AGGRESSION AGAINST UKRAINE

Territory, Responsibility, and International Law

THOMAS D. GRANT

Aggression against Ukraine

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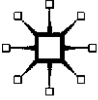

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Preface

Work on this book began in March 2014, instigated by the first formal act of annexation following use and threat of force against a State in Europe since 1945. The UN era had witnessed very few comparable events anywhere. Iraq's invasion and annexation of Kuwait in 1990 was the only episode quite like it—an attempt by one Member State of the United Nations to eradicate an international boundary and to annex the territory of another. Russia's armed intervention in Georgia in August 2008 was followed less than three weeks later by Russia's declaration that two parts of Georgia, Abkhazia and South Ossetia, were separate States. Seen in light of events in 2014, this forcible attempt to change the settled boundaries of a State augured what was to come. As the chapters in this book will argue, if the future is to be a time of armed seizures and forcible revision of territorial settlements, then the suppositions underlying international law in its modern formulation themselves will have to be revised.

Other situations over the past seventy years involved use of force and attempts to acquire territory. These, however, were isolated; almost all of them failed; and, in all of them, the target of acquisition was a colonial territory, not an existing State for which the territorial disposition already had been definitively settled. Argentina's attempt to impose an armed settlement in respect of the Falkland Islands was rejected in law and reversed quickly in fact. Earlier, Indonesia had attempted a similar forced solution to the status of East Timor. East Timor was a Non-Self-Governing Territory under Portugal's responsibility in accordance with Chapter XI of the UN Charter; annexation was not reversed immediately but was in time: Indonesia failed to achieve the permanent assimilation of East Timor. India's incorporation of the Portuguese territories of Goa, Daman, Dadra and Nagar Haveli in 1956 and 1961 ultimately succeeded. India's method—force—was rightly condemned; but this completed the re-consolidation of India after a long period of division and colonial rule and thus marked the achievement of India's right to self-determination, not the deprivation of another people's right. The territories under Portugal's control in India were certainly not part of Portugal, the position under Portuguese municipal law notwithstanding. No other State—least of all India—ever had accepted that they were. They were not States in their own right either. As for Tibet, the situation was more ambiguous, but the neighboring colonial power, Britain, and Russia as well, acknowledged China to hold legal rights over Tibet not consistent

with the independence of the latter and few States treated Tibet other than as a subordinate unit, even if, under China, it had wide-ranging rights. China's forcible re-introduction of its power into the region has given rise to difficulties—but this was not an attempt to overturn a settled disposition of territory.

Elsewhere, it was under municipal law—or through transmutations of the law within an existing municipal legal order—that new States emerged outside the organized procedures of decolonization. There were agreed separations, like that of the Czech Republic and Slovakia. There were separations in the absence of agreement—and attended by violence—when the legal order of the Socialist Federal Republic of Yugoslavia disappeared and new States took its place. Kosovo eventually emerged as well when, after negotiation and transition under multilateral administration over the course of eight years, it proved impossible to accommodate the peoples of that territory and Serbia in a single State. Earlier, after a violent, arguably genocidal, breakdown in the constitutional system, Bangladesh separated from the State of which it had been part, Pakistan.

In Kosovo and Bangladesh—the situations where separation took place against the wishes of a continuously functioning State—external armed interventions had been precipitated by humanitarian calamity and the destabilization of regional security. In both cases, the territories concerned were wracked by constitutional crisis. Radical changes in the municipal legal order were afoot before intervention began, and the changes continued after intervention under their own strength. These were situations in which continued participation in the State by one group in one part of the territory had come to be inconceivable in light of internal developments. The group asserted a separate existence through its own processes of development.

The UN era has witnessed a substantial practice in the pacific settlement of disputes, including disputes concerning territory. Territorial claims have mostly concerned relatively small areas along national frontiers, the general disposition of the frontier in most such cases not having been contested. Maritime boundary cases, by contrast, have involved very large areas of the seas. This is unsurprising, for the law of maritime entitlements emerged in relatively recent times. That so many maritime disputes have achieved successful settlement—whether through negotiation or judicial or arbitral procedure—reflects the resiliency of the general settlement among States. International law rejects use of force to determine sovereignty and other rights over spaces on the globe, and State practice in settling disputes as to the geographic boundaries of those rights (largely) accords with international law.

The professional milieu in which this work was written is that of public international law. My work over the past fourteen years has been a combination of advocacy before courts and tribunals, largely in inter-State cases, and legal research and teaching, mostly as a public international law generalist. I also have served as advisor to public and private entities in respect of public international law problems and have seen how political decision-makers, as well as their jurisconsults, reconcile the law and other considerations that sometimes conflict with law. This book is informed by the professional milieu in which it was written.

The book also reflects my interest in the history of States, particularly States in Europe but also States as part of the legal and political system that in the nineteenth century achieved a global scope. The emergence of the system imposed tremendous

costs on the societies directly affected by it; the European societies, which are sometimes said to have benefited the most from this, were not exempt. However, the world that eventually took shape in the twentieth century is one that holds a far greater potential for human security and human dignity than the one it replaced. The central underpinning of that world is the territorial settlement of 1945—not in the sense that every 1945 border must never be changed, but, instead, in the sense that no border may be changed by an act of violence between States.

As to the immediate background, this book began during a sabbatical year in which my principal project was a major monograph on the diversification of international actors in the era of the League of Nations. Law writers widely assume that access to international legal processes for entities other than States first became a matter of concern in the UN era and in particular in the period since the end of the Cold War. Yet the records of the League and of the diplomatic archives more generally show that a range of actors, peripheral at the time to the mainstream of international relations, sought to participate in the decisions that increasingly affected the international system as a whole. States besides those at the Peace Conference, communities that European States were not agreed really constituted States, and groups that were certainly not States were not silent in the League era. They sought to participate; and the institutions in which they sought to participate, though far from having definitive solutions to the problems this presented, were beginning to feel their way toward answers. What we think of as uniquely present-day problems of participation thus have an earlier history.

The relevance of this observation to aggression against Ukraine is this: certain problems that we thought were uniquely our own we see on closer inspection presented themselves to our forebears; and, inversely, certain problems that we thought were resolved some time ago we discover, in light of new crises, threaten to present themselves again. It is to the danger that we now face a recrudescence of inter-State violence in pursuit of territorial gain that this book is principally addressed.

The use of force against Ukraine has led to the annexation of Crimea. Russia since March 2014 has extended its armed operations to further parts of the territory of Ukraine. At time of press, the full ramifications of these events remain uncertain. It would be premature to say that further annexations are out of the question. As will be argued below, the true core of Russia's legal argument is that certain historical considerations—ethnic affinity in particular—provide grounds for changing inter-State borders, including by force. If such an argument becomes entrenched, then the scope for future aggression is vast. It would open the door to annexations at the expense of other States. Estonia and Kazakhstan have reason to believe that threats have already been made. It would be naïve to think that the problem would affect only the Eurasian borderlands of Russia.

The final word on events in Ukraine is yet to come, and it remains too early to say where Russia's territorial claims will lead. At present, there are many open questions. These include the taking of international observers as hostages and the implications of that conduct for peacekeeping and monitoring missions more generally; the aerial incident of July 17, 2014 and reparation for injuries in that connection; civilian casualties in the fighting in eastern Ukraine; and the question of how to apply humanitarian rules to conflicts having mixed characteristics of internal

armed conflict and external aggression—not to mention the prior factual question of whether internal armed conflict is a proper rubric under which to consider these events at all. Further annexations, or a repetition of the practice in Georgia whereby entities under armed patronage are separated from the State of which they form part, would have profound effects on the ground and on Russia's relations with its other neighbors, with regional organizations, and with international law. It is too early to form a complete view, but steps in October and November 2014 toward the putative independence of "People's Republics" in Donetsk and Luhansk suggest that territorial seizure under the cover of self-determination now belongs to the operational code of Russian foreign policy.

The almost immediate collapse of ceasefires in eastern Ukraine (Minsk I of September 5, 2014 and Minsk II of February 12, 2015) confirms that the situation remains fluid and unstable and that the ultimate limit of Russia's aims is not clearly in sight. The use of force against Ukraine in 2014 and the annexation of Crimea in March 2014, though belonging to a larger situation that is still developing, nevertheless have had sufficiently clear and discrete effects. It is for this reason that the chapters that follow chiefly concern themselves with those events and their effects on international law as rules and as system. Events in Ukraine no doubt will reach some closure at some later date—but that remains an indefinite prospect. If it is closure we want, then we might have to wait a very long time. Too much has happened already to refrain from responding.

Moreover, in respect of much of what has happened, important conclusions can already be reached. The present work aims to address what we know about the situation—and to do so before the damage is beyond repair. Russia's conduct has put values that form the foundation of the international system at stake. A necessary first step, and a central purpose here, is to draw renewed attention to the values.

The time for completing this book was made available thanks to the Hoover Institution at Stanford University, which hosted me as a W. Glenn Campbell and Rita Ricardo-Campbell National Fellow and the Edward Teller Fellow for academic year 2013–2014. The Hoover Institution provided, in addition to time and financial support, a delightful environment for work. Conversations with other National Fellows were a particularly enjoyable—and useful—part of the environment. I thank in particular (but without limitation as to others) Sarah Paine of the US Naval War College, Paul Rahe of the Departments of History and Political Science of Hillsdale College, and Gaurav Sood of the McCourt School of Public Policy at Georgetown. Among permanent Stanford faculty and Hoover fellows who shared valuable insights relevant to this work, I thank Norman Naimark of the Department of History, Ian Morris of the Department of Classics, Don Emmerson and Moria Paz of the Freeman Spogli Institute, Jenny Martinez of the Law School, Hoover Research Fellows Paul R. Gregory and Bert Patenaude, and Hoover Senior Fellows Thomas H. Henriksen, John B. Dunlop, and Abraham D. Sofaer. My time at the Hoover Institution was further enriched by conversations with National Security Fellows (2013–14) Colonel Eric Shirley (USA), Colonel Roy Collins (USAF), Lieutenant Colonel Matthew Atkins (USAF), Commander Steve Newland (USN), and Colonel Thomas Womble (USA National Guard). The National Fellows staff secretary, Heather Campbell, provided unceasingly cheerful support and guidance.

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The conclusions and opinions in the book are mine and do not necessarily reflect those of any of the persons or institutions mentioned here.

Thomas D. Grant
Cambridge, UK
February 23, 2015

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Abbreviations

AdV	*Archiv des Völkerrechts*
AFDI	*Annuaire français de droit international*
AJIL	*American Journal of International Law*
ARSIWA	ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001)
ASIL Proc.	*Proceedings of the American Society of International Law*
ATS	Alien Tort Statute (28 U.S.C. § 1350)
Baltic YBIL	*Baltic Yearbook of International Law*
BYIL	*British Yearbook of International Law*
Can. YBIL	*Canadian Yearbook of International Law*
CCPR	United Nations Human Rights Committee
Chic. JIL	*Chicago Journal of International Law*
CJTransL	*Columbia Journal of Transnational Law*
COE	Council of Europe
CPA	Coalition Provisional Authority
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
EJIL	*European Journal of International Law*
EU	European Union
GAR	UN General Assembly resolution
GA	UN General Assembly
German YBIL	*German Yearbook of International Law*
HRC	UN Human Rights Council
HRMMU	UN Human Rights Monitoring Mission in Ukraine
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (1966)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
ICJ Rep.	Case Reports of the International Court of Justice
ICJ	International Court of Justice
ICLQ	*International & Comparative Law Quarterly*
ICSID	International Centre for the Settlement of Investment Disputes
ILC Ybk	ILC Yearbook

ILC	United Nations International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IO	*International Organization*
JIDS	*Journal of International Dispute Settlement*
Mich. JIL	*Michigan Journal of International Law*
MPEPIL	*Max Planck Encylopedia of Public International Law*
NATO	North Atlantic Treaty Organization
OHCHR	Office of the UN High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PCIJ	Permanent Court of International Justice
RBDI	*Revue belge de droit international*
RdC	*Recueil des cours de l'Académie de La Haye* [*Hague Academy Collected Courses*]
RGDIP	*Revue Générale de Droit International Public*
RIAA	Reports of International Arbitral Awards
S/PV	UN Security Council Provisional Verbatim Record
SC	Security Council
SCR	UN Security Council Resolution
UNCLOS	United Nations Convention on the Law of the Sea (1982)
VCLT	Vienna Convention on the Law of Treaties (1969)
Virg. JIL	*Virginia Journal of International Law*
Yale JIL	*Yale Journal of International Law*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

Introduction

The Russian Federation in February and March 2014 employed its armed forces against Ukraine. This intervention by the Russian Federation in Ukraine quickly escalated to an act of territorial aggrandizement. For the first time since World War II, a State in Europe invaded a neighbor and forcibly annexed part of its territory. The purported incorporation of the Ukrainian territory of Crimea into the Russian Federation is, in the very least, a challenge to regional security. The present work argues that the challenge is wider than that.

International law as a system has grown and flourished since 1945 under conditions of basic stability in the relations between States. Radical social changes have occurred over the past seventy years, and internal strife has been the cause of enormous suffering. It is understandable that observers might overlook the stability in light of so much change and in light of the disastrous effects of internal armed conflict. However, as will be argued in the chapters that follow, the stability that now has been placed at risk is of central importance. To ignore the importance of stability in the specified sense is a mistake. Territorial claims are intractable claims. States long went to war over territory. Wars to prosecute territorial claims were typically intractable wars. If the system of law that emerged in and after 1945 has had one success, it has been its instalment of a settled understanding of territorial relations among States. States from 1945 onward very largely rejected force or threat as a mechanism to prosecute territorial claims. The handful of exceptions were almost entirely suppressed by a powerful (though in cases slow) systemic response. If the system of law has had other successes—for example, the growth of a law of trade, a law of investment, a law of human rights, a law to regulate the use of force—then those would not have been achieved without the stability of the inter-State system that the territorial settlement has fostered. The successes well may obscure how fundamental that settlement has been to all that followed.

The State, Territory, and International Law: The Annexation of 2014 as a Fundamental Challenge

An international order emerged in the aftermath of World War II unlike any that had existed before. This has been (or was) a quintessentially legal order. The treaty practice of States grew out of all proportion to what it had been before, as States

recognized that the volume, complexity, and subject matter of international contact had expanded vastly and thus they needed to agree on matters that earlier had little concerned them at the international level. In respect of certain matters, treaties between States were not enough; permanent organizations with their own capacities for decision-making and management were also needed. And, so, States entrusted substantial powers to multilateral bodies. States also accepted new forms of jurisdiction for the settlement of disputes. Legal rules and, as time went on, legal procedures became more and more important.

International law moreover came in new ways to benefit individuals and other organizations that individuals create besides States. Thus the regional human rights systems of Europe and the Americas afforded individuals direct access to international courts for claims against States. The network of investment treaties gave international actors in other important categories options for vindicating their rights above and beyond the institution of diplomatic protection. A free trade system emerged under a system of treaty rules containing its own mechanism for settling disputes. Monetary policy, too, became international policy with international rules and international organs. The natural environment, not long before only a marginal concern even in national legal systems, came to be another active concern of international law, and international institutions began to address environmental problems as well. "Global governance" might have been a neologism, but it was justified, for it described a real and new phenomenon.[1] In the second half of the twentieth century, global governance had become a phenomenon under a system of law.

All of this new development rested upon an old reality. As much as technology and changes in social and economic life have entailed transit across borders—movement of people, of goods, of money, of ideas—all people and all things at any given time exist in a given place; and, as far as most places are concerned, States remain sovereign.

The term "sovereign" is hardly a neologism; it is an old term. Modern lawyers (and historians and international relations theorists) have puzzled over it and, to a large extent, rejected it. It is a term with a bad history. It fronts for a concept that governments abused in the twentieth century and that governments resort to even now to insulate themselves when they commit new abuses. In its absolute form—which corresponds to its abused form—sovereignty implies supreme authority within their territory—authority unchecked by obligation and unchecked by mechanisms of accountability.[2]

Yet, even when encompassed by rules and procedures that respect basic values of human dignity, a certain aspect of sovereignty in its older sense remains: when we say that States exercise sovereignty, we mean that they exercise legal authority and concomitant incidents of physical control over territory. It is to ignore a fundamental reality of international relations—and international law—to ignore sovereignty; and, more particularly, it is a mistake to ignore the resiliency of the connection between sovereignty and place. The modern regime of international legal responsibility functions as a complete regime in modern conditions because it accommodates the potential disconnection between sovereignty and territory—States and the effects of their acts cannot be neatly restricted to one place, within one set of

boundaries; and so the regime that indicates the legal consequences of their conduct also functions when their conduct is extraterritorial. The core case of responsibility, however, concerns the exercise of the State's authority and control in a particular territory. That is to say, the State is responsible under law to other States—and in many situations to individuals and various non-State entities—for what it does, and for what it refrains from doing, in the territory that the law understands to be its own. We do not look to the government of the Kingdom of Cambodia at Phnom Penh to answer for acts or omissions of the police of the Bolivarian Republic of Venezuela in Caracas. In its modern, moderated form, sovereignty is not a license for the State to do what it pleases to anyone within its grasp; but where the State's hold is strongest is where its power is exercised in respect of territory.

This is another way of saying that the division of responsibility among States, for most cases that arise, is a division along territorial lines. The territorial link—the origin of sovereignty as power in and over territory and those who inhabit territory—is central. The sphere of action of the police, of the army, of the environmental protection agency, of the stock market regulator, of the monetary authority, of the human rights ombudsperson—of all the mechanisms of the State—is defined primarily by reference to the territory over which it is said, and over which it is accepted, that the State is sovereign. Malcolm Shaw had it right when he said that "the territorial definition of States" and the "law relating to territory" are of "the highest importance for the international system."[3] This holds true even in a world where diverse extraterritorial effects are now commonplace.

This point has been obscured by a number of developments. Sovereign power has always had the potential to radiate beyond its seat and into the territory of other sovereigns. The difference today is, first, one of degree: there is more interaction across borders than ever before. Second, it is one of kind: law and its institutions have developed new ways of addressing sovereignty to reflect the reality of a more interconnected world. Where cross-boundary acts have outpaced the law, the law needs to catch up. Attending to the legal problems, for example, of drone strikes in places far beyond the sending State's territory, or of investors integrally involved in a foreign State's economy, is not only justified but imperative.

There is also the vast growth of non-State actors and their impressive power in international relations. This development may well be seen to generate more difficult (and intellectually arresting) problems of international law than the exercise of power by a State within its ordinary physical bounds. Some thirty years of theory now exists about the diversification of international actors. This (non-State) branch of the international family tree is the main focus of whole disciplines and domains of policy and practice. Scholars observe that the largest business organizations now are more powerful than States and operate without regard to boundaries. In a compelling sense this is a fact of modern international relations. The earnings of the largest companies are greater than the GDP of some countries; and the largest companies operate almost everywhere. Then there are the rights and procedures that protect the individual against the State at the international level. There, too, the once all-powerful sovereign may be held to account—and even made to pay financial compensation. There is also a less benign undergrowth in the non-State realm—the violent individual or group acting across international

boundaries and at times going so far as to challenge the cohesion of States. There is a great deal to be said, and to be done, about participants in international relations that are not States.

There are limits, however, to a theory that posits the eclipse of territorial power. The limits become patent when that power shows its teeth. Even the largest non-State actor has few options at its disposal on the day when the local police shutter its offices or the national parliament nationalizes its assets. It is as helpless as it was a hundred years ago if its property and personnel are caught in the cross-fire of armed conflict. As for the individual, if the State chooses to lock him in a cell *incommunicado* for years at a time, the prospect that the new international order will vindicate his rights provides cold comfort at best. The legal institutions of a de-territorialized world may offer remedies later; but, on the day, the State's power is what matters, and the power of the State to destroy and to disrupt is unrivaled. Even in a world where diverse extraterritorial effects are now commonplace, the most potent incidents of State power remain those that the State exercises in its territory. This is a reality that may have submerged in the age of global governance, but it never disappeared.

It is this reality that entails a central—arguably, the most central—characteristic of the international order that emerged after 1945. To an extent that had not been seen before, a shared understanding exists of the territorial limits of each State's power.[4] The international order that emerged is, in short, an order of settled boundaries and enduring territorial settlements.

The emergence at the same time of a system of international law of unprecedented scope and effect is not a mere coincidence. The system of international law as it now serves us would not have come into being without the territorial settlement. This is because State power is territorial power; and international law begins with the proposition that each State knows where it may exercise power as a manifestation of its own legal order and where, absent special considerations of international law, it may not. Each State is responsible for the exercise of power in its territory. The vast majority of public institutions—including especially institutions of coercion—are still State institutions and, so, clarity regarding the territorial responsibility of States is indispensable if those institutions are not to fall into conflict. A legal system perhaps can survive in time of general conflict among States; but, if it does survive, it will be a system of bare minimums. Conflict between States is inimical to a public order based on rules.

A practitioner of the law, or a scholar absorbed in the remarkable realities of international law as it exists today, well may give little or no thought to the antecedents that made it possible for international law to achieve its present form. It has been a long time since the general public order was affected by States going to war over territory. Those incidents of territorial conflict that have occurred since 1945 have mostly concerned small areas, and the States in conflict have limited their claims to asserting an existing title. Before March 2014, few States—arguably none—asserted a right to change title by force. Territorial questions thus have been left to the margins, a matter for specialist lawyers and cartographers. The result has been a conception of international law and its institutions that takes the geography out of the law. In that conception, which is the prevailing one

today, the system of rules is now so potent and far-reaching that, having dissolved the old conflicts over territory and supplanted them with a regulated public order, the rules sustain themselves.

The rise of the non-State actor as a focal point of theory and of practice has played a major role in this conceptual development. How the State might breach its obligations to a corporation, how a State might abuse the rights of an individual—and what remedies against the State such parties have when injured—are central questions in the system as it has functioned over the past half century. But the injury that may be done when a State comes into conflict with another State is greater by far. The international legal system has not quite ignored this. By the same token, when it has addressed inter-State conflict, it has done so as a largely cautionary exercise,[5] seldom as a response to an actual eruption between States,[6] and never a war between major States endangering the system as a whole. That sort of conflict has been largely absent, or it has been confined to situations where it is really only a special case of State power directed against individuals—that is, a dispute in one form or another about how the deployment of force by a State affects human rights or humanitarian law. In turn, the absence of true, system-jeopardizing inter-State conflict reinforces the prevailing conception that the solutions to the present problems of international life are to be found in that supposedly self-sustaining international law system. Scarcely considered are the questions of whether the system is in truth self-sustaining and, if not, what sustains it. The present work means to sound a cautionary note about the prevailing conception and its omissions.

The law has inherent strengths as a means for bringing order to society. The purpose here is not to question the inherent strengths. It is instead to suggest that international law would not have emerged in its present form amid global disarray; and that the definitiveness and finality of the territorial settlement have been the central factor in providing the requisite minimum order. The territorial settlement has created and preserved the conditions in which international law has thrived. If the geographic limits of States' power had not been identified and agreed with definitiveness and finality, then the sheer growth of international governance would not have been possible. International law in its modern form has enabled its many practitioners and other stakeholders to think about things other than the territorial settlement; but that settlement remains the necessary precondition of the functioning of the law. It is dubious to suppose that international law in its present form would survive their loss. It is for this reason that a challenge to the territorial settlement requires a full response.

The present work concerns the most serious challenge to the territorial settlement since 1945. The annexation of territory from Ukraine, which the Russian Federation announced in March 2014, is one of the very few instances since 1945 in which a State has undertaken by force to impose a new territorial settlement. It is the first since 1945 in Europe. And it is the first in which a Permanent Member of the Security Council has sought by force to extend its own borders and thus to aggrandize its territorial power.[7] It not only threatens a Member State of the United Nations, but it also threatens the system that the stability and finality of the territorial settlement for seventy years has enabled to thrive. It is a threat of a character that international lawyers had assumed would not arise again.

Addressing the Challenge: An Unanswered Need

The annexation of Crimea is not the first modern incident to cause despondency to settle over those who study and practice international relations and international law. A prevalent view holds, with weariness, that this is yet another example of a large State using force without accountability and outside a system of rules. In that view, we have seen it all before. Those addressing the situation, even while examining its particulars, adopt an air of resignation over the whole.

That the State which carries out a serious breach of international law would adduce special considerations in its defense is to be expected. It comes as no surprise that there are apologists for annexation. The surprise is that the response to date in the mainstream of the field would be resigned in the face of an act so at odds with the modern law.

Resignation here is accompanied by a particular view of events, which, put succinctly, is this: Ukraine now reaps what other States have sown. This is the view, expressed by some, that armed interventions by other States in other places in recent times have been in essence the same and thus opened the door to the present crisis.[8] In this view, the annexation of Crimea belongs to a continuum of recent events, and this act—the disruption by force of the territorial integrity of a member State of the United Nations—is, at most, a change in degree from recent practice, but not a change in kind. As such, in this view, aggression against Ukraine merits no more alarm than past incidents, as it constitutes no more serious challenge against the legal system than what came before.

The present work takes a different view. It does not accept that the invasion and putative partition of Ukraine in 2014 is an event to which the door was opened by interventions in Kosovo or Iraq. It considers instead that aggression against Ukraine marks a potential turning point; that international law therefore must respond to it as strongly as possible to reject or to isolate its effects; and that, for the law to do so, those who interpret and apply the law must recognize the fundamental discontinuity between the recent past and the present act of aggression, however controversial the recent past may be.

When considering arguments that rely upon history it is important not to confuse the timelines. On the date of Russia's aggression against Ukraine, eleven years had elapsed since a coalition of States intervened in Iraq and forcibly replaced the government of that State. Zhou Enlai may have told Henry Kissinger in the early 1970s that it was still too soon to assess the impact of the French Revolution—though the timelines there indeed seem to have been confused; it later became clear that he was talking about the 1968 student unrest, not the events of 1789.[9] Either way, the passage of time is relative. In relation to the Russian intervention against Ukraine, virtually no time at all passed before radical claims and radical steps in the pursuit of those claims appeared in alarming succession. The president of the Republika Srpska declared that the separation of Crimea from Ukraine "will create a new practice in the world" and the time would be soon at hand for the dissolution of Bosnia and Herzegovina.[10] Some weeks later the China National Offshore Oil Corporation (a State-controlled enterprise of China) placed a drilling platform in an area subject to Viet Nam's maritime entitlement; China threatened to impose its competing

claim by force and deployed a frigate and air force planes, evidently to show that the threat was earnest.[11] A non-State entity, the self-fashioned Islamic State, some months later went on the march from a base in Syria to take effective control of large parts of Iraq—and to declare the end of the boundary between those States.[12] Its goals are explicitly territorial—that is, to establish and maintain a State with jurisdiction over extensive areas of the Middle East.[13] Iran, for its part, suggested that it has a special interest in the Shiite shrines at Karbala, Najaf, Kadhimiya, and Samarra in Iraq.[14]

Russia's neighbors and other States formerly belonging to the Warsaw Pact or having emerged out of the USSR interpreted the annexation as auguring further aggression in those areas as well. Poland moved to activate NATO's consultation mechanism under Article 4 of the North Atlantic Treaty.[15] Defense budgets increased accordingly—and with little delay.[16] Even States that had enjoyed warm relations with Russia began to wonder where Russia's *irredenta* will end. The Kazakhs, whom the Russian president in August 2014 said "had never had statehood,"[17] were alarmed.[18] Belarus in January 2015 adopted legislation stating that hostile acts by foreign forces, whether or not wearing the uniforms and bearing the insignia of a State, would be considered an invasion,[19] a response to Russia's chosen methods of warfare in Ukraine. The main regional organizations appreciated that the concern over Russia's intentions was not contrived; it was justified by the facts.[20] Statements such as the one made by the deputy prime minister that Russia has a right to annex Alaska[21] would seem to belong to the realm of fantasy; but threats against Estonia were backed up on the ground (including on Estonian ground).[22] New threats and new acts, as well as reactions to those threats and acts, presented themselves within weeks, even days, of the deployment of the armed forces of the Russian Federation in Ukraine, and they continued.

If proximity has anything to do with causation, then the more natural claim is not that the interventions in Kosovo and Iraq, over a decade before, opened the door to a brave new world, but, rather, that the real risk of a systemic crisis came into being in March 2014—when Europe witnessed the first forcible annexation of territory it had seen since 1945; and, for the first time in the UN era, a State that was supposed to have been a principal guarantor of the international system attempted to undo the settlement on which that system is based. The rest of the world was watching; and the conclusions drawn had immediate results in practice.

Historians concern themselves with questions of continuity and change. Does a particular event reflect the continuation of an existing trend? Or is it, instead, the starting point of something new? Lawyers concern themselves with precedent, which, after the standard definition, is to ask whether a particular act furnishes an example by which a comparable subsequent act may be justified.[23]

Questions of precedent thus are questions of comparison. It is impossible to say whether an act is a precedent unless one reaches a judgment as to whether the act and a subsequent act that one seeks to justify are comparable in a legally meaningful way.

Lawyers earn a bad reputation for making fine distinctions that do not sound in the layperson's observed reality. A point may be arrived at where parsed words and dubious contrasts undermine confidence in the law and thus instigate the law's revision. But the law equally falters if it ignores the real distinctions between varied

cases. Whatever the rules of the legal system, the system depends on the art of distinction. It is the role of the judge to recognize valid comparisons when they are made and to reject the others.

It is a purpose of this book to judge the comparisons. To do so is not a mere theoretical exercise. To say that one act or set of acts is like another is to lend the latter the same legal status as the former. If one is rejected, the other is to be as well; if one is valid, the other is valid too. The other act, once validated, is all the more likely to give rise to more of its kind. Valid acts tend to have progeny.

Precedent thus is both backward looking and forward looking. To apply precedent is to apply history to a recent event and then to invite those who judge events to declare either that it is not meaningfully similar to the historical case; or that it belongs to a trend—that is to say, that that event, too, is now a precedent by which to judge future events, and all the more persuasively, because it is not exceptional, fresh, or untested but, instead, forms part of, and increasingly entrenches, an existing practice. Judgment relies on comparison and, more particularly, on the conclusion that one draws having made a comparison, that the acts compared are equivalent. If the equivalence that is posited between acts is false, then it is the job of the scholar to say so. A system of reasoning that relies on precedents must get its precedents right. If it does not, then the system cannot credibly function.

To express the matter in the historian's terms, this book argues that aggression in 2014 against Ukraine is not a continuation of an existing trend but, instead, a possible turning point.

That is to say, aggression against Ukraine *will be* a turning point—if we let it. When one of the eminent legal realists talked about the "responsibility for the precedents which their present decisions may make," he was talking about the judgments that judges reach.[24] A precedent is not an event in isolation; it is the judgment reached about an event. In considering aggression against Ukraine, this book considers the precedents and in so doing undertakes a larger task. It undertakes to challenge the position, which unfortunately seems to be gaining ground, that international law now has little or nothing to say in judgment about use of force at all. The book to this end re-examines intervention in Kosovo and Iraq, and considers how, if at all, they may be relevant to intervention in Ukraine. Even an act that everyone agrees constituted a breach, even a grave breach, does not displace the law. And so it falls to those who practice and think about the law to apply it even *in extremis*.

It is to be hoped that, if nothing else, the point is taken that the situation that now has emerged following the forcible seizure of territory from Ukraine is fraught with danger. It may mark a turning point between an era of relative stability, with the many opportunities that stability brings, and a new era of much less certain contour. The question is whether international relations now enters a new and violent phase in which States seek to vindicate their territorial claims by force. A great deal turns on the answer that we give.

General Outline

The present work is organized in three Parts. Part I, comprising Chapters 1, 2, and 3, addresses the seizure of territory in Ukraine by the Russian Federation and the

emerging international response. Part II places those events in their wider context. It argues that the preservation of the territorial settlement among States—that is, the maintenance of the proposition that boundaries are not to be changed by force—is a foundational value of the international system. It is a foundational value in the sense that it runs through the entire corpus of modern international law; attacks on it trigger special obligations on the part of the international community as a whole; the priority attached to it is greater than that attached to virtually any other value in the system; and the other values of the system have little prospect of flourishing if it ceases to operate. Part III, containing Chapter 8, considers Russia's radical argument—namely, that Western interventions in Kosovo and Iraq threw open the door to Russia's territorial seizures in Ukraine, an argument that does not rest upon the established law but, instead, posits the complete displacement of law from inter-State relations.

Chapter 1 begins by considering the municipal law framework in which the annexation of Crimea took place. Because municipal law taken on its own cannot explain even an agreed change of territorial responsibility between States, the chapter then turns to international law—in particular, Russia's assertion that Crimea has exercised a right under the modern law of self-determination. Chapter 1 concludes by considering Russia's case that Crimea constituted an independent State, recognized as such, and to which the annexation of March 21, 2014, was open as a free act.

Chapter 2 considers Russia's further legal arguments that use of force against Ukraine was lawful.

Chapter 3 turns to the response that States and international organizations have adopted to the annexation of Crimea, as well as the response that may emerge in international claims practice. It compares the response to other situations involving use of force. It considers as well the legal consequences that may arise from non-recognition of the forcible seizure of Ukrainian territory.

Chapter 4 relates the response to annexation of Crimea to the system of international law that has taken shape since World War II. In particular, Chapter 4 considers how the territorial settlement is reflected throughout the international law system. International law privileges boundaries and territorial settlements. States can enter into agreements in respect of a great variety of subject matter, but when they settle their boundaries special rules apply. Boundaries do not change except by consent, and for a State to consent to change its boundary, it must consent clearly, unequivocally, and from outside the shadow of force or threat. Chapter 4 recalls the centrality of boundaries and the territorial settlement across a range of legal instruments and situations, and draws attention to how the international order as a whole relies upon the preservation of the territorial *status quo*.

The response that is required when a State has used force to effect a putative change in the territorial settlement is the subject of Chapter 5. The rules that apply to boundaries and the territorial settlement are special not only in the manner in which they entrench against forcible change. The breach of the rules triggers a special response. The rules concerning the liability of States—what international lawyers know as State responsibility—mostly concern the obligations that are imposed on a State that has violated a rule and in so doing injured another State: State A commits a wrongful act, and that act injures State B; as a result State A is now obliged

to make reparation to State B. This is the usual situation; and in the usual situation State responsibility entails only the new obligation—the obligation of the State that has committed the breach to make reparation to the State that it has breached against. However, when a State attempts to change a boundary by force, the wrongful act triggers not only the responsibility of the aggressor to make reparation to the victim of the aggression, but also an obligation on the part of all States not to recognize the putative change. This means that States that would have no legal relation to an ordinary transaction between State A and State B (or for that matter to an ordinary breach by State A against State B) are necessarily involved in the unlawful acquisition of territory: they are obliged not to recognize it. Non-recognition is the mechanism that international law has developed to respond to the unlawful acquisition of territory. The application of this mechanism reflects the grave and distinctive character of that breach.

Chapter 5 having considered how international law responds when use of force undermines the territorial settlement, Chapter 6, by way of contrast, considers the use of force when it is not the territorial settlement but other values that are affected. It is not in every case that the unlawful use of force has affected the foundational value embodied in the territorial settlement. Considering the *Oil Platforms* case in particular (claim and counterclaim), Chapter 6 argues that use of force is not necessarily judged against absolute rules. It may be judged in light of the other legal values that a breach affects.

Chapter 7 considers boundaries, territory, and human rights. A paradox emerges when the effects of human rights on the territorial power of States are considered. It may be that the proliferation of substantive human rights rules and of procedures for implementing those rules have qualified the significance of the State as a mechanism for the exercise of power in territory. How important can the State's territorial power remain, when the State can now be challenged in so many ways by so many actors? It is the stability of the territorial settlement, however, which gave the human rights system the foundation on which it grew in scope and strength. In view of the underlying relation between the territorial settlement and the human rights project, could it be that human rights law, if it has become an all-powerful solvent of territorial power, risks undermining itself? Chapter 7 suggests that it is short-sighted, and indeed ahistorical, to see modern human rights as the "end of geography." The chapter then considers the broader goals that seem to underlie Russia's annexation. It is submitted that a territorial plan and a general attack against the modern human rights system go hand in hand in present Russian policy.

Chapters 1 and 2 considered Russia's legal arguments, which at least roughly fit within the confines of modern international law. Chapter 8 turns to Russia's more problematic claim. Russia says that its conduct in Ukraine is comparable to NATO's intervention in Kosovo (1999) and the Coalition's intervention in Iraq (2003). Moreover, Russia suggests that the earlier interventions have overturned the limits on use of force and rendered the principle of territorial integrity obsolescent as against certain putative historical rights. To say that those interventions had such a transformative effect on the law is to lay down a grave challenge to the law. It is for this reason, and for the reason that the gravity of the challenge has not yet been well recognized, that the arguments must be addressed.

PART I

Aggression against Ukraine

Aggression as a concept of international law has uncertain limits but a relatively uncontroversial core. It is a concept that applies to the responsibility of States. It also applies in the field of individual criminal responsibility, though there the questions it raises remain more controversial. The acts of force by the Russian Federation in 2014 against Ukraine, it will be argued in the chapters that follow, have no legal basis. Moreover, considering in particular the territorial objectives behind them, these are acts of aggression.

The parameters of the term "aggression" were contentious at the time of the League of Nations[1] and remained so after. States deliberated at the Dumbarton Oaks Conference whether to incorporate a definition into the UN Charter and decided not to.[2] The question of how to define the term then absorbed the International Law Commission in a long debate, starting in connection with the draft Code of Offences against the Peace and Security of Mankind.[3] The General Assembly added the question of defining aggression to its agenda in 1952;[4] it took until 1974 to adopt a Definition of Aggression.[5] In the interval, States and jurists wrestled with the concept in multiple forums, including the UN Sixth (Legal) Committee and a Special Committee that the General Assembly created to formulate a draft text.[6] Two decades of work in the Special Committee led to the creation of a Working Group and three Contact Groups, and, finally, a draft definition.[7]

The task of formulating a draft Code of Offences against the Peace and Security of Mankind, to which can be traced the later Statute of the International Criminal Court, itself was expressly connected to the Charter of the Nuremberg Tribunal.[8] This did not mean that "the Nürnberg principles would have to be inserted in their entirety in the draft code"[9] (much less in the future ICC Statute). The principles nevertheless furnished a necessary reference point under the mandate of the General Assembly to address aggression. What that precisely meant would be a matter of controversy. Certain States would argue that the moment of Allied victory at the end of World War II was very different from later decades, the post–Cold War decades in particular (in their view) having given rise to a more "complex international political situation."[10] In that view, a 1945 concept of aggression would have

limited applicability.[11] It will be suggested in Chapter 4, however, that the settlement achieved at the end of the war has enduring significance, particularly with regard to how international law conceives of and responds to aggression.

Of the crimes over which the Nuremberg Tribunal was to exercise jurisdiction, the Tribunal's Charter started with the following:

> (a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[12]

The Tribunal, in applying this provision, did not find the definition of "aggression" particularly problematic. It saw no need to set out a definition.[13] A distinction was made between "aggressive acts" and "aggressive war"—the invasion of Poland having been the first instance of "aggressive war" subject to the Tribunal's jurisdiction; the annexations of Austria, the Sudetenland, and Bohemia and Moravia having been "the first acts of aggression" by Germany but not war acts as such.[14] Jurists saw no serious difficulty in establishing the existence of such a wider category, even as its precise limits remained uncertain.[15] Some thought that attempting to define the concept "would prove to be a pure waste of time."[16] The American delegation at the London Conference had proposed a definition; the Soviet delegate said that there was no point in defining the term: "When people speak about aggression," the Soviet delegate said, "they know what that means."[17]

The definition of aggression as the General Assembly eventually adopted it (by GAR 3314 (XXIX) of December 14, 1974) indicates a wide range of acts. It indicates relatively transitory acts—such as bombardment of one State's territory by the forces of another (Article 3*(b)*). It also encompasses intrusions into the territory of the State by forces other than the regular armed forces of the aggressor. Thus, "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State" of gravity sufficient to amount to one of the other enumerated examples of aggression itself constitutes aggression (Article 3*(g)*). Though no hierarchy is necessarily to be inferred from the structure of Article 3, the first subparagraph (of seven) specifies as an act of aggression:

> The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.

The definition thus in the first instance relates to armed attacks upon the territory of a State and, in particular, includes such attacks that involve some installed presence of the attacker, whether occupation (even brief occupation) or annexation.

The drafting work in the late 1990s on the eventual Statute of the International Criminal Court (ICC) led to renewed debate over aggression.[18] Views differed as to which acts should be considered aggression for the purposes of international criminal responsibility. The General Assembly definition in 1974 concerned the

responsibility of the State as aggressor. The ICC drafters were concerned with a different domain of law—the responsibility of individuals. Some States in the drafting process favored including the widest possible range of acts. This approach implied a direct parallelism between the General Assembly definition and the emerging international criminal law.

A wide definition did not attract consensus. The drafters moved toward a compromise approach. As the representative of Germany said, a "compromise" approach would...

> mention [...] the most important cases of the use of armed force that constituted crimes of aggression, in particular, armed attacks undertaken in violation of the Charter of the United Nations, which had the objective of, or resulted in, the military occupation or annexation of the territory of another State or part thereof.[19]

This was not to restrict the definition to the case in which use of force leads to occupation or annexation, but it suggested that aggression concerns that case in a central way. It was even suggested that annexation was "an essential element" of the definition.[20] By no means did that suggestion attract consensus; certain States at the Diplomatic Conference were clear that other elements were important.[21] Nevertheless, the relevance of territorial aggrandizement was uncontroversial. And so it had been even in 1952, when Fitzmaurice, who cautioned against adopting a list of examples, still affirmed that "invasion of the territory of a country with the object of conquering it is clearly aggression."[22]

Nearly sixty years later, at the Rome Statute Review Conference in Kampala, the States Parties agreed that the crime of aggression is to include "any annexation by the use of force."[23] The Review Conference marked a shift in approach whereby the States Parties agreed to incorporate into the Statute the elements of the crime of aggression as indicated in GAR 3314 (XXIX)—that is, a broad rather than a compromise approach. Across the years of debate, however, nobody doubted that forcible annexation constitutes an obvious example of the crime. Whatever the outer limits of the definition, an unlawful act or threat of force leading to the seizure of territory constitutes a case at the core.[24]

A question may still exist whether a *lawful* act or threat of force may result in a lawful change of boundary without the consent of the other State involved. Under both State and individual responsibility, the armed act of annexation, even if the use of force overall were lawful, would still seem likely to constitute a breach. This conclusion is hinted at in the jurisprudence of the ICJ, if not spelled out completely.[25] Chapter 4 submits that the better view is indeed that even the lawful use of force does not open the door to forcible acquisition of territory; no forcible change is allowed, and, so, the lawfulness or otherwise of the use of force is not material if it is by force that one State takes the territory of another. To the extent that it might, however, it is necessary to address the various arguments that the Russian Federation made in defense of use of force against Ukraine: if forcible acquisition of territory after a lawful use of force is or can be legal, then a convincing legal basis for use of force may cure the illegality of the attempted acquisition.

Then there is the more plausible position: lawfulness of the forcible act itself does not render lawful the annexation that that act effectuates. Under that position, another branch of Russia's legal argument must be addressed, namely, the proposition that the separation of Crimea resulted in a new State and that that new State freely elected (as any State may do) to join another State willing to have it. This would not be to cure the unlawfulness of forcible annexation, but, instead, to claim that the annexation in question was not by force. Chapter 1 examines the Russian argument that Crimea has joined Russia in vindication of the modern right to self-determination. Chapter 2 considers Russia's arguments that use of force was justified on other legal bases. The international response to those arguments—and to the situation on the ground—is the subject of Chapter 3.

CHAPTER 1

"Glory and Outstanding Valor": The Seizure of Crimea

The Russian Federation by a municipal law act dated March 21, 2014, purported to annex Crimea, a territory of Ukraine.[1] No municipal law act of Ukraine or international instrument between Russia and Ukraine provided for a transfer of territory. No negotiation between the Russian Federation and Ukraine, or between the putative authorities of Crimea and the central government of Ukraine, preceded the act of annexation. From on or about February 26, 2014, Russian armed forces, some of which were already present in Crimea under basing agreements in which Russia, inter alia, had affirmed the territorial integrity of Ukraine within the borders existing at the time of independence, were deployed throughout the territory.[2] The Russian forces quickly seized effective control. The process of annexation was completed in a little over three weeks. The president of the Russian Federation, invoking the "glory and outstanding valor" of past generations of Russians in Crimea, identified the transaction as an historic achievement.[3]

No international observers were present in Crimea during this time, and no multilateral process of any kind was involved in the annexation.[4] No credible evidence existed to suggest that the inhabitants of Crimea, or any group of inhabitants of Crimea, had grievances for which even the most speculative theories of self-determination would justify secession as a remedy.[5] Ukraine has not acceded to the separation of Crimea from its territory. Crimea was annexed by an act of armed aggression by one Member State of the United Nations against another, the former having the obligation under a range of specific and general rules to respect the territorial integrity of the latter within the borders existing at the time.[6]

The prohibition against threat or use of force in relations among States forms a foundation of the modern international order, limited exceptions being embodied in the saving clause in Article 51 of the UN Charter, which recognizes the "inherent right of individual or collective self-defence." The rule guaranteeing the territorial integrity of every State against forcible disruption by another State is even more fundamental to the modern international order.[7] While incidents of the unlawful use of force by a State will attract international responsibility to that

State, a putative change in an international boundary arising out of use of force by a State not only attracts international responsibility to that State; it results in a general obligation opposable to all States. This is the obligation not to recognize the putative change as lawful. It is expressed in paragraph 2 of Article 41 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts.

The consequences of the purported annexation of Crimea, including international responsibility, will be considered further in Chapter 5. The present chapter considers the national law acts (Ukrainian and Russian) involved in the purported annexation of Crimea and then begins to consider the arguments that Russia made in its attempt to justify the use of force and the separation of Crimea from Ukraine. Chapter 8 will return to the question of use of force in order to address Russia's more problematic claim, namely that a fundamental shift has taken place from the established rules and that under new rules Russia's conduct is to be exonerated. Addressing that claim entails addressing the two most significant episodes of use of force between the end of the Cold War and 2014—the interventions in Kosovo (1999) and Iraq (2003).

As for the present chapter, the established rules, municipal and international, are the starting point.

Acts in Two Municipal Legal Orders

For a territory to be separated from one State and to join another entails, at a minimum, acts in two municipal legal orders. A referendum taking place in Crimea while that territory was still part of Ukraine purportedly separated Crimea from Ukraine; and then a treaty between an independent Crimea and Russia supposedly incorporated the former into the territory of the latter. While this series of transactions was thus claimed by Russia to involve not two but three States, and while a treaty is an international law act, for purposes of analysis it is useful to begin with the legal acts of the two existing States involved, Ukraine and Russia. The possibility of a legal basis for the independent existence of a Crimean State then will be considered.

The Putative Emergence of a New State in Ukraine

Crimea under Article 134 of the Constitution of Ukraine is an "inseparable constituent part of Ukraine." Article 138, paragraph 2, provides that Crimea may organize referendums but only of a "local" character.

The main legislative organ of Crimea on March 6, 2014, adopted a decree *On the all-Crimean referendum*. The resolution presented two options to the voters of Crimea:

> "1) Do you support the reunification of the Crimea with Russia as a subject of the Russian Federation?
>
> 2) Do you support the restoration of the Constitution of the Republic of Crimea as of 1992 and the status of the Crimea as a part of Ukraine?"

These questions were put to the voters on March 16, 2014.

The Ukrainian government did not participate in the referendum, except to make clear that it was *ultra vires* the Constitution: the Constitution does not allow one region to hold a referendum for the purposes of changing the territorial configuration of the State.[8] The government also made clear that the conduct of the referendum was not credible on the basis of general political considerations either. On March 7, 2014, the acting president of Ukraine suspended the Crimean decree that had called the referendum.[9]

The question of the referendum decree was also submitted to the Constitutional Court of Ukraine for an opinion as to the accordance of the decree with the Constitution. The Constitutional Court indicated that only under an all-Ukrainian referendum could a proposed change to Ukraine's territory be lawfully addressed; and that only the Parliament of Ukraine had authority to call such a referendum.[10] The Constitutional Court required the Crimean authorities to repeal the referendum decree and to refrain from carrying out or financing the referendum.[11]

A number of provisions of the Constitution of Ukraine entrench the territorial integrity of the State. Article 157, paragraph 1, of the Constitution provides as follows:

> The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human rights and citizens' freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.

Article 73 provides that "issues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum."

The Venice Commission of the Council of Europe in an Opinion adopted March 21–22, 2014, considered the referendum and Ukraine's response. The Opinion referred to the relevant provisions of the Constitution and concluded that "it is . . . clear that the Ukrainian Constitution prohibits any local referendum which would alter the territory of Ukraine."[12]

The chairman of the OSCE as well concluded that the referendum, as the decree was drafted, "is in contradiction with the Ukrainian Constitution and must be considered illegal."[13]

It is submitted that, on the plain text of the Ukrainian Constitution in English translation, it is hard to see how a different conclusion could be supported.

There is the further matter of accordance with international law, which will be turned to next. For its part, the Venice Commission concluded that the constitutional restriction on secession referendums under Ukrainian law "does not in any way contradict European constitutional standards."[14] This was not to consider accordance with general international law as such. The "constitutional standards" to which the Venice Commission referred, however, are more, not less, exacting than those of the general law.

The Russian Federation also adopted statements in respect of the referendum. According to the Russian Federation, 96.77 percent of the votes cast in the referendum were in favor of annexation, and voter participation was 81.3 percent of

the eligible population. Voter turnout was reported to have exceeded 80 percent.[15] A summary report published by a Russian State organ (but then quickly removed from official websites) contradicted that figure, estimating a much smaller favorable vote (between 50 and 60 percent) and a relatively small overall voter participation (as low as 30 percent and not higher than 50 percent).[16] A respected polling organization found that only 41 percent favored integration with Russia.[17] Whatever the result, it is not clear, from the standpoint of the administrative law concerning elections and referendums, why the Russian Federation would have had a role to play in respect of a referendum in Ukraine (or part of Ukraine). The formal act of annexation had not yet taken place.

Ukraine in the General Assembly made clear that the referendum did not lawfully transfer Ukrainian territory to Russia.[18] The president of Ukraine in an address on June 7, 2014, inaugurating a new presidential term said that Crimea "is, was and will be Ukrainian."[19] The failure of the referendum in Crimea to accord with Ukrainian law was clear. The competent Ukrainian public organs determined it to be unlawful, and regional organizations agreed.

A new State, however, can emerge within an existing State in ways that violate municipal law. Situations in which States have emerged through unilateral acts against the opposition of the existing State almost necessarily entail lawbreaking. In some instances, such situations involve total disruption of the legal order of the State. The disappearance of the legal order of the Socialist Federal Republic of Yugoslavia in the early 1990s furnishes an extreme case. There, one national legal order disappeared altogether and, as a result, new States took form.[20] This entailed no international transaction as such: where there was one State, several replaced it, and no other State was involved. So the determination, authoritative under Ukrainian law, that Crimea's referendum and declaration of independence were unlawful as a matter of Ukrainian law does not in itself settle the question for purposes of international law. It very well may be a consideration relevant to assessing the putative separation of Crimea; international law is far from agnostic about the procedural aspects by which self-determination is implemented in practice, a point that will be addressed later in this chapter. But general international law does not forbid the emergence of new States as such within an existing State's legal order.

This is the conclusion that is widely drawn from the answer which the ICJ gave to the question posed by the advisory request on *Kosovo* (though the Court addressed a narrower question still, the accordance with international law of a declaration of independence in respect of a territory).[21] The *Kosovo* proceedings and the Court's Advisory Opinion will be considered further below.

Annexation in the Russian Legal Order

The municipal law acts of the Russian Federation concerning annexation of Crimea included preparatory measures beginning four days before annexation, the act of annexation itself on March 21, 2014, and subsequent acts purporting to effect the legal and administrative integration of Crimea. These acts will be summarized and then some conclusions set out as to annexation in the municipal legal order.

The day after the referendum of March 16, 2014, the president of the Russian Federation signed an Executive Order *On Recognising the Republic of Crimea*.[22] The Executive Order indicated, *inter alia,* as follows:

> Given the declaration of will by the Crimean people in a nationwide referendum held on March 16, 2014, the Russian Federation is to recognise the Republic of Crimea as a sovereign and independent state, whose city of Sevastopol has a special status.[23]

The use of the adjective "nationwide" and the reference to a "Crimean people" both implied that Crimea was an international law entity, not just territory within an existing State. The terms, as used, are conclusory as to, or at least strongly suggestive of, an international legal status. One cannot speak of a "nationwide" expression of popular will if there is no nation; and to refer to a territory as having a "people" means, in the language of self-determination, that the inhabitants of that territory hold a general right of disposition over the international status of the territory: it is the existence of a "people" in a territory that identifies the territory as a self-determination unit. More will be said below about the international legal effects that the Executive Order *On Recognising the Republic of Crimea* had, if any.

A word should be said as well about the "special status" of Sevastopol to which the Executive Order referred. The "special status" is evidently the status under municipal law which the Constitution of the Russian Federation attributes to certain cities.[24] The Constitution of Ukraine provides for a similar status.[25] Reference in the Executive Order of March 17 to that status has no international law significance.

It might be asked what the internal organization of Crimea had to do with Russia, if as Russia said Crimea was now an independent State. The answer seems to be that Russia referred to Sevastopol in order to elaborate in more detail the putative consent to annexation: if the city had a special status that the subnational or national government could not revoke, then it might follow that a change of international status would require a distinct transaction. Russia's recognition of Crimea nevertheless was communicated in one instrument, not one for Crimea and one for Sevastopol, as might have been done if there were in truth separate entities each having its own rights. To be sure, a State validly recognizing new statuses may do so in respect of two or more territories in one statement. The formal characteristics of the act of recognition are not rigid. But, if Russia's position were valid that Crimea now constituted an independent State—that is, if Crimea had realized its separation from Ukraine as a matter of international law—then it is unclear why the putative State's municipal legal subdivisions were of concern to a third State extending recognition to it. A coherent position is hard to distil from the form of words in Russia's act of recognition.

In any event, the recognition of Crimea's putative independence was short-lived. It was a step on the way to annexation.

The Russian president, with reference to Article 6 of the Federal Constitutional Law *On the Procedure of Admission to the Russian Federation and the Formation within it of New Constituent Territories*, notified the Government of the Russian Federation, the State Duma, and the Federation Council on March 18 that the

"Crimean State Council" and the "Sevastopol Legislative Assembly" had proposed joining the Russian Federation.[26] The same day, the president signed an Executive Order *On Executing the Agreement on Admission of the Republic of Crimea into the Russian Federation*.[27] The president signed the Agreement on March 18 as well.[28]

Article 1, paragraph 1, of the Agreement provides for the "acceptance" of Crimea into the Russian Federation. Article 2 provides that Crimea and Sevastopol are "formed as new federative entities" of the Russian Federation. Article 9 applies the laws of the Russian Federation to Crimea.

On March 19, the day after the agreement, the president, referring to Article 84(d) of the Constitution and Article 15 of the Federal Law *On International Treaties,* submitted the agreement to the State Duma for ratification.[29] Also on March 19, the draft Federal Constitutional Law *On the Accession of the Republic of Crimea to the Russian Federation and the Creation of New Constituent Entities within Russia* was submitted to the State Duma.[30]

The annexation of Crimea to the Russian Federation was formalized for purposes of Russian law in the Federal Constitutional Law of March 21, 2014, referred to above, the draft of which the State Duma had received two days before. The Federal Constitutional Law of March 21 ratified the putative international agreement between the Russian Federation and Crimea. Both evidently entered into effect immediately.

Annexation of Crimea on March 21 was accompanied by celebratory gun salutes in Moscow, Simferopol, and Sevastopol.[31]

Three days before adoption of the Federal Constitutional Law, the president of the Russian Federation had transmitted to the Constitutional Court a *Request to Verify Compliance of Agreement on Accession of Republic of Crimea to the Russian Federation with the Constitution*.[32] In the request, the president…

> ask[ed] the Constitutional Court of the Russian Federation, taking into account the current situation in Crimea and Sevastopol, to consider this request without holding public hearings, since the Agreement [of annexation between Crimea and Russia] is intended to observe the Russian Federation's state interests, the rights and freedoms of the residents of Crimea and Sevastopol as well as citizens of the Russian Federation, and to strengthen the existing economic and cultural ties between Russia and Crimea and Sevastopol.[33]

The Constitutional Court on March 19 (the day following the request) adopted Judgment No. 6-II/2014, in which it "gave appraisal of the constitutionality of the International Treaty between the Russian Federation and the Republic of Crimea on Admission of the Republic of Crimea into the Russian Federation and Creation of New Subjects in the Composition of the Russian Federation pending its entry into force." The Judgment concluded that that instrument "cannot be regarded as breaking the Constitution of the Russian Federation as to the procedure of signing, conclusion and entry into force."[34]

The Judgment of the Constitutional Court of March 19 referred to the Admission Agreement of March 18 as an "International Treaty." A treaty being an agreement between subjects of international law,[35] the Constitutional Court thus presumably understood both parties to have been subjects of international law.

To say that Crimea entered into an "International Treaty" is not in itself to say that Crimea was an independent State. An entity that does not possess general or plenary competence under international law nevertheless may possess competence to make treaties for specific and limited purposes. So non-State entities may possess treaty-making competence to that extent.[36] A treaty of cession or annexation, however, entails the general transfer of competence in respect of the territory being ceded or annexed. For Crimea to have agreed to such a transfer would have required Crimea to have held plenary competence as a treaty-making entity. This is not a competence that could have been created by an act or judgment within Russia's legal order alone. If such a competence existed, one would have to look outside Russia's legal order to find it.

Further municipal law acts followed the Judgment of March 19 in rapid succession. Key federal ministries and agencies received presidential instructions on March 23, by which "the President approved a programme of organisational measures to set up executive government bodies and other agencies and branches in Crimea and Sevastopol by March 29, 2014."[37] Executive Orders on March 31 established a Ministry of Crimean Affairs.[38] Executive Orders of the same date addressed public sector employees,[39] pensioners,[40] and military personnel.[41] Measures on retail banking[42] and the financial system[43] were promulgated on April 2. Referring to Article 80 of the Constitution of the Russian Federation, the president on April 14 appointed an acting governor of the City of Sevastopol[44] and an acting head of the Republic of Crimea.[45]

Municipal Law, International Act: An Incomplete Argument

While the reception given by municipal law to the act of annexation forms part of the overall picture and thus is not to be ignored, "it is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer."[46] As suggested before, to describe the events leading to the annexation of Crimea and the annexation itself as developments in a national legal order is incomplete. At least the acquisition of territory by a State, if not the separation of territory through strictly internal processes, is an international act. Rules and procedures of municipal law are almost inevitably relevant to such an act; but they cannot in themselves provide the legal basis for it. Nor can the State complete the act solely by reference to its own national legislation. International law as well must be applied if the act is to be completed. Municipal law therefore cannot tell the full story of Crimea's annexation.

As far back as the *Treatment of Polish Nationals* case it was understood that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[47] Where a State is under an international obligation to allow the independence of a territory under its control, a national law act does not change that obligation. This broadly accords with Article 3 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts:

> The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.[48]

If Crimea had had an international law right to secede unilaterally from Ukraine under the circumstances of March 2014, then Ukraine would not have avoided its correlative obligation by adopting national law acts denying the right. But this consideration is relevant only if the putative international law right exists. The national law acts of Ukraine in 2014 assumed that such an international law right did not exist. The next section will return to the question of an international law right to unilateral secession.

Then there is the matter of annexation or absorption of the territory by another State, as distinct from secession. Annexation is fundamentally different from the emergence of a new State in the territory of a single preexisting State. Annexation of territory is per se not an act taking place within only one municipal legal order; it involves a transaction between two preexisting States. That is to say, annexation is a transaction subject to international law.

This was clear in the major modern case of that type. When the Federal Republic of Germany absorbed the *Länder* of East Germany, the act took place under Article 23 of the *Grundgesetz* (Basic Law); there was no serious challenge under national law. But the merger of East Germany into West was not only a matter of German national law. It was subject to international law, and so international agreements were needed to effectuate the transaction.[49] By analogy, the lawfulness of the annexation of Crimea for purposes of Russian municipal law is not the final word on the matter.

There are further international law considerations. In particular, it is necessary to consider the events relating to the act of separation of Crimea. Under the circumstances in which Crimea was separated from Ukraine, it would be at best naïve to accept without closer examination the assertion that this was an act taking place exclusively through the operation of mechanisms within the Ukrainian legal order. The point here is distinct from the observation that Crimea's referendum and subsequent purported separation were rejected by Ukraine's legal institutions. The emergence of an independent State within a territory where there was once only one national legal order well may entail the breakdown of that legal order, or, if not a breakdown, then a serious irregularity in legal processes. The breakdown or irregularities notwithstanding, the State's emergence within the territory may remain a result of changes within one legal order—that is, whatever the precise internal process, a transformation takes place by which the one legal order becomes two.

The problem with describing events in Ukraine in this way is that it is incomplete, and fundamentally so. The separation of Crimea from Ukraine was not exclusively, or even largely, the result of developments confined to Ukraine's legal order: the act of separation was the direct (and immediate) result of international acts of another State. The Russian Federation argued on a number of bases that these were lawful acts under established rules of international law. Each of the bases will be considered in Chapter 2.

Before turning to the use of force by which Crimea's separation was established in fact, the Russian Federation's main argument under modern international law will be considered—namely, that the separation of Crimea was an act of external self-determination performed by a subject "people." As will be argued, it would be artificial to consider the purported exercise of self-determination by a Crimean

people in isolation from Russia's resort to arms against Ukraine. However, as will be seen, even setting aside the arms, the purported exercise entailed serious defects.

Acts in the International Legal Order: Self-Determination and Unilateral Secession

There is no doubt that international law contains a right to self-determination. Both 1966 Covenants, for example, provide for it:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[50]

The difficulties are, first, identifying the precise meaning of the right; and, second, applying it to particular facts. Both are open to differences of view; and the differences may significantly affect the conclusion reached. The meaning of the right now will be addressed; and then, assuming for purposes of argument that the more progressive interpretation of the right should prevail, the right will be applied to the facts in Crimea.

Decolonization and the Limited Scope of Self-Determination

In one set of circumstances, self-determination clearly entails a right for the people inhabiting a territory to establish an independent State. This is the colonial situation addressed under the UN Charter regime of decolonization.

Decolonization under the Charter

The regime of decolonization emerged under the UN Charter, in particular through General Assembly practice under Chapters XI concerning Non-Self-Governing Territories and Chapters XII and XIII concerning Trust Territories.[51] GAR 1514 (XV) of December 14, 1960, and resolution 1541 (XV) of December 15, 1960, were pivotal in the practice. Resolution 1514 (XV) declared that the "subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights."[52] Resolution 1541 made clear that the existence of a right to self-determination in these terms has particular legal consequences. In particular, it means that a Non-Self-Governing Territory may, as of international law right, elect one of three outcomes to settle its final status. The Non-Self-Governing Territory may choose (a) independence as a State; (b) free association with an independent State; or (c) integration with an independent State.[53] The status of the territory as Non-Self-Governing for purposes of Chapter XI of the Charter settles the question whether the right is available in this form. Nothing more need be demonstrated for the people of such a territory to have the right to elect their final status. They are per se a people entitled to elect it.

The General Assembly practice also made clear that the territories for which self-determination is to be applied in this particular way—that is, as the basis for the free election of final status, including, if the people so choose, independent

statehood—belong to a limited category. The category is limited to "territories that were then known to be of the colonial type"—"then" meaning at the time of the adoption of the Charter in 1945.[54] The concern here was with the European overseas possessions. The emergence of an automatic right to independent statehood was in connection with those colonial territories.

The ICJ in the *Kosovo* Advisory Opinion acknowledged the practice and its (limited) legal result:

> During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation . . . A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such case.[55]

It is important here to be clear as to what the Court said and did not say.

The Court referred to "the international law of self-determination" as having created "a right to independence." It then referred to something related to, but distinct from, independence as such: it referred to "*declarations* of independence." The question that the Court addressed was a narrow one: was a declaration of independence prohibited under general international law? This had nothing to do with annexation by another State. Nor did it have anything as such to do with the emergence of a new State for purposes of international law. The question was not whether the separation of territory by unilateral act of the separatists is prohibited under international law, nor was the question whether international law prohibits the emergence of a State in particular circumstances. In short, the Court construed the question (as it certainly had the power to do)[56] to concern the declaration of independence only, and this is an act by one group of persons on one legal level. The Court thus made clear that it was not providing a general opinion in respect of the creation of States at the international level. A declaration may (or may not) be an early step toward a new State; but it does not in itself create a new State.

A referendum took place and a declaration was made in Crimea. These acts, however, are not in themselves the main concern. The main concern is the effective separation of the territory from the State to which it was understood to belong—and the modality by which that separation was brought about. As to that concern, the *Kosovo* Advisory Opinion is, at best, an incomplete guide.

There is another important limitation in the *Kosovo* Advisory Opinion. The Court in the Advisory Opinion was considering whether a general international law prohibition exists against declarations of independence. It was not considering whether general international law contains a permissive rule. In other words, it was not considering whether there is an international law *right* to make a declaration. Limited this way, the Court certainly was not considering whether there is an international law right to take practical steps toward a unilateral separation. This was in

contrast to the Canadian Supreme Court in the *Quebec reference*, which expressly considered whether international law contains a "positive legal right to unilateral secession."[57] Consistent with the more limited scope of the ICJ advisory proceedings, the ICJ did not say whether (outside the colonial situation) an international law right to unilateral secession exists. The *Kosovo* Advisory Opinion thus did not depart from the position that the only clear case where statehood may be freely chosen without negotiation or any prior demonstration of special right is where the territory making the choice is already understood to constitute a colonial or subjugated territory in the relevant sense.

As Crimea is not a territory in the relevant sense, the general law and practice of decolonization that the Court referred to in the Advisory Opinion in itself furnishes no guidance either.

Procedure and Independence

Decolonization, as it emerged in UN practice, though not heavily proceduralized, nevertheless contains certain incidents of procedure. There is, for example, the requirement that the Administering Power transmit information in accordance with Charter Article 73(e) so long as that Power continues to be responsible for the administration of the colony. There is also a procedural requirement at the point in time when the colony achieves its final status. Independence is one of the outcomes that the people of the colony as of right may elect as a final status; but whatever final status they elect they must elect it through a self-determination act.

The self-determination act is a freely chosen decision by which the will of the people is determined and a particular final settlement of status thus achieved. The General Assembly did not at first specify the characteristics of this act. It did, however, from the start suggest that the people of the colony must make a real choice. This is visible in the principles set out under GAR 1541 (XV), in particular where final statuses other than independence were concerned. In respect of free association—that is, statehood but in tight treaty connection to another State[58]—the election of that status "should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes."[59] The requirements in respect of the self-determination act are more exacting still in respect of integration—that is, the final status by which the colonial territory elects to become part of another State. According to Principle IX under GAR 1541 (XV),

Integration should have come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;
(b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.[60]

The stipulation is thus in two broad parts. First, the people of the territory must have such general characteristics of development as a polity that they would possess "the capacity to make a responsible choice through informed and democratic processes." Second, the actual decision to integrate with another State must have been "expressed through informed and democratic processes."

Further practice has affirmed the importance of these checks on the procedures of final settlement. The General Assembly and other UN organs in some instances have gone so far as to monitor the self-determination act as invited under Principle IX *(b)*. The main examples are the referendums in Northern Cameroon,[61] in West Irian[62] and in East Timor.[63]

Thus, though prescribing no precise form that a referendum or other self-determination act must follow, international law nevertheless concerns itself with the existence and overall validity of the act. The procedural aspect under Chapter XI is particular to the colonial setting. But, as will be seen, if self-determination entails a right to independence outside the colonial setting, then the exercise of the right there too will be subject to a procedural control.

Remedial Secession as a Contested Concept[64]

As Crimea is certainly not a territory of the colonial type (it was never inscribed on the list of Chapter XI territories), Russia posits, instead, that Crimea is a territory that was entitled to independence on the basis of other considerations. The president of the Russian Federation said as follows:

> The Supreme Council of Crimea referred to the United Nations Charter, which speaks of the right of nations to self-determination. Incidentally, I would like to remind you that when Ukraine seceded from the USSR it did exactly the same thing, almost word for word. Ukraine used this right, yet the residents of Crimea are denied it. Why is that?[65]

Separation by agreement, which is how the separation of Union Republics of the USSR was achieved, has no relevance to separation by unilateral act, not even "incidentally." A State can agree to anything within its legal powers (subject to the limitations inherent in peremptory rules). It can give up parts of its territory or even, as did East Germany, agree to merge its territory entirely into another State. This has nothing to do with unilateral secession—that is, an act of separation not agreed by the State. The independence of the Union Republics of the USSR has been addressed *in extenso* by writers elsewhere.[66]

So the concern here is not with untenable analogies between agreed separation and unilateral secession. The concern, instead, is with the position of the Russian Federation that "the right of nations to self-determination" operated in 2014 to justify the separation of Crimea from Ukraine and its annexation by Russia.

For that position to be tenable, it must first be accepted that, outside the colonial setting, the right to self-determination may entail a right to unilateral secession. The evidence of such a right in international law is far from complete. Writers have speculated upon its existence, though subject to conditions,[67] and,

as will be seen, some States have as well. The outlines of the concept of remedial secession may be briefly considered, and then how, if at all, it might have applied to Crimea.

The concept of remedial secession, notably, was not invoked by some of the main States that made submissions in favor of Kosovo in the *Kosovo* advisory proceedings.[68] A number of States did invoke it.[69] The Netherlands, for example, which favored Kosovo, developed the concept of remedial secession in some detail. According to the Netherlands, secession would be a right, but open to a community to exercise only upon exceptional considerations. The Netherlands described the right as "an *ultimum remedium*."[70]

The exceptional considerations necessary for the exercise of remedial secession would be both "substantive and procedural," and the considerations would "apply cumulatively."[71] A community could invoke the right only if the incumbent State committed a serious breach of its obligations to the community. A serious breach would exist where the government denied the people a "fundamental human right" or failed to represent the people, or both.[72] A failure to represent the people, in this sense, is a gross and systemic failure, not a passing defect within an otherwise representative system. It is a failure equivalent or akin to that of the *apartheid* system in South Africa, which excluded whole segments of the population. Kosovo, the representative case, involved "years of oppression and exclusion from political and social life . . . culminating in [a] . . . campaign of ethnic cleansing."[73] It was a "severe and long-lasting refusal [of internal self-determination] . . . accompanied by brutal violations of human rights."[74]

Writers considering the substantive aspect by and large agree that, if a remedial secession right exists, it exists only in respect of serious and systematic deprivations of right.[75] In short, if a right to remedial secession exists, it is not a right to dissolve the State merely because one group does not enjoy perfect felicity in the State. Secession, in the remedial theory, is not a remedy for every fault in the social condition. It is instead the final resort when continued rule by an oppressive government has become intolerable and no remedy in the existing legal order has any prospect of ameliorating the crisis.[76]

The procedural condition follows logically from the substantive condition: "All effective remedies must have been exhausted to achieve a settlement."[77] For secession to become available, it is not enough that a difficulty in governance exists. The difficulty would have to be extreme (in accordance with the substantive rule), and attempts would have to have been made to resolve it within the existing legal order (in accordance with the procedural rule). If secession is the remedy, it "may only come into question as a last resort."[78]

The Canadian Supreme Court, when considering the possibility of unilateral secession by Quebec, similarly concluded that a remedial right to self-determination, to the extent one exists in international law at all, would operate only in "exceptional circumstances" (which, in the event, were "manifestly inapplicable to Quebec").[79] According to the Supreme Court,

> International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the

> exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people.[80]

The Supreme Court said that "it remains unclear whether this third proposition [unilateral secession *in extremis*] actually reflects an established international law standard."[81] States that endorsed the remedial concept in the *Kosovo* proceedings similarly acknowledged that the "actual extent of the right to self-determination remains a matter of dispute."[82]

The *Quebec reference* also acknowledged the procedural aspect. The Supreme Court referred to a privilege belonging to the polity as a whole to engage in a "process of negotiation" before an act of separation.[83] Though this was to take place under national law, it had international corollaries: "An emergent State that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition."[84] The concern here was with a rapid separation, where little or no attempt had been made to settle the matter through negotiation within the existing national system. The act of separation is not a matter for the separatists alone; it affects the polity as a whole; and, so, a period of general discussion is expected before the act may be carried out.

The Declaration on the Rights of Indigenous Peoples of 2007, under Article 46, paragraph 1, notably addresses not only States but also "people[s], group[s] or person[s]"—including potential separatist peoples, groups, or persons. According to Article 46, paragraph 1,

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.[85]

This suggests, in accord with the *Quebec reference*, that international law is not entirely agnostic as to the processes by which a group acts to separate itself from the State. An act "dismember[ing] or impair[ing]" the State at any rate is not to be understood as licensed under the 2007 Declaration. Again, to say that there is no license is not to say that there is a prohibition. A multilateral instrument addressing the potential separatist group, however, accords with the position that steps toward separation are not the group's concern alone.

The Concept of Remedial Secession as Applied to the Situation in Crimea

As seen above, to the extent that a concept of remedial secession belongs to international law at all, a number of conditions would limit the cases in which it would apply. The conditions, in their procedural aspect and in their substantive aspect, may be considered in relation to Russia's position.

Procedural Aspect
No negotiation preceded the separation and annexation of Crimea. As a factual matter, this was noted by the Council of Europe organ seised of the situation in Ukraine: "With respect to the referendum of 16 March 2014, the Venice Commission can only note that no negotiations aimed at a consensual solution took place before the referendum was called."[86] Attempts to engage multilateral processes in the situation were frustrated from the start and never got underway. There was no search for "effective remedies" prior to the separation of Crimea from Ukraine. Thus, if a human rights problem had existed in Crimea of the type that would be of concern under the concept of remedial secession, the situation, nevertheless, was not ripe for secession in March 2014.

Because the act of secession and act of integration were tied together, it would be artificial to consider them in mutual isolation. As noted, the referendum itself had serious defects distinct from the failure to seek a negotiated solution. Those defects too are relevant to the putative exercise of self-determination. A state of political emergency existed in Crimea. A massive armed presence was deployed in the territory, and it had displaced the usual administration. The referendum was completed almost as soon as it was called; and it had been called with almost no prior discussion. It is hard to imagine that a people under such circumstances would have had the opportunity to gain "full knowledge of the change in their status" proposed as required under GAR 1514 (XV), Principle IX.

It is all the harder to imagine that they could have obtained such knowledge under the regime of sharply curtailed media freedom imposed in Crimea at the time. The EU, for example, described media in Crimea as "under siege";[87] the Council of Europe agreed.[88] The organizers told the people that their choice was between Russia and a Nazi-style dictatorship.[89] The rhetoric of secession, apocalyptic in tone, and the factual allegations—judged by the Council of Europe, the OSCE, and others to be baseless[90]—went unchallenged, the opposition having been almost entirely silenced, including by physical intimidation.[91] The OSCE Parliamentary Assembly concluded that the referendum "was . . . conducted in an environment that could not be considered remotely free and fair."[92] The Principle IX requirement that "integration . . . be the result of the freely expressed wishes of the territory's peoples" was not met in Crimea.[93]

As to the situation in May 2014 in eastern Ukraine, when similar referendums were held in Donetsk and Luhansk, this was even further *in extremis*. The OSCE Parliamentary Assembly president said that the referendums there would be taking place "amid a climate of fear, violence and lawlessness" and that "the idea that free and fair voting could take place in these so-called referendums is absurd."[94] The referendums took place anyway on May 11. In view of the considerations invalidating the March 16 referendum, their invalidity is an *a fortiori* case. A war zone is not the place to have a vote to decide the constitutional fate of a country.

The Russian Federation did not have a ready answer to these procedural objections. It did however suggest that an earlier procedural defect had set the stage for territorial reversion. According to Russia, the decision under Khrushchev by which the inter-republican borders of the USSR were changed in 1954 so as to place Crimea in the Ukrainian SSR (it had been part of the Russian SFSR) was

invalid. Crimea, in the words of President Putin, had been traded "like a sack of potatoes."[95] However, nothing in Soviet law suggested that this had been anything other than a lawful change of internal boundary.[96] How a State organizes its internal boundaries is a matter for the State to decide. No serious attempt to challenge the transfer during the Soviet period is recorded. And, in any event, as will be noted in Chapter 4, Russia, upon the independence of Ukraine, recognized the boundaries of Ukraine as they stood. Russia in the twenty-four years since Ukraine's independence repeatedly affirmed those boundaries and said nothing until 2014 to call them into doubt.

Substantive Aspect

If a human rights problem existed that justified Crimea seceding from Ukraine, then it would be supposed that the problem affected the largest part of the population, or at least a large part. Inhabitants of Russian ethnic origin comprise the largest part of the population of Crimea—approximately 60 percent. Nobody has said that the Ukrainian part of the population—approximately a quarter of the whole—faced systematic deprivation of human rights. It therefore would be supposed that, if a human rights problem in Crimea had been serious enough to justify the "*ultimum remedium*," then the problem would have affected the Russians.

A fundamental weakness of the Russian claim is that, to the extent that a systemic human rights problem presented itself in Crimea, this did not concern the Russians.

As reflected in Ukraine's Sixth Periodic Report under the International Covenant on Economic, Social, and Cultural Rights, the central human rights question in Crimea in recent times has been the treatment of the Crimean Tatars.[97] The Crimean Tatars are one of the ethnic groups that the USSR in the time of Stalin forcibly deported to Central Asia and Siberia on the grounds that they had collaborated as a group with the German invaders. A large part of the Crimean Tatar population perished at the time.[98] A number of Crimean Tatars, since the end of the USSR, have returned to Crimea.[99] It was estimated (in 2001) that Crimean Tatars comprised 12.1 percent of the population of Crimea.[100] How the views of such a minority are taken into account if the region is considering secession—and how the minority is treated if the region secedes—have been identified as relevant to the exercise of self-determination.[101]

According to Ukraine, in its Sixth Periodic Report,

> Providing deported Crimean Tartars and persons of other ethnic groups with the facilities necessary to ensure their return, settlement, social adaption and integration is a key area of government policy and essential for maintaining the social and economic stability, national security and international standing of Ukraine.[102]

Reference was made in connection with the Universal Periodic Review for Ukraine in 2012 to the "situation of the Crimean Tatars"; nothing was said about a situation involving the Russians in Crimea.[103] The Working Group on the Universal Periodic

Review, in its concluding observations and recommendations to Ukraine, included the following:

> 97.140. [t]hat no effort be spared for the improvement of the current status and living conditions of the Crimean Tatars along with the other minorities (Turkey);
>
> 97.141. [that Ukraine] take further action in ensuring and preserving the political, economic, social and cultural rights of the Crimean Tatars, which would also be conducive to better inter-communal relations (Turkey).[104]

While recommendation 97.140 referred to "other minorities," it did not refer to the Russian majority (in Crimea) or minority (in Ukraine as a whole). No other recommendation in the Working Group Report mentioned the Russians.[105]

The Working Group on the Universal Periodic Review did not question that Crimea forms part of Ukraine, or that minority groups exist in that part of the country. Concerns were expressed about the treatment of the Tatars. If a human rights crisis had existed in Crimea in respect of the Russian population, then it is clear that the Working Group and its members knew how to draw attention to it. The Working Group, however, had nothing to say about the Russian population.

The Russian Federation, for its part, restricted its observations to…

> welcom[ing] the progress made in reforming legislation, the judiciary, law enforcement and the penitentiary system, as well as the work done to combat all forms of intolerance, xenophobia and racial discrimination. It welcomed the creation of the Ombudsman for children under the Office of the President. The Russian Federation noted the improvement in conditions of detention centres.[106]

By the standards of the Universal Periodic Review, these observations were mild, even complimentary. The strongest words that Russia had for Ukraine were those recommending that Ukraine "continue strengthening tolerance in the Ukrainian society and take measures to prevent integration of nationalist ideas in the political platforms of the public associations."[107] These were not the words of a State afraid that its neighbor was at the precipice of a fascist takeover. Again, there was no mention of the Russian minority, much less an indication that the government of Ukraine, or anybody in Ukraine, was mistreating that minority. When Russia, from February 2014, asserted that a crisis had erupted in which the Russian population of Crimea was in peril, this was an auto-appreciation shared by no other international actor. It was not in accord with Russia's own recent practice in the main international human rights organ.

A White Paper circulated by the Ministry of Foreign Affairs of the Russian Federation on May 5, 2014, contained extensive allegations of political extremism in Ukraine. This was at stark variance with Russia's earlier communications. As noted, Russia's representatives only a short while before had indicated general approval about the direction of political life in Ukraine. In international claims practice, evidence generated only after a dispute has arisen is likely to be scrutinized. Where

the evidence finds no support in the State's earlier practice, or is contradicted by the earlier practice, it is unlikely to be credited at all.[108]

In any case, even if one were to accept the (belated) allegations in the White Paper, political unrest over the course of several months is not a basis in modern international law for partition of the State.

Specific complaints about the treatment of members of the Russian minority, to the extent that complaints had been made, were isolated and, in comparison to the systemic collapse of public order that presaged intervention in Kosovo in 1998 and in East Pakistan/Bangladesh in 1971,[109] trivial.

By way of example, an individual communication in 2008 to the Human Rights Committee under the Optional Protocol complained about how a Russian name was misspelled. The author of the communication said that Ukrainian authorities in Crimea had used a Ukrainian variant of his given name and patronymic in State identity documents and by so doing had violated his rights under Articles 17 and 26 of the International Covenant on Civil and Political Rights.[110] The Human Rights Committee observed that…

> in the present case the State party went beyond transcribing the name and patronymic of the author and actually changed them on the basis of the rules contained in a Ukrainian grammar book.[111]

The Committee therefore considered that…

> the State party's unilateral modification of the author's name and patronymic on official documents is not reasonable, and amounts to unlawful and arbitrary interference with his privacy, in violation of article 17 of the Covenant.[112]

Evidently, the Ukrainian spelling "resulted [in the author of the communication] being subjected to frequent mockery and generated a feeling of deprivation and arbitrariness, since it sounded ridiculous to Russian speakers."[113] The same complainant had not gotten anywhere at the European Court of Human Rights, which rejected his claims;[114] the complainant himself acknowledged to the Human Rights Committee that the violation of his rights was not under color of law: Ukraine's national legislation prohibited the imposition of Ukrainian spellings on Russian names;[115] and, as the European Court noted, the law provides a procedure to change the name and the "procedure does not appear to be particularly complicated."[116] Whatever the character of the deprivation of right, it did not rise to the level of a violation under the European Convention; and it did not belong to a systemic legal policy. Even the most active proponents of a protective principle do not claim that infelicitous spelling provides the factual basis for armed intervention. Nor on any plausible application of the principle of external self-determination would such circumstances trigger secession as a remedy. A number of writers share the position that the treatment of persons of Russian ethnicity did not justify the application of external self-determination to Crimea.[117]

The most serious matter to arise in respect of minority rights was a vote in parliament that would have repealed Ukrainian legislation of 2012 indicating Russian as

one of Ukraine's minority languages. The parliament of Ukraine, amid the disturbances of February 2014, voted—subject to presidential veto—to repeal the *Law on principles of state language policy* that had been in force since August 10, 2012.[118] The parliamentary vote was on February 23; 232 of 450 deputies voted for repeal.[119] The president vetoed the repeal bill on February 28.[120]

The OSCE observed that candidates in the May 2014 early presidential elections took "more flexible positions" than before on minority languages.[121] Russia's intervention, however, afforded no time to test Ukraine's commitment to minority rights under normal circumstances. The Council of Europe Committee of Experts of the European Charter for Regional or Minority Languages in May 2014 nevertheless stated that "in respect of the Russian language . . . most undertakings chosen by Ukraine under the Charter were fulfilled or partly fulfilled."[122] In the May 2014 early presidential elections (which were monitored, *inter alia,* by PACE and the OSCE), the Ukranian Radical Party proposed prohibiting Russian language media in Ukraine;[123] some temporary restrictions were placed on certain Russian television channels. By this time the geographic scope and scale of the crisis had increased significantly; Russian forces (or Russian-supported forces) were present across the eastern parts of Ukraine and, at the time, it appeared that a full invasion was possible.[124] The OSCE monitoring mission called the restrictions "unwelcome" but found them not to have "directly impact[ed] the election."[125] Ukraine had valid reasons for restricting hostile propaganda under the circumstances and, provided that it articulated the reasons, restrictions would have been defensible under the European Convention.[126] As of November 2014, the 2012 legislation protecting the Russian language remained in force.

Incidents of an inter-ethnic character in Crimea would appear largely to have been attacks against the Crimean Tatar minority, not against the Russian majority.[127] Systematic deprivations of rights in practice, too—for example access to the general education system—principally concerned the Tatars, not the Russians.[128] The OHCHR concluded, after visiting Ukraine including Crimea, that violations of the rights of Russians, such as did occur, seemed to be "neither widespread nor systematic."[129] There was "no evidence of harassment or attacks on ethnic Russians ahead of the [secession] referendum."[130] It was "widely assessed that Russian-speakers have not been subject to threats in Crimea."[131] The OSCE High Commissioner on National Minorities, on the basis of a visit to Crimea from March 4 to March 6, 2014, reported no human rights problem affecting the Russian population.[132] PACE concluded that there did not exist "any imminent threat to the rights of the ethnic Russian minority in the country, including, or especially, in Crimea."[133]

The Crimean Tatars after Secession

Further doubt may be cast on the Russian claim that armed intervention was for the purpose of protecting an ethnic group when the treatment of the Crimean Tatars after annexation is considered. Problems were noted by PACE, the Assembly expressing its concern "about the increasing number of credible reports of violations of the human rights of ethnic Ukrainian and Crimean Tatar minorities in Crimea, including access to their homes, following its annexation by Russia."[134] The Organisation

of Islamic Cooperation expressed concern as to "the security and well-being of the Muslim Crimean Tatar Community."[135] It was said in the Security Council that the Tatars of Crimea "have started moving to other areas of Ukraine."[136] Concern was noted in the Security Council about enforced disappearances of Crimean Tatars.[137]

The Assistant Secretary-General for Human Rights on April 15, 2014, reported that "a number of measures taken in Crimea [since its purported annexation to Russia]...are deeply concerning in terms of human rights."[138] The Assistant Secretary-General concluded, *inter alia*, that "permitting unregulated forces to carry out abusive security operations violates [rule of law] and basic respect for human rights."[139] The situation in Crimea since annexation also gave rise to the risk that persons not wishing to acquire Russian nationality would be rendered effectively stateless;[140] or, if maintaining Ukrainian nationality, would be forced to emigrate.[141] The HRMMU received reports that persons who did not elect Russian citizenship "are facing harassment and intimidation."[142] According to the Assistant Secretary-General, an "overall climate of uncertainty, including human rights and protection concerns," had led people to leave the area. The persons who had left were "predominantly Tatars and ethnic Ukrainians."[143] Some 3,000 Crimean Tatars were reported (as at mid-April 2014) to have left (mostly for western Ukraine and Turkey).[144] A month later, the HRMMU noted "increasing reports of on-going harassment towards Crimean Tatars" and "reported cases of Crimean Tatars facing obstruction to their freedom of movement."[145] There was also an attack on the Crimean Tatar parliament building.[146] The State Council of Crimea on March 27 adopted a list of "Persons Engaged in Anti-Crimean activity, whose stay is undesirable on the territory of the Autonomous Republic of Crimea"; the list by April 22 reportedly contained 344 names, including that of a senior Tatar politician.[147] A Muslim religious organization that had functioned in Ukraine for over a decade was banned.[148] The chairman of the Crimean Tatar Parliament on May 4 was threatened with prosecution for "extremist activity"; reports emerged that Tatars holding posts in law enforcement and other areas of public administration were being put under pressure to resign.[149] The deputy chairman of the Crimean Tatar assembly was arrested on January 29, 2015.[150] The OHCHR reported that as of May 5, 2014, there were over 7,000 internally displaced persons, the majority of them Tatars.[151] By August 17, 2014, there were 16,000.[152]

The Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities also raised alarm over the treatment of the Tatars during and following the referendum.[153] According to the Advisory Committee in its *ad hoc* report of April 1, 2014, "There are grave and immediate concerns regarding the safety and access to rights of persons belonging to the Crimean Tatars...there is great uncertainty and fear among Crimean Tatars regarding their future" (emphasis in the original).[154] PACE expressed "utmost concern" in respect of the "situation of minorities in Crimea, in particular of Crimean Tatars and Ukrainians."[155]

A decree adopted on May 16, 2014, forbade the Tatars from holding a public observance on the day of national mourning (the anniversary of the Soviet deportations).[156] Tatar language television and radio broadcasting had been terminated as of April 22, 2014,[157] a matter of special concern in view of UNESCO's

acknowledgment that the language is severely endangered.[158] The president of the Russian Federation indicated during a meeting with putative representatives of the Tatars that "one must not defend the interests of Crimean Tatars who live in Russia, in Crimea, from within the parliaments of other countries. This is just nonsense, it's a joke."[159] The president evidently was referring to critics in the parliament of Ukraine who, like the UN General Assembly and other multilateral institutions, rejected the Russian-organized referendum in Crimea.

It is to be asked how Russia's own (putative) rights in Crimea could accord with the president's rejection of "defend[ing] the interests" of ethnic groups "from within the parliaments of other countries." Evidently, Russia's position is that Russia has an extensive right of unilateral appreciation as concerns minority populations outside its borders; that, on Russia's application of that right, annexation by force is an option; and, when it comes to other States having a concern about minorities outside their borders, it is impermissible so much as to raise a question about their treatment. It would be surprising if States with *irredenta* or other territorial claims of their own were to accept such a one-sided view of the Crimean case. Such States are more likely to see Russia's annexation of Crimea as opening the door for them as well.[160]

From Recognition to Annexation: The Limits of a Discretionary Act

Finally, it falls to consider the argument that recognition of the putative independent Crimea had a curative effect on the problems that otherwise affected the act of secession. The present chapter has considered some of the problems.

Russia does not seem to have invoked a curative effect in terms, but Russia's unilateral declarations and purported treaty acts imply it. These acts and the international relations between Russia and the putative Crimean State now will be considered.

Recognition and the International Relations of the Crimean "State"

The day after the independence referendum, the Verkhovna Rada (main legislative body) of Crimea adopted a resolution stating that the referendum "showed that the people of Crimea favoured joining Russia and, therefore, secede from Ukraine."[161] Under paragraph 1 of the resolution,

> Crimea proclaims an independent sovereign State—the Republic of Crimea... The Republic of Crimea intends to build its relations with other States on the basis of equality, peace, good neighbourliness, and other universally recognized principles of political, economic and cultural cooperation... The Republic of Crimea appeals to the United Nations and to all States of the world to recognize an independent State created by the peoples of Crimea.[162]

Russia, as noted, adopted an act on March 16, 2014, indicating that it recognized Crimea as a "sovereign and independent state."[163] This was a unilateral act, which in itself is unremarkable. Recognition is typically communicated unilaterally.[164]

Then came the annexation agreement. This was the "treaty" between Russia and Crimea dated March 18, 2014, purporting to indicate the consent of the latter to be incorporated into the former. The agreement was signed after the declaration of independence and Russia's recognition of the putative Crimean State. It noted in its recital "a general Crimean referendum" and referred to "a decision to reunify with Russia." The matter was thus ostensibly analogous to the merger of the former German Democratic Republic with the Federal Republic of Germany—a freely chosen act and a restoration. As Russia described it, the Crimeans demonstrated their desire for annexation, and annexation restored an interrupted relationship.

By Article 1 of the annexation agreement, "the Republic of Crimea is deemed to have been admitted to the Russian Federation." Article 1 might have referred to "reunification" or the like, which would have been more consistent with the recital. To refer to admission of the territory reflected acquisition of a new territory or accession of a new participant—for example, "admission" of a new state to the United States, "accession" of a Member to the European Union. In any case, not much would seem to turn on the choice of the word "admission," which principally concerned (Russian) constitutional form.[165]

Ratification evidently needed no real lapse of time, Russia ratifying the agreement on March 21 (three days after signing). By Article 1, "admission" was effective immediately upon ratification.

Article 4, paragraph 2, of the March 18, 2014, agreement declared that "the border of the Republic of Crimea on land adjoining Ukrainian territory is the Russian Federation state border." Paragraph 3 indicated in respect of maritime areas as follows:

> The demarcation of the waters of the Black Sea and Sea of Azov is determined on the basis of the Russian Federation's international treaties and of the norms and principles of international law.

This omitted (and presumably was meant to abrogate) the specification in earlier bilateral practice of a maritime boundary in the Kerch Strait, a boundary that by treaty Russia had recognized and guaranteed.[166] The Russian position now—that Crimea is Russian Federation territory—would mean that the Kerch Strait no longer contains a maritime boundary between States. More will be said in Chapter 3 about unlawful changes of territorial status and maritime entitlement.[167]

Article 4, paragraph 3, also introduced an international land boundary between Crimea and Ukraine. No trace of this had existed in prior agreements or in Russian claims.

The agreement of March 18, 2014, was, as far as is recorded, the only act of the putative Crimean State in international relations. It does not however appear to be the sole example of Russian treaty practice of this type. In January 2015, Russia ratified a "treaty on alliance and strategic partnership" with Abkhazia, which Georgia promptly protested as "a step towards the annexation of Georgia's integral territory."[168]

It is clear that the purpose of the Crimean claim to statehood was to adopt an act to bring about the extinction of that putative State and its merger with Russia.

The Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol, which had been adopted by a joint resolution of the Supreme Council of Crimea and the Sevastopol City Council on March 11, 2014, was unambiguous in this regard. According to the Declaration,

> 1. If a decision to become part of Russia is made at the referendum of 16 March 2014, Crimea including the Autonomous Republic of Crimea and the city of Sevastopol will be announced an independent and sovereign state with a republican order;
>
> . . .
>
> 3. If the referendum brings these results, the Republic of Crimea as an independent and sovereign state will turn to the Russian Federation with the proposition to accept the Republic of Crimea on the basis of an interstate treaty into the Russian Federation as a new constituent entity of the Russian Federation.[169]

The steps in the process thus were identified on the eve of their implementation. Crimea would declare independence and, then, under the claim of an independent State, elect to be annexed by Russia. The Resolution of the Crimean Verkhovna Rada adopted the day after the referendum carried through with the stated plan, "appeal[ing] to the Russian Federation with a proposal for the adoption of the Crimean Republic by the Russian Federation as a new subject."[170]

International law certainly permits an independent State to relinquish its independence by agreeing to be annexed by another State. The lawfulness of that transaction depends upon the independent State having formed a free decision—and, prior to that, depends upon the actual existence of the independent State. Entities that are not States well may enter into agreements under international law. Presumably the same requirements of genuine consent apply. Such entities, however, can enter into agreements only to the extent that their agreements concern subject matter that falls within their powers. It could be that a State confers a power of plenary disposal on one of its territorial units. Such a power would not be merely inferable; it would be plain and express. Not having given the power away plainly and expressly, the State alone retains it.

As argued above, it is not at all plausible that Crimea, occupied by a large Russian force and its putative authorities relying upon that force for their influence in Crimean affairs, could have formed a free decision in the relevant sense. This is the case even if the assertion that Crimea constituted a State otherwise was subject to no objection. At least earlier Russian jurists recognized the "rule concerning the nullity of treaties obtained by means of the threat or use of force."[171]

The difficulty to be considered further now is that nobody (except, possibly, Russia) believed that Crimea was a State.

Recognition and Contested Statehood[172]

Recognition is the mechanism by which international law, in the absence of a centralized institution of certification, responds to claims of the emergence of new

States.[173] International law contains no fixed standard to say how many States must recognize a putative new State before that entity's status is definitive. The difficulties in respect of entities having attracted substantial recognition, but against which a significant number of other States withhold recognition, have been noted for some time.[174]

Such difficulties do not arise where the collective (decentralized) judgment is unanimous, or nearly so. This follows from the character of the putative act of secession. Secession is not a usual municipal law act. It is an act purporting to undo the constitutional system, or at least to remove the secessionist community from the system; and thereby to create a new State. If a new State does result, then the act of secession will have had a significant international law effect. This is what the ICJ was referring to when it said that the authors of Kosovo's declaration of independence intended their act to be one "the significance and effects of which would lie outside" the legal order existing at the time for the self-administration of Kosovo.[175] When such an act succeeds, it indeed has "significance and effects" for existing States, for it introduces a new legal person having all the potential for relations with other States that statehood entails.

Whether the act of secession will have that general legal effect cannot be determined by considering the act in isolation of its wider context. Of central importance in the wider context will be how other States respond. Herein is the significance of recognition. Recognition is the main mechanism by which States respond.

Crawford, acting for the United Kingdom in the *Kosovo* advisory proceedings, considered the effect of putative acts of secession and, more particularly, how declarations of independence relate to statehood as such. The Court would agree in the Advisory Opinion that declarations are not subject to any relevant rule of general international law.[176] Where the question is how a declaration relates to the emergence of a new State, the general response—that is, how other States respond—is the central question. According to Crawford,

> A declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping. What matters is what is done subsequently, especially the reaction of the international community. That reaction may take time to reveal itself. But here [in respect of Kosovo] the basic position is clear. There has been no condemnation by the General Assembly or the Security Council; there have been a substantial number of recognitions. This is all in sharp contrast to cases where there has been a fundamental breach of international law in circumstances surrounding the attempt to create a new State—as with the Bantustans, Southern Rhodesia, Manchukuo or the TRNC. In such cases the number of recognitions can be counted on one hand, whether or not it is clapping.[177]

Yet the absence of applause cannot in itself nullify the existence of a State. The international community, notwithstanding the dispositive powers that it might exercise under certain circumstances, has not (as yet under the modern law) developed a procedure for de-recognizing a State even in face of manifold problems. The continued

existence of States like the Congo and Somalia in the face of internal disturbances or Kuwait and Poland under armed occupation testifies to the resilience of the State, as does the largely frigid response to proposals by doctrinal writers to renounce the statehood of so-called failed States.[178] It also testifies to the point about the silent audience: the absence of recognition (as distinct from active non-recognition) will not deprive an entity that constitutes a State of its rights.

Non-recognition, then, is not a response that denies the existence of an established State. Rather, it addresses the claimant that is not yet established as a State and that has breached fundamental rules—and, more particularly, has breached them in direct connection with its attempt to attain statehood. As set out above, a series of municipal legal instruments of the Russian Federation purported to implement the annexation of Crimea. Just prior to that, municipal instruments adopted in Crimea purported to separate Crimea from Ukraine. Russia and Crimea adopted the instruments against a backdrop of an international act—armed intervention in Ukraine. The putative bases that the Russian Federation adduced as justifications for use of force against Ukraine will be considered in Chapter 2. It is submitted that none are convincing. But even where an intervention finds a basis in international law, this is not a basis for a change of boundaries. Chapter 4 will consider in greater detail the special privilege that attaches to boundaries and the territorial settlement in international law.

As an act within a municipal legal order, albeit an act intended to have its main effects outside that order, an act of secession is subject to the rules of the municipal legal order. To say, as the ICJ did, that those rules are distinct from the rules of general international law and from the special international rules that might be adopted to regulate an interim situation such as the one that existed in Kosovo[179] does not render the municipal law rules irrelevant to how other States respond. An act of secession that is plainly unlawful upon "an examination of the legality of the secession according to the law of the state from which the territorial unit purports to have seceded"[180] is unlikely to receive recognition from many States. It is unlikely to receive recognition from any States very soon. It has never resulted in the separation of territory from the State in a matter of forty-eight hours.

It certainly did not do so in Ukraine. There, a functioning central government continued, and its authority was still accepted in virtually the entire territory—and asserted in principle in the entire territory. There is little if any evidence that Ukraine's authority had been rejected in Crimea, or that, absent the armed intervention by Russia, even the appearance of its rejection could have been sustained. There had been murmurings in Crimea off and on about a preference for Russia;[181] but the inhabitants had given no indication that they were ready to pursue secession in earnest. No discussion had taken place between the secessionists and the central government, much less a formal negotiation, steps that the Canadian Supreme Court in the *Quebec reference*, the other leading judicial authority, said that the international community would expect and that the incumbent State has the right to require.[182] The purported annexation was carried out without multilateral involvement of any kind or even an observer process, which might at least have taken cognizance of the facts on the ground.

The shortest-lived State in the UN era, Zanzibar, acceded to independence from the United Kingdom as of December 10, 1963.[183] As of April 26, 1964, Zanzibar entered into union with Tanganyika to form the Union of Tanganyika and Zanzibar; the Union shortly afterward renamed itself United Republic of Tanzania.[184] In between, Zanzibar was admitted as a Member State to the United Nations.[185] The resolution of the Security Council recommending admission was adopted unanimously.[186] The resolution on admission in the General Assembly was adopted by acclamation.[187] This was a union of States properly executed—which means executed by international law acts freely chosen by each participant.[188] Nobody doubted the *bona fides* of the transaction; and the smaller partner had during its tenure been a full participant in international relations. Its union with the larger partner did not entail a change in the boundaries of a third State.

The Mali Federation lasted two months (June 20, 1960 to late August 1960), following which its parts separated.[189] None were annexed or otherwise became part of a preexisting State. The attitude of the former colonial administering power remained one of "*prudente circonspection et neutralité*."[190]

With Crimea by contrast, the former union State had recognized the independence of its constituent republic over twenty years before and, then, in an armed intervention, was the decisive force behind a putative new State—a short-lived successor to its own successor. The Ukrainian territory of Crimea declared independence; Russia purported to enter into an agreement with the putative State—the putative State's sole recorded international act—and under that act Russia annexed it. A writer has cogently observed that "an argument that [seeks] to distinguish the final act of annexation from its first stages makes little sense; they are both violations of Ukraine's right to control its own territory."[191] International law may say little about municipal processes by which a new State can emerge in the territory of an existing State; but international law most certainly says something—indeed, is centrally concerned with—the relations between States. The central tenet in relations between States under the modern law is that each State respects the territorial integrity of all other States. Good faith, too, is a principle of international law having more than passing significance.[192]

In respect of Russia and Ukraine, no State besides Russia accepted that a new State had emerged in Crimea in the short hours between the declaration of independence and the annexationist act. It would appear that the small handful of States that recognized Russia's forcible separation of Abkhazia and South Ossetia from Georgia did not rally in time to communicate recognition of Crimea.[193] In any event, the existence of an extremely small minority that asserts that those entities constitute (or constituted) States did nothing to consolidate a general status—even given six years to do so. A minority of one *a fortiori* could not have done so in respect of Crimea over a period of five days.[194]

The isolation and continued non-recognition of the putative States in Georgia are instructive in this regard. If Russia's armed intervention continues in eastern Ukraine and putative "States" are declared under the cover of that intervention,[195] recognition by Russia and one or two supporters will have no more success in consolidating the status claimed.

Recognition as Unlawful Act

Classically, the "high political act of recognition" is one which no other State can question.[196] To describe the act as unquestionable is an overstatement. Recognition, the discretionary element, strong as it is, is nevertheless an important international law mechanism. Recognition is the principal way the international community expresses judgment as to whether a new State has emerged. It would be surprising if individual exercises of judgment that do not accord with the community judgment were immune from scrutiny. So, though in the twenty-first century a discretion remains, it is likely qualified by a certain deference to the appreciation formed by States in general: "In the absence of collective action by the international community, individual States are left to an appreciation of the position"[197]—a formulation in which it is implicit that in the presence of collective action, individual States are at least in some way constrained.

The judgment entailed by recognition thus has a collective aspect. One or a handful of States withholding recognition will not prevent a State from emerging; and, conversely, one or a handful of States extending recognition will not summon a State into being. This consideration is particularly salient where the existing State in whose territory the secessionists claim to have created a new State still makes a plausible claim to title.

The discretionary aspect here meets a certain limit. Recognition, in isolation, does not affirm the creation of a new State, much less in itself effectuate the creation of a new State. One State may believe itself free to extend recognition, but it well may discover the act to have no effect. Moreover, to extend recognition as against a near-unanimous judgment that no new State has come into being may well overstep the discretion that the State otherwise enjoys.

It has long been understood that an exception to the discretion to recognize a new State arises when the existing State maintains its claim, and not enough time has elapsed, or the putative new State has not achieved a sufficiently stable existence, or the situation has otherwise not sufficiently resolved itself, to justify moving beyond that claim. The exact terms of the exception may be unclear at the margins. The exception as such nevertheless is noted in the works of international law writers.[198] The *Institut de Droit International* has noted it as well.[199] That recognition might be given prematurely, and that in giving it prematurely a State might attract responsibility, is a position that States took on both sides of the controversy surrounding the emergence of States in the territory of the former Socialist Federal Republic of Yugoslavia in the 1990s.[200]

The parameters of a prohibition against premature recognition are not definite, but an isolated case of recognition, in the presence of an armed intervention, in the absence of any multilateral process, against the protest of the incumbent government, followed immediately by annexation to the recognizing State, is not at the borderline. If there is such a thing as an unlawful act of recognition, then Russia's recognition of Crimea is a clear case of an unlawful act.[201]

The response of the international community to date has accorded with this conclusion. Chapter 3 will consider how the international community has responded.

First, however, a residual argument in respect of the annexation of Crimea must be considered. The introduction to Part I noted that the prohibition against the change of boundaries by force almost certainly extends as well to situations in which the use of force as such was otherwise lawful; Chapter 4 will explore this point further. There was once, however, some question as to the absoluteness of the exclusion, and that question may still have lingered in recent years, at least at the margins. Sir Elihu Lauterpacht as Judge *ad hoc* in the *Genocide* case at least suggested as much when he said, "It is beyond question that territory cannot lawfully be acquired by the *aggressive* use of force."[202] The conduct of the Russian Federation, perhaps, has brought the question back to a degree.

Furthermore, the use of force against Ukraine, quite apart from the forcible annexation of Ukrainian territory, constitutes a breach of obligation, unless a valid basis for that use of force exists. For these reasons—to address the residual argument about forcible acquisition of territory, and to address the other breach—the chapter that follows will address Russia's legal arguments for use of force against Ukraine.

CHAPTER 2

The Use of Force against Ukraine

A range of situations exists in which a State may resort to force. Outside the core cases of authorization for use of force under Chapter VII of the Charter and use of force in self-defense following an armed attack but before the organization of a collective response, the scope of the exceptions to the prohibition is one of the most controversial matters of international law. It is not controversial that the prohibition against use or threat of force under international law is not absolute, the existence of qualifications on the prohibition being explicit in Article 51 of the Charter. But the prohibition against acquisition of territory by threat or use of force is. Chapter 4 considers this distinction in greater detail.[1]

The absolute character of the prohibition against acquisition of territory by threat or use of force presents serious difficulties for Russia's legal position. Even if use of force were justified in connection with Russia's intervention in Ukraine in 2014, force could not be the basis for the annexation of Crimea. In the better understanding of modern international law, the arguments that Russia espoused as bases for the use of force against Ukraine are beside the point when seeking a legal basis for the annexation of Crimea.

Russia nevertheless made the arguments and evidently made them in earnest. Moreover, the arguments are relevant to the prior question of Russia's armed intervention. That is to say, prior to the forcible seizure of territory from Ukraine, Russia made legal arguments that, whether or not credible, were admissible as arguments grounding intervention as such. Each of the arguments therefore is to be considered.

It must be said, by way of caveat, that there is a degree of artificiality in assessing the use of force here in isolation from its result. Intervention and annexation were closely connected. While it would have been possible for Russia to intervene without annexing Ukrainian territory, it did, in fact, annex territory. The unity of the operation, in retrospect, was real from the start, even if, until the last moment, Russia had other options. A further reason for considering the arguments is the one stated at the close of the preceding chapter. The absolute prohibition against the forcible acquisition of territory, though deeply entrenched, has sometimes been challenged, at least implicitly. Russia's pairing of forcible annexation with a litany of arguments to justify the use of force is a further (implicit) challenge to the entrenched position.

Finally, the sheer variety of arguments the Russian Federation made in connection with events leading to the annexation of Crimea, and the senior levels at which those arguments were espoused, is indicative of the role of Russia's intervention in the putative self-determination act. However much the Russian Federation might protest that it did not intervene (in Crimea or in the eastern parts of the country), the evidence to the contrary is overwhelming. There are not many instances of a State seeking to justify an intervention that did not occur.

Arguments that Russia put forward in 2014 as putative bases for its armed intervention therefore now will be considered in turn: (a) the Black Sea Fleet agreements furnished a basis for Russia's presence in Ukraine; (b) dangers faced by Russians abroad justified intervention; (c) events in Ukraine threatened regional stability; (d) humanitarian principles or the "responsibility to protect" was applicable in Ukraine; (e) Ukraine invited Russia to intervene; (f) the self-determination of Russians in Crimea was under threat and could only be protected with external assistance; (g) Western powers had intervened and so counterintervention was lawful; (h) Russia had a right to resort to reprisals for breaches by Ukraine.[2]

The Black Sea Fleet Agreements

According to the president of the Russian Federation, he had...

> received permission from the Upper House of Parliament to use the Armed Forces in Ukraine. However, strictly speaking, nobody has acted on this permission yet. Russia's Armed Forces never entered Crimea; they were there already in line with an international agreement. True, we did enhance our forces there; however... we did not exceed the personnel limit of our Armed Forces in Crimea.[3]

National law authorization to use force in the territory of a foreign State has nothing to do with international law, a point the president implicitly recognized. The heart of the argument was that the presence of Russia's armed forces in Crimea was "in line with an international agreement."

The "agreement" to which the president referred comprised a series of instruments adopted in 1997 and 2010. The instruments addressed the former Soviet naval fleet in the Black Sea and arrangements for basing it in Ukrainian ports.[4] The agreements were as follows:

(a) Agreement between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory, May 28, 1997 ("Ukrainian Territory Agreement")[5]
(b) Agreement between the Russian Federation and Ukraine on the Parameters for the Division of the Black Sea Fleet, May 28, 1997 ("Parameters of Division Agreement").[6]
(c) Agreement between the Russian Federation Government and the Government of Ukraine on Clearing Operations Associated with the Division of the Black Sea Fleet and the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory, May 28, 1997 ("Clearing Operations Agreement").[7]

The three agreements entered into force together in accordance with Article 25 of the Ukrainian Territory Agreement.

The Parameters of Division Agreement stipulates the precise numbers of military, air, and naval units to be stationed in Ukrainian territory, and does so with reference to the obligatory ceilings indicated in the Treaty on Conventional Armed Forces in Europe of November 19, 1990.[8] The Clearing Operations Agreement indicates that Ukraine leases to Russia land and infrastructure at Sevastopol and Feodosiya, as set out in annexes 1 and 2 and maps 1 and 2 accompanying the Parameters of Division Agreement.[9] The Ukrainian Territory Agreement also confers a number of rights on Russia.

Throughout the Ukrainian Territory Agreement the rights of Ukraine as receiving State are affirmed. The movement of Russian vessels through Ukrainian ports "are made in observance of the Ukrainian Merchant Shipping Code, the corresponding port regulations, the shipping safety regulations, and [the regulations governing] protection of the Ukrainian environment and fishing."[10] Movement of troops, whether in formation or individually, and of their matériel are subject to "observance of border, customs, and other kinds of state control when crossing the Russian-Ukrainian border in accordance with existing Ukrainian legislation."[11] The basing arrangement is also clear not to confer anything resembling a sovereign right on the sending State. The properties designated in the lease provisions under Article 2 of the Clearing Operations Agreement are identified as "land and infrastructure," not territory.[12] Under such terms, the sending State, as would be expected, is in the position of a leaseholder or similar beneficiary of limited specified rights; it is not the territorial sovereign.

The Ukrainian Territory Agreement makes clear that the territory with which it is concerned remains under Ukrainian jurisdiction. Article 19, paragraph 1, provides (subject to narrow exceptions) that...

> Ukrainian legislation is applied and Ukraine's courts, prosecutor's office, and other competent organs take action in respect of cases involving crimes committed by persons forming part of military formations or their family members on Ukrainian territory.[13]

Article 6, paragraph 1, provides that...

> Military formations carry out their activity at stationing locations in accordance with Russian Federation legislation, respect Ukraine's sovereignty, abide by its legislation, and do not allow interference in Ukraine's internal affairs.[14]

Article 2 of the Clearing Operations Agreement provides that Russia "will utilize the leased land, coastal infrastructure, and water areas in conformity with Ukrainian legislation in force."[15] Article 1, paragraph 2, of the Parameters of Division Agreement provides that the "modalities of utilization of the installations of the Black Sea Fleet...are defined by the Ukrainian party," with the exception of particular properties and facilities designated in Articles 2 and 3.[16] Russia is to inform Ukraine beforehand who the commanding officer will be of the Black Sea Fleet.[17]

Article 24 of the Ukrainian Territory Agreement provides for a Mixed Commission (cross-referenced in Article 8 of the Parameters of Division Agreement and Article 6 of the Clearing Operations Agreement),[18] and this is to resolve disputes regarding the interpretation and application of the agreement. No appointment procedure is indicated in the body of the treaty, or in the other two treaties, nor is an appointing authority indicated. Diplomatic consultation is indicated as the default procedure.[19]

The Ukrainian Territory Agreement remains in force for twenty years, after which it extends automatically for further five-year periods, subject to a unilateral termination clause (Article 25). The period in force of the Parameters of Division Agreement is the same as for the Ukrainian Territory Agreement.[20] The Clearing Operations Agreement was to remain in force until the parties "totally discharged the obligations arising thereunder."[21] The dischargeable obligations are those relating to the apportionment of debts and similar matters under the further paragraphs of Article 2.

The parties on April 21, 2010 adopted an agreement regarding the presence of the Russian Federation Black Sea Fleet on the territory of Ukraine ("Kharkov Agreement"). By that instrument they agreed to extend the effective period of the 1997 basing arrangements. The 2010 agreement contains recitations affirming, *inter alia,* a May 31, 1997 Treaty (which itself had affirmed the inviolability of existing borders)[22] and "the existing basing agreements of the Black Sea Fleet." It then extends the 1997 basing agreements "for 25 years from 28 May 2017 with successive automatic five-year periods, unless either Party notifies the other Party in writing not less than a year in advance of the completion of the term."[23] The agreement stipulates that from May 28, 2017, Russia will pay Ukraine US$100 million per annum as a "rental fee for the stationing of the Black Sea Fleet of the Russian Federation on the territory of Ukraine."[24] It also stipulates that Russia will make dispensations to Ukraine on the price of natural gas delivered under an existing contract between Naftogaz Ukraine and Gazprom, subject to a formula relating to market conditions.[25]

The 2010 agreement is a short text, having two substantive articles and a third addressing entry into force. It contains no dispute settlement procedure or any further specification of the fleet-basing arrangements, except the reference to the May 28, 1997 agreements, which is to be interpreted as a *renvoi*.[26]

Whether they are taken individually or as a whole, it is impossible to see the Black Sea Fleet agreements as anything other than a basing arrangement, not greatly dissimilar to status-of-forces agreements (SOFAs) that States conclude in connection with the hosting of foreign armed forces in their territory. They are not particularly permissive to the sending State. They by no means go as far as the Guantánamo Bay lease under which the United States has "complete jurisdiction and control" in a defined area of Cuba.[27] Even less are they analogous to the Sovereign Base Area arrangements under which the United Kingdom maintains permanent sovereignty under the constitutional settlement in Cyprus.[28] *A fortiori,* the Black Sea Fleet arrangements certainly entail no right on the part of the sending State to intervene in the political affairs of the host State. On the contrary, like a range of other

agreements, they confirm Russia's recognition of Ukraine's borders at the time of independence.[29]

Shortly after the Russian Federation began to deploy forces throughout the territory of Crimea, Ukraine circulated a Non-Paper indicating that the deployments constituted a breach of Russia's international obligations. The Non-Paper noted, *inter alia,* that the deployments were in breach of the May 31, 1997 Treaty and the Ukrainian Territory Agreement of May 28, 1997.[30] Reference was made in particular to Article 6 of the Ukrainian Territory Agreement stipulating respect for the sovereignty of Ukraine.[31] Ukraine later protested that steps by Russia to establish a "full-scale and self-sufficient military force in Crimea" had led to a "gray zone" subject to no effective regime of arms control.[32]

Ukraine also indicated that the conduct of Russia was in breach of Article 30 of the UN Convention on the Law of the Sea.

A question arose as to whether Russia deployed troops in Crimea in excess of the ceilings specified in the fleet agreements. If it did, then this would have constituted a breach of the provisions by which the ceilings were stipulated. But that is largely beside the point: a receiving State does not agree to the basing of troops in its territory on the understanding that the troops may be used to disrupt its territorial integrity. The Definition of Aggression includes as an act of aggression the following: "The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement."[33] The use of agreed forces to effect the breakup of the host State would be an extreme case of aggression in that sense.

The president of the Russian Federation on April 2, 2014, following the purported annexation of Crimea, signed the Federal Law on Termination of the Agreements Governing the Presence of the Russian Federation Black Sea Fleet on the Territory of Ukraine. The Federal Law purported unilaterally to terminate the agreements.[34] The International Law Commission in 2011, considering the effects of armed conflicts on treaties, had said that "a State committing aggression within the meaning of the Charter...and resolution 3314 (XXIX) of the General Assembly...shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State."[35] While the ILC identified the Security Council as competent to determine whether aggression has occurred, it suggested that the determination may involve judges and arbitrators as well.[36]

Protection of Co-ethnics Abroad

The Russian Federation alluded to difficulties allegedly faced by persons of Russian ethno-linguistic origin in Ukraine. The president stated as follows:

> Those who opposed the coup [overthrowing President Yanukovych] were immediately threatened with repression. Naturally, the first in line here was Crimea,

> the Russian-speaking Crimea. In view of this, the residents of Crimea and Sevastopol turned to Russia for help in defending their rights and lives, in preventing the events that were unfolding and are still underway in Kiev, Donetsk, Kharkov and other Ukrainian cities.
>
> Naturally, we could not leave this plea unheeded; we could not abandon Crimea and its residents in distress.[37]

Russia's Permanent Representative also referred to "people . . . fear[ing] for their lives and safety."[38]

The factual problem here has already been noted.[39] No situation existed, as verified by any reliable source, in which the Russian-speaking population in these places faced a threat. Sporadic minor incidents, even if these were shown to have an ethnic motivation, cannot provide the basis for an intervention. That would invite a nearly limitless number of interventions.[40] As for a major incident, this might furnish the factual basis for a targeted intervention—that is, an intervention narrowly tailored in time and place for the purpose of addressing the incident. The Israeli raid on Entebbe suggests the model.[41] Russia, however, presented no evidence to show that persons of Russian nationality or ethnic background were the victims of such an incident in Crimea.

Further relevant here is the scope of the right Russia asserted. Russia's intervention was not narrowly tailored. This was the annexation of a whole province in response to a period of civil unrest (unrest that proved to be transitory). As part of a limiting principle, a rule of intervention for protection of nationals abroad would have to contain an element of proportionality. This accords with the exponents of protective intervention, the United States, for example, indicating that "there is a well-established right to use *limited* force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the state in whose territory they are located either is unwilling or unable to protect them."[42]

Even where the factual circumstances pleaded by the intervening State have been verified, considerable uncertainty exists as to what factual circumstances precisely would justify intervention under the protective rubric. This is an unsettled area of the law.[43] It is submitted here that even under the most permissive interpretation of a protective principle, the Crimean intervention was out of all proportion to the threat as portrayed by Russia. It is hard to see how the deployment of troops, at near division strength, and the complete supplanting of the territorial State's administration, with no mechanism for a return to normal conditions, were justified by persons merely being "threatened with repression." "Residents in distress"—as the Russian president described the Crimeans in March 2014—cannot be enough to justify a de facto takeover. Even lesser abuses long have suggested the need for limits, and so earlier views, such as Sir Humphrey Waldock's,[44] which attributed States wide license in the matter, have now largely been moderated. Most writers addressing the use of force for the protection of nationals of a State abroad now favor strict limits.[45] Writers addressing Russia's intervention in Ukraine in particular have concluded that protection of the Russian population was not a valid basis for the intervention.[46] The Council of Europe has taken a similar position, PACE for example "consider[ing] that justifying . . . military actions by a member State against

other member States by the need to protect its own citizens is not compatible with Council of Europe standards."[47]

To the extent that Russia pleaded a right to protect its nationals, this was largely in respect of persons on whom Russia had conferred nationality recently. The issuance of passports to persons in Georgian territory to give a putative basis for intervention was sharply criticized in any case.[48] PACE considered that the "en masse distribution of Russian passports to persons living outside the Russian Federation ('passportisation') is contrary to the Council of Europe's principles."[49] A State presumptively enjoys wide discretion in determining who its nationals are; but this discretion has limits; and whether the State remains within the limits will be judged in view of the wider circumstances.[50] Nationality conferred as a prelude to invasion merits no deference.

The more serious difficulty here is the even broader right that Russia posited. Russia did not restrict its putative justification to those holding its nationality. It asserted a right to protect a wider and less precisely defined class—persons having a historical or ethno-linguistic connection to the intervening State. This was not, in the main, pleaded as a case of intervention to aid holders of Russian passports, even holders of very new Russian passports such as the persons over whom Russia claimed to have a right of protection in the Georgian regions, Abkhazia and South Ossetia.[51] Russia, instead, pleaded a right of intervention with reference to the sentiments or cultural affinities of the inhabitants of another State.

Other States have claimed a right to intervene in order to unify the lands in which the inhabitants feel a connection to a particular culture or language—but no State has done so in any significant way since 1945. A long history underlies claims like those Russia now makes. The history has a benign chapter—namely, the practice of the Permanent Court in respect of minority rights. States with a connection to minority populations availed themselves of legal procedures to oppose treaty obligations to the States in which the populations were found.[52] States, as time went on, however, did not restrict themselves to treaty rights or to legal procedures. The pursuit of irredentist claims by force was an assault on public order that neither the rules nor the institutions of the day survived.[53]

Regional Stability

According to the president of the Russian Federation, "Crimea is . . . a very important factor in regional stability."[54] Other officials said that Ukraine could affect the security and stability of neighboring regions of the Russian Federation.[55] The difficulty with these assertions is that, though in the aftermath of the forcible separation of Crimea from Ukraine there is evidence of a regional crisis, previously there was not. This contrasts with Kosovo, where the Security Council noted "the enormous influx of Kosovo refugees into Albania, the former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, and other countries, as well as . . . the increasing numbers of displaced persons within Kosovo, the Republic of Montenegro and other parts of the Federal Republic of Yugoslavia."[56] A crisis existed in Kosovo and put several vulnerable States at risk. Both the crisis and the risk were widely acknowledged. Scarcely any State or body outside Russia believed that events in Crimea were of that character.

Humanitarian Principles or "Responsibility to Protect"

The foreign minister of the Russian Federation said to the Human Rights Council on March 3, 2014, that intervention by Russia in Ukraine was "about protection of our citizens and compatriots"—a claim already addressed above under the protection of co-ethnics. The foreign minister in the same statement referred to "the most fundamental of the human rights—the right to live, and nothing more."[57] The phrasing echoes the initial postulates of a responsibility to protect.[58] Responsibility to protect, as postulated, would involve collective determinations that "the most fundamental of human rights" were at stake.[59] Upon much the same considerations as relate to protective intervention under a nationality principle and as relate to regional stability, the factual basis for a humanitarian intervention in Ukraine did not exist. No other State and no international organization believed that it did.

Invitation

The Russian Federation transmitted to the Security Council on March 3, 2014, a statement of the same date purportedly made by V. F. Yanukovych, the deposed president of Ukraine.[60] The statement was as follows:

> As the legally elected President of Ukraine, I hereby make the following statement.
>
> The events on the Maidan and the illegal seizure of power in Kyiv have brought Ukraine to the brink of civil war. Chaos and anarchy reign in the country, and people's lives, safety and human rights are under threat, particularly in the south-east and in Crimea. With the influence of Western countries, open acts of terror and violence are being perpetrated and people are being persecuted on political and linguistic grounds.
>
> I therefore appeal to the President of Russia, V. V. Putin, to use the armed forces of the Russian Federation to restore law and order, peace and stability and to protect the people of Ukraine.[61]

Mr. Yanukovych, a month later, said that he "was wrong" to have invited Russian troops into Ukraine and that he had "acted on [his] emotions" in so doing.[62]

As an initial observation, it is to be doubted whether, under a system of cabinet government and parliamentary responsibility, a statement that results from the "emotions" of a single, individual declarant, is disowned by the government in effective control of the State for which he claims to speak, and within five weeks is repudiated by the declarant himself, expresses a State position having international legal effect. The formation of treaties and the adoption of unilateral declarations are not identical processes, but the rules concerning one bear some relation to the other.[63] Earlier in the era of modern international law, a purported agreement between heads of State, whose status as such was clear, but which contradicted one State's existing obligations and was concluded in secret and without consultation with competent departments, was quickly repudiated; the four-article text signed by Kaiser Wilhelm and Tsar Nicholas on a yacht in the Baltic in 1905 never entered

into force.[64] A unilateral statement, too, where it denotes a substantial change in legal relations but where its constitutionality under national law is not obvious, may well come under scrutiny. This was the case with the statement of the King of Jordan renouncing claims to the West Bank; the context (in particular the peace process) and Jordan's subsequent confirmation of the act made clear that it was valid.[65] Determining whether unilateral acts produce legal consequences or not "it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise."[66]

An ordinary agreement to do ordinary things needs no affirmation by third parties. But, where an agreement would overturn the presumptive inviolability of a State's borders, how others respond may be relevant. In 2013, Mali invited France to intervene in its territory.[67] The Security Council welcomed "the swift action by the French forces, at the request of the transitional authorities, to stop the offensive of terrorist, extremist and armed groups."[68] This was a statement that (a) confirmed the existence of a situation calling for action; (b) confirmed that the competent authorities had made a request; and (c) approved the intervening State's response. The putative invitation to Russia received no such affirmation.

There are situations, like the putative treaty of the Russian Tsar and the unilateral declaration of the Jordanian king, where a question arises, but the question concerns the workings of a largely stable constitutional apparatus. There are other situations where the State has entered a period of convulsion. Apparently central to Russia's position that Russia was invited to intervene in Ukraine is the assertion that Ukraine had entered such a period; and that the only government with which to have dealt was that supposedly embodied in the deposed president. Russia, by taking this position, sought to invoke a series of considerations relating to the effectiveness of governments and the representational capacity of opposition groups.

The classic case in which a national crisis cast the capacity of a government in doubt is *Somalia* v. *Woodhouse Drake & Carey (Suisse) S.A. (The Mary)*. Hobhouse J. said as follows:

> The factors to be taken into account in deciding whether a government exists as the government of a state are: (a) whether it is the constitutional government of the state; (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; (c) whether Her Majesty's Government has any dealings with it and if so what is the nature of those dealings; and (d) in marginal cases, the extent of international recognition that it has as the government of the state.[69]

Applying the factors as indicated, Hobhouse J. concluded that the "interim government [of Somalia] certainly does not qualify" and, thus, its instructions were not valid.[70] A central consideration in *Somalia* v. *Woodhouse Drake & Carey* was the collapse of Somalia into factional fighting. The collapse was complete. The country contained no central authority. Hobhouse J. in particular credited the British government observation that "there is at present [no] effective government in Somalia."[71] This was a very different situation from that in Ukraine in February and March 2014.

To consider the *Woodhouse Drake* factors in turn: *(a)* The Ukrainian interim government came into being amid a public convulsion—but the administrative apparatus of Ukraine passed into the hands of the interim government without discontinuity or disruption in the constitutional system at large. The interim government set about organizing new elections to regularize the situation—early elections organized with all deliberate speed, and then further elections later to allow time for a more considered public dialogue. The interim government in this sense was "the constitutional government of the state." Its status as such received broad recognition.[72] *(b)* Outside the areas where armed intervention by the Russian Federation had commenced, the interim government enjoyed stable administrative control; its ability to maintain that control was not in doubt at the level of the ordinary functioning of the State apparatus. *(c)* The international relations of Ukraine continued with no significant rupture. Where a government's diplomatic apparatus has continued to act, challenges to the government's competence to represent the State indeed have been rejected.[73] And *(d)* the situation in respect of the first three factors was not "marginal"; but, in any event, there was no widespread practice to suggest non-recognition of the interim government. Only a small number of States took steps (and symbolic steps only) to indicate support for the deposed president. The deposed president by and large was not recognized as the head of government or otherwise dealt with as if he were. Unrest, even unrest leading to the expulsion of a government, is not the same as disintegration of public order.

The approach taken in *Somalia* v. *Woodhouse Drake* drew cogent criticism; greater clarification of the judicial function in such cases was needed.[74] Nevertheless, Hobhouse J.'s four factors remain a useful analytic guide. Applied to the facts in February and March 2014, *Somalia* v. *Woodhouse Drake* does not support the proposition that Mr. Yanukovych continued as president of Ukraine.[75]

Spanning over these considerations is a further problem. The scope of an invitation, in addition to being limited by its own terms, is limited by general international law. An invitation cannot be a license to carry out a breach of *jus cogens* rules. Jurists and States have posited that the constraints are tighter still.

When the USSR intervened in Hungary during the uprising of 1956, the invitation was not from the resistance but, purportedly, from the existing government. The head of government, Imre Nagy, denied, however, that he issued it.[76] Conclusion 5 of the General Assembly's Report of the Special Committee on the Problem of Hungary stated as follows:

> The act of calling in the forces of a foreign State for the repression of internal disturbances is an act of so serious a character as to justify the expectation that no uncertainty should be allowed to exist regarding the actual presentation of such a request by a duly constituted Government.[77]

This suggests that the burden of establishing the validity of the invitation will be higher, where the invited forces take action, which normally the receiving State would not permit others to take. A major military operation, supposedly in aid of putting down a revolt in which significant parts of the population are taking part, in effect supplants the receiving State's effective power. An invitation having this effect

is not to be inferred from uncertain statements or attributed to uncertain sources. The Soviet intervention in Hungary took place at the height of the Cold War, but the principle seems to have general applicability. As seen in interventions during the disturbances of the early 2000s in the Congo, a State may consent to foreign assistance in a time of civil disturbance or rebellion in its territory.[78] The indication of consent, however, must be clear, and it is unlikely to be open-ended.[79]

This is against a backdrop of general wariness about intervention in internal armed conflict. Modern international law has shifted to disfavor intervention in civil wars and other internal unrest, even if it has not rejected such intervention entirely. Greg Fox notes this point in connection with Ukraine.[80] The *Institut de Droit International*, though probably going too far, drew useful attention to the trend. According to Article 2, paragraph 1 of *Le principe de non-intervention dans les guerres civiles*,

> *Les Etats tiers s'abstiendront d'assister les parties à une guerre civile sévissant sur le territoire d'un autre Etat.*[81]
>
> [Third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State.]

The *Institut* further stipulated,

> *Les Etats tiers emploieront tous moyens pour éviter que les habitants de leur territoires, nationaux ou étrangers, réunissent des contingents et des équipements, franchissent la frontière ou s'embarquent dans leur territoires, pour fomenter ou déclencher une guerre civile.*[82]
>
> [Third States shall use all means to prevent inhabitants of their territories, whether nationals or aliens, from raising contingents and collecting equipment, from crossing the border or from embarking from their territories with a view to fomenting or causing a civil war.]

The further stipulation is one of a number which the *Institut* formulated. The third State also is to refrain, *inter alia*, from sending armed forces or military volunteers, instructors, or technicians to a civil war (Art. 2(a)); drawing up or training irregular forces (Art. 2(b)); supplying weapons (Art. 2(c)); or allowing their territory to be employed as bases for any party to a civil war (Art. 2(e)). Doswald-Beck largely concurred with the *Institut*'s position that third State intervention is not available as an aid against insurrection.[83] Kreß has asked whether such a prohibition in truth has crystallized;[84] Pellet et al. identify limits within which an intervention might be legal, the clear case of exceeding the limits being that where the State "*aliène…son indépendance*."[85] The other factors—the authority of the actor transmitting the invitation, in particular—will be considered in light of the circumstances as a whole.

When the *Institut* in 2011 revisited the question of aid against insurrection, it did not re-affirm Article 2(a) from the 1974 principles as such. It instead indicated conditions under which intervention would be permitted. In its resolution

of September 8, 2011, the *Institut* indicated that "military assistance may only be provided upon the request of the requesting State . . . The request shall be valid, specific and in conformity with the international obligations of the requesting State."[86] Governments aiding Iraq against the self-styled Islamic State took the view in 2014–2015 that a valid invitation "provides a clear and unequivocal legal basis" for military action.[87] Iraq's request for assistance was communicated by the foreign minister and was also set out in the framework of the Paris conference of September 15, 2014, in which Iraq welcomed "the commitment . . . by 26 States to provide the new Iraqi Government with all necessary support in its war against ISIL."[88]

The *Institut* principles (1975) also would prohibit the third State from "prematurely recognizing a provisional government which has no effective control over a substantial area of the territory of the State in question."[89] The emphasis here is on the "effective control over a substantial area." The principle would seem to apply, conversely, to a new government which is in firm control of nearly the whole territory as against a deposed head of government either no longer in the territory or making only short (and undisclosed) visits to certain places. States in the last thirty years have tended to deal with the effective government and not to take a view, except in extreme cases, as to the mechanism of governmental transition.[90]

Force in Aid of Self-Determination

The difficulties in applying the law of self-determination in the case of Crimea have been set out above. This was not a situation where the conditions for the exercise of external self-determination were met.

Even if Crimea were a territory entitled to exercise a right of self-determination by establishing itself as a separate State, that in itself would not have entitled a State to use force to aid Crimea in attaining that end.

The Friendly Relations Declaration suggests that, where a colonial country or people is forcibly denied the exercise of its right to external self-determination, some qualification to the general rule of noninterference may operate. The question is what options for intervention such a qualification might entail. According to the Declaration,

> Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.[91]

Two paragraphs after this paragraph is the oft-quoted provision that protects the territorial integrity and independence of the State. That provision in turn, however, is apparently subject to the "equal rights and self-determination" of colonial peoples:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part,

> the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[92]

It would seem to follow that the protection of territorial integrity is not absolute. It might be suspended where the State is not "conducting [itself] in compliance with" the stated principle. Whether such a suspension of territorial integrity is in truth available outside the colonial context and, if so, to what extent, is subject to an extensive debate.[93]

If this provision is read together with the preceding provision positing a "duty to refrain from any forcible action" in the stated circumstances, it would seem to follow that a failure to act "in compliance with the principle of equal rights and self-determination of peoples" entails a right of resistance on the part of a people against the State that has failed to comply. The right of the people would appear to include (a) a right to undertake "actions against, and resistance to," the State that has not complied and (b) a right to request "support" from other States. It is the second branch that is of interest here.

In considering the meaning of the term "support" in this context, an initial point is that the Friendly Relations Declaration affirms the established pacific principle of international law. It indicates, "States shall settle their international disputes by peaceful means" and that States "shall refrain in their international relations from the threat or use of force against the territorial integrity . . . of any State." These rules take precedence at least in drafting order over self-determination. They similarly would seem to take precedence over the concept of "support" in aid of self-determination.

Whether the drafting order entails a legal hierarchy or not, it would significantly re-order the international system to place the use of force in self-determination cases on a hair trigger. It is for this reason that writers and jurists have been doubtful that the right to self-determination entails a right on the part of a people to use force against a State. The question exposed sharp divisions between the Western States and recently decolonized States when it arose in the General Assembly.[94] Nothing like a consensus emerged.

Indeed, the Friendly Relations Declaration did not say that the "support" that the people (as a juridical entity) are "entitled to seek and to receive" from other States includes armed intervention.[95] The position is strongly held that such support as a people may request in connection with a claim to self-determination is limited to pacific measures. The Security Council, when addressing "support" to peoples engaged in the struggle for decolonization, avoided language that would have affirmed a right to armed measures.[96]

Military and Paramilitary Activities in and against Nicaragua occasioned a foray into the matter by the ICJ. The Court found that "no . . . general right of intervention, in support of an opposition within another State, exists in contemporary international law."[97] Judge Schwebel was afraid that this did not go far enough: if there was no *general* right, then perhaps in specific situations a right would exist.

Writing in dissent, Judge Schwebel sought to clarify the point by excluding an implied specific right:

> In contemporary international law, the right of self-determination, freedom and independence of peoples is universally recognized; the right of peoples to struggle to achieve these ends is universally accepted; but what is *not* universally recognized and what is *not* universally accepted is any right of such peoples to foreign assistance or support which constitutes intervention. That is to say, it is lawful for a foreign State or movement to give to a people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign State or movement to intervene in that struggle with force or to provide arms, supplies and other logistical support in the prosecution of armed rebellion.[98]

The right in doubt would be for the intervening State to use "force or to provide arms, supplies and other logistical support in the prosecution of armed rebellion." So this is a question of intervention by arms. Such intervention is generally prohibited under Charter Article 2, paragraph 4. To ground an intervention in support of self-determination, a specific exception therefore would have to have emerged.

The exception—to the extent that it exists—would have to keep sight of the terms in which the Friendly Relations Declaration frames it. This would be an exceptional right on the part of the self-determination group to "to seek and to receive support"—as against "forcible action" taken to frustrate the "pursuit of the exercise of their right to self-determination." In other words, the Declaration, which expresses the furthest possible evolution of such an intervention right, limits the right to the situation in which the incumbent State uses force to suppress the self-determination right. Two prerequisites thus condition the application of the putative right to intervene: there exists a people holding the right to self-determination in the relevant sense, and the State is using force to prevent them from exercising that right.

On the evidence, Ukraine, to the extent that it resisted the putative right of self-determination of Crimea at all, did not do so in a forcible way. The situation with which the Friendly Relations Declaration was concerned—that where the State forcibly frustrates self-determination—thus did not arise. Proportionality would also seem relevant here. The deployment of a large and able force in the territory was not in proportion to any force resisting the supposed pursuit of the rights of the Crimean people. The chosen remedy in the circumstances—the separation of the territory from the incumbent State—was also not in proportion to the problem, if a problem existed at all.[99] This consideration applies independently of whether a self-determination right existed in the first place.

With regard to the putative Donetsk and Luhansk republics that were later proclaimed in eastern Ukraine, the absence of the self-determination right renders such an intervention right inapplicable: these are not self-determination units in the relevant sense.

What is more, the armed intervention in support of the putative republics is hard to distinguish from threats and acts against Ukraine as a whole. If (for purposes of argument only) it were accepted that the right to self-determination applied to the

Donetsk and Luhansk entities, then an armed intervention (under the most permissive interpretation of the right of intervention) would be available only as an aid to their resistance. Armed intervention going further than that—that is, an attack on the State from which those entities are seeking to separate—would not be justified.

In Chapter 1, Russia's claim that Crimea was a territory whose inhabitants held an entitlement to self-determination was considered on its own terms.[100] That is to say, the claim was considered with reference to the law of self-determination and the situation of the Crimeans (ethnic Ukrainians, ethnic Russians, and Tatars). The problems with Russia's claim on its terms were noted. Use of force by Russia in Crimea, however, introduced a further problem.

The Russian Federation claimed that the separation of Crimea from Ukraine was an expression of popular will. A significant problem with that claim is that the referendum that Russia says reflected the popular will in Crimea was organized and carried out in a situation of armed emergency. PACE concluded that "the drive for secession" had nothing to do with a real political movement in Crimea; it was "instigated and incited by the Russian authorities, under the cover of a military intervention."[101] At the heart of the right to self-determination is the freedom of the people to decide the fate of their territory. It is impossible to say whether the people have in truth reached their decision freely when a State has exercised such force and threat as to overwhelm the situation.

This is as much the case for an exercise of force by the incumbent State as by an intervening State. In neither case is it sound to presume that an act of self-determination has taken place. The General Assembly was involved with the several self-determination referendums noted in Chapter 1. Its involvement illustrates the concern that the conditions be right for such an act. These were referendums where no taint of unlawfulness affected the situation as a whole, and where no doubt existed that the people participating in the referendums had a right as a matter of the law of self-determination to do so. In any event, the international practice in respect of monitoring such procedures is now highly developed;[102] if there were anything to have been gained from a referendum in Crimea, there is no obvious legal reason to have conducted it in haste, in a period of public crisis, and in the absence of third party observation. This is a further problem raised by use of force in Crimea: it deprives the self-determination claim of the basic materials that would be necessary for its validation.

It will be recalled that, when South Africa proposed a plebiscite for Namibia, evidently in the hope that it would have a curative effect, the ICJ rejected the proposal in light of the underlying wrongful act.[103] Whatever the cause of the emergency in Crimea at the time of the referendum—on a considered view, the cause was an act of aggression of Russia—this meant that the situation in the territory was such that an exercise in participatory democracy, if one had taken place, arguably would not have addressed the underlying problem. Democratic action, though a *desideratum* in certain situations, is not a universal solvent.

Finally, for use of force in any case to be valid under a principle of aid to self-determination, international law imposes a basic measure of good faith. Good faith is a principle of international law that has been found to apply in a variety of situations.[104] It surely applies where the conduct to be tested has disrupted the

territorial integrity of a State. The good faith of the intervening State is not obvious where intervention led immediately to the incorporation of the territory in question into the intervening State—and all the more so when this is a territory that the intervening State openly identifies as having strategic importance.[105] Nor is good faith obvious where, as with Donetsk and Luhansk, putative self-determination units emerge only in the presence of a significant armed intervention.

As suggested before, the timing of events is relevant in this regard. A change in the constitutional structure of the Russian Federation and the putative creation and extinction of an independent State of Crimea took place over the course of barely ten days starting with the declaration of independence by putative authorities in Crimea on March 11 and concluding with the formal annexation act on March 21. The United Nations era, as noted in Chapter 1, has seen other short-lived States,[106] but none as short as this and none that was summoned into being following an armed invasion and extinguished by annexation to the country that sent the invading force. When Russia asserted that it employed armed force in aid of self-determination, the circumstances did not support the inference that this was an assertion in good faith.

Counterintervention

Russia alleged that the European Union or individual Western States had intervened in the internal affairs of Ukraine, including to the extent that the removal of the president in February 2014 was owing to intervention.[107] The allegation should be seen in light of the argument espoused by senior Russian officials that Western institutions, by supporting human rights in Russia, have encroached on Russia's rights as a State. Chapter 7 addresses the wider implications of Russia's turn against human rights. Insofar as Russia has referred to human rights in Ukraine as an intervention and thus as a legal basis for a counterintervention, the following points may be made.

The ICJ in the *Nicaragua* case indicated that an element to a wrongful intervention is that, by means of the intervention, one State seeks to override another State's "choice of a political, economic, social and cultural system" or "the formulation of foreign policy."[108] The further element is that the State seeks to do this by "coercion."[109] The Court did not define the outer limits of "coercion," saying only that acts involving a threat or use of force fall within the definition. Nevertheless, no definition would be workable if it swept into the category of unlawful conduct the whole range of interactions and influences that form part of modern international relations. States interact today in many noncoercive ways.

No multilateral body in 2014 found that an intervention had taken place in Ukraine.[110] As noted above, States and organizations largely accepted the transition to a new government, the unrest in Ukraine at the time notwithstanding. The most that can be said is that a number of States and organizations called for Ukraine and Russia alike to observe their treaty commitments, including in the fields of human rights and democracy. Calling on a State to observe an international law obligation is not intervention. As the PACE observed, where a State has entered into treaty commitments in respect of human rights and democracy, "violations… [of those

commitments] can…not be considered domestic affairs *sensu stricto* and are legitimate areas for concern or criticism from other countries."[111] The expression of concern or criticism, in short, is not an intervention. It furnishes no basis therefore for a counterintervention to say that States have drawn attention to violations.[112]

Even where a factual basis arguably exists for the allegation that intervention has taken place, proving the facts has been notoriously difficult. On the facts of the situation, it is inconceivable that Russia could establish that an intervention had occurred in Ukraine in 2014 prior to its own.[113] This may look like a mere forensic point—a point about establishing a fact through evidence in a courtroom. It is however fundamental: if allegations of intervention not held to any real test provided a basis for counterintervention, then the number of potential counterinterventions would be considerable.

Reprisal

States under modern international law seldom have invoked reprisal as a legal basis for use of force. Countermeasures—measures that otherwise would be unlawful but in any event are peaceable—themselves form a controversial subject. A modern doctrine of countermeasures exists as part of the law but the application of the doctrine in practice gives rise to difficulties.[114] A doctrine of forcible countermeasures—that is, reprisals—is that much more problematic—both in principle and in application.

In an earlier era, reprisal constituted a well-used mechanism in inter-State relations. It was a mechanism short of war but involving armed force. The main early case—but one that began to reveal unease with reprisals as a concept—concerned a series of incidents between Germany and Portugal in southern Africa during World War I. The tribunal in the *Naulilaa* case,[115] the *locus classicus* of the reprisal rule, applied a set of conditions to the State purporting to have acted in accordance with the rule. The State needed to show that (a) the State against which it employed reprisals had performed an unlawful act; (b) efforts at a negotiated settlement proved fruitless; and (c) the reprisals taken were proportionate to the unlawful act.[116] The proportionality requirement would appear to have been a development, influenced by the Great War,[117] and expanding upon a less specific limitation that had referred to "*les expériences de l'humanité et les règles de la bonne foi, applicables dans les rapports d'État à État*" [the experience of humanity and the rules of good faith applicable in inter-State relations].[118] The tribunal rejected Germany's position that its attacks on Naulilaa were lawful reprisals; the situation failed to meet any of the conditions. This was the position of an earlier era. Even then, however, conditions limited the availability of reprisal as a justification for use of force.

The modern position, by contrast, is widely understood to be one of prohibition without exception. The Friendly Relations Declaration says that "States have a duty to refrain from acts of reprisal involving the use of force."[119] ARSIWA Article 50 makes clear that the modern regime of countermeasures does not override the general prohibition against use of force: "1. Countermeasures shall not affect: (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations." The Annex VII tribunal in *Guyana* v. *Suriname* agreed.[120]

Writers in the UN era have largely followed this position. Dinstein belongs to the minority who would include a doctrine of reprisal in modern international law.[121] Other leading publicists state categorically that reprisal (in the sense of the forcible countermeasure) is unlawful in all circumstances. This dates to the 1960s or earlier; it is arguably part of the Charter law on use of force. Bishop, for example, writing in 1965, saw reprisals as forbidden under the Charter.[122]

A problem with a rule permitting reprisals is that it is difficult to make the limits work reliably in practice. Bishop put it as follows: "Acts of reprisal were looked upon as a 'self-help' remedy limited by international law; but the limitations could become illusory because either side could change the legal situation and escape these limitations by resorting to war."[123] Thirty years later, Brownlie, considering operations that a State would justify under a principle of forcible countermeasures, also identified their practical application as giving rise to problems. He thought that the evidentiary problems were particularly serious: "Such operations fall outside any legitimate concept of self-defence, more especially when there is no independent assessment of the evidence alleged to justify the action."[124] Without an independent assessment, the dangers of abuse are that much more serious.

Yet in the reality of inter-State relations it would appear that reprisal has remained an instrument of policy. A range of incidents in modern practice may be instanced in which the purpose behind the use of force would appear to have been to respond, *ex post*, to some threat or act by the target against which force is used.[125] The States using force may or may not have conceived of their actions under the rubric of reprisal, but the practice is nevertheless strongly suggestive.

As of November 2014, no significant representative of the Russian Federation had described the use of force against Ukraine as a reprisal as such. Yet the reality of Russia's relations with Ukraine in the period leading to the annexation of Crimea suggests a political motive for retaliatory acts. During the intervention in February and March 2014, the Russian government referred to the failure of the Ukrainian government to conclude a loan agreement that would have connected the State to the Russian Federation for financial purposes. The failed agreement evidently would have formed part of a larger political plan in which the Russian Federation had hoped to involve Ukraine.[126] It is widely understood that the Russian Federation had close ties with the Ukrainian president who was deposed on February 22, 2014, and perhaps a sense of political investment in him. The removal of President Yanukovych from office took place, in part, because the Ukrainian public was dissatisfied with the steps which his government was taking to conclude the agreement with Russia. The government that replaced him preferred to associate Ukraine with the European Union.

The Russian Federation was clear that it regarded the removal of the president as an act not in accordance with the interests of the Russian Federation, if not a hostile act as such. The act appears to have frustrated, or at least constrained, a wider ambition to establish a consolidated Eurasian zone. It would be surprising if, in its policy deliberations, the Russian Federation considered armed action against Ukraine in isolation from these wider plans. The search for a deterrent against their further unraveling would have entailed a range of possible strategies; Russia had adopted trade measures against Ukraine in 2013, evidently to deter Ukraine from adopting

an Association Agreement with the EU.[127] Use of force as a strategy in the circumstances of 2014 would certainly not have been lawful; but it might have seemed logical. It was a further step after earlier nonforcible measures had failed to achieve a lasting effect. Its demonstration effect would have been potent.

Kazakhstan, Belarus, and the Russian Federation on May 29, 2014, adopted an agreement to form the Eurasian Economic Union (EaEU).[128] The correlation between the EaEU agreement and the use of force against Ukraine certainly does not establish a causal link; some have suggested that use of force against Ukraine may have weakened, not strengthened, the Russian Federation's Eurasian policy.[129] In any event, the unlawfulness of armed reprisal in the circumstances is clear. The main modern proponent of a rule of forcible countermeasures would agree. Dinstein, referring to ARSIWA Article 50, paragraph 1, says as follows: "This is an unassailable statement of international law. If forcible countermeasures are taken in response to [a] breach of international law . . . not constituting an armed attack, they are unlawful."[130] This is a complete answer to the suggestion (if one were to be made) that use of force against Ukraine was a valid exercise of a right of reprisal.

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CHAPTER 3

Non-recognition

Events in Ukraine instigated a widespread response. As Russia's intentions became clear, States and international organizations made their response clear: under the circumstances of March 2014, any attempt to forcibly change the international status of territory of Ukraine would lack validity under international law.

The response of States and of international organizations did not halt the armed intervention or the separation and annexation of Crimea; the Russian Federation also maintained its claim for putative independent entities in eastern Ukraine. The response did, however, set the stage for a long-term legal policy. If maintained and extended, this is the policy of denying the putative annexations and separations legal effect.

This is not the first time that an unlawful territorial situation has attracted non-recognition. A largely unified response followed the putative independence of so-called Homelands in South Africa.[1] A similar response followed the Turkish invasion and occupation of the northern part of Cyprus.[2] The unlawful continuation of the presence of South Africa in Namibia (South-West Africa) was another case in which non-recognition was nearly universal.[3] The effects of non-recognition in none of these situations were immediately felt on the ground in any considerable way.

Non-recognition of Iraq's putative annexation of Kuwait by contrast might be seen to have had relatively rapid effect. The effect of non-recognition in that case, however, is harder to judge. The international response against unlawful annexation quickly graduated to one of collective self-defense; the unlawful situation was reversed in a matter of months.

In all of these cases non-recognition nevertheless was meaningful. It frustrated the attempt by the State to consolidate an unlawful situation through a policy of *fait accompli*. Non-recognition was an important part of the wider response when the territorial settlement was challenged. The distinction between non-recognition and other measures will be considered further in a later section of this chapter.[4]

The chapter begins with the response of States to the annexation of Crimea, then sets out the response of international organizations. Considering judicial and arbitral practice to date, a preliminary outline of non-recognition in courts and tribunals is then suggested. The chapter concludes by considering the specific legal consequences that non-recognition of the annexation may be expected to have.

The next chapter (Chapter 4) places the practice of non-recognition of annexation in a wider context. The context is the legal system, which since 1945 has rested upon the stability of the territorial settlement. How the territorial settlement is reflected throughout and undergirds the system is considered. With the foundational character of the territorial settlement in mind, Chapter 5 turns to the special character of the forcible breach of the territorial settlement, with reference in particular to the obligatory character of non-recognition.[5] Chapter 6 considers how international law has treated use of force that did not involve the forcible acquisition of territory.[6]

State Practice

As will be seen later in connection with General Assembly practice, a majority of States formally joined the general response against the forcible annexation of Crimea. Over half the member States favored a statement declaring that the annexation is not to be recognized or given any other support. The particular positions of a number of States are well illustrated by their statements in explanation of vote. A number of States also adopted declarations outside the Organization.

After considering express non-recognition, joined by the majority of States, the present section considers other States. As will be seen, rather than constituting a coherent block in opposition, the other States held a range of positions.

States Affirming Non-recognition of the Seizure of Crimea

The predominant view among States was that the purported annexation of Crimea is unlawful and is not to be recognized. Representative examples may be canvassed.

France on March 18, 2014, issued the following communiqué in the name of the president of the Republic:

> The Russian President has today signed a treaty integrating Crimea into Russia. This act comes after the holding of a referendum in Crimea which is illegal under Ukrainian and international law.
>
> I condemn this decision. France recognizes neither the results of the referendum held in Crimea on 16 March nor the incorporation of that region of Ukraine into Russia.[7]

There was a preemptive aspect to the French president's statement, as the formal act of annexation under Russian municipal law was as yet several days in the future. Nevertheless, as of March 18, the writing was on the wall, and France made clear that the steps to come would not be accepted. The purported treaty between Russia and Crimea, already signed, was seen to be an act devoid of international law effect.

The next day, the prime minister of the United Kingdom adopted a similar, if somewhat more detailed, statement. He said as follows:

> The steps taken by President Putin today to attempt to annex Crimea to Russia are in flagrant breach of international law and send a chilling message across the continent of Europe.
>
> Britain depends on the stability and security of the international order. That relies on a rules based system where those who ignore it face consequences. And that's why the EU and the United States have already imposed sanctions.
>
> It is completely unacceptable for Russia to use force to change borders, on the basis of a sham referendum held at the barrel of a Russian gun.[8]

The United Kingdom understood that the separation of territory from Ukraine was not an act of self-determination intended to create a new State but, rather, an unlawful use of force to aggrandize the intervening State.

The spokesperson of the German Government said on March 17, 2014, that the referendum in Crimea…

> violates the Ukrainian constitution and is a breach of international law…It is illegal in our view…[W]e will not recognise the results…The way the referendum was held quite clearly contravenes the most elementary requirements of any fair and free vote.[9]

The emphasis in the German statement was on the lack of accordance between the Crimean referendum and the laws of Ukraine. As the Canadian Supreme Court had said in the *Quebec reference*, municipal constitutionality, though not in itself determinative of international lawfulness, likely will be considered by States when they assess the situation. The statements of Germany and other European States accord with the Supreme Court's opinion in that regard.

Following the purported annexation of Crimea by Russia, the German Government through its spokesperson referred more specifically to international law:

> The German government…condemns the signing of a treaty under which Crimea and Sevastopol will become part of the Russian Federation…Like the Russian military intervention in Crimea that preceded it, this step is in breach of international law. This is a unilateral drawing of new borders, and thus a massive intervention in the territorial integrity of Ukraine. The German government will naturally not recognise this action of the Russian Federation.[10]

Like the statement of the United Kingdom on the same day, Germany's response reflected the understanding that borders cannot be changed by force if the international order is to remain secure.

A statement by the minister for Foreign Affairs of Japan on "Measures against Russia over the Crimea referendum" indicated as follows:

> 1. The referendum in the Autonomous Republic of Crimea, Ukraine violates the constitution of Ukraine. It has no legal effect and Japan does not recognize its outcome.

> 2. Japan deplores that Russia has recognized independence of the Autonomous Republic of Crimea which infringes on unity, sovereignty and territorial integrity of Ukraine. Japan can never overlook an attempt to change the status quo with force in the background.
>
> . . .
>
> 4. Japan strongly urges Russia to withdraw its recognition of independence of the Autonomous Republic of Crimea and not to attempt annexation of that, observing international law and respecting Ukraine's unity, sovereignty and territorial integrity. Japan also expresses grave concern and apprehension over increasing tensions in the eastern part of Ukraine.[11]

Japan thus invoked both the municipal illegality of the referendum and the premature character of Russia's recognition of the putative independence of Crimea. (Further to premature recognition, see Chapter 1 under "Recognition as Unlawful Act").[12] Japan also suggested the inadmissibility of changes to the territorial *status quo* effected by force: this was a case of putative independence "with force in the background."

The European Council and its presidency adopted a series of statements reflecting the position of the heads of state and government of the European Union as a whole. The statement of March 6, 2014, reads as follows:

> We strongly condemn the unprovoked violation of Ukrainian sovereignty and territorial integrity by the Russian Federation and call on the Russian Federation to immediately withdraw its armed forces . . . The solution to the crisis in Ukraine must be based on the territorial integrity, sovereignty and independence of Ukraine, as well as the strict adherence to international standards. We consider that the decision by the Supreme Council of the Autonomous Republic of Crimea to hold a referendum on the future status of the territory is contrary to the Ukrainian Constitution and therefore illegal.[13]

The European Council convened again on March 20–21. In its Conclusions from the meeting, the Council said as follows:

> The European Union remains committed to uphold the sovereignty and territorial integrity of Ukraine. The European Council does not recognise the illegal referendum in Crimea, which is in clear violation of the Ukrainian Constitution. It strongly condemns the illegal annexation of Crimea and Sevastopol to the Russian Federation and will not recognise it. The European Council asks the Commission to evaluate the legal consequences of the annexation of Crimea and to propose economic, trade and financial restrictions regarding Crimea for rapid implementation.[14]

The presidency of the European Council, addressing the OSCE Permanent Council on March 27, 2014, said,

> We do not accept the statement made by the Russian Federation . . . alleging that Crimea is not part of Ukraine. Crimea is part of Ukraine. The European Union

> remains committed to uphold the sovereignty and territorial integrity of Ukraine within its internationally recognised borders. The OSCE Special Monitoring Mission has a mandate to work throughout Ukraine, including Crimea. We do not recognise the illegal referendum in Crimea, which is in clear violation of the Ukrainian Constitution. Nor do we recognise Russia's illegal annexation of Crimea and Sevastopol.[15]

In the UN General Assembly, the European Union said that it "firmly believes that there is no place in the twenty-first century for the use of force and coercion to change borders in Europe or elsewhere."[16] National illegality thus was noted here as well, and, again, not as a complete answer to the question of annexation, but as a strong indication of the difficulties. The presence of the armed forces of the Russian Federation was noted.

The United States, through its Permanent Representative to the United Nations, indicated that "we . . . stand with international law . . . and the fundamental principle that borders are not suggestions."[17] The U.S. Permanent Representative earlier had said,

> "The crisis was never about protecting the rights of ethnic Russians and was always about one country's ambition to redraw its own borders.[18]

The president of the United States, by Executive Order 13622 of March 20, 2014, found that "the actions and policies of the Government of the Russian Federation, including its purported annexation of Crimea and its use of force in Ukraine, . . . threaten [Ukraine's] peace, security, stability, sovereignty, and territorial integrity."[19] The president, on March 17, had called for the territorial integrity of Ukraine to be respected;[20] and on February 28 noted "Russia's commitment to respect the independence and sovereignty and borders of Ukraine."[21] The United States thus expressly addressed—and dismissed—Russia's putative grounds for intervention. In the US view, the forcible annexation of Crimea was not justified as an act to protect the rights of persons of Russian ethnic and linguistic origin in Crimea.[22]

A range of other States indicated that they would not recognize the purported annexation. States with outstanding territorial disputes were particularly pronounced in their condemnation.[23]

Nigeria and Indonesia, two of the leading States of the Non-Aligned Movement, indicated that the annexation of Crimea was invalid. Nigeria, which had had its own secessionist crisis in Biafra and which had settled boundary disputes through international adjudication, expressed hope that the situation in Ukraine might be resolved through dispute settlement procedures; Nigeria associated itself with the general policy of non-recognition by voting in favor of General Assembly action (which will be discussed in more detail later in the present chapter).[24] Indonesia, a State with separatist regions (Aceh, western New Guinea), indicated that it would "not accept any separation of territory" that would affect Ukraine's territorial integrity.[25]

Argentina, though abstaining in the General Assembly, had voted in favor of the draft resolution in the Security Council.[26] The president of Argentina described

the referendum in Crimea as "worthless."[27] Argentina most likely did not have a secessionist threat in mind but, instead, perhaps hoped that the more doubt cast on referendums as a means to settle self-determination questions, the better. The inhabitants of the Falkland Islands (Malvinas) would not vote in favor of Argentina if a referendum were held to determine the islands' fate. As noted in Chapter 1, self-determination applies to a Non-Self-Governing Territory like the Falkland Islands in a special way; Argentina perhaps thought it prudent to oppose referendums generally.

The declarations instanced here provide a framework of legal policy for further response to the situation between Russia and Ukraine. In that framework, States adopted a number of sanctions against Russia, largely related to assets and travel of particular Russian officials.[28] It remains to be seen what further measures States adopt under national law to implement international non-recognition.[29] The measures adopted will contribute to the role of individual States "as guardians of community interest."[30]

Non-recognition of the separation of Crimea from Ukraine is consistent with the position that States earlier adopted in respect of attempted separations of territory from Russia. In particular, when the Russian Federation undertook armed actions to suppress the attempted secession of Chechnya, States were clear that Chechnya was, and was to remain, part of Russia.[31] Regional organizations adopted the same position.[32] Russian politicians, in tones bordering on paranoia, declared that NATO was preparing to invade the North Caucasus.[33] Nothing of the sort happened; nothing of the sort was planned; and the consistent practice of the relevant States and their organizations was categorical in its respect for Russia's territorial integrity. It indeed would be ironic if, in discounting the West's assurances in this regard and acting against the territorial settlement, Russia has now set in train a revision of the international order, which in truth opens Russia to challenges from abroad (though it is hard to imagine that these would come from the West). The possibility will be considered further below that Russia, by ignoring the past consensus that favors settled boundaries, may invite future difficulties for its own legal security.[34]

States Adopting Positions Other Than Formal Non-recognition

Not all States formally associated themselves with non-recognition of the separation of Crimea from Ukraine. A rather elliptical heading is needed to describe a disparate group. The States that declined to join the general formal response by no means necessarily approved Russia's conduct; some did; others plainly did not; others still adopted positions of apparently studied ambiguity.

A notable example of ambiguity was China. China, for example, did not reject Russia's actions in Crimea. China did not, however, expressly support the referendum or annexation. China's response was as follows:

> China always respects all countries' sovereignty, independence and territorial integrity. The Crimean issue should be resolved politically under a framework of law and order. All parties should exercise restraint and refrain from raising the tension.[35]

To say that an "issue" remains to "be resolved politically under a framework of law and order" is to imply that the parties are not at present on an appropriate course to settlement. Though measured, this entails concern over both parties' conduct. China in 2009 took a very different view of the possibility that Kosovo might separate from Serbia: "The exercise of the right of self-determination shall not undermine the sovereignty and territorial integrity of the State concerned."[36] This was to state categorically that China believed that Kosovo should not be separated from Serbia; China did not specify whether or not Crimea must remain part of Ukraine but, instead, said how Russia and Ukraine should address the conflict.

China abstained on March 27, 2014, when the General Assembly adopted resolution 68/262. China again drew attention to the processes for settlement. China "call[ed] on the international community to make constructive efforts, including through good offices, to ease the situation in Ukraine" and "for the early establishment and implementation of an international coordination mechanism."[37]

As a State having a number of outstanding territorial issues,[38] China unsurprisingly was deliberate in its response to the annexation of Crimea. But here again a divergence between China's positions is visible. China in respect of its maritime and territorial disputes in East Asia has maintained that bilateral negotiation is the only appropriate mechanism.[39] China's position in the General Assembly in respect of Crimea, by contrast, seems to be that multilateral measures—for example, an "international coordination mechanism"—would be appropriate.

China's position on the substantive aspects of the question of Crimea also seems to be at some variance with its earlier views concerning secession. To be sure, China in the General Assembly by no means endorsed referenda as a mechanism for determining the wishes of the inhabitants of parts of the State who might wish to secede. However, China's rather ambiguous position in respect of Crimea is in stark contrast to its position on Kosovo. In 1999, China's representative in the Security Council said as follows:

> There are nearly 200 countries and over 2,500 ethnic groups all over the world. The majority of countries are home to multiple ethnic groups, and many countries have ethnic problems... [W]e are... opposed to any act that would create division between different ethnic groups and undermine national unity. Fundamentally speaking, ethnic problems within a State should be settled in a proper manner by its own Government and people, through the adoption of sound policies. They must not be used as an excuse for external intervention, much less used by foreign States as an excuse for the use of force. Otherwise, there will be no genuine security for States and no normal order for the world.[40]

The focal point of China's objection then was use of force. However, China equally stated its opposition to "*any act* that would create division." This was an omnibus objection against any and all acts tending to divide a State. It was an objection deeply rooted in China's modern history. It reflected the security imperatives of a State that in living memory has had so many internal difficulties. China's position on Crimea is noteworthy for its relative disinterest in the problem. From the earlier position, which was one of heightened concern over secession, China appears

to have shifted to a position that allows acquiescence in secession, perhaps even mild support.

Or at least secession that leads to re-unification. It is to be asked whether, considering Russia's claim of an historic right to "re-unify" a territory formerly part of the State, China perceives a precedent that would support China's own territorial *desiderata*. In this light, China would see Crimea not as a threat that might lead to territory being lost but as a precedent that might facilitate territory being gained. If such a view has taken hold in China, then its taking hold may reflect a growing confidence in the cohesion of the State. China in 1999 was concerned to rule out any act that might validate secession; China in 2014 was ready to promote the emergence of precedents favorable to the to the re-incorporation of of territories said to belong to a historic legacy.

India, the largest Non-Aligned State, was identified as supporting the annexation of Crimea.[41] India's position on the better view, however, was more reserved than that. The prime minister of India, in conversation with the president of the Russian Federation, "emphasized the consistent position India had on the issues of unity and territorial integrity."[42] India's abstention in the General Assembly disassociated India from the collective statement of non-recognition. Abstention is not a significant form of support.

As the practice of other States in connection with Crimea illustrates, abstention in the General Assembly is consistent with a range of positions, including objection. Saint Vincent and the Grenadines, which abstained from GAR 68/262, criticized the "would-be imperial Powers" for "manipulate[ing] or selectively accept[ing]" referendums; it associated itself with CARICOM's statement calling for preservation of Ukraine's territorial integrity.[43] Uruguay, which also abstained, stated that "in the specific case of the Crimean peninsula Uruguay believes that any declaration that is not in line with the constitutional principles of the Ukrainian State cannot alter the internationally recognized borders and therefore contravenes the principle of the territory integrity of States."[44] Ecuador (also abstaining) said that "a local referendum is not sufficient to justify a change in the territorial integrity of a State."[45] Botswana took a similar position, indicating that it "does not support the dismemberment of sovereign nations, either through unilateral declarations of independence or through coercion by external forces."[46] A number of others evidently shared that position.[47] Noteworthy in these statements is the express distinction between two issues: use of force, on the one hand, and unilateral separation as elected by a region without consultation with the whole, on the other. These States objected, and in several instances in strong terms, to the use of the referendum as a vehicle for secession. This suggests a more general proposition. It suggests that they accept that the State as a whole has a right to preserve its integrity as a territorial unit as against local initiatives that ignore the general community right. This accords with the position as usually understood under international law.

When casting a vote in the General Assembly, every State is its own finder of fact; so when a State sets out factual appreciations in explanation of vote, there is no requirement of conformity with the reliable determinations of fact reached elsewhere. The factual conclusions of States that cast votes against the non-recognition resolution (as distinct from the larger number of States abstaining) are nevertheless

worthy of note. Several of the States voting against GAR 68/262 disagreed with the conclusions of fact made by the main regional organizations (the practice of which will be considered later in this chapter) and with almost all States that expressed a position in respect of the facts. Nicaragua, for example, said that the situation involved Western powers "financ[ing] and direct[ing] from outside internal situations of violence and terrorism."[48] Bolivia indicated that events in Ukraine belong to "the series of attacks suffered by our countries in recent years."[49] North Korea indicated that "the current crisis in Ukraine…has been unquestionably caused by the interference of the United States and other Western countries…and their instigation of chaos and disorder."[50] Whatever legal position is taken about events "in recent years," it is difficult to credit a factual appreciation that sees the separation of Crimea as the result of "violence," "terrorism," or "attacks" perpetrated by Western States against Ukraine.

Even so, States that voted against non-recognition of the annexation were by no means supportive of the annexation itself. Bolivia, for example, refrained from "tak[ing] a position on the referendum that took place in Crimea [and] on the territorial situation of that region."[51] For one of the few States that ostensibly mounted a riposte to the general (active) rejection of annexation, this was rather tepid.

* * *

Non-recognition by the international community as a whole, as Christian Tomuschat described the practice, is "an essential legal weapon in the fight against grave breaches of the basic rules of international law."[52] While the statements of individual States, like those noted above, may coalesce to form a general position, international organizations also have acted in situations calling for an organized response. An organized response to the purported annexation of Crimea has taken shape in organizations since March 21, 2014.

United Nations: Political Organs

The "deterioration of the situation in the Autonomous Republic of the Crimea, Ukraine" prompted Ukraine on February 28, 2014, to invoke Articles 34 and 35 of the Charter.[53] Ukraine on March 13 called upon the General Assembly to "examine the situation" in accordance with Article 11, paragraph 2, and invoked the right to individual and collective self-defense under Article 51.[54]

A word is in order about the steps by which the political organs of the United Nations came to address the situation in Ukraine, and then the response of those organs may be considered.

Seisin of the General Assembly

Under Charter Article 34, the Security Council…

> may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance

> of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35, paragraph 1, invites "any Member of the United Nations" to bring any dispute, or any situation, "of the nature referred to in Article 34" to the attention of either the Security Council or the General Assembly. These provisions belong to Chapter VI—Pacific Settlement of Disputes.

Article 11 belongs to Chapter IV concerning the constitution and powers of the General Assembly. The General Assembly's power under Article 11, paragraph 2, includes the power to discuss "any questions relating to the maintenance of international peace and security" and to make recommendations as to the same. As Article 11, paragraph 2, relates to questions "brought before it," Ukraine's request of March 13 to examine the situation placed the matter of aggression against Ukraine before the Assembly. The provision is cross-referenced by Article 35, paragraph 3, which further indicates the role of the General Assembly in the settlement of disputes. The General Assembly has addressed situations under Article 11, paragraph 2, with some frequency, including in its recent practice.[55]

A formal position is that Article 11, paragraph 2, entails a restriction on the parties that the General Assembly may address under that provision, its power being to address "the state or states concerned or . . . the Security Council or . . . both." In practice, the addressees have been more extensive and more diverse. They have included, for example, "the Taliban and the United Front";[56] "the Taliban, Al-Qaida and other extremist and criminal groups";[57] "all parties" and "all sectors of society" in the Guatemala Peace Agreements[58]—that is to say, a range of non-State actors. They also have included the Member States as a whole.[59]

As to the content that the General Assembly may incorporate into a resolution that it adopts under Article 11, paragraph 2, the early practice is instructive. The Uniting for Peace Resolution—GAR 377 (V) of November 3, 1950—provided a template for General Assembly involvement in situations where the veto of a Permanent Member impedes the Security Council. According to the Uniting for Peace resolution,

> If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[60]

This concerned collective measures of armed enforcement. The further paragraphs of the resolution identified specific steps in organizing those measures.[61]

It has been said that non-recognition, though a form of collective response—and, as will be seen next, in certain situations an organized form of collective response—is not to be equated with a sanctions regime that prohibits lending "support or

assistance" to the party in breach.[62] If this negative characterization were accepted—that is, if non-recognition is not a sanctions regime—then the resolution that calls for non-recognition of an unlawful situation certainly presents no difficulties as to competence. The competence exists to call for "the use of armed force"; it would very much seem that non-recognition is a lesser included case.

Security Council Draft Resolution

In response to the situation in Ukraine, States placed a draft resolution before the Security Council on March 15, 2014. The draft resolution would have affirmed that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal."[63] Referring to the referendum in Crimea that would take place the next day, the draft noted that "Ukraine has not authorized" the referendum. The draft then…

> *declare*[*d*] that this referendum can have no validity, and cannot form the basis for any alteration of the status of Crimea; and call[ed] upon all States, international organizations and specialized agencies not to recognize any alteration of the status of Crimea on the basis of this referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.[64]

The Russian Federation vetoed the draft. China abstained. The remaining thirteen Member States voted in favor. Having failed to find a single supporter in that organ, the Russian Federation thus was thoroughly isolated in the Security Council.

General Assembly Resolution 68/262

The matter then was put to the General Assembly. The General Assembly, on March 27, 2014, adopted resolution 68/262 ("Territorial integrity of Ukraine").[65] The resolution was adopted with 100 votes in favor to 11 against with 58 abstentions.[66] The States casting votes against the resolution were Armenia, Belarus, Bolivia, Cuba, North Korea, Nicaragua, the Russian Federation, Sudan, Syria, Venezuela, and Zimbabwe. As noted above, a number of States that abstained from the resolution placed emphasis on the centrality of the protection of territorial integrity in international law.[67] The withholding of favorable votes by other States would seem to have reflected concerns over procedure or competence, not ambivalence about the legal character of the situation between Russia and Ukraine. With respect to some States that are generally assumed to align themselves with Russia, it is noteworthy that more active support of the Russian position was withheld.

Resolution 68/262 affirmed the commitment of the General Assembly "to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders."[68] The resolution also called upon "all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means."[69] The phrase "or other unlawful means" is not often found in adopted UN

texts concerning armed aggression; resolution 68/262 seems to be the first General Assembly resolution to have used it. It is a catch-all provision. It suggests that the resolution is concerned not only with acts falling under a minimalist understanding of "threat or use of force." It suggests that the General Assembly's purpose is to address *any* unlawful means that might be used to disrupt Ukraine's national unity and territorial integrity.

By comparison, the catch-all phrase in Articles 2, paragraph 4 of the Charter, which is used in the Friendly Relations Declaration as well—"or in any other manner inconsistent with the purposes of the United Nations"—refers not to the means but to the object that the means are employed to obtain: threat or use of force is unlawful if used against the territorial integrity or political independence of any State or "in any other manner inconsistent."[70] The expression "or other unlawful means" in GAR 68/262, instead, would seem to address a wider potential repertoire of aggression. For example, it would seem to address the use of irregular forces such as army personnel wearing no insignia or special operatives mixing with demonstrators in urban settings. "Devious but still unlawful means,"[71] which the aggressor might adopt in order to evade the expression "threat or use of force," in this view, are captured by the resolution. This echoes an "other means" clause proposed in one of the early drafts of the Charter of the Nuremberg Tribunal.[72] Other examples of the (infrequent) use of the phrase in UN organs have concerned international money laundering, where the conduct constituting the breach likewise is likely to entail deception and creative evasion.[73]

The phrase accords with the broader prohibitions contained in the Friendly Relations Declaration as well, which the preamble to GAR 68/262 invokes. The preamble of GAR 68/262 quotes the provision of the Friendly Relations Declaration that "territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force." The Declaration, in its list of prohibited conduct, refers to "threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States." It also refers, *inter alia,* to "propaganda for wars of aggression," "organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State," and "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State."[74] These categories are relevant, too, to the situation in Ukraine. The resolution embraces them. The prohibition against the range of aggressive acts thus enumerated is one of general international law.[75]

Resolution 68/262 indicates the obligation of non-recognition in its penultimate and final paragraphs. These are as follows:

> *The General Assembly…*
>
> 5. *Underscores* that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or the city of Sevastopol.

> 6. *Calls upon* all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.

These paragraphs are evocative of the provision of the Friendly Relations Declaration stipulating that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal," the preamble of the resolution already having referred to the Declaration and the prohibition against the acquisition of territory by threat or use of force. They also evoke the Stimson Doctrine of non-recognition[76] and the modern articulation of the community obligation to resist situations created by serious breach of fundamental rules.[77] Chapter 5 will consider that obligation more closely.[78]

March 2014 is not the first time that an armed intervention followed by putative annexation has called for a response in the principal organs of the UN. There was a series of resolutions following Indonesia's annexation of East Timor in 1975. The ICJ in the *East Timor* case considered the resolutions.[79] None of them said in terms that States must not recognize the alleged incorporation of the territory into Indonesia or that States must deal only with Portugal as the State responsible for the international relations of the territory, a point that Portugal resisted strenuously[80] but which the Court concluded to be dispositive.[81] The text of GAR 68/262 is in this way to be distinguished from the resolutions that were involved in *East Timor*.[82] The circumstances of its adoption, too, must be distinguished. East Timor was a Non-Self-Governing Territory under Chapter XI of the Charter, not a State, a point that we will return to shortly.

Responses to Forcible Change of Regime Distinguished

GAR 68/262 also differs from those resolutions that addressed armed interventions involving a forcible change of government but not involving an attempt to change the disposition of territory or boundaries.

The General Assembly responded to Viet Nam's intervention in Cambodia in 1979 by "*deeply regretting*" the intervention and "*demand*[*ing*] the immediate withdrawal of all foreign forces."[83] The General Assembly later "*deplor*[*ed*] that foreign armed intervention and occupation continue[d] and that foreign forces [had] not been withdrawn."[84] The United States' practice in that case, which included extended non-recognition of the new Cambodian government, which thanks to intervention had put an end to genocide, has been described (justifiably) as "bizarre."[85] In its resolutions concerning intervention in Cambodia, the General Assembly did not call on States to refrain from recognizing the new government.[86] The Khmer Rouge—the deposed regime—nevertheless was allowed to continue as the representative of Cambodia at the UN,[87] a matter under credentialing procedures and not entailing any general obligation on States in their dealings with Cambodia or its government.

The response of the General Assembly to the intervention of the United States in Grenada in 1983 was to "*deeply deplore*[...] the armed intervention" and to say that it "constitute[d] a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State."[88] The General Assembly called for "an immediate cessation of the armed intervention and the immediate withdrawal of the foreign troops from Grenada."[89] Again, there was no call for States to refrain from recognizing the government that came to power as a result of the intervention. The situation was not one giving rise to an obligation of non-recognition. The international relations of the new government in fact were quickly normalized.

The intervention by which the USSR replaced the government of Afghanistan in 1979 drew a similar response. The operative paragraphs in this regard of GAR ES-6/2 said as follows:

> *The General Assembly*...
>
> 2. *Strongly deplores* the recent armed intervention in Afghanistan...
>
> 4. *Calls* for the immediate, unconditional and total withdrawal of the foreign troops from Afghanistan in order to enable its people to determine their own form of government and choose their economic, political and social systems free from outside intervention, subversion, coercion or constraint of any kind whatsoever.[90]

The Organization of the Islamic Conference did not recognize the Soviet-supported government.[91] The United States and other States strongly deplored the invasion and refused to deal with the new government. However, again, as with the Vietnamese intervention in Cambodia and the US intervention in Grenada, the General Assembly did not refer to non-recognition as a form of general collective response where a change of regime was concerned.

Intervention to replace a government, though it well may entail a breach of the prohibition against use of force and of the political independence of the State, is different in kind from a forcible revision of the territorial settlement. The next chapter will consider the centrality of the stability of boundaries to modern international law. The privileged character of boundaries and territorial regimes is evidenced in diverse ways in the law, one of them being the obligation, opposable to all States, to deny recognition to attempts to effectuate a change in boundaries by force. Chapter 8 will further consider regime change.

Responses to Forcible Settlement of Colonial Questions

The organized response of States, as reflected in UN practice, has also differed between seizure of territory from States and attempts to settle colonial situations by force. East Timor has already been noted. The armed intervention by India resulting in the amalgamation into India of Goa, Damão, and Diu (which had comprised the so-called Portuguese State of India) attracted criticism from a number of States.[92] At least one national court said that no legal effects could be recognized as arising from this seizure of territory by force (by which was meant that India had acquired no legal rights in the territory).[93] However, the situation did not lead to a general

statement of non-recognition. The Soviet representative in the Security Council objected to addressing the matter, on the grounds that "the matter... fell exclusively within the domestic jurisdiction of India since the Portuguese colonies in Indian territory could be only regarded as being temporarily under colonial domination of Portugal."[94] A draft resolution put forward by the United States that would have called for withdrawal of Indian forces was rejected.[95] When India maintained that the territory of the Portuguese State of India was a colonial territory,[96] India was in accord with an established legal position; it was not to state a new appreciation of the territory's status and rights.[97]

And to say that a territory is a colonial territory is to say that its final status remains to be settled. This is a territory in a "dynamic state of evolution."[98] Its unsettled character is inherent in the modern international law of decolonization that entails the right of the people, by an act of self-determination, to establish the territory's final status.[99] So India's annexation of the Portuguese colonies was not a seizure of territory having already achieved a clear and final disposition. It was certainly irregular—indeed a breach of the prohibition against use of force—to address the question of final status in this way.[100] It did not, however, upset a definitive territorial settlement.

The international response to the armed intervention in East Timor—and to the armed intervention in Western Sahara as well—similarly, did not entail a general direction against recognition of the purported annexations that followed. There, too, the territories in question were colonial territories, not areas that formed integral parts of a State. The interventions constituted a breach of the right of the peoples involved to determine by an act of popular will the final status of their territory; Judge Dillard's famous dictum that "it is for people to determine the destiny of the territory and not the territory the destiny of the people" reflects this.[101] As to what that destiny would be, the colonial status meant that that remained to be determined.[102]

India was correct in stating that the "Portuguese State of India" was a colonial territory. It thus was an open question whether under the final settlement there would be a "legal frontier between India and Goa."[103] It is doubtful that it was proper for India to settle that question by force. Use of force to settle it however was not the same thing as the forcible change of a settled legal frontier. The colonial interventions did not constitute the disruption of a final status such as that embodied in the boundaries of an established State.

General Assembly Competence in Respect of Dispositions of Territory

GAR 68/262 of March 27, 2014, belongs to General Assembly practice more broadly in respect of territorial transfer, attempted and perfected. The practice makes clear that it is by no means out of the question that a territory might lawfully join another on the basis of an organized expression of popular will; but the practice also makes clear that such a procedure is limited to a particular kind of territorial question and subject to international monitoring and review.

The main case was Cameroon. Cameroon shortly after its independence challenged the plebiscites under which Northern Cameroon, under Trusteeship at the

time, joined Nigeria.[104] The territory concerned was not as yet a State or part of a State but, rather, a Trusteeship Territory, which as such presumptively had a right to choose the final settlement of its status.[105] Two successive plebiscites had taken place under General Assembly supervision—the Assembly having recommended the wording of the plebiscite questions and appointed a United Nations Plebiscite Commissioner, who monitored the plebiscites and reported their results.[106] The General Assembly in resolution 1608 (XV) approved the union and rejected Cameroon's challenge.[107] The ICJ allowed that GAR 1608 (XV) may have been adopted "wholly on the political plane" but concluded that "there is no doubt—and indeed no controversy—that the resolution had definitive legal effect."[108]

Similarly, the General Assembly affirmed the result of the monitored plebiscite by which West New Guinea was transferred from the Netherlands to Indonesia.[109] Challenges to the transfer, at least on the international plane, have been muted.[110] The General Assembly turned its attention again to that part of the world in 1999 when East Timor's final status was settled by referendum; the Assembly confirmed it.[111] Again, the plebiscitary disposition met general approval and little or no objection.

Conversely, the General Assembly has rejected purported transfers of territory to national jurisdiction. It has done so in particular where administering powers have refused to accept their responsibility for Non-Self-Governing Territories under Chapter XI of the Charter.[112] These are the cases where the administering powers asserted that they had integrated territories (e.g., Angola, Mozambique, São Tomé and Principe, São João Batista de Ajudá, New Caledonia) into the metropolitan territory under acts of national law. The General Assembly rejected that such an integration had occurred.[113]

The General Assembly, as evidenced in the practice, thus is able both to affirm and to reject acts that purport to bring about the transfer of territory. It has both an affirmative and a negative function in its capacity as the principal organ most actively involved in questions of the disposition of territory under title (and claimed title) of self-determination. In its negative function, the General Assembly performs an "important function in the maintenance of the authority of the law"—a reinforcement to the "legal character of international law against the 'law-creating effect of facts.'"[114]

* * *

The general position embodied in GAR 68/262 is further reflected in the contemporary practice of other UN organs and in other international organizations. These may be briefly instanced.

United Nations: Human Rights Organs

Referring to GAR 68/262, the United Nations Human Rights Monitoring Mission in Ukraine (HRMMU) indicated that it would continue to monitor the situation in Crimea, and that it would do so "in consultation with the Government of Ukraine," notwithstanding a request by the Russian Federation that the Mission

address Crimea instead through Russia.[115] The Office of the United Nations High Commissioner for Human Rights, in its second report on the human rights situation in Ukraine, noted that the enforcement of legislation of the Russian Federation in Crimea is "in contradiction with" the resolution.[116] The limitations under Russian legislation on freedom of expression, peaceful assembly, association, and religion were predicted to have "a significant impact on human rights" in Crimea.[117] The OHCHR further makes clear that "the status of the Autonomous Republic of Crimea is guided by General Assembly resolution 68/262 . . . on the Territorial Integrity of Ukraine."[118] The human rights apparatus in this way appears prepared both to establish the accountability of Russia for human rights problems in Crimea and to respect the continued rights of Ukraine as the State to which the territory belongs. As will be considered later in the present chapter, this is broadly consistent with the application of the rules of international responsibility to irregular territorial situations.[119]

Council of Europe

The Committee of Ministers of the Council of Europe on March 19–20, 2014, condemned the referendum in Crimea and Russia's purported annexation, though without drawing conclusions as to the legal non-effect of those acts. The Committee . . .

> 2. condemned the fact that the referendum conducted by the local authorities of the Autonomous Republic of Crimea in violation of the Ukrainian legislation took place on 16 March 2014.
>
> 3. deplored the subsequent decision of the President of the Russian Federation to sign treaties on the admission of the Autonomous Republic of Crimea and the city of Sevastopol into the Russian Federation, as well as his appeal to the Parliament of the Russian Federation to adopt a law to complete this process.[120]

The European Commission for Democracy through Law (Venice Commission) on March 21, 2014, delivered an Opinion on the referendum.[121] The Venice Commission determined that the referendum was not in accordance with the Constitution of Ukraine.[122] It also considered that it was "by no means sufficient" that the referendum not contradict the Constitution of Ukraine; it also was necessary that it "comply with basic democratic standards for holding referendums, such as those established by the Venice Commission's Code of Good Practice on Referendums."[123]

The Venice Commission then noted a number of deficiencies in the circumstances in which the referendum was held. Among the deficiencies were that (a) Ukrainian law contains no adequate framework for a referendum; (b) the "massive public presence of (para)military forces is not conducive to democratic decision making"; (c) scarcely any time elapsed between the calling of the referendum and its execution; (d) it was unclear whether freedom of expression in Crimea was well-protected.[124] The Venice Commission concluded that the referendum was not "in line with European democratic standards."[125]

A point of central importance for the Commission was that no such referendum on territorial status should take place unless "preceded by serious negotiations among all stakeholders"; and "such negotiations did not take place."[126]

Shortly after the annexation, the Council of Europe indicated the legal non-effect of the attempted territorial change. The Committee of Ministers on April 2–3, 2014...

> stressed that the illegal referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014 and the subsequent illegal annexation by the Russian Federation cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol.[127]

By resolution 1988 (2014) adopted on April 9, 2014, the Parliamentary Assembly stated that...

> the authorisation of the Russian Federation Parliament to use military force in Ukraine, the Russian military aggression and subsequent annexation of Crimea...is in clear violation of international law...
>
> The so-called referendum that was organised in Crimea on 16 March 2014 was unconstitutional both under the Crimean and Ukrainian Constitutions. In addition, its reported turnout and results are implausible. The outcome of this referendum and the illegal annexation of Crimea by the Russian Federation therefore have no legal effect and are not recognised by the Council of Europe.[128]

The implausibility was in the lopsided declared result and massive declared voter turnout (which were noted in Chapter 1).[129]

On April 10, 2014, the Parliamentary Assembly reconsidered "on substantive grounds...the previously ratified credentials of the Russian delegation." The Parliamentary Assembly, in resolution 1990 (2014) stated, *inter alia,*

> 3. ...that...the recognition of the results of the illegal so-called referendum and subsequent annexation of Crimea into the Russian Federation constitute, beyond any doubt, a grave violation of international law...
>
> 6. ...that by violating the sovereignty and territorial integrity of Ukraine, Russia has created a threat to stability and peace in Europe.[130]

Resolution 1990 (2014) suspended Russia's voting rights, rights to be represented in certain Council of Europe organs, and rights to participate in election observation missions.[131] It reserved the Assembly's "right to annul the credentials of the Russian delegation."[132]

The Council of Europe had previously adopted similar measures against Russia in connection with use of force in Chechnya, the Russian delegates' voting rights having been suspended between April 2000 and January 2001.[133] The Council raised the possibility of annulment in connection with the annexation of Crimea but did not go that far in connection with Chechnya. Russia's conduct in Chechnya was undoubtedly a matter of serious concern: the Council's Committee on Legal

Affairs and Human Rights determined that "the indiscriminate and disproportionate use of force in the course of Russia' military intervention in Chechnya . . . because of its scale, cannot be justified in terms of a pure anti-terrorist operation."[134] In Chechnya, as noted, there was no question of international frontiers. Russia was not seeking in Chechnya to change any State's borders but, instead, to protect its own. Though annexation of Crimea has involved to date nothing like the violence used to suppress the secessionists in Chechnya, the international law breach has been at least as significant in the view of the Council. That the response has been of similar magnitude would seem to reflect the importance of the values affected.

As for eastern Ukraine, in contrast to Crimea in 2014, the violence has been extensive and extreme. The Russian Federation there has opened itself both to measures in response to the use of force as such and in response to the attempted revision of the internationally recognized frontier. The PACE president on February 18, 2015, indicated that the conduct of "the Russian-backed separatist forces" in eastern Ukraine "constitutes a flagrant violation of the [Minsk II] cease-fire agreement."[135] This statement, in isolation, might have left open potentially contentious questions of attribution. A PACE resolution a few weeks earlier, however, referred both to "Russia's role in instigating and escalating" the violence in eastern Ukraine and to "covert military action by Russian troops" there.[136] PACE in the same resolution extended the earlier suspension of Russia' voting rights and other representational rights.[137] Reflecting the increased gravity of the situation, and calling for "the immediate withdrawal of Russian military troops from eastern Ukraine," PACE "resolv[ed] to annul the credentials of the Russian delegation" in June 2015 if "no progress is made" in implementing, *inter alia,* the Minsk protocols.[138]

OSCE

The Permanent Council of the Organization for Security and Cooperation in Europe (OSCE) on March 21, 2014, agreed to the deployment of an OSCE Special Monitoring Mission to Ukraine. On adoption of the monitoring mission resolution, several States reaffirmed non-recognition of the purported annexation of Crimea.[139] The OSCE Parliamentary Assembly, at its twenty-third annual session (Baku), concluded that the Russian Federation "has, since February 2014, violated every one of the ten Helsinki principles in its relations with Ukraine"; the Assembly described the violations as "clear, gross and uncorrected."[140] The Assembly considered Russia's actions to include "military aggression as well as various forms of coercion."[141] It expressed concern "that the Russian Federation continues to violate its international commitments in order to make similarly illegitimate claims in the eastern part of Ukraine" and "in regard to other participating States."[142]

Other Organizations

The heads of State and government of the G7 on March 12, 2014, said, *inter alia,* that "the annexation of Crimea could have grave implications for the legal order that protects the unity and sovereignty of all states."[143] The Hague Declaration of the G7 (March 24, 2014) recalled that "international law prohibits the acquisition of part or

all of another state's territory through coercion or force."[144] It indicated that the G7 States do not recognize the annexation of Crimea.[145] The G7 States excluded Russia from participation in their next summit.[146] As a practical matter, this enabled the Group to adopt the Hague Declaration in strong terms—in contrast to the OSCE, where the continued presence of the Russian Federation, while perhaps opening certain possibilities, precluded a clear statement of non-recognition by the organization as such (though its Parliamentary Assembly, on its own voting rules, adopted the Baku Declaration, as noted).

The Organization for Economic Cooperation and Development (OECD) as of March 12 suspended the accession process for the Russian Federation.[147]

The North Atlantic Council on March 17, 2014, indicated that it considers the…

> so-called referendum held on 16 March in Ukraine's Autonomous Republic of Crimea to be both illegal and illegitimate. The referendum violated the Ukrainian Constitution and international law, and Allies do not recognise its results.[148]

The Council further indicated that…

> the circumstances under which [the referendum] was held were deeply flawed and therefore unacceptable. This was demonstrated by the rushed nature of the poll under conditions of military intervention and the restrictions on, and the manipulation of, the media, which precluded any possibility of free debate and deprived the vote of any credibility.[149]

The foreign ministers of the Member States of the North Atlantic Treaty Organization on April 1, 2014, stated, *inter alia,* that they do not "recognize Russia's illegal and illegitimate attempt to annex Crimea."[150] In September, the Wales Summit Declaration addressed Ukraine extensively, referring in its first paragraph *inter alia* to "Russia's aggressive actions against Ukraine."[151] The Summit Declaration further noted "Russia's escalating and illegal military intervention in Ukraine" and declared that the NATO States "will not recognise Russia's illegal and illegitimate 'annexation' of Crimea."[152] The Declaration indicated that "Russia's illegitimate occupation of Crimea and military intervention in eastern Ukraine have raised legitimate concerns among several of NATO's other partners in Eastern Europe."[153]

Nongovernmental bodies and activists concerned with the integrity of voting procedures broadly shared the view of the public international organizations: the referendum was unlawful and not to be treated as generating legal effects.[154]

* * *

As seen above, the principal international organizations concerned with the European region adopted largely consistent positions in respect of the annexation of Crimea. Taken together with the action of the General Assembly, this reflects a general rejection of the putative incorporation of the territory into the Russian Federation. Though a universal position has not emerged, the strength of the position adopted,

and the breadth of its subscription among States and organizations, furnishes a basis for a long-term policy of non-recognition. The effectiveness of the policy will depend on how it develops over time.

In some situations, the putative acquisition of territory by force has, by turns, been accommodated by some States and resisted by others. For example, widely varied responses met the forcible incorporation of the Baltic States into the USSR.[155] The vast majority of States in time accommodated the situation by treating it as generating the full range of legal consequences associated with a State's sovereignty over territory. This was an annexation completed in 1940—that is to say, before the entrenchment of the territorial settlement of 1945, which Chapter 4 will consider in detail. Nevertheless, non-recognition of the annexation of the Baltic States was maintained by some, and, even though this was a limited range of States, non-recognition had some effect, if by the end only residual.[156] The response to the annexation of Crimea among States and political organizations continues to take shape. Its effectiveness as a response to an unlawful act will depend on the tenacity of those who adhere to non-recognition, as well as on the scope of adherence.

Annexation in Judicial and Arbitral Forums

The effectiveness of collective response to annexation of Ukrainian territory also is likely to depend—indeed, particularly to depend—upon dispute settlement practice.

Acts of aggression typically give rise to a long train of judicial and arbitral *sequelae*. There exists an extensive practice in national courts in respect of the non-recognition of unlawful situations in particular.[157] The post-war claims tribunals of the 1920s and 1930s,[158] set up to proceduralize the responsibility assigned under the Peace Treaties,[159] and the United Nations Compensation Commission,[160] set up to do much the same in respect of the responsibility assigned under the Security Council's ceasefire resolution,[161] suggest the scope of international practice that might emerge.[162] At the present early stage, the lineaments may be discerned.

European Court of Human Rights

Ukraine on March 13, 2014, lodged an inter-State application under Article 33 of the European Convention against the Russian Federation.[163] With the application, Ukraine submitted a request under Rule 39 of the Rules of Court for interim measures as well. The president of the Third Section losing no time called upon both States Parties to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population. The Parties are to inform the Court of the measures they take to ensure implementation of the Convention.[164]

How might the European Court of Human Rights (ECtHR) address the annexation of Crimea? One writer suggests that Crimea presents a situation similar to *Ilaşcu* v. *Moldova and Russia*.[165] There, too, in part of its territory occupied by Russia, a State could not (and as of November 2014 still could not) exercise effective

control. The Court's determination that "the Moldovan Government . . . does not exercise authority over part of its territory, namely that part which is under the effective control of the [separatist movement]" stated the obvious.[166] The conclusion that followed was, perhaps, not obvious. The Court concluded that . . .

> even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.[167]

To hold Moldova responsible for territory beyond its effective control would raise problems of fairness, if the holding were not kept closely bound with the judgment as a whole. Crucially, the "positive obligation" under Article 1 was tempered by the fact that Moldova's effective exclusion from part of its own territory was the result of armed occupation by "a power such as the Russian Federation." Moldova in those circumstances as a practical matter was left little opportunity "to re-establish its authority over Transdniestrian territory."[168] The ECtHR thus did not expect Moldova to discharge all of the acts expected of the responsible State in normal circumstances.

Ilaşcu also indicates the resilience of the State's rights in its territory. Moldova's shift to a negotiating strategy (in place of forcible measures) was not an abandonment of Moldova's rights as the State with jurisdiction over the territory.[169] Nor was it necessary for Moldova to maintain a uniform intensity of protest and opposition against the separatists: "The Court does not see in the reduction of the number of measures taken a renunciation on Moldova's part of attempts to exercise its jurisdiction in the region."[170] This is an important point. Even in ordinary disputes, one party well may ask a court or tribunal to draw conclusions from the other party's briefest silence. The ECtHR in *Ilaşcu* implicitly recognized the well-established proposition that it takes more than that for a State to acquiesce in a loss of territory.

It would appear that at least in the UN treaty organs as of spring 2014, a similar approach toward Ukraine and its obligations in respect of Crimea was taking shape. It seems to have been assumed, for example, in the Committee on Economic, Social, and Cultural Rights, that, like Moldova in respect of Transdniestria, Ukraine in respect of Crimea is still obliged to fulfill its human rights obligations notwithstanding the displacement of effective government control by another State.[171] Presumably, Ukraine's obligations in this regard will be considered, as were Moldova's, in light of the realities on the ground.[172]

The other decided case of the ECtHR that writers speculate may be relevant to Ukraine is *Cyprus* v. *Turkey.* The case was referred to the Court in 1999, and the Court delivered its principal judgment in 2001.[173] Cyprus's complaints arose out of the Turkish armed intervention in northern Cyprus in July and August 1974, which led to the "continuing division of the territory of Cyprus."[174] Though nobody (except Turkey) recognized the separation of territory from the Republic of Cyprus, Turkey was held to have jurisdiction in northern Cyprus for purposes of the

Convention. Turkey's conduct there thus entailed Turkey's responsibility under the Convention.[175] This holding indeed is significant to Ukraine, as it makes clear that the non-recognition of a putative territorial change does not prevent applying the rules and procedures of the Convention against the State that effected the change. Thus the Russian Federation is presumed to be answerable under the Convention for its conduct in Crimea, and to hold it answerable does nothing to qualify or erode the general non-recognition of the unlawful seizure of territory.

Of further possible interest to Ukraine is the Court's eventual determination in *Cyprus* v. *Turkey* that just satisfaction under Article 41 of the Convention is available in an inter-State case. The Court reached this determination in its Judgment of May 12, 2014.[176] One group of concurring judges said that the judgment on just satisfaction "heralds a new era in the enforcement of human rights by the Court and marks an important step in ensuring respect for the rule of law in Europe."[177] A concurring opinion went further still:

> The *Cyprus* v. *Turkey* (just satisfaction) case is the most important contribution to peace in Europe in the history of the European Court of Human Rights... The message to member States of the Council of Europe is clear: those member States that wage war, invade or support foreign armed intervention in other member States must pay for their unlawful actions and the consequences of their actions, and the victims, their families and the States of their nationality have a vested and enforceable right to be duly and fully compensated by the responsible warring State. War and its tragic consequences are no longer tolerable in Europe and those member States that do not comply with this principle must be made judicially accountable for their actions, without prejudice to additional political consequences.[178]

This concurrence should not be read in isolation of wider circumstances. The "responsible warring State" in that case was Turkey, but Europe as of May 12, 2014, had another State which it would be hard to exclude from the same category. The inference to be drawn is that the just satisfaction judgment in *Cyprus* v. *Turkey* contains findings applicable to Russia's conduct in Crimea.

A considerable time had elapsed since the merits judgment in *Cyprus* v. *Turkey,* and a much longer time indeed since Turkey had committed the underlying breach—over a decade and forty years, respectively. To be effective against a stubborn violator, international law and its institutions must hold out against the tendency to accommodate facts over time. *Ilaşcu,* by making clear that the relaxation of a State's policy of protest does not weaken the potential remedies, and *Cyprus* v. *Turkey,* by making clear that the passage of time does not do so either, provide a bulwark against the "normative force of the factual."[179]

In northern Cyprus, there were certainly attempts to turn facts into law, including at the expense of the population as a whole. Cypriot Greeks were displaced en masse and large amounts of property were seized. There were also forced disappearances of persons on a large scale. Turkey's conduct clearly gave rise to a large number of individual claims under the Convention. It is not as yet known what evidence Ukraine will present that Russia has displaced people from Crimea, perpetrated

forced disappearances, or otherwise violated Convention rights of individuals in Crimea, though the multilateral determinations noted above give reason for serious concern.[180]

The Court in *Cyprus* v. *Turkey* (just satisfaction) referred to *Austria* v. *Italy*. There, in 1961, the European Commission of Human Rights had said that a State bringing a case under the inter-State mechanism was not "exercising a right of action for the purpose of enforcing its own rights, but rather . . . bringing before the Commission an alleged violation of the public order of Europe."[181] Russia's annexation of Crimea is a "violation of the public order of Europe" if any act could be. But in *Austria* v. *Italy* and in *Cyprus* v. *Turkey* alike, the applicant State credibly alleged that individuals had been the victims of particular violations of Convention rights. The Court in *Cyprus* v. *Turkey* admonished that "it must be always kept in mind that, according to the very nature of the Convention, it is the individual, and not the State, who is directly or indirectly harmed and primarily 'injured' by a violation of one or several Convention rights."[182] Referring to the ICJ's *Diallo* compensation phase judgment, the ECtHR added that any just satisfaction given in an inter-State case must be transferred to the individuals whose rights were violated.[183] While this was a point about the procedures to be followed post-judgment, it underscores the tight connection to individual rights.

The *Cyprus* v. *Turkey* just satisfaction judgment places the inter-State procedure of the European Convention squarely within the broader framework of public international law. No claim to just satisfaction had ever before been awarded in an inter-State case. The award in *Cyprus* v. *Turkey*, €90 million, was large in comparison to awards of compensation in other judgments. The Court made clear that, as had been understood under public international law generally since *Factory at Chorzów*, "an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered."[184] Article 41 of the Convention stipulates that in the case of a violation of the Convention where the internal law of the State in breach allows only partial reparation, the Court "shall, if necessary, afford just satisfaction to the injured party," a provision that Turkey had argued strenuously should be limited to cases brought by individuals.[185] The Court rejected Turkey's position that Article 41 could not operate in an inter-State case. This presents the possibility of the considerable further growth of an awards practice that up to the *Cyprus* v. *Turkey* just satisfaction judgment had not developed; the Court's approach to just satisfaction is "evolving case by case."[186]

But to make clear that the law of State responsibility operates irrespective of whether a claim is brought by an individual or under the inter-State procedure is not to say that all of the primary rules of public international law are now incorporated into the European human rights system. It is not a system for the general management of inter-State relations. It is not a system for bringing claims for breach of the prohibition against threat or use of force or for the forcible seizure of territory as such. To use the system to challenge an act of aggression, it remains necessary for the State (or individual) to demonstrate the connection to one or more of the applicable protected rights. The judgment well may "open [. . .] the door to claims arising from *that* kind of occupation," but it is necessary to be clear precisely what

kind of occupation that is and, more specifically, what kind of breaches occupation has carried in its train.

Still, a monetary award for breach of one or more of the rights under the Convention and its Protocols is a significant step. It potentially broadens the remedies that Ukraine might seek against Russia.

International Court of Justice

The ICJ as yet has not addressed the situation in Ukraine. It does not appear that the occasion is likely to arise for it to do so directly through a new contentious case.[187] The possibilities for an advisory opinion or lateral approaches to jurisdiction have been considered elsewhere.[188]

Arbitral Tribunals

Those who designed the framework for international investment arbitration did not envisage that its central purpose would be to address situations of armed conflict and other disputes between States. Investor-State disputes have arisen, and have been arbitrated, against a backdrop of armed conflict,[189] but even there the institution of arbitration was concerned with the problems arising out of an investment, not with the situation globally.

And, yet, it was not envisaged at the start that bilateral investment treaties (BITs) would become the main mechanism by which States expressed consent to arbitration of investment disputes under Article 25, paragraph 1 of the ICSID Convention.[190] The evolutionary potential of legal institutions may be latent in unexpected places. But, still, these are investment treaties, not treaties for the general settlement of disputes under public international law.

Ukraine is party to some fifty-five BITs in force, including BITs with a significant number of the capital-exporting States.[191] Ukraine has been respondent in some dozen investment cases, mostly under the International Convention for the Settlement of Investment Disputes.[192] A number of questions might be posed under Ukraine's BITs. Would Ukraine be answerable for claims of breach of investment law by nationals of States with which Ukraine has entered investment treaties, where the conduct constituting the breach is conduct of the Russian Federation in annexed Ukrainian territory? In a hypothetical scenario, an investor has made an investment under Ukrainian law in the area which since has been annexed. The investment might have been based on a contract with the Ukrainian government, or relied upon a concession granted by the government. It would have been made, at any rate, in view of Ukrainian legislation in force for that territory at the time. The putative Russian authorities then declare that they will not honor the contract; or they suspend the concession. They introduce new legislation, including new tax provisions, environmental regulations, and labor laws. The treatment accorded to the investment thus will have changed significantly. In addition, the investment now is based in a territory whose putative acquisition by Russia is subject to the international obligation of non-recognition. The question of Ukraine's responsibility for breaches of the ECHR in Crimea arises in light of ECtHR jurisprudence. Investment law

also gives rise to obligations; and BITs provide consent to a jurisdiction under which investors may make claims.

BITs, including some of Ukraine's, also contain inter-State dispute settlement clauses. Article 10 of the Ukraine-Russian Federation BIT is an example.[193] At least in some general sense, there exists a dispute between Ukraine and Russia in respect of the interpretation of "the territory of the Russian Federation or the territory of the Ukraine and also their respective exclusive economic zone and the continental shelf as defined in conformity with . . . international law," a phrase contained in Article 1, paragraph 4, of the BIT. Arbitration under BITs has not been used to address questions of territorial status. The practice in respect of inter-State clauses is overall scant. Such as they have arisen, State-to-State BIT disputes have been connected to specific investor-State disputes.[194] Annexation of a significant territory belonging to a State, however, has been almost unheard of in the era of modern investment law. This may account for the matter not having yet arisen before an investment tribunal. As noted, investment arbitration has changed over time; and now the international environment in which that mechanism operates appears to be changing as well.

Evidently, as of June 2014, Chinese firms have been in discussions with Russia to build a deep-water port in Crimea. According to the Foreign Ministry of China, "in recent years, some Chinese enterprises have established cooperative relations with companies in Crimea. These cooperation [*sic*] are formed in the course of history and we respect the choices of cooperation made by enterprises themselves."[195] Whether or not to "respect the choices" means to espouse the conduct, it certainly indicates no intention to restrain the enterprises. The China-Ukraine BIT, in addition to an investor-State clause, provides for settlement of State-to-State disputes in accordance with "the universally recognized principles of international law."[196]

Ukraine is reported to have commenced commercial arbitration (under Stockholm Chamber rules) in connection with transactions concerning Crimea.[197]

The practice to date suggests that the decisions of dispute settlement organs will have a role to play in the collective response to annexation. It is to be expected that the politico-legal decisions by States individually and collectively to withhold recognition from the unlawful situation in Crimea will in turn affect dispute settlement proceedings. This is the case, at least to the extent that parties in such proceedings seek to affirm or deny that the situation generates legal effects.

Consequences of Non-recognition of the Unlawful Annexation of Crimea

The *Wall* Advisory Opinion, and the *Namibia* Advisory Opinion before it, concerned the particular consequences that arise out of a situation that a political organ of the United Nations had impugned in legal terms. The situations in the West Bank and Namibia differed, as did the Court's findings about the resultant general obligations. It would seem to follow that the consequences to arise out of annexations in Ukraine, too, will have their own particularities.

Earlier sections of the present chapter set out the basic outline of the general response to the annexation of Crimea as reflected in international practice. What precisely, however, is the meaning of the direction to States, international

organizations, and specialized agencies under GAR 68/262 "not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the…referendum [of March 16, 2014] and to refrain from any action or dealing that might be interpreted as recognizing any such altered status"? What accommodation is to be made to protect the human rights of individuals in Crimea under a policy of non-recognition? And what other incidents are associated with non-recognition, including in respect of State succession, maritime rights, and international responsibility?

The remainder of the present chapter addresses these questions in turn.

The Scope of Non-recognition

As an initial observation, it may be noted that paragraph 6 of GAR 68/262 is a formulation in two parts. The first part is the direction "not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum." The second part is the direction "to refrain from any action or dealing that might be interpreted as recognizing any such altered status."

Taken side by side, as they must be, the two parts of paragraph 6 indicate a broad requirement of non-recognition. The first part is concerned with the formal category—it is concerned with recognition as such of the annexation of Crimea. It directs States not to recognize any "alteration of the status" of the territories of Ukraine purportedly annexed by Russia, meaning that no State is to make a formal statement that accepts the separation of Crimea and its putative incorporation into Russia. Recognition, in the sense with which the first part of paragraph 6 is concerned, is a deliberate act, an expression by which the State adopting it intends to communicate that the State accepts a juridical situation and that that situation produces specific legal effects opposable to it.[198]

The other direction—the second part of paragraph 6—gives further scope to non-recognition. Distinct from withholding recognition of the putative status, the second part of paragraph 6 concerns "any action or dealing that might be interpreted as recognizing such altered status." That is to say, States are called upon not only to refrain from formal expressions of recognition; they also are called upon to adopt a course of conduct in respect of a more extensive category of acts. That the category denoted by the words "action or dealing" is an extensive one is clear in view of the descriptive phrase "that might be interpreted as recognizing any such altered status." States are to refrain not only from the express indication that they recognize the situation. They also are to refrain from any action or dealing that might imply it. A similar drafting approach was taken in respect of Iraq's putative annexation of Kuwait.[199]

A different approach was taken in respect of non-recognition of South Africa's unlawful presence in Namibia. There, in resolution 276 (1970), the Security Council declared that…

> the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf

of or concerning Namibia after the termination of the Mandate are illegal and invalid.[200]

All States then were called upon "to refrain from any dealings with the Government of South Africa which are inconsistent with" that declaration.[201] This was the starting point for an obligation of non-recognition in respect of South Africa's presence in the territory.

By subsequent action, specific categories of transaction were identified that States were to refrain from performing and particular affirmative steps were identified that States were to take.[202] These included:

- refraining from diplomatic, consular or other relations that would imply recognition of the authority of the State unlawfully present in the territory;[203]
- adopting formal declarations that diplomatic relations with that State do not imply recognition of its unlawful presence;[204]
- terminating diplomatic and consular representation to the extent that it extends to the unlawfully occupied territory;[205]
- withdrawing diplomatic or consular missions or representatives from the territory;[206]
- ensuring that business organizations owned or controlled by the State cease all dealings with respect to businesses in the territory; and also cease further investment activities in the territory;[207]
- withholding financial support from any natural or juridical person of the sending State's nationality, where such support would facilitate trade or commerce with the territory;[208] and
- discouraging nationals or business organizations from investing or obtaining concessions in the territory and, to that end, withholding protection of such investment against claims of the lawful government of the territory.[209]

When the ICJ adopted its advisory opinion in respect of SCR 276 (1970), it indicated that the determination in the resolution was "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law."[210] The Court developed the point further, saying that "no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof."[211]

Non-recognition in this sense meant not only that inter-State relations with South Africa in respect of Namibia were invalid and without legal effect, but also that certain ancillary relations were as well. These, arguably, could include relations of non-State actors, where such relations were a "consequence" in the relevant sense. Indeed, the United Nations Council for Namibia determined that measures to exploit mineral resources in Namibia by commercial firms from third States were unlawful.[212] The General Assembly in resolution 36/51 of November 24, 1981, condemned the "depletive exploitation of natural resources" in Namibia; the resolution was addressed, *inter alia*, to "transnational corporations"[213] and "foreign and other economic interests."[214] States therefore are not the only actors to which

obligations associated with non-recognition may be addressed, a point to be considered further below.

Another notable case of non-recognition was that of Iraq's unlawful presence in Kuwait. Non-recognition of Iraq's presence in Kuwait, like non-recognition of South Africa's presence in Namibia, was accompanied by a range of sanctions. A degree of analytic difficulty arises in separating the effects of sanctions from the incidents of the obligation of non-recognition. Several days before SCR 662 (1990) of August 9, 1990 (which required the non-recognition of annexation of Kuwait), the Security Council had imposed sanctions and established a Security Council committee to oversee their implementation.[215] That it was in the subsequent (separate) resolution that the Council indicated the obligation of non-recognition suggests that sanctions and non-recognition are distinct mechanisms. Jurists, as noted, have suggested the same.[216]

And, yet, an obligation not to recognize a situation created by an unlawful act, when such obligation is indicated in broad terms, has had practical steps as its concomitant. It has not been a mere symbolic withholding of acceptance, and it has seldom arisen in isolation from other measures. The language of ARSIWA Article 41 is noteworthy in this regard. It is under a separate paragraph from that indicating the duty of non-recognition—but still under Article 41—that States are obliged to "cooperate to bring to an end through lawful means any serious breach"; and it is in a separate clause from that indicating the duty of non-recognition—but in the same paragraph—that "no state shall . . . render aid or assistance" in maintaining the unlawful situation. There are reasons to analyze each of these elements separately, but their separateness should not be exaggerated. All the more where non-recognition is called for in broad terms—as it has been in respect of Crimea—the relation is holistic between formal acts of recognition and other acts—or omissions—tending to support the unlawful situation. It is against all such acts—or omissions—that the collective response is directed.

* * *

Depending on the purposes of non-recognition and the circumstances in which it is adopted and maintained as a legal policy, non-recognition may permit certain practical accommodations. To say that a State does not recognize a situation, without more, will permit certain interactions between the State and the territory. Financial transactions, even those involving public debt, might not be excluded, at least to the extent that the creditors structure the transactions in a way that avoids expressing a view as to status. This was not the situation in the classic nineteenth-century case *Texas* v. *White*.[217] The U.S. Supreme Court determined that an attempt by an unrecognized secessionist entity to convert federal government bonds was legally ineffective. A contrasting case is furnished by the relations between EU institutions and Kosovo. The EU does not recognize Kosovo; EU institutions nevertheless deal with Kosovo, including in the financial sphere. However, EU institutions do not withhold recognition from Kosovo as a matter of general legal obligation; they do so because the EU as a whole reserves its position. Non-recognition as legal obligation and the withholding of recognition as a political reservation are very different acts.

With respect to South Africa's presence in Namibia, as with Iraq's in Kuwait, States were not merely reserving their position. They were under the obligation not to recognize the situations concerned. Namibia and Kuwait, like Crimea, involved the assertion of a State's authority over territory where a finding had been reached that that assertion was unlawful. Where non-recognition is adopted to address an unlawful situation—that is, where it is the unlawfulness of the situation that has instigated non-recognition and non-recognition is not merely the absence of an affirmative decision yet to recognize a new situation—non-recognition will entail considerably tighter constraints. GAR 68/262 was adopted to address an attempted acquisition of territory by force. That object, taken together with the terms of the resolution calling on States to refrain from any action or dealing that might be interpreted as recognizing Russia's putative annexation, supports the view that non-recognition here entails restrictions on a relatively wide category of conduct. It remains to be seen, as developed through practice, including, possibly, judicial practice, what precisely those restrictions will be. For the time being, a number of further observations may be made in respect of the consequences of non-recognition.

Human Rights and Governmental Acts in Crimea Day to Day

At the same time as non-recognition entails denying legal effect to conduct of the State in breach, international practice has made allowances to protect the human rights of individuals in the territory. In particular, governmental acts of a day-to-day character in the territory are, as a general matter, not denied legal effect.

The ICJ indicated this approach in the *Namibia* Advisory Opinion.[218] The effects of non-recognition of South Africa's unlawful presence in the territory were to be qualified in the following way:

> The non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[219]

The consideration of legal policy behind this exception to the rule of non-recognition is sound. It is hard to see how the "registration of births, deaths and marriages" in annexed territory in Ukraine would have anything more than the most incidental relation to the unlawful annexation. Treating such registration as valid would not obviously constitute an acquiescence in the annexation; denying its validity would cause hardship for individuals.

Yet the allowance given to quotidian incidents of local administration may be more limited in other cases. A central task of local administration is to formalize, register, and maintain records of transactions relating to the ownership and transfer

of real property (land). In ordinary circumstances, the task has nothing to do with higher-level politics. In situations where a State has seized territory by force, however, questions have arisen as to the validity of certain land transactions. Turkish administrative organs in northern Cyprus, to give the main example, denied individuals physical access to their houses and other property. These acts, though relating to property law in the territory, were not treated as valid; the individuals were due compensation[220] and the authorities in the territory were obliged to establish a systematic remedy.[221]

The non-recognition of certain putative transfers of property in northern Cyprus also had downstream effects. A number of Turkish Cypriots came into occupation of property in northern Cyprus after Greek Cypriots who owned the property had been forced to flee as a result of the Turkish invasion and administrative acts of the local Turkish public departments. The Turkish Cypriots occupying the property had done so in accordance with the property laws adopted by the authorities in the territory. When they purported to sell the property to British and other persons, the Republic of Cyprus courts did not accept that the transactions had effected a transfer of title. British individuals who had believed that they had acquired land in northern Cyprus in accordance with the laws in force in that territory discovered that they had not.[222] The European Court of Justice decision in *Apostolides* v. *Orams* determined that the applicable Council Regulation "does not authorize the court of a Member State to refuse recognition or enforcement of a judgment given by the Courts of another Member State concerning land situated in an area of the latter State over which its Government does not exercise effective control."[223] This concerned the European Union legal order and therefore is not directly relevant to Russia and Ukraine. However, if a general principle were to be distilled from the judgment, then it would be as follows: the judicial system of a State continues to operate in respect of disputes over property in the State's territory, including property in territory unlawfully annexed by another State. Many day-to-day acts of public administration will be treated as valid despite non-recognition, but, as the decided cases of the ECtHR and ECJ alike illustrate, forcible expulsion of persons and the seizure of their land will be treated instead as concomitants to the underlying wrongful act. They accordingly will be denied legal effect.[224]

State (Non-)succession in Respect of Crimea

Where a change of international responsibility for territory has taken place by lawful means, State succession operates in respect of the territory.[225] The particular issues involved are numerous; they include succession in respect of treaties, questions of the nationality of the inhabitants of the territory, adoption (or retention) of a currency as legal tender in the territory, allocation of public debt, and control of public archives.[226] *Ad hoc* approaches have been prevalent. For example, when the successor States to the Socialist Federal Republic of Yugoslavia adopted an Agreement on Succession Issues, they referred to equitable considerations and comity, which seem to have played a more important role than fixed rules.[227]

If it ever came to pass that a transfer of responsibility were to be accepted *grosso modo* in respect of Crimea—that is, if Ukraine conceded the loss of its territory—then the

parties concerned would likely take a similar approach. State succession in respect of Goa, which India had annexed by force, was governed under the Treaty of Lisbon (December 31, 1974) and subsequent exchange of notes.[228] Portugal, in the Treaty, had ended its objection to the annexation.[229] An orderly settlement of questions of succession in such situations seldom if ever is achieved before the parties resolve the underlying conflict.[230]

Maritime Jurisdiction of Ukraine

The section immediately above has drawn attention to the relatively open texture of the rules of State succession. However, as Chapter 4 will consider in detail, boundaries that have already been settled remain settled. This is the case, notwithstanding the possibility for *ad hoc* approaches to so many matters following a change in responsibility for territory from one State to another.

To date there is no indication that Ukraine would accept that a succession of States has taken place in respect of Crimea (or any other territory recognized to fall within the State borders of Ukraine). Even if a succession were accepted to have taken place, it would not disturb the settled international boundaries associated with the territory. By "settled international boundaries" here are not meant the *new* boundaries that might be established between Crimea and Ukraine in the event that the separation of Crimea were ever to be accepted. Instead are meant international boundaries that already exist between Crimea as a part of the territory of Ukraine and other States.

The ICJ in 2009 established a maritime boundary between Ukraine and Romania in the Black Sea.[231] The boundary as established runs between Romania's Black Sea coast and, *inter alia*, Ukraine's Black Sea coast on the west side of Crimea. It would seem that, if Crimea were to be annexed lawfully by a third State, then the Black Sea maritime boundary would remain as indicated in 2009. This would be consistent with the principle that boundaries and territorial regimes survive a succession of States; the principle being reflected, for example, in Articles 11 and 12 of the 1978 Vienna Convention and widely applied in practice.[232] The point as yet has not arisen, the reason being that a lawful succession of States as yet has not occurred.

As matters stand, the status of any Russian claim to maritime jurisdiction is a further incident of the invalidity of Russia's annexation. The land dominates the sea,[233] and so a maritime claim is no more valid than the claim to the territory from which it is generated. For this reason, lawful succession in respect of jurisdiction over areas off the Crimean coast has been precluded under the circumstances just as it has been on land. Bernard Oxman in 2006 said that the old temptation of States to seize the resources they covet now entails acts at sea;[234] this indeed seems to be the case, but title to land is where title at sea begins and, so, the legal response to the unlawful claim on land is the first line of defense.[235]

As a matter of the law of the sea, the eligibility of Crimea to generate the full suite of potential maritime entitlements is undisputed. In respect of the foreign coast opposite Crimea's west coast, the overlap of potential entitlements has been resolved through the 2009 *Black Sea* Judgment. Ukraine holds the maritime

entitlement in the area between the maritime boundary and the coast of Crimea—not as a claim but as a vested right. The situation in this way (among others) differs from that which existed in the Timor Gap: no delimitation had existed there between East Timor and Australia before the putative annexation of East Timor by Indonesia.[236] To admit a claim by another State in Ukraine's maritime area would be to say that a legal process has taken place (or may have taken place) resulting in either a new maritime boundary or a succession of States in respect of the relevant land territory. There has been no change in the maritime boundary (for the reason stated). And, as noted, in view of the prohibition against acquisition of territory by force, no legal process resulting in State succession has taken place. Nor is it even arguable that such a process has taken place; the forcible claim to territory is an inadmissible claim. This point would be centrally important in claims processes involving Russia's annexations. The point is developed further in Chapter 4.[237]

A further point in the present connection concerns permanent sovereignty over natural resources. The General Assembly identified permanent sovereignty over natural resources as "a basic constituent of the right to self-determination."[238] Both dissenting judges in *East Timor* drew attention to the concept.[239] The principal resources involved were in the maritime area appurtenant to the territory.

The question of maritime resources arose in connection with Morocco's presence in Western Sahara as well. The ICJ concluded in its *Western Sahara* Advisory Opinion that there existed no "legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory."[240] In short, it remained (and remains) for the peoples of the Territory to determine their final status. Questions later arose about the lawfulness of transactions between Morocco and a number of hydrocarbon firms, including Kerr McGee and TotalFinaElf. The firms, under contracts with Morocco, had carried out reconnaissance and evaluations of potential offshore oil fields. The president of the Security Council in 2001 requested a legal opinion on the matter. The Under-Secretary-General for Legal Affairs concluded that the contracts were not unlawful.[241]

The contracts, however, were for exploration only. Only limited work had been performed under the contracts at the time when they came under challenge. The legal opinion further stated as follows:

> If further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories.[242]

The legal opinion noted that the situation is more nearly absolute where the presence of the occupying State is illegal and its acts therefore invalid.[243] The Legal Service of the European Parliament later advised the EU to refrain from allowing vessels to fish in the waters off Western Sahara under a Fisheries Partnership Agreement between the EU and Morocco.[244]

East Timor and Western Sahara both were Chapter XI Non-Self-Governing Territories. As such, the presence there of an Administering Power was not *per se* unlawful. Yet significant constraints existed against the disposal of the natural resources of the associated maritime areas. Where the presence of an occupying power is necessarily unlawful, an *a fortiori* case is presented. The treatment of mineral resources in Namibia was noted earlier. If the Russian argument that Crimea separated from Ukraine under the right of self-determination is rejected (as it is argued above it must be), then the relevant self-determination unit remains as it was before: Ukraine holds permanent sovereignty to the natural resources of Crimea (including Crimea's maritime areas). As occupying power, the Russian Federation is obliged to refrain from alienating those resources without the consent of Ukraine. Any putative transfer of those resources without Ukraine's consent therefore is to be treated as legally void.

International Responsibility in Crimea

As a general matter, Ukraine retains international responsibility for all Ukraine's territory. As Crimea comprises part of Ukraine's territory, this means that Ukraine retains international responsibility for Crimea. The human rights organs of the United Nations, for example, continue to address Ukraine when it comes to treaty obligations in that territory, a point noted earlier in the present chapter. This is a logical corollary of non-recognition. It is the purpose of non-recognition to preserve the legal relationships that had existed before the unlawful act. The international responsibility of the State for its territory is one of the main legal relationships.

However, where a State has been deprived of effective control in part of its territory by another State's unlawful conduct, the implementation of its responsibility in that part of its territory will be affected. The implementation of Ukraine's responsibility in Crimea therefore is affected by the presence of the Russian Federation. The relation between Moldova and the Russian Federation in respect of Moldova's territory of Transdniestria was noted earlier in the present chapter. Ukraine's responsibility in Crimea in practice is thus likely to be qualified in a manner similar to Moldova's in Transdniestria.

The armed and administrative presence of the Russian Federation in Crimea is no doubt effective, in the sense that it has practical effects and for the time being excludes the operation of the public apparatus of Ukraine. This was the situation of Turkey in northern Cyprus as well. The Republic of Cyprus undoubtedly remained the State to which the territory of northern Cyprus belongs, but the effective operation of the Republic of Cyprus in that area had been excluded by the unlawful presence of a foreign army and the acts of a local administration that that army installed. The ECtHR in respect of individual claims in Cyprus determined as follows:

> The concept of "jurisdiction" under Article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory.[245]

The Court later made clear that this is a "broad statement of principle":

> Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration...It follows that...Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention...and that violations of those rights are imputable to Turkey.[246]

The ECtHR was careful to be clear that the "jurisdiction" in question was a particular form of jurisdiction, namely that which follows from the effective control of territory where the presence of the controlling State is unlawful. The term, as the Court employed it, was "jurisdiction," not jurisdiction. Identifying Turkey's "jurisdiction" in this qualified way avoided a "vacuum in the system of human-rights protections in the territory in question" while making clear that the rights of the Republic of Cyprus had not been displaced.[247] Imputing violations to the occupying power does not affect the title of the State, which for general purposes retains jurisdiction and responsibility for the territory.

It follows from the ECtHR practice that the Russian Federation is responsible under international law for its acts in Crimea. This will mean, in practice, that all or virtually all incidents of day-to-day administration will be acts imputable to Russia for purposes of establishing the international law consequences of any internationally wrongful act in the territory. This legal situation in no way qualifies non-recognition of the annexation of Crimea. The prior wrongful act—the annexation of territory by force—remains imputable to its author.

Sanctions

As noted briefly above, the EU and a number of States individually have adopted sanctions against the Russian Federation in response to its unlawful acts in Ukraine. Sanctions against the economic interests of a State are conceptually distinct from non-recognition of the unlawful situation that might attract sanctions. Yet sanctions would seem to be a natural correlate to non-recognition. The character of non-recognition as a general legal obligation also would seem to have some bearing on sanctions when the State targeted by sanctions seeks to impugn their lawfulness.

As of September 2014, sanctions appear to have had a serious impact on Russia's economy.[248] Of course, in an interconnected world, sanctions against a major economic power are unlikely to affect only that State. Their economic ramifications well may rebound to affect other States, including the States instituting sanctions. So too is it difficult to isolate the legal effects of sanctions. The States which in recent years have been subject to economic sanctions have by and large not been full participants in the international legal framework of trade. Iran, Libya, Sudan, and North Korea—to give the main examples—are not WTO Members. The Russian Federation, however, is.[249]

The Russian Federation has indicated at the WTO that sanctions against it are in breach of WTO rules.[250] Article XXI of the GATT (1947) provides, *inter alia*, that

> "nothing in this Agreement shall be construed
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> . . .
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting part from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

As to paragraph (b), States in practice have taken a liberal view of the meaning of "security interests" and have indicated a wide discretion in determining what their own security interests are. Ghana, for example, in respect of its boycott against Portugal in 1961, said that "under this Article each contracting party [is] the sole judge of what [is] necessary in its essential security interest. There could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests."[251] The EEC, its member States, Canada, and Australia took the same position when the matter came up in connection with their trade restrictions against Argentina (imposed for political, not economic, reasons in 1982).[252] The matter was hotly contested by Nicaragua in response to the US trade embargo in the 1980s. A panel was established. By its terms of reference it "[could not] examine or judge the validity or motivation for the invocation of Article XXI(b)(iii)."[253]

The United Arab Republic in 1970 invoked Article XXI in defense of its boycott against Israel.[254] The European Community invoked it in defense of its trade measures against Yugoslavia.[255]

In reply to the European Community, Yugoslavia complained that no UN action supported sanctions.[256] Conversely, the States adopting sanctions against Argentina in 1982 stated that "they have taken certain measures in the light of the situation addressed in the Security Council Resolution 502 [addressing the situation in the Falkland Islands/Malvinas]; they have taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection."[257] A number of States have also invoked paragraph (c)—"action in pursuance of [a State's] obligations under the United Nations Charter for the maintenance of international peace and security." This mostly has been in connection with UN decisions expressly mandating sanctions.[258]

As noted, GAR 68/262 of March 27, 2014, expressly mandates non-recognition, a response that is conceptually distinct from sanctions. Nevertheless, a general obligation not to recognize the unlawful situation would seem to provide a buttress for trade sanctions, especially in light of the variety of situations in which States have justified unilateral measures under Article XXI. If Article XXI can be invoked in

response to a security threat that a State says has arisen in its bilateral relations, then invoking it in response to a threat that the principal representative body has acknowledged affects the community as a whole seems well-grounded. Non-recognition at least to this extent is relevant to sanctions when the State targeted by sanctions seeks to impugn their lawfulness. Adopting measures otherwise in breach of trade obligations in order, say, to protect the domestic shoe industry (as Sweden did in 1975)[259] is rather less credible than adopting such measures to protect the international order from wholesale collapse. Forcible changes to the territorial settlement are subject to general non-recognition for the reason that such changes present nothing less than such a threat. The centrality of the territorial settlement to the international legal order will be considered in Part II.

So general non-recognition of an unlawful situation would tend to validate, even if taken on its own it does not necessarily require, a regime of sanctions aimed at persuading the author of the situation to reverse it. That said, States when invoking Article XXI largely have referred to paragraph (b) and paragraph (c) as distinct, not as related provisions that might, jointly or cumulatively, support a sanctions policy. The use of trade and economic sanctions to protect other values remains a point of tension in the WTO system.[260]

If the tension between the use of economic sanctions for political aims and the legal obligations of the global trade system are not immediately reconcilable by reference to Article XXI, then, perhaps, a breach of the trade rules might be justified as a countermeasure. Countermeasures have been addressed already in Chapter 2 in connection with a putative (and largely impugned) concept of forcible reprisal. Considerable scholarly attention has been given to the role of countermeasures as a response to breaches of *jus cogens* rules or of obligations having *erga omnes* character.[261] It is beyond the scope of the present discussion to consider the matter in depth.[262] It may be said, however, that trade sanctions against a State whose conduct threatens to forcibly overturn the boundaries of States fall well within the "object and limits of countermeasures" as set out in Article 49 of the ILC Articles.[263]

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PART II

The Territorial Settlement and International Law

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CHAPTER 4

The Privileged Character of Boundaries and Territorial Regimes

The territorial limits of States are the concern of a significant international practice. Counting only agreements registered as of 2014 in accordance with Article 18 of the Covenant of the League of Nations or Article 102 of the UN Charter, since 1923 States have concluded not fewer than 1,200 treaties concerning frontiers, borders, boundaries, delimitation, or demarcation.[1] The boundary unit in the typical foreign ministry, in addition to handling the negotiation, adjudication, and arbitration of boundaries, shares a significant workload with immigration, customs, consular, and diplomatic authorities in respect of the management of the State's frontiers. The sheer number of treaties that address international boundaries suggests that the concern of international law with the territorial contours of States is not merely incidental; the size and activity of the national apparatus devoted to establishing, monitoring, and maintaining the international boundaries of the State suggest equally that territory and its limits are of central interest to national jurisdiction.

This chapter begins by considering instruments in which boundaries and territorial regimes have been the subject of specific guarantees. Ukraine is party to a number of such instruments. The chapter then considers how general principles of international law—such as the law of treaties and the law of State succession—have taken account of boundaries. It further considers the treatment of boundaries in judicial and arbitral practice through the twentieth century and concludes by considering the serious systemic risk entailed by the unsettled boundary.

As will be seen from the practice as a whole, boundaries and the territorial regimes associated with them are intimately connected to general security. The special protections that modern international law accords them are thus of systemic importance. The forcible change of a boundary is inadmissible under modern international law. This privilege, central to international law, cannot be ignored without risk of disturbing the legal framework as a whole.

International Boundary and Territorial Guarantees

The preamble to GAR 68/262 of March 27, 2014, recalls from the Friendly Relations Declaration that "the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force."[2] The preamble refers to four further international instruments: the Helsinki Final Act (1975), the Alma-Ata Declaration (1991), the Budapest Memorandum (1994), and the Russia-Ukraine Partnership Treaty (1997). Each instrument contains provisions in respect of boundaries. So, too, does a range of other treaties relevant to the post–Cold War settlement in Europe generally. Each of the instruments referred to in the preamble and selected other instruments may be considered in turn.

Friendly Relations Declaration (1970)

The Friendly Relations Declaration, which Chapter 3 considered in relation to GAR 68/262, refers extensively to international respect for frontiers. The first principle reads as follows:

> Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues . . . Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.[3]

The Declaration thus lays stress on "the existing international boundaries," "territorial disputes," and "problems concerning frontiers of States." The Declaration also refers to "international lines of demarcation, such as armistice lines," which in some situations in functional terms equate to international frontier lines.[4] These are not the only "international issues" that a State shall not use threat or force to settle—but they are the only international issues expressly identified in the first principle.

The Declaration also stipulates that the "territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force"—the provision recalled in the preamble to GAR 68/262—and it further provides that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal." This suggests a distinction between boundary disputes, in a restricted sense, and disputes over territory in a wider sense. Yet, presumably, use of force or threat to settle "territorial disputes and problems concerning frontiers of States" similarly would seem capable of leading to "territorial acquisition." The distinction nevertheless is sometimes recognized in claims practice.[5] In respect of either—localized boundary questions or the disposition of territory writ large—a situation created by force or threat is not valid.

Definition of Aggression (1974)

As noted in the introduction to Part I, the Definition of Aggression (1974) refers to a special category of use of force. The preamble to the Definition considers that "aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences."[6] It is therefore clear from the start that States have understood a particular category of force to exist entailing a unique threat—"world conflict and all its catastrophic consequences"—and which as such necessitates special legal terms.

Article 1 defines aggression as follows:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

The Definition as such, therefore, while drawing attention to aggression as a special form of breach, does not distinguish between the particular legal interests of the State against which aggression takes place. Whether an act takes place against sovereignty, territorial integrity, or political independence, it is aggression if it meets the requirements of the definition as a whole.

The Definition, however, then indicates that a requirement of non-recognition is linked in particular to use of force employed to acquire territory. According to Article 5, paragraph 3, "no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful." It took over twenty years to arrive at a draft definition that enjoyed consensus support. It was understood from the start of drafting, however, that the definition must reflect the unlawfulness of forcible annexation in a special way. This was not controversial.[7]

A question might arise in connection with Article 5, paragraph 3, as to the effect on territorial dispositions of acts of force not constituting acts of aggression. The Friendly Relations Declaration, as noted before, stipulates, *inter alia*, that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal." That is to say, threat or use of force of any kind cannot provide a lawful basis for territorial acquisition. This would appear to protect the territorial settlement from a wider range of acts than the Definition of Aggression, where the requirement is to withhold recognition from putative acquisitions resulting *from aggression* but not from other instances of the use or threat of force. Something like this distinction is visible in Sir Elihu Lauterpacht's *dictum* in the *Genocide* case (noted earlier).[8] It seems that, under earlier international law, a State that used force in self-defense to repel an aggressor then might lawfully acquire territory.[9]

But the Definition of Aggression is concerned with the particular category of conduct that it defines. It is neither surprising nor in itself conclusive that it did not refer to the privilege of the territorial settlement as against forcible acts belonging

to other categories. In fact, the Special Committee on the Question of Defining Aggression, in its Report on the draft text of the Definition, stated as follows:

> With reference to the third paragraph of article 5, the Committee states that this paragraph should not be construed so as to prejudice the established principles of international law relating to the inadmissibility of territorial acquisition resulting from the threat or use of force.[10]

The indication that acquisition of territory by threat or use of force is not merely unlawful but also subject to a principle of "inadmissibility" is considered later in this chapter.[11] The Special Committee in any event was clear that force in any form is not the basis for territorial change. The omission of a reference to non-aggressive use of force in Article 5 only reflects the limits of the subject matter that the Definition was addressing.

Ukraine's Permanent Representative on December 14, 2014, referred to "the brutal violation by Russia" of General Assembly resolution 3314 (XXIX).[12] Ukraine invoked in particular subparagraphs (a), (b), (c), (d), and (g) of article 3 of the Definition.

Helsinki Final Act (1975)

The Helsinki Final Act was adopted on August 1, 1975, by the United States, the Soviet Union, and most of the States of Europe.[13] The Act opens with a Declaration on Principles Guiding Relations between participating States. Principle I—"Sovereign equality, respect for the rights inherent in sovereignty"—states, *inter alia*, that the Participating States "consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement."[14] Principle III affirms the inviolability of frontiers. According to Principle III,

> The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.
>
> Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.[15]

The allowance for change in Principle I, associated as it is with the title of Principle I, involves "the rights inherent in sovereignty." Those rights include the right to consent to a change of boundaries or cession of territory. This is to be read in conjunction with Principle III, which reflects the importance the participating States attached to stability of frontiers in Europe.

Principle I allows for a change of boundaries, which might suggest a claim by one State against another. Principle III excludes "any demand." There is no disharmony between these Principles, as Principle III excludes "demands," not valid claims. Moreover, Principle III excludes "seizure and usurpation" as a modality for realizing territorial change, regardless of whether it is proposed under a "demand" or a valid claim. The distinction between valid and other claims is essential to an

organized claims process. This is especially so in the international legal order where the jurisdictional provision in many fields allows the exclusion of certain classes of claim.[16] A court or tribunal under such a jurisdictional provision has no power to settle the claim that belongs to an excluded class; but a State does not escape jurisdiction simply by pronouncing a demand with no basis in the law.

Among the final provisions of the Final Act is the statement that, while transmission to the UN Secretary-General is envisaged, the Final Act "is not eligible for registration under Article 102 of the Charter." The United States and other Western delegations at the conference indicated that the Final Act did not create legal commitments.[17] The European Union, much later, seemed to think it did.[18] As noted in Chapter 3, the OSCE Baku Declaration indicated Russia's conduct in Ukraine to be in breach of the Final Act in all its parts.[19]

Instruments Relating to the Independence of States in the Former USSR (1991)

The States that emerged in the territory of the former USSR concluded a significant number of legal instruments in the early 1990s relating to their boundaries, territory, and mutual relations. Two multilateral instruments were central to the transition to independence—the Agreement Establishing the Commonwealth of Independent States, signed at Minsk on December 8, 1991 ("Minsk Agreement"),[20] and the Alma-Ata Declaration of December 21, 1991.[21]

The parties to the Minsk Agreement were Belarus, the Russian Federation, and Ukraine. Article 5 of the Minsk Agreement reads as follows:

> The High Contracting Parties acknowledge and respect each other's territorial integrity and the inviolability of existing borders within the Commonwealth.[22]

Article 11 made clear that national jurisdiction was to be limited by the new national boundaries: "Application of the laws of third States, including the former Union of Soviet Socialist Republics, shall not be permitted in the territories of the signatory States."[23]

The three Minsk Agreement parties, plus Azerbaijan, Armenia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan, adopted the Alma-Ata Declaration three weeks later. The Declaration in its preamble indicates that the States "recogniz[e] and respect [...] each other's territorial integrity and the inviolability of existing borders."[24] The States confirmed their "attachment to cooperation in the establishment and development of a common European space and Europe-wide and Eurasian markets."[25] The Declaration indicated that "with the establishment of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist."[26]

The Russian Federation thus in both the tripartite and general treaties between former USSR republics affirmed the territorial settlement for Ukraine. There was no qualification in either instrument to suggest any exception or unsettled territorial question.

Budapest Memorandum (1994)

The Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum) was adopted on December 5, 1994, by the Russian Federation, Ukraine, the United Kingdom, and the United States.[27] "Noting the changes in the world-wide security situation,"[28] the four parties "reaffirm[ed] their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to respect the independence and sovereignty and the existing borders of Ukraine."[29] The three recognized nuclear weapons States—Ukraine having relinquished nuclear weapons—also "reaffirm[ed] their commitment to Ukraine . . . to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine."[30]

It has been suggested that the memorandum is a political document only—that it is not a legal instrument establishing legal obligations. A number of observations may be made in this connection.

The memorandum was adopted "in Connection with" the accession of Ukraine to the Non-Proliferation Treaty. It is not identified as a protocol to the treaty, but there is no general rule excluding a side agreement by certain parties to a multilateral convention.[31] The Non-Proliferation Treaty expressly indicates that it does not exclude "regional treaties in order to assure the total absence of nuclear weapons" in the territories affected.[32] An extensive series of safeguard agreements exist between States Parties and the International Atomic Energy Agency.[33] So it would not be out of keeping with the Treaty for groups of parties to adopt further legally binding commitments with regard to disarmament.

With regard to its own disarmament, Ukraine had not arrived immediately at the decision.[34] The national security guarantees in the memorandum "were the principal factors and . . . had a key role in the Ukrainian Parliament's decision in favour" of disarmament.[35] So the guarantees were the inducement for Ukraine to relinquish nuclear weapons. It would be surprising for a State, keen to have such guarantees, to give up nuclear weapons in exchange only for a political commitment.[36] Of course, a State enters bargains on the basis of what it knows at the time; not every bargain is perfectly symmetrical.[37]

The formal characteristics of the memorandum, though by no means conclusive as to its status, by the same token by no means exclude that it may create legal obligations. The memorandum contains final clauses—for example, the provision that it "will become applicable upon signature"; and it contains a consultation clause, which a party may invoke "in the event a situation arises that raises a question concerning these commitments."[38] True, it is to be wondered whether these parties, without domestic ratification procedures, would have entered into a mutual defense pact creating a new security arrangement with a State toward whom they previously had no specific commitment of that kind. The "commitments" to which the memorandum refers are those that are "reaffirm[ed]," which is to suggest that they existed already. It does not say where the reaffirmed commitments were established originally. The reference to the Helsinki Final Act is not a *renvoi*; it does not incorporate the Helsinki commitments by reference. Even if it had, it would not, by having done

so, changed the character of those commitments. By associating the memorandum with the Helsinki Final Act, the parties perhaps meant for the memorandum to be interpreted on the same plane as that instrument—that is, as a political instrument. But if this were their intention, the parties could have said so expressly rather than by alluding to it.

The memorandum was not adopted alone; it is one of a pair of documents. A Joint Declaration issued the same day, noting, *inter alia*, "the historical chances [*sic*] in the world," is clearly in the language of politics, not legal obligation.[39] When the Permanent Representatives of the four parties requested that the memorandum be circulated as a document of the General Assembly and of the Security Council, they attached the Memorandum as Annex I and the Joint Declaration as Annex II.[40] There is no rule against adopting two political declarations on the same day, but it may be asked why a further statement of purely political purpose but dressed in legal forms would have been adopted in tandem with a political declaration.

The subsequent practice of the parties in respect of the memorandum at least suggests that it established legal obligations. The Russian Ministry of Foreign Affairs, through the Information and Press Department, on March 19, 2014, said as follows:

> In the context of the situation in Ukraine, some of our partners use the opportunity to point out the obligations of the Russian Federation under the Budapest Memorandum of 1994. In this regard, we would like to remind them what these obligations were and who is responsible for their observation.
>
> Under the Budapest Memorandum Russia, the United States and the United Kingdom are obliged to be guarantors of the rights inherent in the sovereignty of Ukraine.[41]

Ukraine, too, has stated that the instrument created legal obligations.[42] It is not unheard of for States to communicate legal positions through press offices and the like.[43] In claims practice, the legal effect of statements even by high-level officials is not infrequently contested.[44] It is much harder, however, to contest a statement with which one's own statements agree.

Belarus on the same day in Budapest as the Ukraine Budapest Memorandum entered into a memorandum having, *mutatis mutandis*, the same title with the same three recognized nuclear weapons States. In the Belarus Budapest Memorandum, too, the non-weapons State's boundaries and territorial integrity were assured.[45] The memorandum also contained a consultation provision.[46] Belarus registered the memorandum in accordance with Charter Article 102 on September 3, 2012.

From the start, the registration requirement has been understood to concern instruments by which parties "intend to establish legal obligations"[47] rather than political statements, declarations and the like, which are "not...subject to the formality of registration."[48] Sometimes, parties say both that an instrument is a political instrument and that it is not for registration. The parties said neither in the Budapest Memorandums—though they said both in the Code of Conduct on Politico-Military Aspects of Security that was adopted at the same Budapest Summit.[49]

As of the start of the crisis in 2014, it does not appear in fact that any party had registered the Ukraine Budapest Memorandum.[50] "Non-registration or late registration, on the other hand, does not have any consequence for the actual validity of [an] agreement, which remains no less binding upon the parties."[51]

For present purposes, the following (limited) conclusion is supportable: whether intended to create legal obligations or only political commitments, the Budapest Memorandum is another instrument reflecting the integral relation between finality of borders and international security. In respect of a decision having profound consequences for international security—the relinquishment of nuclear armament—Ukraine and the other parties recalled the finality of borders. The linkage between security at the global level and the settlement of boundaries in a particular place thus was brought into sharp relief.

Russia's Admission by the Council of Europe (1996)

As a condition of its admission of the Russian Federation as a member State of the Council of Europe, the Parliamentary Assembly required a number of commitments. Among these were:

> 10.7. to settle international as well as internal disputes by peaceful means (an obligation incumbent upon all member states of the Council of Europe), rejecting resolutely any forms of threats of force against its neighbours; [and]
>
> 10.8. to settle outstanding international border disputes according to the principles of international law, abiding by the existing international treaties.[52]

The Parliamentary Assembly referred to these commitments on April 10, 2014, when it suspended Russia's voting rights;[53] and again on January 28, 2015, when it continued the suspension.[54]

Black Sea Fleet Agreements and Other Bilateral Agreements[55]

Russia accepted the obligation to respect Ukraine's borders in a number of bilateral agreements as well. One of these is the Treaty on Friendship, Cooperation, and Partnership noted in GAR 68/262. Signed at Kiev on May 31, 1997, the treaty provided that Russia and Ukraine base their relations with each other on "the inviolability of borders . . . the non-use of force or threat of force."[56] This is a reinforcement in bilateral form of the multilateral commitments already contained in the Minsk and Alma Ata instruments.

Similar undertakings appear in Russia's bilateral treaty practice with other former union republics of the USSR. For example, the Friendship, Cooperation, and Mutual Security Treaty between Russia and Azerbaijan provides:

> The High Contracting Parties, affirming the inadmissibility of the use of force or threat of force in relations between States, do not recognize the forcible alteration of internationally recognized State borders.[57]

The "inadmissibility" or "inviolability" to which these instruments refer is a principle of general application. The subject matter to which the parties address the principle is the specific territorial settlement between them. Nevertheless, the practice under one of these bilateral treaties will hold considerable interest for Russia's other partners under other treaties. The reliability of one part of the overall treaty framework as a guarantee of boundaries in the States of the former USSR is likely to depend on how reliable the other parts prove to be.

Another bilateral undertaking between Russia and Ukraine is contained in the Black Sea Fleet agreements already discussed in Chapter 2 in connection with Russia's putative legal bases for armed intervention.[58] That Russia referred to these agreements as a putative basis for armed intervention suggests that their ineffectiveness as guarantees is a foregone conclusion. Their territorial component nevertheless should be noted. The breach of the agreements is a further challenge against the territorial settlement, and the connection between the settlement and general security is further suggested by the incorporation of the territorial guarantee in the fleet-basing agreements.

The Black Sea Fleet agreements, like the Treaty on Friendship, Cooperation and Partnership, affirmed Ukraine's borders. The Ukrainian Territory Agreement, it will be recalled, stipulates that the places where Russia's forces may be present remain under Ukraine's jurisdiction (Article 19, paragraph 1) and that Russian forces must "respect Ukraine's sovereignty, abide by its legislation, and . . . not allow interference in Ukraine's internal affairs."[59] These agreements, concluded several days before the Treaty on Friendship, Cooperation and Partnership, were hosting agreements and, as such, assumed friendly relations between the host State and sending State. It would have gone without saying that the latter owed the former the general duty of noninterference and respect for the settled boundaries.

That the boundaries of Ukraine indeed were settled had been confirmed earlier. In addition to the multilateral instruments relating to the independence of States in the former USSR in the 1990s and the European and general framework instruments in the 1970s, there were bilateral treaties as well.

Shortly after independence, Ukraine entered into an Agreement with the Russian Federation on Further Development of Interstate Legal Relations.[60] The Agreement indicated, *inter alia,* "that there are currently no grounds for worries and mutual claims in the field of interstate relations between Ukraine and Russia."[61] Paragraph 13 of the Agreement provided for allocation of former Soviet property overseas between the two States and for settlement of questions relating to the allocation of State debt. A further bilateral agreement in 1992 addressed State property abroad of the former USSR for the purposes of housing diplomatic, consular, and trade offices.[62] There was no indication in these instruments that Russia and Ukraine had outstanding territorial questions between them, which is not surprising: it is very difficult for a parent State and a newly independent State to settle questions of succession where serious questions of territory or general status remain.[63] In any case, the treaty said that no such questions remained; a claim on a substantial territory would have been "grounds for worries" and, *per se*, a "claim."

Further in this connection, the two States on January 28, 2003, adopted a Treaty on the Ukrainian-Russian State Border.[64] The treaty entered into force

on April 20, 2004. Among the recitations, the parties invoked the Helsinki Final Act and the May 31, 1997 Treaty of Friendship, Cooperation and Partnership. Article 2 incorporated as "an integral part" of the treaty a descriptive appendix describing the State border in text (Appendix 1) and a cartographic appendix illustrating the border on maps (Appendix 2). Article 1 defines the "state border" or "boundary" as the border between the tripoint of Russia, Ukraine, and Belarus and "a point located on the shore of the Gulf of Taganrog." No other land boundary is indicated. Article 5 provides that maritime questions are to be resolved by agreement. Article 5 identifies the Sea of Azov and Kerch Strait as "inland waters between the two States." While the Russian and Ukrainian coasts of the Sea of Azov are both opposite and adjacent, the Russian and Ukrainian sides of the Kerch Strait are opposing coasts only. The Ukrainian side is the eastern coast of Ukraine's Crimean territory, Ukraine's sovereignty over which was plainly not in question between the parties.

NATO-Russian Federation Founding Act

NATO and the Russian Federation on May 27, 1997, adopted the NATO-Russian Federation Founding Act.[65] The Act set up the framework for Russia and NATO to cooperate on a range of political-military matters. The Act also set up functional links between the Alliance and Russia—for example, the establishment of a Russian Mission to NATO headed by a representative of ambassadorial rank, and a Permanent Joint Council.

The Founding Act stipulates its parties' commitment to "refrain [. . .] from the threat or use of force against each other as well as against any other state, its sovereignty, territorial integrity or political independence in any manner inconsistent with the United Nations Charter and with the Declaration of Principles Guiding Relations Between Participating States contained in the Helsinki Final Act."[66] It further, and separately, indicates the parties' respect for "sovereignty, independence and territorial integrity of all states and their inherent right to choose the means to ensure their own security, the inviolability of borders, and peoples' right of self-determination as enshrined in the Helsinki Final Act and other OSCE documents."[67] The "inviolability of borders" and the freedom of action of States in respect of self-defense thus are recognized by Russia and NATO as important principles in their own right.

Kal Raustiala says that the Founding Act is a political "pledge," not a legally binding agreement.[68] The "lasting and inclusive peace in the Euro-Atlantic area" to which the Founding Act refers in its first paragraph is "based on an enduring *political* commitment."[69] This is a commitment "undertaken at the highest political level," but the amplifiers do not in themselves change the meaning of "political" to "legal." At the same time, the political character of an instrument probably does not rule out its provisions, or some of them, having legal effect.[70]

The Founding Act indeed refers extensively to the legal commitments of the parties. In particular, it refers to, and reiterates the main terms of, the Treaty on Conventional Armed Forces in Europe (CFE). The Founding Act anticipated that the CFE parties would soon adopt the Adapted CFE—an agreement setting out a

series of amendments to the CFE. The amendments would have replaced the bloc-based provisions on armed forces limitations with country-by-country provisions.[71] The CFE addresses conventional force limitations by reference to alliance areas—the NATO area and the former Warsaw Pact area. The Adapted CFE would have brought this vestige of the Cold War to an end. The Western treaty partners, in light of Russia's military presence in Moldova and Georgia, did not ratify the Adapted CFE. Russia as of July 14, 2007, suspended its participation in CFE.[72]

This much is clear about the NATO-Russian Federation Founding Act: it sets out the political basis for the closer relationship between Russia and NATO that the parties had declared it their purpose to achieve. Disregard for the Founding Act's principles casts doubt on the political basis for such a relationship. If that basis no longer exists, then the circumstances under which were adopted the legal instruments to which the Act refers have themselves arguably undergone a fundamental change.

Other European Security Instruments

A number of other European security instruments identify the settlement of boundaries as a central concern.

The Charter of Paris for a New Europe (1990) pledged "full commitment" to the Principles of the Helsinki Final Act, in particular the "pledge to refrain from the threat or use of force against the territorial integrity or political independence of any State."[73] The Charter was one of a series of instruments, political and legal, adopted as the Cold War drew to a close.

Perhaps the most salient example from this period is the Treaty on the Final Settlement with Respect to Germany and its associated instruments.[74] Concluded on September 12, 1990, by France, the Federal Republic of Germany, the German Democratic Republic, the USSR, the United Kingdom, and the United States and entering into force on March 15, 1991, the treaty was the main instrument in a series clarifying that the territorial disposition in Europe is now final. Of central concern was to finalize the boundaries of central and eastern Europe. These are the boundaries over which the World Wars had broken out.

The Treaty on the Final Settlement opens with the following paragraph:

> The united Germany shall comprise the territory of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin. Its external borders shall be the borders of the Federal Republic of Germany and the German Democratic Republic and shall be definitive from the date on which the present Treaty comes into force. *The confirmation of the definitive nature of the borders of the united Germany is an essential element of the peaceful order in Europe.*[75]

This affirmed that the "peaceful order" and "the definitive nature of the borders" were linked in an "essential" way. The language was not chosen casually. The link that it affirms is neither historically nor legally trivial. It concerns not only the borders of one State but public order on the Continent as a whole. It had taken a second thirty years' war to realize it.

The Treaty on the Final Settlement goes on to indicate that Germany "has no territorial claims whatsoever against other states and shall not assert any in the future."[76] Article 2 requires the German Constitution to forbid and make a punishable offense "acts tending to and undertaken with the intent to disturb the peaceful relations between nations."[77] Under Article 26, paragraph 1, of the Basic Law, aggression as a State act and individual responsibility would thus be conjoined.[78]

Article 7 restored full sovereignty to Germany and terminated the rights of the Quadripartite Powers that had subsisted since Germany's surrender in May 1945.[79]

Among the German borders, the one with Poland demanded particular care. Earlier agreements between Poland on the one hand and East and West Germany (separately) on the other had addressed the border,[80] but a further guarantee was needed. The Warsaw Agreement of November 14, 1990—as stipulated in Article 1, paragraph 2, of the Treaty on the Final Settlement—settled the German-Polish border definitively.[81] The preamble to the Warsaw Agreement acknowledged that the mass expulsions of World War II and its aftermath "should not be forgotten and constitute [...] a challenge to the establishment of peaceful relations" between the States. The preamble then recognized Germany to be "a state with finalised borders."[82] The operative clauses confirmed the finality of the territorial settlement in legally binding terms:

> Article 2
>
> The signatories to the agreement declare that the border existing between them is inviolable at any time now or in the future and each commits itself to respect the other's sovereignty and territorial integrity.
>
> Article 3
>
> The signatories to the agreement declare that they have no territorial claims upon one another and that no such claims shall be laid in the future.[83]

The danger posed by territorial conflict was understood to be so serious that the agreement not only indicated that each State must respect the other's boundaries (Article 2); it also waived territorial claims between them (Article 3). The acknowledgment of the history in the preamble thus was paired with an operative commitment not to repeat it. This reinforced the general bar against claims in the Treaty on the Final Settlement.

As the definitive territorial settlement has closed old chapters of European history, so too has it opened new chapters. The European Union and NATO have stipulated territorial settlements as prerequisites to the admission of new Members. An example is the settlement between Hungary and Romania of September 16, 1996 (Timisoara Agreement). Article 4 of the Agreement provides as follows:

> The Contracting Parties confirm that, in accordance with the principles and norms of international law and the principles of the Helsinki Final Act, they shall respect the inviolability of their common border and the territorial integrity of the other Party. They further confirm that they have no territorial claims on each other and that they shall not raise any such claims in the future.[84]

The affirmation by the parties that they "have no territorial claims" and that they "shall not raise any such claims in the future" is a complete disposition of territorial questions between them. This is a bilateral treaty about the frontier between two States—but it is embedded within a multilateral security architecture. This is implicit in view of the circumstances of the treaty's adoption. The further provision, in Article 7, paragraph 1, that the parties "shall mutually support each other's efforts aimed at integration to the European Union, NATO and the Western European Union,"[85] makes the relation to the security architecture explicit. Article 4 and Article 7(1) are integral: without the settlement, participation in the regional organizations would not have been possible; without the eventual participation, the durability of the settlement would have fallen in doubt.

The civil wars in the former Yugoslavia provide a demonstration of the same linkage. The International Conference on the Former Yugoslavia at London on August 26, 1992, adopted a Statement of Principles. The Statement aimed to set down the basis for a cessation of the escalating conflict in former Yugoslav territory. Principle *viii* required "rejection of all efforts to acquire territory and change borders by force."[86] This principle was central to the peace process. Indeed, it was prior to all else. Its priority was at least implicit legally, but, whatever its position in the legal instruments and political declarations, it was functionally indispensable: if one or more of the States of the former Yugoslavia continued to prosecute the violent overthrow of the existing boundary regime, then there was no hope of implementing any other aspect of a settlement. As of 1992, the "rejection of all efforts to acquire territory and change borders by force" was far from being achieved. No semblance of security would return to the former Yugoslavia until it was. The early, failed efforts of the International Conference to bring peace among the Yugoslav parties ran up against the intractable character of territorial conflict.

Much later, when peace had been restored, two of the former Yugoslav States agreed to settle their remaining boundary questions by arbitration. The Arbitration Agreement between Slovenia and Croatia of November 4, 2009,[87] expressed the parties' consent to arbitration; indicated rules for constituting the Tribunal; identified the basic rules for the conduct of proceedings; and defined the scope of the land and maritime boundary difference that was to be arbitrated. These bilateral commitments were not made in isolation from the wider public order. Under Articles 8 and 9 of the arbitration agreement, the parties pledged that the EU accession process for Croatia would continue uninterrupted. So to this extent, the Arbitration Agreement between Slovenia and Croatia was not unlike the Timisoara Agreement between Hungary and Romania. A boundary in Europe was to be settled; and the States involved would both come to be more deeply embedded in the general system of public order in the region. The linkage between territorial stability and systemic stability presents itself across a range of bilateral relations.

It might be said that the waiver of territorial claims in the German treaties and others in Europe after 1990 is a special rule—a *lex specialis* of boundaries for places where boundaries had been the object of so much strife. Europe, it seemed, had attained an absolute settlement—and in view of the history had had little choice if it wished that settlement to last. Provisions placing an absolute bar on territorial claims, special as they may be, are nevertheless in accord with the privilege accorded

to boundaries in the general law. The law applicable to all States in all regions forbids the forcible change of boundaries under valid and invalid claims alike. The European agreements at the end of the Cold War contain a number of permanent boundary stipulations. Under those stipulations, rather than creating an exception to the general law, the European States indicated with greater specificity than have other States in other instruments a category of claims which are to be excluded *ab initio*. This does not mean that in regions where such specificity is lacking in the adopted treaties that all claims are admissible. As will be seen later in this chapter, in addition to the absolute (and universal) bar against the forcible prosecution of claim, international law makes distinctions that exclude certain territorial claims altogether. This exclusion is not limited to particular boundaries entrenched by convention.

Boundaries in Codification and General Lawmaking

The privileged character of boundaries is also seen in the general law. Perhaps the most central example is the law of treaties. In particular the principle of *rebus sic stantibus*, as it operates in the law of treaties, illustrates the territorial principle and its importance to the legal system.

Article 62 of the Vienna Convention embodies the principle. Subject to certain conditions, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty.[88] The conditions are expressed as two affirmative requirements (paragraph 1*(a)* and *(b)*) and two negative requirements (paragraph 2*(a)* and *(b)*). Of the four requirements, only one is expressed in terms of the specific content of the treaty that the party seeks to terminate or withdraw from: Article 62, paragraph 2*(a)*, excludes invoking fundamental change of circumstances where "the treaty establishes a boundary."

The protection enjoyed by boundaries under the principle of fundamental change of circumstances was carefully considered when the ILC was drafting the Vienna Convention. Some ILC members suggested that the principle of self-determination ought to be an exception to the boundary rule—that is, boundary treaties might still yield to a "higher" principle, where a question of self-determination arose. The Commission, however, concluded that…

> treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions.[89]

Unsettled boundaries were understood to spark wider difficulties. So, to remove that "source of dangerous frictions," the protected character of the boundary would have to be respected against competing principles.

States in their comments on the drafting work mounted other challenges to the absolute protection embodied in the draft (then numbered draft article 59). For example, Canada proposed an exception for treaties fixing a boundary by reference to natural phenomena that might change over time.[90] The Netherlands sought an exception for provisions concerning certain frontier waterways.[91] No further

exception, however, was added. The prevalent view was that territorial settlements were of a special character and thus required special protection.[92]

States at the Vienna Conference agreed. The delegate of (South) Viet Nam, for example, credited the ILC for having "shown itself alive to the dangers by excluding from the application of [draft] article 59 treaties establishing boundaries, for if a single party invoked the rule in such cases, dangerous friction was bound to arise."[93] The boundary exception was endorsed by an overwhelming majority of States in the Conference. The only amendment to the proposed exception clause was to change "treaty fixing a boundary" to "treaty *establishing* a boundary," an amendment that States proposed on the ground that the earlier wording might be interpreted as limited to delimitation treaties when what was meant was a wider class of territorial settlements. The resultant provision addresses treaties of cession as well as delimitation.[94] So the push at the Conference—largely successful—was to express the protection for boundaries in stronger and more extensive terms than it might otherwise have been.

The Ukrainian Soviet Socialist Republic believed that the "reasons for the inclusion of paragraph 2*(a)* had been convincingly expounded in the commentary."[95] The Union of Soviet Socialist Republics agreed: "However far-reaching the change of circumstances, the interests of peace required that the rule could not be invoked with respect to a boundary treaty."[96]

The imperative of protecting the territorial settlement is reflected in the rules of State succession as well. In the Convention on Succession of States in Respect of Treaties,[97] Article 11 (on boundary regimes) and Article 12 (on other territorial regimes) provide as follows:

> *Article 11*
>
> *Boundary regimes*
> A succession of States does not as such affect:
>
> (a) a boundary established by a treaty; or
> (b) obligations and rights established by a treaty and relating to the regime of a boundary.
>
> *Article 12*
>
> *Other territorial regimes*
>
> 1. A succession of States does not as such affect:
>   *(a)* obligations relating to the use of any territory; or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;
>   *(b)* rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.
> 2. A succession of States does not as such affect:
>   *(a)* obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

This is a comprehensive protection. Like Article 62 in the Vienna Convention on the Law of Treaties (VCLT), it is the only one of its kind in the Convention to which it belongs expressed in terms of the specific subject matter of a treaty.

The considerations that require the protection of the territorial settlement in the law of succession are of general application. "The considerations which led . . . to . . . this exception [in the Convention on the Law of Treaties] appear to apply with the same force to a succession of States, even though the question may have presented itself in a different context."[98] In the different context, boundaries and territorial regimes enjoy the privilege as well. The priority that the law accords them is independent of the context.

Articles 11 and 12 survived pointed challenges from a number of States. In particular, the newly independent States of the time, recently emerged from decolonization, wished to qualify the effects, or avoid the effects altogether, of treaties adopted by the former governing powers. It was the "clean slate" principle that they sought to assert in the law of succession. Nevertheless, a strong view was adopted: the principle "does not, in any event, relieve a newly independent State of the obligation to respect a boundary settlement and certain other situations of a territorial character."[99]

The adopted position reflected that the privileged character of boundaries and other territorial regimes derives from the territorial situation as such: the territorial situation has a juridical existence independent of the treaty.[100] It follows of course that a boundary that had *not* been settled under the treaty remains unsettled. This may be seen as a further manifestation of the privilege that protects the territorial settlement from succession: succession leaves the settlement unchanged, including the scope of the territorial questions settled.[101]

The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not yet entered into force) protects boundary settlements as well.[102]

The ILC's Draft Articles on the effects of armed conflicts on treaties also acknowledge the protected character of boundary settlements. Draft article 6 of the Draft Articles addresses "factors indicating whether a treaty is susceptible to termination, withdrawal or suspension." Among the factors is "the nature of the treaty, in particular its subject matter, its object and purpose, its content."[103] Draft article 7 refers to an annex to the Draft Articles. In the annex, the ILC set out an "indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict."[104] The main case was set out in Comment (8) to the annex:

> It is generally recognized that treaties declaring, creating or regulating a permanent regime or status, or related permanent rights, are not suspended or terminated in case of an armed conflict. The types of agreements involved include

cessions of territory, treaties of union, treaties neutralizing part of the territory of a State, treaties creating or modifying boundaries, and the creation of exceptional rights of use of or access to the territory of a State.

The ILC said that such treaties "create permanent rights."[105] As such, "it is their rights which are permanent, not the treaties themselves."[106] Considering the two Vienna Conventions in force, the ILC said that the boundary regime provisions in those instruments were "not directly relevant to the question of the effects of armed conflict on treaties," but "they nevertheless attest to the special status attached to these types of regimes."[107] Across this range of provisions, boundary settlements and territorial regimes are respected as having a life independent of other legal processes.

The protection of boundaries and territorial regimes is not a feature restricted to any one set of framework rules. Nor is it one of a number of ordinary exceptions. Some writers proposed that an exception be adopted to protect treaties "relating to the grant of reciprocal rights to nationals and to acquisition of nationality"; the ILC in the work on effects of armed conflicts on treaties did not adopt the proposed exception.[108] Not surprisingly, when the ICJ (in *Gabčíkovo-Nagymaros*) considered a territorial regime after a succession of States, it found that the regime is protected under customary international law as well.[109]

Boundaries and Territorial Regimes in Judicial and Arbitral Practice[110]

The territorial settlement has been addressed in judicial and arbitral practice through the modern history of international law. A brief overview suggests the priority that it takes.

Interwar Practice

The Permanent Court in both the *Free Zones* case and in the *River Oder Commission* addressed special treaty regimes—in *Free Zones* this was in respect of a land boundary, in *Oder Commission,* in respect of a watercourse. In both cases, the regime contained fixed geographic terms. In neither case did the Permanent Court accept arguments to alter those terms.[111] The cases are instructive as early expressions of the privileged character of rules that organize spatial relations at the international level.

The Gex and Upper Savoy Free Zones fell within the territorial limits of France. However, Swiss customs jurisdiction applied in the zones under an arrangement adopted at the end of the Napoleonic Wars. The effect was that, since 1815, the Swiss frontier for political purposes was in one place; but the Swiss frontier for customs purposes extended past that and into French territory. The purpose of the arrangement was to "'round [...] out' the territory of Geneva and assur[e] direct communication between the Canton of Geneva and the rest of Switzerland."[112] Geneva is in a salient surrounded by French territory. The special territorial regime ameliorated the inconvenience otherwise entailed by the political geography.[113] According to

the Court, the zones were creations of international law; neither zone was a "mere benevolent concession."[114]

At the end of World War I, it was clear that circumstances in Europe had changed, including between France and Switzerland. The Court acknowledged that the High Contracting Parties to the Versailles Treaty—that is, the Allied and Associated Powers and Germany—had declared that "the stipulations of the treaties of 1815 and of the other supplementary acts concerning the free zones of Upper Savoy and the Gex District are no longer consistent with present conditions."[115] According to France, Article 435, paragraph 1, of the Versailles Treaty put this declaration into effect by abrogating the special territorial regime of the free zones.[116] From the plain text of Article 435, it certainly looked like it. The final sentence of paragraph 1 said that "the High Contracting Parties take note of the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone which are and remain abrogated." Further, France adduced extensive evidence that Switzerland, when it accepted the applicability to Switzerland of Article 435, had not reserved its position so as to maintain the free zones in any way.[117]

In the Court's judgment, the evidence failed to support France's position. There was a Swiss reservation to Article 435, and the evidence that France had adduced did not demonstrate any intention to weaken or to qualify that reservation. The Court in turn rejected that the Versailles Treaty had abrogated the free zones regime.[118] France was obliged to "withdraw its customs line in accordance with the said treaties and instruments; and . . . this regime must continue in force so long as it has not been modified by agreement between the Parties."[119]

On one view, the result in the *Free Zones* case followed from the law of treaties. In particular, there was the *pacta tertiis* rule—Switzerland having not been a party to the Versailles Treaty—and principles of the interpretation of treaty reservations—the matter seeming to have turned on the scope of Swiss reservations in respect of Article 435, a provision that Switzerland otherwise had accepted.

In another view, however, the Court's reasoning regarding the treaty questions—particularly the interpretation of the Swiss reservations—was forced, in places difficult to reconcile with the evidence that France had adduced of a general acceptance of the abrogation clause. In that view, the real (if unstated) principle was the stability of the territorial regime, to be upheld against all but the clearest expression of party intention to override it. From any point of view, the result was perfectly clear: the argument saying that the territorial regime had ended was rejected and the one saying that it survived prevailed. Stability was favored over revision.

In the *Oder Commission,* Poland took the position that the International Commission for the administration of the Oder River had administrative authority over only the parts of the river system found on the German side of the Polish-German frontier. The Permanent Court rejected the Polish position.[120] According to the Court, the Commission's authority reached across the international boundary.

In a superficial way, this would seem to have qualified the territorial principle. An international regime ignored the limits of national jurisdiction. However, the principle was visible in the reasoning of the Court and affirmed in the result. An overview of the case recalls how.

Articles 340 to 345 of the Versailles Treaty defined the administrative authority of the International Commission by indicating its tasks and the procedures for the performance of its tasks. The territorial limits of the regime for the Oder were defined in Articles 332 to 337. Poland argued that the separation between the two sets of provisions meant that the administrative authority of the International Commission stopped in one place (namely, Poland's frontier) and the territorial limits of the regime were someplace else. This would have meant a disjunction between the geographic area of the river system and the administrative authority for the regulation of that system. This plainly would have raised a functional problem. How was a commission to manage a river if its authority did not have the run of the river?

The problem with Poland's argument, in view of the adopted text, was that Article 331 made clear that an international regime existed for a number of European rivers, including the Oder, and that the territory to which the regime applied included not just the rivers named but also "all navigable parts of these river systems which naturally provide more than one State with access to the sea."[121] The parties, naturally, contested which tributaries of the Oder the Article 331 regime applied to; the Court resolved that point of contestation by referring to "principles governing international fluvial law in general"[122] and the "community of interest in a navigable river"[123] (these being the statements for which the judgment is best known; they provide a principle, still relied upon, for addressing river systems under international law).[124] The Court concluded that the Oder system includes rivers "situated in Polish territory."[125] The regime thus plainly was international in character, and it was territorial in character: it concerned a special territorial unit, defined with reference to the legal character of river systems that cross international boundaries.

In creating such a regime, the Versailles Treaty had a purpose. The purpose was to place the regime, thus created, under international administration. Nothing in the relevant provisions of the treaty indicated that the territorial scope of the river unit and the territorial scope of the administrative authority of the International Commission were different; nor did the public purposes behind the territorial regime accord with separating the two. The treaty disposition integrated the geographic reality of a river system with the legal reality of State borders by defining a new geographic unit subject to a special jurisdiction. The Permanent Court, in respecting the treaty disposition, respected the geography: the administrative authority of the Oder Commission was coterminous with the relevant territory as defined. The powers of an international functional agency concerning a shared river system, like the powers of a State apparatus concerning an exclusive national jurisdiction, have to be understood by reference to a definite territorial scope. For the functional agency and the State alike, confusion about the territorial scope of their powers would, at best, frustrate the public purposes for which they exist; at worst it would lead to open conflict.

In the *Free Zones case*, the principle of stability of territorial regimes prevailed. This was not at the expense of any other legal principle, for stability in the circumstances of the case was (largely) in harmony with the rules concerning the formation of treaty obligations and with the fundamental rule that a State is not bound

by other States' treaties: Switzerland was not a party to the Versailles Treaty (and, or so the Permanent Court found, it had qualified its acceptance of one article of that treaty with reservations). In the *Oder Commission*, the competence of the river commission conformed to the logic of geography, and there, too, this accorded with formal considerations of law: the relevant parties did belong to the Versailles Treaty, and the treaty was clear that it created an indivisible territorial-administrative regime to govern the river.

Formal dispositions by treaty and the territorial principle were not so clearly in harmony in *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*.[126] The question was whether the Council of the League had authority to settle the boundary. The problem was that the *travaux* and conversations between the Turkish representative and Lord Curzon suggested that the Council was to act only as mediator in the dispute.[127] Moreover, there was the requirement of unanimity in the Council, which would seem to have followed from a plain reading of the Covenant, as well as from a public statement by the same British representative.[128] On these considerations, the boundary would have remained subject to negotiation; and one State would have held a blocking vote in the Council thus making that multilateral body useless as a mechanism to break a negotiating deadlock. The *travaux*, the conversations, and the unanimity rule, however, did not prevail: according to the PCIJ in its Advisory Opinion, the Council had the authority under the treaty to adopt a "definitive determination of the frontier between Turkey and Iraq" and this was not subject to veto by either party.[129]

Similarly, when the Council of the League asked whether "the question of the delimitation of the frontier between Poland and Czechoslovakia [at Jaworzina] [is] still open . . . or should it be considered as already settled by a definitive decision,"[130] the Court answered that it was already settled. The Court's concern was not with one place on one border alone; it was with how the delimitation at Jaworzina might affect the emergent post-war system as a whole:

> When, as a result of the European War and the dissolution of the Austro-Hungarian Monarchy, Poland and Czechoslovakia were reestablished as independent States, their frontiers were, generally speaking, indicated by the same historical and ethnological factors which had led to their reconstitution.
>
> The necessity remained, however, either for a formal pronouncement with regard to the extent of the territories respectively allocated to two States abovementioned or for a settlement of territorial questions in regions where, owing to special circumstances, the historical or ethnological frontier remained uncertain or met with difficulties which prevented the parties concerned from voluntarily accepting it.[131]

The frontier indeed had "remained uncertain" and the parties were indeed "prevented . . . from voluntarily accepting it." The border areas in question were under occupation by troops of the Allied and Associated Powers.[132] The Powers, eager for normality, recognized the need to replace the situation with a permanent solution. This was not a question, however, that the two parties could resolve on a bilateral

basis. It was therefore to the most potent multilateral institution of the day that the task was entrusted:

> The task of ensuring the recognition of the frontiers of the new States and of settling disputes which might arise between them was undertaken by the Principal Allied and Associated Powers represented in the Supreme Council.[133]

The fact that the Supreme Council vacillated as to whether a plebiscite should determine the boundary did not matter.[134] The Ambassadors' Conference upon which the Supreme Council conferred a "special mandate" had the power to settle the boundary.[135] According to the Permanent Court, the Ambassadors' Conference in turn did settle the boundary—in a decision having "much in common with arbitration."[136] The result under the special mandate, according to the Court, was a complete and final settlement.[137]

Poland in the course of the proceedings had produced extensive documentary evidence to show that the question, instead, remained open.[138] Impressive in this evidence was the statement by the president of the Conference of Ambassadors, which he addressed to Poland and Czechoslovakia, and which said as follows:

> The Jaworzina sector of the Polish-Czechoslovak frontier *was not defined in the decision of July 28th, 1920*.[139]

This is the sort of evidence that a tribunal cannot simply brush aside. So the Court—before brushing it aside—acknowledged "the high authority of the opinion expressed" in the president's statement.[140] That still left the content of that high authority's statement—the president's statement that the border sector remained undefined. The Court got around the president's statement by likening the Conference of Ambassadors to an arbitration. Having likened the Conference to an arbitration, the Court then equated its decisions to an arbitral award. According to the Court, "in the absence of an express agreement between the parties, the Arbitrator is not competent to interpret, still less modify his award by revising it."[141]

That is all well and good as a statement of how arbitration works. The difficulty is that *Jaworzina* was not an "arbitration" where a bilateral jurisdictional agreement is the relevant instrument in respect of jurisdiction; "express agreement between the parties" was not central to the process in train. The decision of the Conference of Ambassadors, instead, was one incident under a general power of disposition that the victors in the Great War exercised over large areas of Europe. The Permanent Court decided that a definitive settlement existed between the two States at that sector of their frontier and in so deciding helped to achieve the Supreme Council's purpose.[142] The Court did not, however, convincingly explain the Conference president's statement that the boundary had *not* been settled.

If after an arbitral mandate has been discharged a person who had served as arbitrator says something to contradict the adopted award, what the person says has no effect. It is a statement outside the arbitrator's mandate, for when the arbitration is finished the arbitrator is *functus officio*. A conference of States with practically

total power of settlement and with no time limit yet reached, by contrast, has powers that continue past its particular decisions. When an organ like that says that the boundary is not settled, it is not at all obvious why it should be ignored. The Permanent Court got around the problem. It likened the adopted disposition to an arbitral award—and thus folded the principle of the finality of boundaries into the principle of the finality of awards. Again, the inclination was strong to find a way past statements and decisions, reservations and treaty texts, which might otherwise have unsettled the territorial relations in question. A legal fiction or two was not much price to pay for building the public order.[143]

These were the interwar cases on which Hersch Lauterpacht placed particular emphasis in *The Development of International Law by the International Court*. "After the cataclysm of a World War," wrote Lauterpacht, "there was special cogency in the application of the maxim *interest rei publicae ut sit finis litium*"—the interest of the commonwealth, so that there may be an end to litigation.[144] A world that thinks itself removed from the cataclysm might not think the stakes so high when questions of territory refuse to end, but territory and the stability of its disposition remain nonetheless fundamental.

Practice since 1945

Dispute settlement practice in the UN era has further clarified the limits on territorial claim. The principle of *uti possidetis juris*, applied repeatedly in this period, requires that the boundaries that defined a territory under the law of the empire or colonial administrator before the territory gained independence are to remain in place after independence.[145] The principle of *uti possidetis juris* did not emerge in the UN Charter era, but it is then that the principle became entrenched in practice. The States of the former Spanish Americas in the decades after independence applied the principle. The ICJ acknowledged the genesis.[146] *Uti possidetis* is central to a rich judicial and arbitral practice in the UN era involving Latin American States.[147]

Uti possidetis has provided the starting point for the orderly resolution of inter-State disputes in other parts of the world as well. In Africa, in particular, from an early stage following independence, States made it a matter of principle in their multilateral relations "to respect the borders existing on their achievement of national independence."[148] Those borders have been the almost constant point of reference. The incorporation of the Northern Cameroons to Nigeria was the relatively rare instance in which the disposition of a territory in Africa took place through plebiscite, but this was under a Trusteeship Agreement. The General Assembly, as noted in Chapter 3, gave its approval. The Court would not do anything to overturn the disposition.[149] In any event, the Trust Territory remained intact; the plebiscitary disposition was to determine what the territory's final status would be, not to change its borders. There, and almost everywhere else, the principle has been respected.

This is not to say that respect for old colonial boundaries has led to the orderly resolution of every dispute. A dispute well may persist as to what precisely the border at the time of independence was, which accounts for many of the boundary disputes

that subsist.[150] *Uti possidetis*, taken in isolation, is no guarantee of public order. A further principle must operate if disputes over boundaries are not to become the trigger point for a general breakdown: any dispute must be settled through direct agreement or through third party mechanisms upon which the parties to the dispute agree to confer the competence to settle their dispute. Where States have ignored that principle, the results have been baleful. Eritrea and Ethiopia nevertheless, in due (but bloody) course, accepted "the principle of respect for the borders existing at independence" and the principle of peaceful settlement.[151]

Uti possidetis needs the principle of peaceful settlement, but the dependency is mutual. The principle of peaceful settlement is not workable without at least basic guidance as to what constitutes a *bona fide* claim. *Uti possidetis* exercises a stabilizing effect on public order by placing principled limits on the scope and legal basis of the claims that the international system will accept as admissible. It would require an uncritical faith in the pacific principle to believe that it would survive if the law set no limits upon the arguments that a State makes about the geographic limits of its jurisdiction. A peaceful settlement process works when States eschew force as a means to settle a boundary dispute; but the process would be unworkable if it were open to endless claim. A modicum of legal certainty must attach to territorial relations even in a system at complete peace.

Libya, in its explanation of vote on March 27, 2014, in connection with GAR 68/262, recalled the "need to respect the post-independence boundaries of States."[152] This might seem beside the point; it might seem that the only serious point instead is that States must accept that border disputes are to be settled only by peaceful means. It is submitted here, however, that Libya made an equally serious point and that this is directly relevant to Russia and Crimea. Some boundaries are not to be subject to claim at all, and, as for the others, the law will admit only claims based on modern rules.

States indeed have agreed in some situations that the limits on claims must be absolute. This is what the parties to the Treaty on the Final Settlement with Respect to Germany did.[153] There are no arguments left as to the disposition of the borders of that State. This, the extreme, reflects the special considerations of one case. The limits nevertheless pervade international law.

Once settled, so the boundary is presumed to remain. The *Territorial Dispute* between Libya and Chad in 1994 occasioned the Court to observe, "Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries."[154] The Court in 2007 in the *Territorial and Maritime Dispute* between Nicaragua and Colombia returned to that 1994 Judgment:

> It is a principle of international law that a territorial régime established by a treaty "achieves a permanence which the treaty itself does not necessarily enjoy" and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed.[155]

The Court thus affirmed and reaffirmed the position indicated in the ILC:[156] a territorial regime outlives the agreement by which it is cemented. The territorial regime has a life of its own.

The presumption of independent survival is not confined to the law of treaties. The transition between Britain and independent India did not cause Portugal's right of passage between Daman and the enclaves of Dadra and Nagar Haveli to lapse.[157] The right of passage had emerged from a "constant and uniform practice."[158] So it was a customary rule. The durability of the territorial regime crosses the boundaries of the sources of international law.

Nor is the importance of the stability of the territorial regime confined to the bilateral relations of the parties directly involved. This was visible in the long-running *Temple* proceedings, which reflected many of the main points already suggested. For one thing, the French colonial treaty establishing the boundary between Indochina and Siam certainly survived decolonization and thus settled the boundary between Cambodia and Thailand, a point that was so central that the Court declared a map of doubtful accuracy and doubtful institutional origin as having "enter[ed] the treaty settlement and . . . become an integral part of it"[159] (albeit only in respect of one parcel of territory, sovereignty over which was the "sole dispute" which the Court had been asked to decide).[160] The centrality of the stability of territorial settlements was accepted by both parties at the beginning[161]—and when they revisited the case fifty years later as well.[162] The Court (in 2013) made clear that, when it comes to an obligation to implement a territorial settlement, "it is of the essence of that obligation that it does not permit either party to impose a unilateral solution."[163]

The provisional measures the Court had adopted in 2011 between Cambodia and Thailand addressed a specific situation at the border between the two States.[164] They also acknowledged the wider risk that a territorial dispute entails. The Provisional Measures Order referred to the risk of "aggravation or extension of the dispute."[165] The Court then took a step that was novel in its practice. It defined a "provisional demilitarized zone" between Cambodia and Thailand extending considerably beyond the particular territory subject to the proceedings.[166] Neither party had requested the provisional demilitarized zone, and its geographic limits were not based on their submissions. The gravity of the risk—a metastasizing conflict—demanded broad measures. This was not a risk concerning only the parties' bilateral relationship. The Court invoked the involvement of the Association of Southeast Asian Nations (ASEAN) and required the parties to continue cooperating with that multilateral body and to allow its observers access to the zone.[167] It is not an ordinary problem of interstate relations to which extraordinary measures are applied. Where a boundary may be at risk of instability, the problem has systemic implications. The decision to incorporate a multilateral aspect into the solution may be understood in this light.[168]

It is instructive to consider a contrasting case. *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* involved a boundary. Where there was a threat of environmental harm across the boundary, but there was no indication that the personnel of the other State were encroaching in a way that would impose a change of boundary, the Court declined to indicate provisional measures. This was despite the fact that "a correlative right to be free from such transboundary harm is plausible."[169] In other words, a breach of international law in the form of transboundary harm to the environment was "plausible," but the situation did not merit the urgent response of provisional measures.

The threat to stability of boundaries seems to have no such requirement of magnitude. Any threat is a serious threat and, thus, even the smallest threat—where it is the territorial settlement that is threatened—merits an energetic response. In the earlier (and now joined) proceedings it had instituted against Nicaragua, Costa Rica requested provisional measures to protect against a plausibly alleged encroachment. Costa Rica's request for provisional measures referred to the "occupation by armed Nicaraguan military forces of an initial area of around 3 square kilometres of Costa Rican territory."[170] The Court indicated provisional measures.[171] Three square kilometres in an isolated area of rainforest is not a significant area of territory in comparison to annexed provinces. It is nevertheless just that: an area of territory. It takes only a very small territorial breach (or plausible allegation of the same) to attract a judicial response. This accords with the importance of the territorial settlement to the system that it is the task of the Court to uphold.

The Inadmissibility of the Forcible Claim

The *uti possidetis* principle, as noted, affirmatively identifies the boundary at the time of independence as the lasting boundary between States. As also noted, the principle operates in conjunction with a negative or prohibitionary rule. This is the rule against claims of acquisition based on force.[172] Before the General Assembly adopted the Definition of Aggression in 1974, the Special Committee on the Question of Defining Aggression referred to "the inadmissibility of territorial acquisition resulting from the threat or use of force."[173] This was to make clear that use or threat of force does not create a new legal controversy over territory. Force is not a basis for claim. Instead, the acquisition that the would-be acquirer asserts has taken place, if it has taken place by the use of force, is a nullity. The distinction is important. The Definition of Aggression is not the only instrument to reflect it.

It was reflected as well in SCR 242 (1967) of November 22, 1967, referred to already above. The Security Council "*emphasiz*[*ed*] the inadmissibility of the acquisition of territory by war."[174] Again, this went further than to say that a State shall not acquire territory by threat or use of force. It said that a claim to territory on such a basis was not to be admitted.

There is a suggestion in this, strongly implicit, about how a claims process should address an attempt at forcible acquisition. The suggestion is that no dispute should be treated as having arisen where a clearly existing territorial title has been challenged by armed force. The clearly existing territorial title subsists, and, as a consequence, it is inadmissible for the court or tribunal to conclude that a *bona fide* difference about title has arisen. This approach is reflected in the operative part of SCR 242 (1967), where the Security Council enumerated among UN Charter principles the "termination of all claims" connected to threats or acts of force.[175] It is not that decision makers are to rule such claims to be without merit after a full hearing. It is instead that they are to reject them from the start.

This is not transitory in Security Council practice, nor a rote formula. For example, in SCR 298 (1971) of September 25, 1971, the Security Council "*reaffirm*[*ed*] the principle that acquisition of territory by military conquest is inadmissible"—a slightly different form of words but the same in substance. In SCR 859 (1993) of

August 24, 1993, it "*reaffirm*[*ed*] once again the unacceptability of the acquisition of territory through the use of force."[176] The General Assembly has referred to this as an "established principle of international law."[177] The Draft Declaration on the Rights and Duties of States would have indicated "the duty to refrain from recognizing any territorial acquisition by another State" by threat or use of force.[178]

Jurists refer to the principle in similar terms. For example, Judge Koroma referred to "the fundamental international law principle of the non-acquisition of territory by force."[179] According to Vice President Ammoun, "The most categorical argument on the point [is] that conquest and acquisitive prescription have totally disappeared from the new law which has condemned war and proclaimed the inalienability of sovereignty."[180] Skubiszewski, in his dissenting opinion as Judge *ad hoc* in *East Timor*, said as follows:

> 129. While recognition of States or Governments is still "a free act," it is not so with regard to the irregular acquisition of territory: here the discretionary nature of the act has been changed by the rule on the prohibition of the threat or use of force.
>
> 130. . . . the rule of non-recognition operates in a self-executory way. To be operative it does not need to be repeated by the United Nations or other international organizations. Consequently, the absence of such direction on the part of the international organization in a particular instance does not relieve any State from the duty of non-recognition.[181]

True, this was a dissenting opinion. But Judge Skubiszewski's position had persuasive force. Writers have criticized the Court's imposition of an executory step to implement the obligation of non-recognition.[182] This was 1995, before the ILC adopted the Articles on State Responsibility affirming the obligatory—and decentralized—character of non-recognition.[183] In any event, the situation in Ukraine does not raise the question of "the absence of such direction"; the General Assembly has furnished the direction expressly.

The principle of inadmissibility protects the territorial settlement. Under the principle, it is not so much that a claim based on force would be considered and then by the ordinary methods of merits evaluation (possibly) rejected; it is instead that such a claim is a nullity. This is the better view of Russia's "claims" in respect of Crimea. It has been observed that subsequent acts that accommodate the factual situation may render even a nullity lawful (or, more precisely stated, may render it capable of generating legal effects).[184] The outcome depends in significant part on the solidarity of response against the underlying wrongful act and the situation it created.

Conclusions as to the Territorial Settlement: "If the Boundaries between States were not Scrupulously Respected"

The privileged character of boundaries and territorial regimes in international law is reflected in multiple decided cases, judicial and arbitral. It is reflected as well in treaties that address (a) particular boundaries (including treaties addressing Ukraine's

boundaries), (b) boundaries in a region, and (c) boundaries globally as part of general public order. It is seen in more idiosyncratic arrangements such as those establishing long-term military basing rights, shared rights to rivers, and rights of access to isolated territories.

The many treaties that define particular borders, or serve specifically to guarantee particular existing borders, are one reflection of the centrality of stable territorial relations. The law reflects this centrality a further way: across varied domains of law, the territorial principle is protected against the normal operation of other legal rules. The law of treaties, the law of State succession, the law of international organizations, the law of armed conflict—each of these domains contains rules that otherwise might change a boundary but against which stability prevails. In each, the priority given to the territorial principle is unique. It is not one among coequal values protected from the operation of other rules. It is the one value so protected. Moreover, the rules against which territorial stability is protected operate across virtually the entire field of international law. As such, taken together, these rules and the privilege of the territorial principle in turn concern every rule established by treaty and the general law as well. The connection between boundaries and territorial regimes and modern international law as a whole is intricate, and it is essential.

Though repeated and pervasive, the territorial principle does not derive its strength from repetition alone, nor only from its embedded presence in the framework rules of international law. It grows out of the logic of international relations. States are territorial entities—indeed, they are the only international legal persons that possess territory.[185] They hold rights and obligations in and over territory. The scope of their treaty rights and obligations is usually territorial—which is why the text of the Vienna Convention had to address the question of "their precise scope *territorially*."[186]

States have noted that "defining the frontier between two States or transferring a piece of territory" is not only an act between the States directly involved but also one having legal effects for third States.[187] When treaties that establish situations of law or fact "tending by their nature to have effects *erga omnes*" are considered as a class, this principally means the territorial and boundary treaties.[188] That the relevance of territorial and boundary treaties to the community interest would have been noted in the drafting work on the law of treaties is all the more significant when the influence of contractual analogies in the drafting work on treaties (however much cautioned against) is recalled.[189] The *pacta tertiis* rule pervades treaty law, but it is tempered when territory and boundaries are concerned. Note well the relation here: the rule is tempered; it certainly does not disappear. It is as much the case today as at the time of *Island of Palmas* that the settlement of a dispute between two States over a territory does not settle the *bona fide* claim of a third State to the same territory.[190] The point is, instead, that the settlement of the boundary or of sovereignty has implications for the community as a whole. It is in large part because of the community implications that territorial and boundary treaties "constitute a separate category as opposed to all other treaties."[191] A boundary is an element of the general public order, not just an artefact of relations between States parties to one instrument.[192]

Why is it that a boundary concerns the general public order and not just the States whose territory it defines? The answer is, boundaries are the starting point for stability in the relations between States; States are the principal constituents of the public order at global level; stability in relations between States is a prerequisite for maintaining order at that level; and, so, without settled boundaries order is lost. A boundary is "a line that determine[s] the geographic area over which the State exercise[s] sovereignty."[193] Boundaries thus define the limits of each State's power. That is to say, boundaries prevent the clash of sovereignty in that context—territorial responsibility—in which conflict has such disastrous results. If the community is confused about the geographic scope of the power of its territorial constituents in that sense, then it is hard to see how the legal system of the community will function. A system as robust as that which emerged after 1945 certainly can cope with territorial disputes, but it cannot cope with territorial disarray. A clear definition of the scope of territorial power and lawful means to settle territorial disputes are essential not only to the peaceful coexistence of neighboring States; they are the substratum on which the international order has been built.

Does this mean that the effects of one State's power are never felt beyond its boundaries? Of course not. Connections across boundaries have forged something like a global society; and States have interests across that society and have built legal institutions (some well developed, some less so) to protect those interests. But the main incidents of sovereignty—executive acts to regulate the day-to-day happenings in a given place, including the provision of basic security, legislation to regulate and shape society, judicial functions to settle disputes—take place within national boundaries. If some basic shared understanding did not exist about where those incidents of sovereignty are to be exercised and by whom, then it would be difficult or impossible to maintain public order at large. In the main, what a State does it does within a territorial sphere, the definition of which is recognized and respected by other States. This has always been relevant as between neighbors; in a world of so many interconnections, it is relevant as between all.

States and jurists have understood this proposition since the earliest modern cases concerning individuals and the rights of States.[194] Any State that takes rights seriously is an organ for the protection of individual rights; but all States, whatever their policies or legal philosophy, are organs for the exercise of power. The uncertainties that result when a boundary falls into doubt pose a greater risk of destabilizing international relations than any other uncertainty that might arise—because uncertainty over a boundary is uncertainty about where—not metaphorically "where," but physically where—one State's power ends and another's begins. It is "obvious that peace and security would be constantly threatened if the boundaries between States were not scrupulously respected."[195] If the territorial settlement were not "scrupulously respected," the State's representatives understand that a risk would arise in international relations in general. This is why "the true meaning of... stability and finality [of the border] is... to ensure a long lasting peaceful relationship," not merely to indicate coordinates of a territorial boundary on the ground.[196] The territorial settlement is not merely about one State saying to another "this is yours and this is mine" (even though communities even before they formed States used boundaries for that purpose);[197] it is also about general public order. The stability of territorial regimes

and boundaries is a principle that cannot be dispensed with or relativized. The law that ensures it is not a specialized subset of law; it is the central proposition of the modern international system.

The stability of territorial regimes and boundaries is rooted in the history of international law. If ever a constitutional provision existed that cannot be divorced from the experience of its drafters, then that is Article 2(4) of the United Nations Charter. Article 2(4) contains the rule by which the lawyers and diplomats at Dumbarton Oaks meant to answer once and for all the challenge that, twice in their lifetime, had "brought untold sorrow to mankind." The challenge that they meant to answer was not an abstraction; nor was it mainly about municipal order. These were not all democracies at the drafting table; the drafter with the greatest army was a totalitarian State with a terrible history of its own. The challenge which they meant to answer was that of the *Septemberprogramm* of 1914—by which the *Kaiserreich* would have redrawn the borders of Europe after the anticipated defeat of the Entente Powers. It was the challenge of *Mein Kampf*—by which a Third Reich would have annihilated all opponents and enforced an even more profound territorial revision. Their history was also a history of regional ambitions, *irredenta* in places as varied as Anatolia, the Horn of Africa, Transylvania, Manchuria, Indochina, and the Chaco (to give selected examples only)—conflicts largely forgotten today but present in the minds of the drafters. The world of the League that eventually collapsed amid the rising fury around it had not been the better for its dictators and unrequited hopes of domestic tranquillity, but the Charter that followed was not an instrument to end all dictatorship, much less to realize a universal standard at once.[198] It aimed to negate the claim that most had unsettled the world in which its drafters actually lived. It aimed to settle the territorial contours of the world and to ensure that they never again would change by force.

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CHAPTER 5

Responsibility, Use of Force, and Boundaries

A grave challenge to international order is the situation in which one State attempts to change the boundaries of another State without the latter's consent. Considering the centrality of boundaries and the territorial settlement, as related in the previous chapter, it would be surprising if an attempt to disrupt them by force or threat were treated as anything other than a crisis requiring a general response.

In fact, international law contains a mechanism for responding to the forcible attempt to change the territorial settlement and, as will be seen in the present chapter, the rules of international responsibility entail its general character.

Responsibility and the Ordinary Breach

Under the rules of international responsibility, every breach of an obligation, however serious or minor, entails an obligation to make reparation. *Factory at Chorzów* is commonly recalled as the main early case.[1] In *Factory at Chorzów*, the Permanent Court affirmed that the law of State responsibility is chiefly concerned with the obligation that the State having committed a breach owes to the State that it has injured: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."[2] There is a second part to this, not so commonly recalled: "Reparation therefore is the indispensable complement of a failure to apply a convention *and there is no necessity for this to be stated in the convention itself.*"[3] The point about the "indispensable complement" needed to be stated, because Poland had drawn attention to the absence in one convention of a clause giving the tribunal jurisdiction to deal with questions of reparation; Poland contrasted its absence in the one convention to the presence of such a clause in another convention. The inference that Poland asked the Court to draw was that, where there is no express conferral of jurisdiction to determine reparation, jurisdiction to determine reparation does not exist. The Court judged the matter

differently. According to the Court, the obligation to make reparation inheres in the underlying breach and, so, if jurisdiction exists to determine the existence of the breach, then jurisdiction exists to determine reparation.

The application of the rule of responsibility is uniform in this way. It inheres in every obligation and need not be expressed in the conventional rules that create obligations. It follows that when a rule of customary international law emerges creating an obligation, no special further development is needed for the rules of international responsibility to apply in respect of the newly emerged customary rule either. The obligations arising after a breach in this way are independent of the *jus dispositivum*. Judgment No. 13, the Merits Judgment in *Factory at Chorzów*, read thus:

> As regards the first point, the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.[4]

This "general conception" applies to all breaches, regardless of the underlying obligation that the State has failed to observe. Nothing more is needed after the breach for the reparative obligation to arise; nothing more is needed to oppose the obligation to the State (or States) concerned. How international law responds to the ordinary breach—even where the ordinary breach concerns as important a rule as the general prohibition against use or threat of force—will be considered further in Chapter 6.

The breach of the territorial integrity of a State in the sense with which the present chapter is concerned raises the same considerations as any breach when it comes to the obligation to make reparation to the injured State. Writers have suggested that the serious breach presents no special considerations in the form of specific obligations on the State that has authored it.[5] However, when the public system is confronted with that breach, the rules of responsibility do not stop with the author. The rules are concerned not only with the legal relations between the State in breach and the State that has been injured, but also with the effects of the breach on the system of public order as a whole. State responsibility has developed a set of rules to deal with this.

Responsibility beyond the Ordinary Breach

Article 41, paragraphs 1 and 2, of the ILC Articles on State Responsibility provide as follows:

> 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
>
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

Article 40, paragraph 2, read in combination with Article 40, paragraph 1, defines "serious breach" as...

> A breach of...an obligation [arising under a peremptory norm of general international law]...involv[ing] a gross or systematic failure by the responsible State to fulfil the obligation.[6]

In two ways, the manner in which the rules of State responsibility treat this breach is unusual.

First, both paragraphs 1 and 2 of Article 41 indicate that certain breaches by one State or States bring about obligations on other States. The general principles of State responsibility otherwise, since the days of *Factory at Chorzów* or earlier,[7] have been concerned with the obligation that attaches to the State to which the wrongful act is attributed. This is set out in the provisions comprising Part Two, Chapters I and II, of the ILC Articles. The serious breach, however, may generate a wider legal effect. Article 41, by stipulating that "States shall cooperate to bring to an end through lawful means any serious breach" and by further stipulating that "no State shall recognize as lawful a situation created by a serious breach...nor render aid or assistance in maintaining that situation," means that certain serious breaches have legal consequences for all States. This is distinct from the scheme of secondary obligation set out in the other parts of the Articles. It is for serious breaches of an obligation arising under a peremptory norm of general international law that "additional consequences, not only for the responsible State but for all other States," may arise.[8]

Second, provisions addressing the serious breach are concerned not only with the breach but with the characteristics of the rule that has been breached. This is unusual, because the Articles are otherwise not concerned with the "origin or character" of the primary obligation—that is, State responsibility is a general system for dealing with the consequences of breach, not a catalogue of the substantive rules of international law. The general applicability of State responsibility as a system for all rules is embodied in Article 12:

> *Existence of a breach of an international obligation*
>
> There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin or character* (emphasis added).

Therefore, for example, according to Comment (5) to Article 12, "There is no room in international law for a distinction, such as is drawn in some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e., for responsibility arising *ex contractu* or *ex delicto*."[9] The "general application" of the Articles is expressly affirmed in Comment (3) to Article 12.[10] Crawford, the Special Rapporteur who led the ILC to complete the drafting, referred to the distinction between primary and secondary rules as "indispensable," the explanation for why "the provisions on breach in Chapter III of Part One are framed in broad, general terms and deal with all international obligations at an abstract level without

touching on specifics."[11] Part Two, Chapter III, however, does touch on specifics. It addresses the character of the primary obligation. In this way, too, the "situation created by a serious breach within the meaning of article 40" is a special situation in the system of State responsibility.[12]

So the serious breach in the relevant sense is unusual in the framework of State responsibility in these two ways: it gives rise to a general obligation of community response, not just an obligation of reparation on the State that authored the breach; and it is defined by reference to a specific underlying (or "primary") obligation, not "regardless of the origin or character" of the obligation breached. To this extent, the critique that the ILC drafted the Articles on State Responsibility in "splendid isolation . . . from developments in other areas of law, where scholars and some courts have sought to elaborate a more nuanced, variegated set of consequences responding to different sorts of breaches in different ways" is not unimpeachable.[13]

There are three aspects to the existence of a serious breach within the meaning of Articles 40 and 41. First there is the peremptory character of the underlying obligation (as just noted). In addition, the breach, too, must have a certain character: the breach must ". . . involve [. . .] a gross or systematic failure by the responsible State to fulfil the obligation." That is to say, the definition under Article 40, paragraph 2, "qualifies the intensity of the breach."[14]

And as to the obligation of non-recognition, as indicated in Article 41, paragraph 2, this arises in the presence of a third criterion: the serious breach within the meaning of Article 40 has created "a situation."

The duty of non-recognition under Article 41, paragraph 2, is to be considered in light of these three aspects.

Three Aspects of the Serious Breach

The Peremptory Character of the Rule Breached

Turning first to the peremptory character of the rule, the ILC Articles take an approach similar to that in the VCLT. ARSIWA Article 40, like VCLT Article 53, does not set out examples of peremptory rules.[15] The Commentary adopted a general formulation: "The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values."[16] Unsurprisingly, where the Commentary attempts to enumerate the peremptory rules, it starts with the prohibition against aggression.[17] A range of other prohibitions, not related necessarily to the rights of States but instead to the dignity of the individual human being, is also suggested. These include the prohibitions against slavery and the slave trade, genocide, racial discrimination and *apartheid*, torture, and interference with the right to self-determination.[18]

Seriousness of the Breach

As to the requirement of intensity of breach, the Commentary cautions that "it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable,"[19] a point that follows from the peremptory character of the

rules under which the obligations arise. Nevertheless, "the word 'serious' signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach."[20]

Seriousness, in the sense prescribed, may exist in either of two circumstances. The failure entailed by the breach may be (a) gross; or (b) systematic. The disjunctive "or" makes clear in the text that either will suffice. According to the Commentary...

> To be regarded as systematic, a violation would have to be carried out in an organised and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule.[21]

The two circumstances—gross failure and systematic failure—well may coincide in one breach. The latter would seem discernable by reference to qualitative criteria; the former would seem to require judgments of magnitude.

"Situations" Not to Be Recognized

Finally, the obligation of non-recognition applies to "situations" created by breaches that are serious in the indicated sense. The Articles on State Responsibility and Commentary do not define "situation" for purposes of Article 41, paragraph 2. The Commentary instead sets out a number of examples.

Each of the four Comments addressing "situations" for purposes of Article 41, paragraph 2, refers to unlawful changes of boundaries or other territorial status.[22] Comment (5) refers, "for example," to situations in which a State has attempted to acquire sovereignty over territory through the denial of the right of self-determination of peoples.[23] Comment (7) refers to Iraq's forcible annexation of Kuwait. Comment (8) refers to Namibia and Rhodesia. The situation in Namibia was that South Africa ignored the termination of the League of Nations mandate upon which its presence in the territory had been based: from October 27, 1966, Namibia was a direct responsibility of the United Nations.[24] The situation in Rhodesia was that the territory's racist regime purported unilaterally to terminate its status as a territory of the British Empire.[25]

When South Africa's presence in Namibia is considered as an example of a serious breach, the usual emphasis has been on the imposition of the *apartheid* system. According to the *Namibia* Advisory Opinion,

> Under the Charter...the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.[26]

The Court thus drew attention to the failure of South Africa to observe and respect "human rights and fundamental freedoms for all without distinction as to race."

There was also, however, the question of "international status." This was a territory that the United Nations had declared to be under the direct responsibility of the Organization, no longer a responsibility of South Africa. The forcible seizure of territory and the attendant denial of another's international responsibility for that territory lies at the heart of the modern serious breach. It is a breach such as this that the principle of territorial integrity is centrally concerned to prevent.

With respect to Namibia, the denial of the international status of the territory was one manifestation of the breach of the territorial principle. The other was the attempt to partition the territory. The partition boundaries were laid out in the Odendaal Plan, which South Africa, like other territorial revisionists, defended by referring to supposed anthropological or ethnological considerations.[27] The Security Council observed that "the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the Charter of the United Nations."[28] The ICJ, in its 1950 Advisory Opinion on the *International Status of South-West Africa*, too, recalled the "paramount importance" of "the principle of non-annexation."[29]

When considering Rhodesia as well, the notorious feature was the "usurpation of power by a racist settler minority."[30] That concern was evident before the putative secession of Rhodesia,[31] and remained so after. However, like all political acts, the usurpation affected a territory; and accordingly the international collective response referred to the forcible change in territorial status: "The illegal authorities in Southern Rhodesia have proclaimed independence and . . . the Government of the United Kingdom . . . as administering Power, looks upon this as an act of rebellion."[32] When Rhodesia asked to participate in Security Council proceedings, its putative Minister of Justice said it was a State. The United Nations Secretary-General made clear that it was a Non-Self-Governing Territory.[33] The president of the Security Council asked if "any representative wishe[d] to speak on the subject"; none did. And so the position as stated by the Secretary-General remained undisturbed (except to the extent of Rhodesia's unilateral claim).[34] Non-recognition of the situations in Namibia and Rhodesia thus, too, was related to an attack on the stability of territorial regimes and the boundaries that define them.

Comment (6) of the ILC Commentary on Article 41 refers to the modern origin of the rule of non-recognition—Japan's putative separation by force of Manchuria from China.[35] This was the heyday of forcible territorial change. The subsequent practice has remained largely true to its origins. While the formal structure of Articles 40 and 41 does not exclude that other "situations" may be created by a serious breach of a peremptory rule, which in turn gives rise to the obligation of non-recognition, a significant connection exists, both in the formation of the rule and its application to the case of forcible change, to the territorial settlement. Where other breaches have been concerned, but the State said to be in breach has not formally claimed to have changed a boundary or territorial regime, the results have been ambiguous. This point will be considered further in the next section of the present chapter.

International law contains other concepts that in theory may be multi-faceted but, in their emergence and in their continued application, have concerned a unitary

core. A salient example is the relation between *erga omnes* obligations and *jus cogens* rules. Like the distinction between the ordinary breach and the serious breach, the distinction between the ordinary rule and the *jus cogens* rule is one which the ILC acknowledged in its work on State responsibility. The rule with *jus cogens* or peremptory character is "closely related" to the *erga omnes* obligation,[36] even if it is not possible to conclude that is quite the same thing. According to Comment (7) to Chapter III,

> Whether or not peremptory norms of general international law and obligations of the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them.[37]

Comment (7) then observed that the rules that the ICJ has identified as being of *erga omnes* application "all concern obligations which, it is generally accepted, arise under peremptory norms of general international law."[38]

So, too, is it the case that all, or very nearly all, the situations identified as entailing the obligation of non-recognition under Article 41, paragraph 2, are situations having arisen in connection with an unlawful attempt to change the boundaries and status of a territory. Whether or not unlawful seizure of territory and the situations addressed in Article 41, paragraph 2, belong to the same single basic idea, there is at the very least substantial overlap between them. In strict logic, the obligation of non-recognition might attach to situations not involving the territorial breach. In practice, however, the concepts are closely related.

If the unlawful change in territorial status were the only category of serious breach, then it would follow that a breach that did not involve an unlawful attempt to change a territorial status would not attract the obligation of non-recognition.[39] It also would seem to follow that where uncertainty exists as to whether a breach in truth involved such an attempt, uncertainty will exist as to whether the obligation of non-recognition has arisen. In other words, a borderline case of unlawful attempt to change a territorial status would be a borderline case for non-recognition.

The Wall *Advisory Opinion and the Problem of the Unlawful "Situation"*

The ICJ in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory* in 2004 concluded, *inter alia*, that the situation in the West Bank "resulting from" the construction by the occupying power of a security fence entailed a general obligation of non-recognition. According to the first clause of operative subparagraph 3(D) of the *Wall* Advisory Opinion,

> All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction.[40]

This parallels the two clauses of Article 41, paragraph 2. It indicates an obligation "not to recognize" a "situation" that the Court has concluded is unlawful; and it

indicates an obligation not to "render aid or assistance" to the State that would maintain the "situation."

The Court addressed the wall after the General Assembly had requested an advisory opinion on the subject. The General Assembly, in its resolution containing the request, said that it was "*aware* of the established principle of international law on the inadmissibility of the acquisition of territory by force."[41] It was also "*aware*" that self-determination of peoples is a Charter principle.[42] The resolution "reaffirm[ed] the applicability of the Fourth Geneva Convention as well as Additional Protocol I to the Geneva Conventions to the occupied Palestinian Territory, including East Jerusalem" and "recall[ed]" the 1907 Hague Regulations.[43] The question for the Court was as follows:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

Considering the question in the context of the resolution as a whole, the General Assembly was chiefly concerned with the accordance of the construction of the wall with the rules regulating the conduct of an occupying power.

However, the Court also thought that other legal rules might be relevant. The phrase "considering the rules and principles of international law" invited the Court to indicate the "legal consequences" of the construction of the wall not only under one set of rules. In particular, it is clear from the preambular paragraphs that the General Assembly thought that the legal rules concerning use of force and acquisition of territory and the legal rules concerning self-determination might be relevant as well.[44]

The Court's opinion that the construction of the wall and "its associated régime" are "contrary to international law"[45] is a necessary antecedent for reaching the conclusion that all States have an obligation of non-recognition. It is not, however, sufficient for reaching that conclusion. As noted above, non-recognition as an obligation on all States requires a gross or systematic failure to observe a peremptory rule; and the resultant serious breach must create a situation in the relevant sense.

The forcible annexation of territory constitutes the clear case—indeed the central case—of a gross or systematic failure to observe a peremptory rule. As reflected in practice, it is a failure that creates a situation. That it creates a situation seems clear on general linguistic considerations as well. This is the case to which non-recognition undoubtedly applies.

The Court was unable to say that the construction of the wall was an act of annexation as such. The question put to the Court concerned "construction of the wall." What the Court said was this:

> The construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding

> the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.[46]

The Court thus gave consideration to an "associated régime" in addition to the "construction of the wall" that it had been asked to consider. Having added the element of the "associated régime," the Court continued in a speculative vein: whatever result the wall and its "associated régime" had had so far, this "could well" become permanent and, if it did, then it "would be tantamount to *de facto* annexation." There are at least two qualifiers here. First, the result of the wall and regime "could" become permanent—that is to say, it had the ability to do so but had not yet. Second, if it were to become permanent, then the result would be a *de facto* annexation but not annexation as such—"*de facto*" being another qualifier.[47]

Instead of determining that there had been an annexation—which would have settled the matter plainly in favor of the rule of non-recognition—the Court associated the possible "tantamount... *de facto* annexation" with another breach—a breach of the right to self-determination:

> That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination and is therefore a breach of Israel's obligation to respect that right.[48]

The Court also concluded that "construction of such a wall... constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments."[49] It was from these conclusions that the Court adopted the further conclusion that a situation had arisen entailing the obligation of non-recognition.

The advice of the Court that the wall created a situation requiring non-recognition—the conclusion contained in paragraph 3(D) of the operative part—raises a question about the limits of the rule of non-recognition. The practice, as noted, with a high degree of uniformity has concerned formal changes only—declarations of annexation or formal suspensions of international status including acts of forcible partition in disregard of the wishes of the population. The construction of a wall, as such, was not a formal change of territorial status. It is hard to see how, without more, it could have been. This would seem to account for the Court's addition of the element of "its associated régime." But the question is then to be directed to that element: what exactly was the "associated régime"? Though certainly affecting how Palestinians use the territory, it was not a formal regime of territorial change.

The problem then seems to be this: the breach that surely would have created a situation obliging non-recognition the Court was not sure had occurred; the breaches that the Court was sure had occurred were not breaches that surely created a situation obliging non-recognition.

So what exactly was the "situation" that the Court said called for non-recognition? It is clear on general considerations of language that not every event gives rise to a "situation." Some events are ephemeral and localized, brief encounters well contained in time and space; legal consequences may arise from such events; but it is

not the usual way of speaking to say that every event results in a new "situation." Furthermore, Article 40, read in combination with Article 41, implies that not every breach of a peremptory rule entails a situation. The breach must involve a gross or systematic failure to observe the rule. It must also create a situation—and, more specifically, a situation from which it is meaningful to speak of withholding recognition. If every such breach necessarily entails a situation, then the clause as adopted would serve no purpose.

In the *Wall* advisory proceedings, Judge Kooijmans doubted whether a situation was present in a meaningful sense. Judge Kooijmans in a Separate Opinion wrote as follows:

> 43. Article 41, paragraph 2, however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach just as operative subparagraph (3) (D) does. In its commentary the ILC refers to unlawful situations which—virtually without exception—take the form of a legal claim, usually to territory. It gives as examples "an attempted acquisition of sovereignty over territory through denial of the right of self-determination," the annexation of Manchuria by Japan and of Kuwait by Iraq, South Africa's claim to Namibia, the Unilateral Declaration of Independence in Rhodesia and the creation of Bantustans in South Africa. In other words, all examples mentioned refer to situations arising from formal or quasi-formal promulgations intended to have an erga omnes effect. I have no problem with accepting a duty of nonrecognition in such cases.
>
> 44. I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part of operative subparagraph (3) (D) supposed to do in order to comply with this obligation? That question is even more cogent considering that 144 States unequivocally have condemned the construction of the wall as unlawful (resolution ES-10/13), whereas those States which abstained or voted against (with the exception of Israel) did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to an obligation without real substance.[50]

Judge Kooijmans was unsure that the Court had really identified a situation in the relevant sense. The Court itself seems to have had doubts. This is why the Court strived to connect the fact of the construction of the wall to the core case, "an attempted acquisition of sovereignty over territory." A "duty of nonrecognition in such cases" posed no difficulty, but to posit a "duty not to recognize an illegal fact" was problematic, arguably "without real substance."

Writers have said that no change of "behaviour towards Israel" took place among States after the *Wall* Advisory Opinion.[51] It also has been said that the Advisory Opinion "left States with a particular uncertainty as to what this duty entails—if anything—in circumstances which do not necessarily result in legal claims."[52] This does not, as such at any rate, entail a weakening of the rule of non-recognition, which, by organizing the text of Article 41, paragraph 2, in two clauses, the ILC distinguished, at least to a degree, from the obligation not to render aid or assistance

in maintaining the situation. It was the "aid or assistance" that many writers (and States favoring the advisory proceedings) hoped would stop. The Advisory Opinion was not very effective in curtailing material aid to Israel. This by no means qualifies the duty of non-recognition in the clear case.

Judge Kooijmans's "great difficulty" was this: it is not clear what an obligation not to recognize a "situation" means in respect of a fact or circumstance that falls short of unlawful acquisition of territory.[53] Unlawful acquisition of territory is the serious breach that gave rise to the rule of collective response to serious breach in the first place; and it has remained the central case in practice since. It is arguably the feature shared by every case.

So, in view of the idiosyncrasies of the situation that the Advisory Opinion addressed, it is the less surprising that States have largely not indicated support. How exactly were States to "not recognize" the "illegal situation resulting from construction of the wall,"[54] when that situation was a factual situation, not an assertion of a legal right to territory? The General Assembly, in ES-10/13 (to which Judge Kooijmans referred), "*demand*[*ed*] that Israel stop and reverse the construction of the wall...which is in departure of the Armistice Line of 1949."[55] (It also called on the Palestinian Authority "to undertake visible efforts on the ground to arrest, disrupt and restrain individuals and groups conducting and planning violent attacks").[56] The "departure of the Armistice Line" recalls the protection that the Friendly Relations Declaration accorded to "international lines of demarcation, such as armistice lines."[57] Plainly, the Friendly Relations Declaration addressed such lines as denoting a territorial regime, which is why they are to be treated as privileged. GAR ES-10/13 was adopted by a strong favorable vote—144 in favor, 4 against, 12 abstentions,[58] considerably stronger than resolution ES-10/14, by which the Advisory Opinion was requested.[59] Canada, in casting its vote in favor, "affirm[ed] the right of Israel to ensure its own security...", including "the right to take measures necessary to protect the security of its citizens and its borders from attacks by Palestinian terrorist groups, including by restricting access to its territory."[60] This, in Israel's view, is precisely what the security fence had been—a measure "necessary to protect the security of its citizens and borders."

The Court was clear enough that the construction of the wall was not a claim of annexation of territory in the West Bank and that it had not been an act of annexation that the General Assembly had called upon the Court to address.[61] The obligation not to recognize the fact of the security fence arose because the Court "cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access."[62] The Court was addressing a possibility of future territorial change, a possibility inferable from present facts.

The inference was not far-fetched. The United States, which voted against both GAR ES-10/13 and ES-10/14, nevertheless called on Israel not to "prejudice final negotiations with the placements of walls and fences."[63] But "prejudic[ing] final negotiations" is not the same as making a claim. The fact of the existence of the security fence, as understood by the Court and by a number of States, is not the same as the situation created when, after armed aggression, a State purports to annex territory. The gap between the two would seem to be one that the Court (in Judge

Kooijman's later reflections) "had to walk a tightrope" to cross.[64] The weak effects of the Advisory Opinion in practice, in turn, would seem related to the speculative character of the non-recognition clause—quite apart from the oft-noted silence in the opinion as to Israel's right of self-defense.[65] A range of defensive measures exist, including armed measures, which do not belong to the category of acts creating a new situation that, if unlawful, would require non-recognition.[66]

Conclusions as to Responsibility and the Territorial Breach

The privilege accorded to boundaries and territorial regimes is reflected in a range of treaty rules and judicial decisions, and in customary international law; its prevalence, its historical origins, and its heightened present salience were considered in Chapter 4. As argued in the present chapter, the law of State responsibility reflects the privilege as well.

Every breach entails the obligation on the part of the State that committed it to make reparation. It is a particular category of breach, which, in addition, entails the general obligation of non-recognition. Not all breaches entail the obligation on all States not to recognize the situation created by the breach, but some breaches do. An attempt to acquire territory by force is that sort of breach. An attempt to acquire territory by force is the central instance of that sort of breach. It may be that there are other serious breaches that create a situation which all States are obliged not to recognize; but the seizure of territory by force is the breach with which the formative practice was concerned; and it is breaches such as these that all or nearly all the subsequent practice has addressed. Again, in the matter of responsibility, as in diverse matters, international law protects the territorial settlement. The rules of responsibility recruit the international community as a whole to protect it.

To be sure, this does not mean that every boundary is at present finally fixed. There exist *bona fide* unsettled boundaries. And even a settled boundary may change. Provided that the States concerned have given their express consent, provided that their consent is real, and provided that they have not entrenched their boundary under special rules (e.g., the final settlement in respect of Germany), they may adopt boundary adjustments. They may even transfer whole territories. But the adjustment or transfer is not valid if it is procured by the threat or use of force, a position that follows from the rule expressed in VCLT Article 52.[67] The centrality of boundaries to international public order therefore does not mean that every boundary is frozen in place for all time; it does mean that the validity of purported consent between States to change a boundary will be tested against particularly stringent standards.

From the principle that, in the presence of consent, boundaries may change, it is clear that boundaries are in this (limited) sense relative. They are relative in a further sense as well: a State may consent to the application of international law rules in its territory, such rules entailing obligations of conduct both toward another State and toward persons, natural or juridical, present in its territory. Under the law of trade and the law of investment, such rules are numerous and highly developed. In the modern law of human rights, such rules, too, now comprise a system of great scope and sophistication. The willingness of States in the modern era to admit such

qualification to their once-comprehensive territorial power owes in very large part, however, to the increased security and confidence that the territorial settlement since 1945 has brought. Chapter 7 will turn to the relation between modern human rights and the territorial settlement.

Before turning to human rights—including the shift by Russia against the modern human rights project—a further point is to be made in respect of the privileged character of boundaries and, more particularly, about how international law treats breaches of obligation. The present chapter has recalled that international responsibility arises in a special way when a State attempts to change boundaries by force. The distinctiveness of the response becomes clearer still when other instances of use of force are considered. When States have used force in the UN Charter era, this has most often been not against the territorial settlement but against other values in the system. How the system responds to use of force when it is the other values that have been challenged is instructive, both with respect to the meaning of the international law prohibition against use of force and with respect to the priority that international law gives to the territorial settlement.

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CHAPTER 6

Use of Force and Other Values

The ICJ in *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* said that "the prohibition against the use of force is a cornerstone of the United Nations Charter."[1] Some jurists have gone further. Some have called the prohibition against use of force "*the* very cornerstone of the human effort to promote peace in a world torn by strife."[2] When Judge Elaraby dissented from what he judged to be a too qualified decision in the *Oil Platforms* case he said,

> The principle of the prohibition of the use of force in international relations . . . is, no doubt, the most important principle in contemporary international law to govern inter-State conduct; it is indeed the cornerstone of the Charter.[3]

The pacification of inter-State conduct is of central importance to public order. States arrived at the principle over a long course of wars, and the principle displaced the belief that war between States constituted an ordinary part of their relations.

There are paradoxes, however, in the assertion that the prohibition against use of force is *the* "cornerstone" of international order or that it occupies a position of such priority that all other rules are subordinate to it.[4]

First, there is the UN Charter itself. Article 2, paragraph 4, indicates the prohibition against use of force, but read in conjunction with the Charter as a whole, this is clearly a default position—not an absolute rule. States may use force (a) if the Security Council authorizes them to do so, which, under Chapter VII, the Security Council may do; or (b) if they exercise their "inherent right of individual or collective self-defence," which, under Article 51, remains unimpaired.

Then there is the vast body of conventional[5] and customary law[6] addressed to regulating armed conflict. The law does not absolutely forbid the use of force: a regulatory apparatus for use of force would be without object if it did.

The distinction between the rules of State responsibility and the rules of criminal responsibility suggest a further nuance. From the start of the modern international law era, jurists and senior political officers asked whether all illegal wars are

the same. Thus the UN Secretary-General in 1947 asked, "On what grounds can resorting to a war which is not aggressive but in violation of international treaties, agreements or assurances be considered, according to general international law, as not only illegal but also criminal?"[7] The possibilities of distinction within the scope of the criminal definition, too, were noted from an early date.[8] As the concept of aggression was further developed under international criminal law, States "understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned *and their consequences.*"[9] The forcible incident as such and the situation to which it leads are thus relevant to the law surrounding use of force.

And then there is the practice. States use force in many circumstances.

Hardly all instances of use of force, indeed few, occur with express permission of the Security Council. Doctrinal writers scrutinize the boundaries of self-defense in nearly every instance where a State has employed force on grounds of self-defense; and, yet, there is little organized censure against use of force. This is not simply an artefact of power. States whose power goes little beyond their immediate neighbourhood have faced scarcely more criticism, and scarcely more collective sanction, than the largest States when they have resorted to force as such. Neither the international practice in response to use of force nor the international law rules concerning use of force have been absolute.[10]

A State against which force has been used may of course seek redress under whatever dispute settlement mechanisms are available. The examples are rare in which States in a dispute over use of force have fully joined issue under an international dispute settlement procedure. One of the rare examples is the *Oil Platforms* case between Iran and the United States in which Judge Elaraby delivered the dissenting opinion quoted earlier. *Oil Platforms* merits further attention, for it suggests that actual instances in which States resort to force are not evaluated in an absolute way but, instead, with reference to how the use of force affects other legal values.

Oil Platforms arose over armed actions taken by the United States against certain platforms of Iran in the Persian Gulf; and came, by way of counterclaim, to involve Iran's armed interference with commercial shipping in the Gulf as well. The jurisdiction of the ICJ was limited to that established under the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States.[11] For jurisdiction to exist under the 1955 Treaty, a dispute had to exist that the parties had failed to settle by diplomatic means. In addition, if such a dispute existed, it had to fall within the jurisdiction *ratione materiae* provided by Article XXI, paragraph 2, of the Treaty.[12]

Article XXI, paragraph 2, reads as follows:

> Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.[13]

So the dispute, to be subject to jurisdiction, had to be a dispute concerning the interpretation or application of a provision of the treaty. The Court understood that the jurisdictional provision could only be understood in light of the object and purpose of the treaty as a whole, a treaty concerning economic relations and consular rights. The Court concluded that jurisdiction existed to settle a dispute arising from an alleged breach of one or more of the substantive obligations provided under the treaty—not in respect of "all of the provisions of international law concerning... relations" between the parties.[14]

In respect of an alleged breach of one or more of the substantive obligations, the Court then considered what action might constitute a breach. The Court reasoned thus:

> Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means.[15]

Thus different legal values (as embodied, for example, in treaty rules) may be affected by different means. The means by which the values are affected is not necessarily the most important question: "regardless of the means," whether the values have, or have not, been affected, and if so to what degree, may well be the main question. It was in these terms that the Court determined that it had jurisdiction over allegations of unlawful use of force; and so it was to these terms that the Court had to limit its consideration of the merits.

Important here was the scope of jurisdiction as identified by the Court. The Court rejected Iran's contention that Article I of the Treaty—which referred to "firm and enduring peace and sincere friendship" between the parties[16]—extended jurisdiction to the general rules regarding use of force: "Article I cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning [peaceful and friendly] relations."[17] Nor could Article IV, paragraph 1, a fair and equitable treatment provision, provide jurisdiction to adjudicate the "lawfulness of the armed actions of the United States."[18]

The relevant provision, instead, was Article X, paragraph 1:

> Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.[19]

Accordingly, the requests for reparation that the Court could consider (under both claim and counterclaim) were not for reparation for alleged unlawful use of force as such. Instead, the Court could consider reparation for injuries arising out of alleged breaches of Article X, paragraph 1. The Court, in other words, to award reparation, had to determine that conduct of a party had impeded "freedom of commerce and navigation" between the territories of the parties.

Iran requested reparation for "material" and "non-material" or "moral" injury, in the form of compensation and satisfaction.[20] The United States (in its counterclaim)

requested "full reparation ... in a form and amount to be determined by the Court."[21] The Court declined to uphold either request.

In determining not to award reparation, the Court drew attention to the character of the acts that the parties alleged constituted breaches of Article X, paragraph 1.

In connection with the United States' counterclaim, the Court considered a series of armed incidents against shipping in the Gulf between July 1987 and June 1988, some ten incidents in all.[22] The Court also considered the "cumulation of attacks on United States and other vessels, laying mines and otherwise engaging in military actions in the Persian Gulf."[23] The Court expressed no doubt that such armed incidents had occurred. But they did not amount to a breach determinable within the Court's jurisdiction under the 1955 Treaty. Iran's conduct did not amount to a breach of Article X, paragraph 1. This is because, in the Court's judgment of the facts, Iran's conduct had not caused "*actual impediment* to commerce or navigation *between* the territories of the two High Contracting Parties."[24]

As to the Iranian claims that United States armed actions against the oil platforms constituted a breach of Article X, paragraph 1, there, too, the Court was "unable to uphold ... the ... claim for reparation."[25] And there, too, the Court drew attention to the character of the incidents and asked how, if at all, they affected the freedom of commerce protected under Article X, paragraph 1.[26] Again, there were incidents, but they were not incidents amounting to a breach that the Court could adjudicate under the only head of jurisdiction in the case. The incidents did not affect freedom of commerce in the relevant sense or to a relevant degree.

The most noted aspect of the Judgment was the Court's adumbration of a breach that it had no jurisdiction to determine. This was the opening part of the first paragraph of the *dispositif.* There the Court said that it "*finds*" the following:

> The actions of the United States of America against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 *(d),* of the 1955 Treaty ... as interpreted in the light of international law on the use of force.[27]

Article XX, paragraph 1 *(d),* provided as follows:

> 1. The present Treaty shall not preclude the application of measures:
>
> ...
>
> *(d)* necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.[28]

It is far from clear how it was open to the Court to reach a determination (and a dispositive determination at that) in respect of Article XX, paragraph 1 *(d).* True, Iran had requested the Court to award "full reparation ... in a form and amount to be determined by the Court," an open request, which, like the United States' final submissions, left it to the Court to determine what the reparation would be.

A declaratory judgment thus was a possibility. The difficulty is that there was no submission requesting a determination as to the lawfulness of the United States' actions other than under Article X, paragraph 1—and there was no jurisdiction to determine that a breach other than a breach of Article X, paragraph 1, had occurred. A final submission cannot change the scope of the Court's jurisdiction, and Iran knew this. And the scope of jurisdiction here was limited to Article X, paragraph 1. This is why Iran restricted its request for reparation to reparation for the alleged breach of obligations under Article X, paragraph 1.[29]

Iran did invoke Article XX, paragraph 1(d)—the provision that the Court referred to in the opening part of the first paragraph of the *dispositif*—but Iran did not invoke it as a head of claim. Iran invoked that provision because it anticipated that the United States would invoke it as a legal defense against Iran's claim. Iran in the preliminary objections phase was clear about why it was invoking Article XX, paragraph 1(d): Article XX, paragraph 1(d), was a defense only. According to Iran,

> It is impossible to see how the central issue of a breach of the Treaty of Amity can be addressed without considering the validity of the U.S. plea of self-defence under general international law. But to suggest, as the United States now does, that the issue then becomes one of customary law, and not breach of treaty, is patently wrong. It simply confuses the delict—breach of the Treaty of Amity—with the U.S. defence to that breach—self-defence.[30]

Iran's concern with Article XX, paragraph 1 *(d)*, was that it might exclude the Court's jurisdiction in the circumstances entirely.[31] Iran argued that it did not. The Court agreed with Iran to this extent: Article XX, paragraph 1 *(d)* did not have such an exclusionary effect; it "does not restrict [the Court's] jurisdiction in the present case."[32]

However, the Court immediately made clear that Article XX, paragraph 1 *(d),* though not having an exclusionary effect, does have a purpose. That purpose "is confined to affording the parties a possible defence on the merits to be used *should the occasion arise*."[33] What "occasion" could that have been? It could only have been if the Court, in its merits determination, would otherwise have found that the United States had breached Article X, paragraph 1. This is how defenses work. Defenses come into play on the occasion when the party otherwise would lose under the rule to be applied. But the main part of paragraph 1 of the *dispositif* made clear that that occasion had not arisen. The Court had not found the United States to have breached the rule to be applied—Article X, paragraph 1. So there was no loss against which to defend. The Court accordingly had no need—no occasion—to invoke Article XX, paragraph 1*(d)*, as a provision "affording the [United States] a possible defence on the merits."

So this statement—albeit in the dispositive part of the judgment—had the character of *obiter dictum*—and not only in the sense that it was a matter that the Court did not need to settle in order to settle that which it was called upon to settle. It was, further, a matter that the Court in its jurisdictional holding had judged it could not reach at all. That the Court attached no consequences to this holding, and left

it as a purely declaratory statement, is unsurprising. The basis for having made the statement at all is unclear.

Why, then, did the Court invoke Article XX, paragraph 1*(d)*? The opening part of paragraph 1 of the *dispositif* has been rightly scrutinized. Judge Al-Khasawneh thought it "unusual from the point of view of established drafting technique and unfortunate from that of logical coherence."[34] Judge Elaraby thought that the Court's expansive *dictum* in paragraph 42 of the Judgment had established jurisdiction to reach a decision in respect of use of force.[35] The difficulty with Judge Elaraby's view is that paragraph 41 of the Judgment had just made clear that the Court must still operate "in the limited context of a claim for breach of the Treaty";[36] and in any case it would have ignored *res judicata* to say that either paragraph established a jurisdiction that went beyond the careful determination that the Court had already reached at the preliminary objection phase—that is, the determination that Article XX, paragraph 1*(d)*, is "confined" to defenses[37] and that the dispute subject to jurisdiction in the circumstances was that concerning the interpretation and application of the "freedom of commerce and navigation" provision (Article X, paragraph 1).[38]

The Court did say that the armed actions of the United States "impeded Iran's freedom of commerce,"[39] but then, after a lengthy consideration of the oil trade of Iran,[40] it concluded that the United States had not "breached its obligations to Iran under Article X, paragraph 1."[41] This, at first blush, only deepens the mystery behind the *dispositif.* The relevant obligation was the obligation not to impede freedom of commerce; and the Court found that the United States had impeded commerce; but then concluded that this was not a breach! The way that the Court reached its conclusion was this: it made the question out to be whether the commerce that the U.S. was found to have impeded was commerce between Iran and the United States, and, further, that any other impediment would not have fallen within the ambit of Article X, paragraph 1. This was a point of tension among the judges. Vice-President Ranjeva doubted that the separation of the two clauses of Article X, paragraph 1, was supportable; to find that there had been an impediment to commerce was probably enough, in Vice-President Ranjeva's view, to establish a breach.[42] Judge Simma thought the Court's approach "abstract" to a fault.[43] Judge Koroma seemed to wish to elevate the determination that "Iran's freedom of commerce" had been breached to the level of a dispositive conclusion, regardless of whether Iran's freedom of commerce with the United States in particular had been breached.[44]

Judge Simma criticized the Court more pointedly still for not having gone further. Judge Simma's Separate Opinion, cast in part as a dissent,[45] praised the Court for having concluded that the United States' actions "constituted recourse to armed force not qualifying as acts of self-defence";[46] but he despaired over the "half-heartedness of the manner in which [the Court] deals with the question of use of force."[47] Judge Simma said that the Court's conclusion about self-defense "must be read . . . as stating by way of implication that the United States actions . . . were therefore in breach of Article 2(4) of the United Nations Charter. *Tertium non datur.*"[48] What roused Judge Simma to protest was just that: the Court, in his view, seemed to have landed on middle ground between propositions that, in his view, do not admit any gradation.[49]

But this was a case about a "cumulation of attacks"—a series of events that the Court could not agree amounted to a breach subject to their jurisdiction. It was not the first time that the Court had found a "cumulation" insufficient to conclude that force had been used in a way constituting a breach. The cross-border incursions by Nicaragua into El Salvador, Honduras, and Costa Rica had not been "on a scale of any significance" or enough to amount "singly or collectively" to an armed attack.[50] In *Oil Platforms,* however, unlike in *Nicaragua*, the Court believed the cumulation nevertheless significant enough to require some sort of judicial response. It may be asked—as Judge Simma asked[51]—why the same response was not required in respect of Iran's attacks. An observation to be drawn from *Oil Platforms* is that the prohibition against use of force is not absolute. Not every use of force affects the other values of the legal system to the same degree. And when it comes to breaches, there are degrees.[52]

Breach of the territorial settlement, by contrast, admits of no qualification. Such breach is not a matter of degree. To attempt by international means to change the boundaries of a State without the consent of the State involved is a gross and systematic breach, and the response to the breach under the rules of the post-1945 era goes beyond the attribution of responsibility to its author. The response is a collective one, and it entails the responsibility of every State, whether or not directly involved in the unlawful situation, to deny the situation legal effect. This is the distinction recalled in Chapter 5.

The unqualified and obligatory character of the response and its universal scope reflect the centrality of the territorial principle to international law. Any attack on that principle—even on the smallest scale, even before any "cumulation of attacks" has occurred—concerns international law in the most serious way. Chapter 4 recalled the ICJ's response at provisional measures phase—swift and sharp—against the smallest territorial incursion by Nicaragua in Costa Rica, and the ICJ's reticence when asked to address alleged environmental breaches in the same place. *Oil Platforms* likewise concerned the use of force and other rules. The other rule that most concerned the parties there was a treaty rule protecting freedom of commerce. Where use of force affects the observance of other rules—that is, rules other than the core rule of the inviolability of the territorial settlement—practice has been equivocal. Freedom of commerce is an important value, as are the values associated with environmental protection. The equivocal practice, including judicial practice, in response to an attack on such a value nevertheless has not undermined the system as a whole. By contrast, if use of force were to challenge the territorial settlement, it is doubtful whether the system would survive equivocation. To date, the system seems to have recognized this. Its response to the territorial incursion has been decisive.

CHAPTER 7

Boundaries, Territory, and Human Rights

Human rights treaties diminished the relevance of boundaries. Matters once said to fall largely within the protected domain of national jurisdiction came to be addressed by international law rules. The obligation to apply the rules now is said to be extraterritorial: the discharge of a State's obligation is not necessarily complete when the State applies a rule within its borders.[1] The standing of a State to oppose the rules against another State, too, is not limited by the limits of territory: a State may have standing to oppose a human rights rule against another State in respect of an act or omission having no contact with its own territory.[2] Indeed, it would appear that, at least in respect of certain human rights rules such as that under Article 4 of Protocol 4 of the European Convention, there need be no nexus to territory at all, even when a requirement of territorial nexus follows logically from the content of the rule.[3]

A result of the international human rights project has been to qualify the distinction between the municipal (or "domestic") legal order and international order. The municipal legal order, which once was said to have its limits at the geographic boundaries of the State, under human rights rules may both extend outward past those boundaries and admit the international law system in. Thus the Torture Convention entails obligations on each State party "to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution... regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred."[4] Thus, universal jurisdiction, though it once was to be applied only where there were no borders—that is, against pirates on the high seas[5]—has entered national statute books in respect of "crimes against international law" generally.[6] The "boundaries of State sovereignty have come to be redrawn by human rights."[7]

International human rights law would never have gained so much ground if the territorial privilege had remained entirely intact. States had to give up some of their power over territory if human rights were to advance. If international human rights

law is taken as having enhanced human dignity,[8] then it may be defensible to say that qualifying the territorial privilege was worth it. A departure from the stricter territorial organization of international relations, in that case, may be worth certain losses that it entails.

The human rights order, however, could never have developed without the territorial order. Indispensable to human rights was the peace between States that the territorial order after 1945 secured. Without settled boundaries, there would have been no such peace; without the peace, the possibilities for an international law of human dignity would never have arisen.

In certain modern accounts of history, each new phase of human affairs, superseding a prior one that had disappeared or collapsed, sustains itself on its own terms and is linked to that which came before only by history, not by any ongoing functional dependence. So in Marx's account, to give the most prominent example, monarchy gives way to aristocracy, which gives way to the bourgeoisie, which gives way to the proletariat, and with each step the prior order withers away.[9] The territorial settlement at least as of 2015 has not withered away. True, the territorial settlement marked the close of one phase of human affairs—that in which States had resorted to force to revise the boundaries of other States. The territorial settlement, however, not only was necessary for the development of human rights, but it remains so for the continuation of human rights as a meaningful feature of public order.

Chapter 4 showed how the territorial settlement pervades modern international law, how it forms the core of a system that, to an extent not seen before, secured general peace among States. The present chapter notes the trend in decided cases to push territory aside, for example as a jurisdictional requirement in investment disputes. It then considers the larger claim that jurists have made about the "end of geography"—that is, the claim that territorial relations no longer matter, or at least no longer matter as much as they once did. It then posits, first, that that claim is not supported by the facts; and, second, that the fact that the claim has been made reflects a failure to recognize the stakes entailed by the present attack against the territorial settlement. The chapter then turns to Russia's resistance against international human rights and considers how this is connected to the territorial aggression on which Russia now has embarked.

Law without Territory

The decoupling of the modern law from territory was noted immediately above in connection with the core rules of human rights. It is visible in other parts of international law as well—for example in international investment law. In investment cases, international financial instruments, whose connection to the territory of a putative host State are tenuous, have been held to constitute an investment "in the territory" of the host State for purposes of a bilateral investment treaty and the ICSID Convention. Tribunals have diminished the territorial requirement in this way when they have found support for doing so in the applicable investment treaties. For example, some investment treaties have been clear that certain financial instruments, originating in places outside the host State's territory, are nevertheless to be treated as investments for purposes of arbitral jurisdiction.[10] The existence of

such treaty rules is itself an indication of the trend, for it indicates the willingness of States to depart from a strictly territorial conception of their rights.

Other tribunals have reached the same result where no such indication is evident in the applicable treaty. There, the rationale is functional rather than textual: "The reality of today's banking business is that major banks operate all over the world..." and the fact that a financial transaction originates procedurally and is supported by capital in one country "does not mean that the financial instrument is located in the country concerned."[11] It is now to the point of cliché that large companies declare the world to be without borders. It would have been surprising if legal institutions had not begun, likewise, to say that territory and fixity of place do not matter.

In investment cases such as these, the tribunals would not have had jurisdiction to arbitrate the putative investors' claims against the State if a strict territorial requirement had been applied. In the application of international law rules, the qualification of the centrality of territory has had significant effects. The examples in investment law are more isolated than those in human rights practice, but they are salient. This is not a trend restricted to any one domain of the law.

The "End of Geography" and Its Pitfalls

The growth of human rights has acted as a solvent of international borders. This has an intellectual correlate alongside its effects in practice. The community of international law scholars, or at least some significant part of it, either rejects the proposition that territory is the central concern of international law, or takes little interest in boundaries and territorial regimes, except to the extent that these present obstacles that the human rights project has to overcome. Certainly, international boundaries were never absolute in practice. States, even the most stringently organized ones, have never been impermeable. And States, as they formulate their responses to aggression against Ukraine, seem to keep the centrality of boundaries in mind. The responses in no way suggest that governments have forgotten that boundaries and territorial regimes are specially privileged under international law. The concern here, instead, is about the intellectual milieu, and the response outside the chancelleries.

Territory has declined as a subject of discourse. This can clearly, if crudely, be measured by examining the data of the published word over time.[12] The word "territory" occurred with the highest frequency in books at the end of World War I and through the interwar period, and then its frequency dropped rapidly and with only minor resurgences until around the end of the Cold War when it dropped to its present level—the lowest in 200 years.[13] The expression "territorial claims" entered into relatively frequent usage in the period of the first international claims tribunals (the mid-nineteenth through early twentieth centuries), increased considerably during World War I, and reached a new high in World War II. Its all-time high came in the 1960s—the early period of independence of many former colonies, and then entered a precipitous decline at the end of the Cold War.[14] The word "frontiers" also had its peak in World War II, followed by a largely uninterrupted decline to its present frequency, also the lowest in 200 years.[15]

The word "*irredenta*" has a later origin than the others, and an interesting subsequent career. Etymologists trace it to Italy in 1866 after the Third War of

Independence.[16] The *terra irredenta*—the "unredeemed land"—was that which Italy sought to consolidate into its putative national domain but which at the time still belonged to Austria. It took until 1918 for Italy to get what it wished to have from Austria (or most of it), but it then turned out that Italy wished to have more: between the wars, Italy's *irredenta* expanded to a claim to an imagined historic empire across the Mediterranean.[17] The idea had wider resonance still. Soon people spoke of *Europa irredenta* in reference to the range of territorial claims that States on the Continent were willing to settle by force.[18] Use of the word "*irredenta*" peaked in the 1920s; had a minor resurgence in the early 1960s (the period of decolonization and the Cypriot conflict), and rapidly declined to the near vanishing point thereafter.[19]

People who write books have lost interest over time in territory, frontiers, and *irredenta*.[20]

Daniel Bethlehem (who spent some time in the chancelleries) in 2012 affirmed that "geography stands at the very core of our contemporary international legal order and is everywhere deeply embedded in the most fundamental principles of our legal system" and, further, that geographic principles are not "withering away."[21] He acknowledged a "systemic continuity" based on Westphalian rules that place territorial jurisdiction at the heart of international law.[22] "But"—following these assurances that the territorial idea still matters (it was the pivotal "but")—Bethlehem said that "systemic continuity is only part, and an increasingly small part, of the picture."[23] By this Bethlehem meant that the importance of "systemic continuity" is shrinking. A range of developments has relativized the role of territorial jurisdiction so that in international society, as it exists,

> sovereignty and boundaries are like rocks in a river. They may impede the flow, and even perhaps, on occasion, dam up the water. More usually, however, they simply act as an impediment to the directionality of the flow of the water, which eventually finds a new pathway on its free-flowing gravitational course.[24]

It is perhaps only a metaphorical quibble to point out that, if a course is "gravitational," it is not free-flowing; it is instead flowing under the force of gravity, not directed by some other—for example, conscious and considered—force. Be that as it may, Bethlehem's point seems to be the indisputable one that many things happen across the borders of States, which is usually stated to mean that many things are beyond the control of States.[25]

To take the metaphor on its terms, it nevertheless allows that "dams" exist. It might further allow that some dams are bigger than others; and that more than one State can build dams. But in a world that has graduated beyond States and territory, the "rocks in [the] river" are residual; there is no reason to expect that anyone will put more in place on the streambed to impede the gravity-drawn flow.

The point—and it is not Bethlehem's alone, many international lawyers share it—was further developed as follows:

> The proposition of the end of geography is of course a caricature. But, even though it is a caricature, it is intended to pose a serious question. From a vantage point that is still largely rooted in a Westphalian system, are we—the lawyers—seeing

> the world sufficiently clearly, and is the system of international law with which we are so familiar, a system still so heavily rooted in notions of territoriality—sovereignty, jurisdiction, regulation, accountability—adequate to the challenges that will face us over the coming period?
>
> My response here is to suggest that there is a risk that we are seeing the evolving international system like passengers on a train that is travelling at considerable speed such as to blur our vision of the landscape as we look out of the window. From this vantage point, as we attempt to identify the landscape across which we are travelling, we resort to images and recollections from the last station at which we stopped, and we project to the next point at which we hope to draw breath by reference to the views and atmospheric conditions of the last. And in doing so, there is a real danger, as we take stock of the international legal system and attempt to assess its robustness and fitness for purpose for the future, that things will already have moved decisively past us and we will be caught in a constant cycle of catching up.[26]

What Bethlehem means, of course, is that the "landscape across which we are travelling" today is in truth very different from that of yesteryear. This is the premise of modernity, embedded widely and deeply, that our own age is like no other, and so that what came before can little help guide us forward. To posit that the territorial principle must now be put aside is to say that the considerations that informed past analyses have lost their validity in present "atmospheric conditions." The territorial principle in international law is "rooted in analyses of the 1930s," says Bethlehem. The point would seem to be that we have moved beyond the concerns of that time.

If the passengers in the train looking out onto metaphorical landscapes instead had had actual tickets date-marked March 21, 2014, and attempted to get from Simferopol to Kiev, then they well may have questioned whether we have moved as far as that. It is hardly clear that it identifies a real problem to say that "we—the lawyers" are paying too much attention to "notions of territoriality," when practically no lawyer thought that a major State would pursue territorial ambitions by force; and when, once States resumed such pursuit, so many lawyers were at a loss for cogent analysis. The problem, perhaps, is not too much of the territorial notion, but too much of the legal culture and intellectual constructs that trivialize it. We have imbibed the post-territorial idea with an idealist detachment from the politics of our time. We also see professional opportunities in the de-territorialized framework of modern rules and procedures, and we welcome as both practitioners and scholars the intellectual challenges that those rules and procedures present. It is submitted here that it is not a critique of lawyers as they are recognizable today to say that they pay too much heed to geography. The applicable criticism, instead, is that, amid the rich growth of international law that the territorial settlement has enabled, they heed it too little.

The erasure of a long series of explicit territorial guarantees by use of force and the forcible seizure of territory by one State from another is a gross breach of the law without precedent in Europe since 1945. It was, at least in part, instigated by the very globalization that many lawyers say now requires the territorial rules and principles to cede their central place. It is a response that one State has adopted but that

is available to others. Russia's are not the only territorial claims; and Russia is not the only State that might respond to the challenges of a fluid world by seeking not to bring about the end of geography but rather to reimpose its imperatives. From the indications to date, this is happening with a vengeance. A community of scholars that sees territory as a blur out of a window onto a receding past may not be prepared to recognize the current rupture for what it is.

If you think boundaries no longer matter, then think again. In the long view, States go to war over boundaries, and more readily than they go to war over anything else.[27] Everybody understands territory, as everybody at a given time exists in a given place—even those mid-journey, who in any event hope soon to stand again on *terra firma*. Globalization and its myriad wonders notwithstanding, everybody is susceptible to the territorial control of a State. Placed under threat, the State has ways of making that control felt. Territory is palpable; and the history of territory is a compelling force. When governments have sought to rouse sentiments, they have found territory a convenient object of sentimental appeal. A claim to territory is easy to explain in the public arena, and once the claim is made it is hard to retract. Moreover, the expansion of territorial power means the expansion of the power of the many State organs whose activity is chiefly based on and in territory. If there is any value still in Weber's insight that bureaucracy perpetuates and expands itself, then the State apparatus contains a latent impulse toward territorial growth; the constituencies for expansion may be activated in the streets and in the chancelleries alike. The claim for expansion might have no grounding in law; the government might reject whatever procedures the law furnishes to test the claim; but popular sentiment and statal ambition often are easy to rally for vindication of the claim by other means.

States have gone to war over territory ever since they first came into being. Stephen Neff tells us that the earliest war for which the causes were recorded seems to have concerned a boundary dispute.[28] Wars fought over territory are intractable. One needs no detailed exposition of modern history—the Kashmir dispute, the battles over the Fao peninsula, the border war between Eritrea and Ethiopia—to understand the point.[29] A new speech about old sentiments, even as old as those President Putin invoked about the baptism of Prince Vladimir at Khersones and the spread of Orthodoxy to all the Russias,[30] should not be needed to remind us of the volatility of claims of this kind. To ignore the gravity of the event when a State resorts to force to settle such claims would spell the end of the modern public order, for, like it or not, we have not yet reached the "end of geography" any more than at the end of the Cold War we had reached the end of history.[31] A more tempered view of the major sociolegal developments of our time—they have costs as well as benefits[32]—and a renewed mindfulness of the older principles—they form the foundation of our legal order—will equip us better to address the present challenge.

Russia's Human Rights Program in a New Territorial Age

Addressing the challenge of territorial aggression also requires a better understanding of the aggressor's view of the law and how it sees the law as relating to its extralegal goals and values.

One of several claims that Russia articulated in 2014 was that annexation served to vindicate the self-determination of Russians in Ukraine. Chapter 1 has addressed that claim in view of received understandings of the law of self-determination. The annexation of territory from Ukraine arguably belongs however to a broader, and more radical, legal, and political program. We fail to see the whole picture if we fail to consider the program. That is to say, we must consider the claims on Russia's terms as well.

Detectable in the annexation claims are overlapping shadows of a seemingly distant history on the one hand and of the modern human rights project on the other. To say that rights of Russian minorities in Ukraine are to be protected by the annexation of Ukrainian territory is an interpolation of the principle that makes human rights a general, and not just a national, concern. It is to harness the proposition that borders are relative in service to other propositions antithetical to what the human rights project was intended to achieve. It is no mere coincidence that the president of the Russian Federation referred in his Crimean speech to the "overall basis of the culture, civilisation and human values that unite the peoples of Russia, Ukraine and Belarus." If human rights law is a law that crosses borders, then Russia's new political program takes that proposition to a logical extreme. It is a cross-border program, and the borders it crosses well may be those of more than one State.

Other recent pronouncements by the president point in a similar direction. His address to the Federal Assembly at the end of 2013 in connection with the New Year set out the themes of "culture, civilisation and human values" in more detail. According to the president,

> Today, many nations are revising their moral values and ethical norms, eroding ethnic traditions and differences between peoples and cultures. Society is now required not only to recognise everyone's right to the freedom of consciousness, political views and privacy, but also to accept without question the equality of good and evil, strange as it seems, concepts that are opposite in meaning. This destruction of traditional values from above not only leads to negative consequences for society, but is also essentially anti-democratic, since it is carried out on the basis of abstract, speculative ideas, contrary to the will of the majority, which does not accept the changes occurring or the proposed revision of values.
>
> We know that there are more and more people in the world who support our position on defending traditional values that have made up the spiritual and moral foundation of civilisation in every nation for thousands of years: the values of traditional families, real human life, including religious life, not just material existence but also spirituality, the values of humanism and global diversity.
>
> Of course, this is a conservative position. But speaking in the words of Nikolai Berdyaev, the point of conservatism is not that it prevents movement forward and upward, but that it prevents movement backward and downward, into chaotic darkness and a return to a primitive state.[33]

Berdyaev, a writer expelled from Russia by the Bolsheviks in the 1920s, espoused Orthodox Christianity and Russian culture, arguing that Western political ideas were an imposition for which the country was unsuited.[34] The president is said to

have instructed regional governors to read Berdyaev's works.[35] Historians of Russia also recognize the call for "spirituality" in contrast to "material existence." This is the nineteenth-century Russian ideology of a religio-national exceptionalism, the belief that a philosophical gulf separates the soulful Russian psyche from empty Western pragmatism.[36] Allison in his 2013 study of Russia and international law traces the backlash against human rights to the early 1990s.[37] Whenever it started, it was gathering even more force in the year before the intervention in Ukraine.

The New Year's speech at the end of 2013 was a manifesto of Berdyaevian principles appropriated for modern political, and perhaps legal, purposes. The president posited an antagonistic relation between "traditional values . . . the values of traditional families, real human life, including religious life" on the one hand and "abstract, speculative ideas" on the other. What those ideas might be the president did not say, but what he had in mind was strongly implicit. The president identified "global diversity" as a desirable goal, which he placed in opposition to other forms of diversity. By "global diversity," the president meant that nations or national groups are to be favored over individuals; national cohesion is to take precedence as against the modern international legal code. The president believed that more or less organized forces exist that are "eroding ethnic traditions and differences between peoples and cultures" and "revising . . . moral values and ethical norms." These are the supposed forces against which a new program in Russia is emerging. Under that program, the rights of the individual would yield to community rights. Personal identity would be shaped first by national identity. The legal implication is that international human rights rules should be curtailed, that their inroads into national jurisdiction should be reversed. National jurisdiction, in the emerging program, is to impose itself with new force.

Representatives in the Russian legislature and semiofficial individuals had been more explicit, suggesting, for example, that Russia quit the European Convention on Human Rights.[38] Russia's representatives in the UN and European human rights institutions have indicated the direction of change for some time.[39]

A central part of the official view is its emphasis on unity. Unity—meaning unity of a national community defined on ethnic and religious lines—in this view is indispensable if the State is to repel the forces believed to be attacking it. In this view, individual rights that have grown so potent as to divide the community have gone too far, for a divided community cannot fight back. The repeal of individual rights is thus one part of the refurbishment of the State.

Hand in hand with this view of the State is that the State must reverse its own geographic division. Because unity will fail without ethnic cohesion, and because the main ethnic group comprising the State was divided among a number of States in 1990, the moral-political program is accompanied by territorial aims. So aggression against Ukraine is not only the precursor to further territorial acquisition but also a concomitant to changes in Russia's municipal legal order, and in particular to changes in how the municipal legal order relates to international law. Current developments in Russia and Russia's armed pursuit of *irredenta* indicate that the change is accelerating. The goal is a larger, more nearly self-sufficient State, encompassing all of its coethnics. This is not unity pursued for abstract reasons alone. The goal is a State capable of closing itself off to legal and cultural influence from abroad.

If the price of national cohesion is national isolation, then all the better to carve out a larger socioeconomic—and territorial—space. If the State is to be an isolated and insular community, then better that it be larger than smaller. External borders will be redrawn so as to appropriate the resources which the State needs in order to control the society that it will recast. In short, Russia takes the concept of the border as relative and permeable and uses it to undermine the system of human rights that brought that concept to fruition.

This is not the only way in which Russia's new program is turning the modern legal order back around on itself. It also employs the language of identity to attack legal rights, or, more particularly, to attack identity rights in their personal sense. In defense of one identity—the national identity as the State defines it—the State abrogates the rules protecting other identities. Writers who think about politics and jurisprudence have said that identity, when conceived as a property of a group or a culture, endangers other values. Identity in the group or cultural sense impinges upon individual rights. The loss of individual rights is a result that some have associated with identity's "monolithic character."[40]

Identity equally results in opposition between groups. Jeremy Waldron noted that one group well may think that another's solution to a given social or political problem "is silly or unholy or just plain wrong," and if group identity is the primary identity around which public life is organized then society will find it difficult to reconcile such differences.[41] Waldron suggested (in 2000) that opposition between groups—which is inherent in identity politics—could have consequences at the international level, though he held out hope that it would not: "I don't mean opposition in the sense that the cultures are *necessarily* competing for territory, power or resources."[42] With the territorial settlement as deeply entrenched as it was after 1945, it seemed reasonable to suppose that identity politics indeed would not lead to territorial conflict. But the settlement now has weakened. The risk now presents itself that competition over identity shall equate to competition for power and resources as ascribed by the territorial limits of the State.

Some observers, while acknowledging that Russian leaders have espoused a new program, doubt that they are sincere adherents of the ideology they express. One, for example, in 2013 said as follows:

> The Kremlin's conservative turn has no ambition to reshape Russian society. The Russian elite do not believe in the power of words to affect the social fabric, and see it more as a toolkit to preserve the status quo of the regime.[43]

This misses the point. It is to ask about the reasons behind the current "conservative turn" without asking the more important question: what will the impact of the changes now underway actually be? If the impulse behind the "conservative turn" is genuine, then a conservative turn in society well may result; the regime may well comprise sincere conservatives with the power to achieve their aims. But, so, too, could significant changes result if the impulse is purely self-interested. Even if the impulse in truth is only "to preserve the status quo of the regime," then the pursuit of *that* goal equally may be expected to have consequences. What the government's ambition is and what beliefs it holds are less important to this extent than

the probable consequences of its actions. The "toolkit" might be used for ideological purposes sincerely pursued; it might be used for self-preservation only. It could entail a mix of both. Regardless, its impact on the "social fabric" could be profound. Especially if society no longer supports regime preservation; or if society, as economic conditions become less propitious, no longer even acquiesces in the regime, the incentives for the regime to use whatever "toolkit" is available will grow. Under pressure from a restive public, leaders are likely to give little thought to the impact later of the measures they take to address the challenge of self-preservation right now. As for the sincere ideologues, they are likely to pursue maximalist aims as genuine goals and to continue to do so regardless of rational constraints.[44] The motivation of a gunman, including who, if anybody, unleashed him and why, is of little consequence to a victim like Boris Nemtsov after the bullets have been fired.[45]

Whether or not the shift in legal and cultural policy is ideologically sincere or politically opportunistic, to connect the act of territorial aggression of March 2014 to that shift is scarcely speculative. The connection is reflected in Russia's stated position. When the president of the Federation said that "standards were imposed on these nations that did not in any way correspond to their way of life, traditions, or these peoples' cultures,"[46] he was referring to Russia as well as to Ukraine and Georgia. The Russian Federation is clear that it sees the modern human rights project as justification for its present campaign. Opposition to human rights belongs to a more general argument that Europe, in the form of the European Union, and the Euro-Atlantic community, in the form of NATO,[47] have constrained Russia's strategic space and that Russia thus, for purposes of cultural and civilizational self-preservation, has a right to push back.

International law might seem to have little or nothing to say in response to such a claim. John Mearsheimer, perhaps the most prominent among writers to take such a position, said that "such liberal principles as the rule of law, economic interdependence, and democracy" have clouded Western strategy, which would do better if we embraced a realism free from "liberal delusions."[48] But Russia has articulated legal arguments. In particular, Russia posits a supposed infringement of national sovereignty by the modern system of human rights. Russia says that it holds a right of self-defense against a supposed onslaught of international values. International law certainly has something to say about this.

And international law has a simple answer. A State is free to adopt the commitments it chooses. Once adopted in legal form, a commitment is just that: a binding limit that others may oppose to the State if it acts in breach. To oppose the obligation to the obligee is not an intervention; it is a normal part of the interaction of States in an order governed by law.

Russia, however, goes a step further. Its position is that the human rights project is not simply a matter of treaty obligations—or even treaty in combination with a customary international law of human rights. In Russia's view (as discernible so far), the system of human rights is an encroachment on States, an exertion of power by the West in the guise of law. Seen in this light, human rights is a provocation that Russia affirms it will resist.

The difficulty is not that Russia might withdraw from, or even breach, widely adopted treaties. Withdrawal and breach are problems that the existing system of

international law can, and does, address without loss of coherence as a system. The difficulty is that Russia posits a right of resistance that goes beyond ordinary unlawful acts and extends instead into the realm of extraordinary acts such as a State might exercise at a time of existential threat. The ICJ in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* left open the possibility that threat or use of nuclear weapons would be lawful "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[49] The threat or use of nuclear weapons is otherwise understood to be incompatible with international law, the reason being that the use of weapons of such magnitude would destroy the core values of the legal order.[50] There has been no threat or use of nuclear weapons to date (though Russia, to the alarm of those who are listening, has invoked its nuclear weapons repeatedly since March 2014;[51] a person as eminent as Mikhail Gorbachev sees reason for concern in this).[52] The force that has been threatened and used is nevertheless against a core value—indeed, the value that, as the previous chapters have argued, provides the foundation of the post-1945 legal order. Russia has threatened, and in fact disrupted, the territorial settlement between States. International law contains a "fundamental right of every State to survival,"[53] but, if this entails the right to destroy another State or otherwise to overturn the system of inter-State relations that has maintained the peace between States, then that would only be under circumstances of existential threat to the State exercising the putative right. Russia posits that such circumstances now exist. In Russia's postulate, international human rights are an existential threat to the State and its people.

Modern international law rejects the notion that a State may use force to establish a sphere of influence;[54] and a sphere of influence, though it may lawfully come into being as a social fact through trade, cultural transmission, and other peaceful means, is not a legal category.[55] International law permits measures to protect the cultural heritage of a State, no doubt.[56] And international human rights treaties, even in the hands of those who most ardently invoke them against States, contain their savings clauses in deference to the rights of States.[57] But on no international law principle may a State annex a *cordon sanitaire* against external influence on its culture. In no reading of any instrument, and on no application of customary international law, may a State carry out armed intervention because it wishes to arrest cultural change. Such a course, put into operation, is untenable, and the situation arising from it can never be accepted. If it were, then the potential claims to greater cultural security would multiply, and little material security would remain.

Conclusions as to Human Rights and the Territorial Settlement

International law has developed in the field of human rights far beyond the limits that lawyers or political leaders in 1945 believed it would (or could). The importance of human rights is visible in the richness of the institutions and rules that now exist to protect those rights. A large part of the practice of international law concerns how individuals (and other non-State actors) relate to the State. It comes as no surprise that lawyers in the field see little of relevance in geography and territorial integrity: the territorial settlement and its preservation are seldom in issue in the controversies that come before courts and tribunals.

The territorial settlement is present in so much of the law that one might overlook that it is even there. The first part of the present chapter has drawn attention to the tendency to do just that. Without the territorial settlement, however, international law will enter a crisis. Law requires basic stability; without the stability the law is unsustainable. The Office of the United Nations High Commissioner for Human Rights related the point to Ukraine directly, when it observed that "an environment conducive to the promotion and protection of human rights in Ukraine depends on . . . the absence of armed conflict."[58] The same could just as well be said in respect of any place. Protection of human rights, if it is to be achieved at all, requires the absence of armed conflict. Throw open the question of borders, and armed conflict between States returns. A world of war between States will not be a world of human rights.

Chapter 4 considered the privileged character of boundaries and territorial regimes. The evidence of that privileged character is pervasive. It shows up in the explicit guarantees of bilateral treaties and in the regional and global arrangements that States have adopted in multilateral instruments. It winds its way through other legal regimes and through dispute settlement practice. International law reflects it in the categorical rejection of territorial changes that would breach it. International law as it emerged in the aftermath of World War II has been first and foremost a system to ensure that States do not revert to wars of territory. The success of international law in preventing such wars has enabled States and others to create a more developed system of rules and institutions. One need take no position as to how much, or what, ultimately international law should do—whether it should seek to be maximal, ever expanding toward a more developed system, or minimal, providing only basic guarantees to preserve inter-State peace. Regardless, what is clear is this: if the basic guarantees no longer hold, none of the other values that international law has fostered will retain vitality. The "*véritable explosion normative*" that began after the war[59] seemed to promise an ever-expanding universe of international law. Taking the territorial settlement for granted in the beneficent heat and light of the explosion may have been inevitable. It is to be hoped that current events do not portend international law's collapse. However, we are unlikely to respond effectively to those who would upend the territorial settlement, if we underestimate its centrality to all the other values that we seek to preserve.

But what about a State that does not share the other values? Can one envisage a major, developed State—one of the world's greatest powers—not only rejecting the further advancement of those values, but exerting its power to push them back? What priority is such a State likely to give to the territorial settlement, when the State rejects the edifice of law that that settlement has enabled the community of States as a whole to build?

Russia's acts of territorial aggression in 2014 are intertwined with explicit rejection of the international human rights project. Invasion and annexation have gone hand in hand with declarations that Russia will not abide the further entrenchment of human rights in Russia. To exclude the modern development of the law in one country, however, is not the full extent of Russia's claim. Russia has made clear that it will exert its power to expand its territorial sphere beyond its recognized borders. The connection between Russia's rhetoric in opposition to human rights

and Russia's acts of territorial aggrandizement merits careful consideration. It is too soon to draw final conclusions about the changes underway in Russia's national legal order and Russia's views of the international legal order, but some basic observations may be made.

Russia's claims against the international human rights project furnish no legal basis for armed aggression against Ukraine, much less a legal basis for a new territorial configuration for Russia. A State is free to resist the extension of human rights into its law. International law does not impose the human rights regime on States that object or decline to participate in it. No State, however, is free to attack another for acceding or seeking to accede to the modern law.

Human rights has made the borders between States less significant than they once were in the day-to-day interactions of human beings. But the growth of human rights does not mean that human rights will survive if the territorial settlement does not. The success of human rights as a system created a milieu in which some international lawyers ignore or relativize the gravity of an assault against the territorial order of the international system. They are in error for doing so. The territorial settlement and the basic stability that it has guaranteed gave life to the values they embrace. It is for this reason that the territorial settlement must retain priority in how lawyers understand international order. The privilege that the territorial settlement possesses—as reflected across so many domains of law—is not simply one among coequal legal values. It is distinct from all other values of the modern international law system. It is distinct because it is the foundation—not merely a necessary antecedent but the continuously indispensable basis of the system's architecture.

The law recognizes this. It recognizes the distinction between attempts to overturn the territorial settlement and other breaches of international law. Chapter 5 recalled how the law treats the territorial breach. Chapter 6 considered how the law treats breaches of other rules, in particular the rules governing use of force. Those are important rules; but the response to their breach, where their breach has left territorial boundaries as settled, has been very different from the response to the attempt to change a boundary by internationally unlawful means. The present chapter in turn has considered human rights. It is sometimes said that the dignity of the individual is the main value that international law aims, or should aim, to protect;[60] it even has been said that "the singular achievement of international law since the Second World War has come in the area of human rights."[61] It takes nothing away from the law as a mechanism for the promotion of human dignity to observe that the inter-State peace enabled by the territorial settlement is indispensable to the law. To the contrary, to reaffirm the territorial settlement is indispensable if the achievements of human rights are themselves to be maintained.

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PART III

Domestic Order, International Order, and Mechanisms for Change

Developments in the national constitutional order of one State may have effects at the international level. To give a salient example, a new State may emerge in the territory of an existing State by means of constitutional development. Conversely, international acts may have effects at the national level. Human rights treaties may establish rules that a State is obliged to implement in certain ways in national law. The formation of the treaty obligation may have to be considered from the standpoint of national law as well, for example because the law of treaties recognizes that ratification—a process of national law rules and procedures—may be stipulated as the means of expressing consent to be bound by a treaty.[1] Mechanisms for change thus exist within the domestic order and within the international order; and the effects of a change that starts on one level well may radiate to the other.

The lines of separation between domestic and international are not rigid, but national law and international law nevertheless are distinct. They comprise distinct sets of rules subject to distinct procedural mechanisms. Mechanisms for change that operate at the domestic level and mechanisms for change that operate at the international level thus operate under different legal systems. The results of their operation therefore, too, are judged under different rules. A separation of territory from a State through processes within the domestic order is very different from a forcible seizure of territory by another State. So, too, is an international act that changes domestic legal arrangements: an intervention for purposes of regime change is not the same as an international act that changes the boundaries of a State. Regime change by another State, while international in its execution, is limited to the domestic order in its result. Boundary change by another State is international both in execution and in result. Practice accordingly has treated these differently. Writers have recognized the difference as well.[2] In this light, it falls now to consider Russia's argument that the emergence of Kosovo and the change of regime in Iraq threw open the door to the new approach to international law that Russia now seeks to apply.

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CHAPTER 8

The West's Interventions and Russia's Argument

The Russian Federation argues that a series of international and municipal acts in March 2014 resulted in the separation of territory from Ukraine and the integration of that territory into the Russian Federation. Chapter 1 considered the municipal acts, which in any event cannot complete an international transfer of territory on their own, and the international law of self-determination. Chapter 2 considered Russia's international act—that is, the intervention in Ukraine—and, in particular, each in a series of arguments that Russia made in an attempt to identify a legal basis for that act. The argument under the law of self-determination is an argument relying on a postulated (if not generally recognized) application of that law.[1] The other arguments—intervention by invitation, intervention under right of treaty, etc.—refer to familiar legal rules, even if the arguments would attenuate those rules. All of these arguments, their difficulties notwithstanding, largely exist within the familiar framework of international law.

Russia, however, makes a further claim. This is the claim that a series of putative breaches of international law by Western States since the end of the Cold War either excuse a new breach or change the law in favor of the revision that Russia seeks. The two main episodes to which Russia refers are the intervention in Kosovo in 1999 and the intervention in Iraq in 2003. From this practice, Russia argues that few, if any, limits now exist that would constrain its own acts of intervention, including intervention having the aim of overturning the territorial settlement between Russia and its neighbors. The arguments that Russia makes with reference to Kosovo and Iraq entail a basic challenge to the international legal system. They require separate consideration, and so it is to those arguments that the present chapter turns.

Kosovo

From the start, the *Kosovo* Advisory Opinion has occupied a prominent place in the public rhetoric surrounding annexation of Crimea. The Declaration of Independence

that the putative Crimean authorities adopted on March 11, 2014, opened with a recitation in the following terms:

> taking into consideration the confirmation of the status of Kosovo by the United Nations International Court of Justice on 22 July 2010 which says that unilateral declarations of independence by a part of the country does not violate any international norms.[2]

The president of the Russian Federation, in his speech on the annexation of Crimea, endorsed this view of the Advisory Opinion. He referred to the "well-known Kosovo precedent—a precedent our western colleagues created with their own hands in a very similar situation."[3]

From the start, Russia placed emphasis on the *Kosovo* Advisory Opinion of the International Court of Justice—but not on the position that Russia had taken in the *Kosovo* proceedings. Russia had said in 2009 before the Court that "international law does govern declarations of independence, and the criteria of their legality are the same as those applicable to the legality of the creation of new States."[4] The point was to impugn the declaration of independence of Kosovo as a matter of international law. Russia in 2014 by contrast drew attention to selected parts of the Advisory Opinion and approved them.

Seldom has a speech by a head of State or government quoted as extensively from an Advisory Opinion of the ICJ. The Russian president's speech on Crimea well may have broken a record in this regard.[5] The political purposes behind the use of a legal text certainly merit consideration; no State espouses legal positions in a vacuum; the evolutions and continuities in Russia's politics since the end of the Cold War display important links to the legal positions that Russia has espoused.[6] So, too, however, does legal argument merit consideration on its own terms.

The president was at least factually accurate when he said that the ICJ had said that international law does not prohibit declarations of independence within the territory of a State. He paraphrased the Court as follows: "No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence," and "general international law contains no prohibition on declarations of independence."[7]

The problem was that the president's quotation was both incomplete and out of context. The Court did not say that international law permits declarations of independence; this the president did not note. Nor did he note that the other leading judicial authority on the matter, the Supreme Court of Canada in the *Quebec reference*, said that "international law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession."[8] The Supreme Court also said that international law contains no right to "secession without negotiation."[9] As for the ICJ's Advisory Opinion, its central point was that a declaration of independence, authored in the territory of a State, is not an act about which international law has anything to say either way. It is an act, unlike annexation, taking place within one municipal legal order, even if its intended effect is in the international legal order.[10]

But declarations—that is, mere statements—did not concern the Russian Federation in its dealings with Ukraine. Secession and, then, annexation were its real concerns. The putative Crimean authorities and the president alike elided the point that the ICJ had gone out of its way *not* to confirm the existence of a rule permitting secession. And they conflated two matters the Court was meticulous about keeping separate: a declaration of independence is one thing—the one hand clapping[11]—but the effectuation of independence in law and fact is another thing. The putative Crimean authorities in their declaration referred to "the confirmation of the status of Kosovo by the United Nations International Court of Justice on 22 July 2010"—but a confirmation of Kosovo's status is precisely what the Court did not provide.

Introducing his remarks on Crimea, the president of the Russian Federation invoked Russian history at length. The president said that "everything in Crimea speaks of our shared history and pride." He referred to places like "Balaklava and Kerch, Malakhov Kurgan and Sapun Ridge," which are "dear to our hearts" and "symbolis[e] Russian military glory and outstanding valour."[12] While lawyers may say that such rhetoric does not merit serious analysis, ignoring it risks placing the legal position in a vacuum. When the highest representative of a State delivers a prepared address following use of force, and quotes at length from an ICJ Advisory Opinion, lawyers should consider the content of what he says with care.

In President Putin's address, the historical references strongly imply the rationale that lay behind annexation. This was not a modern legal act but, rather, an invocation of historical principles as justification for overturning the modern law.

The past—the president referred to a Byzantine saint as well as battles of the Crimean War and World War II—overshadowed recent facts. Even if the *Kosovo* Advisory Opinion had said what the Russian Federation said it did—that is, if it had affirmed Kosovo's status as an independent State—this was against a factual background radically different from Crimea. If the Court in its Advisory Opinion of July 22, 2010, had validated the emergence of an independent State of Kosovo, then this was in the context of Kosovo's modern experience, and more particularly it was in the context of the international community's appreciation that an irremediable breakdown had occurred in Kosovo's relation to the national legal order of which the territory had been part. This emerged between 1989 and 2008 and especially after 1998. Crimea's separation and annexation, in the Russian Federation's rhetoric, by contrast belonged to a thousand-year history. Timelines on that scale will invite almost any territorial revision a State might wish. This is why the law contains a temporal principle. There need to be limits on the use of history in support of modern claims.

In keeping with the modern law and its limits, a closer look is merited at the Russian Federation's chosen modern precedent.

At least three considerations are noteworthy in connection with Kosovo. First, a human rights and humanitarian crisis had been instigated there by the federal authorities; the crisis escalated to systemic proportions and put other States in the region at risk; and international institutions, examining the situation including by means of observers on the scene, recognized that a crisis existed. Second, after multilateral intervention, and under a Security Council framework, an international process of administration and transition was installed in the territory with Russia's

participation and with the goal of achieving a settlement within existing borders. And, third, the international process was given over eight years to achieve a final settlement for Kosovo within existing boundaries. Only after the impossibility of reaching such a settlement became manifest, and in the other circumstances already noted, did Kosovo adopt its declaration of independence and States begin to recognize Kosovo as a State. That a settlement on more conservative terms—that is, a settlement preserving the old borders of Serbia—was impossible to achieve was, again, a multilateral judgment. What is more, the acts that precluded more conservative terms were those of the territorial State itself.

Each of these considerations will be set out in turn. The observations of human rights organs concerning Crimea also will be recalled.

The Crisis and the General Acknowledgment of Its Existence

The crisis that led to multilateral intervention in Kosovo was almost universally acknowledged. The Federal Republic of Yugoslavia (from 2003 known as Serbia and Montenegro and from 2006 as Serbia) was one of the few States that actively denied that a crisis had existed. A minority held that NATO had turned an existing crisis into a "catastrophe," but even the minority, led by Russia, acknowledged that the intervention took place following "violations of international humanitarian law" by Yugoslavia.[13]

The majority by contrast was emphatic in its view. The situation in the territory was dire, and this was not the result of intervention. The situation had been teetering on the brink of disaster for a decade, and it finally had erupted the year before.

Islamic States noted the "massacres in Kosovo,"[14] the States of the Gulf Cooperation Council expressing "deep pain at the sufferings, expulsions and killings of the inhabitants of the area at the hands of the brutal Serbian forces."[15] Malaysia understood that large numbers "have been forcibly expelled from their homes and villages in the wake of the heinous policy of ethnic cleansing that has been carried out by the Yugoslav military, police and paramilitary forces in Kosovo at the behest of the leadership in Belgrade."[16]

Countries in other regions not having a direct interest in Kosovo expressed their understanding of the situation in similar terms. Brazil said that "tensions in Kosovo [had] been simmering for a decade" and that "the Belgrade authorities" had "resorted to discrimination and violence" against the Kosovars.[17] Non-aligned States acknowledged that "ethnic cleansing and other human rights abuses [had been] committed" before the NATO intervention began.[18] An African State representative in the Security Council described the situation as follows:

> Neither the peaceful measures that were advocated nor the condemnation repeatedly expressed by the international community succeeded in curbing the violence in Kosovo. Villages have been destroyed, causing thousands of casualties and displacing hundreds of thousands of people. The confrontations in February and March 1998 in the Drenica region, in the centre of Kosovo, are a vivid illustration of this dramatic situation. Should this tragedy have been allowed to continue? The answer is clearly no.[19]

A crisis had erupted in Kosovo well before intervention. Its human toll was significant. A wide range of States understood this.

Multilateral bodies recognized the gravity of the situation as well. The General Assembly took note of the "continuing grave situation of human rights in Kosovo" as of December 9, 1998.[20] More particularly, the General Assembly expressed grave concern over...

> the systematic terrorization of ethnic Albanians, as demonstrated in the many reports, *inter alia*, of torture of ethnic Albanians, through indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanian citizens of the Federal Republic of Yugoslavia... by the police and military.[21]

And it condemned...

> the overwhelming number of human rights violations committed by the authorities of the Federal Republic of Yugoslavia... the police and military authorities in Kosovo, including summary executions, indiscriminate and widespread attacks on civilians, indiscriminate and widespread destruction of property, mass forced displacement of civilians, the taking of civilian hostages, torture and other cruel, inhuman or degrading treatment... and calls upon the authorities... to take all measures necessary to eliminate these unacceptable practices.[22]

The same resolution acknowledged "the regional dimensions of the crisis in Kosovo, particularly with regard to the human rights and the humanitarian situation... and... the potential adverse consequences thereof."[23]

The Security Council later noted "the enormous influx of Kosovo refugees into Albania, the former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, and other countries, as well as... the increasing numbers of displaced persons within Kosovo, the Republic of Montenegro and other parts of the Federal Republic of Yugoslavia."[24] It already had "strongly condemn[ed] the massacre of Kosovo Albanians in the village of Racak in southern Kosovo;" "note[d] that, against clear... advice [of the OSCE Kosovo Verification Mission], Serb forces returned to Racak on 17 January 1999 and that fighting broke out;" and "consider[ed] that the events in Racak constitute the latest in a series of threats to the efforts to settle this conflict through negotiation and peaceful means."[25] In a further statement, the Security Council "express[ed] its deep concern at the escalating violence in Kosovo."[26]

Other organs of the UN system as well had expressed the understanding that a crisis existed in Kosovo.[27] That understanding had crystallized well before the intervention.

An extraordinary situation had erupted in Kosovo, and it threatened a permanent refugee crisis in several of Europe's least secure States. By the end of 1998, this was plain for all to see. The situation was not just one State's concern, and it was not a matter that only one State acknowledged.

Administration, Transition, and Negotiation: A Search for Settlement in One Municipal Order

After the intervention of NATO, a new phase began in the search for settlement. An international administration was established under SCR 1244 of June 10, 1999.[28] A transition toward self-government was begun. And States began a highly involved series of negotiations aiming to settle the situation in Kosovo within the existing boundaries of the State to which the territory belonged. All of these processes—international administration, transition, and negotiation—took place in a multilateral framework in which the main States with concerns in the matter took part.

The centrality of the multilateral process to the transition in Kosovo after 1999 was understood by all parties concerned, including Russia. According to the Russian Permanent Representative, "The United Nations has an important coordinating role to play here."[29] Russia understood itself to be a main player in the process, and not just in the short-term. Russia, having expressed its active involvement in June 1999 in the Security Council, was still doing so ten years later in the *Kosovo* advisory proceedings: "The Russian Federation has been an active participant of the political processes relating to Kosovo ever since the situation in that region appeared on the international agenda."[30] In particular, there was Russia's membership in the Troika negotiations.[31] The Russian Federation would insist in 2014 that Crimea was like Kosovo; but no other State was involved in the situation in Crimea; and there was no negotiation at all.

The timeline in Kosovo is important to keep in mind. The multilateral process in Kosovo had not been instigated by a unilateral intervention. It had begun before. This was in 1997, when the federal government had escalated its campaign of ethnic cleansing. The Contact Group (France, Germany, Italy, the Russian Federation, the United Kingdom, and the United States) initiated engagement in respect of Kosovo in September that year.[32] SCR 1160 (1998) was adopted on March 31, 1998, after violence had escalated and it was clear that a major crisis existed. The Contact Group intensified its efforts from July through November 1998.[33] The Holbrooke Mission undertook to obtain compliance with SCR 1160 (1998) and SCR 1199 (1998); the latter resolution, adopted September 23, 1998, indicated that the Security Council was "*alarmed* at the impending humanitarian catastrophe." Then there was the OSCE Kosovo Verification Mission, a further mechanism intended to obtain compliance in particular with SCR 1199 (1998).[34]

Very shortly after the OSCE Mission was agreed, the Security Council "stresse[d] the urgent need for the authorities in the Federal Republic of Yugoslavia and the Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo."[35] This was an express multilateral determination (to which Russia did not object) calling for negotiation between the central government and the region. The Security Council stipulated that the negotiation was to be open-ended—that is, "without preconditions."

Despite the multilateral efforts in 1998, the situation rapidly worsened. The Racak massacre of January 15, 1999, marked a significant escalation.[36] The powers then convened the Rambouillet Conference, a further, and urgent, attempt to settle the problem.[37] A sub-office of the UN High Commissioner for Human Rights was established in Pristina.[38] And the Contact Group continued throughout the period to cooperate in search of a negotiated settlement.[39] It coordinated from time to time with other States, for example Canada and Japan.[40]

Kosovo was not subject to unilateral intervention in 1999. Nor was it subject to unilateral intervention after. The process in respect of Kosovo was multilateral across its major phases, and the process was open to its skeptics. The skeptics took part. Their participation was of *longue durée*. The phase of armed intervention—1999—was not the starting point. Nor was it the end point.

The ICJ in the *Kosovo* Advisory Opinion recalled the post-intervention efforts to achieve a settlement.[41] The efforts of the Secretary-General's Special Envoys, first Kai Eide of Norway, and then Martti Ahtisaari of Finland, involved negotiations between the Kosovars and the central government, including expert consultations. Negotiation went on for over a year at a high level of intensity. The assumption through the process and all its iterations was that Serbia, even if its title likely would have to be reduced to "bare title," would remain sovereign over Kosovo.[42]

A commitment to negotiate is not a promise to agree upon a predetermined result, or, for that matter, a promise to achieve a result at all. It is, instead, a commitment of best efforts. Implicit in such a commitment is an obligation on the parties involved that they "conduct themselves so that the 'negotiations are meaningful.'"[43] The negotiations in respect of Kosovo were meaningful. They were long and intense and took place through a wide range of modalities. With that history in view, it is clear that the negotiations were an earnest effort to settle the crisis in Kosovo within the constitutional framework of the incumbent State.

The negotiations did not achieve a mutually acceptable result. As of March 2007, the Special Envoy concluded as follows:

> The negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse...
>
> The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.[44]

Even after this sobering assessment, the States involved in Kosovo did not give up hope for a settlement within the existing boundaries. The process of negotiation did not end with the Special Envoy's report. The Troika consisting of the EU, the Russian Federation, and the United States made a final effort to resolve the question of Kosovo's status within the existing boundaries of Yugoslavia. That, too, however, was to no avail.

From One Municipal Order to Two: The Remedy *in extremis*

Serbia by no means remained passive in the process as it unfolded. On November 8, 2006, Serbia adopted a new constitution. The new constitution declared that Kosovo was an integral part of Serbia.[45] The Venice Commission of the Council of Europe was rightly concerned. According to the Venice Commission Opinion of March 19, 2007,

> 7. With respect to substantial autonomy, an examination of the Constitution, and more specifically of Part VII, makes it clear that this substantial autonomy of Kosovo is not at all guaranteed at the constitutional level, as the Constitution delegates almost every important aspect of this autonomy to the legislature. In Part I on Constitutional Principles, Article 12 deals with provincial autonomy and local self-government. It does so in a rather ambiguous way: on the one hand, in the first paragraph it provides that state power is limited by the right of citizens to provincial autonomy and local self-government, yet on the other hand it states that the right of citizens to provincial autonomy and local self-government shall be subject to supervision of constitutionality and legality. Hence it is clear that ordinary law can restrict the autonomy of the Provinces.
>
> 8. This possibility of restricting the autonomy of the Provinces by law is confirmed by almost every article of Part 7 of the Constitution . . . Hence, in contrast with what the preamble announces, the Constitution itself does not at all guarantee substantial autonomy to Kosovo, for it entirely depends on the willingness of the National Assembly of the Republic of Serbia whether self-government will be realised or not.[46]

It is important to be clear what the Venice Commission in the Opinion meant when it said that the autonomy of Kosovo would be subject to restrictions under "ordinary law." This was not to object to Kosovo's status being subject to law; the European Commission on Democracy through Law was not calling for a lawless province! What was meant was that the new Constitution subordinated the province, which was supposed to have a wide-ranging autonomy embedded at the *constitutional* level, to ordinary legislative enactments of Serbia.

This was not the first time that the central government had purported to subordinate the rights of the Kosovar people in their territory. The Constitution adopted in 1990, which abolished Kosovo's autonomy, had been one of the triggers for the difficulties that ensued. As for the early 2000s, this was in the midst of a process intended to define a workable relationship between Kosovo and the State of which that territory was part. A wide-ranging autonomy was understood by the parties from the start to be an irreducible minimum requirement. Serbia's adoption, in the most sensitive phase of negotiations, of an instrument that harkened back to 1990 was a severe impediment to a final settlement that would have preserved the single State. Municipal law acts can have international effects; the effects that they have, if any, will depend not only on the content of those acts but also on the circumstances of their adoption. An act curtailing rights—adopted while a negotiation aiming to safeguard those rights was in train—inevitably had effects.

Following the Troika's further effort to achieve a negotiated settlement, it became clear—in view of the conditions imposed by the constitutional system of Serbia and in view of the emergent constitutional system of Kosovo—that a settlement in a single State was not achievable. When "basic positions have not subsequently evolved," when "negotiations did not and could not lead to the settlement of the dispute,"[47] and when, moreover, "negotiations have become futile or deadlocked,"[48] it is open to a party to seek a final settlement by another means. If a final settlement was to be achieved, it was clear at that point that another means was needed in Kosovo.

It was unclear even then what the final settlement would look like. What was clear was that the final settlement, whatever its exact form, would not entail the continued exercise by Serbia of any real incidents of sovereignty in Kosovo. The other States involved in the process nevertheless still refrained from prejudging the outcome. The Troika concluded in its report to the Secretary-General on December 4, 2007, that "the parties were unable to reach an agreement on Kosovo's status" and that "neither side was willing to yield on the basic question of sovereignty."[49] The implication to be drawn was that a new sovereign entity would have to emerge if stability were to return to the region; but the Troika took care to leave the matter to the actors most concerned—that is to say, to the actors on the municipal level in the territory concerned. Those actors, by early 2008, were involved in a process of constitutional development largely independent from, though monitored by, the international institutions present in the territory. The separation between that process and armed intervention was both temporal and material.[50]

The inhabitants of Kosovo elected the Kosovo Assembly shortly before the Troika report. The election took place under the supervision of the United Nations Interim Administration.[51] On February 17, 2008, with the participation of the vast majority of the members of the Assembly, and almost a decade after multilateral institutions had begun the search for a settlement within the borders of Serbia, Kosovo's declaration of independence was adopted. This is a very different path to independence than one that jettisons the existing municipal order in a single stroke.

The human rights problems of Ukraine did not rise to the level of a systemic crisis putting the population as a whole, or a substantial part of it, at risk; nor did the problems jeopardize stability in the wider region. The only organs that said they did were the organs of the State that invaded the country. The use of force there was a unilateral act based on a unilateral claim. Whereas a multilateral process had concluded that Kosovo was in a state of crisis that demanded action, multilateral process had nothing to do with the decision to intervene in Ukraine. To the extent that international human rights institutions had considered Crimea or Ukraine as a whole, the problems that they identified did not even remotely resemble those in Kosovo. The sporadic complaints of individual Russians were not indicative of incipient genocide.

Russia's Volte-Face

To apply precedent in law is to treat like cases alike. To say that intervention in Kosovo was a precedent for intervention in Ukraine's territory is unconvincing for this reason: the situations are radically different.

The law also assumes a degree of consistency in the arguments a State makes. When addressing Kosovo at the time of the ICJ advisory proceedings in 2009, the Russian agent (as from February 2015, the Russian member of the International Court of Justice), said as follows:

> If ever creation of a State through secession without consent of the parent State is permitted under current international law, it is only on the basis of the right of a people to self-determination and only in exceptional circumstances that evidently did not exist in Kosovo when the UDI was adopted.[52]

The Russian Federation set out the following considerations as well:

> The population of Kosovo has never been recognized as a self-determination unit. There is no basis for that either in the constitutional system of Socialist Yugoslavia or in the Rambouillet Accords, let alone other international instruments. Anyway, the international community reacted to the 1999 crisis without acknowledging the right of Kosovo to secession. Therefore, the events of 1999 cannot serve as the basis for independence for Kosovo in 2008 when the internal realization of all rights of the Kosovo population as a self-governing autonomy within the State of Serbia was clearly possible.[53]

The Russian position, as Russia expressed it, can be reduced to the following propositions:

(a) secession is a valid mechanism for creating a new State only when "exceptional circumstances" obtain, and no such circumstances obtained in Kosovo;
(b) Kosovo was never treated as a self-determination unit under Yugoslav constitutional law;
(c) Kosovo was never treated as a self-determination unit under international agreements;
(d) the "international community" in no other way ever acknowledged that Kosovo had a right to secede; and
(e) the possibility existed for Kosovo to implement "all rights" and autonomy as part of Serbia.

Russia, separately, also said (f) that the recognition of Kosovo was "the premature recognition of a new entity."[54]

The Permanent Representative of France in the Security Council in March 2014 observed that Russia's position in respect of Crimea was a volte-face.[55] Writers—Lauri Mälksoo with particular salience—have observed the same.[56] It is an observation worth developing further:

(a) If the situation in Kosovo was not "exceptional" in the degree necessary to justify secession, then the situation in Ukraine's territories certainly was not. Artillery barrages and mass displacement of the civilian population did not take place in Crimea. They had not taken place in eastern Ukraine until

Russia's armed intervention. To the extent that Crimea was a concern at the international level, it was in respect of human rights questions—and the main question was the treatment of Crimean Tatars, not of Russian-speaking inhabitants. Eastern Ukraine was not an object of international concern at all. The practice was noted in Chapter 1. Russia's silence at the time in respect of Crimea and in respect of Ukraine as a whole is striking in view of the allegations that Russia would later make.

(b) Kosovo had enjoyed a range of special rights under the Yugoslav constitution, and these were at least as extensive as Crimea's special rights as the Autonomous Republic of Crimea within Ukraine. They were considerably more extensive than the rights of Ukraine's eastern *olbasts*. This is a point separate from the prior question whether territorial subunits that are not constituent republics of a federal system merit special treatment in any case. According to the Report of the European Union's Georgia Mission, the "overwhelmingly accepted" position is that they do not.[57] The point is addressed here, because Russia raised it when challenging intervention in Kosovo. Russia had objected that Kosovo's status in the Yugoslav municipal legal system had accorded it no self-determination rights.[58] If Kosovo's status under municipal law had accorded it no special rights, then the status of Crimea and of Ukraine's eastern regions did not either.

(c) Kosovo's rights on paper were that much more extensive when, as repressive measures were escalating, the central government accepted international proposals to grant Kosovo greater autonomy. Greater autonomy still was a prerequisite to continued Serbian sovereignty during the transitional period of international administration after 1999. At the relevant points in time—in 1998, before intervention, when Serbia's conduct in Kosovo had escalated to the point of a humanitarian disaster; and over the course of international administration and the search for a negotiated settlement between 1999 and 2008—Kosovo was entitled to a range of constitutional protections as a unit within the municipal system, and the protections were subject to international guarantee. Its entitlements in this regard were much more extensive than any entitlements enjoyed by Crimea or the eastern regions of Ukraine.

(d) As to the conclusion that Kosovo could not continue in any constitutional relation with Serbia, this was reached only after a significant period of time had elapsed—nearly a decade following military intervention. The conclusion was communicated by the Special Envoy of the Secretary-General. The Troika reached the same conclusion within a year. Nothing even resembling such a conclusion has emerged in respect of Crimea or eastern Ukraine. Furthermore, the possibility of autonomy in Serbia was finally frustrated by Serbia itself, when Serbia adopted a new constitution inimical to Kosovo's rights. Ukraine, in contrast, when language laws were proposed, which would have revoked the advantages enjoyed by the Russian minority, blocked their entry into force and reaffirmed its international commitment to minority protection.[59] No proposal had been made that would diminish Crimea's autonomy under the national constitution.[60]

(e) If ever a possibility existed for Kosovo to implement autonomy in Serbia, then surely the possibility exists for Crimea and the eastern *oblasts* to do the same in Ukraine. With respect to Crimea, the central government had never discriminated against the population, much less perpetrated atrocities, and the central government pledged to respect the special status of Crimea; it never revoked it. This is radically different from the situation in Serbia, where the government of the day, in the midst of negotiations, adopted a new constitution giving the national legislature the power to re-entrench discriminatory exclusions. Serbia's attempted constitutional change of November 2006 moreover has to be considered in light of events over the preceding twenty years. The threat of abrogation of guaranteed rights in any setting likely would cause alarm; but where the population had only seven years before been subject to a massive campaign of organized violence, such a change in municipal law was bound to have serious, indeed preclusive, political effects. By contrast, Ukraine's governments, since independence, had respected Crimea's status in the constitutional system and had committed no serious breach of human rights or humanitarian law against the inhabitants of that region or against Russian speakers in any region. There was no indication that Ukraine was about to legislate Crimea's rights as a region or Russian-speakers' rights as a group out of the national legal order.

(f) States recognized Kosovo after a period of over eight years in which Kosovo's self-governing institutions had expanded their competences under international supervision. Nearly a hundred now have done so;[61] very few States have declared that recognition of Kosovo is premature.[62] Russia recognized Crimea by Executive Order on March 17, 2014, the day after the separatist referendum—which is to say scarcely three weeks after Russia's armed intervention in the region had begun. Again, timelines may not in themselves be conclusive, but they matter. Constitutional development that leads to the emergence of a new State might in theory occur overnight; but if it is genuinely a product of political change at the municipal level it is likely to have taken much longer.

Russia, as of November 2014, had not recognized the self-declared eastern republics in Donetsk and Luhansk. The dependency of those entities upon armed intervention is, independent of questions of timing, an infirmity to any claim on their behalf that Russia might espouse.

Other contradictions may be noted. Russia had maintained a resolute position against separatism in other places. The volte-face does not extend to recognizing Kosovo as a State. Despite equating the two cases, Russia still applies one rule to Kosovo and another to Crimea. Recognizing the former would not of course resolve the problems with the latter. International law, and most of all the international law of the territorial settlement, is not a game of tit-for-tat.

As noted in Chapter 3, not least of the contradictions is in respect of Russia's own territory.[63] States and international organizations criticized the use of force in Chechnya on grounds of proportionality. They affirmed, however, the Russian Federation's right to preserve its existing borders.[64] The violent suppression of

Chechnya is a further episode in Russia's practice difficult to reconcile with Russia's putative bases for action in 2014.

Iraq

Extensive commentary—academic, journalistic, and polemical—in Russia and elsewhere has indicated that the Coalition's intervention in Iraq in 2003 opened the door to Russia's intervention in Ukraine in 2014.[65] Russia's official statements were more allusive than explicit, but they pointed in the same direction. The president of the Russian Federation on March 4, 2014, said as follows:

> We are often told our actions are illegitimate, but when I ask, "Do you think everything you do is legitimate?' [Western leaders] say "yes." Then, I have to recall the actions of the United States in Afghanistan, Iraq and Libya, where they either acted without any UN sanctions or completely distorted the content of such resolutions.[66]

A few weeks later, the president said that the Coalition of States that intervened in Iraq "ignor[ed] the UN Security Council and the UN overall."[67] These were not explicit claims to equate intervention in Iraq with intervention in Ukraine. The purpose of the statements, however, was to explain Russia's conduct in Ukraine; unless the references to Iraq were pure *non sequitur*, they were meant to explain Russia's conduct. The position, at least implicitly, was that Western States' conduct was "illegitimate" in Iraq (among other places), and that Western States cannot oppose a standard against Russia that they themselves have not lived up to.

To evaluate the argument about Iraq as a legal argument, it is necessary first to clarify it in legal terms. The lens of *Realpolitik* is no particular use here.[68] International relations is full of examples of tit-for-tat. The decision to declare three diplomats persona non grata because their sending State recently declared the same in respect of three diplomats of the receiving State is a political decision. The lawfulness of the decision is a matter for the law of diplomatic relations.[69] In the case of the expulsion of diplomats, the discretion in the matter is wide; no reasons need be given; and in practice the political reasons have ranged from conspiracy by an ambassador to depose the head of State[70] to failure to pay parking tickets.[71] But the practice is subject to a rule; nobody has said that the rule has disappeared in the practice. Thus it remains a matter for lawyers. The interest here is with the legal position—and in a field where discretion is considerably more constrained, and the stakes considerably more serious.

Making Sense of Russia's Legal Argument about Iraq

President Putin's invocation of the intervention in Iraq is useful to Russia as a legal basis if two conditions exist:

> *First*, either (i) the intervention was lawful under the rules in force at the time; or (ii) the intervention was unlawful under the rules in force at the time but the

intervention had legislative effect—i.e., it has resulted in a change of rules so that a like intervention now would be lawful;

and

Second, Russia's intervention in Ukraine and the Coalition's intervention in Iraq are not distinguishable.

Each of these points must be considered, if sense is to be made of Russia's argument about Iraq as legal argument.

As to the first point, the Russian position at the time of the intervention was unequivocal. According to the president of the Russian Federation, "The military action is taking place in defiance of world public opinion and in violation of the principles and norms of international law and the Charter of the United Nations... [n]othing can justify this military action."[72] The president said that SCR 1441 (2002) "does not authorize the use of force."[73] The president further said that "Iraq posed no threat either to neighbouring States or to other countries or regions of the world" and that no support existed for "accusations that Iraq is supporting international terrorism."[74] These statements make clear that Russia did not accept that intervention in Iraq was in accord with the rules in force at the time.

Russia had articulated its position in somewhat greater detail shortly before the start of the intervention. According to the foreign minister,

> The use of force against Iraq, all the more so with reference to previous Security Council resolutions, is without foundation, including legal foundation. Resolution 1441 directly indicates, in paragraph 12, that the Council will if necessary meet immediately to ensure full compliance with the relevant resolutions.
>
> Thus, resolution 1441 gives no one the right to the automatic use of force. The Russian Federation considers that a settlement in Iraq must continue to remain under the control of the Security Council, which bears the primary responsibility for the maintenance of international peace and security.[75]

Russia's legal argument against the intervention in Iraq, in basic outline, thus was that intervention did not receive the assent of the Security Council; and it did not fall within the Article 51 inherent right to self-defense (the self-defense point having been made expressly in the president's statement rejecting allegations that Iraq posed a threat to security or was supporting terrorism). Moreover, according to (2003) Russia, while some margin might exist for the "maintenance of international peace and security," the Security Council "bears the *primary* responsibility" for that function. Reference to prior Security Council resolutions was relevant in the negative: SCR 1441 was a bar to use of force. It was not, in the Russian view, relevant in any other way.

Certain other States agreed with Russia that use of force in the circumstances was unlawful, and on similar grounds. For example, there was the Troika of the Non-Aligned Movement, which on March 19, 2003 said,

> 2. We view the imminent unilateral military action by the US and its allies as an illegitimate act of aggression. Such action, without the support and authorization

> of the UN Security Council . . . and not in self defense against any armed attack, is clearly in violation of the principles of international law and the UN Charter.[76]

The position was that use of force by States against another State is allowable only in the presence of an express, contemporaneous authorization in clear terms by the Security Council, or in self-defense against an armed attack, by which was meant an attack in progress, not one in planning. This was, in broad terms, the view in opposition to intervention in Iraq.

The Coalition's Legal Argument in 2003

Against these objections, there was the Coalition's legal argument in support of intervention. The Permanent Representative of the United States referred to Security Council resolutions that

> imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the ceasefire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary-General's public announcement of January 1993 following Iraq's material breach of resolution 687 (1991).[77]

The main position put forward by the Coalition may be expressed in four parts:

(a) There was an authorization to use force against Iraq in 1990 (SCR 678 [1990]);
(b) Iraq existed under obligations contained in particular in SCR 687 (1991) by which the Security Council had indicated the terms of the ceasefire following the use of force to reverse Iraq's armed aggression against and annexation of Kuwait;
(c) under resolution 687 (1991), the use of force was available in the event of a "material breach" by Iraq of the terms of the ceasefire;
(d) implicitly, the use of force available in the event of a breach could be expanded in proportion to the gravity of the breach.[78]

In respect to each of the four parts of the Coalition position, certain points can be made.

First, there is no doubt that SCR 678 (1990) was an authorization to use force against Iraq. The circumstances in which the Security Council had adopted it may be recalled. Iraq had attempted to annihilate and assimilate a Member State of the United Nations, the only instance in the history of the Organization in which one Member had invaded and annexed in its entirety the territory of another. SCR 678 (1990) had been adopted, in short, to address a breach of the peace and act of aggression, which at the time had no precedent since the United Nations had been formed

to confront the Axis States in World War II. This authorization was not instigated by local unrest within one State. It was a response to a systemic threat.

Nor can it be doubted that, after 1990, Iraq was a State lacking the full scope of discretions that are normally concomitant of domestic jurisdiction. SCR 687 (1991) and related resolutions placed Iraq in an unusual situation. Iraq's situation was unusual, in the first place, in that it was obliged to disarm—not just in respect of nuclear weapons but also in respect of chemical and biological weapons and certain other categories of armament, and Iraq's compliance with these obligations was subject to an intrusive regime of inspections. A State is free to agree to a variety of limits on its freedom of action. In modern treaty practice all States have agreed to some limits (though questions well may be raised about treaties that purport to place such extensive limits on core areas of a State's international competence).[79] In Iraq's case, the limits were not created by agreement. The limits were the result of an exercise of Chapter VII powers by the principal security organ of international society. And the limits were exacting.

Serious questions exist as to the scope of the Security Council's powers, including the reviewability of decisions reached under those powers.[80] However, it is hard to see that much would remain of the international security architecture if the Security Council did not have the power to respond when one Member State attempts to destroy another.

As the US Permanent Representative's statement quoted above allowed, Iraq's obligations went further than disarmament obligations: the Security Council had "imposed a series of obligations on Iraq, *including*..."—that is to say, the statement was not setting out an exhaustive list. Two salient aspects of Iraq's other obligations are worth recalling. There was the express determination under Chapter VII in SCR 686 (1991) of March 2, 1991, that resolution 678 (1990) and others "continue to have full force and effect."[81] And there was resolution 688 (1991) of April 5, 1991, in which the Security Council condemned the "repression of the Iraqi civilian population in many parts of Iraq" and demanded that Iraq "as a contribution to removing the threat to international peace and security in the region, immediately end this repression."[82] To condemn the internal practices of a State was an extraordinary step. It served as notification that this State, in view of its proven intentions, would be subject not only to the usual rules governing international conduct, but also to a regime that, for certain purposes, treated its internal conduct as a Chapter VII concern.

It was with reference to resolution 688 (1991) and the considerations set out in that resolution that the United Kingdom, the United States, and France would enforce "no-fly" zones in northern and southern Iraq for over a decade.[83] The situation of Iraq—a situation in which international constraints had been placed on domestic jurisdiction—was not only embedded in the ceasefire resolution and related resolutions; it was evident in practice.[84] Critics rejected the Coalition claim that the authorization to use force continued indefinitely; and the "no-fly" zones were criticized in particular.[85] But it would have been strange for anyone to have argued that, at some point after 1991, Iraq had acquired a right to renew the repression. It does not appear that anybody did.

The main objection against the intervention in 2003 concerns the fourth point—the implicit right to use force on an expanded basis. The objection was not that such

a right could never have been called into being. It was implicit in the protests, such as that by the Russian foreign minister, that a trigger existed ("right to the automatic use of force"). The objectors' position was that the trigger belonged exclusively to the Security Council.

It is important here to be clear about what the trigger in question was for. It is sometimes said that the main objection was to the exercise of a right of appreciation on the part of the Coalition Members, in circumstances where Iraq's compliance with the ceasefire obligations was contested and the Security Council had reached no determination on the matter. The Security Council, however, had reached a determination. It had decided that "Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991)."[86] The determination was not that this had been a momentary or passing breach. The Security Council, in the same resolution (SCR 1441 (2002) of November 8, 2002), had "*deplor*[*ed*]," *inter alia,* "the absence, since December 1998, in Iraq of international monitoring, inspection, and verification, as required by relevant resolutions, of weapons of mass destruction and ballistic missiles."[87] It was not a case of auto-appreciation that Iraq was in "material breach" and had been so for a material period of time. The question, rather, was what consequences this determination had. The view of the Coalition was that it opened the way for collective enforcement action, no further determination by the Security Council being necessary before intervention began.

As at March 27, 2003, forty-nine States comprised the Coalition that intervened in Iraq.[88]

These were the circumstances in which the intervention in Iraq in 2003 took place. Taking account of the circumstances as a whole, a question arises in respect of Russia's position in 2014: what happened to change the legal position, so that an incident that Russia said in 2003 was a plain breach of international law was, by 2014, a precedent that could at least be alluded to as a basis for Russia's intervention in Ukraine?

Effects of Intervention in Iraq on the Charter Framework

Russia's position would seem to be this: intervention in Iraq changed or abrogated the legal rules that, in 2003, had governed use of force. Because Russia in 2003 had said that the intervention in Iraq was unlawful, for Russia to refer to intervention in Iraq as a support for intervention in Ukraine makes no sense as a legal argument unless this is the case.

It is certainly possible for the UN Charter to change. The Charter contains rules for amendment; its provisions have evolved in practice as well. The General Assembly has played a particular role in its evolution.[89] Russia, however, while having been clear that it believes that the Charter furnishes the complete legal regime for use of force, does not say that the Charter was amended through formal procedure; nor does Russia say that the resolutions of the General Assembly or any other UN practice brought about an evolution of the Charter.

What Russia seems to be saying is that rules that existed before intervention in Iraq ceased to operate after. But intervention in Iraq by the Coalition in 2003 was a single incident of State conduct, specific to a particular set of legal and factual

circumstances. Such an incident could not have abrogated one of the fundamental rules of the Charter. The Coalition's intervention in 2003 took place within a Security Council framework that, whatever its exact limits, certainly existed and operated in Iraq. It was a framework unique in UN practice. The Coalition explained the intervention in terms specifically relating to that framework. There is no received understanding of international law that would support the conclusion that, by that act of intervention, the field was cleared so completely that a State now is free to use force outside any legal rule. If it were the case that, as at 2003, no rules existed concerning use of force other than the rules contained in the Charter, and then the Charter rules were abrogated, then, surely, it would not have been a vacuum that resulted. The question to answer, then, is what rules would have come into force?

Two possibilities present themselves. First, it could be that the rules that existed as of 1945 on the eve of the adoption of the Charter became operative again. If that were the case, then the result certainly would not be lawlessness. A State in 1945 did not have complete discretion as to whether and when it used force against another. The Charter was adopted in a context of existing rules. Or, second, a new set of rules came into being at the point in time that the Charter rules ceased to operate, including for example new rules in respect of anticipatory self-defense.[90] In that case, too, the result would not have been that every State acquired complete discretion. The result would have been the entry into force of new rules limiting the discretion of States in a new way.[91]

The greater difficulty in the Russian position in 2003 and the Russian position in 2014 *about* the position in 2003 is not that they are formalistic (though to say that the Charter rules admit the exercise of self-defense only in case of armed-attack-in-being is a formalist's position, and one that may give rise to difficulty in practice under modern conditions). The greater difficulty is the total negation of law that follows. Russia started with the proposition that only the Charter rules apply and that they are to be applied strictly; it observed that the Coalition advanced an interpretation of the Charter rules that by no means did all other States share; and it now concludes that no rules apply. As a theory of rules in a system of law, this is nonsense.

The better view would be either (a) that the events of 2003 entailed a breach of international law and, as such, are not a precedent for future intervention; or (b) the events of 2003 are a precedent that, at the most, would allow States in similar or substantially similar circumstances to carry out a similar or substantially similar intervention. Little more needs be said about (a): if the intervention were a breach, then it would not be a precedent. As to (b), to apply the intervention as precedent, it is necessary to be clear about the characteristics of the intervention. To know if a present case is like a prior case, it is necessary to know what the prior case was.

Characterizing the Intervention

The intervention in 2003 began with the deployment of armed force by the Coalition against Iraq. The Coalition consisted of forty-nine States, led principally by the United States, the United Kingdom, Australia, Poland, the Czech Republic, and Slovakia.[92] Using armed force, the Coalition removed the Ba'ath Party government

in Iraq and established a Coalition Provisional Authority (CPA) as the effective power on the ground. The Security Council conferred a range of powers on the CPA[93] after having made clear that the old regime was no longer the government of Iraq; the Security Council in the same resolution (SCR 1483 (2003)) also made clear that the old regime's main participants were credible suspects in "crimes and atrocities."[94] A Governing Council of Iraq was organized on July 13, 2003, as the first step toward a return to self-government.[95] The CPA was the principal body of government in Iraq from April 16, 2003, until June 28, 2004,[96] at which point a new Transitional Administrative Law entered into force.[97] Iraq's new constitution was approved by referendum on October 15, 2005.[98] The first new government under the constitution assumed power in May 2006.[99]

The intervention thus had a transformative effect on the domestic legal order of Iraq. It removed a government and the mechanisms of power upon which that government had relied. It entailed the direct administration of Iraq by the States of the Coalition for over a year. And it set in train the adoption of a new constitution under which Iraq would be governed. These steps in the intervention took place in a framework of an express and contemporaneous Security Council decision.

The new situation resulting from the intervention in Iraq was a matter of active interest for States and international organizations. The Secretary-General of the United Nations said as follows:

> Whatever view each of us may take of the events of recent months, it is vital to all of us that the outcome is a stable and democratic Iraq—at peace with itself and with its neighbours, and contributing to stability in the region... [T]he United Nations system is prepared to play its full role in working for a satisfactory outcome in Iraq, and to do so as part of an international effort—an effort by the whole international community—pulling together on the basis of a sound and viable policy.[100]

Iran, among other States, associated itself expressly with the Secretary-General's statement.[101]

The process of transition to democratic self-government in Iraq drew particular interest. The Russian Federation noted that SCR 1511 (2003) of October 16, 2003, contained a "recognition of the significance of support on the part of States in the region... for that process."[102] Russia, having joined the resolution, supported the process. It already had joined SCR 1483, on May 23, 2003, which, *inter alia*, lifted sanctions against Iraq. Russia was eager to normalize the situation in post-war Iraq.[103]

"States in the region" resumed contacts with the governing organs in Iraq over time. The establishment of the Governing Council of Iraq—the first step to a new government—was "welcome[d]" by the Security Council in resolution 1500.[104] A number of States were clear that this was not an act of approval. Mexico, for example, welcomed the transitional arrangement "as a first logical step towards establishing a representative government" and added that Resolution 1500 "did not... amount to legal recognition" and "should [not] be interpreted as endorsement."[105] A State must be taken at its word, and Mexico here stated that it was neither recognizing nor endorsing the new situation. To call the situation a "logical first step," however,

was certainly not to express opprobrium. On the contrary, it was a sign of support, even if at that early date it was not an "endorsement."[106] The point that Mexico and other States were making was that they did not intend to validate, *ex post*, the initial use of force itself. Other authorities, including the Arab League, similarly acknowledged the steps toward self-government without endorsing the acts that had set the transition in train.[107] Russia, France, and Germany in their trilateral meetings in 2003–2004—a focal point where opposition to the use of force in Iraq might have taken fuller form—similarly refrained from impugning the post-war process.[108]

The position that emerged at the community level was similar. The Secretary-General of the United Nations committed the UN to "assisting the Iraqi interim administration to gradually rejoin the international community."[109] Some States went so far as to say that the international community as a whole, by summer 2003, had recognized the Governing Council;[110] none—even those like Mexico that were reserving their future dealings with the new government—declared that they were obliged to deny it recognition.[111]

A number of States stated that the intervention itself was unlawful. The reaction of Russia and other States is noted above. Many international law writers agreed.[112] To say that there is a breach of international law is to say that there is international responsibility for the breach. This is the axiom stated in *Factory at Chorzów* and entrenched in the subsequent development of international responsibility, which Chapter 5 recalled. So to say that the intervention in Iraq was unlawful thus was to say (subject to questions of attribution)[113] that the intervention attracted international responsibility to the States that carried it out. However, there has been little, if any, organized expression that the Coalition States bear international legal responsibility for the intervention as such as a wrongful act. It might be said that that result is not surprising, because there are few, if any, effective mechanisms for establishing the responsibility of those States for their conduct.[114] There certainly is, however, a mechanism, albeit one that functions largely in a decentralized way, for responding to the situation their conduct created.

Armed aggression is not an ordinary breach: it is a breach of a peremptory rule. So, if the intervention in 2003 was a breach in that sense, then the consequences that followed—the secondary obligations of responsibility—would have included not only the responsibility of the intervening States to make reparation. The consequences also would have included the further secondary obligation that comes into being in the event of a "gross or systematic" breach of a peremptory rule—that is, the obligation, opposable to all States, not to recognize the situation to which the breach gives rise. This is the case, at least assuming that the intervention was a "gross" breach or a "systematic" breach of the rule which the Coalition States are said to have transgressed. Whatever the meaning of "systematic" breach, to say that an armed intervention was aggression but then to say that it was not a "gross" breach would introduce a distinction in the peremptory rule: some breaches of the rule would be of a lesser magnitude—that is, less than "gross"—others would be of greater magnitude. Distinctions like this make international lawyers leery: they entail appreciation that does not sit comfortably in a system already struggling to limit margins of appreciation.[115] But, unless it is posited that the rules of State responsibility were suspended in respect of the situation resulting from intervention,

it appears that some appreciation was involved in how States applied the rules in connection with Iraq.

As Justice Holmes understood, "most of the distinctions of the law are distinctions of degree."[116] The classic objection to that dictum is that it does not give clear guidance in deciding future cases.[117] While the objection well may apply when the distinctions are between close cases, it is not so clearly applicable when the cases to be distinguished are at opposite extremes—or when one case is at an extreme and the other is in the middle. A case entailing no breach at all is easy to distinguish from a case of the worst breach; and a case entailing significant ambiguity is not one that can be easily judged to belong at either extreme.

By no means did States concede that the intervention in Iraq was the clear case of a lawful act. The practice shows that many concluded that it was far from lawful. Nor does subsequent practice here amount to a retroactive validation of the use of force; a number of States were clear that their acceptance of the new situation in Iraq was not to be taken as curing a prior unlawfulness. But it is hard to reconcile the position that the intervention was a gross or systematic breach of a peremptory rule of international law with the absence of an obligation to deny recognition to the new situation to which the intervention gave rise. Perhaps the practice of the Security Council following the establishment of the CPA, and of the new constitutional system in Iraq after that, suspended the operation of the special rule of responsibility embodied in Article 41. As writers have noted, the practice of the Security Council appears to have made exceptions to the ordinary rules applicable in occupied territory.[118] But the system of international responsibility and the responsibility for breaches of peremptory rules in particular are not ordinary rules. They do not derive from specific conventional undertakings, and they are not restricted to selected bilateral relations. To suspend responsibility would be to suspend a significant part of the system of international law. To say that responsibility was suspended in respect of the situation that emerged in Iraq after 2003 is not a sustainable conclusion.

This, in turn, means that, whatever else intervention in Iraq in 2003 might have been, it was not an act leading to the general obligation of non-recognition of the situation that it created. What, then, was it about the intervention that so many writers and a number of States said made it an unlawful act, but only an unlawful act as such and not also an unlawful act giving rise to a subsequent situation itself requiring a community response?

It is submitted here that the salient characteristic of the intervention was that, in its aims and in its effects, it was essentially confined to the municipal legal order of one State. International law distinguishes between acts on the international plane and acts within other legal orders. This point is central to the ICJ's *Kosovo* Advisory Opinion. National law and international law are by no means mutually uninterested; they have regard for one another in various ways. They remain, however, separate domains. A change in one legal order—even if actions taken in the other played a role in instigating the change—remains presumptively a concern of that order and not the other. It is instructive in this connection to consider more broadly the practice of intervention, where the result has been a change of regime but not a change in international status. The distinction between the domestic and the international legal orders is visible in the way States have responded to different cases of intervention.

Grounds for Scrutinizing the Forcible Change of Regime

Armed interventions in a number of instances in the UN era have resulted in the establishment of new governments with effective control over the territory of the State against which intervention took place. There was France's replacement of the government of the Central African Republic; Viet Nam's replacement of the government of Cambodia;[119] the OAS's replacement of the government of Haiti; Tanzania's replacement of the government of Uganda. Except for the Soviet Union's replacement of the government of Afghanistan, none of these situations entailed prolonged or organized non-recognition.

Any change of regime by external armed force inevitably attracts scrutiny to the State or States that effectuate it. In most of the modern examples, the scrutiny came, but in few cases did it last. Crucial here is to be clear what the object of scrutiny was. States scrutinized the act by which the regime was changed; the resultant situation—the new regime—was only in special cases challenged as unlawful for any length of time. In most cases it was not challenged at all.

In practice, once a new regime has been put in place, States have acted in a way that reflects the distinction between the domestic and international order. The act that takes place across State boundaries—the armed intervention—is subject to the full range of international law rules and attracts international responsibility if it involves a breach of an international law rule. The situation that results from the act, apart from the exceptional case, by contrast is largely free from censure.

What makes certain cases exceptional—and what attracts a long-term community response—is that the change of regime is not effectuated by one episode of intervention alone; but, rather, the regime relies upon a continuing intervention—that is to say, a continuing international act—for its survival. There are also cases where the new regime exists for the purpose of implementing an idea fundamentally at variance with the international legal order. In those cases, the existence of the regime itself—not the intervention that put it in place—results in the obligation to withhold recognition, which applies *erga omnes*.

The existence of an effective government within the boundaries of an existing State, regardless of the means by which it came to be the effective government and regardless of its policies, is not ordinarily a situation demanding the involvement of international law rules. It is a situation on the domestic law plane. The essential confinement of the process of change to that plane has much to do with the practice of States, since the 1970s, of no longer pronouncing upon changes of government. This is the case in respect of any government that has effective control over the territory of the State that it claims to govern—so long as the character of the government is not inextricably connected to the ongoing breach of a peremptory rule of international law. In view of the practice of regime change, it would seem that even a government brought into being by a breach of a peremptory rule—for example, a government established by an unlawful armed intervention—is not necessarily a situation involving the international law rules of non-recognition. The government that attracts the responsibility of States to withhold recognition is that whose continued existence, not whose inception as such, entails a breach of the peremptory rule.

It follows from these considerations that there are two ways in which the continued existence of a government entails a breach of the peremptory rule.

First, as suggested, there is the government that implements an idea fundamentally at variance with the international legal order. A slave State, an *apartheid* State, even a war State—which the Charter category of "enemy States" seems to have envisaged[120]—are situations concerning international law. The Third Reich never formally posited as a constitutional idea the prosecution of war in furtherance of territorial aggrandizement; it continued through its career instead to plead the standard claims of the aggressor. Nazi leaders nevertheless articulated something close enough to the war idea that it appeared to be emerging as a formal rule of the National Socialist "legal" order. A domestic order predicated on an idea like that is a situation that the international legal system cannot tolerate. It is at this extreme periphery of national legal systems that the usual distinction between the domestic and the international must yield. Acts within the State become acts of international concern. But safely removed from the periphery, the distinction is maintained.

Second, as further suggested, the breach of a peremptory rule is also entailed by the government whose existence depends on the continued use of force by another State in the territory it purports to govern. This seems to have been the problem with the Soviet-supported government in Afghanistan. The non-recognition of that government was not a case of the usual distinction yielding; non-recognition there was not because acts in one State became a matter of international concern. Instead, there, the government's continued existence was the result of a continuing act of inter-State force. A government like that is not confined in its existence to the normal territorial limits—that is, the boundaries of its State. Not only its coming into existence but also its preservation over time is part of an international law transaction. Such a government, for this reason, is an international law situation. It presents the unusual case where a government, as such, attracts international scrutiny.

Justifications for Changing Regime (or How to Survive Exceptions in a System of Rules)

Regime change, in Michael Reisman's words, is almost always a bad idea. Whether it is a good idea or bad idea, however, is conceptually distinct from whether it is lawful. And,

> make no mistake about it: Modern international human rights law does not principally concern itself with problems like the suitability for military service of men who wish to wear their hair long or pierce their ears. Its central concern is how to transform regimes whose essential means of governance are repressive terror and torture into governments whose methods of operation approximate human rights standards.[121]

The centrality of transformation in modern international human rights, in turn, means that sovereignty no longer operates in the traditional way. Sovereignty no longer insulates domestic jurisdiction from international law, at least not to the

degree it once did. Another way of describing this development is to say that a far larger category of situations within the territory of one State than ever before are now international law situations. This is "because the international human rights program . . . is based on the notion that, in a crunch, human beings and not states matter."[122] The result is that the "internal organization and modes of governance of each state must now meet certain prescribed international standards or, sovereignty notwithstanding, be subject to change."[123] Intervention for regime change, in its modern form, is thus not accurately understood as a reversion to old forms of sovereign power, to the Thucydian age when the strong did what they could and the weak suffered what they had to. It is better understood as an outgrowth of the human rights program that has significantly diminished the prerogative of a State to insulate its national territory against the rules of the society of States.

This gives rise to a problem. However laudable the objective of securing observance of international human rights standards, international law cannot function without clear definitions of territorial responsibility. States are territorial entities, even though statal rights can survive the forcible deprivation of territory—a feature of the law that, far from qualifying the significance of jurisdiction over territory, reflects all the more its centrality. Territorial integrity and the privileged character of boundaries form the foundation of the legal system. And so to admit the possibility of intervention threatens to destabilize the system. Intervention may be "an extraordinary remedy . . . when the formal international system cannot operate in time—or cannot operate" at all to address gross transgressions by a State within the borders of the State.[124] But to speak of remedy—even extraordinary remedy—is to speak with reference to a system of rules. For a remedy to remain a *legal* remedy—that is, for its exercise to remain subject to a system of rules—standards must exist to indicate when the remedy is available and when it is not. If it is not subject to such standards, then it is no longer properly called a remedy in a legal sense but is instead the rule of exception, under which *Souverän ist, werüber den Ausnahmezustand entscheidet*: sovereign is he who decides on the exception.[125] Such a sovereign does not coexist easily with law. So standards are necessary.

Reisman discerns in the practice with regard to regime change five criteria:

(a) the government that intervention replaced was "widely condemned as pathological," even if its pathologies were confined to the State it governed;
(b) the intervening State did not "plan to use the change of government it was effecting as a means of permanently increasing its influence within that state and its region";
(c) it was feasible to effect the change;
(d) the change could be effected in a reasonable amount of time;
(e) the change, over the long term, was likely to have net beneficial effects on public order within the jurisdiction of the State.[126]

These criteria do not exist *in abstracto*. They are applied by the international community—meaning "the broadest range of official and unofficial international and national decision makers."[127] Accountability for intervention is real, even though accountability operates more often in a diffuse than a centralized way.

And the criteria themselves have emerged through practice, not through a centralized legislative process. The practice is thus the evidence from which the standard must be established.

In the range of cases of regime change, few were judged unlawful. Few, if any, were treated as gross or systematic breaches of a peremptory norm, such as would have required non-recognition of the resultant new regime. This, at first, would suggest that the practice furnishes no useful evidence of the limits. As the law is applied, however, it is not necessary at every step of the way to identify a complete system. It is necessary to apply the rules in respect of the cases that present themselves. Where the rules as identified to date are too vague to address a given case, then it is in relation to *that* case that we are called upon further to specify the rules.

This is so particularly with regard to applying exceptions. A municipal court in a famous case found an exception to the wills statute: to have enforced the statutory rule would have given a murderer an inheritance from his victim, and so the court refused to give effect to the testamentary disposition.[128] The dissenting judge, alarmed by the application of an exception to a clear statutory rule, objected that "the very provision defining the modes of alteration and revocation [of wills] implies a prohibition of alteration or revocation in any other way."[129] The dissenting judge well may have been justified in deploring the application of an exception in that case. The wills statute had been clear and absolute. Now, where does the exception end? No serious critic, however, would say that the ambiguity as to the ultimate limits of the exception means that a gang of armed men may storm the court of probate and, declaring themselves to be the will's sole beneficiaries, seize the estate. A legal system need neither eschew exceptions nor articulate a complete code of exceptions in every case. The custodians of many a legal system have kept the system intact without doing either. This is how a system of rules survives the exceptions that its constituents at times will plead.

The system also sets down imprescriptible rules—rules subject to no exception. Intervention to change a regime in almost no instance resulted in a change in existing boundaries. The possible exceptions were India's intervention in Bangladesh, and NATO's intervention in Kosovo.[130] Kosovo has already been considered earlier in the chapter. It involved a considerable lapse of time between intervention and the introduction of the new boundary. It involved considerable developments over that time in the national legal order. It involved extreme circumstances in which the inhabitants of the seceding territory could not have resumed cohabitation with the existing State; international institutions had clearly determined what those circumstances were and who was responsible for them. Bangladesh had its own particularities, not least of all a catastrophic humanitarian breakdown. The attempted suppression of independence, before intervention began, has been estimated to have cost three million lives.[131] The law certainly does not operate in this area on the basis of simple arithmetic, but it nevertheless may be noted that the people estimated to have died in Bangladesh outnumber the entire population of the Crimean peninsula. The crisis in Bangladesh also had drawn United Nations attention, the Secretary-General having concluded the month before India's intervention that the situation posed "a potential threat to international peace and security."[132] In any event, the incumbent State, Pakistan, after a relatively brief lapse of time, accepted the change of territorial status.[133]

In none of the modern cases that resulted in new boundaries was intervention the only cause, or even the main cause, of change in the legal order of the State. The changes had begun to take shape within the existing order independently of intervention; and the changes were completed by domestic actors. The end result—the new boundary—was a manifestation of processes of revision rooted deeply in one legal order. In no modern intervention did the intervention or ensuing developments lead to the territorial aggrandizement of the intervening State.

A State may exercise influence in many ways. Certain forms of influence are in constant operation. A State with a large economy can hardly prevent itself from influencing others. The question might therefore be asked whether Reisman's second rule—the rule against intervening to install permanent influence—can ever serve to define a clear limit. What is clear is this: international law requires the application of the principle of good faith in many situations. The application of the principle is subject to appreciation when it comes to close cases. International law nevertheless depends upon it. It is embodied in adopted instruments[134] and it belongs to customary international law as well.[135] It would be hard to imagine the legal system functioning without it. So, as with the principle of good faith in general, it may be disputed in close cases whether an armed intervention is an act in good faith, an act that the State or States performing it believe to serve a public order interest. But not all cases are close. An intervention that a State explicitly avows is for the purpose of increasing its influence and for which the State adduces no more convincing explanation is unlawful.

The "end of geography" notwithstanding, acquiring territory is incontrovertibly a means for a State to increase its influence in that territory. To be clear, this is not to say that an act of territorial acquisition by force is assured to increase the State's overall wellbeing, or even to increase its power and influence overall. There are many measures of a State's power—hard, soft, and variations in between; the manifold dimensions have been considered many times over. Lost in the diversity of the manifestations of State power, however, is a simple and enduring reality: power over place remains the most immediate and most potent manifestation of the State, and, whatever qualifications to that reality now operate, they do little to dull the impact of an aggressive State on the persons in the territory it occupies. Assimilating a territory into national jurisdiction was and remains the most significant mechanism for the exercise of State power in respect of a given place. Altruism is not a convincing plea when an extraordinary extension of power into the domestic domain of a State results in a transfer of territory to the benefit of the self-described altruist. A unilateral intervention resulting in the territorial aggrandizement of the intervening State under a system that places limits on intervention is *per se* a breach of international law.

Turkey had concerns about the territorial integrity of Iraq; Turkey's concerns related to the Kurds, and so Turkey made clear its "strong support of a united territorially intact . . . Iraq"—a variation, evidently deliberate, on the usual formula assuring "territorial integrity and political independence."[136] Turkey was concerned that, following intervention, the transition to self-government in Iraq might lead to the creation of a new national constitutional order in one part of the territory and then its separation from the whole. Turkey's concern had nothing to do with Coalition

States seizing territory. Nobody thought that the Coalition in 2003 intended to annex Iraq, or any part of Iraq.

International law cannot permit regime change or any other form of coercive intervention where the purpose is to expand the territorial jurisdiction of the intervening State. This accords with the practice in respect of regime change and intervention. Several States have effected a change in the regimes of other States through armed intervention. None in the modern era has done so with the purpose of seizing territory.

As noted, the principle of good faith is one ground for this approach. A further ground is that regime change, while an exception to national jurisdiction, must remain an exception with limits. The obvious limit is to keep its effects within the existing boundary. The transaction resulting in regime change is a transaction subject to international law (even if it is not necessarily in accord with international law)—that is, a State or States have effected the change by crossing the boundary into another State. The new situation that regime change brings about, by contrast, is a situation within one State. It is not a situation that, once accomplished, necessarily entails international law effects. True, a change of regime resulting in an ongoing breach of a peremptory rule is an international law situation. The forcible installation of a genocidal regime presents perhaps the most extreme example; but the genocidal regime is an international law situation in any case, and it is a special case. There have been very few regimes like that, and few, if any, have resulted from intervention. Iraq's new regime—as reflected in the international response to it—certainly was not such a situation.

Where the intervening State forcibly annexes territory from the State whose regime it has changed, however, the situation is international. Not only is the initial act subject to international law, so too is the situation that results from it. A boundary between States is an international law situation, regardless of how it comes about. Where it is force alone that purports to have established a new boundary, then international law rejects the claim.

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Conclusion

A response is emerging to aggression against Ukraine. The State practice and the positions taken by multilateral organizations since early 2014 were considered in Chapter 3. Lawyers and their organizations have joined the response as well. The International Bar Association, for example, in March 2014 associated itself with Malcolm Shaw's conclusion that Russia has committed an "act of aggression under international law and under the UN definition of aggression."[1] The IBA president said, "Russia, like its fellow Permanent Members of the Security Council, has a special role and degree of responsibility in maintaining [the] system of international stability."[2] Aurel Sari, after some analysis, reached the same conclusion: Russia's conduct in Ukraine constitutes an act of aggression within the meaning of GAR 3314 (XXIX) of December 14, 1974.[3] Other writers similarly have voiced the clear position.

No argument adduced to excuse aggression should be left unanswered. States, nongovernmental organizations, and writers are taking up the burden. From arguments about the self-determination of oppressed peoples[4] to arguments about the protection of citizens abroad,[5] Russia's legal position does not withstand scrutiny. The present work, in Chapter 1, considered Russia's main argument—the argument that the annexation of Crimea was an exercise of self-determination. Chapter 2 considered the subsidiary arguments.

It has been a further purpose here to take to task the idea that intervention in the post–Cold War era set a precedent favoring the acts of aggression that Russia committed against Ukraine in 2014. Discerning when a precedent has been established and applying it to future cases is at the heart of the lawyer's task. Chapter 8 considered the interventions in Iraq and Kosovo and rejected the view that these opened the door for intervention in Ukraine.

It is to be asked whether Russia itself, though its position is steeped in history, arrived at the decision to annex Ukrainian territory with the proper perspective on history's turns and reversals. Annexation brings to Russia, the largest territory in the world, relatively little. It has already drawn international opprobrium. It well may prove to be a long-term irritant for Russia's foreign relations. An international claims practice already appears to be emerging. Chapter 3 considered the particular legal consequences that arise from the obligation not to recognize the unlawful annexation.

There may be more serious consequences still. If Russia's annexations are based on historical argument, and if States accept the annexations, then at least implicitly they will be accepting the argument. This means, in turn, that historical argument comes that much closer to being entrenched as part of general legal method—that is to say, legal method applicable not just as between Russia and Ukraine but as a tool available in other cases. It would be naïve to assume that Russia's conduct in Ukraine will have no such normative effect. The leading scholar of Russia's post-Soviet practice in international law rightly observed that "justifications for interventions are primary indicators for normative change and the emergence of norms around such interventions."[6] In short, these are interventions containing messages for the system as a whole over time. They are not isolated episodes. Historical justifications for intervention in Ukraine indicate a potential shift in the system.

The problem with territorial revision when it is done with reference to history is that more than one State has a history. China in this regard is a salient example. China's response to the annexation of Crimea was considered in Chapter 3.[7] It was a curious response. It was hardly in keeping with China's usual position on questions of international status. China hardly endorsed the annexation, but nor did China object. Russia has no more powerful neighbor than China. China has an abundance of historical claims. China's "unequal treaties" are well known for the exorbitant preferences that they conferred on foreign consuls in China.[8] The extraterritorial powers enjoyed by European States under the treaties—the so-called capitulations—were indeed the main target of the Republic of China's well-reasoned objection to the treaties in the 1920s.[9]

The age of capitulations is long past, but not every mark made by Europe on China has disappeared. The European powers in the age of imperialism did not restrict themselves to asserting extraterritorial rights in China. They also seized territory outright. The term "Outer Manchuria" may not be frequently used by modern Russians. "Khabarovsk," "Primorsky," and "Amur" are better known. These are constituent units of Russia's Far East. The place (however denoted) was assigned to Russia from China under two of the unequal treaties.[10] Historical argument as a basis for the reclamation of one territory well may give strength to historical argument in respect of others. To loosen the restraints that the modern law places on territorial claims because one wishes to pursue a claim of one's own will not be the end of the history of claims. It will loosen the restraints on other claims and by other claimants.

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At the Annual Meeting of the American Society of International Law the year following Operation Iraqi Freedom, James Crawford, then Whewell Professor of International Law, warned against replacing judgments of lawfulness with judgments of legitimacy. Among other defects, legitimacy as a measure of conduct relies on moral assessments of action that we can perform only *post hoc*.[11] Crawford concluded by suggesting that "we use the instruments at our disposal, the treaty-making system, the canons of interpretation, the modalities of dispute settlement, the hermeneutics of qualified consent, in all the particular instances that face us in our professional lives."[12]

The crisis that has erupted in Ukraine is not a crisis for international law, except to the extent that international lawyers make it out to be. They may declare it to be a crisis in terms; they may imply it to be by the judgments they proffer about these events and the course of international relations since 1989. But the events remain subject to law, and the instruments of law remain at our disposal to address them. No more basic instrument of law exists than that by which the lawyer calls for like cases to be treated alike; and—on its other edge—by which the lawyer rejects false analogy.

It is an obligation of States under international law not to recognize the situation arising out of the internationally wrongful acts of the Russian Federation in Ukraine. The wrongfulness of the purported annexation of Crimea and the unlawfulness of the situation arising out of that unilateral act are clear. The situation generates legal effects. In particular, it generates a new legal obligation, opposable against all States, not to recognize the purported annexation. The use of armed force to give cover to putative independent entities in eastern Ukraine is no less a breach; it entails no less a community response.

The practice of multilateral institutions to date reflects an emergent consensus among States as to the scope and character of the response that the community is obliged to adopt. States individually, too, have taken a clear position that the forcible separation of territory from one State by another requires non-recognition. States, both individually and through multilateral institutions, have implemented, or are in the process of implementing, a range of measures, including political, economic, and financial measures, in response to the unlawful situation. These measures are in accordance with the obligation of non-recognition.

Neither the acts of aggression that led to annexations and separations nor the resultant situation would be ameliorated, or the international obligation of non-recognition suspended, by the judgment that other States in the recent past have committed similar breaches. International law contains no principle that allows a modification of peremptory obligations where no evidence exists that a new rule of similar character has emerged. The question of similar recent breaches, in any case, does not arise. The era of the United Nations Charter furnishes only one directly analogous example; and that case—the invasion and purported annexation of Kuwait—provoked effectively universal condemnation and an organized campaign of collective defense.

The proposition inherent in Russia's conduct in 2014 is that a State may use force to vindicate its historicist claims. This is a proposition that would impute from a mélange of past and present boundaries, politics and cultural affinities a right to take territory by unilateral act. In the system of rules that regulates the conduct of States, responsibility for territory forms the foundation. A proposition that invites a State to take territory by force throws that responsibility into doubt. A proposition that invites the reopening of the history books at a time of one State's choosing to any page of the State's choosing is inimical to orderly claims. It is a proposition under which international law would cease to function. States and international lawyers for this reason must reject it.

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Notes

Introduction

1. The expression, which seems to have appeared first in the early 1960s, began to widen in use in the late 1970s and early 1980s. See, for example, Greenwood Onuf (1979); Weston, Falk & D'Amato (1980). It became a major theme in international law writing in the 1990s and early 2000s. See references in Koskenniemi, *ILC Study Group Report* (2006), p. 10 n. 10, p. 11 n. 11. Cf. Baillieu (1943) 163, 165: "If the closely intermeshed world community is not to perish in destructive civil war it must have governance."
2. For references to the literature and synthesis, see Koskenniemi (2011); Bartelson (2006); Jackson (2003). See also Verdirame (2013) 49 *Stan. J. Int'l L.* 371, 377, 409–19; Besson, MPEPIL, para. 1.
3. Shaw (1996) 67 *BYIL* 75.
4. Zacher (2001) 55 *IO* 515, 223–224, Ratner (2006) 100 *AJIL* 808, 811.
5. For example, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, *ICJ Rep.* 1996 p. 226.
6. The exceptions are well known, the *Nicaragua* and *Oil Platforms* cases addressing two of the main examples (the latter of which will be addressed in Chapter 6). The Eritrea-Ethiopia and Iran-Iraq conflicts were the two most serious exceptions, though even there limited to local or regional effects.
7. It might be asked whether China's return to Tibet in the 1950s constituted a prior case of P5 aggression for territorial aims. As noted in the Preface, however, the status of Tibet was either unsettled (it was not widely understood to constitute a State in the full international law sense) or it was understood (as for example by Britain and Russia) to be a territory in a special relationship with China. In either case, the forcible acts of China in Tibet did not overturn a determined international boundary. It may also be recalled that the Chinese government that entered Tibet in the 1950s did not yet act for China at the UN (though its acts are to be seen as acts of one Chinese State for purposes of international responsibility). For analysis with references to treaty practice and General Assembly activity, see Crawford (2006) 324–325.
8. The view that intervention in Kosovo set the stage for intervention in the territory of Ukraine is widespread. For reference to some of the main exponents and a vigorous response, see Peters, Apr. 22, 2014 (noting in particular Nico Krisch, Christian Marxsen, Marcelo Kohen, and Bruno Simma). See also Goldsmith, Mar. 17, 2014. Equivalence between intervention in Iraq in 2003 and in Ukraine in 2014 also has been posited, though more implicitly. Among the more serious legal writers positing that

equation, see Kahn, May 9, 2014. For references to others and rebuttal, see Gregory, *Forbes*, Mar. 13, 2014.

9. Richard McGregor, "Zhou's Cryptic Caution Lost in Translation," *Financial Times,* June 10, 2011.
10. Letter dated 2 May 2014, from the High Representative for Bosnia and Herzegovina addressed to the Secretary-General, pursuant to SCR 1031 (1995), Dec. 15, 1995, transmitting Forty-Fifth report of the High Representative for Bosnia and Herzegovina (Oct. 21, 2013 to Apr. 21, 2014), p. 9, para. 21 and n. 7, quoting president of Republika Srpska, Milorad Dodik, *Voice of Bosnia*, Mar. 10, 2014.
11. See chairman's statement, 24th ASEAN Summit, Nay Pyi Taw, Burma, May 11, 2014, p. 17, para. 64. Western media thought the statement weak; experts on ASEAN noted that it reflected a "tightening of ASEAN's position": http://www.thenational.ae/world/southeast-asia/asean-leaders-express-serious-concern-over-escalating-disputes-in-south-china-sea.
12. As to the potential collapse of Syria, see Henriksen, Aug. 13, 2013.
13. See Wood, March 2015.
14. Keck, June 19, 2014.
15. See also Joint Press Point, NATO Secretary General-Prime Minister of Poland, May 8, 2014.
16. See, for example, Smith, Apr. 22, 2014.
17. Schenkkan, Aug. 30, 2014.
18. See Lillis, Sept. 3, 2014.
19. Radio Free Europe/Radio Liberty, "Under New Belarus Law, 'Little Green Men' Would Mean War," January 26, 2015. The new law was reported as entering into force on February 1, 2015.
20. OSCE Parliamentary Assembly, Baku Declaration, AS(14)DE, June 28 to July 2, 2014, para. 6; PACE res. 1990 (2014), Apr. 10, 2014, para. 12; Declaration of Heads of State and Government, North Atlantic Council, Wales, Sept. 4–5, 2014, para. 30.
21. Mezzofiore, Oct. 2014.
22. Note verbale dated Sept. 26, 2014 from the Permanent Mission of the Republic of Estonia to the United Nations Office and other international organizations in Geneva, addressed to the president of the Human Rights Council, A/HRC/27/G/8.
23. See *Oxford English Dictionary*, n., definition 1(a). Cf. Dainow (1966–7) 15 *American J. Comparative L.* 419, 425.
24. Llewellyn in Seligman (ed.) (1930) vol. III, 249, 251.

Part I Aggression against Ukraine

1. See the historical survey, Spiropoulos, Second Report, Apr. 12, 1951: ILC Ybk 1951 vol. II, pp. 61–66, paras. 136–144.
2. Ibid., p. 66, paras. 147–148.
3. See ILC Ybk 1951, vol. II, p. 58.
4. GAR 599 (VI), Jan. 31, 1952.
5. GAR 3314 (XXIX), Annex, Dec. 14, 1974. About which see Broms (1977) 154(I) *RdC* 348; Stone (1977) 72 *AJIL* 224; Ferencz (1974) 10 *J. Int'l L. & Econ.* 701.
6. GAR 688 (VII), Dec. 20, 1952. For the procedural history, see http://legal.un.org/avl/ha/da/da.html.
7. Apr. 12, 1974: A/9619 and Corr.1.
8. GAR 177(II), Nov. 21, 1947.
9. ILC Report, Third Session, A/1858: ILC YBk. 1951, vol. II, p. 134, para. 52*(b)*.

10. Mr. Hu Bin (China), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, 1st mtg., June 16, 1998, A/CONF.183/C.1/SR.1: II *Official Records* 133, para. 36.
11. Cf. the "emancipation of crimes against humanity from its Nuremberg connection": Kreß in Cassese (ed.) (2009) 143, 146–148.
12. Tribunal Charter, Art. 6, London Agreement (USA, France, UK, USSR), Annex, Aug. 8, 1945.
13. Charter and Judgment of the Nürnberg Tribunal—History and Analysis, Memorandum submitted by the Secretary-General: A/CN.4/5, 47–49.
14. Ibid., 48.
15. See, for example, ILC 17th mtg., May 9, 1949, Mr. Cordova: ILC Ybk 1949 vol. I, p. 134, para. 52; Mr. Arangio-Ruiz, ILC 2329th mtg, May 3, 1994: ILC Ybk 1994 vol. I p. 5, para. 37. Cf. use of the expression "aggressive acts" to describe Iraq's conduct toward Kuwait in 1990: Mr. Bennouna, ILC 2342nd mtg., May 24, 1994, ILC Ybk 1994 vol. I, p. 92, para. 12; and "other aggressive acts" to allege a breach by Albania against Yugoslavia: Note verbale of Oct. 3, 1998, A/C.6/53/7, p. 2.
16. Report by the Spec. Rapp. (Spiropoulos), Apr. 26, 1950: ILC Ybk 1950, vol. II, p. 262, para. 60.
17. Quoted in Report of Robert H. Jackson, US Representative to the International Conference on Military Trials, London, 1945 (Washington, DC: Department of State, 1949), 328.
18. See Wilmshurst (2013).
19. Mr. Westdickenberg (Germany), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, 6th mtg., June 18, 1998, A/CONF.183/C.1/SR.6: II *Official Records* p. 171, para. 20.
20. Mr. van der Wind (Netherlands), ibid., p. 171, para. 17.
21. See, for example, Mr. Nyasulu (Malawi), ibid., p. 172, para. 31; Mr. Dive (Belgium), ibid., p. 174, para. 64; Mr. Shahen (Libyan Arab Jamahiriya), Committee of the Whole, 28th mtg., July 8, 1998, A CONF.183/C.1/SR.28: II *Official Records* 293, para. 102.
22. Fitzmaurice (1952) 1 *ICLQ* 137, 140.
23. ICC Statute, Art. 8 *bis,* as adopted by res. RC/Res. 6, June 11, 2010.
24. As to subsequent developments in the field of criminal responsibility, see Böttner (2013) 51 *AdV* 201; Kreß & Webb (2012) 10 *J. Int'l Criminal Justice* 3; Kreß & von Holtzendorff (2010) 8 *J. Int'l Criminal Justice* 1179 (and also works cited in ibid., p. 1187 n. 30); Stahn (2010) 23 *Leiden JIL* 875; (2002) 96 *ASIL Proc.* 181; Wilmshurst in Cryer, Friman, Robinson & Wilmshurst (eds.) (2010) 3. See also Andreas Zimmermann, "Does 19+11 Equal 30? The Nitty Gritty of the Law of Treaties and the Kampala Amendment to the Rome Statute on the Crime of Aggression," *EJIL Talk!* Nov. 27, 2014 (regarding the calculation of the number of ratifications for purposes of entry into force).
25. *Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion, July 9, 2004, ICJ Rep. 2004 p. 136. As to the hesitancy of the Court to spell the connection out completely, see O'Keefe (2004) 1 *RBdDI* 92, 134–135.

1 "Glory and Outstanding Valor": The Seizure of Crimea

1. Federal Constitutional Law, *On Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation the New Constituent Entities of the Republic of Crimea and the City of Federal Importance Sevastopol*, Mar. 21, 2014: http://en.kremlin.ru/events/president/news/20625.
2. The Black Sea Fleet agreements are addressed in Chapter 2, pp. 44–47.

3. Address of the president of the Russian Federation, Mar. 19, 2014: http://eng.kremlin.ru/transcripts/6889.
4. The Russian-organized referendum of Mar. 16, 2014. in Crimea is addressed further in Chapter 1, pp. 16–19, pp. 22–24, pp. 29–33 and in Chapter 3, pp. 64–89.
5. Self-determination in Crimea is addressed further in Chapter 1, pp. 23–44.
6. Russia's affirmation of Ukraine's borders existing at the time of independence is addressed in Chapter 4.
7. See Chapter 4.
8. In contrast, the referendum of September 18, 2014, on the status of Scotland followed extended consultations between the local (Scottish) government and the national (Westminster) government, and authority to hold the referendum was embodied in an adopted text and in both local and national parliamentary acts. See Agreement on a Referendum on Independence for Scotland, Oct. 15, 2012, and associated Order in Council amending section 30 of the Scotland Act 1998; and Scottish Independence Referendum Act (2013 asp 14), Dec. 17, 2013.
9. Letter dated 15 March 2014, from the Permanent Representative of Ukraine to the United Nations addressed to the president of the Security Council, S/2014/193, p. 1.
10. Id.
11. Ibid., p. 2.
12. Opinion on "Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles," adopted, 98th plen. sess., Venice Commission, Mar. 21–22, 2014 (Paczolay, Hon. Pres.; Suchocka, Tanchev, Tuori, Members): CDL-AD(2014)002, p. 4, para. 15.
13. Statement of Mar. 11, 2014, by Didier Burkhalter, OSCE Chairperson-in-Office for 2014: http://www.osce.org/cio/116313.
14. Venice Commission report, p. 4, para. 17.
15. *Voice of Russia,* Mar. 17, 2014: http://voiceofrussia.com/2014_03_17/With-100-of-ballots-counted-96–77-of-Crimeans-who-came-to-polls-on-Sunday-voted-to-re-united-with-Russia-Crimean-election-chief-1708/.
16. Ilya Somin, "Russian government agency reveals fraudulent nature of the Crimean referendum results," May 6, 2014: http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/06/russian-government-agency-reveals-fraudulent-nature-of-the-crimean-referendum-results/, referring to an earlier article by Gregory in *Forbes* reporting on the Russian Federation Presidential Council on Civil Society and Human Rights report on the referendum: Gregory, "Putin's 'Human Rights Council' Accidentally Posts Real Crimean Election Results," *Forbes,* May 5, 2014: http://www.forbes.com/sites/paulroderickgregory/2014/05/05/putins-human-rights-council-accidentally-posts-real-crimean-election-results-only-15-voted-for-annexation/. For comparison, the verified results of the referendum on Sept. 18, 2014 in Scotland showed a turnout of 84.6 percent: http://scotlandreferendum.info/.
17. http://dif.org.ua/en/events/ukrainieyu-ne-hochut.htm.
18. Mr. Deschchytsia (Ukraine), General Assembly, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, pp. 2–3.
19. Petro Poroshenko upon inauguration as president, June 7, 2014: http://www.voanews.com/content/ukraines-poroshenko-to-be-sworn-in-as-east-seethes-with-separatist-conflict/1931679.html.
20. See Badinter Commission Opinion No. 8, July 4, 1992: 92 ILR 202. About which see Pellet et al. (2009), 588–589.

21. *Accordance with international law of the unilateral declaration of independence in respect of Kosovo,* Advisory Opinion, July 22, 2010, ICJ Rep. 2010 p. 403, 425–426, para. 56; 436, para. 79.
22. Executive Order, *On Recognising the Republic of Crimea,* Mar. 17, 2014: http://eng.kremlin.ru/acts/6884.
23. Id.
24. Constitution of the Russian Federation, 1993 (rev. 2008), Art. 5, para. 2; Art. 66, para. 2; Art. 137, para. 2.
25. Constitution of Ukraine, 1996 (rev. 2004), Arts. 181, 133, 140.
26. http://eng.kremlin.ru/acts/6885.
27. http://eng.kremlin.ru/acts/6888.
28. For the Russian language text, see http://www.kremlin.ru/news/20605 For an English language translation, see https://www.academia.edu/6481091/A_treaty_on_accession_of_the_Republic_of_Crimea_and_Sebastopol_to_the_Russian_Federation._Unofficial_English_translation_with_little_commentary.
29. http://eng.kremlin.ru/acts/6903.
30. http://eng.kremlin.ru/acts/6902.
31. In accordance with Executive Order, *On Holding a Celebratory Gun Salute in Moscow, Simferopol and Sevastopol,* Mar. 21, 2014: http://eng.kremlin.ru/acts/6913.
32. Request, Mar. 18, 2014: http://eng.kremlin.ru/acts/6906.
33. Id.
34. http://www.ksrf.ru/en/Decision/Judgments/Documents/Resume19032014.pdf.
35. See VCLT, Art. 2(1)*(a)* and Art. 3*(c)*: 1155 UNTS 331, 333, 334.
36. See Grant in Hollis (ed.) (2012) 125–148; Pellet et al. (2009) 208–211.
37. Instructions to ministries and agencies following Crimea and Sevastopol's entry into the Russian Federation, Mar. 23, 2014: http://eng.kremlin.ru/acts/6916.
38. Executive Order, *On the Ministry of Crimean Affairs*, Mar. 31, 2014: http://eng.kremlin.ru/acts/6945.
39. Executive Order, *On Raising Wages for Public Sector Employees and State and Municipal Employees in the Republic of Crimea and City of Sevastopol,* Mar. 31, 2014: http://eng.kremlin.ru/acts/6944.
40. Executive Order, *On State Support Measures for Pensioners in the Republic of Crimea and City of Sevastopol*, Mar. 31, 2014: http://eng.kremlin.ru/acts/6943.
41. Executive Order, *On Measures for Ensuring Social Guarantees for Particular Categories of People Serving in the Republic of Crimea and City of Sevastopol*, Mar. 31, 2014: http://eng.kremlin.ru/acts/6941.
42. Federal Law, *On Protection of Interests of Retail Depositors at Banks and the Economically Autonomous Structural Subdivisions Registered in and/or Operating on the Territory of the Republic of Crimea or the Territory of the City of Federal Importance of Sevastopol*, Apr. 2, 2014: http://eng.kremlin.ru/acts/6966.
43. Federal Law, *On Special Operation of the Financial System in the Republic of Crimea and City of Federal Importance Sevastopol during the Transition Period*, Apr. 2, 2014: http://eng.kremlin.ru/acts/6956.
44. Executive Order, *On Acting Governor of the City of Sevastopol*, Apr. 14, 2014: http://eng.kremlin.ru/acts/7024.
45. Executive Order, *On the Acting Head of the Republic of Crimea*, Apr. 14, 2014: http://eng.kremlin.ru/acts/7018.
46. *Cook* v. *Sprigg* (1899) A.C. 572.
47. *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, Feb. 4, 1932, PCIJ Ser. A/B/, No. 44, p. 4, 24.

48. This book refers in places to the ILC. The adopted texts of the ILC are not to be equated to treaties; ILC work product, including draft articles, is not automatically adopted at inter-State level. The Commission acts as a body of legal experts under the authority of the General Assembly, which in implementation of UN Charter Art. 13(1) adopted the ILC's Statute by GAR 174(II) of Nov. 21, 1947. The reception given to the ILC's work varies from one ILC topic to another. The reception given to the ILC's work on State responsibility—in particular to the ILC's adopted Articles on State Responsibility (ARSIWA)—has been strong. See GAR 56/83, Dec. 12, 2001; GAR 59/35, Dec. 2, 2004. States by and large have viewed the Articles as useful. To give examples from a larger practice, the United States has indicated that they have had "tremendous influence and importance" and "have proven to be a useful guide both on what the law is and on how the law might be progressively developed": (2010) *Digest of U.S. Practice in International Law* 337, 338. Germany has indicated that the Articles "were legally binding statements of customary international law": Sixth (Legal) Committee (summary notes): GA/L/3395, Oct. 18, 2010. For an exhaustive account of the dispute settlement practice, see Olleson (2015, forthcoming).

    The wide following the Articles have obtained would seem to validate the preference of a majority of States that have expressed a view (and the preference of the final Special Rapporteur)—that is, not to seek adoption of a convention on State responsibility but, rather, to allow States to become familiar with the Articles and for their status to crystallize through reliance on them by judicial and arbitral organs over time. See Crawford & Olleson (2005) 54 *ICLQ* 959, 960.
49. See Frowein (1992) 86 *AJIL* 152, 154; (1991) 51 *ZaöRV* 333, 336–337.
50. For other examples, see *Reference re Secession of Quebec*, [1998] 2 SCR 217, Aug. 20, 1998, Supreme Court (Canada), paras. 114–121. Ukraine signed the ICCPR and ICESCR on Mar. 20, 1968, and ratified it on Nov. 12, 1973. The USSR signed on Mar. 18, 1968, and ratified it on Oct. 16, 1973.
51. Palau, the last Trust Territory, achieved its final status in 1994, and the Trusteeship System since then has not been involved with the emergence of new States.
52. GAR 1514 (XV), Dec. 14, 1960, para. 1.
53. GAR 1541 (XV), Dec. 15, 1960, Annex, Principle VI. Cf. GAR 2625 (XXV), Oct. 24, 1970 (Friendly Relations Declaration), Annex.
54. GAR 1541 (XV), Annex, Principle I.
55. *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, July 22, 2010, ICJ Rep. 2010 p. 403, 436, para. 79.
56. ICJ Rep. 2010 p. 403, 425, para. 54, quoting *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, July 20, 1962, ICJ Rep. 1962 p. 151, 157.
57. *Quebec reference*, para. 110.
58. The main cases are the Federated States of Micronesia, Palau, the Marshall Islands, the Cook Islands and Niue. See Igarashi (2002).
59. GAR 1541 (XV), Principle VII, para. *(a)*.
60. Ibid., Principle IX.
61. GAR 1350 (XIII) (The Future of the Trust Territory of the Cameroons under United Kingdom Administration), Mar. 13, 1959, paras. 2, 6–7; GAR 1473 (XIV) (The Future of the Trust Territory of the Cameroons under United Kingdom Administration: Organization of a Further Plebiscite in the Northern Part of the Territory), Dec. 12, 1959, para. 3. For the Report of the Plebiscite Commissioner, see A/4727, transmitted by Trusteeship Council res. 2101(S-XI), Apr. 10, 1961. See also GAR 1608 (XV), Apr. 21,

1961; *Northern Cameroons (Cameroon* v. *United Kingdom)*, Preliminary Objections, Dec. 2, 1963, ICJ Rep. 1963 p. 15, 32.

62. GAR 2504 (XXIV), Nov. 19, 1969. As to which, see Musgrave in Chinkin & Baetens (eds.) (2014) 209.
63. GAR 54/194 (Question of East Timor), Dec. 17, 1999.
64. Among the more detailed recent treatments, see Summers (2014), 517–522; Dugard (2011) 357 *RdC* 73, 112–121.
65. Speech of Mar. 18, 2014, before State Duma et al., transmitted by Letter dated 19 March 2014, from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General: A/68/803—S/2014/202, p. 5.
66. See, for example, Mullerson (1993) 42 *ICLQ* 473.
67. See, for example, Crawford (2006), 119–128; Buchanan (2004), 271. Cf. Radan in Pavković & Radan (eds.) (2011) 321, 330.
68. See, for example, Written Statement of the United Kingdom, Apr. 17, 2009, p. 92, paras. 5.30–5.32; Written Comments of the United Kingdom, July 17, 2009, pp. 5–6, para. 10.
69. See, for example, Written Statement of Albania, Apr. 14, 2009, pp. 40–44, paras. 75–85; Written Statement of Denmark, Apr. 17, 2009, pp. 12–13; Written Statement of Estonia, Apr. 13, 2009, pp. 4–12; Written Statement of Germany, Apr. 15, 2009, pp. 32–37; Written Statement of Finland, Apr. 16, 2009, pp. 3–10, paras. 5–18; Written Statement of Ireland, Apr. 17, 2009, pp. 8–12, paras. 27–34; Written Statement of Latvia, Apr. 17, 2009, pp. 1–2; Written Statement of Poland, Apr. 19, 2009, pp. 24–29, paras. 6.1–6.16; Written Statement of Slovenia, Apr. 17, 2009, pp. 1–2; Written Statement of Switzerland, May 25, 2009, pp. 14–26, paras. 57–97.
70. Written Statement of the Kingdom of the Netherlands, Apr. 17, 2009, p. 8, para. 3.6.
71. Ibid., p. 9, para. 3.9.
72. Ibid., para. 3.10.
73. Written Statement of Albania, Apr. 14, 2009, p. 42, para. 79.
74. Written Statement of Denmark, Apr. 17, 2009, p. 6.
75. For an extended examination, see Haljan (2014) 124–193.
76. It follows that the proper emphasis for a group seeking to vindicate its right to self-determination is on remedy in the existing national system, a conclusion shared, for example, by Klabbers (2006) 28 *Human Rights Q'ly* 186, 190–199.
77. Written Statement of the Kingdom of the Netherlands, Apr. 17, 2009, para. 3.11.
78. Written Statement of Poland, Apr. 19, 2009, p. 26, para. 6.7.
79. *Quebec reference*, para. 138.
80. Ibid., para. 112.
81. Ibid., para. 135.
82. *Kosovo* advisory proceedings, Written Statement of Switzerland, May 25, 2009, p. 14, para. 58.
83. *Quebec reference*, paras. 76, 89–91.
84. Ibid., para. 143.
85. GAR 61/295, Annex, Sept. 13, 2007.
86. Venice Commission report, p. 6, para. 26.
87. EU Statement on Ukraine, OSCE Permanent Council Nr. 992, PC.Del/346/14, Mar. 27, 2014.
88. PACE res. 1990 (2014) para. 9 & explanatory memorandum, Mr. Schennach, rapp., para. 63.
89. OHCHR, Report, Apr. 15, 2014, para. 72.
90. Schennach, explanatory memorandum, rapp. paras. 12–13, 16, 20.

91. See, for example, "Why should the Crimean referendum not be recognised?" Foreign & Commonwealth Office (UK), Mar. 17, 2014. Intimidation in eastern Ukraine during the May 25, 2014, early presidential election, by contrast, was aimed at preventing the election altogether: 10 of the 12 election districts in Luhansk *oblast* and 14 of the 22 election districts in Donetsk *oblast* could not conduct polling: OSCE/ODIHR Election Observer Mission Final Report, June 30, 2014, p. 25.
92. OSCE Baku Declaration (2014), para. 5.
93. See further Peters in Calliess (ed.) (forthcoming 2015).
94. http://www.osce.org/pa/118469.
95. Speech of Mar. 18, 2014: A/68/803—S/2014/202, p. 3.
96. Effecting the transfer, see "Meeting of the Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics," Feb. 19, 1954, History and Public Policy Program Digital Archive, GARF. F.7523. Op.57. D.963, L1–10. Published in "Istoricheskii arkhiv," issue 1, vol. 1 (1992). Translated for CWIHP by Gary Goldberg. http://digitalarchive.wilsoncenter.org/document/119638.
97. Sixth periodic report, Ukraine, June 22, 2011, paras. 393–410: E/C.12/UKR/6, Dec. 27, 2012, pp. 50–52.
98. See generally Fisher (1978); Conquest (1970) 13–15, 64–66, 105–107, 160–162, 185–187, 202–209. See also the "very strong claims" and critical overview by Mr. Shirane, Committee on the Elimination of Racial Discrimination, 79th sess., 2099th mtg., Aug. 15, 2011, paras. 59–70: CERD/C/SR.2099, pp. 8–9.
99. Wilson (2013) 418, 419; Subtelny (2009) 609, 632.
100. http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Crimea/.
101. *Quebec reference*, para. 139. See also Xanthaki (2007) 141–146, 166–169.
102. Sixth periodic report, Ukraine, para. 393: E/C.12/UKR/6, p. 50.
103. See, for example, Turkey, Human Rights Council, Report of the Working Group on the Universal Periodic Review, Ukraine, Dec. 20, 2012, para. 46: A/HRC/22/7, p. 8.
104. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Ukraine, Dec. 20, 2012, para. 97: A/HRC/22/7, p. 23.
105. Cf. Committee on the Elimination of Racial Discrimination, 79th sess., 2099th mtg., information relating to the 19th and 21st periodic reports of Ukraine, Aug. 15, 2011, paras. 59–81: CERD/C/SR.2099, pp. 8–10, referring to the Crimean Tatars but raising no questions as to the Russian population of Crimea or of Ukraine as a whole; Committee against Torture, Consideration of reports submitted by States, follow-up information, Ukraine, Feb. 14, 2011, para. 51, CAT/C/UKR/CO/5/Add.1, p. 12, referring to the risk that Uzbek nationals, evidently in Crimea to attempt to recruit Tatar youth to the terrorist group Islamic Movement of Uzbekistan, be tortured if deported to Uzbekistan but raising no questions as to the treatment of the Russian population.
106. HRC, Report of the Working Group on the Universal Periodic Review, Ukraine, Dec. 20, 2012, para. 28: A/HRC/22/7, p. 6.
107. Ibid., recommendation 97.68, A/HRC/22/7, p. 18.
108. Cf. the concept of critical date, as applied by the ICJ, for example, in *Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment, Oct. 8, 2007, ICJ Rep. 2007 p. 661, 697–698, para. 117.
109. As to Bangladesh, see further, Chapter 8, p. 195.
110. Communication No. 1803/2008, May 23, 2008.
111. Views adopted by the Committee at its 106th session, CCPR/C/106/D/1803/2008, Oct. 29, 2012, p. 7, para. 7.3.
112. Id.
113. Ibid., para. 7.2.

114. See *Bulgakov* v. *Ukraine*, ECtHR, Judgment, Sept. 11, 2007. See esp. paras. 53–54 (finding no violation of Art. 8 of the Convention); and paras. 58–59 (finding no violation of Art. 14).
115. CCPR/C/106/D/1803/2008, Oct. 29, 2012, p. 4, para. 3.3.
116. *Bulgakov* v. *Ukraine*, para. 53.
117. See, for example, Fox, Mar. 20, 2014.
118. For text in Ukrainian language, see http://zakon2.rada.gov.ua/laws/show/5029–17/print1331482006276224 The *Law on principles* superseded the *Law of Ukrainian SSR on languages in the Ukrainian SSR,* Bulletin of the Supreme Soviet of the Ukrainian SSR, 1989, No. 45, p. 631. On the earlier legal framework, see Hoškova in Frowein, Hofmann & Oeter (eds.) (1994) 325. On minority protections generally, see Chapter 8, p. 181.
119. http://lenta.ru/news/2014/02/23/language/.
120. http://en.itar-tass.com/world/721537 See further Ukraine's note verbale dated 19 March 2014 to the HRC: A/HRC/25/G/19, Mar. 20, 2014, pp. 5–6.
121. OSCE International Election Observation Mission Ukraine—Early Presidential Election, Statement of Preliminary Findings and Conclusions, May 26, 2014, p. 12.
122. Committee of Experts, 47th mtg., Strasbourg, May 13–16, 2014. See generally Martín Estébanez in Ghanea & Xanthaki (eds.) (2005) 269.
123. Gross, June 23, 2014, p. 6, para. 39.
124. PACE res. 1988 (2014), Apr. 9, 2014, para. 17. Cf. OSCE Baku Declaration (2014) para. 15.
125. OSCE, Preliminary Findings and Conclusions, May 26, 2014, pp. 3, 10.
126. Regarding application of ECHR Art. 10, para. 2, see *Zana* v. *Turkey*, ECtHR (Grand Chamber), Judgment (Merits and Just Satisfaction), Nov. 25, 1997, paras. 51(iii), 61, 62. Cf. *Kommersant Moldovy* v. *Moldova*, ECtHR (Fourth Section), Judgment (Merits and Just Satisfaction), Jan. 9, 2007, para. 35; *Ceylan* v. *Turkey*, Judgment (Merits and Just Satisfaction), ECtHR (Grand Chamber), July 8, 1999, paras. 32(iii), 38.
127. See, for example, Sixth periodic report, Ukraine, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Mar. 4, 2013, para. 346: CAT/C/UKR/6, p. 57, concerning desecration of Crimean Tatar graves.
128. See, for example, Committee on the Rights of the Child, 56th sess., Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Ukraine, para. 89, CRC/C/UKR/CO/3–4, Apr. 21, 2011, p. 22. The Committee urged Ukraine to "intensify efforts to ensure the right to education for all children belonging to minorities, focusing on Roma and Crimean Tatar children." No mention was made of Russians. See also, for example, Thornberry (Country Rapporteur), Aug. 17, 2011: CERD/C/SR.2104, p. 4, para. 15; CERD Concluding observations, Sept. 14, 2011: CERD/C/UKR/CO/19–21, p. 5, para. 17; Wilson, Committee on Economic, Social and Cultural Rights, 39th sess., Nov. 8, 2007: E/C.12/2007/SR.38, p. 6, para. 22; Wedgwood (Country Rapporteur), Human Rights Committee, 88th sess., 2408th mtg., Oct. 23, 2006: CCPR/C/SR.2408, p. 8, para. 45.
129. OHCHR, Report on the human rights situation in Ukraine, Apr. 15, 2014, p. 24, para. 89.
130. Id.
131. Ibid., p. 19, para. 89.
132. See Statement, Apr. 4, 2014: http://www.osce.org/hcnm/117175 See also Note verbale dated Mar. 19, 2014, from the Permanent Mission of Ukraine to the United Nations Office and other international organizations in Geneva addressed to the secretariat of the Human Rights Council, A/HRC/25/G/19, Annex, p. 2.

133. PACE res. 1988 (2014), Apr. 9, 2014, para. 15.
134. PACE res. 1988 (2014), para. 12.
135. "OIC Calls for Respecting the Rights of Muslims in Crimea," Mar. 25, 2014: http://www.oic-oci.org/oicv2/topic/?t_id=8947&ref=3592&lan=en&x_key=Crimea.
136. Mr. Errázuriz (Chile), Security Council, 69th yr., 7144th mtg, Mar. 19, 2014: S/PV.7144, p. 11.
137. Assessment of the work of the Security Council during the presidency of Argentina (October 2014), Dec. 22, 2014, S/2014/935, p. 26.
138. OHCHR, Report, Apr. 15, 2014, p. 24, para. 91.
139. Ibid., p. 26, para. 98.
140. Ibid., para. 100.
141. OHCHR, Report on the situation of human rights in Ukraine, Sept. 19, 2014, A/HRC/27/75, p. 22, para. 91.
142. OHCHR, Report, May 15, 2014, p. 28, para. 129.
143. OHCHR, Report, Apr. 15, 2014, para. 92.
144. Id.
145. OHCHR, Report, May 15, 2014, p. 4, para. iii.
146. Id.
147. Ibid., p. 29, para. 133.
148. Ibid., pp. 30–31, para. 144.
149. Ibid., p. 32, paras. 153, 154.
150. See Statement of the Ministry of Foreign Affairs of Ukraine on the arrest of the Deputy Chairman of the Mejlis of the Crimean Tatar People, Ahtem Chiygoz, January 30, 2015, S/2015/76.
151. OHCHR, Report, May 15, 2014, p. 17, para. 73; p. 27, para. 119.
152. OHCHR, Report on the human rights situation in Ukraine, Aug. 17, 2014, p. 6, para. 22. See also OHCHR summary report (Nov. 21, 2013-Sept. 5 2014), A/HRC/27/75, para. 29.
153. Advisory Committee on the Framework Convention for the Protection of National Minorities, *Ad hoc* Report on the situation of national minorities in Ukraine, Apr. 1, 2014, ACFC(2014)001.
154. Ibid., p. 3, paras. 6–7 (emphasis original).
155. PACE res. 1990 (2014), Apr. 10, 2014, para. 11.
156. http://www.reuters.com/article/2014/05/16/us-ukraine-crisis-crimea-tatars-idUSBREA4F0LS20140516.
157. OHCHR, Report, May 15, 2014, p. 30, para. 138.
158. Christopher Moseley (ed.), *Atlas of the World's Langauges in Danger* (Paris: UNESCO, 2010), 42. See also Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Ukraine, E/C.12/UKR/CO/6, June 13, 2014, p. 10 (para. 27) (observing that the Crimean Tatar language "is on the verge of extinction," a concern under ICESCR arts. 2, para 2, and 15).
159. http://www.reuters.com/article/2014/05/16/us-ukraine-crisis-crimea-tatars-idUSBREA4F0LS20140516.
160. See, for example, statement of the president of the Republika Srpska noted in Introduction, p. 6. See also, in respect of China's claims, Conclusion, p. 200.
161. Verkhovna Rada, Resolution, "On Independence of Crimea," No. 1745–6/14, Simferopol, Mar. 17, 2014: http://www.rada.crimea.ua/act/11748.
162. Ibid., para. 1.
163. Executive Order, *On Recognising the Republic of Crimea,* Mar. 17, 2014: http://eng.kremlin.ru/acts/6884.

164. Rodríguez Cedeño, Sixth report, pp. 6–17, para. 17–67.
165. Ibid.
166. In any event, claims to the "restoration" of an old State or old union, with the rare exception, are mostly historical, not legal. Crawford & Boyle (2012) paras. 95–115.
167. See Chapter 3, pp. 94–96; Chapter 4, p. 112.
168. Statement of the Ministry of Foreign Affairs of Georgia regarding the ratification by the Russian State Duma of the so-called "treaty" between the Russian Federation and its occupation regime in the Abkhazia region of Georgia: A/69/746—S/2015/63, Jan. 23, 2015.
169. http://www.rada.crimea.ua/news/11_03_2014_1.
170. Verkhovna Rada, Resolution, No. 1745–6/14, Simferopol, Mar. 17, 2014, para. 8: http://www.rada.crimea.ua/act/11748.
171. See Mr. Tunkin, ILC 890th mtg., July 14, 1966: ILC Ybk 1966, vol. I, part II, p. 308, para. 27.
172. The expression "contested statehood" is seen for example in Weller (2009). Cf. Thomas D. Grant, *Recognition and uncertain statehood: International title to territory in the search for settlement of the crisis of Chechen independence* (Cambridge, PhD, 2000).
173. As to the distinction between admission to the United Nations and recognition, see, for example, Rodríguez Cedeño, Sixth Report, p. 9, paras. 30–32; Dugard (1987) 41–80; Jennings (1967) 121 *RdC* 346, 351–353.
174. The classic case concerned governments, not States, but is broadly relevant to the point: *Aguilar-Amory and Royal Bank of Canada Claims (Great Britain* v. *Costa Rica)* (more usually known as the *Tinoco* arbitration) (Taft, CJ, Arbitrator), Award, Oct. 18, 1923, 1 RIAA 369, 380–381.
175. ICJ Rep. 2010 at p. 446, para. 105.
176. Ibid., pp. 436–439, paras. 79–84. But see, with reference to decisions, Summers (2014) 523–524, noting that international organs—including the European Court of Human Rights, the UN Human Rights Committee, and the African Commission on Human and Peoples' Rights—have found, in varying degrees, that a human rights protection exists in respect of secessionist sentiments expressed in speech.
177. Crawford (for United Kingdom), *Kosovo* advisory proceedings, Dec. 10, 2009, CR 2009/32, pp. 48–49, para. 6. NB: The author acted in the *Kosovo* advisory proceedings as member of the United Kingdom team.
178. For two of the main expressions of the idea, see Yoo (2014), 171–188; Kreijen (2004) 329–334, 353–360.
179. *Kosovo* Advisory Opinion, 445–446, 452, paras. 105, 121.
180. *Quebec reference*, para. 143.
181. See Blank in Thomas (ed.) (1998) 159, 166.
182. *Quebec reference*, para. 68 (indicating as "necessities [under the national constitution] compromise, negotiation, and deliberation," about which see also paras. 76, 84–104); and paras. 142–143 (indicating the relevance of national constitutionality to the decision by other States whether or not to recognize a secessionist entity, about which see also para. 155).
183. Zanzibar Act 1963 (1963 c. 55), §1(1).
184. Articles of Union, Apr. 22, 1964; Union of Tanganyika and Zanzibar Act, 1964 (Tanganyika, No. 22), Apr. 25, 1964; Union of Zanzibar and Tanganyika Law (Zanzibar, 1964); see also Tanzania, Combined initial, second and third periodic reports, Implementation of the International Covenant on Economic, Social and Cultural Rights, E/C.12/TZA/1–3, Aug. 25, 2009, p. 5, para. 4.
185. SCR 184 (1963), Dec. 16, 1963; GAR 1975 (XVIII), Dec. 16, 1963.

186. SC, 18th yr., 1084th mtg, Dec. 16, 1963.
187. GA, 18th sess., 1281st mtg., Dec. 16, 1963, p. 14, para. 179.
188. As to the international law acts, see Waldock, Fifth report, draft art. 1 *(b)* (Definition of the term "Union of States"), *Comments* (18) to (27): ILC Ybk 1972, vol. II, pp. 22–26.
189. See Gandolfi (1960) 6 *AFDI* 881.
190. (1960) 6 *AFDI* at 899.
191. Fox, Mar. 20, 2014.
192. See Chapter 8, pp. 171–197.
193. As to their recognition of Abkhazia and South Ossetia, those few States are inconstant: see Radio Free Europe/Radio Liberty, "Tuvalu Retracts Recognition of Abkhazia, South Ossetia," Mar. 31, 2014. Vanuatu did the same in 2013, which apparently leaves Nicaragua, Venezuela, Nauru, and Russia as the four States recognizing the occupied territories of Georgia as States: ibid. Recent developments suggest that the need for that façade, too, soon will fade, as Russia has taken steps toward annexation. See EU Independent International Fact-Finding Mission on the Conflict in Georgia (under Council Decision 2008/901/CFSP, Dec. 2, 2008), *Georgia Report,* Sept. 30, 2009, vol. II, p. 440. See also statement of COE Co-rapporteurs on proposed 'integration' treaty between Russia and 'Republic of Abkhazia,' Oct. 31, 2014: http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5274&lang=2&cat=3. See also Robert-Cuendet (2008) 54 *AFDI* 173.
194. See Crawford's observation about Art. 3 of the Montevideo Convention, which had stipulated that "the political existence of the state is independent of recognition by the other states": "Here again the Montevideo Convention is defectively formulated . . . it had better said, independent of recognition by any individual third State." Crawford, "Personality and Participation" (2013) 365 *RdC* 137, 148–149, para. 242. See also, generally, Grant (1999) 37 *CJTransL* 403.
195. As appeared to be happening at the time of press. See PACE president statement "deplor[ing] the decision of the self-appointed authorities of the so-called Donetsk and Luhansk People's Republics" to conduct "presidential" elections on Nov. 2, 2014: Anne Brasseur, PACE President, Oct. 31, 2014.
196. Warren Austin, US Permanent Representative to the United Nations, quoted in Brown (1948) 41 *AJIL* 620, 621. Cf. Whiteman, *Digest* (1973) 10, citing Security Council 249th mtg., May 18, 1948, p. 16.
197. *Kosovo* advisory proceedings, United Kingdom, Written Statement, Apr. 17, 2009, p. 99, para. 5.51.
198. For reference to some of the main writings on premature recognition, see Borgen, Mar. 18, 2014. See also Raič (2002) 92–93; Jennings & Watts (1992) 143; Ruda in Bedjaoui (ed.) (1991) 451, para. 145; Ijalaye (1971) 71 *AJIL* 551; O'Connell (1965) 143; Chen (1951) 106; Hyde (1945) 152–153, §40; Westlake in Oppenheim (ed.) (1914) 475, 485–486; Wheaton (1889) 42, §27d; Phillimore (1882), 23. Gaja asked whether the ILC in its work on the topic of unilateral acts might address premature recognition as an unlawful act, though this was understood to fit better under the topic of State responsibility: 2593rd mtg., June 24, 1999, ILC Ybk 1999, vol. I, p. 192, paras. 79–79. The position is set out in the U.S. *Restatement* as well: *Restatement (Third) of Foreign Relations Law* (American Law Institute, 1987), §99, Comment *(d),* §202, Reporters' Note 4.
199. For the *Institut*'s iteration of the principle, see Dietrich Schindler, Rapporteur, 8th Comm. (Wiesbaden), *Le principe de non-intervention dans les guerres civiles,* Art. 2 (f) (*Institut de droit international*: 1975).

200. For the range of considerations that the United Kingdom believed necessary before recognizing Croatia, see foreign secretary's statement of Feb. 5, 1992, reprinted (1992) 63 *BYIL* 639. For the Yugoslav objection, see Letter dated 8 December 1993, from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General, Dec. 16, 1993: A/C.3/48/25, p. 2; and further letters dated Oct. 10, 1994, A/49/497; Oct. 28, 1994, A/49/586; Nov. 15, 1994, A/C.3/49/18; Dec. 9, 1994, A/C.3/49/29; Jan. 24, 1995, A/49/835—S/1995/72; July 6, 1995 A/50/270—S/1995/543, Annex, p. 2; and statements in the Security Council: Mr. Djokić, Security Council, 48th yr., 3203rd mtg., Apr. 20, 1993: S/PV.3203, pp. 26–35; 49th yr., 3336th mtg., Feb. 15, 1994: S/PV.3336, p. 195; 49th year, 3428th mtg., Sept. 23, 1994: S/PV.3428, p. 15; 50th yr., 3522nd mtg., Apr. 21, 1995: S/PV.3522, p. 3; 50th yr., 3563rd mtg., Aug. 10, 1995: S/PV/3563, p. 8; and the information transmitted by Yugoslavia on June 5, 1995, for the Report of the Secretary-General on good neighbourly relations among Balkan States, Sept. 7, 1995: A/50/412, p. 22, para. 97.
201. See further Jamnejad & Wood (2009) 22 *Leiden J. Int'l L.* 345, 373–374.
202. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia [Serbia and Montenegro])*, Further Requests for the Indication of Provisional Measures, Order, Sept. 13, 1993, Sep. Op. Judge *ad hoc* Sir Elihu Lauterpacht, ICJ Rep. 1993 p. 325, 435, para. 81 (emphasis added).

2 The Use of Force against Ukraine

1. Pp. 103–131.
2. For another taxonomy of Russia's legal arguments (and critical appraisal), see Marxsen (2014) 74 *ZaöRV* 367: Black Sea Fleet Agreements (ibid. 370–372), protection of nationals abroad (372–374), invitation (372–374), legality of the referendum (380–382), legality of the declaration of independence (383–384), and self-determination (384–389).
3. Speech of Mar. 18, 2014, before State Duma et al., transmitted by Letter dated 19 March 2014, from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General: A/68/803—S/2014/202, p. 5.
4. As to the three 1997 agreements and the transactions leading to their adoption, see Hamant (2007), 385–388, 407.
5. None of the agreements appear to have been registered in accordance with Art. 102 of the UN Charter, nor are they in wide circulation in Western languages. For the Ukrainian Territory Agreement, see the text in English translation in J. L. Black (ed.), *Russia & Eurasia Documents Annual: Russian Federation (1997)* (1998) 129. The three 1997 Black Sea Fleet agreements appear in French translation in Ministère des Affairs Étrangers (France), *Documents d'Actualité Internationale (DAI)*, Aug. 15, 1997, no. 16. 577ff.
6. *DAI*, Aug. 15, 1997, no. 16, p. 577.
7. *DAI*, Aug., 1997, no. 16, p. 581.
8. Parameters of Division Agreement, Art. 7: *DAI*, Aug. 15, 1997, no. 16, p. 578.
9. Clearing Operations Agreement, Art. 2, *DAI*, Aug. 15, 1997, p. 582.
10. Art. 15, para. 4.
11. Art. 15, para. 1.
12. *DAI*, Aug. 15, 1997, no. 16, p. 582.
13. Black (ed.) (1998) 131.
14. Ibid., p. 129.
15. *DAI*, p. 582.

16. *DAI*, p. 578.
17. Art. 3: Black (ed.) (1998), 129.
18. *DAI*, Aug. 15, 1997, no. 16, pp. 578, 582.
19. Ibid., p. 132.
20. Art. 10, Parameters of Division Agreement, *DAI*, Aug., 1997, no. 16, p. 579.
21. Art. 7, Clearing Operations Agreement, *DAI*, Aug. 15, 1997, no. 16, p. 583.
22. Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, Kiev, May 31, 1997, Art. 3: A/52/174, annex I. Further to which see Chapter 4, pp. 110–112.
23. Kharkiv Agreement, Art. 1.
24. Ibid., Art. 2.
25. Id.
26. The author thanks Lora Soroka and Maciej Siekierski for the English translation. For the text of the Apr. 21, 2010 Agreement in Ukrainian, see http://www.pravda.com.ua/articles/2010/04/22/4956018/.
27. *Boumediene* v. *Bush*, June 12, 2008: 553 U.S. 723, 753; 128 S.Ct. 2229, 2251–2252. About the leasehold generally, see Thiele (2010) 48 *AdV* 105; Strauss (2009). Cf., generally, Cooley & Spruyt (2009); and, respecting the U.S.-Iraq SOFA, Tigroudja (2009) 55 *AFDI* 63.
28. See http://www.sbaadministration.org/.
29. As to other bilateral agreements confirming the territorial limits of Ukraine, see further pp. 111–112.
30. Note verbale dated Mar. 2, 2014, from the Permanent Mission of Ukraine addressed to the Acting Secretary-General of the Conference on Disarmament transmitting Non-Paper on violations of Ukraine's laws in force and of Ukrainian-Russian agreements by military units of the Black Sea Fleet of the Russian Federation on the territory of Ukraine, para. 2: CD/1976, annex, Mar. 10, 2014.
31. Non-Paper, Mar. 2, 2014, para. 5.
32. Letter dated 17 September, 2014 from the Permanent Representative of Ukraine addressed to the president of the Security Council, S/2014/677.
33. GAR 3314 (XXIX), Dec. 14, 1974, annex: Art. 3(e).
34. http://eng.kremlin.ru/acts/6955.
35. Draft art. 15 (Prohibition of benefit to an aggressor State): adopted, ILC, 63rd sess. (2001): A/66/10, para. 100.
36. Draft art. 15, Comment (1), A/66/10, para. 101.
37. Speech of Mar. 18, 2014, before State Duma et al., transmitted by Letter dated 19 March 2014 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General: A/68/803—S/2014/202, p. 5.
38. Mr. Churkin (Russian Federation), General Assembly, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, p. 3.
39. Chapter 1, pp. 30–33.
40. Recall Cahier's concern that such an interventionist thesis "*peut ouvrir la porte à toutes sortes d'abus*": (1985) 195 *RdC* 9, 78.
41. See Dinstein (2011) 257–259, paras. 680–686; Reisman (2010) 351 *RdC* 303, 311; Rosenne (2001) 291 *RdC* 9, 165; Green, 1976 *Israeli Ybk HR* 312.
42. McDowell (ed.), 1976 *Digest of United States Practice in International Law* 150 (emphasis added). See also President Obama, remarks at the United States Military Academy, West Point, N.Y., May 28, 2014: http://www.washingtonpost.com/politics/full-text-of-president-obamas-commencement-address-at-west-point/2014/05/28/cfbcdcaa-e670-11e3-afc6-a1dd9407abcf_story.html.

43. A point widely accepted by writers. See, for example, Tomuschat (1999) 281 *RdC* 9, 215; Franck (1993) 240 *RdC* 9, 255.
44. Waldock (1952) 81 *RdC* 455, 467.
45. See, for example, Crawford, *Brownlie's Principles*, 8th edn (2012) 754; Dinstein (2011) 218; Gray in Evans (ed.) (2010) 615, 627; Malanczuk, *Akehurst's*, 7th rev. ed. (1997) 110.
46. See the particularly cogent analysis by Wisehart, Mar. 4, 2014.
47. PACE res. 1989 (2014), Apr. 9, 2014, para. 6.
48. See EU *Georgia Report* 18, para. 12. About the *Report* generally see Corten (2010) 114 *RDGIP* 35.
49. PACE res. 1989 (2014), Apr. 9, 2014, para. 6.
50. For the *locus classicus,* see *Nottebohm (Liechtenstein* v. *Guatemala)*, Second Phase, Judgment, Apr. 6, 1955, ICJ Rep. p. 4, 23. Cf. *Soufraki* v. *United Arab Emirates*, ICSID (Fortier, President; Schwebel & El Koly, Members), Award, July 7, 2004, paras. 55, 62–63, 81.
51. Compare the Georgia intervention, which the Chief Justice of the Constitutional Court of the Russian Federation said was justified as a measure to protect Russian nationals: Zorkin (2008).
52. See esp. *Rights of Minorities in Upper Silesia (Minority Schools), (Germany* v. *Poland),* Judgment, Apr. 26, 1928, PCIJ Ser. A no. 15. Cf. *German Settlers in Poland,* Advisory Opinion, Sept. 10, 1923, PCIJ Ser. B no. 6; *Minority Schools in Albania,* Advisory Opinion, Apr. 6, 1935, PCIJ Ser. A/B no. 64. See generally Musgrave (1997) 37–46.
53. See Musgrave (1997) 57–60.
54. A/68/803-S/2014/202, p. 9.
55. See, for example, Press Department Comment, Ministry of Foreign Affairs, Russian Federation, June 24, 2014, alleging "many thousands of refugees from Ukraine to the Russian Federation": http://www.mid.ru/BDOMP/Brp_4.nsf/arh/8A9FD71A0015D34144257D03004C6939?OpenDocument.
56. SCR 1239 (1999), May 14, 1999.
57. http://rt.com/news/lavrov-human-rights-ukraine-542/.
58. "A more secure world: our shared responsibility." *Report of the High-level Panel on Threats, Challenges and Change*, Dec. 2, 2004: A/59/565, p. 57, para. 203.
59. Ibid., p. 45, para. 147.
60. Letter dated 3 March 2014, from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, S/2014/146, Annex.
61. S/2014/146, Annex.
62. http://www.aljazeera.com/news/europe/2014/04/yanukovich-regrets-mistakes-crimea-2014421989300891.html.
63. As reflected in the ILC's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations: ILC Ybk 2006, Vol. II, Pt. Two, pp. 369ff, para. 177. See in particular Principle 2, Commentary (on capacity); Principle 4, Commentary (1) (on authority of persons to adopt the declaration); Principle 7, Commentary (3) (on interpretation); Principle 8, Commentary (on conflict with a peremptory norm); Principle 9, Commentary (1) (on *pacta tertiis*); Principle 10, Commentary (3) (on *rebus sic stantibus*).
64. For a study of the wider context of the July 24, 1905, agreement, see McLean in Mombauer & Deist (eds.) (2003) 119–142. A major concern in the Tsar's government was that the agreement, effectively abrogating the Russian security guarantee to France, most likely would have led to the closure of French financial markets to Russia.

65. Rodriguez Cedeño, Eighth report, 11–12, paras. 44–54.
66. Guiding Principles, Principle 3: ILC Ybk 2006, vol. II, Pt. Two, p. 371.
67. See generally van Steenberghe (2014) 118 *RGDIP* 273, 276–285.
68. SCR 2100 (2013), Apr. 25, 2013, p. 1.
69. *Somalia* v. *Woodhouse Drake S.A.*, Hobhouse J., Mar. 13, 1992, [1993] Q.B. 54, 68.
70. [1993] Q.B. at 68.
71. [1993] Q.B. at 65.
72. See for example PACE res. 1988 (2014), Apr. 9, 2014, para. 3.
73. See, for example, *Cyprus* v. *Turkey*, European Commission of Human Rights, Decision (Admissibility), July 10, 1978, 146–148; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, Judgment, Preliminary Objections, July 11, 1996, ICJ Rep. 1996 p. 595, 621–622, para. 44. See further Rim (2012) 25 *Leiden J. Int'l L.* 683, 692–97 (respecting competing governments in Côte d'Ivoire).
74. Kingsbury (July 1993) 109 *LQR* 377, 382.
75. See further Fox, Mar. 10, 2014; Vermeer, Mar. 6, 2014; Corten (2010) 240–243, 288–310; Nolte (1999) 261–268.
76. A/3592, p. 245.
77. A/3592 (1957), p. 79, para. 266. See also ibid., pp. 245–246, para. 785(vi). Wisehart draws attention to the Special Committee Report as well: Wisehart, Mar. 4, 2014.
78. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment, Dec. 19, 2005, ICJ Rep. 2005 p. 168, 198–199, paras. 49–54.
79. ICJ Rep. 2005 at 198, para. 52.
80. Fox, Mar. 10, 2014.
81. Schindler, Rapporteur, 8th Comm. (Wiesbaden), Art. 2 (*Institut de droit international*: 1975).
82. Ibid., Art. 3(a).
83. Doswald-Beck (1985) 56 *BYIL* 189, 242–252.
84. Kreß (2014) 1 *J. on the Use of Force and Int'l L.* 11, 18.
85. Pellet et al. (2009), 1051.
86. *Institut de Droit International,* Session de Rhodes—2011, 10th Commission, Gerhard Hafner, Rapporteur, Resolution, Sept. 8, 2011, Art. 4, paras. 1, 2.
87. United Kingdom, Prime Minister's Office, *Guidance: Summary of the government's legal position on military action in Iraq against ISIL*, Sept. 25, 2014. For an excellent overview and analysis, see Akande & Vermeer, *EJIL Talk!* Feb. 2, 2015.
88. Annex to the letter dated 20 September 2014, from the Permanent Representative of Iraq to the United Nations addressed to the president of the Security Council, S/2014/691, p. 2.
89. Schindler, Rapporteur, 8th Comm. (Wiesbaden) (1975), Art. 2(f). "*Ils s'abstiendront notamment... de reconnaître prématurément un gouvernement provisoire qui ne dispose pas d'un contrôle effectif sur une partie importante du territoire de l'Etat en question*."
90. Talmon (2001).
91. GAR 2625 (XXV), Oct. 24, 1970 (under "[t]he principle of equal rights and self-determination of peoples").
92. Id.
93. Generally in respect of these provisions of the Friendly Relations Declaration and with citations to further works, see Dugard (2011) 357 *RdC* at 108–110; Shaw in Ghanea & Xanthaki (eds.) (2005) 35, 43–53.
94. See, for example, GAR 36/103 (Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States), Dec. 9, 1981.

95. On this point and use of force in connection with self-determination generally, see Gray (2004) 52–58. Cf. Cassese (1995) 150–155; Wilson (1998) 29–33.
96. See, for example, SCR 445 (1979), Nov. 23, 1979 (Complaint by Zambia); SCR 428 (1978), May 6, 1978 (Complaint by Angola against South Africa).
97. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, Merits, Judgment, June 27, 1986, ICJ Rep. 1986 p. 14, 109, para. 209.
98. Dis. Op. Judge Schwebel, ICJ Rep. 1986 at p. 351, para. 180.
99. See generally Gardam (2004) 121–122.
100. Chapter 1, pp. 23–33.
101. PACE res. 1988 (2014), Apr. 9, 2014, para. 15.
102. See Beigbeder (1994).
103. ICJ Rep. 1971 at pp. 56–57, para. 132.
104. See Chapter 8, p. 196. [ref. to Lac Lenoux]
105. The president of the Russian Federation said that NATO participation by Ukraine "would have meant NATO's navy would be right there in this city of Russia's military glory [Sevastopol], and this would create not an illusory but a perfectly real threat to the whole of southern Russia." A/68/803-S/2014/202, p. 9.
106. See further in respect of Zanzibar and Mali Chapter 1, p. 40.
107. See, for example, President Putin's remarks of Mar. 4, 2014 to journalists: http://eng.kremlin.ru/news/6763.
108. ICJ Rep. 1986 at p. 108, para. 205. Further to para. 205, see Kohen (2012) 25 *Leiden J. Int'l L.* 157, 160–161.
109. Id.
110. For Ukraine's account of the removal of President Yanukovych, see note verbale to the HRC dated Mar. 1, 2014: A/HRC/25/G/11, Mar. 7, 2014.
111. PACE res. 1974 (2014), Jan. 30, 2014, para. 5.
112. Cf. Jamnejad & Wood (2009) 22 *Leiden J. Int'l L.* at 368–377.
113. See *Military and Paramilitary Activities*, Order, Oct. 4, 1984, ICJ Rep. 1984 p. 215; Judgment (Merits), ICJ Rep. 1986 at 70–86, paras. 126–160.
114. See ARSIWA, Part Three, Chapter II, Arts. 49–54; and Comment (2): "Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States." Reprinted Crawford (ed.) (2002), 281.
115. *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (Portugal* v. *Germany)* (de Meuron, Guex & Fazy, arbitrators), Award (Responsibility), July 31, 1928: (1949) 2 RIAA 1011. The incident at Naulilaa, by which name the case is usually known, belonged to a series of incidents that had taken place at seven locations in Angola along the border with the German colony of South West Africa—Maziua, Cuangar, Bunga, Sambio, Dirico, Mucusso, and Naulilaa. 2 RIAA at 1033.
116. 2 RIAA at 1025–1026, and as applied in the case, 2 RIAA at 1027–1028.
117. Oliver Diggelmann draws attention to the tendency of reprisals to escalate and refers to this as a characteristic of earlier international law that may have contributed to the severity of the First World War: presentation, Lauterpacht Centre for International Law, Feb. 27, 2015.
118. 2 RIAA at 1026. Though for an interesting account of reprisals and proportionality as addressed by Francis Lieber to General Halleck in the U.S. Civil War, see Sivakumaran (2012) 454.
119. GAR 2625 (XXV), Oct. 24, 1970, Annex, principle 1.
120. *Guyana* v. *Suriname,* Award (Nelson, president; Franck, Smit, Shearer, and Hossain, Members), Sept. 17, 2007, para. 446.

121. Dinstein (2011) 244–255, paras. 646–675. And see ibid., p. 249 n. 1453 for citations to some of the very small number of other adherents.
122. Bishop (1965) 115 *RdC* 423, 425. Among later writers see, for example, Mrazek (1989) *Can. YBIL* 81, 90; Pellet et al. (2009) 1047–1051.
123. 115 *RdC* at 424.
124. Brownlie (1995) 255 *RdC* 195, 204. See also Schachter (1982) *RdC* 167, 169; Bowett (1972) 66 *AJIL* 1, 3; Falk (1969) 63 *AJIL* 415.
125. For examples, see Reisman (2010) 351 *RdC* at 313. Higgins, too, identifies a punitive element in those incidents: (1991) 220 *RdC* 9, 29.
126. See Henley, Feb. 18, 2014.
127. See Popescu (2013). When Ukraine declared the suspension of the association process with the EU in November 2013, the foreign minister of Sweden, Carl Bildt, said, "Politics of brutal pressure evidently works": Reuters, Nov. 21, 2013: http://www.voanews.com/content/reu-ukraine-drops-plan-to-go-west-turns-east/1794833.html For the text of the Association Agreement, see http://eeas.europa.eu/ukraine/docs/association_agreement_ukraine_2014_en.pdf.
128. Договор о Евразийском экономическом союзе [Treaty on the Eurasian Economic Union], available at http://www.eurasiancommission.org/ru/Lists/EECDocs/635375701449140007.pdf About which see Tuttle, June 6, 2014; Borgen, June 1, 2014.
129. See *The Economist* blog, suggesting that the use of force against Ukraine provoked Kazakhstan to insist on weaker union terms than that State otherwise might have accepted: http://www.economist.com/blogs/banyan/2014/05/introducing-eurasian-economic-union Kazakhstan appears in fact to have insisted on the removal of provisions relating to political relations.
130. Dinstein (2011) 250, para. 662.

3 Non-recognition

1. See Dugard (1987) 98–108; and Dugard (1978) 90, 92–93, 97, 103.
2. Talmon (2006).
3. Schermers (1977) 26 *ICLQ* 81.
4. See this chapter under Sanctions, pp. 97–99.
5. Chapter 5, pp. 137–139.
6. Chapter 6.
7. http://www.diplomatie.gouv.fr/en/country-files/ukraine/events-7684/article/ukraine-communique-issued-by See also Mr. Araud (France), Security Council 69th yr., 7244th mtg, Mar. 19, 2014: S/PV.7144, p. 20.
8. https://www.gov.uk/government/news/pm-statement-on-president-putins-actions-on-crimea. See also Lyall Grant (United Kingdom), Security Council 69th yr., 7244th mtg, Mar. 19, 2014: S/PV.7144, pp. 14–16.
9. Government spokesperson, Steffen Seibert, Mar. 17, 2014: http://www.bundesregierung.de/Content/EN/Artikel/2014/03/2014–03–17-krim-statement-sts.html?nn=709674.
10. Government spokesperson, Steffen Seibert, Mar. 19, 2014: http://www.bundesregierung.de/Content/EN/Artikel/2014/03/2014–03–19-ukraine-abkommen.html?nn=709674.
11. Mar. 18, 2014: http://www.mofa.go.jp/press/release/press4e_000239.html.
12. Pp. 41–42.
13. Statement of the Heads of State or Government on Ukraine, Brussels, Mar. 6, 2014, para. 2.
14. European Council Conclusions, Brussels, Mar. 21, 2014: EUCO 7/14, p. 13, para. 28.

15. EU Statement on Ukraine, OSCE Permanent Council Nr. 992, Vienna, Mar. 27, 2014: PC.DEL/346/14, p. 2.
16. Mr. Mayr-Harting (European Union), GA, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, pp. 4–5.
17. Ms. Power (USA), Security Council, Apr. 13, 2014: http://usun.state.gov/briefing/statements/224764.htm.
18. Ms. Power (USA), Security Council, 69th yr., 7144th mtg, Mar. 19, 2014: S/PV.7144, p. 10.
19. Exec. Ord. 13662, "Blocking Property of Additional Persons Contributing to the Situation in Ukraine," Mar. 20, 2014, 79 Fed. Reg. 16169. See also Exec. Ord. 13661, Mar. 16, 2014, 79 Fed. Reg. 15353; Exec. Ord. 13660, Mar. 6, 2014, 79 Fed. Reg. 13493.
20. Statement of G7 Leaders on Ukraine, Mar. 12, 2014: http://www.whitehouse.gov/the-press-office/2014/03/12/statement-g-7-leaders-ukraine.
21. White House, Office of the Press Secretary, Transcript, Feb. 28, 2014, 5.09 P.M. EST.
22. See further the summary of U.S. practice: (2015) 109 *AJIL* [forthcoming].
23. See, for example, Mr. Oh Joon (Republic of Korea), Security Council, 69th yr., 7144th mtg., Mar. 19, 2014, S/PV.7144, p. 11; Mr. Errázuriz (Chile), Security Council, 69th yr., 7138th mtg., Mar. 15, 2014: S/PV.7138, p. 8. See also Statement by the Republic of Moldova on the situation in Ukraine, OSCE Permanent Council, 989th mtg., Mar. 14, 2014: PC.DEL/287/14; Statement of the Georgian Foreign Ministry regarding the referendum held in Crimea, Tbilisi, Mar. 16, 2014: http://mfa.gov.ge/index.php?lang_id=ENG&sec_id=59&info_id=17341.
24. Mr. Ogwu (Nigeria), GA, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, pp. 18–19.
25. "Indonesia Respects Ukraine's Sovereignty Concerning Crimea Issue," Mar. 21, 2014: http://www.antaranews.com/en/news/93293/indonesia-respects-ukraines-sovereignty-concerning-crimea-issue (quoting foreign minister of Indonesia).
26. Mrs. Perceval (Argentina), A/68/PV.80, p. 19.
27. "Crimea Vote as Worthless as Falklands Poll: Argentina President," *Reuters*, Mar. 19, 2014: http://www.reuters.com/article/2014/03/19/us-ukraine-crisis-falklands-idUSBREA2I1GG20140319.
28. Regarding the relation between sanctions and non-recognition, see further this chapter, pp. 72–73.
29. In respect of EU sanctions see Maya Lester's blog at http://europeansanctions.com/ukraine/.
30. Tams in Fastenrath et al. (eds.), *Simma Essays* (2011) 379.
31. See, for example, France, statement of the foreign minister, reprinted 41 *AFDI* 853, 911 (1995); United Kingdom, Statement of Lord Inglewood, Apr. 18, 1995, reprinted Geoffrey Marston (ed.) (1995) 66 *BYIL* 683, 621; United States, statement of Deputy Sec. State Strobe Talbott (1995) 5 Dept. State Dispatch 119, 120.
32. See, for example, Ministerial Meeting of the North Atlantic Council, Budapest, Final Communiqué, May 29, 2001, para. 61: affirming "Russia's right to preserve its territorial integrity and to protect all citizens against terrorism and criminality, which we condemn in all their forms."
33. Allison (2013) 57.
34. Conclusion, pp. 199–201.
35. Foreign Ministry spokesperson Hong Lei, Mar., 2014: http://thediplomat.com/2014/03/china-reacts-to-the-crimea-referendum/.
36. *Kosovo* advisory proceedings, Written Statement of China, Apr. 16, 2009, p. 4.

37. Mr. Liu Jieyi (China), GA, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, pp. 10–11.
38. For example, in respect of the islands of the South China Sea: "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof." Note verbale dated May 7, 2009, of the Permanent Mission of the People's Republic of China to the United Nations Secretary-General: CML/17/2009. For Viet Nam's (opposite) position, see Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, Oct. 1, 2009: CLCS/64, p. 22, para. 105.
39. See, for example, Note Verbale of the Embassy of the People's Republic of China in Manila to Department of Foreign Affairs of the Republic of the Philippines dated Feb. 19, 2013, No. (13) PG-039: "The territorial disputes between China and the Philippines are still pending and unresolved, but both sides have agreed to settle the disputes through bilateral negotiations."
40. Mr. Shen Guofang (China), SC 54th yr., 4011th mtg., June 10, 1999, p. 9.
41. Keck, Mar. 8, 2014.
42. India, Ministry of External Affairs, Media Centre, Mar. 18, 2014: http://www.mea.gov.in/press-releases.htm?dtl/23101/Prime+Ministers+telephone+conversation+with+Russian+President+Vladimir+Putin.
43. Ms. King (Saint Vincent and the Grenadines), GA, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, p. 15.
44. Mrs. Carrion (Uruguay), GA, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, p. 16.
45. Mr. Lasso Mendoza (Ecuador), GA, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, p. 25.
46. Mr. Ntwaagae (Botswana), GA, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, p. 26.
47. See, for example, Ms. Richards (Jamaica), ibid., p. 24; Mr. Boukadoum (Algeria), ibid., p. 25.
48. Mrs. Rubiales de Chamorro (Nicaragua), GA, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, p. 12.
49. Mr. Llorentty Soliz (Plurinational State of Bolivia), GA, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, p. 14.
50. Mr. Ja Song Nam (Democratic People's Republic of Korea), GA, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, p. 20.
51. Mr. Llorentty Soliz (Plurinational State of Bolivia), GA, 68th sess., 80th plen. mtg., Mar. 27, 2014: A/68/PV.80, p. 13.
52. Tomuschat in Wellens (ed.) (1998) 253, 259; quoted in ILC Commentaries, Article 41, Comment (5) n. 688, p. 250.
53. Letter dated 28 February 2014, from the Permanent Representative of Ukraine to the United Nations addressed to the president of the Security Council, S/2014/136.
54. Letter dated 13 March 2014, from the Permanent Representative of Ukraine to the United Nations addressed to the president of the Security Council, Annex: S/2014/186.
55. See *Repertory of Practice of United Nations Organs,* Supp. 10 (2000–2009), "Article 11," p. 6, para. 9 (and notes 12–21 with references).
56. GAR 55/174, Dec. 19, 2000.
57. GAR 64/11, Nov. 9, 2009, para. 5.
58. GAR 55/178, Dec. 7, 2000, para. 7.
59. See *Repertory of Practice of United Nations Organs,* Supp. 10 (2000–2009), "Article 11," p. 4, para. 6.

60. GAR 377 (V), Nov. 3, 1950, para. 1.
61. Ibid., paras. 3–13.
62. See, for example, *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion, June 21, 1971, Sep. Op. Judge Petren, ICJ Rep. 1971 pp. 16, 136–137.
63. Draft resol., preambular para. 3: S/2014/189, p. 1. The draft resolution was put forward by Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Moldova, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, the United Kingdom, and the United States.
64. Draft res., para. 5: S/2014/189, p. 2.
65. The sponsors of the draft were Canada, Costa Rica, Germany, Lithuania, Poland, and Ukraine: A/68/L.39, Mar. 24, 2014.
66. GA 68th sess., 80th plen. Mtg., Mar. 27, 2014: A/68/PV.80, p. 17.
67. See this chapter, pp. 69–70.
68. GAR 68/262, Mar. 27, 2014, para. 1.
69. Ibid., para. 2.
70. See Principle 1, GAR 2625(XXV), Oct. 24, 1970, Annex. Certain States during the debates over the draft Declaration however wished the Declaration to define the principle of non-intervention broadly enough "to embrace one of the most dangerous current forms of intervention, namely, intervention which began in a clandestine manner and which employed the techniques of subversion and terrorism": Mr. Lee (Canada), Sixth Committee, 1178th mtg., Sept. 23, 1970: A/C.6/SR.1178, para. 29. To similar effect, see Mr. Brennan (Australia), ibid., para. 37; Mr. Gimer (USA), 1180th mtg., Sept. 24, 1970: A/C.6/SR.1180, para. 22; Mr. Beeby (New Zealand), 1181st mtg., Sept. 25, 1970, A/C.6/SR.1181, para. 7; Mr. Watanakun (Thailand), 1183rd mtg, Sept. 28, 1970, A/C.6/SR.1183, para. 25.
71. The expression was de Luna's in the discussion at the ILC of draft article 12 on the law of treaties (consent to a treaty procured by the illegal use or threat of force): ILC 681st mtg., May 16, 1963, ILC Ybk 1963, Vol. I, p. 52, para. 72. There appears to have been only one other instance in discussions at the ILC when the expression "unlawful means" was used in connection with threats or use of force. See Economides, on prohibiting "an aggressor State from giving its nationality to the inhabitants of the territory it had acquired by unlawful means": 2603rd mtg., July 15, 1999, ILC Ybk 1999, Vol. I, p. 267, para. 67. The only instance in which the phrase "unlawful means" appears to have been used in an opinion in an ICJ case was in the Dissenting Opinion of Judge *ad hoc* Torres Bernárdez, in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, Merits, Mar. 16, 2001, ICJ Rep. 2001 p. 40, 269, para. 21: "the maxim [*quieta non movere*] does not protect territorial situations created by coercion, fraud or other unlawful means."
72. The American Revised Draft of June 30, 1945 proposed the following provision:

    5. The Tribunal shall be bound by this declaration of the Signatories that the following acts are criminal violations of International Law:

    (a) Violations of the laws, rules, and customs of war. Such violations shall include, but shall not be limited to, mass murder and ill-treatment of prisoners of war and civilian populations and the plunder of such populations.
    (b) Launching a war of aggression.

(c) Invasion or threat of invasion of, or initiation of war against, other countries in breach of treaties, agreements or assurances between nations, or otherwise in violation of International Law.

(d) Entering into a common plan or enterprise aimed at domination over other nations, which plan or enterprise included or intended, or was reasonably calculated to involve, or in its execution did involve, the use of unlawful means for its accomplishment, *including any or all of the acts set out in sub-paragraphs* (a) *to* (c) *above or the use of a combination of such unlawful means with other means*.

Reprinted ILC Ybk 1950, Vol. II, pp. 182–183 (emphasis added). Compare to Art. 6, Charter of the International Military Tribunal: 82 UNTC 280, 286–288.

73. See, for example, SC 59th yr., 5052nd mtg., Oct. 6, 2005, Mr. Akram (Pakistan): S/PV.5052, p. 10.
74. GAR 2625 (XXV), Oct. 24, 1970, first principle.
75. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States),* Merits, ICJ Rep. 1986 p. 14, 100, para. 188.
76. Grant, "Doctrines" in Wolfrum et al. (eds.), MPEPIL, paras. 8–15.
77. ARSIWA, Arts. 40, 41.
78. Pp. 134–136.
79. *East Timor (Portugal* v. *Australia),* Judgment, June 30, 1995, ICJ Rep. 1995 p. 90, 96–97, 103–104, paras. 14–16, 31.
80. See, for example, Memorial of Portugal, Nov. 18, 1991, pp. 64, paras. 2.17ff, esp. p. 72, para. 2.25; p. 73, para. 3.03; p. 116, para. 4.62; pp. 219–221, paras. 8.22–8.25; and see Protest note of Feb. 11, 1991, as discussed ibid., p. 61, para. 2.13; Reply of Portugal, Dec. 1, 1992, p. 28, para. 2.23; pp. 111–119, paras. 5.01–5.12; and esp. pp. 170–183, paras. 6.24–6.49; Dupuy (for Portugal), Public sitting, Feb. 13, 1995, CR 95/12, pp. 15–33; Correia, ibid., pp. 44–54, paras. 17–29.
81. ICJ Rep. 1995 at p.104, paras. 32–33.
82. SCRs. 384 (1975), Dec. 22, 1975; 389 (1976), Apr. 22, 1976; GARs 3485 (XXX), Dec. 12, 1975; 31/53, Dec. 1, 1976; 32/34, Nov. 28, 1977; 33/39, Dec. 13, 1978; 34/40, Nov. 21, 1979; 35/27, Nov. 11, 1980; 36/50, Nov. 24, 1981; 37/30, Nov. 23, 1982.
83. GAR 34/22, Nov. 14, 1979, preambular para. 2, para. 5.
84. GAR 37/6, Oct. 28, 1982, preambular para. 5.
85. Reisman (2004) 98 *AJIL* at 519.
86. See also GARs 35/6, Oct. 22, 1980; 36/5, Oct. 21, 1981.
87. See Benvenisti (1993) 165.
88. GAR 38/7, Nov. 2, 1983, para. 1.
89. Ibid., para. 4.
90. GAR ES-6/2, Jan. 14, 1980.
91. Benvenisti (1993) 163.
92. See, for example, Mr. Duncan Sandys (United Kingdom Commonwealth Relations Secretary), Dec. 18, 1961, *Hansard,* HC Debates, vol. 651, col. 948; and Mr. Gaitskell (Leader of the Opposition) concurring, ibid., col. 949. For text of statements by other States regretting the use of force in Goa, see *Keesing's Record of World Events,* vol. 8, pp. 18659ff (Mar. 1962).
93. See a Belgian *Cour d'Appel* holding that "*aucune conséquence juridique ne peut être reconnue à cet acte de violence*" (*Estado da India* v. *SA Kredietbank et Verbruggen,* Cour d'Appel [Belgian regional court of appeal], Brussels, Jan. 20, 1965 (1967) 3 *RBDI* 566 and discussed by Reisman & Pulkowski, MPEPIL, para. 16.

94. *Repertory of Practice of United Nations Organs*, (1959–1966), Suppl. 3, vol. I, Art. 2(4), p. 146, para. 98.
95. Ibid., para. 99.
96. Ibid., para. 103.
97. For the General Assembly's designation of Goa and Dependencies on the list of Non-Self-Governing Territories, see GAR 1542 (XV), Dec. 15, 1960, para. 1(g).
98. GAR 1541 (XV), Dec. 15, 1960, Annex, Principle II.
99. Ibid., Principle VI.
100. This was the main ground of objection: see *Repertory of Practice of United Nations Organs,* (1959–1966), Suppl. 3, vol. I, Article 2(4), p. 148, para. 109. The advice from the United States Embassy in New Delhi was to "separate our case against the use of force, which is valid, from any suggestion that we are responsive to pressure by Portuguese": Telegram from the Embassy in India to the Department of State, Dec. 10, 1961, reprinted XIX *Foreign Relations of the United States, 1961–1963*, p. 152.
101. *Western Sahara*, Advisory Opinion, Oct. 16, 1975, Sep. Op. Judge Dillard, ICJ Rep. 1975 p. 12, 122.
102. A point with which extensive State practice is in accord. See, for example, repeated statements of the UK government in respect of "the undetermined status" of Western Sahara: for example, O'Keefe (ed.), UKMIL (2009) 80 *BYIL* at 718–719.
103. India's position was that no legal frontier existed: Security Council 16th sess., 987th mtg, Dec. 18, 1961, for which see also *Repertoire of the Practice of the Security Council*, Suppl. 1959–1963, Part II, p. 197.
104. See Application instituting proceedings, May 30, 1961.
105. See esp. GAR 1207 (XII), Dec. 13, 1957, "*Considering* that, in accordance with the provisions of Article 76 *b* of the Charter . . . one of the basic objectives of the International Trusteeship System is the progressive development of the inhabitants of Trust Territories towards self-government or independence." See also GAR 1541 (XV) (Principles Which Should Guide Members in Determining whether or Not an Obligation Exists to Transmit Information Called for under Article 73(e) of the Charter), Dec. 15, 1960, Annex, Principle VI.
106. See Chapter 1, n. 61.
107. GAR 1608 (XV), Apr. 21, 1961.
108. *Northern Cameroons,* ICJ Rep. 1963 at 32.
109. GAR 2504 (XXIV), Nov. 19, 1969.
110. See Statement of the delegation of Indonesia in reply to Vanuatu, Sept. 26, 2008: A/63/491, Annex.
111. GAR 54/194 (Question of East Timor), Dec. 17, 1999.
112. See, for example, Portugal's position: Dr. J. Socrates Da Costa (Portugal), GA, 14th sess., 823rd plen. mtg., paras. 188–189 (1959); Spain's position, *Communication to the Secretary-General from the Permanent Representative of Spain*, A/C.4/385 (1958).
113. GAR 1542 (XV), Dec. 15, 1960, para. 1; GAR 41/41(A), Dec. 2, 1986, paras. 1–4.
114. Lauterpacht (1947) 430.
115. OHCHR, Report on the human rights situation in Ukraine, Apr. 15, 2014, p. 5, para. 12, p. 26, para. 99. See also OHCHR, Report on the human rights situation in Ukraine, May 15, 2014, pp. 5, 26, paras. 8, 117.
116. OHCHR, Report, May 15, 2014, p. 4, para. iii.
117. Id.
118. OHCHR, Report on the human rights situation in Ukraine, Mar. 3, 2015, p. 6, para. 19.
119. Pp. 96–97.

120. Committee of Ministers, Decision: "Situation in Ukraine," 1195th mtg., Mar. 19–20, 2014, paras. 2–3.
121. Venice Commission, Opinion on "Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles," adopted, 98th plen. sess., Mar. 21–22, 2014 (Paczolay, Hon. Pres.; Suchocka, Tanchev, Tuori, Members): CDL-AD(2014)002.
122. CDL-AD(2014)002, p. 6, para. 28.
123. Ibid., para. 21.
124. Ibid., para. 22.
125. Ibid., para. 28.
126. Id.
127. Committee of Ministers, Decision: "Situation in Ukraine," 1196th mtg., Apr. 2–3, 2014, para. 1.
128. PACE res. 1988 (2014), Apr. 9, 2014, paras. 14, 16.
129. Pp. 17–18.
130. PACE res. 1990 (2014), Apr. 10, 2014, paras. 3, 6.
131. Ibid., para. 15.
132. Ibid., para. 16.
133. See Grant, "Chechnya" in Wolfrum et al. (eds.), MPEPIL, paras. 34–37. See also Rabiller (2000) 104 *RGDIP* 965.
134. COE Parliamentary Assembly, Doc. 8634, "Credentials of the Delegation of Russian Federation," Jan. 26, 2000, para. 4.
135. Anne Brasseur, President, PACE, Feb. 18, 2015: http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5435&lang=2&cat=15.
136. PACE res. 2034 (2015), Jan. 28, 2015, para. 7.
137. Ibid., para. 15.
138. Ibid., para. 16.
139. See, for example, Canada, Interpretative Statement under Paragraph IV.1(A)(6) of the Rules of Procedure of the OSCE, Mar. 21, 2014: PC.DEC/1117, attachment 3.
140. OSCE Baku Declaration (2014), June 28-July 2, 2014, paras. 4, 10.
141. Ibid., para. 12.
142. Ibid., para. 6.
143. Available at http://www.whitehouse.gov/the-press-office/2014/03/12/statement-g-7-leaders-ukraine.
144. G7, Hague Declaration, Mar. 24, 2014, para. 2.
145. Id.
146. See Smale & Shear, Mar. 25, 2014.
147. http://www.oecd.org/russia/statement-by-the-oecd-regarding-the-status-of-the-accession-process-with-russia-and-co-operation-with-ukraine.htm.
148. Statement of the North Atlantic Council on the so-called referendum in Crimea, Mar. 17, 2014: http://www.nato.int/cps/en/natolive/news_108030.htm.
149. Id.
150. Statement by NATO Foreign Ministers, Apr. 1, 2014: http://www.nato.int/cps/en/natolive/news_108501.htm.
151. Declaration of Heads of State and Government, North Atlantic Council, Wales, Sept. 4–5, 2014, para. 1.
152. Ibid., para. 16.
153. Ibid., para. 30. See also paras. 17, 19, 21, 24–28.

154. As to the blocking of media access in connection with the referendum, see Amnesty International, Media Centre, Mar. 14, 2014: http://www.amnesty.org/en/for-media/press-releases/russia-media-black-out-ahead-disputed-crimea-referendum-2014–03–14. See also, for example, Bartkowski & Ackerman, Mar. 22, 2014; Phillips & Perelli, Mar. 19, 2014.
155. For example, the US response, which was one of non-recognition, about which see Grant (2001) 1 *Baltic YBIL* 23.
156. See Yakemtchouk (1991) 37 *AFDI* 259.
157. See, for example, *Jellinek* v. *Levy*, France, Tribunal Commercial of the Seine, Jan. 18, 1940 (refusing effect to "acts of violent confiscation" in German-occupied Czechoslovakia), 11 ILR 24; *The Maret*, U.S. Ct. of Appeals (3rd Cir.) Oct. 17, 1944 (not recognizing title to vessel supposedly derived from Soviet confiscation orders after annexation of Estonia), 12 ILR 29; *Republic of Latvia Case*, German Federal Republic, Restitution Chamber of Berlin, Oct. 3, 1953 (*locus standi* of Republic of Latvia recognised notwithstanding purported annexation of Latvia), 20 ILR 180.
158. See Blühdorn (1932) 41 *RdC* 137; Anderson (1929) 23 *AJIL* 383; Borchard (1925) 19 *AJIL* 133; Borchard (1926) 20 *AJIL* 69.
159. For example, Treaty of St. Germain-en-Laye (Allied and Associated Powers—Austria), Sept. 10, 1919, Art. 177.
160. See Mensah, "United Nations Compensation Commission (UNCC)" in Wolfrum et al. (eds.), MPEPIL; Boisson de Chazournes & Campanelli in Andreas Fischer-Lescano et al. (eds.) (2008) 3; Reed (2003) 306 *RdC* 286; Brower & Lillich (1997–8) 38 *Virg. JIL* 25.
161. SCR 687 (1991), Apr. 8, 1991, para. 16.
162. For historical review, see Waibel (2011) 171–182; Bederman (1994) 27 *NYU JIL & Pol.* 1. Litigation in national court also may arise, for example in connection with government measures against individuals, organizations, and their assets subject to sanctions.
163. *Ukraine* v. *Russia*, ECtHR, Case no. 20958/14. For Ukraine's notification of the institution of proceedings, see Letter dated 17 March 2014, from the Permanent Representative of Ukraine to the United Nations addressed to the president of the Security Council, S/2014/196.
164. Kollmar, Mar. 27, 2014.
165. Leach, Mar. 19, 2014.
166. *Ilaşcu & Others* v. *Moldova and Russia*, ECtHR, Judgment, July 8, 2004, para. 330.
167. Ibid., para. 331. This accords, in a general way, with the rule under which the injured State, too, is obliged not to recognize or aid in the consolidation of the unlawful situation. See ARSIWA, Art. 41, Comment (9): Crawford (ed.) (2002) 251.
168. *Ilaşcu*, para. 341.
169. Ibid., para. 344.
170. Id.
171. See Mr. Sadi, Committee on Economic, Social and Cultural Rights, 52nd sess., 4th mtg., Apr. 29, 2014: E/C.12/2014/SR.4, p. 8, para. 41.
172. See also Grant, May 19, 2014; May 22, 2014.
173. *Cyprus* v. *Turkey*, ECtHR (Grand Chamber), ECHR 2001–IV, Judgment (Merits), May 10, 2001.
174. Ibid., para. 13.
175. Ibid., *dispositif*, para. 4.
176. *Cyprus* v. *Turkey*, ECtHR (Grand Chamber), Judgment (Just Satisfaction), May 12, 2014.

177. Ibid., Joint concurring opinion of Judges Zupančič, Gyulumyan, David Thór Björgvinsson, Nicolaou, Sajó, Lazarova Trajkovska, Power-Forde, Vučinić, and Pinto de Albuquerque.
178. Concurring Opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić, para. 1.
179. A phrase associated with Jellinek, *Allgemeine's Staatslehre*, 337–339.
180. See also Chapter 1, pp. 33–35.
181. *Austria* v. *Italy*, European Commission of Human Rights, Application no. 788/60, Decision, Jan. 11, 1961, p. 20, cited in *Cyprus* v. *Turkey* (Just Satisfaction), para. 37. The public order question was the treatment of persons of German linguistic background in the Italian alpine area.
182. *Cyprus* v. *Turkey* (Just Satisfaction) para. 46.
183. Ibid., citing *Ahmadou Sadio Diallo (Guinea* v. *Democratic Republic of the Congo)* Judgment (Compensation), June 19, 2012, ICJ Rep. 2012 p. 324, 344, para. 57.
184. *Cyprus* v. *Turkey* (Just Satisfaction), para. 41.
185. Ibid. paras. 36–38.
186. Ibid. para. 56, quoting *Varnava and Others* v. *Turkey*, ECtHR (Grand Chamber), Judgment, Sept. 18, 2009, para. 224.
187. Neither the Russian Federation nor Ukraine has accepted compulsory jurisdiction under Art. 36(2) of the Statute of the Court: http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3.
188. Grant, "International Dispute Settlement in Response to an Unlawful Seizure of Territory: Three Mechanisms," *Chic. JIL* (forthcoming 2015).
189. For example, *Asian Agricultural Products Ltd (AAPL)* v. *Sri Lanka,* ICSID Case No. ARB/87/3 (El-Kosheri, President; Goldman & Asante, Members), Award, June 27, 1990.
190. E. Lauterpacht (2009) p. x.
191. http://unctad.org/Sections/dite_pcbb/docs/bits_ukraine.pdf.
192. Starting with a case under the Additional Facility: *Joseph Charles Lemire* v. *Ukraine* (ICSID Case No. ARB(AF)/98/1) (Sir Elihu Lauterpacht, Chair; Paulsson & Voss, Members), Award (containing parties' settlement), Sept. 18, 2000.
193. Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments, signed, Moscow, Nov. 27, 1998, entered into force, Jan. 27, 2000: http://unctad.org/sections/dite/iia/docs/bits/russia_ukraine.pdf.
194. About which see Trevino (2014) 5 *JIDS* 199.
195. PRC Foreign Ministry Spokesperson Hong Lei's Regular Press Conference, June 3, 2014: http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1161810.shtml.
196. Art. 9, Agreement between the Government of the People's Republic of China and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments, adopted Oct. 31, 1992, entered into force May 29, 1993: 1849 UNTS 81, 99–100.
197. This reportedly was in connection with a takeover by the Russian Federation of Chornomornaftogaz. Alexander Bor & Jonathan Dart, "Ukraine to Sue Russia for Seizing Crimean Oil, Gas Assets," May 14, 2014: http://www.platts.com/latest-news/natural-gas/kiev/ukraine-to-sue-russia-for-seizing-crimean-oil-26788163. As to the possible application of GAR 68/262 in commercial arbitration, see Azeredo da Silveira, Sept. 25, 2014. For an examination of Ukraine's own problems of commercial and investment security, see Rojanksy (2014) 22(3) *Demokratizatsiya* 411.

198. As to the element of intent in the act of recognition, see *Annuaire de l'Institut de Droit International*, 11th Commission, Resolution, Art. 4: (1936) 9(ii) 300, 301. As to opposability, see Rodríguez Cedeño, Sixth Report, May 30, 2003, p. 17, para. 67. See further Grant in Chinkin & Baetens (eds.) (2014) 192, 198–204.
199. SCR 662 (1990), Aug. 9, 1990, para. 2:

    The Security Council…

    2. *Calls upon* all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation.
200. SCR 276 (1970), Jan. 30, 1970, para. 2.
201. Ibid., para. 5.
202. SCR 283 (1970), July 29, 1970.
203. Ibid., para. 1.
204. Ibid., para. 2.
205. Ibid., para. 3.
206. Id.
207. Ibid., paras. 4, 6.
208. Ibid., para. 5.
209. Ibid., para. 7.
210. *Namibia,* Advisory Opinion, ICJ Rep. 1971 at 56, para. 126.
211. Id.
212. United Nations Council for Namibia, Decree No. 1 for the Protection of the Natural Resources of Namibia, Sept. 7, 1974.
213. GAR 36/51, Nov. 24, 1981, para. 8.
214. Ibid., para. 5.
215. SCR 661 (1990), Aug. 6, 1990.
216. Pp. 74–75, and n. 76, this chapter.
217. *Texas* v. *White*, 74 U.S. (7 Wall.) 227, 240 (1868) (Chase, C.J.).
218. *Namibia*, Advisory Opinion, ICJ Rep. 1971 p. 16.
219. ICJ Rep. 1971 at p. 56, para. 125.
220. *Xenides-Arestis* v. *Turkey*, ECtHR, Judgment (Just Satisfaction), Dec. 7, 2006, dispositive para. 1.
221. *Xenides-Arestis* v. *Turkey*, ECtHR, Judgment (Merits), Dec. 22, 2005, dispositive para. 5.
222. *Apostolides* v. *Orams*, ECJ (Grand Chamber), Case C-420/07, Judgment, Apr. 28, 2009, esp. para. 19.
223. Ibid., dispositive para. 2.
224. Land seizures of course should also be rejected where they constitute breaches of other applicable rules, such as those in human rights instruments to which the Russian Federation is a party.
225. See definition of State succession, Art. 2(1)(b), Vienna Convention on Succession of States in Respect of Treaties, adopted Aug. 23, 1978, entered into force Nov. 6, 1996: 1946 UNTS 3, 5; Art. 2(1)(a), Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Apr. 8, 1983, not yet in force: A/CONF.117/14. Cf. ILC Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, ILC Ybk 1999 Vol. II Pt. Two p. 25.
226. See Grant in Pavković & Radan (eds.) (2011) 365, 371–375.
227. Adopted June 29, 2001, entered into force June 29, 2004: 2262 UNTS 251. About which see Stavridi & Kolliopoulos (2002) 48 *AFDI* 163.

228. About which see ILC 1605th mtg., June 5, 1980, Mr. Jagota, paras. 8–16: ILC Ybk 1980, vol. I, pp. 115–116.
229. Art. I says as follows:

    Portugal acknowledges that the territories of Goa, Daman, Diu, Dadra and Nagar Haveli have already become parts of India and hereby recognises the fully sovereignty of India over these territories with effect from the dates when they became parts of India under the Constitution of India.

    Treaty between India and Portugal on Recognition of India's Sovereignty over Goa, Daman, Diu, Dadra and Nagar Haveli and Related Matters, signed, Dec. 31, 1974, entered into force June 3, 1975: 982 UNTS 158, 159.
230. In this light, it is open to question how often, if ever, the second paragraph of Art. 14 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Apr. 8, 1983) would apply. Art. 14, para. 2. provides for succession where part of one State has been transferred to another State and no agreement has been reached between them. The paragraph was adopted to apply in "the politically charged circumstances which may surround... territorial changes" that have occurred without agreement: draft art. 13, Comment (4), ILC Ybk 1981, vol. II(2), p. 31. It is submitted that in practice the occasions for application of this provision will be few or none. The 1983 Convention as yet has not received the ratifications necessary for entry into force.
231. *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, Judgment, Feb. 3, 2009, ICJ Rep. 2009 p. 61.
232. See, for example, *Frontier Dispute (Benin/Niger)*, Judgment, July 12, 2005, ICJ Rep. 2005 p. 90, 108, para. 23; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, Sept. 25, 1997, ICJ Rep. 1997 p. 7, 71–72, para. 123; *Frontier Dispute (Burkina Faso/Mali)*, Judgment, Dec. 22, 1986, ICJ Rep. 1986, p. 554, 565, para. 20; *Continental Shelf (Tunisia/Libya)*, Judgment, Feb. 24, 1982, Sep. Op. Judge Jimenez de Arechaga, ICJ Rep. 1982 p. 18, 131–2, paras. 101–102.
233. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, Feb. 20, 1969, ICJ Rep. 1969 p. 3, 51, para. 96. See also *Tunisia/Libya*, ICJ Rep. 1982 at 61, para. 73; *Nicaragua* v. *Honduras*, ICJ Rep. 2007 at 696, para. 113; *Qatar* v. *Bahrain*, Merits, ICJ Rep. 2001 at 97, para. 185; and the Chamber decision in *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States of America)*, Judgment, Oct. 12, 1984, ICJ Rep. 1984 p. 246, 312, para. 157. As for ITLOS practice, see *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, Mar. 14, 2012, p. 61, para. 185.
234. Oxman (2006) 100 *AJIL* 830.
235. And accordingly with mixed territorial and maritime disputes the territorial component has been addressed before the maritime in dispute settlement proceedings.
236. ICJ Rep. 1995 at 98, para. 18.
237. Chapter 4, pp. 127–131. [The inadmissibility of the forcible claim].
238. GAR 1803 (XVII), Dec. 14, 1962, pream. para. 2. See also GAR 1515 (XV), Dec. 15, 1960, para. 5.
239. Dis. Op. Judge Weeramantry, ICJ Rep. 1995 at pp. 197–199; Dis. Op. Judge *ad hoc* Skubiszewski, ICJ Rep. 1995 at pp. 242, 264, paras. 58, 131.
240. *Western Sahara,* Advisory Opinion, ICJ Rep. 1975 at 68, para. 162.
241. Hans Corell, Under-Secretary-General for Legal Affairs/Legal Counsel, Feb. 12, 2002, S/2002/161, p. 6, para. 25. See also Corell's later note on this work: "The Responsibility

of the UN Security Council in the Case of Western Sahara," *International Judicial Monitor* (Winter 2015).

242. Ibid.
243. Ibid., p. 5, para. 19.
244. Opinion SJ-0269/09, July 13, 2009, referred to in Legal Opinion SJ-0665/13, Nov. 4, 2013, p. 4, para. 4(i).
245. *Loizidou* v. *Turkey*, ECtHR, Judgment (Merits), Dec. 18, 1996, para. 52, quoting *Loizidou* (preliminary objections), Judgment, Mar. 23, 1995, pp. 23–24, para. 62.
246. *Cyprus* v. *Turkey* (Merits), para. 77.
247. *Cyprus* v. *Turkey* (Merits), para. 78.
248. See Gregory, Sept. 14, 2014.
249. The Russian Federation has been a WTO Member since Aug. 22, 2012.
250. http://www.reuters.com/article/2014/04/24/us-ukraine-crisis-russia-wto-idUSBREA3N0QS20140424.
251. SR.19/12, p. 196, quoted in *Analytical Index of the GATT*, 6th edn. (1995, republished 2012) 600.
252. Ibid., with citations to statements of State representatives, 600–601.
253. C/M/196 at p. 7, quoted in *Analytical Index* 601.
254. Ibid., 602–603.
255. Ibid., 604.
256. DS272, Feb. 10, 1992, quoted at *Analytical Index* 604.
257. L/5319/Rev.1, quoted at *Analytical Index* 603.
258. See examples at *Analytical Index* 605.
259. Sweden was roundly criticized for invoking Article XXI: ibid., 603.
260. See esp. Dawidowicz, *Third-Party Countermeasures in International Law* (forthcoming, Cambridge University Press). See also Smeets (2000); Lindsay (2003) 52 *Duke LJ* 1277; Alexandroff & Sharma in Macrory, Appleton & Plummer (eds.) (2005) 1571; Bhala (1998) 19 *U. Penn. J. Int'l Econ. L.* 263. As to countermeasures in investment law, see Parlett in Chinkin & Baetens (eds.) (2014) 389.
261. See, for example, Zemanek (2000) 4 *Max Planck UNYB* 1–52. A particular problem with countermeasures in response to one State's breach of the obligation *erga omnes* may be that the countermeasures are, in principle, available to *all* States but target only the one State. Trade measures as countermeasures in that situation would have a multiplicative effect: many, perhaps all, of the targeted State's trade partners would adopt the measures. Problems of proportionality might in principle arise. See also Tzanakopoulos (2011) 81–83.

    As to measures adopted by the Russian Federation in response to sanctions, see Mercédeh Azeredo da Silveira, Sep. 25, 2014.
262. See further Eisenhut (2010) 48 *AdV* 431, 443–447.
263. ARSIWA Art. 49 provides as follows:

    Object and limits of countermeasures

    1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
    2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
    3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4 The Privileged Character of Boundaries and Territorial Regimes

1. This is approximately 2 percent of the total instruments registered. Hinojal-Oyarbide & Rosenboom put the total at 64,000: in Hollis (ed.) (2012) 248, 275. The number 1,200 is derived by searching relevant title keywords in the online databases of the League of Nations Treaty Series (LNTS) and United Nations Treaty Series (UNTS). The search method does not capture instruments that, though not entitled "frontier," "border," "boundary," "delimitation," "demarcation," etc. nevertheless addresses boundary matters in their operative provisions. See, for example, Art. 3 of the Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, entered into force, Nov. 10, 1994: 2042 UNTS 393.
2. GAR 68/262, Mar. 27, 2014, preamb. para. 3.
3. GAR 2625 (XXV), Oct. 24, 1970. As to the Declaration and the non-intervention principle, see Jamnejad & Wood (2009) 22 *Leiden J. Int'l L.* at 375–377.
4. For example, between the People's Republic of China and the territory of Taiwan: Crawford (2006) 198–221.
5. See Jennings's elegant account of the distinction: (1967) 121 *RdC* 416, 428–429. See also, for example, Cameroon's Additional Application, June 6, 1994, para. 17(f), requesting a judgment "*que la souveraineté sur la parcelle litigeuse dans la zone du lac Tchad est camerounaise*" and also to "*préciser définitivement la frontière entre elle et la République fédéral du Nigéria du lac Tchad à la mer*" ["that Cameroon has sovereignty over the disputed parcel in the area of Lake Chad" and to "specify definitively the frontier between her and the Federal Republic of Nigeria from Lake Chad to the sea"].
6. GAR 3314 (XXIX), Dec. 14, 1974, Annex, preambular para. 5.
7. See, for example, Mr. Spiropoulos, ILC 94th mtg., June 1, 1951, ILC Ybk. 1951, vol. I, p. 105, para. 82. As to considerations against referring to annexation, as such, as an international law crime, see Hudson, François and Brierly, ILC 58th mtg, June 30, 1950, ILC Ybk 1950, vol. I, p. 136, paras. 74–76. Hudson, with whom the others agreed, posited that annexation is a State act, and thus would not be relevant to the criminal responsibility of individuals. Scelle favored including annexation as a crime: ibid., p. 225, para. 57. In view of the subsequent development of criminal law, Scelle's position prevailed. See Introduction to Part I, pp. 12–13. [ICC Statute, Art. 8 *bis*].
8. See Chapter 1, p. 42.
9. See Bedjaoui, Ninth report, ILC Ybk 1977, vol. II(1) p. 69, para. 137.
10. Report of the Spec. Comm. on the Question of Defining Aggression, Mar. 11-Apr. 12, 1974: A/9619 (supp.), p. 9, para. 20, n. 4.
11. Pp. 110–111.
12. Annex to the letter dated 14 December 2014, from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council—Statement of the Ministry of Foreign Affairs of Ukraine on the occasion of the fortieth anniversary of the adoption of General Assembly resolution 3314 (XXIX): S/2014/895.
13. Final Act of the Conference on Security and Cooperation in Europe, Helsinki, Aug. 1, 1975: (1975) 14 ILM 1293.
14. 14 ILM at 1294.
15. 14 ILM at 1294.
16. For example, under UNCLOS, Art. 298: 1833 UNTS at 515.
17. See Schachter (1977) 71 *AJIL* 296.
18. See Council Decision 2008/901/CFSP, Dec. 2, 2008, Art. 1, para. 2, n. (1). Art. 1, para. 2, provides that the EU's fact-finding mission for Georgia shall "investigate

the origins and the course of the conflict in Georgia, including with regard to international law." Note (1) indicates that the phrase "with regard to international law" "includ[es] the Helsinki Final Act."

19. OSCE Baku Declaration (2014) paras. 4, 10.
20. A/46/771, annex II.
21. A/47/60—S/23329, annex II.
22. A/46/771, annex II, p. 4.
23. A/46/771, annex II, p. 6.
24. A/47/60—S/23329, annex II, p. 4.
25. A/47/60—S/23329, annex II, p. 5.
26. A/47/60—S/23329, annex II, p. 5.
27. A/49/765—S/1994/1399, annex I.
28. Budapest Memorandum, preambular para. 3.
29. Ibid., para. 1.
30. Ibid., para. 2.
31. Cf. VCLT, Art. 41.
32. NPT Art. VII, 729 UNTS 168, 173.
33. In accordance with NPT Art. III, para. 1, 729 UNTS at 172. See, for example, Agreement between the Kingdom of Saudi Arabia and the International Atomic Energy Agency for the application of safeguards in connection with the Treaty of [*sic*] the Non-Proliferation of Nuclear Weapons, June 16, 2005, entered into force Jan. 13, 2009: 2587 UNTS 29.
34. See Hamant (2007) 398–399.
35. Mr. Zlenko (Ukraine), Security Council, 50th yr., 3514th mtg., Apr. 11, 1995: S/PV.3514, pp. 2–3.
36. See Gelb, Apr. 2, 2014.
37. See Fitzmaurice, Second Report, Law of Treaties, para. 126: ILC Ybk. 1957, vol. II, p. 54.
38. Ibid., para. 6.
39. A/49/765—S/1994/1399, annex II.
40. Letter dated 7 December 1994, from the Permanent Representatives of the Russian Federation, Ukraine, the United Kingdom and the United States addressed to the Secretary-General: A/49/765—S/1994/1399, p. 1.
41. Comment by the Information and Press Department of the Russian Ministry of Foreign Affairs regarding the Budapest Memorandum of 1994, Mar. 19, 2014: http://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/507/64/pdf/N9450764.pdf?OpenElement.
42. Note verbale dated March 13, 2014, from the Permanent Mission of Ukraine addressed to the Acting Secretary-General of the Conference on Disarmament and Annex with Parliamentary statement to the guarantor States of the security of Ukraine: CD/1977.
43. See, for example, Spain's protests over the invasion of Kuwait communicated by the Office of Diplomatic Information: Unilateral acts of States, Rodríguez Cedeño, Seventh report, p. 54, para. 116.
44. The most famous instance being the Norwegian Foreign Minister's statement (the Ihlen Declaration): *Legal Status of Eastern Greenland (Denmark* v. *Norway)*, Judgment, Apr. 5, 1933, PCIJ Ser. A/B No. 53, pp. 36–37. See also, for example, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece)*, Public sittings, Murphy (for the former Yugoslav Republic of Macedonia) (relying on *Nicaragua* v. *United States*), CR 2011/11, Mar. 28, 2011, pp. 24–25, paras. 15–16; Crawford (for Greece), CR 2011/12, Mar. 30, 2011, pp. 33–34, para. 26.

45. Memorandum on Security Assurances in connection with the Accession of the Republic of Belarus to the Treaty on Non-Proliferation of Nuclear Weapons, paras. 1, 2, Budapest, Dec. 5, 1994: UNTS reg. no. 50069.
46. Ibid., para. 6.
47. Memorandum of the Secretary-General, as approved by the Council of the League, May 19, 1920, para. 3: 1 LNOJ 154, 155 (1920), about which see Hudson (1925) 19 *AJIL* 273, 277.
48. Report of the Committee Appointed to Study the Scope of Article 18 of the Covenant from a Legal Point of View (Scialoja, President; Bourquin, Fernandes, Fromageot, Hurst, and Struycken, Members), June 28, 1921: C.256.1921.V, p. 3.
49. Section X of the Code of Conduct provided as follows:

    39. The provisions adopted in this Code of Conduct are politically binding. *Accordingly*, this Code is not eligible for registration under Article 102.

    Letter dated 21 December 1994, from the Permanent Representative of Hungary to the United Nations addressed to the Secretary-General, Annex: A/49/800—S/1994/1435, p. 31 (emphasis added).
50. There is also the Kazakhstan Budapest Memorandum, of the same date, parties, and form. This appears neither to have been registered or circulated. For its text see http://www.exportlawblog.com/docs/security_assurances.pdf.
51. *Qatar* v. *Bahrain*, Jurisdiction and Admissibility, July 1, 1994, ICJ Rep. 1994 p. 112, 122, para. 29. For some considerations that may distinguish political from legal commitments, see "Initial Decisions on Treaty-Making," in Hollis (ed.) (2012) 654–657.
52. Application by Russia for membership in the Council of Europe, Parliamentary Assembly, Opinion 193 (1996), Jan. 25, 1996, para. 10.
53. PACE res. 1990 (2014), Apr. 10, 2014, para. 4.
54. PACE res. 2034 (2015), Jan. 28, 2015, para. 1.
55. As to the Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, see Mälksoo, Mar. 28, 2014, referring to Petr P. Kremnev, *Raspad SSSR: mezhdunarodnov-pravovye problemy* [Disintegration of the USSR: international legal problems] (Moscow: Zercalo-M, 2005), 68–91.
56. Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, Kiev, May 31, 1997, Art. 3: A/52/174, annex I, p. 3.
57. Friendship, Cooperation and Mutual Security Treaty (Azerbaijan-Russian Federation), Art. 3, Moscow, July 3, 1997: A/52/253, Annex, p. 3.
58. Chapter 2, pp. 44–47.
59. Black (ed.) (1998) 129, 131.
60. Agreement between Ukraine and the Russian Federation on Further Development of Interstate Legal Relations, Dagomys, June 23, 1992: 2382 UNTS 13.
61. Ibid., para. 9: 2382 UNTS at 14.
62. Agreement between the Government of Ukraine and the Government of the Russian Federation on exercising the right of property abroad of the former USSR for the purposes of diplomatic, consular, and trade representative offices, Yalta, Aug. 3, 1992, 2380 UNTS Reg. No. 42936 (No. 54173) (text not published).
63. See Chapter 3, pp. 93–94 and n. 230.
64. http://archive.kremlin.ru/text/docs/2003/01/30632.shtml See also Letter dated 30 January 2003 from the Permanent Representative of Ukraine to the United Nations, A/58/62-S/2003/156.
65. Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation, A/52/161—S/1997/413, pp. 3–11. Also reprinted 36 ILM 1006.
66. A/52/161—S/1997/413, p. 5.

67. Id.
68. Raustiala (2005) 99 *AJIL* 581, 584.
69. Ibid., p. 4.
70. Lauterpacht (1933) 125.
71. http://www.osce.org/library/14108?download=true.
72. Hollis, *ASIL Insights,* vol. 11(9), July 23, 2007.
73. (1991) 30 ILM 193, 196.
74. (1990) 29 ILM 1186. See Frowein (1992) 85 *AJIL* 152.
75. Treaty on the Final Settlement with respect to Germany, Art. 1, para. 1 (emphasis added): 29 ILM at 1188.
76. Ibid., Art. 1, para. 3: 29 ILM at 1189.
77. Ibid.
78. Art. 26, para. 1, provides, "Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offence." Christian Tomuschat & David P. Currie (trans.). About which, see Schmidt am Busch (2011), 1275.
79. 29 ILM at 1191.
80. Agreement between the Federal Republic of Germany and Poland concerning the basis for normalizing relations, Nov. 18, 1970: 830 UNTS 327; DDR-Poland Agreement, July 6, 1950; DDR-Poland Demarcation Act, Jan. 27, 1951; Germany-Poland Agreement in relation to the fundamental principles for the standardization of their mutual relations, Dec. 7, 1970; DDR-Poland Agreement in relation to the demarcation of maritime territories in the Oder bay, May 22, 1989.
81. Germany-Poland Agreement in Relation to Ratification of the Border between Them, Warsaw, Nov. 14, 1990: (1992) 31 ILM 1292.
82. Warsaw Agreement, preamble, 31 ILM at 1293.
83. 31 ILM at 1294.
84. (1997) 36 ILM 340, 344; 1966 UNTS 102, 104. Further to the political problem that the treaty settlement addressed, see Zeidler (2007).
85. (1997) 36 ILM at 346.
86. (1992) 31 ILM 1534.
87. Arbitration Agreement between Slovenia and Croatia, signed Nov. 4, 2009, entered into force Nov. 29, 2010: UNTS Reg. No. 48523.
88. Concluded May 23, 1969, entered into force Jan. 27, 1980: 1155 UNTS 331, 347.
89. Draft art. 59, Comment (11), ILC Ybk 1966, Vol. II, p. 259.
90. ILC Ybk 1966, Vol. II, pp. 284–285.
91. ILC Ybk 1966, Vol. II, p. 318.
92. As to the scope of the phrase "treaties establishing a boundary," see Mr. Kearney (USA), United Nations Conference on the Law of Treaties, 63rd mtg., May 10, 1968, A/CONF.39/C.1/SR.63, p. 367, paras. 11–15; with which Japan agreed: Mr. Fujisaki (Japan), ibid., p. 367, para. 17.
93. Mr. Phan-Van-Thinh (Republic of Viet Nam), United Nations Conference on the Law of Treaties, 63rd mtg., May 10, 1968, A/CONF.39/C.1/SR.63, p. 366, para. 2.
94. Draft art. 59, Comment (11), ILC Ybk 1966, Vol. II, p. 259.
95. Mr. Lukashuk (Ukrainian Soviet Socialist Republic), A/CONF.39/C.1/SR.63, p. 368, para. 24. Poland "fully shared" the Ukrainian view: Mr. Osiecki (Poland), 64th mtg., May 10, 1968: A/CONF.39/C.1/SR.64, p. 371, para. 13. Cf. Mr. Outrata (Czechoslovakia), ibid., p. 377, para. 86.
96. Mr. Kovalev (USSR), 64th mtg., May 10, 1968: A/CONF.39/C.1/SR.64, p. 374, para. 49.

97. Signed Aug. 23, 1978, entered into force Nov. 6, 1996: 1946 UNTS 3, 10.
98. Draft art. 11, draft art. 12, Comment (10): ILC Ybk 1974, vol. II, Pt. One, p. 199. See also ibid., p. 172, para. 73.
99. Report of the ILC to the General Assembly, "Succession of States in Respect of Treaties," May 6-July 26, 1974, ILC Ybk 1974, vol. II(1), 169, para. 59.
100. Draft art. 11, draft art. 12, Comment (2): ILC Ybk 1974, vol. II, Pt. One, p 197.
101. On this point, see Draft art. 11, draft art. 12, Comment (16): ILC Ybk 1974, vol. II, Pt. One, pp. 200–201.
102. Art. 29, about which see draft art. 29, Comment (2): ILC Ybk 1982, Vol. II, Pt. Two, p. 40.
103. A/66/10 (to appear in ILC Ybk 2011, Vol. II, Pt. Two).
104. Id.
105. Ibid., Comment (11).
106. Id.
107. Ibid., Comment (14).
108. Ibid., Comment (13).
109. *Hungary/Slovakia*, ICJ Rep. 1997 at 72, para. 123 (indicating the customary character of the Art. 12 rule).
110. For recent consideration of the characteristics of modern boundary disputes and modalities for their settlement, see Alvarez-Jiménez (2012) 23 *EJIL* 495; and, including, but not limited to, judicial and arbitral settlement, see essays in Lagoni & Vignes (eds.) (2006).
111. *Free Zones of Upper Savoy and District of Gex (France* v. *Switzerland)*, Judgment, June 7, 1932, Ser. A/B No. 46, p. 141; *Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden* v. *Poland)*, Judgment, Sept. 10, 1929, Ser. A. No. 23, p. 19.
112. *Free Zones*, Order, Aug. 19, 1929, PCIJ Ser. A. No. 22, p. 20; Judgment, June 7, 1932: Ser. A/B No. 46, p. 148.
113. For a map, see Biermann (1923) 13 *Geographical Review* 368, 369, Fig. 1.
114. Judgment, June 7, 1932: Ser. A/B No. 46, p. 148.
115. PCIJ Ser. A. No. 22, p. 16. And in the Judgment, June 7, 1932: Ser. A/B No. 46, pp. 127–128.
116. PCIJ Ser. A. No. 22, p. 17; Judgment, June 7, 1932: Ser. A/B No. 46, p. 136.
117. PCIJ Ser. A. No. 22, p. 18.
118. PCIJ Ser. A. No. 22, p. 21; Judgment, June 7, 1932, Ser. A/B No. 46, pp. 171–172.
119. Judgment, June 7, 1932: Ser. A/B No. 46, p. 172.
120. *Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden* v. *Poland*), Judgment, Sept. 10, 1919, PCIJ Ser. A, No. 23, pp. 31–32.
121. Ibid., p. 24, quoting Versailles Treaty, Art. 331.
122. Ibid., p. 26.
123. Ibid., p. 27.
124. See McCaffrey, Second report, p. 114, para. 104; Schwebel, Second report, pp. 189–190, paras. 187–193.
125. PCIJ Ser. A, No. 23, p. 32.
126. *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq*), Advisory Opinion, Nov. 21, 1925, PCIJ Ser. B No. 12.
127. Ibid., pp. 13–14.
128. Ibid., pp. 22–23.
129. Ibid., p. 33.

130. *Question of Jaworzina (Polish-Czechoslovakian Frontier)*, Advisory Opinion, Dec. 6, 1923, PCIJ Ser. B. No. 8, p. 10.
131. Ibid., p. 20.
132. Ibid., pp. 30–31.
133. Id.
134. Ibid., pp. 22–23.
135. Ibid., p. 25.
136. Ibid., p. 29.
137. Ibid., p. 32.
138. Ibid., pp. 34–35.
139. Ibid., p. 36 (emphasis added).
140. Id.
141. Ibid., p. 38.
142. Further to the politics of the Jaworzina dispute, see Gasiorowski (1957) 35 *Slavonic & East Eur'n Rev.* 473, 474–480.
143. Further to the *Jaworzina* case, see Kaikobad (2007), 46–52, 109–111, 205–206.
144. Lauterpacht (1996 reprint of 1958 rev'd ed.) 232.
145. See, for example, Nicaragua-Honduras Treaty of Oct. 7, 1894, affirming that "each Republic is owner of the territory which at the date of independence constituted respectively, the provinces of Honduras and Nicaragua." Quoted in *Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment, Oct. 8, 2007, ICJ Rep. 2007 p. 661, 674, para. 37.
146. *Burkina Faso/Mali*, ICJ Rep. 1986 at 566, para. 23.
147. For a thorough review, see Infante Caffi, "Boundary Disputes in Latin America" in Wolfrum et al. (eds.), MPEPIL.
148. *Frontier Dispute (Burkina Faso/Niger)*, Judgment, Apr. 16, 2013, ICJ Rep. 2013, para. 63.
149. *Northern Cameroons*, ICJ Rep. 1963 at 38.
150. See Letter dated 9 April 2013, from the Permanent Representative of Argentina to the United Nations addressed to the Secretary-General: A/67/832, p. 1; Letter dated November 1987 from the Permanent Representative of Bolivia to the United Nations addressed to the Secretary-General, A/42/831—S/19308, p. 2. Bolivia's position now, instead, seems to be that a right to negotiate "sovereign access to the sea" was established by subsequent agreement: Application Instituting Proceedings before the International Court of Justice, Apr. 24, 2013, p. 7, para. 31.
151. Art. 4, para. 1, Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, Dec. 12, 2000, and quoted at para. 3.1, *Decision regarding delimitation of the border*, Eritrea-Ethiopia Boundary Commission (Lauterpacht, President; Ajibola, Reisman, Schwebel, Watts, Members), Apr. 13, 2002.
152. Mr. Dabbashi (Libya), A/68/PV.80, p. 26.
153. Pp. 113–114.
154. *Territorial Dispute (Libya/Chad)*, Judgment, Feb. 3, 1994, ICJ Rep. 1994 p. 6, 37, para. 72.
155. *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Preliminary Objections, Judgment, Dec. 13, 2007, ICJ Rep. 2007 p. 832, 861, para. 89, quoting ICJ Rep. 1994 at p. 37, para. 73.
156. See pp. 116–117.
157. *Right of Passage over Indian Territory (Portugal* v. *India)*, Merits, Apr. 12, 1960, ICJ Rep. 1960 p. 6, 40. For maps, see Memorial of the Government of the Portuguese

Republic, June 15, 1956, after p. 96. See also Karan, (1960) 50 *Annals Ass'n Amer. Geographers* 188, 189, Fig. 1.

158. Id.
159. *Temple of Preah Vihear (Cambodia* v. *Thailand)*, Merits, June 15, 1962, ICJ Rep. 1962 p. 6, 33.
160. ICJ Rep. 1962 at p. 14. And affirmed in *Interpretation of the Judgment of 15 June 1962 (Cambodia* v. *Thailand)*, Judgment, Nov. 11, 2013, ICJ Rep. 2013 p. 281, 308, para. 76. The author served as legal counsel to Thailand in the *Interpretation* proceedings. Reference here to the proceedings and decisions of the Court reflect the author's views alone and are not to be interpreted as expressing a view on behalf of any party or institution.
161. See ICJ Pldgs., *Temple of Preah Vihear*, vol. I, pp. 145–146; ibid., p. 165.
162. *Interpretation of the Judgment of 15 June 1962 (Cambodia* v. *Thailand)*, Written Observations, Kingdom of Thailand, Nov. 21, 2011, pp. 202, 209, paras. 5.14, 5.21; Response, Kingdom of Cambodia, Mar. 8, 2012, p. 47, para. 4.14; Public sitting, Apr. 15, 2013, Sorel (for Cambodia), CR 2013/2, p. 22, para. 27; Public sitting, Apr. 19, 2013, Plasai (Thailand), CR 2013/6, p. 52, para. 21.
163. Judgment, ICJ, Nov. 11, 2013, para. 99.
164. Order, ICJ, July 18, 2011, pp. 550–551, para. 53.
165. Ibid., p. 552, para. 59.
166. Ibid., para. 62; and sketch-map at 553.
167. Ibid., p. 554, para. 64.
168. As to the general security considerations behind the provisional measures, see Kulick, (2013) 52 *AdV* 453, 474–479.
169. *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, Request by Nicaragua for Provisional Measures, Order, Dec. 13, 2013, para. 19.
170. *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, Application instituting Proceedings, Nov. 18, 2010, pp. 4–6, para. 4.
171. Order, Mar. 8, 2011, ICJ Rep. 2011 p. 6, 27, para. 86.
172. As to the "demise of the right of conquest," see Korman (1996) 133–301.
173. Report of the Spec. Comm. on the Question of Defining Aggression, Mar. 11-Apr. 12, 1974: A/9619 (supp.), p. 9, para. 20, note 4.
174. SCR 242 (1967), Nov. 22, 1967, pream. para. 2.
175. SCR 242 (1967), para. 1(ii).
176. SCR 859 (1993), Aug. 24, 1993, pream.para. 10.
177. GAR ES-10/14, Dec. 8, 2003, pream. para. 3.
178. Draft Declaration, art. 11, for which see GAR 375 (IV), Dec. 6, 1949, Annex.
179. *Wall*, Advisory Opinion, Sep. Op. Judge Koroma, ICJ Rep. 2004 at 204, para. 2.
180. *Namibia*, Advisory Opinion, Sep. Op. Vice-President Ammoun, ICJ Rep. 1971 at 91–92, para. 12.
181. *East Timor*, Dis. Op. Judge *ad hoc* Skubiszewski, ICJ Rep. 1995 at 264, paras. 129–130.
182. See Orakhelashvili (2005) 16 *EJIL* 59, 87–88.
183. ARSIWA, Art. 41, para. 2. As to non-recognition's decentralized character and State responsibility, see Klein (2002) 13 *EJIL* 1241.
184. Reisman & Pulkowski, "Nullity in International Law" in Wolfrum et al. (eds.), MPEPIL esp. para. 16. See also Ronen (2011) 4–6.
185. UN Conference on the Law of Treaties between States and International Organizations or between International Organizations, Mrs. Oliveros (Argentina), 21st mtg., Mar. 6, 1986: A/CONF.129/C.1/SR.21, p. 153, para. 5; Mr. Ramadan (Egypt), ibid., p. 154, para. 13; Mr. Gautier (France), ibid., p. 155, para. 25; Mrs. Thakore (India), ibid., p. 156,

para. 32; Mr. Tepavicharov (Bulgaria), ibid., p. 156, para. 35; Mr. Pisk (Czechoslovakia), ibid., p. 156, para. 37. See also draft article 29, Comment (2): ILC Ybk 1982, Vol. II, Pt. Two, p. 40.

186. Draft art. 25 (Art. 29 as adopted), Comment (1), ILC Ybk 1966 Vol. II, p. 213 (emphasis added). See also ibid., draft art. 25, Comment (5).
187. Comments of Governments, Netherlands, ILC Ybk 1966, Vol. II, p. 321, para. 12 (regarding draft art. 58 (*pacta tertiis*)).
188. Fitzmaurice, Fifth Report, p. 80.
189. See Klabbers in Fastenrath, et al. (eds.), *Simma Essays* (2011) 768, 778.
190. *Island of Palmas (or Miangas) (United States of America* v. *Netherlands),* Award, Apr. 4, 1928 (Huber, Arb.), XI RIAA 831, 850. Cf. *Western Sahara*, Sep. Op. Judge Petren, ICJ Rep. 1975 at p. 123. Not all third party claims are relevant; and the threshold for relevance will depend on the procedural posture of the dispute. The Philippines, for example, did not show that its claims in Borneo were well enough supported for permission to intervene under Statute Art. 62: *Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia),* Application by the Philippines for Permission to Intervene, Oct. 23, 2001, ICJ Rep. 2001 p. 575, 598–604, paras. 57–83.
191. Fitzmaurice, Fifth Report, p. 80.
192. This is the case for maritime boundaries as well: *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Judgment, Nov. 19, 2012, ICJ Rep. 2012 p. 624, 668–669, 708, paras. 126, 230, about which see Grant (2013) 4(3) *JIDS* 421, 430–431. See also in regard to the *erga omnes* character of territorial rights Milano & Papanicolopulu (2011) 71 *ZaöRV* 587, 632–635.
193. United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Mr. Monnier (Switzerland), 21st mtg., Mar. 6, 1986: A/CONF.129/C.1/SR.21, p. 157, para. 42.
194. See, for example, *Asylum Case (Colombia/Peru)*, Judgment, Nov. 20, 1950, ICJ Rep. 1950 p. 266, 274–275. Where the grant of diplomatic asylum was irregular, the territorial principle still held, even though "the adjustment of the consequences of [the] situation" was left to "decisions inspired by considerations of convenience or of simple political expediency." A regional customary rule and silence in the relevant treaty required this approach: *Haya de la Torre Case (Colombia/Peru)*, Judgment, June 13, 1951, ICJ Rep. 1951 p. 71, 81. The regional rule was not that an otherwise irregular grant of diplomatic asylum was lawful; it was that the breach did not entail an obligation to return the asylee. Not every breach of territorial integrity entails the same secondary obligation(s). See further Chapter 6.
195. Mr. Osiecki (Poland), United Nations Conference on the Law of Treaties 64th mtg., May 10, 1968: A/CONF.39/C.1/SR.64, p. 371, para. 14.
196. *Interpretation of the Judgment of 15 June 1962 (Cambodia* v. *Thailand)*, Public sitting, Apr. 19, 2013, Plasai (Thailand), CR 2013/6, p. 52, para. 21.
197. See, for example, *In re Boundaries of Pulehunui*, 4 Haw. 239 (McCully, J.) (October Term 1879):

    > With the Hawaiians, from prehistoric times, every portion of the land constituting these Islands was included in some division, larger or smaller, which had a name, and of which the boundaries were known to the people living thereon or in the neighborhood. Some persons were specially taught and made the respositories of this knowledge, and it was carefully delivered from father to son.

    See also *Boundaries of Kaohe*, 8 Haw. 455 (Judd, C.J.) (May 31, 1892). And for discussion, Hlawati (2002) 24 *U. Haw. L. Rev.* 657. Cf. Luna (1999) *Duke L.J.* 787, 831–832.
198. See generally Mazower (2009).

5 Responsibility, Use of Force, and Boundaries

1. Shelton (2002) 96 *AJIL* 833, 836. See also, for example, Bederman (2005) 54 *Emory L.J.* 53, 75–76.
2. *Factory at Chorzów (Claim for Indemnity)*, Jurisdiction, July 26, 1927, PCIJ Ser. A. No. 9, p. 21.
3. Id. (emphasis added). Shelton too notes that this is the "less often cited, but equally important" part of the Court's reasoning: (2002) 96 *AJIL* at 835.
4. *Factory at Chorzów (Claim for Indemnity)*, Merits, Sept. 13, 1928, PCIJ Ser. A No. 17, p. 29.
5. For example, Dupuy 13 *EJIL* 1053, 1058; Tams (2002) 13 *EJIL* 1161, 1162–1163 passim.
6. Interestingly, the Russian Federation, though affirming that the ILC Articles and Commentaries on State Responsibility are "a very valuable aid," suggested that a diplomatic conference on State responsibility might re-visit the provisions on "serious breaches" and the obligations that arise from these: Crawford & Olleson (2005) 54 *ICLQ* at 961.
7. Nolte (2002) 13 *EJIL* 1083.
8. Part Two, Chapter III, Comment (7), reprinted Crawford (ed.) (2002) 245. Tams notes that, as a matter of logic, this means that those "additional consequences" arise for the State that committed the breach as well but doubts that a duty of non-recognition will have much if any effective content for that State. Tams (2002) 13 *EJIL* at 1162–1163.
9. Crawford (ed.) (2002) 127.
10. Ibid., 126. See also David in Crawford, Pellet, Olleson & Parlett (eds.) (2010) 27; Nishimura, ibid., 356.
11. Crawford (2013) 216, 217.
12. Noting the unusual character of the consequences of the serious breach is not to ignore that State responsibility contains other multilateral or communitarian aspects. The point is that the legal consequences of breach—in the sense of the secondary obligations arising from breach—otherwise are confined to the State whose conduct constituted the breach. As to some of the other aspects, see, for example, Scobbie (2002) 13 *EJIL* 1201.
13. Bodansky & Crook (2002) 96 *AJIL* 773, 786.
14. Art. 40, Comment (1), Crawford (ed.) (2002) 245.
15. Ibid., Comment (3), 245.
16. Ibid., Comment (3), 246.
17. Ibid., Comment (4), 246.
18. Id.
19. Ibid., Art. 40, Comment (7), 247. See also Crawford in Crawford, Pellet, Olleson & Parlett (eds.) (2010) 405, 410: "There can be egregious breaches of fundamental obligations which require some response by all States."
20. Art. 40, Comment (7), Crawford (ed.) (2002) 247.
21. Ibid., Comment (8), 247.
22. A point that Dawidowicz noted: in Crawford, Pellet, Olleson & Parlett (eds.) (2010) 677, 678, 683.
23. Art. 41, Comment (5), Crawford (ed.) (2002) 250.
24. GAR 2145 (XXI), Oct. 27, 1966; SCR 264 (1969), Mar. 20, 1969.
25. GAR 2024 (XX), Nov. 11, 1965; SCR 216 (1965), Nov. 12, 1965.
26. *Namibia*, Advisory Opinion, ICJ Rep. 1971 at 57, para. 131.
27. See *South West Africa Cases (Ethiopia* v. *South Africa*; *Liberia* v. *South Africa*), Public hearings, Nov. 1, 1965, Mr. Muller (for South Africa), ICJ Pldgs. 1966 vol. XII, pp. 203–211. See also Wallace (2011) 263.

28. SCR 264 (1969), Mar. 20, 1969, para. 4; see also GAR 2775 E (XXVI), Nov. 29, 1971, para. 1.
29. *International Status of South-West Africa*, Advisory Opinion, July 11, 1950, ICJ Rep. 1950 p. 128, 131.
30. SCR 217 (1965), Nov. 20, 1965.
31. See, for example, Commission on Human Rights, Draft Principles on Freedom and Non-Discrimination in the Matter of Political Rights, Dec. 12, 1962, Comments of Central African Republic: E/CN.4/837, p. 7.
32. SCR 217 (1965), preambular para. 2.
33. Security Council, May 18, 1966, 21st yr., 1280th mtg, paras. 6–8.
34. Ibid., para. 9.
35. Art. 41, Comment (6), reprinted Crawford (ed.) (2002) 250.
36. Chapter III, Comment (4), p. 243.
37. Ibid., Comment (7), p. 244.
38. Ibid., Comment (7), p. 244. Considering the opposite possibility—that not every *jus cogens* rule necessarily applies *erga omnes*—see Kolb (2014) 118 *RGDIP* 5, 14–16.
39. This assumes that Art. 41 is complete as to its identification of situations requiring general non-recognition. The assumption, while perhaps not unassailable, is justifiable in view of the structure of the ILC Articles and the exceptional character of the *erga omnes* consequences of the serious breach.
40. *Wall*, Advisory Opinion, ICJ Rep. 2004 at 202, para. 163.
41. GAR ES-10/14, Dec. 8, 2003, 3rd pream. para.
42. Ibid., 4th pream. para.
43. Ibid., 8th and 9th pream. paras.
44. Further to self-determination and the Palestinians, see Summers (2014) 539–550.
45. ICJ Rep. 2004 at p. 195, para. 142.
46. ICJ Rep. 2004 at p. 184, para. 121.
47. It is subject to appreciation whether the word "tantamount," too, is a qualifying expression. While the standard definition of "tantamount" is "as much; that amounts to as much, that comes to the same thing; of the same amount; equivalent," usage suggests that there is a distinction between things, where one of them is "tantamount" to the other: see, for example, S. Patrick, *Answer to Touchstone* (1692) 17: "Giving us express Words, and not words Tantamount" (from Oxford English Dictionary, 2014).
48. ICJ Rep. 2004 at p. 184, para. 122.
49. ICJ Rep. 2004 at pp. 193–194, para. 137.
50. *Wall*, Advisory Opinion, Sep. Op. Judge Kooijmans, ICJ Rep. 2004 at 232, paras. 43–44, citing ICJ Rep. 1971, p. 56, para. 125.
51. Crawford, *Brownlie's Principles* (2012) 156–157.
52. Dawidowicz in Crawford, Pellet, Olleson & Parlett (2010) at 685.
53. Cf. Crawford, who draws attention to another point in Judge Kooijmans's Separate Opinion—the ambiguity that the Separate Opinion notes in the Advisory Opinion as between the *jus cogens* character of a rule and the *erga omnes* scope of its application: Crawford in Crawford, Pellet, Olleson & Parlett (eds.) (2010) at 412.
54. *Wall*, Advisory Opinion, ICJ Rep. 2004 at 200, para. 159.
55. GAR ES-10/13, Oct. 21, 2003, para. 1.
56. Ibid., para. 2.
57. GAR 2625 (XXV), Oct. 24, 1970.
58. GA Emer. Spec. Sess., 22nd mtg., Oct. 21, 2003: A/ES-10/PV.22, p. 3.
59. Adopted 90–8 with 74 abstentions. China was the only Permanent Member of the Security Council to vote in favor, the United States having voted against; France,

the United Kingdom, and the Russian Federation having abstained: A/ES-10/PV.23, p. 20.

60. Mr. Heinbecker (Canada), A/ES-10/PV.22, p. 3. See also Mr. Balarezo (Peru), ibid., p. 4.
61. ICJ Rep. 2003 at p. 184, para. 121.
62. Id.
63. Mr. Cunningham (USA), GA Emer. Spec. Sess., 23rd mtg., Dec. 8, 2003: A/ES-10/PV.23, p. 19.
64. Judge Kooijmans's interview in Schrijver (2014) 27 *Leiden J. Int'l L.* 839, 851.
65. Declaration of Judge Buergenthal, ICJ Rep. 2004 at pp. 240–245; Sep. Op. Judge Higgins, ICJ Rep. 2004 at p. 215, paras. 33–34. The European Union also expressed reservations as to the treatment by the Court of Israel's security concerns: Mr. Van den Berg (Netherlands, for the EU), GA 10th Emer. Spec. Sess., 27th mtg., July 20, 2004, A/ES-10/PV.27, p. 8. See also Wedgwood (2005) 99 *AJIL* 52, 57–59.
66. On measures against terrorists generally, see Tams (2009) 20 *EJIL* 359; Trapp (2010) 20 *EJIL* 1049.
67. VCLT Art. 52:

    Coercion of a State by the Threat or Use of Force

    A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

6 Use of Force and Other Values

1. ICJ Rep. 2005 p. 201, para. 148.
2. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, ICJ Rep. 1986 p. 14, Sep. Op. President Singh, at p. 153 (emphasis added).
3. *Oil Platforms (Iran* v. *United States)*, Judgment, Nov. 6, 2003, Dis. Op. Judge Elaraby, ICJ Rep. 2003 p. 161, 291. It is the received position in academic legal writing as well. See, for example, Kahn, May 9, 2014.
4. Further to the "cornerstone" cases, see Tams (2009) 20 *EJIL* at 359–360 and n. 1.
5. Esp. the 1949 Geneva Conventions and their Additional Protocols.
6. See Henckaerts & Doswald-Beck (2005).
7. Charter and Judgment of the Nürnberg Tribunal—History and Analysis, Memorandum submitted by the Secretary-General: A/CN.4/5, 50.
8. See, for example, Mr. Spiropoulos, ILC 55th mtg., June 27, 1950: ILC Ybk. 1950, vol. I, p. 109, para. 21.
9. ICC Review Conference, res. RC/Res. 6, June 11, 2010: Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Annex III, para. 6 (emphasis added).
10. To say that the prohibition is not absolute is not the same as saying that it is not a *jus cogens* rule, an argument that has been made elsewhere: Green (2011) 32 *Mich. JIL* 215.
11. Signed Aug. 15, 1955, entered into force June 16, 1957: 284 UNTS 93.
12. *Oil Platforms*, Judgment, Preliminary Objection, Dec. 12, 1996, ICJ Rep. 1996 p. 803, 810, para. 16.
13. 284 UNTS at 134.
14. ICJ Rep. 1996 at p. 814, para. 28.
15. ICJ Rep. 1996 at p. 811, para. 21.
16. 284 UNTS at 110.
17. ICJ Rep. 1996 at p. 814, para. 28.

18. Ibid. at p. 816, para. 33; para. 36.
19. 284 UNTS at 122.
20. Memorial, Islamic Republic of Iran, June 8, 1993: pp. 124–133, paras. 5.14–5.41 (though the compensation for moral injury was requested in compensatory form as well). In its final submissions, Iran did not request satisfaction in terms, using instead the general formula "full reparation . . . in a form and amount to be determined by the Court." Mr. Zahedin-Labbaf (Iran): Public sitting, Mar. 3, 2003, CR 2003/16, p. 36, para. 12.
21. Counter-Memorial and Counter-Claim, United States, June 12, 1997, p. 180; Mr. Taft (USA): Public sitting, Mar. 5, 2003, CR 2003/18, p. 37, para. 29.30, item (2).
22. ICJ Rep. 2003 at pp. 214–217, para. 119.
23. Ibid., p. 217, para. 122.
24. Ibid., p. 217, para. 123 (emphasis original).
25. Ibid., p. 208, para. 99.
26. Ibid, pp. 204–207, paras. 90–98.
27. Ibid., p. 218, para. 125.
28. 284 UNTS at 132.
29. See Mr. Zahedin-Labbaf (Iran): Public sitting, Mar. 3, 2003, CR 2003/16, p. 36, para. 12, point 1—point 2 being the statement of secondary obligations that necessarily would have arisen if the request in point 1 had been granted.
30. Islamic Republic of Iran, Observations and Submissions on the U.S. Preliminary Objection, July 1, 1994, p .3 para. 6.
31. Ibid. at pp. 51–59, paras. 3.45–3.67.
32. ICJ Rep. 1996 at 811, para. 20.
33. Ibid. at p. 811, para. 20 (emphasis added).
34. Diss. Op. Judge Al-Khasawneh, ICJ Rep. 2003 at p. 266, para. 1. Taft, the U.S. Department of State Legal Adviser, referred to the Court's statement on self-defense as "unnecessary to resolve the case" and "regrettable as a matter of form": (2004) 29 *Yale JIL* at 306.
35. Diss. Op. Judge Elaraby, ICJ Rep. 2003 at p. 304, para. 3.3.
36. ICJ Rep. 2003 pp. 182, para. 41.
37. ICJ Rep. 1996 at p. 811, para. 20.
38. Ibid., p. 820, para. 53.
39. ICJ Rep. 2003 p. 202, para. 89;
40. Ibid., pp. 204–207, paras. 90–98.
41. Ibid., p. 208, para. 99.
42. See Declaration of Vice-President Ranjeva, ICJ Rep. 2003 p. 220, para. 1.
43. Sep. Op. Judge Simma, ICJ Rep. 2003, p. 336, para. 26.
44. See Declaration Judge Koroma, ICJ Rep. 2003 p. 224.
45. Sep. Op. Judge Simma, ICJ Rep. 2003 at p. 168 n. 1.
46. Ibid., p. 328, para. 7.
47. Ibid., p. 327, para. 6.
48. Ibid., p. 328, para. 7.
49. On Judge Simma's Separate Opinion, see Corten in Fastenrath, et al. (eds.), *Simma Essays* (2011) 843.
50. ICJ Rep. 1986 at pp. 119–20, paras. 230, 231. As to the cumulative element in *Nicaragua,* see Yusuf (2012) 25 *Leiden J. Int'l L.* 461, 465.
51. ICJ Rep. 2003 at pp. 342–352, paras. 35–58.
52. Further to degrees of use of force and *de minimus* incidents, see Ruys (2014) 108 *AJIL* 159; O'Connell in White & Henderson (eds.) (2013) 89, 102; Corten (2010), 55, 77.

7 Boundaries, Territory, and Human Rights

1. See, for example, *Banković and others* v. *Belgium*, ECtHR 2001-XII, Dec. 12, 2001; *Al-Skeini and Others* v. *Secretary of State for Defence*, [2007] UKHL 26, June 13, 2007; *R.* v. *Hape*, [2007] 2 SCR 292, June 17, 2007, Supreme Court (Canada) Supreme Court. See also Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States of America, Jan. 4, 2011: A/HRC/16/11, p. 23, 92.146. For recent comment, see Wilde in Chinkin & Baetens (eds.) (2014) 51.
2. *Questions relating to the obligation to prosecute or extradite (Belgium* v. *Senegal),* Judgment, July 20, 2012, ICJ Rep. 2012 p. 442, 448–450, paras. 64–70.
3. *Hirsi Jamaa & others* v. *Italy*, ECtHR, Judgment, Feb. 23, 2012. For criticism of which, see Crawford (2013) 365 *RdC* 205, 208–210, paras. 349–353.
4. ICJ Rep. 2012 at 449, para. 68.
5. See *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Sep. Op. Judge *ad hoc* Sreenivasa Rao, May 23, 2008, ICJ Rep. 2008 p. 14, 165–166, para. 24.
6. For example, *Völkerstrafgesetzbuch* [Act to Introduce the German Code of Crimes Against International Law], June 26, 2002, BGBl. I at 2254, (2003) 42 ILM 998 (Eng. trans.), about which and for a critical view see Gärditz (2014) 108 *AJIL* 86, 92. Respecting the current position in US courts under the ATS, see Ku (2013) 107 *AJIL* 835; and recent developments at the ECtHR, Aurel Sari, *EJIL Talk!* Nov. 24, 2014 (discussing *Jaloud* v. *Netherlands*).
7. Brunnée & Toope (2004) 53 *ICLQ* 785, 796.
8. The question is the subject of a substantial literature. See, for example, Neumayer (2005) 49(6) *J. Conflict Resol.* 925. And, comprehensively, including reviews of the major empirical works, Goodman & Jinks (2013).
9. Karl Marx and Frederick Engels, *Manifesto of the Communist Party* (1848) (reprinted New York: New York Labor News Co., 1908), which almost from the first paragraph expresses the idea of order supplanting order: "The modern bourgeois society that has sprouted *from the ruins of feudal society*..." (emphasis added), 9.
10. See, for example., *Abaclat* v. *Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 3, 2011 (Tercier, President; Abi-Saab & van den Berg, Arbitrators), paras. 374–375.
11. *Deutsche Bank* v. *Sri Lanka*, ICSID Case No. ARB/09/02, Award, Oct. 31, 2012 (Hanotiau, President; Williams, Arbitrator; Khan, Arbitrator, dissenting) para. 291. Note: the author served as assistant counsel to Sri Lanka in the jurisdictional phase of the proceedings.
12. Jean-Baptiste Michel, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, Jon Orwant, Steven Pinker, Martin A. Nowak, and Erez Lieberman Aiden, "Quantitative Analysis of Culture Using Millions of Digitized Books," *Science* (Published online ahead of print: 12/16/2010).
13. https://books.google.com/ngrams/graph?content=territory&year_start=1800&year_end=2008&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Cterritory%3B%2Cc0.
14. https://books.google.com/ngrams/graph?content=territorial+claims&year_start=1800&year_end=2014&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Cterritorial%20claims%3B%2Cc0.
15. https://books.google.com/ngrams/graph?content=frontiers&year_start=1800&year_end=2008&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Cfrontiers%3B%2Cc0.

16. Palermo, "Irredentism" in Wolfrum et al. (eds.), MPEPIL, para. 1. See also Markus Kornprobst, *Irredentism in European Politics: Argumentation, Compromise and Norms* (Cambridge: CUP, 2008) 8–10.
17. See generally Smith (1976).
18. Palermo para. 6. See also Kornprobst (2008) 3–4.
19. https://books.google.com/ngrams/graph?content=irredenta&year_start=1800&year_end=2008&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Cirredenta%3B%2Cc0.
20. This is not to say that attention to the problem has disappeared altogether. Brad Roth in 2005 warned that it may be dangerous to allow an unrestrained "broadening of exceptions to sovereign prerogative." (2005) 99 *ASIL Proc.* 392, 395. See also Roth (2004) 56 *Florida L. Rev.* 1017, 1037. Viet Dinh in 2004 observed that "stability is fostered by the nation-state as the basic building block of world order": (2004) 56 *Florida L. Rev.* 867, 881. Behind Michael Reisman's observation that regime change is a logical correlate to human rights one finds an understanding, too, that a potentially destabilizing principle has entered the modern law. Others, including Jan Paulsson and Moria Paz, identify the continuing importance of boundaries in diverse areas of the law. See Paulsson (2001) 95 *ASIL Proc.* 122; Paz, "Immigration, Border Walls and Human Rights Law" (forthcoming, 2014). There are also the technical works concerning boundaries, for example, Prescott & Triggs (2008); Brownlie & Burns (1979).
21. Bethlehem (2014) 25 *EJIL* 9, 14.
22. (2014) 25 *EJIL* at 15.
23. Id.
24. Id.
25. Ibid., 15–17.
26. Ibid., 17–18.
27. Ben-Yehuda (2001) 21 *J. of Conflict Studies*; Huth (1996); Vasquez (1993) esp. 151. See also Ryan Goodman's salient conclusion, in light of a range of empirical evidence, that "among the most escalatory categories of territorial disputes are irredentist claims involving geographic areas of historical or cultural significance" (2006) 100 *AJIL* 107, 122 (with citations to literature).
28. Neff (2014) 14.
29. As to the correlation between territorial dispute and war, see Vasquez & Henehan (2001) 38 *J. Peace Res.* 123; Kocs (1995) 57 *Journal of Politics* 159; between geographic location of territorial resources and war, Caselli, Morelli & Rohner (forthcoming, 2014) *Quart. J. Economics.* See generally Barbara F. Walter, "Explaining the Intractability of Territorial Conflict" (2003) 137 *Int'l Studies Review* 137.
30. Address of the president of the Russian Federation, Mar. 18, 2014: http://eng.kremlin.ru/transcripts/6889. These were not passing references. The president elsewhere has said that "Crimea has a kind of sacred significance…The first, initial font of Russia's Baptism is there." President of Russia, *Meeting with young academics and history teachers*, Nov. 5, 2014, transcript at http://eng.news.kremlin.ru/news/23185/print.
31. For the *locus classicus,* see Fukuyama, "The End of History?" (summer 1989), *The National Interest*; representative of Fukuyama's later position (described variously as retractions, refinements, or clarifications), see "US Democracy Has Little to Teach China," *Financial Times,* Jan. 17, 2011; and *Our Posthuman Future: Consequences of the Biotechnology Revolution* (2002).
32. As to the unavoidable trade-offs between competing social values, see Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (1969) 169.
33. Presidential Address to the Federal Assembly, Dec. 12, 2013: http://eng.kremlin.ru/transcripts/6402.

34. Berdyaev's political career has been described as one of conversion "from Marxism to 'Christian Socialism.'" Richards & Garner (1970) 31 *J. History of Ideas* 121, 125. He did most of his work in exile in the West (Zernov (1948) 27 *Slavonic & East Eur'n Rev.* 283, 284); and is said to have believed the "Russian idea" to be "the very antithesis" of a Western—in particular German—idea. Poltoratzsky (1962) 21 *Russian Review* 121, 123.
35. http://philosophynow.org/issues/101/News_March_April_2014.
36. As to Russian exceptionalism, see, for example, Pomper (2012) 51 *History & Theory* 60, 86; Sakwa (1996) 48 *Studies in East Eur'n Thought* 115, 144. See also as to the Russian right wing, political violence, and anti-European sentiments in the first decade of the twentieth century, Kotkin (2014), 98–102.
37. Allison (2013) 18. And also in respect of democracy promotion, ibid., 110, 133–138.
38. For example, Ilya Kharlamov: Miller, Aug. 4, 2014, pp. 14–15.
39. Russia has reacted in particular against international scrutiny of legislation concerning "propaganda of homosexuality." As to the scrutiny, see the determination by the Human Rights Committee of a breach by the Russian Federation of Art. 19, para. 2, of the ICCPR: *Fedotova* v. *Russian Federation*, Communication No. 1932/2010, CCPR/C/106/D/1932/2010, Nov. 19, 2012; and by the ECtHR of breaches of Arts. 11, 13, and 14 of the European Convention: *Alekseyev* v. *Russian Federation*, Applications Nos. 4916/07, 25924/08, 14599/09, Judgment, Oct. 21, 2010. See also Committee on the Rights of the Child, Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation, Feb. 25, 2014: CRC/C/RUS/CO/4–5, pp. 6, 14, paras. 24, 55; and Statement by the Spokesperson of European Union High Representative Catherine Ashton on LGBT rights in Russia, June 20, 2013, A 338/13. See also PACE res. 1948 (2013), June 27, 2013, paras. 6–7.
40. Weinstock in Primoratz & Pavković (eds.) (2006) 15, 21, 22.
41. Waldron in Kymlicka & Norman (eds.) (2000) 155, 162.
42. Id. (emphasis added).
43. Laruelle, 138(8) *Russian Analytical Digest*, Nov. 8, 2013, p. 4.
44. Further to the ideology of the government of Russia, see Walter Laqueur, *Putinism: Russia and Its Future with the West* (New York: St. Martin's Press, forthcoming 2015); Marcel H. Van Herpen, *Putinism: The Slow Rise of a Radical Right Regime in Russia* (New York: Palgrave Macmillan, 2013).
45. Speculating that extremism and political violence may spin out of control in the wake of the Russian government's rightward turn and propaganda about Ukraine, see Julia Ioffe, "After Boris Nemtsov's Assasination, 'There Are No Longer Any Limits,'" *NY Times Magazine*, Feb. 28, 2015.
46. Address of the president of the Russian Federation, Mar. 18, 2014: http://eng.kremlin.ru/transcripts/6889.
47. The EU's Georgia Mission referred to the NATO dimension, which it said "deeply irritated" Russia: *Georgia Report*, vol. II, p. 25. The Mission was mandated by Council decision "to investigate the origins and the course of the conflict in Georgia": Art. 1, para. 2, & n. 2, Council Decision 2008/901/CFSP, Dec. 2, 2008.
48. Mearsheimer, *Foreign Affairs* (Sept./Oct. 2014).
49. Advisory Opinion, July 8, 1996, ICJ Rep. 1996 p. 226, 266, para. 105(2)(E).
50. A point evidently shared by dissenters from the Advisory Opinion: see, for example, Dis. Op. Judge Schwebel, ICJ Rep. 1996 at p. 320; Dis. Op. Judge Higgins, ICJ Rep. 1996 at p. 587.
51. See, for example, Tayler, *Foreign Policy*, Sept. 4, 2014; Sharkov, *Newsweek*, Oct. 16, 2014.

52. "Gorbachev Issues New Warning of Nuclear War over Ukraine," Jan. 9, 2015: http://www.dw.de/gorbachev-issues-new-warning-of-nuclear-war-over-ukraine/a-18182899.
53. Advisory Opinion, July 8, 1996, ICJ Rep. 1996 p. 263, para. 96.
54. See Charter of Economic Rights and Duties of States, Chapter I *(l)*, GAR 3281 (XXIX), Dec. 12, 1974. See also Letter dated 11 January 1988 from the Permanent Representative of the USSR to the United Nations addressed to the Secretary-General, with Answers by the General Secretary of the Central Committee of the Communist Party of the Soviet Union, A/43/88—S/19427, Annex, p. 3. The rejection of spheres of influence as a legal institution goes at least as far back as Franklin D. Roosevelt in the formation of the UN: see Howard in Roberts & Kingsbury (eds.) (1993) 63. This was not least of all a response to Nazi international law theory, about which see Vagts's magisterial study (1990) 84 *Am. J. Int'l L* 661 and in respect of the sphere of influence theory; ibid., 684.
55. See the use of the term, for example, by Orford (2013) 24 *EJIL* 83, 91. Its use in ICJ practice is limited to historical examples. See for example, reference to the British and Dutch spheres of influence in Johor: *Pedra Branca/Pulau Batu Puteh*, ICJ Rep. 2008 at 25, 41–49, paras. 21, 89–116; reference to British and German spheres of influence in South-West Africa: *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, Dec. 13, 1999, ICJ Rep. 1999 p. 1045, 1054, para. 13. For a definition, see *Western Sahara*, Advisory Opinion, ICJ Rep. 1975 at 56, para. 126. As to spheres of influence in present-day Russian thinking, see Benard & Leaf (2010) 62 *Stanford L. Rev.* 1395, 1433.
56. Though cultural protective measures are subject to international obligations, including human rights obligations, for example, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, entered into force, Mar. 18, 2007, Art. 2, para. 1; Art. 5, para. 1: 2440 UNTS 311, 348, 351; and trade law obligations, as to which see, for example, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Appellate Body Report, WT/DS363/R, Dec. 21, 2009, paras. 250–337. As to US concerns over the abuse of governmental control over cultural life, see Neuwirth (2006) 66 *ZaöRV* 819, 851–853.
57. See, for example, European Convention, Nov. 4, 1950, Art. 10, para. 2. The ECtHR has applied the paragraph 2 exception conservatively. Thus restrictions on political expression, where the expression nevertheless was said to relate to the integrity of the State, may constitute breaches of Art. 10. See, for example, *Erdogdu and Ince* v. *Turkey*, Judgment, July 8, 1999; *Sürek and Özdemir* v. *Turkey*, Judgment, July 8, 1999; *Sürek* v. *Turkey (No.4)*, Judgment, July 8, 1999. The exception nevertheless protects certain government restrictions: see, for example, *Sürek* v. *Turkey (No. 1)* and *Sürek* v. *Turkey (No. 3)*, July 8, 1999.
58. OHCHR summary report (Nov. 21, 2013-Sept. 5 2014), A/HRC/27/75, para. 35.
59. Pellet et al. (2009) 84.
60. See esp. Reisman (2012) 351 *RdC* 9.
61. *Kiobel* v. *Royal Dutch Petroleum Co.,* 621 F.3d 111, 118 (Cabranes, CJ) (2nd Cir. 2010).

Part III Domestic Order, International Order, and Mechanisms for Change

1. VCLT Arts. 11, 14: 1155 UNTS at 335–336.
2. For example, Allison (2013) 1–5.

8 The West's Interventions and Russia's Argument

1. See Chapter 1, pp. 26–28.
2. http://www.rada.crimea.ua/news/11_03_2014_1.
3. Address of the president of the Russian Federation, Mar. 18, 2014: http://eng.kremlin.ru/transcripts/6889.
4. Mr. Gevorgian, Ambassador and Head of the Legal Department, Ministry of Foreign Affairs, Russian Federation, *Kosovo* advisory proceedings, public sitting, Dec. 8, 2009, CR 2009/30, p. 41 para. 7 (emphasis original).
5. Letter dated 19 March 2014, from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, Mar. 20, 2014; Annex, "Address by President of the Russian Federation," Mar. 18, 2014, A/68/803—S/2014/202, p. 2ff. The text in English translation is also posted at the website of the Kremlin: http://eng.kremlin.ru/transcripts/6889.
6. For a wide-ranging and meticulously researched account, see Allison (2013).
7. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, July 22, 2010, ICJ Rep. 2010 p. 403, pp. 437–438, 438–439, paras. 81, 84. The original text differs somewhat from the translation available on the Kremlin website. The original is as follows, from ibid., pp. 437–438, para. 81:

   The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

   Selon la Cour, le caractère exceptionnel des résolutions susmentionnées semble confirmer qu'aucune interdiction générale des déclarations unilatérales d'indépendance ne saurait être déduite de la pratique du Conseil de sécurité.

   And from ibid., pp. 438–439, para. 84.:

   For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence.

   Pour les raisons déjà indiquées, la Cour estime que le droit international général ne comporte aucune interdiction applicable des déclarations d'indépendance.
8. *Quebec reference*, para. 112.
9. Ibid., para. 155.
10. About the *Quebec reference,* see Chapter 1, pp. 25–28.
11. See Chapter 1, p. 38.
12. Address of the president of the Russian Federation, Mar. 19, 2014: http://eng.kremlin.ru/transcripts/6889.
13. Mr. Lavrov (Russian Federation), S/PV.4011, p. 7.
14. Mr. Ghafoor (Pakistan), General Assembly, 53rd sess., 87th plen. mtg., Dec. 10, 1998, A/53/PV.87, p. 26. See also Mr. Ka (Senegal) (for the Organization of the Islamic Conference), General Assembly, 53rd sess., 48th plen. mtg., Oct. 29, 1998, A/53/PV.48, p. 20.
15. Letter dated 6 July 1999 from the Permanent Representative of the United Arab Emirates to the United Nations addressed to the Secretary-General, A/53/1014—S/1999/761, p. 5.
16. Mr. Hasmy (Malaysia), June 10, 1999, S/PV.4011, p. 15.
17. Mr. Fonseca (Brazil), S/PV.4011, p. 17. See also Mr. Marville (for the Caribbean Community), General Assembly, 53rd sess., 49th plen. mtg., Oct. 29, 1998, A/53/PV.49, p. 26.
18. Mr. Andjaba (Namibia), June 10, 1999, S/PV.4011 p. 7.

19. Mr. Dangue Réwaka (Gabon), June 10, 1999, S /PV.4011 p. 20.
20. GAR 53/163, Dec. 9, 1998, para. 41.
21. GAR 53/164, Dec. 9, 1998, preambular para. 5.
22. Ibid., para. 8.
23. Ibid., preambular para. 3.
24. SCR 1239 (1999), May 14, 1999.
25. Statement of the Security Council, Security Council 54th year, 3967th mtg., Jan. 19, 1999, S/PV.3967, p. 2.
26. Statement of the Security Council, Security Council 54th year, 3974th mtg., Jan. 29, 1999, S/PV.3974, p. 2.
27. See, for example, Tadeusz Mazowiecki, Spec. Rapp, Commission on Human Rights, Fifth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, Section III(C) ("The Situation in Kosovo"), Nov. 17, 1993, E/CN.4/1994/47, paras. 188–205. Closer in time to the intervention, see the statement of the Secretary-General, General Assembly, First Committee, 3rd mtg., Oct. 12, 1998, A/C.1/53/PV.3, p. 4; and of the president of the International Criminal Tribunal for the Former Yugoslavia, General Assembly, 53rd sess., 62nd plen. mtg., Nov. 19, 1998, A/53/PV.62, p. 3.
28. Further to the transitional administration, see Wilde (2008) 144–146, 210–211; Knoll (2008), 306–308, 329–348, 395–399.
29. Mr. Lavrov (Russian Federation), S/PV.4011, p. 8.
30. Mr. Gevorgian, Ambassador and Head of the Legal Department, Ministry of Foreign Affairs, Russian Federation, *Kosovo* Advisory Proceedings, public sitting, Dec. 8, 2009, CR 2009/30, p. 40 para. 2.
31. Mr. Gevorgian, Ambassador and Head of the Legal Department, Ministry of Foreign Affairs, Russian Federation, *Kosovo* Advisory Proceedings, public sitting, Dec. 8, 2009, CR 2009/30, p. 50 para. 58.
32. Weller (2009) 81.
33. Ibid., 87–93.
34. See Agreement on the Kosovo Verification Mission of the Organization for Security and Cooperation in Europe: letter dated 19 October 1998, from the Permanent Representative of Poland to the United Nations addressed to the Secretary-General, S/1998/978, enclosure, pp. 4–9.
35. SCR 1203 (1998), Oct. 24, 1998, para. 5.
36. Weller (2009) 105.
37. Ibid., 107, 119–143.
38. See GAR 53/163, Dec. 9, 1998, para. 41.
39. See, for example, Statement of the Security Council, para. 2, Security Council 54th year, 3974th mtg., Jan. 29, 1999, S/PV.3974, p. 2.
40. See, for example, S/1998/567, annex, June 24, 1998.
41. ICJ Rep. 2010 at pp. 430–434, paras. 64–73.
42. As to "bare title" see Knoll (2008) 186–212.
43. *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia* v. *Greece)*, Judgment, Dec. 5, 2011, ICJ Rep. 2011 p. 644, 685, para. 132, quoting *North Sea Continental Shelf Cases*, ICJ Rep. 1969 at 47, para. 85.
44. Report of the Special Envoy of the Secretary-General, S/2007/168, Mar. 26, 2007, quoted at ICJ Rep. 2010 at p. 432 para. 69.
45. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/906, Nov. 20, 2006, para. 6.
46. Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion No. 405/2006, CDL-AD(2007)004, Mar. 19, 2007.

47. *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Judgment, July 20, 2012, ICJ Rep. 2012 p. 422, 446 (para. 59).
48. *Georgia* v. *Russian Federation,* Preliminary objections, ICJ Rep. 2011 at p. 133 (para 159). Cf. *Mavrommatis Palestine Concessions,* Judgment, Aug. 30, 1924, PCIJ Ser. A No. 2, p. 13.
49. ICJ Rep. 2010 at p. 433, quoting Report, annexed to S/2007/723.
50. Further to the distinction between NATO's intervention and the establishment of Kosovo's independence, see Tricot & Sander (2011) 49 *CJTransL* 321, 344–5. Anne Peters makes the same point, forcefully: *EJIL Talk!* Apr. 22, 2014.
51. Report of the Secretary-General on UNMIK, Mar. 28, 2008: S/2008/211.
52. Mr. Gevorgian, Ambassador and Head of the Legal Department, Ministry of Foreign Affairs, Russian Federation, Kosovo Advisory Proceedings, public sitting, Dec. 8, 2009, CR 2009/30, p. 44 para. 23.
53. Mr. Gevorgian, Ambassador and Head of the Legal Department, Ministry of Foreign Affairs, Russian Federation, *Kosovo* advisory proceedings, public sitting, Dec. 8, 2009, CR 2009/30, p. 44 para. 24.
54. Letter dated 1 April 2009, from the Chargé d'affaires a.i. of the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General, with Statement of the State Duma of the Federal Assembly of the Russian Federation: A/63/820—S/2009/208, Annex, p. 3.
55. Mr. Araud (France), Security Council, 69th yr., 7138th mtg., Mar. 15, 2014: S/PV.7138, p. 4.
56. Mälksoo, Mar. 28, 2014.
57. *Georgia Report* (Sept. 2009), p. 17, para. 11.
58. *Kosovo* advisory proceedings, Written Statement of the Russian Federation, Apr. 16, 2009, p. 32, para. 91.
59. See Chapter 1, pp. 32–33.
60. See Note verbale dated March 19, 2014, from the Permanent Mission of Ukraine to the United Nations Office and other international organizations in Geneva addressed to the secretariat of the Human Rights Council, and Annex (Memorandum on the promotion and protection of the national minorities rights in Ukraine), Mar. 20, 2014: A/HRC/25/G/19. Contrast Serbia's "Platform on the Future Status of Kosovo and Metohija" of Jan. 5, 2006, about which see *Kosovo* advisory proceedings, Written Statement of the United Kingdom, Apr. 17, 2009, p. 59 para. 3.47; and the Constitution of Serbia adopted on Nov. 8, 2006, removing most guarantees of autonomy: ibid., p. 61, para. 3.51, quoting Venice Commission Opinion of Mar. 19, 2007.
61. http://www.mfa-ks.net/?page=2,33.
62. Frowein says that nobody said that recognition was unlawful: Frowein in Fastenrath, et al. (eds.), *Simma Essays* (2011) 923, 924. There were, however, objections. See, for example, Mr. Droushiotis (Cyprus), *Kosovo* advisory proceedings, public sitting, Dec. 7, 2009, CR 2009/29, p. 40, paras. 18, 21.
63. Chapter 3, pp. 68, 80–81.
64. See EU *Georgia Report*, vol. II, p. 28.
65. See Introduction, n. 8.
66. Answers to journalists, Mar. 4, 2014: http://eng.kremlin.ru/news/6763.
67. Speech of Mar. 18, 2014: A/68/803—S/2014/202.
68. Which is not to deny the relevance, for other purposes, of a political analysis of Russia's present legal position. As to the Russian view that Western interventions have displaced the law and that pure power politics now fill the void, see Allison (2013) 60 passim.

69. See Vienna Convention on Diplomatic Relations, Art. 9, para. 1, concluded Apr. 18, 1961, entered into force Apr. 24, 1964, 500 UNTS 95, 102.
70. Denza, 3rd edn. (2008) 74.
71. Ibid., 86.
72. Letter dated 20 March 2003, from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, Annex, Statement of the president of the Russian Federation: S/2003/348, p. 2.
73. Id.
74. Letter dated 20 March 2003, from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, Annex, Statement of the president of the Russian Federation: S/2003/348, p. 2.
75. Letter dated 17 March 2003, from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, Annex: S/2003/347, p. 2.
76. Letter dated 19 March 2003, from the Chargé d'affaires a.i. of the Permanent Mission of Malaysia to the United Nations addressed to the Secretary-General, Annex: A/58/68—S/2003/357, p. 2.
77. Letter dated 20 March 2003, from the Permanent Representative of the United States of America to the United Nations addressed to the president of the Security Council, S/2003/351, p. 1.
78. For a slightly different presentation of the US case, see Murphy, 92 *Georgetown L.J.* at 178–179.
79. COE practice on admission of new members, for example, suggested that Monaco, because it was extensively subordinated to France under the 1918 Treaty, was not in truth an independent State. Of particular concern was Art. 3 of the 1918 Treaty with its "contingent reversion of sovereignty" (D.P. O'Connell's description: [1965] vol. I, p. 290). Monaco's application to the Council was delayed for five years as France and Monaco adopted a new treaty arrangement. See Crawford (2006) 328.
80. For a review and analysis of the main literature to 2000, see Fassbender (2000) 11 *EJIL* 219. See also Kokott & Sobotta (2012) 23 *EJIL* 1015; Tzanakopoulos (2011) 87–111; Canor (2009) 20 *EJIL* 870; Weiβ (2008) *Max Planck Yearbook of United Nations Law* 45, 76–109; Payandeh (2006) *ZaöRV* 41; Lamb in Goodwin-Gill & Talmon (1999) 361.
81. SCR 686 (1991), Mar. 2, 1991, para. 1.
82. SCR 688 (1991), Apr. 5, 1991, paras. 1, 2.
83. See Nash (Leich) (1997) 91 *AJIL* 706; (1999) 70 *BYIL* 387. Sir Michael Wood notes that the United Kingdom identified as the legal basis for action not SCR 688 (1991) as such but the humanitarian principle contained in it: "Iraq, Non-Fly Zones" in Wolfrum et al. (eds.), MPEPIL para. 9.
84. And not only the practice of the States enforcing the "no-fly" zones. For the position of the States of the Gulf Cooperation Council, see Letter dated 6 July 1999, from the Permanent Representative of the United Arab Emirates to the United Nations Addressed to the Secretary-General, A/53/104-S/1999/761, Annex, pp. 2–3; Letter Dated 14 September 1999, from the Permanent Representative of the United Arab Emirates to the United Nations Addressed to the Secretary-General of the United Nations, S/1999/974/, Annex, pp. 4–5.
85. Brownlie, 7th edn. (2008) 744–745; Corten & Dubuisson (2000) 104 *RGDIP* 873, 878–885; Gray (1994) 65 *BYIL* 135.
86. SCR 1441 (2002), Nov. 8, 2002, para 1.
87. Ibid., preambular para. 8. Respecting the breakdown of monitoring, inspection, and verification, see Torrelli (1998) 102 *RGDIP* 435.

88. http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030327–10.html.
89. Pellet, 329 *RdC* 17, 31.
90. A possibility that might be inferred from a number of writers, for example, Brunnée & Toope (2004) 53 *ICLQ* at 792; Wedgwood (2003) 97 *AJIL* 576; Sofaer (2003) 14 *EJIL* 209; Reisman (2001) 95 *AJIL* 833; Taft & Buchwald (2003) 97 *AJIL* 557. See also Sofaer (2010) *passim*; Greenwood (2006) 667–700. Among their critics, see Franck (2003) 97 *AJIL* 607, 620; Gray (2007) 56 *ICLQ* 157, 161–164.
91. For a consideration of how the law of self-defense might be evolving, see Zemanek in Buford, Crawford, Pellet & Wittich (eds.) (2008) 287, 305–314.
92. See Murphy (2003–4) 92 *Georgetown L.J.* 173, n. 1. Medical and other special units were provided as well by Denmark, Italy, the Netherlands, and Spain.
93. SCR 1483, May 22, 2003, paras. 4, 8.
94. Ibid., para. 3.
95. CPA Regulation No. 6 ("Governing Council of Iraq"): CPA/REG/13 July 2003/06.
96. See laws-in-force provision ("Applicable Law"), CPA Regulation No. 1 ("Coalition Provisional Authority"): CAP/REG/16May2003/01, sec. 2.
97. See Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority, CPA/ORD/28 June 2004/100. See generally Murphy (2004) 98 *AJIL* 601.
98. Feldman & Martinez (2006) 75 *Fordham L. Rev.* 883, 883.
99. Steps toward the establishment of the new government are set out in *Measuring Stability and Security in Iraq,* Department of Defense, Report to U.S. Congress, May 26, 2006, chart, p. 2. See further Buchan (2013) 194–219.
100. Kofi Annan, Address to the General Assembly, Sept. 23, 2003, 58th sess., 7th plen. mtg., A/58/PV.7, p. 2.
101. Mr. Hosseinian (Iran), General Assembly, 58th sess., 23rd plen. mtg., Oct. 6, 2003, A/58/PV.23, p. 11.
102. Mr. Lavrov (Russian Federation), Security Council, 58th yr., 4844th mtg., Oct. 16, 2003: S/PV. 4844, p. 3.
103. Allison (2013) 112–114.
104. SCR 1500, Aug. 14, 2003, para. 1.
105. Adolfo Aguilar Zinser (Mexico), SC, Aug. 14, 2003: UN Press Release SC/7843.
106. The second category of the scheme that Warbrick proposed in 1997, applied *mutatis mutandis* to governments, would seem to cover the case: Warbrick in Evans (ed.) (1997) 9, quoted by Craven in Evans (ed.) (2010) 203, 244; referred to in Crawford, *Brownlie's Principles* (2012) 147–148.
107. Discussion between Secretary-General's special representative and Amr Moussa, secretary-general of the Arab League: UN News Service, UN Envoy Sees Rapprochement between Iraqi Council and Arab League (Aug. 13, 2003), at http://198.65.138.161/wmd/library/news/iraq/2003/08/iraq-030813-unnews01.htm.
108. Allison (2013) 114.
109. Secretary-General's report, July 15, 2003: S/2003/715.
110. UN Press Release SC/7821, Jul. 9, 2003.
111. On these developments, see Grant (2003) 97 *AJIL* 823.
112. See, for example, Gray (2008) 354–366; Krieger in Thakur & Sidhu (eds.) (2006) 381; Slaughter (2004) 98 *ASIL Proc.* 262; Franck (2003) 97 *AJIL* 607; Wolfrum (2003) 7 *Max-Planck UN Ybk.* 1; Hofmann (2002) 45 *German YBIL* 9. Also before the fact, see the international law teachers' letter, Mar. 7, 2003, *The Guardian,* signed by Ulf Bernitz, Nicolas Espejo-Yaksic, Agnes Hurwitz, Vaughan Lowe, Ben Saul, Katja Ziegler, James

Crawford, Susan Marks, Roger O'Keefe, Christine Chinkin, Gerry Simpson, Deborah Cass, Matthew Craven, Philippe Sands, Ralph Wilde, and Pierre-Marie Dupuy.

113. In respect of certain other cases, see Sicilianos in Boisson de Chazournes & Kohen (eds.) (2010) 95. As to the possibility of imputing the conduct to the UN, see Klein (2007) 53 *AFDI* 43, 64.
114. But see the observation by Chinkin in respect of the General Assembly:

    Any attempt by the SC to condemn the invasion would have been vetoed by the United States and United Kingdom, but the GA could have been active in this regard.

    Chinkin in Falk et al. (eds.) (2012) 219, 243 n. 86, citing Krieger in Thakur & Singh Sidhu (2006) 381, 389. In other words, the multilateral body that might have said something did not.
115. By which here is meant appreciation not confined to its European and conventional sense (i.e., as understood by the ECtHR in *Handyside* and elsewhere) but in a general international law sense.
116. *Panhandle Oil Co.* v. *State of Mississippi ex rel. Knox*, Holmes, J., dissenting, 277 U.S. 218, 223 (1928).
117. See, for example, *Federal Express Corp.* v. *California Public Utilities Commission*, Singleton, Jr., DJ, dissenting (9th Cir., 1991), 936 F.2d 1075, 1081, n. 6.
118. Roberts (2006) 100 *AJIL* 580; Scheffer (2003) 97 *AJIL* 842; Grant, *ASIL Insights* (June 2003). Cf., responding, Tigroudja (2004) 50 *AFDI* 77, 86–91.
119. See Chapter 3, n. 85.
120. The relevant clauses are in Charter Arts. 53, 107, which of course ceased to operate as such with the final settlement of World War II. See Heberlein (1991) 29 *AdV* 85.
121. Reisman (2004) 98 *AJIL* 516, 516–517.
122. Ibid., 517.
123. Id.
124. Ibid., 521.
125. Schmitt (1922) 9.
126. Reisman (2004) 98 *AJIL* at 520.
127. Id.
128. *Riggs* v. *Palmer*, 115 N.Y. 506 (Court of Appeals, 1889), quoting Aristotle: "*Aequitas est correctio legis generaliter latoe qua parte deficit*" [Equity is the correction of that wherein the law, by reason of its generality, is deficient.] (115 N.Y. at 510) and about which see Dworkin (1977) 29. For the current state of play in the debate over defeasibility, see Ferrer Beltrán & Battista Ratti (eds.) (2012).
129. Gray, J. (dissenting), 115 N.Y.at 517.
130. The qualifier "possible" is justified in respect of Bangladesh because this was a territory geographically separate from the parent State, thereby having the central characteristic of the territories subject to the legal regime of decolonization. It is justified in respect of Kosovo because (a) the claim to a new international boundary was not implemented in the national legal order until a considerable time after the intervention and after the failure of efforts to achieve a one-State solution; and (b) this was through acts within that legal order, not the international order.
131. The loss of life from Pakistan's attempted suppression of Bangladeshi independence before intervention has been estimated at three million: Rummel (1998), table 8.1, pp. 157–158. See also *Repertory of Practice of United Nations Organs*, Art. 98, Suppl. 5, vol. V (1970–1978), p. 44, para. 48: the Secretary-General identified as of March 1971 the need for "international assistance on an unprecedented scale").
132. India's intervention began on Dec. 3, 1971, following airstrikes by Pakistan on Indian airbases. The Secretary-General's statement was on Nov. 22, 1971: *Repertory*

of Practice of United Nations Organs, Art. 98, Suppl. 5, vol. V (1970—1978), Art. 99, p. 134, para. 16.

133. Pakistan recognized Bangladesh on Feb. 22, 1974: (1974) 74 *RGDIP* 1171.
134. See, for example, UNCLOS Art. 300: 1833 UNTS at 516.
135. See, for example, *Pulp Mills*, ICJ Rep. 2010 p. 18, 62, para. 128; And earlier see, for example, *Lake Lenoux (France/Spain)* (Petrén, Bolla, Reuter, de Visscher, de Luna, arbitrators), Award, Nov. 16, 1957: XII RIAA 308, para. 13; (1957) 24 ILR 129, para. 13; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, Feb. 4, 1932, PCIJ Rep. 1932 Ser. A/B, No. 44, p. 28; *Minority Schools in Albania*, Advisory Opinion, Apr. 6, 1935, PCIJ Rep. 1935, Ser. A/B, No. 64, pp. 19–20. See also Lachs in Akkerman et al. (eds.) (1977) 47.
136. Mr. Gül (Turkey), General Assembly, 59th sess., 8th plen. mtg., Sept. 23, 2004: A/59/PV.8, p. 26.

Conclusion

1. Appleton (2014).
2. "IBA Calls for Independent Investigation into Russia's Military Intervention in Crimea amid Violation of the UN Charter," Mar. 5, 2014: http://www.ibanet.org/Article/Detail.aspx?ArticleUid=32489A5B-A540–40AA-90C9-C511520E27BE.
3. Sari, Mar. 6, 2014.
4. See, for example, Weller, Mar. 7, 2014. See also Schaefer, Mar. 3, 2014; Peters, Apr. 16, 2014.
5. See, for example, Wisehart's salient observations, Mar. 4, 2014.
6. Allison (2013) 12. See also ibid., 17.
7. Pp. 68–70.
8. See, for example, Detter (1966) 15 *ICLQ* 1069, 1073–1075.
9. See Statement of the Chinese Government Explaining the Termination of the Sino-Belgian Treaty of November 2, 1865, Nov. 6, 1926, reprinted PCIJ Ser. C, No. 16-I, pp. 271–276. See further Chan (2014) 27 *Leiden J. Int'l L.* 859, 874–875.
10. Treaty of Amity and Limits between China and Russia (Treaty of Aighoun), Art. I, May 16, 1858: 118 CTS 493, 495; Additional Treaty of Commerce, Navigation and Limits between China and Russia (Convention of Peking), Arts. I, II, III, Nov. 14, 1860: 123 CTS 125, 126–128. The area ceded to Russia was approximately 900,000 sq. km.—that is, more than thirty times the area of Crimea. This presumably is not what the Soviet Union and its allies had in mind when, during discussions on succession of States in respect of treaties, they called for the removal of legal protections for "territorial régimes which had come into being and continued to exist on the basis of unequal treaties." The phrase was East Germany's: written comments to draft arts. 29, 30 (Boundary régimes or other territorial régimes established by a treaty), Sir Francis Vallat, Spec. Rapp., First report on succession of States in respect of treaties, ILC Ybk 1974 vol. II(1), p. 79, para. 418. Further to the Russian frontier and unequal treaties, see Kaikobad (2007) 33–36.
11. Crawford (2004) 98 *ASIL Proc.* 271, 272.
12. Ibid., 273.

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