

In the Tenth Year of the War

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In 2014, I was invited to write a post on Ukraine. Everyone understood Ukraine's crisis mattered, and wouldn't be short, so [I wrote three](#). Instead of discussing doctrinal unniceties, I made three claims: Our global system is polycentric, not in a good way; its legalism is seriously mismatched with a realist understanding of power; and a stable solution – that could integrate Ukraine into Western structures – would include a territorial deal. My larger warning was that our system's core legal commitments were decaying.

How do those arguments look ten years on? Russia's war is still illegal – continuity so clear that we refer to 2022 as the 'full-scale invasion.' And while we haven't yet dislodged Russia, widespread condemnation arguably [reinforces our shared legal order](#) – as Harold Koh [tirelessly reminds us](#), Russia's short-term game is force, but our long game is law. But a different reading is possible, as I argued a decade ago: The international order is much less 'legal' than such optimism supposes. The real 'long game' is as old as the Greeks, who knew something about relying on fictions.

On the Beach at Melos

Ten years into the Peloponnesian War, the contesting powers have signed a treaty. No one believes it – we'd call it stalemate – and they never stop fighting, until renewed full-scale conflagration. Decades more, and even then not really ended: After Sparta's triumph, realignment; Thebes rising, Athen's Long Walls rebuilt, Leuctra – a new order. Not for long: over the horizon, Philip marches.

But there's a lesson in that unending war:

You know as well as we do that right, as the world goes, is only in question between equal power, while the strong do what they can and the weak suffer what they must.

From Thucydides' Melian Dialogue. The besieged islanders of Melos appeal to justice, providence, anything to lift the hovering sword from their throats. The Athenians do not relent, and when the siege ends – for the Melians do not listen – Athens kills or enslaves them all. It is horrible. But what shocks the Athenians is the Melians' lack of realism: They do not see how the world goes and act accordingly. In that shock – the Melians' irrationalism, and the blood-soaked clarity of our democratic forebears – we recognize one of the most powerful ideas ever expressed about order. The line about the strong is much quoted. But look what comes before: right is a question for those with equal power. This is a theory of law and justice. And a universal truth: "You know as well as we do." They are speaking to us.

A Newer Shore

Such thinking has a modern [pedigree](#): Carr, Kennan, Morgenthau, Kissinger. The Concert of Europe was such a theory: realist, tragic in conception, skeptical of law. Modern internationalists imagine power as a construct; for realists, it constitutes human relations – not a preference, but an apprehension. Such views are at low ebb in the present war, tarred as *Putinverständnis*. But unpopular is not irrelevant – if such theories are right, they will reassert themselves.

Things are different, we say. We are not ancient Greeks, nor 19th century Europeans. We have institutions, processes, a legal order – that serves American interests, yes, but law-based and aiming at justice. But that law is premised upon sovereign equality – the fiction that states have equal rights. ‘As the world goes,’ they don’t, and whenever the fiction is called upon to do real work, it fails, or apologetically aligns with the logic of power.

Doing What We Can – The Order We Actually Have

“You cannot veto our voices,” [the US Ambassador declared](#) when the Security Council debated Russia’s invasion: rhetorical cover, since Russia *could* veto the resolution. In the General Assembly, [141 countries voted](#) to deplore Russian aggression and call for withdrawal from Ukraine; later resolutions condemned annexation. Dramatic – and non-binding: UN mechanisms cannot be deployed; not a flaw, a design. Thus the turn to courts, a host of cases demonstrating the impotence of global judicialism: [cases brought under CERD](#) for lack of better jurisdiction; performative [genocide](#) cases; [child abduction at the ICC](#). None deterring Russia: enforcement will depend on conditions disconnected from abstract legal merit.

A decade of lawfare has demonstrated the deep shallowness of our system’s Melian view of equality before law. Without shared identity and interests – and balanced power – few matters are ‘justiciable,’ and treating them as juridical fails. Indeed, the more effective a remedy, the less likely it is to be, well, legal: Perhaps we’ll get a special aggression tribunal, but for this conflict only: [No serious proposal](#) imagines a court of *general* jurisdiction. That’s order, but it’s barely law.

International law has long made a wise-seeming virtue of institutional thinness and formal equality. We smile at those who still ask, with [Austin](#), is it really law? Of course it’s law, which should just direct us to the adjective: ‘international’ does all the work – or rather doesn’t. International society’s anarchic polycentrism – its lack of hierarchical decision-making and enforcement – has consequences for what its law can do. What, after all, have been the most effective responses to Russia? Munitions and sanctions. International legal institutions – security mechanisms – aren’t needed for those. Coordination is, but everything *effectively* countering Russia could be done in a world of 19th century institutional capacity. ([Hathaway and Shapiro](#) argue that sanctions made little sense in the pre-UN era. Even accepting their argument, it is a normative shift, not institutional architecture, that makes sanctions conceivable. Sanctions don’t require the UN.) In 1979, Henkin [wrote](#) that “nations observe international law in unimportant matters but not in important ones.” He imagined the important matters – wars – becoming rarer. Still, the inevitable conclusion: Law isn’t so important, if you are concerned with global security.

Questions of Right, as the World Goes

On important matters, we have a system of norms and nothing else. So it's troubling to observe Russia violating those norms in a context. Interventions by major powers have increased dramatically: [Over 80 percent of America's post-World War II interventions have occurred since 1989](#), many bypassing legal institutions and breaking normative limits, as in Kosovo and Iraq. Russia's invasion intensifies and accelerates that trend.

So reaction to Russia is not simply response to violation, but violation by the wrong actor. This is not to excuse, merely describe. After all, what did that General Assembly vote mean, really? 141 means 50 states – China, India – *not* upholding the foundational pillars of our global order. Even Russian defeat would not reassert law *in abstracto*, but shore up a particular hegemonic position. In the short run: How long can a renewed order last, if, as in the early post-Cold War, it free-rides on America's peculiarly legalized hegemony? A multipolar future will make any new American-led rules-based order ever less meaningful. Violence and power are a more compelling guide to what is happening: the [decay of norms prohibiting use of force and upholding territorial integrity](#). The question is if and how law will assimilate itself to the logic of power.

Scythian Shores – The Next Phase of the Long Game

Ten years gone: our ships still on the beach, our men on the walls. Athenians, Spartans knew the feeling; those dodging drones in what was once Taurica and Scythia do too. We, they, naturally wonder, what might have been? We can imagine a decade spent rebuilding our ally, getting ready to 'de-occupy' its stolen territory, make our enemies pay, [reaffirm the law](#). We haven't: not enough ships, not enough shells; money that [runs low and comes late](#). Nor have we done what I recommended a decade ago and again [before the full-scale phase](#) – constitutional and territorial reform so a consolidated Ukraine could join the West. If we had, where would we be now? Well, not here.

But it's a long game. Those who believe in Melian principles might take heart knowing the Athenians, in their hubris, were laid low: their walls destroyed, Parthenon occupied. Perhaps they were mistaken about power and justice. But were they? It's not as if 'Melianism' defeated Athens, but Spartan triremes paid with Persian gold. Their error was not inhumanity, but unwillingness to make their own deal with the Great King and peace with Sparta. Anyway, when nemesis came, the Melians were already dead, their city destroyed in the 16th year of war – during the truce, as it happened – so their vindication was presumably muted.

This post's title notwithstanding, this is now the 11th year of our Peloponnesian War. I know whom I would prefer to win, though I don't know what that would mean for today's Melianists – and I hesitate to say who's who. America talks like Melos, but acts like Athens. If that were just hypocrisy, there'd be little to object to. But *thinking* like Melos has consequences – how we fight, when we compromise, what we expect from law. Consequences too, when our unchallenged, curiously lawful imperium comes to an end.

I'd be happy to write again, in five years – the 16th of the war. 'Happy' may not be the right word, but were I to argue the same in that fast-approaching age, unhappily, it might still be true.

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