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Russia-Ukraine: Resolving the World's Most Dangerous Conflict

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By Mary Ellen O'Connell

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Since late 2021, Russia has massed around 100,000 troops on the border with Ukraine, raising the specter of another use of force against its neighbor. The Russia-Ukraine crisis began in earnest in February 2014, when Russian troops spread out from their Black Sea naval base to take control of the Crimean Peninsula. Russia put forward a variety of familiar legal justifications at the time—intervention by invitation, humanitarian intervention, restoration of Russian borders, and self-defense. In my analysis, none of these attempts came close to excusing a serious violation of the United Nations Charter Article 2(4) prohibition on the use of force. (Mary Ellen O'Connell, *The Crisis in Ukraine—2014*, in Tom Ruys and Olivier Corten (eds.), *The Use of Force in International Law, A Case-Based Approach* (2018))



The difference in 2022, is that respect for the Article 2(4) and the obligation to settle disputes peacefully in Article 2(3) are that much weaker. We have reached a moment to either support authentic legal principles or risk losing them altogether.

The Russia-Ukraine crisis debate is being waged using legal concepts of statehood and principles governing the use of force and countermeasures. We rarely hear mention of the other critically relevant area of law, the principles, and procedures of international dispute resolution. Yet, those are the only game in town for this dispute as Anatol Lieven has written. He called the Russia-Ukraine dispute the “most dangerous problem in the world” back in November 2021. It holds the potential for the use of nuclear weapons but even a conventional clash between Russia and the United States could be devastating for the world's economy. Lieven credible predicts a war would end attempts to respond to crises from climate change to human rights atrocities.

Short of these outcomes, a poor resolution of the crisis can have other, less immediate but ultimately wholly corrosive impacts on the modicum of normative order that currently prevails. Following Biden's January 19 press conference, the *New York Times* reported: “Putin may ... be trying to redefine what the West considers unacceptable behavior ... By making an invasion seem possible, Putin can try to win other concessions, such as a freer hand in Eastern Europe.” ... “This is going to require very creative diplomacy to resolve, if it can be resolved.”

It will require diplomacy based on international law. Ukrainian officials speak of Ukraine's right to independence and territorial integrity. They restate the prohibition on the use of military force and the Ukrainian right of self-defense. Russia speaks of an agreement reached in 1994, in which NATO members promised not to expand the alliance to the former Soviet Union and its sphere of influence. Ukraine has provided evidence to the United States that Russia planned a 'false flag' operation to create a legal basis for military force against Ukraine. Apparently, Russia cares enough about international law to possibly kill its own soldiers to create a self-defense justification under UN Charter Article 51.

David Scheffer has also noted that the discourse, like that on China and Taiwan, is being conducted using "bedrock principles of international law". He urges using that fact to promote peace by emphasizing the rules prohibiting force. I agree with his point that Taiwan, like Ukraine is protected by the prohibition on the use of force, codified in Article 2(4). But Taiwan is not a member of the United Nations and needs to argue that Article 2(4) is *jus cogens*. As *jus cogens*, it applies to all significant uses of military force, and it endures in the face of changing state practice. This interpretation is critical to Taiwan and Ukraine in this moment. But the US, often supported by its NATO allies and Australia, has violated Article 2(4) so often in the last three decades it is in a weak position to make demands that others respect it. "Do as I say, not as I do" has never been a persuasive position.

There is a way forward, however. One endorsed by Lieven, a non-lawyer. Negotiators with knowledge of what international law classically requires and what the institutions of international law offer must be engaged with the parties in negotiations. The natural venue for talks is the Organization for Security and Cooperation in Europe (OSCE) based in Vienna. Lieven wants such negotiations to aim at expanding the existing Minsk II treaty reached among Russia, Ukraine, France and Germany in 2015. (Find the agreement, field reports and other information at [here](#)) Minsk II has languished without sufficient support by the participants or the main non-participant—the United States. Ukraine, the US, its allies, and Russia can revisit the agreement and avoid war. Talks aimed at Minsk III should be ambitious, resolving not just the current border issues but Crimea and other regional conflicts. The important provisions of Minsk II to retain are a cease-fire in Eastern Ukraine certified by the OSCE, de-militarization of the border region, and autonomy for the Ukrainian provinces of Luhansk and Donetsk. I would add autonomy for Crimea but recognition of Ukrainian sovereignty and a United Nations peacekeeping force.

Reaching Minsk III will require compromises but those are available and can begin with a consensus: tolerance for armed intervention of any kind is over. And a variety of other issues can be resolved in continuing talks, including arms control, cyber space conduct, and sanctions relief.

The US may think it has alternatives to a Minsk III agreement, such as sending more weapons and, perhaps, more troops for training purposes. It is also preparing to provide substantial support for a long-term insurgency. The US has announced that it is preparing

costly sanctions. Reports on the possibilities have included everything from barring Russia from the SWIFT system to more sanctions on Vladimir Putin personally. President Biden said on January 19 he would counter cyber-attacks with more cyber-attacks.

These countermeasures, however, whether lawful or not, pose more risks of failure than success. Military measures risk a descent to the very armed conflict that must be avoided. Certain economic sanctions or cyber measures risk disrupting economic systems and the Internet for essential purposes. So far, sanctions have been ineffective.

Instead, the US can agree with Russia to a re-set and re-commitment to the peremptory norm against the use of force as codified in the United Nations Charter. They can mutually agree to reject claims respecting humanitarian intervention and self-defense on less than the strict requirements of the Charter. This means ending targeted killings by any means. The two sides can agree to a re-commitment to the OSCE as the natural institution to mediate relations in Eastern Europe. Promoting this organization will provide a face-saving way to avoid the NATO expansion issue, which the US should wish to avoid as much as Russia. Washington clearly does not want a war with Russia to defend Ukraine as a NATO member.

Here is where Germany and the EU come in. The OSCE can take up its role of monitoring any new agreement, providing early warning of violations that will trigger sanctions. Germany holds the key to the most important, lawful, and effective sanction—cutting off natural gas purchases from Russia. It is targeted and less likely to have global, disruptive impacts. It will create hardship in Germany, but German leaders should be regretting not taking on this hardship in 2014, in the first week of the crisis.

President Obama should have insisted on this step in 2014 when Russia unlawfully took control of Crimea. Sacrifice then could well have avoided the far more dangerous situation the world faced today. It would have been a sacrifice not only to restore Crimea to Ukraine but in support of the international rule of law in the world.

Failing to act eight years ago, means the need to act now is all the more urgent. Resolving the ultra-dangerous Russia-Ukraine crisis requires the “rules based order” as the U.S. officials like to term it these days. The rules based order is the international legal order. It is from international law that the concepts at the heart of the crisis come—territorial integrity, and the rest. Russia and the United States have done much to weaken this law, especially the prohibition on force in their conflicts from Afghanistan to Crimea to Yemen. Rebuild the rules and institutions of peace and turn to the other crises that also require law, organization, knowledge, and sacrifice.