doi:10.1017/ajil.2022.48

In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law

By Anastasiya Kotova[*] and Ntina Tzouvala[**]

Abstract

While Western imperialism played a crucial role in the creation of modern international law, it is ever more important to analyze the engagements of non-Western imperialist powers with the field so as to comprehend the changing global patterns of legalized violence and expansionism. In this Essay, we analyze Russia's international legal arguments in support of its use of force against Ukraine through the lens of inter-imperial rivalry. In so doing, we call for strict scrutiny of the deployments of jus ad bellum *equally by all imperial powers.*

Critical approaches to international law, especially Marxism and Third World Approaches to International Law (TWAIL), can help us understand Russia's aggression against Ukraine and related legal arguments. They also show how this unfolding crisis can help refine our critical analyses so as to theorize and adequately respond to reconfigurations of global inequality, violence, and expansionism. Our argument unfolds in two parts. The first part focuses on non-Western imperialisms and their shifting engagements with Eurocentric international law. In so doing, we will make the case for a non-culturalist, materialist understanding of imperialism and its importance for international law. Secondly, we map Russia's international legal arguments in support of its use of force with an emphasis on inter-imperial rivalry as an explanatory device for their structure and content. Engaging with Russia's arguments demonstrates continuity with argumentative deployments of *jus ad bellum* by Western powers during the 1990s and early 2000s in their imperial adventures. At the same time, Russia has refracted rather than simply repeated the arguments of the Western powers, reworking them to fit a partial appropriation of the USSR's anti-fascist legacy. What renders these arguments unpersuasive for international audiences is not primarily their doctrinal incoherence or novelty, but rather the (justified) strict scrutiny of Russia's factual claims about Ukraine posing a threat to its security and Russia's attempts to position itself as an embodiment of universal values, such as anti-Nazism. However, if Russia's engagement with *jus ad bellum* is part of a broader pattern of imperial powers' deployment of international law in inter-imperialist rivalries, debates within the discipline would benefit from extending the same level of scrutiny and disbelief to all imperial powers.

* PhD candidate, Lund University, Lund, Sweden.
** Associate Professor, ANU College of Law, Canberra, Australia.

I. Non-Western Imperialism and International Law: You Better Believe It

In the past thirty years, scholars affiliated with the TWAIL movement have brought questions of imperialism to the center of theoretical debates about international law.[1] Their work focused heavily on Western imperialism because of its undeniable centrality in shaping not only the field but also the world that we inhabit today. In particular, the ascendence of TWAIL scholarship in the early 2000s coincided with what we now know was the peak of global U.S. hegemony and with the most aggressive phases of the war on terror. TWAIL scholars distinguished themselves from liberal critics of empire by showing that international law was not the polar opposite of imperialism, but rather one of its central modalities. In fact, much of TWAIL work relies on the implicit or explicit assumption that Western imperialism has historically been a distinctly legalistic one.[2] More recently, scholarship has addressed non-Western engagements with international law often foregrounding the anti-imperialist ambitions of such creative uses by actors who were initially excluded from the field.[3]

However, as Robert Knox has argued, the centrality of inter-imperialist rivalry in the making of modern international law has been generally absent from these accounts.[4] These rivalries included both imperialist tensions among Western powers and, after the late nineteenth century, emerging non-Western powers, notably Japan. For example, imperial Japan used, more or less successfully, Eurocentric international law in order to establish itself as a sovereign equal and to justify its own colonial projects in East Asia.[5] Seen in this light, its failed attempt to introduce a racial equality clause into the League Covenant had little to do with racial egalitarianism, but rather with its ambition to establish a non-white empire in Asia.[6] In fact, Japan was able to temporarily exploit local opposition to Western imperialism in order to gain support for its rapid expansion during World War II. TWAIL scholars have recently retrieved the legacy of the Indian justice, Radhabinod Pal, whose dissenting opinion in the Tokyo trials condemned Western hypocrisy and selectivity in pursuing justice against Japanese aggression.[7] Simultaneously, from a TWAIL perspective, it is also worth preserving the legacy of non-Western resistance (legalized or not) against Japanese imperialism. In Vietnam, Ho Chi Minh first rose to national prominence thanks to the communist insistence

[1] Amongst many: Antony Anghie, Imperialism, Sovereignty, and the Making of International Law (2005); James T. Gathii, *Imperialism, Colonialism, and International Law*, 54 Buff. L. Rev. 1013 (2007); B.S. Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century*, 14 Ore. Rev. Int'l L. 17 (2012).

[2] For example, TWAIL, Marxist, and other critical legal scholars have resisted the characterization of the "global war on terror" as "lawless." *See, e.g.*, Usha Natarajan, *Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty*, 24 Leiden J. Int'l L. 799 (2011); Frédéric Mégret, *From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other,"* in International Law and Its Others (Anne Orford ed., 2006).

[3] Karin Michelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 Wisconsin Int'l L.J. 353 (1998); Arnulf Becker Lorca, Mestizo International Law: A Global Intellectual History 1842–1933 (2014).

[4] Robert Knox, *Civilizing Interventions? Race, War and International Law*, 26 Camb. Rev. Int'l Aff. 111, 119 (2013).

[5] Alexis Dudden, Japan's Colonization of Korea: Discourse and Power (2006).

[6] Naoko Shimazu, Japan, Race and Equality: The Racial Equality Proposal of 1919, at 89–116 (1998).

[7] Adil Hasan Khan, *Inheriting a Tragic Ethos: Learning from Radhabinod Pal*, 110 AJIL Unbound 25 (2016); Sujith Xavier, *Locating and Situating Justice Pal: TWAIL, International Criminal Tribunals, and Judicial Powers*, Asian J. Int'l L. 1 (2022).

https://doi.org/10.1017/ajil.2022.48 Published online by Cambridge University Press

that the Japanese were the "number one" enemy of Vietnamese people during World War II. The purpose of recovering this legacy of radical resistance against non-Western imperialism at the present moment is dual. First, it enables us to move beyond a culturalist or racialist understanding of empire, inquiring instead into its material underpinnings. Second, by acknowledging the importance of non-Western imperialisms, we have the opportunity to decipher their exact relationship with international law.

Here, we want to understand how non-Western imperialisms engage with a field that has historically developed to serve the specific modalities of Western imperialism, or—at times—of resistance to such imperialism. In recent years, scholars have recovered ways in which domestic ruling classes in the Global South have used—amongst other tools—international legal arguments and techniques in order to justify both imperial projects abroad and processes of colonization and expansion at (what subsequently became) home. From Tibet to Ethiopia and from Siam's north to Korea, non-Western engagements with Eurocentric international law have enabled imperial and colonial projects well beyond Western imperialism,[8] a fact often neglected by celebratory engagements with (semi-)peripheral international lawyers in contemporary international legal scholarship. This engagement of non-Western imperial powers with international law has been a process that combines repudiation, adoption, and adaptation. With the idiom of international law having become factually—if not morally—universal,[9] non-engagement is not an option for states, even in instances where the plausibility of the advanced arguments is questionable.

The decline of U.S. power has also invited such creative uses of the field by non-Western powers. Examples include conduct not only by Russia but also by China. If anything, the latter's unwillingness to engage with dispute-settlement mechanisms has been expressed in heavily legalized language, mobilizing an unprecedented number of international law experts.[10] This is not a process of simple mimicry or strategic appropriation. In the realm of international economic law, China appears to be developing its own, unique forms of legal ordering that rely on soft law and transnational lawyer networks much more than on direct legal exports and binding and judicialized legal instruments favored by Western capital-exporters.[11] This dissimilarity of forms does not automatically negate the imperialist nature of Chinese economic expansion nor does it make that expansion intrinsically "lawless." Rather, such dissimilarity speaks to diverging legal arrangements as encapsulations of different modes of imperialism and different legal cultures. For instance, Matthew Erie has argued that, for Chinese economic expansion, the lack of the "hard" enforcement tools of U.S. military supremacy and the status of the dollar as a global currency renders ongoing negotiations

[8] DUDDEN, *supra* note 5; Maria Adele Carrai, *Learning Western Techniques of Empire: Republican China and the New Legal Framework for Managing Tibet*, 30 LEIDEN J. INT'L L. 801 (2017); Hailegabriel G. Feyissa, *Non-European Imperialism and Europeanisation of Law: Complexities of Legal Codification in Imperial Ethiopia*, 1 THIRD WORLD APPROACHES TO INT'L L. REV. 152 (2020); Ntina Tzouvala, *"And the Laws Are Rude . . . Crude and Uncertain": Extraterritoriality and the Emergence of Terrritorialised Statehood in Siam*, *in* THE EXTRATERRITORIALITY OF LAW: HISTORY, THEORY, POLITICS (Daniel S. Margolies, Umut Özsu, Maïa Pal & Ntina Tzouvala eds., 2019).

[9] On the universality of international law, see SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY (2011).

[10] *The South China Sea Arbitration Awards: A Critical Study*, 17 CHINESE J. INT'L L. 207 (2018).

[11] *See* Greg Shaffer & Henry Gao, *A New Chinese Economic Order?*, 23 J. INT'L ECON. L. 607 (2020).

https://doi.org/10.1017/ajil.2022.48 Published online by Cambridge University Press

(under unequal material conditions) a preferable solution.[12] In addition, China presents itself as an actor leading by example amongst Global South states, which in turn may render open embrace of controversial institutions such as investor-state dispute settlement bodies politically unwise.[13] Here we do not wish to compare these two different paradigms of economic imperialism and their juridical infrastructures, nor can we evaluate the extent to which each offers opportunities for subversion and resistance. We simply want to draw attention to the fact that non-Western empire-building can be institutionally and argumentatively distinct, while replicating the basic patterns of extraction, exploitation, and violence. As we will show below, Russia has not generally put forward arguments—let alone legal structures—of the novelty and strength that China has. Amongst other things, this speaks to the vastly different levels of material and ideological power between the two: Russia is, at best, a regional imperial power, that has seen its political and economic influence—let alone ability to produce hegemony—decline sharply over the past forty years. In comparison, China's global aspirations are backed by a rise of material-economic power, resulting in the ability to produce (at least partially) persuasive ideological and legal justifications. Given Russia's relative weakness, its arguments do not aspire to create wholly novel justifications for force and occupation. Rather, they operate as distorted reflections of Western legal arguments.

II. Russian Legal Arguments Through the Looking Glass

Inter-imperialist rivalries of today are shaped by the ways the previous major inter-imperialist rivalries were resolved. International law is one aspect or "terrain" of inter-imperial rivalry and its outcomes are contingent but structurally constrained. Modern international law, in particular, is co-produced by and reproduces the set of ideas and practices revolving around statehood and sovereignty, violence, internal affairs, and human rights that are part and parcel of the hegemonic domination of the Western capitalist core.[14] Therefore, a crucial reason why international legal arguments advanced by some imperial powers (by Russia in the case of Russian-Ukrainian war) are rejected more readily than those by others (for example, by the United States in justifying the invasion of Iraq) is that the United States and the Western European states have been more successful in making their international legal practices and ideologies hegemonic. They have thus cultivated generalized professional acquiescence with respect to both their factual and legal claims. Their success is aided by the fact that those very claims were articulated through conceptual categories of international law that Western imperial powers crafted and spread worldwide. In other words, the ideological and material power of an actor who articulates a legal argument, as well as the degree of participation of international lawyers in the imperial rivalries of their national states, at least partially determine what ultimately counts as a persuasive international legal argument.

[12] *See* Matthew S. Erie, *The Soft Power of Chinese Law*, Colum. J. Transnat'l L. (forthcoming).

[13] *Id.* at 30–31.

[14] By "hegemony" here we mean the ability of a dominant social group to represent its interests and ideas as universal. For a detailed analysis of hegemony in international law and international relations, see Robert Knox, *Hegemony*, *in* Concepts for International Law: Contributions to Disciplinary Thought (Jean d'Aspremont & Sahib Singh eds., 2019).

https://doi.org/10.1017/ajil.2022.48 Published online by Cambridge University Press

In seeking to justify the aggression against the Ukrainian state, Russia claims that its intervention aims at "denazifying" Ukraine.[15] Russian officials allege that the Ukrainian government perpetrated genocide in the Donbass[16] and even tie the "special military operation" in Ukraine[17] to the resistance against Western neocolonial oppression.[18] Similarly, Ukraine was accused of producing weapons of mass destruction, including chemical and biological weapons[19]—an accusation that is reminiscent of the U.S. rhetoric to justify the invasion of Iraq. In addition, the Russian government at least partially relies on humanitarian intervention to assert the legality of its military action in Ukraine—a doctrine articulated by the UK prior to the NATO military operation in Kosovo and subsequently promoted by U.S. and European scholars.[20] However, Russia's particular political history also leads to adaptation and partial divergence. The "creative reworking" of humanitarian intervention into "denazification" seems designed to generate legitimacy both domestically and internationally by invoking the role of the Soviet Union in the defeat of Nazi Germany in World War II. Invoking denazification could be understood as selective positioning of one inheritor of the USSR to the direct exclusion of other post-Soviet peoples and republics that also participated actively in the anti-Nazi struggle. However, invoking the specters of World War II and Nazism is neither a novelty in international law, nor a uniquely Russian prerogative. Rather, invocations of "Munich" and denazification have been repeatedly mobilized to justify both the use of force and comprehensive post-war reform, notably in Iraq. Reaching beyond *jus ad bellum*, Russia appears to also use "denazification" as an argument for circumventing the "conservationist principle" of the laws of occupation, in ways that are also reminiscent of U.S. arguments that the United States was entitled to reform Iraq's law along neoliberal lines in an effort to wipe out the influence of the Ba'ath, a process that the occupying powers often analogized with "denazification."[21]

Despite vocal opposition to the doctrine of humanitarian intervention in years past,[22] the Russian government has more recently relied on it, for instance during its invasion of South Ossetia in 2008.[23] As Knox argues, the reaction of the U.S. government was premised on the implicit assumption that humanitarian intervention was simply not available to

[15] Address by the President of the Russian Federation (Feb. 24, 2022), *at* http://en.kremlin.ru/events/president/news/67843.

[16] *Id.*

[17] On how the language of "special military operation" is indicative of Russia's imperial ambition, see Kostia Gorobets, *Russian "Special Military Operation" and the Language of Empire*, OPINIO JURIS (May 24, 2022), *at* http://opiniojuris.org/2022/05/24/russian-special-military-operation-and-the-language-of-empire.

[18] *Russian Operation in Ukraine Contributes to Freeing World from Western Oppression - Lavrov*, TASS (Apr. 29, 2022), *at* https://tass.com/politics/1445755?utm_source=twitter.com&utm_medium=social&utm_campaign=smm_social_share.

[19] Zulfikar Abbany, *Ukraine: Infowar of Chemical and Biological Weapons*, DEUTSCHE WELLE (Mar. 11, 2022), *at* https://www.dw.com/en/ukraine-infowar-of-chemical-and-biological-weapons/a-61097325.

[20] Knox, *supra* note 4, at 119.

[21] Marco Longobardo, *The Rhetoric of "Denazification" of Ukraine from the Perspective of the Law of Occupation*, EJIL: *TALK!* (Apr. 26, 2022), *at* https://www.ejiltalk.org/the-rhetoric-of-denazification-of-ukraine-from-the-perspective-of-the-law-of-occupation; NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW 179 (2020).

[22] LAURI MÄLKSOO, RUSSIAN APPROACHES TO INTERNATIONAL LAW 173 (1st ed. 2015).

[23] Knox, *supra* note 4, at 127.

https://doi.org/10.1017/ajil.2022.48 Published online by Cambridge University Press

Russia.[24] Reaching its rhetorical apogee in the midst of post-Cold War U.S. hegemony, the doctrine of humanitarian intervention implicitly relied on the idea that only the United States and its allies could authoritatively articulate and defend the interest of humanity as a whole.

Paradoxically, the United States never claimed for itself the right to unilateral humanitarian intervention. Rather, as Christine Gray has also observed in regards to *jus ad bellum* in general, it has been academic writers (with or without past, present and future links to governments) that have been at the forefront of the efforts to establish such a right.[25] A crucial component of the argument in favor of unilateral humanitarian intervention is that a state or a coalition of states are bound to act on behalf of international community to stop atrocities or restore peace because the international community as a whole is prevented from acting by "selfish" or "irresponsible" states that happen to have veto powers on the United Nations Security Council (UNSC). In addition, Knox points out how the doctrine of humanitarian intervention deploys racialized portrayals of both the societies in periphery in which an empire seeks to intervene (Iraq, Serbia, and Afghanistan) and of the imperial rivals (Russia and China).[26] While deploying racialized tropes against peripheral states is intended to justify the need for intervention as such, racialization of the imperial rivals of the Western powers, namely by pointing out their supposedly inherent irresponsibility and irrationality, is instrumental in doing two things: firstly, it attempts to justify the unilateral character of such intervention, the need to use alternative arrangements instead of "the normal channels of the international legal order,"[27] and secondly, it seeks to deny recourse to the same arguments to imperial rivals. Although the tables turned in the Russian-Ukrainian war, both U.S. and European international lawyers similarly frame their qualification of the Russian aggression in terms of Russia being an irresponsible international actor in a way that aims to preclude any comparison with other acts of imperial aggression.[28]

The use of such racialized tropes has been facilitated by the transformations in the international system following the dissolution of the Soviet Union and Eastern bloc. The end of the Cold War also meant the end of the hegemonic contestation, characterizing the period. The declared "end of history" allowed for the ideological tenets of neoliberalism—market economy, liberal representative democracy, and globalization under the dominance of financial capital—to become hegemonic without contestation. As the ideology of the global capitalist core came unprecedentedly close to becoming true common sense, the ideology of Russia as former Cold War rival became dismissible without any need of engagement or disproving.

[24] *Id.*

[25] Christine Gray, International Law and The Use Of Force 25 (2018).

[26] Knox, *supra* note 4, at 126.

[27] *Id.* at 125.

[28] See, for example, the statement of the U.S. Representative to the United Nations Security Council during the February 25, 2022 Security Council meeting: "Responsible Member States do not invade their neighbours. They do not commit violence against their neighbours just because they have the ability to do so. That is the entire purpose of our international system. That is, fundamentally, the point of the Security Council and the United Nations." UNSC Meeting Record, at 3, UN Doc. S/PV.8979 (Feb. 25, 2022). *See also* UNSC Meeting Record, at 25, UN Doc. S/PV.9027 (May 5, 2022); Statement by the President and the Board of ESIL on the Russian Aggression against Ukraine (Feb. 24, 2022), *at* https://esil-sedi.eu/statement-by-the-president-and-the-board-of-the-european-society-of-international-law-on-the-russian-aggression-against-ukraine.

https://doi.org/10.1017/ajil.2022.48 Published online by Cambridge University Press

The attempted monopolization of certain international legal arguments by the West is not the only reason that Russia's invocations of humanitarian intervention ring so hollow. Rather, even Western uses of force in the past decade have relied less and less on humanitarian justifications, whether unilateral humanitarian intervention or the "responsibility to protect."[29] Despite widespread rhetoric against Assad's government in Syria, actual uses of force were justified either through the language of self-defense, in the case of Western powers and Turkey, or under the banner of intervention by governmental invitation by Russia.[30] Even though aspects of these arguments were controversial,[31] the categories of arguments themselves are relatively conventional. Importantly, both self-defense and intervention by invitation abandon the idea of a universal humanity and instead adopt a less universalizing view of the world, one that implicitly admits the absence of a global hegemon who can claim to speak in the name of humanity. The Russian resurrection of humanitarian rhetoric, just as the solidification of competing power blocs negates its very ideological underpinnings, can be better understood as directed to domestic audiences rather than to the international community.

The diminished purchase of humanitarianism and the shift toward self-defense is also present in Russia's argumentation.[32] Russia has relied on arguments of self-defense, including its (purported) individual right to self-defense against NATO and Ukraine and the (alleged) right of collective self-defense in support of Donetsk and Luhansk "people's republics," Russian puppet states in the Eastern Ukraine.[33] Arguments of collective self-defense are efforts to combine different rationales for using force. On the one hand, they rely on the sovereign equality-based justifications that underlie self-defense. These reflect Russia's sovereigntist approach to international law and demonstrate certain continuity with its traditional insistence on the strict interpretation of *jus ad bellum*, enshrined in the UN Charter, under which self-defense and UNSC authorization are the only two legal bases for the use of force.[34] On the other hand, the ongoing Russian rhetoric about a Nazi takeover in Ukraine means that the purported support offered to these self-proclaimed anti-fascist republics is based on the universalist ideology of self-determination and anti-fascism that animated Soviet rhetoric (if not always policy). This eclectic mix of arguments could be read as symptomatic of Russia's overall indifference toward the international legal order and the lack of a solid, coherent justification. This interpretation is not entirely untrue, but it tends to exceptionalize and pathologize Russia's engagement with the field while also failing to recognize its unique engagement with and understanding of international law. Russia has long insisted that the international legal order is in crisis, placing the blame squarely on the

[29] Andrew Garwood-Gowers spoke of a "backlash against R2P" after the 2011 intervention in Libya. Andrew Garwood-Gowers, *The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?*, 36 U. NEW S. WALES L.J. 594 (2013).

[30] For an overview of the wide range of self-defense arguments in the context of Syria, see Marja Lehto, *The Fight Against ISIL in Syria. Comments on the Recent Discussion of the Right of Self-Defence Against Non-state Actors*, 87 NORDIC J. INT'L L. 1 (2018).

[31] Laura Visser, *Russia's Intervention in Syria*, EJIL:*TALK!* (Nov. 25, 2015), *at* https://www.ejiltalk.org/russias-intervention-in-syria.

[32] Marko Milanović, *What Is Russia's Legal Justification for Using Force Against Ukraine?*, EJIL:*TALK!* (Feb. 24, 2022), *at* https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine.

[33] Address by the President of the Russian Federation, *supra* note 15.

[34] *See, e.g.*, Putin's Prepared Remarks at 43rd Munich Conference on Security Policy (Feb. 12, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/12/AR2007021200555.html (as quoted in MÄLKSOO, *supra* note 22, at 149, and the accompanying analysis).

https://doi.org/10.1017/ajil.2022.48 Published online by Cambridge University Press

United States and its allies that eroded the UN Charter principles.[35] This stance sets the ground for the recourse to a *tu quoque* type of argument, that dates back at least to the annexation of Crimea, which was often presented by Russia as an imperial analogue of NATO's intervention in Kosovo.[36] In a paradigmatic display of using international law as a terrain for the inter-imperialist rivalry, "[r]ather than pursuing a firm ideology of international law in its own right, Moscow first of all responded to Western claims and arguments in international law, i.e. symmetry with the West became part of its ideology of international law."[37]

We posit that this eclecticism is symptomatic of two realities: the existence of multiple audiences for international legal argumentation; and the unfolding of a hegemonic crisis both domestically in Russia and internationally. International legal arguments put forward by Russia may very well not primarily aim at the international community as their main audience—instead, this mixture of justification could be much more legible to a domestic audience. If Russia's engagement with *jus ad bellum* primarily targets a domestic audience, there is little sense in evaluating its success via persuasiveness to Western lawyers and diplomats. In addition, this multiplicity of justifications is a symptom of a hegemonic crisis experienced both by Russia and more broadly: at a time of geopolitical and ideological transition and instability neither ascending nor descending—to recall Martti Koskenniemi's typology[38]—international legal arguments seem to be able to garner automatic and widespread support, or even plausibility. When humanitarian interventions of its imperial rivals were justified primarily through descending legal arguments based on universal values, Russia's opposition to such interventions could be credibly articulated in ascending ones, that emphasized sovereignty. Given the present-day lack of a clear preference for either of the modes of argumentation, Russia is compelled to combine a variety of justifications to cover more ground, which eventually leads to pronounced tensions.

While international legal argumentation of interventionism might be in flux, references to both humanitarianism and self-defense have had tangible effects other than providing plausible legal justification for the use of force. One such effect is the conditioning of sovereignty and the disciplining of weaker states by signaling the existence of requirements to be met so as to avoid coercive force.

For most polities, sovereignty has been both unequal and conditional for most of modern history.[39] In fact, following a brief period of what seemed like a relaxation of requirements for recognizing/awarding sovereignty during the decolonization, post-Cold War decades have been characterized by the return of the requirement of "effective government" interpreted through the lens of "good governance."[40] Good governance, in turn, is understood primarily as the capacity to guarantee a specific subset of individual rights, conducive to free trade,

[35] Mälksoo, *supra* note 22, at 180.

[36] *Id.* at 180–82 (analyzing Russian President Vladimir Putin's speech in the aftermath of the annexation of the Crimea and demonstrating that the justification strongly relied on the *tu quoque* argument).

[37] *Id.* at 180.

[38] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2d ed. 2006).

[39] Rose Parfitt, The Process of International Legal Reproduction: Inequality, Historiography, Resistance 388 (2019); Tzouvala, *supra* note 21, at 192.

[40] Parfitt, *supra* note 39, at 387, 394.

https://doi.org/10.1017/ajil.2022.48 Published online by Cambridge University Press

investment,[41] and the establishment of capitalist modernity, or, more recently, neoliberalism.[42] In that sense, the role of *jus ad bellum* has been to demonstrate the potential consequences of reluctance to accept the conditioning of sovereignty.[43] The conditionalities are substantially different when articulated by different imperial powers. Whether they assume the form of a bilateral investment treaty or a friendship and cooperation treaty (as in the case of the pseudo-republics in the Donbass),[44] they are similarly intended to further the interests of the imperial ruling classes: the differences in the techniques of subjugation and exploitation correspond to the distinct varieties of capitalism (neoliberal capitalism in the West and Bonapartist state capitalism in Russia),[45] adopted by the contemporary imperial powers, rather than moral or "civilizational" differences.

That the Ukrainian government and civil society are adamant in assuring the EU and the United States that it is the state deserving of sovereignty, by gesturing toward the success in the fight against corruption,[46] the observance of human rights,[47] and the endorsement of the "European values"[48] demonstrates just how deeply the conditionalities of sovereignty have been internalized by the political communities outside the capitalist core. Otherwise put, disciplinary deployment of *jus ad bellum* appears to have been successful in the everyday operation of international law as a language of politics, if not in doctrinal terms. Notably, defending European values became the pretext for Ukraine's application for the EU candidate status with the view to eventually acquiring EU membership, i.e., to the aspired closer integration with the core.[49] The statements of Ukrainian officials convey a clear understanding that Ukraine has *earned* its place in the EU by defending both European borders and European values.[50]

[41] *Id.* at 384.

[42] TZOUVALA, *supra* note 21, at 175.

[43] PARFITT, *supra* note 39, at 376–77, 397.

[44] The friendship and cooperation treaties with the pseudo-republics included the provision on the circulation of the Russian ruble as their official currency. Alina Proshyna, *V MID RF raskyli podrobnosti dogovorov o druzhbe i sotrudnichestve s DNR i LNR* [*Russian Foreign Ministry Reveals Details of Friendship and Cooperation Treaties with DPR and LPR*], IZVESTIYA (Feb. 22, 2022), *at* https://iz.ru/1295182/2022-02-22/v-mid-rf-raskryli-podrobnosti-dogovorov-o-druzhbe-i-sotrudnichestve-s-dnr-i-lnr.

[45] Ilya Matveev & Volodymyr Ishchenko, *Russia's War on Ukraine: Imperial Ideology or Class Interest?*, SALVAGE VIA LEFTEAST (June 3, 2022), *at* https://lefteast.org/russias-war-on-ukraine-imperial-ideology-or-class-interest.

[46] National Endowment for Democracy, *Anti-corruption Action Center Pushes for Transparency in Ukraine* (May 31, 2022), *at* https://www.ned.org/anti-corruption-action-center-pushes-for-transparency-in-ukraine.

[47] A noteworthy example is the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence. Ukraine signed the Convention in 2011, but, despite the pressure from the civil society and international actors, only ratified it in June 2022. *See* Asami Terajima, *Ukraine Ratifies Istanbul Convention 11 Years After Signing Treaty to Curb Gender-Based Violence*, KYIV INDEPENDENT (June 20, 2022), *at* https://kyivindependent.com/national/ukraine-ratifies-istanbul-convention-11-years-after-signing-treaty-to-curb-gender-based-violence.

[48] Ukrainian President Volodymyr Zelensky has, for instance, asserted: "Thousands of Ukrainian lives were given to live in Ukraine and all of Europe as a person, to live freely. During such a brutal war, Ukrainians made sure that state and public institutions remain stable. *Our people are absolutely integrated into the European space*." *EU Response to Ukraine's Membership Application to Show Whether Europe Has Future – Zelensky*, INTERFAX-UKRAINE (June 11, 2022), *at* https://en.interfax.com.ua/news/general/838536.html (emphasis added).

[49] *Ukraine Applies for European Union Membership*, EUR. INTEGRATION PORTAL (Feb. 28, 2022), *at* https://eu-ua.kmu.gov.ua/en/node/4582.

[50] On the concept of earned sovereignty, see PARFITT, *supra* note 39, at 405–08.

https://doi.org/10.1017/ajil.2022.48 Published online by Cambridge University Press

While Ukraine's reliance on the rhetoric of the European values and the belonging to the European civilization can be rightly criticized as an exercise in "the global privilege-making of the European race regime,"[51] we should recognize that if "international law [is] a bounded terrain of argumentation,"[52] the arguments available to peripheral and semi-peripheral states are even more constrained by hegemonies past and present. In this instance, decades of legal conditioning of peripheral sovereignty have left Ukraine with the limited choice to decide the terms of which imperialist block it will use to defend its sovereignty, those of the EU/United States or those of Russia. That a (semi-)peripheral state is bound to make such a choice inheres in its very condition of being in the periphery, in a world of the ongoing inter-imperial struggle. At the same time, albeit such tactical moves are unavoidable, especially in the midst of an invasion, it is likely that acceptance of the terms of this legal and political debate by weaker states will further restrict their sphere of legally and politically possible action and autonomy. The imperative to join imperial spheres and to do so through different ways of conditioning one's sovereignty considerably restricts a people's ability to exercise their right to self-determination in a substantive, rather than formal, manner.[53] It is worth bearing in mind that the acceptance and re-enactment of such conditions of sovereignty by domestic ruling classes of (semi-)peripheral states often serve domestic programs of class formation/consolidation and state-building in ways that are hardly emancipatory for the vast majority of the population.

III. Conclusion

Given its brevity, our Essay seeks to raise questions rather than offer comprehensive answers. However, it appears to us that there is analytical, political, and even doctrinal value in reading Russia's legal justifications of the invasion not as aberrational or anomalous but as part of a broader range of imperialist uses of international law, past and present. Identifying these continuities though does not mean that there are no significant divergences and ruptures. Russia's apparent intention to expand its territory in violation of peremptory norms of international law is a tendency that distinguishes it from other forms of modern imperialism, which tend to work through (semi-)peripheral sovereignty rather than openly against it.[54] We suspect that the reliance of Russian capitalism on the state as a direct (rather than indirect) enabler of accumulation is at the root of this significant divergence. Be that as it may, our Essay is a note of caution against metaphysical, "civilizational," and exceptionalist interpretations of imperialist aggression and of its legal justifications. As geopolitical competition is escalating, it is our view that the future of the international legal order will have to be anti-imperialist, or it will not be at all.

[51] Sabri Ege, *Media, Ideology and the War in Ukraine*, Middle East Monitor (May 10, 2022), *at* https://www.middleeastmonitor.com/20220510-media-ideology-and-the-war-in-ukraine.

[52] Tzouvala, *supra* note 21, at 175.

[53] Albeit the *Chagos Islands* Advisory Opinion of the International Court of Justice focused on questions of territory rather than political self-determination, the Court made it clear that it did not endorse an overly formalistic and restrictive understanding of the right. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95, paras. 159–60 (Feb. 25).

[54] On the post-World War II construction of the U.S. empire as a primarily non-territorial one, see Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States 215–61 (2019). On the utilization of other states' sovereignty by the United States in the context of the "global war on terror," see Darryl Li, *From Exception to Empire: Sovereignty, Carceral Circulation, and the "Global War on Terror," in* Ethnographies of U.S. Empire (Carole McGranahan & John F. Collins eds., 2018).

https://doi.org/10.1017/ajil.2022.48 Published online by Cambridge University Press