

SYMPOSIUM ON UKRAINE AND THE INTERNATIONAL ORDER

INTERNATIONAL LAW AFTER UKRAINE: INTRODUCTION TO THE SYMPOSIUM

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The Russian invasion of Ukraine has brought on unspeakable suffering. It has already injured and killed scores of people. It has displaced millions who now face an uncertain future. It raises the specter of all-out cyber war that threatens to draw other countries into the conflict. It is raging not only on the ground in Ukraine, but also on internet platforms where disinformation has spread. It tests the resilience of international partnerships and alliances. Beyond these immediate implications, the Russian attack on Ukraine also violates the prohibition on aggressive use of force, a foundational principle of the post-World War II international order. Facing these alarming prospects, many are pessimistic about what the war in Ukraine may portend for the future of international law and international relations. Surprisingly, however, some of the bleakest predictions have not yet been realized. Quite the contrary. We argue that there is a lot to be optimistic about when it comes to the role of international law, partnerships and norms in this conflict.

The war in Ukraine reiterates and strengthens, rather than undermines, the international order. The strong international response has unequivocally reaffirmed the prohibition on international use of force and the forceful acquisition of territory. Dormant and decaying alliances and partnerships have been reinvigorated. 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. The essays in this symposium illuminate these positive elements.

The picture is not all rosy, of course. The essays in this collection also highlight shortcomings of the international response that reflect longstanding pathologies. In particular, they underline the selectivity of the response, as past crises on a similar scale have not received the same international treatment and resource allocation. 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 threat to European security can become precedents to reference when crises hit parts of the world that garner much less attention.¹

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¹ Katerina Linos, *Diffusion Through Democracy*, 55 AM. J. POL. SCI. 678 (2011).

How the Response to the Ukraine War Defied Expectations

The international response to the war in Ukraine defied expectations about the significance of international law and norms. 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.² But as Tom Ginsburg of the University of Chicago Law School observes in his essay, "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)."³

The war in Ukraine did not only reiterate the importance of Article 2(4). It also proved that international alliances and partnerships like NATO, long criticized as obsolete, have an important role to play in enforcing international norms and maintaining international security. Multilateralism once again reared its head after years of major world powers turning inward and retreating from international cooperation. As one of us (Chachko) and Temple Law's Ben Heath write, never before have such comprehensive economic sanctions been imposed on a G-20 economy.⁴ 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 has moved at breakneck speed, bringing the United States, the European Union, the World Trade Organization, and other powers from North America to Asia into the fold.

In addition to building up economic pressure, NATO allies worked to provide Ukraine with aid, weapons, and intelligence that has proved crucial in complicating Russia's invasion plans. For the first time in years, European countries like Sweden and Finland have expressed interest in joining NATO, reinvigorating an alliance in desperate need of energy and purpose. The EU, notorious for adopting obstacles for new members, vowed to accelerate the process of accepting Ukraine.

The conflict also strengthened public-private geopolitical and security coordination alongside traditional multilateralism. The sanctions campaign against Moscow coincided with an exodus of private companies from Russia, above and beyond what sanctions required. And, although he criticizes the scope of these measures, UCI Law's David Kaye explains how private internet platforms and public actors like the EU 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.⁵

The war in Ukraine similarly defied expectations regarding the methods of warfare. As Kristen Eichensehr of the University of Virginia Law School argues,⁶ many assumed before the invasion that a dominant cyber power like Russia would deploy major cyber operations extensively. But in practice, Russia has conducted few successful large scale cyber operations in Ukraine or elsewhere in this conflict to date. Eichensehr maintains 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

² See Kori Schake, *Putin Accidentally Revitalized the West's Liberal Order*, ATLANTIC (Mar. 1, 2022).

³ Tom Ginsburg, *Article 2(4) and Authoritarian International Law*, 116 AJIL UNBOUND 130 (2022).

⁴ Elena Chachko & J. Benton Heath, *A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield*, 116 AJIL UNBOUND 135 (2022).

⁵ David Kaye, *Online Propaganda, Censorship, and Human Rights in Russia's War against Reality*, 116 AJIL UNBOUND 140 (2022). See also Elena Chachko, *National Security by Platform*, 25 STAN. TECH. L. REV. 55 (2021); Elena Chachko, *Platforms at War*, LAWFARE (Mar. 28, 2022).

⁶ Kristen Eichensehr, *Ukraine, Cyberattacks, and the Lessons for International Law*, 116 AJIL UNBOUND 145 (2022).

assumptions in cyber security, such as the assumption that the defender is at a structural disadvantage or that deterrence works poorly in cyberspace.

And finally, the international response to the Ukrainian refugee crisis has been far-reaching and unprecedented in recent memory. 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, as Temple Law's Jaya Ramji-Nogales documents in her essay,⁷ the European Union opened its doors to all Ukrainians fleeing the war, going well beyond even its most generous past programs.⁸ It invoked the never before used 2001 Temporary Protection Directive to allow Ukrainians to live and work anywhere in the EU for at least one year, and likely longer.⁹ 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. In other words, by loosening the alliance between Hungary and Poland, the Ukraine war alters the EU's internal power dynamics in ways that strengthen the institution going forward.

The United States similarly took significant steps to help Ukrainians. It 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 provided considerable economic aid to Ukraine and its neighbors.¹⁰

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 Selectivity Problem

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.¹¹ And Russia is certainly not alone in making this argument.¹²

Questions about selectivity emerge in several essays in this collection. Jaya Ramji-Nogales contrasts the warm welcome Ukrainians received 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

⁷ Jaya Ramji-Nogales, *Ukrainians in Flight: Politics, Race and Regional Solutions*, 116 AJIL UNBOUND 150 (2022).

⁸ Katerina Linos & Elena Chachko, *Refugee Responsibility Sharing or Responsibility Dumping?*, 110 CAL. L. REV. ___ (forthcoming 2022); Elena Chachko & Katerina Linos, *Sharing Responsibility for Ukrainian Refugees: An Unprecedented Response*, LAWFARE (Mar. 5, 2022).

⁹ [Council Implementing Decision \(EU\) 2022/382 of 4 March 2022 Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine Within the Meaning of Article 5 of Directive 2001/55/EC, and Having the Effect of Introducing Temporary Protection](#), OJ L 71/1.

¹⁰ Ramji-Nogales, *supra* note 7, at 150.

¹¹ *Full Text: Putin's Declaration of War on Ukraine*, SPECTATOR (Feb. 24, 2022).

¹² See, e.g., Katrina vanden Heuvel, Op. Ed., *America's Hypocrisy Over Ukraine and "Spheres of Influence"*, WASH. POST (Apr. 12, 2022); Joseph Krauss, *Many in Mideast See Hypocrisy in Western Embrace of Ukraine*, ABC News (Mar. 29, 2022).

perceives Ukrainians as fellow Europeans, while asylum seekers from the Global South are “others.”¹³ Likewise, the United States has taken relatively extraordinary measures 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.

Heath and Chachko point out that the sanctions 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. Law of war violations by Western powers and allies have not been met with similar economic ostracization. Rutgers Law’s Adil Haque asserts that an *ad hoc* criminal tribunal to try war crimes in Ukraine would be criticized as selective prosecution, and proposes a reform to the International Criminal Court instead to allow for referrals through the United Nations General Assembly.¹⁴ David Kaye worries about the lack of coherence and standards in how private actors approach content moderation in different conflicts around the world. “What distinguishes Russia from the situations in Ethiopia, India, Myanmar, or any other place where the companies face difficult questions of market share, popularity, government demand and human rights protection?,” he asks.¹⁵ Kaye further criticizes the EU for an overbroad ban on Russian media that fails to account for the broader implications of wholesale state content restrictions in other contexts.

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 create momentum for important reforms. The essays in this symposium identify and outline such potential avenues for progress.

The War in Ukraine and a New Agenda for International Law Reform

Read together, the essays in this symposium outline an ambitious agenda for international law reforms that build on insights gleaned or reinforced during the conflict. They span basic principles of the law of armed conflict,

¹³ See, e.g., [UNHCR Chief Condemns “Discrimination, Violence and Racism” Against Some Fleeing Ukraine](#), UN NEWS (Apr. 16, 2022).

¹⁴ Adil Ahmad Haque, *An Unlawful War*, 116 AJIL UNBOUND 155 (2022).

¹⁵ Kaye, *supra* note 5, at 140.

refugee law and policy, governing cyber warfare, the role of private platforms in the modern information ecosystem, and revisiting economic sanctions as a tool of statecraft.

For example, Adil Haque provocatively argues for a capacious definition of the crime of aggression. According to Haque, “[t]here can be no fully lawful attacks or truly legitimate targets in a war of aggression.”¹⁶ This position builds on the strong intuition that Ukraine has the moral high ground in this conflict as a nation fighting for its existence against an unprovoked foreign invader. That intuition may give traction to efforts to bring perpetrators of the crime of aggression to justice.

Jaya Ramji-Nogales explores how the Ukraine displacement illuminates the shortcomings of existing migration and refugee law. The legal definition of a refugee, she argues, is too narrow because it requires proof of individual persecution. It is therefore ill-suited for modern displacements like Ukraine, which often involve mass influxes of asylum seekers over a short period of time that make individualized assessment of refugee status impossible. A more coherent international framework, she argues, 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 responsibly sharing mechanisms when mass displacements occur. Her call joins recent 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 millstone toward more systematic consideration of concrete responsibility sharing mechanisms that may follow the Ukraine blueprint.¹⁷

Heath and Chachko turn the spotlight to the expanding and poorly constrained resort to economic warfare. They observe that the Ukraine conflict stirred the longstanding debate over the legality, effectiveness, and collateral costs of economic sanctions. They explore 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.

David Kaye dives into the thorny field of content restrictions in conflict and the human rights challenges that they raise. This a relatively new field, with lots of unanswered questions that will continue to occupy lawyers and policymakers in both the public and private sectors. For private actors, Kaye advocates better implementation of the UN Guiding Principles on Business and Human Rights to ensure that content related decisions reflect and communicate human rights concerns, not only business interests and government pressures. For public actors, Kaye urges caution in imposing broad, crisis-driven content restrictions on internet platforms such as the EU ban on carrying Russian state media. He calls for more proportional tailoring of such bans that accounts for how they may be misused. The EU ban, he maintains, may be lawful under European human rights law. But the ban is also a set-up for authoritarians to restrict what they see as disinformation.¹⁸ His critique highlights the differences between contexts like asylum policy, in which EU-wide measures work well, and contexts like content restrictions, in which they may be ill-advised.

Finally, Kristen Eichensehr calls 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” such as Distributed Denial of Service attacks.¹⁹ While there is an emerging consensus that

¹⁶ Haque, *supra* note 14, at 155.

¹⁷ Linos & Chachko, *supra* note 8.

¹⁸ Kaye, *supra* note 5, at 140.

¹⁹ Eichensehr, *supra* note 6, at 145.

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 had lost much of its vigor. The international response to the war involved a set of significant actions across a range of international law disciplines. It also generated ideas and illuminated pathways for long overdue reforms or future development of emerging legal areas. The essays in this collection explore and analyze the multiple layers of the response and put forward an ambitious agenda for lawmakers, policymakers and academics to pursue.