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geg@ens.fr

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Hugo Pascal · Visiting Researcher,
University of Cambridge

Vasile Rotaru · Researcher (DPhil),
University of Oxford, Faculty of Law

Rule of Law in the Time of War

The war that has been ravaging Ukraine since early 2014, and especially the brutal full-scale invasion of 24 February 2022, is a tragedy whose consequences will span generations. It is also an existential threat to the rule-bound international order: never since World War II has aggressive interstate war been considered a legitimate way to assert territorial claims. So, what is to be done?

There is no secret in how wars are waged and won. Ukraine's resistance comes at great cost, and the Western world is above all else expected to provide—short of getting directly involved in the conflict—continuous and unwavering military, technological and economic support. That much is clear. But the basic premise of this issue of the *Revue européenne du droit*, as always, is that serious thought should also be given to the role of law in this crisis: What does the war in Ukraine do to the European and international rule of law? What room for action is there for legal practitioners faced with such blatant aggressions? The articles in this volume point to several avenues for legal action that warrant careful consideration, both while the war is raging and after its (hopefully swift) conclusion.

War is an extraneous disruptive factor that domestic legal systems have to tame without giving up their own constitutive rule of law principles. Consider economic sanctions. That this should be the principal lawfare tool for the US and Europe is unsurprising: once inconceivable for non-belligerents, sanctions have now become the main means of enforcing the international status quo. Still, the breadth of the latest restrictive measures imposed by the EU and the scope of their application—including their extra-territoriality—is unprecedented, if still clearly constrained by the EU's own overriding economic interests [Bismuth, page 8]. Leveraging the economic clout of the sanctioning jurisdiction, the primary objectives of restrictive measures are uncontroversial: to create high-powered incentives for powerful individuals to pressure the aggressor state into a change of course, or at least to financially hinder the illegal war effort. The effective reach of the underlying policy is even wider. Countless European businesses voluntarily sever connections with the Russian market, often reflecting the normative expectations to which

large companies are increasingly subject [Cazeneuve & Mennucci, page 48]; sometimes, under the mounting risks of litigation instigated by private parties and NGOs, as it is increasingly the case in France [Belloubet, Rebut & Pascal, page 28]. Notwithstanding, the effectiveness of sanctions is yet to be proven; arguably, their design could be significantly improved by paying closer attention to the internal organization and incentives of the Russian Federation's kleptocracy and the private militias it relies on [Zapatero, page 14].

If restrictive measures fail in their primary objectives, the question is whether they could legitimately morph into compensatory measures. Could frozen Russian assets potentially be confiscated for the benefit of war victims or Ukrainian reconstruction? The mere prospect raises obvious challenges for the rule of law principles. Yet, as painstakingly demonstrated by our authors, these challenges may be surmountable regarding state-owned assets [Moiseienko, page 33]. Indeed, we may even be witnessing the coming of age of an international norm on this matter [Bismuth, page 8]. The idea faces more challenges regarding private assets belonging to sanctioned individuals: any proposal in this respect should pay careful attention to due process and human rights issues [Burnard & Naseer, page 22].

This leads to the second prong of reflection on the war's legal implications: accountability for the atrocities that are now perpetrated. Since the first days of the invasion, the Ukrainian government has resorted to all the legal remedies at its disposal. At first sight, these efforts may seem superfluous: wars are not won before international courts, and the enforcement of any of their rulings is all but illusory for the foreseeable future. But the expressive and symbolic functions of well-established international norms have great strategic value. Indeed, even the Russian Federation's government has repeatedly paid them lip service, from the principle of self-determination supposedly at work in the Eastern regions of Ukraine [Pustorino, page 67] to claims of (preventive) self-defense [Sorel, page 101]. Understandably, the Ukrainian government seeks to command a rapid consensus within the international community on the facts of the illegal aggression, war crimes and human rights violations committed since then—even if the Russian Federation's leaders and other perpetrators are unlikely to be brought to justice in the near future. This raises the stakes for the design of appropriate accountability forums, an issue discussed by several of our authors. Multiple mechanisms have been activated to document the crimes, but the existing institutions may fall short of the job description regarding passing a final judgment. The design of an ad hoc court can draw on a long international experience in similar situations; undoubtedly, its long-term legitimacy and the efficacy of its rulings will hinge on its wide representativeness and international character [D'Alessandra, page 54]. The first step toward post-war justice will be establishing an authoritative truth about the events unfolding and the crimes being committed—by any of the parties involved in the conflict—in a forum with

impeccable credentials [Calvet-Martínez, page 76]. But historical precedent teaches that the subsequent path to viable social and state institutions, healthy collective identities, and eventual reconciliation in Ukraine and Russia—and some of their battered post-Soviet neighbors—will be long and strenuous [Baylis, page 71].

The big(ger)-picture question is what the war in Ukraine means for the rule-bound international system. In a sense, the Russian Federation's actions are just the latest in a long list of affronts to the apparent consensus on the illegality of aggressive war since 1945 (if not since the Kellogg-Briand Pact of 1928), too many of which are the deeds of Western powers and their allies. Nonetheless, it seems too early to dismiss international law altogether. Even if much remains to be done, the international community has generally reacted swiftly on issues such as assistance to displaced civilians and refugees [Mooney, page 40]. On others, the war highlighted the commitment of many states to existing principles [Chachko & Linos, page 94] and may give much-needed impetus for the reform of some of the most anachronistic features

of international law [Pellet, page 83]. The current efforts within the UN General Assembly to curtail the use of the veto right by conflicted permanent members of the Security Council may not be the sweeping breakthrough many hope for, but they are a good example of a pragmatic (albeit incremental) improvement that can be realistically achieved in the near future [Peters, page 87].

But these multifaceted ramifications are merely one part of the complex web of relevant strategic and geopolitical factors that governments consider in their response to the Russian Federation's aggression, many of which are thoroughly analyzed by our authors [Borell, page 106; Albares, page 111; Hollande, page 119]. Perhaps one of the most consequential—yet easily overlooked—is the impact that the war has on the EU's ongoing energy transition [Vinales, page 113], a topic to which the *Revue européenne du droit* will return at length in its next issue. Until then, we hope that the contributions collected in this volume will be useful in making sense of one of this century's human and geopolitical catastrophes and in preparing its aftermath.

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Bernard Stirn · Secrétaire Perpétuel
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Editorial

The last decades of the twentieth century may have led us to believe that liberal democracy was making steady progress. After the end of the dictatorships in Mediterranean Europe, Greece, Spain and Portugal, the Berlin Wall fell, the Soviet bloc broke up and perestroika took hold in Russia. At the same time, the European Community and the Council of Europe were expanding, and the building of Europe was sustained by a framework characterised by economic growth and respect for the rule of law. The European continent was emerging as an unprecedented entity of prosperity, peace, culture and freedom. Its values seemed to prevail throughout the world. Francis Fukuyama's 1992 book, *The End of History and the Last Man*, reflected this period of optimism.

But history knows no end. Rather, it is marked by successive cycles, alternating progress and setbacks, certainties and concerns, assurances and dangers. The attacks of 11 September 2001 are like a turning point that has shown that the values of freedom are not unanimously recognised, that democracies are not without weaknesses, that tragedy has not disappeared from human history. Since the beginning of the twenty-first century, populist ideals have spread, extremes have gained ground, authoritarian regimes have developed. In a few years, Victor Orban in Hungary, the Law and Justice Party in Poland, Xi Jinping in China, Narendra Modi in India Jair Bolsonaro in Brazil have come to power. The year 2016 was the year of the Brexit referendum, the failed *coup d'état* that led to President Erdogan's crackdown on freedoms in Turkey, and the election of Donald Trump as President of the United States. Taking stock of these developments, Yascha Mounk notes in his 2018 book *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It* a worrying divorce between democracy and freedom: 'Liberal democracy, the unique mix of individual rights and popular rule that has long characterized most governments in North America and Western Europe, is coming apart at its seams. In its stead, we are seeing the rise of illiberal democracy, or democracy without rights, and undemocratic liberalism, or rights without democracy.'¹

In Russia, the drift is more marked than elsewhere. Succeeding Boris Yeltsin at the end of 1999, Vladimir Putin served two four-year terms as president and then, after an interlude as prime minister, resumed the presidency for six-year terms. A constitutional amendment adopted in March 2020 gives him the prospect of remaining in power until 2032. Little by little, the press is subdued, opponents muzzled and the judiciary ensnared. Russia, which joined the Council of Europe in 1996, is moving away from its values and is paying decreasing attention to the rulings of the European Court of Human Rights, to the point of allowing its constitutional court in 2015 to depart from the rulings of the Strasbourg court. The annexation of Crimea in 2014 attests to an utter indifference to international law. The dissolution of the 'Memorial' organization in December 2021 was a final warning.

The full-scale invasion of Ukraine on 24 February 2022 was no less of a surprise. Even more unexpected was Ukraine's willingness, and ability, to resist its aggressor. Since then, war has again seized the very heart of Europe. Russia is flouting international law and ignoring international justice. Its aggression disregards the principles of the Charter of the United Nations, without any credible claim to exercise the right of self-defence. Its military operations defy the rules of *jus in bello*. Crimes of aggression, war crimes, and undoubtedly crimes against humanity follow on each other without any court having been able to intervene effectively until now. The International Court of Justice could nurture no illusions about the effectiveness of its decision of 16 March 2022 in which it ordered Russia to suspend its military operations as a provisional measure. Russia's exclusion from the Council of Europe, a measure that no state has ever been subject to, leaves it indifferent. The arrest warrant issued in March 2023 by the International Criminal Court for Vladimir Putin is likely to remain dead letter for the foreseeable future.

With the resurgence of full-scale war in Europe, sheer force has taken front stage, at the expense of the rule of law. Illusions about the solidity of the international order, the value of the rule of law and the authority of courts are dissipating. Nonetheless, while this context undoubtedly mandates greater realism, we shall not forget that international relations are also based on rules, that common values remain our reference points, and courts the best arbiters of disagreements. Democracies have been able to respond with one voice. Seeking a form of international justice, a blast reminiscent of Emile Zola's *J'accuse* inspires the book written in 2023 by Robert Badinter, Bruno Cotte and Alain Pellet, *Vladimir Poutine, L'accusation*.²

1. Yascha Mounk, *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It* (Harvard University Press 2018), 14.

2. Robert Badinter, Bruno Cotte and Alain Pellet, *Vladimir Poutine, L'accusation* (Fayard 2023).

Shaken to their core, rule of law and justice do not fade away during the war, and will find their place again after its end. One of the main challenges will be to rebuild a consensus that, beyond the Western democracies, unites the greatest number of countries, while many of them

are tempted by other political models. As this rich issue of the *Revue européenne du droit* shows, law alone cannot ensure peace, but the geostrategy of the future cannot be written without it.

Law During the War



Régis Bismuth • Professor, Sciences Po Law School

The New Frontiers of European Sanctions and the Grey Areas of International Law

Following Russia's invasion of Ukraine, the European Union (EU) adopted an unprecedented series of sanctions (also known as 'restrictive measures') between February 2022 and April 2023. Each 'package' of sanctions, of which there are ten to date, builds on and amplifies the legal framework of the sanctions imposed in 2014 following the annexation of Crimea, not only by expanding the list of sanctioned individuals and entities but also by targeting new activities, implementing new types of restrictions, and expanding their scope. The current discussions around a possible eleventh sanctions 'package' show that the EU has not yet exhausted this resource, which it has sought to deploy gradually, in the hope that the build-up of sanctions may induce Russia to withdraw from Ukraine, sufficiently affect its war effort or even, less explicitly stated, create the conditions for regime change in Russia.

Assessing the effectiveness of sanctions against Russia is a delicate matter—and not the purpose of this article. While sanctions have brought about neither an end to the conflict nor regime change, they cannot be assessed solely in this light. Sanctions are part of a multidimensional pattern that incorporates not only a whole set of constraints but also many related considerations.

The constraints are primarily those arising from the interests of the EU itself. No doubt their protection, at least in the medium term, has prevented it from adopting measures—for example, a total embargo on the import of Russian gas—which could have dealt a fatal blow to the resources of the Russian Federation, but which would undoubtedly have affected the European economy to just as great an extent. One should also not underestimate that this situation has also led the EU to consider the potential synergies between its response to the invasion of Ukraine and its other objectives of energy independence or the fight against climate change. This is the case, for example, of the REPowerEU plan presented by the European Commission in May 2022, which aims to promote energy savings, the production of clean energy

and the diversification of energy supply sources.¹ To use Pierre Charbonnier's formulation, this 'war ecology'² can also be understood as embodying measures that aim to affect the Russian economy in the long run and to achieve the same objectives as economic sanctions, without being assigned the label of 'restrictive measures'. It is therefore not only necessary not to focus on the question of the effectiveness of sanctions, understood in the strict sense, but also not to let them overshadow the other measures with which they are closely related.

The constraints are also those of the law, mainly EU law and international law. The legality of possible confiscation measures of frozen assets belonging to the Russian Federation or to Russian oligarchs, which is currently the subject of much controversy, is a relevant example—we will return to it below. However, these constraints can be seen in reverse. While international law certainly restricts the right of states to adopt sanctions, one may wonder whether, in some instances, it doesn't authorize them to do so, or even impose on them an obligation to adopt restrictive measures—we will also have the opportunity to come back to this below.³ Considering this possibility shows that we are potentially in one of those grey areas of international law that may serve as both a limit to and a justification for adopting sanctions.

Multiple aspects of the European sanctions adopted as part of the Ukrainian crisis belong to these legal grey areas. These sanctions—and those being seriously considered at this stage—are indeed different from those usually adopted by the Union, through their expansiveness, potential scope of application and the novelty of the instruments that are being (or are about to be) deployed. These grey areas are the focus of this article, which aims to show that they are also consubstantial with the evolution of international law. In other words, these sanctions also constitute a legal laboratory where the limits of international law are tested and where some of its mutations take shape.

After some general considerations on these new European sanctions and the analytical frameworks to which they belong (I), we will successively look at two aspects that deserve to be highlighted, namely the emergence of a new European extraterritoriality (II) and the breakthrough that would be represented by the development of a new framework for the confiscation of frozen assets (III).

1. European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, REPowerEU Plan, COM/2022/230 final, 18 May 2022.
2. Pierre Charbonnier, 'La naissance de l'écologie de guerre' (18 March 2022) *Le Grand Continent* <https://legrandcontinent.eu/fr/2022/03/18/la-naissance-de-lecologie-de-guerre/>.
3. See below section I.

I. European sanctions and the categories of international law

It is a truism to say that the restrictive measures adopted by the EU in the context of the Ukrainian crisis are unilateral. Russia's status as a permanent member of the Security Council with a veto right prevented any multilateral measures from being adopted by this UN body. The legality of unilateral sanctions under international law, which has given rise to a vast literature and various controversies,⁴ can be safely set aside at this point.

The term 'sanction' is not itself a legal concept with a specific regime, and the assessment of the legality of these measures depends on a set of factors regarding the nature of the measure (restriction of economic activity, freezing, confiscation, etc.), its scope (extraterritorial or not) and the reasons that motivated its adoption (tensions between States, armed conflict, non-respect of the rule of law, violation of fundamental rights, violation of a peremptory norm of general international law). There is thus a significant difference in context between, on the one hand, the sanctions adopted by several states and the EU following Russia's invasion of Ukraine in violation of a peremptory norm of general international law and, on the other hand, the extraterritorial sanctions adopted by the United States against Cuba. In the case of the US embargo of Cuba, the United Nations General Assembly (UNGA) adopts every year, by an overwhelming majority, a resolution 'reiterat[ing] its call upon all States to refrain from promulgating and applying [such extraterritorial sanctions], in conformity with their obligations under the Charter of the United Nations and international law, which, inter alia, reaffirm the freedom of trade and navigation'.⁵

The UNGA also strongly condemned in March 2022 Russia's aggression against Ukraine in violation of the UN Charter.⁶ It did not, however, recommend the adoption of sanctions by member states in response to this violation. It also did not do so in its most recent resolution of February 2023.⁷ Some argue that the General Assembly could have coordinated the implementation of such measures in the absence of Security Council action.⁸

4. For an overview, see Iryna Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights – The Impact of the Principle of Common Concern of Humankind* (Brill 2022) 59 et seq. See also Jean-Marc Thouvenin, 'Articulating UN Sanctions with Unilateral Restrictive Measures', in Charlotte Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar 2021) 149 et seq.; Antonios Tzanakopoulos, 'The Right to Be Free from Economic Coercion' (2015) 4 *Cambridge International Law Journal* 616 et seq.
5. For the latest version, see UNGA Resolution 77/7 'Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba', A/RES/77/7, 3 November 2022.
6. UNGA, resolution ES-11/1, Aggression against Ukraine, A/RES/ES-11/1, 2 March 2022.
7. UNGA, resolution ES-11/6, Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine, A/RES/ES-11/6, 23 February 2023.
8. Rebecca Barber, 'What can the UN General Assembly do about Russian Aggression in Ukraine?' (26 February 2022) *EJIL:Talk!*, <https://www.ejiltalk.org/what-can-the-un-general-assembly-do-about-russian-aggression-in-ukraine>. See also Rebecca Barber, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' (2021) 70(2) *ICLQ* 343 et seq.

The fact remains that states can always adopt retaliatory measures that do not violate any international obligation and, that for several years now, a (still debated) practice of third-party countermeasures, adopted by states other than the one injured, has also been developing.⁹

If what states are entitled to do lies indeed in a grey area, a new space of uncertainty is emerging between what states *can* do and what they *must* do when the violation of a peremptory norm is at stake. Consider, for example, the customary rules on state responsibility, which require states to refrain from rendering aid or assistance in maintaining a situation created by a serious breach of a peremptory norm of general international law.¹⁰ Couldn't this obligation of non-assistance be construed as requiring states to adopt restrictive measures designed to prevent any (indirect) support of the military efforts behind the violation? This is only legal conjecture at this point, but as we can see, the rules of international law that govern what is usually referred to as 'sanctions' leave room for many options and alternative interpretations. Unsurprisingly, the states that have firmly condemned Russia's actions do not necessarily draw the same consequences from their condemnation.

In this respect, the European Union's response has been impressive, given the scale of the sanctions adopted, despite the procedural requirement for the Council to act unanimously to adopt restrictive measures, some of which have been coordinated within the G7. Most of the measures are based on the usual two main axes, namely the introduction of economic restrictions, on the one hand, and individual sanctions targeting individuals and entities, on the other. However, there are some novelties in terms of the instruments used and the intensity of the sanctions imposed.

Russia's aggression against Ukraine has indeed been an opportunity to implement new types of restrictions that the EU had never before deployed. For example, the establishment of price ceilings for Russian oil products, the ban on several Russian media (Sputnik, Russia Today, etc.) accused of disinformation and destabilisation campaigns, a ban on providing legal advice to the government of Russia or legal persons, entities or bodies established in Russia, and the freezing of the Russian central bank's foreign exchange reserves.

Other measures are surprising in their intensity or particularly comprehensive nature, which tend to show that they are not aimed solely at targeting those responsible for violations of international law or at affecting the Russian economy and, by extension, its ability to maintain its war effort. The prohibition on European banks to accept deposits above a certain threshold from Russian nationals

9. Martin Dawidowicz, 'Third-Party Countermeasures: A Progressive Development of International Law?' (2016) 29 *Questions of International Law* 3 et seq.
10. International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, Article 41(2).

or individuals residing in Russia may be surprising in that it imposes restrictions on individuals solely on the basis of their nationality or place of residence, while emphasizing that it ‘shall not apply to nationals of a Member State, of a country member of the European Economic Area or of Switzerland’.¹¹

The individual measures imposing an asset freeze and an EU travel ban were also surprising in their scope. These sanctions are aimed not only at persons responsible for actions or policies that primarily ‘undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability or security of Ukraine’,¹² those supporting, materially or financially, such actions,¹³ those supporting, materially or financially, or benefiting from Russian decision-makers responsible for such actions,¹⁴ but also ‘leading businesspersons or legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation’¹⁵ and, for all these persons, ‘natural or legal persons, entities or bodies associated with them’.¹⁶ This last category, as well as that of ‘leading businesspersons’, which targets those usually referred to as ‘oligarchs’, have given rise to some questions, considering the very vague nature of the concept, which allows the EU to target a very large number of people who do not necessarily have direct or indirect links with the reprehensible acts.¹⁷ The proportionality of these sanctions is also questionable, since precisely the same measures of a complete freeze of assets and a ban on travel to the EU are applied indiscriminately on the one hand to leading Russian decision-makers and, on the other hand, for example, to persons merely associated with leading businessmen.

It is not possible to assess the legality of all these measures under international law in this article. The question of legality under EU law, particularly EU fundamental rights, has already been raised, as claims have been lodged against certain European restrictive measures. EU courts have already had the opportunity to annul certain restrictive measures against a person because the existence of a family relationship was insufficient to characterise an association with another sanctioned person.¹⁸ They also rejected RT France’s request to annul the Council’s acts

banning the broadcasting of certain Russian media¹⁹—an appeal is pending in this case before the Court of Justice of the European Union (CJEU).²⁰ A claim has also been lodged by the *Ordre des avocats à la cour de Paris* before EU courts regarding the prohibition on providing legal services, as the Association considers, among other things, that it hinders the right to an effective remedy and access to an impartial tribunal, which includes, within the meaning of the EU Charter of Fundamental Rights, the right ‘of being advised, defended and represented’²¹. It will thus be up to the CJEU in the coming months to position itself as the regulator of these new forms of restrictive measures that the EU has deployed.

II. The creeping extraterritoriality of European sanctions

If the EU has implemented new forms of restrictive measures following Russia’s aggression, the less obvious novelty of these sanctions is their creeping extraterritoriality, which will undoubtedly be reinforced in the coming months when new ‘packages’ of sanctions are adopted. The term extraterritoriality is used here to designate the objective of regulating a situation taking place abroad and not involving persons with no nationality relation with the state issuing the regulation.²² In the context of European sanctions, a good example would be the attempt by the EU to regulate a transaction between a Russian company and a Chinese company.

The possibility of extraterritoriality of European sanctions may be surprising, given that the Union has sometimes been vocal in denouncing the extraterritoriality of US sanctions. As early as 1982, the European Community reacted vigorously to measures prohibiting the export from the US of goods and technologies intended for European companies involved in the Euro-Siberian gas pipeline project with the USSR. Insofar as these sanctions were designed to regulate the behaviour of non-US persons abroad, the Community stated that ‘goods and technology do not have any nationality and there are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them’.²³ A step forward was taken in 1996 when the Community reacted to the US extraterritorial economic sanctions against Cuba (the Helms-Burton Act) and Libya and Syria (the Amato-Kennedy Act), which also applied to non-US persons in respect of their relations with those countries. The Community had adopted a blocking regulation to protect and counteract the US measures, the preamble to which stressed that ‘by

11. Article 5b of Council Regulation (EU) no. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine, as last amended by Council Regulation (EU) 2023/427 of 25 February 2023.

12. Articles 3(1)(a) and (b) of Council Regulation (EU) no. 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

13. Regulation 269/2014, Article 3(1)(b).

14. Regulation 269/2014, Article 3(1)(d).

15. Regulation 269/2014, Article 3(1)(g).

16. Regulation 269/2014, Article 3(1) al. 2.

17. See eg, Etienne Muller, ‘Aspects sectoriels – Les avoirs’ (2022) RFDA 629; Yulia Miadzvetskaya and Celia Challet, ‘Are EU Restrictive Measures Really Targeted, Temporary and Preventive? The Case of Belarus’ (2022) 6(1) *Europe and the World: A Law Review* 10.

18. General court, T-212/22, *Violetta Prigozhina v Council*, 8 March 2023 (ECLI:EU:T:2023:104).

19. General court (Grand Chamber), T-125/22, *RT France v Council*, 27 July 2022 (ECLI:EU:T:2022:483).

20. Case no C-620/22 P.

21. Charter of Fundamental Rights of the European Union, Article 47 para 2.

22. On the issue of extraterritoriality, see Régis Bismuth ‘Pour une appréhension nuancée de l’extraterritorialité du droit américain – Quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas’ (2015) *AFDI* 785 et seq.

23. European Communities, Comments on the US Regulations Concerning Trade with the USSR (1982) 21 *International Legal Materials* 891.

their extraterritorial application' these sanctions 'violate international law'.²⁴

The EU's sanctions packages have traditionally rejected any form of extraterritoriality. Indeed, the Council's sanctions guidelines emphasise that 'EU restrictive measures should only apply in situations where links exist with the EU'²⁵ and that the EU 'will refrain from adopting legislative instruments having extra-territorial application in breach of international law'.²⁶

The general provisions defining the scope of application of EU sanctions aimed at the situation in Ukraine follow the same model. Both Regulation 269/2014 and Regulation 833/2014 emphasise that they apply within the territory of the EU, on board any aircraft or any vessel under the jurisdiction of a Member State, to nationals of the Member States, to any legal person, entity or body incorporated or constituted under the laws of a Member State, and to any business done in whole or in part within the EU.²⁷ This being said, the geographical scope of European sanctions should be re-evaluated in light of several elements, particularly those designed to avoid circumvention of European sanctions.²⁸

The two main regulations specify that European operators are subject to prohibitions on carrying out certain operations 'directly or indirectly'²⁹, thus suggesting that transactions carried out via economic operators in third countries could fall within the scope of the sanctions, even though these operators are not themselves in the scope. The Commission stressed in its FAQs about regulation 833/2014 that while it does not apply to Russian subsidiaries of European companies because they are incorporated under Russian law and fall outside the scope of the measures, it is however 'prohibited for EU parent companies to use their Russian subsidiaries to circumvent the obligations that apply to the EU parent, for instance by delegating to them decisions which run counter the sanctions, or by approving such decisions by the Russian subsidiary'.³⁰

On another level, the criteria used for adopting individual sanctions are also broad enough to target individuals from third states for their activities related to Russia. Thus, in October 2022, the Council sanctioned several Iranian individuals for having supplied military equipment

(notably drones)³¹ to Russia because they 'support[ed], materially or financially, actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine'.³² Equally relevant is the adoption by the Council, to counter sanction circumventions and to target situations taking place outside the territory of the Member States, of a new criterion for placing on the individual sanctions list 'natural or legal persons, entities or bodies facilitating infringements of the prohibition against circumvention [of restrictive measures]'.³³ Although the transaction at stake will undoubtedly have to have a link with the EU (e.g. importing goods from the EU for re-export to Russia from a third state), the EU's willingness to target third-state entities with individual sanctions for carrying out prohibited transactions may be reminiscent of US secondary sanctions.

These developments are also seen in the more general context of the EU's ambition to cause the alignment of the policies of third countries with its own in terms of sanctions. Indeed, it can't be ruled out that the Union will go further in its following sanctions packages by implementing economic restrictions on operators who trade with Russia. The March 2023 joint statement by Commission President von der Leyen and President Biden is very eloquent on this point: 'we are taking new steps together to target additional third-country actors across the globe to disrupt support for Russia's war from any corner of the world where it is identified'.³⁴

The idea is to use the leverage of access to the EU market to compel operators in third countries to comply with European measures. In other words, it would be a matter of transforming an economic privilege (market power) into a legal privilege (the ability to impose extraterritorial rules of conduct).³⁵ In a way, third states could no longer be economically neutral.

These developments may come as a surprise given the EU's traditional position on the extraterritoriality of US sanctions, which undeniably raises questions of consistency. When criticising US extraterritoriality, the EU focused more on the situation that the rule was intended to govern (a transaction between a sanctioned country and an operator in a third state) than on the reason for which the sanctions were imposed. On this last point, a distinction is warranted between the American sanctions against Cuba, which were taken for reasons specific to American foreign policy, and those of the EU against Russia, which were adopted in response to the violation

24. Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.
25. Council of the European Union, Sanctions Guidelines, 5664/18, 4 May 2018, no. 51.
26. *Ibid* no. 52.
27. Article 17 of Regulation 269/2014; Article 13 of Regulation 833/2014.
28. See Jan Dunin-Wasowicz, 'The Long Arm of EU Sanctions' (25 October 2022) *Blog EU Law Live*, <https://eulawlive.com/op-ed-the-long-arm-of-eu-sanctions-by-jan-dunin-wasowicz/#>.
29. Regulation 269/2014, Article 2(2); Regulation 833/2014, Articles 2(1), 2(2), 2bis, 2bis bis, 3, 3ter, 3quater, 3 septies, 3octies, etc.
30. European Commission, General Questions – Council Regulation 833/2014: Council Regulation 269/2014, 26 July 2022, n° 14.

31. Council implementing regulation (EU) 2022/1985 of 20 October 2022 implementing Regulation (EU) no. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.
32. Article 3(1)(b) of Regulation 269/2014.
33. Article 3(1)(h) of Regulation 269/2014.
34. 'Joint Statement by President Biden and President von der Leyen', 10 March 2023, <https://ec.europa.eu/commission/presscorner/detail/fr/statement_23_1613>.
35. Régis Bismuth, 'Au-delà de l'extraterritorialité, une compétence économique', in SFDI, *Extraterritorialités et droit international* (Pedone 2020) 113.

of a peremptory norm of general international law. It would indeed be possible to consider—this is at least one of those grey areas of international law—that the obligation of non-assistance in the event of a violation of a rule of *jus cogens* could generate a responsibility for states to take restrictive measures against operators of third states that contribute even indirectly to the continuation of the situation resulting from this violation.

It is interesting to note when rereading the Council's guidelines on European restrictive measures that there is a slight difference between the English and French versions on the issue of extraterritoriality. While the French version refers to sanctions '*qui, par leur application extraterritoriale, violeraient le droit international*'³⁶ (in this case, focusing on the situation that the rule intends to govern), the English version refers to sanctions 'having extra-territorial application in breach of international law'³⁷, suggesting that there may be extraterritorial sanctions that are not 'in breach of international law'. The obligation of non-assistance in the context of the violation of a peremptory norm of general international law may constitute an argument to justify such extraterritoriality. This would be consistent with more flexible forms of extraterritoriality that have been developed by the EU in previous years, not only for the protection of the EU market or of EU citizens (in matters of competition or data protection) but more for the protection of norms relating to international human rights law or the environment, which are of an *erga omnes* nature.³⁸

III. The possibility of the confiscation of frozen assets

The possibility of confiscating frozen assets to compensate victims, finance the reconstruction of Ukraine or measures taken to help refugees was raised as soon as the first freezing measures were adopted, particularly those targeting Russian oligarchs.³⁹ It has taken on an altogether another dimension after the immobilisation of the foreign exchange reserves of the Central Bank of Russia, which represent a much higher value than the other frozen assets (300 billion euros versus approximately 20 billion euros). The prospect of seizing the assets of the Central Bank of Russia thus becomes particularly attractive given the disproportionate financial consequences of this conflict, which are already higher than the value of all the frozen

or immobilised assets (383 billion euros for the reconstruction of Ukraine alone, according to the most recent World Bank evaluation of March 2023).⁴⁰

The purpose of this article is not to discuss all these different options and the legal problems they raise,⁴¹ but to address the extent to which the most recent initiatives pushing the frontiers of European sanctions fall in a grey area of international law.

Concerning the issue of frozen assets, particularly those of oligarchs, the hypothesis of a European extrajudicial confiscation mechanism, which had been discussed in the past, has been abandoned. It would have raised too many legal risks concerning the potential violation of fundamental rights and would also have weakened the freezing measures themselves. Indeed, European courts have considered that asset freezing measures 'do not therefore infringe the "essential content" of the right to property' because they 'are by nature temporary and reversible'.⁴² Complementing the freezing framework with an automatic confiscation framework would have transformed the nature of freezing measures and made them more vulnerable in the eyes of EU courts. Therefore, the contemplated confiscation measures could be taken in the context of criminal proceedings. To facilitate the confiscation of frozen assets, the EU is in the process of adopting a directive to add the violation of sanctions to the list of EU criminal offences. This new offence would fall in the scope of a future directive on asset recovery and confiscation.⁴³

The legality under international law of the potential confiscation of the Russian Central Bank's assets has given rise to heated debate.⁴⁴ To simplify, the analysis rests mainly on two issues.⁴⁵ First, whether a measure of confiscation of the assets of a central bank falls within the scope of the rules relating to the sovereign immunity from execution, even though the rules relating to this immunity concern measures taken in the context of

36. In free translation from French: 'which, by their extraterritorial application, would violate international law'. See Conseil de l'Union européenne, *Lignes directrices relatives aux sanctions*, 5664/18, 4 May 2018, no. 52.

37. Council of the European Union, *Sanctions Guidelines*, 5664/18, 4 May 2018, no. 52.

38. See Régis Bismuth, 'The European Union Experience of Extraterritoriality – When a (Willing) Victim Has Become a (Soft) Perpetrator', in Austeen Parrish, Cedric Ryngaert (eds), *Extraterritoriality and International Law*, (Edward Elgar, forthcoming 2023). See also Haut Comité Juridique de la Place Financière de Paris, *Rapport sur l'extraterritorialité du droit de l'Union européenne* (May 2022).

39. Régis Bismuth, 'Du gel à la confiscation des avoirs des personnes liées au régime russe?', *Blog Le Club des Juristes*, 3 March 2022, <<https://www.leclubdesjuristes.com/ukraine/du-gel-a-la-confiscation-des-avoirs-des-personnes-liees-au-regime-russe-par-regis-bismuth-professeur-a-lecole-de-droit-de-sciences-po>>.

40. World Bank, *Updated Ukraine Recovery and Reconstruction Needs Assessment de dollars*, 23 March 2023, <<https://www.worldbank.org/en/news/press-release/2023/03/23/updated-ukraine-recovery-and-reconstruction-needs-assessment>>.

41. These issues are addressed by two other contributions to this issue, see in the issue the contributions by Anton Moiseienko (page 34) and Leanna Burnard and Mira Naseer (page 22). See also Andrew Dornbierer, 'From Sanctions to Confiscation while Upholding the Rule of Law, Basel Institute on Governance', Basel Institute on Governance Working Paper 42, <baselgovernance.org/publications/wp-42>.

42. General Court, T-215/15, *Mykola Yanovych Azarov v Council*, 7 July 2017 (ECLI:EU:T:2017:479), para 102.

43. European commission, Proposal for a directive of the European Parliament and of the Council on asset recovery and confiscation, COM(2022) 245, 25 May 2022.

44. In addition to the contribution by Anton Moiseienko (page 34), see Ingrid (Wuerth) Brunk, 'Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?' *Lawfare Blog*, 7 March 2022, <lawfareblog.com/does-foreign-sovereign-immunity-apply-sanctions-central-banks/>; Daniel Franchini, 'Seizure of Russian State Assets: State Immunity and Countermeasures', *Articles of War*, 8 March 2023, <<https://lieber.westpoint.edu/seizure-russian-state-assets-state-immunity-countermeasure/>>.

45. We refer here to the situation where the confiscating state is not in direct conflict with the state whose property is seized and is not the victim of the damage which the confiscation aims to compensate.

judicial proceedings and not those taken by the executive authority. If so, the second issue is whether an infringement of the sovereign immunity from execution could constitute a lawful countermeasure within the framework under the international law of state responsibility. This raises certain difficulties since countermeasures are supposed to be reversible, insofar as possible, to induce the responsible state to comply with its international obligations, while confiscation measures are by their very nature irreversible.

The answers to each of these questions are far from obvious, and one should not overlook the risks arising from invasive measures such as the confiscation of frozen Russian assets, i.e. exposing oneself to equivalent measures in Russia or putting at risk the attractiveness of European markets for the management of foreign central bank assets. Significantly, France had previously established specific legislation reinforcing the immunity from execution of foreign central banks' assets to preserve the competitiveness of its financial centre.⁴⁶ It is therefore not surprising that the EU has adopted a precautionary approach, a working group on this issue having been established under the Swedish Presidency of the EU Council.

It appears difficult for the EU to commit itself at this stage to a total confiscation of the assets of the Central Bank of Russia for the legal, political, and economic consequences that such a step would imply. The chairman of the working group has stated that it will have to be 'a bit innovative in order to move forward'⁴⁷ and that it is not inconceivable that the confiscation would not directly affect the assets but would be limited to 'income or interest on the capital'⁴⁸, which would also guarantee the reversibility of the immobilisation measure.

Future EU initiatives in this area will address issues where international law is unclear and leaves room for interpretation. They will necessarily raise risks inherent to all unprecedented initiatives, or that appear to be

transgressive. Still, these measures are also necessary for the evolution of the law, especially when the violation of a peremptory norm of general international law is at stake.

This dynamic of the development of international law was highlighted in the dissenting opinion of Judge Yusuf in the *Jurisdictional Immunities of the State* case, in which the Court found Italy in breach of its international obligations by the refusal of its courts to grant sovereign immunity for Germany in a dispute involving violations of *jus cogens* rules.⁴⁹ While recognizing the violation of a *jus cogens* rule as a new exception to sovereign immunity did not meet with consensus at the time, Judge Yusuf noted that the development of international law in this area could not be linear and would necessarily involve national initiatives that are initially isolated. These may come from national courts, but also from the practice of legislators and executive bodies. Judge Yusuf stressed that '[c]ertain rules of international law may remain in a grey zone, and their existence may be debated in legal scholarship, until such time as a court of law—in the case of State immunities, a domestic court of law—clarifies their status and establishes their legal quality.'⁵⁰ He added that the exceptions and derogations to sovereign immunity have not developed 'through diplomatic exchanges, or through the conclusion of conventions', but that '[their development] has most often occurred through single, and sometimes isolated, domestic court decisions, which gradually turned mainstream.'⁵¹ Therefore, it cannot be excluded that isolated initiatives may denote an international law in development, even when they 'are considered, at first sight, not to conform to what may have hitherto been viewed as State practice.'⁵²

Thus, it is in the interstices and on the ridges of a body of law in motion that the EU is, in a way, trying to draft the international law of tomorrow, be it on the issue of the extraterritoriality of EU sanctions or on the issue of the possible implementation of measures to confiscate Russian assets.

46. Régis Bismuth, 'Expanding Immunity from Execution Through the Backdoor: The French Example', in Régis Bismuth et al. (eds), *Sovereign Immunity Under Pressure – Norms, Values and Interests* (Springer 2022), 449 et seq.; Régis Bismuth, 'L'immunité d'exécution après la loi Sapin 2' (2018) *JDI* 445 et seq.
47. "'Not Easy" to Seize Russia Assets: EU Task Force Head', *Euractiv*, 25 March 2023, <<https://www.euractiv.com/section/global-europe/news/not-easy-to-seize-russia-assets-eu-task-force-head/>>.
48. *Ibid.*

49. ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *I.C.J. Reports 2012*, p 99.
50. Dissenting opinion of Judge Yusuf, para 47.
51. *Ibid.*
52. *Ibid.*, para 48.



Luis Arroyo Zapatero • Rector Emeritus of the University of Castilla-La Mancha, President of the International Society of Social Defense, corresponding member of the *Académie de Sciences Morales et Politiques*.

Criminology of War and Criminal Policy of the European Union

14

For over a year now, we have been witnessing a war broadcasted live on television. If images were for the first time shown live from the conflict zone during the Balkan wars, the situation today is different: we have not only live broadcasting and daily information, but also images captured and dispersed by thousands of cell phones. It is a war of spectacle. It is a traditional war, albeit with new technological and destructive means—notably drones and sophisticated missiles—but also a so-called ‘hybrid’ war, because it combines military action with cybernetics and economics, but also with the manipulation of energy and raw material distribution; a war described by Louis Gautier as ‘bastard’.¹

What we can all witness clearly is the indiscriminate civilian casualties and the conscious and systematic destruction of basic civilian infrastructure such as hospitals and thousands of apartment buildings, the huge convoys of homeless women and children. All of this arouses a grave emotion, solidarity and the desire to cooperate effectively to defend the victims of a criminal aggression. ‘This war is politically and emotionally unbearable,’ said Alexandra Sukhareva, a Russian artist. She was scheduled to exhibit her work at the Venice Biennale, but couldn’t attend, because the war has triggered emotions that upset the reasons of cultural life. Many activities and interventions were cancelled, and some had to be abandoned. Russophobia is there: Russia is guilty! All this is favoured not only by the war (and the bestial way in which it is carried out), but also by the personality of its leader: an autocrat with hints of psychopathy.²

1. L. Gautier, ‘La guerre bâtarde, Ukraine, guerre hybride, guerre ouverte et technologie’, *Revue Défense Nationale* (2022/6) no. 851, 15-32; L. Gautier, *Mondes en Guerre, IV, Guerre sans frontières* (Passés/Composés 2021).
2. See ‘Killings of civilians: summary executions and attacks on individual civilians in Kyiv, Chernihiv, and sumyregions in the context of the Russian federation’s armed attack against Ukraine’, HCHR (December 2022). See also the analysis of Putin’s discourse by Guillaume Lancereau, ‘Discours

Europe has been a permanent battlefield since 1808, the date of the Napoleonic invasions. Since the Crimean War, with Russia on the one hand, and Turkey, France and England on the other, followed by the Franco-Prussian War, and then the First World War, which quickly gave way to the Second World War, it is almost always the same thing: in the West, the urge to invade France, the Ruhr, to seize coal and steel; in the East, the urge to seize Ukraine, the breadbasket of Europe and the conquest of the living space, Lebensraum. Indeed, over the last five hundred years, almost all European countries had their borders modified by wars, from Russia to the United Kingdom. Only Spain and Portugal have been spared—although not by civil wars. But today’s war marks the return of interstate conflict with territorial pretensions in Europe, a figure last seen in 1945; it is above all a crime of aggression, and its conduct results in many war crimes and crimes against humanity.

1. Criminology’s long path towards addressing the realities of war

The issues raised by the existence of wars has always sparked deep reflections, ever since the classical authors, of what would be called today political science, although a general theoretical framework only emerged after the end of the First World War, under the banner of geopolitics. But phenomena such as those we experience today must be approached from different viewpoints: law, international relations, economics and criminology. What we witness are atrocious crimes, leading to terrible causalities and damage, perpetrated in the cruellest of ways. Preventing such crimes requires understanding how the underlying processes of force, ambition and confrontation emerge and evolve. A criminology of war and its atrocities is necessary.

Crimes of war, as well as the crimes perpetrated by the state against its own citizens, are the gravest of crimes. And yet, criminology, born with a bang in the second half of the 19th century, has only very recently started addressing these types of crimes, almost systematically after the Balkan wars in the 1990s.

Before that, only three criminologists have attempted to examine the wars and their crimes: Hermann Mannheim, Sheldon Glueck and Mariano Ruíz Funes, all three motivated by the genocides and atrocities of the Second World War.

Ruth Jamieson begins the introduction to her book *Towards a Criminology of War* (1998) by stating that, despite significant recent debates about the decline of barbarism in 20th century Europe, the incidence and ferocity of war and ethnic conflict show no sign of abating and that contemporary European criminology remains largely aloof and impassive to these issues. Twenty-five years before the current war in Ukraine, the author concluded that despite

de Poutine: la politique intérieure de l’agresseur’, *Le Grand Continent*, 22 February 2023.

compelling historical and substantive reasons, contemporary criminology had not paid attention to the complex connections that structure the relationship between war and crime. In 2014, the European Criminology Group on Atrocity Crimes and Transitional Justice met for the first time within the European Society of Criminology, initiated by the great Alette Smeulers and now chaired by Nandor Knust, currently at the Arctic University of Tromsø in Norway and formerly responsible for research into international crime at the Max Planck Institute in Freiburg.³ For Alexia Pierre, the reasons for this lack of interest lie in the fact that ‘contemporary mass crimes are most often committed during armed conflicts, in the aftermath of such conflicts, or during periods of crisis and prolonged destabilization. Attacks on civilian populations then appear to outside observers as acts of war, collateral damage, or unavoidable acts resulting from an uncontrollable context’ and that most of these war crimes and atrocities are the result of a project, usually the appropriation of a territory and the purge of undesirable elements.⁴

Genocide became the subject of criminological investigation after the commission of crimes in the former Yugoslavia and Rwanda. But it was not until 2009 that the Stockholm Prize in Criminology was awarded to Raúl Zaffaroni for his work on mass state crimes, which were epidemic in Latin America in the 1970s and 1980s.⁵

The reasons for this delay are multiple: epistemological problems preventing the analysis of these heinous crimes as crimes of ordinary, rational people, difficulties in apprehending the reality of events of such magnitude, difficulties in obtaining data indispensable to an evidence-based criminology, difficulties in finding the victims and understanding their languages, etc. But the criminological approach, the material identification of the behaviours and processes that lead to such atrocities, the characteristics of the power and command relationships of armed groups, are essential not only for the development of an adequate criminal policy towards international crimes, but also for the administration of international justice. The International Criminal Court’s devastating acquittal in the Bemba II case stems from a failure to consider the material properties of the acts prosecuted in both the trial and the sentence.

The ambition of this article isn’t to delve into the various trials and procedures to analyse and deal with the numerous methodological approaches that have since

been developed in criminology with respect to genocide, crimes of aggression, war crimes and crimes against humanity. Rather, my aim here is to assess what appears to be most significant to provide a material basis for legal action, whether national or international, and to identify the processes that led to this and other wars—the modelling of which could enable better prevention of future wars—as well as the design or improvement of the relevant legal policies for the European Union.⁶

The sanctions that some states impose on others in response to the war warrant a formal legal analysis, such as the one undertaken by other contributions to this volume,⁷ but also an analysis of their relevance in the effort to mitigate the level of violence of the aggressor or to achieve the cessation of hostilities. It is necessary to study the real criminological functioning of the targets, both states and other persons, and to establish European criteria on the material components of the criminal liability of natural and legal persons.

It is equally important to address the systematic efforts of fostering a public opinion conducive to war, which characterise the use of hate speech to incite to genocide and war, as well as to aim to repress behaviours that facilitate materially the war effort. Criminological literature frequently shows that genocides and great atrocities are not unintended consequences, but usually result from efforts to create a state of mind that denigrates and dehumanises the enemy, systematically repeated until it takes hold of the hearts and minds of people who normally have access to no other information. Moreover, it shows that in such scenarios militias and other forces that fall outside the scope of military legal discipline are frequently used. This is what happened in an extraordinary way with ‘Radio Télévision Libre des Mille Collines’ in Rwanda, and this is what is happening in Putin’s Russia, where there is an absolute control over communications and the war effort relies on private militias such as the Wagner group, which recruits criminals massively.

In what follows, I will address the criminological aspects of the fundamental problems of prevention and avoidance of atrocities from an international and European point of view, both in terms of the European security and defence policies and the harmonisation of criminal sanctions and incriminations, as well as their application, if necessary by the European Prosecutor’s Office.

I will limit the scope of my analysis here to the policy aiming to prevent the intervention of mercenary groups and companies in military and war actions and to the policy of sanctions and criminal prosecution at the European level, which is of paramount importance, especially in a ‘bastard’ war that uses energy and food resources as weapons of war. I will leave two other important aspects

3. Nandor Knust, *Strafrecht und Gacaca. Die Aufarbeitung des ruandischen Völkermords mit einem pluralistischen Rechtsmodell* (MPI Fribourg i. Br. 2013); Alette Smeulers and Fred Grünfeld, *International crimes and other gross human rights violations: a multi- and interdisciplinary textbook* (Martinus Nijhoff Publishers 2011); Alette Smeulers, *Supranational criminology: towards a criminology of international crimes* (Roelof Haveman, Intersentia 2008).
4. Alexia Pierre, ‘Le crime de masse en criminologie’ (2015) 3 *Revue de science criminelle et de droit pénal comparé*, 627 - 637.
5. Raúl Zaffaroni, *El crimen de Estado como objeto de la Criminología* (Biblioteca del Instituto de Investigaciones Jurídicas 2013), and ‘Can Criminal Law Really Contribute to the Prevention of Crimes against Humanity?’, (2009) *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 2-25.

6. See *supra* notes 4 and 5.
7. See in this volume the contributions by Régis Bismuth (page 8), Anton Moiseienko (page 33) and Leanna Burnard and Mira Naseer (page 22).

of the prevention of genocide, war crimes and atrocities for another occasion: the policy targeting the systematic disinformation by the adversary, and the fight against the ‘hate speech’ that supports genocidal policies, illegal wars and war crimes. Nonetheless, it must be stressed that the most reasonable policy in the face of atrocious wars and genocides is that of prevention, which, when ineffective, can morph into repressive measures.⁸

2. Prohibiting mercenaries and similar private military and security companies

Since 1949, the Convention for the Protection of Victims of International Armed Conflicts has identified ‘mercenaries’ as a risk factor. Since then, but especially since the Iraq War, at the initiative of African countries particularly affected by the phenomenon, the United Nations has been trying to regulate, prohibit and criminalize not only mercenaries, but also their modes of organization, which are now known as ‘private military and security companies’ (PMSC). There is but one UN Convention on the prohibition and punishment of ‘the recruitment, use, financing and training of mercenaries’, only applicable outside of armed conflicts.⁹ The Convention criminalizes (a) the recruitment, use, training or training of mercenaries, (b) the direct participation of a mercenary in hostilities or in concerted acts of violence, and (c) the intention to commit any of the offences set out in the Convention, and calls on states to incorporate these prohibitions into their domestic law with penalties appropriate considering their gravity. For its part, the African Union has had a convention for the elimination of mercenary activities in Africa since 1977, which was expanded in the statute of the African Court on Human and Peoples’ Rights to governments that assemble mercenaries to maintain themselves in power.

The additional risk factor for the commission of atrocities in wars is clearly the intervention of military units falling outside the ordinary army, which lack the order and discipline of professional armies and to which states sometimes resort precisely because of this characteristic. In the Ukrainian war, Russia is using two militia armies, the so-called Wagner group on the one hand and Kadyrov’s Chechen units on the other. It is not known which one of them is more atrocious. The former, as is well known, is largely composed of criminals who are offered their freedom after serving their sentences in combat, and soldiers of fortune, pure mercenaries, who advance Russian policy goals both in Ukraine and throughout Africa. As for Kadyrov’s men, it suffices to look at their combat slogans, recalling the great destiny awaiting them after death in a holy war.

During the war in Iraq, the intervention of thousands of ‘contractors’, in particular the company called Blackwater

at the time, was widely covered by the media. We know the crimes they committed against the civilian population and that their main leaders were convicted by the American courts after long trials and pardoned by Donald Trump in the last days of his presidency.¹⁰

The prevention of atrocities would essentially consist of prohibiting the use of mercenaries by states and considering them, under international criminal law, as criminal organizations punished as such. On December 4, 1989, after nine years of debate, the United Nations General Assembly approved—without a vote—the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. However, not only has no progress been made in this area, but there have been setbacks, especially since the war in Iraq, where these ‘private military and security companies’ have appeared on a massive scale, making it difficult to distinguish between the legitimate and criminal activities of these organizations. All of this has been the subject of an extensive study, the *Montreux Document*, produced by the International Red Cross. For the purposes of this article, it is sufficient to note that this document recommends that states institute criminal responsibility for all international crimes for which international law requires criminalization. However, as the working group of the UN Commission on Human Rights points out, there is a need not only for recommendations and codes of good practices, but also for binding legal provisions of international law.

The European Union has applied restrictive measures to the leaders of the Wagner Group (European Council, Foreign Affairs, News, Dec. 13, 2021), for their actions not only in Ukraine, but also in Syria and several African countries. But it seems that the EU does not have a clear-cut doctrine on this issue, other than whether the mercenary companies are Russian. Indeed, in 2017 there was a debate in the UN Human Rights Council on a resolution condemning the use of mercenaries, during which representatives of the United States and the European Union voted against.¹¹ During the same year, a debate took place in the European Parliament’s Committee on Foreign Affairs, which issued a draft resolution proposing that the European Commission should only contract private security companies based in EU member states and that there should be monitoring of their activities, as well as stricter rules for their contracting, subject to common and binding criteria across the European states.¹²

8. Hollie Nyseth Brehm, ‘Re-examining risk factors of genocide’ (2017) 19 *Journal of Genocide Research* 1, 61-87.

9. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by General Assembly Resolution 44/34 on 4 December 1989.

10. ACNUDH, ‘US pardons for Blackwater guards an ‘affront to justice’ – UN experts’ (2020) <https://www.ohchr.org/en/press-releases/2020/12/us-pardons-blackwater-guards-affront-justice-un-experts>; Jelena Aparac, ‘Business and armed non-State groups: challenging the landscape of corporate (un)accountability in armed conflicts’ (2020) 5 *Business and Human Rights Journal* 2; Sandra Walklate and Ross McGarry, ‘Typologies: Policing in Conflict and Post-conflict Zones’, in *The Palgrave Handbook of Criminology and War* (Palgrave Macmillan 2016).

11. 22 September 2017, A/HRC/36/L.2

12. E. Krahnmann and C. Friesendorf, *The role of private security companies (PSCs) in CSDP missions and operations*, Directorate-General for external policies of the Union (Bruxelles 2011).

In view of the above, it seems obvious that the EU should promote at its own level legislation on PMSCs, their criminalization and the harmonization proposals recommended by member states. It is clear that the EU has much to do in this area. It has done so by adopting the so-called European Magnitsky Act,¹³ which provides for sanctions in cases of genocide, crimes against humanity and other human rights violations such as torture, slavery, extrajudicial executions, enforced disappearances and arbitrary detention. Sanctions may also be adopted to target other human rights violations, provided they are systematic or widespread, such as trafficking in persons, sexual violence, freedom of assembly and association, freedom of opinion and expression, and freedom of religion.

3. EU Sanctions and Restrictive Measures against Perpetrators and European Criminal Law Harmonization on Measures against Circumvention Behaviour

As noted above, the analysis of sanctions that some states impose on others in response to the war warrant a formal legal analysis, but also an investigation into their practical relevance in the effort to mitigate the level of violence of the aggressor or to achieve the cessation of hostilities. It is necessary to study the real criminological functioning of the targets, both states and other persons, and to establish European criteria on the material components of the criminal liability of natural and legal persons. It doesn't suffice to point to the officials of the aggressor state, but to identify and substantiate with clear evidence the liability of those individuals who have full control over companies involved in these crimes. A criminology of corporations and white-collar criminals would certainly be welcome.

Interstate sanctions aiming to prevent or to react to war efforts have a long history, particularly as a trade policy. Already the Napoleonic wars were marked by trade sanctions and export embargoes; but modern restrictive measures and financial sanctions, as well as the freezing of goods and assets, are a modern phenomenon, explained precisely by the levels of globalisation that have been achieved. To the best of my knowledge, the first reflection on these sanctions as a weapon of peace and war is offered in Hermann Mannheim's *War and Crime*, which first reflects on the limits of mediation in the pre-defensive war phases, including the limits of resocialisation. Reflections on its effectiveness in preventing wars of aggression and war atrocities has not ceased since then.¹⁴

But the worst thing about sanctions against aggressor states is that they are not enforced. This was the case with the sanctions imposed by the League of Nations: Italy was

not subjected to an oil embargo and the UK did not block the Suez Canal to cut off supplies to the aggressors. It is worth recalling the cost to Europe and the world of the arms embargo imposed on the Spanish Republic. It is surprising, for example, that René Cassin's excellent book *Les hommes partis de rien* does not mention the decisive effect of the defeat of the Second Spanish Republic on the invasion of Austria, Czechoslovakia, and then Poland and France. A comprehensive and recent study is offered by Nicholas Mulder in a book analysing sanctions policy from 1945 to the present day.¹⁵

3.1 Confiscation and compensatory appropriation of assets subject to restrictive measures

Analysing the efforts of the EU authorities and the Member States to effectively enforce the European sanctions, one can see problems stemming from the feeble identification capacities and the circumvention of the restrictive measures by individuals and companies. The objective, therefore, is to improve European regulation in this area and to harmonise the weak measures at national level. It is clear that non-compliance and evasion, as well as the lack of enforcement of these measures by certain national authorities must be subject to the same sanctions in all countries, without the subjects of the measures being able to 'choose their prince' within the EU, in the words of Cesare Pedrazzi.

There is an urgent need for harmonisation of incriminations and for sanctions defining a new Euro-offense; a project has been in preparation for several weeks, at an unprecedented speed in the Union's legislative practice. This issue, which has been intensively commented on since the Russian invasion of Ukraine, has two consequences. First, the harmonisation of the various forms of non-compliance with sanctions as a crime by means of a European directive and, second, the granting of powers to investigate such crimes to the European Public Prosecutor.

The European Council meeting of 9 February 2023 reaffirmed its intention to demand accountability for war crimes and other serious crimes committed in Ukraine and to support the establishment of an appropriate mechanism for the prosecution of the crime of aggression, as well as the investigations initiated by the Prosecutor of the International Criminal Court. It further supported the establishment of an appropriate mechanism for the prosecution of the crime of aggression in The Hague, an effort that has been linked to the existing Joint Investigation Team at Eurojust.¹⁶

13. Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses; Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses.
14. *International Sanctions. A Report by a Group of Members of the Royal Institute of International Affairs.* (Oxford University Press 1938), published by a working group created following the Italian invasion of Ethiopia.

15. Nicholas Mulder, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (Yale University Press 2022), followed by several interesting reviews, edited by Christopher Schaefer in *Toqueville* 21, Book Forum, March 2022, with an answer from the author.
16. On the complexity of the exercise of criminal jurisdiction over Russian aggression and atrocities, see the contribution of Federica D'Alessandra to this volume (page 54), as well as William Schabas, 'La Justice pénale et la guerre en Ukraine', *Blog Club des Juristes*, 19 March 2022, and the contributions of Didier Rebut, J.-F. Laval and A.-L. Chaumette on the same blog, and the various contributions to the September 2022 issue of *Journal*

The same European Council called for increased cooperation between public customs control bodies, tax authorities, intelligence services, research institutes and statistical agencies to improve the implementation of restrictive measures and other sanctions. It concluded by referring to EU legislative action on sanctions policy and the incrimination of circumvention of sanctions in a regulation, and on the harmonisation instrument of the offence in a directive, the proposal for which was published after receiving a favourable vote from the Parliament last December.¹⁷

This provision is based on Article 83(1) TFEU, which establishes a closed list of Euro-offences, which can only be extended if necessary for the implementation of a Union policy, as in the case of market abuse offences. However, Article 83(1) itself provides that the Parliament and the Council may extend the list of Euro-offences where, in light of developments in crime and another group of offences, they are particularly serious and have a cross-border dimension.¹⁸ The idea of extending the Euro-offences to the circumvention of sanctions and restrictive measures, and not only those related to the external security of the Union, arose during the French Presidency of the European Council in 2022. The Council then sought the approval of the Parliament and then adopted the decision to initiate this procedure on 28 November 2022.¹⁹

The restrictive measures are, or should be, aimed not only at exercising appropriate psychological coercion in order to deter entities or individuals from initiating or continuing war activities, but also at securing the resources necessary to finance solidarity with Ukraine in the civilian and military spheres and, in the future, to restore Ukraine after the massive destruction it is suffering. This would obviously be the case if the crime of aggression and the war crimes and crimes against humanity were tried before a court, but it seems clear that such an expectation would be postponed to an uncertain future. It is also true that the object of the sanctions and the funds and property withheld could be qualified as direct or indirect fruits of these crimes and be subject to confiscation. This is an issue that has been resolved in all the countries of the

Union, but it would be questionable and there would be no facilities for the European management of the funds, except if established through European legislation.

It should be recalled that the invasion of Ukraine by Russia and the support of the European Union and its Member States has resulted in extremely high financial costs and that its mitigation is a major issue for the financial interests of the European Union, which will again see its interests and budget compromised during the inevitable reconstruction of Ukraine. This point is not explicit in the documents relating to the Directive, as Andres Dornbierer points out in a recent study.²⁰ Nonetheless, on 30 November 2022, Ursula von der Leyen stated that 'Russia must also pay financially for the devastation that it caused. The damage suffered by Ukraine is estimated at 600 billion euros. Russia and its oligarchs have to compensate Ukraine for the damage and cover the costs for rebuilding the country. And we have the means to make Russia pay. We have blocked 300 billion euros of the Russian Central Bank reserves and we have frozen 19 billion euros of Russian oligarchs' money. In the short term, we could create, with our partners, a structure to manage these funds and invest them. We would then use the proceeds for Ukraine. And once the sanctions are lifted, these funds should be used so that Russia pays full compensation for the damages caused to Ukraine. We will work on an international agreement with our partners to make this possible. And together, we can find legal ways to get to it. Russia's horrific crimes will not go unpunished.'²¹

But so far, the issue is both simple and surprising, as the EU seems to have been careful to create through legislation a system of financial coercive measures that would not morph into asset confiscation in the event of failure, meaning that if the war in Ukraine were to end other than with an unlikely unconditional Russian surrender, all frozen assets and financial securities would have to be returned to Russia. For its part, the EU would then have to establish a special tax to cover the costs of supporting Ukraine, both in terms of arms delivered as part of its defensive war efforts and assistance provided to the millions of displaced people, as well as the future recovery plan. The fact is that the current programme of the directive in question, as well as another programme being prepared on confiscation, which will be specified shortly, only envisage the creation of offences for the circumvention and violation of the regulations and provisions that impose the restrictive measures. The EU has so far avoided converting the provisional restrictive measures into definitive measures, ie to confiscate the

of International Criminal Justice, with an introduction by Julia Geneus and Florian Jessberger.

17. Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures (COM(2022) 684 final), 2 December 2022.
18. K. Tiedemann and A. Nieto, *Eurodelitos, con edición mexicana de INACIPE de 2006: el derecho penal económico en la Unión Europea* (UCLM Cuenca 2005); Marta Muñoz de Morales and Luis Arroyo Zapatero, 'Le contrôle des choix de pénalisation: effets directs et indirects', in Geneviève Giudicelli-Delage, Stefano Manacorda (dir.), *Cour de Justice et Justice Pénale en Europe*, UMR de Droit Comparé de Paris, vol. 19 (Société de Législation Comparée 2010), 23-55; Luis Arroyo Zapatero and Marta Muñoz Morale, 'L'harmonisation autonome', in Geneviève Giudicelli-Delage and Stefano Manacorda (dir.) *Le droit pénal de l'Union européenne au lendemain du Traité de Lisbonne* (Société de Législation Comparée 2012), 113-139.
19. For a review and a precise assessment of the developments in criminal law in the EU that year, see v. Didier Rebut, *L'ajout de la violation des sanctions européennes contre la Russie à la liste des infractions pénales de l'Union européenne: Signification, portée et perspective*, *Le Blog du Club des Juristes*, 2 December 2022.

20. A. Dornbierer, 'From sanctions to confiscation while upholding the rule of law' (Basel Institut on Governance, Working Paper 42, February 2023).
21. Statement of the President of the European Commission, Brussels, 30 November 2022, https://ec.europa.eu/commission/presscorner/detail/en/statement_22_7307; B. de Miguel, 'La UE promueve la confiscación de bienes rusos para pagar la reconstrucción de Ucrania', *El País*, 9 May 2022; Russian Elites, Proxies, and Oligarchs Task Force Joint Statement, U.S. Department of the Treasury, 29 June 2022, <https://home.treasury.gov/news/press-releases/jy0839>.

goods and assets subject to these measures once the intended objective (the cessation of hostilities and of the occupation of Ukraine by Russia), has been achieved. This is not only missing in this proposal for a directive, but also in Regulation 2020/1998 on restrictive measures and its corresponding decision 2020/1999.²²

The proposal for a Directive on asset recovery and confiscation of 25 May 2022, which is limited to extending confiscation measures to the crimes of circumvention of restrictive measures, does not address the issue either. Thus, in recital 6, it is stated ‘This Directive does not regulate the freezing of funds and economic resources under Union restrictive measures’, and recital 11 states that ‘in order to ensure the effective implementation of Union restrictive measures, it is necessary to extend the scope of the Directive to the violation of Union restrictive measures’. Therefore, to define the scope of offenses to which the new rules apply, Article 1.2 states: ‘This Directive also establishes rules to facilitate the effective implementation of Union restrictive measures and the subsequent recovery of related property where necessary to prevent, detect or investigate criminal offences related to the violation of Union restrictive measures.’

The issue is the widespread fear that the confiscation of these assets would have to be carried out in a complex procedure that would result in litigation before the CJEU in Luxembourg and, if necessary, before the ECHR in Strasbourg; the two courts may refuse to recognise measures that violate due process or property rights. The concern is valid: one need only look at the Luxembourg Court’s decision of 8 March 2023 annulling the application of restrictive measures against the mother of Wagner’s founder, who has considerable wealth, apparently because, quite simply, the Commission was unable to obtain access to and documentation from the Moscow commercial register proving the origin of assets and companies belonging to the Russian war criminal and mercenary leader before 2019,²³ an argument that is completely alien to the Court’s own doctrine, which calls for cases to be interpreted ‘in their context’, ie in this case an ongoing war.

One conclusion from the above is that the EU should not only define and harmonise the behaviours that circumvent the restrictive measures but should also include in the

catalogue of punishable offences subject to confiscation measures the behaviours proscribed by Article 3 of the proposed Directive. The definition of unlawful conduct can and should be provided in Regulation 2020/1998 on restrictive measures against serious human rights violations and abuses. It is interesting to note that in setting out the offences to which this Regulation applies, it mentions genocide (a) and crimes against humanity (b) but does not mention crimes of aggression or war crimes.

It would therefore be necessary to incorporate a provision in Regulation 2020/1998 which, without prejudice to its final drafting, would establish that ‘where actions constituting abuses or violations of human rights which are the basis for the adoption of restrictive measures continue despite the enforcement of such measures, the funds and economic resources obtained shall be confiscated and allocated to the reparation of damages caused or continuing to be caused or to the recovery of expenses incurred, in particular as a result of an unlawfully declared war against another country. The EU Council shall have full powers of administration and allocation of these funds.’

3.2 Relevance of the criminalisation of intent and recklessness in the harmonisation Directive: the problem of deliberate ignorance

But criminology reveals that one of the most serious problems facing a harmonised criminalisation of circumventing behaviour is that of subjective liability. The proposed Directive states in Article 3(1a) that ‘violations of a Union’s restrictive measure [which] constitute a criminal offence when committed intentionally’ will be punishable by the relevant penalties provided for in Article 5 and Article 3. Article 3(3) provides that ‘the conduct referred to in paragraph 2(a) to (g) shall constitute a criminal offence also if committed with serious negligence’, without any indication of the sanction to be harmonised for these cases; this deserves an initial consideration, given that the sanctions for reckless conduct are usually minimal, generally excluding imprisonment and limited to fines, often lower than administrative pecuniary sanctions.

Criminology precisely points out that in practice, what usually happens in that prosecutions based on breaches of rules and regulations are resolved as negligence, because it cannot be proved that the main conduct was carried out with full knowledge of the circumstances and prohibition of the conduct. And yet, in most criminal cases carried out for violations of administrative or commercial regulations such as those in question, the subjects act in deliberate ignorance, which prevents them from being conscious of the circumstances and provisions mandating the immobilisation of goods or knowing that their actions violate the general or specific regulations that apply to them. This is a very conscious behaviour in practice, whereby the subject avoids having to learn that he is subject to a restrictive measure and nevertheless carries out the act of disposal. National or European law cannot ignore this

22. See, critical towards the European commission, Jeff Nielsen, ‘Considering the EU Commission’ proposal on its Directive for Criminal Penalties for Violations of Restrictive Measures in the Context of a Comparative Analysis with United States Sanction Enforcement’ (2022) <https://ssrn.com/abstract=4283807>; see also Michael Kilchling, ‘Beyond Freezing? The EU’s Targeted Sanctions against Russia’s Political and Economic Elites, and their Implementation and Further Tightening in Germany’ (2022) 2 EUCRIM, 136-146; on their criminology, see Eurojust/Genocide, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis* (December 2021); Eurojust, *Key factors for successful investigations and prosecutions of core international crimes* (2022).

23. Anna Pinget, ‘Annulment of Restrictive Measures Applied to Mother of Wagner Group Founder’, *eucrim* (10 March 2023), <https://eucrim.eu/news/annulment-of-restrictive-measures-applied-to-mother-of-wagner-group-founder/>; see also the Judgment of the General Court of 8 mars 2023.

reality because it facilitates what some legal systems call fraud, although the expression that best identifies the subjective behaviour of the subject and its consequences is that of acting with ‘wilful blindness’ (*Rechtsblindheit*).²⁴

Such evasive behaviour is typical for professionals and commercial organisations, as is generally the case, for example, in the field of corporate economic crime or in the market for protected cultural goods, which has recently been the subject of numerous investigations. In this respect, criminological studies indicate that art dealers are often unaware that they are dealing with protected cultural property because they have not been willing to verify its true origin or protected nature, despite the fact that there are often indicia in this respect, which leaves the policy objective of protecting such cultural property marred by uncertainty.²⁵

Therefore, a provision should be introduced in the European texts harmonising the criminal offences of circumvention of the rules on restrictive measures, in order to avoid the automatic re-characterisation of criminal behaviour as mere liability for negligence and the downgrade of available sanctions to fines only, where offenses are committed in wilful ignorance. Such a provision would ensure that the Directive is applied equally across the European Union, without any country being allowed to become the ‘Principality’ of choice for negligence torts.

It would suffice to add to Article 5, after paragraph 4, a paragraph 4 bis stating that ‘the same sanctions as those provided for in the two preceding paragraphs shall apply to the respective conduct when committed in wilful blindness either of the fact that goods or funds are subject to restrictive measures or of the scope and meaning of such restrictive measures’. The meaning of such provisions is well understood in common law and in some civil law countries. Distinguishing malice from recklessness is a deep and extremely complex theoretical problem, but it is all solved if the law explicitly provides for it, and it is no longer a mere doctrinal or theoretical question. Doctrine will only have to develop criteria to discriminate certain behaviours as more serious than others. The law, in this case, is first and foremost fundamentally a system for qualifying offences and assigning penalties. The provision does not say that wilful blindness is an intentional offense, but only that it is punishable by the same penalty as intentional offenses.²⁶

24. On the German experience on this area, and especially the freezing of assets, see Klaus Tiedemann, *Wirtschaftsstrafrecht* (5th ed. Wahlen 2018), in particular at 257 et seq.

25. See Stefano Manacorda and Duncan Chappell, *Crime in the Art and Antiquities World, Illegal Trafficking in Cultural Property* (Springer 2011); Kenneth Polk and Duncan Chappell, ‘Fakers and Forgers, Deception and Dishonesty: An Exploration of the Murky World of Art Fraud’ (2009) 20 *Current Issues in Criminal Justice* 3, 393-412; Duncan Chappell and Kenneth Polk, *The Peculiar Problem of Art Theft, Contemporary Perspectives on the Detection, Investigation and Prosecution of Art Crime* (Routledge 2014).

26. See for instance Francesco Rossi, ‘Un’introduzione al problema dell’“ignoranza deliberata” nella teoria dell’elemento soggettivo del reato’, *La legislazione penale*, 27 September 2022, <https://www.lalegislationepenale.eu/>; Ramon Ragués i Vallès, *La ignorancia deliberada*

Conclusion

From the perspective of criminal law, the response to war and atrocities must be primarily legal—the denunciation and the criminal sanctioning of criminal offenses—but it should not be imposed blindly; rather, it should be well thought through and reflective of the factual context. For this reason, the legal response should be supported by criminological investigation.

Criminology teaches us that *impunity* for atrocities is the strongest criminogenic factor, which is why it is essential to bring those responsible for this war and its conduct to criminal justice, either at the ICC, an *ad hoc* international tribunal, or an internationalised Ukrainian tribunal with the cooperation of the European Union.

The Ukrainian war was initiated with an army of mercenaries, the Wagner Group, the ‘little green men’ who occupied Crimea in 2014. The harmonisation of their criminalisation and an early prosecution of mercenaries can prevent and avoid the subsequent aggression with ordinary armies.

The policy of sanctions against the aggressor states is the only viable alternative for other European states—bar their own mobilisation and involvement in the war—because a policy of imperialist warfare, whose limits are unknown and which would be a source of new and continuous dangers, cannot be acquiesced. The only real alternative to war is to supply weapons to a people that has taken up arms and to apply economic sanctions which, if the war does not stop, must morph into definitive measures, with confiscated funds and goods used to compensate the victim country, to support its reconstruction and future development, and to finance EU’s commitments in terms of delivery of weapons and solidarity with displaced persons. To ensure the legality of these measures, it is necessary to include crimes of aggression and war crimes among the offences justifying the adoption of restrictive measures and to provide for the confiscation of goods and assets in Regulation 2020/1998, as well as in the proposal for a Directive on asset recovery and confiscation, and to include in the proposal for a Directive on the harmonisation of the offences of violation of Union restrictive measures the sanctioning of conduct carried out in wilful ignorance.

Ultimately, the EU faces the challenge of providing for a legal characterisation of the violations of international law that it wishes to address and must therefore complement the concept of restrictive measures with the definition of the international violation that grounds, first, the application of restrictive measures and, second,

en Derecho penal, (Atelier 2008); Jonathan L. Marcus, ‘Model Penal Code Section 2.02(7) and Willful Blindness’ (1993) 102 *The Yale Law Journal* 8, 2231; Francesco Curi, *Tertium datur. Dal common law al civil law per una scomposizione tripartita dell’elemento soggettivo del reato* (Guiffè 2003); Alexander Sarch, *Criminally Ignorant: Why the Law Pretends We Know What We Don’t* (Oxford University Press 2019).

confiscation, under conditions that are not reprehensible to the institutions charged with the protection of human rights. The criminology of the behaviour of those who contribute to the war and are subject to restrictive measures and their financial operating methods calls for the criminalisation of circumvention behaviour by means of severe prison sentences and the harmonisation of offences and penalties throughout the European Union.

The criminological analysis of companies and their managers calls for the further criminalisation of certain behaviours in the business context: not only knowing and wilful circumventing behaviour, as proposed in the Directive, but also ‘wilfully blind’ behaviour, which should be sanctioned with penalties equivalent to those applicable to wilful misconduct, and not the light penalties applicable to negligent behaviour.

Furthermore, the positive experience of the effectiveness of the European Public Prosecutor’s Office in the criminal prosecution of offences against the EU’s financial interests has prompted the French and German Justice Ministers to propose extending its competences to infringements of the EU restrictive measures.²⁷ Without a harmonisation of criminal prosecutions through the European Public Prosecutor, there will be no real harmonisation of the underlying offences. We face today a truly global criminal law and, as Adam Nieto points out, an era of post-national criminal justice.²⁸

27. Eric Dupond-Moretti and Marco Buschmann, *Le Monde*, 29 November 2022 (https://www.lemonde.fr/en/opinion/article/2022/11/29/violations-of-eu-sanctions-must-be-prosecuted-by-the-european-public-prosecutor-s-office_6006013_23.html).

28. Adán Nieto Martín, *Global Criminal Law. Postnational Criminal Justice in the Twenty-First Century* (Palgrave 2022).



Leanna Burnard · Legal Advisor, REDRESS

Mira Naseer · Legal Fellow, REDRESS

Sanction. Confiscate. Compensate. How Russian Money Can Be Repurposed as Reparations for Ukrainian Victims

22

Since Russia's invasion of Ukraine, £18 billion of assets belonging to Russian individuals have been frozen under the UK's Russia sanctions regime,¹ and €19 billion has been frozen by the European Union.² One year on from the start of the invasion, governments are grappling with what to do with the vast amounts of frozen wealth within their jurisdictions.³ This article explores law reform that can enable frozen assets to be confiscated and repurposed for the benefit of victims and survivors of the invasion.⁴ It considers avenues of repurposing within the context of the right to reparations, which includes financial compensation, entrenched in international human rights and international humanitarian law.⁵

1. Figure as of 20 October 2022 under the Russia regulations, OFSI annual review, p. 7, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1116689/OFSI_Annual_Review_2021-22_10.11.22.pdf.
2. Figure as of 30 November 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311.
3. See eg, <https://www.congress.gov/bill/117th-congress/house-bill/6930/text>; <https://www.canada.ca/en/global-affairs/news/2022/12/canada-starts-first-process-to-seize-and-pursue-the-forfeiture-of-assets-of-sanctioned-russian-oligarch.html>. See also <https://news.un.org/en/story/2022/11/1130587>.
4. This article specifically looks at money belonging to individuals, derived from human rights violations or corruption, and not state money/assets. On this question, see the contributions in this volume by Régis Bismuth (page 8) and Anton Moiseienko (page 33).
5. Article 8 of the Universal Declaration of Human Rights ('UDHR'); Article 2 of the International Covenant on Civil and Political Rights ('ICCPR'); Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD'); Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearances ('ICPPED'); Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('UNCAT'); Article 75 of the Rome Statute of the International Criminal Court ('Rome Statute'); Article 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land ('Hague Convention (IV)'); and Rule 150 of ICRC Customary International Humanitarian Law.

For decades, Europe has been a safe haven for global dirty money.⁶ Wealth amassed by Russian oligarchs and kleptocrats has been funnelled through complex tax structures, intermediaries and enablers, into luxury properties, yachts, private jets, and offshore bank accounts.⁷ The ongoing conflict in Ukraine and its devastating impact on the Ukrainian people has brought this issue to the forefront of public and political debate. The people of Ukraine have been victims of a range of international crimes, including summary executions, indiscriminate shelling, sexual violence, and looting of civilian property.⁸ The world is considering how to stop the war, ensure accountability for the crimes committed, and provide reparations for victims.⁹

Under international law, victims of gross human rights violations and serious violations of international humanitarian law are entitled to reparations.¹⁰ Despite this right, there remain considerable gaps in the payment of reparations to victims. Individual judgments frequently fail to address adequate reparations or damages to repair the harm caused by abuses, compliance is patchy where reparations are awarded, and victims are largely left to rely upon the generosity of donors and state trust funds that are often underfunded.¹¹

Targeted sanctions, which are imposed on individuals and entities, rather than States or entire economic sectors, have been imposed by governments around the world in response to the invasion of Ukraine.¹² They are used to

6. A.B. Guardia, 'The world's dirty money by the numbers', *Politico*, 19 May 2020 (available at: <https://www.politico.eu/article/the-world-dirty-money-by-the-numbers/>).
7. See eg, 'Why is London so attractive to tainted foreign money?', *The Economist*, 7 May 2022 (available at: <https://www.economist.com/britain/why-is-london-so-attractive-to-tainted-foreign-money/21809124>); 'Western nations face a challenge seizing property from Russian oligarchs', *France 24*, 7 March 2022 (available at: <https://www.france24.com/en/europe/20220307-western-nations-face-a-challenge-seizing-property-from-russian-oligarchs>); 'UK is 'top destination' for Russians looking to hide dirty money in property', *OpenDemocracy*, 25 February 2022 (available at: <https://www.opendemocracy.net/en/dark-money-investigations/uk-top-destination-for-russians-to-hide-dirty-money-in-property/>).
8. See eg, 'Ukraine: Apparent War Crimes in Russia-Controlled Areas', *Human Rights Watch*, 3 April 2022 (available at: <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>).
9. See eg, UN GA Resolution A/RES/ES-11/5, Furtherance of remedy and reparation for aggression against Ukraine, available at: <https://digitallibrary.un.org/record/3994481?ln=en>.
10. UN Basic Principles of the Right to a Remedy and Reparation for Serious Violations of International Human Rights Law and Gross Violations of International Humanitarian Law, Article VII (available at: <https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>).
11. For example, awards totaling approximately US \$300 million have been issued in favor of victims of torture and other abuses perpetrated by the regime of Hissène Habré in Chad. Yet these victims have so far been paid none of this sum. Similarly, an award of more than \$2 billion for 10,000 victims of the regime of former Philippine President Ferdinand Marcos has yet to be satisfied by Marcos' estate. See REDRESS Framework for Financial Accountability, page 5 (available at: <https://redress.org/wp-content/uploads/2021/03/Financial-Accountability-for-Torture.pdf>).
12. <https://www.gov.uk/government/collections/uk-sanctions-on-russia>; <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/>; <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/ukraine-russia-related-sanctions>; https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/ukraine-sanctions.

freeze the assets of the sanctioned individual or entity within the sanctioning jurisdiction and/or prevent the sanctioned person from traveling to that jurisdiction. Any national of the sanctioning State is also prohibited from dealing financially with the sanctioned person. These restrictions aim to deter individuals from continuing violations and provide a form of accountability for past violations. Even in cases where an individual has no known assets in the sanctioning jurisdiction and does not intend to travel there, the signalling of international condemnation of their actions can lead to behavioural change.

While the sanctions regimes are an important first step in providing accountability for Russian aggression, they fall short of providing redress for victims. Assets frozen through sanctions currently cannot be repurposed as reparations. They are unable to be used by the targeted individual until a decision is made to either unfreeze them or a license is granted to use them. In practice, this means that assets can remain frozen indefinitely. Existing legislation is largely ill-equipped to pass ownership of frozen assets to the sanctioning government, allowing it to liquidate those assets and repurpose the proceeds as reparations. New laws are needed to make the jump from freezing to confiscation in order to address the dual problems of illicit wealth and the delivery of practical reparations for victims and survivors of conflict.

1. Existing Mechanisms for Targeting Illicit Wealth

A. Targeted Sanctions

Numerous jurisdictions, including the EU and UK, have adopted targeted sanctions regimes in order to meet specific foreign policy or national security objectives.¹³ Sanctions regimes are either thematic, such as the Magnitsky sanctions regimes that are designed to combat violations of international human rights law and corruption, or geographic, such as the Russia regulations,¹⁴ which have been used to sanction oligarchs and others supporting Putin's regime and the war.

Targeted sanctions are a foreign policy tool rather than a judicial accountability mechanism, with the primary objectives of encouraging behavioural change in the sanctioned individuals and providing a form of accountability,

aspx?lang=eng#:~:text=Canada%20is%20imposing%20sanctions%20against%206%20entities%20involved%20in%20gross,Ukraine%20and%20anti%20Democratic%20policies.; <https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/russia-sanctions-regime#:~:text=Australia%20imposes%20autonomous%20sanctions%20in,extended%20in%202015%20and%202022>.

13. For example, the aim of the EU targeted sanctions regime related to the independence and territorial integrity of Ukraine is to 'impose severe consequences on Russia for its actions and to effectively thwart Russian abilities to continue the aggression.' See <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/>. The purpose of the UK's Global Human Rights Sanctions Regime is to 'deter, and provide accountability' for specified human rights violations. See GHRs Regulations (2020), Section 4(1), <https://www.legislation.gov.uk/uksi/2020/680/regulation/4>.
14. The UK Russia (Sanctions) (EU Exit) Regulations 2019, available at: <https://www.legislation.gov.uk/uksi/2019/855/contents>.

rather than acting as a punishment *per se*. Current sanctions regulations do not allow for the confiscation of frozen assets, and as a result, these assets can sit untouched in the sanctioning jurisdiction for years—leading to waste and loss of any potential benefit for victims. One example is the £9 million mansion in London of former Libyan dictator Muammar Qaddafi's son, which was seized after he was sanctioned by the UK in 2012.¹⁵ A decade on, the property is falling apart and efforts to liquidate the home and have the proceeds returned to the Libyan people have been fraught.¹⁶ Similarly, in continental Europe, governments are struggling to keep up with the expensive maintenance of frozen Russian superyachts.¹⁷ This provides a concerning picture for the future of the swath of Russian luxury assets that have been frozen under sanctions if changes to legislation are not made.¹⁸ Confiscation and repurposing mechanisms that complement existing targeted sanctions regimes are needed to ensure that opportunities to use frozen assets as reparations for victims are not wasted.

B. Asset Confiscation Measures

Outside of the sanctions context, some existing mechanisms within the EU and UK law enable asset confiscation. However, each is limited in their application, making them ill-equipped to tackle the issue at hand.

Conviction-Based Confiscations

Conviction-based confiscation allows for the proceeds of crime to be confiscated following a trial or guilty plea. For convictions involving human rights violations, such as torture, crimes against humanity, genocide and war crimes, where an individual is found guilty, courts can make compensation or confiscation orders that allow victims to be financially compensated for injury, loss or damage that results from the offense. In these cases, the monetary damages payments do not target specific assets related to the violation, but the individual perpetrator.¹⁹

For corruption convictions involving embezzlement of State funds, the proceeds of the corrupt acts are repatriated to the country of origin rather than as compensation to individual victims.²⁰ Asset repatriation can be compli-

15. '£10m house in expensive London suburb recovered by Libya', *Global Witness* (available at: <https://www.globalwitness.org/en/archive/10m-house-expensive-london-suburb-recovered-libya/>).
16. Paul Peachey, 'Libya's rotting London mansion and the mystery of the missing Qaddafi billions', *The National News*, 1 February 2022 (available at: <https://www.thenationalnews.com/world/uk-news/2022/02/01/libyas-rotting-mansion-and-the-mystery-of-the-60bn-qaddafi-fortune/>).
17. Stephen Beard, 'Floating liabilities: Western authorities grapple with the cost of seizing oligarchs' superyachts', *Marketplace*, 19 May 2022 (available at: <https://www.marketplace.org/2022/05/19/floating-liabilities-western-authorities-grapple-with-the-cost-of-seizing-oligarchs-superyachts/>).
18. Jack Sidders, 'Top London Properties Owned By Russian Oligarchs Are Frozen in Time', *Bloomberg*, 30 November 2022, (available at: <https://www.bloomberg.com/graphics/2022-sanctioned-properties-in-london/>).
19. For example, in the UK, compensation orders are permitted under POCA Section 130 of the Powers of Criminal Courts (Sentencing Act) 2000/Chapter 2 of the Sentencing Act, and confiscation orders are permitted under Section 6 of the Proceeds of Crime Act 2002.
20. In accordance with Article 57 of the UN Convention Against Corruption.

cated, as illustrated in the case of Vice President Nguema Obiang of Equatorial Guinea. Assets belonging to Obiang valued at more than US\$200 million have been forfeited or confiscated in the context of criminal proceedings in Switzerland,²¹ the US,²² and France.²³ The respective governments are grappling with how to return the wealth to the people of Equatorial Guinea where the notoriously corrupt regime which stole the assets initially remains in power. In a similar case, following the conviction of Syrian president Bashar Al Assad's uncle for money laundering, French authorities are looking to liquidate his luxury properties and return the proceeds to victims of the civil war in Syria.²⁴

While conviction-based confiscation mechanisms may be effective in select examples, they pose distinct challenges in enabling reparations for victims. In particular, in order to obtain a conviction, the submitted evidence needs to meet the evidentiary standard under criminal law. Meeting this highest standard of proof is particularly challenging in the corruption context, which relies on extensive and complicated investigations, which can be slow and resource intensive. Further, because confiscated proceeds of corruption are repatriated, rather than repurposed as reparations,²⁵ in the context of Ukraine, authorities may prioritise the return of confiscated proceeds of Russian corruption to the Russian people, rather than to victims in Ukraine.

Non-Conviction Based Confiscations

Non-conviction based ('NCB') confiscation provides a more effective avenue for confiscation as it benefits from a lower evidentiary threshold. However, in the context of international law violations and human rights abuses,

these mechanisms are still limited in their ability to provide redress to victims.

NCB confiscation generally allows government authorities to confiscate assets where it can be proven that they are obtained through unlawful conduct.²⁶ Where wealth builds off historic corruption or its origin is hidden behind complex financial structures, this can be difficult to prove. The UK has tried to address this by introducing Unexplained Wealth Orders ('UWOs').²⁷ When certain conditions are met, a UWO can be attached to any property in the UK, shifting the burden of proof by requiring the owner to evidence that the property was legitimately acquired. Should that person fail to respond, the property is presumed to have been obtained through illegal activity—allowing confiscation through civil recovery proceedings.²⁸ This ambitious legislation, however, has been largely ineffective in tackling grand corruption. In assessing UWOs, UK courts have accepted the law of the country where the corrupt acts took place.²⁹ This means that those who retain power or influence in their home countries can simply appeal to domestic law enforcement to confirm that their income is lawful for a UWO to be dismissed.³⁰ Further, where an individual provides an ostensibly legitimate explanation, the enforcement agency then has to disprove that explanation in order to succeed in civil recovery, where the standard of proof is higher—thus returning to the challenges that UWOs were designed to alleviate.³¹ Bringing UWO cases can also be extremely costly for enforcement agencies—an additional hurdle for resource constrained departments.³² Given these challenges, unless there is legal reform to existing UWO provisions in the UK, these mechanisms will remain a weak tool against kleptocracy.

Italy has adopted a slightly more flexible approach to UWOs, through the Anti-Mafia Code, which unlike the UK regime, attaches to a person rather than property.³³ The Italian legislation enables prosecutors to bring

21. *Agence France Presse*, 'Swiss to auction 25 supercars seized from son of Equatorial Guinea dictator' *The Guardian*, 29 September 2019 (available at: <https://www.theguardian.com/world/2019/sep/29/swiss-to-auction-25-supercars-seized-from-son-of-equatorial-guinea-dictator>); 'Geneva closes graft case against Obiang's son, confiscates 25 luxury cars', *Reuters*, 7 February 2019 (available at: <https://www.reuters.com/article/us-equatorial-swiss-court-idUSKCN1PW2K2>).
22. US Department of Justice, '\$26.6 Million In Allegedly Illicit Proceeds to Be Used To Fight COVID-19 and Address Medical Needs in Equatorial Guinea', 20 September 2021 (available at: <https://www.justice.gov/opa/pr/266-million-allegedly-illicit-proceeds-be-used-fight-covid-19-and-address-medical-needs>).
23. 'France: Equatorial Guinea Vice President's Conviction Upheld', *Human Rights Watch*, 28 July 2021 (available at: <https://www.hrw.org/news/2021/07/28/france-equatorial-guinea-vice-presidents-conviction-upheld>); 'France Adopts New Provision for Returning Stolen Assets and Proceeds of Crime: A Step Forward With Room for Improvement', *Transparence International*, 3 March 2021 (available at: <https://www.transparency.org/en/press/france-adopts-new-provision-for-returning-stolen-assets-and-proceeds-of-crime-a-step-forward-with-room-for-improvement>); Sara Brimbeuf, 'The ill-gotten gains of corruption: a possible French model for restitution', *Medium*, 27 April 2021 (available at: <https://medium.com/u4-anti-corruption-resource-centre/ill-gotten-gains-of-corruption-french-model-restitution-932a7452baaa>).
24. Paul Peachey and Sunniva Rose, 'Frozen, the disputed European property empire of Rifaat Al Assad', *The National News*, 23 November 2021 (available at: <https://www.thenationalnews.com/world/uk-news/2021/11/23/frozen-the-disputed-european-property-empire-of-rifaat-al-assad/>).
25. For more information on reparations in international law, see for example, UN CAT General Comment No. 3, available at: https://www2.ohchr.org/english/bodies/cat/docs/gc/cat-c-gc-3_en.pdf.

26. See, for example, Part 5 of the UK's Proceeds of Crimes Act 2002. Sec. 73 et seq of the German Criminal Code allows for assets to be confiscated in certain cases even if the owner has not been convicted of an underlying offense, if there is sufficient evidence to show that the assets are connected to criminal activity. See also Title 18 U.S.C. Chapter 46 on civil forfeiture procedures in the US.
27. Criminal Finances Act of 2017.
28. Criminal Finances Act of 2017.; <https://ace.globalintegrity.org/wp-content/uploads/2022/03/CriminalityNotwithstanding.pdf>.
29. The Criminal Finances Act 2017. Section 362B.6(c) states that income is 'lawfully obtained' if it is obtained lawfully under the laws of the country from where the income arises.
30. See *NCA v. Baker* (See Ms Justice Lang's comments in her Judgment, para 77. Available at <https://www.judiciary.uk/wp-content/uploads/2020/04/Approved-Judgment-NCA-vBaker-Ors.pdf>, accessed 10 February 2022. See page 45 and footnote 215 for information on the lack of independence of the Kazakh Prosecutor's office); <https://ace.globalintegrity.org/wp-content/uploads/2022/03/CriminalityNotwithstanding.pdf>, p. 19.
31. Tom Mayne and John Heathershaw, 'Criminality Notwithstanding. The Use of Unexplained Wealth Orders in Anti-corruption Cases', *ACE Power Briefs*, March 2022 (available at: <https://ace.globalintegrity.org/wp-content/uploads/2022/03/CriminalityNotwithstanding.pdf>), p. 20–21.
32. *Id.*, p. 23; Sean O'Neill, '£1.5m legal bill forces rethink over McMafia wealth orders', July 13 2020 (available at: <https://www.thetimes.co.uk/article/1-5m-legal-bill-forces-rethink-over-mcmafia-wealth-orders-xo2gc8s23>).
33. Legislative Decree 159/2011 (Anti-Mafia Code).

administrative seizure and confiscation claims against persons involved in criminal associations and does not require their assets to be proceeds of criminal conduct. Confiscated funds can be used to compensate victims of mafia-type crimes.³⁴ The European Court of Human Rights has held that these measures are compliant with the rights to property³⁵ and a fair trial³⁶ under the European Convention on Human Rights ('ECHR').³⁷

Switzerland has taken a different approach to combating kleptocracy. The 2016 Foreign Illicit Assets Act allows assets of foreign corrupt officials or their close associates to be frozen, confiscated, and repatriated to their country of origin via administrative proceedings.³⁸ However, the Act can be applied only in very narrow circumstances in the context of regime change. It is only available following an MLA request from the country of origin. Thus, where a perpetrator or their allies remain in power, the Swiss law is essentially unusable. Additionally, the law only enables the repatriation of assets to the country of origin, rather than repurposing assets for the benefit of victims no matter which country they are in—limiting the law's ability to provide meaningful redress in situations that have resulted in displacement.

While existing NCB confiscation mechanisms have been successful in some cases of corruption, there are several challenges that limit their effectiveness in the case of frozen Russian assets. Russian assets that are products of corruption have often been amassed over decades and syphoned into apparently legitimate enterprises, making it easier for a sanctioned individual to provide a valid explanation for their wealth that enforcement agencies will then have to disprove to succeed in a civil recovery action.³⁹ Often assets are well-hidden behind complex structures, making it difficult to identify whether a sanctioned individual is in fact the real owner for confiscation purposes.⁴⁰ Moreover, where domestic NCB mechanisms require that confiscated assets be derived from unlawful

conduct, human rights or international humanitarian law violations are not always included within the definitions of unlawful conduct.⁴¹ More broadly, it is extremely difficult for enforcement agencies to prove that assets are the direct proceeds of human rights abuses because such illicit wealth is often gained within a wider context of corrupt and abusive conduct.

2. A Way Forward: From Freezing to Confiscation

To respond to the current limitations in the law, various proposals are being developed to ensure victims' right to reparation can be fulfilled.

A. Expanding Proceeds of Crime Laws

Proceeds of Crime laws could be expanded to enable the confiscation of assets obtained through gross violations of human rights, including genocide, war crimes and crimes against humanity. Some existing NCB confiscation laws are also limited in the types of actors they reach. For example, the assets of 'family members' of 'politically exposed persons' can be captured within the UK's Proceed of Crimes Act 2002,⁴² but this is limited to 'parents, spouses (and equivalent of spouses), children and their spouses.' This definition is too narrow and does not reflect the reality of how politically exposed persons distribute and conceal their wealth.⁴³

B. Expanding Sanctions Evasion Laws

Expanding sanctions evasion laws may also provide viable avenues for confiscation and subsequent reparations. The EU has criminalised sanctions violations, enabling proceeds of such violations to be confiscated.⁴⁴ Building on this directive, there are proposals from civil society to introduce a new duty on designated persons to disclose *all* assets held in the sanctioning jurisdiction, and to criminalise the failure to disclose as a form of sanctions evasion. This duty would expand the scope of conduct that constitutes sanctions evasion so that undisclosed frozen assets could be recoverable as proceeds of that evasion.⁴⁵

34. REDRESS, 'Briefing: Comparative Laws for Confiscating and Repurposing Russian Oligarch Assets' (available at: <https://redress.org/wp-content/uploads/2022/09/Briefing-on-Comparative-Laws.pdf>).

35. Article 1, Protocol 1, European Convention of Human Rights.

36. Article 6 European Convention of Human Rights.

37. The Court specifically noted that the interference with the right to property is proportionate to the legitimate aims pursued, States have a wide margin of appreciation when addressing problems which affect the public interest, and the procedures set out in the law respect the right of the defence to be heard and to appeal. *Raimondo v. Italy*, European Court of Human Rights, (Application no. 12954/87), Judgement, 22 February 1994, Arcuri & Three Others v. Italy, European Court of Human Rights, (Application no. 52024/99), Decision, 5 July 2001. See also REDRESS Briefing (p. 4–5): REDRESS, 'Briefing: Comparative Laws for Confiscating and Repurposing Russian Oligarch Assets'.

38. Open-ended Intergovernmental Working Group on Asset Recovery, 'Foreign Illicit Assets Act (FIAA) of 18 December 2015', 16 August 2016 (available at: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1605154e.pdf>).

39. Tom Mayne and John Heathershaw, *op. cit.*, p. 20–21; Maria Nizzero, 'From Freeze to Seize: Dealing with Oligarchs' Assets in the UK', *Rusi*, 13 April 2022 (available at: <https://rusi.org/explore-our-research/publications/commentary/freeze-seize-dealing-oligarchs-assets-uk>).

40. Robert Smith *et al.*, 'Not my yacht' — how murky structures cloud ownership of oligarch toys', *Financial Times*, 5 April 2022 (available at: <https://www.ft.com/content/2a5abdec-1bd1-4a5c-99a6-5aa1fc722d1b>).

41. See eg, Part 5 Proceeds of Crimes Act 2002, section 241A 'gross human rights abuse or violation' provides that the confiscation provisions are only applicable in very narrow circumstances of human rights abuses.

42. Section 362B(7)–(8)(b) of POCA by reference to Article 3 of Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2014.

43. For example, the UK sanctioned Russian Foreign Minister Sergey Lavrov's 'stepdaughter' who owns a £4 million luxury apartment in London. However, under the existing provisions of POCA, these assets would not be subject to the Act's NCB confiscation measures. Will Taylor, 'Lavrov's stepdaughter Polina Kovaleva among new Russian sanctions', *Leading Britain's Conversation*, 24 March 2022 (available at: <https://www.lbc.co.uk/news/lavrov-stepdaughter-sanctioned-london/>).

44. European Commission, 'Confiscation and asset recovery' (available at: https://home-affairs.ec.europa.eu/policies/internal-security/organised-crime-and-human-trafficking/confiscation-and-asset-recovery_en); Anna Pingen, 'Commission Proposes Directive on Asset Recovery and Confiscation', *Eucrim*, 27 July 2022 (available at: <https://eucrim.eu/news/commission-proposes-directive-on-asset-recovery-and-confiscation/#:~:text=With%20the%20proposed%20directive%20on,crime%20groups%20can%20be%20covered>).

45. Tom Keatinge and Maria Nizzero, 'From Freeze to Seize: Creativity and Nuance is Needed', *Rusi*, 7 June 2022 (available at: <https://rusi.org/explore-our-research/publications/commentary/freeze-to-seize-creativity-and-nuance-is-needed>).

In addition, there are also proposals to establish mechanisms to divert monetary penalties received by governments following sanctions breaches related to human rights law and international humanitarian law into a fund specifically dedicated to providing reparations to victims (as opposed to the current structure of having such penalties placed in a consolidated fund that is used for general purposes of the sanctioning government).⁴⁶

These proposals can provide effective near-term solutions to help fill the gaps between asset freezing and confiscation. While there is existing momentum in the EU to expand sanctions evasion laws, such measures are also limited as they require a qualifying sanctions breach and therefore only target a limited subset of individuals and assets which are currently subject to sanctions.

C. New Laws: From Freezing to Confiscation

The Canadian Approach

In June 2022, Canada became the first country to pass legislation that enables direct confiscation and repurposing of assets frozen under sanctions.⁴⁷ Under the law, proceeds from liquidated confiscated property can be used to compensate victims; aid in the reconstruction of a foreign state affected by a grave breach of international security; or restore international peace or security.

The Canadian law is the most ambitious model for asset repurposing that has been adopted to date. However, it is unclear whether it would meet the due process and right to property protections required in some jurisdictions. The law includes some protections for the sanctions target, including access to a petition for delisting and judicial review. Yet, the threshold for asset confiscation is low, which may raise due process concerns.⁴⁸

The ability of Canada's law to withstand fundamental rights challenges will likely soon be tested. In December 2022, the Canadian government announced that it will seize and pursue forfeiture of US \$26 million from a company owned by sanctioned Russian oligarch

Roman Abramovich. This is the first time that Canada will use the legislation to pursue confiscation, and if successful the proceeds will be provided for the reconstruction of Ukraine and compensation to victims of the invasion.⁴⁹

A Novel Human Rights Compliant Approach to Asset Confiscation

A novel approach to confiscating and repurposing sanctioned assets needs to balance the aspirations of swift repurposing with the requirements of the ECHR, including the right to property under Article 1 of Protocol 1. The right to property is a fundamental right but it is not absolute, meaning it can be weighed against other interests.⁵⁰ In the current legislative and political landscape, the balance is weighted too far in favour of the right to property at the expense of victims' rights to reparation. The novel approach seeks to address this.

Traditionally, NCB confiscation laws have required a nexus between assets and violations, which, as explained above, can be difficult to prove. The novel approach aims to tip that balance towards victims by instead requiring a link between the sanctioned person, the violations, and the victims who are owed reparations under international law. To ensure that this legal ground can be relied upon without violating the ECHR, there need to be numerous safeguards, including evidence that the individual has been involved in the violations,⁵¹ opportunities for the involved person to challenge the sanctions designation and confiscation proceedings at every stage of the process, and a requirement that Courts assess whether the confiscation is proportionate in line with ECHR standards. Including comprehensive due process provisions would help to guard against the inherent risk in sanctions that, as a political tool, they may be abused by governments and imposed inappropriately.⁵²

research/publications/commentary/freeze-seize-creativity-and-nuance-needed); Maria Nizzero, 'From Freeze to Seize: How the UK Can Break the Deadlock on Asset Recovery', *Rusi*, 10 October 2022 (available at: <https://rusi.org/explore-our-research/publications/commentary/freeze-seize-how-uk-can-break-deadlock-asset-recovery>); Maria Nizzero, 'Sanctioned oligarchs should have to list their UK assets', *The Times*, 23 February 2023 (available at: <https://www.thetimes.co.uk/article/sanctioned-oligarchs-should-have-to-list-their-uk-assets-lqprkw3fs>).

46. Hogan Lovells, 'Finance for Restorative Justice. Using sanctions and terrorist financing legislation to fund reparations for victims of sexual violence in conflict', January 2020 (available at: https://www.hoganlovells.com/-/media/hogan-lovell/pdf/2020-pdfs/2020_01_29_rethinking-reparations-report.pdf).

47. The C-19 budget implementation Act received royal assent on 23 June 2022. The Act amends the 1992 Special Economic Measures Act (SEMA) and the 2017 Justice for Victims of Corrupt Foreign Officials Act (Magnitsky Act) creating new powers to confiscate and sell-off assets owned by individuals and entities on Canada's sanctions list. See <https://www.parl.ca/legisinfo/en/bill/44-1/c-19>.

48. REDRESS, *op. cit.*, supra note 34.

49. Government of Canada, 'Canada starts first process to seize and pursue the forfeiture of assets of sanctioned Russian oligarch' (news release available at: <https://www.canada.ca/en/global-affairs/news/2022/12/canada-starts-first-process-to-seize-and-pursue-the-forfeiture-of-assets-of-sanctioned-russian-oligarch.html>).

50. Article 1 of Protocol 1(2) states: 'The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.' Thus, the text of Article 1 of Protocol 1 itself allows States to limit this fundamental right where such restriction is necessary to achieve a legitimate public interest.

51. 'Involvement' would need to be defined more narrowly than in most sanctions legislation, to include, for example those who are responsible for or engaged in violations; facilitate violations; knowingly provide financial services, funds, economic resources, good or technology which will or may contribute to the violations; knowingly profit or benefit from the violations; or intentionally failed to fulfil their responsibility to investigate or prosecute the violations.

52. For example, following the September 11 terrorist attacks in the United States, numerous individuals were designated under terrorism-related sanctions regimes based on extremely limited evidence. Within this context, experts have warned against 'sacrificing individual freedoms and human rights for a sense of security.' See 'Leiden professor petitions UN to release Guantanamo prisoner', 23 August 2021 (available at: <https://www.universiteitleiden.nl/en/news/2021/08/leiden-professor-petitions-un-to-release-guantanamo-prisoner>); see also Helen Duffy, *Dignity Denied: The Abu Zubaydah Case Study*, Human Dignity and Human Security in Times of Terrorism, April 2020 (available at: <https://papers.ssrn.com/sol3/papers>).

Once the relevant property has been confiscated, a government appointed trustee would have the power to administer the funds and ensure that they are delivered to victims of the violations as reparations.

This novel approach to confiscation aims to secure reparations for victims of the most serious breaches of international law in a manner that also respects the rights of the individual perpetrator, while aiming to deter and hold them accountable for their conduct.

3. Delivering Reparations: Mechanisms to Ensure Effective Repurposing of Confiscated Assets

The legal basis for confiscating frozen assets is the first step in this burgeoning area of law. Once frozen assets have been seized, jurisdictions must tackle how to effectively deliver funds to victims and survivors.

An initial challenge in designing reparations programmes is determining who is eligible for the scheme, in essence, defining the victim group. Reparations programmes risk excluding groups from receiving benefits if the eligibility criteria, often the basis of categories of violations giving rise to ‘victim status’, are narrowly defined.⁵³ Thus, victim participation from the outset is critical in ensuring that a reparations programme is inclusive and effective.⁵⁴ The case-law of international and regional courts can provide insight into determining the mechanics of reparations delivery. Courts have considered how to define harm caused to victims, how to establish a causal link between the violation and harm caused, and how to calculate compensation for victims. In making these determinations, it is essential that victims of human rights violations are able to fully participate in all proceedings.⁵⁵ Where available funds are insufficient to provide reparations for all victims, States may consider voluntary donations to fill the reparations gap.

Another key consideration is whether reparations will be delivered on an individual or collective basis. While individual reparations respond to harm suffered by individual persons, collective reparations focus on delivering

benefits to groups of victims that have suffered harm and are bound by a common identity, experience, or form of violation.⁵⁶ Collective reparations may address, for example, the gender-based aspect of individual violations, or violations affecting the entire population of an area. Collective reparations may be privileged in situations where it is difficult to draw a stark line between victims and non-victims, or where there is limited capacity to implement individual reparations. At the same time, however, individual victims may resist them because they do not respond to the often intimate, individual nature of human rights violations and victims’ suffering. It is also possible for collective reparations to be used for political gain and for reparations programs to become confused with development policies that recipient communities are already entitled to.

With these considerations in mind, in the context of the Russian invasion of Ukraine, existing reparations delivery mechanisms, particularly trust funds, may provide models for delivering confiscated assets to victims of the conflict. The ICC’s Trust Fund for Victims (‘TFV’) currently collects funds through voluntary contributions by State Parties and is designed to benefit victims of crimes under the Court’s jurisdiction.⁵⁷ Contributions can be earmarked for specific situations. The Global Survivor’s Fund, a civil society organisation that aims to enhance access to reparations for survivors of conflict-related sexual violence (‘CRSV’), currently has a memorandum of understanding with the Ukrainian government to implement a reparations programme for Ukrainian survivors of CRSV.⁵⁸ Confiscating jurisdictions could deposit funds from liquidated assets into reputable trust funds to ensure reparations are delivered by those with the necessary expertise.

Conclusion

At present, there is an unparalleled opportunity in Europe to mobilise the vast amounts of illicit Russian wealth that sits frozen on the streets of London, in the bays of Southern Europe, and across the continent’s financial institutions, to redress harm for victims in Ukraine. States should use all legal tools available to achieve this. Developing a novel legal basis for confiscation of frozen assets will strengthen opportunities to actualise the right to reparations for victims of the invasion. However, for these novel legal approaches to be successful they must be human rights compliant, and States must ensure that the delivery of reparations is victim centred.

cfm?abstract_id=3562402). For asset repurposing models to be effective and human rights compliant, they must be utilised in an ECHR compliant manner, no matter the political context in which they are deployed.

53. Office of the UN High Commissioner for Human Rights, ‘Rule-of-Law Tools for Post-Conflict States. Reparations programmes’, 2008 (available at: <https://www.ohchr.org/sites/default/files/Documents/Publications/ReparationsProgrammes.pdf>), p.15-16; see also International Center for Transitional Justice, ‘From Principles to Practice. Challenges of Implementing Reparations for Massive Violations in Colombia’, October 2015 (available at: https://www.ictj.org/sites/default/files/ICTJ_Report_ColombiaReparationsChallenges_2015.pdf), p. 3-4.
54. Reparations application forms and victim registries are an important part of the process of identifying verifying and registering those entitled to reparations. For more information on victims registration programmes, see: https://www.ictj.org/sites/default/files/ICTJ_Guide_ReparationsForms_2017_Full.pdf.
55. Amicus Curiae brief pursuant to article 75 of the Statute and Rule 103 of the Rules of Procedure and Evidence, *The Prosecutor v. Dominic Ongwen* (available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_00811.PDF).

56. Magarrell, Lisa, *Reparations in Theory and Practice, Reparative Justice Series* (International Center for Transitional Justice, 2007) 5-6.
57. International Criminal Court, ‘Trust Fund for Victims. Background Summary’, August 2008 (available at: https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV_Background_Summary_Eng.pdf).
58. Global Survivors Fund, ‘Ukraine Sets a World Precedent: Moving forward on holistic care and urgent interim reparation for survivors of CRSV’, 28 October 2022 (press release available at: <https://www.globalsurvivorsfund.org/media/ukraine-sets-a-world-precedent-moving-forward-on-holistic-care-and-urgent-interim-reparation-for-survivors-of-crsv>).



Nicole Belloubet • Former French Minister of Justice, President of the Club des Juristes

Didier Rebut • Professor, University Paris Panthéon Assas, Director of the Institut de criminologie et de droit pénal de Paris

Hugo Pascal • Visiting Researcher, University of Cambridge

Corporations Facing the War

'Faced with international crimes, the question is less that of restoring a world order that does not exist, than of contributing to the establishment of a future order that is still in preparation. The newly created international criminal jurisdictions will not suffice, and it will remain necessary, for a long time to come, for international crimes to be prosecuted before national jurisdictions, which will be invited to extend their criminal jurisdiction beyond the traditional criteria.'¹ It is with these words that Antonio Cassese and Mireille Delmas-Marty chose to open their 2002 book *Juridictions nationales et crimes internationaux*, noting that the lack of experience with international organizations, their limited resources, recognition, or sometimes simply limited scope of their jurisdiction prevented them from responding fully to the problems posed to the international community. The globalization of law was therefore still largely based on a certain globalization of domestic courts, still the first point of contact for these new expectations to 'organise the word' better.²

One year after the full-scale invasion of Ukraine by the Russian Federation, the observation made twenty years ago by these two eminent criminal lawyers remain relevant: The voices calling for the creation of a special tribunal for the repression of the crime of aggression against Ukraine,³ as well as the multiple proceedings brought before domestic courts to seek the criminal responsibility of transnational corporations for their alleged ties with the Russian Federation, exemplify the difficulty for international criminal justice—and more particularly for the International Criminal Court—to deal with global challenges.

1. Antonio Cassese and Mireille Delmas-Marty (dir.), *Juridictions nationales et crimes internationaux* (Presses Universitaires de France 2002).
2. Sandrine Kott, *Organiser le monde* (Seuil 2021).
3. See notably the arguments of Gordon Brown and Philippe Sands in favour of the creation of specialised tribunal to prosecute the crime of aggression against Ukraine, <<https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>>. See also the contribution to this issue by Federica D'Alessandra (page 54).

For businesses, these challenges arise in part from the fact that society has taken on new 'forms of governmental-ity'⁴ as a result of the new gaps created by globalization. Chief amongst them are the cracks arising between a de-territorialized market and regulatory states that are no longer homogeneous and superimposed. Evolving in a borderless world, businesses tend to deploy a global strategy, conceived on a supranational scale, and to build governance and regulatory systems independent of state intervention and state borders,⁵ to satisfy normative expectations that go beyond their traditional shareholder-value maximisation focus.⁶ It is increasingly acknowledged that transnational corporations, beyond their purely economic clout, have a structuring power that makes them objects and sometimes subjects of politics or even geopolitics.

In this regard, the UN Guiding Principles on Business and Human Rights⁷ recommend that states establish legal frameworks to uphold certain human rights throughout the international supply chain, including ensuring that when '[business-related human rights abuses] occur within their territory and/or jurisdiction those affected have access to effective remedy'. The principles emphasize the central role of transnational corporations and other business enterprises in the global economy, particularly where states are share governmental responsibilities with private actors (i.e., the provision of public goods and services), or in circumstances where state authority is weakened, such as in the midst of war zones. In this context, new normative expectations are projected onto corporations, sources of responsibility that sometimes take the form of legal liability, including criminal liability.

An increase in lawsuits against transnational corporations for their activities in the context of armed conflicts

In December 2018, two former managers of a local Ford Motor plant were criminally convicted following the kidnapping and torture of twenty-four company employees during the Argentine dictatorship from 1976 to 1983, 'the company [having] acted in a coordinated manner with the military'.⁸ On December 6, 2021, Rohingya refugees in the United States filed a class action lawsuit against Facebook, accusing the social network of having 'materially contributed to the development and widespread dissemination of anti-Rohingya hate speech, misinformation, and incitement of violence'.⁹ Plaintiffs argued that

4. Michel Foucault, *Naissance de la biopolitique, Cours au Collège de France* (Gallimard-Seuil 1978-1979).
5. Alain Supiot (dir), *L'entreprise dans un monde sans frontières* (Daloz 2015).
6. Hugo Pascal, 'La nouvelle place des entreprises dans la définition et la réalisation des choix collectifs', in *Mélanges ouverts en l'honneur de Mireille Delmas-Marty* (Mare & Martin 2023).
7. https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf
8. 'Argentina: two ex-Ford executives convicted in torture case', *The Guardian*, 11 December 2018 (<https://www.theguardian.com/world/2018/dec/11/pedro-muller-hedo-sibilla-ford-executives-argentina-torture-case>).
9. US District Court, Northern District of California, *J. Doe v. Meta Platforms Inc.*, class action complaint, 6 December 2021 (<https://www.classaction.org/media/doe-v-meta-platforms-inc.pdf>). See Shannon Raj Singh, 'Move

Facebook had designed its system and underlying algorithms in a manner that ‘rewarded users for posting, and thereby encouraged and trained them to post, increasingly extreme and outrageous hate speech, misinformation, and conspiracy theories attacking particular groups.’¹⁰ In September 2023, the two top executives of the Swedish company Lundin Petroleum will appear in court on charges of aiding and abetting war crimes allegedly committed in Sudan between 1997 and 2003, fuelling the oil wars in the south of the country.¹¹

These examples, chosen from among many others, bear witness to a global movement aimed at increasing the accountability of transnational corporations for the potential adverse effects of their activities, especially in the context of armed conflicts. Recent events provide striking illustrations. On the one hand, economic sanctions, which have become the instrument of choice of European foreign policy,¹² have a direct impact on the conduct of Western businesses, even to the point of forcing them to withdraw from certain jurisdictions, as shown in the context of sanctions against Iran, Russia and Myanmar, for example. On the other hand, beyond the technical reach of sanctions, the activities of a company, and sometimes its mere presence in a given country, have given rise to intense legal—and even ethical or moral—discussions on the possibility of maintaining an economic activity in a country at war. The strict legal or regulatory framework is no longer perceived as being sufficient to set the boundaries of the authorised and the prohibited.

France as a laboratory?

This litigation seems to have two particularities in France: the proceedings aim at the companies themselves, and not only at their directors, and are largely based on criminal provisions.

Of course, criminal prosecutions of legal persons in the context of armed conflicts are not the prerogative of the French courts. The Syrian conflict provides recent examples. On February 7, 2019, the Antwerp court convicted three Flemish companies (AAE Chemie Trading, Anex Customs and Danmar logistics) for shipping 168 tons of isopropanol—used, among other things, to synthesize sarin gas—to Syria between 2014 and 2016 without having obtained the export licenses required under a

2012 European regulation.¹³ In a case with a fairly similar factual background, on December 14, 2021, a Danish court sentenced the shipping company Dan Bunkering and its parent company, Bunker Holdings, to nearly \$4 million in fines, for having sold 172,000 tons of kerosene between 2015 and 2017 for use in Syria through Russian companies, in violation of sanctions enacted by the European Union.¹⁴

Nevertheless, in recent years, its particular historical, sociological, and legal features have turned France into a ‘laboratory’ for criminal proceedings against companies for their activities in the context of armed conflict. To date, thirteen criminal proceedings (three preliminary investigations and ten judicial inquiries) have been initiated in France against companies for complicity in crimes against humanity, complicity in genocide, complicity in war crimes, or complicity in murder or attempted murder, complicity in acts of torture or other inhuman or degrading treatment or punishment, complicity in enforced disappearance, committed in the form of financing of criminal groups or regimes, the supply of arms, or the export of dual-use items used in the commission of acts of violence against civilian population. The proceedings target companies or their directors and managers. Such complaints are now centralized through a new National Anti-Terrorism Prosecutor’s Office (*Parquet national antiterroriste* or ‘PNAT’)—created by the 2018-2022 law reforming the justice system¹⁵—which acts as the public prosecutor in cases involving potential international crimes.

A historical context: the special role of civil society in France

Philippe Aghion has described constitutions as ‘incomplete contracts’: the role of civil society is to give substance to traditional checks and balances, to move the control of executive power from the notional to the effective, and thus to ensure that these constraints are effectively implemented or activated whatever new contexts arise.¹⁶ Civil society is often a necessary complement to the state-market duo, as shown by Bowles and Carlin regarding the effort to contain the Covid pandemic.¹⁷ Associations in particular are becoming increasingly important at both national and international levels, pushing for a coherent policy balancing world trade, environmental concerns and human rights, and relying—for the defence of a global general interest—on a strategy of ‘self-legitimization’ or ‘self-institution’ that would replace that of ‘self-limitation’.¹⁸

fast and break societies: the weaponization of social media and options for accountability under international criminal law’ (2019) 8 *Cambridge International Law Journal* 2, 331–342.

10. *Ibid.*

11. Harrison A Meyer, ‘Swedish Prosecution of Corporate Complicity in Sudanese War Crimes’ *N.Y.U. Journal of International Law & Politics*, 7 April 2022 (<https://www.nyujilp.org/swedish-prosecution-of-corporate-complicity-in-sudanese-war-crimes/>).

12. See Ramona Bloj, ‘Les sanctions, instrument privilégié de la politique étrangère européenne’, (2021) *Question d’Europe* 598. For a historic account, see Nicholas Mulder, *The Economic Weapon. The Rise of Sanctions as a Tool of Modern War* (Yale University Press 2022). See also in this volume the contributions by Régis Bismuth (page 8), Leanna Burnard & Mira Naseer (page 22) and Anton Moiseienko (page 33).

13. ‘Belgian exporters found guilty of sending chemicals to Syria’, *Politico*, 7 February 2019.

14. ‘Danish fuel trader convicted over exports to war-torn Syria’, *Reuters*, 14 December 2021.

15. Law no 2019-222 of 23 March 2019 ‘*Loi de programmation 2018-2022 et de réforme pour la justice*’.

16. Philippe Aghion, Céline Antonin and Simon Bunel, *The Power of Creative Destruction* (trans. Jodie Cohen-Tanugi, Harvard University Press 2021).

17. Samuel Bowles and Wendy Carlin, ‘The coming battle for the COVID-19 narrative’, *Voxeu*, 10 April 2020 (<https://cepr.org/voxeu/columns/coming-battle-covid-19-narrative>).

18. Guy Haarcher, ‘La société civile et le concept d’autolimitation’, in B. Frydman (dir.), *La Société civile et ses droits* (Bruylant 2003), 147-160.

The historical context makes associations all the more important in France. The adoption of the 1901 Law of Associations was a difficult process, building on decades-long debates and no less than 33 projects, proposals and reports. Above all, it marks the culmination of the great liberal legislative work of the Third Republic, in the wake of the repeal of the Le Chapelier Law,¹⁹ and enshrines a freedom that Tocqueville considered to be the first of freedoms: '[i]n democratic countries the science of association is the mother science; the progress of all the others depends on the progress of that one'.²⁰ The place given to associations in French criminal procedure is also the outcome of a long history: the protection of young children, a technical subject that is not well known to the public prosecutor's office, justified historically the search for a 'substitute public prosecutor'.

This explains why associations are authorised to initiate proceedings, in specifically designated areas (fight against racism or discrimination, fight against sexual violence and sexual harassment, defence and protection of animals, fight against exclusion and poverty, etc.), based on specific offences (eg, 'discrimination' for associations fighting against racism or 'pollution' for associations for the protection of the environment, etc.) and subject to a general condition of seniority (the association must have been registered for at least 5 years on the date of the facts for which it is filing suit).

In matters of alleged crimes against humanity and war crimes,²¹ acts of terrorism,²² or—since a law of August 5, 2013—human trafficking, slavery, and pimping,²³ eligible associations are invested with a real right to initiate public action, parallel to that of the public prosecutor. In these cases, contrary to the usual conditions for civil action within criminal proceedings, the law does not require proof of direct or indirect damage caused by the offence to the interest defended by the association. This possibility—to become a private party in a criminal prosecution—doesn't exist in England or the United States, where the victim herself is not party, but only a witness, in criminal proceedings. In Germany, becoming a private party to criminal proceedings is only conceivable through a voluntary intervention once they are initiated: the victim may support or back up the public prosecutor's action, but cannot herself initiate the criminal proceedings.

As far as the protection of human rights is concerned, associations first assume a political role (advocacy, denunciation, alert)—their media or lobbying actions having a growing influence on internal, European or international political choices—but their legal role is also growing: they

'invite themselves' to the trials.²⁴ Today, they seem to have succeeded in their 'necessary *aggiornamento*'²⁵ in terms of skills and resources, which contributes to their visibility and impact. Multiple recent criminal proceedings brought against transnational corporations for crimes under international law have been initiated by members of the civil society. One example is the investigation of BNP Paribas concerning the Rwandan genocide: the French bank is accused of complicity in genocide and crimes against humanity by Sherpa, the *Collectif des parties civiles pour le Rwanda and Ibuka France*, for having financed the purchase of eighty tons of arms for the Hutu militia in 1994. The investigations appear to be still ongoing, although the Paris prosecutor's office has requested that the case be dismissed in April 2021.²⁶ Several complaints were also filed following the Russian invasion of Ukraine, such as the one filed on October 13 by the Darwin Climax Coalition and Razom We Stand for 'complicity in war crimes' against the TotalEnergies group. This request has since been dismissed by the Paris Public Prosecutor's Office, for whom the offence was insufficiently characterized.²⁷

Associations are now essential actors in triggering public action in the fight against human rights violations abroad, and French civil society is turning naturally to the law in order to seek the criminal responsibility of corporations, most often in parallel with that of their directors.

A legal context: the evolution of the conditions for the criminal liability of legal persons for international crimes

Many states have now rejected the traditional principle of *societas delinquere non potest*. The concept of corporate criminal liability has long been accepted in common law jurisdictions and has more recently spread to several other domestic criminal law systems, including the French one—since the 1992 Penal Code—although it is not yet universally accepted. Among our closest neighbours, Germany continues to limit criminal liability to natural persons, while in Italy, the criminal liability of legal persons can only be sought for a limited number of offences, which do not include, for example, international crimes. Recall that at the international level, the International Criminal Court has no jurisdiction over legal persons²⁸: the French proposal in this regard received no support at the 1998 Rome Conference. The Rome Statute's principle of complementarity,²⁹ which depends on the compatibility of criminal law in the jurisdictions of States Parties, would have been hamstrung by the too small number of national jurisdictions that held corporations

19. The Le Chapelier Law of June 1791 (named after reformer Jean Le Chapelier) made any association of workers or of employers, as well as any strikes, illegal. The law was in force until 1884. See <https://www.britannica.com/biography/Jean-Le-Chapelier#ref155864>.

20. Alexis de Tocqueville, *Democracy in America* (trans. Harvey C Mansfield and Delba Winthrop, University of Chicago Press 2000), 492.

21. Art 2-4 of the Code of Criminal Procedure (CCP).

22. Art 2-9 of CCP.

23. Art 2-9 of CCP.

24. Isabelle Soumy, *L'accès des ONG aux juridictions internationales* (Ph.D. thesis, University of Limoges, 30 September 2005).

25. William Bourdon, *Face aux crimes du marché* (La Découverte 2010).

26. 'Génocide au Rwanda: en France, des enquêtes tardives et sous tension', *AFP*, 7 May 2022.

27. 'La plainte contre TotalEnergies pour 'complicité de crimes de guerre' en Ukraine classée sans suite', *Le Monde*, 16 January 2023.

28. David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* 203 (Princeton University Press 2012).

29. William A Schabas, *The International Criminal Court* (4th ed, Oxford University Press 2011), 190-199.

liable under criminal law at the time, as opposed to the more universal tort liability.

As pointed out by Juliette Lelieur³⁰, at least ‘at first glance, French criminal law seems to be favourable to the prosecution of companies for international human rights violations’, in particular because of the scope of jurisdiction (and the possible plurality of criminal jurisdictions) granted to French criminal courts in matters of international crimes.³¹ The jurisdiction of French criminal courts to deal with violations of fundamental rights committed abroad by transnational companies headquartered in France is, by assumption, likely to be based on the active personal jurisdiction of French criminal law, which results from the French nationality of the perpetrator or the victim of the offense.³² It may also in certain cases result from territorial jurisdiction, the French territory being defined as ‘any territory over which the sovereignty of France is exercised and governed by its laws’³³, including ‘the maritime and air spaces linked to it’³⁴. Exceptionally, jurisdiction can be asserted over acts committed abroad but which can be linked to acts committed on the French territory. Finally, French courts have universal jurisdiction over any person who has allegedly committed one of the offences specially listed by the Code of Criminal Procedure abroad but is located in France.³⁵ This includes torture and enforced disappearance and, for persons having their residence in France, the crime of genocide. Other crimes against humanity and war crimes defined in the Criminal Code are also covered if the acts are punishable under the legislation of the state where they were committed or if that state or the state of which the suspected person is a national is a party to the Rome Convention of 1998.

The contours of criminal liability continue to be defined by case law, and particularly by the criminal chamber of the *Cour de cassation*, as illustrated by the case regarding Lafarge’s activities in Syria. In this particularly serious case, the cement company, which had built a cement plant in northern Syria, was accused by two NGOs (Sherpa and ECCHR) of having, via its local subsidiary, paid several million dollars to the Islamic State to facilitate the crossing of checkpoints by its employees, but also of having purchased raw materials from quarries controlled by the terrorist group and finally of having sold cement

to distributors linked to the jihadists.³⁶ On June 28, 2018, Lafarge became the first company to be indicted on charges including complicity in crimes against humanity, financing of a terrorist enterprise, and endangering the lives of others, following a request from the Public Prosecutor.

In four decisions dated September 7, 2021,³⁷ the criminal chamber of the *Cour de cassation* reversed the annulment by the judges of the Paris Court of Appeal of the indictment of Lafarge. Following the approach it had taken in the *Papon* case³⁸ regarding complicity in crimes against humanity, the criminal chamber stated that under the terms of article 121-7 of the Criminal Code, ‘it is required neither that an accomplice to a crime against humanity belong to the organisation, where applicable, that is guilty of this crime, nor that he support the formulation or execution of a concerted plan against a section of the civilian population in the context of a generalised or systematic attack, nor even that he approve the commission of the crimes under ordinary law constituting the crime against humanity.’³⁹ The court further states that ‘[i]t is sufficient that the accomplice be aware that the main perpetrators are committing or will commit such a crime against humanity and that, through his aiding or abetting, he is facilitating the preparation or execution of said crime’⁴⁰, before concluding that ‘knowingly paying a sum of several million dollars to an organisation whose purpose is purely criminal is sufficient to be considered complicity by aiding and abetting’⁴¹. This last statement is particularly important: the voluntary nature of the act of participation and the accomplice’s awareness of contributing to the principal offence are sufficient, without requiring that the accomplice share the principal offender’s intention, and without the commercial pursuit of an activity being an exemption from criminal liability.

For many commentators, the particular role of civil society in France combined with this favourable legal framework put Paris at the forefront of the defence of fundamental freedoms. Litigation of this type, fuelled by an unstable international situation, can develop further in the future—even if, for the time being, this conclusion remains partially open-ended, as none of the cases cited above has been the subject of a final ruling.

30. Juliette Lelieur, ‘French Report on Prosecuting Corporations for Violations of International Criminal Law’ in Sabine Gless and Sylwia Broniszewska-Emdin (dir), *Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues* (International Colloquium Section 4, Basel, 21-23 June 2018).

31. See Didier Rebut, *Droit pénal international* (4th ed., Dalloz 2022).

32. Art 113-6 of the Criminal code.

33. Cass. Crim. 23 February 1884 (*Bull. crim.* no. 52).

34. Art 113-1 of the Criminal code.

35. As Juliette Lelieur points out, this requirement that the person be in France makes it difficult to apply universal jurisdiction to legal persons, absent any precision on how to characterize the presence of a foreign legal person on French territory. She underlines that as of today, ‘there have been no examples of prosecution of a company under the principle of universal jurisdiction’, see Juliette Lelieur, ‘French Report on Prosecuting Corporations for Violations of International Criminal Law’, *op. cit.*

36. See eg, ‘Lafarge en Syrie: la Cour de cassation invalide l’annulation des poursuites pour complicité de crimes contre l’humanité’, *Le Monde*, 7 September 2021.

37. Cass. Crim. 7 September 2021, nos 19-87.367, 19-87.376 and 19-87.662.

38. Cass. Crim. 23 janv. 1997, no 96-84.822.

39. Cass. Crim. 7 September 2021, no 19-87.367, at [66].

40. *Ibid* at [67].

41. *Ibid*, at [81].

Concluding remarks

The criminal liability of legal persons for international crimes remains today an uncharted territory in which an increasing number of disputes are attempting to delimit the boundaries of a field that is itself confronted with new or at least long unexplored problems. Nevertheless, at least two basic trends can be identified.

The first trend is certainly the new role that courts are expected to assume. Confronted with a growing number of cases, courts may face material and technological limitations. More fundamentally, their legitimacy is sometimes challenged in highly political or mediatised cases, which are at risk of being instrumentalised. The role of the courts is becoming increasingly complex: to ensure that courts are legitimate, and the public trusts in their decisions, it is necessary to take into account broader considerations in their deliberation process, including from a technical point of view. The generalisation of specialized units, such as the National Anti-Terrorism Prosecutor's Office,

and the diversification of recruitment channels, notably through the employment of specialized assistants, show that there is a real concern for these issues.

The second trend is the new relationship between criminal law and human rights in the light of these disputes. As a group of eminent Belgian academics foresaw a few years ago, human rights have entered into a dialectical relationship with criminal law.⁴² If human rights have historically served mainly as a 'shield against the potential excesses of criminal law', one can ask, following these authors, if an opposite function has not also evolved, transforming 'human rights into the "sword" of criminal law', and leading to an inevitable 'criminalisation of fundamental rights'.⁴³ The extent of recent litigation seems to point in this direction.

42. Yves Cartuyvels, Hugues Dumont, François Ost, Michel Van de Kerchove and Sébastien Van Drooghenbroeck, *Les droits de l'homme, bouclier ou épée du droit pénal ?* (Bruylant 2007).

43. *Ibid.*



Anton Moiseienko • Lecturer in Law at the Australian National University

Sanctions, Confiscation, and the Rule of Law

One of the many depressing features of Russia’s ongoing war against Ukraine is the dearth of immediately available avenues for accountability. Discussions continue apace as to the establishment of a tribunal to adjudicate international crimes committed, but there is no denying that its effectiveness will be hostage to political—meaning, in this instance, military—realities.¹ The thus-far symbolic verdict of a Dutch court in the MH 17 trial bears witness to the limited role that criminal justice can play until a resounding military defeat and thus regime change in Russia.²

One major exception to that overall bleak assessment is the (potential) availability of frozen Russian assets as a source of compensation for Ukraine. Within days of Russia’s full-scale invasion, the G7 economies froze an estimated \$350 billion in the Russian Central Bank’s foreign currency reserves.³ Furthermore, pursuant to sanctions imposed on hundreds of regime-affiliated individuals and companies, dozens of billions more were frozen in private wealth (\$58 billion according to the latest estimates).⁴

Drawing the connection between the ongoing destruction in Ukraine, measured in hundreds of billions if not trillions of dollars, and those pools of frozen property is rather obvious. It is not surprising, therefore, that proposals soon emerged to confiscate such property—as opposed to its temporary freezing—and transfer it to Ukraine. Thus far, however, not much has happened on that front. The US is reportedly concerned about the economic implications of jeopardising its status as a safe haven for foreign sovereign

wealth,⁵ the EU is studying the matter,⁶ and the UK may adopt a law that will require it to study the matter.⁷ What unites all of them is a degree of unease about the legality of permanent confiscation under international law.

Concurrently, there is a strand of legal and policy commentary that counsels caution in the face of any temptation to confiscate frozen Russian assets.⁸ The legal issues involved are diverse and vary from the application of sovereign immunities, in relation to state-owned property, to human rights concerns insofar as private wealth is concerned. But underpinning much of that commentary is a more fundamental objection to potential confiscation of Russian assets, namely that to do so would be contrary to the rule of law.⁹

This article aims to address this higher-order concern, which goes to the legitimacy of any proposed confiscatory measures.¹⁰ In doing so, this article first considers the rule-of-law aspects of unilateral, non-UN-mandated sanctions writ large. Then it proceeds to discuss the potential confiscation of frozen Russian assets.

Sanctions and the Rule of Law

The notion of the ‘rule of law’ defies a crisp and clearcut definition, but it is relatively uncontroversial that it speaks to fundamental attributes of a legal system that render it worthy of respect and observance. In his well-known book, Lord Bingham identified it thus: ‘that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and

1. ‘Ukraine war: MEPs push for special tribunal to punish Russian crimes’, European Parliament, 19 January 2023, <https://www.europarl.europa.eu/news/en/press-room/20230113IPR66653/ukraine-war-meps-push-for-special-tribunal-to-punish-russian-crimes>.
2. ‘Transcript of the MH17 judgment hearing’, 17 November 2022, <https://www.courtmh17.com/en/news/2022/transcript-of-the-mh17-judgment-hearing.html>.
3. ‘Joint Statement by the G7 Announcing Further Economic Costs on Russia’, The White House, 11 March 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/joint-statement-by-the-g7-announcing-further-economic-costs-on-russia/>.
4. ‘Joint Statement from the REPO Task Force’, US Department of the Treasury, 9 March 2023, <https://home.treasury.gov/news/press-releases/jy1329>.

5. Alan Rappeport and David E Sanger, ‘Seizing Russian Assets to Help Ukraine Sets Off White House Debate’, *New York Times* (New York, 31 May 2022) <https://www.nytimes.com/2022/05/31/us/politics/russia-sanctions-central-bank-assets.html>.
6. Sam Fleming and Henry Foy, ‘EU to Examine Seizing Confiscated Russian Assets for Reconstruction’, *Financial Times* (London, 23 January 2023) <https://www.ft.com/content/dabofe80-dae0-4973-88ea-de2d95cd9a4a>.
7. Seizure of Russian State Assets and Support for Ukraine Bill, Bill 245 (UK), § 1, at <https://bills.parliament.uk/bills/3415>.
8. See eg, Paul Stephan, ‘Giving Russian Assets to Ukraine—Freezing Is Not Seizing’, *Lawfare*, 26 April 2022, <https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing>; Paul Stephan, ‘Seizing Russian Assets’ (2022) 17(3) *Capital Markets LJ* 276; ‘Russian asset seizures must follow the law’, *Financial Times* (London, 5 June 2022) <https://on.ft.com/3GPzQtY>; Andrew Dornbierer, ‘From Sanctions to Confiscation While Upholding the Rule of Law’, (Basel Institute on Governance 2023) 1; Julianne Kokott, ‘Confiscation of Russian Assets to Rebuild Ukraine?’, *Legal Tribune Online* (27 February 2023) <https://www.lto.de/recht/hintergruende/h/confiscation-freezing-russian-assets-rebuilding-ukraine-war-russia/>; Doug Bandow, *Seizing Russian Assets Is a Bad Idea* (Cato Institute, 12 May 2022) <https://www.cato.org/commentary/seizing-russian-assets-bad-idea>.
9. Stephan, ‘Giving Russian Assets to Ukraine’ (n 8) (‘Since the end of the Cold War, U.S. foreign policy has presented the international rule of law as one of the linchpins of the global society that the U.S. wants to build. [...] [A] transparent violation of a category of rules that the U.S. normally supports, simply because compliance would frustrate an immediate sense of justice, undermines the ability to use international law to shape a more peaceful and prosperous world.’); Kokott (n 8) (see references to the rule of law throughout); Bandow (n 8) (‘[Confiscating Russia’s assets] is an extremely bad idea, one which would undermine America’s rule of law while impeding peace between Russia and Ukraine’).
10. For a broader overview of issues involved, see Anton Moiseienko et al, ‘Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options’, 22 July 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4149158.

publicly administered in the courts'.¹¹ As Lord Bingham emphasised, there were exceptions to this formula, and it was not to be applied dogmatically.¹² There are also other features that the rule of law entails, such as respect for human rights.¹³

Whether the rule of law exists on the international plane is subject to some controversy, largely because of how different international law is to domestic legal systems. It lacks a centralised enforcement mechanism;¹⁴ inequality is part of its fabric due to the veto powers in the Security Council;¹⁵ and some of its rules, such as (of relevance to this article) those pertaining to sovereign immunities, are notoriously fuzzy as a result of their customary—as opposed to treaty-based—nature.¹⁶ Overall, though, it seems fair to accept that some version of the rule of law, at least in the sense of consistency of state behaviour based on well-accepted rules, should obtain in international relations, too.

Before moving on to the issue of confiscation specifically, consider for a moment the rule of law implications of sanctions writ large. Some commentators are critical of all unilateral sanctions.¹⁷ That overlooks the diversity of sanctions measures, which range from the profound to the (relatively) trivial. For instance, UK sanctions against Russia include the prohibition on providing accountancy and management consultancy services to Russian companies.¹⁸ Few would view this as an affront to the rule of law. Critics of unilateral sanctions also oddly overestimate the importance (from a rule-of-law, rather than formal legal perspective) of the Security Council's imprimatur: UN sanctions have long suffered from due process shortcomings whose remediation remains work in progress.¹⁹

If one were to propose a more nuanced rule-of-law oriented classification of sanctions than the crude unilateral/multilateral divide, four categories emerge.

First, there are sanctions that breach applicable rules of domestic or international law. Of course, whether or not something is in violation of the law can be contestable, but leave that to one side. As an example, Iran's submissions to the International Court of Justice (ICJ) allege that a raft

of US sanctions are incompatible with a treaty of amity between the two countries.²⁰

Second, some sanctions raise rule-of-law concerns if one reasons from first principles, but are widely accepted in practice. The freezing of individual assets is the paradigmatic example. Whether we talk of suspected terrorists or Russian oligarchs, it is legitimate to ask if government-imposed asset freezes, especially ones that can last for many years, are human rights-compliant. And, as it happens, governments and courts around the world have answered that, time and again, with a resounding 'yes!'²¹ One might query that premise, but given that the right to property is not absolute, the more productive way of tackling the underlying concern is to engage with applicable procedural guarantees (especially the evidentiary standard and the standard of judicial review) rather than attack the legitimacy of the practice as such.

Third, there are sanctions that do not appear to raise any legal issues of note at all, except perhaps a potential interference with private contractual arrangements. These can be broadly characterised as 'restrictions on access' to the sanctioning state's markets or infrastructure.²² One instance of that would be the partial disconnection of Russian banks from the SWIFT payment network. While no doubt an inconvenience for the banks concerned, no one has a *right* to be part of the SWIFT network. Export controls are another example of such sanctions, since it is up to states to decide whom they trade with and in what, subject of course to any applicable WTO rules and suchlike.

Fourth and finally, there is perhaps the most challenging category of sanctions, which is essentially the same as the previous one but taken to the extreme in terms of its intensity. They too involve discretionary state action, such as withdrawing from trade with another state, but one that produces severe and far-reaching effects. US trade embargo on Haiti in the 1980s would be one instance of such sanctions, often cited as one of the factors behind the later move towards more tailored, 'targeted' sanctions.²³

The lines between these four categories are blurred, most obviously so in relation to the third and fourth ones. While cutting off from SWIFT a handful of Russian banks is a nuisance, disconnecting all of them—or, more significantly, banning correspondent relationships with

11. Tom Bingham, *The Rule of Law* (Penguin Books 2011) 8.

12. *Ibid.*

13. *Ibid.*, chapter 7.

14. Jeremy Waldron, 'The Rule of International Law' (2006) 30 *Harv JL & Pub Pol'y* 15, 24.

15. James Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide LR* 3, 10-11.

16. See Monica Hakimi, 'Making Sense of Customary International Law' (2020) 118(8) *Michigan LR* 1487, 1501.

17. See eg, Daniel H. Joyner, 'International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions' in Ali Z Marossi and Marisa R Bassett (eds), *Economic Sanctions under International Law* (Springer 2015) 83.

18. UK Government, 'Russia cut off from UK services' (4 May 2022) <https://www.gov.uk/government/news/russia-cut-off-from-uk-services>.

19. See Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (OUP 2016).

20. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v US)*, Provisional Measures, 2018 ICJ Rep 623 (3 October).

21. See Anton Moiseienko, *Corruption and Targeted Sanctions: Law and Policy of Anti-Corruption Entry Bans* (Brill 2019).

22. Tom Ruys and Cedric Ryngaert, 'Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses To, US Secondary Sanctions' (2021) 0(0) *BYIL* 1, 11-16.

23. Daniel Drezner, 'Sanctions sometimes smart: Targeted sanctions in theory and practice' (2011) 13 *International Studies Review* 96. See also W Michael Reisman, 'Assessing the Lawfulness of Non-military Enforcement: The Case of Economic Sanctions' [1995] *ASIL Proceedings* 350, 350-351.

such banks²⁴—could edge towards significant disruption of the Russian economy.²⁵ So would be a complete embargo on Russian energy trade or other measures along the lines of the ‘maximum pressure campaign’ used against Iran.²⁶

One of the paradoxes of that last category of sanctions is that, significant though the effects of those measures might be, neither international law nor any notion of the rule of law serve as a constraint on them. Much of the criticism of unilateral sanctions can be viewed in that light: put simply, it expresses discomfort with that unfettered exercise of economic power on the international arena. Some solutions that have been proffered include incorporating the principles of proportionality and distinction from the laws of war;²⁷ extending the principles of non-intervention in other states’ internal affairs;²⁸ and vesting the power to use those economic levers in the hands of the UN Security Council.²⁹

Any of those options would obliterate that domain of sanctions that is effectively untouched by international law and would subject it to a prohibition on far-reaching economic sanctions, subject perhaps to a couple of exceptions. This would transform what is now a policy issue, namely how much pain one can inflict on the population of a non-compliant state in pursuit of bringing it back to respecting international law, into a matter governed by international law.

An abiding weakness of the sanctions-critical discourse is its obliviousness to the objectives of sanctions and their context. It is good and well to speak of economic coercion by one state against another, but if such economic coercion is meant to forestall Iran’s development of nuclear weapons or force Russia out of Ukraine, the issue acquires a different complexion. No less important is the fact that, as alluded to above, it is taking place against the backdrop of a lacking central enforcement mechanism. ‘Decentralised’ enforcement of international law by powerful states is hardly a happy state of affairs, but departing from it would not serve the international rule of law: instead, it would make conflicts between states strictly a bilateral affair, at least insofar as the P5’s interests are concerned, which would only serve the interests of rogue regimes.

24. SWIFT is a network that enables the (easier) provision of correspondent banking services, which are also possible, albeit less convenient, without SWIFT.
25. Ian Zhou, ‘Russia’s exclusion from SWIFT: an explainer’, *Australian Parliament*, 9 March 2022, https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/FlagPost/2022/March/Exclusion_of_Russia_from_SWIFT.
26. On Iran, see Richard Nephew, *The Art Of Sanctions: A View From the Field* (Columbia University Press 2017), but note that this book predates the Trump Administration’s so-called ‘maximum pressure campaign’.
27. W Michael Reisman, ‘Sanctions and International Law’ (2008) 4 *Int’l Hum Rights LR* 9.
28. Antonios Tzanakopoulos, ‘The Right to Be Free from Economic Coercion’ (2015) 4 *Cambridge J Int’l Comp L* 616.
29. Alexander Orakhelashvili, ‘The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria’ in Ali Z Marossi and Marisa R Bassett (eds), *Economic Sanctions under International Law* (Springer 2015) 83.

Sanctions and Confiscation

With that background in mind, it is rather clear that no general, blanket claim of illegality can be raised in relation to unilateral sanctions against Russia. It is possible, therefore, to discuss specifically the freezing (and potential confiscation) of Russian-linked assets. Different issues present themselves depending on whether one is talking about private or state-owned property.

Private Property

Consider private property. Hundreds of Russian officials, businesspeople, and others (allegedly) affiliated with Putin’s regime are now on sanctions lists across the US, UK, EU and other G7 economies.³⁰ Some dozens of billions of dollars are known to have been frozen. As discussed above, this practice is widely recognised as lawful, subject to appropriate evidentiary and due process safeguards. Unsurprisingly, we are seeing some of the targeted individuals make use of those safeguards, and wealthy Russian businessmen are currently challenging sanctions in the UK, EU, US and Australia.³¹ This is a familiar sight in common with most other sanctions programmes.³²

What is (almost) new is the discussion concerning the potential confiscation of such property. The traditional approach to financial sanctions is to keep frozen property frozen until sanctions are lifted. This in itself is not unproblematic because those whose property has been subject to sanctions for many years can argue that such measures are tantamount to confiscation. So far, however, no court has endorsed that argument.³³

There have been occasional departures from that traditional approach, which is why the issue is only ‘almost’ new. In 2011-2014, the EU adopted ‘misappropriation’ sanctions to freeze the property of former public officials from Egypt, Tunisia and Ukraine until investigations into their alleged corrupt activities conclude in their home countries.³⁴ Those investigations became mired in

30. A useful tracker of individual sanctions is available at <https://nowheretorun.org/>.
31. For the UK, see Rob Davies, ‘Oligarch’s lawyers say UK caused serious hardship by freezing assets’, *The Guardian* (London, 3 March 2023) <https://www.theguardian.com/business/2023/mar/03/oligarchs-lawyers-uk-caused-serious-hardship-freezing-assets-eugene-shvidler>. For Australia, see Alexander Abramov’s legal challenge in the Federal Court at <https://www.comcourts.gov.au/file/Federal/P/VID335/2022/actions>. For the US, see Jacqueline Thomsen, ‘Russian Oligarch Deripaska Loses U.S. Court Battle to Lift Sanctions’ (*Reuters*, 30 March 2022) <https://www.reuters.com/legal/government/russian-oligarch-deripaska-loses-us-court-battle-lift-sanctions-2022-03-29/>; followed by US Department of Justice, ‘Russian Oligarch Oleg Vladimirovich Deripaska and Associates Indicted for Sanctions Evasion and Obstruction of Justice’, 29 September 2022, <https://www.justice.gov/opa/pr/russian-oligarch-oleg-vladimirovich-deripaska-and-associates-indicted-sanctions-evasion-and>.
32. See Anton Moiseienko, ‘Due Process and Unilateral Targeted Sanctions’ in Charlotte Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Cheltenham: Edward Elgar Publishing, 2021).
33. *Kadi v Commission and Council*, CJEU General Court, Judgment of 30 September 2010 in Case T-85/09, at [150].
34. Council Decision 2011/72/CFSP of 31 January 2011; Council Decision 2011/172/CFSP of 21 March 2011; Council Decision 2014/119/CFSP of 5 March 2014.

delays and, for the large part, misappropriation sanctions withered on the vine. Such sanctions were criticised as a short-cut allowing third countries to bypass mutual legal assistance processes in EU member states, but at any rate they demonstrate that sanctions and confiscation are not always mutually exclusive.³⁵

Importantly, though, misappropriation sanctions concerned alleged proceeds of corruption. That is consistent with the recognised principle that proceeds or instrumentalities of crime can be confiscated. That is quite distinct from the case at hand. Here, the starting point is whether, in the context of widespread destruction in Ukraine, the property of those close to Putin's regime can be confiscated to shoulder the costs of repairing the damage, proceeds of crime or not.

There is a range of possible approaches. One of those was adopted by Canada, which essentially allows for the confiscation of frozen property with no further preconditions.³⁶ The first attempt to use those provisions is ongoing and involves the politician and businessman Roman Abramovich.³⁷ Another (very similar) option is to allow for the confiscation of property based on affiliation with an undesirable organisation, such as the Russian government, proven to a higher standard of proof, such as the balance of probabilities. Another technique, used in the US and proposed by the European Commission, is to confiscate the 'proceeds' of sanction evasion.³⁸ That is, if someone attempts to remove or conceal sanctioned property, such as sail off on a yacht subject to sanctions, it becomes subject to confiscation for that very reason. Finally, one can make it easier to confiscate alleged proceeds of crime, for example by requiring the owner of certain property to prove it has been lawfully obtained.³⁹

The first two options and, to a lesser extent, the last one, involve certain rule-of-law trade-offs. The right to property is not absolute, but they make it less absolute still. It is possible that in Russia's context those measures would pass human rights scrutiny, such as that by the European Court of Human Rights, given the public interest

behind them.⁴⁰ But a fundamental issue of principle is implicated, and it is right that the current public debate reflects the need for caution.

State-Owned Property

The position of state-owned property is very different. Under international law, Russia owes Ukraine reparations for the damage caused by its war of aggression.⁴¹ Barring dramatic changes in Russia's national politics, there is no chance that it will comply with that obligation. And, at the same time, hundreds of billions of dollars in frozen Russian assets are within the grasp of Ukraine's international partners, the major hurdle to their confiscation being sovereign immunity rules.

It is common to encounter the view that, context notwithstanding, confiscating Russian central bank assets would be a clearcut breach of international law, akin almost to seizing the property of a diplomatic mission.⁴² If that were the case, then such action would also run counter to the notions of consistency and predictability that, as we have seen above, characterise the rule of law. And, to use a cliché, two wrongs do not make a right.

That line of argument is, with respect, unconvincing. First of all, the boundaries of sovereign immunities are uncertain and untested. The law of sovereign immunities has evolved to prohibit the courts of one state from exercising authority over another state.⁴³ It is unclear whether it extends to purely executive action. If it does, then the mere *freezing* of sovereign property is in breach of international law, yet few states ever made that argument.⁴⁴

Of course, the notion of executive (or, one might say more ominously, extrajudicial) confiscation does not sit easily with ordinary conceptions of the rule of law, including at the domestic level. To suggest that it is exempt from the reach of sovereign immunities, whereas judicial measures are precluded by such immunities, is paradoxical. This was precisely Timor-Leste's argument in its now-discontinued litigation against Australia in the International Court of Justice concerning the (executive) seizure by Australia of certain documents that belonged to

35. For criticism, see Scott Crosby, 'The Ezz Case: Some Critical Observations: Case T-256/11 and on Appeal Case C-220/14 P' (2015) 6 *New J Eur Crim L* 316.

36. Budget Implementation Act, 2022, no 1 (SC 2022, c 10) (Can), ss 440-441, amending Special Economic Measures Act (SC 1992, c 17) (Can), s 4(1)(b).

37. Government of Canada, 'Canada Starts First Process to Seize and Pursue the Forfeiture of Assets of Sanctioned Russian Oligarch' (19 December 2022) <https://www.canada.ca/en/global-affairs/news/2022/12/canada-starts-first-process-to-seize-and-pursue-the-forfeiture-of-assets-of-sanctioned-russian-oligarch.html>.

38. For the US, see Deripaska's indictment (n 31). For the EU, see European Commission, 'Questions and Answers: Commission proposes to criminalise evasion of EU sanctions', 2 December 2022, https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_7373.

39. On unexplained wealth orders, see Anton Moiseienko, 'The Limitations of Unexplained Wealth Orders' (2022) 3 *Crim LR* 230. For other ways to facilitate confiscation of criminal proceeds currently under consideration in the US, see The White House, 'Fact Sheet: President Biden's Comprehensive Proposal to Hold Russian Oligarchs and Elites Accountable', 28 April 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/28/fact-sheet-president-biden-comprehensive-proposal-to-hold-russian-oligarchs-accountable/>.

40. For instance, the European Court of Human Rights has generally accepted the lawfulness of reversing the burden of proof in civil confiscation cases as long as justification was present. See Johan Boucht, *The Limits of Asset Confiscation* (Hart Publishing 2017) 227-230.

41. Article 31 of the Articles on Responsibility of States for Internationally Wrongful Acts, which are generally accepted to codify customary international law in most respects.

42. See n 8 above.

43. Article 5 of the United Nations Convention on Jurisdictional Immunities of States and Their Property; International Law Commission, 'Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries', *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, 3; Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2015) 27.

44. For the argument that sovereign immunities do apply to executive action, see Jean-Marc Thouvenin, 'Gel des fonds des banques centrales et immunité d'exécution' in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds) *Immunities in the Age of Global Constitutionalism* (Brill 2014). See also Geneviève Bastid-Burdeau, 'Le gel d'avoirs étrangers' (1997) 124 *J Droit Int'l* 5, 39.

Timor-Leste's government.⁴⁵ The Australian rejoinder was that Timor-Leste was wrongly equating immunity (from judicial measures of constraint) to inviolability, which is reserved for diplomatic property.⁴⁶ The weight of scholarly opinion appears to be with the Australian position in that respect, as demonstrated by the writings by Tom Ruys, Ingrid (Wuerth) Brunk and Philippa Webb.⁴⁷

A careful examination of state practice leads one to qualify the intuitive notion that executive confiscation of central bank assets is wholly unprecedented. For instance, in 2003 the US government confiscated \$1.7 billion in the assets of the Iraqi central bank.⁴⁸ This was done based on the provisions of the International Emergency Economic Powers Act (IEEPA), the statute authorising most US sanctions programmes, that enable confiscation of foreign property 'when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals'. Remarkably, that incident seems to have sparked no discussion as to the sovereign immunity implications of such actions. One might surmise this is because the lawfulness of confiscating an enemy state's public property is well-accepted in international practice.⁴⁹

The reasons for exempting wartime confiscation from the ambit of sovereign immunity rules have never been articulated. This is of particular interest since public debates during the two World Wars traversed the terrain similar to today's 'freeze to seize' debates: thus, in a departure from the original US plan to keep enemy assets frozen, in 1918 the powers of the Alien Property Custodian were expanded to allow for their confiscation.⁵⁰ Likewise, while the UK initially proclaimed its determination only to freeze enemy property, (minor) departures from that practice involved the confiscation of German state property at the beginning of the war.⁵¹ One might have expected international humanitarian law to contain specific rules that allow for the confiscation of the enemy's public property, but this does not appear to be so, at least outside the context of occupation.⁵²

It is plausible, therefore, that state practice *supports* the notion of (lawful) executive confiscation under international law. The fact that its use has largely been confined to wartime may reflect practicality, not legal principle: to be in a position to confiscate significant amounts of a foreign state's public property, a state needs to be an international financial or trading hub almost by definition. Inevitably, it would be reluctant to put that status under any strain by confiscating foreign assets unless its own vital interests were implicated, which explains why such confiscations are normally limited to wartime.

Imagine that it were abundantly clear that no legal barriers existed for the US to seize Russian state-owned property and redistribute them to Ukraine. In and of itself, this would do little to alleviate pragmatic concerns about the impact on US economic appeal as a place to store sovereign wealth or about potential Russian retaliation. No doubt, these concerns weigh heavily on the minds of policymakers, even despite the military support that the US and other nations are providing to Ukraine; Russia's egregious violations that, in common with Nazi atrocities, 'shock the conscience of humanity'; and US and EU commitments to fund Ukraine's reconstruction, which create a direct monetary incentive to confiscate Russia's own property. Even against this wholly extraordinary background, confiscation is not a step likely ever to be taken lightly. To point to the paucity of peacetime precedent over the past 80 years and interpret it as reflective of the *law* would be question-begging.

If executive confiscation of Russian state property were indeed possible, that would be subject to other applicable rules of international law, such as the prohibition of expropriation in customary international law and bilateral investment treaties. However, those rules tend to allow for exceptions for state action underpinned by public interest, such as forfeiture of the proceeds of crime.⁵³ In this case, while one is not talking about the proceeds of crime, public interest nonetheless exists in ensuring accountability for Russia's war of aggression and securing compensation for the damages it caused, thereby potentially rendering lawful the (executive) confiscation of Russian central bank assets and their transfer to Ukraine.

The need to counteract Russia's own violations of international law also enables the confiscation of its state property as a lawful countermeasure. In essence, countermeasures present a temporary departure from a state's international obligations vis-à-vis another state in response to that other state's breach of international law. Three issues arise in connection with confiscating Russian central bank assets, namely (a) whether states other than Ukraine are entitled to take such countermeasures; (b) whether confiscation of property is inherently inconsistent with the requirements for countermeasures to be temporary and

45. *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Memorial (28 April 2014) para 5.18. Discussed in Tom Ruys, 'Immunity, Inviolability and Countermeasures - A Closer Look at Non-UN Targeted Sanctions' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019).

46. *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Counter-Memorial (28 July 2014) paras 5.59-5.64.

47. Ruys (n 46); Ingrid (Wuerth) Brunk, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds' (forthcoming) *George Washington Law Review* 1, 14-23; Philippa Webb, 'Building Momentum: Next Steps Towards Justice for Ukraine', (Articles of War, 2 May 2022) <https://lieber.westpoint.edu/building-momentum-next-steps-justice-ukraine/>.

48. Executive Order 13,290 3 CFR § 13290 (2003).

49. See Anton Moiseienko, 'Trading with a Friend's Enemy' (2022) 116(4) *AJIL* 720.

50. Benjamin A Coates, 'The Secret Life of Statutes: A Century of the Trading with the Enemy Act' (2018) 1 *Modern American History* 151, 157-158.

51. Foreign and Commonwealth Office, 'British Policy Towards Enemy Property During and After the Second World War', History Notes, Issue 13, April 1998, 1, 10-30.

52. International Committee of the Red Cross, *Customary IHL: Rule 51. Public and Private Property in Occupied Territory*, at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule51.

53. Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, OUP 1992) 917.

reversible; and (c) whether countermeasures can justify a departure from sovereign immunity rules.

The first of those questions is a relatively straightforward one. Historically there has been reluctance to endorse ‘third-party’ countermeasures for fear of further ‘decentralising’ the enforcement of international law by leaving it in the hands of powerful states.⁵⁴ But if one accepts the notion of *erga omnes* obligations, including those stemming from the prohibition of aggression, the availability of such countermeasures is a corollary.⁵⁵ (And, indeed, the term ‘third-party countermeasures’ is a misnomer because all states are injured, conceptually speaking, by a breach of such an obligation.) Insofar as the policy argument about decentralised enforcement is concerned, Ukraine’s situation demonstrates that, for all its flaws, such decentralised enforcement is preferable to the state of what I would describe as ‘you’re-on-your-own’ bilateralism.

The second issue, namely that of temporariness and reversibility, has attracted much expert commentary, primarily highlighting the (purported) incompatibility of confiscation with those requirements.⁵⁶ There are two problems with that prevailing view. First, it rests on the premise that the *sole* function of countermeasures is to induce compliance by a state acting in breach of international law, rather than serve as a means of self-help.⁵⁷ This directly contradicts the International Law Commission’s (ILC) Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which says:

‘In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury.’⁵⁸

The ILC goes on to explain how, in older literature, countermeasures are often known as ‘legitimate reprisals’ or, more generally, measures of ‘self-protection’ or ‘self-help’.⁵⁹ There seems to be no basis for a distinction the (supposedly lawful) inducement to act and the (supposedly unlawful) measures of self-help. Instead, the line that the ILC draws is between countermeasures that make the injured state whole and those that go beyond that to impose (unlawful) punishment on the state in breach of its obligations.⁶⁰ It is in that context that the ILC’s requirement for countermeasures to be reversible, ‘as far as possible’,

must be read: once a state has resumed compliance with international law, it should not continue to face the adverse effect of countermeasures. In Russia’s situation, such a return to compliance would entail compensating Ukraine for the damage it caused.

That leads to the second problem with the (current) majority view, namely the application of the temporariness and reversibility requirement to the circumstances at hand. They must be applied in a context-sensitive manner with the overall objectives of countermeasures in mind. Suppose State A unlawfully confiscated State B’s property. State B then confiscates the same amount of State A’s property as a countermeasure. Rigid adherence to temporariness and reversibility would mean that this is unlawful, but that result runs counter to the objectives of countermeasures and state practice alike.⁶¹ Nor is this required by the ARSIWA—hence the ‘as far as possible’ proviso. Furthermore, even if one were keen to observe the reversibility requirement at any cost, one must query whether confiscation is truly incompatible with it. Much of the public discourse surrounding the ‘freeze to seize’ problem involves explaining the difference between (temporary) freezing and (permanent) confiscation. This juxtaposition seems to have infected the discussion of countermeasures. The confiscation of Russian central bank’s securities or currency reserves is *not* ‘permanent’ or ‘irreversible’ in the sense that it cannot be undone. It is possible to take \$350 billion from Russia today and return it once Russia complied with its reparation obligations towards Ukraine. The net result is, of course, the same as that of simply taking Russia’s funds—as a lawful countermeasure—and transferring them to Ukraine.

Thirdly, and finally, as relates to countermeasures and immunity, there has been much discussion of whether countermeasures can affect state’s *jurisdictional* immunities.⁶² Some difficulties arise from the fact that, once a state’s jurisdictional immunities are lifted as a countermeasure, litigation against it can result in judgments whose quantum can be disproportionate to the original breach. Some other challenges can also stem from the involvement of courts and private litigants. None of these concerns apply to the potential executive confiscation of Russian central bank assets, which (assuming it applies at all) implicates the immunity from *execution*, not the immunity from adjudication. Of course, the Russian central bank may wish to challenge the confiscation of its property and thus be involved in litigation in another state’s domestic courts, but it is well-accepted that the immunity from adjudication

54. Martin Dawidowicz, *Third-Party Countermeasures in International Law* (OUP 2017) 72–110.

55. See *Barcelona Traction (Belgium v Spain)*, Judgment, 1970 ICJ Rep 3 (24 July) para 34.

56. See n 8. See Daniel Franchini, ‘Seizure of Russian State Assets: State Immunity and Countermeasures’ (*Articles of War*, 8 March 2023) <https://lieber.westpoint.edu/seizure-russian-state-assets-state-immunity-countermeasures/>.

57. See eg, Stephan (n 8), 10.

58. ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, UN Doc A/56/10 (24 October 2001) 75.

59. *Ibid.*

60. *Ibid.*, 130.

61. See Italy’s assertion of its right to ‘confiscate American property of equivalent value’ in response to American seizures of its merchant vessels in 1941, referred to in Enzo Canizzaro, ‘The Role of Proportionality in the Law of International Countermeasures’ (2001) 12(5) *EJIL* 889, 907. See also the UK’s efforts to seize Albanian monetary gold to enforce the *Corfu Channel* judgment, discussed in Oscar Schachter, ‘The Enforcement of International Judicial and Arbitral Decisions’ (1960) 54 *AJIL* 1, 7–12, mentioned also in Franchini (n 57).

62. See eg, Daniel Franchini, ‘State Immunity as a Tool of Foreign Policy’ (2020) 60 *Virginia J Int’l L* 433; Marco Longobardo, ‘State Immunity and Judicial Countermeasures’ (2021) 32 *EJIL* 457.

does not apply to states or state agencies that themselves initiate proceedings in a foreign court.⁶³

Conclusion

The international response to Russia's invasion of Ukraine must strive to vindicate, rather than undermine, the rule of law. It is sometimes suggested that this uncontroversial proposition should operate to strip the international community of one of the few efficacious means it has for addressing Russia's misconduct, namely the (potential) confiscation of Russia's frozen central bank assets. As this article has sought to demonstrate, this is an overstatement at best. The issues involved are complicated, and economic and policy considerations understandably feature in the debate alongside legal norms,⁶⁴ but it is likely that confiscation of Russian central bank assets would be lawful under international law. This is because executive (non-judicial) confiscation is potentially compatible with the law of sovereign immunities, and it is not necessarily precluded by other applicable rules of international law, such as the prohibition on expropriation.

Even if such confiscation were unlawful after all (which is doubtful but plausible), it is nonetheless almost certainly justifiable as a lawful countermeasure to Russia's own breaches of international law. Effecting such confiscation would therefore not only serve to safeguard the international rule of law in the face of armed aggression, but also be compatible with *lex lata*, properly understood.

On the domestic plane, legal reform would be necessary to allow for such confiscatory measures. In ordinary circumstances, one would rightly be suspicious of legal changes allowing the government to take one's possessions, especially without judicial oversight. Here, however, one is concerned with state assets, and it is therefore impossible to isolate the domestic issue from the broader international law context, including the need to support Ukraine in resisting armed aggression and rebuilding itself. To render such support at Russia's expense would be to bolster, not jeopardise, the international and domestic rule of law.

The caution that much of the current expert commentary calls for is warranted, but best directed at the thorny issue of frozen private assets. Here, a genuine dilemma exists between, on the one hand, respecting private property and, on the other hand, extending confiscation to the wealth of someone involved not in crime but in other pernicious activities, such as supporting a repressive regime. It is likely that further developments in this field, if any, will continue to spark controversy.

63. Article 8 of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

64. Anton Moiseienko, 'Politics, Not Law, Is Key to Confiscating Russian Central Bank Assets' (*Just Security*, 17 August 2022) <https://www.justsecurity.org/82712/politics-not-law-is-key-to-confiscating-russian-central-bank-assets/>.



Erin Mooney · Independent consultant to the UN and other international organizations, as senior policy advisor, field practitioner, and researcher on forced migration, human rights and humanitarian issues.

The Displacement Crisis in Ukraine: Key Legal Issues

One of the most immediate and dramatic human consequences of the 24 February 2022 invasion of Ukraine by the Russian Federation was of millions of people fleeing for their lives. In what became the world's fastest growing displacement crisis since World War II, nearly 13 million people—more than a quarter of Ukraine's population—fled their homes and communities within the first two months of the war.¹ Of these, more than 5.2 million people, mostly women and children,² fled to other countries, while 7.7 million remained within Ukraine, as 'internally displaced persons' (IDPs).³ This massive displacement crisis in fact exacerbated a pre-existing one, which had begun with Russia's annexation of Crimea in March 2014 and the outbreak of armed conflict in eastern Ukraine in April 2014. By March 2015, almost 2 million people from these regions had fled their homes: nearly 1.2 million became IDPs in Ukraine while the remainder left the country, many to the Russian Federation.⁴ At the end of 2021, there were still 854,000 IDPs in Ukraine.⁵ In 2022, after the dramatic escalation of eight years of conflict in the Donbas and Crimea regions of Ukraine into a full-scale war engulfing

the entire country, many of these IDPs from 2014 onwards were forced to flee again.

By early 2023, nearly one year after Russia's invasion, a staggering almost 19 million people—nearly half of Ukraine's population—had been uprooted by the war. Among these, more than 5.3 million persons were internally displaced in Ukraine, while there were more than 8.1 million refugees from Ukraine in Europe alone.⁶ Added to these numbers, an estimated 5,562,000 people who had been displaced either within Ukraine or to other countries, have returned to their habitual place of residence in Ukraine in recent months; however, with the ongoing conflict, their return is precarious and not necessarily permanent.⁷ Indeed, the war continues to force large numbers of people to flee: over 640,000 people became displaced in the two months spanning late November 2022 and late January 2023 alone.⁸

While international attention to the displacement crisis caused by the war largely has focused on the millions of people who fled Ukraine to other countries, this paper addresses the situation of the millions of people displaced by the conflict who are in Ukraine. Specifically, it concerns three groups of persons. First, it focuses on persons who have fled their homes and are internally displaced in Ukraine. Second, it also encompasses the situation of IDPs who have returned to their area of habitual residence in recent months, as well as of refugees who have returned to Ukraine and done the same.⁹ Third, also of concern is the situation of civilians who have not yet been displaced by the conflict but are at risk of so becoming. Indeed, more than two million persons in Ukraine who had not yet been displaced in the first year of the war reportedly now are actively considering fleeing their homes due to the conflict.¹⁰ Each of these groups of persons have distinct needs and vulnerabilities requiring attention and responses in line with international legal standards.

This paper sets out key legal issues related to the protection of civilians from arbitrary displacement, to ensuring they are protected and assisted once displaced, and to supporting them to find a durable solution to displacement. The relevant standards are set by international humanitarian law, international human rights law and, as relevant, international refugee law. The *UN Guiding Principles on Internal Displacement*¹¹ are also a key reference. The

1. United Nations High Commissioner for Refugees (UNHCR), *Ukraine Regional Refugee Response Plan and Flash Appeal* (UNHCR, April 2022) 2.
2. While women and children typically comprise a large majority of displaced persons globally, as men often remain to fight in the conflict or, in natural disasters, to safeguard the home and to care for any livestock, the Government of Ukraine issued a temporary regulation on 24 February 2022 restricting any male citizens aged 18-60 years from leaving the country during martial law. A July 2022 proclamation by the military extended this ban to restricting men of that age from leaving their home districts. Charli Carpenter, 'Civilian Men Are Trapped in Ukraine: Human Rights and Humanitarian NGOs Should Pay Attention to Kyiv's Sex-selective Martial Law' (*Foreign Policy*, 15 July 2022).
3. International Organization for Migration (IOM), 'One in Six People Internally Displaced in Ukraine' (IOM, 21 April 2022). By early May 2022, the number of IDPs in Ukraine had surged to over 8 million. IOM, 'Needs Growing for Over 8 Millions Internally Displaced in Ukraine' (IOM, 10 May 2022).
4. United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 'Ukraine: Overview of population displacement (as of 23 March 2015),' (UNOCHA, 27 March 2015).
5. Internal Displacement Monitoring Centre (IDMC), 'Country Profile: Ukraine' (IDMC, 2022) <www.internal-displacement.org/countries/ukraine> accessed on 14 March 2023.

6. UNHCR, 'Ukraine Situation Flash Update #41' (UNHCR, 24 February 2023). While UNHCR statistics emphasize the number of refugees from the Ukraine conflict who currently are in Europe, which is where the overwhelming majority are located, significant numbers also are found in other countries, for instance, in Canada and the United States.
7. IOM, *Ukraine Returns Report* (IOM, 23 January 2023).
8. IOM, *Ukraine Internal Displacement Report: General Population Survey, Round 12* (IOM, 23 January 2023), 1.
9. At end September 2022, the number of returnees reported by IOM was at the highest point since the conflict began, totalling an estimated 6,036,000. Four months later, at end January 2023, the number of returnees had dropped by almost half a million, to 5,562,000. IOM, *Ukraine Returns Report*, (n 7), 2.
10. UN IOM, *Ukraine Internal Displacement Report*, (n 8), 2.
11. United Nations, *Guiding Principles on Internal Displacement*, UN doc. E/CN.4/1998/53/Add.2 (1998) [hereinafter: *UN Guiding Principles on Internal*

Guiding Principles define ‘internally displaced persons’¹² and spell out the rights of IDPs and the responsibilities of States and other authorities towards them in all phases of displacement. Although not a legally binding document in of itself, the Guiding Principles expressly are based on and consistent with the binding sources.¹³

The Guiding Principles have gained broad international standing and recognition. Most notably, in 2005, the Heads of State of all Member States of the United Nations, including the Russian Federation and Ukraine, recognized the Principles as ‘an important international framework for the protection of internally displaced persons.’¹⁴ Reaffirming this at the regional level, all Participating States of the Organization for Security and Cooperation in Europe (OSCE) recognize the UN Guiding Principles ‘as a useful framework’ for addressing internal displacement.¹⁵ The Council of Europe’s Committee of Ministers, noting that the UN Guiding Principles ‘have gained international recognition and authority’, has stated its ‘commitment to the spirit and provisions’ of the Principles, affirmed that the Principles, along with other relevant international instruments of human rights or humanitarian law, apply to all IDPs, and has recommended that Member States be guided by these Principles when faced with internal displacement including when formulating domestic legislation.¹⁶ Indeed, the Government of Ukraine, in response to the conflict and earlier displacement crisis that began in 2014, adopted that year a *Law on ensuring rights and freedoms of internally displaced persons*¹⁷ that largely was based on the UN Guiding Principles and, after certain

amendments to the law, is now considered by the UN to be in line with them.

1. Protection from Displacement

‘Every human being has the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence’ affirms Principle 6(1) of the UN Guiding Principles on Internal Displacement. Reaffirming this right, all Member States of the Council of Europe have declared that ‘the arbitrary displacement of persons from their homes or place of habitual residence is prohibited, as can be inferred from the European Convention on Human Rights’.¹⁸

In situations of armed conflict, the UN Guiding Principles on Internal Displacement specify that displacement is prohibited ‘unless the security of the civilians involved or imperative military reasons so demand’.¹⁹ This principle is well established in international humanitarian law. In situations of international armed conflict, it is a rule of customary international humanitarian law that parties to the conflict ‘may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand’.²⁰ Outside of these circumstances, the act of ordering displacement constitutes a grave breach of the Fourth Geneva Convention and its Additional Protocol I²¹ and a war crime.²² A similar rule applies in non-international armed conflicts,²³ including by virtue of customary international humanitarian law²⁴ and under international criminal law.²⁵ In situations of international armed conflict, international humanitarian law further stipulates that ‘States may not deport or transfer parts of their own civilian population into a territory they occupy.’²⁶

The general prohibition of ordering the displacement of civilians during armed conflict does allow an exception, as the above wording suggests, if the security of the civilians concerned or imperative military reasons, such

Displacement].

12. ‘Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border.’ *UN Guiding Principles on Internal Displacement*, Introduction: Scope and Purpose, para. 2. Important to understand is that the definition of ‘internally displaced persons’ is not a legal definition, but a descriptive one. It does not connote or confer a special legal status under international law in the same way that recognition as a ‘refugee’ does. While refugees are, by definition, outside of their country and therefore require a special protected status under international law, IDPs remain in the country of their citizenship or habitual residence, entitled to all the rights and guarantees stemming from this fact. The IDP definition simply describes the factual situation of a person being displaced within their country of habitual residence. See Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, Rev. Ed., Studies in Transnational Legal Policy, No. 38 (American Society of International Law and Brookings-Bern Project on Internal Displacement, 2008), 3-4.
13. See Kälin (n 12).
14. United Nations, General Assembly, *World Summit Outcome*, UNGA Resolution UN Doc. A/60/L.1 (28 September 2005), para. 132.
15. Organization for Security and Cooperation in Europe (OSCE), Ministerial Council, Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti Within the OSCE Area, MC. DC/3/03, Annex, Chapter VII; and Decision 4/03 on Tolerance and Non-Discrimination, para. 13, adopted at the OSCE Ministerial Council Meeting in Maastricht, 1-2 December 2003.
16. Council of Europe, Committee of Ministers, Recommendation (2006)6 of the Committee of Ministers to member states on internally displaced persons, adopted by the Committee of Ministers on 5 April 2006 at the 961st meeting of the Ministers’ Deputies [hereinafter CoE CoM Rec (2006)6], Preamble and para. 1.
17. Government of Ukraine, *Law No. 1706-VII, on Ensuring the Rights and Freedoms of Internally Displaced Persons* [hereinafter: *Ukraine Law on Ensuring the Rights and Freedoms of Internally Displaced Persons*].

18. CoE CoM Rec. 2006(6), Preamble.

19. *Guiding Principles on Internal Displacement*, Principle 6(2)(b).

20. Rule 129A. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law, Volume I: Rules* (International Committee of the Red Cross and Cambridge University Press, 2005), 457-459.

21. *Geneva Convention IV Relative to the Protection of Civilians in Time of War* (1949) [hereinafter Fourth Geneva Convention], Article 49; *Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* [hereinafter *Fourth Geneva Convention Additional Protocol I*], Article 85(2)

22. *Statute of the International Criminal Court* [hereinafter, *ICC Statute*], Article 8(2)(b)(VIII).

23. *1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* [hereinafter *Fourth Geneva Convention Additional Protocol II*], Art. 17(1).

24. Rule 129B. See Henckaerts and Doswald-Beck (n 20), 459-460.

25. ‘[O]rdering the displacement of civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand’ constitutes a war crime in non-international armed conflicts’ is a crime pursuant to ICC Statute, Article 8(2)(e)(viii).

26. Rule 130. See Henckaerts and Doswald-Beck (n 20), 462-463; ICC Statute, Article 8(2)(b)(VIII)

as clearing a combat zone, require civilians' evacuation.²⁷ The requirement of 'imperative military reasons' can never cover cases of removing the civilian population in order to persecute it.²⁸ Nor is displacement outside the bounds of occupied territory permitted 'except where for material reasons it is impossible to avoid such displacement',²⁹ while in non-international armed conflict, evacuations may never involve displacement outside the national territory.³⁰ Moreover, in cases where parties to a conflict do order the displacement of civilians on the grounds of security of the civilian population or for imperative military reasons, they have a corollary duty, under customary and conventional international humanitarian law, to take all possible measures to ensure satisfactory conditions of shelter, hygiene, health, safety and nutrition, and to avoid the separation of members of the same family.³¹ Indeed, in all cases, including situations outside of armed conflict, displacement shall never be carried out 'in a manner that violates the rights to life, dignity, liberty and security of those affected.'³²

In addition to the general prohibition of directly ordering the displacement of civilians, parties to a conflict have a duty to prevent displacement indirectly caused by their acts, at least those acts which are prohibited under international humanitarian law, such as terrorising the civilian population or carrying out indiscriminate attacks. In the words of a senior legal adviser of the ICRC:

'During armed conflict, the civilian population is entitled to an immunity intended to shield it as much as possible from the effects of war. Even in times of war, civilians should be able to lead as normal a life as possible. In particular, they should be able to remain in their homes; this is a basic objective of international humanitarian law'.³³

Indeed, whether or not it is a situation of conflict, 'all authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid the conditions that might lead to displacement of persons'.³⁴ Moreover, the prohibition of arbitrary displacement affirmed in the UN Guiding Principles on Internal Displacement explicitly includes displacement 'when it is based on policies of apartheid, ethnic cleansing or similar practices aimed at or resulting in altering the ethnic, religious or racial

composition of the affected population'.³⁵ The deportation or forcible transfer of population, defined as 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law', constitutes a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population.³⁶ Forcibly transferring children of a national, ethnical, racial or religious group to another group, when this act is committed with intent to destroy, in whole or in part, the group to which the children belong, constitutes the crime of genocide.³⁷ According to a group of independent international legal experts, the large-scale forcible transfers of Ukrainian children from Russian-occupied territories to the Russian Federation constitutes 'a genocidal act under Art. II(e) of the Genocide Convention' and may also be characterized as ethnic cleansing.³⁸

On 17 March 2023, the International Criminal Court issued warrants for the arrest of Vladimir Putin, President of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in President Putin's Office, for the war crime of unlawful deportation of population, specifically children, and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation. The Court specified that these crimes allegedly were committed in occupied territory of Ukraine from at least 24 February 2022. It noted there are 'reasonable grounds to believe' that both of the named persons bear individual criminal responsibility for the aforementioned crimes, for having committed the acts directly, jointly with others and/or through others, and, in the case of President Putin, also 'for his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control'. Further, noting that this conduct is allegedly ongoing, the Court expressed the hope that 'public awareness of the warrants may contribute to the prevention of the further commission of crimes'.³⁹ The UN-established Independent International Commission of Inquiry on Ukraine has identified three scenarios according to which Russian authorities have transferred children from one area they controlled in Ukraine to another in the Russian Federation and has pronounced that '[i]n none of the situations which the Commission has examined, transfers of children appear to

27. *Fourth Geneva Convention*, Article 49(2); *Additional Protocol II*, Article 17(1); and UN Guiding Principles on Internal Displacement, Principle 6(2)(b). See also Henckaerts and Doswald-Beck, (n 20), 460-461.

28. *Fourth Geneva Convention*, Article 45(4). See also Henckaerts and Doswald-Beck, (n 20), 461.

29. *Fourth Geneva Convention*, Article 49.

30. *Fourth Geneva Convention Additional Protocol II*, Article 17(2).

31. Rule 131; *Fourth Geneva Convention*, Article 49, para. 3; *Fourth Geneva Convention Additional Protocol II*, Article 17(1). See also Henckaerts and Doswald-Beck, (n 20), 461.

32. *Guiding Principles on Internal Displacement*, Principle 8. See also Kälin (n 12), 41-42.

33. Jean-Philippe Lavoyer, 'Refugees and Internally Displaced Persons: International Humanitarian Role and the Role of the ICRC,' (1995), 35 *International Review of the Red Cross*, 162, 170.

34. *Guiding Principles on Internal Displacement*, Principle 5.

35. *Guiding Principles on Internal Displacement*, Principle 6(2)(a).

36. *ICC Statute*, Article 6.

37. *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), adopted by UN General Assembly Resolution 260A(III), on 9 December 1948, Article II(e). See also *ICC Statute*, Article 6.

38. Yonah Diamond et al, *An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent* (New Lines Institute for Strategy and Policy and the Raoul Wallenberg Centre for Human Rights, May 2022), 3, 34-35. More than 33 international legal scholars contributed to and co-signed the report.

39. International Criminal Court, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (17 March 2023).

have satisfied the requirements set forth by international humanitarian law.⁴⁰

2. Protection and Assistance during Displacement

IDPs are entitled to enjoy, in full equality, the same rights and freedoms under international and domestic law as other persons in their country and ‘shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.’⁴¹ At the same time, the fact that IDPs have, as it well-recognized including by the Council of Europe, ‘specific needs by virtue of their displacement’, may require taking specific measures or consideration tailored to meet their needs.⁴² Indeed, displacement creates distinct needs and heightened exposure to a range of risks and vulnerabilities. Forced from their homes and in urgent need of shelter, compelled to abandon most of their belongings, cut off from their usual livelihood, and detached from their land and community, displaced persons suddenly find themselves stripped of their normal sources of security and habitual means of survival. Families often become separated, with especially serious consequences for children, older persons, and persons with disabilities. Often, IDPs remain trapped in conflict areas. They may find themselves in areas that are inaccessible or hard to reach by humanitarian actors, for instance, due to insecurity or political and administrative obstacles. Risks of sexual violence, sexual exploitation, and trafficking, including child trafficking, are intensified. Psychological distress is prevalent. Exacerbating their plight, IDPs often remain at risk of further, secondary, displacement; sometimes even being displaced multiple times.

Attention to the specific vulnerabilities and risks that IDPs face infuses the provisions of the UN Guiding Principles regarding protection and assistance during their displacement. Typically, each Principle reaffirms, as a general principle the right of every human being to the particular need, for instance, for safety, freedom of movement, official documentation, education. The relevant provision then details in subsequent paragraphs what specific measures may be required in order to give effect to this right for IDPs.

For example, displacement often results in the separation of families, the reunification of which is especially critical for children, older persons, and persons with disabilities. After affirming that everyone has right to family life, Principle 17 specifies that for IDPs, respect of this right means that family members who wish to remain together during displacement shall be allowed to do so, that families separated by displacement should be reunited as quickly as possible, and that IDP families confined in camps have the right to remain together.⁴³ Another entire prin-

ciple is devoted to establishing the fate of, and providing next of kin with information about, any family members of IDPs who are reported to be missing.⁴⁴ The Council of Europe elaborates that states’ responsibility towards IDPs includes ‘locating missing family members, notably those that have been taken hostage’ and conveying to relatives any information on missing persons’ whereabouts.⁴⁵ In contexts where the effective control of territory is divided, UN guidance recommends: ‘national and de facto authorities should cooperate pragmatically (eg through humanitarian actors or other impartial intermediaries) to allow for family reunification despite obstacles such as closed boundary lines.’⁴⁶

In the chaos of displacement, IDPs and refugees also often lose their official personal documentation, such as birth and marriage certificates, passports, voter identification cards, property title deeds, and social security cards. It could be that such documents are destroyed as a result of the hostilities or even confiscated, for instance, at checkpoints. IDPs have the right to reissuance, or issuance if they never had them, of such documents, and relevant authorities have the responsibility to facilitate this without imposing unreasonable conditions, such as requiring return to one’s area of habitual residence.⁴⁷ The Council of Europe emphasizes that IDPs ‘shall be provided with all documents necessary for the effective exercise of their rights *as soon as possible following their displacement* and without unreasonable conditions being imposed’.⁴⁸ In situations where a state does not have effective control over parts of its territory, interim practical solutions will be necessary. UN guidance recommends: ‘national authorities may recognize papers provided by *de facto* authorities as *prima facie* factual proof of personal status, without this implying legal recognition of the entities providing the papers.’⁴⁹

As IDPs are still within their country, primary responsibility for their protection and assistance rests with their own government.⁵⁰ Where a state lacks the will or capacity to effectively fulfil its responsibility to protect and assist IDPs, it is expected to request or accept, and to facilitate, offers of humanitarian assistance, including by providing international humanitarian actors with safe and unimpeded access to IDPs and other civilians in need.⁵¹ Indeed, as Council of Europe member states jointly have emphasized, the principle of state responsibility for IDPs ‘entails requesting aid from other states or international

40. United Nations, Report of the Independent International Commission of Inquiry on Ukraine, UN doc. A/HRC/52/62 (15 March 2023), 98.

41. *Guiding Principles on Internal Displacement*, Principle 1(1).

42. CoE CoM, Rec.(2006)6, para. 2. See also Kälin (n 12), 13.

43. *Guiding Principles on Internal Displacement*, Principle 17.

44. *Guiding Principles on Internal Displacement*, Principle 16.

45. CoE CoM, Rec.(2006)6, para. 6, with explicit reference to Article 8 of the ECHR.

46. United Nations, *Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons* (UN IASC and Brookings Institution-University of Bern Project on Internal Displacement, 2010), 40.

47. *Guiding Principles on Internal Displacement*, Principle 20.

48. CoE CoM, para. 7.

49. *IASC Framework on Durable Solutions for Internally Displaced Persons*, 39.

50. *Guiding Principles on Internal Displacement*, Principle 3(1). See also CoE CoM Rec.2006(6), Preamble.

51. *Guiding Principles on Internal Displacement*, Principles 25 and 26. For the standards of international law from which these principles are derived, see Kälin (n 12), 114-121.

organisations if the state concerned is not in a position to provide protection and assistance to its internally displaced persons' and 'not to arbitrarily refuse offers from other states or international organisations to provide such aid.'⁵²

Since the outbreak of the conflict and displacement crisis in Ukraine in 2014, the Government has expressed its commitment to ensure the safety and welfare of IDPs, and to do so in line with international standards. The Government of Ukraine has taken many legal, policy, and institutional measures to respond to the needs and protect the rights of IDPs, including adopting specific legislation on IDPs, establishing a ministry to lead the national response to IDPs, and implementing many programs for IDPs.⁵³ The 2014 Law on Ensuring the Rights and Freedom of Internally Displaced Persons is the core reference, with many other pieces of national legislation also relevant. A compilation and analysis of Ukraine's national legislation relevant to internal displacement has assessed the compliance of Ukraine's national legislation with relevant international and regional standards, most notably the UN Guiding Principles on Internal Displacement and the European Convention on Human Rights.⁵⁴ The findings and recommendations of this study were welcomed by the Government of Ukraine as well as civil society and utilized by the *Verkhovna Rada* (Parliament) Committee for Human Rights to inform a series of legislative amendments by the Government of Ukraine to enhance protection of the rights of IDPs.⁵⁵ To support implementation of domestic legislation, specialized training is being provided to judges on the judicial protection of IDPs and other war-affected people.⁵⁶

Ukraine also generally has proven responsive to recommendations from international and regional institutions to improve, where necessary, its response to internal displacement.⁵⁷ Indeed, Ukraine's national law on IDPs contains an express commitment by the Government to cooperate with other states and international organizations to prevent displacement, to protect the rights of IDPs and to support solutions for IDPs. The Law then spells out several ways in which the Government will facilitate the work of international humanitarian, charitable, technical or any other aid for IDPs, for instance, exempting this from tax

and customs fees.⁵⁸ At the same time, the sheer scale of the IDP crisis, even more so since 2022, has meant that additional assistance and capacity has been requested by the Government.⁵⁹

However, a tremendous practical obstacle to the ability of the Government of Ukraine to discharge its responsibilities towards IDPs arises in conflict areas currently not under its territorial control.⁶⁰ As a result, the situation of IDPs and other, non-displaced, civilians in these areas is especially concerning. Ever since the outbreak of conflict in 2014, the UN reports that restrictions on the movement of humanitarian staff relief supplies across the front lines has 'imposed tremendous challenges and limited humanitarian assistance in these parts of the country.'⁶¹ Since the escalation of the war on 24 February 2022, the UN reports that no inter-agency humanitarian convoys have been able to cross from Ukraine to areas of the control under Russian military control 'despite repeated attempts and notifications to the Russian Federation.'⁶² International and local non-governmental humanitarian organizations face the same problem, reporting that it remains 'near impossible for aid workers to reach the communities most in need' and that '[s]ome areas have not received any assistance from aid organisations' for now over a year.⁶³ These severe problems of humanitarian access repeatedly have been flagged to the UN Security Council, with the UN Emergency Relief Coordinator reminding the parties to the conflict that among the 'basic rules of war [...] they must allow and facilitate the rapid and unimpeded passage of humanitarian relief for civilians in need, wherever they

52. CoE CoM Rec.2006(6), para. 4.

53. Erin Mooney, Yevgen Gerasymenko, Olga Morkova, and Sergiy Zayets, *Enhancing the National Legal Framework in Ukraine for Protecting the Human Rights of Internally Displaced Persons* (Council of Europe, 2016).

54. Mooney et. al. (n 53).

55. See, for instance, 'The Regional Forum 'Human Rights of Internally Displaced Persons: National and Regional Responses' hosted by the Dnipropetrovsk Regional State Administration was successfully held in Dnipro on 14 and 15 July 2016,' (20 July 2016) <www.coe.int/en/kyiv/web/news-event> accessed 15 March 2023.

56. Council of Europe, 'A new specialised course and a series of workshops on the judicial protection of IDPs and war-affected people for judges in Ukraine,' (2 June 2022) <www.coe.int> accessed 15 March 2023.

57. See, for example, United Nations, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Mr. Chaloka Beyani: Mission to Ukraine*, UN Doc. A/HRC/29/34/Add.3 (2 April 2015); Erin Mooney, *Enhancing the National Response to Internal Displacement: A Guide to Good Practices by Council of Europe Member States*, Manual developed for the Government of Ukraine under the Framework of the Council of Europe Action Plan for Ukraine 2015-2017 (Council of Europe, 2017).

58. *Ukraine Law on Ensuring Rights and Freedoms of Internally Displaced Persons*, Article 18, paras 2-4. Also relevant is the general *Law on Humanitarian Aid*. See Mooney et. al. (n 53), 190-193.

59. For 2023, the Government of Ukraine and the United Nations jointly have appealed for US \$3.9 billion to enable 652 humanitarian organizations (local and international) to provide humanitarian assistance and protection services to 11.1 million people most in humanitarian need. Of these, 3.8 million are IDPs and 2.5 million are displaced people who recently have returned to their home area. United Nations, *2023 Humanitarian Response Plan: Ukraine* (UN, February 2023).

60. An analogous situation arises in Georgia, where the Government has not had effective control of the territories of Abkhazia and South Ossetia/Tskhinvali since the outbreak of war in these regions in the early 1990s. See Erin Mooney, 'From Solidarity to Solutions: The Government Response to Internal Displacement in Georgia,' in Elizabeth Ferris, Erin Mooney and Chareen Stark, *From Responsibility to Response: Assessing National Approaches to Internal Displacement* (Brookings Institution - London School of Economics Project on Internal Displacement, November 2011), 228-229. In 2021, the European Court of Human Rights (ECHR) determined that the Russian Federation exercised 'effective control' over South Ossetia, Abkhazia and the 'buffer zone' from 12 August to 10 October 2008, the date of the official withdrawal of the Russian troops and that '[e]ven after that period, the strong Russian presence and the South Ossetian and Abkhazian authorities' dependency on the Russian Federation, on whom their survival depends, as is shown particularly by the cooperation and assistance agreements signed with the latter, indicate that there was continued 'effective control' over South Ossetia and Abkhazia.' *Georgia v. Russia (II)*, (ECHR, 29 January 2021).

61. United Nations, Office for the Coordination of Humanitarian Affairs, *Situation Report: Ukraine* (UNOCHA, 10 February 2023), 7.

62. *Ibid.*

63. 'Ukraine One Year On: NGOs Call for the Protection of Civilians, Humanitarian Access, Localisation and Durable Solutions' (23 February 2023) 1, accessed 21 March 2023 <www.nrc.no/globalassets/pdf/ukraine-one-year-on-awg-statement-22.02.pdf>.

are.⁶⁴ This is a norm of customary international law.⁶⁵ Moreover, it is relevant to note that under the Statute of the International Criminal Court extermination, defined as including ‘the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population’ constitutes a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, and with knowledge of the attack.⁶⁶

In addition to cutting off access by civilians in need to life-saving humanitarian assistance, the lack of humanitarian access also has put a halt to the critically important independent on-site monitoring of conditions in these areas, including regarding the human rights situation, by the UN and OSCE. The unarmed civilian OSCE Special Monitoring Mission in Ukraine, which had operated since 21 March 2014 based on a request from the Government of Ukraine and a consensus decision by all OSCE states, including the Russian Federation, was compelled to close permanently on 31 March 2022.⁶⁷ The United Nations Human Rights Monitoring Mission in Ukraine has no physical access to the areas of Ukraine occupied by the Russian Federation, so can only monitor remotely the human rights situation in these areas, leading to significant information gaps and under-reporting. For instance, the UN cautions that the number of civilian casualties it reports (21,293, including 8,006 killed and 13,287 persons injured, in the first year of the war), ‘represents only a fraction of the actual toll, as the verification process has faced immense challenges, including a lack of access to areas under the military control of the Russian Federation.’⁶⁸

3. The Right to a Safe, Voluntary, and Durable Solution to Displacement

To be forced to flee one’s home is a life-changing, often traumatic, experience which is meant to be temporary. The UN Guiding Principles on Internal Displacement prescribe that ‘displacement shall last no longer than required by the circumstances.’⁶⁹ In a situation of armed conflict, whether international or non-international, it is a rule of customary international law that ‘[d]isplaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.’⁷⁰ Voluntary return of IDPs and refugees is a principle reaffirmed in many peace agreements and countless UN Security Council resolutions.⁷¹

Indeed, when discussing displacement solutions there is a general tendency, both in common parlance and in peace agreements, to emphasize, often exclusively, the solution of ‘voluntary return’.

While the qualifier ‘voluntary’ connotes that return should be a choice, overemphasis of the principle of ‘voluntary return’ can be problematic in practice by making it more difficult for displaced persons to exercise their right to choose other possible solutions, to which they also have a right. Epitomizing this risk, the Dayton Peace Accord ending the conflict in Bosnia and Herzegovina in 1995 gave prominence to refugees’ and IDPs’ right to return. Driving this emphasis were strong moral and political imperatives for the Government as well as the international community, and shared by many displaced persons themselves, to reverse the war’s brutal campaign of ‘ethnic cleansing’ and the resulting dramatic demographic changes in disputed territories. The Agreement stressed many times not only the right of refugees and IDPs to return but the urgency of their doing so, even underscoring that ‘[t]he early return of refugees and displaced persons is an important objective of the settlement of the conflict’.⁷² However, for many years it remained very challenging for IDPs to pursue a solution other than return to their pre-war residence: under national legislation, even their recognition as an IDP, their access to reintegration assistance, and their ability to repossess their home and property effectively was contingent upon their expressing an intention to return.⁷³ It was fifteen years after the war had ended, and only after intensive international advocacy and support, before the Government adopted a Revised Strategy for Implementation of Annex VII of the Dayton Peace Agreement which explicitly recognized for the first time IDPs’ right not only to return but, should they choose, instead to locally integrate in their place of displacement or resettle elsewhere in the country.⁷⁴

International law prescribes solutions to displacement can take any one of three forms: return to the place of origin; local integration in the location of stay during displacement; or resettlement elsewhere, in another part of the country in the case of IDPs.⁷⁵ IDPs have the right to choose among these solutions while ‘[c]ompetent authorities have the primary duty to establish conditions, as well as provide the means, which allow IDPs to return voluntarily, in safety and with dignity to their homes or places of habitual residence, or to resettle voluntarily in another part of the country’.⁷⁶ The Council of Europe’s Committee of Ministers explicitly recognizes the right

64. United Nations, Security Council, 9254th Meeting, 6 February 2023, *Provisional Verbatim Record* (6 February 2023) 5.

65. Rule 55. See Henckaerts and Doswald-Beck, (n 20), 193-200.

66. ICC Statute, Article 7. See also *ibid.*, 195.

67. OSCE, ‘OSCE Special Monitoring Mission to Ukraine (closed),’ accessed 15 March 2023 <www.osce.org/special-monitoring-mission-to-ukraine-closed>.

68. United Nations, *Situation Report: Ukraine*, (61), 3.

69. *Guiding Principles on Internal Displacement*, Principle 6(3).

70. Rule 132. See Henckaerts and Doswald-Beck, (n 20), 468-472.

71. Kälin (n 12), 127-129. See also Christine Bell, *Negotiating Justice? Human Rights and Peace Agreements* (International Council on Human Rights Policy, 2006), 65-68; and Patricia Weiss Fagan, ‘Peace Processes and IDP Solutions’ (2009) 28 *Refugee Survey Quarterly* 1, 31-58.

72. *The General Framework Agreement for Peace in Bosnia and Herzegovina, initialled in Dayton on 21 November 1995 and signed in Paris on 14 December 1995, Annex 7: Agreement on Refugees and Displaced Persons*, Article 1.1.

73. Erin Mooney and Naveed Hussain, ‘Unfinished business: UNHCR and IDPs in Bosnia and Herzegovina’ (2009) 33 *Forced Migration Review*, 22-24.

74. *Ibid.*

75. *Guiding Principles on Internal Displacement*, Principle 28(1). See also Kälin (n 12), 125-130. For refugees, resettlement refers to relocating to a third country. Solutions for refugees other than return ie, solutions in countries of asylum or resettlement fall outside the scope of this paper.

76. *Guiding Principles on Internal Displacement*, Principle 28(1).

of IDPs ‘to return voluntarily, in safety and dignity, to their homes or places of habitual residence or to resettle in another part of the country in accordance with the European Convention on Human Rights.’⁷⁷

A critically important corollary principle to that of voluntary return is the right of IDPs and refugees ‘to be protected against forcible return or resettlement in any place where their life, safety, liberty and/or health would be at risk.’⁷⁸ This is the principle of *non-refoulement* which, in addition to being articulated in international refugee law⁷⁹ and having deep roots in international human rights law,⁸⁰ particularly in the protections relating to torture, constitutes a principle of customary international law.⁸¹ This principle explicitly is reaffirmed by the Council of Europe, with reference to the European Convention on Human Rights.⁸² In Ukraine, the national IDP law explicitly protects IDPs from involuntary return.⁸³

Another key element of the voluntary character of solutions to displacement is that IDPs and refugees have access to objective and updated information on the conditions in prospective areas of return or resettlement.⁸⁴ Such information should cover issues including security and economic conditions as well as the availability of public services and infrastructure, including education and health services. A valuable first-hand source of such information often comes from preliminary brief visits, so-called ‘go and see visits’, undertaken by members of IDPs’ or refugees’ family or trusted community representatives, to these areas. The Council of Europe emphasizes that IDPs ‘should be properly informed, but also consulted to the extent possible, in respect of any decision affecting their situation prior to, during or after their displacement’.⁸⁵

Whichever solution option IDPs choose—whether to return to their place of origin, locally integrate in the place of displacement, or resettle in another part of the country—it must be sustainable to be considered a solution. As noted above, competent authorities have the ‘primary duty to establish conditions, as well as provide the means’, enabling IDPs to exercise their choice of solution in the country. Moreover, ‘[s]uch authorities shall endeavour to facilitate the reintegration’ of IDPs, irrespective of the

solution they choose.⁸⁶ Reaffirming this principle, Council of Europe member states are expected to ensure ‘conditions for proper and sustainable integration’ of IDPs.⁸⁷

International guidance and criteria define what constitutes a durable solution to internal displacement.⁸⁸ In summary, IDPs who have achieved a durable solution will enjoy without discrimination: (1) long-term safety, security, and freedom of movement; (2) an adequate standard of living including, at a minimum, access to adequate food, water, housing, health care and basic education; (3) access to employment and livelihoods; and (4) access to effective mechanisms that restore their housing, land, and property or provide them with compensation. In addition to these four essential criteria, and depending on the context and whether these are challenges that IDPs face, the following four additional criteria also may be relevant: (5) access to and replacement of personal and other official documentation; (6) voluntary reunification with family members separated during displacement; (7) participation in public affairs at all levels on an equal basis with the resident population⁸⁹; and (8) effective remedies for displacement-related violations, including access to justice, reparations, and information about the causes of violations.

Achieving durable solutions to displacement through fulfillment of these criteria inevitably will, the guidance emphasizes, be ‘a gradual, often long-term process of reducing displacement-specific needs and ensuring the enjoying of human rights without discrimination’ and be ‘a complex process that addresses human rights, humanitarian, development, reconstruction and peace-building challenges’. In other words, the physical act of IDPs returning, resettling in another part of the country, or choosing to settle permanently in the location where they have been living while displaced is literally just the first step towards a solution to displacement. In addition to reconstruction and reintegration support, sustained objective monitoring of the security and other conditions in areas of return, local integration, and resettlement, will be essential.

In the case of Ukraine, as of February 2023, most people displaced by the war—some 77 percent of those who became refugees outside of the country and 79 percent of IDPs in Ukraine—report they want to return home

77. CoE, CoM Rec.(2006)6, para. 12.

78. *Guiding Principles on Internal Displacement*, Principle 15(d).

79. *Convention on the Status of Refugees (1951)*, Art. 33.

80. United Nations, Office of the High Commissioner for Human Rights, *Technical Note: The Principle of Non-Refoulement in International Human Rights Law* (5 July 2018).

81. Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion,’ in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Erika Feller, Volker Türk and Frances Nicholson (eds.) (Cambridge University Press, 2003), 87-177. That non-refoulement constitutes a principle of customary international law was confirmed by consensus by a roundtable of international law experts, convened in July 2001. See, *ibid.*, 178-179.

82. CoE, CoM Rec.(2006)6, para. 5.

83. *Ukraine Law on ensuring rights and freedoms of internally displaced persons*, Art. 3.

84. *UN IASC Framework for Durable Solutions for Internally Displaced Persons*, 15-17.

85. CoE, CoM Rec.(2006)6, para. 11.

86. *Guiding Principles on Internal Displacement*, Principle 28(1).

87. CoE CoM Rec.(2006)6, para. 12.

88. *IASC Framework on Durable Solutions for Internally Displaced Persons*.

89. IDPs also have this right during displacement. UN Guiding Principles on Internal Displacement, Principle 22(1)(d). However, legal and practical obstacles often arise impeding IDPs’ ability to participate in elections, requiring targeted measures. See Jeremy Grace and Erin Mooney, ‘Political Participation Rights in Particular the Right to Vote,’ in Walter Kälin, Rhodri C. Williams, Khalid Koser and Andrew Solomon (eds.), *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, *Studies in Transnational Legal Policy* 41 (ASIL: 201), 507-550. Specifically regarding Ukraine, see Mooney et. al, (n 53), 131-138, and L D Rudenko and O O Androsova, ‘Ensuring the Voting Rights of Internally Displaced Persons in Local Elections’ (2017), 2 *Legal Horizons* 15.

one day.⁹⁰ However, this is not an immediate plan: only 12 percent plan to do so in the next three months. Given the ongoing conflict, it is not surprising that safety and security concerns constitute the main barrier to return. Even once hostilities eventually cease, landmines and unexploded ordnance will continue to pose a significant risk to people's safety and impediment to return, especially for people from areas that experienced active hostilities.⁹¹ Access to housing—much of which has been significantly damaged or destroyed by the conflict—is another major obstacle. Other concerns cited include the availability of basic services, including electricity, water and health-care, and access to work opportunities. Meanwhile, seven percent of IDPs already indicate that they do not hope or plan to return to their places of origin.⁹² Instead, they plan to locally integrate in the place where they are staying while displaced or to resettle and integrate in another part of the country. As noted above, they have the right to do so and to receive support for alternative solutions to return.

Irrespective of the solution they choose, IDPs and refugees have the right to repossess their housing, land, and property, left behind during their displacement.⁹³ That the property rights of displaced persons must be respected constitutes a norm of customary international law applicable in both international and non-international armed conflicts.⁹⁴ In Ukraine, some IDPs and refugees who already have returned to their place of habitual residence are arriving only to find their homes illegally occupied by other persons.⁹⁵ This situation, as experience around the world underscores, can become an additional source of conflict and violence unless judiciously handled. An effective mechanism to adjudicate property claims will need to be established and operate in line with international principles and guidance on the issue.⁹⁶ A key principle is that restitution should be the primary remedy unless it is practically impossible or the refugee's or IDP's expressed wish to receive compensation in lieu of restitution. Any eventual peace agreement for the conflict in Ukraine should refer to IDPs' and refugees' right to restitution of their housing, land, and property, specify that this right applies irrespective of the solution to displacement they choose, and provide for the establishment of a credible mechanism for adjudicating disputed property claims.

The Dayton Peace Agreement and the experience in post-war Bosnia and Herzegovina regarding property restitution is particularly instructive and, although not

without its challenges, was highly successful and is widely considered a model. Within four years of adoption of the Property Law Implementation Plan in 1999, 92 percent of the more than 200,000 property claims received had been adjudicated and the decisions implemented, allowing IDPs and refugees to regain possession of their homes and land.⁹⁷ Even so, many homes (60 percent of the country's housing stock) were severely damaged or completely destroyed (18 percent).⁹⁸ Notably, this destruction not only occurred during the conflict but also after the peace agreement by those seeking to prevent returns.⁹⁹ Indeed, many homes of IDPs and refugees were illegally occupied by other people, often displaced persons themselves. Legal restitution of property rights therefore is a first step; practically, reconstruction assistance to support IDPs, refugees and other war-affected civilians to support IDPs, refugees and other war-affected civilians to repair and rebuild their homes, and a humane human rights-based approach to remove any secondary occupants, also will be required.

An eventual peace agreement for the conflict in Ukraine should have resolving the challenges raised by displacement as a specific goal and should lay the foundations for enabling IDPs and returning refugees to achieve a voluntary and durable solution to their plight.¹⁰⁰

Conclusion

For the many millions of persons displaced by the war who are still in Ukraine, an end to the conflict is essential for them to find a safe and durable solution to their displacement and begin the difficult task of rebuilding their lives. In the meantime, parties to the conflict must be held accountable for meeting their well-established obligations under international law to protect civilians, to safeguard them from arbitrary displacement, and to ensure that all those who already are displaced in Ukraine receive the protection and assistance they so desperately need. Other countries, meanwhile, must continue to uphold their own responsibilities under international law, namely, to respect the fundamental right of individuals, including IDPs,¹⁰¹ to seek asylum in another country and the principle of *non-refoulement* protecting any individual from being returned to a country where their life, safety, or security would be at risk. As the conflict in Ukraine continues to drag on, these fundamental principles will continue to be tested.

90. UNHCR, *Lives on Hold: Intentions and Perspectives of Internally Displaced Persons in Ukraine* (UNHCR: February 2023), 4; *Lives on Hold: Intentions and Perspectives of Refugees from Ukraine* (UNHCR: February 2023), 4.

91. IOM, *Ukraine Returns Report*, (n 7) 6.

92. UNHCR, *Lives on Hold: Intentions and Perspectives of Internally Displaced Persons in Ukraine*, 4.

93. *Guiding Principles on Internal Displacement*, Principle 29(2). See also Kälin (n 12), 131-140; and CoE CoM Rec. (2006)6, para. 8.

94. Rule 133. See Henckaerts and Doswald-Beck (n 20), 472-474.

95. IOM, *Ukraine Returns Report*, (n 7) 6.

96. United Nations *Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles)*, UN doc. E/CN.4/Sub.2/2005/17 28 June 2005; and *Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the 'Pinheiro Principles'* (United Nations, March 2007).

97. Bosnia and Herzegovina, *Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) End of Mandate Report (1996-2003)*, cited in Immaculada Serrano, 'Property rights and reconstruction in the Bosnian return process,' *Forced Migration Review*, 50 (September 2015), 19.

98. *Ibid.*

99. *Ibid.*

100. Erin Mooney, 'Internally Displaced Persons and Refugees,' Options Paper (September 2022), Ukraine Peace Settlement Project, University of Cambridge, Lauterpacht Research Centre for International Law <www.lcil.cam.ac.uk/researchcollaborative-projects-housed-lcilukraine-peace-settlement-project/settlement-options > accessed 15 March 2023.

101. *Guiding Principles on Internal Displacement*, Principle 15(c).



Bernard Cazeneuve • Former Prime Minister of France, Partner at August Debouzy (Paris)

Alexandre Mennucci • Ph.D., Associate at August Debouzy (Paris)

The European Due Diligence Duty: Promoting a Virtuous Corporate Governance Model

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Civil society and non-governmental organisations ('NGOs') are increasingly sensitive to the effects of economic activity and production on human rights, the environment, biodiversity and climate change, while companies, concerned about their reputation and attractiveness, are more willing to question their corporate purpose (*raison d'être*). Some companies are keen to communicate on the efforts they are making to meet these new expectations. The vision embodied in Milton Friedman's famous article published in the *New York Times* in 1970, 'The Social Responsibility Of Business Is to Increase Its Profits' seems to have passed.¹ If, at the end of the '*Trente Glorieuses*', companies took few risks for their competitiveness, their brand or their reputation by ignoring the potentially adverse impacts of their activities on their employees and local communities, such indifference is no longer conceivable today. Indeed, under the joint pressure of citizens, NGOs, the media and social networks, states have been led—including with the objective of protecting their own companies against extraterritorial sanctions for serious breaches of the principles of probity—to adopt legislation aimed at preventing corruption and reminding companies of their due diligence duties. Thus, within the European Union, banking and financial institutions in particular have been required to implement binding compliance programmes to protect them from the risk of exposure to money laundering or terrorist financing operations.

1. See Milton Friedman, 'The Social Responsibility Of Business Is to Increase Its Profits', *New York Times*, 13 September 1970: '[i]n a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom. [...] [T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.'

As corruption is also a phenomenon likely to seriously undermine the moral, intellectual, economic, and social development of political societies, the French legislator adopted Law No 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life. This text requires large French companies to take all measures to prevent and detect the commission, in France or abroad, of acts of corruption or influence peddling.

Similarly, after the tragedy of the Rana Plaza collapse in 2013, many NGOs campaigned for the law to force multinationals to better control the impact of their activities, both in France and abroad, on the environment, health, human safety, and human rights. In the scope of their jurisdiction, judges have also played a major role by contributing, through the development of case law, to better define the scope of responsibilities that companies now must assume. For example, since 2011, a significant number of judicial investigations have been opened by the 'Crime against humanity' unit of the Judicial Court of Paris, at the request of the public prosecutor, against companies accused of complicity in crimes against humanity or genocide. Banks are being prosecuted for allegedly financing dictatorial regimes or for selling surveillance systems to cyber intelligence companies. Although no conviction has yet been handed down against them—due to the difficulty of establishing a causal link between the supply of goods or services by the company and the crimes committed by the political regimes in question—the procedures that have been initiated are punctuated by high-profile investigations (indictments, searches, police custody, etc.), which can seriously affect the reputation of these companies and force them to seek the best means to avoid being implicated in this way in the future. Markets follow this movement of mounting pressure on economic actors. Thus, financial institutions, which are themselves being challenged by some NGOs and citizens, are increasingly requesting that companies seeking their funding include CSR principles in their strategic objectives. Furthermore, certain activist funds have set themselves the objective of ensuring the offensive defence of social and environmental rights, against shareholders for whom financial profitability remains the only concern. Thus, on 26 May 2021, the investment firm Engine no. 1, whose positions in favour of the energy transition are well known and which holds only 0.02% of ExxonMobil's capital, had two of its representatives elected to ExxonMobil's Board of Directors, against the advice of the oil company's management. In this operation, Engine no. 1 was able to benefit from the assistance of the funds BlackRock, Vanguard and State Street which, for their part, held 20% of the capital of the US company. This event clearly shows the desire of certain investment funds, which are very involved in financing the world economy, to influence the strategy of large groups that do not sufficiently promote the ethical principles constantly mentioned in the conventions or guidelines of major international organisations (OECD, UN, World Bank, etc.) or certain NGOs.

French law has responded in part to these new concerns with the adoption of the Law of 27 March 2017 on the duty of vigilance of parent companies and instructing undertakings

In a context where the reputation of companies has become an important aspect of their competitiveness, the efforts they make to anticipate the risks they may face are decisive elements of their development strategy and their organisation. Thus, Law No 2017-399 of 27 March 2017 on the duty of vigilance of parent companies and instructing undertakings (the ‘law on the duty of vigilance’) specified the obligations that are now incumbent on companies with regard to the consequences of their activities on human rights, health and the environment. This new legislation, developed with the active support of NGOs, has subjected large groups² to the obligation to adopt a policy that ‘include[s] reasonable vigilance measures able to identify risks and prevent severe violations of human rights and fundamental freedoms, serious harm to human health and personal safety and environmental damage’ resulting from their activities, those of their subsidiaries or their partners (subcontractors and suppliers).³ The French law on the duty of vigilance provides that companies failing to comply with their obligations can be challenged by any person, particularly NGOs, who can justify an interest in taking action (*‘intérêt à agir’*) before French courts. The latter may not only order the company, under penalty, to comply with its obligations (creation or reinforcement of the due diligence policy) but can also oblige it to repair the damage caused by its activities to people or the environment, particularly when the performance of the company’s due diligence obligations has not been sufficiently closely monitored.

This text has undoubtedly enabled significant progress in the consideration by the public authorities of the need to promote the emergence of a new model of corporate governance. However, six years after its entry into force, the French law on the duty of vigilance has some weaknesses, as shown by the difficulties observed in its enforcement, which were also highlighted by the

2. See the French *Code de commerce* Art L. 225-102-4-1: ‘Any company that at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad, must establish and implement an effective vigilance policy’ (free translation from the French original: ‘*Toute société qui emploie, à la clôture de deux exercices consécutifs, au moins cinq mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français, ou au moins dix mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français ou à l’étranger, établit et met en œuvre de manière effective un plan de vigilance*’).
3. Free translation from the French original. See the French *Code de commerce* Art L. 225-102-4-1: ‘*Le plan comporte les mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l’environnement, résultant des activités de la société et de celles des sociétés qu’elle contrôle au sens du II de l’article L. 233-16, directement ou indirectement, ainsi que des activités des sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, lorsque ces activités sont rattachées à cette relation.*’

parliamentary report on its evaluation.⁴ The absence of a public authority that could have facilitated the understanding and proper enforcement of the law through its control and the issuing of clear guidelines contributed to the emergence of an environment of legal uncertainty, which companies constantly point out as a risk factor for the future of their activities. This being said, courts will eventually be able to contribute, through case law, to removing the remaining legal uncertainties and ambiguities, and there are good reasons to expect that they will take into account possible developments in European law in this area.

The proposed European Directive on Corporate Sustainability Due Diligence aims to promote a more virtuous business model in Europe

The European Commission’s proposal for a directive was the result of the impetus given by the European Parliament

The current European Commission, under the impetus of a large part of European opinion, which is increasingly expressing a strong desire for environmental protection and respect for human rights, has undertaken to impose much stricter rules on companies in terms of corporate governance. In 2021, the Commission proposed the adoption of a new European directive, the Corporate Sustainability Reporting Directive.⁵ This text, which entered into force on 5 January 2023, reforms the Non-Financial Reporting Directive of 2014 and strengthens the obligations of companies with regard to the publication of information on sustainability. Its application now extends to a much larger number of companies, including small and medium-sized listed companies. The aim of the text is to give investors and other stakeholders access to the information they need to assess investment risks related to climate change and other sustainability issues. It is also intended to create a culture of transparency within European companies on all human rights and environmental issues.

On 23 February 2023, the European Commission proposed to complement this initiative by presenting to the Council of the European Union, the representative body of the Member States, a proposal for a European directive on corporate sustainability due diligence.⁶ This text is the result of a resolution of the European Parliament of 10 March 2021, urging the Commission to propose, as soon as possible, a text on due diligence supply chains. The proposed directive, largely inspired by

4. Coralie Dubost and Dominique Potier, *Rapport d’information sur l’évaluation de la loi du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*, Assemblée nationale, 24 February 2022.
5. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) no. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.
6. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final) (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>).

French, German and Dutch laws on the subject, and the OECD's Due Diligence Guidance for Responsible Business Conduct, is intended to require companies to (i) integrate the due diligence duties into their policies, in particular by adopting a code of conduct, (ii) identify the actual or potential adverse impacts arising from their own activities or those of their subsidiaries, and, where related to their value chains, those of their business partners (risk mapping), (iii) prevent and mitigate potential adverse impacts and stop actual adverse impacts, (iv) establish and maintain a complaints procedure relating to these impacts, (v) establish internal monitoring of the effectiveness of the due diligence system and (vi) communicate publicly on their actions in this area (Art 5).

The political compromise reached by the governments around the common position of the Council of the European Union was based on the will of the Member States to find a balance between the ambition of the Commission's proposal and the need to provide companies with a framework offering a sufficient level of legal certainty

Many Member States, particularly the Nordic countries, considered that the European Commission's proposal was far too clear-cut and sometimes even out of touch with economic realities. In particular, they insisted on the fact that European economic entities were subject to competition from players who were not subject to such restrictive legislation in their own jurisdictions. The text of the Council of the European Union, as established at the end of the meeting of the Permanent Representatives Committee on 30 December 2022, is therefore the result of a political compromise. Without calling into question the objectives of the initial draft, it takes into account the reservations of many Member States about the Commission's proposal.

The scope of the Directive

The Commission's draft envisaged that the companies subject to the new obligations would be EU limited companies with more than 500 employees and a worldwide net turnover of more than EUR 150 million (Group 1) and EU limited companies with more than 250 employees and a worldwide net turnover of more than EUR 40 million, at least half of which is in a risk sector such as textiles, agricultural raw materials and mineral extraction (Group 2) (Art 2). Moreover, companies from third countries, active on the European market, were also to be subject to the European duty of care if they exceeded the above-mentioned thresholds, it being specified that the turnover taken into account must be achieved solely on the territory of the European Union. The Commission estimated that these thresholds, which are wider than those applicable under French law, should lead to more than 13,000 companies being required to apply the provisions of the directive.

The Council made two adjustments to these provisions, first by specifying that the thresholds had to be exceeded

over two consecutive financial years, as provided for under the French law on the duty of vigilance, and, second, by proposing that the scope of companies subject to the Directive be extended only gradually. Thus, the Directive would apply for a period of three years from its entry into force to European and foreign companies with more than 1,000 employees and a worldwide net turnover of more than 300 million euros. After four years, the thresholds would then be lowered to European and foreign companies with more than 500 employees and a worldwide net turnover of at least EUR 150 million, and after five years to companies with more than 250 employees and a worldwide net turnover of at least EUR 40 million, 50% of which comes from sectors identified as high risk (Art 30).

The financial sector was not fully covered by the European Commission's proposal, as it was already foreseen that the identification of adverse impacts should only be carried out before the service is provided to the counterparty. The majority of the Council, concerned that this measure might discourage banks from financing developing regions, chose to leave it to each Member State to decide, when transposing the Directive, whether or not to include the provision of financial services by regulated institutions within its scope. By way of derogation from the general regime, it also specified that these undertakings, if included in the scope of application at the time of transposition, would in no way be obliged to temporarily suspend or terminate the commercial relationship, even where no other measure had made it possible to correct the adverse impact (Art 7 and Art 8).

The extent of the obligation to identify adverse impacts

The core of the mechanism envisaged by the proposed Directive is therefore for companies to draw up a map of the 'actual or potential adverse impacts' on human rights and the environment resulting from their activities, those of their subsidiaries or their 'business relationships' (Article 6).⁷

The Commission thus seemed to adopt a position that led companies to have to assess all their established business partners, including those in the downstream value chain. This was in response to a strong expectation on

7. The notion of 'adverse impacts'—the European equivalent of the French notion of 'serious harm' (*atteintes graves*)—has been defined by reference to an annex which lists the nature of the violations to be apprehended, as well as the reference standards in terms of human rights and the environment, which must be taken into consideration (Annex 1 of the proposal for a Directive). While the creation of such a list is to be welcomed, its particularly broad nature does not allow for a precise definition of the scope of the negative impacts to be identified. While the establishment of such a list is to be welcomed, its particularly broad nature does not allow for a precise definition of the scope of the adverse impacts that have to be identified. The Council of the European Union has decided to reduce the list in Annex 1 to cover only 'those international instruments that were ratified by all Member States' (ie the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and fundamental conventions of the International Labour Organisation). The Council retained the 'catch-all' clause included in the Commission's proposal (Recital 25) and expanded the list of possible environmental damage, but without including the climate risk.

the part of NGOs, in whose view human rights and environmental abuses do not always occur at the level of suppliers or subcontractors, but also at that of customers. In order to ensure legal certainty to those subject to the obligations of the Directive, the Council chose to replace the term ‘value chain’, used by the Commission, by that of ‘chain of activities’, ‘leaving out the phase of the use of the company’s products or provision of services entirely’.⁸ This clarification by the Council could lead to the exclusion of companies’ customers from the scope of the due diligence assessment. It limits the scope of the duty of care to upstream business partners (design, extraction, manufacture, transport, storage, supply of raw materials or products, product development) and to downstream partners as regards exclusively the distribution, transport, storage and disposal of the product (dismantling, recycling, composting or landfill) (Art 3(g)).⁹

The obligation of companies to mitigate and remove adverse impacts

On the basis of the risk mapping exercise, companies will therefore have to put in place an action plan to prevent or mitigate potential adverse impacts (Art 7) and to bring actual adverse impacts to an end (Art 8) (payment of damages to affected persons, planned corrective actions with qualitative and quantitative indicators for measuring improvement, contractual assurances from partners, investments for such prevention, temporary suspension of business relations, or even permanent cessation if necessary). The Council has significantly redefined the obligations of companies in identifying, preventing and eliminating negative impacts by inserting two new provisions. The first provides that if a company could not simultaneously remedy all the adverse impacts identified, it would simply be required to prioritise them and deal only with those that are the most serious and most likely to occur (Art 6a). The second is not to require companies to terminate business relationships that enable them to obtain raw materials, goods or services that are essential to the company’s production of goods or provision of services, if this would result in substantial prejudice to the company (Art 7.7).

The establishment of national supervisory authorities authorized to impose sanctions

In order to guarantee the proper enforcement of the text, the proposal for a Directive requires Member States, when transposing it into their national law, to lay down ‘effective, proportionate and dissuasive’ sanctions (Art 20) imposed by national administrative supervisory authorities, which would have significant powers of

investigation (Art 17 and Art 18). The creation of such authorities will enable certain Member States that do not have them, such as France, to escape from the current climate of legal uncertainty, as certain legal concepts are insufficiently defined (serious infringements, established business relationship, etc.). In the same spirit, the proposal for a Directive provides for the publication by the European Commission of guidelines, which will be important to enable a harmonised application by companies of the provisions relating to the due diligence duties. These provisions have not been substantially modified by the Council of the European Union. However, it will be recalled that in France, the Constitutional Council censured the principle of the civil fine provided for by the French law on the duty of vigilance, considering that the terms used such as ‘human rights’ and ‘fundamental freedoms’ were insufficiently clear and precise for a sanction to be imposed in the event of a breach. When transposing the Directive into national law, the possibility of administrative sanctions as provided for in the proposed Directive could be contested, and it is therefore highly desirable for future drafters of the Directive to better define these key notions.

The scope of civil liability of companies

The Commission’s text, inspired by the French regime, provides that companies could be held liable for damages in the event of failure to fulfil their obligations to prevent the adverse effects of their activities, and this failure led to damage (Art 22). Such a provision is undoubtedly likely to encourage companies to rigorously apply the text. While the Council did not call into question the principle of liability, it clarified its scope. In particular, it excluded the possibility for national legislation to provide for punitive damages and ruled out compensation for ecological damage, which has been allowed in French law since 2016, by providing only for compensation for damage caused to natural or legal persons. It also removed the cause of exemption related to the insertion of contractual guarantees and specified, in return, that a company ‘cannot be held liable if the damage was caused only by its business partners in its chain of activities’ without the company intervening (Art 22).

The duty of directors to ensure that the due diligence policy is put in place

The Commission’s proposal for a Directive provided that directors had a duty to implement and supervise due diligence measures and to adapt the corporate strategy to take account of the adverse impacts identified and the due diligence measures adopted, at the risk of incurring liability based on the directors’ duty of care. This provision raised transposition difficulties. Unlike UK law, French law does not enshrine a general duty on directors to act in the best interests of the company. The vast majority of Member States considered that this proposal for a Directive could not pre-empt their national competences in the field

8. Council of the European Union, ‘Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach’ (15024/1/22 REV 1), 30 November 2022, paras 18 and 19.

9. The Council clarified that these downstream assessment obligations do not apply to products subject to export controls (ie, dual-use items and weaponry).

of company law. The Council has therefore deleted this provision (Art 25 and Art 26).

The Council's common position has therefore specified the scope of the European due diligence duty, in accordance with a pragmatic approach dictated by a number of considerations: few Member States have national rules on this issue at this stage; experience in their application is still limited and the economic stakes and political expectations remain considerable. It therefore seems unlikely that the Council, in the forthcoming negotiations with the European Parliament, will agree to relinquish the balances it proposed, be it on the extent of the value chain, the policy to combat climate change or director duties. In any case, the Directive is not expected to be adopted until late 2023 or early 2024 and Member States will then have two years to transpose its provisions into national law.

The debate on the extraterritorial application of the Corporate Sustainability Due Diligence Directive

Member States, concerned about the distortion of competition between European and foreign businesses, have pushed for an extraterritorial application of European due diligence obligations in order to create a *de facto* level playing field. Thus, the proposal for a Directive provides that companies established in third countries with a turnover of at least 150 million euros in the EU will be subject to its obligations (Art 2).¹⁰

A large number of foreign companies will thus have to apply European law, including for their activities outside the Union. Moreover, foreign companies integrated in the chain of activities of companies subject to the provisions of the Directive (subcontractors, suppliers, etc.) will have to, at least indirectly, submit to European legislation. Finally, foreign parent companies may have to bear the costs of an administrative sanction or damages where one of their European subsidiaries subject to the Directive is liable. Similarly, if the parent company is included in the chain of activities of the European subsidiary, the latter will have to undergo the same assessment as any other business partner.¹¹

The European Union, following the example of the United States in the fight against corruption, now fully assumes the leverage of the attractiveness of its market to export its standards, including to foreign entities, and thus promote a virtuous corporate governance model, respectful of human rights and the environment, for all those who wish to access its market.¹² Some, considering that foreign companies could choose to leave the European market rather than apply these rules, are concerned about

the risk of a loss of competitiveness of the European economy in a context of strong international competition.¹³ However, one of the EU's strengths is that it is an important economic market for foreign companies. Living standards are among the highest in the world and consumer purchasing power among the highest. It is therefore unlikely that any company, even American or Chinese, could afford relinquishing access to the European market in order to avoid the implementation of due diligence measures. Consequently, the European Union, in its desire to promote an economic model in which the protection of human rights and the environment is guaranteed, has every interest in making full use of the attractiveness of its market to require foreign players operating on its territory to comply with the values it promotes.

Conclusion

In contemporary Western societies, the vision of businesses as being exclusively concerned with profit is fading. Economic actors are now legitimately expected to take into account the ethical duty to protect fundamental human rights and the environment in the performance of their business operations and with regard to their business partners. Failure to do so would expose them to major risks for the sustainability of their activities. These risks can result in criminal liability, loss of market financing and the launch of public campaigns against them. The French law on the duty of vigilance has already required companies to put in place mechanisms to prevent serious violations of human rights, fundamental freedoms, human health and safety, and the environment resulting from their activities. The main weakness of this text is the absence of a supervisory authority capable of guiding companies in the implementation of their due diligence policies. Similarly, the fact that France, Germany, and the Netherlands are the only jurisdictions to impose this type of duties could create distortions of competition to the detriment of their own companies. The adoption of a European Directive is therefore necessary to create a level playing field. Although the terms of the proposed Directive are still under discussion in the trilogue, the basic principles relating to the obligation for companies to ensure risk mapping, as well as measures to prevent and eliminate the adverse impacts of their activities, all under the control of an authority capable of imposing sanctions, have now been established, in a very timely manner. In addition to the fact that the evolution of European law will provide companies with a protective framework, leading them to carry out their activities in accordance with binding ethical principles, it also responds to the demand clearly expressed by citizens that human rights and the environment be better taken into account by the major economic groups and their main business partners.

10. The same applies to companies with a net turnover in the EU between 40 million euros and 150 million euros, provided that at least 20 million euros was generated in one or more of the high-risk sectors (textiles, agricultural raw materials and mineral extraction).

11. *Ibid.*

12. See Anu Bradford, 'The European Union in a globalised world: the "Brussels effect"' (2021) 2 *Revue européenne du droit* 1, 75; *The Brussels Effect. How the European Union Rules the World* (Oxford University Press 2020).

13. See eg Pierre-Henri Conac, 'Sustainable Corporate Governance in the EU: Reasonable Global Ambitions?' (2022) 3 *Revue européenne du droit* 2, 129.

Law After the War



Federica D'Alessandra · Deputy Director, Oxford Institute for Ethics, Law, and Armed Conflict (ELAC), Executive Director, Oxford Programme on International Peace and Security, Blavatnik School of Government, University of Oxford.¹

Pursuing Accountability for the Crime of Aggression Against Ukraine

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A little over one year ago, multilateralism seemingly ‘lied on its deathbed’² as the world’s second largest nuclear power, Russia, invaded neighbouring Ukraine right as the UN Security Council was meeting in New York in an eleventh-hour effort to ‘give peace a chance’.³ For months, a massive military build-up by Russian forces at the border with Ukraine had raised concerns of an imminent and unprovoked invasion, to the Kremlin’s full-throated denial. About one hour into the meeting, however, from Moscow, President Vladimir Putin announced the start of his ‘special military operation’⁴—or his naked aggression against Ukraine, as the rest of the world would see it. For weeks, the world watched in horror and dismay as Russian missiles rained on Ukrainian cities, indiscriminately targeting civilians and civilian infrastructure across the country, as far west as Lviv on the border with Poland, a NATO member; while Russian infantry and armoured divisions marched in from neighbouring Belarus and the embattled Donbass region towards the Ukrainian capital,

1. The author is indebted to Gwendolyn Whidden for her invaluable research assistance, to her colleagues at Oxford, including Dapo Akande, Talita de Souza Dias, Kirsty Sutherland, Hannes Jöbstl, and Amb. Stephen Rapp, for endless intellectual nourishment on this issue, and to Vasile Rotaru for the invitation to be part of this Special Issue, and to Jean Chuilon-Croll for his editorial support with the French version of this article. Most crucially, the author is—in fact, we all are—indebted to the late Benjamin Berrell Ferencz, until recently last surviving prosecutor of the Nuremberg trials, and indefatigable advocate for the criminalization of aggression. Without him, we would not be having this conversation today. This essay is dedicated to his enduring legacy and to honouring his memory.
2. UN Security Council Report, ‘In Hindsight: Ukraine and the Tools of the UN’ (28 February 2022), <<https://www.securitycouncilreport.org/monthly-forecast/2022-03/in-hindsight-ukraine-and-the-tools-of-the-un.php>> accessed 7 March 2023.
3. UN Press, ‘Give Peace a Chance,’ Secretary-General Urges Russian Federation at Security Council Meeting on Ukraine, Saying too Many People Have Died’ (23 February 2022) <<https://press.un.org/en/2022/sgsm21155.doc.htm>> accessed 7 March 2023.
4. The Kremlin, ‘Address by the President of the Russian Federation’ (Moscow, 24 February 2022) <<http://en.kremlin.ru/events/president/news/67843>> accessed 7 March 2023.

in an attempt to overthrow the elected government of President Volodymyr Zelensky.

The shock to the multilateral system was such that, well-beyond Europe, the invasion drew immediate and widespread condemnation, with only few notable exceptions.⁵ Within days from the full-scale invasion, 141 countries at the UN voted in favour of a General Assembly resolution condemning Russia’s aggression against Ukraine, suspending Russia from the UN Human Rights Council, and demanding its unconditional withdrawal—but to no avail.⁶ As a 60km-long Russian military convoy reached the outskirts of Kyiv, many expected the capital to fall within days. The United States even offered President Zelensky evacuation, but he refused ‘the ride’, asking for ‘ammunition’ instead.⁷ In the ensuing month-long Battle of Kyiv, to the surprise of most, the Ukrainian Armed Forces successfully halted the Russian offensive, forcing their first of many retreats. As Ukrainians took up arms and joined the resistance, Ukraine’s partners rallied around the invaded nation—a fierce ‘David on the Dnipro’⁸—paying the ultimate price to defend its sovereignty, territorial integrity, and right to self-determination.

One year later, Russian forces have lost 54% of their initial territorial gains, but remain hunkered down in the Southern and Eastern parts of Ukraine.⁹ From their indiscriminate shelling across the country to the deployment of the ruthless Wagner mercenaries, from the sieges of Mariupol and Bakhmut to the countless, spineless acts of sexual violence, the trafficking of children, or the horrific

5. UNGA Res ES-11/1 (18 March 2022) UN Doc A/RES/ES-11/1; Council of Europe Committee of Ministers, ‘Decision 2.3 Situation in Ukraine’ (Strasbourg, 24 February 2022) CM/Del/Dec(2022)1426bis/2.3; European External Action Service, ‘Russia’s Aggression Against Ukraine: Press Statement by the High Representative/Vice-President Josep Borrell’ (24 February 2022) Press Statement; OSCE, ‘Joint Statement by OSCE Chairman-in-Office Rau and Secretary General Schmid on Russia’s Launch of a Military Operation in Ukraine’ (Vienna, 24 February 2022) Press Release; NATO, ‘Statement by NATO Heads of State and Government on Russia’s Attack on Ukraine’ (Brussels, 25 February 2022) Press Release (2022) 061; African Union, ‘Statement from the Chair of the African Union, H. E President Macky Sall and Chairperson of the AU Commission H. E Moussa Faki Mahamat, on the Situation in Ukraine’ (Addis Ababa, 24 February 2022); ECOWAS Commission, ‘Communique on the War in Ukraine (Abuja, 27 February 2022) Press Release; Pacific Island Forum, ‘Remarks: Pacific Islands Forum Secretary General Puna-Statement on Ukraine’ (Suva, 28 February 2022); Organization of American States, ‘Statement from the OAS General Secretariat on the Russian Attack on Ukraine’ (Washington, D.C., 24 February 2022) Press Release, Doc E-008/22; CARICOM, ‘CARICOM Statement on the Situation in Ukraine’ (Georgetown, 24 February 2022); CARICOM, ‘Statement of the Conference of CARICOM Heads of Government on the War and Humanitarian Crisis in Ukraine’ (Georgetown, 3 March 2022); Nordic Council, ‘President of the Nordic Council Condemns Russia’s Attack on Ukraine’ (Copenhagen, 24 February 2022).
6. UNGA Res ES-11/1.
7. Sharon Braithwaite, ‘Zelensky Refuses US Offer to Evacuate, Saying ‘I Need Ammunition, Not a Ride’ *CNN* (February 26, 2022.) [CNN](https://edition.cnn.com/2022/02/26/europe/ukraine-zelensky-evacuation-intl/index.html) <<https://edition.cnn.com/2022/02/26/europe/ukraine-zelensky-evacuation-intl/index.html>> accessed 7 March 2023.
8. Munich Security Conference, ‘David on the Dnipro: Ukraine’s Fight for Freedom’ (17 February 2023) <<https://securityconference.org/msc-2023/agenda/>> accessed 7 March 2023.
9. New York Times, ‘Maps: Tracking the Russian Invasion of Ukraine’ 25 January 2023 <<https://www.nytimes.com/interactive/2022/world/europe/ukraine-maps.html>> accessed 8 March 2023.

massacres in cities such as Bucha,¹⁰ the brutality of their tactics is revealed daily in the systematic trail of death and destruction they leave behind wherever they retreat. As shocking evidence of the unspeakable atrocities they have committed continues to mount, compounding the sense of outrage already felt at the illegal invasion, Ukraine and its partners in the international community demand accountability, putting international law front and centre in all debates.

The Centrality of International Law in Ukraine's Response to the Invasion

It is a remarkable statement to the value of international law to those it is intended to protect that, even as it continues to defend itself militarily, Ukraine has chosen to simultaneously pursue any and all opportunities for legal remedy it has available against Russia and its leadership. Ukraine's reliance on a variety of international law mechanisms as part and parcel of its response to Russia's invasion can be understood as having various dimensions. In the context of a war being fought to prevent Ukraine's alignment with European values and transatlantic institutions, the choice to mobilize the international rule of law in response to the invasion is immensely powerful at the symbolic level, for it contrasts Ukraine as a law-abiding nation to the 'lawlessness' of the invader. Equally, by deferring to international judicial processes and institutions wherever they are available, Ukraine can successfully demonstrate that it is pursuing every and all means it has available to resolve its dispute with Russia by peaceful means. This is meaningful especially in light of the fact that, as the victim of aggression, Ukraine is not *required* to do so under international law, for it has an undisputed right to defend itself militarily; however, by *choosing* to do so, Ukraine is indirectly demonstrating that Russia could have, in fact, done so itself, and that the recourse to war to settle its dispute with Ukraine was by no means of last resort, thus adding to the case for Russia's responsibility for internationally wrongful acts.

The choice is also meaningful at a strategic level: by engaging international law and global institutions as part of its quest for a *just* resolution of the war, Ukraine is helping the case internationally that the war is not just a European matter, but one of global concern. Most importantly, however, turning to international laws and institutions is key as an immediate instrument of protection and redress, both during and after the war: as the war continues to rage, Ukraine is turning to international judicial bodies to establish the empirical truth about what is taking place, both as a way to counter Moscow's attempts to advance false narratives to justify the invasion, and to lay the foundation for fact-based assessments of culpability for the myriad of violations affecting both

Ukrainian citizens and the Ukrainian State. These, it is hoped, will be key to supporting judicial accountability processes moving forward, as well as reparations and a just settlement once the war ends.

Only days after the invasion begun, for example, Ukraine 'sued' the Russian *State* for violations of the UN Genocide Convention and other key human rights treaties before the UN International Court of Justice, in an attempt to get the international judicial body to finally and officially rebuke (part of) Russia's *casus belli*, which it had already deployed in Crimea: that is a baseless claim that Ukraine was committing 'genocide' against ethnic Russians in its Eastern oblasts, 'forcing' Russia into a 'humanitarian intervention'.¹¹ Using the UNiting for Peace Resolution to circumvent Russia's veto on the Security Council, Ukraine asked the General Assembly to make a determination that Russia's conduct amounts to international aggression,¹² and that Ukraine is entitled to war reparations¹³ and justice for all victims of the war.¹⁴ Pursuant to the same objective, in May 2023, the Council of Europe (CoE) created a register of damage for Ukraine as the first step towards an international compensation mechanism for victims of Russian aggression.

At Ukraine's request, the UN, the EU and the OSCE have all dispatched investigative teams focusing on upholding both *State* and *criminal* liability for violations of the laws of war, committed by all parties.¹⁵ Ukrainian authorities are also investigating and preparing to prosecute domestically over 70,000 such incidents.¹⁶ And, benefitting of protections and remedy enshrined in the Rome Statute of the International Criminal Court (ICC)—to which neither Russia nor Ukraine are States Parties, but whose jurisdiction Ukraine has accepted dating back to 2013—Ukraine asked the ICC to intervene, in a move later backed by 43 ICC member States, which also referred the situation for investigation collectively to the Court.¹⁷ As a result, the ICC swiftly deployed investigators and opened a field office

10. UN Human Rights Council, 'UN Commission has found an array of war crimes, violations of human rights and international humanitarian law have been committed in Ukraine' <<https://www.ohchr.org/en/press-releases/2022/10/un-commission-has-found-array-war-crimes-violations-human-rights-and-accessed>> 8 March 2023.

11. *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide Case (Ukraine v Russian Federation)* (2022) ICJ; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (2017) ICJ; Sergiy Sydorenko, 'European Human Rights Court Rules on Russian Responsibility in Eastern Ukraine' *Euractiv* (Brussels, 3 February 2023 <<https://www.euractiv.com/section/europe-s-east/news/eu-human-rights-court-rules-on-russian-responsibility-in-eastern-ukraine/>> accessed 7 March 2023.

12. UNGA Res ES-11/1.

13. UNGA Res ES-11/L.6.

14. UNGA Res ES-11/L.7.

15. UNGA Res 40/1 (7 March 2022) UN Doc A/HRC/RES/94/1; Elana Sánchez Nicolás, 'EU Will Support Investigation into War Crimes in Ukraine' *EUObserver* (Brussels, 13 April 2022) <<https://euobserver.com/ukraine/154729>> accessed 7 March 2023; OSCE, 'OSCE Special Monitoring Mission to Ukraine (Closed)' <<https://www.osce.org/special-monitoring-mission-to-ukraine-closed>> accessed 7 March 2023.

16. EuroNews, 'Zelenskyy Says 70,000 War Crimes Committed in Ukraine as Kyiv moves to Open ICC Office' (4 March 2023) <<https://www.euronews.com/2023/03/04/zelenskyy-says-70000-war-crimes-committed-in-ukraine-as-kyiv-moves-to-open-icc-office>> accessed 7 March 2023.

17. ICC, 'Ukraine - Situation in Ukraine' <<https://www.icc-cpi.int/ukraine?>> accessed 7 March 2023.

in Ukraine.¹⁸ In an unprecedented move, in March 2023 the Court proceeded with issuing arrest warrants against Putin himself, and his Children's Rights Commissioner Maria Lvova-Belova, for war crimes relating to the illegal deportation and forced adoption of children from Russian occupied territories in Eastern Ukraine.¹⁹ The extraordinary warrant is the first ever issued against the sitting Head of State of a Permanent Member of the Security Council—which is not a party to the Court.

A Gap in the International Justice Architecture

Ukraine's focus on pursuing legal avenues has re-energized many in the international community, particularly those who see the enforcement of fundamental rules of international law—such as protections enshrined in the Geneva Conventions, and the prohibition against aggression—as key to the restoration of global security. Ukraine's US and European partners, in particular, see this as a historical juncture, potentially a 'second Nuremberg moment'—in reference to the trials set up by the Allies at the end of World War II, which became foundational to the post-War global order.²⁰ A gaping hole exists, however, in today's judicial accountability landscape: if a variety of domestic and international tribunals will sit in judgement over international crimes committed *during* the war, no court today can exercise jurisdiction on the war itself, or the 'crime of aggression' as it is known in international law.

On this basis, the government of Ukraine has proposed the establishment of a special aggression tribunal.²¹ Different models are currently being explored but many legal, policy, and political issues remain to be addressed. Challenges are particularly acute in light of the unique features of the crime of aggression in international law. Against this background, this essay may constitute a primer to some of the key issues arising in this debate. It will first contextualize the nature of the crime of aggression (ie why it is so controversial, and the jurisdictional challenges to which it gives rise), and will then proceed by discussing the key legal and policy questions with the most bearing on the proposed tribunal, as well as models under consideration. It will conclude with the author's own views and recommendations on the way forward for accountability for the crime of aggression, both in and beyond Ukraine.

What is the Crime of Aggression?

In international law, the large-scale use of force by a State against the territorial integrity and political

independence of another State is known as 'international aggression'. Today, its prohibition is enshrined in the UN Charter, and considered a peremptory norm of international law binding all States at all times, for it is rightly seen as the bedrock and foundation of international peace and security. In today's world, force can be lawfully used by States only in self-defence, and pursuant to UN Security Council authorization under its Chapter VII powers to enforce, maintain, and restore international peace and security.²² In international law, any breach of the prohibition against the unlawful use of force may entail *State responsibility* for an internationally wrongful act; egregious violations of this prohibition may amount to international aggression; and, at least since Nuremberg, international aggression also gives rise to the *criminal liability* of the military and political leadership of the aggressor State for the 'planning, preparation, initiation or waging' of the war of aggression.²³ At the end of World War II, both Nazi and Japanese defendants were charged, convicted, and executed for 'crimes against peace', as aggression was then known, for this was considered to be the 'supreme' offense against the international community.²⁴ After the judgement, the criminality of aggression was also enshrined in the Nuremberg Principles²⁵, and today the crime of aggression is defined in both international customary and treaty law, more precisely in provisions contained in the Rome Statute of the ICC, which were informed by—but do not overlap entirely with—the customary law definition of the crime.²⁶

The crime of aggression has long been controversial among States, as aggression is by nature a *State act* and a *leadership crime*, for it can only be committed by those in a position to direct the action of a State to wage war against another State.²⁷ Through the years, much of the controversy was aimed at who exactly would meet this leadership requirement, and whether 'specific iterations of the use of force by States should, in fact, be captured by the definition of a *crime* of aggression, either because they did not raise to a threshold of gravity comparable to the unleashing of a full-scale war, or because States maintained these should be considered as falling under one of the existing 'exceptions' to the prohibition against the use of force—for example, military operations carried out in self-defence against non-state armed groups operating from the territory of another, non-consenting State, or 'genuine' humanitarian interventions carried out to protect

18. <https://twitter.com/andriykostinua/status/1638861171867648000?s=46&t=feNYa9AC8vUFy2LVx9XVMQ>
 19. <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>
 20. Silvia Ellena, 'Ukraine War Crimes 'Another Nuremberg Moment,' US Says' *Euractiv* (24 May 2022) <<https://www.euractiv.com/section/europe-s-east/news/ukraine-war-crimes-another-nuremberg-moment-us-says/>> accessed 7 March 2023.
 21. Office of the President of Ukraine, 'We must create a Special Tribunal on the crime of aggression against Ukraine' <<https://www.president.gov.ua/en/news/mayemo-stvoriti-specialnij-tribunal-shodo-zlochynu-agresiyi-78285>> accessed 7 March 2023.

22. UN Charter, art 2, art 39, and Chapter VII.
 23. Yoram Dinstein, 'The Crime of Aggression under Customary International Law' in Leila Sadat (ed), *Seeking Accountability for the Unlawful Use of Force* (Cambridge University Press 2018), pp. 124-162.
 24. *Judgement of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172.
 25. These were drawn up by the UN International Law Commission (ILC) at the request of the UN General Assembly, in an attempt to extrapolate general principles of international law arising from the tribunal and its judgement. See *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (1950) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf> accessed 7 March 2023.
 26. Carrie McDougall, *The Crime of Aggression as Custom and the Mechanisms for Determining Acts of Aggression* (Cambridge University Press 2017).
 27. *Ibid.* Also see: Rome Statute, art 8bis.

civilians from mass atrocities, even where these might be unsanctioned by the UNSC.²⁸ However, and although it took twenty years of negotiations to achieve it, the Rome Statute's provision defining the crime of aggression was ultimately approved unanimously by all States Parties to the Court; and also non-States Parties such as Russia, which had also participated in the negotiations, approved the definition of the crime for the purposes of the Statute.²⁹

The ICC's definition makes it clear that liability for the crime of aggression attaches only to those in a position to 'effectively exercise control over or to direct the political or military action of a State'.³⁰ This, in contrast to the customary law standard, which was articulated by the Nuremberg Military Tribunal in the *High Command* case in reference not to: 'a person's rank or status, but his power to shape or influence the policy of his State'.³¹ According to this latter standard, for example, private and industry actors—such as Russian oligarchs—could also be liable for the crime of aggression.³² In addition, the Rome Statute introduces a 'gravity threshold' differentiating between an act of aggression (only giving rise to State responsibility) and a crime of aggression (impugning the penal liability of specific leaders) where the underlying act of aggression by its 'character, gravity and scale, constitutes a manifest violation' of the UN Charter. This was intended to align as much as possible the Rome Statute provisions with the core 'essence' of the customary law definition of the crime, which is that the unlawful use of force ought to be large scale enough to amount to a war to be criminal.³³ The ICC definition also lists a series of acts of aggression that, meeting the requisite gravity threshold, and where perpetrated against the territorial integrity or political independence of another State, will amount to a crime of aggression. Many of these have been committed by Russia against Ukraine, including, among others: an armed attack, invasion, military occupation or annexation by the use of force, as well as bombardments, blockades, or the sending of mercenaries and irregular armed bands into the territory of another State.³⁴ Importantly, the list of acts of aggression provided in the ICC definition also covers the 'action of a State in allowing its territory [...] to be used by [...] [an] other State for perpetrating an act of aggression against a third State', which is of relevance to Belarus.

Does the International Criminal Court Have Jurisdiction Over Aggression in Ukraine?

The short answer is, unfortunately, no. Because of the nature of the crime of aggression (both a State act and leadership crime, with self-evident political implications), States insisted on a separate jurisdictional regime for this particular offense, which would be a lot more stringent than the ICC's jurisdiction over war crimes, crimes against humanity, and genocide. Over the twenty years they spanned, negotiations around the conditions for the ICC exercise of jurisdiction over the crime of aggression were extremely fraught, and resulted in a regime that is so narrow to cast doubt as to whether the Court might, in fact, ever be able to prosecute anyone for this offense.³⁵ Explicitly, the ICC cannot exercise jurisdiction on the crime of aggression over non-States Parties to the Court or their nationals,³⁶ arguably, in fact, even if aggression is committed against a States Party, the ICC's exercise of jurisdiction over aggression would require the consent of the aggressor State.³⁷ At the moment, the only way for the ICC to exercise jurisdiction on aggression over a non-State Party is through a UNSC referral,³⁸ which is however out of the question in this situation.

Why Can't We Simply Give the International Criminal Court Jurisdiction?

In light of the current limitations of the ICC's jurisdiction with respect to the crime of aggression, some have proposed that the Rome Statute should be amended, either to remove the clause that bars it from exercising jurisdiction over non-State parties³⁹—which explicitly applies to the crime of aggression⁴⁰—or to allow for referrals by the UN General Assembly.⁴¹ After all, as the ICC Prosecutor put it during the last Assembly of State Parties in December 2022: 'when we recognise that there is a gap in that [legal] architecture, [...] we should try to address it through the Rome Statute [...]. We don't want dilution, we want consolidation.'⁴² And it is worthy of note that by issuing its very first arrest warrants to include President Vladimir Putin himself, the Court is sending a strong signal that it is both willing and able to go right at the top of the Russian State apparatus in order to fulfil its mandate to enforce accountability for the highest level, most responsible perpetrators of international crimes under its jurisdiction. Thus, without question, amending

28. Christian Wenaweser and Stefan Barriga, '18 Forks in the Road: Personal Reflection on the Kampala Amendments on the Crime of Aggression' in Suzannah Linton, Gerry Simpson and William A Schabas (eds) *For the Sake of Present and Future Generations* (Brill 2015), pp. 281–297.

29. ICC, *Crime of Aggression* <<https://asp.icc-cpi.int/crime-of-aggression>> 'Understandings' in Annex III of Resolution 6 of Kampala Review Conference.

30. Rome Statute, art 8bis. Emphasis added.

31. Emphasis added. *United States v. von Leeb et al.*, Military Tribunal XII, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1950), 489.

32. IG Farben case, p 1124.

33. The customary definition of the crime of aggression is thus narrower than that of the ICC; and although its precise contours are debated, various possible definitions under customary international law have been catalogued by scholars, including Claus Kress and Stefan Barriga, *The Crime of Aggression: A Commentary* (Cambridge University Press 2016).

34. Rome Statute, art 8bis.

35. Claus Kress, *The Crime of Aggression* (Cambridge University Press 2017); also see Kevin Jon Heller, 'Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea' *Opinio Juris* (7 March 2022) <<http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>> accessed 7 March 2023.

36. Rome Statute, art 15bis(5).

37. Rome Statute, art 15 (bis), paras 4–5.

38. Rome Statute, art 15ter.

39. Luis Moreno Ocampo, 'Ending Selective Justice for the International Crime of Aggression' *Just Security* (31 January 2023).

40. Rome Statute, art 15bis(5).

41. Jennifer Trahan, 'The Need to Reexamine the Crime of Aggression's Jurisdictional Regime' *Just Security* (4 April 2022).

42. ICC, 'Statement by the ICC Prosecutor Mr. Karim A.A. Khan KC to the Assembly at the first plenary meeting' (5 December 2022) <<https://asp.icc-cpi.int/sites/asp/files/2022-12/ASP21-STMT-PROS-ENG.pdf>> accessed 8 March 2023.

the Rome Statute is an objective all States supporting Ukraine's proposal for a special tribunal should work towards, to ensure that the Court will be able to exercise its jurisdiction if and when a similar situation may arise in the future – and even better yet, to deter it. In fact, a mandatory review of the Rome Statute amendments on the crime of aggression will be coming up as soon as 2024,⁴³ and it is incumbent upon States to take lessons learned from Ukraine into account in those negotiations.

The fact remains however that, at present, the Court does not have jurisdiction over the crime of aggression itself, and that—at least at the current stage—amending the Rome Statute appears unfeasible, for it would require ratification of such amendments by 2/3 of ICC States Parties, followed by a 7/8 (or consensus) vote by its Assembly⁴⁴—a very high bar that would likely entail protracted negotiations—and, if history is of guidance, possibly years if not decades before the amendments become operational. This, at a time when urgency is paramount. Perhaps even more importantly, it remains unclear—and, in fact, highly unlikely—that the long-standing policy posture of those States that made the ICC aggression regime weak to begin with has indeed changed since the Rome Statute was amended to include the offense in 2010, and even more so since its jurisdiction over the crime was activated in 2017 thanks to ratification of the amendments by 30 ICC member States. That number has since grown to 44,⁴⁵ but still falls short of the 82 that would be currently required under the Statute to be amended any further. Indeed, as Professor Reisinger Coracini recently put it: ‘if amending the Rome Statute were an available option, many of those [...] arguing for the establishment of a [Special] Tribunal [...] would do nothing short of embracing it’, continuing ‘the reason why many supporters of a [Special Tribunal] argue for a two-tiered approach [...] is their understanding that a quick fix of the Court’s jurisdictional regime is unrealistic’.⁴⁶

Who Does Have Jurisdiction Over Aggression in Ukraine?

Russia and Belarus both have jurisdiction over their nationals, and their respective domestic criminal codes also criminalize aggression.⁴⁷ However, unless there is a significant change in leadership, it is unrealistic to expect either to exercise jurisdiction over the current situation, given that their top political and military echelon stands accused of the crime of aggression. Aggression is, by nature, a transboundary act, and as the victim State, Ukraine has the strongest jurisdictional claim, for the crime is being committed on its territory.⁴⁸ Aggression is

explicitly criminalized in Ukraine's domestic penal code,⁴⁹ and its domestic definition of the crime is not limited to leaders. In fact, Ukraine has already identified at least 623 Russians who might be prosecuted under its domestic definition of the crime,⁵⁰ and its domestic judicial system does have precedent for prosecuting and convicting both Russian and Ukrainian nationals on this basis,⁵¹ but past proceedings have drawn some concerns among international observers.⁵² Other States might also be able to claim jurisdiction over specific suspects, for example if they are dual nationals, and if their domestic criminal codes equally extend liability for aggression to the rank and file.⁵³ And States that have criminalized aggression domestically are considering whether they could rely on the principles of universal or protective jurisdiction in this case.

Indeed, international law recognizes that certain crimes are so serious that the duty to prosecute them transcends all borders, and this is the basis of a number of universal jurisdiction laws implemented by various States to allow them to prosecute international crimes domestically, irrespective of where they take place. Lithuania, for example, has announced it is investigating Russia's crime of aggression on this basis.⁵⁴ However, it is debatable whether universal jurisdiction actually exists for aggression.⁵⁵ Poland, too, has announced it is investigating Russia's crime of aggression, but based on the protective jurisdiction principle, a rule of international law that allows a sovereign state to assert jurisdiction over a person whose conduct outside its boundaries threatens the State's security or interferes with the operation of its government functions. However, observers disagree on whether protective jurisdiction can be exercised by States that are indirectly affected by the conduct in question.⁵⁶ In fact, on the basis of this principle, Ukraine would have the strongest claim to exercise this form of jurisdiction as the *directly* affected State. However, any such jurisdictional assertions would run into a significant obstacle with respect to certain Russian and Belorussian high-level officials who are protected by sovereign immunities.

43. https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

44. Rome Statute, art 121.

45. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=en

46. <https://www.justsecurity.org/85593/is-amending-the-rome-statute-the-panacea-against-perceived-selectivity-and-impunity-for-the-crime-of-aggression-committed-against-ukraine/>

47. Russian Penal Code, art 343; Belarus Penal Code, art 122.

48. Cedric Ryngaert, ‘Public International Law Approaches to Jurisdiction’ in *Jurisdiction in International Law* (Oxford University Press 2008), pp. 21–41.

49. Ukraine Penal Code, art 437.

50. Sergey Vasiliev, ‘The Reckoning for War Crimes in Ukraine Has Begun’, *Foreign Policy* (17 June 2022).

51. Specifically, two low-ranking Russian soldiers were convicted of violating Art. 437(2) by entering Ukraine and participating in hostilities in the Luhansk region, as well as the former President of Ukraine, Viktor Yanukovich, for complicity in conducting an aggressive war on the basis of the same provision for asking Putin to send Russian troops into Ukraine after he was removed from office.

52. Sergey Sayapin, ‘A Curious Aggression Trial in Ukraine: Some Reflections on the Alexandrov and Yerofeyev Case’, *Journal of International Criminal Justice* 16 (2018), p. 1094; Sergey Sayapin, ‘The Yanukovich Trial in Ukraine: A Revival of the Crime of Aggression?’, *Israel Yearbook on Human Rights* 50 (2020), p. 65.

53. For example, Ukraine's penal code.

54. Carrie McDougall, ‘Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics’ *Opinio Juris* (15 March 2022). Also see, https://academic.oup.com/jcsl/advance-article/doi/10.1093/jcsl/krad004/7081290?login=false&utm_source=advanceaccess&utm_campaign=jcsl&utm_medium=email

55. Kevin Jon Heller, ‘Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis’ *Journal of Genocide Research* (2022).

56. For differing opinions, see McDougall (n 54), for ‘no’, and Heller (n 55) for ‘maybe’.

What is the Issue with Immunities?

International law is fundamentally, though not exclusively, an inter-State affair, the conduct of which is anchored on the principle of *sovereign equality*. A corollary of this principle is that *par inter parem no habet imperium*—ie a sovereign State cannot exercise jurisdiction over another sovereign State. On this basis, various forms of immunities are awarded to representatives of the State to allow them to carry out their sovereign functions. In the context of our discussion, at least two levels of immunities arise: *personal immunity*, or immunity *ratione personae*, a status-based immunity applying to a small number of high-level State officials because of their office—specifically the Head of State, Head of Government and Minister of Foreign Affairs—and *functional immunity*, or immunity *ratione materiae*, that is a conduct-based immunity applying with respect to acts performed in an official capacity. Personal immunities apply for as long as the person is in office, for both private and official acts; whereas functional immunities protect a State official, both during and after their time in office, but only for official acts they carried out while in office.⁵⁷ On this basis, then, both Presidents Putin and Lukashenko, as well as Russian Prime Minister Mikhail Mishustin and Foreign Minister Lavrov are entitled to personal immunity for as long as they are in office, and any of their official acts while in office should also be covered by functional immunity before another State's domestic courts.⁵⁸ However, in international law, two grounds for exception exist with respect to the application of these immunities that are worth discussing.

According to the first, immunities *ratione materiae* cannot be invoked when the relevant act constitutes an international crime. Many authoritative legal scholars are proponents of this view,⁵⁹ and the question has been under study by the UN International Law Commission (ILC) since 2008. However, this exception is not firmly established in international law, at least with respect to aggression itself: indeed in its study, the ILC found a '*discernible trend*'—not a clear one—in State practice 'towards limiting the applicability of immunity from jurisdiction *ratione materiae*', but only 'in regard to *certain* types of behaviour that constitute crimes under international law'.⁶⁰ However, many experts (including Members of the ILC themselves,⁶¹ as well as external legal observers⁶²) disagree that this exception exists; and if it does, they disagree that it applies to aggression, which is generally not listed among the types of acts to which this exception

would apply,⁶³ presumably because aggression is by nature a State act. And even if one takes the view that the exception does exist, and that it applies to aggression, this exception only covers functional immunities, and does not apply to personal immunities, at least according to the prevalent view.⁶⁴

The second potential ground for exception, applicable to both immunities *ratione personae* and *ratione materiae*, concerns the argument that such immunities (which would be available jointly, or at least with respect to personal immunities in a domestic court) cannot be invoked if the person is to be judged by an *international* tribunal. This exception is more widely, though not universally,⁶⁵ accepted to be grounded in established international law, and has been upheld in the jurisprudence of various international courts, including the ICC.⁶⁶ Indeed, Article 27 of the Rome Statute makes it clear that 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.⁶⁷ At the same time, Article 98 of the Statute also requires that: 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State', and that it may 'not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court'—that is, unless it can first obtain the concerned State's consent to waive immunity or to proceed with surrendering the suspect.⁶⁸

It is on the basis of these seemingly conflicting provisions that some member States in the past have refused to surrender State officials wanted by the Court—more specifically, sitting Heads of State such as then Sudanese President Omar al Bashir (indicted on charges that include genocide) whom they maintained was protected by personal immunity—even though the ICC's intervention had been

57. Malcolm N. Shaw, 'Immunities from Jurisdiction' in *Immunities in International Law* (Cambridge University Press 2003), pp. 621–693.
 58. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Rep, para 61.
 59. Institute of International Law, *Resolution on the Immunity from Jurisdiction of the State and of persons Who Act on behalf of the State in case of International Crimes*, Napoli Session, 2009, art III, § 1-2.
 60. ILC, 'Report of the International Law Commission on the Work of its 69th Session' (21 May-2 June and 3 July-4 August) UN Doc A/72/10, pp. 178–179, commentary to art 7, § 5.
 61. *Ibid.*
 62. Advisory Committee on Public International Law, *No. 40 Challenges in Prosecuting the Crime of Aggression: Jurisdiction and Immunities* (2022).

63. ILC, 'Immunity of State Officials from Foreign Criminal Jurisdiction – Texts and Titles of the Draft Articles Adopted by the Drafting Committee on First Reading' (31 May 2022) UN Doc A/CN.4/L.969, p. 2.
 64. Oliver Corden and Vaïos Koutroulis, 'Tribunal for the Crime of Aggression Against Ukraine – A Legal Assessment' (European Parliament 2022). Finally, even if there is some support for a view that the exception to immunity for serious international crimes reflects existing international law and covers the crime of aggression, it should be noted that this does not seem to be shared by all EU Member States.
 65. Heller, 'Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea'.
 66. *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (Judgment) ICC-02/05-01/09 OA2 (6 May 2019), paras. 113–117; Judgment in the Jordan Referral, paras. 113–117; *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction) SCLS-2003-01-1, paras. 52–53; *Prosecutor v Milošević* (Decision on Review of the Indictment and Application for Consequential Orders) ICTY-99-37-PT (24 May 1999).
 67. Rome Statute, Art 27.
 68. Rome Statute, Art 98.

mandated by the UNSC.⁶⁹ The issue is likely to be relitigated in light of the recent arrest warrant against Vladimir Putin, but thus far the ICC judges have rejected the claim and reiterated that the ICC does not recognize immunities as applicable to suspects wanted by the Court.⁷⁰ I anticipate that the same argument will prevail with respect to the Putin arrest warrant as well. In any case, however, as mentioned above, Article 15*bis*(5) of the Statute explicitly bars the Court from exercising jurisdiction over aggression when committed by the nationals of a State that is not a party to the Statute (such as Russia);⁷¹ so, insofar as aggression at the ICC is concerned, immunities are not the biggest issue.⁷²

Importantly, many remain critical of the position that immunities do not apply—in general—to international tribunals, maintaining that this is, in fact, not a blanket pronouncement, and that the extent to which this exception applies will depend on the *characteristics* of the international tribunal—ie how it is formed, in whose jurisdiction it is grounded, etc. This is principally because an international court can only be delegated by its members jurisdiction that they themselves possess. Meaning that, unless jurisdiction is already possessed by its members States at the domestic level, some take the more restrictive view that a court—even if created at the international level—may otherwise be able to exercise jurisdiction only with the affected State’s consent, or through UN Security Council action under its Chapter VII powers.⁷³ In the case of Russia’s aggression, as mentioned, the strongest jurisdictional claim outside of Russia and Belarus is on the basis of Ukraine’s reliance on the territorial or protective principles, and the proposed international tribunal would be anchored in Ukraine’s own jurisdiction.

This is extremely important as it has been argued that, as the State victim of aggression, Ukraine might be entitled to *override* immunities by relying on other cardinal rules of international law, such as the rights to self-defence and to self-help, as well as other principles under the laws of war.⁷⁴ If Ukraine can use lethal force to defend itself, the

argument goes, including by targeting the commander-in-chief of the adversary, it should also be able to recur to non-lethal measures to repel the aggression—for example, arresting and detaining the enemy command, which is allowed under the laws of war. Under Ukraine’s right to self-help, then, what would otherwise be an unlawful exercise of jurisdiction over Russia’s officials should be considered a lawful countermeasure in response to the aggressor State’s own breach of international law.⁷⁵ In my opinion, this argument does have merit. It is untested, however, making its reliance much safer in combination with other legal arguments, such as the second ground for exception identified above concerning the non-applicability of immunities before a tribunal of ‘international character’—specifically, one grounded on the jurisdiction of Ukraine as the directly affected victim state.

Why Wouldn’t Ukraine Itself Exercise Jurisdiction?

Given it has jurisdiction over aggression and that it *could* override immunities based on self-help and self-defence, shouldn’t Ukraine itself prosecute Russian and Belorussian leaders for aggression? The answer is varied but, at a minimum, Ukraine’s status as a victim state could cast concerns over the legitimacy and especially impartiality of any proceedings it would administer alone against the top-level political leadership of its adversary for what is, ultimately, a crime with political implications—no matter the talent and integrity of its judicial appointees. Equally, if Ukraine’s jurisdiction might be the gateway to unlock the issue of immunities, an indictment issued by its domestic judicial system would, certainly, have far less repercussions (and, possibly, a weaker jurisdictional claim) than if the indictment were issued by an international judicial authority. In addition, if the tribunal were not only international but also drew from broad membership of States beyond Ukraine, this would immensely benefit the tribunal itself, as a legal duty to cooperate, enforce, and comply with its decisions—which would presumably be written into its Statute—would arise for each of its member-States, as opposed to only Ukraine.

This could result in not only greater expertise, resources, and capacity being available to the tribunal, but at a practical level—based on just how broad its membership would be—it could have the effect to relegate any leader wanted by the court to live their life as a fugitive of the law in many countries, a pariah only able to travel within Russia and perhaps a handful of other States, least they may face the threat of arrest elsewhere. This is, precisely, one of the most immediate effects that—it is hoped—will follow the ICC arrest warrant against President Putin, impacting all 123 of its States Parties. As mentioned above, however,

69. *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral, paras. 113–117.

70. *Ibid.*

71. Rome Statute, art 15*bis*5.

72. Thus far, the only ICC member States that have been critical of the arrest warrant against Vladimir Putin, based on him being the sitting Head of State of a country that is not party to the Court have been Hungary and South Africa. Notably, South Africa, who is hosting the G20 in just a few months, was one of the countries which refused to surrender then President Omar al Bashir, whose transfer to the Court is still pending. For a rolling list of updates on which countries have spoken out against the ICC Putin arrest warrant, see: https://twitter.com/Alonso_GD/status/1638996767873159186

73. Dapo Akande and Talita de Souza Dias ‘Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some Observations from the Drafting History of Article 27(2) of the Rome Statute’ (14 November 2018) <<https://iow.eui.eu/2018/11/14/icc-statute-remove-immunities-state-officials-national-proceedings-observations-drafting-history-article-272-rome-statute/>> accessed 8 March 2023; Max Du Plessis and Dire Tladi ‘The ICC’s immunity debate – the need for finality’ *EJIL:Talk!* (11 August 2017) <<https://www.ejiltalk.org/the-iccs-immunity-debate-the-need-for-finality/>> accessed 8 March 2023.

74. <https://www.ejiltalk.org/ejilthe-podcast-episode-18-be-careful-what-you-ask-for/>. Also see: Tom Dannenbaum, ‘Mechanisms for Criminal Prosecution

of Russia’s Aggression Against Ukraine’ *Just Security* (10 March 2022); Dapo Akande, ‘A Criminal Tribunal For Aggression in Ukraine’ (at 41:20) *Chatham House* <https://www.youtube.com/watch?v=XdHGf5ofCck&ab_channel=ChathamHouse> accessed 7 March 2023.

75. Anton Moiseenko, ‘Russian Assets, Accountability for Ukraine, and a Plea for Short-Term Thinking’ *EJIL:Talk!* (5 March 2022) <<https://www.ejiltalk.org/russian-assets-accountability-for-ukraine-and-a-plea-for-short-term-thinking/>> accessed 8 March 2023.

the most important argument for asking an international judicial body—rather than the domestic authorities of Ukraine—to prosecute the crime of aggression is that relying exclusively on the self-defence argument to waive immunities is risky, for the argument remains untested; it would be wiser to leverage it in combination with the argument concerning the inapplicability of immunities before a tribunal of ‘international’ character, further discussed below.

Pathways to the Creation of a Special Tribunal for Aggression

For a tribunal to be considered ‘international’ with respect to the inapplicability of sovereign immunities, two conditions would need to be met.⁷⁶ First, the tribunal must be established under international law, either through creation on the basis of a *source* of international law, such as a treaty, or on the basis of *authority* derived from a source of international law, such as through the decision by an organ of an international organization, which can be the UN or a regional organization such as the EU or the CoE, acting within the competencies given to that organ under the treaty establishing the organization. Secondly, the ‘nature of an international criminal court or tribunal must be such that, through its establishment and its institutional design, it is sufficiently detached from national jurisdictions’,⁷⁷ and that it sufficiently reflects the will of the international community as a whole to enforce crimes under customary international law. As discussed above, the customary international law status of the crime of aggression is uncontested, although many (myself included) take the view that for the cohesive development of international law, it would be imperative that the tribunal indeed adopt the Rome Statute definition of the crime.⁷⁸ Arguably, in fact, Ukraine can already prosecute any of the suspects it has identified that do not meet the Rome Statute’s leadership requirement; and it is in large part for these latter suspects that the issue of immunities might arise. For this reason, the analysis in this section will chiefly be dedicated to the nature and potential modalities of the creation of the tribunal itself, which as mentioned however would be anchored in the jurisdiction of Ukraine as the victim state of aggression. So, how could such a tribunal be created?

I. Creation by Treaty at the Request of the UNGA

With respect to the first condition, one of the ways in which a tribunal could be created would be by bilateral treaty or agreement—specifically one entered into between Ukraine and an international organization such as the UN, the EU, or the CoE, for example. In the case of the UN, the General Assembly has ‘residual responsibilities’

on international peace and security matters under the Charter,⁷⁹ which observers argue could be triggered pursuant to a vote through the Uniting for Peace mechanism to instruct the UN Secretary General to conclude an agreement between the UN and Ukraine to this effect. Precedent for the creation of a tribunal by means of a treaty between the UN and the affected State already exists, for example in the creation of the Extraordinary Chambers in the Courts of Cambodia (ECCC), or the Special Court for Sierra Leone (SCSL), among others.⁸⁰ Although it is important to underscore that both precedents were, in reality, ‘internationalized’ or hybrid tribunals (the definition of which is further discussed below), and relied on the interested States’ consent to prosecute individuals on whom they already had jurisdiction, chiefly as their own nationals, none of whom were still in office at the time prosecutions took place. The notable exception being former Liberian President Charles Taylor, who was indicted by the SCSL as a sitting Head of State but prosecuted after he had left office (meaning he was no longer entitled to personal immunity at the time his prosecution took place),⁸¹ for crimes (war crimes and crimes against humanity) to which functional immunity does not apply, and pursuant to a UNSC resolution for his arrest.⁸² This is important because, as just mentioned above, the prosecution of sitting Heads of State has a history of profound controversy in international law.⁸³ So, while nothing prevents the UNGA from recommending the creation of a tribunal by treaty, such tribunal would still have to rely on States’ cooperation, which has not always been forthcoming in the past. To be clear, however, this is not an argument against a tribunal’s creation, which I believe is necessary.

Equally, the UNGA could recommend or endorse the creation of such a tribunal by a regional organization, such as the EU or the CoE.⁸⁴ Here too, there already is precedent for a regional tribunal with jurisdiction over the crime of aggression, by virtue of Article 28A(1)(14) of the Malabo Protocol extending the jurisdiction of the proposed African Court of Justice and Human Rights over this very offense.⁸⁵ In this latter case, however, the establishing treaty would have to be entered into between Ukraine and that organization directly, be it the EU or the CoE. We might refer to this option as the ‘General Assembly Model’,⁸⁶ for in either case the UNGA would

79. UN Charter, art 11.

80. David Scheffer, ‘Prosecuting the Crime of Aggression in Ukraine’ *USIP* (at 47:43) 7 December 2022.

81. *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction) SCLS-2003-01-I, para. 52-53.

82. Helmut Kreicker, ‘Immunities,’ in Kress and Barriga (n 33), p. 683.

83. *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (Judgment) ICC-02/05-01/09 OA2 (6 May 2019), paras. 113-117; Judgment in the Jordan Referral, paras. 113-117.

84. James Goldstone and Anna Khalfaoui ‘In Evaluating Immunities before a Special Tribunal for Aggression Against Ukraine, the Type of Tribunal Matters’ *Just Security* (1 February 2023).

85. Sergey Sayapin, ‘The Crime of Aggression in the African Court of Justice and Human and Peoples’ Rights’ in *The African Court of Justice and Human and Peoples’ Rights in Context* (CUP, 2019).

86. Goldstone and Khalfaoui (n 84). In more detail, see Heller (n 55). Hereinafter, I adopt their same terminology in reference to the four models under discussion.

76. Claus Kress, Commentary on Article 98 RS, para. 123 *et seq.*

77. Astrid Reisinger Coracini and Jennifer Trahan, ‘The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities’ *Just Security* (8 November 2022).

78. *Ibid.* Also see, for example, McDougall (n 54).

back—and, in fact, recommend—the establishment of a tribunal by international treaty prior to its creation. This model would be preferable if we keep in mind the simultaneous fulfilment of the second condition mentioned above, given that a UNGA resolution could be understood as ‘reflect[ing] the will of the international community as a whole’. Some States, however, particularly Permanent Members of the UNSC, might be weary of the precedent this might create, on the basis of the same political rationale that limited the ICC’s ability to exercise jurisdiction over the crime of aggression. But the key question with this proposal is a different one: whether there is, in fact, sufficient appetite even within the UNGA to pass such a resolution;⁸⁷ without the prospective votes, tabling a resolution might, in fact, undermine the prospects for a special tribunal, and perhaps even the case for accountability for the crime of aggression more generally, as it would send the signal that a large chunk of the international community opposed upholding justice in the face of one of the greatest examples of a crime of aggression since the birth of the UN. The implication might be that, if not in this case, then aggression will never be prosecuted.

II. Creation by Treaty Through a European Regional Organization

A second option would be to create the tribunal independently and regionally in Europe, through authority derived not under the UN Charter, but under one of the regional organizations’ founding instruments. This means that the EU and the CoE could also both establish such a tribunal themselves. More specifically, the EU could do so under the scope of its foreign and security policy, ‘where the powers of the Union are sufficiently broad and flexible to be adapted to the circumstances of a specific situation’;⁸⁸ for this, too, precedent already exists by virtue of the EU’s previous establishment of the Kosovo Specialist Chambers, set up by treaty between the EU and Kosovo as the interested State. With respect to the CoE, ‘matters relating to national defence do not fall within the scope’ of the organization,⁸⁹ whose purpose is rather ‘to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic

and social progress’.⁹⁰ However, experts have argued that if ‘seen under the prism of accountability for the commission of an international crime, the fight against impunity and the need to ensure full reparation for the damage caused by the crime’, the establishment of a tribunal would not be *ultra vires* even if created in such a manner.⁹¹ In fact, the Parliamentary Assembly of the CoE has already called for the creation of an ‘*ad hoc* international criminal tribunal’,⁹² while the Rapporteur of its Committee on Legal Affairs and Human Rights has called for the creation of said tribunal even ‘on the basis of a multilateral treaty’, presumably between Ukraine and CoE member States.⁹³ Equally, the European Parliament has already passed a resolution explicitly endorsing the need for the creation of a special tribunal,⁹⁴ with the European Commission also announcing the establishment of a Center for the Prosecution of the Crime of Aggression (ICPA), to be created in the Hague and supported by Eurojust,⁹⁵ which the EU could build up into a court. We might hereinafter refer to this option as the ‘Regional Model’, which differs from the previous one in that, process-wise, UNGA endorsement would not need to be sought *a priori*, as both the EU and the CoE are regional organizations *independent* of the UN.

One objection could be made to the fully ‘Regional Model’, which is that—by definition—such a tribunal would reflect the will of the region, rather than that of the ‘international community as a whole’. This is particularly true if the tribunal were created directly by the 27 members of the EU, and perhaps less so if the tribunal were created by the CoE, whose 46 members are representative of a broader variety of legal traditions, as well as political and military alliances.⁹⁶ It is precisely for this reason that, although a UNGA resolution would not be *a priori necessary* in either case, its endorsement would, without a doubt, be *politically beneficial*, even if it came *after* the regional organization in question moved independently to create the court. And in fact, if the tribunal were constituted regionally, this might perhaps sway some votes in the UNGA, particularly those from States concerned with the financial burden

87. For example, Kevin Jon Heller points out that ‘the African Union, which represents more than 50 states, categorically rejects the idea that personal immunity is inapplicable before international courts. It is thus almost inconceivable that more than a small number of African states would vote for such a resolution – even one that was limited to Russian aggression’; adding that ‘a significant number of states in the Middle East and Southeast Asia either voted against or abstained on Res. ES-11/1, which said nothing about a Special Tribunal or personal immunity but simply deemed Russia’s invasion of Ukraine an act of aggression. And an even greater number voted against or abstained on Res. ES-11/L.4, removing Russia from the Human Rights Council, including a significant group of states in South America’, <https://www.tandfonline.com/doi/full/10.1080/14623528.2022.2095094#>.

88. Olivier Corten and Vaïos Koutroulis, ‘Tribunal for the crime of aggression against Ukraine - a legal assessment’ *European Parliament*, December 2022, 19.

89. Council of Europe, Statute of the Council of Europe, European Treaty Series - No. 1, 5.V.1949, London, 5 May 1949, art 1(d).

90. Council of Europe, Statute of the Council of Europe, European Treaty Series - No. 1, 5.V.1949, London, 5 May 1949, art 1(a).

91. Corten and Koutroulis (n 64) 18.

92. Resolution 2436, adopted in April 2022.

93. Aleksander Pocij, ‘The Russian Federation’s Aggression Against Ukraine: Ensuring Accountability for Serious Violations of International Humanitarian Law and Other International Crimes,’ Report of the Parliamentary Assembly of the Council of Europe, 26 April 2022, 15.

94. European Parliament, Resolution on the establishment of a tribunal on the crime of aggression against Ukraine, (2022/3017(RSP) 18 January 2023.

95. Eurojust, International Centre for the Prosecution of the Crime of Aggression made official at United for Justice Conference in Ukraine, Press Release, 5 March 2023.

96. In fact, Kevin Jon Heller has observed that it might be more likely that CoE rather than EU member states are more amenable to constituting an aggression tribunal given that 80% of them have either criminalized aggression domestically, or ratified the Rome Statute’s amendment on aggression. He goes even further by suggesting that a Council of Europe-backed tribunal, which in his preference should be a hybrid set of chambers, ‘would also minimize the problem of unclean hands. Although the UK and France are members of the CoE, most of the other states responsible for limiting the ICC’s jurisdiction over aggression and/or for the invasion of Iraq – the US, Canada, Australia, New Zealand – are not’. However, in my view, according to this latter test, the EU would be an even better fit, given only France, among the States he lists, is a member. See: Heller (n 55).

such an institution might impose on them, or those who might prefer amending the Rome Statute if the idea is to set a precedent potentially at the global level. An additional observation is that, even if the tribunal were created fully regionally, if the treaty was open to universal accession (in addition to, or instead of, UNGA endorsement), this *might* also be helpful to meet the second criteria above.⁹⁷ Making the treaty open to universal accession could also be instrumental for the tribunal's proper functioning, as none of the options currently on the table would, in fact, create a legal obligation to cooperate on non-Member States. A regional court would certainly have a *raison d'être*, for the strongest consequences of the aggression are being felt regionally within Europe. A regional formulation would also be key to reasserting European stability for it would send the strong signal that European countries and their partners in the region remain steadfast in their commitment to the rule of law and to accountability, and that no aggressive threats will ever again be tolerated against its regional security. That being said, if a UNGA resolution could in fact be obtained, whether *a priori* or *ex-post facto*, it would be equally important to reassert—at the *political* level—that the crime of aggression is indeed a threat to global peace and stability, irrespective of which region is most affected. In fact, a UNGA resolution could be sought to this effect, with the specification that—where regional mechanisms are able and willing to step in, as it is the case here—priority should be given to investing in regional solutions.

III. Creation by Limited Multilateral Treaty

The third option that has been suggested would be the creation of the said tribunal through a multilateral treaty between Ukraine and other 'willing' States (we shall call this the 'Multilateral Treaty Model'). With respect to the 'Multilateral Treaty Model', the biggest issue arising would squarely be that of immunities (although, I believe, it would also raise legitimacy concerns). Proponents of this model often cite the International Military Tribunal (IMT) at Nuremberg as precedent for the inapplicability of immunities before even a tribunal set up by a handful of States. However, such a comparison is misguided because the IMT was established by the Allies pursuant to their authority as occupying powers, meaning that the Allied Control Council could lawfully waive immunities for Nazi officials because the Council was, in fact, itself the government of Germany.⁹⁸ In this case, at least at present, it is highly unlikely that the governments of Russia and Belarus would agree to waive immunities for their leaders; and, although, as mentioned, the argument could be made that immunities would still not apply on the basis of Ukraine's rights to self-help and self-defence, it is questionable whether a tribunal built on the basis of a limited multilateral treaty would fulfil the second condition mentioned above, that is that it should 'sufficiently reflect the will of the international community as a whole'. Importantly, accepting the

premise that *any* small group of states can independently come together and create a tribunal before which Head of State immunities would not arise—and even more so doing this specifically for the crime of aggression—would create a worrisome precedent that, in my view, could very easily be politicized or misused in the future, thus detracting to perceptions around the seriousness of aggression as an internationally justiciable criminal offense.

IV. An Internationalized Set of Chambers

A fourth option being discussed would be the creation of an internationalized set of chambers anchored in Ukraine's domestic judicial system (following an 'Internationalized' or 'Hybrid' model).⁹⁹ Unlike options I-III above, I see this option as relating less to the *modality* and *authority* on the basis of which a tribunal would be created (ie. bilateral treaty between the UN and Ukraine, at UNGA request; independent, bilateral treaty between a European regional organization and Ukraine; and limited multilateral treaty), and more to the *character* and *institutional set up* of the tribunal itself, irrespective of how it is created. The choice here being between an-ICC like court - ie. an *independent* international organization (with supranational elements),¹⁰⁰ applying *international* law and staffed *entirely* of international judges, counsel and prosecutors - or a 'hybrid' or 'internationalized' tribunal, for which ample precedent also exists.¹⁰¹ AA hybrid / internationalized tribunal (also often referred to with names such as High, Specialist, or Extraordinary Chambers) would be anchored in - but sufficiently detached from - Ukraine's domestic system, for it would enforce international law (alone or in combination with Ukrainian domestic law), and also draw from the external expertise of international judges and prosecutors attached to or embedded within the court. It appears that some States are indeed pivoting towards this option,¹⁰² particularly the G7,¹⁰³ and according to a recent poll conducted among Ukrainian citizens, this would be their preferred option as well. Interestingly, 93% of respondents polled also expressed a preference for the hybrid court to be given jurisdiction over other international crimes alongside the crime of aggression.¹⁰⁴ It is true that no domestic system, alone, could cope with the volume of international crimes prosecutions that Ukraine's current investigations demand, reason why Ukraine's international partners should without a doubt *also* invest in building up and supporting Ukraine's domestic judicial system.

99. <https://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/>

100. https://www.icrc.org/en/doc/assets/files/other/079-092_luder.pdf

101. In fact, all precedents referenced above are examples of internationalized courts, differing however in terms of how they were set up. Such as the Special Court for Sierra Leone, or the Extraordinary Chambers in the Courts of Cambodia, for example. See David Scheffer (n 80).

102. <https://www.usatoday.com/story/news/politics/2023/03/26/us-russia-putin-war-crimes-ukraine-prosecution/11364190002/>; <https://www.spiegel.de/international/world/the-special-tribunal-debate-an-arrest-warrant-against-putin-would-be-immense-a-7e88adff-1ea2-4cf2-b78e-b5e99fa46a6e>

103. <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/19/g7-leaders-statement-on-ukraine/>

104. <https://twitter.com/ULAGroup/status/1632644281625202688?s=20>. Also see this Memorandum signed by Ukrainian civil society and partner organizations <https://rights-justice-peace.in.ua/en-us/>.

97. See, for example, Kress (n 76) para. 123 *et seq.*

98. Janet Anderson, 'Everything You Need to Know or Argue About a Special Tribunal on Russia's Crime of Aggression' *Justice Info* (13 December 2022).

In fact, one proposal out there is concerned, precisely, with setting up a hybrid set of chambers specifically for war crimes, crimes against humanity, and genocide, to complement the jurisdiction of both the ICC and the proposed aggression tribunal.¹⁰⁵ But if the idea of the proposed tribunal is to fill an accountability gap, then the tribunal's jurisdiction should be *complementary* to—not overlapping with—that of the ICC.

The Ukrainian government has, thus far, flatly rejected the idea of a hybrid court for aggression, and so have some experts, as well as smaller European nations within the 'core group' of states (which includes but is larger than the G7) pushing for the creation of a tribunal. Critics of the hybrid model prefer instead 'a *fully* international tribunal' created by the General Assembly.¹⁰⁶ The assumption here being that—if it even were politically realistic—the latter would be a legally superior option. It is important to underscore, however, that the tribunals that are regularly cited as precedent for the UNGA-backed 'international' court—such as the SCSL, or the ECCC—are, in fact, themselves hybrid / internationalized courts, with some degree of anchorage in the domestic system of the affected state for which it was created. By all means, if a tribunal could realistically be created via the UN rather than the EU or CoE, one might reasonably prefer that outcome, *politically* speaking. If a UN tribunal were not politically viable however (as it currently appears to be the case), critics should not be so quick to discount the possibility of creating what would essentially be the same form of tribunal, but established under proper regional authority by a European institution—at least in my view.

In any case, the key obstacle with this proposal is that, as of currently, it might not be viable under the Constitution of Ukraine, and particularly Article 125, according to which 'the establishment of extraordinary and special courts shall not be permitted'.¹⁰⁷ And for as long as Ukraine remains under martial law and in a state of emergency, no amendments to its Constitution are permitted.¹⁰⁸ Some have pointed to the 2019 creation of the High Anti-Corruption Court of Ukraine as potential precedent, particularly in light of the fact that, in May 2022, the Verkhovna Rada—Ukraine's Parliament—passed legislation expanding its jurisdiction to include issuing orders 'to seize the property of particular individuals and legal entities

associated with the ongoing military aggression by the Russian Federation against Ukraine'.¹⁰⁹ Others have raised that 'Ukraine judicial experts have explained [...] that this provision is intended to prohibit temporary courts created by executive authority', but that '[t]he prohibition would not likely apply to an internationalized domestic court [...] created through the legislative process'.¹¹⁰ However, it is doubtful from my perspective the extent to which the High Anti-Corruption Court, which does not have international judges or prosecutors (but rather international 'advisors', precisely because the alternative is barred under Article 125) is, in fact, a viable precedent.

If the apparent constitutional obstacle could be overcome, I see a hybrid set of chambers as a very - if not the most - suitable option, provided that it had the backing of a competent international organization (whether the UN or a European regional institution), that it applied international law (and better yet the ICC substantive definition of the crime of aggression), and *only if* international judges and prosecutors - rather than simply 'advisors' - could be embedded within it. Such requirements would be key not only to the court's internationalized character, which could be crucial to overcoming the immunities hurdle, but to its very legitimacy, in light of the concerns addressed above with respect to Ukraine carrying out high-level aggression prosecutions alone as the victim State. Once again, ideally, such court would be set up via bilateral treaty between the international authority creating the tribunal and Ukraine. Supporting States that are not member of the international organization in question—including the United States in the case of a European court—could still partake in supporting the effort directly or indirectly by either themselves joining the treaty, or as the US currently does, for example, with respect to the Kosovo Specialist Chambers.¹¹¹

Legitimacy, Enforcement, and Cooperation Matters

As mentioned, whichever option is pursued, the tribunal would benefit of as broad a membership base as possible—for legitimacy, legal (ie immunities), and enforcement reasons. On this latter point, it is crucial to reiterate that the tribunal will need to rely on its member States for enforcement and cooperation, as cooperation by non-member States could only be imposed under Chapter VII powers by the UN Security Council, which do not extend to the UNGA by virtue of the Uniting for Peace mechanism. Equally, it is important to underscore that, given the proven challenges of executing an arrest warrant against a sitting Head of State, the tribunal might either have to wait for President Putin's fall from grace,

105. <https://opiniojuris.org/2022/07/29/high-war-crimes-court-of-ukraine-for-atrocity-crimes-in-ukraine/>. In a more recent post, the same authors have also suggested that the model could also accommodate aggression prosecutions, for example for Parliamentarians and the Defense Minister, but admittedly not for the Russian President and Foreign Minister, given their personal immunity. <https://www.justsecurity.org/85886/the-united-states-proposal-on-prosecuting-russians-for-the-crime-of-aggression-against-ukraine-is-a-step-in-the-right-direction/>

106. <https://www.passblue.com/2023/05/23/the-divide-hardens-on-what-a-special-court-for-the-crime-of-aggression-by-russia-should-look-like/>

107. Ukraine Constitution, art 125.

108. 'Legal jurists in Ukraine agree, however, that "if a court to try the crime of aggression is created not as a domestic court but as a wholly international one, then Article 125 of the Ukrainian Constitution is not a bar to establishing such a tribunal.' In Alexander Komarov and Oona A Hathaway, 'Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression' *Just Security* (5 April 2022).

109. Cameron McKenna and Nabarro Olswang, "Ukraine Expands Sanctions against Russia and its Supporters," *Lexology*, 20 May 2022, <https://www.lexology.com/library/detail.aspx?g=7d1f4c76-3219-4caa-8678-196368912a4f>. cited in Heller (n 55).

110. <https://www.justsecurity.org/85886/the-united-states-proposal-on-prosecuting-russians-for-the-crime-of-aggression-against-ukraine-is-a-step-in-the-right-direction/>

111. <https://www.scp-ks.org/en/background>

or carry out his and Minister Lavrov's trials *in absentia*.¹¹² However, such trials are highly controversial, for they may violate certain rights of the accused; although, under certain conditions, they are not precluded under international law.¹¹³ And while some say said trials would have 'negligible value and legitimacy' against such high profile defendants, others maintain that 'the symbolic nature of a judgment by an *ad hoc* tribunal—even in *absentia*—should not be underestimated'.¹¹⁴

Conversely, others have argued that, given the unlikely scenario of a Putin arrest while in office, and the fact the personal immunity would no longer apply if he is surrendered after he leaves office, the question of immunities is largely an academic one, and 'the likelihood of personal immunity ever being an issue in an actual trial is effectively zero'.¹¹⁵ Arguably, however, the tribunal in question might not need to proceed to the trial stage, whether or not *in absentia*, to have an impact, for—as it is hoped will be the case with the ICC arrest warrant against Putin—such a warrant might already carry sufficient stigma and entail strong enough consequences for any suspect's ability to travel freely and carry out official duties. A pending arrest warrant could also become crucial to reset the terms of relations in the event of a post-Putin Russia. In fact, precisely on this basis, some also question the political wisdom of creating a tribunal for Russia's aggression while the war continues to rage, with its outcomes being all but predetermined.¹¹⁶ However, as it is the case with the Rome Statute,¹¹⁷ legal mechanisms could be built into the tribunal's charter to facilitate a peace process if and when conditions might so require. Indeed, the importance of adopting a long-term perspective cannot be overestimated: from Charles Taylor to Omar al Bashir, from Slobodan Milošević to Hissen Habré, history bears witness to the mantra that the 'long arch of international justice' eventually catches up even with once powerful and seemingly untouchable individuals. For this reason, it is imperative to set up the tribunal in a way that keeps as many options as possible open, and so that—if the question did arise—it would stand the highest chance of having the inapplicability of immunities confirmed by its judges. Importantly, as some observers have noted, whichever form its establishment will take, the tribunal should seek to forge a cooperative relationship with the ICC.¹¹⁸ This is, at least in part, to support the cohesive development of both substantive and procedural law moving forward, given that many believe—as I do—that the ultimate lesson States should take away from this experience trying to prosecute Russia's aggression is that the Rome Statute should be

re-amended to address at least some of its greatest limitations in exercising jurisdiction over this offense.

The Imperative of Accountability for Russia's Aggression

One year after Russia's full-scale invasion begun, there can be no doubt of just how consequential the shockwaves of its aggression have been. As decried by the UN General Assembly,¹¹⁹ the humanitarian consequences of the war have been horrific, with a human toll that has since reached near-epic proportions—with half a million casualties, of which at least 21,000 Ukrainian civilians, and 16 million between the internally displaced and cross-border refugees.¹²⁰ The conflict has challenged Europe's most basic assumptions on regional peace and security, leading historically neutral countries such as Switzerland to send weapons to Ukraine, Finland and Sweden to seek NATO membership, and even Germany to turn a point in its defence and military posture.¹²¹ Equally, the conflict has brought the spectre of nuclear confrontation back on the world stage,¹²² disrupted the global economy, leading to energy and food crises,¹²³ and challenged the cardinal rules that have anchored the conduct of international affairs since the end of World War II. At a UN Security Council meeting on the eve of the invasion, Kenya's UN envoy put it starkly as it rebuked Russia's 'irredentism and expansionism', citing its own colonial past, and urging a 'recovery from the embers of dead empires in a way that does not plunge us back into new forms of domination and oppression'.¹²⁴ What is worse, Russia's aggression against Ukraine—which started with the 2014 illegal annexation of Crimea, and the fomenting of separatist armed rebellions in the Donbass region—appears to be part and parcel of a worrisome, repeated pattern of blatant disregard for international law dating back to—at least—its 2008 invasion of Georgia, and visible in its 'Veto abuse' at the UN, and the involvement of its armed forces and irregular mercenaries in brutal campaigns of indiscriminate violence against civilians well beyond Ukraine, in places such as Chechnya, Syria and Mali, for example.¹²⁵ It is for this reason that accountability has

112. As it was stipulated, for example, in: United Nations Security Council, Resolution 1757 (2007) on the establishment of a Special Tribunal for Lebanon, UN Doc S/RES/1757 (2007), 30 May 2007, article 22.

113. Sergey Vasiliev, 'Aggression against Ukraine: Avenues for Accountability for Core Crimes', *EJIL:Talk!* 3 March 2022.

114. Corten and Koutroulis (n 64) 35.

115. <http://opiniojuris.org/2023/04/10/the-need-for-pragmatism-or-dont-let-the-immunity-tail-wag-the-tribunal-dog/>

116. <https://www.foreignaffairs.com/ukraine/russia-ukraine-justice-thwarting-peace>

117. Art 16 and 53

118. David Scheffer, 'Forging a Cooperative Relationship Between International Criminal Court' *Just Security* (25 October 2022).

119. UNGA Res ES-11/2 (28 March 2022) UN Doc A/RES/ES-11/2.

120. UN Human Rights Council, 'Operational Data Portal – Ukraine Refugee Situation' <<https://data.unhcr.org/en/situations/ukraine>> accessed 7 March 2023.

121. Bundesregierung, 'Policy Statement by Olaf Scholz, Chancellor of the Federal Republic of Germany and Member of the German Bundestag, 27 February 2022 in Berlin (Berlin, 27 February 2022) <<https://www.bundesregierung.de/breg-en/news/policy-statement-by-olaf-scholz-chancellor-of-the-federal-republic-of-germany-and-member-of-the-german-bundestag-27-february-2022-in-berlin-2008378>> accessed 7 March 2023.

122. Jon Stone, 'Stop 'Nuclear Sabre-Rattling,' NATO Chief Tells Putin' *The Independent* (Brussels, 23 March 2022) <<https://www.independent.co.uk/news/world/politics/russia-nuclear-putin-ukraine-nato-b2042251.html>> accessed 7 March 2023; Julia Mueller, 'Put Puts US Officials on Edge with Nuclear Sabre-Rattling' *The Hill* (Washington, D.C., 2 October 2022) <<https://thehill.com/policy/international/3671258-putin-puts-us-officials-on-edge-with-nuclear-saber-rattling/>> accessed 7 March 2022.

123. UN Sustainable Development Group, 'Global Impact of War in Ukraine on Food, Energy and Finance Systems – Brief No. 1' (April 2022) <<https://unsdg.un.org/resources/global-impact-war-ukraine-food-energy-and-finance-systems-brief-no1>> accessed 7 March 2023.

124. NPR, 'Kenyan U.N. ambassador compares Ukraine's plight to colonial legacy in Africa' 22 February 2022.

125. UN, 'Mali: Independent rights experts call for probe into Wagner Group's alleged crimes' (31 January 2023) <<https://news.un.org/en/>>

rightly become a key component of debates surrounding Russia's unlawful war.

Of course, Russia's aggression against Ukraine is not the first time that force is unlawfully used by States in egregious breach of the UN Charter. In the minds of many outside the Euro-Atlantic region, past instances of Western military adventurism, and frustrations with the lack of accountability for the consequences of devastating military campaigns—such as the 2003 illegal invasion of Iraq—remain raw, and weight heavily in the background of this discussion. Equally, the irony is not lost on many that some of the States taking the proposal for a special tribunal most seriously today are, in fact, the same States that sought to restrict as much as possible the subject-matter jurisdiction of the ICC on the issue. At the same time, however, in light of rising geopolitical tensions, and fears that other powerful States may themselves be considering using armed force against less-powerful neighbours in other regions, many do feel a certain sense of urgency to reinstate the cardinal prohibition against aggression, and the potentiality of criminal consequences for its violation. And if, to some, the response to the crisis in Ukraine has been further evidence of long-decried double-standards,¹²⁶ others see the current momentum generated by the war in Europe as an opportunity to reclaim the universal nature of certain core international rules, and the global character of the fight against impunity.¹²⁷

The Way Forward on Accountability for the Crime of Aggression, In and Beyond Ukraine

There can be no doubt that this is a momentous time in world affairs, and that the consequences of any action we take—or refuse to take—today will be felt for generations to come. Each of the models discussed above present unique legal and policy challenges that are difficult, but not impossible, to navigate. By this point, the need to hold Russian leaders accountable for their naked crime of aggression against the sovereign nation of Ukraine should be beyond dispute. Indeed, in my view, I believe European governments and their partners can and should move forward with asserting regional competence and willingness to punish criminally this heinous offense against the region's peace and stability. Of course, proponents of any tribunal formulation could continue to consider seeking a resolution by the UN General Assembly aimed to reiterate that the crime of aggression is a threat to *all* nations' peace and stability. Alongside general endorsement for a tribunal's creation, the UNGA resolution could also explicitly stipulate that preference should indeed be given to its establishment through regional institutions. This not only on account of the fact that the strongest consequences of the war are being felt in Europe, but perhaps also as a

way to 'win over' the votes of those States that for policy, strategic, or financial concerns would oppose its creation through the United Nations. At the same time, for reasons discussed above, if such endorsement were *not* anticipated to be forthcoming *a priori* by the UNGA, this should not be seen as a bar to the creation of the special tribunal, for European regional organizations already themselves possess the right to establish such a court—and could, in fact, build on existing initiatives such as the recently announced Center for the Prosecution of the Crime of Aggression precisely to this effect.

It is my opinion that a court created by treaty between Ukraine and a regional organization in Europe, which is sufficiently distinct from Ukraine's domestic judicial system, and that entails the full participation of international judges, counsel and prosecutors (alongside Ukrainians) would be the strongest and most viable option. From a legal perspective, the international/lized character of the court would be crucial both to its legitimacy, as well as with respect to the inapplicability of immunities (particularly if the ICC judges were to uphold the Bashir precedent with respect to the arrest warrant now outstanding against President Putin). Equally, however, I believe this model would be preferable also from both a policy and strategic perspective, for it would set a precedent that is at once strong but also not easily abused or replicated with ease—doing so would, in fact, require the *bona fide*, genuine, and strong diplomatic backing of the entire region most affected by the crime of aggression in the future—something that would require real diplomatic legwork, and that would be hard to 'manufacture' spuriously.

Whichever model is pursued, it should be clearly stipulated that the creation of a special tribunal for aggression today ought to be understood as a one-time, emergency measure aimed at prosecuting one of the most heinous crimes of aggression since the birth of the UN, precisely as a way to restore the cardinal prohibition against aggression and, with it, the global rule of law. Then, it also ought to be clear that establishing a special tribunal to prosecute the crime of aggression against Ukraine is not—and should not be seen—as a long-term substitute or alternative to the ICC, with whom the tribunal should be required to cooperate. In fact, if the establishment of the tribunal is to mean something outside of Europe and of Ukraine, its creation must become the catalyst that finally brings States Parties to the Rome Statute back to the negotiating table to address the limitations imposed on the ICC's exercise of jurisdiction on the offense. By virtue of its permanence and universalist ambition, an ICC with robust authority and jurisdiction over *all* international crimes—including the 'supreme international crime' that is aggression—might be the best—and, in fact only—way forward to reassert once and for all the central role that criminal accountability for egregious violations of international law *should* and *will* play as a key tenet of world affairs.

story/2023/01/1133007> accessed 8 March 2023.

126. <https://opiniojuris.org/2023/03/27/putin-arrest-warrant-international-law-and-perceptions-of-double-standards/>; Luis Moreno Ocampo, 'Ending Selective Justice for the International Crime of Aggression' *Just Security* (31 January 2023).

127. James Goldston, 'Ukraine and the Rebirth of Human Rights' *Project Syndicate* (28 February 2023).



Pietro Pustorino • Full Professor
of International Law, Director of the Center
for International and Strategic Studies,
Luiss Guido Carli (Rome)

Self-determination of Ukrainian People and Russian Aggression

1. Brief remarks on the international law regime on self-determination of peoples

The principle of *external* self-determination of peoples operates in three well-known cases identified in practice and consolidated case-law: former colonies, foreign military occupation and government that practices apartheid or racial discrimination. As indicated by the ICJ in the Advisory Opinion on Kosovo ‘during the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.’¹

In the other cases (ie, not former colonies, foreign military occupation or governments practicing racial discrimination) there is a so-called neutral stance of the principle of self-determination that neither authorizes nor prevents declarations of independence. It should be noted that this is a ‘reasoned’ neutrality, which is a result of a balance between the right to external self-determination of the local population and the right of the State to maintain its territorial integrity. However, in this case a general limit—stated, once again, by the ICJ in the aforementioned opinion on Kosovo—must be applied. According to the Court, the declaration of independence of the new State must not be ‘connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).’² The importance of this limit in the context of the topic discussed in this contribution is apparent, in light of the Russian practice both in Ukraine and in other Eastern countries.

With regard to *internal* self-determination, it is equally known that the exercise of this right does not imply the

1. See *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 436, para 79.
2. *Ibid* 437, para 81.

right to secede by local populations. A possible exception is the application of the highly problematic theory of remedial secession in case of gross violation of the right at stake, together with the commission of serious breaches of human rights against a specific part of the national population. With particular reference to Quebec, the Canadian Supreme Court, in its Advisory Opinion of 20 August 1998 on the secession of Quebec, considered that ‘when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.’³ As in the other cases of self-determination,⁴ in the secession-remedy case it is necessary to respect not only the substantive requirements indicated above but also the procedural obligations to negotiate in good faith with the central government, in order to balance the principle of self-determination and the principle of territorial integrity of the State, as well as to give adequate time to organize and carry out the referendum. This guarantees local population to be adequately informed of the referendum questions and the consequences of the secession.

In my opinion, although designed to react to a violation of fundamental principles and norms in the international legal order (*erga omnes* obligations), remedial secession does not seem to be accepted in international law yet, as implicitly stated again by the ICJ in the above-mentioned Advisory Opinion of 2010. Therein the Court stressed that ‘whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so, in what circumstances.’⁵

2. General overview on the Russian stance on self-determination issues

For some authors, the Russian practice on the subject of secession, after following a ‘conservative’ approach, based on the prevalence of the principle of the State’s territorial integrity, has changed its course.⁶ Mälksoo argues that prior to the annexation of Crimea, even the most prominent representatives of the Russian scholarship of international law ‘argued that, in international

3. See *Reference Re Secession of Quebec* (Advisory Opinion) [1998] Canadian Supreme Court, para 134. Anyway, the Court concluded that, even assuming that the remedial secession ‘is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold’, para 135.
4. On the relevance of the procedural obligations in secession cases, see Thomas D. Grant, ‘Annexation of Crimea’ (2015) 109 AJIL 76.
5. *Supra* note 1, 438, para 82.
6. For an in-depth analysis of the Russian approach on the principle of self-determination of peoples, see J. Johannes Socher, *Russia and the Right to Self-Determination in the Post-Soviet Space* (OUP 2021).

law, the principle of State sovereignty clearly trumps the right to self-determination', whereas afterwards 'no Russian international lawyer [...] publicly declared the invasion and annexation of Crimea to be illegal under international law.'⁷

According to Christakis,⁸ Russia endorsed for the first time the theory of remedial secession in August 2008, in order to justify its decision to recognize the independence of Abkhazia and South Ossetia in Georgia. The same argument was cautiously used by Russia in 2009 in the written statement submitted by Russia to the ICJ in relation to the Kosovo Advisory Opinion proceedings.⁹ As claimed by Russia, 'outside the colonial context, international law allows for secession of a part of a State against the latter's will only as a matter of self-determination of peoples, and only in extreme circumstances, when the people concerned is continuously subjected to most severe forms of oppression that endangers the very existence of the people.' Russia also clarified that no extreme circumstances existed in the case of Kosovo and that 'the population of Kosovo faced no risk of oppression.'

It seems that Russia has recently changed its opinion not because it is convinced of the validity of the pro-self-determination arguments. On the contrary, it has used and still uses in a specious way the principle of self-determination and other international law principles, such as the self-defense principle, for its purposes of expanding its territory and its area of influence, sometimes suddenly changing its positions as to the legal basis of its conduct, even in relation to the same case of practice.

3. The application of the principle of self-determination of peoples in the conflict in Ukraine: from the annexation of Crimea in 2014 up to the aggression of 2022

The annexation of Crimea is the 'litmus test' of the aforementioned Russian *modus operandi* in relation to self-determination issues. As noted by Corten, Russia did not refer to the unilateral right to intervene in a civil war in Crimea, but it rather invoked an intervention by invitation, at a first stage, by what it considered the official Ukrainian authority (President Yanukovich), and, in a second phase, by the government of the new Crimean State.¹⁰ At the same time, Russia invoked the application of the principle of self-determination of the Crimean population, awkwardly justifying its intervention in Crimea by affirming that 'Russia created conditions [...] only for the

free expression of the will of the people living in Crimea and Sevastopol.'¹¹

With regard to the Russian invocation of the self-determination principle and, more specifically, the remedial secession theory on behalf of the Crimean population, it can be said that no legal ground in the current regime on self-determination can be found for the Russian position for multiple reasons.

Russia violated the *jus cogens* rule on the prohibition of the use of force, thus rendering unlawful and without any legal effect the declaration of independence and the subsequent incorporation of Crimea to Russia. Moreover, in relation to the remedial secession theory, reference has been made by Russia to the human rights violations suffered by Tatars in Crimea, but it is very doubtful that the alleged violations against the Tatars reached the high threshold commonly accepted by the authors who support this theory. Furthermore, the Tatars situation in Crimea got worst after the annexation, with their displacement in significant numbers and in different areas, and this shows how the Russian argument was created just as a pretext.¹² Russia seems even to propose a particularly extensive interpretation of the remedial secession theory, allowing external armed intervention in order to guarantee it. Finally, Russia has not respected any substantive and procedural obligations connected to the application of the self-determination principle in the case at stake.

In general terms, the unfounded application of the self-determination principle in Crimea by Russia has been underlined by the UN General Assembly in its Resolution of 27 March 2014, No. 68/262, on the *Territorial Integrity of Ukraine*¹³ and, in more specific terms, by the Venice Commission of the Council of Europe in the Advisory Opinion of 21 March 2014.¹⁴ Apart from the violations of the Ukrainian Constitution, the Commission, on the basis of international law, considered that 'a number of circumstances make it appear questionable whether the referendum of 16 March 2014 could be held in compliance with international standards.' Among others, such circumstances are 'the massive public presence of (para) military forces [which] is not conducive to democratic decision making', the concerns regarding the 'respect to the freedom of expression in Crimea', the short period (10

7. See Lauri Mälksoo, 'Crimea and (the Lack of) Continuity in Russian Approaches to International Law' (2014) EJIL: Talk! <<https://www.ejiltalk.org/>> (accessed 30 January 2023); Lauri Mälksoo, *Russian Approaches to International Law*, (OUP 2015) 192.
8. See Theodore Christakis, 'Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea' (2015) 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 87.
9. See *Written Statement by the Russian Federation* [2009] ICJ <www.icj-cij.org/docket/files/141/15628.pdf>, accessed 30 January 2023, 39-40.
10. Olivier Corten, 'The Russian Intervention in the Ukrainian Crisis: Was Jus Contra Bellum Confirmed rather than Weakened?' (2015) 2 (1) *J. Use Force Int. Law* 17.

11. See the statements of the Russian President Vladimir Putin held on 18 March 2014, annexed to UN Doc. A/68/803-S/2014/202, 5.
12. For further details on the Tatars' situation, see Thomas D. Grant, 'Annexation of Crimea' 73-75; Sofia Cavandoli, 'The Unresolved Dilemma of Self-determination: Crimea, Donetsk and Luhansk' (2016) 20 (7) *Int. J. Hum. Rights* 881.
13. According to the UNGA 'the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol.' See *Territorial Integrity of Ukraine*, UNGA Res 68/262 (27 March 2014), para 5.
14. See *Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles* (Advisory Opinion) Venice Commission of the Council of Europe No. 762/2014, CDL-AD(2014)002.

days) between the decision to call the referendum and the referendum itself. Moreover, in the Commission's opinion the referendum question was not worded neutrally and in unambiguous way, in addition to the fact that 'no negotiations aimed at a consensual solution took place before the referendum was called.'¹⁵

4. The application of the principle of self-determination in Russian practice relating to territorial contexts other than Ukraine

In territorial contexts other than Crimea, but always in the area of influence of the former USSR (eg in Abkhazia and South Ossetia, Georgia, or in Transnistria, Moldova), the Russian approach is similar but it is adapted to the local context. The main legal ground, directly or indirectly invoked, is again the remedial secession, not always declared *expressis verbis*. Moreover, the discussed approach even considers the external intervention by third parties, aimed at supporting the secession by local population, as lawful.

It is well-known that Russia guarantees political, economic, and military support to some secessionist entities in sovereign States located in the former USSR territory or area of influence. In some cases, relying on the objective historical and political ties with Russia, which are sometimes effectively disregarded by foreign States, such guarantees have been accorded with regard to the alleged protection of the rights of the numerous Russian-speaking minorities present in Eastern European countries.

On the one hand, the Russian support for secessionist entities has the intent of reducing and progressively severing the ties with the territorial State that is subjected to separatist requests, also by using very unscrupulous tools—such as the possibility of easily obtaining Russian citizenship for the inhabitants of these entities—thus violating, as far as my opinion is concerned, the principle of non-interference in foreign affairs. In this context, the measures adopted by Russia, entailing the almost automatic granting of Russian citizenship to Ukrainian citizens residing in Crimea, cannot be clearly considered as lawful. Such conclusions shall also be extended to the most recent Russian measures aimed at facilitating the acquisition of Russian citizenship by all Ukrainian citizens, included those residing in the four recently annexed regions of Donetsk, Luhansk, Kherson and Zaporizhzhia.¹⁶

On the other hand, Russia seems to make efforts to feed tensions between the foreign State and the secessionist entity under the Russian support or control, in order to induce that State to react towards the local population and to subsequently invoke the remedial secession also

through military intervention, as in the case of South Ossetia, Crimea and Donbass.

From an operational point of view, Russia facilitates, where possible, the holding of referenda in the secessionist entities and subsequently supports, but with different approaches, the request for annexation to Russia. For example, while Russia accepted the request for annexation of Crimea a few days after the referendum on independence,¹⁷ with reference to the independence of the Donetsk People's Republic and the Luhansk People's Republic, proclaimed on 6 and 27 April 2014 after the referenda were held, Russia recognized the independence only in February 2022, accepting at the same time the request of armed intervention by these entities.

As in the case of the referendum and annexation of Crimea, similar considerations of unlawfulness are valid for the referenda of September 2022 on the annexation by Russia of the regions of Donetsk, Lugansk, Kherson and Zaporizhzhia, as again noted by the UNGA in the Resolution of 12 October 2022,¹⁸ in line with Article 41, paragraph 2 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.

In a further different way, in South Ossetia, which has long declared itself independent in 1990 and has been recognized by Russia only in 2008, the holding of the referendum on annexation by Russia, which should have been held in July 2022, was postponed in May 2022 after a change of government in South Ossetia.¹⁹

In light of the above, in the context of the application of self-determination on territories under Russian influence, the Russian main legal ground is based on remedial secession, which is invoked in a specious way and interpreted very extensively, so as to justify an armed intervention allegedly in support of the local population. The times and methods of exercising the right of self-determination of peoples under Russian military control or occupation vary according to the different situation on the ground, but, in all of the cases I referred to, there is no respect of the substantive and procedural obligations linked to the self-determination issues under international law.

5. Final considerations on the development of the principle of self-determination of peoples in the recent practice

As far as I am concerned, the Russian recent practice shows the necessity of a rethinking in terms of the content and application of the principle on self-determination,

17. See the bilateral agreement on the accession of Crimea to Russia of 18 March 2014.

18. See UNGA Res (12 October 2022) UN Doc A/RES/ES-11/4, paras 2-5.

19. Anyway, the preparation of the referendum on the independence of South Ossetia was considered legitimate by Russia again on the basis of the remedial secession theory. See UNSC Rep (28 August 2008) UN Doc S/PV.5969, 6-9.

15. *Ibid* paras 22-26.

16. See the Russian Presidential Executive Order of 11 July 2022, No. 440.

whose compliance is systematically circumvented by Russia (and sometimes by other States, including Western countries), which seeks to exploit the weaknesses of the current international regime on self-determination by invoking it in specious ways, bending the principle to the State's interests.

The time has come to review the aforementioned neutrality of the international law regime outside the consolidated cases of external self-determination, further enhancing the principle of territorial integrity in a very different historical period from that in which the principle of self-determination emerged and thrived as a legal principle, and in which the aggressive conducts of the strong States—Eastern but also sometimes Western countries—take advantage from the said neutrality of the principle at stake.

At the same time, it is necessary to take a clearer and sharper position, by scholars as well as by the States, even on the part of Western countries, on the theory of remedial secession, thus overcoming political opportunisms and positions of political convenience, as happened in the case of Kosovo. In other words, in order to prevent aggressive States from the ill-founded invocation of this theory, time has come to take an explicit position on whether the theory itself has a foundation in international law, even if only in terms of progressive development of the principle of self-determination, provided that precise and stringent substantive and procedural requirements are respected (included the exclusion of foreign armed interventions to enforce the remedial secession). If elaborated in these terms, the remedial secession could be accepted in international law as better balancing the application of the principle of territorial integrity on self-determination issues.



Elena Baylis - Professor of Law
at the University of Pittsburgh and Visiting
Professor of Law at The George
Washington University Law School
(2022-2023)

Post-Conflict Reconciliation in Ukraine

One year after Russia's illegal invasion of Ukraine, it is still unclear how a peace agreement might be achieved or what its terms could be. Nor is it apparent what territory and what balance of Russian, Ukrainian, and other communities will constitute post-war Ukraine. Nonetheless, the nature of this conflict as a war justified by claims about history, identity, and legitimacy suggests that there will be a need for post-war reconciliation measures. Such reconciliation mechanisms would be intended to enable Ukraine's Russian, Ukrainian, and other communities to live together constructively within the same state by fostering 'mutual recognition and acceptance' among them.¹

While social reconciliation within Ukraine has value as an end in itself, the goals of social reconciliation also converge with Ukraine's long-term, political aims vis-à-vis both Russia and Europe. Concerning Russia, social reconciliation has been found to support the success and longevity of peace accords by reducing the social incentives for conflict (although of course no form of reconciliation could prevent Russia from acting as the aggressor again should it choose to do so).² Concerning Europe, as discussed below, transitional justice and minority group protections not only foster social reconciliation but are also core European values endorsed by European Union policy and Council of Europe treaties. Accordingly, engaging in these measures would also advance Ukraine's interest in strengthening its ties with Europe.³

1. Daniel Bar-Tal and Gemma H Bennink, 'The Nature of Reconciliation as an Outcome and as a Process,' in Yaacov Bar-Siman-Tov (ed.), *From Conflict Resolution to Reconciliation* (OUP 2004) 15.
2. Elena Baylis, 'Options for a Peace Settlement for Ukraine: Option Paper XI - Reconciliation,' (*Opinio Juris*, 19 July 2022) <<http://opiniojuris.org/2022/07/19/options-for-a-peace-settlement-for-ukraine-option-paper-xi-reconciliation/>> accessed 7 March 2022.
3. Framework Convention for Protection of National Minorities (Council of Europe 1995) <<https://rm.coe.int/09000016800c10cf>>; European Charter for Regional or Minority Languages (1998 Council of Europe) <<https://rm.coe.int/1680695175>>; The EU's Policy Framework on Support to Transitional Justice (2015), <http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eu_policy_framework_on_support_to_transitional_justice.pdf>.

Conflict and Reconciliation

Many wars are not exclusively political acts, but rather, are instigated by social conflict or draw on social divisions between communities to justify and elicit violence. The premise that there are social aspects of conflict that must be addressed in some form of post-conflict process is familiar to many models of conflict and post-conflict redevelopment. Most relevant for this paper are socio-psychological theories, which have developed robust models of the relevant social dynamics and associated reconciliation processes.⁴

Socio-psychological theories posit armed conflict as both produced by and contributing to an interdependent, antagonistic relationship between communities. Over time, communities with competing needs and interests can create mutually exclusive narratives of their shared history, such as the contrasting Russian and Ukrainian histories of their relationship from the time of Kievan Rus' through the Soviet and post-Soviet eras. These historical narratives typically express each group's core needs and the perceived threat that the other group poses to its physical or cultural survival. Over time, each community's sense of its collective identity comes to be grounded in its rejection of the other community's identity and claims about the meaning of their shared history and current interactions. Escalation into armed conflict exacerbates this dynamic, causing extreme harms and grievances and reinforcing the perceived nature of the other community as an existential threat. The conflict feeds the opposition of identities, and the opposition of identities feeds the conflict.⁵

While a peace agreement may resolve political questions by means of a compromise between elites, typically it will not address the social dynamic of reciprocal, self-perpetuating hostility that is closely tied to the identity of both groups. Cooperative social, economic, and political activities will be difficult or impossible, and violence may easily arise again. The longer a conflict continues, the more embedded these social beliefs are in each community's ethos, and the more intractable the conflict becomes. Reconciliation measures are intended to change this social dynamic.⁶

Accordingly, if the war in Ukraine solely concerned conflicting political interests in territory, national security, or access to resources, those issues might be fully resolved politically through a peace agreement between the governments of Russia and Ukraine, and there would be no need

4. Nevin T Aiken, *Identity, Reconciliation and Transitional Justice: Overcoming Intractability in Divided Societies*, (Taylor & Francis Group 2013) 13-29.
5. Herbert C Kelman, 'Socio-Psychological Dimensions of Armed Conflict,' in I. William Zartman (ed.), *Peacemaking in International Conflict: Methods and Techniques*, (Revised edn, USIP 2007) 64; Arie Nadler and Nurit Shnabel, 'Intergroup reconciliation: Instrumental and socio-emotional processes and the needs-based model,' [2015] 26:1 *European Review of Social Psychology* 93, 94.
6. Bar-Tal and Bennink (n 1) 13.

for reconciliation processes.⁷ But instead, intertwined with these political disagreements are questions of social identity: the legitimacy of Ukraine as an independent state and of Ukrainians as a separate people, the contradictory histories of Russian dominance and Ukrainian nationalism, and the modern relationships between Russian-identified and Ukrainian-identified Ukrainian citizens. Putin deliberately incorporated these socio-psychological elements in justifying the Russian invasion of Ukraine, as well as the previous seizure of Crimea and involvement in Donbas.⁸ Ukraine has asserted its legitimacy as a people and as an independent state in countering Russian claims to those territories.⁹

Underlining the significance in the Ukrainian context of this social dynamic and of post-conflict reconciliation, the 2001 census and more recent studies indicate that many Ukrainian citizens have complex linguistic, ethnic, and national identifications. Often, families have both Russian and Ukrainian ancestry. Russian speakers do not necessarily identify as ethnically Russian. Those who do identify as Russian do not necessarily support the Russian invasion. While Russians are by far the largest minority group within Ukraine, there are many other minority and indigenous groups, including Romanians, Bulgarians, Crimean Tatars, Karaites, and Roma. Accordingly, Ukrainian citizens may have affiliations with and connections to multiple communities, rather than identifying exclusively with one community.¹⁰

Furthermore, these identifications and allegiances have been challenged and reshaped by the rising tensions between Russia and Ukraine over the last decade, through the Euromaidan protests, Russia's illegal annexation of Crimea, and the armed conflict in Donbas. A 2018 Council of Europe report notes that 'the conflict [in Donbas] has created an atmosphere in which persons who hitherto felt comfortable with complex, layered and multiple identities, feel the obligation to choose sides by showing loyalty to the state. The persons most impacted in this regard are those who identify as ethnic Russians or those who identify with the Ukrainian majority but communicate in the Russian language.'¹¹ Reporting from Ukraine suggests that the Russian invasion has heightened this sense of polarization.¹²

In such a context, reconciliation is intended to promote two interrelated objectives. The first is the vital goal of deterring armed conflict from recurring once it has been ended.¹³ This will be particularly salient if Ukraine's post-war territory includes Donbas and Crimea, where allegiances have been more divided than in the rest of Ukraine. The second is a more ambitious aim of shifting the dynamic between the concerned groups to a positive social, economic, and political interdependence, by enabling each group to accept and accommodate the legitimacy of the other group's identity, interests, and historical narrative.¹⁴ If successful, reconciliation would establish mutual understanding and acceptance, forming the basis for an ability to engage in education, businesses, and governmental administration together without rancor, and the capacity to negotiate touchy political and social issues such as the nature of relations with Russia and the European Union respectively. In a situation like Ukraine's, where people may not identify solely with one community, recognition and acceptance of the existence of multiple affiliations, without requiring individuals to exclusively choose one affiliation, will also be significant.

Reconciliation Mechanisms

While there are many typologies of reconciliation mechanisms, this brief paper addresses three broad categories that could be relevant for post-conflict Ukraine: instrumental, historical, and structural mechanisms. Instrumental mechanisms attempt to disrupt the cycle of hostility and oppositional identities by enabling positive perceptions and shared experiences in the present.¹⁵ The simplest such measure is public statements by political, social, cultural, and religious leaders. These could include statements of respect, apologies for harm suffered, or other symbolic gestures.¹⁶ Nelson Mandela wearing a Springbok jersey at the 1995 Rugby World Cup shortly after the end of apartheid in South Africa is a famous example of a well-received symbolic gesture of reconciliation.¹⁷ Another instrumental mechanism is cooperative economic, cultural, and social initiatives, like USAID support for interethnic microenterprises, joint business enterprises, and economic associations in post-conflict Bosnia-Herzegovina and Croatia in the 1990s.¹⁸ Such programs are jointly executed by and provide benefits

7. *Ibid.*

8. 'Address by the President of the Russian Federation' (*President of Russia* 21 Feb 2022) <<http://en.kremlin.ru/events/president/transcripts/67828>>.

9. Canan Saritepe, 'Russians, Ukrainians Two Separate Nations: Kuleba to Putin' (*Qirim News* 01 July 2021) <<https://qirim.news/en/kryimskie-tataryi-en/russians-ukrainians-two-separate-nations-kuleba-to-putin/>>.

10. Sergiu Constantin, 'Ethnic and Linguistic Identity in Ukraine? It's Complicated,' (*Eurac Research* 21 Mar. 2022) <<https://www.eurac.edu/en/blogs/mobile-people-and-diverse-societies/ethnic-and-linguistic-identity-in-ukraine-it-s-complicated/>>.

11. Advisory Committee on the Framework Convention on National Minorities, Fourth Opinion on Ukraine - adopted on 10 March 2017, Published on 5 March 2018, ACFC/OP/IV(2017)002, 1.

12. Eg. Simon Shuster, 'Volodymyr Zelensky: 2022 Person of the Year', (*Time* 7 Dec. 2022) <<https://time.com/person-of-the-year-2022-volodymyr-zelensky/>>; Naira Davlashyan, 'How Locals in Kharkiv Are Switching to Ukrainian Language Amid the Terror of Russian Bombing,' (*Euronews* 8 March

2022) <<https://www.euronews.com/2022/03/08/how-locals-in-kharkiv-are-switching-to-ukrainian-language-amid-the-terror-of-russian-bombing>>.

13. Herbert C Kelman, 'Reconciliation as Identity Change: A Social-Psychological Perspective,' in Yaacov Bar-Siman-Tov (ed.), *From Conflict Resolution to Reconciliation* (OUP 2004) 111, 122-24.

14. *Ibid.* 119-20; Bar-Tal and Bennink (n 1).

15. Arie Nadler and Nurit Shnabel, 'Instrumental and Socioemotional paths to Intergroup Reconciliation,' in A Nadler, T E Malloy and J D Fisher (eds.) *The Social Psychology of Intergroup Reconciliation*, (OUP 2008).

16. Nadler and Shnabel (n 5); Kelman (n 13); Bar-Tal and Bennink (n 1).

17. Melanie Esta Sarah Garson, *The Third Pillar: The Role of Reconciliation in Supporting Peace Agreements*, Dissertation, School of Public Policy, University College London (May 2017) 41.

18. Krishna Kumar, 'Promoting Social Reconciliation in Postconflict Societies: Selected Lessons From USAID's Experience,' USAID Program and Operations Assessment Report No. 24 (January 1999), <<https://www.oecd.org/derec/unitedstates/35112635.pdf>>.

for members of both communities.¹⁹ In a post-conflict setting like Ukraine's, in which significant infrastructure reconstruction and economic redevelopment projects will be needed, these can be designed to facilitate reconciliation by requiring inter-communal cooperation. A third instrumental mechanism is direct dialogue, which comprises structured opportunities for conversation and sharing of experiences among ordinary citizens who are members of the affected communities. Such measures famously played a significant role in the immediate aftermath of the conflict in Northern Ireland and were endorsed by the Good Friday Agreement.²⁰ Depending on the framing of the dialogue, this measure may be closely related to other instrumental measures, or, if a program is aimed primarily at discussing past traumatic experiences, may connect more closely to the historical measures described below. Some studies have found direct community dialogue to be quite popular with participants.²¹

Acknowledgements, cooperative initiatives, and dialogue are all relatively uncontroversial and low-risk, especially to the extent that dialogue is more focused on the present and future rather than the past. Such positive measures do not require grappling with the core questions of identity or conflicting historical narratives that tend to drive conflict. Rather, they aim to shift the dynamic between groups by incrementally building trust and goodwill through mutually beneficial statements, projects, and interaction. Thus, while these strategies are unlikely to exacerbate tensions in the short-term, they also do not aspire to mitigate any of the underlying issues, risking that their persistence may contribute to future conflict.

In contrast to instrumental measures, historical and structural mechanisms directly address aspects of the core dynamics that can contribute to conflict and undermine cooperative relationships among groups. Accordingly, such mechanisms are, by their nature, difficult and high-stakes projects. While they may enable a profound shift in how each group understands and interacts with the other, they are also likely to be controversial, particularly in the immediate aftermath of the conflict. If they fail, they risk contributing to the cycle of escalating conflict and oppositional identities, rather than disrupting that cycle.

Historical mechanisms addressing the past can include educational programs to inform the public about past events, memorials to honor or commemorate them, or joint academic ventures to formally research and record historical events.²² Perhaps the most prominent historical mechanism has become transitional justice. War crimes trials, truth commissions, and similar justice processes enable a public reckoning with the past and accountability for atrocities.²³ The field of transitional justice takes as a

premise that societies need to grapple with the harms caused by a conflict or authoritarian government in order to establish a democratic, fair, stable society.²⁴ Ukraine developed both a non-public draft roadmap and a draft law addressing transitional justice for Donbas and Crimea in 2020, although neither was adopted and, of course, neither addresses the subsequent invasion.²⁵ The since-withdrawn draft law proposed criminal trials, victim reparations, memorials, and lustration, as well as measures relating to gender justice and peacebuilding, among other measures relating to political transition and transitional justice.²⁶

Concerning trials, since the 1990s, international and hybrid criminal courts have been established to hold trials for war crimes, genocide, and crimes against humanity that occurred in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, Central African Republic, Chad, and Timor-Leste, and the International Criminal Court has investigated situations in more than fifteen countries.²⁷ Ukraine has already held some war crimes trials of Russian soldiers, and both Russian and Ukrainian soldiers could be held accountable in Ukrainian courts for war crimes or genocide.²⁸ The International Criminal Court is also investigating allegations of international crimes in Ukraine, and the European Commission is considering options for an international or hybrid criminal court.²⁹ One advan-

19. Nadler and Shnabel (n 5); Kelman (n 13); Bar-Tal and Bennink (n 1).
20. Baylis (n 2); Garson (n 17) 44.
21. Garson (17).
22. Nadler and Shnabel (n 5); Kelman (n 13); Bar-Tal and Bennink (n 1).
23. Ruti Teitel, *Transitional Justice* (OUP 2002); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Hill Press 1998).

24. Aiken (14).
25. Kateryna Busol, 'Mariupol and the Origins and Avenues of Ukraine's Transitional Justice Process,' (*Just Security* 1 June 2022) <<https://www.justsecurity.org/81680/mariupol-and-the-origins-and-avenues-of-ukraines-transitional-justice-process/>>; Kateryna Busol and Rebecca Hamilton, 'Transitional Justice in Ukraine: Guidance to Policymakers,' (*Just Security* 2 June 2022) <<https://www.justsecurity.org/81719/transitional-justice-in-ukraine-guidance-to-policymakers/>>; Elisenda Calvet-Martinez, 'Options for a Peace Settlement for Ukraine: Option Paper XIV - Transitional Justice in a Settlement to End the Conflict between Ukraine and Russia,' (*Opinio Juris* 11 August 2022) <<http://opiniojuris.org/2022/08/11/options-for-a-peace-settlement-for-ukraine-option-paper-xiv-transitional-justice-in-a-settlement-to-end-the-conflict-between-ukraine-and-russia/>>.
26. Busol (n 25); European Commission for Democracy through Law (Venice Commission), Ukraine, Opinion on the Draft Law 'On the Principles of State Policy of the Transition Period,' Adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), Opinion No.1046/2021, CDL-AD(2021)038 (18 October 2021) ('Venice Commission 2021 Opinion'). The draft roadmap similarly proposed criminal prosecutions for war crimes and for occupation administration leaders, as well as lustration, a truth-seeking role, memorials, compensation for victims, and reforms to ensure fair administration in Donbas and Crimea. Oksana Kovalenko and Katerina Kobernik, 'Punishment for War Criminals, Compensation for Victims and Monuments for Heroes - What Will Justice Be Like After the War: Interview with Permanent Representative of the President in Crimea Anton Korinevich' (*Babel* 8 July 2020), <<https://babel.ua/texts/46817-pokarannya-dlya-voyennih-zlochinciv-kompensacii-dlya-gerojiv-yakim-bude-pravosudnya-pislya-viyni-interv-yu-postiynogo-predstavnika-prezidenta-v-krimu-antona-korinevicha>>. [Оксана Коваленко & Катерина Коберник, 'Покарання для воєнних злочинців, компенсації для жертв і пам'ятники для героїв — яким буде правосуддя після війни. Інтерв'ю постійного представника президента в Криму Антона Кориневича' (Бабель 8 липня 2020)].
27. 'The Hybrids' (*Hybrid Justice*, accessed 10 March 2023), <<https://hybridjustice.com/hybrid-and-internationalised-mechanisms/>>; Situations under investigations,' (International Criminal Court, accessed 10 March 2023), <<https://www.icc-cpi.int/situations-under-investigations>>.
28. 'Map of War Crimes Trials in Ukraine' (*Justice Info* 6 December 2022), <<https://www.justiceinfo.net/en/109654-map-of-war-crimes-trials-in-ukraine.html>>.
29. 'Situation in Ukraine,' ICC-01/22, International Criminal Court <<https://www.icc-cpi.int/ukraine>>; 'Ukraine: Commission Presents Options to Make Sure that Russia Pays for its Crimes,' European Commission (30 Nov. 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311>.

tage of trials as a reconciliation measure is their focus on individual rather than group culpability. By asserting that individual soldiers, and not Russians or Ukrainians as a group, bear responsibility for the atrocities they have committed, trials may diminish the association of such harms with the perpetrator's group as a whole, and thus function to break the escalating cycle of antagonism and oppositional identification. However, this focus on individuals also limits the effectiveness of trials as a reconciliation mechanism; trials address only the acts of an individual and not the conflict as a whole. Also, trial proceedings, transcripts, and judgments may not be readily accessible or easy for the public to understand. The Venice Commission criticized Ukraine's 2020 draft law for treating Russians differently than other nationals with regard to criminal liability and eligibility for amnesties for war crimes and occupation activities in Donbas; for reconciliation purposes as well as basic principles of fairness, it will of course be important that all perpetrators, regardless of nationality, be equally subject to criminal prosecution for war crimes and other atrocities.³⁰

Another well-established transitional justice mechanism is a truth commission, which can stand on its own or complement trials. Truth commissions have been widely used in more than forty countries, including South Africa, Canada, Germany, Timor-Leste, and Colombia. Truth commissions are aimed at creating an authoritative record of facts and events, rather than at establishing accountability for individuals. A truth commission typically produces a report that is intended to be publicly accessible and meaningful, in contrast to a trial transcript or judgment. A commission established for Ukraine could be given a broad mandate to explore not only conflict-related harms but also Soviet-era and other historical events.³¹ In Ukraine, there is already a Ukrainian Institute of National Remembrance, which has developed an archive of documents from Soviet era law enforcement and secret police.³² Ukraine's draft transitional justice roadmap reportedly proposed a truth-seeking process to be carried out by an existing institution.³³ However, its 2020 draft law was criticized by the Venice Commission for promoting a single official historical narrative rather than proposing a truth commission or similar institution, and for focusing solely on Russia's aggression rather than on establishing the truth about all violations.³⁴ 'Defining truth is contentious,'³⁵ and it will be important for a Ukrainian truth commission to take steps to ensure that it is not viewed as biased or one-sided, for example, through careful selection of commission members who will be perceived as neutral and by holding public hearings so that victims' voices and other evidence

can be heard directly.³⁶ Otherwise, its investigation and its claim to authoritatively state the truth might itself become a point of contention.³⁷ The complex, changing community affiliations and allegiances in Ukraine add to the uncertainty about how a truth commission report might be received, particularly if pursued immediately after the end of the conflict.

Finally, engaging in transitional justice is important to Ukraine's interest in strengthening its relationship with Europe and becoming an EU member state. The EU's Policy Framework on Supporting Transitional Justice explicitly requires candidate and potential candidate countries to engage in transitional justice in appropriate situations.³⁸ This was a consideration for Kosovo in partnering with the EU to establish the Specialist Chambers in the Courts of Kosovo;³⁹ a similar partnership could benefit Ukraine in its aspirations to EU membership.

While transitional justice is backward-looking and addresses past wrongs, structural reforms are forward-looking and establish an equitable legal and administrative framework for the future. Structural mechanisms include reforms to ensure social equality, rights of political participation, and access to education and other government services for all communities, and particularly for affected minority groups.⁴⁰ As with transitional justice, minority group protections are also a core aspect of the European agenda. Ukraine is a party to two European treaties concerning minority group protections: the Framework Convention for Protection of National Minorities⁴¹ and the European Charter for Regional or Minority Languages.⁴²

Ukraine has already been grappling for years with how to balance the interest in developing an independent Ukrainian identity with protections for minority groups. Language use has often been central to this controversy. Ukraine's engagement with the Council of Europe on its fulfilment of its treaty obligations under the Framework Convention reflects the complexity of these issues in Ukraine. Soviet policy promoted use of the Russian language. A policy enacted shortly before Euromaidan favored use of Russian and other regional languages. Laws enacted since then have promoted use of the Ukrainian language by, among other measures, setting quotas for use of Ukrainian language, songs, and programs on broadcast TV and radio.⁴³ Ukraine's reports have emphasized the

36. Ibid, 214, 218.

37. Ibid, 20-23.

38. The EU's Policy Framework on Support to Transitional Justice (2015), <http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf>.

39. Emanuele Cimiotta, 'The Specialist Chambers and the Specialist Prosecutor's Office in Kosovo: The "Regionalization" of International Criminal Justice in Context' (2016) 14 *Journal of International Criminal Justice* 53, 69.

40. Nadler and Shnabel (n 5); Bar-Tal and Bennink (n 1).

41. Framework Convention for Protection of National Minorities (Council of Europe 1995) <<https://rm.coe.int/0900016800c10cf>>.

42. European Charter for Regional or Minority Languages (Council of Europe 1998) <<https://rm.coe.int/1680695175>>.

43. Advisory Committee on the Framework Convention on National Minorities, Fourth Opinion on Ukraine - adopted on 10 March 2017, Published on 5 March

'President's Office Opposes "Hybrid Tribunal" on Russia's Crime of Aggression,' (*Ukrainian Pravda* 17 Feb. 2023) <<https://www.pravda.com.ua/eng/news/2023/02/17/7389799/>>

30. Venice Commission 2021 Opinion, para. 53-54.

31. Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, (2d edn, Routledge 2011) 20-23; Calvet-Martinez (n 25).

32. Archive of the Ukrainian Institute of National Remembrance <<https://hdauinp.org.ua/en/about-archive-en/about-us>>

33. Busol (n 25); Kovalenko and Kobernik (n 26).

34. Venice Commission 2021 Opinion para. 63-66.

35. Hayner (n 31) 84.

need to develop Ukrainian as a state language and have argued that Ukraine needs to recover from the Soviet-instigated overrepresentation of the Russian language in Ukrainian life.⁴⁴ The Venice Commission's evaluations, in turn, have acknowledged the legitimacy of the aim of promoting a state language and the protections Ukraine has offered to minority groups. However, they have also concluded that Ukraine should not elevate its legitimate interest in promoting use of the Ukrainian language above its obligation to protect minority interests in their own language use. The Venice Commission found particularly concerning policies that disfavored Russian as compared to other, European languages.⁴⁵ Overall, language policies in Ukraine have been divisive.⁴⁶

Protections for minority groups are an important building block of reconciliation in the long-term by ensuring security and equitable participation in society and government for vulnerable groups. However, as with transitional justice, there is a risk that such protections will continue to play a role as a marker of support for one side or the other and could contribute to maintaining oppositional identities rather than resolving those differences, particularly in the short-term.

Despite these risks, both historical and structural initiatives are central to Ukraine's own policies and

of considerable interest to the international community. There are already significant international efforts underway at pursuing transitional justice with regard to war crimes and other international crimes committed during the conflict. Both transitional justice and legal protections for minority groups would align Ukraine with European values. For these reasons, Ukraine needs to pursue war crimes trials and to address questions of minority languages, education, and political participation. Such measures are best undertaken cautiously and deliberately, with great care to ensure their fairness, and with an eye toward their long-term effects on relationships amongst communities within Ukraine.

Conclusion

When, as in Ukraine, armed conflicts are not solely political but build on and reinforce social divisions, reconciliation measures may be needed to address the self-reinforcing cycle of conflict and oppositional identities. Once a self-perpetuating, mutually antagonistic relationship has been established, it is difficult for the affected communities to collaborate constructively in the same society and easy for armed conflict to recur. In such contexts, reconciliation measures are important to promote the long-term success of any peace agreement and to enable constructive interactions between the concerned groups within the same state.

Some instrumental reconciliation measures tend to be relatively low-risk and offer mutual benefits in the short-term. Historical and structural reconciliation measures that directly address core issues of history and identity, such as transitional justice and minority group protections, represent a high-risk, high-reward approach that have the potential to ameliorate some of the most fundamental contributors to conflict between the groups, but if unsuccessful, could exacerbate polarization.

2018, ACFC/OP/IV(2017)002, para. 117; Fifth Periodic Report of Ukraine on Implementation of the Framework Convention for the Protection of National Minorities (10 January 2022) 20-22.

44. Fifth Periodic Report of Ukraine on Implementation of the Framework Convention for the Protection of National Minorities (10 January 2022) 20.

45. European Commission for Democracy Through Law (Venice Commission), Opinion on the Law on Supporting the Functioning of the Ukrainian Language as the State Language, Adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019), Opinion No. 960/2019, para. 33, 39-44, 68-69.

46. Roman Huba, 'Why Ukraine's New Language Law Will Have Long-term Consequences,' (*Open Democracy* 28 May 2019) <<https://www.opendemocracy.net/en/odr/ukraine-language-law-en/>>.



Elisenda Calvet-Martínez

Assistant Professor of International Law and co-director of the Law Clinic Fight Against Impunity at the Faculty of Law of the Universitat de Barcelona (UB)

Transitional Justice in the Context of the War in Ukraine

In the wake of the first anniversary of Russia's invasion of Ukraine, the chances of a peace agreement between the parties to the armed conflict are still very low.¹ However, this does not preclude bringing to the table the issues that should be addressed in a future peace agreement. While transitional justice is often understood as a process that deals with the atrocities² occurred in the past, it also includes other types of measures, like the guarantees of non-repetition, to prevent the recurrence of human rights violations in the future. In the past three decades, 105 peace agreements have included transitional justice measures, ranging from amnesty measures, the establishment of a specific court, creation of truth commissions, release of prisoners, special units for missing persons, to reparation measures for victims, and vetting processes³. This has been the case of Guatemala⁴, South Sudan⁵ or Colombia.⁶ Addressing transitional justice issues in a peace agreement is important as it contributes to promoting sustainable peace for societies in transition.

Transitional justice can be defined as a process by which a state deals with atrocities that occurred in the past

1. Lauterpacht Center for International Law, *Ukraine Peace Settlement Project*, <https://www.lcil.cam.ac.uk/researchcollaborative-projects-housed-lcil/ukraine-peace-settlement-project>
2. The term 'atrocities' is used in a broad sense to include serious human rights violations such as war crimes, crimes against humanity, genocide, enforced disappearances, torture, extrajudicial killings and conflict-related sexual violence crimes.
3. Bell, Christine, Sanja Badanjak, Juline Beujouan, Robert Forster, Tim Epple, Astrid Jamar, Kevin McNicholl, Sean Molloy, Kathryn Nash, Jan Pospisil, Robert Wilson and Laura Wise *PA-X Codebook, Version 6* (2022). The database includes over 1959 agreements in over 140 peace processes. www.peaceagreements.org
4. Comprehensive Agreement on Human Rights between the government of Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca* (URNG), 29 March 1994, which created a truth commission.
5. Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) of 19 September 2018 which has a specific chapter on 'Transitional Justice, Accountability, Reconciliation and Healing'.
6. Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace of 24 November 2016 between the Colombian government and the FARC-EP which creates a 'Comprehensive System for Truth, Justice, Reparations and Non-Recurrence'.

because of an armed conflict or authoritarian regime.⁷ This process may include judicial and non-judicial mechanisms and involves not only legal aspects but also political, sociological, economic, and ethical aspects, although here it will be analysed from a legal perspective. While recognizing that each transition is unique and needs to address local needs, it is essential to adopt a holistic transitional justice strategy, including a combination of different transitional justice mechanisms.⁸

At the international level, two relevant instruments developed by the United Nations (UN) in 2005 establish international standards on transitional justice. First is the set of Principles against Impunity, which establish general obligations of states to adopt effective measures to fight against impunity and recognize the right to truth, to justice, reparation and guarantees of non-repetition.⁹ Second is the set of Basic Principles and Guidelines on Reparations adopted by the UN General Assembly, which define the notion of 'victim' and present the different mechanisms and types of reparation, with a clear victim-centred approach.¹⁰ These international standards, although not legally binding, guide states in transition and impose limits related to the fight against impunity.

In Ukraine many efforts at domestic and international level focus on accountability for atrocity crimes and the need to create special courts to investigate and prosecute serious human rights violations. Prosecuting those responsible contributes to strengthening the rule of law by confirming that the perpetrators do not go unpunished. However, these measures must also be accompanied by other mechanisms, such as truth-seeking initiatives, to address the root causes of the armed conflict and to search for the disappeared persons, the establishment of reparations mechanisms with a victim-centred approach, and guarantees of non-repetition measures to prevent future violations of Ukraine's sovereignty and territorial integrity.

1. Truth-seeking measures

The right to truth is an autonomous and inalienable right, related to the duty of the state to protect and guarantee human rights, carry out effective investigations, and guarantee effective remedies and reparation.¹¹ The right to know the truth is generally invoked in a context of serious human rights violations and has an individual

7. Juan E Méndez, 'Accountability for Past Abuses' (2017) 1 *Genocide and Human Rights* 429.
8. UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, UN Doc. S/2004/616, 23 August 2004, para. 26.
9. UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.
10. UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147, 16 December 2005.
11. Dermot Groome, 'The Right to Truth in the Fight against Impunity' (2011) 29 *Berkeley Journal of International Law* 175 <<http://scholarship.law.berkeley.edu/bjil/vol29/iss1/5>> accessed 18 March 2023.

and collective dimension. In the Ukrainian peace process, it could be promoted through two types of mechanisms: a truth commission and a special unit for disappeared persons.

Truth commission

The most common non-judicial transitional justice mechanism is the establishment of a truth commission. Hayner defines a truth commission as a mechanism that deals with the past, investigates a pattern of abuses over a certain period of time, is of temporary character, engages broadly with the affected population and is officially authorised by the state.¹² The first truth commission for the search of the disappeared people was established in Uganda in 1974. Since then, more than 50 truth commissions have been created, mainly in Latin America and Africa, among them the well-known truth commission of Argentina¹³ and the Truth and Reconciliation Commission of South Africa.¹⁴ One of the most recent and innovative truth commission has been the one set up in Colombia to deal with mass atrocities committed during the internal armed conflict with the *guerrilla* FARC-EP which lasted more than 50 years.¹⁵

In the case of Ukraine, a truth commission could be created with a mandate to study not only the atrocities committed from the Russian invasion in February 2022, but also those in the ongoing armed conflict in the Donbas region since 2014. Some elements would need consideration. The truth commission should be based on a prior and broad public consultation with civil society, human rights organisations, victims and survivors. The independence, impartiality, and competence of its members must be ensured, considering gender and geographic representativity. The ambit of its work should be wide, to address all human rights and humanitarian law violations, including not only civil and political rights, but also economic, social and cultural rights, and paying particular attention to the experience of women, displaced persons and other vulnerable groups. Throughout its work, the commission should establish specific guarantees for the victims to avoid re-traumatisation. The mandate of the truth commission could go further by including the human rights violations occurred in the soviet and post-soviet era. The mandate and functions of the truth commission could be set out in the peace settlement or alternatively, the settlement may include only the general terms of the mechanism

and leave the details of the mandate to be defined later, through the adoption of national legislation.¹⁶

The advantages of a truth commission for Ukraine would be that it could go beyond the mere documentation of the facts and analyse why human rights violations occurred and what should be done to prevent recurrence of these atrocities in the future. The work of a truth commission can significantly contribute to the truth and official recognition of the harm suffered by the victims in the context of the armed conflict. Existing institutions like the Ukrainian Institute of National Remembrance or similar entities can work on initiatives to preserve the collective memory and prevent revisionist and denial arguments.

But to be effective and contribute to reconciliation, the truth commission must include all parties of the armed conflict to avoid exacerbating the ideological divide between Ukrainians and Ukraine and Russia.¹⁷ The truth commission must also have sufficient resources to ensure its independence and to be able to perform its mandate. Finally, institutional support is crucial to fully implement the truth commission's recommendations once the final report is out.

Special Unit for Disappeared Persons

The UN has documented 270 cases of arbitrary detention and enforced disappearance in Ukraine between 24 February and 15 May 2022.¹⁸ Ukraine's police registered more than 9.000 missing persons since the Russia's invasion in 2022¹⁹ but figures could be higher if we include disappearances in the context of the ongoing armed conflict since 2014. The suffering of relatives who don't know the fate and whereabouts of their loved ones amounts to inhumane treatment under the international human rights mechanisms.²⁰ Addressing enforced disappearances can contribute to peace as it alleviates this suffering and contributes to the satisfaction of the rights to truth and reparation. Therefore, it is important to deal with enforced disappearances, not only from a humanitarian perspective, but also from a judicial perspective, through a quick and effective investigation of the facts, prosecution of those responsible, and comprehensive reparation for victims.²¹

12. Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Second Edi, Routledge 2011) at 8.

13. National Commission on the Disappeared (CONADEP), Report Never Again (*Nunca Más*), 1984. More information at: <https://www.usip.org/publications/1983/12/truth-commission-argentina>

14. South African Truth and Reconciliation Commission (TRC), set up by the Government of National Unity to help deal with what happened under apartheid. More information at: <https://www.justice.gov.za/trc/>

15. Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, established in 2017 to deal with atrocities committed during the internal armed conflict with the *guerrilla* FARC-EP, which released the report in July 2022. More information at: <https://comisiondelaverdad.co/>

16. Hayner, n (12)

17. Ilya Nuzov, 'The Dynamics of Collective Memory in Ukraine Crisis: A Transitional Justice Perspective' (2017) 11 International Journal of Transitional Justice 132.

18. OHCHR, 'Ukraine: High Commissioner Updates Human Rights Council | OHCHR' (Geneva, 5 July 2022) <<https://www.ohchr.org/en/statements/2022/07/ukraine-high-commissioner-updates-human-rights-council>> accessed 18 March 2023.

19. Council of Europe Commissioner for Human Rights, *Memorandum on the human rights consequences of the war in Ukraine*, 8 July 2022.

20. Marthe LOT Vermeulen, 'Living beyond Death': Torture or Other Ill-Treatment Claims in Enforced Disappearances Cases' (2008) 1 *Inter-Am. & Eur. Hum. Rts. & Eur. Hum. Rts* 159.

21. Elisenda Calvet Martínez, *Desapariciones Forzadas y Justicia Transicional* (Tirant lo Blanch 2018).

This mechanism has been used in other peace processes in the Balkans,²² Nepal²³ and Colombia.²⁴

A peace agreement for the Ukrainian conflict could create a special unit or commission for disappeared persons. The mandate would be to determine the fate and whereabouts of the disappeared and, in case of death, to return the remains to relatives so that they can bury them according to their traditions and beliefs and mourn the death of their loved ones. This mechanism could coordinate its work with the International Commission on Missing Persons, which currently has a program supported by the EU, Canada, Germany, and US, to locate and identify the missing and the disappeared from the war in Ukraine.²⁵

2. Accountability Measures: Fighting against Impunity

States have an obligation to investigate serious human rights violations promptly and effectively according to international law. To guarantee the right to justice, it is important to adopt a victim-centred approach and ensure the right to an effective remedy. At the same time, investigations should be conducted by independent and impartial bodies and prosecute crimes committed by all parties in the armed conflict. It is also relevant to adopt a gendered approach because conflict-related sexual violence crimes frequently remain invisible, perpetuating impunity.²⁶

Amnesty Laws

The adoption of amnesty laws is probably one of the most controversial aspects of negotiating a peace settlement. Some consider amnesty laws to be an obstacle for justice, while others consider amnesty measures essential for a sustainable peace. In international law, amnesty laws are not prohibited, but they cannot prevent the investigation and prosecution of serious human rights violations such as war crimes, crimes against humanity or genocide. Therefore, blanket or general amnesties are not accepted under international law as they contribute to the impunity of atrocity crimes.²⁷

In the context of Ukraine, the Minsk Agreement I (2014) and Minsk Agreement II (2015) included an amnesty clause by establishing the adoption of a 'law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the

Donetsk and Lugansk regions of Ukraine'. While these provisions do not necessarily violate international law, a future peace settlement, especially if UN sponsored, should expressly exclude any type of amnesty or pardon for persons responsible for atrocity crimes that would prevent their investigation and prosecution. If amnesty is considered necessary to promote peace and reconciliation, it has to be as limited as possible by, for example, excluding the 'most responsible' and the most serious crimes, and not simply providing immunity for certain groups of individuals.²⁸

Coordination Mechanism to Document Atrocity Crimes

Documentation is a vital component of transitional justice. It paves the way for accountability for perpetrators, reparation for victims, memorialization, and institutional reforms that help prevent the recurrence of serious human rights violations. It also contributes to a clearer narrative and helps survivors deal with the aftermath of the conflict. Historically, transitional justice processes have been delayed, evidence destroyed, and witnesses have died. As we face unprecedented efforts to document atrocities occurring in Ukraine, it is important to stress the need to avoid re-traumatization of victims and duplication of evidence.

While states have primary responsibility to prosecute perpetrators of atrocity crimes, the participation and support of the international community can be important to prevent impunity. In the context of the conflict in Ukraine, there is concerted effort to investigate these crimes from different jurisdictions. At the state level, the Ukrainian authorities have opened more than 71.000 investigations of large-scale war crimes and 276 individuals have been charged.²⁹ Other states, such as Estonia, France, Germany, Latvia, Lithuania, Norway, Poland, Slovakia, Spain, Sweden and Switzerland have initiated or stated the interest in initiating criminal investigations into war crimes and crimes against humanity committed in the context of the war in Ukraine, based on the universal jurisdiction principle.³⁰

At the international level, the UN Human Rights Council has created an Independent International Commission of Inquiry on Ukraine (IICIU) to investigate violations of human rights and international humanitarian law in the context of the aggression against Ukraine.³¹ In addition, the International Criminal Court (ICC) has been investigating

22. ICMP, 'ICMP International Commission on Missing Persons' <<https://www.icmp.int/>> accessed 18 March 2023.

23. CIEDP, 'Commission of Investigation on Enforced Disappeared Persons' set up based on the 2006 Peace Agreements between the government and Maoist forces <<https://ciedp.gov.np/en/home/>> accessed 18 March 2023.

24. UBPD, 'UBPD - Unidad de Búsqueda de Personas Dadas Por Desaparecidas' <<https://ubpdbusquedadesaparecidos.co/>> accessed 18 March 2023.

25. ICMP, 'How the International Commission on Missing Persons Works in Ukraine' (2022) <<https://www.icmp.int/news/icmp-dg-op-ed-how-the-international-commission-on-missing-persons-works-in-ukraine/>> accessed 18 March 2023.

26. UN Security Council meeting, 'Sexual Violence 'Most Hidden Crime' Being Committed against Ukrainians, Civil Society Representative Tells Security Council | UN Press' (2022) <<https://press.un.org/en/2022/sc14926.doc.htm>> accessed 18 March 2023.

27. UN Secretary-General, (n 8)

28. L Mallinder, 'Can Amnesties and International Justice Be Reconciled?' (2007) 1 International Journal of Transitional Justice 208.

29. Stephanie Van den Berg and Anthony Deutsch, 'Explainer: How Are War Crimes in Ukraine Being Investigated?', Reuters (2023) <<https://www.reuters.com/world/europe/how-are-war-crimes-ukraine-being-investigated-2023-02-23/>> accessed 18 March 2023.

30. Yvonne M Dutton, 'Prosecuting Atrocities Committed in Ukraine: A New Era for Universal Jurisdiction?' (2022) Case Western Reserve Journal of International Law <<https://papers.ssrn.com/abstract=4235676>> accessed 18 March 2023.

31. Human Rights Council, *Situation of human rights in Ukraine stemming from the Russian Aggression*, Resolution 49/1, UN Doc. A/HRC/RES/49/1, 3 March 2022.

past and present allegations of war crimes, crimes against humanity or genocide committed on Ukrainian territory by any person from 21 November 2013 onwards.³² On 17 March 2023, the ICC issued two arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova for the unlawful deportation and transfer of Ukrainian children from occupied areas of Ukraine to the Russian Federation, which (if proven) constitute war crimes under the Rome Statute.³³ The international cooperation of the State Parties to the Rome Statute in the enforcement of the arrest warrants will be essential to proceed with future trials, as the ICC cannot judge *in absentia*. However, issues of immunity *ratione personae* may arise, as Putin is a Head of State in office. As experienced in the case of the ex-President of Sudan Omar al-Bashir, many difficulties arise when non-State parties and State parties to the Rome Statute are called on to detain Heads of State.³⁴ The fact that Putin and Lvova-Belova are nationals of a non-State party to the Rome Statute can also be a controversial issue, because some States, like the US, have strongly opposed the ICC's exercise of jurisdiction without a Security Council referral of the situation or the consent of the State concerned.³⁵ There may also be concerns regarding the impact of these arrest warrants and the opening of investigations by the ICC on an eventual peace settlement.

Moreover, the EU, the US and the UK have created the Atrocity Crimes Advisory Group for Ukraine to support the War Crimes Unit of the Office of the Prosecutor General of Ukraine.³⁶ At the same time, EU Member States, third countries and the ICC have joined the EU Joint Investigation Team (JIT) coordinated by Eurojust.³⁷ The JIT, composed of judges, prosecutors and law enforcement officials, is a mechanism of international criminal cooperation, in which Eurojust assists national investigating and prosecuting authorities who have initiated investigations into core international crimes in the context of the war in Ukraine.³⁸ In March 2023, Ukraine, ICC and EU created a coordination mechanism called the Dialogue Group on Accountability for Ukraine that will offer a platform to states, international organisations and civil society to

discuss and align national and international accountability initiatives regarding the crimes committed in Ukraine.

Creation of Specific Justice Mechanisms with an International Component

Since the investigation and prosecution of atrocity crimes is very complex and difficult, as they are often committed in a systematic manner, it may be necessary to establish a specific transitional justice mechanism to deal with these crimes with the support of the international community. There are different options on the table: the establishment of a hybrid criminal tribunal for the investigation and prosecution of atrocity crimes; the establishment of a hybrid prosecutor office to work together with the Ukrainian Prosecutor General Office; the establishment of an *ad hoc* criminal tribunal to investigate the crime of aggression, as the ICC does not have jurisdiction over this crime in the situation of Ukraine.³⁹

The main advantages of a hybrid court or prosecutor are that these mechanisms are composed of international and national personnel. The presence of international staff helps protect the mechanism from political interference and increases its independence. Working with national staff generates institutional capacity building and contributes to strengthening the national judicial system and rule of law.⁴⁰ One of the main drawbacks is the likely lack of judicial cooperation between Ukraine and Russia for the investigation and prosecution of atrocity crimes. If Russia refuses to engage with any of these mechanisms presented above, it will be very difficult to hold accountable those responsible.

Another important issue is what kind of perpetrators are going to be brought to justice (high, middle, or low-ranking officials) and the ability of these accountability mechanisms to charge based on command responsibility. Another question that arises is where should these mechanisms be established: in Ukraine where the crimes occurred or in a third country? While the Ukraine option is the best in terms of victims' access to justice and access to evidence, a mechanism outside of Ukraine could also be more independent and impartial, especially if it had jurisdiction over the crime of aggression.

Indeed, there has been strong advocacy in favour of the creation of a special criminal tribunal for aggression to prosecute President Putin and Russian high-ranking officials. However, there are a number of complications, such as the issue of the immunity of serving and former officials from prosecution, the high cost of establishing

32. ICC, 'Ukraine | International Criminal Court' <<https://www.icc-cpi.int/ukraine>> accessed 18 March 2023.

33. ICC, 'Statement by Prosecutor Karim A.A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova | International Criminal Court' (2023) <<https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>> accessed 18 March 2023.

34. Ntombizozuko Dyani-Mhango, 'South Africa's Dilemma: Immunity Laws, International Obligations, and the Visit by Sudan's President Omar Al Bashir' (2017) 26 *Washington International Law Journal* 535.

35. Miles Jackson, 'The ICC Arrest Warrants against Vladimir Putin and Maria Lvova-Belova. An Outline of Issues' (*EJIL: Talk!*, 2023) <<https://www.ejiltalk.org/the-icc-arrest-warrants-against-vladimir-putin-and-maria-lvova-belova-an-outline-of-issues/>> accessed 23 March 2023.

36. United States Department of State, 'Creation of Atrocity Crimes Advisory Group for Ukraine' (2023) <<https://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine/>> accessed 18 March 2023.

37. Eurojust, 'Eurojust and the War in Ukraine | Eurojust | European Union Agency for Criminal Justice Cooperation' (2023) <<https://www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine>> accessed 18 March 2023.

38. Julia Crauford, 'Ukraine, ICC and Eurojust: How Will That Work' *Justiceinfo.net* (2022) <<https://www.justiceinfo.net/en/91763-ukraine-icc-eurojust-how-will-that-work.html>> accessed 23 March 2023.

39. See the contribution to this volume by Federica D'Alessandra (page 54).

40. See for example the case of the International Commission against Impunity in Guatemala (CICIG), which acted as an international prosecutor office and worked together with the domestic prosecutors. See further Andrew Hudson and Alexandra W Taylor, 'The International Commission against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms' (2010) 8 *Journal of International Criminal Justice* 53.

a new *ad hoc* tribunal,⁴¹ and the question of selectivity of international criminal justice by prioritising criminal investigations efforts in the context of Ukraine and not in other similar contexts.⁴² Still, some steps have been taken with the creation in March 2023 of the Center for the Prosecution of the Crime of Aggression against Ukraine (ICPA), which will be based in The Hague and be part of the JIT coordinated by Eurojust.⁴³ The ICPA aims to collect evidence and prepare the prosecution for future trials, whether national or international, on the crime of aggression in the context of Ukraine.

3. Reparations and Guarantees of Non-Repetition

Societies in transition must address remedies for victims of serious human rights violations. To this end, the courts and, increasingly, truth commissions, have a fundamental role when it comes to recognizing a right to victims' reparation and in directing reparation measures. The UN Principles against Impunity recognises as a general principle that 'any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the state to make reparation and the possibility for the victim to seek redress from the perpetrator'. The victim is the essential focus, thus overcoming traditional conceptions of reparation centred on the relationship between state and perpetrator. This evolution is reflected in the UN Basic Principles and Guidelines on Reparations, which seeks to codify the norms and principles of protection of human rights from the perspective of the victim. Traditional reparations are framed within the framework of the international responsibility of states, in which the main subjects are the states, while international human rights law has developed an approach based on the victims and the right to an effective remedy and to obtain reparation. Both types of reparations can be addressed in a future settlement.

Reparations within the Framework of State Responsibility

Under international law, states have an obligation to repair the damage when they commit an internationally wrongful act. The Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARIO) adopted by the International Law Commission in 2001, provides in article 31(1) that '[t]he responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act'.⁴⁴ According to

the DARIO, which reflect customary international law, the damage caused includes both material and moral damage. The foundations for reparations were set out in the Chorzow Factory Case, in which the Permanent Court of International Justice determined that it is well-established in general international law that a state which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the damage caused by that act to the injured state.⁴⁵

Russia's invasion of Ukraine is an act of aggression which violates the principle of prohibition of the threat or use of force enshrined in the UN Charter. This principle constitutes a peremptory norm, which means that its breach not only affects Ukraine but the whole international community. Besides, the violations of international humanitarian law and international human rights law that occurred in the context of the armed conflict in Ukraine also entail international responsibility of the state parties in conflict.

There are different options to determine reparations within the framework of international responsibility of states. One possibility is to create a Russian-Ukraine Claims Tribunal, an International Mass Claim Commission, which is an *ad hoc* tribunal set up for resolving large-scale violations of international law arising from a conflict.⁴⁶ In the past four decades there have been only three such claims commissions: the Iran-United States Claims Tribunal established in 1981,⁴⁷ the United Nations Compensation Commission (UNCC), and the Eritrea-Ethiopia Claims Commission. The other option is to seek reparations through judicial proceedings, for instance, by instituting a claim before the International Court of Justice (ICJ). In the *Armed Activities case (Democratic Republic of the Congo (DRC) v. Uganda)*, the Court awarded to the DRC the compensation for damage on persons, properties and related to natural resources a total of US\$325 million.⁴⁸

The disadvantage of inter-state reparations mechanisms is that they do not always take into consideration or cover the victim's needs, since they are determined at the state level. The option of a Russia-Ukraine Claims Tribunal could be included in a future peace agreement, although it will much depend on how the armed conflict unfolds. One of the main problems will be how to get Russia to pay for the damage, as the freezing of sanctioned assets does not automatically mean that those assets can be seized and put towards a reparations scheme.⁴⁹

41. Kevin Jon Heller, 'Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea - *Opinio Juris*' (7 March 2022) <<https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>> accessed 18 March 2023.
42. 'The ICC at 20: Elusive Success, Double Standards and the "Ukraine Moment" - JusticeInfo. Net' <<https://www.justiceinfo.net/en/102866-icc-20-elusive-success-double-standards-ukraine-moment.html>> accessed 23 March 2023.
43. Oleksandra Drik, 'New Tribunal Announced to Prosecute Russian Crime of Aggression in Ukraine * Visegrad Insight' (8 March 2023) <<https://visegradinsight.eu/new-tribunal-announced-to-prosecute-russian-crime-of-aggression-in-ukraine/>> accessed 18 March 2023.
44. UN International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by General Assembly resolution 56/83 of 12 December 2001.

45. Permanent Court of International Justice, *The case concerning the factory at Chorzow*, Series A. - No. 9 July 26th, 1927
46. Lea Brilmayer, 'Understanding "IMCCs": Compensation and Closure in the Formation and Function of International Mass Claims Commissions' (2018) 43 *The Yale Journal of International Law* 274.
47. Iran-United States Claims Tribunal established in 1981 under the Algiers Accords, which also ended the hostage crisis at the US embassy in Tehran. <https://iusct.com/about/>
48. ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, decision of reparations of 9 February 2022.
49. See the contributions in this volume by Régis Bismuth (page 8), Anton Moiseienko (page 33) and Leanna Burnard & Mira Naseer (page 22).

Seeking a judicial process of reparation before the ICJ or another international court can be another option. Ukraine has already issued a claim against Russia on the grounds of the 1948 Genocide Convention and has requested that the ICJ adopt provisional measures to suspend the military operations of Russia that started on 24 February 2022.⁵⁰ One of the advantages of this strategy is that the ICJ has addressed in the past similar cases of serious human rights violations and adopted decisions on reparations. However, as Russia has rejected the ICJ's jurisdiction on the Allegations of Genocide Case issued by Ukraine, it may also reject the jurisdiction of the court for future settlement on reparations. Moreover, these proceedings can take a long time and often do not offer full redress to victims as they have a State-centric focus.

Victim-oriented Reparations

The UN Basic Principles and Guidelines on Reparations establish that full and effective reparation for the harm suffered must include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The capacity of existing domestic mechanisms to obtain reparation for victims is often limited, and individual reparations can be difficult to grant without financial support from the international community. In this context, collective reparations addressing the harm suffered at the community level can be a solution and can contribute to restorative justice. These collective reparations should be based on an inclusive approach, include moral reparation and recognition at the community level, and ensure victims access to public resources and services.

At the international level, one option is the establishment of a multilateral mechanism to deal with individual claims like the UN compensation Commission established in the aftermath of the Iraqi war of 1991.⁵¹ This mechanism was a subsidiary organ of the UN Security Council and was funded by the UN Compensation Fund, which received a percentage of proceeds from the export of Iraqi petroleum and petroleum products. Another possibility is the reparations awarded by the ICC in the cases under investigation in the context of the war in Ukraine. In this case, reparation will be linked to the prosecution of the perpetrators of the international crimes committed in the war in Ukraine and limited to the evidence of the harm established in the criminal proceeding by the Court. Eventually, the reparation could be covered by the Trust Fund for Victims.⁵²

At the domestic level, a national program of reparations can also be established by creating a specific mechanism with international financial support. Examples that illustrate the inclusion of reparation mechanisms in peace agreements are the 1996 Comprehensive Peace Agreement of Guatemala which established a 'State body responsible for public policy regarding compensation for and/or assistance to victims of human rights violations and present a compensation programme',⁵³ and the Sudan Peace Agreement of 2020 which includes a Compensation and Reparations Fund in Darfur and details its composition and functioning.⁵⁴

The inclusion of mechanisms to deal with reparations in a future peace settlement is essential and needs to adopt a victim-centred approach, providing for compensations, but also other forms of reparation. Reparation programs should especially focus on refugees, the return to their homes and restitution of their land and housing. International financial support will be crucial to help Ukraine recover from war and repair the damage suffered by its population. The establishment of a reparation's mechanism similar to the UN Compensation Commission seems unlikely as the UN Security Council is currently blocked by the Russian veto power. Eventually, this mechanism could be created by the by other UN bodies, like the General Assembly.

Guarantees of Non-repetition

Guarantees of non-repetition (GNR) include all measures that a state must adopt to reduce the likelihood of recurrence of serious violations of human rights.⁵⁵ The institutional reforms undertaken in transitional justice processes are understood as means to prevent this recurrence. Within the framework of the international responsibility of states, article 30 (b) of the DARIO provides that the state responsible for the internationally wrongful act must 'offer assurances and guarantees of non-repetition, if circumstances so require'.⁵⁶ The GNR aim at the restoration of confidence between the injured State and the State responsible for the internationally wrongful act.⁵⁷ The GNR are necessary when the injured state has a reason to believe that a return to the previous situations will not be

50. ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, 27 February 2022. <https://www.icj-cij.org/case/182>

51. Established in 1991 by the UN Security Council through Resolution 687(1991) to process claims and pay compensation for losses and damage suffered because of Iraq's invasion of Kuwait in 1990. <https://uncc.ch/compensation-fund>

52. The Trust Fund for Victims is not part of the ICC and was created in 2004 by the Assembly of State Parties of the Rome Statute. One of its functions is to implement the reparations ordered by the Court. See further: <https://www.icc-cpi.int/tfv>

53. 1996 Agreement on a Firm and Lasting Peace between the government of Guatemala and the URNG. Available at: <https://www.peaceagreements.org/view/254>

54. Juba Agreement For Peace In Sudan Between The Transitional Government of Sudan and the Parties to Peace Process, 30 October 2020. Available at: <https://www.peaceagreements.org/viewmasterdocument/2325>

55. A Mayer-Rieckh, 'Guarantees of Non-Recurrence. An Approximation' (2017) 39 *Human Rights Quarterly* 416.

56. In the ICJ *Lagrand* case, the US had detained two German nationals, who were tried and sentenced to death without having been informed of their rights, as is required under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations of 1963. Germany requested general and specific assurances and guarantees from the US as to the means of future compliance with the article 36 of the Vienna Convention, as it considered that apologies were not a sufficient measure of reparation. ICJ, *LaGrand Case (Germany v. United States of America)*, Judgment, 27 June 2001.

57. UN International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at p. 89, article 30 (9).

a sufficient measure to protect it from future harm. So, the main purpose of GNR is not just looking at past wrongs but to prevent future breaches of international law: they are forward-looking measures.⁵⁸ These measures are aimed at society as a whole, while truth, justice and reparation are rights that belong to victims and their families, and only ultimately to society.⁵⁹ In the context of the Russia-Ukraine war, a future settlement should include some type of GNR measures aimed at the prevention of future violation of Ukraine's sovereignty and to give assurance that its territorial integrity will be respected. The mere restoration of the situation before the invasion of Russia in 2022 is not enough as Ukraine already suffered the violation of its sovereignty with the *de facto* annexation of Crimea by Russia in 2014 and the ongoing conflict in the Donbas Region of Ukraine. Therefore, some positive measures will be required from the Russian side to guarantee the non-recurrence of the violation of these international obligations in relation to Ukraine.

Beyond the inter-state dimension of the conflict, it is difficult at this moment to foresee the GNR that could be included in a future peace settlement. Such measures normally focus on the security sector reform and the need for disarmament, demobilization, reinsertion, and reintegration of armed groups. In the context of the Russia-Ukraine war, these measures may include the guarantee of civilian control of military and security forces as well as intelligence agencies; human rights training for public officials and employees, military, security, police, intelligence, and judicial sectors, and vetting of public officials personally responsible for atrocity crimes. However, these programs, focused on the security sector most of the time, must not be carried out to the detriment of victims and survivors and need to make sure that vulnerable groups such as women, children, refugees and displaced people are not excluded.⁶⁰

58. Christian J Tamst, 'Recognizing Guarantees and Assurances of Non-Repetition: LaGrand and the Law of State Responsibility' (2002) 27 *The Yale Journal of International Law* 441.

59. Méndez (n 7).

60. Th Van Boven, 'Reparative Justice- Focus on Victims SIM Lecture 2007' (2007) 25 *Netherlands Quarterly of Human Rights* 723.

As GNR take time and imply institutional reforms which need broad consensus and public participation, they require more concerted efforts in comparison to other transitional justice mechanisms, such as truth commissions, which are temporary and have limited impact. The advantages of including GNR in the future peace settlement is that they help build trust not only between Russia and Ukraine, but also for the whole international community.

This being said, it is difficult to imagine what types of measures exactly Russia could commit to in order to ensure the non-repetition of the breaches of international law. All the more so that the levels of trust between Russia and Ukraine are understandably low.

4. Final remarks

Transitional justice measures do not only address past atrocities but are also forward-looking. They aim to prevent the recurrence of human rights violations by addressing the root causes of the armed conflict. There is no transitional justice template that states need to comply with, but studies show that the combination of non-judicial and judicial mechanisms contribute to the protection and respect of human rights.⁶¹

As the armed conflict in Ukraine is ongoing and atrocities continue to be committed systematically, it is important to keep documenting the human rights violations in a coordinated manner not only for accountability purposes, but also to know the truth of what happened and help determine the type and form of reparations. Different options have been presented in this contribution to serve as a guide for a future peace settlement. The inclusion of transitional justice issues in a peace agreement is important as it represents the commitment of the parties to the armed conflict to promptly address the atrocities that have occurred and places the victims and survivors at the center of the agreement.

61. Tricia Olsen, Leigh Payne and Andrew Reiter, 'The Justice Balance: When Transitional' (2010) 32 *Human Rights Quarterly*.



Alain Pellet · Emeritus Professor,
University Paris Nanterre and Former
Member and Chairperson, International
Law Commission

War in Ukraine: Mutation or Resilience of the Principles of the United Nations Charter?

It is surely no exaggeration to state that never since 1945 has the international legal order been confronted with existential threats as great as those that have accumulated since the beginning of the 2020s. Some are immediate, others medium- or long-term, but all are due—more or less directly—to the folly of men, the inability of politicians to assume their responsibilities and resist the sirens of nationalism and populism and, sometimes, the demons of their own greed. The Russian aggression against Ukraine is only one of many such threats—the most spectacular without doubt, but not necessarily the most perilous on the long run.

The noble ideals of 1919, 1928 or 1945 of ‘outlawing war’ have in no way eradicated armed conflicts, neither international nor internal.¹ Russia’s aggression against Ukraine, however spectacular and ubiquitous, is far from being unprecedented; the US and UK’s aggression against Iraq in 2003 is a recent and lamentable example.² The fact remains that never since 1945 have so many of the principles of the United Nations Charter been so cynically flouted by a great power; never since the Cuban Missile Crisis of 1962 has the threat of the use of nuclear weapons been so openly brandished, with the exception of North Korea, a loyal supporter of Russia; never since the Second World War has an armed conflict, albeit limited to the territory of a single state, had such harmful consequences for so many countries.

This has led to major changes in the content and ordering of international legal principles and rules—and many other changes are yet to come. But it is still difficult, if not impossible, to assess with certainty the direct implications of the war in Ukraine and the devastation wrought

1. By 2021, 46 States had experienced armed conflict since 1945, including three major conflicts and 19 high-intensity conflicts, according to the Stockholm International Peace Research Institute, *Sipri Yearbook 2022, Armaments, Disarmament and International Security*, 2.
2. Alain Pellet, ‘L’agression’, *Le Monde*, 22 March 2023.

by all the other crises that have revealed the flaws in the international legal order.

By launching its ‘special military operation’, the President of the Russian Federation violated almost all the principles set forth in Article 2 of the United Nations Charter.³

There is no doubt that Russia violated the principle embodied in paragraph 4, which enjoins members to 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 principle allows for only two exceptions: a decision of the Security Council under Chapter VII of the Charter authorizing the use of armed force, which is obviously out of the question in the present circumstances, or a situation of self-defense, contemplated in Article 51. Invoked by President Putin, this circumstance cannot be upheld even if Russia formally complied with the procedural obligation to ‘report [...] to the Security Council’ the measures taken in the exercise of this ‘inherent right’ by sharing the speech of the Russian President delivered in the early hours of 24 February before the start of the ‘special military operation’...⁴ On the merits, the fanciful grounds advanced, without the slightest proof of alleged preparations for aggression by Ukraine and NATO against Russia, cannot deceive, even if one were to admit that preventive or ‘preemptive’ self-defence could be lawful, which is highly doubtful.⁵ The United Nations General Assembly made no mistake and, in a resolution adopted overwhelmingly on 2 March 2022 deplored ‘in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter’.⁶

Russia’s self-proclaimed annexation of Crimea in 2014, followed by the Luhansk and Donetsk oblasts and the Zaporizhzhia and Kherson regions in September 2022, was a clear and serious violation of the principle of territorial integrity of States, albeit in different ways. In the case of Crimea, which became part of Ukraine in 1954, Russia did not openly use armed force despite the massive infiltration of special units which, without bloodshed or resistance from Ukrainian troops, took control of the main political centers and civilian and military infrastructure of Crimea, as a prelude to an irregular referendum. While it is a clear violation of international law, this operation could not, however, be qualified as an aggression,⁷ unlike the

3. See Robert Badinter, Bruno Cotte and Alain Pellet, *Vladimir Poutine – L’accusation* (Fayard 2023) 48-59.
4. Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General.
5. See Olivier Corten, ‘La légitime défense préventive: un oxymore?’, *Médiathèque de droit international de l’ONU*, 24 March 2017; Mathias Forteau, Alina Miron and Alain Pellet, *Droit international public* (9th edn, LGDJ 2022) 1285, para 893.
6. United Nations General Assembly Resolution ES-11/1, passed with 141 voting in favour, 5 against, and 35 abstentions.
7. See Alain Pellet, ‘Crimée: une invasion, un référendum, une sécession?’, *Le Monde*, 14 March 2014.

annexation of Donbass, which was preceded by a military, political and economic ‘effective control’ by Russia since May 2014⁸ and violent fighting with the Ukrainian army. This annexation is further a clear violation of the Minsk II Agreement of 12 February 2015. In both cases, the infringement of Ukraine’s territorial integrity—which should be assessed by reference to its territory at the date of independence⁹—is blatant and has been condemned by strong UN General Assembly resolutions recalling that ‘no territorial acquisition resulting from the threat or use of force shall be recognized as legal’.¹⁰

By challenging the legitimacy of Ukraine’s very existence as an ‘artificially created’ State, the Russian President is denying the sovereign equality of the Members of the United Nations, the first of the principles proclaimed by the Charter.¹¹ At the same time, Russia violated both the principle of equal rights and self-determination of peoples¹² and the principle of non-intervention in the internal affairs of States. In his speech of 24 February 2022, and in many others, the Russian head of State proclaimed his aim to ‘demilitarize and denazify Ukraine’ and requested its neutrality.¹³ Paraphrasing a dictum of the International Court of Justice (ICJ) in its famous 1986 ruling in the *Nicaragua v. United States* case: ‘In any event, while [Russia] might form its own appraisal of the situation as to respect for human rights in [Ukraine], the use of force could not be the appropriate method to monitor or ensure such respect’¹⁴; furthermore, ‘in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception’.¹⁵

By resorting to massive use of armed force to settle disputes with Ukraine—largely based on imaginary grounds—Russia has disregarded the principle set out in Articles 2(3) and 33 of the Charter that ‘[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and

justice, are not endangered’. In his speech of 24 February 2022, Putin blamed Ukraine: ‘For eight years, endlessly long eight years, we have done everything possible to resolve the situation by peaceful, political means. All in vain.’¹⁶ On the eve of the attack, he had declared himself ‘always open to direct and honest dialogue in order to find diplomatic solutions to the most complex problems’, but adding: ‘However, the interests and security of our citizens are non-negotiable for us’.¹⁷ He and other senior Russian politicians have since repeated this ‘offer’ with more or less specific conditions (but always demanding the demilitarization, neutralization and ‘denazification’ of Ukraine and the acknowledgement of Russia’s territorial gains).¹⁸ This empties negotiations of all meaning; as the ICJ insisted, ‘the concept of ‘negotiations’ [...] requires—at the very least—a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute’¹⁹ and if there are discussions, ‘[the parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.’²⁰

More generally, the result of all these violations is also a clear violation of the principle set out in Article 2, paragraph 2, of the Charter that Members of the United Nations ‘shall fulfil in good faith the obligations assumed by them in accordance with the present Charter’. While the principle of good faith, which is ‘one of the basic principles governing the creation and performance of legal obligations [...] is not in itself a source of obligation where none would otherwise exist’,²¹ all the other breaches attributable to Russia are characterized by manifest bad faith.

The result is a systematic undermining of one of the founding principles of international law, that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’ (*Pacta sunt servanda*)²²—for the UN Charter is not the only treaty flouted by Russia. The major conventions on ‘international humanitarian law’, in particular the Geneva Conventions

8. ECHR (Grand Chamber) *Ukraine and The Netherlands v. Russia* (applications nos 8019/16, 43800/14 and 28525/20) (Eastern Ukraine and flight MH17 cases), 30 November 2022, para 695.

9. See Yugoslavia Arbitration Commission, opinion n 2, 11 January 1992, *RGDIP* 1992, 266; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019* 95, paras 153-162.

10. See resolution 68/262 of 27 March 2014 and resolution ES-11-4 of 12 October 2022 ‘Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations’, which refer notably to resolution 2625(XV) of 24 October 1970 ‘The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States’.

11. Article 2, para 1 of the Charter.

12. Articles 1, para 2 and 55 of the Charter.

13. For a more recent speech by Vladimir Putin in this sense, see ‘Ukraine War: Russia Demands Annexations Recognised Before Talks’, *BBC News*, 2 December 2022; see also the 5 January 2023 telephone conversation between Vladimir Putin and Turkey’s President Recep Tayyip Erdoğan, <http://www.en.kremlin.ru/events/president/news/70770>.

14. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, at 134, para 268.

15. *Ibid.* at 135, para 269.

16. Speech cited above (n 4).

17. See ‘Congratulations on the occasion of Defender of the Fatherland Day’, 23 February 2022, <http://www.en.kremlin.ru/events/president/news/70575>.

18. See especially ‘Conversation with President of France Emmanuel Macron’, 28 February 2022 (<http://www.en.kremlin.ru/events/president/news/67850>) and ‘Telephone Conversation with Federal Chancellor of Germany Olaf Scholz’, 4 March 2022 (<http://en.kremlin.ru/events/president/news/69971>); see more recently ‘Ukraine War: Russia Demands Annexations Recognised Before Talks’, *BBC News*, 2 December 2022 (<https://www.bbc.co.uk/news/world-europe-63832151>); ‘Telephone conversation with President of the Republic of Turkey Recep Tayyip Erdogan’, 5 January 2023 (<http://www.en.kremlin.ru/events/president/news/70328/print>); ‘Concert marking the anniversary of Crimea’s reunification with Russia’, 18 March 2022 (<http://www.en.kremlin.ru/events/president/transcripts/68016>).

19. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011* 70, para 157 (*italics added*).

20. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969* 3, para 85.

21. *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988* 69, para 94 (*citation omitted*).

22. Article 26 of the Vienna Convention on the Law of Treaties (1969).

of 1949 (whose provisions largely reflect customary rules), are also systematically violated, justifying indictment not only of those who commit them directly on the ground but also of the head of State and other Russian decision-makers, for war crimes or crimes against humanity, as evidenced by the recent arrest warrants issued by the International Criminal Court for? against? Vladimir Putin and Maria Lvova-Belova, the Russian Children's Rights Commissioner, for their involvement in the deportation and transfer to Russia of Ukrainian children.²³ Other more specific treaties are also violated by Russia—for example the Minsk Agreements of 2014 and 2015, and the Budapest Memorandum of 5 December 1994, in which, together with the United States and the United Kingdom, Russia undertook to 'respect the independence and sovereignty and the existing borders of Ukraine' and 'reaffirm[ed] [its] obligation to refrain from the threat or the use of force against the territorial integrity or political independence of Ukraine, and that none of [its] weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United Nations.'²⁴ This may be little more than a reaffirmation of pre-existing obligations, but their restatement through commitments that are specific to the two States further reinforces their binding nature; and, in the light of the war in Ukraine initiated by Russia, its commitment under Article 4 of the Memorandum 'to seek immediate United Nations Security Council action to provide assistance to Ukraine, as a non-nuclear-weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used' sounds bitterly ironic. Moreover, Vladimir Putin's repeated threats about the possible use of such a weapon²⁵ are contrary to both Article 5 of the Memorandum and the Non-Proliferation Treaty itself, which also prohibits in particularly broad and categorical terms the direct or indirect transfer of nuclear weapons or 'other nuclear explosive devices' 'to any recipient whatsoever'²⁶; the announced deployment of 'tactical' nuclear weapons in Belarus²⁷ would be a further violation.

Rarely, with the exception of Nazi Germany in its time, has a State violated so many principles and rules of international law in such a short period of time. There is no doubt that this is a deliberate policy, part of the Russian

dictator's desire to challenge the post-war international legal order—while pretending to aim to restore it to its original purity. Already in 2017, during the enlarged meeting of the Council of the Commonwealth of Independent States (made up of the heads of the States that emerged from the former Soviet Union), Putin had pleaded for 'the construction of a just international order based on the generally accepted principles of international law'.²⁸ More recently, as his foreign minister was castigating the 'rule-based order of the West'²⁹, Putin accused the United States of having 'dismantled the post-World War II architecture of international relations'³⁰.

There can be no doubt left that the accumulation of violations of the most established norms of international law by a major State—even if it is no longer a major power—with the (albeit cautious) support of China, can in itself contribute to undermining these principles. At their meeting in Moscow on 20-21 March 2023, the Chinese and Russian Presidents made no secret of their desire to radically change the international legal order, as stated by the former: 'Now there are changes that haven't happened in 100 years. When we are together, we drive these changes.'³¹ But are changes really happening? That remains unclear.

What is clear is that several factors reinforce the challenges raised to the international order, as imagined in 1945 and strengthened by the fall of the Berlin wall in 1989. Western States, which were the promoters and main beneficiaries of the international order, have themselves cynically violated the rules they claimed to impose on the rest of the world, particularly with regard to the protection of human rights and even the use of armed force; there is no doubt that, among other causes, the addition of Russian violations to the repeated breaches committed by Western countries weakens these principles. Moreover, the bipolar world in which these principles were adopted and flourished has largely been replaced by an unequal multipolarity and what has been called 'polylateralism', characterized by the role played in the definition and implementation of the rules applicable to transnational activities by a wide variety of stakeholders—states, of course, but also, to the detriment of the traditional monopoly of the latter, civil society and transnational companies.³² Finally, in this new environment, Russia is far from being isolated; the same challenges are raised by a large number of the States of the 'global south' and by China, which, while presenting itself as an alternative to the 'West-South' partnership and the champion of multilateralism, is working to 'confiscate' the multilateral order, thus sparking a new 'Cold War'—another

23. ICC, 'ICC Arrest warrants in the situation of Ukraine: Statement by President Piotr Hofmański', 17 March 2023 (<https://www.youtube.com/watch?v=FbKhCAaRlfc>); ICC, 'Situation en Ukraine: les juges de la C.P.I. délivrent des mandats d'arrêt contre Vladimir Vladimirovitch Poutine et Maria Alekseevna Lvova-Belova', press release, 17 March 2023.
24. Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Budapest, 5 December 1994
25. See 'Address by the President of the Russian Federation', 21 February 2022 (<http://www.en.kremlin.ru/events/president/news/67828>); see also Resolution adopted by the General Assembly on 2 March 2022 'Aggression against Ukraine', A/RES/ES-11/1. In the same vein, see the press release on the suspension of the New START Treaty by Russia on 28 February 2023.
26. Article 1 of the Treaty on the Non-Proliferation of Nuclear Weapons of 22 April 1970.
27. See BBC, 'Putin: Russia to station nuclear weapons in Belarus', 26 March 2023 (<https://www.bbc.com/news/world-europe-65077687>).

28. www.en.kremlin.ru/catalog/persons/215/events/55818.

29. See 'Russia had 'no choice' but to launch 'special military operation' in Ukraine, Lavrov tells UN', *UN News*, 24 September 2022 (<https://news.un.org/en/story/2022/09/1127881>).

30. Presidential Address to Federal Assembly, 21 February 2023 (<http://www.en.kremlin.ru/events/president/transcripts/messages/70565>).

31. Dan Peleschuk and Sergiy Chalyl, 'Russia hits Ukraine with missiles, drones as 'dear friend' Xi departs', *Reuters*, 22 March 2023.

32. See Geoffrey Wiseman, 'Polylateralism' and New Modes of Global Dialogue' (Centre for the Study of Diplomacy Leicester 1999) 26; Pascal Lamy, 'Answering the crisis of multilateralism with polylateralism', *Revue européenne de droit* 2021, 26-29.

way of undermining the international order, undoubtedly more subtle and effective than Putin's brutality.

This being said, in a way, the aggression against Ukraine has contributed, at least in the short term, not only to closing the ranks of the West and to strengthening the EU and NATO, but also, from a legal perspective, to the solemn restatement of the principles transgressed by Russia, notably by the United Nations General Assembly in several resolutions adopted during its eleventh emergency special session.³³ Russia, moreover, was careful not to call these principles explicitly into question and, on the contrary, invoked them with aplomb, even pushing cynicism to the point of organising, on 24 April 2023, a debate in the Security Council chaired by the Russian Minister of Foreign Affairs Sergey Lavrov, dedicated to 'Effective Multilateralism through the Defence of the Principles of the UN Charter'. And, human rights aside—which is not negligible—China also constantly refers to them, attesting to their vitality.

Of course—parodying a famous witticism once applied to Article 2, paragraph 4, of the Charter—the reports of

death of the Charter's principles are greatly exaggerated,³⁴ although the war in Ukraine highlights their frailty. The values of peace that they embody remain as relevant as ever, and there is no reason to give in to calls for relativism in the field of human rights, despite the virulent criticisms of the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and, above all, their—albeit uncertain—implementation mechanisms. The fact remains that the long-term resilience of the principles proclaimed in 1945 would be better assured if they were adapted and supplemented to meet the demands of today's world. A thorough 'upgrade' is needed—first and foremost to make room for the imperative of rescuing the planet, which is not mentioned in the Charter, initially conceived as a response to the traumas caused by the war and Nazi barbarism. Without this *aggiornamento*, the principles it sets out, frozen in an anachronistic wording, will be open to criticism from their detractors and will be unable to respond to the terrible challenges of our time.

33. See in particular resolution ES-11/4 of 12 October 2022, 'Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations'.

34. Louis Henkin, 'The Reports of Death of Article 2(4) are Greatly Exaggerated', *American Journal of International Law*, 1971, 544-548, responding to Thomas M Franck, 'Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States', *AJIL*, 1970, 809-837.



Anne Peters · Director at the Max Planck Institute for Comparative Public Law and International Law Heidelberg (Germany)

The War in Ukraine and the Curtailment of the Veto in the Security Council

Russia repeatedly vetoed draft Security Council resolutions that concerned its military activities in the neighbouring state of Ukraine, both in 2014 and in 2022.¹ In this context, after the Russian full-blown invasion, the US ambassador to the United Nations stated that ‘any Permanent Member that exercises the veto to defend its own acts of aggression loses moral authority’.² And in the General Assembly debate on remedy and reparation for the war damage inflicted upon Ukraine, the Ukrainian delegate highlighted that the emergency special session of the General Assembly, within the Uniting for Peace framework, was ‘designed for instances just like this, when a country like Russia abuses its veto power’.³

This paper traces how two recent procedural developments (the so-called veto-initiative and a US-American self-commitment), triggered by the war in Ukraine, contribute to eroding the lawfulness of a vote in the Security Council which shields manifestly illegal own conduct such as aggression. Importantly, this erosion does not call into question the legal right of the permanent members of the Security Council to use the veto at their discretion, to further their own interests, even if in tension with their responsibility to contribute to maintaining world peace. But it confirms what recent empirical, both large N-analysis and case studies tracing the decision-making

1. In 2014: Draft SC resolution (UN Doc. S/2014/189) of 15 March 2014; Russian veto in meeting of 15 March 2014 (S/PV.7138, 3). In 2022: Draft SC resolution (UN Doc. S/2022/155) of 25 February 2022; vetoed by Russia in meeting of 25 February 2022 (S/PV.8979, 6). Draft SC resolution ‘Maintenance of peace and security of Ukraine’ (UN Doc. S/2022/720) of 30 September 2022; vetoed by Russia in meeting of 30 September 2022 (S/PV.9143, 4).

2. Remarks by Ambassador Linda Thomas-Greenfield on the Future of the United Nations of 8 September 2022 (<https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-on-the-future-of-the-united-nations/>).

3. General Assembly, Eleventh Emergency Special session, 15th plenary meeting Monday, 14 November 2022, 10am, Official Records, A/ES-11/PV.15, 2. See also the ‘Statement of the Foreign Ministry of Ukraine on the illegitimacy of the Russian Federation’s presence in the UN Security Council and in the United Nations as a Whole’ of 26 December 2022, listing examples of Russian ‘abuse of the veto power’.

processes in the Security Council, have shown: ‘[t]he powerful hold the veto, but they do not hold sway over the entire process. [...] The rules of the institution have an impact.’ The Security Council is not a simple ‘pass-through for powerful states’.⁴ The paper concludes that reformed working methods are a suitable vehicle to contain the veto and thereby to improve the effectiveness and legitimacy of Security Council.

The anachronism of the veto

The composition of the Council and the veto freeze a historic moment by privileging states which had been powerful in 1945, but which may no longer be equally important on a world scale, especially in comparison to non-European states that are economic and political giants like Brazil or India. In 1945, the voting scheme for the projected Security Council (including the requirement of a ‘concurring vote’ of the permanent members) was conceived at a conference among the four victorious powers in Yalta in 1945, without participation of the rest. The ‘Yalta formula’ already foreshadows the text of what later became Art 27 of the UN Charter.⁵ The four sponsoring states made clear that there would be no world organisation without such a prerogative: The voting scheme was ‘essential’ to the new organisation.⁶ The veto was ‘a price to be paid for the creation of the UN’.⁷

In 1945, the Yalta formula was approved in a vote of 30 to 2, with 15 abstentions.⁸ A cynical view on this vote is that it only embellished the fact that the other states had to swallow the privileges of the Great Powers if they wanted to get what all sides wanted: a new world organisation through which peace and security could be maintained. However, the veto was accepted not only due to overwhelming military, political, and even economic power of the permanent members of the Security Council or some of them, but also because the other states had the normative expectation that this would be a guarantee

4. Susan Allen and Amy Yuen, *Bargaining in the Security Council: Setting the Global Agenda* (Oxford University Press 2022), 169.

5. Protocol of Proceedings at the Yalta Conference, Yalta (Crimea), 11 February 1945, C. ‘Voting’: ‘3. Decisions of the Security Council on all other matters should be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VIII, Section A and under the second sentence of paragraph 1 of Chapter VIII, Section C, a party to a dispute should abstain from voting.’ (emphases added).

6. Statement at San Francisco by the delegations of the four Sponsoring Governments (China, the UK, the USA, and the USSR) on ‘The Yalta Formula’ on Voting in the Security Council’, San Francisco, 8 June 1945, Sec. I. 9 and 10. Sec. I. 9.: ‘9. In view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred.’ Sec. I. 10: ‘For all these reasons, the four sponsoring Governments agreed on the Yalta formula and have presented it to this Conference as essential if an international organization is to be created through which all peace-loving nations can effectively discharge their common responsibilities for the maintenance of international peace and security.’ (emphasis added).

7. Niels Blokker, *Saving Succeeding Generations from the Scourge of War: The United Nations Security Council at 75* (Brill 2021), 73.

8. Francis Orlando Wilcox, ‘The Yalta Voting Formula’, *The American Political Science Review* 39 (1945), 943-956, at 950.

of peace and security. The four sponsoring powers of the Yalta formula (later joined by France) pledged, at least implicitly, to continue to safeguard world peace, as they had proven in World War II.

Security Council reform on the road to nowhere

Soon after the foundation of the United Nations, the political split of the world into two hostile blocks paralysed the Security Council until 1991. The period of overall Council activism since 1991 has meanwhile given way to a concentration of Council action against non-state actors in the fight against global terrorism, and to selectivity in the field of sanctions against states. The permanent members of the Security Council and their clients, ranging from Israel over North Korea to Syria, remain protected from any Council action. In addition, the Security Council suffers, as mentioned, from the increasingly obvious unfair veto privilege of the 'old' powers.

Against this background, the debate on reforms of the Security Council, including the veto, has been ongoing for the past 30 years.⁹ The objective of reforms have been two-fold, addressing both the problems of effectiveness and the problems of legitimacy of the Council. Effectiveness is hampered by blockade and undue passivity, while the legitimacy of the Council is undermined by its un-representativity, its intransparency, and by its selective action that is often perceived as applying double standards. Reform proposals have addressed notably the composition of the Council with the addition of new members in different categories (permanent and non-permanent) and the voting schemes. On the 'question of the veto', all proposals in the inter-state negotiations were summarised in a 2013 paper of an Advisory Group appointed by the President of the UN General Assembly.¹⁰ These proposals range from extension of a veto power to new members up to the complete abolition of the veto. They comprise ideas such as allowing potential new Security Council members a veto subject to a moratorium to use it for 15 years, or—on the contrary—to limit the use of the veto to chapter VII matters, not to allow its use for Council action aiming at preventing or ending genocide, or to require non-concurring votes (vetoes) by two permanent members to block Security Council action.

There was a real window of opportunity for Security Council reform from 1992 to 1997, but this opportunity was missed.¹¹ After further momentum between 1998 and 2008, the negotiations have been, as Bardo Fassbender

put it, 'on a road to nowhere'.¹² The political reasons for the deadlock are the national interests of states which all fear to lose something in comparison to the status quo.¹³ The legal difficulty is the requirement of a 2/3 majority of the members of the General Assembly and of a ratification by all five permanent members of the Security Council.¹⁴ This legal threshold would—in the present constellation—seem to constitute an unsurmountable obstacle against a formal revision of Art 27(3) of the Charter which embodies the veto. Therefore, the informal changes of the working methods and reforms 'below' the level of a formal Charter revision are crucial. On this level, the war in Ukraine has catalysed important developments.

The veto initiative of 26 April 2022

The Russian aggression pushed long-standing efforts to curtail the veto towards a procedural reform. Already in 1949, in its resolution 'Essentials of Peace', the General Assembly had called on the Security Council's permanent members '[t]o broaden progressively their cooperation and to exercise restraint in the use of the veto'.¹⁵ Fast-forward seventy years: on 26 April 2022, two months after the Russian invasion in Ukraine, the UN General Assembly adopted the so-called 'veto initiative'.¹⁶ This reform was co-sponsored by 83 states from every UN regional group, including the three Western permanent members of the Security Council. Under GA Resolution 262/76, the President of the General Assembly must 'convene a formal meeting of the General Assembly within 10 working days of the casting of a veto by one or more permanent members of the Security Council, to hold a debate on the situation as to which the veto was cast, provided that the Assembly does not meet in an emergency special session on the same situation'.¹⁷ The permanent member that cast the veto may speak first in the mandatory General Assembly debate.¹⁸ Moreover, the General Assembly 'invites' the Security Council 'to submit a special report on the use of the veto in question to the General Assembly at least 72 hours before the relevant discussion in the Assembly'.¹⁹ The resolution finally foresees a provisional agenda item entitled 'Use of the veto' for the next General Assembly.²⁰ In result, this important resolution establishes a standing mandate to publicly discuss and criticise each and every veto in the General Assembly, i.e. by all member states.

9. See from a legal perspective, Bardo Fassbender, *Key Documents on the Reform of the UN Security Council 1991-2019* (Brill Nijhoff 2020), 'Landmarks in the history of the Security Council reform debate', 15-35; from a political science perspective, Madeleine O Hosli and Thomas Dörfler, 'The United Nations Security Council: History, Current Composition, and Reform Proposals', in Madeleine Hosli and Joren Selleslaghs (eds) *The Changing Global Order* (Springer 2020), 299-320.

10. Non-paper, Annex to a letter from the President of the General Assembly, 10 December 2013 (reprinted in Fassbender (n 9), at 912).

11. Fassbender (n 9), 16.

12. *ibid.*, 26.

13. Hosli and Dörfler (n 9), 306.

14. Amendment under Art 108 or revision under Art 109(2) of the UN Charter.

15. UN GA Res 290 (IV) of 1 December 1949, para 10.

16. UN GA Res 76/262, 'Standing mandate for a General Assembly debate when a veto is cast in the Security Council' (UN Doc. A/RES/76/262) of 26 April 2022, adopted by consensus.

17. UN GA Res 76/262 (n 16), para 1.

18. *ibid.*, para 2.

19. *ibid.*, para 3. Such special reports are foreseen in Art 24(3) of the UN Charter.

20. *ibid.*, para 4.

The US-American self-commitment not to veto of 8 September 2022

The second procedural response to the Russian invasion is the United States' self-commitment to 'refrain from the use of the veto except in rare, extraordinary situations'.²¹

With this self-commitment of 8 September 2022, the United States roughly mirrors (even if not espousing them explicitly) the two major prior initiatives to curtail the use of the veto.²² The first was the code of conduct by the Accountability, Coherence and Transparency (ACT) Group that has been signed by 121 UN members, including the two permanent members France and UK. The signatories 'pledge in particular not to vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes, or to prevent such crimes'.²³

The other attempt to restrain the veto was the French-Mexican initiative, first launched by French state representatives in the press in 2013²⁴ and then tabled in the 70th General Assembly of 2015, as a 'Political statement on the suspension of the veto in case of mass atrocities'.²⁵ It proposes 'a collective and voluntary agreement among the permanent members of the Security Council to the effect that the permanent members would refrain from using the veto in case of mass atrocities.' This statement has been signed by 104 UN member states and two observers, but among the permanent members only by France.²⁶ Observers have explained the renunciation on the veto by France and the UK (which signed the ACT code of conduct mentioned above) as these two European middle powers' implicit acknowledgment that the exercise of their veto would be illegitimate.²⁷ Indeed, the French and British veto competence can no longer obviously be

justified by these states' military capacity to guarantee world peace. On the other hand, both states are nuclear powers, and they continue to project military force outside Europe. Moreover, the most recent self-commitment by the US cannot be taken as an admission of relative military weakness. Therefore, it should not be excluded that all three Western veto-powers are driven, *inter alia*, by the normative convictions about the impropriety of exercising the veto in situations of mass atrocities.

The two earlier initiatives were launched with the scenarios of Rwanda, Bosnia, and Myanmar in mind. They seek to foreclose the exercise of the veto in a situation of imminent or ongoing *core crimes* which are typically committed by non-state or para-state groups, often orchestrated by a state (not necessarily by a permanent member of the Security Council itself).

The situation of Ukraine since 2014 and more even since 2022 is different. Here a permanent member is itself committing an aggression, a crime that is not mentioned by the ACT-initiative and not normally understood to fall under 'mass atrocities' in terms of the French-Mexican initiative. However, there is an overlap between mass atrocities, war crimes, and aggression. It would seem that the ACT code and the French-Mexican voluntary agreement would *a fortiori* cover the situation that a state is *itself* committing these crimes and not only asked to prevent or stop another (non-state) actor from committing them.

In conclusion, all three 'Western' permanent members are now self-committed not to veto Security Council action against core crimes (arguably including their *own* crimes). The exact normative status of these self-commitments is not fully clear. They have not been framed as formally binding unilateral declarations. The headings such as 'code of conduct' and 'political statement' and 'remarks' rather point in the direction of 'pure' politics. Moreover, all commitments leave loopholes. The French-Mexican initiative has a carve-out for 'vital national interests', and the US 'remarks' leave out 'rare, extraordinary situations' that remain undefined.²⁸ But even these political commitments may over time (through consistent observance) acquire a soft legal quality. Their normative relevance is secured only by the reputational costs that a breach of the promise would entail. With these caveats, the three powers' commitments are faithful to the historic pledge of the veto powers. They bolster the legitimacy of the Security Council.

The veto initiative in practice

The veto initiative as implemented by the General Assembly in 2022 differs from the pledges just mentioned. It does *not* foresee a 'responsibility not to veto' as it has been called in scholarship,²⁹ but 'only' a mandatory

21. Ambassador Linda Thomas-Greenfield (n 2); comment by Raphael Schäfer, 'The Echo of Quiet Voices. Liechtenstein's Veto Initiative and the American Six Principles', EJIL: Talk! (10 October 2022).
22. See for a detailed analysis of the prior initiatives: Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (CUP 2020), 102-141. Trahan also recalls that the USA had already under the Obama administration proposed a veto restraint, a proposal which however petered out (*ibid* at 118-119).
23. Accountability, Coherence and Transparency (ACT) Group, Submission to the United Nations, 'Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes' of 23 October 2015, Annex I to the letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General (UN Doc. A/70/621-S/2015/978).
24. Statement by Mr. François Hollande, President of the Republic, 24 September 2013 (Opening of the 68th Session of the United Nations General Assembly (https://gadebate.un.org/sites/default/files/gastatements/68/FR_en.pdf); Laurent Fabius, Foreign Minister of France, 'A Call for Self-Restraint at the U.N.', New York Times of 4 October 2013 (<https://www.nytimes.com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html>).
25. 70th General Assembly of the United Nations, 'Political statement on the suspension of the veto in case of mass atrocities, presented by France and Mexico, open to signature to the members of the United Nations' (2015) (<https://www.global2p.org/resources/political-declaration-on-suspension-of-veto-powers-in-cases-of-mass-atrocities/>).
26. Signatory list, status of 13 July 2022 (not updated as of 1 April 2023), at: <https://www.global2p.org/resources/list-of-supporters-of-the-political-declaration-on-suspension-of-veto/>.
27. Hosli and Dörfner (n 9), 301; Fassbender (n 9), 33; Trahan (n 22), 138 fn. 182.

28. It would seem that the shielding of Israel's violations of international law by US vetoes cannot be continued under this exception.
29. Ariela Blätter and Paul D. Williams, 'The Responsibility Not to Veto', *Global Responsibility to Protect* 3 (2011), 301-322; Jean-Baptiste Jeangène Vilmer,

General Assembly debate. It operationalises ideas that had been formulated in prior scholarship. For example, Daniel Moeckli and Raffael Nicolas Fasel have elaborated the duty to give reasons in the Security Council.³⁰ Devika Hovell has drawn out the duties to notify, to inform, to consult, to give reasons, and to account, as part of the Security Council's fiduciary role.³¹ Anna Spain has expounded the Security Council's duty to decide in a *prima facie* Article 39 situation, and its duty to disclose, and to consult.³² Spain postulates a duty to decide that triggers the Council's duty to examine whether a threat or breach to peace is present. Next, a duty to disclose is prompted when the Council is unwilling or unable to decide (eg due to a veto): in that case, the Council must, according to Anna Spain, issue a public statement and provide justification why it has not decided.³³ Spain argued that this disclosure is a procedural matter in the sense of Art 27(2) of the UN Charter, and that therefore the publication of the statement cannot be prevented by a veto.³⁴ The reasoning is intriguing but it remains unclear whether the legal construct can be derived from the law as it stands. Along a similar line, the 'Elders Group' (an independent group of global leaders founded by Nelson Mandela in 2007)³⁵ had in 2015 tabled a proposal on 'Strengthening the United Nations', in which the Elders suggested that the five permanent members of the Security Council should pledge not to use or threaten to use their veto in situations of mass atrocities 'without explaining, clearly and in public, what alternative course of action they propose, as a credible and efficient way to protect the populations in question'.³⁶

The 'veto-initiative procedure' as established by the General Assembly led to a similar outcome, by assigning the duty of explanation to the permanent member that had blocked the Council action by the exercise of its veto; and this permanent member of the Security Council must now respond to the General Assembly.³⁷

The procedure was triggered quite soon after being created, with a General Assembly debate on the vetoes cast by Russia and China on a draft Security Council resolution seeking to condemn intercontinental ballistic missile launches and nuclear tests by the Democratic People's Republic of Korea (DPRK), in violation of multiple prior Security Council resolutions.³⁸ In the General Assembly

debate of 8 and 10 June 2022,³⁹ numerous states from all world regions made explicit and very positive statements on the new procedure as established by GA Res 262/76. At least 11 states qualified the debate as 'historic', as a 'milestone', or as a landmark.⁴⁰ 16 states found that the new mechanism would enhance the transparency and accountability of the Security Council.⁴¹ Others saw an improvement of effectiveness or efficiency of the Council.⁴² Especially Liechtenstein expressed its hope 'that the prospect of accountability to the General Assembly will lead to more Security Council action and fewer vetoes being cast'.⁴³

Several states welcomed the empowerment and the 'vital' role of the General Assembly.⁴⁴ The state using veto would no longer have 'the last word',⁴⁵ but the Assembly could step in and assume a useful function.⁴⁶ GA Res 262/76 marks, according to Uruguay, 'a turning point in the relationship between the Council and the Assembly'.⁴⁷ Other states pointed out that the new mechanism serves to upholding, strengthening or improving the multilateral system.⁴⁸ Only Syria criticised the new standing debate in the General Assembly, deploring a 'political polarization'.⁴⁹ Although it is true that publicity always carries the risk of 'show debates' in which the antagonist positions are hardened, the Syrian critique is in the end not convincing. The publicity of a General Assembly debate might just as well ultimately allow for consensus-building. Syria's lonely voice should rather be taken as a manifestation of complete dependence of the Syrian government on Russia—after all it owes its sheer existence to the Russian military assistance in its criminal oppression of its uprising population.

The second General Assembly debate under the new mechanism established by GA resolution 76/262 took place after a Russian veto against cross-border humanitarian assistance in Syria.⁵⁰ In the debate of 21 July 2022, Nicaragua, Belarus, and Cuba criticised the General

³⁰ 'The Responsibility Not to Veto: A Genealogy', *Global Governance* 24 (2018), 331-349.
³¹ Daniel Moeckli and Raffael Nicolas Fasel, 'A Duty to Give Reasons in the Security Council', *International Organizations Law Review* 14 (2017), 13-86.
³² Devika Hovell, 'On Trust: The UN Security Council as Fiduciary', *William and Mary Law Review* 62 (2021), 1229-1295, esp. at 1279-80.
³³ Anna Spain, 'The UN Security Council's Duty to Decide', *Harvard National Security Journal* 4 (2013), 320-384.
³⁴ *ibid.*, at 359.
³⁵ *ibid.*, at 362.
³⁶ 'The Elders' work, as they write on their website, 'for peace, justice, human rights and a sustainable planet'. (<https://theelders.org/who-we-are>).
³⁷ The Elders, 'Strengthening the United Nations', 7 February 2015, para 2.
³⁸ UN GA Res 76/262 (n 16).
³⁹ Draft resolution of the Security Council proposed by the US on 26 May 2022 (UN Doc S/2022/431); vetoes by Russia and China (UN SC, 9048th meeting, 26 May 2022, S/PV.9048, 3).

⁴⁰ Agenda item 124 (in three parts): UN GA, 77th Plenary Meeting, 8 June 2022, 10am (UN Doc. A/76/PV.77, 1-29); 78th Plenary Meeting, 8 June 2022, 3pm (UN Doc. A/76/PV.78, 10-27); UN, GA 81st Plenary Meeting, 10 June 2022, 10am (UN Doc. A/76/PV.81, 11-18).
⁴¹ Denmark (PV.77, 9); USA (PV.77, 14); Costa Rica (PV.77, 18); Turkey (PV.77, 19); Indonesia (PV.77, 23); Switzerland (PV.77, 26); Poland (PV.77, 27); Kuwait (PV.78, 14); Estonia (PV.78, 19); Peru (PV.78, 23); Mexico (UN Doc. A/76/PV.79, 10); Hungary (UN Doc. A/76/PV.81, 16).
⁴² Denmark (PV.77, 9); Liechtenstein (PV.77, 11); Ecuador (PV.77, 13); Ireland (PV.77, 17); Mexico (PV.77, 18-19); Singapore (PV.77, 22 and A/76/PV.79, 11); Indonesia (PV.77, 23); Australia (PV.77, 24); Kuwait (PV.78, 14); Germany (PV. 78, 16); Slovenia (PV.78, 19); Peru (PV.78, 23); Portugal (UN Doc. A/76/PV.79, 7); South Africa (UN Doc. A/76/PV.79, 19); Uruguay (UN Doc. A/76/PV.81, 11); Chile (UN Doc. A/76/PV.81, 13).
⁴³ Singapore (PV.77, 22); Poland (PV.77, 27).
⁴⁴ UN Doc. A/76/PV.79, 15.
⁴⁵ Liechtenstein (PV.77, 11); Ireland (PV.77, 17); Turkey (PV.77, 19); Lithuania (UN Doc. A/76/PV.81, 12).
⁴⁶ Liechtenstein (PV.77, 11); Ecuador (PV.77, 13).
⁴⁷ Austria (PV.77, 21); Switzerland (PV.77, 26); Italy (UN Doc. A/76/PV.79, 22); Ecuador (UN Doc. A/76/PV.79, 7); Malaysia (UN Doc. A/76/PV.79, 9); Slovenia (UN Doc. A/76/PV.79, 23); El Salvador (UN Doc. A/76/PV.81, 17).
⁴⁸ Uruguay (UN Doc. A/76/PV.81, 11).
⁴⁹ EU (PV.77, 8); Albania (PV.77, 12); Singapore (PV.77, 22); Poland (PV.77, p 27); Ukraine (UN Doc. A/76/PV.81, 15); El Salvador (UN Doc. A/76/PV.81, 17).
⁵⁰ Syria (PV.77, 28).
⁵¹ The Russian Veto was cast on 8 July 2022, in 9087th meeting of the Security Council under agenda item 'The situation in Middle East' (UN Doc. S/PV.9087)

Assembly meeting as undermining good faith negotiations on the draft resolutions in the Council, as ‘duplicating’ the work of the Council, in short as ‘unnecessary’.⁵¹

The third application of the new mechanism again concerned Ukraine. Albania and the United States of America had tabled a draft resolution to condemn and declare invalid the referendums conducted at the end of September 2022 in the occupied zones Donetsk, Luhansk, Kherson und Zaporizhzhya.⁵² Russia cast its veto on 30 September 2022.⁵³ The ‘special report’ required under GA Res 262/76 was transmitted by the President of the Security Council to the President of the General Assembly on 4 October 2022. This report was a one pager that merely recapitulated the procedure, listed the relevant documents, and stated that ‘the resolution obtained the required number of votes, but was rejected because a permanent member of the Security Council voted against its adoption.’⁵⁴ In the future, it is conceivable that such reports become more elaborate, but this does not seem to be necessary to trigger the General Assembly debate.

Within ten working days, as prescribed in GA Res 76/262, the General Assembly met.⁵⁵ In the plenary of 12 October 2022, the new accountability mechanism—that had been celebrated in June—was barely an issue. The debate concentrated on the violation of international law by the Russian annexation, and the Assembly adopted a resolution entitled ‘Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations’.⁵⁶

Since then, no attempt was made to engage the Security Council on the situation in Ukraine. Rather, the General Assembly took the question of remedy and reparation in its hands. In its resumed Emergency Special session, it adopted a resolution on the ‘Furtherance of remedy and reparation for aggression against Ukraine’.⁵⁷

Assessment and Outlook

The legal and political effects created by GA Res 76/262 remain to be seen. Against the background that members of the Security Council already use to explain their vetoes

in a public meeting of the Council, the new mechanism might be duplicative and superfluous.⁵⁸ However, the new procedural obligation to hold a General Assembly resolution goes beyond past practice. The novelty is (only) that this explanation now must be repeated in the General Assembly, in front of all UN member states, which also have the right to take the floor.

A Chinese concern is that the new procedure risks to cause ‘procedural confusion and inconsistency’.⁵⁹ This is a very old trope, reminiscent of the Soviet opposition to the so-called ‘Uniting for Peace’ procedure established in 1950.⁶⁰ Indeed, Art 12 of the UN Charter establishes a procedural priority of the Security Council over the General Assembly by prescribing that, ‘[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.’ But this provision does not prevent the General Assembly from pronouncing itself on an issue when the Security Council is precisely *not* exercising its function due to blockage by a veto. The ‘Uniting for Peace’ mechanism had been mainly dormant, even throughout the war in Syria, but has now been activated in the Ukrainian crisis.⁶¹ Three days after the Russian invasion, the Security Council decided to call the 11th Emergency Special Session of the General Assembly because ‘the lack of unanimity of the permanent members at its 8979th meeting has prevented it [the Council] from exercising its primary responsibility for the maintenance of international peace and security’.⁶² (This is a procedural decision and not subject to the veto (Art 27(2)).⁶³ Politically speaking, the ‘Uniting for Peace’ was a baby of US politics, and was occasionally criticised by the USSR. However, the USSR itself has invoked the Uniting for Peace procedure in the 1950s and 1960s (with regard to the Suez crisis and the Six Day Arab-Israeli War). Its application in the Ukraine crisis has placed the lawfulness of the Uniting for Peace-procedure beyond any doubts.⁶⁴ The General Assembly has the implied power to act, *a contrario* Art 12, in the event of a failure or deadlock of the Council.

Independently of its lawfulness, the new mandatory General Assembly debate might be in political terms

on the Security Council draft resolution sponsored by Ireland and Norway (UN Doc. S/2022/538) of 8 July 2022.

51. UN GA, 96th Plenary Meeting, 21 July 2022, 3pm (UN Doc. A/76/PV.96, 1-14 (at 8, 11, 12).
52. Draft Security Council resolution ‘Maintenance of peace and security of Ukraine’ (UN Doc. No. S/2022/720) of 30 September 2022.
53. UN SC, 9143rd meeting, 30 September 2022, S/PV.9143.
54. Letter dated 4 October 2022 from the President of the Security Council addressed to the President of the General Assembly (UN Doc. A/77/551).
55. This took place in the framework of the resumed 11th Special Emergency Session (ES) of the General Assembly that had been convened in response to the Russian invasion by UN SC Res 2623 (2022) of 27 February 2022 ‘Decision to call an emergency special session of the General Assembly; UN GA, ‘Uniting for Peace’, Resolution UNGA/ES-11/L.1 of 1 March 2022. The ES has been standing since 1 March 2022. See for the debate on the veto: UN Doc. A/ES-11/PV.14 General Assembly Eleventh Emergency Special session 14th plenary meeting Wednesday, 12 October 2022, 3pm (GAOR).
56. A/RES/ES-11/4 of 12 October 2022.
57. GA Res A/RES/ES-11/5 (14 November 2022). General Assembly, Eleventh Emergency Special session, 15th plenary meeting, Monday, 14 November 2022, 10am, Official Records, A/ES-11/PV.15.

58. See the critique by Nicaragua, Belarus, and Cuba in the General Assembly (n 51).
59. Permanent Mission of the People’s Republic of China to the UN, Explanation of Position by China after the Adoption of Resolution ‘Standing mandate for a General Assembly debate when a veto is cast in the Security Council’, 27 April 2022 (http://un.china-mission.gov.cn/eng/hyyfy/202204/t20220427_10674706.htm).
60. UN GA Res 377(V) (3 November 1950) ‘Uniting for Peace’.
61. See UN GA, ‘Uniting for Peace’, Resolution UNGA/ES-11/L.1 of 1 March 2022. The emergency special session has been standing since 1 March 2022.
62. UN SC Res 2623 (2022) of 27 February 2022 ‘Decision to call an emergency special session of the General Assembly’, preamble.
63. The decision was adopted with 11 positive votes, one negative vote by the Russian Federation and three abstentions (China, India, UAE).
64. See Nico Schrijver, ‘A Uniting for Peace Response to Disuniting for War: The Role of the two Political Organs of the UN’ (18 March 2022) (<https://www.leidenlawblog.nl/articles/an-uniting-for-peace-response-to-disuniting-for-war-the-role-of-the-two-political-organs-of-the-un>).

divisive. This concern seems to have motivated France to hesitate in co-sponsoring the resolution (although it ultimately did). France would prefer to obtain consent of all five permanent members of the Security Council on its own proposal, the political statement on the suspension of the veto.⁶⁵

Importantly, the purely procedural move under GA Res 262/76 does not address the substance of the veto power and it does not address the root cause of the discomfort with this power, namely that it does not reflect contemporary geo-political realities. Unsurprisingly, emerging states such as Brazil and India have voiced some skepticism against the new procedure.⁶⁶

Russia, not without merit, pointed out that the veto remains a necessary device to prevent the adoption of resolutions on military action without the support of states that are willing and able to actually deploy military action.⁶⁷ Without such support, these decisions would be mere paper tigers and would destroy the authority of the Security Council.

Therefore, the question remains which normative and factual power lies in such procedures. The twin objectives of the veto initiative are to deter the use of the veto and to create accountability. Deterrence might result from the (slight) increase of the costs of exercising the veto, namely the shaming effect of the broad and public debate. Putting veto users ‘under the spotlight’⁶⁸ in the General Assembly generates transparency which is in itself a mild form of accountability.⁶⁹

Generally speaking, the obligation to explain and give reasons forces a decision-maker (in our case the veto power) to base its acts on claims regarding the general interest rather than on selfish appeals. This has been called the ‘civilizing force of hypocrisy’.⁷⁰ These reasons, even if they may be hypocritical, still have the consequence of generating better outcomes, because in an official debate the ‘bad’ reasons cannot be stated. The obligation to explain before the General Assembly leaves the exercise of the veto within the realm of discretion of the permanent member of the Security Council, but still forces this state to rationalise the exercise of its veto right. This allows not only all other states but also the public to criticise these reasons. In the long run, the necessity to justify the veto might lead to ruling out those most blatant abuses that can simply not be rationalised.

65. ‘UN takes step to put veto users under global spotlight’, NPR (27 April 2022), <https://www.npr.org/2022/04/27/1094971703/u-n-takes-step-to-put-veto-users-under-global-spotlight>. NPR quotes the French deputy ambassador, Nathalie Broadhurst, but erroneously writes that France did not co-sponsor GA res 262/76. See on the French proposal text with n 24-26.

66. NPR (n 65).

67. *ibid.*

68. *ibid.*

69. Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013).

70. Jon Elster, ‘Deliberation and Constitution Making’, in Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press 1998), 97–122, 111.

But is this hope realistic? The United Nations, including its most powerful organ, ‘exists in a world of sovereign states, and its operations must be based in political realism. But the organization is also the repository of international idealism, and that sense is fundamental to its identity.’⁷¹ This characterisation of the UN by the International Commission on State Sovereignty and Intervention (ICISS) seems more pertinent than ever. ICISS had, twenty years ago, opined that ‘[t]he task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work much better than it has.’⁷²

The emphasis here is on ‘working better’. Improvement of procedures and working methods can—in functional terms—be a substitute for a formal amendment of the Charter. This is not to say that such procedural reform would be purely ‘technical’ or un-political. Quite to the contrary. The enormous political potential of procedures is illustrated by the fact that the Security Council has until now not managed to adopt final procedural rules but still works under ‘provisional’ rules that have last been revised in 1982.⁷³

The difference between Charter amendment and reform of working methods is only—but importantly—that the latter can be legally framed as dynamic interpretation of the UN Charter through subsequent practice. The UN Charter, formally a treaty, may be interpreted (and re-interpreted) by ‘taking into account’ any ‘subsequent agreement between the parties regarding the interpretation of the treaty’ (Art 31(3) lit. a) of the Vienna Convention on the Law of Treaties) or by taking into account ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ (Art 31(3) lit. b) of the Vienna Convention on the Law of Treaties). If all member states agree on such a course, it would be in the end acceptable in legal terms, because the lines between mere ‘interpretation’ of the Charter and its tacit amendment are blurry both in legal theory and in fact, and because member states may in an *ad hoc* fashion agree to change the rules of revision.⁷⁴ It is often argued that the UN Charter is particularly prone to and in need of dynamic interpretation due to its constitutional

71. Report of the International Commission on State Sovereignty and Intervention (ICISS) 2001, para 6.25.

72. *ibid* para 6.14.

73. *Provisional Rules of Procedure of the Security Council*, as amended 21 December 1982 (UN Doc. S/96/rev. 7); *The UN Security Council Handbook: A User’s Guide to Practice and Procedure*, Security Council Report, 2019, 14.

74. ILC, ‘Reports of the Commission to the General Assembly’, *Yearbook of the ILC* vol 2 (1966), 236; Wolfram Karl, *Vertrag und spätere Praxis im Völkerrecht* (Springer 1983), 21-46, 43 on the fluid boundary; Ian M Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2d ed 1984), 138; Georg Nolte, ‘Report 1 – Jurisprudence of the International Court of Justice and Arbitral Tribunals of Ad Hoc Jurisdiction Relating to Subsequent Agreements and Subsequent Practice’, in Georg Nolte (ed.), *Treaties and Subsequent Practice*, (Oxford University Press 2013), 169-209, 200. See specifically for the UN Charter, Philip Kunig, ‘United Nations Charter, Interpretation of’, in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006), para 20: ‘[T]he limit of the treaty interpretation begins where it goes beyond the provisions of the UN Charter and becomes in effect an amendment. The definition of the line between the two remains difficult.’

character and due to the difficulty of formal amendment.⁷⁵ On the other hand, ‘informal’ amendments in the guise of dynamic interpretation risk to undermine legal clarity and security.⁷⁶

Another question is whether the new procedures could even morph into customary law.⁷⁷ This seems difficult for various reasons. Commitments that are explicitly called ‘political’ as opposed to ‘legal’ cannot easily count as a manifestation of *opinio juris*. Moreover, two permanent members of the Security Council oppose the trend, but they are states whose interests are specially affected and whose opinion and practice would be needed for a maturation of a customary rule. And finally, a custom superseding and deviant from the written Charter law is in normative terms unwelcome because it risks to undermine the Charter.

With these caveats in mind, I would nevertheless welcome further changes in the working methods that might lead, for example, to a reactivation and even expansion of the scope of the abstention clause of Art 27(3) UN Charter.⁷⁸ This provision foresees an obligatory abstention for all members of the Security Council when there is a ‘dispute’ to which that state is a ‘party’, provided that the decision is not a procedural one (Art 27(2)) and falls either under Chapter VI on the ‘Pacific Settlement of Disputes’ or under Chapter VIII (Art 52(3))—but not under Chapter VII on ‘Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression’.⁷⁹ In legal terms, states’ and scholarly proposals to read the proviso broadly and extensively should be revisited, in order to avoid the paralysis of the Security Council against blatantly

illegitimate behaviour of a permanent member. This extensive Charter interpretation had been widely assumed in the first decades of the life of the United Nations.⁸⁰

It is to be hoped that the political momentum to improve the workings of the Security Council, even towards a further limitation of abusive vetoes, can be built up in the situation of extreme tension. In 1945, the permanent members had proclaimed: ‘It is not to be assumed, however, that the permanent members, any more than the non-permanent members, would use their “veto” power wilfully to obstruct the operation of the Council.’⁸¹ The current permanent members should be reminded time and again of this historic promise. The long-lasting attempts of initiatives to curtail the veto which have peaked in April 2022 shows that there is no acquiescence by states to an unlimited use of the veto.⁸²

With China poised to become the world’s leading power, the country might set an example of wise leadership.⁸³ In fact, China commented on the new procedure: ‘We define our position in the Security Council in a manner that is responsible to the UN Charter and to history.’⁸⁴ China had, as a founding member of the United Nations, stated ‘that it was not unreasonable to suppose that after a time the great powers would be willing to consider elimination of the veto.’⁸⁵ This time may come, even if we do not know when.

75. Kunig (n 74), paras 4-5 and 19.

76. This is the main reason why Bardo Fassbender finds informal amendment of the Charter impermissible (Bardo Fassbender, *The United Nations Charter as Constitution of the International Community* (Leiden: Nijhoff 2009), 136-137).

77. See Trahan (n 22), at 121-22.

78. Enrico Milano, ‘Russia’s veto in the Security Council: Whither the Duty to Abstain under Art 27(3) of the UN Charter?’, *Heidelberg Journal of International Law* 75 (2015), 215-231; In Hindsight, ‘Obligatory Abstentions’, Security Council Report Monthly Forecast 2 (New York, 31 March 2014), available at https://www.securitycouncilreport.org/monthly-forecast/2014-04/in_hindsight_obligatory_abstentions.php; John Chappell, ‘Must Russia Abstain on Security Council Votes Regarding the Ukraine Crisis?’ *Lawfare*, 11 February 2022.

79. Art 27(3) ‘... provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.’

80. Paul Guggenheim, *Traité de droit international public Tome II* (Librairie de l’Université 1954), 236; Georg Dahm, *Völkerrecht*, Vol II (Kohlhammer 1961), 227-228.

81. Statement (n 6), Sec. I 8.

82. Trahan (n 22), 141.

83. China seeks to establish itself as a norm-entrepreneur. Some observers therefore see prospects for a Chinese accession to the veto-limiting initiatives (Vilmer (n. 29), 341); but see skeptically Trahan (n. 22), at 139 fn. 185.

84. Permanent Mission of the People’s Republic of China to the UN, Explanation of Position by China after the Adoption of Resolution ‘Standing mandate for a General Assembly debate when a veto is cast in the Security Council’, 27 April 2022 (http://un.china-mission.gov.cn/eng/hyyfy/202204/t20220427_10674706.htm).

85. UNCIO Vol VII, Summary Report of Twenty Sixth Meeting of Committee I/2, of 16 June 1945, 241-244 (244); also quoted in Blokker (n 7) at 71. Of course, this Chinese government of 1945 was before the Maoist revolution. But under international law as it formally stands, political and even revolutionary ruptures of government do not affect the identity of the state as an international legal person.



Elena Chachko · Rappaport Fellow and Lecturer on Law, Harvard Law School, and Fellow, Miller Center for Global Challenges and the Law, UC Berkeley

Katerina Linos · Tragen Professor of Law, and Co-Director, Miller Center for Global Challenges and the Law, UC Berkeley

The Ukraine War at One: A Silver Lining

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One year after the Russian invasion of Ukraine, the fog of war still obscures its full implications. The war continues to cause unspeakable suffering. Estimates indicate that Ukraine and Russia each sustained 100,000 military casualties by November 2022. Ukraine suffered upward of 40,000 civilian casualties. Dozens of millions have been displaced.¹ Reports of war crimes have become frequent.² The war has tested the resilience of international institutions, partnerships and alliances. The Russian invasion violated a basic tenet of the international order: the prohibition on aggressive use of force. It raised the specter of cyber war that threatens to draw other countries in. It once again highlighted the role of online disinformation in fueling conflict.

Facing these alarming prospects, many were pessimistic about what the war in Ukraine may portend for the future of international law and institutions. Surprisingly, however, some elements of the war and the international responses to date offer a silver lining. The responses defied expectations about the significance of international law and norms, and about the relevance of post-WWII institutions. We argue that there is much to be optimistic about.³ More

specifically, we argue that European Union institutions in particular have dramatically centralized and expanded their capacity, in ways that are, on net, very positive.

The strong international response has reaffirmed the prohibition on international use of force and the forceful acquisition of territory. The Russian invasion came at a time when article 2(4) of the United Nations Charter, which prohibits the use of force in international relations, was already facing immense pressure because of recurring violations on scales large and small. Many believed that Russia's blatant invasion of a sovereign nation with the stated aim of ending Ukraine's existence as an independent state would be the last nail in article 2(4)'s coffin.⁴ But as Tom Ginsburg observed, 'Just when Ukraine's death by five cuts seemed a possibility... the Atlantic alliance and many other countries... have vociferously reiterated the importance of Article 2(4).'⁵

The international response did not just reaffirm a longstanding legal norm. Cyber warfare remains, to date, relatively contained. International powers have mobilized in unprecedented ways to offer solutions for Ukrainian refugees. And states and private actors alike have taken much more significant measures than in the past to stem Russian disinformation. There is extensive debate on the role of NATO in the Ukraine conflict, but critics and proponents alike acknowledge that this alliance received a major injection of energy and direction. We focus however is a different institution: the EU. We believe that the EU has built on the Ukraine crisis to advance ambitious and unprecedented policies and strengthen Brussels further. This comes on the heels of a major expansion of EU powers as part of the Covid epidemic.

To focus on the silver lining is not to deny the shortcomings of the international response. It still reflects longstanding pathologies, chief among them the selective nature of how powerful actors address international law violations. Past crises on a similar scale have not received the same international treatment and resource allocation as the Ukraine war. Moreover, for many, the prospect of NATO expansion is no cause for celebration. Relatedly, for some, the accretion of power by the EU's central institutions represent a victory of bureaucracy over democracy.

Recognizing this, however, we argue that the Ukraine response is an unusual window of opportunity to address these shortcomings. The arduous and frustrating process of moving international law forward got jump-started following the Russian invasion. In fields including the law of war, economic sanctions, refugee law, international criminal law, disinformation and cyberwarfare, new ideas are being developed, and old ideas are getting new backers. Generous and ambitious policies to address a

1. Helene Cooper, 'Russia and Ukraine Each Have Suffered Over 100,000 Casualties, the Top U.S. General Says' (10 Nov. 2022) *N.Y. Times*, <https://www.nytimes.com/2022/11/10/world/europe/ukraine-russia-war-casualties-deaths.html>.
2. U.S. Dep't of State, *Evidence of Russia's War Crimes and Other Atrocities in Ukraine: Recent Reporting on Child Relocations*, Feb 14, 2023, <https://www.state.gov/evidence-of-russias-war-crimes-and-other-atrocities-in-ukraine-recent-reporting-on-child-relocations/>; 'Germany Has Evidence of War Crimes in Ukraine "in three-digit range" Prosecutor Says' (4 Feb. 2023) *Reuters*, <https://www.reuters.com/world/europe/germany-has-evidence-war-crimes-ukraine-in-three-digit-range-prosecutor-2023-02-04/>.
3. This essay revises and updates previous work published in Elena Chachko & Katerina Linos, 'Ukraine and the Emergency Powers of International Institutions' (2022) 116 *Am. J. of Int'l L.* 775 ('Chachko & Linos, Emergency Powers'); Elena Chachko & Katerina Linos, 'International Law After Ukraine: Introduction to the Symposium' (2022) 116 *American Journal of International Law Unbound* 124; Elena Chachko & Katerina Linos, 'Refugee Responsibility Sharing or Responsibility Dumping?' 110 *Cal. L. Rev.* 897 (2022) ('Chachko & Linos, Responsibility Sharing').

4. See eg, 'Kori Schake, Putin Accidentally Revitalizes the West's Liberal Order', (1 March 2022) *The Atlantic*, <https://www.theatlantic.com/international/archive/2022/02/vladimir-putin-ukraine-invasion-liberal-order/622950/>.
5. Tom Ginsburg, 'Article 2(4) and Authoritarian International Law' (2022) 116 *American Journal of International Law Unbound* 130.

threat to European security can become precedents to reference when crises hit parts of the world that garner much less attention.⁶

The Silver Lining

1. Galvanizing Institutions, Alliances and Partnerships

The war in Ukraine proved that international alliances and partnerships, long criticized as obsolete, still have an important role to play in enforcing international norms and maintaining international security. Multilateralism once again emerged after some major world powers, notably the United States, chose to turn inward and retreat from international and regional cooperation.

NATO is one major example. For the first time in years, European countries like Sweden and Finland have expressed interest in joining NATO, reinvigorating an alliance in need of energy and purpose. NATO allies worked to provide Ukraine with aid, weapons and intelligence that has proved crucial in complicating Russia's military campaign and shoring up Ukraine's odds-defying defense.⁷ The United States has already invested upward of 22 billion euro in military aid to Ukraine.⁸ EU member states and EU institutions have made military commitments exceeding euro 11 billion.⁹

Another example is the extensive transatlantic cooperation around the comprehensive sanctions regime that world powers have built up against Russia. Never before have such comprehensive economic sanctions been imposed on a G-20 economy. As the conflict progressed and evidence of atrocities mounted, the United States and the European Union began targeting the Russian energy sector despite the potential costs to the world economy. The economic sanctions campaign—at least in its early stages—moved at breakneck speed, bringing the United States, the EU, the WTO, and other powers from North

America to Asia into the fold. The conflict also strengthened public-private coordination alongside traditional multilateralism. The sanctions campaign against Moscow coincided with an exodus of private companies from Russia, above and beyond what sanctions required.¹⁰

In Europe, the EU built on the Ukraine emergency to breathe new life into European integration.¹¹ It harnessed a swell of political will among member states fueled by the geographic proximity of the war and memories of life under Soviet occupation. In the run up to the war, prominent observers lamented the EU's unraveling as consecutive economic and migration crises, Brexit and internal challenges from member states like Hungary and Poland seemed to threaten its existence. Defying expectations, however, Brussels has emerged from the Ukraine conflict stronger. The central EU institutions have been able to push through unprecedented legal reforms and policies in the areas of defense and security, migration and asylum, and energy that expanded the EU's reach globally and, consequentially, within its own borders.¹²

We start with some financial figures, because until recently, EU institutions had huge regulatory, but no financial, muscle. The EU annual budget was, until 2019, tiny – representing only 1% of the gross national income of the EU member states, on the order of 100 million euro.¹³ For comparison, the US federal budget has long been at least 20 times as large. Until 2019, the EU ruled through regulation, not money. This all changed with the Covid pandemic, and extraordinarily the NGEU program. The issuance of hundreds of billions in common debt, backed by Germany's excellent credit, to pay for anti-poverty programs in the European periphery has been called Europe's Hamiltonian's moment. We argue that the Ukraine crisis has further reinforced this trend to centralization of EU financial resources.

European figures on aid to Ukraine are striking when it comes to overall assistance, including non-military financial and humanitarian commitments. The EU total of military, financial and humanitarian aid comes to 52 billion euro, a number on par with the 48 billion euro in US aid in these three categories.¹⁴ But what is striking is that the vast majority of European financial and humanitarian

6. Katerina Linos, 'Diffusion through Democracy' (2011) 55 *Am. J. Pol. Sci.* 678; Katerina Linos, *The Democratic Foundations of Policy Diffusion: How Health, Family and Employment Laws Spread Across Countries* (Oxford University Press 2013).

7. See eg. David Brown, Jake Horton & Tural Ahmedzade, 'Ukraine Weapons: What Tanks and Other Equipment are The World Giving?' (18 Feb. 2023) *BBC News*, <https://www.bbc.com/news/world-europe-62002218>.

8. We use data from the 8th edition of the Ukraine support tracker for comparability in our main text. This includes expenditures from January 24 2022 through November 20 2023. See Ariana Anteza et al., 'The Ukraine Support Tracker: Which countries help Ukraine and how?' Available at <https://www.econstor.eu/handle/10419/262746> [heirinafter Ukraine Support Tracker]. See also Anthony J. Blinken, 'Significant New Military Assistance to Ukraine' (19 Jan. 2023) U.S. Dep't of State, <https://www.state.gov/significant-new-u-s-military-assistance-to-ukraine/> (explaining that as of January 2023, the US has committed over \$27 billion in military aid to Ukraine).

9. See Ukraine Support Tracker, supra note 8. See also Press Release, 'Ukraine: Council Agrees on Further Military Support Under the European Peace Facility', Council of the EU (Feb. 2, 2023), <https://www.consilium.europa.eu/en/press/press-releases/2023/02/02/ukraine-council-agrees-on-further-military-support-under-the-european-peace-facility/>. (noting that EU institutions have committed 3.6 billion euros worth of military assistance). See also 'Military Support for Ukraine', Die Bundesregierung, <https://www.bundesregierung.de/breg-en/news/military-support-ukraine-2054992> (noting that Germany alone allocated over 4 billion Euros in 2022-2023 to fund Ukraine military aid).

10. Elena Chachko & J. Benton Heath, 'A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield' (2022) 116 *American Journal of International Law Unbound* 135; See also Sanctions against Russia – a Timeline, S&P Global, <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/sanctions-against-russia-8211-a-timeline-69602559>.

11. But see Veronica Anghel & Erik Jones, 'Is Europe Really Forged Through Crisis? Pandemic EU and the Russia – Ukraine War' (2022) *J. of Eur. Public Pol'y* 1.

12. See Chachko & Linos, *Emergency Powers*, supra note 3.

13. See Deutsche Bundesbank, The EU budget and its financing: looking back and ahead (April 2020) <https://www.bundesbank.de/resource/blob/831226/a569592c0a71b7c5c2494f6acace6a75/mL/2020-04-eu-haushalt-finanzierung-data.pdf>

14. See Ukraine Support Tracker, supra note 8. See also Steven Erlanger, 'When It Comes to Building Its Own Defense, Europe Has Blinkered' (4 Feb. 2023) *N.Y. Times*, <https://www.nytimes.com/2023/02/04/world/europe/europe-defense-ukraine-war.html?smid=url-share> (noting that overall EU assistance to Ukraine exceeds 50 billion Euro).

funds come through EU institutions - not directly through the member states.¹⁵ When the Council and Commission typically fight over one or a few hundred million to be shared each year among 27 member states, but go ahead and commit 30 billion to a non-member state (perhaps on a longer and less clear time horizon), the transformation seems striking.

The regulatory techniques to accomplish EU integration goals are also fascinating. As we have shown elsewhere, the EU Ukraine emergency measures have used several techniques: legal workarounds; scaling up; consolidation; and technocracy-maximization. They created legal workarounds by circumventing constitutional restrictions or suspending longstanding EU rules. They leveraged and repurposed existing programs to scale them up. They consolidated power by migrating important authority from the member states to the central EU institutions. In some cases, like migration policy, they pushed through policies that EU member states had affirmatively rejected before. And they maximized technocracy by deploying centrally predetermined quotas, formulae, and legal definitions for allocating obligations and entitlements among member states to reduce—if not eliminate—political haggling around implementation.¹⁶

In defense and security, the Russian invasion allowed the EU to consolidate key defense authorities and reshape its regional and global security role. The EU circumvented a constitutional prohibition on funding military and defense actions from the regular EU budget to provide Ukraine with billions of euros in military assistance, thus setting a precedent for collectively arming a third state during armed conflict. To accomplish this, the EU used a little known preexisting legal instrument called the European Peace Facility (EPF).¹⁷ Before Russia invaded Ukraine, the Council adopted several assistance measures under the EPF to support limited action in various countries,¹⁸ including non-lethal assistance to Ukraine.¹⁹ But none were as extensive as the post-invasion Ukraine measures. And none involved the provision of lethal weapons to a third country during armed conflict or 3.6 billion in centralized EU funding.

The EPF is an important framework for military and defense spending moving forward. Unlike related past programs, the EPF can be used for any conflict, anywhere in the world, and to assist any third state. This gives the EU a vital tool for consolidating power and pushing for a more robust common security and defense policy (CSDP), which largely remained aspirational before Ukraine. The Ukraine assistance measure also extends the EU's reach into the defense and security realm by creating a precedent for collective EU provision of lethal weapons to a

third state during an armed conflict. It is a new model of EU international military engagement.

In the energy field, the Ukraine invasion accelerated EU policies to collectively promote energy independence and divest from rogue exporters like Russia. Facing the prospect of Russian supply manipulation, skyrocketing energy prices and possible winter shortages, the EU even introduced an extraordinary authority to mandate EU-wide emergency energy rationing. The authority derives from Article 122 of the Treaty on the Functioning of the European Union (TFEU), which allows the EU Council to act 'if severe difficulties arise in the supply of certain products, notably in the area of energy.' As a first step, member states were asked to voluntarily reduce their consumption by 15 percent by spring 2023. If voluntary measures prove insufficient, however, the new energy measures grant the EU emergency authority to mandate rationing with some exceptions.²⁰

In addition, the war accelerated the promotion of longstanding domestic EU policy goals such as transitioning to green energy and a more sustainable EU economy. The EU Commission proposed an ambitious energy plan, REPowerEU, to wean Europe off Russian energy by the end of the decade and diversify EU suppliers. Alongside these immediate goals, the plan leverages the Ukraine crisis to advance a broader climate agenda of gradually moving the EU toward green energy sources.²¹ The plan emphasizes the advantages of the EU working as a union to accomplish the goals of divestment from Russia and energy sustainability faster.²²

Once again, the plan repurposes a preexisting EU instrument called the Recovery and Resilience Facility (RRF), much like the EU did with the European Peace Facility in the defense and security context. The RRF is a coordination and investment mechanism that the EU created as part of the response to yet another emergency, COVID-19.²³ REPowerEU proposes to amend the RRF regulation to implement the divestment, diversification, and sustainability goals of the plan as part of the response to the Russian invasion. It includes guidance and rules that member states should follow to reshape their national 'recovery and resilience' plans to incorporate REPowerEU's objectives.²⁴

15. See Ukraine Support Tracker, *supra* note 8.

16. *Id.*

17. Council Decision (CFSP) 2021/509, at 14, OJ L102 (24 March 2021).

18. Eur. Comm'n, *European Peace Facility*, https://fpi.ec.europa.eu/what-we-do/european-peace-facility_en.

19. Council Decision (CFSP) 2021/2135, at 59, OJ L432 (3 Dec. 2021).

20. Council Regulation (EU) 2022/1369, OJ L 206/1. See also Chachko & Linos, *Emergency Powers*, *supra* note 2; Katja Yafimava, 'EU Solidarity at a Time of Gas Crisis: Even With a Will the Way Still Looks Difficult' (Feb. 2023) The Oxford Institute for Energy Studies, <https://a9w7k6qg.stackpathcdn.com/wp-content/uploads/2023/02/EU-solidarity-at-a-time-of-gas-crisis-NG179.pdf>.

21. See Chachko & Linos, *Emergency Powers*, *supra* note 3.

22. Eur. Comm'n Press Release, 'REPowerEU: A Plan to Rapidly Reduce Dependence on Russian Fossil Fuels and Fast Forward the Green Transition', https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3131.

23. Eur. Comm'n, *Recovery and Resilience Facility*, https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en.

24. COM(2022) 231 (May 18, 2022).

Adding to these elements, the REPowerEU plan includes initiatives to collectivize and centralize EU energy procurement. Under the EU treaties, although the EU has competence in certain areas of internal energy policy, each member state maintains its right to ‘determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.’²⁵ But in the wake of Ukraine, the EU—not individual member states—has led the effort to reduce the bloc’s dependence on Russia.²⁶ REPowerEU builds on this trend and expands it. In December 2022, the European Parliament and the EU Council reached political agreement on financing REPowerEU and ‘enabling Member States to introduce REPowerEU chapters in their recovery and resilience plans’.²⁷

Refugee and migration policy is yet another area in which the EU took unprecedented steps following the Russian invasion.²⁸ Within days of the invasion, the EU Council decided to activate for the first time the EU Temporary Protection Directive, a 2001 directive issued in response to the war in the Balkans to address mass influxes of individuals fleeing conflict.²⁹ The Council granted Ukrainian nationals and others fleeing Ukraine the right to live, work, and receive benefits in any EU country.³⁰ Refugees and asylum seekers have never before enjoyed this degree of choice regarding the country where they will live and work. The Ukraine temporary protection decision is also generous in defining the group of eligible individuals and the rights they would enjoy. These rights apply automatically across the EU.

The temporary protection decision is a model of centralized administration of a mass displacement by the EU institutions. It is a remarkable collective response that replaced the EU default of placing all responsibility with the individual member states immediately neighboring Ukraine under the Dublin regime—the controlling EU instrument that typically governs responsibility for hosting and processing asylum seekers. It is a striking example of refugee responsibility sharing that significantly expands even the most generous responsibility sharing measures that the EU had adopted during the 2015 middle eastern migration crisis.³¹ Poland and Hungary—two EU countries that vehemently opposed asylum seeker assistance measures in the past and have long played spoilers in many EU projects—supported these extensive measures this time around.

25. TFEU, *supra* note 3, Art. 194(2); see also Kaisa Huhta, ‘The Scope of State Sovereignty Under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector’ (2021) 70 *Int’l & Comp. L. Q.* 991.

26. See Chachko & Linos, *Emergency Powers*, *supra* note 2.

27. See Eur. Comm’n, ‘REPowerEU: affordable, Secure and Sustainable Energy for Europe’, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en.

28. Council Implementing Decision (EU) 2022/382, at 1, OJ L71 (Mar. 4, 2022).

29. Council Directive 2001/55/EC, at 12, OJ L212 (July 20, 2001).

30. Council Implementing Decision (EU) 2022/382, *supra* note 28.

31. Linos & Chachko, *Responsibility Sharing*, *supra* note 3; Elena Chachko & Katerina Linos, ‘Sharing Responsibility for Ukrainian Refugees: An Unprecedented Response’ (5 March 2022) *Lawfare*, <https://www.lawfareblog.com/sharing-responsibility-ukrainian-refugees-unprecedented-response>.

2. Operationalizing Refugee Responsibility Sharing

Against the backdrop of repeated failures by world powers to alleviate the plight of displaced persons fleeing from the Middle East, Africa, and Central America, it was difficult to imagine that the world would rapidly mobilize to welcome Ukrainians. Yet, the EU’s extraordinary measures to help those displaced from Ukraine as well as measures taken by other countries are one of the most striking examples to date of true responsibility sharing for asylum seekers. The EU has taken an estimated 4 million Ukrainians in under the Temporary Protection Directive.³² The United States awarded Temporary Protected Status to Ukrainians resident in the United States, created exceptions for Ukrainians in restrictive policies that apply to migrants arriving at its southern border, promised to welcome 100,000 Ukrainians, and has provided considerable economic aid to Ukraine and its neighbors.³³

Before Ukraine, the growing incidence and geographic spread of mass displacements has fueled consideration of various arrangements designed to relieve the pressure on heavily burdened receiving states while addressing the plight of international protection seekers. The vast majority of asylum seekers today are hosted in a handful of largely developing countries bordering areas of mass displacement. Responsibility sharing has become a key concept in the migration policy debate. Long viewed as theoretical and hortatory, responsibility sharing has been increasingly translated from theory to practice as the UN, the EU, the United States and other actors have experimented with different responsibility sharing mechanisms of vastly varying adequacy.

Responsibility sharing arrangements may deviate from the international refugee law baseline of an obligation for individualized assessment of eligibility for refugee status in the country of arrival. They adopt a more systemic approach that also accounts for the perspective of host countries and the difficulty of conducting individualized assessments when millions of asylum seekers flee at once. In previous work, we proposed a model for evaluating responsibility sharing arrangements and assessing whether they are regressive or progressive. Progressive arrangements that ought to spread are ones that shift asylum seekers to more secure, more affluent and more administratively competent states. Regressive arrangements are ones that do the opposite and should be discouraged. We identify four key parameters for classification, including hosting commitments, a monetary component or equivalent non-monetary assistance, multilateralism and legal anchoring.³⁴

32. EU Council, *Refugee Inflow from Ukraine*, <https://www.consilium.europa.eu/en/policies/eu-migration-policy/refugee-inflow-from-ukraine/> (reflecting the number of Ukrainians registered for temporary protection or similar schemes in the EU).

33. See Jaya Ramji-Nogales, ‘Ukrainians in Flight: Politics, Race, and Regional Solutions’ (2022) 116 *Am. J. Int’l L. Unbound* 150.

34. Linos & Chachko, *Responsibility Sharing*, *supra* note 3.

Both the EU and the U.S. Ukraine refugee responses are very close to the progressive end of the scale. They involve the relocation of millions displaced from Ukraine to some of the most powerful, most affluent western countries. They grant asylum seekers robust legal protection and economic rights. They are accompanied by generous aid to Ukraine and its neighbors. They are grounded in legally binding instruments. And at least the EU Temporary Protection Directive is a collective responsibility sharing mechanism. The conflict in Ukraine, then, has produced a model for a highly progressive refugee responsibility sharing arrangement. That model can and should be replicated in dealing with future instances of mass displacement. It also illustrates the importance of reforming international refugee and migration law to better address mass influxes of asylum seekers and accommodate responsibility sharing arrangements.

3. Warfare and Cyberspace

The war in Ukraine defied expectations regarding the methods of warfare in ways that give cause for optimism. Many assumed before the invasion that a dominant cyber power like Russia would deploy major cyber operations extensively.³⁵ But in practice, Russia has conducted few successful large scale cyber operations in Ukraine or elsewhere in this conflict to date.³⁶ Scholars have maintained that this may be evidence of effective defenses set up by the Ukrainians and their powerful allies, or a desire to avoid unintended escalation that may rope other powers into the conflict. Both explanations challenge well-established operational assumptions in cyber security, such as the assumption that the defender is at a structural disadvantage or that deterrence works poorly in cyberspace.³⁷

Online disinformation is another way in which the Ukraine war has penetrated cyberspace. Scholars have observed that private internet platforms and state actors have come together to do a lot more than they had at previous geopolitical inflection points to counter Russian disinformation and misuse of internet platforms to promote its objectives in Ukraine.³⁸ For example, the EU Council prohibited the broadcasting of Russian state media organs RT and Sputnik within the EU, and banned private platforms from hosting their content or making it accessible

via search.³⁹ Major tech companies like Meta, Google, Twitter and Microsoft all took action to contain Russian disinformation and to warn against Russian cyberattacks.⁴⁰

Indeed, scholars have argued that these efforts may have gone too far, resulting in excessive censorship based on opaque rules and state intervention in online content governance.⁴¹ Still, here, as in the other contexts we discuss, the Ukraine War has motivated a strong international response implementing lessons learned from previous successful Russian cyber and disinformation campaigns.

The Russian invasion of Ukraine is a significant stress test for the international order and the norms that undergird it. Far from meeting predictions of the international order's demise, we argue that the extraordinary response to the war reaffirmed and reinvigorated many of its most important elements.

The Downside and the Future

The flip side of the exceptional response to the Russian invasion is that it is, by definition, different from the international response to other crises. Is it sustainable to have an international regime that responds to grave threats selectively, with some triggering billions in spending on weapons and humanitarian aid and others barely registering diplomatic condemnations? Does the response to the Ukraine invasion expose the so-called rules based international order for what it is—an empty vehicle for the interests of powerful, mostly western, countries? Russia's justification for its actions emphasized the hypocrisy of western powers who condemn Russia while engaging in similar actions themselves.⁴² And Russia is certainly not alone in making this argument.⁴³

In the refugee context, the warm welcome Ukrainians received is often contrasted with inadequate responses to other recent major displacements in Syria, Iraq, Afghanistan, Central America and elsewhere. Many view this disparity as an expression of racism. The West perceives Ukrainians as fellow Europeans, while asylum seekers from the global south are 'others'.⁴⁴ Likewise, the United States has taken relatively extraordinary measures

35. Kristen Eichensehr, 'Ukraine, Cyberattacks, and the Lessons for International Law' (2022) 116 *Am. J. Int'l L. Unbound* 145.

36. See eg, Gavin Wilde, 'Cyber Operations in Ukraine: Russia's Unmet Expectations' (12 Dec. 2022) *Carnegie Endowment for International Peace*, <https://carnegieendowment.org/2022/12/12/cyber-operations-in-ukraine-russia-s-unmet-expectations-pub-88607>; James A. Lewis, 'Cyber War and Ukraine' (June 2022), CSIS, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/220616_Lewis_Cyber_War.pdf?VersionId=S.iEKeom79InugnYWlcZL4r3Ljuq.ash; Susan Landau, 'Cyberwar in Ukraine: What You See Is Not What's Really There' (30 Sep. 2022) *Lawfare*, <https://www.lawfareblog.com/cyberwar-ukraine-what-you-see-not-whats-really-there>.

37. See Eichensehr, supra note 35.

38. David Kaye, 'Online Propaganda, Censorship, and Human Rights in Russia's War against Reality' (2022) 116 *Am. J. Int'l L. Unbound*; See also Elena Chachko, 'National Security by Platform' (2021) 25 *Stan. Tech. L. Rev.* 55; Elena Chachko, 'Platforms at War', (28 March 2022) *Lawfare*, <https://www.lawfareblog.com/platforms-war>.

39. Council Regulation (EU) 2022/350, OJ L65, paras. 5–8 (1 March 2022).

40. Chachko, supra note 38.

41. Kaye, supra note 38.

42. 'Full Text: Putin's Declaration of War on Ukraine' (24 Feb. 2022), *The Spectator*, <https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine>.

43. See eg, Katrina Vanden Heuvel, 'America's Hypocrisy Over Ukraine and Spheres of Influence' (12 April 2022), *Wash. Post*, <https://www.washingtonpost.com/opinions/2022/04/12/americas-hypocrisy-over-ukraine-spheres-influence/>; Joseph Krauss, 'Many in Mideast See Hypocrisy in Western Embrace of Ukraine' (29 March 2022), *ABC News*, <https://abcnews.go.com/International/wireStory/mideast-hypocrisy-western-embrace-ukraine-83734095>.

44. See eg, United Nations, 'UNHCR Chief Condemns "Discrimination, Violence and Racism" Against Some Fleeing Ukraine' (16 April 2022), <https://news.un.org/en/story/2022/03/1114282>.

to assist Ukrainians who reach the United States while consistently falling short in providing solutions for asylum seekers along its southern border and those displaced by its Middle East wars.

In the sanctions context, the coalition against Russia excludes many developing countries and key players like China, who do not share the objectives of those leading the sanctions coalition or their view of international law and the international order.⁴⁵ Law of war violations by western powers and allies have not been met with similar economic ostracization.

In the disinformation context, scholars worry about the lack of coherence and standards in how private actors approach content moderation in different conflicts around the world. Scholars have also criticized the EU for an overbroad ban on Russian media that fails to account for the broader implications of wholesale state content restrictions.⁴⁶

For some, the selectivity problem nullifies whatever virtues the international response to the Ukraine war may have. If predominantly western world powers apply a double standard grounded in political interests in deciding what violations of international law to punish severely and which individuals deserve protection, the whole international rule of law enterprise loses its legitimacy and appeal for those who are not a part of the dominant coalition.

This view, we argue, goes too far. It is better for all nations that world powers reaffirm the prohibition against international use of force this time, even if they wavered in the past, so that we can do more in the future. It is better to offer solutions for Ukrainians and alleviate a mass humanitarian crisis this time even if world powers have not been as generous in the past, as this generosity can serve as a benchmark for what is possible. It is better for internet platforms who control global information flows to accept responsibility for their role in geopolitical conflicts than to have them stand idly by as disinformation and harmful online behavior spread because they failed to come up with a coherent and workable rulebook that they can apply consistently across regions and conflicts.

International law and the international order have always been works in progress. International law has always been enforced haphazardly, and politics and cold state interests have always played a substantial role. We should welcome instances, like the Ukraine war, in which international law, norms and partnerships function as intended. At the same time, it is important to work toward more equitable, less selective application of international law and to address the pathologies that have long plagued the international system across different subject-matter areas. And in that respect, the Ukraine war may prove rather generative. By resurfacing challenges related to

selectivity, racism, north-south relations, mass displacement, and new methods and theaters of warfare, the war has reinvigorated discussions that could precipitate important reforms.

For example, the Ukraine conflict stirred the long-standing debate over the legality, effectiveness, and collateral costs of economic sanctions. A year into the conflict, one of the most comprehensive sanctions regimes in post-Cold War history has failed to dissuade Russia from pressing forward with its military aspirations in Ukraine. This has contributed to an impression that sanctions do more harm than good in hurting the international economy, imposing immense compliance costs, encouraging overcompliance, bolstering alternative economic systems to the dollar dominated one, sparing sophisticated sanctions targets that conceal their assets well, and taking an excessive toll on individual liberties.

Scholars have considered potential avenues for reform, from incremental addition of due process requirements, through using domestic law to impose restrictions on the resort to sanctions in the main sanctions-imposing jurisdictions, to even more ambitious and fundamental reforms like pushing for greater financial transparency worldwide and moving toward energy self-sufficiency to diminish dependence on powers like Russia that violate international norms.⁴⁷ All of these proposals are currently on the table, and international players would do well not to let this moment go to waste in assessing and implementing them.

Ukraine also highlights how dated the international refugee and migration law framework is. An international framework more in tune with the reality of mass displacements today would expand the international refugee definition to cover situations of armed conflict and generalized violence, address problems of racism and equity, and institutionalize mechanisms for facilitating true responsibly sharing mechanisms when mass displacements occur. The time has come to heed calls from scholars and policymakers to refocus attention on responsibility sharing as a promising path for addressing global migration and displacement. The Ukraine war is an important milestone toward more systematic consideration of concrete responsibility sharing mechanisms that may follow the Ukraine blueprint.⁴⁸

Much work remains to be done in the thorny field of content restrictions in conflict and the individual rights challenges that they raise. This is a relatively new field, with a world of unanswered questions that will continue to occupy lawyers and policymakers in both the public and private sectors. Ukraine once again demonstrated the importance of developing capacity and mechanisms within private online intermediaries to better address harmful content. This is one of the objectives of the EU's recent

45. Chachko & Heath, *supra* note 10.

46. Kaye, *supra* note 35.

47. Chachko & Heath, *supra* note 10.

48. Linos & Chachko, *supra* note 3; Ramjii-Nogales, *supra* note 33.

comprehensive Digital Services Act, which requires online intermediaries to put in place procedures for addressing a variety of harmful online behaviors and imposes various related requirements.⁴⁹

Whether the Act strikes the right balance between state intervention in content moderation and preventing online harms has been intensely debated. In any event, the EU model is bound to be a globally influential one.⁵⁰ Its implementation should be informed by instances of success—and overreach—during the Ukraine conflict to date. In particular, the EU experience with comprehensive crisis-driven bans on certain content cautions against using the emergency intervention authority that the Digital Services Act provides for such purposes. As David Kaye has argued, the EU Russian state media ban backfired in giving authoritarians license to restrict what they see as disinformation in the guise of emergency measures.⁵¹

Finally, scholars have called on regulators and policymakers to move their thinking forward from flashy, high impact cyber operations to ‘lower-level operations that have proven more consistently problematic, both

in Ukraine and elsewhere.’⁵² While there is an emerging consensus that the former should be treated as use of force equivalents, the latter category of operations continues to raise difficult policy and regulatory questions that should receive more attention.

Conclusion

The war in Ukraine injected much needed energy into an international system of norms and institutions that has lost much of its vigor. The international response to the war has been far from perfect, and it has suffered from familiar pathologies of the international order. One year after the Russian invasion, it is becoming clear that the international response has failed to meet its ultimate objective: ending the war and the unspeakable suffering that it has caused. Nonetheless, the response has involved a set of significant actions across a range of international law institutions and disciplines. The EU in particular appears to have emerged from the crisis stronger, with more power in the hands of the central institutions and far greater reach into fields like defense and energy, traditionally dominated by member states. The international response also generated ideas and illuminated pathways for long overdue reforms or future development of emerging legal areas. To supporters of international law and European integration, this is a silver lining in an otherwise bleak situation.

49. Regulation (EU) 2022/2065, OJ L277/1 (19 Oct. 2022).

50. See Anu Bradford, *The Brussels Effect: The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020); in this journal see Anu Bradford, ‘The European Union in a globalised world: the “Brussels effect”’ (2021) 2 *Revue européenne du droit* 1.

51. Kaye, *supra* note 38.

52. Eichensehr, *supra* note 35.



Jean-Marc Sorel • Professor, Sorbonne Law School

International Law and War in Light of the Ukrainian Conflict: A Relation Biased Since Its Inception

Jus ad bellum and *jus in bello*. Traditionally, a distinction is made in international law between the *jus ad bellum*, the right to wage war or the right of a state to resort to war in a lawful manner, and the *jus in bello*, the law governing the conduct of war, which includes international humanitarian law, the law of neutrality, but also today international criminal law. The *jus ad bellum* is derived from the old customary basis of international law and has been progressively limited since the end of the 19th century, before the Charter of the United Nations prohibited the use of force between states. But the engraving of limits to the right to wage war in what seemed to be the marble of international conventions during the Peace Conferences in The Hague between 1899 and 1907 left many skeptical back then already. The irruption of the First World War shortly afterwards gave a sad illustration. The *jus in bello* is today on everyone's mind, as a result of the de-structuring of wars, most of which are the result of internal and not international conflicts.

The aggression of Ukraine by Russia is nevertheless a masterful exception to this pattern, which almost seemed to have put inter-state wars in the storehouse of antiquities. It is easy to understand, however, that these distinctions are often reduced to a simple reality, that of the hypocrisy of the use of force, most often outside the prescribed rules, with countless violations of humanitarian law. In this respect, Article 51 of the United Nations Charter on the 'inherent right of self-defense' has been the main pretext for the use of force since the Second World War, forgetting, on the one hand, that this power is conditioned 'until the Security Council has taken the necessary measures' and, on the other hand, that it is not subject to interpretations (such as 'pre-emptive' or 'preventive' self-defense) which extend it *ad infinitum*.

The right to [wage] war: indifference to the cause as long as it seems just. In the end, states never managed to get rid of the idea that they were waging a just war, which gave them the 'right' to do so. This is of course the

position that the Russian Federation wishes to adopt, placing the idea of a just war above all imperative norms, chief amongst them the prohibition of wars of aggression.

This 'feeling' has a long history. In the dispute between Sepulveda and Las Casas, the central question was indeed that of the right to wage war, through its moral formulation, ie the question of the just war. This is apparent from the title of Sepulveda's work—*On the Just Causes of War*—which sets the tone.¹ Las Casas received the support of Francisco de Vitoria, an illustrious theologian who rejected the very idea of a just war. But reflections on the connection between war and justice were not, however, new to the 16th century.

Believing that a war can be just is a dead end, since justice and injustice are not real but relative qualities. This furrow will nevertheless be dug for centuries, through multiple projects promoting the idea that perpetual peace can protect against wars because the latter can never be 'just'. These 'peace through law' projects assumed that law had this power, when it is only the reflection of a power relationship at a given moment. Many tried (Sully or the Abbé de Saint-Pierre in particular), but the most successful project remains that of Kant in *Toward Perpetual Peace: A Philosophical Sketch*: 'The state of nature (*status naturalis*) is not a state of peace among human beings who live next to one another but a state of war [...] [h]ence the state of peace must be *established*.'²

It is thus necessary to legally 'establish' a state of peace in order to prohibit a 'natural' war. This is a strange philosophical conception which is probably more rooted in historical observation than in reflection on the nature of humankind, or else it is necessary to 'establish' (that is to say 'educate') human beings rather than to think about natural violence. Nevertheless, the result is that peace is considered in opposition to war, as a simple interlude between two wars, as hope during a conflict, or as an unattainable ideal, all of which are intertwined. Peace sometimes seems more difficult to apprehend and to live than war. This ranges from the most absolute pessimism to a sometimes-blissful optimism. The pessimistic vision is that of a peace that always hides a future war, violence being natural and legitimate, and that it can be just. In Ukraine too, there were already hidden wars preparing the present one. There was no peace before the interstate war of 2022, but latent wars as a prelude to the open war.

The war before the war. Since the independence of Kosovo, lived as a setback by the leaders of the Russian Federation, all the actions taken by the latter tend to prove that, on this basis, all kinds of secessions and annexations are possible insofar as a Russian-speaking population feels

1. Juan Ginés De Sepulveda, 'Democrates Alter, Or, on the Just Causes for War Against the Indians', in Columbia College (ed.), *Introduction to Contemporary Civilization in the West* (Columbia University Press 1946).
2. Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2006), 72-73.

aggrieved: Georgia with the self-proclaimed republics of Ossetia and Abkhazia in 2008, before that Transnistria in Republic of Moldova, and of course Crimea in 2014, and then Donbass. Consider the ‘Minsk Agreements’ of September 2014, negotiated under the aegis of representatives of the Trilateral Contact Group on Ukraine (Russia, Ukraine and the OSCE) to achieve a peaceful settlement of the conflict in Donbass. The agreements failed almost immediately. None of their provisions were fully implemented, including the ceasefire that was at their heart. Indeed, President Putin has cited their failure as one of the reasons for invading Ukraine. In any case, Ukraine was already at war with the Russian-aided ‘separatists’ since 2014.

And this war was not only on the ground, but also before the courts. Whether before the International Court of Justice (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*), via arbitrations (*Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*) before the Permanent Court of Arbitration including in investment matters (seven cases between 2017 and 2019), before the International Tribunal for the Law of the Sea (*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*), or finally before the WTO (*Measures concerning traffic in transit, Measures affecting the import of railway equipment and their parts*).

Russian legal pretexts for war, the continuation of the deviation from *jus ad bellum*. Recall and legal arguments and facts of the Russian Federation’s aggression. On February 21, 2022, the President of Russia signed a decree by which two secessionist territories in eastern Ukraine were recognized as independent states, namely the Donetsk People’s Republic and the Luhansk People’s Republic. On February 22, 2022, treaties of friendship and mutual assistance between the Russian Federation and each of these ‘states’ were ratified by the Federation Council (the upper house of the State Duma). On February 24, 2022, Russia launched a military operation against Ukraine, with Russian armed forces entering Ukrainian territory.

The legal arguments are essentially contained in Vladimir Putin’s televised address of February 24, 2022: first, preventive self-defense, faced with the threat of NATO enlargement and the alleged desire of the ‘totalitarian’ regime in Kiev to acquire nuclear weapons and prepare an attack against the Russian Federation, requiring in particular an effort of ‘denazification’ and demilitarization of Ukraine; second, the alleged genocide committed by Ukraine in the separatist territories, the Russian military action being aimed at putting an end to it; finally, the request for assistance presented by the two ‘states’ recognized by Russia, by virtue of the right to collective self-defense provided for in Article 51 of the UN Charter

and on the basis of treaties of friendship and mutual assistance.³

This is a summary of all the pretexts accumulated in contemporary history for unjustified military interventions, be it the former French military actions in Africa, the justification for the 1979 intervention in Afghanistan by the Soviet Union, or the more recent intervention by the United States and its allies in Iraq in 2003. Jurists may be satisfied with the legal arguments invoked for each one of these actions, which means that the aggressor state feels obliged to wrap its actions in a legal justification; but satisfaction ends there, because legal arguments are just a smoke screen. Add to that the masquerade of the sham referendums after which four regions of Ukraine (Lugansk, Donetsk, Zaporizhzhia and Kherson) officially joined the Russian Federation on 30 September 2022.

What are we left with? A war that cannot be halted, but whose excesses one can still hope to mitigate.

***Jus in bello*: repression in the absence of prevention.** Absent realistic means to limit the war, the conflict in Ukraine illustrates the much-publicized reliance on the *jus in bello*. Paradoxically, this attests both to an undeniable progress and a tragic renunciation. Peacekeeping in its UN version being, to say the least, jammed (if not definitively discredited), the question is no longer that of halting the war, since this is impossible, but that of mitigating its consequences and planning for a post-war period, whenever it may come. For this purpose, we multiply conferences with future donors (or investors), we deal with humanitarian tragedies as best as we can, and we brandish justice against the impunity of aggressors. Punishing the aggressor would be a progress (provided we manage to do so), but preventing the aggression would be even better. The renunciation is here: if we cannot stop the aggressors in their actions, we hope to punish those responsible. This is not so simple, since the aggressor often claims to respect the law, and the aggressed is not exempt from responsibility in certain exactions, the reciprocal accusations too often resembling schoolboy quarrels. The flagrant violations of *jus in bello* by the Nazi regime did not prevent it from having a War Crimes Office, dependent on the legal department of the Wehrmacht, composed of jurists. This example is not isolated. What is striking is the impeccable legal and hierarchical order that seems inversely proportional to the respect of the rules applicable to the conduct of wars.

Courts are opening up again, but the legal battle is no longer pseudo-economic, but rather on the defense of humanitarian law. In addition to a new referral to the International Court of Justice by Ukraine to show that it is a victim of genocide, and deny the Russian Federation the argument that it is a perpetrator of genocide, the International Criminal Court (‘ICC’) started investigations

3. On the use of the principle of self-determination, see in this volume the contribution of Pietro Pustorino (page 67).

into various crimes, on the basis of a cooperation with Ukraine and the support of many ICC member states. This procedural magic thus allows ICC to rule on crimes against humanity, war crimes and genocide, but it does not allow it to rule on the crime of aggression, an eternal sea serpent that blocked legal progress for a long time before the General Assembly agreed in 1974 on a definition that is still used today. Indeed, the Court can only exercise its jurisdiction over the crime of aggression when it is committed by a State Party to the Rome Statute, and if the State Party has ratified the relevant amendments. Ukraine is not a party to the Rome Statute. Hence the resurgence of the idea of an *ad hoc* jurisdiction that could compensate for this inability.⁴

The machinery would be complex and the outcome uncertain but, in addition to the many humanitarian actions undertaken by numerous actors (intergovernmental organizations, NGOs, states, etc.) whose benefits cannot be denied, there remains a central question (which is not new): how to reconcile the necessary condemnation of those responsible with the search for the truth, which goes far beyond this framework because it implies a much broader form of transitional justice more capable of getting to the roots of the evil.⁵ Rendering justice is an element of peace but it is not peace. It is one element among others of transitional justice. One can think in particular of the Russian

population (of Russia or elsewhere) raised in the belief of a form of resurrection of the tsarist power, and it is above all to this population that one must address oneself in order to enable it to have a critical view of its President-dictator. And this is the most important thing. Judging Putin and his acolytes is of course important, but it is also necessary to avoid making him a martyr and a victim of the victors' justice in the eyes of his population. Mladić is on trial, but huge portraits of the deposed general still adorn the streets of the towns of the Bosnian Serb Republic, with the inscription: 'Come back, we're waiting for you.'

As it stands, the *jus in bello* can create barriers but cannot resolve the issue, dependent as it is to *jus ad bellum*, whose roots stretch back to the origin of violence between entities (not yet states), but whose legal restrictions have never succeeded in dissuading states that have the means to do so from waging what they consider to be a just war, without fearing ridicule most of the time.

If *jus ad bellum* and *jus in bello* are surprising, it is not because of tragic aspects which, conversely, should frighten, but because frightful events are not halted by these 'laws', a tragedy that can only raise eyebrows considering the great distance that separates the norms and their application. This is not a reason to give up on the law, but one should be keenly aware of its role and its effectiveness, which are circumscribed to good-faith actors willing to subject themselves to it. Unfortunately, while bad faith is sometimes apparent in the actions of certain states, it remains the most difficult thing to prove, and not only legally.

4. See the contribution in this volume by Federica D'Alessandra (page 54).

5. See the contributions in this volume by Elisenda Calvet-Martínez (page 76) and Elena Baylis (page 71).

Lasting Geopolitical Scars

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Josep Borrell · Vice-President
of the European Commission and High
Representative of the Union for Foreign
Affairs and Security Policy

Europe in the Interregnum: our Geopolitical Awakening after Ukraine

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The war against Ukraine proves that Europe is even more in danger than we thought just a few months ago. Russia's brutal invasion of Ukraine is not only an unprovoked attack on a sovereign country standing up for its rights and its democracy, it is also the biggest challenge to Europe's security order since the end of World War II. At stake are the very principles upon which international relations are built, not least those of the UN Charter and the Helsinki Final Act.

Crises tend to crystallise developments and this one has made it even clearer that we live in a world shaped by raw power politics, where everything is weaponised and where we face a fierce battle of narratives. All these trends were already happening before the Ukraine war; now they are accelerating.

This means that our response must accelerate too - and it has. We have taken rapid action across the whole policy spectrum and broken several taboos along the way: unprecedented sanctions, massive support to Ukraine including, for the first time ever, financing the delivery of military equipment to a country under attack. We have also built a wide international coalition to support Ukraine, isolate Russia and restore international legality. By any standard, the EU's response has been impressive - even if it is still not enough with the war still going on.

We do not know how and when this war will end. As *le Grand Continent* frames it in their recent print issue, we are still navigating an Interregnum.¹ But we can already say that the 2022 Ukraine war saw the belated birth of a geopolitical EU. For years, Europeans have been debating how to make the EU more security-conscious, with a unity of purpose and capabilities to pursue its political goals on the world stage. We have now arguably gone further down that path in the past weeks than we did in the previous decade. This is welcome, but we need to ensure that the

EU's geopolitical awakening is turned into a more permanent strategic posture. For there is so much more to do, in Ukraine and elsewhere.

Making Europe also a hard power

I am convinced that the EU must be more than a soft power: we need hard power too. However, we need to realise that the concept of hard power cannot be reduced to military means: it is about using the full range of our instruments to achieve our goals. It is about thinking and acting in terms of power. And, bit by bit, the conditions for this to happen are being fulfilled.

First, there is a growing awareness among Europeans about the threats they face together and the degree to which their fates are tied. Today, no one in Europe can believe or think that what is happening in Ukraine does not concern them, no matter how far away they are from the drama. So our support to Ukraine is not just an act of solidarity but also a way of defending our common interests and acting in self-defence against a heavily-armed and ruthless aggressor.

Second, the peoples of Europe have reached an unprecedented level of prosperity and social welfare, which EU membership has further increased. This makes Europe a fundamentally peaceful area built around the idea of interdependence generating prosperity and peace. However, one of the lessons of the war in Ukraine is that economic interdependence alone cannot guarantee our security. On the contrary, it can be instrumentalised against us. So we need to be ready to act against those who want to use the benefits of interdependence to harm us or wage war.

This is what is happening today. By taking unprecedented sanctions against Russia's invasion of Ukraine, we are making the cost of aggression more and more prohibitive. At the same time, we must further enhance our resilience and reduce strategic vulnerabilities, be it on critical infrastructure, raw materials, health products or other domains.

Across the EU, there is a clear commitment to learn the right lessons from this crisis. This involves us finally getting serious about threats to our strategic interests that we have been aware of but not always acted upon. Take energy. We have known for years that energy plays a disproportionate role in EU-Russia relations and that Russia has used energy as a political weapon. We are now fully mobilised to cut our excessive dependence on Russia energy imports (of oil, gas and coal).

In a similar way, the war in Ukraine is making it more urgent to achieve a leap forward on EU security and defence. Here the main point is to stress that the extra investments that EU member states are now making - which are very welcome - should involve more coordination in EU and NATO. It is not just that each of us should spend more; it is that we must all spend more together.

1. *Le Grand Continent*, *Politiques de l'interrègne* (Gallimard 2022).

A new world of threats

The Ukraine war is the most serious security crisis in Europe in decades, but threats to European security clearly come from a variety of sources, both within Europe and beyond. Our security interests are at stake in the western Balkans, the Sahel, the wider Middle East, the Indo-Pacific, etc.

While the Ukraine war rages on and exacts a terrible toll, we should not forget that the world is full of situations where we face hybrid tactics and intermediate dynamics of competition, intimidation and coercion. Indeed, in Ukraine as elsewhere, the tools of power are not only soldiers, tanks and planes but also financial sanctions or import and export bans, as well as energy flows, and disinformation and foreign interference operations.

In addition, we have seen in recent years the instrumentalisation of migrants, the privatisation of armies and the politicisation of the control of sensitive technologies. Add to this the dynamics of state failures, the retreat of democratic freedoms, plus the attacks on the ‘global commons’ of cyber space, the high seas and outer-space, and the conclusion is clear: the defence of Europe requires a comprehensive concept of security.

Thankfully, there is more awareness and agreement in Europe today on the nature of the threats we face—just as there is a process of strategic convergence on what to do about them.

The Strategic Compass — a leap forward on European security and defence

If we do want to avoid being a bystander in a world shaped by and for others, we need to act—together. That is the philosophy of the Strategic Compass that I presented last November and which was finalised by EU Foreign and Defence Ministers on 21 March.² There is a lot of detail in the Compass, which has developed into 47 pages, grouped under four work strands (Act, Secure, Invest and Partner). Let me highlight just a few of the main ideas:

To strengthen our capacity to act, we will work to reinforce our crisis management missions and operation and will develop an EU Rapid Deployment Capacity to allow us to quickly deploy up to 5.000 troops for different types of crises. We will increase the readiness of our forces through regular live exercises (never been done before at the EU level), strengthen our command and control arrangements and promote faster and more flexible decision-making. We will expand our capacity to tackle cyber threats, disinformation and foreign interference. And we will deepen investment into the necessary strategic enablers and next-generation capabilities. This will make the EU a

more capable security provider for its citizens, but also a stronger global partner working for international peace and security.

More than the papers that we usually produce in Brussels, the Strategic Compass sets out concrete actions – with clear deadlines to measure progress. This is a Member States-owned document now adopted by the Council. Throughout the process, Member States have been in the driving seat. By signing off to it, they commit to implementing it. There will be a robust follow-up process to ensure implementation. These are major differences with the 2003 EU Security Strategy and the 2016 Global Strategy.

A stronger EU also means a stronger Transatlantic partnership

At this point of the conversation, people tend to say: ‘that is all very nice but what about NATO?’. Let me stress that NATO remains at the heart of Europe’s territorial defence. No one is questioning that. However, this should not prevent European countries from developing their capabilities and conducting operations in our neighbourhood and beyond. We should be able to act as EU in scenarios like we saw last year in Afghanistan (securing an airport for emergency evacuation) or intervene quickly in a crisis where violence is threatening the lives of civilians.

I am convinced that greater European strategic responsibility is the best way to reinforce transatlantic solidarity. It is not either EU or NATO: it is both EU and NATO. Let me add that hesitations to move ahead on this agenda “because of NATO” come from inside the EU, not the US. Here I can quote from the joint statement that Secretary Blinken and I issued last December, namely that the US wants: ‘a stronger and more capable European defence that contributes to global and Transatlantic security’. The US essentially says: ‘Don’t talk, act. Please get on with it and help us share the security burden.’

If not now, then when?

I realise that those, like me, who want a step change on security and defence should explain why we feel that ‘this time will be different’. We should acknowledge that in the history of European defence there have been numerous plans and initiatives, full of acronyms, going from the Plevin Plan and the European Defence Community; to the start of the Common Foreign and Security Policy after Maastricht; to the wars in former Yugoslavia and the ‘hour of Europe’, to Saint Malo, the start of ESDP, then CSDP, the Helsinki Headline Goal, PESCO, the European Defence Fund and the European Peace Facility, etc.

Yet the basic fact remains that security and defence is probably the area in EU integration with the biggest gap between expectations and results. Between what we could be and what citizens demand—and what we actually achieve.

2. You can read more on the rationale and main elements in my personal foreword: https://eeas.europa.eu/sites/default/files/en_updated_foreword_-_a_strategic_compass_to_make_europe_a_security_provider_v12_final.pdf

So it is time to have another go. And the reason why I feel the Strategic Compass could have more impact than previous plans lies in the speed at which the global trends and geopolitical context are changing and worsening. This makes the case for action urgent and indeed compelling. This is vividly true for the war in Ukraine and the wider implications of a revisionist Russia has for European security.

But it goes beyond that: all the threats we face are intensifying and the capacity of individual member states to cope is both insufficient and declining. The gap is growing and this cannot go on.

My job has been to sketch a way out. But I know all too well that results do not depend on strategy papers, but on actions. These belong to the member states: they hold the prerogatives and the assets.

The good news is that every day we are seeing more member states ready to invest more in security and defence. We have to ensure that these welcome additional investments are done in a collaborative way and not in a fragmented, national manner. We must use the new momentum to ensure that we, finally, equip ourselves with the mind-set, the means and the mechanisms to defend our Union, our citizens and our partners.

Politically I see the choice we face as similar to when we launched the euro or the Recovery Plan. When the costs of 'non-Europe' became so high that people were ready to re-think their red lines and invest in truly European solutions. We jumped together, so to speak and, in both cases, the results are clear and positive. Let us make a similar jump forward on European security and defence, as our citizens expect. If not now, then when?

The language of power revisited

For good or bad, I suspect that my mandate as EU High Representative will be associated with a phrase I used during my hearing in October 2019 in the European Parliament, namely that Europeans had 'to learn to speak the language of power'.

I argued that the origin of European integration had stemmed from a rejection of power politics among the participating states. The European project had succeeded by turning political problems into technocratic ones and by supplanting power calculations with legal procedures. In the history of international relations and our war-torn continent, this was a Copernican revolution. It was also spectacularly successful, cementing peace and cooperation among previously warring parties, creating institutions, mental maps and a vocabulary that were unique.

But this historic chapter has ended, as the EU grappled with various crises and shocks: the financial and euro

crises, the migration crisis³ and Brexit. All these triggered intensely political debates about the nature of the EU and the sources of solidarity and legitimacy. These could not be solved with the usual EU tactic of de-politicisation and technical fixes and market-based solutions.

For many years, we have been living through a new phase of European history that is not so much about *spaces* (a Brussels favourite, of open borders and free movement) but about *places* (where people come from and belong to, their identity). We seem less focused on *trends* (globalisation, technological progress) and more on historic *events* (and how we respond to them): like the pandemic and Russia's attack against Ukraine.⁴

On top comes a major external driver. The success of EU integration and the chosen method of de-politicisation also came at a price: a reluctance and inability to come to terms with the fact that, outside our post-modern garden, 'the jungle was growing back'.⁵ Thirty years ago, many discussions and books were about how the world was flat, how history had ended and how Europe and its model was going to run the 21st century. These days they are about the weaponisation of interdependence and how a supposedly naïve Europe is ill suited to the age of power politics.⁶

Throughout all this, I have been convinced of two core points:

First, we must be realistic and recognise that the current phase in history and global politics requires us to think and act in terms of power (hence, the phrase 'the language of power'). The war against Ukraine is the latest and most dramatic illustration of this.

Second, the best way to exert influence, shape events and not be driven by them, is at the EU level: by investing in our collective capacity to act.⁷

Everything else is embellishment and detail.

As a consequence, we must equip ourselves with the mind-set and the means to handle the age of power politics and we must do so at scale. This will not happen overnight – given who we are and where we come from. However, I do believe that we are putting in place the building blocks and that the Ukraine crisis has accelerated this trend.

3. Ivan Krastev, 'Angoisse écologique contre crise démographique: le clivage européen de deux imaginaires apocalyptiques' in *Le Grand Continent, Politiques de l'interrègne* (Gallimard 2022). See also Hugo Brady, 'Openness versus helplessness: Europe's 2015-2017 border crisis', *Groupe d'études géopolitiques*, June 2021.
4. Luuk van Middelaar makes this point in <https://legrandcontinent.eu/fr/2021/04/15/le-reveil-geopolitique-de-leurope/>
5. See Robert Kagan, *The Jungle Grows Back: America and Our Imperiled World*, Brookings, 2018.
6. Mark Leonard, 'L'ère de l'a-paix', *Le Grand Continent*, 18 February 2022.
7. Luiza Bialasiewicz, 'Le moment géopolitique européen: penser la souveraineté stratégique' in *Le Grand Continent, Politiques de l'interrègne* (Gallimard 2022).

Already in 2021, we were showing that we were ready to adopt a strong posture to counter the open displays of power politics on our eastern borders. In addition to our support for Ukraine, one can point to what we did on Belarus, where we have held firm including on the instrumentalisation of migrants, or to Moldova, where we expanded our support.

In addition, we have been strengthening our approach to China and set out how the EU can enhance its engagement in and with the Indo-Pacific region. On China, we have become less naïve and been doing our homework to counter the challenge of asymmetrical openness with our policies on investment screening, 5G, procurement and the anti-coercion instrument, as also set out by Sabine Weyand in *Le Grand continent*.⁸

Plus, with our Indo-Pacific strategy, we are engaged in a process of political diversification, investing in our ties with democratic Asia. Central to this effort is our work on the Global Gateway, to spell out our offer and how it differs from that of other actors. The point of the Global Gateway is to build links not dependencies. Indeed, many Africa and Asian partners welcome the European approach to connectivity with its emphasis on agreed rules, sustainability and local ownership. But this is a competitive field and there is a battle of standards underway. Therefore, we need to be concrete and not limit our stance to general statements of principles and intent. That is why we envisage mobilising up to €300 billion under the Global Gateway, with €150 billion especially for Africa, plus several flagships, to make the cooperation as concrete and tangible as possible.⁹

I could go on but the main point is to underline that, bit by bit, the notion of a geopolitically aware EU was already taking shape before the war against Ukraine. The task ahead is to make Europe's geopolitical awakening more permanent and consequential. This requires us not just to learn the language of power but to speak it.

Halfway through the mandate: what can we do differently and better?

This European Commission started in December 2019. More than two years on and having analysed how we make EU foreign policy, my main worry is that we are not keeping pace. As my friend and the EU's first High Representative Javier Solana says, time in politics, like in physics, is relative: if the speed at which you are changing is lower than the speed of change around you, you are going backwards. And this we cannot afford. Our response to the Ukraine crisis shows what can be done if the pressure is extreme. However, it is too early to conclude this has become the general way of operating in EU foreign policy.

So let me share some ideas on what could be the four key ingredients for success and greater EU impact in a turbulent world:

1. Think and act in terms of power.

Europeans, with good reason, continue to favour dialogue over confrontation; diplomacy over force; multilateralism over unilateralism. But if you want dialogue, diplomacy and multilateralism to succeed, you need to put power and resources behind it. Whenever we have done so—in Ukraine, Belarus or with our climate diplomacy—we have had an impact. Whenever we opted for stating principled positions without specifying the means to give them effect, the results have been less impressive.

My sense is that the ideas around the language of power or the weaponisation of inter-dependence are now broadly accepted. However, the implementation and the needed resources and commitments are still a challenge.

2. Take the initiative and be ready to experiment.

Overall, we are too often in a reactive mode, responding to other people's plans and decisions. I also believe we have to avoid bureaucratic routine ('what did we do last time?') and regain a sense of initiative.

In addition, we must be ready to experiment more. It is often the safest option to stick to what we know and what we have always done. But that is not always the best way to get results.

3. Build diverse coalitions and take decisions faster.

We need to be more goal-oriented and think how we can mobilise partners around our priorities, issue by issue. We should acknowledge that, alongside coalitions of like-minded partners, we also have countries working with us on some issues while opposing us on others. And if the central government is unhelpful, we should work more with local forces or civil society groups.

In the EU, we are very busy with ourselves, and it takes a long time to establish common positions. When member states are divided, the unanimity rule in foreign security policy is a recipe for paralysis and delay. That is why I am in favour of using constructive abstention and other options foreseen under the Treaty, such as using qualified majority voting (QMV) in selected areas, to facilitate faster decision-making.¹⁰

There is the risk that we prioritise the search for internal unity over maximising our external effectiveness. When we have finally reached a common position—often by

8. See <https://legrandcontinent.eu/fr/2022/01/31/doctrine-de-la-double-integration-sabine-weyand/>

9. See more here https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6433

10. See more on this: https://eeas.europa.eu/headquarters/headquarters-homepage/86276/when-member-states-are-divided-how-do-we-ensure-europe-able-act_en

adding a lot of water to the wine—the rest of the world has moved on.

4. *Shape the narrative*

After spending decades in politics, I am convinced that probably the most important ingredient for success is shaping the narrative. This is the real currency of global power.¹¹

For this reason, at the beginning of the pandemic I spoke about existence of a 'battle of narratives'¹² and stressed the importance of investing in a common strategic culture, which needs a European debate, a space to discuss about what we can and cannot do in EU foreign policy and why. Accordingly, I regularly contribute to this journal and to the seminars of Groupe d'études géopolitiques, which I consider a tangible example of the emergence of a strategic, political and intellectual debate on a continental level.¹³

The citizens of the EU do not care much about who does what in Brussels, nor about abstract discussions. They are not bothered with the number of statements we make, or what sanctions we adopt. They judge us on outputs not inputs. In other words, on results: are they safer, or more prosperous because of EU action? Is the EU more or less influential, also in terms of defending our values, than a year ago? Are we more or less trusted by others? Have we achieved more or less by way of supporting our partners? These are the metrics that matter.

The war against Ukraine has made it clear that in a world of power politics we need to build a greater capacity to defend ourselves. Yes, this includes military means, and we need to develop them more. But the essence of what the EU did in this crisis was to use all policies and levers - which remain mainly economic and regulatory in nature - as instruments of power.

We should build on this approach, in Ukraine but elsewhere too. The core task for 'geopolitical Europe' is straightforward: to use our newfound sense of purpose and make that the 'new normal' in EU foreign policy. To protect our citizens, to support our partners and to face our global security responsibilities.

11. Lorenzo Castellani, 'Le nouveau visage du pouvoir' in *Le Grand Continent, Politiques de l'interrègne* (Gallimard 2022).

12. See the blog post here https://eeas.europa.eu/headquarters/headquarters-homepage/76379/coronavirus-pandemic-and-new-world-it-creating_en

13. <https://geopolitique.eu/en/2021/05/05/european-foreign-policy-in-times-of-covid-19/>



José Manuel Albares · Minister of Foreign Affairs, European Union and Cooperation, Spain

A New Strategic Concept for NATO

Shortly after the announcement of the 2022 summit in Madrid, the withdrawal of NATO's 'Resolute Support' mission from Afghanistan became a complex and dramatic military operation that was followed closely by Euro-Atlantic public opinion who watched in disbelief as thousands of civilians evacuated at the same time as our own troops. Global public opinion was equally taken aback as many wondered how more than ten years of allied efforts had failed to prevent the Taliban from regaining power.

The Alliance's strategic outlook will not disregard this experience as we approach the Madrid summit this coming June 29th and 30th. But it is the missiles falling on Kiev, the Bucha massacre, the grisly bombing of a maternity hospital in Mariupol, in short, the use of war as a political tool, which has transformed Euro-Atlantic security in the most profound way, making it the backbone of the work that will be done in this next meeting of the Alliance's heads of state and government.

For Spain, the summit that will take place in Madrid on June 29th and 30th marks an important milestone in our NATO membership as it coincides with the 40th anniversary of our membership in the organization. Forty years during which Spain has been a loyal and engaged ally, and for which membership in the Alliance has been the driving force for modernization of equipment and a doctrinal change for our armed forces, based on interoperability and the joint deployment of assets and capabilities, with Spain being one of the main contributors to the Alliance's missions and operations.

From this point of view, we want the Madrid summit to be a success. In order to achieve this, it must meet four main objectives: formulate a firm response to the Russian threat, highlight threats coming from the southern flank, show unequivocal support for the accession of Finland and Sweden, and above all, project an image of unity and cohesion among the allies. This should be reflected in the new strategic concept that will be adopted by the Alliance.

Among the questions that the Alliance will have to address, defining a posture of deterrence and defense has gained importance, with a particular focus on the Eastern flank. This was an important question before February 24th given the Russian Federation's assertiveness since the invasion of Crimea and the conflict in the Donbas in 2014, but we have seen on the ground that the Russian threat has become a reality making it a clear need to strengthen our deployment in order to secure NATO's borders. During its more than 70 years of existence, the Alliance has worked on a variety of approaches to contain the threat on this flank. This is therefore a part of its DNA, and we have the doctrine and the capabilities to adapt and respond in an appropriate way. Spain has also demonstrated its engagement by contributing to strengthening the Alliance's deterrence in the East, the security of which we are currently contributing to through two primary missions: ensuring the security of Baltic airspace through the deployment of eight F-18s for the Baltic Air Policing operation, as well as the enhanced forward presence mission in Latvia where we currently have over 500 troops deployed in addition to armored vehicles and combat tanks. This is a clear demonstration of our understanding of European security as an indivisible whole, stretching from the Baltic Sea to the Mediterranean.

To be precise, an unequivocal understanding of European security also requires that we pay attention to threats coming from other fronts, specifically our Southern flank. The undeniable priority of the Eastern flank is and must be compatible with the Alliance's need to maintain a '360-degree approach' to confront these threats. Today, the Mediterranean and the Sahel are both faced with a multi-dimensional crisis which directly affects our continent's safety.

This region has become the epicenter of jihadist terrorist activity, which has been fed by a humanitarian crisis and is now compounded by a food crisis due to difficulties in securing grain supplies from Ukraine and the increase in prices for staple food items. This situation, along with the deteriorating political situation and democratic norms in the Sahel and increased Russian presence in the region compels us to strengthen our commitment in favor of the stability and prosperity of the Southern flank.

This Southern dimension is also particularly vulnerable to the use of migration and energy as pressure tactics, similar to what has already been observed on the Eastern flank. NATO must therefore pay particular attention to its ability to respond to hybrid threats, notably by strengthening cybersecurity.

The international impact of the challenge to NATO resulting from Russia's attack against the most important partner of NATO's Eastern neighborhood also requires us to consider the future of NATO's partnerships in this new security context. Cooperative security is one of NATO's main tasks, along with deterrence, defense, and managing crises. The Alliance must be able to efficiently transfer its

support to partners who need it, but also to have partners to contribute to NATO's security.

In our immediate neighborhood, support for partners—such as Georgia, Moldova, or Bosnia-Herzegovina—as well as the Alliance's 'open door' policy are the tools that will allow us to structure future relations. On the Southern flank, we must revitalize frameworks such as the Mediterranean Dialogue—which is of particular importance to Spain—or the Istanbul Cooperation Initiative.

All this must be reflected in NATO's Strategic Concept. This document describes the objective and nature of the organization, its primary tasks in terms of security and defense, as well as the challenges and opportunities it faces. It also specifies the elements of the Alliance's security approach and provides guidelines for it to be adapted politically and militarily. Its creation is the source of one of the most important debates that can take place within the Alliance, to which is added an important component of strategic communication and deterrence, since Strategic Concepts are made public after they are adopted.

Added to these debates on the Strategic Concept is the question of NATO expansion. Russia's aggression had the opposite effect of what Putin had likely calculated before the invasion of Ukraine; it has led the two countries in its Northern neighborhood, Sweden and Finland, to request immediate NATO membership following decades of neutrality. This will likely be another major focus of the Madrid meeting.

The future membership of Sweden and Finland to NATO, which Spain supports, brings us to a fundamental element of Euro-Atlantic security: the relationship between the European Union and NATO.

While formally 'partners,' the relationship between the two organizations is far more extensive and complex than that definition. Consider the network of common interests arising from the fact that 21 of the 30 Allies are also members of the Union.

If some questioned this cooperation in the past, the Ukraine crisis highlighted the symbiosis between the two organizations' actions. The combination of NATO's traditional military deterrence and the Union's economic leverage, along with the financing for delivery of military equipment to Ukraine via the European Peace Facility, are proving pivotal in our response to the crisis.

For decades there existed a de facto division of labor between the EU and NATO which gave political and

economic leadership to one and military leadership to the other. But as European defense developed—with the implementation of the European Security and Defense Policy, followed by the Common Security and Defense Policy (CSDP)—and as NATO made progress in strengthening what can be called 'political interoperability' the interaction gradually moved to a higher level.

In this sense, it is essential to strengthen the synergies and complementarity of efforts between the two organizations. With the adoption of the Strategic Compass in April 2022, the new scenario that is emerging within the European Union's security policy paradigm offers an opportunity to strengthen the relationship with NATO.

Spain has always been on the forefront when it comes to development of European defense initiatives as it maintains an absolute conviction that a strong Europe in this matter strengthens NATO and vice versa. We hope that Madrid can be a starting point for a new framework of relations between the EU and NATO. The next joint EU-NATO declaration should therefore take into account the experiences of the last few months and seek to channel the potential that the Russian invasion of Ukraine has revealed.

For Spain, who will assume the presidency of the Council of the EU in the second half of 2023, the Madrid Summit offers an extraordinary occasion to convey to our citizens, our partners—and to other countries—the unity between the Allies and EU member states in defending the values and principles of democracy and international law.

The questions that the Allies will address during this next summit clearly demonstrate that their relevance goes beyond that of an ordinary meeting of heads of state and government and the Alliance. The circumstances are truly exceptional. We are responsible before our citizens and before our partners not only for defending the Euro-Atlantic space, but also for a model of international society founded on rules which must rebuff both state and non-state actors who use violence to achieve their goals. Those of us who will gather in Madrid in June 2022 are obligated to respond together to the challenge posed by those who seek to dominate by force.

At this critical moment in our Alliance's history, our responsibility to our commitments under the Washington Treaty, in the service of a democratic and secure future, leads us to once again strengthen the unity that makes our organization the most successful military alliance in history.



Jorge E. Viñuales · Harold Samuel
Professor of Law and Environmental Policy,
University of Cambridge, and Professor of
International Law, LUISS Rome

The Ukraine War and the Energy Transition

The global energy crisis resulting from Russia's invasion of Ukraine is deceptively familiar. Since the 1970s, the weaponization of energy exports has become a real possibility, used to great effect in a handful of cases. It first emerged when, in 1973, certain members of the increasingly assertive Organization of Petroleum Exporting Countries ("OPEC"), which had organised themselves as the OAPEC ('A' standing for Arab), imposed an embargo on oil exports against supporters of Israel in the Yom Kippur war. The spike in the price of oil that followed bears a clear resemblance to that of fossil fuels, particularly gas, observed in the last year, and it has been largely driven by the decision of a major producer, Russia, to achieve a political aim in the context of a military confrontation.

Yet, the analogy is deceptive. It fails to capture a fundamental difference, namely that Russia's offensive takes place at a crucial moment within a broader process of energy transition and socio-economic transformation driven by the need to reduce emissions of greenhouse gases. In its recent 2022 *World Energy Outlook*, the International Energy Agency ('IEA'), itself a child of the 1973 energy crisis, has lucidly noted this major difference.¹ It means that, unlike the response to the 1973 crisis, which did not question the place of oil in the energy matrix, today's response involves a much more fundamental transformation of the energy system away from reliance on fossil fuels, which is already underway as a response to the much wider phenomenon of climate change. From this perspective, today's energy crisis must be seen as a clash in an ongoing tension driven by climate change between two competing socio-technical regimes, one based on fossil fuel technologies and another on low-carbon ones.

Months before Russia launched its offensive, the very 'rescue' and 'recovery' policies introduced by governments to navigate the COVID-19 pandemic had raised red flags

due to their general inconsistency with climate action.² As the pandemic or, more specifically, the lockdowns imposed as a result of the pandemic receded, the fear of having back-tracked on the effort to decarbonise energy systems became increasingly visible. But back-tracking fears reached new heights following the Russian offensive, which deliberately relied on energy exports manipulation to pressurise European countries not to interfere with Russian aims. In Europe, high energy prices and their associated political costs provided a new rationale for the temptation to revert to fossil fuels, pitting short-term political needs against medium- and long-term energy transition strategies.

In this context, today's energy crisis has deeper roots than the Russian invasion of Ukraine. The fundamental question, from an energy perspective, is whether the current crisis threatens the viability of the ongoing energy transition or not and, more realistically, whether it does so to some degree in at least some parts of the world. There is no single answer to this question, but in searching for possible answers, there are three long-held assumptions of energy policy that should no longer be assumed, namely: that fossil fuels are the key to cheap energy, that States face an 'energy trilemma' opposing energy security, affordability and sustainability, and that climate policy is costly and incites a 'race-to-the-bottom', ie the dismantling of environmental policy to increase competitiveness. In this brief contribution, I revisit these assumptions. My overall point is not that one or more of them may not be relevant for a specific country, at a specific point in time, but that they no longer can be held as 'assumptions' or basic tenets of energy policy.

1. Cheap energy from fossil fuels?

Energy prices are a complex concept. First, there are important differences between different energy commodities (ie the resources used to produce a certain energy product), such as coal, crude oil, natural gas or uranium, but not sunlight or wind, which are not priced commodities. Secondly, depending on the commodity, there may also be significant regional differences in prices, such as for natural gas. Thirdly, from the perspective of products, particularly electricity, assessing the price of electricity produced from different technologies and, specifically, from power generation facilities at different stages of their operation, requires non-trivial adjustments, embodied in the concept of levelised cost of electricity. Fourthly, the data and measurement from different reports may vary, sometimes significantly, depending on what aspects are

2. According to the Global Recovery Observatory ('GRO'), as of August 2022, USD 18.16 trillion had been spent on COVID-19 fiscal stimulus in the 89 countries monitored since the beginning of the pandemic. Of these, USD 15.05 trillion went into short-term 'rescue' policies and only USD 3.11 trillion were spent on longer term 'recovery' measures. Only a third of these USD 3.11 trillion (USD 0.97 trillion) qualified as 'green spending', understood by reference to the associated emissions of greenhouse gases (GHG), air pollution and impact on natural capital. See the website of the Global Recovery Observatory, available at: <https://recovery.smithschool.ox.ac.uk/tracking/>

1. IEA, *World Energy Outlook 2022*, Executive Summary, at 26.

emphasised and which ones are played down or excluded. These and several other differences stem from the basic observation that the term ‘energy’ is a conceptual construct aggregating very different realities. One can observe the evolution of different measurements of this aggregate (eg an energy commodity price index³) but, for the analysis of the prospects of the energy transition, the assessment must necessarily be more granular.

In the latest World Bank report on *Commodity Markets Outlook*, of October 2022, it is observed that overall:

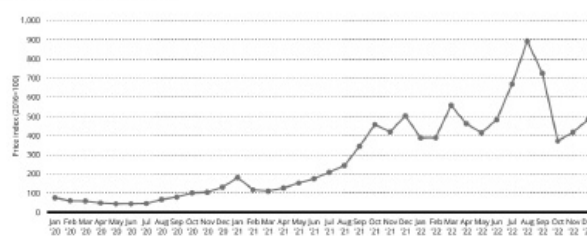
‘[m]ost commodity prices have retreated from their peaks in the aftermath of the post-pandemic demand surge and war in Ukraine as global growth slows and worries about a global recession intensify. However, individual commodities have seen divergent trends amid differences in supply conditions and their response to softening demand.’⁴

The focus of this observation is on the pandemic, the war in Ukraine and the economic slowdown, rather than on the longer-term energy transition. Importantly, the price of fossil fuel resources (coal, oil and natural gas) saw a sharp increase starting in late 2021, with the post-pandemic rebound, reaching all-time highs (for natural gas) due to the weaponization of such resources by Russia as part of its strategy in the Ukraine war, and then declining as a result of successful reserve replenishment efforts in Europe, milder than expected weather, the economic slow-down, the tightening of credit (to fight inflationary pressures) and fears of an economic recession. According to the IEA’s *World Energy Outlook 2022*, the Ukraine crisis provided:

‘a short-term boost to demand for oil and coal as consumers scramble for alternatives to high priced gas. But the lasting gains from the crisis accrue to low-emissions sources, mainly renewables, but also nuclear in some cases, alongside faster progress with efficiency and electrification’.⁵

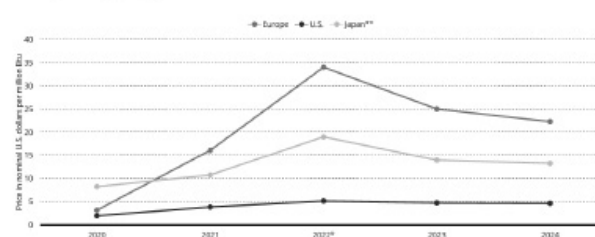
Although all three main fossil fuel resources, coal, oil and gas, saw substantial price increases over this period, the prices reached by natural gas were utterly unprecedented. The following picture, sourced from *Statista*, shows the evolution of the monthly natural gas price index worldwide between January 2020 and December 2022:

Global monthly natural gas price index 2020-2022



If this trend is regionally disaggregated, we see that the main price increases took place in Europe:

Global natural gas commodity prices by region 2020-2024



The massive increase in the prices of fossil fuel resources revived classic energy security fears, with their traditional responses, namely diversification of energy supply sources and efficiency or other consumption management policies. But the context of these responses today is very different from that of prior energy supply crises. More than the climate emergency, the short-term responses were particularly sensitive to the high costs of fossil fuels compared to the lower costs of electricity generated by renewable energy technologies, particularly wind and solar photovoltaic. The diversification of supply sources is thus taking place in a context where such technologies are mature and extremely competitive, even against ordinary (ie much lower) fossil fuel prices. To grasp this dimension, it is useful to refer to the concept of levelised cost of electricity (‘LCOE’), which provides an estimate of the average cost per unit of electricity generated across the lifetime of a new power plant. It allows comparison of costs across different forms of electricity generation technologies. The LCOE produced from renewable energy technologies decreased steeply in the decade before the Ukraine war, as a result of the socio-technical transformation driven by climate change.

According to a 2022 Report of the International Renewable Energy Agency (‘IRENA’):

‘[t]he period 2010 to 2021 has witnessed a seismic shift in the balance of competitiveness between renewables and incumbent fossil fuel and nuclear options. The global weighted average LCOE of newly commissioned projects utility-scale solar PV projects declined by 88% between 2010 and 2021, that of onshore wind and CSP by 68%, and offshore wind by 60%. In 2021, the global weighted average LCOE of new utility-scale solar PV and hydropower was 11% lower than the cheapest new fossil

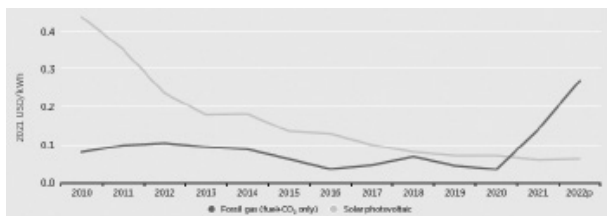
3. See eg the global commodity price index (2013-2021, with forecast to 2024) calculated by Statista: <https://www.statista.com/statistics/252795/weighted-price-index-of-energy/>

4. World Bank, *Commodity Markets Outlook*, October 2022, Executive Summary, at 1.

5. IEA, *World Energy Outlook 2022*, at 29.

fuel-fired power generation option and that of onshore wind 39% lower.⁶

The following figure, extracted from this report, compares the global weighted average LCOE of solar PV and gas-generated electricity (expressed in USD per kWh of electricity). The figures of 2022 are a possible projection, but the figure is useful, precisely, to show the underlying trend in which the energy crisis triggered by the Russian invasion of Ukraine intervened:



According to another report from the network REN21, in 2021, renewable energies generated 28.3% of global electricity, up from only 20.4% in 2011.⁷ Of particular note, solar PV and wind energy technologies provided, for the first time, more than 10% of global electricity. However, electrical end-uses only accounted for 17% of total final energy consumption (“TFEC”), with the largest share of TFEC coming from thermal uses (51%), followed by transportation uses (32%), where the share of renewables is much smaller. The share of renewables in TFEC varies widely across countries. It is noteworthy that the share of renewables in TFEC in large emitters of greenhouse gases such as China, the US, India, Russia and most EU countries remains below 20%.⁸ Moreover, as discussed later in this article, the increase in fossil fuel prices from late 2021 onwards led to additional investment in fossil fuel infrastructure, which if effectively put to use may ‘lock in’ future emissions or, alternatively, result in massive stranded assets.

Thus, from the perspective of energy prices, the price signals are unclear. If a direction can be discerned in recent developments, it is not that fossil fuels are the cheapest way of producing energy. Quite to the contrary, fossil fuels have emerged as the most expensive way of doing so, in the short term. In the electricity sector, renewable energy technologies have been instrumental in making prices lower, but their role in thermal services and, above all, transportation, is still limited, although growing. Under these circumstances, the assumption that fossil fuel prices are the key to cheap energy is inaccurate and, even if fossil fuel prices decrease significantly in the medium- and long-term, the even more significant decrease in renewable energy prices, together with their growing use for thermal and transportation, makes that assumption far from obvious.

2. An ‘energy trilemma’ no longer?

For over a decade now, the World Energy Council has maintained a ‘World Energy Trilemma’ index.⁹ The concept of an energy trilemma postulates the existence of tensions between policies aimed at achieving three different goals, namely energy security (the ability of a country ‘to meet current and future energy demand reliably’), energy equity (the ability of a country ‘to provide universal access to affordable, fairly priced and abundant energy for domestic and commercial use’), and environmental sustainability (the transition of a country’s energy system ‘towards mitigating and avoiding potential environmental harm and climate change impacts’).¹⁰

The term ‘trilemma’ may be intriguing, but it is inaccurate. Achieving each of these goals is not mutually exclusive. Moreover, even when tensions arise, their degree and nature would require a more granular grid. For example, low-carbon nuclear energy mitigates climate change impact but pollutes the environment when considered from the perspective of nuclear waste. Moreover, there are important goals of energy policy, such as the safety of the installations, which are not represented in the trilemma. Despite these shortcomings, the concept is useful because it captures a commonly held perception that a country cannot choose, at the same time, eg sustainability and affordability or energy security and sustainability. The assumptions underlying the framing of the problem as a ‘trilemma’ are that only a fossil fuel energy matrix is affordable and secure enough to provide the electricity, transport and thermal products needed by a country (see discussion in the previous section). The very terms of the ‘trilemma’ assume that fossil fuel-based energy, although less sustainable, is more affordable and the only approach genuinely capable of ensuring security of supply.

The accuracy of these assumptions largely depends upon circumstances, such as the specific energy endowments, the system and infrastructure of a given country, the uses of energy (electricity, transportation, thermal) and the time-frame (short, medium, long-term). Moreover, technological change and diffusion can fundamentally challenge the ‘zero sum game’ perspective of the relations between the three terms of the trilemma. In the specific context of the energy crisis catalysed by the Russian invasion of Ukraine, the ‘trilemma’ lens has significant shortcomings. Whereas the urges of energy security in the very short-term have indeed given added momentum to new investment in fossil fuels, coal, oil and gas, they have also shown that fossil fuels can quickly become unaffordable, interrupt security of supply, while at the same time harming the environment, including the climate system. In such a case, a focus on fossil fuels would not satisfy any of the terms of the trilemma. Conversely, with wind

6. IRENA, *Renewable Power Generation Costs in 2021* (July 2022), Executive Summary, at 2.
 7. REN21, *Renewables 2022. Global Status Report*, at 22.
 8. REN21, *Renewables 2022. Global Status Report*, at 41.

9. World Energy Council, *World Energy Trilemma Index 2022*: <https://www.worldenergy.org/transition-toolkit/world-energy-trilemma-index>
 10. The text is quoted from the WEC’s website.

energy (both onshore and offshore) and solar photovoltaic technologies now sufficiently mature, reliance on such sources can overperform fossil fuels not only in terms of environmental sustainability, but also of equity (including affordability) and, remarkably, security of supply. That does not remove the complex interactions between energy policy goals, including the potential tensions between two or more of them, but it does emphasise the important limitations of the ‘energy trilemma’ lens. Maintaining such lens may well feed a political narrative that supports additional investment in fossil fuels, at a time when radical transformation away from them is needed.

The increasing alignment of energy security with both sustainability and affordability has not gone unnoticed. In its *World Energy Outlook 2022*, the IEA notes that:

‘[i]n the most affected regions, higher shares of renewables were correlated with lower electricity prices, and more efficient homes and electrified heat have provided an important buffer for some - but far from enough - consumers.’¹¹

Later on, it states, more explicitly, that the alignment is not a passing phenomenon:

‘[e]nergy markets and policies have changed as a result of Russia’s invasion of Ukraine, not just for the time being, but for decades to come. The environmental case for clean energy needed no reinforcement, but the economic arguments in favour of cost-competitive and affordable clean technologies are now stronger - and so too is the energy security case. This alignment of economic, climate and security priorities has already started to move the dial towards a better outcome for the world’s people and for the planet.’¹²

In a similar vein, REN21’s *Renewables Global Status Report 2022* also emphasises the alignment of the economic, security and environmental rationales:

‘a strong synergy exists between measures needed to improve energy security and those associated with the energy transition, and especially the shift to renewables. High levels of locally produced renewable energy, coupled with energy saving and better energy efficiency, improve energy security, sovereignty and diversity. This helps to reduce exposure to energy price fluctuations while at the same time reducing emissions and providing other economic benefits.’¹³

In IRENA’s *World Energy Transitions Outlook 2022*, the potential of the alignment of these goals is also emphasised:

‘[a]cceleration of the energy transition is also essential for long-term energy security, price stability and national resilience. Some 80% of the global population

lives in countries that are net energy importers. With the abundance of renewable potential yet to be harnessed, this percentage can be dramatically reduced. Such a profound shift would make countries less dependent on energy imports through diversified supply options and help decouple economies from wide swings in the prices of fossil fuels. This path would also create jobs, reduce poverty, and advance the cause of an inclusive and climate-safe global economy.’¹⁴

These three authoritative reports are merely taking stock of an increasingly noticeable alignment of goals, not only in the exceptional circumstances of the post-pandemic and the Ukraine war, but, as noted in the *World Energy Outlook 2022*, ‘for decades to come’. Under such circumstances, assuming the existence of an ‘energy trilemma’ is misleading and, given its potential to fuel a pro-fossil fuels narrative, it should be subject to caution.

3. Race to the bottom, or to the top?

Assuming that fossil fuels are the cheaper and most competitive form of energy (whereas renewable energy technologies are expensive) and that the economic goals of energy policy are at loggerheads with sustainability goals (as implicit in the ‘energy trilemma’ lens) is at the roots of yet another long held assumption: that climate policies are bad for the economy and, as a result, countries around the World are engaged in a race to increase competitiveness by lowering their standards (so called ‘race-to-the-bottom’) and benefitting from other countries’ efforts to reduce emissions.

Such an assumption has been influential in policy circles. Shortly before the adoption of the Kyoto Protocol, the US Senate adopted—by 95 votes to 0—the Byrd-Hagel Resolution stating that:

‘the United States should not be a signatory to any protocol... which would (A) mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol [...] also mandates new specific scheduled commitments [...] for Developing Country Parties within the same compliance period, or (B) result in serious harm to the economy of the United States.’¹⁵

The US signed but never ratified the Kyoto Protocol. When, years later, President Bush repudiated the instrument, he noted that he:

‘oppose[d] the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the US economy.’¹⁶

11. IEA, *World Energy Outlook 2022*, Executive Summary, at 20.

12. IEA, *World Energy Outlook 2022*, Executive Summary, at 26.

13. REN21, *Renewables Global Status Report 2022*, at 38.

14. IRENA, *World Energy Transitions Outlook 2022*, at 15.

15. S. Res. 98—105th Congress (1997-1998), agreed on 25 July 1997, available at: <https://www.congress.gov/bill/105th-congress/senate-resolution/98/text>

16. Letter from the President to Senators Hagel, Helms, Craig, and Roberts, 13 March 2001, available at: <https://georgewbush-whitehouse.archives.gov/news/releases/2001/03/print/20010314.html>

More recently, the assumption that it is economically advantageous not to adopt climate policy—ie to continue reliance on ‘cheap’ and ‘secure’ fossil fuels—and ‘free-ride’ the efforts of other countries taking mitigation action has found expression in unexpected ways. In 2015, environmental economist W. Nordhaus argued for the establishment of ‘climate clubs’ on the grounds that:

‘it has up to now proven difficult to induce countries to join in an international agreement with significant reductions in emissions. The fundamental reason is the strong incentives for free-riding in current international climate agreements. Free-riding occurs when a party receives the benefits of a public good without contributing to the costs. In the case of the international climate-change policy, countries have an incentive to rely on the emissions reductions of others without taking proportionate domestic abatement.’¹⁷

This idea has been taken up by the G7 in its ‘Statement on Climate Club’ of June 2022, announcing the aim:

‘to establish a Climate Club to support the effective implementation of the Paris Agreement by accelerating climate action and increasing ambition, with a particular focus on the industry sector, thereby addressing risks of carbon leakage for emission intensive goods, while complying with international rules.’¹⁸

The implicit understanding in this Statement and in Nordhaus’ contribution is summarised by two authors in the following terms:

‘[w]hile there are significant collective benefits associated with climate change mitigation, climate policy imposes concentrated costs on early movers who, nevertheless, only capture a small fraction of their actions’ global benefits’¹⁹

This assumption is questionable. It understates the fact that low-carbon energy policy may have important environmental and health benefits which are specific to the country taking action and, no less importantly, it entirely omits the specific economic benefits associated with ‘green industrial policies’. Low-carbon energy policies in sectors such as solar PV, wind energy, energy efficiency and electrification of thermal and transportation services are not a mere ‘burden’.²⁰ Rather, they have been shown to be highly beneficial in economic and strategic terms, raising the question as to what

‘race’ are countries running.²¹ On the evidence, a new race ‘to the top’, ie to reap the benefits of an early mover in low-carbon technologies and industries, is becoming increasingly discernible alongside the ‘locked-in’ rigidities of investment in fossil fuels.

In late 2019, the European Commission published a Communication entitled ‘The European Green Deal’, which it described as a:

‘new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use’.²²

The EU Green Deal expressly aims to design a ‘set of deeply transformative policies’ for ‘clean energy supply across the economy, industry, production and consumption, large-scale infrastructure, transport, food and agriculture, construction, taxation and social benefits.’ Transforming the energy system into a low-carbon one is a particularly important aspect of the EU Green Deal. The EU’s carbon neutrality (net zero) target by 2050 was subsequently enshrined in the so-called ‘European Climate Law’.²³ A legislative package was then proposed by the Commission in July 2021, known as the ‘Fit for 55’ (ie by reference to the pledge to reduce GHG emissions by at least 55% by 2030, as compared to 1990), with a strong focus on the development of renewable energies, increased energy efficiency (including building renovation), and the electrification of the economy (particularly the transport sector).

With the outbreak of war in Ukraine and the increase in the price of fossil fuels, the Commission doubled down on its goal to transform the Union’s energy matrix. In May 2022, the Commission published a new communication on REPowerEU, with a focus on achieving energy savings, diversifying energy suppliers (away from Russia) and accelerating the roll out of renewable energies.²⁴ A few months later, in August 2022, the US adopted the Inflation Reduction Act (‘IRA’), which contains very substantial measures to incentivise energy efficiency, electric transportation and renewable energies.²⁵ One should not underestimate the extent of the intellectual shift underlying this major piece of ‘industrial policy’ adopted by the US federal government in a country where industrial policy has long been considered anathema.

17. W. Nordhaus, ‘Climate Clubs: Overcoming Free-Riding in International Climate Policy’ (2015) 105(4) *American Economic Review* 1339.

18. G7 Statement on Climate Club, Elmau, 28 June 2022, available at: <https://www.g7germany.de/resource/blob/974430/2057926/2a7cd9f10213a481924492942dd660a1/2022-06-28-g7-climate-club-data.pdf>

19. M. Aklin, M. Mildemberger, ‘Prisoners of the Wrong Dilemma: Why Distributive Conflict, Not Collective Action, Characterizes the Politics of Climate Change’ (202) 20(4) *Global Environmental Politics* 4.

20. M. Grubb et al, *The New Economics of Innovation and Transition*, EEST November 2021

21. J.-F. Mercure et al., ‘Reframing incentives for climate policy action’ (2021) 6 *Nature Energy* 1133.

22. Communication from the Commission, *The European Green Deal*, COM(2019) 640 final, 11 December 2019.

23. Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) no. 401/2009 and (EU) 2018/1999.

24. Communication from the Commission, REPowerEU Plan, COM(2022) 230 final, 18 May 2022.

25. Inflation Reduction Act, Public Law 117–169—AUG. 16, 2022.

Interestingly, the IRA is a major challenge to the ambitions of the EU to become competitive in the green sector. This is because its financial incentives could attract part of the European industry to the US. The ability of EU countries to provide financial incentives as a means of industrial policy is limited by EU State aid rules. Yet, in a bold move signalling the increasing focus on green industrial policy, the EU has recently published a communication laying out 'A Green Deal Industrial Plan for the Net Zero Age',²⁶ which includes the possibility of adjusting State aid rules following a consultation. The rationale for this plan is stated clearly in the introduction, in a text that deserves to be quoted *in extenso*:

'[...] Europe's partners are also beginning to seize the net-zero industrial opportunities. The United States' Inflation Reduction Act will mobilise over USD 360 billion by 2032 (approximately EUR 330 billion). Japan's green transformation plans aim to raise up to JPY 20 trillion (approximately EUR 140 billion) - through 'green transition' bonds. India has put forward the Production Linked Incentive Scheme to enhance competitiveness in sectors like solar photovoltaics and batteries. The UK, Canada and many others have also put forward their investment plans in clean tech technologies. Europe is committed to working with all of those partners for the greater good.

However, trade and competition on net-zero industry must be fair. Some of our partners' initiatives can have undesired collateral effects on our own net-zero industries. More fundamentally, China's subsidies have long been twice as high as those in the EU, relative to GDP³. This has distorted the market and ensured that the manufacturing of a number of net-zero technologies is currently dominated by China, which has made subsidising clean tech innovation and manufacturing a priority of its Five-Year Plan. China's pipeline of announced investments in clean technologies exceeds USD 280 billion (approximately EUR 260 billion). Europe and its partners must do more to combat the effect of such unfair subsidies and prolonged market distortion. Where the public footprint in private markets is outsized, distortions create an unlevelled playing field and unfair competition emerges. The Commission will continue to make full use of trade

defence instruments (TDI) to defend the Single Market, and rules-based international trade, from unfair trade practices like dumping and distortive subsidies.²⁷

Whereas it may be easier to finger-point China rather than 'Europe's partners' in the text, this communication clearly signals a deeper shift in how low-carbon policies are framed: as green industrial policy to enhance the competitive edge of early movers. This is very different from the prior narrative. Some aspects of both narratives overlap to some extent, in that becoming competitive in low-carbon technologies may benefit from some degree of protection in the form of carbon equalisation measures at the border, as in a climate club. But, from a policy perspective, it is the opposite of a competitive 'race-to-the-bottom' framing. Even China's actions portrayed as market distortions are, in fact, low carbon energy policies.

4. Three assumptions not to be assumed

The significance of the Ukraine war for the energy transition must be assessed in its wider context. Despite its apparent similarity with the weaponization of oil supplies in the 1970s, the context of the war is fundamentally different.

Part of this difference comes from the need to revisit the three long held assumptions of energy policy discussed in this brief contribution. This is because, on the evidence, fossil fuels can no longer be assumed to be the key to cheap energy, the purported 'energy trilemma' may not be one, and the most important race in the years to come may not be to the bottom, but to the top.

Revisiting these three assumptions does not, as such, provide an answer to the question of whether the current crisis threatens the viability of the ongoing energy transition. But it does change the parameters of possible answers. The search for such answers belongs to each political community. Political decision-making, including in matters of economic, energy and environmental policy, is largely influenced by policy assumptions that sometimes remain surprisingly unchallenged. The current energy crisis offers a clear perspective on why some influential assumptions of energy policy need to be corrected.

26. Communication from the Commission, A Green Deal Industrial Plan for the Net Zero Age, COM(2023) 62 final, 1 February 2023.

27. Communication from the Commission, A Green Deal Industrial Plan for the Net Zero Age, COM(2023) 62 final, 1 February 2023, at 2 (emphasis added).



François Hollande • Former French President

The War in Ukraine and the Conditions for World Peace

The year 2023 has begun with the perspective of a protracted conflict on the European continent. The main protagonist is a nuclear power whose leader, Vladimir Putin, has the ability to blend the hot and the cold, or more precisely, the red-hot and the glacial, and to keep the risk of an escalation alive, which the world may fear the worst of.

This war, which is currently on everyone's mind, did not happen through a sudden flare-up in tensions between Ukraine and Russia. It is part of a process that began ten years ago and which is now partly coming to an end. This process reflects the desire of Russia and China to change the world order and to make force prevail over law.

Putin and Xi: The temptation of an authoritarian world order

This is the strategy established by Vladimir Putin, returning to the Kremlin in 2012, and Xi Jinping, who rose to become General Secretary of the Chinese Communist Party at the end of that same year. This strategy is based on the conviction shared by the two leaders that the United States—and Western nations more broadly—have reached the pinnacle of their influence and are now facing an irreversible decline, therefore justifying a revision of the international hierarchy that prevailed up to that point. In their view, this ambition is justified by the development of a new power balance. China believes that it will be the world's largest economy by 2050.

For the centennial of the Chinese Revolution in 2049, China expects to have a decisive technological advantage in key sectors such as digital, cyber, and even space. Over the last decade, Russia and China have also embarked on military programs which, in terms of weapons stockpiles, remain far smaller than the American arsenal but which, in terms of quality and quantity, represent considerable sums of money that indicate a desire to catch up with and even surpass the most sophisticated equipment. They are also convinced that the United States will inevitably fade from the international scene. Barack Obama's refusal to intervene in Syria in the summer of 2013 was the first

indication of this; this was confirmed by the West's tepid reaction to the annexation of Crimea and the occupation of a part of the Donbass. The debacle in Afghanistan did the rest.

China and Russia also interpreted the financial turmoil that engulfed Western economies, the terrorist crises that hit Europe and the United States, and finally the large migratory movements that destabilized Western societies as signs that the regimes of freedom were losing their influence. These empires took advantage of this to break new ground in Africa and the Middle East and to extend their borders ever further. Russia, and to a lesser extent China, also encouraged any and all efforts that could undermine the democratic framework within our own nations through the presence in our countries of media under their control and the use of social networks under their influence. The combined efforts of these operations succeeded in disrupting the course of elections and fueling conspiracy theories.

China and Russia have concluded that after the long period that began with the fall of the Berlin Wall and the acceleration of globalism—which both experienced as a period of secrecy, submission and humiliation—that the time had come for these two major powers to go on the offensive. In this regard, 2012 was a pivotal year. Indeed, since then, Vladimir Putin and Xi Jinping have met forty times—including during the pandemic, even though the two leaders were said to have been totally isolated during this period.

Beyond the frequency of these interactions, Putin and Xi have forged a friendship that they describe as “eternal and without limitations”. This pact has never cracked: not over Syria, nor Iran, nor North Korea. It has held firm over Ukraine through all kinds of economic, commercial, energy and military cooperation... Its impact is explicit: Russia is now China's second largest supplier of oil and its main supplier of arms. The two countries conduct joint exercises, naval operations, and air patrols.

But this relationship goes beyond the affirmation of shared interests. Putin and Xi detest the same things: the West, which they wish to weaken and repress where it intends to act, and democracy, which they believe leads to the decline and downfall of nations. They have adopted the same methods: fear at home—sometimes mild, sometimes cruel depending on the circumstances—and domination abroad. There is, however, a considerable difference given the respective places of China and Russia within globalization. For its growth, and therefore for its domestic stability, China needs to trade with the rest of the world and to receive investments from it, whereas Russia can live in relative autarky—but for how long? In any case, Putin and Xi believe that no matter what, time is working in their favor and that, since their power is unlimited in its duration as well as in its execution as long as there is no apparent counter-power, they will remain eternally linked to each other.

They are aware that this is where they have the advantage over democracies. They can allow themselves patience and delays, whereas democratic leaders know very well that their future is inevitably limited, that others will systematically succeed them and that they are obligated to act in the short term; it is never guaranteed that they will be able to inscribe their actions in the long-term.

This asymmetry, which has always existed between dictatorships and democracies, is taking on a specific dimension today. In order to preserve popularity—for autocrats always need to measure support of their opinions—authoritarian regimes play the overblown patriotism card and pretend to be under attack from Western imperialism and neo-colonialism in order to better articulate their ambitions. With ideologies that today are different—communism for Xi Jinping, Slavophilia for Putin—they are converging towards the rejection of what has been the global order. This is their message to the populations they want to enlist in this struggle. This is why, even if it is very difficult to exactly measure the Russian people's support for what is going on in Ukraine, we cannot underestimate the effectiveness of propaganda on a large part of the social body, which sincerely believes that its country is under attack from NATO and threatened by Ukrainian 'Nazis'.

Finally, if Beijing and Moscow act separately in increasingly large geographic areas, which do not necessarily overlap, they are careful to never be in competition with each other and to never publicly show any differences. These two powers, while they do not necessarily need to reiterate at every opportunity that they are allies, agree on a series of objectives.

The first is to counter the United States, which remains their main adversary. It is difficult to imagine how much Putin detests the United States. He undoubtedly hates the Americans' ambitions to impose a particular economic system, and he abhors them for their way of life and their supremacy since the fall of the Berlin Wall. These grievances remain his driving force. The second objective is to impress Europe. This is clearly one of the goals of the war in Ukraine. To frighten. To bring about, through fear, retreat and division. Their third objective is to exert as much influence as possible in conflicts affecting regions that are particularly rich in raw materials, rare earth minerals, and fossil energies. From this viewpoint, Russia is succeeding in its African operations. Russia has also taken strong positions in the Middle East by maintaining good relations with the Gulf countries and Iran as well as with Israel, all while making sure that it, along with China, controls the straits and the seas.

The ends of the war in Ukraine

This great alliance, which remains nameless, is founded on a contract that is less and less implicit, which no longer thinks of itself as a rebalancing of worlds but as the creation of a new hierarchy. The global upheaval begins with a challenge to our values of freedom, democracy and

fundamental rights. It is in this context that the Ukrainian conflict takes on its full meaning. What is at stake goes far beyond territorial battles. The issue at play is the balance of power on a global scale and setting a precedent that could justify the use of force to modify borders, or even the integrity of several nations. A new international landscape will depend on how the war is resolved and how peace is achieved.

In this regard, the alternative is relatively simple. Should Vladimir Putin obtain even a partial victory, by absorbing the four regions whose annexation he has already announced—even if he has not conquered them militarily—in addition to Crimea which has been annexed since 2014, it would mean that, despite all the aid bestowed on Ukraine, the United States and Europe did not succeed in beating back the invasion. The risk would therefore be of exposing the Baltic nations, Moldova, and perhaps even Poland to other threats; perhaps not invasion but certainly pressure on their own stability. This would also be interpreted by China as fresh proof of the West's weakness in its support for its allies and of the aversion of democracies to acknowledge the possibility of war—which is another major difference with dictatorships. In this scenario, there is reason to fear that Taiwan could be targeted before long.

This scenario would also be interpreted by nations who hold dreams of imperial destiny—such as Turkey, Iran, and Saudi Arabia—as an authorization to wade further into repression at home or conquest abroad. Emerging countries such as India, Brazil, or South Africa would be reassured in their position of equidistance or indifference regarding the attitude to adopt towards other conflicts.

In contrast, let us consider the second possibility: if Vladimir Putin were to suffer a defeat in Ukraine, if he was forced to retreat behind the lines that existed before the invasion, and if he was even forced to surrender all the territories that he has been occupying since 2014. In that case, beyond the domestic consequences this would cause in Russia, this retreat would be a death knell for any temptation to make force prevail over law. China would shelve its desire to reclaim Taiwan through military means for quite some time, though it would not necessarily abandon it. China's alliance with Russia, however eternal, would remain. But this solidarity would become an economic burden for the former as well as a political millstone with the prospect of a long isolation. China could then have to worry about the sanctions that would inevitably be imposed, penalizing its growth, which has already been affected by the pandemic; in particular, it would fear trade restrictions, which would ruin its hopes of becoming the world's leading economic power.

In order for the best scenario to occur, several conditions must be met. The first is renewed American commitment. Admittedly, the United States' position as a superpower may have elicited rejection, hostility, and even confusion during the Bush years. However, their retreat from the world stage that began under Obama, and which

was expanded by Trump, has proven to be disastrous as it created a vacuum that has been rapidly filled by rival powers, opening the door to Russia's expansion.

While it was feared that Biden would move in the same direction, particularly during the Afghanistan debacle, we must admit that he has taken a firm and courageous stance on the Ukrainian conflict. The United States has committed considerable sums of money and continues to do so to aid the Ukrainians. But will the Republican majority in the House of Representatives allow him to continue this effort? And will the next president, to be elected in November 2024, pursue a policy that combines the trade protectionism already in place with political isolationism? This is undoubtedly Putin's calculation, which focuses on the long term. He will bide his time and freeze the Ukrainian conflict if he can.

The second condition for envisioning a return to peace is ongoing support of Western public opinion. Before the invasion of Ukraine, there were several factors that could explain the resurgence in inflation: there was the ample money supply caused by the accommodating policies of central banks, the imbalance between supply and demand following the health crisis, as well as 'whatever the cost' policies in Europe, that in a certain manner stimulated purchasing power, etc. But the war in Ukraine has further amplified the rise in prices and a portion of public opinion attributes today's difficulties not so much to the end of the health crisis, but to the beginning of the conflict. Consequently, fears of shortages, skyrocketing bills, and energy insecurity necessarily challenge the picture of a public opinion in total support of the Ukrainian cause.

A union under new terms for Europe

There is every reason to believe that certain political groups, and even some European states, will call for negotiations or accommodations regarding sanctions. There are already tensions emerging in a Europe that has responded rather well to the Ukrainian crisis. These tensions will center on this highly sensitive point: the opportunity of a transactional solution with Russia. One country—Turkey—is preparing to play a key role in this. It has even laid out a strategy: to take Ukraine region by region, and to look on a case-by-case basis at what could be conceded by one side or the other. Additionally, Turkey has a dual relationship that adds to this ambiguity since it is a member of NATO and Russia's best enemy. This means that Turkey and Russia can be in competition in all areas that concern them, but they always come to an agreement. We have seen this in Syria as well as in the conflict between Armenia and Azerbaijan.

This is Vladimir Putin's second hope: believing that public opinion will eventually falter, and that Europeans prove to be more attached to their way of life over their values, to their comfort over democracy, and to their economy over security. This is the question facing the European Union today: what is its destiny? Does it want

to be an important economic and trading power, whose achievements would ensure internal cohesion and external respect, if not political influence? Does it want to be an entity with a strong economy at the global level and no political ambitions? Germany has taken this view for a long time. Today, the limits of this view are apparent.

Does Europe want to retreat to its own continent? Since its way of life has become such an exception in the world, should it not be protected at all costs by putting up borders as high as possible in order to limit immigration and to ensure industrial and energy sovereignty so as to not be affected by crises? Europe would be hard pressed to unanimously accept this choice. But it is already being promoted by some. Today, the populists no longer want to dismantle Europe. This is a paradoxical victory stemming from Brexit: no one wants to leave the Union anymore. They want to turn it into a fortress, an enclave that no longer worries about what happens outside, all the better to protect what is happening within. However, this kind of isolation requires a security guarantee. This can only be provided by the United States—and this was Donald Trump's gamble—which will naturally impose its conditions. But an alternative path is possible, and that is the path of a political union capable of ensuring the strength of these values—and therefore of making an effort in terms of defense and security—in order to better carry a message of stability and balance in the world. This direction has long been pushed aside in European debates. Now, it can no longer be postponed.

We know the hesitations and contradictions of our partners: Northern and Eastern Europe have placed their trust in the Atlantic Alliance to the point of blindness. France, for its part, is calling for strategic autonomy within the framework of NATO, but with the aim of building a European defense industry and of creating joint forces in the future. Germany, for its part, would like to combine all of these elements, in other words, to make a greater budgetary effort, to move towards joint production, although it is already buying the equipment it needs from the United States—it will never break with the United States—while making sure that it makes as much progress as possible with the Europeans.

Nevertheless, it is futile to hope that the Europe of 27 can form a union in which security is a major axis. It is therefore not with the Europe of 27, but through a Europe of certain countries in the context of strongly reinforced cooperation, that a defensive Europe will be built. The Ukrainian conflict has made it possible to clarify these different options without singling out one in particular.

Towards a new multilateralism

A new era in international relations is beginning. What will it look like? Globalization, understood as the general opening of markets and an increased intensity in trade, has reached its own limits. Let us remember that in 1975, the share of trade in world GDP was 30%; it has increased to 60%. The health crisis began a decline in this share, a

decline that will become more pronounced through the relocation of activities, paired with the enactment of new constraints and rules that will restrict the growth of international trade—to which must be added the effects of sanctions against China and other 'offending' countries. There are also value chains being set up to bypass China and Russia through protectionist measures (friend-shoring): the United States has already taken action in this area and the Europeans will have to follow. Additional taxes will be introduced and subsidies to domestic industries will increase. Finally, the generalization of environmental standards will also contribute to reducing the role of world trade in production. We are not in a phase of de-globalization, as some have said, but rather of a decline in world trade.

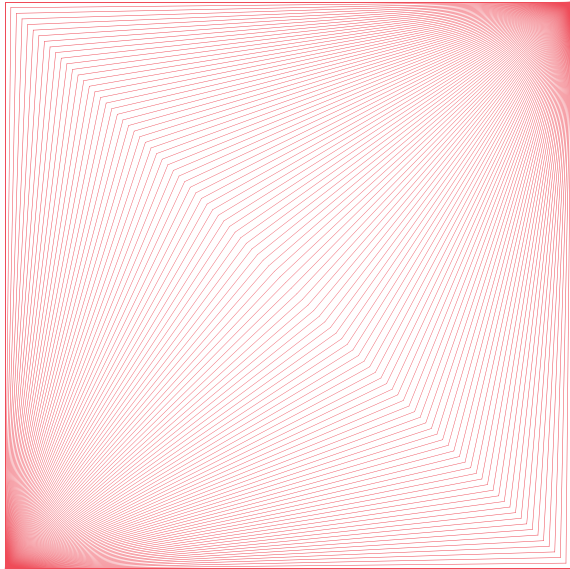
At the same time, a multi-polarization is taking place along new axes. On the one side, the Sino-Russian pact will be strengthened and will support all authoritarian regimes, whatever they may be. In places where people are executed or hanged, one of the two will always support the government in place—sometimes Russia, sometimes China.

On the other side will be the alliance of democracies, assuming that the United States is willing to make a decision on the solidity of this relationship in light of its own interests—which do not necessarily align with ours—and if Europe has chosen the option described above to ensure its own defense, and that other countries, such as Japan, Korea, Australia and Canada, will be included in the alliances. The increase in defense spending among democracies is proof that alignment is possible. Between these two blocs, other countries will be tempted to play their own part, including by launching peripheral confrontations: new, smaller powers are asserting themselves and playing a role in Africa, like Rwanda, or in Asia, like Indonesia. Not to mention Turkey. Finally, terrorism will not necessarily disappear from the picture, because whenever unresolved conflicts remain, and religious elements can be added, there is bound to be spillover that affects us.

Multilateralism will be the great loser in this new state of affairs. The Security Council is permanently paralyzed by vetoes and every day, UN peacekeeping missions demonstrate their total ineffectiveness and prohibitive cost, both in Mali and in the DRC. The UN Secretary General courageously makes statements that are only heard by those who share his values. While this system is politically stalled, health crises, global warming, or the challenge of digital technology or communications on a global scale paradoxically force cooperation and even decision-making. If our emissions prevent us from breathing, if certain regions of the world are subject to recurring disasters, if Big Tech threatens our security, we are all concerned and therefore called upon to mitigate the causes. This explains why, on major issues such as climate change, international agreements are still possible, so there is, ultimately, a ray of hope. Public opinion and the people have not had their last word. They could emerge at any moment to demand the creation of a common order.

The recent example of China's zero-covid strategy is enlightening. Public opinion finally manifested itself when least expected; a government can certainly confine a population for a year or two, but there comes a time when, even with brutal authority and almost unlimited means of repression, it comes up against something irrepressible: the need to live. There is a global public opinion. It is this public opinion that will challenge all ambitions.

It is the only bright spot we can see in the dark place that the world has become. The series of crises that we have not managed to overcome should, however, lead us to a new democratic commitment. In short, the lesson of this confrontation that is taking place on a global scale, of this ambition of force to disregard the law, and of this challenge to freedom, which is not a regression but a plan, is that democracies are superior to all other regimes—provided that the citizens concerned are convinced of this so as to better defend them.



WAR

José Manuel Albares, Luis Arroyo Zapatero, Elena Baylis, Nicole Belloubet, Régis Bismuth, Josep Borrell, Leanna Burnard, Elisenda Calvet-Martínez, Bernard Cazeneuve, Elena Chachko, Federica D'Alessandra, François Hollande, Katerina Linos, Alexandre Mennucci, Anton Moiseienko, Erin Mooney, Mira Naseer, Hugo Pascal, Alain Pellet, Anne Peters, Pietro Pustorino, Jean-Marc Sorel, Bernard Stirn, Didier Rebut, Vasile Rotaru and Jorge E. Viñuales.