

# International Law Goes to War in Ukraine

## *The Legal Pushback to Russia's Invasion*

By Oona A. Hathaway

**The Russian invasion of Ukraine is the most brazen illegal war waged by one sovereign state against another since World War II.** The Kremlin launched the invasion in clear violation of the core obligation in the UN Charter, which prohibits the “use of force against the territorial integrity or political independence of any state.” Russian President Vladimir Putin has recently threatened that if Ukrainians continue to resist, they “risk the future of Ukrainian statehood.” And there is an avalanche of real-time evidence emerging from Ukraine that the Russian military is committing war crimes throughout the country—including by targeting civilians.

**These extraordinary acts of law-breaking have been met with equally extraordinary acts of law enforcement.** The most widely discussed response to the blatantly illegal war has been an unprecedented cascade of coordinated sanctions by the United States, Europe, and much of the rest of the world. Those sanctions have been applied specifically and directly in response to Russia's violation of the UN Charter. As a result, the sanctions send a clear message: the invasion of Ukraine is a threat not just to Ukraine but to the international legal order as well. By joining the sanctions, states around the world are making clear that they, too, reject Russia's illegal invasion and the violation it represents.

Contemporary international law demands that states respond to violations not with war but with what Scott Shapiro and I have termed “**outcasting**”—that is, **sanctions that exclude a state that has broken the law from the benefits of global cooperation**. In this case, outcasting involves not just **economic sanctions** but also barring Russian athletes from participating in international sporting events, banning Russian airplanes from European and U.S. airspace, and curtailing Russian media outlets’ access to European audiences.

As the invasion began, the UN Security Council tried to pass a resolution deploring the Russian invasion and demanding the withdrawal of Russian forces from Ukraine, but Russia vetoed it. Nevertheless, **the UN has so far served as the epicenter of the international legal response to the war**. Although Russia is able to exercise its veto power on the Security Council to prevent it from mandating any punitive action, the country’s almost complete isolation within the organization has been swift and thorough. Soon after Russia blocked the resolution, the Security Council, acting under the long-dormant **Uniting for Peace Resolution**, which does not permit a veto, referred the matter to the General Assembly, which soon voted overwhelmingly to demand that Russia “immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders.” Only a small handful of states—Belarus, Eritrea, North Korea, and Syria—voted with Russia against the resolution. The other countries that Russia might have hoped would support it, most notably China, chose instead to abstain. Russia, it is clear, is more isolated than ever.

**The gears of the international criminal justice system also started turning quickly. On February 28, just four days after the invasion began, ICC Prosecutor Karim Khan announced that he was seeking authorization to open an investigation** as soon as

possible. Neither Russia nor Ukraine is party to the Rome Statute, which created the ICC and gives it jurisdiction. But in 2013, Ukraine legally accepted the court's jurisdiction over alleged crimes occurring on its territory. Still, Khan said the process would be expedited if an ICC member country referred the Ukraine crisis to his office. On March 2, Khan announced that he had received 39 such referrals and that he would immediately proceed. Never has the ICC responded so quickly to the outbreak of a conflict. The announcement means that combatants in the country and their commanders on both sides, including Putin himself, could potentially be prosecuted by the ICC for war crimes, crimes against humanity, or genocide. Because the crime of aggression can only be brought in the ICC against states that are party to the Rome Statute, and Russia is not a party, there have been calls to establish a special tribunal to try Russians for waging an illegal war of aggression in Ukraine.

Not to be outdone, the usually slow-to-act International Court of Justice has also begun proceedings at lightning speed. On February 26, just two days after the invasion began, Ukraine submitted an application to the ICJ, beginning proceedings against Russia. The application takes Putin's outrageous (and baseless) claims of genocide by Ukraine in the eastern regions of Ukraine and turns them against him. Russia, as a party to the Genocide Convention, has agreed that the ICJ is the forum at which disputed allegations of genocide may be resolved. In a brilliant act of lawyering, Ukraine seized on this fact and argued that Putin's claims provide the ICJ grounds for jurisdiction to adjudicate whether, indeed, any such genocide has occurred. The ICJ immediately scheduled a hearing on the matter for March 7, but Russia was a no-show.

**WHY THIS TIME IS DIFFERENT**

By all reports, **Putin** was not expecting the extraordinary global response that his invasion of Ukraine has provoked. That is understandable. After all, Putin is using a playbook for destruction in Ukraine that he has been using for years in Syria with little reaction. And while his illegal annexation of Crimea in 2014 was met with sanctions, the response was nothing compared to the economic tsunami that is hitting Russia today.

Putin failed to appreciate that neither Syria nor Crimea involved an open challenge to the core principle of the international legal order—the UN Charter’s prohibition on the use of force against the territorial integrity or political independence of any state. In Syria, Putin acted with the consent of the president of Syria, Bashar al-Assad. As a result, his actions, while horrific, did not violate the UN Charter’s prohibition on use of force. The annexation of Crimea, meanwhile, took place under a cloud of confusion and with little bloodshed. “Little green men,” whom Putin later admitted were Russian troops, mysteriously arrived on the peninsula. The government and population of Crimea, the longtime home of the Russian Black Sea Fleet, largely supported succession from Ukraine and annexation by Russia. Leaders around the world called the annexation what it was—a clear violation of the UN Charter—but it took time for them to realize what was unfolding and to put together a program of sanctions. By then the annexation was largely a fait accompli.

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But this is different. Unlike in Syria, the leadership of Ukraine has not consented to Russia’s use of force. Instead, Ukrainian President Volodymyr Zelensky has led the country in perhaps the most remarkable moment of resistance and national identity formation in recent memory. He has made Ukraine into a symbol of democracy and freedom in the face of the Russian onslaught. Ordinary Ukrainians have responded by

fighting for their country against one of the most powerful and vicious armies on the planet. And they have inspired the world, even in the face of extraordinary loss.

Meanwhile, the global community, aided by outstanding real-time disclosures of intelligence from the United States regarding Russia's true intentions, has demonstrated that it learned a lesson from Crimea and was ready to go with sanctions as soon as Russia invaded. Many countries in Europe see their own fates linked to Ukraine's. And they recognize now, more than ever, how fragile the postwar peace has become—and how important the prohibition on the use of force is to their own future security.

#### ON THE RIGHT SIDE OF THE LAW

To be clear, no international legal institutions will be able to halt or turn back the Russian invasion. But they have power nonetheless. Together, these institutions are making it very difficult for Putin to muddy the legal waters and keep any remaining allies standing by him. Since the invasion began, the Russian leader has made many baseless claims—that Ukraine has committed genocide in the Luhansk and Donetsk oblasts of Ukraine, that economic sanctions are tantamount to a declaration of war, that Russia is simply responding to requests from people in the “independent” regions of Ukraine to come to their defense. But these have been sapped of any authority by the mounting evidence of war crimes by Russian forces as well as the unified response of international legal institutions to subject Putin's claims to careful scrutiny. Ukraine and its allies are calling Putin's bluff. And they are using international legal institutions to do so.

The decision of Ukraine and its supporters to rely on the UN Charter and on international legal institutions mark Putin's actions not only as morally reprehensible but as illegal.

**That, in turn, serves to isolate Putin.** This helps explain why only the international legal pariahs who are utterly dependent on, or at the mercy of, Russia voted with it in the UN General Assembly. Even authoritarian states that usually side with Russia find its legal position indefensible. Two of Russia's own lawyers who had been defending the country at the ICJ in cases related to Crimea have quit, publicly stating that "it has become impossible to represent in forums dedicated to the application of the law a country that so cynically despises it."

**Even though there is little prospect that Putin will appear in the dock in the ICC courtroom in The Hague and slight chance that Russia will abide by a decision of the ICJ, international law remains one of Ukraine's most powerful weapons against Russia.** The law is helping states that agree on little else unify in opposition to the invasion. **The law has brought together an unprecedented global coalition of states to oppose the Russian intervention and forge a program of sanctions** that will raise the costs of the Kremlin's aggression. And the law has led these same states to pour assistance into Ukraine, including by transferring massive amounts of weaponry to allow the country to defend itself. The law will hold this coalition of diverse states together by demonstrating again and again that Putin has no legitimate arguments on which he can rely.

Even if Ukraine's government falls, the unified and sustained legal condemnation of the invasion is essential not only to sustaining hope for a future in which Ukraine is free and independent but also to maintaining an international legal order founded on the principle that might cannot make right.

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