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UKRAINE, NUCLEAR WEAPONS, AND THE FUTURE OF INTERNATIONAL LAW

Nicholas Rostow

Russia's 2022 invasion of Ukraine, which continued the Russian war against Ukraine begun in 2014, has raised profound strategic, legal, and moral issues.¹ In addition to posing a direct threat to such former Soviet republics as the Baltic States, Russian aggression threatens the character and future of the international system of states. One state's aggression against another challenges the very idea of a system. While any international use of force poses questions about the relevance of international law to peace, aggression stands apart—and great-power aggression all the more so, because a great power has enormous destructive capabilities. In the past three centuries, great-power aggression has triggered world wars.

Since the defeat of Napoléon in 1815 and the ensuing establishment of the European system of great-power congresses, governments and observers have presumed that great powers bear special responsibility for the maintenance of international peace and security.² The two world wars and subsequent decolonization globalized this presumption, which is embodied today in the United Nations (UN) Charter. The 1928 Treaty Providing for the Renunciation of War as an Instrument of National Policy (also known as the Pact of Paris or Kellogg-Briand Pact) and article 2, paragraph 4, of the UN Charter codified the prohibition on the use of force against the territorial integrity or political independence of states even more than the League of Nations Covenant had done.³ The Soviet Union (USSR), of which the Russian Federation is a successor, joined the Kellogg-Briand Pact in 1929 and helped draft the UN Charter.⁴ Russia's uses of force against independent states, including Ukraine (an original UN member), which formerly were republics of the Soviet Union, have attacked the long-established

and most-fundamental norms of the international system.⁵ Therefore, the stakes at issue in Russia's war against Ukraine could not be more significant for every member of the international community.

These stakes include the continued vitality and relevance of the following: (1) the UN Charter prohibition on the threat or use of force against the territorial integrity or political independence of any state; (2) the 1968 Nuclear Non-Proliferation Treaty (NPT) and the positive security assurances of the United States, United Kingdom, and Soviet Union to non-nuclear-weapons states given in connection with the NPT and reaffirmed by the five UN Security Council permanent members, each of which possesses nuclear weapons, when the NPT became permanent in 1995; and (3) the subjection of even the greatest powers to the rule of law and legal accountability with respect to war crimes and other justiciable crimes under international and municipal law.

The strategic and legal issues overlap because they implicate the fundamental values of the international community. As a result, they give additional moral meaning to the issues involved. By invading a UN member country for the second time in less than a decade, Russia under President Vladimir V. Putin has repudiated the international order. He labels it a tool of the United States and has never accepted Ukraine as an independent state.⁶ That refusal, whatever its justification, does not change the international and legal character of Ukraine. It is the same as that of Kuwait, a country that Iraq tried to annex by force beginning on 2 August 1990, claiming that Kuwait was a province of Iraq hived off by Great Britain during the period of imperial rule.⁷ Ukraine's legal character and right to exist as an independent state in fact is the same as those of the United States or Russia. Just as Iraq's invasion of Kuwait assaulted the most fundamental norms of international behavior, so too did Russia's 2014 and 2022 invasions of Ukraine (actually, a continuous military campaign). All states understood this reality in 1990 and continue to do so today with respect to Ukraine, even if some sit on the fence waiting to see whether Russia prevails in its aggression.

Putin's justification for the invasion provides a structure for examining his understanding of history and law. He has raised the possibility of using nuclear weapons, and thus reversed Soviet and Russian positions since 1968 with respect to the threat, use, or proliferation of such weapons. Opponents of his action should develop and implement a new strategy for addressing this situation. This last point is even more important because Putin has made clear that his war is with the Atlantic Alliance and its organization, NATO, even more than with history and Ukraine.

Putin has confronted the world—not just Ukraine, the United States, and NATO allies—with fateful choices. First is whether the minimum world public order so painfully constructed and defended after World War II is to survive, or

is it to be replaced completely by the rule of Thucydides's Melian dialogue: "the strong do what they have the power to do and the weak accept what they have to accept"?⁸ Second, are nuclear powers to be free to commit aggression, using the fear that they might start a nuclear war as the ultimate guarantee against successful defense? Third, is any state that is not a formal ally of a state possessing nuclear weapons fair game for attack? In other words, in Europe, if a state is not a member of NATO, does Russia have a license to kill?

To date (June 2023), the United States and its allies have refrained from engaging directly with Russian forces in Ukraine. To avoid positive answers to the foregoing questions and others like them, Ukraine's friends should up the ante. This conclusion does not mean attacking Russia. It does mean preparing to attack Russian forces in Ukraine in the event Russia uses weapons of mass destruction or seems close to victory. A place for Ukraine's allies to start would be to send armored divisions, air wings, and missiles and other advanced, precision-guided offensive and defensive weapons to NATO states bordering on Ukraine and engage in large training exercises with Finland and Sweden. Such steps should make clear to Putin that he will not be allowed to prevail or escape accountability for his crimes—aggression, brandishing nuclear weapons, war crimes, and perhaps crimes against humanity. It may not be too late to impose a no-fly zone over Ukraine.

The first part of this article situates the Ukraine war and Russia's justifications for it in international law. Part 2 examines Russia's threats to use nuclear weapons. Part 3 recommends vigorous responses to those threats. The conclusion is that, because I believe the stakes raised by the Russian invasion of Ukraine could not be higher, the response required has to be correspondingly firm and courageous. The whole world is watching. We do not want the consequence of Russia's invasion for Ukraine to be *sauve qui peut* (everyone for itself).

RUSSIA AND UKRAINE: INTERNATIONAL LAW AND WAR

The UN Charter limits the circumstances in which a use of military force is lawful. The Charter starts with a general prohibition on "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 [i.e., article 1 of the UN Charter]."⁹ Then comes the right of self-defense. It is lawful to use force in response to an armed attack or in anticipation of an armed attack where no alternative reasonably exists.¹⁰ Second, it is lawful to use force pursuant to another state's inherent right to ask others to join in its defense—that is, in exercise of the right of collective self-defense. Third, it is lawful to use force pursuant to UN Security Council authorization. Essential to both the law governing the use of force and the law governing military operations are the principles of necessity and proportionality.

Necessity, Proportionality, and Self-defense

Necessity means that no reasonable alternative to the use of force exists. It makes force a last resort, taking the totality of the circumstances into account in reaching a decision that therefore is reasonable.¹¹ Judgment is inescapable. *Necessity* with respect to the decision to use force is different from the concept of *military necessity*, which the United States, for example, defines as “the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”¹²

Proportionality requires that the quantum of force be the minimum required to achieve the lawful purpose.¹³ Proportionality also involves the application of

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a standard of reasonableness and judgment.¹⁴ “Tit for tat” is not the standard; rather, it is that amount of force reasonably necessary to bring to an end the circumstances giving rise to the right to use force in self-defense—in the UN Charter’s language, “armed

attack”—whatever that may mean in practical terms, given both the articulated law of self-defense going back at least to the *Caroline* affair in 1837 and the technological context of the moment.¹⁵

In that mid-nineteenth-century *Caroline* case, when the technological context more closely resembled the eighteenth century’s than today’s, Secretary of State Daniel Webster and British foreign secretary Lord Ashburton agreed that the party claiming a right to use force in self-defense had to “show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”¹⁶

At the time, statesmen adhered to the view represented in this language because they considered it both realistic and accurate as a statement of legal requirements, including limits. Subsequent statesmen, scholars, and international bodies have concurred.¹⁷ Indeed, limit is an essential idea in the law. While Webster and Ashburton acknowledged that self-preservation—an instinct—underpinned the right of self-defense, the two foreign ministers also accepted that that right was limited by necessity and must be kept within it.¹⁸ Instinct and the law may clash, and instinct may prevail. Illustrating this connection, the views of J. L. Brierly—a

leading scholar writing in a previous time—are so well stated and relevant that they bear lengthy quotation:

[W]e ought not to argue that because states or individuals are likely to behave in a certain way in certain circumstances, therefore they have a right to behave in that way. . . .

Self-defence, properly understood, is a legal right, and as with other legal rights the question whether a specific state of facts warrants its exercise is a legal question. It is not a question on which a state is entitled, in any special sense, to be a judge in its own cause. In one sense a state in international law may always be a judge in its own cause, for, in the absence of a treaty obligation, it is not compulsory for a state to submit its conduct to the judgement of any international tribunal. But this is a loose way of speaking. A state which refuses to submit its case does not become a “judge”; it merely blocks the channels of due process of law, as, owing to the defective organization of international justice, it is still able to do. This is a defect of general application in international law, which applies, but not in any special sense, to a disputed case of self-defence. There is, however, another circumstance which gives a certain plausibility to the common claim that every state is competent to decide for itself whether a necessity for self-defence has arisen. It is, or may be, of the nature of the emergency which seems to justify defensive action that action, if it is to be effective, must be immediate. This is equally true of defensive action by an individual. To wait for authority to act from any outside body may mean disaster, either for a state or an individual, and either may have to decide *in the first instance* whether or in what measure the occasion calls for defensive action. With the individual, under any civilized system of law, this initial decision is not final; it may be reviewed later by the law in the light of all the relevant circumstances. There is no reason to believe that the case is different with a state, apart from the procedural difficulty of procuring the submission of the question to judicial review; and fortunately this conclusion does not depend on *a priori* argument. For the practice of states decisively rejects the view that a state need only declare its own action to be defensive for that action to become defensive as a matter of law.¹⁹

Were this analysis not correct, there would have been no cause to complain about unlawful invasions, including Russia’s invasions of Ukraine in 2014 and 2022.

The point is that the right of self-defence is a legal, if limited, right. Under the UN Charter, the Security Council may judge its exercise. The Charter requires that a state using force in self-defence report that fact to the Security Council and that the right remains to be exercised until the Security Council takes measures necessary to maintain or restore peace. That is, the Security Council’s measures must be effective: they must bring an end to the situation giving rise to the right or effectively start the process of bringing it to an end.²⁰ The General Assembly also has authority to approve a claim that a use of force is in self-defence. When Russia exercised its veto to block Security Council

substantive consideration of the invasion of Ukraine, the Security Council invited the General Assembly to consider the matter, a move that was procedural and not subject to veto.²¹ On 2 March 2022, the General Assembly considered the invocation of self-defense and “*deplore[d] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter.*”²²

In addition to the Security Council and the General Assembly, the UN International Court of Justice (ICJ) also may review uses of force claimed to be in self-defense. It has done so on five occasions. It is considering Russia’s invasion of Ukraine under the guise of Ukraine’s claim that Russia has violated the Convention against Genocide.²³ The fact that Moscow understood that its use of force against Ukraine would be subject to review and evaluation, first by the Security Council, whose response it could block, and then by the General Assembly and the ICJ, which could not be prevented from acting, demonstrates that Russia was unwilling to be deterred. Moreover, and of utmost import, international law, like all law, is not a suicide pact. The blockage of certain avenues of vindication does not mean members of the international system are powerless to defend themselves, their allies and friends, and the values expressed in the UN Charter.

Putin’s Justification of the Invasion of Ukraine

Article 51 does not require a particular form of report. More common than using a speech as the report are brief notifications of the use of force, such as the U.S. communication in regard to Afghanistan in 2001.²⁴ At that time, no state complained that the United States lacked the right to use force in self-defense in response to the terrorist attacks of September 11, 2001. Russia’s report on 24 February 2022 took the form of President Putin’s speech of the same date.²⁵

Speeches are occasions when leaders express their thoughts, claims, and justifications. Whether in private or in public, they are of inestimable value as a place to begin analysis. President Putin’s public speeches justifying his actions against Ukraine in 2014 and 2022 share themes. In March 2014, Putin gave his view of Russian-Crimean history, concluding that “[i]n people’s hearts and minds, Crimea has always been an inseparable part of Russia.”²⁶ He insisted that the 2014 Crimean referendum on joining Russia—“Over 96 percent of them spoke out in favour of reuniting with Russia”—was consistent with history and international law and no more than what the United States had endorsed with respect to Kosovo’s declaration of independence from Serbia.²⁷ Within five years of this speech, Putin was admitting that Russian intelligence and military forces had entered Crimea, ensured the outcome of the vote, and secured the peninsula for Russia.²⁸ Putin’s 2014 speech then addressed Ukraine: “[W]e are not simply close neighbours but, as I have said many times already, we are one people. Kiev is the

mother of Russian cities. Ancient Rus is our common source and we cannot live without each other.”²⁹ He also more than hinted that the United States and NATO were responsible for Russian action.

Like a mirror, the situation in Ukraine reflects what is going on and what has been happening in the world over the past several decades. After the dissolution of bipolarity on the planet, we no longer have stability. Key international institutions are not getting any stronger; on the contrary, in many cases, they are sadly degrading. Our western partners, led by the United States of America, prefer not to be guided by international law in their practical policies, but by the rule of the gun. They have come to believe in their exclusivity and exceptionalism, that they can decide the destinies of the world, that only they can ever be right. They act as they please: here and there, they use force against sovereign states, building coalitions based on the principle “If you are not with us, you are against us.” To make this aggression look legitimate, they force the necessary resolutions from international organisations, and if for some reason this does not work, they simply ignore the UN Security Council and the UN overall.

This happened in Yugoslavia; we remember 1999 very well. It was hard to believe, even seeing it with my own eyes, that at the end of the 20th century, one of Europe’s capitals, Belgrade, was under missile attack for several weeks, and then came the real intervention. Was there a UN Security Council resolution on this matter, allowing for these actions? Nothing of the sort. And then, they hit Afghanistan, Iraq, and frankly violated the UN Security Council resolution on Libya, when instead of imposing the so-called no-fly zone over it they started bombing it too.

There was a whole series of controlled “colour” revolutions. Clearly, the people in those nations, where these events took place, were sick of tyranny and poverty, of their lack of prospects; but these feelings were taken advantage of cynically. Standards were imposed on these nations that did not in any way correspond to their way of life, traditions, or these peoples’ cultures. As a result, instead of democracy and freedom, there was chaos, outbreaks in violence and a series of upheavals. The Arab Spring turned into the Arab Winter.³⁰

A similar situation unfolded in Ukraine. . . .

Today, we are being threatened with sanctions, but we already experience many limitations, ones that are quite significant for us, our economy and our nation. For example, still during the times of the Cold War, the US and subsequently other nations restricted a large list of technologies and equipment from being sold to the USSR, creating the Coordinating Committee for Multilateral Export Controls list. Today, they have formally been eliminated, but only formally; and in reality, many limitations are still in effect.

In short, we have every reason to assume that the infamous policy of containment, led in the 18th, 19th and 20th centuries, continues today.³¹ They are constantly

trying to sweep us into a corner because we have an independent position, because we maintain it and because we call things like they are and do not engage in hypocrisy. But there is a limit to everything. And with Ukraine, our western partners have crossed the line, playing the bear and acting irresponsibly and unprofessionally.

After all, they were fully aware that there are millions of Russians living in Ukraine and in Crimea. They must have really lacked political instinct and common sense not to foresee all the consequences of their actions. Russia found itself in a position it could not retreat from. If you compress the spring all the way to its limit, it will snap back hard. You must always remember this.

Today, it is imperative to end this hysteria, to refute the rhetoric of the cold war and to accept the obvious fact: Russia is an independent, active participant in international affairs; like other countries, it has its own national interests that need to be taken into account and respected.³²

Putin's 2014 recitation of historical claims and grievances amounts to the idea that Russia has national interests and, therefore, can do what it wants and

Putin has made clear that his war is with the Atlantic Alliance and its organization, NATO, even more than with history and Ukraine.

move in whatever direction it can until it meets immovable resistance. Hence, Russia invaded Ukraine in 2014 and seized Crimea. Putin's theme is common in international

history but inconsistent per se with the foundational norms of the international system of independent states.³³

Putin's address of 24 February 2022 repeated the themes of 2014 but this time began with NATO. Putin justified Russia's second invasion of Ukraine as self-defense against NATO expansion "ever closer to Russia's borders."³⁴ It is difficult to recall a historical example of a state claiming that the inclusion of new states in a defensive alliance constituted an "armed attack" giving rise to the right to use force in self-defense. He accused the United States of abusing its position after the end of the Cold War and collapse of the Soviet Union to engage in military action against Serbia, Libya, and Iraq without proper authorization from the Security Council. Even taking these historical accounts and legal conclusions to be true—as lawyers like to say—these events did not constitute armed attacks against Russia.

Putin said that the consequences of these U.S.-led actions in North Africa and the Middle East were dire because those areas became homes to terrorists and sources of massive migrations to Europe. He blamed the Syrian civil war on the United States as well. "In general," Putin said, "it would appear that in many regions of the world, almost wherever the West comes to establish its order, it leaves bloody, open wounds and the sores of international terrorism and extremism."³⁵

He rehearsed Russian grievances, even to the point of blaming Hitler's attack on the Soviet Union in 1941 on Western appeasement of Germany in the 1930s (conveniently omitting such material events as the signing of the Ribbentrop-Molotov Nonaggression Pact of August 1939, which, among other things, redistributed countries in central and eastern Europe between Germany and the Soviet Union). "For the United States and its allies, this is the so-called policy of containment of Russia, with obvious geopolitical dividends. *But for our country this is ultimately a matter of life and death, the question of our historical future as a people.*

"And this is not an exaggeration—it is a fact. This is a real threat not just to our interests, but to the very existence of our State and its sovereignty. This is the red line that has been talked about many times: they have crossed it."³⁶

Putin also reminded his listeners of Russia's nuclear power and willingness to use nuclear weapons: "Russia today is one of the most powerful nuclear powers in the world and, moreover, has certain advantages in some of the newest types of weaponry. In that context, no one should have any doubt *that a direct attack on our country will lead to defeat and terrible consequences for any potential aggressor.*"³⁷

Putin reiterated these themes in the remainder of his speech, accusing NATO—"it is only a tool of United States foreign policy"—of threatening Russia by expanding its "infrastructure to the borders of Russia."³⁸ He capped off the argument by claiming that Ukraine was engaging in

a genocide against the millions of people living there [Donbass] who are pinning their hopes on Russia, on us alone. It is their aspiration, the feelings and pain of these people that were the main motivating force behind our decision to recognize the independence of the Donbass People's Republics. . . .

In this regard, in accordance with Article 51 (chapter VII) of the Charter of the United Nations, I have decided to conduct a special military operation . . . to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years.³⁹

This statement recalled Hitler's tactics and justifications with regard to ethnic Germans living in Czechoslovakia: Czechoslovakia was persecuting ethnic German citizens of that country, and, therefore, Germany had a right to dismember Czechoslovakia and incorporate areas with ethnic Germans and eventually the whole of Czechoslovakia into Germany.⁴⁰ Putin's speech also showed that he is cavalier about the legal consequences of the use of particular words. Ukraine used the accusation of genocide to sue Russia before the International Court of Justice.

In February 2023, Putin repeated the same themes. One year after this second invasion of Ukraine, Putin's message was even clearer than it had been earlier.

Responsibility for inciting and escalating the Ukraine conflict as well as the sheer number of casualties lies entirely with the Western elites and, of course, today's

Kiev regime, for which the Ukrainian people are, in fact, not its own people. The current Ukrainian regime is serving not national interests, but the interests of third countries.

The West is using Ukraine as a battering ram against Russia and as a testing range. I am not going to discuss in detail the West's attempts to turn the war around, or their plans to ramp up military supplies, since everyone is well aware of that. However, there is one circumstance that everyone should be clear about: the longer the range of the Western systems that will be supplied to Ukraine, the further we will have to move the threat away from our borders. This is obvious.

The Western elite make no secret of their goal, which is, I quote, "Russia's strategic defeat." What does this mean to us? This means they plan to finish us once and for all. In other words, they plan to grow a local conflict into a global confrontation. This is how we understand it and we will respond accordingly, because this represents an existential threat to our country.⁴¹

These speeches fall far short of making a credible or even colorable legal argument for a use of force in self-defense. If Russia's invasion of Ukraine has resulted in, and constitutes, "an existential threat" to Russia, Putin made it so, not Ukraine by exercising its inherent right of individual and collective self-defense.

Putin's principal points are three. One, NATO expansion constitutes a mortal threat to Russian civilization and existence. Two, Ukraine is not a real state but rather an integral part of Russia that has engaged in genocide against ethnic Russians. Finally, U.S. and Western abuse of international law resulted in unlawful wars against Serbia, Libya, and Iraq, leaving great human tragedies and international threats in their wake. None of these complaints, even if valid—which they are not, or at least not as framed by Putin—constitutes an *armed attack* against Russia within any interpretation of the international law of self-defense as summarized in the UN Charter and expounded elsewhere.⁴² In addition, of course, the ICJ is considering the legal consequences of Russia's allegation that Ukraine has engaged in genocide. So far, the court has held that it has jurisdiction under the Genocide Convention to consider whether genocide has occurred and whether the convention confers a right to use force to prevent its continuation.⁴³

Whether Russia has any justification in the law for using force against Ukraine, its scarcely veiled threats to use nuclear or other weapons of mass destruction merit separate consideration. In 1968 and 1995, the Soviet Union and then Russia assured all non-nuclear-weapons states party to the NPT that it would seek action by the UN Security Council if they were subject to the threat or use of force involving nuclear weapons. In 1994, Russia, the United States, and the United Kingdom reiterated the 1968 positive security assurance specifically with regard to Ukraine. Nothing that occurred since those assurances were given in any way

amounted to an armed attack or even an incipient armed attack on the Russian Federation that would justify the invasions of Ukraine.

NUCLEAR WEAPONS AND UKRAINE

Nuclear weapons occupy a unique place within arsenals, in grand strategy, in international law, and in world public order. They are by far the most lethal of modern weapons in terms of quantum and longevity of destructiveness per unit.⁴⁴ The absence of general war among the great powers since 1945 owes much to such weapons and the fear that they properly engender. Whether or not a state possesses nuclear weapons, they figure in calculations of national interest. Nuclear weapons also highlight the importance of proportionality as a political, strategic, and legal principle.⁴⁵

Western Views

As the developer, first user, and monopolist holder until August 1949, the United States was the first state to confront the implications of the weapon. On 9 August 1945, after the bombing of Nagasaki, Truman said that he understood at least some of the ramifications of the atomic bomb:

I realize the tragic significance of the atomic bomb.

Its production and its use were not lightly undertaken by this Government. But we knew that our enemies were on the search for it. We know now how close they were to finding it. And we knew the disaster which would come to this Nation, and to all peace-loving nations, to all civilization, if they had found it first. . . .

The atomic bomb is too dangerous to be loose in a lawless world. That is why Great Britain, Canada, and the United States, who have the secret of its production, do not intend to reveal that secret until means have been found to control the bomb so as to protect ourselves and the rest of the world from the danger of total destruction. . . .

We must constitute ourselves trustees of this new force—to prevent its misuse, and to turn it into the channels of service to mankind.

It is an awful responsibility which has come to us.⁴⁶

Almost from the inception of the nuclear age, therefore, Western leaders and commentators began to equate war involving nuclear weapons with obliteration. The U.S.-U.K.-Canada Agreed Declaration of 15 November 1945—the first postwar multilateral statement on atomic weapons—reaffirmed Truman's point: the three governments affirmed their policy "to attain the most effective means of entirely eliminating the use of atomic energy for destructive purposes and promote its widest use for industrial and humanitarian purposes."⁴⁷

Stalin's reaction to the atomic bomb was markedly different from Truman's. At Potsdam on 24 July 1945, slightly more than a week after the successful test

in New Mexico, Truman told Stalin that the United States had a “new weapon of unusual destructive force.”⁴⁸ Stalin, however, already knew about the atomic bomb by means of espionage. No sooner had the United States used the weapon against Japan than Stalin decided to accelerate the Soviet atomic weapons program, launched in 1942, to completion.⁴⁹ He told Boris Vannikov, People’s Commissar for Munitions, his deputies, and Igor V. Kurchatov, a physicist: “You know that Hiroshima has shaken the whole world. The equilibrium has been destroyed. Provide the bomb—it will remove a great danger from us.”⁵⁰ Stalin’s reaction to the bombing of Hiroshima itself was that it was unnecessary “super-barbarity. And

Putin . . . has used nuclear weapons to try to shield Russian aggression against Ukraine from a confrontation with non-Ukrainian armed forces.

there was no need to use it. Japan was already doomed.”⁵¹

He also apparently believed that the bombing of Hiroshima was aimed at the Soviet Union and on hearing of it said that

“A-bomb blackmail is American policy.”⁵² Stalin’s summation of American policy discounted Washington’s eagerness to have the Soviet Union enter the war against Japan and the opportunity for territorial and perhaps other gains that that invitation offered.

Stalin sought to shorten as much as possible the period during which the United States had a monopoly of the weapon. Did Stalin understand U.S. inability to decide how to use or even try to use the weapon in terms of international politics? Did he have ideas about how he would have used a monopoly of nuclear weapons? In any event, at the dawn of the nuclear age and of the Cold War, American officials were on a different tack from that of Stalin.

In 1961, newly appointed Secretary of State Dean Rusk received a briefing on nuclear war and concluded that every political leader in every country should sit through a detailed briefing on the probable look of nuclear war so that they would “understand what they are talking about when they discuss nuclear war.”⁵³ According to Rusk, President John F. Kennedy understood “and was appalled” by nuclear war.⁵⁴ As Raymond Aron wrote, “The free choice between war and peace, [the] essence of sovereignty in the traditional sense of the word, no longer has the same meaning now that the choice of war implies or could imply the annihilation of the nation itself.”⁵⁵ Yet the divergence between U.S. and Soviet perspectives on nuclear weapons persisted until the United States and the Soviet Union saw their interests coinciding with respect to the proliferation of nuclear weapons. A little more than twenty years after Hiroshima and Nagasaki, the great nuclear powers gave a positive security assurance to states that did not possess nuclear weapons. This action followed much experience with the danger of nuclear weapons and the development of nuclear diplomacy and crisis management.⁵⁶

In connection with the adoption in 1968 of the NPT, three of the five permanent members of the UN Security Council—the United Kingdom, the United States, and the Soviet Union—issued declarations that, in the event that a non-nuclear state party to the NPT was victim of aggression or threat of aggression “in which nuclear weapons are used,” they would seek immediate Security Council action to provide assistance.⁵⁷ France did not join these declarations or the NPT, although it had possessed nuclear weapons since 1960. In 1968, the People’s Republic of China was not a UN member. In the context of 1968, one might be forgiven for considering that the agreement of the United States, the United Kingdom, and the Soviet Union amounted to a guarantee. One should understand the statements as a crucially important part of the NPT bargain, persuading nonnuclear states to forgo nuclear weapons. The identical statements contained the following language:

The Government of the Soviet Union [the United Kingdom, the United States] notes with appreciation the desire expressed by a large number of States to subscribe to the Treaty on the Non-Proliferation of Nuclear Weapons.

We welcome the willingness of these States to undertake not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

The Soviet Union [the United Kingdom, the United States] also notes the concern of certain of these States that, in conjunction with their adherence to the Treaty on the Non-Proliferation of Nuclear Weapons, appropriate measures be undertaken to safeguard their security. Any aggression accompanied by the use of nuclear weapons would endanger the peace and security of all States.

Bearing these considerations in mind, the Soviet Union [the United Kingdom, the United States] declares the following:

Aggression with nuclear weapons, or the threat of such aggression, against a non-nuclear-weapon State would create a qualitatively new situation in which the nuclear-weapon States which are permanent members of the United Nations Security Council would have to act immediately through the Security Council to take the measures necessary to counter such aggression or remove the threat of aggression in accordance with the United Nations Charter, which calls for taking “effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.” [U.N. Charter art. 1, para. 1] Therefore, any State which commits aggression accompanied by the use of nuclear weapons or threatens such aggression must be aware that its actions will be countered

effectively by measures to be taken in accordance with the United Nations Charter to suppress the aggression or remove the threat of aggression.

The Soviet Union [the United Kingdom, the United States] affirms its intention, as a permanent member of the United Nations Security Council, to seek immediate Security Council action to provide assistance, in accordance with the Charter, to any non-nuclear-weapon State, party to the Treaty on the Non-Proliferation of Nuclear Weapons, that is a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used.

The Soviet Union [the United Kingdom, the United States] reaffirms in particular the inherent right, recognized under Article 51 of the Charter, of individual or collective self-defence if an armed attack, including a nuclear attack, occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

The Soviet Union's [the United Kingdom's, the United States] vote for the resolution before us and this statement of the way in which the Soviet Union [the United Kingdom, the United States] intends to act in accordance with the Charter of the United Nations are based upon the fact that the resolution is supported by other permanent members of the Security Council who are nuclear-weapon States and are also proposing to sign the Treaty on the Non-Proliferation of Nuclear Weapons, and that these States have made similar statements as to the way in which they intend to act in accordance with the Charter.⁵⁸

The three states did not use Truman's trustee metaphor, but their assurance perhaps ought to be understood as a reversion to that idea.

Everyone familiar with the UN during the Cold War knew that the Soviet Union, the United Kingdom, and the United States, if they acted together, could command an overwhelming majority in the Security Council and that neither France nor China likely would exercise its veto in opposition. Indeed, the resolution endorsing the Soviet, U.K., and U.S. statements was adopted without opposition (although five states abstained).⁵⁹

When the NPT was made permanent in 1995, these assurances could be reinforced and added to by pledges from China and France. But first came Ukrainian adherence to the NPT and the country's commitment in December 1994 to allow the removal of all nuclear warheads from its territory as well as the destruction or removal of all strategic nuclear weapons delivery vehicles. (The last warhead was removed on 1 June 1996.)⁶⁰ Among the documents filed in the UN Treaty Office in connection with Ukraine's accession to the NPT is the formal Budapest memorandum on security assurances, signed on 5 December 1994, by the presidents of Ukraine, the Russian Federation, and the United States and the prime minister of the United Kingdom.⁶¹ Adapting the 1968 NPT language and the language of

the UN Charter, and other international security assurances such as those in the Helsinki Final Act, Russia, the United Kingdom, and the United States pledged that they would respect Ukraine's independence and territorial integrity and ensure its safety in the event of threat or attack with nuclear weapons.⁶² By its terms, the memorandum took effect on signature. In this document, Russia, the United Kingdom, and the United States

1. . . . reaffirm their commitment to Ukraine, in accordance with the principles of the CSCE Final Act [Conference on Security and Co-operation in Europe—Helsinki, 1975], to respect the independence and sovereignty and the existing borders of Ukraine[;]
2. . . . reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United Nations[;]
3. . . . reaffirm their commitment to Ukraine . . . to refrain from economic coercion designed to subordinate to their own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind[;]
4. . . . reaffirm their commitment to seek immediate United Nations Security Council action to provide assistance to Ukraine, as a non-nuclear-weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used[;]
5. . . . reaffirm, in the case of Ukraine, their commitment not to use nuclear weapons against any non-nuclear-weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an attack on themselves, their territories or dependent territories, their armed forces, or their allies, by such a state in association or alliance with a nuclear weapon state.

Ukraine, Russia, the United Kingdom, and the United States also agree to “consult in the event a situation arises which raises a question concerning these commitments.”⁶³

In 1995, in connection with the NPT review, the permanent members of the Security Council—China, France, Russia, the United Kingdom, and the United States—issued declarations stating their promises not to use nuclear weapons against a nonnuclear state except in individual or collective self-defense against an attack by such state in association or alliance with a nuclear-weapon-state. In the event of aggression or the threat of aggression against a nonnuclear state in

which nuclear weapons are used, these powers individually declared that they would offer immediate assistance and use the UN Security Council and other bodies to provide effective assistance and bring an end to the threat or use of nuclear weapons.⁶⁴

These events of 1968, 1994, and 1995 ought to have strengthened the regime of the UN Charter and added to every state's security.

Russia's Position

Obviously, Russia has ignored these commitments. It also has ignored the Soviet Union's pledge to the world community made at the Security Council in 1968. A wave of acquisitions of nuclear weapons by presently nonnuclear states party to the NPT, were it to occur, would be a foreseeable consequence of Russia's invasion

[I]f the relevant international machinery is blocked and unavailable, for whatever reason, the law does not leave states helpless to defend fundamental values under siege.

and disregard of its obligations. While some political scientists would regard such a growth in the number of nuclear-weapons states as stabilizing, governments such as

that of the United States take a more cautious approach. They worry that nuclear proliferation increases the risk of nuclear conflict.⁶⁵

President Putin's view is different. On 24 February 2022, he said:

I would now like to say something very important for those who may be tempted to interfere in these developments from the outside. No matter who tries to stand in our way or all the more so create threats for our country and our people, they must know that Russia will respond immediately, and the consequences will be such as you have never seen in your entire history. No matter how the events unfold, we are ready. All the necessary decisions in this regard have been taken. I hope that my words will be heard.⁶⁶

Governments understood that this statement, followed by an order to place Russian nuclear forces on alert, constituted a threat to use nuclear weapons against, particularly, a NATO intervention on behalf of Ukraine. This part of Putin's speech seemed to go further than his reference to using nuclear weapons to defend Russia in the event of a direct attack on the country.⁶⁷ Putin thus has used nuclear weapons to try to shield Russian aggression against Ukraine from a confrontation with non-Ukrainian armed forces.⁶⁸

MORE TO BE DONE

A recent analysis published in these pages has described the Russian military doctrine and operational devices supporting the policy of aggression against Ukraine and hostility to the West more generally.⁶⁹ The threat to use nuclear

weapons is an integral part of Russia's approach. It has helped deter Western states from imposing such measures as no-fly zones in Ukraine's airspace, something that would have harmed Russia in Ukraine and limited Russia's ability to control the pace of the war. Without directly challenging NATO, Russia thus has retained "escalation dominance."⁷⁰ Yet Russia's Ukraine war has demonstrated that Moscow cannot challenge NATO directly with any hope of success.

That said, Russia's continuation of the war demands additional measures in response. Sanctions always take time to work and inflict sufficient pain on the target country to affect government decision-making. In the history of sanctions, a year is not long. They therefore need to be maintained with—if possible—even-more-rigorous enforcement. The possibility of imposing a no-fly zone in Ukraine should be reexamined. During the Cold War, the United States and NATO undertook training exercises to demonstrate the speed with which troops could be sent to Germany (the REFORGER exercises).⁷¹ Such substantial NATO training exercises should be conducted, and they should include newest NATO members Finland and Sweden. Putin's actions warrant nothing less.

President Putin went beyond using nuclear weapons as a shield. He also repudiated the international law requirement of armed attack as the basis for a lawful, defensive use of force.⁷² The accusation that "containing" Russia, whatever that might mean in the post-Cold War context—resisting Russian territorial expansion at the expense of neighboring, independent states that also are UN members?—justifies a use of force does not come close to meeting the requirements of article 51 of the UN Charter, however expansively one might interpret the "inherent right of individual or collective self-defence."⁷³

At the strategic level, Russia confronts an Atlantic community more united in fear than has been the case in decades. Successive American politicians and presidents, including Barack H. Obama and Donald J. Trump, railed against rich European countries that did not contribute adequately to Europe's and the Atlantic community's defense and did not meet defense spending obligations in relation to gross domestic product to which they had agreed at NATO meetings.⁷⁴ Now, as a result of Russia's invasion, allied defense spending has increased.⁷⁵

Finland and Sweden have become members of the Atlantic Alliance and NATO.⁷⁶ In addition, of course, friends of Ukraine such as the United States have contributed billions of dollars in matériel to Ukraine's armed forces fighting Russia. Governments do not have a monopoly on assistance. Nongovernmental organizations—whether companies, bar associations, or other organizations and networks—have provided assistance, including to preserve evidence to support eventual legal claims. This outpouring represents a community

response. Russia's veto of UN Security Council action forced governments, citizens, and nongovernmental organizations to try other methods to vindicate the values of the UN Charter.

Russia also has sharpened the tensions between democratic and not-so-democratic or outright tyrannical governments that have dominated international politics since the end of the Cold War and certainly since the terrorist attacks of September 11, 2001, and the U.S.-led invasion of Iraq of 2003. At the same time, some voices urge trying to find a negotiated end to the Ukraine war that would leave Russia with Crimea and the Donbass and avoid creating a long-lived, perhaps even permanent, Russo-Chinese alliance. Some advocates of such an end to the war worry that the West is on a course to paint Putin into a corner from which he cannot escape.⁷⁷ One journalist called this view "pragmatic realpolitik."⁷⁸ But is it an appropriate attitude toward international relations and aggression? There are a substantial number of historical examples of aggressors beginning with a single target but then moving on to others. It is important to recall in this context that Putin painted Russia into the corner in which it finds itself. At the moment (June 2023), he is showing no interest in escaping. Indeed, he continues to say that the war is a response to an existential threat posed by NATO. It is difficult to see in such views the basis for a negotiation. And any result that allows Putin to claim success will leave Ukraine vulnerable in the future to Russian influence operations and encourage other states to see nuclear weapons as the essential tool for military and political success.

Russia's conduct of the Ukraine war has demonstrated its military weakness. Despite seemingly vast quantities of weapons, Russia has not been able to defeat Ukraine and seize much more territory than it controlled after the 2014 invasion. Russian weakness has increased the country's dependency on China. That fact affects China's ability to be any kind of honest broker of negotiations. It also upsets the dynamic balance of power that imposes limits on the actions of sovereign states. This new reality is of strategic significance for the near and long terms.

It also is of legal significance, because the idea of balance and the acceptance of limits is at the core of every legal system. In this connection, Justice Louis D. Brandeis's insight into the working of the American Constitution is relevant to understanding the working of the international political and legal system and the importance of a balance of power to that system: "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."⁷⁹ In the international arena, the balance of power plays the same role.

Wars matter. The Russian invasion of Ukraine already has had important strategic, moral, and legal consequences. Russia's military operations ignore the most fundamental law governing the use of force and laws of war: it ignores the need to distinguish between military and civilian targets. Other Russian actions arguably amount to genocide and pillage/plunder.⁸⁰ Russia uses nuclear weapons as a shield granting impunity for aggression and war crimes.

The international legal system includes fundamental norms regarding the use of force and other subjects such as human rights enforced or advanced through the actions of governments, intergovernmental organizations, and nongovernmental actors. It is a flexible arrangement, particularly where the existence of states is at stake. In September 1965, Secretary of State Dean Rusk put the point well in discussing the role of the State Department legal adviser.

The test of policy by reference to law goes beyond the technical issues of law or even the broader objective of the rule of law. Law is the custodian of the standard of generalized conduct. Our Legal Adviser is responsible for putting to us the questions: What happens if everyone else acts as we are proposing to do? How are we prepared to act if a similar situation arises elsewhere?

The law liberates by making it possible to predict, with reasonable assurance, what the other fellow is going to do. One of the most exciting and hopeful developments of this postwar period, even though largely unnoticed, is the rapid growth of what Wilfred Jenks has called "the Common Law of Mankind." The gravitational pull of law in policy is and must be a powerful factor in policy decision.⁸¹

What the invasion of Ukraine has put on the table is the future of that gravitational pull toward minimum world public order. Part of that gravitational pull involves answers to the question, Who decides? The structure of the international system—a system of independent, sovereign, nominally equal states and international organizations to which the states have delegated certain powers without giving up their independence—means that states decide. Their decisions may take place inside or outside international organizations such as the UN. The point is that, if the relevant international machinery is blocked and unavailable, for whatever reason, the law does not leave states helpless to defend fundamental values under siege. That is the situation raised by the Russian invasion of Ukraine.

The answer is neither *sauve qui peut* nor submission. A collective, multilayered, and multifaceted defense of the fundamental values under attack lawfully may be mounted. We have seen the West engage in such an effort in response to Russia's invasion. Additional measures are in order. They include the provision of advanced aircraft, imposition of a no-fly zone, and the reinforcement of NATO's defenses as an additional warning to Russia not to use weapons of mass destruction. The West, in fact, should send the message to Putin that President George H. W.

Bush sent to Saddam Hussein in 1990: “This will not stand, this aggression against Kuwait.”⁸² In a world of nuclear and other weapons of mass and indiscriminate destruction, where international organizations essentially are powerless, there is no acceptable alternative to applying Bush’s statement to Russia’s invasion of Ukraine.

NOTES

The views expressed here are my own and do not reflect the views of any governmental or other institution with which I am or have been associated. I would like to acknowledge the assistance of Susan J. Koch, formerly of the National Security Council, the U.S. Arms Control and Disarmament Agency, and the Department of Defense, for saving me from error with regard to the 1968 and 1995 assurances given in connection with the Nuclear Non-Proliferation Treaty.

1. On the issue of nuclear weapons and international law, including the laws of war and the International Court of Justice 1996 advisory opinion, see Nicholas Rostow, “The World Health Organization, the International Court of Justice, and Nuclear Weapons,” *Yale Journal of International Law* 20, no. 1 (Winter 1995), pp. 151–85, and Nicholas Rostow, “Pandora’s Paradoxes: Nuclear Weapons, World Public Order, and International Humanitarian Law,” *Israel Yearbook on Human Rights* 45 (2015), pp. 107–31, and works cited therein.
2. See, for example, F. H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (Cambridge, U.K.: Cambridge Univ. Press, 1963).
3. League of Nations Covenant pmbl. and arts. 12–15 (the preamble begins: “THE HIGH CONTRACTING PARTIES, in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war . . .”; articles 12–15 address measures and mechanisms in the event of war between or among states); U.N. Charter art. 2, para. 4.
4. It took World War II and the postwar Nuremberg trials to vindicate the Kellogg-Briand Pact.
5. Although they were constituent parts of the USSR, Ukraine and Belorussia (now Belarus) became UN members in 1945 as part of the price the Soviet Union exacted for joining the new global organization. Ukraine and Belarus became independent states de facto as well as de jure only after the Soviet Union dissolved in 1991.
6. Permanent Rep. of the Russian Federation to the U.N., letter dated 24 February 2022 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/2022/154 (24 February 2022), which includes text of President Putin’s speech of the same date.
7. See John Norton Moore, *Crisis in the Gulf: Enforcing the Rule of Law* (New York: Oceana, 1992), and S. Shamir Hasan, “Britain and the Iraq-Kuwait Dispute,” *Proceedings of the Indian History Congress* 56 (1995), p. 881.
8. Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (Harmondsworth, U.K.: Penguin Books, 1972), p. 402.
9. U.N. Charter art. 2, para 4.
10. Ibid., art. 51. “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” There is no need here to discuss the interpretative issues (or the substantial literature about those ideas) surrounding article 51’s use of the term *armed attack* in the English-language version, because there can be no doubt that Russia has engaged in an armed attack against Ukraine. On the issue of

anticipatory self-defense (or “interceptive self-defense,” as Professor Yoram Dinstein prefers), see, for example, High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, in U.N. Secretary-General, Note by the Secretary-General, U.N. Doc. A/59/565 (2 December 2004); and Yoram Dinstein, *War, Aggression and Self-defence*, 6th ed. (Cambridge, U.K.: Cambridge Univ. Press, 2017), p. 232. See also, among others, C. H. M. Waldock, “The Regulation of the Use of Force by Individual States in International Law,” *Académie de droit international Recueil des cours* 81 (1952), p. 455, and Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Order: The Legal Regulation of International Coercion* (New Haven, CT: Yale Univ. Press, 1961), pp. 228–41. While the Charter’s articulation of this law was new, the principle was not; hence, the Charter uses the word “inherent” to describe the right of self-defense. See Alfred Vagts and Detlev F. Vagts, “The Balance of Power in International Law: A History of an Idea,” *American Journal of International Law* 73 (1979), p. 555.

11. McDougal and Feliciano, *Law and Minimum World Order*, pp. 229–41; Dinstein, *War, Aggression and Self-defence*, pp. 282–87.
12. U.S. Defense Dept., *Department of Defense Law of War Manual* (Washington, DC: Office of General Counsel, 12 June 2015), § 2.2, available at www.dod.defense.gov/.
13. McDougal and Feliciano, *Law and Minimum World Order*, pp. 241–42.
14. See, for example, E. Thomas Sullivan and Richard S. Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (Oxford, U.K.: Oxford Univ. Press, 2009), and Michael Newton and Larry May, *Proportionality in International Law* (Oxford, U.K.: Oxford Univ. Press, 2014).
15. U.N. Charter art. 51. Note Hugo Grotius’s usage: “Indeed even if new grounds of war should arise, every one may, during the continuance of peace, defend himself and his property. For it is a natural right to repel force by force: a right which it cannot easily be supposed that those, who are upon a footing of equality have ever renounced.” Hugo Grotius, *The Rights of War and Peace*, trans. A. C. Campbell (Washington, DC: M. Walter Dunne, 1901), p. 395. In 1837, New York citizens supported a rebellion against British rule in Canada. The British claimed the New Yorkers were using *Caroline* to transport weapons across the Niagara River to the rebels. The British crossed into the United States, set fire to *Caroline*, and sent it over Niagara Falls. This act caused a controversy that was resolved in the negotiations leading to the Webster-Ashburton Treaty, establishing the northwest border between Canada and the United States. See Hunter Miller, ed., “The ‘Caroline,’” in *Treaties and Other International Acts of the United States of America*, vol. 4, *Documents 80–121: 1836–46* (Washington, DC: GPO, 1934), available at avalon.law.yale.edu/.
16. Miller, “The ‘Caroline.’” The agreed language is in a letter from Webster to Ashburton, 24 April 1841. The correspondence, which is rich in nuance, reveals that the authors knew they were finding words on which they could agree that were close to the concepts that they wanted to express. The correspondence sheds light not only on the origin and content of the customary international law governing the use of force but also on the significance of necessity, proportionality, and state responsibility in context. No government ever has disputed the accuracy of this summary of the customary international law governing the use of force in self-defense.
17. John Norton Moore, “*Jus ad Bellum* before the International Court of Justice,” *Virginia Journal of International Law* 52, no. 4 (Summer 2012), pp. 903–61, and the cases cited therein.
18. J. L. Briery, *The Law of Nations: An Introduction to the International Law of Peace*, 5th ed. (Oxford, U.K.: Clarendon, 1955), pp. 318–19.
19. *Ibid.*, pp. 318–20, emphasis in original.
20. U.N. Charter art. 51.
21. U.N. SCOR, 77th Sess., 8979th mtg., U.N. Doc. S/PV.8979 (25 February 2022); Security Council, draft resolution, U.N. Doc. S/2022/155 (25 February 2022) (the vote was eleven [Albania, Brazil, France, Gabon, Ghana, Ireland, Kenya, Mexico, Norway, United Kingdom, United States] to one [Russia] to three abstentions [China, India, United Arab Emirates]); U.N. SCOR, 77th Sess., 8980th mtg., U.N. Doc. S/PV.8980 (27 February 2022); S.C. Res. 2623 (27 February 2022) (this

- vote was the same as that of the previously mentioned vetoed resolution); G.A. Res. ES-11/1, Aggression against Ukraine (2 March 2022).
22. G.A. Res. ES-11/1. Emphasis in original. In 1950, the Soviet Union boycotted the Security Council on the grounds that the Republic of China (Taiwan) improperly represented China at the United Nations. When North Korea invaded South Korea, the UN Security Council responded by authorizing assistance to South Korea and establishing a UN Command. When the Soviet Union returned to the council and vetoed further action on the Korean War, the United States introduced in the General Assembly the Uniting for Peace Resolution, G.A. Res. 377 (V) (3 November 1950), available at documents-dds-ny.un.org/, by which the General Assembly, recognizing that the Security Council was blocked from acting and unable to discharge its “primary responsibility for the maintenance of international peace and security” (U.N. Charter art. 24), recommended, among other things, continued assistance to South Korea.
 23. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order (16 March 2022) available at www.icj-cij.org/. On the previous ICJ decisions, see Moore, “*Jus ad Bellum* before the International Court of Justice.”
 24. Permanent Rep. of the United States to the U.N., letter dated 7 October 2001 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (7 October 2001). This document reported on the use of force in self-defense against Afghanistan in response to the terrorist attacks of September 11, 2001.
 25. See note 6.
 26. Vladimir V. Putin, “Address to the Duma,” *President of Russia*, 18 March 2014, en.kremlin.ru/.
 27. *Ibid.* The ICJ endorsed the unilateral declaration of independence on the grounds that it knew of no prohibition in international law against the move. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 s I.C.J. Rep., p. 403 (22 July) available at www.icj-cij.org/.
 28. Carl Schreck, “From ‘Not Us’ to ‘Why Hide It?’: How Russia Denied Its Crimea Invasion, Then Admitted It,” *Radio Free Europe / Radio Liberty*, 26 February 2019, www.rferl.org/; Shaun Walker, “Putin Admits Russian Military Presence in Ukraine for First Time,” *The Guardian*, 17 December 2015, www.theguardian.com/.
 29. Putin, “Address to the Duma.”
 30. *Ibid.*
 31. Putin does not seem to have explained his view that “containment” of Russia existed in the eighteenth and nineteenth centuries.
 32. Putin, “Address to the Duma.”
 33. Mikhail Pogodin, a mid-nineteenth-century leading pan-Slavist, wrote for the benefit of Tsar Nicholas I in 1853: “France takes Algeria from Turkey, and almost every year England annexes another Indian principality: none of this disturbs the balance of power; but when Russia occupies Moldavia and Wallachia [the core of modern Romania], albeit only temporarily, that disturbs the balance of power. France occupies Rome and stays there several years in peacetime [during the period 1849–70; France invaded Rome and stayed to protect the Pope against the antipapal Roman Republic]; that is nothing; but Russia only thinks of occupying Constantinople, and the peace of Europe is threatened. . . . We can expect nothing from the West but blind hatred and malice, which does not understand and does not want to understand (*comment in the margin by Nicholas I*: “This is the whole point’).” Orlando Figes, *The Crimean War: A History* (New York: Picador, 2010), p. 134. Emphasis in original.
 34. Permanent Rep. of the Russian Federation to the U.N., letter dated 24 February 2022. In April 2023, China’s ambassador to France questioned the independence of former Soviet republics. In clarifying that China respected their independence, other Chinese officials said that China did not recognize Russia’s annexation of Crimea or any other Ukrainian territory. “But [Fu Cong, China’s ambassador to the European Union] said that Beijing had not condemned the Russian invasion of Ukraine because it understood Russia’s claims about its being a defensive war against NATO encroachment, and because his government believes ‘the root causes are

more complicated' than Western leaders say." Steven Erlanger and David Pierson, "A Chinese Ambassador's Comments on Ex-Soviet States Draw Ire," *New York Times*, 24 April 2023, www.nytimes.com/. Does "NATO encroachment" constitute an "armed attack"? If that is indeed the case, one reasonably may conclude that there is no consensus on fundamental international rules and that a contest—perhaps "world war" is not too strong—over those rules is under way.

35. Permanent Rep. of the Russian Federation to the U.N., letter dated 24 February 2022.
36. *Ibid.*, p. 5. Emphasis added. Note that Putin did not specify the geopolitical dividends that containment brought the West.
37. *Ibid.*, pp. 4–5. Emphasis added.
38. *Ibid.*, p. 5.
39. *Ibid.*, pp. 5–6.
40. See, for example, Michael Ruane, "Putin's Attack on Ukraine Echoes Hitler's Takeover of Czechoslovakia," *Washington Post*, 24 February 2022, www.washingtonpost.com/; Williamson Murray, *The Change in the European Balance of Power, 1938–1939: The Path to Ruin* (Princeton, NJ: Princeton Univ. Press, 1984); and Christopher Thorne, *The Approach of War 1938–1939* (London: Macmillan, 1967).
41. Vladimir V. Putin, "Address to the Federal Assembly," *President of Russia*, 21 February 2023, en.kremlin.ru/. In the course of the speech, Putin condemned—"ranted against" is not too strong—the United States specifically and the West generally for centuries of misbehavior: "Over the long centuries of colonialism, diktat and hegemony, they got used to being allowed everything, got used to spitting on the whole world."
42. For a start, see note 10.
43. Allegations of Genocide, Order. As a preliminary matter, the court held that it has jurisdiction under the Genocide Convention, to which Ukraine and Russia are parties, and it indicated provisional measures (in effect, a preliminary injunction against continuing the fighting) against Russia and Ukraine.
44. See, for example, Herman Kahn, *On Thermonuclear War*, 2nd ed. (New Brunswick, NJ: Transaction Books, 2007), and Herman Kahn, *Thinking about the Unthinkable in the 1980s* (Greenwich, CT: Touchstone, 1985).
45. They also epitomize the irreducible importance of the state in international politics and international law. See Paul W. Kahn, "Nuclear Weapons and the Rule of Law," *New York University Journal of International Law and Politics* 31, nos. 2–3 (Winter–Spring 1999), pp. 349–415.
46. Harry S. Truman, "Radio Report to the Nation on the Potsdam Conference," 9 August 1945, in *Public Papers of the Presidents of the United States: Harry S. Truman*, unnumbered vol. 1, 1945 (Washington, DC: U.S. Government Printing Office [hereafter GPO], 1961), pp. 203, 212–13, available at millercenter.org/. Truman also said: "Having found the bomb we have used it. We have used it against those who attacked us without warning at Pearl Harbor, against those who have starved and beaten and executed American prisoners of war, against those who have abandoned all pretense of obeying the international laws of warfare. We have used it in order to shorten the agony of war, in order to save the lives of thousands and thousands of young Americans."
47. Agreed Declaration on Atomic Energy, Can.-U.K.-U.S., 15 November 1945, as found in U.S. State Dept., *The International Control of Atomic Energy: Growth of a Policy* (Washington, DC: GPO, 1946), p. 118.
48. Harry S. Truman, *Memoirs*, vol. 1, *Year of Decisions* (New York: Doubleday, 1955), p. 416.
49. McGeorge Bundy, *Danger and Survival: Choices about the Bomb in the First Fifty Years* (New York: Random House, 1988), pp. 177–78.
50. *Ibid.*, p. 177.
51. Simon Sebag Montefiore, *Stalin: The Court of the Red Tsar* (New York: Knopf, 2004), p. 502. Stalin was not given to irony. His humor was crude and laced with brutality.
52. *Ibid.*
53. Dean Rusk, *As I Saw It* (New York: W. W. Norton, 1990), p. 247.
54. *Ibid.*
55. Raymond Aron, *The Great Debate: Theories of Nuclear Strategy*, trans. Ernst Pawel (Garden

- City, NY: Doubleday, 1965), p. 264. See also Philip Bobbitt, *Democracy and Deterrence: The History and Future of Nuclear Strategy* (New York: St. Martin's, 1988).
56. Coral Bell, *The Conventions of Crisis: A Study in Diplomatic Management* (London: Oxford Univ. Press, 1971).
 57. U.S. portion of the statement; the statements were identical. "Declaration of the Government of the United States of America," 17 June 1968, in "Security Assurances Resolution Adopted by U.N. Security Council," *Department of State Bulletin* 59, no. 1515 (8 July 1968), p. 57.
 58. U.N. SCOR, 23rd Sess., 1430th mtg., para. 16 U.N. Doc. S/PV.1430 (17 June 1968) available at www.undocs.org/. The identical U.K. and U.S. statements are on pp. 2–3.
 59. The French abstained on the resolution (S.C. Res. 255 [19 June 1968], adopted by 10–0–5 [with Algeria, Brazil, France, India, Pakistan abstaining]) regarding the NPT on the grounds that France regarded the threat of nuclear war as best addressed by elimination of the weapons. U.N. SCOR, 23rd Sess., 1430th mtg., p. 6. Most of the abstaining states expressed doubt regarding the necessity for the guarantees.
 60. John J. Mearsheimer, "The Case for a Ukrainian Nuclear Deterrent," and Steven E. Miller, "The Case against a Ukrainian Nuclear Deterrent," *Foreign Affairs* 72, no. 3 (Summer 1993), pp. 50–80. In addition to the question of Russian control of the weapons, the International Monetary Fund insisted on the removal of the weapons as a condition for loans to Ukraine.
 61. See Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, 5 December 1994, available at treaties.un.org/. President William J. "Bill" Clinton, Prime Minister John Major, and President Boris N. Yeltsin signed the document on behalf of their respective governments.
 62. For Helsinki Final Act, see Conference on Security and Co-operation in Europe, Final Act, 1 August 1975, available at www.osce.org/.
 63. Memorandum on Security Assurances.
 64. See S.C. Res. 984 (11 April 1995); U.N. SCOR, 50th Sess., 3514th mtg. (11 April 1995); and statements by the Permanent Five representatives, made on 5 or 6 April 1995 and enclosed in the following letters: Permanent Rep. of China to the U.N., letter dated 6 April 1995 from the Permanent Rep. of China to the United Nations addressed to the Secretary-General, U.N. Doc. A/50/155 / S/1995/265 (6 April 1995); Permanent Rep. of France to the U.N., letter dated 6 April 1995 from the Permanent Rep. of France to the United Nations addressed to the Secretary-General, U.N. Doc. A/50/154 / S/1995/264 (6 April 1995); Permanent Rep. of Russia to the U.N. [Sergey Lavrov], letter dated 6 April 1995 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. A/50/151 / S/1995/261 (6 April 1995); Permanent Rep. of the United Kingdom to the U.N., letter dated 6 April 1995 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General, U.N. Doc. A/50/152 / S/1995/262 (6 April 1995); and Chargé d'affaires a.i. of the Permanent Mission of the United States to the U.N., letter dated 6 April 1995 from the Chargé d'affaires a.i. of the Permanent Mission of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. A/50/153 / S/1995/263 (6 April 1995).
 65. W. Seth Carus, "Why U.S. Policymakers Who Love the Bomb Don't Think 'More Is Better,'" in *Should We Let the Bomb Spread?*, ed. Henry D. Sokolski (Carlisle, PA: Strategic Studies Institute, 2016). See also William J. Broad, "Ukraine Gave Up a Giant Nuclear Arsenal 30 Years Ago. Today There Are Regrets," *New York Times*, 5 February 2022, www.nytimes.com/.
 66. "Transcript: Vladimir Putin's Televised Address on Ukraine," *Bloomberg News*, 24 February 2022, www.bloomberg.com/.
 67. See text accompanying note 37. In 1996, the ICJ gave an advisory opinion on the legality of the threat or use of nuclear weapons and concluded that international law did not prohibit their use "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake." *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep., p. 266 (8 July). Putin has claimed that "the very existence of our State" is at stake in the Ukraine war.

68. See, for example, Bryan Bender, “How the Ukraine War Could Go Nuclear,” *Politico*, 24 March 2022, www.politico.com/.
69. Stephen Blank, “Nuclear Weapons in Russia’s War against Ukraine,” *Naval War College Review* 75, no. 4 (Autumn 2022), pp. 53–78.
70. *Ibid.*, p. 54.
71. Return of FORces to GERmany.
72. The scholarly debates on the meaning of article 51 and its use of the term *armed attack* form a voluminous collection. One place to begin is Dinstein, *War, Aggression and Self-defence*. See also Moore, “*Jus ad Bellum* before the International Court of Justice.” See note 10.
73. U.N. Charter art. 51. See also China’s response to the visit to Taiwan of former House Speaker Nancy Pelosi: “Beijing says a visit to Taiwan by the third-ranking U.S. politician, Mrs. Pelosi, violated American agreements to honor a One China Policy and may encourage politicians on the island to seek independence. It says it is within its rights to take action to defend its sovereignty. ‘China has been compelled to act in self-defense,’ Jing Quan, a minister in China’s Embassy in Washington told reporters on Friday [5 August 2022].” Wenxin Fan, Joyu Wang, and James T. Areddy, “China Steps Up Action in Anger over Taiwan,” *Wall Street Journal*, 6–7 August 2022, pp. A1, A8. China, of course, violated its 1984 commitments to the United Kingdom when it asserted control over Hong Kong affairs notwithstanding the Joint Declaration on the Question of Hong Kong, China-U.K., 19 December 1984, 1399 U.N.T.S., p. 33. Article 3 states: “The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.”
74. Jeffrey Goldberg, “The Obama Doctrine,” *The Atlantic*, April 2016, available at www.theatlantic.com/; Julie Hirschfeld Davis, “Trump Warns NATO Allies to Spend More on Defense, or Else,” *New York Times*, 2 July 2018, www.nytimes.com/.
75. “Face-Off with Russia over Ukraine Lifts Military Spending in 2021, Think Tank Says,” *Reuters*, 25 April 2022, www.reuters.com/. See also Jack Dutton, “Putin’s NATO Backfire? How Finnish, Swedish Forces Compare with Ukraine’s,” *Newsweek*, 16 May 2022, www.newsweek.com/.
76. “Finland & Sweden Accession,” *NATO Parliamentary Assembly*, www.nato-pa.int/.
77. See, for example, Imran Khalid, “Henry Kissinger’s Advice on Ending the War in Ukraine Is Pragmatic,” *Toronto Star*, 4 July 2022, www.thestar.com/.
78. *Ibid.*
79. *Myers v. United States*, 272 U.S., pp. 52, 293 (1926) (Brandeis, J., dissenting).
80. See, for example, Kristina Hook, “Why Russia’s War in Ukraine Is a Genocide,” *Foreign Affairs*, 28 July 2022, www.foreignaffairs.com/.
81. Dean Rusk, “The Anatomy of Foreign Policy Decisions” (address to the American Political Science Association, Washington, DC, 7 September 1965), repr. in U.S. State Dept., *Bulletin*, 53, no. 1370 (27 September 1965), p. 506.
82. George H. W. Bush, “Remarks and an Exchange with Reporters on the Iraqi Invasion of Kuwait,” 5 August 1990, available at www.margaretthatcher.org/.

