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Russia's War on Ukraine – An International Rule of Law Perspective

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Western businesses with operations in Eastern Europe and other global companies have reacted to Russia's invasion of Ukraine with shock, concern for their employees' safety and well-being, and a scramble to comply with the raft of sanctions levied against Russia as fighting began. Likely among the lower priorities for businesses would be consideration of the environmental, social and governance (ESG) implications of the conflict. Nonetheless, Russia's brazen military incursion does in fact raise critical considerations for the ESG programs of forward-thinking American businesses—namely the importance of the Rule of Law.

The Rule of Law

The ABA simply defines the Rule of Law as “a set of principles, or ideals, for ensuring an orderly and just society.” Expanding on that definition, the World Justice Project defines the Rule of Law as “a durable system of laws, institutions, norms and community commitment that delivers:

Accountability

The government as well as private actors are accountable under the law.

Just Laws

The law is clear, publicized, and stable; and is applied evenly. It ensures human rights as well as property, contract, and procedural rights.

Open Government

The processes by which the law is adopted, administered, adjudicated, and enforced are accessible, fair, and efficient.

Accessible & Impartial Dispute Resolution

Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.”

For corporations, support for the Rule of Law should be a critical component of their ESG and corporate social responsibility (CSR) practices because the Rule of Law is the foundation upon which any system of organized business depends. Much of this foundation is so elemental as to be taken for granted, such as in the creation of reliable private property rights, the laws that enable a contract to be enforceable, or an independent judiciary to adjudicate disputes. Without societal buy-in to the Rule of Law, the corporation, itself a creation of the law, would not exist. And while support for the Rule of Law has typically been viewed from a domestic legal standpoint, the crisis in Ukraine demands that businesses and business lawyers expand this horizon.

Russia's Breaches of International Law

Russia's invasion has provoked and upended international laws and norms dating back to the conclusion of the Second World War. By doing so, the world has gained an appreciation for the value of international law and also its fragility and difficulty to enforce.

Where does international law come from? There is no international congress to pass bills, as we might be accustomed to in the United States. A useful primer for what constitutes international law is found in Article 38 of the statute of the International Court of Justice, which directs that court to apply the following law in adjudicating disputes between states:

1. international treaties or conventions;
2. international custom, as evidence of a general practice accepted as law;
3. general principles of law recognized by civilized nations, and;
4. as a subsidiary means, national judicial decisions and the opinions of the highest qualified publicists. In reviewing the Russia-Ukraine war, it is easy to find applicable treaties and customary international law.

Perhaps the most well-known and fundamental tenants of international law, enshrined in both treaty and international custom, is that of a sovereign state's territorial integrity. Article 2 of the UN Charter obligates member states to refrain “from the threat or use of force against the territorial integrity of political independence of any state....” On its face, Russia breached the principal of territorial integrity when it invaded Ukraine, and based in part on Article 2, the UN General Assembly overwhelmingly passed on March 2, 2022 a resolution condemning the Russian invasion with the support of 141 countries.

Another set of laws that have received additional scrutiny with the Russian invasion but seldom understood in detail are the Geneva Conventions. The Geneva Conventions are a set of four separate treaties agreed to in 1949, as supplemented by three protocols, that establish detailed international legal standards for humanitarian treatment during times of war. The Conventions cover, in sequence, the treatment of the wounded and sick members of armed forces, the treatment of wounded, sick and shipwrecked members of maritime armed forces, the treatment of prisoners of war, and the treatment and protection of civilians in times of war, and become applicable in times of armed conflict or cases of partial or total occupancy of another state's territory. Broadly speaking, the Conventions prohibit the wilful killing, rape or other sexual violence, torture or other inhumane treatment of captured combatants and civilians.

War crimes under the Geneva Conventions are notoriously difficult to prove, but the disturbing evidence coming out of Ukraine strongly suggest that Russia has breached both the Conventions as well as customary international human rights law. The Russian siege of Mariupol has involved attacks against hospitals, indiscriminate shelling of non-military targets, and has prevented the International Red Cross from bringing needed humanitarian supplies to the city – all of which would constitute war crimes under the Conventions. As the Russian military retreated from the region surrounding Kyiv, the world's conscience has been shocked by scenes of atrocities committed by Russian forces against the civilian population such as torture, rape, and execution-style killings. Based on these and other reports, Human Rights Watch has issued a report alleging numerous breaches of the Geneva Conventions and other international laws, and war crimes investigators, including the chief prosecutor of the International Criminal Court, have flooded into Ukraine to document evidence.

While not enforceable international law, the UN Universal Declaration of Human Rights (the UDHR) contains several articles implicated by the Russian invasion, among them the right to life, liberty and security of person, the right to be free of torture or cruel, inhuman or degrading treatment, and the right to be free of arbitrary arrest, detention or exile. Important principles present in the UDHR are also present in the European Convention on Human Rights (the ECHR), to which Ukraine is party to and Russia remains a party to until September 16, 2022. Already, the European Court of Human Rights has issued a series of interim measures against Russia based on probable risk of violations of Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment or punishment), and 8 (right to respect for private and family life) of the ECHR, in each case urging the Russian government to detail measures taken to comply with these provisions.

While it is comparatively easy to point out breaches of international law on the battlefield, the implications of the Russian invasion also touch on international legal obligations toward Russian citizens within Russia, and the property rights of private companies doing business in Russia. The invasion has corresponded with a crackdown on freedom of expression and public dissent within Russia, with laws passed to criminalize critiques of Russia's military, demonstrate publicly against the

war or even to call the Ukraine war a “war.” Articles 10 (freedom of expression) and 11 (freedom of assembly and association) of the ECHR are implicated in this regard.

On March 5, 2022, the Russian government announced that Russian patents owned by companies from a list of “unfriendly countries” may be infringed without compensation to the patent holder. For affected businesses, this served to render their patent rights in Russia worthless, with speculation that similar orders will be issued for copyrights and trademarks. And indeed, shortly after the announcement on Russian patent rights, Russian courts have filled the gap by refusing to enforce certain trademark rights owned by foreign entities. By choosing to not enforce IP rights held by foreign nationals, but enforcing the rights of its own nationals, Russia is arguably breaching not only the Protocol 1 of the ECHR (protection of property), but also several international treaties regarding intellectual property, including the TRIPS Agreement and Paris Convention. *Id.*

Practical Implications

Forward thinking businesses and business lawyers need to be concerned about the rule of international law now and to push for accountability for Russia under applicable international institutions. Leaving this issue aside sets the stage for further atrocities and further disruption to global commerce. By making respect for the rule of international law a part of its ESG and CSR considerations, American corporations can help to shape and update the system of international laws that have allowed global commerce to prosper.

Armed conflict in violation of the UN Charter or violations of the Geneva Conventions impact American corporations on a spectrum. The implications to global business may take many forms, including the documented derogation of intellectual property or other rights, or human capital concerns in safeguarding employees or business partners. Corporations operating only in the US have also suffered the secondary effects of the conflict, including shocks to financial markets, supply chain difficulties, increased cost of goods and general economic uncertainty. In either case, the best interests of the corporation lie in continued respect for the International Rule of Law.

It is easy to chalk war up as just another force majeure event that any corporation will have to deal with and react to and to pass off concern for the International Rule of Law as idealistic folly. But as Russia has shown in the past few months, there is a new willingness on the part of certain state actors to fundamentally deviate from the norms that have allowed for unprecedented peace and prosperity in the post-war era, and further escalation should surprise no one. As a hypothetical, if Russia sees no issue to invalidate intellectual property rights, what will stop them from pulling out of the New York Convention on the Enforcement of Arbitral Awards? One critical reason international arbitration is the preferred venue for resolving global disputes is the parties' certainty that the award will be enforceable anywhere in the world, the great success of the NY Convention. How will parties manage risk and confidently conduct business in new markets if they cannot be certain their investment will be

protected and enforced?

Similar questions can be asked with respect to other critical tools of global commerce such as the UN Convention on the International Sale of Goods or bilateral investment treaties. As breaches of international law become normalized, the foundation of global business is further destabilized, to the detriment of American corporations. At a time that American corporations are doing business with globalized supply chains, instability in the legal structure governing those relationships will only compound issues.

What then can a corporation do to support the International Rule of Law? A few suggestions are:

- For businesses with operations remaining in Russia, to cease those operations until Russia withdraws from Ukraine and is held accountable for its breaches of international law.
- Be vocal in supporting international institutions such as the UN, the World Intellectual Property Organization, the International Chamber of Commerce and other global NGOs.
- Support reforms to the UN and other international organizations that will allow them to more effectively react to international emergencies.
- Lobby the Biden Administration and Congress to support international institutions that could hold Russia accountable for its crimes in Ukraine. While consensus is that the International Criminal Court (the ICC) is the body best equipped for this task, the U.S. has historically been hostile to the court and Congressional action has prohibited direct US support for the ICC. Recent developments have begun to shift long held political attitudes on the U.S., and U.S. corporations should assist in accelerating U.S. cooperation.
- Build out ESG and CSR platforms that educate corporate stakeholders on the importance of the International Rule of Law, and why it is important for corporations and global business at large.

Russia's invasion of Ukraine is many things: a humanitarian catastrophe, a turning point in European history and a symptom of a weakened respect for the rule of international law. As the world reacts to the invasion and plans for a new global reality, the corporation can and should do its part by strenuously advocating for the International Rule of Law as a fundamental tenant of its ESG and CSR programs.