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SYMPOSIUM ON UKRAINE AND THE INTERNATIONAL ORDER

ARTICLE 2(4) AND AUTHORITARIAN INTERNATIONAL LAW

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In 1970, Thomas Franck asked a rhetorical question of enduring significance: *Who Killed Article 2(4)*?[1] The reference is to the provision of the United Nations Charter that requires all member states to refrain "from the threat or use of force against the territorial integrity or political independence of any state."[2] Vladimir Putin's gambit in Ukraine, conducted with the rhetorical purpose of eliminating the country as an independent state, is the latest in a series of events that periodically cause analysts to bemoan the end of the post-World War II international order. Will this time be different? Will it mark a definitive change in international law? This short essay will argue that, bloody as the Ukraine conflict has been, the immediate response has been to reinforce rather than reject traditional norms about sovereignty and territorial integrity. At the same time, the invasion and other states' reaction to it illustrate both the character of, and limits to, authoritarian use of international law.

Conflicting Approaches to International Law

This argument will grapple with a central framing of the invasion in the West: Ukraine's defense is part of a global struggle between democracies and dictatorships for control over international order. As President Biden put it in a major speech, "[a] dictator bent on rebuilding an empire will never erase the people's love of liberty."[3] It is surely true that norms of national self-determination and territorial integrity associated with the United Nations Charter are at stake, and that imperial expansion is part of Russia's declared goal. But this is different than saying that democracies are bound to join together against dictatorships. Even Russia's authoritarian neighbors have been lukewarm about the invasion: after all, they too have reason to fear for their borders. The widespread condemnation of the invasion by all kinds of states contrasts with the milder response to the prior tactic of Russian imperial expansion through dismemberment of neighbors, including its aggressive use of passportization of friendly populations. How can we understand this mixed set of reactions?

Instead of a conflict between two kinds of states, we are witnessing a conflict between two approaches to international law. As I have recently argued, "authoritarian international law" refers to the way in which authoritarian states try to develop and shape norms of international law in ways that extend their ability to remain in power across time and space.[4] The authoritarian approach to international law is rooted in the ultimate criterion for such regimes: survival of the ruling coalition. Because the consequences of losing power are so great for dictators,

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[1] Thomas Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AJIL 809 (1970).

[2] United Nations Charter, Art. 2(4).

[3] *Biden Says War in Ukraine Is a Test for Democracies and that Putin "Cannot Remain in Power,"* RadioFreeEurope (Mar. 26, 2022).

[4] Tom Ginsburg, Democracies and International Law (2021); Tom Ginsburg, *Authoritarian International Law*, 114 AJIL 221 (2020).

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they tend to avoid deep commitments that might cause surprises down the road. Their agreements with each other are thinner, and tend to focus on cooperating on internal security problems rather than external ones. Repressing each others' opponents provides stability for all, but authoritarian states are also distrustful of each other and so have difficulty developing true alliances. Authoritarians are also likely to abuse norms of international law to fit their own ends. Putin's invasion, like his earlier acts of dismemberment, fits this framing: Putin used a cynical justification of preventing "genocide" to target a domestic audience, so as to maintain internal support at a moment when it was slipping. But Putin has not been able to build a broad international coalition in support of his position, and even his treaty partners are responding with their own internal interests in mind.

Authoritarian international law contrasts not only with pro-democratic international norms, such as those contained in regional democracy charters and the international human rights covenants, but also with what we might call "general" norms of international law, which have no particular valence toward democracy. These include norms of self-determination and territorial integrity, which obtain regardless of the form of government. Thus we observe, in response to an authoritarian invasion, a reinforcement of the traditional framework.

Article 2(4)'s Premature Obituary

Let us turn to Article 2(4). Looking back at Franck's autopsy in 1970, it is easy to argue that Article 2(4) was in a relatively robust state at that point. Indeed, as David Wippman pointed out in an account of the "Nine Lives" of Article 2(4), the norm has been periodically laid to rest by analysts, only to be revived in the real world.[5] To be sure, there have been exceptions to the general rule that states tend to observe the territorial integrity of their neighbors, and interstate territorial conflict has occurred with some regularity. But the maximalist, "Hobbesian" view that one state can invade and eventually annex another has been rejected quite routinely, most robustly after the end of the Cold War when the United Nations blessed the United States' repulsion of Saddam Hussein's attempt to incorporate Kuwait as the nineteenth province of Iraq. The exceptions—for example Morocco in the Western Sahara, Turkey in Northern Cyprus, or Israel in the West Bank—typically involved states of nascent or contested status. Less clear are norms against using force to effectuate regime change: violations include the United States aggression in Iraq in 2003, the invasion of Grenada in 1986, the Economic Community of West African States' interventions in West Africa, and the North Atlantic Treaty Organization (NATO) action in Kosovo. The authors of some of these actions offered international legal justifications. Kosovo was not fundamentally more soundly grounded in international law than was Putin's invocation of "genocide" in the Donbas, but the action was acknowledged retroactively by the Security Council.[6] So we can think of violations as exceptions that prove the rule.

Article 2(4) seemed to take a bit of a beating during the Trump years, when the United States decided to recognize Israeli sovereignty over the Golan Heights, a part of Syrian territory which Israel acquired by force in the 1967 war. Even Israel, which imposed Israeli law there in 1981, had arguably not gone so far as to formally annex the territory, and had repeatedly engaged in negotiations with the Syrian government over its return as part of an overall peace agreement.[7] But the Trump attitude toward territorial integrity was certainly revisionist.

Enter Vladimir Putin. During the first few years of his rule, he acted as if all territorial conquest through violence was putatively illegitimate. But in a novel strategy, it was fairly easy for him to create "independent" entities that would align with Russia, and existed at its sufferance. The model was the quasi-states of Abkhazia and South Ossetia, both of which had engaged in territorial conflict with newly independent Georgia in the early 1990s.

[5] David M. Wippman, *The Nine Lives of Article 2(4)*, 16 Minn. J. Int'l L. 387 (2007).

[6] SC Res. 1244 (1999).

[7] *Syria and Israel: Secret Negotiations Over Golan for Severing Iranian, Hezbollah Ties*, Arab News (Apr. 2, 2022).

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In the aftermath of the Bucharest Declaration in early 2008, when George W. Bush invited application to the NATO security alliance by Georgia and Ukraine, Putin responded aggressively. Putin's forces engaged in war with Georgia over South Ossetia and Abkhazia and recognized their independence. They joined Transnistria, a part of Moldova which sought to remain part of Russia in 1991, and in which Russian forces remain as peacekeepers. These pseudo-states continue to be recognized only by each other and a handful of Russian client states, including Nicaragua, Venezuela, and Syria. Norms of self-determination provided a fig leaf for this dismemberment of UN member states Moldova and Georgia, just as it did for the severing of the Crimea from Ukraine in the 2014 war. The latter was a novel development, since the breakaway republic voted to join Russia itself rather than form an independent country. This was an escalation of legal strategy, as it marked a formal territorial expansion of Russia's borders, albeit under the guise of self-determination, and so posed a more direct challenge to Article 2(4). But it was one with a superficial legal veneer.

2022 has seen a much more severe escalation. After publicly declaring that Ukraine was not a real country at all, Putin built up his forces on the border and, in late February 2022, recognized the Luhansk and Donbas People's Republics as independent states. The next day, Russia invaded with the declared war goal of ending Ukraine's sovereignty, and its attack has not been limited to the immediate vicinity of the nominally independent quasi-states. We are in one of those moments, somewhat like November 1989, when one understands that we may be living through a critical turning point, toward an uncertain future. In February, the questions were immediate: Would the international community tolerate yet another instance, the fourth since 2008, of Russia dismantling and severing a part of a sovereign state? Would Article 2(4) finally be laid to rest, five decades after Thomas Franck asked his question?

Clearly the answer is no. Just when Ukraine's death by five cuts seemed a possibility, the Atlantic alliance and many other countries around the world have vociferously reiterated the importance of Article 2(4). Just as in prior instances of premature obituaries, we have seen reinforcement of the norm of territorial integrity and self-determination, so that the moment looks like one of recalibration rather than disintegration. International relations are not linear, and violations of a norm can accumulate to the point of erosion, but we also observe sharp reversals. Indeed, an analytic approach in line with systems analysis, which emphasizes dynamics, shifts, and contingences, seems in order.

Putin's International Legal Playbook

The United States has said it is defending the "rules-based international order" rather than the more accurate term: international law, and specifically Article 2(4) of the United Nations Charter. Indeed, the rhetoric of Western leaders has cast the moment as one of struggle as between democracies and dictatorships, and this seems quite wrong. One hundred forty-one countries, including many non-democracies, voted to condemn Russia's action at the United Nations. India, the world's largest democracy, notably abstained from doing so. The five countries voting no on the resolution were indeed a rogue's gallery—North Korea, Eritrea, Syria, Belarus, and Russia itself. But it is important to be clear: neither Russia nor China can be said to be opposed to democratic governance per se. Rather, each of their governments rejects it for their own systems, and opposes certain exercises of self-determination in the immediate neighborhood. Russia's main international constructs, the Eurasian Economic Union and the Collective Security Treaty Organization (CSTO), have a territorial logic rather than a regime-type logic. Russia has been willing to include the Republic of Armenia in both, and has not sought to systematically undermine Armenian democracy, robust since 2018. Similarly, both Russia and China have tolerated the democratic nation of Mongolia, which occupies territory between them. Instead of opposing democracy per se, both countries demand that others respect what they see as their vital interests. This is not fundamentally different from the United States and its approach to international institutions. Very much like other imperial powers, Russia reserves the right to except itself from norms that violate what it sees as its core interest.

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Where Russia is different is in its creative use of authoritarian international law. Russia's strategy in protecting its interests has been deeply legalized, a reflection perhaps of Putin's lawyerly training as well as the general tendency of authoritarians to mimic and repurpose international norms. First, it has declared the treatment of Russians abroad to be a core national interest. Defending one's nationals abroad has been a prerogative of states for millennia, and particularly important during the era of "gunboat diplomacy" during the nineteenth century. Russia has exploited this norm by manufacturing grievances to give it a pretext for invasion. In the Donbas, Russia has issued passports to locals, thus giving it a right to defend the interests of its putative nationals from what is in reality their own government in Kyiv. In the case of Crimea, the annexation was framed as giving effect to international norms of self-determination, with a carefully choreographed sequence of a declaration of independence, followed by a referendum to decide to merge with Russia, followed by absorption and the stationing of Russian military there. All this violated Ukraine's own constitution. State dismemberment in this way can be seen as a strategy of authoritarian international law. It dilutes and repurposes the general principle of self-determination, chiefly the right laid out in Article 1(2) of the Charter and in Article 1 of the international human rights covenants.[8] Recognizing a new country is a prerogative of all states, and in this case provides Russia with a nominal right to engage in collective self-defense under Article 51 of the United Nations Charter. But of course this conflicts with the general understanding of internal self-determination, which is that it does not allow dismemberment of existing states.[9]

The never-implemented Minsk agreements were also reflective of a legalist strategy. The Minsk II agreement, signed in February 2015, was supposed to end the fighting in the Donbas.[10] It included a promise to withdraw Russian forces, the return of border control to Ukraine, and the devolution of power to the Donetsk and Luhansk regions, with a high degree of special autonomy for them. The agreements would have recognized the existing locally elected assemblies, and given local governments control over major policies. Russia framed itself as a mediator between the Ukraine government and the local separatists, rather than as instigator of and party to the conflict. Of course, now that Russia has recognized the separatist republics and initiated hostilities, it is not clear whether Minsk II could even be put back on the table, but it is consistent with the Russian overall strategy of territorial expansion under the guise of self-determination.

On the other hand, the crisis shows the thinness of authoritarian security cooperation. As noted above, authoritarian cooperation is focused more on internal security than external. Putin has had to call in favors, but thus far has not been able to draw on a broad set of allies for its invasion: the "no limits" partnership between China and Russia has not led to any material support from China, which instead has modestly enforced some sanctions. Authoritarians will easily cooperate to repress each others' dissidents, but genuine military alliances can disserve authoritarians' need for internal control. This is clearly evident in the reactions of CSTO members Belarus and Kazakhstan to Russia's invasion, just months after Russia had led the CSTO to save the leaders of those countries from internal threats. It is likely that these immediate neighbors themselves fear territorial absorption under Putin's maximalist vision of Russian empire. Kazakhstan refused to send troops and even abstained in the UN vote. Belarus allowed its territory to be used for staging and logistics of the invasion, but did not commit troops. The government of Alexander Lukashenko barely survived mass demonstrations in the course of holding elections in 2020. Sending his security forces to die in the Ukraine would potentially deal him a death blow at home, as

[8] International Covenant on Civil and Political Rights, Art. 1, Dec. 16, 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, Art. 1, Dec. 16, 1966, 993 UNTS 3 ("All peoples have the right of self-determination.")

[9] Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (1995).

[10] *See* Package of Measures for the Implementation of the Minsk Agreements, Agreed by the Trilateral Contact Group at the Summit in Minsk on 12 February 2015 (Russian version only).

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his regime relies on the military to survive. Just as the Warsaw Pact proved to be nothing more than a vehicle for Soviet support of its proxies abroad, the CSTO is not a true alliance in the sense that NATO is.

There are many ways in which the Ukraine invasion has put pressure on the international legal system. Europe's largest refugee crisis since World War II, the investigation and possible prosecution of war crimes, and punishing sanctions on the Russian and Belarussian economies are immediate issues, but there will be longer term ones. The viability of sanctions in the future may be undermined, as authoritarian countries from Saudi Arabia to China diversify away from the dollar. Control over cyberspace will remain a highly contested area. Putin's threat of using nuclear weapons may undermine the non-proliferation regime further. His innovative strategy of passportization and dismemberment might yet spawn imitators, but it is more likely that authoritarians come up with new ways to repurpose international legal norms to their own ends.

All of these still uncertain developments, however, do not mark an epochal change. The norms of territorial integrity and political independence are cornerstones of the post-War international order. Precisely because they apply to democracies and authoritarians, and can be repurposed to suit multiple interests, there is a wide consensus on preserving these norms, even in an era of rising authoritarianism. The world's response to Russia's invasion has shown the continued vitality and broad acceptance of these core norms, even as their implementation remains wanting, as in so many areas of international law.

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