

TRANSCRIPT

KEYNOTE ADDRESS

ROLE OF INTERNATIONAL LAW IN CONTEMPORARY TIMES

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This is a transcript of the Keynote Address of the 2023 conference “Nuclear Weapons and International Law: The Renewed Imperative in Light of the Ukraine War.” The speakers’ remarks have been edited for readability and clarity by the Georgetown Journal of International Law Digital Committee staff as well as by the speakers themselves.

PROF. CHARLES MOXLEY:

Professor Hathaway is a professor at Yale Law School and has other professorships at Yale. She's been a member of the Advisory Committee on Public International Law for the U.S. State Department and she also has served as special counsel of the General Counsel at the U.S. Department of Defense. Wonderful background. I know you're very involved in this area so, thank you and welcome. The floor is yours.

PROF. OONA HATHAWAY:

I was asked to give a talk with this rather grand title: *The Role of International Law in Contemporary Times*. I've tried to structure a talk that scopes out a bit from the conversation you have been having this morning so far. I'm not going to speak specifically about international law as it relates to nuclear weapons in Ukraine, as that was the focus of the last panel, but I will speak more generally about how we think about the international law relevant to conflict, as well as the enforceability of international law. I will begin with a brief historical background, then consider how international law is enforced, and finally, I want to talk about the Ukraine war. I will consider what the global response has been to the war in Ukraine, and what that tells us about the impact of international law on the war so far.

Historical Background:

Let me begin with the historical background. I'm going to take us way back, well before nuclear weapons existed to Hugo Grotius. If you study international law or you've even dabbled in international law, chances are good that you've heard of Hugo Grotius. He's sometimes called the “father of international law” and he's generally known for his “just war” theory. But people

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don't necessarily fully understand his theory. Some think that what he called a “just war” was what we would think of as a “just war.” But in fact, his views were very different. In his view, war was a permissible remedy for wrongdoing. He specifically said that states could go to war for any reason that tends toward the attainment of their rights. If a state suffered harm, it could respond to the state that caused that harm with military force. They could use force to take land or to take booty in compensation for the harm that was done to them.

Not only did Hugo Grotius write that states could wage war to right wrongs, but that is what states did. My research assistants and I collected hundreds of war manifestos, which are available as the “[war manifestos database](#)” at the Yale Law Library’s website, where you can download them and read them. It is an extensive collection of the various reasons that states gave for going to war over time. Some of the reasons are familiar. For example, self-defense was a common reason given for war in the manifestos. Today, that is still a permissible reason for going to war. But if you look at the rest of the reasons that states often gave in the war manifestos that they issued when they went to war to explain what they were doing to their own population and to other states, they include many reasons that today are not considered to be lawful reasons for going to war. Interestingly, enforcing treaty obligations and enforcing the law of war were common reasons that were given for using military force against another state. They also reference reasons like protection of trade interests, defending religion, protection of diplomatic relations, and the like, that today would not be considered lawful reasons for going to war.

That all changed beginning after World War I. Salmon Levinson, a bankruptcy lawyer from Chicago, was a key intellectual leader in the movement to outlaw war. He declared [in August 1917 that “the real disease of war is the legality and availability of war.” He argued we shouldn't just have rules regulating war, but laws *against* war, that is, laws preventing states from going to war in the first place. His ideas ultimately helped lead to the much-maligned Kellogg-Briand Pact of 1928. I wrote a book about this development with my colleague Scott Shapiro called *The Internationalists*. If you're interested in the broader history and how this came to be, I encourage you to read it. In the book, we explain that the Kellogg-Briand Pact was the first time that states decided that war was no longer going to be lawful and legitimate in the way that Hugo Grotius had suggested it would be for the enforcement of legal rights. Now, you might be thinking: “What does that have to do with today?” As we argue in the book, the Pact is the necessary precursor for understanding the [U.N. Charter](#). The Charter provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. This legal principle governs the decisions of states that go to war in the modern era. The permitted reasons for war are now quite modest and minimal: The U.N. Charter includes an exception for self-defense under Article 51 and states can seek approval from the Security Council for uses of force under Chapter 7.

How is International Law Enforced?

Now how is this law enforced and how are all the rest of these laws enforced? The last panel talked a lot about the law of armed conflict as applied to nuclear weapons, the principles of distinction, necessity, and proportionality. How are all these rules enforced? It's worth reflecting on the fact that the answer to that question used to be that they could be enforced with war. So, this question used to have a very easy answer. Thanks to the decision to outlaw war, it's complicated in a way that it wasn't for hundreds of years. It's worth bearing in mind, then, that the challenge of how to enforce international law is itself a product of international law. I want that to be a background for our thinking about this question.

In the last panel, there was a lot of talk about ways in which international law is enforced domestically within the U.S. There was mention of the Department of Defense [*Law of War Manual*](#) that was issued while I happened to be working as a special counsel to the General Counsel of the Department of Defense. There are over 10,000 lawyers at the U.S. Department of Defense whose job it is to keep the use of military force within lawful boundaries. There are hundreds of lawyers elsewhere in the Executive Branch whose job in the U.S. is to enforce international law. There are hundreds of lawyers in the State Department and throughout the agencies of the U.S. Government, not to mention Congress, so there's this extensive internal process of assessing what the law is, and ensuring that decisions in the U.S. are consistent with the law. There are various internal enforcement mechanisms like a Court Martial. If a soldier is found to have acted in violation of the law, they can be court-martialed and bear the legal consequences. There is also domestic court enforcement of international law. For example, there's the Alien Tort Statute [28 U.S.C. § 1350] that gives authorization to enforce the law of nations in U.S. federal courts. Various treaties have provisions that are implemented into domestic law and allow for the enforcement of international law in U.S. domestic courts.

So, this is the U.S. Of course, international law applies to every state, so the question is, how does this apply to other states? The answer is that every state has its version of these same rules. They have legal advisors that give an assessment of what the law requires and what it permits. There was a reference in the last panel to the UK's [*Law of War Manual*](#) [Joint Service Publication 383 Manual of the Law of Armed Conflict]. Most states have their own version of a *Law of War Manual* that lays out their interpretation of international law and how it applies to their actions. Other states also have processes by which domestic courts can enforce the law as well.

But what if that's not enough? We heard a reference in the last panel again to this concern: "Well, the Russians seem pretty hellbent on violating international law?" We can see this in the war in Ukraine, where Russia is not abiding by international law and whatever domestic processes there might be are not enough. There doesn't seem to be a sufficient internal process to restrain unlawful uses of force or the use of means or methods of warfare to ensure that they're consistent with the law of armed conflict.

So what happens when a state decides to violate international law and whatever domestic processes it may have in place to prevent such violations aren't sufficient to ensure that states are

abiding by their obligations? The answer is that there are methods of international enforcement, but they look very different from domestic law enforcement. We don't have international police to enforce the law. We can't use military force in most cases to enforce the law. International law has to be a lot more creative. What I'll talk about here is what that process of enforcement looks like. I'm going to use the case of the Ukraine war since that's one of the subjects of this panel and talk a bit about the major violations of international law that we're seeing in the Ukraine war, and how enforcement of international law is taking place there.

The Case of the Ukraine War:

So you all are familiar with the fact that the war began on February 24th, 2022, and Russia very quickly conquered significant amounts of territory, taking territory from Ukraine that it was not lawfully entitled to. There was general condemnation of the invasion. There was wide acknowledgement that this was not a lawful use of military force. Many predicted that Ukraine would lose within a few days. In fact, Putin himself seemed to think that this was going to be a three-day effort, but there was unexpectedly effective pushback from Ukraine. The war certainly didn't end in three days, and Ukraine has succeeded in maintaining its sovereignty and independence. The war continues and Ukraine has not been defeated. It continues to fight against this unlawful war. I want to talk about why that is. Because Ukraine was vastly outmatched. There is no doubt its army was no match in terms of its number of men and women, in terms of the resources that it needs to survive an assault from one of the most powerful nations in the world. It is vastly out-resourced in all the things that matter in war. There are a number of reasons that it has survived nonetheless.

Putin has threatened a nuclear response in the Ukraine war. He has not made threats more recently; these were early threats. In September 2022, when the war wasn't going the way he was expecting it to, he started bringing out the nuclear threat. Under international pressure from the very few allies that he has left, he began abandoning that rhetoric. Certainly, we're not in the clear, but it's interesting that, while he made these threats early on, Putin has pulled back since. U.S. leaders did think that these threats were not just bluffs, that there were almost certainly serious internal conversations of the use of nuclear weapons in the war, and that there was, and there still are, serious concerns that it may be a real risk.

When the war in Ukraine began, many people said, "Well, this just shows international law doesn't work, this just demonstrates the global legal order, the rules-based order is kind of just a kind of chimera. There's nothing really there; this is just evidence that international law is really ineffective." What I want to argue is that, in fact, while it is certainly true that this is the greatest challenge the modern international order has faced since World War II, it's not just the violation that matters, but how the world responds. I want to remind listeners that when we're talking about domestic law we don't say: "There's no point having laws prohibiting theft because theft happens all the time." We say: "No, there's a set of rules that are not perfectly observed." The question is not just: "Are there violations?" but "What happens next?" and "What

TRANSCRIPT

procedures and processes are in place to enforce the rules in the system even if it's not perfect and even if it doesn't work exactly as we would wish every time?"

The Global Response: International Law Goes to War in Ukraine:

Here I'm going to speak briefly about the global response to the war in Ukraine and the ways in which Ukraine, and the world, has framed its response around international law.

First, the world gathered to condemn what Russia did. There was a [General Assembly Resolution](#) shortly after the war began condemning Russia's recourse to war, condemning it as an unlawful act of aggression and violation of Article 2(4). Over 140 states voted in favor and only four states voted with Russia against this resolution. There have been five resolutions since and the vast majority of them have won very similar numbers. So over 140 states of the 193 states that are party to the U.N. Charter have condemned Russia's recourse to war as a violation of international law and of the rules-based order. This is a level of unanimity and coherence that you don't often see at the U.N. There's general agreement that this is really a fundamental violation. We see that in the resolution itself. It specifically points out the violation of the Charter as one of the key violations that Russia has committed in the war that it's waging in Ukraine. So the resolution is not just decrying the war as destabilizing, but it is denouncing the war as an unlawful violation of the Charter. You see broad-based agreement around this although a number of nations in Asia and Africa have abstained for various reasons that I'm happy to talk about. The majority of states within these regions nonetheless have voted in favor and the number of states that voted against are, as you can see, quite minimal beyond Russia itself.

The second way in which international law is enforced in general, and has been enforced in Ukraine specifically, is through what Scott Shapiro and I have called "outcasting." Outcasting involves denying the disobedient the benefits of social cooperation and membership. So what does that mean? It means that states join a variety of international agreements because there are things in them that they want, things that they get, and various benefits that they can take advantage of. When a state violates the rules of the international system, those benefits can be taken away, and that is a concrete punishment that states can levy against other states that are engaging in violations of international law. Among those punishments are sanctions. Sanctions are a version of outcasting. What they do is they basically say, "You would otherwise be entitled to trade with us under general principles of international law, under the WTO, and yet because you are violating this fundamental principle of international law, we're going to refuse to trade with you. We're going to cut you off, we're going to stop buying your oil and gas, we're going to stop selling you various kinds of consumer goods and other things that you need in order to supply your population with a number of things that you can't produce internally." The sanctions against Russia for the war in Ukraine have been quite extensive. We have seen one of the most broad-based sanction systems since World War II that hasn't been coordinated through the U.N. Security Council. A number of states and private actors are signing on to cut off trade with Russia in order to punish it for its violations. The Russian Federation was kicked out of the Council of Europe directly in response to its decision to violate international law through

engaging in an unlawful use of military force. This is a pretty unprecedented move to remove a state from the Council of Europe, but that unprecedented move was determined to be necessary given Russia's willingness to engage in clearly unlawful behavior. Russia was also suspended from the Human Rights Council and has been excluded from a number of international gatherings that Russia would otherwise like to have been a part of.

[I wrote with Ryan Goodman](#) about why China giving military assistance to Russia would be in violation of international law [“Why China Giving Military Assistance to Russia Would Violate International Law”]. The short version is that under the Geneva Conventions, not only violating international law through engaging in Law of Armed Conflict (LOAC) violations directly is unlawful, but so is aiding and assisting or allowing another state to engage in those violations under Common Article 1 and the Law of State Responsibility. That has actually had some bite with Russia. You might think that this has had no impact but, actually, China promised not to sell arms to any party involved in the war because selling arms to Russia could potentially implicate China in the unlawful violations of international humanitarian law that Russia is very clearly and publicly undertaking in Ukraine. These responses to the unlawful behavior really do have an effect on the ability of Russia to fight. You all may have seen now that Russia is turning to North Korea, the most outcast of the outcasted states in the world, to try and buy arms because that's one of the only places it can get the supplies that it needs in order to continue to fight the war.

A third thing that states have done in response to the unlawful action of Russia against Ukraine is to assist Ukraine. While it's unlawful to assist an actor that's engaging in violations of international humanitarian law, it is entirely lawful to support states that are lawfully defending themselves, which Ukraine is doing. In fact, states have made the unprecedented move of supplying Ukraine with massive amounts of arms, financial aid, and humanitarian aid. Of course, we all know that this is something that is subject to debate in Congress right now, but it really has been essential to the ability of Ukraine to fight back and to respond to this unlawful invasion. Without it, Ukraine certainly would have collapsed. I think almost everyone agrees that Ukraine would not have been able to survive this long against the Russian assault without this massive assistance program. It's important to know that this massive assistance program is conditioned on the unlawful invasion by Russia and grounded in the belief that Ukraine is defending not just itself but also the rules-based order. They're justifying their decision to provide levels of lethal aid that previously were unprecedented because of that context.

Fourth, we've seen prosecutions. The International Criminal Court has opened a significant investigation into Ukraine. Thirty-nine states referred the matter to the Prosecutor. The Prosecutor has been engaging in significant investigations on the ground and has already issued the first arrest warrant, the first of almost certainly many, against Putin for his war crimes. In this case, it is for removing Ukrainian children from Ukraine and taking them to Russia, engaging in various kinds of brainwashing, and cutting them off from their parents. This is one of the many terrible acts that Russia has undertaken in the war. I would expect that we're going to see a number of other indictments based on many of the other unlawful actions that Putin has

TRANSCRIPT

undertaken. Now you might say, “What's the point of this? Who cares? You know Putin's never going to end up in the dock.” This arrest warrant means that Putin can't travel to any of the states that are party to the International Criminal Court. In fact, he was not able to attend the BRICS Summit in South Africa recently because South Africa is a party to the ICC and therefore lawfully obligated to turn him over if he shows up. So he didn't show up. That does have an impact on his ability to lead and represent Russia. Eventually, the hope is that he in fact will be in the dock and be prosecuted.

We have learned some key lessons from this war. First, it's not just the violations, it's the response and the expected response that matters. While force is no longer an available tool for enforcing international law, there nonetheless are many other tools available. Sometimes people throw up their hands and say: “International law is not really enforced,” and the answer is “Actually, it really is enforced, it's just not enforced in the ways we're used to seeing in domestic law.” Second, state behavior is shaped by international law and that's even if states don't care about it and even if they despise it. We're seeing that right now with Russia. Its ability to buy arms is being affected. The ways in which sanctions are impacting Russia, the way in which Ukraine is able to fight back is affected, and that's all because international law is having a significant impact on this war in all the ways that I've mentioned.

Last, I want to leave you with this: it's not just power but also ideas that make a difference. We sometimes tend to think so much about the ways in which geopolitical reality and geopolitical power differ, and who has nuclear weapons, and who doesn't. These are all important factors. I don't want to deny that power makes a difference, but power isn't the *only* thing that matters. Ideas really do make a difference. The decision to outlaw war, the decision to regulate war, the decision to put in place a set of rules, and the decision to defend Ukraine in the face of this onslaught are all motivated not just by power, but by ideas. So a conference like this is so important for articulating those ideas and the rules that should govern us. I hope that we'll continue to work together to try and continue to make the world a better and more lawful place.

Q&A:

PROF. CHARLES MOXLEY:

Thank you so much, Professor Hathaway. Several questions. There's one in the chat and let me just first ask as sort of a two-part question: we've heard the description earlier, and you've reinforced it, that Russia doesn't seem to care about international law and we've heard observations that the same is true of China and other countries and there are obvious issues there. How does that affect us in dealing with these countries in terms of following the law ourselves? Does the law at some point go out the window and how do we make that not happen? Secondly, vis-a-vis these different sanctions, probably one thing we don't want to happen, is to lose the ability to communicate, talk, you know have back-channel and front channel. How do we keep that going while we're doing these other things that are understandably necessary?

PROF. OONA HATHAWAY

Great question. I would be loath to make the blanket claim that Russia and China don't care about international law. I think, again, it's important to recognize that the vast majority of the time Russia is following international law in ways that we just don't notice. For example, they're not invading their other neighbors right now. That's a win. You may think that's a small win, but if you look back historically, lots of states invaded their neighbors over and over again, and many at the same time. It's also the case that there are lots of international laws that Russia is abiding by, including for a long time the nuclear test ban. There are various ways in which international law is shaping states' behavior, even Russia's.

China as well. While we can point to examples where China is flouting international law, particularly in the South China Sea, it has also decided to double down and try to shape that law in really interesting ways. I think they have done that because they recognize how much power comes from the law itself and from the ability to write the rules and the ability to shape the international legal order. They've decided that this is an important way in which they can exercise power in the world. I'm not the first to recognize that there are limits and there are challenges. As international lawyers, we're constantly trying to think about creative ways to enforce the law. But at the same time, I think it's important for us to recognize that most of the time international law really is working. While there are states that are more willing to flaunt it than others, you don't want to overstate the case because there are lots of ways in which they are actually abiding by the law and not engaging in violations.

Now, of course, as I mentioned, Russia is violating one of the most essential principles of international law, which is the prohibition on the use of force. It's also violating the law of armed conflict in Ukraine, and therefore consequences are necessary. I think the way in which we can play an important role here is by articulating what those principles are and abiding by them ourselves. So, making clear when we're acting what are the legal principles that are guiding our own actions and what is motivating our behavior. In our efforts to defend and assist Ukraine in defending itself again and again, the U.S. Government has cited international law and called on other states to abide by international law, making clear that that's what's motivating the decision to engage in the support that we're providing.

In the South China Sea, with regard to China, the U.S. has played an important role in refusing to acknowledge the unlawful claims that China has made to significant swaths of the South China Sea. The U.S. has engaged in various kinds of operations to resist their claims by sending our ships and our Air Force into airspace that is claimed by China, and into waters that are unlawfully claimed by China because many of the states whose lawful claims to the law of the sea in the South China Sea are being ignored by China don't really have the power to do that. So the U.S. is using its power to try and reinforce their lawful claims. I think that's what we can do. I think what we can do is continue to articulate principled positions. The last session made clear that there are some areas where there's still disagreement about what exactly the rules are and how they apply to nuclear weapons. I think an important thing the U.S. can do is take strong principled positions.

TRANSCRIPT

The last thing I'll say on this is that as a government lawyer for a short period of time, I saw that government lawyers sometimes have a reflex to try to retain maximum room of maneuver for their policy principals. By that, I mean that they sometimes have a reflex of trying to articulate limited legal constraints in order to give their policy principals maximum space for making decisions. Sometimes that's the right thing to do and sometimes it's not the right thing to do. I think that in the context of nuclear weapons, the U.S. probably could take a stronger position about what the legal limits are on the use of nuclear weapons, be clear about those principles, and maybe not be quite so attached to the idea of maintaining room for maneuver. Obviously, it's complicated by the importance of deterrence. I'm sure you all are very familiar with the debate about whether to articulate a no-first-use principle that took place under the Obama administration that ultimately ended up not making that announcement. I think that this is the kind of work that we can do to not only shape our own behavior but also to shape the behavior of other states and set expectations for what they are going to do.

PROF. CHARLES MOXLEY:

Thank you, Professor Hathaway. We're running out of time but there's a question that Alan posed asking whether it would make sense in your view, proceeding or building on the U.N. General Assembly Resolution to go to the next level and for the General Assembly to take the question in one way or another to the ICJ.

PROF OONA HATHAWAY:

Well, that's a great question so thanks for that question, Alan. You're right that it doesn't have the legal kind of heft that perhaps an ICJ decision might. I don't think it is contested as a legal matter. I think those states that abstained, are doing so largely for political reasons and not for legal reasons. I do think there is a role for the ICJ, however. I don't know that we necessarily need the ICJ to pronounce on the principle that this is a crime of aggression. Although you have seen some suggestions in that direction in the genocide case. As you probably are aware, Russia made claims of genocide against Ukraine, and Ukraine very cleverly used that as a basis to seek jurisdiction in the International Court of Justice, claiming that those claims of genocide were at least one of the bases under which Russia was trying to justify its unlawful use of force. The ICJ said: "Yes it is, and they have to stop because Ukraine had not engaged in any acts of genocide and therefore any invasion by Russia is not justified." That is ongoing litigation.

I do think there is also room for the ICJ to play a role and for the General Assembly (GA) to seek an Advisory Opinion of the ICJ on a number of other matters related to this. In particular, there have been questions about whether the General Assembly would have the authority to establish a special tribunal to try the crime of aggression. There is no court now that can try the crime of aggression because the International Criminal Court, which has jurisdiction over Ukraine, is bound by the various jurisdictional limits that the Rome Statute created. The court can't try the crime of aggression by Russians and there's no other international court with jurisdiction either. The Security Council is not going to provide accountability, because Russia

has a veto. There are questions about whether the GA has the authority to create a special court for this purpose. That's a question that I think could be properly put to the ICJ.

Another question that could be properly put to the ICJ is: "Could the Security Council act under Chapter VI, which has within it a provision that requires states not to vote in matters in which they're directly involved?" But that requirement has been observed in the breach and there could be room for the General Assembly to seek ICJ opinions as to whether states that are involved are obligated to abstain. In this case, the Security Council could act under Chapter VI to do a lot more than it has been able to do under Chapter VII because, so far, Russia has been threatening to veto everything even though it's directly involved. I do think there's a lot of room for the GA to play a greater role. I think there's a lot of room for the GA to seek the ICJ's involvement on a number of these ongoing questions around the scope of authority of the General Assembly. But on the legality of the war, I think that there is no question about that. I haven't seen any legal defense of the war. Very few international leaders take seriously the claims Putin made that this war was justified. But thank you for that question. It's a really great one.