

## THE RUSSIA-UKRAINE WAR AND THE SEEDS OF A NEW LIBERAL PLURILATERAL ORDER

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### ABSTRACT

*Since about 2008, the rise of autocracy and the decline of democracy has threatened the modern liberal international order. To counter the threat of authoritarian international law, the United States should collaborate with liberal democracies from Europe, Asia, Africa, and Latin America to develop new plurilateral institutions and treaties to create a “liberal plurilateral order.” This Essay shows that states are planting the seeds of a future liberal plurilateral order in their response to Russian aggression in Ukraine.*

### I. INTRODUCTION

Since about 2008, the rise of autocracy and corresponding decline of democracy has been a key trend in international affairs. Freedom House reports that, as of 2022, “some 38 percent of the global population live in Not Free countries, the highest proportion since 1997. Only about 20 percent now live in Free countries.”<sup>1</sup> The growth of Chinese power is one of several factors contributing to these trends. Democratic decay affects the international legal order because, as Tom Ginsburg has convincingly argued, growing Chinese power and the spread of authoritarian governance are pushing international law in the direction of “authoritarian international law.”<sup>2</sup>

The United States has led the world in creating a liberal international order since World War II. (For the purpose of this Essay, a “liberal” order is one based on a normative commitment to democracy, human rights, the rule of law, and limited government.) Despite the growth of authoritarian international law, can that liberal order survive? To answer that question, it is helpful to distinguish among global law, regional law, and plurilateral international law. Since World War II, the most important international institutions have been either regional (e.g., the European Union and the Economic Community of West African States)

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<sup>1</sup> Sarah Repucci & Amy Slipowitz, *Freedom in the World 2022: The Global Expansion of Authoritarian Rule*, FREEDOM HOUSE (Feb. 2022), available at [https://freedomhouse.org/sites/default/files/2022-02/FIW\\_2022\\_PDF\\_Booklet\\_Digital\\_Final\\_Web.pdf](https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf).

<sup>2</sup> Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221 (2020).

or global (e.g., the United Nations and the World Trade Organization). Several plurilateral institutions exist (e.g., the Organisation for Economic Co-operation and Development), but they have played at most a secondary role in the creation and enforcement of international law.

We assume that regional international law in Europe will continue to reflect liberal values. However, the rise of authoritarian international law poses a significant threat to the continued vitality of liberal international law at the global level. To counter that threat effectively, the United States will need to collaborate with other liberal democracies, including those outside Europe, to develop new plurilateral institutions and treaties to create a “liberal plurilateral order.” In fact, this Essay demonstrates that states are currently planting the seeds of a future liberal plurilateral order in their response to Russian aggression and atrocities in Ukraine.

States’ responses to the war in Ukraine reinforce a point that was evident previously: most autocratic states do not support a liberal international order, rooted in a principled commitment to democracy, human rights, and the rule of law. Opposition from powerful autocracies, especially China and Russia, makes it increasingly unrealistic to try to maintain a *global* liberal order. However, state responses to Russian aggression demonstrate that liberal democracies from every continent are cooperating informally to uphold a *plurilateral* international order that is consistent with liberal values. In the longer term, a liberal plurilateral order will be more effective if it is codified in the form of new treaties and institutions. Thus, the war in Ukraine highlights the need for new plurilateral treaties and institutions to facilitate cooperation among liberal democracies from Asia, Africa, Europe, and the Americas. Such treaties and institutions could potentially reshape international law to help stem the rising tide of autocracy that has gained momentum over the past ten to fifteen years.

The remainder of this Essay proceeds in three parts. Part II analyzes state responses to the war in Ukraine, showing that liberal democracies have responded very differently from autocratic states. Part III focuses on international humanitarian law (IHL). International humanitarian law comprises a key element of the liberal international order and the rule of law because it limits excessive force by states (and others) and protects civilians.<sup>3</sup> This Part shows that liberal democracies, joined in many cases by hybrid states (those that are neither democratic nor autocratic), are fighting to defend IHL norms and develop new accountability mechanisms to respond to Russian war crimes. Part IV suggests pathways for building on the current processes of informal collaboration to create new plurilateral treaties and institutions to develop a liberal, plurilateral order.

## II. THE RESPONSE TO RUSSIAN AGGRESSION

Analysis of states’ responses to Russia’s invasion of Ukraine demonstrates that liberal democracies behave differently from autocracies in the international arena. We divide UN member states into three groups: liberal democracies, autocracies, and hybrid states. Liberal democracies are states that score .6 or better on the V-Dem liberal democracy index.<sup>4</sup>

<sup>3</sup> See Security Council Report, UN Doc. S/PV.8499 (2019), at <https://www.securitycouncilreport.org/un-documents/document/s-pv-8499.php>.

<sup>4</sup> The Varieties of Democracy Institute publishes data every year that provides detailed information about the global state of democracy. See *The V-Dem Dataset*, VARIETIES OF DEMOCRACY INST., at <https://www.v-dem.net/vdemds.html>. V-Dem data includes five indexes for measuring the quality of democracy. We use the liberal democracy index because it provides the best measure of human rights protection.

Autocracies are states that score below .3. States that score between .3 and .6 are hybrid states. Twenty-one UN member states are not included in the V-Dem index. We use Freedom House data to classify those states.<sup>5</sup> Overall, the 193 UN member states include sixty-six liberal democracies, seventy-five autocracies, and fifty-two hybrid states.<sup>6</sup>

The UN General Assembly (UNGA) held two key votes in response to Russia's invasion of Ukraine. On March 2, 2022, the UNGA voted to condemn Russian aggression, with 141 states in favor and only five opposed.<sup>7</sup> Then, on April 7, the UNGA voted to suspend Russia's membership in the UN Human Rights Council due to "violations and abuses of human rights and violations of international humanitarian law."<sup>8</sup> Ninety-three states voted in favor of the resolution; twenty-four voted against.<sup>9</sup>

The following table demonstrates that there is a strong correlation between the classification of states by regime type and their votes on the UN resolutions. Liberal democracies voted unanimously to condemn Russia's invasion of Ukraine. Fifty-eight of sixty-six liberal democracies (88 percent) voted to suspend Russia from the Human Rights Council. In contrast, fewer than half of UN autocratic states voted to condemn Russian aggression. Among autocratic states, "no" votes on the Human Rights Council resolution exceeded "yes" votes by a margin of almost two-to-one.

### Votes in UN General Assembly<sup>10</sup>

	Vote to Condemn Russia's Invasion of Ukraine		Vote to Suspend Russia from Human Rights Council	
Liberal Democracies (66)	66	Yes (100%)	58	Yes (88%)
	0	No	0	No
	0	Abstain	8	Abstain
Hybrid States (52)	41	Yes (79%)	23	Yes (44%)
	0	No	1	No
	11	Abstain	28	Abstain
Autocratic States (75)	34	Yes (45%)	12	Yes (16%)
	5	No	23	No
	36	Abstain	40	Abstain

<sup>5</sup> Freedom House data is available at *Freedom in the World*, FREEDOM HOUSE, at <https://freedomhouse.org/report/freedom-world>. Freedom House assigns every state a score on a scale from one to one hundred (one hundred is the most free). Twenty of the twenty-one UN member states excluded from the V-Dem index scored seventy-seven or better on the Freedom House scale. We classify those twenty states as liberal democracies. Freedom House scores Brunei as twenty-eight. We classify Brunei as an autocracy.

<sup>6</sup> A file with classifications and other data is on file with authors. Some question whether the United States still qualifies as a "liberal democracy." On the V-Dem liberal democracy index, the U.S. score declined from .852 in 2015 to .735 in 2021. That is a sharp decline, but the United States still qualifies as a liberal democracy under our criteria. Using Freedom House data, the U.S. score declined from 93 in 2013 to 83 in 2022, but Freedom House still categorizes the United States as a "free" country.

<sup>7</sup> See UN Press Release, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, UN Press Release GA/12407 (Mar. 2, 2022), at <https://www.un.org/press/en/2022/ga12407.doc.htm>.

<sup>8</sup> GA Res. ES-11/3 (Apr. 8, 2022).

<sup>9</sup> UN Press Release, General Assembly Adopts Text to Suspend Russian Federation from Human Rights Council, Continuing Emergency Special Session on Humanitarian Crisis in Ukraine, UN Press Release GA/12414 (Apr. 7, 2022), at <https://press.un.org/en/2022/ga12414.doc.htm>.

<sup>10</sup> The figures for abstentions include states that abstained and states that did not vote. Russia is included as an autocratic state. Russia voted against both resolutions.

The UN Human Rights Council includes forty-seven member states: thirteen liberal democracies, nineteen autocracies (including Russia), and fifteen hybrid states. On March 4, 2022, the Council voted to establish a commission of inquiry (COI) to investigate “violations and abuses of human rights and violations of international humanitarian law, and related crimes” committed by Russia.<sup>11</sup> The voting pattern in the Human Rights Council was similar to the voting pattern for the first UNGA resolution. Ninety-two percent of liberal democracies (12/13) and 73 percent of hybrid states (11/15) voted in favor of the COI. Only 47 percent of autocracies (9/19) voted in favor. Only two states voted against the resolution: Eritrea and Russia. Both are autocracies.

Analysis of economic sanctions against Russia reinforces the point that liberal democracies responded to Russian aggression very differently than autocracies did. According to the Peterson Institute for International Economics, forty states (thirty-nine UN members plus Taiwan) have imposed sanctions on Russia in response to the Ukraine invasion.<sup>12</sup> Not surprisingly, none of the UN’s seventy-five autocratic states imposed sanctions. In contrast, thirty-five liberal democracies and five hybrid states have imposed economic sanctions.<sup>13</sup> Thus, slightly more than half of the world’s liberal democracies have collaborated to impose sanctions in response to Russian aggression. Perhaps more importantly, almost every liberal democracy with significant economic power has joined the sanctions coalition. Specifically, eighteen of the world’s twenty wealthiest liberal democracies—all except Israel and Argentina—have imposed sanctions on Russia. Collectively, those eighteen countries account for more than fifty percent of global gross domestic product (GDP).<sup>14</sup>

The forty states that are members of the sanctions coalition are mostly European.<sup>15</sup> However, the coalition also includes six states from the Asia-Pacific region (Australia, Japan, New Zealand, Singapore, South Korea, and Taiwan) and two states from North America (the United States and Canada). The sanctions coalition does not include any states from Africa or Latin America.

Skeptics may argue that states’ votes in the United Nations provide weak evidence of a commitment to liberal internationalism because UN votes are essentially cost-free. The same cannot be said, however, with respect to economic sanctions. European members of the sanctions coalition, in particular, have already incurred significant economic costs by blocking purchases of Russian oil. There is a significant risk that many Europeans could freeze this winter if Russian President Vladimir Putin blocks their access to Russian gas.<sup>16</sup> It is debatable whether states have chosen to incur those costs to uphold the principle of non-aggression

<sup>11</sup> Human Rights Council Res. 49/1, para. 11(a) (Mar. 7, 2022).

<sup>12</sup> Sanctions data is available from the Peterson Institute for International Economics. Chad P. Brown, *Russia’s War on Ukraine: A Sanctions Timeline*, PETERSON INST. INT’L ECON. (July 18, 2022), at <https://www.piie.com/blogs/realtime-economic-issues-watch/russias-war-ukraine-sanctions-timeline>.

<sup>13</sup> We classify Taiwan as a liberal democracy; Taiwan scores .699 on the V-Dem liberal democracy index. The five hybrid states are Singapore, Hungary, Poland, Bulgaria, and Slovenia.

<sup>14</sup> GDP information is based on 2020 IMF data, published at *GDP Ranked by Countries*, WORLD POPULATION REV., at <https://worldpopulationreview.com/countries/countries-by-gdp>.

<sup>15</sup> The coalition includes the twenty-seven members of the European Union, plus Iceland, Liechtenstein, Norway, Switzerland, and the United Kingdom.

<sup>16</sup> See Alex Lawson, “Gas Blackmail”: How Putin’s Weaponised Energy Supplies are Hurting Europe, *GUARDIAN* (July 15, 2022), at <https://www.theguardian.com/world/2022/jul/15/gas-blackmail-how-putins-weaponised-energy-supplies-are-hurting-europe>.

(which is not really a liberal norm) or to uphold core IHL principles (which are properly viewed as liberal norms).<sup>17</sup> We believe that states' willingness to incur the costs associated with economic sanctions manifest a principled commitment to both IHL and non-aggression. Indeed, the fact that the vast majority of states imposing sanctions on Russia are liberal democracies, combined with the fact that no autocratic states have chosen to impose sanctions, strongly suggests that the decision to impose sanctions is linked to a principled commitment to the liberal norms embodied in IHL.

### III. INTERNATIONAL HUMANITARIAN LAW AND THE EMERGING LIBERAL PLURILATERAL ORDER

IHL is a cornerstone of the liberal international order. Forged out of the tragedy of warfare in the nineteenth and twentieth centuries, when states agreed to limit their use of force to curb the excesses that manifested in two global conflicts, IHL seeks to balance military necessity with protection of civilians. Its core tenets are enshrined in the four Geneva Conventions of 1949,<sup>18</sup> the two Additional Protocols,<sup>19</sup> and customary international law. Well-established international institutions have played a key role in interpreting and implementing this body of law. World leaders and international organizations have emphasized that respect for IHL, which includes obligations to impose accountability for violations, is central to the rule of law<sup>20</sup> and the "rules-based [international] order."<sup>21</sup>

Russia's brutal tactics in the war in Ukraine are putting IHL, and the liberal values this body of law reflects, to the test. Multiple contemporary forces have already placed IHL under strain.<sup>22</sup> Yet the fact that IHL has weathered some of these challenges suggests it may well survive even Russia's flagrant violations in Ukraine. This Part examines two encouraging developments in the Russia-Ukraine context: (1) broad embrace of IHL norms by non-autocratic states; and (2) strong support for IHL accountability processes, also by non-autocratic states. In each case, the involvement of a worldwide coalition of liberal democracies and hybrid states is striking, and may indicate that IHL is a domain where the seeds of a new liberal plurilateral order are taking root.

<sup>17</sup> IHL principles are closely linked to human rights and the rule of law, which are liberal norms. Non-aggression is more closely linked to state sovereignty and non-intervention—norms at the heart of the emerging body of authoritarian international law. See Ginsburg, *supra* note 2.

<sup>18</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

<sup>19</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 UNTS 609.

<sup>20</sup> See Security Council Report, *supra* note 3.

<sup>21</sup> See U.S. Dep't of State Press Release, Anthony J. Blinken, Sec'y, U.S. Dep't of State, Virtual Remarks at the UN Security Council Open Debate on Multilateralism (May 7, 2021), at <https://www.state.gov/secretary-antony-j-blinken-virtual-remarks-at-the-un-security-council-open-debate-on-multilateralism>.

<sup>22</sup> Laura A. Dickinson, *The Jus in Bello Under Strain: Diluted but not Disintegrating*, in *IS THE INTERNATIONAL LEGAL ORDER UNRAVELING?* (David L. Sloss ed., forthcoming 2022).

### A. Norms

The resilience of IHL has emerged in the strong statements of world leaders condemning Russian violations. From international organization leaders, to non-autocratic governments around the world, to prominent civil society voices, a large swath of the international community has excoriated Russia for its numerous IHL violations in Ukraine. Indeed, when Russian forces bombed maternity hospitals and schools or executed civilians in the streets, public outrage grew so strong that it kindled a growing interest in IHL among the public at large in many countries, garnering extensive media coverage in liberal democracies and hybrid states.

Condemnation of Russia's IHL violations extends well beyond the European region and includes large numbers of liberal democracies and hybrid states, even as authoritarian countries have remained silent or tacitly supported Russian aggression. For example, Japan's Chief Cabinet Secretary, Hirokazu Matsuno, called Russia's suspected massacre of civilians near Kyiv a "serious violation of international humanitarian law" and a "war crime."<sup>23</sup> The transition team of the new South Korean President, Yoon Seok-yul, "strongly condemn[ed]" Russia's alleged massacre of civilians in Bucha and described it as "an act against humanity and a clear violation of international law."<sup>24</sup> Officials from Australia,<sup>25</sup> Canada, and New Zealand have made similar statements,<sup>26</sup> as have government leaders from the Marshall Islands and Colombia.<sup>27</sup> Moreover, as discussed in Part II, the votes in the United Nations, along with sanctions decisions, demonstrate that liberal democracies (and hybrid states) are much more likely than autocratic states to condemn IHL violations and impose costly sanctions. Collectively, these statements and actions reflect strong support for IHL as a cornerstone of the international legal order, embraced by liberal democracies and hybrid states around the globe (but not by autocratic states).

### B. IHL Accountability Processes

The war in Ukraine has also revealed the strength of IHL accountability processes, spawning a multi-layered array of investigative and prosecutorial efforts, including the COI discussed above. Perhaps the most significant international institution pursuing accountability for Russian atrocities in Ukraine is the International Criminal Court (ICC). Although Ukraine is not a party to the Rome Statute,<sup>28</sup> the ICC has jurisdiction over

<sup>23</sup> *In First, Japan Condemns Russia for "War Crime" in Ukraine*, JAPAN TIMES (Apr. 6, 2022), at <https://www.japantimes.co.jp/news/2022/04/06/national/japan-ukraine-civilian-killings-war-crime>.

<sup>24</sup> *Transition Team Condemns Russia's Alleged Massacre of Civilians in Ukraine*, YONHAP NEWS AGENCY (Apr. 8, 2022), at <https://en.yna.co.kr/view/AEN20220408005500315>.

<sup>25</sup> Australia Min. For. Affs. Press Release, *Australia and the UK Work Together to Get Vital Aid to Ukraine* (Mar. 28, 2022), at <https://www.foreignminister.gov.au/minister/marise-payne/media-release/australia-and-uk-work-together-get-vital-aid-ukraine>.

<sup>26</sup> See Michael Neilson, *Russia Ukraine War: NZ Supports International Call for War Crimes Accountability*, NZ HERALD (May 19, 2022), at <https://www.nzherald.co.nz/nz/russia-ukraine-war-nz-supports-international-call-for-war-crimes-accountability/IJLKMf24BBAWXRPIKUPLSNVEHU/>.

<sup>27</sup> Perm. Mission Alb. to UN Press Release, *Albania, Colombia, Denmark, Marshall Islands, the Netherlands and Ukraine Launch Group of Friends of Accountability Following the Aggression Against Ukraine* (Mar. 25, 2022), at <http://ambasadat.gov.al/united-nations/albania-colombia-denmark-marshall-islands-the-netherlands-and-ukraine-launch-group-of-friends-of-accountability-following-the-aggression-against-ukraine>.

<sup>28</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3 (*entered into force* July 1, 2002).

international crimes committed on Ukrainian territory because Ukraine issued declarations accepting the court's jurisdiction.<sup>29</sup> Almost immediately after Russia's invasion, ICC Chief Prosecutor Karim Khan announced that he would seek authorization to open an investigation.<sup>30</sup> A referral from forty-three states parties soon followed,<sup>31</sup> and the prosecutor promptly initiated an investigation into war crimes, crimes against humanity, and genocide in Ukraine.<sup>32</sup>

Significantly, states supporting the ICC investigation include not only European states, but also other liberal democracies from around the world. Non-European liberal democracies joining the referral include Australia, Canada, Chile, Costa Rica, Japan, and New Zealand.<sup>33</sup> Colombia, a hybrid state, also signed.<sup>34</sup> Significantly, no autocratic states joined the referral. It is also striking that the United States, a liberal democracy not party to the Rome statute and therefore unable to join the referral, has nevertheless welcomed the investigation.<sup>35</sup> The U.S. position is notable because the United States faces domestic legislative restrictions on certain forms of support for the ICC.<sup>36</sup> Indeed, the U.S. Congress is considering multiple bills that would loosen such restrictions.<sup>37</sup>

<sup>29</sup> Ukraine Declaration No. 61219/35-673-384 (Apr. 9, 2014), available at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>; Ukraine Declaration (Sept. 8, 2015), available at [https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine\\_Art\\_12-3\\_declaracion\\_08092015.pdf](https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaracion_08092015.pdf).

<sup>30</sup> Int'l Crim. Ct. Press Release, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation." (Feb. 28, 2022), at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

<sup>31</sup> Int'l Crim. Ct. Press Release, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, (Mar. 2, 2022) (Albania, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, New Zealand, Norway, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom), at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> [hereinafter Referrals from Thirty-Nine States]; Int'l Crim. Ct. Press Release, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Additional Referrals from Japan and North Macedonia; Contact Portal Launched for Provision of Information (Mar. 11, 2022), at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and> [hereinafter Japan and North Macedonia Referrals]; Int'l Crim. Ct., *Ukraine: Situation in Ukraine*, at <https://www.icc-cpi.int/ukraine> [hereinafter Montenegro and Chile Referrals] (noting that, in March 2022 and April 2022, Montenegro and Chile (respectively) joined the referral). Of the total of forty-three states, thirty-four are liberal democracies, nine are hybrid states (Albania, Bulgaria, Colombia, Georgia, Hungary, Poland, Slovenia, North Macedonia, and Montenegro), and none are autocracies.

<sup>32</sup> See Referrals from Thirty-Nine States, *supra* note 31.

<sup>33</sup> *Id.*; see also Japan and North Macedonia Referrals, *supra* note 31; Montenegro and Chile Referrals, *supra* note 31.

<sup>34</sup> See Referrals from Thirty-Nine States, *supra* note 31.

<sup>35</sup> U.S. Dep't of State Press Release, Statement of Beth Van Schaack, U.S. Ambassador for Global Crim. Just. (Mar. 23, 2022), at <https://www.state.gov/briefings/department-press-briefing-march-23-2022>; see also Missy Ryan, *U.S. Looks to Assist War Crimes Prosecutions Targeting Russian Leaders*, WASH. POST (Apr. 25, 2022), at <https://www.washingtonpost.com/national-security/2022/04/25/russia-ukraine-war-crimes-prosecutions>.

<sup>36</sup> Foreign Relations Authorization Act, Fiscal Years 2000 and 2001, Pub. L. No. 106-113, § 705 113 Stat. 1501A-405, 460 (1999) (codified at 22 U.S.C. § 7401(b) (2006)); see also American Servicemembers' Protection Act of 2002 (ASPA), Pub. L. No. 107-206, 116 Stat. 899 (codified as amended at 22 U.S.C. §§ 7421-7433 (2006 and West Supp. 2009)).

<sup>37</sup> See Ryan Goodman, *How Best to Fund the International Criminal Court*, JUST SECURITY (May 27, 2022), at <https://www.justsecurity.org/81676/how-best-to-fund-the-international-criminal-court>.

In addition, the Organization for Security and Cooperation in Europe (OSCE) launched an investigation into war crimes and other atrocities in Ukraine following the Russian invasion.<sup>38</sup> Initiated pursuant to the “Moscow Mechanism,” the investigation has already yielded a report that “found clear patterns of IHL violations by the Russian forces in their conduct of hostilities.”<sup>39</sup> The European Union has also pledged to support an investigation into war crimes in Ukraine.<sup>40</sup> Notably, twenty-three of the twenty-seven EU member states are liberal democracies. Although the OSCE includes some autocratic states, the vast majority of OSCE members are either liberal democracies or hybrid states.

Perhaps the swiftest-moving accountability processes for war crimes in Ukraine have been domestic. As with other accountability initiatives, liberal democracies are leading the way. As of this writing, Ukraine has convicted three Russian soldiers of “violating the laws and customs of war.”<sup>41</sup> According to the Ukrainian prosecutor general, tens of thousands of investigators are spreading out throughout the country to gather evidence of war crimes and other atrocities.<sup>42</sup> The office receives between two hundred to three hundred new war crimes cases each day, a total of 15,000 so far, and has identified eighty individual suspects.<sup>43</sup>

Multiple countries—all liberal democracies or hybrid states, not autocratic states—along with several multinational bodies, have offered support to Ukraine’s domestic prosecutorial efforts. For example, France, Lithuania, the Netherlands,<sup>44</sup> and the United Kingdom<sup>45</sup> have sent investigators to Ukraine. The Council of Europe has supported such domestic efforts by establishing an expert advisor group and training prosecutors.<sup>46</sup> Latvia, Estonia, Slovakia, the Czech Republic, Poland, the United States, and the United Kingdom, along with the EU and the ICC, have formed a joint investigative initiative to fund and support Ukrainian investigations, share evidence, and coordinate investigative efforts.<sup>47</sup> The initiative includes a cohort of senior war crimes prosecutors, investigators, military analysts, forensic specialists, and other experts who are advising Ukraine’s prosecutor general, as well as mobile justice teams.<sup>48</sup>

<sup>38</sup> OSCE, Report on Violations of International Humanitarian and Human Rights Law, War Crimes, and Crimes Against Humanity Committed in Ukraine Since 24 February 2022, ODIHR.GAL/26/22/REV.1 (Apr. 13, 2022), available at <https://www.osce.org/files/f/documents/f/a/515868.pdf>.

<sup>39</sup> *Id.* at i.

<sup>40</sup> Elena Sánchez Nicolás, *EU Will Support Investigation into War Crimes in Ukraine*, EUR. UNION OBSERVER (Apr. 13, 2022), at <https://euobserver.com/ukraine/154729>.

<sup>41</sup> Claire Parker, Ellen Francis & Annabelle Chapman, *Russian Soldiers Get Prison Terms in Second Ukraine War Crimes Trial*, WASH. POST (May 31, 2022), at <https://www.washingtonpost.com/world/2022/05/31/ukraine-russian-war-crimes-second-trial-sentencing>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> UK Foreign, Commonwealth & Dev. Off. Press Release, UK Dispatches War Crimes Experts to Help Ukraine with Investigations (Apr. 29, 2022), at <https://www.gov.uk/government/news/uk-dispatches-war-crimes-experts-to-help-ukraine-with-investigations>.

<sup>46</sup> Council of Europe Press Release, Council of Europe Expert Advisory Group Starts Its Work Supporting Ukraine’s Prosecutor General Office (Apr. 21, 2022), at <https://www.coe.int/en/web/kyiv/-/council-of-europe-expert-advisory-group-starts-its-work-supporting-ukraine-s-prosecutor-general-office>.

<sup>47</sup> Parker, Francis & Chapman, *supra* note 41.

<sup>48</sup> U.S. Dep’t of State Press Release, The European Union, the United States, and the United Kingdom Establish the Atrocity Crimes Advisory Group (ACA) for Ukraine (May 25, 2022), at <https://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine>.

Beyond Europe, states supporting investigative efforts include the United States, Australia,<sup>49</sup> the Marshall Islands,<sup>50</sup> Colombia,<sup>51</sup> and South Korea.<sup>52</sup>

Finally, at least eighteen other countries, none of which are autocracies, have started their own criminal investigations into war crimes perpetrated in Ukraine.<sup>53</sup> For example, relying on principles of universal jurisdiction, Germany has opened a “structural” investigation into war crimes in Ukraine, and two former ministers have lodged a formal complaint against thirty-three Russian officials.<sup>54</sup> Poland, where thousands of refugees are sheltering, has similarly initiated domestic criminal investigations and has already gathered “significant testimonies,” video, and photographic evidence.<sup>55</sup> Spain and Sweden have also initiated domestic criminal investigations of war crimes in Ukraine.<sup>56</sup> Beyond Europe, Canada has initiated a “national structural investigation into allegations of war crimes and crimes against humanity committed in Ukraine.”<sup>57</sup> In the United States, Russian atrocities in Ukraine have spurred a bipartisan effort to expand U.S. war crimes jurisdiction, opening the door to domestic prosecutions.<sup>58</sup>

Russia’s blatant atrocities in Ukraine present a challenge to the liberal international order. So far, the strong response across the international community is not only an encouraging sign of IHL’s durability, but also suggests the potential for a new alignment around liberal democracies and hybrid states. The overwhelming majority of non-authoritarian states, along with international organizations and many private actors, have reaffirmed their commitment to IHL norms and values and supported an enormous, multilevel effort to investigate and prosecute Russian atrocities. Moreover, the commitment to defend and enforce IHL norms can be found broadly among liberal democracies and hybrid states around the globe, transcending regional groupings and reflecting shared values. In contrast, the evidence from the Ukraine war shows that autocratic states are *not* willing to defend or enforce the liberal norms embodied in IHL. This alignment suggests that, in the domain of IHL, we can see the seeds of a new liberal plurilateral order.

#### IV. THE FUTURE ARCHITECTURE OF THE INTERNATIONAL LEGAL ORDER

Parts II and III show that state responses to Russia’s invasion of Ukraine have begun to sow the seeds of a liberal plurilateral order. Part IV contends that, for a liberal plurilateral order to

<sup>49</sup> Paul Osborne, *Australia Backs Russia War Crime Probes*, CROOKWELL GAZETTE (May 20, 2022), at <https://www.crookwellgazette.com.au/story/7746850/australia-backs-russia-war-crime-probes>.

<sup>50</sup> Perm. Mission Alb. to UN Press Release, *supra* note 27.

<sup>51</sup> *Id.*

<sup>52</sup> *Transition Team*, *supra* note 24.

<sup>53</sup> Loveday Morris, *An “Unprecedented” Effort to Document War Crimes in Ukraine. But What Chance of Justice?*, WASH. POST. (May 28, 2022), at <https://www.washingtonpost.com/world/2022/05/28/ukraine-war-crimes-investigations>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Lauren Baillie, *Ukraine: Justice for War Crimes Must Begin with Evidence: Democracies Must Immediately Support the Massive Task of Gathering Evidence Amid War*, U.S. INST. PEACE (Apr. 7, 2022), at <https://www.usip.org/publications/2022/04/ukraine-justice-war-crimes-must-begin-evidence>.

<sup>57</sup> Royal Can. Mounted Police Press Release, *A Statement by the Partners of Canada’s War Crimes Program on the Conflict in Ukraine* (Apr. 7, 2022), at <https://www.rcmp-gc.ca/en/news/2022/a-statement-the-partners-canadas-war-crimes-program-the-conflict-ukraine>.

<sup>58</sup> Charlie Savage, *Russian Atrocities Prompt Bipartisan Push to Expand U.S. War Crimes Law*, N.Y. TIMES (May 16, 2022), at <https://www.nytimes.com/2022/05/16/us/senate-bill-war-crimes-ukraine.html>.

flourish, more formal cooperation among liberal democracies is required, and liberal democracies—joined by hybrid states in some cases—must begin to create new plurilateral treaties and institutions.

### A. *The Case for New Plurilateral Treaties and Institutions*

For the past decade, China and Russia have been nurturing the growth of new international institutions, such as the Shanghai Cooperation Organization, that are committed to the development of authoritarian international law.<sup>59</sup> Those institutions contribute to the worldwide rise of autocracy and the corresponding decline of democracy.<sup>60</sup> Liberal democracies have a shared interest in resisting democratic decline and the continued development of authoritarian international law. Effective resistance requires more formalized cooperation among liberal democracies, in the form of new plurilateral treaties and institutions, particularly in two areas: reducing vulnerability to economic coercion, and building an information ecosystem consistent with liberal, democratic values.

Russia has exploited European dependence on Russian oil and gas as a tool of economic coercion to advance its objectives in Ukraine.<sup>61</sup> A Chinese invasion of Taiwan would trigger massive supply chain problems because several industries are highly dependent on Taiwanese manufacturers of critical computer chips.<sup>62</sup> These examples illustrate the danger that ensues when liberal democracies become overly dependent on powerful autocratic states—especially Russia and China—for critical materials and supplies.

It is neither realistic nor desirable to eliminate economic interdependence with China and Russia. However, compelling geopolitical considerations support a partial decoupling to reduce supply chain vulnerability in areas of strategic significance. Australia, India, and Japan recently introduced a “Resilient Supply Chain Initiative” (RSCI) to allay concerns about “security risks associated with production networks significantly embedded in, or connected to, China.”<sup>63</sup> The RSCI is a useful first step, but broader plurilateral cooperation is necessary to internalize supply chains within and among liberal democracies, and to reduce their vulnerability to Chinese and Russian economic coercion. A new plurilateral trade agreement linking democracies from Asia, Europe, Africa,<sup>64</sup> and the Americas<sup>65</sup> could help preserve efficiency gains associated with international trade, while also reducing dependence on China and Russia for strategically important materials and equipment.

<sup>59</sup> See Ginsburg, *supra* note 2.

<sup>60</sup> See note 1 *supra* and accompanying text.

<sup>61</sup> See Jonathan Hackenbroich & Filip Medunic, *The Kremlin’s Energy Warfare*, EUR. COUNCIL FOR. REL. (Apr. 29, 2022), at <https://ecfr.eu/article/the-kremlins-energy-warfare>.

<sup>62</sup> See Alan Crawford, Jarrell Dillard, Helen Fouquet & Isabel Reynolds, *The World is Dangerously Dependent on Taiwan for Semiconductors*, BLOOMBERG (Jan. 25, 2021), at <https://www.bloomberg.com/news/features/2021-01-25/the-world-is-dangerously-dependent-on-taiwan-for-semiconductors>.

<sup>63</sup> Amitendu Palit, *The Resilient Supply Chain Initiative: Reshaping Economics Through Geopolitics*, DIPLOMAT (Sept. 10, 2020), at <https://thediplomat.com/2020/09/the-resilient-supply-chain-initiative-reshaping-economics-through-geopolitics>.

<sup>64</sup> Under the criteria specified in Part II, Cape Verde is the only liberal democracy in Africa. However, if one reduces the threshold on the V-Dem index from .6 to .55, South Africa, Ghana, and Senegal would also qualify. For political reasons, new plurilateral treaties and institutions founded on a shared commitment to democracy and human rights must include some African countries. Those three would be good candidates.

<sup>65</sup> Major liberal democracies from Latin America include Argentina, Chile, Costa Rica, Peru, and Uruguay.

Information and communications technology (ICT) is another important area requiring plurilateral cooperation among liberal democracies. Russia and China have both developed sophisticated, socio-technical models of information management that emphasize surveillance and censorship.<sup>66</sup> Both countries are using modern information technology to spread misinformation about the war in Ukraine to global audiences in Asia, Africa, and Latin America.<sup>67</sup> More broadly, Russia exploits modern information technology to subvert democratic governance in existing democracies<sup>68</sup> and China exploits ICT to spread so-called “digital authoritarianism” to hybrid and autocratic states.<sup>69</sup> Although it is impossible to prove causation, there are reasons to believe that Chinese and Russian propaganda about the Ukraine war may have induced some states to abstain or vote against key UN resolutions.<sup>70</sup>

The United States and EU recently agreed “to develop a common analytical framework for identifying foreign information manipulation and interference.”<sup>71</sup> The goal is laudable, but the approach is flawed, because it represents a regional solution to a global problem. Chinese and Russian information warfare threatens democracies around the world, not just in Europe and North America. An effective response—designed to protect existing democracies and inhibit the use of ICT to spread digital authoritarianism—requires cooperation among leading democracies from Asia, Europe, Africa, and the Americas.

No existing international institution has the right membership and substantive focus to facilitate plurilateral cooperation among liberal democracies in the areas of information technology and supply chain resilience. Accordingly, leading democracies should establish new plurilateral treaties and/or institutions that bring together liberal democracies from different regions to reduce states’ vulnerability to Chinese and Russian economic coercion and to fight back against Chinese and Russian information warfare.

### *B. Obstacles to a Liberal, Plurilateral Order*

Creation of a liberal plurilateral order that includes states from Asia, Africa, and Latin America—as well as Europe and North America—will not be possible without strong, effective U.S. leadership. However, even with strong U.S. leadership, it is questionable whether other states will follow. President Trump’s foreign policy was overtly hostile to liberal democratic values, prompting a sharp decline in the level of trust in U.S. leadership globally.<sup>72</sup>

<sup>66</sup> See DAVID L. SLOSS, *TYRANTS ON TWITTER: PROTECTING DEMOCRACIES FROM INFORMATION WARFARE* (2022).

<sup>67</sup> See Samantha Hoffman & Matthew Knight, *China’s Messaging on the Ukraine Conflict*, AUSTL. STRATEGIC POL’Y INST. (May 23, 2022), at <https://www.aspi.org.au/report/chinas-messaging-ukraine-conflict>.

<sup>68</sup> See SLOSS, *supra* note 66.

<sup>69</sup> See Andrea Kendall-Taylor, Erica Frantz & Joseph Wright, *The Digital Dictators: How Technology Strengthens Autocracy*, FOR. AFFS. (Mar.–Apr. 2020), at <https://www.foreignaffairs.com/articles/china/2020-02-06/digital-dictators>.

<sup>70</sup> See David L. Sloss, *The US Should Ban China’s State Media from Social Platforms*, DIPLOMAT (May 19, 2022), at <https://thediplomat.com/2022/05/the-us-should-ban-chinas-state-media-from-social-platforms>.

<sup>71</sup> EU-U.S. Trade & Tech. Council, Second Ministerial Meeting, Factsheet Technology Outcomes (May 16, 2022), at <https://digital-strategy.ec.europa.eu/en/library/eu-us-trade-and-technology-council-factsheet-technology-outcomes>.

<sup>72</sup> In a survey of people from twelve nations near the end of the Trump presidency, only 17% said that they had confidence in the U.S. president to do the right thing regarding world affairs. Richard Wike, Jacob Poushter, Laura Silver, Janell Fetterolf & Mara Mordecai, *America’s Image Abroad Rebounds with Transition from Trump to Biden*, PEW RES. CTR. (June 10, 2021), at <https://www.pewresearch.org/global/2021/06/10/americas-image-abroad-rebounds-with-transition-from-trump-to-biden>.

Moreover, the United States itself experienced significant democratic decline, as measured by both the V-Dem liberal democracy index<sup>73</sup> and Freedom House's "Freedom in the World" database.<sup>74</sup> The risk that U.S. voters will reelect Donald Trump in 2024 is well known to leaders of other liberal democracies. "Why should we enter into new agreements with the United States?" they might ask, given that the next President Trump may simply repudiate those agreements.

On the other hand, it is far too early to write the obituary for liberal internationalism. When historians write the history of this decade, Biden's "Summit for Democracy," convened in December 2021,<sup>75</sup> may ultimately be seen as a critical step toward a new liberal plurilateral order. Authoritarian international law has clearly made significant gains over the past decade, but liberal international law could still stage a comeback. States have planted the seeds of a liberal plurilateral order in their responses to the war in Ukraine. Only time will tell whether those seeds receive the water and sunlight they need to grow into a mature liberal plurilateral order.

<sup>73</sup> The U.S. score on the V-Dem liberal democracy index declined from .852 in 2015 to .735 in 2021. *See* note 6 *supra*.

<sup>74</sup> According to Freedom House, the U.S. aggregate freedom score declined from ninety-three in 2013 to eighty-three in 2022. *See* note 6 *supra*.

<sup>75</sup> *See* U.S. Dep't of State, The Summit for Democracy, at <https://www.state.gov/summit-for-democracy>.