

Long Reads

A Special Tribunal for Putin

Mar 11, 2022 | MURRAY HUNT

OXFORD – The international rule of law – the simple idea that relations between states should be governed by enforceable constraints – has come under increasing strain in recent years. Russia’s unprovoked invasion of Ukraine, a clear violation of both the United Nations Charter and customary international law, is perhaps the clearest example of just how precarious the situation has become.

But Russian President Vladimir Putin and his authoritarian peers are hardly the only ones who have been systematically undermining the international rule of law. The resurgence of populist nationalism around the world – espoused most prominently by former US President Donald Trump and his latter-day “America First” movement – also has steadily eroded the rules-based international order that emerged after World War II. But even before Trump, many countries were asserting the primacy of their laws and policies over international rules and multilateral cooperation.

As a result, a pandemic of parochialism has infected many mature democracies to varying degrees. Nor has it been confined to instances of states refusing to implement the judgments of international courts – as China did when it dismissed the Permanent Court of Arbitration’s ruling against its claims in the South China Sea; and as the United Kingdom did when it refused to comply with the International Court of Justice’s advisory opinion ordering it to return the Chagos Islands in the Indian Ocean to Mauritius. Rather, these are symptoms of a new “variant of concern.”

Around the world, states are increasingly committing flagrant violations of international rules while still claiming to comply with them. And neither the United States nor the UK can claim fidelity to the post-war rules-based international order they played such a large role in constructing.

Last October, for example, when US President Joe Biden’s Senior Legal Adviser to the State Department, the highly respected international lawyer Harold Koh, left his post, he wrote a detailed objection to Biden’s continuation of Trump’s border

policy. The Biden administration's approach, Koh wrote, "continues to violate our legal obligation not to expel or return ... individuals who fear persecution, death, or torture, especially migrants fleeing from Haiti." He concluded that the policy was in breach of both the Convention against Torture and the Refugee Protocol.

Similarly, the UK House of Lords recently had to strike clauses from a Nationality and Borders Bill because they were manifestly in breach of the UN Refugee Convention, contrary to what Prime Minister Boris Johnson's government had claimed. A similar confrontation also looms over an attempt to reform the UK Human Rights Act. The Johnson government claims that its proposed changes would be compatible with the UK remaining a signatory to the European Convention on Human Rights, even though the proposals flagrantly authorize "push back" against rulings by the European Court of Human Rights (ECHR).

This Humpty Dumpty approach to international law undermines the very rules-based system that both post-Brexit "Global Britain" and the Biden administration purport to promote abroad. If international law means whatever nation-states want it to mean, it is on the verge of becoming a dead letter.

Russia's War of Aggression

Russia's shocking and barbaric war against Ukraine marks a new low in this dangerous global trend toward international law doublespeak. Claiming that the invasion is justified in international law, Putin has offered a series of mendacious rationales, ranging from the right to pre-emptive self-defense to the responsibility to protect ethnic Russians in Ukraine from "genocide" (a brazen falsehood that echoes Hitler's own justification for invading Czechoslovakia in 1939).

In fact, as an overwhelming majority of UN General Assembly members recognized last week, the invasion lacks any legal justification and constitutes an act of "aggression" in violation of the UN Charter. Aggression, otherwise known as a crime against peace, is one of the most serious crimes in international criminal law, along with genocide, crimes against humanity, and war crimes.

In addition to unleashing terrible suffering – with thousands already dead and more than two million Ukrainian refugees having fled – Russia's aggression highlights the world's dependence on the international rule of law for peace, security, and prosperity. It is a wake-up call for states everywhere: neglect the erosion of the international rule of law at your peril.

When states commit such grave breaches, our commitment to the international rule of law – memorably described by former UK Senior Law Lord Tom Bingham as "the domestic rule of law writ large" – requires that there be effective institutional machinery to hold accountable those responsible, and to provide justice for those who have suffered.

This machinery is much more developed now than it was during World War II, thanks in part to the UK's influence in constructing the post-war rules-based international order. States or individuals can now bring Russia before the ECHR in Strasbourg, and the International Criminal Court (ICC) in The Hague can

investigate, prosecute, and punish actions amounting to genocide, war crimes, or crimes against humanity. In fact, both processes have already begun.

Mind the Legal Gap

These institutions represent major improvements to the rule-of-law machinery that existed in the first half of the twentieth century. But there is still a significant gap, because no entity currently can investigate, prosecute, and punish the international crime of aggression against Ukraine. The recent expansion of the ICC's jurisdiction to cover the crime of aggression does not extend to Russia's actions on Ukrainian territory, because neither country is a party to the ICC statute.

The very existence of this gap could be seen as proof of the current system's dysfunction. What kind of legal system recognizes certain wrongs as serious crimes but does not provide the institutional means for investigating, prosecuting, or punishing them?

Some might argue that this gap is irrelevant, because existing institutions could still hold Putin and his generals accountable for other offenses, such as violations of human rights, war crimes, and crimes against humanity. But it does matter, because the machinery to punish the crime of aggression would be more effective than those other channels in holding Putin's inner circle accountable.

Sign up for our weekly On Point newsletter

Make your inbox smarter.

Select Newsletters

Aggression is a crime committed by leaders who plan, initiate, or have the power to influence or shape an overall policy of aggression. It applies to the top ranks, rather than to middle- or lower-ranking officials, and it is generally easier to prove than individual responsibility for specific acts amounting to war crimes or crimes against humanity. Moreover, it also would allow for those who have been complicit in aggression – for example, by providing material support to facilitate it – to be held responsible.

As such, the process of ensuring legal accountability is correspondingly swifter. In the short run, the threat of being brought to justice might encourage those who are systemically sustaining the war of aggression to begin to distance themselves from the regime. And in the long run, knowledge of this risk will act as a deterrent to future enablers of aggression.

The Case for a Special Tribunal

Given these potential outcomes, there is a growing chorus calling for the gap in the international rule-of-law machinery to be filled with a special tribunal to punish the crime of aggression against Ukraine. This body would complement, rather than compete with, the ICC, because it would have authority to act only where the ICC lacks prosecutorial power.

One such proposal, which has the Ukrainian government's support, encourages states to form a coalition of the willing with Ukraine to create a special tribunal. Another proposal envisions a tribunal being established under the UN's auspices, on the recommendation of the General Assembly. Notably, The Elders – a private organization of prominent former government and international leaders – has endorsed calls for a criminal tribunal to be established, though they have not specified how it should come into being.

Any of these proposals would fill the current institutional gap by enabling the victim state to ensure that aggression on its territory does not go unpunished. The modalities by which a special criminal tribunal is established are of secondary importance. What matters is that there is now a powerful movement to uphold the international rule of law by ensuring that there is no impunity for aggression. Russia's aggression has thus created the conditions for reversing the disturbing trend of recent years.

What will it take to ensure that this historic opportunity is not missed? Rebuilding the international rule of law will require more than merely reasserting the supremacy of international rules over national laws and policies. For a restored system to endure, its reconstruction must account for the reasons why it was eroded in the first place.

One of those reasons is reflected in criticism of the proposals for a special tribunal. Some legal scholars argue that a special tribunal is a bad idea because it sends the message that international criminal justice is ultimately selective. According to this critique, the international rule of law would be subverted, rather than strengthened, by the hypocrisy and double standards involved in singling out Russian aggression when other states' equally grave acts of aggression have gone unpunished.

This is a powerful critique that proponents of a special tribunal cannot simply dismiss. Nationalist attacks on international norms, institutions, and court rulings have found ready audiences among some electorates partly because there is a growing perception that the international rule of law is a Western imperial construct. Powerful states invoke international law when it suits their interests and conveniently overlook it when it does not.

As I have recently argued elsewhere, rebuilding the international rule of law requires that this critique be fully acknowledged. It is important that proposals invoking the rule of law be seen as manifestations of an inclusive and equitable multilateral system, not as mechanisms imposed solely by the Western powers that designed the post-war international order. But it is one thing to recognize the problem of selectivity; it is quite another thing to argue against the creation of a special tribunal on these grounds. That path leads to a counsel of despair, turning the perfect into the enemy of the good.

A Chance to Rebuild

A special tribunal to punish Russia's crime of aggression against Ukraine would be a pragmatic way to start rebuilding our global institutions, in keeping with what former British Prime Minister Gordon Brown advocates in his recent book, *Seven Ways to Change the World*. Brown's proposed strategy is grounded in universal values, but it would build the case for international cooperation issue by issue. Support for reform must be won, not demanded. States must show leadership and build coalitions of the responsible, persuading both governments and electorates that there are advantages in pooling national sovereignty.

Today's proposals for a special tribunal are not about creating and imposing new international norms on the rest of the world. Aggression is a long-recognized international crime. The case that must be made now is for developing the institutional machinery to enable punishment of that crime. Russia's aggression has summoned into being an extraordinary global consensus that there can be no impunity for such grave acts of aggression in the twenty-first century.

The ball is now in the court of those who aspire to global leadership on this issue, not least the UK, the US, and many European countries. The international rule of law faces existential threats around the world. But by developing the institutional machinery needed to uphold this powerful ideal, governments can demonstrate that their commitment to it is more than merely rhetorical. They have an opportunity to step back from rule-of-law doublespeak, to renew their commitments to abide by obligations they have voluntarily adopted, and to uphold the universally recognized norms of customary international law.

It is in everyone's interest that international rules be consistently enforced. Rebuilding the international rule of law will take intelligent leadership and patient work, and that work must begin now.

MURRAY HUNT

Murray Hunt, Director of the Bingham Centre for the Rule of Law, is Visiting Professor of Human Rights Law at the University of Oxford and a co-editor of *Parliaments and Human Rights: Redressing the Democratic Deficit* (Bloomsbury, 2015).

<https://prosyn.org/1GaMB8w>

© Project Syndicate - 2022