannot prevent the Court from concluding that his invasion of Ukraine is unlawful. Yes, he can pontificate about the ethnic unity between Russians and Ukrainians, even as he orders the merciless killing of those he pronounces his Slavic brethren. But he cannot prevent the rest of the world from concluding that, at times like these, there is a greater need for a predictable, equitable, comprehensive, and yes, enforceable, set of international legal norms, more than ever before.

So, as we watch the unfolding of this war, and its devastating consequences for so many innocent victims, with increasing horror, I think we can be confident that the international legal regime will not be among those victims. The actions of a wanton criminal who believes that he can disregard the law with impunity suggest the need for more law, not less. International law cannot, any more than domestic law can, prevent those bent on violating it from committing their crimes. But it can, and it will, ensure that there is no impunity for those criminals, and those who aid and abet them. so long as the world's commitment to the rule of law remains paramount.

Thanks for your attention to our presentations, and Prof. Appleton and I now welcome your questions and reactions.