

THE FAILURE OF INTERNATIONAL LAW,
INSTITUTIONS, AND DIPLOMACY TO PREVENT
RUSSIA’S INVASION OF UKRAINE

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I. INTRODUCTION

A key goal of international law and global institutions since the end of World War II has been to promote peaceful resolutions of international disputes. The UN Charter mandates that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹ Europe, especially, exemplified the general progress of those aims during the period of 1946-2021, and was comparatively free from violent conflict between sovereign states during that time. Russia’s February 2022 escalation of its sustained aggression toward Ukraine into a full-blown invasion of a sovereign nation poses an enormous challenge to that encouraging macro trend. The outbreak of large-scale conflict between sovereign European countries also raises the fundamental question of how diplomacy, international law, and global cooperative systems failed to prevent the worst-case scenario between Russia and Ukraine. Still, Russia has paid lip service towards defending the legality of its actions, indicating meaningful progress in the efficacy of international law. Ultimately, Russia’s invasion of Ukraine was a consequence of the Kremlin’s perception that a brutal pursuit of immediate geopolitical interests was worth the substantial

1. U.N. Charter art. 2, ¶ 4.

costs of violating international law and norms despite progressively strengthened institutions.

II. HISTORICALLY SITUATING THE ESCALATION OF RUSSO-UKRAINIAN TENSIONS

While the crisis state preceding Russia's invasion was seeded in 2014, developments since the U.S.S.R.'s collapse are indispensable to understanding the context of these tensions. Ukraine's sovereignty in 1990-91 succeeded decades of domination from Moscow, which has persistently sought to maintain its influence over the former Soviet Socialist Republic.² Ukraine's 2004 Orange Revolution forced a rerun of the presidential election after a rigged vote, subsequently allowing opposition candidate Victor Yushchenko's convincing electoral victory.³ While Yushchenko's presidency did not immediately prove transformative, the Orange Revolution evidenced, and further crystallized, an emergent Ukrainian national identity.⁴

In 2014, Ukraine's then-President Yanukovich—who favored closer Russian ties over embracing the West—refused to sign an association agreement between Ukraine and the European Union, precipitating the eruption of historic protests across the country.⁵ In Kyiv, the protests escalated to violent confrontations between police and protesters, resulting in over 100 deaths and precipitating a political unification against Yanukovich, who fled to Russia.⁶ The new government signed the E.U. agreement in March 2014, solidifying a consequential foreign policy shift toward Europe.⁷ These developments discomfited Russia because, prior to 2014, Ukraine had remained responsive to Russian pressure.⁸ Russia staked out the public position that

2. Taras Kuzio, *Escape from empire: Ukraine's post-Soviet national awakening*, ATLANTIC COUNCIL (July 7, 2021), <https://www.atlanticcouncil.org/blogs/ukrainealert/escape-from-empire-ukraines-post-soviet-national-awakening/>.

3. *Id.*

4. *Id.*

5. Becky Sullivan, *Russia's at war with Ukraine. Here's how we got here*, NPR (February 12, 2021), <https://www.npr.org/2022/02/12/1080205477/history-ukraine-russia>.

6. *Id.*

7. ASSOCIATION AGREEMENT between the European Union and its Member States, of the one part, and Ukraine, of the other part, 2014 O.J. (L 161/3) (EU).

8. Robert McMahon, *Background Briefing: What you should know about the Ukraine crisis*, PBS NEWSHOUR (Mar. 7, 2014), <https://www.pbs.org/newshour/world/background-briefing-ukraine-crisis>.

Yanukovych's government was an illegal coup, thus challenging the successor government's legitimacy.⁹

Also in March, Russia took advantage of Ukraine's political instability and vulnerability by seizing the Crimean Peninsula.¹⁰ On March 27, 2014, the U.N. adopted a nonbinding resolution affirming the General Assembly's commitment to Ukraine's territorial integrity in the face of a disputed Crimean referendum favoring secession from Ukraine to the Russian Federation.¹¹ A few days earlier, a Security Council resolution urging the same affirmation was not adopted due to Russia's veto.¹²

Herein lies a central impediment to the efficacy of international institutions and law as it relates to Russia-Ukraine and analogous tensions. The Security Council has extraordinary formal powers under the UN Charter. These include its Chapter VII powers to determine whether a threat to peace and security exists, which may then serve as a basis for measures, legally binding upon all nations, to restore peace and security.¹³ When a conflict's aggressor also wields veto power over all resolutions and actions of the UN Security Council—where a critical portion of both formal and informal legal powers are vested—a consequential response through international cooperation becomes significantly more difficult to effectuate.¹⁴

III. RUSSIA'S ACTIONS IN DONBAS, AND SUBSEQUENT

9. Sullivan, *supra* note 5.

10. *Id.*

11. U.N. General Assembly Resolution 68/262, <https://undocs.org/en/A/RES/68/262>.

12. Somini Sengupta, *Russia Vetoes U.N. Resolution on Crimea*, N.Y. TIMES (Mar. 16, 2014) <https://www.nytimes.com/2014/03/16/world/europe/russia-vetoes-un-resolution-on-crimea.html>.

13. U.N. Charter arts. 34, 39, 41-42. Article 34 permits the Security Council to investigate *any* situation to decide whether "international peace and security" are endangered; Article 39 allows the Security Council to decide whether aggression or threat to peace have occurred; Article 41 provides the Security Council with a variety of non-military measures to restore compliance; failing that, Article 42 gives the Security Council legal authority to take "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."

14. From the 1991 dissolution of the Soviet Union through March 2022, the Russian Federation has cast the most veto votes, with 29, of any Security Council permanent member. Security Council - Veto List, DAG HAMMARSKJÖLD LIBRARY, <https://research.un.org/en/docs/sc/quick>.

CONSTRUCTIVE DIPLOMATIC DEVELOPMENTS

In April of 2014, violence broke out in Donbas, the easternmost region of Ukraine, resulting in Russian-backed separatists taking control of the Donetsk and Luhansk regions within Donbas. Russia, in response, recognized their sovereign independence.¹⁵ The Secretary-General asserted that Russia's recognition of Donetsk and Luhansk's independence violates the principles of Ukraine's sovereignty, territorial integrity, and sovereign equality mandated by both the U.N. General Assembly's Friendly Relations Declaration¹⁶ and the U.N. Charter itself.¹⁷ The Friendly Relations Declaration has been consistently interpreted by the ICJ as representing international law,¹⁸ while the U.N. Charter is binding upon member nations.¹⁹

In September 2014, the Minsk Agreement between Ukraine, the separatists, and Russia, achieved a cease-fire negotiated in Ukraine's eastern provinces.²⁰ Russia, for its part, maintained its denial of any direct involvement in the fighting despite Ukraine, the United States, and the North Atlantic Treaty Organization (NATO) asserting otherwise.²¹ This cease-fire proved short-lived, as fighting resumed before the end of 2014.²² Early 2015 saw a second ceasefire take hold in the Minsk II agreement, but violence reemerged, albeit at lower levels, and would continue until Russia's 2022 invasion.²³ In the interim, Russia conducted a slew of cyberattacks against Ukraine's infrastructure.²⁴

Regarding the foreign relations matchbox of Donbas, international cooperation facially appears to have played a significant role in disrupting and delaying the invasion. Another interpretation, however,

15. Sullivan, *supra* note 5.

16. G.A. Res. 2625 (XXV) (Oct. 24, 1970).

17. Uphold International Law, UNITED NATIONS, <https://www.un.org/en/our-work/uphold-international-law>. Both Russia and Ukraine are member states of the United Nations.

18. *Id.*

19. Secretary-General Says Russian Federation's Recognition of 'Independent' Donetsk, Luhansk Violate Ukraine's Sovereignty, Territorial Integrity, UNITED NATIONS (Feb. 23, 2022), <https://www.un.org/press/en/2022/sgsm21153.doc.htm>.

20. Eyder Peralta, *In Ukraine, Cease-Fire Between Government, Separatists Takes Hold*, NPR (Sept. 9, 2014), <https://www.npr.org/sections/thetwo-way/2014/09/05/346037526/kiev-ukrainian-separatists-reach-cease-fire-deal>.

21. *Id.*

22. Scott Neuman, *Ukrainian Peace Talks Put On Hold*, NPR (Dec. 12, 2014), <https://www.npr.org/sections/thetwo-way/2014/12/26/373249361/ukrainian-peace-talks-put-on-hold>.

23. Sullivan, *supra* note 5.

24. *Id.*

would cast Russia's course of action as using a blend of diplomacy, aggression, and subversive violence to solidify a status quo it found advantageous, without eliminating its capacity to conduct a future full-scale invasion on its preferred terms.

IV. FRESH WATER TO CRIMEA

Russia's annexation of Crimea led to massive practical, economic, and foreign policy complications for the peninsula's occupiers and civilians. Crimea was heavily reliant on the Northern Crimea Canal, which supplied over 80% of Crimea's freshwater from the Ukrainian mainland, until Ukraine dammed its flow shortly following Russian occupation in 2014.²⁵ In the following years, as reservoirs dried up, the creeping drought triggered internal migrations, contributed to a steep decline in agriculture, and necessitated significant water rationing by Crimean municipalities.²⁶ The worsening crisis threatened the region's economic stability, while also threatening President Putin's position with the Russian populace. President Putin's national popularity had initially risen dramatically immediately following the annexation of Crimea, but over the following years it tailed off to pre-annexation levels.²⁷

In the year prior to Russia's February 2022 invasion, Russia lodged an application with the European Court of Human Rights (ECHR) that included a series of complaints regarding Ukraine's

25. Clar Ferreira Marques, *Crimea's Water Crisis Is an Impossible Problem for Putin*, BLOOMBERG (Mar. 19, 2021), <https://www.bloomberg.com/opinion/articles/2021-03-19/russia-vs-ukraine-crimea-s-water-crisis-is-an-impossible-problem-for-putin>; Nathan Vanderklippe, *Why Ukraine fears a canal that once flowed into Crimea could be a key target in a new Russian attack*, THE GLOBE AND MAIL (Feb. 20, 2022), <https://www.theglobeandmail.com/world/article-why-ukraine-fears-a-canal-that-once-flowed-into-crimea-could-be-a/>.

26. Tony Wesolowsky, *Pray For Rain: Crimea's Dry-Up A Headache For Moscow, Dilemma For Kyiv*, RADIO FREE EUROPE RADIO LIBERTY (Mar. 29, 2020), <https://www.rferl.org/a/pray-for-rain-crimea-s-dry-up-a-headache-for-moscow-dilemma-for-kyiv/30515986.html>; Christian Mamo, *Inside Crimea's Water Crisis*, EMERGING EUROPE (Apr. 2, 2021), <https://emerging-europe.com/news/inside-crimeas-water-crisis/>.

27. *Do you approve of the activities of Vladimir Putin as the president (prime minister) of Russia?* STATISTA (Feb. 2022) <https://www.statista.com/statistics/896181/putin-approval-rating-russia/>; PUTIN'S APPROVAL RATING, <https://www.levada.ru/en/ratings/> (last visited Apr. 30, 2022); *What is Putin's greatest worry right now? His own citizens*, CNBC (Oct. 14, 2021), <https://www.cnbc.com/2021/10/14/what-is-putins-greatest-worry-right-now-his-own-citizens.html>.

operation of the Northern Crimea Canal's water supply.²⁸ This was followed by an "urgent request" that the Court order Ukraine to relieve the canal's blockade under the ECHR's Rule 39 "interim measures," which allows parties to request measures for the Court to consider prior to a case's proceedings.²⁹ The court rejected the Rule 39 request, "since it did not involve a serious risk of irreparable harm of a core right."³⁰ It could be argued that this suit indicates some residual willingness of the Russian regime to operate within the guardrails of international institutions charged with deciding disputes of international law. More realistically, Russia viewed its ECHR suit as an opportunity demonstrate the international order's ineffectiveness and opposition to Russian interests, despite its own manifest unwillingness to operate within the constraints of international law.

From Ukraine's perspective, damming the canal served to both undermine the Crimean military occupation and provide meaningful leverage in its diplomatic standoff with Russia.³¹ Ukraine maintained the position,³² along with the greater portion of the global community,³³ that Russia's annexation of Crimea is illegal under international law: violating, for example, the U.N. Charter's Article 2 prohibition on the use of force when the aggressor cannot reasonably invoke an exception, such as self-defense under Article 51.³⁴

28. Inter-State application brought by Russia against Ukraine, European Court of Human Rights (Jul. 23, 2021), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7085775-9583164&filename=Inter-State%20case%20brought%20by%20Russia%20against%20Ukraine.pdf>.

29. *Id.*; Rules of Court, European Court of Human Rights (Feb. 1, 2022) https://www.echr.coe.int/documents/rules_court_eng.pdf.

30. European Court of Human Rights, *supra* note 28.

31. Polina Vynogradova, *Background: The Water Crisis in Crimea*, GEOPOLITICAL MONITOR (Apr. 24, 2020), <https://www.geopoliticalmonitor.com/background-the-water-crisis-in-crimea/>.

32. Bermet Talant, *Zelensky promises not to trade Crimea for peace in Donbas*, KYIV POST (Feb. 26, 2020), <https://www.kyivpost.com/ukraine-politics/zelensky-promises-not-to-trade-crimea-for-peace-in-donbas.html>.

33. UN General Assembly Resolution on Territorial Integrity of Ukraine, *supra* note 28; Resolutions Calling on Withdrawal of Forces from Crimea, Establishing Epidemic Preparedness International Day among Texts Adopted by General Assembly, United Nations (Dec. 7, 2020), <https://www.un.org/press/en/2020/ga12295.doc.htm>.

34. U.N. Charter art. 2, ¶ 4. Russia could not justifiably invoke the "inherent right of . . . self-defence if an armed attack occurs against a Member of the United Nations," because—among other flaws with such a position—Ukraine did not launch an armed attack against Russia. U.N. Charter art. 51, ¶ 1.

Yet, for Russia, abandoning Crimea has been perceived to be entirely incompatible with Russia's fundamental security interests. Thus, damming the Northern Crimean Canal precipitated a pressing security and economic vulnerability for which the Kremlin could identify no available diplomatic resolution it could stomach.³⁵ This unsustainable reality was a motivating factor in Russia's decision to invade. It is also retrospectively emblematic of Ukraine's efforts, on balance, to maneuver from 2014 to 2022. Any attempts on Ukraine's part to enhance its diplomatic leverage, bolster its defensive position, or challenge Russia's occupation of Crimea and aggravations in Donbas, have been viewed—or at least characterized by Russia—as further necessitating an overwhelming military response.

V. THE PATH TO WAR

The gradual drift westward of Ukraine's ties has been accompanied by a *less* gradual defensive militarization, strengthening Ukraine's capacity to defend itself in the result of a Russian invasion through significant assistance by the United States and other allies supplying defensive weapons.³⁶ From the governmental overthrow in 2014 to 2021, Ukraine's active combat force nearly doubled and became vastly better equipped.³⁷ The policy justifications behind the United States, Ukraine, and their allies pursuing this armament were clear: (1) give Ukraine the capacity to potentially repel or sustain a Russian invasion³⁸; and (2) alter the Kremlin's calculus with the threat of higher human and military costs or potential failure, thus seeking to *deter* a full invasion.³⁹ Ultimately, this course of action failed to deter Russian invasion, and perhaps even hastened or induced that invasion, as the Kremlin

35. Vanderklippe, *supra* note 25.

36. Samuel Charap, *The West's Weapons Won't Make Any Difference to Ukraine*, FOREIGN POLICY (Jan. 21, 2022), <https://foreignpolicy.com/2022/01/21/weapons-ukraine-russia-invasion-military/>; Joint Statement on the U.S.-Ukraine Strategic Partnership, White House Briefing Room (Sept. 1, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/01/joint-statement-on-the-u-s-ukraine-strategic-partnership/>.

37. Marc Champion *et al.*, *Ukraine's Army Is Underfunded, Outgunned and Not Ready to Stop a Russian Invasion*, BLOOMBERG QUINT (Jan. 5, 2022), <https://www.bloombergquint.com/business/ukraine-news-army-underfunded-not-ready-to-stop-a-russia-invasion>.

38. Eurasia Center, *How to deal with the Kremlin-created crisis in Europe*, ATLANTIC COUNCIL (Dec. 30, 2021), <https://www.atlanticcouncil.org/blogs/ukrainealert/how-to-deal-with-the-kremlin-created-crisis-in-europe/>.

39. Charap, *supra* note 36.

sought to solidify its geopolitical objectives while it still perceived its military advantage against Ukraine as overwhelming.

Significantly, the United States has been less-than-consistent during recent years in its efforts to support peace in Ukraine in the face of Russia's increasingly aggressive actions. This is best illustrated by President Trump's 2019 insinuations on a phone call with Ukrainian President Volodymyr Zelensky that U.S. military aid was conditioned on Ukraine initiating an investigation into investigating Joe Biden and his son.⁴⁰ At a critical juncture, this distraction from one of Russia's most powerful counterweights in Eastern European affairs left Ukraine particularly isolated and vulnerable to Russia's increasingly aggressive measures and posturing.⁴¹

Russia's demands from NATO prior to its invasion were: (1) guarantees that Ukraine will never be permitted to join the NATO alliance; (2) the removal of NATO armaments from Eastern Europe; (3) a ban on intermediate-range missiles in Europe; and (4) autonomy for Eastern Ukraine.⁴² In aggregate, these concessions would have marked a departure from the status quo that Ukraine and its allies were plainly unwilling to make. The ban from NATO and autonomy for Eastern Ukraine in particular were viewed by the United States and NATO as being fundamentally incompatible with the principles of sovereign autonomy underlying the relations of states in international law.

Another factor that encumbered the international order's capacity to decisively disrupt the path to open war was the Kremlin's perception that Russia had little to gain from engaging constructively with international law, institutions, or diplomacy. While the United States and its allies sought to use the United Nations as a "political theater where they can publicly shame Russia in the event of a war," this clearly served as insufficient deterrence for Russia's calculation that a full-scale invasion was advantageous.⁴³ Russia's near-pariah status through

40. *Trump impeachment: The short, medium and long story*, BBC (Feb. 5, 2020), <https://www.bbc.com/news/world-us-canada-49800181>.

41. Scott Neuman, *After Trump Call, Ukraine's Zelenskiy Gambles On Russia Peace Push Without U.S. Help*, NPR (Oct. 10, 2019), <https://www.npr.org/2019/10/10/768885914/after-trump-call-ukraines-zelenskiy-gambles-on-russia-peace-push-without-u-s-hel>.

42. Charles Maynes, *4 things Russia wants right now*, NPR (Jan. 24, 2022), <https://www.npr.org/2022/01/12/1072413634/russia-nato-ukraine>.

43. Michelle Nichols, *Explainer: Can the U.N. do more than just talk about Russia, Ukraine crisis?* REUTERS (Feb. 13, 2022), <https://www.reuters.com/world/can-un-do-more-than-just-talk-about-russia-ukraine-crisis-2022-01-31/> (statements of Richard Gowan, U.N. director at Crisis Group, a think-tank).

Western eyes,⁴⁴ paired with the significant burden of sustained Western sanctions levied on Russia and many of its high-status individuals since 2014,⁴⁵ contributed to the Russian Federation's perception—miscalculation or otherwise—that there was no longer much to lose from eliciting further global criticism and backlash. European economies' perceived dependence on Russia may have caused hesitancy among European nations—particularly Germany—in deterring and responding to Russia's violent posturing prior to its invasion of Ukraine.⁴⁶ Concurrently, European energy reliance under the prewar status quo could have led to optimistic Russian calculations that economic hardships imposed in response to invading Ukraine might not be prohibitively steep.⁴⁷ These costs were presumably weighed, and ultimately lost out, against the expected benefits of further pursuing an aggressive path of conduct toward Ukraine, down which Russia had already made significant progress. Russia—or at least this generation of its leadership—may have perceived it had arrived at a now-or-never decision, where it must either see through the violent course it initiated in the preceding decade or watch Ukraine's western shift take permanent hold.

VI. CONCLUSION

From one perspective, the invasion of Ukraine marks a fundamental rebuke of the salience of international law, international diplomacy, and global institutions' capacity to prevent large-scale international conflict. From another, the fact that open war between two sovereign nations in Europe is a distressing departure from the status quo stands as a stark endorsement of the slow march international norms have led toward conflict avoidance in recent history. Yet, in the face of a powerful, ambitious, and cynical authoritarian regime such as the Russian Federation's, perhaps the breakout of an international

44. Aleks Zivic, *The Danger of Turning Russia Into a Pariah State*, THE NATIONAL INTERESTS (Mar. 18, 2020), <https://nationalinterest.org/feature/danger-turning-russia-pariah-state-134262>.

45. Ivan Gutterman *et al.*, *A Timeline Of All Russia-Related Sanctions*, RADIO FREE EUROPE RADIO LIBERTY (Sept. 19, 2018), <https://www.rferl.org/a/russia-sanctions-timeline/29477179.html>.

46. Dennis C. Blair & Joseph F. Dunford Jr., *The West's Delusion of Energy Independence*, N.Y. TIMES (Feb. 22, 2022), <https://www.nytimes.com/2022/02/22/opinion/russia-ukraine-energy-conflict.html>.

47. *How will Europe cope if Russia cuts off its gas?* THE ECONOMIST (Jan. 29, 2022), https://www.economist.com/europe/2022/01/29/how-will-europe-cope-if-russia-cuts-off-its-gas?gclid=Cj0KCQjwjN-SBhCkA-RIsACsrBz5DXrKN93C8plKk1S3dKPxhJib2aNWgDjL-WMJ7obIUzQlMYlj3k3YaAp1IEALw_wcB&gclsrc=aw.ds.

conflict in Europe is hardly an indictment of international law and institutions. The Kremlin evidently views Ukraine's long-term drift from Russia's geopolitical influence and the possibility of NATO integration with Ukraine that could ensue, as intolerably threatening Russia's long term foreign policy interests. When powerful nations perceive certain fundamental interests as crucial or existential, the incentives of abiding by international law and institutions still fundamentally pale in comparison to those interests.

Russia, at times, has publicly defended its escalations prior to the invasion as justified *under* international law, invoking its defensive interests as a sovereign state. Russia has insisted it perceived U.S. and NATO military drills in the Black Sea and military flights near Russia's borders as direct threats to its capacity to defend itself.⁴⁸

Moreover, Russia *has* indirectly, and spuriously, attempted to justify its invasion of Ukraine under the U.N. Charter's Article 51 exceptions to the use of force by invoking the doctrines of: (1) self-defense, referring vaguely to NATO's "eastward expansion" and charges of threats to Russian interests from Ukraine itself; (2) collective self-defense, citing peril to the Donbas territories that Russia (and few others in the international community) recognize as sovereign states; and (3) perhaps even humanitarian intervention, referring to fabricated claims of a Ukraine-perpetrated genocide threatening Russian inhabitants of Donbas.⁴⁹ While entirely void of merit, it is significant that the Russian regime feels yet compelled to defend its actions as compliant with international law.

Hopefully, history will view this war as a tragic, painful hiccup in a larger, if gradual, trend toward settlement of international disputes through peaceful means, as is required under Article 2 of the U.N. Charter, rather than resort to conflict. The global community's long-term response to the invasion of Ukraine could result in a strengthening of deterrents to conflict and incentives for peaceful resolution through fortification of international law and institutions.

48. Video: *Everything you need to know about why Russia has invaded Ukraine*, CNN (Feb. 24, 2022), <https://www.cnn.com/videos/world/2022/02/24/timeline-of-events-russia-ukraine-lon-orig.cnn/video/playlists/around-the-world/>.

49. Marko Milanovic, *What is Russia's Legal Justification for Using Force against Ukraine?* BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (Feb. 24, 2022), <https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/>; *Transcript: Vladimir Putin's Televised Address on Ukraine*, BLOOMBERG (Feb. 24, 2022), <https://www.bloomberg.com/news/articles/2022-02-24/full-transcript-vladimir-putin-s-televised-address-to-russia-on-ukraine-feb-24>.

Alternatively, the Russian invasion could mark a disturbing escalation of conflict, despite and to the detriment of international law.